

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

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| NATIONAL WILDLIFE FEDERATION, | : | Case No. ERAC 996447 |
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| and | : | |
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| WESTERN LAKE ERIE ASSOCIATION, | : | Case No. ERAC 486448 |
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| and | : | |
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| LAKE ERIE CHARTER BOAT ASSOCIATION, | : | Case No. ERAC 626449 |
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| and | : | |
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| IZAAK WALTON LEAGUE OF AMERICA, OHIO DIVISION, | : | Case No. ERAC 096450 |
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| and | : | |
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| OHIO ENVIRONMENTAL COUNCIL, | : | Case No. ERAC 256451 |
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| Appellants, | : | |
| | : | |
| v. | : | |
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| CHRISTOPHER KORLESKI, DIRECTOR OF ENVIRONMENTAL PROTECTION, | : | |
| | : | |
| and | : | |
| | : | |
| U.S. ARMY CORPS OF ENGINEERS, | : | |
| | : | |
| | : | |
| Appellees. | : | |

DECISION

Rendered on February 29, 2012

Neil S. Kagan, Esq., for Appellant National Wildlife Federation

Peter A. Precario, Esq., for Appellants Western Lake Erie Association, Lake Erie Charter Boat Association, Izaak Walton League of America, Ohio Division

Megan De Lisi, Esq., for Appellant Ohio Environmental Council

Mike DeWine, Attorney General, *David H. Dokko, Esq.*, and *Janean R. Weber, Esq.*, for Appellee Director of Environmental Protection

Ann D. Navaro, Esq., and *Bryan E. Miller, Esq.*, for U.S. Army Corps of Engineers

SHILLING, Commissioner

This matter comes before the Environmental Review Appeals Commission (“ERAC,” “Commission”) upon the May 13, 2010 Notice of Appeal filed by Appellants National Wildlife Federation (“NWF”), Western Lake Erie Association (“WLEA”), Lake Erie Charter Boat Association (“LECBA”), Izaak Walton League of America, Ohio Division (“IWLA”), and Ohio Environmental Council (“OEC”). The action underlying the instant appeal is the Director of Ohio Environmental Protection Agency’s (“Ohio EPA,” “Agency,” “Director”) April 15, 2010 issuance of a Section 401 Water Quality Certification (“401 Certification”) to the United States Army Corps of Engineers (“USACE,” “Corps”) to engage in dredging activity in Toledo Harbor and Lake Erie.

The Commission held a de novo hearing on this matter August 23 through August 25, 2010, during which all documents in the certified record (“CR”) were moved into the record and admitted into evidence. Based on a review of the evidence adduced at hearing and applicable laws and regulations, the Commission finds the Director acted reasonably and lawfully in issuing the 401 Certification to USACE.

FINDINGS OF FACT

{¶1} Appellant NWF is a not-for-profit corporation headquartered in the District of Columbia, with an office in Ann Arbor, Michigan. Its mission is to protect “ecosystems that are most critical to native wildlife in order to ensure a healthy wildlife legacy for future generations.” NWF’s membership includes tens of thousands of members in Ohio, some who enjoy and recreate in the waters of Lake Erie. Appellants’ Exhibit (“Ex.”) 5.

{¶2} Appellant WLEA is a not-for-profit corporation, whose purpose is to protect the water and aquatic life in Lake Erie. Appellants’ Ex. 7; Testimony Bihn.

{¶3} Appellant LECBA is a not-for-profit association, whose purpose is to seek environmental protection for fish and wildlife in Lake Erie. Appellants’ Ex. 19; Testimony Unger.

{¶4} Appellant IWLA is a not-for-profit organization with a division based in Ohio. IWLA’s purpose is to defend the environment and wildlife of the United States and to protect and restore the waters of Lake Erie and the other Great Lakes. Appellants’ Ex. 21; Testimony Graham.

{¶5} Appellant OEC is a not-for-profit organization dedicated to protecting Ohio’s natural resources, including Lake Erie. Appellants’ Ex. 4, 17; Testimony Matuszczak.

{¶6} Lake Erie, the warmest and most biologically productive Great Lake, is divided into western, central, and eastern Basins. The Western Basin, where the dredging-related activity will occur, is shallow, with an average base of twenty-four feet. Most of the lake’s bottom is covered with fine sediment particles, and under certain conditions, predominantly storm events, these fine sediment particles become

resuspended in the lake water. In addition to general recreational activities, the lake supports significant commercial navigational routes and local boat-chartering businesses, worth approximately \$800 million. Appellants' Ex. 9.

{¶7} The Maumee River is the greatest tributary to the Western Basin of Lake Erie. The 4.2-million acre Maumee River Watershed is largely dedicated to agricultural use. Run-off from agricultural fields during rain events causes high levels of phosphorus-rich sediments to enter the Maumee River and eventually migrate into the Western Basin of Lake Erie. Though several factors affect algal growth in the lake, phosphorus is the limiting nutrient in the formation of algae in the Western Basin. Testimony Smith.

{¶8} The United States and Canada entered into the Great Lakes Water Quality Agreement of 1978 “[t]o restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem.” Generated under this agreement and updated in 2008, the Lake Erie Lakewide Management Plan (“LaMP”) identified several impairments to the lake: (1) degradation of phytoplankton and zooplankton populations, (2) degradation of fish populations, (3) loss of fish habitat caused by sediment and nutrient loading, (4) degradation of wildlife populations, (5) loss of wildlife populations, (6) degradation of benthos populations, and (7) eutrophication or undesirable algae. Appellants' Ex. 9.

{¶9} On September 8, 2009, USACE applied to Ohio EPA for a 401 Certification proposing to dredge the Toledo Harbor federal navigational channel and discharge up to 1.25 million cubic yards (“CY”) of dredged matter to the open waters of Lake Erie, approximately 3.5 miles from the Toledo Harbor Lighthouse. The application stated, because large amounts of sediment are deposited in the Western Basin near the

Maumee River, dredging was necessary to maintain sufficient water depths for commercial navigation. Appellees' Ex. 16; Testimony Smith.

{¶10} At hearing, Mr. Ben Smith testified generally about the 401 Water Quality Certification process within Ohio EPA and specifically the 401 certification process undertaken in this matter. As 401 Coordinator for Ohio EPA's Division of Surface Water, Northwest District Office, Mr. Smith holds a Bachelor of Science in Biology from Ohio University and has been employed by Ohio EPA since 2001. Mr. Smith testified that a 401 certification review follows a fairly straight forward process through the Agency and that USACE's request was no exception. Typically, once Ohio EPA receives a 401 certification application, Mr. Smith performs a completeness review to ensure the applicant fully responded to the specific questions contained in the application and provided all supporting documents necessary for Ohio EPA to complete its evaluation of the project. He also contacts Ohio EPA's public information center ("PIC") to advise it that the Agency has received a 401 certification application and offers to assist PIC in preparing for a public hearing on the proposed project. Following the public hearing, Mr. Smith conducts a more thorough review of the application, making certain to address concerns raised orally and in writing during the public participation period. Throughout the substantive review process, Mr. Smith routinely consults with his supervisor, Mr. Randy Bornique, other Ohio EPA staff, and the applicant. If warranted, Mr. Smith also seeks additional documents or information to complete his in-depth review and to respond to issues raised during the public participation period. Testimony Smith.

