

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO

BARBARA A. LUND,	:	Case No. ERAC 15-6836
	:	Case No. ERAC 15-6838
Appellant,	:	Case No. ERAC 15-6839
	:	Case No. ERAC 15-6840
v.	:	
	:	
PORTSMOUTH LOCAL AIR AGENCY	:	
	:	
and	:	
	:	
OHIO DEPARTMENT OF NATURAL	:	
RESOURCES,	:	
	:	
Appellees.	:	

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DECISION

Rendered on December 16, 2015

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Barbara A. Lund, pro se Appellant

*Michael DeWine*, Attorney General, *Adreanne G. Stephenson*, and *Elizabeth R. Ewing* for Appellee Portsmouth Local Air Agency

*Michael DeWine*, Attorney General, and *Nicole Candelora-Norman* for Appellee Ohio Department of Natural Resources

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{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon four notices of appeal filed by Appellant Barbara A. Lund. Ms. Lund challenges four permissions to open burn issued by Portsmouth Local Air Agency (“PLAA”) to Ohio Department of Natural Resources (“ODNR”). Specifically, Ms. Lund challenges permission number 150213cds5, issued February 17, 2015; permission number 150213cds4, issued February 17, 2015; permission number 150217cds7, issued February 13, 2015; and permission number

150213cds6, issued February 17, 2015 (collectively, “Burn Permissions”). ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

{¶2} The Commission held a de novo hearing on November 9, 2015. At hearing, Appellees<sup>1</sup> made an oral motion to dismiss three out of the four appeals.<sup>2</sup> Appellees asserted that because ODNR had executed burns Adams Lake Prairie State Nature Preserve, Davis Memorial State Nature Preserve, and Compass Plant Prairie State Nature Preserve, no meaningful relief was available to Appellant with regard to those permissions. The Commission denied the motion, finding that the issues presented are capable of repetition, yet evading review.

{¶3} Based upon the pleadings, the evidence adduced at hearing, and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order AFFIRMING PLAA’s issuance of the Burn Permissions.

### **FINDINGS OF FACT**

{¶4} Appellant Barbara A. Lund resides at 2635 Hamilton Road, Lynx, Ohio 45650.

{¶5} Appellee PLAA is a local air agency approved by the Ohio Environmental Protection Agency (“Ohio EPA”). Pursuant to Ohio Revised Code (“R.C.”) 3704.112, the Director of Ohio EPA has delegated certain powers and duties to PLAA. Under R.C.

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<sup>1</sup> Counsel of record for ODNR was not present at the November 9, 2015 de novo hearing. However, Ms. Stephenson and Ms. Ewing, counsel of record for PLAA, orally entered their appearance on behalf of ODNR.

<sup>2</sup> The permission issued for Chaparral Prairie State Nature Preserve has expired without ODNR having executed its proposed prescribed burn. Testimony Lund.

3704.112(D), one such delegated power is the authority to grant or deny permissions to conduct open burning. Testimony Charles.

{¶6} Appellee ODNR is a state agency that manages numerous nature preserves throughout Ohio, including Chaparral Prairie State Nature Preserve, Adams Lake Prairie State Nature Preserve, Davis Memorial State Nature Preserve, and Compass Plant Prairie State Nature Preserve. Testimony Johnson.

{¶7} In these appeals, Ms. Lund challenges four open burning permissions issued by PLAA to ODNR. PLAA issued the Burn Permissions to ODNR based upon application forms submitted to PLAA by ODNR. Each application form contained questions corresponding to the following categories of information:

- The purpose of the proposed burning;
- The quantity or acreage and the nature of the materials to be burned;
- The date or dates when such burning will take place;
- The location of the burning site, including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks; and
- The methods or actions which will be taken to reduce the emissions of air contaminants.

PLAA Exhibits 1, 2, 3, 4.

## **I. Procedural History**

### **A. Application and Issuance of Permission Number 150213cds5**

{¶8} ODNR filed with PLAA its application for permission to open burn at Chaparral Prairie State Nature Preserve, located in Adams County, Ohio, on February 12, 2015. The application requested permission to conduct open burning within an approximately 35-40 acre site. ODNR requested a burn window from March 1, 2015 to May 2, 2015. PLAA Exhibit 1.

{¶9} In describing the purpose of the of the proposed burn, ODNR's application stated in pertinent part as follows:

This burn will be conducted in order to maintain the unique wildlife ecosystems (prairie cedar barrens and oak association prairie) of this site to include prairie specific plant species and the associated animal species that utilize this particular open habitat. Conducting burns at this site will promote the unique ecosystem and support populations of specific species of insects including the Edwards hairstreak and their associated ant protectors as well as spiders, mammals and birds that have adapted to the open grassland nature and would likely be lost if it were allowed to return to woodland. \* \* \*

PLAA Exhibit 1.

{¶10} Regarding the quantity and nature of the materials to be burned, ODNR's application stated in full as follows:

The areas to be burned will be open prairie and small portions of oak woodland consisting mainly of dried standing prairie grasses and various forbs as well as dried leaves. In all sections there will be some standing woody vegetation which we will be burned [sic] in order to top kill and maintain the site in an open condition. The total amount of area [sic] burned under this permit will [be] 12-30 acres depending on how many of the smaller units at the site are in need of burning and have fuel conditions conducive to burns that will achieve our goals. Dry weights of fuel are estimated to be about 1000-4000 pounds per acre.

PLAA Exhibit 1.

{¶11} Additionally, ODNR's application included four maps, which detailed the location of the proposed burn site, as well as distances to occupied structures, airports, and populated areas. Specifically, ODNR's maps depicted seven nearby occupied structures, ranging from 200 feet to 0.28 miles from the proposed burn site, the nearest airport at approximately 3,000 feet from the burn location, and the nearest populated center at approximately 3.4 miles. PLAA Exhibit 1.

{¶12} Finally, regarding the methods or actions that will be taken to reduce the emissions of air contaminants, ODNR's application stated as follows:

Burning will occur on dried vegetation on days with low humidity to allow for more complete combustion of the fuel. The firing method (ring fire, strip fire, head fire, backing fire, etc.) employed will be done so as to create sufficient heat to more completely burn the materials and create less smoke and contaminants. Burning will also only occur on days with wind directions needed to carry smoke away from Sensitive Areas with transport winds of at least 9 MPH and mixing heights of at least 1700 feet to quickly dissipate contaminants.

