

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

DAVID J. NEUENDORFF, : Case No. ERAC 15-6848
: :
Appellant, : :
: :
v. : :
: :
CRAIG BUTLER, DIRECTOR OF : :
ENVIRONMENTAL PROTECTION, : :
: :
and : :
: :
U.S. ARMY CORPS OF ENGINEERS, : :
: :
Appellees. : :

DECISION

Rendered on June 8, 2016

David J. Neuendorff, pro se Appellant

Michael DeWine, Attorney General, *Janeane R. Webber*, and *Casey L. Chapman* for Appellee Craig Butler, Director of Environmental Protection

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) on a notice of appeal filed by Appellant David J. Neuendorff on June 19, 2015. Mr. Neuendorff raises five assignments of error challenging the May 18, 2015 issuance of a Section 401 Water Quality Certification (“Permit”) by Appellee Craig Butler, Director of Environmental Protection (“Director,” “Ohio EPA,” “Agency”) to Appellee U.S. Army Corps of Engineers (“Army Corps”). Case File Items A, D.

{¶2} Prior to de novo hearing, the Director filed a Motion to Dismiss and Motion for Partial Summary Judgment (“Motion”), seeking dismissal, or in the alternative summary judgment, on Appellant’s assignments of error one, two, three, and four. Upon review of the Director’s Motion and Mr. Neuendorff’s response thereto, the Commission granted partial summary judgment on assignments of error one through four and indicated that detailed findings of fact and conclusions of law regarding those assignments of error would be included in the Commission’s decision following the de novo hearing. Case File Items BB, GG, II.

{¶3} On February 24, 2016, the Commission held a de novo hearing on Appellant’s remaining assignment of error five.

{¶4} Based upon a review of the pleadings, the evidence adduced at hearing, and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order AFFIRMING the Director’s issuance of a Section 401 Water Quality Certification to the U.S. Army Corps of Engineers.

FINDINGS OF FACT

I. Background and Regulatory Framework

{¶5} The U.S. Army Corps of Engineers is responsible for maintaining the commercial navigation channels of the Toledo Harbor in Lucas County, Ohio. To ensure sufficient water depth for commercial navigation, the Army Corps proposed to dredge approximately 1,100,000 cubic yards of sediment from the Toledo Harbor, with the dredged material to be placed in a two square-mile open-lake placement area. Director’s Ex. 10.

{¶6} Because this project would result in discharge of dredged or fill material to waters of the state (here, to the western basin of Lake Erie), the Army Corps filed an application for Section 401 Water Quality Certification with Ohio EPA on December 24, 2014. Testimony Allamon; Director's Ex. 13.

{¶7} In evaluating an application for a Section 401 Water Quality Certification, Ohio EPA applies two sets of rules: (1) the certification rule and (2) the anti-degradation rule.

{¶8} The certification rule sets forth the factors that the Director must consider when evaluating a Section 401 Water Quality Certification application and states:

(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 * * * will:

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

* * *

Ohio Administrative Code ("Adm.Code") 3745-32-05 (Emphasis added).

{¶9} "Water quality standards" contain two distinct elements: (1) use designations and (2) numerical or narrative criteria designed to protect such use designations. Ohio Adm.Code Chapter 3745-1.

{¶10} For certain water bodies, use designations are assigned by rule. Lake Erie is designated "exceptional warmwater habitat, superior high quality water, public water supply, agricultural water supply, industrial water supply, and bathing waters." Ohio Adm.Code 3745-1-31,

{¶11} The second component of Ohio EPA's review of Section 401 certification applications is Ohio's anti-degradation rule, which expressly requires that "existing uses" be maintained and protected. Ohio Adm.Code Chapter 3745-1.

{¶12} Further, the anti-degradation rule requires the Director to consider several additional factors when making determinations regarding proposed activities that lower water quality. Those factors include:

(C)(5) When making determinations regarding proposed activities that lower water quality the director shall consider the following:

- (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).

II. Application, Review, and Issuance of Section 401 Water Quality Certification

{¶13} Upon receiving the Army Corps' application, Heather Allamon, Environmental Specialist 2, Division of Surface Water, Ohio EPA, Northwest District Office, conducted an initial completeness review. The purpose of the completeness review was to ensure the application contained responses to each of the application questions and sufficient documentation for Ohio EPA to complete its technical evaluation of the proposed project. Testimony Allamon; Director's Ex. 13.

{¶14} In its application, the Army Corps stated that several questions were inapplicable to its proposed dredging of the Toledo Harbor. Relevant to this appeal is the Army Corps' response to "Item 7 – Proposed Mitigation Plan." The application stated, "[a]s the proposed discharge of dredged material to Lake Erie would not result in the loss of wetland area or function, a mitigation plan would not be applicable to the proposed project." Director's Ex. 10.

