

IN THE COURT OF COMMON PLEAS  
CLARK COUNTY, OHIO

CAM-MAD RIVER TOWNSHIP, ET AL.	)	
	)	
Appellants,	)	
	)	<b>JUDGE: HON. RICHARD J. O'NEILL</b>
vs.	)	
	)	
DIVISION OF MINERAL RESOURCES	)	<b>CASE NO. 18-CV-0425</b>
MANAGEMENT	)	
OHIO DEPARTMENT OF NATURAL	)	
RESOURCES	)	<b>Administrative Appeal from the Ohio</b>
	)	<b>Reclamation Commission</b>
Appellee,	)	
	)	
and	)	
	)	
ENON SAND & GRAVEL, LLC	)	
	)	
Intervenor-Appellee.	)	

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APPELLANTS' REPLY BRIEF

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Appellants, by and through their undersigned counsel, hereby file and serve their Reply to the Merit Brief of Appellee State of Ohio and the Appellate Brief of Intervenor-Appellee.

Appellants incorporate all arguments from their original Brief of Appellants within.

**I. LAW AND ARGUMENT**

**A. The Model Does Not Accurately Reflect the Ground Water Flow Conditions of the Hydrologic Study Area.**

The Division first argues that the model's Potentiometric Surface Map confirms that the model accurately reflects ground water flow conditions because, they argue, the map and the Histogram of Residuals from Comparison of Model Heads to Heads Calculated from Well Log Data indicate a "normal distribution" according to the Division's hydrologist. Division's Brief at pp. 11-12. First, this does not address the problem of "nonuniqueness" that was argued in Appellants' Brief (pp.13-14), and simply matching modeled groundwater levels to static water levels does not address the flow rate and other hydrologic conditions of the study area. Moreover, even when just used to match observed heads to modeled heads, the residual data and the Histogram showing Gaussian Distribution are heavily misleading. The ASTM standard related to modeling a site-specific problem speaks directly to this part of calibration, and states that calibration should "minimize the standard deviation of the residuals." Appellants' Ex. Z at p.4, ¶ 6.6.2. The graph the Division relies on can be found at Appellants' Ex. G, Bates No. 4195, and doesn't speak to standard deviation. Figure 14 shows that 237 wells are within a positive or negative residual range of 10-20 feet. Appellants' Ex. G at Figure 14 (Bates No. 4195). In fact, the total number of wells that have a greater than 10 foot positive or negative residual is 354. *See id.* Thus, far more than half the wells calibrated did not match the actual water level by 10 feet or more, and the Division's reliance on normal distribution is flawed, especially when used to justify such low flow rates.

The Division additionally argues that the 1 ft/day value used for the entire limestone formation over the permit area and large portions of the adjacent area is reasonably accurate because the value falls within the broad range of .1 to 500 feet per day in published sources, and even implied that Appellants' expert ultimately agreed that anything within that value is acceptable. Division's Brief at p. 13. However, Mr. Huntsman simply stated that the value used in the EAI model is "set at the very bottom" of that range. Day 1 Tr. 247:11-15. Moreover, rather than Mr. Huntsman's own calculations suggesting 1 ft/day is reasonable, he stated only a limited number of wells would support that conclusion, and that a number of them showed yields "that are very much higher." *Id.* at 160:19-23. Intervenor additionally argues that Mr. Champa testified to his "extensive work" in developing hydraulic conductivity for use in the model. Intervenor's Brief at pp. 16-17. However, Mr. Champa stated that in his exercise of calculating hydraulic conductivity he "assumed unconfined conditions." Day 4 Tr. 1053:6-8. This is a grave error because, during calculations, unconfined aquifers are multiplied by 1,500, while confined aquifers are multiplied by 2,000. *See id.* at 1057:24-1058:13. The entirety of the lower bedrock aquifer is confined, and was treated that way in the modeling. *See* Appellants' Ex. G. at p. 7. These careless and incorrect calculations, which ultimately must underestimate hydraulic conductivity values by using a lower multiple for many, if not most, of the wells cannot be used to justify such unsubstantiated low flow values for the limestone formations. In addition, the lack of evidence that such calculations were completed at all is highly concerning and inconsistent with ASTM international standards. Discussion of the use of site-specific well data to calculate hydraulic conductivity is found nowhere in the EAI report. When asked directly if Eagon did this type of calculation, Division Geologist Barrett responded at the hearing that "[t]hey didn't do that process. But – well, to my knowledge. They didn't put it in the report," and furthermore, that had

