BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

PATRIOT WATER TREATMENT, LLC	:	ERAC No. 156477 ERAC No. 156588
and	:	
CITY OF WARREN	:	ERAC No. 786501 ERAC No. 786589
Appellants,	:	
v.	:	
CHRIS KORLESKI, DIRECTOR OF ENVIRONMENTAL PROTECTION	:	
and	:	
SCOTT NALLY, DIRECTOR OF ENVIRONMENTAL PROTECTION	:	
Appellees.	:	

DECISION

Rendered on July 3, 2012

April R. Bott, Sarah L. Herbert, and *MacDonald W. Taylor* for Appellants Patriot Water Treatment, LLC and City of Warren

Summer J. Koladin Plantz, Janean R. Weber, and *Christine L. Rideout* for Appellees Chris Korleski, Director of Environmental Protection and Scott Nally, Director of Environmental Protection

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{¶1} This matter comes before the Environmental Review Appeals Commission ("Commission," "ERAC") on notices of appeal and objections filed by Patriot Water Treatment, LLC ("Patriot") and the City of Warren ("Warren") (collectively "Appellants") opposing final actions by Appellees Chris Korleski, Director of

the Ohio Environmental Protection Agency from 2007 through 2010, and Scott Nally, Director of the Ohio Environmental Protection Agency since 2011 ("Director" or "Ohio EPA"). Appellants challenge the Director's August 10, 2010 issuance of Patriot's permit to install ("PTI") 748163 ("2010 PTI"), the Director's December 1, 2010 modification of Warren's National Pollutant Discharge Elimination System ("NPDES") 3PE00008*MD ("2010 NPDES Modification"), and the Director's March 19, 2012 issuance of Warren's NPDES 3PE00008*ND ("2012 NPDES Permit").

{¶2} Following issuance of the 2012 NPDES Permit, the Director filed a Motion to Dismiss the appeals of the 2010 PTI and the 2010 NPDES Modification. The Director argued that the 2012 NPDES Permit rendered both the 2010 PTI and the 2010 NPDES Modification moot. On April 12, 2012, the Commission granted the Director's Motion with respect to the 2010 NPDES Modification.[1] The Commission denied the Director's Motion in all other respects.[2]

{¶3} The Ohio Department of Natural Resources ("ONDR") filed an amicus brief on April 19, 2012. At the hearing, Appellants orally moved to strike the ODNR's amicus brief. After arguments of counsel, the Commission denied Appellants' Motion to Strike. ERAC Nos. 156477 & 786501, Case File Items QQQQQQ and TTTTTT.

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[1] Pursuant to Revised Code ("R.C.") 3745.04(B), Patriot and Warren filed Objections to the 2012 NPDES Permit, which the Commission construed as both objections and new notices of appeal. The objections effectively amended Warren's original notice of appeal to include assignments of error related to the 2012 NPDES Permit. Nonetheless, issuance of the 2012 NPDES Permit rendered the 2010 NPDES Modification moot. Therefore, the Commission dismissed those assignments of error that challenged the 2010 NPDES Modification, but preserved the appeal regarding the objections that challenged the 2012 NPDES Permit. ERAC Nos. 156477 & 786501, Case File Item EEEEEE; ERAC Nos. 156588 & 786589, Case File Items B and C.

[2] The Commission denied the Director's Motion to Dismiss regarding the 2010 PTI appeal. The Commission found that the 2010 PTI appeal was not moot because meaningful relief could be granted if the Commission ultimately concluded that Section BB of Warren's 2012 NPDES Permit was unlawful or unreasonable. ERAC Nos. 156477 & 786501, Case File Item EEEEEE.

{¶4} The Commission held a four-day de novo hearing on the remaining issues relating to Patriot's 2010 PTI and Warren's 2012 NPDES Permit from April 24 to April 26, 2012, and concluded on May 1, 2012.

{¶5} Based on the evidence adduced at the hearing[3] and relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order AFFIRMING Patriot's 2010 PTI and MODIFYING Warren's 2012 NPDES Permit by striking Part II, Section BB therefrom.

FINDINGS OF FACT

I. Introduction

{¶6} Hydraulic fracturing, commonly known as "fracking," refers to the extraction of natural gas from tight shale formations through either the creation of artificial fractures or the expansion of existing ones. First, a well is drilled vertically from the Earth's surface down to a shale formation, then horizontally along the length of the shale formation. Liquid, called "drilling liquid" or "drilling mud," is commonly used to assist in this drilling process. OHIO ENVIRONMENTAL PROTECTION AGENCY, *Drilling for Natural Gas in the Marcellus & Utica Shales: Environmental Regulatory Basics*, http://www.epa.ohio.gov/shale.aspx (last visited May 4, 2012).

{¶7} After drilling the well, the driller creates perforations along the horizontal portion of the well, and then pumps high pressure "fracturing fluid" containing sand and other chemicals into the well, opening small cracks in the shale formation. *Id.*

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[3] None of the parties moved the Certified Records into evidence.

{¶8} After the fracturing process, the natural pressure of the shale formation forces some of the fracturing liquid back to the surface. Once it returns to the surface, this liquid is known as "flowback water." *Id.*

{¶9} Flowback water can vary greatly in composition. Specifically, testimony established that initial flowback water is generally "low-salinity" wastewater, which the oil and gas industry defines as containing less than 50,000 mg/L of total dissolved solids ("TDS"). Comparatively, fracturing liquid remaining in the ground continues to pick up salts, heavy metals, and other contaminants over time. Thus, flowback water that has been in the ground for longer periods of time is generally "high-salinity" wastewater, which the oil and gas industry defines as containing more than 50,000 mg TDS/L. *See id.*; Testimony Blocksom.

{¶10} Patriot operates a "brine wastewater treatment system"[4] located at 2840 Sferra Avenue NW, Warren, Ohio, Trumbull County. Patriot accepts "low-salinity" brine wastewater from shale gas extraction activities. It treats the wastewater to remove heavy metals and other constituents before the treated wastewater is sent to Warren's wastewater treatment plant ("WWTP"). The treated wastewater is ultimately discharged into the Mahoning River.

{¶11} Because Patriot sends wastewater to Warren's WWTP, Patriot is subject to certain pretreatment standards and permitting requirements as outlined in Ohio Administrative Code ("Ohio Adm.Code") Chapter 3745-3 and Ohio Adm.Code Chapter

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[4] In its January 11, 2010 PTI application, Patriot refers to its facility as a "brine wastewater treatment system." Accordingly, the Commission refers to discharges from Patriot as "brine wastewater" throughout this opinion. The Commission, however, makes no determination as to whether the liquid treated by Patriot constitutes "brine" within the meaning of R.C. 1509.22. As discussed below, the Commission does not express any opinion as to the applicability of R.C. 1509.22 to Patriot's and/or Warren's activities. *See* Appellants Ex. 24.

3745-42. Wastewater treatment plants are designed to treat residential rather than industrial sewage, and accordingly, some industrial sewage must be "pretreated" before entering the WWTP. Industrial users, such as Patriot, are therefore required to obtain PTIs, as well as comply with federal, state, and local pretreatment standards. Testimony Kniss.

{¶12} Patriot appealed its 2010 PTI on September 10, 2010. During the pendency of Patriot's appeal of the 2010 PTI, the Director issued a second PTI to Patriot on March 19, 2012, for the "removal and replacement of six frac tanks with two holding tanks." Patriot has not appealed the 2012 PTI. ERAC No. 156477, Case File Item A; Testimony Blocksom.

{¶13} Warren operates a WWTP located at 2323 Main Avenue SW, Warren, Ohio 44481, Trumbull County. Because Warren's WWTP discharges to the Mahoning River, it is subject to Ohio's NPDES permitting requirements as outlined in Ohio Adm.Code Chapter 3745-33. Additionally, because industrial users discharge wastewater to Warren's WWTP, Warren administers an Ohio EPA-approved publicly owned treatment works ("POTW") pretreatment program pursuant to Ohio Adm.Code Chapter 3745-3.[5] Publicly owned treatment works pretreatment programs are created to ensure that local POTWs maintain adequate control over discharges of industrial wastewater entering their WWTPs. This serves to protect the WWTP and ensure that industrial discharges do not cause degradation of water quality downstream of the WWTP. Testimony Kniss.

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[5] At hearing, Ms. Kniss explained that a WWTP is one component of a POTW. POTWs also consist of pump stations and other components. Testimony Kniss.

{¶14} To accommodate discharges from Patriot, Warren applied for and obtained an NPDES Modification in 2010 expressly allowing for acceptance of "wastewater generated during oil and gas well drilling". ERAC No. 786501, Case File Item A.

{¶15} Warren appealed its 2010 NPDES Modification on December 29, 2010. During the pendency of Warren's appeal of the 2010 NPDES Modification, the Director issued the 2012 NPDES Permit. Part II, Section BB ("Section BB") of Warren's 2012 NPDES Permit expressly prohibited Warren from accepting "brine wastewater from oil or gas drilling, exploration, or production * * * unless and until it is approved by the Chief of the Division of Oil and Gas Resources Management" and "until after an NPDES Permit Modification authorizing acceptance of the material is approved." On March 22, 2012, both Patriot and Warren filed objections to the 2012 NPDES Permit. ERAC. Nos. 156588 & 786589, Case File Item A.

II. 2010 PTI and NPDES Issuances

{¶16} Patriot and Warren first approached Ohio EPA to inquire about the possibility of discharging brine wastewater through Warren's WWTP in early 2009. By April 2009, Ohio EPA had begun to informally investigate the interaction between the statutes that govern its NPDES permit program and Revised Code ("R.C.") Chapter 1509, which is administered by ODNR and not Ohio EPA. Specifically, as a part of her initial review of Patriot's PTI application, Donna Kniss, Environmental Specialist 2 with Ohio EPA's Division of Surface Water Management ("DSWM"), reviewed the following provision contained in R.C. 1509.22(C)(1):

> Brine from any well * * * shall be disposed of only by injection into an underground formation * * *; by surface application * * *; in association with a method of enhanced recovery * * *; or by other methods approved by the chief for testing or implementing a new technology or method of disposal. * * *

{¶17} Ms. Kniss and others at Ohio EPA evaluated whether R.C. 1509.22 conflicted with activities Patriot proposed in its PTI application. An April 27, 2009 email from Ms. Kniss summarized Ohio EPA's evaluation of R.C. 1509.22. The email states in pertinent part as follows:

> The Ohio EPA Division of Surface Water has contacted the Ohio Department of Natural Resources to ensure that Ohio EPA actions comply with the requirements of ORC 1509.22 regarding the disposal of this wastewater. If [Patriot/Warren's treatment process] does not comply with ORC 1509.22(C), then Ohio EPA will not authorize the installation of these wastewater treatment units.

Appellants Ex. 50.

{¶18} Shortly thereafter, however, ODNR came to a decision regarding the interaction between the NPDES permit program and R.C. 1509.22(C). An April 29, 2009 email from Brian Hall, of Ohio EPA, to Rich Blasick, also of Ohio EPA, summarized Ohio EPA's discussions with ODNR, stating in pertinent part:

> Scott [Kell, of ODNR] clearly stated that taking brine to POTW/CWT is clearly under Ohio EPA jurisdiction and it would leave it up to [Ohio EPA] to determine if a treatment system could meet WQS. * * *

ERAC Nos. 156477 & 786501, Case File Item XXX.

