

**BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO**

NATIONAL WILDLIFE FEDERATION, et al.,	:	ERAC Case Nos. 996447,
	:	486448, 626449, 096450, 256451
Appellant	:	
	:	Submitted Electronically on
	:	August 9, 2010
v.	:	
	:	
CHRIS KORLESKI, DIRECTOR OF	:	
ENVIRONMENTAL PROTECTION,	:	
et al.,	:	
Appellees.	:	

APPELLEE DIRECTOR'S PREHEARING BRIEF

I. INTRODUCTION

This matter concerns the issuance of a Section 401 Water Quality Certification ("WQC") to the United States Army Corps of Engineers ("USACE") to perform routine maintenance of the Toledo Harbor Navigation Channel comprised of Maumee River, Toledo Harbor, and Lake Erie watersheds. This maintenance includes the dredging and open-lake placement of sediment during the 2010 calendar year. Appellants National Wildlife Federation, *et al.*, appealed the issuance of this certification on May 13, 2010.

II. ISSUE PRESENTED FOR REVIEW

Whether the Director acted lawfully and reasonably in granting the Section 401 WQC to USACE pursuant to Revised Code Chapter 6111 and Ohio Adm. Code Chapters 3745-1 and 3745-32.

III. ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

A. Appellants National Wildlife Federation, *et al.* have raised the following assignments of error in the May 13, 2010, appeal (Case Nos. 996447-256451) regarding the Director's granting of the 401 WQC:

1. The application for certification fails to demonstrate that the discharge of sediment will not prevent or interfere with the attainment or maintenance of the water quality standard for the Western Basin of Lake Erie and will not violate the water quality standard for the Western Basin of Lake Erie as required by law. Ohio Adm. Code 3745-32-05(A), 3745-32-07, 3745-47-23(A)(1). Specifically, the Corps failed to prove that the deposition, settling, and re-suspension of discharged sediment will not prevent or interfere with the attainment or maintenance of, and will not violate:
 - a. the designated uses of the Western Basin of Lake Erie, including, but not limited to, its designation as exceptional warmwater aquatic habitat, Ohio Adm. Code 3745-1-31(A). Data is either insufficient to establish whether the designated uses of the Western Basin of Lake Erie are attained or, in the alternative, data establishes that the designated uses of the Western Basin of Lake Erie are already impaired, for instance, as a result of siltation;
 - b. the water quality criteria applicable to the Western Basin of Lake Erie, including, but not limited to, the criteria requiring all surface waters to be:
 - i. "Free from suspended solids or other substances that enter the waters as a result of human activity and that will settle to

form...objectionable sludge deposits, or that will adversely affect aquatic life,” Ohio Adm. Code 3745-1-04(E); and

- ii. “Free from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae,” Ohio Adm. Code 3745-1-04(E); and
- c. the prohibition against the elimination or substantial impairment of existing uses of the Western Basin of Lake Erie, including, but not limited to, its existing use as aquatic life habitat, Ohio Adm. Code 3745-1-05(C)(1). The Corps failed to determine the existing uses, including, but not limited to, the resident aquatic life, or the level of water quality necessary to protect the existing uses; and
- d. the limitation on the lowering of water quality in high quality waters to situations where lower water quality is necessary to accommodate important social or economic development in the area where the Western Basin of Lake Erie is located. Ohio Adm. Code 3745-1-05(C)(5).

The deposition, settling, or re-suspension of dredged sediment will cause or contribute to a reduction in the penetration of sunlight through the water column, reducing phytoplankton and aquatic plant growth; harm to fish, increasing the risk of infection and disease; and harm to benthic organisms and bottom substrate. The Director’s grant of the Certification, regardless, is unlawful and unreasonable.

- 2. The Director failed properly to apply the antidegradation review requirements by conflating the rule governing the prohibition of degradation that results in the elimination or substantial impairment of existing uses – whether or not such degradation is necessary

to accommodate development – and the rule governing the lowering of water quality in high quality waters to accommodate development. As a result, the Director failed to separately determine whether the Corps demonstrated that the lowering of water quality, which the Director admits the Certification will allow, will not prevent or interfere with the attainment or maintenance of, and will not violate the prohibition against the elimination or substantial impairment of existing uses in the Western Basin of Lake Erie, including, but not limited to, its existing use as aquatic habitat, Ohio Adm. Code 3745-1-05(C)(1).

3. The Director failed properly to apply the antidegradation review requirements by failing entirely or adequately to consider the factors he is obligated to consider when determining whether lower water quality in high quality waters is necessary to accommodate important social or economic development. Ohio Adm. Code 3745-1-05(C)(5)(a)-(m). The factors the Director entirely or adequately failed to consider include, but are not limited to, the following:
 - a. “The magnitude of the proposed lowering of water quality,” Ohio Adm. Code 3745-1-05(C)(a);
 - b. “The anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, including threatened and endangered species, important commercial or recreational sport fish species, other individual species and the overall aquatic community structure and function; Ohio Adm. Code 3745-1-05(C)(5)(b); and
 - c. “The effects of lower water quality on the economic value of the water body for recreation, tourism and other commercial activities, aesthetics, or other use and enjoyment by humans,” Ohio Adm. Code 3745-1-05(C)(5)(e).

IV. STATEMENT OF CASE AND FACTS

On October 26, 2009, USACE applied for a 401 WQC seeking the authority to dredge approximately 2,000,000 cubic yards of material annually from the Toledo Harbor Navigation Channel between 2010 and 2012. Of the total 2,000,000 cubic yards of material, 1,900,000 cubic yards were to be placed in an existing two-square mile open-lake placement area in the Western Basin of Lake Erie. The quality of the sediment had been evaluated in 2004 and 2006, and this sediment is chemically and toxicologically comparable to sediments at an open-lake reference area in the Western Basin. The remaining approximately 100,000 cubic yards between River Mile 1 and River Mile 2 were to be disposed of in a confined disposal facility ("CDF") as this material did not meet federal guidelines for open-lake placement. This 2,000,000 cubic yard proposal was USACE's preferred design alternative. USACE's minimum degradation alternative was similar to its preferred alternative, although it was for a total of 1,350,000 cubic yards.

On April 15, 2010, the Director authorized the certification allowing for dredging and open-lake placement of the dredged material. The certification only authorized 800,000 cubic yards for open-lake placement, which was even less material than USACE's minimum degradation alternative. The dredging and open-lake placement as contemplated in USACE's application was conditioned in the following ways:

- 1) no more than 800,000 cubic yards of the dredged material may be placed in the open lake;
- 2) the certification is only for the 2010 calendar year;
- 3) at a minimum, a portion of the dredged material must be put to beneficial reuse by 2012;
- 4) USACE must continue to investigate and evaluate alternatives to open-lake placement;
- 5) no dredging or placement may take place during storm events;

- 6) dredging operations may not take place within 3,000 feet up-current of water supply intakes;
- 7) no in-water work may take place during March 15 to June 30 to reduce impacts to aquatic species and their habitat;
- 8) dredging must occur between July 1 and November 30 in order to minimize any impacts to fisheries and other local environmental resources; and
- 9) USACE must avoid unnecessary creation of turbidity to prevent water quality degradation or adverse effects on aquatic life outside the project area.

The purpose of this Toledo Harbor dredging project (“the Project”) is to maintain sufficient water depths for deep-draft commercial navigation (CR 10-8). The commercial activity in Toledo Harbor is critical to the regional economy, as well as the overall economy of the State, as there are hundreds of millions of dollars and thousands of jobs that are directly and indirectly tied to the operation of the harbor (CR 10-13 – 10-14). The economic viability of Toledo Harbor is dependent upon this maintenance dredging—if this annual dredging did not occur, the harbor would lose the ability to accept deep-draft commercial activity resulting in the loss of much needed revenue and jobs. *Id.*

Although this Project is vital to the economic viability to Toledo and Ohio, Ohio EPA has put conditions on the dredging and open-lake placement. There has been speculation that this dredging and open-lake placement contributes to harmful algal blooms and other water quality impacts to the Western Basin of Lake Erie. However, at this time, and at the time Ohio EPA was considering USACE’s application, *speculation* is all that there was for Ohio EPA to consider. The scientific community has not reached a definitive conclusion as to the effects of this Project.

National Wildlife Federation, *et al.* (“NWF”) appealed Ohio EPA’s decision to grant the certification on May 13, 2010, and a *de novo* hearing is set before this Commission for the week of August 23, 2010.

V. LAW AND ARGUMENT

A. Appellants Bear the Burden of Proceeding, and the Applicant Bears the Burden of Proof.

NWF, as the third party initiating the instant appeal, has the burden of proceeding. O.A.C. 3746-5-30(C)(3). Therefore, Appellants must present evidence constituting a prima facie case on the issues Appellants wish to pursue. *Broadway Christian Church v. Williams* (1978), 59 Ohio App. 2d 243, 254 (Attachment 1). This burden is distinguished from the “burden of proof” which is upon the applicant to prove its entitlement to the permit, license, or certificate. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgmt. Dist. v. Republic Waste Servs. of Ohio II, LLC*, 10th Dist. No. 07AP-599, 2009-Ohio-2143 ¶ 69 (Attachment 2).

Furthermore, there is a threshold burden upon Appellants to demonstrate that they possess standing—that is, how Appellants are, in fact, actually aggrieved and adversely affected by the action of the Director. These adverse effects cannot be a mere speculative claim of an injury but injury in fact that falls within the purview of matters that may be considered by the Commission. “The alleged injury must be concrete, rather than abstract or suspected; a party must show he or she has suffered or will suffer a specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction.” *Stark-Tuscarawas-Wayne Joint Solid Waste Mgmt. Dist.*, 2009-Ohio-2143 ¶ 24 (internal citations and quotations omitted). See also Ohio Adm. Code 3746-5-30(A); *Holiday Trav-L-Park v. Shank* (Nov. 1, 1990)(Attachment 3), 1990 Ohio ENV LEXIS 10 at *4, EBR Case No. 222211; *City of Olmsted Falls v. Jones* (10th Dist.), 152 Ohio App. 3d 282, 2003-Ohio-1512 ¶ 21 (Attachment 4); *Helms v. Korleski* (10th Dist.), 2008-Ohio-5073 ¶ 32 (Attachment 5); *Helms v. Korleski*, ERAC Case No. 765931, 2008 Ohio ENV LEXIS 2, at *10-13 (Attachment 6). Moreover, the Ohio Supreme Court has held that there are three factors that need to be met before an association can have standing on behalf of its members:

[A]n association has standing on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. However, to have standing, the association must establish that its members have suffered actual injury. To be compensable, the injury must be concrete and not simply abstract or suspected.

Ohio Contractors Ass'n v. Bicking (1994), 71 Ohio St. 3d 318, 320 (internal citation and quotations omitted)(Attachment 7). This burden to demonstrate standing applies to each of Appellants' assignments of error.

Once the appellant has established a prima facie case, the burden of proceeding shifts to the applicant. Ultimately, the applicant—USACE in this case—bears the burden of proof to demonstrate its entitlement to the permit as issued. *Broadway Christian Church*, at 254.

B. Standard of Review: The Commission Must Affirm an Action of the Director Unless It Finds that the Director's Action is Unlawful or Unreasonable.

Revised Code 3745.05 defines the scope of the Commission's power in reviewing an action of the Director:

If, upon completion of the hearing, the [Commission] finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action; if the [Commission] finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

In *Citizens Committee to Preserve Lake Logan v. Williams*, the Tenth District Court of Appeals explained how the Commission should apply this standard:

The [Commission] initially does not stand in place of the Director upon appeal, and is not entitled to substitute its judgment for that of the Director, but is limited to a determination of whether the action taken by the Director is unreasonable or unlawful.

Citizens Committee to Preserve Lake Logan v. Williams (1977), 56 Ohio App. 2d 61, 69, 381 N.E.2d 661 (Attachment 8). The Court went on to define "unlawful" and "unreasonable" as follows:

"Unlawful" means that which is not in accordance with the law.

“Unreasonable” means that which is not in accordance with reason, or that which has no factual foundation. It is only where the [Commission] can properly find from the evidence that there is no valid factual foundation for the Director’s action that such action can be found unreasonable. Accordingly, the ultimate factual issue to be determined by the [Commission] upon the *de novo* hearing is whether there is a valid factual foundation for the Director’s action and not whether the Director’s action is the best or most appropriate action, nor whether the [Commission] would have taken the same action.

Id. at 70.

In the instant case, the Commission may review only whether the Director’s action which has been appealed—that is, the decision to grant the 401 certification—was lawful and reasonable. The evidence presented at hearing will show: 1) that the Director issued the 401 certification in compliance with R.C. Chapter 6111 and the rules adopted thereunder; and 2) that the Director’s issuance of the certificate had a valid factual foundation. For the reasons discussed below, NWF cannot demonstrate that the Director’s issuance of the certificate was unlawful or unreasonable.

C. Appellants’ Assignments of Error Are without Merit as the Director’s Action Was Lawful and Reasonable.

The Director’s action in granting the 401 certification was lawful and reasonable as all of the requirements of O.A.C. Chapters 3745-1 and 3745-32 were met. The Director properly considered USACE’s application, as well as numerous other documents and studies, and determined that the Project would not interfere with the attainment or maintenance of existing uses and would not violate any requirements of O.A.C. 3745-1-31(A), 3745-1-04, or 3745-1-05. The evidence will establish that, in light of the application and other relevant information before the Director, including the social and economic importance of maintenance dredging to allow and support the operation of shipping through the Port of Toledo, the Director’s action was lawful and reasonable. The environmental concerns surrounding this Project have not been substantiated with evidence, and, taking into consideration the

economic importance of Toledo Harbor coupled with the regulatory role played by Ohio EPA, it was reasonable and lawful for the Director to have granted the 401 certification.

In reviewing an application for a 401 certification, two groups of rules must be applied: 1) O.A.C. Chapter 3745-05; and 2) O.A.C. 3745-1-05. The first applicable rule regarding the Director's review of USACE's application is the 401 certification rule—O.A.C. 3745-32-05. Ohio Adm. Code 3745-32-05(A) authorizes the Director to grant a 401 certification if he determines that the discharge of dredged or fill materials to waters of the state will not prevent or interfere with the attainment or maintenance of any water quality standards and will not result in a violation of any water quality standards.

Tellingly, the 401 certification rule does not call for an absolute restriction on any lowering of water quality. In fact, the rule specifically gives the Director the discretion to deny a 401 certification that results in an adverse long or short term impact on water quality when the criteria in O.A.C. 3745-32-05(A) has been met. O.A.C. 3745-32-05(B). The Director's failure to exercise his discretionary powers does not render a decision to issue a 401 certification unreasonable or unlawful, and it is also not a valid basis for overturning one of his decisions. See *Southeast Montgomery County Environmental League, et al., v. Schregardus* (1997), 1997 Ohio ENV LEXIS 9, at *39, citing *Kuzman v. Nichols* (1982), 1982 Ohio ENV LEXIS 5, EBR 18793, at *5-6 (where the Board held the Director was reasonable and lawful in granting a permit to install and that failure to exercise his discretionary powers is not a basis for overturning a decision of the Director)(Attachments 9 & 10).

The second rule in reviewing a 401 certification application is Ohio's Antidegradation Rule, set forth in O.A.C. 3745-1-05. This rule provides a series of regulatory layers of requirements that govern the issuance of a number of the permits issued by the Director under R.C. Chapter 6111, including 401 certifications. Ohio Adm. Code 3745-1-05(C)(1) sets a floor below which degradation of a water body

may not occur. Ohio Adm. Code 3745-1-05(C)(1) requires that both the existing and designated uses of a water body be maintained and protected. The rule provides that there may be “no degradation of water quality that results in either a violation of the applicable water quality criteria for the designated uses” or “the elimination or substantial impairment of existing uses.” O.A.C. 3745-1-05(C)(1).

Ohio Adm. Code 3745-1-05(C)(5) also expressly sets out the process of weighing various considerations which governs the Director when making a determination that a lowering of water quality is necessary to accomplish important social or economic development in the area. Under Ohio Adm. Code 3745-1-05, the Director may approve activities that lower water quality after a number of factors have been met: 1) an examination of non-degradation, minimal degradation, and mitigative technique alternatives; 2) a review of the social and economic issues related to the activity; 3) a public participation process and appropriate intergovernmental coordination; and 4) a determination that the degradation is necessary to accommodate important social or economic development where the water body is located. In making the determination regarding proposed activities that lower water quality, the Director must also make a number of considerations:

- (a) The magnitude of the proposed lowering of water quality;
- (b) The anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, including threatened and endangered species, important commercial or recreational sport fish species, other individual species and the overall aquatic community structure and function;
- (c) The anticipated impact of the proposed lowering of water quality on human health and the overall quality and value of the water resource;
- (d) The degree to which water quality may be lowered in waters located within national, state or local parks, preserves or wildlife areas, waters listed as state resource waters in rules 3745-1-08 to 3745-1-30 of the Administrative Code, or waters categorized outstanding national resource waters, outstanding state waters or superior high quality waters;

(e) The effects of lower water quality on the economic value of the water body for recreation, tourism and other commercial activities, aesthetics, or other use and enjoyment by humans;

(f) The extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state;

(g) The cost of the water pollution controls associated with the proposed activity;

(h) The cost effectiveness and technical feasibility of the non-degradation alternatives, minimal degradation alternatives or mitigative technique alternatives and the effluent reduction benefits and water quality benefits associated with such alternatives;

(i) The availability, cost effectiveness, and technical feasibility of central or regional sewage collection and treatment facilities, including long-range plans outlined in state or local water quality management planning documents and applicable facility planning documents;

(j) The availability, reliability and cost effectiveness of any non-degradation alternative, minimal degradation alternative or mitigative technique alternative;

(k) The reliability of the preferred alternative including, but not limited to, the possibility of recurring operational and maintenance difficulties that would lead to increased degradation;

(l) The condition of the local economy, the number and types of new direct and indirect jobs to be created, state and local tax revenue to be generated, and other economic and social factors as the director deems appropriate; and

(m) Any other information regarding the proposed activities and the affected water body that the director deems appropriate.

Ohio Adm. Code 3745-1-05(C)(5)(a)-(m). Although, in their third assignment of error, Appellants contend that the Director failed to adequately consider three of the thirteen separate considerations contained in O.A.C. 3745-1-05(C)(5)(a)-(m), he properly weighed all that was before him as required by the 401 certification and Antidegradation rules and determined that the maintenance dredging of Toledo Harbor was necessary to accommodate important social or economic development in the area.

Appellants improperly combine O.A.C. 3745-32-05 and 3745-1-05 in their third assignment of error when arguing the Director needs to "separately determine" whether USACE demonstrated that the lowering of water quality will not prevent or interfere with the maintenance of designated uses and will

not eliminate or substantially impair the existing uses in the Western Basin of Lake Erie. Ohio Adm. Code 3745-32-05(A) specifically requires the Director make a “determination” that the Project will not prevent or interfere with the attainment or maintenance of applicable water quality standards. However, O.A.C. 3745-1-05(C)(1) does not require that the Director make any “determination.” No degradation can result in a violation of applicable water quality criteria for the designated uses or in the elimination or substantial impairment of existing uses, but there is no separate requirement for a “determination” to be made.

With regard to what information is considered by the Director in the issuance licenses, permits, or certificates, it has long been the policy of Ohio EPA that the Director is not limited to the information provided in the four corners of that particular application. Ohio Adm. Code 3745-1-05(C)(8) supports this policy: “For each proposed activity, the director shall weigh the information acquired relative to the proposal, that submitted by the applicant or otherwise obtained by the director...” Although the Director need not accept every aspect of an application as true or accurate, he is entitled to rely upon the information provided by USACE in its application. See *Club 3000 v. Jones*, 10th Dist. No.07AP-593, 2008-Ohio-5058 ¶ 26 (Attachment 11). Contrary to what Appellant contends in its assignments of error, the Director is not limited to USACE’s application in making his determination.

In this case, the evidence will demonstrate that the Director determined that the Project would not result in the elimination or substantial impairment of existing uses, result in a violation of water quality criteria for the designated uses of the Western Basin of Lake Erie, or interfere with the attainment or maintenance of applicable water quality standards. As such, the Director’s decision to grant the 401 WQC was lawful and reasonable. In granting the certificate, the Director imposed conditions on the dredging and disposal that were more restrictive than even the minimum degradation alternative proposed by USACE—less than half of the material from the preferred design alternative.

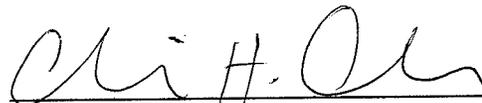
Furthermore, the certificate was limited to one year, as opposed to three, and conditions were imposed to greatly limit Project as proposed by USACE. For all of the above-mentioned reasons and in light of these conditions, this Commission should affirm the decision of the Director has his action—granting the 401 certification—was lawful and reasonable.

VI. CONCLUSION

The Director respectfully requests that the Commission affirm the Director's issuance of this certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **APPELLEE DIRECTOR'S PREHEARING BRIEF** was filed with the Ohio Environmental Review Appeals Commission on August 9, 2010, and served via email on August 9, 2010, upon the following:

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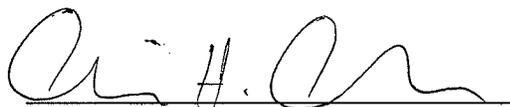
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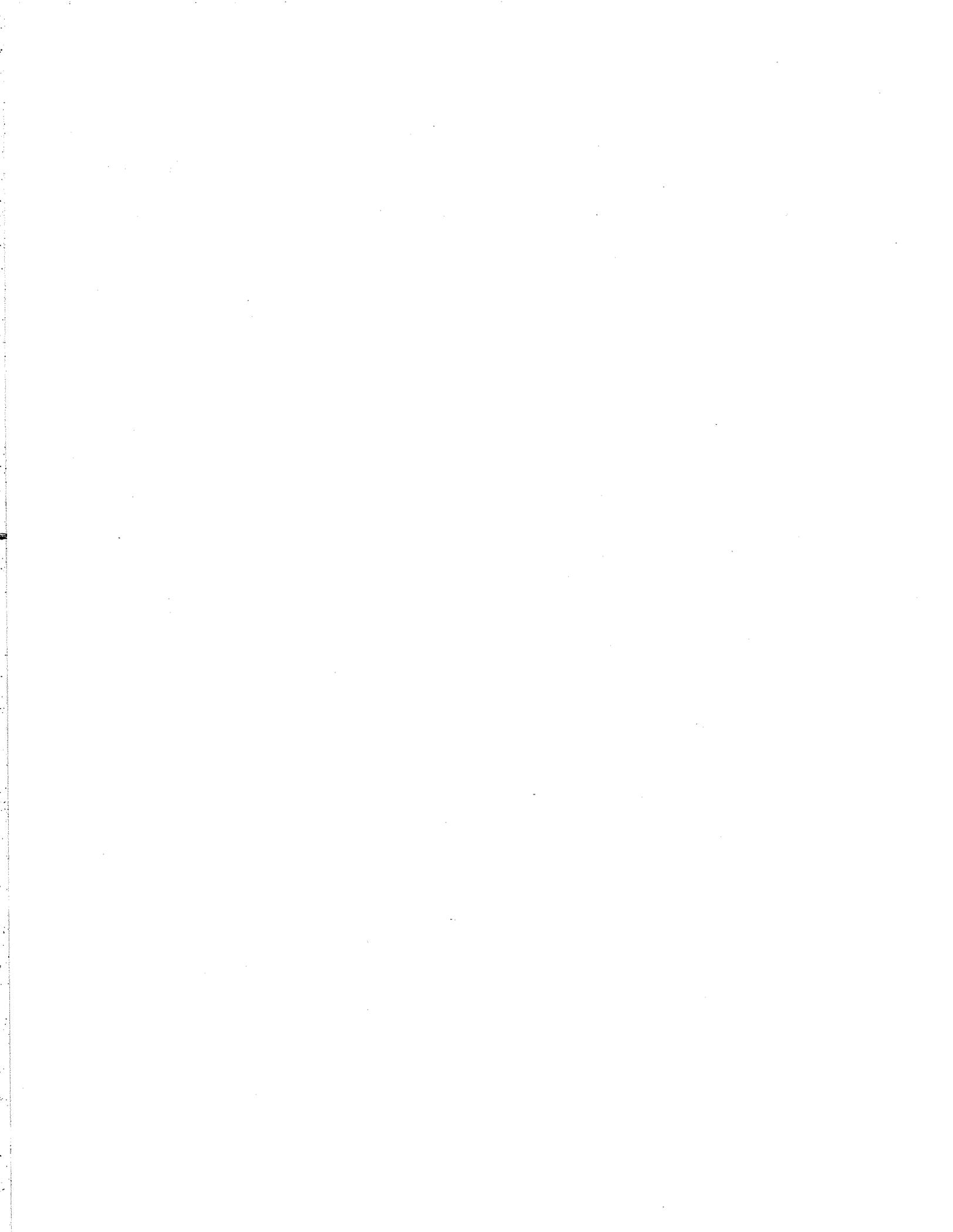
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ATTACHMENT 1

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Citation: 59 Ohio App. 2d 24359 Ohio App. 2d 243, *; 394 N.E.2d 339, **;
1978 Ohio App. LEXIS 7596, ***; 13 Ohio Op. 3d 249

BROADWAY CHRISTIAN CHURCH ET AL., APPELLANTS v. WILLIAMS, DIRECTOR, ET AL., APPELLEES

No. 37329

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

59 Ohio App. 2d 243; 394 N.E.2d 339; 1978 Ohio App. LEXIS 7596; 13 Ohio Op. 3d 249

August 10, 1978, Decided

PRIOR HISTORY: [***1] APPEAL: Court of Appeals for Cuyahoga County.**DISPOSITION:** *Judgment reversed and cause remanded.***CASE SUMMARY****PROCEDURAL POSTURE:** Appellant property owners sought review of the judgment of the Environmental Review Board (Ohio), which ordered appellee Director of the Ohio Environmental Protection Agency to grant appellee applicant a conditional operating permit.**OVERVIEW:** The applicant requested a permit to install a new coke battery at its district plant. The director granted the applicant permission to operate the battery as long as its operation did not violate emission standards. The director waived the necessity for obtaining a permit to install the battery, and decreed that the applicant would not be subject to enforcement action for its failure to obtain such a permit. The property owners challenged the director's authority to issue the consent and abatement order. The review board found that the order was unlawful because Ohio Rev. Code Ann. § 3704.03(S) did not expressly authorize the director to enter into consent orders. However, the review board ordered the director to issue the applicant a conditional operating permit. On appeal, the court reversed the review board's determination. The court found that the director issued the consent order in furtherance of his statutorily imposed powers. The consent order issued pursuant to § 3704.03(S) was a legitimate enforcement tool designed to remedy violations of Ohio Rev. Code Ann. § 3704.05. The director had the authority to issue the consent order.**OUTCOME:** The court reversed the judgment of the review board, which ordered the Director of the Ohio Environmental Protection Agency to grant the applicant a conditional operating permit.**CORE TERMS:** battery, environmental, environmental protection, emission, install, conditional, burden of proof, adjudication hearing, emission standards, abatement orders, air quality, hearing de novo, authority to issue, ambient, notice, steel, air, reasonableness, authorize, issuance, progress, consent decree, evidentiary hearings, de novo hearing, evidence relating, challenging, feasibility, settlement, attainment, pollutants**LEXISNEXIS® HEADNOTES**[Civil Procedure](#) > [Judgments](#) > [Entry of Judgments](#) > [Consent Decrees](#)[Environmental Law](#) > [Air Quality](#) > [General Overview](#)[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Consent Decrees](#)**HN1** Ohio Rev. Code Ann. § 3704.03 provides: Powers of director of environmental protection. The director of environmental protection may: (S) Issue, modify, or revoke orders prohibiting or abating emissions which violate applicable emission standards, or requiring emission control devices or measures in order to comply with applicable emission standards. In the making of such orders the director shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of compliance with such orders, and their relation to benefits to the people of the state to be derived from such compliance. [More Like This Headnote](#)

[Environmental Law](#) > [Air Quality](#) > [General Overview](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Consent Decrees](#) 

HN2  The absence of the word "consent" in [Ohio Rev. Code Ann. § 3704.03\(S\)](#) is not of such legal gravity that an entry by consent is forbidden. [More Like This Headnote](#)

[Civil Procedure](#) > [Judgments](#) > [Entry of Judgments](#) > [Consent Decrees](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Consent Decrees](#) 

HN3  [Ohio Admin. Code § 3745-47-19-\(D\)](#) reads as follows: (D) If, at a prehearing conference or at any other time prior to the termination of the hearing, the parties agree to a settlement, the Hearing Examiner may recommend in writing to the Director that the settlement terms be adopted as a final order; or the parties may prepare a suggested consent order, signed by the parties other than the Agency, which may be submitted along with the file to the Director for adoption after consideration of all materials in the file. [More Like This Headnote](#)

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HN4  [Ohio Rev. Code Ann. § 3704.03](#) authorizes any person who was a party to a proceeding before the director to participate in an appeal to the environmental board of review for an order vacating or modifying the action of the director of environmental protection. [More Like This Headnote](#)

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HN5  [Ohio Rev. Code Ann. § 3704.03\(S\)](#) contains a broad grant of power to the Director to issue orders. The legislature did not specify or limit what types of orders the Director may or may not issue. [More Like This Headnote](#)

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[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Jurisdiction & Procedure](#) 

HN6  [Ohio Rev. Code Ann. §§ 3704.03\(S\)](#) and [\(T\)](#) vest the Director with the discretion to issue enforcement orders. Those sections read as follows: 3704.03 Powers of director of environmental protection. The director of environmental protection may: (S) Issue, modify, or revoke orders prohibiting or abating emissions which violate applicable emission standards, or requiring emission control devices or measures in order to comply with applicable emission standards. In the making of such orders the director shall give consideration to and base his determination on, evidence relating to the technical feasibility and economic reasonableness of compliance with such orders and their relation to benefits to the people of the state to be derived from such compliance. (T) Exercise all incidental powers required to carry out §§ 3704.01 to 3704.11. [More Like This Headnote](#)

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HN7  The Director has broad discretionary enforcement options and he need not necessarily seek an injunction pursuant to [Ohio Rev. Code Ann. § 3704.06](#) to combat violations of emission standards. The Director is given a great deal more effective enforcement weapon by a holding that no further variance is possible, which means that the operator is acting illegally if the emission from his plant exceeds the applicable air quality regulations. More prompt and effective measures can be taken for enforcement under penalty of severe monetary fines or threat of shut down to achieve, at the earliest possible time, attainment of properly adopted air quality standards. [More Like This Headnote](#)

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HN8  [Ohio Rev. Code Ann. § 119.06\(C\)](#) provides that adjudication orders are invalid unless opportunity for a hearing is afforded except when the rules of the agency promulgating the order or the statutes pertaining to such agency specifically give an appellant a right of appeal to a higher authority within the agency or to another agency. [More Like This Headnote](#)

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[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Consent Decrees](#) 

HN9  For those who wish to challenge the order, [Ohio Rev. Code Ann. § 3745.07](#) gives an aggrieved party the right to appeal to the Environmental Review Board while [§ 3745.05](#) and [Ohio Admin. Code § 3749-7-01](#) provide for a hearing de novo when an adjudication hearing was not held below. To require that a formal adjudication hearing be conducted, where there is no contest of the issues, would serve only to unnecessarily delay the attainment of national ambient air quality standards. [More Like This Headnote](#)

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[Environmental Law > Air Quality > General Overview](#) 

[Environmental Law > Litigation & Administrative Proceedings > Jurisdiction & Procedure](#) 

HN10 ↓ The acquisition of a permit is a prerequisite to operation of any new air contaminant source. Ohio Admin. Code §§ 3745-3102(A)(1), 3745-35-02(C)(5)(a). [More Like This Headnote](#)

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HN11 ↓ The burden of proof may be defined as the necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent. In contrast, the burden of proceeding is the obligation resting upon a party to meet with evidence a prima facie case created against him, that is, the duty of proceeding with evidence at the beginning or at any subsequent stage of the trial in order to make or meet a prima facie case. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN12 ↓ The procedural rules adopted by the Director govern all adjudication hearings, public meetings, and other proceedings relating to adjudicatory acts conducted by the Ohio Environmental Protection Agency or by its duly authorized hearing examiners. Ohio Admin. Code § 3745-47-01. The Environmental Board of Review, however, is an appellate review board, separate and distinct from Ohio Environmental Protection Agency. [More Like This Headnote](#)

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HN13 ↓ When an adjudication hearing is conducted by the Director, on appeal the Environmental Review Board acts as an appellate agency and reviews the evidence presented below. However, when the Director does not conduct an adjudication hearing, the Board must hold a hearing de novo. Ohio Rev. Code § 3745.05; Ohio Admin. Code § 3746-7-01. The procedure at the de novo hearing is the same as if there had been no prior proceedings. Although the regulations of the Director do not apply to proceedings before the Board, when there has been no prior hearing, the burden of proof at the de novo hearing is on the applicant for the permit. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

HEADNOTES

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HEADNOTES

Environmental Protection -- EPA Director may issue consent and abatement orders -- Not required to conduct evidentiary hearings prior to issuing orders, when -- Facts not in dispute; appeal available to aggrieved persons -- Appeal of permit issuance -- Burden of proof on applicant, when -- Adjudication hearing not conducted by Director.

SYLLABUS

1. The Director of the Ohio Environmental Protection Agency (hereinafter Director) may issue consent and abatement orders pursuant to R. C. 3704.03(S) notwithstanding the absence of the word "consent" in that statute.
2. When the facts are not in dispute, and an appeal is available to aggrieved persons when there is no hearing, the Director is not required to conduct evidentiary hearings before issuing consent orders.
3. A new facility which may cause or contribute to air pollution must be built in accordance with a permit to install in order to qualify for a conditional operating permit. R. C. 3704.03(G); O. A. C. 3745-35-02(H).
4. When an adjudication hearing is not conducted by the Director on an application for a permit, **[***2]** at the hearing *de novo* on appeal, the burden of proof is on the applicant for the permit.

COUNSEL: Ms. Ann Aldrich, Mr. Joseph P. Meissner and Mr. Jeffrey H. Olson, for appellants.

Mr. Victor E. DeMarco and Mr. James C. Sennett, for appellee Republic Steel Corporation.

Mr. William J. Brown, attorney general, Ms. Colleen K. Nissl and Mr. Joel S. Taylor, for appellee Ned E. Williams, director, Environmental Protection Agency.

JUDGES: PRYATEL, J. STILLMAN, P. J., and KRUPANSKY, J., concur.

OPINION BY: PRYATEL

OPINION

[*244] [341]** This matter comes before this court as an appeal pursuant to R. C. 3745.06 and O. A. C. 3746-13-01 from the December 17, 1976, decision of the Environmental Board of Review. The following facts reveal the history of this litigation.

On October 23, 1974, Republic Steel Corporation (hereinafter Republic) filed an application for a permit to install a new coke battery (Battery No. 1) at its Cleveland district plant and simultaneously began construction of this facility. On December 23, 1975, the Director of the Ohio Environmental Protection Agency (hereinafter Director and O. E. P. A. respectively) denied Republic's application **[**3]** as did the city of Cleveland and the United States Environmental Protection Agency. Subsequently, Republic filed a timely request for an adjudication hearing in accordance with O. A. C. 3745-47-13. That hearing was never conducted because on July 7, 1976, Republic and the Director entered into a Consent and Abatement Order. The Director granted Republic permission to operate Battery No. 1 as long as its operation did not violate the emission standards specified in its order. The Director waived the necessity for obtaining a permit to install Battery No. 1 and decreed that Republic would not be subject to enforcement action for its failure to obtain such a permit, provided that Republic comply with a strict schedule and issue quarterly progress reports. Finally, an appropriate system for controlling pushing cycle emissions must be installed no later than September 1, 1978.

Subsequently, on August 6, 1976, the Broadway Christian Church, the Broadway United Methodist Church, the Broadway Retirees' Fellowship, the Southwest Civic Association, the Forest Park Civic Association, and the Northern Ohio Lung Association (hereinafter referred to collectively as Broadway) appealed to the **[**4]** Environmental Board of Review (hereinafter the Board), challenging the validity of the Consent and Abatement Order. After an extensive hearing *de novo*,¹ the Board ruled that the Consent and **[*245]** Abatement Order was unlawful because R. C. 3704.03(S) does not expressly authorize the Director to enter into consent orders. The Board accordingly vacated the Director's consent decree and ordered him to issue Republic a conditional operating permit incorporating the terms and conditions of Order No. EPA-5-77-A-3 of the United States Environmental Protection Agency to the extent that the terms of that order relate to Battery No. 1. Broadway has appealed to this court challenging the validity of the Board's ruling. Republic and the Director have filed cross-appeals. Assignments of error will be consolidated where similar issues are presented.

FOOTNOTES

¹ R. C. 3745.05 and O. A. C. 3746-7-01 require the Board to conduct a hearing *de novo* on appeal if the Director did not hold an adjudication hearing. Union Camp Corp. v. Whitman (1975), 42 Ohio St. 2d 441.

[5]** *Republic's Sole Assignment of Error:*

"The board erred in holding that the director had no authority to issue the consent and abatement order herein."

Director's Assignment of Error No. 1:

"The Environmental Board of Review erred in holding that the Director of Environmental Protection has no authority to issue consent orders pursuant to enforcement authority granted by section 3704.03(S), Revised Code."

The Board held that the Consent and Abatement Order was unlawful because "nowhere in R. C. 3704.03(S) is the express power given to the Director to enter into consent orders."² That statute reads as follows:

[342]** ^{HN17} Sec. 3704.03 Powers of director of environmental protection.

FOOTNOTES

² Broadway concedes that the Director does have authority to issue consent orders; however they object to the particulars of the consent order at issue here.

"The director of environmental protection may:

"* * *

"(S) Issue, modify, or revoke orders prohibiting or abating emissions which violate applicable [***6] emission standards, or requiring emission control devices or measures in order to comply with applicable emission standards. In the making of such orders the director shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of compliance with such orders, and their relation to benefits to the people of the state to be derived from such compliance."

[*246] In reaching its conclusion, the Board noted (1) that R. C. 3704.03(S) contains neither the word "consent" nor the phrase "consent order"; (2) that although R. C. 3745.01 lists a variety of documents which can result from the Director's orders, it does not mention consent orders; and (3) that although 3704.03(T) authorized the Director to exercise all incidental powers required to carry out Chapter 3704 of the Revised Code, it does not expressly grant the power to enter into consent orders. We do not agree with the Board. In our judgment, its ruling elevates form over substance, R. C. 3704.03(S) specifically authorizes the Director to "[i]ssue * * * orders prohibiting or abating emissions which violate applicable emission standards." ³ The Consent [***7] and Abatement Order at issue here is such an order. It permits Republic to continue operations while constructing necessary emission controls which would abate any further violations. ^{HN2} The absence of the word "consent" in R. C. 3704.03(S) is not of such legal gravity that an entry by consent is forbidden. In *Ontario v. Whitman* (1973), 47 Ohio App. 2d 81, the Franklin County Court of Appeals considered the question whether the Board could "reverse" an order of the Director since the statute authorizing appeals to the Board, R. C. 3745.04, does not contain any express language permitting such action. ⁴ The court concluded that the Board does have the power to reverse orders of the Director:

"* * * [u]nder R. C. 3745.05, the board was empowered [*247] to hold a hearing *de novo*. In such an instance, of a hearing *de novo*, it is beyond contemplation to conclude that the authority conferred on the board was restricted by the phrase 'vacating or modifying the order' to a mere vacation of the director's order and the ordering of a hearing. If the board of review has authority to conduct a hearing from scratch, it would seem ridiculous to conclude that it was confined [***8] as narrowly as its order suggests. It should be remembered that the term modify not only suggests to moderate, or create a more temperate or less extreme situation, but the term is also synonymous with the word change, which is to make a basic or important adjustment." *Id.*, at 88.

FOOTNOTES

³ It should be noted that the Director's regulation codified at O. A. C. 3745-47-19-(D) specifically refers to consent orders. ^{HN3} That provision reads as follows:

"(D) If, at a prehearing conference or at any other time prior to the termination of the hearing, the parties agree to a settlement, the Hearing Examiner may recommend in writing to the Director that the settlement terms be adopted as a final order; or the parties may prepare a suggested consent order, signed by the parties other than the Agency, which may be submitted along with the file to the Director for adoption after consideration of all materials in the file." (Emphasis added.)

⁴ ^{HN4} R. C. 3704.03 authorizes "[a]ny person who was a party to a proceeding before the director [to] participate in an appeal to the environmental board of review for an order vacating or modifying the action of the director of environmental protection." (Emphasis added.)

[***9] In the same vein, it is too confining to suggest that the Director may not issue consent orders. ^{HN5} R. C. 3704.03(S) contains a broad grant of power to the Director to issue orders. The legislature did not specify or limit what types of orders the Director may or may not issue as suggested here by Broadway. Therefore, the use of [***343] the word consent, admittedly not in the statute, does not invalidate the order.

