

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO

BARBARA A. LUND, : Case No. ERAC 13-016720  
: :  
Appellant, : :  
: :  
v. : :  
: :  
PORTSMOUTH LOCAL AIR AGENCY, : :  
: :  
and : :  
: :  
OHIO DEPARTMENT OF NATURAL : :  
RESOURCES, : :  
: :  
Appellees. : :

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DECISION

Rendered on December 19, 2013

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Barbara A. Lund, pro se Appellant

*Michael DeWine*, Attorney General, *Elizabeth R. Ewing*, and *Wednesday M. Szollosi* for Appellee Portsmouth Local Air Agency

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

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{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant Barbara A. Lund on February 15, 2013. Ms. Lund challenges Permission to Open Burn number 1301118cds4 (“Burn Permission”), issued by Appellee Portsmouth Local Air Agency (“PLAA”) to Appellee Ohio Department of Natural Resources (“ONDR”) (collectively “Appellees”) on January 18, 2013. Case File Item A.

{¶2} On March 27, 2013, Appellees filed a Motion To Dismiss For Lack of Standing Or, In The Alternative, Motion For Summary Judgment. Ms. Lund filed a Memorandum in Opposition on April 9, 2013. Appellees filed a Reply on April 19, 2013. The Commission issued a Ruling denying Appellees' Motion to Dismiss for Lack of Standing ("Motion to Dismiss") and granting in part Appellees' Motion for Summary Judgment ("Motion for Summary Judgment") on May 8, 2013. Specifically, the Commission granted Appellees' Motion for Summary Judgment with respect to Ms. Lund's Assignments of Error 1, 2, 3, 6, 7, 11, and 12. As indicated in the Commission's May 8 Ruling, a detailed discussion of those assignments of error is included below. Case File Items T, V, X, BB.

{¶3} The Commission held a de novo hearing on Ms. Lund's remaining assignments of error on June 11, 2013.

{¶4} Based upon the pleadings, the evidence adduced at the hearing, and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order finding PLAA's final action issuing Burn Permission 130118cds4 unlawful and unreasonable to the extent it was issued pursuant to Ohio Administrative Code ("Ohio Adm.Code") 3745-19-04(C)(5). The Commission affirms PLAA's issuance of Burn Permission 130118cds4 in all other respects.

## FINDINGS OF FACT

### **I. Regulatory Framework**

{¶5} Open burning, as defined by Ohio Adm.Code 3745-19-01(I),<sup>1</sup> is generally prohibited in Ohio except under certain limited circumstances. Ohio Adm.Code 3745-19-03(A); Ohio Adm.Code 3745-19-04(A).

{¶6} The various exceptions to Ohio’s general prohibition on open burning fall within two broad categories: (1) where no prior notification to the Ohio Environmental Protection Agency (“Ohio EPA”) is required and (2) where the individual seeking to conduct the burn must notify Ohio EPA and obtain permission prior to conducting the burn. See generally, Ohio Adm.Code 3745-19-03; Ohio Adm.Code 3745-19-04.

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

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

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<sup>1</sup> “Open burning” means “the burning of any materials wherein air contaminants resulting from combustion are emitted directly into the ambient air without passing through a stack or chimney. \* \* \*” Ohio Adm.Code 3745-19-01(I).

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

- The purpose of the proposed burning;
- The quantity or acreage and the nature of the materials to be burned;<sup>2</sup>
- The date or dates when such burning will take place;
- The location of the burning site, including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks; and
- The methods or actions which will be taken to reduce the emissions of air contaminants.

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

{¶10} Upon receiving an application for open burning, the Director of Ohio EPA (“Director”) must review the request and either grant or deny the permission to burn. When reviewing an application to open burn, the Director must consider the following:

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

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<sup>2</sup> In various pre-hearing filings, the parties referenced a prior version of Ohio Adm.Code 3745-19-05(A)(2) that was not effective at the time PLAA issued the Burn Permission. The prior version of the regulation required open burning applications to include “[t]he nature of quantities of material to be burned.” At hearing, counsel for The Nature Conservancy (see ERAC No. 13-016726) noted that the most recent version of the regulation, rather than the prior version, was effective at the time of issuance. In Appellant’s post-hearing brief, Ms. Lund acknowledged the recent amendment to Ohio Adm.Code 3745-19-05(A)(2) and withdrew a portion of her Assignment of Error 4. Appellees’ joint post-hearing brief, however, continued to rely upon the prior version of the regulation.

The Commission finds the most recent version of Ohio Adm.Code 3745-19-05(A)(2), effective May 27, 2012, applicable to the open burning permission at issue here. The Commission notes, however, that PLAA—one of the agencies tasked with enforcing Ohio’s open burning regulations—appeared to rely on a regulation that was not effective at the time of its final action.

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

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

## **II. Procedural Background**

{¶12} On December 20, 2012, ONDR submitted to PLAA<sup>3</sup> the open burning request at issue in this appeal. In its application, ODNR sought permission to conduct open burning on up to 30 acres of Chaparral Prairie State Nature Preserve in Adams County, Ohio. The application stated that the purpose of the burn was for “recognized horticultural, silvicultural, range management or wildlife management practices.” Testimony Johnson, Charles; Lund Exhibit E.

{¶13} After reviewing the Open Burning Request Form submitted by ODNR, PLAA issued Burn Permission 130118cds4 (“Burn Permission”) on January 18, 2013. The Burn Permission, issued pursuant to Ohio Adm. Code 3745-19-04(C)(5) and 3745-19-05, contained six special conditions that appeared as follows:

1. Permission to open burn shall be effective from January 21, 2013 to May 4, 2013, between the hours of 10:00a.m. until 4:00 p.m;
2. Open burning shall be conducted in a time, place, and manner as to minimize the emission of air contaminates;
3. Fire cannot create visibility hazard on roadways, railroad tracks or air fields;

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<sup>3</sup> PLAA has authority to grant permission to conduct an open burn on behalf of Ohio EPA pursuant to contractual agreements entered into under R.C. 3704.111 and 3704.112.

4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;
5. Any potential spot fires shall be addressed in accordance with ODNR approved prescribed burn contingency plan(s);
6. The Nature Conservancy shall notify our office the day prior to ignition of the prescribed burn.

Testimony Johnson, Charles; Lund Exhibit C.

{¶14} ODNR conducted the prescribed burn, as authorized by the Burn Permission, on April 16, 2013. Testimony Lund.<sup>4</sup>

{¶15} Ms. Lund timely appealed PLAA's issuance of the Burn Permission and raised twelve assignments of error challenging whether issuance of the Burn Permission was lawful and reasonable. Ms. Lund's assignments of error can be broadly described as falling within four categories: (1) the Burn Permission did not expressly prohibit certain activities that are harmful to public safety and the environment; (2) ODNR's application did not contain sufficient detail; (3) the purpose of the burn is not in the public interest and is not consistent with the intent of Ohio's open burning regulations; and (4) the Burn Permission violated the due process clause of the federal and Ohio constitutions. Case File Item A.