{¶19} Similarly, an email sent on July 21, 2009 from Scott Kell, of ODNR, to John Husted, also of ODNR, stated in pertinent part as follows:

> [Patriot's] proposal would be permitted and regulated by OEPA. We [ODNR] would not have approval, inspection, or enforcement authority.

Appellants Ex. 52.

{¶20} In addition to the legal questions regarding the applicability of R.C. 1509.22 to Patriot and Warren's brine wastewater treatment activities, Ohio EPA also conducted an evaluation of the potential impact of Patriot's discharge on water quality. Following Patriot's submission of its PTI application, Ohio EPA requested that Patriot and Warren provide more information and data regarding the disposal of brine wastewater through a WWTP. In response, Appellants proposed to conduct a pilot study to collect data and resolve issues related to the water quality concerns Ohio EPA raised. Appellants Ex. 6, 7, and 8; Testimony Blocksom.

{¶21} Subsequently, as Ohio EPA considered the pilot study proposal, Appellants voluntarily hired EnviroScience to conduct whole effluent toxicity ("WET") testing to determine the toxicity of the brine wastewater Patriot proposed to accept and treat. Tom Angelo, Director of the Warren WWTP, explained that the purpose of the WET test was to determine the point at which brine wastewater would begin to cause the death of certain indicator species[6]—in other words, to determine "how much brine water could actually come through the plant before an oops would happen." Testimony Angelo.

{¶22} The EnviroScience WET test, conducted in September 2009, involved laboratory toxicity testing to determine median lethal concentrations ("LC50")[7] and absolute lethal concentrations ("LC100")[8] of brine wastewater with respect to water

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6 Indicator species are chosen as representatives of the biological community to be protected. *See* Testimony Kniss.

7 LC50 refers to the concentration required to kill half of the tested population.

8 LC100 refers to the concentration required to kill all of the tested population.

fleas and fathead minnows. The test used effluent from Warren's WWTP to create various dilutions of brine wastewater. Director Ex. G; Testimony Kniss, Angelo.

{¶23} Based on observed mortality data at these varying concentrations, EnviroScience concluded that the LC50 and LC100 values for water fleas were 8.3% and 25%, respectively. EnviroScience also concluded that the LC50 and LC100 values for fathead minnows were 13.7% and 25%, respectively. Director Ex. G.

{¶24} Using the 8.3% dilution corresponding to the LC50 value for water fleas as the maximum acceptable concentration of brine, EnviroScience concluded that Patriot could safely discharge 664,000 gallons per day ("gpd") of brine wastewater through Warren's WWTP.[9] Warren submitted the WET test results to Ohio EPA on November 17, 2009. Director Ex. G; Testimony Angelo, Kniss.

{¶25} In response, Ohio EPA advised Warren that the WET test was insufficient because it failed to adequately characterize the "brine" utilized to prepare the various dilutions. In particular, on December 16, 2009, Ms. Kniss advised Warren that concentrations of TDS and other pollutants can vary greatly from one brine to another in the oil and gas industry, and therefore, Ohio EPA required data to ensure that the test sample brine was representative of the brine wastewater that Patriot would actually be treating. In addition, Ms. Kniss stated that WET testing must include both acute and chronic toxicity data.[10] Because the EnviroScience WET test did not adequately

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[9] Neither party introduced testimony or evidence indicating why the LC50 value for water fleas would or would not be the maximum acceptable concentration in Warren's WWTP effluent. Further, neither party introduced testimony or evidence indicating how EnviroScience calculated that a 664,000 gpd discharge would result in an 8.3% dilution. *See* Director Ex. G.

[10] Acute toxicity refers to immediate adverse effects resulting from short-term exposure to a substance, often at comparatively high levels. Conversely, chronic toxicity refers to adverse effects resulting from long-term exposure to a substance, often at comparatively low levels. Testimony Kniss.

characterize the brine wastewater used in the WET test and did not include chronic toxicity data, Ms. Kniss stated that Ohio EPA could not approve Warren's proposal to begin accepting brine wastewater from Patriot. Director Ex. H; Testimony Kniss.

{¶26} On February 15, 2010, Ohio EPA authorized the 8-week pilot study Appellants had proposed. The pilot study consisted of a series of increasing brine discharges through Warren's WWTP. For the first week, 20,000 gallons of brine (at 50,000 mg TDS/L) would be discharged through Warren's WWTP during an 8-hour period. The following week, 40,000 gallons would be discharged during an 8-hour period. During the third week, 60,000 gallons of brine would be discharged during an 8-hour period. During the fourth week, 80,000 gallons of brine would be discharged during an 8-hour period. And finally, from the fifth week through the conclusion of the study, 100,000 gallons of brine would be discharged during an 8-hour period. At no time did brine discharges exceed 100,000 gallons per 8-hour period during the pilot study. Appellants Ex. 15, 19.

{¶27} Throughout the pilot study, Warren collected daily samples from its WWTP's influent and effluent streams, as well as from the Mahoning River upstream and downstream of Warren's WWTP. Warren measured conductivity, TDS, and chloride levels from each sample taken. In addition, Warren conducted further toxicity testing on water fleas and fathead minnows. Appellants Ex. 19.

{¶28} Warren's summary of the pilot study concluded the following:

> The 8 week Pilot Study demonstrated that a controlled discharge of brine water into Warren's WWTP did not have adverse water quality impacts to the treatment facility or receiving stream. The Study supports the initial toxicology test that indicated that Warren would be able to accept up to 664,000 gallons per day of brine water at a maximum limit of 50,000 mg/l TDS at 8 MGD daily plant flows. The 8 MGD is set as the low flow limit that can occur in mid-summer at 3:00am.

> Warren should be able to begin accepting brine water at the initial rate of 100,000 gallons per day and increase amounts at a controlled rate, while sampling, to determine final ceiling concentration.

Appellants Ex. 19.

{¶29} Following the pilot study, Warren submitted an NPDES modification application to Ohio EPA on June 9, 2010. Director Ex. D.

{¶30} Ohio EPA conducted an internal review of both Patriot's PTI application[11] and Warren's NPDES modification application. After the Director issued the 2010 PTI in August 2010, Patriot timely appealed to this Commission, raising the following two assignments of error:

> A. PTI 748163 limits the amount of discharge to no more than 100,000 gallons per day ("gpd") despite the fact that technical data supporting the PTI demonstrates discharges significantly higher than 100,000 gpd have no adverse impacts on the City of Warren sewer system. The Director has no reasonable technical basis nor lawful justification to merit setting a restrictive limit of 100,000 gpd. As such, the Director's action is both unreasonable and unlawful.
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> B. PTI 748163 requires Patriot to comply with U.S. EPA categorical pretreatment standards and local pretreatment regulations "as they are adopted from time to time." Such a requirement does not provide regulatory certainty for Patriot and requires Patriot to potentially changes [sic] applicable requirements during the pendency of the already issued PTI. As such, the Director's action is both unreasonable and unlawful.

ERAC No. 156477, Case File Item A.

{¶31} Patriot's two assignments of error relate to the following terms contained in its 2010 PTI:

> No more than 100,000 gallons per day (gpd) may be discharged into the City of Warren sewer system unless prior approval is obtained from the Ohio Environmental Protection Agency and the City of Warren.

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[11] Patriot submitted a modified PTI application on January 11, 2010. Appellants Ex. 24.

* * *

> Patriot Water Treatment LLC shall comply with all applicable U.S. EPA categorical pretreatment standards and local pretreatment regulations as they are adopted from time to time.

ERAC No. 156477, Case File Item A.

{¶32} After the Director's issuance of Warren's 2010 NPDES Modification in December 2010, Warren timely appealed to this Commission setting forth the following three assignments of error:

> A. The NPDES Modification, Part I, C.3. limits the amount of wastewater generated during oil and gas well drilling to a discharge maximum of no more than 100,000 gallons per day ("gpd") despite the fact that technical data demonstrates discharges significantly higher than 100,000 gpd have no adverse impacts on either the Warren sewer system or the receiving water bodies. The Director has no reasonable technical basis nor lawful justification to merit setting a restrictive limit of 100,000 gpd. As such, the Director's Action is both unreasonable and unlawful.
>
> B. The NPDES Modification, Part I, C.3 unreasonably and unlawfully sets a wastewater discharge limit based on gpd of flow in addition to concentration of the pollutant of concern. The Director has no reasonable technical basis nor lawful justification to add an additional restriction in Warren that does not appear in law or in permits for other municipal dischargers. As such, the Director's action is both unreasonable and unlawful.
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> C. As justification for setting the unreasonably restrictive discharge limit described in [Assignment of Error A] above, the Director used inaccurate, outdated, and inappropriate data. Additionally, the Director set the limit based on hypothetical, future, speculative scenarios, including possible "future load increases" and "future changes to Ohio water quality standards." Establishing overly restrictive limits based on potential, future possibilities is both unreasonable and unlawful.

ERAC No. 786501, Case File Item A.

{¶33} Warren's assignments of error relate to the following term in its 2010 NPDES Modification:

> The permittee may elect to accept wastewater generated during oil and gas well drilling, development, and production in accordance with its approved Pretreatment Program. The pretreated wastewater must originate from regulated Centralized Waste Treatment (CWT) facilities which are tributary to the permittee's collection system. A maximum volume of 100,000 gallons/day of wastewater, with a Total Dissolved Solids (TDS) concentration equal to or less than 50,000 mg/l, may be discharged to the collection system.

ERAC No. 786501, Case File Item A.

III. The Director's "Determination of Unlawful Permit Issuance"

{¶34} On May 16, 2011, Director Nally sent a letter to David Mustine, then Director of ODNR. The letter stated in full:

> Dear Director Mustine:
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> I am writing to memorialize our recent discussions regarding brine disposal from oil and gas operations so that our respective agencies and the regulated community will have clear direction moving forward concerning this issue. As we have discussed, ODNR has the regulatory authority over the disposal of brine generated from oil/gas operations pursuant to Ohio Revised Code (ORC) Section 1509.22(C). There are no qualifiers as to the relative level of salinity in this definition or rules adopted by ODNR under this authority.
>
> Ohio Revised Code Section 1509.22(C)(1) strictly limits the options for disposing of brine resulting from the production of oil and gas to the following:
>
> - injection into an underground formation;
> - road surface application (excluding flow back, drilling and treatment fluids);
> - use in association with a method of enhanced recovery; or
> - by other methods approved by the ODNR, Chief of Mineral Resources Management for testing or implementing a new technology or method of disposal.
>
> Disposing into a surface water body, either directly or via a Publicly Owned Treatment Works (POTW) is not listed as one of these options. Moving Forward, ODNR does not envision using its authority to allow for discharges to surface waters either directly or via a POTW.
>
> As you know, the City of Warren is currently accepting low salinity brine from oil/gas operations (under 50,000 mg/l). Other POTWs have expressed a similar interest but those have not been approved. In order to

> implement this direction, it is my intention, as Director of Ohio EPA, to not reauthorize the City of Warren to take brine from oil/gas operations when their permit expires. Further, we will also proceed to deny any other permit applications from POTWs that have expressed an interest in receiving this material.

