

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

National Wildlife Federation,	:	
Appellant-Appellee,	:	
Western Lake Erie Association (n.k.a.	:	Nos. 12AP-278
Lake Erie Waterkeeper, Inc.) et al.,	:	(ERAC No. 486448)
	:	12AP-279
Appellants-Appellants,	:	(ERAC No. 626449)
	:	12AP-280
v.	:	(ERAC No. 096450)
	:	and 12AP-281
Christopher Korleski, Director of	:	(ERAC No. 256451)
Environmental Protection et al.,	:	
	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on September 12, 2013

National Wildlife Federation Great Lakes Regional Center, and Neil S. Kagan, pro hac vice; and Peter A. Precario, for appellants.

Michael DeWine, Attorney General, Janean R. Weber and Christine L. Rideout, for appellees.

APPEALS from the Environmental Review Appeals Commission

TYACK, J.

{¶ 1} Appellants, Western Lake Erie Association, now known as Lake Erie Waterkeeper, Inc.), Lake Erie Charter Boat Association, Izaak Walton League of America, Ohio Division, and Ohio Environmental Council, (collectively, "appellants"), appeal the order of the Environmental Review Appeals Commission ("ERAC") finding that the Director of the Ohio Environmental Protection ("the Director" or "Ohio EPA") acted reasonably and lawfully in issuing a certification to the United States Army Corps of

Engineers ("the Corps") to allow maintenance dredging of the navigation channel of Toledo Harbor and the disposal of the dredged material into the western basin of Lake Erie. For the following reasons, we affirm ERAC's order.

{¶ 2} Appellants present the following assignments of error:

[I.] The order of the Environmental Review Appeals Commission upholding the decision to certify sediment dumping in Lake Erie was not in accordance with law.

[II.] The order of the Environmental Review Appeals Commission upholding the decision to certify sediment dumping in Lake Erie is not supported by the requisite quantum of reliable, probative, and substantial evidence.

Factual and Procedural History

{¶ 3} Lake Erie is the shallowest of the Great Lakes, with the western basin, where the disposal took place, having an average depth of 24 feet. Lake Erie is "the warmest and most biologically productive of the Great Lakes." Appellants' exhibit No. 9; Appellee's exhibit No. 2. The Maumee River is the greatest tributary into the western basin, approximately 4.2 million acres with a large portion of that being agricultural land use. The main two contaminants commonly found in the western basin are phosphorus and suspended sediments. Rain hits the agricultural fields and the run off brings sediment into the river and eventually high levels of sediment gradually accumulate. Lake Erie is the Great Lake most subjected to sediment loading, especially due to intensive agricultural development. Much of the Lake Erie shoreline experiences active erosion, especially during storms and periods of high water. The western basin is the most turbid region. Phosphorus is considered the main culprit of accelerated eutrophication in Lake Erie.

{¶ 4} The United States and Canada agreed to the Great Lakes Water Quality Agreement of 1978 "to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem." Appellants' exhibit No. 9, Appellee's exhibit No. 2. The agreement committed the United States and Canada to address water quality issues of the Great Lakes in a coordinated, joint fashion. To achieve this goal, the United States and Canada agreed to develop and implement a Lakewide Management Plan ("LaMP") for each lake. The LaMP identified several impairments to

Lake Erie, including: (1) degradation of fish populations; (2) degradation of wildlife populations and loss of wildlife habitat; (3) degradation of benthos communities; (4) eutrophication or undesirable algae; (5) recreational water quality impairments; (6) degradation of aesthetics; (7) degradation of phytoplankton and zooplankton populations; and (8) loss of fish habitat.

{¶ 5} On September 8, 2009, the Corps applied to the Ohio EPA for a 401 Certification proposing dredging Toledo Harbor and discharging the material in an open-lake disposal site in the western basin of Lake Erie. The application provides that dredging was necessary to maintain sufficient water depths for deep-draft commercial navigation. The dredging is necessary because large amounts of sediment are deposited into the western basin. Pursuant to the Clean Water Act, 33 U.S.C. 1341, the state must certify that the activities authorized by Section 404 of the Clean Water Act will comply with 33 U.S.C. 1311-13; 1316-17.

{¶ 6} On April 15, 2010, the Director authorized the Corps to dump 800,000 cubic yards of dredged material during calendar year 2010 into the western basin of Lake Erie. On May 13, 2010, appellants appealed the certification to ERAC seeking a review of the Director's decision.

{¶ 7} A de novo hearing was held by ERAC August 23 through August 25, 2010. ERAC did not issue its order until February 29, 2012, finding that the Director acted reasonably and lawfully in issuing the 401 Certification to the Corps. The ERAC order was issued after the Corps had completed dumping the dredged sediment into Lake Erie. Appellants filed a timely notice of appeal to this court.