{¶16} On March 27, 2013, Appellees filed a Motion To Dismiss For Lack Of Standing Or, In The Alternative, Motion For Summary Judgment. In their Motion to Dismiss, Appellees argued that Ms. Lund lacks standing in this appeal because her

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<sup>4</sup> The Commission acknowledges ODNR conducted its prescribed burn on April 16, 2013 and the Burn Permission expired on May 4, 2013. Nonetheless, consistent with its prior rulings involving permissions to conduct open burning, the Commission accepts jurisdiction in this appeal pursuant to the "capable of repetition, yet evading review" exception to mootness. See Ruling on Motion to Dismiss, *Montgomery v. Nally*, ERAC No. 12-316590 (Aug. 16, 2012).

alleged injuries did not fall within the realm of interests protected by Ohio's open burning regulations. Case File Item T.

{¶17} Additionally, Appellees argued in their Motion for Summary Judgment that they were entitled to summary judgment on the merits of each of Ms. Lund's twelve assignments of error. In essence, Appellees argued that Ms. Lund's Assignments of Error 1, 2, 3, 8, 9, and 10 were impermissible collateral attacks on Ohio's open burning regulations, and therefore Appellees were entitled to judgment as a matter of law. Further, Appellees argued they were entitled to summary judgment as to Ms. Lund's Assignments of Error 4, 5, 6, and 7 because Ms. Lund had not supported those assignments of error with reliable, probative, and substantial evidence that ODNR would violate the terms of the permission. And finally, Appellees argued they were entitled to summary judgment on Assignments of Error 11 and 12 because Ms. Lund's public policy concerns were outside the scope of PLAA's evaluation of open burning requests under Ohio Adm.Code Chapter 3745-19 and because ERAC lacks jurisdiction to consider constitutional claims. Case File Item T.

{¶18} On May 8, 2013, the Commission denied Appellees' Motion to Dismiss and granted in part and denied in part Appellees' Motion for Summary Judgment. Specifically, the Commission granted summary judgment on Assignments of Error 1, 2, 3, 6, 7, 11, and 12. As indicated in the Commission's May 8 Ruling, a detailed discussion of those assignments of error is included below. Case File Item BB.

{¶19} The Commission held a de novo hearing on Ms. Lund's remaining assignments of error on June 11, 2013.

### III. Assignments of Error

{¶20} The Commission will now discuss the seven assignments of error dismissed on summary judgment, as well as the five assignments of error presented at hearing.

#### A. Assignments of Error Dismissed on Summary Judgment

*i. Assignments of Error 1 and 2*

{¶21} In Assignments of Error 1 and 2, Ms. Lund argued that PLAA's issuance of the Burn Permission was unreasonable and unlawful because it allows for open burning within 1,000 feet of inhabited structures.

{¶22} Ohio Adm.Code 3745-19-04(B)(3)(c) provides in pertinent part as follows:

(B) Open burning shall be allowed for the following purposes without notification to or permission from the Ohio EPA \* \* \* :

\* \* \*

(3) *Disposal of residential waste or agricultural waste* generated on the premises if the following conditions are observed:

\* \* \*

(c) The fire is located at a point on the premises no less than one thousand feet from any inhabited building not located on said premises;

(Emphasis added).

{¶23} Although Ms. Lund acknowledged that the above provision is not directly applicable to open burning conducted for silvicultural purposes, she argued that the rationale underlying Ohio Adm.Code 3745-19-04(B)(3)(c) should nonetheless apply in such scenarios. Case File Item A.

{¶24} In essence, Ms. Lund’s Notice of Appeal posits that, as evidenced by Ohio Adm.Code 3745-19-04(B)(3)(c), it is per se unreasonable to allow open burning within 1,000 feet of an occupied structure. Significantly, Ms. Lund’s Notice of Appeal did not allege that the site specific characteristics of the area surrounding Chaparral Prairie State Nature Preserve present a unique safety risk for prescribed burns occurring within 1,000 feet of the nearest occupied structures. Instead, Ms. Lund’s Notice of Appeal simply stated that Ohio EPA should impose a *general* prohibition on open burning within 1,000 of an occupied structure, regardless of the purpose of the burn or the specific characteristics of the location. Case File Item A.

{¶25} In their Motion for Summary Judgment, Appellees argued that no specific regulation requires a 1,000 foot buffer zone for open burning conducted pursuant to recognized horticultural, silvicultural, range, or wildlife management practices. Appellees thus contended that there is no genuine issue of material fact as to whether the prescribed burn poses a threat to nearby occupied structures and that they are entitled to judgment as a matter of law. Case File Item T.

{¶26} In response, Ms. Lund reiterated her argument that the rationale underlying the 1,000 foot requirement for residential or agricultural waste should also apply to open burns conducted pursuant to recognized silvicultural practices. Case File Item V.

*ii. Assignment of Error 3*

{¶27} In Assignment of Error 3, Ms. Lund alleged that PLAA’s issuance of the Burn Permission was unlawful and unreasonable because it does not expressly prohibit the burning of dead animals. Ms. Lund noted that Ohio Adm.Code 3745-19-01(A) expressly excludes dead animals from the definition of “agricultural waste.” Thus, the

burning of dead animals (for example, deceased cattle) does not fall within the scope of Ohio Adm.Code 3745-19-03(C)(3), which provides for residential and agricultural waste exceptions to Ohio's general prohibition of open burning. Case File Item A.

{¶28} In her Notice of Appeal, Ms. Lund asserted that this limitation on the scope of the residential and agricultural waste exceptions functions to affirmatively prohibit the burning of dead animals under all circumstances. Further, Ms. Lund argued that some incidental burning of dead animals is likely to occur as a result of the burn described in the Burn Permission. Ms. Lund thus contended that PLAA's issuance of the Burn Permission was unlawful and unreasonable because it implicitly authorizes the burning of dead animals. Case File Item A.

{¶29} In their Motion for Summary Judgment, Appellees noted that Ohio Adm.Code 3745-19-01(A) defines the scope of the agricultural and residential waste exceptions; it does not apply to the horticultural, silvicultural, range, or wildlife management practices exception contained in Ohio Adm.Code 3745-19-04(C)(5). Appellees thus contended that even if some incidental burning of dead animals is likely to occur as a result of the prescribed burn, PLAA was not required to specifically prohibit such action. As a result, Appellees posit that they are entitled to summary judgment with regard to Assignment of Error 3. Case File Item T.

{¶30} In response, Ms. Lund argued that even if the definition of agricultural waste contained in Ohio Adm.Code 3745-19-01(A) does not prohibit the burning of dead animals during burns conducted pursuant to Ohio Adm.Code 3745-19-04(C)(5), Ohio EPA nonetheless intended to do so in promulgating Ohio Adm.Code Chapter 3745-19. As evidence, Ms. Lund cited an Ohio EPA guidance document, which states, dead animals "may not be burned anywhere in the state at any time \* \* \* unless approved for

control of disease by a governing agency.” OHIO EPA, BEFORE YOU LIGHT IT...KNOW OHIO’S OPEN BURNING REGULATIONS 2 (2013), available at <http://epa.ohio.gov/portals/47/facts/openburn.pdf>. Case File Item V.

*iii. Assignment of Error 6*

{¶31} In Assignment of Error 6, Ms. Lund alleged that PLAA’s issuance of the Burn Permission was unreasonable and unlawful because ODNR would not be able to ensure that the prescribed burn would not “create [a] visibility hazard on roadways, railroad tracks or air fields” as required by Special Condition 3 of the Burn Permission. Case File Item A.

