

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

FRIENDS OF OTTAWA RIVER,  
ET AL.

Appellants,

Vs.

DONALD SCHREGARDUS, DIRECTOR  
OF ENVIRONMENTAL PROTECTION,  
ET AL.

Appellees.

Case No. EBR 483893-483903

Issued: September 15, 1998

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FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND FINAL ORDER

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This matter comes before the Ohio Environmental Review Appeals Commission ("ERAC" or "the Commission") upon an appeal filed by ten named members of the Friends of Ottawa River ("FOR") of the issuance by Appellee the Director of the Ohio Environmental Protection Agency ("Director", "OEPA" "the Agency") of a Section 401 Water Quality Certification ("Section 401 Certification") to Appellee City of Toledo ("the City"). An evidentiary hearing on a Motion for Stay filed by Appellants was held before the full Commission on April 1, 1998 and a de novo hearing was held in this matter on May 14, 1998. At the de novo hearing, the parties agreed that all exhibits and testimony offered at the April 1, 1998 evidentiary hearing on Appellants' Motion for Stay be entered into evidence for purposes of the de novo hearing.

Appellants FOR were represented in these proceedings by Mr. Terry J. Lodge, Esq., Toledo, Ohio; Appellant Rick B. Van Landingham, one of the members of FOR who participated extensively in the hearing, appeared pro se; Appellee Director was represented by Mr. Joseph P. Koncelik and Mr. Robert J. Karl, Assistant Attorneys General; and Appellee City was represented by Ms. Lourdes Santiago of the Toledo City Attorney's Office.

Based upon the evidence adduced at the Motion for Stay hearing and the de novo hearing, the certified record ("CR") filed with the Commission pursuant to Revised Code ("R.C.") Section 3745.04, and the pleadings of the parties, the Commission makes the following Findings of Fact, Conclusions of Law and Final Order affirming the Director's issuance of the instant 401 Certification

to Appellee City of Toledo.

FINDINGS OF FACT

1. Pursuant to state and federal law, before any fill material may be discharged into waters of the state, which include wetlands, one must first obtain both a Section 401 Certification from the OEPA and a Section 404 permit from the United States Corps of Engineers ("the Corps"). (33 USC Section 1344; 33 USC Section 1341; Ohio Administrative Code ["OAC"] 3745-32-04)

2. The 401 Certification process commences when an applicant proposing to discharge dredged or fill material into the waters of the state submits an application for a 404 permit to the Corps. Upon receipt of the application, the Corps issues a public notice containing a description of the proposed project and soliciting comments from the public. In Ohio, it is this filing and notice which triggers the state's 401 Certification process. (33 USC Section 1344; OAC 3745-32-04; testimony, Linda Merchant)

3. In the instant action, Appellee City submitted its 404 permit application to the Corps on September 17, 1997. On October 10, 1997, the Corps issued its Public Notice indicating that the City of Toledo<sup>1</sup> had submitted an application for a Section 404 permit in connection with the construction of proposed Chrysler project located adjacent to the existing Chrysler Corporation facility at 400 Stickney Avenue in Toledo. (CR Item 60)

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<sup>1</sup> In order to retain the Stickney Avenue Chrysler plant in Toledo, the City successfully negotiated an agreement with Chrysler whereby the City would remediate and prepare parcels of property surrounding the existing Chrysler plant to accommodate a proposed expansion of the facility. Pursuant to this agreement, the City was responsible for obtaining the necessary regulatory permits, which is the reason the City, as opposed to Chrysler, applied for the 401 Certification at issued herein. (CR Item 60; testimony, William J. Burkett)

4. Specifically, the project at issue involves the expansion of the existing Chrysler facility and the construction of a vehicle production facility. The Chrysler Corporation is the largest single employer in the City of Toledo, presently providing over 5,000 full-time jobs and directly generating approximately \$7 million in tax revenues annually. The total cost of the proposed project is estimated to be one billion dollars. The project site of roughly 400 acres contains approximately 42 acres of jurisdictional wetlands, of which 25.21 acres will be impacted as a result of the proposed filling and expansion activities associated with the construction; 5.34 acres of the impacted wetlands are adjacent to the Ottawa River. (CR Items 1, 60, 61)

