

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW

STATE OF OHIO

JOHNSON'S ISLAND PROPERTY : Case No. EBR 622732-622733
OWNERS'S ASSOCIATION, ET AL. : Case No. EBR 622736-622737
: Case No. EBR 622738-622739
Appellants, :
: v. :
DONALD SCHREGARDUS, DIRECTOR :
OF ENVIRONMENTAL PROTECTION, ET AL. :
Appellees. : Issued: September 7, 1994

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
FINAL ORDER AND RULING
ON MOTIONS TO DISMISS

Issued By:

ENVIRONMENTAL BOARD OF REVIEW
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STATEMENT OF THE CASE

These matters come before the Environmental Board of Review (EBR) upon separate appeals by Johnson's Island Property Owner's Association and the Individual Trustees of the Property Association (the Association) from actions of Appellee Director of the Ohio Environmental Protection Agency (OEPA, the Director, the Agency) granting 401 Certification to Co-Appellee Baycliffs Corporation (Baycliffs) by letters dated March 20, 1992. The certifications reflect a determination on the part of the Agency that Baycliffs' proposed development of a portion of Johnson's Island will comply with Ohio water quality standards. Appeals were timely filed to the Board, and a de novo hearing was held in September, 1993.

Stephen P. Samuels, of Samuels & Northrop Company, L.P.A., Columbus, Ohio, represented Appellant. Paula Brooks and Donald J. McTigue, both of McTigue & Brooks Law firm in Columbus, Ohio, represented Appellee Baycliffs. James O. Payne and John K. McManus, Assistant Attorneys General, represented Appellee Director of the Ohio Environmental Protection Agency.

Based upon the pleadings, the briefs and the evidence adduced at hearing, the Board makes the following Findings of Fact, Conclusions of Law, and Final Order.

FINDINGS OF FACT

BURDEN OF PROCEEDING

1. Before the substantive issues raised in the Notice of Appeal could be

addressed, a procedural dispute involving the burden of proceeding had to be resolved. This dispute involved which party was to bear the burden and what that burden encompassed.

2. Appellant argued that the burden should be placed upon the Applicant, Baycliffs Corporation, citing the decision of the Tenth District Court of Appeals in Jackson County Environmental Committee vs Shank, (December 10, 1991) 91-AP-57 (unreported). Counsel asserted that Jackson County, supra, established a rule that in de novo proceedings before the Board, the Applicant must always bear the burden of proof, and proceed first with the presentation of evidence. In support of this position, counsel cited the following language from that decision:

"As a technical matter, since the hearing is de novo, the same as if no prior decision had been made, and since, in effect, it is the initial original adjudication hearing the burden necessarily is upon the applicant, not only with respect to proof, but, also, with respect to going forward with the evidence." (Tape 1).

3. The Director, on the other hand, argued that the burden of proceeding has two components, one of which concerns the burden of making a prima facie case, and the other which concerns the order in which parties present evidence in de novo hearings before the Board. The first component requires that, even in a situation where an Appellant produces no evidence, Applicant must nevertheless ensure that sufficient evidence exists in the hearing record to support a decision by the Board that the Director's action was both lawful and reasonable. The latter component, which is commonly referred to as the burden of proceeding, concerns the order in which evidence is presented. It was the argument of the Director that the Board possessed the authority to determine the order of the presentation of evidence. (Tape 1)

4. The Board agrees with the Director, but for different reasons than

those offered at hearing. First, we note that in Jackson County, no evidence was adduced at the de novo hearing, and the Board affirmed the action of the Director based solely upon the record certified to the Board by the Agency. The court of appeals found that such reliance was unacceptable, and instructed that in a de novo situation, decisions of the Board must be predicated upon testimony of sworn witnesses and authenticated documents. (Jackson County, supra)

5. This does not mean, however, that the court established the universal rule suggested by Appellant in this matter. To the contrary, this Board reads the Jackson County opinion to indicate that the same party does not always bear both the burden of proof and the burden of going forward. In the paragraph cited and relied upon by Appellant, the court begins by stating,

"As a technical matter... the burden is necessarily upon the applicant not only with respect to proof but, also, with respect to going forward with the evidence."(emphasis added).