{¶32} Ms. Lund’s Notice of Appeal acknowledged that ODNR’s application listed some procedures aimed at minimizing smoke, but argued that unpredictable wind could create visibility hazards. Ms. Lund’s Notice of Appeal reads, “[a] fire might be started with wind from one direction, but it could change or vary or swirl. Heat energy from a fire can create its own wind direction and strength and can influence air currents.” Case File Item A.

{¶33} In their Motion for Summary Judgment, Appellees argued that a claim based on the inability of a permittee to comply with the terms of its permit must be supported with reliable, probative, and substantial evidence. Thus, Appellees contended that Ms. Lund was required to support her claim that ODNR would not be able to comply with Special Condition 3 with reliable, probative, and substantial evidence. Appellees argued that Ms. Lund failed to do so, and, therefore, they are entitled to summary judgment with regard to Assignment of Error 6. Case File Item T.

{¶34} In response, Ms. Lund argued that the burn would necessarily create at least some smoke and noted that even a small amount of smoke can pose a visibility hazard on roads. Case File Item V.

*iv. Assignment of Error 7*

{¶35} In Assignment of Error 7, Ms. Lund argued that PLAA's issuance of the Burn Permission was unlawful and unreasonable because the burn at issue would not be conducted in "a time, place, and manner as to minimize the emission of air contaminants," as required by Special Condition 2 of the Burn Permission. Case File Item A.

{¶36} Ms. Lund's Notice of Appeal stated that the only way to reduce the emission of air contaminants is to burn less material. Ms. Lund acknowledged that ODNR's application lists several steps that ODNR would take to reduce smoke emissions; specifically, ODNR would limit burning to days with low humidity and winds of at least 9 mph, as well as use a firing method designed to create sufficient heat so as to more completely burn materials. Ms. Lund argued, however, that these steps would function only to limit smoke at the burn site, rather than "minimize" total air emissions. Ms. Lund thus concluded that ODNR would not be able to comply with Special Condition 2, and therefore PLAA's issuance of the Burn Permission was unreasonable and unlawful. Case File Item A.

{¶37} In their Motion for Summary Judgment, Appellees argued that a claim based on the inability of a permittee to comply with the terms of its permit must be supported with reliable, probative, and substantial evidence. Thus, Appellees contended that Ms. Lund was required to support her claim that ODNR would not be able to "minimize" the emission of air contaminants with reliable, probative, and substantial

evidence. Appellees argued that Ms. Lund failed to do so, and, therefore, they are entitled to summary judgment on Assignment of Error 7. Case File Item T.

{¶38} In response, Ms. Lund reiterated her argument that the steps listed in ODNR's application would function only to limit smoke, rather than total air emissions, and argued that dispersion affects only the ultimate location of contaminants, rather than its quantity. Case File Item V.

v. *Assignment of Error 11*

{¶39} In Assignment of Error 11, Ms. Lund alleged that PLAA's issuance of the Burn Permission was unlawful and unreasonable because the prescribed burn at issue here is not "necessary to the public interest." Ms. Lund raised a variety of concerns in her Notice of Appeal, generally arguing that ODNR's efforts to maintain a prairie ecosystem are "unnatural." Case File Item A.

{¶40} In their Motion for Summary Judgment, Appellees argued that such concerns are outside of the scope of what PLAA is required to evaluate when issuing open burning permits. Further, Appellees argued that the prescribed burn was necessary to maintain and promote the native ecosystems at the site. Accordingly, Appellees argued there is no genuine issue of material fact as to whether PLAA acted lawfully and reasonably in determining that the prescribed burn was necessary to the public interest. Appellees thus contended that they are entitled to judgment as a matter of law with regard to Assignment of Error 11. Case File Item T.

{¶41} In response, Ms. Lund argued that it is the applicant's burden to provide specific facts to establish that the proposed burn is necessary to the public interest. Ms. Lund argued that ODNR's application contained no specific facts to establish that the

proposed burn is necessary to the public interest and concluded that PLAA's issuance of the Burn Permission was thus unreasonable and unlawful. Case File Item V.

*vi. Assignment of Error 12*

{¶42} Finally, in Assignment of Error 12, Ms. Lund argued that PLAA's issuance of the Burn Permission was unlawful and unreasonable because the permitting process did not provide an opportunity for public comment prior to the issuance of the permission. In essence, Ms. Lund argued that PLAA's action issuing the Burn Permission violated the due process clause of the federal and/or Ohio constitutions. Case File Item A.

{¶43} In their Motion for Summary Judgment, Appellees argued that the Commission lacks jurisdiction to consider constitutional claims. Therefore, Appellees suggested that they are entitled to judgment as a matter of law with regard to Assignment of Error 12. Case File Item T.

{¶44} Ms. Lund responded that although Ohio EPA and PLAA may not be required to hold public hearings prior to the issuance of open burning permissions, such practice would be advisable because, in contrast to an appeal to ERAC, such hearings are non-adversarial. Case File Item V.

**B. Assignments of Error Presented at Hearing**

{¶45} In its May 8 Ruling, the Commission denied Appellees' Motion for Summary Judgment with respect to Assignments of Error 4, 5, 8, 9, and 10. At hearing, Ms. Lund presented testimony regarding each of those remaining assignments of error.

*i. Assignment of Error 4*

{¶46} In Assignment of Error 4, Ms. Lund argued that ODNR's open burning permission request did not adequately describe the material to be burned. Case File Item A.

{¶47} ONDR's open burning permission request describes the material to be burned as follows:

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

Lund Exhibit E.

{¶48} Ms. Lund argued that this description did not provide sufficient detail to allow PLAA to evaluate the application. Specifically, Ms. Lund argued that ODNR's description failed to disclose that the prescribed burn is likely to consume "ferns, mosses, lichens, fungus, algae, bacteria, vertebrate animals, including mammals, reptiles, amphibians, birds, and numerous categories of invertebrate animals, including insects, spiders, snails, and worms." Additionally, Ms. Lund argued that fire would consume "carbonaceous humus soil." Because ODNR did not list all material that would likely be consumed by its proposed prescribed burn, Ms. Lund argued that PLAA could not have accurately evaluated the burn's impact on air emissions, as required by Ohio Adm.Code 3745-19-05(A)(3). Testimony Lund.

{¶49} In response, Ms. Cindy Charles, Director of PLAA, testified that the purpose of the description requirement is to ensure that the type of material to be burned is not prohibited by law. Ms. Charles opined that the regulation does not set out

a specific level of detail. Further, Ms. Charles testified that based on her eighteen years of experience reviewing permit applications at PLAA, she believed ODNR's application accurately and adequately described the material to be burned. Testimony Charles.

{¶50} Mr. Jeff Johnson, Southeast Ohio District Preserve Manager for ODNR, Division of Natural Areas & Preserves, testified that the application listed the material that constituted the target of the proposed burn; it did not list material that would be considered incidental to the purpose of the burn. Mr. Johnson estimated that such incidental material (e.g., trash) would constitute less than 2% of the material burned by mass. Testimony Johnson.

*ii. Assignment of Error 5*

{¶51} In Assignment of Error 5, Ms. Lund argued that ODNR's proposed burn does not fall within the scope of Ohio Adm.Code 3745-19-04(C)(5). Case File Item A.