5. The Ottawa River lies within the Maumee River Basin and has been assigned a designated use of warm water aquatic life habitat, which means these are waters capable of supporting and maintaining a balanced, integrated, adaptive community of warmwater aquatic organisms. (OAC 3745-1-07; OAC 3745-1-11)

6. On October 20, 1997, Hull and Associates filed an application with the OEPA on behalf of the City for a Section 401 Certification for the Chrysler project. This application constituted the second portion of the filing required to complete the 404 permit/ 401 Certification application. (CR Item 61; testimony, Linda Merchant)

7. In addition to the general requirement that an application for a Section 401 Certification must contain information necessary to determine that the discharge of fill material being proposed will not prevent or interfere with the attainment or maintenance of applicable water quality standards, the application must also specifically contain a detailed description of the proposed activity, including a

description of the type and quantity of dredged and fill material to be discharged, as well as an evaluation of the Preferred Design Alternative, the Non-Degradation Alternative(s), the Minimal Degradation Alternative(s), and the Mitigative Techniques for the project, i.e., a so-called "alternatives analysis." (CR Item 61, Appendix B; OAC 3745-1-05; OAC 3745-32-04; OAC 3745-32-05)

8. In the instant action, the application began by describing the project at issue and then proceeded to address the proposed fill to be used as follows:

. . . the majority of facility expansion\construction activities are to occur on the interior of the project area, some distance away from the Ottawa River. As a prerequisite to these activities, approximately 32,000 cy (cubic yards) of fill material (soil) may be placed into the twenty acres of interior (isolated) wetlands . . .

Minimal facility expansion\construction activities are to occur in wetlands adjacent to the Ottawa River, in the area of the shipping lot . . . Facility installations in or near these riverside wetlands - collectively referred to as wetland DW1 in the Wetland Delineation Report - may require the installation of various materials, including bulkhead-steel sheet piling, filter cloth, and toe-stone protection. In particular, approximately 800 cy of sloped protection rock will be placed into areas below the ordinary high-water mark of the Ottawa River. Additionally, approximately 67,000 cy of clay fill and sloped protection rock will be placed into less than seven of the twenty-two acres of wetlands comprising wetland DW1, in order to bring the area up to grade. (CR Item 61, p. 7; also see CR Item 61, Appendix B, response to question 5c)

9. The alternatives analysis was discussed in a summary of the City's application (see CR Item 61, pp. 3-5 and 7-8), as well as in a six page attachment to the application itself entitled, "Evaluation of Potential Alternatives to Planned Expansion of Stickney Avenue Chrysler Facility, Including

Proposed Wetlands Restoration Plan." (CR Item 61, Appendix C)

10. In discussing its "preferred design alternative" the City indicated, in part, as follows:

[T]he Preferred Design Alternative involves expansion-related activities at the existing Stickney Avenue vehicle production facility in Toledo, Ohio. See Figure 2 for details of anticipated facility components as well as their approximate locations . . . Further redesign of the shipping lot or other plant components in an effort to further minimize wetlands impacts adjacent to the river, within wetland DW1, is not feasible, beyond that portrayed in Figure 2 . . . (Emphasis added; CR Item 61)

11. Relative to the "Minimal Degradation Alternative," the City summarized:

The Minimal Degradation Alternative is equivalent to the Preferred Design Alternative because minimizing environmental (i.e. wetlands) impacts within the project area was an important design consideration during development of the Preferred Design Alternative. In particular, the final facility layout design as described herein is not the first such layout design developed by Chrysler, but instead represents the last design in a series of iterative efforts to minimize, to the greatest extent possible, impacts to wetlands within the project area, particularly wetlands located south of and adjacent to the Ottawa River. . . . (CR Item 61)

