

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BARBARA A. LUND, : Case No. ERAC 13-016726
: :
Appellant, : :
: :
v. : :
: :
PORTSMOUTH LOCAL AIR AGENCY, : :
: :
and : :
: :
THE NATURE CONSERVANCY, : :
: :
Appellees. : :

DECISION

Rendered on December 19, 2013

Barbara A. Lund, pro se Appellant

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

Christopher Jones and *Christopher M. Ward* for Appellee
The Nature Conservancy

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant Barbara A. Lund on March 13, 2013. Ms. Lund challenges Permission to Open Burn number 130307cds11 (“Burn Permission”), issued by Appellee Portsmouth Local Air Agency (“PLAA”) to Appellee The Nature Conservancy (“TNC”) on March 7, 2013. Case File Item A.

{¶2} On April 19, 2013, PLAA filed a Motion To Dismiss For Lack of Standing Or, In The Alternative, Motion For Summary Judgment.¹ Ms. Lund filed a Memorandum in Opposition on May 3, 2013. The Commission issued a Ruling denying PLAA’s Motion to Dismiss for Lack of Standing (“Motion to Dismiss”) and granting in part PLAA’s Motion for Summary Judgment (“Motion for Summary Judgment”) on May 8, 2013. Specifically, the Commission granted PLAA’s Motion for Summary Judgment with respect to Ms. Lund’s Assignments of Error 1, 2, 3, 6, 10, 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 M, R, S.

{¶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 affirming PLAA’s issuance of Burn Permission 130307cds11.

FINDINGS OF FACT

I. Regulatory Framework

{¶5} Open burning, as defined by Ohio Administrative Code (“Ohio Adm.Code”) 3745-19-01(I),² is generally prohibited in Ohio except under certain limited circumstances. Ohio Adm.Code 3745-19-03(A); Ohio Adm.Code 3745-19-04(A).

¹ On April 22, 2013, TNC joined PLAA’s Motion for Summary Judgment, but took “no position” regarding PLAA’s Motion to Dismiss for Lack of Standing. Case File Item N.

² “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).

{¶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.

{¶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).

{¶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;³

³ In various pre-hearing filings, Ms. Lund 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 TNC 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 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 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. * * *

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.

The Commission finds the current 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.

II. Procedural Background

{¶12} On February 27, 2013, TNC submitted to PLAA⁴ the open burning request at issue in this appeal. In its application, TNC sought permission to conduct open burning on up to 66 acres of a vacant lot identified in the application as “Lynx Burn Unit 1.” The application stated that the purpose of the burn was for “recognized horticultural, silvicultural, range management or wildlife management practices.” Testimony Whan, Charles; PLAA Exhibits 3, 4.

{¶13} After reviewing the application, PLAA issued Burn Permission 130307cds11 (“Burn Permission”) on March 7, 2013. The Burn Permission, issued pursuant to Ohio Adm. Code 3745-19-04(C)(5) and Ohio Adm.Code 3745-19-05, contained seven special conditions that appeared as follows:

1. Permission to open burn shall be effective from March 12, 2013 to April 29, 2013, between the hours of 10:00a.m. until 6:00 p.m;⁵
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;
4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;
5. Any potential spot fires shall be addressed in accordance with The Nature Conservancy prescribed burn contingency plan(s);
6. The prescribed burn operations shall be performed in a manner consistent with The Nature Conservancy prescribed burn procedures as outlined in the Open Burning Request; and
7. The Nature Conservancy shall notify our office the day prior to ignition of the prescribed burn.

⁴ 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.

⁵ The Commission acknowledges the Burn Permission expired on April 29, 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).

Testimony Whan, Charles; PLAA Exhibits 3, 4.

{¶14} No testimony was presented as to whether TNC conducted the prescribed burn authorized by the Burn Permission before its expiration on April 29, 2013.

