

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

JAMES M. RYAN : Case No. EBR 253363  
: :  
Appellant. : :  
: :  
v. : :  
: :  
DONALD SCHREGARDUS, DIRECTOR : :  
OF ENVIRONMENTAL PROTECTION, ET AL. : :  
: :  
Appellees. : Issued: April 10, 1997

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FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND FINAL ORDER

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Issued By:

ENVIRONMENTAL REVIEW APPEALS  
COMMISSION  
Toni E. Mulrane, Chairman  
Mary Kay Finn, Vice-Chairman  
Jerry Hammond, Member

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APPELLEE KARL WETHERHOLD WAS NOT  
REPRESENTED BY COUNSEL

This matter comes before the Environmental Review Appeals Commission ("Commission") upon an appeal filed by James M. Ryan ("Ryan"), an individual. In his August 24, 1995 Notice of Appeal, Ryan contests the Director's July 25, 1995 dismissal of Verified Complaint No. 9502001 ("Verified Complaint"). Ryan had filed the Verified Complaint on February 25, 1995 alleging, in essence, that the Director had failed to properly oversee decisions made by the Gahanna City Engineer concerning the allocation of sewer tributary areas in the vicinity of Ryan's properties lying to the north and south of Morse Road in Gahanna, Ohio. In sum, Ryan claimed that the City Engineer's realignment of the tributary area deprived third parties of access to the Rocky Fork Outfall Sewer. He also requested that the Director investigate the city engineer's decision and issue a "stay" of the realignment until such time as Ryan and others could assess the impact of the decision on sanitary sewer access.

The Commission convened a de novo hearing in this matter on November 18, 1996. Appellant Ryan was represented by Attorney Steve J. Edwards, 4030 Broadway, Grove City, Ohio. The Director was represented by Assistant Attorneys General Michael E. Idzkowski and Lori A. Massey.

Based on the certified record and the evidence adduced at the de novo hearing, the Commission hereby issues the following Findings of Fact, Conclusions of Law and Final Order DISMISSING the instant appeal as moot.

FINDINGS OF FACT

1. At some time prior to July 21, 1993, Appellant Ryan filed an application for a permit to install ("PTI") a septic tank leach field system for waste disposal from Ryan's Mercantile Building located south of Morse Road at 4721 - 4723 Johnstown Road (U.S. Route 62)<sup>1</sup>. (Testimony of Ryan; Director's Response to Appellant's Proposed Findings of Fact and Conclusions of Law, Attachment 1; Appellant's Exhibit 3.)

2. On July 21, 1993, the Director issued a proposed denial of Ryan's PTI application stating:

In accordance with Ohio Administrative Code (OAC) 3745-31-05(A)(3), all treatment works are required to install the best available technology (bat). Installation and construction of a septic tank leach field system in an area where public sewers are available does not meet this requirement. (Id.)

3. In short, the proposed denial recited the fact that the best available technology requirements in the Ohio Administrative Code for new sewer facilities could not be satisfied by installation of a septic system at Ryan's location. (Appellee's Response to Proposed Findings of Fact and Conclusions of Law, Attachment.)

4. Despite Ryan's assertions to the contrary, there is no statement or determination in the proposed denial concerning the "availability" of particular public sewers, or the permitting status of sanitary sewers in the vicinity of Ryan's property. (Id.)

5. Again, contrary to Ryan's repeated assertions at the hearing in this

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<sup>1</sup> For demonstrative purposes, it is helpful to understand that this roughly rectangular property is located to the south of Morse Road within a triangular shaped area formed by the intersection of Johnstown Road from the south, and that it spans the distance between Morse Road and Johnstown Road.

matter, the proposed denial does not identify any particular public sewer or section thereof into which Ryan could, or should, gain access. The proposed denial does not require that Ryan undertake any affirmative action. (Id.)

6. Ryan appealed the proposed denial to the Ohio Environmental Protection Agency ("OEPA"), and a hearing was held before a hearing officer from January 24, 1995 to February 14, 1995<sup>2</sup>. A portion of the transcript of the OEPA hearing for January 24 and 25, 1995 is included in the Certified Record as Item Nos. 22 and 23, respectively.

7. At both the OEPA hearing and the hearing before the Commission, Ryan presented evidence that indicated that his property was not included in the original 1989 Master Sanitary Sewer Plan ("Plan") for a portion of the Rocky Fork Sanitary Outfall Sewer area specifically known as the Villages at Rocky Fork Section 1 ("Rocky Fork"). (Testimony of Ryan.)

8. The July 14, 1989 map for the at Rocky Fork Sewer tributary area, signed by representatives of both the City of Gahanna and the City of Columbus, was submitted by Appellant as Exhibit 2.

9. The 1989 Plan, which has since been materially altered<sup>3</sup>, appeared to indicate that Ryan's properties were situated solely within Jefferson Township, and that the western boundary of the Rocky Fork Sewer tributary area fell along the eastern boundary of his property south of Morse Road.

