BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BUCKEYE POWER, INC.,	:	Case No. ERAC 13-256734
and	:	
DAYTON POWER AND LIGHT CO.,	:	Case No. ERAC 13-296735
and	:	
DUKE ENERGY OF OHIO,	:	Case No. ERAC 13-316736
and	:	
FIRSTENERGY,	:	Case No. ERAC 13-776737
and	:	
OHIO POWER COMPANY,	:	Case No. ERAC 13-256738
and	:	
OHIO VALLEY ELECTRIC CORP,	:	Case No. ERAC 13-666739
Appellants,	:	
v.	:	
SCOTT NALLY, DIRECTOR OF ENVIRONMENTAL PROTECTION,	:	
Appellee.	:	

RULING ON DIRECTOR'S MOTION FOR SUMMARY JUDGMENT

Rendered on November 27, 2013

Louis E. Tosi, *Michael E. Born*, and *Cheri A. Budzynski* for Appellants Buckeye Power, Inc., Dayton Power and Light Co., Duke Energy of Ohio, FirstEnergy, Ohio Power Co., and Ohio Valley Electric Corp.

Michael DeWine, Attorney General, *Alana R. Shockey*, and *Molly J. Patterson* for Appellee Scott Nally, Director of Environmental Protection

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{¶1} This matter comes before the Environmental Review Appeals Commission ("Commission," "ERAC") on a May 8, 2013 Notice of Appeal filed by Buckeye Power, Inc., Dayton Power and Light Co., Duke Energy Ohio, FirstEnergy, Ohio Power Co., and Ohio Valley Electric Corp. (collectively "Appellants"). Appellants challenge the April 8, 2013 promulgation of Ohio Administrative Code ("Ohio Adm.Code") 3745-33-04(C)(2) by Scott Nally, Director of Environmental Protection ("Director," "Ohio EPA," "Agency"). Case File Item A.

{¶2} On October 17, 2013, the Director filed a Motion for Summary Judgment, arguing that the Director's promulgation of Ohio Adm.Code 3745-33-04(C)(2) is lawful and reasonable. Appellants filed a Response on October 28, 2013. The Director filed a Reply on November 6, 2013. Case File Items Y, Z, AA.

{¶3} Based upon the pleadings and the relevant case law, statutes, and regulations, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING the Director's Motion for Summary Judgment.

FINDINGS OF FACT

{¶4} Revised Code 6111.03(J)(7) sets forth the Director's authority to issue renewal National Pollutant Discharge Elimination System ("NPDES") permits under the Ohio's Water Pollution Control Act. Substitute Senate Bill 294 ("Sub.S.B. No. 294"), which became effective on September 5, 2012, amended the provision as follows:

> (7) A permit may be issued for a period not to exceed five years and may be renewed upon application for renewal ~~and upon a finding by the director~~. In renewing a permit, the director shall consider the compliance history of the permit holder and may deny the renewal if the director determines that the permit holder ~~is making satisfactory progress toward the achievement of all applicable standards and~~ has not complied with the terms and conditions of the existing permit. A permit may be modified, suspended, or revoked for cause, including, but not limited to, violation of any condition of the permit, obtaining a permit by misrepresentation or failure to disclose fully all relevant facts of the permitted discharge or of

> the sludge use, storage, treatment, or disposal practice, or changes in any condition that requires either a temporary or permanent reduction or elimination of the permitted activity. No application shall be denied or permit revoked or modified without a written order stating the findings upon which the denial, revocation, or modification is based. A copy of the order shall be sent to the applicant or permit holder by certified mail.

2012 Sub.S.B. No. 294.

{¶5} In response to Sub.S.B. No. 294, Ohio EPA initiated revisions to the administrative regulations affected by the statutory amendment, including Ohio Adm.Code 3745-33-04 [Permit actions.]. The Agency submitted a Business Impact Analysis to the Common Sense Initiative ("CSI") Office[1] on September 14, 2012 regarding the Agency's proposed revisions to Ohio Adm.Code 3745-33-04. Case File Item Y, Exhibit 2, Attachment A.

