

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO

BARBARA A. LUND, : Case No. ERAC 16-6875  
: :  
Appellant, : :  
: :  
v. : :  
: :  
PORTSMOUTH LOCAL AIR AGENCY : :  
: :  
and : :  
: :  
THE NATURE CONSERVANCY, : :  
: :  
Appellees. : :

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DECISION

Rendered on July 7, 2016

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Barbara A. Lund, pro se Appellant

*Michael DeWine, Attorney General, Sarah Bloom Anderson, Elizabeth R. Ewing, and Cameron F. Simmons* for Appellee  
Portsmouth Local Air Agency

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

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{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant Barbara A. Lund on April 7, 2016. Ms. Lund challenges permission to open burn number 160303cds12, issued by Appellee Portsmouth Local Air Agency (“PLAA”) to Appellee The Nature Conservancy (“TNC”) on March 8, 2016. Case File Item A.

{¶2} Ms. Lund’s Notice of Appeal included a Motion for Expedited Stay. Accordingly, pursuant to Ohio Administrative Code (“Adm.Code”) 3746-5-14, the

Commission held an oral argument on Appellant's motion on April 20, 2016. Following oral argument, the Commission ruled to deny Ms. Lund's Motion for Expedited Stay. Case File Items A, I.

{¶3} Additionally, at argument, TNC orally moved to dismiss Appellant's assignments of error four, five, six, and seven based upon the doctrine of collateral estoppel. Upon consideration, the Commission granted TNC's oral motion and stated that detailed findings of fact and conclusions of law would be included in the Commission's final order. Case File Item I.

{¶4} In the interest of judicial economy, the Commission then commenced a de novo hearing on Ms. Lund's remaining assignments of error.

{¶5} Based upon a review of the pleadings, the evidence adduced at hearing, and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order AFFIRMING PLAA's issuance of permission to open burn 160303cds12.

#### **FINDINGS OF FACT**

{¶6} Appellant Barbara A. Lund resides at 2635 Hamilton Road, Lynx, Ohio 45650. Case File Item A.

{¶7} 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.

{¶8} Appellee TNC is a non-profit organization. Amongst other activities, TNC manages an area known as the Lynx Prairie 1 in Adams County, Ohio. TNC Ex. 1.

## I. Application and Issuance of Permission to Open Burn

### A. Email Exchange between TNC, PLAA, and Ohio EPA

{¶9} In January 2016, Michael Hall, Southern Ohio Stewardship Coordinator, TNC, sent an email to Cindy Charles, Director, PLAA, regarding the possibility of burning brush piles within TNC's Lynx Prairie area. Specifically, Mr. Hall sought an opinion from PLAA as to whether such a burn would be permissible under Ohio's open burning regulations. PLAA Ex. 4.

{¶10} Upon receiving Mr. Hall's email, Ms. Charles consulted with Paul Braun, Ohio EPA, Central District Office, who indicated more information would be required from TNC. In particular, Mr. Braun commented that PLAA and Ohio EPA would require information regarding whether the proposed burn would be for the purpose of extending the Lynx Prairie area or for the purpose of maintaining and refurbishing the existing site. In light of Mr. Braun's comments, Ms. Charles sent Mr. Hall a follow-up email requesting additional information from TNC. PLAA Ex. 3, 4.

{¶11} Mr. Hall sent Ms. Charles a response on January 15, 2016. The response stated in pertinent part:

Below are my answers to your previous questions about brush pile burning at the Lynx prairies and grasslands:

1. **Why are [you] cutting the woody stems and dragging to brush piles rather than burning in place?** Broadcast burning, like what was performed in the fall of 2015 at Lynx and Cat's Eye, are effective at controlling (removing) woody plants below a certain size. At lynx there have not been frequent enough broadcast fires to prevent woody plants from getting large enough to survive a single broadcast burn. Because of this, manual cutting of woody stems has been, and will likely continue to be, part of maintaining the rare and diverse plant communities contained [within] the grassland and prairie openings at Lynx. Burning the cut remains of these woody stems in brush piles is the best way to deal with the brush for a number of reasons.

Two such reasons are 1) pile burning removes debris that, if left, can alter the rare plant community by creating local moisture pockets in what are xeric (dry) prairies and grasslands, and 2) pile burning reduces the amount of relatively large woody fuels in future broadcast fires at Lynx which makes future fires safer and produce fewer smoke emissions.

2. **Is the purpose to extend the prairie area or to refurbish and return the existing prairie area to a more pristine state?** The permit request that I plan on submitting for pile burning at Lynx for 2016 will be aimed at reclaiming (refurbishing) the current prairie and grassland openings that have living woody plants and pre-existing brush piles within their interiors. There are a number of eastern red cedars and other woody plants that have grown large enough to withstand the broadcast burn that was performed in the fall of 2015 that need to be manually removed. The pre-existing brush piles to \* \* \* be burned were intentionally protected (fire break was created surrounding them) during the broadcast fire in the fall of 2015 for safety concerns[.] \* \* \* [These piles] will be burnt to increase available prairie and grassland habitat and to increase the safety of future broadcast fires.
3. **Is burning in piles a more efficient management tool for the prairie area?** Pile burning will be done in support of broadcast burning within Lynx for the reasons outlined in my first and second answer. Broadcast burning provides unique ecological benefits, in addition to woody plant control, that cannot be mimicked by pile burning alone.

A number of factors (e.g. weather conditions, availability of logistical resources, etc.) may prevent future broadcast burns from occurring frequently enough to manage woody plants within the grassland and prairie openings, which in the future could require additional brush pile burning in the openings at Lynx.