{¶11} Ohio EPA held a public hearing for USACE's 401 Certification on January 14, 2010. Among others, Sandy Bihn, WLEA's Executive Director, Richard Unger,

LECBA's president, and Kristy Meyer, OEC's Director of Agriculture and Clean Water Programs each testified at Ohio EPA's public hearing. During the public comment period, Mr. Smith received comments from private citizens, other government agencies, and not-for-profit organizations, including WLEA. Appellants' Ex. 4, 6; Testimony Bihn, Unger, Meyer.

{¶12} During his review of USACE's 401 Certification application, Mr. Smith analyzed Ohio Administrative Code ("Ohio Adm.Code") regulations to ensure USACE's compliance with applicable sections. He also consulted Mr. Bornique, other Ohio EPA staff, Ohio EPA records regarding previous certifications issued to the Corp and engaged in further communications with the Corp itself. Ultimately, Mr. Smith prepared a draft certification and responsiveness summary, which he forwarded to Mr. Bornique for additional review and comment. Testimony Smith.

{¶13} Evidence demonstrates that the Director considered the following factors when evaluating USACE's request for certification: (1) USACE's application, (2) input from U.S. Fish and Wildlife, (3) input from Ohio Department of Natural Resources, (4) the LaMP, (5) input from a phosphorus task group, (6) a review conducted by Ohio EPA's Division of Drinking and Ground Water assessing the effect of the project on the water supply, and (7) the absence or presence of a connection between USACE's proposed project and hazardous algal blooms. CR Items 1, 6-2, 36-31, 20; Testimony Smith.

{¶14} On April 15, 2010, the Director sent correspondence to Martin P. Wargo, Supervisory Biologist, U.S. Army Corp of Engineers, notifying him that Ohio EPA had granted a 401 Water Quality Certification, Ohio EPA ID No. 093554, to USACE. The letter advised USACE that the Director had "determined that a lowering of water quality

in the Maumee River, Toledo Harbor, and Lake Erie watersheds as authorized by this permit is necessary.” The Director stated that he had reached his decision after considering public comments, as well as the technical, social, and economic considerations of this project and its impact on water quality. Appellees' Ex. 13; Testimony Bornique.

{¶15} Although the Director granted the 401 Certification to USACE, he placed several operational restrictions in the certification and cautioned, “long term open-lake disposal of dredge material in the Western Basin of Lake Erie [is] not an environmentally acceptable long term alternative. * * * The [USACE] is strongly encourage[d] to develop other disposal/placement options for the dredged material in anticipation of these new rules.” Appellees' Ex. 13

{¶16} On May 13, 2010, Appellants timely filed a Notice of Appeal asserting that the Director’s granting of the 401 Certification was unlawful and unreasonable for the following reasons:

1. The application for certification fails to demonstrate that the discharge of sediment will not prevent or interfere with the attainment or maintenance of the water quality standard for the Western Basin of Lake Erie and will not violate the water quality standard for the Western Basin of Lake Erie as required by Ohio law. Ohio Adm.Code 3745-32-05(A), 3745-32-07, 3745-47-23(A)(1). Specifically, the Corps failed to prove that the deposition, settling and resuspension of discharged sediment will not prevent or interfere with the attainment or maintenance of, and will not violate:
 - a. the designated uses of the Western Basin of Lake Erie, including, but not limited to, its designation as exceptional warmwater aquatic life habitat, Ohio Adm.Code 3745-1-31(A). Data is either insufficient to establish whether the designated uses of the Western Basin of Lake Erie are attained or, in the alternative data established that the designated uses of the Western Basin of Lake Erie are already impaired, for instance, as a result of siltation;

b. the water quality criteria applicable to the Western Basin of Lake Erie, including, but not limited to, the criteria requiring all surface waters to be:

i. 'Free from suspended solids or other substances that enter the waters as a result of human activity and that will settle to for * * * objectionable sludge deposits, or that will adversely affect aquatic life.' Ohio Adm.Code 3745-1-04(A); and

ii. 'Free from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae.' Ohio Adm.Code 3745-1-04(E); and

c. the prohibition against the elimination or substantial impairment of existing uses of the Western Basin of Lake Erie, including, but not limited to, its existing use as aquatic life habitat. Ohio Adm.Code 3745-1-05(C)(1). The Corps failed to determine the existing uses, including but not limited to the resident aquatic life, or the level of water quality necessary to protect the existing uses; and

d. the limitation of the lowering of water quality in high quality waters to situation where lower water quality is necessary to accommodate important social or economic development in the area where the Western Basin of Lake Erie is located. Ohio Adm.Code 3745-1-05(C)(5).

The deposition, settling, and resuspension of dredged sediment will cause or contribute to a reduction in the penetration of sunlight through the water column, reducing phytoplankton and aquatic plant growth; harm fish, increasing the risk of infection and disease; and harm to benthic organisms and bottom substrate. The Director's grant of the Certification, regardless, is unlawful and unreasonable.

2. The Director failed properly to apply the antidegradation review requirements by conflating the rule governing the prohibition of degradation that results in the elimination or substantial impairment of existing uses – whether or not such degradation is necessary to accommodate development – and the rule governing the lowering of water quality in high quality waters to accommodate development. As a result, the Director failed to separately determine whether the Corps demonstrated that the lowering of water quality, which the Director admits the Certification will allow, will not prevent or interfere with the attainment or maintenance of, and will not violate the prohibition against the elimination or substantial impairment of existing uses of the Western

Basin of Lake Erie, including, but not limited to, its existing use as aquatic life habitat. Ohio Adm.Code 3745-1-05(C)(1).

3. The Director failed properly to apply the antidegradation review requirements by failing entirely or adequately to consider the factors he is obligated to consider when determining whether lower water quality in high quality waters is necessary to accommodate important social or economic development. Ohio Adm.Code 3745-1-05(C)(5)(a)-(m). The factors the Director failed entirely or adequately to consider include, but are not limited to, the following:

a. 'The magnitude of the proposed lowering of water quality.' Ohio Adm.Code 3745-1-05(C)(a);

b. 'The anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, including threatened and endangered species, important commercial or recreational sport fish species, other individual species and the overall aquatic community structure and function.' Ohio Adm.Code 3745-1-05(C)(5)(b); and

c. 'The effects of lower water quality on the economic value of the water body for recreation, tourism and other commercial activities, aesthetics, or other use and enjoyment by humans. Ohio Adm.Code 3745-1-05(C)(5)(3).

Case File Item A.

{¶17} In essence, Appellants argue that the Director acted unlawfully and unreasonably in concluding that USACE's dredging plan would not significantly adversely affect the water quality in Lake Erie. Specifically, Appellants argue that open-lake placement of dredged material could increased turbidity, such that it would harm existing aquatic wildlife, contribute to the growth of Harmful Algal Blooms ("HABs"), and hamper a variety of recreational and economically beneficial activities on the lake.

{¶18} The Commission will now discuss USACE's application and Ohio EPA's review and issuance of the 401 Certification as it relates to Appellants' Assignments of Error. The first few sections of the application request general information about the applicant and a description of the project and its location. Mr. Smith testified he

reviewed the application and determined that all material to be dredged under the proposed minimal degradation alternative qualified for open-lake placement. The sediments in the Toledo Harbor were tested and evaluated in accordance with the Great Lakes Material Testing and Evaluation Manual and found to be toxicologically similar to the sediments in the Western Basin where they would be placed. The open-lake placement site is located approximately two square miles north of Lake Mile 11. Originally selected because the in-situ materials were as similarly fine-grained as the placement materials, USACE has used this general area for approximately twenty years. The application specified that only the northeast portion of the marked area would receive the placement materials. Testimony Smith.