they performed such calculations, they should have been described in their report. Day 3 Tr. 642:13-21. This, predictably, is wholly inconsistent with the ASTM Standard Guide for Application of a Ground-Water Flow Model to a Site Specific Problem (such as a cone of depression), which requires reports to document the procedures so that decision makers can replicate the results. Appellants' Ex. Z at p.5, ¶ 7. A simple comparison of the hydraulic conductivity analysis in the 2009 hydrology study to that of the EAI report shows a clear difference in detail and analysis. *Compare* Appellants' Ex. G at p. 8 (generally discussing hydraulic conductivity being "determined during model calibration...and adjusted in relation to the groundwater pollution potential indicated on Plate 7" *with* Appellants' Ex. Q at pp. 21-22 (calculating transmissivity and hydraulic conductivity from well data and providing a detailed discussion of justifiable values using multiple studies, and arriving at final reasonable values before calibration).

Moreover, Appellees' focus on technical values and far reaching literature distracts from the simple fact that the low values used in the model suggest highly impermeable strata. Day 1 Tr. 149:4-7 (Huntsman testimony); Day 3 Tr. 623:11-13 (Barrett testimony); Day 4 Tr. 1062:14-16 (Champa testimony). The Commission's finding that the record does not contain evidence that the model study area contains karst and fractured features (Decision at p. 20) is simply false, and Appellee-Division and Intervenor-Appellee ignore the pertinent evidence to argue otherwise. As referenced in Appellants' Brief, Appellants introduced numerous credible pieces of evidence into the record, including reports, studies, firsthand testimony, and photographs related to the study area that clearly identified karst and/or the fractured geology of the limestone bedrock in the study area. *See* Brief of Appellants at pp. 8-10.

Ignoring all of this evidence, the Division claims that “[a]side from a hearsay exhibit...there was no support for any karst development in the vicinity of Phase 1 or Phase 2 of the mine.” Division’s Brief at p. 14. As argued above, there are a large number of documents showing karst development in the vicinity of the mine, but in addition, the “hearsay exhibit” was specifically testified to by the witness that created it. *See* Day 2 Tr. 364:16-366:7 (testimony of Kyle Peterson describing how he created the map of karst features at Appellants’ Ex. W). As its sole contrary evidence, the Division states that Mr. Champa “indicated that no karst topography existed in the vicinity of the mine or in residential well logs.” Division’s Brief at p. 14. First, Mr. Champa’s evaluation of karst in the vicinity of the mining area occurred after the Applications were approved, and only consisted of driving around the area. Day 5 Tr. 1047:22-1048:16. Second, Mr. Champa apparently never even studied the well logs, but instead utilized an electronic database from ODNR when evaluating well log data. *Id.* at 1160:12-1161:2. Even if he had looked at the well logs, the well logs simply note what type of material was encountered, not the weathering or fracturing of the formations. *See e.g.* Appellants’ Exs. MMM-000.

Finally, both the Division and Intervenor rely on OAC 1501:14-5-01(A) and (B) to argue that the information they relied on was reasonable, essentially regardless of whether the model accurately reflects the groundwater flow conditions associated with hydrologic study area. *See* Intervenor’s Brief at pp. 14-15. To be clear, OAC 1501:14-5-01 starts with “[e]xcept as provided in paragraph C, each application for a permit that proposes to dewater shall include the following...”, and then goes onto list information required to be submitted when the Division creates a model pursuant to paragraphs (A) and (B). The requirements at part (C) are different. Simply put, if the model does not “accurately reflect the ground water flow conditions associated with the hydrologic study area” it cannot be said to be in compliance with OAC 1501:14-5-01(C).

