No. _____

In the Supreme Court of the United States

STATE OF OHIO, EX REL.
DAVE YOST, OHIO ATTORNEY GENERAL,

Petitioner,

v.

ROVER PIPELINE, LLC, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX

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TABLE OF CONTENTS

Page

APPENDIX A

THE SUPREME COURT OF OHIO

State of Ohio, ex rel. Dave Yost Ohio Attorney General

v.

Rover Pipeline, LLC and Pretec Directional Drilling, LLC

Case No. 2024-1603

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Stark County Court of Appeals; No. 2023CA00151)

s/ Sharon L. Kennedy
Sharon L. Kennedy
Chief Justice

APPENDIX B

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL. DAVE YOST, OHIO ATTORNEY GENERAL

Plaintiff-Appellant

-vs-

ROVER PIPELINE, LLC AND PRETEC DIRECTIONAL DRILLIING, LLC

Defendants-Appellees

JUDGES:

Hon. Patricia A Delaney, P.J.
Hon. W. Scott Gwin, J.
Hon. Craig R. Baldwin, J.

Case No. 2023CA00151

OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2017-CV-02216

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Gwin, J.,

{¶1} Appellant State of Ohio, ex rel. Dave Yost, Ohio Attorney General, appeals the judgment of the Stark County Court of Common Pleas dismissing its fourth amended complaint against appellees Rover Pipeline, LLC and Pretec Directional Drilling, LLC.

Facts & Procedural History

{¶2} Appellee Rover Pipeline, LLC ("Rover") is the owner and operator of the drilling operations for the Rover pipeline. Appellee Pretec Directional Drilling, LLC ("Pretec") is a subcontractor hired by Rover to perform horizontal-directional drilling related to construction of the pipeline.

{¶3} In February of 2015, Rover filed an Application for a Certificate of Public Convenience and Necessity with the Federal Energy Regulatory Commission ("FERC Certificate"), as required by federal law, to construct the 713-mile interstate pipeline. The pipeline is designed to transport natural gas from the Marcellus and Utica shale supply areas through West Virginia, Pennsylvania, Ohio, and Michigan, to outlets in the Midwest and elsewhere.

{¶4} As required by Section 401 of the Clean Water Act ("Section 401"), 33 U.S.C. 1341(a)(1), Rover applied for water quality certification from appellant on November 10, 2015 (hereinafter "401 Certification"). Appellant did not respond to Rover's application within one year. FERC issued an Environmental Impact Statement ("EIS") in July of 2016. In February of 2017, FERC issued its Certificate, granting approval for construction of the pipeline, subject to 45 environmental conditions. FERC gave Rover the authorization to begin construction in March of 2017. In May of 2017, the Ohio Environmental Protection Agency asked FERC to halt construction of the pipeline based on concerns of inadvertent returns and failure to adequately control storm water runoff. FERC stopped construction until Rover implemented protective measures. In September of 2017, FERC allowed Rover to resume activity. Additionally, in 2017, the FERC Office of Enforcement opened an investigation into the discharge of diesel fuel, hydraulic oil, contaminated fluids, and unapproved additives into the water in various locations across Ohio caused by the construction of the Rover pipeline.

{¶5} On May 6, 2022, appellant filed a fourth amended complaint, the dismissal of which is the entry appealed in the instant action. The complaint alleges appellees illegally discharged millions of gallons of drilling fluids into Ohio's waters, causing pollution and degrading water quality across the state during construction of the Rover pipeline.

{¶6} Appellant alleges, "during construction of an interstate, natural-gas pipeline, [appellees] illegally discharged millions of gallons of drilling fluids to Ohio's waters, causing pollution and degrading water quality on numerous occasions and in various counties across the state" on multiple dates in April and May of 2017. Further, Rover "discharged sediment-laden stormwater" during construction on dates in April through October of 2017. Appellant states appellees failed to secure any permits designed to control these discharges, and, because appellees had control, authority, direction, and responsibility for construction of the pipeline, Rover violated Ohio state law.

{¶7} In its complaint, appellant sought both civil penalties and injunctive relief. However, the pipeline became fully operational in 2018. Thus, appellant is seeking civil penalty damages only for past violations.

{¶8} The fourth amended complaint contains the following counts:

> Count One – Rover and Pretec discharged pollutants (drilling fluids) to the waters of the State without point-source NPDES permits, failing to apply for and obtain point-source NPDES permits in violation of Ohio law.

Count Two – Rover failed to obtain a general storm water permit for its storm water discharges

Count Three – Rover and Pretec violated Ohio's general water quality standards for unpermitted drilling fluid discharges into waters of the state and unpermitted storm water discharges into the waters of the State.

Count Four – Rover and Pretec violated Ohio's wetland water quality standards (unpermitted drilling fluid discharges and unpermitted storm water discharges severe enough to violate standards).

Count Five – Rover violated the Director's Orders by failing to obtain coverage or even submit a notice of intent to obtain coverage under the Ohio EPA's Construction Storm Water Permit.

Count Six – Rover violated the Hydrostatic Permit (the permit that covers discharge of water that a pipeline company places into the pipe, during the construction phase, for safety testing).

{¶9} The trial court held pre-trials with the parties. As stated in the trial court's judgment entry, "the parties agreed that, instead of addressing the matters on remand, they wished to readdress the arguments made in the prior motions to dismiss that were summarily addressed by the Court in the footnote." Appellees each filed motions to dismiss appellant's fourth amended complaint on August 1, 2022. Appellant filed a memorandum in opposition to the motions to dismiss on October 3, 2022. Appellees each filed replies.

{¶10} The trial court issued a judgment entry on October 20, 2023, granting appellees' motion to

dismiss. The trial court found the Natural Gas Act ("NGA") is a "comprehensive scheme," wherein FERC serves as the lead agency in regulating and assuring compliance with the National Environmental Policy Act. The trial court went through the various applicable provisions of the NGA, in addition to the Clean Water Act ("CWA"), and found that, through the NGA, the federal government exclusively occupies the field of sale and transportation of natural gas, which, by necessity, includes the construction of natural gas pipelines. Further, that the NGA creates a scheme so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.

{¶11} As to the argument by appellant that the CWA's "Savings Clause," prevents preemption, the trial court found such a reading would allow appellant to independently attack the FERC-certified project and, while Congress carved out the ability of states to have the right to approve or disapprove certain discharges and certifications under the 401 Certification process, the "Savings Clause" does not create independent rights. The trial court held such a reading of the "Savings Clause" would undermine the regulatory nature of the NGA. The trial found the NGA preempts the claims asserted by appellant in its fourth amendment complaint. Consequently, the trial court dismissed the complaint.

{¶12} Appellant appeals the October 20, 2023 judgment entry of the Stark County Court of Common Pleas and assigns the following as error:

{¶13} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE STATE OF OHIO'S CLAIMS AGAINST ROVER AND PRETEC, WHICH ALLEGED VIOLATIONS OF

OHIO'S WATER POLLUTION LAW, WERE EITHER PREEMPTED BY THE NATURAL GAS ACT OR WAIVED UNDER THE CLEAN WATER ACT, SECTION 401, THOUGH THE TRIAL COURT DID NOT HEAR ANY EVIDENCE, THEREBY IGNORING THE OHIO SUPREME COURT'S DIRECTIVES ON REMAND."

Standard of Review

{¶14} If the claims of appellant are federally preempted, the common pleas court does not have jurisdiction over the matter. The standard of review regarding a claimed lacked of subject matter jurisdiction is "whether any cause of action cognizable by the forum has been raised in the complaint." *State v. Spurlock*, 42 Ohio St.3d 77 (1989). When determining its subject matter jurisdiction, "the trial court is not confined to the allegations of the complaint." *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211 (1976). The trial court can consider material beyond the complaint "without converting the motion into one for summary judgment." *Id.*

{¶15} This case is before us based on the trial court's grant of appellees' motions to dismiss pursuant to Civil Rule 12(B)(1) and (6). We review dismissals pursuant to Civil Rule 12(B)(6) de novo, presume the truth of all material factual allegations in the complaint, and make all reasonable inferences in appellant's favor. *Alford v. Collins-McGregor Operating Co.*, 2018-Ohio-8. We also review dismissals under Civil Rule 12(B)(1) de novo. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 2016-Ohio-478.

Law of the Case

{¶16} This case was remanded to the trial court from the Ohio Supreme Court in *State ex rel. Yost v. Rover Pipeline, LLC*, 2022-Ohio-766 ("*Rover I*"). In the majority opinion, the Supreme Court held appellant waived its authority with respect to issues related to the Section 401 Certification. *Id.* However, if the allegations are "outside the contours" of the Section 401 Certification, waiver does not apply. *Id.* The Supreme Court remanded to the trial court to determine whether any allegations in the complaint were "outside the contours" of the Section 401 Certification. *Id.*

{¶17} Upon remand from the Supreme Court, the trial court held several pre-trial conferences with the parties. In its judgment entry, the trial court stated it held these conferences "for remaining parties to discuss proceeding on the remand from the Ohio Supreme Court." Further, "pursuant to discussions, the parties agreed that, instead of addressing the matters on remand," they wanted to address jurisdictional issues such as preemption. In its appellate brief, appellant states the "parties agreed to address the issue of preemption and other jurisdictional issues within the motions to dismiss first, instead of the matters on remand because the motions to dismiss are jurisdictional and thus could be dispositive * * * the State understood that the hearing on the scope of the State's 401 waiver would follow the jurisdictional briefing below if the trial court did not dismiss the State's case entirely on preemption grounds."

{¶18} In its assignment of error, appellant contends the trial court violated the law of the case by ignoring the directives of the Ohio Supreme Court.

{¶19} The law of the case doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Giancola v. Azem*, 2018-Ohio-1694. However, the doctrine of the law of the case only comes into play with respect to issues previously determined and "while a mandate is controlling as to matters within its compass, on remand a lower court is free as to other issues." *Id.* at ¶16. The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results. *Nolan v. Nolan*, 11 Ohio St.3d 1 (1984). However, the rule is designed to ensure consistency of results in a case. *Id.*

{¶20} Appellant contends the trial court did not rely on preemption as the sole basis to dismiss the complaint and instead dismissed the claims based upon waiver, improperly determining the waiver issue without conducting the hearing contemplated by the Ohio Supreme Court in *Rover I*. Appellant bases its conclusion on a footnote by the trial court stating, "the parties have agreed to address the issue of preemption prior to addressing the remanded issue. However, even if the Court had the hearing contemplated by the remand and determined that the counts in the complaint were outside of the 401 certification, dismissal of the complaint would still be appropriate as such claims would be preempted by the NGA for the reasons set forth in this judgment entry."

{¶21} We find nothing in this language violating the law of the case. Appellant contends this language means the trial court improperly based its decision on the waiver issue. This Court reads the text appellant focuses on to mean that, even if the court held the hearing and determined there were claims that fell outside of the "contours" of Section 401, the claims in the complaint that *do not* fall within the "contours" of Section 401 are preempted by the NGA. The trial court's judgment entry focuses on preemption, and issues its ruling based upon preemption, not waiver. As noted by the trial court and both parties in their appellate briefs, the parties agreed they wanted the trial court to rule on the preemption issue prior to conducting any hearing on remand due to the jurisdictional nature of preemption.

{¶22} While the dissent in the *Rover I* case addressed the preemption argument and found the NGA preempted the majority of appellant's claims, the majority opinion did not address the preemption issue at all. Accordingly, the preemption issue was not "an issue previously determined" by the Ohio Supreme Court, and thus the doctrine of law of the case does not come into play on the issue of preemption. *Giancola v. Azem*, 2018-Ohio-1694. The trial court did not act contrary to the mandates of any superior tribunal, and the law the case doctrine did not preclude the trial court from resolving the dispute by considering an alternative legal theory on remand. *Id.* at ¶17.

{¶23} Appellant also contends the trial court's statement that a certain paragraph in the Supreme Court's *Rover I* opinion regarding the text of the CWA was "dicta," means the trial court violated the law of

the case because it wrongly considered this paragraph "dicta." However, the trial court clearly stated the reason it considered the paragraph dicta is because the majority in *Rover I* did not consider the preemption issue. The trial court did not consider it dicta for the waiver issue (which was specifically ruled on by the Court), but did consider it dicta for the preemption issue (which was not ruled on by the Court). As discussed above, the parties sought to have the trial court deal with the issue of preemption first, and the trial court based its holding upon preemption, not waiver.

{¶24} Finally, appellant contends the language utilized by the Ohio Supreme Court means that some of the claims in appellant's complaint must survive, but the trial court failed to follow this holding in violation of the law of the case. The Ohio Supreme Court held that some of appellant's claims may not have been waived. However, as noted above, the majority opinion never deals with preemption. Simply because some of appellant's claims may not have been waived does not mean they cannot be preempted. The legal issue of preemption was not an "issue previously determined" by the Supreme Court. Accordingly, the trial court did not violate the law of the case in this regard.

{¶25} As to the parties' agreement to address the preemption issue first before having the trial court determine which claims were and were not within the "contours" of the 401 Certification, any such argument on appeal that this was incorrect or violated the law of the case is barred by the doctrine of invited error. The invited-error doctrine is a well-settled principle of law under which a "party will not be permitted to take

advantage of an error which he himself invited or induced." *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20 (1986). Appellant failed to object to the trial court ruling on the preemption issue first, agreed to having the trial court decide the preemption issue first, and argued the case on that basis. Appellant cannot now take advantage of any error in that regard. *Wojcik v. Pratt*, 2011-Ohio-5012 (9th Dist.).

{¶26} While this Court does not believe the trial court impermissibly premised its opinion on waiver or violated the law of the case, we note that any confusion as to or mention of waiver is due to the fluctuating arguments by appellant at the various stages in these proceedings. In response to motions to dismiss filed by appellees in 2018, appellant argued it was exercising its powers under the CWA Sections 303 and 402. At the Supreme Court level, appellant instead argued it was exercising its "traditional power to regulate water quality," which was authority that allegedly existed independently of the CWA. *Appellant's Supreme Court Brief* at p. 4, 21, 32 (claims are saved from waiver due to state's "traditional power to regulate water quality," "traditional and primary power over land and water use," and "traditional authority over water quality"). In its response to the 2022 motions to dismiss at issue in this case, appellant returns to the CWA Sections 303 and 402 arguments. The Supreme Court did not directly decide the CWA Section 303 or 402 issue, because it based its decision on the state's "traditional" authority to bring these claims. Thus, the law of the case is not violated.

Preemption Law

{¶27} The doctrine of federal preemption originates from the Supremacy Clause of the United States Constitution in Article VI, clause 2. Pursuant to the Supremacy Clause, the United States Congress has the power to preempt state laws.

{¶28} There are three ways federal law can preempt state law: (1) where federal law expressly preempts state law (express preemption); (2) where federal law has occupied the entire field (field preemption); or (3) where there is conflict between federal law and state law (conflict preemption). *State ex rel. Yost v. Aktiengesellschaft,* 2019-Ohio-5084.

{¶29} Conflict preemption is a form of "implied" preemption, and occurs where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at ¶13.

{¶30} Field preemption is also a form of "implied" preemption, in which Congress meant to preempt state law without explicitly saying so, and in which the state law regulates conduct in a field Congress intended the Federal Government to occupy exclusively. *State ex rel. Yost v. Volkswagen Aktiengesellschaft*, 2021-Ohio-2121. "Field preemption," occurs when Congress has enacted a legislative and regulatory scheme that is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of states law on the same subject. *Id.* at ¶13.

{¶31} In determining whether federal law preempts state law, "the purpose of Congress is the ultimate touchstone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Congress' intent is primarily discerned from the language contained in the preemption statute and the statutory framework around it. *State ex rel. Yost v. Aktiengesellschaft,* 2019-Ohio-5084 at ¶14. Also relevant is the structure and purpose of the statute as a whole as revealed through text and the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law. *Id.* A court reviewing possible preemption must consider federalism as part of its analysis because both national and state governments have elements of sovereignty the other is bound to respect. *Id.* at ¶14-15.

Preemption by the NGA

{¶32} It is well-established that under the Commerce Clause, U.S. Constitution, Article I, Section 8, cl. 3, the federal government "has dominion, to the exclusion of the States, over navigable waters of the United States." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). The NGA has long been recognized as a "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). The NGA confers upon FERC exclusive jurisdiction over the transportation of sale of natural gas in interstate commerce for resale. *Id.* at 300-301. Thus, FERC is the regulatory body charged with implementation of the NGA. FERC serves as the lead agency to coordinate all applicable

federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969. 15 U.S.C. 717n(b)(1).

{¶33} The NGA mandates each federal and state agency considering an aspect of an application for federal authorization to "cooperate" with FERC and comply with deadlines established by FERC. 15 U.S.C. 717n(b)(1). FERC has the authority to establish a schedule for all federal authorizations. 15 U.S.C. 717n(c). Additionally, the NGA requires FERC to, "with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission * * * with respect to any Federal authorization." 15 U.S.C. 717n(d). This record maintained by FERC serves as the record for judicial review under section 717r(d) of "decisions made or actions taken of Federal and State administrative agencies and officials." *Id.*

{¶34} Among other duties, FERC must determine the public necessity for the development of natural gas pipelines. This determination is made by FERC when they issue a "certificate of public convenience and necessity." 15 U.S.C. 717f(c). The NGA details a specific procedure for an applicant to obtain a FERC Certificate, and no company may construct any facilities for the transportation in interstate commerce of natural gas without obtaining this certificate from FERC. The applicant must first: (1) describe the proposed pipeline project, (2) explain why the project is required, and (3) estimate the beginning date and completion date for the project. Notice of the application is filed in the Federal Register, a period of

public comment and protest is allowed, and FERC conducts public hearings on the application. *Id.*

{¶35} In evaluating an application, FERC must investigate "the environmental consequences of the proposed project and issue an environmental impact statement." *Id.* FERC must ensure that the proposed pipeline construction complies with specific federal environmental regulations, including those promulgated under the CWA. 15 U.S.C. 717b(d); 18 CFR 4.38. The EIS addresses multiple areas, including water use and water quality. FERC also requires natural gas companies to develop and comply with contingency and mitigation plans for construction, including the measures to be taken in the event of an inadvertent release. *Rover Pipeline, LLC, and Energy Transfer Partners, LP*, 177 FERC P 61182 (F.E.R.C.), 2021 WL 5982321. In this case, during the EIS process, FERC required as a condition of its FERC Certificate that Rover comply with an "HDD Contingency Plan," and required Rover to comply with specific procedures to address storm water discharges and potential discharges of fuel and fuel oil.

{¶36} If, after completing the process, FERC finds the proposed project "is or will be required by the present or future public convenience or necessity," and the applicant demonstrates it will conform to the rules and regulations of FERC, FERC will issue the certificate. 15 U.S.C. 717f(e). FERC has the "power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

Clean Water Act

{¶37} Congress established the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Under CWA Section 401, any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters – defined in the statute as "waters of the United States," shall provide the federal licensing or permitting agency with a 401 Certification. This certification issued by the state in which the discharge originates, attests that the discharge will comply with applicable provisions of certain enumerated sections of the CWA. These include effluent (i.e., discharge) limitations and standards of performance for new and existing discharge sources (Sections 301, 302, and 306), water quality standards and implementation plans (Section 303), and toxic pretreatment effluent standards (Section 307). Effluent limitations establish the levels of specific pollutants that are allowable in a discharger's effluent based on levels necessary to attain water quality standards in the waterbody receiving the discharge (water quality-based effluent limitations). *Water-Quality Based Effluent Limits.* U.S. Environmental Protection Agency https://www3.epa.gov/npdes/pubs/chapt_06.pdf (accessed September 15, 2024).

{¶38} The CWA gives states the opportunity to have a substantial role in the FERC certification proceedings, and specifically allows states to participate in environmental regulation of natural gas facilities pursuant to the CWA. "By enacting the [Clean Water Act], Congress provided states with an offer of shared regulatory authority." *Arkansas v.*

Oklahoma, 503 U.S. 91 (1992). The Supreme Court has established that the CWA is a valid exercise of Congress' power under the Commerce Clause, and, in regard to the CWA, Congress has the power to offer states the choice of regulating activity according to federal law or having state law preempted by federal law. *New York v. U.S.*, 505 U.S. 144 (1992).

{¶39} In this comprehensive regulatory scheme, Congress has delegated to the states the option to exercise some authority to enforce state environmental laws that are more stringent or broader than federal laws. The U.S. Supreme Court has held that the authority given to the states in the 401 Certification process is broad, as state approval through the 401 Certification process is required any time a federally licensed activity "may" result in a "discharge." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006). Further, that the authority given to the states via the 401 Certification process in the CWA "provides for a system that respects the State's concerns," and state certifications under the CWA are "essential in the scheme to protect state authority to address the broad range of pollution." *Id.* at 386.