10. Consequently, Ryan testified that his interpretation of the 1989 Master Plan, which was included in substantially the same form in a 1995 PTI

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<sup>2</sup> At the time of the hearing in this matter, the OEPA appeal of the proposed denial was still pending and, therefore, there had been no final action, reviewable by this Commission, on Ryan's PTI application.

<sup>3</sup> See Finding of Fact No.67, et seq.; infra.

issued for a portion of the Rocky Fork Outfall Sewer, excluded his Mercantile Building from the Villages at Rocky Fork tributary area. (Appellant's Exhibit 2.)

11. Thus, Ryan contended that he could not have the sewer access he believed was contemplated in the proposed denial.

12. In support of his claim, Ryan first asserted that his property at that time was situated solely within Jefferson Township and, because Jefferson Township did not have authorization to use Gahanna's sewers, there was a political barrier to his use of the Rocky Fork sewer.

13. Second, Ryan interpreted the 1989 map to exclude his property from the Villages at Rocky Fork tributary area within the City of Gahanna<sup>4</sup>, a fact that would generally preclude use of the Villages at Rocky Fork sewer. (Testimony of Ryan.)

14. Sometime prior to the hearing on the OEPA appeal, Gahanna initiated, and had nearly completed annexation proceedings that included Ryan's properties, as well as additional properties to the south and west of Ryan, south of Morse Road. (Testimony of Wetherholt; Ryan.)

15. The annexation was rigorously opposed by Ryan in a variety of judicial forums<sup>5</sup>, but was finalized prior to the instant hearing before the

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<sup>4</sup> At both the OEPA hearing and the hearing before the Commission, Ryan attempted to assert a third argument that the sewer which he believes has the most convenient access for his property did not have a PTI. This testimony was not admitted following the objection of the Director.

<sup>5</sup> In Franklin County Common Pleas Case No. 93CVH09-6014, Ryan unsuccessfully opposed the annexation of his Mercantile Building into Gahanna. That decision was appealed to the Franklin County Court of Appeals (Case No. 96APE05-577), and Ryan's request for stay in that appeal was denied. During the pendency of that appeal, Ryan's property was annexed into Gahanna. Ryan also initiated a separate federal action, Case No. C2-94-507, in the Southern

Commission. (Testimony and Affidavit of Karl Wetherholt; Testimony of Ryan.)

16. On the first day of the OEPA hearing, Mr. Karl Wetherholt ("Wetherholt"), City Engineer for the City of Gahanna, testified that he is the public official responsible for determining the boundaries of the tributary areas for the Gahanna sewer system. (Testimony of Wetherholt.)

17. Upon examination of a copy of a map secured from the County Auditor's Office, Mr. Wetherholt testified, at the OEPA hearing and again before the Commission, that he interpreted the western boundary of the Rocky Fork Outfall sewer tributary area to roughly coincide with the western boundary of Ryan's property located to the south of Morse Road. (Appellant's Exhibit 2; Appellee's Exhibit E.)

18. This resulted in the inclusion of Ryan's property within the Villages at Rocky Fork tributary area. (Certified Record Item 22 at p. I-129; Appellee's Exhibit E.)

19. Wetherholt addressed the apparent discrepancy between the 1989 Master Plan that excluded Ryan's property and his testimony at the OEPA hearing which concluded that Ryan's property lies within the Rocky Fork tributary area by explaining that the County Auditor's map was a detailed map that enabled him to more accurately assess the topography of the area. (Testimony of Wetherholt.)

20. Wetherholt identified natural drainage areas and high points on the Auditor's map that allowed a more logical and refined delineation of tributary area that included, rather than excluded, Ryan's Mercantile Building property from the Rocky Fork Sewer tributary area. (Testimony of Wetherholt.)

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District of Ohio. At the time of the Commission's hearing in this matter, that case had been dismissed.

21. Although Certified Record Items No. 22 and 23 were submitted without the accompanying map exhibits, Wetherholt further testified at the OEPA hearing that property lying to the west and south of Ryan's property south of Morse Road could be served by another sewer known as the Northeast Sanitary Subtrunk Sewer. (Certified Record Item No. 23, at pp. II-8 and 9.)

22. According to Ryan, Wetherholt's testimony at the OEPA hearing that Ryan's property had been included within the Villages at Rocky Fork sewer by virtue of Wetherholt's refined interpretation of the 1989 Master Plan prompted him to file the instant Verified Complaint<sup>6</sup>. (Testimony of Ryan; Certified Record Item No. 11.)

23. In his Verified Complaint, however, Ryan did not focus on the impact of the claimed realignment on his own property, so much as he asserted that other property owners lying to the south and west of his tract would be affected<sup>7</sup>.