{¶6} On September 27, 2012, Ohio EPA circulated the specific language of its draft revision to Ohio Adm.Code 3745-33-04 for review and comment from interested parties. The draft revision to Ohio Adm.Code 3745-33-04(C) read as follows:

> (C) Renewal of permits.
>
> (1) The director shall notify the permittee that any permittee who wishes to continue to discharge after the expiration date of ~~his~~ the permittee's Ohio NPDES permit must file for reissuance of the permit at least one hundred eighty days prior to ~~its~~ the expiration of the permit. ~~Except as provided by paragraph (C)(2) of this rule,~~ Ohio NPDES permits shall be renewed in accordance with the provisions for issuance of permits under this chapter.
>
> ~~(2) A permit shall not be renewed unless the director determines that the permittee is making satisfactory progress toward the achievement of all applicable limitations and has complied with the terms and conditions of the existing permit.~~

[1] John R. Kasich, Governor of Ohio, established the CSI Office in 2011 to provide "a process for independently evaluating the economic impact of agency rules and regulations on small businesses in Ohio." Exec. Order No. 2011-01K.

> ~~(3)~~(2) For new sources or new dischargers as defined in 40 C.F.R. 122.2, see C.F.R. 122.29(d) for applicability of more stringent new source performance standards or technology-based standards under section 301 (b)(2) of the act.
>
> [Comment: Pursuant to 301 (b)(2) of the act, this provision is not applicable to publicly owned treatment works or water quality standards.]
>
> ~~(4)~~(3) Any more stringent limitation on the thermal component of a discharge shall not be imposed as a condition of a permit or renewal thereof for a discharge during a ten year period in accordance with division (J)(3) of section 6111.03 of the Revised Code.

Case File Item Y, Exhibit 2, Attachment B.

{¶7} On October 29, 2012, Appellants submitted written comments to Ohio EPA regarding the proposed revisions. Case File Item A.

{¶8} On December 18, 2012, the CSI Office issued the following recommendation regarding Ohio EPA's proposed revision to Ohio Adm.Code 3745-33-04(C):

> 1. The CSI Office recommends that the Agency add the new statutory language from Senate Bill 294 to the rules so that the Administrative Code mirrors the Revised Code in this instance. The language in ORC 6111.03(J)(7) mandates the Director of the Agency to consider a permitee's compliance history when reviewing a renewal application. The CSI Offices believes this information is helpful to the business community and adds transparency to the process.

CR Item 22.

{¶9} Ohio EPA issued written responses to comments, including those submitted by Appellants, in January 2013. Case File Item Y, Exhibit 2, Attachment C.

{¶10} On January 22, 2013, following the completion of the CSI process, Ohio EPA filed its proposed revisions to Ohio Adm.Code 3745-33-04 with the Joint Committee on Agency Rule Review ("JCARR").[2] The proposed revisions to Ohio Adm.Code 3745-33-04(C) incorporated the CSI Office's recommendation and read as follows:

> (C) Renewal of permits.
>
> (1) The director shall notify the permittee that any permittee who wishes to continue to discharge after the expiration date of ~~his~~ the permittee's Ohio NPDES permit must file for reissuance of the permit at least one hundred eighty days prior to ~~its~~ the expiration of the permit. ~~Except as provided by paragraph (C)(2) of this rule,~~ Ohio NPDES permits shall be renewed in accordance with the provisions for issuance of permits under this chapter.
>
> ~~(2) A permit shall not be renewed unless the director determines that the permittee is making satisfactory progress toward the achievement of all applicable limitations and has complied with the terms and conditions of the existing permit.~~ In renewing a permit, the director shall consider the compliance history of the permit holder and may deny the renewal if the director determines that the permit holder has not complied with the terms and conditions of the existing permit. If a permit renewal application is submitted at least one hundred eighty days prior to the expiration date of the existing permit, and the director proposes to deny the renewal of the permit in accordance with rule 3745-49-05 of the Administrative Code, the expired permit shall continue to be in effect in accordance with section 119.06 of the Revised Code until such time as the director issues a final action.
>
> (3) For new sources or new dischargers as defined in 40 C.F.R. 122.2, see C.F.R. 122.29(d) for applicability of more stringent new source performance standards or technology-based standards under section 301 (b)(2) of the act.