PLAA Exhibit 1.

{¶13} In a correspondence from Ms. Cindy Charles (Director, PLAA) to Mr. Jeffrey Johnson (Natural Resource Administrator, ODNR), PLAA granted ODNR's application and issued permission number 150213cds5 on February 17, 2015. The permission contained the following six special conditions:

1. Permission to open burn shall be effective from March 1, 2015 to May 2, 2015 between the hours of 10:00 a.m. until 4:00 p.m.;
2. Open burning shall be conducted in a time, place, and manner as to minimize the emission of air contaminants;
3. Fire cannot create a visibility hazard on roadways, railroad tracks or airfields;
4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;
5. Any potential spot fires shall be addressed in accordance with the ODNR approved contingency plan(s); and
6. ODNR shall notify our office the day prior to ignition of the prescribed burn.

PLAA Exhibit 5.

**B. Application and Issuance of Permission Number 150213cds4**

{¶14} ODNR filed with PLAA its application for permission to open burn at Adams Lake Prairie State Nature Preserve, located in Adams County, Ohio, on February 12, 2015. In its application, ODNR requested a burn window from March 1, 2015 to May 2, 2015. PLAA Exhibit 2.

{¶15} In describing the purpose of the of the proposed burn, ODNR's application stated in pertinent part as follows:

This is a land management action needed to maintain the unique wildlife ecosystem and promote the native prairie and cedar barrens ecosystem at this site. Burns will promote the populations of the mound building ants and associated Edward's Hairstreak butterfly as well as other invertebrate, and vertebrates that have adapted to the open barren/prairie/savanna ecology. \* \* \*

PLAA Exhibit 2.

{¶16} Regarding the quantity and nature of the materials to be burned, ODNR's application stated in full as follows:

The material to be burned will consist [of] 5-10 acres of cedar barrens and a small amount of open oak woodland (~1 acre) containing mostly dried standing prairie grasses, sedges, and various forbs. The small section of oak woodland will have the above components as well as dried leaves. Within the barrens section, there will be some standing woody vegetation which we will be burning in order to top kill and maintain the site in an open condition. Dried fuels are estimated to weigh between 1000-4000 pounds per acre.

PLAA Exhibit 2.

{¶17} Additionally, ODNR's application included two maps, which detailed the location of the proposed burn site, as well as distances to occupied structures, airports, and populated areas. Specifically, ODNR's maps depicted the nearest occupied structure at approximately 1,104 feet from the proposed burn site, the nearest airport at approximately 3.3 miles from the burn location, and the nearest populated center at approximately 1.4 miles. PLAA Exhibit 2.

{¶18} Finally, regarding the methods or actions that will be taken to reduce the emissions of air contaminants, ODNR's application stated as follows:

Burning will occur on dried vegetation on days with low humidity to allow for more complete combustion of the fuel. The firing method (ring fire, strip fire, head fire, backing fire, etc.) employed will be done so as to create sufficient heat to more completely burn the materials and create less

smoke and contaminants. Burning will also only occur on days with wind directions needed to carry smoke away from Sensitive Areas with transport winds of at least 9 MPH and mixing heights of at least 1700 feet to quickly dissipate contaminants.

PLAA Exhibit 2.

{¶19} In a correspondence from Ms. Charles to Mr. Johnson, PLAA granted ODNR's application and issued permission number 150213cds4 on February 17, 2015.

The permission contained the following six special conditions:

1. Permission to open burn shall be effective from March 1, 2015 to May 2, 2015 between the hours of 10:00 a.m. until 4:00 p.m.;
2. Open burning shall be conducted in a time, place, and manner as to minimize the emission of air contaminants;
3. Fire cannot create a visibility hazard on roadways, railroad tracks or airfields;
4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;
5. Any potential spot fires shall be addressed in accordance with the ODNR approved contingency plan(s); and
6. ODNR shall notify our office the day prior to ignition of the prescribed burn.

PLAA Exhibit 6.

**C. Application and Issuance of Permission Number 150217cds7**

{¶20} ODNR filed with PLAA its application for permission to open burn at Davis Memorial State Nature Preserve, located in Adams County, Ohio, on February 12, 2015. In its application, ODNR requested a burn window from March 1, 2015 to May 2, 2015. PLAA Exhibit 3.

{¶21} In describing the purpose of the of the proposed burn, ODNR's application stated in pertinent part as follows:

This is a land management action needed to maintain the unique wildlife ecosystem and promote the native oak-prairie association and cedar barren ecosystem to include the animal species that utilize these specific plants. These habitats that are best preserved by prescribed fire are home to several species including a mound building ant that is necessary for the survival of the Edward hairstreak butterfly. These habitats are also important for the survival of other insect species that have adapted to this specific plant community. \* \* \*

PLAA Exhibit 3.

{¶22} Regarding the quantity and nature of the materials to be burned,

ODNR's application stated in full as follows:

The areas to be burned will be open prairie and small portions of oak woodland consisting mainly of dried standing prairie grasses and various forbs as well as dried leaves. In all sections there will be some standing woody vegetation which will be burned in order to top kill and maintain the site in an open condition. The total amount of area burned [sic] under this permit will be up to 6 acres between two units. One unit is 2.5 acres [and] the other is 3.5 acres. It is possible that only one of the two will be burned based on fuel conditions. Dried fuel weights are estimated to be 1000-4500 pounds per acre.

PLAA Exhibit 3.

{¶23} Additionally, ODNR's application included three maps, which detailed the location of the proposed burn site, as well as distances to occupied structures, airports, and populated areas. Specifically, ODNR's maps depicted the nearest occupied structure at approximately 1,800 feet from the proposed burn site, the nearest airport at approximately 12.2 miles from the burn location, and the nearest populated center at approximately 2.6 miles. PLAA Exhibit 3.

{¶24} Finally, regarding the methods or actions that will be taken to reduce the emissions of air contaminants, ODNR's application stated as follows:

Burning will occur on dried vegetation on days with low humidity to allow for more complete combustion of the fuel. The firing method (ring fire, strip fire, head fire, backing fire, etc.) employed will be done so as to create sufficient heat to more completely burn the materials and create less smoke and contaminants. Burning will also only occur on days with wind

directions needed to carry smoke away from Sensitive Areas with transport winds of at least 9 MPH and mixing heights of at least 1700 feet to quickly dissipate contaminants.

PLAA Exhibit 3.

