

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO

THE VILLAGE OF ALBANY, : Case No. ERAC 16-6876  
: :  
Appellant, : :  
: :  
v. : :  
: :  
CRAIG BUTLER, DIRECTOR OF : :  
ENVIRONMENTAL PROTECTION : :  
: :  
and : :  
: :  
ALEXANDER LOCAL SCHOOL : :  
DISTRICT, : :  
: :  
Appellees. : :

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RULING ON APPELLEE ALEXANDER LOCAL SCHOOL  
DISTRICT'S MOTION TO DISMISS

Rendered on March 22, 2017

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*Robert R. Rittenhouse and Scott M. Robe* for Appellant The  
Village of Albany

*Michael DeWine, Attorney General, Nicole Candelora-  
Norman, and Casey L. Chapman* for Appellee Craig Butler,  
Director of Environmental Protection

*Christopher L. McCloskey, Christine Rideout Schirra,  
Desmond J. Cullimore, and Tarik M. Kershah* for Appellee  
Alexander Local School District

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{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant The Village of Albany (“Village”) on May 12, 2016. Appellant challenges the April 13, 2016 issuance of a Permit-to-Install (“PTI”) by Appellee Craig Butler, Director of Environmental Protection

("Director," "Ohio EPA," "Agency") to Appellee Alexander Local School District ("School District"). Case File Item A.

{¶2} On November 14, 2016, the School District filed a Motion to Dismiss for Lack of Standing ("Motion"). The Village filed a Memorandum in Opposition to the School District's Motion on November 23, 2016. The School District filed a Reply on December 2, 2016. Case File Items FF, HH, II.

{¶3} The Commission heard oral argument on the School District's Motion on February 15, 2017. Case File BBB.<sup>1</sup>

{¶4} Based upon a review of the pleadings and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING the School District's Motion.

### **FINDINGS OF FACT**

#### **I. Factual Background**

{¶5} Appellant Village of Albany is a village located in Athens County, Ohio.

{¶6} Appellee Alexander Local School District is a school district located in part in Athens County, Ohio.

{¶7} In 2002, the Village entered into an agreement with the Athens County Board of Commissioners<sup>2</sup> to provide wastewater treatment service to the Greater Albany Service Area ("2002 Agreement"). The 2002 Agreement described the Greater Albany Service Area as including certain properties outside the corporate limits of the Village of Albany, but within Athens County. Specifically, the 2002 Agreement expressly defined

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<sup>1</sup> The Commission also heard oral argument on the Village's Motion for Summary Judgment and the School District's Motion for Summary Judgment. Case File Item BBB.

<sup>2</sup> The School District was not a party to the 2002 Agreement. Case File Item HH, Exhibit A.

the Greater Albany Service Area to include “[p]roperties along [S]chool Road and Alexander School property, and properties between Alexander School property and Rossiter Road.” The parties do not dispute that the property at issue in this appeal is within the Greater Albany Service Area, as defined in the 2002 Agreement. Case File Item HH, Exhibit A.

{¶8} Additionally, Section 1 of the 2002 Agreement between the Village and Athens County states in pertinent part:

It is further understood and agreed that areas served within the Greater Albany Service Area shall abide by the Sewer Use Regulations, Sewer Rate Ordinances, and as now in affect (sic) and as may be amended from time to time, and shall take all action allowed by law that may be necessary to enforce those regulations.

Case File Item HH, Exhibit A.

{¶9} In 2004, the Village enacted the Sewer Use Regulations referred to in the 2002 Agreement. The Village’s Sewer Use Regulations set out circumstances under which connection to the public sewer system is required. The Sewer Use Regulations state in pertinent part:

Section 102 – Except as hereinafter provided, no person shall construct or maintain any privy, privy vault, septic tank, cesspool, or other facility intended for or used for the disposal of sewage or wastes of an objectionable nature.