Appellants Ex. 60.

{¶35} Several witnesses testified at the de novo hearing that this letter memorialized a change in "policy" between Director Nally's administration and that of the previous Director's administration. The evidence unambiguously documents that this "policy change" reflected a new interpretation of the interplay between R.C. Chapter 6111, which governs Ohio's NPDES program and is regulated by Ohio EPA, and R.C. Chapter 1509, which governs oil and gas operations and that the Director acknowledges is regulated by ODNR. Significantly, no testimony was presented establishing any change in Ohio EPA's evaluation of the potential impact of Patriot's and/or Warren's brine wastewater discharges on water quality in the Mahoning River. Testimony Kniss, Hall, Blasick, Stuhlfauth.

{¶36} On November 1, 2011, the Director filed a pleading entitled "Determination of Unlawful Permit Issuance and Request for Remand" ("Request"). In his Request, the Director stated that he "determined" that Ohio EPA's previous issuances of the 2010 PTI and the 2010 NPDES Modification exceeded its authority because the permits violated R.C. 1509.22. The Director also "requested" that the Commission remand the permits because "there [was] an independent legal defect in the issuance of the permits and there [was] no further reason for the Commission to consider [the] appeals." Case File Item FF.

{¶37} Construing the Director's Request as a motion for summary judgment, the Commission denied the Request on November 29, 2011. The Commission noted it

was unclear whether ERAC had jurisdiction to grant the Director's Request, and even if it did, the Director had not properly supported his Motion with admissible evidence substantiating several material facts. ERAC Nos. 156477 & 786501, Case File Item FFF.

{¶38} On February 13, 2012, the Director moved for summary judgment on the "unlawful issuance" of the 2010 PTI and 2010 NPDES Modification. The Motion for Summary Judgment restated the Director's argument that Ohio EPA's previous actions were unlawful because they violated R.C. 1509.22. Unlike his November 1, 2011 Request, however, the Director supported his February 13, 2012 motion with affidavits from Ohio EPA and ODNR employees. ERAC Nos. 156477 & 786501, Case File Item XXX.

{¶39} The Commission denied the Director's Motion for Summary Judgment on March 20, 2012. In its ruling, the Commission found that by arguing Ohio EPA's actions were unlawful, the Director was effectively appealing his own action. The Commission concluded that as an appellant, the Director lacked standing because he could not be aggrieved or adversely affected by his own final action.[12] ERAC Nos. 156477 & 786501, Case File Item CCCCC.

IV. Issuance of the 2012 NPDES Permit

{¶40} In the midst of the pending litigation at ERAC and elsewhere,[13] Warren's 2010 NPDES Modification was set to expire on January 31, 2012. Thus, prior to the

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[12] The Commission also noted that pursuant to R.C. 6111.03(J)(7), Ohio Adm.Code 3745-33-04, and Ohio Adm.Code 3745-42-02, the Director retained authority to modify or revoke permits under certain circumstances, including where the Director determines that "applicable laws" have been violated. ERAC Nos. 156477 & 786501, Case File Item CCCCC.

[13] Patriot and Warren maintained at least one parallel case in the Trumbull County Court of Common Pleas. In their Trumbull County case, Patriot and Warren asked the Court for declaratory judgment on the issue of "whether OEPA, or ODNR, or both, have authority to regulate the treatment, processing, and disposal of a type of 'brine water' originating from natural gas and oil production operations and ultimately discharging into the waters of the State." Additionally, Patriot and Warren asked the Court to define the phrases "implementing a new technology" and "method of disposal" as used

expiration date, Warren submitted its application for an NPDES renewal on September 16, 2011. Director Ex. TT.

{¶41} In its application for an NPDES renewal, instead of the 100,000 gpd limit contained in the 2010 NPDES Modification, Warren requested a loading-based TDS limit of 1,180,073 pounds per day. Director Ex. TT.

{¶42} After receiving Warren's NPDES application, Ohio EPA began internal discussions regarding terms and conditions to be included in Warren's renewal NPDES permit. Among other internal activities, Gary Stuhlfauth, the primary permit writer for Warren's 2012 renewal NPDES permit, drafted terms and conditions that incorporated the new policy regarding the disposal of brine wastewater through a WWTP as set forth in the Director's May 16, 2011 letter. This language would later become Section BB in Warren's final 2012 NPDES Permit. Testimony Stuhlfauth.

{¶43} On December 1, 2011, Ohio EPA released a draft of Warren's NPDES renewal permit for public comment. The draft permit contained two specific TDS limitations: (1) a maximum effluent TDS concentration of 622 mg/L, and (2) a monthly loading limit of 37,700 kilograms.[14] The draft permit also included a provision, Section BB, citing R.C. 1509.22 and implementing Ohio EPA's new policy prohibiting the

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in R.C. 1509.22. Complaint, *Patriot Water Treatment, LLC v. Ohio Env. Protection Agency*, Trumbull C.P. No. 11 CV 2454 (Nov. 2, 2011).

On March 30, 2012, the Trumbull County Court of Common Pleas dismissed Patriot and Warren's declaratory action, finding that exclusive jurisdiction vested with ERAC because Appellants' Objections to Warren's 2012 NPDES Permit, which it filed before this Commission on March 22, 2012, were "indistinguishable" from the arguments raised in the Trumbull County declaratory action. Judgment Entry, *Patriot Water Treatment, LLC v. Ohio Env. Protection Agency*, Trumbull C.P. No. 11 CV 2454 (Mar. 30, 2012).

[14] 37,700 kilograms is equivalent to approximately 83,114 pounds. For a 30-day month, this figure is the approximate equivalent of 2,770 lbs per day, or roughly 0.23% of the 1,180,073 lbs per day Warren had requested in its NPDES renewal application.

disposal of brine wastewater through a WWTP until that method of disposal is approved by ODNR. Appellants Ex. 71.

{¶44} Ohio EPA held a public comment period from December 1, 2011 to January 12, 2012. During the review period, Ohio EPA received 12 written comments, including submissions from Patriot and Warren. Both Patriot's and Warren's written comments objected to the specific 622 mg/L TDS limitation and Section BB's express prohibition of the acceptance of brine wastewater by Warren until that method is approved by ODNR. Director Ex. YY.

{¶45} Ohio EPA also held an approximately 2-hour public hearing on January 12, 2012. At the public hearing, Ohio EPA received oral testimony from 30 individuals, including Tom Angelo (Director, Warren Department of Water Pollution Control), Andrew Blocksom (President, Patriot Water Treatment), and April Bott (counsel for Appellants). Director Ex. ZZ.

{¶46} Prior to the public hearing, the Agency released the following statement:

> Tonight's public hearing is the final information gathering step in the normal five-year renewal process for all NPDES permits. *In addition to data from a science based study conducted in the Mahoning River from December 2010 until September 2011*, Ohio EPA took into consideration the Clean Water Act, specific U.S. EPA requirements, Pennsylvania water quality standards and Ohio law when writing this proposed permit renewal.

Appellants Ex. 74 (emphasis added).

{¶47} Upon learning of this statement, Appellants' counsel requested clarification of Ohio EPA's reference to a "science based study." Following a series of internal emails, Ohio EPA eventually determined that the statement referencing a "science based study" was "a poor choice of words." Mr. Stuhlfauth concluded that the statement was "probably referring to the work that [Ohio EPA] did in support of

renewing the permit," but specifically acknowledged that "[t]here was no study, such as a special stream survey, etc., that [Ohio EPA] did in support of the renewal." Because the statement was released the day of the January 12, 2012 public hearing, Ohio EPA was unable to correct the statement prior to the hearing. Appellants Ex. 74; Testimony Stuhlfauth.

{¶48} On March 19, 2012, the Director issued Warren's final 2012 NPDES Permit. The final 2012 NPDES Permit did *not* contain any specific TDS limitation, but did address the acceptance of brine wastewater in Section BB of the final 2012 NPDES Permit as follows:

> BB. Beginning on the effective date of this permit, the permittee shall stop accepting brine wastewater from oil or gas drilling, exploration or production. Disposal of brine wastewater from oil or gas drilling, exploration or production through a wastewater treatment plant and discharge to waters of the state is not an authorized method of disposal under R.C. 1509.22(C)(1) unless and until it is approved by the Chief of the Division of Oil and Gas Resources Management for testing or implementing a new technology or method of disposal. If such an approval is granted under R.C. 1509.22(C)(1) by the Chief of the Division of Oil and Gas Resources Management, the permittee must submit an NPDES Permit Modification application to Ohio EPA for approval prior to acceptance of brine wastewater. The permittee may not accept brine wastewater from oil or gas drilling, exploration or production until after an NPDES Permit Modification authorizing acceptance of the material is approved.

ERAC No. 786589, Case File Item A.

V. Appellants' Objections and the Director's Motion to Dismiss

{¶49} On March 21, 2012, the Director filed a Notice of Permit Issuance and Motion to Dismiss and Postpone De Novo Hearing. The Director argued that the 2012 NPDES Permit superseded the 2010 NPDES Modification, thereby rendering the 2010 NPDES Modification moot. The Director further argued that because Warren's 2012

NPDES Permit prohibited acceptance of brine wastewater, Patriot's 2010 PTI was moot.[15] ERAC Nos. 156477 & 786501, Case File Item EEEEE.

{¶50} On March 22, 2012, Patriot and Warren each filed Objections to Warren's 2012 NPDES Permit pursuant to R.C. 3745.04(B). The Commission construed Appellants' Objections as both R.C. 3745.04(B) objections and as new appeals.[16] ERAC Nos. 156477 & 786501, Case File Items FFFFF and GGGGG, ERAC Nos. 156588 & 786589, Case File Items A, B, and C.

{¶51} Both Patriot and Warren presented the same four objections to Warren's 2012 NPDES Permit:

> A. The Director failed to follow Ohio law with respect to pre-issuance requirements.
>
> B. The Director engaged in an unreasonable and unlawful public process that misled the public.
>
> C. The Director's issuance of Section II.BB of the NPDES Renewal Permit exceeds the Director's authority.
>
> D. The Director's issuance of Section II.BB of the NPDES Renewal Permit is unreasonable and unlawful.

ERAC Nos. 156477 & 786501, Case File Items FFFFF and GGGGG.

{¶52} These objections effectively amended Patriot's and Warren's appeals to the 2010 PTI and 2010 NPDES Modification to include objections to Warren's 2012 NPDES Permit. Accordingly, even though the Commission found that the 2012 NPDES Permit superseded the 2010 NPDES Modification, the Commission granted the

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[15] Notably, the Director did not argue that Patriot's 2012 PTI superseded its 2010 PTI. ERAC Nos. 156477 & 786501, Case File Item EEEEE.

[16] Both Objections stated, " * * * this document should also serve as [Patriot/Warren's] protective Notice of Appeal filed pursuant to R.C. 3745.04, R.C. 3745.07 and/or O.A.C. 3746-5-06 and Ohio case law." ERAC Nos. 156477 & 786501, Case File Items FFFFF and GGGGG.

Director's Motion to Dismiss only with respect to the assignments of error challenging Warren's 2010 NPDES Modification. The Commission also denied the Director's Motion with respect to Patriot's 2010 PTI, finding that meaningful relief could be granted if the Commission ruled in Appellants' favor with respect to Section BB of Warren's 2012 NPDES Permit. ERAC Nos. 156477 & 786501, Case File Item EEEEEE.