{¶40} However, in order for a state to avail itself of this option to exercise authority, the state must follow a certain procedure. If the state fails to exercise this option to participate in the 401 Certification process, waiver applies. *State ex rel. Yost v. Rover Pipeline, LLC*, 2022-Ohio-766; *FFP Missouri 15, LLC, FFP Missouri, LLC*, 162 FERC 61237 (F.E.R.C.), 2018 WL 1364654 (March 15, 2018) ("as a result of the state's waiver, the conditions listed in its waived certifications were no longer mandatory"). This is

because the waiver provisions were created to prevent a state from indefinitely delaying a federal licensing proceeding. *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (Dist. Col. 2019).

"Savings Clause"

{¶41} Appellant contends it maintains all of its authority pursuant to the "Savings Clause" contained in the NGA. Appellant believes it has the authority to adopt or enforce *any* standard or limitation regarding discharges of pollutants, separate and distinct from its ability to regulate through its issuance of the 401 Certification or its participation (or lack thereof) in the 401 Certification process, due to the broad nature of the "Savings Clause" in the NGA. The "Savings Clause" in the NGA provides, "Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under * * * (3) the Federal Water Pollution Control Act (commonly known as the "Clean Water Act").

{¶42} We find appellant's reading of the Savings Clause to be too broad. The Savings Clause specifically preserves the "rights of the States" under the CWA. However, as discussed further below, the "right of the States" under the CWA is the federally delegated power to participate in the 401 Certification process. Outside of these federally delegated "rights" referenced in the Savings Clause, states have no power to regulate the construction of interstate natural gas pipelines due to the dominion the federal government has, to the exclusion of the states, over navigable waters of the United States. Unlike an antitrust claim that "affected" the FERC-regulated field of wholesale natural gas rates but was not "aimed

directly" at the field, in this case, the claims set forth in appellant's complaint are aimed directly at the heart of a FERC-regulated field (the construction of an interstate natural gas pipeline). *Oneok v. Learjet, Inc.*, 575 U.S. 373 (2015) (no preemption because antitrust law was not aimed at natural gas companies and broadly aimed at all businesses, so not directly aimed at FERC-regulated field).

{¶43} The Savings Clause does not separately create any independent rights for appellant. As stated by the EPA, the CWA "does not provide an independent regulatory enforcement role" for states once they have waived certification. *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276. Rather, the rights protected from preemption via the Savings Clause are those rights delegated to the state from the federal government in the 401 Certification process. The object of giving states broad authority during the 401 Certification process is to maintain states' water quality standards. *S.D. Warren Co. v. Maine Board of Environmental* Protection, 547 U.S. 370 (2006).

{¶44} To read the Savings Clause as broadly as appellant would like this Court to would allow appellant to independently attack a FERC-certified project, despite having the opportunity and authority to utilize their authority during the 401 Certification process. It would also give states a second chance to regulate through the Savings Clause, as appellant is essentially seeking to impose new requirements after the FERC Certificate has already been issued, even though they were given the chance to participate in process. See *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (stating Congress provided states with power to

enforce "any other appropriate" requirement of state law" in the 401 Certificate). Given the detailed regulations promulgated by the NGA and the power given to FERC throughout these regulations, we find such a broad reading would undermine the regulations contained in the 401 Certification process. See *Arizona v. U.S.*, 567 U.S. 387 (2012) (permitting state to impose its own penalties would conflict with careful framework Congress adopted).

{¶45} We find preemption is consistent with the text and purpose of the NGA. 15 U.S.C. 717(a) provides that "federal regulation in matters relating to the transportation of natural gas and the sale thereof * * * is necessary in the public interest." Additionally, 15 U.S.C. 717r specifically provides that, after a FERC Certificate is issued, as it was in this case, the way in which to challenge or contest that order is to: (a) apply for a rehearing with FERC and (b) by filing a petition in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. Additionally, the NGA provides states with the ability to petition FERC to investigate a potential violation of the NGA or the FERC Certificate. 15 U.S.C. 717m; 15 U.S.C. 717n.

{¶46} FERC has the authority to pursue an enforcement action and penalties for violations of the NGA. 15 U.S.C. 717s; 15 U.S.C. 717t and t-1. FERC initiated an enforcement action against Rover for the same actions appellant in this case lists in its complaint: (1) intentionally including diesel fuel and other toxic substances and unapproved additives in

the drilling mud during its horizontal directional drilling operations; (2) failing to adequately monitor and (3) improperly disposing of inadvertently released drilling mud that was contaminated by diesel fuel and hydraulic oil. FERC directed Rover to show cause why it should not be assessed a civil penalty under 15 U.S.C. 717t in the amount of $40 million. *Rover Pipeline, LLC, and Energy Transfer Partners, LP*, 177 FERC P 61182 (F.E.R.C.), 2021 WL 5982321. FERC has thus crafted a multi-million dollar penalty that balanced a variety of financial and environmental factors. *Id.*

{¶47} Courts examining the issue have also found the preemptive effect of the NGA to be broad. *Karuk Tribe of Northern California v. California Regional Water Quality Control Board, North Coast Region*, 183 Cal.App.4th 330 (1st Dist. March 20, 2010) (it is only when states attempt to act outside of the federal context and federal scheme under authority of independent state law that such collateral assertions of state power are nullified); *Delaware Riverkeeper Network v. Secretary, Pennsylvania Dept. of Environmental Protection*, 833 F.3d 350 (3rd Cir. Aug. 8, 2016) (holding when a state declines to exercise its authority to issue a Water Quality Permit, this non-participation returns the state's delegated authority to enforce Section 401 to FERC with respect to the project due to NGA preemption); *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental Protection*, 482 F.3d 79 (2nd Cir. Oct. 5, 2006) (Congress wholly preempted and completely federalized the area of natural gas regulation, but provided states with the option of being deputized regulators under the 401 Certification process); *Islander East Pipeline Co., LLC v. Blumenthal*, 478

F.Supp.2d 289 (D. Conn. March 22, 2007) (state permitting preempted by NGA once FERC certificate was issued); *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571 (2nd Cir. Jan. 24, 1990) (the matters sought to be regulated by the state were directly considered by FERC in the 401 Certification process, this direct consideration is more than enough to preempt state regulation); *Northern Natural Gas Co. v. Munns*, 254 F.Supp.2d 1103 (S.D. Iowa Feb. 28, 2003) (considerations of state regulations does not change the fact FERC considers and determines a full range of environmental and land use standards); *Northern Natural Gas Co. v. Iowa Utilities Board*, 377 F.3d 817 (8th Cir. 2004) (NGA preempts laws state was attempting to enforce; because FERC has authority to consider environmental issues, states may not engage in concurrent environmental review; FERC policy to require certain companies cooperate with state and local authorities does not change the preemptive effect of NGA); *No Tanks, Inc. v. Public Utilities Commission*, 697 A.2d 1313 (Maine 1997) (state commission's review of environmental issues would be an attempt to regulate matters within FERC's exclusive jurisdiction contrary to preemption rule).

{¶48} The U.S. EPA itself recognizes the limited role the states have, and also recognizes that the ability of the state to participate in the 401 Certification process is a carve-out from what otherwise would be preempted by federal law. As stated by the EPA, "Section 401 * * * provides specific and defined authority for States and Tribes to protect their water quality in the context of a federal licensing and permitting process, including those processes in which State or Tribunal authority may otherwise be

entirely preempted by federal law." *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276. The EPA also recognizes that while there may be situations in which "state enforcement under state authorities may be lawful where State authority is not preempted by federal law," one example of a situation "where State authority would be preempted by federal law includes FERC's sole authority to approve the construction of interstate natural gas pipelines * * * under the National Gas Act." *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276.

{¶49} Appellant contends it is conflicting and not possible for a court to find the federal government occupies the field of the sale and transportation of natural gas, which includes the construction of a natural gas pipeline, while at the same time recognizing the state retains some authority under the CWA 401 Certification process (assuming they do not waive the right). According to appellant, (1) either Congress has exclusive governance of the field, or (2) the states maintains *all* of its powers under the Savings Clause. We find this argument is too narrow, and misapprehends the fact that preemption can be limited in scope. In fact, when preemption is used, it should be used in as narrow scope as possible so as to retain as much of the state's historical police powers as possible. *City of Girard v. Youngstown Belt Railway Co.*, 2012-Ohio-5370; *Matthews v. Centrus Energy Corp.*, 15 F.4th 714 (6th Dist. Oct. 6, 2021) (even absent complete preemption, can have partial preemption).

{¶50} We find that, during the permitting process, states can exercise their CWA permitting authority, and choose to regulate the activity. However, once the

state waives this authority, state law is preempted by federal law. See *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696 (Dist. Col. 2017) (stating once the CWA's requirements have been waived, the CWA "falls out of the equation" and "there is nothing left for the state to do.") Appellant's "either/or" scenario misses a crucial and important detail: Congress has set up the regulatory system to offer a state the option to regulate the activity. The state retains their authority and ability to regulate through the CWA when the state imposes conditions, limitations, and specific permits on the project to assure compliance with various provisions of the CWA through the 401 Certification process.

{¶51} However, once the state gives up this authority Congress offered to them by waiving participation in the 401 Certification process, the state's delegated authority to enforce is returned to FERC, and the NGA preempts the field. "Where Congress has the authority to regulate private activity under the Commerce Clause, [the Supreme Court] recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation." *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental Protection*, 482 F.3d 79, 92 (2nd Cir. Oct. 5, 2006); see also: *Karuk Tribe of Northern California v. California Regional Water Quality Control Board, North Coast Region*, 183 Cal.App.4th 330 (1st Dist. March 20, 2010) (state must exercise its authority through the 401 Certification process or preemption applies); *Delaware Riverkeeper Network v. Secretary, Pennsylvania Dept. of Environmental Protection*, 833 F.3d 350 (3rd Cir. Aug. 8, 2016) (holding when a state

declines to exercise its authority to issue a Water Quality Permit, this non-participation returns the state's delegated authority to enforce Section 401 to FERC with respect to the project); *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental* Protection, 482 F.3d 79 (2nd Cir. Oct. 5, 2006) (stating if state chooses not to regulate through the 401 Certification process, the regulatory decision-making reverts back to federal authorities). We find this is not an either/or proposition, as Congress has clearly stated its intention as to the scope of preemption, i.e., either participate, regulate, and enforce through the 401 Certification process or lose authority under the CWA because this ability to regulate and enforce reverts back to the federal authorities.

Specific Clean Water Act Provisions

{¶52} Appellant contends it retains power or authority under the CWA *other* than the power or authority that it derives from the 401 Certification process. However, Congress has provided direction regarding the scope of what a state should consider in making a Section 401 Certification decision. Section 401(a)(1) provides that, in the 401 Certification process, the state must certify that a discharge to navigable waters that may result from a proposed activity will comply with specific enumerated sections of the CWA, including Sections 301, 302, 303, 306, and 307, and also whether the proposed activity will comply with any other appropriate requirement of state law. *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276. Section 401(d) of the CWA provides that any 401 Certification by the state "shall set forth any effluent limitations and other limitations, and

monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under Section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section." *Id.*; 33 U.S.C.§ 1341(d).

{¶53} Specifically, appellant contends that Sections 303 (33 U.S.C. 1313) and 402 (33 U.S.C. 1342) of the CWA provide it independent authority to require the permits listed in their complaint or allow them to set water quality standards even though they waived their opportunity to participate in the 401 Certification process. Appellant contends Section 303 "saves" Counts 3 and 4 from preemption, and Section 402 "saves" Counts 1, 2, and 5 from preemption.

{¶54} However, both Sections 303 and 402 take their force from 301(a) of the CWA, which prohibits the "discharge of any pollutant" into U.S. waters "except as in compliance" with certain enumerated provisions of the CWA, including state quality standards under 303 and permitting requirements under 402. In turn, Section 401 of the CWA, the section that deals with the 401 Certification process, specifically provides that compliance with Section 301 (including the requirements of Sections 303 and 402 incorporated therein) must be addressed during the 401 Certification process ("any applicant for a federal permit to conduct * * * construction * * * which may result in any discharge into the navigable waters,

shall provide * * * a certification from the State * * * that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title"). Section 401(d) makes it mandatory for appellant, through the 401 Certification process, to set forth and include in the 401 Certification, any limitations it seeks to impose via Section 301 of the CWA, which includes any permits or limitations sought pursuant to Sections 303 and 402.

{¶55} Viewing these provisions of the CWA together and examining the statutory text, it is clear that these provisions do not separately create any independent rights for appellant. Rather, to the extent that these sections provide any authority to appellant, they provide the authority through the 401 Certification process. See *PUD No. 1 Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (upholding state's ability to impose limitations on the project through the 401-certification process to assure compliance with various provisions of CWA). Based upon the unambiguous statutory language, if the state wanted to require permits or impose limitations pursuant to Sections 301, 303, and 402, they had to participate in the 401-certification process.

{¶56} Appellant also contends that Section 510 (33 U.S.C. 1370) of the CWA provides it authority to require the permits listed in the complaint or allow them to set water quality standards even though they waived their opportunity to participate in the 401 Certification process. Appellant argues Section 510 triggers the NGA "Savings Clause," and creates rights for them independent of the 401 Certification. Section 510 of the CWA provides, "except as expressly

provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharge of pollution * * * except that if an effluent limitation, or other limitation * * * is in effect under this chapter, such State * * * may not adopt or enforce any effluent limitation or other limitation * * * which is less stringent than the effluent limitation, or other limitation * * * under this chapter."

{¶57} We find Section 510 does not separately create any rights or "independent authority" for a state who has waived its participation in the 401 Certification process. Section 510 does provide that a state who participates in the 401 Certification process is permitted to require "more stringent" limitations than the federal government does on effluent and other limitations. The purpose of Section 510 is to clarify that the CWA does not prohibit states from adopting water quality standards that are stricter than federal standards. *International Paper v. Ouelette*, 479 U.S. 481 (1987). However, these limitations must be set forth in the 401 Certification, because Section 401 requires a state to attach conditions to the 401 Certificate related to any part of the proposed "activity," which, in this case, is the construction of the pipeline. *PUD No. 1 v. Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994),

{¶58} The first words of Section 510 are instructive and important. Section 510 states, "except as expressly provided in this chapter * * *." Chapter 26 of the CWA expressly contains the 401 Certification provisions that (1) requires the state to grant, deny, or

waive participation in the 401 Certification process and (2) requires a state, as part of the 401 Certification process, to set forth *any* effluent limitations, other limitations, or monitoring requirements necessary to assure the applicant will comply with the CWA and any other appropriate requirement of State law so they can be included in the FERC Certificate. Application of state law pursuant to Section 510 as appellant seeks to do would allow the state to circumvent the permit system established by the CWA. *Id.* Notably, Section 510 makes no mention of the NGA. Accordingly, Section 510 does prevent the presumptive effect of the NGA from applying to a situation in which the state has waived its participation in the 401 Certification process.

{¶59} We note that our discussion of Sections 301, 303, 402, and 510 are not designed to indicate we premise our opinion on waiver in violation of the Supreme Court's *Rover I* opinion. Rather, our analysis is done to explain why Sections 303, 402, and 510 of the CWA cannot "save" appellant's complaint from preemption, i.e., because Sections 301, 303, 402, and 510 do not create any independent rights, and appellant waived any authority it did have under these sections by waiving their participation in the 401 Certification process. If appellant retained power or authority under the CWA in Sections 301, 303, 402, and 510 to regulate these items, the waiver by appellant in the 401 Certification process would be meaningless. Additionally, it would allow the state two opportunities to regulate discharges from natural gas pipeline construction, first, through the 401 Certification process, and second, through state court litigation premised on other CWA provisions.

Congress specifically prohibited this "two opportunity" theory in Section 401(d), which mandates that the state, through the 401 Certification process, include any limitations it seeks to impose via Sections 301, 303, and 402.

{¶60} Permitting a state to essentially regulate twice – once in the 401 Certification process, and then again after the FERC Certificate is issued utilizing their "powers" under the CWA would run afoul of Section 401(d) of the CWA, which requires (as evidenced by the use of the word "shall") the state to set forth ANY effluent limitations, other limitations, or monitoring requirements necessary to ensure compliance with the CWA "and with any other appropriate requirement of state law." These limitations and monitoring requirements, even if they are more stringent than federal law requires, automatically become a condition of the FERC Certificate. 401(d). "In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards * * * and with 'any other appropriate requirement of State law.' " *PUD No. 1 v. Jefferson County v. Wash. Dep't of* Ecology, 511 U.S. 700, 712 (1994), quoting *EPA, Wetlands and 401* Certification 23 (April 1989). If a state could, after the FERC Certificate is issued, simply use their alleged "independent" powers pursuant to the CWA, the plain language contained in Section 401(d) would be rendered meaningless, as would the regulatory framework designed by Congress in the CWA.

Hydrostatic Permit

{¶61} Count 6 of appellant's fourth amended complaint alleges Rover violated the hydrostatic permit issued by the State of Ohio. Unlike the other counts in which the permits and/or regulations the state alleges were violated were not included in the FERC Certificate, the hydrostatic permit was included in the FERC Certificate. However, the permit was obtained by Rover because FERC required it as part of the FERC Certification process, not because it was required by the State of Ohio.

{¶62} The hydrostatic permit was not obtained independently of the 401 Certification process. Since appellant waived its participation in the 401 Certification process and FERC was the regulatory body that required the permit, it is FERC who has to enforce the permit. Federal courts have recognized that FERC is charged with policing compliance with the FERC Certificate it issues. *Waldock v. Rover Pipeline, LLC*, 2020-Ohio-3307 (6th Dist.). 15 U.S.C. 717m explicitly provides FERC with the power to investigate violations of the provisions of FERC's orders.

{¶63} "[T]he federal agency issuing the applicable federal license or permit is responsible for enforcing certification conditions that are incorporated into a federal license or permit." *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276. Here, the hydrostatic permit was incorporated into the federal license or permit, as required by FERC. Thus, it became a requirement of federal law, not state law. *Karuk Tribe of Northern California v. California Regional Water Quality Control Board, North Coast Region*, 183 Cal.App.4th 330 (1st Dist. March 20, 2010). FERC, in its exercise

of regulatory authority pursuant to the power specifically given to it under 15 U.S.C. 717f(e), elected to require Rover to cooperate with state authorities in obtaining the hydrostatic permit despite the state's waiver. This policy decision "does not change the preemptive effect of the NGA." *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (Dist. Col. Jan. 25, 2019); See *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571 (2nd Cir. Jan. 24, 1990). (state permit does not lessen presumptive effect).

{¶64} Pursuant to the complaint, the alleged violation of the hydrostatic permit occurred due to Rover's "control, authority, direction, and responsibility over the construction of the pipeline." Accordingly, this claim is preempted by the NGA.

Conclusion

{¶65} At various times throughout these proceedings, appellant has argued that it can enforce its state laws due to its "traditional" or "inherent" powers, while at other times arguing it can enforce its laws through power "delegated" to it by the federal government in the CWA.

{¶66} To avoid any confusion, we conclude the following: Counts 1, 2, and 5 of appellant's fourth amended complaint allege violations under state law for inadvertent returns of drilling fluid and storm water runoff without obtaining permits from the state. Counts 3 and 4 allege violations of Ohio's general wetland-specific-water quality standards. To the extent appellant argues these claims are permitted as an exercise of their "traditional" or "inherent" state authority, we find this does not fall within the NGA Savings Clause and these claims are therefore

preempted. If appellant is arguing these claims are permitted due to powers "delegated" to them from the federal government by the CWA, we find the state has no "independent" authority from the CWA; the only powers delegated to them are those delegated to them through the 401 Certification process. If the state wanted to require permits or impose limitations pursuant to Sections 301, 303, and 402, they had to participate in the 401 Certification process, which they did not.

{¶67} Each of the claims in appellant's fourth amended complaint falls within the field of natural gas pipeline construction preempted by the NGA. The complaint expressly ties each of the alleged discharges and/or storm water runoff to natural gas pipeline construction. The complaint states the drilling fluid release occurred "during construction of an interstate, natural gas pipeline," and that the discharges of storm water were "from Rover's construction activities." We agree with the trial court that our finding is narrowly tailored to the specific situation. During the construction of a natural gas pipeline certified by FERC when a state has waived its ability to participate in the 401 Certification process and there are discharges of pollutants into waterways, a state's recourse for such discharges is limited to those provided in the 401 Certificate. Any claims outside thereof are preempted by the NGA.

{¶68} The state's waiver and the preemption of claims does not mean the state is without remedy for damages from violations of the federal permit. The U.S. Supreme Court has stated that the state may still sue for violations of federal law. *U.S. Dept. of Energy v. Ohio,* 503 U.S. 607 (states may bring suit under

CWA pursuant to act's citizens-suit provision, 33 U.S.C. 1365). Further, the state had, and continues to have, despite any waiver or preemption, the ability to petition FERC to revisit its CWA permitting pursuant to the procedures set forth in 15 U.S.C. 717r.