**B. Consistency with ASTM International Standards is Required by Ohio Law.**

OAC 1501:14-5-01(C) requires completed groundwater model submissions to be consistent with ASTM international standards, and notably no such requirement is referenced in OAC 1501:14-5-01(A) or (B). This is important to note because the ASTM international standards guide how a modeler is supposed to collect and then *use* the data collected in order to ensure that the model accurately reflects ground water flow conditions associated with the model study area. *See e.g.* Appellants' Ex. Y at ¶ 10.2 (directing modelers to quantify aquifer parameter values using "aquifer tests, laboratory analysis, or parameter estimation"). On this assignment of error, the Division and Enon cannot reasonably argue that the model was consistent with the standards, so they are forced to argue that these ASTM standards do not have the force of law, and that any amount of "professional judgment" completely overrides the requirement that the model be consistent with the standards. Intervenor's Brief at pp. 21-22; Division's Brief at pp. 15-16. In making this argument, Appellees rely solely on the general caveats within each ASTM standard. *Id.* First, mischaracterizing the hydrologic system, using incorrect flow rates, having an incomplete report, and not running a sensitivity analysis cannot constitute good "professional judgment." Second, the Appellants aren't arguing the ASTM international standards are themselves laws, but rather Appellants argue that consistency with those standards is plainly required by OAC 1501:14-5-01(C).

In their Brief, and throughout the hearing, Appellants detailed numerous inconsistencies between the EAI Model and ASTM international standards. *See* Brief of Appellants at pp. 6-14. The Commission's holding that these inconsistencies were not unlawful was clearly in error pursuant to the plain language of OAC 1501:14-5-01(C).



**C. The Chief is Required to Establish the Cone of Depression.**

R.C. 1514.13(A) requires plainly that the “chief of the division of mineral resources management...establish a projected cone of depression for any surface mining operation that may result in dewatering.” Even where an applicant submits a groundwater model, the statute reiterates and makes clear that “the chief shall establish the projected cone of depression for the purposes of this section.” R.C. 1514.13(A). The Division and Intervenor argue that, contrary to the plain language in R.C. 1514.13(A), the chief can allow his staff to establish the cone of depression because the chief’s staff has implied authority to act on behalf of the Chief. Division’s Brief at pp. 17-18. The Division only cites to *Bell v. Board of Trustees*, 34 Ohio St.2d 70, 75 (1973), for this supposed authority. *Id.* at p. 18. The Ohio Supreme Court in *Bell* found that a board of trustees could empower hearing examiners to represent their authority in hearings and administrative proceedings. *Bell*, 34 Ohio St.2d 70 at 74. The major difference between the *Bell* case and this case is that the “General Assembly has given administrative agencies express authority to appoint a hearing examiner having ‘the same powers and authority in conducting the hearing as is granted to the agency,’ subject to final approval by the agency.” *State v. Cooper*, 120 Ohio App.3d 284, 294, 697 N.E.2d 1049 (10th Dist.1997) (citing R.C. 119.09, paragraph 9). The statute grants no such authority here. Intervenor points to R.C. 1501.05, which simply allows the Chief to, “with the advice and consent of the director, employ such number of technical and administrative assistants as are necessary.” Intervenor’s Brief at p. 24. This, again, says nothing to dispute the statutory mandate that it be the chief who establishes the cone of depression. R.C. 1514.13(A).

Thus, for these reasons, and the reasons argued in the Brief of Appellants at pp. 15-16, the Commission erred by upholding the Division’s approval of the Application for dewatering prior to the chief establishing the required cone of depression pursuant to R.C. 1514.13(A).

**D. Enon Never Submitted an Analysis on the Availability and Suitability of Alternative Water Supply Sources Pursuant to OAC 1501:14-5-02, and Such Analysis is Required During the Application Period.**

OAC 1501:14-5-02(A) clearly requires an analysis of the availability and suitability of alternative water supply sources to be conducted during the application stage. Intervenor and the Division spend a lot of time trying to argue that the groundwater monitoring plan, combined with the remediation plan, somehow comply with an “analysis of the availability and suitability of alternative water supply sources” pursuant to OAC 1501:14-5-02(A). Intervenor’s Brief at pp. 24-26; Division’s Brief at pp. 21-27. The monitoring itself offers no analysis on the availability and suitability of alternate water supplies should Enon mine to base of the carbonate aquifer as permitted. *See* Appellants’ Ex. G at p. 12. The remedial measures in the model report, and thus the only remedial measures in the Application, only include lowering pumps and deepening or installing replacement wells. Appellants’ Ex. G at p. 12. However, the formation beneath the carbonate aquifer, the Ordovician shale, is not an aquifer and would not be considered an alternate water supply. Day 3 Tr. 702:13-15; Day 1 Tr. 213:2-12. Still, Intervenor and the Division attempt to rely on references to non-binding testimony where Enon witnesses testified that they may hook people up to public water, or might use some unspecified storage option. Intervenor’s Brief at pp. 26-27; Division’s Brief at p. 22. This testimony is not part of the Application, and, in any event, even the Commission noted that “there is no public water system in place” in this area, which would be obvious to Intervenor and the Division had there actually been an analysis on suitable water replacement supplies. Decision at p. 3, ¶ 3.