24. The Ryan Verified Complaint began with the assertion that Wetherholt's alleged alteration of the original sanitary sewer tributary areas assigned the properties lying to the south and west of Ryan's property and owned by third parties to the tributary area for the Northeast Sanitary Subtrunk Sewer instead of the Rocky Fork Outfall Sewer. (Certified Record Item No. 11.)

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<sup>6</sup> Ryan attempted to introduce facts at hearing indicating that the City of Gahanna had not secured a PTI prior to construction for portions of the Rocky Fork Sewer to which he believed the Director had ordered him to connect. This lack of a PTI for portions of the Rocky Fork Sewer is acknowledged in the Director's investigative report, but it was not cited as a basis for Ryan's Verified Complaint. Further, the investigative report confirms that the PTI had been secured as of April 27, 1995. There was evidence indicating that the tributary map considered in relation to this 1995 PTI initially did not include Ryan's property. Certified Record Item No. 14; Testimony of Ryan.

<sup>7</sup> As to the impact of these assertions on the jurisdictional issue of standing, see Finding of Fact No. 88 et seq., infra.

25. Among other things, Ryan claimed that his property was included in the Rocky Fork Outfall tributary area by virtue of the tributary map which accompanied a 1990 Permit to Install for the Rocky Fork Outfall Sewer. This, claimed Ryan, created a "property right" to dispose of "permitted waste into the Rocky Fork Out Fall[sic] Sewer". The implications of this assertion were not made clear at the hearing, except in the context of Ryan's general opposition to the concept of tributary realignment by local officials. (Certified Record Item No. 11.)

26. Second, Ryan requested that the Director conduct an investigation into Wetherholt's decision to realign the tributary area for the Rocky Fork Outfall in a manner which excluded properties to the south and west of his property. (Id.)

27. Finally, Ryan requested that the Director take action to "stay" Wetherholt's decision until the other property owners, as well as Ryan, could be afforded the opportunity to determine the impact of his decision on their respective properties. (Certified Record Item No. 11.)

28. In sum, the grievances set forth in the Verified Complaint were generated solely by Wetherholt's testimony at the OEPA hearing which concluded that Ryan's western property line generally coincided with the westernmost boundary of the Villages at Rocky Fork Outfall tributary area.

29. In addition, the major thrust of the Complaint was the assertion that the reinterpretation had the effect of excluding third parties from the Rocky Fork area.

30. Ryan's testimony at hearing also shed little light on the nature and extent to which he was affected, adversely or otherwise, by the inclusion of



these properties in the Northeast Sanitary Subtrunk Sewer tributary area to the west of Ryan's property.

31. At hearing, Ryan provided only unsubstantiated and generalized assertions that changes to one tributary area may impact other tributary areas. (Testimony of Ryan.)

32. In other words, we did not find any credible evidence to support Ryan's assertion that including property belonging to third parties to the south and west of his tract on the south side of Morse Road in the Northeast Sanitary Subtrunk Sewer had any specific cognizable impact on his Mercantile Building site.

33. The personal interest that Ryan was apparently asserting, absent from the Verified Complaint, was not made clear until the Commission heard the testimony of Ryan and Larry Korecko, the OEPA employee who investigated Ryan's Verified Complaint.

34. In particular, the investigative report prepared by Korecko in conjunction with the Verified Complaint crafted a colorable explanation for Ryan's status as a complainant. (Certified Record Item No. 14.)

35. It was Korecko who articulated that the delineation of sewer tributary area affects Ryan in that it determines what type of sewer system is adequate for his property. (Testimony of Korecko.)

36. If the tributary area for the Rocky Fork Outfall Sewer ends at the western property line of his property, Ryan would only be required to construct a sewer to his building, and not to the western edge of his property. As Wetherholt testified, this could be accomplished by the installation of a grinder pump and force main. (Testimony of Wetherholt; Certified Record Item No. 14;

Testimony of Korecko; Testimony of Ryan.)

37. Under this scenario, adjoining landowners to the west of the Ryan property would most likely have to construct sewers to the Northeast Sanitary Subtrunk area. (Id.; Certified Record Item 14.)

38. If, however, the tributary area extends past the western boundary of Ryan's property, he would most likely be required by OEPA to extend a sewer line to the western edge of his property so that the adjoining upstream landowners to the west (an area comprising approximately ten acres) could continue the sewer. (Id.)

39. In this situation, according to Wetherholt, the OEPA may require that Ryan undertake a more sophisticated solution such as the installation of a gravity sewer running the entire width of his property<sup>4</sup>. (Testimony of Wetherholt; Testimony of Ryan.)

40. In dismissing the Verified Complaint, the Director stated that the Ohio EPA does not approve sewer tributary areas in the Permit to Install process, and that the precise delineation of tributary areas for sanitary sewers approved by Ohio EPA is within the discretion of local authorities involved in the approved sewer projects. (Certified Record Item No. 1.)