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[2] JCARR consists of five members of the Ohio Senate and five members of the Ohio House. Its primary function is "to review proposed, new, amended, and rescinded rules from over 120 agencies to ensure they do not exceed their rule-making authority granted to them by the General Assembly." JCARR, http://www.jcarr.state.oh.us/home (last visited November 20, 2013).

> [Comment: Pursuant to 301 (b)(2) of the act, this provision is not applicable to publicly owned treatment works or water quality standards.]
>
> (4) Any more stringent limitation on the thermal component of a discharge shall not be imposed as a condition of a permit or renewal thereof for a discharge during a ten year period in accordance with division (J)(3) of section 6111.03 of the Revised Code.

Case File Item Y, Exhibit 2, Attachment D.

{¶11} On February 26, 2013, Appellants filed written comments with Ohio EPA regarding the version of Ohio Adm.Code 3745-33-04 submitted to JCARR. Case File Item A.

{¶12} Ohio EPA issued written responses to these comments, including Appellants' February 26, 2013 submission, in March 2013.

{¶13} On March 18, 2013, JCARR held a public hearing on Ohio EPA's proposed revision to Ohio Adm.Code 3745-33-04. Following the public hearing, JCARR recommended adoption of the proposed revision. Case File Item Y, Exhibit 2.

{¶14} On April 8, 2013, Ohio EPA finalized its revisions Ohio Adm.Code 3745-33-04. The revisions became effective on May 1, 2013. Case File Item Y, Exhibit 2.

{¶15} On May 8, 2013, Appellants filed a Notice of Appeal with the Commission challenging Ohio EPA's revisions to Ohio Adm.Code 3745-33-04. In their Notice of Appeal, Appellants raise a single assignment of error:

> The Director's action is unlawful and unreasonable because the Ohio Adm.Code 3745-33-04(C)(2) allows the Director to deny renewal of an existing National Pollutant Discharge Elimination System ("NPDES") permit. Once the Director's denial becomes final, the regulations unlawfully and unreasonably require a permittee to cease operations during the pendency of the administrative appeals process, which could have severe economic impacts on the permittee.

Case File Item A.

{¶16} On October 17, 2013, the Director filed a Motion for Summary Judgment ("Motion"), arguing that Ohio EPA's revision to Ohio Adm.Code 3745-33-04 is lawful and reasonable. The Director asserts that the promulgation of Ohio Adm.Code 3745-33-04 is lawful because it is consistent with R.C. 6111.03(J)(7), as amended by 2012 Sub.S.B. No. 294. Further, the Director contends that Ohio EPA's action is reasonable because the denial of a renewal application must be preceded a proposed denial, which affords the applicant the opportunity for an adjudicatory hearing under R.C. 119.06. Finally, the Director notes that even after Ohio EPA issues a final action denying a renewal NPDES permit application, the applicant may appeal the denial to ERAC and seek a stay of the Agency's action. Case File Item Y.

{¶17} Appellants filed their Response to the Motion on October 28, 2013. Appellants note that the Director's revision to Ohio Adm.Code 3745-33-04(C)(2) adds additional language beyond that contained in Sub.S.B. No. 294. Case File Item Z.

{¶18} Further, Appellants argue that the Director's action is unreasonable because the denial of a utility's NPDES renewal application, which could require a facility to cease operations, "could have catastrophic consequences on the power grid." Appellants contend that an adjudicatory hearing held pursuant to R.C. 119.06 would be an inadequate procedural safeguard to address the denial of a utility's NPDES renewal. Appellants posit that such hearings are intended to address only denials of an individual professional license, such as a cosmetology license or teaching license, and thus such hearings do not provide adequate procedural safeguard to address the denial of large-scale NPDES permits. Case File Item Z.

