

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

WILLIAM A. MONTGOMERY,	:	Case No. ERAC 12-316590
	:	
Appellant,	:	
	:	
v.	:	
	:	
SCOTT NALLY, DIRECTOR OF ENVIRONMENTAL PROTECTION,	:	
	:	
and	:	
	:	
PORTSMOUTH LOCAL AIR AGENCY,	:	
	:	
and	:	
	:	
OHIO DEPARTMENT OF NATURAL RESOURCES,	:	
	:	
Appellees.	:	

RULING ON MOTION APPELLEES' JOINT MOTION FOR
SUMMARY JUDGMENT

Rendered on September 27, 2012

William A. Montgomery, pro se Appellant

Mike DeWine, Attorney General, *Cameron F. Simmons*, and
Chris Kim for Appellees Scott Nally, Director of
Environmental Protection, and Portsmouth Local Air Agency

Mike DeWine, Attorney General, and *Tara L. Paciorek* for
Appellee Ohio Department of Natural Resources

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant William A. Montgomery on April 16, 2012. Mr. Montgomery challenges three open burning permits issued by Appellee Portsmouth Local Air Agency (“PLAA”), in which

PLAA granted Appellee Ohio Department of Natural Resources (“ODNR”) permission to carry out prescribed burns in certain areas of the Shawnee State Forest.

{¶2} Currently before the Commission are Appellees’ Joint Motion for Summary Judgment filed August 28, 2012, Mr. Montgomery’s Response filed September 18, 2012, and Appellees’ Reply filed September 26, 2012. Case File Items W, CC, DD.

{¶3} Based upon a review of the pleadings and the relevant statutes, regulations, and case law, the Commission hereby GRANTS Appellees’ Joint Motion for Summary Judgment and issues the following Findings of Fact, Conclusions of Law, and Final Order.

FINDINGS OF FACT

{¶4} On February 28, 2012, PLAA received from ODNR three requests to carry out prescribed open burns in the Shawnee State Forest. First, Permission Request Number 120315cds9 sought permission to burn 399 acres in Brush Fork Unit 1. Second, Permission Request Number 120315cds10 sought permission to burn 151 acres in Brush Fork Unit 2. And third, Permission Request Number 120315cds11 sought permission to burn 159 acres in Upper Pond Run Subunit 1. Case File Item W, Exhibit 1.

{¶5} The applications listed two periods during which ODNR sought to complete the burns: (1) March 1, 2012 to April 20, 2012, and (2) October 15, 2012 to November 30, 2012. Case File Item W, Exhibit 1.

{¶6} On March 15, 2012, Cindy Charles, Director of PLAA, sent Mike Bowden, Fire Supervisor at ODNR’s Division of Forestry, an email informing him that PLAA could not grant permission for both spring and fall burns. Instead, Ms. Charles informed

Mr. Bowden that ODNR would need to re-apply in the Fall if it wished to conduct burns in October. Case File Item W, Exhibit 1.

{¶7} In his response, Mr. Bowden thanked Ms. Charles for the clarification and stated that ODNR would plan on applying again in the Fall if necessary to conduct its work. Case File Item W, Exhibit 1.

{¶8} On March 19, 2012, PLAA granted ODNR's three open burn requests. Each permit contained an April 20, 2012 expiration date. Case File Item W, Exhibit 1.

{¶9} Mr. Montgomery timely filed his Notice of Appeal on April 16, 2012, challenging the three burn permits. Case File Item A.

{¶10} ODNR did not conduct the prescribed burns before the permits expired on April 20, 2012. Case File Item W, Exhibit 2.

{¶11} On July 10, 2012, Appellees filed a Joint Motion to Dismiss. Appellees argued that Mr. Montgomery's appeal should be dismissed for four reasons: (1) the appeal was moot because the burn permits expired without ODNR having conducted the burns; (2) any appeal of future permits was not ripe for review; (3) the 10-year Burn Plan was not a final appealable action of the Director under Revised Code ("R.C.") 3745.04; and (4) Mr. Montgomery failed to state a claim upon which relief could be granted. Case File Item O.

{¶12} Specifically, regarding their contention that Mr. Montgomery failed to state a claim upon which relief could be granted, Appellees argued that Mr. Montgomery's Notice of Appeal made only "general arguments indicating that he disagrees with the practice of prescribed burning and * * * that the prescribed burns are not in the best interest of Shawnee State Forest." Thus, Appellees argued that Mr.

Montgomery “does not allege how the Portsmouth Local Air Agency’s specific actions of approving the burn permits at issue were unlawful or unreasonable.” Case File Item O.

{¶13} The Commission granted in part and denied in part Appellees’ Motion to Dismiss. The Commission dismissed Mr. Montgomery’s challenge to ODNR’s 10-year Burn Plan because it was not a final appealable action of the Director under R.C. 3745.04, and dismissed Mr. Montgomery’s challenges to future burn permits because they were not ripe for review. Regarding mootness, however, the Commission denied Appellees’ Motion, finding that the “capable of repetition, yet evading review” exception to mootness applied. Case File Item V.

