

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO

JOHN SCHRENK, : Case No. ERAC 15-6851  
: :  
Appellant, : :  
: :  
v. : :  
: :  
CRAIG W. BUTLER, DIRECTOR OF : :  
ENVIRONMENTAL PROTECTION, : :  
: :  
Appellee. : :

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DECISION

Rendered on June 8, 2016

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John Schrenk, pro se Appellant

*Michael DeWine*, Attorney General, *Tasha N. Miracle*, and  
*D. Rees Alexander* for Appellee Craig W. Butler, Director of  
Environmental Protection

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{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a notice of appeal filed by Appellant John Schrenk on July 13, 2015. Mr. Schrenk challenges the Director’s Final Findings of Fact, Conclusions of Law and Orders (“DFFOs”) issued by Appellee Craig W. Butler, Director of Environmental Protection (“Director,” “Ohio EPA,” “Agency”) on June 11, 2015. Case File Items A, F.

{¶2} Pursuant to Ohio Administrative Code (“Adm.Code”) Chapter 3746-9, the Commission held an oral argument on this matter on February 10, 2016.

{¶3} Based upon a review of the Certified Record (“CR”), the pleadings, the oral argument, and the relevant statutes, regulations, and case law, the Commission

issues the following Findings of Fact, Conclusions of Law, and Final Order AFFIRMING IN PART AND VACATING IN PART the Director's issuance of the June 11, 2015 DFFOs.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I. Procedural History**

#### **A. Proposed Order and Request for Adjudication Hearing**

{¶4} On January 3, 2014, the Director sent a letter to Mr. Schrenk containing notice of alleged violations of Ohio's operator certification regulations and a proposed settlement offer. In lieu of civil penalties, the Director offered a proposed order which, if signed, would suspend Mr. Schrenk's Class II Water Supply Operator Certificate (WS2-1012476-11) and Class III Wastewater Treatment Operator Certificate (WW3-1012476-96) for five years. Case File Item Q, Exhibit B.

{¶5} The letter also advised Mr. Schrenk to contact Ohio EPA within 14 days to schedule a meeting with Ohio EPA staff if he wished to discuss the alleged violations and possible settlement. The Certified Record does not contain documents indicating whether such a meeting occurred; however, at oral argument, Mr. Schrenk stated that he met with Ohio EPA staff on January 29, 2014.<sup>1</sup> Case File Item Q, Exhibit B.

{¶6} On April 11, 2014, the Director sent a second letter to Mr. Schrenk. This letter again indicated the Director's intention to suspend Mr. Schrenk's Class II Water Supply Operator Certificate and Class III Wastewater Treatment Operator Certificate for

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<sup>1</sup> Following the oral argument, the Commission ordered the Director to review and supplement the Certified Record "with documents that include, but are not limited to, the communications to Mr. Schrenk from Ohio Environmental Protection [Agency] initiating this action and any subsequent communications between the parties." The Director filed a response to the Commission's Order on March 9, 2016. Although Mr. Schrenk indicated at oral argument that Ohio EPA staff kept notes from the January 29, 2014 meeting, such notes were not included in either the Certified Record or in the document filed in response to the Commission's Order. See CR and Case File Item Q.

five years and stated that Mr. Schrenk could request an adjudication hearing pursuant to Revised Code (“R.C.”) Chapters 119 and 6109. CR Item 2, Hearing Exhibit 18.

{¶7} On May 8, 2014, Mr. Schrenk requested an adjudication hearing regarding the proposed suspension. CR Item 3, Attachment 15.

### **B. Adjudication Hearing**

{¶8} At the adjudication hearing, conducted on December 16, 2014, Andrew Barienbrock, Environmental Manager, Ohio EPA, Certification Operations and Resiliency Section, testified that Mr. Schrenk was an operator of record at the following facilities:

- St. Hazards Resort Public Water System (“PWS”), between June 1, 2012 and September 6, 2012. CR Item 2, page 20, lines 10-14; Hearing Exhibit 1.
- St. Hazards Resort Wastewater Treatment Facility (“WWTP”), between June 1, 2012 and April 16, 2014. CR Item 2, page 22, lines 8-11; Hearing Exhibits 2, 18.
- Lake Erie Utilities WWTP, between April 2, 2012 and April 16, 2014. CR Item 2, page 23, lines 14-17; Hearing Exhibit 3, 18.

{¶9} Additionally, Mr. Barienbrock testified that Ohio EPA received a request to add Mr. Schrenk as an operator of record at the Lake Erie Utilities PWS. But, because that facility required a Class III Water Supply Operator Certificate, rather than the Class II certificate Mr. Schrenk possessed, Ohio EPA rejected Mr. Schrenk as an operator of record for the Lake Erie Utilities PWS. CR Item 2, page 24, line 21 to page 25, line 4; Hearing Exhibits 4, 5.

{¶10} At the adjudication hearing, the Director presented testimony alleging Mr. Schrenk committed the following violations: (1) operated the Lake Erie Utilities PWS without appropriate certification; (2) failed to meet minimum staffing requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities

WWTP, and Lake Erie Utilities PWS; (3) failed to comply with recordkeeping requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS; and (4) operated the Lake Erie Utilities PWS above approved capacity.

{¶11} As detailed below, Mr. Schrenk generally did not present testimony on his own behalf at the adjudication hearing below. In his post-adjudicatory hearing filings with Ohio EPA and at oral argument before ERAC, however, Mr. Schrenk explained that he did not testify at the adjudication hearing because he was recovering from bronchitis. Additionally, Mr. Schrenk argued that he did not receive the Director's supplemental exhibit list until the morning of the adjudication hearing and was therefore unable to prepare any testimony. CR Item 3, Attachments 4, 7.