{¶25} In a correspondence from Ms. Charles to Mr. Johnson, PLAA granted ODNR's application and issued permission number 150217cds7 on February 13, 2015.

The permission contained the following six special conditions:

1. Permission to open burn shall be effective from March 1, 2015 to May 2, 2015 between the hours of 10:00 a.m. until 4:00 p.m.;
2. Open burning shall be conducted in a time, place, and manner as to minimize the emission of air contaminants;
3. Fire cannot create a visibility hazard on roadways, railroad tracks or airfields;
4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;
5. Any potential spot fires shall be addressed in accordance with the ODNR approved contingency plan(s); and
6. ODNR shall notify our office the day prior to ignition of the prescribed burn.

PLAA Exhibit 7.

**D. Application and Issuance of Permission Number 150213cds6**

{¶26} ODNR filed with PLAA its application for permission to open burn at Compass Point Prairie State Nature Preserve, located in Lawrence County, Ohio, on February 12, 2015. In its application, ODNR requested a burn window from March 1, 2015 to May 2, 2015. PLAA Exhibit 4.

{¶27} In describing the purpose of the of the proposed burn, ODNR's application stated in pertinent part as follows:

This burn will be conducted in order to maintain the unique wildlife ecosystem of this site to include prairie specific plant species and the associated animal species that utilize this particular open habitat.

Conducting burns at this site will promote the unique ecosystem and support the numerous species of insects, spiders, mammals and birds that have adapted to the open grassland nature and would likely be lost if it were allowed to return to woodland. Most varieties of woody species (trees and shrubs) will be controlled with the burning while other that are suitable to the ecological health – specifically some species of oak – will survive the burning process and be allowed to contribute to the natural ecological system. \* \* \*

PLAA Exhibit 4.

{¶28} Regarding the quantity and nature of the materials to be burned,

ODNR's application stated in full as follows:

The areas to be burned will be semi-open prairie consisting mainly of dried prairie grasses and forbs as well as some standing woody vegetation and dried hardwood leaves. The total amount of area burned [sic] under this permit will be app. 15 acres. Dried fuel weights are estimated to range between 1000-4000 pounds per acre.

PLAA Exhibit 4.

{¶29} Additionally, ODNR's application included three maps, which detailed the location of the proposed burn site, as well as distances to occupied structures, and populated areas. Specifically, ODNR's maps depicted the two nearest occupied structure at approximately 300 feet and 1,200 from the proposed burn site, and the nearest populated center at approximately 1.6 miles. PLAA Exhibit 4.

{¶30} Finally, regarding the methods or actions that will be taken to reduce the emissions of air contaminants, ODNR's application stated as follows:

Burning will occur on dried vegetation on days with low humidity to allow for more complete combustion of the fuel. The firing method (ring fire, strip fire, head fire, backing fire, etc.) employed will be done so as to create sufficient heat to more completely burn the materials and create less smoke and contaminants. Burning will also only occur on days with wind directions needed to carry smoke away from Sensitive Areas with transport winds of at least 9 MPH and mixing heights of at least 1700 feet to quickly dissipate contaminants.

PLAA Exhibit 4.

{¶31} In a correspondence from Ms. Charles to Mr. Johnson, PLAA granted ODNR's application and issued permission number 150213cds6 on February 17, 2015. The permission contained the following six special conditions:

1. Permission to open burn shall be effective from March 1, 2015 to May 2, 2015 between the hours of 10:00 a.m. until 4:00 p.m.;
2. Open burning shall be conducted in a time, place, and manner as to minimize the emission of air contaminants;
3. Fire cannot create a visibility hazard on roadways, railroad tracks or airfields;
4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;
5. Any potential spot fires shall be addressed in accordance with the ODNR approved contingency plan(s); and
6. ODNR shall notify our office the day prior to ignition of the prescribed burn.

PLAA Exhibit 8.

## **II. Assignments of Error**

{¶32} Ms. Lund timely filed appeals challenging the four burn permissions discussed above. Specifically, Ms. Lund's appeals of permission number 150213cds5 (ERAC No. 15-6836) and permission number 150213cds4 (ERAC No. 15-6838) were filed on March 13, 2015, and permission number 150217cds7 (ERAC No. 15-6839) and permission number 150213cds6 (ERAC No. 15-6840) were filed on March 16, 2015. ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

{¶33} The Commission finds Ms. Lund's assignments of error in each of the four appeals correspond to the following categories:

	Case Number			
	15-6836 <sup>3</sup>	15-6838	15-6839	15-6840
Purpose of burn does not fall within the scope of the “recognized horticultural, silvicultural (forestry), range, or wildlife management practices” exception	1	1	1	1
Application does not quote the language of the Administrative Code exactly	1			
Description of the location of the burn in the application did not provide sufficient detail	2	2, 3	2	2
PLAA should prohibit burning within 1,000 ft. of occupied structures	3	3		
Description of materials to be burned did not provide sufficient detail	4	4	3	3
Burn will not be conducted in a time, place, or manner as to minimize emission of air contaminants	5	5	5	5
Permissions allow for spot fires	6	6	6	6
PLAA should have required ODNR to file its burn plans as a part of the application	6	6	6	6
Burn is not necessary to the public interest	7	7	7	7
Due process	8	8	8	8
Specific dates of authorized for opening burning are unreasonable and unlawful	9		4	4

### A. Purpose of Proposed Open Burn

{¶34} In this group of assignments of error, Ms. Lund argues that the purposes of the proposed burns, as set forth in ODNR’s applications, do not fall within the scope of the “recognized horticultural, silvicultural (forestry), range, or wildlife management practices” exceptions to Ohio’s general prohibition of open burning. ERAC No. 15-6836,

<sup>3</sup> Appellant filed an amended notice of appeal on March 17, 2015. Case File Item C.

Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

{¶35} At hearing, Ms. Lund testified that these exceptions should apply only to activities that further broad agricultural and economic interests for the state of Ohio. As examples of such activities, Ms. Lund cited the management of horticultural orchards, timber producing forests, and livestock produced on rangeland. Ms. Lund argued that because ODNR's proposed burns do not provide direct economic or agricultural benefits for the state, the burns do not fall within the scope of Ohio Administrative Code ("Adm.Code") 3745-19-04(C)(5). Specifically, Ms. Lund argued that the burns do not fall within the scope of "recognized wildlife management practices" because the primary purpose of the burn is not to manage for the production of game species or livestock. Testimony Lund.

