

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BARBARA A. LUND, : Case No. ERAC 15-6841
: :
Appellant, : :
: :
v. : :
: :
PORTSMOUTH LOCAL AIR AGENCY : :
: :
and : :
: :
WAYNE NATIONAL FOREST, : :
: :
Appellees. : :

RULING ON MOTION TO DISMISS

Rendered on June 16, 2015

Barbara A. Lund, pro se Appellant

Michael DeWine, Attorney General, Adreanne G. Stephenson, and Elizabeth Ewing for Appellee Portsmouth Local Air Agency

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant Barbara A. Lund (“Appellant”) on March 26, 2015. Ms. Lund challenges six Permissions to Open Burn issued by Appellee Portsmouth Local Air Agency (“PLAA”) to Appellee Wayne National Forest on March 6, 2015. Specifically, Ms. Lund challenges permission numbers 150303cds12, 150303cds13, 150303cds14, 150303cds15, 150303cds16, and 150303cds17. Case File Item A.

{¶2} On April 15, 2015, PLAA filed a Motion to Dismiss (“Motion”), arguing that Ms. Lund lacks standing to pursue this appeal. Ms. Lund filed a Response on April 28, 2015. PLAA did not file a reply. Case File Items I, L.

{¶3} Wayne National Forest did not enter an appearance in this case and did not file a response to PLAA’s Motion.¹

{¶4} Based upon a review of the pleadings and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING PLAA’s Motion to Dismiss.

FINDINGS OF FACT

{¶5} On March 6, 2015, PLAA issued six Permissions to Open Burn to Wayne National Forest. The permissions granted Wayne National Forest authority to conduct open burning in six burn units (Bluegrass Burn Units 1 through 6), totaling 1,253 acres in Lawrence County, Ohio. Case File Item A.

{¶6} On March 26, 2015, Ms. Lund timely filed a Notice of Appeal challenging each of the six burn permissions. Ms. Lund raises eleven assignments of error and generally asserts that she is aggrieved by various unlawful and unreasonable aspects of the burn permissions. Case File Item A.

{¶7} Additionally, Ms. Lund states in her Notice of Appeal that she is “a private resident of the state of Ohio and a US citizen who lives about 75 road miles from the Bluegrass Burn [area]” and that she “considers herself a responsible and caring owner of [the] federal public land in Wayne National Forest.” Case File Item A.

¹ On May 18, 2015, the Commission received a letter from Wayne National Forest (“Forest Service”) in which the Forest Service construed Ms. Lund’s Notice of Appeal as being filed pursuant to the federal Clean Air Act (“CAA”). The Forest Service asserted that ERAC lacks jurisdiction over the federal CAA and thus characterized any participation by the Forest Service as “informal.” Case File Item O.

{¶18} On April 15, 2015, PLAA filed a Motion to Dismiss, stating, “Appellant acknowledges that her property is 75 miles away from Bluegrass Units 1 through 6. * * * Therefore, the burns will not have a detrimental effect on Appellant’s property, since she is not adjacent to or an occupant of the Bluegrass Units.” PLAA argues that because Ms. Lund’s property will not be affected by the burns, she therefore lacks standing in this appeal. Case File Item I.

{¶19} On April 28, 2015, Ms. Lund filed her Response to PLAA’s Motion to Dismiss. The Commission finds the following excerpts summarize the crux of Ms. Lund’s Response:

* * *

When the PLAA Permissions were issued, Appellant was immediately and directly aggrieved, wronged, by the unlawful use of the law by a public government agency, PLAA. Misuse of the law degrades the integrity and effectiveness of the legal system. It promotes lack of trust and respect by the public for its government. These adversely affect Appellant.

* * *

Appellant, as an Ohio and a US citizen, was aggrieved, wronged, when PLAA misused Ohio law and issued the unlawful and unreasonable six Permissions for the Bluegrass burn units in Wayne National Forest. Appellant has standing to appeal.

Appellant has standing to bring this Appeal because she is a resident of the U.S. and an owner of the public property of Wayne National Forest.

* * *

Appellant has standing to bring this Appeal because she is an Ohio citizen and has a right and responsibility to speak about her concerns about PLAA, an agency of Appellant’s state government. Most Ohio citizens won’t speak formally about PLAA’s actions in issuing open burn pollution permissions to burn in the Bluegrass area of the Wayne, but Appellant very much wants and believes that her concern is not unique to her, but that she speaks for others also and that she should be allowed to speak at least for herself.

Appellant has standing to bring this Appeal because it involves harm to the atmosphere and the biosphere that are life-support systems for all life, including Appellant's.

