

IN THE SUPREME COURT OF OHIO

Trans Rail America, Inc.

Appellee,

vs.

James J. Enyeart, M.D.,  
Commissioner, Trumbull County  
Health Department

Appellant.

Case No. 2008-

08-0359

On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District

Appeal Nos. 07AP-273 and  
07AP-284

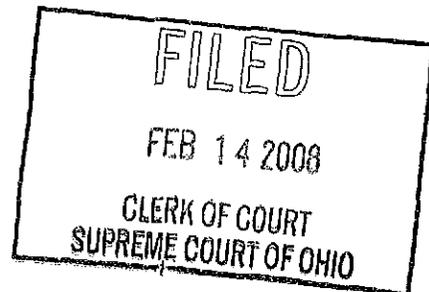
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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,  
JAMES J. ENYEART, M.D., COMMISSIONER  
TRUMBULL COUNTY HEALTH DEPARTMENT

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**EXPLANATION OF WHY THIS CASE IS A CASE  
OF PUBLIC AND GREAT GENERAL INTEREST**

This case presents a public and great general interest as the Tenth Appellate District's ruling undermines the statutory scheme devised by the legislature regarding, among other matters, the issuance of environmental licenses and permits. In its ruling, the Tenth Appellate District delegated the administrative agency's authority to process license applications to the administrative review tribunal. As the dissenting opinion by Judge French correctly notes, this ruling is a dangerous precedent that can affect matters far beyond the case at bar.

**A. The Appellate Court's ruling unjustly expands the ERAC's jurisdictional authority beyond that enumerated in the statute.**

The Environmental Review Appeals Commission ("ERAC") is a statutorily created administrative review tribunal with jurisdiction specifically enumerated to encompass appeals from the "act" or "actions" of the director of Ohio EPA and the local boards of health. R.C. 3745.04. The appellate court's ruling expands ERAC's jurisdictional authority beyond that enumerated in statute. This expansion of jurisdiction is in derogation of decades of legal precedent and the plain language of the statute. See *U.S. Tech. Corp. v. Korleski*, 2007 Ohio 5922 (Nov. 6, 2007); *Dayton Power and Light Co. v. Schregardus* (1997) 123 Ohio App.3d 476; *Youngstown Sheet and Tube Co. v. Maynard* (1984), 22 Ohio App.3d 3; *General Motors Corp. v. McAvoy* (1980), 63 Ohio St.2d 232; *Aristech Chem Corp. v. Shank* (July 25, 1989), EBR No. 441977; *Inorganic Recycling of Ohio, Inc. v. Shank* (Nov. 30, 1989), EBR No. 252011.

Bestowing ERAC with the authority to review actions that are not final interferes with local boards of health and their ability to effectively perform their function. Specifically at issue in this case is the right of a local board of health to issue or deny a construction and demolition debris

landfill license based upon a complete application, containing all of the information required for the board of health to make an informed and correct final decision or “action.” Because the board’s consideration as to whether the application is complete is part of the application process, the completeness consideration is not a final, conclusive decision by the board of health. The applicant has the opportunity to supplement its application and then receive a final decision, i.e., issuance or denial of its permit. The board of health’s intermediate step in considering whether the application is complete is not reviewable to ERAC because it is not a final action by the board. No action has been taken as to the application’s issuance or denial.

The determination of whether the application is complete is part of the board of health’s process in considering the landfill permit application. In fact, the board is not permitted to issue or deny the permit unless the application is first complete. See, Ohio Adm. Code 3745-37-02. Should an application be lacking the required information, the board of health must notify the applicant of the deficiency and request the applicant to submit additional information. Thus, the first step in the permit review process is the administrative review and consideration of a complete application. In other words, is the necessary information filled in and provided by the applicant.

However, the Tenth Appellate District’s ruling places the determination of whether an action is final firmly in the hands of ERAC rather than a board of health or the director of Ohio EPA. This action undermines the precept that agencies are in the best position to make decisions concerning the matters they regulate, particularly environmental issues. The board of health or environmental agency has superior knowledge of the environmental rules and regulations as well as access to technical guidance and expertise that ERAC does not. Moreover, the board is involved in enforcing

these environmental rules on a daily basis and is better equipped to determine whether an application is complete.

On the other hand, the role of ERAC is to review actions of the director of Ohio EPA or local boards of health to determine whether such actions are unreasonable or unlawful. ERAC is a review board and does not have the same powers or technical expertise of the director or the board to issue and deny permits. The Tenth Appellate District's ruling effectively divests the director and the boards of their duties to evaluate the sufficiency and completeness of an application prior to its consideration by allowing the applicant to circumvent the application process.