VI. Director's Motion for Partial Summary Judgment

{¶53} On April 13, 2012, the Director filed a Motion for Partial Summary Judgment on the following three issues: "(1) Appellants treat and dispose of brine; (2) the Chief of the Ohio Department of Natural Resources ('ODNR') Division of Oil and Gas Management, or his predecessor, the Chief of ODNR Division of Mineral Resources Management, has not approved Appellants' method of disposal of brine; and (3) the Director's issuance of a draft renewal permit to Warren was lawful and reasonable." ERAC Nos. 156477 & 786501, Case File Item MMMMMM.

{¶54} Although these three issues did not correspond directly to either Appellants' specific assignments of error or Appellants' objections filed in response to the Director's Notice of Permit Issuance, the Commission addressed each of Appellants' four objections to the 2012 NPDES Permit. The Commission granted the Director's Motion for Partial Summary Judgment with respect to Appellants' Objection A, which challenged the Director's issuance of a "draft" rather than "proposed" NPDES permit, and denied the Director's Motion for Partial Summary Judgment in all other respects. As indicated in the Commission's Ruling, a discussion of Objection A is included below. ERAC Nos. 156477 & 786501, Case File Item YYYYYY.

VII. Appellants' Assignments of Error and/or Objections

{¶55} The Commission will now address each of Appellants' Assignments of Error and/or Objections.

A. 100,000 gpd Discharge Limitation

{¶56} Appellants argue that the 100,000 gpd discharge limitation contained in Patriot's 2010 PTI is unlawful and unreasonable for two reasons: (1) the Director should have set a "loading-based" rather than "flow-based" discharge limitation; and (2) even if a flow-based discharge limitation is acceptable, the 100,000 gpd limitation is unreasonably low. Conversely, the Director responds that (1) Ohio EPA did not set a loading-based limit because Patriot lacked the equipment necessary to demonstrate compliance with such a requirement at the time the 2010 PTI was issued; and (2) the 100,000 gpd limitation is reasonable because it was necessary to ensure compliance with its anti-degradation rule.

{¶57} At hearing, Richard Blasick, Manager, DSWM, Ohio EPA Northeast District Office ("NEDO"), testified that loading, concentration, and flow are all components of the same mathematical relationship.[17] Based on this relationship, Mr. Blasick explained that all three components are standard water quality related terms and conditions routinely contained in Ohio EPA PTI and NPDES permits. Testimony Blasick.

{¶58} Further, Mr. Blasick confirmed that Ohio EPA set only flow- and concentration-based discharge limitations in Patriot's 2010 PTI. Ohio EPA did not set a

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[17] Specifically, these three factors are related as follows:

$$Concentration({}^{mass}/_{vol}) \times Flow({}^{vol}/_{time}) = Loading({}^{mass}/_{time})$$

loading-based discharge limitation because, at the time, Patriot had not installed a conductivity meter, a device designed to demonstrate compliance with a loading-based limit.[18] Testimony Blasick.

{¶59} Appellants do not dispute that a conductivity monitor is required to comply with a "loading-based" discharge limitation and that Patriot did not include such a conductivity monitor in its PTI application. Instead, Appellants merely argue that Patriot "offered" to install such a monitor. Significantly, the parties presented no testimony at hearing indicating that Patriot ever modified its PTI application to reflect this "offer." Testimony Blocksom, Angelo.

{¶60} Paul Novak, DSWM's Permitting and Compliance Manager, also explained that the Agency set a maximum discharge limitation of 100,000 gpd to ensure that the potential increase in TDS concentration in the Mahoning River was not "significant."[19] Mr. Novak explained that, pursuant to Ohio EPA's anti-degradation rule, the Agency considered "significant" increases to be those that are greater than approximately 10%. Testimony Novak.

{¶61} Mr. Novak testified that he calculated the potential TDS increase associated with various discharge levels using the following inputs: (1) the TDS

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[18] Mr. Blasick noted that because Patriot installed a conductivity monitor after the 2010 PTI was issued, Ohio EPA could successfully impose a loading-based discharge limitation. Testimony Blasick.

[19] Mr. Novak explained that he also considered possible biological inhibition at the Warren WWTP, Ohio's water quality standard for TDS (1,500 mg/L), and Pennsylvania's water quality standard for TDS (500 mg/L). However, Mr. Novak testified that his primary concern was whether a "significant" increase in TDS concentration would occur in the Mahoning River as a result of the Patriot/Warren discharge. Testimony Novak.

concentration in Patriot's effluent, (2) the discharge rate from Patriot to Warren's WWTP, (3) the flow in the Mahoning River, and (4) the flow from Warren's POTW.[20] Testimony Novak; Director Ex. X and Y.

{¶62} Selecting 50,000 mg/L as the TDS concentration in Patriot's effluent, 12 million gpd as Warren's WWTP flow, and 87 million gpd as the Mahoning River flow, Mr. Novak calculated a potential TDS concentration increase of 51 mg TDS/L for a 100,000 gpd discharge rate from Patriot's facility. Testimony Novak; Director Exs. X and Y.

{¶63} Using a background TDS concentration in the Mahoning River of 307 mg TDS/L, Mr. Novak calculated that this 51 mg TDS/L increase represented an approximately 17% increase in TDS levels in the Mahoning River. Testimony Novak.

{¶64} Ms. Kniss also testified that she performed similar calculations to determine the potential increase in TDS concentration resulting from Patriot's proposed discharges. Although Ms. Kniss did not include the 12 million gpd Warren WWTP flow in her calculations, she did, however, factor in the additional flow that would be caused by the volume of liquid discharged by Patriot through Warren's POTW.[21] Testimony Kniss; Director Ex. V.

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[20] Specifically, Mr. Novak testified that he used the following equations:

$$TDS\ concentration \times Daily\ Discharge = Daily\ TDS\ loading$$

$$\frac{Daily\ TDS\ loading}{Flow_{Mahoning\ River} + Flow_{Warren\ WWTP}} = Increase\ in\ TDS\ concentration$$

Testimony Novak; Director Exs. X and Y.

[21] Specifically, Ms. Kniss testified that she used the following equations:

$$TDS\ concentration \times Daily\ Discharge = Daily\ TDS\ loading$$

$$\frac{Daily\ TDS\ loading}{Flow_{Mahoning\ River} + Discharge_{Patriot}} = Increase\ in\ TDS\ concentration$$

Testimony Kniss; Director Ex. V.

{¶65} Using the same 50,000 mg TDS/L for brine, Ms. Kniss calculated a TDS concentration increase of 57.3 mg TDS/L for a 100,000 gpd discharge rate. This corresponded to an approximately 19% increase over baseline TDS levels. Testimony Kniss; Director Ex. V.

{¶66} Although Mr. Novak and Ms. Kniss's calculations differed slightly, both calculations yielded similar results with respect to a 100,000 gpd discharge. Mr. Novak's calculations estimated a 17% increase, whereas Ms. Kniss's calculations predicted an approximately 19% increase. Both figures exceed the target 10% TDS concentration increase. Director Exs. V, X, and Y.

{¶67} With respect to the specific 100,000 gpd figure, Appellants do not dispute Ohio EPA's use of 50,000 mg TDS/L for the TDS concentration in the brine wastewater discharged from Patriot's facility. In fact, Mr. Blocksom explained that 50,000 mg TDS/L represented both the industry-defined upper limit for "low-salinity" wastewater and the point at which Patriot's facility could no longer effectively treat brine wastewater. Appellants likewise do not dispute the equations used by Mr. Novak and Ms. Kniss to calculate the potential TDS concentration increase. *See* Testimony Blocksom; Director Ex. TT.

{¶68} Instead, Appellants challenge only the 87 million gpd input Ohio EPA used as the value for flow in the Mahoning River. The 87 million gpd figure represents the "7Q10" flow for the relevant portion of the Mahoning River. "7Q10" flow is defined as the lowest 7-day average flow that occurs, on average, every 10 years. Thus, 7Q10 values reflect seasonal and other natural variations in river flow. Testimony Angelo.

{¶69} Appellants argue that Ohio EPA improperly used the 87-million gpd 7Q10 value to calculate the discharge limit. In particular, because the flow in the Mahoning

River is controlled by the Army Corps of Engineers ("Army Corps") through a series of dams rather than by seasonal variations, Appellants contend that Ohio EPA should have used a flow value of 145 cubic feet per second ("cfs") in calculating the permit limits. Appellants note that the 145 cfs flow value had been used in setting limits in previous NPDES permits for Warren. Testimony Angelo.

{¶70} In support, Appellants point to a fact sheet released in association with Warren's 1986 NPDES permit. The fact sheet stated in pertinent part:

> Flows in the Mahoning River are completely regulated by a series of dams located upstream of the study area. The lowest flow occurs in February while the high flow is July. *Because of this, using the $Q_{30,10}$ flow to calculate average limits and the $Q_{7,10}$ flow to calculate the maximum limits is not appropriate.*

Appellants Ex. 28 (emphasis added).

{¶71} At the hearing, witnesses for the Director were unable to identify any specific factor to explain why the Agency's determination that the use of 7Q10 was not appropriate would have "changed" since issuance of the 1986 Warren fact sheet. *See* Testimony Kniss, Novak, Blasick.

{¶72} Further, on Appellants' behalf, Mr. Angelo testified that even small differences in the value used for flow can create significant changes when calculating permit limits. Significantly, however, Mr. Angelo provided no specific testimony regarding the extent of the changes that might have resulted from the higher 145 cfs flow value proposed by Appellants, and no other witnesses discussed the effect the use of a flow value of 145 cfs might have had on Warren's NPDES permit terms or conditions. Testimony Angelo.

{¶73} Several witnesses on behalf of the Director testified that the use of 7Q10 was indeed appropriate and that the 7Q10 low-flow value is routinely used to calculate permit limits. Testimony Kniss, Novak, Blasick.

{¶74} Moreover, Ohio EPA also argues that the 87-million gpd 7Q10 value used to calculate the discharge limitation in Patriot's 2010 PTI was not significantly different from the 145 cfs Army Corps value cited by Appellants. For example, Ohio EPA's response to comments on the draft 2012 NPDES Permit relating to the 7Q10 flow value appeared as follows:

> *Comment 8: The stream flow that was used in the conservative substance wasteload allocation model (CONSWLA) is incorrect. It is different than the flow cited in fact sheets from the period 1984 through 1996. During that time, the flow used in the allocation was based on the low flow that occurred in February due to the Army Corp of Engineers' regulation of the flows in the Mahoning River.*
>
> Response 8: Similar to the allocation procedure described in the fact sheet for the 2008 permit renewal, the modeling for the current renewal used the annual 7Q10 flow to calculate the allocation for TDS. The 7Q10 flow, 136 cfs, is similar to the February low flow cited in the 1996 fact sheet, 145 cfs.

Appellants Ex. 8.