{¶15} Ms. Lund timely appealed PLAA's issuance of the Burn Permission and raised twelve assignments of error challenging whether PLAA's 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) TNC'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 April 19, 2013, PLAA filed a Motion To Dismiss For Lack Of Standing Or, In The Alternative, Motion for Summary Judgment. In its Motion to Dismiss, PLAA argued that Ms. Lund lacks standing in this appeal because her alleged injuries did not fall within the realm of interests protected by Ohio's open burning regulations. Case File Item M.

{¶17} Additionally, PLAA argued in its Motion for Summary Judgment that it was entitled to summary judgment on the merits of each of Ms. Lund's twelve assignments of error. In essence, PLAA argued that Ms. Lund's Assignments of Error 1, 2, 3, 7, 8, 9, and 10 were impermissible collateral attacks on Ohio's open burning regulations, and therefore PLAA was entitled to judgment as a matter of law. Further, PLAA argued it was entitled to summary judgment as to Ms. Lund's Assignments of

Error 4, 5, and 6 because Ms. Lund had not supported those assignments of error with reliable, probative, and substantial evidence that TNC would violate the terms of the permission. And finally, PLAA argued that it was 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 lacked jurisdiction to consider constitutional claims. Case File Item M.

{¶18} On May 8, 2013, the Commission denied PLAA's Motion to Dismiss, but granted in part and denied in part PLAA's Motion for Summary Judgment. Specifically, the Commission granted summary judgment on Assignments of Error 1, 2, 3, 6, 10, 11, and 12. Case File Item S.

{¶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 alleged 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 conceded in her Notice of Appeal that the above provision is not 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 Lynx Burn Unit 1 present a unique safety risk for prescribed burns occurring within 1,000 feet of the nearest occupied structures. Instead, the 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 its Motion for Summary Judgment, PLAA 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. PLAA

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 it is entitled to judgment as a matter of law. Case File Item M.

{¶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 R.

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 3745-19-04(B)(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 its Motion for Summary Judgment, PLAA 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). PLAA thus contended that even if some incidental burning of dead animals is likely to occur as a result of the prescribed burn, it was not required to specifically prohibit such action. As a result, PLAA posits that it is entitled to summary judgment with regard to Assignment of Error 3. Case File Item M.

{¶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 R.

iii. Assignment of Error 6

{¶31} In Assignment of Error 6, Ms. Lund alleged 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.

{¶32} 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 TNC’s application lists several steps that would be taken to reduce smoke emissions;

specifically, TNC would limit burning to periods of time when atmospheric mixing heights are greater than 1,500 feet and fuels are cured or dry, as well as mop up any lingering fires. Ms. Lund argued, however, that these steps would function only to limit smoke, rather than total air emissions. Ms. Lund thus concluded that TNC 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.

{¶33} In its Motion for Summary Judgment, PLAA 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, PLAA contended that Ms. Lund was required to support her claim that TNC would not be able to "minimize" the emission of air contaminants with reliable, probative, and substantial evidence. PLAA argued that Ms. Lund failed to do so, and, therefore, the agency is entitled to summary judgment with regard to Assignment of Error 6. Case File Item M.

{¶34} In response, Ms. Lund distinguished between reduction and minimization of air contaminants. Ms. Lund argued that "minimum" air emissions should equate to zero air emissions. Thus, although TNC may indeed be successful in reducing smoke, Ms. Lund concluded that such reductions would not satisfy Special Condition 2, which requires TNC to "minimize" the emission of air contaminants. Case File Item R.

{¶35} Further, Ms. Lund reiterated her argument that the steps listed in TNC'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 R.

iv. Assignment of Error 10

{¶36} In Assignment of Error 10, Ms. Lund alleged that PLAA’s issuance of the Burn Permission was unreasonable and unlawful because PLAA did not require TNC to submit a burn plan as a part of its open burning permission request. Ms. Lund argued that, as compared to the open burning permission request itself, a burn plan would contain a more detailed description of the procedures that will be employed when conducting the prescribed burn. Ms. Lund’s Notice of Appeal thus suggested that it would have been necessary for PLAA to review a burn plan prior to issuing a permission to conduct open burning. Because PLAA did not request TNC’s burn plan for Lynx Burn Unit 1, Ms. Lund contended that PLAA’s issuance of Burn Permission 130307cds11 was unreasonable and unlawful. Case File Item A.