We feel that the introductory phrase, "As a technical matter", qualifies a general rule which admits to exceptions; that is, while the same party may normally bear both the burden of proof and burden of proceeding, this is not necessarily so. By way of example, in fact, the court then states that "...in some cases [the court of appeals] has indicated that it is not inappropriate for the EBR to require the Appellant, even if not the Applicant, to proceed first with the evidence, that is, to place a burden of going forward with the evidence upon the appellant, whether or not the applicant". Similarly, the court indicates that the EBR does not "commit prejudicial error by placing the burden of going forward upon a nonapplicant appellant". Finally, the court details at some length situations in which one "party has only the burden of going forward." If the proposition regarding the burden were as well settled as argued by Appellant, such examples on the part of the court would be superfluous.

6. Furthermore, the Board's reading of the language in Jackson County harmonizes with the Board's own regulations, lawfully adopted in conformity with the Ohio Revised Code. These regulations allow the Board to determine, on a case by case basis, the order in which evidence will be offered at a hearing. Specifically, OAC 3746-5-30, entitled Burden of Proceedings, states, in subsection (C)(3):

A private party appealing an action of the state shall have the burden of proceeding,...when that is not the applicant or holder of a license and protests the permit issuance... unless otherwise ordered by the Board (emphasis added.)

7. In reliance upon his reading of Jackson County, counsel for Appellant refused the Board's request that he proceed first.

ruling-

THE CERTIFICATIONS

BACKGROUND

1. Johnson's Island is located in Sandusky Bay in the Ohio portion of Lake Erie. (Appellee Ex. 2, p.5)

2. Currently, the island is connected to the Marblehead Peninsula, also in Sandusky Bay, by a causeway, or bridge. No sewer line currently serves the island. Appellee Baycliffs, through its President, Carl Zipfel, proposed construction on the island which would include installing a marina, developing residential lots, placing fill for a bridge embankment and shore protection, and, installing a sanitary sewer. (Certificate Numbers 90-450-6(A), 91-780-4, 91-780-1) (deposition Colleen Crook p. 26)(Appellee Ex.2)(Fenker, tape 6).

3. Section 404 of the federal Clean Water Act requires a developer of a project that will affect waters of the United States to obtain a permit through which the Department of the Army may regulate the discharge of dredged or fill materials into the waters of the U.S. The project proposed by Baycliffs is such

a project. (deposition, Crook) (Appellee Ex. 1, 2)

4. As a prerequisite to obtaining a 404 permit, Section 401 of that same Act, directs that an applicant must first obtain state certification that the project will comply with water quality standards. Specifically, section 401 of the Clean Water Act, 33 U.S.C. 1341(a), provides:

Any applicant for a Federal license or permit to conduct any activity... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates...that any such discharge will comply with the applicable provisions of sections 301,302,303,306 and 307 of this Act, as well as being consistent with applicable provisions of state law. (see also deposition of Colleen Crook, taken as if upon direct examination, August 21, 1993,p. 13)

5. Accordingly, Baycliffs was required to obtain 401 certification from the state of Ohio that its development would not violate the requirements of the Clean Water Act or state water quality standards. (Appellee 2)

6. The 401 certification process is initiated when an entity who is considering discharging dredged or filled materials submits an application for its 404 permit to the U.S. Army Corps of Engineers. The Corps reviews the application, and issues a Public Notice announcing its consideration. The Public Notice is then circulated to involved Agencies, such as the OEPA and Ohio Department of Natural Resources (ODNR). (Crook deposition) (Appellee Ex.2)

7. In November 1990, Baycliffs submitted its application for a 404 "dredge and fill" permit to the Department of the Army, U.S. Army Corps of Engineers. (Appellee 1)

8. On January 29, 1991, the US Army Corps of Engineers issued its Public Notice that Baycliffs had submitted an application for work on Johnson's Island. Among other things, the Notice contained a description of the work proposed to

be accomplished by Baycliffs, and a statement that the application included a proposal to construct a marina project, to install a sewer line and to construct a bridge embankment. The Notice explicitly stated that "Water Quality Certification (or waiver thereof) from the Ohio Environmental Protection Agency" might be required for the project, and that the work proposed "would not affect a species proposed or designated by the U.S. Department of the Interior as threatened or endangered, nor will it affect the critical habitat of any species". (Appellee 2)

9. When the OEPA received this Public Notice, it began its consideration of the 401 certification issues, which centered on a review of what affect this project would have on water quality standards. (Crook deposition, p 23).