{¶19} Finally, Appellants also argue that it is unclear whether ERAC would grant a stay in any particular appeal. Thus, Appellants suggest that the possibility of

such remedy cannot justify the Director's April 8, 2013 revision to Ohio Adm.Code 3745-33-04(C)(2). Case File Item Z.

CONCLUSIONS OF LAW

I. Standard of Review

{¶20} 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.

{¶21} 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).

{¶22} This standard 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 Director's determination inherent in the reasonableness standard. *National Wildlife Federation v. Korleski*, 2013-Ohio-3923 (10th Dist. 2013), ¶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.*

{¶23} The Commission is also 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*, 2013-Ohio-3923 (10th Dist. 2013), ¶56. Thus, such agencies are entitled to considerable deference when reviewing their interpretation of their own governing rules and regulations. *Id.*

{¶24} This deference 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 the Director's interpretation of the statutes and regulations governing Ohio EPA must not be "at variance with the explicit language of the [statutes or] regulations." *Id.*

II. Summary Judgment Standard

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

{¶26} Civ.R. 56(C) states in pertinent part:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed

> in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * *

{¶27} Thus, under Civ.R. 56, "[t]he moving party has the burden of showing that there is no genuine issue as to any material fact as to critical issues." *Stockdale v. Baba*, 153 Ohio App.3d 712, 2003-Ohio-4366, 795 N.E.2d 727, at ¶23. However, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response * * * must set forth specific facts showing that there is a genuine issue for trial." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65 (1978). All doubts and evidence should be construed against the moving party, and "[s]ummary judgment may not be rendered unless it appears that reasonable minds can come to but one conclusion and that conclusion is adverse to the part[y] against whom [the] motion is made." *Stockdale*, 2003-Ohio-4366, at ¶32.

{¶28} "If the moving party has satisfied its initial burden under Civ.R. 56(C), then the nonmoving party has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial. If the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *State v. Pryor*, Franklin App. No. 07AP-90, 2007 Ohio 4275 (Aug. 21, 2007), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

III. Analysis

{¶29} In their lone assignment of error, Appellants assert that the Agency's final action revising Ohio Adm.Code 3745-33-04 is both unlawful and unreasonable. The Commission will address each argument separately.

A. Lawfulness

{¶30} Appellants contend in their Notice of Appeal that the Director's action amending Ohio Adm.Code 3745-33-04 is unlawful because it is inconsistent with the

intent of Sub.S.B. No. 294 and because it does not ensure adequate procedural safeguards prior to the denial of a renewal application.

{¶31} In his Motion, the Director argues that his revision to Ohio Adm.Code 3745-33-04(C)(2) is lawful because it is consistent with R.C. 6111.03(J)(7).

{¶32} In response, Appellants reiterate their concern that the denial process lacks adequate procedural safeguards, and further note that the Director's revision to Ohio Adm.Code 3745-33-04(C)(2) is not a verbatim recitation of the language in Sub.S.B. No. 294.

{¶33} The Commission finds that although the Director's revision to Ohio Adm.Code 3745-33-04(C)(2) includes additional language beyond an exact recitation of Sub.S.B. No. 294, the revision is consistent with its underlying statutory authority and is, therefore, lawful.

{¶34} As amended, R.C. 6111.03(J)(7) provides as follows:

> (7) A permit may be issued for a period not to exceed five years and may be renewed upon application for renewal. *In renewing a permit, the director shall consider the compliance history of the permit holder and may deny the renewal if the director determines that the permit holder has not complied with the terms and conditions of the existing permit.* A permit may be modified, suspended, or revoked for cause, including, but not limited to, violation of any condition of the permit, obtaining a permit by misrepresentation or failure to disclose fully all relevant facts of the permitted discharge or of the sludge use, storage, treatment, or disposal practice, or changes in any condition that requires either a temporary or permanent reduction or elimination of the permitted activity. No application shall be denied or permit revoked or modified without a written order stating the findings upon which the denial, revocation, or modification is based. A copy of the order shall be sent to the applicant or permit holder by certified mail.

