

STATE OF OHIO
OFFICE OF THE INSPECTOR GENERAL

RANDALL J. MEYER, INSPECTOR GENERAL

REPORT OF
INVESTIGATION



AGENCIES: OFFICE OF GOVERNOR, STATE OF OHIO
OHIO ENVIRONMENTAL PROTECTION AGENCY
FILE ID NO.: 2014-CA00024
DATE OF REPORT: MAY 7, 2015

The Office of the Ohio Inspector General ... The State Watchdog

“Safeguarding integrity in state government”

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Randall J. Meyer
Ohio Inspector General



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REPORT OF INVESTIGATION

FILE ID NUMBER: 2014-CA00024

SUBJECT NAME: John Kasich;
Ohio Environmental Protection Agency (OEPA)

POSITION: Governor of Ohio

AGENCY: Office of Governor, State of Ohio;
OEPA

BASIS FOR INVESTIGATION: Complaint

ALLEGATIONS: Undue Political Influence

INITIATED: March 19, 2014

DATE OF REPORT: May 7, 2015

INITIAL ALLEGATION AND COMPLAINT SUMMARY

On March 18, 2014, the Office of Ohio Inspector General received a complaint from the Ohio House Democratic Caucus, signed by state representatives Debbie Phillips, John Patrick Carney, Nickie Antonio, and Robert Hagan. The complaint requested that the Office of the Ohio Inspector General investigate allegations that Governor of Ohio John Kasich was exerting inappropriate political influence on Ohio regulatory agencies; specifically, the Ohio Environmental Protection Agency (OEPA).

The representatives identified 13 coal facilities in Ohio which were operating with expired water pollution discharge permits, and alleged that many of these coal facilities also contributed to Governor Kasich's campaign effort.

The representatives also alleged that the "ouster" of Division of Surface Water Chief George Elmaraghy, as well as the resignation of Director of OEPA Scott Nally, were both due to improper political pressure by the governor's office, "... in order to achieve favorable outcomes for political financiers."

On March 19, 2014, the Office of the Ohio Inspector General opened an investigation into these allegations.

BACKGROUND

Ohio Governor's Office

The Ohio Governor's Office oversees the operations of state government and serves as its chief executive officer. The governor's major duties include creating administrative policies for state agencies; submitting biennial capital and operating budgets to the state legislature; and appointing various agency directors, state board and commission members, and judges to mid-term vacancies. The governor also serves as the commander-in-chief of the Ohio National Guard. The governor is elected to a four-year term with no more than two consecutive terms

allowed. Funding for the governor's office is through general revenue funds and charges to other state agencies.¹

Ohio Environmental Protection Agency

The Ohio Environmental Protection Agency (OEPA) is charged with protecting the environment and public health by ensuring compliance with environmental laws. To carry out this mission, the OEPA issues permits, conducts inspections, monitors and reports on environmental quality, provides public education, takes enforcement actions against violators and responds to spills and other environmental emergencies. Low-interest loans, subsidies, and grants are also provided to local governments for various environmental construction, restoration, protection, and clean-up projects. The director of the OEPA is appointed by the governor and confirmed by the Ohio Senate. The OEPA is funded through licenses, permits and fees charged to those they regulate, and federal funds.²

United States Environmental Protection Agency Oversight of State NPDES Program

The National Pollutant Discharge Elimination System (NPDES) permit program was created under the Federal Water Pollution Control Act of 1972, and was amended in 1977 as the Clean Water Act. The NPDES permit program is a federal program governed by the United States Environmental Protection Agency (USEPA). The NPDES regulates the amount of particular pollutants that industrial sources are allowed to discharge into the nation's waterways. Although the NPDES program is a federal program, the administration of the program is delegated to many states, through an approved Memorandum of Agreement between USEPA and the state regulatory body. For Ohio, a Memorandum of Agreement was approved and entered into on March 11, 1974, with the Ohio Environmental Protection Agency (OEPA), an authorized NPDES administrator through USEPA. ([Exhibit 1](#)) Ohio falls under the jurisdiction of USEPA Region 5, headquartered in Chicago, Illinois, and includes the states of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

¹ Source: Biennial budget documents.

² Source: Biennial budget documents.

NPDES permits are divided into general and individual permits. The general NPDES permit is one statewide permit, issued by OEPA, which is approved for a five-year period. Entities wishing to discharge pollutant materials into state waterways apply for coverage under this general permit, and must meet certain qualifications to fall under the general permit umbrella. Larger scale or more industrial entities do not qualify under the general NPDES permit, and must apply for an individual permit to discharge pollutants into state waterways.