PLAA Ex. 4 (emphasis in original).

### **B. TNC's Application for Permission to Open Burn**

{¶12} On February 29, 2016, TNC submitted to PLAA an application for permission to open burn seven brush piles within Lynx Burn Unit 1. The application form contained responses to the following seven questions:

1. Provide a sketch of the burn location below or on an attached sheet. Include the location of the site and burn location within the site, nearest road intersection(s) and distance to/placement of nearest off-site structures including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks.
2. Describe the purpose of the burn. Provide a written description of your proposed burn.
3. To be completed if “Instruction for methods of fire fighting or for research in the control of fire” is chosen in [Question] 2 above. \* \* \*
4. Did the material to be burned originate from the same site where it is being burned?
5. Is the burning located within a restricted area? \* \* \*
6. Provide the date(s) and time(s) when the burning is anticipated to take place.
7. What methods or actions will be taken to reduce the emission of air contaminants?

TNC Ex. 1.

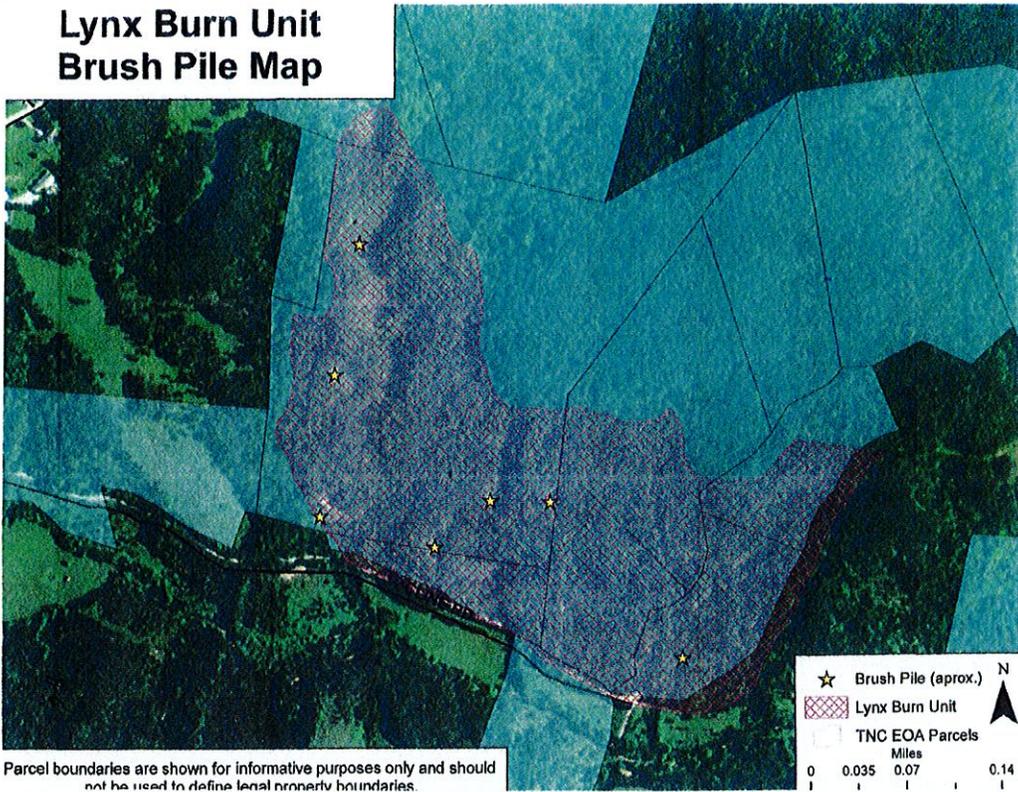
{¶13} In response to Question 1, TNC described the location of the proposed

burn as follows:

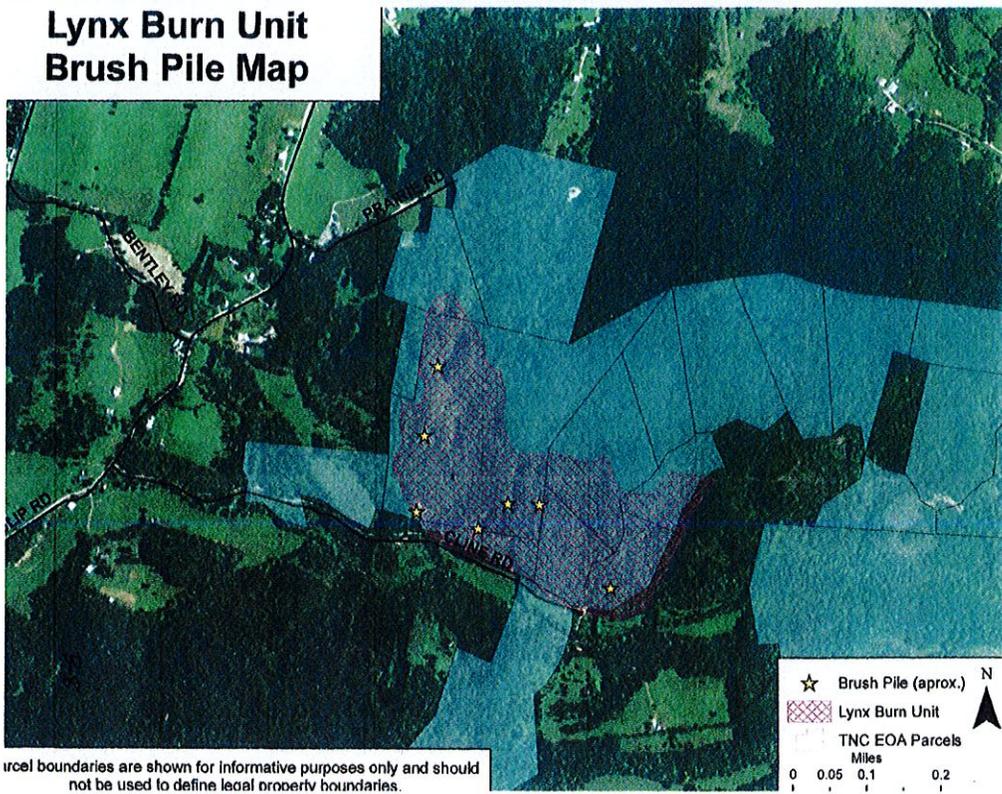
The site is vacant land having no formal address located 2500’ East of the intersection of Tulip Road (County Road 9 D) and Cline Road (Township Road T-226), identified as Lynx Burn Unit 1.