The Franklin County Court of Appeals addressed another similar question in *Columbia Township Trustees v. Williams*, unreported, Case Nos. 76 AP-107, 76 AP-109, 76-AP-153, decided August 5, 1976. In that case, the Board vacated the Director's issuance of a permit to install a sanitary landfill because the O. E. P. A. did not have legal authority to issue such a permit. The applicable statute, R. C. 3734.02 (C), did, however, require prior approval of the Director before establishing a solid waste disposal site. The court rejected the Board's literal approach to determining the powers of the Director and concluded that the permit to install was issued in conformity with applicable law:

"First, contrary to the finding of the EBR, we find nothing violative [***10] of the law in the issuance by the director of what the EPA terms a 'permit to install.' Although R. C. 3734.02 does not specifically refer to any such permit, the adoption of a regulation entitled EP-30 by this agency, which provides for these installation permits, is not per se offensive to this section of law." *Id.*, at 9.

[*248] Similarly, in the case at bar, the Director issued a consent order in furtherance of his statutorily imposed powers.

In this case, it is necessary to review the facts before the Director and the options available to him. One alternative was to conduct an adjudication hearing on the proposed denial of a permit to install which would inevitably have

resulted in a final denial since Republic could not meet the requirements specified in O. A. C. 3745-31-05. The Director would have been compelled to institute court action since the Director does not have the authority to levy monetary penalties or invoke contempt sanctions. *Cf.* R. C. 3704.06. The Director would be forced to seek injunctive relief in order to close down Battery No. 1. A court, sitting in equity after considering the economic, technological, and health aspects, in all probability *****11** would issue an order allowing Republic a reasonable period of time to comply with environmental regulations. ⁵ Since Battery No. 1 was already reducing the level of air pollutants from those produced by Battery No. 5 that it replaced, it is quite likely ***249** that the court would give Republic the time necessary to install additional emission controls. Thus, it would be much better for all if Republic without the necessity of a hearing agreed (1) to a consent order, (2) to deliver progress reports and (3) to accept a deadline of September 1, 1978, for full compliance. To the Director, this approach was preferable to protracted hearings followed by appeals, thus delaying a successful conclusion far into the future. ⁶ *****344** By issuing a consent order, the Director attempted to accomplish within a reasonable space of time what Republic would have eventually been required to do after a long period of litigation. The consent order issued pursuant to R. C. 3704.03 (S) was a legitimate enforcement tool designed to remedy violations of R. C. 3704.05.

FOOTNOTES

⁵ The economic impact of shutting down Battery No. 1 would be severe, for the city of Cleveland, its citizens, and for Republic. (Certified Record Item No. 6). The closing of Battery No. 1 would necessitate the lay-off of 1247 Republic employees, a loss of \$ 18,000,000 in annual salaries. In addition, 997 other jobs would be lost particularly in retailing and other nonmanufacturing areas throughout the metropolitan Cleveland area as a direct result of the lay-off of Republic employees. The closing of Battery No. 1 would also cause the following annual revenue losses: \$ 45,000,000 in the Cleveland metropolitan area in total generated income; \$ 13,140,000 in the Cleveland metropolitan area in retail sales; \$ 180,000 in income tax to the city of Cleveland; and \$ 260,000 in sales taxes. (Affidavit of Franklin H. Maris, director of Research and Planning of the Greater Cleveland Growth Association.) Such a shut down would cost Republic approximately \$ 1,255,800 per month. (Battery No. 1 will produce approximately one-sixth of the coke used at the Cleveland District Works which in turn accounts for about one-sixth of the total steel production in Cleveland). The interim cost to the public of permitting Republic to operate Battery No. 1 *while* constructing necessary emission controls is far less. Indeed, the record reflects that the replacement of Battery No. 5 with Battery No. 1 will lead to a significant decrease in emissions thus constituting progress toward the attainment of national ambient air quality standards and diminishing any health hazards, and that by September 1, 1978, Battery No. 1 will be operating in accordance with applicable laws. *****12**

⁶ ~~HN67~~ R. C. 3704.03(S) and (T) vest the Director with the discretion to issue enforcement orders. Those sections read as follows:

" R. C. 3704.03 Powers of director of environmental protection.

"The director of environmental protection may:

"(S) Issue, modify, or revoke orders prohibiting or abating emissions which violate applicable emission standards, or requiring emission control devices or measures in order to comply with applicable emission standards. In the making of such orders the director shall give consideration to and base his determination on, evidence relating to the technical feasibility and economic reasonableness of compliance with such orders and their relation to benefits to the people of the state to be derived from such compliance.

"(T) Exercise all incidental powers required to carry out sections 3704.01 to 3704.11 of the Revised Code."

In *Cleveland Electric Illuminating Co. v. Williams*, unreported, Tenth Appellate District, case Nos. 76 AP-929, 76 AP-938, decided December 18, 1977, the Franklin County Court of Appeals recognized that ~~HN77~~ the Director has broad *****13** discretionary enforcement options and that he need not necessarily seek an injunction pursuant to R. C. 3704.06 to combat violations of emission standards. The court noted that the Director "is given a great deal more effective enforcement weapon by a holding that no further variance is possible, which means that the operator is acting illegally if the emission from his plant exceeds the applicable air quality regulations. More prompt and effective measures can be taken for enforcement under penalty of ***250** severe monetary fines or threat of shut down to achieve, at the earliest possible time, attainment of properly adopted air quality standards." *Id.*, at 14.

Accordingly, we hold that the Board erred when it held that the Director does not have the authority to issue consent orders. Republic's sole assignment of error and the Director's Assignment of Error No. 1 are therefore sustained. ⁷

FOOTNOTES

⁷ In so ruling, we do not necessarily release Republic from the necessity of applying for a permit to operate after September 1, 1978.

[*14] Director's Assignment of Error No. 2:**

"The Environmental Board of Review erred in holding that the Director of Environmental Protection must hold evidentiary hearings before settlement of administrative litigation through the issuance of an enforcement order pursuant to Section 3704.03(S), Revised Code."

In its joint findings of fact, the board found that:

" R. C. 3704.03(S) requires that the Director give consideration to evidence relating to technical feasibility, economic reasonableness and the benefits to the people of the State. However, the consent order itself states that no evidence has been tried. * Thus the consent order is on its face inconsistent with and in violation of the very statute upon which it is supposed to be based." Finding of Fact No. 30.

FOOTNOTES

§ The consent order contained the following language:

"Republic and the Director agreed to resolve all issues raised in this adjudication proceeding as set forth in this Consent and Abatement Order. It is acknowledged that no evidence has been submitted and no issue of law or fact has been tried."

[*15]** ^{HN8} ~~T~~ R. C. 119.06(C) provides that adjudication orders are invalid unless opportunity for a hearing is afforded except when the rules of the agency promulgating the order or the statutes pertaining to such agency specifically give an appellant a right of appeal to a higher authority within the agency or to another agency.

Such is the case here. ^{HN9} ~~T~~ For those who wish to challenge the order, R. C. 3745.07 gives an aggrieved party such as Broadway (who was not a party to the consent decree), the right to appeal to the Board while R. C. 3745.05 and O. A. **[*251]** C. 3749-7-01 provide for a hearing *de novo* when an adjudication hearing was not held below. However, in our opinion, R. C. 3704.03(S) does not necessitate a formal evidentiary hearing under the present circumstances. Republic conceded that it was in violation of emission standards **[**345]** and agreed to take necessary steps to abate the violations. To require that a formal adjudication hearing be conducted, where there is no contest of the issues, would serve only to unnecessarily delay the attainment of national ambient air quality standards. The approach taken by the Director was the most expedient and allowable under **[***16]** law. The rights of the public are adequately protected by the right to appeal as discussed above. We conclude that the Board erred when it held the consent order invalid for failure to conduct proceedings to hear evidence that was not in dispute. The Director's Assignment of Error No. 2 is sustained.

Director's Assignment of Error No. 3:

"The Environmental Board of Review erred in ordering the Director of Environmental Protection to issue to Republic Steel Corporation conditional operating permits pursuant to Section 3704.03(G), Revised Code, and OAC 3745-35-02 (H) when the Coke Battery was not constructed and completed in accordance with a permit to install."

Broadway's Assignments of Error No. 1 and No. 2:

"The Environmental Board of Review erred in permitting the immediate operation of Coke Oven Battery No. 1 because the operation of that Battery, in its present condition, violates Ohio law, whether that operation is pursuant to the consent agreement appealed from, or pursuant to a conditional permit."

"The Environmental Board of Review erred in permitting the immediate operation of Coke Oven Battery No. 1 because the operation of a new source of air pollution **[***17]** in a non-attainment region, without the pollution controls required by law, is in violation of applicable federal statutes."

Central to the complaints of Broadway and the Director is Republic's failure to obtain a permit to install Battery No. 1. ^{HN10} ~~T~~ The acquisition of such a permit is a prerequisite **[*252]** to operation of any new air contaminant source. ⁹ O. A. C. 3745-3102(A)(1), 3745-35-02(C)(5)(a).

FOOTNOTES

9 This court has previously determined that Battery No. 1 is a new source of air pollutants and not a mere replacement of Battery No. 5 as Republic contends. *Broadway Christian Church v. Republic Steel Corp.* (1976), 50 Ohio App. 2d 98, 103.

R. C. 3704.03(G) and O. A. C. 3745-35-02(H) authorize new sources such as Republic to operate pursuant to a

conditional operating permit to allow the holder of the permit to make necessary adjustments or modifications. However, *such facility must have been built in accordance with a permit to install*. Republic's failure to qualify for a permit to install *****18** is fatal to its eligibility for a conditional permit. Moreover, pursuant to O. A. C. 3745-35-02(H), conditional operating permits are valid for a period not to exceed six months and are not renewable. The conditional operating permit mandated by the Board's order was in clear violation of these provisions -- the permit was to be renewed at the end of sixty days and its expected duration was well beyond six months. Accordingly, we hold that the Board erred when it ordered the Director to issue a conditional operating permit for Battery No. 1.

Broadway also alleges that federal regulations (40 C. F. R., Section 51.18(b)) prohibit the construction of new sources such as Battery No. 1 in areas where national ambient air quality standards have not been achieved. That section is not a prohibition of such new sources of pollutants, rather it is a guideline to be utilized by the states when promulgating state implementation plans. Moreover, an interpretative ruling of the United States Environmental Protection Agency, in 40 C. F. R., Section 51.18 has provided, in general, that:

"* * * a major new or modified source [may] locate in an area that exceeds a national ambient air quality *****19** standard (NAAQS) only if stringent conditions can be met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ('emission offset') will be obtained from ***253** existing sources; and that ****346** there will be progress toward achievement of the N.A.A.Q.S. * * *" 41 Fed. Reg. 55524, 55528 (1976).

Battery No. 1 meets all of the standards. After considerable study and testing, Republic has contracted for the one spot car to be constructed for Battery No. 1, which, upon completion, is expected to achieve national ambient air quality standards. Indeed, the consent order entered by the United States Environmental Protection Agency has found this to be the case. ¹⁰

FOOTNOTES

¹⁰ It should be noted that Broadway is currently challenging the federal consent agreement in a proceeding before the United States Court of Appeals for the Sixth Circuit.

The Director's Assignment of Error No. 3 *****20** is sustained; Broadway's Assignments of Error No. 1 and No. 2 are sustained only to the extent that Battery No. 1 is illegally operating under a conditional permit.

Broadway's Assignment of Error No. 3:

"The Environmental Board of Review erred in requiring public notice simultaneously with the operation of the new coke oven battery because 'simultaneous' notice fails to comply with both state and federal procedural statutory requirements."

The Board ordered the Director to immediately issue a conditional operating permit to Republic "citing therein as its evidentiary basis the facts adduced before the EBR in Case No. 76-24." In addition, the Director was ordered to issue public notice and obtain public participation in order to satisfy the requirements of Chapter 119 of the Revised Code and 40 C.F.R., Section 52.1879 during the sixty day duration of that permit. Prior to the expiration of that period, the Director was instructed to determine whether or not to issue a second conditional operating permit, authorizing operation until the earliest possible date that Republic can install necessary emission controls. Broadway contends that this order violates the federal notice *****21** requirements of 40 C. F. R., Section 52.1879.

In light of our holding that the Board erred in ordering the Director to issue a conditional operating permit for ***254** Battery No. 1, this assignment of error dealing with notice on permits to install or construct new air pollution sources is rendered moot. Since we have concluded that a consent decree is an enforcement order intended to remedy violations of law, federal regulations dealing with permits are inapplicable.

Accordingly, the Director's Assignment of Error No. 3 is dismissed.

Broadway's Assignments of Error No. 4 and No. 5:

"The Environmental Board of Review erred by placing the ultimate burden of proof upon the appellants."

"The Environmental Board of Review erred by placing upon the appellants the burden of proof with respect to the economic reasonableness of the director's order, where the evidence necessary to prove such an assertion is peculiarly within the sole possession and control of Republic."

At the *de novo* hearing before the Board, the Board placed the *burden of proof* on Broadway while the burden of proceeding was imposed on Republic and the Director. ^{HN11} The burden of proof may be defined *****22** as "[t]he necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent." *Martin v. City of Columbus* (1920), 101 Ohio St. 1, 9. In contrast, the burden of proceeding is "the obligation resting upon a party to meet with evidence a prima facie case created against him, that is, the

duty of proceeding with evidence at the beginning or at any subsequent stage of the trial in order to make or meet a prima facie case." 21 Ohio Jurisprudence 2d 161, Evidence, Section 154.

Broadway cites to O. A. C. 3745-47-23(A)(1)¹¹ in support of the assertion that the burden of proof should have been on **[**347]** Republic. That regulation of the Director does not apply to proceedings before the Board. ^{HN12} ¶The procedural rules adopted by the Director govern "all adjudication **[*255]** hearings, public meetings, and other proceedings relating to adjudicatory acts *conducted by the Ohio Environmental Protection Agency* or by its duly authorized hearing examiners. * * *" (Emphasis added.) O. A. C. 3745-47-01. The Environmental Board of Review, however, is an appellate review board, *separate and distinct* from the **[***23]** O. E. P. A. O. E. P. A. Law & Regs. EBR i (1977).

FOOTNOTES

¹¹ That provision reads as follows:

"3745-47-23 *Burden of Proof -- Evidence.*

"(A)(1) The burden of proof at all hearings with respect to applications, permits, licenses, variances, and certificates shall be upon the applicant."

^{HN13} ¶When an adjudication hearing is conducted by the Director, on appeal the Board acts as an appellate agency and reviews the evidence presented below. However, when the Director does not conduct an adjudication hearing, as is the case here, the Board must hold a hearing *de novo*. R. C. 3745.05; O. A. C. 3746-7-01; Union Camp Corp. v. Whitman (1975), 42 Ohio St. 2d 441. The procedure at the *de novo* hearing is the same as if there had been no prior proceedings. Farrand v. State Medical Board (1943), 46 Ohio Law Abs. 14, 16. Although the regulations of the Director do not apply to proceedings before the Board, when there has been no prior hearing, the burden of proof at the *de novo* hearing is on the applicant **[***24]** for the permit. Therefore, we hold that the Board erred when it imposed the burden of proof on Broadway. Broadway's Assignments of Error No. 4 and No. 5 are sustained.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

CONCUR BY: STILLMAN

CONCUR

STILLMAN, P. J., concurring.

I join in the determination of the court with respect to the issues presented upon appeal, but I would add two additional observations which I believe are pertinent to the case.

The first is my view that the determination at which we have arrived is primarily predicated on pragmatic rather than specifically legal considerations.

Republic Steel undertook to construct a facility without having received the requisite permit. Its construction in this regard has now been condoned by the Director of the **[*256]** Environmental Protection Agency of Ohio and this court. I do not believe that such a disregard of the law should be summarily dismissed as insignificant in terms of its potentiality for future abuse. The case before us is not limited in its implications to the specifics of this single occurrence. If we **[***25]** are to genuinely seek the protection of the environment which we profess through the enactment of comprehensive legislation and the establishment of appropriate enforcement agencies, it is necessary to support both the statutes and the agencies through a meaningful application of the law. In the instant case, Republic has promised to install the necessary systems to assure the adequate control of noxious emissions by September 1, 1978. Presumably, this will be done. If, however, further action on behalf of environmental protection groups becomes necessary after that date, this decision may prove unwarrantedly precedential in inhibiting aggressive action.

The second concern which I wish to express relates to the current confusion and overlapping which has developed in the area of environmental control. The fact that both the federal government and the several states are currently seeking to legislate through congressional enactments and statutory law gives rise to the possibility of conflicting judgments and endless litigation. As we have noted in this opinion, the environmental groups in this case are currently contesting a federal consent agreement in the United States Court **[***26]** of Appeals for the Sixth Circuit. Such a process of seemingly vexatious litigation must lend urgency to a resolution of conflicts of this kind. It is possible that the Sixth Circuit case may alter the significance of the decision herein, all to the prejudice of efforts to **[**348]** solve the problems with which we have struggled. It would seem highly desirable in this area for the

adoption of uniform state and national legislation to deal with the expanding field of environmental protection. See, *State Environmental Policy Acts: A survey of Recent Developments*, 2 Harv. Environmental L. Rev. 419 (1977); see also, *The Environmental Impact Statement Requirement in Agency Enforcement Adjudication*, 91 Harv. L. Rev. 815 (1978).

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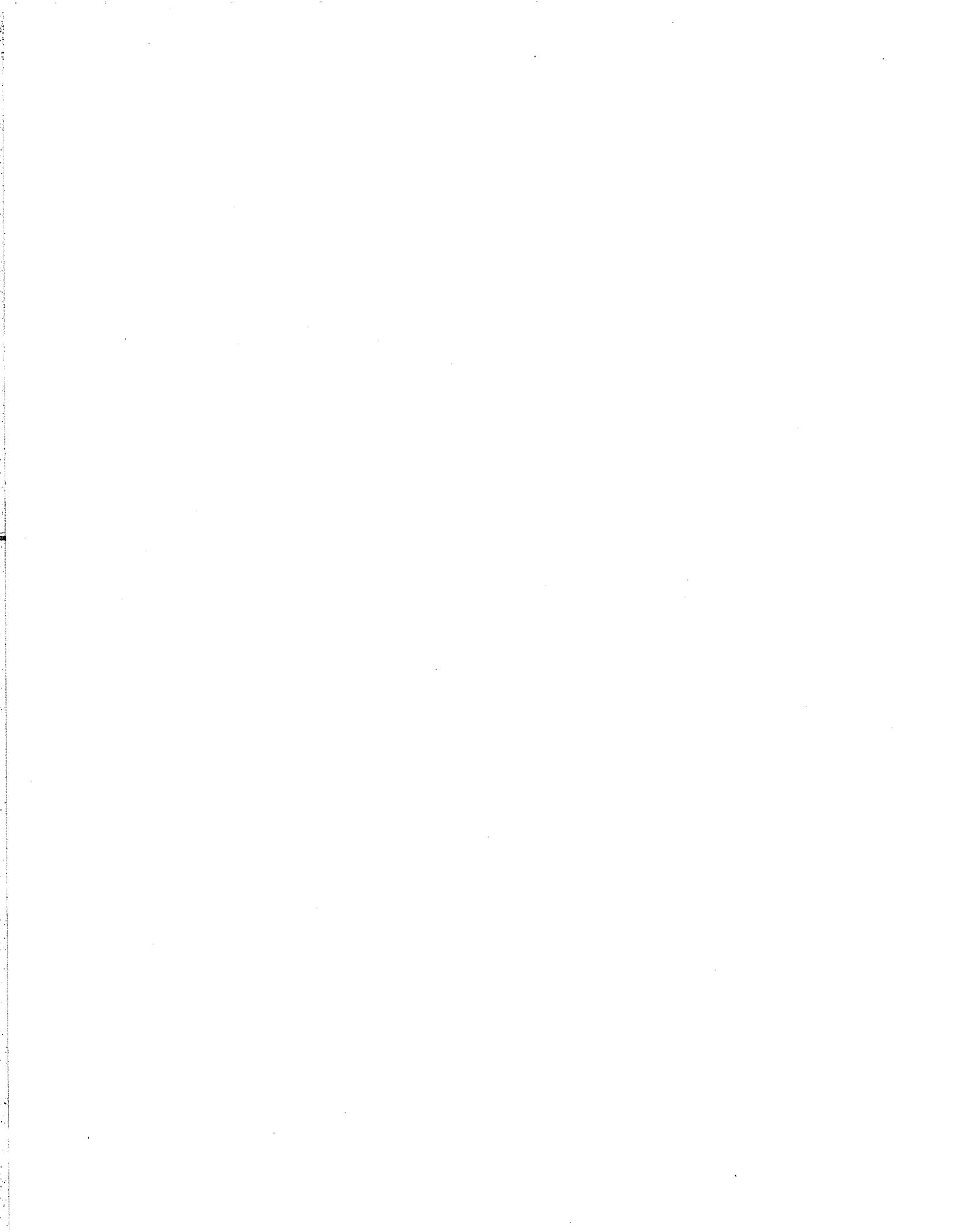
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ATTACHMENT 2



Service: Get by LEXSEE®
Citation: 2009 Ohio 2143

2009 Ohio 2143, *; 2009 Ohio App. LEXIS 1799, **

Stark-Tuscarawas-Wayne Joint Solid Waste Management District, Appellant-Appellant/Cross-Appellee, v. Republic Waste Services of Ohio II, LLC, Appellee-Appellee/Cross-Appellant, Christopher Jones, Director of Environmental Protection, Appellee-Appellee.

No. 07AP-599

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2009 Ohio 2143; 2009 Ohio App. LEXIS 1799

May 7, 2009, Rendered

PRIOR HISTORY: [1]**

APPEAL from the Environmental Review Appeals Commission. (ERAC No. 795334).
Club 3000 v. Jones, 2008 Ohio 5058, 2008 Ohio App. LEXIS 4279 (Ohio Ct. App., Franklin County, Sept. 30, 2008)

DISPOSITION: Order affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant, a joint solid waste management district, sought review under R.C. 3745.06 of an order from the Environmental Review Appeals Commission (ERAC), which affirmed a decision of appellee, the Director of the Ohio Environmental Protection Agency. The Director granted to appellee waste service company (WSC) a permit to install (PTI) an expansion to its solid waste landfill.

OVERVIEW: The WSC applied for the PTI for an expansion to its existing municipal solid waste landfill. The Director approved the permit, and the district appealed. After a de novo hearing, the ERAC affirmed the Director's decision. On appeal, the district asserted that the evidence did not support the affirmance. The WSC filed a cross-appeal from the denial of its claim that the district lacked standing. The district sought dismissal of the WSC's cross-appeal. The court found that pursuant to § 3745.06 and App. R. 4(B)(1), the WSC's cross-appeal was timely. Further, the issue of the district's standing was not barred by res judicata. The court held that it was properly determined that the district had standing to appeal the Director's decision based on its statutory duty under R.C. 3734.52(A) and the evidence of threatened injury to the district's residents and environment under R.C. 3745.04. There was reliable, probative, and substantial evidence pursuant to R.C. 3745.05 and 3745.06 that supported the decision to issue the permit. The factual foundation underlying the Director's decision that the WSC complied with Ohio Admin. Code 3745-27-07(H)(2)(e) was valid.

OUTCOME: The court affirmed the order of the ERAC.

CORE TERMS: landfill, fracture, groundwater, issuance, cross-appeal, aquifer, standing to appeal, beneath, contamination, liner, dairy's, environmental, reliable, shale, assignments of error, probative, notice, site, solid, solid waste, de novo hearing, aggrieved, formation, decision to issue, notice of appeal, operational, install, newly, waste management, substantial evidence

LEXISNEXIS® HEADNOTES

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN1  Where a statute confers the right of appeal, an appeal may be perfected only in the manner prescribed by statute. R.C. 3745.06 confers the right to appeal orders of the Environmental Review Appeals Commission and provides the procedures for perfecting such appeals. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN2  See R.C. 3745.06.

[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Notice of Appeal](#) 

[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Time Limitations](#) 

HN3  [App. R. 4\(B\)\(1\)](#) provides that cross-appeals may be filed within 10 days of the filing of an initial notice of appeal. [More Like This Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [General Overview](#) 

[Governments](#) > [Courts](#) > [Rule Application & Interpretation](#) 

HN4  [App. R. 1\(A\)](#) provides that the appellate rules govern procedure in appeals to court of appeals from the trial courts of record in Ohio. [More Like This Headnote](#)

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HN5  [R.C. 3745.06](#) provides only limited guidance on the procedural aspects of an Environmental Review Appeals Commission appeal. The appellate rules do not apply to an appeal under [R.C. 3745.06](#), at least to the extent that the statute provides the procedure for appeal. [More Like This Headnote](#)

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HN6  Since the Environmental Review Appeals Commission (ERAC) is an administrative agency created by [R.C. 3745.02](#) rather than a trial court of record, the appellate rules do not apply to appeals from ERAC to a court of appeals pursuant to [R.C. 3745.06](#). Rather, [§ 3745.06](#) controls appeals to the court of appeals from ERAC. [Section 3745.06](#) expressly provides that a court hearing an ERAC appeal may grant a suspension of the order and fix its terms in the case of an unjust hardship. [More Like This Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Time Limitations](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

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HN7  In the case of a cross-appeal from an Environmental Review Appeals Commission (ERAC) order, there is no conflict between [App. R. 4\(B\)\(1\)](#) and [R.C. 3745.06](#). Rather, [Rule 4\(B\)\(1\)](#) acts as a necessary supplement to the appellate procedures contained in [§ 3745.06](#). Accordingly, the 10-day time frame set forth in [Rule 4\(B\)\(1\)](#) applies to a cross-appeal. Any other result could effectively foreclose cross-appeals in ERAC cases, especially where a party appealing the ERAC order does so at the very cusp of the 30-day deadline set forth in [§ 3745.06](#). [More Like This Headnote](#)

[Environmental Law](#) > [Natural Resources & Public Lands](#) > [General Overview](#) 

HN8  An aquifer is a geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring. [Ohio Admin. Code 3745-34-01\(D\)](#). An aquitard is a rock formation, which acts as a confining unit, and impedes the flow of groundwater from reaching the formations around it. The terms "hydraulically active" or "hydraulic conductivity" refer to a formation's ability to transmit water. [More Like This Headnote](#)

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Standing](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN9  Standing is a threshold jurisdiction issue that must be resolved before an appellant may proceed with an appeal to the Environmental Review Appeals Commission (ERAC). The Ohio General Assembly has sanctioned two avenues of appeal to ERAC. The first, [R.C. 3745.04\(B\)](#), permits appeals of actions or inactions by the Director of the Ohio Environmental Protection Agency by any person who was a party to a proceeding before the Director. Interpreting [§ 3745.04](#), the statutory language "party to a proceeding before the Director" encompasses any person affected by the proposed action who appears in person, or by his attorney, and presents his position, arguments, or contentions orally or in writing, or who offers or examines witnesses or presents evidence tending to show that said proposed rule, amendment or rescission, if adopted or effectuated, will be unreasonable or unlawful. A two-prong test has been developed for determining whether a person is a party under [§ 3745.04](#). In addition to appearing before the Director and presenting arguments in writing or otherwise, the person must also be "affected" by the action or proposed action. [More Like This Headnote](#)

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Standing](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN10  An avenue of appeal to the Environmental Review Appeals Commission, [R.C. 3745.07](#), authorizes appeals by parties "aggrieved or adversely affected" by a decision of the Director of the Ohio Environmental Protection Agency where the Director acts without issuing a proposed action. In determining whether a party has been "aggrieved or adversely affected" for purposes of [§ 3745.07](#), the principles of traditional standing analysis apply. [More Like This Headnote](#)

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Standing](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

[Evidence](#) > [Procedural Considerations](#) > [Burden of Proof](#) > [Allocation](#) 

HN11  Courts employ the same analysis in determining whether an appellant has been or will be "affected" under [R.C. 3745.04\(B\)](#) or has been or will be "aggrieved or adversely affected" under [R.C. 3745.07](#). Under either section, the appellant bears the burden of demonstrating that it has standing. In order to establish standing, a person must demonstrate that the challenged action has caused or will cause him or her injury in fact, economic or otherwise, and that the interest sought to be protected is within the sphere of interests protected or regulated by the statute in question. The alleged injury must be concrete, rather than abstract or suspected; a party must show he or she has suffered or will suffer a specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction. The alleged injury in fact may be actual and immediate, or threatened. A party who alleges a threatened injury, however, must demonstrate a realistic danger arising from the challenged action. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Standing](#) 

HN12  A general interest as a citizen does not convert an individual right into a right which would permit any citizen who suffers no distinct harm to sue a governmental agency. It is not unreasonable to require a citizen to demonstrate, at a minimum, that she is within the sphere of impact for the actions in question. [More Like This Headnote](#)

[Environmental Law](#) > [Solid Wastes](#) > [General Overview](#) 

HN13  [R.C. 3734.52](#) establishes solid waste management districts and creates the two-fold purpose of the districts, i.e., preparing, adopting, submitting, and implementing the solid waste management plan for a county or joint district, and providing for, or causing to be provided for, the safe and sanitary management of solid wastes within all the incorporated and unincorporated territory of the county or joint solid waste management district. [More Like This Headnote](#)

[Civil Procedure](#) > [Judgments](#) > [Preclusion & Effect of Judgments](#) > [Estoppel](#) > [Collateral Estoppel](#) 

[Civil Procedure](#) > [Judgments](#) > [Preclusion & Effect of Judgments](#) > [Res Judicata](#) 

HN14  The doctrine of res judicata provides that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. In Ohio, the doctrine of res judicata encompasses the two related concepts of claim preclusion and issue preclusion, also known as collateral estoppel. Issue preclusion, or collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different. [More Like This Headnote](#)

[Civil Procedure](#) > [Judgments](#) > [Preclusion & Effect of Judgments](#) > [Estoppel](#) > [Collateral Estoppel](#) 

[Civil Procedure](#) > [Judgments](#) > [Preclusion & Effect of Judgments](#) > [Res Judicata](#) 

HN15  While the merger and bar aspects of res judicata have the effect of precluding the relitigation of the same cause of action, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action. Collateral estoppel applies when the fact or issue: (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action. [More Like This Headnote](#)

[Environmental Law](#) > [Solid Wastes](#) > [General Overview](#) 

HN16  A district's principal statutory duty set forth in [R.C. 3734.52\(A\)](#) is to provide for the safe and sanitary management of solid wastes within all of the incorporated and unincorporated territory of the district. [More Like This Headnote](#)

[Administrative Law](#) > [Agency Adjudication](#) > [Review of Initial Decisions](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Jurisdiction & Procedure](#) 

HN17  [R.C. 3745.05](#) sets forth the standard the Environmental Review Appeals Commission must employ when reviewing a final action of the Director of the Ohio Environmental Protection Agency. [More Like This Headnote](#)

[Administrative Law](#) > [Agency Adjudication](#) > [Review of Initial Decisions](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Jurisdiction & Procedure](#) 

HN18  See [R.C. 3745.05](#).

[Administrative Law](#) > [Agency Adjudication](#) > [Review of Initial Decisions](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Jurisdiction & Procedure](#) 

HN19  The standard under [R.C. 3745.05](#) does not permit the Environmental Review Appeals Commission (ERAC) to substitute its judgment for that of the Director of the Ohio Environmental Protection Agency as to factual issues. The term "unlawful" means that which is not in accordance with law, and the term "unreasonable" means that which is not in accordance with reason, or that which has no factual foundation. It is only where ERAC can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by ERAC upon the de novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action. [More Like This Headnote](#)

[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [Substantial Evidence](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN20  [R.C. 3745.06](#) provides the standard a court must employ when reviewing a final order of the Environmental Review Appeals Commission. [Section 3745.06](#) provides, in part, that the court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN21  As used in [R.C. 3745.06](#), reliable evidence is evidence which can be trusted. In order for evidence to be reliable, there must be a reasonable probability that it is true. Probative evidence is evidence which tends to prove the issue in question, while substantial evidence is evidence which carries weight, or evidence which has importance or value. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

[Evidence](#) > [Procedural Considerations](#) > [Weight & Sufficiency](#) 

HN22  In determining whether the Environmental Review Appeals Commission's (ERAC) decision is supported by the requisite quantum of evidence, a court must weigh and evaluate the credibility of the evidence presented to ERAC. This process involves a consideration of the evidence and, to a limited extent, would permit a substitution of judgment by the reviewing court. However, a court must bear in mind that the General Assembly created administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. Accordingly, the court must afford due deference to ERAC's interpretation of rules and regulations, as well as its resolution of evidentiary conflicts. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Administrative Law](#) > [Judicial Review](#) > [Administrative Record](#) > [General Overview](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN23  See [R.C. 3745.06](#).

[Environmental Law](#) > [Solid Wastes](#) > [Permits](#) > [General Overview](#) 

HN24  There is a difference between a permit to install and the ongoing regulation, maintenance and operation of a solid waste facility. A permitting decision based upon the submission of plans by an applicant is different from the "actual operation" of the approved facility. The determination upon application for a permit to install is based upon whether the plan proposes a plant that is capable of being operated in accordance with environmental regulations and applicable statutes. Before an applicant may begin construction, he must submit and have approved details of such plans. The actual operation of such plant is distinct and separate. [More Like This Headnote](#)

[Environmental Law](#) > [Solid Wastes](#) > [Permits](#) > [General Overview](#) 

HN25  Issues related to the operation of a solid waste facility are pertinent at the permitting stage only to the extent the issues relate to whether the plans submitted by an applicant propose a facility that can be operated in accordance with the applicable laws. Concerns about the actual operation and maintenance of a facility are the subject of corrective measures or enforcement by the Ohio Environmental Protection Agency. [More Like This Headnote](#)

[Environmental Law](#) > [Solid Wastes](#) > [Permits](#) > [General Overview](#) 

[Evidence](#) > [Procedural Considerations](#) > [Burdens of Proof](#) > [Allocation](#) 

HN26  With respect to a solid waste facility permit, the "burden of proof" relates to the burden placed upon an applicant to prove its entitlement to the requested permit. In contrast, the "burden of proceeding" relates to the burden placed upon a non-applicant party who challenges a decision of the Director of the

Ohio Environmental Protection Agency to issue a permit. [More Like This Headnote](#)

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Jurisdiction & Procedure](#)

[Environmental Law](#) > [Solid Wastes](#) > [Permits](#) > [General Overview](#)

HN27 To the extent that the Director of the Ohio Environmental Protection Agency's granting of a solid waste disposal facility permit is debatable, the Environmental Review Appeals Commission has a duty to affirm the Director's decision, rather than substitute its own judgment. [More Like This Headnote](#)

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Jurisdiction & Procedure](#)

[Environmental Law](#) > [Solid Wastes](#) > [Permits](#) > [General Overview](#)

HN28 With respect to a solid waste facility permit, if the factual basis for a particular decision is found to be invalid or no longer exists, then the action of the Director of the Ohio Environmental Protection Agency stemming from that invalid basis may be invalid. [More Like This Headnote](#)

[Environmental Law](#) > [Solid Wastes](#) > [Municipal Landfills](#)

HN29 Ohio Admin. Code 3745-27-07(H)(2)(e) requires a 15-foot isolation distance between the bottom of a landfill liner and the uppermost aquifer system. [More Like This Headnote](#)

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

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

Richard Cordray, Attorney General, R. Benjamin Franz, and Nicholas J. Bryan, for appellee, Christopher Jones, Director of Environmental Protection.

JUDGES: BROWN, J. TYACK, J., concurs. McGRATH, J., concurs separately.

OPINION BY: BROWN, J.

OPINION

(REGULAR CALENDAR)

OPINION

BROWN, J.

[*P1] Appellant, Stark-Tuscarawas-Wayne Joint Solid Waste Management District ("the District") appeals from an order of the Environmental Review Appeals Commission ("ERAC") that affirmed the decision of appellee, Christopher Jones, Director of the Ohio Environmental Protection Agency ("the Director" or "OEPA"),¹ to grant appellee/cross-appellant, Republic Waste Services of Ohio, II, LLC ("Republic"), a permit to install an expansion to Countywide Recycling Disposal Facility, a solid waste landfill that it has owned and operated in East Sparta, Stark County, Ohio since 1995. **[**2]**² Because reliable, probative, and substantial evidence supports the order and the order is in accordance with law, we affirm.

FOOTNOTES

¹ Chris Korleski is the current Director of the Ohio Environmental Protection Agency.

² This court originally dismissed the District's appeal for lack of subject-matter jurisdiction. *Club 3000 v. Jones*, 10th Dist. No. 07AP-593, 2008 Ohio 5058 ("Club 3000 I"). We granted the District's application for reconsideration and therein resolved to consider the assignments of error presented in the original briefs and at oral argument. *Club 3000 v. Jones* (Jan. 22, 2009), 10th Dist. No. 07AP-593, memorandum decision.

[*P2] Much of the factual foundation, procedural background, and applicable law set forth below is derived from our opinion in *Club 3000 I*. We will supplement that information with additional facts, procedural background, and applicable law pertinent to the issues before us in the instant appeal.

[*P3] On February 14, 2001, Republic submitted an application for a permit to install ("PTI") a 170-acre lateral and vertical expansion to its existing 88-acre municipal solid waste landfill. Republic's application and supporting documentation included engineering plans, a groundwater **[**3]** monitoring plan ("groundwater plan"), a report

authored by Eagon & Associates, a consulting firm commissioned by Republic, entitled "Hydrogeologic Investigation for Countywide Recycling and Disposal Facility Lateral and Vertical Expansion" (the "HGI report"), as well as numerous maps, charts, graphs, tables, and various other reports. The HGI report included information previously collected by Burgess & Niple, Ltd., and Golder Associates, consulting firms involved with the site before it was operated by Republic.

[*P4] Over the more than two-year period Republic's application was pending, representatives from Republic and the OEPA engaged in numerous detailed discussions related to the PTI. Ultimately, the OEPA, on May 21, 2002, issued a final recommendation for approval to the Director. On July 1, 2003, the District appealed the Director's final action to ERAC, setting forth six separate assignments of error. Through these assignments, the District argued that the Director acted unlawfully or unreasonably in issuing the permit: (1) despite evidence that the expansion would compromise the ambient water quality in violation of Ohio Adm.Code 3745-31-05(A)(1); (2) in violation of, or without **[**4]** lawful waiver from, the siting requirements of Ohio Adm.Code 3745-27-07(H)(2), prohibiting a landfill above an unconsolidated aquifer capable of sustaining a yield of 100 gallons per minute; (3) in violation of, and without a lawful waiver from, the siting requirement of Ohio Adm.Code 3745-27-07(H)(3) prohibiting the landfill at a location within a five-year time of travel to a public water supply well; (4) without adequately considering the substantial risk of contamination to area aquifers resulting from highly fractured bedrock present beneath the proposed landfill expansion; (5) without adequately investigating and addressing the risk of contamination arising from highly fractured bedrock, pre-existing mines, and oil and gas wells in the area of and beneath the proposed landfill expansion; and (6) where the proposed liner system, materials for fill and sub-base, and groundwater monitoring systems are inadequate and are not the best available technology.

[*P5] On March 24, 2004, Republic filed a motion to dismiss the District's appeal for lack of standing. ERAC denied Republic's motion to dismiss on April 21, 2004.

[*P6] ERAC conducted a 19-day de novo hearing over five months between October **[**5]** 2004 and February 2005, during which the parties presented extensive documentary and testimonial evidence. At the conclusion of the hearing, Republic orally renewed its motion to dismiss the District's appeal for lack of standing. On April 6, 2005, ERAC denied Republic's oral motion to dismiss and noted that it would address the standing issue in its final order.

[*P7] On December 26, 2006, the District filed a "Motion To Suspend Proceedings And To Remand Proceedings" ("motion to remand") on grounds that ongoing problems at the existing landfill site, including extensive leachate buildup, increased temperatures, and movement in the waste mass had compromised the integrity of the landfill liner under the vertical expansion area, thus rendering invalid the factual foundation supporting the Director's issuance of the expansion PTI. The District requested that ERAC remand the case to the Director for further consideration of these issues and their impact on the issuance of the PTI. The Director and Republic each opposed the motion in writing. ERAC heard oral arguments on the motion February 23, 2007.

[*P8] Thereafter, on June 27, 2007, ERAC issued its "Findings of Fact, Conclusions of Law and Final **[**6]** Order and Ruling On Motion to Suspend Proceedings and to Remand Proceedings." In its order, ERAC affirmed the Director's issuance of the PTI. In addition, ERAC denied the District's post-hearing motion to remand, finding that the District had not established a sufficient nexus between the existing compliance issues at the landfill and the Director's decision to issue the expansion PTI. In addition, ERAC, in a footnote, summarily denied Republic's motion to dismiss the District's appeal on the basis of standing.

[*P9] On July 26, 2007, the District filed a notice of appeal pursuant to R.C. 3745.06. The District raises a single assignment of error, in the instant appeal, as follows:

Whether the Environmental Appeal Review Commission's [sic] ("ERAC") June 27, 2007 order is supported by reliable, probative and substantial evidence and is in accordance with law.

