

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BARBARA A. LUND, : Case No. ERAC 15-6831
: Case No. ERAC 15-6837
Appellant, : Case No. ERAC 15-6856
:
v. :
:
PORTSMOUTH LOCAL AIR AGENCY :
:
and :
:
THE NATURE CONSERVANCY, :
:
Appellees. :

DECISION

Rendered on January 28, 2016

Barbara A. Lund, pro se Appellant

Michael DeWine, Attorney General, *Adreanne G. Stephenson*, and *Elizabeth R. Ewing* 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 three notices of appeal filed by Appellant Barbara A. Lund. Ms. Lund challenges three permissions to open burn issued by Portsmouth Local Air Agency (“PLAA”) to The Nature Conservancy (“TNC”). Specifically, Ms. Lund challenges permission number 150210cds3, issued February 12, 2015; permission number 150210cds2, issued February 12, 2015; and permission number 150810cds24, issued August 14, 2015 (collectively, “Burn Permissions”). ERAC

No. 15-6831, Case File Item A; ERAC No. 15-6837, Case File Item A; ERAC No. 15-6856, Case File Item A.

{¶2} The Commission held a de novo hearing on November 9, 2015. At hearing, TNC made an oral motion to dismiss these appeals. The Nature Conservancy asserted that because it had already executed burns at both locations at issue in these appeals,¹ no meaningful relief was available to Appellant. Consistent with its prior ruling, the Commission denied the oral motion, finding that the issues presented are capable of repetition, yet evading review.

{¶3} Additionally, TNC filed a Motion of Appellee The Nature Conservancy to Dismiss Assignments of Error One, Two, and Four through Eleven Based Upon Doctrine of Collateral Estoppel (“Motion”). In its memorialization of the de novo hearing, the Commission advised Ms. Lund that any response to TNC’s motion must be filed on or before November 24, 2015. Ms. Lund filed her Response on November 24, 2015. ERAC No. 15-6831, Case File Items Z, AA, BB.

{¶4} Based upon the pleadings, the evidence adduced at hearing, and the relevant statutes, regulations, and case law, the Commission GRANTS IN PART TNC’s Motion. Additionally, regarding the remaining assignments of error, the Commission hereby AFFIRMS PLAA’s action in granting the Burn Permissions.

¹ The permits at issue in ERAC No. 15-6831 and 15-6856 were issued for the same location, Lynx Burn Unit 1. ERAC No. 15-6831, Case File Item A; ERAC No. 15-6856, Case File Item A.

FINDINGS OF FACT

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

{¶16} Appellee PLAA is a local air agency approved by the Ohio Environmental Protection Agency ("Ohio EPA"). Pursuant to Ohio Revised Code ("R.C.") 3704.112, the Director of Ohio EPA delegated certain powers and duties to PLAA. Under R.C. 3704.112(D), one such delegated power is the authority to grant or deny permissions to conduct open burning. Testimony Charles.

{¶17} Appellee TNC is a non-profit organization. Among other activities, TNC manages the Richard and Lucile Durrell Edge of Appalachia Preserve, which contains both burn units at issue in these appeals. TNC Exhibits 1, 2.

{¶18} Ms. Lund challenges three open burning permissions issued by PLAA to TNC. Portsmouth Local Air Agency issued the Burn Permissions to TNC based upon application forms submitted to PLAA by TNC. Each of the application forms contained questions corresponding to the following categories of information:

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

PLAA Exhibits 1, 2, 5.

I. Procedural History

A. Application and Issuance of Permission Number 150210cds3

{¶9} The Nature Conservancy filed its application for permission to open burn at Lynx Burn Unit 1 (“Lynx 1”) on February 6, 2015. The application requested permission to conduct open burning within the approximately 54-acre site between February 15, 2015, and April 7, 2015. PLAA Exhibit 1.

{¶10} The application described the location of the burn:

The site is vacant land having no formal address located 2500’ East of the intersection of Tulip Road (County Road 9 D) and Cline Road (Township Road T-226), identified as Lynx Burn Unit 1. * * *

PLAA Exhibit 1.

{¶11} Additionally, TNC included two sketches, a topographic map, and an aerial photograph identifying Lynx 1 in relation to nearby residences, roads, and populated areas. PLAA Exhibit 1.

{¶12} In describing the purpose of the of the proposed burn, TNC’s application stated:

The purpose of the burn is to encourage establishment of oak regeneration in the forested areas, increase the herbaceous component of the forested areas to benefit wildlife, and reduce the number of woody stems in the grass dominated openings to maintain habitat diversity. A prescribed fire will be conducted under an approved prescribed burn plan that considers current and expected weather conditions, smoke management, safety of fire personnel/resources and management goals for the unit.

PLAA Exhibit 1.

{¶13} Regarding the quantity and nature of the materials to be burned, TNC’s application stated:

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 management areas. Fuel loads will vary

within the unit. This unit contains 54 acres total of both forested and grassland fuels. Approximately 46 acres of forested fuels may contribute 3-5 tons per acre. The remaining approximately 8 acres of grassland fuels may contribute 2-4 tons per acre.

PLAA Exhibit 1.

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

Prescribed fires will be conducted when conditions (i.e. humidity and fuel moistures) are favorable for efficient combustion and smoke lift and dispersion into the atmosphere. Examples of actions taken to reduce the emission of air contaminants include burning only when atmospheric mixing heights are greater than 1500' to disperse smoke into the atmosphere, burning when wind conditions (speed and direction) are favorable for lifting and carrying smoke away from nearby road intersections and off site residences, burning when fuels are cured or dry to reduce smoke production. Mop up is described as taking action to extinguish smoking and/or burning debris after the flaming front of the fire has moved across the landscape. Mop up to extinguish smoking stumps, logs, etc, to reduce emissions from prolonged smoldering will begin immediately after completion of ignition.

PLAA Exhibit 1.

{¶15} In a written communication between Ms. Cindy Charles, Director, PLAA, and Mr. Richard McCarty, Naturalist, TNC, PLAA granted TNC's application and issued permission number 150210cds3 on February 12, 2015. The permission contained the following seven special conditions:

1. Permission to open burn shall be effective from February 15, 2015 to April 7, 2015, between the hours of 10:00 a.m. until 6:00 p.m.;
2. Open burning shall be conducted in a time, place, and manner as to minimize the emission of air contaminants;
3. Fire cannot create a visibility hazard on roadways, railroad tracks or airfields;
4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;
5. Any potential spot fires shall be addressed in accordance with The 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.