The appellate court's ruling gives ERAC the authority to determine the completeness of the application even though ERAC lacks the authority to process permit applications and lacks the knowledge and resources to determine whether the information necessary to make an informed decision has been included within the application. This dangerous derogation of established procedure unjustly expands ERAC's statutory authority to include the authority to make decisions that the General Assembly placed in the hands of the director of Ohio EPA or a delegated board of health.

**B. The Appellate Court's ruling encourages innumerable premature appeals to ERAC.**

According to the Tenth Appellate District, any applicant who disagrees with a board of health's request for additional information can appeal to ERAC without any further action or substantive evaluation of the merits of the application by the board. The ruling permits an obviously premature appeal, as a simple request for additional information is not an appealable action. As the dissent noted in the Court of Appeals decision, "not only is this interpretation contrary to past decisions of this court, it creates dangerous precedent for interference in the comprehensive statutory

scheme for the issuance of environmental licenses and permits, a precedent with the potential to extend well beyond the facts of this case before us.” Judgment Entry ¶ 27.

This dangerous precedent will burden ERAC’s already heavily-loaded docket with unnecessary, frivolous appeals from any applicant dissatisfied with a simple request from the director or board of health. If ERAC finds the application to be complete, then ERAC must now order the board to issue or deny the permit. The board could deny the permit, in which case the permit applicant is likely to appeal the subsequent permit denial to ERAC. On the other hand, the board could issue the permit, in which case the applicant could appeal from the terms and conditions of the permit or an interested third-party could appeal the issuance of the permit. In either case, ERAC will have to hold a second hearing to determine whether the issuance or denial of the permit was unlawful or unreasonable. Considerable time and money will have been spent on two appeals to ERAC when only one appeal, the appeal from the final decision on the application, should have been permitted.

Finally, the Ohio Supreme Court should hear this case because if the Tenth District Court of Appeals’ decision stands, then ERAC will be overrun with appeals from citizens, companies, municipalities, and all other persons who are dissatisfied when the director or board of health has not responded to their requests. In this case, Trans Rail America, Inc. (“Trans Rail”) was dissatisfied with the Commissioner of the Trumbull County Health Department (“Health Department”) because he would not process Trans Rail’s incomplete application for a landfill permit. Instead of completing the application and waiting for the Health Department to issue or deny the landfill permit, Trans Rail appealed to ERAC requesting that ERAC order the Health Department to process the application.

If appeals such as this one are allowed to be heard without first considering whether a final “action” has been taken, ERAC will become so overwhelmed by the numerous additional appeals

that it will be prevented from performing its true function, which is to determine whether a final “act” or “action” of the director or board of health was reasonable and lawful. ERAC’s decisions have a great impact on regulating the director’s actions and balancing the protection of Ohio’s environment with Ohio’s economy and the success of Ohio’s industries; thus, it is of public and great general interest that ERAC be able to perform its function.

The Appellant urges this Court to accept jurisdiction in this matter to review the erroneous ruling by the Tenth Appellate District.

### **STATEMENT OF THE CASE AND FACTS**

The Appellee, Trans Rail, submitted an application for a license to open and operate a construction and demolition debris landfill to the Appellant the Trumbull County Health Department (“Health Department”) on May 21, 2004. The Health Department determined that the application was incomplete and notified Trans Rail by letter dated July 16, 2004, of the deficiencies in the application.

Over a year and half later, Trans Rail submitted additional information to the Health Department for consideration in its permit application. On February 15, 2006, the Health Department determined that the application by Trans Rail remained incomplete and notified Trans Rail of the remaining deficiencies in the application.

On March 30, 2006, Trans Rail submitted a letter to the Health Department in response to the Health Department’s finding that the application was incomplete. The Health Department, on May 31, 2006, notified Trans Rail that its application remained incomplete and could not be considered until Trans Rail submitted all of the information required for the Health Department to determine whether the landfill would be constructed and operated pursuant to law.

On June 30, 2006, Trans Rail appealed to ERAC requesting ERAC to find that the application was complete and to order the Health Department to process the application. The Health Department moved ERAC to dismiss the appeal for lack of subject matter jurisdiction as the May 31, 2006 letter from the Commissioner of the Health Department was not an appealable action. ERAC granted the motion by the Health Department and dismissed the appeal for lack of subject matter jurisdiction on March 8, 2007.