{¶69} Based on the foregoing, appellant's assignment of error is overruled. The October 20, 2023 judgment entry of the Stark County Court of Common Pleas is affirmed.

By: Gwin, J.,

Delaney, P.J., and

Baldwin, J., concur

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

s/ Craig R. Baldwin
HON. CRAIG R. BALDWIN

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APPENDIX C

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, EX REL., MICHAEL DEWINE, OHIO ATTORNEY GENERAL,

Plaintiff,

-vs-

ROVER PIPELINE, LLC, et al.,

Defendant.

CASE NO. 2017CV02216

JUDGE KRISTIN G. FARMER

JUDGMENT ENTRY

This matter came before the Court upon the motions of the following defendants to dismiss the Fourth Amended Complaint filed by the plaintiff, The State of Ohio ex rel. Michael Dewine, Attorney General ("State of Ohio"): Rover Pipeline, LLC ("Rover") Group and Pretec Directional Drilling, LLC ("Pretec"). The State of Ohio filed a combined response to the motions to dismiss[1], to which the individual defendants have replied. Upon review, the Court finds as follows.

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[1] The State of Ohio has requested an oral argument on the motions to dismiss. As this Court has previously found that the claims at issue were preempted by federal law, this entry serves to set forth this Court's reasoning for such finding. As such, the Court finds that oral argument on the issue is unnecessary.

Procedural History

The State of Ohio filed an Amended Complaint on November 30, 2017. After the filing of the amended complaint, a "Notice of Removal to Federal Court" was filed on December 8, 2017. The Federal Court remanded this matter back to the Stark County Court of Common Pleas on January 31, 2018. In his Order remanding this matter back to Stark County, Judge John R. Adams found that, although the State of Ohio's complaint necessarily raises a federal issue in some capacity, the focal point of the litigation will be the Clean Water Act and as such, the federal court "cannot exercise jurisdiction without disrupting the division of labor between the state of Ohio and the federal government."

Upon remand, the State of Ohio filed a motion for leave to file a Second Amended Complaint. The Court granted the motion and the Second Amended Complaint was filed on April 17, 2018. After the filing of the Second Amended Complaint, the defendants filed motions to dismiss. Prior to ruling upon said motions, the State of Ohio filed an unopposed motion for leave to file a Third Amended Complaint. The Third Amended Complaint was filed on July 19, 2018. Thereafter, the defendants again filed motions to dismiss. This Court granted the motions to dismiss. Although the judgment entry focused on its finding of waiver by the State of Ohio under Section 401 of the Clean Water Act, this Court specifically noted that:

> Although not specifically addressed in this entry, the Court has reviewed the arguments relative to dismissal on grounds other than a waiver under Section 401. The Court finds that, even if such waiver had not occurred, the defendants would be

> entitled to dismissal on the alternative grounds presented by the motions to dismiss, including, but not limited to, preemption.

Judgment Entry filed March 12, 2019, footnote 2.

The State of Ohio appealed this Court's entry to the Fifth District Court of Appeals on April 16, 2019, in Fifth District Case No. 2019CA00056. In the appeal, the State of Ohio asserted two assignments of error:

> 1. The trial court erred as a matter of law when it held that, under the Clean Water Act, 33U.S.C. 1341, the State of Ohio waived all of its water pollution authority over environmental violations occurring during the construction of Rover's interstate pipeline,
>
> 2. The trial court erred as a matter of law when it found, in a footnote, that even without the waiver, the other defenses raised by Rover and its contractors including preemption barred the State of Ohio's counts one through six.

State of Ohio ex rel. Yost v. Rover Pipeline, LLC, et al, 5th District No. 2019CA00056, 2019-Ohio-5179. The Fifth District Court of Appeals affirmed this Court's decision regarding waiver under the Clean Water Act. As such, the Court found that assignment of error regarding other basis for dismissal, including preemption, moot. The State of Ohio appealed the Fifth District Court of Appeal's decision to the Supreme Court of Ohio.

The Supreme Court of Ohio accepted the State of Ohio's appeal on propositions of law relating to waiver under the Clean Water Act. In a 4-3 decision, the Court held as follows:

> We conclude that the state waived its right to participate with respect to certification under 33 U.S.C. 1341 and, therefore, that the state cannot assert rights related to that certification. That waiver does not extend, however, to the state's rights and authority that are unrelated to that certification. Accordingly, we reverse the judgment of the court of appeals, and we remand to the trial court to determine whether any of the allegations in the seven 1 specific counts set forth by the state address issues that are outside the contours of the Section 401 certification.

State ex. rel. Yost v. Rover Pipeline, LLC, 167 Ohio St.3d 223, 2022-Ohio-766.

Upon remand, the State of Ohio dismissed defendants Mears Group, Inc., Laney Directional Drilling Co., Atlas Trenchless, LLC., and B & T Directional Drilling, Inc., as well as Count 7 (Defendant Rover Pipeline LLC engaged in activities without effective state 401 water quality certification) as set forth in the Third Amended Complaint. Additionally, the State of Ohio filed a Fourth Amended Complaint to reflect the dismissals.

The Court held telephonic conferences with counsel for remaining parties to discuss proceeding on the remand from the Supreme Court of Ohio. Pursuant to discussions, the parties agreed that, instead of addressing the matters on remand, they wished to readdress the arguments made in the prior motions to dismiss that were summarily addressed by the Court in the footnote. As a result of those discussions, Rover and Pretec filed the instant motions to dismiss.

The Complaint filed by the State of Ohio

The State of Ohio's complaint alleges that the defendants illegally discharged millions of gallons of drilling fluids to Ohio's waters, causing pollution and degrading water quality across the state in construction of the Rover Pipeline, a 713-mile interstate natural gas pipeline crossing 18 counties. Rover was the owner or operator of the drilling operations for the construction of the pipeline. Pretec was a contractor hired by Rover to perform horizontal-directional-drilling activities related to the construction of the pipeline.

More specifically, the State of Ohio's Fourth Amended Complaint alleges the following:

Count One: Defendants (Rover and Pretec) discharged pollutants (drilling: fluids) to waters of the state, without point source NPDES permits.

Count Two: Defendant Rover failed to obtain a necessary storm water permit for its storm water discharges.

Count Three: Defendants (Rover and Pretec) violated Ohio's general water quality standards (unpermitted drilling fluid discharges into waters of the state and unpermitted storm water discharges into waters of the state).

Count Four: Defendants (Rover and Pretec) violated Ohio's wetland water quality standards (unpermitted drilling fluid discharges into wetlands).

Count Five: Defendant Rover violated the Director's Orders by failing to obtain coverage or even submit a notice of intent to obtain coverage under the Construction Storm Water Permit.

Count Six: Defendant Rover violated the Hydrostatic Permit.

In its prayer for relief, the State of Ohio seeks injunctive relief, requesting that the defendants be permanently enjoined to comply with RC Chapter 6111, and the imposition of civil penalties. However, the pipeline at issue has been completed. As such, the requested relief by the State of Ohio now sounds in civil penalties for past violations.

Motions to Dismiss

Through their motions, both Rover and Pretec request dismissal of the State of Ohio's Fourth Amended Complaint on the basis that the claims asserted therein are preempted by the Natural Gas Act and, as such, this Court lacks subject matter jurisdiction. Additionally, Rover argues that the State of Ohio's claims are challenges to FERC's approval of the pipeline project and improper collateral attacks on FERC's orders. In response, the State of Ohio asserts that the claims are an exercise of the State's independent authority under the Clean Water Act.

Civil Rule 12(B)(1) Standard

In their motions, the defendants seek dismissal of the State of Ohio's Fourth Amended Complaint for lack of subject matter jurisdiction. Civ.R. 12(B)(1) provides for the defense of lack of subject matter jurisdiction to be raised by motion. Subject matter jurisdiction generally concerns "a court's power to hear and decide a case on the merits and does not relate to the rights of the parties." *Pacific Indemnity Co. v. Deems,* 10th Dist. No. 19AP-349, 2020-Ohio-349, citations omitted. "In considering a Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter

jurisdiction, a trial court 'determines whether the claim raises any action cognizable in that court.'" Id.

The trial court is not confined to allegations of complaint when determining its subject matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment. Civ.R. 12(B) (1,6). *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.,* 48 Ohio St. 2d 211 (1976).

Preemption

The Court finds the following relatively recent analysis regarding the principle of preemption by the Tenth District Court of Appeals in *State ex rel. Yost v. Volkswagen Aktiengesellscharft,*10th Dist. No. 19AP-7, 2019-Ohio-5084, judgment affirmed in *State ex rel. Yost v. Volkswagen Aktiengesellscharft,* 165 Ohio St.3d 223, 2021-Ohio-2121, instructive in its analysis of the instant motions:

> The doctrine of federal preemption arises from the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United · States * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Article VI, cl. 2. Pursuant to the Supremacy Clause, the United States Congress has the power to preempt state laws. *In re Miamisburg Train Derailment Litigation,* 68 Ohio St.3d 255, 259, 626 N.E.2d 85 (1994).

There are three ways federal law can preempt state law: (1) where federal law expressly preempts state law (express preemption); (2) where federal law has occupied the entire field (field preemption); or (3) where there is a conflict between federal law and state law (conflict preemption). *Norfolk S. Ry.* Co. *v. Bogle,* 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶ 7. Express preemption occurs when Congress explicitly defines the extent to which its enactments preempt state law. *English v.* Gen. *Elec.* Co., 496 U.S. 72, 78, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). In the case of field preemption, "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation * * *so pervasive as to make reasonable: the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Id. at 79, 110 S.Ct. 2270, quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). Conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements," or "where state law stands as an obstacle to the accomplishment and execution of the full purposes *1272 and objectives of Congress.'" *English* at 79, 110 S.Ct. 2270, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and

identifying its purpose and intended effects." *Crosby v. Natl. Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000).

In determining whether federal law preempts state law, "'[t]he purpose of Congress is the ultimate touchstone.'" *Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978), quoting *Retail Clerks Internatl. Assn. v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963); see *Riverside v. State,* 190 Ohio App.3d 765, 2010-Ohio-5868, 944 N.E.2d 281, ¶ 22 (10th Dist.) ("The Supreme Court has framed preemption analysis as asking whether Congress intended to exercise its constitutionally delegated authority to set aside state laws."). "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it. * * * Also relevant, however, is the 'structure and purpose of the statute as a whole,' * * * as: revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (Internal citations omitted.) *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996).

Additionally, a court reviewing possible preemption must consider federalism as part of that analysis. Federalism, which is "central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States,* 567 U.S. 387,

> 398, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). "[B]ecause the States are independent sovereigns in our federal system," the United States Supreme Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic* at 485, 116 S.Ct. 2240. The "historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress," and therefore "a presumption exists against preemption of state police-power regulations." *Darby v. A-Best Prods. Co.,* 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117, 27; *PNH, Inc. v. Alfa Laval Flow, Inc.,* 130 Ohio St.3d 278, 2011-Ohio-4398, 958 N.E.2d 120, 18, *Wyeth v. Levine,* 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009); *Rice* at 230, 67 S.Ct. 1146.

"[I]f a claim is federally preempted, the common pleas court does not have subject matter jurisdiction over the matter." *Machlup v. TIAA-CREF Indiv. & Inst. Serv.,* 8th Dist. No. 99298, 2013-Ohio-2704, see also *Steele v. Aultcare Corp.,* 5th Dist. No.2005CA00241, 2006-Ohio-2200.

Applicable Federal Law

A. Natural Gas Act and FERC

Congress enacted 15 U.S.C. §717 *et seq.,* which is known as the Natural Gas Act ("NGA"), to govern the transportation of natural gas in interstate commerce. The NGA specifically states that the "business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is

necessary in the public interest." 15 U.S.C. §717a. The authority to regulate natural gas companies and the interstate sale and transportation of natural gas, as well as the construction of natural gas facilities, including natural gas pipelines, rest with the Federal Energy Regulatory Commission ("FERC"), formerly known as the Federal Power Commission. "The NGA long has been recognized as a 'comprehensive scheme of federal regulation of all' wholesales of natural gas in interstate commerce," which "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293 (1988), citations omitted.

Any entity desiring to construct an interstate natural gas pipeline must obtain a FERC Certificate prior to doing so. 15 U.S.C. §717f(c). The process for obtaining a FERC Certificate was explained by the Court in *Waldock v. Rover Pipeline,* 6th Dist. No. WD-19-048, 2020-Ohio-3307, as follows:

> The process begins with an application from the gas company (1) describing the proposed pipeline project, (2) explaining why the project is required, and (3) estimating the beginning date and completion date for the project. *E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir.2004), citing 15 U.S.C. 717f(d); 18 C.F.R. 157.6(b). Notice of the application is filed in the Federal Register, a period of public comment and protest is allowed, and FERC conducts public hearings on the application. Id., citing 18 C.F.R. 157.9-11. In evaluating an application, FERC must investigate "the environmental consequences of the proposed

> project and issue an environmental impact statement." Id., citing 42 U.S.C. 4332.
>
> If after completing this process FERC finds that the proposed project "is or will be required by the present or future public convenience and necessity," it will issue the certificate. Id., citing 15 U.S.C. 717f(e). "The certificate may include any terms and conditions that FERC deems 'required by the public convenience and necessity.'" Id., citing 18 C.F.R. 157.20. A person or entity seeking review of the FERC order may do so "by way of petition to the court of appeals where the proposed pipeline is located or the holder of the FERC Certificate has its principal place of business or to the Court of Appeals for the District of Columbia." [*Grdn. Pipeline, L.L.C. v. 529.42 Ac.res of Land,* 210 F.Supp.2d 971, 973 (N.D. Ill. 2002)] at 973, citing 15 U.S.C. 717r.

In its consideration of the environmental impact of a proposed natural gas pipeline, FERC must ensure that it complies with specific federal environmental regulations, including those promulgated under 33 U.S.C. §1251 et seq., The Clean Water Act, formerly called the Federal Water Pollution Control Act. 15 U.S.C. §717b(d). In so doing, FERC serves as the lead agency for the purpose of coordinating all federal authorizations, as well as compliance with National Environmental Policy Act ("NEPA"). 15 U.S.C. §717n(b).

The NGA also charges FERC with establishing a schedule for all required Federal authorizations which ensures "expeditious completion of all proceedings" and compliance with any other applicable schedules established by Federal law. 15 U.S.C. §717n(c)(1). Any

state agency that is considering involvement in an application made to FERC is required to cooperate with FERC and comply with its schedules. 15 U.S.C. §717n(b)(2). If a federal or state agency fails to adhere to FERC's schedule, it may appeal directly to federal circuit court for relief. 15 U.S.C. §717n(c)(2).

The NGA authorizes FERC to hold hearings on an application for a proposed natural gas pipeline and provides for any state, state commission, or "any other person whose participation in the proceeding may be in the public interest" to be admitted therein. 15 U.S.C. §717n(e). FERC is required to maintain a complete record of all decisions that are made, which shall serve as a basis for any appeal taken from such decisions. 15 U.S.C. §717d.

In addition to the above regulatory scheme, the NGA specifically provides "[e]xcept as specifically provided in this chapter, nothing in this chapter affects the rights of States under. . . (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)." 15 U.S.C. §717b(d)(3). This provision has been referred to by the parties in their briefs as the "savings clause" of the NGA.

B. Clean Water Act

The objective of the Federal Water Pollution Control Act, aka the Clean Water Act ("CWA"), found in 33 U.S.C. §1251, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251a. It further declares that:

> it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

> eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . .

33 U.S.C §1251b, and that:

> [i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. §1251g.

The CWA specifically preserves the right of the states to adopt and enforce standards and requirements regarding pollutants in waterways as follows:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any

> effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. 1370 (referred to by the parties as "Section 501"). In response, the State of Ohio has delegated to its Director of Environmental Protection the authority to promulgate rules and regulations, including the issuing of permits, concerning the discharge of pollutants into the waters within Ohio. R.C. 6111.03. Such rules and regulations are found in OAC Chapter 3745, including, but not limited to OAC 3745-33-01, et seq., and OAC 3745-38-02, et seq. However, such water quality standards are subject to review and approval by the EPA. 33 U.S.C. §1313.

In general, the CWA prohibits all discharges into navigable waterways without a permit. Pursuant to the CWA, any project in which discharge of a pollutant into navigable waters may occur, must receive certification from the state in which the discharge will originate that such discharge will comply with the state's water quality standards. 33 U.S.C. §1341 (a)(1). Additionally, the Clean Water Act authorizes the EPA to regulate the discharge of pollutants in navigable waters under the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. §1342. The EPA has given such permitting authority

to the States, including Ohio, that meet the EPA's requirements.

State certification of discharge of pollutants into navigable waters related to a federal license or sanctioned project is often referred to as "401 certification." As to such "401 certification,"

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, 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 or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.
>
> * * *
>
> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the

> State, interstate agency, or the Administrator, as the case may be.

Therefore, if a state fails or refuses to act on a 401 Certification within one year from the request, the 401 Certification requirement is waived with respect to any application. See, *State ex. rel. Yost v. Rover Pipeline, LLC,* supra. If a 401 Certification request is denied by the state, no permit shall be issued for the requesting project. If the state approves the 401 Certification request upon any conditions or limitations, such conditions or limitations shall be set forth in the 401 Certification. 33 U.S.C. §1341(d). The time frame set forth in Section 401 of the Clean Water Act is a "bright-line rule" and not a "subjective standard." *N.Y. State Dep't of Envtl. Conservation v. FERC,* 884 F.3d 450, 456 (2nd Cir., 2018).

Analysis

In their motions, Rover and Pretec argue that the remaining claims in the fourth amended complaint should be dismissed under "field preemption" and that they constitute a collateral attack on FERC authority. In response, the State of Ohio asserts that the "savings clause" of the NGA, and, thus, the CWA, preserves its enforcement authority and, further, that the claims are an independent exercise of authority and not an attack on FERC's authority.

The Court has thoroughly reviewed all of the briefs and arguments submitted by the parties. Further, the Court has carefully examined the specific language of all applicable provisions of both the NGA and CWA, including their textually expressed individual goals and purposes. In so doing, the Court finds that, through the enactment of the NGA, the Federal Government exclusively occupies the field of the sale

and transportation of natural gas, which, by necessity, includes the construction of natural gas pipelines. Further, in such field, the NGA creates a "scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Volkswagen Aktiengesellscharft,* 10th Dist. No. 19AP-7, 2019-Ohio-5084, supra, citation omitted. The perceived exception being the "savings clause."

However, given the framework establish by the NGA and its' expressed intent to control the transportation of natural gas, the Court finds that the "savings clause" cannot be read as suggested by the State of Ohio. To do so, would allow the states to infiltrate such regulation by providing for the right to independently attack a FERC certified project, despite having had the opportunity to "regulate" through a 401 Certification. Rather, the Court finds that, through the enactment of the NGA, Congress intended to control all things relating to the sale and transportation of natural gas, which includes the construction of natural gas pipelines that could impact waterways within the states. In acknowledging the states' interests and rights under the CWA, through the NGA's "savings clause," Congress carved out the ability of the states to have the right to approve discharges into waterways within their borders during the construction of natural gas pipelines, or to deny in its entirety such discharges, under the 401certification process. The "savings clause" does not create any rights independent thereof[2].

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[2] Although there does not appear to be caselaw on-point with the exact issue presented by the motions to dismiss, preemption of

The State argues that, had Congress intended to limit the "savings clause" to that which is provided for in Section 401, it would have expressly stated such limitation in the language of the "savings clause." Admittedly, such addition would have made the analysis presented by motions to dismiss much easier. However, given the clear and unambiguous intent of the NGA to exclusively occupy the field of sales and transportation of natural gas, the Court finds that Congress' failure to state such limitation is not dispositive of the issue before the Court.

The concern with accepting the State's reading of the NGA's "savings clause" becomes magnified when it is considered that the Rover Pipeline was constructed through multiple states, including Ohio, Michigan, West Virginia, and Pennsylvania. If the Court were to accept the position advanced by the State, it would suggest that even states that had properly participated in the 401 Certification Process would have the proverbial "second bite at the apple" in regulating discharges relating to the construction

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the CWA by the NGA has been contemplated as set forth in U.S. EPA, Clean Water Act Section 401 Certification Rule, 85 Fed.Reg. 42,210, 42,276: "State enforcement under State authorities may be lawful where State authority is not preempted by federal law.[64] Nothing in this final rule prohibits States from exercising their enforcement authority under enacted State laws; however, the legality of such enforcement actions may be subject to review by a court of competent jurisdiction."

Footnote 64 (in part): "Examples of situations where State authority would be preempted by federal law include FERC's sole authority to approve the construction of interstate pipelines under the Natural Gas Act (5 U.S.C. 717 et seq…"

of a natural gas pipeline that had received a federal permit. Such authority would undermine the regulatory nature of the NGA.