12. Pertaining to the Non-Degradation Alternative, the City indicated:

The Non-Degradation Alternative would involve complete avoidance of on-site wetlands through not placing any fill material or fill related structures into or adjacent to any of the wetlands. Considering the limited acreage available at this site for expansion (wetlands and non-wetlands combined), together with the dispersed yet widely distributed occurrence of wetlands across the project area, implementation of a non-degradation (complete avoidance) alternative would require cancellation or relocation of the project away from this site. The impracticality of this particular alternative is discussed in detail as "Alternative 1" within the Alternatives Analysis included herein as Appendix C. (CR Item 61)

13. Finally, the Mitigative Technique Alternative was summarized, in part, thusly:

The Mitigative Technique Alternative is to be implemented concurrently with the Preferred Design Alternative and is to consist of off-site wetland restoration to compensate for wetlands impacts within the project area. In particular, this mitigation project will involve restoration of wetlands located at Pickerel Creek in Sandusky County, Ohio. Details regarding the planned wetland restoration plan are provided in Appendix D. . . . (CR Item 61)

14. Testimony and evidence offered at the hearing revealed that the specifications of the project were modified after the submission of Appellee's application relative to the location of an access road and a shipping lot. Specifically, the construction plans as currently envisioned by Appellee will require an access road to be built in the wetland area adjacent to the Ottawa River where originally a parking lot was to be located. At the hearing it was established that despite this change, the acreage to be used for the construction of the access road and shipping lot in the revised plan and the original plan submitted to OEPA is identical and the general construction activities will be the same. Furthermore, testimony was offered that no additional fill will be used and no additional wetlands will be impacted as a result of the revision in plans. <sup>2</sup> (CR Item 61; Testimony, William Burkett)

15. On November 10, 1997, the OEPA caused to be published in The Blade, a newspaper of general circulation in Toledo, Ohio, a Public Notice regarding the receipt of Appellee's application for a Section 401 Water Quality Certification. The notice indicated that a public information session and public hearing would be held, "relative to issues of lower water quality on January 7, 1998 at the

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<sup>2</sup> William Burkett, the project manager for the City, also testified that, in his opinion, this modification does not constitute a change in land use because: 1) both the road and the shipping lot will be constructed of asphalt; and 2) geotechnical borings show that the same base material will be used to support the shipping lot and the access road. (Testimony, William Burkett)

Whiter High School Auditorium 5601 Clegg, Toledo, Ohio 43613." The notice specifically stated that the certification was, "for a project to fill 27 acres of wetlands, including 6.89 acres of wetlands adjacent to the Ottawa River to expand a Chrysler facility." The notice further provided:

The discharges from the activity, if approved, would result in degradation to, or lowering of, the water quality of the wetlands. The review of the application will be conducted, and a decision whether to grant or deny the application will be made, in accordance with Rules 3745-1 and 3745-32 of the Ohio Administrative Code (OAC). In accordance with OAC 3745-05 (sic.), an antidegradation review of the application will be conducted before deciding whether to allow a lowering of the water quality. Other alternatives resulting in lesser or no degradation, or lowering of water quality, will be considered by Ohio EPA during the review process.

All interested persons are entitled to attend or be represented and give written or oral comments on the proposed projects at the hearing. Written comments must be received by the OEPA . . . by the close of business on January 9, 1998 . . . (CR Item 54)

16. Ms. Sophia Antjas of the OEPA presided over the January 7, 1998 Public Hearing. In her opening remarks, Ms. Antjas described the proposed project, Appellee's request for the 401 Certification, and the relevance of Ohio's antidegradation regulation to the process, in part, as follows:

The purpose of this hearing tonight is to obtain comments regarding the receipt of (sic.) application for a Section 401 Water Quality Certification for the City of Toledo. the City of Toledo proposes to fill a total of 25.21 (sic.) wetlands, including 5.34 acres adjacent to the Ottawa River to expand a Chrysler facility. Fill material would have to be acceptable to Ohio EPA.

While the impact of the filling of the wetland will not be allowed to exceed state water quality standards for human health or aquatic life., Ohio EPA believes the activity will cause limited degradation to the existing water quality of the wetland area. Therefore in accordance with Ohio Administrative Code 3745-05 (sic.), an antidegradation review of the application will be conducted before deciding whether to



allow a lowering of the water quality.

