BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

DORTHEA CULVER HEARTWOOD	:	Case No. ERAC 735937 Case No. ERAC 995938
Appellant,	:	
v.	:	
JOSEPH KONCELIK, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.	:	
Appellees.	:	Issued: October 11, 2007

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

THE ENVIRONMENTAL REVIEW APPEALS COMMISSION:
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SHILLING, COMMISSIONER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon an appeal filed on August 14, 2006 by Appellants Dorthea Culver ("Culver") and Heartwood[1] of three open burning permits (Burning Permit Nos. 05-18 [Revised 7/19/06], 05-19 [Revised 7/19/06], and 05-20 [Revised 7/19/06])[2] issued on July 19, 2006 by Appellee Director of the Ohio Environmental Protection Agency ("Ohio EPA," "Director") and the Portsmouth Local Air Authority[3] ("PLAA") to Appellee Ohio Department of Natural Resources ("ODNR").[4]

Appellants Culver and Heartwood were represented by Leigh Haynie, Esq., of Carencro, Louisiana, who was granted pro hac vice status in this appeal. Appellees Director and PLAA were represented by Assistant Attorneys General Raymond J. Studer, Esq. and Karla G. Perrin, Esq.

Based on the testimony and evidence adduced at the de novo hearing held on October 24, 2006 and the Certified Record ("CR"), which was moved into evidence without objection, the

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1 Heartwood is "a nonprofit environmental group who has members in Ohio, including Ms. Culver." (Case File Item A.)

2 Each revised burning permit is captioned with the permit number followed by the revised-on date, e.g., "Burning Permit No. 05-18 [Revised 7/19/06]." For simplicity throughout this opinion, the Commission will reference the revised burning permits by their permit numbers only, and omit the revised-on date, making special notation if the original burning permit is being referenced.

3 The PLAA is an approved local air agency, which has been delegated certain powers and duties of the Director, pursuant to Revised Code ("R.C.") §§ 3704.111 and 3704.112. One such delegated power is the authority to grant or deny permission to open burn under R.C. § 3704.112(D). (*Lund I*, Footnote 1.)

4 The subject of these permits was the basis of an earlier ERAC appeal by Ms. Lund, in which the Commission affirmed Burning Permit No. 05-18 and modified Burning Permit Nos. 05-19 and 05-20 to "include a Special Condition requiring that the applicant submit appropriate smoke dispersion modeling, which is to be reviewed and accepted by the Ohio EPA, prior to the initiation of the prescribed burns described in these two permits." Like Appellants Culver and Heartwood, Ms. Lund appealed the Director's issuance of the three revised permits, ERAC Case No. 015935. In the interest of judicial expediency, the Commission placed the Lund, Culver, and Heartwood appeals on an identical scheduling track, as they all relate to the same three burning permits. (*Lund v. Konchelik, et al.* (2006), ERAC Case No. 015795 ("*Lund I*").)

Commission hereby issues the following Rulings on Mootness and Motions to Dismiss, Findings of Fact, Conclusions of Law, and Final Order AFFIRMING the PLAA's issuance of Burning Permits Nos. 05-19 and 05-20 and DISMISSING the assignments of error relating to Burning Permit No. 05-18 as being moot.[5]

PRELIMINARY DISCUSSION REGARDING MOOTNESS

{¶1} The three burning permits at issue herein expired on April 30, 2007, during the pendency of this appeal.[6] As such, the Commission requested that the parties file briefs discussing whether Ms. Culver's and Heartwood's appeals of these permits had become moot and were no longer ripe for consideration by the Commission.

{¶2} As a general rule, courts will not resolve issues that are moot. See *Miner v. Witt* (1910), 82 Ohio St. 237. "The doctrine of mootness is rooted both in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint. * * * While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question." (Citations omitted.) *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App. 3d 788, 791. "Thus, the 'duty of * * * every * * * judicial tribunal * * * is to decide actual controversies by a * * * judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the

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5 The Ohio Department of Natural Resources conducted a prescribed burn pursuant to Burning Permit No. 05-18 on April 10, 2007, during the pendency of this appeal. The Commissions findings regarding this permit are discussed more fully in ¶7 below.

6 In their Notices of Appeal, Appellants requested that the Commission issue a stay to preclude Appellees from executing the burns under the terms of the permits. Appellees opposed Appellant's requests. Appellants withdrew their request for stay on September 12, 2006. (Case File Items A, E, F, M.)

matter in issue in the case before it.'" *Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO v. Ohio Dept. of Transp.* (1995), 104 Ohio App.3d 340, quoting *Miner v. Witt* (1910), 82 Ohio St. 237, 238, quoting *Mills v. Green* (1895), 159 U.S. 651, 653.

{¶3} Notwithstanding the above discussion, courts recognize exceptions to the mootness doctrine. A court may hear an appeal that is otherwise moot when the issues raised are "capable of repetition, yet evading review." *State ex rel. Plain Dealer Pub. Co. v. Barnes* (1988), 38 Ohio St. 3d 165, paragraph one of the syllabus.

{¶4} The United States Supreme Court considered the mootness doctrine and its exceptions in the environmental case *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)* (2000), 528 U.S. 167. The *Friends of the Earth* case arises from an alleged violation of a permit authorized under the Clean Water Act and issued by the state of North Carolina to Laidlaw. During the notice period required under the Clean Water Act, Laidlaw and the state settled their dispute, which required the owner to pay civil penalties, yet, Friends of the Earth, a citizen's environmental group, sued anyway. The Fourth Circuit Court of Appeals held that the case was moot. The Supreme Court reversed, finding that the case was not moot due to the fact that the violations alleged were "capable of repetition, yet evading review." *Friends of the Earth* at 189.

{¶5} Ohio's Tenth District Court of Appeals has explored the "capable of repetition, yet evading review" exception to the mootness doctrine and found that it "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." *Nextel W. Corp. v. Franklin County Bd. of Zoning Appeals*, 2004 Ohio 2943, P13

(Ohio Ct. App. 2004), quoting *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231.