{¶19} In Section 7, the applicant must “[l]ist all approvals or certifications and denials received from other federal, interstate, state, or local agencies for any structures, construction, discharge, or other activities described in this application.” In response, USACE attached several documents, including an Environmental Assessment and 404(b)(1) Evaluation, referred to as the Finding of No Significant Impact (“FONSI”), dated July 24, 2009. Testimony Smith.

{¶20} After reviewing the FONSI, on May 29, 2009, Mr. Bornique sent correspondence to Mr. Wargo unambiguously advising USACE that Ohio EPA did not concur with USACE’s FONSI determination. Section manager of the 401/Wetlands section within Ohio EPA, Mr. Bornique was admitted at hearing as an expert in water quality, Ohio’s regulatory water quality standards, and Ohio EPA’s 401 certification process. Mr. Bornique May 29th letter stated:

* * * The disposal of dredged material into the shallow waters of the Western Basin of Lake Erie has been a concern to the State of Ohio for over 20 years. * * * We continue to believe that the practice of open lake

disposal of large quantities of fine grain dredged material is harmful to the Western Basin * * * This is an opinion that is shared by U.S. EPA, the Ohio Department of Natural Resources, members of the academic community, a number of environmental organizations, and many members of the general public. * * * Appellants' Ex. 18.

{¶21} Mr. Bornique's letter continues:

Ohio EPA appreciates the difficult task that the Corps faces * * *. We are not questioning the accuracy of the work that has been performed. Rather, our concern is that the fundamental nature of the analysis is inadequate to properly assess the impacts. * * *

More recently, harmful algal blooms have become more of a concern in this area and we do not believe that the relationship between open lake disposal practices and these blooms is adequately documented. * * *

In conclusion, Ohio EPA cannot concur with the finding of no significant impact from the operations and maintenance dredging and placement of dredged material from Toledo Harbor. The Agency remains committed * * * to find[ing] a long term solution to this issue while ensuring that the Toledo Harbor navigation channel remains open and active. * * *

Id.

{¶22} At hearing, Mistery Smith and Bornique confirmed the Agency's ongoing concern about open-lake placement of dredged materials, but also underscored the Agency's recognition that the FONSI contained technically accurate and valuable information about the dredging project and was considered a reliable source for Ohio EPA's review process. Testimony Smith, Bornique.

{¶23} Mr. Bornique further explained Ohio EPA's opposition to the dredging activity. Through comments in the May 2009 letter, Ohio EPA reiterated its long-standing awareness of excess sediment in the lake and advocated a beneficial reuse of the dredged material, rather than simply moving it from one area of the lake to another. Specifically, Ohio EPA expressed concern about USACE's project due to sediment load problems in the Western Basin and that open-lake placement presented a lost

opportunity to remove sediment already in the lake. Further, Ohio EPA was taking steps to track and manage sediment in the Western Basin and was overseeing specific programs focused on managing sediment flow into the Western Basin. These programs included a storm water program designed to manage construction project run-off and a wetlands program created to minimize impact to wetlands that act to filter sediment before it reaches rivers. Testimony Bornique.

{¶24} Ohio EPA's greatest unease about granting the 401 Certification was the unsettled science surrounding the linkage between open-lake placement of the dredged material with outbreaks of excessive growths of algae, or HABs, in the Western Basin. Though not always toxic, large HABs are harmful due to their effect on dissolved oxygen levels in the lake water. Additionally, *Microcystis aeruginosa*, a blue-green algae that produces the toxin microcystin and can generate massive HABs, has been identified in the lake. The World Health Organization's recommendation for safe drinking and swimming in water containing microcystin is one part per billion ("PPB") for drinking waters and twenty PPB for swimming waters. Sampling in the Maumee Bay and the vicinity of the shipping channel revealed a microcystin level of less than one PPB. Testimony Bornique.

{¶25} To acquire more information about the origin of HABs in the lake, Ohio EPA contacted well-known Lake Erie scientist, Dr. Reutter, in hopes that he would contact other knowledgeable scientists who could develop a scientific-based statement linking open-lake placement with increased HABs in Lake Erie. After reaching out to his colleagues, Dr. Reutter advised the Agency that he was unable to form a scientific consensus linking the proliferation of HABs to open-lake placement of dredged materials. Testimony Bornique.

{¶26} In Section 10, the largest, most substantive portion of the application, the applicant must “address the requirements of the Antidegradation Rule” and include a report evaluating three alternatives: (1) the “Preferred Design (your project) and Mitigative Techniques,” (2) the “Minimal Degradation Alternative(s) (scaled-down version(s) of your project) and Mitigative Techniques,” and (3) the “Non-Degradation Alternative(s) (project resulting in avoidance of all waters of the state).” The applicant is then directed to various requirements set out in Ohio Adm.Code 3745-1-05(B)(2), 3745-1-05(C)(1), and 3745-1-54. Application sections 10(a) through (k) correspond to certain sections of Ohio Adm.Code 3745-1-05(C)(5)(a)-(m), the portions of the Ohio Adm.Code the Director must consider when evaluating a 401 application. Appellees’ Ex. 16.

{¶27} Section 10(a) requires the applicant to provide a “detailed description of any construction work, fill, or other structures to occur or to be placed in or near the surface water. Identify all substance to be discharged including the cubic yardage of dredged or fill material to be discharged to the surface water (OAC 3745-1-05(B)(2)(b)).” Appellees’ Ex. 16.

{¶28} USACE satisfied Section 10(a) by describing the three degradation alternatives: 1) USACE’s preferred degradation alternative, which “would entail the dredging of an estimated 2,000,000 cubic yards of dredged material for the Federal navigation project on an annual basis between 2010 and 2012;” 2) USACE described the non-degradation alternative as a ‘No Action’ alternative, meaning the Toledo Harbor would not be dredged; and 3) the minimum degradation alternative, which was essentially the project as certified by the Director. The minimum degradation alternative

entails “dredging 1,350,000 cubic yards of material from the Federal navigation project on an annual basis between 2010 and 2012.”¹ Appellees’ Ex. 16.

{¶29} Section 10(b), “Water Quality Impacts,” invokes Ohio Adm.Code 3745-1-05(C)(5)(a), which requires the Director to consider the “magnitude of the proposed lowering of water quality,” and Ohio Adm.Code 3745-1-05(C)(5)(b), which requires the Director to consider the impact on aquatic life and wildlife. USACE responded to Section 10(b) by stating that the material to be dredged was sediment that had “deposited in the Federal navigation channels since the last maintenance dredging effort. These types of sediments are homogeneous and residually contaminated with pollutants that are ubiquitous throughout the Great Lakes.” The sediments are “similar in chemistry, and toxicologically comparable, to bottom sediments in the Lake Erie Western Basin environs. * * * This alternative would result in a short-term, negligible lowering of ambient water quality, less that (sic) that which occurs during Lake Erie storms.” USACE described the effects of the dredging and placement as:

* * * the generation of turbidity and variation of dissolved oxygen levels in the water column. Elutriate testing indicates that the release of contaminants from the dredged material would comply with State water quality standards for the Protection of Aquatic life in Lake Erie. * * * Following dredging operation, the benthic communities would recolonize the impacted areas, and fish and wildlife would return. Dredging would be restricted to between 1 July and 30 November in order to minimize impact to local environmental resources, primarily fisheries. In response to local concerns, the discharge of dredged material would be restricted to the northeast half of the open-lake area. In addition, dredging would not be performed during Lake Erie storm events. No impact to threatened or endangered species would occur.” Appellees’ Ex. 16.

