

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 TO DISMISS

Rendered on August 16, 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. In addition, Mr. Montgomery challenges any future burn permits that PLAA may issue to ODNR for those same areas, as well as ODNR’s 10-year Burn Plan for the Shawnee State Forest.

{¶2} Currently before the Commission is Appellees’ Joint Motion to Dismiss the Appeal filed July 10, 2012, Mr. Montgomery’s Response filed July 19, 2012, Appellees’ Reply filed July 20, 2012, and Mr. Montgomery’s Surreply filed July 31, 2012. Case File Items O, P, Q, S.

{¶3} Based upon a review of the pleadings and the relevant statutes, regulations, and case law, the Commission hereby GRANTS IN PART and DENIES IN PART Appellees’ Joint Motion to Dismiss and issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

{¶4} 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,” “Director”) before conducting open burns. PLAA has authority to grant such permission on behalf of Ohio EPA pursuant to contractual agreements entered into under Revised Code (“R.C.”) 3704.111 and 3704.112. *See* Case File Item O.

{¶5} On February 24, 2012, ODNR submitted to PLAA 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 H.

{¶6} 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, 2012.¹ Case File Item S.

{¶7} On March 19, 2012, PLAA granted all three of ODNR's requests. Each permit contained an April 20, 2012 expiration date. Case File Item H.

{¶8} Mr. Montgomery timely filed his Notice of Appeal on April 16, 2012, challenging the three burn permits, as well as ODNR's 10-year Burn Plan. The Notice of Appeal also states, "[i]f the burns are not executed [by April 20, 2012], but are deferred until later, this appeal is intended to be applied to whenever they want to go forward with it." Case File Item A.

{¶9} ODNR did not conduct the prescribed burns by the time the permits expired on April 20, 2012. Case File Item O.

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

¹ Mr. Montgomery attached copies of the three permission requests at issue to his Surreply. Although unauthenticated, Appellees have not challenged their accuracy. Further, the requests are internal Ohio EPA documents that are also included in the Certified Record ("CR"). Case File Item S; CR Item 3.

{¶11} Regarding their contention that Mr. Montgomery fails to state a claim upon which relief can be granted, Appellees argue that Mr. Montgomery's Notice of Appeal makes 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 argue 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

{¶12} In response, Mr. Montgomery argues that the appeal is not moot because "attempts to burn these three sites have not ended." Mr. Montgomery also asserts that the permits provide "by design an insufficient time period * * * to adequately prepare a case against them." Thus, he contends that his appeal should not be dismissed because if it is, "ERAC will be unable to deal with the rights and wrongs of Prescribed Burning." Case File Item P.

{¶13} Moreover, Mr. Montgomery argues that his appeal should not be dismissed because subsequent burn permits will provide insufficient time to complete review if and when they are issued. In his Surreply, Mr. Montgomery observes that in all three permission requests, ODNR applied for both spring and fall burn dates. He contends that because the three requests list October 15-November 30 as a period for conducting the burn, it is likely that ODNR will apply for, and that PLAA will issue, identical burn permits in October 2012. Case File Item S.

CONCLUSIONS OF LAW

{¶14} The Commission will address each of Appellees' arguments as set forth in their Motion to Dismiss.

I. Mootness of the March 19, 2012 Burn Permits

{¶15} As a general rule, courts will not resolve issues that are moot. See *Miner v. Witt*, 82 Ohio St. 237 (1910). "The doctrine of mootness is rooted both in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint. * * * While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question." *James A. Keller, Inc. v. Flaherty*, 74 Ohio App. 3d 788, 791 (10th Dist. 1991) (internal citations omitted). "Thus, the 'duty of * * * every * * * judicial tribunal * * * is to decide actual controversies by a * * * judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO v. Ohio Dept. of Transp.*, 104 Ohio App. 3d 340 (10th Dist. 1995), quoting *Miner v. Witt*, 82 Ohio St. 237, 238 (1910), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).