PLAA Exhibit 3.

B. Application and Issuance of Permission Number 150210cds2

{¶16} The Nature Conservancy filed its application for permission to open burn at the Cat's Eye area ("Cat's Eye") on February 6, 2015. The application requested permission to conduct open burning within the approximately 32-acre site between February 15, 2015, and April 7, 2015. PLAA Exhibit 5.

{¶17} The application described the location of the burn:

The site is vacant land having no formal address located 1 mile south of the intersection of Abner Hollow Road (Township Road T-177B) and West Fork Road (County Road 9 A), identified as Cat's Eye.

PLAA Exhibit 5.

{¶18} Additionally, TNC included two sketches, a topographic map, and an aerial photograph identifying Cat's Eye in relation to nearby residences, roads, and populated areas. PLAA Exhibit 5.

{¶19} In describing the purpose of the of the proposed burn, TNC's application stated:

The purpose of the burn is to encourage establishment of oak regeneration in the forested areas, increase the herbaceous component of the forested areas to benefit wildlife, and reduce the number of woody stems in the grass dominated openings to maintain habitat diversity. A prescribed fire will be conducted under an approved prescribed burn plan that considers current and expected weather conditions, smoke management, safety of fire personnel/resources and management goals for the unit.

PLAA Exhibit 5.

{¶20} Regarding the quantity and nature of the materials to be burned, TNC's application stated:

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 management areas. Fuel loads will vary within the unit. This unit contains 32 acres total of mostly forested and some grassland fuels. Approximately 27 acres of forested fuels may contribute 3-5 tons per acre. The remaining approximately 5 acres of grassland fuels may contribute 2-4 tons per acre.

PLAA Exhibit 5.

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

Prescribed fires will be conducted when conditions (i.e. humidity and fuel moistures) are favorable for efficient combustion and smoke lift and dispersion into the atmosphere. Examples of actions taken to reduce the emission of air contaminants include burning only when atmospheric mixing heights are greater than 1500' to disperse smoke into the atmosphere, burning when wind conditions (speed and direction) are favorable for lifting and carrying smoke away from nearby road intersections and off site residences, burning when fuels are cured or dry to reduce smoke production. Mop up is described as taking action to extinguish smoking and/or burning debris after the flaming front of the fire has moved across the landscape. Mop up to extinguish smoking stumps, logs, etc, to reduce emissions from prolonged smoldering will begin immediately after completion of ignition.

PLAA Exhibit 5.

{¶22} In a written communication between Ms. Charles and Mr. McCarty, PLAA granted TNC's application and issued permission number 150210cds2 on February 12, 2015. The permission contained the following seven special conditions:

1. Permission to open burn shall be effective from February 15, 2015 to April 7, 2015, between the hours of 10:00 a.m. until 6:00 p.m.;
2. Open burning shall be conducted in a time, place, and manner as to minimize the emission of air contaminants;

3. Fire cannot create a visibility hazard on roadways, railroad tracks or airfields;
4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;
5. Any potential spot fires shall be addressed in accordance with The 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.

PLAA Exhibit 6.

C. Application and Issuance of Permission Number 150810cds24

{¶23} The Nature Conservancy did not execute a burn at Lynx 1 pursuant to permission number 150210cds3, which expired on April 7, 2015. Thus, TNC reapplied for permission to open burn at Lynx 1 on August 7, 2015. The Nature Conservancy's August application contained identical answers to those included in its February application, except for the dates requested for permission to burn. The new application requested a burn window from September 1, 2015, to December 1, 2015. PLAA Exhibit 2.

{¶24} In a written communication between Ms. Charles and Mr. Michael Hall, TNC, PLAA granted TNC's application and issued permission number 150810cds24 on August 14, 2015. The permission contained the following seven special conditions:

1. Permission to open burn shall be effective from September 1, 2015 to December 1, 2015, between the hours of 10:00 a.m. until 6:00 p.m.;
2. Open burning shall be conducted in a time, place, and manner as to minimize the emission of air contaminants;
3. Fire cannot create a visibility hazard on roadways, railroad tracks or airfields;
4. Smoke from fires shall have no serious detrimental effect upon adjacent properties or the occupants thereof;

5. Any potential spot fires shall be addressed in accordance with The 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.

PLAA Exhibit 4.

II. Assignments of Error

{¶25} Ms. Lund timely appealed the three burn permissions discussed above. Specifically, Ms. Lund filed her appeal of permission number 150210cds (ERAC No. 15-6831) on March 4, 2015; permission number 150210cds2 (ERAC No. 15-6837) on March 13, 2015; and permission number 150810cds24 (ERAC No. 15-6856) on September 11, 2015. ERAC No. 15-6831, Case File Item A; ERAC No. 15-6837, Case File Item A; ERAC No. 15-6856, Case File Item A.

{¶26} The Commission groups Ms. Lund's assignments of error in each of the three appeals in the following categories:

	Case Number		
	15-6831	15-6837 ²	15-6856
Purpose of burn does not fall within the scope of the “recognized horticultural, silvicultural (forestry), range, or wildlife management practices” exception	1, 2, 4, 6	1, 2	1, 2, 4, 6
Application does not quote the language of the Administrative Code exactly	3		3
Description of the location of the burn in the application did not provide sufficient detail	5	3	5
PLAA should prohibit burning within 1,000 ft. of occupied structures	10		9
Description of materials to be burned did not provide sufficient detail	4, 6	4	4, 6
Burn will not be conducted in a time, place, or manner as to minimize emission of air contaminants	8	5	7
Permissions allow for spot fires	7	6	10
PLAA should have required ODNR to file its burn plans as a part of the application	4, 7, 8	6, 7	4, 10, 11
Burn is not necessary to the public interest	9	8	12, 13
Due process	11	9	14
Burn will create a visibility hazard			8
Specific dates of authorized for opening burning are unreasonable and unlawful			13

A. Purpose of Proposed Open Burn

{¶27} In this group of assignments of error, Ms. Lund argues that the purposes of the proposed burns, as set forth in TNC’s applications, do 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. ERAC No. 15-6831,

² Appellant filed an amended notice of appeal on March 19, 2015. ERAC No. 15-6837, Case File Item C.