In accordance with Ohio Administrative Code Rule 3745-1-05, Ohio EPA will provide an opportunity for public comment concerning this project. The testimony and any written comments will be considered by Ohio EPA as part of its analysis of the technical, social and economic considerations associated with the proposed project and any degradation resulting from this project. Other alternatives resulting in lesser or no degradation, or lowering of water quality, will be considered by Ohio EPA during the review process. All written and oral comments received as part of the official record will be considered by Ohio EPA prior to final actions of the director. . . . (CR Item 29)

17. After completion of the Public Hearing and the close of the public comment period, a "Responsiveness Summary" was prepared by the OEPA to address the comments, both written and oral, which had been received by the Agency. Four major categories were included in the Responsiveness Summary: "Habitat Impacts," "Water Quality Degradation," "Mitigation," and "Alternatives." (CR Item 4)

18. On February 9, 1998, the Director issued a 401 Water Quality Certification to Appellee City of Toledo. The certification was issued subject to several conditions including the following two conditions which are relevant to our inquiry herein:

The applicant shall identify the source and the nature of the fill to be placed in wetlands. Ohio EPA shall be satisfied that the quality of the fill material is acceptable before any fill is placed in waters of the State.

Fill used in this project shall consist of suitable material free from toxic contaminants in other than trace quantities. (CR Item 1)

19. On February 18, 1998, Appellants timely filed a Notice of Appeal with the Commission challenging the Director's issuance of the 401 Certification. The assignments of error set forth by

Appellants which were developed at the hearing in this matter can be summarized as follows:

--Appellee City did not provide an adequate description of the type and quantity of fill to be used as required by the applicable regulations, nor did the applicant provide a complete description of the proposed activity. As a result, the Director should have found the application to be incomplete and required the submission of additional information.

--Appellee Director unlawfully applied the public notice and hearing requirements set forth in Ohio's antidegradation regulation. That is, the notice did not include an accurate description of the nature and source of the fill to be used or a complete description of the proposed activity and without an adequate public notice, "the public hearing was also an exercise in futility." Furthermore, the Director should have published a new public notice or held a new public hearing after the plans were modified relative to the proposed shipping lot and access road.

--Appellee City did not provide the alternatives analysis required by Ohio's anti-degradation regulation. (Case File Item A)

20. Ms. Linda Merchant, a Section 401 Coordinator in the Division of Surface Water at the OEPA Central Office, was the principal reviewer assigned to evaluate the City's 401 application. At the hearing in this matter, Ms. Merchant testified extensively concerning her review and analysis of Appellee's Section 401 Certification request. First, Ms. Merchant generally testified that the relevant statutes and regulations for purposes of reviewing an application for a Section 401 Certification are OAC Chapter 3745-32 ("Section 401 Water Quality Certifications"), OAC Chapter 3745-1 ("Water Quality Standards") and R.C. Chapter 6111 ("Water Pollution Control"). Ms. Merchant also stated that in conducting a review of a 401 application, the total scope of the impact to aquatic habitat is evaluated. She also stressed the importance of minimizing the amount of fill to be used to the maximum extent practicable. Finally, she indicated that in conducting her review herein she examined

all the documents pertaining to the project, including, but not limited to, the City's application and various comments from the United States Fish and Wildlife Agency, the United States Environmental Protection Agency, and the Ohio Department of Natural Resources. (Testimony, Merchant)

21. Ms. Merchant stated that, in her opinion, Appellee's application contained all the information necessary for a determination to be made that the application complied with all relevant statutes and regulations. (Testimony, Merchant)

22. More specifically, Ms. Merchant testified that after the review of Appellee's request was completed, a determination was made that the proposed filling of 25.21 acres of wetland would not interfere with either the attainment of the applicable water quality standards or the ability of the Ottawa River to maintain its warmwater habitat designated use. She did indicate that a lowering in water quality would occur as a result of filling the wetland and the resulting loss of aquatic habitat area; however, in her opinion, this loss would be mitigated with the creation of the 53 acre wetland area in Sandusky County outlined in Appellee's mitigation plan. (Testimony, Merchant)

