

OPINION NO. 99-053

Syllabus:

1. Neither R.C. 4733.17 nor R.C. 4733.23 requires the Director of Environmental Protection to reject plans that are submitted to the Ohio Environmental Protection Agency for review under R.C. Chapter 6109
-

or R.C. Chapter 6111 on the basis that such plans were not prepared by a registered engineer. (1972 Op. Att'y Gen. No. 72-108, syllabus, paragraph two, overruled to the extent that it is inconsistent with this opinion.)

2. Absent a statute or validly adopted rule that authorizes the Director of Environmental Protection to reject plans that have been submitted to the Ohio Environmental Protection Agency for review under R.C. Chapter 6109 or R.C. Chapter 6111 on the basis that such plans have not been prepared by a registered engineer, the Director is without authority to reject such plans on that basis.
3. R.C. 6109.04(B) authorizes the Director of Environmental Protection to adopt a rule requiring that plans submitted to the Ohio Environmental Protection Agency under R.C. 6109.07(A)(1) be prepared by a registered engineer, provided that the Director finds such a requirement to be reasonable and necessary for the protection of the public health or welfare.

To: Christopher Jones, Director, Ohio Environmental Protection Agency, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, November 17, 1999

You have requested an opinion concerning the authority of the Ohio Environmental Protection Agency (Ohio EPA) with respect to the approval of plans submitted for the design, construction, or modification of privately funded public water systems or private wastewater systems in the event that such plans have not been prepared by a professional engineer. In order to answer your question we must begin with a brief discussion of the powers and duties of Ohio EPA with respect to such plans.

R.C. 3745.01 creates Ohio EPA and imposes upon it the duty to administer laws with respect to various matters, including, "the prevention, control, and abatement of air and water pollution; public water supply; comprehensive water resource management planning; and the disposal and treatment of solid wastes, infectious wastes, construction and demolition debris, hazardous waste, sewage, industrial waste, and other wastes." *See generally* R.C. 3745.011 (explaining the legislative intent in creating Ohio EPA). Additional powers and duties are imposed upon Ohio EPA in other chapters of the Ohio Revised Code. *See, e.g.*, R.C. 1501.20 (stating in part, "[t]he director of environmental protection shall utilize the department of natural resources, the division of soil and water districts, and local soil and water conservation districts in encouraging landowner abatement of agricultural pollution and urban sediment pollution"); R.C. 6101.13 (Ohio EPA approval of conservancy district plan with respect to "the supplying of water for domestic, industrial, and public use or to the collection and disposal of sewage and other liquid wastes"). As a creature of statute, Ohio EPA has only such authority, either express or implied, as is conferred upon it by the General Assembly. *See Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975).

According to information provided by your staff, your particular concern is with the manner in which Ohio EPA approves plans in conjunction with the issuance of permits

under R.C. Chapter 6109, concerning public water systems,¹ and R.C. Chapter 6111, governing private wastewater systems. *See, e.g.*, R.C. 6109.07 (public water system plan approval); R.C. 6111.03(I) (review of plans, specifications, and other data in connection with "orders, permits, and industrial water pollution control certificates under" R.C. Chapter 6111 (water pollution control)).

It has been asserted that, even though R.C. 4733.03 establishes the State Board of Registration for Professional Engineers and Surveyors "to administer [R.C. 4733.01-.23]," the duty of enforcing the prohibition contained in R.C. 4733.22 against the unauthorized practice of engineering is vested not only in the Board, but also in various other public officials.² It is suggested that, pursuant to R.C. 4733.23,³ public officials, such as the county recorder, the county engineer, the county treasurer, and the Director of Environmental Protection are "officers of the law of this state, or of any political subdivision thereof" for purposes of R.C. 4733.23, and thus have a duty to enforce R.C. 4733.01-.22. According to this theory, as part of the duty to enforce R.C. 4733.01-.22, the Director of Environmental Protection must reject plans submitted for approval under R.C. Chapter 6109 and R.C. Chapter 6111 if such plans have not been prepared by a professional engineer.⁴ For the reasons that follow, however, we do not concur with the suggested reading of R.C. 4733.23.