The individual NPDES permits are again subdivided into “major” and “minor” permits. “Major” permits are those that allow discharge of certain chemicals at certain thresholds. A larger number of “major” permit holders are municipal sewage treatment facilities. “Minor” permits are those that allow discharge of certain chemicals at lower thresholds.

There are approximately 300 “major” permits and 3,150 “minor” permits currently issued by OEPA. Of the approximately 3,150 “minor” permits issued, approximately 50 are for coal treatment or coal-related facilities, including coal mining, processing, and preparation. The complaint received by the Office of the Ohio Inspector General made reference to 13 coal facilities alleged to be operating with expired pollutant discharge permits.

Ohio Statutes Governing the Administration of the NPDES Program

The Ohio program is governed by Ohio Revised Code (ORC) Chapter 6111- Water Pollution Control. ORC §6111.035 defines the criteria as to how the director of OEPA is to issue general permits for coal mining and reclamation operations, noting that the issuance of permits should be “... consistent with the Federal Water Pollution Control Act.” The statute allows for the director of OEPA to require that an entity seeking to discharge pollutants into the state waterways obtain an individual permit, instead of coverage under the general permit, and specifies that anyone subject to an individual permit shall not be covered under the general permit.

ORC §6111.041 instructs the director of OEPA to develop statewide water quality standards “... in accordance with Section 303 of the ‘Federal Water Pollution Control Act.’” Further, “... [t]he director shall implement the standards so established in the issuance, revocation, modification, or denial of permits.”

ORC §6111.042 specifically requires all standards and practices to be in compliance with the Federal Water Pollution Control Act. In situations where there may not be an applicable federal authority or standard, the statute states:

To the extent the effluent limitations adopted by the administrator of the United States environmental protection agency pursuant to section 304 of the Federal Water Pollution Control Act are inapplicable, the director may establish on a case-by-case basis effluent limitations in a permit issued under section 6111.03 of the Revised Code, based upon best professional judgment.

ORC §6111.03(J)(7) states:

A permit may be issued for a period not to exceed five years and may be renewed upon application for renewal. In renewing a permit, the director shall consider the compliance history of the permit holder and may deny the renewal if the director determines that the permit holder has not complied with the terms and conditions of the existing permit. A permit may be modified, suspended, or revoked for cause, including, but not limited to, violation of any condition of the permit, obtaining a permit by misrepresentation or failure to disclose fully all relevant facts of the permitted discharge or of the sludge use, storage, treatment, or disposal practice, or changes in any condition that requires either a temporary or permanent reduction or elimination of the permitted activity. No application shall be denied or permit revoked or modified without a written order stating the findings upon which the denial, revocation, or modification is based. A copy of the order shall be sent to the applicant or permit holder by certified mail.

Ohio Administrative Code (OAC) §3745-33-03(B) states,

If a permit renewal application is submitted at least one hundred eighty days prior to the expiration date of the existing permit, and the director does not issue a new permit before the expiration date, the conditions of the expired permit shall continue in force until the director acts on the permit application.

ORC Chapter 6111 allows for the director of OEPA to issue permits in variance with federal regulations and OAC §3745-33-07(D) established the process for obtaining those variances.

INVESTIGATIVE SUMMARY

USEPA NPDES Program Review

Since USEPA is the issuing authority of NPDES permits, the agency conducts periodic reviews of the state NPDES programs. On July 13, 2010, USEPA issued its report, “Review of Clean Water Act §402 Permitting for Surface Coal Mines by Appalachian States,” which looked specifically at the NPDES permitting process in Kentucky, Ohio, Tennessee, and West Virginia.³ These states span USEPA regions 3, 4, and 5. This report identified 250 coal mining operations in the state of Ohio. Two hundred of these operations are subject to the general NPDES permit issued by OEPA. The remaining 50 facilities are covered under individual permits. This report noted concerns with “... the vast majority of permits reviewed that warrant immediate attention.” These concerns included the standardization of pollutant discharge standards, anti-degradation analyses, required permitting documentation, and communication between state and federal regulatory agencies.

The USEPA report encouraged the directors of the three USEPA regions to work together to ensure a comparable level of review across Appalachia. One of the recommendations was to strengthen federal review of state-issued permits. The regions were encouraged to continue traditional methods to resolve deficiencies in states’ NPDES permits; however, a more standardized and formal review process was suggested.

USEPA Region 5 conducted an additional NPDES permit quality review in 2008, and issued a report on January 13, 2011.⁴ This report looked at the effective rates of the total NPDES permits, not just surface coal mining permits. Although this is the most recent review conducted by USEPA, in July of 2013 the process began for conducting another review; however, those results have not yet been made available.

³ U.S. Environmental Protection Agency. *Report Review of Clean Water Act §402 Permitting for Surface Coal Mines by Appalachian States: Findings & Recommendations*. Washington: Government Printing Office, July 13, 2010. (Water Permits Division; Office of Wastewater Management).