Arguably in support of the State's position, the Supreme Court of Ohio, in its consideration the State's prior appeal, stated as follows:

> Rover, Pretec Directional, and Mears Group argue that the state's "failure to timely act on the certification request means that it cannot enforce its water-pollution laws as to the pipeline construction's water-quality impacts." But this argument is contradicted by the Clean Water Act itself: "[N]othing in this chapter shall (1) preclude or deny the right of any State * * * to adopt or enforce (A) any standard or limitation respecting discharge of pollutants," 33 U.S.C. 1370. The Clean Water Act also states that "[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. 1341(b). See *Natl. Assn. of Home Builders v. United States Army Corps of Engineers*, 453 F.Supp.2d 116, 134 (2006) ("the authority provided to the states to control water quality is not usurped by Section 401").

State ex rel Yost v. Rover Pipeline, 167 Ohio St.3d 223, 2022-Ohio-766. Notably, however, the Supreme Court was not presented with, nor did it consider, the issue of preemption by the NGA. The same can be said about the holding in *Natl. Assn. of Home Builders v. United States Army Corps of Engineers,* supra, upon which the Court based its conclusion. As such, this dicta is not controlling on the issue before the Court. In fact,

although the Supreme Court in *Rover* was not presented with the issue of preemption, in his concurrence/dissent, Justice Fischer noted as follows:

> I would also conclude that the state's preemption argument is unavailing. It is well established that under the Commerce Clause, U.S. Constitution, Article I, Section 8, cl. 3, the federal government "has dominion, to the exclusion of the States, over navigable waters of the United States." *Islander E. Pipeline Co., L.L.C. v. Connecticut Dept. of Environmental Protection*, 482 F.3d 79, 92 (2d Cir.2006), citing *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). But "[b]y enacting the [Clean Water Act], Congress provided states with an offer of shared regulatory authority." *Id*., citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (stating that the Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective").
>
> As the Supreme Court of the United States has established, the Clean Water Act is a valid exercise of Congress's powers under the Commerce Clause, and in regard to that Act, Congress has the power to offer states the choice of regulating activity according to federal law or having state law preempted by federal law. See *New York v. United States*, 505 U.S. 144, 167-168, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Moreover, this is not a situation in which Congress requires states to enact a certain piece of legislation. Instead, Congress has effectively delegated to the states the option to exercise some authority to enforce state

> environmental laws that are more stringent or broader than federal laws if the states follow a certain procedure. Significantly, Congress could have completely prevented the states from exercising any authority regarding this interstate-pipeline project.

Rover Pipeline, supra.

Further, the Court is unpersuaded by the State's argument that preemption in this case would "gut" the rights of the states under the CWA. To the contrary, this Court's finding is narrowly tailored to the specific issue presented before it-in instances of discharge of pollutants into waterways during the construction of a natural gas pipeline certified by FERC, a state's recourse for such discharges is limited to those provided in the 401 Certificate. Any claims outside thereof, are preempted by the NGA[3]. Further, to this end, the Court reiterates the following from its March 12, 2019, judgment entry:

> The holding of this Court in no way stands for the position that the State of Ohio does not have rights relative to the construction of a natural-gas pipeline through the State and a right to impose

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[3] In *Rover*, supra, the Supreme Court of Ohio remanded the matter to this Court "to determine whether any of the allegations in the seven specific counts set forth by the state address issues that are outside the contours of the Section 401 certification." As previously noted, the parties have agreed to address the issue of preemption prior to addressing the remanded issue. However, even if the Court had the hearing contemplated by the remand and determined that the counts in the complaint were outside of the 401 certification, dismissal of the complaint would still be appropriate as such claims would be preempted by the NGA for the reasons set forth in this judgment entry.

regulations to curb disastrous environmental impacts on its waterways as a result of such construction. Nor does this holding provide natural gas companies *carte blanche* to perform drilling and other construction related to natural-gas lines regardless of the environmental impact of such action. Rather, in order to assert its rights, the State of Ohio is required to act in conformance with the Clean Water Act, as opposed to instigating litigation as a collateral attack subsequent to the completion of a pipeline. Moreover, the Court finds that, despite the State of Ohio's inability to pursue the instant litigation, all aspects of the construction of the pipeline, including the discharging of pollutants into waterways, were subject to oversight by FERC, which responded to environmental concerns presented by the State of Ohio, including, but not limited to, halting construction operations. As such, any alleged discharges were still subject to Federal Regulations, including the Clean Water Act.

Conclusion

For the reasons set forth herein, as well as those set forth in the motions to dismiss, the Court finds that that the claims presented in the Fourth Amended Complaint are preempted by the NGA and, as such, the Court is without jurisdiction to consider the same. Accordingly, the Fourth Amended Complaint filed by the State of Ohio is, hereby, **DISMISSED.**

IT IS SO ORDERED.

s/ Kristin G. Farmer
Judge Kristin G. Farmer

NOTICE TO THE CLERK:
FINAL APPEALABLE ORDER
Case No. 2017CV02216

IT IS HEREBY ORDERED that notice and a copy of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.

s/ Kristin G. Farmer
JUDGE KRISTIN G. FARMER

APPENDIX D

THE STATE EX REL. YOST, ATTY. GEN., APPELLANT, v. ROVER PIPELINE, L.L.C., ET AL., APPELLEES.

[Cite as *State ex rel. Yost v. Rover Pipeline, L.L.C.*, 167 Ohio St.3d 223, 2022-Ohio-766.]

Clean Water Act—33 U.S.C. 1341(A)(1)—State certification—One-year period during which the state must act on a request for certification under 33 U.S.C. 1341(A)(1) begins when application is submitted, not when it is deemed complete—State waives its rights or authority only with respect to activities approved under federal application when it fails to act on 33 U.S.C. 1341(A)(1) application—Trial court's dismissal was improper because it failed to determine whether any allegations brought by state address issues outside the contours of the federal application.

(No. 2020-0091—Submitted January 26, 2021—Decided March 17, 2022.)

APPEAL from the Court of Appeals for Stark County, No. 2019CA00056, 2019-Ohio-5179.

DONNELLY, J.

{¶ 1} Appellee Rover Pipeline, L.L.C., sought a license to construct an interstate pipeline that crossed several counties in Ohio. As required by Section 401 of the Clean Water Act ("section 401"), 33 U.S.C. 1341(a)(1), Rover applied for certification from the state of Ohio that any discharge into the state's navigable waters would comply with applicable provisions of federal law. When the pipeline discharged pollutants into surrounding waters, the state of Ohio sued Rover and other companies involved

in building the pipeline. Rover argued that the state's complaint should be dismissed because the state had waived its ability to participate in the certification process when it did not respond to Rover's application within one year. We agree. The waiver applies, however, only to issues that are related to the section 401 certification, the contours of which have not been established by the trial court. Accordingly, we reverse, and we remand with instructions to determine whether the violations alleged by the state can be prosecuted or whether the state has waived the right to take action.

FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellant, the Ohio Attorney General ("the state"), sought injunctive relief and other remedies after pollutants were discharged from the pipeline into Ohio's navigable waters. On July 19, 2018, in a third amended complaint, the state alleged, among other things, that Rover and the other appellees, Pretec Directional Drilling, L.L.C.; Laney Directional Drilling Company; Atlas Trenchless, L.L.C.; Mears Group, Inc.; and B&T Directional Drilling, Inc. (collectively, "the defendants") had "illegally discharged millions of gallons of drilling fluids to Ohio's waters, causing pollution and degrading water quality on numerous occasions and in various counties across the state." The state alleged seven specific counts:

(1) "Defendants discharged pollutants to waters of the state without point source [National Pollutant Discharge Elimination System] permits."

(2) "Rover failed to obtain a general storm water permit for its storm water discharges."

(3) "Defendants violated Ohio's general water quality standards."

(4) "Defendants violated Ohio's wetland water quality standards."

(5) "Rover violated the [Ohio Environmental Protection Agency] Director's orders."

(6) "Rover violated the hydrostatic permit."

(7) "Rover engaged in activities without effective certification."

The state also asked the trial court to retain jurisdiction "to carry out its judgment" and such other relief as may be just.

{¶ 3} Rover and Mears filed a joint motion to dismiss the complaint; the other defendants filed separate motions to dismiss. In an order issued on March 12, 2019, the trial court noted that the motions were largely duplicative and it therefore focused on the motion submitted by Rover and Mears, because "the claims arising against the other defendants are a result of actions taken at the behest of Rover." The trial court granted the various Civ.R.12(B) motions to dismiss, stating:

> On November 16, 2015, the State of Ohio received a 401 Certification request from Rover. As such, the State of Ohio had until November 16, 2016, to "act" on such request pursuant to Section 401 of the Clean Water Act. * * *
>
> * * * The Court finds that, in order to assert its rights under the Clean Water Act, the State of Ohio was required to "act," i.e., grant or deny, upon Rover's November 16, 2015, 401 Certification

> request on or before November 16, 2016. Its failure to do so resulted in a waiver of rights.

The court concluded that it did not have jurisdiction over the matter, because the state had "failed to act upon rights specifically given to it pursuant to the Clean Water Act within the Act's specified period of time."

{¶ 4} The state appealed. The court of appeals affirmed, stating that it "is undisputed in the case [that the state] failed to act on Rover's original certification request within one year of November 16, 2015." 2019-Ohio-5179, 150 N.E.3d 491, ¶ 20. With respect to the extent of the waiver, the court of appeals essentially deferred to the findings of the trial court. Having overruled the first assignment of error, which was related to the issue of waiver by the state, the court of appeals deemed a second assignment of error addressing other asserted defenses moot.

{¶ 5} The state timely appealed, and we accepted the appeal. 158 Ohio St.3d 1482, 2020-Ohio-1487, 143 N.E.3d 520.

ANALYSIS

{¶ 6} This case is before us based on the trial court's grant of the defendants' motions to dismiss under Civ.R. 12(B)(1) and (6). We review dismissals pursuant to Civ.R. 12(B)(6) de novo, *Alford v. Collins-McGregor Operating Co.*, 152 Ohio St.3d 303, 2018-Ohio-8, 95 N.E.3d 382, ¶ 10, presume the truth of all material factual allegations in the complaint, *id.*, and make all reasonable inferences in the state's favor, *State ex rel. Bohlen v. Halliday*, 164 Ohio St.3d 121, 2021-Ohio-194, 172 N.E.3d 114, ¶ 12, citing *State ex rel. Zander v. Judge of Summit Cty. Common Pleas*

Court, 156 Ohio St.3d 466, 2019-Ohio-1704, 129 N.E.3d 401, ¶ 4. We also review dismissals under Civ.R. 12(B)(1) de novo. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12.

{¶ 7} The state's second proposition of law states: "The one-year time limit in Section 401 of the Clean Water Act begins to run only once the applicant submits a completed application." We disagree.

{¶ 8} Section 401 states:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

33 U.S.C. 1341(a); *see Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 388 (4th Cir.2018) (after receiving a section 401 application, a state has four options: grant a certificate without conditions, grant it with conditions, deny it, or waive its right to participate in the process).

{¶ 9} The state encourages us to rely on *AES Sparrows Point LNG, L.L.C. v. Wilson*, 589 F.3d 721, 729 (4th Cir.2009), which deferred to an Army Corps of Engineers' determination that the clock did not begin to run until a completed section 401 application was submitted. The state argues that an application is not valid unless it is complete, which had been the practice of the Federal Energy Regulatory Commission ("FERC") until August 1985, *see California ex rel. State Water Resources Control Bd. v.*

Fed. Energy Regulatory Comm., 966 F.2d 1541, 1552 (9th Cir.1992).

{¶ 10} Rover, Pretec Directional, and Mears Group argue that allowing the state to determine when the one-year clock starts based on its own determination whether an application is complete gives the state too much discretion. In our view, it is discretion that is not needed, because the state can reject an application as incomplete or for another legitimate reason.

{¶ 11} Other courts have concluded that the clock starts running upon the submission of an application. In *New York State Dept. of Environmental Conservation v. Fed. Energy Regulatory Comm.*, 884 F.3d 450, 456 (2d Cir.2018), the court specifically addressed the issue before us and concluded that because the statute does not refer to "complete" applications, the one-year period begins upon the submission of an application. *See California State Water Resources Control Bd.* at 1552 (noting that the FERC had issued a new rule on February 11, 1987, regarding section 401 certification, that stated that the "one-year period for waiver would commence on the date the certifying agency received the certification request").

{¶ 12} We conclude that the one-year period during which the state must act on a request for certification under section 401 begins when the application is submitted, not when it is deemed complete. Though we do not rely on it, we note that the federal Environmental Protection Agency recently stated that "the section 401 certification process begins on the date when the certification request is received by a certifying authority." Clean Water Act Section 401 Certification Rule, 85 Fed.Reg. 42210, 42243 (July 13,

2020); *see also* 40 C.F.R. 121.6(d) ("The Federal agency may extend the reasonable period of time at the request of a certifying authority or a project proponent, but in no case shall the reasonable period of time exceed one year from receipt"). It is clear from the record, and the parties' failure to dispute it, that more than one year had passed between the date that the application was filed and the date that the state approved it. Accordingly, we agree with the court of appeals that "the state failed to act on the certification request in a timely manner, thereby waiving its right to participation in the certification process." 2019-Ohio-5179, 150 N.E.3d 491, at ¶ 27.

{¶ 13} We turn now to the state's first proposition of law, which addresses the consequences of the state's waiver of its right to participate in the certification process. The state argues that "[a] State's decision not to act on a Section 401 water-quality certification has no effect on the State's power to enforce state water-pollution laws." We disagree. Frankly, it is not plausible that the state's failure to act would not have any effect, and the state concedes that point.

{¶ 14} According to 33 U.S.C. 1341(a)(1), "the certification requirements of this subsection shall be waived with respect to such Federal application" if the state fails to act on a request for certification. The state's failure to act on the section 401 application means (quite plainly) that the state waived its rights or authority only with respect to the federal application. But the vast bulk of the state's rights and authority—those that apply to matters not encompassed by the section 401 application—remain intact. How could it be otherwise?

{¶ 15} Rover, Pretec Directional, and Mears Group argue that the state's "failure to timely act on the certification request means that it cannot enforce its water-pollution laws as to the pipeline construction's water-quality impacts." But this argument is contradicted by the Clean Water Act itself: "[N]othing in this chapter shall (1) preclude or deny the right of any State * * * to adopt or enforce (A) any standard or limitation respecting discharge of pollutants," 33 U.S.C. 1370. The Clean Water Act also states that "[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. 1341(b). *See Natl. Assn. of Home Builders v. United States Army Corps of Engineers*, 453 F.Supp.2d 116, 134 (2006) ("the authority provided to the states to control water quality is not usurped by Section 401").

{¶ 16} Because this action was dismissed pursuant to Civ.R. 12(B)(6), a full record has not been developed and we do not know the extent to which the claims asserted by the state fall within the four corners of the federal application. The trial court concluded that "the State of Ohio can prove no set of facts entitling it to its requested relief." We disagree. We consider it possible, even likely, that given the opportunity to present evidence, the state will be able to establish that certain of its allegations fall outside the contours of the Section 401 certification.

{¶ 17} For example, the state contends that "[b]ecause *none* of the Defendants' water pollution discharges are from fill placement, all of the violations are outside the scope of the 401 certification."

(Emphasis sic.) That the discharges are not "fill placement" is a material factual assertion that must be presumed to be true when considering a motion to dismiss. Whether the discharges are outside the scope of the 401 certification is a legal determination that the trial court needs to address. Similarly, the state contends that the flow of storm water is governed by the federal and state environmental-protection agencies, not by the 401 certification. At a minimum, the trial court must determine whether these assertions can be proved. If they can, the alleged violations are outside the contours of the 401 certification and waiver does not apply.

{¶ 18} "In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12. As mentioned above, we are not convinced that the state can prove no set of facts in support of its claims.

CONCLUSION

{¶ 19} We conclude that the state waived its right to participate with respect to certification under 33 U.S.C. 1341 and, therefore, that the state cannot assert rights related to that certification. That waiver does not extend, however, to the state's rights and authority that are unrelated to that certification. Accordingly, we reverse the judgment of the court of appeals, and we remand to the trial court to determine whether any of the allegations in the seven specific

counts set forth by the state address issues that are outside the contours of the Section 401 certification.

Judgment reversed

and cause remanded.

O'CONNOR, C.J., and STEWART and BRUNNER, JJ., concur.

FISCHER, J., concurs in part and dissents in part, with an opinion joined by KENNEDY and DEWINE, JJ.

FISCHER, J., concurring in part and dissenting in part.

{¶ 20} I agree with the conclusion set forth in the majority opinion that the one-year period during which the state must act on a request for certification under Section 401 of the Clean Water Act ("section 401"), 33 U.S.C. 1341(a)(1), begins when the application is submitted, not when the application is deemed complete. However, I respectfully disagree with the conclusion set forth in the majority opinion that the contours of the section 401 certification have not been established in this case.

I. The Parties' Arguments

{¶ 21} In this appeal, the state argues that the failure to timely act on a certification request waives only the state's ability to object if conduct that it has allowed to proceed under the certification causes pollution. In connection with this argument, the state focuses on the phrase "with respect to such Federal application" of section 401(a)(1). *See* 33 U.S.C. 1341(a) (providing that if the state fails to act on a request for certification, the certification requirements in that section "shall be waived with respect to such Federal

application"). It argues that the waiver provision of section 401 applies only to discharges within the scope of a federal application and thus the state may enforce its laws in response to any discharge that is beyond the scope of the certification at issue. As it pertains to this case, the state asserts that appellee Rover Pipeline, L.L.C. ("Rover") was permitted to use only naturally occurring, nontoxic bentonite clay and water when drilling and that the state's waiver applies only to the discharge of this material into wetlands. It argues that because nothing in the application indicated that Rover would discharge diesel-laced fluid, the discharge of that fluid is beyond the scope of the application and the state is permitted to enforce its laws in regard to that discharge.

{¶ 22} The state further argues that it has the general power to enact and enforce water-pollution laws and that federal approval under section 401 does not free the applicant from having to comply with state-issued permits and laws. It asserts that the Clean Water Act, 33 U.S.C. 1251 et seq., does not contain a clear statement of Congress's intention to preempt state water laws and that the Clean Water Act should not be read to impermissibly require the state to follow federal law in this area.

{¶ 23} Rover responds that section 401 applies more broadly than the state argues. Rover asserts that section 401 requires the state to consider the eventuality of any discharge into state waters that may result from any activity under the federal license or permit. Rover argues that the state's waiver applies to any discharge that could result from the activity for which the applicant sought a permit. In response to the state's preemption argument, Rover asserts that

the Clean Water Act is a valid exercise of Congress's power under the Commerce Clause of the United States Constitution and that there are no constitutional concerns arising from interpreting section 401 to impose a complete waiver of a state's ability to enforce its laws.

II. Section 401 Certification Applies to "Any Discharge" that "May Result" from the Activity, Resulting in a Broad Waiver

{¶ 24} Section 401 provides: "If the State * * * fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. 1341(a). Relying on the reference to the federal application in the statute, the majority concludes that "[t]he state's failure to act on the section 401 application means (quite plainly) that the state waived its rights or authority only with respect to the federal application." Majority opinion, ¶ 14. This conclusion, however, does not answer the question before us; it is undisputed that the waiver relates to the application for a federal permit. The issue in this case turns on which activities performed as a result of the application are encompassed within the scope of the waiver. To answer that question, it is necessary to look at other portions of section 401.

{¶ 25} In part, section 401 as codified in 33 U.S.C. 1341(a)(1), 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 or will originate * * * that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

(Emphasis added.) Further, the statute requires that a state's section 401 certification "shall set forth *any* effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations * * * and with *any other* appropriate requirement of State law set forth in such certification." (Emphasis added.) 33 U.S.C. 1341(d). The limitations set forth in the state's section 401 certification "shall become a condition on" the federal permit. *Id.*

{¶ 26} The United States Supreme Court has held that these provisions authorize a state to impose conditions and requirements related not just to the specific discharge proposed in the federal application for a permit but rather to the entire activity for which the permit is being sought. *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700, 711-712, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). Section 401, the court explained, "allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.' " *Id.* at 711; *see also id.* at 712 (section 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole").

{¶ 27} The state would have this court construe the effect of its failure to attach conditions to the permit

much more narrowly. It asserts that by failing to act within the required one-year time frame, it waived the ability to object only to the discharge method authorized by the permit. If, however, as the United States Supreme Court has explained, section 401 empowers the state to attach conditions related to any part of the proposed activity, then the waiver of the opportunity to impose requirements on the federal project under that same provision must necessarily apply just as broadly.