¹ *See generally* R.C. 6109.01(A) (defining "[p]ublic water system"); R.C. 6109.02 (exemptions from R.C. Chapter 6109).

² R.C. 4733.22 states:

No person shall practice, or offer to practice, the *profession of engineering* or the profession of surveying without being registered or exempted in accordance with [R.C. 4733.01-.23], or present or attempt to use as his own the certificate of registration, the certificate of authorization, or the seal of another, or give any false or forged evidence of any kind to the state board of registration for professional engineers and surveyors or to any member thereof in obtaining a certificate of registration or certificate of authorization, or falsely impersonate any other registrant or holder of a certificate of authorization of like or different name, or attempt to use an expired or revoked certificate of registration or certificate of authorization, or violate such sections. (Emphasis added.)

³ R.C. 4733.23 states:

All *officers of the law* of this state, or of any political subdivision thereof, shall enforce [R.C. 4733.01-.22], and prosecute any persons violating same. The state board of registration for professional engineers and surveyors is hereby authorized to apply for relief by injunction or restraining order to enjoin or restrain a person from the commission of any act which is prohibited by [R.C. 4733.01-.22]. The remedy provided by this section shall be in addition to any other remedy provided by law. The attorney general or his designated assistant shall act as legal adviser of the board and render such legal assistance as may be necessary. (Emphasis added.)

⁴ As indicated in your request letter, you are not asking about the approval of plans for publicly-funded projects, which are often approved by other means. *See, e.g.*, R.C. 6109.07(A)(2) (agreements for review of plans by political subdivision or investor-owned public utility); R.C. 6111.032(A) (special powers granted to municipal legislative authority or governing board of a county or special district owning or operating a publicly owned

As used in R.C. 4733.23, the term "officers of the law" is not defined by statute. We must, therefore, look to the common meaning of those words. R.C. 1.42. Although we have been unable to find a dictionary definition of the phrase "officers of the law," our research reveals that this term has been used by the courts in a variety of contexts.⁵ It is interesting to note, however, that in none of these decisions have the courts attempted to define the term "officers of the law," but have simply referred to particular persons, such as a sheriff, police officer, probation officer, game warden, or prosecuting attorney, as "officers of the law." No statute or judicial decision of which we are aware, however, refers to the Director of Environmental Protection as an "officer of the law."

Rather, examination of the types of positions that have been referred to as "officers of the law" suggests that the phrase is commonly used to refer to public officials who are otherwise referred to as law enforcement or peace officers. *See generally, e.g.*, R.C. 109.71(A) (defining "[p]eace officer" for purposes of certification by the Ohio Peace Officer Training Commission); R.C. 2901.01(A)(11) (defining "[l]aw enforcement officer" as used in the Ohio Revised Code); R.C. 2921.51(A)(1) (defining "[p]eace officer" for purposes of prohibition against impersonating peace officer); Ohio R. Crim. P. 2(J) (defining "[l]aw enforcement officer" as used in the Ohio Rules of Criminal Procedure). Often, the primary statutory duties of such public officials include the enforcement of some or all of the laws of the state or the prosecution of violations thereof, and, in certain instances, the power to arrest.⁶ It

treatment works or sewerage system). The approval of plans by the Ohio Environmental Protection Agency (Ohio EPA) for such projects will not, therefore, be addressed in this opinion.