Jurisdiction

{¶ 8} As a preliminary matter, the Corps filed a notice of lack of subject-matter jurisdiction with this court. The Corps asserted the defenses of sovereign immunity and supremacy under U.S. Constitution, but did not specify the waiver of immunity or exception found in the Clean Water Act.

{¶ 9} In the Clean Water Act, 33 U.S.C. 1344(t), Congress waived the federal government's sovereign immunity with respect to state regulation of dredging and water pollution, as follows:

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

{¶ 10} Immunity was also waived under 33 U.S.C. 1323(a), which provides when a federal agency must comply with State controls of water pollution, as follows:

Each department, agency * * * shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity. * * * [This] shall apply (A) to any requirement whether substantive or procedural (including any record keeping or reporting requirement, * * * any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies * * * under any law or rule of law.

{¶ 11} It is clear from these federal statutes that there is a limited waiver of sovereign immunity under the Clean Water Act. *See State of Delaware Dept. of Natural Resources and Environmental Control v. U.S. Army Corps of Engineers*, 681 F.Supp.2d 546, 555 (D.Del. 2010); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 935 (9th Cir.1988). In cases where the federal government is an alleged polluter, "Congress indicated its intent to require governmental entities to comply with pollution requirements to the same extent as nongovernmental polluters." *Olmstead Falls v. U.S. Environmental Protection Agency*, 233 F.Supp.2d 890, 897 (N.D.Ohio 2002).

{¶ 12} However, 33 U.S.C. 1344(t) and 33 U.S.C. 1371(a) further limit the limited waiver of sovereign immunity. 33 U.S.C. 1371(a) provides that the Clean Water Act generally "shall not be construed as * * * affecting or impairing the authority of the

Secretary of the Army * * * to maintain navigation." *See In re: Operation of the Missouri River Sys. Litigation*, 418 F.3d 915, 918 (8th Cir.2005).

{¶ 13} In this case, the Corps simply asserts sovereign immunity and supremacy under the U.S. Constitution. The Corps did not indicate that its ability to maintain navigation has been impaired in any way and there is no specific reliance on the navigation exception to the waiver of sovereign immunity. However, the conduct at issue in this case, is the conduct of the state in granting the 401 Certification, not any action taken by the Corps. The issue is whether the courts of Ohio have jurisdiction over the Director and in this case, they certainly do.

Mootness Doctrine

{¶ 14} There is an issue of whether this case is moot since the dredging and dumping of the sediment occurred in 2010. The courts are "to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies. The extension of this principle includes * * * questions which are moot." *Fortner v. Thomas*, 22 Ohio St.2d 13, 14 (1970). Actions are moot when:

"[T]hey are or have become fictitious, colorable, hypothetical, academic or dead. The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations. * * * 'A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy.' "

In re L.W., 168 Ohio App.3d 613, 2006-Ohio-644, ¶ 11 (10th Dist.), quoting *Grove City v. Clark*, 10th Dist. No. 01AP-1369, 2002-Ohio-4549, ¶ 11, quoting *Culver v. Warren*, 84 Ohio App. 373, 393 (7th Dist.1948).

{¶ 15} There is an exception to the mootness doctrine, which involves issues that are capable of repetition, yet evading review. "This exception applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to

the same action again." *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231 (2000). "[T]here must be more than a theoretical possibility that the action will arise again." *Robinson v. Indus. Comm.*, 10th Dist. No. 04AP-1010, 2005-Ohio-2290, ¶ 8, quoting *James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 792 (10th Dist.1991).

{¶ 16} In the case at bar, the challenged action in this case, the granting of the certification, is too short in its duration to be fully litigated before its cessation or expiration. Appellants filed an appeal with ERAC within one month of the Director's issuing the 401 Certificate to the Corps. The certificate allowed dredging and disposal to occur in the 2010 calendar year. ERAC's hearing took place in August 2010, but ERAC's order was not issued until February 29, 2012, by which time the dredging and dumping had taken place and the 401 Certification had expired.

{¶ 17} Toledo Harbor requires dredging on a consistent basis to remain open. There is a reasonable expectation that the Corps will seek open lake disposal of dredged material which many of the plaintiffs in this case will certainly oppose in the future. In fact, appellants' counsel explained during oral argument to this court that in each successive year since 2010, the Corps had applied for 401 Certification and the Ohio EPA had granted such. Appellants appealed each certification and ERAC is holding those appeals until a decision in this case is reached. Thus, this case meets both requirements necessary to apply the exception to the mootness doctrine in cases for issues that are capable of repetition, yet evading review and this case, therefore, falls within the exception to the mootness doctrine.