23. Ms. Merchant further indicated that the general description in Appellee's application regarding the type of fill to be used was sufficient in light of the special terms and conditions included in Appellee's Section 401 Certification. More precisely, she stated that before any fill could be used in the wetland area, leach tests and other soil tests would have to be performed and the results submitted to OEPA for its review and approval, thus ensuring that only clean fill, i.e., fill that is in compliance with the relevant standards, is used for the project. (Testimony, Merchant)

24. Relative to OAC 3745-1-04, generally known as the five "free froms", Ms. Merchant testified

that the City's application satisfied this regulation since the City and Chrysler would be using best management practices to prevent additional adverse "free from" type impacts on the Ottawa River.

(Testimony, Merchant)

25. Ms. Merchant's testimony regarding the information in the application was supported by testimony offered by Mr. William Burkett, the project manager for the City of Toledo, who indicated that the only material that would be used as fill would be rock, dirt and/or clay that meets the standards and conditions specified in the City's 401 Certification. (Testimony, Burkett)

26. Relative to the modification in the site plan, i.e., the placement of the loop road and shipping lot, Ms. Merchant indicated that OEPA would only be concerned about this alteration if the amount and type of fill to be used had been varied as a result of the change. Thus, since there is to be no additional fill and no additional impacts as a result of this proposed change, it was not necessary in Ms. Merchant's opinion to issue a new public notice or hold a new public hearing. (Testimony, Merchant)

27. Finally, Ms. Merchant stated that Appellee's application did contain the alternatives analysis which the Director is required to examine by Ohio's anti-degradation regulation. Furthermore, as indicated in the Agency's Responsiveness Summary, all alternatives offered during the public hearing and comment period, "present options that had been previously considered in the design of the new Stickney facility." Additionally, "[t]he alternatives would create operational inefficiencies, cause safety problems, present additional security issues, prove much more costly and result in potential project delays." (Testimony, Merchant)

CONCLUSIONS OF LAW

1. The statutory duty of review imposed upon the Commission in a de novo hearing is a determination of whether the action of the Director which is under appeal is "unlawful" or "unreasonable". (R.C. 3745.05)

2. "Unlawful" means that the action taken by the Director is not in accordance with law. "Unreasonable" means that the action is not in accordance with reason, or that it has no factual basis. It is only when the evidence in the case yields no valid factual foundation for the action in question or that it was not in accordance with law, that the Commission may declare that the action under appeal is unlawful or unreasonable.. (Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61 (1977).

3. Where the evidence in the record before the Commission demonstrates that the action taken by the Director is both reasonable and lawful, the Commission must affirm the action of the Director. In such an instance, the Commission may not substitute its judgement for that of the Director. (Citizens Committee, supra.)

4. Appellee City of Toledo, as the applicant, possesses the burden of proof in this action. (Jackson County Environmental Committee v. Shank, Case Nos. 91AP-57, -58 [Franklin Cty. App.], dec's. December 10, 1991.)

5. Revised Code Section 6111.03(P) empowers the Director to:

(P) Certify or deny certification to any applicant for a federal license or permit to conduct any activity which may result in any discharge into the waters of the state that the discharge will comply with the Federal Water Pollution Control Act; . . .

It is this section which authorizes the Director to grant or deny an application for a Section 401 Water Quality Certification.

6. Ohio Administrative Code Chapter 3745-32, entitled "Section 401 Water Quality Certifications," expands upon this authorization and establishes the regulatory framework by which the Director evaluates such applications. Specifically, OAC Section 3745-32-02 delineates the circumstances under which a Section 401 Certification is required, while OAC Section 3745-32-04 specifies what constitutes an application for a Section 401 Certification. In the instant action, the applicant was required to secure a Section 401 Water Quality Certification to obtain a Section 404 permit from the army corp of engineers, and it is the filing of an application for the 404 permit with the Corps which constitutes an application for the Section 401 Certification at issue.

7. Ohio Administrative Code Section 3745-32-05(A) specifically prohibits the Director from granting a Section 401 Certification absent a determination that the discharges at issue: 1) Will not prevent or interfere with the attainment or maintenance of applicable water quality standards; and 2) will not result in a violation of certain specified provisions of the Federal Water Pollution Control Act.