{¶ 28} As the state acknowledges, Rover applied to construct an interstate natural-gas pipeline. Thus, the "activity" contemplated under section 401 in this case was construction of the pipeline. Both the state and Rover contemplated that this activity could result in the discharge of materials into Ohio waters. The state argues that the only discharge contemplated involved naturally occurring nontoxic bentonite clay and water, while Rover argues that other discharges, including discharges involving diesel-laced fluid, were contemplated during the application process. What type of discharges were contemplated is irrelevant to this appeal, however, for the section 401 certification applies to "any discharge" that "may result" from the activity. There, accordingly, is no reason to remand this case for the trial court to determine whether the discharges at issue are outside the scope of the section 401 certification, as instructed in the majority opinion. *See* majority opinion at ¶ 19. Because the federal application at issue in this case permitted Rover's activity of building the pipeline, the state waived all certification requirements with respect to that application, including any requirements relating to "any discharge" resulting from the activity, whether

that discharge involved natural fluids or diesel-laced fluids.

{¶ 29} I would also conclude that the state's preemption argument is unavailing. It is well established that under the Commerce Clause, U.S. Constitution, Article I, Section 8, cl. 3, the federal government "has dominion, to the exclusion of the States, over navigable waters of the United States." *Islander E. Pipeline Co., L.L.C. v. Connecticut Dept. of Environmental Protection*, 482 F.3d 79, 92 (2d Cir.2006), citing *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). But "[b]y enacting the [Clean Water Act], Congress provided states with an offer of shared regulatory authority." *Id.*, citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (stating that the Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective").

{¶ 30} As the Supreme Court of the United States has established, the Clean Water Act is a valid exercise of Congress's powers under the Commerce Clause, and in regard to that Act, Congress has the power to offer states the choice of regulating activity according to federal law or having state law preempted by federal law. *See New York v. United States*, 505 U.S. 144, 167-168, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Moreover, this is not a situation in which Congress requires states to enact a certain piece of legislation. Instead, Congress has effectively delegated to the states the option to exercise some authority to enforce state environmental laws that are more stringent or broader than federal laws if the states follow a certain procedure. Significantly,

Congress could have completely prevented the states from exercising any authority regarding this interstate-pipeline project. For these reasons, there are no constitutional concerns regarding section 401's broad waiver provision.

III. The State May Enforce the Hydrostatic Permit

{¶ 31} While I would conclude that the state waived all certification requirements with respect to the federal section 401 application, I would note that the state is not entirely barred from raising claims against appellees. Although the state waived participation in the federal permitting process, the Federal Energy Regulatory Commission ("FERC") required Rover to obtain a hydrostatic permit from the state in order for FERC to sign off on construction. The Fifth District Court of Appeals concluded that because of the state's section 401 waiver, it could not enforce the separately obtained hydrostatic permit. 2019-Ohio-5179, 150 N.E.3d 491, ¶ 31. However, because the hydrostatic permit was obtained independently of the section 401 certification process at the behest of FERC, I would conclude that the state may seek to enforce the terms of the hydrostatic permit, and I would reverse the Fifth District's decision on this limited basis.

{¶ 32} Finally, I would also note that the state's waiver in regard to the section 401 certification does not necessarily mean that the state is without a remedy for damages from violations of the federal permit. As the Supreme Court of the United States has noted, the state may still sue for violations of federal law. *United States Dept. of Energy v. Ohio*, 503 U.S. 607, 613, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992),

fn. 5 (states may bring a suit under the Clean Water Act pursuant to the act's citizen-suit provision, 33 U.S.C. 1365). The state's ability to file a suit under the Clean Water Act, coupled with its ability to enforce the hydrostatic permit, means that the state has some tools at its disposal to ensure Rover's compliance with its relevant obligations, despite the state's section 401 waiver.

IV. Conclusion

{¶ 33} I would hold that when the state fails to act within the one-year period specified in section 401 of the Clean Water Act, the state waives its ability with respect to that permit to enforce any conditions that it could have otherwise imposed regarding the discharge of any materials into Ohio water that may have resulted from the permitted activity. In this case, because the state failed to act within the one-year period, it waived its ability in connection with the federal permit to enforce any state laws regarding any discharges resulting from the activity of constructing the pipeline, not just the discharge of naturally occurring nontoxic bentonite clay and water. For these reasons, I would affirm the judgment of the Fifth District Court of Appeals in part, but I would reverse that court's judgment to the extent that it concluded that the state may not enforce the terms of its hydrostatic permit. I accordingly concur in part, and I would order a remand for further proceedings related to the hydrostatic permit.

KENNEDY and DEWINE, JJ., concur in the foregoing opinion.

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Trent Dougherty and Chris Tavenor, urging reversal for amici curiae, Ohio Environmental Council and Sierra Club.

APPENDIX E

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL., DAVE YOST, OHIO ATTORNEY GENERAL

Plaintiff-Appellant

-vs-

ROVER PIPELINE, LLC; PRETEC DIRECTIONAL DRILLING, LLC; MEARS GROUP, INC.; LANEY DIRECTIONAL DRILLING CO.; ATLAS TRENCHLESS, LLC; AND B & T DIRECTIONAL DRILLIING, LLC

Defendants-Appellees

JUDGES:

Hon. William B. Hoffman, P.J.
Hon. John. W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2019CA00056

OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2017-CV-02216

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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Hoffman, P.J.,

{¶1} Appellant State of Ohio, ex rel. Dave Yost, Ohio Attorney General, appeals the judgment of the Stark County Common Pleas Court dismissing its complaint against Appellees Rover Pipeline, LLC; Mears Group, Inc.; Pretec Directional Drilling, LLC; Laney Directional Drilling Co.; Atlas Trenchless, LLC; and B&T Directional Drilling, Inc.

STATEMENT OF THE CASE AND FACTS

{¶2} On July 19, 2018, Appellant filed a third amended complaint, the dismissal of which is the entry appealed from in the instant action. The complaint alleged Appellees illegally discharged millions of gallons of drilling fluids into Ohio's waters, causing pollution and degrading water quality across the state during construction of the Rover Pipeline, a 713-mile interstate natural gas pipeline crossing 18 Ohio counties. Appellee Rover was the owner/operator of the drilling operation for construction of the pipeline. The remaining Appellees were subcontractors hired by Rover to perform horizontal-directional drilling related to construction of the pipeline. Appellant sought civil penalties and injunctive relief.

{¶3} Specifically, Appellant's complaint alleged the following:

Count one: Appellees discharged pollutants (drilling fluids) into the waters of the state without point source NPDES permits.

Count two: Appellee Rover failed to obtain a necessary storm water permit for its storm water discharges.

Count three: Appellees violated Ohio's general water quality standards (unpermitted drilling fluid discharges and storm water discharges into waters of the state).

Count four: Appellees violated Ohio's wetland water quality standards by unpermitted drilling fluid discharges into wetlands.

Count five: Appellee Rover violated the Director of the EPA's orders by failing to obtain coverage or submit a notice of intent to obtain coverage for a Construction Storm Water Permit.

Count six: Appellee Rover violated the hydrostatic permit laws.

Count seven: Appellee Rover engaged in activity from February 14, 2017 through May 15, 2017, without the state 401 water quality certification.

{¶4} Appellees moved to dismiss the complaint pursuant to Civ. R. 12(B)(1) and (6), raising four basic arguments.

{¶5} First, Appellees argued Appellant's failure to act within one year on Rover's November 16, 2016, application for the State to issue a § 401 certification under the federal Clean Water Act resulted in the State waiving its power to impose conditions and

enforce environmental requirements for the pipeline project as a matter of federal law.

{¶6} Second, Appellees argued Rover received all necessary regulatory approvals from FERC (Federal Energy Regulatory Commission). They argued Appellant participated in the preparation of an Environmental Impact Statement (EIS) as a part of the process of obtaining FERC approval, and failed to identify additional State permitting requirements through the EIS process.

{¶7} Third, Appellees argued the State's claims are preempted by the Natural Gas Act, and the trial court therefore lacked subject matter jurisdiction.

{¶8} Fourth, Appellees argued the State's claims are an improper collateral attack on FERC's orders approving the pipeline project.

{¶9} Appellant responded Counts 1-6 were not subject to Section 401 certification. As to Count Seven, Appellant argued waiver did not apply because Rover reapplied for Section 401 certification on February 23, 2017, and the State granted the revised request on February 24, 2017.

{¶10} The trial court granted Appellees' motion to dismiss on March 12, 2019. The court found by failing to act on Rover's November 16, 2015, request for 401 certification, Appellant waived its rights under the Clean Water Act. The court found the resubmission of the request for certification on February 23, 2017, did not save the State from waiver, as the request was resubmitted outside the one-year period for action on the initial submission.

{¶11} It is from the March 12, 2019 judgment of the trial court Appellant prosecutes this appeal, assigning as error:

> I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT, UNDER THE CLEAN WATER ACT, 33 U.S.C. 1341, THE STATE OF OHIO WAIVED ALL OF ITS WATER POLLUTION AUTHORITY OVER ENVIRONMENTAL VIOLATIONS OCCURRING DURING THE CONSTRUCTION OF ROVER'S INTERSTATE PIPELINE.
>
> II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND, IN A FOOTNOTE, THAT EVEN WITHOUT WAIVER, THE OTHER DEFENSES RAISED BY ROVER AND ITS CONTRACTORS INCLUDING PREEMPTION BARRED THE STATE OF OHIO'S COUNTS ONE THROUGH SIX.

I.

{¶12} Appellant argues the court erred in finding its failure to act in a timely manner on Rover's application for Section 401 certification waived its rights to enforce Ohio's Clean Water Act in regards to the violations alleged in Counts One through Six of its third amended complaint.[1]

{¶13} The trial court dismissed the complaint pursuant to Civ. R. 12(B)(1), lack of subject matter

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[1] Appellant states in its brief, "While the State disagrees with the conclusion below that it waived Count Seven, the State seeks review of the trial court's dismissal of the water pollution claims alleged in Counts One through Six only." Brief of Appellant, page 6.

jurisdiction and Civ. R. 12(B)(6), failure to state a claim upon which relief could be granted. An order granting a Civ.R. 12(B)(1) or a 12(B)(6) motion to dismiss is subject to de novo review. *Moody v. Frazeysburg*, 5th Dist. Muskingum No. CT2005-0037, 167 Ohio App.3d 106, 2006-Ohio-3028, 854 N.E.2d 212, ¶ 9; *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. In determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, a court is not confined to the allegations of the complaint and may consider material pertinent to the inquiry without converting it into a motion for summary judgment. *Moody, supra, citing Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211, 2 O.O.3d 393, 358 N.E.2d 526, paragraph one of the syllabus (1976).

{¶14} The Federal Clean Water Act specifically reserves to the states the right to adopt and enforce standards and requirements regarding pollutants in its waterways:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent

> standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

{¶15} 33 U.S.C. 1370.

{¶16} Ohio has delegated to its Director of Environmental Protection the authority to promulgate rules and regulations, including issuing permits, concerning the discharge of pollutants into the State's waters. R.C. 6111.03. These rules and regulations are found in Ohio Administrative Code Chapter 3745.

{¶17} The Federal Clean Water Act further provides any project in which discharge of a pollutant into navigable waters occur must receive certification from the state in which the discharge will originate. This certification, referred to as the "401 certification," is governed by 33 U.S.C. § 1341(a)(1), which provides:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, *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 or will originate*, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such

discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. *If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.* No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be. (Emphasis added).

{¶18} 33 U.S.C. § 1341(d) further provides:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

{¶19} "The plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after receipt of such request.'" *New York State Dept. of Environmental Conservation v. Fed. Energy Regulatory Commission*, 884 F.3d 450, 455 (2nd Cir. 2018). Further, the withdrawal and resubmission of requests for certification does not extend the time beyond one year from the original request, as resubmissions of requests involving the same project are not independent requests, subject to a new period of review. *Hoopa Valley Tribe v. Fed. Energy Regulatory Commission*, 913 F.3d 1099, 1104 (D.C. Cir. 2019), *reh'g denied*, 2019 WL 3928669.

{¶20} It is undisputed in this case Appellant failed to act on Rover's original certification request within one year of November 16, 2015. Further, while Appellant appears to have abandoned on appeal its argument the resubmission of the certification request

on February 23, 2017, restarted the one-year time period, pursuant to *Hoopa Valley, supra*, we find the trial court did not err in finding the resubmission did not restart the one year period within which the State must act on a request for certification.

{¶21} Appellant first argues Section 401(d)(1)'s language stating the certification "shall" set forth any conditions in a timely certification has been interpreted by the courts to read "may." Appellant argues pursuant to O.A.C. 3745-32-02(A), Section 401 certification applies solely to fill dirt, and does not apply to discharge of drilling fluids or stormwater.

{¶22} Appellant cites this court to *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 713-714 (1994), and *Great Basin Mine Watch v. Hankins*, 456 F3d 955, 963 (9th Cir. 2006) in support of its argument we should interpret the language of Section 401(d)(1) to read "may," thus reserving their rights over the types of effluents set forth in counts one through six of the complaint.

{¶23} We find these cases distinguishable from the issue presented in the instant case. *PUD No. 1* dealt with the question of whether a State could only impose water quality limitations specifically tied to a discharge. In finding Section 401(d)(1) allowed a state to impose water quality standards to other types of activities not involving discharges, the United States Supreme Court held the states "may condition certification upon any limitations necessary to ensure compliance with state water quality standards." *Id.* at 713-714. In *Great Basin Mine Watch*, the court held, "*PUD No. 1* merely holds that states *may* set minimum flow standards as part of section 401 certification requirements; it does not hold that states

must do so." 456 F.3d at 963. However, the issue in *Great Basin* was not whether the state could waive its rights to enforce its water pollution statutes by failing to timely act on a certification or to include all types of pollution in its certification process, but rather whether Congress can force a state to issue a 401 certification or to include specific conditions when it does so. Neither of these cases stand for the proposition the clear language of the statute should be changed from "shall" to "may" when considering the issue of whether a state has waived its right to participate in the certification process.

{¶24} Appellant also cites this court to Ohio Administrative Code 3745-32-02(A) which provides, "Any applicant for a federal license or permit to conduct any activity which may result in a discharge of dredged or fill material to a water of the state shall apply for and obtain a 401 certification from Ohio EPA." Appellant argues pursuant to this state administrative code section, 401 certification in Ohio only applies to the discharge of dredged or fill material, and thus does not apply to the types of discharges in counts one through six of the complaint, which are governed by other regulatory schemes in Ohio.

{¶25} However, we note 33 U.S.C. § 1341(a)(1) is not limited to dredged or fill material, but specifically applies to any discharge into the navigable waters. Further, 33 U.S.C. § 1341(d) provides the certification "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations," again without

limiting the certification process to dredged or fill material.

{¶26} A state receiving a Section 401 application has four options: it may grant a certificate without imposing any additional conditions, grant it with additional conditions, deny it, or waive its right to participate in the process. *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 388 (4th Cir. 2018). If we accept Appellant's argument Ohio Administrative Code 3745-32-02(A) demonstrates Ohio's participation in the certification process is limited solely to activities which result in the discharge of dredged or fill material into the waters of the state, then Ohio has waived its right to participate in the certification process as to all activities other than those involving dredged and fill material, despite the clear language of the United States Code allowing much broader participation. As Appellee Rover states in its brief, "In short, States have choices; and their choices have consequences." Brief of Appellees Rover Pipeline LLC and Mears Group, Inc., page 21.

{¶27} Appellant argues it could not anticipate the extent of the types of pollution the pipeline project would generate at the time of the certification request. The record reflects the Ohio EPA participated in the preparation of the Environmental Impact Statement in the instant case, which provided a sweeping exploration of the scope of the pipeline project. From its active participation in the EIS process, Appellant should have been aware of the types of pollution the project would be likely to generate. Further, the State could have simply denied the certification based on a lack of information, or granted it by imposing additional conditions subjecting all types of discharge

to compliance with the laws of Ohio. *See Sierra Club, supra.* However, the state failed to act on the certification request in a timely manner, thereby waiving its right to participation in the certification process.

{¶28} Appellant also argues the trial court's interpretation of the certification rules runs contrary to the overarching intent of the Federal Clean Water Act. We agree with the findings of the trial court to the contrary:

> The holding of this Court in no way stands for the position that the State of Ohio does not have rights relative to the construction of a natural-gas pipeline through the State and a right to impose regulations to curb disastrous environmental impacts on its waterways as a result of such construction. Nor does this holding provide natural gas companies *carte blanche* to perform drilling and other construction related to natural-gas lines regardless of the environmental impact of such action. Rather, in order to assert its rights, the State of Ohio is required to act in conformance with the Clean Water Act, as opposed to instigating litigation as a collateral attack subsequent to the completion of a pipeline. Moreover, the Court finds that, despite the State of Ohio's inability to pursue the instant litigation, all aspects of the construction of the pipeline, including the discharging of pollutants into waterways, were subject to oversight by FERC, which responded to environmental concerns presented by the State of Ohio, including, but not limited to, halting construction operations. As such, any alleged

discharges were still subject to Federal Regulations, including the Clean Water Act.

{¶29} Judgment Entry, March 12, 2019, pp. 9-10.

{¶30} Finally, Appellant argues the court erred in dismissing count six of its complaint regarding hydrostatic water, because Appellees did obtain a permit concerning hydrostatic water from the Ohio EPA, which was listed in the Environmental Impact Statement.

{¶31} We find a state's 401 waiver cannot be undone by agreement of the parties. *See Hoopa Valley, supra*, at 1105, (state waived participation in certification despite applicant's agreement with state in withdrawal and resubmission of certification request in attempt to extend one year time deadline). The mere fact Appellees chose to obtain a certificate from the state, as set forth in the EIS, does not change the fact the state waived its right to enforce its hydrostatic water laws by failing to include such permit requirement in a timely issued 401 certificate.

{¶32} The first assignment of error is overruled.

II.

{¶33} Any discussion of Appellant's second assignment of error is rendered moot by our disposition of the first assignment of error.

{¶34} The judgment of the Stark County Common Pleas Court is affirmed.

By: Hoffman, P.J.

Wise, John, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

APPENDIX F

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, EX REL., MICHAEL DEWINE, OHIO ATTORNEY GENERAL,

Plaintiff,

-vs-

ROVER PIPELINE, LLC, et al.,

Defendant.

CASE NO. 2017CV02216

JUDGE KRISTIN G. FARMER

JUDGMENT ENTRY

This matter came before the Court upon the motions of the following defendants to dismiss the Third Amended Complaint filed by the plaintiff, The State of Ohio ex rel. Michael Dewine, Attorney General ("State of Ohio"): Rover Pipeline, LLC ("Rover")/ Mears Group, Inc. ("Mears"), Pretec Directional Drilling, LLC ("Pretec"), Laney Directional Drilling Co. ("Laney"), Atlas Trenchless, LLC. ("Atlas"), and B & T Directional Drilling, Inc. (B & T"). The State of Ohio filed a combined response to all of the motions to dismiss, to which the individual defendants have replied. Upon review, the Court finds as follows.

Procedural History

The State of Ohio filed an Amended Complaint on November 30, 2017. After the filing of the amended complaint, a "Notice of Removal to Federal Court" was filed on December 8, 2017. The Federal Court

remanded this matter back to the Stark County Court of Common Pleas on January 31, 2018. In his Order remanding this matter back to Stark County, Judge John R. Adams found that, although the State of Ohio's complaint necessarily raises a federal issue in some capacity, the focal point of the litigation will be the Clean Water Act and as such, the federal court "cannot exercise jurisdiction without disrupting the division of labor between the state of Ohio and the federal government."

Upon remand, the State of Ohio filed a motion for leave to file a Second Amended Complaint. The Court granted the motion and the Second Amended Complaint was filed on April 17, 2018. After the filing of the Second Amended Complaint, the defendants filed motions to dismiss. Prior to ruling upon said motions, the State of Ohio filed an unopposed motion for leave to file a Third Amended Complaint. The Third Amended Complaint was filed on July 19, 2018. Thereafter, the defendants again filed motions to dismiss. Those motions, which have been fully briefed, are as follows:

1. B & T Directional Drilling, Inc.'s Motion to Dismiss Plaintiff's Third Amended Complaint filed on September 7, 2018;

2. Rover Pipeline LLC and Mears Group, Inc.'s Motion to Dismiss filed on September 10, 2018 (referred to herein as "Rover's Motion to Dismiss");

3. Laney Directional Drilling Co.'s Motion to Dismiss filed on September 10, 2018;

4. Pretec Directional Drilling LLC's Motion to Dismiss Third Amended Complaint filed on September 10, 2018; and

5. Atlas Trenchless LLC's Motion to Dismiss filed on September 10, 2018.

The State of Ohio filed a collective memorandum contra to all defendants' motions to dismiss on October 12, 2018. Defendants, Atlas Trenchless LLC, Pretec Directional Drilling LLC, and Laney Directional Drilling Co., and defendants, Rover, Mears, and B&T, filed separate reply briefs on November 2, 2018.