¹ Within each subsection of Section 10, the application calls for an analysis of three alternatives: (1) the preferred design alternative, (2) the non-degradation alternative, and (3) the minimum degradation alternative. Because the Director approved USACE’s project at the minimum degradation alternative level, the Commission will omit information relating to the other alternatives unless it is helpful in understanding this opinion or necessary to the Commission’s ultimate conclusion.

{¶30} In reviewing Section 10(b), Mr. Smith evaluated USACE’s claim that the project would cause minor, short-term adverse impacts to macroinvertebrates, aquatic vegetation, and fish. In support of its contention that the negative impacts would be brief, USACE supplied elutriate testing results indicating that the release of contaminants from the dredged material would not violate State water quality standards for the protection of aquatic life in Lake Erie. Appellees’ Ex. 16, 18.

{¶31} Regarding the project’s overall potential impact on macroinvertebrates, Mr. Smith reviewed information documenting that open-lake placement of dredged materials would smother organisms in the placement site, but that the area would recolonize. Mr. Smith also reviewed a study titled “Assessment of Macroinvertebrate Community In and Around an Open-Lake Disposal Area, Western Basin of Lake Erie.” This study, authored by Kenneth Krieger, PhD., Senior Research Scientist at Heidelberg University, supported USACE’s assertion that the macroinvertebrate communities would recolonize following open-lake placement of sediment materials. Specifically, Mr. Krieger’s team concluded, “* * * the macroinvertebrate community throughout the study area prior to dredge spoil disposal was typical of the community that is expected * * *, and that there is no evidence of degradation of that community within the study area.” Testimony Smith; Appellees’ Ex. 14, 18.

{¶32} Regarding open-lake placement’s impact on fish and wildlife, USACE stated that fish and wildlife would only temporarily avoid the turbidity plume caused by the open-lake placement process. In addition to the statements contained in USACE’s application, Mr. Smith also considered a study titled, “Assessment of Potential Impacts of Bucket Dredging Plumes on Walleye Spawning Habitat in Maumee Bay, Ohio.” The study noted that walleye broadcast their eggs over gravel and rock in shallow areas of

tributaries or mid-lake reefs, but the bottom substrate of the open-lake placement area is silty. Mr. Smith, therefore, concluded that the open-lake placement site contained no notable Walleye spawning grounds. Moreover, the spawning season for walleye occurs in mid-April, and dredging was scheduled to occur during the period of July 1 through November 1. Thus, USACE's dredging project was slated to occur outside the Walleye spawning season. Testimony Smith; Appellees' Ex. 17

{¶33} Sections 10(c) through 10(f) are either not applicable to the USACE's project or not relevant to the instant matter; therefore, these sections do not require analysis. Appellants' Ex. 1.

{¶34} In Section 10(g), USACE assessed "Human Health Impacts" as they relate to Ohio Adm.Code Sections 3745-1-05(C)(6)(c) and 3745-1-54 and determined that the major effects associated with the dredging operations would be the "generation of turbidity and variation in the dissolved oxygen levels in the water column." Also, because the dredging area was considered an "industrialized water resource designed for commercial navigation," which was already "naturally turbid," the impact to human health would be "indiscernible." Further, Mr. Smith observed that USACE's activities would be far enough from the water intakes for the cities of Toledo and Oregon that dredging activity would not impact the public water supply. And finally, sediment trend analyses indicated that the sediment flowed away from public water supply intakes. Appellants' Ex. 1; Testimony Smith.

{¶35} In Section 10(h), USACE evaluated "Social/Economic Benefits Gained," as set out in Ohio Adm.Code Sections 3745-1-05(B)(2)(e) and 3745-1-05(C)(6)(i), and concluded that this project would "restore navigable depths in the harbor channels for commercial vessel traffic." USACE noted the area's "large industrial base depends on

the harbor to receive and ship commercial goods at a competitive cost.” These shipments, the majority of which include coal, fuel oil, steel, and grain, have a “substantial positive impact on the local economy by providing jobs that support the transportation, processing and production of these commodities;” “maintaining competitive pricing levels on these goods;” and providing substantial tax revenues for local governments. Harbor activities generate an estimated \$126 million in regional revenues and support 1,789 maritime-related jobs. Appellants' Ex. 1.

{¶36} Conversely, in Section 10(i), USACE analyzed “Social/Economic Benefits Lost,” as set out in Ohio Adm.Code Sections 3745-1-05(B)(2)(b-f), 3745-1-05(C)(6)(b) and 37451-54, and noted that the turbidity in the water column would be “aesthetically displeasing” to boaters and recreational fishing may be negatively affected by the lowering of water quality. USACE also stated, “[e]xcept for commercial industries such as restaurants and other riparian retail establishments, the lowering of water quality would have minimal negative effects on commercial activities.” Appellants' Ex. 1.

{¶37} In Section 10(j), USACE examined “Environmental Benefits Lost/Gained” and found that the project would cause a “short-term reduction of water quality in the receiving waters.” USACE explained that the receiving waters are naturally turbid and the main water quality impacts would be the generation of additional turbidity and a variation of dissolved oxygen levels in the water column. Further, testing indicated that placing the dredged material at the authorized open-lake site “would not significantly impact aquatic life.” Specifically, project activities would cause the excavation, smothering, and mortality of macroinvertebrates and the temporary avoidance of work areas by fish and wildlife species (i.e., mostly waterfowl).” Once dredging activities

ceased, however, the macroinvertebrate communities would recolonize, and fish and wildlife would return to the impacted areas. Appellants' Ex. 1.

{¶38} In Section 10(k), USACE reviewed “Mitigative Techniques” and noted the following: (1) dredging would occur only between July 1 and November 30; (2) placement of dredged material would be restricted to the northeast portion of the open-lake placement site; (3) no dredging would occur during storm events; and (4) care would be taken to minimize turbidity. Appellants' Ex. 1.

{¶39} Interestingly, Appellants and Ohio EPA shared similar apprehension about USACE’s ongoing open-lake placement of dredged materials and its impact on the condition of Lake Erie. During the public comment period, Mr. Smith responded to numerous concerns about a potential connection between open-lake placement and the increase in HABs in Lake Erie. To explore this possible connection, Mr. Smith reviewed several documents, including an article titled “Cause and Effect: Sediment Plume Creates Perfect Incubator for Microcystis Plume.” The article tied increased microcystis outbreaks to phosphorus run-off from agriculture lands and storm events, noting that microcystis flourishes in turbid water. The article did not, however, directly tie microcystis outbreaks to dredging and open-lake placement activities. Mr. Smith also attended a phosphorus task force meeting in March 2010 in the Director’s office to further discuss HABs and the fact that the scientific community was unable to reach a consensus regarding the connection between open-lake placement and HABs. Appellants' Ex. 29; Appellees' Ex. 15; Testimony Smith.

