BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

CITY OF OLMSTED FALLS, OHIO	:	Case No. ERAC 184928
Appellant	:	
v.	:	
CHRISTOPHER JONES, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.	:	
Appellees.	:	Issued: June 11, 2002

RULING ON MOTION FOR SUMMARY JUDGMENT AND FINAL ORDER

Issued By:

ENVIRONMENTAL REVIEW APPEALS COMMISSION
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This matter comes before the Environmental Review Appeals Commission ("ERAC", "the Commission") upon separate Motions to Dismiss filed by Co-Appellees The City of Cleveland ("Cleveland") and the Director of the Ohio Environmental Protection Agency ("the Director", "OEPA", "the Agency"), as well as a Motion for Summary Judgment filed by Appellant City of Olmsted Falls ("Olmsted Falls").

The appeal with the Commission originated on May 14, 2001 when Olmsted Falls appealed an April 13, 2001, letter addressed to the Chief of the Regulatory Branch of the United States Army Corps of Engineers ("the Corps") and signed by the Director. This letter communicated the Director's decision to "waive the State's authority to act on the City of Cleveland's request for [401] certification," despite its impact on wetlands and a creek in the area. The import of the Director's decision to "take no action" on Cleveland's 401 application was to allow Appellee Cleveland to proceed with a project involving the expansion of the Cleveland Hopkins International Airport ("Cleveland Hopkins", "the airport").

Appellee Cleveland based its request that the Commission dismiss the appeal on two assertions: 1) that failure on the part of Appellant's counsel to request permission to appear *pro hoc vice* before the Commission prior to the filing of the Notice of Appeal was fatal to the appeal; and 2) that the Commission lacked subject matter jurisdiction to hear the appeal because the Director's letter to the Corps was not a final appealable action of the Director. On November 14, 2001, the Commission found the assertion regarding permission to participate *pro hoc vice* not

well taken, and denied same. The Commission did not rule on the jurisdictional issue regarding whether the waiver letter constituted an appealable action of the Director. Like Cleveland, the Director based his Motion to Dismiss on the contention that the Commission lacks subject matter jurisdiction to entertain the instant appeal because the letter in question did not constitute an appealable act or action of the Director. (Case file XX, BB).

Appellant Olmsted Falls requested the Commission to grant summary judgment in its favor on its claim that Ohio law standing alone, or in combination with federal law, does not grant the Director the power to waive the State's authority to act on an application for 401 certification and, therefore, his action in so doing is unlawful. (Case file Y). Counsel for all parties filed respective responses and replies with the Commission regarding the Motions to Dismiss and Motion for Summary Judgment.

On November 29, 2001, the Commission issued a ruling on a number of procedural and substantive motions which had been filed with the Commission and ordered that Oral Arguments on the Motions to Dismiss and the Motion for Summary Judgment be presented to the Commission. (Case file YY).

Oral Argument was held before the full Commission on April 12, 2002. At the conclusion of the Oral Argument, the Commission advised the parties that they would take the matter under advisement and issue its ruling in writing. That ruling follows. (Case file NNN).

Subsequent to the Oral Argument, Co-Appellees filed yet another Motion to Dismiss. This motion was based on two allegations: 1) that pursuant to Section 401 of the Clean Water Act, codified at 33 U.S.C. Section 1341(a), the appeal is now moot because more than one year

has passed since receipt of Cleveland's application for a 401 certification, and 2) that Olmsted Falls lacks standing to file the instant appeal. Olmsted Falls replied to the Motion, Co-Appellees responded to the reply and the Mayor of Olmsted Falls filed a "Declaration" with the Commission to which the Appellees objected. All filings will be addressed below. (Case File SSS, UUU, VVV, WWW, XXX, ZZZ).

Finally, as evidenced by a Certified Record of more than fifteen 3- inch binders, and events which span a period of nearly four years, this case presents a technically complex and historically complicated series of events. This record does not necessarily constitute everything that would be produced as evidence in a *de novo* hearing before this Commission, but merely a compilation of those documents which were before the Director, and considered by the Agency, before the Director determined not to take any action regarding Cleveland's 401 application. Despite this plethora of documents, the parties were jointly able to stipulate to only five facts ("Second Amended Joint Stipulations of Fact") and two exhibits; *i.e.*, the letter of the Director under appeal and the Agency's public notice that it had received Cleveland's application for a 401 certification for the airport project. We rely upon these five Joint Stipulations of Fact and the two exhibits in reaching our decision today. (Case File EE, Case file A).