{¶37} In its Motion for Summary Judgment, PLAA argued that Ohio Adm.Code 3745-19-05(A)(2) does not expressly require an applicant to submit a burn plan as a component of an open burning permission request. Thus, PLAA asserted it is entitled to judgment as a matter of law regarding Assignment of Error 10. Case File Item M.

{¶38} In response, Ms. Lund reiterated her contention that the details contained within a burn plan are necessary to fully evaluate a proposed burn. Case File Item R.

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, including the release of fungal material into the air, the prescribed burn’s contribution toward global climate change, and the indiscriminant and

destructive nature of fire. Additionally, Ms. Lund argued that the use of prescribed burns to control plant ecosystems is “not natural” and that ample alternative methods, such as tree cutting, were available to achieve TNC’s objectives. Case File Item A.

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

{¶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 TNC’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 R.

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 its Motion for Summary Judgment, PLAA argued that the Commission lacks jurisdiction to consider constitutional claims. Therefore, PLAA suggested that it is entitled to judgment as a matter of law with regard to Assignment of Error 12. Case File Item M.

{¶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 R.

B. Assignments of Error Presented at Hearing

{¶45} The Commission denied PLAA's Motion for Summary Judgment with respect to Assignments of Error 4, 5, 7, 8, and 9. 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 TNC's open burning permission request did not contain adequate information regarding its description of the material to be burned. Case File Item A.

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

Natural fuels within the unit will include grass and herbaceous stems, deciduous leaf litter, woody branches, limbs, and trees both live and dead. The identified natural fuels are typical fuels expected in range management or silvicultural areas. Fuel loads will vary within the unit. This unit contains 66 acres total of both forested and grassland fuels. Approximately 40 acres of forested fuels may contribute 3-5 tons per acre. The remaining approximately 26 acres of grassland fuels may contribute 2-4 tons per acre.

PLAA Exhibit 3.

{¶48} Ms. Lund argued that this description did not provide sufficient detail to allow PLAA to evaluate the application. Specifically, Ms. Lund argued that TNC's description failed to disclose that the prescribed burn is likely to consume animals, carbon sequestered in the soil, and other material not listed in the application. Thus, 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). 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 require a specific level of detail. Further, Ms. Charles testified that based on her eighteen years of experience reviewing permit applications, she believed TNC's application accurately and adequately described the material that would be burned. Testimony Charles.

{¶50} Mr. Peter Whan, Senior Conservationist at TNC, 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. Testimony Whan.

{¶51} Further, Mr. Whan testified that TNC takes steps to minimize impacts to animals. Mr. Whan explained that TNC conducts "patchy burns," during which islands of vegetation are left intact. These islands are used as refuges by animals, insects, and reptiles during the burn. And as a result of the availability of such refuges, wildlife populations recover more quickly. For example, Mr. Whan testified that data from previous burns indicated that populations of butterflies and mosses are replenished within approximately two years following a burn. Testimony Whan.

ii. Assignment of Error 5

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

{¶53} Ohio Adm.Code 3745-19-04(C)(5) creates exceptions to Ohio’s general prohibition of open burning and allows for open burning pursuant to “[r]ecognized horticultural, silvicultural (forestry), range, or wildlife management practices.” TNC’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 stated, “[t]he purpose of the burn is to suppress the invasion of woody species and to reduce the canopy cover to encourage the growth of native grasses and forbs.” PLAA Exhibit 3.

{¶54} Ms. Lund argued that PLAA’s issuance of the Burn Permission was unlawful and unreasonable because Lynx Burn Unit 1 is a prairie preserve, which is outside the scope of Ohio Adm.Code 3745-19-04(C)(5). Testimony Lund.

{¶55} First, Ms. Lund argued that “horticulture” means the cultivation of fruits, vegetables, or ornamental plants. Lynx Burn Unit 1 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.