*i. Operation of the Lake Erie Utilities PWS without Appropriate Certification*

{¶12} Mr. Barienbrock testified that the Lake Erie Utilities PWS is a Class III PWS, and therefore operators of record must possess a Class III Water Supply Operator Certificate. Mr. Barienbrock explained that Mr. Schrenk possessed only a Class II Water Supply Operator Certificate and was not qualified to serve as an operator of record for that facility. CR Item 2, page 24, line 21 to page 25, line 4; Hearing Exhibits 4, 5.

{¶13} He explained that Ohio EPA rejected Mr. Schrenk's application to be added as an operator of record at the facility, but that Mr. Schrenk nonetheless *acted* as an operator of record for the Lake Erie Utilities PWS on multiple occasions from July to September 2012. Specifically, the Commission's review of the Certified Record indicates that Mr. Schrenk acted as an operator of record on 16 occasions between July 9, 2012, and September 28, 2012. CR Item 2, page 51, lines 11-15; Hearing Exhibits 8, 12.

{¶14} Except for a brief exchange with Mr. Barienbrock which clarified that the Lake Erie Utilities PWS had been designated as a Class III PWS prior to the relevant time period, Mr. Schrenk did not provide testimony regarding this alleged violation. CR Item 2, page 82, line 17 through page 83, line 12.

*ii. Failure to Meet Staffing Requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS*

{¶15} At the adjudication hearing, Mr. Barienbrock testified that Ohio EPA was unable to verify compliance with minimum staffing requirements at the St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS.

{¶16} Specifically, documents in the Certified Record demonstrate the St. Hazards Resort WWTP is designated as a Class I WWTP. Therefore, Ohio Adm.Code 3745-7-04(C) requires an operator of record to be present at the facility for a minimum of 3 days and 1.5 hours per week. CR Item 2, Hearing Exhibit 2.

{¶17} The log book presented at the adjudication hearing supports the following conclusions regarding staffing at the St. Hazards Resort WWTP:

<b>Week</b>	<b>Staffing</b>
July 1-7	Operator of record present on 2 days; no indication of time in/out
July 8-14	Operator of record present on 3 days; no indication of time in/out
July 15-21	Operator of record present on 2 days; at least 0.75 hours recorded
July 22-28	Operator of record present on 4 days; at least 0.50 hours recorded
July 29-August 4	Operator of record present on 2 days; at least 0.50 hours recorded
August 5-11	Operator of record present on 3 day; no indication of time in/out
August 12-18	Operator of record present on 6 days; no indication of time in/out
August 19-25	Operator of record present on 5 days; no indication of time in/out
August 26-September 1	Operator of record present on 5 days; at least 10.5 hours recorded
September 2-8	Operator of record present on 2 days; 7.5 hours recorded
September 9-15	Operator of record present on 4 days; 1.7 hours recorded
September 16-22	Operator of record present on 2 days; 0.95 hours recorded
September 23-29	Operator of record present on 3 days; 1.48 hours recorded

CR Item 2, Hearing Exhibit 10.

{¶18} Regarding the St. Hazards Resort PWS, documents in the Certified Record demonstrate the facility is designated as a Class A facility with treatment. Therefore, Ohio Adm.Code 3745-7-03(C) requires an operator of record to be present at this facility for a minimum of 2 days and 1 hour per week. CR Item 2, Hearing Exhibit 1.

{¶19} The log book presented at the adjudication hearing supports the following conclusions regarding staffing at the St. Hazards Resort PWS:

<b>Week</b>	<b>Staffing</b>
June 24-30	Operator of record present on 2 days; no indication of time in/out
July 1-7	Operator of record present on 3 days; no indication of time in/out
July 8-14	Operator of record present of 3 days; at least 0.45 hours recorded
July 15-21	Operator of record present on 3 days; at least 0.97 hours recorded
July 22-28	Operator of record present on 2 days; at least 1.25 hours recorded
July 29-August 4	Operator of record present on 2 days; 2.0 hours recorded
August 5-11	Operator of record present on 3 days; at least 1.17 hours recorded
August 12-18	Operator of record present on 3 days; 2.25 hours recorded
August 19-25	Operator of record present on 4 days; no indication of time in/out
August 26-September 1	Operator of record present on 5 days; at least 12.82 hours recorded
September 2-8	Operator of record present on 5 days; 7.07 hours recorded
September 9-15	Operator of record present on 3 days; 1.92 hours recorded
September 16-22	Operator of record present on 5 days; at least 3.08 hours recorded
September 23-29	Operator of record present on 6 days; at least 2.17 hours recorded
September 30-October 6	Operator of record present on 5 days; at least 2.83 hours recorded

CR Item 2, Hearing Exhibit 9.

{¶20} Regarding the Lake Erie Utilities WWTP, documents in the Certified Record indicate that the facility is designated as a Class I WWTP. Therefore, Ohio Adm.Code 3745-7-04(C) requires an operator of record to be present at this facility for a minimum of 3 days and 1.5 hours per week. CR Item 2, Hearing Exhibit 3.

{¶21} The log book presented at the adjudication hearing supports the following conclusions regarding staffing at the Lake Erie Utilities WWTP:

<b>Week</b>	<b>Staffing</b>
July 1-7	Operator of record present on 7 days; no indication of time in/out
July 8-14	Operator of record present on 7 days; no indication of time in/out
July 15-21	Operator of record present on 7 days; no indication of time in/out
July 22-28	Operator of record present on 6 days; no indication of time in/out
July 29-August 4	Operator of record present on 6 days; no indication of time in/out
August 5-11	Operator of record present on 5 days; no indication of time in/out
August 12-18	Operator of record present on 6 days; no indication of time in/out
August 19-25	Operator of record present on 6 days; no indication of time in/out
August 26-September 1	Operator of record present on 6 days; no indication of time in/out
September 2-8	Operator of record present on 7 days; no indication of time in/out
September 9-15	Operator of record present on 7 days; no indication of time in/out
September 16-22	Operator of record present on 6 days; no indication of time in/out
September 23-29	Operator of record present on 7 days; no indication of time in/out

CR Item 2, Hearing Exhibits 7, 11.