8. In addition, OAC 3745-32-05(B) grants the Director the discretion to deny an application if he concludes that the discharge of dredged or fill material or obstructions or alterations in water of the state will result in adverse long or short term impact to water quality.

9. That same regulation, however, provides the Director with the following options regarding 401 Certification:

(C) The director may impose such terms and conditions as part of a

section 401 water quality certification as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality.

(D) Prior to the issuance of a section 401 water quality certification or prior to, during, or after the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state to ensure adequate protection of water quality, the director may require that the applicant perform various environmental quality tests including, but not limited to, chemical analyses of water, sediment or fill material, and bioassays.

10. The Director is given additional guidance regarding what must be specifically included in an application for a Section 401 Certification in OAC 3746-1-05, the State's anti-degradation rule.

This regulation provides in relevant part as follows:

(B)(2) . . . the applicant . . . must submit documentation of the following. (sic.)

(a) Identification of the substances to be discharged, including the amount of regulated pollutants to be discharged in terms of mass and concentration, and, if paragraph (B)(1)(d) of this rule applies<sup>3</sup>, the amount of dredged and fill material to be discharged.

(b) A description of the construction work, fill or other structures to occur or be placed in or near the stream bed.

(c) A description of the applicant's preferred alternative for design and operation of the activity.

(d) Descriptions and analyses of non-degradation alternatives, minimal degradation alternatives and mitigative technique alternatives for the design and operation of the activity that the applicant has considered.

(e) An estimate of the important social, economic and environmental

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<sup>3</sup> Paragraph (B)(1)(d) is the paragraph which specifically indicates that the anti-degradation rule applies to section 401 water quality certifications.

benefits to be realized through the project or activity if the water quality is lowered, including, as appropriate, the number and types of jobs created and the tax revenues generated.

(f) An estimate of important social, economic and environmental benefits to be lost if water quality is lowered, such as lost or lowered recreational opportunities. . . . "

11. Consequently, upon receipt of an application for a Section 401 Certification, the Director must make a determination regarding the completeness of the application, and then evaluate the application in light of the relevant statutes and regulations. Specifically, OAC Section 3745-32-04(A) provides:

. . . If an application, in the judgment of the director, lacks information necessary or desirable to determine whether the applicant has demonstrated the criteria set forth in paragraph (A) of rule 3745-32-05 of the Administrative Code, the director shall inform the applicant in writing that review of the application will not proceed until the applicant has submitted additional information as described by the director.

12. In the instant action, Appellants claim that Appellee City submitted an incomplete application to the Corps, which constitutes an incomplete application for purposes of the state 401 Certification, as the application did not contain a "complete description of the proposed activity," since only the eastern portion of the "Urban Industrial Park" to be developed was addressed in Appellee's filing. Further, Appellants claim the source and composition of fill material to be used was not adequately defined. In the absence of this information, Appellants assert the Director could not have made the determinations required by OAC 3745-32-05(A). We disagree.

13. First, relative to the scope of the project, we find the evidence establishes that Appellee's



application contained sufficient information regarding the project at issue to allow the Director to make the determinations required by this regulation. The relevant features of the proposed project, along with the specific impacts that would result were set out in such a manner as to enable the Director to make the necessary evaluations required by OAC 3745-1-05. Furthermore, we feel the proposal was described in such a way as to allow the public at large to be fully apprized of what was to be undertaken by Appellee City and the Chrysler Corporation and to enable the public to offer an informal opinion on the project.

