` BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

NEIGHBORS OPPOSING PIT EXPANSION, INC.	:	Case No. ERAC 21-7114
Appellant,	:	
v.	:	
LAURIE STEVENSON, DIRECTOR OF ENVIRONMENTAL PROTECTION,	:	
and	:	
COMMERCIAL LIABILITY PARTNERS, LLC,	:	
and	:	
NEW RICHMOND DEVELOPMENT CORP., LLC,	:	
Appellees.	:	

DECISION

Rendered on January 10, 2024

D. David Altman, *Justin D. Newman*, and *Robin A. Burgess* for Appellant Neighbors Opposing Pit Expansion, Inc.

Dave Yost, Attorney General, *Amber Wooton Hertlein*, *Nicole DiVottorio*, and *Amy Geocaris* for Appellee Laurie Stevenson, Director of Environmental Protection

Gregory J. DeGullis, *Megan E. Goedeker,* and *David Michalski* for Appellees Commercial Liability Partners, LLC and New Richmond Development Corp., LLC

{¶1} This matter comes before the Environmental Review Appeals Commission ("Commission," "ERAC") on a Notice of Appeal filed by Appellant Neighbors Opposing

Pit Expansion, Inc. ("NOPE") on October 13, 2021. NOPE challenges the September 3, 2021 issuance of Permit-to-Install No. 1405793 ("PTI") to Appellee New Richmond Development Corp., LLC ("NRDC") by Appellee Laurie Stevenson, Director of Environmental Protection ("Director," "Ohio EPA," "Agency"). Case File Item A.

{¶2} Prior to the de novo hearing held May 22, 2023, through May 24, 2023, Appellees NRDC and Commercial Liability Partners, LLC (collectively, "CLP") filed a motion to dismiss based on timeliness, a motion to dismiss based on standing, and a partial motion to dismiss certain assignments of error. Case File Items 4A, 4B, 4C.

{¶3} The Commission denied CLP's motions to dismiss based on timeliness and standing. Case File Item 4W. Nonetheless, because CLP raised these issues during this appeal, including again at the de novo hearing, a brief discussion of the Commission's jurisdiction under Revised Code ("R.C.") 3745.04 and 3745.07 is included below.

{¶4} Regarding CLP's partial motion to dismiss certain assignments of error, the Commission denied CLP's motion as to assignments of error 2, 9, and 14 but deferred ruling on the motion as to assignments of error 4, 15, and 16 until after the de novo hearing. Case File Item 4X. A discussion of those assignments of error, in relation to both CLP's partial motion to dismiss and the evidence presented at the hearing, is also included below.

{¶5} Based on a review of the pleadings, the evidence adduced at hearing, and the relevant statutes, regulations, and case law, the Commission issues these Findings of Fact, Conclusions of Law, and Final Order AFFIRMING the Director's September 3, 2021 issuance of the PTI.

FINDINGS OF FACT

I. Procedural and Factual Background

{¶6} At hearing, the parties presented minimal background testimony, including little or no testimony regarding the history of Beckjord Station, the original purpose and design of Pond B, the reasons for CLP's proposal to close Pond B, CLP's PTI application to close Pond B, or Ohio EPA's review of the PTI application.

{¶7} In reaching its decision, the Commission sourced the following foundational information from the Certified Record ("CR").[1]

A. Site History and Initial PTI Application

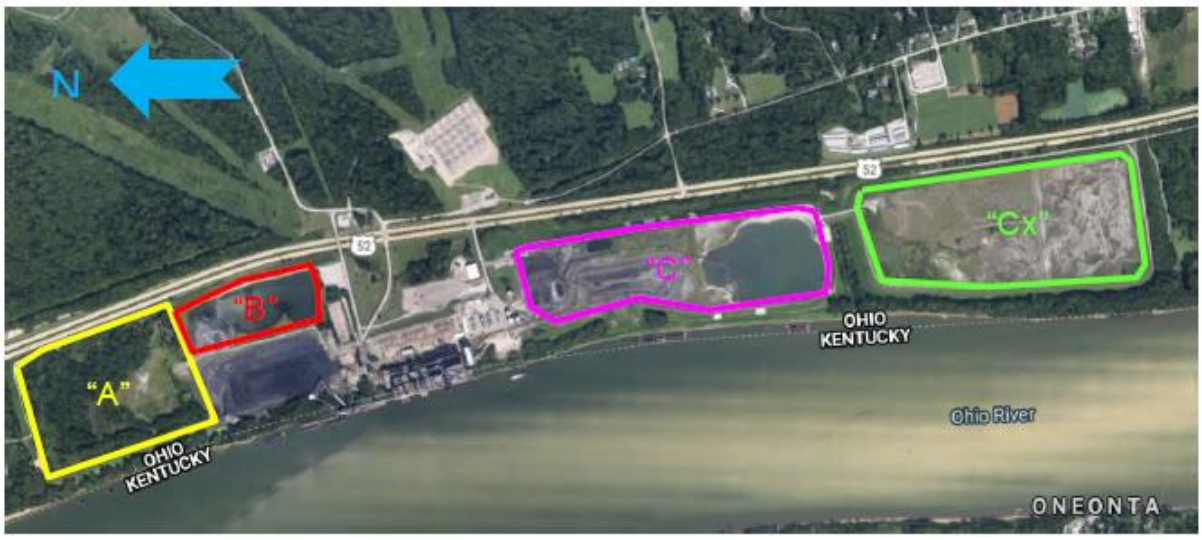
> The Walter C. Beckjord Station Generating Station (WCB) began service in 1952 as a coal fired steam electric power station along the Ohio River. The permanent cessation of electric generation occurred in 2014, prior to current Coal Combustion Residual Rules becoming effective. In 2018, the previous owners of this former generation asset sold the facility to Commercial Liability Partners, LLC, which created the New Richmond Development Corporation, LLC (NRDC) for the purpose of decommissioning the former electric generation facility, [including] closure of coal ash disposal facilities and redevelopment [of those facilities] for future use. These coal ash facilities include both land disposal units, as well as coal ash impoundments.

CR Item 1, p.6

> * * * The Station contains four coal combustion residual (CCR) surface impoundments, designated as Ash Pond A, B, C and C Extension, that were used when the Station was in operation. * * *

CR Item 1, p. 33

[1] The Director moved the Certified Record into evidence at the conclusion of the de novo hearing. The Commission admitted the Certified Record into evidence in its Ruling on June 7, 2023. Case File Item 5E.



CR Item 1, p. 7.

> Ash Pond B is approximately 18 acres, roughly 700 feet from the Ohio River, and is located south of Ash Pond A. Ash Pond B was placed into service in 1952. Ash Pond B was taken out of service during the late 1950's and reactivated in the early 1960's. Since 1981 until the closing of the Station [in 2018], Ash Pond B was used primarily to receive bottom ash from [Generating] Units 1 through 4 during peak electrical demand periods and to receive leachate [i.e., liquid that has contacted coal ash] from the ash pile areas east of U.S. Route 52. After Station closure, Ash Pond B continued to receive leachate from the ash piles.

CR Item 1, p. 33.

> [Pond B's] outfall is currently permitted under a NPDES permit as station 1IB00000002 discharging to an unnamed tributary of the waterway, Pond Run, before combining with the Ohio River.

CR Item 1, p. 8.

{¶8} In its current state, Pond B serves to "treat" leachate from surface piles of coal ash. This "treatment" consists primarily of allowing sediment (i.e., coal ash) to settle out of the liquid entering Pond B before it ultimately discharges to Pond Run and then the Ohio River. *See generally* Testimony Vonderembse.

{¶9} Surrounding Ponds A, B, C, and Cx is a system of groundwater monitoring and interceptor wells. In total, 39 monitoring locations (36 monitoring wells, 2 interceptor wells, and 1 river stage staff gauge) are currently present at the Beckjord site:

NOPE Ex. 28, pp. 9 & 24.[2]

[2] This version of CLP's Groundwater Monitoring Plan, revised December 2021, was prepared after the Director's issuance of the PTI. However, earlier versions of the Plan were neither included in the

{¶10} The wells monitor groundwater for various contaminants, including, relevant to this appeal, sulfate. CLP annually submits groundwater monitoring reports to Ohio EPA. NOPE Ex. 28, p. 22.

{¶11} In its permit application, dated January 13, 2021, CLP proposed the "closure" of Pond B.[3] To close Pond B, CLP proposed the following major elements:

- Replacement of the existing dike common to both Ash Pond A and Ash Pond B ("splitter dike") with compacted clay;
- Placement of buttress material on the north portion of the eastern dike of Ash Pond B;
- Regrading the Coal Combustion Residuals (CCR) within Ash Pond B;
- Placement of a low permeability clay cover over CCRs in Ash Pond B;
- Placement of a vegetative cover soil over low permeability clay cover; and,
- Installation of a stormwater management system.

CR Item 1, p. 32; *see also* CR Item 1, p. 497.