⁵ *See, e.g., Ayers v. Woodard*, 166 Ohio St. 138, 140, 140 N.E.2d 401, 403 (1957) (questioning "whether the deputy sheriff was acting within the scope of his capacity as an officer of the law at the time of the incident"); *Brinkman v. Drolesbaugh*, 97 Ohio St. 171, 179, 119 N.E. 451, 453 (1918) (a game warden is an officer of the law with a duty to "to serve and enforce the processes of the various courts"); *Allen v. Medill*, 14 Ohio 445, 454 (1846) ("[a] sheriff is an officer of the law"); *State v. Metcalf*, 60 Ohio App. 2d 212, 217, 396 N.E.2d 786, 790 (Tuscarawas County 1977) (finding undercover agents for multi-county narcotics agency to be "officers of the law" for purposes of entrapment defense); *State v. Glover*, 52 Ohio App. 2d 35, 38, 367 N.E.2d 1202, 1204 (Franklin County 1976) ("[a] duly commissioned police officer holds a public office upon a continuing basis. The officer here remained an officer of the law, and his obligation to preserve the peace was not nullified by the fact he was working for Kroger"); *State v. McDonald*, 32 Ohio App. 2d 231, 289 N.E.2d 583 (Summit County 1972) (syllabus, paragraph two) ("[a] person is not entrapped when police officers, for the purposes of detecting crime, merely present a defendant with the opportunity to commit an offense. Under such circumstances, craft and pretense may be used by officers of the law to accomplish such a purpose"); *State v. Morris*, 100 Ohio App. 307, 312, 136 N.E.2d 653, 658 (Erie County 1954) ("[a] prosecuting attorney, as an officer of the law, has the duty to conduct the state's case with vigor and alertness, so that the guilty may not escape punishment"); *State v. Nowak*, 91 Ohio App. 401, 405, 108 N.E.2d 377, 379 (Lucas County 1952) (referring to a probation officer's report as "the report of the officer of the law having charge of the county probation department and from whom the court had a right to receive a statement of fact relative to the conduct of defendant while on probation").

⁶ *See, e.g., R.C. 309.08(A)* (stating in part, "[t]he prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, ..., and other suits, matters, and controversies that the prosecuting attorney is required to

appears, therefore, that the term "officers of the law of this state," as used in R.C. 4733.23, refers to persons who are commonly described as law enforcement or peace officers, but does not include the Director of Environmental Protection.⁷ See 1962 Op. Att'y Gen. No. 3000, p. 356, at 360 (finding that municipal "law enforcement officials" constitute "officers of the law" for purposes of R.C. 4733.23).

There appears to be an alternative theory under which it is asserted that Ohio EPA has a duty to reject plans submitted to it under R.C. Chapter 6109 or R.C. Chapter 6111 if those plans have not been prepared by a registered engineer. 1972 Op. Att'y Gen. No. 72-108 concluded as follows in the second paragraph of its syllabus:

A county engineer, or a city engineer, or any public official of any political subdivision of this state, who, as part of his responsibility to that jurisdiction, is required to review *engineering or surveying plans*, designs, or specifications of a public work, costing in excess of \$5,000, for compliance with the applicable codes and regulations, has the authority ... to reject

prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals"); R.C. 311.07(A) (stating in part, "[e]ach sheriff shall preserve the public peace and cause all persons guilty of any breach of the peace, within the sheriff's knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the court of common pleas, and the sheriff shall commit such persons to jail in case they refuse to do so"); R.C. 737.11 (stating in part, "[t]he police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority of the municipal corporation, all criminal laws of the state and the United States.... Both the police and fire departments shall perform any other duties that are provided by ordinance"); R.C. 1533.67 (stating in part, "[t]he chief of the division of wildlife, wildlife officers, and other employees of the division that the chief specifies may serve and execute warrants and other processes of law issued in the enforcement of [R.C. 2923.12, R.C. 2923.15, and R.C. 2923.16] and in the enforcement of any law or division rule governing the taking, possession, protection, preservation, or propagation of wild animals, or for protection against the wrongful use or occupancy of state owned or leased lands and waters, and property under division control, or in the enforcement of [R.C. 3767.32 (improper disposal of litter)] or any other section of the Revised Code prohibiting the dumping of refuse into or along waters, or in the enforcement of a criminal law of the state when violation of it involves equipment or property owned, leased, or controlled by the division, in the same manner as a sheriff or constable may serve or execute a process, and may arrest on sight and without a warrant a person found violating any such law or rule"); R.C. 2301.27 (stating in part, "[p]robation officers have all the powers of regular police officers and shall perform any duties that are designated by the judge or judges of the court").