Intervenor and the Division, and at issue in this appeal, the Commission, dangerously downplay the very real danger that Enon’s own modeling predicts dewatering poses to nearby residential water supplies. Enon claims that Appellants are using small data sets (Intervenor’s

Brief at p. 27), which trivializes the risk to Clark County residents closest to the quarry. Appellants simply applied the model's drawdown contour to well logs in these areas to show that wells near the proposed quarry are at serious risk of complete dewatering. *See* Day 5 Tr. 1164-1167. The same analysis holds when applied to the Culbertson well. The Division argues that conclusions Appellants made on the Culbertson well are wrong and cites to the analysis of Mr. Champa during his testimony. Division's Brief at p. 24. However, a closer look reveals that Mr. Champa applied a water level from a different well log to the Culberston well, because that better suited the model's projected surface water elevation in the area. *See* Day 4 Tr. 1029-1034. Nothing about this "analysis" says anything at all about the impact of the drawdown on the water level of Ms. Culbertson's well. Similarly, Ms. Barrett claimed that for her analysis she purposefully applied the drawdown incorrectly to Ms. Culbertson's well, because she believed that's how Mr. Huntsman was applying it. Day 3 Tr. 709:21-710:13. Ms. Barrett clarified that the correct way to apply the 70-foot drawdown contour is to apply the drawdown to the well's water level. Day 3 Tr. 710:24-711:5.

Ultimately, the Commission's opinion that Appellants are required to somehow prove "it would be impossible to supply replacement water" (Decision at p. 24) evidences the Commission's complete disregard for OAC 1501:14-5-02(A) and its purpose of ensuring Ohio residents are protected from the most serious impacts of dewatering. The Court should reverse the Commission's holding on this issue, and remand to require the analysis mandated by law.

**E. The Division and Intervenor's Interpretations of "Contamination, Resulting From Mining" are in Direct Conflict with the Plain Meaning and Purpose of R.C. 1514.02(A)(10)(h).**

In a clear example of how dangerous the Commission's ruling on R.C. 1514.02(A)(10)(h) is for the 60-plus residents in the Echo Hills development directly adjacent to the permitted

mining operation, Intervenor argues that Appellants “want to foist responsibility for pre-existing E. coli and nitrate contamination on the Division and Enon” because, Intervenor argues, dewatering causing those contaminants to migrate into people’s drinking water is not “resulting from mining.” Intervenor’s Brief at p. 30. To be sure, this suggests that if and when dewatering pulls those contaminants into local residents’ drinking water, Enon is prepared to contest that it wasn’t their *mining* that caused such contamination, thus relieving them from the responsibility to remediate the contaminated water supplies. However, the plain language of “contamination, resulting from mining, of underground water supplies” is enough to avoid such a result. Even Intervenor recognizes that dewatering is just a part of the quarrying process. Day 4 Tr. 955:9-13. The E. coli and nitrates at issue are in a shallow aquifer and not yet in the groundwater that many residents are using for drinking and other household uses. *See* Appellants’ Ex. XX. Thus, if dewatering causes contaminants to migrate into water supplies, it is clearly “resulting from mining.”