14. Second, we also find that the description of fill provided by Appellee was sufficient to allow the Director to make the determinations required by OAC 3745-32-05 and, also, complied with the provision in OAC 3745-1-05 requiring that the amount and substance of fill material to be discharged be identified. Specifically, Appellee's application indicated that "32,000 cubic yards (cy) of fill material (dirt)" "800 cy of sloped protection rock" and "approximately 67,000 cy of clay fill and sloped protection rock" would be used in this project. We feel both the amount (i.e., 67,000 cy, 800 cy and 32,000 cy) and the substance (i.e., rock, dirt and clay) of the fill was sufficiently delineated. Furthermore, we feel it is significant to note that in the present action the Director used the authority granted to him in OAC 3745-32-05(C) and (D) to include specific terms and conditions in Appellee's 401 Certification to provide further assurances that the fill to be used would comply with all applicable regulations.<sup>4</sup>

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<sup>4</sup> Prior to placing any fill into water of the state, Appellee is required to identify the source and nature of the fill to be used and, also, to perform testing to confirm that the fill consists of suitable material free from toxic contaminants in other than trace quantities.

15. In sum, the Commission is of the opinion that the testimony and evidence presented herein establishes that the City's application contained the necessary information to enable the Director to make the determinations required by OAC 3745-32-05 and that the application was "complete" in light of the requirements of both OAC 3745-32-05 and OAC 3745-1-05. Furthermore, while it is clear the Director has a mechanism available pursuant to OAC 3745-32-04(A) to require an applicant to submit additional information if he deems an application to be lacking in necessary information, it is also apparent that in the instant case the Director determined that the information provided by the City was sufficient for him to conduct his evaluation relative to appellee's application. In reviewing the information supplied to the Agency, and based upon the evidence presented to this Commission, we do not disagree with this assessment. Therefore, we find that the Director's determination that Appellee's application for a Section 401 Certification was complete was both reasonable and lawful.

16. Once the Director has determined that an application for a Section 401 Certification is complete, he must evaluate the application in light of the criteria enumerated in OAC Section 3745-1, the state's Water Quality Standards, and OAC Chapter 3745-1. Of particular relevance in the present action are OAC Section 3745-1-04(A)-(E), generally known as the "free-from" regulation, and OAC Section 3745-1-05, the state's anti-degradation

17. Specifically, OAC Section 3745-1-04 provides in relevant part:

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

(A) Free from suspended solids or other substances that enter the waters as a result of human activity . . .

(B) Free from floating debris, oil, scum and other floating materials entering the waters as a result of human activity in amounts sufficient to be unsightly or cause degradation;

(C) Free from materials entering the waters as a result of human activity producing color, odor or other conditions in such a degree as to create a nuisance;

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

(E) Free from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae.

18 As testified to by Ms. Merchant, a determination was made that Appellee's application demonstrated compliance with OAC 3745-1-04 in that the City and Chrysler will be using best management practices in order to avoid any additional "free from" impacts on the Ottawa River. Conversely, Appellants did not present the Commission with any evidence to support a finding that the project being proposed would in any way violate the provisions of OAC Section 3745-1-04. Therefore, we find that it was both reasonable and lawful for the Director to determine that the project at issue would comply with the provisions of OAC Section 3745-1-04.

19 Finally, OAC 3745-1-05, Ohio's anti-degradation regulation, is relevant to our inquiry today. Ohio Administrative Code Section 3745-1-05 establishes a general rule that both existing instream uses, as well as existing water quality be maintained and protected. In the instant case, this general rule would preclude the Director from authorizing any activity which would prevent the Ottawa River from maintaining its warmwater aquatic life habitat designated use, or the applicable

numerical water quality standards to support that use.

20. However, the general rule found in OAC Section 3745-1-05 does allow for certain exceptions. Specifically, the regulation provides that the Director may, after compliance with public notice and hearing requirements, and after due consideration of technical, economic and social criteria, choose to allow a lowering of water quality.

21. The relevant public notice and hearing requirements, as set out in OAC 3745-1-05 and Title 40 CFR Part 25, require the Director to cause to be published a timely public notice advertising the date, time and place of the public hearing. The notice is to be published once in a newspaper of general circulation in the county where the facility is located. Furthermore, the public notice must identify the matters to be discussed at the hearing and it must include the Agency's tentative determination on major issues, if any.

22. The policy underlying both the federal and state regulations relating to the public notice and hearing requirements is to provide adequate information concerning proposed projects to allow for the public's meaningful comment and participation.

