

ORIGINAL

IN THE SUPREME COURT OF OHIO

BOARD OF COMMISSIONERS OF
FAIRFIELD COUNTY, OHIO,

Appellant,

v.

SCOTT J. NALLY, DIRECTOR OF
ENVIRONMENTAL PROTECTION,

Appellee.

: Case No. 2013-1085
:
: On Appeal from the Franklin County Court
: of Appeals, Tenth Appellate District
: (Court of Appeals Case No. 11AP-508)
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:
:

LIST OF ADDITIONAL AUTHORITIES RELIED UPON DURING ORAL ARGUMENT
BY APPELLANT BOARD OF COMMISSIONERS OF FAIRFIELD COUNTY, OHIO

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FILED
JUN 18 2014
CLERK OF COURT
SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing List of Additional Authorities Relied Upon During Oral Argument of Appellant Board Of Commissioners Of Fairfield County, Ohio was sent via regular U.S. Mail this 18th day of June, 2014 upon the following counsel:

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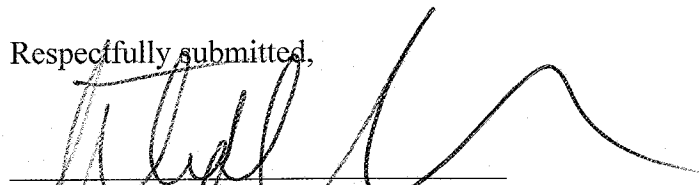
LIST OF ADDITIONAL AUTHORITIES

Pursuant to Supreme Court Rule of Practice 17.08, Appellant Board of Commissioners of Fairfield County, Ohio hereby gives notice that it may rely upon the following additional authority during oral argument:

Dayton Power and Light Company, et al. v. Nally, Director of Environmental Protection, Case Nos. ERAC 13-296712, 13-256713, 13-576714, 13-316715, 13-776717, 13-666718 (Ruling on Appellants' Motion for Partial Summary Judgment) (June 18, 2014).

A copy of this additional authority is attached for the Court's convenience.

Respectfully submitted,



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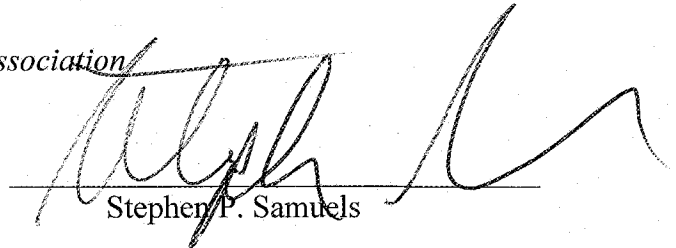
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4826-9809-1034.v1

4818-8967-4011, v. 1

**BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO**

THE DAYTON POWER AND LIGHT	:	Case Nos. ERAC 13-296712
COMPANY,	:	13-256713
	:	13-576714
and	:	13-316715
	:	13-776716
BUCKEYE POWER, INC.,	:	13-256717
	:	13-666718
and	:	
DUKE ENERGY OHIO,	:	
	:	
and	:	
FIRSTENERGY GENERATION, LLC,	:	
	:	
and	:	
OHIO POWER COMPANY,	:	
	:	
and	:	
OHIO VALLEY ELECTRIC,	:	
CORPORATION,	:	
	:	
Appellants,	:	
	:	
v.	:	
	:	
SCOTT NALLY, DIRECTOR OF	:	
ENVIRONMENTAL PROTECTION,	:	
	:	
Appellee.	:	

Ruling on Appellants' Motion for Partial Summary Judgment

Rendered on June 18, 2014

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Appellant The Dayton Power and Light Company

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Protection

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) on a February 1, 2013 Notice of Appeal filed by Appellant The Dayton Power & Light Company (“DP&L”), and a February 6, 2013 Notice of Appeal filed by Appellants Buckeye Power, Inc.; The Dayton Power & Light Company; Duke Energy Ohio; FirstEnergy Generation, LLC; Ohio Power Company; and Ohio Valley Electric Corporation (collectively “Appellants”). ERAC No. 13-296712, Case File Item A; ERAC Nos. 13-256713 through 13-666718, Case File Item A.

{¶2} Appellants challenge the January 7, 2013 issuance of a National Pollutant Discharge Elimination System (“NPDES”) permit by Scott Nally, Director of Environmental Protection (“Director,” “Ohio EPA,” “Agency”) to DP&L for its J.M. Stuart Station power plant. ERAC No. 13-296712, Case File Item A; ERAC Nos. 13-256713 through 13-666718, Case File Item A.