Ultimately, the only authority cited for Appellees’ position is the unsupported testimony of Dave Crow. Division’s Brief at pp. 26-27; Intervenor’s Brief at p. 31. However, if the General Assembly meant such specific limitations, they certainly would have written them into the statute. *Clark v. State Bd. of Registration for Professional Engineers & Surveyors*, (1997), 121 Ohio App.3d 278, 284, 699 N.E.2d 968 (holding that “words and phrases contained in Ohio's statutes and administrative regulations are to be given their plain, ordinary meaning”). Mining statutes such as R.C. 1514 “should be broadly construed and any exceptions should be narrowly construed.” *Buckeye Forest Council v. Div. of Mineral Resources Mgt.*, 7th Dist. Belmont CASE NO. 01 BA 18, 2002-Ohio-3010, ¶ 13. Mr. Crow’s narrow interpretation would be carving out an exception where none exists in order to conclude that dewatering is not “mining.” *See* R.C.

1514.01(A) (defining surface mining as *all or any part of a process followed* in the production of minerals). Moreover, the rule at OAC 1501:14-3-05 "cannot add [to] or subtract from the legislative enactment." *San Allen v. Buehrer*, 2014-Ohio-2071, 11 N.E.3d 739, ¶ 82 (8th Dist.) (quoting *AMOCO v. Petroleum Underground Storage Tank Release Comp. Bd.*, 89 Ohio St.3d 477, 484, 2000-Ohio-224, 733 N.E.2d 592).

Therefore, this Court should follow the plain meaning and purposes of the statute, and vacate the Decision and remand to the Commission with instructions to require that this performance measure be complied with.

**F. The Amendments and Modifications Fail to Comply with R.C. 1514.02 Because the Performance Standards at R.C. 1514.02(A)(10) Were Never Updated.**

For their arguments, both Intervenor and the Division point to the language at R.C. 1514.02(D), which reads that when adding land to a permit the chief "shall apply the same prohibitions and restrictions applicable to land described in an original application for a permit." However, most of the performance standards are not met simply by applying prohibitions and restrictions that were in place for the previously 21-acre IM-340 permit.

R.C. 1514.02(E) allows an operator to amend a mining plan for any reason, "provided that the plan, as amended, includes measures that the chief determines will be adequate to prevent damage to adjoining property and to achieve the performance standards set forth in division (A)(10) of this section." The IM-340 mining plan as amended constitutes clear evidence that the performance measures should have been updated. For example, for compliance with R.C. 1514.02(A)(10)(h) the 2007 renewal application asks the applicant to "[d]escribe all measures that you will take to prevent contamination of water in each of the impoundments described above." Appellee's Ex. 4 at Bates No. 2733, ¶ 29. First, when we look at "each of the impoundments

described above” we only see 1 impoundment, 12 acres in surface area, and 20 feet in maximum depth. *Id.* The Division and Intervenor argue that the performance measures for two new 70 acre impoundments, over 120 feet in depths, and on land that wasn’t even covered under Permit IM-340 at the time, are covered under the two sentence answer for this one impoundment. Frankly, the performance standards would be rendered meaningless if this is all that is required for such a drastic change in mining. Importantly, the performance measures themselves are enforceable by the Division, allowing the Division to address problems *before* a violation of a performance standard occurs. *See* R.C. 1514.07 (“If the chief finds that an operator... failed to perform **any measure** set forth in the approved plan of mining and reclamation that is necessary to prevent damage to adjoining property or to achieve...the performance standards of division (A)(10) of section 1514.02 of the Revised Code... chief may issue orders directing the operator to cease violation, **perform such measures...**”). (Emphasis added). In an effort to apparently contend there is just no risk of contamination, the Division takes issue with Mr. Huntsman’s opinion that E. coli and nitrate pollution in the nearby shallow aquifer and in the fields would “move into the quarry” (Day 1 Tr. 236:11-12). Division’s Brief at pp. 30-31. The Division characterizes this as based on assumptions, but mining on the relevant areas has not yet occurred, so of course there will be assumptions. All Mr. Huntsman did was identify a *risk* of contamination as an example of why the performance measure is important.