{¶6} The decision whether or not to hear an otherwise moot case is within the trial court's discretion and will not be reversed absent an abuse of discretion. *Robinson v. Indus. Comm'n*, 2005 Ohio 2290 (Ohio Ct. App. 2005) citing *Lariscy v. Franklin Park Mall, Inc.* (Feb. 7, 1986), Lucas App. No. L-85-245, 1986 Ohio App. LEXIS 5547; see also, *Peeples v. Department of Corrections*, 1995 Ohio App. LEXIS 4491 (Ohio Ct. App. 1995), [**5] (noting that court may, in its discretion, render judgment on moot arguments). The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1141. Although the line of cases discussing the standard of review for hearing an otherwise moot case directly reference trial courts, the Commission believes the "abuse of discretion" standard afforded to trial courts is applicable to the case herein.

{¶7} Ms. Culver and Heartwood submit that two of the three permits are not moot. Regarding Burning Permit No. 05-18, Appellants Culver and Heartwood assert, and Appellees agree, that ODNR executed the prescribed burn authorized under Burning Permit No. 05-18 on April 10, 2007. And, therefore, issues relating to whether the Director of Ohio EPA or the PLAA acted lawfully or reasonably in issuing this permit are moot. The Commission agrees that because the prescribed burn has already occurred at this particular burn unit, no controversy, upon which the Commission may rule, is present before the Commission. Accordingly, the appeal of Burning Permit No 05-18 is moot. (Case File Items TT, UU.)

{¶8} Regarding Burning Permit Nos. 05-19 and 05-20, Appellants and Appellees agree that the portions of Appellants' appeals dedicated to Burning Permit Nos. 05-19 and 05-20 are

not moot. Further, the parties urge the Commission to reach a decision on the merits of the cases, as these permits fall within the generally-accepted exception to the mootness doctrine; they are "capable of repetition, yet evading review." (Case File Item YY.)

{¶9} The Commission agrees that the underlying actions authorized in both permits, prescribed burns of specified areas, are capable of repetition, and yet, could evade review by this Commission. The issues presented in Appellants' appeals satisfy both prongs of the exception to the mootness doctrine outlined in *Nextel*. The first prong, that the "challenged action is too short in its duration to be fully litigated before its cessation or expiration," is satisfied because the permits have already expired. The second prong, that "there is a reasonable expectation that the same complaining party will be subject to the same action again," is met because ODNR is likely to request, and OEPA is likely to issue, permits that allow ODNR to burn the exact areas identified in Burning Permit Nos. 05-19 and 05-20. Indeed, this scenario is precisely what happened once ODNR, OEPA, and the PLAA realized the original burning permits for these areas were deficient; they revised and reissued the permits to comport with ERAC's decision in *Lund I*.

{¶10} In reaching its determination regarding mootness, the Commission observes that, unlike other permits that may expire during the pendency of an appeal, the Commission has already conducted a full de novo hearing to determine whether the Director acted reasonably and lawfully when reissuing the three burning permits and the parties are awaiting the Commission's issuance of Findings of Fact and Conclusions of Law. In light of the discussion above, the Commission finds the issues relating to Burning Permit No. 05-18 moot, as the permit has expired and the prescribed burn has already been conducted pursuant to the terms of this permit.

Conversely, the Commission finds the issues relating to Burning Permit Nos. 05-19 and 05-20 not moot, as they satisfy the two prongs of the well-accepted exception to the mootness doctrine.

RULING ON MOTION TO DISMISS

{¶11} On September 8, 2006, ODNR filed a Motion to Dismiss moving the Commission to dismiss this appeal on grounds that the "issues presented in these appeals have previously been litigated before the Commission and Appellants *** are barred from relitigating these issues under the Doctrine of Res Judicata." On September 11, 2006, Ohio EPA filed a similar Motion to Dismiss also arguing that Culver and Heartwood are barred from relitigating the same issues litigated in *Lund I*. On September 18, 2006, Appellants Culver and Heartwood filed a Memorandum in Opposition to [Appellees'] Motion to Dismiss. (Case File Items J, K, P.)

{¶12} On October 12, 2006, the Commission issued a ruling in which it granted in part and denied in part Appellees' Motions to Dismiss. Specifically, the Commission granted Appellees' Motions to Dismiss "for all issues other than those issues relating to smoldering, for all three permits, and the VSmoke[7] analysis conducted for the two larger burns." The Commission also advised the parties that it would incorporate a full discussion of its ruling on matters related to res judicata in its Findings of Fact, Conclusions of Law, and Final Order issued following the de novo hearing. (Case File Item W.)

Summary of the Doctrine of Res Judicata

{¶13} The doctrine of res judicata precludes the re-litigation of a cause of action. It also precludes re-litigation, between the same parties, of facts or issues involving a different claim or cause of action. "Res judicata has the effect of precluding relitigation based upon any claim

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[7] VSmoke, discussed more fully in FOF ¶32, is a smoke dispersion modeling tool designed to, inter alia, predict smoke behavior during open burns. (Testimony Bowden.)

arising out of the transaction or occurrence that was the subject matter of the previous action." 63 Oh Jur Judgments § 381 (2005). In *Grava v. Parkman Township* (1995), 73 Ohio St.3d 379, the Ohio Supreme Court held that "a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Grava* at 381, quoting *Norwood v. McDonald* (1943), 142 Ohio St. 299 ¶1 of the syllabus. The Ohio Supreme Court "expressly adhere[s] to the modern application of the doctrine of res judicata *** that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava* at 382. Res judicata prevents a party from litigating issues in a subsequent action that were considered in a previous action, even if the cause of action is different. See *Johnson's Island Inc. v. Board of Trustees*, 1980 WL 351597 (Ohio App. 6 Dist.). "If the prior cause of action involves identical issues, then that prior cause of action is conclusive of the rights, questions and facts in issue as between the parties or their privies." *Jacobs v. Teledyne, Inc.* (1988), 39 Ohio St.3d 168, 170.

{¶14} Res judicata also operates to bar all claims that were not, but *could have been*, litigated in the previous action. "It has long been the law of Ohio that an existing final judgment or decree between the parties to the litigation is conclusive to all claims which were or might have been litigated in a first lawsuit." *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69. Thus, where the parties, subject matter, and causes of action are identical, the former judgment is conclusive as to all matters actually determined and to any other matters that could have been determined. 63 Oh Jur Judgments § 381 (2005).