{¶12} CLP's PTI application described the construction sequence for the closure of Pond B as follows:

1. Install construction entrance and maintain throughout closure.
2. Install perimeter controls (e.g., silt fence and filter socks) downgradient of areas prior to disturbance. Maintain perimeter controls throughout closure.
3. Begin management of contact water within berms of Ash Pond B and treat as required prior to discharge at Outfall 002.
4. Clear vegetation within limits of disturbance.

Certified Record nor introduced as exhibits during the de novo hearing. Ms. Reed testified that the differences between this version and earlier versions of the Groundwater Monitoring Plan were minimal. Testimony Reed, transcript p. 94.

[3] The closure of ponds C and Cx were authorized under separate permits-to-install. CR Item 1, p. 7.

5. Protect monitoring wells and piezometer to remain. Decommission piezometer AB-14PZ.

6. *Reroute leachate flow from ash piles to existing NPDES Outfall 002*. Remove 8 inch diameter steel leachate pipe (northwest pipe) from manhole MH2 and associated bedding and backfill materials and replace with compacted buttress material (USCS CL). Grout and abandon in-place leachate conveyance system downgradient of manhole MH4A (i.e., manholes MH1, MH2, MH3 and associated piping).

7. Reroute stormwater flow from upper parking lot to existing NPDES Outfall 002. Remove corrugated PE pipe from southeast corner of Ash Pond B and backfill portion located within dike limits with compacted buttress material (USCS CL). Grout and abandon in-place or remove remainder of corrugated PE pipe.

8. *Dewater Ash Pond B in accordance with Ash Pond B Water Management*.

9. Construct buttress on the northern portion of the Ash Pond B eastern dike.

10. Lay back CCR in northern end of Ash Pond B to 5H:1V slope or flatter to facilitate Ash Pond A / Ash Pond B splitter dike reconstruction and place in Ash Pond B.

11. Remove ash buttress in southeast corner of Ash Pond A to facilitate splitter dike reconstruction and place removed ash in Ash Pond B, Ash Pond C in accordance with PTI 13-0831 requirements, or Ash Pond C Extension in accordance with PTI 13-42365 requirements.

12. Remove CCR comprising splitter dike and place in Ash Pond B, Ash Pond C, or Ash Pond C Extension.

13. Proof-roll exposed splitter dike native clay and reconstruct splitter dike using buttress material (USCS CL).

14. Regrade Ash Pond B to subgrade conditions, i.e. to 3 feet less than grades indicated on final grading plan.

15. Install northern and southern sediment basins and drainage structures. Place caps on top of the northern and southern sediment basin risers and do not install orifices in the risers. Prevent water from flowing into the risers and discharge barrels until non-contact water is eliminated.

16. *Construct Ash Pond B final cover system.*

17. Remove caps from the top of the northern and southern sediment basin risers and install orifices in the risers after all CCR materials have been covered with low permeability clay. Allow flow into the risers and discharge barrels.

18. Place vegetative cover soil as required and seed and mulch disturbed areas. Phase vegetative cover material placement, amendment application, seeding, and mulching activities to achieve "final stabilization" of areas to the maximum extent practicable as well as to limit onsite erosion and sediment transport.

19. After vegetation is established, clean out any sediment accumulated in the sediment basins. Modify risers to allow for permanent stormwater drainage after achieving "final stabilization" of upgradient area.

20. Remove associated temporary erosion, sediment and stormwater management practices downgradient of the final stabilization area upon achieving and receiving acceptance of final stabilization.

CR Item 1, pp. 37-38 (emphasis added).

{¶13} Regarding groundwater monitoring, CLP's application stated:

> Groundwater monitoring will continue as specified in the Groundwater Monitoring Program Plan for Surface Impoundments Ash Pond B (URS, 2008) and OEPA's February 9, 2017 recommendation. NRDC may petition the OEPA for approval to modify or terminate the groundwater monitoring program following closure of Ash Pond B and stable groundwater quality conditions are demonstrated.

CR Item 1, p. 46.

B. Ohio EPA's Review of PTI Application

{¶14} After receiving CLP's application, Glen Vonderembse, Environmental Engineer 2, Division of Surface Water, Ohio EPA, Southwest District Office, began Ohio EPA's review.

{¶15} On June 3, 2021, Mr. Vonderembse sent an email to Alan Briggs[4] with the following comments relevant to this appeal:

> 1. Section 2.4 Sequence of Construction: Item 6 of the described sequence addresses the reroute of leachate from land disposal units located in the uplands, north and south of Beckjord Road. Please confirm this activity will not occur until such time leachate treatment ponds are constructed at the Pond Run Ash Landfill, which would alleviate the need to maintain "pond" treatment in the treatment train for leachate prior to discharge via the permitted outfall, 002.
>
> * * *
>
> 3. Section 2.6 Ash Pond B Water Management: In this section, the coal pile area is listed as a discharge into Ash Pond B, With the closure of this pond, what will be the fate of this discharge after the closure of Pond B? The reason this question is being asked is the coal pile runoff pind is specifically listed as a source of water through the nPDES [sic] permitted outfall 002.
>
> * * *
>
> Please know two options that provide a path forward are: (1) remove any and all coal residuals in the former bulk coal storage area to allow a classification of runoff as clean stormwater and redirect to an existing or newly created stormwater outfall. (2) Provide a sedimentation basin upstream of the coal pile lift station and reroute the discharge of this lift station to the location of the existing Pond B Outfall, Station 002. It is not clear to me if the existing coal pile runoff lift station has existing sedimentation basins. If these exist, these could serve the purpose of a sedimentation basin.

CR Item 2, p. 1.

{¶16} Essentially, because Pond B serves to treat leachate from surface ash piles, Mr. Vonderembse sought assurance that the closure of Pond B would not result in the discharge of that leachate directly to Pond Run and the Ohio River without treatment.

{¶17} Responding to Mr. Vonderembse's comments, CLP amended its proposed sequence of construction in July 2021 as follows:

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[4] Alan Briggs appears to be the Supervising Engineer for CLP's proposed closure of Pond B. *See* CR Item 1, p. 494.

> 3. Reroute leachate flow from ash piles to existing NPDES Outfall 002 after the ash pile leachate treatment system is operational. Remove 8 inch diameter steel leachate pipe (northwest pipe) from manhole MH2 and associated bedding and backfill materials and replace with compacted buttress material (USCS CL). Grout and abandon in-place leachate conveyance system downgradient of manhole MH4A (i.e., manholes MH1, MH2, MH3 and associated piping). Perform Items 3, 4, and 5 in parallel or in any order.
>
> 4. Reroute stormwater flow from upper parking lot to existing NPDES Outfall 002. Remove corrugated PE pipe from southeast corner of Ash Pond B and backfill portion located within dike limits with compacted buttress material (USCS CL). Grout and abandon in-place or remove remainder of corrugated PE pipe. Perform Items 3, 4, and 5 in parallel or in any order.
>
> 5. Reroute flow from the former coal pile area runoff sumps to other than Ash Pond B. Perform Items 3, 4, and 5 in parallel or in any order.

CR Item 5, p. 277 (underlining in original).

{¶18} Additionally, Mr. Briggs submitted the following response to Comment 3 in a letter dated July 14, 2021:

> Stormwater runoff from the former coal pile area sumps will not be routed through Ash Pond B after Ash Pond B closure activities are initiated. Refer also to Response to Comment 1. It is currently proposed that the former coal pile area will be decommissioned as follows:
>
> - All visible coal will be removed from the former coal pile area;
> - Clay suitable for cap construction at Ash Pond C or Ash Pond Cx will be removed from the former coal pile area;
> - The clay borrow area and other depressed areas will be filled with common fill obtained from the Ash Pond A dikes;
> - The northern face of the dike between Ash Pond A and the former coal pile area will be regraded to a slope of 5H:1V and stabilized with permanent vegetation;
> - The former coal pile area surface will be graded to drain toward Ash Pond A;
> - The former coal pile area surface will be stabilized with permanent vegetation; and,

- The existing sumps and pumping system will be decommissioned after achieving "final stabilization" of the surface.

CR Item 5, pp. 730-31.

{¶19} Regarding Ohio EPA's review of CLP's proposed groundwater monitoring system, Mr. Vonderembse requested assistance in reviewing CLP's application from Allison Reed, Geologist IV, Division of Drinking and Groundwater, Southwest District Office. Ms. Reed reviewed CLP's proposal and sent her comments to Mr. Vonderembse in an interoffice memorandum dated March 23, 2021. CR Item 5, pp. 776-80.

C. Ohio EPA's Issuance of the PTI

{¶20} Ultimately, Ohio EPA issued the PTI to CLP on September 3, 2021. Relevant to this appeal, the PTI contains the following conditions:

> 12. The permit to install is not an authorization to discharge pollutants to waters of the state. Pursuant to Chapter 6111 of the Ohio Revised Code, the applicant shall apply for a permit to discharge (NPDES) 180 days prior to any discharge of pollutants to waters of the state.
>
> * * *
>
> 14. The closure of Ash Pond "B" shall not commence until such time leachate treatment ponds have been constructed to provide treatment from ash land disposal units.
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> * * *
>
> 16. The OWNER, New Richmond Development LLC, shall implement the post closure plan of the facility as submitted in this permit to install. Groundwater Monitoring of this closed ash pond shall be conducted under the approved groundwater plan implemented as part of the Interceptor Well(s) permit to install (Ohio EPA PTI #s 05-6266 and 1354698, as applicable) and any subsequent revisions of this plan.

