

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BARBARA A. LUND, : Case No. ERAC 15-6828
: :
Appellant, : :
: :
v. : :
: :
CRAIG W. BUTLER, DIRECTOR OF : :
ENVIRONMENTAL PROTECTION, : :
: :
Appellee. : :

DECISION

Rendered on April 5, 2016

Barbara A. Lund, pro se Appellant

Michael DeWine, Attorney General, Adreanne G. Stephenson, and Cameron F. Simmons for Appellee Craig W. Butler, Director of Environmental Protection

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant Barbara A. Lund on January 9, 2015. Ms. Lund challenges the dismissal of three verified complaints, entered into the journal of Craig W. Butler, Director of Environmental Protection (“Director,” “Ohio EPA”) on December 12, 2014. Case File Item A.

{¶2} The Commission held a de novo hearing on November 24, 2015. 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 IN PART and VACATING AND REMANDING IN PART the Director’s December 12, 2014 dismissal.

FINDINGS OF FACT

{¶3} As an initial matter, the Commission notes that numerous documents, referred to in testimony as having formed the basis of the Director's dismissal of three verified complaints, were not included in the Certified Record filed by Ohio EPA. Further, many of these documents were not introduced by the Director as evidence.

{¶4} Nonetheless, upon review of the Certified Record,¹ the Commission observed that many documents not individually included in the Certified Record or separately introduced at hearing were attached to the various verified complaints and supplements filed with Ohio EPA. Because the verified complaints *are* included in the Certified Record, and because the testimony indicated these documents formed critical components of the Director's action in this matter, the Commission relies upon the copies of those documents attached to the verified complaints in the Findings of Fact below.

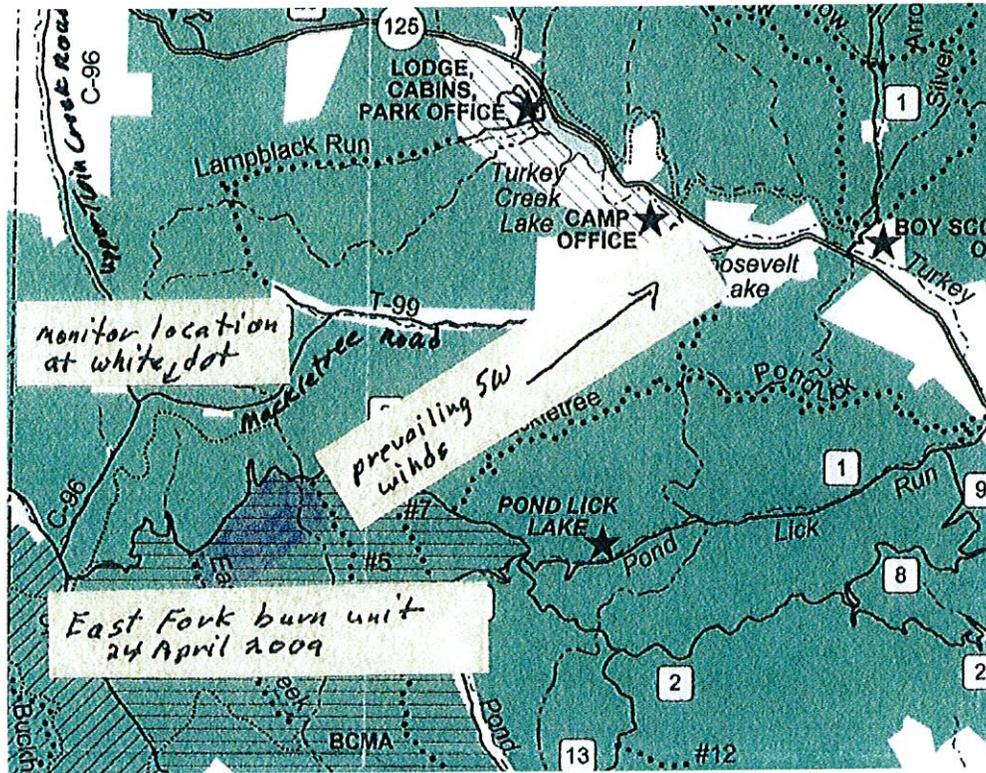
I. Procedural History

A. Permit Issuance and Burn

{¶5} The Portsmouth Local Air Agency² ("PLAA") issued Permission to Open Burn #090304cds07 ("Permission") to the Ohio Department of Natural Resources ("ODNR") on March 27, 2009. The Permission allowed ODNR to conduct a prescribed burn at a 250-acre site known as the East Fork Burn Unit of Shawnee State Forest ("East Fork Burn Unit"). The East Fork Burn Unit is pictured below:

¹ The parties moved the Certified Record into evidence at the conclusion of the de novo hearing.

² PLAA is a local air agency approved by 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. 3704.112(D), one such delegated power is the authority to grant or deny permissions to conduct open burning.



Certified Record ("CR") Item 9; Lund Exhibit L-1.

{¶16} Ms. Lund filed an appeal challenging the issuance of the Permission on April 10, 2009, and subsequently voluntarily dismissed that appeal on May 12, 2009. Journal Entry, *Lund v. Korleski*, ERAC No. 016324 (May 12, 2009).

{¶17} ODNR conducted the prescribed burn at the East Fork Burn Unit on April 24, 2009, beginning at approximately 10:30am. Although the cause is disputed in this appeal, one or more wildfires developed near the East Fork Burn Unit during the late afternoon and evening of April 24, 2009. The wildfire(s) then spread over the next five days and ultimately consumed approximately 2,800 acres of the Shawnee State Forest before ODNR declared the fire 100% contained on April 30, 2009. CR Item 1.

B. Verified Complaints

{¶8} Following the wildfires at Shawnee State Forest, Ohio EPA and PLAA received three verified complaints from Ms. Lund, Ms. Cheryl Carpenter, and Mr. Matt Peters.

i. Ms. Lund's Verified Complaint

{¶9} Ms. Lund filed her verified complaint with PLAA on June 3, 2009, followed by two supplements filed on June 10, 2009, and July 8, 2009 ("Ms. Lund's Verified Complaint"). Ms. Lund's Verified Complaint alleged the following violations by ODNR:

1. The prescribed fire at East Fork Burn Unit exceeded the boundaries of the burn unit as described in the Permission
2. The prescribed fire at East Fork Burn Unit burned materials other than those listed in ODNR's application
3. The prescribed fire at East Fork Burn Unit created a visibility hazard on State Route 125 and Mackletree Road
4. The prescribed fire at East Fork Burn Unit had a serious detrimental effect on adjacent properties or the occupants thereof
5. ODNR conducted the prescribed burn at East Fork Burn Unit when the weather conditions did not meet minimum standards as detailed in ODNR's burn plan
6. The prescribed fire at East Fork Burn Unit exceeded the time of day restrictions as contained in the Permission
7. The prescribed fire at East For Burn Unit was not conducted in a time, place, and manner as to minimize the emission of air contaminants
8. Spot fires were not addressed in accordance with ODNR's contingency plans
9. ODNR failed to follow the various procedures in its burn plan (e.g., buffer zones)

CR Items 4, 7, 8.

ii. Cheryl Carpenter's Verified Complaint

{¶10} Ms. Carpenter filed her verified complaint on June 22, 2009, followed by two supplements filed on January 29, 2010, and April 27, 2010 ("Ms. Carpenter's Verified Complaint"). Ms. Carpenter's Verified Complaint alleged the following violations by ODNR:

1. The prescribed fire at East Fork Burn Unit exceeded the boundaries of the burn unit as described in the Permission
2. ODNR did not maintain adequate personnel at the site throughout the duration of the prescribed fire at East Fork Burn Unit
3. ODNR failed to enlist adequate assistance from local fire departments once the fire became uncontrolled
4. The prescribed fire at East For Burn Unit was not conducted in a time, place, and manner as to minimize the emission of air contaminants
5. ODNR did not provide adequate notice to visitors of the Shawnee State Forest
6. The prescribed fire at East Fork Burn Unit created a visibility hazard on roadways and had a serious detrimental effect on adjacent properties or the occupants thereof
7. Spot fires were not addressed in accordance with ODNR's contingency plans
8. The prescribed fire at East Fork Burn Unit exceeded the time of day restrictions as contained in the Permission
9. ODNR conducted the prescribed burn at East Fork Burn Unit when the weather conditions did not meet minimum standards as detailed in ODNR's burn plan

CR Items 3, 6; Director's Exhibit 6.³

³ Ohio EPA did not include the second supplement filed by Ms. Carpenter in the Certified Record.

iii. Matt Peters's Verified Complaint

{¶11} Mr. Matt Peters filed his verified complaint with Ohio EPA's Southeast District Office ("SEDO") on June 23, 2009. In his verified complaint, Mr. Peters alleged that ODNR conducted the prescribed burn at East Fork Burn Unit during inappropriate weather conditions and that the burn exceeded the boundaries of the unit as described in the Permission. Further, Mr. Peters alleged that the 2,800-acre wildfire in the Shawnee State Forest was caused by the prescribed burn and was not the result of arson. CR Item 5.

C. Investigation & Dismissal

{¶12} After receiving the three verified complaints, Ms. Charles, Director, PLAA, initiated an investigation as required by Ohio Revised Code ("R.C.") 3745.08(B). Because all three verified complaints addressed the same incident, Ms. Charles grouped the complaints together for purposes of conducting her investigation and preparing her recommendation to Ohio EPA. Testimony Charles.

{¶13} Ms. Charles completed her investigation in January 2012 and submitted a summary of her findings to Ohio EPA's Central District Office ("CDO"). Testimony Charles; CR Item 2.