{¶22} Finally, regarding the Lake Erie Utilities PWS, testimony indicated the facility is designated as a Class III PWS. Therefore, Ohio Adm.Code 3745-7-03(C) requires an operator of record to be present at this facility for a minimum of 5 days and 40 hours per week. CR Item 2, page 24, line 21 to page 25, line 4.

{¶23} The log book presented at the adjudication hearing supports the following conclusions regarding staffing at the Lake Erie Utilities PWS:

<b>Week</b>	<b>Staffing</b>
July 1-7	Operator of record present on 5 days; 40.75 hours recorded
July 8-14	Operator of record present on 6 days; at least 29.75 hours recorded
July 15-21	Operator of record present on 6 days; at least 24 hours recorded
July 22-28	Operator of record present on 7 days; at least 35 hours recorded
July 29-August 4	Operator of record present on 5 days; 32.75 hours recorded
August 5-11	Operator of record present on 7 days; at least 25.75 hours recorded
August 12-18	Operator of record present on 3 days; 20.25 hours recorded
August 19-25	Operator of record present on 4 days; 20.5 hours recorded
August 26-September 1	Operator of record present on 4 days; 20.17 hours recorded
September 2-8	Operator of record present on 4 days; 18.5 hours recorded
September 9-15	Operator of record present on 3 days; 14.92 hours recorded
September 16-22	Operator of record present on 6 days; at least 9.75 hours recorded
September 23-29	Operator of record present on 4 days; at least 2 hours recorded

CR Item 2, Hearing Exhibit 8, 12.

{¶24} On behalf of the Director, Mr. Barienbrock testified that because the log books often did not contain information regarding arrival and/or departure times for the operator of record, Ohio EPA was “unable to determine” whether St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS met minimum staffing requirements between August and September 2012. Therefore, Mr. Barienbrock concluded that Mr. Schrenk was in violation of Ohio Adm.Code 3745-7-03(C) and Ohio Adm.Code 3745-7-04(C) with respect to those four facilities. CR Item 2, page 47, line 9 through page 53, line 25.

{¶25} Mr. Schrenk did not provide testimony at the adjudication hearing regarding alleged violations of minimum staffing requirements.

*iii. Failure to comply with recordkeeping requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS*

{¶26} The Director asserted that Mr. Schrenk failed to comply with recordkeeping requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS. See generally, CR Item 2, pages 38-46.

{¶27} Specifically, Mr. Barienbrock testified that Mr. Schrenk routinely did not record arrival and departure times in the log books. Further, Mr. Barienbrock testified that Mr. Schrenk did not record operation and maintenance activities. See generally, CR Item 2, pages 38-46.

{¶28} For example, regarding the log book for the Lake Erie Utilities WWTP, Mr. Barienbrock explained:

I would expect to see information related to changed chlorine, fixed a pump, greased a pump, did maintenance on a pump, did maintenance on a blower, did maintenance on the lift station, things like that, normal routine duties that would be going on with the facility, checked flow, any kind of thing like that. I would expect to see those things in this logbook, not just a simple statement plant check.

CR Item 2, page 38, lines 7-15.

{¶29} Similarly, regarding the Lake Erie Utilities PWS log book, Mr. Barienbrock stated:

Similar to the other changes in chemical at the surface water treatment plant, surface water quality changes on a routine basis so there should be some type of changes in treatment that are going on. What is the operator doing? Removing sludge, changing chemical feeds, changing permanganate feeds, changing any type of feed that they have with regard to chlorine. We should be seeing changing out chlorine cylinders. Any of that information should be included in here.

CR Item 2, page 40, lines 14-23.

{¶30} As to the St. Hazards Resort PWS log book, Mr. Barienbrock testified:

Similar to the others, Mr. Schrenk is not recording his time of arrival or time of departure and there is minimal or no operation and maintenance activities recorded when he is the operator.

CR Item 2, page 42, lines 3-6.

{¶31} And regarding the log book for the St. Hazards Resort WWTP, Mr.

Barienbrock stated:

Again, it shows Mr. Schrenk was negligent in his duties. He is not recording time in or time out. He's not – he is recording little or minimal information related to duties that he performed at the facility.

CR Item 2, page 46, lines 21-25.

{¶32} Moreover, in addition to the deficiencies discussed above, Mr. Barienbrock testified that Mr. Schrenk failed to provide certain required information in monthly operating reports (“MORs”) submitted to Ohio EPA. Specifically, the Director introduced two notices of violation (NOVs) prepared by Ohio EPA staff. Mr. Barienbrock explained that the NOVs indicated the Agency reviewed the MORs submitted to it and determined the Lake Erie Utilities PWS failed to record residual disinfectant concentration on May 9, 2012, and failed to record the temperature of disinfected water on 14 separate occasions in October 2012. CR Item 2, page 56, line 3 through page 58, line 21; Hearing Exhibits 14, 15.

{¶33} Significantly, based upon the testimony presented at the adjudication hearing, it is unclear to the Commission whether Mr. Barienbrock or another Ohio EPA staff member reviewed the MORs and prepared the NOVs. Further, the Certified Record does not include any testimony or other record of the Agency’s underlying analysis of the MORs or the data contained therein.

{¶34} Mr. Schrenk did not provide testimony at the adjudication hearing regarding these alleged violations of recordkeeping requirements.

*iv. Operation of the Lake Erie Utilities PWS Above Approved Capacity*

{¶35} Finally, at the adjudication hearing, the Director presented testimony that Mr. Schrenk operated the Lake Erie Utilities PWS above its approved capacity. Again, the Director introduced two NOVs prepared by Ohio EPA staff. Mr. Barienbrock testified that the NOVs indicate that the Agency reviewed MORs submitted to Ohio EPA and determined that the facility had exceeded its capacity of 115,000 gallons per day on multiple occasions in May, June, July, and August 2012. Mr. Barienbrock explained that operating a PWS above its approved capacity endangers public health because water does not contact disinfectant for a sufficient amount of time, and it “creates a potential for pathogens, algal toxins to pass through the process.” CR Item 2, page 59, line 14 through page 60, line 3; page 68, line 24 through page 69, line 14; Hearing Exhibits 15, 16.