CR Item 1, p. 5.

D. NOPE's Notice of Appeal

{¶21} NOPE filed its Notice of Appeal on October 13, 2021. The Notice of Appeal raised 16 assignments of error:

> 1. The Director erred and/or abused her discretion because the issuance of the Permit exceeds her authority. The Permit purports to authorize "closure" of the unlined Pond B (i.e., permanent disposal of CCRs, solid wastes under federal law, under a "cap"). The surface water permit regulations, on their face, do not authorize permitting of permanent final disposal of solid wastes or of CCRs. See OAC 3745-42. In fact, the Director has no authority to regulate CCRs because CCR is exempt from the definition of solid waste under Ohio law. RC § 3734.01(E). In issuing the Permit, the Director acted unreasonably and unlawfully.
>
> 2. The Director erred and/or abused her discretion by failing to require a complete application and issuing the Permit based on an incomplete and/or inaccurate application. The Director is aware of and ignored widespread CCR contamination on properties where the unlined CCR piles, CCR landfill, and soil and clay borrow areas for Pond B are located, and failed to require an investigation to determine the extent of contamination to ensure contaminated material would not be used in the cap for Pond B. In so doing, the Director acted unreasonably and unlawfully.
>
> 3. The Director erred and/or abused her discretion because the Permit was issued under a "guidance" document, titled Coal Ash Impoundment Closure Requirements, which is invalid and unenforceable because the Director failed to comply with RC Chapter 119 in issuing said guidance. The Director further erred and/or abused her discretion by failing to follow the invalid guidance. In so doing, the Director acted unreasonably and unlawfully.
>
> 4. The Director erred and/or abused her discretion because the Permit authorizes an adverse impact to NOPE's Greenbelt Area expressly prohibited by the plain language of the easement instrument. The Director also erred and/or abused her discretion in failing to provide NOPE with any notice, let alone meaningful notice, and the opportunity to comment on plans to excavate and relocate tens of thousands of cubic yards of material, despite knowing NOPE's interests and concerns. In so doing, the Director acted unreasonably and unlawfully.
>
> 5. The Director erred and/or abused her discretion by not considering, by ignoring, and by not giving appropriate weight to the information that NOPE furnished to Ohio EPA, especially in the eight months preceding the Director's action. This expressly includes facts about the scope and extent of contamination that is escaping from unlined disposal areas on property owned by CLP on Beckjord, Nelp, and Pond Run Roads. In so doing, the Director acted unreasonably and unlawfully.

6. The Director erred and/or abused her discretion by failing to consider the social and economic impacts that will be a foreseeable consequence of the Pond B "closure" plans authorized by the Permit. This includes the excavation and relocation of materials from known areas of contamination along Pond Run, Nelp, and Beckjord Roads to Pond B. In so doing, the Director acted unreasonably and unlawfully.

7. The Director erred and/or abused her discretion by failing to determine, or determining with no valid factual foundation, that the closure of Pond B would not result in a violation of applicable laws as defined in OAC 3745-42-01. In so doing, the Director acted unreasonably and unlawfully.

8. The Director erred and/or abused her discretion by failing to determine, or determining with no valid factual foundation, that the closure of Pond B would employ the best available technology. In so doing, the Director acted unreasonably and unlawfully.

9. The Director erred and/or abused her discretion by failing to determine, or determining with no valid factual foundation, whether the closure of Pond B would prevent or interfere with the attainment or maintenance of applicable water quality standards contained in OAC 3745-1. In so doing, the Director acted unreasonably and unlawfully.

10. The Director erred and/or abused her discretion by failing to consider the design flow, effluent characteristics, structural integrity, and operational history of Pond B. Further, the Director erred and/or abused her discretion by failing to consider CLP's ability to operate, maintain, and close Pond B. These failures render the Permit, including the Director's findings regarding stability, settlement, and liquefaction potential, unreasonable and unlawful.

11. The Director erred and/or abused her discretion in failing to require Appellee CLP to submit plans in accordance with generally accepted engineering standards or guidance for design and operation to ensure the protection of human health or the environment. In so doing, the Director acted unreasonably and unlawfully.

12. The Director erred and/or abused her discretion by not exercising her authority under OAC 3745-42-04 to impose such special terms and conditions as are appropriate or necessary to ensure compliance with applicable laws and to ensure adequate protection of human health or the environment. In so doing, the Director acted unreasonably and unlawfully.

13. In light of the ongoing ground and surface water contamination resulting, inter alia, from the unlined ash disposal areas, the Director erred and/or abused her discretion because the Permit is contrary to OAC 3745-1 to 3745-05, 3745-32, 3745-33, and 3745-42 and the requirements set forth therein. In so doing, the Director acted unreasonably and unlawfully.

> 14. In light of the ongoing ground and surface water contamination resulting, inter alia, from the unlined ash disposal areas, the Director erred and/or abused her discretion because the Permit is contrary to R.C. 6111., including, e.g., RC 6111.03, and the requirements set forth therein. In so doing, the Director acted unreasonably and unlawfully.
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> 15. The Director erred and/or abused her discretion in determining that Antidegradation review was not required pursuant to OAC 3745-1-05. In so doing, the Director circumvented public participation requirements set forth in OAC 3745-1-05 and otherwise acted unreasonably and unlawfully.
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> 16. The Director erred and/or abused her discretion in failing to require a mixing zone demonstration pursuant to 3745-1-06 and 3745-1-32. In so doing, the Director acted unreasonably and unlawfully.

Case File Item A, pp. 4-8.

{¶22} In the interest of judicial economy, the Commission summarizes and groups NOPE's assignments of error as follows:

	Assignments of Error
The Director acted unlawfully/unreasonably because Ohio EPA lacks statutory/regulatory authority to permit the disposal of the coal combustion residuals in Pond B.	1
The Director acted unlawfully/unreasonably because CLP's PTI application was incomplete.	2
The Director acted unlawfully/unreasonably because the groundwater around Pond B is contaminated with sulfate.	2, 7, 9, 12, 13, 14
The Director acted unlawfully/unreasonably by not including a requirement to test material to be used for the cap for Pond B.	2
The Director acted unlawfully/unreasonably by failing to require the use of Best Available Technology.	3, 8
The Director acted unlawfully/unreasonably because the PTI will result in a violation of an easement to NOPE's Greenbelt Area.	4

The Director acted unlawfully/unreasonably by failing to require a public comment period and/or a public meeting.	5
The Director acted unlawfully/unreasonably by failing to consider social/economic impacts.	6
The Director acted unlawfully/unreasonably because CLP will not be able to comply with the terms of the PTI.	10, 12
The Director acted unlawfully/unreasonably because CLP's application was not in accordance with generally accepted engineering standards.	11
The Director acted unlawfully/unreasonably by not performing an antidegradation analysis.	15
The Director acted unlawfully/unreasonably by not performing a mixing zone analysis.	16

II. Testimony Presented at Hearing

{¶23} In addition to testimony relating to Appellant's 16 assignments of error, the parties also presented evidence relating to CLP's argument that NOPE untimely filed their appeal and/or lacks standing. Accordingly, the Commission will address those issues first.

A. ERAC's Jurisdiction under R.C. 3745.04 and 3745.07

{¶24} The Commission's jurisdiction is governed by R.C. 3745.04 and 3745.07. Relevant to this appeal, R.C. 3745.04 provides:

> (B) Any person who was a *party to a proceeding before the director of environmental protection* may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. * * *
>
> * * *

> (D) * * * The appeal shall be filed with the commission *within thirty days after notice of the action*.

(Emphasis added). Thus, under R.C. 3745.04, any person who was a "party to a proceeding" before the Director may appeal a final action of the Director to ERAC "within thirty days after notice of the action."

{¶25} By contrast, R.C. 3745.07 provides in relevant part:

> 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 review appeals commission *within thirty days of the issuance, denial, modification, revocation, or renewal*.

(Emphasis added). Under R.C. 3745.07, the appellant need not have been a "party to a proceeding" before the Director. Under R.C. 3745.07, however, the appellant must file within thirty days of the date of the action, rather than within thirty days of notice of the action.

{¶26} Here, the parties do not dispute that NOPE's appeal was filed more than thirty days after the Director's issuance of the PTI but within thirty days of the Director's notice of the issuance of the PTI. In other words, NOPE's appeal is *not* timely filed under R.C. 3745.07 but *is* timely filed under R.C. 3745.04.

{¶27} Relative to R.C. 3745.04, then, the only issue in dispute is whether NOPE was a "party to a proceeding" before the Director.

{¶28} The Tenth District Court of Appeals has defined a "party to a proceeding" before the Director using the following two-prong test: (1) did the person "appear" before the Director; and (2) was the person "affected" by the action or proposed action. *Sierra Club, et al. v. Koncelik, et al.*, ERAC Nos. 256002-256006 (Feb. 29, 2012), citing *Martin v. Schregardus*, 10th Dist. No. 96APH04-433 (Sept. 30, 1996).