* * *

Case File Item L.

{¶10} Regarding the alleged harm suffered, Ms. Lund Response states as follows:

Appellant's life-support systems were harmed when the six Permissions to open burn the Bluegrass area of the Wayne were exercised during March, 2015. The atmosphere and the biosphere are immediately and directly harmed by fire and its adverse consequences when a fire takes place.

Because everything is connected to everything else and everything has to go somewhere – Barry Commoner's ecological laws – Appellant was harmed when her life-support system was harmed.

The harm and adverse consequences of the open burning at the Wayne Bluegrass area are not only immediate and direct but are long-lasting and sometimes indirect, further harming Appellant.

Case File Item L.

{¶11} In essence, Ms. Lund argues that she has standing in this appeal because (1) PLAA's issuance of the six burn permissions at issue in this case was unlawful and unreasonable; (2) she is a resident of Ohio and values the well-being of the Wayne National Forest; and (3) the burns will negatively affect the overall quality of the air.

Case File Item L.

{¶12} Additionally, the Commission notes that Ms. Lund's Response concedes "[a]ll six burn units were burned during March, 2015; 265 acres of unit 1 on March 23, 2015 and 988 acres of units 2 through 6 on March 29, 2015. Case File Item L.

CONCLUSIONS OF LAW

I. Motion to Dismiss Standard

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

{¶14} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim is a procedural motion designed to test the sufficiency of a complaint or cause of action. *Thompson v. Central Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 538, 639 N.E.2d 462 (8th Dist. 1994), citing *Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545 (1992).

{¶15} The Ohio Supreme Court has explained, “* * * [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Obrien v. University Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). Further, “[u]nder Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3rd 190, 532 N.E.2d 753 (1988).

II. Standing

{¶16} The question of standing is a threshold issue of jurisdiction, which must be resolved before an appellant may proceed with an appeal before the Commission. *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶22, citing *New Boston Coke v. Tyler*, 32 Ohio St.3d 216 (1987). The standing requirement ensures that each

appellant has a personal stake in the outcome of the controversy. *Merkel v. Jones*, ERAC Case Nos. 185274-75 (Oct. 23, 2003).

{¶17} Two avenues exist for a person to establish individual standing before the Commission. First, under Ohio Revised Code (“R.C.”) 3745.04, a person may establish standing to appeal a final action of the Director by showing that he or she is “affected” by the Director’s action and that he or she was a “party to a proceeding before the director.” *Girard Bd. of Health v. Korleski*, 193 Ohio App.3d 309, 2011-Ohio-1385, ¶13. To be a “party to a proceeding before the director,” a person must have “appeared” before the Director. *Id.*

{¶18} Second, pursuant to R.C. 3745.07, certain circumstances allow persons who are merely “aggrieved or adversely affected” by the Director’s final action to establish standing. In such circumstances, a person need not be a “party to a proceeding before the Director.”

{¶19} Here, the parties do not dispute that Ms. Lund properly brought this appeal under R.C. 3745.07. Thus, Ms. Lund need not demonstrate that she was a party to a proceeding before the Director. Instead, Ms. Lund’s standing in this appeal rests on whether she is “affected” or “aggrieved or adversely affected” by PLAA’s action.

{¶20} The Tenth District has stated that a person is “affected,” or “aggrieved or adversely affected,” by the Director’s final action if: “(1) the challenged action will cause injury in fact, economic or otherwise, and (2) the interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged.” *Girard*, at ¶15, quoting *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, 10th Dist. No. 06AP-836, 2007-Ohio-2649.

{¶21} Further, the injury in fact must be “concrete, rather than abstract or suspected.” *Id.* In other words, a party must show “that he or she will suffer a specific injury, even slight, from the challenged action or inaction, and that the injury is likely to be redressed if the court invalidates the action or inaction.” *Id.* The alleged injury may be actual and immediate, or threatened. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Servs. of Ohio, II, L.L.C.*, 10th Dist. No. 07AP-599, 2009-Ohio-2143, at ¶24, quoting *Johnson’s Island Property Owners’ Ass’n v. Shregardus*, 10th Dist. No. 96APH10-1330 (June 30, 1997). However, a party who alleges a threatened injury “must demonstrate a realistic danger arising from the challenged action.” *Id.*

{¶22} Finally, “the interest sought to be protected is within the realm of interest regulated or protected by the statute or constitutional right being challenged.” *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, 84 Ohio App.3d 591, 599 (10th Dist. 1992).

III. Analysis

{¶23} Ms. Lund concedes in her Notice of Appeal that she resides approximately 75 “road miles” from the six burn units at issue in this appeal. Accordingly, the Commission finds Ms. Lund’s residence insufficient to establish standing as an adjacent property owner or occupant.