{¶75} The Commission surmises that the differences in flow values did not have a significant effect on Patriot's corresponding discharge limitation. Even if Ohio EPA had adopted the Army Corps flow value (145 cfs) rather than 7Q10 (87 million gpd), the

corresponding change in the discharge required to reach an equivalent TDS level in the Mahoning River would have been no more than 7,000 gpd.[22]

{¶76} Finally, Appellants argue that notwithstanding any error in Ohio EPA's calculations, the results of the EnviroScience WET testing and pilot study demonstrate that discharges of more than 100,000 gpd would not have resulted in a violation of water quality standards for the Mahoning River. Specifically, Appellants argue that, because the pilot study showed no adverse effects at a discharge rate of 100,000 gallons per 8-hour period, Patriot and Warren could safely discharge at least 300,000 gallons per 24-hour period. *Cf.* Testimony Kniss.

{¶77} On the Director's behalf, Ms. Kniss explained that Ohio EPA could not extrapolate the study's 100,000 gallons per 8-hour period discharge to support a 300,000 gallons per 24-hour period discharge because such escalation would increase the risk of effluent toxicity and the inhibition of the biological processes at the Warren WWTP. Although the pilot study confirmed the safety of short-term discharges at a particular level of TDS loading, Ms. Kniss explained that it did not specifically demonstrate the same for *continuous* loading at that level. Testimony Kniss.

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[22] Specifically, the table below shows the flow rates that would result in an equivalent TDS load to that permitted in Patriot's 2010 PTI, using both Ms. Kniss's and Mr. Novak's method of calculation:

	2010 PTI discharge limit (using 7Q10 flow)	Discharge Required to Achieve Equivalent TDS Concentration (using Army Corps flow)
Novak Method	100,000 gpd	Approx. 105,823 gpd
Kniss Method	100,000 gpd	Approx. 106,617 gpd

See notes 20 and 21, *supra*.

{¶78} Neither party addressed in detail the EnviroScience WET testing, which concluded that Patriot and Warren could safely discharge 664,000 gpd. In particular, the Commission notes that only the cover page of the test results was admitted into evidence at the de novo hearing and that the underlying data was not presented. Thus, no evidence before the Commission demonstrates *how* EnviroScience arrived at the conclusion that Appellants could safely discharge 664,000 gpd into the Mahoning River.

B. Requirement to Comply with Pretreatment Standards

{¶79} In Assignment of Error B, Patriot challenges the following term in its 2010 PTI:

> Patriot Water Treatment LLC shall comply with all applicable U.S. EPA categorical pretreatment standards and local pretreatment regulations as they are adopted from time to time.

ERAC No. 156477, Case File Item A.

{¶80} Patriot did not present any specific evidence at the de novo hearing regarding this assignment of error. Its Notice of Appeal, however, states that the term is unreasonable and unlawful because it "does not provide regulatory certainty." ERAC No. 156477, Case File Item A.

C. Misleading Statement Accompanying Public Hearing

{¶81} In Objection B, Appellants argue that the public notice and comment process for the 2012 NPDES Permit was unlawful because the Director released a false and/or misleading statement to the public in connection with the January 12, 2012 public hearing. This, Appellants argue, rendered the permit's notice and comment period defective. ERAC Nos. 156477 & 786501, Case File Items FFFFF and GGGGG.

{¶82} Specifically, Appellants take issue with the statement's reference to a "science based study." As noted above, Ohio EPA eventually concluded that the

statement was a "poor choice of words." Appellants argue because Ohio EPA released an inaccurate statement in connection with its January 12, 2012 public hearing, Warren's 2012 NPDES Permit should be invalidated. Appellants Ex. 74.

{¶83} Significantly, the Commission notes that the final version of 2012 NPDES Permit does *not* contain a specific TDS effluent discharge limitation, and no evidence was presented demonstrating that the "science based study" at issue here had any bearing on any of the permit terms challenged by Appellants during the renewal process. As discussed in greater detail below, the Director included Section BB in Warren's 2012 NPDES Permit in order to "ensure compliance" with R.C. 1509.22 rather than for scientific reasons or to ensure compliance water quality standards. Thus, Appellants were not prejudiced by Ohio EPA's error. Appellants Ex. 79.

D. Draft vs. Proposed NPDES Permit

{¶84} In Objection A, Appellants argue that the Director was required to first issue Warren's 2012 NPDES renewal as a "proposed," rather than "draft," permit. ERAC Nos. 156477 & 786501, Case File Items FFFFF and GGGGG.

{¶85} On April 13, 2012, the Director filed a Motion for Partial Summary Judgment, in which he argued that pursuant to R.C. 3745.07, the decision to issue a permit as "proposed" is discretionary. Specifically, R.C. 3745.07 states in pertinent part:

> Before issuing, denying, modifying, revoking, or renewing any permit, license, or variance under Chapter 3704., 3714., 3734., or 6111. of the Revised Code, the director of environmental protection *may* issue a proposed action to the applicant that indicates the director's intent with regard to the issuance, denial, modification, revocation, or renewal of the permit, license, or variance. * * *

(Emphasis added).

{¶86} The Director argued the word "may" indicates that the choice to issue a "proposed" rather than a "draft" permit was wholly within his discretion. ERAC Nos. 156477 & 786501, Case File Item MMMMMM.

{¶87} In their memorandum in opposition to the Director's motion, Appellants argued that a Memorandum of Agreement between the United States Environmental Protection Agency ("U.S. EPA") and Ohio EPA requires all NPDES permits to be issued as "proposed" rather than "draft."[23] Although the Memorandum of Agreement makes several references to "proposed" NPDES permits, the term is not defined. ERAC Nos. 156477 & 786501, Case File Item VVVVVV.

{¶88} A U.S. EPA memorandum issued specifically relating to Warren's 2012 NPDES Permit also references a "proposed" rather than "draft" permit. In particular, the memorandum states in pertinent part:

> When the Proposed Permit is issued, please forward one copy and any significant comments received during any public notice period to this office * * *

Director Ex. AAA (emphasis removed).

{¶89} Similarly, however, this memorandum neither defines "proposed" nor expressly requires issuance of a "proposed" permit within the meaning of the Ohio Administrative Code. Director Ex. AAA.

{¶90} The Commission granted the Director's Motion for Partial Summary Judgment with respect to Objection A on April 24, 2012. ERAC Nos. 156477 & 786501, Case File Item YYYYYY.

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[23] Appellants did not attach the Memorandum of Agreement to their Response or otherwise provide an authenticated copy of the memorandum to this Commission. Moreover, the memorandum was not introduced at the hearing. *See* ERAC Nos. 156477 & 786501, Case File Item VVVVVV.

E. Part II, Section BB of Warren's 2012 NPDES Permit

{¶91} In Objections C and D, Appellants argue that the Director acted unlawfully and unreasonably by including Section BB in Warren's 2012 NPDES Permit. Section BB appears as follows:

> BB. Beginning on the effective date of this permit, the permittee shall stop accepting brine wastewater from oil or gas drilling, exploration or production. Disposal of brine wastewater from oil or gas drilling, exploration or production through a wastewater treatment plant and discharge to waters of the state is not an authorized method of disposal under R.C. 1509.22(C)(1) unless and until it is approved by the Chief of the Division of Oil and Gas Resources Management for testing or implementing a new technology or method of disposal. If such an approval is granted under R.C. 1509.22(C)(1) by the Chief of the Division of Oil and Gas Resources Management, the permittee must submit an NPDES Permit Modification application to Ohio EPA for approval prior to acceptance of brine wastewater. The permittee may not accept brine wastewater from oil or gas drilling, exploration or production until after an NPDES Permit Modification authorizing acceptance of the material is approved.

ERAC No. 786589, Case File Item A.

{¶92} Appellants argue that the Director lacks authority to enforce Chapter 1509 of the Revised Code and therefore exceeded his authority by including Section BB in Warren's 2012 NPDES Permit. Further, Appellants argue that even if the Director had the authority to include Section BB, Patriot and/or Warren did, in fact, obtain "approval" from ODNR pursuant to R.C. 1509.22(C).

{¶93} The Director responds that he was required to include Section BB to "ensure compliance" with R.C. 1509.22, and the permit term is also "ancillary" to the protection of water quality and thus authorized under Ohio Adm.Code 3745-33-07(A). Testimony Hall.

{¶94} As an initial matter, the parties also dispute whether Section BB affirmatively prohibits Warren from accepting brine wastewater. Appellants argue that

neither Patriot's 2010 PTI nor Warren's 2010 NPDES Permit conditioned the acceptance of brine wastewater on ODNR approval. Therefore, Appellants argue Section BB constitutes an affirmative prohibition. Testimony Blocksom.

{¶95} On behalf of the Director, Brian Hall, Assistant Chief for DSWM at Ohio EPA, testified that the provision does not create an affirmative prohibition. Mr. Hall testified in relevant part as follows:

> Q. * * * Ohio EPA is prohibiting Warren from accepting waters from Patriot based on Ohio EPA's determination of compliance status with 1509.22. Does your statute allow you to do that?
>
> * * *
>
> A. I believe that what we put in the Warren NPDES permit is asking Warren -- we're not prohibiting them. We're saying you need to get approval from DNR before you can accept this.
>
> * * *
>
> Q. So on page 34 in BB, the first sentence says, "Beginning on the effective date of this permit, the permittee shall stop accepting brine wastewater from oil and gas drilling, exploration and production." Do you see that?
>
> A. It goes on, April, to say that, upon approval from DNR, that they could discharge it.

Testimony Hall.

{¶96} Significantly, however, also on behalf of the Director, Mr. Blasick explained that Section BB could give rise to an enforcement action, based solely on the permit term. Specifically, Mr. Blasick testified as follows:

> COMMISSIONER SHILLING: I have one question. What would you advise the agency to do if, all of a sudden, Patriot and Warren resumed business together, ignoring BB all together?
>
> THE WITNESS: They ignored --
>
> COMMISSIONER SHILLING: They just pretended BB didn't exist in the NPDES permit.

> THE WITNESS: I would recommend that we initiate an enforcement action against the City of Warren.
>
> COMMISSIONER SHILLING: Based on?
>
> THE WITNESS: Based on the fact that they were in violation of that condition within the permit.
>
> COMMISSIONER SHILLING: I guess I'm getting to the bigger question. If you take that -- and I'm kind of guessing at this point. How would you put that case together for the Director in terms of a violation of 1509?
>
> THE WITNESS: Yeah. It would be a violation of the permit conditions that they had not received approval from ODNR for 1509, and they were accepting wastewaters that they shouldn't be.

Testimony Blasick.

{¶97} Addressing the Director's authority to issue Section BB, Mr. Stuhlfauth, who drafted the 2012 NPDES Permit, testified that although Ohio EPA rarely includes specific references to sections of the Revised Code outside of Chapter 6111 in NPDES permits, the provision was included in Warren's 2012 NPDES Permit to implement the Director's policy, as outlined in his May 16, 2011 letter, and to ensure compliance with R.C. 1509.22. Specifically, Mr. Stuhlfauth testified as follows:

> Q. And, again, the purpose for BB was to implement Director Nally's determination; is that correct?
>
> A. It was in the May 2011 letter. Yes.

Testimony Stuhlfauth.

{¶98} On behalf of the Director, Mr. Hall also explained that he believes Section BB is "ancillary" to water quality protection and, therefore, authorized under Ohio Adm.Code 3745-33-07(A). Regarding the connection between Section BB and the protection of water quality, Mr. Hall testified in pertinent part as follows:

> Q. And you testified that [Ohio Adm.Code 3745-33-07] gives you the ability to add a prohibition [of brine] in Warren's NPDES renewal?