{¶29} A person "appears" before the Director if he "appears in person, or by his attorney, and presents his position, arguments, or contentions orally or in writing, or * * * offers or examines witnesses or presents evidence tending to show that said proposed [action], if adopted or effectuated, will be unreasonable or unlawful." *D'Andrea, et al. v. Butler, et al.*, ERAC Nos. 17-6935 & 17-6936, citing *Girard Bd. of Health v. Korleski*, 193 Ohio App.3d 309, 2011-Ohio-1385, 951 N.E.2d 1072 (10th Dist.).

{¶30} A person is "affected" by the Director's action if: "(1) the challenged action will cause injury in fact, economic or otherwise, and (2) the interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged." *Girard,* at ¶15.

{¶31} Further, the injury in fact must be "concrete, rather than abstract or suspected." *Id.* In other words, a party must show "that he or she will suffer a specific injury, even slight, from the challenged action or inaction, and that the injury is likely to be redressed if the court invalidates the action or inaction." *Id.* The alleged injury may be actual and immediate, or threatened. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Servs. of Ohio, II, L.L.C.*, 10th Dist. No. 07AP-599, 2009-Ohio-2143, at ¶24, quoting *Johnson's Island Property Owners' Ass'n v. Shregardus*, 10th Dist. No. 96APH10-1330 (June 30, 1997). However, a party who alleges a threatened injury "must demonstrate a realistic danger arising from the challenged action." *Id.*

{¶32} Finally, "the interest sought to be protected [must be] within the realm of interests regulated or protected by the statute or constitutional right being challenged." *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, 84 Ohio App.3d 591, 599 (10th Dist. 1992).

{¶33} For an association to establish standing, it must demonstrate that: (1) at least one of its members would otherwise have standing to sue in his own right, and (2) the interests it seeks to protect are germane to the association's purpose. *Ohio Acad. Of Nursing Homes, Inc. v. Barry*, 37 Ohio App.3d 46, 47 (10th Dist. 1987).

{¶34} Here, NOPE offered two documents supporting that it "appeared" before the Director and presented its position to Ohio EPA prior to the issuance of the PTI. First, NOPE introduced a series of emails between counsel for NOPE and Ohio EPA employees. NOPE Ex. 41. The emails generally request records and information regarding CLP's PTI application. For example, one email dated March 11, 2021, requests records relating to, among other things, "[t]he chemical composition of the waste (including fly ash and bottom ash) in each pond (A, B, C, and C Extension)." *Id*. at p. 5.

{¶35} Additionally, NOPE introduced a "notice of intent to sue" letter under the Resource Conservation and Recovery Act ("RCRA"). NOPE Ex. 42. The letter, sent May 26, 2021, was addressed to CLP but also copied to Laurie Stevenson, Director of Ohio EPA. *Id*. at p. 22. The letter generally notifies CLP of NOPE's intent to sue under RCRA's citizen suit provision and alleges violations of RCRA relating to CLP's overall closure plan for the Beckjord site. The letter sets out NOPE's position that "[u]nless [coal combustion residuals] are removed and/or otherwise restrained, Ponds B, C, and Cx will continue to contribute substantial quantities and volumes of Coal Ash pollution, including sulfate, to groundwater and surface water." *Id.* at p. 7. The letter also articulates NOPE's position that such actions "constitute ongoing Open Dumping that is prohibited by law." *Id*.

{¶36} Regarding injury, Steven Utter, member, NOPE, testified at hearing that several NOPE members live near the Beckjord facility and use the Clermont County public water supply system. Mr. Utter explained that in the past, elevated sulfate levels in the

groundwater had forced Clermont County to close one of its supply wells. Mr. Utter further asserted that the source of sulfate contamination was the Beckjord facility, including Pond B, and explained that he and other NOPE members are concerned that the closure of Pond B could lead to further impacts to the Clermont County public water supply system. Testimony Utter, transcript pp. 472-73.

{¶37} Additionally, Mr. Utter testified that NOPE holds an easement known as the "Greenbelt Area." Mr. Utter asserted that the PTI authorizes CLP to violate the terms of the easement by removing soil from certain areas within the easement for use in the closure of Pond B. Testimony Utter, transcript pp. 480-86.

{¶38} In response, Appellees argue that the emails in NOPE Ex. 41 do not establish "appearance" before the Director because they do not specifically object to the Director's issuance of the PTI. Rather, Appellees observe that NOPE's counsel merely requested information and did not expressly state that NOPE opposed issuance of the permit. Testimony Utter, transcript pp. 555-57.

{¶39} Similarly, Appellees contend that NOPE's notice of intent to sue letter also does not establish "appearance" because it relates to alleged RCRA violations rather than the CLP's PTI application before Ohio EPA. Testimony Utter, transcript pp. 559-62.

{¶40} In essence, Appellees assert that an appellant must have expressly stated an objection to the specific action being appealed in order to have "appeared" before the Director within the meaning of R.C. 3745.04.

{¶41} Finally, regarding injury, Appellees argue that no member of NOPE is currently drinking contaminated water because the relevant water supply well was previously closed by Clermont County. In other words, Appellees assert that no sulfate

contamination to the groundwater is currently impacting any member of NOPE "at the tap." *See* Testimony Utter, transcript pp. 514-16.

{¶42} Regarding potential impacts to the Greenbelt Area, CLP and the Director argue that the PTI does not require CLP to obtain soil from the Greenbelt. Testimony Utter, transcript p. 519. Additionally, Appellees note that the Director's issuance of the PTI does not relieve CLP of the obligation to comply with other applicable laws and regulations. Testimony Utter, transcript p. 567.

B. NOPE's Assignments of Error

{¶43} Appellant called no substantive witnesses of its own. Rather, NOPE advanced its arguments through the cross-examination of several Ohio EPA employees. Below, the Commission summarizes the discussions between NOPE's counsel and the witnesses regarding each of NOPE's assignments of error.

i. The Director acted unlawfully/unreasonably because Ohio EPA lacks statutory/regulatory authority to permit the disposal of the coal combustion residuals in Pond B (assignment of error 1).

{¶44} Appellant argues that the Director acted unlawfully/unreasonably because Ohio EPA lacks statutory/regulatory authority to permit the disposal of the coal combustion residuals in Pond B.

{¶45} At hearing, Mr. Vonderembse explained, and NOPE does not dispute, that Ohio EPA derives its authority to regulate CCR from R.C. 6111.45. Testimony Vonderembse, transcript pp. 425-26.

{¶46} The parties also do not dispute that to qualify as an "industrial waste" under R.C. 6111.45, CCR material must be nontoxic. Testimony Vonderembse, transcript p. 455-56.

{¶47} Further, the parties do not dispute that the CCR material in Pond B has not been specifically tested for toxicity. Thus, NOPE argues that the Director acted unreasonably and/or unlawfully in concluding that the CCR material in Pond B falls within the scope of "industrial waste" under R.C. 6111.45. *See generally* Testimony Vonderembse, transcript pp. 455-59.

{¶48} In response, Mr. Vonderembse explained that CCR is nontoxic in most cases and that no statute or regulation specifically requires testing for toxicity. Testimony Vonderembse, transcript pp. 443, 573.

ii. The Director acted unlawfully/unreasonably because CLP's PTI application was incomplete (assignment of error 2).

{¶49} Under Ohio Adm.Code 3745-42-04(A)(3), the Director may not consider an incomplete PTI application for approval. NOPE argues that the Director acted unlawfully and/or unreasonably because she issued CLP's PTI based on an incomplete application. NOPE, however, introduced no specific testimony as to which required part or parts it believes CLP failed to include in its PTI application.

{¶50} By contrast, Mr. Vonderembse testified that a complete PTI application consists of properly completed and signed forms, an anti-degradation review or a properly completed anti-degradation form, detailed plans, any necessary supporting narratives, and the payment of applicable fees. Mr. Vonderembse further explained that CLP's PTI application contained each of the required parts and was administratively complete. Testimony Vonderembse, transcript pp. 448, 599.

iii. The Director acted unlawfully/unreasonably because the groundwater around Pond B is contaminated with sulfate (assignments of error 2, 7, 9, 12, 13, and 14).

{¶51} The bulk of the testimony presented at hearing related to sulfate contamination of the groundwater near Beckjord Station.

{¶52} The Director must consider certain criteria when evaluating a PTI application. Specifically, the regulation provides in pertinent part:

> (2) In deciding whether to approve or deny a permit to install or plan approval, the director shall take into consideration the following factors:
>
> (a) Whether the installation or modification and operation of the disposal system shall do the following:
>
> (i) Not prevent or interfere with the attainment or maintenance of applicable water quality standards contained in Chapter 3745-1 of the Administrative Code.

Ohio Adm.Code 3745-42-04(A)(2)(a)(i).