The Brief of Appellants at pp. 21-31 describes more fully why each standard was not met with the approval of the Applications. However, by way of another example of Intervenor’s flawed reasoning, they claim that reading the 2007 IM-340 renewal application shows “[e]ach mining area’s future use will be as a permanent water impoundment with a full description of the final highwall grading....” Intervenor’s Brief at p. 38 (citing Appellee’s Ex. 4, at ¶ 26). In reality,

part 26 reads "...there is only one (1) mining area...[a]fter mining is completed in the Permit area, a private permanent water impoundment will be left/constructed..." Appellee's Ex. 4, Bates No. 2732, at ¶ 26. Thus, if we look at the evidence, the mining and reclamation plan anticipates "a", singular, permanent impoundment with applicable measures on grading that one impoundment's highwalls. Notably, these are not "prohibitions" or "restrictions" so these answers must be clarified. This same flaw is applicable to all of the other performance measures upon close inspection. The Division downplays the fact that there are now three proposed impoundments, but nowhere in the Applications or the mining plan is there an Impoundment #3. Division's Brief at p. 39. There are now two Impoundment #1s for the same permit, and even the Division's inspector was confused as to which was which. *See* Day 2 Tr. 486:11-488:1-2. Without the proper amendments, the current mining plan is nonsensical and dangerous, and the Commission's finding that the performance measures did not have to be amended was in error.

**G. The Division's Approvals Violate R.C. 1514.02 by Failing to Include Measures to Prevent Damage to Property.**

R.C. 1514.02(A)(10) and R.C. 1514.02(B) require that the mining and reclamation plan include "measures the operator will perform to prevent damage to adjoining property." There are no updated measures whatsoever to meet this standard, and Appellants put forth evidence of risks of damage to nearby springs and fens, and a risk of increased flooding from pumping. Brief of Appellants at pp. 27-29. Ultimately, the Division, Intervenor, and the Commission rely on Mr. Champa's opinion that because the elevation of the perched aquifer feeding an adjacent fen is above the bedrock aquifers, mining will not impact the fen. *See* Division's Brief at pp. 31-32. However, this is clearly not reliable evidence, as Mr. Champa never visited the fen, and admitted that he did no analysis whatsoever on nearby fens, streams, or any of the springs that feed them.

Day 5 Tr. 1177:15-1178:11.<sup>1</sup> Furthermore, focusing on the bedrock aquifers alone ignores the obvious fact that mining will occur at the surface of the mine site first. The surface of the mine site is at the same elevation as the Vanderglas property, and above the Culbertson property, and considering the close proximity of wetlands on those properties, the mining is likely to intercept the perched aquifers. *See* Appellants' Ex. D (showing the mine elevation at 970 msl, the Vanderglas property at 970 msl, and the Culbertson property at 960 msl); Day 2 Tr. 315:19-316:4.

For their argument related to flooding, Intervenor cites to cases that discuss the use of expert testimony as to the cause of past flooding, but tellingly could not point to a single case that requires expert testimony on the cause of future flooding. Intervenor's Brief at p. 37. In fact Intervenor's own cited authority provides that lay testimony, "although not expert testimony, supports the hypothetical analysis that flooding will increase...." *State ex rel. Post v. Speck*, 3<sup>rd</sup> Dist. Mercer No. 10-2006-01, 2006-Ohio-6339, ¶ 66. Intervenor's argument that establishing a "risk of damage falls short" must likewise fail. Predictions cannot be "proven", as of course there will be some amount of speculation. In any event, such risks are obvious, as Mr. Verbillion testified that he already experiences flooding damage from the Mud Run on occasion. Day 1 Tr. 95:8-98-8; Appellants' Ex. UU. The modelers predict that quarry pumpage into Mud Run will be "about 260,000 gallons per day (gpd) for Phase I dewatering and 520,000 gpd for Phase II dewatering." Appellants' Ex. G at p. 12. Thus, the mining plan should have been amended to include measures to prevent flooding related to these increased discharges.

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<sup>1</sup> The Division additionally argues that the fen is protected under R.C. 1514.02(A)(10)(j), and the monitoring program, which will not monitor the water supplying the fen, will ensure that the impact of dewatering the fen is minimized. Division's Brief at p. 34. While Appellants agree that groundwater supplying the fen should be considered in R.C. 1514.02(A)(10)(j), a monitoring program that will not monitor the groundwater supplying the fen is obviously inadequate to minimize impacts.