{¶15} Ms. Allamon testified at hearing that although the Army Corps' application did not contain a "detailed mitigation plan," its response was sufficient to satisfy the Agency's completeness review requirements due to the nature of the proposed project. Ms. Allamon explained that mitigation plan requirements are not as specific for lake projects as they are for other projects, such as those that impact wetlands. Following her initial completeness review, Ms. Allamon deemed the Army Corps' application administratively complete on January 5, 2015. Testimony Allamon; Director's Ex. 13.

{¶16} On February 18, 2015, Ohio EPA held a public hearing on the proposed dredging of Toledo Harbor. At the public hearing, Ms. Allamon gave a presentation regarding the proposed project, and Ohio EPA accepted oral and written comments from members of the public. Eight individuals, including Appellant, testified at the public hearing. Additionally, Mr. Neuendorff submitted a printed copy of an online petition that he prepared and organized. Testimony Allamon; Director's Ex. 3, 11, 13.

{¶17} After the public hearing, Ohio EPA conducted a substantive, technical review of the Army Corps' application. Ms. Allamon considered the three alternative scenarios presented by the Army Corps in its application: (1) a non-degradation alternative, which consisted of no dredging activity; (2) a minimum degradation alternative, which proposed to dredge 1,100,000 cubic yards of material; and (3) a preferred design alternative, which proposed to dredge up to 1,500,000 cubic yards of material. Ms. Allamon also reviewed a study prepared by the Army Corps ("Army Corps' report") regarding the effect of open lake placement of dredged material on harmful algal blooms in the western basin of Lake Erie. Testimony Allamon; Director's Ex. 9, 13.

{¶18} On May 18, 2015, the Director issued a Section 401 Water Quality Certification approving the Army Corps' minimum degradation alternative. The Permit contained several restrictions designed to minimize the effects of the Toledo Harbor dredging project on the water quality and aquatic life of Lake Erie. Testimony Allamon; Director's Ex. 1, 13.

{¶19} Additionally, the Permit required the Army Corps to complete a study regarding the establishment of habitat restoration units, as well as the potential viability of beneficial reuse or alternative placement options to open-lake placement of dredged material. Testimony Allamon; Director's Ex. 1, 13.

{¶20} In its Response to Comments, issued the same day as the Permit, Ohio EPA stated it acknowledged Mr. Neuendorff's online petition. Director's Ex. 4.

III. Mr. Neuendorff's ERAC Appeal

A. Notice of Appeal

{¶21} On June 19, 2015, Mr. Neuendorff filed a notice of appeal with the Commission challenging the Director's issuance of the Permit. Because Mr. Neuendorff's notice of appeal did not comply with the requirements of Ohio Adm.Code 3746-5-07(A)-(D), the Commission ordered Appellant to file an amended notice of appeal. Mr. Neuendorff filed his amended notice of appeal on July 22, 2015, listing five assignments of error:

1. That the Army Corps of Engineers be directed to provide the required third alternative as published in the Public Notice of Receipt of 401 Application and Public Hearing;
2. The applicant has in fact made no attempt to propose any alternative at all that will mitigate the affects of open lake disposal;
3. The applicant be required to submit identification of the substances to be discharged;

4. The applicant be directed to demonstrate the actual disposal of 5% of dredged material into a quarry; and
5. Specific testimony about information provided by the Corps of Engineers was not adequately examined, in the light of the required need for mitigation alternatives by the Ohio EPA and the Corps held accountable.

Case File Items A, D (punctuation in original).

B. Director's Motion

{¶22} On December 29, 2015, the Director filed a Motion to Dismiss and Motion for Partial Summary Judgment, seeking dismissal, or in the alternative summary judgment, on assignments of error one, two, three, and four. Mr. Neuendorff filed his Response to the Director's Motion on January 19, 2016. Case File Items BB, GG.

{¶23} Regarding assignments of error one, two, and four, Mr. Neuendorff argued that the non-degradation alternative presented in the Army Corps' application was inadequate because it did not represent a "realistic" alternative to the preferred design. Instead, Mr. Neuendorff argued the Army Corps should have been required to present a different, more realistic non-degradation scenario. Specifically, Mr. Neuendorff asserted that the Army Corps should have been required to present a mitigative technique alternative such as the use of "clam shell bucket dredging," combined with the placement of dredged material at an alternate location. Case File Items D, GG.

{¶24} Further, Mr. Neuendorff argued that Ohio EPA should have deemed the Army Corps' application incomplete because it lacked a "detailed mitigation plan." Case File Items D, GG.

{¶25} In his Motion, the Director argued that the Army Corps' proposed no-action scenario satisfied the requirements of the applicable law, Revised Code ("R.C.") 6111.30(A)(8). Case File Item BB.

{¶26} Further, the Director contended the applicable statutes and regulations did not require the inclusion of a mitigative technique alternative. The Director argued that the Army Corps' response to "Item 7 – Proposed Mitigation Plan," that such a mitigation plan was not applicable, was sufficient due to the nature of the proposed project. Case File Item BB.