{¶16} Courts do, however, recognize exceptions to the mootness doctrine. For example, a court may hear an appeal that is otherwise moot when the issues raised are "capable of repetition, yet evading review." *State ex rel. Plain Dealer Pub. Co. v. Barnes*, 38 Ohio St.3d 165 (1988).

{¶17} Ohio's Tenth District Court of Appeals explored the "capable of repetition, yet evading review" exception to the mootness doctrine, finding that it

“applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Nextel W. Corp. v. Franklin County Bd. of Zoning Appeals*, 2004-Ohio-2943, ¶13 (10th Dist. 2004), quoting *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231 (2000).

{¶18} The Commission has previously discussed the applicability of the “capable of repetition, yet evading review” exception in the context of expired burn permits. *Lund v. Korleski*, ERAC No. 015935 (October 11, 2007). In *Lund*, the Commission stated as follows:

The first prong, that the ‘challenged action is too short in its duration to be fully litigated before its cessation or expiration,’ is satisfied because the permits have already expired. The second prong, that ‘there is a reasonable expectation that the same complaining party will be subject to the same action again,’ is met because ODNR is likely to request, and OEPA is likely to issue, permits that allow ODNR to burn the exact areas identified in Burning Permit Nos. 05-19 and 05-20.

{¶19} Here, as in *Lund*, the permits at issue have expired. Thus, the Commission finds that the challenged action is too short in its duration to be fully litigated before its cessation or expiration. Moreover, because each of the applications specifically request burn dates in October/November 2012, the Commission finds that ODNR is likely to request, and PLAA is likely to issue, identical permits to those at issue in this appeal.

{¶20} Accordingly, the Commission finds that the March 19, 2012 burn permits are *not* moot because they fall within the “capable of repetition, yet evading review” exception to mootness.

II. Ripeness of Future Burn Permits

{¶21} While ripeness relates closely to the principle of mootness, it differs in at least two significant aspects. First, as the court in *State ex rel. Elyria Foundry Co. v. Industrial Commission of Ohio*, 82 Ohio St. 3d 88, at 89 (1998), noted, “[r]ipeness is peculiarly a question of timing.” The court explained that the ripeness doctrine is motivated in part “to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements * * *.” *Id.*

{¶22} Second, inherent in the mootness doctrine is the notion that the issues presented have become academic or dead, and thus the case no longer presents a justiciable controversy and will never present such a controversy. Ripeness, on the other hand, involves a decision on the part of the court that the case presented has not yet matured into a controversy worthy of adjudication. As the Fourth District Court of Appeals observed, “[t]he basic principle of ripeness may be derived from the conclusion that judicial machinery should be conserved for problems which are real or present or imminent, not squandered on problems which are abstract or hypothetical or remote.” *State v. Merrill*, 4th Dist. No. 98CA2 (October 14, 1998).

{¶23} Here, the Commission finds that no live controversy exists with respect to any future actions PLAA or Ohio EPA may or may not take. Such actions are neither present nor imminent. Accordingly, to the extent Mr. Montgomery challenges PLAA’s issuance of *future* burn permits, Appellees’ Motion to Dismiss is well-taken.

III. 10-Year Burn Plan

{¶24} In addition to PLAA burn permits, Mr. Montgomery also challenges the 10-year Burn Plan for the Shawnee State Forrest. Mr. Montgomery does not dispute that this plan was promulgated solely by ODNR.

{¶25} Revised Code 3745.04(B) grants the Commission jurisdiction over appeals from final actions of “the director of environmental protection” and local boards of health. Further, R.C. 3745.04(E) provides that “director of environmental protection” is deemed to include the Director of Agriculture. The Commission does not, however, have jurisdiction over final actions of ODNR.

{¶26} As Mr. Montgomery does not dispute that the 10-year Burn Plan was promulgated by ODNR and not by Ohio EPA or PLAA, the Commission finds that it lacks jurisdiction to hear Mr. Montgomery’s challenge of the of ODNR’s 10-year Burn Plan.²

IV. Failure to State a Claim

{¶27} Traditionally, when determining the appropriate standard for reviewing a motion to dismiss, the Commission has applied the Ohio Rules of Civil Procedure (“Civ.R.”). *Meuhfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010). Here, Appellees assert that Mr. Montgomery failed to state a claim upon which relief can be granted. Therefore, the Commission finds that the present Motion to Dismiss is properly examined under the framework of Civ.R. 12(B)(6).