23. Similar to the arguments discussed above, Appellants herein claim that these requirements were not met because the description of fill which was provided was inadequate. They further claim that since the parameters of the project relative to the loop road and shipping lot were modified after the application had been submitted, a new public notice and hearing should have been held to consider alternatives to the new configuration for the project. We disagree.

24. As discussed above, we find the description of fill provided in Appellee's application was

sufficient to comply with the requirement in OAC 3745-1-05.

25. Relative to the modification in location of the loop road and shipping lot, we agree with the testimony offered by Ms. Merchant and Mr. Burkett. In its application, the City indicated that some modification to the final project was possible (see the discussion of the "Preferred Design Alternative," above). Furthermore, since the scope of the project had not changed and as there were assurances that there will be no additional fill and no additional impacts relative to the wetlands herein, we do not find that it was necessary to issue a new public notice or hold a new public hearing in order to comply with the mandates of the anti-degradation rule.

26. Therefore, in the instant case, the Commission finds the Director complied with all applicable public notice and hearing requirements and engaged in all appropriate inquiries before lawfully and reasonably making his determination to allow for the lowering of water quality.

27. Thus, based upon the evidence and testimony, it is the opinion of the Commission that the City has proven its entitlement to the Section 401 Certification as approved and issued by the Director.

28. Furthermore, based upon the evidence and testimony offered in the instant matter, it is the opinion of the Commission that the Director acted both lawfully and reasonably in determining that the City had satisfied the criteria for a Section 401 Certification. For the foregoing reasons, the Commission finds that the issuance of the instant Section 401 Certificate to the City of Toledo was a lawful and reasonable action of the Director, and should be affirmed.

FINAL ORDER

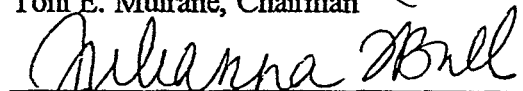
Based upon the above, the Commission hereby rules to AFFIRM the Director's action in the issuance of the Section 401 Certificate to the City of Toledo.

The Commission, in accordance with Section 3745.06 of the Revised Code and the Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Review Appeals Commission may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulations to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Commission a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which the Appellant received notice from the Commission by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION

  
Toni E. Mulrane, Chairman

  
Julianna F. Bull, Vice-Chairman

  
Jerry Hammond, Member

Entered in the Journal of the  
Commission this 15<sup>th</sup>  
day of August, 1998.

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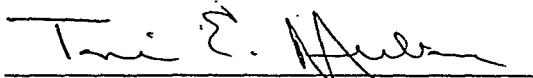
FRIENDS OF OTTAWA RIVER	[CERTIFIED MAIL]
RICK VAN LANDINGHAM, III	[CERTIFIED MAIL]
TERRY LODGE	[CERTIFIED MAIL]
MIKE FERNER	[CERTIFIED MAIL]
MICHAEL LEONARDI	[CERTIFIED MAIL]
BEN KROMPAK	[CERTIFIED MAIL]
LESLIE DUDEN	[CERTIFIED MAIL]
BETH OVERMANN	[CERTIFIED MAIL]
DANA FALL	[CERTIFIED MAIL]
TERESA FLYNN	[CERTIFIED MAIL]
CARRIE HAWKINS	[CERTIFIED MAIL]
DONALD SCHREGARDUS, DIRECTOR	[CERTIFIED MAIL]
CITY OF TOLEDO	[CERTIFIED MAIL]
Terry J. Lodge, Esq.	
Joseph P. Koncelik, Esq.	
Robert J. Karl, Esq.	
Edward M. Yosses, Esq.	
Lourdes Santiago, Esq.	

FINDINGS OF FACT  
AND FINAL ORDER

Case No. EBR 483893, etc.

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND FINAL ORDER in FRIENDS OF OTTAWA RIVER,  
ET AL. V. DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL  
PROTECTION, ET AL., Case No. EBR 483893-483903 entered into the Journal of the  
Commission this 15<sup>th</sup> day of September, 1998.

  
Toni E. Mulrane, Chairman

Dated this 15<sup>th</sup> day of  
September, 1998, at Columbus, Ohio.



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