{¶24} The Commission has held, “[a] plain reading of [Ohio Adm.Code 3745-19-05(A)(3)] dictates a finding that the interests protected by this regulation are associated with the level of air emissions generated during a burn and that the burn must not have a detrimental effect on adjacent properties or occupants.” *Lund v. Korleski*, ERAC Nos. 016046, 016047, 016051 (Oct. 11, 2007), at ¶11.

{¶25} Here, because Ms. Lund states that she resides approximately 75 miles from the burn locations, she lacks interest as an adjacent property owner or occupant.

{¶26} Further, the Commission finds Ms. Lund's generalized interest as a citizen of Ohio and the United States is insufficient to establish standing. "[A] *general* interest as a citizen does not convert an individual right into a right which would permit any citizen who suffers no distinct harm to sue a governmental agency." *Martin v. Schregardus*, 10th Dist. App. Nos. 96APH04-433, 96APH04-434 (Sept. 30, 1996) (emphasis added), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

{¶27} However, these findings do not end the Commission's inquiry. As noted above, Ohio's open burning laws protect not only the interests of adjacent property owners or occupants, but also the level of air emissions generated during a burn. *Lund v. Korleski*, ERAC Nos. 016046, 016047, 016051 (Oct. 11, 2007), at ¶11.

{¶28} Although the regulations do not protect purely recreational or aesthetic interests, the Commission's prior standing analyses in open burning cases have noted the significance of the likelihood that an appellant would be directly affected by smoke or other air pollutants generated during a burn. See *Montgomery v. Nally*, ERAC No. 12-316590 (Sept. 27, 2012); see also *Lund v. Korleski*, ERAC Nos. 016046, 016047, 016051 (Oct. 11, 2007).

{¶29} For example, in *Lund*, the Commission found significant appellant's express concession that she "[did not] plan or expect to be immediately and directly affected by the heat and flames and heavy smoke of a prescribed fire on the Wayne." *Lund*, at ¶12.

{¶30} Similarly, in *Montgomery*, the Commission relied upon an un rebutted affidavit submitted along with appellees' motion for summary judgment stating that PLAA had analyzed air emissions associated with the requested burns and issued the burn permits in compliance with Ohio's open burning regulations. *Montgomery*, at ¶31.

{¶31} Here, as noted above, Ms. Lund's Response to PLAA's Motion to Dismiss concedes that each burn unit at issue this appeal has already been burned. Specifically, Ms. Lund states that Bluegrass Burn Unit 1 was burned on March 23, 2015, and Bluegrass Burn Units 2 through 6 were burned on March 29, 2015.

{¶32} Significantly, Ms. Lund's Response does *not* indicate that she was present at either of these burns or that she was otherwise directly affected by the fires. Ms. Lund's Response alleges only generalized harm to the overall ecosystem, rather than specific, individualized harm she actually suffered. Because the interests protected by Ohio's open burning regulations are those associated with the emission of air pollutants that may *directly* affect individuals during a burn, the Commission concludes that Ms. Lund has not alleged facts sufficient to establish that she has been aggrieved or adversely affected within the meaning of R.C. 3745.04 and 3745.07.

{¶33} Ms. Lund correctly observes that her appeal challenges the issues of the six burn permissions, rather than the burns themselves. However, to the extent Ms. Lund's appeal challenges the issuance of specific documents, rather than the actions those documents authorize, any injury to Ms. Lund is too abstract as to establish standing.

FINAL ORDER

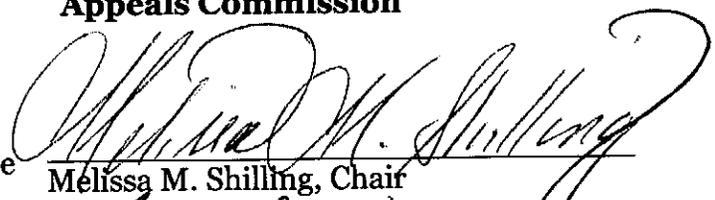
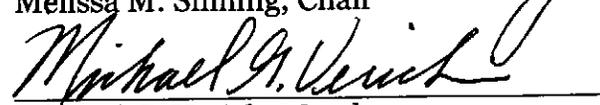
{¶34} For the foregoing reasons, the Commission hereby GRANTS PLAA's Motion to Dismiss and ORDERS that the above-captioned appeal be DISMISSED.

{¶35} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

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 10th day of June 2015.


Melissa M. Shilling, Chair

Michael G. Verich, Member

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