10. On March 20, 1992, the Director granted 401 certification to Appellee Baycliffs.

11. Appellant timely filed appeals of this certification with the Board.

12. A de novo hearing was held in September, 1993.

13. On October 22, 1993, Appellee Baycliffs filed two motions to dismiss. The first motion requested that the appeal related to the quarry area be dismissed, on the grounds that until a channel was cut to connect the quarry to the Bay, navigable waters of the state are not involved, and thus 401 certification would not be required. The second motion requested that all three appeals be dismissed on procedural grounds.

14. Responses to both motions were filed by Appellant and Appellee Director on November 5, 1993, and November 8, 1993, respectively.

THE MARINA OR DOCKAGE AREA (Application 90-450-4(A))

15. Several aspects of the proposed development could affect the water quality of both surface and groundwater in the area. The Agency considered not

only how the construction might adversely affect water quality, but also what effects the development itself might have once that construction was completed.

16. George Fenker, a structural and civil engineer with over 30 years of experience with projects focussing on water pollution control, and past supervisor of the Northeast Ohio Regional Sewer District, testified that compliance with water quality standards in the quarry during construction, and in the marina post-construction, was a goal throughout the project. John S. Matricardi, a civil and environmental engineer with considerable dredging experience with the Corps of Engineers and the United States Coast Guard, similarly testified that he had been involved with the project since its inception, and that construction methods were designed to mitigate adverse environmental impacts of the project. (testimony, Matricardi, tape 7)(testimony, Fenker, tape 6)

17. Baycliffs employed Dr. Charles E. Herdendorf, Ph.D. Professor Emeritus of Limnology & Oceanography at the Ohio State University, to determine what impact the proposed project might have on the water resources of Johnson's Island. To this end, he performed a Hydrogeology Assessment of the project. His findings, which were published in a document presented to Baycliffs on December 5, 1988, indicated that water from Lake Erie enters the underlying aquifer to supply shoreline wells, rather than having the wells supplied by water from the quarry. Thus, Dr. Herdendorf was able to conclude that any adverse impacts of the proposed development project on the water resources of Johnson Island would be "negligible." (Appellee 20)

18. The marina project contemplated construction in two areas: the inner dock area, which is the existing quarry, and the outer dock area. Baycliffs planned to excavate a channel to connect the quarry with the outer dock area,

which opens into Sandusky Bay. A residential area with docks was planned for the perimeter of the quarry. (testimony, Zipfel)

19. As part of this construction, Baycliffs proposed to build breakwater extensions of piers from rubble mound (blue marks on Appellee Baycliffs Ex. 2), fish spawning shelves (orange marks), and floating docks (green). In considering the construction effects on surface and groundwater, the Agency considered, among other things, the volume of fill that would be placed for the pier extensions, the nature of the material to be used for the fill, and the width of the opening of the channel into the dockage area. (Appellee 2)

20. The width of the channel is critical in that it needs to be of a size sufficient to allow water to enter the marina from the outside bay. (Crook p.31, Herdendorf, Fenker).

21. Dr. Herdendorf testified that a natural exchange will occur between the marina and the bay; that is, water from the marina will periodically exit the marina, and be replaced with clean water from the Bay. Further, he testified that, in his opinion, the key to cleansing in the marina was to enhance this natural exchange. He based this statement on the fact that the water in the Lake is 50 times more influential in assessing water quality than rainfall, for example. (Herdendorf, 9/13/93)

22. Dr. Herdendorf also testified that in any marina project, care must be given to the type of material placed as part of the project, and that if, for example, the dredged material were to contain contaminants, those contaminants could become entrained in the sediment, and cause pollution. (Herdendorf)

23. As part of the marina construction, Baycliffs planned to use fill which had been dredged from the surrounding area. As mentioned above, the nature and amount of this fill were key considerations of the Agency in granting

401 certification to Baycliffs. (Crook 31, 38, Herdendorf)

24. To evaluate the effect the actual act of dredging might have on water quality, the Agency looked at impacts that might occur to the water column and the fact that increased levels of suspended sediments might occur. (Crook, 38)