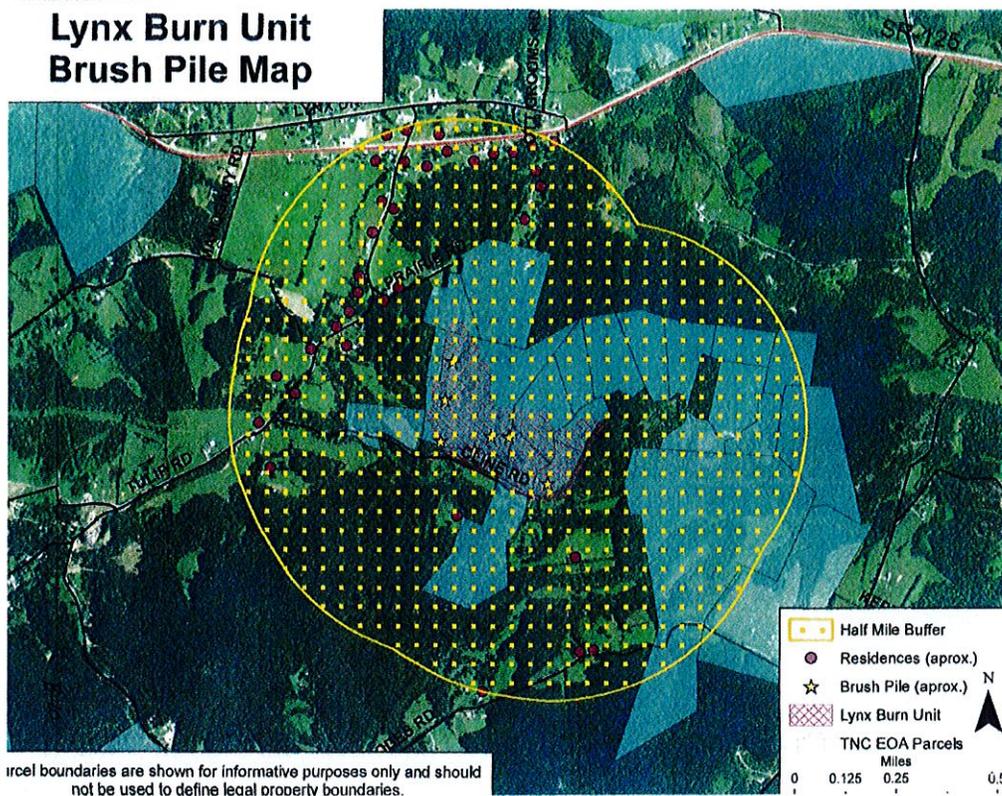
Additionally, TNC included three maps:

### Lynx Burn Unit Brush Pile Map



### Lynx Burn Unit Brush Pile Map





Case File Item A; TNC Ex. 1.

{¶14} In response to Question 2, TNC checked the box marked “prairie and grassland management, or invasive species management practices” and described the proposed burn as follows:

Woody brush piles have been created from work performed by The Nature Conservancy, the Cincinnati Museum Center, and volunteers in the effort to maintain prairie openings in the Lynx Prairie system. The piles will not be larger than twenty feet in diameter and ten feet tall. The piles will be prepared within each opening to prevent the risk of unintended ignition by locating the piles away from overhanging fuels and with a hand-made fire break surrounding each pile. Some or all of the brush piles may be lit depending on available resources, weather conditions, and other pertinent factors.

TNC Ex. 1.

{¶15} Regarding Question 3, TNC checked the box marked “not applicable” under each of the three subsections to Question 3. TNC Ex. 1.

{¶16} Regarding Question 4, TNC stated that the material to be burned originated from the same site where it would be being burned. TNC Ex.1.

{¶17} In response to Question 5, TNC indicated the burn site was not within a restricted area. TNC Ex. 1.

{¶18} In response to Question 6, TNC requested a burn window was from March 1, 2016 to May 1, 2016, but did not specify a particular time of day. TNC Ex. 1.

{¶19} Finally, to answer Question 7, TNC described the methods or actions to be taken to reduce the emission of air contaminants as follows:

The existing brush piles have been cut and left on site for at least one full calendar year, which has allowed leaves and needles to dry and fall of leaving mainly woody fuel. Brush piles will be ignited only if the fire weather forecast is adequate to alleviate nuisance smoke for neighbors and nearby roads. Freshly cut fuels will be added in small quantities, if at all.