[*P10] On August 3, 2007, Republic filed a notice of cross-appeal pursuant to R.C. 3745.06. In its brief, Republic advances a single cross-assignment of error, in the instant appeal, as follows:

The Environmental Review Appeals Commission erred as a matter of law in denying cross-appellant's motion to dismiss the Stark-Tuscarawas-Wayne Joint Solid **[**7]** Waste Management District for lack of standing.

[*P11] Initially, we must address the District's motion to dismiss Republic's cross-appeal. ^{HN1} "Where a statute confers the right of appeal, an appeal may be perfected only in the manner prescribed by statute." Camper Care, Inc. v. Forest River, Inc., 10th Dist. No. 08AP-146, 2008 Ohio 3300, P8. R.C. 3745.06 confers the right to appeal ERAC orders and provides the procedures for perfecting such appeals. In pertinent part, R.C. 3745.06 provides:

^{HN2} Any party adversely affected by an order of the environmental review appeals commission may

appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the commission a notice of appeal designating the order appealed. A copy of the notice also shall be filed by the appellant with the court, and a copy shall be sent by certified mail to the director of environmental protection unless the director is the party appealing the order. Such notices shall be filed and mailed within thirty days after the date upon

[8]** which the appellant received notice from the commission by certified mail of the making of the order appealed. No appeal bond shall be required to make an appeal effective.

[*P12] As noted above, ERAC issued its final order on June 27, 2007. The District filed its notice of appeal on July 26, 2007 -- one day shy of the 30-day time limit provided in R.C. 3745.06. Republic filed its notice of cross-appeal on August 3, 2007 -- outside the 30-day time limit, but only seven days after the District filed its notice of appeal.

[*P13] The District contends that Republic's cross-appeal must be dismissed because it was not filed within the mandatory 30-day time limit set forth in R.C. 3745.06. Republic and the Director counter that the 30-day time limit applies only to the filing of the initial notice of appeal and, since R.C. 3745.06 does not provide a procedure for the filing of cross-appeals, such procedure is governed by ^{HN3}App.R. 4(B)(1), which provides that cross-appeals may be filed within ten days of the filing of the initial notice of appeal. The District responds that App.R. 4(B)(1) does not apply because appeals from ERAC orders are governed by R.C. 3745.06 and not by the Ohio Rules of Appellate Procedure. **[**9]** In support of its argument, the District cites ^{HN4}App.R. 1(A), which provides that the appellate rules "govern procedure in appeals to court of appeals from the trial courts of record in Ohio." The District maintains that, since ERAC is an administrative agency and not a trial court of record, the appellate rules do not apply to ERAC appeals.

[*P14] The parties concede that no Ohio court has addressed the interplay between the 30-day appeal window set forth in R.C. 3745.06 and the ten-day cross-appeal time frame provided by App.R. 4. However, this court, in Jackson Cty. Environmental Comm. v. Shank (Dec. 10, 1991), 10th Dist. No. 91AP-57, 1991 Ohio App. LEXIS 6006, recognized that ^{HN5}R.C. 3745.06 provides only limited guidance on the procedural aspects of an ERAC appeal. There, we stated that the appellate rules do not apply to an appeal under R.C. 3745.06, "at least to the extent that the statute provides the procedure for appeal." *Id.*, citing Wooster Iron & Metal Co. v. Whitman (1973), 37 Ohio App.2d 1, 305 N.E.2d 812. Similarly, in Camper Care, a case involving an R.C. 119.12 appeal, we stated that "the appellate rules of procedure could have applicability in administrative appeals 'only if R.C. 119.12 fails to address' the issue for **[**10]** which the appellate rule is being evoked." (Emphasis sic.) *Id.*, at P10, quoting In re Namey (1995), 103 Ohio App.3d 322, 659 N.E.2d 372. Since R.C. 3745.06 does not provide a procedure for the filing of cross-appeals, Jackson Cty. and Camper Care are instructive in the application of App.R. 4(B)(1) with respect to the filing of cross-appeals.

[*P15] The cases cited by the District do not establish that the 30-day appeal period prescribed by R.C. 3745.06 applies equally to cross-appeals from ERAC orders. In Kimble Clay & Limestone v. McAvoy (1979), 59 Ohio St.2d 94, 391 N.E.2d 1030, the appellant appealed from an Environmental Board of Review ("EBR") (the predecessor to ERAC) order affirming the Director's denial of a permit to the Tuscarawas County Court of Appeals. The Supreme Court of Ohio held that, since the appeal arose from a permit denial proceeding, and not an enforcement proceeding, the appellant should have brought the appeal in this court pursuant to R.C. 3745.06. The court based its decision on a provision in R.C. 3745.06, which expressly directs aggrieved parties to file EBR appeals in this court unless the ERAC order is based upon "an alleged violation of a law or regulation." *Id.*, at 96-97.

[*P16] Wooster concerned **[**11]** a motion for a stay of execution of an ERAC order from which the appeal was taken pursuant to R.C. 3745.06. This court noted that, if the appellate rules applied, App.R. 7 would require that the relief be sought from the "trial court" and denied prior to seeking a stay, pending appeal, from this court. *Id.* Citing App.R. 1, we stated that "the appellate rules are limited in application to appeals from trial courts of record and do not apply to administrative appeals directly to the court of appeals." *Id.*, at 2. We concluded that, ^{HN6}since ERAC is an administrative agency created by R.C. 3745.02 rather than a trial court of record, "the appellate rules do not apply to appeals from [ERAC] to the court of appeals pursuant to R.C. 3745.06. Rather, that section controls appeals to the court of appeals from [ERAC]." *Id.* The court granted the motion for stay in light of the fact that R.C. 3745.06 expressly provides that the court hearing an ERAC appeal "may grant a suspension of the order and fix its terms" in the case of an unjust hardship. *Id.*, at 3.

[*P17] Thus, the courts in both Kimble and Wooster held that the appellate rules did not apply because the provisions the respective parties sought to **[**12]** apply were in direct conflict with R.C. 3745.06. Neither court considered the application of the appellate rules to a procedure not addressed in R.C. 3745.06. ^{HN7}In the case of a cross-appeal from an ERAC order, there is no conflict between App.R. 4(B)(1) and R.C. 3745.06. Rather, App.R. 4(B)(1) acts as a necessary supplement to the appellate procedures contained in R.C. 3745.06. Accordingly, the ten-day time frame set forth in App.R. 4(B)(1) applies to Republic's cross-appeal. Any other result could effectively foreclose cross-appeals in ERAC cases, especially where, as here, the party appealing the ERAC order does so at the very cusp of the 30-day deadline set forth in the statute. Initially, Republic was not a "party adversely affected by an [ERAC] order," as ERAC awarded Republic the PTI. But for the filing of the District's appeal, Republic would not have filed a

cross-appeal challenging ERAC's determination that the District had standing to appeal the permit issued by the Director. The District filed its appeal one day prior to the 30-day appeal deadline set forth in R.C. 3745.06. Without the ten-day time frame provided by App.R. 4(B)(1), Republic would not have had sufficient notice **[**13]** or opportunity to prepare and file a notice of cross-appeal prior to the 30-day cutoff. By filing a notice of appeal at the end of the 30-day window, an appellant could virtually foreclose the filing of a cross-appeal in ERAC cases. Applying the ten-day window for cross-appeals provided by App.R. 4(B)(1), we conclude that Republic's cross-appeal was timely. Accordingly, the District's September 28, 2007 motion to dismiss Republic's cross-appeal is dismissed.

[*P18] Having concluded that Republic's cross-appeal is properly before us, we now consider Republic's claim that ERAC erred as a matter of law in denying its motion to dismiss the District for lack of standing. As resolution of the standing issue involves an understanding of the scientific underpinnings and geology of the landfill site, we reiterate here our discussion of those subjects from *Club 3000 I*. Regarding the underlying science, we stated:

Groundwater is the water that is found underground and fills the cracks and openings between sand and rock. It is formed when precipitation permeates the soil and moves downward to the water table. Water in the ground is stored in the spaces between rock particles, and, through movement, may **[**14]** eventually be expressed above ground in streams, rivers, lakes, or oceans.

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

A fracture is a break in the continuity of a material and is created by pressure. A fracture's ability to transmit water depends upon its size, type, and orientation. Not all fractures, however, are capable of transmitting water; for example, a fracture may be filled in with a substance or material that prevents transmission. "Fracture flow is water moving along a fracture within a rock, like a conduit. Porosity, or porous flow, is water moving between the grains or matrix of the formation."

Id., at P19-21, quoting ERAC order at 20-21, fn. 15.

[*P19] As to the site's geology, we averred:

The landfill rests upon the Clarion Shale, which is a "tight" shale formation with low permeability. **[**15]** Directly below the Clarion Shale is the Putnam Hill formation ("Putnam Hill"), which consists of Brookville No. 4 underclay ("Brookville Clay"), the Brookville No. 4 coal, and the Putnam Hill limestone; these strata are interconnected through fractures and share similar water bearing characteristics. The Putnam Hill is 100 times more permeable than the Clarion Shale. * * * According to Republic, the fractures that exist in the Putnam Hill allow groundwater to flow horizontally beneath the Clarion Shale and above the Brookville Clay. Because the Putnam Hill "daylights" at the sides of the hill upon which the landfill is situated, groundwater flows horizontally through it, where it exists at the hillside as seeps or springs.

The Putnam Hill was designated as the uppermost aquifer system ("UAS") and the Clarion Shale as its confining unit. To ascertain the hydrogeologic properties of the bedrock underlying the site, slug and packer testing was performed throughout the Clarion Shale, the Putnam Hill, and Brookville Coal No. 4. The results of these tests, which were contained in the HGI report, were interpreted to mean that the Clarion Shale could not be considered part of the UAS because **[**16]** of the hydraulic conductivities it exhibited. It is also significant that the Putnam Hill had been recognized as the UAS by the OEPA prior to Republic's PTI application, as evidenced by a letter drafted by Bowman in 1994.

Id., at P22-23.

[*P20] In its July 1, 2003 notice of appeal to ERAC, the District alleged that it had standing to appeal the Director's decision pursuant to both R.C. 3745.04 and 3745.07. Republic, on March 24, 2004, moved to dismiss the District's appeal for lack of standing. More specifically, Republic argued that the District had failed to demonstrate, pursuant to R.C. 3745.04, that the issuance of the PTI affected it, and had likewise failed to demonstrate, pursuant to R.C. 3745.07, that the issuance of the permit aggrieved or adversely affected it. The District responded to Republic's motion in writing. By decision issued April 21, 2004, ERAC denied Republic's motion. ERAC did not provide a detailed explanation of its decision; rather, ERAC stated only that it found Republic's motion to dismiss not well-taken "[a]fter a review of the pleadings, pertinent case law, facts of the instant appeal, and considerable discussion amongst the Commission members." (ERAC April 21, **[**17]** 2004 Ruling on Motion to Dismiss, ERAC No. 795334 Exh. AA.)

[*P21] At the close of evidence in the de novo hearing, Republic orally renewed its motion to dismiss the District's appeal for lack of standing. On March 18, 2005, Republic supplemented its oral motion with a memorandum discussing the legal basis for dismissal. On April 6, 2005, ERAC issued a ruling denying Republic's oral motion to

dismiss. ERAC noted that it had reviewed Republic's March 18, 2005 memorandum in support and would address the legal issues regarding standing in its final order. As noted, in its June 27, 2007 order, ERAC summarily denied Republic's motion to dismiss.

[*P22] ^{HN9} Standing is a threshold jurisdiction issue that must be resolved before an appellant may proceed with an appeal to ERAC." *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008 Ohio 5073, P22, citing *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio St.3d 216, 217, 513 N.E.2d 302. The Ohio General Assembly has sanctioned two avenues of appeal to ERAC. The first, R.C. 3745.04(B), permits appeals of actions or inactions by the Director by "[a]ny person who was a party to a proceeding before the director." Interpreting R.C. 3745.04, this court in **[**18]** *Cincinnati Gas & Elec. Co. v. Whitman*, (Nov. 19, 1974), 10th Dist. No. 74AP-151, 1974 Ohio App. LEXIS 3290, found that the statutory language "party to a proceeding before the director" encompassed "any person affected by the proposed action who appears in person, or by his attorney, and presents his position, arguments, or contentions orally or in writing, or who offers or examines witnesses or presents evidence tending to show that said proposed rule, amendment or rescission, if adopted or effectuated, will be unreasonable or unlawful." Following *Cincinnati Gas & Elec.*, this court developed a two-prong test for determining whether a person is a party under R.C. 3745.04. In addition to appearing before the Director and presenting arguments in writing or otherwise, the person must also be "affected" by the action or proposed action. See *Martin v. Schregardus* (Sept. 30, 1996), 10th Dist. No. 96APH04-433, 1996 Ohio App. LEXIS 4288 ("[e]ven assuming arguendo that appellant appeared before the director, we may not escape the import of the words in *Cincinnati Gas, i.e.,* that a person must be 'affected'").

[*P23] ^{HN10} The second avenue of appeal, R.C. 3745.07, authorizes appeals by parties "aggrieved or adversely affected" by a decision of the Director where the Director **[**19]** acts without issuing a proposed action. In determining whether a party has been "aggrieved or adversely affected" for purposes of R.C. 3745.07, the principles of traditional standing analysis apply. *Johnson's Island Prop. Owners' Assn. v. Schregardus* (June 30, 1997), 10th Dist. No. 96APH10-1330, 1997 Ohio App. LEXIS 2839.

[*P24] ^{HN11} This court has employed the same analysis in determining whether an appellant has been or will be "affected" under R.C. 3745.04(B) or has been or will be "aggrieved or adversely affected" under R.C. 3745.07. Under either section, the appellant bears the burden of demonstrating that it has standing. *Olmsted Falls v. Jones*, 152 Ohio App.3d 282, 2003 Ohio 1512, P21, 787 N.E.2d 669. "In order to establish standing, a person must demonstrate that the challenged action has caused or will cause him or her injury in fact, economic or otherwise, and that the interest sought to be protected is within the sphere of interests protected or regulated by the statute in question." *Johnson's Island*, citing *Franklin Cty. Regional Solid Waste Mtg. Auth. v. Schregardus* (1992), 84 Ohio App.3d 591, 599, 617 N.E.2d 761. "The alleged injury must be concrete, rather than abstract or suspected; a party must show he or she has suffered or will suffer **[**20]** a 'specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction.'" *Johnson's Island*, quoting *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, 424, 8 Ohio B. 544, 457 N.E.2d 878. "The alleged injury in fact may be actual and immediate, or threatened." *Id.*, citing *State ex rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App. 3d 44, 46-47, 8 Ohio B. 47, 455 N.E.2d 1331. "A party who alleges a threatened injury, however, must demonstrate a realistic danger arising from the challenged action." *Id.*, citing *Babbitt v. United Farm Workers Natl. Union* (1979), 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895.

[*P25] At this juncture, a review of this court's pertinent jurisprudence on the issue of standing in ERAC appeals is in order. In *Martin*, the Director issued a PTI authorizing United Waste Systems to install a new sanitary landfill facility. *Martin*, who resided in the multi-county solid waste district in which the new landfill was to be located, submitted written letters/comments to the Director and attended public hearings on the issuance of the PTI. *Martin* appealed the Director's action to the EBR. Following a de novo hearing, the **[**21]** EBR affirmed the Director's order.

[*P26] *Martin* appealed the EBR's order to this court. Addressing the threshold issue of standing, we acknowledged that *Martin* had appeared before the Director by submitting written comments. However, we noted that the only possible connection *Martin* had with the proposed action was that she resided in the solid waste district, approximately 20 miles from the site. We further noted that *Martin* provided no evidence, nor did she call witnesses to testify, as to how she was or would be affected or aggrieved by the issuance of the PTI. We also noted that she testified by deposition that she did not expect the proposed landfill to directly affect her.

[*P27] We also rejected *Martin's* attempt to gain standing simply by virtue of being a resident of the county in which the landfill was to be constructed. Specifically, we stated that ^{HN12} "a general interest as a citizen does not convert an individual right into a right which would permit any citizen who suffers no distinct harm to sue a governmental agency. It is not unreasonable to require [*Martin*] to demonstrate, at a minimum, that she is within the sphere of impact for the actions in question." (Citations omitted.) *Id.*, **[**22]** citing *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 112 S.Ct. 2130, 119 L. Ed. 2d 351. We held that, because *Martin* failed to demonstrate how she was or would be affected by the grant of the PTI, she lacked standing to bring the action. Accordingly, we concluded that, absent standing, we had no jurisdiction under which we could proceed. *Id.*

[*P28] In *Olmsted Falls*, the city of Cleveland ("Cleveland") submitted a permit application to the Army Corps of Engineers ("ACOE") for a permit under Section 404 of the Clean Water Act for authorization to discharge dredged or fill materials into waters of the United States during an expansion project of Cleveland Hopkins International Airport. Cleveland also submitted an application to the OEPA for certification pursuant to Section 401 of the Clean Water Act.

The Director of the OEPA informed the ACOE by letter that he was waiving the state of Ohio's authority to act on Cleveland's request for Section 401 certification process.

[*P29] The city of Olmsted Falls ("Olmsted Falls") appealed the Director's waiver to ERAC. After ERAC granted Cleveland's motion to intervene, Cleveland and the Director filed several motions to dismiss. At the hearing on the motions to dismiss, **[**23]** the parties submitted the following five stipulated facts to ERAC: (1) Cleveland owned and operated the airport, (2) Olmsted Falls is located approximately 2.2 miles from the airport, (3) Cleveland submitted its application for Section 401 certification, (4) OEPA issued a public hearing notice on Cleveland's 401 certification request, and (5) OEPA issued a letter to the ACOE. The parties also submitted the Director's letter to the ACOE, the public hearing notice, and a copy of the ACOE guidelines for Section 404 permits.

[*P30] Olmsted Falls filed a motion for summary judgment, claiming that the Director's waiver was unlawful. ERAC denied the motions to dismiss and granted Olmsted Falls' motion for summary judgment. In its ruling, ERAC stated that it reached its decision on the five stipulations of fact, the Director's letter to the ACOE, and the public hearing notice. ERAC also stated that it determined that Olmsted Falls had standing from a consideration of the stipulated facts.

[*P31] Cleveland and the Director appealed from ERAC's order, arguing, inter alia, that Olmsted Falls lacked standing to appeal the Director's action to ERAC. We agreed, holding that ERAC erred in denying the motions to **[**24]** dismiss. This court noted that the Director stated in his letter to the ACOE that the project would impact 87.75 of the 94 acres of wetlands presently on the property and 7,900 linear feet of Abram Creek and its tributaries. We further noted that the public hearing notice provided that the discharges from the activity would result in degradation to, or lowering of, the water quality of Abram Creek and its tributaries and wetlands. We found that this evidence did not demonstrate how Olmsted Falls would suffer an injury. We acknowledged that the stipulated facts indicated that Olmsted Falls was located 2.2 miles from the airport. However, we concluded that "being a city within close proximity of the airport is not a concrete or specific injury as required to demonstrate standing. Proximity is only a factor when coupled with a threatened or actual injury." *Id.*, at P29. We found that the evidence provided only that the land and water would be affected, but did not demonstrate the effect on Olmsted Falls. *Id.* We also rejected Olmsted Falls' argument that it was affected by the Director's order because it was a city and, as such, had responsibility for providing for public health and safety. **[**25]** We found that "merely being a city does not confer standing without demonstrating the adverse impact or injury resulting from the Director's letter." *Id.*, at P30.

[*P32] In *Johnson's Island*, the Johnson's Island Property Owner's Association ("JIPOA") and its individual trustees appealed the Director's issuance of a PTI authorizing Baycliff's Corporation ("Baycliff's") to construct a sanitary sewer system to the EBR. Following a de novo hearing, the EBR vacated the PTI. Baycliff's appealed to this court, arguing, inter alia, that JIPOA lacked standing to appeal the Director's action to the EBR.

[*P33] This court noted that, at the de novo hearing, JIPOA members testified about potential problems associated with the sanitary sewer system: (1) the possible breakage of an eight-inch pressurized line to be laid along the causeway leading to Johnson's Island, (2) the possibility of overflows and odors emanating from the pump stations and manholes created by the construction of the sewer system, (3) possible damage to a historic cemetery for Confederate officers caused by the construction of the sewer system, and (4) the effect the construction could have on the Lake Erie watersnake habitat, which is indigenous **[**26]** to the island. Testimony at the hearing also indicated that some JIPOA members' houses had been shaken by the blasting done in connection with the construction of a portion of the sewer, which was already underway.

[*P34] Upon this evidence, we concluded that JIPOA had standing to appeal the Director's action. More particularly, we stated that "[a]lthough the evidence of actual injury to members of JIPOA, such as their homes being shaken by the construction blasting, is slight, and some of the threatened injury borders on the overly speculative, the evidence, when viewed in its totality, supports a finding that members of JIPOA have suffered an 'injury in fact' for purposes of establishing their standing to bring their claim against [Baycliff's]." *Id.*

[*P35] In *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, 10th Dist. No. 06AP-836, 2007 Ohio 2649, Hijma Dairy submitted both permit to install and permit to operate applications to the Ohio Department of Agriculture ("ODA") for approval to construct and operate an 825 dairy cow facility. Citizens Against Megafarm Dairy Development, Inc. ("CAMDD") members organized to oppose the dairy's application, fearing the dairy's operations might contaminate **[**27]** the groundwater drawn through their contiguous private wells. The ODA Director issued the requested permits. CAMDD appealed to ERAC, setting forth five separate assignments of error relating to the dairy's alleged violations of ODA's aquifer siting restrictions, ODA's inadequate review of the permits, and the potential for water contamination. Following a de novo hearing, ERAC affirmed the ODA Director's decision.

[*P36] Hijma Dairy challenged CAMDD's standing to appeal from the ODA Director's action to ERAC. We noted that the evidence adduced at the ERAC hearing revealed the following. CAMDD consisted of approximately 20 citizens whose homes were located within one to two miles southeast of the proposed dairy. These citizens used wells to draw groundwater for their personal use. If the dairy released contaminants into the ground, it would take over 45 years for the contaminants to reach the citizens' wells. Acknowledging Hijma Dairy's contention that, through decay and attenuation, the threat of the contaminants would lessen over this time period, we nevertheless concluded that "a realistic, albeit slight, danger remains that the dairy's operations could contaminate the citizens' wells." **[**28]** Because CAMDD challenges the director's actions regarding the dairy's compliance with the aquifer

siting criteria, a statute aimed at protecting the groundwater that the dairy's contiguous citizens' use, CAMDD has standing to appeal this case." *Id.*, at P8.

[*P37] Republic maintains that the District has not presented any documentary or testimonial evidence establishing that it has been or will be affected or aggrieved by the issuance of the expansion PTI. Republic contends that the District filed its ERAC appeal relying solely on its role as a political subdivision under R.C. 3734.52. Republic maintains that the issuance of the expansion PTI does not negatively impact the District's statutory duties, i.e., planning for solid waste disposal capacity in its geographic area, encouraging solid waste reduction, and promoting recycling. Republic further argues that, although the District's expert witnesses collectively questioned the characterization of the geology surrounding the landfill, siting criteria, and landfill construction and design, none identified a specific negative impact or injury to the District.

[*P38] Republic also contends that the deposition testimony of Stark County Commissioner **[**29]** and District Board Member Richard Regula demonstrates that the District has not been affected or aggrieved by the issuance of the PTI. In particular, Republic cites the following testimony:

Q: If the Countywide Landfill expansion is approved, what damage is there to the Solid Waste Management District?

A: It it's approved?

Q: Yes.

A: To the district?

Q: Yes.

A: I don't believe --

MR. SEEBERGER: To the district as a geographic body or to the district as a Board of Directors?

BY MR. PERDION:

Q: I'm talking about the Solid Waste Management District.

A: Is there any damage to the district?

Q: Yes

A: No.

Regula September 2, 2004 Depo., 66-67; ERAC 795334 Exhibit HHH.

[*P39] Republic further relies upon our averment in *Martin*, that the general interest of a citizen does not convert an individual right into a right which permits a citizen who suffers no distinct harm to sue a governmental agency. Republic maintains that the District's general concerns about construction of the landfill expansion, including characterization of the geology or the OEPA siting criteria, do not demonstrate an injury, actual or threatened, to the District. Republic further argues that the District's generalized interest in a safe **[**30]** landfill does not convert the District's interest into an injury that confers standing.

[*P40] In response, the District first contends that Republic is precluded by the doctrine of res judicata from relitigating the issue of standing because the Fifth District Court of Appeals has already determined that the District had standing to bring the appeal. Prior to the de novo hearing, Republic wrote to the Ohio Attorney General ("AG") claiming that the District did not have statutory or plan authority to pursue or finance an appeal to ERAC. Republic based its contention upon ^{HN13}R.C. 3734.52, which establishes solid waste management districts and creates the two-fold purpose of the districts, i.e., "preparing, adopting, submitting, and implementing the solid waste management plan for the county or joint district" and "providing for, or causing to be provided for, the safe and sanitary management of solid wastes within all the incorporated and unincorporated territory of the county or joint solid waste management district." Republic asserted that review and contest of OEPA decisions were not functions delegated to the District by statute or authorized by its approved plan.

[*P41] In response to the letter, **[**31]** the District filed a complaint in the Stark County Court of Common Pleas seeking a declaration that it had statutory authority to pursue and finance such an appeal. In its judgment entry, the trial court set forth the issues presented as whether the District had authority to appeal an OEPA permit to install to ERAC and, if so, whether the District had authority to expend funds in furtherance of its appeal. The court found that the District "may appeal" an OEPA decision to ERAC and that the District, with certain limitations, could expend funds in furtherance of the appeal. The court further found that "the issue of standing is within the authority of ERAC."

[*P42] On appeal, the assignments of error raised issues regarding whether the District had "authority" to appeal to ERAC and expend funds in furtherance of such an appeal. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Serv. of Ohio II, LLC*, 5th Dist. No. 2004-CA-00099, 2004 Ohio 5710, P7-9. Nonetheless, the appeals court characterized the trial court's decision as finding that the District had "standing" to appeal the OEPA's decision to ERAC. *Id.*, at P13, 36. Applying the standing analysis applicable to *R.C. 3745.04*, **[**32]** the court concluded that the District had met the threshold requirements for invoking ERAC's jurisdiction, as it was a party to the proceeding before the Director and had asserted grounds alleging a threat of injury to the District. *Id.*, at P36.

[*P43] ^{HN14} "The doctrine of res judicata provides that '[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.'" *Clagg v. Clagg*, 10th Dist. No. 08AP-570, 2009 Ohio 328, P13, quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995 Ohio 331, 653 N.E.2d 226, syllabus. "In Ohio, '[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion * * * and issue preclusion, also known as collateral estoppel.'" *Id.*, at P14, quoting *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, Slip Opinion No., 120 Ohio St. 3d 386, 2008 Ohio 6254, P27, 899 N.E.2d 975, quoting *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007 Ohio 1102, P6, 862 N.E.2d 803. "[I]ssue preclusion, [or] collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may **[**33]** not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.'" *Id.*, quoting *Davis*, quoting *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998 Ohio 435, 692 N.E.2d 140. ^{HN15} "While the merger and bar aspects of res judicata have the effect of precluding the relitigation of the same cause of action, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action.'" (Emphasis sic.) *Id.*, quoting *Davis*, quoting *Ft. Frye Teachers Assn.* "Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.'" *Id.*, at P15, quoting *Davis*, at P28, quoting *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 1994 Ohio 358, 637 N.E.2d 917.

[*P44] In response to the District's res judicata argument, Republic contends **[**34]** that issue preclusion does not apply because the issue of standing was never litigated in the prior action. Specifically, Republic argues that the question of whether the District had standing to appeal the Director's issuance of the expansion PTI was not at issue; rather, the appellate court made that finding in an apparent misunderstanding of the trial court's decision, which expressly left open the standing question for ERAC's determination. According to Republic, issue preclusion is not applicable because it never had a full and fair opportunity to litigate the standing issue.

[*P45] We are persuaded by Republic's arguments on this issue. Although the parties are the same, the underlying issues are not. Republic's letter to the AG asserted that the District was not statutorily authorized, pursuant to *R.C. Chapter 3734*, to review and contest OEPA decisions. The District sought a judicial declaration that it was statutorily authorized to do so. Neither Republic's letter nor the District's complaint for declaratory judgment raised the issue of standing pursuant to *R.C. Chapter 3745*. As noted, the trial court expressly refused to address standing, finding it to be within ERAC's authority. **[**35]** Nevertheless, the appellate court addressed standing sua sponte and found that the District had standing to appeal. Under the circumstances, Republic was not provided a full and fair opportunity to litigate the standing issue. Accordingly, the doctrine of res judicata does not apply.

[*P46] As to the merits of the standing issue, the District contends that it will be "affected" or "aggrieved" by issuance of the PTI because expansion of the landfill is at odds with ^{HN16} its principal statutory duty set forth in *R.C. 3734.52(A)*, i.e., "providing for * * * the safe and sanitary management of solid wastes within all of the incorporated and unincorporated territory of the * * * district." The District avers that it is statutorily charged with assuring that solid waste disposal in the district does not harm the District's residents or the environment. The District maintains that testimony from its experts at the de novo hearing established that fractures in the strata beneath the landfill could permit contamination of the underlying aquifer, which is located within the District's territorial jurisdiction.

[*P47] In particular, the District notes that one of the central issues at the hearing was whether the **[**36]** Clarion Shale, located directly beneath the landfill liner, could serve as an adequate isolation distance between the landfill and the uppermost aquifer. In support of its arguments before ERAC, the District offered the testimony of Daniel S. Fisher, an expert qualified in the areas of geology, hydrogeology, geomorphology, hydrogeochemistry, groundwater flow rate analysis calculations, and groundwater flow modeling. Fisher testified that he reviewed the Golder report as well as the HGI report and groundwater monitoring plan submitted by Republic; upon review of these reports, he concluded that the HGI report submitted by Republic in support of the permit was based upon an incorrect conceptual model of groundwater flow. Specifically, Fisher found that the HGI report downplayed or omitted the presence of groundwater in the Clarion Shale and the vertical downward communication of that groundwater between the Clarion Shale and the uppermost aquifer due to fractures. He opined that this fracture network could permit a pathway for water and dissolved contaminants. Fisher opined that the ramifications of the travel of groundwater through the fractures was "critical." (Tr. 896.) He further **[**37]** opined that Eagon's failure to recognize the fractures impaired its analysis and conclusions regarding both the hydrogeologic investigation and groundwater monitoring plan. According to Fisher, this deficiency compromised the validity of the permit application and the concomitant assurance of protection of human health or the environment. (Tr. 915-16;

923-25). He further testified that mischaracterization of the aquifer system would preclude proper design of the groundwater monitoring plan and monitoring locations, as well as calculation of the travel time of contaminants, which, in turn, would compromise the detection of contaminants from the landfill. (Tr. 897, 908-09, 945.)

[*P48] As additional support, the District cites the testimony of Dr. Darrell I. Leap, an expert qualified in the areas of geology, hydrogeology, fracture tracers, and analysis of fracture terrain. Dr. Leap testified that the HGI report submitted by Republic was inadequate because it did not address existing bedrock fractures and was deficient regarding the travel velocity of water through the subterranean areas below the landfill. (Tr. 1189-91.) Dr. Leap further testified that fractures in the bedrock beneath a landfill **[**38]** are significant because they can be conduits for contamination from the landfill into the environment, including public water supply wells. (Tr. 1204, 1210.)

[*P49] Upon review of the District's evidence and this court's prior decisions, we conclude that the District has established that it has standing to appeal to ERAC. The District presented expert testimony that fractures beneath the landfill provide a pathway for contaminants to the aquifer and that Republic's investigation regarding these fractures was insufficient to assure compliance with pertinent Ohio Administrative Code regulations. Such evidence demonstrates that there is a real potential that the expansion will endanger the District's residents and environment and consequently compromise the District's statutory duty to ensure the safe and sanitary management of solid waste within the District.

[*P50] As in *Johnson's Island*, the District has provided evidence of threatened injury to the District's residents and environment which, when viewed in its totality, supports a finding that the District has or will suffer an "injury in fact" for purposes of establishing its standing to appeal to ERAC. We also find **[**39]** *Citizens Against MegaFarm Dairy* persuasive. As here, the concern in that case was possible contamination of the water supply. We concluded that, although the threat of contamination to the citizens' wells was slight, the danger was nonetheless realistic. Here, both Fisher and Dr. Leap testified that groundwater contamination was a realistic possibility via the interconnection of fractured bedrock beneath the landfill. As noted, Fisher deemed the consequences of the travel of groundwater through the fractures to be "critical." Further, as in *Citizens*, the District challenged the Director's action regarding compliance with the aquifer siting criteria and the Director's investigation and consideration of the risk of groundwater contamination resulting from the fractured bedrock beneath the landfill expansion.

[*P51] Further, we agree with the District's contention that *Martin* is inapposite. Unlike *Martin*, the District presented expert testimony regarding the potential problems with the expansion. In addition, the District's interest is distinguishable from that of an ordinary citizen with a general interest in a safe environment because it is statutorily charged with ensuring the safety of the residents and environment within **[**40]** the District.

[*P52] We also find *Olmsted Falls* unpersuasive. While the city of Olmsted Falls was only within "close proximity" of the expansion project in that case, the expansion project here is located within the geographic territory of the District. Further, the city of Olmsted Falls raised only generic arguments regarding its responsibility for providing for public health and safety. Here, the District cites its specific statutory duty under R.C. 3734.52(A) to provide for the safe and sanitary management of solid waste within the District.

[*P53] We also reject as unreasonable Republic's contention that the cited portion of Regula's deposition testimony is conclusive on the issue of whether the District has been or will be damaged by the issuance of the expansion permit. In addition to the testimony upon which Republic relies, Regula testified that, in voting to appeal the Director's decision to ERAC, he relied on information provided by the District's experts that expansion of the facility presented a threat of contamination to the groundwater within the District. He also testified that he agreed with the District's interrogatory responses asserting that the expansion could result in a reduction **[**41]** in the surrounding land values, stench from the landfill, and pollution. Depo. 36-37. He further testified that he was concerned about liner ruptures and aquifer contamination. Depo. 38-39.

[*P54] Further, the exchange between counsel for Republic and Regula is unclear at best. Indeed, counsel did not clarify whether the question of damage related to the District as a geographic body or the District as a board of Directors. Without clarification on this point, it is unclear whether Regula's answer related to the board or the geographic area. Accordingly, we find it is unreasonable to conclude that Regula's uncertain testimony regarding damage to the District negates his testimony that the District's experts provided information that granting the permit posed a threat of contamination to the groundwater within the District and that he himself was concerned about liner ruptures and aquifer contamination.

[*P55] For all the above reasons, we conclude that ERAC did not err as a matter of law in concluding that the District established that it had standing to appeal the Director's final action to ERAC. Accordingly, Republic's cross-assignment of error is overruled.

[*P56] Having concluded that the District **[**42]** has standing to appeal, we turn now to the merits of that appeal. Initially, we note that the District's assignment of error, "[w]hether the Environmental Appeal Review Commission's [sic] ("ERAC") June 27, 2007 order is supported by reliable, probative and substantial evidence and is in accordance with law" technically presents an issue, not a claim of error. However, we construe the assignment of error as claiming that ERAC's determination is not supported by reliable, probative, and substantial evidence and is not in accordance with law. See *Carter-Jones Lumber Co. v. Denune* (1999), 132 Ohio App.3d 430, 432, 725 N.E.2d 330 (finding that, although an appellant's brief failed to contain a statement of assignments of error, the error

assigned from the trial court's judgment was readily discernible from appellant's statement of issues).

[*P57] ^{HN17} R.C. 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. That statute provides, in relevant part that, ^{HN18} "[i]f, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable **[**43]** or unlawful, it shall make a written order vacating or modifying the action appealed from." ^{HN19} This standard does not permit ERAC to substitute its judgment for that of the Director as to factual issues. *CECOS Internatl., Inc. v. Shank* (1992), 79 Ohio App.3d 1, 6, 606 N.E.2d 973. The term "unlawful" means "that which is not in accordance with law," and the term "unreasonable" means "that which is not in accordance with reason, or that which has no factual foundation." *Citizens Committee to Preserve Lake Logan v. Williams* (1977), 56 Ohio App.2d 61, 70, 381 N.E.2d 661. "It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by [ERAC] upon the De novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action." Id.

[*P58] ^{HN20} R.C. 3745.06 provides the standard this court must employ when reviewing a final order of ERAC. That statute provides, as pertinent here, that "[t]he court shall affirm the order **[**44]** complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."

[*P59] In *Tube City Olympic of Ohio, Inc. v. Jones*, 10th Dist. No. 03AP-295, 2004 Ohio 1464, this court discussed the terms "reliable," "probative," and "substantial." ^{HN21} "Reliable evidence is evidence which can be trusted. In order for evidence to be reliable, there must be a reasonable probability that it is true. Probative evidence is evidence which tends to prove the issue in question, while substantial evidence is evidence which carries weight, or evidence which has importance or value." Id., at P25, quoting *City of Perrysburg v. Schregardus* (Nov. 13, 2001), 10th Dist. No. 00AP-1403, 2001 Ohio 4085.

[*P60] ^{HN22} In determining whether ERAC's decision is supported by the requisite quantum of evidence, we must weigh and evaluate the credibility of the evidence presented to ERAC. **[**45]** Id., at P26, citing *Perrysburg*. This process involves a consideration of the evidence and, to a limited extent, would permit a substitution of judgment by the reviewing court. Id., citing *Perrysburg*. However, we must bear in mind that the General Assembly created administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. *Club 3000 I*, at P29, citing *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 1993 Ohio 122, 614 N.E.2d 748, paragraph one the syllabus. Accordingly, this court must afford due deference to ERAC's interpretation of rules and regulations, as well as its resolution of evidentiary conflicts. Id.

[*P61] In the first of two issues set forth in its assignment of error, the District contends that ongoing problems with the landfill liner at the existing portion of the Countywide facility invalidate the factual foundation for the Director's issuance of the expansion permit. In particular, the District maintains that extensive leachate buildup, increased temperatures, and movement in the waste mass has compromised the integrity of the landfill liner under the vertical expansion **[**46]** area. The District contends that, since the factual foundation underlying the Director's determination was eliminated, ERAC's finding that the Director's determination was lawful and reasonable is no longer supported by reliable, probative, and substantial evidence. Republic and the OEPA contend that the District's argument relates to operational and compliance issues pertaining to the existing portion of the landfill, which have no bearing on the Director's issuance of the expansion PTI.

[*P62] In support of its claim, the District seeks to introduce "newly discovered evidence" that purportedly could not with reasonable diligence have been discovered prior to the ERAC hearing. R.C. 3745.06 provides that ^{HN23} "[i]n hearing the appeal, the [appellate] court is confined to the record as certified to it by the commission. The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the commission."

[*P63] As noted, the ERAC hearing concluded in February 2005 and ERAC issued its order on June 27, 2007. The District appears to want to amend the **[**47]** record to include an order from the Director dated March 28, 2007, in which the Director determined that a chemical reaction involving aluminum waste disposal was producing elevated temperatures, resulting in a continuing subsurface fire at the landfill. In its order, ERAC references a March 2007 order from the Director. Thus, it appears that ERAC considered the Director's March 2007 order before issuing its June 27, 2007 final order. Even assuming, arguendo, that ERAC failed to consider the March 2007 order, the District fails to provide reasoning why it could not with reasonable diligence have discovered this order prior to ERAC's issuance of its decision. Accordingly, we cannot conclude that the March 2007 order was newly discovered evidence that could not with reasonable diligence have been discovered prior to ERAC's issuance of its June 27, 2007 final order.

[*P64] The District also seeks to introduce an October 1, 2007 letter from the Director to Republic. That letter stated that the subsurface fire was migrating throughout the original 88 acres of the landfill and possibly into Cell 7, which is part of the horizontal expansion area; accordingly, the Director ordered Republic to construct **[**48]** a firebreak between Cells 8A (which is adjacent to Cell 7) and 8B and to cease disposal at Cell 8A after October 15, 2007. This letter was not issued until after ERAC issued its decision. Accordingly, this evidence is not "newly discovered." See *Northfield Park Assoc. v. Ohio State Racing Comm.*, 10th Dist. No. 05AP-749, 2006 Ohio 3446, P59 (construing R.C. 119.12 and stating that "[n]ewly discovered evidence is evidence that was in existence at the time of the administrative hearing" and that "[n]ewly discovered evidence does not refer to newly created evidence"); *CVS/Pharmacy # 3131 v. Ohio State Bd. of Pharmacy*, 8th Dist. No. 82215, 2003 Ohio 3806, P36 (construing R.C. 119.12 and stating that "[n]ewly discovered evidence refers to that in existence at the time of the administrative hearing but which was incapable of discovery by due diligence").

[*P65] The District also seeks to supplement the record with an OEPA citation issued to Republic in February 2008. This evidence does not appear to be "newly discovered"; rather, it appears to be "newly created." Even if this court could consider this additional evidence, the District's arguments related thereto are untenable. As noted above, this **[**49]** court's review is limited to whether sufficient evidence supports ERAC's conclusion that the Director's decision to issue the expansion permit was reasonable and lawful. See *Citizens Against Megafarm Dairy Dev.*, at P22.