Case File Item A; ERAC No. 15-6837, Case File Item A; ERAC No. 15-6856, Case File Item A.

{¶28} At hearing, Ms. Lund testified that this exception should apply only to activities that enhance broad agricultural and economic interests for the state of Ohio. As examples of such activities, Ms. Lund cited the management of horticultural orchards, timber producing forests, and livestock produced on rangeland. Ms. Lund argued that because TNC's proposed burns do not provide direct economic or agricultural benefits for the state, the burns do not fall within the scope of Ohio Administrative Code ("Adm.Code") 3745-19-04(C)(5). Testimony Lund.

{¶29} Regarding wildlife management, Ms. Lund argued that the burns do not fall within the scope of the term "recognized wildlife management practices" because the primary purpose of the burns is not to manage for the production of game species or livestock. And regarding silvicultural practices, Ms. Lund asserted that the burns do not fall within the scope of the silvicultural exception because the forested "areas" within Lynx 1 and Cat's Eye do not constitute a "forest." Testimony Lund.

{¶30} In response, Ms. Charles testified that each of TNC's applications contained information sufficient to conclude that the purpose of the burn falls within the scope of Ohio Adm.Code 3745-19-4(C)(5). She testified that the applications listed the purpose of the burn as "oak regeneration" and that this falls within the scope of the "recognized silvicultural practices" exception. Testimony Charles.

{¶31} Additionally, Mr. McCarty asserted his belief that the proposed burns would fall within the scope of the "recognized silvicultural practices" exception. Specifically, Mr. McCarty noted that "silvicultural activity" is defined by Ohio Adm.Code 1501:3-10-01(E) as "any management activity that controls the establishment,

composition, growth, and productivity of forests.” Although this definition is not specifically applicable to Ohio Adm.Code Chapter 3745-19, Mr. McCarty explained that it accurately reflects his understanding of the term, as well as the purpose of the prescribed burn at Lynx 1. Testimony McCarty.

{¶32} Additionally, Mr. McCarty explained that although Lynx 1 does contain pockets of grassland, the area encompassed by the burn unit, taken as a whole, constitutes a forested unit. Testimony McCarty.

B. Wording of Application Form

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

{¶34} By contrast, PLAA’s application form allows the applicant to check a category labeled “recognized horticultural, silvicultural, range management or wildlife management practices,” which lacks the parenthetical word “forestry” to describe the term “silvicultural” and expressly states that the word “management” is associated with both “range” and “wildlife.” E.g., PLAA Ex. 1

{¶35} Ms. Lund contends that, in doing so, PLAA has expanded the scope of Ohio Adm.Code 3745-19-04 and thus acted unlawfully and unreasonably in issuing the Burn Permissions. Testimony Lund.

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

C. Description of the Location of Proposed Open Burn

{¶37} In this group of assignments of error, Ms. Lund argues that the information TNC provided in its applications regarding the locations of its proposed burns—both narrative descriptions and maps—lacks sufficient detail to describe the boundaries of the burn units and/or does not identify the latitudinal and longitudinal coordinates. Testimony Lund.

{¶38} At hearing, Ms. Charles testified that Ohio's open burning regulations do not require an applicant to provide specific geographical coordinates and that the maps TNC provided as a part of its applications were "sufficient under the law." Testimony Charles.

D. Distance to Nearest Occupied Structures

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

{¶40} Ms. Lund did not offer specific testimony regarding this argument at hearing. In her notices of appeal, however, Ms. Lund notes that Ohio Adm.Code 3745-19-04(B)(3)(c) prohibits open burning of residential or agricultural waste within 1,000 feet of the nearest inhabited building. Ms. Lund argues that the same rationale underlying the minimum distance requirement for residential or agricultural waste should also apply to the type of burn at issue in these appeals. ERAC No. 15-6831, Case File Item A; ERAC No. 15-6856, Case File Item A.

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

E. Description of Material to be Burned

{¶42} In this group of assignments of error, Ms. Lund argues that TNC's description of the nature and quantity of materials to be burned was inadequate. At hearing, Ms. Lund suggested that an applicant should list each and every species of plant and animal present at the burn location. Ms. Lund testified that TNC's applications list only some of the species that would be affected by open burning; specifically, TNC omitted dead animals, spiders, insects, salamanders, rodents, mosses, lichens, and mushrooms. Thus, Ms. Lund concluded that PLAA's issuance of the Burn Permissions was unlawful and unreasonable. Testimony Lund.

{¶43} In response, Ms. Charles testified that TNC's descriptions were "sufficient under the law." Testimony Charles.

{¶44} Further, Mr. McCarty explained that animals are not the target material for the prescribed burns. Mr. McCarty testified that wildlife generally avoids fire and that in his experience, which consists of approximately 40 prescribed burns, he has not witnessed any large animal carcasses consumed during prescribed fire activities. Testimony McCarty.

F. Minimization of Emission of Air Contaminants

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

approach to “minimize” the emission of air contaminants is to not burn. Thus, because the Burn Permissions authorize open burning, Ms. Lund argues they do not minimize the emission of air contaminants. ERAC No. 15-6831, Case File Item A; ERAC No. 15-6837, Case File Item A; ERAC No. 15-6856, Case File Item A.

{¶46} At hearing, Mr. McCarty testified that TNC conducts prescribed burning only when fuels are cured and dried, which reduces smoke emissions. Also, TNC conducts prescribed burns only when weather conditions are such that smoke can be sufficiently dispersed into the atmosphere. And finally, prompt mop-up activities minimize smoldering after prescribed burns have concluded. Testimony McCarty.

G. Spot Fires

{¶47} In this group of assignments of error, Ms. Lund argues that PLAA’s issuance of the Burn Permissions was unlawful and unreasonable because they “allow” spot fires. Although Ms. Lund did not offer specific testimony at hearing, her notices of appeal generally allege that such spot fires constitute “additional” fires authorized by the Burn Permissions to occur outside the boundaries of the burn site. Thus, Ms. Lund reasons that PLAA’s issuance of the Burn Permissions was unlawful and unreasonable. ERAC No. 15-6831, Case File Item A; ERAC No. 15-6837, Case File Item A; ERAC No. 15-6856, Case File Item A.