{¶52} Ohio Adm.Code 3745-19-04(C)(5) creates exceptions to Ohio's general prohibition of open burning that allow for open burning pursuant to "[r]ecognized horticultural, silvicultural (forestry), range, or wildlife management practices." ODNR's application for permission to conduct open burning listed the purpose of the proposed burn as falling within Ohio Adm.Code 3745-19-04(C)(5). Specifically, the application states, "[t]his is a land management action needed to maintain and promote the native prairie and cedar barrens ecosystem at the site." Lund Exhibit E.

{¶53} Ms. Lund argued that PLAA's issuance of the Burn Permission was unlawful and unreasonable because Chaparral Prairie State Nature Preserve is a prairie preserve, which is outside the scope of Ohio Adm.Code 3745-19-04(C)(5). Testimony Lund.

{¶54} First, Ms. Lund argued that “horticulture” means the cultivation of fruits, vegetables, or ornamental plants. Chaparral Prairie State Nature Preserve is not used for the cultivation of food or ornamental plants. Thus, Ms. Lund argued that the burn does not fall within the scope of the “horticultural” exception to Ohio’s general prohibition of open burning. Testimony Lund.

{¶55} Second, Ms. Lund argued that although some trees do exist at Chaparral Prairie State Nature Preserve, the land cannot be described as a forest. Ms. Lund noted that ODNR’s burn plans describe some portions of the area as wooded, but asserted that PLAA did not possess a copy ODNR’s burn plans available during its review of the application. Thus, Ms. Lund contended that PLAA necessarily based its decision to issue the Burn Permission on ODNR’s application materials only. ODNR’s application describes the area to be burned as “open prairie and small portions of oak woodland *consisting mainly of dried standing prairie grasses* and various forbs as well as dried leaves.” (Emphasis added). Ms. Lund argued that based on this description, PLAA did not possess a valid factual foundation for concluding that the burn fell within the “silvicultural” exception to Ohio’s general prohibition of open burning. Testimony Lund.

{¶56} Finally, Ms. Lund also contended that “range” and “wildlife” management is intended to encompass only livestock and hunting practices. Ms. Lund argued that although some game species do exist at Chaparral Prairie State Nature Preserve, hunting is not allowed on the premises. Further, no livestock is raised at that location. Thus, Ms. Lund concluded that the proposed burn does not fall within the scope of the “range management or wildlife management” exception to Ohio’s general prohibition of open burning. Testimony Lund.

{¶57} In response, Ms. Charles stated her belief that ODNR’s proposed prescribed burn was within the scope of the “horticultural, silvicultural, range management or wildlife management practices” exception. Testimony Charles.

{¶58} Further, Mr. Johnson opined that the proposed burn fell within both the “wildlife management” exception, because it would affect wildlife in the area, and the “silvicultural” exception, because the burn is designed to promote the growth of oak trees in the area. Mr. Johnson explained that oak trees are resistant to damage by fire. Thus, the proposed prescribed burn would promote the growth of oak trees over other species less resistant to fire damage. Testimony Johnson.

*iii. Assignments of Error 8 and 9*

{¶59} In Assignments of Error 8 and 9, Ms. Lund argued that ODNR’s application did not provide sufficient information regarding the location of its proposed burn.

{¶60} Ohio Adm.Code 3745-19-05(A)(2)(d) requires applications for permission to conduct open burning to include “[t]he location of the burning site, including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks.”

{¶61} ODNR’s application did not include a written narrative description of the burn location. Instead, the application referenced an attached map. Lund Exhibit E.

{¶62} First, Ms. Lund argued that Ohio 3745-19-05(A)(2)(d) requires open burning permission requests to include a separate written narrative description, in addition to a map. Ms. Lund contended that because ODNR’s application did not include a written narrative description of its proposed burn location, it did not meet the

requirements of Ohio 3745-19-05(A)(2)(d), and therefore PLAA's issuance of the Burn Permission was unlawful and unreasonable. Testimony Lund.

{¶63} Moreover, Ms. Lund argued that ODNR's map of its proposed burning location did not include sufficient information regarding the boundaries of the various burn units within Chaparral Prairie State Nature Preserve. The map included in ODNR's open burning permission request depicts the six burn units at Chaparral Prairie State Nature Preserve with a flame symbol as shown below:



Lund Exhibit E.

{¶64} At hearing, Ms. Lund argued that ODNR's map did not meet the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d) and that the flame symbols did not provide sufficient information for PLAA to establish a valid factual foundation for its conclusion that ODNR's proposed prescribed burn would not have a serious detrimental effect upon adjacent properties or the occupants thereof, as required by Ohio Adm.Code 3745-19-05(A)(3). Thus, Ms. Lund concluded that even if PLAA could lawfully rely on ODNR's map in the absence of a narrative description of the proposed burning location,

PLAA's issuance of the Burn Permission was nonetheless unlawful and unreasonable. Testimony Lund.

{¶65} Finally, Ms. Lund also noted that Special Condition 5 requires ODNR to address spot fires "in accordance with the ODNR approved contingency plan(s)." Ms. Lund argued, that because the application's description of the proposed burn location was deficient, it would not be possible to accurately identify "spot fires."<sup>5</sup> Ms. Lund thus argued that PLAA's issuance of the Burn Permission was also unlawful and unreasonable because it failed to adequately address potential spot fires at Chaparral Prairie State Nature Preserve. Testimony Lund; Lund Exhibit E.

{¶66} In response, Ms. Charles testified that the purpose of the location requirement is to enable PLAA to determine distances to roads, residences, and other landmarks. In this instance, Ms. Charles explained that she was able to use the scaled map in ODNR's application to determine distances to the relevant landmarks, including the residences, populated areas, and roadways nearest to Chaparral Prairie State Nature Preserve.<sup>6</sup> Testimony Charles.

*iv. Assignment of Error 10*

{¶67} Finally, in Assignment of Error 10, Ms. Lund argued that PLAA's issuance of the Burn Permission was unlawful and unreasonable because PLAA lacked a valid factual foundation to determine that ODNR's contingency plans would be sufficient to address escaped fires that occur during the prescribed burn at Chaparral Prairie State Nature Preserve.

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<sup>5</sup> At hearing, the parties generally described "spot fires" as any fire that occurs outside of the planned burn unit boundaries. Testimony Lund, Charles.

<sup>6</sup> Ms. Lund did not cross examine Ms. Charles. Testimony Charles.

{¶68} The Burn Permission states, “[a]ny potential spot fires shall be addressed in accordance with the ODNR approved contingency plan(s).” As an initial matter, Ms. Lund argued that this term does not adequately address spot fires because it addresses only “potential” spot fires as opposed to “actual” spot fires or larger fires (i.e., forest fires). Testimony Lund.

{¶69} Further, Ms. Lund contended that detailed contingency plans were not included as a part of ODNR’s application. Instead, Ms. Lund noted that information regarding fire escapes was included only in ODNR’s “burn plans” for Chaparral Prairie State Nature Preserve. Lund Exhibits G, H, I.

{¶70} Ms. Lund argued that because contingency information was not included in ODNR’s application, PLAA could not have reasonably based its issuance of the permission on ODNR’s contingency plans. Testimony Lund.

{¶71} In response, Ms. Charles explained that through correspondence with ODNR, she understood that contingency plans were in place. Testimony Charles.

## **CONCLUSIONS OF LAW**

### **I. Standard of Review**

{¶72} 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.

{¶73} 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).