Standard of Review

{¶ 18} Since they are related, and to avoid repetition, we will address appellants' assignments of error together. Essentially, appellants argue that ERAC's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. In reviewing ERAC orders, R.C. 3745.06 provides that this court "shall affirm the order" if we find "upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, * * * [the court] shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."

{¶ 19} Reliable evidence is "evidence which can be trusted. In order for evidence to be reliable, there must be a reasonable probability that it is true. Probative evidence is evidence which tends to prove the issue in question, while substantial evidence is evidence which carries weight, or evidence which has importance and value." *Perrysburg v. Schregardus*, 10th Dist. No. 00AP-1403 (Nov. 13, 2001), citing *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992). In determining whether an ERAC order is supported by reliable, probative, and substantial evidence, this court must weigh and evaluate the credibility of the evidence. *Parents Protecting Children v. Korleski*, 10th Dist. No. 09AP-48, 2009-Ohio-4549, ¶ 10. However, in doing so, we must remember that the General Assembly created these administrative bodies to facilitate certain areas of the law by placing the administration of those areas before members with special expertise and thus, we afford due deference to ERAC's interpretation of rules and regulation and resolution of evidentiary conflicts. *Id.*; *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619 (1993), syllabus. "Unlawful" means "that which is not in accordance with law." *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist.1977).

ERAC's Order

Appellants argue that ERAC's order is not in accordance with law because ERAC did not apply its standard of review properly. R.C. 3745.05(F) sets forth ERAC's standard of review requiring ERAC to review the Director's action to determine whether it is lawful and reasonable and to vacate or modify the action if ERAC finds the action unlawful or unreasonable. Appellants contend that ERAC did not apply its standard of review properly because it upheld the certification despite the Director's failure to follow the applicable rules regarding sediment dumping. Appellants' argument is that since the Director's decision did not specify that he determined that sediment dumping will not interfere with the attainment or maintenance of applicable water quality standards, and ERAC found that the Director made the determination merely because he issued the 401 Certification, ERAC did not properly review the Director's decision. Essentially, appellants' argument is that ERAC's order is not in accordance with law because the Director did not make a determination and did not examine all the required factors before issuing the certification and he did not provide a written explanation for his decision to certify.

Assignments of Error
Water Quality Standards

{¶ 20} Ohio Adm.Code 3745-32-05, the Certification Rule, states the criteria for the Director issuing a Section 401 Water Quality Certification that would result in the lowering of water quality standards, as follows:

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

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

{¶ 21} Appellants allege that the Director did not make the necessary determination as required by law in order to issue the certification because he did not specify anywhere that he made the determination set out in Ohio Adm.Code 3745-32-05(A)(1). ERAC found, as follows: "Simply stated, issuance of the 401 Certification is evidence of the Director's ultimate determination that the requested activity satisfies the requirements of Ohio Adm.Code 3745-32-05(A)(1)." ERAC Order, at ¶ 84. Appellants argue that the complete lack of information about this determination defeats the purpose of ERAC reviewing the Director's decisions, arguing that the Director must at least indicate that he made such determinations, if not provide written explanations or formal findings. Appellants also argue that nothing in the record establishes whether Lake Erie's designated uses were being protected, its water quality being met, or its existing uses being maintained as required by Ohio Adm.Code 3745-32-05(A)(1) and (2)(c).

{¶ 22} The Director argues that the plain language of Ohio Adm.Code 3745-32-05 does not require the Director to make his determination in writing, nor provide written explanations or formal findings regarding his determinations.

{¶ 23} In *Rings v. Nichols*, 13 Ohio App.3d 257, 260 (10th Dist.1983), we found the Director was not required by Ohio Adm.Code Chapter 3745-31 to make any written formal findings of fact prior to issuing a permit for a landfill. In *Rings*, County Commissioners applied for a permit to install a sanitary landfill. Before issuing a permit, the Director was required to consider factors pursuant to Ohio Adm.Code 3745-31-05(A). The appellants in *Rings* argued that the Director violated Ohio law by not incorporating express findings

in his order when he was required to consider the Ohio Adm.Code 3745-31-05(A) factors. This court determined that the regulations in Ohio Adm.Code Chapters 3734 and 3745 do not require the Director to make formal written findings of fact before issuing the permit. This court found the record indicated that the Director had concluded, prior to issuing the permit, that Ohio Adm.Code 3745-31-05(A) and 3745-27-06(H)(1) through (4) were met by the applicants. This court found that there was no agency rule requirement that the Director had to make written findings, and concluded that the Director was not required to specifically state his findings prior to issuing the permit and his journalized permit to install, stated it was issued pursuant to Ohio Adm.Code Chapter 3745-31, and gave appellants sufficient notice of the reasons that the permit was issued.