TNC Ex. 1.

### **C. PLAA's Review and Issuance of Permission Number 160303cds12**

{¶20} After reviewing TNC's application and the supplemental information sent to PLAA by TNC earlier in the year, PLAA issued permission to open burn number 160303cds12 ("Permission") on March 11, 2016.

{¶21} The Permission contained eight special conditions:

1. Permission to open burn shall be effective from March 14, 2016 to May 1, 2016, 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 emissions of air contaminants;
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 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;
7. Individual brush piles from Lynx Burn Unit 1 prairie management activities shall not exceed the maximum size referenced in the February 29, 2016 Open Burning Request; and
8. The Nature Conservancy shall notify our office the day prior to ignition of the prescribed burn.

TNC Ex. 2.

## **II. Ms. Lund's Appeal to ERAC**

{¶22} Ms. Lund timely filed her Notice of Appeal on April 7, 2016, raising seven assignments of error. The Commission summarizes Ms. Lund's assignments of error as follows:

1. The proposed burn did not fall within the scope of the "prairie and grassland management, or invasive species management practices" exception, and was more accurately described as "land clearing" activity;
2. The application did not include information regarding the quantity or acreage and the nature of the materials to be burned, as required by Ohio's open burning regulations;
3. PLAA acted unreasonably by issuing the Permission while there was a pending verified complaint regarding open burning activities conducted in the same area the previous year;
4. The maps included in TNC's application did not provide sufficient detail;
5. The Permission is unlawful and unreasonable because it authorizes additional fires beyond those requested in TNC's application;
6. TNC's application did not provide specific boundary information for the burn unit; and
7. The review and issuance process violated the due process clause of the federal and/or state constitutions.

Case File Item A.

### **III. Motion for Expedited Stay**

{¶23} Ms. Lund’s Notice of Appeal included a Motion for Expedited Stay. Accordingly, pursuant to Ohio Adm.Code 3746-5-14, the Commission held an oral argument Appellant’s motion on April 20, 2016. Following oral argument, the Commission ruled to deny Ms. Lund’s Motion for Expedited Stay. Case File Items A, I.

### **IV. Assignments of Error Dismissed Prior to Hearing**

{¶24} Following the oral argument on Ms. Lund’s Motion for Expedited Stay, TNC orally moved to dismiss Appellant’s assignments of error four, five, six, and seven based upon the doctrine of collateral estoppel. A discussion of those assignments of error and the Commission’s ruling to grant TNC’s oral motion is provided below.

#### **A. Assignment of Error Four**

{¶25} The Nature Conservancy moved to dismiss assignment of error four, arguing that the issue of a 1,000-foot buffer had been previously litigated between the same parties and was ruled upon by the Commission in *Lund v. PLAA & TNC*, ERAC Nos. 15-6831, 15-6837, 15-6856 (Jan. 28, 2016) (“2015 Appeal”). Further, counsel for TNC stated that the maps included in TNC’s application clearly denoted the locations of nearby residences, as well as the locations of the brush piles to be burned. De Novo Hearing Recording.<sup>1</sup>

{¶26} In response, Ms. Lund argued that the primary allegation contained in assignment of error four did not address a 1000-foot buffer requirement. Rather, Ms. Lund asserted that the assignment of error addressed the level of precision required by

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<sup>1</sup> The notation of “De Novo Hearing Recording” includes oral argument on Ms. Lund’s Motion for Expedited Stay and TNC’s Motion to Dismiss as all proceedings were conducted on the same day and recorded during the same session.

Ohio's open burning regulations. Specifically, Ms. Lund asserted that the maps contained in TNC's application did not lack sufficient detail to determine the distances to nearby residences. Ms. Lund alleged that TNC should have been required to provide precise, numeric values for the distances to nearby residences, instead of simply marking their approximate locations on scaled maps. De Novo Hearing Recording.

{¶27} Ms. Lund contended that these precise, numeric values would be significant if, as alleged in her other assignments of error, the purpose of the proposed burn was most accurately described as "land clearing" activity rather than "prairie and grassland management, or invasive species management practices." Specifically, Ms. Lund asserted that *if* the purpose of the proposed burn was most accurately described as "land clearing" activity, then Ohio's open burning regulations would prohibit burning within 1,000 feet of the nearest residence. De Novo Hearing Recording.

#### **B. Assignment of Error Five**

{¶28} In assignment of error five, Ms. Lund alleged PLAA's issuance of the Permission was unlawful and unreasonable because Special Condition 5 "allowed" for spot fires. Ms. Lund contended such spot fires constitute "additional" fires authorized by the Permission. De Novo Hearing Recording.

{¶29} The Nature Conservancy moved to dismiss assignment of error five, arguing this issue had been previously litigated between the same parties and was ruled upon by the Commission in the 2015 Appeal. De Novo Hearing Recording.

{¶30} Ms. Lund did not specifically address TNC's motion to dismiss with respect to assignment of error five. De Novo Hearing Recording.

### **C. Assignment of Error Six**

{¶31} The Nature Conservancy also moved to dismiss assignment of error six, arguing the assignment of error addresses whether a narrative description of the location of the proposed burn must stand alone, or whether it may be reviewed in context with other information, such as the maps included in TNC's application. The Nature Conservancy argued this issue had been previously litigated between the same parties and was ruled upon by the Commission in the 2015 Appeal. De Novo Hearing Recording.