A. No. What I said was that I believe that we have the ability – if something is ancillary to water quality or to an NPDES permit, that we feel that we have the right to add it as a condition of the permit.

Q. What does "ancillary" mean?

A. To me, it means it's something that's additive. It gets us from Point A to Point B to Point C.

* * *

Q. So to ensure adequate protection of water quality. I'm asking you: What are you trying to – what compliance or noncompliance have you determined that Warren – that you cannot ensure adequate protection of water quality without prohibiting Warren from accepting Patriot's water?

A. We don't know. That's why we're asking for a modification to the permit.

Q. You don't know?

A. Yeah. What concentrations will be coming from Patriot to Warren is why we're asking – we would be asking for another modification to the permit.

Q. You already know, Brian. You set those limits in the 2010 modification. They are 50,000 milligrams per liters TDS, correct?

A. That was in the previous permit, yes.

Q. So you do know. You know what water's coming into Warren.

A. But if DNR gives them approval, would it be what – would it be for low-salinity brine? Would it be for high-salinity brine? We don't know.

Testimony Hall.

{¶99} Mr. Hall explained that the concentration of TDS affects the volume of wastewater discharge that Ohio EPA would allow under its NPDES program. For example, if ODNR "approved" Warren to dispose of high salinity brine, such approval could affect Ohio EPA's evaluation of the volume of liquid it would authorize Warren to discharge. Significantly, however, no testimony was presented indicating why the

Director could not *directly* regulate TDS concentration in a permit, independent of any ODNR action, just as the Agency had done in Warren's 2010 NPDES Modification and in Patriot's 2010 PTI. Testimony Hall.

{¶100} Finally, both the Director's argument that Section BB was required to "ensure compliance" with R.C. 1509.22, and his argument that Section BB is "ancillary" to the protection of water quality, necessarily hinge on a determination that Patriot and Warren have not, in fact, obtained ODNR "approval" pursuant to R.C. 1509.22(C). In this regard, the Director argues that ODNR only issues R.C. 1509.22(C) "approval" in response to formal applications, and that such "approval" is issued only in the form of a Chief's Order. Because Warren had neither applied for such approval nor obtained a Chief's Order, the Director contends that Warren had not received "approval" pursuant to R.C. 1509.22. Testimony Husted, Simmers.

{¶101} Conversely, Appellants argue that a series of communications between Ohio EPA and ODNR demonstrate that ODNR did "approve" Patriot's method of disposal and that no formal Chief's Order was required. Specifically, Appellants rely on an April 29, 2009 email from Brian Hall to Rich Blasick, which states in pertinent part:

> Scott [Kell, of ODNR] clearly stated that taking brine to POTW/CWT is clearly under Ohio EPA jurisdiction and it would leave it up to [Ohio EPA] to determine if a treatment system could meet WQS. * * *

ERAC Nos. 156477 & 786501, Case File Item PPPP; Testimony Blocksom, Angelo.

{¶102} Appellants argue that this email memorializes extensive discussions between Ohio EPA and ODNR regarding R.C. 1509.22. Appellants contend that ODNR's knowledge of Patriot's and Warren's proposal, combined with its subsequent determination that ODNR did not have jurisdiction over such discharges, constituted

"approval" within the meaning of R.C. 1509.22. ERAC Nos. 156477 & 786501, Case File Item PPPP.

CONCLUSIONS OF LAW

I. Standard of Review

{¶103} Ohio 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, that "[i]f, 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.

{¶104} This standard does not permit ERAC to substitute its judgment for that of the Director as to factual issues. *CECOS Internatl., Inc. v. Shank*, 79 Ohio App.3d 1, 6 (10th Dist. 1992). 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). "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. 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.*

{¶105} Further, 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). The deference is not, however, without limits. *See e.g., B.P. Exploration and Oil, Inc. v. Jones*, ERAC Nos. 184134-36 (March 21, 2001) (in which the Commission noted that such deference must be granted to the Director's interpretation and application of his statutes and rules, "particularly if the Director's interpretation is not at variance with the explicit language of the regulations").

{¶106} The Commission will now address each of Appellants' assignments of error, as well as each of Appellants' objections to Warren's 2012 NPDES Permit.

II. 100,000 gpd Discharge Limitation

{¶107} In Assignment of Error A, Patriot challenges the following provision in its 2010 PTI:

> No more than 100,000 gallons per day (gpd) may be discharged into the City of Warren sewer system unless prior approval is obtained from the Ohio Environmental Protection Agency and the City of Warren.

{¶108} Specifically, Patriot argues that the Director improperly imposed a flow-based rather than loading-based discharge limitation. Patriot also argues that even if a flow-based limitation was acceptable, the specific 100,000 gpd limitation was unreasonably low. Specifically, Patriot challenges Ohio EPA's use of the 87-million-gpd 7Q10 value in calculating the 100,000 gpd discharge limitation and also argues that WET testing data demonstrates Patriot could safely discharge at least 300,000 gpd.

{¶109} In response, the Director argues that Ohio EPA could not have set a loading-based discharge limitation at the time the 2010 PTI was issued because Patriot

had not yet installed the requisite equipment. The Director further contends that PTIs and NPDES permits regularly contain a combination of limitations based on flow, concentration, and loading. Additionally, with respect to the specific 100,000 gpd limitation, the Director argues that its use of 7Q10 was reasonable and that the 100,000 gpd limitation was necessary to ensure compliance with Ohio EPA's anti-degradation rule.

{¶110} Regarding the use of flow-based rather than loading-based discharge limitations, Patriot agrees that a conductivity meter is required to demonstrate compliance with loading-based discharge limitations. Patriot also agrees that its PTI application did not contain such equipment and that such equipment was not installed when the Director issued the 2010 PTI. Accordingly, the Commission finds that the Director possessed a valid factual foundation, and thus acted reasonably in not including a loading-based discharge limitation in Patriot's 2010 PTI.

{¶111} Moreover, the Commission also notes that it has previously affirmed permit restrictions based on a combination of factors. *See Shelly Materials, Inc. v. Koncelik*, ERAC No. 645916 (January 25, 2012), at ¶203. Similar to the restrictions in *Shelly Materials*, the combination of the flow and concentration restrictions at issue here work together to restrict TDS loading in the Mahoning River.

{¶112} Regarding the specific 100,000 gpd value, testimony established that Ohio EPA set the 100,000 gpd limit primarily for the purpose of satisfying its anti-degradation rule set forth in Ohio Adm.Code 3745-1-05. Specifically, Mr. Novak explained that Ohio EPA targeted a TDS concentration increase in the Mahoning River of approximately 10%.

{¶113} Ohio's anti-degradation rule states in pertinent part:

* * *

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

(a) The magnitude of the proposed lowering of water quality;

(b) The anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, including threatened and endangered species, important commercial or recreational sport fish species, other individual species and the overall aquatic community structure and function;

(c) The anticipated impact of the proposed lowering of water quality on human health and the overall quality and value of the water resource;

(d) The degree to which water quality may be lowered in waters located within national, state or local parks, preserves or wildlife areas, waters listed as state resource waters in rules 3745-1-08 to 3745-1-30 of the Administrative Code, or waters categorized outstanding national resource waters, outstanding state waters or superior high quality waters;

(e) The effects of lower water quality on the economic value of the water body for recreation, tourism and other commercial activities, aesthetics, or other use and enjoyment by humans;

(f) The extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state;

(g) The cost of the water pollution controls associated with the proposed activity;

(h) The cost effectiveness and technical feasibility of the non-degradation alternatives, minimal degradation alternatives or mitigative technique alternatives and the effluent reduction benefits and water quality benefits associated with such alternatives;

(i) The availability, cost effectiveness, and technical feasibility of central or regional sewage collection and treatment facilities, including long-range plans outlined in state or local water quality management planning documents and applicable facility planning documents;

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

> (k) The reliability of the preferred alternative including, but not limited to, the possibility of recurring operational and maintenance difficulties that would lead to increased degradation;
>
> (l) The condition of the local economy, the number and types of new direct and indirect jobs to be created, state and local tax revenue to be generated, and other economic and social factors as the director deems appropriate; and
>
> (m) Any other information regarding the proposed activities and the affected water body that the director deems appropriate.

Ohio Adm.Code 3745-1-05 (Emphasis added).

{¶114} Thus, under Ohio Adm.Code 3745-1-05, the magnitude of TDS concentration increase, and its corresponding effect on water quality, is clearly a permissible factor the Director may consider in evaluating a proposed discharge.

{¶115} Further, the myriad of factors listed in the anti-degradation rule illustrates the balance the Director must strike when evaluating the impact of new or experimental types of discharges. Here, Patriot did not specifically challenge Ohio EPA's 10% target TDS concentration increase and acknowledges its proposal represented a novel approach to brine wastewater treatment and disposal in Ohio. Moreover, even after Appellants' 8-week pilot study, Ohio EPA had not received data regarding the long-term (i.e., longer than eight weeks) effects of the proposed discharge.

{¶116} With regard to Ohio EPA's calculation of the potential TDS concentration increase associated with a discharge rate of 100,000 gpd, Patriot contends that Ohio EPA's use of 7Q10 as a factor in the calculation was unreasonable. Specifically, Patriot argues that flow in the Mahoning River is controlled by the Army Corps through a series of dams. Thus, Patriot argues that the use of the 87-million-gpd 7Q10 flow value was inappropriate and that Ohio EPA should have used the 145-cfs Army Corps' flow value instead.

{¶117} Notably, Appellants presented no evidence indicating that the resulting difference between equivalent TDS discharges using the 87-million-gpd 7Q10 figure, as compared to the 145-cfs Army Corps figure, would be significant. In fact, as indicated in its response to comments, Ohio EPA determined that the difference would be minimal. Moreover, based upon the equations introduced by Mr. Novak and Ms. Kniss, which Appellants did not challenge, the evidence demonstrated that even at only 100,000 gpd, the resulting TDS concentration increase in the Mahoning River could be as high as 19%—significantly greater than the 10% TDS concentration increase Ohio EPA targeted pursuant to its evaluation of the factors listed in the anti-degradation rule.

{¶118} Thus, the Commission finds that Director possessed a valid factual foundation for targeting a potential TDS concentration increase of 10% and for using 7Q10 as a factor in calculating such potential TDS concentration increases. Accordingly, the Commission finds that the Director acted lawfully and reasonably in imposing a 100,000 gpd discharge limitation in Patriot's 2010 PTI.

III. Requirement to Comply with Pretreatment Standards

{¶119} In Assignment of Error B, Patriot challenges the following term in its 2010 PTI:

> Patriot Water Treatment LLC shall comply with all applicable U.S. EPA categorical pretreatment standards and local pretreatment regulations as they are adopted from time to time.

Although no testimony was presented at hearing, Patriot's 2010 Notice of Appeal argues that the term at issue does not provide sufficient regulatory certainty. The Commission disagrees.

{¶120} The parties do not dispute that Patriot's 2010 PTI was issued pursuant to Ohio Adm.Code Chapter 3745-42, which provides in pertinent part:

> (D) The director may impose such special terms and conditions as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of environmental quality.