{¶56} Second, Ms. Lund argued that although some trees do exist at Lynx Burn Unit 1, the land cannot be described as a forest. Thus, Ms. Lund argued that the burn cannot fall within the “silvicultural” exception to Ohio’s general prohibition of open burning. Testimony Lund.

{¶57} And finally, Ms. Lund 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 Lynx Burn Unit 1, 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.

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

{¶59} Further, Mr. Whan explained that TNC’s proposed burn constitutes “silvicultural” activity. TNC noted that “silvicultural activity” is defined by Ohio Adm.Code 1501:3-10-01(E) as “any management activity that controls the establishment, composition, constitution, growth, and productivity of forests.” Although this definition is not specifically applicable to Ohio Adm.Code Chapter 3745-19, Mr. Whan explained that it accurately reflects his understanding of the term, as well as the purpose of the prescribed burn at Lynx Burn Unit 1. Specifically, Mr. Whan explained that the purpose of the burn is to promote certain native species of plants and suppress the growth of invasive species. Testimony Whan.

iii. Assignments of Error 7 and 8

{¶60} In Assignments of Error 7 and 8, Ms. Lund argued that TNC’s application did not provide sufficient information regarding the location of its proposed burn.

{¶61} 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.”

{¶62} TNC’s application described the location of the proposed burn as “2500’ East of the intersection of Tulip Road (County Road 9 D) and Cline Road (Township Road T- 226).” Significantly, the application also included three maps showing burn unit boundaries: (1) a sketch with arrows showing approximate distances to the nearest residences and roads, (2) an aerial photograph, and (3) a topographical map. Each of the three maps includes a scale. PLAA Exhibit 3.

{¶63} Ms. Lund argued that Ohio Adm.Code 3745-19-05(A)(2)(d) requires the written description of the location to stand alone, independent of any maps included with the application. Ms. Lund contended that the written description of Lynx Burn Unit 1, when read apart from TNC’s maps, does not contain sufficient information to allow PLAA to identify the location of the burn. Accordingly, Ms. Lund concluded that PLAA’s issuance of the Burn Permission was unlawful and unreasonable because TNC’s application failed to satisfy the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d).
Testimony Lund.

{¶64} Moreover, Ms. Lund noted that Special Condition 5 requires TNC to address spot fires “in accordance with The Nature Conservancy prescribed burn 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.”⁶ 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 Lynx Burn Unit 1. Testimony Lund; PLAA Exhibit 4.

{¶65} 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 three maps in TNC’s application, each of which included a scale, to determine distances to the residences, populated areas, and roadways nearest to Lynx Burn Unit 1. Testimony Charles.

{¶66} Similarly, Mr. Whan explained that the three maps included in TNC’s application contain boundary information, along with specific distances to the nearest residences, roadway, and populated areas. Mr. Whan testified that such boundary information would allow TNC and PLAA to identify spot fires near the Lynx Burn Unit 1 site. Testimony Whan.

iv. Assignment of Error 9

{¶67} Finally, in Assignment of Error 9, 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 TNC’s contingency plans would be sufficient to address escaped fires that occur during the prescribed burn at Lynx Burn Unit 1.

{¶68} The Burn Permission states, “[a]ny potential spot fires shall be addressed in accordance with The Nature Conservancy prescribed burn contingency plan(s).” As an initial matter, Ms. Lund argued that this term does not adequately address spot fires

⁶ At hearing, the parties generally described “spot fires” as any fire that occurs outside of the planned burn unit boundaries. Testimony Lund, Charles.

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 TNC’s application. Instead, Ms. Lund noted that the following information regarding contingencies was included only in TNC’s burn plan for Lynx Burn Unit 1:

Contingencies (include safety zones, escape routes, secondary control lines, escape response procedures): Immediate safety zones will be the black areas. The main route to all safety zones will be the break lines. In the event of a spot fire, priority will switch to suppress of the spot. Spots will be monitored by the holding crews. In the event of an escape, the resulting wildfire will be allowed to head through grass areas, attack the flank only. Head fire will be attacked in the woods where the fire intensity will have diminished. Secondary breaks will be put in on the backside of the ridge on Burr Hill. A crew member designated to get help will call the local V.F.D. when directed by the fire boss.