⁴ U.S. Environmental Protection Agency. *2008 Regional NPDES Program Review: EPA Region 5*. Washington: Government Printing Office, January 13, 2011. (Water Permits Division).

The 2008 Regional NPDES Program Review noted that many Region 5 states are continuing to face resource issues which add to the backlog of permit applications. The program review further noted that Ohio had a backlog of 19 percent (meaning in 2008, 81 percent of all NPDES permits issued by OEPA were current). Of special interest to USEPA were the 10-year expired permits. It was reported that Wisconsin had two permits that were expired for more than 10 years, and Indiana had one permit expired over 10 years. The report addressed how Wisconsin and Indiana should handle their permits that were expired more than 10 years.

No corrective action was recommended for the Ohio NPDES program in the 2008 Regional NPDES Program Review.

USEPA Guidance to State NPDES Administrators

On April 1, 2010, the USEPA issued an “interim final guidance” concerning Appalachian surface coal mining operations which presented new water quality standards for NPDES permits. This guidance was applicable to state NPDES permit programs in Kentucky, West Virginia, Ohio, Tennessee, and Pennsylvania. In September 2010, the National Mining Association, in conjunction with the states of Kentucky and West Virginia, sought an injunction in federal court to prevent the implementation of the new standards. After the National Mining Association sought its injunction, USEPA finalized its “guidance” into the “Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order” memorandum, issued July 21, 2011.⁵

In an opinion issued July 31, 2012, Judge Walton, writing for the United States District Court for the District of Columbia, held that USEPA had overstepped the authority granted to the agency under federal law and was attempting to illegally infringe on the authority of the state NPDES administrators.

⁵ U.S. Environmental Protection Agency. *Memorandum: Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order*. By N. Stoner and C. Giles. Washington: Governmental Printing Office, July 21, 2011.

On July 11, 2014, the United States Court of Appeals for the District of Columbia Circuit overturned the lower court's ruling, and remanded the case back with instructions to grant judgment in favor of USEPA.⁶

NPDES Permitting Process

On June 30, 2014, the Office of the Ohio Inspector General met with Eric Nygaard, an environmental specialist in the permits and compliance section of OEPA, and Bill Fischbein, supervising attorney for OEPA. Nygaard and Fischbein explained the NPDES process.

According to Nygaard and Fischbein, once an NPDES permit is issued, it expires after a set time (usually five years). The permit holder may apply to renew the permit, if a renewal application is submitted at least 180 days prior to the expiration of an existing permit. Once an application for renewal is submitted, the permit holder may continue to operate on the existing permit, even after that permit's expiration date, until a new permit is issued. Denials of a permit renewal are rare, and steps are taken to avoid denial. Instead of issuing a denial, OEPA will initiate negotiations between the permit holders and USEPA in an attempt to work out effective pollution limits agreeable to all parties.

After an application for renewal is submitted, a review of the previous permit is conducted. A draft permit is created by OEPA, making changes to any pollution standards which may need to be updated. The draft permit is then submitted for a period of public review, giving the permit holder, as well as private citizens, an opportunity to voice concerns over the proposed permit. If either the company or the public has concerns, OEPA attempts to address those concerns. Once a draft permit has moved through the public notice phase, it is submitted to USEPA for final approval. USEPA can allow the draft permit, in which case OEPA issues a final permit, or USEPA may object to the permit. If USEPA objects to the permit, OEPA usually works with USEPA and the permit holder to address the issues underlying the objection. OEPA may issue a permit without addressing the USEPA objection, in which case USEPA is able to take measures to cancel the permit, and withdraw OEPA's delegated authority to issue future permits. If OEPA

⁶ *National Mining Ass. v. McCarthy*, 758 F.3d 243.

were to issue a permit over the objection of USEPA, the federal agency would have the power to override and cancel the permit.

If a permit holder is not compliant with the terms of a permit, corrective compliance actions are then taken. An expired permit cannot be renewed until the permit holder is in full compliance with the original permit. A permit holder involved in a compliance action can continue to operate with the expired permit, within the parameters of the compliance action, until the permit holder is brought into compliance, at which time a renewed and updated permit will be issued. OEPA takes into consideration the compliance history of a facility before renewing the permit.

Internal email communications at OEPA concerning individual NPDES permit renewals, which were reviewed by the Office of the Ohio Inspector General, revealed that USEPA has been reviewing the parameters of each individual coal NPDES permit since 2001, but that federal oversight was increased alongside the issuance of the guidance in 2010. Other emails between Executive Assistant to Governor Kasich for Energy, the Environment, and Agriculture Craig Butler and Director of OEPA Scott Nally, discussed using the “WV process” as a model for Ohio in developing future NPDES permits and renewals, asking other states about potential “pitfalls” with USEPA as they moved the process forward.