41. Although our decision today falls short of a determination on the merits due to mootness, it is worth noting that both Wetherholt and Korecko testified that changes in tributary areas by local authorities for permitted sewer facilities is a common practice, and that the realignment which occurred

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<sup>4</sup> Given this testimony, the Commission was confused by Ryan's insistence that the fact that his western boundary roughly establishes the limits of the Rocky Fork Sewer tributary area, the only scenario relevant to the matter at hearing, operated to his detriment.

in this case would not routinely or necessarily invoke the jurisdiction of the OEPA.

42. In addition, Korecko's testimony, his investigative report and the letter dismissing the Verified Complaint, consistently concluded that the OEPA does not approve definitive sewer tributary areas or tributary maps in the permit to install process. (Testimony of Korecko; Certified Record Item Nos. 1, 14.)

43. As stated in the dismissal, "The precise delineation of areas tributary to sanitary sewers approved by Ohio EPA is within the discretion of the local authorities involved in the approved projects." (Certified Record Item No. 1; Testimony of Korecko; Testimony of Wetherholt; Certified Record Item No. 14.)

44. Although Korecko hinted that certain alterations to tributary areas with respect to permitted facilities may amount to a revision to the PTI, both Korecko and Wetherholt testified that such was not the case here. (Testimony of Korecko; Wetherholt.)

45. As Korecko concluded in his investigative report, if the Sewer Data Sheets submitted with respect to a sewer system reasonably indicate that a proposed facility has adequate capacity, OEPA's inquiry ends. (Certified Record Item No. 14.)

46. Ryan did not cite to any provision of law that conflicts with the Director's conclusion that the delineation of the precise boundaries of a tributary area is not within the Director's authority.

47. Ryan did not offer any evidence that the alteration to the tributary area so significantly affected capacity that the Director may be required to assess the ability of the Gahanna sewer system to adequately convey sewage from the additional areas.

48. At hearing, the Commission was presented only with the conclusory statements by Ryan that alteration of tributary area falls within the general authority of the Director as the permitting authority under R.C. Sec. 6111.03. (Testimony of Ryan.)

49. There was no allegation in the Verified Complaint that the reinterpretation of the tributary area was unlawful, but merely that it was done by Wetherholt without a public hearing.

50. Although there was a suggestion that the tributary area alteration differed from the tributary map submitted with the PTI for the Rocky Fork Outfall Sewer, this statement concluded with a request that the Director merely investigate Wetherholt's decision in order to allow Ryan the opportunity to assess the impact of the realignment on him and other property owners.

51. At no point in the Verified Complaint did Ryan allege that Wetherholt lacked the authority to realign the tributary areas.

52. It was only in his Notice of Appeal that Ryan alleged for the first time that Wetherholt's decision to alter the Rocky Fork Outfall tributary area was not within the scope of his authority.

53. We are not persuaded by Ryan's testimony at hearing that the Verified Complaint implicitly questioned Wetherholt's authority, or that it would be fair for the Director to glean such an intent from the wording of the Verified Complaint.

54. Assuming, arguendo, that Wetherholt did exceed his authority as a public official of Gahanna, Ryan presented no credible arguments to support his contention that the Director had jurisdiction over Wetherholt's decision, or that Wetherholt's decision constituted a violation of Ohio's environmental laws.

55. Second, again in an effort to assert the interests of third parties, Ryan alleged in his Notice of Appeal that alteration of the tributary area by Wetherholt conflicted with the authority of the Jefferson Township Water and Sewer District by reducing the service area for the Rocky Fork Outfall which the Township "is entitled to use."

56. This issue was not pursued at the hearing, and no evidence was presented to support a claim of any negative impact on Jefferson Township by any party in interest with respect to that issue.

57. Third, Ryan alleged that the dismissal of the Verified Complaint subjected him to "unrealistic, unnecessary, [and] unreasonable" burdens associated with installing an irregular sewer on his premises.

58. On this issue, there was no evidence presented at hearing to support the claim that the effect of the dismissal requires any action whatsoever by Ryan, let alone that it dictated the precise manner in which Ryan was to handle his sewage or connect to a sewer system.

59. Finally, Ryan alleged in his Notice of Appeal that the alteration of the tributary area constituted a revision to the PTI for the Rocky Fork Outfall Sewer that was not approved by the Director.

60. With the possible exception of the allegation that the alteration of the tributary area constituted an unlawful revision to the Rocky Fork Outfall PTI, none of the assignments of error in the Notice of Appeal were set forth in the Verified Complaint.

61. Thus, none of the remaining allegations in the Notice of Appeal were presented to the Director in the context of the Verified Complaint, nor related to an issue investigated by him in the Verified Complaint process.

62. Neither the Verified Complaint nor the Notice of Appeal contained any allegation that any portion of the sewer had been constructed without a PTI.

63. This issue, which Ryan attempted to raise at hearing, was, therefore, not considered by the Director relative to his investigation and dismissal of the Verified Complaint.