{¶74} 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*, 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.*

{¶75} The deference accorded the Director when interpreting 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 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.*

{¶76} 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 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.*

{¶77} Similar to the deference afforded the Director with regard to the interpretation of administrative regulations, however, ERAC’s deference for the Director’s factual determinations is also not unlimited. Instead, the Commission engages in “a *limited* weighing of the evidence.” *Ohio Fresh Eggs, LLC v. Wise*, 2008-Ohio-2423, (10th Dist. App. 2008), ¶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.*

### **I. Appellees’ Motion for Summary Judgment**

{¶78} The Commission will first discuss the assignments of error dismissed on summary judgment.

#### **A. Summary Judgment Standard of Review**

{¶79} 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).

{¶80} 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 \* \* \*

{¶81} 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.

{¶82} “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).

### **B. Assignments of Error 1 and 2**

{¶83} In Assignments of Error 1 and 2, Ms. Lund alleged that PLAA’s issuance of the Burn Permission was unlawful and unreasonable because it allows for open burning within 1,000 feet of the nearest occupied structure.

{¶84} Ohio Adm.Code 3745-19-04(B)(3)(c) prohibits open burning for the purpose of residential and agricultural waste disposal within 1,000 feet of the nearest occupied structure. However, the 1,000 foot restriction does not expressly apply to prescribed burns conducted pursuant to recognized horticultural, silvicultural, or range or wildlife management purposes. Nonetheless, Ms. Lund argued in her Notice of Appeal that the underlying rationale should nevertheless apply in such scenarios.

{¶85} In their Motion for Summary Judgment, Appellees argued that Assignments of Error 1 and 2 are essentially collateral attacks on Ohio’s open burning regulations, which are not properly before the Commission on an appeal from the issuance of an open burning permission. The Commission agrees.

{¶86} Significantly, Ms. Lund did not argue that the site specific characteristics of the area surrounding Chaparral Prairie State Nature Preserve would present a unique safety risk if a prescribed burn occurs within 1,000 feet of the nearest occupied structures. Instead, Ms. Lund simply argued that Ohio EPA should impose a *general* prohibition on open burning within 1,000 of an occupied structure, regardless of the purpose of the burn or the specific characteristics of the location. Ms. Lund’s Notice of Appeal states that the PLAA should include such a condition in order to resolve an “inconsistency” between Ohio Adm.Code 3745-19-04(B)(3)(c), which does include a 1,000 restriction, and Ohio Adm.Code 3745-19-04(C)(5), which does not.

{¶87} Because Ms. Lund argued for a *generally-applicable* 1,000 foot limitation, the Commission finds that Assignments of Error 1 and 2 are a challenge to Ohio Adm.Code 3745-19-04(C)(5), rather than to the particular open burning permission the PLAA issued to ODNR for Chaparral Prairie State Nature Preserve.

{¶88} The Commission has previously noted that collateral attacks on Ohio’s open burning regulations are not appropriately before ERAC on an appeal from the issuance of an open burning permission. *Lund v. Koncelik*, ERAC No. 015935 (Oct. 11, 2007), at ¶37 (“Lund I”). In *Lund I*, the Commission stated as follows:

Had Ms. Lund wished to affect the statutes providing the legislative scheme under which Ohio’s open burning regulations are promulgated, she could have worked with the legislature prior to the enactment of the relevant statutes or challenged the enactment of those statutes. Ms. Lund also could have timely appealed relevant OAC provisions under which

burning permits are issued \* \* \*. Her attempt to now collaterally attack applicable OAC sections through this appeal is not well-taken.

*Id.*

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

### **C. Assignment of Error 3**

{¶90} In Assignment of Error 3, Ms. Lund alleged that PLAA's issuance of the Burn Permission was unlawful and unreasonable because it allows for the burning of dead animals. Specifically, Ms. Lund argued that the burning of dead animals is prohibited under Ohio Adm.Code 3745-19-01(A), which expressly excludes dead animals from the scope of residential and agricultural waste disposal exception to Ohio's general prohibition of open burning.

{¶91} In their Motion for Summary Judgment, Appellees noted that Ohio Adm.Code 3745-19-01(A) defines the scope of the agricultural and residential waste exceptions; it does not apply the horticultural, silvicultural, range, or wildlife management practices exception contained in Ohio Adm.Code 3745-19-04(C)(5). Appellees thus contended that even if some incidental burning of dead animals is likely to occur as a result of the prescribed burn at issue here, PLAA was not required to expressly prohibit such action in the Burn Permission.

{¶92} As an initial matter, the Commission notes that Ohio Adm.Code 3745-19-01(A) does not create a blanket prohibition on the burning of dead animals. Instead, it excludes dead animals from the scope of the agricultural waste disposal *exception* to Ohio's general prohibition on open burning. Because the open burning permission at

issue here was not issued pursuant to the agricultural and residential waste disposal exception, the applicable regulations did not expressly prohibit the burning of dead animals.

{¶93} Nonetheless, the Commission acknowledges that the absence of an explicit regulation prohibiting an act does not conclusively establish that the issuance of an open burning permission was lawful and reasonable. Site specific information or data specific to a particular proposed burn may, for example, necessitate the inclusion of special terms and conditions to ensure that the burn will minimize the emission of air contaminants and have no serious detrimental effect upon adjacent properties or the occupants thereof.

{¶94} Here, however, Ms. Lund does not allege that the incidental burning of dead animals would result in excessive air emissions or have a detrimental effect upon adjacent properties. Instead, Ms. Lund argued for a general prohibition on the burning of dead animals. As with Assignments of Error 1 and 2, the Commission finds that Assignment of Error 3 is a collateral attack on Ohio's open burning regulations and is thus not properly before the Commission on an appeal from the issuance of an open burning permission. See *Lund I*, ERAC No. 015935 (Oct. 11, 2007), at ¶37. Assignment of Error 3 is not well-taken.

#### **D. Assignment of Error 6**

{¶95} In Assignment of Error 6, Ms. Lund alleged that PLAA's issuance of the Burn Permission was unlawful and unreasonable because ODNR would be unable to comply with Special Condition 3 the Burn Permission, which states, "[f]ire cannot create [a] visibility hazard on roadways, railroad tracks or air fields."

{¶96} In her Notice of Appeal, Ms. Lund argued that the unpredictable nature of wind could result in smoke-related visibility hazards during the burn.

{¶97} In their Motion for Summary Judgment, Appellees argued that because Ms. Lund's Assignment of Error 6 is based upon ODNR's inability to comply with the terms of its permission, she must affirmatively demonstrate through reliable, probative, and substantial evidence that ODNR cannot comply with those terms. See *Lund v. Koncelik*, ERAC No. 015795 (February 28, 2006) ("Lund II"), at COL ¶8, citing *CECOS Int'l, Inc. v. Shank*, 79 Ohio App.3d 1, 606 N.E.2d 973 (10th Dist. 1992). Appellees contended that because Ms. Lund has failed to support her assignment of error with the required reliable, probative, and substantial evidence, Appellees are entitled to summary judgment.

{¶98} As noted above, under Civ.R. 56, the moving party has the burden of demonstrating that there is no genuine issue as to any material fact as to critical issues. The Commission must, however, presume a permit holder will comply with the terms of its permit absent evidence to the contrary. E.g., *Thomas v. Zehringer*, ERAC Nos. 11-496560; 11-496561 (Sept. 20, 2012), citing *CECOS Int'l, Inc.*, 79 Ohio App.3d 1. Thus, with regard to an assignment of error based on an allegation that the permit holder will be unable to comply with the terms of its permit, the burden effectively shifts to the non-moving party to produce evidence—of the type listed in Civ.R. 56(E)—that the permit holder will indeed be unable to comply with the terms of its permit.