{¶14} After receiving Ms. Charles's report, Ohio EPA's Mr. John Paulian, Supervisor, Compliance Monitoring Unit, Division of Air Pollution Control, CDO, reviewed her summary and prepared a recommendation for the Director's approval and signature. Testimony Paulian.

{¶15} On December 14, 2014, the Director accepted Mr. Paulian's recommendation and dismissed all three verified complaints. The dismissal letter detailed the Director's findings as follows:

PLAA Permission to Open Burn #090304cds07 issued by the PLAA on March 27, 2009 specifically granted ODNR approval to conduct prescribed burning activities in the East Fork Unit of the Shawnee State Forest. Special instructions in the permission included requirements for smoke management, addressing spot fires, following ODNR prescribed burn protocols, and notification of the PLAA prior to beginning prescribed burn operations.

On April 17, 2009, PLAA staff placed a PM 2.5 air monitor at 189 Mackletree Road which was determined to be an appropriate location for the East Fork burn unit. The monitor was set to operate on the national air monitoring schedule of one 24-hour sample every three days.

On April 23, 2009 Mike Bowden, Fire Supervisor for ODNR, Division of Forestry, notified PLAA that ODNR planned to conduct a prescribed burn of 250 acres in the East Fork Unit the next day.

The prescribed burn operations began on April 24, 2009 at approximately 10:30 AM.

A PLAA inspector drove through the Shawnee State Forest to observe the East Fork prescribed burn while returning from observing a stack test in Adams County. At approximately 2:40 pm, the inspector noted a smoky odor along State Route 125 around the boat ramp entrance. The inspector proceeded to drive down Mackletree Road noting the smoke did not create a driving or visibility hazard.

Two spot fires were identified during the course of the open burn operations. Both spot fires were located outside the burn perimeter but within the contingency line, one affecting approximately 0.1 acres of the northeast end of the burn unit near State Forest Road 2 and the other consisting of approximately 5 acres along the southeast end of the burn unit near Webb Hollow. As required by the open burning permission, the contingency plan outlined in the Division of Forestry's general prescribed burn plan was implemented and followed in response to these spot fires.

Firing continued until approximately 6:00 PM at which time mop up operations commenced.

At approximately 6:00 PM an ODNR forest officer, a trained arson investigator, discovered what he determined to be three arson fires on Mackletree Road. At approximately 6:20 PM ODNR diverted resources from the prescribed fire to suppress these wildfires in order to protect individuals and property on Mackletree Road.

The arson related fires burned to the south during the evening of April 24 and early morning hours of April 25, 2009. This wildfire activity reached the northern portion of the prescribed burn unit, along State Forest Road 2, on the morning of April 25th. At this time, the arson set fires and

prescribed burn was on contiguous area of burned area. The prescribed burn did not breach the control lines to the west and south until later during the afternoon hours of April 25 when the entire area was being managed as one wildfire event.

The wildfires spread over the next five days, resulting in approximately 2,800 acres of forest being burned. On April 30, 2009, the fire was considered to be 100% contained and fire command was returned to Shawnee State Forest Personnel.

ODNR did exceed the prescribed burn boundaries specified in the open burn permission as two spot fires did occur during the prescribed burning operations. As required by Condition 5 of the burn permission, ODNR identified, evaluated, contained and extinguished the spot fires without impact beyond Forestry land and in a manner that considered the safety of the firefighting personnel and was consistent with ODNR's contingency plans.

The prescribed burn itself was never declared a wildfire. The wildfire was a result of the arson fires set on the evening of April 24, 2009. Once the wildfire was declared, the ODNR on-scene incident commander is responsible for taking action to control and extinguish the wildfire in a manner that protects individuals and property and is also protective of firefighter safety. The prescribed burn area was incorporated into the wildfire suppression strategy developed for the arson fires that originated along Mackletree Road. The prohibitions and restrictions of the prescribed burn permission, including restrictions on visibility, excessive smoke, and deployment of resources, do not apply to the wildfire suppression operations. The tactical decisions regarding the development of resources and prioritization of objectives for the plan of attack to control and extinguish the wildfire are made by the ODNR incident commander and are the responsibility of ODNR in its role as the state forest manager.

During the entire time the prescribed burn was being conducted the Division of Forestry monitored weather conditions through the Shawnee National Fire Danger Rating System ("NFDRS") station located approximately 1.5 miles east of the East Fork burn unit. Data provided by ODNR demonstrates that all values recorded at the Shawnee NFDRS station the day of the burn remained within the maximum and minimums of the acceptable ranges in the East Fork burn plan.

There is no requirement in either the burn permission or rules requiring ODNR to provide public notification prior to conducting open burning operations. Previously, ODNR has issued a new release prior to the prescribed burn. PLAA has recommended to ODNR that, in addition to any other notification practices it follows, it should also notify residents in close proximity to the prescribed fire sites by postcard. Any other issues regarding ODNR's notification practices fall outside Ohio EPA's

jurisdiction and are best addressed with ODNR, Division of Forestry, as it is the agency responsible for the management of State Forest land.

PLAA was unable to substantiate the claim that the prescribed burn produced prohibited amounts of smoke, particulate matter, and other detrimental air pollutants. Air quality monitoring is not required by either the open burn permission or by rule. PLAA did collect air monitoring samples on Mackletree Road in Shawnee State Forest during the East Fork prescribed burn and subsequent wildfire. The results of the air monitoring conducted were all well below the National Ambient Air Quality Standards for Particulate Matter less than 2.5 microns. Additionally, the prescribed burn conducted on April 24, 2009, consisting of approximately 250 acres, plus approximately five to six acres burned by spot fires. Weather conditions during the prescribed burn were within the prescription established by ODNR and the VSmoke modeling results were considered to be within the acceptable parameters. The five to six acres burned by the spot fires consist of less than 3% of the total and would not have caused a significant impact regarding modeling results or in the amount of particulate produced during the prescribed burn.

During its investigation, PLAA was unable to substantiate the allegation that visibility on State Route 125 was significantly impaired during the prescribed burn operation. The PLAA received no other complaints regarding visibility on the forest roads during the prescribed burn operations.

In investigating Ms. Carpenter's evidence alleging that additional spot fires had occurred near the location where the wildfire had started on Mackletree Road, PLAA first contacted ODNR, Division of Forestry, to provide confirmation that the wildfire reports that Ms. Carpenter had submitted had not been included in the records provided to PLAA by ODNR on September 10, 2010.

ODNR subsequently responded that the two wildfire reports from the Nile Township Fire Department had not been received by ODNR and therefore ODNR could not verify their accuracy.

PLAA next sent a letter to the Nile Township Trustees requesting copies of any wildfire reports filed by the Nile Township Fire Department in association with the April 24, 2009 Shawnee State Forest prescribed burn and wildfire.

The Nile Township Trustees' Fiscal Officer stated to PLAA that per the Nile Township Fire Department copies of wildfire reports sent to ODNR are not routinely kept and that [they] only keep dispatch sheets on file. PLAA email the Nile Township Fire Department and the Township Trustees a copy of the two ODNR wildfire reports requesting them to confirm whether the reports were true and accurate. No response was received by

PLAA from either entity; therefore PLAA could not confirm the accuracy of the two wildfire reports.

SEDO investigated Mr. Peters' allegations regarding the prescribed burn activities in Zeleski State Forest. SEDO found that while the total acreage for the proposed burn had not been included in the application it had been obtained by SEDO prior to the issuance of the permission to open burn. Regarding his allegation that non-native pine species were not included in the prescribed burn application, SEDO found that the application indicated that the open burning was needed to regenerate pines, which is a recognized silvicultural practice, regardless of whether the species is native or not, and therefore allowable by the OAC. Finally, SEDO could find no evidence that additional unauthorized burning had taken place. If ODNR has plans for future burns in this area it will have to first obtain permission from Ohio EPA as required by OAC rules.

The remaining issues raised by the complainants, such as the purpose of ODNR's prescribed burn program in State forests and the need for such a program, and the impact to the flora and fauna located in the prescribed burn area again fall outside the scope of Ohio EPA's jurisdiction and are best addressed with ODNR, Division of Forestry. Additionally, questions regarding the investigation into the April 24, 2009, arson fires are best address by the Division of Forestry.

Based upon the above information, PLAA and Ohio EPA have determined that ODNR did not violate the terms and conditions of burn permission 090304cds07. The two spot fires that occurred outside of the prescribed burn area were adequately addressed through implementation of ODNR's contingency plan. Based on analysis of the data and information available, PLAA and Ohio EPA have not been able to substantiate the alleged violations related to excess smoke and particulate emissions generated by the prescribed fire or the allegations of restricted visibility on area roadways. Additionally, Ohio EPA and PLAA have determined that ODNR did follow its prescription for allowable ambient weather conditions when conducting the open burn and that it had performed the burn operations in a manner consistent with its prescribed burn procedures, as outlined in its open burn permission request. Therefore, pursuant to ORC Section 3745.08(B), your verified complaints are hereby dismissed.

CR Item 1.