⁷ We are aware that the Director of Environmental Protection has been granted certain duties with respect to the enforcement of state and federal laws. See, e.g., R.C. 6109.04(A) ("[t]he director of environmental protection shall administer and enforce this chapter [public water systems] and rules adopted under it"); R.C. 6111.03(Q) (in part, authorizing the Director of Environmental Protection to "[a]dminister and enforce the publicly owned treatment works pretreatment program in accordance with the 'Federal Water Pollution Control Act'"). Those duties do not, however, extend to the enforcement of R.C. 4733.01-22.

engineering plans, designs, or specifications which have been certified by other than a professional engineer. (Emphasis added.)

In reaching this conclusion, 1972 Op. Att'y Gen. No. 72-108 relied upon R.C. 4733.17,⁸ which states, in pertinent part:

Neither this state, nor any of its political subdivisions, nor any municipal corporation shall engage in the construction of any public work involving the practice of professional engineering or professional surveying, for which plans, specifications, and estimates have not been made by, and the construction thereof inspected by, a licensed professional engineer or professional surveyor; provided this section shall not apply to the design, construction, improvement, or maintenance of any public work wherein the contemplated expenditure for the completed project does not exceed five thousand dollars.

Based upon this language, 1972 Op. Att'y Gen. No. 72-108 concluded, at 2-424, that "any public official, who is required to review engineering or surveying plans, designs, or specifications of a public work for compliance with the applicable codes, must reject such plans, if they call for expenditures in excess of \$5,000, and if they are not certified by a properly qualified person."

The 1972 opinion thus finds that R.C. 4733.17 requires the state and its political subdivisions not only to use the services of registered engineers and surveyors in the construction of certain of their public works, but also, when acting in their capacities as the public entities charged with the review of engineering or surveying plans for construction generally, to reject any such plans for public works costing in excess of \$5,000 that are not prepared by a registered engineer or registered surveyor.⁹ The rationale for such a reading of R.C. 4733.17, however, is not explained in 1972 Op. Att'y Gen. No. 72-108.¹⁰

More recently, the meaning of R.C. 4733.17 was addressed in *Ramby v. Ping*, No. 95-CA-92, 1996 Ohio App. LEXIS 1406 (Ct. App. Greene County April 5, 1996), in a slightly different context. In *Ramby*, the court was asked to consider whether a city could be held liable for an accident alleged to have occurred as a result of the city's failure to comply with R.C. 4733.17. In finding that R.C. 4733.17 imposed no such liability, the *Ramby* court instead characterized in the following manner the duty imposed upon political subdivisions by R.C. 4733.17:

⁸ At the time 1972 Op. Att'y Gen. No. 72-108 was issued, former R.C. 4733.17 contained language identical to that in the above-quoted portion of current R.C. 4733.17. See 1969-1970 Ohio Laws, Part III, 2429 (Am. H.B. 610, eff. Nov. 21, 1969).

⁹ 1972 Op. Att'y Gen. No. 72-108, syllabus, paragraph two, applies by its terms to plans only for those public works costing in excess of \$5,000. Although your question excludes the approval of plans for public works, see generally note four, *supra*, we mention this opinion only because it may serve as the basis of the assertion that public entities have a duty to reject construction plans that have not been prepared by a registered engineer.

¹⁰ 1972 Op. Att'y Gen. No. 72-108 failed to address any specific statutory provisions pursuant to which engineering plans are reviewed by public officials. Thus, it is not clear whether these statutory schemes may themselves require the rejection of any such plans that are not prepared by a registered engineer or surveyor.

R.C. 4733.17 ... imposes a responsibility upon political subdivisions to use the services of a licensed professional engineer or professional surveyor whenever it is engaged in the construction of any public work involving the practice of professional engineering. However, that statute includes no express imposition of liability. Indeed, as the City notes, the only remedy provided in the statute for its violation is that any contract for engineering or surveying services executed in violation of the statute is void, and any monies paid under the void contract are to be refunded.