The Complaint filed by the State of Ohio

The State of Ohio's complaint alleges that the defendants illegally discharged millions of gallons of drilling fluids to Ohio's waters, causing pollution and degrading water quality across the state in construction of the Rover Pipeline, a 713-mile interstate natural gas pipeline crossing 18 counties. Rover was the owner or operator of the drilling operations for the construction of the pipeline. Pretec, Laney, Atlas, Mears, and B&K were subcontractors hired by Rover to perform horizontal-directional-drilling activities related to the construction of the pipeline.

More specifically, the State of Ohio's complaint alleges the following:

Count One: Defendants (Rover, Pretec, Laney, Atlas, Mears, and B & T) discharged pollutants (drilling fluids) to waters of the state without point source NPDES permits.

Count Two: Defendant Rover Pipeline LLC failed to obtain a necessary storm water permit for its storm water discharges.

Count Three: Defendants (Rover, Pretec, Laney, Atlas, Mears, and B & T) violated Ohio's general

water quality standards (unpermitted drilling fluid discharges into waters of the state and unpermitted storm water discharges into waters of the state).

Count Four: Defendants (Rover, Pretec, Laney, Atlas, Mears, and B & T) violated Ohio's wetland water quality standards (unpermitted drilling fluid discharges into wetlands).

Count Five: Defendant Rover Pipeline LLC violated the Director's Orders by failing to obtain coverage or even submit a notice of intent to obtain coverage under the Construction Storm Water Permit.

Count Six: Defendant Rover Pipeline LLC violated the Hydrostatic Permit:

Count Seven: Defendant Rover Pipeline LLC engaged in activities without effective certification. Plaintiff alleges that the Defendant engaged in activity from February 24, 2017 through May 15, 2017, without the state 401 water quality certification.

Rover's Motion to Dismiss

While separate, the defendants' motions to dismiss are, for the most part, duplicative in argument. Because Rover is the main defendant in this litigation, i.e., the claims arising against the other defendants are a result of actions taken at the behest of Rover, the Court will focus its consideration primarily on Rover's motion to dismiss. In its motion, Rover argues for dismissal of the Third Amended Complaint on the following assertions:

1. The State of Ohio's failure to act within one year on Rover's application for the State of Ohio to issue a §401 certification (a Water Quality Certification request) under the federal Clean Water Act, resulted in the State of Ohio waiving its power to impose conditions and to enforce environmental requirements for the pipeline project as a matter of federal statutory law;

2. Rover received all necessary regulatory approvals from FERC for the construction of the pipeline. In the process of obtaining these approvals, an Environmental Impact Statement ("EIS") was completed, which the State of Ohio helped to prepare. The State of Ohio now seeks to impose additional permitting requirements without any legal authority, as the permits sought were not previously identified to the FERC through the EIS process;

3. The State of Ohio's claims are preempted by the Natural Gas Act and, as such, this Court lacks subject matter jurisdiction; and

4. The State of Ohio's claims are challenges to FERC's approval of the pipeline project and improper collateral attacks on FERC's orders.

Civil Rule 12(B) Standard

In essence, the collective motions of the defendants seek dismissal of the State of Ohio's Third Amended Complaint for failure to state a claim upon which

relief may be granted and lack of subject matter jurisdiction.[1]

In construing a complaint under a Civ. R. 12(B) motion to dismiss for failure to state a claim upon which relief can be granted, the Court must presume the truth of all factual allegations of the complaint and make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1989), 40 Ohio St.3d 190. The Court, nonetheless, need not assume the truth of the conclusions, which are not supported by factual allegations. *Id.* at 193.

Dismissal is appropriate where it appears beyond doubt that the complaining party can prove no set of facts in support of the complaining party's claim that would entitle said party to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242.

The trial court is not confined to allegations of complaint when determining its subject matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment. Civ.R. 12(B)(1,6). *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.,* 48 Ohio St. 2d 211 (1976).

Applicable Federal Law

Congress enacted the Natural Gas Act to govern the transportation of natural gas in interstate

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[1] While all of the Defendants have filed separate motions to dismiss, all of the motions are based upon the same arguments. In fact, arguments have been referenced, adopted, and restated by some Defendants from other Defendants' briefs.

commerce. 15 U.S.C. §717. In so doing, Congress gave authority to regulate natural gas companies and the interstate sale and transportation of natural gas, as well as the construction of natural gas facilities, including natural gas pipelines, to the Federal Power Commission, which ultimately became the Federal Energy Regulatory Commission ("FERC").

However, the Natural Gas Act is subservient to the Federal Water Pollution Control Act, aka the Clean Water Act, found in 33 U.S.C. §1251, which prohibits the discharge of pollutants in waterways. 15 U.S.C. §717(b)(d). The Clean Water Act specifically reserves to the states the right to adopt and enforce standards and requirements regarding pollutants in waterways as follows:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any

> manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. 1370. In response, the State of Ohio has delegated to its Director of Environmental Protection the authority to promulgate rules and regulations, including the issuing of permits, concerning the discharge of pollutants into the waters within Ohio. R.C. 6111.03. Such rules and regulations are found in OAC Chapter 3745, including, but not limited to OAC 3745-33-01, et seq., and OAC 3745-38-02, et seq.

In addition to the preservation of the states' rights to enforce and adopt standards and requirements regarding the discharge of pollutants into waterways, the Clean Water Act requires that any state promulgated water quality standards be subject to review and approval by the EPA. 33 U.S.C. §1313 (also referred to as "Section 303 of the Clean Water Act"). The Clean Water Act also provides that any project in which discharge of a pollutant into navigable waters may occur, must receive certification from the state in which the discharge will originate that such discharge will comply with the state's water quality standards. 33 U.S.C. §1341 (a)(l) (also referred to as "Section 401of the Clean Water Act"). As to such "401 certification,"

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the

> certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

Id. Therefore, if a state fails or refuses to act on a 401Certification within one year from the request, the 401Certification requirement is waived with respect to any application. If a 401 Certification request is denied by the state, no permit shall be issued for the requesting project. If the state approves the 401 Certification request upon any conditions or limitations, such conditions or limitations shall be set forth in the 401 Certification. 33 U.S.C. §1341(d). The time frame set forth in Section401oftheClean Water Actis a "bright-line rule" and not a "subjective standard." *N.Y. State Dep't of Envtl. Conservation v. FERG,* 884 F.3d 450, 456 (2nd Cir., 2018).

Additionally, the Clean Water Act authorizes the EPA to regulate the discharge of pollutants in navigable waters under the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. §1342. The EPA has given such permitting authority to the States, including Ohio, that meet the EPA's requirements.

While, as previously noted, the Natural Gas Act gives deference to the Clean Water Act, such deference is not unlimited. Notably, the Natural Gas Act designates FERC as the lead agency for the coordination of all federal permits (which would include any permit required under the Clean Water Act), special use authorizations, certifications, opinions, or other approvals regarding the

construction of a natural gas pipeline. 15 U.S.C. §717n(b). Further, the Act requires all federal and state agencies considering an aspect of an application for the construction of a natural gas pipeline to cooperate with FERC and comply with the deadlines established by FERC. Id.

Analysis

In its motion, Rover asserts that the State of Ohio failed to "act" on its request for a 401 certification within the one-year period provided in said section. As such, Rover argues that the State of Ohio waived any limitations on a discharge certification. The State of Ohio argues that it did "act" upon such request within one year. Moreover, the State of Ohio asserts that any such waiver applies only to Count 7 of the complaint and does not affect the other claims.

On November 16, 2015, the State of Ohio received a 401 Certification request from Rover. As such, the State of Ohio had until November 16, 2016, to "act" on such request pursuant to Section 401 of the Clean Water Act. However, the State of Ohio did not "act" on the initial 401 Certificate request. Rather, the State of Ohio required Rover to resubmit its request on February 23, 2017, and the State granted the revised request on February 24, 2017, again without ever acting on the initial request filed November 16, 2015.

The Court finds the language of Section 401 to be clear and unambiguous in regard to the timeframe for acting upon a 401 Certification. Further, as noted by the Court in *N.Y. State Dep't of Envtl. Conservation,* the one-year requirement is a "bright-line" rule. Id. The Court finds that, in order to assert its rights under the Clean Water Act, the State of Ohio was required to "act," i.e., grant or deny, upon Rover's

November 16, 2015, 401 Certification -request on or before November 16, 2016. Its failure to do so, resulted in a waiver of rights.

The Court does not find that the "resubmission" of Rover's request on February 23, 2017, acts to save the State of Ohio from such waiver. Although the State of Ohio timely acted upon the resubmitted request, such action, which occurred outside of the one-year period for the initial submission, does not negate the waiver that resulted from the failure to act on or before November 16, 2015. Simply put, because the State of Ohio did not grant or deny the November 16, 2015, 401 Certification request on or before November 16, 2016, it waived its rights pursuant to the Clean Water Act, regardless of any subsequent action.

Like a house of cards, Rover asserts that, because the State of Ohio waived its rights under section 401, all of its remaining claims fail as well. To the contrary, the State of Ohio argues that any such waiver applies only to count 7 of its complaint and does not affect any of the remaining claims. Upon review, the Court finds that counts 1-6 of the Third Amended Complaint are based upon limitations and monitoring requirements needed for compliance with Ohio's water quality standards. However, Section 401 gave the State of Ohio the opportunity, within one year of Rover's request for certification, to set forth such limitations and requirements. The failure by the State of Ohio to do so, as set forth above, waived its authority to enforce the same.

This Court finds that the State of Ohio cannot, through the instant litigation, assert rights given to it under the Clean Water Act which it waived by failing to act within the specified time provided by the Clean

Water Act. Because the Court finds that such waiver is dispositive of all claims in the Third Amended Complaint, the Court will not address the merits of the defendants' remaining arguments for dismissal.[2]

The holding of this Court in no way stands for the position that the State of Ohio does not have rights relative to the construction of a natural-gas pipeline through the State and a right to impose regulations to curb disastrous environmental impacts on its waterways as a result of such construction. Nor does this holding provide natural gas companies *carte blanche* to perform drilling and other construction related to natural-gas lines regardless of the environmental impact of such action. Rather, in order to assert its rights, the State of Ohio is required to act in conformance with the Clean Water Act, as opposed to instigating litigation as a collateral attack subsequent to the completion of a pipeline. Moreover, the Court finds that, despite the State of Ohio's inability to pursue the instant litigation, all aspects of the construction of the pipeline, including the discharging of pollutants into waterways, were subject to oversight by FERC, which responded to environmental concerns presented by the State of Ohio, including, but not limited to, halting construction operations. As such, any alleged

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[2] Although not specifically addressed in this entry, the Court has reviewed the arguments relative to dismissal on grounds other than a waiver under Section 401. The Court finds that, even if such waiver had not occurred, the defendants would be entitled to dismissal on the alternative grounds presented by the motions to dismiss, including, but not limited to, preemption.

discharges were still subject to Federal Regulations, including the Clean Water Act.

Conclusion

For the reasons set forth herein, as well as those set forth in the motions to dismiss, the Court finds that the State of Ohio failed to act upon rights specifically given to it pursuant to the Clean Water Act within the Act's specified period of time. As such, the Court finds that it lacks jurisdiction over this matter, and further finds that the State of Ohio can prove no set of facts entitling it to its requested relief. As such, the Third Amended Complaint filed by the State of Ohio is, hereby, **DISMISSED.**

IT IS SO ORDERED.

s/ Kristin G. Farmer
Judge Kristin G. Farmer

NOTICE TO THE CLERK:
FINAL APPEALABLE ORDER
Case No. 2017CV02216

IT IS HEREBY ORDERED that notice and a copy of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.

s/ Kristin G. Farmer
JUDGE KRISTIN G. FARMER

APPENDIX G

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, *EX REL.*, DAVE YOST OHIO ATTORNEY GENERAL

Plaintiff,

v.

ROVER PIPELINE, LLC,

and

PRETEC DIRECTIONAL DRILLING, LLC

Defendants.

CASE NO. 2017CV02216

JUDGE KRISTIN G. FARMER

FOURTH AMENDED COMPLAINT FOR INJUNCTIVE RELIEFAND CIVIL PENAL TIES

I. NATURE OF THE ACTION

During construction of an interstate, natural-gas pipeline, Defendants Rover and Pretec illegally discharged millions of gallons of drilling fluids to Ohio's waters, causing pollution and degrading water quality on numerous occasions and in various counties across the state. Additionally, the activities of Defendants Rover and Pretec harmed pristine wetlands in Stark County that require the highest level of protection. Finally, Defendant Rover caused the degradation of Ohio's waters by discharging pollution in the form of sediment-laden stormwater to Ohio's waters on multiple occasions.

Defendants failed to secure any water pollution permits designed to control these discharges. Defendant Rover has a permit to address unrelated water pollution, but the company violated that permit as well. Whether their actions (and failures to act) stem from a series of calculated business decisions or complete indifference to Ohio's regulatory efforts, Defendants have endangered the environment in more than ten counties (including Stark) and violated state laws, rules, and permits designed to protect the quality of Ohio's waters.

Plaintiff, State of Ohio, by and through the Attorney General Dave Yost, and at the written request of the Director of the Ohio Environmental Protection Agency on September 20, 2017, hereby timely amends its Third Amended Complaint, filed July 19, 2018, under Civ. R. 15(A). Through its Fourth Amended Complaint (referred to throughout as "this Complaint"), the State of Ohio seeks to enforce R.C. Chapter 6111 and the rules and permits adopted thereunder against Defendants, for injunctive relief and the assessment of civil penalties. Specifically, the State of Ohio alleges as follows:

II. GENERAL ALLEGATIONS

A. Defendants

1. Defendant Rover Pipeline, LLC ("Rover"), located at 3738 Oak Lawn Avenue, Dallas, Texas 75219, is a limited liability company organized under the laws of the State of Delaware and registered with the Ohio Secretary of State as a foreign limited liability company since July 10, 2014.

2. Corporation Service Company, 50 West Broad Street, Suite 1330, Columbus, Ohio 43215 is the statutory agent for Rover.

3. Rover is a "person," as defined by R.C. 1.59, R.C. 6111.01, Ohio Adm.Code 3745-32-01, Ohio Adm.Code 3745-33-01, and Ohio Adm.Code 3745-38-01.

4. At all times and locations relevant to this Complaint, Defendant Rover is the owner or operator of drilling operations for the construction of a 713-mile, interstate pipeline crossing 18 counties in Ohio including Stark County. Rover has control, authority, direction, and responsibility over underground horizontal-directional-drilling for the construction of the pipeline repeatedly referenced throughout this Complaint. Through this control, authority, direction, and responsibility over the construction of the pipeline and/or through its activities, Rover caused, participated in, controlled, authorized, directed, and/or acted, or failed to act, in violation of R.C. Chapter 6111, the rules adopted, and the permits issued thereunder as alleged in this Complaint.

5. Defendant Pretec Directional Drilling, LLC ("Pretec"), located at 800 S. Douglas Rd., #1200, Coral Gables, Florida 33134 and/or 3314 56th Street, Eau Claire, WI 54703, is a limited liability company organized under the laws of the State of Florida and registered with the Ohio Secretary of State as a foreign limited liability company since March 30, 2017.

6. Corporation Service Company, 50 West Broad Street, Suite 1330, Columbus, Ohio 43215 is the statutory agent for Pretec.

7. Pretec is a "person," as defined by R.C. 1.59, R.C. 6111.01, Ohio Adm.Code 3745-32-01, Ohio Adm.Code 3745-33-01, and Ohio Adm.Code 3745-38-01.

8. At all times and locations relevant to Defendant Pretec's actions or omissions alleged in this Complaint, Defendant Pretec conducted underground horizontal-directional-drilling activities for the construction of the pipeline repeatedly referenced throughout this Complaint. Through these activities, Pretec caused, participated in, controlled, and/or acted, or failed to act, in violation of R.C. Chapter 6111 and the rules adopted thereunder as alleged in this Complaint.

9. [Paragraph intentionally blank].

10. [Paragraph intentionally blank].

11. [Paragraph intentionally blank].

12. [Paragraph intentionally blank].

13. [Paragraph intentionally blank].

14. [Paragraph intentionally blank].

15. [Paragraph intentionally blank].

16. [Paragraph intentionally blank].

17. [Paragraph intentionally blank].

18. [Paragraph intentionally blank].

19. [Paragraph intentionally blank].

20. [Paragraph intentionally blank].

21. [Paragraph intentionally blank].

22. [Paragraph intentionally blank].

23. [Paragraph intentionally blank].

24. [Paragraph intentionally blank].

25. [Paragraph intentionally blank].

B. Jurisdiction and Venue

26. This Court has jurisdiction over the subject matter of this action, personal jurisdiction over Defendants, and authority to grant the relief requested pursuant to R.C. 2307.382, R.C. 6111.07, and R.C. 6111.09.

27. At all times and locations, Defendants have purposefully availed themselves of this forum. The activities (or failures to act) and/or control, authority, direction, and responsibility over the activities (or failures to act) caused all environmental violations alleged in this Complaint in Ohio including Stark County. Defendants have transacted business and/or contracted to supply services or goods in Ohio, and in Stark County specifically, or have an interest in, use, and/or possess real property in Ohio and in Stark County.

28. As the allegations in this Complaint reveal, the exercise of specific jurisdiction over each Defendant is proper and consistent with due process.

29. Venue lies in the Stark County Court of Common Pleas pursuant to Civ.R. 3(B) and Civ.R. 3(E).

30. Pursuant to Civ.R. 8(A), the State informs the Court that the amount sought is in excess of twenty-five thousand dollars ($25,000.00).

C. Cooperative Federalism: the Relationship between Relevant Federal and State Law

31. Federal law—specifically, the Natural Gas Act—regulates "the transportation of natural gas in interstate commerce." 15 U.S.C. § 717(b).

32. The Natural Gas Act yields to any state right reserved under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq*, also known as the Clean Water Act. 15 U.S.C. § 717b(d).

33. Enacted in 1972, Congress intended the Clean Water Act to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

34. The Clean Water Act expresses the national goal of eliminating the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1). Section 101(a)(2) of the Clean Water Act further establishes "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." 33 U.S.C. § 1251(a)(2).

35. To achieve these goals, Section 301 of the Clean Water Act prohibits "the discharge of pollutants by any person," except as permitted under certain sections of the Clean Water Act. 33 U.S.C. § 1311(a).

Clean Water Act – Rights Reserved for the States

36. The Clean Water Act recognizes that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources * * *." 33 U.S.C. § 1251(b).

37. Congress also granted authority to the states by ensuring that "nothing * * * shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution * * *." 33 U.S.C. § 1370. Further, Congress made clear that the Clean Water Act shall not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370.

38. Consistent with its delegated authority under federal law, Ohio has enacted laws and adopted rules prohibiting actions and mandating requirements in order to protect water quality. The pertinent laws and rules to this action are set forth in greater detail below.

Ohio's Prohibition against Polluting Waters of the State

39. Revised Code 6111.04(A) prohibits any person from causing pollution or placing or causing to be placed "any sewage, sludge, sludge materials, industrial waste[s] or other wastes in a location where they cause pollution of any waters of the state" unless that person holds a valid, unexpired permit to do so. Such an action constitutes "a public nuisance," under R.C. 6111.04(A)(2).

40. "Pollution," as defined in R.C. 6111.01(A), includes, but is not limited to, the placing of "industrial waste" or "other wastes" in any "waters of the State."

41. "Industrial waste," as defined in R.C. 6111.01(C), "means any liquid, gaseous, or solid waste substance resulting from any process of industry, manufacture, trade, or business, or from the development, processing, or recovery of any natural resource, together with such sewage as is present."

42. "Other wastes," as defined in R.C. 6111.01(D), includes but is not limited to "dredged or fill material, or silt, other substances that are not sewage, sludge, sludge materials, or industrial waste."

43. "Waters of the state," as defined in R.C. 6111.01(H), means "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial * * * that are situated * * * within * * * this state * * *."

Ohio's NPDES Permitting Program for Point Source Discharges

44. Ohio administers a federally-delegated, National Pollutant Discharge Elimination System ("NPDES") permit for point source discharges of any pollutant to waters of the state. *See, e.g.* 33 U.S.C. § 1342(b).

45. Ohio Adm.Code 3745-33-02(A), adopted under R.C. 6111.03, states that "[n]o person may discharge any pollutant or cause, permit, or allow a discharge of any pollutant without applying for and obtaining an Ohio NPDES permit in accordance with the requirements of [Ohio Adm.Code Chapter 3745-33]."

46. Ohio Adm.Code 3745-33-01 defines "discharge of a pollutant or pollutants" as "any

addition of any pollutant to waters of the state from a point source."

47. Ohio Adm.Code 3745-33-01 defines "pollutant" as "sewage, industrial waste or other waste as defined by" R.C. 6111.01(B) to (D).