{¶15} The doctrine of res judicata applies to administrative proceedings. "Originally applicable to judicial proceedings, the Ohio Supreme Court has found the doctrine of res judicata applicable to administrative proceedings as well. Where administrative proceedings are quasi-judicial in nature and where parties are allowed ample opportunity to litigate the issues involved, the doctrine of res judicata will bar further litigation on the matter." *Green v. Akron*, 1997 WL 625484 (Ohio App. 9 Dist.) at *2. See also *Jacobs v. Teledyne Inc., supra* and *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260.

Res Judicata and the Requirement of Privity

{¶16} In order to invoke the doctrine of res judicata, the party in the subsequent action must be identical to, or in privity with, the party in the former action. *Kirkhart v. Keiper* (2004), 101 Ohio St.3d 377, 379; see also *Johnson's Island, Inc.*, supra. "It is well established in Ohio that res judicata does not apply merely to those who were parties to the proceeding but also to those in privity with the litigants and to those who could have entered the proceeding but did not avail themselves of the opportunity." 63 Oh Jur Judgments § 421 (2005).

{¶17} The Supreme Court of Ohio has stated that "what constitutes privity in the context of res judicata is somewhat amorphous," but a contractual or beneficiary relationship is not required. *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248. The Court has "applied a broad definition to determine whether the relationship between the parties is close enough to invoke the doctrine." *Kirkhart* at 379. In *Brown*, the Court held that "a mutuality of interest, including an identity of desired result, creates privity between plaintiffs." *Brown* at 248. To determine whether there is privity between parties, a court must look behind the named parties to the actual substance of the cause of action. 63 Oh Jur Judgments § 422 (2005). "For a non-party to be

considered in privity to a party in a prior proceeding, the rights of such a person must have been presented and adjudicated in the prior proceeding, or he or she must have controlled or participated in the prior proceeding." *Id.* at § 417. "A person though not technically a party to a prior judgment may nevertheless have been so connected with it by his or her interest in the result of the litigation, and by his or her active participation therein, as to be bound by such a judgment." *Id.*

Culver and Heartwood are in Privity with Lund and, Therefore, Bound by *Lund 1*

{¶18} Although not a named party in *Lund 1*, Ms. Culver actually participated in the proceedings. She testified before the Commission on behalf of Ms. Lund regarding the effect of the prescribed burns on her residence and regarding forestry concerns in general. Ms. Culver and Ms. Lund have a mutuality of interest that is "close enough to invoke the doctrine." *Kirkhart* at 379. Ms. Culver's opinions and objections were presented to the Commission in *Lund 1* via her testimony and were considered in that proceeding. "The doctrine of res judicata as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person *or with another so identified in interest with such person that he represents precisely the same question which has been necessarily tried and finally determined.*" (Emphasis added.) *Green* at *4, quoting *Wade v. Cleveland* (1982), 8 Ohio App.3d 176, 177. (See also *Jacobs v. Teledyne Inc.* at 169: "This court has applied the doctrine of res judicata *** where the parties have had an ample opportunity to litigate the issues involved in the proceeding.") Ms. Culver has not offered any evidence that Ms. Lund failed to adequately represent the interests of all who might have sought to challenge Burning Permits Nos. 05-18, 05-19, and 05-20. Because of her participation in *Lund 1*, and because of the mutuality of

interests, including an identical desired result with the appellant in *Lund 1*, the Commission finds Ms. Culver is in privity with Ms. Lund and, therefore, is bound by the *Lund 1* judgment.

{¶19} Like Ms. Culver, Heartwood was not a named party in *Lund 1*. But, unlike Ms. Culver, Heartwood did not participate in the proceedings of *Lund 1*. In fact, Ms. Culver joined Heartwood in July of 2006, which was approximately four months after the Commission issued its decision in *Lund 1*. (Case File Item P.) Nevertheless, the Commission finds that the Supreme Court of Ohio's broad definition of privity in the application of res judicata indicates that Heartwood is in privity with Ms. Lund. As previously discussed, the application of res judicata is not limited to named parties. "The Supreme Court of Ohio has taken the position that the doctrine of privity is not limited to such a narrow concept and that a better rule is that *the acquisition of an interest in a cause of action can arise at any time after the cause of action arises, depending upon the circumstances or upon the agreement of the parties*." (Emphasis added.) 63 Oh Jur Judgments § 422 (2005). See also *Nationwide Ins. Co. v. Steigerwalt* (1970), 20 Ohio St. 2d 87; and *Spargur v. Dayton Power & Light Co.* (1958), 7 Ohio Op. 2d 138. When Ms. Culver joined Heartwood in July 2006, she had already participated in *Lund 1* and was aware of the Commission's ruling on the issues involved. Heartwood is a party to the current appeal because its member, Ms. Culver, asserts she would be adversely affected by the prescribed burns. Because Heartwood's member participated in *Lund 1*, and because Heartwood had its interests represented (via Ms. Culver) in *Lund 1*, Heartwood is in privity with Ms. Lund and is, therefore, bound by the Commission's opinion in *Lund 1*.

{¶20} Noting that the Commission finds Ms. Culver and Heartwood in privity with Ms. Lund, the Commission finds that the doctrine of res judicata is applicable to portions of this appeal. The permits at issue in the instant matter authorize ODNR to conduct prescribed burns

in the exact same locations as the permits at issue in *Lund 1*, and the applications for the permits considered in *Lund 1* are the only applications that have been filed for the reissued burning permits. Furthermore, the current cause of action (challenging the three open burning permits) is identical to that in *Lund 1*. Because *Lund 1* was a quasi-judicial proceeding where the parties were provided ample opportunity to litigate the issues involved, the doctrine of res judicata is applicable to the current proceeding involving the same parties, or parties in privity, the same cause of action, and the same issues. Res judicata operates to bar Appellants, because they are in privity, "from raising issues in a subsequent hearing where they have been determined in a previous proceeding." *Jacobs et. al. v. Maynard et. al.*, EBR Case Nos. 50929-50934, 76935-76942 (Apr. 14, 1983), 1983 Ohio ENV LEXIS 14 at *8. Moreover, "the doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *National Amusements Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62.