{¶3} On April 18, 2014, Appellants filed a Motion for Partial Summary Judgment to Vacate the Human Health Temperature Standard in the Dayton Power and Light Company’s J.M. Stuart Station NPDES Permit (“Motion”). In their Motion, Appellants argued that the 110-degree maximum effluent temperature limitation

contained in the permit is unlawful and unreasonable. Appellants requested that the Commission vacate and remand the NPDES permit in its entirety. Case File Item 4H.

{¶14} The Director filed a Response on May 6, 2014, and Appellants filed a Reply on May 13, 2014. Case File Items 4U, 4X. The Commission held an oral argument on Appellants' Motion on June 4, 2014.

{¶15} Based upon the pleadings and the applicable statutes, regulations, and case law, the Commission issues the following Findings of Fact and Conclusions of Law and hereby GRANTS Appellants' Motion for Partial Summary Judgment.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the relevant facts and the parties' arguments

{¶16} J.M. Stuart Station ("Stuart Station") is a 2,400 megawatt coal-fired power plant operated by DP&L and is located along the Ohio River in Aberdeen, Ohio. Three of the four power-generating units at Stuart Station utilize a "once-through" cooling system. The once-through system operates by pumping water from the Ohio River through the plant, where it absorbs heat generated by the facility. The heated water is ultimately discharged back to the Ohio River through two outfalls located within a discharge canal off the north bank of the Ohio River. Case File Item 4H.

{¶17} The NPDES permit at issue in this appeal contains two alternative sets of requirements regulating thermal discharge from the plant's once-through cooling system. Both sets contain two distinct temperature components; one component is

¹ The Commission separately rules on Appellee Director's Motion for Partial Summary Disposition. See Ruling on Director's Motion for Partial Summary Disposition, ERAC Nos. 13-256713 – 6718 (June 18, 2014).

designed to protect aquatic life, and the other is designed to protect human health.² To protect aquatic life, each alternative specifies average and maximum allowable temperatures, and to protect human health, each alternative imposes certain temperature-based conditions. Case File Items 4G, 4H, 4U.

{18} Under the first alternative, the NPDES permit requires DP&L to meet various outside mixing zone³ temperature limitations at outfalls 001 and 002, the outfalls associated with the once-through cooling system. Specifically, the permit requires DP&L to meet the aquatic life temperature criteria applicable to tributaries of the Ohio River. The relevant temperature limitations, as stated in the permit, are set forth below:

Month	Monthly Average (F)	Daily Maximum (F)
January	47	52
February	47	52
March	52.5	59
April	62	70
May	68.5	76
June	78	85
July	82	85
August	82	85
September	77.5	85

² Under either alternative, the permit also imposes a maximum thermal discharge rate of 11,000 million BTU/hr. ERAC No. 13-296712, Case File Item A; ERAC Nos. 13-256713 through 13-666718, Case File Item A.

³ "Thermal mixing zone' means that portion of a water body into which waste heat is discharged and assimilated, and within which the average and maximum daily average temperatures do not apply, except as prescribed by this chapter." Ohio Adm.Code 3745-1-02(B)(78).

October	68	76
November	60	65
December	47	52

ERAC No. 13-296712, Case File Item A; ERAC Nos. 13-256713 through 13-666718, Case File Item A.

{¶9} Addressing human health, the first alternative requires DP&L to restrict public access to the discharge canal when effluent temperatures exceed 110 degrees. ERAC No. 13-296712, Case File Item A; ERAC Nos. 13-256713 through 13-666718, Case File Item A.

{¶10} Under the second alternative, the NPDES permit requires DP&L to relocate the two outfalls for the once-through cooling system such that the system bypasses the canal and discharges directly to the Ohio River. The permit does not contain a table of average and maximum temperatures for the Ohio River. However, the parties do not dispute that as currently written, the permit requires DP&L to comply with the following final outside mixing zone aquatic life temperature criteria for the Ohio River:

Month	Monthly Average (F)	Daily Maximum (F)
January	45	50
February	45	50
March 1-15	51	56
March 16-31	54	59
April 1-15	58	64
April 16-30	64	69
May 1-15	68	73
May 16-31	75	80

June 1-15	80	85
June 16-30	83	87
July	84	89
August	84	89
September 1-15	84	87
September 16-30	82	86
October 1-15	77	82
October 16-31	72	77
November	67	72
December	52	57

Case File Items 4G, 4H, 4U; Ohio Administrative Code ("Adm.Code") 3745-1-32, Table 32-3.

{¶11} Regarding human health under the second alternative, the permit requires DP&L to restrict maximum effluent temperature to 110 degrees at outfall 021, which is a calculated outfall at the Ohio River. Case File Items 4G, 4H, 4U.