{¶40} At hearing, Mr. Bornique explained that the Agency closely analyzed the dredging activity and its effect on phosphorus attached to the sediment slated for open-lake placement and concluded that no new phosphorus will be added into the lake as a

result of USACE's project. In other words, proposed 401 Certification activities involved moving sediment from one area of the lake to another. Moreover, the data generated by the Agency's phosphorus task force and supplied by USACE demonstrated that only thirty percent of the phosphorus in the sediment material was considered Dissolved Reactive Phosphorus ("DRP"), the growth-limiting nutrient for algal growth. And, in this project, the amount of DRP was very small when compared to the phosphorus load already in the lake. Mr. Bornique also testified that although the LaMP detailed several impairments to the lake (*See ¶8, supra.*) attributable to excess phosphorus, the impairments described in the LaMP are legally distinguishable from Ohio EPA's formal designation of a water body as "impaired" under Ohio's laws and regulations protecting water quality. Testimony Bornique.

{¶41} Appellants' presentation of certain historical facts dovetailed with and enhanced the Agency's overarching concerns about the potential effects of open-lake placement. To highlight their concerns regarding the environmental impacts of the dredging activity, Appellants presented evidence about the lake's history of HABs, testimony about the impact on those who frequent Lake Erie, and one technical witness, Michael Murray, a staff scientist with NWF.

{¶42} Appellants documented that after a period of few algal blooms in the 1980s, blue-green algae began reappearing in the Western Basin of Lake Erie in the 1990s. By the mid-2000s, toxic algal growths had begun forming in the lake. Appellees' Ex. 22.

{¶43} Harmful algal blooms can produce unpleasant odors, neurotoxins, and hepatoxins, which can be harmful to humans. Skin exposure to these toxins may cause rashes, hives, or skin blisters. Breathing mist from lake-related activities may cause

runny eyes and noses, sore throat, and asthma-like symptoms or allergic reactions. And swallowing the water can cause acute diarrhea and vomiting, along with liver and kidney toxicity. The Ohio Department of Natural Resources advises people to avoid direct contact with affected lake water when blooms are occurring. Appellants' Ex. 9.

{¶44} Ohio EPA, in conjunction with Heidelberg University, convened the Ohio Lake Erie Phosphorus Task Force to address increased HABs and appearances of *Microcystis aeruginosa* and *Lyngbya wollei*, two toxin-producing algae that can be potentially harmful to humans, animals, and aquatic life. Among other things, the goals of the task force were to (1) identify and evaluate phosphorus sources, (2) determine what practices had changed since 1995 that may have led to an increase in DRP loads, and (3) review the relationship between DRP loads and the increased eutrophication in the lake, particularly in the Western Basin. The task force included representatives from state and federal agencies, Lake Erie researchers, soil scientists, agricultural program representatives, and wastewater treatment plant personnel. Appellants' Ex. 10; Testimony Murray.

{¶45} Mr. Murray, staff scientist for NWF's Great Lakes Regional Office, testified as an expert in scientific methods of studying impact of actions on the environment. Mr. Murray possesses specialized knowledge in the area of toxic chemicals, cycling of mercury, and PCBs, but lacks expertise in the impacts of increased phosphorus in water bodies or open-lake placement of dredged materials. In preparation for the hearing, he reviewed various documents and data including the LaMP and the Ohio Lake Erie Phosphorus Task Force Final Report. Testimony Murray.

{¶46} Though he was unable to point to a specific code section supporting his belief, Mr. Murray advocated that the standard for the Director's approval of the

dredging project should have been the unequivocal establishment that an insignificant environmental harm would be derived from open-lake placement. Mr. Murray continued by detailing a complex testing structure under which the Director could have more accurately assessed the impacts of open-lake placement in Lake Erie. On cross examination, however, Mr. Murray stated that despite decades of research, scientists have not yet developed a comprehensive understanding of all factors affecting sediment deposition and resuspension in water bodies; thus they have been unable to develop models to predict impacts and outcomes of these activities. Mr. Murray acknowledged that in this instance, the question is not what affects an increase in phosphorus or change in nutrient loads can have, but rather, what impact does moving sediment from one place to another have on the lake. Testimony Murray.

{¶47} Additionally, several Appellants testified about their experiences with HABs in Lake Erie. Richard Graham, a member of the IWLA, Ohio Division, observed turbidity from South Bass Island to Kelleys Island and attributed the turbidity to open-lake placement of sediments. Mr. Graham also recognized that other things, such as natural weather events and boat traffic, could generate the level of turbidity he observed. Testimony Graham.

{¶48} Rick Unger, a charter boat captain on Lake Erie and member of the LECBA, observed a correlation between the time of year open-lake placement occurs and an increase in algal growth in the lake. Mr. Unger also acknowledged that the rise in the presence of algae also corresponded with the warmest months of the year, when algal growth typically is at its peak. Mr. Unger expressed concern about fish avoiding turbid areas of the lake. He testified that because it has become increasingly difficult to

find areas of the lake unaffected by the algae, his charter boat business has experienced a noticeable decline in revenue. Testimony Unger.

{¶49} Jerald Eichbauer, a member of the WLEA and property owner, observed problems associated with the turbidity and open-lake placement in the open areas of the lake and closer to his home, approximately six miles from the sediment placement site. Testimony Eichbauer.

{¶50} And finally, Jamie Matuszak, also a member of the WLEA and an avid boater, testified that she observed turbidity up to roughly ten miles from the placement site and is concerned about potential ecological problems resulting from the dredging and placement activities. She acknowledged, though, that she had never tracked the turbidity from the placement site to any points further and was aware that natural occurrences and numerous factors could cause the lake disturbances she observed. Testimony Matuszak.

CONCLUSIONS OF LAW

{¶51} Standing, a threshold jurisdictional issue, must be resolved before an appellant may proceed with an appeal to the Commission. *Village of Canal Winchester v. Jones*, ERAC Case No. 255235 (April 14, 2004), citing *New Boston Coke v. Tyler*, 32 Ohio St.3d 216, 217 (1987). “Each individual Appellant bears the burden of demonstrating standing to maintain an appeal.” *Moffitt v. Korleski*, ERAC Case Nos. 216172-75 (August 27, 2009).

{¶52} The critical importance of a positive finding regarding a party’s standing is that it ensures that the party challenging a final action has a personal stake in the outcome of the controversy and that he or she will actually be aggrieved or adversely

affected by the Director's action. *Merkel et al. v. Jones et al.*, ERAC Case Nos. 185274-75 (October 23, 2003). A ruling that a party bringing an appeal has standing is not determinative of whether the issue presented by the appellant is itself justiciable; rather it is solely an issue of jurisdiction. *Id.*

{¶53} Ohio Revised Code (“R.C.”) authorizes two avenues of appeal to the Commission: R.C. 3745.04 and R.C. 3745.07. Revised Code 3745.04(B) states, “[a]ny person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director * * *.” For purposes of R.C. 3745.04, a “party” has been defined as “any person affected by the proposed action who appears in person, or by his attorney, and presents his position, arguments, or contentions orally or in writing * * *.” *New Boston Coke*, 32 Ohio St.3d at 218. Thus, to establish standing under R.C. 3745.04, an appellant must demonstrate that he appeared before the Director, presenting argument in writing or otherwise, and that he was affected by the final action of the Director. *Id.*

{¶54} Revised Code 3745.07 authorizes appeals to the Commission by stating the following:

If the director issues, denies, modifies, revokes, or renews a permit, license, or variance without issuing a proposed action, an officer of an agency of the state or of a political subdivision, acting in a representative capacity, or any person who would be aggrieved or adversely affected thereby, may appeal to the environmental review appeals commission within thirty days of the issuance, denial, modification, revocation, or renewal.