Assignments of Error Raised in the Instant Matter

{¶21} To determine whether issues raised in Ms. Culver's and Heartwood's Notice of Appeal are barred by the doctrine of res judicata, the Commission lists their three Assignments of Error ("AoE"), as follows:

- AoE One - The reissued permits were unreasonable and unlawful because "[h]uman health will be significantly affected by the burns proposed in these three permits" and will contribute to existing air pollution in the Scioto County area.
- AoE Two – "The Agency's failure to acknowledge the nonatainment status of the area is both unreasonable and unlawful."
- AoE Three – "The Agency's contention that fire is necessary for regeneration of a historic forest and the threat of wildfire has no basis in reason or valid factual foundation and is unreasonable." (Case File Item A.)

Assignments of Error Considered in *Lund I* and, Therefore, Barred from Consideration in the Instant Appeal

{¶22} The Commission finds that AoE One and Three were fully considered in *Lund I*, and therefore, Appellants were properly barred from presenting evidence related to those AoE at the de novo hearing. (See generally, *Lund I.*)

{¶23} Appellants' First Assignment of Error, that the burns authorized by the permits will significantly affect human health and contribute to existing air pollution in the Scioto County area, was considered by the Commission in *Lund I.* In *Lund I*, Ms. Lund asserted "one general concern regarding air quality, i.e., the permitted burns will produce unnecessary and harmful air pollution emissions." (*Lund 1*, Conclusions of Law ¶ 9.) Addressing Ms. Lund's concern about "harmful air pollution emissions," the Commission held that "[w]hile the Commission is satisfied that Mr. Bowden's smoke dispersion modeling analyses adequately addressed the air quality concerns associated with the proposed 266 acre burn, ODNR submitted no similar demonstrations for the two larger proposed burns." (*Id.* at ¶ 12.) Once the Commission remanded the permits with Special Instructions that smoke modeling analysis be submitted on the two larger parcel burns, ODNR conducted the requisite smoke modeling analysis and submitted the data to the Director. The Director reviewed the smoke modeling submitted by ODNR and used ODNR's analysis as a starting point to conduct its own smoke modeling analysis. After determining that the VSmoke data adequately assessed the general air quality concerns associated with the larger parcel burns, the permits were reissued. Therefore, as in *Lund 1*, the Commission acknowledges the Director's determination that the smoke modeling analysis adequately addressed general air quality concerns. Because it was found in *Lund 1* that

VSmoke, a smoke modeling analysis tool, adequately addresses general air quality concerns, that issue cannot be re-litigated in the current appeal.

{¶24} Appellants' Third Assignment of Error, that the reissuance of the permits is unreasonable because the stated reasons for conducting the burns (the burns are necessary for oak regeneration and wildfire management), has no basis in reason or valid factual foundation. In *Lund 1*, Ms. Lund's Seventh Objection was that "the permits are based on specious reasoning and logic for the need to burn," and "there is no scientific evidence that these prescribed fires in these proposed burn areas would reduce maples and increase oaks." (*Lund 1*, Case File Item A.) The Commission addressed this objection and held that "ODNR presented persuasive evidence demonstrating that not only is burning necessary to the public interest; it can be advantageous to the growth and development of healthy forests." (*Lund 1*, Conclusions of Law ¶ 15.) The Commission rejected Appellants' argument that there is no basis in reason or valid factual foundation for the prescribed burns, as follows:

> Although there continues to be debate in the scientific community regarding the efficacy of prescribed burns for certain purposes, the Commission finds that the testimony and evidence established that the proposed burns at issue herein are 'necessary to the public interest' as they reduce the potential for uncontrolled and damaging wildfires in the Shawnee State Forest. (*Id.* at ¶ 16.)

Because this issue was directly addressed and disposed of in *Lund 1*, it is barred from consideration in the current appeal by the doctrine of res judicata.

Appellants' Remaining Assignment of Error

{¶25} Ms. Culver's and Heartwood's Second Assignment of Error is that the reissuance of the permits is unreasonable because OEPA failed to acknowledge the area's non-attainment status, and the VSmoke modeling considered by the agency was inadequate, because VSmoke

was designed to function over flat terrains and not on areas with topographical relief similar to the Shawnee State Forest. "The general rule in Ohio is that where there has been a change in the facts *** which either raises a new material issue or which would have been relevant to the resolution of a material issue involved in the earlier action, the doctrine of res judicata . . . will not bar litigation of that issue in a later action . *** This principle is an application of the rule that an adjudication affects no claims which the parties had no opportunity to litigate." 63 Oh Jur Judgments §396 (2005). This issue was not and could not have been raised in *Lund 1*, because the VSmoke modeling for Permit Nos. 05-19 and 05-20 had not yet been conducted. Therefore, Appellants' second assignment of error is not barred by the doctrine of res judicata, as it was not and could not have been raised in the first appeal.

{¶26} Based on the foregoing, the Commission previously denied Appellees' Motions to Dismiss pertaining to Appellants' Second Assignment of Error. As such, Appellants were limited to presenting evidence and testimony at the de novo hearing regarding the Second Assignment of Error only. All other assignments of error were found not well taken and were dismissed.

{¶27} In light of the foregoing, the Commission will now discuss the Findings of Fact and Conclusions of Law relating to Assignment of Error Two.

FINDINGS OF FACT

{¶28} On October 21, 2005, Mr. Michael Bowden, Fire Supervisor with ODNR's Division of Forestry, "submitted to the PLAA an application for Permission to Conduct Open Burning. *** Specifically, the application requested permission to conduct three prescribed

burns within the Shawnee State forest 'during the fire seasons of Fall 2005 and Spring 2006.'" (*Lund I,* Findings of Fact ¶ 3.)

{¶29} On November 8, 2005, the PLAA issued to ODNR's Division of Forestry Permission to Open Burn Permits Nos. 05-18, 05-19, and 05-20. "Specifically, Burning Permit No. 05-18 authorized open burning on a 266 acre parcel, generally referred to as 'Upper Pond Run'; Burning Permit No. 05-19 authorized open burning on a 619 acre parcel, generally referred to as 'Pond Run/Pheasant Hollow'; and Burning Permit No. 05-20 authorized open burning on a 711 acre parcel, generally referred to as 'Hobey Hollow/Rock Lick.'" (*Lund I*, Findings of Fact ¶ 13.)