{¶12} In their Motion, Appellants argue that the Director's inclusion of the 110-degree "at the pipe" effluent temperature limitation (under the second alternative) is unlawful and unreasonable. Appellants contend that the 110-degree requirement, in effect, functions to set a temperature-based human health water quality standard. And, because the applicable water quality regulations for the Ohio River do not include temperature-based human health criteria, Appellants conclude the Director acted unlawfully and unreasonably by setting the 110-degree effluent temperature limitation (and corresponding compliance schedule) in DP&L's NPDES permit. Case File Item 4H.

{¶13} Initially, Appellants note that the procedure for adopting water quality standards is set forth in Revised Code (“R.C.”) 6111.041, which provides in pertinent part as follows:

[T]he director of environmental protection shall adopt standards of water quality to be applicable to the waters of the state. Such standards shall be adopted * * * in accordance with Chapter 119. of the Revised Code. * * *

Thus, pursuant to R.C. 6111.041, Appellants argue that water quality standards must be adopted in accordance with the rule-making procedures set forth in R.C. Chapter 119. Case File Item 4H.

{¶14} Ohio EPA first adopted specific water quality standards for the Ohio River in 1985.⁴ The regulation has been amended several times since its original adoption, and the current version of the Ohio River water quality standards, which became effective on December 30, 2002, includes specific limitations for more than 150 chemicals identified as harmful to human health. It also includes aquatic life temperature criteria. Significantly, it is undisputed that the regulation does *not* include a human health temperature criterion.⁵ Ohio Adm.Code 3745-1-32, Table 32-2; Case File Items 4H, 4U.

{¶15} Appellants argue that the 110-degree effluent temperature limitation, as included in DP&L’s NPDES permit, essentially functions to set a temperature-based human health water quality standard. In support of their contention, Appellants note

⁴ Former Ohio Adm.Code 3745-1-32, effective April 4, 1985.

⁵ The Commission notes that in April 2013, Ohio EPA filed the following proposed amendment to Ohio Adm.Code 3745-1-32 with the Joint Committee on Agency Rule Review (“JCARR”):

(5) Temperature. The maximum temperature at any location where public access is possible shall not exceed one hundred and ten degrees Fahrenheit to protect human health caused by exposure resulting from water contact.

Proposed amendment to Ohio Adm.Code 3745-1-32, available at http://epa.ohio.gov/Portals/35/rules/draft_3745-1-32_apr13.pdf

that the Ohio River Valley Water Sanitation Commission (“ORSANCO”)⁶ adopted a generally-applicable human health temperature standard in 2012. The ORSANCO standard states in pertinent part as follows:

TEMPERATURE: The maximum temperature at any location where public access is possible shall not exceed 110 degrees F to protect human health caused by exposure resulting from water contact.

Case File Item 4H.

{¶16} In addition, Appellants cite Ohio EPA’s December 2012 response to comments, which reads, “to prevent temporary exceedences of recreation standards, we have included a temperature maximum limit of 110°F. This is the new ORSANCO criterion * * *.” Case File Item 4T, Fulks Depo., Ex. 4, at p. 33 (emphasis added); Certified Record Item 11.

{¶17} Appellants argue that ORSANCO standards are intended to be promulgated by member states as state water quality standards, rather than simply inserted into permits as was done here.

{¶18} As noted above, Ohio EPA has not promulgated a specific human health temperature criterion, 110-degree or otherwise, in its water quality standards for the Ohio River. Thus, Appellants contend that Ohio EPA bypassed the rule-making requirements set out in R.C. 6111.041 by inserting the ORSANCO-derived 110-degree standard as a term in the NPDES permit. Because the applicable water quality regulations lack a human health criterion for temperature, Appellants conclude the Director exceeded his authority and acted unlawfully and unreasonably by setting the 110-degree effluent temperature limitation in the NPDES permit. Case File Item 4H.

⁶ In 1948, the states of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia, and West Virginia entered into a compact creating ORSANCO for the purpose of improve water quality in the Ohio. See generally, About Us, <http://orsanco.org/about> (last visited May 8, 2014).

{¶19} In response, the Director argues that the 110-degree effluent temperature limitation is a lawful and reasonable exercise of his authority under R.C. 6111.03(J)(3) and Ohio Adm.Code 3745-33-05(A)(1)(a).

{¶20} Revised Code 6111.03(J)(3) sets forth the Director's authority to impose terms and conditions in NPDES permits and provides in pertinent part as follows:

(3) To achieve and maintain applicable standards of quality for the waters of the state adopted pursuant to section 6111.041 of the Revised Code, the director shall impose, where necessary and appropriate, as conditions of each permit, water quality related effluent limitations * * * and, to the extent consistent with that act, shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from those wastes and to evidence relating to conditions calculated to result from that action and their relation to benefits to the people of the state and to accomplishment of the purposes of this chapter.

R.C. 6111.03(J)(3).