{¶55} To determine whether a party has been “affected” under R.C. 3745.04 or “aggrieved or adversely affected” under R.C. 3745.07, the Commission looks to a traditional standing analyses. *Johnson’s Island Prop. Owner’s Assn. v. Schregardus*,

10th Dist. No. 96APH10-1330 (June 30, 1997). A party must demonstrate that the challenged action “has caused or will cause him or her injury in fact, economic or otherwise, and that the interest sought is within the sphere of interest protected or regulated by the statute in question. *Id.*, citing *Franklin Cty. Regional Solid Waste Mtg. Auth. v. Schregardus*, 84 Ohio App.3d 591, 599 (10th Dist. 1992). The alleged injury must be concrete, rather than abstract or suspected; a party must show that he or she has suffered or will suffer a “specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction.” *Johnson’s Island*, quoting *State ex rel. Consumers League of Ohio v. Ratchford*, 8 Ohio App.3d 420, 424 (10th Dist. 1982). The alleged injury may be actual and immediate or threatened. *Johnson’s Island*, citing *State ex rel. Connors v. Ohio Dept. of Transportation*, 8 Ohio App.3d 44 (10th Dist. 1982). A party who alleges a threatened injury must demonstrate a realistic danger arising from the challenged action. *Johnson’s Island*, citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289 (1979); *City of Olmstead Falls v. Jones*, 152 Ohio App.3d 282, 2003-Ohio-1512, ¶21 (10th Dist.).

{¶56} A not-for-profit corporation has standing to sue on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. *Ohio Acad. Of Nursing Homes, Inc. v. Barry*, 37 Ohio App.3d 46 (10th Dist. 1987).

{¶57} Appellants brought their appeal under both R.C. 3745.04 and R.C. 3745.07. To survive Appellees’ challenge to Appellants’ standing, Appellants need only

satisfy one of the two avenues of appeal. The Commission will consider whether the party was aggrieved or adversely affected, as it is required under both standing analyses and is the sole factor under R.C. 3745.07.

{¶58} Through this appeal, all five Appellant organizations seek to protect interests that are germane to their stated organizational purpose. Except for NWF, each Appellant presented at least one member to testify at hearing. Each witness testified as to how he or she was negatively impacted by algal blooms in Lake Erie. Some described how their recreational activities had been impaired, while others detailed how the presence of algal blooms negatively affected their occupational pursuits.

{¶59} Based on the testimony presented at hearing, the Commission is satisfied that each individual member speaking on behalf of his or her organization adequately demonstrated the requisite standing to proceed in this matter.

{¶60} The question remaining is whether NWF, who did not present an individual member before ERAC, established standing in the instant matter. In support of standing, Appellants' Notice of Appeal asserts the following:

[NWF's] mission includes protecting the ecosystems that are most critical to native wildlife in order to ensure a healthy wildlife legacy for future generations. Its approximately one million members nationwide include approximately 40,000 Ohio citizens, which include one or more individuals who have used or use the Western Basin of Lake Erie for recreational and aesthetic enjoyment, or who would were it not for the turbidity, suspended sediment, and siltation caused or exacerbated by the discharge of the dredged sediment * * *, and who are concerned that the discharge of dredged sediment * * * will adversely affect their recreation in the Western Basin of Lake Erie, including boating and fishing, and adversely affect fish and fish habitat and contribute to harmful algal blooms. NWF submitted written comments on the draft Certification on February 22, 2010.

{¶61} The United States Supreme Court held an "organization lacked standing because it failed to 'submit affidavits * * * showing, through specific facts * * * that one

or more of [its] members would be “directly affected” by the alleged illegal activity.’ ” *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992). In *Summers*, the Court rejected Sierra Club’s standing argument, as articulated in its pleading, that it had more than 700,000 members nationwide, including thousands in California who used and enjoyed the National Forest at issue. The Court’s majority wholly rejected the dissent’s position that it is “probable (according to the dissent) that some (unidentified) members have planned to visit some (unidentified) small parcels affected by the Forest Service’s procedures and will suffer (unidentified) concrete harm as a result.” *Summers*, 555 U.S. at 497-98.

{¶62} Similarly, the Commission rejects NWF’s assertion that it satisfied organizational standing because about 40,000 of its approximately one-million members are Ohio citizens, who, were it not for the dredging activity, would recreate or enjoy the aesthetics of the Western Basin of Lake Erie. Accordingly, NWF is dismissed from this matter for lack of standing.

{¶63} Significantly, the five Appellants jointly filed one Notice of Appeal and acted in cooperation throughout the prosecution of the appeal, agreeing to present evidence jointly and rely on each others’ attorneys, witnesses, and documents at the de novo hearing.² Thus, based on the inter-relation between NWF and other the parties who have established standing, the Commission has determined it is appropriate to allow NWF’s expert witness’s testimony to remain part of the record herein and that the

² In some case, multiple appellants file separate notices of appeal, even though the underlying matter arises from the same final action of the Director.

dismissal of NWF for lack of standing has no bearing on the overall outcome of this appeal.

{¶64} R.C. 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. The statute provides, in relevant part, that “[i]f, 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.

{¶65} 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). This standard does not permit ERAC to substitute its judgment for that of the Director as to factual issues. *CECOS Internatl., Inc. v. Shank*, 79 Ohio App.3d 1, 6 (10th Dist. 1992). “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. 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 the board would have taken the same action.” *CECOS Internatl., Inc. v. Shank*, 74 Ohio App.3d 43, 52 (10th Dist. 1991).

{¶66} In cases “[w]here qualified, credible expert witnesses disagree on a matter within their expertise, the Commission defers to the decision of the Director.” *Tube City Olympic of Ohio v. Jones*, ERAC No. 994681 (March 5, 2003); *see also, Copperweld*

Steel Co. v. Shank, EBR No. 781787 (October 24, 1989) (where “the question of what levels of treatment or design are necessary to protect public health or ground water are the subject of legitimate debate or dispute between qualified experts, the [Commission] will defer to the action of the Director where that action is otherwise reasonable and lawful”).

{¶67} 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-Ohio-4982, at ¶8, 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). The deference is not, however, without limits. See e.g., *B.P. Exploration and Oil, Inc. v. Jones*, ERAC No. 184134-36 (March 21, 2001) (in which the Commission noted that such deference must be granted to the Director’s interpretation and application of his statutes and rules, “particularly if the Director’s interpretation is not at variance with the explicit language of the regulations”).

{¶68} R.C. 6111.03(P) authorizes the Director to “certify or deny certification to any applicant for a federal license or permit to conduct any activity that may result in any discharge into the waters of the state that the discharge will comply with the Federal Water Pollution Control Act” or Clean Water Act.

{¶69} When considering an application for a 401 certification, the Director applies two sets of rules – (1) the certification rule, Ohio Adm.Code 3745-32-05, and (2) the antidegradation rule, Ohio Adm.Code 3745-1-05.

~~{¶70}~~ Ohio Adm.Code 3745-32-05 [Criteria for decision by director.] sets out the factors the Director must consider when evaluating a 401 certification. Ohio Adm.Code 3745-32-05 states the following:

(A) The director shall not issue a section 401 water quality certification unless he determines that the applicant has demonstrated that the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state will:

(1) Not prevent or interfere with the attainment or maintenance of applicable water quality standards;

(2) Not result in a violation of any applicable provision of the following sections of the Federal Water Pollution Control Act including:

(a) Effluent limitations as described in section 301;

(b) Water quality related effluent limitations as described in section 302;

(c) Water quality standards and implementation plans as described in section 303;

(d) National standards of performance as described in section 306; or

(e) Toxic and pretreatment effluent standards as described in section 307.