TNC Exhibit 1.

{¶70} Ms. Lund argued that because the contingency information was not included within TNC’s open burning permission application, PLAA could not have reasonably based its issuance of the permission on TNC’s contingency plan. Testimony Lund.

{¶71} In response, Ms. Charles explained that during her review of TNC’s application, she requested a copy of TNC’s burn plan and obtained a draft version of its plan. Accordingly, Ms. Charles explained that she understood that TNC had a contingency plan in place for its proposed burn at Lynx Burn Unit 1. 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} This deference in regards to the interpretation of 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.*

{¶176} 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.*

{¶177} 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. PLAA's Motion for Summary Judgment

{¶178} 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. 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.

{¶84} In its Motion for Summary Judgment, PLAA 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.

{¶85} Significantly, Ms. Lund did not argue that the site specific characteristics of the area surrounding Lynx Burn Unit 1 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.

{¶86} 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 TNC for Lynx Burn Unit 1.

{¶87} 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.

{¶88} 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

{¶89} 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.

{¶90} In its Motion for Summary Judgment, PLAA 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). PLAA 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, it was not required to expressly prohibit such action in the Burn Permission.

{¶91} As an initial matter, the Commission notes 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.

{¶92} 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.

{¶93} Here, however, Ms. Lund did 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

{¶94} In Assignment of Error 6, Ms. Lund alleged that PLAA's issuance of the Burn Permission was unreasonable and unlawful because TNC would not be able to 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 permission. Specifically, Ms. Lund argued 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.

{¶95} In its Motion for Summary Judgment, PLAA argued that because Ms. Lund's Assignment of Error 6 is based upon TNC's inability to comply with the terms of its permission, the allegation must be supported with reliable, probative, and substantial evidence. 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). PLAA contended that because Ms. Lund has failed to support her assignment of error with the required reliable, probative, and substantial evidence, PLAA is entitled to summary judgment.

{¶96} 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. Zehring*, 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.

{¶97} Here, Ms. Lund conceded that TNC's open burning permission application did include information regarding steps TNC would take to reduce air emissions. However, in alleging that TNC will not be able to minimize the emission of air contaminants, Ms. Lund argued that such measures will function only to reduce visible particulate emissions and will result in an increase of other air contaminants.

{¶98} The Commission finds that Ms. Lund's unsupported contentions regarding the effectiveness of TNC's efforts to reduce the emission of air contaminants do not meet the requirements of Civ.R. 56(E). Neither Ms. Lund's Notice of Appeal nor her Response to PLAA's Motion 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 TNC will comply with the terms of the permission. *Thomas*, at ¶68.

{¶99} The Commission notes that if, after TNC conducts the prescribed burn, Ohio EPA determines that TNC did not comply with Special Condition 2, Ohio EPA could either initiate enforcement proceedings or rely upon the remedy set out in Ohio

Adm.Code 3745-19-05(A)(5).⁷ Additionally, if TNC 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”).

{¶100} Here, however, because Ms. Lund has not supported her argument that TNC will not be able to comply with Special Condition 2 with evidence of the type required by Civ.R. 56, Assignment of Error 6 is not well-taken.

E. Assignment of Error 10

{¶101} In Assignment of Error 10, Ms. Lund argues that PLAA’s issuance of the Burn Permission was unreasonable and unlawful because PLAA did not require TNC to submit a burn plan as a part of its open burning permission request. Ms. Lund argued that PLAA should have required TNC to submit a burn plan because TNC’s burn plan contains a more detailed description of the proposed burn procedures than does its open burning permission request.