{¶21} Similarly, Ohio Adm.Code 3745-33-05(A)(1)(a) governs terms and conditions the Director must include in NPDES permits. It provides as follows:

(A) Final limitations.

(1) * * * [T]he director shall determine and specify in the permit the maximum levels of pollutants that may be discharged to ensure compliance with:

(a) Applicable water quality standards; * * *

* * *

Ohio Adm.Code 3745-33-05(A)(1)(a).

{¶22} In his response to the Motion, the Director argues that the 110-degree effluent temperature limitation is a lawful and reasonable exercise of his authority under R.C. 6111.03(J)(3) and Ohio Adm.Code 3745-33-05(A)(1)(a) because the restriction is necessary and appropriate to protect *existing* applicable water quality standards. Specifically, the Director suggests that the 110-degree limitation is not an

independent water quality standard required to be promulgated as a rule, but rather a term calculated to protect the existing narrative water quality standard contained in Ohio Adm.Code 3745-1-04(D), which states:

The following general water quality criteria shall apply to all surface waters of the state including mixing zones. To every extent practical and possible as determined by the director, these waters shall be:

* * *

(D) Free from substances entering the waters as a result of human activity in concentrations that are toxic or harmful to human, animal or aquatic life and/or are rapidly lethal in the mixing zone;

* * *

Ohio Adm.Code 3745-1-04(D); Case File Item 4U.

{¶23} Contrary to Appellants' assertion, the Director contends that the 110-degree effluent temperature limitation is not a rote recitation of the ORSANCO standard. Instead, the Director contends the term is a "best professional judgment" "translation" from the narrative criteria contained Ohio Adm.Code 3745-1-04(D) to a specific numeric value. Although the Director concedes that the Agency may have referred to the ORSANCO standard in developing its own figure, the Director argues that Ohio EPA engaged in its own independent analysis before arriving at a figure of 110 degrees.⁷ Accordingly, the Director argues that the 110-degree limitation was appropriate and necessary to protect human health. Case File Item 4U.

⁷ In support of its contention that Ohio EPA engaged in its own independent analysis before arriving at a figure of 110 degrees, the Director cites primarily the deposition testimony of Paul Novak, Manager of Permitting and Compliance, Ohio EPA Division of Surface Water. However, the Commission notes the Director does not identify any internal documentation from the relevant time period establishing that the 110-degree figure arose from the Agency's own independent analysis, rather than from an implementation of the ORSANCO standard. Case File Item 4U.

{¶24} The Director further contends that even if the 110-degree limitation constitutes a separate water quality standard, the term is still lawful under Ohio Adm.Code 3745-33-05(A)(2). Case File Item 4U.

{¶25} Ohio Adm.Code 3745-33-05(A)(2) provides as follows:

(2) Prior to promulgation of regulations by the administrator setting forth effluent standards or limitations, or standards of performance pursuant to the act, the director may impose standards, limitations, or conditions in an Ohio NPDES permit necessary to ensure compliance with Chapter 6111. of the Revised Code and the act.

(Emphasis added).

{¶26} Thus, the Director postulates that Ohio's water quality regulations contemplate a situation in which Ohio EPA may implement a water quality standard without first promulgating the standard as a rule pursuant to R.C. 6111.041. Case File Item 4U.

{¶27} Finally, the Director maintains that a temperature-based human health effluent limitation is justified for the Stuart Station facility because the temperature of the discharge from Stuart Station's once-through cooling system is higher than that of similarly-situated facilities. The Director concludes that the risk of harmful thermal discharges is greater at Stuart Station than at other facilities, and therefore, Ohio EPA was justified in imposing a site-specific temperature based limitation calculated to ensure compliance with the narrative human health criteria contained in Ohio Adm.Code 3745-1-04(D). Case File Item 4U.

II. Summary Judgment Standard

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

{¶29} Civ.R. 56(C) states in pertinent part:

* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * *

{¶30} Thus, under Civ.R. 56, “[t]he moving party has the burden of showing that there is no genuine issue as to any material fact as to critical issues.” *Stockdale v. Baba*, 153 Ohio App.3d 712, 2003-Ohio-4366, 795 N.E.2d 727, at ¶23. However, “an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response * * * must set forth specific facts showing that there is a genuine issue for trial.” *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65 (1978). All doubts and evidence should be construed against the moving party, and “[s]ummary judgment may not be rendered unless it appears that reasonable minds can come to but one conclusion and that conclusion is adverse to the part[y] against whom [the] motion is made.” *Stockdale*, 2003-Ohio-4366, at ¶32.