{¶53} When applicable, water bodies in the state of Ohio are assigned water supply use designations. Ohio Adm.Code 3745-1-33 Relevant to this appeal, the water quality standard for sulfate is 250 mg/L. *Id*. The Ohio Adm.Code also identifies secondary maximum contaminant levels ("SMCLs"), and for sulfate, the regulation again lists an SMCL of 250 mg/L. Ohio Adm.Code 3745-82-02

{¶54} Appellant argues that groundwater samples from the area around Pond B have, at various times, shown sulfate levels exceeding 250 mg/L. Because the PTI allows CLP to close Pond B without first removing the CCR material, NOPE asserts that the Director acted unreasonably and/or unlawfully in concluding that such closure would not cause a violation of the water quality criteria for sulfate. *See, e.g.,* Testimony Reed, transcript pp. 144-47; *see, e.g.,* NOPE Ex. 30D.1, p. 8.

{¶55} In response, Appellees argue the 250 mg/L SMCL for sulfate is not a *mandatory* water quality standard. Appellees stress that the 250 mg/L standard for sulfate is a "secondary maximum contaminant level." Ms. Reed explained SMCLs as follows:

> Q. Okay. The SMCL, is that a surface [sic] water standard?

> A. It is a guideline for Ohio – or U.S. EPA set out guidelines for public water systems to basically help them determine what levels are best in the course of providing drinking water to their consumers because it's an aesthetic standard, so like taste and odor. U.S. EPA has determined that if it's above a secondary standard, it's not a health risk, but it may make the water more unpalatable for drinking.
>
> Q. People won't want to drink it?
>
> A. Right.
>
> Q. So it's a drinking water standard?
>
> A. Right.
>
> Q. And is an SMCL a law?
>
> * * *
>
> A. So no. It's a guideline.
>
> Q. It's a guideline. Okay. Is it a mandatory standard in any way?
>
> A. No.

Testimony Reed, transcript pp. 204-06.

{¶56} In other words, Appellees contend that SMCLs are *optional* standards for drinking water that have been developed for aesthetic reasons such as taste and odor. *Id.*; *see also* Ohio Adm.Code 3745-82-01(B) ("'Secondary maximum contaminant level' means the *advisable* maximum level of a contaminant in water which is delivered *to the free-flowing outlet of the ultimate user of a public water system*") (emphasis added). Moreover, Appellees note that SMCLs apply "at the tap" rather than within groundwater. *Id.* Thus, Appellees assert that an exceedance above the sulfate SMCL in the groundwater around Pond B would not pose a risk to human health. *Id.*

{¶57} Additionally, Appellees note that the water quality criteria for water supply use designations only apply within "within five hundred yards of drinking water intakes." Ohio Adm.Code 3745-1-33(A)(1). Here, Appellees argue that there are no

exceedances of the sulfate water quality criterion because the Clermont County supply well that had been previously affected by elevated sulfate levels has since been closed and an "interceptor well" has been constructed to prevent the future spread of sulfate in the groundwater. *See* Testimony Reed, transcript p. 183, 206.

{¶58} Regardless of the applicability of the water quality or the drinking water rules, Appellees also argue that Pond B may or may not have been the source of sulfate contamination around the Beckjord site. Other sources of potential sulfate contamination, such as surface coal storage piles, exist in the vicinity of Pond B and may be contributing to the observed elevated sulfate levels. Testimony Reed, transcript p. 136.

{¶59} Finally, Appellees assert that the closure of Pond B, as approved in the Director's issuance of the PTI, will ultimately *reduce* the potential for the discharge of contaminants to groundwater from Pond B.

{¶60} As discussed above, the closure of Pond B will involve the "dewatering" of CCR material in Pond B — that is, the removal of liquid — and include the installation of a cap. CR Item 1, p. 37, at ¶8 and p. 38, at ¶16.

{¶61} Ms. Reed explained that the installation of a vegetative cover cap will prevent the infiltration of the stormwater through the waste material:

> Q. Okay. I want to talk a little bit about the cap remedy, or the cap. You described it yesterday as a remedial action. Can you explain what you mean by that?
>
> A. So when a cap is installed, it is installed in order to provide a cover or a barrier that's impermeable to surface water infiltration, and it allows – instead of infiltration through the waste material, it allows surface water to run off. So you don't get that infiltration through the waste material, and so it's – it helps protect the groundwater.
>
> Q. Okay. And why is it important to stop water from infiltrating the waste material?

> A. Because, you know, as water moves down through the ash column, it potentially could leach out constituents from the ash and carry it to the groundwater.
>
> Q. Okay. And with no water penetration, what happens to the waste in this case in the pond?
>
> A. It just – it just stays in place. I mean, there's no – it's under cover, it's not – it's not impacted by the infiltrating water.

Testimony Reed, transcript pp. 202-03.

{¶62} In other words, the installation of a cap will reduce the amount of *new* water (from storm events) contacting CCR material in Pond B. *Id*. Combined with removal of *existing* water in the CCR material (i.e., dewatering), the overall amount of liquid contacting CCR material in Pond B will be substantially lower than before closure. Testimony Vonderembse, transcript pp. 411-12. Mr. Vonderembse explained that this will reduce the overall flow rate of any discharge from Pond B and thus necessarily reduce the overall contaminant load out of Pond B and into ground or surface waters:

> If you think about it, it's a direct relation. So load is equal to flow times concentration. So that's what I mean by direct relation. No fraction, denominators, or anything. One to one. So obviously, if you hold concentration constant and decrease flow [by the installation of a cap and by dewatering], load has to decrease.

Testimony Vonderembse, transcript p. 412.

iv. The Director acted unlawfully/unreasonably by not including a requirement to test material to be used for the cap for Pond B (assignment of error 2).

{¶63} Here, Appellant alleges that the Director acted unlawfully and/or unreasonably by not requiring CLP to test the material to be used to construct the cap for Pond B. *See* Case File Item A, p. 5, at ¶2. Appellant presented no specific testimony relating to this assignment of error at hearing.

{¶64} The Director, however, provided testimony at hearing that the PTI does require testing and documentation to ensure material to be used for the cap meets the

applicable specifications. Testimony Vonderembse, transcript pp. 429-30; Dir. Ex. 6, p. 13.

v. The Director acted unlawfully/unreasonably by failing to require the use of Best Available Technology (assignments of error 3 and 8).

{¶65} The Director must consider whether an application for a PTI employs "best available technology" ("BAT"). Ohio Adm.Code 3745-42-04(A)(2)(a)(iii). NOPE argues that the Director acted unlawfully and/or unreasonably in concluding that CLP's PTI application employs BAT.

{¶66} Specifically, Appellant argues that the Director omitted several additional items: (1) an engineered liner beneath Pond B, (2) the removal of all CCR material from Pond B, and (3) a revised groundwater monitoring plan.

{¶67} As an initial matter, Appellees assert that these regulations include no specific requirements for particular components and that BAT determinations are made by the Agency on a case-by-case basis. Testimony Vonderembse, transcript p. 583.

{¶68} Regarding Appellant's suggestion that a liner should have been required, Ms. Reed explained that a liner was not required in this instance because the installation of a cap will be sufficient:

> Q. * * * Did you consider whether CLP should be required to retrofit [Pond B] with a liner?
>
> A. No.
>
> Q. Why not?
>
> A. Because when they install a cap, that is in itself a remedial – a remedial activity that prevents – that prevents infiltration of water through the waste. So that cap – basically, you'd be over-remedying an area if you put in a liner and a cap. You're basically doing double duty. So only one of those is sufficient.

Testimony Reed, transcript pp. 112-13.

{¶69} Regarding the removal of CCR material, NOPE argues that the removal of the CCR material would have been preferable to the dewatering of the CCR material because effective dewatering may be difficult to complete. *See generally, e.g.,* Testimony Vonderembse, transcript pp. 450-52.

{¶70} In response, both Ms. Reed and Mr. Vonderembse explained that the removal of ash is not required to satisfy BAT. Testimony Reed, transcript p. 134; Testimony Vonderembse, transcript p. 355.

{¶71} Mr. Vonderembse further explained that dewatering is a well-defined process and that it will be effective at removing water from the CCR material in Pond B. He also observed that CLP's Construction Specifications require the final moisture content of the CCR material to be within a particular acceptable zone. Testimony Vonderembse, transcript p. 577; Dir. Ex. 5, p. 36. Further, if dewatering alone is insufficient to achieve those moisture content requirements, the Construction Specifications require the use of "disking" or "harrowing." *Id.*

{¶72} Mr. Vonderembse described disking and harrowing as follows:

> Q. Can you explain what those two terms I just said are?
>
> A. Disking and harrowing?
>
> Q. Yes.
>
> A. It means – when you think of a disk, think of farming agricultural practices. So it's common for soil-like soils and soil-like material that you would disk it which will open it up to allow air to get to it so it will allow it to dry out quicker.
>
> Q. And harrowing?
>
> A. Harrowing is another type. Instead of a nice disk to slice it, if you will, it kind of digs a little trench and creates a little – I call it a wind borough. And again, you're maximizing the surface area exposed to the air that can help increase – or increase the rate of drying.