\* \* \*

Section 104 – No person shall discharge to any natural outlet within the Village of Albany, or in any area under the jurisdiction of said Village, any sewage or other polluted waters, except where suitable treatment has been provided in accordance with the requirements of the Ohio EPA and/or the local Health Department.

\* \* \*

Section 106 – Where a public sanitary sewer is not available under the provisions herein, the building sewer shall be connected to a private sewage

disposal system complying with the provisions of the regulations of the Athens County Health Department.

\* \* \*

Section 108 – At such time as a public sewer becomes available to a property served by a private sewage disposal system, as provided herein, a direct connection shall be made to the public sewer in compliance with this regulation, and any septic tanks, cesspools and similar private sewage disposal facilities shall be abandoned and filled with sand or other suitable material at the time the connection to the public sewer is made and the owner shall comply with all applicable requirements of this Ordinance.

Case File Item HH, Exhibit C.

{¶10} Also in 2004, the School District began a renovation project at its Ayers Road facility. As a component of these renovations, the School District and Village entered into a separate agreement (“2004 Agreement”) to extend sewer lines and install a public sewer tap at that location. Case File Item HH.

{¶11} In 2010, the Village codified a policy change regarding sewer taps by passing Ordinance No. 08-16-2010 (“2010 Ordinance”). The 2010 Ordinance states, “[T]he Village of Albany shall not provide sewer taps outside the Village unless the property served by the tap is annexed into the Village.” The Village characterizes the 2010 Ordinance as a “moratorium” on public sewer taps located outside the Village of Albany, such as the tap previously installed at the School District’s Ayers Road facility. Case File Item HH, Exhibit D.

## **II. Wellness Center Project and Application for PTI**

{¶12} In 2015, the School District began planning the construction of a new Wellness Center at its Ayers Road location. Initially, the School District intended to use the existing Ayers Road sewer tap to service its new Wellness Center project. Thus, in its initial PTI application filed with Ohio EPA on August 12, 2015, the School District stated

it would connect the proposed Wellness Center to the Village's public sewer system. Case File Item HH, Exhibit F.

{¶13} In separate communications, the Village subsequently informed both the School District and Ohio EPA that it would not allow the School District to utilize the existing tap without first annexing the property into the Village. Case File Item HH, Exhibits I, M.

{¶14} Thus, based upon the Village's response regarding the requirement to annex, the School District filed an amended application with Ohio EPA on February 22, 2016. In its amended application, the School District indicated the proposed Wellness Center would now include an on-site sewage treatment system, rather than a connection to the Village's public sewer system. Case File Item HH, Exhibit P.

{¶15} Additionally, the School District filed a complaint against the Village in the Athens County Court of Common Pleas. In its complaint, the School District sought to compel the Village, pursuant to the 2004 Agreement, to allow the School District to connect its Wellness Center to the existing Ayers Road sewer tap. Case File Item HH.

{¶16} On March 3, 2016, the Athens County Court of Common Pleas granted the Village's motion to dismiss in that case, but delayed entering its dismissal as a final appealable order so that the parties would have the opportunity to mediate or negotiate "a solution to this dispute."<sup>3</sup> Case File Item HH, Exhibit R.

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<sup>3</sup> The Court's ruling on the Village's motion to dismiss states:

There are options for the parties at this point. The outcome of this Decision can be reduced to a final judgment and the case may be litigated on appeal. Depending upon the outcome thereof, the case may be litigated into 2017 and beyond. Or the parties may wish to postpone and/or alleviate the need for a final judgment by mediating or negotiating a solution to this dispute. *Of course, there may be other plausible courses of action. Alexander Local School District and the Village co-exist in and as a small community. If there is any consensus that a Wellness Center would benefit the community at large, perhaps the*

{¶17} Mediation failed, and the Court entered a final order dismissing the complaint on June 23, 2016. The School District has since appealed the decision to the Fourth District Court of Appeals. Case File Item HH, Exhibit U.

