

**BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO**

OHIO ENVIRONMENTAL COUNCIL,
1145 Chesapeake Ave., Suite I
Columbus, Ohio 43212

DARBY CREEK ASSOCIATION
2726 Camden Rd.
Upper Arlington, OH 43221

And

CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 710
Tucson, AZ 85702,

Case No. ERAC_____

Appellants.

v.

NOTICE OF APPEAL

LAURIE A. STEVENSON
DIRECTOR
OHIO ENVIRONMENTAL
PROTECTION AGENCY
50 W. Town Street, Suite 700
Columbus, Ohio 43215

And

VILLAGE OF PLAIN CITY
800 Village Boulevard
PO Box 167
Plain City, Ohio 43064,

Appellees.

Pursuant to Section 3745.04 of the Ohio Revised Code, notice is hereby given that the Ohio Environmental Council (OEC), Darby Creek Association (DCA), and the Center for

Biological Diversity (“Center” or CBD) (Appellants) are appealing to the Environmental Review Appeals Commission the issuance by the Director of the Ohio Environmental Protection Agency of an Authorization to Discharge Under the National Pollutant Discharge Elimination System (hereinafter “NPDES Permit” or “Permit”) issued to Appellee, Village of Plain City (hereinafter “Plain City”). The NPDES Permit (Permit No. 4PB00016*JD) was issued as a final action by the Director on October 3, 2022.

PROCEDURAL AND FACTUAL BACKGROUND

The Big Darby Creek, rated as Exceptional Warmwater Habitat (EWH), is one of the most important streams in Ohio and the entire Midwestern United States. Located just west of Columbus, Ohio, the Darby is a National and State Scenic River and an Outstanding State Water because of its outstanding aquatic biodiversity. The Darby has some of the highest biodiversity of fish and mussels in the Midwest, including state and federally endangered species. In 1991, The Nature Conservancy declared it one of the dozen “Last Great Places” in the western hemisphere.

However, the freshwater mussels in the Big Darby, including federally listed species, are in decline. Overall, Eight federally listed species have been recorded in Big and Little Darby Creeks, including four endangered mussels (northern riffleshell, clubshell, snuffbox, and rayed bean), one endangered fish (Scioto madtom), two endangered mammals that rely on its riparian corridors for reproductive colonies (Indiana bat, northern long-eared bat), and one threatened mussel (rabbitsfoot). In addition, another Big Darby fish species is listed as federally monitored (spotted darter) and two freshwater mussels are currently under consideration for federal listing (round hickorynut and longsolid).

The NPDES Permit that Appellee OEPA Director issued to Appellee Plain City authorizes Plain City's wastewater treatment plant to double its effluent discharge directly into the Big Darby Creek, from 0.75 million gallons per day (MGD) to 1.5 MGD. The lowering of the Big Darby's water quality authorized by the Director and the doubling of Plain City's wastewater discharge capacity will directly harm federal and state-listed mussel species. And the Director's Permit issuance, which again doubles Plain City's permitted wastewater discharge capacity, will facilitate substantial urban development in the Big Darby watershed, resulting in substantial increases in stormwater discharge and significant cumulative harm to listed species.

The OEC is a statewide non-profit environmental advocacy organization with thousands of individual and group members throughout Ohio. The mission of the OEC is to secure healthy air, land, and water for all who call Ohio home. The OEC has members who live near and recreate in and around Big Darby Creek, and who will be adversely affected by the permit under appeal.

DCA unites concerned citizens to preserve, protect, and restore the scenic Big Darby Creek ecosystem so that this and future generations may benefit from its rich diversity. DCA has members who live near and recreate in and around Big Darby Creek, and who will be adversely affected by the permit under appeal.

Appellants OEC and DCA have been parties to this proceeding before the Director. The OEC and DCA testified at Ohio EPA's July 2022 public hearing on the draft version of the Permit, submitting timely written comments on the same. The OEC also timely submitted a citizen petition comment containing the endorsements of hundreds of OEC members and

supporters.