{¶36} Again, based upon the testimony presented at the adjudication hearing, it is unclear to the Commission whether Mr. Barienbrock or another Ohio EPA staff member reviewed the MORs and prepared the NOVs. Further, the Certified Record does not include any testimony or other record of the Agency’s underlying analysis of the MORs or the data contained therein.

{¶37} Mr. Schrenk did not provide testimony at the adjudication hearing regarding the alleged operation of the Lake Erie PWS above approved capacity.

### C. Hearing Officer's Report and Recommendation

{¶38} On March 26, 2015, Hearing Officer Wilson submitted his Report and Recommendation ("Report") to the Director based upon testimony and evidence presented at the December 16, 2014 adjudication hearing. The Report contained the following findings regarding each of the alleged violations.

*i. Operation of the Lake Erie Utilities PWS without Appropriate Certification*

{¶39} Regarding the allegation that Mr. Schrenk operated the Lake Erie Utilities PWS without appropriate certification, the Report stated:

The Lake Erie Utilities public water system is a Class III public water system. (See Exhibit 5.) Mr. Schrenk has never had a Class III or higher Water Supply Operator Certificate. Despite the fact that Mr. Schrenk did not possess a Class III or higher water supply operator certificate, from April 2, 2012, to at least March 12, 2013, Mr. Schrenk performed the duties of an operator of record at the Lake Erie Utilities public water system. (See Exhibits 7-10, and 13.)

CR Item 3, Attachment 3.

*ii. Failure to Meet Staffing Requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS*

{¶40} Regarding the allegation that Mr. Schrenk failed to meet staffing requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS, the Report found:

Given the fact that Mr. Schrenk often failed to record his times of arrival at and departure from the Lake Erie Utilities facilities and the St. Hazards facilities, and given the fact that O.A.C. 3745-7-09(A)(3)(b) required that Mr. Schrenk must record such arrival and departure times, I must conclude that Mr. Schrenk was not present at those facilities, except for the periods that can be calculated by using the times Mr. Schrenk actually entered in the logbooks.

Examination of the 2012 logbooks reveals that, at times during 2012, Mr. Schrenk, along with his fellow operators of record, failed to be physically present at the St. Hazards public water system for 2 days per week and for

a minimum of one hour per week. Examination of the 2012 logbooks also reveals that, at times during 2012, Mr. Schrenk, along with his fellow operators of record, failed to be physically present at the Lake Erie Utilities public water system for a total of 5 days per week and for a minimum of 40 hours per week. Examination of the 2012 logbooks also reveals that, at times during 2012, Mr. Schrenk, along with his fellow operators of record, failed to be physically present at the St. Hazards wastewater treatment plant for 3 days per week and for a minimum of an hour and a half per week. Likewise, examination of the 2012 logbooks reveals that, at times during 2012, Mr. Schrenk, along with his fellow operators of record, failed to be physically present at the Lake Erie Utilities wastewater treatment plant for 3 days per week and for a minimum of an hour and a half per week. (See Exhibits 7-10; Exhibit 13.)

CR Item 3, Attachment 3.

*iii. Failure to comply with recordkeeping requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS*

{¶41} With respect to Mr. Schrenk's alleged failure to record time in and time

out, the Report stated:

\* \* \* Examination of the entries found in the logbooks at the Lake Erie Utilities wastewater treatment plant, the Lake Erie Utilities public water system, the St. Hazards public water system, and the St. Hazards wastewater treatment plant demonstrate that Mr. Schrenk failed to document his times of arrival at and departure from these facilities on numerous occasions during the period from July through September, 2012. (See Exhibits 7-10; Exhibit 13 Tr. Pg. 53, Ls. 3-6.)

CR Item 3, Attachment 3.

{¶42} Regarding operational activities, the Report stated:

An examination of the 2012 logbooks also revealed that Mr. Schrenk included only limited documentation of the operation, maintenance, and repair of the Lake Erie Utilities and St. Hazards facilities. (See Exhibits 7-10.) Mr. Schrenk generally did not record information on the logbooks about the normal, routine activities at the facilities such as changing chlorine, greasing a pump, repairing a pump, maintaining a pump, maintaining a blower, maintaining a lift station, and checking flow. (Tr. Pg. 38, Ls. 1-15.) Mr. Schrenk did not record in the Lake Erie Utilities logbook any information regarding changes in treatment, removal of sludge, changes in chemical feeds, changes in permanganate feeds, changes in any type of chlorine feed, changing chlorine cylinders, and changing chlorine drums. (See Tr. Pg 40, Line 7 thru Pg. 41, Line 1; Exhibit

8.) On page 15 of Exhibit 9, Mr. Schrenk recorded short notations that did not describe any significant activity at the St. Hazards public water system. (See Exhibit 9.) Minimal notations can also be found in the St. Hazards wastewater treatment plant logbook. (See Exhibit 10; Tr. Pg. 45, Line 20 thru Pg. 46, Line 25.)

CR Item 3, Attachment 3.

{¶43} Addressing the MORs submitted to Ohio EPA, the Report concluded:

During the period from April 2, 2012, to March 14, 2013, John Schrenk was acting as an Operator of Record for the Lake Erie Utilities public water system. (See Exhibit 5.) Monthly operating reports (MOR's) kept during that period documented the performance of the public water system. Examination of the Lake Erie Utilities public water system MOR's reveals several omissions. Examination of the MOR's reveals that Mr. Schrenk and his fellow operators of record failed to monitor the residual disinfectant concentration of the water entering the Lake Erie Utilities public water distribution system at least once every four hours that the plant was in operation on May 9, 2012. (See Exhibit 14; Tr. Pg 57, Ls. 5-10.) Examination of the MOR's also reveals that Mr. Schrenk and his fellow operators of record failed to monitor for the temperature of the disinfected water at the Lake Erie Utilities public water system on at least fourteen occasions in October 2012. (See Exhibit 15; Tr. Pg. 58, Ls. 10-21.) \* \* \*

CR Item 3, Attachment 3.