{¶18} On April 13, 2016, during the pendency of the School District's case before the Athens County Court of Commons Pleas, the Director issued the present PTI based on the School District's amended application, which included an on-site wastewater treatment system. Certified Record ("CR") Item 1.

### **III. The Village's ERAC Appeal and the School District's Motion to Dismiss**

{¶19} The Village timely appealed the Director's issuance of the PTI, asserting six assignments of error:

1. The Director's action of granting the School District a permit to install a sewage treatment system on property that is already being serviced by the Village's sewer system, was in violation of Section 102 of the Village's sewer system regulations, and thus it was unlawful and unreasonable.
2. Subject to the School District adhering to the Village's sewer use regulations and local laws, the Village is ready, willing and able to provide sewer services to the School District's proposed Wellness Center and thus The Director's action was unlawful and unreasonable.
3. The Director of the Ohio Environmental Protection Agency's decision granting the School District a permit to install was unlawful and unreasonable as it was based on inaccurate information, including the distance necessary to complete a connection of the School District's proposed Wellness Center to the Village's sewer system, the costs associated with this connection and the availability of the connection to the Village's sewer system.

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*parties can investigate feasible methods for making the Center a reality rather than litigating for months or years to come. \* \* \**

Case File Item HH, Exhibit R (emphasis added).

4. The permit was issued without regard to the Village's authority to regulate sewer matters in the area surrounding the Village corporate limits.
5. The permit and consequent sewer discharge may or will affect the water quality of the watershed downstream from the permitted facility, potentially adversely affecting the Village's discharge limitations
6. For all the reasons set forth in this Notice and in the above Assignments of Error, the permit was granted without a rational basis, without developing a complete or reasonable factual basis, without an appropriate consideration of the facts and circumstances, and is unlawful and unreasonable.

Case File Item A.

{¶20} On November 14, 2016, the School District filed the present Motion to Dismiss, arguing the Village lacks standing in this appeal. The School District asserts that the Village was not a party to a proceeding before the director and is not aggrieved or adversely affected by the Director's issuance of the PTI. Specifically, the School District contends the issuance of the PTI does not affect the Village's ability to operate its wastewater treatment plant or enforce its sewer-related ordinances and agreements. Moreover, the School District argues that to the extent the Village alleges lost revenue as a result of the Director's issuance of the PTI, such injuries are both not within the realm of interests protected by the PTI program and too speculative to give rise to standing. Case File Item FF.

{¶21} The School District also asserts that even if the Village could prevail in this appeal, the Commission could not redress its alleged injuries. The School District notes that even if Commission vacates the Director's issuance of the PTI, the School District could discontinue building its Wellness Center project rather than annex the property into the Village, obviating the need to connect to the public sewer system. Case File Item FF.

{¶22} The Village filed its Memorandum in Opposition on November 23, 2016. The Village argues that the Director's action "allows" the School District to violate the Village's Sewer Use Regulations. In essence, the Village argues that the School District's Ayers Road property is subject to the Village's Sewer Use Regulations through Section 1 of the 2002 Agreement.<sup>4</sup> The Village maintains that a connection to its public sewer system is "available," notwithstanding the 2010 Ordinance's annexation requirement. And therefore, the Village concludes the School District's use of an on-site sewage treatment system is a violation of Sections 102 and 108 of the Sewer Use Regulations. Case File Item HH.<sup>5</sup>

{¶23} The Village then asserts it is aggrieved or adversely affected because the Director's issuance of the PTI represents an implicit "authorization" to violate of the Sewer Use Regulations and/or 2002 Agreement and that such "authorization" impairs the Village's ability to enforce its Sewer Use Regulations and/or the 2002 Agreement. Case File Item HH.

{¶24} Additionally, the Village argues that the Director's issuance of the PTI impacts its pecuniary interest. The Village contends that its loss of revenue is imminent and not speculative, because the Wellness Center will connect to an on-site sewage treatment system, rather than the Village's public sewer system as prior buildings at that location had done. The Village has not, however, detailed any specific revenue losses. Case File Item HH.