95 CA-92, 1996 Ohio App. Lexis 1406, at *7.

Unlike the expansive reading given to R.C. 4733.17 by 1972 Op. Att'y Gen. No. 72-108, the *Ramby* court did not read into R.C. 4733.17 responsibilities not expressly set forth in the statute. The *Ramby* court's reading of R.C. 4733.17 is supported by well-established rules of statutory construction. See e.g., *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 586, 651 N.E.2d 995, 999 (1995) ("[i]t is the duty of the court to give effect to the words used and not to insert words not used"); *State v. Smorgala*, 50 Ohio St. 3d 222, 223, 553 N.E.2d 672, 674 (1990) ("[w]here the words of a statute are free of ambiguity and express plainly and distinctly the sense of the lawmaking body, the courts should look no further in their efforts to interpret the intent of the General Assembly"). We, therefore, find the *Ramby* court's reading of R.C. 4733.17 to be persuasive. Accordingly, we reject the 1972 opinion's characterization of R.C. 4733.17 as requiring the state and its political subdivisions, when acting in the capacity of reviewer or evaluator of construction plans for purposes of issuing permits or other similar purposes, to reject plans for public works costing in excess of \$5,000 on the basis that the plans were not prepared by a registered engineer or surveyor. We, therefore, overrule 1972 Op. Att'y Gen. No. 72-108, syllabus, paragraph two, to the extent that it is inconsistent with this opinion.¹¹

Having concluded that neither R.C. 4733.17 nor R.C. 4733.23 imposes a duty upon Ohio EPA with respect to the enforcement of the provisions of R.C. Chapter 4733, let us now turn to the statutory schemes governing Ohio EPA's approval of plans for public water systems under R.C. Chapter 6109 and the issuance of permits under R.C. Chapter 6111 for private wastewater systems to determine the statutory bases for the rejection of plans sub-

¹¹ Unlike the situation about which you ask, syllabus, paragraph two of 1972 Op. Att'y Gen. No. 72-108 assumes that the documents subject to review were, in fact, "engineering or surveying plans, designs, or specifications." It has not been established that the items subject to review by Ohio EPA are, in fact, documents the preparation or review of which requires the services of a registered engineer or surveyor. Whether the preparation or review of the documents that are the subject of your request involves the practice of engineering, as defined in R.C. 4733.01(D), is a matter requiring various factual determinations that may best be made through consultation with the State Board of Registration for Professional Engineers and Surveyors. See *Clark v. State Board of Registration*, 121 Ohio App. 3d 278, 285, 699 N.E.2d 968, 972 (Summit County 1997) ("[i]t is elementary that anything falling within the 'practice of surveying' is under the Board's jurisdiction"); 1972 Op. Att'y Gen. No. 72-108 (syllabus, paragraph one) (stating, in part: "[t]he State Board of Registration for Professional Engineers and Surveyors has the authority, under [R.C. Chapter 4733], to make the determination of the types of services which shall be intrinsic to the practice of engineering"). See generally 1981 Op. Att'y Gen. No. 81-080 (finding that the registration requirements of R.C. Chapter 4733 are applicable to persons who engage in the practice of engineering while employed by the State of Ohio).

mitted under those chapters. Additional information provided by your office indicates that the plans with which you are concerned are submitted to Ohio EPA for review under a variety of different statutes. The statutory schemes governing the approval of public water system plans and the issuance of various types of wastewater disposal permits are too numerous to be addressed individually within a single Attorney General opinion.¹² We will, instead, attempt to address your concerns more generally and examine, by way of example, only certain of these statutory provisions. Should a question arise with respect to the duty of the Director to reject plans submitted under one of the other statutory schemes about which you ask, the following analysis may be helpful in resolving such question.

Because neither R.C. 4733.17 nor R.C. 4733.23 requires the Director of Environmental Protection to reject plans solely on the basis that such plans were not prepared by a registered engineer, whether the Director has an obligation to reject particular plans on that basis depends upon whether there is an applicable statute or validly promulgated rule requiring rejection of such plans on that basis. *See* 1984 Op. Att'y Gen. No. 84-100 (addressing the review and approval of plans submitted to state and local building authorities in conjunction with an application for a building permit, even if such plans were not prepared by a certified architect).

