



State of Ohio Environmental Protection Agency

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April 11, 2002

Mr. Robert W. Barnes  
Barnes Nursery Inc.  
3511 W. Cleveland Road  
Huron, Ohio 44839

**CERTIFIED MAIL**

RE: Erie County, City of Huron  
Proposed Denial of Section 401 Certification to approve construction of a water storage facility in a Category 3 wetland which has resulted in dredging and filling of 4.97 acres of Category 3 wetland, P.N.#(B)2000-02170(1)

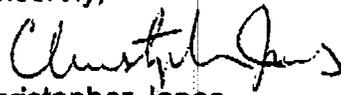
Issuance Date: April 11, 2002  
Effective Date: May 11, 2002

Dear Mr. Barnes:

Pursuant to Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. Section 1341, Ohio Revised Code Chapters 119 and 6111 and Ohio Administrative Code (OAC) Chapters 3745-1 and 3745-32, and other applicable provisions of state and federal law, I hereby propose to deny certification of the project described above for the reasons specified in Attachment A.

Under Ohio Revised Code Chapters 119 and 6111, this action of the director will become final on the effective date indicated unless you or an objector request an adjudication hearing. As provided by Ohio Revised Code Section 119.07 and 3745.07, a request for an adjudication hearing must be received by Ohio EPA within thirty (30) days of the date of issuance of this action. At an adjudication hearing you may appear in person, or be represented by your attorney, or by such representative as is permitted to practice before this Agency, or you may present your position, arguments, or contentions in writing. At the hearing you may present evidence and examine witnesses appearing against you. The request for a hearing shall be in writing and shall specify the issues of fact and law to be contested. Requests for hearing shall be sent to the Hearing Clerk, Ohio EPA, P.O. Box 1049, Columbus, Ohio 43216-1049.

Sincerely,

  
Christopher Jones  
Director

cc: Michael Montone, Buffalo District Corps of Engineers  
Dave Schulenberg, U.S. EPA, Region 5  
Mary Knapp, U.S. Fish & Wildlife Service  
Kim Baker, ODNR, Environmental Program  
Laura Fay, Ohio EPA, 401 Unit

Bob Taft, Governor  
Maureen O'Connor, Lieutenant Governor  
Christopher Jones, Director

**ATTACHMENT A**  
**Specific Reasons for Proposed Denial**

1. **OAC Rule 3745-32-05 (A) states the director shall not issue a section 401 water quality certification unless he determines that the applicant has demonstrated that the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state will not prevent or interfere with the attainment or maintenance of applicable water quality standards.**

The applicant has failed to demonstrate that the discharge of fill material to wetlands on the site, or the creation of any obstruction or alteration in waters of the state would not prevent or interfere with the attainment of applicable water quality standards including, but not limited to, the narrative and chemical standards for wetlands in OAC Rules 3745-1-51 and 3745-1-52 or other applicable water quality standards.

2. **OAC Rule 3745-32-05 (B) provides that notwithstanding an applicant's demonstration of the criteria in paragraph (A) of rule 3745-32-05 of the Administrative Code, the director may deny an application for a section 401 water quality certification if the director concludes that the discharge of dredged or fill material or obstructions or alterations in waters if the project will result in adverse long or short term impacts to water quality.**

The discharge of fill material or obstructions or alterations in waters of the state will result in adverse long or short term impacts to water quality including but not limited to the narrative and chemical standards for wetlands in OAC Rules 3745-1-51 and 3745-1-52 or other applicable water quality standards.