{¶121} Ohio Adm.Code 3745-42-01 defines "applicable laws" as follows:

> (A) "Applicable laws" means any applicable provisions of Chapter 6111. of the Revised Code and rules promulgated thereunder, the federal water pollution control act (33 U.S.C. sections 1251 et seq., as amended through July 1, 2007) and 40 CFR Chapter I, subchapters D, N and O (effective July 1, 2008).

{¶122} Appellants do not dispute that Patriot, as an industrial user, is subject to pretreatment standards as set forth in the Federal Water Pollution Control Act, Chapter 6111 of the Revised Code, and Chapter 3745-3 of the Ohio Administrative Code. Thus, the term at issue in Patriot's 2010 PTI is simply a term or condition designed to ensure compliance with "applicable laws" within the meaning of Ohio Adm.Code 3745-42-04(D).

{¶123} Accordingly, the Commission finds that the Director acted lawfully and reasonably in requiring Patriot to "comply with all applicable U.S. EPA categorical pretreatment standards and local pretreatment regulations as they are adopted from time to time."

IV. Misleading Statement Accompanying Public Hearing

{¶124} In Objection B, Appellants argue Ohio EPA's January 12, 2012 statement, released in conjunction with a public hearing scheduled for that same day, was misleading. Appellants assert this statement rendered the public notice and comment period for the 2012 NPDES Permit defective.

{¶125} The statement read in pertinent part:

> Tonight's public hearing is the final information gathering step in the normal five-year renewal process for all NPDES permits. *In addition to data from a science based study conducted in the Mahoning River from December 2010 until September 2011,* Ohio EPA took into consideration the Clean Water Act, specific U.S. EPA requirements, Pennsylvania water quality standards and Ohio law when writing this proposed permit renewal.

{¶126} The Director concedes Ohio EPA could not identify any particular "science based study," and the statement was a "poor choice of words."

{¶127} The Commission acknowledges that the statement at issue demonstrates a lack of attention to detail on the part of Ohio EPA. Nonetheless, Warren's 2012 NPDES Permit did not contain a specific TDS limitation. The 622 mg TDS/L restriction contained in the draft permit did not ultimately appear in the final version. Thus, to the extent that a "science based study" may or may not have existed, data obtained from a non-identified study did not have any impact on the challenged terms and conditions in Warren's final 2012 NPDES Permit. Appellants were, therefore, not prejudiced by the Ohio EPA's inaccurate statement.

{¶128} Accordingly, the Commission finds that Ohio EPA's January 12, 2012 statement does not render the 2012 NPDES Permit unlawful or unreasonable.

V. Draft vs. Proposed NPDES Permit

{¶129} Appellants' Objection A asserts that the Director acted unlawfully and unreasonably by issuing Warren's 2012 NPDES Permit as a "draft" rather than "proposed" action. As stated in its April 24, 2012 Ruling, the Commission disagrees and finds the Director's decision to issue the 2012 NPDES Permit as "draft" to be lawful.

{¶130} The issuance of "proposed actions" is governed by R.C. 3745.07, which states in pertinent part:

> Before issuing, denying, modifying, revoking, or renewing any permit, license, or variance under Chapter 3704., 3714., 3734., or 6111. of the Revised Code, the director of environmental protection *may* issue a proposed action to the applicant that indicates the director's intent with regard to the issuance, denial, modification, revocation, or renewal of the permit, license, or variance. * * *

(Emphasis added). Thus, under the plain language of the governing statute, the issuance of "proposed" actions is discretionary rather than mandatory.

{¶131} Further, although Appellants correctly observe that both the Memorandum of Agreement and the U.S. EPA memorandum regarding Warren reference a "proposed" permit, the documents neither define the term nor reference any provision of Ohio law. Appellants presented no evidence demonstrating that either the Memorandum of Agreement or U.S. EPA's memorandum regarding Warren's 2012 NPDES Permit used the phrase "proposed permit" as defined in Ohio Adm.Code 3745-47-03(M). Instead, it appears that both documents use the phrase in its more ordinary vernacular.

{¶132} In contrast, the phrase "proposed action" is specifically defined in the Ohio Administrative Code. The then-effective version of Ohio Adm.Code 3745-47-03(M) stated as follows:[24]

> "Proposed action" means a written statement that gives the director's intention with respect to the issuance * * * of any permit * * *, *and concerning which persons authorized by law or agency regulations may file comments or request an adjudication hearing or public meeting.*

(Emphasis added).

{¶133} Moreover, the Tenth District Court of Appeals previously held that neither state law nor the Federal Water Pollution Control Act require an adjudicatory

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[24] A similar definition can now be found in Ohio Adm.Code 3745-47-02(P)(3) (effective date April 2, 2012).

hearing *prior* to the issuance of an NPDES permit. *City of Lancaster v. McAvoy*, 10th Dist. No. 79AP-260 (Oct. 25, 1979). The court stated:

> While a determination of the Director's duties with regard to the holding of adjudication hearings before issuing final actions need not be reached in this appeal, the issue was briefed by the parties and, in the interest of judicial economy, we shall address the issue. The cities contend that three federal circuit courts of appeals have all interpreted the "public hearings" provision of the Federal Water Pollution Control Act (Section 402(a)(1)) to require a formal adjudication hearing prior to the issuance of a permit. The federal courts construed this provision within the context of the federal procedure for issuing permits, which does not provide for a *de novo* hearing at a second administrative level [such as ERAC]. Accordingly, we do not find the federal decision persuasive.
>
> Under the procedures employed in this case, the cities were afforded an opportunity to make written comments or request a public meeting prior to the issuance of the final permits, and have an opportunity for a full *de novo* hearing before [ERAC] if they so desire. We find that this procedure is consistent with due process, federal requirements, and R.C. 3745.07.

Id.

{¶134} Thus, pursuant to R.C. 3745.07, the Commission finds the Director acted within his discretion in issuing Warren's 2012 NPDES Permit as a "draft action." Accordingly, the Commission finds that he acted lawfully and reasonably when issuing the 2012 NPDES Permit as "draft" rather than as "proposed."

VI. Part II, Section BB of Warren's 2012 NPDES Permit

{¶135} In Objections C and D, Appellants challenge Section BB of Warren's 2012 NPDES Permit. Section BB provides as follows:

> Beginning on the effective date of this permit, the permittee shall stop accepting brine wastewater from oil or gas drilling, exploration or production. Disposal of brine wastewater from oil or gas drilling, exploration or production through a wastewater treatment plant and discharge to the waters of the state is not an authorized method of disposal under R.C. 1509.22(C)(1) unless and until it is approved by the Chief of the Division of Oil and Gas Resources Management for testing or implementing a new technology or method of disposal. If such approval is granted under R.C. 1509.22(C)(1) by the Chief of the Division of Oil and

> Gas Resources Management, the permittee must submit an NPDES Permit Modification application to Ohio EPA for approval prior to acceptance of brine wastewater. The permittee may not accept brine wastewater from oil or gas drilling, exploration or production until after an NPDES Permit Modification authorizing acceptance of the material is approved.

{¶136} Appellants argue that Section BB exceeds the scope of Director's authority under Ohio's NPDES permitting scheme.

{¶137} The Director counters that Section BB of Warren's 2012 NPDES Permit does not prohibit the acceptance of brine wastewater, and thus should not be analyzed as a substantive provision of the permit. Instead, the Director argues that Section BB merely informs Warren of its existing obligations under Ohio law. The Director also argues that even if the term does create an affirmative prohibition, it is permissible under Ohio Adm.Code 3745-33-04(A)(3) and Ohio Adm.Code 3745-33-07(A) because the term is both necessary to "ensure compliance" with R.C. 1509.22 and necessary to ensure protection of water quality.

{¶138} The Commission will first address the Director's argument that Section BB does not constitute an affirmative prohibition of the acceptance of brine wastewater. The Director argues that because Section BB does not affirmatively prohibit acceptance of brine wastewater, it need not be analyzed as a substantive provision of the permit.

{¶139} The Commission disagrees with the Director's characterization of Section BB and finds that this provision does affirmatively prohibit Warren's acceptance of brine wastewater.

{¶140} First, the language "shall stop accepting" explicitly requires Warren to take an affirmative action, namely, stop accepting brine wastewater. On behalf of the

Director, Mr. Blasick testified that Section BB is enforceable to the extent that Ohio EPA could seek an enforcement action based on a violation of Section BB.[25]

{¶141} Significantly, if Warren wishes to resume acceptance of brine wastewater, it must demonstrate to Ohio EPA compliance with R.C. 1509.22. Specifically, as set out in Section BB, prior to accepting brine wastewater, Warren must submit an NPDES modification application demonstrating that ODNR's Chief of the Division of Oil and Gas Resources Management has approved this method of disposal.

{¶142} Ohio EPA asserts that it is common practice to include references to provisions of local, state, and federal laws not under its jurisdiction, but that are related to the permit at issue. For example, Part III, Section 24 of Warren's 2012 NPDES Permit provides as follows:

> Nothing in this permit shall * * * relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authority preserved by Section 510 of the Clean Water Act.

{¶143} The Commission notes, however, that unlike Section BB, the above term is an example of a simple, boilerplate term generally informing a permittee of its duty to comply with other applicable laws. It is, therefore, distinguishable from Section BB in that Section BB imposes an affirmative obligation to demonstrate compliance with R.C. 1509.22

{¶144} Because Section BB imposes an affirmative obligation on Warren, and because it subjects Warren to potential Ohio EPA enforcement actions that would have been otherwise unavailable to Ohio EPA had the provision been omitted, the

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[25] Also, it remains unclear whether Ohio EPA believed ODNR would possess concurrent jurisdiction and could pursue an enforcement action under R.C. 1509.22

Commission finds that Section BB affirmatively prohibits the acceptance of brine wastewater. Therefore, Section BB must be analyzed as a substantive provision in Warren's 2012 NPDES Permit.

{¶145} The Commission will now turn to the question of whether the Director had the legal authority to include Section BB in Warren's 2012 NPDES Permit.

{¶146} The Director relies on two provisions of the Administrative Code as the legal basis for the Director's authority to include Section BB in Warren's 2012 NPDES Permit, Ohio Adm.Code 3745-33-04(A)(3) and 3745-33-07(A).

{¶147} Ohio Administrative Code 3745-33-04(A)(3) governs the relationship between Ohio's NPDES permitting scheme and other applicable laws. The provision states as follows:

> Possession of an Ohio NPDES permit shall not relieve any person of the responsibility to comply with the authorized discharge levels specified in the permit or other provisions of applicable law.

{¶148} Ohio Administrative Code 3745-33-07(A) grants the Director the authority to impose certain additional terms and conditions in NPDES permits not specifically enumerated elsewhere. The provision provides as follows:

> (A) * * * The director may impose additional terms and conditions as part of an NPDES permit as are appropriate or necessary to ensure compliance with the *applicable laws* and to ensure adequate protection of water quality.

(Emphasis added).

{¶149} The Director argues that Section BB is lawful under either or both of these provisions because it is necessary to ensure compliance with R.C. 1509.22, a provision the Director deemed an "applicable law." Alternatively, the Director argues that Section

BB is authorized under Ohio Adm.Code 3745-33-07(A) because it is "ancillary" to the protection of water quality. The Commission disagrees.