{¶99} Here, Ms. Lund offered no evidence beyond speculation that wind could potentially cause smoke visibility hazards. Her Notice of Appeal states, "[a] fire might be started with wind from one direction, but it *could* change or vary or swirl." Thus, the

language contained within the Notice of Appeal itself acknowledges the hypothetical nature of Ms. Lund's contention.

{¶100} The Commission finds Ms. Lund's unsupported contentions regarding the possibility of smoke creating a visibility hazard do not meet the requirements of Civ.R. 56(E). Neither Ms. Lund's Notice of Appeal nor her response to Appellees' Motion for Summary Judgment contain admissible evidence of the type required by Civ.R. 56, as Ms. Lund's factual contentions are not supported by an affidavit or other admissible evidence. Accordingly, in the absence of admissible evidence to the contrary, the Commission must presume that ODNR will comply with the terms of the Burn Permission. *Thomas*, at ¶68.

{¶101} The Commission notes that if, after ODNR conducts the prescribed burn, Ohio EPA determines that ODNR did not comply with Special Condition 3, Ohio EPA could either initiate enforcement proceedings or rely upon the remedy set out in Ohio Adm.Code 3745-19-05(A)(5).<sup>7</sup> Additionally, if ODNR fails to comply with the terms of its open burning permission, Ms. Lund could initiate a verified complaint pursuant to R.C. 3745.08. E.g., *Lund v. Nally*, ERAC No. 11-016568 (July 12, 2012) ("Lund III").

{¶102} Because Ms. Lund did not support her argument that ODNR will be unable to comply with Special Condition 3 with evidence of the type required by Civ.R. 56, Assignment of Error 6 is not well-taken.

#### **E. Assignment of Error 7**

{¶103} In Assignment of Error 7, Ms. Lund argues that PLAA's issuance of the Burn Permission was unreasonable and unlawful because ODNR would be unable to

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<sup>7</sup> Ohio Adm.Code 3745-19-05(A)(5) provides, "[v]iolations of any of the conditions set forth by the Ohio EPA in granting permission to open burn shall be grounds for revocation of such permission and refusal to grant future permission, as well as for the imposition of other sanctions provided by law."

conduct the burn in a “time, place, and manner as to minimize the emission of air contaminants,” as required by Special Condition 2 of the Burn Permission. Specifically, Ms. Lund argues that compliance with Special Condition 2 is not possible because the only way to “minimize the emission of air contaminants” is to burn less material.

{¶104} In their Motion for Summary Judgment, Appellees again argued that because Ms. Lund’s Assignment of Error 7 is based upon Mrs. Lund’s belief that ODNR will not comply with the terms of its permission, her allegation must be supported by reliable, probative, and substantial evidence. See *Lund II*, at COL ¶8. Appellees contended that because Ms. Lund has failed to support her assignment of error with the required reliable, probative, and substantial evidence, Appellees are entitled to summary judgment. The Commission agrees.

{¶105} Ms. Lund conceded that ODNR’s open burning permission application included information regarding steps ODNR would take to reduce air emissions. Specifically, the application stated that ODNR would limit burning to days with low humidity and winds of at least 9 mph. Further, the application stated that ODNR would use a firing method that would create sufficient heat so as to more completely burn materials. In arguing that ODNR would be unable to minimize the emission of air contaminants, Ms. Lund contended that such measures would function only to reduce visible particulate emissions, but would result in an increase of other air contaminants.

{¶106} As with Assignment of Error 6, the Commission finds that Ms. Lund’s unsupported contentions regarding the effectiveness of ODNR’s efforts to reduce the emission of air contaminants do not meet the requirements of Civ.R. 56. Ms. Lund has not set forth evidence of the type required by Civ.R. 56 to establish that ODNR is likely to fail to comply with the terms of its open burning permission. Accordingly, the

Commission must presume that the permit holder will comply with the terms of the permission. *Lund II*, ERAC No. 015795, at COL ¶8.

{¶107} Assignment of Error 7 is not well-taken.

#### **F. Assignment of Error 11**

{¶108} In Assignment of Error 11, Ms. Lund argued that PLAA's issuance of the Burn Permission was unlawful and unreasonable because the prescribed burn at issue is not "necessary to the public interest." Ms. Lund raised a variety of concerns in her Notice of Appeal, generally arguing that ODNR's efforts to maintain a prairie ecosystem are "unnatural."

{¶109} In their Motion for Summary Judgment, Appellees argued that such concerns are outside of the scope of what PLAA is required to evaluate when issuing open burning permits. The Commission agrees.

{¶110} The Commission has previously held that Ohio EPA or PLAA need not consider specific "forestry concerns" in evaluating open burning permission requests. *Lund II*, at COL ¶¶13-16. Instead, the Commission found that Ohio EPA or PLAA need only be satisfied—and possess a valid factual foundation to conclude—that the proposed burn is "necessary to the public interest." *Id.*

{¶111} The Commission notes that the various issuance criteria outlined in Ohio Adm.Code 3745-19-05(A)(3) are interwoven into the open burning permission request forms. ODNR's application states that the purpose of the proposed burn is "to maintain and promote the native prairie and cedar barrens ecosystem at the site." Thus, PLAA's issuance of the Burn Permission is evidence of the agency's implicit conclusion that ODNR's stated goals were "necessary to the public interest." See *National Wildlife Federation v. Korleski*, ERAC Nos. 996447-256451 (Feb. 29, 2012), at ¶89.

{¶112} The mere fact that PLAA may or may not have specifically considered the various specific policy concerns Ms. Lund raised in her appeal does not render the issuance of the Burn Permission unlawful or unreasonable. Accordingly, Assignment of Error 11 is not well-taken.

### **G. Assignment of Error 12**

{¶113} In Assignment of Error 12, Ms. Lund argued that PLAA's issuance of the Burn Permission was unlawful and unreasonable because the permitting process did not provide an opportunity for public comment prior to the issuance of the permission. In essence, Ms. Lund argued that PLAA's action issuing the Burn Permission violated the due process clause of the federal and/or Ohio constitutions. Case File Item A.

{¶114} It is well settled that the Commission does not have jurisdiction to hear constitutional challenges to rules or statutes. E.g., *BP Exploration & Ohio, Inc. v. Jones*, ERAC No. 184134 (March 21, 2001). Thus, Assignment of Error 12 is not well-taken.

## **II. Arguments Presented at Hearing**

{¶115} At hearing, Ms. Lund presented testimony relating to Assignments of Error 4, 5, 8, 9, and 10. The Commission will now discuss each of the assignments of error presented at hearing.

### **A. Assignment of Error 4**

{¶116} In Assignment of Error 4, Ms. Lund argued that ODNR's open burning permission request did not contain adequate information regarding its description of the material to be burned.

{¶117} Ohio Adm.Code 3745-19-05(A)(2)(b) requires an applicant to provide information regarding the "quantity or acreage and the nature of the materials to be burned." Ms. Lund argued that PLAA's issuance of the Burn Permission was unlawful

and unreasonable because ODNR's description of the nature of the material to be burned did not provide sufficient detail.