{¶102} In its Motion for Summary Judgment, PLAA argued that Ohio Adm.Code 3745-19-05(A)(2) does not expressly require an applicant to submit a burn plan as a component of an open burning permission request. PLAA thus contended that even if TNC did not provide its burn plan to PLAA during the application process, PLAA is nonetheless entitled to judgment as a matter of law regarding Assignment of Error 10.

{¶103} The Commission finds that PLAA did not act unlawfully or unreasonably in issuing the Burn Permission without first reviewing TNC’s burn plan. Ohio Adm.Code 3745-19-05(A)(2) sets forth the minimum information that an applicant must include in an open burning permission request:

⁷ 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.”

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

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

{¶104} Further, Ohio Adm.Code 3745-19-05(A)(3) sets forth the criteria PLAA must apply in determining whether to grant an open burning permission request:

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. The Ohio EPA may impose such conditions as may be necessary to accomplish the purpose of this chapter.

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

{¶105} Thus, neither Ohio Adm.Code 3745-19-05(A)(2) nor Ohio Adm.Code 3745-19-05(A)(3) specifically require an applicant to submit detailed information regarding the procedures to be used during the prescribed burn. Instead, the regulations require that the applicant include information establishing the purpose of the prescribed burn; that the burn will be conducted in a time, place, and manner as to minimize the emission of air contaminants; and that the burn will have no serious detrimental effect upon adjacent properties or the occupants thereof.

{¶106} In Assignment of Error 10, Ms. Lund argued that a burn plan is necessary because it contains detailed information regarding burn procedures. Significantly, however, she did not argue that the additional information contained within TNC's burn plan was either required by Ohio Adm.Code 3745-19-05(A)(2) or

necessary to establish the permission issuance criteria contained in Ohio Adm.Code 3745-19-05(A)(3). Thus, even if PLAA did not review TNC's burn plan prior to issuing the Burn Permission, the Commission finds PLAA's decision to not do so would not have rendered the Burn Permission per se unlawful or unreasonable.

{¶107} Because Ms. Lund did not allege that specific information contained in TNC's burn plan, but not included in its open burning permission request, was either required by Ohio Adm.Code 3745-19-05(A)(2) or necessary to establish the permission issuance criteria contained in Ohio Adm.Code 3745-19-05(A)(3), Assignment of Error 10 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 here was not "necessary to the public interest." Ms. Lund raised a variety of concerns in her Notice of Appeal, including the release of fungal material into the air, the prescribed burn's contribution toward global climate change, and the indiscriminant and destructive nature of fire. Additionally, Ms. Lund argues that the use of prescribed burns to control plant ecosystems is "not natural" and that ample alternative methods, such as tree cutting, were available to achieve TNC's objectives.

{¶109} In its Motion for Summary Judgment, PLAA 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 noted 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. TNC’s application states that the purpose of the proposed burn is “to suppress the invasion of woody species and to reduce the canopy cover to encourage the growth of native grasses and forbs.” Thus, PLAA’s issuance of the Burn Permission is evidence of the agency’s implicit conclusion that TNC’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 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, 7, 8, and 9. 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 TNC'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 TNC's description of the nature of the material to be burned did not provide sufficient detail.

{¶118} Specifically, Ms. Lund contended that animals, carbon sequestered in the soil, and other material not listed in the application would necessarily be burned along with the target material. Because TNC did not list these items, Ms. Lund argued that TNC'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 of a type prohibited by law.

{¶120} Additionally, Mr. Whan testified on TNC's behalf that its application listed the material that constituted the target of the proposed burn.

{¶121} Finally, Mr. Whan testified that TNC uses "patchy burns" to provide refuges for animals, insects, and reptiles during the burn. As a result of the availability of such refuges, Mr. Whan testified that wildlife populations are able to recover more quickly.

{¶122} The Commission finds that PLAA's issuance of the Burn Permission was lawful and reasonable with respect to PLAA's consideration of TNC's description of the nature of the material to be burned. As Mr. Whan explained, the items listed in TNC's application constitute TNC's target burn material.

{¶123} 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 TNC's description of the nature of the material *targeted* in its proposed burn.