25. To evaluate the impact that the dredged material itself, once dredged and placed, might have on groundwater, the Agency's Division of Groundwater prepared a preliminary hydrogeology site evaluation of both the geology and hydrogeology of the area encompassed by the Baycliffs permit application. To prepare the evaluation, the Division examined the soils at the site, as well as the underlying geology and hydrogeology. The hydrogeology review included a consideration of both the aquifer and water levels. Subsequent to its evaluation, the Division recommended that several steps be taken by Baycliffs before certification be granted. (Crook , pp. 38 et seq.)(Appellee 6).

26. Following up on, among other things, the concern regarding the nature and cleanliness of the fill, Gary Martin, Chief of Division of Water Quality Planning and Assessment, wrote Baycliffs on March 22, 1991, and asked that Baycliffs conduct a Toxic Characteristics Leaching Procedure (TCLP) and to establish a baseline ground water quality upgradient of the proposed dredged material disposal site. (Appellee Ex 3)

27. In addition, the Agency also requested that Baycliffs examine the soil for grain size distribution. All required tests were performed, and the test results were submitted to the Agency. (Appellee 3,4,7,8, 25, Crook deposition, testimony Matricardi, Zipfel)

28. Testing indicated that the material was not contaminated, and that the soil was silty clay. (Appellee 4, 25)

29. In addition to using the fill, the quarry work also contemplated using

stone from the quarry to change the contours of the quarry lake, as well as placing smaller stones (rip rap) around the perimeter.

30. The natural rock to be used presents no potential for adverse impact. Rock, being inorganic in nature, not only has an extremely low oxygen demand, and thus would not be expected to adversely affect aquatic and wildlife, but also does not sort contaminants the way that fill or sediment does. (Herdendorf, Matricardi)

31. Dr. Herdendorf, Mr. Fenker and the Agency were all of the opinion that the material to be dredged and placed was clean, and of an acceptable nature and size. The Agency concluded, based on the data submitted, that neither the dredging and disposal of sediment, nor the digging and placing of rock would be likely to adversely affect the ground water quality below the disposal sites. (Crook 36, 73,)(Appellee 5)(Herdendorf tape 4, Appellee 25)

32. Further, the Agency concluded that the mechanical disturbance which would result from the construction was temporary in nature. (Crook 36, et seq.)

33. Whether post-construction activities would adversely affect water quality was also reviewed by the Agency. In this regard, the contribution of non-point source pollution was a special concern. Residential developments can be expected to contribute pesticides, lawn clippings, leaves, etc., to storm water run-off (SRO). The degree to which this contribution to the runoff into the marina would adversely affect water quality was also considered.

34. In addition to residential contributions, marinas, by their very nature, present additional pollution concerns. Thus, the Agency also considered the impact to the water from oil, grease and fuel discharged from the boats. At this same time, they considered whether the channel would be deep enough to prevent the resuspension of sediments from the propellers of the boats.

Baycliffs, too, considered the impact to water quality that might result from human activities within the channel. (Crook, 35)(Fenker) Herdendorf)

35. Dr. Herdendorf testified regarding the effect that storm water runoff might have on the water quality of the marina. It was his expert opinion that the effect would be negligible. He based this opinion on a comparison of the amount of quarry water which would be comprised of SRO (2%) to the amount comprised of Bay water (infinitely large). (Herdendorf, 9/13/93)

36. Dr. Herdendorf also addressed the effect that pollution sources such as oil and fuel within the marina might have upon the water quality in the area. It was his opinion that successful control would be dependent upon the periodic exchange of marina water with that in the Bay, and that the exchange in this instance would be more than adequate. He did, however, recommend that pollution sources such as the boat fueling be controlled by means of rental agreements. (Appellee 21)

37. In fact, restrictive covenants as a means to control runoff from nonpoint source pollutants into the quarry were requested by the Agency. A concern that fertilizers, pesticides, oil and grease would be discharging into the quarry prompted the request. (Zipfel, tape 9, Crook, 136, Appellee 14,15)

38. Mr. Zipfel testified that in response to Agency concerns, he volunteered to restrict the application of pesticides, herbicides, etc. Accordingly, he directed his attorney to draft restrictive covenants which would minimize the presence of these pollution sources, such as fertilizers, pesticides and grease. The restrictive covenants were then submitted to the Agency for review. (Zipfel, tape 9, Appellee 14,15)

39. Mr. Fenker testified that these types of pollutants, sometimes also called "floatables", will bio-degrade with oxygenation. Further, he testified

regarding a proposed mechanical aeration system which was part of the certification, and stated, and that this system would eliminate these pollutants.