{¶118} Specifically, Ms. Lund contended that ODNR failed to disclose that the prescribed burn is likely to consume "ferns, mosses, lichens, fungus, algae, bacteria, vertebrate animals, including mammals, reptiles, amphibians, birds, and numerous categories of invertebrate animals, including insects, spiders, snails, and worms." Additionally, Ms. Lund argued that fire would consume "carbonaceous humus soil." Because ODNR did not list these items, Ms. Lund argued that ODNR's application failed to meet the requirements of Ohio Adm.Code 3745-19-05(A)(2). Further, Ms. Lund argued that PLAA could not have accurately evaluated the proposed prescribed burn's impact on air emissions, as required by Ohio Adm.Code 3745-19-05(A)(3).

{¶119} In response, Ms. Charles noted that the applicable regulations do not specify a specific level of detail required and that the purpose of the regulation is to ensure the type of material to be burned is not prohibited by law.

{¶120} Additionally, Mr. Johnson testified on ODNR's behalf that its application listed the material that constituted the target of the proposed burn. Mr. Johnson estimated that incidental material that might be burned along with the target material would constitute less than 2% of the material burned by mass.

{¶121} The Commission finds that PLAA's issuance of the Burn Permission was lawful and reasonable as to PLAA's consideration of ODNR's description of the nature of the material to be burned. As Mr. Johnson explained, the items listed in ODNR's application constitute ODNR's target burn material, which he estimated represented approximately 98% of the material that would be consumed during the proposed prescribed burn.

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

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

{¶124} At hearing, Ms. Lund also argued that PLAA should have required ODNR to describe the quantity of material to be burned in tons rather than in acres. However, following the hearing, Ms. Lund acknowledged in her post-hearing brief that the version of Ohio Adm.Code 3745-19-05 in effect at the time of issuance expressly provided that open burning permission requests must include information regarding the “quantity *or* acreage” (emphasis added) of the material to be burned. Ms. Lund consequently withdrew the portion of Assignment of Error 4 relating to the manner in which ODNR described quantity of material to be burned.<sup>8</sup> Accordingly, the Commission declines to address that portion of Assignment of Error 4.

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<sup>8</sup> Appellees’ post-hearing brief continued to reference the prior version of Ohio Adm.Code 3745-19-05. See note 2, *supra*.

**B. Assignment of Error 5**

{¶125} In Assignment of Error 5, Ms. Lund argued that ODNR’s prescribed burn does not fall within the scope of Ohio Adm.Code 3745-19-04(C)(5), which provides in pertinent part as follows:

(C) Open burning shall be allowed for the following purposes upon receipt of written permission from the Ohio EPA, in accordance with paragraph (A) of rule 3745-19-05 of the Administrative Code \* \* \* :

\* \* \*

(5) Recognized horticultural, silvicultural (forestry), range, or wildlife management practices; \* \* \*

{¶126} Ms. Lund argued that PLAA’s issuance of the Burn Permission was unlawful and unreasonable because ODNR’s proposed prescribed burn does not fall within the scope of the “recognized horticultural, silvicultural (forestry), range, or wildlife management practices” exception to Ohio’s general prohibition of open burning.

{¶127} Ms. Lund opined that “horticulture” means the cultivation of fruits, vegetables, or ornamental plants and argued that those activities do not occur in the area comprising Chaparral Prairie State Nature Preserve.

{¶128} Similarly, Ms. Lund contended that “silvicultural” includes only activities relating to forests and argued that because Chaparral Prairie State Nature Preserve is a prairie rather than a forest, the “silvicultural” exception cannot apply.

{¶129} Finally, Ms. Lund argued that the range and wildlife management practices exception cannot apply to the prescribed burn at issue because the property is not used to raise livestock or used as hunting grounds.

{¶130} In response, ODNR argued that its proposed prescribed burn falls within the scope of the “silvicultural” exception because it is being conducted for the purpose of affecting the composition of plant wildlife at Chaparral Prairie State Nature Preserve.

Alternatively, Appellees argued that the proposed prescribed burn falls within the scope of “wildlife management” because the burn would affect animal populations. The Commission disagrees.

{¶131} Ohio Adm.Code Chapter 3745-19 does not define the term “silvicultural.” However, the Commission notes that Ohio Adm.Code 3745-19-04(C)(5), which sets forth the silvicultural exception at issue, expressly includes only “silvicultural (*forestry*)” activity. (Emphasis added). Thus, the text of the regulation itself indicates that the word “silvicultural” is intended to cover activity related to *forestry*.

{¶132} Similarly, the Merriam Webster Online Dictionary defines “silviculture” as “a branch of *forestry* dealing with the development and care of forests.” <http://www.merriam-webster.com/dictionary/silviculture> (last visited October 10, 2013) (emphasis added). Thus, the Commission finds that the “silvicultural” exception to Ohio’s general prohibition of open burning, as set forth in Ohio Adm.Code 3745-19-04(C)(5), encompasses only activity related to forestry.

{¶133} ODNR’s application states, “[t]he areas to be burned will be open prairie and small portions of oak woodland *consisting mainly of dried standing prairie grasses and various forbs as well as dried leaves.*” (Emphasis added). Significantly, ODNR’s application does not describe the area to be burned as containing “forest.”<sup>9</sup> Instead, ODNR’s application describes the area as primarily “open prairie.”

{¶134} As noted above, the Commission grants Ohio EPA and PLAA deference regarding their interpretations of their own governing statutes and regulations. E.g.,

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<sup>9</sup> Compare to the application submitted by The Nature Conservancy (“TNC”) in *Lund v. Nally*, ERAC No. 13-016726 (Dec. 19, 2013). TNC’s application described the proposed burn location as “66 acres total of both forested and grassland fuels,” consisting of approximately 40 acres of forested land and 26 acres of grassland.

*Sandusky Dock Corp.*, 106 Ohio St.3d at 274. Such deference, however, is not unlimited, and an agency's interpretation of its own governing rules must not conflict with the express language of the regulation. E.g., *B.P. Exploration and Oil, Inc.*, ERAC Nos. 184134-36.

{¶135} Here, the express language of the rule indicates the “silvicultural” exception to Ohio's general prohibition of open burning, as set forth in Ohio Adm.Code 3745-19-04(C)(5), encompasses only activity related to forestry.

{¶136} ODNR's application indicates that the area comprising its proposed burn location is most accurately described as a prairie, rather than a forest, and neither PLAA nor ODNR presented testimony at hearing indicating that the land could be properly characterized as a forest. Although ODNR's burn plans indicated that some portions of the burn units were wooded, the testimony established that PLAA did not obtain a copy of ODNR's burn plans during its review of the application. Instead, Ms. Charles testified that she was merely aware that the plans existed. Thus, ODNR's burn plans could not have provided a valid factual foundation for PLAA to conclude that Chaparral Prairie State Nature Preserve could be accurately characterized as a forest.

{¶137} The Commission acknowledges that in certain circumstances, a prescribed burn of a prairie may indeed be related to recognized silvicultural purposes within the meaning of Ohio Adm.Code 3745-19-04(C)(5). For example, a prescribed burn of a prairie conducted in close proximity to a forested area may, potentially, aid in the management of the forested area. However, the Commission notes that in this instance, neither PLAA nor ODNR introduced evidence that *this* prescribed burn was related to the management of a specific forested area.