(Emphasis added).

{¶35} By comparison, the revised version Ohio Adm.Code 3745-33-04(C)(2) at issue reads as follows:

> (2) *In renewing a permit, the director shall consider the compliance history of the permit holder and may deny the renewal if the director determines that the permit holder has not complied with the terms and conditions of the existing permit.* If a permit renewal application is submitted at least one hundred eighty days prior to the expiration date of the existing permit, and the director proposes to deny the renewal of the permit in accordance with rule 3745-49-05 of the Administrative Code, the expired permit shall continue to be in effect in accordance with section 119.06 of the Revised Code until such time as the director issues a final action.

(Emphasis added).

{¶36} Upon analysis, the Commission notes that the first sentence of Ohio Adm.Code 3745-33-04(C)(2) mirrors verbatim the language contained in Sub.S.B. No. 294 regarding the Director's duty to consider the compliance history of the permit holder and authority to deny the renewal if the Director determines that the permit holder has not complied with the terms and conditions of the existing permit.

{¶37} Further, the second sentence of Ohio Adm.Code 3745-33-04(C)(2) clarifies that if the Director proposes to deny a renewal application, the existing permit remains in effect until the denial becomes final, even after the expiration of the previous permit. Although this language is not directly drawn from the text of Sub.S.B. No. 294, nothing in the text of the statute, or indeed elsewhere in R.C. Chapter 6111, prohibits the Director from allowing a permittee to operate under an expired NPDES permit during the pendency of a renewal application.

{¶38} The Commission notes that this approach appears to be consistent with existing practice regarding NPDES renewal applications. Ohio Adm.Code 3745-33-03 [Permit applications.] provides in pertinent part as follows:

> (B) * * * If a permit renewal application is submitted at least one hundred eighty days prior to the expiration date of the existing permit, and the director does not issue a new permit before the expiration date, the conditions of the expired permit shall continue in force until the director acts on the permit application.

Ohio Adm.Code 3745-33-03(B).

{¶39} Accordingly, the Commission finds that the Director's revision of Ohio Adm.Code 3745-33-04(C)(2) is consistent with its statutory authorization under R.C. 6111.03. Having found that the Agency's revision to Ohio Adm.Code 3745-33-04(C)(2) is consistent with its statutory authorization, the Commission finds that the Director's April 8, 2013 action promulgating Ohio Adm.Code 3745-33-04 is lawful.

{¶40} To the extent Appellants' Notice of Appeal can be construed as a challenge to the lawfulness of the underlying policy contained in Ohio Adm.Code 3745-33-04(C)(2), the Commission notes that such a challenge is, by extension, also a challenge to the lawfulness of the policy underlying R.C. 6111.03(J)(7). The Commission has consistently held that ERAC lacks jurisdiction to hear collateral challenges to the lawfulness and/or constitutionality of state statutes. See e.g., *Sierra Club v. Koncelik*, ERAC. Nos. 256002-256006 (Feb. 29, 2012); *Environmental Services, Inc. ("ESI") v. Schregardus*, ERAC No. 843354 (Feb. 5, 1997).

{¶41} Accordingly, the Commission finds the Director's Motion well-taken with respect to the lawfulness of the Director's April 8, 2013 promulgation of Ohio Adm.Code 3745-33-04(C)(2).

B. Reasonableness

{¶42} Appellants also allege that the Director's action promulgating Ohio Adm.Code 3745-33-04 is unreasonable. Specifically, Appellants suggest the Director's action is unreasonable because it allows Ohio EPA to require a utility to cease operations within 15 days following the denial of a renewal NPDES permit.