(Fenker, cross tape 6)

40. A final post-construction concern which was discussed was whether the project would violate the applicable water quality standard for dissolved oxygen in this water. That standard, specifically found in O.A.C. 3745-1-07, provides a table of chemical criteria for the water at issue. The record demonstrates that maintenance of the required dissolved oxygen (OD) levels was a concern of the Agency. Sufficient amounts of dissolved oxygen must be maintained in water to support desired aquatic species. The natural exchange of waters between the bay and the marina, in addition to the cleansing properties discussed above, is critical because it replenishes the dissolved oxygen in the marina. In addition to the natural mixing which occurs with the exchange, however, OD may be mechanically enhanced. One method for achieving this enhancement is through the use of mechanical floating aerators, such as proposed by the Applicant, and approved by the Agency. (Crook, 73; Fenker Tape 6)

41. The Agency required Baycliffs to develop a plan to maintain the dissolved oxygen level of 6 milligrams per liter within the quarry. In response, Baycliffs submitted an aeration plan which would maintain the required level through the use of floating aerators strategically placed in the quarry. (Crook, 74-76)(Appellee 15, 16)(Fenker).

42. In fact, under natural conditions, for several months of the year the bay water does not satisfy the regulatory oxygen requirements; however, installation of the proposed aeration system will result in compliance even during those times. (Fenker 6, appellee 24, Herdendorf direct)

43. Mr. Fenker testified that he had been hired by Baycliffs to resolve

the dissolved oxygen concerns of the Agency (Testimony Fenker tape 6).

44. It was his opinion that the floating aerators would maintain water quality in the marina. (Appellee 15, 16)

45. The Agency agreed with Dr. Herdendorf and Mr. Fenker's opinions that to maintain water quality in the marina area, the water should re-circulate, or exchange with the Lake, once every ten days, but disagreed that the pump originally proposed to be installed to aerate the area was adequately sized. (Appellant F)

46. Baycliffs agreed to a larger pump size, and the Agency was also ultimately satisfied that the circulation of water subsequent to the construction would be sufficient to maintain dissolved oxygen standard. (Appellant Ex. F) (Def. (Crook 83)

47. The Agency's concern over non-point source pollution and pollutants was substantially alleviated by the resolution of the dissolved oxygen issue in the quarry. In fact, Ms. Crook testified that "at the time of [the restrictive covenant] submittal we had not resolved the issue of the circulation in the quarry. So we remained concerned about the water quality within the quarry after construction." (Crook, 137)

48. The Agency concluded, as did Dr. Herdendorf, that the project, as amended and certified, would comply with water quality standards. Further, it was the opinion of Dr. Herdendorf that the Agency had given appropriate consideration to the Water Quality Standards, and to the effect the project would have on them. (Herdendorf direct) (Crook 82-85, Def. ex 3-8)

THE BRIDGE, OR CAUSEWAY (Application 91-780-4)

1. The Baycliffs project also included an application to revise the bridge, or causeway, connecting the island to the mainland. (Crook 78)

2. Baycliffs was proposing to place fill on, and adjacent to, the existing bridge. Mr. Fenker also assisted Baycliffs in this part of the project. He testified that he had designed the bridge, and that his design would effectively use fill, as well as raw rock from the quarry to improve the grade (Fenker 6).

3. Mr. Fenker further stated that the use of raw rock was of no environmental concern due to its low oxygen demands, and that the concern with the fill was, as with the quarry, that it be uncontaminated and of appropriate size and grain. Dr. Herdendorf offered the same testimony regarding the rock. (Herdendorf, Fenker)

4. The Agency reviewed the bridge application, and considered several factors before determining to grant the 401 certification for the bridge.