{¶ 24} Also, in *Gahanna v. Shank*, 10th Dist. No. 88AP-436 (Sept. 22, 1988), this court followed *Rings*, again finding that the Director is not required to specify his findings with respect to each of the Ohio Adm.Code 3745-31-05 factors.

{¶ 25} This case is similar to *Rings* and *Shank*. Appellants here argue that the Director was required to make written findings prior to issuing the 401 Certification, which is the same argument made in *Rings*. Similar to Ohio Adm.Code Chapter 3745-31, Ohio Adm.Code 3745-32-05 has no requirement that the Director set forth his findings in writing, or provide an explanation of his formal findings. While it is a better practice to make written findings, we find there is no statutory or agency rule requirement that the Director set forth his findings in writing.

{¶ 26} The record supports the finding that the Director determined that the discharge of dredged material will not prevent or interfere with the attainment or maintenance of applicable water quality standards. Ohio Adm.Code 3745-32-05(A). The Ohio EPA evaluated the information provided by the Corps, including the LaMP, and the "Status of Nutrients in the Lake Erie Basin," prepared by the Lake Erie Nutrient Science Task Group. Appellee's exhibit Nos. 3, 4. In addition, the Ohio EPA reviewed extensive environmental studies of the water quality conditions in the open-lake disposal area, and also studies about the potential water quality impacts regarding the dredging and open lake disposal. See Appellee's exhibit Nos. 14, 17, 18, 19. The Corps' application set forth that the minimum degradation alternative would have a short-term negligible lowering of ambient water quality similar to storm events due to the turbidity. Ben Smith, a 401

coordinator in the Division of Surface Water of the Ohio EPA, examined further studies regarding the length of the turbidity that determined the plume would last one to three hours.

{¶ 27} This evidence determined that the dredged material was toxicologically similar to sediments at the open-lake disposal site. The Ohio EPA examined the effect on the public water supplies and the water quality standards related to human health, the aquatic life, and the designated uses. Thus, the Ohio EPA determined that the dredging and open lake disposal would not prevent or interfere with the attainment or maintenance of the water quality standards.

The Anti-Degradation Factors

{¶ 28} The Anti-Degradation Rule contained in Ohio Adm.Code 3745-1-05 governs the issuance of certain permits or certifications that may result in the lowering of water quality. Generally, the rule permits the Director to certify activities that lower water quality only after reviewing alternatives (non-degradation, minimal and mitigative technique alternatives), reviewing the social and economic issues, reviewing the impact on aquatic life, reviewing the overall value of Lake Erie as a unique resource, implementing public participation and determining that the lower water quality is necessary to accommodate social or economic development in the area. *See* Ohio Adm.Code 3745-1-05(C)(5).

{¶ 29} Ohio Adm.Code 3745-01-05(C)(5) requires the Director to examine 13 factors before approving an activity that lowers water quality, as follows:

(C) Antidegradation review requirements.

* * *

(5) Other waters.

* * *

The director may approve activities that lower water quality only if there has been an examination of non-degradation, minimal degradation and mitigative technique alternatives, a review of the social and economic issues related to the activity, a public participation process and appropriate intergovernmental coordination, and the director determines that the lower water quality is necessary to accommodate

important social or economic development in the area in which the water body is located.

* * *

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

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

facilities, including long-range plans outlined in state or local water quality management planning documents and applicable facility planning documents;

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

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

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

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

Ohio Adm.Code 3745-01-05(C)(5)(a)-(m).

{¶ 30} Appellants argue that the Director failed to consider all these factors, specifically, they argue that factors "d" and "f" were not considered since they were not addressed in the Corps' application for the 401 Certification and the Director made no mention of them in the certification.

{¶ 31} The Director states that this argument was waived by appellants when they failed to argue before ERAC that the Director did not consider factors "d" and "f" because appellants failed to state in writing to ERAC "the action complained of and the grounds upon which the appeal is based," as required by R.C. 3745.04(D). Such "requirements and procedures set forth in R.C. 3745.04 are specific and use statutory language which is mandatory." *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, 84 Ohio App.3d 591, 597 (10th Dist.1992). In this case, appellants' third assignment of error to ERAC argued that the Director failed to consider factors contained in Ohio Adm.Code 3745-1-05(C)(5)(a)-(m), by stating that, "[t]he factors the Director failed entirely or adequately to consider include, but are not limited to, the following: [wherein factors "a," "b," and "c" were stated.]" Notice of Appeal to ERAC, May 13, 2010, at 9. The Director was clearly put on notice as to the action complained of by appellants, that the Director

failed to consider the factors in Ohio Adm.Code 3745-1-05(C)(5)(a)-(m). This assignment of error is sufficient for the purposes of R.C. 3745.04(D), and appellants have not waived this argument.