{¶43} The Commission construes this argument as both a facial challenge to Ohio Adm.Code 3745-33-04(C)(2) (i.e., a challenge to the regulation as applied to *all*

types of facilities) and an as-applied challenge (i.e., specifically as applied to Appellants and other utilities).

i. Facial Challenge to the Reasonableness of Ohio Adm.Code 3745-33-04(C)(2)

{¶44} Appellants allege that it is unreasonable to require an applicant to cease operation within 15 days of the denial of a renewal NPDES permit application. Specifically, Appellants contend that the regulation does not provide Ohio EPA with sufficient flexibility when deciding whether to deny a permit renewal on the basis of past non-compliance.

{¶45} In his Motion, the Director argues that the revision of Ohio Adm.Code 3745-33-04(C)(2) is reasonable because it is consistent with R.C. 6111.03(J)(7), as amended by Sub.S.B. No. 294. Further, the Director notes that a denial must be preceded by a proposed denial, thereby affording the applicant the opportunity for an adjudicatory hearing under R.C. 119.06. Finally, the Director notes that even after the Agency's action becomes final, an applicant may file an appeal with ERAC and seek a stay of the denial.

{¶46} In response, Appellants contend that adjudicatory hearings held pursuant to R.C. 119.06 lack sufficient procedural safeguard with respect to the denial of an NPDES renewal application. Likewise, Appellants argue that the theoretical remedy of a stay fails to provide sufficient protection for an applicant during the pendency of an appeal as to justify the Director's promulgation of Ohio Adm.Code 3745-33-04.

{¶47} As an initial matter, the Commission finds that in this instance, Appellants' assignment of error essentially challenges the policy underlying the General Assembly's enactment of Sub.S.B. No. 294. As noted above, the first sentence of Ohio Adm.Code 3745-33-04(C)(2) mirrors verbatim the statutory language and the second

sentence of the regulation merely clarifies that an applicant may continue to operate under an existing permit until the Director either approves or denies a renewal application. Thus, Appellants' facial challenge to the reasonableness of the regulation is, in effect, a collateral challenge to the reasonableness of the underlying statute.

{¶48} The Commission has previously held that the reasonableness of a legislative directive is not a question properly before ERAC. *ESI*, ERAC No. 843354, at ¶¶17-19. In *ESI*, appellants challenged Ohio EPA's promulgation of certain rules governing siting requirements for infectious waste incineration facilities, arguing, among other things, that the regulations should not have been applicable to pending permit applications. The Commission held that the application of the revised requirements to pending permit applications was lawful and reasonable, stating as follows:

> Assuming for a moment that Appellant's allegation in this regard is true * * *; i.e., that the rules are overbroad in their explicit application to pending permit applications, we must acknowledge ***that is precisely what the operative statute requires.***

Id. at ¶19 (emphasis in original).

{¶49} In other words, the Commission concluded that even assuming the practice of applying the new requirements to pending applications could be considered bad policy, the regulation was necessarily reasonable because it simply executes the directive contained in the operative statute.

{¶50} Similarly, here, the Commission finds that the Director's revision to Ohio Adm.Code 3745-33-04(C)(2) is reasonable on its face because the regulation simply reflects the statutory directive contained in Sub.S.B. No. 294. The reasonableness of a legislative enactment is not a question properly before the Commission.

{¶51} Accordingly, the Commission finds the Director's Motion for Summary Judgment well-taken to the extent that Appellants raise a facial challenge to the Agency's promulgation of Ohio Adm.Code 3745-33-04(C)(2).

ii. As-Applied Challenge to the Reasonableness of Ohio Adm.Code 3745-33-04(C)(2)

{¶52} In their Response to the Director's Motion, Appellants also assert that utility facilities operate in a unique relationship with the power grid. Thus, Appellants argue that Ohio Adm.Code 3745-33-04(C)(2) is unreasonable as applied specifically to NPDES renewal applications for such facilities. Appellants contend that if the Director denies an NPDES renewal application for a utility facility, the facility would be required to cease operations, which "could have catastrophic consequences on the power grid." The Commission finds that such an as-applied challenge is not ripe for review.