5. At the Agency's request, soil samples were taken to determine both grain size and chemical composition of proposed fill. (Testimony Matricardi, tape 8)

6. The results indicated that the material is silt and clay, and not contaminated. Furthermore, the results of the soil samples also enabled the Agency to conclude that the disposal of sediment from the Bay on the site contemplated on Johnson Island would not affect the ground water quality adversely. (Appellee 5,6,7)

7. The Agency also considered whether the minimum amount of fill was being dredged and placed.

8. The Agency ultimately determined to grant the certifications, after concluding that the "the material was clean", and that the water quality impacts from construction "would be temporary." (Crook 79)(Appellee 7)

THE SEWER LINE (Application 91-780-1)

1. The final part of the proposed project involved the installation of a sewer force main line from the island to the mainland. Mr. Fenker testified

that he designed the sewer line to be placed adjacent to the bridge, and to have a force main conduct waste from the island to the mainland. (Fenker, 6)

2. The sewer line will run along the entirety of the bridge, and water quality considerations involved the diameter of the sewer line along the roadway. (Appellee 2, Crook 79)

3. Mr. Fenker testified that in addition to considering how to comply with water quality standards in the installation of the sewer line, he considered and developed a method of installation which would prevent undue disturbance to the Bay bottom sediment and fish and wildlife in the area. (Fenker, 6)

4. The certifications all contained special conditions that "extreme care" be taken to avoid unnecessary turbidity and that material be placed to "minimize" runoff.

5. Dr. Herdendorf testified that practical engineering techniques are routinely used to satisfy such conditions, and offered specific examples of those techniques. One example was the use of dikes to satisfy this permit condition.

THE LAKE ERIE WATERSNAKE

1. The Public Notice states that available evidence indicates that the work proposed will not affect a species proposed or designated by the U.S. Department of the Interior as threatened or endangered. Nor may the project affect the habitat of any such species. (Appellee 2)

2. As part of the certification, the Agency considered the potential impacts that the project might have on the Lake Erie Watersnake. This consideration arose from comments which the Agency received that increased human activity as a result of the development might adversely impact the snake. (Crook

49)

3. According to Dennis Case, an acknowledged expert on the Lake Erie Watersnake from the Ohio Department of Natural Resources Division of Wildlife, the snake is a threatened species, and contact with humans is considered adverse to the snake. (Case)

4. In response to this concern, Baycliffs submitted a number of proposals for managing the snake. (Appellee 32, 33) Mr. Case, who was asked to provide an opinion on the effect of the project on the species, testified that his initial opinion was to oppose the project. (Appellee 31,32,33, Case, tape 10)

5. In response to this opposition, Baycliffs designed a plan which encompassed a secluded refuge and monitoring program for the snake. In the opinion of both Mr. Case and the Agency, Baycliffs' plan not only did not threaten the snake, but actually enhanced the likelihood of its survival. (Case, 10) (Crook, 49)

6. The 404 permit incorporates the construction of the refuge and, significantly, the monitoring of the island's snake population into the permit. It was the opinion of the Agency, as well as the Department of Natural Resources, that this project would either maintain, or increase, the snake population. (Crook 51, Case tape 10, Appellee 11, 16B)

CONCLUSIONS OF LAW

1. Pursuant to R.C. 3745.05, the statutory duty of review imposed on the Board in a de novo hearing is to determine whether the action of the Director which is under appeal is unreasonable or unlawful.

2. Unlawful means that the action taken by the Director is not in

accordance with the relevant, applicable law. Unreasonable means that the action is not in accordance with reason, or that it has no factual foundation. Only where the Board can find from the certified record filed in the case and from the evidence adduced at the de novo hearing that there is no valid factual foundation for the Director's action, or that the action was not in accordance with law, can the action under appeal be found to be unreasonable or unlawful. (Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App.2d 61 (1977)).

3. Where the evidence adduced in the record produced before the Board demonstrates that the action taken by the Director is reasonable and lawful, the Board must affirm the action of the Director. In such an instance, the Board must not substitute its judgment for that of the Director. (Citizens' Committee, supra)

4. R.C. Sec.6111.03(P) authorizes the Director to issue or deny a certification as to whether a proposed development will comply with applicable water quality standards. That section, in pertinent part states:

The Director of environmental protection may:

(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" [Clean Water Act]

5. Chapter 3745-32 of the Ohio Administrative Code, entitled "Section 401 Water Quality Certifications", expands upon this authorization, and establishes the rules regarding Water Quality Certificates. O.A.C. 3745-32-04 describes what constitutes an application for a 401 certificate, and who must submit such an application. Significantly, that section also states:

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.