3. **OAC Rule 3745-1-05(C)(6) states that in addition to the requirements of OAC Rules 3745-1-50 through 3745-1-54 the Director may apply requirements of OAC Rule 3745-1-05(C)(6)(a) through (C)(6)(f) and (C)(6)(k) to (C)(6)(m) when making determinations on whether to allow a lowering of water quality.**

The Director has considered the following and determined that considered separately or together, denial of the application is warranted:

- a. **OAC Rule 3745-1-05(C)(6)(a). The magnitude of the proposed lowering of water quality including the size and areal extent of the project within the Sheldon's Marsh wetland system, actual and potential impacts on water quality in the marsh including changes in the natural hydrology, natural plant and animal communities, natural chemistry, ability of invasive species to expand or colonize the marsh;**

- b. OAC Rule 3745-1-05(C)(6)(b). Actual and potential impacts on aquatic life and wildlife including threatened or endangered species, important commercial or recreational sport fish species, other individual species and the overall aquatic community structure and function of barrier-beach lagoon coastal marsh system;
- c. OAC Rule 3745-1-05(C)(6)(c). The overall quality and value of the Sheldons Marsh, one of the last remaining hydrologically unrestricted barrier-beach lagoon coastal marsh systems in the State of Ohio;
- d. OAC Rule 3745-1-05(C)(6)(d). The overall water quality within Sheldons Marsh State Nature Preserve as specified in, but not limited to, the narrative and chemical standards for wetlands in OAC Rules 3745-1-51 and 3745-1-52 or other applicable water quality standards;
- e. OAC rule 3745-1-05(C)(6)(e). The effects of lower water quality on the economic value of the water body for recreation or tourism in Sheldons' Marsh;
- f. OAC Rule 3745-1-05(C)(6)(f). The extent to which Sheldons Marsh is a unique and rare wetland resource within the State of Ohio as one of the last remaining barrier-beach lagoon Lake Erie Coastal Marshes in the State of Ohio;
- g. OAC Rule 3745-1-05(C)(6)(k). The reliability of the preferred alternative including but not limited to the possibility of recurring operational and maintenance difficulties, including regular maintenance dredging and equipment access along the spoil piles north of the dredged channel necessary to keep the channel from silting in, that would lead to increased degradation;
- h. OAC Rule 3745-1-05(C)(6)(l). The fact that the project will result in no or incremental economic gain, jobs, and tax revenues since it does not result in any changes to the Applicant's existing nursery operation at the site which has operated there for several decades and has used Lake Erie water drawn from Sheldons Marsh in both low and high water years;
- i. OAC Rule 3745-1-05(C)(6)(m). The fact that the project as proposed in the application requires the dredging of a channel across the dedicated state nature preserve as a critical project component and justification and this violates ORC Section 1517.06 which prohibits such private economic activity on state nature preserves without the a finding of an imperative and unavoidable public necessity and the approval of the Director of the Department of Natural Resources and the Governor of the State of Ohio, and the fact that such approval is unlikely to be obtained since the project does

not present an unavoidable public necessity.

4. **Ohio Administrative Code (OAC) 3745-1-54(B)(1) states that the wetland designated use shall be maintained and protected such that degradation of surface waters through direct, indirect, or cumulative impacts does not result in the net loss of wetland acreage or function in accordance with paragraphs (D) and (E) of this rule.**

The Applicant has failed to demonstrate that the wetland designated use will be maintained and protected and that degradation of Sheldons Marsh through direct, indirect, or cumulative impacts will not result in a net loss of wetland acreage or function. Applicant's project will result in the permanent conversion of wetland habitat including emergent marsh and mudflats, in a rare wetland type replacing this with a water storage channel and upland spoil piles. The Applicant has not demonstrated that the converted acreage and lost functions will be maintained, protected, or replaced. The Applicant has not demonstrated that there will not be actual or reasonably foreseeable degradation to the Sheldons Marsh ecosystem from direct, indirect, or cumulative impacts.

5. **OAC Rule 3745-1-54(B)(3) provides that the Director may consider the regional significance of the functions a wetland performs when determining whether degradation of the wetlands can be authorized.**

Sheldons Marsh is a unique and rare wetland resource within the State of Ohio, as one of the last remaining barrier-beach lagoon Lake Erie Coastal Marshes in the State of Ohio. It has functions that are significant regionally, statewide, and internationally, including but not limited to migratory waterfowl and neotropical songbird breeding and migratory habitat, excellent foraging habitat for the piping plover and a myriad of other birds and waterfowl, habitat for threatened and endangered plant and animal species, intact natural hydrologic and biogeochemical regimes, and habitat for characteristic Lake Erie coastal marsh plant and animal communities. It is an irreplaceable resource in the State of Ohio and the actual and/or potential degradation proposed by this project cannot be authorized.

