

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

WESTERN LAKE ERIE ASSOCIATION

6565 Bayshore Road
Oregon, OH 43618
(419) 691-3788

and

NATURAL RESOURCES DEFENSE COUNCIL

2 N. Riverside Plaza, Ste. 2250
Chicago, Illinois 60606
(312) 663-9900

and

ERAC Case No. _____

SIERRA CLUB

131 N. High St. #605
Columbus, Ohio 43215
(614) 461-0734

and

OHIO ENVIRONMENTAL COUNCIL

1207 Grandview Ave., Suite 201
Columbus, Ohio 43212
(614) 487-7506

and

ALLIANCE FOR THE GREAT LAKES

17 N. State Street, Suite 1390
Chicago, IL 60602
(312) 939-0838 x 230

Appellants,

vs.

CHRIS KORLESKI

DIRECTOR, OHIO ENVIRONMENTAL PROTECTION AGENCY

50 W. Town Street, Suite 700
Columbus, Ohio 43215

2010 DEC 17 AM 11:50

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ENVIRONMENTAL REVIEW
APPEALS COMMISSION

and

FIRST ENERGY GENERATION CORP.

76 South Main Street
Akron, Ohio 44308

Appellees.

NOTICE OF APPEAL

BACKGROUND

Notice is hereby given that the Western Lake Erie Association (“WLEA”), Natural Resources Defense Council (“NRDC”), Sierra Club, Ohio Environmental Council (“OEC”), and the Alliance for the Great Lakes (“Alliance”) (collectively “Appellants”), on behalf of their members who will be aggrieved and adversely affected, hereby appeal to the Environmental Review Appeals Commission from the issuance by Appellee Chris Korleski, Director of the Ohio Environmental Protection Agency (“Ohio EPA”), of a final modified National Pollution Discharge Elimination System (“NPDES”) Permit to Appellee First Energy Generation Corp. (“First Energy”), OEPA Permit No. 2IB00000*RD (the “Permit”) on November 19, 2010. The Permit allows First Energy to discharge pollutants into Lake Erie from its Bayshore Power Plant at 4701 Bayshore Road in Oregon, Lucas County, Ohio (the “Bayshore Plant”) and to operate a cooling water intake structure at the Bayshore Plant.

This appeal is brought pursuant to O.R.C. 3745.04 and O.R.C. 3745.07.

Appellants are each non-profit environmental organizations with numerous members in Ohio and nationwide.

WLEA is a regional non-profit environmental organization with more than 150 members in Ohio, Michigan, and Ontario, including over 125 in Ohio and 92 in Lucas County. WLEA’s

mission is to preserve, protect, and improve the waters and fish of the Western basin of Lake Erie, the warmest, shallowest, most biologically productive area in all of the Great Lakes through collaboration, education and advocacy.

NRDC is a national, non-profit, environmental organization with more than 400,000 members nationwide, including over 12,600 in Ohio and 430 in Lucas County. NRDC is dedicated to the preservation, protection, and defense of the environment, its wildlife and natural resources, and actively supports effective implementation and enforcement of the federal Clean Water Act on behalf of its members.

The Sierra Club is the nation's oldest grassroots environmental non-profit organization, with more than 617,000 members nationwide, including over 17,200 in Ohio and 425 in Lucas County. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth and educate and enlist humanity to protect and restore the quality of the natural and human environment. Since its founding over a century ago, Sierra Club has become a leader in working to reduce water pollution.

OEC is a statewide non-profit environmental advocacy organization with 116 member environmental/conservation organizations and 2,821 individual members throughout Ohio. The mission of OEC is to secure healthy air, land, and water for all who call Ohio home.

The Alliance is a regional non-profit environmental organization based in Chicago with offices in Ohio, Michigan and Wisconsin. The mission of the Alliance is to "conserve and restore the world's largest freshwater resource using policy, education and local efforts, ensuring a healthy Great Lakes and clean water for generations of people and wildlife."

Appellants have numerous members who live, work, and/or recreate in and around the western basin of Lake Erie, who will be aggrieved and adversely affected by the discharge of

pollutants (including thermal discharges) from the Bayshore Plant that the Permit authorizes, as well as the continued operation of the cooling water intake structure at the Bayshore Plant. The discharge of pollutants authorized by the Permit from the Bayshore Plant will increase the level of pollutants in, as well as the temperature of, waters that are used and enjoyed by such members. The discharge of pollutants authorized by the Permit, as well as the continued operation of the cooling water intake structure at the Bayshore Plant, will result in adverse impacts to aquatic life in waters that are used and enjoyed by such members.

Appellants were parties to the proceeding before the Director regarding the Permit, as each Appellant organization submitted written comments on the draft modified Permit. In addition, members and/or representatives of WLEA, Sierra Club, and OEC appeared and made statements at the public hearing regarding the draft modified Permit held in Oregon, Ohio on April 22, 2010.

A copy of the final modified Permit is attached to this notice.