{¶31} “If the moving party has satisfied its initial burden under Civ.R. 56(C), then the nonmoving party has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial. If the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *State v. Pryor*, Franklin App. No. 07AP-90, 2007 Ohio 4275 (Aug. 21, 2007), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

III. ERAC Standard of Review

{¶32} Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. The statute provides in relevant part as follows:

If, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

R.C. 3745.05.

{¶33} The term “unlawful” means “that which is not in accordance with law,” and the term “unreasonable” means “that which is not in accordance with reason, or that which has no factual foundation.” *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977).

{¶34} The Commission is required to grant “due deference to the Director’s ‘reasonable interpretation of the legislative scheme governing his Agency.’” *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274 (2005), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State ex rel. Celebrezze v. National Lime & Stone Co.*, 68 Ohio St. 3d 377 (1994); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App. 3d 331 (2nd Dist. 1984). Administrative agencies possess special expertise in specific areas and are tasked with implementing particular statutes and regulations. *National Wildlife Federation v. Korleski*, 2013-Ohio-3923 (10th Dist. 2013), ¶56. Thus, such agencies are entitled to considerable deference when reviewing their interpretation of their own governing rules and regulations. *Id.*

{¶35} Deference granted to an agency’s interpretation of its administrative regulations is not, however, without limits. See e.g., *B.P. Exploration and Oil, Inc. v. Jones*, ERAC Nos. 184134-36 (March 21, 2001). The Commission has consistently held that an agency’s interpretation of its governing statutes and regulations must not be “at variance with the explicit language of the [statutes or] regulations.” *Id.*

{¶36} Further, the Commission's standard of review does not permit ERAC to substitute its judgment for that of the Director as to factual issues, and it is well-settled that there is a degree of deference for the agency's determination inherent in the reasonableness standard. *National Wildlife Federation v. Korleski*, 2013-Ohio-3923 (10th Dist. 2013), ¶48. "It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable." *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977). Accordingly, "the ultimate factual issue to be determined by [ERAC] upon the de novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether [ERAC] would have taken the same action." *Id.*

{¶37} Similar to the deference afforded the Director's regarding interpretation of administrative regulations, deference toward an agency's factual determinations is also not unlimited. Instead, the Commission engages in "a limited weighing of the evidence." *Ohio Fresh Eggs, LLC v. Wise*, 2008-Ohio-2423, (10th Dist. App. 2008), ¶32 (emphasis added). Specifically, "ERAC must determine whether the evidence is of such quantity and quality that it provides a sound support for the Director's action." *Id.*

IV. Discussion

{¶38} The Commission finds the Director's action imposing a 110-degree effluent temperature limitation unlawful because no numeric human health temperature criterion has been promulgated as a rule pursuant to R.C. 6111.041. Further, to the extent the Director argues that site-specific conditions justified the 110-degree effluent temperature limitation at Stuart Station, the Commission finds the Director's action unreasonable.

A. Lawfulness

{¶39} As noted above, administrative agencies are entitled to deference with regard to the interpretation of their governing regulations. However, such deference does not extend to circumstances where the agency's interpretation of the regulation conflicts with the text of its enabling statute. *B.P. Exploration and Oil, Inc.*, ERAC Nos. 184134-36 (March 21, 2001).

{¶40} Here, the Director's interpretation of R.C. 6111.03(J)(3) and Ohio Adm.Code 3745-33-05(A)(1)(a) is inconsistent with the express language of R.C. 6111.041. Specifically, the Commission finds the Director's interpretation of R.C. 6111.03(J)(3) and Ohio Adm.Code 3745-33-05(A)(1)(a) would allow Ohio EPA to implement a *generally-applicable* water quality standard without promulgating the standard as a rule as mandated by R.C. 6111.041 and Chapter 119. of the Revised Code.

{¶41} In its Response, Ohio EPA argued that the 110-degree effluent temperature limitation was merely the implementation of the narrative water quality standard contained in Ohio Adm.Code 3745-1-04(D), which requires that to the extent practical and possible, waters of the state shall be "[f]ree from substances entering the waters * * * in concentrations that are toxic or harmful to human * * * life * * *." The Director asserted that the 110-degree effluent temperature limitation was not a rote recitation of the ORSANCO standard,⁸ but rather a "translation" of Ohio Adm.Code

⁸ The Commission acknowledges that for purposes of motion for summary judgment, the trier of fact must resolve genuine issues of material fact in favor of the non-moving party.

Nonetheless, and although it is not critical to the Commission's analysis of the present Motion, the Commission notes that Ohio EPA's position that the 110-degree limitation is merely a "translation" of its narrative water quality criteria, rather than a rote recitation of ORSANCO's human health criteria, is belied by the Agency's own responses to comments. In its December 2012 response to comments, Ohio EPA stated, "to prevent temporary exceedences of recreation standards, we have included a temperature maximum limit of 110° F. *This is the new ORSANCO criterion * * **" Case File Item 4T, Fulks Depo., Ex. 4, at p. 33 (emphasis added); Certified Record Item 11.