{¶ 32} The Director also argues that appellants, in their pre-hearing and post-hearing briefs to ERAC, restated their original assignments of error and changed their argument from the Director failing to consider anti-degradation factors to his failing to explain his determination. We disagree. While the numbering of the assignments of error was changed and the wording of the assignments of error may have changed, appellants clearly argued in their post-hearing brief that the Director failed to consider the anti-degradation factors. *See* Post-Hearing brief to ERAC, at 26; 40-42. The assignments of error are sufficient for the purposes of R.C. 3745.04(D).

{¶ 33} The Director was required to consider the factors listed in Ohio Adm.Code 3745-1-05(C)(5)(a)-(m). Appellants contend that the Director did not consider Ohio Adm.Code 3745-1-05(C)(5)(d) and (f) in this case. As already stated, Ohio Adm.Code 3745-1-05(C)(5)(d) requires that the Director consider "[t]he degree to which water quality may be lowered in * * * waters categorized * * * [as] superior high quality waters." A "superior high quality water" is a surface water that "possess[es] exceptional ecological values and that have been so categorized pursuant to paragraph (E) of this rule." Ohio Adm.Code 3745-1-05(A)(10)(b). Lake Erie has been categorized as a "superior high quality water." Ohio Adm.Code 3745-1-05(E)(1)(a). Ohio Adm.Code 3745-1-05(C)(5)(f) requires the Director to consider "[t]he extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state."

{¶ 34} ERAC held that the Director did consider all of the factors found in Ohio Adm.Code 3745-1-05(C)(5)(a)-(m), by considering the 401 Certification application which has the factors interwoven and finding that the record is replete with instances supporting the conclusion that the Director did consider these issues. ERAC Order, at ¶ 89. ERAC also noted that Ben Smith testified at length regarding the factors and his testimony "supports the conclusion that he considered, among other things, the magnitude of the proposed lowering of water quality, the impact of the proposed lowering of water quality

on aquatic life and wildlife, and the economic value of the project on the Western Basin of Lake Erie." ERAC Order, at ¶ 89.

{¶ 35} Appellants argue that nothing in the application or the testimony given establishes that the Director considered factors "d" and "f." They point out that the Corps' application does not specify the Ohio Adm.Code 3745-1-05(C)(5) factors. ERAC conceded that "the Director did not create an independent document precisely outlining the internal process of considering whether open lake placement will result in a violation of water quality standards and that a lowering of water quality is necessary" in reference to the Ohio Adm.Code 3745-1-05(C)(5) factors. ERAC Order, at ¶ 89. In short, appellants argue that there is no evidence that the Director considered factors "d" and "f" which address Lake Erie's superior high quality water or its uniqueness as a resource.

{¶ 36} Although there was no independent document precisely outlining the internal process of considering whether open lake placement will result in a violation of water quality standards and that a lowering of water quality is necessary, there was evidence in the record that supports a finding that the Director considered all the anti-degradation factors as required.

{¶ 37} The Corps' application addressed most of the anti-degradation factors. Section 10 of the application requires the Corps to address the anti-degradation factors, sections 10(a) through (k) correspond to certain sections of Ohio Adm.Code 3745-1-05(C)(5)(a)-(m). Smith testified he reviewed the application and determined that the material to be dredged under the proposed minimal degradation alternative, the alternative approved, qualified for open lake placement. Sediment from the Toledo Harbor was tested and evaluated according to the Great Lakes Material Testing and Evaluation Manual and determined that all the dredged material pursuant to the minimal degradation alternative was acceptably toxicologically similar to the sediments in the western basin and acceptable to be placed in the designated open lake area.

{¶ 38} Randy Bournique, an Ohio EPA manager tasked with review of 401 water quality certification, testified before ERAC that Ohio Adm.Code 3745-1-05(C) factors were considered. Bournique testified that he specifically recalled Ben Smith's consideration of factor "d" which led Smith to recommend certification to Bournique. However, Bournique

did not recall Smith telling him that Smith's consideration of factor "f" led to the recommendation.