{¶27} Regarding assignment of error three, Mr. Neuendorff argued that the Army Corps' application was incomplete because it did not identify "the substances to be discharged, including the amount of regulated pollutants to be discharged in terms of mass and concentration, and * * * the amount of dredged and fill material to be discharged" as required by Ohio Adm.Code 3745-1-05(B)(3)(a). Case File Items D, GG.

{¶28} In his Motion, the Director argued that Ohio Adm.Code 3745-1-05(B)(3)(a) was not applicable to applications for Section 401 Water Quality Certifications. Case File Item BB.

{¶29} The Commission granted the Director's Motion for Partial Summary Judgment with respect to assignments of error one, two, three, and four on January 21, 2016. The Commission's Ruling stated in pertinent part:

In summary, the Commission finds the U.S. Army Corps of Engineers' application for Section 401 Water Quality Certification contained a preferred alternative, a minimum degradation alternative, and a non-degradation alternative as required by Revised Code 6111.30(A)(8). Further, the Commission finds the applicable statutes and regulations did not require the submission of a specific mitigative technique alternative and/or mitigation plan because the proposed activity would not result in the loss of wetland or stream activity. Finally, the Commission finds the applications for Section 401 Water Quality Certification are exempt from

the identification requirement contained in Ohio Administrative Code 3745-1-05(B)(3)(a).

Case File Item II.

{¶30} As indicated in the Commission's January 21, 2016 ruling, a detailed discussion of assignments of error one, two, three, and four is included in the Conclusions of Law below. Case File Item II.

C. De Novo Hearing.

{¶31} The Commission held a de novo hearing on Appellant's remaining assignment of error five on February 24, 2016.

{¶32} At hearing, Mr. Neuendorff testified on his own behalf. Ms. Allamon and Elizabeth Wick, Manager, Division of Surface Water, Ohio EPA, Northwest District Office, testified on behalf of Ohio EPA. The Army Corps neither entered an appearance nor participated in the de novo hearing.

{¶33} The Commission summarizes Mr. Neuendorff's arguments as presented at hearing as follows: (1) Ohio EPA acted unlawfully and unreasonably by failing to require the Army Corps to utilize mitigative techniques; (2) Ohio EPA's reliance on the Army Corps' report regarding the effect of open lake placement of dredged material on harmful algal blooms in the western basin of Lake Erie was unreasonable; (3) the Army Corps' application indicated that the project was a "fill" project only rather than a "dredge" and "fill" project; (4) certain portions of the application did not contain sufficient detail; (5) the Director acted unreasonably in granting the Army Corps permission to dredge river mile one of the Maumee River; and (6) the Director failed to adequately consider comments submitted at the public hearing.

- i. Ohio EPA acted unreasonably by failing to require the Army Corps to utilize mitigative techniques*

{¶34} Mr. Neuendorff argued that the Director acted unlawfully and unreasonably by failing to require the Army Corps to utilize mitigative techniques. Specifically, Mr. Neuendorff contended that the Director should have required the Army Corps to use “clam shell bucket dredging” and/or required the Army Corps to place dredged material at alternative locations, such as in a quarry. Mr. Neuendorff acknowledged that such techniques would be more costly, but argued their use would reduce the impact of dredging activity on water quality in Lake Erie. Further, Mr. Neuendorff argued that the Army Corps’ application should have been deemed incomplete because it did not contain a “detailed mitigation plan.” Testimony Neuendorff.

{¶35} In response, Ms. Allamon testified the Agency reviews applications as submitted and does not evaluate hypothetical applications that could have been submitted instead. Moreover, Ms. Allamon explained that other factors, such as cost and technical feasibility, may prevent the use of the techniques proposed by Mr. Neuendorff. Ms. Allamon stated that because the Army Corps’ application met the requirements for the issuance of a Section 401 Water Quality Certification, the Director ultimately approved the Army Corps’ minimum degradation alternative. Testimony Allamon.

{¶36} Further, regarding the Army Corps’ response to “Item 7 – Proposed Mitigation Plan,” Ms. Allamon stated she considered the response to be sufficient because Ohio EPA’s compensatory mitigation requirements for lake projects are not as specific as those for wetland projects. In this instance, Ms. Allamon testified that the Permit satisfied the applicable mitigation requirements because it included terms and conditions designed to minimize the effects of the Toledo Harbor dredging project on

the water quality and aquatic life of Lake Erie. For example, Ms. Alamon noted that the Permit prohibits dredging or disposal activities during storm events. Testimony Allamon.

{¶37} Finally, Ms. Allamon testified that although the dredging of the Toledo Harbor would result in some degradation of water quality in Lake Erie, such degradation was justified in this instance because of the economic importance of maintaining adequate water depth in the commercial navigation channels within the harbor. Testimony Allamon.