[*P66] This court has recognized that ^{HN24} there is a difference between a permit to install and the ongoing regulation, maintenance and operation of a facility. *Little Miami, Inc. v. Williams* (Dec. 23, 1976), 10th Dist. No. 76AP-292, 1976 Ohio App. LEXIS 8204. There, this court reversed an EBR decision vacating the Director's issuance of a permit to install a package sewer treatment facility. In so doing, we agreed with the applicant that EBR improperly took into account the Director's consideration of the operation and maintenance of the proposed sewage treatment plant and the Director's ability to enforce permits. *Id.* We clarified that a permitting decision based upon the submission of plans by an applicant is different from the "actual operation" of the approved facility:

The determination upon application for a permit to install is based upon whether the plan proposes a plant that is capable of being operated in accordance with environmental regulations and applicable statutes. Before an applicant may **[**50]** begin construction, he must submit and have approved details of such plans. The actual operation of such plant is distinct and separate.

Id.

[*P67] As this court has stated, ^{HN25} issues related to the operation of a facility are pertinent at the permitting stage only to the extent the issues relate to whether the plans submitted by an applicant propose a facility that can be operated in accordance with the applicable laws. *Id.* Concerns about the actual operation and maintenance of a facility are the subject of corrective measures or enforcement by the OEPA. *Id.* The District contends that the post-permitting conditions at the existing portion of the landfill constitute "permit issues" because "the regulations clearly require an applicant to ensure that the landfill can be operated in accordance with operational criteria such as maintaining the integrity of the landfill liner." However, the District does not argue that Republic failed to submit an expansion plan that proposed a facility capable of being operated in accordance with the applicable liner requirements. Nor has the District challenged ERAC's conclusion that it was "reasonable and lawful for the Director to have determined that Republic **[**51]** satisfied various construction requirements relating to berm construction and landfill liner design and construction." (ERAC Order, 98, at P94.) Rather, the District's contentions pertain to Republic's purported failure to ensure that it has maintained the integrity of the landfill liner in the existing portion of the facility.

[*P68] In concluding that the District's issuance of the expansion permit was both reasonable and lawful, ERAC found that the District, in its December 26, 2006 motion to remand, raised concerns about the operation of the existing portion of the landfill, but failed to link those concerns with the proposed expansion of the facility. (ERAC Order, 97, at P91-92.) Specifically, ERAC stated that:

Moreover, the Commission finds that neither the Village nor the District scientifically quantified or substantiated the entirety of their claims. Appellants believe that, on their face, the changes at the landfill are substantial enough to alter the basis upon which the Director issued the expansion PTI to Republic. Even if we were to find that the Director should have known or anticipated these future events at Republic's existing facility, the Commission notes that Appellants' **[**52]** allegations in the post-hearing matters fail to demonstrate a scientifically valid link tying the conditions at the existing portion of the facility to the expansion PTI. Indeed, even Appellants note the inherent difficulty in scientifically quantifying their concerns and identifying how these concerns would impact Republic's proposed expansion. The Village argued that the "circumstances . . . have so fundamentally physically altered and changed, that it is clear that the facts upon which the application to construct had been filed must now be reevaluated by the Director" and that the "essential facts necessary to understand and possibly resolve this issue are not known by Bolivar, the Director, or Countywide." Though it offered significantly more data and affidavits to support its contention that the Director's action was based on an invalid factual foundation, the District too, ultimately, noted that the expansion should not be authorized because the affects of the current conditions upon the horizontal expansion are unknown. Absent such a

link between the current conditions at the existing landfill and the proposed expansion, Appellants' concerns remain operational in nature and **[**53]** relate exclusively to the on-going regulation of an existing facility for which an operational license is reviewed annually.

(Footnote omitted; ERAC Order, 97, at P91-92.)

[*P69] Thus, ERAC concluded that the District had failed to demonstrate how operational issues regarding the existing portion of the facility were related to the issues presented in the Director's decision to issue the expansion permit. The District argues that ERAC improperly shifted the burden of ensuring regulation compliance from Republic to the District. However, the District confuses the concept of "burden of proof" with "burden of proceeding." ^{HN26} ¶The "burden of proof" relates to the burden placed upon an applicant to prove its entitlement to the requested permit. Columbus & Franklin Cty. Metro. Park Dist. v. Shank (June 27, 1991), 10th Dist. No. 90AP-516, 1991 Ohio App. LEXIS 3105. In contrast, the "burden of proceeding" relates to the burden placed upon a non-applicant party who challenges the Director's decision to issue a permit. *Id.* (stating that "an appellant who challenges the Director's decision regarding the issuance or denial of a permit has an initial burden of proceeding to establish a *prima facie* case before the applicant's burden **[**54]** to prove entitlement to the permit arises"). See also Sutton v. Schregardus (1994), 94 Ohio App.3d 213, 640 N.E.2d 581.

[*P70] Here, rather than improperly shifting the burden, ERAC simply provided its rationale for finding that the District's contention lacked merit. A review of ERAC's decision as a whole does not suggest that ERAC improperly shifted the burden of proof to the District. Furthermore, ^{HN27} ¶to the extent that the Director's granting of the permit was debatable, ERAC had a duty to affirm the Director's decision, rather than substitute its own judgment. See Citizens Committee to Preserve Lake Logan, at 69-70 (stating that "[w]here the evidence demonstrates that it is reasonably debatable as to whether the permit should be granted, [ERAC's] duty is to affirm the Director, rather than merely to substitute its judgment for his. If [ERAC] properly determines the action of the Director to be unreasonable or unlawful, it then possesses power similar to that of the Director, by way of vacating or modifying the action of the Director to implement the appropriate action in accordance with the evidence.").

[*P71] The District further claims that ERAC incorrectly limited its determination that the Director possessed **[**55]** a valid factual foundation to issue the expansion permit to information available to the Director instead of determining the matter with information that had been made available to ERAC. We disagree. ERAC expressly found that it was "not confined to the record certified by the Director, but may consider additional evidence properly presented to it." (ERAC Order, 93, at P72.) Implementing this standard, ERAC considered evidence that was not available to the Director, including "affidavits and journal articles" submitted by the District which "describ[ed] the alleged conditions currently existing at the Countywide site and predict[ed] what affects these conditions will have on the existing site." (ERAC Order, 94, at P75.) In its Findings of Fact, ERAC meticulously set forth the parties' arguments, as well as the contents of the affidavits offered in support thereof. (ERAC Order, 73-77, at P257-79.) As noted, ERAC heard oral arguments on the matter. In addition, ERAC noted in its order that it conducted a site visit of the Countywide facility on June 22, 2006, during which it toured the existing operations and observed construction of the expansion area. (ERAC Order, at 3.)

[*P72] In support **[**56]** of its claim that the factual foundation underlying the Director's determination was eliminated, the District relies upon two cases from this court in which we held that the OEPA Director's decision was invalid because the factual foundation for that decision no longer existed. In Swan Super Cleaners, Inc. v. Tyler (1988), 48 Ohio App.3d 215, 549 N.E.2d 526, this court affirmed an EBR order finding that the Director's adoption of a rule regulating the emission of perchloroethylene ("perc") from dry cleaning operations was unreasonable and unlawful. The Director's basis for adopting the regulation was a policy statement from the United States Environmental Protection Agency ("USEPA") concerning perc emissions and their negative impact on the ozone. However, after the Director adopted the rule, the USEPA revised its policy statement, indicating that perc emissions do not contribute to the degradation of air quality standards. *Id.*, at 216-17. This court concluded that EBR correctly found that the Director no longer had a valid foundation for the perc regulations, as the sole basis for the regulation had been revoked by the USEPA. *Id.*, at 221.

[*P73] In C.F./Water v. Schregardus (Oct. 28, 1999), 10th Dist. No. 98AP-1481, 1999 Ohio App. LEXIS 5028 **[**57]**, we affirmed an ERAC order reversing the Director's issuance of a PTI for a new solid waste disposal facility. The Director's decision to issue the PTI was based upon a determination that there were no hydraulically active fractures beneath the proposed landfill capable of transmitting groundwater from the landfill to a productive aquifer located beneath the proposed landfill. On appeal, ERAC heard evidence demonstrating that, before issuing the PTI, the Director possessed evidence that hydraulically active fractures existed beneath the proposed landfill site, but did not review this evidence when deciding whether to issue the PTI. *Id.* Because the Director did not consider all evidence available to him at the time of his decision, and because evidence presented at the de novo hearing before ERAC established that, had the Director considered this information, his decision would have been different, ERAC found the Director's decision to be unreasonable and remanded the case to the Director for further review. We affirmed, finding reliable, probative, and substantial evidence to support ERAC's decision. Citing Swan Super Cleaners, we noted that ^{HN28} ¶ "[i]f the factual basis for a **[**58]** particular decision is found to be invalid or no longer exists, then the action of the Director stemming from that invalid basis may be invalid." *Id.*

[*P74] Contrary to the District's assertions, the current operational and compliance issues arising at the landfill do

not invalidate the factual foundation for the Director's decision to issue the expansion PTI. Our decisions in *Swan Super Cleaners* and *C.F./Water* were predicated upon factors that are not present in the instant case. First, in those cases, the evidence that arose and was presented after the Director's determination was undisputed. In *C.F./Water*, all parties acknowledged that the overlooked evidence proved the existence of fractures beneath the landfill and, in *Swan Super Cleaners*, the parties agreed by joint stipulation that the USEPA amended its policy statement after the Director adopted the rule. In this case, ERAC noted that significant factual disputes exist as to the validity of the District's assertions and the relationship between the current operational and compliance issues at the landfill and the Director's decision to issue the expansion.

[*P75] Further, in both *Swan Super Cleaners* and *C.F./Water*, there was a clear relationship **[**59]** between the newly presented evidence and the Director's action. In *C.F./Water*, the existence of hydraulically active fractures beneath the landfill was an issue throughout the permitting process, and all parties acknowledged that, had the Director been aware that fractures existed, the PTI would not have been issued. Here, ERAC did not hear any evidence that OEPA personnel failed to consider elevated temperature readings at the existing portion of the facility, nor did it hear testimony or have presented to it any other testimony that such a review of the elevated temperatures would have altered the factual basis for the Director's decision to grant the expansion permit. In *Swan Super Cleaners*, the USEPA policy statement on perc was "the sole technical foundation supporting Ohio EPA's regulation of emissions of perc." *Id.*, at 216. Here, whether or not Republic had maintained the integrity of the landfill liner under the existing portion of the facility was not the basis for the Director's decision to issue the expansion permit, much less the sole basis for the Director's action. We further note that ERAC carefully considered the District's contentions regarding the applicability of **[**60]** *C.F./Water*, but found it distinguishable from the instant case. (ERAC Order, 95, at P77-90.) Because the factors determinative of the outcomes in *Swan Super Cleaners* and *C.F./Water* are not present in this case, ERAC correctly determined that the District failed to present sufficient evidence establishing a prima facie case linking the operational conditions at the existing portion of the facility with any requirement for obtaining the expansion permit. Accordingly, the first issue raised in the District's assignment of error is without merit.

[*P76] The District also questions the validity of the factual foundation underlying the Director's determination that Republic complied with ^{HN29} Ohio Adm.Code 3745-27-07(H)(2)(e), requiring a 15-foot isolation distance between the bottom of the landfill liner and the uppermost aquifer system. In particular, the District contends that Republic did not properly determine the existence of vertical fractures in the Clarion Shale, which, according to Republic, acts as the confining unit for the uppermost aquifer system. This court thoroughly addressed this issue in *Club 3000 I*, and concluded that reliable, probative, and substantial evidence supported ERAC's

[61]** determination that the evidence supported the Director's determination that Republic adequately characterized the geology and hydrogeology of the site, and, thus, its application met the requirements set forth in, inter alia, Ohio Adm.Code 3745-27-07(H)(2)(e). See *Club 3000 I*, at P30-37. Accordingly, we need not address the District's claims regarding this issue.

[*P77] For the foregoing reasons, we overrule the District's single assignment of error and, accordingly, affirm the order of the Environmental Review Appeals Commission.

Order affirmed.

TYACK, J., concurs.

McGRATH, J., concurs separately.

CONCUR BY: McGRATH ↓

CONCUR

McGRATH ↓, J., concurring separately.

[*P78] While I concur in the opinion and judgment of the majority herein, I would also have dismissed the District's appeal for the reasons originally cited in this court's previous dismissal for lack of subject-matter jurisdiction. *Club 3000 v. Jones*, 10th Dist. No. 07AP-593, 2008 Ohio 5058.

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ATTACHMENT 3



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1990 Ohio ENV LEXIS 10, *

HOLIDAY TRAV-L-PARK, Appellant, v. RICHARD SHANK, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.,
Appellees

Case No. EBR 222211

Ohio Environmental Board of Review

1990 Ohio ENV LEXIS 10

November 1, 1990, Issued

CORE TERMS: real estate, present appeal, adversely affected, aggrieved, present action, motion to dismiss, court of appeals, order appealed, certified mail, restitution, notice, campground, adjacent, site

[*1]

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PANEL: Peter A. Precario; Chairman, Julianna F. Bull, Vice-Chairwoman.

OPINION:

RULING ON MOTION TO DISMISS AND FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

The present case is an appeal by Jeffrey Farms, Inc. from a final action of the Director of the Ohio EPA granting to the Appellee, S & S Realty, a Permit To Install (PTI) a waste-water treatment facility. The appeal alleges, in essence, that the action of the Director in granting the PTI was unreasonable and unlawful. The appeal was filed with the Board on June 14, 1990.

On June 18, 1990, Appellee S & S Realty filed a motion to dismiss the appeal on a number of grounds including the ground that Appellant lacked appropriate standing to file the present appeal and that the appeal was consequently improper.

Oral argument was held before the Board on October 5, 1990. Appellant Jeffrey Farms Inc. was represented by Mr. Timothy H. Dempsey, Attorney at Law of Smith & Smith, [*2] Avon Lake, Ohio. Appellee S & S Realty was represented by Mr. Walter R. Wagner of Wagner & Wagner, Sandusky, Ohio. Appellee Director was represented by Mr. Shane Farolino, Assistant Attorney General, State of Ohio.

Based upon the memoranda and arguments of Counsel, the pleadings, affidavits, and the record certified to this Board pursuant to section 3745.04 of the Ohio Revised Code, the Environmental Board of Review makes the following ruling on the motion to dismiss and issues its Final Order.

FINDINGS OF FACT

1. Appellant Jeffrey Farms, Inc. was, at all times relevant to this appeal, either the owner or a lessee of certain real estate located adjacent to the real estate being developed by Appellee S & S Realty in Erie County, Ohio.
2. Appellee S & S Realty's development included, among other things, the installation of the sewage treatment plant which was the subject of the PTI under appeal here. The plant was located on Appellee's property but near one of several water well sites located on Appellant's property. The wells supplied water to Appellant's property which was being used as a campground. (Notice of Appeal)
3. The Appellant has not alleged, and nothing in the [*3] record indicates, that the Appellant was a party to, or participated in, the PTI proceeding "before the Director" as defined in section 3745.04 of the Revised Code.

4. On July 5, 1990, in a Forcible Entry and Detainer action filed by S & S Realty, the County Court of Erie County, Ohio issued a Writ Of Restitution against Jeffrey Farms, Inc. The Writ removed it from its campground premises and granted restitution of the real property to the Appellee in this appeal, S & S Realty. (Affidavit of George Sortino, Exhibits A and B)

5. The record indicates that, as a result of the Writ of Restitution, evicting Jeffrey Farms, Inc. from the real estate in question here, the Appellant to the present appeal no longer had any interest in the real estate or any right of possession in the real estate. Appellant has not contested this point and has offered no evidence nor alleged that it has any further interest in the real estate. (Affidavit George Sortino)

6. Independent of having an interest in the real estate described above, nothing in the record presented to this Board demonstrates or implies that the Appellant would have standing as an aggrieved or adversely affected person as described [*4] in section 3745.07 of the Revised Code.

7. The record in the present case demonstrates that the Appellant did not participate in and was not a party to the proceeding under Appeal here when the PTI was under consideration by the Director. Further, the record demonstrates that the Appellant is not a person who would be aggrieved or adversely affected by the present action in the absence of an interest in the real estate in question in the present appeal. The Appellant has failed to show any factual basis upon which this Board could find that it has standing to pursue the present appeal under either section 3745.04 or 3745.07 of the Revised Code.

CONCLUSIONS OF LAW

1. When the standing of a party to an appeal before the Board is called into question, it is incumbent upon that party to demonstrate that it has the requisite standing to pursue the action in question in the appeal.

2. When a party has made a prima facie showing that another party has no standing to pursue an appeal, the party whose standing is questioned has the burden of demonstrating, through the presentation of facts or based upon a theory of law, that it does have appropriate standing to challenge the action [*5] in question.

3. In the present case, the Appellant has failed to demonstrate any facts or to advance any theory of law by which this Board could conclude that the Appellant has standing to pursue the present appeal.

4. The record of this proceeding before the Board contains no evidence which would demonstrate that the Appellant was a party pursuant to section 3745.04 of the Revised Code as a result of participating in this action while it was before the Director.

5. Likewise, Appellant's standing as an aggrieved or adversely affected person was predicated upon an interest in real estate adjacent to a site which was subject to a Permit to Install issued by the Ohio EPA. When the Court Order was issued foreclosing Appellant's entire interest in the real estate and granting restitution of the real estate to the Appellee S & S Realty, Appellant's standing to pursue this appeal was likewise terminated.

6. The motion of the Appellee to dismiss the present action based upon Appellant's lack of standing to pursue the appeal is well taken and should be sustained.

FINAL ORDER

The motion of the Appellee to dismiss the present appeal is well taken and is hereby sustained. The appeal [*6] is ORDERED dismissed.

The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:

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Citation: 152 Ohio App. 3d 282*152 Ohio App. 3d 282, *; 2003 Ohio 1512, **;
787 N.E.2d 669, ***; 2003 Ohio App. LEXIS 1425*

City of Olmsted Falls, Ohio, Appellant-Appellee v. Christopher Jones, Director of Environmental Protection, Appellee-Appellant, City of Cleveland, Ohio, Appellee-Appellant.

No. 02AP-753, No. 02AP-761

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

152 Ohio App. 3d 282; 2003 Ohio 1512; 787 N.E.2d 669; 2003 Ohio App. LEXIS 1425

March 27, 2003, Rendered

SUBSEQUENT HISTORY: Counsel Corrected June 26, 2003.Discretionary appeal not allowed by City of Olmsted Falls v. Jones, 99 Ohio St. 3d 1513, 2003 Ohio 3957, 792 N.E.2d 200, 2003 Ohio LEXIS 2047 (Ohio, July 30, 2003)**PRIOR HISTORY:** (ERAC No. 184928). APPEALS from the Environmental Review Appeals Commission.**DISPOSITION:** Order reversed and cause remanded.**CASE SUMMARY****PROCEDURAL POSTURE:** Appellant city applied for a permit to discharge dredged or fill materials into the water during an expansion of the airport. Appellee neighboring city sought review of the Director of the Ohio Environmental Protection Agency's waiver to the Environmental Review Appeals Commission (ERAC). The city intervened and, along with the Director, moved to dismiss. ERAC granted the neighboring city's motion for summary judgment. The city appealed.**OVERVIEW:** The Director waived the state's authority to act on the city's request for certification process. The Director stated the project would impact 87.75 acres of wetlands of the 94 acres presently on the property, and 7,900 linear feet of a creek and its tributaries. The appellate court held the evidence did not demonstrate how the impact will cause the neighboring city to suffer an injury. The stipulated facts indicated the neighboring city was located approximately 2.2 miles southwest of the airport. However, being a city within close proximity of the airport was not a concrete or specific injury as required to demonstrate standing. Proximity was only a factor when coupled with a threatened or actual injury. The evidence only provided the land and water would be affected. It did not demonstrate the effect on the neighboring city. Merely being a city did not confer standing without demonstrating the adverse impact or injury resulting from the Director's letter. Thus, the neighboring city did not have standing, and ERAC erred in overruling the city's and Director's joint motion to dismiss.**OUTCOME:** The city's and Director's assignment of error were sustained as to the motions to dismiss. The remainder of their claims of error were moot. The order of the ERAC was reversed and the cause was remanded for further proceedings.**CORE TERMS:** assignments of error, environmental review, certification, environmental protection, administrative appeal, airport, summary judgment, Environmental, challenged action, stipulated facts, public notice, public hearing, wetlands, creek, guidelines, moot, expansion project, notice of appeal, substantial evidence, specific injury, actual injury, demonstrating, probative, southwest, tributaries, proximity, reliable, concrete, inaction, miles**LEXISNEXIS® HEADNOTES**

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Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
HN1 See Ohio Rev. Code Ann. § 3745.06.

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Standing](#) 
[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 
 HN2 See [Ohio Rev. Code Ann. § 3745.04](#).

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Standing](#) 
[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 
 HN3 In considering both [Ohio Rev. Code Ann. § 3745.04](#) and [Cincinnati Gas](#), it is necessary to administer a two-prong test to determine whether a person is a party. First, did the person appear before the director of the Ohio Environmental Protection Agency, presenting his arguments in writing or otherwise; and, second, was the person "affected" by the action or proposed action. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Civil Procedure](#) > [Justiciability](#) > [Standing](#) > [Injury in Fact](#) 
 HN4 In order to have standing, a party must demonstrate that the challenged action has caused, or will cause, the appellant injury in fact, economic or otherwise, and that the interest sought to be protected is within the realm of interests regulated or protected by the statute or constitutional right being challenged. The alleged injury must be concrete, rather than abstract or suspected; a party must show that he or she has suffered or will suffer a specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: Chevalier, Allen & Lichman, L.L.P., Barbara E. Lichman and Berne C. Hart; Carbone & Murphy Co., L.P.A., Rick J. Carbone and Paul T. Murphy, for appellee City of Olmsted Falls.

Jim Petro, Attorney General, Margaret A. Malone and Daniel Martin, for appellant Christopher Jones, Director of Environmental Protection.

Subodh Chandra, Law Director, Julianne Kurdila and Nancy A. Kelly, for appellant City of Cleveland, Ohio.

Eugene P. Whetzel, for amicus curiae Ohio State Bar Association.

JUDGES: PETREE, P.J. DESHLER, J., concurs. BROWN, J., concurs in judgment only.

OPINION BY: PETREE

OPINION

[*284] [***670] (REGULAR CALENDAR)

PETREE, P.J.

[**P1] On July 5, 2000, the City of Cleveland ("Cleveland") submitted a permit application to the Army Corps of Engineers ("ACOE") for a permit under [Section 404 of the Clean Water Act, Section 1341, Title 33, U.S.Code](#), for authorization to discharge dredged or fill materials into waters of the United States during an expansion project of Cleveland Hopkins International Airport. On that same day, Cleveland also submitted an application to the Ohio Environmental Protection Agency ("OEPA") for certification pursuant to [Section 401 of the Clean Water Act, Section 1341, Title 33, U.S.Code](#) ("Section 401"). [***671] The expansion project was going to impact wetlands and Abram Creek.

[**P2] On April 13, 2001, the Director of the OEPA ("Director") sent the ACOE a letter in which he informed the ACOE that he was waiving the State of Ohio's authority to act on Cleveland's request for Section 401 certification process. The City of Olmsted Falls ("Olmsted Falls") appealed the Director's waiver to the Environmental Review Appeals Commission ("ERAC"). Cleveland filed a motion to intervene, which was granted. Cleveland and the Director filed several motions to dismiss. Olmsted Falls filed a motion for summary judgment on its claim that Ohio law standing alone, or in combination with federal law, does not grant the Director the power to waive the state's authority to act on an application for 401 certification and, therefore, his action in doing so is unlawful. ERAC denied the motions to dismiss and granted Olmsted Falls' motion for summary judgment.

[**P3] In case No. 02AP-761, Cleveland filed a notice of appeal and raises the following assignments of error:

[**P4] "[1.] The Environmental Review Appeals Commission erred in denying the joint motion of the city of Cleveland and Christopher Jones, Director, Ohio Environmental Protection Agency, to dismiss the administrative appeal of the city of Olmsted Falls.

[P5] [*285]** "[2.] The Environmental Review Appeals Commission erred in denying the motion of the city of Cleveland to dismiss the administrative appeal of the city of Olmsted Falls.

[P6]** "[3.] The trial court erred in granting the motion of the city of Olmsted Falls for summary judgment under Rule 56 of the Ohio Rules of Civil Procedure."

[P7]** In case No. 02AP-753, the Director also filed a notice of appeal and raises the following assignments of error:

[P8]** "[1.] The Environmental Review Appeals Commission Erred in Denying the Director of Environmental Protection's and the City of Cleveland's Joint Motion to Dismiss Olmsted Falls' Administrative Appeal Because the Matter Appealed by Olmsted Falls is Moot.

[P9]** "[2.] The Environmental Review Appeals Commission Erred in Denying the Director of Environmental Protection's and the City of Cleveland's Joint Motion to Dismiss Olmsted Falls' Administrative Appeal Because Olmsted Falls Lacks Standing to Bring the Appeal.

[P10]** "[3.] The Environmental Review Appeals Commission Erred in Denying the Director of Environmental Protection's Motion to Dismiss Olmsted Falls' Administrative Appeal Because the Appeal was Not Properly Commenced by a Person Authorized to Practice Law in Ohio or by a *Pro Se* Appellant.

[P11]** "[4.] The Environmental Review Appeals Commission Erred in Denying the Director of Environmental Protection's Motion to Dismiss Olmsted Falls' Administrative Appeal Because Olmsted Falls Did Not Appeal an 'Action' of the Director.

[P12]** "[5.] The Environmental Review Appeals Commission Erred in Granting Olmsted Falls' Motion for Summary Judgment Because It Incorrectly Found That the Director of Environmental Protection Lacks the Authority to Waive the State of Ohio's Authority to Act on a 401 Certification Application."

[P13]** For purposes of briefing and argument, the two appeals were consolidated.

[P14]** R.C. 3745.06 provides our standard of review as follows:

[P15]** ^{HN1} ~~HN1~~ **[***672]** The court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record * * * that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. * * *

[P16] [*286]** In both Cleveland's first assignment of error and the Director's second assignment of error, they contend that Olmsted Falls lacks standing to appeal the Director's action to ERAC. R.C. 3745.04 governs appeals to ERAC and provides, in pertinent part, as follows:

[P17]** ^{HN2} ~~HN2~~ "Any person who was a party to a proceeding before the director may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director of environmental protection * * *."

[P18]** In *Martin v. Schregardus* (Sept. 30, 1996), Franklin App. Nos. 96APH04-433, 1996 Ohio App. LEXIS 4288, this court stated:

[P19]** ^{HN3} ~~HN3~~ "[In] considering both R.C. 3745.04 and *Cincinnati Gas [& Elec. Co. v. Whitman* (1974), 11 O.O.3d 192], we find it necessary to administer a two-prong test to determine whether a person is a party. First, did the person appear before the director, presenting his arguments in writing or otherwise; and, second, was the person 'affected' by the action or proposed action."

[P20]** In this case, the parties do not dispute that Olmsted Falls participated by submitting comments during

the comment period. At issue is whether Olmsted Falls was affected by the letter written by the Director.

[P21]** In *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus* (1992), 84 Ohio App.3d 591, 599, 617 N.E.2d 761, this court further explored the requirements to establish standing. First, we look to traditional standing analysis, and the appellant has the burden of demonstrating that it has standing. See, also, Ohio Admin.Code 3746-5-30(A). ~~HN4~~ The party must demonstrate "that the challenged action has caused, or will cause, the appellant injury in fact, economic or otherwise, and that the interest sought to be protected is within the realm of interests regulated or protected by the statute or constitutional right being challenged." Id. This court has stated that "the alleged injury must be concrete, rather than abstract or suspected; a party must show that he or she has suffered or will suffer a 'specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction.'" See *Johnson's Island Property Owners' Assoc. v. Schregardus* (June 30, 1997), Franklin App. No. 96APH10-1330, 1997 Ohio App. LEXIS 2839, quoting *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, 424, 8 Ohio B. 544, 457 N.E.2d 878. The court in *Johnson's Island* further stated that the injury must be actual and immediate or threatened. However, if a threatened injury is alleged, the party must demonstrate a realistic danger arising from the challenged action. Id., 1997 Ohio App. LEXIS 2839

[P22]** In this case, the parties submitted five stipulated facts to ERAC as follows:

[P23] [*287]** "1. The City of Cleveland, Ohio ('Cleveland') owns and operates the Cleveland Hopkins International Airport ('CLE').

[P24]** "2. Olmsted Falls is a city located approximately 2.2 miles southwest of CLE.

[P25]** "3. **[***673]** On July 5, 2000, the City of Cleveland, Department of Port Control ('DPC'), submitted an Application for a Clean Water Act Section 401 Water Quality Certification to the Ohio Environmental Protection Agency ('OEPA').

[P26]** "4. On December 8, 2000, OEPA issued a Public Notice of Receipt of Cleveland's 401 Application and Public Hearing.

[P27]** "5. On April 13, 2001, the Director, OEPA, sent a letter, 'Re: City of Cleveland Department of Port Control Application for Section 401 Water Quality Certification Expansion of Cleveland Hopkins International Airport,' to Paul Leuchner, U.S. Army Corps of Engineers." (Exhibit EE.)

[P28]** The only other evidence presented at the hearing on the motions was the April 13, 2001 letter from the Director to the ACOE in which the Director waived the state of Ohio's authority to act on Cleveland's request for Section 401 certification process and the December 8, 2000 public notice. A copy of the ACOE guidelines for 404 permits was also provided to ERAC. (Tr. 7 at 79, Exhibit TTT.) ERAC stated in its ruling that the five stipulations of fact and the Director's letter and the public hearing notice were the evidence it relied upon in reaching its decision. ERAC also stated in its ruling that it determined that Olmsted Falls possessed standing from a consideration of the stipulated facts.

[P29]** In the Director's April 13, 2001 letter, he stated that the project would impact 87.75 acres of wetlands of the 94 acres presently on the property, and 7,900 linear feet of Abram creek and its tributaries. The December 8, 2000 public notice of the receipt of 401 application and public hearing provided that the discharges from the activity would result in degradation to, or lowering of, the water quality of Abram Creek and its tributaries and wetlands. However, this evidence does not demonstrate how the impact will cause Olmsted Falls to suffer an injury. The stipulated facts indicate that Olmsted Falls is a city located approximately 2.2 miles southwest of Cleveland Hopkins International Airport. However, being a city within close proximity of the airport is not a concrete or specific injury as required to demonstrate standing. Proximity is only a factor when coupled with a threatened or actual injury. *Temple v. Schregardus* (May 27, 1999), Franklin App. No. 98AP-650, 1999 Ohio App. LEXIS 2373. The evidence only provides that the land and water will be affected but does not demonstrate the effect on Olmsted Falls.

[P30]** Olmsted Falls argues that it is affected merely because it is a city and, as such, has the responsibility for providing for public health and safety. **[*288]** However, merely being a city does not confer standing without demonstrating the adverse impact or injury resulting from the Director's letter.

[P31]** Olmsted Falls also argues that the ACOE guidelines demonstrate an injury because in them the ACOE recognizes that a violation of the regulations and guidelines may cause injury. However, Olmsted Falls has not demonstrated that there is an actual injury to the city but, rather, only the potential effects of a violation. Thus, Olmsted Falls does not have standing, and ERAC erred in overruling Cleveland's and the Director's joint motion to dismiss. Cleveland's first assignment of error and the Director's second assignment of error are well-taken.

[P32]** Based upon our ruling on Cleveland's first assignment of error and the Director's second assignment of error, the other assignments of error are rendered moot.

[P33]** For the foregoing reasons, Cleveland's first assignment of error and **[***674]** the Director's second assignment of error are sustained, and Cleveland's second and third and the Director's first, third, fourth and fifth assignments of error are moot. The order of the Environmental Review Appeals Commission is reversed, and this cause is remanded to that commission for further proceedings in accordance with law and consistent with this opinion.

Order reversed and cause remanded.

DESHLER, J., concurs.

BROWN, J., concurs in judgment only.

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2008 Ohio 5073, *; 2008 Ohio App. LEXIS 4277, **

Joel Helms, Appellant-Appellant, v. Joseph P. Koncelik, Director of Environmental Protection, Appellee-Appellee.

No. 08AP-323

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2008 Ohio 5073; 2008 Ohio App. LEXIS 4277

September 30, 2008, Rendered

PRIOR HISTORY: [1]**

APPEAL from the Environmental Review Appeals Commission. (ERAC No. 765931).

DISPOSITION:

CASE SUMMARY

PROCEDURAL POSTURE: Appellant property owner sought review of an order from the Environmental Review Appeals Commission (Ohio), which dismissed his appeal of a permit granted to a county pursuant to R.C. 6111.03 (J)(1) to install a wastewater disposal system that was issued by appellee, the Director of the Ohio Environmental Protection Agency. The dismissal was based on lack of standing under R.C. 3745.07. The Director sought dismissal of the appeal.

OVERVIEW: The Director issued the permit to install the wastewater disposal system consisting of a sanitary sewer, pump station, and force main. The owner appealed that decision to the Commission. The Director sought dismissal due to lack of standing under § 3745.07, which was granted by the Commission. Thereafter, the owner mailed multiple copies of a notice of appeal from the dismissal to the Commission. The Director sought dismissal due to lack of compliance with the service requirements under R.C. 3745.06. The Director also sought to strike the owner's two replies to the dismissal motion, as well as an affidavit from a court clerk. The court found that the second reply was untimely, repetitive, and unnecessary, but that the other documents were sufficient. As the court clerk mistakenly rejected the owner's timely filed notice of appeal due to the mistaken belief that it had to be time-stamped pursuant to R.C. 3745.06, the court had jurisdiction over the appeal. However, the owner did not show that he was aggrieved or adversely affected by issuance of the permit for standing purposes. There was also no merit to his claims on appeal.

OUTCOME: The court granted the Director's motion to strike the second reply, but denied the motion to strike the first reply and an affidavit of the clerk. The court denied the Director's motion to dismiss the owner's appeal, and it affirmed the order of the Commission.

CORE TERMS: notice of appeal, notice, planning, station, reply, pump, sanitary, sewer, certified mail, mail, property value, environmental, time-stamped, diminished, issuance, assignments of error, adversely affected, time stamp, clerk's office, installation, aggrieved, area-wide, mailing, force main, confirmed, regulated, authorizes, disposal, install, mailed

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HN1 See R.C. 3745.06.

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Jurisdiction & Venue](#)

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HN2 Strict compliance with statutory filing requirements is a necessary precursor to jurisdiction. Compliance with R.C. 3745.06 thus requires: (1) filing an original notice with the Environmental Review Appeals

Commission, (2) filing a copy of that notice with an Ohio court of appeals, and (3) sending a copy of the notice by certified mail to the Director of the Ohio Environmental Protection Agency, all within 30 days. Section 3745.06 does not, however, require that the notice filed with the court contain a time stamp from the Commission. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN3 Standing is a threshold jurisdiction issue that must be resolved before an appellant may proceed with an appeal to the Environmental Review Appeals Commission. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN4 R.C. 3745.07 provides that, if the Director of the Ohio Environmental Protection Agency issues a permit without issuing a proposed action, then "any person who would be aggrieved or adversely affected" by the permit may appeal to the Environmental Review Appeals Commission. In addition, basic to the establishment of standing is that the challenged action has caused, or will cause, an appellant injury in fact, economic or otherwise, and that the interest sought to be protected is within the realm of interests regulated or protected by the statute. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Environmental Law](#) > [Water Quality](#) > [Clean Water Act](#) > [Discharge Permits](#) > [Storm Water Discharges](#)

HN5 R.C. 6111.03(J)(1) authorizes the Director of the Ohio Environmental Protection Agency to issue permits for the discharge of sewage or other wastes into the waters of Ohio, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the Federal Water Pollution Control Act and mandatory regulations adopted thereunder. This same provision requires that any permit terms and conditions imposed must be designed to achieve and maintain full compliance with the national effluent limitations, national standards of performance for new sources and any other mandatory requirements under federal law or regulations. Finally, § 6111.03(J)(2)(b) requires the Director to deny a permit application if the Director determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with § 208 of the Federal Water Pollution Control Act. [More Like This Headnote](#)

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HN6 R.C. Chapter 6117 authorizes a board of county commissioners to construct and maintain sanitary or drainage facilities and to undertake sanitary facility improvements. R.C. 6117.01(B) and 6117.06 (A). [More Like This Headnote](#)

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[Evidence](#) > [Procedural Considerations](#) > [Burdens of Proof](#) > [Allocation](#)

HN7 A diminution in property value may confer standing. But a mere allegation that property value has been or will be diminished is not sufficient to sustain an appellant's burden to prove standing. [More Like This Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Preservation for Review](#)

HN8 A party who fails to raise an argument in a court below waives his or her right to raise it on appeal. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: Joel Helms, Pro se.

Nancy H. Rogers, Attorney General, Margaret A. Malone, and Jessica B. Atleson, for appellee.

JUDGES: FRENCH, J. BRYANT and GREY, JJ., concur. GREY, retired of the Fourth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: FRENCH

OPINION

(ACCELERATED CALENDAR)

OPINION

FRENCH, J.

[*P1] Appellant, Joel Helms ("appellant"), appeals from a final order of the Environmental Review Appeals Commission ("ERAC"), which dismissed his appeal of a permit to install issued by appellee, the Director of Environmental Protection ("the Director") for lack of standing.

[*P2] On June 29, 2006, the Director issued to Summit County a permit to install a wastewater disposal system consisting of a sanitary sewer, pump station, and force main. On July 28, 2006, appellant filed a notice of appeal to ERAC and alleged four assignments of error. Through these assignments, appellant argued that the project was inconsistent with approved **[**2]** statewide facilities planning, usurped his procedural rights to challenge property assessments under R.C. 6117, and should not have been approved while his "Petition of Redress" was pending before the Governor and while a "Local Referendum Petition" was pending.

[*P3] The Director moved to dismiss appellant's ERAC appeal for lack of standing. Specifically, the Director argued that appellant had failed to demonstrate, pursuant to R.C. 3745.07, that the issuance of the permit aggrieved or adversely affected him. Appellant responded in writing, and ERAC heard oral argument on the motion.

[*P4] In its February 28, 2008 order, ERAC granted the Director's motion and dismissed appellant's appeal. Appellant was served with a copy of the order on March 20, 2008.

[*P5] In his appeal to this court, appellant raises one assignment of error:

ERAC incorrectly dismissed case based on defective 'Finding of Facts' [sic].

[*P6] Before addressing the merits of appellant's appeal, we must first address the Director's motion to dismiss this appeal for lack of jurisdiction. As to that motion, the following facts are relevant.

[*P7] Appellant mailed multiple copies of a notice of appeal to ERAC. ERAC received the mailing, which included **[**3]** a \$ 75 filing fee intended for this court, on April 17, 2008. Linda Adams, an office assistant at ERAC, contacted appellant and informed him that ERAC is not responsible for forwarding the notice of appeal to the court or filing the fee. Adams returned the \$ 75 to appellant by mail.

[*P8] On April 18, 2008, the Director received, by certified mail, a copy of the notice of appeal ERAC received on April 17, 2008 (the "April 17, 2008 notice of appeal"). The notice did not contain a time stamp indicating that it had been filed with ERAC.

[*P9] On April 21, 2008, ERAC received a second notice of appeal (the "April 21, 2008 notice of appeal"), which ERAC also filed. Counsel for the Director submitted an affidavit indicating that the Director never received a copy of the April 21, 2008 notice of appeal.

[*P10] On May 14, 2008, the Director moved to dismiss this appeal. The Director argued that appellant failed to adhere to R.C. 3745.06. Specifically, the Director argued that appellant's attempt to file the April 17, 2008 notice of appeal was "unsuccessful." The Director also argued that the April 21, 2008 notice of appeal was improper because appellant did not send a copy of that notice via certified mail to **[**4]** the Director. Therefore, according to the Director, this court lacks jurisdiction to hear this appeal.

[*P11] On June 9, 2008, appellant filed a reply to the Director's motion. In his reply, appellant stated that he had mailed the April 17, 2008 notice of appeal to this court and that it was returned to him with a note stating: "You need to mail this directly to the Environmental Review Board. We do not forward mail. --Clerk."

[*P12] On June 23, 2008, pursuant to this court's sua sponte request pursuant to App.R. 9(E), the affidavit of Dennis Higgins was filed and served upon the parties. The affidavit states that Higgins is employed in this court's clerk's office. Higgins confirmed that, on or about April 16 or 17, 2008, he opened mail from appellant, including a notice of appeal from the February 28, 2008 ERAC order. He also confirmed that he returned the notice, without filing it, to appellant because he believed that such an order had to be time-stamped by ERAC before filing with the court. Finally, Higgins confirmed that appellant appeared in the clerk's office on April 21, 2008, and filed the April 21, 2008 notice of appeal, which had first been time-stamped by ERAC.