{¶48} In response, Mr. McCarty testified that the Burn Permissions do not “allow” spot fires. Rather, Mr. McCarty explained that the responsible execution of a prescribed burn requires planning for all potential eventualities, including preparations for addressing accidental or escaped fires. Testimony McCarty.

H. Burn Plans and Contingency Plans

{¶49} Ms. Lund argues that PLAA acted unlawfully and unreasonably by failing to require that TNC submit its burn plans and contingency plans with its applications. The Nature Conservancy's applications state that approved burn plans are in place, and the plans consider "current and expected weather conditions, smoke management, safety of fire personnel and resources, and management goals for the unit." Further, each Burn Permission contains a condition requiring TNC to address spot fires "in accordance with The Nature Conservancy prescribed burn contingency plan(s)." The Nature Conservancy did not submit these plans to PLAA for review as part of its applications. Testimony Lund; PLAA Exhibits 1, 2, 3, 4, 5, 6.

{¶50} Ms. Lund testified that it was unreasonable and unlawful for PLAA to issue the Burn Permissions without first reviewing TNC's burn plans and contingency plans. Moreover, Ms. Lund asserted that the TNC's burn plans for both Lynx 1 and Cat's Eye were out of date. Ms. Lund noted that TNC created the burn plans in 2014 and argued that TNC should have been required to update their burn plans for 2015. Testimony Lund; Lund Exhibit G.

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

{¶52} On behalf of TNC, Mr. McCarty testified that TNC develops a burn plan prior to each burn it conducts. He explained that such burn plans contain a variety of information, including emergency contact numbers, a detailed description of the

required weather conditions, modeling information, and contingency plans for addressing spot fires. Testimony McCarty.

{¶53} Further, Mr. McCarty explained that although TNC created the burn plans in 2014, they were still “current” in 2015 because conditions at the two sites had not changed significantly in the intervening time. Testimony McCarty.

I. Necessary to the Public Interest

{¶54} Here, Ms. Lund argues that PLAA acted unlawfully and unreasonably in concluding that the proposed burns were necessary to the public interest. As discussed above, Ms. Lund testified that the proposed burns did not fall within the scope of Ohio Adm.Code 3745-19-04(C)(5). Additionally, Ms. Lund testified that PLAA should have undertaken a cost-benefit analysis before granting the Burn Permissions. Testimony Lund.

{¶55} In response, Ms. Charles testified that because PLAA determined that the proposed open burns meet the requirements of Ohio’s open burning regulations, the burns are necessary to the public interest. Testimony Charles.

J. Due Process

{¶56} In this group of assignments of error, Ms. Lund argues that the process PLAA utilizes for issuing permissions to open burn is unconstitutional. Ms. Lund did not present specific testimony at hearing. Her notices of appeal, however, allege that issuing the permissions without prior opportunity for public input violates the Due Process Clause of the federal Constitution. ERAC No. 15-6831, Case File Item A; ERAC No. 15-6837, Case File Item A; ERAC No. 15-6856, Case File Item A.

K. Visibility Hazard

{¶57} Regarding visibility hazards, Ms. Lund argues that PLAA acted unreasonably and unlawfully by including Special Condition 3 in permission number 150810cds24. The special condition provides, “[f]ire cannot create a visibility hazard on roadways, railroad tracks or airfields.” Ms. Lund did not present specific testimony at hearing. However, her notice of appeal in ERAC No. 15-6856 alleges that PLAA should have used the word “smoke” rather than “fire.” ERAC No. 15-6856, Case File Item A.

L. Dates Authorized for Open Burning

{¶58} Finally, Ms. Lund argues that PLAA acted unreasonably and unlawfully by issuing permission number 150810cds24 with effective dates between September 1, 2015, and December 1, 2015. Although Ms. Lund did not provide specific testimony at hearing, her notice of appeal in ERAC No. 15-6856 asserts that execution of a prescribed burn at Lynx 1 during the fall season would negatively impact native populations of box turtles. ERAC No. 15-6856, Case File Item A.

III. Motion to Dismiss

{¶59} Prior to the de novo hearing, TNC filed a partial motion to dismiss in ERAC No. 15-6831 (“2015 Appeal”). In its motion, TNC argues that all but one of the assignments of error in Ms. Lund’s 2015 Appeal were previously litigated by the same parties in *Lund v. PLAA & TNC*, ERAC No. 13-016726 (Dec. 19, 2013) (“2013 Appeal”). Thus, TNC contends that those assignments of error should be dismissed pursuant to the doctrine of collateral estoppel or issue preclusion. ERAC No. 15-6831, Case File Item Z.

{¶60} Ms. Lund filed a response on November 24, 2015. In her response, Ms. Lund argues that TNC’s Motion mischaracterizes her assignments of error in the 2015

Appeal. Ms. Lund contends that the issues presented in the 2015 Appeal differ from those in the 2013 Appeal. Specifically, Ms. Lund notes that although the underlying action in both appeals are burn permissions issued for Lynx 1, the information provided by TNC to PLAA in its applications differ between the 2013 and 2015 appeals.

{¶61} Although TNC's motion addresses only ERAC No. 15-6831, the Commission will discuss the application of the collateral estoppel doctrine to all three of the appeals presently before ERAC in the Conclusions of Law below.

CONCLUSIONS OF LAW

I. ERAC Standard of Review

{¶62} 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:

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.

{¶63} 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).