{¶36} Additionally, Ms. Lund cites *Lund v. PLAA & ODNR*, ERAC No. 13-016720 (Dec. 19, 2013), *aff'd*, 2014-Ohio-2741 (10th Dist.) in support of her argument related to the Chaparral Prairie State Nature Preserve. Ms. Lund contends that pursuant to this prior decision, ERAC has held that open burning at Chaparral Prairie State Nature Preserve cannot fall within the scope of the "recognized horticultural, silvicultural (forestry), range, or wildlife management practices" exceptions to Ohio's general prohibition of open burning. Testimony Lund.

{¶37} In response, Ms. Charles testified that the applications at issue in this matter contained information sufficient to conclude that the purpose of the burn falls within the scope of the "recognized wildlife management practices" exception. Specifically, Ms. Charles cited ODNR's answers to Question 2 on the application form, which state that the burns will promote populations of the Edwards' hairstreak butterfly

and their associated mound-building ants, as well as spiders, other insects, mammals, and birds. Testimony Charles.

{¶38} Similarly, Mr. Johnson testified that, although each ODNR application discusses the management of both plant and wildlife species, the purpose of the proposed burns nonetheless falls within the scope of the “recognized wildlife management practices” exception. Mr. Johnson explained that many of the insect and animal species present at those locations rely on the native plant populations for their survival. Thus, by using prescribed fire to control the plant species present, ODNR consciously seeks to manage wildlife populations, as well. Testimony Johnson.

#### **B. Wording of Application Form**

{¶39} In addition to her contention that ODNR did not provide sufficient information regarding the purpose of its proposed burns, Ms. Lund also argues that PLAA’s issuance of the Burn Permissions was unlawful and unreasonable because the application form does not directly quote language from the Ohio Administrative Code. Specifically, Ms. Lund notes that Ohio Adm.Code 3745-19-04(C)(5) allows for open burning pursuant to “recognized horticultural, silvicultural (forestry), range, or wildlife management practices.” Testimony Lund.

{¶40} By contrast, PLAA’s application form allows the applicant to check a category labeled “recognized horticultural, silvicultural, range management or wildlife management practices.” E.g., PLAA Ex. 1.

{¶41} PLAA’s application form omits the parenthetical word “forestry” to describe the term “silvicultural,” and expressly states that the word “management” is associated with both “range” and “wildlife.” Thus, Ms. Lund contends that PLAA has

expanded the scope of Ohio Adm.Code 3745-19-04 and thus acted unlawfully and unreasonably in issuing the Burn Permissions. Testimony Lund.

{¶42} Neither PLAA nor ODNR provided specific testimony addressing this assignment of error at hearing.

### **C. Description of the Location of Proposed Open Burn**

{¶43} In this group of assignments of error, Ms. Lund argues that the information ODNR provided in its applications regarding the locations of its proposed burns—both narrative descriptions and maps—lacks sufficient detail. Ms. Lund did not provide specific testimony regarding these assignments of error at hearing. In her notices of appeal, however, Ms. Lund generally contends that ODNR’s maps and its location narratives are deficient because they lack specificity regarding the boundaries of the burn units and/or latitudinal and longitudinal coordinates. ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

{¶44} At hearing, Ms. Charles testified that Ohio’s open burning regulations do not require an applicant to provide specific geographic coordinates. Additionally, Ms. Charles testified that the maps ODNR provided as a part of its applications were “sufficient under the law.” Testimony Charles.

### **D. Distance to Nearest Occupied Structures**

{¶45} Related to her argument regarding ODNR’s description of location, Ms. Lund also argues that PLAA’s issuance of the Burn Permissions was unreasonable and unlawful because they allow for open burning within 1,000 feet of occupied structures.

{¶46} Ms. Lund did not offer specific testimony regarding this argument at hearing. In her notices of appeal, however, Ms. Lund notes that Ohio Adm.Code 3745-

19-04(B)(3)(c) prohibits open burning of residential or agricultural waste within 1,000 feet of the nearest inhabited building. Ms. Lund argues that the same rationale underlying the minimum distance requirement for residential or agricultural waste should also apply to the type of burn at issue in these appeals. ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A.

{¶47} At hearing, Ms. Charles testified that the 1,000-foot requirement applies only to opening burning conducted for the purpose of clearing land. Testimony Charles.

#### **E. Description of Material to be Burned**

{¶48} In this group of assignments of error, Ms. Lund argues that ODNR's description of the nature and quantity of materials to be burned did not provide sufficient detail. At hearing, Ms. Lund suggested that an applicant should list each and every species of plant and animal present at the burn location. Ms. Lund testified that ODNR's applications list only some of the species that would be affected by open burning. Thus, Ms. Lund concluded that PLAA's issuance of the Burn Permissions was unlawful and unreasonable. Testimony Lund.

{¶49} In response, Ms. Charles testified that the applicable regulations do not require a particular level of specificity and that ODNR's descriptions were "sufficient under the law." Testimony Charles.

#### **F. Minimization of Emission of Air Contaminants**

{¶50} In this group of assignments of error, Ms. Lund alleges that PLAA's issuance of the Burn Permissions was unlawful and unreasonable because the permissions do not ensure the burns will be conducted in a time, place, and manner so as to minimize the emission of air contaminants. Although Ms. Lund did not offer specific testimony at hearing, her notices of appeal generally state that the only effective

approach to “minimize” the emission of air contaminants is to not burn. Thus, because the Burn Permissions authorize open burning, Ms. Lund argues they do not minimize the emission of air contaminants. ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

### **G. Spot Fires**

{¶51} In this group of assignments of error, Ms. Lund argues that PLAA’s issuance of the Burn Permissions was unlawful and unreasonable because they “allow” spot fires. Although Ms. Lund did not offer specific testimony at hearing, her notices of appeal generally allege that such spot fires constitute “additional” fires authorized by the Burn Permissions, which will to occur outside the boundaries of the burn site. Thus, Ms. Lund reasons that PLAA’s issuance of the Burn Permissions was unlawful and unreasonable. ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

### **H. Burn Plans and Contingency Plans**

{¶52} Additionally, Ms. Lund argues that PLAA acted unlawfully and unreasonably by failing to require ODNR to submit its burn plans and contingency plans. Each of ODNR’s applications state that contingency plans are in place to address spot fires. Further, each of the four Burn Permissions contains a condition requiring ODNR to address spot fires “in accordance with the ODNR approved contingency plan(s).” However, ODNR did not submit these plans to PLAA for review as part of its applications. PLAA Exhibits 1, 2, 3, 4, 5, 6, 7, 8.