{¶30} On December 1, 2005, Ms. Lund timely filed a Notice of Appeal containing ten assignments of error alleging that the Director's action of issuing Open Burning Permit Nos. 05-18 through 05-20 was unlawful and unreasonable. (ERAC Case No. 015795, Case File Item A.)

{¶31} On February 21 and 22, 2006, the Commission conducted a de novo hearing and issued a ruling on the original appeal, *Lund I.* The Commission's ruling in *Lund I* affirmed the Director's issuance of Burning Permit No. 05-18 and modified Burning Permits Nos. 05-19 and 05-20 "to include a Special Condition requiring ODNR to submit smoke dispersion modeling, which had to be reviewed and accepted by Ohio EPA prior to conducting the two prescribed burns." (*Lund I,* Final Order p. 21.)

{¶32} Appellees employed a smoke dispersion modeling tool, VSmoke, to assess the impacts of the proposed open burns on surrounding air quality in both the *Lund I* case and in the instant matter. VSmoke is described as "a plume model, *** developed by the USDA (United States Department of Agriculture) Forest Service to model dispersion of particle emissions produced during prescribed fire operations allowing fire managers to properly plan and

implement prescribed burns" and can be used to predict smoke behavior and assess levels of carbon monoxide, particulate matter 2.5 ("PM2.5"), and particulate matter 10 ("PM10") occurring during and following an open burn. VSmoke is designed to model smoke dispersion in rolling to flat topography, like what is found in the Shawnee State Forest and is similar to other air emissions modeling programs used by Ohio EPA, in that it takes into account the source, the transitional period, and the dispersion factors of air emissions. (*Lund I*, Findings of Fact ¶ 6; CR Item 2; testimony Bowden.)

{¶33} In keeping with the Commission's decision in *Lund I*, on March 15, 2006, Mr. Michael Bowden, Division of Forestry, ODNR, sent a letter to Mr. William Spires, Ohio EPA, Division of Air Pollution Control ("DAPC"), that contained Mr. Bowden's "smoke dispersion modeling analysis for the prescribed burn units specified in Burning Permit Numbers 05-19 and 05-20." Mr. Bowden also included "smoke screening maps for the Hobey Hollow and Pheasant Hollow" area, showing the "burn unit location, state forest boundaries, arcs indicating a distance of 1.5, 2.0, 2.5, and 3.0 miles away from the edge of the units, as well as an indicator of acceptable and unacceptable wind direction vectors." Mr. Bowden advised that the presence of a "combination of acceptable atmospheric conditions (mixing height and transport wind speed) and acceptable wind direction will be necessary for these burns to take place." Further, he noted that these operational factors are contained in the "burn plans" and that if all of these conditions are not present on the day selected for the burn, the burn will not be conducted that day. (CR Item 2.)

{¶34} Ohio EPA reviewed Mr. Bowden's VSmoke data and determined that it would use this data as a starting point to conduct an independent VSmoke analyses for burn units specified in Burning Permit Nos. 5-19 and 5-20. Ms. Sara Hedlund, who is employed by Ohio

EPA's Central Office in DAPC as an air quality specialist and air quality modeler, conducted OEPA's independent VSmoke analysis for the two larger burns, Burning Permit Nos. 05-19 and 05-20. And, even though the Commission in *Lund I* found the PLAA's issuance of Burning Permit No. 05-18 to be reasonable and lawful, Ms. Hedlund also conducted an analysis for Burning Permit No. 05-18, the smallest burn unit. Ms. Hedlund received training both informally, through conversations with Mr. Bowden, of ODNR, and William Jackson, of the U.S. Forest Service and co-creator of VSmoke, and formally, through completion of VSmoke training sponsored by a division of the U.S. Forest Service. (Testimony Hedlund.)

{¶35} Prior to running VSmoke models for each of the burn units, Ms. Hedlund attended a prescribed burn conducted by ODNR and observed the levels of smoldering that occurred after the burn period. Based on her observations while at the prescribed burn and conversations with Mr. Jackson, the co-creator of VSmoke, Ms. Hedlund adjusted specific VSmoke parameters to allow the VSmoke model to more accurately predict concentrations of air contaminates attributable to the effects of smoldering. Ms. Hedlund testified that VSmoke data was used to determine who, in the surrounding area, should be notified that the burn would be taking place. (CR Items 8, 18; testimony Hedlund.)

{¶36} Ms. Hedlund's analysis is summarized in letter dated June 15, 2006 sent from Mr. Robert Hodanbosi, Ohio EPA, Chief of DAPC, to Mr. Phillip Thompson, Director of the PLAA, and Mr. Bowden, of ODNR. Specifically, Mr. Hodanbosi's correspondence stated that OEPA had been "evaluating the modeled air quality impact of the three prescribed burns in the Shawnee State Forest which were the subject of recent hearing ***." Mr. Hodanbosi noted that Ohio laws do not require the performance of a VSmoke analysis to gain permission for an open burn, but recognized that OEPA had reviewed PLAA's VSmoke analysis for the smallest of the three

burn sites and that ERAC had imposed a special condition requiring a similar review for the two larger burn sites, Burning Permit Nos. 05-19 and 05-20. To properly conduct their modeling, Ohio EPA gathered data from several sources, including data provided by ODNR and data maintained by the U.S. Forest Service, which allowed the Agency to ascertain the nature of fuels to be burned. Further, Ohio EPA also evaluated the meteorological conditions specified in the smoke management, or burn, plan, as these conditions related to "ambient impacts" on air quality standards. (CR Item 8.)

{¶37} In his letter, Mr. Hodanbosi characterized VSmoke as a tool used by "burn managers" to develop "smoke management plans. These plans are used to define the burn in a way that will safely contain the burn, protect personnel working the burn and minimize ambient air quality impacts beyond the boundaries of the burn." He further stated that the VSmoke model is a "screening tool" designed to "err on the side of overprediction" and set out the following example: "the model generates downwind concentrations as if the burn is always located at the farthest downwind point of the cell being burned, when in fact the active burn continually moves upwind away from that point as the burn progresses. Many of the highest predicted 'downwind' concentrations are actually occurring within the burn cell." (CR Item 8.)

