

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

WARREN TOWNSHIP : Case No. ERAC 25-7208
BOARD OF TRUSTEES, :
 :
Appellant, :
 :
v. :
 :
ANNE VOGEL, DIRECTOR OF :
ENVIRONMENTAL PROTECTION, :
 :
and :
 :
TRUMBULL COUNTY :
METRO PARKS, :
 :
Appellees. :

RULING ON DIRECTOR'S MOTION TO DISMISS

Rendered on June 18, 2025

Michael D. Dortch and Richard R. Parsons for Appellant
Warren Township Board of Trustees

*Dave Yost, Attorney General, Kelly D. Becker, and Greta
Raser* for Appellee Anne Vogel, Director of Environmental
Protection

Elizabeth H. Farbman for Appellee Trumbull County Metro
Parks

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) on a Notice of Appeal filed by Appellant Warren Township Board of Trustees (“Warren Township”) on February 7, 2025. Warren Township challenges Appellee Anne Vogel, Director of Environmental Protection’s (“Director,” “Ohio EPA,” “Agency”) December 4, 2024 approval (the “Approval”) of Appellee

Trumbull County Metro Parks' ("Metro Parks") application for coverage under National Pollutant Discharge Elimination System General Permit OHC000006 (the "General Permit"). Case File Items A, J.

{¶2} On April 4, 2025, the Director filed a Motion to Dismiss ("Motion"), arguing that (1) Ohio EPA's December 4, 2024 approval was not a final appealable action, (2) an appeal of the issuance of the General Permit would be untimely, and (3) Appellant lacks standing. Case File Item L. Metro Parks filed a notice of support for the Director's Motion on April 10, 2025. Case File Item M.

{¶3} On April 18, 2025, Warren Township filed a combined Response to the Director's Motion and its own Motion to Compel, arguing that although its appeal is styled as a challenge to Ohio EPA's December 4, 2024 approval, it is actually challenging all "actions" associated with Metro Parks' removal of the Leavittsburg Dam. Case File Item O.

{¶4} The Director filed a Reply in support of her Motion on April 25, 2025. Case File Item P.

{¶5} The Commission issued a Ruling on Appellant's Motion to Compel and Order for Issue Briefing on May 14, 2025. Case File Item Q. In it, the Commission denied Warren Township's Motion to Compel, but found that the Director's December 4, 2024 approval is a final appealable action within the meaning of Revised Code ("R.C") 3745.04(A). Accordingly, the Commission ordered issue briefing on the following issues:

- Did Appellant participate before the Director in the proceeding leading up to the Director's December 4, 2024 approval of the NPDES Notice of Intent application?
- Is Appellant aggrieved or adversely affected by the Director's December 4, 2024 approval of the NPDES Notice of Intent application?

- Was Appellant's appeal of the Director's December 4, 2024 approval of the NPDES Notice of Intent application timely under either R.C. 3745.04 or R.C. 3745.07?

Case File Item Q.

{¶6} Pursuant to the Commission's Order, the Director filed her issue brief on May 21, 2025. Case File Item R. Warren Township filed its issue brief on May 28, 2025. Case File Item S. Metro Parks missed its deadline to file its issue brief, but nonetheless filed a two-page Notice of Support for the Director's issue brief on May 29, 2025. Case File Item T.

{¶7} Based on a review of the pleadings and the relevant statutes, regulations, and case law, the Commission issues these Findings of Fact, Conclusions of Law, and Final Order GRANTING the Director's Motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Standard of Review

{¶8} 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 resolving appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010).

{¶9} The Tenth District explained a motion to dismiss for lack of subject matter jurisdiction as follows:

Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. * * * A trial court is not confined to the allegations of the complaint when determining its subject matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into one for summary judgment.

Guillory v. Ohio Dep't of Rehab. & Corr., 10th Dist. Franklin No. 07AP861, 07AP-928, 2008-Ohio-2299, P6 (internal citations omitted).

II. Discussion

A. Requirement for Final Action

{¶10} As an initial matter, the Commission will address the Director's argument that the December 4, 2024 approval was not a final appealable action within the meaning of R.C. 3745.04(A).

{¶11} "Action" is defined in 3745.04(A):

As used in this section, 'action' or 'act' includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

R.C. 3745.04(A).

{¶12} The list of "actions" contained in R.C. 3745.04(A), however, is illustrative rather than exhaustive. *Shelly Materials, Inc. v. Koncelik*, ERAC No. 645775 (Feb. 9, 2010), citing *Trans Rail America, Inc. v. Enyeart*, 123 Ohio St.3d 1, 2009-Ohio-3624,913 N.E.2d 948. Where a document does not fall within the enumerated categories of "actions" under R.C. 3745.04(A), the Commission examines both the form and substance of the document to determine whether it is nonetheless appealable. *Shelly Materials*, at ¶16.