The Center is a national nonprofit, public interest environmental organization, founded in 1989, that is dedicated to the protection of imperiled species and the habitat and climate they need to survive. The Center uses science, policy, law, and creative media to protect all species, great and small, hovering on the brink of extinction. The Center is supported by 74,000 members and more than 1.7 million online activists throughout the country. The Center's members have educational, scientific, recreational, moral, spiritual, and aesthetic interests in the health of the natural environment, and they have interests in preventing the extinction of imperiled freshwater species. The Center has members who are affected by the Village of Plain City's wastewater treatment plant and the health of the Big Darby River.

Big Darby Creek is a nationally significant river with over 100 recorded fish species and 44 recorded mussel species, including five federally listed species of mussels protected under the Endangered Species Act. These mussel populations have been steeply declining in Big Darby Creek. The Center for Biological Diversity has submitted comments to Ohio EPA regarding the permit for the Village of Plain City's Wastewater Treatment Facility expansion. The Center has also submitted independent comments to Ohio EPA and the Village of Plain City notifying them that the wastewater treatment facility's expansion will result in the take of federally listed species and encouraging them to develop a habitat conservation plan, as required by the Endangered Species Act. The Center for Biological Diversity has offered to assist with the development of a habitat conservation plan.

The Center and its members are especially concerned about the extinction crisis occurring

in our nation's rivers. The extinction rate for freshwater species has accelerated to 1,000 times the background rate due to human-caused changes to the environment. The Center is taking action to protect the rich biological heritage of Big Darby Creek and to prevent federally listed mussel species from being further harmed.

For the foregoing reasons, Appellants OEC, DCA, and the Center have standing to file this appeal before the Commission.

A copy of the NPDES permit under appeal is enclosed with this Notice of Appeal.

ASSIGNMENTS OF ERROR

For the following reasons, Appellants allege that the Director of Environmental Protection has exceeded her authority and has acted unreasonably and unlawfully and without appropriate factual and legal basis to support her action in issuing the permit. Appellants reserve the right to amend this pleading and to supplement the issues raised herein upon the filing of the Certified Record with this Commission or upon discovery of additional information during the course of proceedings in this appeal.

1. The Director unlawfully and unreasonably failed to adequately consider required Antidegradation review factors, 3745-1-05(C)(5), including but not limited to failing to consider the anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, including threatened and endangered species.
2. The Director unlawfully and unreasonably failed to require permit terms and conditions critical to determining impacts to threatened and endangered mussels, including but not limited to Whole Effluent Toxicity (WET) testing for an applicable freshwater mussel

species.

3. The Director unlawfully and unreasonably failed to consider or develop reliable or adequate data and modeling of cumulative water quality impacts resulting from the Permit, including but not limited to impacts from development-related stormwater, thereby violating applicable law and regulation, including the requirements of Antidegradation review. 3745-1-05(C)(5).
4. The Director unlawfully and unreasonably failed to adequately evaluate or account for increases in contaminants of emerging concern (CECs) resulting from the permit issuance and their impacts on listed mussel species, thereby violating applicable law and regulation, including the requirements of Antidegradation review. 3745-1-05(C)(5).
5. The Director unlawfully and unreasonably failed to include a permit effluent limit for Strontium despite a lack of data showing Strontium would be absent from the Permittee's discharge, thereby violating Antidegradation review requirements and 40 C.F.R. § 122.44(d).

RELIEF REQUESTED

Based upon the above, Appellants OEC, DCA, and the Center respectfully request that the Commission find that the action of the Director in issuing Permit No. 4PB00016*JD to the Village of Plain City was unlawful and unreasonable and, as a result, vacate the Permit and remand the matter to the Director for further action as required by law, and for such other relief as appropriate and just.

Dated November 2, 2022

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Nathan G. Johnson', with a long horizontal flourish extending to the right.

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Attorneys for Appellants OEC, DCA, CBD

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Notice of Appeal was served via email on November 2, 2022 upon the following:

Laurie A. Stevenson
Todd Anderson
William Fischbein
Ohio Environmental Protection Agency
50 W. Town Street, Suite 700
Columbus, Ohio 43215

Jody Carney, Mayor
Village of Plain City
800 Village Boulevard
PO Box 167
Plain City, Ohio 43064



Nathan G. Johnson
Attorney for Appellants OEC, DCA, CBD