{¶138} Accordingly, the Commission finds that Appellees failed to present testimony or evidence establishing the prescribed burn fell within the scope of the “silvicultural” exception to Ohio’s general prohibition of open burning.

{¶139} Further, the Commission finds that ODNR’s proposed prescribed burn did not fall within the “wildlife management” exception to Ohio’s general prohibition of open burning. Although Mr. Johnson testified that the burn would affect animal populations, the testimony established that such effects would be incidental to the purpose of the burn, which is to promote the growth of native plant species. Therefore, the *purpose* of the burn cannot be accurately described as “wildlife management.”

{¶140} Having found that Appellees failed to establish that the prescribed burn fell within the scope of either the “silvicultural” or “wildlife management” exception to Ohio’s general prohibition of open burning, the Commission finds that PLAA acted unlawfully and unreasonably to the extent it issued the Burn Permission pursuant to Ohio Adm.Code 3745-19-04(C)(5).

### **C. Assignments of Error 8 and 9**

{¶141} In Assignments of Error 8 and 9, Ms. Lund argued that ODNR’s application did not satisfy Ohio Adm.Code 3745-19-05(A)(2)(d), which requires open burning permission requests to include information regarding the “location of the burning site, *including* a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks.” (Emphasis added).

{¶142} Ms. Lund argued that ODNR’s open burning permission request did not meet the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d) because the application lacked a written narrative description and because the included map failed to detail the boundaries of the burn proposed prescribed burn. Without boundary information, Ms.

Lund argued that PLAA could not have accurately evaluated the proposed burn's effect on surrounding properties as required by Ohio Adm.Code 3745-19-05(A)(3).

{¶143} Further, Ms. Lund argued that without boundary information, PLAA and Ohio EPA would be unable to accurately identify "spot fires" as required under Special Condition 5 of the Burn Permission. Thus, Ms. Lund concluded that PLAA's issuance of the Burn Permission was unlawful and unreasonable.

{¶144} In response, Appellees argued that Ohio Adm.Code 3745-19-05(A)(2)(d) does not require a separate written narrative description. Rather, the purpose of the requirement is to enable PLAA or Ohio EPA to obtain distances to relevant features so the agency can determine whether the proposed burn would have any serious detrimental effect upon adjacent properties or the occupants thereof.

{¶145} Further, Ms. Charles testified that by using the map included in ODNR's application, she was indeed able to determine distances to the relevant landmarks and conclude that the proposed burn would have no serious detrimental effect upon adjacent properties or the occupants thereof.

{¶146} The Commission finds that PLAA acted lawfully and reasonably in its review of ODNR's map of the proposed burn location. Ohio Adm.Code 3745-19-05(A)(2)(d) does not expressly require a written narrative description of the burn location. Instead, the regulation simply states that an application must provide information regarding the proposed burn location, including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks. Further, as Ms. Charles explained, the purpose of Ohio Adm.Code 3745-19-05(A)(2)(d) is to ensure that an application contains enough information so that PLAA can ascertain the effects of the proposed burn on adjacent properties.

{¶147} ODNR included a map in its open burning permission request, which, as Ms. Charles explained, allowed PLAA to determine distances to relevant landmarks and conclude that the proposed burn would have no serious detrimental effect upon adjacent properties or the occupants thereof, as required by Ohio Adm.Code 3745-19-05(A)(2)(d) and Ohio Adm.Code 3745-19-05(A)(3).

{¶148} Significantly, Ms. Lund did not cross examine Ms. Charles as to her testimony that she was able to ascertain the distances to relevant landmarks using ODNR's map. Although Ms. Lund offered testimony regarding her own assessment that ODNR's map lacked certain details, Ms. Charles' unchallenged testimony at hearing established that PLAA—the agency tasked with reviewing open burning permission requests—was able to ascertain the relevant information using ODNR's map.

{¶149} As noted above, regulatory agencies are afforded considerable deference as to factual determinations and ERAC may not substitute its judgment for that of the agency as to factual issues. *National Wildlife Federation*, 2013-Ohio-3923, at ¶48. Accordingly, the Commission finds that PLAA acted lawfully and reasonably in determining that ODNR's open burning permission request met the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d) and Ohio Adm.Code 3745-19-05(A)(3). Assignments of Error 8 and 9 are not well-taken.

#### **D. Assignment of Error 10**

{¶150} Finally, in Assignment of Error 10, Ms. Lund argued that PLAA's issuance of the Burn Permission was unlawful and unreasonable because the Director lacked a valid factual foundation to determine that ODNR's contingency plans would be sufficient to address escaped fires (or "spot fires") that occur during the prescribed burn at Chaparral Prairie State Nature Preserve.

{¶151} Ms. Lund noted that the Burn Permission states, “[a]ny potential spot fires shall be addressed in accordance with the ODNR approved contingency plan(s).” At hearing, Ms. Lund contended that detailed contingency plans were not included as a part of ODNR’s application. Instead, Ms. Lund noted that ODNR’s plan to address spot fires is contained only in its burn plans for Chaparral Prairie State Nature Preserve. Because its contingency plans were not included in ODNR’s application, Ms. Lund concluded that PLAA could not have possessed a valid factual foundation for determining that ODNR’s contingency plans would be sufficient to address escaped fires that occur during the prescribed burn at Chaparral Prairie State Nature Preserve.

{¶152} In response, Ms. Charles explained that through correspondence with ODNR during her review of the application, she understood ODNR maintained contingency plans for spot fires at Chaparral Prairie State Nature Preserve.

{¶153} The Commission finds that PLAA acted lawfully and reasonably in concluding that ODNR’s contingency plans would be sufficient to address spot fires. Through Ms. Charles’ correspondence with ODNR during the application review process, she understood that ODNR maintained contingency plans for the various burn units within Chaparral Prairie State Nature Preserve. Although the burn plans were not included within ODNR’s application, PLAA thus had a valid factual foundation to conclude that ODNR maintained contingency plans for addressing spot fires. Accordingly, Assignment of Error 10 is not well-taken.

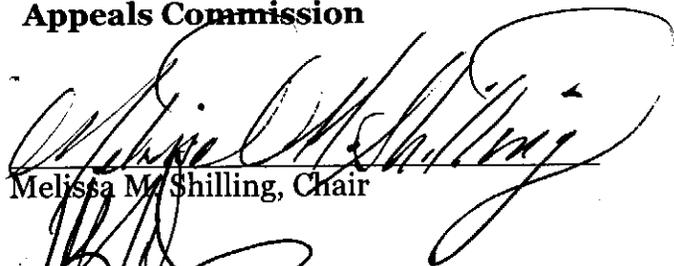
**FINAL ORDER**

{¶154} For the foregoing reasons, Ms. Lund's Assignment of Error 5 is well-taken, and the Commission finds PLAA's issuance of Burn Permission 130118cds4 unlawful and unreasonable to the extent it was issued pursuant to Ohio Adm.Code 3745-19-04(C)(5). The Commission affirms PLAA's issuance of Burn Permission 130118cds4 with regard to the remainder of Ms. Lund's assignments of error (Assignments of Error 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, and 12).

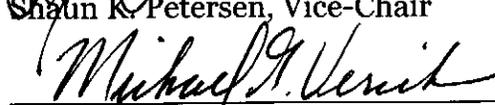
{¶155} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

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 19<sup>th</sup> day of  
December 2013.

Copies Sent to:

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