{¶ 39} Ohio EPA had reservations regarding the open lake placement of the dredged material because of the outbreaks of excessive growths of algae, or harmful algal blooms ("HABs") in the western basin. The blue-green algae or cyanobacterial species produce a microcystin toxin which causes illness in humans, pets and aquatic life. The cause of HABs is still unidentified in the scientific community. Bournique testified that there are no studies that definitively link the dredging and disposal with HABs. The Ohio EPA approached Jeffrey M. Ruetter, Ph.D., director of the Ohio Sea Grant College Program, and requested that he contact other experts in the field who had studied the western basin to create a consensus statement regarding the connection between open lake disposal and HABs. However, a consensus among the experts was never reached. Bournique testified that currently the World Health's recommendation for safe drinking and swimming in water containing microcystin is one part per billion ("PPB") for drinking waters and 20 PPB for swimming waters. The samples from Maumee Bay and the vicinity of the shipping channel revealed a microcystin level of less than 1 PPB. So, currently, the microcystin levels are within acceptable limits.¹

{¶ 40} Smith reviewed several studies on the topics involved in how dredging and open lake placement affected Lake Erie. He reviewed appellee's exhibit No. 14, a micro invertebrate community study that concluded the macroinvertebrate community in the study area in the western basin and the macroinvertebrate communities within fine grain sediments of the surrounding areas were similar and there was no evidence of degradation to the community within the study area. Smith testified regarding his examination of appellee's exhibit No. 17, a study that was associated with dredging activities within the Maumee Bay and its effect on walleye spawning and the walleye population.

{¶ 41} Smith reviewed studies investigating the impact on the ambient water quality finding that the turbidity plume would last between one and three hours. Smith reviewed two sediment trend analysis studies attempting to determine the movement of

¹ The Ohio EPA formed the Phosphorus Task Force to review the phosphorus loading data from Ohio tributaries to Lake Erie, consider possible relationships between phosphorus loading and in-lake conditions,

sediment within the western basin. Smith consulted with the Ohio EPA Division of Drinking and Groundwater concluding that it is unlikely that the proposed dredging project and open lake placement would impact water quality at the intakes for the cities of Toledo and Oregon. Smith reviewed the Twinline report, Cause and Effect: Sediment Plumes Creates Perfect Incubator for *Microcystis* Bloom. Appellants' exhibit No. 29. The report examined the algal bloom at the Maumee River and continuing east along the shoreline. He reviewed the Toledo-Lucas County Port Authority document that outlines the social and economic benefits associated with harbor activities. Without dredging, the channel would be severely restricted within five years. The Port of Toledo adds \$1 billion to the economy and employs approximately 1,000 people. Additionally, Lake Erie tourism generates \$10.7 billion and employs approximately 119,000 people. Appellee's exhibit No. 7.²

{¶ 42} As Bournique summarized, the Ohio EPA reviewed the Corps' application in addition to other sources of information regarding Lake Erie, contacted the Division of Drinking and Groundwater and the U.S. Fish and Wildlife Service to determine if drinking water would be affected and the impact on wildlife. Without a direct connection between the dredging project and harmful algal blooms, the process the Corps was undertaking did not add any new material, in terms of total phosphorus, simply moving sediment from one location to another of the lake. While there is no direct statement that the Ohio EPA examined the "[t]he extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state" pursuant to Ohio Adm.Code 3745-1-05(C)(5)(f), it is clear that the Ohio EPA did examine studies relating directly to Lake Erie. The Ohio EPA sought input from the scientific community about harmful algal blooms concerning Lake Erie specifically. It is clear that the Director did consider the unique characteristics of Lake Erie as the focus of these numerous studies and investigations regarding Lake Erie specifically, and not about lakes, sediment

to determine possible causes for increased soluble phosphorus loading and to evaluate possible management options for reducing soluble phosphorus loading.

² Available at the de novo hearing was the Ohio Lake Erie Phosphorus Task Force Final Report which contains the conclusion that dumped sediment is potentially increasing mobilization of phosphorus in the system, but does not reach a conclusion regarding the relationship between the potential for increased mobilization of phosphorus with open lake placement of sediment. Appellants' exhibit No. 9; Appellee's exhibit No. 2 (Tr. Vol. I, 95-96.) However, the final report was not yet available at the time the certification was prepared. (Tr. Vol. III, 13.) Ohio EPA granted the certification on April 15, 2010, and the final report is dated April 2010.

dumping, or algal blooms generally. Thus, we find that the Director is in accordance with the law in that Ohio Adm.Code 3745-1-05(C)(5) factors, including factors "d" and "f," were considered in the issuing of a 401 Certification to the Corps.

Certification Rule Exception

{¶ 43} Appellants' phrase their argument as nothing in the record establishes whether Lake Erie's designated uses were being protected, its water quality being met, or its existing uses being maintained, but appellants' specifically argue that ERAC misconstrued an exception to the Certification Rule, provided in Ohio Adm.Code 3745-1-01(E)(2). This exception provides:

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

* * *

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

{¶ 44} Appellants argue that the exception only applies to "water quality criteria," which do not have a role in the maintenance of "existing uses," pursuant to Ohio Adm.Code 3745-1-05(C)(1). Ohio Adm.Code 3745-1-05(C)(1) provides:

(C) Antidegradation review requirements.