Appellants are represented by Mr. Berne Hart, Esq. and Ms. Barbara E. Lichman, Ph.D, Esq. of the law firm of Chevalier, Allen & Lichman, LLP, Irvine, California. The City of Cleveland is represented by Ms. Julianne Kurdila, Esq., Chief Assistant Director of Law for the City of Cleveland. The Director is represented by Assistant Attorneys General Mr. David Kern, Esq. and Mr. Daniel Martin, Esq., State of Ohio.

PROCEDURAL BACKGROUND

In 1972, Congress amended the Federal Water Pollution Control Act ("FWPCA"), originally enacted in 1948, to more aggressively address the water pollution problem of the nation. The statute was again amended in 1977 (The Clean Water Act) and in 1987 (The Water Quality Act of 1987). For purposes of consistency and clarity, the Commission will hereinafter refer to the federal amended statute as the Clean Water Act ("the Act", "the CWA").

This dispute began when Appellee Cleveland decided to explore the expansion of the existing facilities at the Cleveland Hopkins International Airport. Since the proposed project would involve the potential discharge of dredged or filled materials into waters of the state and would likely affect local area wetlands, what is commonly referred to as a "404 permit" was required. Under Section 404 of the Clean Water Act, codified at Section 1344, Title 33, U.S. Code, persons seeking to discharge any dredge or fill materials into the waters of the nation must first obtain approval for such activities from the Army Corps of Engineers. Pursuant to that section, the Corps may authorize such activities in two separate ways (1) with an individual permit, which extends only to a given project, based upon a site-specific review of the particular activities proposed there; or (2) with a general permit, commonly known as a "nationwide permit" ("NWP"), which authorizes a certain category of activities that are substantially similar in nature and cause minimal individual and cumulative environmental impact. (See Section 1344, Title 33, U.S. Code).

Of critical importance for purposes of the instant case, Section 401 of the Act (codified at Section 1341, Title 33, U.S. Code) prohibits the Corps from issuing a 404 permit without first obtaining certification from the state in which the activity is to take place that the proposed

discharge will comply with federal and state clean water requirements. Under certain circumstances, and in accordance with specific procedural requirements set out in the federal regulations, state certification may be waived. It is the state statute and implementing regulations relating to Ohio's 401 certification program which are at issue before us today.

FINDINGS OF FACT

1. Appellee Cleveland owns and operates the Cleveland Hopkins International Airport ("CLE"). (Second Amended Joint Stipulations of Fact [" JSF"] 1, Case File EE).

2. Appellant Olmsted Falls is a city located approximately 2.2 miles southwest of the airport. (JSF 2).

3. On July 5, 2000, the City of Cleveland, Department of Port Control ("DPC"), submitted an Application for a Clean Water Act Section 401 Water Quality Certification to the OEPA. (JSF 3).

4. On December 8, 2000, the OEPA issued a "Public Notice of Receipt of Cleveland's 401 Application and Public Hearing." (JSF 4, The Ohio EPA *Weekly Review*, December 18, 2000).

5. That notice stated, in part, as follows:

> The Ohio Environmental Protection Agency (Ohio EPA) Division of Surface Water (DSW) has received an application for, and has begun to consider *whether to issue or deny*, a Clean Water Act Section 401 certification for a project to expand the Cleveland Hopkins International Airport....(emphasis added). (The Ohio EPA *Weekly Review*, December 18, 2000).

6. The notice explicitly advised the public that a review of the application would be conducted, and a decision *"whether to grant or deny the application"* would be made. Finally, the notice also advised the public that the "discharges from the activity, *if approved*, would result

in degradation of the water quality of Abram Creek and its tributaries and wetlands." (Emphasis added) (The Ohio EPA *Weekly Review*, December 18, 2000).

7. On April 13, 2001, the Director sent a letter captioned : "RE: City of Cleveland Department of Port Control Application for Section 401 Water Quality Certification Expansion of Cleveland Hopkins International Airport," to Mr. Paul Leuchner, U.S. Army Corps of Engineers. (JSF 5, Letter of Director dated April 13, 2001).

8. In the letter, the Director noted that a number of design alternatives had been submitted to the Agency by the City of Cleveland, but, for various reasons, none had been acceptable. He also noted that the airport expansion had been identified as "the most important economic development priority in northeast Ohio", although he does not specify by whom. Further, he notes that the current runway configuration presents safety concerns that might be alleviated by the project. (JSF 5, Letter of Director dated April 13, 2001).