Additional OEPA communication showed that Craig Butler, Scott Nally, George Elmaraghy, and other OEPA officers were involved in a change of OEPA policy after the court opinion in 2012. References were made to the “WV process” as well as references to phone calls and meetings with officials from both the West Virginia Department of Environmental Protection and the Kentucky Department of Environmental Protection.

The Expired Permits

A review of the expired individual permits was conducted using OEPA internal documents as well as the USEPA Enforcement and Compliance History Online Database (ECHO). The 13 expired permits referenced in the complaint received by the Office of the Ohio Inspector General were reviewed, as well as five additional permits which had expired prior to receiving the

complaint. Two additional permits were identified during the course of the investigation, for a total of 20 permits reviewed. The following table depicts the individual permits reviewed:

Name on Permit	USEPA Permit Number	OEPA Permit Number	Date Issued	Date Expired
Ohio Valley Coal Co. - Powhatan No. 6 Mine	OH0012661	0IL00046*DD	5/18/2000	6/30/2005
Oxford Mining Co. - Strasburg	OH0076970	0IL00102*CD	4/18/2002	5/31/2007
American Energy Corp. - Century Mine	OH0059552	0IL00091*GD	10/7/2002	7/31/2007
Rosebud Mining Co.	OH0121801	3IL00018*DD	6/19/2006	11/30/2009
B & N Coal Inc. - West Fork Pit	OH0134970	0IP00848*AD	2/25/2005	3/31/2010
Hopedale Mining Preparation Plant	OH0011827	0IL00092*HD	5/4/2006	5/31/2011
Sterling Mining Corp. - South Mine Complex	OH0120405	0IL00136*ED	6/8/2010	4/30/2012
Hopedale Mining - Cadiz Portal	OH0011835	0IL00092*HD	7/24/2007	8/31/2012
Riddles Run Refuse Disposal/Coal Processing Plant	OH0135411	0IL00146*AD	2/13/2008	2/28/2013
Norfolk Southern Railway Co. - Wheelersburg Terminal	OH0075868	0IL00010*ED	6/11/2008	6/30/2013
Sterling Mine Corp.- Shean Hill Mine	OH0120391	0IL00135*DD	6/6/2008	6/30/2013
Shelly Materials Inc. (DBA Price Inland Terminal Coal)	OH0041335	0IL00049*FD	6/26/2008	7/31/2013

Name on Permit	USEPA Permit Number	OEPA Permit Number	Date Issued	Date Expired
Southern Ohio Coal Co. - Meigs Mine No. 1	OH0022829	0IL00027*FD	7/24/2008	8/31/2013
Conesville Coal Preparation Plant	OH0076368	0IL00073*HD	11/5/2012	8/31/2013
Southern Ohio Coal Co. - Meigs Mine No. 2	OH0022837	0IL00028*ED	10/1/2008	10/31/2013
Central Ohio Coal Co. - Muskingum Coal Prep.	OH0059196	0IL00038*JD	11/8/2011	10/31/2013
Consolidated Coal Co. - Powhatan Mine No. 4	OH0012211	0IL00071*FD	9/18/2008	10/31/2013
Gatling Ohio LLC - Yellowbush Mine	OH0135313	0IL00145*BD	10/5/2011	12/31/2013
Sterling Mine Corp. - Shean Hill Mine	OH0129895	3IJ00063	Unknown	6/30/2014
American Energy Corp. - Century Mine	OH0140198	0IM00033*AD	1/26/2012	2/28/2017

American Energy Corp. - Century Mine Permit OH0059552 and American Energy Corp. - Century Mine Permit OH0140198 were determined to be permits for the same facility in the same location. Permit OH0140198 is not expired, is currently compliant, and according to ECHO has replaced permit OH0059552, so both of those permits were eliminated from further review.

Similarly, Sterling Mine Corp. - Shean Hill Mine Permit OH0120391 and Sterling Mine Corp. - Shean Hill Mine Permit OH0129895 are duplicate permits for the same facility, and the most recent permit expired during the course of the investigation. Since renewals regularly take six months to a year according to the statements made by Nygaard, these permits were also eliminated from further review.

During the course of this investigation, Shelly Materials Inc. Permit OH0041335 was renewed. This permit was renewed on May 1, 2014, and given a new expiration date of April 30, 2019.

The remaining 15 permits were reviewed to determine what issues may exist to justify delay in renewing the permits.

Compliance Actions Against Expired Permits

In the June 30, 2014, interview, Nygaard and Fischbein stated the largest hurdle to renewing an expired permit was whether a permit holder had any noncompliance issues in the past two years. Permits with noncompliance violations took longer, and faced higher scrutiny than a permit which did not have a history of noncompliance.