(1) Protection of water body uses.

Existing uses, which are determined using the use designations defined in rule 3745-1-07 of the Administrative Code, and the level of water quality necessary to protect existing uses, shall be maintained and protected. There may be no degradation of water quality that results in either a violation of the applicable water quality criteria for the designated uses, unless authorized by a water quality standard variance issued in accordance with rule 3745-33-07 of the Administrative Code, or the elimination or substantial impairment of existing uses. The director shall, pursuant to paragraph (A)(6) of rule 3745-1-07 of the Administrative

Code, prohibit the increased concentrations of specific regulated pollutants that are incompatible with the attainment or restoration of the designated use.

{¶ 45} ERAC determined that Ohio Adm.Code 3745-1-01(E)(2) allows for temporary impacts to water quality. Here, there was no violation of the water quality criteria. A temporary lowering of water quality standards is not necessarily the same as a violation of applicable water quality criteria. Thus, Ohio Adm.Code 3745-1-05(C)(1) is not controlling. The Director reviewed studies regarding the effects of resediment in Lake Erie, consulted scientists in an attempt to establish a link between dredging activities and algal blooms and determined that a lowering of water quality is necessary given the technical, social and economic considerations.

{¶ 46} Appellants also argue that the exception for temporary impacts to water quality only applies to "dredging or construction activities," not to the discharge of the dredged material. Appellants are correct that dredging and discharge are separate activities, but "dredging activities," while not defined in Ohio Adm.Code 3745-1-02, is a broad enough term to encompass both the dredging and the discharge of the material.

Factual Support

{¶ 47} Finally, appellants argue that ERAC failed to evaluate the quality and quantity of evidence presented in the de novo hearing in order to determine whether the factual foundation underlying the Director's action is reasonable. In *Parents Protecting Children* at ¶ 10, we noted that when determining whether ERAC's order is supported by the requisite quantum of evidence, we must weigh and evaluate the credibility of all the evidence presented to ERAC. "This process involves a consideration of the evidence and, to a limited extent, would permit a substitution of judgment by the reviewing court." *Id.* However, we must remember that the administrative bodies were created by the General Assembly to facilitate certain areas of the law by placing the administration of those areas before boards or commissions with special expertise. *Id.* at ¶ 10, citing *Club 3000 v. Jones*, 10th Dist. No. 07AP-593, 2008-Ohio-5058, ¶ 29, citing *Pons*, 66 Ohio St.3d 619, at paragraph one of the syllabus. Therefore, as stated above, this court must afford due deference to ERAC's interpretation of rules and regulations, as well as its resolution of evidentiary conflicts. *Parents Protecting Children* at ¶ 10.

{¶ 48} ERAC only evaluates whether the Director's decision is lawful and reasonable, reasonable being that there is a valid factual foundation for his actions. R.C. 3745.05(F); *Citizens Comm't.*, 56 Ohio App.2d 61. Where there is supporting evidence in the record, there is a degree of deference for the Director's determination inherent in the reasonableness standard, and ERAC may not substitute its judgment for that of the Director. *Ohio Fresh Eggs, LLC v. Wise*, 10th Dist. No. 07AP-780, 2008-Ohio-2423, ¶ 32.

{¶ 49} Appellants contend that the Environmental Assessment ("EA") and the 404(b)(1) Evaluation, referred to as the Finding of No Significant Impact ("FONSI") are not valid in order for Ohio EPA to rely on them. After reviewing the FONSI, Bournique sent a letter to the Corps advising that the Ohio EPA did not concur with the Corps' FONSI determination. The letter stated, in pertinent part, as follows:

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

* * *

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

Appellants' exhibit No. 13.

{¶ 50} Both Smith and Bournique testified at the de novo hearing that the Ohio EPA is concerned about open lake placement of dredged materials, but acknowledged that the FONSI contained technically accurate and valuable information concerning the project and was considered a reliable source for the Ohio EPA's review process. The acknowledgment of and commitment to finding an alternative long-term solution by the Ohio EPA does not discount the recognition of the importance of dredging the Toledo Harbor and open lake placement as a viable short-term solution going forward. Smith testified that a cost-effective alternative was not available at that time. Moreover, the Ohio EPA sought a scientific consensus establishing a link between the dredging activity

(including open lake placement) and the algal blooms in Lake Erie, but was unable to do so.