{¶64} The Commission is required to grant "due deference to the Director's 'reasonable interpretation of the legislative scheme governing his Agency.'" *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274 (2005), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State ex rel. Celebrezze v. National Lime & Stone Co.*, 68 Ohio St. 3d 377 (1994); *North Sanitary Landfill, Inc. v.*

Nichols, 14 Ohio App. 3d 331 (2nd Dist. 1984). Administrative agencies possess special expertise in specific areas and are tasked with implementing particular statutes and regulations. *National Wildlife Federation v. Korleski*, 10th Dist. Franklin Nos. 12AP-278, 12AP-279, 12AP-80, 12AP-81, 2013-Ohio-3923, ¶56. Thus, such agencies are entitled to considerable deference when reviewing their interpretation of their own governing rules and regulations. *Id.*

{¶65} Deference granted to an agency's interpretation of its administrative regulations is not, however, without limits. See e.g., *B.P. Exploration and Oil, Inc. v. Jones*, ERAC Nos. 184134-36 (March 21, 2001). The Commission has consistently held that an agency's interpretation of its governing statutes and regulations must not be "at variance with the explicit language of the [statutes or] regulations." *Id.*

{¶66} Further, the Commission's standard of review does not permit ERAC to substitute its judgment for that of the Director as to factual issues, and it is well-settled that there is a degree of deference for the agency's determination inherent in the reasonableness standard. *National Wildlife Federation*, ¶48. "It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable." *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977). Accordingly, "the ultimate factual issue to be determined by [ERAC] upon the de novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether [ERAC] would have taken the same action." *Id.*

{¶67} Similar to the deference afforded the Director's regarding interpretation of administrative regulations, deference toward an agency's factual determinations is

also not unlimited. Instead, the Commission engages in “a limited weighing of the evidence.” *Ohio Fresh Eggs, LLC v. Wise*, 10th Dist. Franklin No. 07AP-780, 2008-Ohio-2423, ¶32 (emphasis added). Specifically, “ERAC must determine whether the evidence is of such quantity and quality that it provides a sound support for the Director’s action.” *Id.*

II. Regulatory Framework

{¶68} Open burning, as defined by Ohio Adm.Code 3745-19-01(I),³ is generally prohibited in Ohio except under certain limited circumstances. Ohio Adm.Code 3745-19-03(A); Ohio Adm.Code 3745-19-04(A).

{¶69} 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.

{¶70} 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).

{¶71} Conversely, prior to conducting open burning pursuant to recognized horticultural, silvicultural, range, or wildlife management practices, an applicant must

³ “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).

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).

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

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

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

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

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

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

{¶74} Finally, pursuant to R.C. 3704.111 and 3704.112, the Director is authorized to enter into contractual agreements with local air pollution control agencies (such as PLAA) to provide air pollution control regulatory services on behalf of Ohio EPA. Such services include the administration of Ohio's open burning regulatory

scheme and the issuance or denial of permissions to conduct open burning made pursuant to Ohio Adm.Code Chapter 3745-19.

III. Doctrine of Collateral Estoppel/Issue Preclusion

{¶75} The doctrine of issue preclusion, traditionally known as collateral estoppel, provides “a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.” *Ft. Frye Teachers Assn. v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 692 N.E.2d 140 (1998).

{¶76} The Ohio Supreme Court has held that collateral estoppel applies when: (1) the identical issue or fact was actually and directly litigated in a previous action; (2) the issue or fact was passed upon and determined by a court of competent jurisdiction; and (3) both actions involved the same parties. *Thompson v. Wing*, 70 Ohio St.3d 176, 637 N.E.2d 917 (1994).

{¶77} Here, the parties in all three appeals currently before the Commission are identical to those in the 2013 Appeal, and the parties do not dispute that ERAC had jurisdiction over the 2013 Appeal.

{¶78} Thus, application of the collateral estoppel doctrine in these appeals turns on whether the issues are identical to those litigated in Ms. Lund’s 2013 Appeal. For purposes of determining whether issues in two actions are identical, courts look to whether the same evidence would be presented in each issue. *State ex rel. Petro v. Dujute*, 11th Dist. Trumbull Nos. 2002-T-0059, 2002-T-0074, 2003-Ohio-1211, ¶19.

IV. Analysis

A. Purpose of Proposed Open Burn

{¶79} Ms. Lund argues that TNC's proposed burns do not fall within the scope of Ohio Adm.Code 3745-19-04(C)(5). Specifically, Ms. Lund argues that Ohio Adm.Code 3745-19-04(C)(5) authorizes only those burns that enhance broad agricultural and economic interests in the state of Ohio. Because TNC's proposed burns would not directly further the economic or agricultural interests of the state, Ms. Lund contends that the burns fall outside the scope of the "recognized horticultural, silvicultural (forestry), range, or wildlife management practices" exceptions to Ohio's general prohibition of open burning.

{¶80} Additionally, Ms. Lund notes that although both Lynx 1 and Cat's Eye contain forested or wooded areas, the units also contain areas of grassland or prairie. Thus, Ms. Lund asserts that the silvicultural exception to Ohio's general prohibition of open burning cannot apply because the units are not accurately described as "forest."

{¶81} In response, Ms. Charles testified that TNC's stated purpose—"oak regeneration"—falls within the scope of the "recognized silvicultural practices" exception, and Mr. McCarty explained that although Lynx 1 does contain areas of grassland, the burn unit, taken as a whole, constitutes a forested unit.

{¶82} To the extent Ms. Lund argues that a burn unit with both forested and un-forested areas cannot qualify under the silvicultural exception, the Commission finds this argument is barred by the doctrine of collateral estoppel. In describing Ms. Lund's argument in the 2013 Appeal, the Commission stated:

* * * 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.

2013 Appeal, ¶56.

{¶83} The Commission disagreed, concluding:

* * * Significantly, TNC’s application also described the areas as containing ‘[a]pproximately 40 acres of rested fuels’ and ‘approximately 26 acres of grassland fuels.’

* * *

* * * 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. * * *

2013 Appeal, ¶¶133-135

{¶84} Here, in the 2015 Appeals, TNC’s applications for Lynx 1 state that the unit consists of “[a]pproximately 46 acres of forested fuels” and “approximately 8 acres of grassland fuels.” Additionally, TNC describes Cat’s Eye as “[a]pproximately 27 acres of forested fuels” and “approximately 5 acres of grassland fuels.” The Commission notes that the 2015 burn units contain a *higher* percentage of forested area, relative the total burn unit area, as compared to the burn unit at issue in the 2013 Appeal.

{¶85} Thus, although the precise acreage may indeed differ slightly from the 2013 Appeal, the Commission concludes that the relevant issue—whether a prescribed burn conducted in a partially forested/partially grassland area may qualify under the silvicultural exception—has been previously litigated by the same parties and decided upon by a tribunal of competent jurisdiction. Ms. Lund’s claims regarding the forest/grassland composition of the burn units is barred by collateral estoppel.