- ii. *Ohio EPA's reliance on the Army Corps' report regarding the effect of open lake placement of dredged material on harmful algal blooms in the western basin of Lake Erie was unreasonable*

{¶38} Mr. Neuendorff argued Ohio EPA's reliance on the Army Corps' report regarding the effect of open lake placement of dredged material on harmful algal blooms in the western basin of Lake Erie was unreasonable. The report concluded that open-lake placement of dredged material was not a significant contributor to phosphorus concentrations and harmful algal blooms in the western basin of Lake Erie. At hearing, Mr. Neuendorff argued that the report was internally inconsistent. Specifically, Mr. Neuendorff observed that the report states that resuspension from dredging and placement activities can be a source of phosphorous loading in the water column, yet the report ultimately concludes that open-lake placement of dredged material is not a significant contributor to phosphorus concentrations and harmful algal blooms in the western basin of Lake Erie. Mr. Neuendorff contended that Ohio EPA's reliance on the Army Corps' report in evaluating its application was therefore unreasonable. Testimony Neuendorff; Director's Ex. 9.

{¶39} Ms. Allamon and Ms. Wick testified on behalf of the Director that although Ohio EPA staff raised some questions during the Agency's review of the Army Corps' report, the report nonetheless provided a robust and useful analysis of the complex problem of nutrient loading. Therefore, both Ms. Allamon and Ms. Wick concluded that Ohio EPA's reliance on the study in evaluating the Army Corps' application was reasonable. Testimony Allamon, Wick; Director's Ex. 12.

iii. The Army Corps' application indicated that the project was a "fill" project rather than a "dredge" project

{¶40} Mr. Neuendorff also noted that the Army Corps indicated, in section 2.K of its application, that the project was a "fill" project. Mr. Neuendorff asserted that the project is more accurately characterized as both a "dredge" and a "fill" project. Testimony Neuendorff; Director's Ex. 10.

{¶41} In response, Ms. Allamon acknowledged that the project is more accurately described as both a "dredge" and a "fill" project. Ms. Allamon explained, however, that this constituted a minor administrative error and was not significant in Ohio EPA's evaluation of the application. Testimony Allamon.

iv. Certain portions of the application did not contain sufficient detail

{¶42} Mr. Neuendorff argued that certain portions of the Army Corps' application lacked sufficient detail. Specifically, Mr. Neuendorff cited Ohio EPA's Section 401 Water Quality Certification Application Primer ("Primer"), arguing the information required by Question 10 of the application form was omitted from the Army Corps' application. Testimony Neuendorff; Appellant's Ex. E.

{¶43} In response, Ms. Allamon noted that the version of the Section 401 Water Quality Certification Application Primer that Mr. Neuendorff introduced into evidence at hearing was outdated. Ms. Allamon stated that the Primer, dated August

1998, had since been updated due to changes in Ohio EPA's application form. The Commission also notes that the Army Corps' application appears to contain only seven parts, compared to the eleven questions detailed in the August 1998 version of the Primer. Testimony Allamon; Compare Appellant's Ex. E with Director's Ex. 10.

- v. *The Director acted unreasonably in granting the Army Corps permission to dredge river mile one of the Maumee River*

{¶44} Here, Mr. Neuendorff argued that the Director acted unreasonably in granting the Army Corps permission to dredge river mile one of the Maumee River. Mr. Neuendorff introduced portions of the Toledo Harbor Sediment Management and Use Plan ("THSMUP"), which states, "[s]ediments dredged from River Mile 1, River Mile 2, and River Mile 4 were identified as not meeting Federal guidelines for open-lake placement in the latest Sediment Sampling Analysis." Mr. Neuendorff contended that in light of this statement in the THSMUP, it was unreasonable for the Director to grant the Army Corps permission to dredge river mile one of the Maumee River in issuing the Permit. Testimony Neuendorff; Appellant's Ex. F.

{¶45} Significantly, however, Mr. Neuendorff introduced only limited portions of the THSMUP into evidence. Thus, the full context of the above statement within the report¹ is unclear to the Commission, including whether data supports that open-lake placement of dredged material from river mile one would result in a violation of applicable water quality standards. Moreover, the testimony at hearing was unclear as to whether the Permit actually granted permission to dredge river mile one of the Maumee River. Testimony Neuendorff, Wick; Appellant's Ex. F.

¹ The statement is contained in a footnote to Table B-1 in the THSMUP. Appellant's Ex. F.

vi. *The Director failed to adequately consider comments submitted at the public hearing*

{¶46} Finally, Mr. Neuendorff argued that the Director acted unreasonably because the Agency failed to adequately consider comments submitted at the February 18, 2015 public hearing. Mr. Neuendorff testified that, at the public hearing, he submitted a copy of an online petition containing nearly 4,000 signatures opposing dredging in the Toledo Harbor.² He contended that Ohio EPA's response to the petition in the Agency's Response to Comments document was inadequate. Specifically, Mr. Neuendorff noted that Ohio EPA's response to the petition merely stated, "Ohio EPA acknowledges the petition." Testimony Neuendorff; Director's Ex. 4, 12.