[*P13] On June 24, 2008, appellant **[**5]** filed a Second Reply Contra. On June 30, 2008, the Director filed a motion to strike appellant's second reply and the affidavit of Dennis Higgins.

[*P14] Pursuant to App.R. 15, we deny the Director's motion to strike appellant's first Reply Contra. We grant the Director's motion to strike appellant's Second Reply Contra, however, as this second reply is untimely, repetitive, and unnecessary. Finally, as indicated in our journal entry supplementing the record on appeal to include the affidavit of Dennis Higgins, we deny the Director's motion to strike that affidavit. Instead, we conclude that the affidavit is critical to clarify the record on appeal and to resolve the Director's motion to dismiss. We note, too, that the Director similarly filed affidavits in support of his motion to dismiss.

[*P15] To determine our jurisdiction, we begin with R.C. 3745.06. That section provides, in pertinent part:

HN1 Any party adversely affected by an order of [ERAC] may appeal to the court of appeals of Franklin county * * *. Any party desiring to so appeal shall file with the commission a notice of appeal designating the order appealed. A copy of the notice also shall be filed by the appellant with the court, and a **[**6]** copy shall be sent by certified mail to the director of environmental protection unless the director is the party appealing the order. Such notices shall be filed and mailed within thirty days after the date upon which the appellant received notice from the commission by certified mail of the making of the order appeal. * * *

[*P16] Here, appellant attempted to meet the requirements of R.C. 3745.06 by (1) mailing an original notice of appeal to ERAC for filing, (2) mailing a copy of that notice to this court for filing, and (3) mailing a copy, via certified mail, to the Director. As the affidavit of Dennis Higgins confirms, however, the clerk's office did not accept the notice of appeal for filing because Higgins believed that a time stamp from ERAC was required before this court could accept the notice. We disagree with this interpretation of the statute.

[*P17] As the Director argues, this court and the Ohio Supreme Court have stressed that *HN2* strict compliance with statutory filing requirements is a necessary precursor to jurisdiction. See, e.g., Hughes v. Ohio DOC, 114 Ohio St. 3d 47, 2007 Ohio 2877, P17, 868 N.E.2d 246 (construing R.C. 119.12); Kimble Clay & Limestone v. Williams (Aug. 29, 1978), Franklin App. No. 78AP-320, 1978 Ohio App. LEXIS 8308 **[**7]** (construing R.C. 3745.06). Important for our purposes here, compliance with R.C. 3745.06 thus requires (1) filing an original notice with ERAC, (2) filing a copy of that notice with this court, and (3) sending a copy of the notice by certified mail to the Director, all within 30 days.

[*P18] R.C. 3745.06 does not, however, require that the notice filed with the court contain a time stamp from ERAC. That interpretation would require an appellant either to file the notice personally at ERAC and then at the court--a significant burden for appellants outside Franklin County--or to mail the original notice to ERAC, wait for the returned time-stamped copies, file one of the time-stamped copies with the court, and then mail a time-stamped copy, via certified mail, to the Director, all within the 30-day deadline. We find nothing in the statute or in prior court opinions to impose such a burden upon an appellant.

[*P19] In support of its contrary argument, the Director offers the Supreme Court's opinion in Hughes and this court's opinion in Smith v. Ohio Dept. of Commerce (Aug. 21, 2001), Franklin App. No. 00AP-1342, 2001 Ohio App. LEXIS 3660. In Hughes, the Supreme Court considered the filing requirements **[**8]** under R.C. 119.12. The court held that, if the state agency had properly served a certified copy of its order upon the appellant, the court still would have lacked jurisdiction because the appellant filed a copy of the notice of appeal, rather than the original notice of appeal, with the agency. In Smith, this court considered whether a notice of appeal sent to an agency by facsimile could be considered an original notice of appeal for purposes of R.C. 119.12. This court held that a facsimile is not an original under R.C. 119.12 and that, by failing to file an original notice of appeal with the agency, the appellant failed to comply with R.C. 119.12. Neither of these opinions discusses the precise question at issue here, i.e., whether R.C. 3745.06 requires that the copy filed with this court contain a time stamp showing that the original notice of appeal has been filed with ERAC. As we noted, we find no authority to impose this time-stamp requirement.

[*P20] On these grounds, we conclude that the clerk's office should have accepted appellant's first notice of appeal for filing. Having before us evidence that the clerk's office precluded what would have been a timely filing, we conclude that **[**9]** appellant's attempted filing conferred jurisdiction upon this court as of April 17, 2008. See Rhoades v. Harris (1999), 135 Ohio App.3d 555, 558-559, 735 N.E.2d 6; Ricart North, Inc. v. B.W. Towing, Inc. (May 25, 1999), Franklin App. No. 98AP-926, 1999 Ohio App. LEXIS 2376. As jurisdiction was conferred at that time, we need not consider whether the April 21, 2008 notice of appeal met the statutory filing criteria. For all these reasons, we deny the Director's motion to dismiss appellant's appeal. We turn, then, to appellant's assignment of error.

[*P21] First, we agree with the Director that appellant's brief does not conform to the Rules of Appellate Procedure. Nevertheless, we are able to discern the substance of appellant's arguments sufficiently for our purposes, primarily because ERAC's order addresses a single and straightforward issue. Therefore, in the interest of justice, we will consider appellant's appeal. In doing so, however, we limit our consideration to the evidence contained within the record and reject any attempt by appellant to introduce new evidence on appeal.

[*P22] The sole issue before us is standing. *HN3* Standing is a threshold jurisdiction issue that must be resolved before an appellant may proceed with an appeal **[**10]** to ERAC. New Boston Coke Corp. v. Tyler (1987), 32 Ohio St.3d 216, 217, 513 N.E.2d 302.

[*P23] *HN4* R.C. 3745.07 provides that, if the director issues a permit without issuing a proposed action, as the Director did here, then "any person who would be aggrieved or adversely affected" by the permit may appeal to

ERAC. In addition, this court has held that "basic to the establishment of standing is that the challenged action has caused, or will cause, the appellant injury in fact, economic or otherwise, and that the interest sought to be protected is within the realm of interests regulated or protected by the statute." *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus* (1992), 84 Ohio App.3d 591, 599, 617 N.E.2d 761. Here, the Director argues that appellant is not aggrieved or adversely affected and that the interest appellant seeks to protect is not within the realm of interests regulated by the statutes at issue.

[*P24] In his memorandum in opposition to the Director's motion to dismiss filed before ERAC and his subsequent Lack of Standing Summary, appellant attempted to identify several broad bases for establishing standing to appeal the permit at issue. He also submitted numerous documents in support. Considering all these **[**11]** materials together, we have discerned the following.

[*P25] Appellant is engaged in a multi-faceted battle against current plans for development of public sewers in the area immediately surrounding his property. He has engaged in a long-standing dispute with government planning agencies, especially the Northeast Ohio Four County Regional Planning & Development Organization ("NEFCO"), over area-wide planning conducted pursuant to requirements in federal law. He has apparently attacked both the planning process and the plans themselves on, at least, the following fronts: (1) the Summit County Court of Common Pleas (see *Helms v. Northeast Ohio Four Cty. Regional Planning & Dev. Org.*, Summit App. No. 23526, 2007 Ohio 3059 [affirming trial court's dismissal of appellant's attempted appeal from NEFCO's recommendation for plan approval]); (2) the Governor (through a "Petition of Redress"); (3) the Ohio Environmental Protection Agency ("Ohio EPA") (see September 2006 "Ohio EPA Responsiveness Summary for Public Comments Received Regarding the Proposed State Water Quality Management Plan, including updates to the State and Areawide Agency 208 Plans," attached to appellant's memorandum in opposition **[**12]** to motion to dismiss); and (4) ERAC (see *Helms v. Korleski*, ERAC case No. 765966 [October 30, 2007 Order dismissing appellant's appeal from Governor's letter certifying plan update]). The gist of appellant's attacks on this front appears to be that current planning is inconsistent with historical planning, which he or a member of his family may have had some part in proposing.

[*P26] Appellant has also engaged in a dispute with local government officials over the actual construction of sewers in the area. See *State ex rel. Helms v. City of Green*, Summit App. No. 23534, 2007 Ohio 2889 (affirming the trial court's grant of summary judgment against appellant in an action to suspend construction of a sanitary sewer project). The focus of this dispute appears to be alleged misuse of public money and, again, alleged inconsistency with prior long-term planning.

[*P27] Finally, we have the matter before us. The Director issued the permit to Summit County, authorizing the county to install a wastewater disposal system consisting of a sanitary sewer, pump station, and force main for Massillon and Greensberg Roads. According to the county's application, the "project includes the installation of 4,475 feet **[**13]** of 12 inch and 8 inch sanitary sewer with manholes and appurtenances, 7,930 feet of 10 inch sanitary force main, and a sanitary pumping station including wetwell, submersible pumps, controls, valves, piping, meter, and building." The application indicates that "[i]t is very likely that future sewers will connect to this pump station." Id. The total projected cost of the project is just over \$ 2 million. Ohio EPA's report on the detail plans for the project stated that the new sewer "will initially serve 84 properties and flow from an existing grinder pump station. Future connections to this pump station are very likely."

[*P28] The Director issued the permit pursuant to ^{HNS}R.C. 6111.03(J)(1), which authorizes the Director to "[i]ssue * * * permits for the discharge of sewage * * * or other wastes into the waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the Federal Water Pollution Control Act and mandatory regulations adopted thereunder." This same provision requires that any permit terms and conditions imposed must "be designed to achieve and maintain full compliance with the national effluent limitations, **[**14]** national standards of performance for new sources" and any other mandatory requirements under federal law or regulations. Id. Finally, R.C. 6111.03(J)(2)(b) requires the Director to deny a permit application if the Director "determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the Federal Water Pollution Control Act." See, also, Ohio Adm.Code 3745-42-04.

[*P29] Here, appellant alleges that the issuance of the permit is inconsistent with area-wide planning, in violation of R.C. 6111.03(J)(2)(b). ERAC found, however, that appellant failed to demonstrate that the permit conflicts with an area-wide plan currently in effect. We agree. None of the evidence before ERAC shows the manner in which the Summit County permit is inconsistent with any provision of an area-wide plan. While appellant's submissions state that the permit conflicts with prior planning, and appellant's brief is replete with similar allegations, appellant has submitted nothing substantive from these prior plans for comparison. As ERAC concluded, "[a]ppellant presented no authenticated documents, testimony, depositions, legal citations **[**15]** or case law to support his argument."

[*P30] Appellant also alleged that the permit was issued in violation of a pending "Petition of Redress" before the Governor and a local referendum petition. As ERAC concluded, however, appellant offered no legal authority to support his argument that these petitions precluded the Director from acting, nor have we found any.

[*P31] Appellant also alleged that issuance of the permit usurped his rights under ^{HNS}R.C. 6117, which authorizes a board of county commissioners to construct and maintain sanitary or drainage facilities and to undertake sanitary facility improvements. See R.C. 6117.01(B), 6117.06(A). As ERAC concluded, however,

appellant's concern about future county action that may or may not occur is "far too speculative to establish standing in this action." Moreover, this concern is not within the realm of interests to be regulated or protected under laws and regulations applicable to the Director's issuance of the permit.

[*P32] Finally, and perhaps most importantly, we agree with ERAC's conclusion that, even if appellant's allegations were correct, he has failed to prove that he is aggrieved or adversely affected by the Director's issuance of the permit, as **[**16]** required by R.C. 3745.07. His Lack of Standing Summary does contain the following:

* * * This pump station is going across the street from Helms' home vs. the engineering preferred and previously parceled property about 800 feet downwind. This devaluation can only be speculated but is real. It puts in shambles any concept of regional planning.

[*P33] In other contexts, Ohio courts have held that ^{HNS} a diminution in property value may confer standing. See, e.g., Jenkins v. Gallipolis (1998), 128 Ohio App.3d 376, 383, 715 N.E.2d 196 (in an appeal pursuant to R.C. 2506, holding that an assertion of diminished property value due to increased traffic from a proposed Wal-Mart store was sufficient to raise standing); Westgate Shopping Village v. Toledo (1994), 93 Ohio App.3d 507, 514, 639 N.E.2d 126 (holding that "evidence that the value of an appellant's property may be reduced by the enactment of a zoning ordinance will support a finding that an appellant was directly affected by the zoning ordinance"). But a mere allegation that property value has been or will be diminished is not sufficient to sustain an appellant's burden to prove standing. Jenkins at 383-384 (remanding for factual determination); Conkle v. S. Ohio Med. Ctr., Scioto App. No. 04CA2973, 2005 Ohio 3965, P16-17 **[**17]** (holding that, to prove standing under R.C. 713.13 based on theory of diminished property value, a plaintiff must present evidence of diminished value).

[*P34] Here, appellant conceded before ERAC that any diminution in value that may result from installation of the pump station "can only be speculated." With no evidence of diminished property values before it, ERAC correctly concluded that appellant had failed to satisfy his burden of proof on these grounds.

[*P35] Finally, in his reply brief and at oral argument, appellant alleged that installation of the facilities would create an odor problem on his property. Appellant's concern may result from his belief that the pump station will have a flow capacity of 1.6 million gallons. The permit issued by the Director, however, only authorizes a "pump station with an effective capacity of 4,993 gallons." In any event, appellant did not raise this issue before ERAC, nor did he raise the issues of "deteriorating water quality and quantity of Ditch, lost wetlands." Having failed to raise these issues below, he cannot raise them on appeal. State ex rel. Zollner v. Indus. Comm. (1993), 66 Ohio St.3d 276, 278, 1993 Ohio 49, 611 N.E.2d 830 (^{HNS} "[a] party who fails to raise an argument in the **[**18]** court below waives his or her right to raise it" on appeal).

[*P36] For these reasons, we conclude that ERAC did not err in dismissing appellant's appeal for lack of standing. Accordingly, we overrule appellant's only assignment of error, and we affirm ERAC's order.

Motion to strike Reply Contra denied; motion to strike Second Reply Contra granted; motion to strike affidavit denied; motion to dismiss denied; and Order affirmed.

BRYANT and GREY, JJ., concur.

GREY, retired of the Fourth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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ATTACHMENT 6



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2008 Ohio ENV LEXIS 2, *

JOEL HELMS, Appellant, v. JOSEPH KONCELIK, DIRECTOR OF ENVIRONMENTAL PROTECTION, Appellee

Case No. ERAC 765931

Ohio Environmental Board of Review

2008 Ohio ENV LEXIS 2

February 28, 2008, Issued

CORE TERMS: sewer, issuance, adversely affected, aggrieved, sanitary, station, pump, proposed project, oral argument, sewer line, areawide, challenged action, speculative, wastewater, disposal, failed to demonstrate, requisite, regulated, realm, notice of appeal, regulation, wetland, usurp, standing to maintain, failed to satisfy, issuing, Federal Water Pollution Control Act, referendum petition, lack of standing, sewer system

[*1]

COUNSEL FOR APPELLANT: Appellant appeared Pro se.

COUNSEL FOR APPELLEE DIRECTOR: Todd K. DeBoe, Esq., Jessica Atleson, Esq., Assistant Attorneys General, Environmental Enforcement Section, Columbus, Ohio.

PANEL: Melissa M. Shilling, Chair; Toni E. Mulrane, Vice-Chair; Sarah E. Lynn, Member

**OPINION:
RULING ON MOTION TO DISMISS AND FINAL ORDER**

LYNN, COMMISSIONER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon a Motion to Dismiss for Lack of Standing filed on October 23, 2006, by Appellee Director of the Ohio Environmental Protection Agency ("Director," "Agency," "Ohio EPA"). In his Motion to Dismiss, the Director asks this Commission to Dismiss Appellant Joel Helms' ("Helms") appeal of the Director's issuance of Permit to Install ("PTI") No. 557202 to the Summit County Department of Environmental Services ("Summit County") for the construction of a sanitary sewer, pump station, and force main on the grounds that Appellant lacks standing to bring this appeal. (Case File Item J.)

Appellant Helms is proceeding *pro se* in this matter. Appellee Director is represented by Assistant Attorneys General Todd K. DeBoe, Esq. and Jessica Atleson, Esq. [*2]

On June 21, 2007, the Commission conducted oral argument on the Motion to Dismiss. Upon the conclusion of oral argument, the Commission informed the parties that it would take the matter under advisement and issue a final ruling in writing. That ruling follows.

The Commission, after hearing oral argument on the Motion and upon a careful review of the Certified Record, pleadings, relevant statutes, regulations, and case law, issues the following Findings of Fact, Conclusions of Law, and Final Order granting Appellee Director's Motion to Dismiss for Lack of Standing.

FINDINGS OF FACT

1. On June 29, 2006, the Director issued PTI No. 557202 to Summit County. The PTI authorized Summit County to install a wastewater disposal system consisting of a sanitary sewer, pump station, and force main ("sewer improvements," "project") for Massillon and Greensberg Roads. (Case File Item J, Certified Record ("CR") Item 2.)

n1

n1 The Commission hereby, sua sponte, admits the Certified Record into evidence for the limited purpose of resolving the instant Motion to Dismiss

----- End Footnotes----- [*3]

2. The permit was issued pursuant to Ohio Administrative Code ("OAC") Chapter 3745-42 (Permits and Approval Requirements for Disposal Systems). (CR Item 1.)

3. On July 28, 2006, Helms timely filed his Notice of Appeal alleging four Assignments of Error ("AoE") which can be summarized as follows:

AoE 1. The proposed sanitary sewer project is inconsistent with any approved facilities plans. n2

AoE 2. The project should not be approved during the pendency of self-described "Petition of Redress," which Appellant claimed was "pending with the Governor" at the time of the filing of his Notice of Appeal. Appellant explained that the subject matter of the alleged "Petition" involves complaints about the "last review of Ohio's Water Quality Maintenance (sic) Plan update."

AoE 3. The proposed project "usurps" Appellant's procedural rights as a property owner to challenge assessments pursuant to Ohio Revised Code ("R.C.") Chapter 6117 (Ohio law governing sewer districts and county sewers).

AoE 4. The Director should not have issued the PTI authorizing the project during the pendency of a local Referendum Petition, which was filed prior to the issuance of the PTI. [*4] (While Appellant does not explain or provide a citation for such alleged Referendum Petition, he claims the Petition, if allowed, would render the PTI "mute" (sic).)

n2 Appellant cites the following "facilities plans" without giving any further reference or explanation: "Franklin Green, Canton -- Nimishillem Basin or Springfield No. 91." The Commission assumes that Appellant is referring to areawide waste treatment management plans required under Section 208 of the Federal Water Pollution Control Act.

----- End Footnotes-----

4. On October 23, 2006, the Director filed a Motion to Dismiss stating that Appellant had failed to demonstrate, pursuant to R.C. Section 3745.07, that he was aggrieved or adversely affected by the issuance of the PTI in this matter. Therefore, the Director asserts, Appellant lacks the requisite standing to maintain his appeal before this Commission. Specifically, the Director argues that Appellant failed to demonstrate that the "challenged action has caused, or will cause [*5] the Appellant injury in fact, economic or otherwise, and that the interest sought to be protected is within the realm of interests regulated or protected by the statute ... being challenged." (Case File Item J.)

5. On November 17, 2006, Appellant filed a Memorandum in Opposition to the Motion to Dismiss that did not directly address the standing issue raised by the Director in his Motion to Dismiss, but which asserted that Appellant had "presented an engineering and financial ten year plan in 1996 to sewer the total Franklin and Green Facility Planning Area (FGFPA)." According to his Memorandum, Appellant's "plan" would require no funding and was "... more than a wastewater prescription, but also a storm water solution and a proposed thirty year doubling of wetlands." Helms also claimed that his 1996 plan would have provided sewer service to more units than those that would be served by the sewer line improvements at issue in the instant appeal. Finally, Helms asserted that he has expended over \$ 500,000.00 to prepare his 1996 proposal which will be "vacated" by the issuance of the PTI. (Case File Item L.)

6. On December 6, 2006, the Director filed his Response to Appellant's Memorandum [*6] in Opposition to Motion to Dismiss, in which the Director noted that Appellant had not attempted to establish that he had standing to maintain the instant action. The Director acknowledged that Appellant did refer to the costs associated with the proposed project, as well as his own alleged expenditures, but that he had not shown he would be aggrieved by the sewer improvements authorized by the PTI. The Director pointed out that Appellant had not even alleged that the sewer line would run past, or provide sewer service to, his property. The Director asserted that the proposed sewer line would actually run north of his property. (Case File Item R.)

7. On December 26, 2006, Appellant filed an affidavit entitled "Lack of Standing Summary" in which he reasserted his arguments that: 1) the project that is the subject of the PTI is not consistent with any approved facilities plan;

and 2) the project should not be considered by Ohio EPA while Appellant's "Petition of Redress is pending with the Governor." In addition, Appellant merely reasserted AoE No.3 alleging that the proposed project "usurps [his] procedural rights to challenge assessments per R.C. (sic) 6117." Appellant also raised [*7] objections concerning the alleged cost of the project. Appellant asserted that the pump station, which is a part of the construction authorized by the PTI, will be located across the street from his property, but conceded that any devaluation of his property resulting from the installation of the pump station "can only be speculative." Nor did Appellant provide any evidence that the siting of sewer improvements near property would tend to devalue such property. Finally, Appellant asserted that the project would do nothing to "foster wetland enrichment" in the area, would not enhance water quality in ditches that are located on his property, and would increase "storm water problems" for the area where the project is to be located. Appellant also alleged that the pump station would be located in a wetland. Appellant failed to cite any law governing the issuance of PTIs that was allegedly violated, nor did he provide any evidence to support any of his claims concerning water quality, storm water management, or location of the project in a wetland. (Case File Item S.)

8. Furthermore, Appellant did not assert that he will be required to tie into the current sewer line improvements authorized [*8] by the PTI. Indeed, in his Lack of Standing Summary, he seems to express concern about a separate sewer line extension that a "developer" is planning, which is not the subject of the current appeal and which, Appellant alleges, will extend past his personal property. In short, it seems Appellant is concerned that Summit County's current project will, in the future, be further extended to serve his property, and at that point, he will be required to tie into that system. (Case File Item S.)

9. On June 20, 2007, Appellee Director filed a Notice of Filing of an Affidavit of Richard Blasick. In his Affidavit, Mr. Blasick averred that he was the Ohio EPA Environmental Specialist who reviewed the PTI application for the waste water treatment works at issue in the instant appeal. Mr. Blasick stated that he was "familiar with the various parcels of land owned by Joel Helms along Massillon Road ... [and] the pump station, force main, and sewer extension are all north of parcels owned by Mr. Helms." (Case File Item Z.)

10. The Commission heard oral arguments on the Motion to Dismiss on June 21, 2007. During the oral argument, the Commission ruled to admit the Affidavit of Mr. Blasick as additional [*9] evidence in the pending matter.

11. Following the oral argument, on June 26, 2007, Appellant filed an "Oral Argument Clarification and Reply to June 20th Affidavit of Richard Blasick," in which Appellant reasserted and attempted to illuminate AoE No. 1, which alleged that the PTI is not "consistent with any approved facilities plans. In addition, Appellant attempted to refute the information contained in Mr. Blasick's Affidavit by including Exhibit 10, identified as "pictures taken by Joel Helms in Nov. 06 of general contractor approved prints." Appellant claims these pictures "show that a segment of the PTI runs along the total west edge of Helms property." Appellant's "pictures," however, were unauthenticated, partial copies of unidentified drawings, and contained added markings made by Appellant. (Case File Item CC.)

12. The Director subsequently filed a Motion to Strike Appellant's Oral Argument Clarification and Reply to June 20th Affidavit. (Case File Items DD.) Appellant filed a Memorandum in Opposition to the Motion to Strike and the Director filed a Motion to Strike Appellant's Memorandum in Opposition. (Case File Items EE, FF.) n3

n3 The Commission hereby denies the Director's Motion to Strike Appellant's Oral Argument Clarification and denies the Director's subsequent Motion to Strike Appellant's Memorandum in Opposition. The Commission admits the Oral Argument Clarification and attachment as evidence for the sole purpose of ruling on the instant Motion to Dismiss.

----- End Footnotes----- [*10]

CONCLUSIONS OF LAW

1. The question before the Commissions is whether Mr. Helms has the requisite standing to pursue the instant appeal.

2. Standing is a threshold jurisdictional issue which must be resolved before an Appellant may properly proceed with an appeal. *Village of Canal Winchester v. Jones*, ERAC Case No. 255235 (April 14, 2004 at *8); *New Boston Coke v. Tyler* (1987), 32 Ohio St.3d 216, 217.

3. Standing "analysis focuses upon whether the litigant is the proper party in the lawsuit, and not whether the issue itself is justiciable." *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus* (1992), 84 Ohio App.3d 591, 599; *Merkel v. Jones*, ERAC Case Nos. 185274-185275 (October 23, 2003) at *6.

4. To maintain an appeal before the Commission, an Appellant must demonstrate that it is a proper party in the lawsuit by showing one of the following: 1) that Appellant was "a party to a proceeding before the director" and has been "'affected' by the action or proposed action," pursuant to R.C. Section 3745.04; or 2) that Appellant was

"aggrieved or adversely affected" [*11] by the Director's action under appeal pursuant to R.C. Section 3745.07, regardless of whether the Appellant was previously a party to a proceeding before the Director. *Martin v. Schregardus* (1996), 10 Dist. Nos. 96APH04-433, 96APH04-434, 1996 Ohio App. LEXIS; *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, supra at 599.

5. To determine whether a person was "a party to a proceeding before the director" pursuant to R. C. Section 3745.04, the appellant must demonstrate that he "appeared before the Director, presenting his arguments in writing or otherwise." *Martin v. Schregardus*, supra at 3. Nowhere in his Notice of Appeal or subsequent pleadings, does Appellant allege that he appeared before the Director to present his arguments concerning the PTI at issue. As such, Appellant simply has not demonstrated that he was "a party to a proceeding before the director" in accordance with R.C. Section 3734.04. Thus, to survive Appellee's Motion to Dismiss, Appellant must demonstrate that he has standing to proceed with his [*12] appeal pursuant to R.C. Section 3734.07.

6. To show that he has been aggrieved or adversely affected by the issuance of the PTI, as required by R.C. Section 3745.07, Appellant must demonstrate that the "challenged action has caused, or will cause, the appellant injury in fact, economic or otherwise, and that the interest sought to be protected is within the realm of interests regulated or protected by the statute ... being challenged." *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, supra at 599. Appellant must satisfy both prongs of the standing requirement to pursue his appeal. *Lund v. Korleski*, ERAC Case No. 016046 (October 11, 2007.)

7. Further, when considering whether an injury constitutes and "injury in fact" the courts have clarified that "the alleged injury must be concrete, rather than abstract or suspected; a party must show that he or she has suffered or will suffer a 'specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction.'" *City of Olmsted Falls v. Jones* (2003), 152 Ohio App. 3d 282, 285; [*13] *Johnson's Island Property Owners' Ass'n. v. Schregardus* (1997), 10 Dist. No. 96APH10-1330 at *7 (quoting *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, 424).

8. Finally, "[t]he alleged injury in fact may be actual and immediate, or threatened... A party who alleges a threatened injury, however, must demonstrate a *realistic danger arising from the challenged action*." (Emphasis added.) *Johnson's Island Property Owners' Ass'n.* at *7.

9. The Commission believes that Mr. Helms has failed to satisfy the standing requisites prescribed in R.C. 3745.07, both because he has failed to demonstrate that he has or will suffer an immediate or threatened injury that will arise from the challenged action and has failed to demonstrate that the interests he seeks to protect are within the realm of interests regulated or protected by the statute governing the Director's action that is the subject of this appeal.

10. In issuing a PTI for the wastewater disposal system in question, the Director was required to adhere to the statutory and regulatory criteria set forth in R.C. Section 6111.03 (J) [*14] and O.A.C. 3745-42-04. Revised Code Section 6111.03(J) empowers the Director to "[i]ssue ... permits for the discharge of sewage ... or other waste into the waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the Federal Water Pollution Control Act and mandatory regulations adopted thereunder." R.C. Section 6111.03(J)(1). The statute further states, in relevant part, "[a]ny permit terms or conditions shall be designed to achieve and maintain full compliance with the national effluent limitations, national standards for performance of new sources ... and any other mandatory requirements of the act that are imposed by regulation of the administrator of the United States environmental protection agency." *Id.*

11. In addition, R.C. Section 6111.03 states, in relevant part, that "[a]n application for a permit or renewal thereof shall be denied if any of the following applies:

(b) the director determines that the proposed discharge [*15] or source would conflict with an areawide waste treatment management plan adopted in accordance with Section 208 of the Federal Water Pollution Control Act.

O.R.C. 6111.03(J)(2)(b).

12. Ohio Administrative Code Section. 3745-42-04 amplifies the statutory criteria the Director must follow in issuing a PTI for a disposal system.

13. Thus, the Director is required to ensure that the permitted project will comply with effluent limits and standards of performance for new sources, imposed by federal law and that the project will not conflict with regional wastewater management plans in place for the geographic area affected.

14. The Director asserts in his motion to Dismiss that Appellant has failed to allege any facts showing that he was or

would be aggrieved or adversely affected by the alleged violations set forth in AoE 1,2 and 4. The Commission agrees.

15. In AoE 1, Mr. Helms alleged that the issuance of the PTI in question is "inconsistent with any approved facilities plans" for the geographic area. Appellant, however, did not point to any provision of any areawide waste treatment management [*16] plan that has allegedly been violated by the Director's approval of the PTI. Appellant did not even specify which areawide waste treatment management plan is in force in the geographic region where the project is located. Other than a broad assertion that the Director's action is "inconsistent with any approved facilities plans," Appellant presented no authenticated documents, testimony, depositions, legal citations or case law to support his argument.

16. Even assuming that a violation of R.C. 6111.03(J)(2)(b) may have occurred (i.e., the PTI somehow conflicts with mandates of an areawide waste treatment management plan) Appellant has failed to show how he has been personally "aggrieved or adversely affected" by such alleged violation. See *Martin v. Schregardus* supra at 3; *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus* supra at 599. Appellant has failed to satisfy the burden of demonstrating that he will suffer any immediate or threatened harm by the proposed project.

17. Assignments of Error Nos. 2 and 4 allege that the PTI was issued in violation of a pending "Petition for Redress" and a "Local Referendum Petition." [*17] The Commission notes that nothing in the statute or regulation at issue prohibits the Director from issuing a PTI for sewer improvements while there is a pending challenge to an underlying areawide waste treatment management plan or a referendum petition challenging the project. Further, Appellant's Notice of Appeal does not allege any facts that show how he was, or might be, personally aggrieved or adversely affected by the alleged violations contained in AoE Nos. 2 and 4. See *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, supra at 599.

18. In Assignment of Error No. 3, Appellant claims that the sewer project authorized by the PTI "usurps [his] procedural rights to challenge assessments per R.C. (sic) 6117." While Appellant's cryptic, unexplained reference to an entire Chapter of the Revised Code is insufficient to give notice as to the actual nature of this Assignment of Error, the Commission presumes that Appellant is concerned about his ability to challenge any assessment that may be made by the Summit County Board of Commissioners for the sewer system improvements authorized by the issuance of the PTI.

19. Revised Code Chapter 6117 [*18] governs the establishment and operation of county sewer districts and authorizes a board of county commissioners to "... lay out ... and maintain, one or more sewer districts within the county ..." and to "... acquire, construct, maintain and operate within any district, sanitary or drainage facilities." R.C. Section 6117.01(B). Revised Code Section 6117.06 authorizes the board of county commissioners, if it determines to undertake sanitary facility improvements, to adopt a general plan of sewerage which may include a resolution to determine "... whether or not special assessments are to be levied and collected to pay any part of the cost of the improvement." R.C. Section 6117.06(A).

20. Appellant does not explain how the issuance of the PTI in this case will "usurp" his right to challenge assessments under R.C. Chapter 6117. He does not allege that an assessment on his property has been made or will likely be made for the sewer improvements at issue, nor does he explain how the issuance of the PTI would impair his ability to challenge a future assessment under the [*19] procedures for appeal set forth in R.C. Chapter 6117. See R.C. Section 6117.09. An action that the board of county commissioners may or may not take in the future regarding an assessment is far too speculative to establish standing in this action. See *Johnson's Island Property Owners' supra* at *8. Further, the interest which Appellant seeks to protect, the ability to challenge future assessments made by a county for sewer improvements is not within the realm of interests to be regulated or protected by the statute and regulations governing the issuance of a wastewater disposal PTI. *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, supra at 599.

21. Appellant also alleges that he has been aggrieved or adversely affected by the issuance of the PTI due to the costs associated with the sewer improvement project at issue. The Commission notes that this allegation is tantamount to a claim that any citizen might make concerning public expenditures and is insufficient to establish standing in this matter. "[A] general interest as a citizen does not convert an individual right into a right which would permit [*20] any citizen who suffers no distinct harm to sue a governmental agency." *Lujan v. Defenders of Wildlife* (1993), 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351.

22. Finally, Appellant attempts to establish standing by arguing that he will be aggrieved or adversely affected by the installation of the sewer system due to its proximity to property or properties that he owns. In his Lack of Standing Summary, Appellant asserted that the sanitary sewer pump station, which is a part of the project authorized by the PTI, will be located across the street from his property and may devalue his property, but Appellant conceded that any devaluation of his property "can only be speculative." The Commission finds that such alleged harm is purely speculative and that potential devaluation does not constitute "a realistic danger arising from" the issuance of the PTI. See *Johnson's Island Property Owners' Ass'n. v. Schregardus* at * 7

23. During oral argument, Appellant also alleged that part of the sewer line extension authorized by the PTI would be located adjacent to his property, however, Commission finds that Appellant failed to [*21] show that he has been, or will be aggrieved or adversely affected by the siting of the proposed project close to his property. The

Commission finds it persuasive that Appellant has not alleged, at any time during these proceedings, that he will be required to tie into the system authorized by the PTI. Indeed, he seems to be concerned about possible future extensions of the system that are not the subject of the present appeal. Any harm that he may suffer, economically or otherwise, by being located near the proposed sanitary sewer system improvements is purely speculative. Appellant has failed to satisfy the burden of demonstrating that he will suffer any immediate or threatened harm by the proposed project. See *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, supra at 599.

24. Thus, the Commission finds that Appellant did not demonstrate that he possessed the requisite standing to maintain the instant appeal.

SHILLING and MULRANE, COMMISSIONERS, concur.

RULING ON MOTION AND FINAL ORDER

Based on the foregoing, the Commission hereby GRANTS the Director's Motion to Dismiss for lack of standing and DISMISSES this matter.

The Commission, [*22] in accordance with Ohio Administrative Code Section 3746-13-01, informs the parties that:

Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

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71 Ohio St. 3d 318, *; 1994 Ohio 183;
643 N.E.2d 1088, **; 1994 Ohio LEXIS 2917, ***

Ohio Contractors Association, Appellant, v. Bicking, Director, Ohio Public Works Commission, et al., Appellees

No. 93-2034

Supreme Court of Ohio

71 Ohio St. 3d 318; 1994 Ohio 183; 643 N.E.2d 1088; 1994 Ohio LEXIS 2917

November 29, 1994, Submitted
December 23, 1994, Decided

PRIOR HISTORY: [***1] Appeal from the Court of Appeals for Franklin County, No. 93AP-939.

On October 30, 1992, the village of South Point entered into a contract with the Ohio Public Works Commission to fund a storm sewer drainage project known as Garden Court Neighborhood Storm Drainage Improvements. The estimated cost of the project was \$ 450,000. Of this amount, \$ 370,000 was to be paid by the State Issue 2 Small Government Fund, \$ 5,970 was to be financed through local public revenues, and the village was to provide the remaining \$ 74,030 from in-kind contributions, including labor by village employees and cash. Hence, as part of its funding, the village intended to use its own employees for the labor portion of the project and to pay them less than the prevailing wage. Even though the village had decided to employ its own workforce, it nevertheless advertised in the local paper for bids for the installation of the storm sewer.

Ohio Contractors Association ("OCA"), a not-for-profit corporation and association of Ohio contractors, was upset with the village's decision not to competitively bid the labor portion of the sewer project. Therefore, OCA filed suit in the Franklin County Court [***2] of Common Pleas against W. Lawrence Bicking, Director of the Ohio Public Works Commission, and Pat Leighty, the village administrator of South Point. OCA sought to enjoin construction of the project and disbursement of funds; it further asked the court to declare that defendants violated statutory bidding requirements and that the bidding procedure used by the village was unlawful.

A two-day hearing was held before a trial-court referee. At the hearing, Leighty testified that he had told two prospective bidders that the village planned to proceed with the project by "force account." This meant that it would use its own employees to perform the labor rather than hire private contractors. Nonetheless, Leighty told these contractors they were welcome to submit bids. No bids were submitted. Nor did any contractor testify that he intended to bid the project. In fact, OCA's only contractor witness did not intend to submit a bid and did not even speak with anyone about submitting a bid until the actual bid date.

The referee found that OCA had standing to bring the lawsuit and that the village was not obliged to competitively bid for the installation of the storm sewer. The referee [***3] recommended denying OCA's request for preliminary and permanent injunction.

Both OCA and Leighty filed objections to the referee's report. Leighty specifically objected to that portion of the report wherein the referee found that OCA had standing to bring suit.

The trial court overruled the objections of OCA. However, it sustained the village's objection as to standing. The trial court adopted the referee's report on all other grounds.

OCA filed a timely appeal to the Franklin County Court of Appeals. The court of appeals chose not to resolve the standing issue, but instead reached the merits of the case and affirmed the trial court.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant contractors' association challenged the judgment of the Court of Appeals for Franklin County (Ohio), which sustained an objection by appellees, state official, village, and others, to the

standing of the contractors' association to bring an action challenging the bidding decisions on a public construction project.

OVERVIEW: Subsequent to the village's decision not to competitively bid the labor portion of a sewer project, the contractors' association brought an action and claimed that the decision was illegal. However, the court concluded that the association lacked standing to bring the suit because none of the members of the contractors' association intended to submit bids, which the village had stated it would welcome despite its initial decision. The court held that the contractors' association failed to show actual injury to any of its members, which was requisite to establishing standing.

OUTCOME: The court affirmed the judgment of the appellate court and dismissed the action because the contractors' association lacked standing.

CORE TERMS: contractor's, bid, legality, village's, suffered actual injury, concrete, standing to challenge, bidding

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HN1  The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN2  An association has standing on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. However, to have standing, the association must establish that its members have suffered actual injury. To be compensable, the injury must be concrete and not simply abstract or suspected. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN3  The Ohio Supreme Court holds that a contractor's association lacks standing to pursue a cause of action in a representative capacity where its members fail to bid on the project in question. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HEADNOTES

Civil procedure -- Association representing private contractors lacks standing to challenge the legality of a village's bidding procedure on a storm sewer drainage project when its members fail to bid on the project.

COUNSEL: *Schottenstein, Zox & Dunn* and *Roger L. Sabo*, for appellant.

Lee Fisher, Attorney General, and *Doug S. Musick*, Assistant Attorney General, for appellees *W. Lawrence Bicking*, Director of the Ohio Public Works Commission, and *David Kern*, Administrator, Ohio Small Government Capital Improvements Commission.

Vorys, Sater, Seymour & Pease, *G. Ross Bridgman* and *Michael N. Barnett*, for appellee *Pat [***4] Leighty*, village administrator.

John E. Gotherman and *Malcolm C. Douglas*, urging affirmance for *amici curiae*, Ohio Municipal League and Ohio Municipal Attorneys Association.

JUDGES: Francis E. Sweeney, Sr., J. Moyer, C.J., A.W. Sweeney, Douglas, Wright, Resnick and Pfeifer, JJ., concur.

OPINION BY: SWEENEY, SR.

OPINION

[*320] [1089]** Ohio Contractors Association asks this court to decide the legality of a village's decision to use its own, regularly employed workforce on a public project and to pay them less than the prevailing wage rather than competitively bid the work to outside contractors. Since we find that OCA does not have standing, we decline to reach the merits of this case. Instead, we dismiss the cause due to OCA's lack of standing.

HN1 The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented. *Warth v. Seldin* (1975), 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343, 354.

In this case, OCA seeks legal redress in its capacity as an association representing private contractors. In **[**5]** *Hunt v. Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383, 394. The United States Supreme Court has held that **HN2** an association has standing on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." However, to have standing, the association must establish that its members have suffered actual injury. **[**1090]** *Simon v. E. Kentucky Welfare Rights Org.* (1976), 426 U.S. 26, 40, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450, 460-461; *Warth, supra*, at 511, 95 S.Ct. at 2211-2212, 45 L.Ed.2d at 362. To be compensable, the injury must be concrete and not simply abstract or suspected. See *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, 424, 8 OBR 544, 548, 457 N.E.2d 878, 883.