{¶38} Mr. Hodanbosi continued:

> *** Under the meteorological condition specified in the smoke management plan, the ambient impacts associated with the three prescribed burns were evaluated and the summary of the ambient impact are attached. Based on the model predications, *these concentrations should stay below the ambient air quality standards beyond that area included in the ODNR notification of intent to burn, which is generally a three mile radius around the burn cell. Under most meteorological conditions within the array of proposed mixing heights and transport winds, levels exceeding the 24-hour average ambient PM2.5 standard are limited to a distance less than one mile downwind of the burn cell. This would keep concentrations at the closest downwind home below the ambient standard for PM2.5 for each burn.* (Emphasis added.) (CR Item 8.)

{¶39} Additionally, Mr. Hodanbosi discussed "how long it will be after the burn before predicted concentrations [of air contaminants] return to background levels." He observed that the "VSmoke model has some hardwired assumptions with respect to the onset of night time stable conditions and the continuation of those conditions the following day" that are inapplicable to the burns under review. As such, OEPA reviewed an "example of November meteorological data from the Industrial Source Complex (ISC) air quality model." The ISC, an air quality dispersion model approved by U.S. EPA, includes a meteorological component that allows the evaluator to review specific data on an hour by hour basis. Based on its ISC evaluation, OEPA adjusted the VSmoke analysis for the three burn sites to calculate a "more reasonable" estimate of when stable conditions would occur and when "residual smoke" would "disperse." (CR Item 8.)

{¶40} Mr. Hodanbosi concluded his letter by stating, "[b]ased on the above information, I believe that it is acceptable for Portsmouth to issue the revised permissions for these prescribed burns and this issuance would be consistent with OAC [Ohio Administrative Code Chapter] 3745-19." (CR Item 8.)

{¶41} Following Mr. Hodanbosi's recommendation, the PLAA issued the revised versions of Burning Permit Nos. 05-18 through 05-20. The revised permits are essentially identical to the original permits, but for the supplemental details describing recommended controlled burning procedures and a correction of a clerical error to state that the fire is for "recognized silvicultural practices only." (*Lund I*, Findings of Fact ¶ 2; CR Items 1, 9.)

{¶42} Several sections of the permits are relevant to the instant appeal. These include:

TYPE OF MATERIAL TO BE BURNED: LEAF LITTER, TWIGS, BRANCHES, AND SMALL LOGS LYING ON THE FOREST FLOOR

SIZE OF FIRE PERMITTED: AS NEEDED

NUMBER OF FIRES: AS NEEDED

BURNING TIME FROM: 10:00 A.M. UNTIL 4:00 P.M.

SPECIAL INSTRUCTIONS: FIRE WILL BE SET FOR RECOGNIZED SILVICULTURAL PRACTICES ONLY. FIRE CANNOT CREATE VISIBLITY HAZARD ON ROADWAYS/RAILROAD TRACKS OR AIR FIELDS. SMOKE FROM FIRES SHALL NOT ADVERSELY IMPACT SURROUNDING RESIDENCES. ALL IGNTION SHALL BE COMPLETED BY 1600 HOURS; AND MOP-UP WILL COMMENCE IMMEDIATELY AFTER THE FIRE LINES ARE SECURED. MOP UP SHALL BE CONDUCTED AT LEAST 50 FEET IN FROM THE FIRE LINES. HEAVY SMOKE PRODUCING FUELS THAT ARE LOCATED FURTHER IN THAN 50 FEET SHALL BE MOPPED UP TO MINIMIZE SMOKE IMPACTS UNLESS DOING SO WOULD JEOPARDIZE THE SAFETY OF FIREFIGHTERS. ALL BURNING SNAGS THAT HAVE THE POTENTIAL TO FALL ACROSS OR TOSS EMBERS ACROSS THE FIRE LINES WILL BE CUT AND DROPPED. SNAGS THAT ARE TOO DANGEROUS TO DROP WILL BE PUSHED OVER BY BULLDOZERS OR BE MONITORED UNTIL THE SNAG FALLS. MOP-UP WILL CONTINUE UNTIL THE INCIDENT COMMANDER DETERMINES THAT THE BURN UNIT IS SECURE, INCLUDING THAT THERE IS NO VISIBLE SMOLDERING, AND RELEASE THE RESOURCES. THE BURN WILL NEED TO BE CHECKED THE DAY AFTER AND DAILY UNTIL NO SMOKE IS SHOWING. IF SMOKE IS SHOWING & CAN BE SAFELY MITIGATED, IT WILL BE SUPPRESSED. SHAWNEE STATE FOREST PERSONNEL WILL CHECK FIRE & DISTRICT MANAGER WILL BE RESPONSIBLE FOR DECLARING THE FIRE OUT. (CR Item 1.)

{¶43} On August 17, 2006, Ms. Culver and Heartwood appealed the PLAA's issuance of these permits and in September 2006, the Director and ODNR filed separate motions to dismiss Ms. Culver's and Heartwood's appeal based on the doctrine of res judicata. On October 12, 2006, the Commission ruled to grant, in part, Appellees' motions to dismiss, dismissing all assignments of error except "those issues relating to smoldering, for all three permits, and the VSmoke analysis conducted for the two larger burns." The Commission advised the parties that it will incorporate a "full discussion of the Commission's ruling" on the motions to dismiss in its

Findings of Fact, Conclusions of Law and Final Order issued after the de novo hearing. (Case File Items K, M, AA.)

{¶44} At the de novo hearing conducted on October 24, 2006, the Commission heard testimony regarding Appellants remaining assignment of error, AoE Two, which relates to VSmoke analysis for the two larger burn units. Unlike Ms. Lund, Ms. Culver and Heartwood's assignments of error did not include issues relating to the effects of smoldering. (See ERAC Case Nos. 015935, 015937, 015938.)

{¶45} In their notice of appeal and at the de novo hearing, Ms. Culver and Heartwood alleged that the Agency's issuance of these burning permits was unreasonable and unlawful because it failed to "acknowledge the nonattainment status" of the surrounding area. Appellants argued the VSmoke is suited for "'flat lands' primarily in the southeastern United States," and not for the "hills, escarpments, and high topographical relief" found in the Shawnee State Forest. Further, Appellants assert that the "[a]pplication and permit fail to identify how far the particulate matter will travel and whether the burning will contribute to the nonattainment status in another state, such as West Virginia. (Case File Item A.)