{¶47} The Director did not directly address this assignment of error. However, both Ms. Allamon and Ms. Wick testified that based on public comments presented at the February 18, 2015 hearing, they believed members of the public understood the importance of maintaining adequate water depth in the commercial navigation channels of Toledo Harbor. Testimony Allamon, Wick.

² The Commission notes that the petition appears to have been presented to the public as follows:

The most valuable natural resource we will have this century is potable water. We must do everything we can to preserve and protect this national resource. Protecting our fresh water from pollution should be one of our nation's sacred duties to the future.

It is unclear to the Commission whether this statement specifically relates to dredging projects in the Toledo Harbor. Director's Ex. 11.

CONCLUSIONS OF LAW

I. ERAC Standard of Review

{¶48} Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. The statute provides in relevant part as follows:

If, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

R.C. 3745.05.

{¶49} The term “unlawful” means “that which is not in accordance with law,” and the term “unreasonable” means “that which is not in accordance with reason, or that which has no factual foundation.” *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977).

{¶50} The Commission is required to grant “due deference to the Director’s ‘reasonable interpretation of the legislative scheme governing his Agency.’” *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274 (2005), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State ex rel. Celebrezze v. National Lime & Stone Co.*, 68 Ohio St. 3d 377 (1994); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App. 3d 331 (2nd Dist. 1984). Administrative agencies possess special expertise in specific areas and are tasked with implementing particular statutes and regulations. *National Wildlife Federation v. Korleski*, 10th Dist. Franklin Nos. 12AP-278, 12AP-279, 12AP-80, 12AP-81, 2013-Ohio-3923, ¶56. Thus, such agencies are entitled to considerable deference when reviewing their interpretation of their own governing rules and regulations. *Id.*

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

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

{¶53} Similar to the deference afforded the Director regarding interpretation of administrative regulations, deference toward an agency's factual determinations is also not unlimited. Instead, the Commission engages in "a limited weighing of the evidence." *Ohio Fresh Eggs, LLC v. Wise*, 10th Dist. Franklin No. 07AP-780, 2008-Ohio-2423, ¶32 (emphasis added). Specifically, "ERAC must determine whether the evidence is of such quantity and quality that it provides a sound support for the Director's action." *Id.*

II. Director's Motion for Partial Summary Judgment

A. Summary Judgment Standard of Review

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

{¶55} 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 * * *

{¶56} 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.*, 54 Ohio St.2d 64, 65 (1978). 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 part[y] against whom [the] motion is made." *Stockdale*, 2003-Ohio-4366, at ¶32.

{¶57} "If the moving party has satisfied its initial burden under Civ.R. 56(C), then the nonmoving party has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial. If the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *State*

v. Pryor, Franklin App. No. 07AP-90, 2007 Ohio 4275 (Aug. 21, 2007), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

B. Analysis

i. Assignments of Error One, Two, and Four

{¶58} In these assignments of error, Mr. Neuendorff argued that the non-degradation alternative presented in the Army Corps' application was inadequate because it did not represent a "realistic" alternative to the preferred design. Instead, Mr. Neuendorff argued that the Army Corps should have been required to present a different, more "realistic" non-degradation scenario. Specifically, Mr. Neuendorff argued that the Army Corps should have been required to present a mitigative technique alternative such as the use of "clam shell bucket dredging" combined with the placement of dredged material at an alternate location.

{¶59} Further, Mr. Neuendorff argued that the Army Corps' application should have been deemed incomplete because it did not contain a "detailed mitigation plan."

{¶60} The Director contended that the Army Corps' proposed no-action scenario satisfied the requirements of R.C. 6111.30(A)(8). Moreover, the Director argued that the applicable statutes and regulations did not specifically require the inclusion of a mitigative technique alternative. The Director argued that the Army Corps' statement in response to "Item 7 – Proposed Mitigation Plan" was sufficient due to the nature of the proposed project.

{¶61} The Commission agrees.

{¶62} Revised Code 6111.30(A) sets forth the required contents of an application for Section 401 Water Quality Certification. It provides:

(A) Applications for a section 401 water quality certification required under division (P) of section 6111.03 of the Revised Code shall be submitted on forms provided by the director of environmental protection and shall include all information required on those forms as well as all of the following:

(1) A copy of a letter from the United States army corps of engineers documenting its jurisdiction over the wetlands, streams, or other waters of the state that are the subject of the section 401 water quality certification application;

(2) If the project involves impacts to a wetland, a wetland characterization analysis consistent with the Ohio rapid assessment method;

(3) If the project involves a stream for which a specific aquatic life use designation has not been made, data sufficient to determine the existing aquatic life use;

(4) A specific and detailed mitigation proposal, including the location and proposed real estate instrument or other available mechanism for protecting the property long term;

(5) Applicable fees;

(6) Site photographs;

(7) Adequate documentation confirming that the applicant has requested comments from the department of natural resources and the United States fish and wildlife service regarding threatened and endangered species, including the presence or absence of critical habitat;

(8) Descriptions, schematics, and appropriate economic information concerning *the applicant's* preferred alternative, nondegradation alternatives, and minimum degradation alternatives for the design and operation of the project;

(9) The applicant's investigation report of the waters of the United States in support of a section 404 permit application concerning the project;

(10) A copy of the United States army corps of engineers' public notice regarding the section 404 permit application concerning the project.