Permits are monitored quarterly by an OEPA official who takes a water sample of the permit run-off site to ensure that permit holders are not exceeding the allowable limits of pollutants released into Ohio waterways. A permit was considered to be noncompliant if the permit holder had exceeded the amounts of pollutants allowable under the permit in the past quarterly sampling. A permit holder could be considered in compliance if the holder met the appropriate limits on the most recent quarterly sampling; however, the permit renewal process could be stalled for a compliant permit holder if there was a consistent period of noncompliance within the past three years.

Multiple quarters of noncompliance could lead to enforcement actions being taken against a permit holder. A permit holder with a current enforcement action would not be able to renew its permit until it has been brought into compliance, and its compliance has been monitored for three years.

The 15 identified permits were reviewed to determine if those permits showed problems with compliance and enforcement. All but two permit holders were determined to have at least one quarter within the last three years in violation of their pollutant limits: Southern Ohio Coal Co. - Meigs Mine No. 2 permit OH0022837 and Consolidated Coal Co. Powhatan Mine No. 4 permit

OH0012211. Both permits expired on October 31, 2013, and were determined to have no violations and no enforcement actions, and appeared to be ready to renew.

Of the remaining 13 permits, four were identified as having had pollutant limit violations in the past three years, but no enforcement actions had been taken against the permit holders. Rosebud Mining Co. permit OH0121801, B & N Coal Inc. - West Fork Pit permit OH0134970, and Central Ohio Coal Co. - Muskingum Coal Prep permit OH0059196 had excessive pollutant limit violations in the quarter covering April - June of 2011. Rosebud Mining and B & N Coal also had excessive limit violations in the quarter covering October - December 2011. These permits would be ready to renew at the end of a three-year period with no violations.

Hopedale Mining - Cadiz Portal permit OH0011835 has had no enforcement actions taken against the facility as of March 2014; however, this facility has been in violation of the pollutant discharge limits set forth in the permit for each quarter sampled over the last three years. OEPA continues to monitor this facility with the last onsite inspection being conducted by OEPA officials on August 13, 2013.

The nine remaining permits were all found to have had compliance enforcement actions within the last three years, which prevented the permits from being renewed. An enforcement action takes the form of a letter called a "Notice of Violation," which indicates to the permit holder that a major violation has occurred. The permit holder must then take steps to remedy the violation, including the adoption of a compliance plan. This results in the permit holder facing greater scrutiny in future compliance checks with more frequent onsite inspections from OEPA or USEPA inspectors.

The table below includes the nine remaining permits and the dates of their most recent enforcement actions:

Name on Permit	USEPA Permit Number	OEPA Permit Number	Date of Most Recent Enforcement Action
Ohio Valley Coal Co. - Powhatan No. 6 Mine	OH0012661	0IL00046*DD	2/4/2013
Oxford Mining Co. - Strasburg	OH0076970	0IL00102*CD	9/22/2009
Hopedale Mining Preparation Plant	OH0011827	0IL00092*HD	7/2/2014
Riddles Run Refuse Disposal/Coal Processing Plant	OH0135411	0IL00146*AD	2/5/2013
Norfolk Southern Railway Co. - Wheelersburg Terminal	OH0075868	0IL00010*ED	2/6/2013
Southern Ohio Coal Co. - Meigs Mine No. 1	OH0022829	0IL00027*FD	5/2/2013
Conesville Coal Preparation Plant	OH0076368	0IL00073*HD	4/18/2014
Gatling Ohio LLC - Yellowbush Mine	OH0135313	0IL00145*BD	10/7/2013
Sterling Mining Corp. - South Mine Complex	OH0120405	0IL00136*ED	4/14/2014

While none of the expired NPDES permits reach the benchmark level of being expired for more than 10 years, Ohio Valley Coal Co. - Powhatan Mine No. 6 permit OH0012661, which expired June 30, 2005, is approaching that mark. As a result, the Office of the Ohio Inspector General conducted a closer review.

Ohio Valley Coal Co. was issued a NPDES permit on May 18, 2000, and the permit expired on June 30, 2005. The application for renewal was submitted on June 24, 2005. This is not at least 180 days prior to expiration as required by law; however, OEPA accepted the renewal application and began processing the renewal. Compliance actions were taken by OEPA on July 7, 2009; September 20, 2011; July 2, 2012; and February 4, 2013. In 2010 there was an accident

or spill at the permitted facility. The failure in compliance, coupled with the spillage, led to federal criminal charges being filed against the Ohio Valley Coal Company on July 5, 2012. The same day, a negotiated plea was entered into by agents of the Ohio Valley Coal Company. The plea agreement included admission to the findings contained in the OEPA Director's Final Findings and Orders, dated July 2, 2012.⁷ Since entering into the settlement agreement in federal court, the permit holder had one calendar quarter of limit violations, for the third quarter of 2012. This was the same period during which the settlement agreement took place. The enforcement action taken in February 2013 was for the limit violations in 2012. ([Exhibit 2](#)) Despite many periods of noncompliance by this permit holder, OEPA remained actively monitoring and involved.