(B) Notwithstanding an applicant's demonstration of the criteria in paragraph (A) of rule 3745-32-05 of the Administrative Code, the director may deny an application for a section 401 water quality certification if the director concludes that the discharge of dredged or fill material or obstructions or alterations in waters of the state will result in adverse long or short term impact on water quality.

(C) The director may impose such terms and conditions as part of a section 401 water quality certification as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality.

(D) Prior to the issuance of a section 401 water quality certification or prior to, during, or after the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the

state to ensure adequate protection of water quality, the director may require that the applicant perform various environmental quality tests including, but not limited to, chemical analyses of water, sediment or fill material, and bioassays.

{¶71} The second rule evaluated by the Director when reviewing a 401 certification application is Ohio's Antidegradation Rule set out in Ohio Adm.Code 3745-1-05. Ohio EPA describes this comprehensive rule as follows:

Antidegradation provisions describe the conditions under which water quality may be lowered in surface waters. Existing beneficial uses must be maintained and protected. Further, water quality better than that needed to protect existing beneficial uses must be maintained unless lower quality is deemed necessary to allow important economic or social development (existing beneficial uses must still be protected).

http://www.epa.state.oh.us/dsw/rules/antidegguide_2003.aspx

{¶72} Ohio's Antidegradation Rule contains multiple provisions governing issuance of certain permits or certifications that may result in the lowering of water quality. Ohio Adm.Code 3745-1-05(C)(1) establishes the floor below which degradation of a water body may not occur by stating the following:

Existing uses * * * and the level of water quality necessary to protect existing uses, shall be maintained and protected. There may be no degradation of water quality that results in either a violation of the applicable water quality criteria for the designated uses, unless authorized by a water quality standard variance issued * * * or the elimination or substantial impairment of existing uses.

{¶73} In general, this rule permits the Director to approve activities that lower water quality only if there has been an examination of non-degradation, minimal degradation, and mitigative technique alternatives; a review of the social and economic issues related to the activity; implementation of a public participation process; coordination of appropriate intergovernmental communications; and a determination that the lower water quality is necessary to accommodate important social or economic

development in the area in which the water body is located. Ohio Adm.Code 3745-1-05(C)(5)

{¶74} More specifically, Ohio's Antidegradation Rule enumerates multiple factors the Director must consider when evaluating proposed activities that lower water quality, such as:

- (a) The magnitude of the proposed lowering of water quality;
- (b) The anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, including threatened and endangered species, important commercial or recreational sport fish species, other individual species and the overall aquatic community structure and function;
- (c) The anticipated impact of the proposed lowering of water quality on human health and the overall quality and value of the water resource;
- (d) The degree to which water quality may be lowered in waters located within national, state or local parks, preserves or wildlife areas, waters listed as state resource waters in rules 3745-1-08 to 3745-1-30 of the Administrative Code, or waters categorized outstanding national resource waters, outstanding state waters or superior high quality waters;
- (e) The effects of lower water quality on the economic value of the water body for recreation, tourism and other commercial activities, aesthetics, or other use and enjoyment by humans;
- (f) The extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state;
- (g) The cost of the water pollution controls associated with the proposed activity;
- (h) The cost effectiveness and technical feasibility of the non-degradation alternatives, minimal degradation alternatives or mitigative technique alternatives and the effluent reduction benefits and water quality benefits associated with such alternatives;
- (i) The availability, cost effectiveness, and technical feasibility of central or regional sewage collection and treatment facilities, including long-range plans outlined in state or local water quality management planning documents and applicable facility planning documents;

(j) The availability, reliability and cost effectiveness of any non-degradation alternative, minimal degradation alternative or mitigative technique alternative;

(k) The reliability of the preferred alternative including, but not limited to, the possibility of recurring operational and maintenance difficulties that would lead to increased degradation;

(l) The condition of the local economy, the number and types of new direct and indirect jobs to be created, state and local tax revenue to be generated, and other economic and social factors as the director deems appropriate; and

(m) Any other information regarding the proposed activities and the affected water body that the director deems appropriate.

Ohio Adm.Code 3745-1-05(C)(5)(a-m)

{¶75} In their post hearing brief, Appellants restated their assignments of error in a format more in keeping with ERAC's standard of review and posited them as follows:

- A. The Director's action issuing the Section 401 Certification was unreasonable because the Director acted without knowing whether the water quality for Lake Erie is attained.
- B. The Director's action issuing the Section 401 Certification was unlawful because the Director failed to determine that the discharge of dredged sediment will not prevent or interfere with the attainment or maintenance of applicable water quality standards.
- C. The Director's action issuing the Section 401 Certification was unreasonable because the Director failed to explain his determination that 1) the discharge of dredged sediment will not result in a violation of water quality standards; and 2) a lowering of water quality is necessary.
- D. The Director's action of issuing the Section 401 Certification was unreasonable because the Corps failed to prove that the discharge of dredge sediment will not prevent or interfere with the attainment or maintenance of the Lake Erie water quality standard and will not result in a violation of the Lake Erie Water Quality standard.

Case File Item II.

{¶76} In restated Assignment of Error A, Appellants assert the Director’s action was unreasonable because he failed to properly assess the water quality of Lake Erie. The Commission disagrees.

{¶77} First, Appellants erroneously equate the word “impaired” as used in the LaMP, with “impaired” as used in Ohio Adm.Code. In the LaMP, “impaired” is used as a descriptor of the lake's condition; it is employed in a general or common way, referring to a “diminished, damaged, or weakened” condition. *See*, Webster’s New Basic Dictionary. Comparatively, Ohio Adm.Code reserves the word “impaired” for water bodies that have been subjected to a formal assessment process, fail to meet specific water quality standards, and thus, are deemed “impaired” by Ohio EPA. *See e.g.*, Ohio Integrated Report, <http://www.epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx> (last visited February 17, 2012). Significantly, Appellants do not assert that Lake Erie is deemed impaired; only that it suffers from the diminished, damaged, or weakened conditions described in the LaMP.

{¶78} Second, evidence supports that the Director evaluated numerous studies and documents and considered various information sources and data before making his determination to grant the 401 Certification. The Director did not conduct, and was not required to conduct, a formal 305(b)-styled assessment.³ Nonetheless, the Commission is satisfied that the Director possessed adequate information upon which to base his decision to issue the 401 Certification.

³ “The National Water Quality Inventory Report to Congress (305(b) report) is the primary vehicle for informing Congress and the public about general water quality conditions in the United States. This document characterizes our water quality, identifies widespread water quality problems of national significance, and describes various programs implemented to restore and protect our waters. <http://water.epa.gov/lawsregs/guidance/cwa/305b/index.cfm>. A 305(b) report differ from a 303(d) list in that 305(b) reports are submitted to the United States Congress and include all waters of the state, not just the impaired water bodies found on a 303(d) list. www.water.epa.gov/type/watersheds/monitoring/repguid.cfm.”