48. Ohio Adm.Code 3745-33-01 defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

49. Upon information and belief, Defendants use drilling fluids—mixtures of water and bentonite—for its drilling operations. These drilling fluids ordinarily assist in the lubrication and encasement of the pipeline underground, but when discharged to waters of the state, are "industrial wastes" or "other wastes" under R.C. 6111.01 and also "pollutant[s]" under Ohio Adm.Code 3745-33-01.

50. At all times and locations relevant to this Complaint, Defendants, through their control, authority, direction, and responsibility over their drilling operations, used equipment and created underground bores or channels for its pipeline, all of which are point sources as defined in Ohio Adm.Code 3745-33-01.

Ohio's General NPDES Permits for Storm Water Associated with Construction and Industrial Activities

51. Ohio Administrative Code 3745-38-02(A)(1) provides that no person may discharge any pollutant or cause, permit, or allow a discharge of any pollutant

from a point source without applying for and obtaining an Ohio NPDES individual permit or obtaining authorization to discharge under an Ohio NPDES general permit.

52. "Discharge of any pollutant or pollutants" and "point source," as defined in Ohio Adm.Code 3745-38-01, share the same definitions in Ohio Adm.Code 3745-33-01 above.

53. Ohio Adm.Code 3745-38-02(B)(2)(a) authorizes the Director to "issue a general NPDES permit * * * for storm water point sources."

54. On April 11, 2013, pursuant to his authority in Ohio Adm.Code 3745-38-02(B)(2)(a), the Director issued a General NPDES Permit for Storm Water Discharges Associated with Construction Activities, Permit No. OHC000004 ("Construction Storm Water Permit"). The Construction Storm Water Permit is appended at **Attachment 1** and hereby incorporated by reference as if fully rewritten herein.

55. The Construction Storm Water Permit regulates storm water discharges associated with construction activities that enter waters of the State. *See* Attachment 1 p. 3.

56. "Construction activity" is defined in the Construction Storm Water Permit as "any clearing, grading, excavating, grubbing and/or filling activities that disturb" either "one or more acres of total land, or will disturb less than one acre of land but are part of a larger common plan of development * * * that will ultimately disturb one or more acres of land." Attachment 1, Part I, B.1, p. 3.

57. "Large construction activities" is defined by the Construction Storm Water Permit as involving the

disturbance of five or more acres of land or will disturb less than five acres, but is a part of a larger common plan of development or sale which will disturb five or more acres of land. Attachment 1, Part III.G.2.e, p. 19.

58. Upon information and belief, in constructing its natural gas pipeline, Defendant Rover has cleared, graded, excavated, grubbed and/or filled at least 5 acres of total land. Defendant Rover is thus engaged in "construction activities" and "large construction activities" as defined in the Construction Storm Water Permit, Attachment 1, Part I, B.1, p. 3 and Part III.G.2.e, p. 19.

59. On May 8, 2017, pursuant to his authority in Ohio Adm.Code 3745-38-02(B)(2)(a), the Director issued a General NPDES Permit for Storm Water Discharges Associated with Industrial Activities, Permit No. OHR000006 ("Industrial Storm Water Permit"). The Industrial General Permit is appended at **Attachment 2** and hereby incorporated by reference as if fully rewritten herein.

60. The Industrial Storm Water Permit regulates storm water discharges associated with industrial activities that enter waters of the State. *See* Attachment 2 p. 1.

61. "Storm water discharge associated with industrial activity," in pertinent part, includes storm water discharges from "construction activity including clearing, grading and excavation" involving the disturbance of five or more acres of land or that will disturb less than five acres, but is a part of a larger common plan of development or sale which will disturb five or more acres of land. Ohio Adm.Code 3745-39-04(B)(14)(j).

62. Upon information and belief, in constructing its natural gas pipeline, Defendant Rover has cleared, graded, excavated, grubbed and/or filled at least 5 acres of total land. Defendant Rover is thus considered to be engaged in industrial activity in accordance with Ohio Adm.Code 3745-39-04(B)(14)(j).

Limited Exemption from Storm Water Permitting for Oil and Gas Facilities

63. Federal regulations generally exempt oil and gas exploration, production, processing, or treatment operations or transmission facilities from obtaining a storm water permit for their activities. *See* 40 C.F.R. 122.26(c)(1)(iii).

64. Ohio's rules contain a similar exemption at Ohio Adm.Code 3745-39-04(A)(2)(b) with respect to storm water permitting, stating that no permit is required for discharges of storm water runoff from, in pertinent part, "[a]ll field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (C)(1)(c) of this rule."

65. However, both the federal and Ohio's exemption for oil and gas facilities are limited—they cease to apply when the otherwise exempted facility causes a discharge of storm water that contributes to a violation (exceedance) of a water quality standard.

See 40 C.F.R. 122.26(c)(1)(iii)(C)[1] and Ohio Adm.Code 3745-39-04(C)(1)(c)(iii), respectively.

66. Ohio Adm.Code 3745-1-02(B) defines "water quality standards" as "the rules set forth in [Ohio Adm.Code Chapter 3745-1] establishing stream use designations and water quality criteria protective of such uses for the surface waters of the state."

67. In essence, if an oil or gas operation discharges, or controls, authorizes, directs, or has responsibility over a discharge of storm water that exceeds any of Ohio's water quality standards, that operation must submit an application for an Ohio NPDES storm water permit pursuant to Ohio Adm.Code 3745-39-04(C) and/or 3745-38-02.

68. Upon information and belief, on at least the following dates and at the following locations, Defendant Rover caused point source discharges of sediment-laden storm water to waters of the state from its construction activities that violated (exceeded) water quality standards:

(a) April 10, 2017: unnamed tributaries to the Woodsfield Reservoir in Monroe County;

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[1] 40 CFR 122.26(a)(2)(ii) states that "[d]ischarges of sediment from construction activities associated with oil and gas exploration, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section. However, the Ninth Circuit Court of Appeals vacated this subsection of the rule in *NRDC v. EPA*, 526 F.3d 591, 608 (9th Cir. 2008). As a result, storm water discharges composed entirely of sediment can trigger the requirement to obtain a storm water permit for an oil and gas operation if sediment contributes to a violation (exceedance) of a water quality standard.

(b) April 12, 2017: Bull Creek, at Tank Road, southeast of the Village of Cygnet in Wood County;

(c) May 2, 2017: unnamed tributary to South Branch Portage River located near the intersection of Pelton Road and Portage View Road, Bloomdale, Wood County;

(d) May 3, 2017: Brushy Fork Creek, at 77960 Slater Road, Cadiz, Harrison County;

(e) May 4, 2017: an unnamed tributary to Eckert Ditch, located on Cloverdale Road north of Oil Center Road, Wood County;

(f) May 4, 2017: an unnamed tributary to Pea Vine Creek, Belmont County;

(g) May 5, 2017: Brush Creek, located near the Village of Cadiz, Harrison County;

(h) May 5, 2017: Hammer Creek, located southwest of the intersection of County Road 2 and County Road H, Henry County;

(i) May 5, 2017: an unnamed tributary to Lost Creek, located at County Road 11, south of County Road J, Henry County;

(j) May 5, 2017: Huff Run and Wetland W8H-TU-225, located at Access 12 – Lindentree Road, Sandy Township, Tuscarawas County;

(k) May 5, 2017: an unnamed tributary of Conotton Creek, Wetland W4ES-TU-217, and Wetland W4ES-TU-217 at Access 6 – Dawn Road, Warren Township, Tuscarawas County; and

(l) May 8, 2017: an unnamed tributary to Sandy Creek and/or Wetland W3H-TU-223, located at Access 15 – Sandyville Road, Sandy Township, Tuscarawas County.

69. At least as early as May 12, 2017, Ohio EPA notified Defendant Rover that its storm water discharges contributed to violations of Ohio's water quality standards including but not limited to Ohio Adm.Code 3745-1-04(A) and/or (C), and as a result, the storm water permit exemption for oil and gas operations no longer applied. Consequently, Defendant Rover was required to obtain coverage under an Ohio NPDES permit to regulate its storm water discharges pursuant to Ohio Adm.Code 3745-39-04(C)(1)(c)(iii).

70. Following this notification, Rover continued to engage in construction activities without a permit and continued to discharge sediment-laden storm water. Upon information and belief, on at least the following dates and at the following locations, Defendant Rover's construction activities caused point-source discharges of sediment-laden storm water to waters of the state:

(a) July 13, 2017: Old Bean Creek, located in Fulton County;

(b) July 14, 2017 and July 17, 2017: an unnamed tributary to Cat Run, located in Monroe County;

(c) July 25, 2017: McMahon Creek, located in Belmont County;

(d) July 25, 2017: Conotton Creek, located in Tuscarawas County;

(e) July 28, 2017: Dining Fork, located in Carroll County;

(f) September 20, 2017: a tributary of Irish Creek, at Branch Road SE in Loudon Township, Carroll County; and

(g) October 20, 2017: a tributary of Middle Fork Sugar Creek, in Sugar Creek Township, Stark County.

Ohio's Water Quality Standards

71. Ohio adheres to "the policy of the Congress to * * * protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution * * *" by adopting the water quality standards in Ohio Adm.Code Chapter 3745-1. 33 U.S.C. § 1251(b).

72. Ohio Adm.Code 3745-1-04(A) provides, in part, that "all surface waters of the state" shall be "[f]ree from suspended solids or other substances that enter the waters as a result of human activity and that will settle to form putrescent or otherwise objectionable sludge deposits, or that will adversely affect aquatic life."

73. Ohio Adm.Code 3745-1-04(B) provides, in part, that "all surface waters of the state" shall be "[f]ree 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."

74. Ohio Adm.Code 3745-1-04(C) provides, in part, that "all surface waters of the state" shall be "[f]ree 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."

75. Ohio Adm.Code 3745-1-51 incorporates Ohio Adm.Code 3745-1-04 and adds criteria specific to wetlands.

76. Ohio Adm.Code 3745-1-51(A) provides that "[t]he hydrology necessary to support the biological and physical characteristics naturally present in wetlands shall be protected to prevent significant adverse impacts on:

(1) Water currents, erosion or sedimentation patterns;

(2) Natural water temperature variations;

(3) Chemical, nutrient and dissolved oxygen regimes of the wetland;

(4) The movement of aquatic fauna;

(5) The pH of the wetland; and

(6) Water levels or elevations, including those resulting from ground water recharge and discharge."

77. Ohio Adm.Code 3745-1-51(B)(1) provides that "[w]ater quality necessary to support existing habitats and the populations of wetland flora and fauna shall be protected to prevent significant adverse impacts on:

(a) Food supplies for fish and wildlife;

(b) Reproductive and nursery areas; and

(c) Dispersal corridors, as that term is defined in rule 3745-1-50 of the Administrative Code."

78. Ohio Adm.Code 3745-1-02(B) defines "[w]etlands" as "those areas that are inundated or

saturated by surface or ground water at a frequency and duration that are sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. 'Wetlands' includes swamps, marshes, bogs, and similar areas that are delineated in accordance with 1987 United States army corps of engineers wetland delineation manual and any other procedures and requirements adopted by the United States army corps of engineers for delineating wetlands."

79. For the purposes of this Complaint, "wetlands" are "marshes * * * springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial * * * that are situated * * * within * * * this state * * *," and thus, wetlands are "waters of the state" under R.C. 6111.01(H).

80. Wetlands are assigned quality designations under Ohio Adm.Code 3745-1-54. Pertinent to this Complaint, wetlands assigned to "Category 3" are the highest quality of wetlands categorized under Ohio law. Ohio Adm.Code 3745-1-54(D)(1)(c).

Director's Authority to Issue Orders under R.C. Chapter 6111

81. Under R.C. 6111.03(H)(1), the Director of Ohio EPA has the authority to "issue * * * orders to prevent, control, or abate water pollution * * *."

82. On or before April 13, 2017 and continuing to date to be determined, Defendant Rover deposited spent drilling mud containing diesel fuel residuals at the Oster Sand and Gravel Disposal Pit located near the City of Massillon's public water system's public

drinking water intake and the Beach City Quarry located in proximity to the City of Canton's Sugarcreek drinking wellfield.

83. To address the contaminated drilling waste and Defendant Rover's other environmental violations, the Director of Ohio EPA, pursuant to R.C. 6111.03, issued Orders against Defendant Rover on July 7, 2017 ("Director's Orders" affixed hereto as **Attachment 3**).

84. The Orders, in part, required Defendant Rover to submit various plans for approval to protect against surface and ground water pollution. Pursuant to the Orders, Ohio EPA approved the following plans submitted by Defendant Rover on or about the following dates:

(a) "Release Prevention and Emergency Response Contingency Plan": August 4, 2017;

(b) "Material Removal Plan-Oster and Beach City Quarries (version 3)"—Rover's Industrial Waste Disposal Plan: August 4, 2017;

(c) "Horizontal Directional Drill (HDD) Sampling Plan": August 4, 2017;

(d) "Tuscarawas River Wetland Restoration Plan": August 3, 2017;

(e) "Stark County Sample and Analysis Plan": August 11, 2017;

(f) "Stark County Plan – Ground Water Monitoring Well Installation Work Plan Supplement": August 11, 2017;

(g) "Aqua Massillon Plan": August 11, 2017;

(h) "Work Plan for Installation of Monitoring Wells: Aqua Massillon (Oster Sand and Disposal Pit) and Quarry Plan (Beach City Quarry)": August 10, 2017;

(i) "Quarry Plan": August 11, 2017; and

(j) "Storm Water Pollution Prevention Plan": August 11, 2017.

85. The Orders also required Defendant Rover to perform ground water assessments following any release of contamination to groundwater and implement corrective measures if sampling shows that ground water quality has been impacted. Attachment 3, ¶18, 19, 30, 31, 42, and 43.

86. The Orders also mandated that Defendant Rover provide relief to nearby residents, Aqua Massillon, or the City of Canton, as applicable, if sampling shows that Defendant Rover is contaminating any water supply well downgradient, including drilling new drinking water wells, or siting and development of a new drinking water well field including permitting and installation of drinking water supply wells in the new field, taking into account the costs of design, such that a sustainable or adequate, and uncontaminated source of ground water is assured. Attachment 3, ¶20, 32, 44, and 45.

87. Finally, the Orders required Rover to submit a notice of intent to obtain coverage under Ohio EPA's Construction Storm Water Permit by July 14, 2017. Attachment 3, ¶8.

Rover's Only NPDES Point Source Discharge Permits: Hydrostatic General Permits

88. On October 31, 2012, pursuant to his authority in R.C. 6111.035, the Director issued a General NPDES Permit for discharges resulting from hydrostatic test water for a limited duration from a point source to waters of the state, Permit No. OHH000002 ("Hydrostatic Permit"). The Hydrostatic Permit is appended at **Attachment 4** and hereby incorporated by reference as if fully rewritten herein.

89. At all times relevant to this Complaint, Defendant Rover operated under the Hydrostatic Permit. The Director assigns authorization under the Hydrostatic Permit depending on the location of the discharge. As pertinent to this Complaint, Nos. 0GH00217 and 0GH00218 regulate Defendant Rover's activities in Harrison and Belmont Counties; Nos. 3GH00071 and 3GH00072 regulate Defendant Rover's activities in Stark and Wayne Counties; and Nos. 2GH00035 and 2GH00036 regulate Defendant Rover's activities in Seneca and Wood Counties. The language of the Hydrostatic Permit remains the same regardless of the number assigned to the authorization.

90. These hydrostatic permits regulate point-source discharges of hydrostatic water from tanks and pipelines used to detect leaks and determine the structural integrity of relevant equipment.

Ohio's Enforcement of Water Pollution Control

91. Revised Code 6111.07(A) provides that "[n]o person shall violate or fail to perform any duty imposed by sections 6111.01 to 6111.08 of the Revised Code or violate any order, rule, or term or condition of

a permit issued or adopted by the director of environmental protection pursuant to those sections. Each day of violation is a separate offense."

92. The Director adopted Ohio Adm.Code 3745-1-02, 3745-1-04, 3745-1-51, and 3745-1-54 under R.C. 6111.041.

93. The Director adopted Ohio Adm.Code 3745-32-01, 3745-32-02, 3745-33-01, 3745-33-02, and 3745-39-04 under R.C. 6111.03.

94. The Director adopted Ohio Adm.Code 3745-38-01 and 3745-38-02 under R.C. 6111.03 and R.C. 6111.035.

95. Revised Code 6111.07(B) provides that "[t]he attorney general, upon written request of the director, shall bring an action for an injunction against any person violating or threatening to violate this chapter or violating or threatening to violate any order, rule, or condition of a permit issued or adopted by the director pursuant to this chapter."

96. Revised Code 6111.09(A) provides that "[a]ny person who violates [R.C. 6111.07] shall pay a civil penalty of not more than ten thousand dollars per day of violation," and the Ohio Attorney General shall commence an action against any person for any violation of R.C. 6111.07 upon the Ohio EPA Director's written request.

D. Allegations are incorporated in all Counts.

97. The allegations contained in Paragraphs 1 through 96 of this Complaint are incorporated into each and every Count of this Complaint as if fully restated therein.

III. CLAIMS FOR RELIEF

COUNT ONE

DEFENDANTS DISCHARGED POLLUTANTS TO WATERS OF THE STATE WITHOUT POINT SOURCE NPDES PERMITS

98. Revised Code 6111.04(A)(1) prohibits any person from causing or placing or causing to be placed any industrial wastes or other wastes, in a location where they cause pollution of any waters of the state without a valid, unexpired permit issued by the Director of Ohio EPA.

99. Ohio Adm.Code 3745-33-02(A) prohibits any person from discharging any pollutant or causing, permitting, or allowing a discharge of any pollutant without applying for and obtaining an Ohio NPDES permit in accordance with Ohio Adm.Code Chapter 3745-33.

100. Defendants, through their control, authority, direction, and responsibility, caused the point-source discharges to waters of the state as set forth below. To date, Defendants have failed to apply for and obtain point-source NPDES permits in violation of R.C. 6111.04(A)(1) and Ohio Adm.Code 3745-33-02(A).

101. On or before April 8, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 1,000 gallons of drilling fluids to waters of the state—i.e., wetlands located near the crossing of Indian Fork River, near Dawn and Miller Hill Roads, in Warren Township, Tuscarawas County (latitude 40° 31.06" North / longitude 81° 17.173" West).

102. [Paragraph intentionally blank].

103. On or before April 13, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately several million gallons of drilling fluids to waters of the state—i.e., wetlands identified as high quality Category 3, located adjacent to the Tuscarawas River in Navarre Township, Stark County (latitude 40° 40.270" North / longitude 81° 29.098" West). Upon information and belief, these drilling fluids included diesel fuel as an additive.

104. On or before April 14, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 50,000 gallons of drilling fluids to waters of the state—i.e., wetlands located near Amoy Pavonia Road, Mifflin Township, Richland County (latitude 40° 49' 44.4" North / longitude 82° 25' 4.1" West).

105. On or before April 22, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 200 gallons of drilling fluids to waters of the state—i.e., an unnamed ditch located at 4489 Prairie Lane Road, Wooster Township, Wayne County.

106. [Paragraph intentionally blank].

107. [Paragraph intentionally blank].

108. On or before July 2, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 5,000 gallons of drilling fluids to waters of the state—i.e., wetlands identified as Category 3, located adjacent to the Tuscarawas River in Navarre Township, Stark

County (latitude 40° 40.270" North / longitude 81° 29.098" West).

109. On or before July 3, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 2,500 gallons of drilling fluids to waters of the state—i.e., wetlands identified as Category 3, located adjacent to the Tuscarawas River in Navarre Township, Stark County (latitude 40° 40.270" North / longitude 81° 29.098" West).

110. On or before July 14, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 1,000 gallons of drilling fluids to waters of the state—i.e., wetlands located at 9236 Riverland Ave., SW, Bethlehem Township, Stark County.

111. [Paragraph intentionally blank].

112. [Paragraph intentionally blank].

113. On or before November 9, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 60 gallons of drilling fluids to waters of the state—i.e., wetlands located at or near Amoy Pavonia Road, Milton Township, Ashland County.

114. On or before November 14, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 30 gallons of drilling fluids to waters of the state—i.e., wetlands located at or near Amoy Pavonia Road, Milton Township, Ashland County.

115. On or before November 16, 2017 and continuing until a date to be determined, Defendants

Rover and Pretec discharged approximately 200 gallons of drilling fluids to waters of the state—i.e., Black Fork Mohican River at or near Amoy Pavonia Road, Milton Township, Ashland County.

116. On or before November 30, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 150 gallons of drilling fluids to waters of the state—i.e., wetlands located at or near Amoy Pavonia Road, Mifflin Township, Richland County (Latitude 40.829222° North / Longitude 82.417694° West).

117. On or before December 1, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 350 gallons of drilling fluids to waters of the state—i.e., wetlands located at or near Amoy Pavonia Road, Mifflin Township, Richland County (Latitude 40.829417° North / Longitude 82.417972° West).