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<sup>4</sup> See note 2, *supra*.

<sup>5</sup> As set forth in greater detail below, the Commission finds that the Village's authority to enforce its own regulations is not affected by the Director's issuance of the PTI. Therefore, the Commission need not address whether School District's actions constitute a violation of the Village's Sewer Use Regulations.



{¶25} Finally, the Village contends the Director's issuance of the PTI allows the School District to discharge additional pollutants and thereby impacts water quality within the Village and/or harms the Village's ability to operate its own wastewater treatment plant. In support this assertion, the Village relies upon the affidavit of Mr. Gary Silcott. The relevant portion of Mr. Silcott's affidavit states:

The result of EPA's preference of the proposed onsite sewage system to the available Albany Sanitary Sewer System will be a lower degree of sewage treatment, and a greater burden to the discharge stream.

Case File Item HH, Exhibit V.

{¶26} Significantly, Mr. Silcott's affidavit neither identifies a specific water body that would be impacted by the School District's operation of an on-site sewage treatment system nor articulates the specific manner in which the Village's wastewater treatment plant would be harmed. Case File Item HH.

{¶27} At oral argument, counsel for the School District and counsel for the Village clarified that the School District's on-site system utilizes a leach field design and does not discharge to any surface water body. Thus, the parties agree that the relevant water body (identified at oral argument as Margaret Creek) would be impacted only in the event of a failure or malfunction of the School District's on-site sewage treatment system. Regarding evidence that such a failure or malfunction is likely to occur, counsel for the Village cited Mr. Silcott's affidavit. The Commission notes, however, that Mr. Silcott's affidavit does not expressly discuss any flaws, potential failure, or malfunction of the School District's on-site system, nor does it provide any specific basis for his conclusion that the system would result in "a greater burden to the discharge stream." Case File Item HH, Exhibit V.

## CONCLUSIONS OF LAW

### IV. Standing

{¶28} The question of standing is a threshold issue of jurisdiction, which must be resolved before an appellant may proceed with an appeal before the Commission. *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶22, citing *New Boston Coke v. Tyler*, 32 Ohio St.3d 216 (1987). The standing requirement ensures that each appellant has a personal stake in the outcome of the controversy. *Merkel v. Jones*, ERAC Case Nos. 185274-75 (Oct. 23, 2003).

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

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

{¶31} The Tenth District has stated that a person is “affected,” or “aggrieved or adversely affected,” by the Director’s final action if: “(1) the challenged action will cause injury in fact, economic or otherwise, and (2) the interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged.” *Girard*, at

¶15, quoting *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, 10th Dist. No. 06AP-836, 2007-Ohio-2649.

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

{¶33} Finally, “the interest sought to be protected [must be] within the realm of interests regulated or protected by the statute or constitutional right being challenged.” *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, 84 Ohio App.3d 591, 599 (10th Dist. 1992).

## **V. Analysis**

### **A. Party to a Proceeding Before the Director**

{¶34} The Commission finds that the Village of Albany was a party to a proceeding before the Director. As detailed above, the Village communicated its position regarding its annexation requirement to Ohio EPA in response to the School District’s initial application. Although the School District subsequently amended its application, the Commission finds that a person need not appear before the Director at every stage of the proceeding to satisfy the “party to a proceeding” requirement. Rather, a person need only appear before the Director at some stage during the proceeding. Because the Village

articulated its position to Ohio EPA in response to the School District's initial application, the Commission finds that the Village of Albany was a party to a proceeding before the Director.