OCA has failed to satisfy this burden. The evidence clearly shows that no outside bids were ever submitted on this project. The only contractor to testify on behalf of OCA neither submitted a bid nor intended to submit a bid. Thus, no aggrieved contractor exists. OCA has failed **[**6]** to prove that any of its members have suffered actual injury. Clearly, under the facts of this case, where no bid was submitted and there was consequently no concrete injury suffered by any private contractor, OCA does not have the standing to challenge the legality of the village's bidding procedure. **HN3** We hold that a contractor's association lacks **[*321]** standing to pursue a cause of action in a representative capacity where its members fail to bid on the project in question.

Accordingly, for the reason that OCA lacks standing, we affirm the judgment of the court of appeals, and dismiss the instant cause.

Judgment affirmed.

Moyer, C.J., A.W. Sweeney, Douglas, Wright, Resnick and Pfeifer, JJ., concur.

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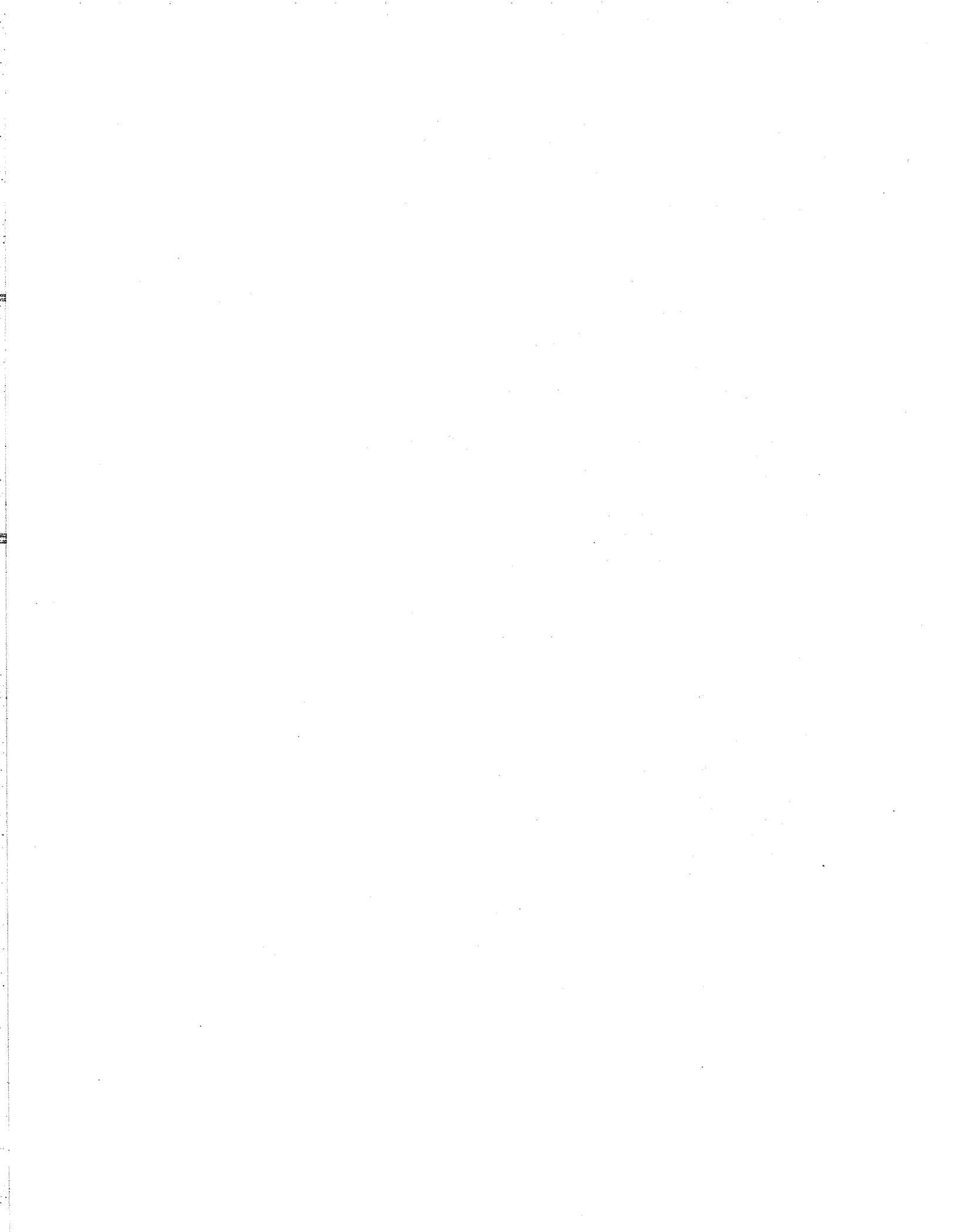
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Citation: 56 Ohio App. 2d 6156 Ohio App. 2d 61, *; 381 N.E.2d 661, **;
1977 Ohio App. LEXIS 7085, ***; 10 Ohio Op. 3d 91CITIZENS COMMITTEE TO PRESERVE LAKE LOGAN ET AL., APPELLEES, v. WILLIAMS, DIRECTOR, ET AL.,
APPELLANTS

No. 77AP-504

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

56 Ohio App. 2d 61; 381 N.E.2d 661; 1977 Ohio App. LEXIS 7085; 10 Ohio Op. 3d 91

December 27, 1977, Decided

SUBSEQUENT HISTORY: [***1] Reporter's Note: A motion to certify was overruled by the Supreme Court of Ohio, April 20, 1978.**PRIOR HISTORY:** APPEAL: Court of Appeals for Franklin County.**DISPOSITION:** *Judgment reversed and cause remanded.***CASE SUMMARY****PROCEDURAL POSTURE:** Appellant Director of Environmental Protection sought review of the decision of the Ohio Environmental Board of Review (Board) (Ohio), which ordered the Director to modify the effluent limitations contained in a permit previously issued to the Board of County Commissioners of Hocking County, Ohio pursuant to the National Pollutant Discharge Elimination System (NPDES).**OVERVIEW:** Appellee citizen committee objected to the issuance of a discharge permit for sewer into Lake Logan. The Director had approved the permit. Upon review, the Board ordered the Director to modify the effluent limitations contained in a permit previously issued to the Board of County Commissioners of Hocking County, Ohio pursuant to NPDES. The order also instructed the County Commissioners to terminate the permitted discharge within a certain time period if modifications of their sewage plant were not meeting new effluent limitations ordered by the Board. Reversing and remanding the Board's decision, the court held that the Board failed to make its findings based on the proper test of "significant degradation." The Board only determined that the discharge from the new plant would have caused degradation with reasonable probability. The court noted that upon review the initial power and duty of the Board was not dissimilar to that of a court in an action seeking to enjoin administrative action. Its decision was limited to a determination of whether the action taken was unlawful, or constituted an abuse of discretion under the evidence presented.**OUTCOME:** The court reversed the Board's order and remanded the matter to the Board for an appropriate adjudication hearing, if desired by the parties, and for findings of fact upon the issue of whether the discharge from the installation would have occasioned a significant degradation of the waters of Lake Logan; and for the ultimate finding, whether the prior action of the Director was reasonable and lawful.**CORE TERMS:** environmental, lake, plant, effluent, degradation, water quality, assignments of error, technology, pollutants, sewage, nondegradation, installation, issuing, issuance, de novo hearing, high quality, discharged, treatment plant, factual issues, modification, installed, match, air, adjudication hearing, wastewater, modified, modify, sewage treatment, board of review, final order**LEXISNEXIS® HEADNOTES** Hide[Administrative Law](#) > [Agency Adjudication](#) > [Review of Initial Decisions](#)[Environmental Law](#) > [Solid Wastes](#) > [Permits](#) > [General Overview](#)[Governments](#) > [Local Governments](#) > [Administrative Boards](#)

HN1 Where the evidence demonstrates that the action taken (granting the permit) by the Director of

Environmental Protection is reasonable and lawful -that is, the evidence reasonably supports the Director's action - the Environmental Review Board must, in accord with [Ohio Rev. Code § 3745.05](#), affirm the Director even though it might have taken different action (denied the permit). The Board initially does not stand in place of the Director upon appeal, and is not entitled to substitute its judgment for that of the Director, but is limited to a determination of whether the action taken by the Director is unreasonable or unlawful. Where the evidence demonstrates that it is reasonably debatable as to whether the permit should be granted, the board's duty is to affirm the Director, rather than merely to substitute its judgment for his. If the board properly determines the action of the Director to be unreasonable or unlawful, it then possesses power similar to that of the Director, by way of vacating or modifying the action of the Director to implement the appropriate action in accordance with the evidence. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN2  The initial power and duty of the board on appeal is not dissimilar to that of a court in an action seeking to enjoin administrative action. In such an action, the court necessarily conducts a de novo hearing so that all pertinent evidence may be adduced. However, a court cannot predicate its decision upon whether it agrees with the action taken by the administrative agency, or would have taken such action, but, rather, is limited to a determination of whether the action taken is unlawful, or constitutes an abuse of discretion under the evidence presented. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN3  "Unlawful" means that which is not in accordance with law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN4  "Unreasonable" means that which is not in accordance with reason, or that which has no factual foundation. It is only where the board can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by the board upon the de novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Real Property Law](#) > [Zoning & Land Use](#) > [Special Permits & Variances](#) 

HN5  [Ohio Rev. Code § 3745.07](#) reads, in part, that if the director issues, denies, modifies, revokes, or renews a permit, license, or variance without issuing a proposed action, an officer of an agency of the state or of a political subdivision, acting in a representative capacity, or any person who would be aggrieved or adversely affected thereby, may appeal to the environmental board of review, within thirty days of the issuance, denial, modification, revocation, or renewal. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Administrative Law](#) > [Agency Adjudication](#) > [Review of Initial Decisions](#) 

HN6  [Ohio Rev. Code § 3745.05](#) does require the board to make written findings upon which its orders are based. [More Like This Headnote](#)

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Environmental protection -- Sewage treatment plant -- Lake containing higher quality water than required by EPA -- Degradation test to be applied -- Must be "significant" to support denial of permit -- Environmental Board of Review -- Appeal -- Initial powers of review -- May only determine if Director's actions unreasonable or unlawful -- Failure to join permit holder as party in [R. C. 3745.07](#) appeal -- Board not relieved of jurisdiction.

SYLLABUS

1. In determining whether a permit should be issued for the installation of a sewage treatment plant, the effluent of which will empty into a water source of a higher quality than required by Ohio EPA Regulation EP-1, an applicant must show (1) that the best treatment equipment available will be installed and (2) that the plant will not result in a

"significant degradation" of the water.

2. The Environmental Board of Review, initially, does not stand in the place of the Director of Environmental Protection in considering an appeal [***2] and may not substitute its judgment for that of the Director, but may consider only whether his actions were unreasonable or unlawful.

3. Where an appeal is taken to the Environmental Board of Review, pursuant to R. C. 3745.07, from the granting of a permit by the Director of Environmental Protection, and the party to whom the permit was issued is not made a party to the proceedings, such failure does not vitiate the Board's jurisdiction to consider the issues involved.

COUNSEL: *Messrs. Segreti & Tousey*, for appellees.

Mr. William J. Brown, attorney general, *Mr. Joel S. Taylor* and *Ms. Margaret A. Malone*, for Ned E. Williams, director of the Environmental Protection Agency.

Messrs. Vorys, Sater, Seymour & Pease, and *Mr. John W. Hoberg*, for Drummond Construction, Inc.

JUDGES: HOLMES, J., WHITESIDE and McCORMAC, JJ., concur.

OPINION BY: HOLMES

OPINION

[*62] [***663] This case involves the appeal from findings of fact and a final order of the Ohio Environmental Board of Review (EBR). In that order, the EBR ordered the Director of Environmental Protection to modify the effluent limitations contained in a permit previously issued to the Board of County Commissioners [***3] of Hocking County, pursuant to the National Pollutant Discharge Elimination System (NPDES). The order also requires the County Commissioners to terminate the permitted discharge within a certain time period if modifications of their sewage plant are not meeting new effluent limitations ordered by the board. The basic facts giving rise to this appeal are as follows:

In late 1971, or early 1972, Drummond Construction, Inc., investigated the possibility of developing a certain tract of land near Lake Logan as a residential subdivision. In connection with this development, Mr. Drummond discussed the sewage treatment necessary for this subdivision with Mr. Robers, Hocking County Sanitarian, and Mr. Marlow of the Ohio Department of Health, who approved the site as a subdivision. Further discussions were had with Mr. Cottrill, chief engineer of the Southeast District of the Ohio Department of Health, who stated a central sewage system would be required. Mr. Drummond subsequently obtained cost estimates for such a system, purchased the land, and retained an engineering firm to design the central waste water treatment plant. Thereafter, on October 10, 1972, general plans for the subdivision [***4] and plant were submitted to Mr. Cottrill.

In February 1973, the Director of Environmental Protection [*63] approved the site of the plant and its discharge into Lake Logan. On July 17, 1974, the Director issued a proposed Permit to Install for the construction of the plant, pursuant to Ohio EPA Regulation EP-30. The permit was modified by the Director in December.

In June 1974, Drummond Construction, Inc., on behalf of the Hocking County Commissioners, who were to own and operate the plan, applied for a National Pollutant Discharge Elimination System (NPDES) permit. In December 1974, the Director proposed that an NPDES permit be issued to the County Commissioners for the plant to be effective March 26, 1975. A public meeting was held in Hocking County on March 25, 1975, regarding the permit and the Director withdrew the proposed permit in order to consider the meeting record. Subsequently, the Director approved the issuance of the permit. The United States Environmental Protection Agency was notified of the intended issuance and the permit was issued in final form June 4, 1975.

On July 2, 1975, the Citizens Committee to Preserve Lake Logan, objecting to the issuance [***5] of such permit, filed its notice of appeal with the Environmental Board of Review. Neither Drummond Construction, Inc., the builder, nor the Board of County Commissioners were made parties-appellees to the appeal before the board. Drummond, however, was subsequently granted leave to intervene as an appellee.

On May 27, 1977, the EBR entered findings of fact and final order on its journal which reversed the order of the Director of Environmental Protection, and in effect modified the permit to the extent that any discharge of effluent may not degrade the water below the existing water quality of the receiving waters. Based on this action by the EBR, the Director and Drummond Construction, Inc., thereafter filed this appeal. The Director alleged the following assignments of error:

1. "The Environmental Board of Review erred both in failing to dismiss this appeal for lack of jurisdiction and in issuing an order affecting an NPDES permit issued [*64] to the Hocking County Commissioners in a proceeding where the Commissioners were not parties; its order also violates the 14th Amendment to the U. S. Constitution."

2. "The Environmental Board of Review erred in interpreting [***6] the nondegradation regulation to require that effluent 'match' surface water quality at certain locations on the lake."

[**664] 3. "The Environmental Board of Review erred in determining that the effluent from the sewage treatment plant in question must 'match' the existing water quality in Lake Logan in order to comply with OAC 3745-1-02."

4. "The Environmental Board of Review erred in issuing an order which required the Director to modify an expired NPDES permit."

5. "The Environmental Board of Review erred in issuing an order that requires the Director to violate state and federal law governing water pollution control."

6. "The Environmental Board of Review erred in issuing the instant order in that it failed to make written findings of the facts upon which such order is based as required by Section 3745.05 of the Revised Code."

7. "The Environmental Board of Review erred in basing its decision and order on its determination concerning the Director's actions prior to the issuance of the permit in question rather than on the evidence submitted at the *de novo* hearing held by the EBR."

8. "The Environmental Board of Review erred in issuing an enforcement order [***7] to permittee upon the apparent assumption that the modified permit would be violated; such an order is beyond the authority of the EBR."

Drummond Construction, Inc., alleged the following assignments of error:

"1. The Environmental Board of Review erred in failing to dismiss the Appeal from the action of the Director of Environmental Protection for want of jurisdiction.

"2. The Environmental Board of Review erred in finding the Director's Action Unreasonable and unlawful.

"3. The Environmental Board of Review erred in [*65] ruling that effluent limits for discharges into waters meeting or cleaner than water quality standards must match the quality of the receiving waters.

"4. The Environmental Board of Review erred in finding that the effluent limits to be included in the subject permit should be water quality related effluent limits.

"5. The Orders of the Environmental Board of Review are not supported by reliable, probative and substantial evidence and are not in accordance with law."

At the outset it should be stated that the crux of this case relates to the Director's assignments of error two and four, and Drummond's assignment of error three, which involve [***8] the attempt by the Environmental Board of Review to determine Ohio's "nondegradation" law as it relates to the discharge from a "new source" sewage treatment plant into a high quality body of water. After extensive testimony and evidence was taken, the EBR formulated 27 intertwined and complex findings. The board's basic finding and order, however, was that the discharge permit which was issued to the County Commissioners authorized a larger quantity of pollutants to be discharged into Lake Logan than is allowed by law. Nowhere in the board's 27 findings do they state that the law prohibits any discharges into the lake. The board does find, however, in Finding 14, that the effluent discharged into Lake Logan (which contains cleaner water than is required by Ohio EPA Regulation EP-1), "must meet the existing quality of the receiving waters * * *." Therefore, the board's finding was to the effect that "nondegradation" requires that effluent limitations in NPDES permits for discharge into high quality water must match the quality of the receiving waters. It is obvious, therefore, that an analysis of Ohio's "nondegradation" standards is required to determine the correctness of the [***9] board's order.

In that Lake Logan is a lake with water of a quality better than Water Quality Standards, and the sewage treatment plant was to be installed pursuant to Regulation EP-30, the Director was required, pursuant to EP 3745-1-04, to [*66] comply with Ohio's nondegradation standards. EP-1-04 states as follows:

"It is the policy of the Ohio EPA that waters whose existing quality is better than these standards as of July 1, 1973, will be maintained at their existing high quality, [**665] pursuant to the Ohio Water Pollution Control statutes, so as not to interfere with or become injurious to any assigned uses made of, or presently possible, in such waters. This will require that any industrial, public or private project or development that would constitute a new source of wastewater discharge or an increased wastewater discharge to high quality waters as part of the initial project design, to provide the most effective waste treatment available under existing technology, as provided in the Regulations of Ohio EPA governing installation of new sources of wastewater discharge."

Among the other pertinent regulations with which the Director must adhere in making [***10] his determination of whether to issue a permit for the installation and operation of a "new source" sewage treatment facility are the following.

EP 30-05, in part, reads:

"(A) The Director shall not issue a Permit to Install unless on the basis of the information appearing in the application and information gathered by or furnished to the Ohio EPA, he determines that installation or modification and operation of the new source of air pollutants, new source treatment works, or solid waste disposal facility will * * *

"(3) employ the best available technology; and

"(4) not cause significant degradation of the air or water, if at the time of installation or modification either the ambient air or the receiving water meets or is better than applicable air or water quality standards."

EP 31-04 states, in part: * * *

"(B) Authorized Discharge Levels.

"(1) Final Limitations.

"(a) Except as provided by paragraph (3), for each point source from which pollutants are discharged, the [*67] Director shall determine and specify in the permit the maximum levels of pollutants that may be discharged to insure compliance with * * *

"(iii) standards which prohibits significant degradation [***11] of the waters of the state, if the point source was installed or should have been installed pursuant to a Permit to Install under Chapter EP-30 of the Ohio EPA Regulations, * * *."

Based on these regulations, it is seen that effluent limitations for new sources are based upon "existing technology." As to degradation of the waters then, an applicant must be able to show that he installed the best waste treatment equipment available under existing technology, and, further, that the discharge from the plant will not cause a "significant degradation" of the water. These standards for nondegradation do not require a matching of the receiving water quality. What these regulations seek to achieve is a plan which protects existing and planned uses of waters in the state, while allowing for reasonable industrial and residential development.

The central focus thus becomes whether there was evidence before the board upon which a determination could be made as to whether or not these standards had been complied with. Therefore, a careful examination of the record is essential.

In regard to the design technology used in construction of the plant, Mr. Boothe, who designed the plant, testified [***12] that this type of plant was the best waste water system that could be put in. Mr. Boothe further stated that the plant incorporates the best existing applied technology, which is not in the mere experimental stage. Mr. Cottrill, chief of Southeast District of Ohio EPA, testified that the discharge of water pollutants from the sewage plant would not cause any problem with interfering or being injurious to the assigned uses in Lake Logan. On this point a review of the board's finding shows no finding that the technology utilized in this plant would not provide the most effective treatment available under existing technology as required by the regulations. It could have reasonably [*68] been concluded by the EBR that the evidence before the board supported the view that this treatment plant does in fact meet the standards required under Ohio law. However, the board made no such findings on [**666] this point, and the matter must be remanded to the EBR for an appropriate adjudication hearing, if requested by the parties, and for findings on this issue.

The next inquiry before the EBR should have been in relation to whether the effluent discharge under the final effluent [***13] limitations set out in the NPDES permit would cause a "significant degradation" of the waters in Lake Logan. In connection with this, Mr. Cottrill testified that the effluent limits set in the NPDES permit would not violate water quality standards. Mr. Cottrill further testified that if the plant is operated and maintained properly the water quality standards would not be exceeded in respect to dissolved oxygen, suspended solids, or fecal coliform. In addition, he stated that the phosphorus discharge would not cause any over-eutrophication in the lake, since there would not be any significant or excess growth of algae.

Mr. Boothe testified that the concentration of water pollutants from the plant will be smaller than the effluent limitations contained in the NPDES permit. Dr. Hedeem, a professor of biology at Xavier University, testified that in his opinion the effluent being discharged from the plant will increase eutrophication of the lake. However, he went on to say that it is impossible to tell how much it will increase the rate of eutrophication, and that this aging process will occur in any event.

The EBR, in its Finding 26, stated in effect that the discharge from this [***14] "new source" plant will cause degradation with reasonable probability. However, we feel that this is not the test, nor the requirement of the regulation. What the Director must determine in the issuance of this permit is whether the operation of this facility of highest available technology will comply with existing water quality standards and, in doing so, not occasion a significant degradation of this high quality water.

[*69] Here the evidence before the board on the issue of the degree of degradation of the waters of Lake Logan

could have reasonably supported the conclusion that the discharge of the effluents from this plant would be in compliance with the general water quality standards of the state, as set forth in EP 3745-1-02, and would not occasion a significant degradation of Lake Logan, or interfere with the various uses of the lake. However, the EBR did not make its finding using the proper test of "significant degradation." In such respect, the EBR erred, and the matter must be remanded for an appropriate adjudication hearing, if requested by the parties, and for findings on this issue.

At this point, a remand to the EBR being necessary, we feel that it would [***15] be timely to further clarify what we believe to be the original appellate procedure of the EBR pursuant to statute. Although upon a *de novo* hearing, pursuant to R. C. 3745.05, the board of review must, of necessity, make factual findings upon the factual issues presented, it is first necessary to define and delimit the factual issues to be determined upon appeal by the board.

As indicated, the factual issue before the board upon appeal herein was not whether the permit should be granted. Rather, the factual issue to be determined was whether the action of the Director in granting the permit was unreasonable or unlawful. This determination is to be made from the totality of the evidence before the board upon the *de novo* hearing.

HN1 Where the evidence demonstrates that the action taken (granting the permit) by the Director is reasonable and lawful -- that is, the evidence reasonably supports the Director's action -- the board must, in accord with R. C. 3745.05, affirm the Director even though it might have taken different action (denied the permit). The board initially does not stand in place of the Director upon appeal, and is not entitled to substitute its judgment for [***16] that of the Director, but is limited to a determination of whether the action taken by the Director is unreasonable or unlawful. Where the evidence demonstrates that it is reasonably debatable [*70] as to whether the permit should be granted, the board's duty is to affirm the Director, rather than merely to substitute its judgment for his. If the board properly determines [**667] the action of the Director to be unreasonable or unlawful, it then possesses power similar to that of the Director, by way of vacating or modifying the action of the Director to implement the appropriate action in accordance with the evidence.

HN2 The initial power and duty of the board on appeal is not dissimilar to that of a court in an action seeking to enjoin administrative action. In such an action, the court necessarily conducts a *de novo* hearing so that all pertinent evidence may be adduced. However, a court cannot predicate its decision upon whether it agrees with the action taken by the administrative agency, or would have taken such action, but, rather, is limited to a determination of whether the action taken is unlawful, or constitutes an abuse of discretion under the evidence presented.

[***17] **HN3** "Unlawful" means that which is not in accordance with law. As indicated, the board erroneously found the Director's action to be unlawful by utilizing a nondegradation, rather than a significant degradation standard.

HN4 "Unreasonable" means that which is not in accordance with reason, or that which has no factual foundation. It is only where the board can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by the board upon the *de novo* hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action.

The Director's assignments of error two and three, and Drummond's assignments of error two, three and five are hereby sustained.

As to the Director's assignment of error one, and Drummond's assignment of error one, both taking the position that failing to make the County Commissioners [*71] party-appellees before the EBR was jurisdictional, we must overrule such assignments. [***18] The pertinent section involved is **HN5** R. C. 3745.07, which is, in part, as follows:

"If the director issues, denies, modifies, revokes, or renews a permit, license, or variance without issuing a proposed action, an officer of an agency of the state or of a political subdivision, acting in a representative capacity, or any person who would be aggrieved or adversely affected thereby, may appeal to the environmental board of review, within thirty days of the issuance, denial, modification, revocation, or renewal."

Here the Director issued the permit in question and the appeal was filed within the prescribed thirty days. It seems to be undisputed that the County Commissioners had actual notice of the filing of the appeal, but did not seek joinder.

Joinder could have been accomplished if so desired, but such would have been merely a procedural action, and was not requisite to the proper invoking of the jurisdiction of the EBR.

The Director's assignment of error six alleges that the EBR erred in failing to make written findings of certain facts upon which the board's order is based.

HNG **R. C. 3745.05** does require the board to make written findings upon which its orders are based. The *****19** findings of fact here are rather extensive, however, as noted, and there were no findings relative to the degree of technology involved in this subject sewage treatment installation, and the degree of degradation it might occasion the waters of Lake Logan. We hold that the board erred, not only as to the absence of these findings, but in their interpretation of the applicable laws and regulations. This assignment of error is therefore sustained.

The remaining assignments of error, numbers four, five, seven and eight, of the Director are hereby overruled.

Drummond's fourth assignment of error is hereby overruled.

*****668** For the foregoing reasons, the order of the Board of Review is hereby reversed, and this matter is hereby remanded ***72** to the EBR for an appropriate adjudication hearing, if desired by the parties, and for findings of fact upon the issues of the degree of technology used in this installation, and upon the issue of whether the discharge from the installation would occasion a significant degradation of the waters of Lake Logan; and for the ultimate finding, in light of all of the evidence adduced, whether the prior action of the Director in issuing *****20** the permit was reasonable and lawful.

Judgment reversed and cause remanded.

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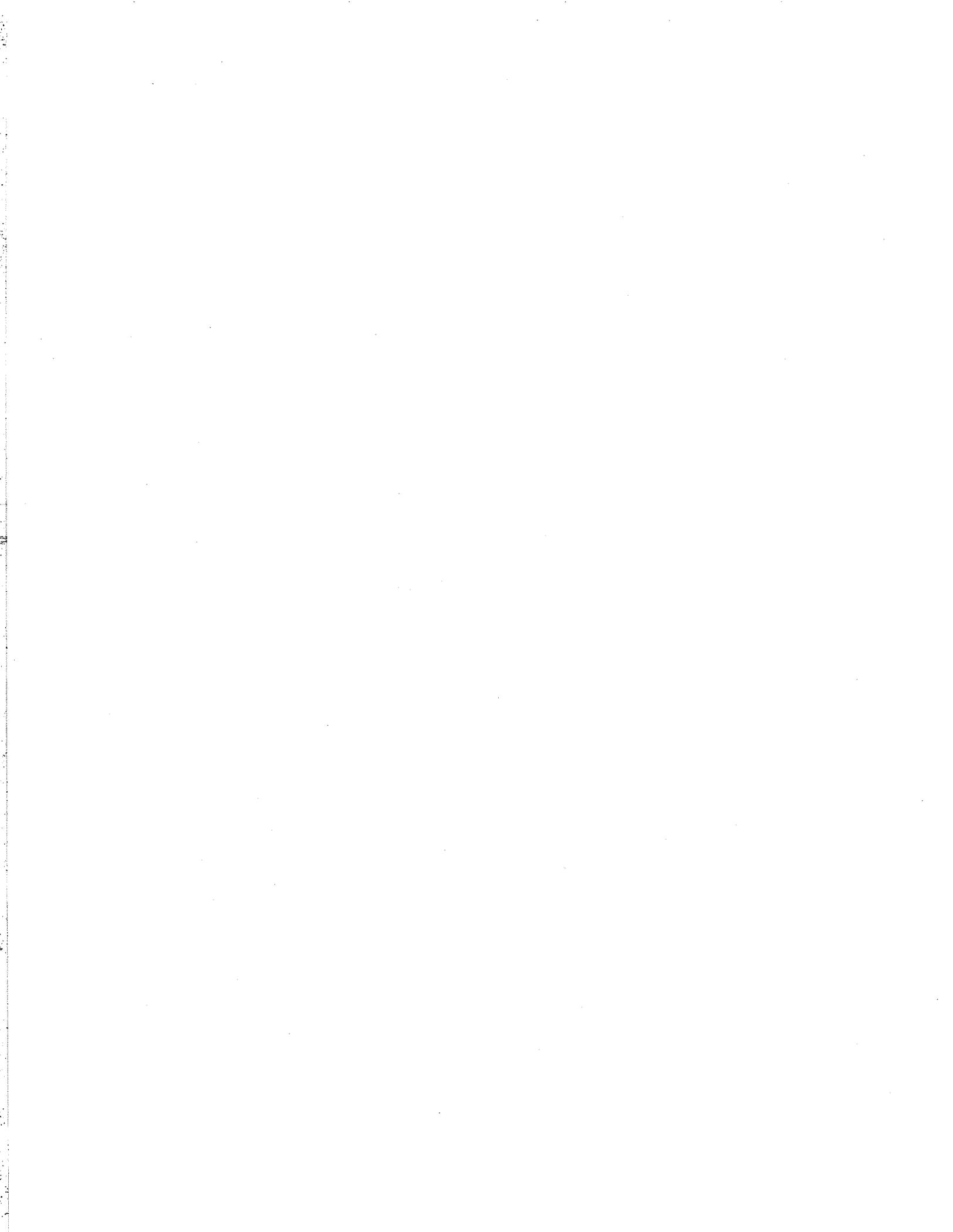
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ATTACHMENT 9



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Citation: 1997 Ohio ENV LEXIS 9

1997 Ohio ENV LEXIS 9, *

SOUTHWEST MONTGOMERY COUNTY ENVIRONMENTAL LEAGUE, ET AL., LEONARD J. HOWIE, JR., Appellants v.
DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL., Appellees

Case Nos. EBR 573283-573285; EBR 573286

Ohio Environmental Board of Review

1997 Ohio ENV LEXIS 9

March 26, 1997, Issued

CORE TERMS: solid waste, notice of appeal, air, dust, landfill, fugitive, bird, emission, local zoning, zoning, notice, assignment of error, notices of appeal, air pollution, particulate, ordinance, issuance, rezoning, roadways, speed, install, aggregate, visible, federal law, environmental, disposal, installation, blasting, mining, wind

[*1]

COUNSEL FOR APPELLANTS: Charles A. Smiley, Jr., Esq., SMILEY, SUAREZ & ASSOCIATES, Dayton, Ohio.

COUNSEL FOR APPELLEE DIRECTOR: William H. Haak, Esq., Assistant Attorney General, Environmental Enforcement Section, Columbus, Ohio.

COUNSEL FOR APPELLEE STONY HOLLOW: David E. Nash, Esq., Philip E. Lee, Esq., THOMPSON, HINE AND FLORY, Columbus, Ohio.

PANEL: Toni E. Mulrane, Chairman; Mary Kay Finn, Vice-Chairman; Jerry Hammond, Member.

OPINION:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter comes before the Environmental Review Appeals Commission ("ERAC" or "Commission") upon four notices of appeal filed by James L. Sweeney, who identified himself as the facilitator for an association known as Southwest Montgomery County Environmental League ("SMEL"), and three individuals, Leonard J. Howie, Jr. ("Howie"), Theresa Murphy ("Murphy"), and Robert J. Rosencrans ("Rosencrans"). A fifth related Notice of Appeal, filed on behalf of Act III Broadcasting of Dayton, was voluntarily dismissed by order of the Commission dated September 11, 1996 (Case No. EBR 573289).

In its February 23, 1995 Notice of Appeal, SMEL challenged the Director of the Ohio Environmental Protection Agency's ("Director" [*2] or "OEPA") January 25, 1995 decision to issue a solid waste Permit to Install ("PTI") to Waste Management of Ohio, Inc. ("Waste Management") for its Stony Hollow Recycling and Disposal facility ("Stony Hollow"). This matter was docketed as Case No. EBR 573283. In his February 24, 1995 Notice of Appeal, Howie challenged the January 25, 1995 issuance of the air PTI for the Stony Hollow facility (Case No. EBR 573286), but his February 27, 1995 corrected Notice indicated that he had intended to appeal only the solid waste PTI.

In their joint Notice of Appeal filed on February 23, 1995, Murphy and Rosencrans contested the Director's January 25, 1995 action issuing the air PTI for the same facility (Case Nos. EBR 573284 and 573285, respectively). There is some basis to conclude, discussed infra, that Rosencrans also appealed certain provisions of the solid waste PTI by virtue of the narrative portion of his Notice of Appeal and the addendum thereto. (See discussion, infra, concerning the overall adequacy of the Notices of Appeal.)

On April 12, 1995, Appellee Stony Hollow filed a Motion to Dismiss SMEL's appeal on the ground that the Commission lacked jurisdiction over the zoning [*3] issue identified as the sole assignment of error set forth in the Notice of Appeal. The Commission denied Stony Hollow's Motion on August 30, 1995 determining that the absence of any evidence before the Commission rendered such disposition inappropriate "at [that] time." Stony Hollow also filed a Motion to Dismiss Howie's appeal on April 12, 1995. The grounds for this Motion was that the vagueness of the Notice of Appeal did not meet the regulatory requirements for perfecting an appeal. The Commission similarly denied Stony Hollow's Motion on August 30, 1995. In the interim, on June 26, 1995, SMEL filed a Motion for Stay, which was denied by the Commission after Oral Argument on August 10, 1995.

Appellant SMEL appeared by and through its "facilitator", James L. Sweeney, both of whom were represented by Attorney Charles A. Smiley, Jr., Charles Smiley & Associates, Dayton, Ohio. n1 The record is unclear as to the status of Appellants Murphy's, Rosencrans' and Howie's legal representation. Although these Appellants initially appeared pro se, Mr. Smiley filed Briefs on behalf of each. These filings, however, were not preceded by an Appearance of Counsel, and directly conflict with [*4] representations made by Mr. Smiley in a July 12, 1996 letter to the Commission n2. Appellee Stony Hollow was represented by Attorneys David E. Nash and Philip W. Lee, Thompson, Hine and Flory, Columbus, Ohio. Appellee Director was represented by Assistant Attorney General William J. Haak.

n1 On July 16, 1995, Attorney Charles A. Smiley, Jr. entered an appearance on behalf of SMEL and Sweeney.

n2 In the July 12 letter, Mr. Smiley indicated that he does "not represent Messrs. Howie and Rosencrans, nor Ms. Murphy." In closing, Mr. Smiley states that "Mr. Rosencrans and Ms. Murphy will continue to act pro se".

----- End Footnotes-----

Based upon the pleadings of the parties, the attached affidavits, and the certified record hereby admitted into evidence upon the unopposed Joint Motion of the Director and Stony Hollow, the Commission issues the following Findings of Fact, Conclusions of Law and Final Order AFFIRMING the actions of the Director in each of these appeals.

FINDINGS OF FACT

1. On January 25, 1995, the Director issued a [*5] solid waste PTI (Application No. 05-5457) to Appellee Stony Hollow for the installation of a solid waste disposal and recycling facility located at 2460 South Gettysburg Avenue, Dayton, Montgomery County, Ohio. (Certified Record ("Cert. Rec.") Item No. 2.)
2. On the same date, the Director issued an air PTI (Application No. 08-2758) for the same facility for the air contaminant sources attendant to the disposal and recycling operations; e.g. soil mixing, roadways and parking areas, blasting, mining, and crushing and screening of aggregate. (Cert. Rec. Item No. 1.)
3. On February 23, 1995, Appellant SMEL filed a Notice of Appeal of the Director's issuance of the solid waste PTI. The assignments of error, appear to rest on SMEL's claim that the issuance of the PTI should be "reversed" due to the fact that the PTI "is in variance with local ordinance No. 28527," and conflicts with pending litigation concerning the rezoning issue. (Notice of Appeal, Case Nos. EBR 573283.)
4. Ordinance No. 28527 was approved by the Dayton City Commission on April 15, 1992 n3, and resulted in the rezoning of the proposed landfill site to light industrial (I-2), and the approval of planned development [*6] overlay No. PD-69 ("PD-69") n4.

n3 Judicial opinions attached to the pleadings reveal that the rezoning of the landfill site was the subject of protracted litigation before the Montgomery County Common Pleas and Appellate Courts, as well as before Judge Walter Herbert Rice in the U.S. District Court for the Southern District of Ohio. In 1991, in *Waste Management of Ohio, Inc. et al. v. City of Dayton, et al.*, Case No. C-3-91-081, WMO alleged that the defendants' failure to permit the rezoning of the proposed site to accommodate a landfill violated the Fifth and Fourteenth Amendments to the U.S. Constitution. This matter was settled via a Consent Decree in which the parties agreed to the rezoning and the approval, in some form, of PD-69. (Case No. C-3-91-081, Doc. No. 30.) In a subsequent declaratory judgment action filed by SMEL representatives and Howie against the City of Dayton and certain of its public officials in the Montgomery County Court of Common Pleas (Case No. 93-3667), SMEL alleged that the approval of PD-69 and the attendant rezoning was illegal and should be invalidated. This matter was later removed by the plaintiffs to federal court under 28 U.S.C. Sec. 1441(a) based on claims of original and ancillary federal jurisdiction. Following removal, the case was dismissed when Judge Rice granted the defendants' Motion to Remand to state court based on a lack of a basis for Article III jurisdiction. (Case No. C-3-93-436.) Subsequent attempts by SMEL to enjoin a vote on the rezoning issue, and an appeal of the trial court's decision to deny the injunction were also unsuccessful. (*Wall, et al. v. City of Dayton, et al.*, Case No. 92-1426; dismissed as moot, *Wall, et al. v. City of Dayton, et al.*, Case No. 13419, Ct. App. Montgomery County, May 5, 1993.) [*7]

n4 PD-69, variously referred to by all parties to these appeals, was approved in Ordinance 28527 subject to a

number of conditions addressing the siting of the Stony Hollow landfill, the preservation of the residential nature of the surrounding neighborhood, parking, signage, traffic control, access, permit requirements, and landfill dimensions. (Dayton City Ordinance No. 28527.) The parties do not dispute that PD-69 and the rezoning issue have been the subject of ongoing litigation concerning the intent and scope of PD-69, and the ultimate location and dimensions of the landfill.

----- End Footnotes-----

5. On February 25, 1995, the ERAC received a second packet of correspondence from SMEL and Sweeney that purported to be an amended Notice of Appeal n5. The amended Notice contained additional factual assertions but, by way of an assignment of error, asserted only that the "Ohio EPA did not consider local zoning requirements when approving the drawings that are part of the Permit to Install." (February 25, 1995 Amendment to Notice of Appeal, Case No. EBR 573286.)

n5 Although the amended Notice of Appeal was arguably untimely, the Commission accepted it for filing without a Motion from SMEL based on its pro se status and the absence of an objection. Basically, the February 27, 1995 filing was described as an amendment to the original Notice. However, the body of the amendment sought only to reaffirm the sole assignment of error contained in the original Notice, and did not contain any additional claims.

----- End Footnotes----- [*8]

6. There is no allegation in the original or amended Notice of Appeal in Case No. EBR 573283, set forth as a distinct assignment of error, that the Director violated any provision of Ohio's solid waste or air pollution control laws or the regulations promulgated thereunder.

7. On its face, the Notice of Appeal filed by Howie on February 24, 1995 challenged the issuance of air PTI No. 08-2758, and included copies of both the air PTI and solid waste permit No. 05-5457. A subsequent February 27, 1995 filing by Howie indicated that he intended to appeal only the solid waste PTI n6. The body of the Notice of Appeal was not affected by this change.

n6 As in the SMEL appeal, the Commission allowed this arguably untimely amendment for the reason that it was only the caption of the Notice that changed. In particular, the single sentence where Howie had referenced air PTI No. 08-2857 in his original cover documents was overstruck, and Howie had substituted in his own handwriting, solid waste PTI No. 05-5457. The Commission views this amendment as basically a clerical correction.

----- End Footnotes----- [*9]

8. Howie, like SMEL, focused on allegations that representations made in Dayton Municipal Ordinance No. 28527, PD-69, and by WMO representatives to the Stony Hollow residents, were vastly inconsistent with the PTI plan. (Notice of Appeal, Case No. EBR 573286.)

9. Howie included additional assertions that the Director "failed to safeguard the rights and welfare of the residents of the . . . area adjacent to the proposed landfill." (Id.)