On September 22, 2014, a telephone interview was conducted with Director of USEPA Region 5 Division of Water Tinka Hyde. During the interview, Hyde stated that from the perspective of USEPA, there were no issues of concern for how OEPA administered the NPDES permitting program. She stated that USEPA monitors "a decent number" of OEPA permits, and OEPA is working with USEPA to develop a "template" for coal permits to streamline the renewal process.

Hyde also stated that USEPA had a program in place to review permit renewal backlogs, and monitors expired permits. If issues with Ohio's expired permit backlog existed, Hyde said they would be noted in the NPDES program review. Ultimately, the authority to issue NPDES permits rests with USEPA, not OEPA, and frequent problems with a state-administered program would be addressed by abolishing the program, and sole authority to issue permits would be returned to USEPA. Hyde stated that was "a rare occurrence" and that, to her knowledge, there were no issues with Ohio's program that would prompt USEPA to begin this process.

A citizen group could petition USEPA to abolish a state-administered program, but USEPA would attempt to take remedial steps and work out a resolution with a state before beginning the process to abolish the state-administered program.

⁷ Ohio Environmental Protection Agency. Director's Final Findings and Orders, *In Re: The Ohio Valley Coal Company and American Energy Corp.* Ohio EPA: Director's Journal, July 12, 2012.

Employment Issues

On June 13, 2014, the Office of the Ohio Inspector General received a complaint from Bruce Goff, a permit supervisor for the southeast region of OEPA. Goff stated in his complaint that he had been removed from his duties at OEPA "... by the Governor's Office." Goff also stated that he had appealed this change in job duties to the State Personnel Board of Review (SPBR).

Goff alleged that on August 19, 2013, he was given notice that his position was being reassigned, effective August 27, 2013, and that he would no longer be supervising the NPDES permitting process for the southeastern Ohio region. Goff further alleged that his reassignment was due to a complaint from Gary Alkire, CEO of Rosebud Mining, concerning falsified information on NPDES permits in relation to effluent⁸ limits.

On August 27, 2013, Goff filed an appeal of his reassignment with the Ohio State Personnel Board of Review. In his Notice of Appeal form, Goff stated that his reassignment was retaliatory discipline, and he sought whistleblower protection.

SPBR assigned two case numbers to Goff's allegations, one concerning the whistleblower protection sought, and another concerning his reassignment.

On June 20, 2014, SPBR dismissed Goff's whistleblower claim, ruling that he was not entitled to whistleblower protection because he had failed to report the retaliation to a supervisor or appointing authority, as required by ORC §124.341.⁹

On September 3, 2014, SPBR dismissed as moot Goff's remaining claim concerning the reassignment as discipline. This ruling was based on an error Goff had made on his Notice of Appeal referring to his reassignment as a "... reduction in pay or position." It is noted in the

⁸ Waste material (as smoke, liquid industrial refuse, or sewage) discharged into the environment, especially when serving as a pollutant. *Merriam Webster*.

⁹ *Goff v. Environmental Protection Agency*, 2013-WHB-08-0224, State of Ohio, State Personnel Board of Review. Order, June 20, 2014.

Order to Dismiss that OEPA appeared to have "... reconsidered its decision" and had restored Goff to "... the duties that he previously performed."¹⁰

A review of Goff's Employee History Report (EHOC) showed that Goff has been a "Water Quality Engineer" since June 19, 1988. Prior to that, Goff had been an "Environmental Engineer" since May 7, 1979. The last payroll change to his position was June 22, 2008, when he received a pay increase. The most recent change to his position was on July 1, 2014, when Goff had a change in his direct report supervisor. The EHOC report showed that there had been no substantial change in his employment status, that he had not received a reduction in pay, nor a change in who he reported to since June 24, 2007, when his position was moved from Columbus to a regional office.

In Goff's complaint, he also alleged that other employees at OEPA had been forced to resign or face termination, specifically Timothy Campbell, environmental manager; George Elmaraghy, OEPA Division of Water chief; Brian Cook, OEPA chief legal counsel and deputy director 5; and Scott Nally, OEPA director.

A review of EHOC for those employees show that Campbell and Nally had both submitted resignations, and Elmaraghy and Cook had completed the necessary paperwork in order to retire. No complaint was submitted by either Campbell or Cook to indicate that the resignation and retirement were anything other than voluntary.