D. Notice of Appeal

{¶16} Ms. Lund timely filed her Notice of Appeal on January 9, 2015. Subsequently, Ms. Lund filed three amended notices of appeal—the first on January 16, 2015, the second on January 27, 2015, and the third on January 28, 2015 (collectively, “Notice of Appeal”). The Commission summarizes Ms. Lund’s assignments of error as follows:

1. The Director’s investigation of the verified complaints was not “prompt” as required by R.C. 3745.08(B).
2. The Director acted unlawfully and unreasonably because the dismissal letter misstated the dates Ohio EPA received the verified complaints and associated supplements.
3. The Director lacked a valid factual foundation for concluding the 2,800-acre wildfire was caused by arson, rather than the prescribed burn at the East Fork Burn Unit.
4. The Director acted unlawfully and unreasonably in disregarding Ms. Carpenter’s allegation that additional spot fires, unrelated to the alleged arson, occurred along Mackletree Road.
5. The Director acted unlawfully and unreasonably in determining ODNR did not violate the terms of the Permission when the prescribed burn breached the control lines to the west after ODNR personnel began managing both the prescribed burn and the alleged arson fires as a single wildfire event
6. The Director acted unlawfully and unreasonably in determining ODNR did not violate the terms of the Permission when the prescribed burn breached the control lines to the south after ODNR personnel began managing both the prescribed burn and the alleged arson fires as a single wildfire event.
7. The Director acted unlawfully and unreasonably in determining ODNR addressed spot fires in accordance with its contingency plans.
8. The Director acted unlawfully and unreasonably in relying upon the air quality monitor located at 189 Mackletree Road to determine the prescribed burn did not produce excessive air pollutants.

9. The Director acted unlawfully and unreasonably in determining the weather conditions on April 24, 2009, were within acceptable limits as set forth in ODNR's burn plan.
10. The Director acted unlawfully and unreasonably by not holding a conference with the complainants, as required by R.C. 3745.08(B).
11. The Director acted unlawfully and unreasonably by failing to investigate any deficiencies in ODNR's burn plan.
12. The Director acted unlawfully and unreasonably by concluding the two known spot fires discussed in the dismissal letter did not constitute violations of the Permission.
13. The Director acted unlawfully and unreasonably by concluding the two known spot fires discussed in the dismissal letter did not constitute violations of Ohio's air pollution control laws and regulations.

Case File Items A, C, I, J.

II. Testimony Presented at Hearing

{¶17} At hearing, Appellant Barbara A. Lund testified as the sole witness on her own behalf. Ms. Charles and Mr. Paulian each testified on behalf of Appellee Ohio EPA. The Commission summarizes the testimony presented, as it relates to Ms. Lund's assignments of error, below.

A. Promptness of Investigation

{¶18} As noted previously, Ms. Lund filed her verified complaint on June 3, 2009, followed by two supplements on June 10, 2009, and July 8, 2009. Ms. Carpenter filed her verified complaint on June 22, 2009, followed by two supplements filed on January 19, 2010, and April 27, 2010. And finally, Mr. Peters filed his verified complaint on June 23, 2009. CR Items 3, 4, 5, 6, 7, 8; Director's Exhibit 6.

{¶19} Over five years later, on December 12, 2014, the Director issued his decision dismissing the verified complaints. CR Item 1.

{¶20} At hearing, Ms. Lund argued that this timeframe between the initial filing of her verified complaint on June 3, 2009, until the Director's dismissal on December 12, 2014, did not constitute a "prompt" investigation as required by R.C. 3745.08(B). Testimony Lund.

{¶21} In response, the Director countered that the timeframe was reasonable given the complexity of the investigation. Ms. Charles noted both Ms. Lund and Ms. Carpenter filed supplements to their verified complaints, with Ms. Carpenter's final supplement having been received on April 27, 2010. Further, Ms. Charles emphasized the length of the verified complaints, noting Ms. Carpenter's verified complaint was "over 100 pages" in length. Testimony Charles.

{¶22} Ms. Charles testified that once she completed her investigation, she prepared a 15-page summary and recommendation and submitted it to John Paulian at Ohio EPA in January 2012. Testimony Charles; CR Item 2.

{¶23} Mr. Paulian stated that he reviewed Ms. Charles's summary and recommendation and prepared a draft dismissal letter for the Director's approval and signature.⁴ Regarding the delay between January 2012, when he received Ms. Charles's summary and recommendation, and December 2014, when the Director issued his decision, Mr. Paulian explained that staff at Ohio EPA's CDO, Division of Air Pollution Control, were occupied with other responsibilities. Testimony Paulian.

⁴ The testimony did not indicate when Mr. Paulian's sent his draft dismissal letter to the Director's office, and the draft dismissal letter was not included in the Certified Record.

B. PLAA's Determination that Arson Caused Wildfires

{¶24} The Director's dismissal letter stated, "[t]he prescribed burn itself was never declared a wildfire. The wildfire was a result of the arson fires set on the evening of April 24, 2009." CR Item 1.

{¶25} In support, Ms. Charles testified that she received a letter from ODNR on November 10, 2009, in response to an email request she had previously sent regarding the wildfire. The Director did not introduce into evidence either Ms. Charles's request to ODNR or ODNR's response,⁵ nor were these documents included in the Certified Record. Nonetheless, the Commission located the response from ODNR referred to in Ms. Charles's testimony as an attachment to Ms. Carpenter's Verified Complaint. Testimony Charles; CR Item 3, pages 15-16.

{¶26} As contained in Ms. Carpenter's Verified Complaint, ODNR's response read in pertinent part:

* * * [P]aragraphs 1 and 2 of your email seek information which, if provided, could lead to the identity of undisclosed suspects in the arson event of that weekend. The events surrounding the arson are presently subject to an on-going criminal investigation. As such, those records are confidential law enforcement investigatory records which are exempt from public disclosure at this time under the authority of Ohio Revised Code § 149.43(A)(1)(h). * * *

The remaining requests for information have been compiled as follows:

"At what point was the burn declared a wildfire?"

The burn itself was never declared a wildfire, instead the burn area was incorporated into the wildfire suppression strategy developed for the arson fires that originated along Mackletree Road. These fires burned to the south during the evening of April 24th and early morning hours of April 25th. This wildfire activity reached the northern portion of the prescribed

⁵ At hearing, the Director introduced a report from the West Virginia Division of Forestry, which was an attachment to ODNR's response. However, the Director did not introduce ODNR's response itself. See Director's Exhibit 10.

burn unit, along forest road 2, on the morning of April 25th. At this time, the arson set fires and prescribed burn were one contiguous area of burned area. The prescribed burn did not breach the control lines to the west and south until later during the afternoon hours of April 25th when the entire area was being managed as one wildfire event.

* * *

Although it was not specifically requested, we are also providing you with a redacted copy of the August 11, 2009 report of the West Virginia Division of Forestry's review and analysis of the arson episode.

CR Item 3, page 16.

{¶27} The West Virginia Division of Forestry report, referred to in the above correspondence from ODNR, read in pertinent part:

On Monday July 20, 2009 the West Virginia Division of Forestry ("WVDOF") received copies of your agency documents chronicling the April 24, 2009 prescribed fire and wildfire at Shawnee State Forest. * * *

* * *

The review of this incident and the information supplied was limited to the initial prescribed burn, containment efforts including the burn plan for the prescribed burn, weather conditions for burn date, documentation detailing fire behavior analysis of three (3) fires along Mackletree Road in Nile Township, Scioto County, Ohio as well as the initial documentation provided detailing the discovery of the suspected arson fires on Mackletree road.

* * *

The WVDOF review team next considered the Fire Behavior Analysis of Three Fires discovered along Mackletree Road on April 24, 2009. This analysis was conducted by Michael W. Bowden, Fire Behavior Analyst for the Ohio Division of Forestry. This report concludes that the three fires discovered at approximately 1800 hours most likely started at approximately 1740-1750 hours on the same date. This conclusion is based upon the size of the fires at the time of discovery, the fuel conditions at the scene and the observed weather conditions at the scene as well as the topography. We find the calculations of Forest Officer Bowden to be accurate, based on the provided information, and substantiated.

The WVDOF review team concurs with the submitted Fire Behavior Analysis stipulating time of ignition for three (3) fires on Mackletree Road.

The WVDOF review team next considered the Fire Behavior Analysis of Spotting Distance of East Fork prescribed burn on East Fork on April 24, 2009. This analysis was conducted by Michael W. Bowden, Fire Behavior Analyst for the Ohio Division of Forestry. This report stipulates that the maximum potential spotting distance from the East Fork prescribed burn [occurred] between 1700-1900 hours. This analysis includes the weather conditions, fuel conditions and the topography for the prescribed burn area. Based upon his calculations Forest Officer Bowden opines that the closest fire is over 500 feet further away than embers could have been carried under the worst weather conditions (winds in excess of 22 mph). In fact the distances of the fires are clearly defined on a map and indicate distances of approximately ½ to almost 1 mile from the prescribed burn. Additionally, given the wind directions on the day of the prescribed burn spot fires would have occurred Northeast (40 degrees) and East Northeast (60 degrees) of the prescribed burn when in fact the discovered fires occurred directly north of the prescribed burn. We find the calculations and opinion of Forest Officer Bowden to be accurate and substantiated based upon the provided information and that the fires on Mackletree Road were not ignited by spotting from the prescribed burn

The WVDOF review team concurs with the submitted Fire Behavior Analysis of spotting distance of the East Fork prescribed burn on April 24 2009.

The WVDOF review team next reviewed general information relating to the discovery of the 4 [sic] fires on Mackletree Road as stipulated by the Ohio Division of Forestry. These fires were located along Mackletree Road within easy access to a motor vehicle pathway. From the information provided it is clear these fires started within a few minutes of each other. Based upon the provided information relating to fire size at the time of discovery it is the opinion of the WVDOF Review Team that Fire #3 was the first ignition, Fire #2 was the second ignition and Fire # 1 the last ignition. This would indicate a west to east ignition path and an exit from the fire scene consistent with information related to Officer Mark Hassel on April 24, 2009.