{¶86} However, to the extent Ms. Lund argues that TNC's specific descriptions (i.e., its answers to Question 2 on the application forms) did not indicate the intent to conduct open burning pursuant to recognized silvicultural practices, the Commission finds Ms. Lund's argument is *not* barred by collateral estoppel.

{¶87} In the 2013 Appeal, the Commission noted the following language in TNC's application in response to Question 2:

* * * 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.'

2013 Appeal, ¶53.

{¶88} By contrast, in each of the 2015 Appeals, TNC's applications stated:

The purpose of the burn is to encourage establishment of oak regeneration in the forested areas, increase the herbaceous component of the forested areas to benefit wildlife, and reduce the number of woody stems in the grass dominated openings to maintain habitat diversity.

PLAA Exhibits 1, 2, 5.

{¶89} Thus, the Commission finds these issues are not identical, and the doctrine of collateral estoppel does not apply.

{¶90} Nonetheless, the Commission finds PLAA acted lawfully and reasonably in concluding that TNC's proposed burns fell within the scope of the silvicultural exception to Ohio's general prohibition of open burning.

{¶91} Meriam-Webster Online Dictionary defines "silviculture" as "a branch of forestry dealing with the development and care of forests." Silviculture, <http://www.merriam-webster.com/dictionary/silviculture>. Similarly, Ohio Adm.Code 1501:3-10-01(E) defines "silvicultural activity" as "any management activity that controls the establishment, composition, growth, and productivity of forests." Thus, the

term “silvicultural” is not limited to commercial logging activities or the management of timber producing forests.

{¶92} As noted above, administrative agencies are granted due deference in interpreting the statutes and regulations their own governing rules and regulations. And here, TNC’s applications expressly indicated their intent to use prescribed fire to affect the composition of plant life in the forested areas of Lynx 1 and Cat’s Eye. Specifically, TNC states that the purposes of its proposed burns are to “encourage establishment of oak regeneration” and to “increase the herbaceous component” of the forested areas of the burn units.

{¶93} Thus, because the term “silvicultural” is not limited to commercial logging activities and having found that TNC’s applications expressly indicated their intent to use prescribed fire to affect the composition of plant life in the forested areas of Lynx 1 and Cat’s Eye, the Commission finds that PLAA acted lawfully and reasonably in concluding that TNC’s proposed burns fell within the scope silvicultural exception to Ohio’s general prohibition of open burning.

B. Wording of Application Form⁴

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

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

⁴ These assignments of error were not previously litigated in the 2013 Appeal and thus are not barred by collateral estoppel.

labeled “recognized horticultural, silvicultural, range management or wildlife management practices.”

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

{¶97} As discussed above, PLAA’s interpretation of the word “silvicultural” did not conflict with the text of the regulation. Further, the evidence indicated that PLAA did not grant TNC’s applications pursuant to the “range management” or “wildlife management” exceptions. Instead, as discussed above, the evidence demonstrated that PLAA granted TNC’s applications pursuant to the “silvicultural” exception.

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

C. Description of the Location of Proposed Open Burn

{¶99} Here, Ms. Lund argues that the information TNC provided in its applications regarding the proposed locations of its burns lacks sufficient detail to describe the boundaries of the burn units and/or latitudinal and longitudinal coordinates.

{¶100} In response, Ms. Charles testified that Ohio’s open burning regulations do not require an applicant to provide specific coordinates and that the maps TNC provided as a part of its applications were “sufficient under the law.”

{¶101} To the extent Ms. Lund argues that an applicant should be required to provide latitudinal/longitudinal coordinates to describe the boundaries of a burn unit in the narrative portion of the application, the Commission finds this argument is barred by collateral estoppel.

{¶102} In the 2013 Appeal, the Commission described Ms. Lund's arguments:

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 must be able to stand alone. * * *

2013 Appeal, at ¶137.

{¶103} The Commission held that PLAA acted lawfully and reasonably in its review of TNC's description of the proposed burn location, stating:

* * * 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.

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 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). * * *

2013 Appeal, at ¶¶140-141.

{¶104} Similarly, here, in arguing that an applicant should be required to provide specific latitudinal/longitudinal coordinates to describe the burn unit's boundaries as part of the narrative description, Ms. Lund contends that the narrative description must fulfill the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d)

without reference to supplemental maps. This argument is identical to the issue presented in the 2013 Appeal and thus is barred by collateral estoppel.

{¶105} To the extent Ms. Lund argues that the specific information provided in TNC's 2015 applications (both the narrative descriptions and maps, taken together) did not meet the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d), the Commission finds this argument is *not* barred by collateral estoppel.

{¶106} Regarding Cat's Eye, the particular location of the burn unit differs from the unit at issue in the 2013 Appeal. Thus, the issues of whether TNC provided sufficient information as to show distances to relevant landmarks, and whether PLAA possessed a valid factual foundation to conclude that the proposed burn would have a serious detrimental effect upon adjacent properties, have not been previously litigated.

{¶107} Further, regarding Lynx 1, Ms. Lund correctly observes that although the name of the burn unit is identical to the unit at issue in the 2013 Appeal, the specific information provided by TNC regarding location is not identical the information provided in the 2013 application. Although TNC did not include a copy of its 2013 application as part of its Motion, Ms. Lund's Response included a partial copy of TNC's 2013 application. The portion of the application attached to Appellant's Response demonstrates that although the names of the burn units are identical, the specific size and shape of the burn unit—and thus the associated maps and narrative description—has changed between the 2013 and 2015 applications. The Commission finds this difference significant and concludes that Ms. Lund's argument regarding the sufficiency of the specific location information provided by TNC about Lynx 1 is not barred by the doctrine of collateral estoppel.

{¶108} Nonetheless, the Commission finds that PLAA acted lawfully and reasonably in its review of TNC's location information. Each TNC application included four maps, identifying the locations of the burn units in relation to nearby residences, roads, and populated areas, as required by Ohio Adm.Code 3745-19-05(A)(2)(d). Together with the other information contained in TNC's applications, PLAA possessed a valid factual foundation for its conclusion that the proposed burns would have no serious detrimental effect upon adjacent properties or the occupants thereof, as required by Ohio Adm.Code 3745-19-05(A)(3). Ms. Lund did not provide testimony to suggest that PLAA could not have discerned the relevant information because TNC's maps were in some way deficient.