9. The Director further acknowledged that the City's "preferred course of action"; that is, "culverting Abram Creek in the area of the runway extension", would adversely impact wetlands and water quality in the area. Specifically, and significantly, he stated as follows:

> Weighing these important social, economic and environmental factors, I have decided to waive the State's authority to act on the City of Cleveland's request for certification for the proposed expansion project pursuant to ORC Sec. 3745 (01)(A) [sic], 33 CFR 325.2 and 40 CFR 121.16. Therefore, *we will take no action* on the Section 401 application and the Corps may proceed with its review of the Section 404 permit. (emphasis added). (JSF 5, Letter of Director dated April 13, 2001).

10. The Director acknowledged that this was an "unusual" course of action, but asserted his action was authorized by certain federal regulations (33 CFR 325.2 and 40 CFR 121.16) and

Ohio law (Ohio Revised Code Section 3745.01(A)). (JSF5, Letter of Director dated April 13, 2001).

11. The Director also mentioned that he had issued a set of administrative orders to the City of Cleveland that would "mitigate" the adverse environmental impacts of the proposed project. (Letter of Director dated April 13, 2001).

12. Appellant Olmsted Falls timely appealed this April 13, 2001 letter of the Director to the Commission on May 14, 2001. (Letter of Director dated April 13, 2001).

CONCLUSIONS OF LAW

1. When any party to a proceeding believes that no genuine issue of material fact exists and it is entitled to prevail as a matter of law, a Motion for Summary Judgment is an appropriate avenue for disposition of the action being appealed without holding a *de novo* hearing. Further, when a statutorily created appellate review agency, such as the Commission, lacks subject matter jurisdiction to hear an appeal, a Motion to Dismiss the appeal for lack of jurisdiction presents an appropriate avenue for disposition of the action being appealed without holding a *de novo* hearing. In the instant case, it is the opinion of the Commission that the parties have stipulated to relevant facts, which, when considered in conjunction with the law, allow the Commission to dispose of this case without a *de novo* hearing and issue a ruling on purely legal issues. (City of Toledo vs Schregardus et al., ERAC Case Nos. 482536, 482972 and 483055, issued November 1, 1994).

2. In deciding the pending motions, we must first determine whether the April 13, 2001, letter from the Director, indicating that he would neither certify nor deny Cleveland's 401 application, is a final act or action of the Director which may be appealed to this Commission.

3. Ohio Revised Code Section ("R.C") 3745.04 outlines the scope of the Commission's jurisdiction in relevant part as follows:

> Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the *action* of the director . . . . (emphasis added).

4. An "act" or "action" of the Director which may be appealed to the Commission is defined in R.C. 3745.04 as follows:

> ... 'action' or 'act' includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

5. This same definition of "action" or "act" is reiterated in the pertinent regulation found at Ohio Administrative Code Section ("OAC") 3745-1-01(A).

6. Historically, when a question is raised as to whether a document, including a letter, constitutes a final action of the Director appealable to the Commission, we begin by examining both the form and the substance of the letter, as well as the circumstances and events surrounding the sending of the document. (*City of Columbus, et al. v Jones* ERAC Case Nos. 254926 and 254927).

7. With regard to the form of this letter, we note that although it was signed by the Director, it contains no language identifying it as a final action, nor was it ever entered into the Director's journal, as are most final actions. Thus, in form, the Director's letter contains only some of the indicia of a traditional "final action" of the Director. (Letter of Director dated April 13, 2001).

8. The Commission also considers the substance of a document under appeal when determining whether a document constitutes an appealable action of the Director. Among other things, the Commission considers whether the document represents an intermediate step in a continuing process, or if the content of the letter indicates that it is part of a previously contemplated review or process. Finally, the Commission considers whether or not the document in question determines or adjudicates with finality any legal rights or privileges of the appealing party. *(Dayton Power and Light Co. v. Schregardus* (1997), 123 Ohio App. 3d 476).

9. With regard to the substance of this letter, the Commission finds that is does not represent an intermediate step in a continuing process and, in fact, concludes a process that spanned several years and involved a number of exchanges between applicant Cleveland, the Agency, Appellant Olmsted Falls and the public. We further find that the letter adjudicates with finality the rights or privileges of Olmsted Falls when it advises the Corps that it "may proceed with its review of the Section 404 permit." In light of these findings, the Commission concludes that the Director's April 13, 2001 letter is a final action of the Director. (Letter of Director dated April 13, 2001).