### **I. Motion to Dismiss Standard**

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

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

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

#### **A. Aggrieved or Adversely Affected**

{¶38} Nonetheless, the Commission finds the Village lacks standing in this appeal because it is not aggrieved or adversely affected. First, the Director's issuance of the PTI does not affect the Village's ability to enforce its own sewer-related ordinances

and agreements. Second, to the extent the Director's issuance of the PTI may have resulted in lost revenue for the Village, the alleged injury is not within the realm of interests protected by the PTI program and would not be redressed by a favorable outcome before the Commission. And finally, the Village has failed to allege facts sufficient to support its allegation that the Director's issuance of the PTI negatively impacts water quality within the Village and/or the Village's ability to operate its wastewater treatment plant.

*i. Sewer Use Regulations and 2002 Agreement*

{¶39} The Village argues the Director's issuance of the PTI compromises its ability to enforce the 2002 Agreement and its Sewer Use Regulations. The Commission disagrees.

{¶40} The Village failed to present any evidence demonstrating that the Director's action prevents the Village from enforcing its ordinances or the terms of its agreements through the local courts or any other venue possessing jurisdiction over this dispute. The mere allegation of a violation of those ordinances and/or agreements does not, without more, constitute an injury sufficient to give rise to standing before the Commission. The PTI evidences the Director's conclusion that the School District's proposed project complies with Ohio's water pollution control laws, but does not relieve the permittee from its obligation to comply with local laws and regulations. Thus, if the Village determines a violation has occurred, it may seek to enforce its Sewer Use Regulations and/or the terms of its 2002 Agreement in the local courts or any other venue possessing jurisdiction over this dispute.

{¶41} Significantly, the scope of the Commission's review in this appeal is limited to the lawfulness and reasonableness of the Director's issuance of the PTI. R.C.

3745.05(F). The Commission lacks jurisdiction to independently enforce local ordinances or inter-governmental agreements.

{¶42} Because the Village's authority to enforce its own regulations is not affected by the Director's issuance of the PTI, the Commission finds the alleged violation of the Village's Sewer Use Regulations and/or 2002 Agreement is insufficient to confer standing.

ii. *Lost Revenue*

{¶43} The Commission also finds that the Village's alleged loss of revenue is insufficient to establish standing in this instance. Even taking as true the Village's allegation that but for the School District's Wellness Center project, the Village would have continued to receive sewer use fees from buildings previously on the site,<sup>6</sup> such loss of revenue is both outside the scope of interests protected by the PTI program and would not be redressed by a favorable outcome before the Commission.

{¶44} As noted above, the Tenth District has held that "the interest sought to be protected [must be] within the realm of interests regulated or protected by the statute being challenged." *Girard Bd. of Health v. Korleski*, 193 Ohio App.3d 309, 2011-Ohio-1385, ¶15.

{¶45} For example, the Commission has previously found, "[i]t is not within the realm of interest of the NPDES program to protect against lost revenues or anticipated loss of customers." *Village of Canal Winchester v. Jones*, ERAC No. 255235 (April 14, 2014). In *Village of Canal Winchester*, the Director issued the City of Pickerington a

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<sup>6</sup> The Village's stated concern regarding lost revenue is belied by the Village's own actions. During Oral Argument, counsel for the Village alerted the Commission that in the time since the School District filed its Motion, the Village has enacted an ordinance (effective August 1, 2017) terminating sewer service—thus foregoing the associated sewer usage fees—for the entire School District property. Village of Albany Ordinance No. 01-18-2017(B).

National Pollutant Discharge Elimination System (“NPDES”) permit authorizing the City to discharge wastewater from its treatment works to Sycamore Creek, rather than to Canal Winchester’s sewer system. Canal Winchester appealed, arguing that the issuance of the NPDES permit allowed the City to violate its sewerage contract and would result in a loss of revenue for Canal Winchester. The Commission found this alleged loss of revenue was not within the realm of interests protected by the NPDES program and stated as follows:

National Pollutant Discharge Elimination System permits, and the laws and regulations associated with these permits, are intended to address the national issue of water pollution and to improve water quality by regulating the discharge of certain pollutants from point sources. It is not within the realm of interest of the NPDES program to protect against lost revenues or anticipated loss of customers.