{¶53} Although Ms. Lund did not provide specific testimony at hearing, her notices of appeal generally allege that it was unreasonable and unlawful for PLAA to

issue the Burn Permissions without first reviewing ODNR's burn plans and contingency plans. ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

{¶54} In response, Ms. Charles testified at hearing that Ohio's open burning regulations do not require an applicant to submit a contingency plan and/or burn plan. Additionally, Ms. Charles explained that even if ODNR had done so, she is not qualified to evaluate such plans. Testimony Charles.

{¶55} Mr. Johnson testified that ODNR develops a burn plan prior to each burn it conducts. He explained that such burn plans contain emergency contact numbers, a detailed description of the site (including the boundaries for each burn unit), a description of the equipment required to execute the burn, and contingency plans for addressing spot fires. Testimony Johnson.

### **I. Necessary to the Public Interest**

{¶56} Here, Ms. Lund argues that PLAA acted unlawfully and unreasonably in concluding that the proposed burns were necessary to the public interest. As discussed above, Ms. Lund testified that the proposed burns did not fall within the regulatory scope of recognized wildlife management practices" exceptions. Additionally, Ms. Lund testified that open burning is unnatural and generally harms her enjoyment of the nature preserves at issue in these appeals. Testimony Lund.

{¶57} In response, Ms. Charles testified that because PLAA determined that the proposed open burns fall within scope of the "recognized wildlife management practices" exception, the burns are necessary to the public interest. Testimony Charles.

### **J. Due Process**

{¶158} In this group of assignments of error, Ms. Lund argues that the process PLAA utilizes for issuing permissions to open burn is unconstitutional. Ms. Lund did not present specific testimony at hearing. However, her notices of appeal allege that issuing the permissions without prior opportunity for public input violates the Due Process Clause of the federal Constitution. ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

### **K. Dates Authorized for Open Burning**

{¶159} Finally, Ms. Lund argues that PLAA acted unlawfully and unreasonably in granting the Burn Permissions for a time period between March 1, 2015 and May 2, 2015. Ms. Lund did not present specific testimony at hearing. Her notices of appeal, however, generally allege that increased plant growth during the spring will result in increased emission of air contaminants if the burns are executed towards the end of the burn window. ERAC No. 15-6836, Case File Item A; ERAC No. 15-6838, Case File Item A; ERAC No. 15-6839, Case File Item A; ERAC No. 15-6840, Case File Item A.

{¶160} At hearing, Ms. Charles testified that no applicable regulation limits the length of the burn window. Testimony Charles.

## CONCLUSIONS OF LAW

### I. ERAC Standard of Review

{¶61} 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.

{¶62} 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).

{¶63} The Commission is required to 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.*

{¶64} 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.*

{¶65} Further, the Commission's standard of review does not permit ERAC to substitute its judgment for that of the Director as to 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.*

{¶66} Similar to the deference afforded the Director's regarding interpretation of administrative regulations, deference toward an agency's factual determinations is also not unlimited. 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.*

## II. Regulatory Framework

{¶67} Open burning, as defined by Ohio Adm.Code 3745-19-01(I), is generally prohibited in Ohio except under certain limited circumstances. Ohio Adm.Code 3745-19-03(A); Ohio Adm.Code 3745-19-04(A). Open burning” means “the burning of any materials wherein air contaminants resulting from combustion are emitted directly into the ambient air without passing through a stack or chimney. \* \* \*” Ohio Adm.Code 3745-19-01(I).

{¶68} The various exceptions to Ohio’s general prohibition on open burning fall within two broad categories: (1) where no prior notification to the Ohio Environmental Protection Agency (“Ohio EPA”) is required and (2) where the individual seeking to conduct the burn must notify Ohio EPA and obtain permission prior to conducting the burn.

{¶69} An individual need not, for example, obtain permission from Ohio EPA prior to building a campfire, provided the campfire is fueled with clean seasoned firewood, natural gas, or equivalent; is not used for waste disposal purposes; and has a total fuel area of three feet or less in diameter and two feet or less in height. Ohio Adm.Code 3745-19-03(B)(2); Ohio Adm.Code 3745-19-04(B)(2).

{¶70} Conversely, prior to conducting open burning pursuant to recognized horticultural, silvicultural, range, or wildlife management practices, an applicant must notify Ohio EPA and obtain permission to conduct the burn. Ohio Adm.Code 3745-19-03(D)(4); Ohio Adm.Code 3745-19-04(C)(5).

{¶71} Where prior notification to Ohio EPA is required, the application for permission to conduct open burning must, at a minimum, contain the following information:

- The purpose of the proposed burning;
- The quantity or acreage and the nature of the materials to be burned;
- The date or dates when such burning will take place;
- The location of the burning site, including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks; and
- The methods or actions which will be taken to reduce the emissions of air contaminants.

Ohio Adm.Code 3745-19-05(A)(2).

{¶72} Upon receiving an application for open burning, Ohio EPA must review the request and either grant or deny permission to burn. When reviewing an application to open burn, the agency must consider the following:

Permission to open burn shall not be granted unless the applicant demonstrates to the satisfaction of the Ohio EPA that open burning is necessary to the public interest; will be conducted in a time, place, and manner as to minimize the emission of air contaminants, when atmospheric conditions are appropriate; and will have no serious detrimental effect upon adjacent properties or the occupants thereof. \* \* \*

Ohio Adm.Code 3745-19-05(A)(3).

{¶73} Finally, pursuant to R.C. 3704.111 and 3704.112, the Director is authorized to enter into contractual agreements with local air pollution control agencies, such as PLAA, to provide air pollution control regulatory services on behalf of Ohio EPA. Such services include the administration of Ohio's open burning regulatory scheme and the issuance or denial of permissions to conduct open burning made pursuant to Ohio Adm.Code Chapter 3745-19.

### III. Analysis

#### A. Purpose of Proposed Open Burn

{¶74} Ms. Lund argues that Ohio Adm.Code 3745-19-04(C)(5) authorizes only those burns that further broad agricultural and economic interests for the State of Ohio. Because ODNR's proposed burns would not be conducted for the primary purpose of managing *game* species, Ms. Lund contends that the burns fall outside the scope of the term "recognized wildlife management practices."