6. **OAC Rule 3745-1-54(B)(4)(b) provides that the Director may consider the anticipated impact of the proposed lowering of water quality on threatened or endangered species where the wetlands contain critical habitat for an endangered or threatened species or a permanent or seasonal presence of such species.**

Sheldons marsh contains numerous endangered or threatened species on a permanent or seasonal basis. The project as designed permanently converts mudflat areas, which is excellent feeding habitat for the piping plover and other birds, including the bald eagle, to open water channel and spoil pile. Per the United States Fish and Wildlife "the bald eagle, a Federal threatened and State endangered species is notoriously shy and generally avoids areas that are disturbed by humans. Any modification of this habitat could

negatively affect the piping plover, bald eagle and other birds, and could reduce the value of the habitat for these species." The project provides an invasion pathway for invasive plants and animals to colonize the marsh and alters the natural drainage pathways in the marsh by diverting and retaining water in the storage channel. Because of actual or potential impacts on threatened or endangered species, the project cannot be authorized.

7. **OAC Rule 3745-1-54(D)(1)(c)(i) states that no lowering of water quality shall be allowed, unless the applicant demonstrates to the satisfaction of the director that there is no practicable alternative, based on technical, social, and economic criteria, which would have less adverse impact on the wetland ecosystem, so long as the alternative does not have other significant adverse environmental impacts as determined through an off-site and on-site alternatives analysis. Less damaging upland alternatives are presumed to be available for Category 3 wetlands, unless clearly demonstrated otherwise.**

The Applicant has not demonstrated to the satisfaction of the director that there is no practicable alternative to the project, nor has the Applicant rebutted the presumption that such upland alternatives are in fact available. "Practicable" is defined in OAC Rule 3745-1-50(GG) as "...available and capable of being done after taking into consideration cost, existing technology and logistics in light of the overall and basic project purposes, (1) "Available" means an alternative which is obtainable for the purpose of the project; (2) "Basic project purpose" means the generic function of the project; and (3) "Overall project purpose" means the basic project purpose plus consideration of costs and technical and logistical feasibility."

The project purpose is to provide water to Applicant's nursery operations in all years and especially in years when Lake Erie water levels are low. The Applicant has an existing nursery operation which has operated at this site for several decades and the Applicant has chosen to rely upon a naturally variable water source. Based on the recent construction of a pump access channel and new pumphouse, the Applicant has demonstrated that it has the economic, technical, and logistical resources to implement significant water supply activities. The Applicant has not demonstrated that upland alternatives including, but not limited, to permanent water conservation measures, temporary water conservation measures during low water years, upland water storage facilities, county water supplies, ground water wells, and upland pipelines are not practicable, or that such upland alternatives are insufficient to offset temporary water shortfalls in certain years or certain days when insufficient water cannot be withdrawn from Applicant's existing pumphouse and water channel.

8. **OAC Rule 3745-1-54(D)(1)(c)(ii) states that appropriate and practicable steps have been taken to minimize potential adverse impacts on the wetland ecosystem and that for Category 3 wetlands all potential adverse impacts foreseeably caused by the project shall be minimized.**

The Applicant has not demonstrated that appropriate and practicable steps have been taken to minimize potential adverse impacts on the wetland ecosystem including, but not limited to, the use of buried pipelines within the wetland rather than an open dredged channel and spoil piles and the foreseeable colonization of the channel and spoil pile by invasive species. In addition, the project proposed by the Applicant is not sensitive to the natural features of Sheldons Marsh as an intact barrier-beach lagoon wetland system.