Additionally, during the subsequent and still ongoing investigation evidence of arson activity was discovered near the location of Fire #3. This evidence was [REDACTED].

The WVDOF Review Team concurs with this general information indicating arson activity along Mackletree Road on April 24, 2009.

Director's Exhibit 10 (redaction and emphasis in original).⁶

⁶ Ohio EPA did not include the West Virginia Division of Forestry report in the Certified Record.

{¶28} The underlying data, provided by ODNR to the West Virginia Division of Forestry and which appears to have formed the basis of the West Virginia Division of Forestry's analysis, was not provided to PLAA and was not introduced as evidence at hearing. Further, neither Mr. Michael Bowden, who both supervised the prescribed burn at East Fork Burn Unit and conducted ODNR's analysis regarding the alleged arson, nor any member of the West Virginia Division of Forestry testified at hearing. Instead, both Ms. Charles and Mr. Paulian testified that PLAA and Ohio EPA simply accepted ODNR's assessment because PLAA and Ohio EPA lacked personnel qualified to evaluate fire behavior and/or the allegation of arson. Testimony Charles, Paulian.

{¶29} Ms. Lund argued that because PLAA and Ohio EPA relied solely upon ODNR's own investigatory conclusions and failed to either evaluate ODNR's underlying assertions or conduct their own independent analysis, the Director lacked a valid factual foundation to conclude that the wildfire at Shawnee State Forest was the result of arson. Testimony Lund.

{¶30} Additionally, Ms. Lund noted that although an individual was arrested and charged with the alleged arson at Shawnee State Forest, those charges were later dropped.⁷ Testimony Lund.

{¶31} In response, Ms. Charles acknowledged she was aware that the Scioto County Prosecutor had dropped the charges relating to the alleged arson. Significantly, however, testimony supports that Ms. Charles failed to initiate any follow-up with ODNR after the dismissal of the criminal charges. Testimony Charles.

⁷ Media accounts from that time period reported the Scioto County Prosecutor dismissed the charge of arson without prejudice in July 2009. The Portsmouth Daily Times quoted the Scioto County Prosecutor as stating, "[t]hey [ODNR] have a lot of work to do—*both to show this is arson*—and to show that he (Thompson) is the one who did it." (Emphasis added). CR Item 3, page 86.

{¶32} Both Ms. Charles and Mr. Paulian testified they visited the site of the wildfire on June 11, 2009, accompanied by Ms. Carpenter and Mr. Guy Denny, whom Mr. Paulian acknowledged as an individual with experience in prescribed fire operations. Ms. Charles and Mr. Paulian explained that Mr. Denny offered his opinion as to how the wildfire occurred, stating that the wildfire was more likely to have been caused by spot fires than by arson. Ms. Charles and Mr. Paulian dismissed Mr. Denny's analysis as merely a "difference of opinion" with ODNR. Testimony Charles, Paulian; CR Item 2.

{¶33} Finally, Ms. Lund notes Ms. Carpenter sent an email to Ms. Charles containing three National Fire Incident Reporting System ("NFIRS") reports, which Ms. Carpenter contended conflicted with ODNR's narrative of the wildfire. Specifically, ODNR's analysis indicated the three alleged arson fires were identified at approximately 6:00pm on April 24, 2009. In her email to Ms. Charles, Ms. Carpenter asserted the NFIRS report corresponding to one of the three alleged arson fires, incident #027, lists the "alarm" time as approximately one hour earlier at 4:53pm.⁸ Testimony Lund; Director's Exhibit 6.

{¶34} Ms. Charles explained that upon receiving these NFIRS reports from Ms. Carpenter, she attempted to contact both ODNR and the Niles Township Fire Department to "verify the accuracy" of the NFIRS reports. But because she was unsuccessful in her attempts to authenticate the reports, Ms. Charles stated that she did not consider them in her investigation. Nonetheless, Ms. Charles's summary incorrectly

⁸ This email was not included in the Certified Record or introduced as evidence at hearing, but two of the three NFIRS reports appear to have been attached to Ms. Carpenter's Verified Complaint. Director's Exhibit 6.

states, “I note the time of the [three NFIRS] wildfire reports of 1739 hours corresponds with the approximate start time of the three arson fires as noted in the WVDOP August 11, 2009 report.”⁹ Testimony Charles; CR Item 2.

C. PLAA’s Analysis of Weather Data and Smoke Visibility Hazard

{¶35} In this assignment of error, Ms. Lund challenges both PLAA’s analysis of the weather data from April 24, 2009, and the Director’s conclusion that smoke from the prescribed fire at the East Fork Burn Unit did not create a visibility hazard on roadways or have a serious detrimental effect upon adjacent properties or the occupants thereof. Testimony Lund.

i. PLAA’s Analysis of Weather Data

{¶36} Special Condition 6 of the Permission issued to ODNR states, “[t]he prescribed burn operations shall be performed in a manner consistent with ODNR prescribed burn procedures as outlined in the Open Burning Request.” CR Item 9.

{¶37} Regarding appropriate weather conditions, ODNR’s open burning request states,¹⁰ “[t]he burn will occur during weather and atmospheric conditions which are conducive to smoke lifting and mixing at a high level in the atmosphere above the ground.” CR Item 7, page 15-17.

{¶38} And in defining such appropriate conditions, ODNR prepared a burn plan for the East Fork Burn Unit. The burn plan listed the required weather parameters as follows:

⁹ The NFIRS report for incident #030 lists the “alarm” time as 5:39pm on April 24, 2009. However, the NFIRS report for incident #027 lists the “alarm” time as 4:53pm on April 24, 2009. Director’s Exhibit 6.

¹⁰ Ohio EPA did not include ODNR’s open burning request in the Certified Record. However, the request form appears to have been attached to Ms. Lund’s first supplement to her verified complaint. CR Item 7.

Required Parameters	Max.	Min.	Preferred (if applicable)
Wind Direction(s)	Any	Any	SE/E/NE/N
Eye level Wind speed (mph)	7 mph	1 mph	3-4 mph
1-Hour Fuel Moisture (%)	11%	4%	6-8%
10-Hour Fuel Moisture (%)	12%	5%	7-9%
100-Hour Fuel Moisture (%)	22%	9%	12-15%
Live Fuel Moisture (%)	150%	0%	<30%
Atmospheric Mixing Height (ft)	Unlimited	2000 feet	3000+ feet
Transport Wind Speed	Unlimited	6 mph	12+ mph
KBDI	600	0	150-250
Ventilation Index	Unlimited	24,000	36,000+
Guidance Parameters	Max.	Min.	Preferred (if applicable)
Air Temperature (F)	85	40	60-70
Relative Humidity (%)	45	20	30-35
Days Since Rain	10	1	2-5
20 ft. wind speed (mph)	25	1	8-12

Lund Exhibit J.

{¶39} As part of her investigation into the verified complaints, Ms. Charles obtained the weather forecast prepared for ODNR by the National Oceanic and Atmospheric Administration (“NOAA”) on the day of the prescribed burn, as well as actual weather data for April 24, 2009 from a nearby weather station. Testimony Charles.

{¶40} Ms. Charles did not testify about the specific results of her analysis at hearing. Ms. Lund, however, offered into evidence what appears to be a written weather analysis report prepared by Ms. Charles. This report, which was not included in the

Certified Record, concludes, “[a]ll values are within the maximum and minimums of the acceptable ranges noted in the burn plan.” Testimony Charles; Lund Exhibit O.

{¶41} The report also includes the following table detailing the “actual recorded values”¹¹ for April 24, 2009:

Observed Parameters	Max.	Min.
Wind Direction(s)	SW, WSW	SW, WSW
Eye level Wind speed (mph)	5 mph (3 PM)	<1 mph ¹² (throughout)
1-Hour Fuel Moisture (%)	7% (10 AM-1 PM)	5% (3 PM-6PM)
10-Hour Fuel Moisture (%)	8% (10 AM-1 PM)	6% (4 PM-6PM)
100-Hour Fuel Moisture (%)	14%	14%
Live Fuel Moisture (%)	32%	32%
Atmospheric Mixing Height (ft)	4200 ft	2200ft
Transport Wind Speed	33 mph	15 mph
KBDI	21 (6 PM)	16 (10 AM)
Ventilation Index	138,600	33,000
Guidance Parameters	Max.	Min.
Air Temperature (F)	84 (3 PM)	76 (10 AM)
Relative Humidity (%)	42 (10 AM)	26 (4 PM)
Days Since Rain	1	1
20 ft. wind speed (mph)	11 (3 PM)	4 (6 PM)

Lund Exhibit O.

¹¹ Some of the purported “actual” values appear to be based upon *forecast* data provided to ODNR by NOAA, rather than *actual* recorded data. Compare Lund Exhibit O with CR Item 6, page 124.

¹² The Commission notes the minimum eye-level wind speed listed in ODNR’s burn plan is 1 mph. Lund Exhibit J.

{¶42} At hearing, Ms. Lund argued that Ms. Charles's report misstates the minimum forecasted atmospheric mixing height and miscalculates the minimum forecasted ventilation index. Ms. Lund asserted that the correct value for the minimum forecasted mixing height is actually 900 feet, rather than 2,200 feet, based upon the weather forecast provided to ODNR and PLAA by NOAA. Further, because the ventilation index is the product of the mixing height and transport wind speed, Ms. Lund contended the correct minimum forecasted value for the ventilation index is 13,500, which is below the minimum required value of 24,000 listed in ODNR's burn plan. Testimony Lund.