Trans Rail appealed ERAC's decision to the Tenth Appellate District. The Tenth Appellate District reversed ERAC's ruling and determined that ERAC did have the power to consider whether the application was complete and to order the Health Department to process the application. Order ¶ 10. The Court ruled that it did not have to consider whether the Health Department's incompleteness determination letter constituted a final action for ERAC to have jurisdiction. Order ¶ 11. It is from this erroneous opinion that the Health Department appeals to this Court.

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

#### **Proposition of Law:**

*Pursuant to R.C. § 3745.04(B), ERAC may review only final actions of statutorily designated agencies, such as approved boards of health. Letters requesting further information from said agencies are not final actions, therefore, cannot be reviewed.*

By statute, ERAC has jurisdiction to hear appeals from "acts" or "actions" of the director or local board of health. R.C. § 3745.04. The statute defines an "act" or "action" to include "the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval or plans and specifications pursuant to law or rules adopted thereunder."

The list of actions enumerated above, however, is not exhaustive. ERAC also has jurisdiction over certain events or documents of the director not specifically listed in R.C.

§ 3745.04(A) if ERAC determines such event or document is a final action of the director. *Youngstown Sheet & Tube v. Maynard* (1984), 22 Ohio App.3d 3, 6.

If the event or document is not listed in R.C. § 3745.04(A), then ERAC must analyze the document's form to see if it contains the traditional indicia of a final act or action. There are four factors that have been identified as indicia traditionally found in final actions: (1) has the document been signed by the director; (2) does it contain language identifying it as a final action; (3) does it contain the customary information informing the recipient of the right to appeal; and (4) does the document indicate that it has been entered into the director's journal as a final action. *Wheeling-Pittsburgh Steel Corp. v. Jones* (2002), ERAC 995015, 2002 Ohio ENV Lexis 6. If the document contains none of the traditional indicia of a final act or action, then ERAC considers whether its substance adjudicates with finality any legal rights of the appealing party. *Dr. Kevin Lake v. Jones* (2003), ERAC 255300, 2003 Ohio ENV LEXIS 11; *Dayton Power & Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476, 479.

ERAC properly analyzed the commissioner's letter at issue and correctly determined that it was not a final action appealable to ERAC. First, ERAC noted that the letter is not among those events enumerated in R.C. § 3745.04(A). Second, the letter failed to exhibit three of the four indicia of a final action. Finally, the letter did not adjudicate with finality any right of Trans Rail, but rather was an intermediate step in the continuing application process to the Health Department.

The Health Department is precluded from considering an incomplete application for a construction and demolition debris landfill facility by Ohio Adm. Code 3745-37-02, which states, "An incomplete application shall not be considered...[and] the applicant shall be notified of ...the deficiency...." Because of this regulation, the Health Department had no choice but to refuse to

consider the incomplete application submitted by Trans Rail, and ERAC recognized the same by dismissing Trans Rail's appeal. Trans Rail could simply have provided the required information, but instead chose to avoid the application process and appealed directly to ERAC.

The Tenth Appellate District erroneously skipped the proper "final action" analysis outlined above and permitted Trans Rail to circumvent the statutory scheme. The Tenth Appellate District interpreted R.C. § 3745.04(B) as allowing ERAC to determine whether the application is complete, without a final action from the Health Department. This reading is incorrect, unsupported and in derogation of years of established, accepted procedure.

The Tenth Appellate District's decision in this case is all the more confusing and contradictory to case precedent considering the court's recent decision in *US Technologies v. Korleski* (Nov. 15, 2007), 10<sup>th</sup> Dist. Case No. 07AP-383, 2007-Ohio-6087. In *US Technologies*, the Tenth Appellate District was asked to determine whether a letter from an Ohio EPA district representative to US Technologies was a final "action" appealable to ERAC. The court stressed that the letter had to be a final action of the director to be appealable to ERAC. The court analyzed the letter for the traditional indicia of final actions and questioned whether the letter adjudicated with finality the legal rights of US Technologies.

In deciding that the letter was not a final action, the court noted that the letter afforded US Technologies "the occasion to provide information to Ohio EPA to address the issues raised" in the letter. *Id.* at ¶ 11. The court also discussed that the letter was part of the process of Ohio EPA performing its function as a regulatory agency. The court stated:

In the final analysis, OEPA's function as a regulatory agency requires it to advise a company if OEPA believes the company is violating Ohio's environmental laws. To do otherwise would abdicate OEPA's responsibilities under those laws. By notifying a company of OEPA's observations and

discussing the issues, OEPA maintains informal discourse with the company in an effort to determine whether agreement can be reached about potential violations and the remedies to rectify them. If the company disagrees with OEPA's recommendations, it need not abide by them, but in all likelihood it can expect a statement of violations. The interim step, however, of advising and investigating does not rise to the level of a final action.