{¶14} The Commission then addressed Appellees’ argument that Mr. Montgomery had failed to state a claim upon which relief could be granted. The Commission construed Mr. Montgomery’s notices of appeal as alleging that the Director’s issuances of the March 19, 2012 burn permits were unlawful and/or unreasonable because they violated various state and federal statutes. The Commission found that it lacks jurisdiction to hear federal law challenges and, therefore, dismissed Mr. Montgomery’s challenges to the extent they raised federal law claims. Case File Item V.

{¶15} The Commission did not, however, examine the merits of Mr. Montgomery’s state law claims. In their Joint Motion to Dismiss, Appellees did not present any discussion or explanation regarding the scope of Ohio’s open burning regulations. Instead, Appellees simply argued that Mr. Montgomery made no claims of any kind. Therefore, the merits of any state law claim were not properly before the Commission. Accordingly, the Commission denied Appellees’ Joint Motion to Dismiss Mr. Montgomery’s state law claims. Case File Item V.

{¶16} Currently before the Commission is Appellees’ Joint Motion for Summary Judgment. Appellees argue that Mr. Montgomery lacks standing because, “[f]irst and foremost, no burning actually occurred pursuant to the terms of the permissions.” Moreover, “acknowledging” that the Commission has found that the present appeal is not moot,¹ Appellees argue that Mr. Montgomery would not be aggrieved or adversely affected by future burns because he does not reside adjacent to the Shawnee State Forest and because his backpacking, camping, hiking, fishing, and other activities in the Shawnee State Forest would not put Mr. Montgomery “in a position to breath or otherwise be affected by the air emissions from hypothetical fires.” Case File Item W.

{¶17} Finally, Appellees argue that they are entitled to summary judgment because there are no genuine issues of material fact regarding the lawfulness or reasonableness of the Director’s actions. Specifically, Appellees argue that PLAA made its decision to issue the burn permits only after a detailed review of potential air emissions associated with the proposed burns. Further, Appellees argue that Ohio’s endangered species regulations and its state implementation of the federal Clean Water Act are inapplicable to PLAA’s review of burn permit applications. Case File Item W.

¹ Appellees appear to argue that because ODNR did not conduct the permitted burn in April 2012, it will not reapply for identical burn permits in Fall 2012 or at some later date. However, as the Commission noted in its previous ruling, the burn permit applications themselves requested permission to burn in Fall 2012. Moreover, an email from ODNR to PLAA, attached to Appellees’ Joint Motion for Summary Judgment, states that ODNR “will plan on applying again in the fall if necessary to conduct our work.” Accordingly, the Commission reaffirms that Mr. Montgomery’s appeal of the March 19, 2012 burn permits is not moot because it falls within the “capable of repetition, yet evading review” exception to mootness. Case File Item W, Exhibit 1.

CONCLUSIONS OF LAW

{¶18} Pursuant to Ohio Administrative Code (“Ohio Adm.Code”) 3745-19-04 and 3745-19-05, an applicant must obtain permission from the Ohio Environmental Protection Agency (“Ohio EPA”) before conducting open burns. PLAA has authority to grant such permission on behalf of Ohio EPA pursuant to contractual agreements entered into under R.C. 3704.111 and 3704.112.

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

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

* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * *

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

{¶22} The question of standing is a threshold issue of jurisdiction, which must be resolved before an appellant may proceed with an appeal before the Commission. *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶22, citing *New Boston Coke v. Tyler*, 32 Ohio St.3d 216 (1987). The standing requirement ensures that each appellant has a personal stake in the outcome of the controversy. *Merkel v. Jones*, ERAC Case Nos. 185274-75 (Oct. 23, 2003). Accordingly, each individual appellant bears the burden of establishing his or her own independent standing. *Moffitt v. Korleski*, ERAC Nos. 216172-75 (Aug. 27, 2009), citing *Olmsted Falls v. Jones*, 152 Ohio App.2d 282, 2003-Ohio-1512 (10th Dist.).

{¶23} Two avenues exist for a person to establish individual standing before the Commission. First, under R.C. 3745.04, a person may establish standing to appeal a final action of the Director by showing that he is “affected” by the Director’s action and that he was a “party to a proceeding before the director.” *Girard Bd. of Health v. Korleski*, 193 Ohio App.3d 309, 2011-Ohio-1385, ¶13. To be a “party to a proceeding before the director,” a person must have “appeared” before the Director. *Id.*

{¶24} Second, pursuant to R.C. 3745.07, certain circumstances allow persons who are merely “aggrieved or adversely affected” by the Director’s final action to establish standing. In such circumstances, a person need not be a “party to a proceeding before the Director.”

{¶25} Here, because PLAA did not issue a proposed action prior to issuing the March 19, 2012 burn permits, R.C. 3745.07 applies and Mr. Montgomery need only demonstrate that he is “aggrieved or adversely affected” in order to establish standing.

{¶26} The Tenth District has stated that a person is “affected,” or “aggrieved or adversely affected,” by the Director’s final action if: “(1) the challenged action will cause

injury in fact, economic or otherwise, and (2) *the interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged.*” *Girard*, at ¶15 (emphasis added), quoting *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, 10th Dist. No. 06AP–836, 2007-Ohio-2649.