*iv. Operation of the Lake Erie Utilities PWS Above Approved Capacity*

{¶44} Finally, regarding the allegation that Mr. Schrenk operated the Lake Erie

Utilities PWS above its approved capacity, the Report stated:

In May, June, July, and August, 2012, Mr. Schrenk was an operator of record at the Lake Erie Utilities public water system plant when the plant sometimes exceeded the approved capacity of 115,000 gallons per day and the approved filtration capacity of 90 gallons per minute. (See Exhibit 16; Tr. Pg 69, Ls. 2-9.) Mr. Schrenk was also an operator of record when the plant exceeded the approved plant capacity of 80 gallons per minute on at least fifteen separate occasions in October, 2012. (See Exhibit 15.) \* \* \*

CR Item 3, Attachment 3.

{¶45} Based upon the findings discussed above, Hearing Officer Wilson concluded:

Because Mr. Schrenk has violated a number of Ohio Administrative Code rules on numerous occasions and because some of the violations endangered the public health and welfare, the Director should issue an order suspending Mr. Schrenk's Water Supply Operator Certificate and Mr. Schrenk's Wastewater Treatment Operator Certificate for a period of five years from the date of the Director's Order.

CR Item 3, Attachment 3.

#### **D. Director's Issuance of the DFFOs**

{¶46} On June 11, 2015, the Director issued DFFOs approving Hearing Officer Wilson's Report. The DFFOs suspended Mr. Schrenk's Class II Water Supply Operator Certificate (WS2-1012476-11) and Class III Wastewater Treatment Operator Certificate (WW3-1012476-96) for five years. CR Item 3, Attachments 1, 2.

#### **E. Appeal to ERAC**

{¶47} Mr. Schrenk filed his notice of appeal on July 13, 2015 and an amended notice of appeal on September 2, 2015. Case File Items A, F.

{¶48} Pursuant to Ohio Adm.Code Chapter 3746-9, the Commission held an oral argument on this matter on February 10, 2016.

##### *i. Operation of the Lake Erie Utilities PWS without Appropriate Certification*

{¶49} At oral argument, Mr. Schrenk acknowledged that the Lake Erie Utilities PWS is a Class III PWS and that he possessed only a Class II Water Supply Operator Certificate. Nonetheless, Mr. Schrenk argued that he did not violate Ohio's operator certification regulations by operating the Lake Erie Utilities PWS. Specifically, Mr. Schrenk noted that Ohio Adm.Code 3745-7-03(C)(2)(d) provides:

The operator of record of a class II, III, or IV public water system or class II water distribution system may be replaced by a backup operator with a certificate one classification lower than the public water system's classification *for a period of up to thirty consecutive days*. The use of this provision does not require notification to the agency. The operational records shall clearly indicate every time the backup operator is being used to meet the minimum staffing requirement. *This provision may not be used to routinely circumvent minimum staffing requirements.*

(Emphasis added).

{¶50} Mr. Schrenk contended that because he operated the Lake Erie Utilities PWS for a total of less than 30 days between July 9, 2012, and September 28, 2012, his activity was authorized pursuant to Ohio Adm.Code 3745-7-03(C)(2)(d).

{¶51} In response, the Director highlighted that the regulation allows for up to 30 *consecutive* days with a backup operator. Because the relevant period—July 9, 2012 to September 28, 2012—is greater than 30 consecutive days, the Director argued that Mr. Schrenk's activity did not fall within the scope of the exception contained in Ohio Adm.Code 3745-7-03(C)(2)(d).

*ii. Failure to Meet Staffing Requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS*

{¶52} Regarding minimum staffing, Mr. Schrenk argued that because Ohio EPA ultimately rejected his application to be added as an operator of record for the Lake Erie Utilities PWS,<sup>2</sup> he could not have violated the minimum staffing requirements. In essence, Mr. Schrenk argued that even though he acted as operator of record for the Lake Erie Utilities PWS on some occasions, he cannot be held legally responsible as an

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<sup>2</sup> Mr. Schrenk did not address minimum staffing at Hazards Resort WWTP, St. Hazards Resort PWS, or Lake Erie Utilities WWTP.

operator of record for non-compliance with minimum staffing requirements at that facility because his application was ultimately rejected.

{¶53} Further, Mr. Schrenk argued that even if he could be held legally responsible for the minimum staffing requirements at the Lake Erie Utilities PWS, the facility was nonetheless in compliance with those requirements. Mr. Schrenk argued that during some of the relevant time period, the Lake Erie Utilities PWS was not operating. Thus, Mr. Schrenk asserted that, pursuant to Ohio Adm.Code 3745-7-03(C)(2)(b), the minimum staffing requirements did not apply during those times. Moreover, Mr. Schrenk argued that certain automation present at the Lake Erie Utilities PWS reduced staffing requirements pursuant to Ohio Adm.Code 3745-7-03(C)(2)(c)(i).

{¶54} In response, the Director argued that even though Mr. Schrenk's application to be added as an operator of record was ultimately rejected, Ohio EPA's review of the log books for the Lake Erie Utilities PWS indicated that he *acted* as an operator during the relevant time period.

{¶55} The Director did not specifically address Mr. Schrenk's arguments regarding the various exceptions to the minimum staffing requirements. However, counsel for the Director generally objected to the introduction of new evidence that Mr. Schrenk could have presented at the adjudication hearing below.

*iii. Failure to comply with recordkeeping requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS*

{¶56} Regarding the finding that he failed to record time in and time out, Mr. Schrenk argued that although he did not record those times in the log books, he did record his time in and time out on separate time sheets. Mr. Schrenk argued that this practice was permissible under Ohio Adm.Code 3745-7-09(A).