*Village of Canal Winchester*, at Conclusions of Law ¶ 10.

{¶46} Similarly, here, the Village argues that the Director’s issuance of the PTI to the School District resulted in the discontinuation of sewer service at that site and thus a loss of revenue for the Village. As in *Village of Canal Winchester*, however, the Village has not demonstrated that such loss of revenue is within the realm of interests protected by the PTI program. The Commission has previously stated, “A plain reading of [Ohio Administrative Code] 3745-42-04 supports a finding that the interests protected by this regulation are to assure the attainment or maintenance of water quality in Ohio.” *Moffit v. Korleski*, ERAC Nos. 216172-75 (Aug. 27, 2009). Thus, the mere loss of revenue for a third-party public sewer system, without any evidence of associated harm to water quality, is not within the realm of interests protected by the PTI program and is insufficient to establish standing.

{¶47} The Commission notes that Ohio Administrative Code (“Ohio Adm.Code”) 3745-42-04 does permit the Director to consider certain social or economic impacts in determining whether to grant an application for PTI. Significantly, however, such

discretionary consideration is limited to the social or economic impacts “*of water pollutants* or other adverse *environmental* impacts that may be a consequence of issuance of the permit to install or plan approval.” Ohio Adm.Code 3745-42-04(C) (emphasis added). Here, the Village has not alleged that its lost revenue is the consequence of water pollution or adverse environmental impacts associated with the Director’s issuance of the PTI.<sup>7</sup>

{¶48} Moreover, the Commission finds that the alleged injury would not be redressed by a favorable outcome before the Commission. As the School District correctly observes, even if the Commission vacates the PTI, the School District could choose to abandon its Wellness Center project rather than annex into the Village for the purpose of connecting to its public sewer system. Significantly, the Commission lacks jurisdiction to *compel* the use of the Village’s sewers.<sup>8</sup>

{¶49} Thus, the Commission finds the Village’s alleged loss of revenue is insufficient to establish standing in this appeal.

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<sup>7</sup> At oral argument, counsel for the Village advanced an additional theory regarding the economic impact of the Director’s issuance of the PTI. Counsel for the Village asserted that sewer usage fees generated from the School District’s Ayers Road facility were necessary for the operation of the Village’s sewer system and WWTP. The Commission need not address this argument because it was not raised in the Village’s Memorandum in Opposition.

Nonetheless, even if the Village had properly raised the argument, the Commission notes that such interest is not within the realm of interests protected by Ohio’s PTI program. As noted above, to the extent the Director may consider social or economic impacts, such consideration is limited to the social or economic impacts of water pollutants or other adverse environmental impacts that may be a consequence of issuance of the PTI.

<sup>8</sup> Several potential alternative remedies, however, are available to the Village outside of an appeal before ERAC. For example, the Village could waive the annexation requirement for this project, or alternatively repeal the 2010 Ordinance. Either such course of action would allow the School District to connect to the Village’s public sewer system and thereby redress the alleged injury. As the Athens County Court of Common Pleas observed in its ruling on the Village’s motion to dismiss, it may benefit both parties to “investigate feasible methods for making the Center a reality rather than litigating for months or years to come.” Case File Item HH, Exhibit R.



iii. *Harm to Water Quality and/or Operation of the Village's Wastewater Treatment Plant*

{¶50} Finally, the Village contends that the Director's issuance of the PTI negatively impacts water quality within the Village and/or affects the Village's ability to operate its own wastewater treatment plant.<sup>9</sup> At oral argument, counsel for the Village stated that the relevant water body (identified at oral argument as Margaret Creek) would be adversely impacted in the event of a failure or malfunction of the School District's on-site sewage treatment system. Because the Village failed to present evidence that the School District will be unable to comply with the terms of the PTI, the Commission finds such harm speculative and insufficient to establish standing.