{¶ 51} The algal blooms have historically been a problem in the western basin, back to the 1960s. In the 1980s and 1990s, point source controls were placed on waste water treatment plants to reduce the phosphorus loadings into the system and algal blooms were reduced. In the past decade, the algal blooms have been quite common. The Ohio Lake Erie Phosphorus Task Force Final Report concluded that tributary loads of dissolved reactive phosphorus have been increasing since the mid-1990s after they had been decreasing for the prior 15-20 years. The conclusion of the report is that there is no determination whether dredging and disposal of sediments in western Lake Erie is a potential problem regarding phosphorus. After reviewing the Ohio Lake Erie Phosphorus Task Force Final Report, the status of nutrients in the Lake Erie basin, the article "Cause and Effect: Sediment Plumes Creates a Perfect Incubator for Microcystis," and the Ohio EPA's responses to comments on the proposed project, Dr. Murray, designated as an expert on scientific methods of evaluating impacts of actions on the environment, concluded that it is a possibility that dredging and disposal in the open lake contribute to HABs, but there is no clear demonstration that the dumping contributes.

{¶ 52} Appellants argue that ERAC unreasonably upheld the Director's decision by failing to determine the quality of the evidence presented and did not engage in a limited weighing of evidence. Specifically, appellants point to evidence produced by anonymous individuals with unknown credentials who completed the Corps' application and the fact that Smith was not qualified as an expert, therefore, appellants contend that he is unqualified to determine whether a 401 Certification was warranted. They argue that the Corps' application and the 2009 EA study on which the Director relied were not carefully assessed by ERAC.

{¶ 53} ERAC's standard of review is limited to the lawfulness and reasonableness of the Director's decision, not whether the Corps convinced the Director. If there is reliable, probative, and substantial evidence supporting the Director's decision, and the decision or action is lawful, ERAC should find it reasonable and lawful and defer decisions regarding conflicting experts or evidence to the Director. It is well-settled that ERAC may

not substitute its judgment for that of the Director. *Northeast Ohio Regional Sewer Dist. v. Shank*, 58 Ohio St.3d 16, 25 (1991).

{¶ 54} Moreover, the Corps' application contains a certification stating: "I certify that I am familiar with the information contained in this application and, to the best of my knowledge and belief, such information is true, complete and accurate. I further certify that I possess the authority to undertake the proposed activities or I am acting as the duly authorized agent of the applicant." Appellee's exhibit No. 16, at 4. It was signed by both the applicant and the agent. Smith testified that it was his understanding that the Ohio EPA is entitled to rely on the information contained in the 401 application. The Corps certified that the information is true, accurate and complete. The Ohio EPA is justified in relying on such information.

{¶ 55} ERAC found that inherent in the process of consideration is the authority to weigh information supplied by the applicant supporting the proposed activity. Additionally, the Ohio EPA gathered other evidence independent of the information supplied by the Corps, which the Ohio EPA also evaluated before granting the 401 Certification.

{¶ 56} As stated above, there is a degree of deference given to the Director's decision and ERAC may not simply substitute its judgment for that of the Director. In *Burket v. N. Olmsted*, 8th Dist. No. 40605 (1980), quoting *State ex rel. Brown v. Rockside Reclamation*, 48 Ohio App.2d 157, 179-80 (8th Dist.1975), the court explained that " '[t]he legislature created the environmental protection agency consisting of a staff of experts to investigate alleged complaints, to conduct hearings on these complaints and to make determinations as to whether the laws in regard to air and water pollution and sewage disposal are being violated.' " Administrative agencies are entitled to considerable deference when reviewing an agency's interpretation of rules and regulations, as well as to their resolution of evidentiary conflicts. *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health*, 10th Dist. No. 04AP-1338, 2005-Ohio-3146, ¶ 8. The General Assembly created these administrative bodies to facilitate certain areas before members with special expertise and that is why they are entitled to deference. *Parents Protecting Children* at ¶ 10. As recognized in *Sierra Club v. Koncelik*, 10th Dist. No. 12AP-288, 2013-Ohio-2739, the Ohio EPA as an agency is comprised of experts, therefore, regardless

of whether the witness was designated or qualified as an expert, ERAC was entitled to rely on Smith's testimony as an Ohio EPA employee.

{¶ 57} We find that there is evidence to support ERAC's order of sufficient quality that it can be considered reliable; and of sufficient weight as to be substantial and it tends to support the Director's decision. Accordingly, ERAC's order finding that there was valid information for the Director's actions is supported by reliable, probative, and substantial evidence. Moreover, ERAC did properly apply its standard of review and the order is in accordance with law. The first and second assignments of error are overruled.

Disposition

{¶ 58} Having overruled both assignments of error, we affirm the order of the Environmental Review Appeals Commission.

Order affirmed.

BROWN and CONNOR, JJ., concur.