118. On or before December 15, 2017 and continuing until a date to be determined, Defendants Rover and Pretec discharged approximately 1000 gallons of drilling fluids to waters of the state—i.e., an unnamed tributary of the Black Fork Mohican River located at or near Amoy Pavonia Road, Milton Township, Ashland County (Latitude 40.825917° North / Longitude 82.414025° West).

119. [Paragraph intentionally blank].

120. On or before February 3, 2018 and continuing until a date to be determined, Defendants Rover and Pretec, discharged approximately 30 gallons of drilling fluids to waters of the state—i.e., an unnamed tributary of the Ohio River located near State Route 7 in Shadyside, Belmont County

(Latitude 39.981911° North / Longitude 80.740635° West).

121. [Paragraph intentionally blank].

122. [Paragraph intentionally blank].

123. [Paragraph intentionally blank].

124. The acts or omissions alleged in this Count constitute violations of R.C. 6111.04(A) and Ohio Adm.Code 3745-33-02(A), which constitute violations of R.C. 6111.07(A), for which Defendants are jointly and severally liable and subject to injunctive relief pursuant to R.C. 6111.07(B) and for which Defendants are jointly and severally liable to pay to the State of Ohio a civil penalty up to ten thousand dollars ($10,000.00) for each day of each violation including each day subsequent to filing this Complaint under R.C. 6111.09.

COUNT TWO

ROVER FAILED TO OBTAIN A GENERAL STORM WATER PERMIT FOR ITS STORM WATER DISCHARGES

125. Revised Code 6111.04(A)(1) prohibits any person from causing or placing or causing to be placed any industrial wastes or other wastes, in a location where they cause pollution of any waters of the state without a valid, unexpired permit issued by the Director of Ohio EPA.

126. Ohio Adm.Code 3745-38-02(A), issued pursuant to R.C. 6111.035, prohibits any person from discharging any pollutant or causing, permitting, or allowing a discharge of any pollutant from a point source without applying for and obtaining an individual NPDES permit in accordance with Ohio

Adm.Code Chapter 3745-33 or obtaining authorization to discharge under a general NPDES permit under Ohio Adm.Code Chapter 3745-38.

127. At least as early as May 12, 2017, Ohio EPA notified Defendant Rover that its previous storm water discharges contributed to violations of Ohio's water quality standards including but not limited to Ohio Adm.Code 3745-1-04(A) and/or (C), and as a result, the storm water permit exemption for oil and gas operations in Ohio Adm.Code 3745-39-04(A)(2)(b) no longer applied. Consequently, Defendant Rover was required to obtain coverage under an Ohio NPDES permit to regulate its storm water discharges pursuant to Ohio Adm.Code 3745-39-04(C)(1)(c)(iii).

128. From May 12, 2017 to present, Rover has failed to obtain coverage under Ohio EPA's Construction Storm Water Permit or Industrial Storm Water Permit in violation of R.C. 6111.04(A)(1), Ohio Adm.Code 3745-38-02(A) and Ohio Adm.Code 3745-39-04(C)(1)(c)(iii).

129. The acts or omissions alleged in this Count constitute violations of R.C. 6111.04(A), Ohio Adm.Code 3745-38-02(A) and Ohio Adm.Code 3745-39-04, which constitute violations of R.C. 6111.07(A), for which Defendant Rover is liable and subject to injunctive relief pursuant to R.C. 6111.07(B) and for which Defendant Rover is liable to pay the State of Ohio a civil penalty up to ten thousand dollars ($10,000.00) for each day of each violation including each day subsequent to filing this Complaint under R.C. 6111.09.

COUNT THREE

DEFENDANTS VIOLATED OHIO'S GENERAL WATER QUALITY STANDARDS

130. Ohio Administrative Code 3745-1-04, adopted pursuant to R.C. 6111.041, requires, in pertinent part, that all surface waters of the state shall be free from: (A) suspended solids or other substances that enter the waters as a result of human activity that will adversely affect aquatic life; (B) 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 of the waters; and/or (C) 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.

131. Upon information and belief, each of the Defendants' unpermitted drilling fluid discharges into waters of the state, as detailed in Paragraph 101, Paragraphs 103 through 105, Paragraphs 108 through 110, Paragraphs 113 through 118, and Paragraph 120 of this Complaint was severe enough to violate Ohio's general water quality standards as set forth in Ohio Adm.Code 3745-1-04(A), 3745-1-04(B), and/or 3745-1-04(C).

132. Upon information and belief, each of Defendant Rover's unpermitted storm water discharges into waters of the state, as detailed in Paragraphs 68 and 70 of this Complaint was severe enough to violate Ohio's general water quality standards as set forth in Ohio Adm.Code 3745-1-04(A), 3745-1-04(B), and/or 3745-1-04(C).

133. The acts or omissions alleged in this Count constitute violations of Ohio Adm.Code 3745-1-04, which constitute violations of R.C. 6111.07(A), for which Defendants are jointly and severally liable and subject to injunctive relief pursuant to R.C. 6111.07(B) and for which Defendants are jointly and severally liable to pay the State of Ohio a civil penalty up to ten thousand dollars ($10,000.00) for each day of each violation including each day subsequent to filing this Complaint under R.C. 6111.09.

COUNT FOUR

DEFENDANTS VIOLATED OHIO'S WETLAND WATER QUALITY STANDARDS

134. Specific to waters of the state that are wetlands, Ohio Adm.Code 3745-1-51(A), adopted pursuant to R.C. 6111.041, requires the protection of the hydrology necessary to support the biological and physical characteristics naturally present in wetlands to guard against significant adverse impacts on: (1) water currents, erosion or sedimentation patterns; (2) natural water temperature variations; (3) chemical, nutrient and dissolved oxygen regimes of the wetland; (4) the movement of aquatic fauna; (5) the pH of the wetland; and (6) water levels or elevations, including those resulting from ground water recharge and discharge.

135. Also specific to wetlands, Ohio Adm.Code 3745-1-51(B)(1), adopted pursuant to R.C. 6111.041, requires the protection of water quality necessary to support existing habitats and the populations of wetland flora and fauna shall be protected to prevent significant adverse impacts on: (a) food supplies for fish and wildlife; (b) reproductive and nursery areas; and (c) dispersal corridors.

136. Upon information and belief, Defendants' unpermitted drilling fluid discharges into wetlands, as detailed in Paragraph 101, Paragraphs 103 through 104, Paragraphs 108 through 110, Paragraphs 113 through 114, and Paragraphs 116 through 117 of this Complaint, were severe enough to violate Ohio's wetland water quality standards in Ohio Adm.Code 3745-1-51(A) and/or 3745-1-51(B)(1).

137. Upon information and belief, Defendant Rover's unpermitted storm water discharges into wetlands, as detailed in Paragraph 68(k) of this Complaint were severe enough to violate Ohio's wetland water quality standards in Ohio Adm.Code 3745-1-51(A) and/or 3745-1-51(B)(1).

138. The acts or omissions alleged in this Count constitute violations of Ohio Adm.Code 3745-1-51, which constitute violations of R.C. 6111.07(A), for which Defendants are jointly and severally liable and subject to injunctive relief pursuant to R.C. 6111.07(B) and for which Defendants are jointly and severally liable to pay the State of Ohio a civil penalty up to ten thousand dollars ($10,000.00) for each day of each violation including each day subsequent to filing this Complaint under R.C. 6111.09.

COUNT FIVE

ROVER VIOLATED THE DIRECTOR'S ORDERS

139. The Director's Orders (Attachment 3, ¶ 8), issued under R.C. 6111.03, require Rover to submit a notice of intent to obtain coverage under Ohio EPA's Construction Storm Water Permit by July 14, 2017.

140. To date, Defendant Rover has failed to obtain coverage under the Construction Storm Water

Permit or even submit a notice of intent to obtain coverage under the Construction Storm Water Permit.

141. The acts alleged in this count constitute violations of the Director's Orders, which constitute violations of R.C. 6111.07(A), for which Defendant Rover is liable and subject to injunctive relief under R.C. 6111.07(B), and Defendant Rover is liable to pay civil penalties up to ten thousand dollars ($10,000.00) for each day of each violation including each day subsequent to filing this Complaint under R.C. 6111.09.

COUNT SIX

ROVER VIOLATED THE HYDROSTATIC PERMIT

Rover's Effluent Limit Violations – Suspended Solids, Oil and Grease, and Residual Chlorine

142. Table 001 (Part III. A.1.) and Part V. A. of Defendant Rover's Hydrostatic Permit Nos. 0GH00218, 2GH00035, 2GH00036, and 3GH00071 require Defendant Rover to comply with a total-suspended-solids effluent limit of 45 milligram per liter ("mg/L") for a daily maximum and 30 mg/L for monthly average. Attachment 4 p. 6, 10.

(a) On or about August 5, 2017, Defendant Rover violated these limits in Permit Nos. 2GH00035 and/or 2GH00036 by discharging effluent with suspended solids measuring 60 mg/L from a segment of its operation referred to as Spread C, Line A into Honey Creek in Seneca County.

(b) On or about August 19, 2017, Defendant Rover violated these limits in Permit No.

2GH00035 by discharging effluent with suspended solids measuring 87 mg/L from a segment of its operation referred to as Spread C, Line A into Honey Creek in Seneca County.

(c) On or about August 30, 2017, Defendant Rover violated these limits in Permit No. 0GH00218 by discharging effluent with suspended solids measuring 228 mg/L from a segment of its operation referred to as the Clarington Lateral into Wheeling Creek in Belmont County.

(d) On or about October 21, 2017, Defendant Rover violated these limits in Permit No. 3GH00071 by discharging effluent with suspended solids measuring 127 mg/L and with a suspended-solids monthly average for October 2017 measuring 81 mg/L from Outfall 006 to Muddy Fork located in Ashland County.

143. Table 001 (Part III. A.1.) and Part V. A. of Defendant Rover's Hydrostatic Permits No. 2GH00035 and/or 2GH00036 also require Defendant Rover to comply with an oil-and-grease effluent limit of 10 mg/L. Attachment 4 p. 6, 10.

(a) On or about July 29, 2017, Defendant Rover violated this limit in Permit Nos. 2GH00035 and/or 2GH00036 by discharging effluent with oil and grease measuring 30.5 mg/L from a segment of its operation referred to as Spread D, Line A into the South Fork, Portage River in Wood County.

144. Table 001 (Part III. A.1.) and Part V.A. of Defendant Rover's Hydrostatic Permit No. 0GH00218 requires Defendant Rover to comply with a total residual chlorine limit of 0.019 mg/L. Attachment 4 p. 6, 10.

(a) On or about October 21, 2017, Defendant Rover violated this limit in Permit No. 0GH00218 by discharging effluent with total residual chlorine measuring 0.09 mg/L from Outfall 019 to Sandy Creek located in Tuscarawas County.

Rover's Failure to Report Effluent Limit Violations

145. Part V. S. 1.a. and Part V. A. of Defendant Rover's Hydrostatic Permit Nos. 0GH00218, 2GH00035, 2GH00036, and 3GH00071 require Defendant Rover to report noncompliance as a result of any violation of a daily maximum discharge limit for pollutants including suspended solids and oil and grease within 24 hours of discovery by e-mail or telephone. Attachment 4 p. 10, 18.

(a) At least through on or about August 31, 2017, Defendant Rover failed to report its violations of maximum discharge limits for suspended solids (discharged on or about August 5, 2017 and on or about August 19, 2017 into Honey Creek in Seneca County) and for oil and grease (discharged on or about July 29, 2017 into South Fork, Portage River in Wood County) in violation of Permit Nos. 2GH00035 and/or 2GH00036.

(b) At least through on or about January 23, 2018, Defendant Rover failed to report its

violation of maximum discharge limits for suspended solids (discharged on or about October 21, 2017 into Muddy Fork in Ashland County) in violation of Permit No. 3GH00071.

(c) At least through on or about January 23, 2018, Defendant Rover failed to report its violation of maximum discharge limits for total residual chlorine (discharged on or about October 21, 2017 into Sandy Creek located in Tuscarawas County) in violation of Permit No. 0GH00218.

Rover's Failure to Monitor for All Parameters – Iron and pH

146. Table 001 (Part III. A.1.) and Part V. A. of Defendant Rover's Hydrostatic Permit Nos. 0GH00217, 0GH00218, 3GH00071, and 3GH00072 require monitoring of parameters including iron and pH. Attachment 4 p. 6, 10.

(a) On or about July 12, 2017, Defendant Rover discharged effluent including iron from a segment of its operation referred to as Spread B, Line A into Killbuck Creek in Wayne County, regulated by Hydrostatic Permit Nos. 3GH00071 and/or 3GH00072. Defendant Rover failed to produce a sample result for iron as required for this discharge.

(b) On or about July 29, 2017, Defendant Rover discharged effluent and failed to produce a sample result of pH as required for the discharge from a segment of its operation referred to as Spread 1, Line A into Clearfork Creek in Harrison County,

regulated by Hydrostatic Permit Nos. 0GH00217 and/or 0GH00218.

(c) On or about August 1, 2017, Defendant Rover discharged effluent including iron from a segment of its operation referred to as Spread B, Line B into Muddy Fork in Wayne County, regulated by Hydrostatic Permit Nos. 3GH00071 and/or 3GH00072. Defendant Rover failed to produce a sample result for iron as required for this discharge.

(d) On or about August 4, 2017, Defendant Rover discharged effluent including iron from a segment of its operation referred to as Spread B, Line A into Muddy Fork in Wayne County, regulated by Hydrostatic Permit Nos. 3GH00071 and/or 3GH00071. Defendant Rover failed to produce a sample result for iron as required for this discharge.

Rover's Failure to Report or Properly Report Discharge Information

147. Part V. L.1, Part V. L.3. and/or Part V. L.4. and Part V. A. of Defendant Rover's Hydrostatic Permit Nos. 0GH00218, 3GH00071, and 3GH00072 require Defendant Rover to mail signed, complete, and accurate discharge monitoring reports to Ohio EPA by the 20th day of the month following the month of interest on forms provided by Ohio EPA. Attachment 4 p. 10, 15, 16.

(a) Before on or about August 31, 2017, Defendant Rover failed to submit discharge monitoring reports for a discharge that occurred on or about July 27, 2017 from Spread A, Line A into Sugar Creek in Stark

County as required by Hydrostatic Permit Nos. 3GH00071 and/or 3GH00072.

(b) On or about September 15, 2017, Defendant Rover submitted a discharge monthly report to Ohio EPA and indicated that "no discharge" occurred. Defendant Rover failed to submit the required sample analysis for the discharge that occurred on or about August 30, 2017 from a segment of its operation referred to as the Clarington Lateral into Wheeling Creek in Belmont County as required by Hydrostatic Permit No. 0GH00218. On November 6, 2017, Defendant Rover submitted the August 2017 discharge monthly report with the required information.

Rover's Failure to Properly Sample – pH, Dissolved Oxygen, and Chlorine

148. Part V. M. and Part V. A. of Defendant Rover's Hydrostatic Permit Nos. 0GH00217 and 0GH00218 require Defendant Rover to sample parameters in accordance with 40 C.F.R. 136, "Test Procedures For The Analysis of Pollutants," which in turn requires the sampling of field data for pH, dissolved oxygen, and chlorine immediately within 15 minutes of collection. 40 C.F.R. 136, Table II: Required Containers, Preservation Techniques, and Holding Times. Attachment 4 p. 10, 16.

(a) Until on or about August 31, 2017, Defendant Rover failed to sample pH, dissolved oxygen, and chlorine field data immediately within 15 minutes of collection and instead performed laboratory analysis on these parameters.

* * *

149. The acts or omissions alleged in this Count constitute violations of Rover's Hydrostatic Permit Nos. 0GH00217, 0GH00218, 2GH00035, 2GH00036, 3GH00071, 3GH00072, which constitute violations of R.C. 6111.07(A), for which Defendant Rover is liable and subject to injunctive relief pursuant to R.C. 6111.07(B) and for which Defendant Rover is liable to pay to the State of Ohio a civil penalty up to ten thousand dollars ($10,000.00) for each day of each violation including each day subsequent to filing this Complaint under R.C. 6111.09.

COUNT SEVEN

[Count intentionally blank].

PRAYER FOR RELIEF

THEREFORE, Plaintiff, State of Ohio, respectfully requests that this Court:

A. Permanently enjoin Defendants to comply with R.C. Chapter 6111 and the rules adopted thereunder;

B. Permanently enjoin Defendants from discharging any pollutant, other wastes, or industrial wastes into wetlands and other waters of the state except in compliance with R.C. Chapter 6111, the rules adopted thereunder, and any necessary permits and/or 401 certifications issued pursuant to R.C. Chapter 6111 or rules adopted thereunder;

C. Permanently enjoin Defendant Rover to submit to Ohio EPA a written notice of intent to obtain coverage under the Construction Storm Water Permit or the Industrial Storm Water Permit;

D. Permanently enjoin Defendant Rover to obtain coverage and comply with the Construction Storm Water Permit or the Industrial Storm Water Permit;

E. Permanently enjoin Defendant Rover to comply with the Ohio EPA-approved plans as named below:

(a) "Release Prevention and Emergency Response Contingency Plan";

(b) "Material Removal Plan-Oster and Beach City Quarries (version 3)"—Rover's Industrial Waste Disposal Plan;

(c) "Horizontal Directional Drill (HDD) Sampling Plan";

(d) "Tuscarawas River Wetland Restoration Plan";

(e) "Stark County Sample and Analysis Plan";

(f) "Stark County Plan – Ground Water Monitoring Well Installation Work Plan Supplement";

(g) "Aqua Massillon Plan";

(h) "Work Plan for Installation of Monitoring Wells: Aqua Massillon (Oster Sand and Disposal Pit) and Quarry Plan (Beach City Quarry)";

(i) "Quarry Plan"; and

(j) "Storm Water Pollution Prevention Plan."

F. Permanently enjoin Defendant Rover to perform ground water assessment and long term monitoring following any release of drilling fluids to

groundwater and implement corrective measures if sampling shows that ground water quality has been impacted.

G. Permanently enjoin Defendant Rover to provide relief to nearby residents, Aqua Massillon, or the City of Canton, as applicable, if sampling shows that Defendant Rover is contaminating any water supply well downgradient, including drilling new drinking water wells, or siting and development of a new drinking water well field including permitting and installation of drinking water supply wells in the new field, taking into account the costs of design, such that a sustainable or adequate, and uncontaminated source of ground water is assured.

H. Permanently enjoin Defendant Rover to comply with the Hydrostatic Permit Nos. 0GH00217, 0GH00218, 3GH00071, 3GH00072, 2GH00035, and 2GH00036.

I. Order Defendants, pursuant to R.C. 6111.09, to pay, jointly and severally, civil penalties in an amount of ten thousand dollars ($10,000.00) for each day of each violation;

J. Order Defendants to reimburse Ohio EPA for all costs incurred;

K. Order Defendants to pay all costs and fees for this action, including attorney fees assessed by the Office of the Ohio Attorney General;

L. Retain jurisdiction of this suit for the purpose of making any order or decree which it may deem necessary at any time to carry out its judgment; and

M. Grant such other relief as may be just.

Respectfully submitted,

DAVE YOST
OHIO ATTORNEY GENERAL

s/ Aaron S. Farmer

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APPENDIX H

15 U.S. Code § 717b provides, in relevant part:

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

33 U.S. Code § 1341 provides, in relevant part:

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, 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 or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a

reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

33 U.S. Code § 1342 provides, in relevant part:

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect

for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its

jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to

the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which

such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

Ohio Revised Code § 6111.30 provides, in relevant part:

(A) Applications for a section 401 water quality certification required under division (O) of section 6111.03 of the Revised Code shall be submitted on forms provided by the director of environmental protection and shall include all information required on those forms as well as all of the following:

(1) A copy of a letter from the United States army corps of engineers documenting its jurisdiction over the wetlands, streams, or other waters of the state that are the subject of the section 401 water quality certification application;

(2) If the project involves impacts to a wetland, a wetland characterization analysis consistent with the Ohio rapid assessment method;

(3) If the project involves a stream for which a specific aquatic life use designation has not been made, data sufficient to determine the existing aquatic life use;

(4) A specific and detailed mitigation proposal, including the location and proposed real estate instrument or other available mechanism for protecting the property long term;

(5) Applicable fees;

(6) Site photographs;

(7) Adequate documentation confirming that the applicant has requested comments from the department of natural resources and the United States fish and wildlife service regarding

threatened and endangered species, including the presence or absence of critical habitat;

(8) Descriptions, schematics, and appropriate economic information concerning the applicant's preferred alternative, nondegradation alternatives, and minimum degradation alternatives for the design and operation of the project;

(9) The applicant's investigation report of the waters of the United States in support of a section 404 permit application concerning the project;

(10) A copy of the United States army corps of engineers' public notice regarding the section 404 permit application concerning the project.