6. We feel that this section demonstrates that the Agency contemplated situations in which additional information, such as the restrictive covenants herein, would be added during the permit review process, prior to a determination to grant or deny certification. Thus, while the document originally submitted to the Agency as an application for certification did not contain the restrictive covenants, Ms. Crook and Mr. Zipfel both testified that the covenants were filed as part of the application process. Therefore, it is the finding of the Board that the Agency and Applicant considered that they had become part of the 401 certification.

7. O.A.C. 3745-32-05 specifically delineates the criteria the Director must consider in making his decision to issue or deny a 401 certification.

Subsection (A) of that section states:

(A)The director shall not issue a section 401 water quality certification unless he determines that the applicant has demonstrated that 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 will:

(1) Not prevent or interfere with the attainment of applicable water quality standards;

(2) Not result in the violation of any applicable provisions of the following sections of the Federal Water Pollution control Act, including: [Sec.301 (effluent limits); Sec.302 (water quality effluent limitations); Sec.303 (water quality standards); Sec.306 (national performance standards); Sec. 307 (toxic and pretreatment effluent standards).]

Thus, the first part of this regulation prohibits the Director from granting 401 certification absent a determination that the Applicant has demonstrated that the discharge of dredged or fill material to waters of the

state will not prevent or interfere with the attainment or maintenance of water quality standards.

8. Nevertheless, the Director may still deny certification, even if an applicant has satisfied the requirements of subsection (A) if, upon review, he concludes that the proposed project will result in "adverse long or short term impact on water quality". The record demonstrates that the director did consider the long and short term impact to water quality and determined that the project would not violate applicable standards (Crook, 47)(O.A.C. 3745-32-05(B)).

9. Subsection (C) of this same rule authorizes the Director to impose special terms and conditions as part of the certification as he deems "appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality". In this instance, the director attached special terms and conditions to each certification, which, according to expert testimony, could be achieved through standard engineering practices. Thus, while Appellant charges that Baycliffs failed to meet the burden set forth in 3745-32-05(A), and that the Director abused the discretion allotted him in subsections (B) and (C), the Board disagrees. It is the opinion of the Board that the record demonstrates that applicant Baycliffs met the burden established in O.A.C.3745-32-05, and that the Director did not abuse the discretion afforded him therein.

10. Finally, subsection (D) of O.A.C. 3745-32-05 allows the Director to require that the applicant perform various environmental quality tests prior to the issuance of a 401 certification. Ms. Crook testified regarding which tests the Director, in this instance, determined to be relevant. She indicated that those were required of applicant Baycliffs; further, she stated in her deposition why the Director chose to require certain tests, but not others. Thus, the Board

finds that the Director did not abuse the discretion granted herein.

11. Appellants also charge that the project will violate OAC 3745-1-04(A)-(E):

The following general water quality criteria shall apply to surface waters of the state including mixing zones. To every extent practical and possible 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.

12. The record demonstrates that the Director considered this regulation, generally known as the "free froms", in his review of the application. It is clear from the deposition of Colleen Crook, as well as the testimony of Dr. Herdendorf and Mr. Fenker, that the certification was only granted after it had been determined that the water subsequent to the development would still satisfy the "free froms" described above.

13. Appellant alleges that the project authorized by the certifications will result in degradation of the waters involved, thus violating O.A.C. 3745-1-05(C). Again, it is the finding of the Board that the record does not support this allegation. Dr. Herdendorf, Mr. Fenker and Ms. Crook testified that the

aerators and the proposed channel will, in fact, improve the water quality in the area. Further, Dr. Herdendorf testified that the anticipated run-off into the marina would be insignificant in relation to the water from the Lake. Finally, the proposed Restrictive Covenants satisfied the Director that water would not be degraded.