(Emphasis added).

{¶63} Revised Code 6111.30(A) neither requires the inclusion of a specific, mitigative technique alternative nor expressly precludes an applicant from submitting a “no action” alternative as its non-degradation scenario. Rather, the statute merely

requires the applicant's preferred alternative, a nondegradation alternative, and a minimum degradation alternative. Significantly, the statute places the burden of selecting the three alternatives on *the applicant*. It does not allow Ohio EPA to predetermine the type of techniques the applicant must include in an application, nor does it specifically require a particular *type* of non-degradation alternative.

{¶64} Additionally, Ohio Adm.Code 3745-1-05(C)(5) requires the Director to consider the economic and social impacts of the proposed project. By including a discussion of a “no action” alternative in its application, the Army Corps provided information necessary and relevant to the Director’s consideration of such factors.

{¶65} Finally, the Commission finds that the mitigation requirements contained in R.C. 6111.30 and the regulations promulgated thereunder apply most directly to compensatory wetland mitigation. See e.g., R.C. 6111.30(I); see also Ohio Adm.Code 3745-1-54. For example, R.C. 6111.30(I) provides that mitigation may be accomplished by purchasing credits at a mitigation bank, participating in an in-lieu fee mitigation program, or constructing individual mitigation projects—all of which refer to various forms of compensatory wetland mitigation.

{¶66} The Commission must give “due deference to the Director’s ‘reasonable interpretation of the legislative scheme governing his Agency.’” *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274 (2005), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001). Here, the Director’s interpretation of the applicable statutes and regulations was consistent with the express language of R.C. 6111.30(A). Accordingly, the Commission finds the Director acted lawfully and reasonably with respect to his interpretation of the requirement to submit a preferred alternative, non-degradation alternative, and minimum degradation alternative.

{¶67} The Commission acknowledges that R.C. 6111.30(A)(4) requires applicants to include a “specific and detailed mitigation proposal.” The Commission finds, however, that the Army Corps’ application did include a response to this requirement. Specifically, the Army Corps stated, “[a]s the proposed discharge of dredged material to Lake Erie would not result in the loss of wetland area or function, a mitigation plan would not be applicable to the proposed project.”

{¶68} As discussed above, the mitigation requirements contained in R.C. 6111.30 and regulations promulgated thereunder apply most directly to compensatory wetland mitigation. Thus, although the Army Corps did not propose to purchase credits at a mitigation bank, participate in an in-lieu fee mitigation program, or construct an individual mitigation project, the Commission finds that the Director acted lawfully and reasonably in deeming the Army Corps’ application complete and in issuing the Section 401 Water Quality Certification.

ii. Assignment of Error Three

{¶69} In assignment of error three, Mr. Neuendorff argued that the Army Corps’ application was incomplete because it did not identify “the substances to be discharged, including the amount of regulated pollutants to be discharged in terms of mass and concentration, and * * * the amount of dredged and fill material to be discharged” as required by Ohio Adm.Code 3745-1-05(B)(3)(a).

{¶70} In his Motion, the Director argued that Ohio Adm.Code 3745-1-05(B)(3)(a) did not apply to the Army Corps’ application for Section 401 Water Quality Certification.

{¶71} Ohio Adm.Code 3745-1-05(B)(3)(a) provides as follows:

(3) *Except as provided in paragraphs (B)(2), (B)(4), (D) and (F) of this rule, the applicant covered by paragraph (B)(1) of this rule must submit documentation of the following.*

(a) Identification of the substances to be discharged, including the amount of regulated pollutants to be discharged in terms of mass and concentration, and, if paragraph (B)(1)(c) of this rule applies, the amount of dredged and fill material to be discharged.

(Emphasis added).

{¶72} In turn, paragraph (B)(4) provides:

(4) *Applications for section 401 water quality certifications are exempt from paragraph (B)(3) of this rule. Required submissions shall be determined in accordance with section 6111.30 of the Revised Code, Chapter 3745-32 of the Administrative Code and rules 3745-1-50 to 3745-1-54 of the Administrative Code.*

Ohio Adm.Code 3745-1-05(B)(4) (emphasis added).