{¶43} Although neither Ms. Charles's report nor the underlying data were included in the Certified Record or discussed by the Director at hearing, the relevant weather forecast, prepared by NOAA at the request of ODNR on April 24, 2009, was attached to Ms. Carpenter's Verified Complaint. The weather forecast expressly indicates a proposed ignition time of 10:30am and lists the forecasted mixing height as "900-2200 FT AGL...INCREASING TO 2900-4200 FT AGL IN THE AFTERNOON." CR Item 6, page 124.

{¶44} At hearing, Ms. Charles did not testify as to her rationale for choosing 2,200 feet, rather than 900 feet, as the minimum forecasted value for mixing height in her analysis of the weather conditions. Testimony Charles.

ii. Smoke as Visibility Hazard

{¶45} Special Condition 3 of the Permission states, "[f]ire cannot create a visibility hazard on roadways, railroad tracks or air fields." Special Condition 4 states, "[s]moke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof." CR Item 9.

{¶46} At hearing, Ms. Lund testified that smoke from the prescribed burn at East Fork Burn Unit remained at or near ground level throughout the day. Thus, Ms. Lund asserted that PLAA acted unreasonably in concluding that smoke from the prescribed fire did not create a visibility hazard on roadways and did not have a serious detrimental effect upon adjacent properties or the occupants thereof. Testimony Lund.

{¶47} Ms. Lund introduced the following photograph, taken at approximately 2:42pm on April 24, 2009, (during the prescribed burn) along State Route 125 near its intersection with Mackletree Road. Ms. Lund testified that smoke at this time was heavier than it appears in the photograph because the photograph was taken without the correct lens.



Testimony Lund; Lund Exhibit M-4.

{¶48} Further, Ms. Lund introduced two photographs, taken later in the day, documenting heavy smoke in the air at approximately 6:21pm on April 24, 2009.



Testimony Lund; Lund Exhibit M-13, M-14.

{¶49} In response, Ms. Charles testified that a PLAA inspector drove through the area of the East Fork Burn Unit at approximately 2:40pm on April 24, 2009.

Although the inspector noted a smoky odor along State Route 125, the inspector concluded that the smoke did not create a driving or visibility hazard at that time.

Testimony Charles; CR Item 2.

D. Placement of Ambient Air Quality Monitor

{¶50} In this assignment of error, Ms. Lund argues the Director acted unreasonably in relying upon data obtained from the ambient air quality monitor located at 189 Mackletree Road to support his conclusion that the prescribed burn did not produce prohibited amounts of smoke, particulate matter, and other detrimental air pollutants.

{¶51} Ms. Lund noted that the ambient air quality monitor was located northwest of the East Fork Burn Unit; yet the prevailing wind direction on April 24, 2009 would have carried smoke and other air pollutants in a northeasterly direction. Testimony Lund.

{¶52} In response, Ms. Charles testified that PLAA chose the location for the monitor based on her staff's assessment, but did not offer any specific testimony regarding her staff's rationale for the placement. Testimony Charles.

E. Additional Reports of Fires Not Along Mackletree Road Not Considered During Investigation

{¶53} As discussed above, Ms. Carpenter emailed Ms. Charles three NFIRS reports which Ms. Charles contended conflicted with ODNR's narrative of the events surrounding the wildfire at Shawnee State Forest.¹³ Specifically, ODNR's analysis indicated that the three alleged arson fires were identified at approximately 6:00pm on April 24, 2009. In her email to Ms. Charles, Ms. Carpenter asserted that the NFIRS

¹³ See note 9, *supra*.

report corresponding to incident #027 listed the “alarm” time as approximately one hour earlier at 4:53pm. Ms. Lund testified that PLAA acted unreasonably by disregarding the NFIRS reports provided by Ms. Carpenter. Testimony Lund; Director’s Exhibit 6.

{¶54} In response, Ms. Charles testified that she was unable to “verify the accuracy” of the reports after contacting ODNR and the Niles Township Fire Department and therefore disregarded the reports in her analysis. Testimony Charles; CR Item 2.

III. Additional Assignments of Error Not Presented at Hearing

{¶55} In her Notice of Appeal, Ms. Lund raised several additional assignments of error not specifically address at hearing.

A. PLAA’s Determination that Two Spot Fires Did Not Constitute Violations of the Permission and/or Ohio’s Air Pollution Control Laws

{¶56} Ms. Lund failed to present testimony about two spot fires not constituting violations of the Permission and/or Ohio’s air pollution control laws at hearing. However, in her third amended notice of appeal, Ms. Lund generally contends that spot fires—fires that occur outside the boundary of the burn unit—should be considered per se violations of the Permission and/or Ohio’s air pollution control laws. Case File Item J.

{¶57} At hearing, both Ms. Charles and Mr. Paulian testified that spot fires addressed in a manner consistent with approved contingency plans are not necessarily violations of the Permission. Further, the Director’s dismissal letter notes that the two spot fires identified during the course of the burn represented less than 3% of the total area of the 250 acres authorized to be burned at East Fork Burn Unit. Because Ohio EPA

and PLAA concluded that ODNR addressed the two spot fires in accordance with its approved contingency plans, Ms. Charles and Mr. Paulian testified that the spot fires were not violations of ODNR's Permission or Ohio's air pollution control laws. Testimony Charles, Paulian; CR Item 1.

B. PLAA's Determination that ODNR Addressed Spot Fires in Accordance with Contingency Plans

{¶58} Special Condition 5 of the Permission states, "[a]ny potential spot fires shall be addressed in accordance with the ODNR prescribed burn contingency plan(s)." CR Item 9.

{¶59} As noted above, the Director found as follows regarding two spot fires at the East Fork Burn Unit:

Two spot fires were identified during the course of the open burn operations. Both spot fires were located outside the burn perimeter but within the contingency line, one affecting approximately 0.1 acres of the northeast end of the burn unit near State Forest Road 2 and the other consisting of approximately 5 acres along the southeast end of the burn unit near Webb Hollow. As required by the open burning permission, the contingency plan outlined in the Division of Forestry's general prescribed burn plan was implemented and followed in response to these spot fires.

CR Item 1.

{¶60} Ms. Lund failed to present testimony at hearing regarding whether spot fires were addressed in accordance with the burn contingency plans. However, in her first amended notice of appeal, Ms. Lund generally argues that the Director's dismissal letter lacks sufficient detail as to what actions ODNR took in addressing the spot fires near Forest Road 2 and near Webb Hollow. Case File Item C.

{¶61} At hearing, the Director did not specifically address the actions ODNR took to contain the two known spot fires; however, testimony generally indicates that Ms. Charles and Mr. Paulian met with representatives from ODNR to discuss the events

of April 24, 2009, including the spot fires near Forest Road 2 and near Webb Hollow.
Testimony Charles, Paulian.

C. PLAA's Determination that Breaches of Control Lines to West and South Did Not Constitute Violations of the Permission

{¶62} As noted above, the Director's dismissal letter contained the following language:

The arson related fires burned to the south during the evening of April 24 and early morning hours of April 25, 2009. This wildfire activity reached the northern portion of the prescribed burn unit, along State Forest Road 2, on the morning of April 25th. At this time, the arson set fires and prescribed burn was on contiguous area of burned area. The prescribed burn did not breach the control lines to the west and south until later during the afternoon hours of April 25 when the entire area was being managed as one wildfire event.

CR Item 1.

{¶63} The Director determined that breaches of the control lines to the west and south of the East Fork Burn Unit were not solely attributable to the prescribed fire activity; rather, the alleged arson fires merged with the prescribed fire and created one contiguous area of fire after ODNR had reallocated personnel to combat the additional wildfires. The Director thus concluded that the breaches of the control lines to the west and south did not constitute violations of the Permission. CR Item 1.

{¶64} At hearing, Ms. Lund did not provide specific testimony regarding PLAA's determination that the breaches of control line constituted violations of the Permission. However, in her first amended notice of appeal, Ms. Lund generally argues that any breach of the control lines should be considered a violation of the Permission, regardless of the circumstances in which they occur. Case File Item C.

{¶65} The Director did not specifically address these assignments of error at hearing, either; nonetheless, testimony generally supports that the Director found

ODNR's allocation of personnel to be reasonable. Ms. Charles and Mr. Paulian testified that PLAA and Ohio EPA lack the authority to regulate ODNR personnel during a wildfire event. Thus, *after* a wildfire had been declared (in this case, allegedly due to arson fires), it was reasonable for ODNR to divert personnel from the prescribed burn area to attempt to contain the wildfire. Testimony Charles, Paulian.

D. Deficiencies in ODNR's Burn Plan

{¶66} Ms. Lund did not provide specific testimony regarding potential deficiencies in ODNR's burn plan; however, in her second amended notice of appeal, Ms. Lund generally alleges that Ohio EPA and PLAA should have evaluated whether ODNR's burn plan was deficient. Case File Item I.

{¶67} In essence, Ms. Lund theorizes that wildfire at Shawnee State Forest was caused by ODNR's prescribed burn activities, rather than arson. Thus, Ms. Lund concludes that if, as the Director determined in his dismissal letter, ODNR conducted the prescribed burn in accordance with the procedures outlined in its burn plan, then the burn plan itself must have been deficient. Case File Item I.

{¶68} The Director did not address this assignment of error at hearing.

E. Conference Requirement

{¶69} Here, Ms. Lund argues that the Director acted unreasonably by not providing her with a conference. Ms. Lund acknowledges that the Director is not required to provide a conference prior to the dismissal of a verified complaint, but argues that in this instance, it was unreasonable to not do so. Case File Item I.