On June 27, 2014, the Office of the Ohio Inspector General received a complaint from Elmaraghy, alleging that he had been forced to resign from his position under pressure from the governor's office. Elmaraghy alleged that he was asked to retire, or be terminated, by Nally on August 9, 2013. Elmaraghy alleged that Nally stated the decision to terminate Elmaraghy's employment came from the governor's office, not from Nally. Elmaraghy alleged that he was given the weekend to consider his options, and was expected to make a decision on August 12, 2013. On August 16, 2013, Elmaraghy submitted a letter expressing his intent to retire, effective

¹⁰ *Goff v. Environmental Protection Agency*, 2013-MIS-08-0221, State of Ohio, State Personnel Board of Review. Order, September 3, 2014.

September 13, 2013. Elmaraghy's retirement became effective September 14, 2013.

On July 24, 2014, the Office of the Ohio Inspector General conducted an interview with Scott Nally, former director of OEPA. Nally was asked about the allegations made by Goff and Elmaraghy. Nally stated that, based on his past employment experience in Indiana, where he had made too many staffing changes, he intentionally left many of the old staff in place in order to "... develop as a team."

Nally stated that there were communication issues between his office and the Division of Surface Water. Nally stated he was not being given all the information he needed in order to make decisions, and wasn't being given "... the full picture." As an example, Nally stated that employees in the Division of Surface Water were having issues with a new compliance process Nally had put in place, in order to work through compliance issues more quickly. Specifically, there were employees in the Division of Surface Water who Nally felt were being too selective in the information they were providing to the director's office. Nally stated he had many meetings with Elmaraghy to discuss these issues; however, changes were not coming quickly enough, and he decided to make a staffing change. Nally stated that staffing decisions at OEPA were always the director's choices, and he did not feel any outside pressure.

Nally also stated that he never received pressure from the governor's office in relation to staffing matters. When Nally was appointed, he believed he was given wide latitude in choosing his staff. Since he had come from Indiana, Nally felt he was not part of the "political" system in Ohio, and he wanted OEPA to remain "apolitical." Nally stated that he was never directed to fire anyone, and when Nally asked for recommendations from the governor's office, he never felt pressure to hire any one of the governor's "pool" of applicants.

As to his own resignation, Nally stated that it was his decision alone, and that after directing environmental efforts in Indiana and Ohio, he was "tired."

One element of Elmaraghy's complaint was that his position was changed from "Classified" to "Unclassified"¹¹ status. Under Ohio law, classified civil servants may only be removed from employment with cause and are afforded specific due process rights. Conversely, unclassified employees may be removed from employment at any time without the requirement for the appointing authority to provide any cause or reason for the termination. Unclassified employees serve at the pleasure of the employer, and may be removed from employment at any time without the requirement for the appointing authority to provide any cause or reason for the termination. Unclassified employees do not have the right to appeal termination to the State Personnel Board of Review unless they also allege that their unclassified status was improper.¹²

ORC §124.11(A)(9) states, "The deputies and assistants of state agencies authorized to act for and on behalf of the agency, or holding a fiduciary duty or administrative relation to that agency..." are included in the "Unclassified" service status. OAC §123:1-3 gives the director of a state agency the right to occasionally audit the status of agency employees. When the director finds that an improper classification of a position exists, the director may reallocate the position to the appropriate classification.

The Ohio Department of Administrative Services provides a Civil Service Status Change Checklist for use by agency human resource representatives in order to provide the proper documentation to effectuate a status change. The checklist requires that the agency provides a request/justification letter, the old position description, the new position description, both an old and a new table of organization, and a list of agency employees similarly situated.

A review of Elmaraghy's employment history shows that while serving as Division of Surface Water chief, Elmaraghy was designated in a "Classified" status until August 15, 2013. On this date, his status was changed to "Unclassified."

A review of the ODAS records was conducted to determine if OEPA officials complied with ODAS practices when changing Elmaraghy's civil service status. On August 15, 2013, the day

¹¹ Ohio Administrative Code §1231-47-01(A)(82).

¹² See, *Christophel v. Kukulinsky*, 61 F.3d 479, 482 (6th Cir. 1995).

prior to Elmaraghy submitting his retirement letter, Karen Haight, OEPA Employee Services representative, submitted the Civil Service Status Change Checklist and associated documents to ODAS. In the justification letter attached, Haight stated that, “The position duties have been reviewed and it is the Agency’s opinion that this position should be unclassified pursuant to ORC [§] 124.11.”

The letter then stated that, as a division chief, “... this position has substantial discretion in formulating and implementing policy on behalf of the Director of Ohio EPA.” The letter also stated that “... there exists a fiduciary relationship between this position and the Ohio EPA Director whereby special trust and confidence is placed in this employee to perform the function of the position beyond that of an average employee.”