{¶32} In response, Ms. Lund reiterated her arguments regarding the insufficiency of TNC's narrative description of the location of the proposed burn. Specifically, Ms. Lund asserted TNC's narrative described a single point, rather than the location of the seven brush piles, or even the area within which those brush piles were to be located. Further, Ms. Lund emphasized that PLAA included the language from TNC's narrative description, but not the maps, in the Permission itself. De Novo Hearing Recording.

### **D. Assignment of Error Seven**

{¶33} Here, Ms. Lund acknowledged that the issue of due process has both been previously litigated and is outside the scope of the Commission's jurisdiction. Nonetheless, Ms. Lund stated that she included assignment of error seven in her Notice of Appeal to emphasize that PLAA and Ohio EPA could alleviate many, if not all of her concerns by allowing for public participation prior to the issuance of opening burning permissions. De Novo Hearing Recording.

## V. Assignments of Error Presented at De Novo Hearing

{¶34} The Commission ruled to grant TNC’s oral partial motion to dismiss and, in the interest of judicial economy, proceeded to conduct a de novo hearing on remaining assignments of error one, two, and three.

### A. Assignment of Error One

{¶35} Ms. Lund argued that PLAA acted unreasonably and unlawfully in approving TNC’s proposed burn, which TNC characterized as “land clearing” activity rather than “prairie and grassland management, or invasive species management practices.” At hearing, Ms. Lund testified that TNC’s application did not contain any information regarding invasive species and did not otherwise indicate that the burning of seven brush piles<sup>2</sup> would be for the purpose of managing the Lynx Prairie ecosystem. Further, Ms. Lund asserted the proposed burning of brush piles inherently constitutes “land clearing” activity. Testimony Lund.

{¶36} Ms. Lund concluded PLAA lacked a valid factual foundation for its determination that TNC’s proposed burn would be for the purpose of “prairie and grassland management, or invasive species management practices” and therefore acted unreasonably and unlawfully in issuing the Permission. Testimony Lund.

{¶37} In response, Mr. Hall explained that during the previous year, TNC manually cut and removed specific woody material from the Lynx Prairie as a method of preserving and maintaining the prairie ecosystem. He testified this proposed burn would be for the purpose of disposing of the resulting brush piles. Because the brush

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<sup>2</sup> Ms. Lund also noted that while TNC’s application requested to burn seven brush piles, the Permission authorized only six. Mr. Hall explained that because PLAA authorized only six piles to be burned, TNC would burn up to six of the seven brush piles identified in its application. Testimony Lund, Hall.

piles originated from prairie management and invasive species management activities, Mr. Hall contended disposal activities would similarly relate to prairie management and invasive species management practices. Testimony Hall.

{¶38} On behalf of PLAA, Ms. Charles testified that based on the supplemental information contained in Mr. Hall's January 15, 2016 email, she understood the purpose of TNC's proposed burn to be "prairie and grassland management, or invasive species management practices." Similar to Mr. Hall's testimony, Ms. Charles explained because the brush piles originated from prairie management and invasive species management activities, their subsequent disposal could also be accurately characterized as being conducted pursuant to "prairie and grassland management, or invasive species management practices." Testimony Charles.

{¶39} Additionally, Ms. Charles clarified that TNC's proposed burn could *not* be accurately characterized as "land clearing" activity because that term is defined in Ohio Adm.Code Chapter 3745-19 as activity undertaken for the purpose of making land useful for residential, commercial, or industrial development. Because TNC's proposed burn would not be conducted for the purpose of making the land useful for residential, commercial, or industrial development, Ms. Charles asserted that it could not be accurately characterized as land clearing. Testimony Charles.

### **B. Assignment of Error Two**

{¶40} Ohio Administrative Code 3745-19-05(A)(2) sets forth the required information to be included in an application for permission to open burn. Generally, the questions on the application form prepared by Ohio EPA mirror the requirements of the regulation. Compare TNC Ex. 1 with Ohio Adm.Code 3745-19-05(A)(2).

{¶41} In this assignment of error, however, Ms. Lund observed that the version of the application form utilized by TNC omitted any question specifically addressing Ohio Adm.Code 3745-19-05(A)(2)(b) (“[t]he quantity or acreage and the nature of the materials to be burned”). Ms. Lund argued that because a specific response to such a question was not present in TNC’s application, PLAA acted unlawfully and unreasonably in issuing the Permission. Testimony Lund.

{¶42} Additionally, Ms. Lund argued TNC should not have completed Question 3 on the application form. The form states the question is applicable only to burns to be conducted for the purpose of firefighting instruction or research. Because TNC included responses to Question 3 when the question was not applicable, Ms. Lund contended it was thus unlawful and unreasonable for PLAA to have granted TNC’s application and issued the Permission. Testimony Lund.

{¶43} In response, Mr. Hall testified he utilized the version of the application form he downloaded from Ohio EPA’s website in January 2016. Further, Mr. Hall explained, although the questions on the application form did not expressly use the phrase “quantity or acreage and the nature of the materials to be burned,” that information was present in TNC’s responses to the other questions on the application. Specifically, Mr. Hall explained that his response to Question 2 stated, the material to be burned were seven “[w]oody brush piles” “not \* \* \* larger than twenty feet in diameter and ten feet tall.” Testimony Hall; TNC Ex. 1.

{¶44} Similarly, Ms. Charles testified that during her review of TNC’s application, she was able to identify the quantity and nature of the materials to be burned from TNC’s responses to Question 2, namely, seven woody brush piles not larger than twenty feet in diameter and ten feet tall. Testimony Charles.