64. Because pre-hearing pleadings filed by Appellant revealed that he intended to pursue contract, annexation, inability to comply and permitting issues, as well as other issues that were not raised in the Verified Complaint, the Commission issued an order *in limine* restricting the presentation of evidence on any issues unrelated to the dismissal of the Verified Complaint.

65. Despite this ruling, the Commission afforded Ryan great latitude at the hearing and allowed abundant testimony, over the objection of the Director, aimed at providing background information relative to the dismissal of the Verified Complaint<sup>9</sup>.

66. At the hearing in this matter, the Director presented ample evidence to support the lawfulness and reasonableness of the Director's decision to dismiss the verified complaint.

67. However, the Director presented evidence on a myriad of facts which developed after the filing of Ryan's Notice of Appeal, some of which have particular bearing on the viability of this matter and which obviate the necessity of deciding the merits of the Director's decision to dismiss.

68. Specifically, the Director presented the affidavit of Wetherholt, to which Appellant stipulated for admission, which indicated that the tributary map

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<sup>9</sup> Relative to the amount of latitude granted the parties in the prosecution of this case, we feel both sides were equally indulged. In this regard, the Commission indulged both sides equally.

for the Villages at Rocky Fork had been modified in July, 1996.

69. Both the Plan and Wetherholt's testimony indicate that additional properties lying to the south of Morse Road and to the west and south of Ryan's property now lie within the tributary area for the Rocky Fork sewer. (Appellant's Exhibit 3.)

70. A copy of the 1996 Sanitary Sewer Plan referred to by Wetherholt was annexed to his affidavit, and included the signatures of both Columbus and Gahanna officials, dated on various dates in July, 1996. (Id., at Attachment 1.)

71. Wetherholt's testimony further indicated that a sewer line had been installed to within approximately 5 feet of Ryan's property lying to the south of Morse Road at the location referred to as "Manhole No. 1" on Appellant's Exhibit 3. (Testimony of Wetherholt; Director's Motion for Summary Affirmance, Affidavit of Karl Wetherholt.)

72. Further, Ryan confirmed Wetherholt's belief expressed in his affidavit that Ryan had been granted an easement by the New Albany Company to connect to a sewer within the Rocky Fork tributary area pursuant to a judicial settlement. (Testimony of Ryan.)

73. Thus, the testimony at the hearing in this matter established conclusively that certain of the properties that Wetherholt had originally indicated were outside of the Rocky Fork Outfall tributary area located to the south and west of Ryan's property at the OEPA hearing are now included within the tributary area for the Rocky Fork Outfall Sewer.

74. In other words, the precise situation which gave rise to Ryan's complaint; i.e., the exclusion of properties lying to the south and west of his property from the Rocky Fork Outfall, was reversed in 1996 with the most recent

reinterpretation of the Rocky Fork Outfall Sewer tributary area by Wetherholt.

75. Even if Ryan is not satisfied with the delineation as it stands in the 1996 tributary map, the fact remains that the Verified Complaint was directed to a situation that has been materially altered since the dismissal order under appeal in this matter, and presents a tributary configuration that the Director never had the opportunity to review in the context of Ryan's Verified Complaint.

76. In deciding to dismiss the Verified Complaint, the Director never had before him the 1996 tributary map which has supplanted in all respects Wetherholt's 1995 delineation offered at the OEPA hearing.

77. The parties are in agreement that the delineation about which Wetherholt testified at the OEPA hearing has been superseded by the 1996 delineation that includes properties to the south and west of Ryan's property, and that the new delineation was depicted on a map approved by both the City of Columbus and the City of Gahanna in August, 1996.

78. The parties also appear to be in agreement that Ryan now possesses the property rights necessary to connect to the Rocky Fork sewer.

79. At hearing, Ryan attempted to interject his contention that the sewer to which he is now provided access via the 1996 map is not properly permitted. However, the Commission ruled this evidence inadmissible in some instances, and gave it virtually no weight to the extent it was offered and admitted in Ryan's testimony.

80. In any event, neither the Verified Complaint nor the Notice of Appeal contained any allegation about the lack of a PTI for this segment of the Rocky Fork sewer.

81. Although not essential for our decision here, the Commission would



like to include findings regarding the sufficiency of the Verified Complaint.

82. Revised Code Section 3745.08(A) states, in pertinent part:

(A) \* \* \* [A]ny person who is or will be aggrieved or adversely affected by a violation which has occurred, is occurring, or will occur may file a complaint, in writing and verified by the affidavit of the complainant . . . alleging that another person has violated, is violating, or will violate any law, rule, standard, or order relating to . . . water pollution . . . or . . . that the person has violated, is violating or will violate the conditions of the license, permit, variance, or plan approval. [R.C. Section 3745.08(A).]

83. The Verified Complaint in this matter, although notarized, was not accompanied by a verifying affidavit made upon the personal knowledge of Ryan. (Certified Record Item No. 11.)