{¶27} Further, the injury in fact must be “concrete, rather than abstract or suspected.” *Id.* In other words, a party must show “that he or she will suffer a specific injury, even slight, from the challenged action or inaction, and that the injury is likely to be redressed if the court invalidates the action or inaction.” *Id.* The alleged injury may be actual and immediate, or threatened. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Servs. of Ohio, II, L.L.C.*, 10th Dist. No. 07AP-599, 2009-Ohio-2143, at ¶24, quoting *Johnson’s Island Property Owners’ Ass’n v. Shregardus*, 10th Dist. No. 96APH10-1330 (June 30, 1997). However, a party who alleges a threatened injury “must demonstrate a realistic danger arising from the challenged action.” *Id.*

{¶28} Here, Mr. Montgomery states he “has visited Shawnee State Forest numerous times, for backpacking, camping, hiking, fishing, and for special programs conducted out of that State Park Lodge.” Further, Mr. Montgomery alleges he is aggrieved or adversely affected “because he has already seen the devastated landscape along Forest Road 2, photographed burned trees, and wonders how long the land will look messed up, especially adjacent to the Backpack Trail.” In essence, Mr. Montgomery argues that he has standing primarily because the Director’s actions affect his recreational and aesthetic interests.

{¶29} Additionally, Mr. Montgomery alleges that “many trees [in Shawnee State Forest] are festooned with [poison] ivy vines,” and that smoke from burning

poison ivy is harmful when inhaled. Thus, Mr. Montgomery argues that the Director acted unreasonably in concluding that the burns would be “conducted in a time, place, and manner as to minimize the emission of air contaminants.”

{¶30} In response, Appellees argue that Mr. Montgomery’s backpacking, camping, hiking, and fishing activities are insufficient to establish standing. Specifically, Appellees argue, “[n]one of these activities demonstrate that Appellant would have been in a position to breathe or otherwise be affected by the air emissions from hypothetical fires.” Case File Item W.

{¶31} With regard to smoke from burning poison ivy, Appellees attached the affidavit of Ms. Charles, which states that PLAA analyzed air emissions associated with the requested burns and issued the burn permits in compliance with Ohio’s open burning regulations. Appellees further note that Mr. Montgomery has set forth no admissible evidence of the type required by Civ.R. 56(E) to rebut Appellees’ assertion that the burn permits were lawfully and reasonably issued. Case File Item W.

{¶32} The Commission finds that although Mr. Montgomery would, presumably, breathe the air in and around Shawnee State Forest while backpacking, camping, hiking, and/or fishing in the Shawnee State Forest, recreational activities are nonetheless insufficient to establish standing because they are not within the “realm of interests” protected by Ohio’s open burning regulations. *Lund v. Korleski*, ERAC No. 016047 (Oct. 11, 2007).

{¶33} In *Lund*, the Commission stated as follows:

Ms. Lund's second assertion of standing fails because the injury she alleges—the destruction and degradation of the forest occurring during a prescribed burn would “interfere with her use, enjoyment and benefiting from a natural forest ecosystem”—is not within the realm of interests regulated or protected by the regulation being challenged. * * * OAC § 3745-19-05(A)(3) states:

Permission to open burn shall not be granted unless the application 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; and will have no serious detrimental effect upon adjacent properties or the occupants thereof. * * *

A plain reading of the regulation dictates a finding that the interests protected by this regulation are associated with the level of air emissions generated during a burn and that the burn must not have a detrimental effect on adjacent properties or occupants. Significantly, Ms. Lund's does not allege that the Forest Service will conduct the burn in a time, place, and manner so as not to minimize the emission of air contaminants, only that the fire will "destroy, degrade and diminish" her use and enjoyment of the forest and that the fire will "harm or destroy" the forest ecosystem. Moreover, Ms. Lund acknowledges that her property will not be affected, as it is several miles away.

Id. at ¶¶10-11.

{¶34} Thus, the Commission has held that purely recreational and aesthetic interests are insufficient to establish standing to a challenge to the issuance of a burn permit under Ohio Adm.Code 3745-19-05. *Id.*

{¶35} Further, with regard to Mr. Montgomery's arguments concerning smoke from burning poison ivy, the Commission finds that by attaching Ms. Charles's affidavit, Appellees shifted the burden to Mr. Montgomery to set forth admissible evidence rebutting the Appellees' factual assertion that PLAA analyzed potential air emissions and issued the burn permits in compliance with Ohio Adm.Code 3745-19-05. Mr. Montgomery has failed to do so. Accordingly, the Commission finds that Mr. Montgomery lacks standing in the present appeal.

ORDER

{¶36} For the foregoing reasons, the Commission hereby GRANTS Appellees’ Joint Motion for Summary Judgment and ORDERS that Mr. Montgomery’s appeal be DISMISSED.

{¶37} 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 _____ day of September 2012.

Melissa M. Shilling, Vice Chair

Shaun K. Petersen, Member

Copies Sent to:

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