{¶45} Regarding TNC's responses to Question 3, Ms. Charles explained that although TNC did include responses to each of the question's subparts, those responses stated, "not applicable." Ms. Charles testified that such responses were equivalent to leaving the question blank and did not affect PLAA's review of TNC's application. Testimony Charles.

### **C. Assignment of Error Three**

{¶46} Finally, Ms. Lund argued PLAA acted unreasonably by issuing the Permission while her verified complaint was pending. Ms. Lund testified she filed a verified complaint regarding a 2015 prescribed fire conducted in the Lynx Burn Unit 1 area and, to date, no final action has been taken on that complaint. Ms. Lund argued it was therefore unreasonable for PLAA to have issued the Permission to the same applicant for the same area while her verified complaint was pending. Testimony Lund; Case File Item A.

{¶47} In response, Ms. Charles explained, although the Director of Ohio EPA has not issued a final action on Ms. Lund's verified complaint, she completed her investigation on behalf of PLAA and submitted a recommendation to Ohio EPA's Central District Office in March 2016. Moreover, Ms. Charles testified that no statute or regulation prohibits the issuance of a permission to open burn during the pendency of a verified complaint. Testimony Charles.

## CONCLUSIONS OF LAW

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

{¶48} 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.

{¶49} 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).

{¶50} 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.*

{¶51} 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.*

{¶52} 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.*

{¶53} Similar to the deference afforded the Director’s 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

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

{¶55} The various exceptions to Ohio's general prohibition on open burning fall within two broad categories: (1) where no prior notification to 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.

{¶56} 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).

{¶57} Conversely, prior to conducting open burning pursuant to recognized prairie and grassland 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).

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

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<sup>3</sup> "Open burning" means "the burning of any materials wherein air contaminants resulting from combustion are emitted directly into the ambient air without passing through a stack or chimney. \* \* \*" Ohio Adm.Code 3745-19-01(I).

- 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).

{¶159} 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).

{¶160} 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**

{¶161} 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).

{¶62} 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).

{¶63} Here, the parties currently before the Commission are identical to those in several of Ms. Lund’s prior appeals, and the parties do not dispute that ERAC had jurisdiction over those appeals.

{¶64} Thus, application of the collateral estoppel doctrine in the present appeal turns on whether the issues are identical to those litigated in Ms. Lund’s previous appeals of open burning permissions issued by PLAA to TNC. 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. Assignments of Error Dismissed Prior to Hearing**

###### *i. Assignment of Error Four*

{¶65} The Nature Conservancy moved to dismiss assignment of error four, arguing that the issue of a 1,000-foot buffer had been previously litigated between the same parties and was ruled upon by the Commission in the 2015 Appeal.

{¶66} In response, Ms. Lund argued that the primary allegation contained in assignment of error four did not address a 1000-foot buffer requirement. Rather, Ms. Lund asserted the maps contained in TNC's application lacked sufficient detail to determine the distances to nearby residences. Ms. Lund alleged TNC should have been required to provide precise, numeric values for the distances to nearby residences, instead of simply marking their approximate locations on scaled maps because such values would be significant if, as alleged in her other assignments of error, the purpose of the proposed burn was most accurately described as "land clearing" activity rather than "prairie and grassland management, or invasive species management practices."

{¶67} To the extent Ms. Lund argues for a generally-applicable 1,000-foot limitation, the Commission finds Ms. Lund's argument barred by collateral estoppel. The Commission has previously held:

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.

*Lund v. PLAA & TNC*, ERAC No. 13-016726 (Dec. 19, 2013) (“2013 Appeal”), at ¶¶83-88 (internal citations omitted) (emphasis in original).

{¶68} Further, regarding the argument that TNC should have been required to provide precise, numeric values for the distances to nearby residences, Ms. Lund concedes the maps included in TNC’s application provide at least approximate distances to the relevant landmarks. Nonetheless, Ms. Lund argues for, in essence, a per se requirement that the applicant provide precise, numeric values for those distances.

{¶69} The Commission has previously addressed the use of approximate distances in describing the location of a proposed burn. In the 2013 Appeal, the Commission stated:

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.

2013 Appeal, at ¶62 (emphasis added).

{¶70} The Commission then affirmed PLAA’s issuance of the permission to open burn, finding:

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.

*Id.*, at ¶141.

{¶71} Similarly, here, Ms. Lund does not dispute TNC’s maps included a scale and thus provided approximate distances to nearby residences and roads. Rather, Ms. Lund challenges only that TNC did not include precise, numeric values for those distances in its application. Because the Commission has previously held that approximate distances may be sufficient to satisfy the requirements of Ohio Adm.Code 3745-19-05(A)(3), the Commission finds this argument is also barred by collateral estoppel.

*ii. Assignment of Error Five*

{¶72} In assignment of error five, Ms. Lund alleged PLAA’s issuance of the Permission was unlawful and unreasonable because Special Condition 5 “allowed” for spot fires. Ms. Lund contended that such spot fires constitute “additional” fires authorized by the Permission.

{¶73} The Nature Conservancy moved to dismiss assignment of error five, arguing this issue had been previously litigated between the same parties and was ruled upon by the Commission in the 2015 Appeal. The Commission agrees.

{¶74} In the 2015 Appeal, the Commission stated as follows:

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.

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.

Ms. Lund’s assignments of error regarding spot fires are not well-taken.

2015 Appeal, at ¶¶128-30 (emphasis added).

{¶75} The language of Special Condition 5, as contained in the Permission, is identical to the language at issue in the 2015 Appeal. Thus, the Commission finds Ms. Lund's assignment of error five raises an identical challenge to that in her 2015 Appeal. Accordingly, the Commission finds Ms. Lund's assignment of error five is barred by collateral estoppel.