{¶109} Accordingly, Ms. Lund's assignments of error regarding TNC's location descriptions are not well-taken.

D. Distance to Nearest Occupied Structures

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

{¶111} The Commission finds this argument is barred by collateral estoppel.

{¶112} In the 2013 Appeal, the Commission stated:

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.

* * *

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 PLAA issued to TNC for Lynx Burn Unit 1.

* * *

* * * [Ms. Lund's] 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.

2013 Appeal, at ¶¶83-88 (internal citations omitted) (emphasis in original).

{¶113} The Commission finds that Ms. Lund's argument relating to a 1,000-foot limitation is identical to that presented in the 2013 Appeal and therefore is barred by collateral estoppel.

E. Description of Material to be Burned

{¶114} In this group of assignments of error, Ms. Lund argues that TNC's description of the nature and quantity of materials to be burned was inadequate. At hearing, Ms. Lund suggested that an applicant should list each and every species of plant and animal present at the burn location and testified that TNC's applications list only some of the species that would be affected by open burning. Specifically, Ms. Lund contended that TNC omitted dead animals, spiders, insects, salamanders, rodents, mosses, lichens, and mushrooms.

{¶115} In response, Ms. Charles testified that TNC's descriptions were "sufficient under the law."

{¶116} Further, Mr. McCarty explained that animals are not the target material for the prescribed burns. Mr. McCarty testified that wildlife generally avoids fire and

that in his experience, which consists of approximately 40 prescribed burns, he has not witnessed any large animal carcasses consumed during prescribed fire activities.

{¶117} As an initial matter, the Commission notes that Ms. Charles's statement that TNC's descriptions were "sufficient under the law" is not determinative of these assignments of error. Ohio Adm.Code 3745-19-05(A)(2) requires that an application include "[t]he quantity or acreage and the nature of the materials to be burned."

{¶118} Upon review, however, the Commission finds these assignments of error are barred by collateral estoppel.

{¶119} In all three of its 2015 applications, TNC described the material to be burned using language identical to the application at issue in the 2013 Appeal. Specifically, TNC described the material to be burned as including "grass and herbaceous stems, deciduous leaf litter, woody branches, limbs, and trees both live and dead." Compare 2013 Appeal, ¶47 with PLAA Exhibits 1, 2, 5.

{¶120} Further, as in her 2013 Appeal, Ms. Lund does not dispute here that TNC accurately described the majority of the material to be burned.⁵ Rather, Ms. Lund contends that TNC should have included additional species in describing the material to be burned.

{¶121} In the 2013 Appeal, the Commission ruled upon an identical issue, stating:

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

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

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.

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.

2013 Appeal, at ¶¶123-124.

{¶122} Thus, the Commission finds the relevant issue—whether an applicant is required to list every organism that may be consumed during a proposed prescribed burn—has been previously litigated between the same parties in a previous appeal. Accordingly, the Commission finds the argument barred by collateral estoppel.

F. Minimization of Emission of Air Contaminants

{¶123} Here, Ms. Lund alleges that PLAA's issuance of the Burn Permissions was unlawful and unreasonable because the permissions do not ensure the burns will be conducted in a time, place, and manner so as to minimize the emission of air contaminants. Although Ms. Lund did not offer specific testimony at hearing, her notices of appeal generally state that the only effective approach to "minimize" the emission of air contaminants is to not conduct prescribed burns. Thus, because the Burn Permissions authorize open burning, Ms. Lund argues they do not minimize the emission of air contaminants.

{¶124} At hearing, Mr. McCarty testified that TNC conducts prescribed burning only when fuels are cured and dried, which reduces smoke emissions. Also, TNC conducts prescribed burns only when weather conditions are such that smoke can be

sufficiently dispersed into the atmosphere. And finally, prompt mop-up activities minimize smoldering after prescribed burns have concluded.

{¶125} The Commission finds this argument is barred by collateral estoppel. In the 2013 Appeal, the Commission noted the following:

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.

2013 Appeal, at ¶32 (emphasis added).

{¶126} The Commission dismissed this assignment of error pursuant to PLAA's motion for summary judgment, holding:

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. 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.

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.

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.

2013 Appeal, at ¶¶96-98 (internal citations omitted).

{¶127} Here, as with her 2013 Appeal, Ms. Lund concedes that TNC's applications list several steps that will be taken to reduce smoke emissions. Ms. Lund argues that the only way to reduce the emission of air contaminants is to burn less, or no, material. The Commission finds this issue is identical to the one presented in Ms. Lund's 2013 Appeal. Accordingly, Ms. Lund's assignments of error regarding minimization of the emission of air contaminants are barred by collateral estoppel.

G. Spot Fires⁶

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

{¶129} Special Condition 5 in each of the Burn Permissions states, "[a]ny potential spot fires shall be addressed in accordance with the ODNR approved contingency plan(s)." As Mr. McCarty explained at hearing, this language does not "authorize" spot fires. Rather, the condition imposes restrictions on the manner in which the permission holder must address unplanned or escaped fires that occur during a prescribed burn.

{¶130} Ms. Lund's assignments of error regarding spot fires are not well-taken.

⁶ These assignments of error were not previously litigated in the 2013 Appeal and are thus not barred by collateral estoppel.

H. Burn Plans and Contingency Plans

{¶131} Here, Ms. Lund argues that PLAA acted unreasonably by failing to require that TNC submit its burn plans and contingency plans with its applications. The Nature Conservancy's applications state that approved burn plans are in place that consider "current and expected weather conditions, smoke management, safety of fire personnel and resources, and management goals for the unit." Further, each burn permission contains a condition requiring TNC to address spot fires "in accordance with The Nature Conservancy prescribed burn contingency plan(s)." However, TNC did not submit these plans to PLAA for review as part of its applications.

{¶132} Ms. Lund testified that it was unreasonable and unlawful for PLAA to issue the Burn Permissions without first reviewing TNC's burn plans and contingency plans. Moreover, Ms. Lund asserted that the TNC's burn plans for both Lynx 1 and Cat's Eye were out of date.