{¶46} Regarding whether the prescribed burns would have an impact on the nonattainment status in the area, Appellees relied upon data generated by the VSmoke analysis demonstrating that the burn will have little impact on the ambient air quality in the surrounding area.

{¶47} Regarding carbon monoxide, Ms. Hedlund testified that VSmoke predicts carbon monoxide concentrations emitted during and following a burn. Importantly, the carbon monoxide concentrations predicted for these burns were far below any level that would adversely affect human health. For example, if the prescribed burn were to be conducted under the worst

meteorological conditions allowable for the proposed burn – 9 miles per hour ("mph") transport wind speed and 2000 feet mixing height – the VSmoke analysis predicted the carbon monoxide concentration levels to be 22.22 parts per billion ("ppb") at a distance of three hundred seventeen feet from the fire. The National Ambient Air Quality Standards[8] ("NAAQS") for carbon monoxide is 35 parts per million ("ppm"). Converted to ppb, the NAAQS level for carbon monoxide is 35,000 ppb, which is far greater than the concentration level of 22.22 ppb of carbon monoxide emission predicted under the VSmoke analysis. (CR Item 2; OEPA Ex. 12; testimony Hedlund.)

{¶48} Ms. Hedlund testified that VSmoke modeling does not predict concentrations of other pollutants such as acetaldehyde, acrolein, butadiene, formaldehyde, and polycyclic aromatic hydrocarbons, which are potentially emitted during and following a prescribed fire. VSmoke anticipates that, if these pollutants are emitted, their concentrations are so low, and they so quickly dissipate, that their presence is not a threat to human health. Regarding methane, Ms. Hedlund testified that methane is a non-toxic hydrocarbon. Mr. Bowden testified that sometimes ODNR does monitor for methane, but does so for the safety of the firefighters, as methane is highly flammable. (Testimony Bowden, Hedlund.)

{¶49} Additionally, Appellees presented evidence at the de novo hearing to support their belief that VSmoke is an appropriate modeling tool for the Shawnee State Forest region.

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[8] "The Clean Air Act, which was last amended in 1990, requires [the United States] EPA to set National Ambient Air Quality Standards (40 CFR part 50) for pollutants considered harmful to public health and the environment. The Clean Air Act established two types of national air quality standards. Primary standards set limits to protect public health, including the health of 'sensitive' populations such as asthmatics, children, and the elderly. Secondary standards set limits to protect public welfare, including protection against decreased visibility, damage to animals, crops, vegetation, and buildings. The [United States] EPA Office of Air Quality Planning and Standards (OAQPS) has set National Ambient Air Quality Standards for six principal pollutants, which are called 'criteria' pollutants." The six principal pollutants are: ozone, particulate matter, carbon monoxide, sulfur dioxide, nitrogen oxide, and lead. (http://www.epa.gov/ttn/naaqs/)

Specifically, Appellees presented an affidavit from William A. Jackson, a Biological Scientist and Air Resource Specialist for the United States Department of Agriculture, Forest Service. Mr. Jackson is "considered a technical specialist in regards to how air pollution impacts forest resources and how USDA Forest Service management activities affect air quality." A co-creator of VSmoke, Mr. Jackson is also considered an "expert in the use and operation of VSmoke" and has trained about three hundred people over the past decade in the use of VSmoke software. Though Mr. Williams cautioned against a blanket use of VSmoke in the western United States, particularly the Rocky Mountains, he stated that the "terrain in southern Ohio is gently rolling and VSmoke *** can be used to estimate the downwind concentrations of particulate matter and carbon monoxide from a single fire." He believes that VSmoke is appropriate for use in the eastern United States, and certainly the Shawnee State Forest, as this region lacks the "'spatial variability of windflow over rugged terrain [that] will limit the plume model's effectiveness,'" as found in the Rocky Mountain terrain. (Appellee Ex. 1.)

{¶50} Regarding the distance that particulate matter may travel during a prescribed burn, Ms. Hedlund posited that under worst-case-scenario conditions for the largest burn, e.g., setting the meteorological conditions at 9 mph wind speed and 2000 feet atmospheric mixing height, and overestimating the level of PM2.5 emissions, the PM2.5 emissions at about 2 miles from the burn site would be just above the NAAQS for PM2.5. At a distance of three miles from the burn area, the concentration of PM2.5 emissions dropped to below the NAAQS level for PM2.5. Comparatively, under best-case-scenario conditions, e.g. setting the meteorological conditions at 21 mph transport wind speed and 5000 feet mixing height, the PM2.5 concentration level at a distance of approximately one mile from the burn unit was well below the NAAQS level for PM2.5. (C.R. Item 2; OEPA Ex.12; testimony Hedlund.)

{¶51} The results of the VSmoke modeling assisted ODNR in concluding that residents within a three mile area of the prescribed burns should be apprised of the upcoming burns. All residents within this area were notified via postcard of the future prescribed burns and were advised that they could request additional information; three residents requested such information. (ODNR Ex. 4; testimony Bowden, Hedlund.)

CONCLUSIONS OF LAW

{¶1} Pursuant to R.C. § 3745.05, the statutory duty of review imposed upon the Commission at the conclusion of a de novo hearing is a determination of whether the Director's action under appeal was unlawful or unreasonable.

{¶2} "Unlawful" means that the action was not in accordance with the relevant, applicable law. *Citizens Committee to Preserve Lake Logan v. Williams* (1977), 56 Ohio App.2d 61. "Unreasonable" means that the action was not in accordance with reason, or that there was no valid factual foundation for the Director's action. *Id.* It is only in those cases where the Commission can find evidence that the Director's action was not in accordance with the relevant law, or that the Director's action was not based upon a valid factual foundation, that the action under appeal can be found to be unlawful or unreasonable. *Id.*

{¶3} Conversely, where the evidence before the Commission demonstrates that the Director's action was lawful and reasonable, the Commission must affirm the Director's action. In such an instance, the Commission may not substitute its judgment for that of the Director. *Id.*

{¶4} Further, it is well-established that the Commission must grant deference to the Agency's interpretation of the regulations it is authorized and empowered to enforce. *Jones*

Metal Products Co. v. Walker (1972), 29 Ohio St.2d 173; *Rings v. Nichols* (1983), 13 Ohio App.3d 257.