*iii. Assignment of Error Six*

{¶76} The Nature Conservancy moved to dismiss assignment of error six, arguing the assignment of error addresses whether a narrative description of the location of the proposed burn must stand alone. The Nature Conservancy argued this issue had been previously litigated between the same parties and was ruled upon by the Commission in the 2015 Appeal.

{¶77} In response, Ms. Lund reiterated her arguments regarding the insufficiency of TNC's narrative description of the location of the proposed burn. Specifically, Ms. Lund asserted TNC's narrative described a single point, rather than the individual locations of the seven brush piles. Further, Ms. Lund emphasized that PLAA included the language from TNC's narrative description, but not the maps, in the Permission itself.

{¶78} The Commission has previously addressed the issue of whether a narrative description of a proposed burn location must stand alone. In the 2013 Appeal, the Commission stated:

\* \* \* 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.

{¶79} Here, as discussed above, Ms. Lund conceded TNC's maps provided approximate locations of the seven proposed brush piles. Thus, in arguing TNC's narrative description did not satisfy the requirements of Ohio Adm.Code 3745-19-05(A)(2)(d), Ms. Lund essentially contended PLAA should have evaluated TNC's narrative description independent of any information provided in the maps. Because the Commission has previously ruled on this issue in the 2013 Appeal, the Commission finds assignment of error six is barred by collateral estoppel.

*iv. Assignment of Error Seven*

{¶80} Ms. Lund acknowledged the issue of due process has both been previously litigated and is outside the scope of the Commission's jurisdiction. Nonetheless, Ms. Lund stated that she included assignment of error seven in her Notice of Appeal to emphasize that PLAA and Ohio EPA could alleviate many, if not all of her concerns by allowing for public participation prior to the issuance of opening burning permissions.

{¶81} The Commission finds this issue has been previously litigated by the same parties and was ruled upon by the Commission in the 2015 Appeal. 2015 Appeal, at ¶¶148-49. Accordingly, the Commission finds assignment of error seven is barred by collateral estoppel.

## **B. Assignments of Error Presented at De Novo Hearing**

### *i. Assignment of Error One*

{¶82} At hearing, Ms. Lund argued PLAA acted unreasonably and unlawfully in approving TNC's proposed burn, which TNC characterized as "land clearing" activity rather than "prairie and grassland management, or invasive species management practices."

{¶83} In response, Mr. Hall explained that during the previous year, TNC manually cut and removed specific woody material from the Lynx Prairie as a method of preserving and maintaining the prairie ecosystem, and that this proposed burn would be for the purpose of disposing of the resulting brush piles.

{¶84} Further, Ms. Charles testified based on the supplemental information contained in Mr. Hall's January 15, 2016 email, she understood the purpose of TNC's proposed burn to be "prairie and grassland management, or invasive species management practices." Similar to Mr. Hall's testimony, Ms. Charles explained because the brush piles originated from prairie management and invasive species management activities, their subsequent disposal could also be accurately characterized as being conducted pursuant to "prairie and grassland management, or invasive species management practices."

{¶85} Additionally, Ms. Charles clarified TNC's proposed burn could *not* be accurately characterized as "land clearing" activity because that term is defined in Ohio Adm.Code Chapter 3745-19 as activity undertaken for the purpose of making land useful for residential, commercial, or industrial development. Because TNC's proposed burn would not be conducted for the purpose of making the land useful for residential,

commercial, or industrial development, Ms. Charles asserted it could not be accurately characterized as land clearing.

{¶86} The Commission finds PLAA had a valid factual foundation for its conclusion that TNC's proposed burn fell within the scope of the "prairie and grassland management, or invasive species management practices" exception to Ohio's general prohibition of open burning.

{¶87} As Ms. Charles explained, TNC provided PLAA with supplemental information via email regarding the purpose of its proposed burn. Specifically, TNC explained that the brush piles originated from woody material removed from the Lynx Prairie as a method of preserving and maintaining the prairie ecosystem. Thus, the Commission finds PLAA acted reasonably in concluding that their subsequent disposal similarly relate to "prairie and grassland management, or invasive species management practices."

{¶88} Further, Ms. Charles correctly observes the term "land clearing" is defined in Ohio Adm.Code Chapter 3745-19. The regulation states in pertinent part:

'Land clearing waste' means plant waste material which is removed from land, including plant waste material removed from stream banks during projects involving more than one property owner, for the purpose of rendering the land useful for *residential, commercial, or industrial development*. Land clearing waste also includes the plant waste material generated during the clearing of land for *new agricultural development*.

Ohio Adm.Code 3745-19-01(I) (emphasis added).

{¶89} The parties do not dispute TNC's proposed burn would not be conducted for the purpose of making land useful for residential, commercial, industrial or agricultural purposes. Thus, the Commission also finds PLAA had a valid factual foundation for concluding TNC's proposed burn did not fall within scope of "land clearing" practices.

{¶90} Ms. Lund's assignment of error one is not well-taken.

ii. *Assignment of Error Two*

{¶91} Ohio Administrative Code 3745-19-05(A)(2) sets forth the required information to be included in an application for permission to open burn. It states in pertinent part:

(2) Except as provided in paragraphs (A)(6) and (A)(7) of this rule, such applications shall contain, a minimum, information regarding:

(a) The purpose of the proposed burning;

(b) The quantity or acreage and the nature of the materials to be burned;

(c) The date or dates when such burning will take place;

(d) The location of the burning site, including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks; and

(e) The methods or actions which will be taken to reduce the emissions of air contaminants.