{¶150} First, with respect to Section BB being necessary to ensure compliance with R.C. 1509.22, the Commission finds that Ohio Administrative Code 3745-33-04(A)(3) does not authorize the Director to impose restrictions in NPDES permits beyond the scope of Ohio EPA's regulatory authority. Instead, Ohio Adm.Code 3745-33-04(A)(3) simply notes that other laws and regulations may be applicable to the permittee and possession of an NPDES permit does not affect the permittee's duty to comply with those other laws and regulations.

{¶151} Similarly, Ohio Adm.Code 3745-33-07(A) also does not provide a legal basis for the Director to enforce R.C. 1509.22. Although this provision authorizes the Director to impose additional terms and conditions necessary or appropriate to ensure compliance with "applicable laws," it is well-settled that an administrative agency's regulations cannot expand upon the statutory authority under which they are promulgated. *Odita v. Ohio Dept. of Human Serv*, 88 Ohio App.3d 82 (10th Dist. 1993) ("an administrative agency can only exercise those powers conferred upon it by the Constitution or the statute which created it or vested it with power"). Therefore, the term "applicable laws" cannot be interpreted such that Ohio Adm.Code 3745-33-07(A) would expand the scope of the Director's authority under R.C. 6111.03—the statute pursuant to which he promulgated the rule.[26]

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[26] Ohio Admistrative Code 3745-42-01 specifically defines "applicable laws" as "any applicable provisions of Chapter 6111. of the Revised Code and rules promulgated thereunder, the federal water pollution control act (33 U.S.C. sections 1251 et seq., as amended through July 1, 2007) and 40 CFR Chapter I, subchapters D, N and O (effective July 1, 2008)." Although Ohio Adm.Code 3745-42-01 is not directly applicable to Ohio Adm.Code Chapter 3745-33 of the Administrative Code, the Commission notes

{¶152} Revised Code 6111.03(A) outlines the overall purpose of Ohio's Clean Water Act. It authorizes the Director to develop plans and programs "for the prevention, control, and abatement of new or existing pollution of the waters of the state."

{¶153} Further, R.C. 6111.03(J) describes the scope of the Director's authority to issue NPDES permits:

> The director of environmental protection may * * *:
>
> * * *
>
> (J)(1) Issue, revoke, modify, or deny * * * permits for the discharge of sewage, industrial waste, or other wastes into the waters of the state * * *.
>
> Any permit terms and conditions set by the director shall be designed to achieve and maintain full compliance with the national effluent limitations, national standards of performance for new sources, and national toxic and pretreatment effluent standards set under that act * * *.
>
> * * *
>
> (3) To achieve and maintain applicable *standards of quality for the waters of the state* * * *, the director shall impose, where necessary and appropriate, as conditions of each permit, *water quality related* effluent limitations * * *.

(Emphasis added).

{¶154} And finally, R.C. 6111.03(Q) outlines the scope of the Director's authority to approve POTW pretreatment programs:

> The director of environmental protection may * * *:
>
> (Q) Administer and enforce the publicly owned treatment works pretreatment program * * *. In the administration of that program, the director may do any of the following:
>
> * * *

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that its definition reflects the well-established notion that an administrative agency may not enact rules that expand upon the statutory authority under which those rules were promulgated.

> (2) Approve and deny requests for approval of publicly owned treatment works pretreatment programs * * *
>
> * * *
>
> Any approval of a publicly owned treatment works pretreatment program may contain any terms and conditions, including schedules of compliance, that are necessary to achieve compliance with *this chapter*.

(Emphasis added).

{¶155} Thus, under the applicable provisions of R.C. 6111.03, the unambiguous purpose of the NPDES permit program, the POTW pretreatment program, and indeed the entirety of Ohio's Clean Water Act is to prevent, control, and reduce water pollution. Accordingly, when interpreting Ohio Adm.Code 3745-33-07(A), the Director's authority to impose terms and conditions necessary to ensure compliance with "applicable laws" must be limited to those laws and regulations that fall within the scope of Chapter 6111. In other words, the Director's authority to ensure compliance with "applicable laws" is limited to those "applicable laws" that serve the purpose of protecting water quality. To hold otherwise would be to allow the Director to use the rulemaking and permitting processes to impermissibly expand upon his statutory authority.[27]

{¶156} Revised Code Chapter 1509 does not expressly fall within the scope of Chapter 6111, and no testimony was presented indicating that R.C. Chapter 1509

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[27] The Commission notes that Senate Bill 315, effective September 10, 2012, modifies R.C. 1509.02 to include the following language.

> * * * In order to assist the division in the furtherance of its sole and exclusive authority as established in this section, the chief may enter into cooperative agreements with other state agencies for advice and consultation, including visitations at the surface location of a well on behalf of the division. *Such cooperative agreements do not confer on other state agencies any authority to administer or enforce this chapter and rules adopted under it. In addition, such cooperative agreements shall not be construed to dilute or diminish the division's sole and exclusive authority as established in this section.* * * *

(Emphasis added). Thus, the bill acknowledges the well-established rule that one administrative agency may not, unless otherwise provided for by statute, enforce the rules and regulations of another.

otherwise served as an integral component of R.C. Chapter 6111's implementation of the Clean Water Act.[28] Therefore, the Commission finds that, to the extent Section BB seeks to "ensure compliance" with R.C. 1509.22, the Director acted unlawfully.

{¶157} Notwithstanding his argument that Ohio EPA was required to ensure compliance with R.C. Chapter 1509, the Director also argues that inclusion of Section BB was lawful and reasonable under his authority to protect water quality, which *is* within the scope of R.C. Chapter 6111 and authorized under Ohio Adm.Code 3745-33-07(A).

{¶158} On behalf of the Director, Mr. Hall provided testimony that Ohio EPA included Section BB in Warren's 2012 NPDES Permit because it was "ancillary" to the protection of water quality. Specifically, Mr. Hall explained that the term was included in response to concerns regarding TDS in brine wastewater derived from oil and gas operations.[29] Mr. Hall opined that ODNR could theoretically approve Warren to dispose of brine at high concentrations of TDS, and that in such a scenario, the discharge could jeopardize Warren's WWTP or water quality in the Mahoning River.

{¶159} Significantly, the Commission has previously held that the Agency must be able to establish a valid factual foundation for the correlation between an operational restriction and that restriction's ultimate goal. *E.g., General Electric Lighting v. Jones*, ERAC No. 185017 (March 1, 2005), citing *Dayton Power & Lighting Co. v. Jones*, ERAC No. 574950 (Aug. 21, 2003).

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[28] In fact, NPDES permits rarely, if ever, included terms that even cross-reference statutes outside of Chapter 6111. Testimony Stuhlfauth.

[29] Mr. Hall's argument is undercut by the fact that in the various dispositive motions filed with the Commission prior to the hearing, the Director consistently argued that the mere existence of R.C. 1509.22 necessitated inclusion of Section BB, independent of any impact on water quality. *E.g.*, ERAC Nos. 156477 & 786501, Case File Items FF, XXX, and MMMMMM.

{¶160} For example, in *General Electric Lighting*, the permit at issue imposed operational restrictions on the "secondary voltage (V) and current (milliamps) recorded at each transformer set within the [electrostatic precipitator] ESP * * *." *Id.* at FOF ¶7. Ohio EPA noted that the voltage and current restrictions contained in the permit reflected the conditions present during a required stack test. *Id.* at FOF ¶19. Thus, Ohio EPA argued that the restrictions on voltage and current served the purpose of ensuring compliance with emissions limitations by requiring that the ESP be operated under "normal" conditions. *Id.* The Commission, however, rejected this contention, finding that "the data demonstrate[d] that no direct correlation exists between the required parameters, in this instance kilovolts, milliamps and emissions, and assuring compliance." *Id.* at COL ¶17.

{¶161} Here, as in *General Electric Lighting*, the Commission finds that the evidence fails to establish the correlation between Section BB and the stated purpose of the restriction, namely, protecting water quality. Indeed, Section BB does not expressly limit TDS at all. Rather, it simply requires ODNR approval for a particular disposal method. Just as Mr. Hall explained, the term does not limit ODNR's ability to approve of brine disposal at *any* concentration.

{¶162} Moreover, testimony supports that other terms and conditions within the Director's authority to include in NPDES permits can be used to directly limit TDS. For example, Warren's 2010 NPDES permit contained terms limiting the acceptance of brine from Patriot to a maximum of 100,000 gpd at 50,000 mg TDS/L. These limitations worked together to restrict the total TDS entering Warren's WWTP.

{¶163} Although the Commission grants deference to the Director's factual determinations, the nexus between a given permit term and the desired result must be

based on a valid factual foundation. *General Electric Lighting*, at COL ¶17. Here, the Commission finds that no valid factual foundation exists to establish the correlation between the restriction imposed by Section BB and the goal of reducing TDS or protecting water quality. Instead, the evidence established that Section BB was included for the primary purpose of ensuring compliance with R.C. 1509.22,[30] a statute outside of Chapter 6111 and over which the Director has no jurisdiction.

{¶164} Accordingly, for the foregoing reasons, the Commission finds that the Director acted unlawfully and unreasonably by including Section BB in Warren's 2012 NPDES Permit.

{¶165} The Commission notes that it makes no determination as to the applicability of R.C. 1509.22 to Warren or to Patriot. Further, the Commission makes no determination regarding whether Patriot or Warren engage in the disposal of brine. Likewise, the Commission also makes no determination as to whether ODNR "approved" of the Warren/Patriot method of disposal.

{¶166} The Commission emphasizes that this Decision does not relieve Patriot or Warren of their independent obligations to comply with applicable laws. The Commission simply holds that Director exceeded his authority by including Section BB in Warren's 2012 NPDES Permit.

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[30] Note 29, *supra*.

FINAL ORDER

{¶167} For the foregoing reasons, the Commission hereby AFFIRMS Patriot's PTI 748163.

{¶168} Further, the Commission finds Part II, Section BB of Warren's 2012 NPDES Permit unlawful, and hereby MODIFIES, pursuant to R.C. 3745.05(F), Warren's NPDES 3PE00008*ND by removing Part II, Section BB therefrom. The Commission AFFIRMS Warren's NPDES 3PE00008*ND in all other respects.

{¶169} The Commission, in accordance with Ohio Adm.Code 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

Entered into the Journal of the Commission this 30 day of July 2012.

Lisa L. Eschleman, Chair

Melissa M. Shilling, Vice Chair

Shaun K. Petersen, Member

Copies Sent to:

PATRIOT WATER TREATMENT, LLC	[Certified Mail]
CITY OF WARREN	[Certified Mail]
CHRIS KORLESKI, Director	[Certified Mail]
SCOTT NALLY, Director	[Certified Mail]

April R. Bott
Sarah L. Herbert
MacDonald W. Taylor
Summer J. Koladin Plantz
Janean R. Weber
Christine L. Rideout

Nos. 156477, 786501, 156588, 786589

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the DECISION in **Patriot Water Treatment LLC, and City of Warren, Ohio v. Chris Korleski, Director of Environmental Protection**, Case Nos. ERAC 156477, 786501, 156588, 786589 entered into the Journal of the Commission this 3rd day of July, 2012.

Julie A. Slane, Executive Secretary

Dated this 3rd day of
July 2012, at Columbus, Ohio.