10. However, our determination that this letter is a final action of the director does not end our jurisdictional inquiry. Counsel for the City of Cleveland, in her Motion to Dismiss, argues that the act was discretionary and, thus, not appealable to the Commission. In support of this argument she cites R.C. 6111.03(P) which states, in pertinent part:

> Sec. 6111.03 Powers of director of environmental protection.
> The director of environmental protection *may*:
>
> . . .
>
> (P) Certify or deny certification to any applicant for a federal license or permit to conduct any activity which may result in any discharge into the waters of the state

that the discharge will comply with the "Federal Water Pollution Control Act": (emphasis added).

11. Counsel for Cleveland asserts that the General Assembly's use of the word "may" regarding the delineation of the Director's powers makes the Director's act discretionary, and, thus, not appealable to the Commission. (See *e.g., Rumpke Sanitary Landfill, Inc. v Schregardus*, ERAC Case Nos. 313684-685, issued December 11, 1991, finding that discretionary actions of the Director are not appealable to the Commission).

12. While it is true that discretionary acts may not be appealable, it is also true that the mere use of the word "may" in a statute does not necessarily make an act discretionary. Although this sort of inquiry may be instructive and occasionally determinative in cases involving a single document or statute, it is not appropriate in situations involving the interpretation of numerous state and federal statutes and regulations. In such instances, the better approach is to read all the statutes and regulations together in an effort to determine how those laws and regulations interrelate. In the instant dispute, we are asked to ascribe the correct meaning to federal law, federal regulations, state law and state regulations which must be read in conjunction with each other. In such instances, rules of construction which go beyond a cursory acceptance of the "may" versus "shall" argument exist which, in our opinion, are more appropriately applied to these facts. (*Devine v State* (1922) 105 Ohio St. 288; *Ohio Nurses Assn., Inc. v Ohio State Bd. of Nursing Edn. & Nurse Registration* (1989) 44 Ohio St.3d 73).

13. The Ohio Supreme Court has considered a number of instances in which they were asked to construe apparently conflicting statutes and regulations. By way of specific example, in *Johnson's Markets, Inc. v New Carlisle Dept. of Health* (1991), 58 Ohio St. 3d 28, the Court was

asked to construe a number of statutes and regulations, all of which related to the same general subject matter. We find the facts of that case and the Court's reasoning instructive regarding the matter before the Commission today. In *Johnson's Markets, Inc., supra,* the Court considered whether the Ohio Department of Agriculture had exclusive authority to regulate sanitary conditions of food establishments, or whether local boards of health might prescribe some sanitary regulations as well. In reaching its decision that day, the Court set forth the following general rule of statutory construction to be followed when construing a number of statutes and regulations in an effort to arrive at a correct interpretation of the laws and regulations. Towards that end, the Court stated:

> A number of basic rules must be followed by a reviewing court in construing the regulations and statutes at issue. First, all statutes which relate to the same general subject matter must be read *in pari materia*. * * * And, in reading such statutes *in pari materia*, and construing them together, this court must give such reasonable construction as to give the proper force and effect to each and all such statutes. * * * The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. * * * All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. * * * (*Johnson's Markets, Inc. v New Carlisle Dept. of Health* at 35.)

Although it was solely Ohio statutes and regulations involved in *Johnson's Markets, supra*, we believe the same logic and rule apply when both state and federal statutes and regulations are being construed.

14. With the above language in mind, the Commission believes that it must consider the federal law and implementing state law and regulations together in an effort to ascribe a meaning that gives effect to the intent of the statutory scheme as enacted by Congress, the Ohio General Assembly and the Director himself.

15. Thus, we cannot determine the validity of the Director's action in this instance by limiting our consideration to Revised Code 6111.03's introductory statement regarding what the Director "may" do regarding water pollution in Ohio. We must consider this section in conjunction with federal law, as well as the Director's own amplifying state regulations. Those regulations, set forth in Ohio Administrative Code Sections ("OAC") 3745-32-01 through 3745-32-07, contain the general regulatory guidance by which the Director is to evaluate 401 applications.[1]

16. OAC 3745-32-07 ("Procedure for decision by the director") states, in relevant part:

> A section 401 water quality certification *shall* be issued, modified, revoked, or denied and may be challenged in accordance with the provisions of the rules of procedure of the Ohio EPA . . . (emphasis added).