{¶53} Ripeness has been described as "peculiarly a question of timing." *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 694 N.E.2d 459 (1998). Its origin is rooted in Article III of the United States Constitution and is motivated in part by the need "to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* In determining whether a claim is ripe for review, a tribunal must evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967).

{¶54} Here, Appellants' as-applied challenge implicates specific, undetermined, and unestablished facts related to a hypothetical review and denial of a future NPDES permit for a particular type of facility. The Commission finds that such facility-specific facts, which surround an event that has not yet occurred, are of the type most appropriately examined on a case-by-case basis during the permitting process and

subsequent appeal to this Commission, rather than as a component of the present challenge to the underlying regulation.

{¶55} Ohio Adm.Code 3745-33-04(C)(2) applies to *all* NPDES renewal applications. Thus, as presented here, Appellants' as-applied challenge to the reasonableness of the regulation raises the issue of how the regulation may be applied to a particular *subset* of facilities at some undetermined time in the future. Such an argument necessarily implies facts and circumstances specific to those particular facilities, which are most appropriately raised in relation to an individual permit application, rather than in a challenge to the regulation as a whole.

{¶56} In *ESI*, the appellant, in its challenge of the underlying regulation, presented evidence that Ohio EPA would likely deny a pending application filed by the appellant on the basis of the relevant regulation. Significantly, however, Ohio EPA had not finalized its decision with respect to the appellant's permit application and the Commission stated the following:

> The lawfulness and reasonableness of the proposed denial is not before us in the instant action. In fact, the Commission is clearly without jurisdiction to decide the legality or reasonableness of proposed actions, our jurisdiction being limited to the review of final acts or actions of the Director. * * *
>
> Furthermore, the question of how the statute and implementing regulations <u>may apply</u> to ESI's pending PTI application is not before us. The propriety of that decision is clearly beyond the scope of our jurisdiction at this juncture.

ESI, ERAC No. 843354, at ¶¶ 7-8.

{¶57} Similarly, here, Appellants essentially ask the Commission to examine the reasonableness of the manner in which Ohio EPA may apply Ohio Adm.Code 3745-33-04(C)(2) to utilities at some point in the future. As in *ESI*, the issue of how Ohio EPA

may apply the regulations to a particular factual scenario is not properly before the Commission at this time.

{¶58} Accordingly, the Commission finds that Appellants' challenge to the Director's promulgation of Ohio Adm.Code 3745-33-04, as applied specifically to utilities, is not ripe for review.

FINAL ORDER

{¶59} For the foregoing reason, the Commission finds the Director's Motion well-taken and hereby GRANTS summary judgment to the Director.

{¶60} 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 27 day of November 2013.

Copies Sent to:

BUCKEYE POWER, INC.	[CERTIFIED MAIL]
DAYTON POWER AND LIGHT CO.	[CERTIFIED MAIL]
DUKE ENERGY OHIO	[CERTIFIED MAIL]
FIRSTENERGY	[CERTIFIED MAIL]
OHIO POWER COMPANY	[CERTIFIED MAIL]
OHIO VALLEY CORP.	[CERTIFIED MAIL]
SCOTT NALLY, DIRECTOR OF ENVIRONMENTAL PROTECTION	[CERTIFIED MAIL]

Louis E. Tosi
Michael E. Born
Cheri A. Budzynski
Alana R. Shockey
Molly J. Patterson

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the RULING ON DIRECTOR'S MOTION FOR SUMMARY JUDGMENT in **Buckeye Power, Inc., et al. v. Scott Nally, Director of Environmental Protection**, Case Nos. 13-256734, 13-296735, 13-316736, 13-776737, 13-256738, 13-666739, entered into the Journal of the Commission this 27th day of November 2013.

Julie A. Slane, Executive Secretary

Dated this 27th day of
November 2013