{¶75} Additionally, with respect to Chaparral Prairie State Nature Preserve, Ms. Lund argues that the Commission's ruling in *Lund v. PLAA & ODNR*, ERAC No. 13-016720 (Dec. 19, 2013) precludes any open burning at that location conducted pursuant to Ohio Adm.Code 3745-19-04(C)(5).

{¶76} In response, Appellees note that each of ODNR's applications expressly state that the burns will promote populations of the Edwards' hairstreak butterfly and associated mound-building ants, as well as spiders, other insects, mammals, and birds. Further, Mr. Johnson explained that ODNR specifically seeks to manage certain insect and animal species through the management of associated plant populations by prescribed fire.

{¶77} As an initial matter, the Commission finds the term "recognized wildlife management practices" is not limited to the management of game species. As noted above, administrative agencies are afforded considerable deference when reviewing their interpretation of their own governing rules and regulations. Here, the Commission finds PLAA's interpretation of Ohio Adm.Code 3745-19-04(C)(5) is consistent with the text of the regulation.

{¶78} Moreover, the Oxford Online Dictionary defines “wildlife” as “[w]ild animals collectively; the native fauna (and sometimes flora) of a region.” Wildlife: Definition of Wildlife, [http://www.oxforddictionaries.com/us/definition/american\\_english/wildlife](http://www.oxforddictionaries.com/us/definition/american_english/wildlife). Thus, the term generally refers to all non-domesticated animals of a particular area and is not limited to game animals specifically. Accordingly, the Commission notes the term can sometimes refer to both plant and animal species—a definition consistent with the interpretation PLAA applied in this instance.

{¶79} Because each of ODNR’s applications expressly stated its intent to use prescribed fire to manage native wildlife populations, the Commission finds PLAA had a valid factual foundation for concluding that the burns would be conducted pursuant to “recognized wildlife management practices.”

{¶80} Regarding Ms. Lund’s assertion that the Commission’s ruling in *Lund v. PLAA & ODNR*, ERAC No. 13-016720 (Dec. 19, 2013) (“*Lund I*”) precludes any open burning at that location conducted pursuant to Ohio Adm.Code 3745-19-04(C)(5), the Commission finds that case distinguishable from the present appeals.

{¶81} In *Lund I*, the Commission held that PLAA lacked a valid factual foundation for concluding that ODNR’s proposed prescribed burn would fall within the scope of either the “silvicultural” or “wildlife management” exceptions. *Id.* at ¶¶138-140. In so finding, the Commission relied heavily on the specific language of ODNR’s application and the testimony presented at hearing. Specifically, the Commission noted, “ODNR’s application does not describe the area to be burned as containing ‘forest.’ Instead, ODNR’s application describes the area as primarily ‘open prairie.’” *Id.* at ¶133.

{¶82} Thus, the Commission concluded, “in this instance, neither PLAA nor ODNR introduced evidence that *this* prescribed burn was related to the management of a specific forested area.” *Id.* at ¶137 (emphasis in original).

{¶83} In other words, the Commission did not find that prescribed burning at the Chaparral Prairie State Nature Preserve could *never* fall within the scope of Ohio Adm.Code 3745-19-04(C)(5). Rather, the Commission found that ODNR’s description of the purpose of the burn, as contained within its application, did not provide sufficient information to support PLAA’s conclusion that the burn fell within the scope of either the “silvicultural” or “wildlife management” exceptions.

{¶84} Here, as discussed above, the Commission finds ODNR’s applications *do* provide sufficient information to support PLAA’s conclusion that the proposed burns fall within the scope of the “wildlife management” exception. Accordingly, the Commission finds Ms. Lund’s assignments of error regarding the purpose of the proposed burns not well-taken.

### **B. Wording of Application Form**

{¶85} The Commission also finds Ms. Lund’s argument regarding the wording of PLAA’s application form not well-taken.

{¶86} Ohio Adm.Code 3745-19-04(C)(5) allows for open burning pursuant to “recognized horticultural, silvicultural (forestry), range, or wildlife management practices.” By contrast, PLAA’s application form allows the applicant to check a category labeled “recognized horticultural, silvicultural, range management or wildlife management practices.”

{¶87} However, the Commission finds this difference in wording did not materially affect the manner in which PLAA interpreted and applied Ohio Adm.Code 3745-19-04(C)(5) during its review of ODNR’s applications.

{¶88} Ms. Lund did not present any evidence that PLAA’s interpretation of the word “silvicultural” conflicted with the text of the regulation. Moreover, evidence supported that PLAA did not grant ODNR’s applications pursuant to the “silvicultural” exception; rather evidence demonstrated that PLAA granted ODNR’s applications pursuant to the “wildlife management” exception.

{¶89} Further, regarding range and wildlife management, the Commission finds that PLAA’s interpretation of the regulation—that the word “management” is associated with both “range” and “wildlife”—is consistent with the text of the regulation.

{¶90} Accordingly, Ms. Lund’s argument regarding the wording of PLAA’s application form not well-taken.

### **C. Description of the Location of Proposed Open Burn**

{¶91} Ms. Lund did not provide specific testimony regarding these assignments of error at hearing, but generally alleges in her notices of appeal that ODNR’s maps and its location narratives are deficient because they do not include specific information regarding the boundaries of the burn units and/or latitudinal and longitudinal coordinates.

{¶92} At hearing, Ms. Charles testified on behalf of PLAA that Ohio’s open burning regulations do not require an applicant to provide specific geographic coordinates. Additionally, Ms. Charles testified that the maps ODNR provided as a part of its applications were “sufficient under the law.”

{¶93} As an initial matter, the Commission notes that Ms. Charles's conclusion that ODNR's descriptions were "sufficient under the law" is not determinative of these assignments of error. Ohio Adm.Code 3745-19-05(A)(2) requires that an application include "[t]he location of the burning site, including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks."

{¶94} Upon review, the Commission finds that PLAA had a valid factual foundation to conclude that the information provided by ODNR in its applications relating to the locations of the proposed burns met the requirements of Ohio Adm.Code 3745-19-05(A)(2). As noted above, each of the four applications contained maps specifically indicating distances to occupied structures, airports, populated areas, and other pertinent landmarks.<sup>4</sup> Further, Ms. Lund did not provide testimony to suggest that PLAA could not have discerned the relevant information because ODNR's maps were in some way deficient.

{¶95} Finally, Appellees correctly observe that the applicable regulations do not require a particular level of specificity regarding boundary information or latitudinal and longitudinal coordinates.