10. Further, Howie alleged that the Director acted in concert with WMO to assist "environmental racism n7 and economic degradation" in the Stony Hollow community. (Id.)

n7 In the summation page of his Notice of Appeal, Howie asserts that the Director's alleged failure to take into account political and social factors evident in Montgomery County fostered WMO's "environmental racism" and turned "an attractive black community into an expanded landfill area."

----- End Footnotes-----

11. Despite all efforts to liberally apply pleading requirements to pro se litigants, there appears to be no [*10] cognizable assertion or statement of error in the Howie Notice of Appeal relating to an alleged increased bird population. n8 (See Finding of Fact No. 22, infra.)

n8 While related issues appear in the newspaper article attached to the Howie complaint such as concerns about noise from garbage trucks and odor from the landfill, we would be remiss in our duty as an objective tribunal if we were to construct assignments of error or make assumptions about attachments to the Notice of Appeal to facilitate the creation of error not specified in the Notice of Appeal.

----- End Footnotes-----

12. There is no allegation, discernable as an assignment of error, in the original or amended Notice of Appeal in Case No. EBR 573286 that the Director violated any provision of Ohio's solid waste or air pollution control laws or the regulations promulgated thereunder.

13. The Murphy Notice of Appeal (Case No. EBR 573284), filed on February 23, 1995, was captioned as a challenge to the Director's issuance of the air PTI to Stony Hollow. However, Murphy [*11] attached copies of both the air and solid waste PTIs to her Notice.

14. Murphy identified complaints about an alleged fugitive dust situation at what was referred to as the "Pinnacle Road landfill," and expressed her concerns that the same problem would again pervade the locale. n9

n9 Interestingly, Murphy's Notice of Appeal contains an apparent concession that the dust problem at the defunct Pinnacle Road landfill was not the result of a violation of any law or rule, and concludes that, for that reason, the Director will be powerless to control other dust emissions. Although the air PTI is annexed to the Notice of Appeal and referenced therein, there is no assignment of error set forth with regard to either Stony Hollow or the Director.

----- End Footnotes-----

15. There was no allegation in the Notice of Appeal in Case No. EBR 573284 that any provisions of Ohio's solid waste or air pollution control laws or the rules promulgated thereunder were being violated.

16. The Rosencrans' Notice of Appeal (Case No. EBR 573285), like the Murphy [*12] case, was directed to the air PTI and was captioned as an appeal of that action.

17. Rosencrans' appeal posed fugitive dust issues, questioned a 15 mile per hour wind speed limit contained in the permit and challenged the ability of the Ohio Environmental Protection Agency staff to adequately monitor wind speed n10. There is no reference in the Notice of Appeal regarding what provision of law was allegedly being violated.

n10 Although not identified in the Rosencrans Notice of Appeal, the Board interprets this argument to be directed to two provisions of the air PTI. First, with regard to solid waste disposal, the PTI provides:

This facility shall ensure solid wastes are deposited and compacted in such a manner as to minimize or prevent visible emissions of dust. This facility shall require all truck loads of solid waste to be unloaded in a manner which will minimize the drop height of the . . . wastes. Any dusty materials or wastes likely to become airborne[,] shall be watered as necessary prior to or during dumping operations in order to minimize or eliminate visible emissions of fugitive dust, . . . No dusty material shall be dumped during periods of high wind speed unless treated to prevent it from becoming airborne. "High wind speed" means equal to or greater than 15 mph (observed as raises dust, loose paper; small branches are moved). Application No. 08-2758 para. 14, p. 13 of 18.

Later, the PTI states:

Blasting and mining shall not be done during periods of high wind speed. "High wind speed" means equal to or greater than 15 mph (observed as raises dust, loose paper; small branches are moved). A portable anemometer may be used to ensure blasting and mining do not occur during periods of high wind speed. Application No. 08-2758, para 22, p. 15 of 18, "Mineral Extraction."

----- End Footnotes----- **[*13]**

18. Although Rosencrans did not indicate that his appeal was directed also to the solid waste PTI, the PTI was attached to his Notice of Appeal.

19. In the body of his Notice of Appeal, Rosencrans articulated an additional concern about the alleged increase in population of indigenous birds that, "black out the sun when they take flight." Rosencrans also cited disease control issues associated with the flocking of so many birds. (Notice of Appeal, Case No. EBR 573285.)

20. There was no allegation in the Notice of Appeal in Case No. EBR 573285 that any provisions of Ohio's solid waste or air pollution control laws or the rules promulgated thereunder were being violated.

21. Without entering a Notice of Appearance in Case Nos. EBR 573284, 573285 and 573286, Attorney Smiley filed Briefs on behalf of Howie, Murphy and Rosencrans on August 26, 1996. In each of these briefs, Howie, Murphy and Rosencrans, *for the first time*, attempted to assert various technical errors with regard to the issuance of the solid waste PTI. (Briefs of Appellants Howie, Murphy and Rosencrans, Case Nos. EBR 573286, 573284 and 573285, respectively.)

22. The myriad of new arguments raised by Howie in **[*14]** his brief included unsupported allegations that the Director did not conduct a lawful and reasonable technical review of the environmental issues evident in the PTI application; i.e. the Director allowed the closure of a monitoring well (p. 2), the Director failed to address the adequacy of the design plans for access roads and sedimentation ponds (p. 6), the Director failed to provide adequate protection to the underlying aquifer (p. 6), and the Director failed to mitigate the bird and scavenging animal population issues (p. 5). (Brief of Appellant Howie, Case No. EBR 573286.)

23. In Case No. EBR 573284, Murphy included novel allegations in her brief concerning procedural irregularities in the public hearing associated with the PTI. (Brief of Appellant Murphy, at p.2.)

24. In addition to his arguments concerning the potential flocking of birds to the landfill site, Rosencrans included in his brief unprecedented allegations concerning the zoning issues and assertions that the air PTI violated federal law.

25. Due to a lack of argument thereon, it also appears that Rosencrans had elected in the meantime not to pursue the assignment of error set forth in his Notice of Appeal letter **[*15]** concerning the fugitive dust problem. (Brief of Rosencrans at pp. 6-7.)

26. In its August 26, 1996 merit brief, SMEL, who had been represented by counsel for over a year, similarly raised new issues beyond the zoning dispute articulated in its Notice of Appeal. These included concerns with dust, mud, and siting issues, such as disagreements over the exact location and dimensions of the landfill. Attorney Smiley had entered an appearance on behalf of SMEL on July 17, 1995. (Brief of SMEL, Case No. EBR 573283.)

27. The new arguments in the Murphy, Rosencrans and Howie briefs surfaced over eighteen months after the filing of the Notices of Appeal.

28. Additionally, the new arguments were raised several months after the parties had agreed to submit the matters on briefs - - - a situation that generally is allowed by the Board only where the parties are in agreement that little or no factual disputes are apparent from the pleadings.

29. Appellants, despite their subsequent representation by counsel, never filed any request to amend their Notices of Appeal. n11 In fact, Attorney Smiley had entered an appearance on behalf of SMEL more than a year prior to the submission of the case on **[*16]** briefs.

n11 In the Commission's view, a Motion to Amend the Notice of Appeal would have afforded the opposing parties the opportunity to develop a strategy to formally oppose the amendment and/or avail themselves of the opportunity for an evidentiary hearing in order to develop contested factual issues. In any event, the Commission, rather than the

Appellants, should have determined the propriety of adding new arguments at such a latent stage of the proceedings.

----- End Footnotes-----

30. Thus, we preface our opinion that these cases are, at the very least, confusing. n12

n12 The Notices of Appeal in the Murphy and Rosencrans matters, identified as appeals of the air PTI, consist of a one or two page cursory narration followed by in excess of fifty pages of attachments including pleadings from related court cases, permits, zoning materials, public documents, judicial opinions, and both the solid waste and air PTIs. The SMEL Notice of Appeal contains a lengthy reiteration of what apparently transpired at a local public meeting concerning zoning, as well as what is claimed to be a partial transcript from an OEPA public hearing on the Stony Hollow solid waste PTI. In its initial and closing paragraphs, however, the SMEL Notice indicates that the grounds of the appeal and the basis for the reversal of the Director's action is that the PTI in question conflicts with zoning and pending rezoning litigation in the Montgomery County Court of Common Pleas. The Howie Notice of Appeal is more comprehensive, consisting of a narrative and summary several pages in length. It is accompanied by nearly forty pages of additional material, including newspaper articles, zoning documents, and photographs of the surrounding homes. Initially filed as an appeal of the air PTI, Howie later corrected the Notice of Appeal to indicate that he intended to appeal only the solid waste PTI. The addenda to his Notice included both the solid waste and the air PTI. Thus, regardless of the assignments of error set forth in their Notices of Appeal, some of which contained issues relevant to only one of the permits, each of the Appellants annexed both the solid waste and air PTI permits to their Notices. In some cases, the Appellants indicated they were appealing only the air PTI, yet included references to alleged deficiencies in the solid waste permit. The Commission includes this information in the Introduction in order to establish that these cases are confusing, and that the Commission has made every effort to both discern the errors alleged in such voluminous filings, as well as to accommodate the Appellant's intent where to do so would not unduly prejudice the Appellees. (See additional discussion, infra.)

----- End Footnotes----- [*17]

31. Ohio Administrative Code Section 3745-31-05(A)(3), entitled, "Criteria for decision by the director" under the heading, "Permit to Install New Sources of Pollution" states:

The director shall issue a permit to install [a new air contaminant source] . . . if he determines that the installation . . . and operation of the air contaminant source . . . will . . .

(3) Employ the best available technology . . . O.A.C. 3745-31-05(A)(3).

32. "Best Available Technology" or "BAT" is defined in the Ohio Administrative Code as:

. . . any combination of work practices, raw material specification, throughput limitations, source design characteristics, an evaluation of the annualized cost per ton of air pollutant removed, and air pollution control devices that have been previously demonstrated to the director . . . to operate satisfactorily in this state or other states with similar air quality on substantially similar air pollution sources. O.A.C. 3745-31-01(M).

33. PTI No. 08-2758, authorizing the operation of the air contaminant sources associated with the landfill, requires the employment of BAT with respect to each air contaminant source. (PTI No. 082758 at pp. [*18] 4 and 5 of 18, "Air Emissions Summary.")

34. In the PTI, the sources subject to BAT requirements are identified as the landfill, the soil mixing activities, roadways and parking areas, aggregate storage piles, blasting and mining, and aggregate crushing and screening. (Id.)

35. In PTI 08-2758, BAT with respect to the soil mixing is described as "control by water application to process." The permit indicates that compliance with BAT will result in "negligible particulate emissions." (Id. at p. 4 of 18.)

36. Best Available Technology for roadways and parking areas is described as "fugitive dust control requirements including water application." The emissions limit set for fugitive dust from these sources is 1.00 ton per year. (Id.)

37. With regard to the aggregate storage piles, BAT is described as "fugitive dust control by keeping piles moist or covered." The aggregate storage piles are expected to emit less than .29 tons per year of particulates. (Id.)

38. For blasting and mining and the transfer and loading of aggregate, BAT is defined as "fugitive dust control specified in [permit] terms and conditions." The special terms and conditions applicable to blasting [*19] and mining are set forth in a section entitled, "Mineral Extraction," and prohibit such activities during periods where the wind speed exceeds 15 mph. Again, "negligible particulate emissions" are expected from these activities. (Id.)

39. The BAT determination for aggregate crushing and screening are summarized as fugitive dust requirements including water application and limitation of drop heights." For these activities, limits of 5.49 lbs./day, up to 34.82 tons per year are specified. (Id.)

40. Finally, the BAT standards for the landfill operation is described as "fugitive dust control requirements . . ." In this case, the Regional Air Pollution Control Authority ("RAPCA") n13 indicated that negligible particulate emissions would occur due to required compliance with BAT determination. (Id.)

n13 The Regional Air Pollution Control Agency, or "RAPCA", is the approved local air agency which, pursuant to R.C. Sections 3704.111 and 3704.112, has been delegated certain powers and duties of the Director with respect to, *inter alia*, the review and drafting of air permits within a six county area.

----- End Footnotes----- [*20]

41. There was no evidence offered by any of the Appellants to support a conclusion that any of the measures identified by the Director as adequate to meet the rules' BAT mandate for the air PTI are inadequate.

42. With regard to fugitive dust, the regulated sources are also specifically required to comply with the applicable portions of O.A.C. 3745-17-08 and O.A.C. 3745-7-07. (Id.)

43. Ohio Administrative Code 3745-17-08 entitled, "Restriction of emission of fugitive dust," provides:

(B) No person shall cause or permit any fugitive dust source to be operated; or any materials to be handled, transported, or stored; or a building or its appurtenances or a road to be used, constructed, altered, repaired, or demolished without taking or installing reasonably available control measures n14 to prevent fugitive dust from becoming airborne. O.A.C. 3745-17-08(B).

n14 "Reasonably available control measures" means the control technology which enables a particular fugitive dust source to achieve the lowest particulate matter emission level possible and which is reasonably available considering technological feasibility and cost-effectiveness. O.A.C. 3745-17-01(B)(15).

----- End Footnotes----- [*21]

44. Ohio Administrative Code 3745-17-08 continues by specifying particular measures that must be undertaken by the operator of a fugitive dust source. These include requirements to (1) use water or other suitable dust suppression chemicals on active areas to control dust emissions, (2) periodically apply dust suppressants to roadways and parking lots, (3) cover, at all times, open-bodied vehicles when transporting materials likely to become airborne, and (4) pave roadways and maintain them in a clean condition. [O.A.C. 3745-17-08(B).]

45. Finally, O.A.C. 3745-17-08(C) states:

For purposes of determining compliance with the requirements of paragraph (B) of this rule, the director shall consider a control measure to be adequate if it complies with the following:

* * *

(1) the visible particulate emission limitation(s) contained in rule 3745-17-07 of the Administrative Code . . . [O.A.C. 3745-17-08(C).]

46. To the extent it is relevant to these appeals, O.A.C. 3745-17-07 contains the visible particulate emissions limitations for stationary sources, and includes fugitive dust limitations for paved and unpaved roadways. There is nothing in the record to suggest that the [*22] visible particulate emissions limitations set forth in air PTI No. 08-2758 are inconsistent with the allowable rates specified in the rule. (Cf. O.A.C. 3745-7-07(B)(4) - (5) and PTI No. 08-2758 at pp. 4 - 5 of 18.)

47. In addition to identifying the sources of air pollutants, the air PTI identifies applicable New Source Performance Standards ("NSPS"), as well as specific requirements under the National Emissions Standards for Hazardous Air Pollutants ("NESHAPS"). (Id., p. 5 of 18.)

48. Importantly, the air PTI incorporates approximately forty additional terms and conditions that detail the precise measures to be undertaken in order to control, among other things, fugitive dust emissions relative to each source of pollution. (Id., at pp. 8 - 18 of 18.)

49. The affidavit of Curt Marshall n15, Supervisor of ("RAPCA") Abatement Unit in Dayton, details the extensive research and review process that precedes the approval of any air PTI by RAPCA. (Brief of Appellee Stony Hollow, Attachment A, Affidavit of Curt Marshall.)

n15 Mr. Marshall's notarized affidavit was annexed to Stony Hollow's Brief. No counter affidavits of objections thereto have been lodged by any of the Appellants in these appeals.

----- End Footnotes----- [*23]

50. This process includes the systematic review of each application to determine the range and quantity of contaminants likely to be emitted, the air quality attainment status of the source location, and the allowable emissions limitation that will apply to each contaminant identified. (Id., at para. 7.)

51. Where, as here, the source is a new source of air pollution, RAPCA imposes the requirement that the operator employ BAT for controlling and limiting emissions. (Id., at para. 13.)

52. In the case of the Stony Hollow air PTI, Marshall details the procedure by which it was determined by RAPCA that one of the primary air contaminants to be emitted by the landfill was fugitive dust. (Id., at para. 18.)

53. RAPCA determined that compliance with Ohio's particulate matter rules codified at O.A.C. 3745-17-01, et seq., would satisfy the BAT requirement. (Id. at para. 22.)

54. Consequently, RAPCA incorporated applicable provisions of O.A.C. 3745-17 into PTI No. 08-2758. These conditions are generally described as the application of water or other dust suppressants, the sweeping of roadways, the observance of wind speed limitations, and a 1 - 3 minutes per hour [*24] limit for visible emissions from paved and unpaved roadways and parking areas, respectively. (Id., at para. 22; Cert. Rec. Item No. 1. at pp. 4 - 5 of 18, PTI No. 08-2758.)

55. Finally, RAPCA imposed a requirement in the air PTI that the operator comply with Federal New Source Performance Standards. (Id. at para 23; PTI No. 08-2758 at pp. 5 of 18.)

56. With regard to the allegations in the Rosencrans' Notice of Appeal concerning the flocking of large numbers of indigenous birds, O.A.C. 3745-27-06(C)(3)(d) requires permit applicants to:

Detail the measures and operations to control and manage the following:

* * *

(d) Fires, dust, scavenging, vectors, erosion, blowing litter and birds;

[O.A.C. 3745-27-06(C)(3)(d).]

57. The affidavit of Greg Meyer, Manager of Environmental Engineering for WMO, which is uncontroverted by Appellants, indicates that solid waste PTI No. 05-5457 specified the management practices that are designed to control the bird population at the Stony Hollow facility. In particular, Meyer cites to the daily cover specification in the solid waste application as a means to avoid attracting birds. (Meyer affidavit at para. 10.)

58. Further, in [*25] the solid waste provisions of air PTI No. 08-2758, there is a daily cover requirement that specifies that all waste areas are to be covered with at least six inches of cover at the end of each day. (PTI No. 08-2758 at p. 13 of 18.)

59. The OEPA's Summary of Responses to Public Comments Regarding Draft Solid Waste Disposal Facility Permit to Install for the Stony Hollow Recycling and Disposal Facility ("Summary") indicates that "requirements for landfill operation, including minimizing the area of the work face and applying daily cover material to eliminate exposed waste, are designed to minimize the attraction of birds to the landfill and any nuisances associated with birds." (Cert. Rec. 20 at pp. 13 - 14.)

60. The Summary also provides that, if birds become a nuisance due to operation at the landfill, the Montgomery County Health Department will address the issue during routine inspections. (Id., at p. 14.)

61. Finally, the Summary indicates that if bird droppings become an issue, the Ohio Department of Health should be notified. (Id., at p. 14.)

62. No party has cited any additional requirements for the control or minimization of indigenous bird populations.

CONCLUSIONS [*26] OF LAW

1. In determining a de novo appeal, the Commission must decide whether or not the Director's actions that are under appeal were unreasonable or unlawful. (R.C. Section 3745.05.)

2. "Unlawful" means that the action is contrary to applicable law. "Unreasonable" means that the action is not in accordance with reason or that it has no factual basis. It is only where the Commission can properly find from the evidence presented at the hearing that there is no valid factual foundation for the Director's action that the action in question can be found to be unreasonable. (Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61, 381 N.E. 2d 661 [Franklin County, 1977].)

3. Conversely, where the evidence indicates that the action taken by the Director is both lawful and reasonable, the Commission must affirm the action. (Id., at 69 - 70.)

4. This Commission is not confined to the record certified by the Director, but may consider additional evidence properly presented to it. [Northeast Ohio Regional Sewer District v. Shank, 58 Ohio St. 3d 16, 567 N.E. 2d 993 (1991); O.A.C. 3746-7-01(D).]

5. As long as there is a reasonable factual foundation for [*27] the Director's action, the Commission may not substitute its judgment for that of the Director. (Id., at 69 - 70.)

6. The burden of proof in this matter is upon Stony Hollow as the permit applicant. (Jackson County Environmental Committee v. Shank, Case Nos. 91 AP-57, -58 (Franklin Cty. App.), dec'd. December 10, 1991; Johnson's Island Property Owners Association v. Schregardus, Case Nos. 94 APH10-1441 - 1446, 94APH101472 - 1477, (Franklin Cty. App.) dec'd. June 15, 1995.)

7. The Commission's jurisdiction is limited to a resolution of issues raised in timely filed notices of appeal. A Notice of Appeal filed more than thirty days after the date of the subject act or action or notice thereof must be dismissed for lack of jurisdiction. (CLEAN, Inc. v. Schregardus, Case No. EBR 092958-61, dec'd Oct. 19, 1995; Palumbo v. Schregardus, Case No. EBR 892487, dec'd Sept. 5, 1991; Duren v. Schregardus, Case No. EBR 833204, dec'd Mar. 16, 1995.)

8. Generally, where an appellant attempts to raise new issues in an amended Notice of Appeal filed out of time, the Commission will engage in an ad hoc determination of the propriety of allowing such amendment.

9. In these [*28] instances, the Commission seeks to balance the judicial trend in favor of liberality against prejudice to any opposing party. In certain cases, we also weigh the apparent disadvantages of those Commission litigants who elect to appear without legal counsel.

10. Finally, we must examine the limits of our statutory jurisdiction to discern whether the amendment differs so significantly in substance from the original notice so as to impermissibly extend our jurisdiction beyond the thirty day appeal time.

11. In cases where the new issues are raised in briefs long after the original Notice of Appeal was filed, the Commission is extremely reluctant to consider questions that fall clearly outside the scope of the Notice of Appeal.

12. Our reluctance is magnified in this case where the subject Appellants were represented by counsel at the briefing stage, and, more particularly, where the pleadings which raise the novel disputes are the very briefs upon which the matter was submitted to the Commission.

13. The Appellees could not have reasonably anticipated the existence of the numerous factual disputes posed in the Appellants' briefs from the assertions set forth in the Notices of Appeal, [*29] Answers and other pleadings filed up to that time.

14. Nor is it reasonable to expect opposing parties to counter newly-raised factual arguments at the briefing stage.

15. Consequently, the Commission declines to consider including Murphy's new assertion that certain public hearing and comment requirements were not followed n16.

n16 Murphy's brief attempts to elevate her claim in her Notice of Appeal that the Director "did not listen to our comments at the Public Hearings" to a concise assignment of procedural error that the public hearing was somehow not lawfully conducted. We do not draw the same parallel from the Notice. Further, we question whether Murphy, in fact, intended to pursue this issue as an assignment of error when she concedes, in her Brief, that, "As a general proposition, it has been held that, although the Director may invite public comment and statements concerning a pending application and shall, then, consider those statements and comments, there is no express provision in the procedural rules requiring any direct response to be taken by the Director to those comments or statements. Trustees of Denmark Township vs. [sic] Nichols, (10/2/81) EBR 81-109." (Brief of Appellant Murphy at pp. 8 - 9.)

The public hearing argument in the Brief is one of several that illustrates that with respect to the issues of birds, fugitive dust, and public participation, the Appellants generally express concerns about shortcomings in the current law and regulations. Unfortunately, it is not our position to overrule the Director's actions because of alleged inadequacies in the law. As long as the Director acts in accordance with the current regulatory requirements, we cannot find his actions to be unlawful.

----- End Footnotes----- [*30]

16. In the interest of fairness to what were then pro se litigants, however, the Commission will examine the bird population complaint in the Rosencrans appeal, despite the fact that the Notices of Appeal did not purport in any way to be a challenge to the solid waste PTI. n17

n17 In addition, the Murphy and Rosencrans Appeals of the air PTI had annexed to them copies of the solid waste PTI, even though there was no reference to the solid waste permit at any point in the Notice of Appeal. If, indeed, the Commission had been aware of the attempt to appeal the solid waste PTI, the Murphy and Rosencrans appeals would have been docketed as four cases rather than as two, necessitating the submission of additional filing fees.

----- End Footnotes-----

17. With respect to this issue, the Appellees' had adequate notice and the opportunity to brief and present evidence.

18. The zoning and compliance with federal law issues raised by Rosencrans in his brief were raised in an untimely manner and will not be permitted for purposes of his appeal. [*31] However, as a practical matter, Rosencrans will have the benefit of a determination of his arguments on the zoning issue which appear in his brief by virtue of their inclusion, nearly verbatim, in the SMEL brief. n18

n18 In this regard, we do not mean to suggest that the disallowed issue is resolved as to the parties to the Rosencrans appeal, and we do not intend to further suggest that subsequent appeals in these unconsolidated cases would allow an appellant who had benefit of a fortuitous resolution of an issue not properly raised in his notice of

appeal in another of these related matters to raise such issue in the court of appeals as part of his individual case.

----- End Footnotes-----

19. Howie's Notice of Appeal focused on the zoning dispute and inconsistencies with PD-69. In his brief, however, Howie inappropriately attempted to raise the issue of birds and scavenging animals. Thus, the bird population and scavenging animals concerns raised in Howie's brief will not be resolved in his discrete appeal. However, again as a practical [*32] matter, the latter issue will nonetheless be indirectly addressed because we have allowed its inclusion, in nearly identical form, in the Rosencrans appeal.

20. The Commission also will not consider the additional solid waste issues raised by Howie for the first time in his merit brief. Identified in Finding of Fact No. 22, these include unsupported allegations concerning the siting of the landfill, the removal of a monitoring well, and the effect on the aquifer.

21. In the SMEL appeal, the Commission similarly rules to withhold consideration of the solid waste issues raised at the briefing stage beyond the single issue related to the PTI's consistency with Ordinance No. 28527.

22. Therefore, the Commission will not entertain arguments concerning the fugitive dust issue raised for the first time in the SMEL brief. SMEL did not cite any discernable error relative to the air PTI in its Notice of Appeal. Again, however, the resolution of this issue as part of the Murphy appeal will allow an indirect consideration of the fugitive dust question.

23. Whether the permit was issued in compliance with federal law was not raised in SMEL's Notice of Appeal, and will not be resolved here. [*33] n19

n19 Even if the Board were to allow this assignment of error, we would be constrained to find Appellant's arguments in this regard not well taken. The Commission does not agree with Appellant that the decision of a district court judge clarifying the terms of a consent decree, though a scholarly interpretation of a settlement agreement, rivals "federal law".

On a separate issue, whether or not the PTI was issued in a manner consistent with federal law would presumably involve additional factual inquiry not anticipated by the Appellees until the briefing stage.

To the extent that consistency with federal law is, as argued by Appellant, an issue inextricably related to the zoning dispute, see discussion, infra.

----- End Footnotes-----

24. Likewise, we will not consider SMEL's allegations, the scope of which is unclear from the briefs, that there was no valid factual foundation for the Director's determination that Stony Hollow was capable of operating the site in a lawful manner n20.

n20 Though the bulk of SMEL's arguments on this issue relate back to Stony Hollow's alleged physical inability to construct a facility which conflicts with a local zoning ordinance, SMEL nonetheless incorporates other claims concerning the siting of the landfill, groundwater, and prevailing wind issues that will not be entertained at this stage, due to the fact that they did not surface until the matter was submitted to the Commission.

----- End Footnotes----- [*34]

25. To hold otherwise at this juncture would operate to the great prejudice of Stony Hollow and the Director, permitting the latent interjection of substantial factual disputes that could not have been anticipated from the Notice of Appeal.

26. There is no requirement in R.C. Chapter 3734 or the rules promulgated pursuant to this chapter which establishes compliance with local zoning ordinances or restrictions as a solid waste permit approval criterion.

27. Specifically, O.A.C. 3745-31-05, which sets forth permit approval criteria for new sources of both solid waste disposal and air pollution does not even reference zoning requirements.

28. Thus, there is no legal basis for the argument that the Director's failure to consider zoning requirements under the approval criteria set forth in the statute and rules was unlawful.

29. Aside from the governing provisions of law, however, the courts have consistently recognized that the enforcement of local zoning ordinances lies within the province of local governments and courts, not with the Director as the permitting authority. [*City of Independence v. Maynard*, 25 Ohio App. 3d 20, 25, 495 N.E. 2d 444, 452 (Franklin County, 1985); [*35] *City of Garfield Heights v. Williams*, Case No. 77AP-449, slip op. (Franklin County).]

30. In the 1977 decision in *City of Garfield Heights*, supra, the court of appeals clarified its previous holding in *Columbia Township Trustees v. Williams*, Case No. 76AP-107, slip op. (Franklin County). In *Garfield Heights*, the court established that:

. . . the Environmental Protection Agency does not have jurisdiction to change or affect local zoning by the issuance of a permit. Instead the permitted use continues to be subject to local zoning. However, the director has the prerogative of granting a permit that is final so far as environmental consideration within his purview are concerned, even though the activity is not permitted by local zoning. Even if not expressly stated in the director' order, the permit issued is subject to local zoning and remains subject thereto.

* * *

. . . if the director issues a final permit, and the permit applicant seeks to execute the permit in violation of local zoning, the appropriate party can commence an action to enforce the local zoning. That action is commenced in the same fashion as an action to enforce local zoning. The creation [*36] of the Environmental Protection Agency with its pertinent powers has no effect on local zoning or the enforcement thereof. [Emphasis added.]

31. Later, in *City of Independence*, supra, the court had before it a case where the Director had issued a permit for the construction of a landfill which was proposed to be sited on a portion of the Cuyahoga Valley National Recreation Area. In addition to other restrictions, the City of Independence had enacted an ordinance specifically prohibiting the construction of such a facility in the protected area.

32. Nonetheless, the court of appeals unequivocally reiterated its position that the Director is not required to consider local zoning issues when approving a PTI for a solid waste landfill, holding:

In disposing of the second assignment of error, we observe first that R.C. 3745.011, by which the General Assembly enunciated the specific function of the Environmental Protection Agency, says nothing with respect to the Agency's responsibility to defer to local zoning ordinances, master plans, or the social and economic impact of the establishment of a landfill in any part of this State. (*Id.* at 25.)

33. The court further [*37] explained its decision that the functions of local governments and the Director are discrete with respect to the scope of their lawful authority:

Determination of whether of not to grant or deny a permit to install a facility is predicated upon the impact of the proposed facility on the environmental or public health. Zoning and pollution control are separate and distinct governmental interests, independently enforced and administered by different governmental units. (*Id.*, at 25.)

34. Importantly, the court concluded:

Neither the director nor the Board has jurisdiction to prohibit the installation of a landfill for the reason that another government agency may object to such installation. (*Id.*)

35. Finally, in *Families Against Reily/Morgan Sites v. Butler County Board of Zoning Appeals*, 56 Ohio App. 3d 90,

564 N.E. 2d 1113 (Butler County 1989), the court of appeals held:

. . . the legislature intended for the state through the Ohio EPA to preempt and solely occupy the licensing and regulation of solid waste disposal and sanitary landfill facilities. However, local zoning does play a pivotal role in the installation and chartering of these facilities. [*38] Once the Ohio EPA has granted approval, its permit is subject to those local zoning provisions which do not conflict with the environmental law and regulations approved by the state. (Id.)

36. We do not find merit in the Appellants' arguments that if zoning renders the installation of the facility arguably impossible or more difficult, the Director must conclude that the facility cannot be operated in accordance with applicable environmental laws. Such a position would directly conflict with consistent and long-held pronouncements of the courts.

37. To hold contrary would interject the Director into the realm of local zoning, where he would be required to use his resources to become the arbiter of disputes between local governments and permittees. Not only is the Director unlikely to possess the expertise to engage in such determinations, the scope of his responsibility would be distorted beyond his statutory authority to oversee the environmental impacts of permitting.

38. With respect to the issue of social and economic factors raised in the Howie complaint, O.A.C. 3745-31-05(C) provides that such consideration is purely discretionary:

(C) In deciding whether to grant [*39] or deny a permit to install or plan approval, *the director may take into consideration the social and economic impact of the air contaminants, water pollutants, or other adverse environmental impact that may be a consequence of issuance of the permit to install . . .* [O.A.C. 3745-31-05(C).]

39. Even if the Director failed to consider social and economic factors, however, such a failure does not render the Director's action unlawful or unreasonable. [Kuzman v. Nichols, Case No. EBR 18793 (April 15, 1982).]

40. Where the consideration of social and economic factors is discretionary, it is not a basis for overturning the decision of the Director that he failed to do so. (Id.)

41. Further, where there exists a reasonable factual foundation for the Director's action, the Commission's duty is to affirm. (Citizens Committee to Preserve Lake Logan, supra, at 69 - 70.)

42. With regard to the fugitive dust complaints in the Murphy and Rosencrans appeals, we find that both the air and solid waste PTIs meet the legal requirements relevant to these matters.

43. Specifically, we find that the BAT requirement for landfill-associated air pollution sources (fugitive dust) and [*40] the requirements vis-a-vis visible emissions limitations set forth in O.A.C. 3745-17-01, et seq., are clearly incorporated into the air PTI.

44. Finally, with regard to the bird population issues raised by Rosencrans, we find that the solid waste PTI adequately addresses the requirement of O.A.C. 3745-27-06(C)(3)(d).

45. In sum, the Commission determines that the Director's approvals of both air PTI No. 08-2758 and solid waste PTI No. 05-5457 were lawful and reasonable.

FINAL ORDER

For all of the foregoing reasons, the Environmental Review Appeals Commission hereby AFFIRMS the actions of the Director issuing air PTI No. 08-2758 and solid waste PTI No. 05-5457.

The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Review Appeals Commission may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal [*41] designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and

mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

CONCURBY: HAMMOND

CONCUR:

Jerry Hammond

CONCURRENCE

While I concur with the decision of this Commission, I feel it is important to note that in this instance the process of government interaction failed miserably to protect the interests of a community. It is clear that the residents of Stony Ridge relied upon the agreement reached by the City of Dayton and Waste Management. It is equally clear that the plan agreed to was not the plan acted upon by OEPA.

While I understand that the Director of OEPA is not required to take local zoning issues into consideration when issuing a PTI (and justifiably so in most instances), this case highlights how that policy impacts negatively on people who look to government for relief. For all intents and purposes, the residents [***42**] of Stony Ridge have every right to believe that neither the City of Dayton nor the State of Ohio acted in their best interests. It would have been far better if the Director could have delayed the issuance of the PTI until such time as the litigation surrounding Dayton City Ordinance 28527 had been resolved. However, since he is not required to do this and since this Commission cannot substitute its judgment for that of the Director, it is clear that his decision must be supported as being "lawful and reasonable."

Legal Topics:

For related research and practice materials, see the following legal topics:

[Environmental Law](#) > [Solid Wastes](#) > [Disposal Standards](#) 

[Environmental Law](#) > [Solid Wastes](#) > [Permits](#) > [General Overview](#) 

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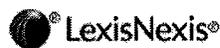
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ATTACHMENT 10



Service: Get by LEXSEE®
Citation: 1982 Ohio ENV LEXIS 5

1982 Ohio ENV LEXIS 5, *

JOHN P. KUZMAN, Appellant, v. WAYNE S. NICHOLS, DIRECTOR OF ENVIRONMENTAL PROTECTION and MAYOR AND COUNCIL, Appellees

Case No. EBR 18793

Ohio Environmental Board of Review

1982 Ohio ENV LEXIS 5

April 15, 1982, Issued

CORE TERMS: sewer, install, mandatory, issuance, sewage, water quality, installation, aeration, sanitary, tertiary, applicable law, final action, regulation, parties stipulated, court of appeals, order appealed, certified mail, notice, installed, submittal, staff, plant

[*1]

COUNSEL FOR APPELLANT: No Counsel of Record.

COUNSEL FOR APPELLEE DIRECTOR: Terrence M. Fay, Esq., Assistant Attorney General, Environmental Law Section, Columbus, Ohio.

COUNSEL FOR APPELLEE MAYOR AND COUNCIL: Rick J. Carbone, Esq., Law Director, Lyndhurst, Ohio.

PANEL: Thomas M. Phillips, Chairman; Sherman L. Frost, Vice-Chairman; James L. Baumann, Member.

OPINION:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

INTRODUCTION

This case concerns an appeal by John P. Kuzman of Olmstead Falls, Ohio of a final action of the Director of Ohio Environmental Protection Agency in which the Director granted a Permit to Install (PTI) certain sewage facilities by the City of Olmstead Falls. The Board held a prehearing conference, a de novo hearing, received responsive briefs and examined the Director's Certified Record (R.C. 3745.04). Based on the evidence now before it, the Board finds as follows:

FINDINGS OF FACT

1. On May 21, 1981, Appellee City of Olmstead Falls (Appellee) submitted an application to the Ohio Director of Environmental Protection (Director) for a permit to install two 25,000 gallon extended aeration plants at its Brookside/Garfield Wastewater Treatment Plant and 3,609 [*2] lineal feet of 8 inch sanitary sewers. See Document No. 15, Certified Record of Proceedings in Case No. EBR 18793 (hereinafter, "R- "), together with a Sanitary Data Sheet, (R-13) and treatment facility data sheet, (R-16) describing the extended aeration plants and sanitary sewers. Also submitted with this application was evidence that the legislative authorities of Appellee City had approved the installation of such extended aeration plans and sewers (R-14).
2. After the submittal of additional information by Appellee's consultant (R-12, 17-19) at the request of the Director's staff (R-11) on August 6, 1981, the Director's staff advised him that the plans for the upgraded sewage treatment facility and sanitary sewer extensions were satisfactory (R-20). On September 1, 1981, the Director issued the requested PTI (R-21) as a final action.
3. On September 8, 1981, the issuance of the PTI at issue was publicized in the Weekly Review and on September 20, 1981, in the Cleveland Press (R-4 and 3). On September 21, 1981, Appellant filed a Notice of Appeal with the Board, and followed it by an Amended Notice of Appeal on October 9, 1981.
4. In his Amended Notice of [*3] Appeal, Mr. Kuzman challenged issuance of the PTI to the City on essentially two grounds: (a) the cost of tertiary treatment and the alleged failure of the City to advise those of its citizens who will

pay for the facilities to be installed under the challenged permit of the requirement to include tertiary treatment; and (b) the inconsistency of the facility and sewers approved by the Director with a prior master plan for taking care of all the City's sewage problems. In his Prehearing Brief Mr. Kuzman addressed at length the second issue raised in his Amended Notice of Appeal. (See Appellant's Assignment of Error and Brief filed January 6, 1982, Exhibit D and Exhibit E which shows approval of general plans for Olmstead Falls by the Director of Ohio Department of Health on September 15, 1958.)

5. A hearing de novo was held by the Board in this matter on January 20, 1982. In place of the submittal of evidence the parties chose to read into the record a stipulation of facts.

6. The parties stipulated that installation and operation of the facility for which Appellee City of Olmstead Falls sought a permit to install would:

(a) Not prevent or interfere with the attainment [***4**] or maintenance of applicable ambient water quality standards; and

(b) Not result in a violation of any applicable laws; and

(c) Employ the best available technology; and

(d) Not cause significant degradation of the water, if at the time of installation receiving water meets or is better than applicable water quality standards.

7. At the conclusion of the hearing, the Board indicated its intention to affirm the Director. At the request of the Board the Director agreed to furnish a memorandum and/or affidavit specifying the current status of the Northeast Ohio Regional Sewer District (R-7) and clarifying the guidelines the Director will use to determine when the treatment plant is no longer "temporary" and when the tertiary rapid sand filter will be required as shown in the Director's Order (R-1). The affidavit filed in response to this request was received April 6, 1982, and was made a part of the Board's Record.

CONCLUSIONS OF LAW

1. The Board is empowered to vacate or modify an action of the Director when it finds that the action was "unlawful or unreasonable", R.C. § 3745.05; Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App.2d 61, 10 Ohio Ops.3d [***5**] 91, N.E.2d 661 (Franklin County App., 1977).

2. In challenging the issuance of a PTI, the challenger, in this case Mr. Kuzman, has the burden of demonstrating either that the Director's action is not in accordance with applicable law, or is without a substantial factual foundation. O.A.C. § 3746-5-30(C) (3); Lake Logan, *supra*.

3. The regulation which governs issuance of PTI(s) is contained in Section 3745-31-05 of the Ohio Administrative Code. The criteria set forth in subsection (A) of that section, which concern, inter alia the impact of the proposed facility's discharge on water quality, the technological design of the proposed facility, and whether the proposed facility can be installed and operated consistently with other applicable law, are mandatory. If the proposed facility violates any of the mandatory criteria set forth in O.A.C. § 3745-31-05(A), the Director cannot lawfully issue a PTI for such facility. The criteria set forth in subsection (B) of that section, which include, inter alia, the social and economic impact of granting or denying the permit to install, are not mandatory. The Director may deny a PTI upon any of the discretionary factors included [***6**] in O.A.C. § 3745-31-05, but he need not, and his failure to do so does not render his decision to issue a PTI either unreasonable or unlawful. Bernard v. McAvoy, Case No. EBR 79-86 (March 3, 1980) approved and followed.

FINAL ORDER

WHEREFORE, since the parties stipulated that the mandatory requirements of C.A.C. § 3745-31-05(A) have been satisfied in the instant case, and since the two issues raised by Appellant for this Board's review (the cost of the proposed facility and its relation to a master plan for collecting and treating the sewage of the entire City) relate to criteria concerning which the Director has the discretionary authority under O.A.C. § 3745-31-05(B), but not a mandatory duty to consider, the Board finds that the decision of the Director to issue the challenged PTI to the City of Olmstead Falls is neither unreasonable nor unlawful and must be affirmed.