> Q. Okay. And I apologize. I should have led with this. This is part of the construction specifications for the closure plan, correct?
>
> A. Yes, it is.
>
> Q. And that was approved by the Director?
>
> A. Yes.
>
> Q. So it is specifically called for in the closure plan to dry as much of this material as possible within the acceptable zone of moisture content, correct?
>
> A. Yes.
>
> Q. As far as the acceptable – or, I'm sorry, approved zone, is that something that's explicitly provided for in the closure plan, or is that something the engineers would establish based on conditions at the site?
>
> A. That would be something that would be based upon conditions at the site by the engineer of record.

Testimony Vonderembse, transcript pp. 578-79.

{¶73} Finally, regarding CLP's groundwater monitoring plan, NOPE argues that the groundwater monitoring plan does not meet the requirements of either Ohio Adm.Code 3745-30-08 or a 1996 guidance document known as GD0303.010. Testimony Reed, transcript pp. 180-82.

{¶74} In response, Ms. Reed explained that neither Ohio Adm.Code 3745-30-08 nor CD0303.010 are applicable requirements to CLP's closure of Pond B. *Id.* Instead, Ms. Reed explained that the existing monitoring network around Pond B is sufficient to detect releases of contaminants from Pond B. *Id.*

{¶75} Moreover, Ms. Reed testified that after completion of construction at Pond B, the PTI requires CLP to update and optimize its groundwater monitoring plan. She explained:

> Q. * * * So what criteria did you use when you were assessing the adequacy of the monitoring system for pond B?

> A. Well, I think that we have said – or I have said that the interceptor well network monitors the entire down gradient area from ponds A, B, the coal storage area, the power plant itself, and so the monitoring network has been established. Its' been there for 30-plus years.
>
> And then there is a requirement that once construction and closure of the ponds is completed, then we reevaluate the monitoring network. This monitoring network is not final as it is.
>
> We would expect that NRDC would come back to us with an optimized network, monitoring network that would provide us with adequate groundwater data to show that the closure of the pond is – is working. The way they've closed the pond is working.

Testimony Reed, transcript pp. 182-83.

vi. The Director acted unlawfully/unreasonably because the PTI will result in a violation of an easement to NOPE's Greenbelt Area (assignment of error 4).

{¶76} NOPE argues that the Director acted unlawfully and/or unreasonably because her issuance of the PTI will result in a violation of an easement known as the "Greenbelt Area." This easement, possessed by NOPE, is located near the Beckjord site. Ex. 38.

{¶77} CLP's PTI application demarcated several "candidate" soil and clay areas where material could be obtained for use in constructing the vegetative cover for Pond B. NOPE Ex. 2C, p. 9.

{¶78} NOPE argues that portions of the candidate soil and clay areas overlap with the Greenbelt Area, and thus the Director's issuance of the PTI will result in a violation of the easement. *See* Testimony Vonderembse, transcript pp. 397-98.

{¶79} In response, Appellees argue that even if portions of particular candidate areas overlap with NOPE's Greenbelt Area, the PTI does not require CLP to use material from those overlapping areas. Instead, CLP could use material from the candidate areas that do not encroach upon NOPE's Greenbelt Area. Testimony Vonderembse, pp. 427-28.

{¶80} Moreover, the Director observes that the Agency's issuance of the PTI does not relieve CLP from its obligation to comply with other applicable laws and regulations. Testimony Vonderembse, p. 426; CR Item 1, p. 3.

vii. The Director acted unlawfully/unreasonably by failing to require a public comment period and/or a public meeting (assignment of error 5).

{¶81} Here, Appellant alleges that the Director acted unlawfully and/or unreasonably because she failed to hold a public comment period and/or public meeting. Appellant presented no specific testimony on this subject.

{¶82} The Director offered testimony that neither a public comment period nor a public meeting was required in this instance. Testimony Vonderembse, transcript p. 420.

viii. The Director acted unlawfully/unreasonably by failing to consider social/economic impacts (assignment of error 6).

{¶83} Appellant alleges that the Director acted unlawfully and/or unreasonably by failing to consider social and economic impacts. Again, Appellant presented no specific testimony regarding this issue.

{¶84} However, Mr. Vonderembse testified that consideration of social and economic impacts is not required unless an antidegradation analysis is required. Testimony Vonderembse, transcript p. 596.

{¶85} As discussed in greater detail below, the Director did not perform an antidegradation analysis in this instance and contends she was thus not required to consider social and economic impacts. *Id.*

ix. The Director acted unlawfully/unreasonably because CLP will not be able to comply with the terms of the PTI (assignments of error 10 and 12).

{¶86} Neither Appellant nor Appellees presented specific testimony regarding this issue.

x. The Director acted unlawfully/unreasonably because CLP's application was not in accordance with generally accepted engineering standards (assignment of error 11).

{¶87} Appellant argues that the Director acted unlawfully and/or unreasonably in issuing CLP's PTI because the application was not in accordance with generally accepted engineering standards. Appellant presented no specific testimony regarding this issue.

{¶88} On behalf of the Director, Mr. Vonderembse explained that CLP's PTI application was in accordance with generally accepted engineering standards. Testimony Vonderembse, transcript pp. 599-600.

xi. The Director acted unlawfully/unreasonably by not performing an antidegradation analysis (assignment of error 15).

{¶89} Appellant argues that the Director acted unlawfully and/or unreasonably by not performing an antidegradation analysis. Again, Appellant presented no specific testimony regarding this issue.

{¶90} Nonetheless, Mr. Vonderembse explained on behalf of the Director that an antidegradation analysis was not required because CLP's proposed closure of Pond B would result in a reduction of contaminant load. Testimony Vonderembse, transcript p. 444; *see also* Testimony Vonderembse, transcript p. 412 (explaining that closure of Pond B will result in load reduction).

xii. The Director acted unlawfully/unreasonably by not performing a mixing zone analysis (assignment of error 16).

{¶91} Finally, NOPE argues that the Director acted unlawfully and/or unreasonably by not performing a mixing zone analysis. Again, NOPE presented no specific testimony regarding this issue.

{¶92} Mr. Vonderembse, however, testified that a mixing zone analysis is only required in conjunction with an antidegradation analysis. As discussed above, the Director did not perform an antidegradation analysis because Ohio EPA concluded the closure of Pond B would result in load reduction of contaminants. Thus, the Director also concluded that a mixing zone analysis was not required. Testimony Vonderembse, transcript p. 444.

CONCLUSIONS OF LAW

I. ERAC's Jurisdiction under R.C. 3745.04 and 3745.07

{¶93} Prior to the de novo hearing, the Commission denied CLP's motions to dismiss based on timeliness and standing. Because CLP raised these issues several times during this appeal, the Commission includes a brief discussion of its jurisdiction under R.C. 3745.04 and 3745.07.

{¶94} CLP's timeliness and standing arguments are necessarily related because NOPE's appeal is not timely filed under R.C. 3745.07 but *is* timely filed under R.C. 3745.04. CLP asserts that because NOPE did not participate in the proceeding before the Director, it cannot establish standing under R.C. 3745.04. CLP then contends that NOPE's appeal is barred by timeliness because its Notice of Appeal would not have been timely filed under R.C. 3745.07. Thus, CLP concludes that NOPE cannot establish jurisdiction under either statute.

{¶95} NOPE concedes that its appeal would not have been timely filed under R.C. 3745.07. Therefore, the only issue the Commission must resolve, in relation to either of CLP's motions, is whether NOPE participated in the proceeding before the Director. The Commission finds that it did.

{¶96} Although neither of the documents introduced by NOPE in support of its assertion that it participated in the proceeding before the Director expressly "object" to the Agency's issuance of the PTI, the totality of the circumstances establishes that NOPE generally opposed CLP's proposed closure of Pond B.

{¶97} Neither R.C. 3745.04 nor the case law require the use of specific words or phrases to convey an appellant's position, arguments, or contentions to the Director. In finding NOPE has standing in this appeal, the Commission does not hold that *any* communication relating to the subject matter of the appeal is sufficient to establish participation before the Director. Rather, the Commission finds that in this instance, the totality of NOPE's communications were sufficient to establish standing.

{¶98} Further, regarding NOPE's alleged injuries, the Commission finds that its allegations are sufficiently specific to meet the threshold required to establish standing. Although, as discussed below, NOPE does not ultimately prevail on the merits of its claims, standing is a separate inquiry. Here, the Commission finds that NOPE has alleged sufficiently specific injuries as to establish standing.

II. NOPE's Assignments of Error

A. ERAC Standard of Review

{¶99} Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. The statute provides in relevant part as follows:

> 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, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

R.C. 3745.05.

{¶100} 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*, 56 Ohio App.2d 61, 70 (10th Dist. 1977).