{¶51} Absent evidence to the contrary, the Commission must presume a permit holder will comply with the terms of its permit. E.g., *Lund v. Portsmouth Local Air Agency*, ERAC No. 13-016720 (Dec. 19, 2013). Although all factual allegations in a notice of appeal are taken as true, "unsupported conclusions of a complaint are not considered admitted \* \* \* and are not sufficient to withstand a motion to dismiss." *Grange Mutual Casualty Co. v. Klatt*, 10th Dist. Franklin No. 96APE07-888 (Mar. 18, 1997), quoting *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989).

{¶52} Here, the Village relies upon Mr. Silcott's assertion that the School District's on-site sewer treatment system will provide "a lower degree of sewage treatment" and create "a greater burden to the discharge stream." The Commission notes, however, that Mr. Silcott's affidavit does not expressly discuss any flaws in the design, or the potential for failure or malfunction of the School District's on-site system. Further, to

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<sup>9</sup> As with its argument regarding lost revenue, the Village's assertion that the use of its public sewer system is necessary to maintain water quality is belied by the enactment of Ordinance No. 01-18-2017(B). The ordinance will terminate sewer service for the entire School District property, effective August 1, 2017. See note 6, *supra*.

the extent Mr. Silcott's affidavit appears to imply the likelihood that the School District will be unable to comply with the terms of its PTI, the affidavit fails to provide any specific basis for such a conclusion.

{¶153} Thus, the Commission finds Mr. Silcott's unsupported conclusory statement is insufficient to establish that the School District will be unable to comply with the terms of its PTI. The Commission must therefore presume compliance for purposes of this appeal.

{¶154} Further, the Village conceded that the School District's on-site sewage treatment system utilizes a leach field design and would not discharge water pollutants to Margaret Creek absent a failure or malfunction. Thus, having previously found that the Village has not adequately rebutted the presumption of compliance, the Commission also finds that the Village failed to establish the Director's issuance of the PTI will negatively impact water quality within the Village and/or affect the Village's ability to operate its wastewater treatment plant.

{¶155} Accordingly, the Commission finds the Village lacks standing in this appeal.

**FINAL ORDER**

{156} For the foregoing reasons, the Commission hereby GRANTS the School District's Motion to Dismiss and ORDERS the above-captioned appeal be DISMISSED.

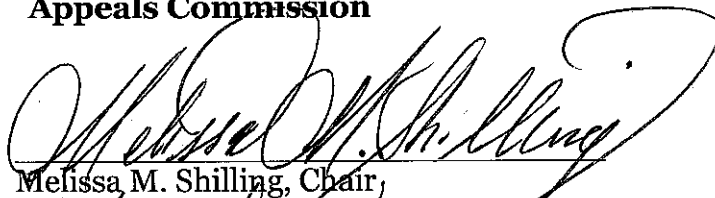
{157} In light of the Commission's dismissal of this appeal, the following motions are rendered MOOT:

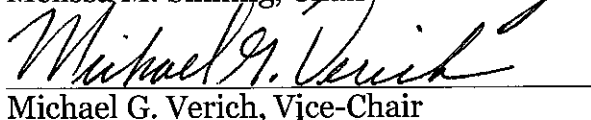
- School District's Motion for Protective Order, filed October 31, 2016
- Village's Motion to Compel, filed November 8, 2016
- Village's Motion for Summary Judgment, filed December 6, 2016
- School District's Motion for Summary Judgment, filed December 6, 2016

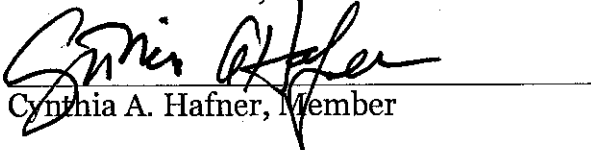
{158} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties:

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

  
Michael G. Verich, Vice-Chair

  
Cynthia A. Hafner, Member

Entered into the Journal of the Commission this 22<sup>nd</sup> day of March 2017.

Copies Sent to:

THE VILLAGE OF ALBANY  
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