84. There is no averment that the facts set forth in the complaint were based on the personal knowledge of Ryan, or were verified by him as the affiant. (Id.)

85. In addition, the notarized complaint contains at least two conclusory statements regarding both the legal effect of the claimed revision to the tributary area (i.e., the alleged deprivation of a "property right"), as well as an apparent determination of the acreage now encompassed in the tributary area for which no foundation for Ryan's expertise had been established (i.e., "It appears that at least 550 acres has (sic) been added to the tributary area as . . . well as the possible elimination of tributary area north and south of Morse Road". (Id.)

86. Finally, there is no allegation in the complaint that any provision of law over which the Director has jurisdiction was, is or would be violated. Specifically, there is no averment that any provision of the water pollution laws was, or is, being violated by any person or entity.

87. Thus, the Commission has serious concerns about the adequacy of the Verified Complaint, and whether it merited the Director's consideration at the outset.

88. On the issue of standing, although not pursued in a jurisdictional motion or necessary to our decision, the Commission is concerned that there is no allegation whatsoever in the Verified Complaint that Ryan had been aggrieved or adversely affected by the tributary area change.

89. In fact, the focus of the vast majority of the Complaint was the impact that the realignment may have on other property owners to the south and west of the Ryan property; i.e., that they implicitly may have been deprived of a "property right"; that they should be notified of Wetherholt's "administrative decision," and given an opportunity to assess the impact of that decision.

90. To the best of the Commission's ability to interpret Ryan's testimony, Ryan also indicated that he believed that realignment of tributary areas generally would impact other jurisdictions and/or deplete the capacity of the sewer system in a way that may not allow him to ultimately connect to the sewer.

91. Only incidentally does Ryan allege that the decision may relate to the availability of sewer to his properties lying to the north and south of Morse Road, but he did not specify what, if any, adverse impact may be experienced by him as a property owner because of the realignment.

92. Therefore, Ryan's Complaint could fairly be construed as a request to investigate a local decisional process predominantly for the purpose of protecting third party interests.

93. Aside from Ryan's questionable standing on these issues, these

concerns were not supported by evidence at hearing.

CONCLUSIONS OF LAW

1. By analogy to longstanding judicial opinions, the Board is not empowered to review questions unless there is an actual, live controversy to adjudicate. Miner v. Witt (1910) 82 Ohio St. 237; Tschantz v. Ferguson (1991) 57 Ohio St. 3d 131.

2. In assessing whether a matter has become moot, the Commission will examine the circumstances underlying an appeal in order to determine if there is any meaningful substantive relief that can be granted. If the Commission determines that its ruling will be strictly advisory in nature and that no meaningful relief can be granted, the Commission will dismiss the appeal. Citizens Lobby for Environmental Action Now, Inc., et al. v Schregardus, Case No. EBR 092346-312347, dec'd. May 19, 1994; C/F Water v. Schregardus, Case No. EBR 112579, dec'd. October 27, 1994; Ormet Primary Aluminum Corp., v. Schregardus, Case No. EBR 562933, dec'd. June 21, 1995.

3. Where, as here, the circumstances underlying the appeal have changed so significantly that the facts giving rise to the controversy are no longer in existence, we cannot find that a live controversy capable of meaningful resolution remains. Clark County Solid Waste Management District v. Schregardus, C.A. Case No. 94 CA-75, Clark County, May 17, 1995; State ex rel. Beacon Journal Publishing Co. v. Donaldson (1992) 63 Ohio St. 3d 173, citing Weinstein v. Bradford (1975) 423 U.S. 147, 149.

4. In other words, even if the Commission were to find that the Director's action in this matter was unlawful or unreasonable, it would have no bearing on the fact that the tributary area has now been officially changed to

include areas to the south and west of Ryan's property within the Rocky Fork Outfall.

5. It is also a fair statement that the exclusion of the properties lying to the south and west of that tributary area was the primary, if not the sole, motivating factor appearing on the face of Ryan's Verified Complaint.

6. Even if the Commission were to assume that the alteration of the tributary area that gave rise to the Verified Complaint was a violation of the Gahanna Sewer PTI, the fact remains that the tributary has now changed, and the Director has never reviewed the 1996 map in the context of Ryan's Verified Complaint.

7. Therefore, there has been no act or action of the Director with respect to the 1996 tributary map over which the Commission would have jurisdiction.

8. Conversely, if we were to determine that the Director's action dismissing the Verified Complaint was both lawful and reasonable, it would not affect in any way Wetherholt's and the City of Columbus's subsequent determination that the additional properties to the south and west of Ryan's property are, in fact, presently within the Rocky Fork tributary area.

9. In sum, a final decision of this Commission could neither afford further relief to Ryan, nor have any bearing on the fact that subsequent official actions have significantly altered the scenario giving rise to the appeal.

10. The Director's dismissal of the Verified Complaint related to a scenario that has been superseded and has no present effect whatsoever.