{¶13} In *Shelly Materials*, the Commission found that the form of the letter at issue lacked "any of the indicia customarily found in final actions of the Director." *Shelly Materials*, at ¶17. Specifically, the Commission noted four factors:

1. The letter was signed by an Ohio EPA employee rather than the Director;

2. the letter did not contain language identifying it as a final action;
3. the letter did not include information regarding the recipient's right to appeal; and
4. the letter did not indicate that it had been entered into the Director's journal as a final action.

Id.

{¶14} Regarding substance, the Commission has noted that a document is a final appealable action “if the document mandates that the appealing party take some action, or if the substance of the document adjudicates with finality any legal right or privilege of the appealing party.” *Shelly Materials*, at ¶18. Conversely, a document is not a final appealable action if it “simply represents an intermediate step in a continuing process, if it is part of a contemplated review or evaluation that will lead to a final action by the Director, or if it is merely an explanation of an Ohio EPA policy or position.” *Id.*

{¶15} Here, the Director’s Motion acknowledges that the December 4, 2024 approval was signed by the Director, but emphasizes that the Approval does not contain language identifying it as a final appealable action and was not entered into the Director’s journal. Moreover, citing *Shelly Materials*, the Director observes that the Approval did not adjudicate any legal right of Warren Township. Motion, at p. 10. Instead, the Director asserts that the Approval affected only the rights of Metro Parks. *Id.*

{¶16} In focusing on the Approval’s effect on the rights of Warren Township, counsel for the Director misinterprets a critical nuance in ERAC’s analysis in *Shelly Materials*. In that case, *Shelly Materials* was both the appellant and the party to whom the letter was addressed. Thus, ERAC used those terms interchangeably when analyzing whether the letter adjudicated the legal rights of the affected party. The critical inquiry in

Shelly Materials was whether the document adjudicated with finality the legal rights of the party to whom the agency action was directed.

{¶17} Here, the circumstances are materially different. In contrast with *Shelly Materials*, the Director issued her Approval to Metro Parks not Warren Township. Thus, the relevant inquiry is not whether the Director's December 4, 2024 approval adjudicated with finality the rights of Appellant, but rather whether it adjudicated with finality the rights of Metro Parks—i.e., the party to whom the Approval was issued. And in that respect, the Commission finds that it does. Without the Director's December 4, 2024 approval, Metro Parks would not be authorized to proceed with the removal of the Leavittsburg Dam under the General Permit. Thus, the Commission finds the Director's Approval is a final appealable action within the meaning of R.C. 3745.04(A).

{¶18} Indeed, to hold otherwise—to require that an appellant challenge the issuance of a general permit rather than the Agency's approval of coverage for a specific project—would lead to an unworkable result. Such a process would require a potential appellant to anticipate that an unspecified applicant, at some unspecified time in the future, will apply for coverage under a general permit for use in conjunction with an unspecified future project. Not only would this process be impractical, such an appeal would not be ripe for review before ERAC. *See, e.g., Buckeye Power, Inc., et al. v. Nally*, ERAC Nos. 13-256734 through 13-666739 (Nov. 27, 2013).

{¶19} Accordingly, the Commission finds the Director's December 4, 2024 approval is a final appealable action within the meaning of R.C. 3745.04(A).

B. Timeliness

{¶20} Having found that the December 4, 2024 approval is a final appealable action, the Commission now turns to whether the Warren Township's appeal was timely.

{¶21} The Commission's jurisdiction is governed by R.C. 3745.04 and R.C. 3745.07. 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."

{¶22} By contrast, under R.C. 3745.07, an appellant need not be a party to a proceeding before the Director:

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, however, the appeal must be filed within thirty days of the issuance, denial, modification, revocation, or renewal.

{¶23} Here, Warren Township concedes that it was not a party to a proceeding before the Director. Case File Item S, pp. 1-2. Thus, R.C. 3745.07 is the sole avenue by which Warren Township could invoke the Commission's jurisdiction.

{¶24} In opposing the Director's Motion, Warren Township contends that it should not be subject to the 30-day deadline because Ohio EPA failed to publish notice of the Approval in a newspaper of general circulation in Trumbull County. In support of its argument, Warren Township cites the following requirement set forth in R.C. 3745.07:

The director shall cause notice of each proposed action, each issuance, denial, modification, revocation, or renewal of a permit, license, or variance for which no proposed action was issued, each verified complaint received, and each hearing or public meeting to be published *in a newspaper of general circulation* in the county where the permit, license, or variance is sought or violation is alleged, within fifteen days after the date of the proposed action, the issuance, denial, modification, revocation, or renewal of a permit, license, or variance, or the receipt of the verified complaint, and at least thirty days prior to a hearing or public meeting.