{¶157} Regarding the finding that he failed to record operation and maintenance activities, Mr. Schrenk noted several specific examples where he did record such activities. For instance, Mr. Schrenk cited a number of entries that listed maintenance activities such as “raked filter,” “refilled Cl<sub>2</sub>,” “drained tanks,” and other brief notations.

{¶158} Finally, regarding the finding that he failed to provide certain required information in MORs submitted to Ohio EPA, Mr. Schrenk asserted that additional data was kept on dry erase boards and/or clipboards at the facility.

{¶159} In response, the Director acknowledged that some daily entries provided some information regarding maintenance activities, but emphasized that the log books, taken as a whole, did not provide the level of detail required by Ohio’s operator certification regulations. Specifically, the Director noted that numerous entries simply stated, “checked plant.” The Director did not address Mr. Schrenk’s argument regarding either the time cards or the data allegedly missing from the MORs, but generally objected to the introduction of new evidence.

*iv. Operation of the Lake Erie Utilities PWS Above Approved Capacity*

{¶160} Regarding the finding that he operated the Lake Erie Utilities PWS above its approved capacity, Mr. Schrenk again argued that he could not be held legally responsible for those violations because his application to be added as an operator of record for that facility was ultimately rejected. Further, Mr. Schrenk argued that the NOVs presented at the adjudication hearing do not contain any underlying evidence to support the allegation that the plant operated above its approved capacity. Finally, although not specifically discussed at oral argument, Mr. Schrenk’s amended notice of

appeal stated, “low-service pumps incorrectly recorded more water being filtered because [of] accumulation of zebra mussel shells in wells and piping.” Case File Item F.

{¶61} In response, and as discussed above, the Director asserted that even though Mr. Schrenk’s application to be added as an operator of record was ultimately rejected, review of the log books for the Lake Erie Utilities PWS indicated that he acted as an operator during the relevant time period. The Director did not address Mr. Schrenk’s other arguments regarding the alleged operation of the Lake Erie Utilities PWS above its approved capacity.

## II. Standard of Review

{¶62} 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:

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.

{¶63} 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).

{¶64} 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.*

{¶65} 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.*

{¶66} 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).

{¶67} 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.*

### III. Analysis

#### *i. Operation of the Lake Erie Utilities PWS without Appropriate Certification*

{¶68} Ohio Adm.Code 3745-7-03(C)(2)(d) provides:

The operator of record of a class II, III, or IV public water system or class II water distribution system may be replaced by a backup operator with a certificate one classification lower than the public water system's classification *for a period of up to thirty consecutive days*. The use of this provision does not require notification to the agency. The operational records shall clearly indicate every time the backup operator is being used to meet the minimum staffing requirement. *This provision may not be used to routinely circumvent minimum staffing requirements.*

(Emphasis added).

{¶69} Testimony presented at the adjudication hearing supports that the Lake Erie Utilities PWS is a Class III facility and that Mr. Schrenk possesses only a Class II Water Supply Operator Certificate. Nonetheless, Mr. Schrenk argued that because he operated the Lake Erie Utilities PWS for a total of 16 days between July 9, 2012 and September 28, 2012, such activity was authorized pursuant to Ohio Adm.Code 3745-7-03(C)(2)(d).

{¶70} The Director responded that although Mr. Schrenk operated the Lake Erie Utilities PWS for a total of less than 30 days, those days were not consecutive. Thus, the Director asserted that Mr. Schrenk's activity did not fall within the scope of the exception contained in Ohio Adm.Code 3745-7-03(C)(2)(d).

{¶71} The Commission finds Mr. Schrenk's argument not well-taken.

{¶72} As the Director correctly observes, Ohio Adm.Code 3745-7-03(C)(2)(d) permits the use of a backup operator with one classification lower than the public water system's classification for a period of up to thirty *consecutive* days. It is unclear to the Commission, however, whether the phrase “consecutive days” refers to consecutive days worked or consecutive calendar days. Moreover, although Ohio Adm.Code 3745-7-03(C)(2)(d) states that the provision “may not be used to routinely circumvent minimum staffing requirements,” it contains no specific guidance as to the frequency the provision may be used within a given period of time.

{¶73} The Commission notes that Mr. Schrenk’s construction of Ohio Adm.Code 3745-7-03(C)(2)(d)—that “consecutive days” refers to consecutive days worked—would appear to be inconsistent with other minimum staffing requirements. Specifically, Class III PWS facilities require an operator of record to be present at this facility for a minimum of only 5 days (and 40 hours) per week. Thus, 30 consecutive days worked would exceed the minimum staffing requirements for even the largest of PWS facilities.

{¶74} As to the Director’s construction of Ohio Adm.Code 3745-7-03(C)(2)(d)—that “consecutive days” refers to consecutive calendar days—it is unclear to the Commission precisely how the phrase “for a period of up to thirty consecutive days” should be calculated. For example, it is unclear whether a violation could occur where a facility utilizes a backup operator on just two days, with the second day occurring 31 calendar days after the first.

{¶75} Nonetheless, as noted above, the Commission must afford “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). The

Commission finds that the Director's interpretation of Ohio Adm.Code 3745-7-03(C)(2)(d) does not conflict with the express language of the regulation in this instance.

{¶76} Testimony and evidence presented at the adjudication hearing established that Mr. Schrenk acted as operator of record for the Lake Erie Utilities PWS on 16 occasions between July 9, 2012 and September 28, 2012—a period of 82 consecutive days. Although it is unclear to the Commission how much time would be required to pass between each 30-calendar-day period under Ohio Adm.Code 3745-7-03(C)(2)(d), the Commission finds the Director's action was not unlawful or unreasonable, in this instance, when he determined Mr. Schrenk's activities constituted a single, 82-day period rather than a series of shorter periods.