3745-1-04(D) and thus did not constitute a separate water quality standard. The Commission disagrees.

{¶42} As an initial matter, the Commission finds that neither heat nor temperature fall within the scope of Ohio Adm.Code 3745-1-04(D). The regulation provides that waters of the state shall be “[f]ree from *substances* entering the waters * * * in concentrations that are toxic or harmful to human * * * life * * *.” (Emphasis added). The term “substances” is not defined in Ohio’s water quality regulations, but Merriam Webster’s Online Dictionary defines “substance” as “a material of a particular kind.” Substance, <http://www.merriam-webster.com/dictionary/substance> (emphasis added). By contrast, “heat” is defined as “energy that causes things to become warmer,” and “temperature” is defined as “a measurement in degrees showing the heat of something (such as air or water).” Heat, <http://www.merriam-webster.com/dictionary/heat>; Temperature, <http://www.merriam-webster.com/dictionary/temperature>.

{¶43} The Commission acknowledges that at oral argument, counsel for the Director theorized that “heated water” (as opposed to simply “heat” or “temperature”) constitutes a “substance” within the meaning of Ohio Adm.Code 3745-1-04(D). The Commission finds the Director’s argument untenable. It would be illogical to conclude that the condition of the water itself—as opposed to a material added to water—constitutes a “substance” regulated under Ohio’s water pollution control laws.⁹

Additionally, the Commission notes that Ohio EPA’s proposed revisions to Ohio Adm.Code 3745-1-32 contain a verbatim recitation of the ORSANCO 110-degree standard, and that accompanying documentation states that Ohio EPA proposed the revisions for the purpose of implementing ORSANCO human health standards. Compare OHIO RIVER VALLEY WATER SANITATION COMMISSION, POLLUTION CONTROL STANDARDS FOR DISCHARGES TO THE OHIO RIVER: 2012 REVISION (2012) with April 2013 draft revisions to Ohio Adm.Code 3745-1-32, available at http://epa.ohio.gov/Portals/35/rules/draft_3745-1-32_apr13.pdf; see also Case File Item 4Y, Ex. 2.

⁹ The Commission acknowledges that “heat” falls within the definition of “pollutant” under Ohio Adm.Code 3745-1-02(B)(68) and R.C. 6111.01(D). Significantly, however, the Commission notes that Ohio

Accordingly, the Commission rejects the Director's contention that the 110-degree effluent temperature limitation was a lawful "translation" of Ohio Adm.Code 3745-1-04(D) and finds that the Director exceeded his authority by including the condition in DP&L's NPDES permit.

{¶44} Further, the Commission finds that even if heat and/or temperature fall within the scope of Ohio Adm.Code 3745-1-04(D), the Director nonetheless acted unlawfully because such a "translation" from a narrative water quality standard to a numeric water quality standard would have required the promulgation of a separate rule pursuant to R.C. 6111.041.

{¶45} First, Ohio's water quality regulations expressly distinguish between narrative and numeric water quality standards. Specifically, Ohio Adm.Code 3745-1-07(A) states, "[w]ater quality standards contain two distinct elements: designated uses; and numerical *or* narrative criteria designed to protect and measure attainment of the uses." (Emphasis added). Thus, the Director's contention that the numeric 110-degree standard is essentially interchangeable with its corresponding narrative standard conflicts with a plain reading of Ohio Adm.Code 3745-1-07(A).

{¶46} Second, the Commission observes that the current version of Ohio Adm.Code 3745-1-32 [Ohio river standards.] contains over 150 numeric human health criteria. Thus, the regulation itself evidences that the Agency has historically distinguished between narrative and numeric water quality standards *and has promulgated each type of water quality standard separately*. Indeed, Ohio EPA began

Adm.Code 3745-1-04(D) regulates "substances." It does not specifically address "pollutants." Ohio Adm.Code 3745-1-04(D).

Thus, although certain "pollutants" may indeed be "substances" (e.g., sewage or industrial waste), the Commission finds that "heat" does *not* constitute a "substance" under Ohio Adm.Code 3745-1-04(D).

the process to amend Ohio Adm.Code 3745-1-32 to include a 110-degree ORSANCO human health criterion in April 2013, but later withdrew the proposed amendments.¹⁰

{¶47} Accordingly, the Commission finds the 110-degree effluent limitation is not merely an extension of Ohio Adm.Code 3745-1-04(D). The Commission finds that even if the Agency “translated” from the narrative water quality criteria contained in Ohio Adm.Code 3745-1-04(D) to the numeric figure of 110-degrees (rather than simply inserting the ORSANCO standard into DP&L’s permit), in doing so, Ohio EPA implemented a *separate* water quality standard. Because the parties agree that the numeric 110-degree standard had not been promulgated as a rule pursuant to R.C. 6111.041, the Commission finds the Director acted unlawfully by including the 110-degree effluent temperature restriction in DP&L’s 2013 Stuart Station NPDES permit.