In compliance with the ODAS Checklist, an old and a new position description were included. A comparison between the old and new position descriptions revealed no changes made to the duties and requirements of the position, other than the new position’s description included the unclassified designation. Some of the duties, included in both position descriptions, were planning and directing programmatic tasks and budget allocations, supervising management staff, and speaking for and acting on behalf of the director of Ohio EPA.

A review was conducted of a sample of other OEPA division chiefs, in order to determine whether other division chiefs were also unclassified, or if Elmaraghy was being treated differently.

All four of the division chief positions reviewed were “Unclassified” at the time the person holding that position was hired. This included the chief of the Division of Drinking and Ground Water, who was made unclassified in 1999; the chief of the Division of Materials and Waste Management, who was made unclassified in 2008; the chief of the Division of Environmental Services, who was made unclassified in 2011; and the chief of the Division of Environmental Response and Revitalization, who was made unclassified in 2014. Elmaraghy was the only division chief who remained classified at the time of his promotion into that status.

Subsequently, Elmaraghy filed an appeal of his employment status with SPBR, as well as a complaint with the U.S. Department of Labor. On April 25, 2014, Elmaraghy, while represented by counsel, entered into a settlement agreement with OEPA, agreeing to drop his appeal in SPBR and his complaint with U.S. Department of Labor, to avoid further litigation. In the settlement, Elmaraghy agreed to hold OEPA blameless for his termination, and neither he nor the agency admits to any wrongdoing. ([Exhibit 3](#))

On September 9, 2014, the Office of the Ohio Inspector General conducted an interview with George Elmaraghy. During the interview, Elmaraghy again alleged that his retirement had been forced due to political influence. He stated multiple times that he had proof in the form of email communications. Elmaraghy was given an opportunity to provide that evidence, and to date he has not done so.

CONCLUSION

The Office of the Ohio Inspector General reviewed the OEPA National Pollutant Discharge Elimination System permitting process in order to determine if there had been undue political influence from the governor's office in the way NPDES permits were issued or renewed.

Based on oversight reports from USEPA and OEPA, it was determined that OEPA's NPDES permitting authority is delegated by USEPA, and is periodically reviewed for quality. It was further determined that OEPA had been looking into changing how they interacted with USEPA, to bring the Ohio process more in line with other coal producing states, based on a legal challenge in the U.S. Court of Appeals. A review of specific expired permits revealed that many permits linger for long periods of time without renewal due to pending enforcement actions. No evidence was found of the governor's office exceeding their authority in order to influence the NPDES process.

Accordingly, the Office of the Ohio Inspector General finds no reasonable cause to believe that a wrongful act or omission occurred in this instance.

Further, the Office of the Ohio Inspector General investigated allegations that the governor's office had exceeded its authority to influence OEPA staffing decisions. It was determined that OEPA Water Quality Manager Bruce Goff had been reassigned from his duties; however, no evidence was found that the governor's office was involved in that decision. Goff sought intercession from the State Personnel Board of Review, the appropriate authority in that matter, who dismissed Goff's claim when he was restored to his position.

It was determined that OEPA Division of Water Chief George Elmaraghy retired under pressure from OEPA Director Scott Nally; however, no evidence was found to link Nally's decision to an order from the governor's office. Nally accepted responsibility for Elmaraghy's departure.

Elmaraghy had his civil service status changed the day prior to his submission of notice of his retirement; however, Ohio EPA followed the policies of ODAS to effectuate that change, and had authority to change the status under the Ohio Revised and Administrative codes.

Additionally, it appears the civil service status change was necessary to bring the position in line with a category of similar positions within the OEPA, because the job duties of the position were such that the position should have been unclassified under ORC §124.11(A)(9).

Accordingly, the Office of the Ohio Inspector General finds no reasonable cause to believe that wrongful acts or omissions occurred in these instances.

RECOMMENDATION(S)

The Office of the Ohio Inspector General has determined that no recommendations are warranted for this report of investigation.

REFERRAL(S)

The Office of the Ohio Inspector General has determined that no referrals are warranted for this report of investigation.



STATE OF OHIO
OFFICE OF THE INSPECTOR GENERAL

RANDALL J. MEYER, INSPECTOR GENERAL

**NAME OF REPORT: Office of Governor, State of Ohio
Ohio Environmental Protection Agency**

FILE ID #: 2014-CA00024

KEEPER OF RECORDS CERTIFICATION

This is a true and correct copy of the report which is required to be prepared by the Office of the Ohio Inspector General pursuant to Section 121.42 of the Ohio Revised Code.

**Jill Jones
KEEPER OF RECORDS**

**CERTIFIED
May 7, 2015**

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