11. Furthermore, it is only logical that the Commission cannot fairly consider the lawfulness of the Director's dismissal against the backdrop of facts

that did not even come into existence until long after the action at issue. To this extent, we lack jurisdiction.

12. Thus, it is important to reemphasize that this appeal relates to a narrow and nonviable set of facts which formed the basis for the Director's dismissal of a complaint that requested an investigation into, and stay of, a local official's actions defining tributary area.

13. This case is not about whether the 1996 tributary map constitutes a revision to Gahanna's PTI. And, it is not about whether particular sewers within the Rocky Fork area have secured all of the necessary permits.

14. This case is simply a request for the Commission to review a decision that was based on expired facts. The appeal is, therefore, moot.

15. Although we do not need to reach the issue of the adequacy of the Verified Complaint, the Commission feels compelled to note that it has concerns about the adequacy of the complaint in light of the Court of Appeals' decision in Martin v. Schregardus, et al., (September 30, 1996), Franklin County App. No. 96APH02-138, unrept'd.

16. Initially, we note that the Verified Complaint was in the form of a narrative, notarized letter, and was not accompanied by a verifying affidavit of the complainant, Ryan, as required in Martin, supra.

17. Even if we were to interpret the form of the notarized letter as sufficient to satisfy the appellate court's requirement in Martin, supra, that a verified complaint be accompanied by a verifying affidavit, we cannot find that Ryan's notarized correspondence satisfies the condition that the affidavit state and indicate in the averments that the complaint is made upon the personal knowledge of the affiant.

18. We are further concerned with Ryan's statements in the affidavit which appear to surpass his expertise. In short, there is no allegation in the affidavit that Ryan is competent to testify as to (1) the legal conclusion that the realignment of the tributary area constituted a deprivation of a property right, or (2) the effect of the realignment on the number of acres added or deleted to/from the tributary area.

19. Finally, although we do not need to reach the issue of Ryan's standing vis-a-vis the Verified Complaint, we have serious questions concerning his ability to advance the interests of third parties, whether they be those of the adjoining landowners or the local sewer district.

20. Indeed, it appears likely that the Director may have had the authority to dismiss the Verified Complaint on either of these two additional grounds.

21. For all of the foregoing reasons, the Commission hereby rules to DISMISS the instant appeal on the ground of mootness.

#### FINAL ORDER

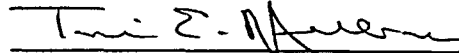
The Commission hereby rules to DISMISS the instant appeal on the ground of mootness.

The Commission, in accordance with Section 3745.06 of the Revised Code and 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. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Commission by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

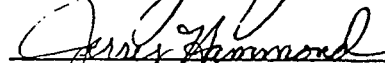
THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION



Toni E. Mulrane, Chairman



Mary Kay Finn, Vice-Chairman



Jerry Hammond, Member

Entered into the Journal of  
the Commission this 10<sup>th</sup>  
day of April, 1997.

COPIES SENT TO:

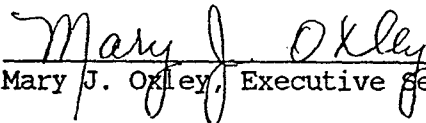
JAMES M. RYAN  
DONALD SCHREGARDUS, DIRECTOR  
KARL WETHERHOLD, CITY MANAGER  
Steve J. Edwards, Esq.  
Michael E. Idzkowski, Esq.  
Lori A. Massey, Esq.

[CERTIFIED MAIL]  
[CERTIFIED MAIL]  
[CERTIFIED MAIL]

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND FINAL ORDER  
Case No. EBR 253363