Id. at ¶ 16.

This case is analogous to *US Technologies* in that both cases involve appeals from letters setting forth the status of ongoing interactions between an administrative agency and a company, and each letter requested the company to provide additional information to the agency. Trans Rail appealed the Health Department's May 31, 2006 letter in which the Health Department informed Trans Rail that its application was incomplete and that more information was required before the Health Department could process the application. Part of the Health Department's function is to issue and deny landfill permit and license applications. The Health Department receives applications, reviews the applications, and advises the applicant if the application is incomplete. "The interim step, however, of advising...does not rise to the level of a final action." Id. at ¶ 16. Just as the appellate court decided that the letter to US Technologies was not a final, appealable action, the court should have decided that the letter to Trans Rail was not a final, appealable action.

## CONCLUSION

For the reasons discussed above, this case involves matter of public or great general interest. The Appellant requests this Court accept jurisdiction, so that the issues presented will be reviewed on the merits.

Respectfully submitted,

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## PROOF OF SERVICE

This is to certify that a copy of this Memorandum in Support of Jurisdiction was served by regular U.S. Mail this 14<sup>th</sup> day of February, 2008, upon the following:

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Trans Rail America, Inc ,

Appellant-Appellant,

Nos 07AP-273 and  
07AP-284  
(ERAC No 785917)

v

James J Enyeart, M D , Health  
Commissioner, Trumbull County Health  
Department,

(ACCELERATED CALENDAR)

Appellee-Appellee

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O P I N I O N

Rendered on December 31, 2007

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*Walter & Haverfield, LLP, Michael A Cyphert, Leslie G Wolfe, and Jonathan R Goodman, for appellant*

*Ronald James Rice Co , LPA, and Robert C Kokor, for appellee*

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APPEAL from the Environmental Review Appeals Commission

KLATT, J

{¶1} Appellant, Trans Rail America, Inc ("Trans Rail"), appeals from an order of the Environmental Review Appeals Commission ("ERAC") dismissing its appeal against appellee, James J Enyeart, M D , Health Commissioner of the Trumbull County Health Department ("Commissioner") For the following reasons, we reverse

{¶2} On May 21, 2004, Trans Rail applied to the Trumbull County Health Department ("Health Department") for a license to establish a construction and demolition

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debris facility in Hubbard, Ohio<sup>1</sup> In a July 16, 2004 letter, the Commissioner stated that the Health Department could not consider Trans Rail's application because it was incomplete To assist Trans Rail in the application process, the Commissioner identified the parts of the application that did not comply with Ohio Adm Code 3745-37-02(E), which enumerates the items that a construction and demolition debris facility license application must include

{93} Representatives of CT Consultants, Inc ("CT Consultants"), an engineering firm that Trans Rail hired to oversee the application process, met with the Commissioner to discuss the application On December 16, 2005, CT Consultants delivered to the Commissioner written responses and additional documents to resolve the deficiencies in Trans Rail's application In a letter dated February 15, 2006, the Commissioner acknowledged receipt of the additional information, but he again found that the application was incomplete and refused to consider it The Commissioner attached to the February 15, 2006 letter a report generated by Bennett & Williams Environmental Consultants, Inc ("Bennett & Williams"), a firm that the Health Department hired to evaluate Trans Rail's application The Commissioner directed Trans Rail to address those areas of the application that the report found were lacking the necessary information

{94} In two letters dated March 30, 2006, CT Consultants replied to the comments in Bennett & Williams' report and submitted further information regarding the proposed construction and demolition debris facility In a response letter dated May 31,

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<sup>1</sup> Former R.C. 3714.06(A) required applicants to submit their construction and demolition debris facility applications to the local board of health if that local board of health appeared on the "approved list." If it did not, then former R.C. 3714.06(A) directed applicants to apply to the Director of the Ohio Environmental Protection Agency As the Health Department is on the "approved list," Trans Rail applied there

2006, the Commissioner concluded that Trans Rail's application still failed to comply with Ohio Adm Code 3745-37-02(E), and he again deemed the application incomplete. The Commissioner attached to his letter a second report from Bennett & Williams that characterized CT Consultants' March 30, 2006 replies as an inadequate answer to the concerns listed in the first report.