In the absence of a statute requiring that particular types of plans submitted to Ohio EPA for review be prepared by registered engineers, if the Director intends uniformly to impose such a requirement with respect to particular types of plans, he may do so by promulgating a rule imposing that requirement.¹³ *See Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. and Nurse Registration*, 44 Ohio St. 3d 73, 540 N.E.2d 1354 (1989) (an agency's issuance of a "position paper" that had the effect of establishing a new rule, standard, or regulation constituted a "rule" that should have been adopted in accordance

¹² *See, e.g.*, R.C. Chapter 6111.03(I) (authorizing the Director of Environmental Protection to "[r]eview plans, specifications, or other data relative to disposal systems or any part thereof in connection with the issuance of orders, permits, and industrial water pollution control certificates under [R.C. Chapter 6111]"); R.C. 6111.03(J) (in part, authorizing the Director of Environmental Protection to "[i]ssue, revoke, modify, or deny permits for the discharge of sewage, industrial waste, or other wastes into the waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the 'Federal Water Pollution Control Act' and mandatory regulations adopted thereunder, and set terms and conditions of permits, including schedules of compliance, where necessary"); R.C. 6112.03 ("[a]pplications for approval of plans for the construction and installation of facilities under this chapter shall be made in the manner and form prescribed by the director of environmental protection and shall be accompanied by plans, specifications, and other data that the director may require relative to the facilities for which approval of plans is requested. Thereafter, the director shall act upon the application in accordance with law and the rules adopted pursuant thereto").

¹³ R.C. 119.02 requires Ohio EPA, among others, to comply with the rule-making procedure set forth in that chapter, and "[u]nless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule." *See generally* R.C. 119.01(C) (as used in R.C. Chapter 119, "rule" means "any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule"). Thus, in order to establish "any rule, regulation, or standard, having a general and uniform operation," the Director must comply with the rule-making procedures of R.C. Chapter 119.

with the procedural requirements of R.C. Chapter 119); *Jackson County Environmental Committee v. Schregardus*, 95 Ohio App. 3d 527, 642 N.E.2d 1142 (Franklin County 1994) (an administrative agency's issuance to a company of "guidelines" that set standards for the application of sludge containing dioxins under certain specific conditions should have been promulgated as rules in accordance with R.C. Chapter 119).¹⁴

By way of example, let us examine the provisions of R.C. Chapter 6109, concerning the approval of plans for public water systems. Pursuant to R.C. 6109.04(A), the Director of Environmental Protection is required to administer and enforce R.C. Chapter 6109 and the rules adopted under it. *See generally* R.C. 6109.03 ("[t]he purpose of [R.C. Chapter 6109] is to protect the public health and welfare and to enable the state to assume and retain primary enforcement responsibility under the Safe Drinking Water Act"). In furtherance of this purpose, the General Assembly has enacted R.C. 6109.07(A), pursuant to which, "[n]o person shall begin construction or installation of a public water system, or make a substantial change in a public water system, until plans therefor have been approved by the director of environmental protection under division (A)(1) or (2) of this section."¹⁵ The Director's duties with respect to the approval of such plans are prescribed, in pertinent part, by R.C. 6109.07(A)(1), as follows:

Upon receipt of a proper application, the director shall consider the need for compliance with requirements of the Safe Drinking Water Act, and *generally accepted standards for the construction and equipping of water systems*, and shall issue an order approving or disapproving the plans. In granting an approval, the director may stipulate conditions designed to ensure that the system will be able to meet the requirements of this chapter and rules adopted under it. (Emphasis added.)

R.C. 6109.07(A)(1) thus establishes two criteria for the Director's evaluation and ultimate approval or disapproval of plans for the construction, installation, or modification of public water systems—"the need for compliance with requirements of the Safe Drinking Water Act" and "generally accepted standards for the construction and equipping of water sys-

¹⁴ *See generally Dressler Coal Corp. v. Call*, 4 Ohio App. 3d 81, 446 N.E.2d 785 (Franklin County 1981) (syllabus, paragraphs two and three) ("2. There are circumstances which arise where an agency is justified in acting by individual order rather than by general rule: (1) situations that could not reasonably be foreseen; (2) problems which must be solved despite the absence of a relevant general rule; and (3) insufficient experience with the particular problem to warrant rigidifying a tentative judgment into a hard and fast rule; and (4) problems so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule. 3. The Chief of the Division of Reclamation was authorized to solve problems involving reclamation requirements on a case by case method during the period when there were no specific regulations in effect").