{¶96} Accordingly, the Commission finds that PLAA acted lawfully and reasonably with regard to its review of ODNR's map of the proposed burn location.

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<sup>4</sup> The Commission notes that some information regarding distances to nearby residences provided in ODNR's applications are internally inconsistent. For example, ODNR's application for the Chaparral Prairie State Nature Preserve states on page 4 that the nearest residence is 100 feet from the burn unit; on page 8, the application states that the nearest residence is 200 feet from the burn unit. PLAA Exhibit 1. However, Ms. Lund did not present evidence to suggest that these differences were significant or that they materially altered PLAA's review of ODNR's applications.

#### **D. Distance to Nearest Occupied Structures**

{¶97} Again, Ms. Lund did not offer specific testimony regarding this group of assignments of error at hearing. In her notices of appeal, however, Ms. Lund notes that Ohio Adm.Code 3745-19-04(B)(3)(c) prohibits open burning of residential or agricultural waste within 1,000 feet of the nearest inhabited building and argues that the same rationale should also apply to the type of burn at issue in these appeals.

{¶98} At hearing, Ms. Charles testified that the 1,000-foot requirement applies only to opening burning conducted for the purpose of clearing land.

{¶99} In these assignments of error, Ms. Lund advocates for a generally-applicable 1,000 foot limitation. In essence, Ms. Lund contends that the requirements of Ohio Adm.Code 3745-19-04(B)(3)(c) should be extended to apply to all open burns. The Commission has previously addressed this specific argument. *Lund I*, at ¶¶87-89. Regarding a 1,000-foot limitation, the Commission held as follows:

The Commission has previously noted that collateral attacks on Ohio's open burning regulations are not appropriately before ERAC on an appeal from the issuance of an open burning permission. \* \* \*

Similarly, here, Ms. Lund could have challenged the relevant Ohio Administrative Code provisions when they were promulgated. Her attempt to now collaterally attack Ohio Adm.Code Chapter 3745-19 through a challenge to the issuance of a particular open burning permission is not well-taken.

*Id.* (internal citations omitted).

{¶100} Accordingly, the Commission finds Ms. Lund's assignments of error regarding a 1,000 minimum distance requirement not well-taken.

### **E. Description of Material to be Burned**

{¶101} In this group of assignments of error, Ms. Lund argues that ODNR failed to describe each and every species of plant and animal present at the burn location. Ms. Lund testified that ODNR's applications listed only some of the species that would be affected by open burning and thus PLAA's issuance of the Burn Permissions was unlawful and unreasonable.

{¶102} In response, Ms. Charles testified that the applicable regulations do not require a particular level of specificity and that ODNR's descriptions were "sufficient under the law."

{¶103} The Commission has previously addressed a similar issue *Lund I*, stating as follows:

Neither Ohio Adm.Code 3745-19-05(A)(2) nor Ohio Adm.Code 3745-19-05(A)(3) expressly require an applicant to list every organism that may be consumed during a proposed prescribed burn. Instead, as Ms. Charles explained, Ohio Adm.Code 3745-19-05(A)(2) requires applicants to include a description of the nature of material to be burned for the purpose of allowing Ohio EPA or PLAA to determine whether the proposed burn meets the issuance criteria set forth in Ohio Adm.Code 3745-19-05(A)(3). Accordingly, the Commission finds that PLAA could have reasonably relied upon ODNR's description of the nature of the material *targeted* in its proposed burn.

Ms. Lund does not dispute that ODNR's application accurately represents the target material and describes a majority of the material that would be burned in Chaparral Prairie State Nature Preserve. Thus, the Commission finds that PLAA acted lawfully and reasonably with regard to its evaluation of ODNR's description of the nature of the material to be burned.

*Lund I*, at ¶¶122-123.

{¶104} Similarly, here, Ms. Lund does not dispute that ODNR's applications accurately describe the majority of the material to be burned.<sup>5</sup> Rather, Ms. Lund contends that ODNR should have included additional species in describing the material to be burned. As discussed above, the regulations require only that an applicant describe the "quantity or acreage and the nature" of the materials to be burned. The regulations do not require a complete inventory of every plant and animal species present.

{¶105} Therefore, having found that ODNR's applications adequately describe the majority of the material to be burned, the Commission finds PLAA acted lawfully and reasonably with regard to its review of ODNR's description of the materials to be burned.

#### **F. Minimization of Emission of Air Contaminants**

{¶106} In this group of assignments of error, Ms. Lund argues that the Burn Permissions do not ensure the burns will be conducted in a time, place, and manner so as to minimize the emission of air contaminants. Ms. Lund did not present specific testimony regarding these assignments of error at hearing.

{¶107} As noted above, each of ODNR's applications contained the following language in response to the application form's question regarding the methods or actions that will be taken to reduce the emissions of air contaminants:

Burning will occur on dried vegetation on days with low humidity to allow for more complete combustion of the fuel. The firing method (ring fire, strip fire, head fire, backing fire, etc.) employed will be done so as to create sufficient heat to more completely burn the materials and create less smoke and contaminants. Burning will also only occur on days with wind directions needed to carry smoke away from Sensitive Areas with

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<sup>5</sup> The Commission notes that Ms. Lund did take issue with some of the wording used by ODNR in its applications. However, the evidence adduced at hearing indicated that PLAA successfully discerned ODNR's intended meaning.

transport winds of at least 9 MPH and mixing heights of at least 1700 feet to quickly dissipate contaminants.

PLAA Exhibits 1, 2, 3, 4.

{¶108} Accordingly, the Commission finds PLAA acted lawfully and reasonably as its conclusion that the proposed burns would be conducted in a time, place, and manner so as to minimize the emission of air contaminants.

### **G. Spot Fires**

{¶109} Although Ms. Lund did not offer specific testimony at hearing, her notices of appeal generally allege that such spot fires constitute “additional” fires authorized by the Burn Permissions to occur outside the boundaries of the burn site. Thus, Ms. Lund reasons that PLAA’s issuance of the Burn Permissions was unlawful and unreasonable. The Commission disagrees.

{¶110} Special condition 5 in each Burn Permissions states, “[a]ny potential spot fires shall be addressed in accordance with the ODNR approved contingency plan(s).” The Commission finds this language does not “authorize” spot fires. Rather, the condition imposes restrictions on the manner in which the permission holder must address unplanned or escaped fires that occur during a prescribed burn.