{¶73} Because the Permit at issue in this appeal is a Section 401 Water Quality Certification, the Commission finds that the requirements contained in Ohio Adm.Code 3745-1-05(B)(3)(a) were not applicable to the Army Corps' application.

III. Arguments Presented at De Novo Hearing

- i. *Ohio EPA acted unreasonably by failing to require the Army Corps to utilize mitigative techniques*

{¶74} As presented at hearing, Mr. Neuendorff's arguments did not materially differ from those discussed above in relation to the Director's Motion for Partial Summary Judgment. Having already concluded that the Director acted lawfully and reasonably regarding his evaluation of the Army Corps' preferred alternative, nondegradation alternative, and minimum degradation alternative, the Commission declines to address these issues further.

- ii. *Ohio EPA's reliance on the Army Corps' report regarding the effect of open lake placement of dredged material on harmful algal blooms in the western basin of Lake Erie was unreasonable*

{¶75} Here, Mr. Neuendorff argued that Ohio EPA's reliance on the Army Corps' report regarding the effect of open lake placement of dredged material on harmful algal blooms in the western basin of Lake Erie was unreasonable. The report concluded that open-lake placement of dredged material was not a significant contributor to phosphorus concentrations and harmful algal blooms in the western basin of Lake Erie. Mr. Neuendorff argued that the report was internally inconsistent. Specifically, Mr. Neuendorff observed that the report states that resuspension from dredging and placement activities can be a source of phosphorous loading in the water column, yet the report ultimately concludes that open-lake placement of dredged material is not a significant contributor to phosphorus concentrations and harmful algal blooms in the western basin of Lake Erie.

{¶76} Ms. Allamon and Ms. Wick testified that although Ohio EPA staff raised some questions during the Agency's review of the Army Corps' report, the report nonetheless provided a robust and useful analysis of the complex problem of nutrient loading. Therefore, both Ms. Allamon and Ms. Wick concluded Ohio EPA's reliance on the study in evaluating the Army Corps' application was reasonable.

{¶77} The Commission notes the Army Corps' report did not constitute the sole basis for the Director's approval of the application. Rather, the testimony established Ohio EPA considered a variety of sources of information during its review. Ms. Allamon testified that she consulted with other members of Ohio EPA staff while reviewing the Army Corps' application, past Section 401 Water Quality Certifications, and the Great Lakes Testing Evaluation Manual, in addition to reviewing the Army Corps' report

regarding the effect of open lake placement of dredged material on harmful algal blooms in the western basin of Lake Erie. Thus, even if the report lacked a full and complete analysis of nutrient loading in the western basin of Lake Erie, testimony established that the Agency conducted a comprehensive review of the Army Corps' application, including gathering information from a variety of other sources.

{¶78} The Commission affords a degree of deference for the agency's determination inherent in the reasonableness standard. *National Wildlife Federation v. Korleski*, 10th Dist. Franklin Nos. 12AP-278, 12AP-279, 12AP-80, 12AP-81, 2013-Ohio-3923, ¶48. Here, the testimony established that although some questions were raised during the Agency's review of the Army Corps' report, the report nonetheless provided a robust and useful analysis of the complex problem of nutrient loading in the western basin of Lake Erie.

{¶79} Accordingly, the Commission finds the Director acted reasonably when reviewing and weighting the Army Corps' report during its review of the application.

iii. The Army Corps' application indicated that the project was a "fill" project rather than a "dredge" project

{¶80} Mr. Neuendorff argued that because the Army Corps indicated, in section 2.K of its application, that the project was a "fill" project, rather than both a "dredge" and a "fill" project, the Director acted unreasonably in issuing the Permit.

{¶81} In response, the Director acknowledged the project is more accurately described as both a "dredge" and a "fill" project, but concluded that this constituted a minor administrative error and was insignificant in Ohio EPA's review of the application.

{¶82} The Commission agrees and finds the Army Corps' inaccurate description of its project constituted a minor administrative error. Further, Mr. Neuendorff did not establish this error affected Ohio EPA's understanding of the nature of the Army Corps' proposed project. Accordingly, the Commission finds the Director acted lawfully and reasonably with respect to section 2.K of the Army Corps' application.

iv. Certain portions of the application did not contain sufficient detail

{¶83} Here, Mr. Neuendorff argued that certain portions of the Army Corps' application lacked sufficient detail. Specifically, Mr. Neuendorff argued that certain information listed in Ohio EPA's application Primer as required by Question 10 was not present in the Army Corps' application.

{¶84} In response, Ms. Allamon noted Mr. Neuendorff introduced into evidence an outdated version of the Section 401 Water Quality Certification Application Primer. Ms. Allamon stated that the August 1998 Primer had since been updated due to changes in Ohio EPA's application form. The Commission notes that the Army Corps' application appears to contain only seven parts, compared to the eleven questions detailed in the August 1998 version of the Primer.