{¶70} The Director did not specifically address this assignment of error at hearing; however, the testimony generally indicated that PLAA and Ohio EPA corresponded with Ms. Carpenter on several occasions. The testimony did not indicate

whether PLAA or Ohio EPA corresponded with Ms. Lund or Mr. Peters during the course of the investigation. Testimony Charles, Paulian.

F. Typographical Errors in Ohio EPA's Dismissal Letter

{¶71} Finally, Ms. Lund argues that the Director's dismissal letter is deficient because it contains several typographical errors. Specifically, Ms. Lund argues that the dismissal letter misstates the date Ohio EPA received her verified complaint, the number of supplements she submitted, and the date Ohio EPA received Ms. Carpenter's first supplement. Case File Item A.

{¶72} The Director did not address this assignment of error at hearing.

CONCLUSIONS OF LAW

I. ERAC Standard of Review

{¶73} 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.

{¶74} 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).

{¶75} 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.*

{¶76} 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.*

{¶77} 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.*

{¶78} 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. Analysis

A. Promptness of Investigation

{¶79} Revised Code 3745.08(B) provides in pertinent part as follows:

Upon receipt of a complaint authorized by this section, the director shall cause a *prompt* investigation to be conducted such as is reasonably necessary to determine whether a violation, as alleged, has occurred, is occurring, or will occur. * * *

(Emphasis added).

{¶80} Ms. Lund filed her verified complaint on June 3, 2009 followed by two supplements on June 10, 2009 and July 8, 2009. Ms. Carpenter filed her verified complaint on June 22, 2009 followed by two supplements filed on January 19, 2010 and April 27, 2010. And finally, Mr. Peters filed his verified complaint on June 23, 2009.

{¶81} Ms. Charles completed her investigation in approximately January 2012, approximately two and one-half years after Ms. Lund filed her verified complaint and one and one-half years after the final supplement was filed with the PLAA. Subsequently, the Director issued his decision dismissing the verified complaints on December 12, 2014.

{¶82} Ms. Lund argued that this approximately five and one-half year timeframe between the initial filing of her verified complaint on June 3, 2009, until the

Director's dismissal on December 12, 2014, did not constitute a "prompt" investigation as required by R.C. 3745.08(B).

{¶83} In response, the Director argued that the timeframe was reasonable given the complexity of the investigation at PLAA. Ms. Charles noted that both Ms. Lund and Ms. Carpenter filed supplements to their verified complaints. Further, Ms. Charles emphasized the length of the verified complaints, explaining that Ms. Carpenter's verified complaint was "over 100 pages."

{¶84} Regarding the delay between January 2012, when Ohio EPA received Ms. Charles's summary, and December 2014, when the Director issued his decision, Mr. Paulian explained that staff at Ohio EPA's Central District Office, Division of Air Pollution Control were occupied with other responsibilities.

{¶85} The Commission finds the approximately five and one-half year timeframe between Ms. Lund's initial filing and the Director's dismissal was unlawful and unreasonable.

{¶86} The Director's explanation regarding the nearly three-year delay between the completion of PLAA's investigation in January 2012 and the Director's issuance of his dismissal in December 2014—that Ohio EPA did not possess sufficient personnel resources—does not excuse the agency's statutory responsibility to conduct a *prompt* investigation. R.C. 3745.08(B); see *Lund v. PLAA*, ERAC Nos. 15-6838, 15-6838 to 15-6840 (Dec. 16, 2015), ¶115 ("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").

{¶87} Notably, although the testimony did indicate that Ms. Charles and Mr. Paulian consulted with each other between January 2012 and December 2014, neither

Ms. Charles nor Mr. Paulian testified as to any continued contact with ODNR, the Niles Township Fire Department, or the verified complainants regarding the wildfire at Shawnee State Forest. Moreover, despite acknowledging that the Scioto County Prosecutor dropped the criminal arson charges against the alleged arsonist in July 2009, the evidence establishes that neither Ms. Charles nor Mr. Paulian attempted to follow up with ODNR regarding the previously-confidential evidence of arson.

{¶88} Further, because the testimony establishes that the delay between January 2012 and December 2014 was purely administrative in nature, and not related to ongoing efforts to gather information, the Commission cannot find that the Director conducted a “prompt” investigation within the meaning of R.C. 3745.08(B).

{¶89} The “promptness” of each verified complaint investigation is a factual determination that must be evaluated on a case by case basis. Thus, the Commission does not establish a bright line test to determine whether a particular investigation is “prompt.” Nonetheless, given the facts in this matter, the Commission finds the Director acted unlawfully and unreasonably by failing to act in the approximately five and one-half years between Ms. Lund’s initial filing in June 2009 and the Director’s issuance of the dismissal in December 2014.

B. PLAA’s Determination that Arson Caused Wildfires

{¶90} Ms. Lund argued that the Director lacked a valid factual foundation for his conclusion that the wildfire at Shawnee State Forest was caused by arson, rather than ODNR’s prescribed burning activities at East Fork Burn Unit. In support of her contention, Ms. Lund noted that PLAA and Ohio EPA simply accepted ODNR’s own determination regarding the cause of the fire without reviewing any of the underlying data supporting ODNR’s conclusion.

{¶91} Additionally, Ms. Lund argued that PLAA and Ohio EPA failed to conduct a follow-up investigation after pending criminal charges of arson were dropped and failed to consider information presented by Ms. Carpenter in her verified complaint. Specifically, Ms. Lund cited the assertions of Mr. Guy Denny and three NFIRS reports corresponding to fires along Mackletree Road.

{¶92} In response, the Director argued that Ohio EPA acted reasonably in accepting ODNR's account of events because PLAA and Ohio EPA lack the requisite expertise to evaluate fire behavior and the allegations of arson. Additionally, the Director cited a report from the West Virginia Division of Forestry, which reached the same conclusion as ODNR regarding the cause of the wildfire.

{¶93} Regarding the information offered to PLAA and Ohio EPA by Ms. Carpenter, Ms. Charles and Mr. Paulian testified that they did not consider the opinions of Mr. Guy Denny because his analysis was merely a "difference of opinion" with ODNR. Further, Ms. Charles explained that she did not consider the NFIRS reports because she could not "verify the accuracy" of the reports.

{¶94} Upon review, the Commission finds the Director lacked a valid factual foundation to support his conclusion that the wildfire at Shawnee State Forest was caused by arson, rather than ODNR's prescribed burning activities at East Fork Burn Unit.

{¶95} As an initial matter, the Commission notes that its standard of review does not permit it to substitute its judgment for that of the Director's as to factual issues. Significantly, however, the Director's action must be supported by a *valid* factual foundation. *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977). Further, when evaluating the evidence, 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; *Oxford Mining Co., LLC v. Nally*, 2015-Ohio-182, 27 N.E.3d 920 (10th Dist.). Specifically, “ERAC must determine whether the evidence is of such quantity and quality that it provides a sound support for the Director’s action.” *Ohio Fresh Eggs, LLC v. Wise*, at ¶32.

{¶96} Here, the Commission finds 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.” *Lund v. PLAA*, ERAC Nos. 15-6838, 15-6838 to 15-6840 (Dec. 16, 2015). Thus, the mere circumstance that PLAA and Ohio EPA may lack personnel qualified to analyze fire behavior does not relieve the agency from the requirement that it support its determinations regarding the cause of a fire with a *valid* factual foundation.

{¶97} The testimony established that PLAA and Ohio EPA simply accepted ODNR’s assertion that the wildfire at Shawnee State Forest was caused by arson without evaluating ODNR’s underlying assertions or conducting their own independent analysis. Significantly, ODNR’s November 10, 2009 letter to Ms. Charles contained no information as to how ODNR determined the wildfire was caused by arson.

{¶98} The Commission acknowledges that ODNR also provided Ms. Charles with a copy of an “independent” investigation report prepared by the West Virginia Division of Forestry. However, according to the report itself, the West Virginia Division of Forestry based its conclusions solely upon information provided by ODNR—information that was not disclosed to Ohio EPA or PLAA. Further, the description of the evidence of arson was redacted in the version of the report provided to Ms. Charles by ODNR. Although the West Virginia report contained limited information indicating the

fires along Mackletree Road were not likely to have been caused by spot fires due to their distance from the boundary of the East Fork Burn Unit, the testimony at hearing established that Ohio EPA and PLAA did not conduct even a cursory review of the West Virginia Division of Forestry's *rationale* for its conclusions. Instead, as noted above, the testimony established that Ohio EPA and PLAA simply accepted ODNR's contention at face value.

{¶99} Moreover, the testimony at hearing belies Ms. Charles's assertion that no evidence supported Appellant's theory that ODNR's prescribed burn caused the wildfire at Shawnee State Forest. Specifically, both Ms. Charles and Mr. Paulian testified that they met with Mr. Guy Denny during a tour of the wildfire site. Mr. Denny provided his analysis of the events relating to the wildfire, stating that the wildfire was more likely to have been caused by spot fires than by arson. Although Mr. Paulian acknowledged Mr. Denny's experience with prescribed burning, Mr. Paulian admitted that Ohio EPA and PLAA summarily rejected his analysis simply because it differed from that of ODNR. At hearing, neither Mr. Paulian nor Ms. Charles offered *any* substantive rationale for their rejection of Mr. Denny's conclusion and acceptance of ODNR's conclusion.

{¶100} Further, regarding the NFIRS reports submitted to Ms. Charles by Ms. Carpenter, the mere fact that it may have been challenging to "verify the accuracy" of the reports does not establish that PLAA and Ohio EPA acted reasonably in disregarding them altogether or in failing to make any attempt to verify the substantive aspects of Ms. Carpenter's assertions.