{¶77} Accordingly, the Commission finds the Director acted lawfully and reasonably in determining that Mr. Schrenk's activities at the Lake Erie Utilities PWS fell outside the scope of Ohio Adm.Code 3745-7-03(C)(2)(d) and that he operated the Lake Erie Utilities PWS without the appropriate certification.

*ii. Failure to Meet Staffing Requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS*

{¶78} Mr. Schrenk argues that he cannot be held legally responsible for minimum staffing requirements at the Lake Erie Utilities PWS because his application to be added as an operator of record for that facility was ultimately rejected by Ohio EPA. Further, Mr. Schrenk asserts that the facility complied with minimum staffing requirements because the facility was not operating on some dates during the relevant time period and because certain automation at the facility reduced staffing requirements pursuant to Ohio Adm.Code 3745-7-03(C)(2)(c)(i).

{¶79} In response, the Director argued that even though Mr. Schrenk's application to be added as an operator of record was ultimately rejected, Ohio EPA's review of the log books for the Lake Erie Utilities PWS indicated that he *acted* as an operator during the relevant time period. Further, the Director objected to Mr. Schrenk's attempt to introduce evidence of automation and that the facility was not operating on certain dates. The Director noted that such evidence was not presented at the adjudication hearing below.

{¶80} As an initial matter, the Commission finds that Mr. Schrenk's evidence of automation and non-operation of the facility is inadmissible in this appeal from an adjudicatory hearing below. Ohio Adm.Code 3746-9-01(A) states:

If an adjudication hearing was conducted by the director or other statutory agency, \* \* \* the commission is confined to the record as certified to it \* \* \*, except as provided in rule 3746-9-02 of the Administrative Code.

(Internal citations omitted).

{¶81} Regarding the admission of newly discovered evidence, the Commission's rules state in pertinent part:

The commission may grant a motion for the admission of additional evidence when satisfied that such additional evidence is newly discovered *and could not with reasonable diligence have been ascertained prior to the adjudication hearing before the director or other statutory agency.*

Ohio Adm.Code 3746-9-02(A) (emphasis added).

{¶82} Here, the Director's January 3, 2014 letter contained a Proposed Order notifying Mr. Schrenk of the nature of the allegations against him. This Proposed Order contained specific allegations regarding the failure to satisfy minimum staffing requirements at the Lake Erie Utilities PWS between July and September 2012. The Commission finds that evidence of automation and/or non-operation of the facility

could have been ascertained with reasonable diligence by Appellant. Accordingly, the Commission hereby sustains the Director's objection pursuant to Ohio Adm.Code 3746-9-01(A).

{¶83} Nonetheless, the Commission finds the Director lacked a valid factual foundation for his conclusion that Mr. Schrenk failed to satisfy minimum staffing requirements at each of the four facilities at issue in this appeal.

{¶84} As discussed above, Hearing Officer Wilson—and subsequently, the Director—found that because Mr. Schrenk failed to record his arrival and departure times, he “was not present at those facilities.” The Commission disagrees with this conclusion.

{¶85} By its very nature, Mr. Schrenk's failure to record arrival and departure times resulted in a *lack of information* regarding the time he was present on certain occasions. It did not, however, *affirmatively establish that he was absent*. In fact, by creating an entry in the log books, albeit without specific information regarding duration, Mr. Schrenk provided evidence that he may have been present on those days. Accordingly, the Commission finds the Director lacked a valid factual foundation for his conclusion that Mr. Schrenk failed to satisfy minimum staffing requirements at each of the four facilities at issue in this appeal.

{¶86} The Commission notes that this finding does not establish that Mr. Schrenk satisfied the minimum staffing requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS. Rather, the Commission merely finds that the evidence presented at the adjudication hearing below was insufficient to support the conclusion that he did not.

{¶87} The Commission finds that the Director acted unreasonably when finding that Mr. Schrenk violated minimum staffing requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS.

*iii. Failure to comply with recordkeeping requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS*

{¶88} Regarding the finding that he failed to record time in and time out, Mr. Schrenk argued that although he did not record those times in the log books, he did record his time in and time out on separate time sheets. Mr. Schrenk argued that this practice was permissible under Ohio Adm.Code 3745-7-09(A).

{¶89} Regarding the finding that he failed to record operation and maintenance activities, Mr. Schrenk noted several specific examples where he did record such activities.

{¶90} Finally, regarding the finding that he failed to provide certain required information in MORs submitted to Ohio EPA, Mr. Schrenk asserted that additional data was kept on dry erase boards and/or clipboards at the facility.

{¶91} In response, the Director acknowledged that some daily entries provided some information regarding maintenance activities, but emphasized that the log books, taken as a whole, did not provide the level of detail required by Ohio's operator certification regulations. Specifically, the Director noted that numerous entries simply stated, "checked plant." The Director did not address Mr. Schrenk's argument regarding either the time cards or the data allegedly missing from the MORs, but generally objected to Mr. Schrenk's attempts to introduce new evidence not presented at the adjudication hearing below.

{¶92} For the following reasons, the Commission finds that the Director acted lawfully and reasonably in concluding that Mr. Schrenk failed to record time in/time out, as well as that he failed to maintain adequate records of operation and maintenance activities. However, the Commission concludes the Director lacked a valid factual foundation to find that Mr. Schrenk failed to record certain required information in MORs submitted to Ohio EPA.

{¶93} Regarding time in/time out, the Commission rules to sustain the Director's objection regarding the introduction of new evidence. As noted above, the January 3, 2014 letter contained a Proposed Order notifying Mr. Schrenk of the nature of the allegations against him. The Commission finds that Mr. Schrenk could have, with reasonable diligence, ascertained evidence regarding separate time sheets prior to the December 16, 2014 adjudication hearing.