{¶101} The Commission must grant "due deference to the Director's 'reasonable interpretation of the legislative scheme governing his Agency.'" *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274 (2005), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State ex rel. Celebrezze v. National Lime & Stone Co.*, 68 Ohio St. 3d 377 (1994); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App. 3d 331 (2nd Dist. 1984). Administrative agencies possess special expertise in specific areas and are tasked with implementing particular statutes and regulations. *National Wildlife Federation v. Korleski*, 10th Dist. Franklin Nos. 12AP-278, 12AP-279, 12AP-80, 12AP-81, 2013-Ohio-3923, ¶56. Thus, such agencies are entitled to considerable deference when reviewing their interpretation of their own governing rules and regulations. *Id.*

{¶102} Deference granted to an agency's interpretation of its administrative regulations is not, however, without limits. *See e.g., B.P. Exploration and Oil, Inc. v. Jones*, ERAC Nos. 184134-36 (March 21, 2001). The Commission has consistently held that an agency's interpretation of its governing statutes and regulations must not be "at variance with the explicit language of the [statutes or] regulations." *Id.*

{¶103} Further, the Commission's standard of review does not permit ERAC to substitute its judgment for that of the Director on factual issues, and it is well-settled that there is a degree of deference for the agency's determination inherent in the reasonableness standard. *National Wildlife Federation*, ¶48. "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." *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977). 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 [ERAC] would have taken the same action." *Id.*

{¶104} Like the deference afforded the Director's interpretation of administrative regulations, deference toward an agency's factual determinations is not unbounded. Instead, the Commission engages in "a limited weighing of the evidence." *Ohio Fresh Eggs, LLC v. Wise*, 10th Dist. Franklin No. 07AP-780, 2008-Ohio-2423, ¶32 (emphasis added). Specifically, "ERAC must determine whether the evidence is of such quantity and quality that it provides a sound support for the Director's action." *Id.*

B. Motion to Dismiss Standard Under Civ.R. 12(B)(6)

{¶105} As discussed above, the Commission denied CLP's partial motion to dismiss with respect to assignments of error 2, 9, and 14 but deferred ruling on the motion with respect to assignments of error 4, 15, and 16 until after the de novo hearing.

{¶106} Although not strictly bound by the Ohio Rules of Civil Procedure ("Civ.R."), the Commission has historically applied those rules when appropriate to assist in the resolution of appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010).

{¶107} In considering CLP's partial motion to dismiss, the Commission construed CLP's motion as having been filed pursuant to Civ.R. 12(B)(6). A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim is a fundamental procedural motion designed to test the sufficiency of a complaint or cause of action. *Thompson v. Central Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 538, 639 N.E.2d 462 (8th Dist. 1994), citing *Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545 (1992).

{¶108} The Ohio Supreme Court explained, "* * * [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Obrien v. University Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). Further, "[u]nder Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3rd 190, 532 N.E.2d 753 (1988).

{¶109} The Commission's analysis of NOPE's assignments of error 4, 15, and 16, as it relates to both the evidence presented at hearing and CLP's partial motion to dismiss, is included below.

C. Burden of Proceeding

{¶110} Before turning to the merits of each of NOPE's assignments of error, the Commission also finds it appropriate to briefly address the "burden of proceeding." In formulating several of its assignments of error, NOPE appeared to suggest that CLP should be required to undertake particular affirmative demonstrations at the de novo hearing. For example, NOPE appeared to imply that CLP should be required to

affirmatively demonstrate that Pond B was not contaminating the groundwater with sulfate and that additional engineered components, as proposed by NOPE, were not required as BAT. In essence, NOPE sought to shift the burden of proceeding to Appellees. The Commission disagrees with this formulation.

{¶111} The Tenth District Court of Appeals has explained that in an appeal before ERAC, the "burden or proceeding" and "burden of proof" are distinct concepts. The Court explained the difference as follows:

> 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 to prove entitlement to the permit arises"). *See also Sutton v. Schregardus* (1994), 94 Ohio App.3d 213, 640 N.E.2d 581.

Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Servs. of Ohio II, LLC, 10th Dist. Franklin No. 07AP-599, 2009-Ohio-2143.

{¶112} Thus, a third-party Appellant such as NOPE bears the "burden of proceeding" to establish a prima facie case that the Director's action was unlawful or unreasonable, while the permit holder will subsequently bear the burden of proof to demonstrate entitlement to the permit *if the third-party appellant meets its burden of proceeding*. *Id.*

D. Discussion

i. The Director acted unlawfully/unreasonably because Ohio EPA lacks statutory/regulatory authority to permit the disposal of the coal combustion residuals in Pond B (assignment of error 1).

{¶113} The parties do not dispute that Ohio EPA derives its authority to regulate CCR from R.C. 6111.45. On behalf of the Director, Mr. Vonderembse explained that CCR is nontoxic in most cases and thus is considered an "industrial waste" under R.C. 6111.45.

{¶114} Appellant has presented no affirmative evidence to that the specific material in Pond B is toxic. Thus, the Commission finds Appellant's argument not well-taken.

ii. The Director acted unlawfully/unreasonably because CLP's PTI application was incomplete (assignment of error 2).

{¶115} Under Ohio Adm.Code 3745-42-04(A)(3), the Director may not consider an incomplete PTI application for approval. On behalf of the Director, Mr. Vonderembse explained that CLP's PTI application contained each of the required parts and was administratively complete.

{¶116} Appellant introduced no specific testimony as to which required part or parts it believes CLP failed to include in its PTI application. Accordingly, NOPE's argument is not well-taken.

iii. The Director acted unlawfully/unreasonably because the groundwater around Pond B is contaminated with sulfate (assignments of error 2, 7, 9, 12, 13, and 14).

{¶117} Ohio Adm.Code Chapter 3745-42-04 outlines the criteria the Director must consider in evaluating a PTI application. Specifically, the regulation provides in pertinent part:

> (2) In deciding whether to approve or deny a permit to install or plan approval, the director shall take into consideration the following factors:

> (a) Whether the installation or modification and operation of the disposal system shall do the following:
>
> > (i) Not prevent or interfere with the attainment or maintenance of applicable water quality standards contained in Chapter 3745-1 of the Administrative Code.

Ohio Adm.Code 3745-42-04(A)(2)(a)(i).

{¶118} Relevant to this appeal, both Ohio Adm.Code 3745-1-33 and Ohio Adm.Code 3745-82-02 set a maximum sulfate concentration level of 250 mg/L. The Commission finds, however, that neither standard is a mandatory restriction in the context of CLP's closure of Pond B.

{¶119} Regarding SMCLs, Ohio Adm.Code 3745-82-02 and the uncontroverted testimony establish that SMCLs are "advisory" standards based on aesthetic considerations such as taste and odor. *See* Ohio Adm.Code 3745-82-01 ("'Secondary maximum contaminant level' means the *advisable* maximum level of a contaminant in water which is delivered to the free-flowing outlet of the ultimate user of a public water system."). Further, SMCLs apply at "the free-flowing outlet of the ultimate user" rather than in the groundwater. *Id*. Appellant presented no evidence that the water "at the tap" of any user of the Clermont County public water system is currently above the sulfate SMCL.

{¶120} Regarding Ohio Adm.Code 3745-1-33, the evidence establishes that the area affected by elevated sulfate levels in the groundwater is not within five hundred yards of a drinking water intake. Although one drinking water well had been previously affected by sulfate, the parties do not dispute that the Clermont County public water system has since closed the affected well. Additionally, Appellant presented no affirmative evidence

that the exiting interceptor well around Pond B is insufficient to prevent the future spread of sulfate to other drinking water intakes.

{¶121} Finally, the Commission finds persuasive Appellees' argument that the closure of Pond B will *reduce* the overall potential for sulfate contamination. Ms. Reed and Mr. Vonderembse both explained that CLP's closure plan involves removing existing water from the CCR material in Pond B, as well as the installation of a cap to prevent new water from contacting the CCR material. Together, the testimony of Ms. Reed and Mr. Vonderembse establishes that these steps will reduce the amount of liquid contacting CCR material and thus reduce potential contamination flowing into either the Ohio River or the groundwater from Pond B.

{¶122} Appellant presented no affirmative evidence to rebut Appellees' assertions, and the Commission finds the testimony of Ms. Reed and Mr. Vonderembse credible as to the efficacy of CLP's Pond B closure plan. Accordingly, the Commission finds NOPE's argument regarding sulfate contamination not well-taken.

iv. The Director acted unlawfully/unreasonably by not including a requirement to test material to be used for the cap for Pond B (assignment of error 2).

{¶123} Here, Appellant alleges that the Director acted unlawfully and/or unreasonably by not requiring CLP to test the material to be used to construct the cap for Pond B. Appellant presented no specific testimony relating to this assignment of error at hearing.

{¶124} By contrast, Mr. Vonderembse testified on behalf of the Director that the PTI does require testing and documentation to ensure material to be used for the cap meets the applicable specifications.

{¶125} Accordingly, the Commission finds Appellant's argument not well-taken.

v. The Director acted unlawfully/unreasonably by failing to require the use of Best Available Technology (assignments of error 3 and 8).

{¶126} Again, Ohio Adm.Code Chapter 3745-42-04 outlines the criteria the Director must consider in evaluating a PTI application. Relating to best available technology, the regulation provides:

> (2) In deciding whether to approve or deny a permit to install or plan approval, the director shall take into consideration the following factors:
>
> (a) Whether the installation or modification and operation of the disposal system shall do the following:
>
> * * *
>
> (iii) Employ the best available technology. * * *

Ohio Adm.Code 3745-42-04(A)(2)(a)(iii).

{¶127} Appellant argues that to fulfill the BAT requirement, CLP should have been required to install an engineered liner, remove CCR material from Pond B, and prepare a revised groundwater monitoring plan.