{¶111} Accordingly, Ms. Lund’s assignments of error regarding spot fires are not well-taken.

### **H. Burn Plans and Contingency Plans**

{¶112} Here, Ms. Lund argues that PLAA acted unlawfully and unreasonably in approving ODNR’s applications without first reviewing its burn plans and/or contingency plans. Ms. Lund did not provide specific testimony regarding these assignments of error at hearing. In her notices of appeal, however, she notes that each of the Burn Permissions references a contingency plan. Thus, Ms. Lund reasons that PLAA

should have required ODNR to submit such plans for review as part of its evaluation of ODNR's applications.

{¶113} At hearing, Ms. Charles testified that Ohio's open burning regulations do not require an applicant to submit a contingency plan and/or burn plan. Further, Ms. Charles explained that even if ODNR had done so, she is not qualified to evaluate such plans.

{¶114} Mr. Johnson testified on behalf of ODNR that the agency develops a burn plan prior to each burn it conducts. He explained that such burn plans contain emergency contact numbers, a detailed description of the site (including the boundaries for each burn unit), a description of the equipment required to execute the burn, and contingency plans for addressing spot fires.

{¶115} The Commission notes that a reviewer's qualifications, or lack thereof, to review a particular type of information do not absolve his or her agency from the responsibility to fully administer programs with which the agency is entrusted. The specific background of a particular employee neither expands nor reduces the scope of an agency's regulatory authority and responsibility.

{¶116} Nonetheless, the Commission finds PLAA acted lawfully and reasonably in this instance. Appellees correctly observe that nothing in Ohio's open burning regulations require an applicant to submit a burn plan as a part of its application for permission to open burn. Further, each of ODNR's applications stated that contingency plans had been developed to address potential spot fires or escaped fires that could occur during the prescribed burns. Even without evaluating the contents of the contingency plans, the mere existence of such plans would tend to indicate preparedness. Thus, in conjunction with the other information provided in the

applications (e.g., the distance to nearby occupied structures), the Commission finds Ms. Charles could have reasonably concluded the proposed burns would not have any serious detrimental effect upon adjacent properties or the occupants thereof.

{¶117} Ms. Lund's assignments of error regarding burn plans and/or contingency plans are not well-taken.

### **I. Necessary to the Public Interest**

{¶118} Ms. Lund argues that the prescribed burns at issue are not necessary to the public interest. Specifically, Ms. Lund testified that the proposed burns do not fall within the scope of Ohio Adm.Code 3745-19-04(C)(5) and that open burning is unnatural and generally harms her enjoyment of the nature preserves at issue in these appeals.

{¶119} In response, Ms. Charles testified that because PLAA determined that the proposed open burns fall within scope of the "recognized wildlife management practices" exception, the burns are therefore necessary to the public interest.

{¶120} The Commission finds Ms. Lund's assignments of error not well-taken.

In *Lund I*, the Commission stated as follows:

The Commission has previously held that Ohio EPA or PLAA need not consider specific 'forestry concerns' in evaluating open burning permission requests. Instead, the Commission found that Ohio EPA or PLAA need only be satisfied—and possess a valid factual foundation to conclude—that the proposed burn is 'necessary to the public interest.'

The Commission notes that the various issuance criteria outlined in Ohio Adm.Code 3745-19-05(A)(3) are interwoven into the open burning permission request forms. ODNR's application states that the purpose of the proposed burn is 'to maintain and promote the native prairie and cedar barrens ecosystem at the site.' Thus, PLAA's issuance of the Burn Permission is evidence of the agency's implicit conclusion that ODNR's stated goals were 'necessary to the public interest.'

Lund I, at ¶¶110-111 (internal citations omitted).

{¶121} Similarly, here, the Commission has previously found that PLAA possessed a valid factual foundation for its conclusion that ODNR's proposed burns would be conducted pursuant to "recognized wildlife management practices." This finding is evidence of the agency's implicit conclusion that ODNR's stated goals were "necessary to the public interest." Therefore, the Commission finds PLAA acted lawfully and reasonably with respect to the requirement that the issuance of a burn permission be necessary to the public interest.

### **J. Due Process**

{¶122} Here, Ms. Lund argues that the process PLAA utilizes for issuing permissions to open burn is unconstitutional. Specifically, Ms. Lund alleges that issuing the permissions without prior opportunity for public input violates the Due Process Clause of the federal Constitution.

{¶123} It is well-settled that the Commission lacks jurisdiction to hear constitutional challenges to rules or statutes. E.g., *BP Exploration & Ohio, Inc. v. Jones*, ERAC No. 184134 (March 21, 2001). Accordingly, Ms. Lund's assignments of error regarding due process are not well-taken.

### **K. Dates Authorized for Open Burning**

{¶124} Finally, Ms. Lund argues that PLAA acted unlawfully and unreasonably in granting the Burn Permissions for a time period between March 1, 2015 and May 2, 2015. Ms. Lund did not present specific testimony at hearing, but generally alleges in her notices of appeal that increased plant growth during the spring will result in increased emission of air contaminants if the burns are executed towards the end of the burn window.

{¶125} Ms. Charles testified in response that no applicable regulation limits the length of the burn window.

{¶126} Because no applicable regulation limits the length of the burn window and Ms. Lund did not present evidence at hearing to support her contention that the execution of a prescribed burn during the latter part of April and early May would result in unacceptably high emissions of air contaminants, the Commission finds Ms. Lund's assignments of error regarding the dates authorized for open burning not well-taken.

**FINAL ORDER**

{¶127} For the foregoing reasons, the Commission hereby AFFIRMS PLAA's issuance of burn permission numbers 150213cds5, 150213cds4, 150217cds7, and 150213cds6.

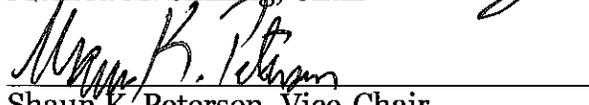
{¶128} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

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.

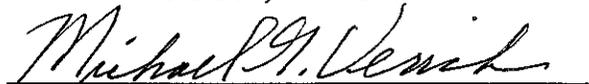
**The Environmental Review  
Appeals Commission**



Melissa M. Shilling, Chair



Shaun K. Petersen, Vice-Chair



Michael G. Verich, Member

Entered into the Journal of the  
Commission this 10<sup>th</sup> day of  
December 2015.

Copies Sent to:

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