APPELLANTS' ASSIGNMENTS OF ERROR

The Director's issuance of the final modified NPDES Permit No. 2IB00000*RD was unreasonable and unlawful for a number of reasons, including, but not limited to, the following:

1. The Director unlawfully and unreasonably failed to require in the Permit that the "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact," as is required by Section 316(b) the Clean Water Act, 33 U.S.C. § 1326(b).
2. The Director unlawfully and unreasonably determined that the terms and conditions in Part I, C of the Permit "reflect the best technology available for minimizing adverse environmental impact" from the Bayshore Plant's cooling water intake structure, despite

the availability of technology options that would achieve greater reductions in impingement and entrainment of fish, shellfish and other aquatic organisms at all life stages (i.e., eggs, larvae, juveniles and adults) than those required by Part I, C of the Permit.

3. The Director unlawfully and unreasonably failed to ensure that impingement and entrainment of fish, shellfish and other aquatic organisms at all life stages (i.e., eggs, larvae, juveniles and adults) from the Bayshore Plant's cooling water intake structure will comply with applicable Ohio Water Quality Standards at O.A.C. Chapter 3745-1, including but not limited to O.A.C. 3745-1-07 and O.A.C. 3745-1-31, as is required by O.A.C. 3745-33-05(A)(1).
4. The Director unlawfully and unreasonably failed to establish technology-based effluent limitations ("TBELs") for discharges of heat in the Permit based on application of Best Available Technology ("BAT") determined through Best Professional Judgment ("BPJ") pursuant to 33 U.S.C. § 1311 and 40 C.F.R. § 125.3(c)(2), (d). *See* 33 U.S.C. § 1311(b)(2)(A)(i) (NPDES permits "shall require application of" Best Available Technology ("BAT") to reduce pollutant discharges to the maximum extent "technologically and economically achievable," including "elimination of discharges of all pollutants" if it is achievable); *id.* § 1362(6) (defining "pollutant" to include "heat"); *see also* O.R.C. 6111.042 (authorizing the Director to make BPJ determinations in NPDES permits); O.A.C. 3745-33-05(A)(1)(e) (Director shall set "[a]ny more stringent limitations" in NPDES permits "required to comply with any other state or federal law or regulation").

5. The Director unlawfully and unreasonably failed to ensure that discharges of heat authorized by the Permit will comply with applicable Ohio Water Quality Standards at O.A.C. Chapter 3745-1, including but not limited to O.A.C. 3745-1-04 and O.A.C. 3745-1-31, as is required by O.A.C. 3745-33-05(A)(1).
6. The Director unlawfully and unreasonably failed to establish TBELs for discharges of mercury in the Permit based on application of BAT determined through BPJ pursuant to 33 U.S.C. § 1311 and 40 C.F.R. § 125.3(c)(2), (d). *See also* O.R.C. 6111.042 (authorizing the Director to make BPJ determinations in NPDES permits); O.A.C. 3745-33-05(A)(1)(e) (Director shall set “[a]ny more stringent limitations” in NPDES permits “required to comply with any other state or federal law or regulation”).
7. The Director unlawfully and unreasonably granted a variance from water quality based effluent limitations (“WQBELs”) for mercury in the Permit without requiring First Energy to provide information with its application demonstrating that “that there are no readily available means of complying with the WQBEL without construction of end-of-pipe controls,” as is required by O.A.C. 3745-33-07(D)(10).
8. The Director unlawfully and unreasonably failed to ensure that discharges of mercury authorized by the Permit will comply with applicable Ohio Water Quality Standards at O.A.C. Chapter 3745-1, including but not limited to O.A.C. 3745-1-04 and O.A.C. 3745-1-33, as is required by O.A.C. 3745-33-05(A)(1).
9. The Director unlawfully and unreasonably failed to ensure that discharges of total residual chlorine (“TRC”) authorized by the Permit will comply with applicable Ohio Water Quality Standards at O.A.C. Chapter 3745-1, as is required by O.A.C. 3745-33-05(A)(1).

10. The Director unlawfully and unreasonably failed to establish a WQBEL in the Permit for TRC discharges.

Appellants reserve the right to amend or supplement these assignments of error as further information becomes available to them.

REQUESTED REMEDY

Based upon the above, Appellants respectfully request that the Commission find that the action of the Director in issuing the final modified NPDES Permit No. 2IB00000*RD was unlawful and unreasonable, vacate the Permit, and remand this matter to the Director for further action as required by law and for such other relief as appropriate and just.

Dated: December 17, 2010

Respectfully submitted,



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Alliance for the Great Lakes**

Certificate Of Service

I hereby certify that I will serve by Federal Express delivery a copy of this notice of appeal upon the Director of the Ohio Environmental Protection Agency, Chris Korleski, at 50 W. Town Street, Suite 700, Columbus, Ohio 43215; Chief of the Environmental Enforcement Section, Office of the Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215; First Energy Generation Corp., 76 S. Main St., Akron, Ohio 44308; and Ct Corporation System, 1300 East Ninth Street, Suite 1010, Cleveland, Ohio 44114 on December 17, 2010.

Thomas Cmar by R.C.S.
Thomas Cmar