¹⁵ R.C. 6109.07(A)(2) provides for an alternative system of review for plans of certain changes in a public water system owned or operated by a political subdivision or investor-owned public utility. We will assume that your question does not include such scheme of alternative review. *See generally* 7B Ohio Admin. Code 3745-91-12 (certification by political subdivisions and investor-owned public utilities).

tems.” No statute of which we are aware requires that the plans submitted under R.C. 6109.07(A)(1) be prepared by a registered engineer in order to be approved by Ohio EPA.¹⁶

The criteria established by R.C. 6109.07(A)(1) may, however, be amplified by the Director of Environmental Protection under R.C. 6109.04(B),¹⁷ which requires the Director to adopt such rules governing public water systems as may be necessary or desirable to protect the public health or to protect the public welfare.¹⁸ Thus, R.C. 6109.04 invests the Director with discretion to determine whether a requirement that plans submitted under R.C. 6109.07(A)(1) be prepared by a registered engineer would be necessary or desirable for the protection of the public health or welfare, and if so, to adopt a rule imposing such requirement.¹⁹ See generally 1986 Op. Att’y Gen. No. 86-076 at 2-422 (the Attorney General

¹⁶ Cf. R.C. 6112.02 (stating, in part, that surveys accompanying applications requesting approval of general plans for sewage disposal system in one or more counties “shall have been made under the supervision of and certified by a registered engineer or surveyor”).

¹⁷ R.C. 6109.04(B) states:

The director *shall* adopt, amend, and rescind such rules in accordance with [R.C. Chapter 119] as may be *necessary or desirable* to do both of the following:

(1) Govern public water systems in order to *protect the public health*;

(2) Govern public water systems to *protect the public welfare*, including rules governing contaminants in water that may adversely affect the suitability of the water for its intended uses or that may otherwise adversely affect the public health or welfare. (Emphasis added.)

See also R.C. 6109.04(C)(1) (permissive rule-making authority of the Director).

¹⁸ 7B Ohio Admin. Code 3745-91-02(A) requires that an application for the approval of plans required by R.C. 6109.07(A)(1) include, among other things, “plan drawings as specified by rule 3745-91-03.” According to 7B Ohio Admin. Code 3745-91-03, “[p]lan drawings shall ... (B) [s]how that the plans have been prepared in conformance with Ohio engineering registration laws.” The precise meaning of this rule is unclear. To the extent that the preparation of particular plans involves the practice of engineering, rule 3745-91-03(B) appears to require that the plans show that they were prepared by a registered engineer. Nothing in rule 3745-91-03(B), however, requires Ohio EPA independently to determine whether the requirements of R.C. Chapter 4733 have been complied with in the preparation of any plans submitted to it.

¹⁹ It is interesting to note the provisions of R.C. 3745.14, which provides for the establishment by the Director of Environmental Protection of a program to certify registered engineers to conduct compliance reviews. For purposes of R.C. 3745.14, “[c]ompliance review” means, in part:

the review of an application for a permit, renewal of a permit, or plan approval, or modification thereof, for an existing or proposed facility, source, or activity and the accompanying engineering plans, specifications, and materials and information that are submitted under [R.C. Chapter 3704, R.C. Chapter 3734, R.C. Chapter 6109, or R.C. Chapter 6111] and rules adopted under them for compliance with performance standards under the applicable chapter and rules adopted under it.

is without authority to exercise on behalf of another officer or entity of the government discretion that has been bestowed by statute on that officer or entity).