R.C. 3745.07 (emphasis added).

{¶25} The parties do not dispute that notice of the Director's December 4, 2024 approval was not published in a newspaper of general circulation in Trumbull County. Therefore, Warren Township contends that the 30-day deadline to file an appeal does not apply. The Commission disagrees.

{¶26} The Commission has held that the newspaper requirement of R.C. 3745.07 is directory rather than mandatory and a failure to give such notice as required by R.C. 3745.07 is not fatal to the action absent a showing of justifiable reliance on the Agency's failure to comply with the notice requirement. *Campbell v. Maynard*, EBR Case No. 521036, (Aug. 16, 1983). While the Commission acknowledges that some circumstances may result in justifiable reliance on a defective public notice, *see, e.g., Thompson v. Schregardus*, EBR No. 343812 (Dec. 11, 1997), it finds no such circumstance exists here.

{¶27} Through the affidavit of Jason Fyffe, Stormwater Program Manager, Division of Surface Water, Ohio EPA, the Director states that "[o]n its website, Ohio EPA maintains a public log of all parties with active coverage under the NPDES Construction

General Permit.” Case File Item R, Fyffe Aff, ¶22. Further, “[t]he log of coverage holders is updated daily at 6:00AM ET.” *Id.* Thus, the Director essentially asserts that the Approval would have been discoverable by Warren Township by no later than December 5, 2024.

{¶28} Although Warren Township alleges that it had difficulty in obtaining a copy of the Approval letter from Ohio EPA, it does not assert that it was unaware of the Approval. Indeed, a representative of Warren Township contacted ERAC staff regarding a potential appeal of the Approval on January 9, 2025. Moreover, Warren Township’s Issue Brief also appears to indicate that it was aware of Metro Parks’ intent to proceed with the removal of the Leavittsburg Dam by, at the latest, August 2024. *See* Case File Item S, Ex. A (dated August 19, 2024).

{¶29} Because Warren Township has not alleged, much less demonstrated, justifiable reliance on Ohio EPA’s failure to publish notice of the Approval in a newspaper of general circulation in Trumbull County, the Commission finds Warren Township was required to file its Notice of Appeal within thirty days of the issuance of the December 4, 2024 approval. R.C. 3745.07. And because Warren Township did not file its Notice of Appeal until February 7, 2025—more than 60 days after the issuance—the Commission finds Warren Township’s appeal untimely. *Skye Metals Recovery, Inc. v. Nally*, 10th Dist. Franklin No. 12AP-836, 2013-Ohio-1522, citing *Johnson v. Williams*, 10th Dist. No. 77AP-776, 1978 Ohio App. LEXIS 10126 (Feb. 16, 1978) (“the statutorily established 30-day deadline is a mandatory condition precedent to the commission’s authority to hear an appeal”).

C. Aggrieved or Adversely Affected

{¶30} The Director also argues that Warren Township lacks standing because it is not aggrieved or adversely affected by the Approval. Having found Warren Township's appeal untimely, the Commission declines to address whether Warren Township has sufficiently alleged harm.

FINAL ORDER

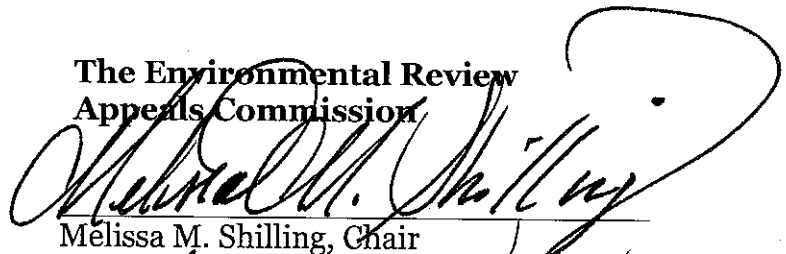
{¶31} For the foregoing reasons, the Commission GRANTS the Director's Motion and DISMISSES Warren Township's appeal.

{¶32} The Commission informs the parties:

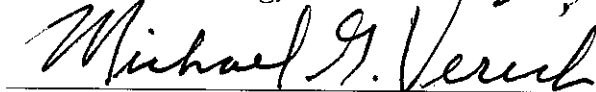
Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing 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 19th day of June
2025.

Copies Sent to:

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BOARD OF TRUSTEES
ANNE VOGEL, DIRECTOR OF
ENVIRONMENTAL PROTECTION
TRUMBULL COUNTY
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