{¶5} On June 30, 2006, Trans Rail filed an appeal before the ERAC asserting one assignment of error:

The Health Department erred in determining that Trans Rail's [Construction Demolition and Debris] License Application was incomplete and could not be considered under the requirements of Ohio Administrative Code ("O A C") Rule 3745-37-02(A)(2)

Trans Rail asked the ERAC to find that its application was complete and to order the Health Department to consider it. The Commissioner moved to dismiss Trans Rail's appeal for lack of subject matter jurisdiction. The Commissioner argued that the May 31, 2006 letter was not an appealable action under R C 3745 04, which delineates the scope of the ERAC's jurisdiction. The ERAC agreed with the Commissioner's argument, concluding that the May 31, 2006 letter was an intermediate step in the continuing application process (and not an appealable action). In reaching this conclusion, the ERAC evaluated the evidence and held that it was reasonable for the Commissioner to determine that Trans Rail's application was incomplete. Pursuant to its decision, the ERAC issued a final order dismissing Trans Rail's appeal on March 8, 2007.

{¶6} Trans Rail now appeals from the March 8, 2007 final order and assigns the following errors:

1 THE ENVIRONMENTAL REVIEW APPEALS  
COMMISSION ERRED IN FINDING THAT IT LACKED

SUBJECT MATTER JURISDICTION TO HEAR THE APPEAL ON THE GROUNDS THAT THE APPELLEE HEALTH DEPARTMENT'S DETERMINATION OF INCOMPLETENESS OF APPELLANT'S LICENSE APPLICATION WAS NOT A FINAL APPEALABLE ACT OR ACTION

2 THE ENVIRONMENTAL REVIEW APPEALS COMMISSION ERRED IN FINDING THE APPELLEE HEALTH DEPARTMENT'S DETERMINATION OF INCOMPLETENESS TO BE REASONABLE DESPITE THE COMMISSION'S FINDING THAT IT LACKED JURISDICTION TO HEAR THE APPEAL

{¶7} By its first assignment of error, Trans Rail argues that the ERAC erred in dismissing its appeal for lack of subject matter jurisdiction We agree

{¶8} An administrative agency has only those powers that the General Assembly expressly confers upon it *Shell v Ohio Veterinary Med Licensing Bd*, 105 Ohio St 3d 420, 2005-Ohio-2423, at ¶32, *State ex rel Lucas Cty Bd of Commrs v. Ohio Environmental Protection Agency* (2000), 88 Ohio St 3d 166, 171 When the General Assembly invests an administrative agency with the power to hear appeals, statutory language determines the parameters of the agency's jurisdiction *Waitco Truck Equip. Co v Tallmadge Bd of Zoning Appeals* (1988), 40 Ohio St 3d 41, 43, *Cordial v. Ohio Dept of Rehab & Corr*, Franklin App No 05AP-473, 2006-Ohio-2533, at ¶20. In interpreting a jurisdictional statute, courts cannot ignore portions of the statute, nor can they insert words or phrases into the statute *State v Craig*, 116 Ohio St 3d 135, 2007-Ohio-5752, at ¶14, *Hall v Banc One Mgt Corp*, 114 Ohio St 3d 484, 2007-Ohio-4640, at ¶24 Rather, where the statute is plain and unambiguous, courts are obligated to apply it as written *Davis v Davis*, 115 Ohio St 3d 180, 2007-Ohio-5049, at ¶15, *Hubbell v. Xenia*, 115 Ohio St 3d 77, 2007-Ohio-4839, at ¶11

{¶9} The parameters of the ERAC's jurisdiction are set forth in R C 3745 04(B), which reads

Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act

We have previously found that this provision allows the appeal of "actions" to the ERAC *Dayton Power and Light Co v Schregardus* (1997), 123 Ohio App 3d 476, 478 However, in addition to empowering the ERAC with the ability to review actions, the statute also authorizes the ERAC to order the performance of acts Thus, the statute invests the ERAC with jurisdiction over two types of appeals (1) an appeal from an "action" that the ERAC may vacate or modify, and (2) an appeal requesting that the ERAC order the performance of an "act " R C 3745 04(A) defines "action" and "act" to include "the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate "

{¶10} In the case at bar, Trans Rail's appeal requests that the ERAC order the Health Department to either issue or deny it a license to establish a construction and demolition debris facility R C 3745 04(B) grants the ERAC the power to order the Health Department to perform an "act," which includes the ability to order the issuance or denial of a license Therefore, the ERAC has the authority to consider whether the application is complete and, if it is, to order the Health Department to issue or deny Trans Rail a license

{¶11} Our analysis does not require consideration of whether the Commissioner's May 31, 2006 letter constitutes a "final" action The ERAC and, if necessary, this court

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must determine whether an action is final only if the aggrieved party requests that the ERAC vacate or modify the action. See *US Technology Corp v Korleski*, Franklin App. No 07AP-383, 2007-Ohio-5922. Because Trans Rail seeks an order requiring the performance of an act, i.e., the issuance or denial of a license, Trans Rail's appeal does not depend upon the finality of the May 31, 2006 letter.