17. Co-appellees argue that this section relates to the processing of applications, is procedural in nature, and merely indicates the procedural steps the director must follow if he determines to issue, modify, revoke or deny a 401 certification application. We disagree. First, such an assertion ignores the plain language used in the remainder of the chapter which expands

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[1] The responsibility for reviewing state regulations is assigned to the Joint Committee on Agency Rule Review ("JCARR"). The primary function of JCARR is to review proposed rules to ensure, *inter alia*, that:

1. the rules do not exceed the scope of the rule-making agency's statutory authority;
2. the rules do not conflict with another rule of that agency or another rule-making agency; and
3. the rules do not conflict with the intent of the legislature in enacting the statute under which the rule is proposed;. . . (JCARR Procedures Manual).

Thus, when JCARR did not recommend that the General Assembly disapprove OAC Chapter 3745-32-01 *et seq.*, it, in effect, considered these regulations within the scope of the OEPA's rulemaking authority and accepted the fact that they were not in conflict with the intent of the legislature in enacting R.C. 6111.03(P).

the Director's authority regarding 401 certification applications beyond a mere issuance or denial.

18. By way of specific example, OAC 3745-32-04 states that if an application, in the judgment of the Director, lacks the information necessary to determine whether the applicant has demonstrated the criteria necessary to obtain a 401 certification, the director "shall inform the applicant in writing that the review will not proceed until the applicant has submitted additional information as described by the Director." (OAC 3745-32-04).

19. Similarly, OAC 3745-32-05 "Criteria for decision by the Director", clearly goes beyond allowing the Director to merely issue or deny an application for 401 certification. That section explicitly authorizes the Director to impose "*such terms and conditions...as are appropriate or necessary*" to a 401 certification. That same section allows the Director to "*require that the applicant perform various environmental quality tests*" as part of the 401 certification process. (Emphasis added).

20. Finally, and significantly, the Director does mention his authority to "waive" in OAC 3745-32-04(B) as follows:

> The director may waive the application requirement if, in the judgment of the director, the activity for which a federal permit of license is sought will not result in a discharge to the waters of the state.

Thus, although waiver is clearly contemplated in the state regulations relating to 401 certifications, the ability to waive applies only in the narrowest of circumstances. Further, it is a waiver of the entire application requirement, and the waiver is authorized only subsequent to a determination that the activity for which a federal license or permit is sought will not result in a discharge to the waters of the state. That is clearly not the fact pattern presented in the instant dispute. (OAC 3745-32-04(B)).

21. Finally, in considering these statutes and regulations *in pari materia,* the federal counterpart to Ohio law must be examined to determine whether the Director of the Ohio EPA possessed the authority to waive taking any action on a 401 certification application. That Federal counterpart contemplates and authorizes both implicit and explicit waiver by the appropriate decisonmaker. Section 401 discusses the implicit waiver and provides, in pertinent part:

> FWPCA Section 401.-certification
>
> (a) Compliance with applicable requirements; application; procedures; license suspension
>
> (1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate....that any such discharge will comply with the applicable provisions of Sections 1311 ("Effluent Limitations"), 1312 ("Water Quality Related Effluent Limitations"), 1313 ("Water Quality Standards and Implementation Plans"), 1316 "(National Standards of Performance") and 1317 ("Toxic and Pretreatment Effluent Standards") of this title. . . . . If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be *waived* with respect to such federal application. (Emphasis added).

22. The "waiver" language in Section 401 (*supra*) is explained in 40 CFR 121.16 as follows:

> The certification requirement with respect to an application for a license or permit shall be waived upon:
> (a) Written notification from the State...that it expressly waives its authority to act on a request for certification.....
> In the event of a waiver hereunder, the Regional Administrator shall consider such waiver as a substitute for certification....

23. Cleveland argues that the waiver provision in Section 401 provides states with a basis for opting out of the 401 certification process. That argument ignores the actions of Ohio's General Assembly and the Director himself in response to the enactment of Sections 401 and 404 of the Clean Water Act.