{¶128} As an initial matter, the Commission finds that the Director has the discretion to determine BAT requirements on a case-by-case basis. *See Shelly Materials, Inc. v. Koncelik*, ERAC No. 645916 (Jan. 25, 2012), ¶46, citing *State ex rel. Northeast Ohio Sewer Dist. v. Ohio Environmental Protection Agency*, 8th Dist. Cuyahoga No. 87928, 2007-Ohio-834.

{¶129} Further, the Commission notes that in advancing its argument, Appellant introduced no specific testimony as to why any of its proposed elements (an engineered liner, the removal of CCR material, or a revised groundwater monitoring plan) should be required as BAT. Instead, counsel for NOPE speculated, with no affirmative testimony in support, that CLP's closure plan will be insufficient to prevent contamination of groundwater.

{¶130} By contrast, as discussed above in relation to sulfate contamination, Appellees presented persuasive evidence that CLP's closure of Pond B will reduce the overall risk of contamination from the CCR material present in the impoundment.

{¶131} Accordingly, NOPE's argument regarding BAT is not well-taken.

vi. The Director acted unlawfully/unreasonably because the PTI will result in a violation of an easement to NOPE's Greenbelt Area (assignment of error 4).

{¶132} NOPE argues that the Director's issuance of the PTI was unlawful and/or unreasonable because it authorizes CLP to violate an easement to NOPE's Greenbelt Area. The Commission disagrees.

{¶133} Although portions of particular candidate areas overlap with NOPE's Greenbelt Area, the parties agree that the PTI does not require CLP to use material from those overlapping areas. Instead, Appellant concedes that CLP could use material from the candidate areas that do not encroach upon NOPE's Greenbelt Area.

{¶134} NOPE presented no testimony or evidence, in either its prehearing response to CLP's partial motion to dismiss or at hearing, that the Director's issuance of the PTI would inhibit its ability to enforce the terms of its easement through the local courts.

{¶135} It is well established that issuance of a permit does not relieve the permit holder from its obligation to comply with other applicable laws and regulations. *Village of Albany v. Butler*, ERAC No. 16-6876 (Mar. 22, 2017), *aff'd. Village of Albany v. Butler*, 2018-Ohio-660, 95 N.E.3d 450 (10th Dist.).

{¶136} In *Village of Albany,* the appellant Village of Albany sought to enforce its local sewer ordinances and the terms of a prior contract through an appeal of a permit-to-install issued by Ohio EPA to the Alexander Local School District. *Id.* at ¶39. The

Commission granted the District's Motion to dismiss, finding that "the scope of the Commission's review * * * is limited to the lawfulness and reasonableness of the Director's issuance of the PTI" and that "[t]he Commission lacks jurisdiction to independently enforce local ordinances or inter-governmental agreements." *Id*. at ¶41. In so doing, the Commission also noted that the Village could seek to enforce its local ordinances or the terms of its contract in the local courts or any other venue with jurisdiction over those issues. *Id*. at ¶40.

{¶137} Similarly, NOPE presented no evidence that the Director's issuance of the PTI to CLP would hinder NOPE's ability to enforce the terms of its easement in the local courts. Additionally, as in *Village of Albany*, the terms of the PTI expressly provide that the Director's issuance of the PTI does not relieve CLP of the obligation to comply with other applicable laws and regulations.

{¶138} Appellant cites no statute or regulation that requires the Director to consider third-party easements in evaluating an application for a PTI. And because the Commission's jurisdiction is limited to the lawfulness and reasonableness of the Director's issuance of the PTI to CLP, the Commission finds NOPE's argument with respect to the Greenbelt Area not well-taken.

{¶139} The Commission GRANTS CLP's Motion to Dismiss as to NOPE's assignment of error 4.

vii. The Director acted unlawfully/unreasonably by failing to require a public comment period and/or a public meeting (assignment of error 5).

{¶140} Here, Appellant alleges that the Director acted unlawfully and/or unreasonably because she failed to hold a public comment period and/or public meeting. Appellant presented no specific testimony on this subject.

{¶141} On behalf of the Director, Mr. Vonderembse testified that neither a public comment period nor a public meeting was required in this instance.

{¶142} Accordingly, NOPE's argument regarding public comment and/or public meeting is not well-taken.

viii. The Director acted unlawfully/unreasonably by failing to consider social/economic impacts (assignment of error 6).

{¶143} Ohio Adm.Code Chapter 3745-42-04 outlines the criteria the Director must consider in evaluating a PTI application. In relation to social and economic impacts, the regulation provides:

> (2) In deciding whether to approve or deny a permit to install or plan approval, the director shall take into consideration the following factors:
>
> * * *
>
> (c) Social and economic impacts relevant to the environment, *if applicable*, that may be a consequence of issuance of the permit to install or plan approval.

Ohio Adm.Code 3745-42-04(A)(2)(c) (emphasis added).

{¶144} Appellant alleges that the Director acted unlawfully and/or unreasonably by failing to consider social and economic impacts. Again, Appellant presented no specific testimony regarding this issue.

{¶145} By contrast, on behalf of the Director, Mr. Vonderembse explained that consideration of social and economic impacts is not required unless an antidegradation analysis is required.

{¶146} As discussed in greater detail below, an antidegradation analysis was not required in this instance. Thus, the Commission finds that the Director was not required to consider social and economic impacts.

{¶147} Appellant's argument is not well-taken.

ix. The Director acted unlawfully/unreasonably because CLP will not be able to comply with the terms of the PTI (assignments of error 10 and 12).

{¶148} Neither Appellant nor Appellees presented specific testimony regarding this issue.

{¶149} The Commission must presume compliance absent evidence to the contrary. *Corwin v. Pelanda, et al.*, ERAC No. 20-7051, ¶27, citing *Village of Albany v. Butler, et al.*, ERAC No. 16-6876 (Mar. 22, 2017).

{¶150} Accordingly, Appellant's argument is not well-taken.

x. The Director acted unlawfully/unreasonably because CLP's application was not in accordance with generally accepted engineering standards (assignment of error 11).

{¶151} Ohio Adm.Code 3745-42-04(A)(4) requires that "[p]lans submitted under this chapter shall be in accordance with generally accepted engineering standards."

{¶152} NOPE alleges that the Director acted unlawfully and/or unreasonably in issuing CLP's PTI because the application was not in accordance with generally accepted engineering standards. Appellant, however, presented no specific testimony regarding this issue.

{¶153} By contrast, Mr. Vonderembse explained on behalf of the Director that CLP's PTI application was in accordance with generally accepted engineering standards.

{¶154} Accordingly, Appellant's argument is not well-taken.

xi. The Director acted unlawfully/unreasonably by not performing an antidegradation analysis (assignment of error 15).

{¶155} Appellant argues that the Director acted unlawfully and/or unreasonably by not performing an antidegradation analysis. Again, Appellant presented no specific testimony regarding this issue.

{¶156} Nonetheless, Mr. Vonderembse explained on behalf of the Director that an antidegradation analysis was not required because CLP's proposed closure of Pond B would result in a reduction of contaminant load.

{¶157} As discussed above, the Commission finds Mr. Vonderembse's testimony credible as to the efficacy of CLP's proposed closure of Pond B in reducing the potential contaminant load from the impoundment.

{¶158} Accordingly, the Commission finds Appellant's argument not well-taken.

{¶159} However, because this evidence (specifically, Mr. Vonderembse's testimony) was not available to ERAC prior to the de novo hearing, the Commission DENIES CLP's motion to dismiss with respect to assignment of error 15.

xii. The Director acted unlawfully/unreasonably by not performing a mixing zone analysis (assignment of error 16).

{¶160} Finally, NOPE argues that the Director acted unlawfully and/or unreasonably by not performing a mixing zone analysis. Again, NOPE presented no specific testimony regarding this issue.

{¶161} Mr. Vonderembse, however, testified on behalf of the Director that a mixing zone analysis is only required in conjunction with an antidegradation analysis. As discussed above, the Director did not perform an antidegradation analysis because Ohio EPA concluded the closure of Pond B would result in load reduction of contaminants. Thus, the Director also concluded that a mixing zone analysis was not required.

{¶162} Because the Commission denied CLP's motion to dismiss regarding assignment of error 15, the Commission also DENIES CLP's motion with respect to assignment of error 16. Nonetheless, the Commission finds Appellant's argument not well-taken.

FINAL ORDER

{¶163} For the foregoing reasons, the Commission hereby GRANTS CLP's motion to dismiss regarding NOPE's assignment of error 4. The Commission hereby DENIES CLP's motion regarding assignments of error 15 and 16.

{¶164} Further, the Commission AFFIRMS the Director's issuance of CLP's PTI. The Commission finds NOPE's assignments of error 1 through 3 and 5 through 16 not well-taken.

{¶165} The Commission informs the parties:

> 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.

Ohio Administrative Code 3746-13-01.

The Environmental Review Appeals Commission

Melissa M. Shilling, Chair

Michael G. Verich, Vice-Chair

Thomas W. Johnson, Member

Entered into the Journal of the Commission this 10th day of January 2024.

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