{¶12} Having concluded that the ERAC has jurisdiction over Trans Rail's appeal, we sustain Trans Rail's first assignment of error.

{¶13} By Trans Rail's second assignment of error, it argues that the ERAC prematurely determined the merits of its appeal. We agree.

{¶14} If neither the Director of the Ohio Environmental Protection Agency nor a board of health conducts an adjudicatory hearing, then the ERAC must conduct a hearing de novo on the appeal. R.C. 3745.05. In the case at bar, no hearing has ever occurred. Nevertheless, the ERAC ruled upon the merits of Trans Rail's appeal, holding that Trans Rail's application was incomplete. We conclude that the ERAC erred in making a substantive ruling without a hearing, and thus, we sustain Trans Rail's second assignment of error.

{¶15} For the foregoing reasons, we sustain Trans Rail's first and second assignments of error. Further, we reverse the March 8, 2007 final order of the Environmental Review Appeals Commission, and we remand this matter to that commission for further proceedings in accordance with law and this opinion.

*Order reversed and matter remanded.*

TYACK, J, concurs  
FRENCH, J, dissents

FRENCH, J , dissenting

{¶1} In its opinion, the majority concludes that the Environmental Review Appeals Commission ("ERAC") has jurisdiction over an appeal from a letter finding a license application incomplete. The majority reaches this conclusion based solely on ERAC's authority under R C 3745 04(B) to order the director of the Ohio Environmental Protection Agency ("director" or "Ohio EPA") or a board of health "to perform an act" and with no consideration as to whether the letter constitutes a final act or action appealable under R C 3745 04. Because I strongly disagree with the majority's interpretation of applicable law, I dissent.

{¶2} The specific question in this case is whether ERAC has jurisdiction over an appeal by appellant, Trans Rail America, Inc ("appellant"), from a finding by appellee, James J Enyeart, M D , Health Commissioner, Trumbull County Health Department ("appellee"), that appellant's application for a license to establish a construction and demolition debris ("C&DD") facility was incomplete. As detailed in the majority opinion, appellant first applied for the license in May 2004. Over the next two years, appellee twice found the application to be incomplete, despite appellant's submissions of additional information. Finally deciding that it had no remedy but to appeal to ERAC, appellant filed an appeal from appellee's May 31, 2006 letter, which indicated for the third time that appellant's application was incomplete.

{¶3} On appeal, ERAC analyzed whether the May 31, 2006 letter was a final action appealable under R C 3745 04. ERAC ultimately determined that appellee's requests were reasonable and that the letter was not appealable, and ERAC dismissed the appeal for lack of jurisdiction.

{¶4} Before this court, appellant's first assignment of error asserts that ERAC erred in finding that it had no jurisdiction. In support, appellant asserts that the letter constituted a final action appealable under R C 3745 04 because the circumstances surrounding the letter were indicative of a final appealable order and because it materially and adversely affected appellant's property rights. Following submission of briefs and oral argument, this court asked the parties to submit supplemental briefing regarding the jurisdictional impact of ERAC's authority under R C 3745 04(B) to issue an order "ordering the director or board of health to perform an act." In the end, without considering whether appellee's letter constituted a final action under R C 3745.04, the majority relies solely on ERAC's authority under R C 3745 04(B) and concludes that ERAC had jurisdiction. I disagree.

{¶5} R C 3745 04(B) provides, in pertinent part

Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to [ERAC] for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. [ERAC] has exclusive original jurisdiction over any matter that may, under this section, be brought before it.

{¶6} Clearly, R C 3745 04(B) gives ERAC authority to order the director or board of health "to perform an act." This grant of power is not in isolation, however. References throughout R C 3745 04 make clear that there must first be a final "act" or "action" to trigger ERAC jurisdiction.