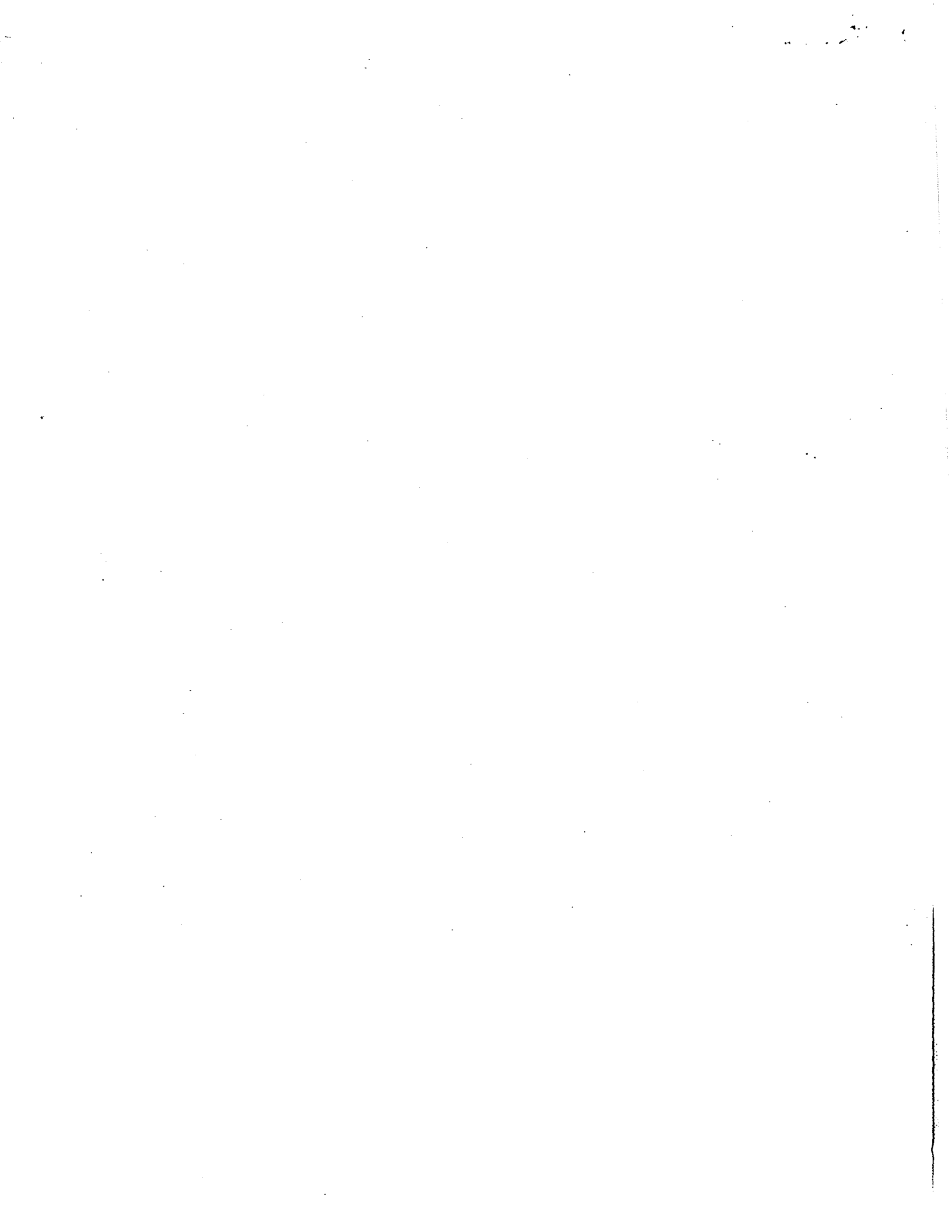
C E R T I F I C A T I O N

I hereby certify that the foregoing is a true and accurate copy of the  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in JAMES M. RYAN V.  
DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL. Case No. EBR  
253363 entered into the Journal of the Commission this 10<sup>th</sup> day of  
April, 1997.

  
Mary J. Oxley, Executive Secretary

Dated this 10<sup>th</sup> day of  
April, 1997, at Columbus, Ohio.







Attorney General  
Betty D. Montgomery

MEMORANDUM

To: All EES Attorneys

From: Mike Idzkowski

Subject: James Ryan ERAC Appeal Dismissal For Mootness

Date: April 11, 1997

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Attached is a recent Environmental Review Appeals Commission decision involving an appeal of the Director's dismissal of James Ryan's verified complaint. The Environmental Review Appeals Commission ruled to dismiss Ryan's ERAC appeal on the ground of mootness. The Commission determined that the circumstances underlying this appeal had changed and that a "live controversy capable of meaningful resolution" did not remain. The Commission pointed to an affidavit of the City of Gahanna's Engineer, Karl Wetherholt, and a 1996 Sanitary Sewer Plan attached to the affidavit, as the central basis of its determination of mootness. That affidavit and plan showed that the facts of the case had changed significantly since Ryan filed his verified complaint, e.g., Ryan's property had been annexed by the City of Gahanna, the property was shown to be located in the sewer tributary area and Gahanna had extended its sewer to within five feet of Ryan's property. The Commission noted that there had been no act or action of the Director with respect to the 1996 tributary map over which the Commission would have jurisdiction and "[i]n sum, a final decision of this Commission could neither afford further relief to Ryan, nor have any bearing on the fact that subsequent official actions have significantly altered the scenario giving rise to the appeal. The Director's dismissal of the Verified Complaint related to a scenario that has been superseded and has no present effect whatsoever."

At the same time, the Commission found that the Director presented "ample evidence at the hearing to support the lawfulness and reasonableness of the Director's decision to dismiss the verified complaint." Further, the Commission expressed concerns about both the adequacy of the complaint in light of the recent Franklin County Court of Appeal's decision in Martin v. Schregardus, et al., (September 30, 1996), Franklin County App. No. 96APH02-138, unreported, and Ryan's standing to advance the interests of third parties such as adjoining landowners and the local sewer district. In reaching this decision, the Commission rejected Ryan's arguments, discounted his testimony and understood the issues well.