14. It is true that the actual effectiveness of the restrictive covenants cannot be verified until after the completion of the project. However, the record demonstrates that it was reasonable for the Director to conclude that restrictions on the use of pesticides, fertilizers, and fueling of boats, by way of specific example, would minimize pollution by runoff. Furthermore, the fact that the Director accepted them as a means to control pollution prior to the establishment of a Homeowners Association which would ultimately enforce these covenants was not unreasonable. In fact, it would be unreasonable to demand the existence of such an organization during the application process. Proposed covenants are inherent in the nature of a of proposed development. Therefore, it is the opinion of the Board that the Director reasonably determined that the covenants were part of the application, and would reduce the impact of non-point source pollution on the water.

15. Finally, the record contains a substantial amount of evidence that, from the project's inception, the Applicant intended to present a project which would not adversely affect the water quality of the involved area. Similarly, the record contains substantial evidence that the Agency went to considerable lengths in its review of the application.

16. Specifically, the record reflects that, upon receipt of the application at issue, the Director employed six divisions of the Agency in the review process, and solicited comments from two divisions of the Ohio Department of

Natural Resources. (Crook deposition 77, Appellee 15)

17. The record further demonstrates that considerable effort was made by Baycliffs to respond to concerns raised by the Agency and the Department of Natural Resources, and that the process involved a great deal of cooperation on the part of the Applicant.

18. The Board heard several days of testimony which convinced this Board that Baycliffs had successfully designed a project that would comply with applicable environmental laws and regulations. Furthermore, the testimony suggested that throughout this process, Baycliffs had expected its consultants to offer unbiased, scientific opinions regarding their findings, and to submit practical solutions which would enable Baycliffs to construct a marina which would not adversely affect water quality during or after construction. (Herdendorf, Fenker, Matricardi)

19. Based on the analytical data, as well as the opinion of experts and evaluations by Agency personnel, the Director's determination that the project proposed in Baycliffs' 401 application would not prevent or interfere with applicable water quality standards was both reasonable and lawful.

20. The Director's action in issuing the certifications of March 20, 1992, was reasonable and lawful and should be affirmed.

FINAL ORDER

The allegations of error raised by Appellants herein are not well taken and are hereby overruled. The action of the Director in issuing the certifications of March 20, 1992 was both reasonable and lawful and is hereby affirmed.

Furthermore, the Board finds the arguments raised by Appellee Baycliffs in

FINDINGS OF FACT
AND FINAL ORDER

-24-

Case No. EBR 622732, etc.

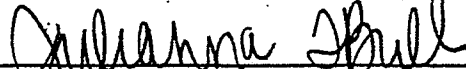
its post-hearing Motions to Dismiss not well taken, and denies those motions.

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


Any party adversely affected by an order of the Environmental Board of Review 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. Any party desiring to so appeal shall file with the Board 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 Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

Entered in the Journal
of the Board this 7th
day of September, 1994.

THE ENVIRONMENTAL BOARD OF REVIEW



Julianna F. Bull, Chairwoman



Toni E. Mulrane, Vice-Chairwoman



Jerry Hammond, Member

FINDINGS OF FACT
AND FINAL ORDER

-25-

Case No. EBR 622732, etc.

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DONALD SCHREGARDUS, DIRECTOR
BAYCLIFFS CORPORATION

[CERTIFIED MAIL]

[CERTIFIED MAIL]

Stephen P. Samuels, Esq.

James O. Payne, Jr., Esq.

John K. McManus, Esq.

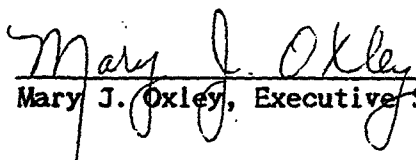
Paula L. Brooks, Esq.

Donald J. McTigue, Esq.

FINDINGS OF FACT,
AND FINAL ORDER
AND RULING ON MOTIONS
Case No. EBR 622632, 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 AND RULING ON MOTIONS TO DISMISS in JOHNSON'S ISLAND PROPERTY OWNERS' ASSOCIATION, ET AL V. DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION ET AL, Case No. EBR 622732-622733, EBR 622736-622737 and 622738-622739 entered into the Journal of the Board this 7th day of September, 1994.



Mary J. Oxley, Executive Secretary

Dated this 7th day of
September, 1994, at Columbus, Ohio.