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

{¶92} Ms. Lund observed that the version of the application form utilized by TNC omitted any question specifically addressing "the quantity or acreage and the nature of the materials to be burned" as required by Ohio Adm.Code 3745-19-05(A)(2)(b). Ms. Lund argued, because a specific response to such a question was not present in TNC's application, PLAA acted unlawfully and unreasonably in issuing the Permission.

{¶93} Further, Ms. Lund argued TNC should not have completed Question 3 on the application form. The form states that the question is applicable only to burns to be conducted for the purpose of firefighting instruction or research. TNC included responses to Question 3, even though the question was not applicable, and Ms. Lund

contended it was thus unlawful and unreasonable for PLAA to have granted TNC's application and issued the Permission.

{¶94} In response, Mr. Hall explained he downloaded the application form from Ohio EPA's website in January 2016. Further, Mr. Hall testified that although the questions on the application form did not expressly use the phrase "quantity or acreage and the nature of the materials to be burned," the relevant information was present in TNC's responses to the other questions on the application. Specifically, Mr. Hall explained that in his response to Question 2, he wrote that the material to be burned was seven "[w]oody brush piles" "not \* \* \* larger than twenty feet in diameter and ten feet tall."

{¶95} Similarly, Ms. Charles testified that during her review of TNC's application, she was able to identify the quantity and nature of the materials to be burned from TNC's responses to Question 2, namely TNC proposed to burn seven woody brush piles not larger than twenty feet in diameter and ten feet tall.

{¶96} Regarding TNC's responses to Question 3, Ms. Charles explained, although TNC did include responses to each of the question's subparts, those responses stated, "not applicable." Ms. Charles testified that such responses were equivalent to leaving the question blank and did not affect PLAA's review of TNC's application.

{¶97} The Commission finds Ms. Lund's assignment of error two not well-taken.

{¶98} There is no requirement that an application form precisely mirror the language of the applicable statutes and regulations. 2015 Appeal, at ¶¶94-98. Here, although the application form did not contain a question expressly addressing the "quantity and nature of the materials to be burned," testimony established that the

relevant information was contained in TNC's response to Question 2 and that PLAA was able to identify that information during its review of the application. Specifically, the testimony established that PLAA determined TNC proposed to burn seven woody brush piles not larger than twenty feet in diameter and ten feet tall.

{¶99} Further, regarding TNC's responses to Question 3, testimony established TNC marked "not applicable" for each of the three subparts, and these responses were equivalent to leaving the question blank and did not affect PLAA's evaluation of the application.

{¶100} Accordingly, the Commission finds PLAA acted lawfully and reasonably in its evaluation of the "quantity and nature of the materials to be burned" and TNC's responses to Question 3. Ms. Lund's assignment of error two is not well-taken

*iii. Assignment of Error Three*

{¶101} Finally, Ms. Lund argued PLAA acted unreasonably by issuing the Permission while her verified complaint was pending. Ms. Lund testified she filed a verified complaint regarding a 2015 prescribed fire conducted in the Lynx Burn Unit 1 area. She explained that, to date, no final action has been taken on that complaint and argued that it was therefore unreasonable for PLAA to have issued the Permission to the same applicant for the same area while her verified complaint was pending.

{¶102} In response, Ms. Charles explained that although the Director of Ohio EPA has not issued a final action on Ms. Lund's verified complaint, she completed her investigation on behalf of PLAA and submitted a recommendation to Ohio EPA's Central District Office in March 2016. Moreover, Ms. Charles testified that no statute or regulation prohibits the issuance of a permission to open burn during the pendency of a verified complaint.

{¶103} The Commission finds PLAA acted lawfully and reasonably to the extent it issued the Permission while a verified complaint was pending.

{¶104} Revised Code 3745.08, which governs verified complaints, states in pertinent part as follows:

\* \* \*

(B) Upon receipt of a complaint authorized by this section, the director shall cause a prompt investigation to be conducted such as is reasonably necessary to determine whether a violation, as alleged, has occurred, is occurring, or will occur. \* \* \* If, upon completion of the investigation, the director determines that a violation, as alleged, has occurred, is occurring, or will occur, the director may enter such order as may be necessary, request the attorney general to commence appropriate legal proceedings, or, where the director determines that prior violations have been terminated and that future violations of the same kind are unlikely to occur, the director may dismiss the complaint. \* \* \*

\* \* \*

{¶105} Significantly, nothing in the applicable statute requires the Director of Ohio EPA or his delegate to withhold the issuance of permissions during the pendency of a verified complaint investigation. Rather, the statute simply provides that if the Director of Ohio EPA determines a violation has occurred, is occurring, or will occur, he may, within his discretion, enter an order, request the attorney general to commence appropriate legal proceedings, or dismiss the complaint where the violations are not likely to reoccur.

{¶106} Accordingly, the Commission finds assignment of error three is not well-taken.

**FINAL ORDER**

{¶107} For the foregoing reasons, the Commission hereby AFFIRMS PLAA's issuance of permission to open burn 160303cds12.

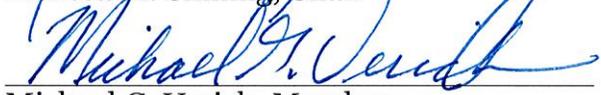
{¶108} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties:

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 7th day of July  
2016.

  
Melissa M. Shilling, Chair

  
Michael G. Verich, Member

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