{¶48} The Commission is unpersuaded by the Director’s argument that Ohio Adm.Code 3745-33-05(A)(2) authorizes Ohio EPA to implement water quality standards through permit terms and conditions rather than by rule. Such interpretation would conflict with R.C. 6111.041, which expressly requires water quality standards to be adopted “in accordance with Chapter 119. of the Revised Code.” The statute does not permit the Director to indefinitely postpone his duty to adopt water quality standards as regulations through the imposition of terms and conditions in individual NPDES permits.

{¶49} Similarly, the Commission is unpersuaded by the Director’s argument that the present appeal is analogous to *City of Salem v. Jones*, ERAC No. 155148 (December 16, 2004).

¹⁰ April 2013 draft revisions to Ohio Adm.Code 3745-1-32, available at http://epa.ohio.gov/Portals/35/rules/draft_3745-1-32_apr13.pdf.

{¶50} In *Salem*, Ohio EPA imposed monthly average and weekly average effluent total phosphorous discharge limitations of 1.0 mg/L and 1.5 mg/L, respectively. *Id.* at FOF, ¶67. At hearing, the evidence established that no aquatic life water quality standard existed for total phosphorous. *Id.* at COL, ¶25. Nonetheless, the Commission affirmed the effluent total phosphorous limitations because they were appropriate and necessary to protect the existing water quality standards. *Id.* at COL, ¶30.

{¶51} Significantly, however, the evidence in *Salem* indicated that “[i]n-stream effects from phosphorus are site-specific and vary based on the habitat conditions of a stream.” *Id.* at FOF, ¶8. Specifically, the evidence established that the in-stream effects of phosphorous on aquatic wildlife vary depending on the presence of sunlight, the makeup of the fish community, and other factors. *Id.* Thus, the Director’s site-specific approach to total phosphorous effluent limitations was supported by evidence that regulation of the relevant pollutant was most appropriately evaluated on a site-specific basis.

{¶52} By contrast, in the present case, the Director has not set forth any evidence indicating that the effects exposure to temperatures greater than 110 degrees vary according to the geographic location of the exposure, or that temperature is otherwise best regulated on a case-by-case basis. Instead, the Director asserts that Ohio EPA included the term in DP&L’s NPDES permit precisely because the Agency concluded that prolonged whole-body exposure to 110-degree water is hazardous to human health, regardless of where such exposure occurs. In other words, as set forth in the Director’s Response, the Agency concluded that prolonged exposure to water in excess of 110-degrees is hazardous to human health whether such exposure occurs

through swimming in the Ohio River, wading in Little Threemile Creek, or soaking at home in a hot tub.

{¶53} Having found that the 110-degree effluent limitation was the implementation of a new, unpromulgated human health criterion, the Commission finds the Director's action unlawful.

B. Reasonableness

{¶54} To the extent the Director argues that unique temperature and thermal loading conditions exist at Stuart Station, thereby triggering the Ohio EPA's authority to impose site-specific conditions under R.C. 6111.03(J)(3) and Ohio Adm.Code 3745-33-05(A)(1)(a), the Commission finds the Director's action imposing the 110-degree effluent temperature limitation unreasonable.

{¶55} As noted above, the Director did not argue that site-specific conditions at Stuart Station created a unique risk to human health because of the *effects* of exposure to water with a temperature of 110 degrees or higher. Instead, the specific "unique" factors cited by the Director merely suggest that the *likelihood* of exposure to 110-degree water might be greater at Stuart Station than at other locations.

{¶56} In particular, the Director cited data suggesting the temperature of the discharge from Stuart Station's once-through cooling system is higher than that of other once-through cooling systems in Ohio. However, such elevated temperatures would merely function to increase the *likelihood* of exposure to water with a temperature above 110 degrees; it would not suggest that *effects* of exposure to 110-degree water would be more harmful to human health at Stuart Station than at other locations.

{¶57} The Commission acknowledges that the site-specific characteristics of Stuart Station could conceivably support permit terms and conditions designed to

restrict access to the discharge waters, due to the likelihood of exposure to water temperatures greater than 110 degrees. But significantly, the Commission finds that the alleged site-specific characteristics of Stuart Station do not provide a valid factual foundation for the 110-degree maximum *temperature* limitation imposed on the facility. The Director has not set forth any admissible evidence indicating that the *effects* of exposure to water with a temperature of more than 110 degrees are greater at Stuart Station than they are at other locations.