{¶85} In light of Ms. Allamon's testimony indicating the 1998 Primer was outdated, the Commission finds Mr. Neuendorff's argument not well-taken.

v. The Director acted unreasonably in granting the Army Corps permission to dredge river mile one of the Maumee River

{¶86} Mr. Neuendorff argued that the Director acted unreasonably in granting the Army Corps permission to dredge river mile one of the Maumee River. Mr. Neuendorff introduced portions of the THSMUP, which states, "[s]ediments dredged from River Mile 1, River Mile 2, and River Mile 4 were identified as not meeting Federal guidelines for open-lake placement in the latest Sediment Sampling Analysis." Mr.

Neuendorff contended that in light of this statement in the THSMUP, it was unreasonable for the Director to grant the Army Corps permission to dredge river mile one of the Maumee River in issuing the Permit.

{¶187} Significantly, however, Mr. Neuendorff introduced only limited portions of the THSMUP into evidence. Thus, the context of the above statement within the report is unclear, including whether data supports that the open-lake placement of dredged material from river mile one would result in a violation of applicable water quality standards. Moreover, testimony at hearing was unclear as to whether the Permit actually granted permission to dredge river mile one of the Maumee River.

{¶188} Because Mr. Neuendorff established neither that the Permit grants permission to dredge river mile one of the Maumee River, nor that the open-lake placement of dredged material from river mile one would result in a violation of applicable water quality standards, Appellant's argument is not well-taken.

vi. The Director failed to adequately consider comments submitted at the public hearing

{¶189} Finally, Mr. Neuendorff argued that the Director acted unreasonably because the Agency failed to adequately consider comments submitted at the February 18, 2015 public hearing. Mr. Neuendorff testified he submitted a copy of an online petition at the public hearing, containing nearly 4,000 signatures opposing dredging in the Toledo Harbor. He contended that Ohio EPA's response to the petition in the Agency's Response to Comments document was inadequate. Specifically, Mr. Neuendorff noted that Ohio EPA's response to the petition merely stated, "Ohio EPA acknowledges the petition."

{¶90} The Director did not directly address this argument at hearing. However, both Ms. Allamon and Ms. Wick testified that based on public comments presented at the February 18, 2015 hearing, they believed members of the public understood the importance of maintaining adequate water depth in the commercial navigation channels of Toledo Harbor.

{¶91} The Commission has previously noted that the Director's consideration of public comments is solely within his discretion. See *Ohio Citizen Action, et al v. Jones*, ERAC Nos. 184867-4887 (Oct. 17, 2001), at COL ¶14.

{¶92} Here, the evidence establishes that the Director received Mr. Neuendorff's oral testimony and petition and responded to those comments in the Agency's Response to Comments document. Although Mr. Neuendorff may have preferred a different response, no requirement exists for the Director to do so. Indeed, the applicable statutes and regulations do not require the Director to adopt a "majority rules" approach and deny the Army Corps' application for Section 401 Water Quality Certification merely because many people opposed it.³

{¶93} Accordingly, the Commission finds the Director acted lawfully and reasonably in his response to public comments.

³ Again, it is unclear to the Commission whether the statement contained in Mr. Neuendorff's petition specifically relates to dredging projects in the Toledo Harbor. See note 2, *supra*.

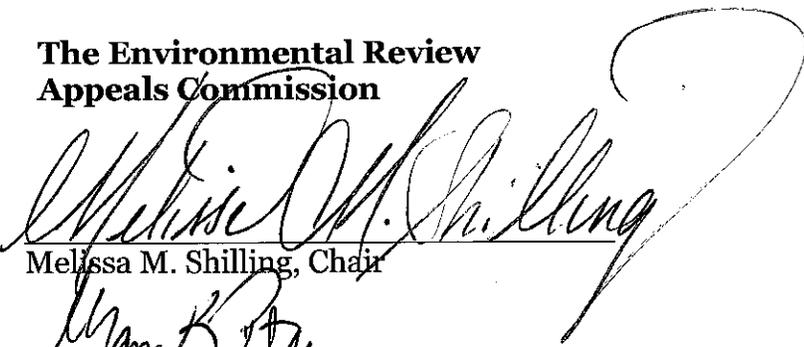
FINAL ORDER

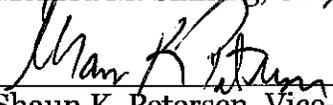
{¶94} For the foregoing reasons, the Commission hereby AFFIRMS the Director's May 18, 2015 issuance of a Section 401 Water Quality to the U.S. Army Corps of Engineers for the dredging of the Toledo Harbor.

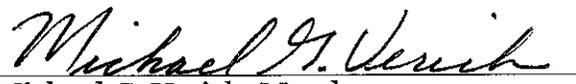
{¶95} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties:

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

**The Environmental Review
Appeals Commission**


Melissa M. Shilling, Chair


Shaun K. Petersen, Vice-Chair


Michael G. Verich, Member

Entered into the Journal of the
Commission this 8th day of June
2016.

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