{¶101} Ms. Carpenter submitted the NFIRS reports to PLAA in support of her theory that the Niles Township Fire Department responded to a fire along Mackletree Road as early as 4:53pm on April 24, 2009. This, as Ms. Carpenter observed, would

conflict with ODNR's narrative that the arson fires were not discovered until approximately 6:00pm.

{¶102} At hearing, the testimony established that Ms. Charles did not attempt to verify the *substance* of the NFIRS reports—namely, the time of the incidents—with the Niles Township Fire Department. Rather, Ms. Charles testified that she attempted to obtain a copy of the documents from another source, and when unable to do, she simply chose to disregard Ms. Carpenter's assertion regarding the timing of the fire department's response altogether.¹⁴

{¶103} Finally, the Commission notes that neither PLAA nor Ohio EPA attempted to follow up with ODNR regarding the evidence of arson activity during the more than five years that passed following the dismissal of the criminal charges related to the alleged arson. Although the underlying evidence may indeed have been exempted from public disclosure during the pendency of ODNR's investigation, Appellee offered no explanation for the failure to conduct any follow-up inquiry with ODNR between July 2009, when the criminal proceedings were completed, and December 2014, when the Director issued his dismissal.

{¶104} For the foregoing reasons, the Commission finds the Director lacked a valid factual foundation for his conclusion that the wildfire at Shawnee State Forest was caused by arson.

{¶105} The Commission's finding on this assignment of error does not definitively resolve the matter of the cause of the wildfire at Shawnee State Forest.

¹⁴ The Commission also notes that Ms. Charles's investigation summary incorrectly states, "I note the time of the [three NFIRS] wildfire reports of 1739 hours corresponds with the approximate start time of the three arson fires as noted in the WVDOF August 11, 2009 report." The NFIRS report for incident # 030 does list the "alarm" time as 5:39pm on April 24, 2009. However, the Commission notes that the NFIRS report for incident #027 lists the "alarm" time as 4:53pm on April 24, 2009.

Specifically, the Commission does not affirmatively conclude that the wildfire was or was not caused by arson. Rather, the Commission finds the Director's *investigation* into the cause of the wildfire at Shawnee State Forest, as detailed at hearing, did not yield sufficient information to support the Director's findings in his dismissal letter. In other words, the Commission finds that the Director lacked a valid factual foundation to reach *any* conclusion regarding the cause of the wildfire at Shawnee State Forest.

C. PLAA's Analysis of Weather Data and Smoke Visibility Hazard

i. PLAA's Analysis of Weather Data

{¶106} As a part of her investigation regarding the verified complaints, Ms. Charles analyzed weather data for the East Fork Burn Unit on April 24, 2009. Ms. Charles's review of the forecasted mixing height, transport wind speed, and ventilation index is most relevant to this appeal.

{¶107} Based upon her analysis of the weather forecast prepared for ODNR by NOAA, Ms. Charles found the following minimum and maximum forecasted values for mixing height, transport wind speed, and ventilation index:

Forecasted Parameters	Max.	Min.
Atmospheric Mixing Height (ft)	4200 ft	2200ft
Transport Wind Speed	33 mph	15 mph
Ventilation Index	138,600	33,000

{¶108} Ms. Charles then compared those values to the requirements listed in ODNR's burn plan:

Required Parameters	Max.	Min.	Preferred (if applicable)
Atmospheric Mixing Height (ft)	Unlimited	2000 feet	3000+ feet
Transport Wind Speed	Unlimited	6 mph	12+ mph
Ventilation Index	Unlimited	24,000	36,000+

{¶109} Having found that the forecasted values fell within the acceptable range listed in ODNR's burn plan, Ms. Charles concluded that ODNR did not violate the Permission terms related to weather conditions.

{¶110} At hearing, Ms. Lund argued that Ms. Charles's report misstates the minimum forecasted atmospheric mixing height and miscalculates the minimum forecasted ventilation index. Ms. Lund asserted that, based upon the weather forecast provided to ODNR and PLAA by NOAA, the correct value for the minimum forecasted mixing height is actually 900 feet, rather than 2,200 feet. Further, because the ventilation index is the product of the mixing height and transport wind speed, Ms. Lund contended that the correct minimum forecasted value for the ventilation index is 13,500, which is below the minimum value of 24,000 listed in ODNR's burn plan.

{¶111} The Commission agrees.

{¶112} The relevant weather forecast, which expressly indicates a proposed ignition time of 10:30am, lists the forecasted mixing height as "900-2200 FT AGL...INCREASING TO 2900-4200 FT AGL IN THE AFTERNOON." Thus, 2,200 feet appears to be a *maximum* forecast value for the morning of April 24, 2009, rather than

a *minimum* value for the day. Significantly, in her analysis of the weather conditions, Ms. Charles did not provide any rationale for choosing 2,200 feet, rather than 900 feet, as the minimum observed value for mixing height.

{¶113} Accordingly, the Commission finds the Director lacked a valid factual foundation for concluding that the forecasted mixing height fell within acceptable values.

{¶114} Additionally, the parties do not dispute that the ventilation index is calculated by multiplying the atmospheric mixing height by the transport wind speed. The product of 900 feet and 15 miles per hour yields a ventilation index of 13,500, which falls below the minimum acceptable value of 24,000 listed in ODNR's burn plan.

{¶115} Therefore, the Commission also finds the Director lacked a valid factual foundation for concluding that the forecasted ventilation index fell within acceptable values.

{¶116} Having found that the Director lacked a valid factual foundation for concluding that the forecasted mixing height and ventilation index fell within acceptable values, the Commission finds the Director acted unreasonably in concluding that ODNR did not violate the terms of its Permission with regard to required weather conditions.

ii. *Smoke as Visibility Hazard*

{¶117} Additionally, Ms. Lund argued that the Director lacked a valid factual foundation for concluding that ODNR's prescribed burn at East Fork Burn Unit did not create a visibility hazard on roadways or have a serious detrimental effect upon adjacent properties or the occupants thereof.

{¶118} Ms. Lund testified that smoke from the prescribed burn at East Fork Burn Unit remained at or near ground level throughout the day. Ms. Lund also cited

several photographs which she contends document smoke caused by the prescribed burn.

{¶119} In response, Ms. Charles testified that a PLAA inspector drove through the area of the East Fork Burn Unit at approximately 2:40pm on April 24, 2009. Although the inspector noted a smoky odor along State Route 125, the inspector concluded that the smoke did not create a driving or visibility hazard at that time.¹⁵

{¶120} Based upon the statements of the PLAA inspector, the Commission finds the Director possessed a valid factual foundation for determining that smoke did not create a visibility hazard or have a serious detrimental effect upon adjacent properties or the occupants thereof during the afternoon of April 24, 2009.

{¶121} Additionally, the Director's dismissal letter addresses only smoke present within Shawnee State Forest prior to 6:00pm on April 24, 2009. Having already found that the Director lacked a valid factual foundation to determine that arson caused the wildfire at Shawnee State Forest, the Commission notes the Director's re-evaluation of the cause of the wildfire at Shawnee State Fire *may* necessitate further re-evaluation of smoke levels between the evening of April 24, 2009 and April 30, 2009.

D. Placement of Ambient Air Quality Monitor

{¶122} Here, Ms. Lund argued that the Director acted unreasonably in relying upon data obtained from the ambient air quality monitor located at 189 Mackletree

¹⁵ The Commission notes that the testimony regarding the observations of the PLAA inspector is hearsay. Although the inspector's statements describe the ambient conditions he observed, they do not fall within the present sense impression exception to the hearsay rule because the testimony did not establish that the statements were made while the declarant was perceiving the event or condition or *immediately* thereafter. Nonetheless, the Commission finds Ms. Lund has waived any objection to hearsay because she did not raise the objection at hearing or in her post-hearing brief.

Road to support his conclusion that the prescribed burn did not produce prohibited amounts of smoke, particulate matter, and other detrimental air pollutants.

{¶123} Ms. Lund noted that the ambient air quality monitor was located to the northwest of the burn unit. However, the prevailing wind direction on April 24, 2009 would have carried smoke and other air pollutants in a northeasterly direction.

{¶124} In response, Ms. Charles testified that PLAA chose the location for the monitor based on her staff's assessment. Ms. Charles did not offer any specific testimony regarding her staff's rationale for the placement.

{¶125} As an initial matter, the Commission notes that PLAA's own determination regarding the placement of the ambient air quality monitor does not definitively establish that the monitor had been placed in a location well-suited to sampling ambient air quality during the prescribed burn. The mere conclusory statement of an agency witness, without any testimony regarding the agency's underlying rationale, does not establish that the Director acted lawfully and reasonably. *Lund v. PLAA*, ERAC Nos. 15-6838, 15-6838 to 15-6840 (Dec. 16, 2015), ¶93 ("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").

{¶126} Nonetheless, the Commission's standard of review does not permit ERAC to substitute its judgment for that of the Director as to factual issues. *National Wildlife Federation v. Korleski*, 10th Dist. Franklin Nos. 12AP-278, 12AP-279, 12AP-80, 12AP-81, 2013-Ohio-3923, ¶48. Rather, "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.” *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977).

{¶127} Here, although the ambient air quality monitor may or may not have been placed in an ideal location, the testimony established that the Director based his determination regarding ambient air conditions throughout the wildfire based upon data obtained from a nearby ambient air quality monitor. Ms. Lund advances a plausible argument regarding other, more appropriate locations that PLAA could have placed the monitor. However, the Commission finds that in this instance, the data from the ambient air quality monitor nonetheless formed a valid factual foundation for the Director’s determination.