9. **OAC Rules 3745-1-54(D)(1)(c) and 3745-1-54(D)(1)(c)(iii) state that for impacts to Category 3 wetlands that the wetland designated use shall be maintained and protected...and no lowering of water quality shall be allowed, unless it is demonstrated to the satisfaction of the Director that the proposed activity is necessary to meet a demonstrated public need, as defined in rule 3745-1-50 of the Ohio Administrative Code (OAC).**

The Applicant has failed to demonstrate that the project (the construction of a water storage facility for nursery irrigation) meets a demonstrated public need. Public need is defined in OAC Rule 3745-1-50(II) as "...an activity or project that provides important tangible and intangible gains to society, that satisfies the expressed or observed needs of the public where accrued benefits significantly outweigh reasonably foreseeable detriments." In order to justify impacts to a category 3 wetland, an applicant must demonstrate how the benefits accrue to society, rather than just satisfying gains in the area in which the project is located. The construction of a water storage facility in a Category 3 wetland to supply irrigation water to a nursery does not constitute "public need" as that term is defined in OAC Rule 3745-1-50(II).

10. **OAC Rule 3745-1-05(C)(6) and 3745-1-54(D)(1)(c)(iv) state that for approval the applicant must demonstrate to the satisfaction of the director that the lowering of water quality is necessary to accommodate important social or economic development in the area in which the water body is located.**

The Applicant has not demonstrated that the lowering of water quality is necessary to accommodate important social or economic development in the area in which the water body is located. The applicant has not demonstrated that the economic development from the construction of a water storage facility in a Category 3 wetland in order to assure the Applicant has access to Lake Erie water during low water years is "important." The Applicant has an existing nursery operation which has operated for several decades at this location. The Applicant has removed water from Lake Erie throughout this period and has chosen to rely upon a water source that is naturally variable with high and low water years. The Applicant has not demonstrated that the construction of a water storage facility in a Category 3 wetland will result in any gain, or in more than incremental economic gain, in the area in which the Category 3 wetland is located. In addition, assuming there is economic gain in the area in which the Category 3 wetland is located, the Applicant has not demonstrated that the lowering of water quality is "necessary" to accommodate the economic development since other options are available for ensuring sufficient water in

lower water years including but not limited to water conservation measures, upland water facilities, county water supplies, upland pipelines, etc.

- 11 **OAC Rule 3745-1-54(D)(1)(c)(vi) states that no lowering of water quality shall be allowed, unless it is demonstrated to the satisfaction of the Director that the wetland is not scarce regionally and/or statewide, or if the wetland is scarce regionally or statewide, the project will cause only a short term disturbance of water quality that will not cause long-term detrimental effects.**

Sheldons Marsh is a hydrologically unrestricted barrier-beach lagoon Lake Erie coastal marsh and is one of the scarcest types of wetland in the State of Ohio. The project as proposed will permanently alter the natural configuration and drainage pathways of the marsh and Applicant has not demonstrated that the impacts are short term or that the impacts will not cause long-term detrimental effects.

12. **OAC Rule 3745-1-54(D)(1)(c)(vii) states that compensatory mitigation for will be performed in accordance with OAC Rule 3745-1-54(E) which requires that mitigation be on-site, in-kind, of an equal or higher category as the wetland impacted, and at the ratios specified in the rule, unless the Applicant makes demonstrations in accordance with the rule that alternatives are acceptable.**

The Applicant has not provided compensatory mitigation in accordance with OAC Rule 3745-1-54(E). Specifically, the Applicant has failed to offer mitigation that complied with the requirements in OAC Rule 3745-1-54(E) for their proposed impacts in both their 401 application and their revised application. The Applicant's proposal to preserve 26.05 acres of wetlands does not comply with the requirements of OAC Rule 3745-1-54(E). Per 3745-1-54(E)2 wetland restoration shall be the form of compensatory mitigation unless the applicant can demonstrate that wetland restoration is impractical. Per 3745-1-54(E)(1) the applicant must also be able to demonstrate that appropriate management measures are or will be in place to restrict harmful activities that may jeopardize the mitigation wetland. The continued existence and operation of the water storage facility, dike and water intake channel between Sheldons Marsh and the proposed preserved wetland will not restrict harmful activities.