{¶28} A Civ.R. 12(B)(6) motion to dismiss is a procedural motion designed to test the sufficiency of a complaint or cause of action. *Thompson v. Central Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 538, 639 N.E.2d 462 (8th Dist. 1994), citing *Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545 (1992).

² The Commission notes that although a challenge to ODNR’s 10-year Burn Plan is outside of ERAC’s jurisdiction, appeals from burn permits issued by Ohio EPA or local air agencies, which may incorporate some or all of the 10-year Burn Plan, remain within the Commission’s jurisdiction.

{¶29} The Ohio Supreme Court explained, “* * * [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *O'Brien v. University Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). Further, “[u]nder Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991) citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3rd 190, 532 N.E.2d 753 (1988).

{¶30} Although the precise nature of Mr. Montgomery’s challenges to the March 19, 2012 burn permits remain unclear, his various pleadings reference the federal and state Endangered Species Act, the federal and state Clean Air Act, the federal and state Clean Water Act, the federal Migratory Bird Act, the “Western Hemisphere Convention Treaty Act of 1940,” and the silvicultural exemption contained in Ohio Adm.Code 3745-19-04(C)(5).

{¶31} To the extent that Mr. Montgomery argues that Ohio’s open burning laws and regulations conflict with federal law, the Commission finds that he is essentially raising a constitutional question over which the Commission lacks jurisdiction. In essence, Mr. Montgomery argues that, pursuant to the Supremacy Clause of the United States Constitution, federal law should invalidate state law permitting the type of open burning at issue here. It is well-settled that the Commission lacks jurisdiction to hear constitutional challenges. *BP Exploration & Ohio, Inc. v. Jones*, ERAC No. 184134 (March 21, 2001). Accordingly, to the extent Mr. Montgomery

challenges the burn permits on the basis of federal law, Appellees' Motion to Dismiss is well-taken.

{¶32} Regarding Mr. Montgomery's state law claims, however, the Commission finds Appellees' Motion to Dismiss unpersuasive. In his various pleadings, Mr. Montgomery alleges that PLAA's actions in issuing the March 19, 2012 burn permits are unlawful and/or unreasonable because they violate the *state* Clean Air Act, Clean Water Act, and/or Endangered Species Act. The Commission does have jurisdiction to hear such claims.

{¶33} The Commission also notes that before issuing permission to burn, PLAA must find that a proposed open burn "is necessary to the public interest." Ohio Adm.Code 3745-19-05(A)(3). In their Joint Motion to Dismiss, Appellees acknowledge that Mr. Montgomery contends "the prescribed burns are not in the best interest of Shawnee State Forest." Thus, the Commission finds that Mr. Montgomery's appeal can be construed, in part, as challenging PLAA's issuance of the March 19, 2012 burn permits on the basis that they did not comply with Ohio Adm.Code 3745-19-05(A)(3)'s requirement that the Director find the burn to be "necessary to the public interest."

ORDER

{¶34} Accordingly, the Commission hereby GRANTS Appellees' Motion to Dismiss to the extent that Appellant challenges *future* burn permits and ODNR's 10-year Burn Plan. The Commission also GRANTS Appellees' Motion to Dismiss with regard to Appellant's federal law challenges to the March 19, 2012 burn permits.

{¶35} However, the Commission hereby DENIES Appellees' Motion to Dismiss with regard to Appellant's state law challenges to the March 19, 2012 burn permits.

**The Environmental Review
Appeals Commission**

Entered into the Journal of the
Commission this _____ day of
August 2012.

Melissa M. Shilling, Vice Chair

Shaun K. Petersen, Member

Copies Sent to:
WILLIAM A. MONTGOMERY
Cameron F. Simmons
Chris Kim
Tara L. Paciorek