24. We agree that federal law clearly and explicitly mentions waiver as an option for the appropriate decision maker.[2] However, the Federal regulations also contemplate state participation in the 401 certification process. Ohio chose to participate and has implemented an expansive 401 Certification program within the OEPA's Division of Surface Water. The General Assembly enacted subsection (P) of R.C. 6111.03 (authorizing the director to "certify or deny" applications) subsequent to the enactment of Sections 401 and 404. Thus, when this subsection was enacted, the General Assembly was well aware of the federal waiver language and could have chosen to insert waiver as an explicit option for the Director regarding 401 certification applications. It did not. Instead, the General Assembly gave the Director two options regarding those applications for 401 certification: 1) he may certify or, 2) he may deny. As discussed above, the Director looked at this general and permissive language in R.C. 6111.03(P) and, in adopting his implementing regulations, chose to be more stringent than either the state or federal laws.[3] That is, the Director chose to adopt regulations that, among other things, provide that

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[2] The Commission notes that waiver has been discussed in at least one prior Commission opinion (*Interstate Properties v. Schregardus,* ERAC, December 30, 1999) Franklin App. No. 99 AP-249, (unreported). The Commission distinguishes *Interstate Properties, supra,* from the case before us today. In *Interstate Properties, supra,* waiver was not an issue in dispute; therefore, the director's authority under state law or state regulations was not determined or explored. The Commission merely noted that it "exists" under federal law.

[3] This stringency consideration is in keeping with Section 510 of the Clean Water Act, title U.S. Code, which authorizes states to adopt or enforce standards in accordance with the

Section 401 quality certifications "*shall* be issued modified, revoked, or denied . . . ." (emphasis added).[4]

25. While we are sympathetic to the myriad of complex technical and political issues surrounding this project and this application, we are reminded of our powers as an administrative appellate review body, and simply do not find the statutory language to support the Director's decision in this action. We also find it disturbing that, throughout the process, all indications from the Agency were that the Director would certify or deny this application. The decision to waive, or "take no action" appears to be a last minute, and not well communicated decision on the part of the Director to resolve a highly charged and complex situation. Accordingly, we find the Director's attempt to waive his authority to act on Appellee Cleveland's 401 application is not supported in the pertinent statutes and regulations and is, therefore, unlawful.

26. With regard to the post-argument Motion to Dismiss for mootness, the Commission finds that it does not have sufficient facts in evidence, as stipulated to by the parties, to reach a ruling on that issue. The record before the Commission does not demonstrate whether the Corps

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dictates of the federal law as long as such standards are not less stringent than the federal law. (FWPCA Sec. 510, Section 1370 title 33, "State Authority").

[4] It is interesting to note that the Director did not rely on any of the state regulations dealing with section 401 certifications in his April 13, 2002, letter to the Corps. Rather, he indicated that his decision to waive the State's authority to act on Cleveland's 401 application was pursuant to R.C. 3745.01(A), 33 CFR 325.2 and 40 CFR 121.16, set out above. Revised Code Section 3745.01(A) is a general provision which authorizes the Director to "take such other actions as may be necessary to comply with the requirements of the federal laws and regulations pertaining to . . . water pollution control." Furthermore, 33 CFR 325.2 delineates the procedure to be followed by the Corps in processing certain permits, including those encompassed by Section 401 of the Clean Water Act. Finally, 40 CFR 121.16 contains the waiver language which was discussed previously. We do not feel that any of the provisions cited by the Director in his April 13, 2001, letter authorize the action he attempted to take.

relied upon the Director's April 13, 2001 letter in moving forward with the 404 permit, waited until the one year time period (December 9, 2001) had tolled, or has yet to move forward with regard to issuing a Section 404 permit. Therefore, the Commission may not, and need not, reach the mootness argument in issuing its decision today.

27. Co-Appellees also raise the issue of Appellant's standing in their April 25, 2002, Motion to Dismiss. The Commission is able to rule on this basic jurisdictional issue, and agrees with Appellant from a consideration of the facts presented in the Amended Joint Stipulations of Facts that Appellant Olmsted Falls possesses standing to pursue this appeal in that may be adversely affected by the activities contemplated by part of the expansion.

FINAL ORDER

Based on the above, the Commission finds the action of the director unlawful and rules to grant Appellant Olmsted Falls Motion for Summary Judgment. The Commission denies all of Appellees' Motions to Dismiss and finds all other motions regarding requests to strike declarations moot.

The Commission, in accordance with Section 3745.06 of the Revised Code and the Ohio Administrative Code 3746-13-01, informs the parties that:

> Any party adversely affected by an order of the Environmental Review Appeals 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. Any party desiring to so appeal shall file with the Commission a Notice of Appeal designating the order appealed from. 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 of Environmental Protection or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which the 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

Julianna F. Bull, Chair

Toni E. Mulrane, Vice-Chair

Jeff Cabot, Member

Entered in the Journal of the Commission this 11th day of June, 2002.

Mary J. Oxley, Executive Secretary

COPIES SENT TO:

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