The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged [***7**] violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the

Board by certified mail of the making of the order appealed from. No appeal bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:

[Administrative Law](#) > [Agency Adjudication](#) > [Prehearing Activity](#) 

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ATTACHMENT 11



Service: Get by LEXSEE®
Citation: 2008 Ohio 5058

2008 Ohio 5058, *; 2008 Ohio App. LEXIS 4279, **

CLUB 3000 et al., Appellants-Appellants, v. Christopher Jones, Director of Environmental Protection et al., Appellees-Appellees.

Nos. 07AP-593, 07AP-598, 07AP-599

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2008 Ohio 5058; 2008 Ohio App. LEXIS 4279

September 30, 2008, Rendered

SUBSEQUENT HISTORY: Application granted by, Cause dismissed by Club 3000 v. Jones, 2009 Ohio 565, 900 N.E.2d 1017, 2009 Ohio LEXIS 380 (Ohio, 2009)
Subsequent appeal at Stark-Tuscarawas-Wayne Joint Solid Waste Mgmt. Dist. v. Republic Waste Servs. of Ohio II, LLC, 2009 Ohio 2143, 2009 Ohio App. LEXIS 1799 (Ohio Ct. App., Franklin County, May 7, 2009)

PRIOR HISTORY: [1]**

APPEAL from The Environmental Appeals Review Commission. (ERAC Nos. 795307-795320, 795323 and 795334).

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants, a property owner, a village, and a solid waste management district (SWMD), sought review of an order from the Environmental Review Appeals Commission (Ohio), which affirmed the decision of appellee, the Director of the Ohio Environmental Protection Agency (OEPA), to grant appellee waste service company (WSC) a permit to install (PTI) an expansion to its solid waste landfill facility.

OVERVIEW: The WSC applied for a PTI in order to expand its existing solid waste facility and in support thereof, various reports were included. After the WSC agreed to additional conditions and after extensive investigation into the application, it was approved by the OEPA. Appellants sought review by the Commission, which conducted a de novo hearing and thereafter affirmed the OEPA's approval. On further review pursuant to R.C. 3745.06, the court initially determined that it lacked jurisdiction over the appeals by the village and the SWMD, as they had only served the OEPA Director's counsel by ordinary mail, which was inadequate under R.C. 3745.06. As to the appeal by the owner, the court held that there was reliable, probative, and substantial evidence to support the Commission's decision, which was in accordance with law. The OEPA and Commission agreed that upon the evidence, the requirements for the permit pursuant to Ohio Admin. Code 3745-27-06 were met. As the quantum of evidence supported that decision, the court deferred to the Commission's special expertise in its resolution of the parties' conflict regarding whether fractures beneath the landfill were hydraulically communicative.

OUTCOME: The court dismissed the appeals by the SWMD and the village. It affirmed the order of the Commission.

CORE TERMS: fracture, shale, site, geology, certified mail, boring, hydraulic, hydrogeology, landfill, formation, monitoring, assignments of error, hydrogeologic, testing, environmental, notice, de novo hearing, notice of appeal, groundwater, complied, beneath, ground water, hydraulically, certificate, probative, reliable, drilling, borehole, appealing, confining

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HNI The right to appeal from an administrative order is governed by statute. An administrative appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN2 See [R.C. 3745.06](#).

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Jurisdiction & Venue](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Jurisdiction & Procedure](#) 

HN3 [R.C. 3745.06](#) requires that a notice of appeal be filed with the Environmental Review Appeals Commission and the appropriate court, designating the order that is being appealed. [Section 3745.06](#) also requires that an appealing party serve the Ohio Director of Environmental Protection with a copy of the notice of appeal by certified mail. The foregoing requirements must be satisfied in order to invoke the jurisdiction of an Ohio court of appeals. [More Like This Headnote](#)

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[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Jurisdiction & Procedure](#) 

HN4 The primary function of a certificate of service is to demonstrate that service was accomplished. Such takes on new significance when considering a statute such as [R.C. 3745.06](#), which makes the perfection of service by a particular method upon a specified individual a jurisdictional requirement. In the context of an administrative appeal, when a statute directs an appealing party to serve a particular individual, service upon that individual's counsel is insufficient to invoke jurisdiction. [More Like This Headnote](#)

[Civil Procedure](#) > [Jurisdiction](#) > [Subject Matter Jurisdiction](#) > [Jurisdiction Over Actions](#) > [General Overview](#) 

HN5 A court may sua sponte raise the issue of subject matter jurisdiction. [More Like This Headnote](#) |

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[Real Property Law](#) > [Water Rights](#) > [Groundwater](#) 

HN6 An aquifer is a geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring. [Ohio Admin. Code 3745-34-01\(D\)](#). An aquitard is a rock formation, which acts as a confining unit, and impedes the flow of groundwater from reaching the formations around it. The terms "hydraulically active" or "hydraulic conductivity" refer to a formation's ability to transmit water. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Environmental Law](#) > [Solid Wastes](#) > [Permits](#) > [General Overview](#) 

HN7 An application for a permit to install with respect to a solid waste facility will be deemed complete when all the statutory and regulatory enumerated and mandatory components of the application have been reasonably and fully answered. [Ohio Admin. Code 3745-27-06](#) contains an extensive list of details that must be included in order for an application to be complete. The Director of the Ohio Environmental Protection Agency is not required to conduct additional testing to ensure an applicant complies with the criteria set forth in § 3745-27-06, but can rely on the information contained in the application, and submitted therewith, before issuing a permit. [More Like This Headnote](#)

[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [Substantial Evidence](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN8 [R.C. 3745.06](#) sets out an Ohio court of appeals' standard for reviewing Environmental Review Appeals Commission (ERAC) orders. The court shall confirm the order if it finds upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, the court shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. [R.C. 3745.05](#) sets out the standard that ERAC must employ when reviewing a final action of the Director of the Ohio Environmental Protection Agency. [More Like This Headnote](#)

[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [General Overview](#) 

[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [Unlawful Procedures](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN9 See [R.C. 3745.05](#).

[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [General Overview](#) 

[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [Unlawful Procedures](#) 

[Environmental Law](#) > [Litigation & Administrative Proceedings](#) > [Judicial Review](#) 

HN10 The standard under [R.C. 3745.05](#) does not allow the Environmental Review Appeals Commission (ERAC) to substitute its judgment for that of the Director of the Ohio Environmental Protection Agency, nor to stand in the place of the Director. The term "unlawful" means that which is not in accordance with law, and the term "unreasonable" means that which is not in accordance with reason, or that which has no

factual foundation. It is only where a board can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by the board upon the de novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN11 The Environmental Review Appeals Commission (ERAC) reviews the quality of information contained in a permit application and, together with testimony adduced at the de novo hearing, considers whether the Director of the Ohio Environmental Protection Agency's actions were unreasonable or unlawful, ultimately determining whether a factual foundation supports the Director's action. In turn, an Ohio court of appeals' review is limited to whether reliable, probative, and substantial evidence supports ERAC's order. The General Assembly created administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. Accordingly, courts should give due deference to the administrative interpretation of rules and regulations, as well as the administrative resolution of evidentiary conflicts. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN12 The siting restrictions set forth in [Ohio Admin. Code 3745-27-07\(H\)\(2\)\(e\)](#) provides that the isolation distance between the uppermost aquifer system and the bottom of the recompacted soil liner of a sanitary landfill facility is not less than 15 feet of in-situ or added geologic material deemed acceptable by the Director of the Ohio Environmental Protection Agency. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: [Richard C. Sahli](#), for appellant, CLUB 3000.

[Peter A. Precario](#), for appellant, Village of Bolivar.

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

[Baker & Hostetler, LLP, Maureen A. Brennan](#) and [Jason P. Perdion](#), for appellee, Republic Waste Services of Ohio, LLC.

[Nancy H. Rogers](#), Attorney General, [R. Benjamin Franz](#) and [Nicholas J. Bryan](#), for appellee, Christopher Jones, Director of Environmental Protection.

JUDGES: [McGRATH](#), P.J. [BROWN](#), J., concurs. [TYACK](#), J., concurs separately.

OPINION BY: [McGRATH](#)

OPINION

(REGULAR CALENDAR)

OPINION

[McGRATH](#), P.J.

[*P1] Appellants, CLUB 3000 ("CLUB 3000"), the Village of Bolivar ("the Village"), and Stark-Tuscarawas-Wayne Joint Solid Waste Management District ("the District") (collectively "appellants"), appeal from an order of the Environmental Review Appeals Commission ("ERAC") that affirmed the decision of appellee, Christopher Jones, Director of the Ohio Environmental Protection Agency ("the Director" or "OEPA"), to grant appellee-cross appellant, Republic Waste Services **[**2]** of Ohio, LLC ("Republic"), a permit to install ("PTI" or "application") an expansion to Countywide Recycling Disposal Facility, a solid waste landfill that it has owned and operated in East Sparta, Stark County, Ohio, since 1995. Because reliable, probative, and substantial evidence supports the order, and the order is in accordance with law, we affirm.

I. PROCEDURAL BACKGROUND

[*P2] The following facts and procedural background are germane to our discussion. On February 14, 2001, Republic submitted an application for a PTI for approval to expand its existing facility. The application consisted of five bound volumes; the first two volumes contained the application, and the remaining three volumes contained engineering plans, a ground water monitoring plan ("ground water plan"), and a report authored by Eagon & Associates, a consulting firm hired by Republic, "Hydrogeologic Investigation for Countywide Recycling and Disposal Facility Lateral and Vertical Expansion" ("the HGI report"). For ease of reference, Republic's application also included a reference chart, which listed the OEPA rules and identified where information corresponding to a particular rule could be located in the application. **[**3]** A plethora of maps, charts, graphs, and tables accompanied the application, as well as various reports.

[*P3] The HGI report prepared by Eagon included information previously collected by Burgess & Niple, Ltd. and Golder Associates, which were consulting firms that had been involved with the site before it was operated by Republic. ¹ In addition to the reports penned by those firms, the HGI also included data from 200 borings and approximately 100 wells and piezometers, the results of approximately 100 hydraulic tests (pump, slug, and packer tests), water-level data collected on 40 different dates between 1995 and 2000, and data collected from wells, springs, and seeps.

FOOTNOTES

¹ Previous site investigations dated back to the late 1980's. Burgess & Niple, Ltd. conducted the initial hydrogeologic investigation, and issued a report that was submitted in connection with the first PTI application. Golder Associates was another firm that was hired to perform hydrogeologic field investigations between 1992 and 1994. Golder Associates submitted a report in connection with a PTI application that was submitted and approved on March 30, 1995. Several months later, in August 1995, another report was presented; **[**4]** this report contained data generated from various field programs that Golder Associates had been working on during the interim.

[*P4] During the two years Republic's application was pending, representatives from Republic and the OEPA engaged in numerous and extensive discussions. Jeffrey Rizzo ("Rizzo"), a hydrogeologist for the OEPA's Division of Drinking and Ground Water, reviewed the hydrogeology and geology portions of the application for compliance with the applicable rules in the Ohio Administrative Code ("administrative code"). Rizzo noted two potential compliance deficiencies, which he brought to the attention of Judith Bowman ("Bowman"), who was an environmental specialist with OEPA's Division of Solid and Infectious Waste Management. Bowman contacted Vandersall, Republic's general manager, regarding Rizzo's comments. Vandersall collaborated with James Walker, a registered engineer hired by Republic to serve as the PTI's project manager, who revised the application in response to Rizzo's concerns. Walker's revisions did not wholly satisfy Rizzo, who recommended the inclusion of two additional conditions to the application that addressed the deficiencies he noted. Republic assented **[**5]** to the additional conditions, and, in late 2001, Rizzo advised Bowman that Republic's hydrogeological investigation and ground water monitoring plan satisfied the administrative code's criteria.

[*P5] After a review of the PTI application and additional submittals relating to revisions, the OEPA issued a final recommendation for approval to the Director on May 21, 2002. Republic further revised its application to include conditions that were added in response to comments that the OEPA received during the public comment period. On June 2, 2003, the Director issued a lateral and vertical expansion PTI to Republic, authorizing them to increase the size and total capacity of the landfill. The final PTI requires Republic to comply with all applicable laws and regulations, as well as all permit conditions mandated by the Director. The permit approval also included financial assurances for closure and post-closure care.

[*P6] Appellants appealed to ERAC, which reviewed the matter for over two years. A 19-day de novo hearing was conducted over five months, during which, considerable testimony was received. On June 27, 2007, in a 100-page, single-spaced decision, ERAC affirmed the Director's final action. **[**6]** Pursuant to R.C. 3745.06, appellants appealed to this court.

II. JURISDICTION

[*P7] Prior to delving into the merits of the instant matter, we must, as a threshold matter, determine whether we possess jurisdiction to hear the appeals filed by the District and the Village. ^{HN1} The right to appeal from an administrative order is governed by statute. The Supreme Court of Ohio has long held that "an [administrative] appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements." Zier v. Bur. of Unemployment Comp. (1949), 151 Ohio St. 123, 84 N.E.2d 746, paragraph one of the syllabus. The court recently repeated this axiom of jurisdiction in Hughes v. Ohio DOC, 114 Ohio St. 3d 47, 2007 Ohio 2877, 868 N.E.2d 246.

[*P8] The statute at issue here is R.C. 3745.06, which provides, in pertinent part:

^{HN2} * * Any party desiring to so appeal shall file with the commission a notice of appeal designating

the order appealed. A copy of the notice also shall be filed by the appellant with the court, and a copy shall be sent by certified mail to the director of environmental protection unless the **[**7]** director is the party appealing the order. Such notices shall be filed and mailed within thirty days after the date upon which the appellant received notice from the commission by certified mail of the making of the order appealed. * * *

Thus, ^{HN3}~~HN4~~ R.C. 3745.06 requires that a notice of appeal be filed with ERAC and the appropriate court, designating the order that is being appealed. The statute also requires that the appealing party serve the Director of Environmental Protection ("the Director") a copy of the notice of appeal by certified mail. The foregoing requirements must be satisfied in order to invoke the jurisdiction of this court. Kimble Clay & Limestone v. McAvoy (1979), 59 Ohio St.2d 94, 391 N.E.2d 1030, paragraph two of the syllabus ("An appeal from the order of the Environmental Board of Review in a permit or licensing proceeding must be filed in a timely and proper manner with the Court of Appeals for Franklin County and as otherwise prescribed by R.C. 3745.06").

[*P9] At oral argument, this court sua sponte raised the issue of jurisdiction, questioning both the District and the Village as to whether they had complied with R.C. 3745.06 by serving the Director a copy of their notices of appeal by certified **[**8]** mail. Both parties asserted that they had complied with that requirement of the statute.

[*P10] Following oral argument, Republic moved to dismiss the appeals filed by the aforementioned parties on jurisdictional grounds. Citing to the certificates of service attached to both notices of appeal, Republic argued that both parties had, in fact, not served the Director by certified mail as required by R.C. 3745.06. Republic also supported its motion with the affidavit of Miles Davison ("Davison"), the legal office manager for the OEPA. In his affidavit, Davison stated that he had "reviewed all of the files, records and correspondence relating to [the District and the Village] and he was unable to find "any evidence or proof in the files, records or correspondence that the Director of Ohio EPA received, by certified mail, a copy" of the notices of appeal filed by the District or the Village. (Davison affidavit at P3.)

[*P11] Subsequent to filing, Republic moved to withdraw its motion as to the District. It explained that the District had "contacted [Republic] and provided evidence that [it] had timely served its notice of appeal on the director of environmental protection by certified mail." (Republic's **[**9]** motion to withdraw motion to dismiss at 1.) Republic further indicated that it was not withdrawing its motion as to the Village, as it had failed to provide Republic with any evidence demonstrating that it had served the Director in accordance with R.C. 3745.06.

[*P12] The Village responded to Republic's motion to dismiss, asserting that it had served the Director with a copy of its notice of appeal by certified mail, and, thus, had complied with the statute. In support, the Village attached the affidavit of its counsel, Peter Precario, Esq. ("Precario"), who opined that he caused the Director to be served by certified mail, but was unable to locate any documents (i.e., a mailing receipt or tracking number) to evidence the same.

[*P13] ^{HN4}~~HN5~~ The primary function of a certificate of service is to demonstrate that service was accomplished. Such takes on new significance when considering a statute such as R.C. 3745.06, which makes the perfection of service by a particular method upon a specified individual a jurisdictional requirement. In this case, the certificates of service attached to the notices of appeal filed by the District and the Village do not indicate that the Director was served by certified **[**10]** mail, but, rather, his *counsel* was served by ordinary mail. In the context of an administrative appeal, when a statute directs an appealing party to serve a particular individual, service upon that individual's counsel has been held insufficient to invoke jurisdiction. See, e.g., Salem Med. Arts and Dev. v. Columbiana Cty. (1998), 80 Ohio St.3d 621, 1998 Ohio 657, 687 N.E.2d 746 (because R.C. 5717.01 required that the appealing party serve the board of revision, service of a copy of a notice of appeal upon the board's counsel was insufficient, and the appeal was properly dismissed); Powell v. Chemi-Trol Chem. Co. (June 12, 1981), Sandusky App. No. S-80-20, 1981 Ohio App. LEXIS 10364 (jurisdictional defect existed where appealing party served counsel for the interested party but not the interested party as required by R.C. 4141.28); see, also, Evans v. Ohio Depart. of Ins., Delaware App. No. 04CA80, 2005 Ohio 3921.

[*P14] In addition to the certificates of service, the affidavit of Davison also states that neither the District nor the Village served the Director by certified mail. While the District may have provided Republic with documentary evidence demonstrating its compliance with R.C. 3745.06, such was not provided to this court for our consideration.

[11]** Given that ^{HN5}~~HN6~~ a court may sua sponte raise the issue of subject matter jurisdiction, which this court did, it was incumbent upon the District to clarify the matter before us.

[*P15] This brings us to our consideration of the Village, which proffered the affidavit of its counsel, who attested to having caused the Director to be served by certified mail. While this court has no reason to doubt the assertions contained in Precario's affidavit, we are hard-pressed to hold that an affidavit purporting compliance, without more, can be substituted for an accurate certificate of service. We find that determination is especially appropriate in light of Davison's affidavit. Indeed, if this court were to accept an affidavit attached to a memorandum contra to a motion to dismiss as evidence of statutory compliance, it is not difficult to imagine the potential abuses that might result.

[*P16] By sua sponte raising the issue during oral argument, this court put the District and the Village on notice that it was questioning whether it had subject matter jurisdiction to consider their appeals. At no time thereafter,

has either party provided this court with any evidence, aside from an unsupported affidavit, that demonstrates **[**12]** the Director was served in accordance with R.C. 3745.06. Nor has either party provided an explanation that reconciles the certificates of service attached to their notices of appeal, which clearly indicate that the Director's counsel was served by ordinary mail (and not that the Director was served by certified mail), with the positions taken after oral argument and after Republic filed its motion to dismiss.

[*P17] Given that the evidence before this court does not reflect that either the District or the Village served the Director by certified mail in accordance with R.C. 3745.06, we are compelled to conclude that this court is without subject matter jurisdiction to consider the appeals filed by the District and the Village. That determination renders Republic's cross-appeal moot. Having resolved the issue of jurisdiction, we turn now to the merits of CLUB 3000's appeal.

III. CLUB 3000

A. The Underlying Science.

[*P18] Although the scientific underpinnings of this case are geologically complex, a short discussion of only a few terms and principles is necessary for an understanding of the matter. Succinctly stated, our discussion involves groundwater and the material through which it travels.

[*P19] Groundwater **[**13]** is the water that is found underground and fills the cracks and openings between sand and rock. It is formed when precipitation permeates the soil and moves downward to the water table. Water in the ground is stored in the spaces between rock particles, and, through movement, may eventually be expressed above ground in streams, rivers, lakes, or oceans.

[*P20] ^{HNG7}An aquifer is "a geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring." Ohio Adm.Code 3745-34-01 (D). An aquitard is a rock formation, which acts as a confining unit, and impedes the flow of groundwater from reaching the formations around it. The terms "hydraulically active" or "hydraulic conductivity" refer to a formation's ability to transmit water.

[*P21] A fracture is a break in the continuity of a material and is created by pressure. A fracture's ability to transmit water depends upon its size, type, and orientation. Not all fractures, however, are capable of transmitting water; for example, a fracture may be filled in with a substance or material that prevents transmission. "Fracture flow is water moving along a fracture within a rock, like a conduit. **[**14]** Porosity, or porous flow, is water moving between the grains or matrix of the formation." (ERAC decision at 20-21, footnote 15.)

B. The Site's Geology.

[*P22] The landfill rests upon the Clarion Shale, which is a "tight" shale formation with low permeability. Directly below the Clarion Shale is the Putnam Hill formation ("Putnam Hill"), which consists of Brookville No. 4 underclay ("Brookville Clay"), the Brookville No. 4 coal, and the Putnam Hill limestone; these strata are interconnected through fractures and share similar water bearing characteristics. The Putnam Hill is 100 times more permeable than the Clarion Shale. (Hearing Tr. at 3174.) According to Republic, the fractures that exist in the Putnam Hill allow groundwater to flow horizontally beneath the Clarion Shale and above the Brookville Clay. Because the Putnam Hill "daylights" at the sides of the hill upon which the landfill is situated, groundwater flows horizontally through it, where it exists at the hillside as seeps or springs.

[*P23] The Putnam Hill was designated as the uppermost aquifer system ("UAS") and the Clarion Shale as its confining unit. To ascertain the hydrogeologic properties of the bedrock underlying the site, slug **[**15]** and packer testing was performed throughout the Clarion Shale, the Putnam Hill, and Brookville Coal No. 4. The results of these tests, which were contained in the HGI report, were interpreted to mean that the Clarion Shale could not be considered part of the UAS because of the hydraulic conductivities it exhibited. It is also significant that the Putnam Hill had been recognized as the UAS by the OEPA prior to Republic's PTI application, as evidenced by a letter drafted by Bowman in 1994.

C. Assignments of Error.

[*P24] CLUB 3000 assigns the following two assignments of error.

ASSIGNMENT OF ERROR NO. 1

ERAC ERRED AS A MATTER OF LAW IN AFFIRMING THE PERMIT WHERE THE DIRECTOR NEVER MADE AN INITIAL DETERMINATION OF THE SIGNIFICANCE OF THE FRACTURES BENEATH THE LANDFILL AND ERAC MADE THAT INITIAL DETERMINATION ITSELF.

ASSIGNMENT OF ERROR NO. 2

ERAC ERRED BY HAVING NO VALID FACTUAL FOUNDATION FOR ITS INDEPENDENT DETERMINATION ON THE SIGNIFICANCE OF THE FRACTURES BENEATH THE LANDFILL.

[*P25] In its first assignment of error, CLUB 3000 asserts that ERAC's decision is unlawful because the Director did not evaluate the significance of the fractures beneath the landfill, despite a duty to do so. Given the Director's **[**16]** failure to make a determination regarding their significance, CLUB 3000 contends that ERAC, pursuant to the standard by which it reviews a final action of the Director, was obligated to either vacate or modify the order that issued the PTI. Instead, however, CLUB 3000 asserts that ERAC made that determination itself based upon its de novo review, an act which CLUB 3000 contends constituted error as a matter of law. ERAC's unlawful act notwithstanding, CLUB 3000 asserts in its second assignment of error that there was no valid factual foundation to support ERAC's determination that the fractures were not hydraulically communicative.

[*P26] ^{HN7} An application will be deemed complete when all the statutory and regulatory enumerated and mandatory components of the application have been reasonably and fully answered. *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health*, Franklin App. No. 04AP-1338, 2005 Ohio 3146. Pertinent to this appeal, Ohio Adm.Code 3745-27-06 contains an extensive list of details that must be included in order for an application to be complete. Contrary to CLUB 3000's contentions, the Director was not required to conduct additional testing to ensure Republic complied **[**17]** with the criteria set forth in Ohio Adm.Code 3745-27-06, but could rely on the information contained in the application, and submitted therewith, before issuing a permit. See *CECOS Internatl., Inc. v. Shank* (1991), 74 Ohio App.3d 43, 598 N.E.2d 40 (distinguishing between quality and completeness in an application). By so phrasing its argument, CLUB 3000 attempts to persuade this court to reweigh the evidence the Director used to support his decision. This court, however, reviews all the evidence presented to ERAC at the de novo hearing, not just that contained in the permit application. *Northeast Ohio Regional Sewer Dist. v. Shank* (1991), 58 Ohio St.3d 16, 567 N.E.2d 993, paragraph two of syllabus. Because, under the proper standard of review, CLUB 3000's argument essentially raises the same issue presented in its second assignment of error, we will discuss it under that assignment of error.

[*P27] With respect to the appropriate standards of review, ^{HN8} R.C. 3745.06 sets out this court's standard for reviewing ERAC orders. We "shall confirm the order" if we find "upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial **[**18]** evidence and is in accordance with law." R.C. 3745.06. "In the absence of such a finding," the court "shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." Id. Accord *Save the Lake v. Schregardus* (2001), 141 Ohio App.3d 530, 752 N.E.2d 295, appeal not allowed, 92 Ohio St. 3d 1429, 749 N.E.2d 756.

[*P28] R.C. 3745.05 sets out the standard that ERAC must employ when reviewing a final action of the Director. That statute provides, ^{HN9} "[i]f, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from." ^{HN10} This standard does not allow ERAC to substitute its judgment for that of the Director, nor to stand in the place of the Director. *CECOS Intl. Inc. v. Shank* (1992), 79 Ohio App. 3d 1, 6, 606 N.E.2d 973. The term "unlawful" means "that which is not in accordance with law," and the term "unreasonable" means "that which is not in accordance with reason, or that which has no factual foundation." *Citizens Committee v. Williams* (1977), 56 Ohio App.2d 61, 70, 381 N.E.2d 661. **[**19]** "It is only where the board can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by the board upon the de novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action." Id.

[*P29] Putting the above discussion in the context of this case, ^{HN11} ERAC reviews the quality of information contained in a permit application and, together with testimony adduced at the de novo hearing, considers whether the Director's actions were unreasonable or unlawful, ultimately determining whether a factual foundation supports the Director's action. *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, Franklin App. No. 06AP-836, 2007 Ohio 2649, at P22 (citations omitted). In turn, this court's review is limited to whether reliable, probative, and substantial evidence supports ERAC's order finding that it was not unreasonable or unlawful for the Director to conclude that Republic submitted an application **[**20]** that adequately characterized the site-specific geology, thereby submitting an application that complied with the requirements found in Ohio Adm.Code 3745-27-06(C)(2)(a). It is important to keep in mind that the General Assembly created administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 1993 Ohio 122, 614 N.E.2d 748, paragraph one of the syllabus. Accordingly, courts should give due deference to the administrative interpretation of rules and regulations, as well as the administrative resolution of evidentiary conflicts. *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health*, Franklin App. No. 04AP-1338, 2005 Ohio 3146, at P8. (Citations omitted.)

[*P30] At the de novo hearing before ERAC, the parties offered conflicting testimony as to the site's specific geology and hydrology. While all the parties agreed that some fracturing beneath the landfill was present, they disagreed as to the nature and extent of the same. Specifically, and as germane to this appeal, the parties disagreed whether a significant fracture network **[**21]** exists, allowing hydraulic communication between the Putnam Hill (the UAS) and the Clarion Shale. If these strata are connected through fractures, as CLUB 3000 contends, then the

Clarion Shale would be considered part of the UAS, as opposed to its confining unit. Such would then mean Republic's application, as approved by the Director, ran afoul of ^{HN127}the siting restrictions set forth in Ohio Adm.Code 3745-27-07(H)(2)(e) ("The isolation distance between the uppermost aquifer system and the bottom of the recompacted soil liner of a sanitary landfill facility is not less than fifteen feet of in-situ or added geologic material deemed acceptable by the director."). CLUB 3000 also asserts that hydraulic communication between the UAS and the Clarion Shale poses a serious threat to the public water supply for area residents.

[*P31] CLUB 3000 cites to three specific pieces of data, which it claims were either not included in Republic's application or were ignored by the Director. The first concerns the results of two borings (Boring 99-10 and 57), which CLUB 3000 claims "unequivocally established that hydraulically active fractures existed immediately beneath the landfill in multiple locations." (CLUB **[**22]** 3000's brief at 24.) The second involves the direction of the flow of water from the seeps associated with the Clarion Shale, which it claims was not characterized as required by Ohio Adm.Code 3745-27-06(C)(2)(c)(iv)(b). The third piece of data was the rapid water transport that occurred with the drilling of Monitoring Wells 20 and 20A ("MW 20" and "MW 20A"). CLUB 3000 contends the application omitted and/or the Director ignored the above, and all three demonstrate the existence of hydraulically active fractures within the Clarion Shale. As such, the conceptual model proposed by Republic was flawed, and the Director erred in approving the same.

[*P32] To support its argument before ERAC, CLUB 3000 offered the testimony of Dr. Julie Weatherington-Rice ("Dr. Rice"). A synthesis of Dr. Rice's testimony reflects that she believes there is a significant fracture system present at the site, and these fractures hydraulically connect the Clarion Shale with the UAS. Dr. Rice based her opinion on: the water loss recorded for Borings 99-10 and 57; the existence of the fractures noted as detected in the borehole logs contained within the HGI report; oxidization and precipitate observed on fractures in **[**23]** the borehole logs; and the rapid water transport noted in connection with the drilling of MW 20 and MW 20A. Dr. Rice applied hydrogeologic principles to the foregoing, and explained how an application of that science supported her conclusion that a highly communicative fracture network exists. While Dr. Rice was qualified as an expert in the areas of geology, hydrogeology and geomorphology, in general, she was not accepted as an expert in the areas of geological and hydrogeological mapping, fracture flow analysis, and economic geology. The hearing examiner did indicate, however, that her opinion would be taken into account and assigned the appropriate weight when resolving the appeal. (Hearing Tr. at 381.)

[*P33] Rizzo, who was involved in evaluating Republic's application, testified at the hearing. He asserted that Republic adequately characterized the site based on the information provided in the HGI report, and, thus, Republic's application complied with all applicable administrative code requirements, including Ohio Adm.Code 3745-27-06(C)(2). Rizzo testified that in the ten years that he has been reviewing data from the site, he has seen nothing that suggests the existence of "conduits **[**24]** that would allow water to move" swiftly through the Clarion Shale to the Putnam Hill. (Hearing Tr. at 3610.) Rizzo testified that the areas that were noted to be highly fractured were located on the hillsides, which is "what we'd expect to see." Id. at 3616. Given that Borings 99-10 and 57 were located on a weathered and fractured hillside, he found the loss of water from these borings to be consistent with Republic's conceptual model. Rizzo further explained that the hydrogeology of the region needs to be considered on the whole, as opposed to myopically viewing each section. Thus, he opined that it would be incorrect to view the data from MW 20 and MW 20A and/or Boring 99-10 and 57 as anomalies because when viewed "in relation to the cross-section and see where that falls on the hillside," the data is not contradictory, but, rather, characteristic and serves to support "all the other data." Id. at 3617. When questioned as to whether there were any OEPA regulations that would require Republic to "analyze the effect of the discontinuous fractures in the Clarion Shale in order to adequately characterize the site," Rizzo replied that none existed. Id. at 3765.

[*P34] David John Sugar ("Sugar"), **[**25]** a hydrogeologist employed by Eagon, testified on behalf of Republic. Sugar has been involved with the site since 1990, upon which he has installed numerous monitoring wells and conducted hydraulic testing. Sugar explained that the oxidation observed on fractures suggests that the surface of that material was probably, at some point in time, exposed to air and water, but that oxidation could also occur without water. With respect to the fractures throughout the Clarion Shale, Sugar described them as the "typical weathering pattern that you are going to get with the shale." Id. at 2687. He testified that the concentration of fractures decreased with depth, and were "pretty sparse when you get to the UAS." Id. Sugar bored and logged Borings 99-10 and 57. He acknowledged the amount of water lost in connection with those borings, but explained that such does not necessarily indicate a "highly transmissive fracture." Id. at 2788. He **[**26]** testified that packer testing is used to determine whether fractures are capable of transmitting water, and the results of the packer testing performed within the Clarion Shale did not indicate that a network of fractures capable of transmitting water was present.

[*P35] Another hydrogeologist employed by Eagon, Allan Razem ("Razem"), testified on behalf of Republic, and was qualified as an expert in geology, hydrogeology, geomorphology, groundwater chemistry, and the design of groundwater monitoring well systems. Razem has been evaluating the geology and hydrogeology of the site since 1990, and was involved in developing and preparing the PTI application. Razem testified that the water lost in connection with MW 20, MW 20A, Boring 99-10, and Boring 57 "was nothing unusual." Id. at 3072. He discounted the possibility that the loss was due to hydraulic conductivity between the two wells because, if such were the case, then MW 20 would have drained when MW 20A was being drilled, which did not occur; thus, because the presence of water was observed in MW 20, it followed that MW 20A was not draining out through a fracture. Id. at 3089-3090. Razem explained that finding, when viewed together with **[**27]** the low permeability of the Clarion Shale as

demonstrated by slug and packer testing, did not suggest that there was hydraulic communication between the fractures. He also opined that, based upon a reasonable degree of scientific certainty, that Republic accurately characterized the Putnam Hill as the UAS.

[*P36] Republic also offered the testimony of Dr. Michael Sklash ("Dr. Sklash"), who was qualified as an expert in geology, hydrogeology, and geomorphology. Dr. Sklash was initially retained by Republic to evaluate the sufficiency and quality of data contained in the PTI application, as well as review the expert reports submitted by parties opposing the application. With respect to the issue of fractures detected at the site, Dr. Sklash opined that when the 200 plus borelogs are reviewed on the whole, he does not find an "obvious relationship between where the fractures are and where the water is." Id. at 3153. For example, he explained that because Boring 99-10 is topographically located in a valley, "[t]here is less confining stress on the rock, so it would tend to fracture more than it would away from the valley." Id. at 3300. Dr. Sklash testified that he did not believe the fractures **[**28]** present within the Clarion Shale were capable of transmitting water because when he physically inspected the site, he did not observe water being emitted from the fractures, and that is what he would "expect" to see in the event of hydraulic activity. ² He also concluded that "[t]he hydraulic performance of the monitoring wells in the Clarion Shale indicate that the fractures are not well connected." Id. at 3240. In sum, Dr. Sklash's expert opinion that there was no hydraulic communication between fractures within the Clarion Shale was based on his physical inspection of the boreholes and his interpretation of the Clarion Shale's hydraulic behavior. The reasons offered in support of his opinion included: (1) the lack of water issue issuing from fractures while surveying the site and the Homes mine; (2) "the monitoring wells that were formally in the Clarion Shale didn't produce water"; and (3) water was not observed on a widespread basis when doing "core work or boring work." Id. at 3296-3297.

FOOTNOTES

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

[*P37] In addition to witness testimony, **[**29]** the evidence before ERAC also included the data submitted in connection with Republic's application, including the HGI report and the ground water monitoring plan. After considering the competing testimony, ERAC concluded the evidence supported the Director's determination that Republic adequately characterized the geology and hydrogeology of the site, and, thus, its application met the requirements set forth in the administrative code. Accordingly, it found the Director possessed a valid factual foundation when he approved Republic's PTI application, and his action was reasonable. And, upon our review of the record, we find that reliable, probative, and substantial evidence supports ERAC's decision.

[*P38] As relevant to the issue before us, ERAC explained in its decision:

Evidence presented at the *de novo* hearing supports the Director's decision to accept Republic's characterization, *i.e.* although some fractures are present, no fracture network exists that will transmit water differently than characterized in their hydrogeologic report. To substantiate the presence of a fracture system, Appellants cite to fractures and water loss noted on borehole logs during the drilling process. Experts **[**30]** who inspected Republic's borehole logs determined that the fractures are small, discontinuous and unmappable. The fractures noted in the borehole logs could not create the brick-layer like structure as asserted by Appellants. Further, water loss during the drilling process is not uncommon. The noted behavior of MWs20 and 20a during the drilling process does not prove the Putnam Hill limestone/Brookville coal is connected by fractures to the Clarion shale. If a fracture had connected MW20 with the Putnam Hill limestone/Brookville coal, MW20 would have drained to that formation and would not have had water in it when MW20A was drilled. Further, MW20 slug test results showed low permeability in the Clarion shale.

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

Importantly, if an aggressive fracture system, capable of producing the hydraulic communication posited by Appellants, were present at the Countywide site, the fractures would **[**31]** have drained the formation and no saturated zone would exist. Further, in a 1994 letter from OEPA responding to Republic's inquiry as to whether the Clarion shale is a significant zone of saturation, OEPA concluded "[t]he Clarion shale is a very poor sustainer of ground water flow as witnessed by monitoring wells installed . . . being purged dry during routine sampling and during past in-situ well testing." Ohio EPA concluded by stating the Clarion shale lacks "any of the properties needed to act as a preferential pathway of migration away from the limits of solid waste placement."

* * *

In summary, the Commission rejects Appellants' assertions relating to whether Republic adequately

characterized the geology and hydrogeology at the Countywide site. Having found that the Director possessed a valid factual foundation to determine that Republic adequately characterized the geology and hydrogeology at the site, the Commission, correspondingly, finds the Director's action reasonable in this regard.

In reaching his conclusion that Republic satisfied the regulations regarding characterization of geology and hydrogeology (OAC 3745-27-06, generally, and OAC 3745-27-06(C)(2)(a), more specifically), **[**32]** the director extensively reviewed, examined and considered numerous documents and sources, including the 2001 Hydrogeologic Report and the 2001 Ground Water Monitoring Plan.

The Commission finds that Republic's application contained sufficient hydrogeologic information to allow the Director to determine the suitability of the site for solid waste disposal, identify and characterize the hydrogeology of the uppermost aquifer and all geologic strata that exist about the uppermost aquifer system and to sufficiently characterize the site geology in such a way that allows the Director to evaluate the proposed design of the sanitary landfill facility to ensure compliance with OAC regulations.

Accordingly, the Commission finds that the Director's action in determining that Republic had satisfied OAC 3745-27-06 was lawful. As such, the Commission denies Appellants' assignments of error relating to adequate characterization of the geology and hydrogeology.

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

[*P39] The record reflects that fractures detected at the site were noted in the borelogs, and Republic's expert witnesses, Razem and Sklash, testified that these fractures were not hydraulically communicative. **[**33]** Dr. Sklash testified that hydraulic testing was conducted at the site, including the fractures, and any additional evaluation would be superfluous. The testimony given by Rizzo and Sugar was in accord with that of Razem and Dr. Sklash. These witnesses provided ample testimony regarding the site's geology and offered explanations based on accepted hydrogeologic principles, and all agreed that the Putnam Hill was accurately designated as the UAS and the Clarion Shale as its confining unit. Although CLUB 3000 contends that the Director failed to evaluate the significance of the fractures detected beneath the landfill, the collective testimonies of Razem, Sklash, Rizzo, and Sugar, when combined with the data considered by the Director in connection with the PTI application, makes clear that CLUB 3000 disagrees with the interpretation of the results, and not that the issue was never considered. Thus, we find that the testimony and the record in toto provided a valid factual foundation for ERAC to determine that the fractures were qualitatively and quantitatively evaluated through various hydraulic testing, and met the applicable administrative requirements.

[*P40] Additionally, the testimony of **[**34]** Razem, Sklash, Rizzo, and Sugar provided scientific explanations for the loss of water that occurred in connection with MW 20, MW 20A, Boring 99-10, and Boring 57, and the oxidation observed on the fractures detected at the site. These witnesses also provided testimony as to the characterization of the recharge and discharge areas identified in Ohio Adm. Code 3745-27-06, as well as explained how Republic's application complied with that specific section of the administrative code. Although CLUB 3000's expert witness, Dr. Rice, contested the accuracy of, and asserted differing opinions from, the witnesses mentioned above, ERAC was charged with the duty to weigh the evidence and determine its credibility. Because the requisite quantum of evidence supports ERAC's decision, this court must defer to ERAC's special expertise for resolving the evidentiary conflicts. To that end, a review of the application and data accompanying it, as well as the testimony adduced at the hearing, undercuts CLUB 3000's argument that ERAC made the initial determination regarding the fractures based on the evidence presented at the de novo hearing.

IV. CONCLUSION

[*P41] Based on the foregoing, given the determination **[**35]** that we lack jurisdiction to consider the appeals filed by the District and the Village, the appeals filed by those parties are hereby dismissed, and Republic's cross-appeal is dismissed as being moot. We overrule CLUB 3000's two assignments of error, and the judgment of the Environmental Review Appeals Commission is affirmed.

Judgment affirmed.

BROWN, J., concurs.

TYACK, J., concurs separately.

CONCUR BY: TYACK ↘

CONCUR

TYACK ↘, J., concurring separately.

[*P42] I believe that an affidavit of counsel, an officer of the court, suffices to demonstrate that certified mail was sent to the former director of the Ohio EPA. I would not dismiss any of the appeals on a theory that experienced, capable counsel did not comply with R.C. 3745.06. That being noted, we address the same central issues with regard to the *Club 3000* appeal. I agree that ERAC's order is supported by reliable, probative and substantial evidence and that the order is in accordance with law. I, therefore, also would affirm.

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