**H. Appellee and Intervenor’s Arguments Regarding Zoning Issues are Contrary to the Plain Language of R.C. 1514.02.**

With regard to industrial mineral mining application requirements related to zoning, Appellee and Intervenor continue to rely on witness testimony in making legal conclusions. While Mr. Crow may be an expert in the Division’s permitting process, he is not an expert in the law, and his opinions and legal conclusions “are simply not helpful.” *Waste Mgt. of Ohio, Inc.*, 159 Ohio App.3d 806, 2005-Ohio-1153, 825 N.E.2d 660, ¶ 55; *See also Morning View Care Ctr.-Fulton*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, ¶ 43.

The requirements of R.C. 1514.02(A)(3) (permit applications must both **identify** zoning regulations that would affect proposed mining operations and **explain** how compliance will be achieved) are clearly distinct from those of R.C. 1514.02(A)(14) (permit applications must include a sworn statement that compliance with applicable zoning regulations will be maintained throughout the duration of the permit). The numerous provisions of R.C. 1514.02(A) must be presumed to have their own meaning and purpose. R.C. 1.47.

Intervenor and the Division argue that R.C. 1514.02(A)(10)(b) only applies to permitting decisions pending or issued prior to March 15, 2002. Division’s Brief at p. 41; Intervenor’s Brief at pp. 41-42. However, by the plain language of the statute, an application may be a “revision” or “amendment” of an application that “was first approved prior to March 15, 2002.” R.C. 1514.02(A)(10)(b) reads that “unless the application for such a permit, renewal, **amendment**, or modification is a resubmission, **revision**, or reconsideration of an application that was pending before the chief or was **first approved prior to March 15, 2002.**” (Emphasis added). It is plain that the Applications at issue revised and amended numerous aspects of applications that were approved prior to March 15, 2002. *See* Decision at ¶¶ 12 and 14. The “or” language of the statute makes clear the legislature’s intent that previously approved mining applications revised or

amended after March 15, 2002 remain subject to the land use considerations of R.C.

1514.02(A)(10)(b).

Finally, the Division's assertion that Appellants use of the Clark County Zoning Regulations is an "appeal to add additional facts outside the record" is false. All Parties discussed admitting the zoning resolution as an exhibit at the hearing, and the Commission stated:

...the Commission can take note of it as a law, and if the parties wish to reference it in briefing and so it will be treated as any other law was. And just like the other statute and rules that we referenced in this case, we did not bring them in as exhibits.

Day 5 Tr. 1250:20-1251:5. The resolution can be found on the website referenced in the Brief of Appellants or at Appellants' Ex. B, and this Court can properly take notice of it for purposes of this Appeal, just as the Commission did.

## **II. CONCLUSION**

For all of the foregoing reasons, and the reasons in the Brief of Appellants, Appellants request that the Commission's Decision be reversed and remanded for compliance with the applicable laws and regulations.

Respectfully submitted,



James Yskamp (0093095)  
Fair Shake Environmental Legal Services  
159 South Main Street, Suite 1030  
Akron, Ohio 44308  
Telephone: (234) 571-1970  
Fax: (330) 319-8859  
E-mail: [jyskamp@fairshake-els.org](mailto:jyskamp@fairshake-els.org)  
*Attorney for Appellants*

**CERTIFICATE OF SERVICE**

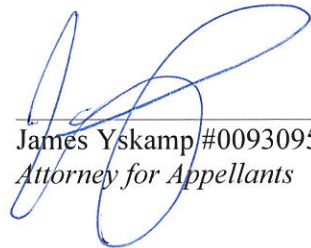
A true and correct copy of the foregoing **Reply Brief** was served on November 19, 2019 to following counsel of record via electronic mail and US mail:

Eastman & Smith LTD  
Brian P. Barger  
bpbarger@eastmansmith.com  
100 E. Broad Street, Suite 2100  
Columbus, Ohio 43215  
Matthew D. Harper  
mdharper@eastmansmith.com  
One SeaGate, 24<sup>th</sup> Floor  
Toledo, Ohio 43699  
*Attorneys for Intervenor*

Brian A. Ball  
brian.ball@ohioattorneygeneral.gov  
Scott Myers  
scott.myers@ohioattorneygeneral.gov  
Office of Attorney General  
Environmental Enforcement Section  
2045 Morse Road, Bldg. A-3  
Columbus, Ohio 43229  
*Attorneys for Appellee*

Date November 19, 2018

By:

  
James Yskamp #0093095  
*Attorney for Appellants*