{¶5} The PLAA is an approved local air agency, which has been delegated certain powers and duties of the Director, pursuant to Revised Code ("R.C.") §§ 3704.111 and 3704.112. One such delegated power is the authority to grant or deny permission to open burn under R.C. § 3704.112(D).

{¶6} The open burning permits were issued pursuant to OAC § 3745-19-05 [Permission to individuals and notification to the Ohio EPA], which provides, in part:

> (3) Permission to open burn shall not be granted unless the application demonstrates to the satisfaction of the Ohio EPA that open burning is necessary to the public interest; *will be conducted in a time, place, and manner as to minimize the emission of air contaminants*; and will have no serious detrimental effect upon adjacent properties or the occupants thereof. The Ohio EPA may impose such conditions as may be necessary to accomplish the purpose of Chapter 3745-19 of the Administrative Code. (Emphasis added.)

{¶7} In their Second Assignment of Error, Ms. Culver and Heartwood alleged that the Agency's issuance of these burning permits was unreasonable and unlawful because: 1) it failed to "acknowledge the nonattainment status" of the surrounding area; 2) it failed to identify how far the particulate matter will travel and whether the burning will contribute to the nonattainment status in other states, such as West Virginia; and 3) VSmoke is not suited to the topography found in the Shawnee State Forest. The Commission disagrees.

{¶8} The evidence presented at the de novo hearing demonstrates that the burns will be conducted so as to fully comport with the requirements set forth in OAC § 3745-19-05(A)(3), i.e., the burns "will be conducted in a time, place, and manner as to minimize the emission of air contaminates." *Id.* In *Lund I*, the Commission, noting that Ohio statutes and regulations do not require a VSmoke analysis to be performed prior to the issuance of a burning permit, found that

the VSmoke analysis performed for the smaller burn unit "adequately addressed the air quality concerns associated with the proposed 266 acre burn." *Lund I* at 20. Correspondingly, the Commission found the Director's action unreasonable when he failed to conduct a similar analysis for the two larger burns. *Id.* Conversely, in the instant matter, the Director, not only reviewed ODNR's VSmoke analysis for the two larger burns, but conducted his own analysis of all three burns to more carefully ascertain the prescribed burns' impacts on ambient air quality in the surrounding area.

{¶9} Regarding whether the Director considered the "nonattainment status of the area," Appellants site no regulation requiring the Director to consider specifically the "nonattainment status" of the proposed burn area. Indeed, when evaluating applications for burning permits, the regulation specifically requires the Director to ensure that the burn will be conducted in a "time, place, and manner as to minimize the emission of air contaminants." OAC 3745-19-05(A)(3). The regulation does not prescribe a precise methodology for the Director's review, only that the permits must satisfy the regulation's requirement of minimizing emissions of air contaminants.

{¶10} Secondly, testimony at the de novo hearing evinces the Agency's sensitivity to the possible air quality implications associated with the issuance these permits. Mr. Hodanbosi's letter detailed the Agency's in-depth review of whether VSmoke analysis was an appropriate tool to measure the impact of the burns and that the Agency's analysis revealed that conducting the burns consistent with the smoke management plans, or burn plans, would not violate OAC regulations related to open burning.

{¶11} Further, Ms. Hedlund's testimony provided details about the specific parameters included in a VSmoke analysis and how the results of her analyses demonstrated that any negative impact of the burns on the ambient air quality was quite limited in scope and duration.

Specifically, Ohio EPA's VSmoke model analysis for the three burn units demonstrated that concentration of PM2.5 "should stay below the ambient air quality standards" beyond the area ODNR intends to send out notifications of the burn via postcard, which in most cases is three miles from the perimeter of the prescribed burn. Under most meteorological conditions, transport speeds, and mixing heights authorized in the burn plan, the PM2.5 concentration levels "exceeding the 24-hour average ambient PM2.5 standard are limited to a distance less than one mile downwind of the burn cell." Additionally, observing that VSmoke calculates levels of carbon monoxide emissions, Ms. Hedlund stated that, even if the prescribed burns were to be conducted under the worst meteorological conditions, the levels of carbon monoxide documented at three hundred seventeen feet from the fire would be far below the NAAQS standard for carbon monoxide.

{¶12} The Commission last considers whether VSmoke modeling is an appropriate tool to use in the topography found in the burn areas. Mr. Jackson, co-creator of and expert in VSmoke analysis, believes that VSmoke is appropriate for the "gently rolling terrain" found in the eastern United States, and certainly in the Shawnee State Forest, because this region lacks the rugged terrain found in the Rocky Mountains. Based on the testimony of Mr. Jackson, the Commission finds VSmoke to be an appropriate smoke dispersion modeling tool for use in the area of the proposed burns.

{¶13} Based upon the evidence presented at the de novo hearing and noting that the Agency conducted an independent VSmoke analysis for the two burn sites and reviewed the results from the VSmoke analysis with even greater scrutiny than it had in *Lund I*, the Commission correspondingly finds that the two prescribed burns "will be conducted in a time,

place, and manner as to minimize the emission of air contaminants." Accordingly, the Commission finds AoE Two not well taken.

MULRANE and LYNN, COMMISSIONERS, concur.

FINAL ORDER

In keeping with the foregoing, the Commission hereby AFFIRMS Open Burning Permit Nos. 05-19 and 05-20.

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

> 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

Toni E. Mulrane, Vice-Chair

Sarah E. Lynn, Member

Entered in the Journal of the Commission this 12th day of October, 2007.

COPIES SENT TO:

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HEARTWOOD	[CERTIFIED MAIL]
JOSEPH KONCELIK, DIRECTOR	[CERTIFIED MAIL]
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CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in **DORTHEA CULVER and HEARTWOOD V. JOSEPH KONCELIK, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.,** Case No. ERAC 735937 & 995938 entered into the Journal of the Commission this 11th day of October, 2007.

Mary J. Oxley

Mary J. Oxley, Executive Secretary

Dated this 11th day of
October, 2007, at Columbus, Ohio.