According to information provided by your staff, part of your concern arises from your uncertainty as to whether the preparation of plans submitted to Ohio EPA for approval under R.C. 6109.07(A)(1) or other sections, involves the practice of engineering, as defined in R.C. 4733.01(D). *See generally* note eleven, *supra*. Resolution of this issue may well be useful in considering the manner in which to enforce 7B Ohio Admin. Code 3745-91-03(B), *see* note eighteen, *supra*, or whether it may be necessary or desirable to protect the public health or welfare to require that such plans be prepared by a registered engineer in order to receive Ohio EPA approval. At the same time, however, resolution of this issue is not dispositive of the wholly separate question whether Ohio EPA may or must reject plans that have not been so prepared.

We conclude, therefore, that, although there is no statutory requirement that the Director of Environmental Protection reject plans submitted to Ohio EPA under R.C. 6109.07(A)(1) on the basis that the plans were not prepared by a professional engineer, should the Director determine that it would be necessary or desirable in order to protect the public health or welfare to require that such plans be prepared by a professional engineer, it is within the scope of the Director's authority under R.C. 6109.04(B) to adopt a rule imposing that requirement.²⁰ *See* note eighteen, *supra*. *See generally Ohio Society of Professional Engineers v. Hulslander*, 86 Ohio App. 497, 42 Ohio Op. 156 (Ct. App. Cuyahoga County 1949) (syllabus, paragraph one) (G.C. 1083-1 through 1083-26 (analogous provisions now in R.C. Chapter 4733), "regulating the practice of professional engineering comprehends only engineering that concerns the safeguarding of life, public health, or property"). Moreover, whether or not the preparation of plans submitted for Ohio EPA approval under R.C. 6109.07(A)(1) involves the practice of engineering, as defined in R.C. 4733.01(D), Ohio EPA has no authority, absent a statute or validly promulgated rule authorizing the Director to reject any such plans that have not been prepared by a registered engineer, to reject such plans solely on the basis that they have not been prepared by a registered engineer.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

R.C. 3745.14(A)(1) (emphasis added). Under this program, only a registered engineer or a firm, partnership, association, or corporation providing engineering services in compliance with R.C. Chapter 4733 may be certified to conduct compliance reviews. R.C. 3745.14(A)(2) and (B). As you have informed us, Ohio EPA has not established such a program. We note, however, that R.C. 3745.14(G) states that, when a certified engineer conducts a "compliance review," "the *other activities* in connection with the consideration, approval, and issuance of the permit, renewal of the permit, or plan approval, or modification thereof, *shall be conducted by the director* or, when applicable, the hazardous waste facility board established in [R.C. 3734.05], in accordance with the applicable provisions of [R.C. Chapter 3704, R.C. Chapter 3734, R.C. Chapter 6109, or R.C. Chapter 6111] and rules adopted under the applicable chapter." (Emphasis added.) R.C. 3745.14(G) thus suggests that the review of plans under R.C. Chapter 6109 and R.C. Chapter 6111, among others, is not solely a review of applications for compliance with matters falling within the practice of engineering.

²⁰ Of course, whether the Director of Environmental Protection may adopt a rule requiring other types of plans submitted to the EPA for approval to be prepared by a professional engineer depends upon the extent of the Director's rule-making authority with respect to such plans.

1. Neither R.C. 4733.17 nor R.C. 4733.23 requires the Director of Environmental Protection to reject plans that are submitted to the Ohio Environmental Protection Agency for review under R.C. Chapter 6109 or R.C. Chapter 6111 on the basis that such plans were not prepared by a registered engineer. (1972 Op. Att'y Gen. No. 72-108, syllabus, paragraph two, overruled to the extent that it is inconsistent with this opinion.)
2. Absent a statute or validly adopted rule that authorizes the Director of Environmental Protection to reject plans that have been submitted to the Ohio Environmental Protection Agency for review under R.C. Chapter 6109 or R.C. Chapter 6111 on the basis that such plans have not been prepared by a registered engineer, the Director is without authority to reject such plans on that basis.
3. R.C. 6109.04(B) authorizes the Director of Environmental Protection to adopt a rule requiring that plans submitted to the Ohio Environmental Protection Agency under R.C. 6109.07(A)(1) be prepared by a registered engineer, provided that the Director finds such a requirement to be reasonable and necessary for the protection of the public health or welfare.