{¶7} For example, R C 3745 04(D) requires appeals to be in writing and to "set forth the action complained of." That same subsection provides that appeals must be

filed within 30 days after notice of the "action," and the filing of an appeal does not automatically suspend "the action appealed from "

{¶8} R C 3745 04(A) also provides that, as used in R C 3745 04

\*\*\* "[A]ction" or "act" includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder

{¶9} For decades, this court has recognized that the terms "act" and "action" include, but are not limited to, the actions enumerated in R C 3745 04(A) As this court stated in *Youngstown Sheet & Tube Co v Maynard* (1984), 22 Ohio App 3d 3, 6

The General Assembly \*\*\* in drafting R C 3745 04 chose to illustrate rather than define an appealable action, thereby vesting [ERAC's predecessor, the Environmental Board of Review] with jurisdiction over acts of the director beyond the adoption, modification or repeal of a rule Past decisions of this court illustrate that the broad definition of appealable acts contained in the statute is to be liberally construed in favor of appeals to [ERAC] See, e.g., *Cain Park Apts v Nied* (June 25, 1981), Franklin App No 80AP-817 et seq, unreported

{¶10} When faced with an action not enumerated in R C 3745 04(A), this court has analyzed the challenged action or failure to act and considered whether it affects the appellant's rights, privileges or property For example, in *Dayton Power & Light Co v Schregardus* (1997), 123 Ohio App 3d 476, this court considered whether ERAC properly dismissed an appeal from the director's decision to place a site on a master site list of contaminated properties The court found that the site owner had no opportunity to contest the listing, which government officials and businesses would rely on when evaluating property The court ultimately remanded the matter to ERAC for a hearing to

determine whether the listing "affected a substantial legal right with finality and/or that Ohio EPA exceeded its authority by promulgating" the list. *Id.* at 481.

{¶11} This court recently distinguished *Dayton Power & Light in US Technology Corp v Kortesi*, Franklin App No 07AP-383, 2007-Ohio-5922. In *US Technology*, this court considered whether a letter issued by an Ohio EPA employee was a final action appealable to ERAC under R.C. 3745.04. While concluding that "the letter, in form," was not a final action, the court acknowledged "that the letter nonetheless may constitute final action if in substance it finally adjudicates [the appellant's] legal rights." *Id.* at ¶7. After considering the course of conduct between Ohio EPA employees and the appellant, the content of Ohio EPA's communications with the appellant, and the status of Ohio EPA's findings with respect to alleged violations of environmental laws, the court concluded that the letter was not a final action appealable to ERAC. Rather, it "was the latest in a series of meetings and letters addressing issues" between the two parties. *Id.* at ¶11. Therefore, ERAC had no jurisdiction to review it.

{¶12} In contrast, here, the majority does not analyze whether ERAC properly determined that it lacked jurisdiction over appellee's May 31, 2006 letter because it was not a final action appealable under R.C. 3745.04. Instead, the majority relies solely on ERAC's authority under R.C. 3745.04(B) to order the director or the board "to perform an act." Not only is this interpretation contrary to past decisions of this court, it creates a dangerous precedent for interference in the comprehensive statutory scheme for the issuance of environmental licenses and permits, a precedent with the potential to extend well beyond the facts of the case before us.

{¶13} R C 3745 07 establishes the process Ohio EPA must follow when issuing, denying, modifying, revoking or renewing a license, including a C&DD facility license under R C Chapter 3714 R C 3745 07 provides that the director may issue a "proposed action" indicating the director's intended action If the director receives an objection to the proposed action, the director must hold an adjudication hearing before issuing a final decision, which triggers appeal rights under R C 119 09 If the director issues or denies a license without first issuing a proposed action, then "any person who would be aggrieved or adversely affected thereby" may appeal to ERAC within 30 days of the issuance or denial R C 3745 07

{¶14} R C 3714 09 grants to approved boards of health the specific authority to issue, deny, suspend, and revoke C&DD facility licenses R C 3714 10 states "Appeal from any suspension, revocation, or denial of a license shall be made in accordance with" R C 3745 02 to 3745 06

{¶15} Nowhere in these statutes authorizing the issuance and denial of licenses generally, or even C&DD facility licenses specifically, is there authority for an appeal to ERAC before a final action by Ohio EPA or the board of health, and allowing a premature appeal, i e , an appeal prior to a final action that adjudicates the rights of the applicant, interferes with this legislative scheme Rather than requiring an applicant to complete the statutory process, the majority opinion allows an applicant to circumvent the process by prematurely appealing an agency's request for additional information or finding that an application is incomplete