{¶94} Having found the new evidence of separate time sheets inadmissible, the Commission's review of the testimony and exhibits presented at the adjudication hearing supports the finding that the Director had a valid factual foundation to conclude that Mr. Schrenk regularly failed to record arrival and departure times, as required by Ohio's operator certification regulations. On numerous occasions, Mr. Schrenk's entries contained only a date and his initials. Further, even when some time information was indicated, specific arrival *and* departure times were recorded only once in any of the log books for the four facilities between July and September 2012.

{¶95} Moreover, even if the Commission did consider the time sheets Mr. Schrenk attempted to introduce as exhibits at oral argument, the Commission's finding would not differ. The Commission notes that the time sheets do not indicate time present *at a particular facility*. Rather, the time sheets indicate only time worked on a

particular day. Such time could have been spent at one facility, multiple facilities, or even at locations that are not WWTPs or PWSs. Thus, the time sheets would not have satisfied the requirement to record the date and times of arrival and departure for the operator of record as required by Ohio Adm.Code 3745-7-09(A)(3)(b).

{¶96} Similarly, regarding records of operation and maintenance activities, the Commission finds the Director had a valid factual foundation for concluding that Mr. Schrenk did not meet the requirements of Ohio Adm.Code 3745-7-09(A)(3)(c). Although Mr. Schrenk correctly notes that some log book entries provide some information regarding certain maintenance activities, the undisputed testimony presented at the adjudication hearing established that the log books, taken as a whole, did not provide the level of detail required by Ohio's operator certification regulations.

{¶97} Accordingly, the Commission finds that the Director acted reasonably in finding that Mr. Schrenk failed to adequately record operation and maintenance activities at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS.

{¶98} Regarding the Director's finding that Mr. Schrenk failed to include certain required information in MORs, however, the Commission finds that the Director acted unreasonably.

{¶99} At the adjudication hearing, Mr. Barienbrock testified that two NOVs indicated the Agency reviewed MORs submitted to Ohio EPA and determined that the Lake Erie Utilities PWS failed to record residual disinfectant concentration on May 9, 2012, and failed to record the temperature of disinfected water on 14 separate occasions in October 2012.

{¶100} Significantly, however, based upon the testimony presented at the adjudication hearing, it is unclear to the Commission whether Mr. Barienbrock or another Ohio EPA staff member reviewed the MORs and prepared the NOV's. Further, the Certified Record does not include any testimony or other record of the Agency's underlying analysis of the MORs or the data contained therein.

{¶101} Without any supporting testimony or other evidence, the Commission finds that the NOV's are merely the Agency's own, unsubstantiated assertions. Although the Commission must not substitute its judgment for that of the Director as to factual issues, the Director's conclusions must be supported by a valid factual foundation. *Ohio Fresh Eggs, LLC v. Wise*, 10th Dist. Franklin No. 07AP-780, 2008-Ohio-2423, ¶32.

{¶102} Here, the Director presented only unsubstantiated assertions regarding the contents of various MORs. The testimony did not establish that Mr. Barienbrock had personal knowledge of the contents of the MORs, nor were the MORs themselves introduced as exhibits. Instead, Mr. Barienbrock simply reviewed two NOV's and restated their conclusions. The Commission finds that such testimony is inadmissible hearsay and is therefore insufficient to support the truth of the matter asserted. Specifically, the NOV's are insufficient evidence to support the conclusion that the MORs, which were not otherwise included in the Certified Record or otherwise addressed in the testimony, lacked certain required information.

{¶103} Accordingly, the Commission finds the Director acted unreasonably in concluding that Mr. Schrenk violated recordkeeping requirements with respect to the MORs he submitted to Ohio EPA.

*iv. Operation of the Lake Erie Utilities PWS Above Approved Capacity*

{¶104} Finally, regarding the finding that he operated the Lake Erie Utilities PWS above its approved capacity, Mr. Schrenk again argued that he could not be held legally responsible for those violations because his application to be added as an operator of record for that facility was ultimately rejected. Further, Mr. Schrenk argued that the NOV's presented at the adjudication hearing did not contain any underlying evidence to support the allegation that the plant operated above its approved capacity.

{¶105} The Commission finds Mr. Schrenk's argument well-taken.

{¶106} As discussed above, without supporting evidence, the NOV's presented at the adjudication hearing are merely the Agency's own, unsubstantiated assertions. The testimony at the adjudication hearing did not establish that Mr. Barienbrock had personal knowledge of the contents of the MOR's, nor were the MOR's themselves introduced as exhibits. Instead, Mr. Barienbrock simply reviewed two NOV's and restated their conclusions. Thus, Commission finds that such testimony is inadmissible hearsay and insufficient to support the truth of the matter asserted. Specifically, the NOV's are insufficient to support the conclusion that certain MOR's, which were not otherwise included in the Certified Record or otherwise addressed in the testimony, contained information that led Ohio EPA to determine that the Lake Erie Utilities PWS operated above its approved capacity.

{¶107} Accordingly, the Commission finds the Director acted unreasonably with respect to his conclusion that Mr. Schrenk violated Ohio's operator certification regulations by allowing the Lake Erie Utilities PWS to operate above its approved capacity.

**FINAL ORDER**

{¶108} For the foregoing reasons, the Commission hereby VACATES the Director's June 11, 2015 DFFOs relating to:

- Mr. Schrenk failed to meet minimum staffing requirements at St. Hazards Resort WWTP, St. Hazards Resort PWS, Lake Erie Utilities WWTP, and Lake Erie Utilities PWS;
- Mr. Schrenk violated recordkeeping requirements by failing to include certain required information in MORs; and
- Mr. Schrenk violated Ohio's operator certification regulations by allowing the Lake Erie Utilities PWS to operate above its approved capacity.

{¶109} The Commission AFFIRMS the Director's issuance of the June 11, 2015 DFFOs in all other respects.

{¶110} The Commission hereby REMANDS the June 11, 2015 DFFOs to the Director for action consistent with this Decision.

{¶111} 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 8<sup>th</sup> day of June 2016.

Copies Sent to:

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[CERTIFIED MAIL]  
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