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

{¶134} Mr. McCarty testified that TNC develops a burn plan prior to each burn it conducts. He explained that such burn plans contain a variety of information, including emergency contact numbers, a detailed description of the required weather conditions, smoke modeling information, and contingency plans for addressing spot fires. Further, Mr. McCarty explained that although TNC created the burn plans in 2014, they had determined that the plans were still "current" in 2015 because conditions at the two sites had not changed significantly in the intervening time.

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

{¶136} Nonetheless, the Commission finds PLAA acted lawfully and reasonably in this instance.

{¶137} First, to the extent Ms. Lund argues that the mere reference to TNC's contingency plans in the Burn Permissions created an affirmative duty for TNC to submit its burn plans to PLAA for review, the Commission finds this argument is barred by collateral estoppel.

{¶138} In the 2013 Appeal, the Commission stated:

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.

2013 Appeal, at ¶106.

{¶139} To the extent Ms. Lund argues that the information contained within TNC's burn plans would have been necessary for PLAA to conclude that TNC's proposed burns would not have a serious detrimental effect upon adjacent properties or the occupants thereof, the Commission finds the issue is *not* barred by collateral estoppel.

{¶140} In the 2013 Appeal, testimony established that PLAA requested and obtained a draft copy of TNC's burn plan for Lynx 1. 2013 Appeal, at ¶145. Here, the

record does not indicate whether PLAA possessed a copy of TNC's burn plan for either Lynx 1 or Cat's Eye. Because the present factual scenario is dissimilar to the scenario presented in the 2013 Appeal, the issue is therefore not barred by collateral estoppel.

{¶141} Nonetheless, the Commission finds that PLAA acted lawfully and reasonably with respect to burn plans and/or contingency plans. Appellees correctly observe that nothing in Ohio's open burning regulations require an applicant to submit a burn plan as a part of its application for permission to open burn. Further, the applications stated TNC had developed burn plans that consider weather conditions, smoke management, safety of fire personnel and resources, and management goals for the unit. Even without evaluating the contents of the contingency plans, the mere existence of such plans would tend to indicate preparedness. Thus, in conjunction with the other information provided in the applications (e.g., the distance to nearby occupied structures), the Commission finds Ms. Charles could have reasonably concluded the proposed burns would not have any serious detrimental effect upon adjacent properties or the occupants thereof.

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

I. Necessary to the Public Interest

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

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

{¶145} To the extent Ms. Lund argues that the application form should include specific questions related to the proposed burn’s necessity to the public interest, the Commission stated in the 2013 Appeal:

The Commission has previously held that Ohio EPA or PLAA need not consider specific ‘forestry concerns’ in evaluating open burning permission requests. Instead, the Commission 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.’

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.’

2013 Appeal, at ¶¶110-111 (internal citations omitted).

{¶146} To the extent, however, that Ms. Lund argues these particular prescribed burns were not necessary to the public interest, the Commission finds her assignments of error are not barred by collateral estoppel because the reviewing agency must conduct a separate review for each application it receives.

{¶147} Nonetheless, the Commission has previously found that PLAA possessed a valid factual foundation for its conclusion that TNC’s proposed burns would be conducted pursuant to “recognized silvicultural practices.” This finding is evidence of the agency’s implicit conclusion that TNC’s stated goals were “necessary to the public interest.” Therefore, the Commission finds PLAA acted lawfully and reasonably with

respect to the requirement that the issuance of the burn permission be necessary to the public interest.

J. Due Process

{¶148} The Commission finds Ms. Lund's assignments of error regarding due process are both barred by collateral estoppel and not within the Commission's jurisdiction. In the 2013 Appeal, the Commission held:

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.

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.

2013 Appeal, at ¶¶113-114.

{¶149} In the present appeals, Ms. Lund raises identical assignments of error. Thus, Ms. Lund's assignments of error regarding due process are barred by collateral estoppel and are also not within the Commission's jurisdiction.

K. Visibility Hazard⁷

{¶150} Here, Ms. Lund argues that PLAA acted unreasonably and unlawfully by including Special Condition 3 in permission number 150810cnds24. The special condition provides, "[f]ire cannot create a visibility hazard on roadways, railroad tracks or airfields." Ms. Lund did not present specific testimony at hearing. However, her notice

⁷ This assignment of error was not previously litigated in the 2013 Appeal and is thus not barred by collateral estoppel.

of appeal in ERAC No. 15-6856 alleges that PLAA should have used the word “smoke” rather than “fire.”

{¶151} Because Ms. Lund did not present testimony at hearing regarding the significance of PLAA’s choice of words, her assignment of error regarding the wording of Special Condition 3 is not well-taken.

L. Dates Authorized for Open Burning⁸

{¶152} Finally, Ms. Lund argues that PLAA acted unreasonably and unlawfully by issuing permission number 150810cds24 with effective dates between September 1, 2015 and December 1, 2015. Although Ms. Lund did not provide specific testimony at hearing, her notice of appeal in ERAC No. 15-6856 asserts that execution of a prescribed burn at Lynx 1 during the fall season would negatively impact native populations of box turtles.

{¶153} Because Ms. Lund did not present testimony at hearing regarding the impact of the proposed burns on the native populations of box turtles, her assignment of error regarding the dates authorized for open burning is not well-taken.

FINAL ORDER

{¶154} For the foregoing reasons, the Commission hereby GRANTS IN PART TNC’s Motion to Dismiss.

{¶155} Regarding the assignments of error not disposed of pursuant to TNC’s Motion to Dismiss, the Commission finds PLAA acted lawfully and reasonably and hereby AFFIRMS the issuance of burn permission numbers 150210cds3, 150210cds2, and 150810cds24.

⁸ This assignment of error was not previously litigated in the 2013 Appeal and is thus not barred by collateral estoppel.

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

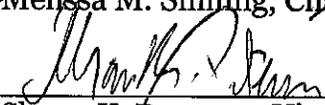
Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

The Environmental Review Appeals Commission

Entered into the Journal of the Commission this 18th day of January 2016.



Melissa M. Shilling, Chair



Shaun K. Petersen, Vice-Chair

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