{¶128} Accordingly, the Commission finds that the Director acted lawfully and reasonably when determining that ambient air conditions did not exceed National Ambient Air Quality Standards for particulate matter less than 2.5 microns throughout the wildfire at Shawnee State Forest.

E. Additional Reports of Fires Not Along Mackletree Road Not Considered During Investigation

{¶129} As detailed above, the Commission found that the Director lacked a valid factual foundation for his conclusion that the wildfire at Shawnee State Forest was caused by arson rather than by ODNR’s prescribed burn at the East Fork Burn Unit. Therefore, the Commission finds that it need not address this assignment of error separately.

F. PLAA’s Determination that Two Spot Fires Did Not Constitute Violations of the Permission and/or Ohio’s Air Pollution Control Laws

{¶130} Ms. Lund did not present specific testimony regarding these assignments of error at hearing. However, in her third amended notice of appeal, Ms. Lund generally

contends that spot fires should be considered per se violations of the Permission and/or Ohio's air pollution control laws.

{¶131} At hearing, both Ms. Charles and Mr. Paulian testified that spot fires are not necessarily violations of the Permission if addressed in a manner consistent with approved contingency plans. Further, the Director's dismissal letter stated that the two spot fires identified during the course of the burn represented less than 3% of the total area of the 250 acres authorized to be burned at East Fork Burn Unit. Because Ohio EPA and PLAA concluded that ODNR addressed the two spot fires in accordance with its approved contingency plans, Ms. Charles and Mr. Paulian testified that the spot fires were not violations of ODNR's Permission or Ohio's air pollution control laws.

{¶132} The Commission finds Appellee's interpretation of terms of the Permission is reasonable. The Permission states in pertinent part, "[a]ny potential spot fires shall be addressed in accordance with the ODNR prescribed burn contingency plans." The Commission finds this term contemplates that some unplanned or escaped fires may occur outside the boundaries of the burn unit. Thus, the Commission concludes that the Director acted lawfully and reasonably in determining that limited spot fires may not necessarily constitute a violation of the Permission, provided such spot fires are addressed in accordance with approved contingency plans.

G. PLAA's Determination that ODNR Addressed Spot Fires in Accordance with Contingency Plans

{¶133} Ms. Lund did not present specific testimony at hearing regarding this assignment of error. In her first amended notice of appeal, however, Ms. Lund generally argues that the Director's dismissal letter does not provide sufficient detail as to what actions ODNR took in addressing the spot fires near Forest Road 2 and near Webb Hollow.

{¶134} The Director did not specifically address the actions ODNR took with regard to the two known spot fires; however, the testimony generally indicates that Ms. Charles and Mr. Paulian met with representatives from ODNR to discuss the events of April 24, 2009, including the spot fires near Forest Road 2 and near Webb Hollow.

{¶135} Because Appellant presented no specific evidence regarding this assignment of error at hearing, the Commission finds the Director acted lawfully and reasonably with respect to this issue.

{¶136} Nonetheless, the Director's dismissal letter addresses only the spot fires near State Forest Road 2 and near Webb Hollow. Because the Commission has already found that the Director lacked a valid factual foundation for his conclusion that the wildfire at Shawnee State Forest was caused by arson, the Commission observes that the Director's re-evaluation of the cause of the wildfire *may* necessitate further evaluation of additional spot fires.

H. PLAA's Determination that Breaches of Control Lines to West and South Did Not Constitute Violations of the Permission

{¶137} Ms. Lund did not provide specific testimony regarding these assignments of error at hearing. In her first amended notice of appeal, however, Ms. Lund generally argues that any breach of the control lines should be considered a violation of the Permission, regardless of the circumstances in which they occur.

{¶138} The Director did not specifically address these assignments of error at hearing. Nonetheless, the testimony generally indicated that the Director found ODNR's allocation of personnel to be reasonable. Ms. Charles and Mr. Paulian testified that PLAA and Ohio EPA do not have the authority to direct ODNR personnel during a wildfire event. Thus, *after* a wildfire had been declared (in this case, allegedly due to

arson fires), Ms. Charles and Mr. Paulian testified it was reasonable for ODNR to divert personnel from the prescribed burn area to attempt to contain the wildfire.

{¶139} The Commission finds the Director acted lawfully and reasonably in determining that ODNR's personnel allocation choices during the wildfire event did not constitute a violation of the terms of the Permission. Regardless of its cause, once the wildfire event at Shawnee State Forest occurred, it created an extreme and unusual circumstance, requiring ODNR to redistribute personnel to combat the wildfire and protect nearby structures. Although the cause of the wildfire remains in dispute, the Commission finds the Director could have reasonably concluded that ODNR's actions *after* the wildfire had been declared did not constitute a violation of the Permission.

I. Deficiencies in ODNR's Burn Plan

{¶140} Neither Ms. Lund nor the Director presented specific testimony regarding this assignment of error at hearing. In Ms. Lund's second amended notice of appeal, however, she generally alleges that Ohio EPA and PLAA should have evaluated whether ODNR's burn plan was deficient.

{¶141} The Commission finds Ms. Lund's assignment of error regarding deficiencies in ODNR's burn plan not well-taken.

{¶142} In essence, through her challenge to ODNR's burn plan, Ms. Lund raises a collateral attack on the issuance of the Permission. As noted above, Ms. Lund filed an appeal challenging the issuance of the Permission, but voluntarily dismissed the appeal on May 12, 2009. Journal Entry, *Lund v. Korleski*, ERAC No. 016324 (May 12, 2009).

J. Conference Requirement

{¶143} Here, Ms. Lund argues that the Director acted unreasonably by not providing her with a conference. Although Ms. Lund acknowledges that the Director

need not provide a conference where he dismisses a verified complaint, Ms. Lund argues that in this instance, it was unreasonable to not do so.

{¶144} The Commission finds Ms. Lund's assignment of error regarding the conference requirement not well-taken.

{¶145} As Ms. Lund acknowledges, the Director need not provide a conference prior to the dismissal of a verified complaint. The Commission has previously held:

At issue is the last sentence of R.C. 3745.08(B), which requires the Director to provide the complainant with an opportunity for a conference '[i]f the [D]irector enters an order * * * without having commenced a hearing * * *.' The Director argues that the word 'order,' as used in the third sentence of R.C. 3745.08(B), creates a distinction between an 'order' and a 'dismissal.' The Director argues the same distinction must be made in connection with the conference requirement, reasoning that because he 'dismissed' Ms. Lund's verified complaint and did not issue an 'order,' Ms. Lund was not entitled to a conference.

The Commission agrees and finds that R.C. 3745.08(B) differentiates between an 'order' and a 'dismissal.' Specifically, the third sentence of the statute authorizes the Director, upon finding that a violation occurred, to enter such order as may be necessary, request the attorney general to commence appropriate legal proceedings, or dismiss the complaint if future violations of the same kind are unlikely to occur. In this context, an 'order' and a 'dismissal' are two separate, alternative actions.

Lund v. Nally, ERAC No. 11-016568 (July 12, 2012), ¶¶14-15 (internal citations omitted).

{¶146} Here, because the Director dismissed Ms. Lund's complaint, Ohio EPA was not required to hold a conference with Appellant.

{¶147} However, the Commission notes that if on remand, the Director enters an "order" without having commenced a hearing, the Director would, in that scenario, be required to provide "an opportunity to the complainant and the alleged violator to attend a conference with the director or the director's delegate concerning the alleged violation." R.C. 3745.08(B).

K. Typographical Errors in Ohio EPA's Dismissal Letter

{¶148} Finally, Ms. Lund argued that the Director's dismissal letter is deficient because it contains several typographical errors. Specifically, Ms. Lund argued that the dismissal letter misstates the date Ohio EPA received her verified complaint, the number of supplements she submitted, and the date Ohio EPA received Ms. Carpenter's first supplement.

{¶149} Neither Ms. Lund nor the Director presented specific testimony regarding the impact these errors may have had, if any, on the Director's findings regarding ODNR's prescribed burn at East Fork Burn Unit.

{¶150} Accordingly, Ms. Lund's assignment of error regarding typographical errors in the Director's dismissal letter is not well-taken.

FINAL ORDER

{¶151} For the foregoing reasons, the Commission finds that the approximately five and one-half year timeframe between Ms. Lund's initial filing and the Director's issuance of the dismissal was unlawful and unreasonable.

{¶152} Additionally, the Commission finds the Director lacked a valid factual foundation to support his conclusion that the wildfire at Shawnee State Forest was caused by arson, rather than ODNR's prescribed burn at East Fork Burn Unit. Specifically, the Commission finds the Director's investigation into the cause of the wildfire at Shawnee State Forest did not yield sufficient information to support any conclusion regarding its cause.

{¶153} Finally, the Commission finds the Director lacked a valid factual foundation to support his conclusion that the forecasted weather conditions for April 24, 2009 fell within the acceptable range as set forth in ODNR's burn plan.

{¶154} The Commission hereby VACATES IN PART the Director’s dismissal and REMANDS for action consistent with this Decision. The Commission notes that the Director’s re-evaluation of the cause of the wildfire at Shawnee State Forest *may* necessitate further re-evaluation of other aspects of the verified complaints, such as whether smoke caused a visibility hazard and whether ODNR addressed spot fires in accordance with its contingency plans.

{¶155} The Commission hereby AFFIRMS the Director’s dismissal with respect to Ms. Lund’s remaining assignments of error.

{¶156} 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 3rd day of April 2016.

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