{¶124} Ms. Lund does not dispute that TNC's application accurately represents the target material and describes a majority of the material that would be burned in Lynx Burn Unit 1. Thus, the Commission finds that PLAA acted lawfully and reasonably with regard to its evaluation of TNC's description of the nature of the material to be burned.

{¶125} At hearing, Ms. Lund also argued that PLAA should have required TNC 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 TNC described quantity of material to be burned.⁸ Accordingly, the Commission declines to address that portion of Assignment of Error 4.

B. Assignment of Error 5

{¶126} In Assignment of Error 5, Ms. Lund argued that TNC’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; * * *

{¶127} Ms. Lund argued that PLAA’s issuance of the Burn Permission was unlawful and unreasonable because TNC’s proposed prescribed burn did 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.

⁸ Appellees’ post-hearing brief continued to reference the prior version of Ohio Adm.Code 3745-19-05. See note 3, *supra*.

{¶128} 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 composing Lynx Burn Unit 1.

{¶129} Similarly, Ms. Lund contended that “silvicultural” includes only activities relating to forests and argued that because Lynx Burn Unit 1 is a prairie rather than a forest, the “silvicultural” exception cannot apply.

{¶130} 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.

{¶131} In response, TNC 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 Lynx Burn Unit 1. The Commission agrees.

{¶132} As noted above, the Commission grants regulatory agencies considerable deference with regard to their interpretation of the statutes and regulations governing their agency. Administrative agencies, such as PLAA, possess special expertise and are thus entitled to deference in reviewing their interpretation of their own governing statutes and regulations. *National Wildlife Federation*, 2013-Ohio-3923, at ¶56.

{¶133} Here, TNC’s application stated that the purpose of the proposed burn was “to suppress the invasion of woody species and to reduce the canopy cover to encourage the growth of native grasses and forbs.” Significantly, TNC’s application also described the area as containing “[a]pproximately 40 acres of forested fuels” and “approximately 26 acres of grassland fuels.”

{¶134} Ms. Charles testified that she concluded that this description fell within the scope of the “silvicultural” exception to Ohio’s general prohibition of open burning.

{¶135} The Commission finds that PLAA’s interpretation of “silvicultural,” as applied to the Burn Permission, was lawful and reasonable. Although TNC and PLAA do not dispute that the area comprising Lynx Burn Unit 1 consists of both forested areas and grasslands, TNC’s application provided a valid factual foundation upon which PLAA could have reasonably concluded that the burn unit, taken as a whole, is accurately described as forested land. Accordingly, the Commission finds that PLAA acted reasonably in concluding that the activity described in TNC’s open burning permission request (intended to affect the composition of plant wildlife in the area) constitutes “silvicultural” activity. Assignment of Error 5 is not well-taken.

C. Assignments of Error 7 and 8

{¶136} In Assignments of Error 7 and 8, Ms. Lund argued that TNC’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).

{¶137} Ms. Lund argued that TNC’s open burning permission request did not meet the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d) because the written narrative description included in the application failed to detail the boundaries of Lynx Burn Unit 1. Although TNC’s application included various maps showing the proposed burn unit boundaries in relation to pertinent landmarks, Ms. Lund argued that the written narrative description must be able to stand alone. Because the narrative description itself did not include boundary information, Ms. Lund argued that the application failed to adequately detail the burn location. Further, Ms. Lund argued that without boundary information, PLAA and Ohio EPA would not be able to accurately

identify “spot fires” pursuant to Special Condition 5. Thus, Ms. Lund concluded that TNC’s application did not meet the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d) and that PLAA’s issuance of the Burn Permission was therefore unlawful and unreasonable.

{¶138} In response, Appellees argued that the narrative description must be considered in context with the maps included in TNC’s application. Mr. Whan testified that TNC’s application included three maps, each of which included boundary information along with information regarding distances to residences, populated areas, roadways, air fields, and other pertinent landmarks.