{¶58} Having found the Director lacked a valid factual foundation for the site-specific imposition of the 110-degree effluent temperature limitation, the Commission finds the Director's action unreasonable.

V. Relief Requested

{¶59} Finally, the Commission notes that Appellants' Motion includes a request that ERAC vacate and remand the permit in its entirety. Further, during oral argument, the Commission inquired of DP&L's counsel whether its Motion is dispositive of this matter; he confirmed it is.

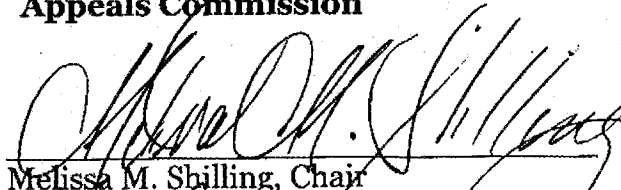
{¶60} Upon review, the Commission declines to vacate or remand the permit at this time. In addition to the assignments of error associated with the 110-degree effluent temperature limitation, Appellants' Notice of Appeal contains several additional assignments of error related to, among other things, the characterization of the discharge canal and mercury discharge from the facility's flue-gas desulfurization system. The present Motion does not resolve these additional assignments of error, and therefore the Commission declines to vacate or remand the permit with assignments of error still pending before the Commission.

ORDER

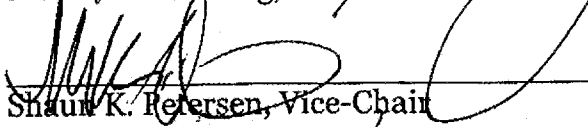
{¶61} For the foregoing reasons, the Commission hereby finds the 110-degree effluent temperature limitation (as a component of the second compliance option) unlawful and unreasonable and GRANTS Appellants' Motion for Partial Summary Judgment.

{¶62} The Commission will hear Appellants' remaining assignments of error at the de novo hearing scheduled for August 18 through August 29, 2014.

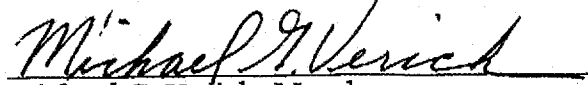
**The Environmental Review
Appeals Commission**



Melissa M. Shilling, Chair



Shaun K. Petersen, Vice-Chair



Michael G. Verich, Member

Entered into the Journal of the
Commission this 18th day of June
2014.

Copies Sent to:

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BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO


THE DAYTON POWER	:	Case No. ERAC 13-296712
AND LIGHT COMPANY, ET AL.,	:	Case No. ERAC 13-256713
	:	Case No. ERAC 13-576714
	:	Case No. ERAC 13-316715
	:	Case No. ERAC 13-776716
	:	Case No. ERAC 13-256717
	:	Case No. ERAC 13-666718
	:	
Appellants,	:	
	:	
v.	:	<u>RULING ON DIRECTOR'S</u>
	:	<u>MOTION FOR PARTIAL</u>
SCOTT NALLY, DIRECTOR OF OHIO	:	<u>SUMMARY DISPOSITION</u>
ENVIRONMENTAL PROTECTION AGENCY,	:	
	:	
Appellee.	:	Issued: June 18, 2014

On April 21, 2014, the Commission received APPELLEE DIRECTOR'S MOTION FOR PARTIAL SUMMARY DISPOSITION in the above-captioned matter. On May 6, 2014, the Commission received APPELLANT'S RESPONSE TO APPELLEE DIRECTOR'S MOTION FOR SUMMARY DISPOSITION. On May 13, 2014, the Commission received APPELLEE DIRECTOR'S REPLY IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY DISPOSITION. The Commission held an oral argument on June 4, 2014.

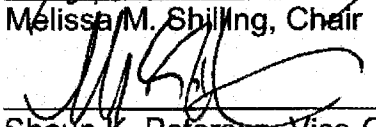
Upon review, the Commission finds that genuine issues of material fact exist with respect to the assignment of error at issue in the Director's Motion. Accordingly, the Commission hereby rules to DENY the same.¹

¹ The Commission separately rules on Appellants' Motion for Partial Summary Judgment to Vacate the Human Health Temperature Standard in Dayton Power and Light Company's J.M. Stuart Station NPDES Permit. See Ruling on Appellants' Motion for Partial Summary Judgment, ERAC Nos. 13-256713 – 6718 (June 18, 2014).

THE ENVIRONMENTAL REVIEW,
APPEALS COMMISSION



Melissa M. Shilling, Chair

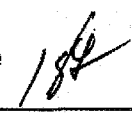


Shaun K. Petersen, Vice-Chair



Michael G. Verich, Member

Entered in the Case File
of the Commission this
day of June 2014.



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