{¶79} Finally, Ohio Adm.Code 3745-1-01(E)(2) allows for temporary impacts to water quality, by stating the following:

3745-1-01 Purpose and Applicability

* * *

(E) The following exceptions will apply only to the specific water quality criteria involved in each case for a reasonable period of time as determined by the director:

* * *

(2) Whenever dredging or construction activities occur on or near water bodies or during the period of time when the aftereffects of dredging or construction activities degrade water quality and such activities have been authorized by the United States army corps of engineers and/or by a 401 water quality certification or an isolated wetland permit issued by the Ohio environmental protection agency.

{¶80} Evidence supports the conclusion that the Director anticipated and considered the effects of the temporary turbidity both at the dredging and at the open-lake placement sites. Indeed, the Director reviewed studies regarding the effects of resedimentation in Lake Erie, contacted researchers and scientists to inquire as to the presence of a link between dredging activities and algal blooms, and even convened a task force to more fully evaluate the effects of phosphorus in Lake Erie.

{¶81} Accordingly, the Commission finds that the Director had before him adequate information upon which to base his issuance of the 401 Certification.

{¶82} In restated Assignment of Error B, Appellants assert the Director's action was unlawful because he failed to determine that the placement of dredged material will prevent or interfere with attainment or maintenance of Lake Erie's water quality standard. The Commission disagrees.

{¶83} Appellees readily concede that to grant a 401 certification the Director must determine that the activity requested does not prevent or interfere with attainment or maintenance of the water quality standard of the water body affected. Appellees assert, however, that the Director did in fact make this determination, and no Ohio regulation or statute requires the Director to make this determination in writing, independent of the certification process as a whole. Specifically, Ohio Adm.Code 3745-32-05(A)(1) (*See*, ¶70, *supra.*), precludes the Director from issuing a 401 certification unless “he determines the applicant has demonstrated that the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state will not prevent or interfere with the attainment or maintenance of applicable water quality standards; * * * ”

{¶84} Admittedly, neither the 401 Certification nor the letter accompanying the certification include explicit language stating that the Director had made the determination set out in Ohio Adm.Code 3745-32-05(A)(1). The Commission believes, however, that such an overt summary statement is unnecessary because the entire 401 certification application and review process is designed to walk the applicant and Director through a procedure that will ultimately lead to a determination of whether the activity requested will “prevent or interfere with attainment or maintenance of applicable water quality standards.” Simply stated, issuance of the 401 Certification is evidence of the Director’s ultimate determination that the requested activity satisfies the requirements of Ohio Adm.Code 3745-32-05(A)(1).

{¶85} Accordingly, the Commission finds that the Director did in fact make a determination that USACE’s dredging activity would not prevent or interfere with attainment or maintenance of applicable water quality standards.

{¶86} In restated Assignment of Error C, Appellants assert the Director’s action was unreasonable because he failed to explain his determination that open-lake placement will not result in a violation of water quality standards and that a lowering of water quality is necessary. The Commission disagrees.

{¶87} The Commission believes this assignment of error is similar to Assignment of Error B, except that Assignment of Error C challenges the Director’s review of anti-degradation standards, rather than water quality standards.

{¶88} Ohio Adm.Code 3745-1-05(C)(5) states, “* * * [w]hen making determinations regarding proposed activities that lower water quality the director shall *consider*” sections (a-m). *See*, ¶74, *supra*. Emphasis Added.

{¶89} Once again, Appellees concede that the Director did not create an independent document precisely outlining the internal process of considering whether open-lake placement will result in a violation of water quality standards and that a lowering of water quality is necessary. The record is replete, however, with instances supporting the conclusion that the Director did in fact consider these issues before issuing the 401 Certification. Indeed, the anti-degradation requirements set out in Ohio Adm.Code 3745-1-05(C)(5)(a)-(m) are interwoven directly into the application itself. As the applicant responds to individual questions on the application, it addresses specific aspects of the antidegradation requirements. Thus, as the Director reviews and evaluates 401 certification applications, he is analyzing and considering whether the project will violate water quality standards and whether a lowering of water quality is necessary. Further, Mr. Smith’s in-depth testimony supports the conclusion that he considered, among other things, the magnitude of the proposed lowering of water

quality, the impact of the proposed lowering of water quality on aquatic life and wildlife, and the economic value of the project on the Western Basin of Lake Erie.

{¶90} Accordingly, the Commission finds that the Director considered whether open-lake placement would result in a violation of water quality standards and whether a lowering of water quality was necessary.

{¶91} In restated Assignment of Error D, Appellants assert that the Director's action was unreasonable because USACE failed to prove that open-lake placement would not prevent or interfere with the attainment or maintenance of Lake Erie water quality standards and would not result in a violation of those standards. The Commission disagrees.

{¶92} At the outset, the Commission must clarify that its standard of review is limited to the lawfulness and reasonableness of the Director's action, not whether an applicant proved some fact or process to the Director. That said, a brief analysis of Appellants' final Assignment of Error may be warranted.

{¶93} Appellants specifically attack the information contained in the application and the FONSI, arguing that they were inadequate and invalid, and therefore, the Director should not have considered them. When making a determination under Ohio Adm.Code 3745-32-05(A), the Director is required to *consider* the antidegradation requirements set out in Ohio Adm.Code 3745-1-05. Inherent in the process of considering is the authority to weigh information supplied by the applicant supporting the proposed activity, along with other information gathered and evaluated by the Director pursuant to Ohio Adm.Code 3745-1-05(C)(8).

{¶94} In part, because the Director did not wholly concur with the finding of no significant impact contained in the FONSI, Appellants seek to discredit the Director's

reliance on the actual data contained in the document. Mr. Smith's testimony clarified that the Director's response to the FONSI did not impugn the accuracy of the supporting data in the FONSI; rather, the Director was underscoring his commitment to developing alternative disposal methods of the sediment dredged from the harbor. Additionally, the Director actively pursued scientific consensus establishing a link between dredging activity and algal blooms in Lake Erie. Unable to procure such information and determining that USACE had satisfied the other portions of the 401 certification requirements, the Director issued a 401 certification to USACE. Thus, evidence presented at hearing and testimony by Mr. Smith and Mr. Bonique support the conclusion that the Director fully considered the requirements of both Ohio Adm.Code 3745-32-05(A) and 3745-01-05(C) and determined that the activity proposed by USACE in their 401 Certification application would not prevent or interfere with the attainment or maintenance of Lake Erie water quality standards and would not result in a violation of those standards.

{¶95} Accordingly, the Commission finds that the Director possessed a valid factual foundation for determining that open-lake placement of sediment would not prevent or interfere with attainment or maintenance of Lake Erie water quality and would not result in a violation of those standards.

FINAL ORDER

In light of the forgoing the Commission finds that the Director acted lawfully and reasonably in issuing a 401 Certification to USACE for their proposed activity in Lake Erie. The Commission, in accordance with Ohio Adm.Code Section 3746-13-01, informs the parties that:

Any party adversely affected by an order of the commission may appeal to the Court of Appeals For Franklin County, or if the appeal arises from an alleged violation of 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.

ESCHLEMAN AND PETERSEN, COMMISSIONERS, CONCUR

THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION

Lisa L. Eschleman, Chair

Melissa M. Shilling, Vice-Chair

Shaun K. Petersen, Member

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

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| WESTERN LAKE ERIE ASSOCIATION | [CERTIFIED MAIL] |
| LAKE ERIE CHARTER BOAT ASSOCIATION | [CERTIFIED MAIL] |
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