{¶139} Further, Ms. Charles testified that by using the maps, she was able to determine distances to the relevant landmarks, as required by Ohio Adm.Code 3745-19-05(A)(2)(d), and determine 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)(3).

{¶140} The Commission finds that PLAA acted lawfully and reasonably in its review of TNC’s description of the proposed burn location. Ohio Adm.Code 3745-19-05(A)(2)(d) does not expressly require the written narrative description of the burn location to stand alone, apart from included maps. Instead, the regulation simply states that the description must “include” a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks. In other words, any included maps are simply a *component* of an applicant’s description of the proposed burn location; the map and the narrative description are not separate requirements.

{¶141} TNC included three maps in its open burning permission request, each of which detailed the burn unit’s boundaries. Further, Ms. Charles testified that she was

able to use the maps to determine distances to relevant landmarks, as required by Ohio Adm.Code 3745-19-05(A)(2)(d), and 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)(3). Accordingly, the Commission finds that PLAA acted lawfully and reasonably in determining that TNC'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 7 and 8 are not well-taken.

D. Assignment of Error 9

{¶142} Finally, in Assignment of Error 9, 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 TNC's contingency plans would be sufficient to address escaped fires that occur during the prescribed burn at Lynx Burn Unit 1.

{¶143} Ms. Lund noted that the Burn Permission states, "[a]ny potential spot fires shall be addressed in accordance with The Nature Conservancy prescribed burn contingency plan(s)." At hearing, Ms. Lund contended that detailed contingency plans were not included as a part of TNC's application. Instead, Ms. Lund noted that TNC's plan for addressing spot fires is contained only in its burn plan for Lynx Burn Unit 1. Because its contingency plans were not included in TNC's application, Ms. Lund concluded that PLAA could not have possessed a valid factual foundation for determining that TNC's contingency plans would be sufficient to address escaped fires that occur during the prescribed burn at Lynx Burn Unit 1.

{¶144} In response, Ms. Charles explained that during her review of TNC's application, she requested a copy of TNC's burn plan and that TNC did provide her with a draft version of its plan.

{¶145} The Commission finds that PLAA acted lawfully and reasonably in concluding that TNC's contingency plans would be sufficient to address spot fires. Ms. Charles requested and obtained a draft copy of TNC's burn plan for Lynx Burn Unit 1. Although TNC's burn plan may not have been finalized at the time, PLAA could have reasonably concluded, based on a draft version of TNC's burn plan, that TNC would maintain contingency plans to address spot fires at Lynx Burn Unit 1. Accordingly, Assignment of Error 9 is not well-taken.

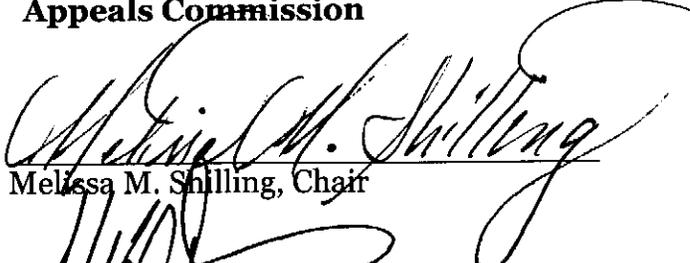
FINAL ORDER

{¶146} For the foregoing reasons, the Commission hereby AFFIRMS PLAA's issuance of Burn Permission 130307cds11.

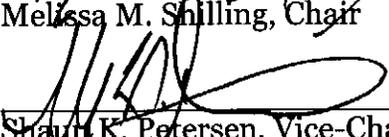
{¶147} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

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 19th day of December 2013.

Copies Sent to:

- BARBARA A. LUND
- PORTSMOUTH LOCAL AIR AGENCY
- THE NATURE CONSERVANCY
- Elizabeth R. Ewing, Esq.
- Wednesday M. Szollosi, Esq.
- Christopher Jones, Esq.
- Christopher M. Ward, Esq.

- [CERTIFIED MAIL]
- [CERTIFIED MAIL]
- [CERTIFIED MAIL]