{¶16} Here, ERAC clarified that it did "not intend to imply that repeated, unreasonable requests for additional information by a licensing authority could never"

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give rise to a final appealable action under R C 3745 04 (Final Order at 19, fn 9.) In fact, the appropriate analysis for determining whether such repeated requests do give rise to a final action appealable under R C 3745 04 is the analysis used by this court in its prior decisions and articulated by ERAC in this case, i.e., consideration of whether the form of the action indicates finality and whether the action materially and adversely affects the rights of the appellant, not simple reliance on ERAC's authority to order the director or the board "to perform an act "

{¶17} In my view, the better reading of R C 3745 04(B) is that the General Assembly intended to grant ERAC authority to order the director or the board of health to perform an act where, for example, the director or board denied an approval that ERAC determines should have been granted. In that scenario, ERAC would not rely on its authority to issue an order "vacating or modifying the action," but would rely on its authority to issue an order "ordering the director or board of health to perform an act," i.e., to grant the approval it deems appropriate. This reading of R C 3745 04(B) maintains the integrity of both the legislative scheme and the administrative process for considering license and permit applications, and it ensures that ERAC will not be burdened with premature appeals.

{¶18} In the end, I would find that ERAC properly identified the factors it must consider in determining whether it has jurisdiction over the appeal. Specifically, having concluded that the May 31, 2006 letter did not reflect an "act" or "action" enumerated in R C 3745 04(A), ERAC considered the form and substance of the document. I agree with ERAC's determination that, in form, the letter does not constitute a final action. The letter does not indicate that it is a final action, it does not advise appellant of a right to

appeal, and it contains no indication that appellee understood, journalized or documented the letter as a final action

{¶19} ERAC also recognized correctly that the May 31, 2006 letter still could constitute a final action if it met certain substantive criteria, as follows

Even if a document does not, in form, constitute a final action it may still be a final action if the substance of the document adjudicates with finality any legal right or privilege of the appealing party. Conversely, if the document represents an intermediate step in a continuing process, or if the contents of the document indicate that it is only a segment of an evaluation that will ultimately lead to a final action, then, at that juncture, no final appealable action has occurred. Thus, the final inquiry [ERAC] must make is whether [appellee's] May 31, 2006 letter adjudicates with finality any legal right or privilege of [appellant] \* \* \*

(Final Order at 14, ¶8 )

{¶20} I concur in ERAC's articulation of the test for determining whether the letter was appealable under R C 3745 04. Nevertheless, I would remand this matter to ERAC for further consideration of the jurisdictional question. Specifically, I would conclude that ERAC improperly relied on *CECOS Internatl, Inc v Shank* (1991), 74 Ohio App 3d 43, to conclude that appellee's "determination that [appellant's] application was incomplete was reasonable and its request for additional information was well within its regulatory authority" (Final Order at 18-19, ¶14). In *CECOS*, the director had denied a hazardous waste permit renewal, in part because the director found that CECOS had failed to submit a complete and adequate application in compliance with administrative rules. ERAC's predecessor affirmed the determination, and this court affirmed. Here, ERAC relied on *CECOS* to conclude in this case that appellee has discretion to determine whether an

application is complete and that appellee's requests for additional information were reasonable under the circumstances

{¶21} In contrast to the case before us, however, in *CECOS*, neither ERAC nor this court had to determine whether the director's finding that the application was incomplete was a final action appealable under R C 3745 04. Rather, in *CECOS*, ERAC and this court considered the merits of that finding on appeal from the director's final action denying the application. See, also, *Harmony Environmental Ltd v. Morrow Cty. Dist Bd of Health*, Franklin App No 04AP-1338, 2005-Ohio-3146 (decision regarding completeness of C&DD license application on appeal from board's final action denying application)

{¶22} Here, ERAC correctly stated that, in order to determine whether it has jurisdiction over appellant's appeal, ERAC must first determine whether the May 31, 2006 letter "adjudicates with finality any legal right or privilege" of appellant. Only after finding jurisdiction proper may ERAC proceed to the merits, i.e., deciding whether the application is complete.

{¶23} Admittedly, ERAC concluded that the May 31, 2006 letter "was not a final appealable action, but rather, represents an intermediate step in a continuing process." (Final Order at 19, ¶15) However, ERAC reached that conclusion without analyzing the factors it had identified previously. Therefore, while I would overrule the substance of appellant's first assignment of error, I would remand this case for further consideration in accordance with the appropriate jurisdictional test, as articulated by ERAC and this court.

{¶24} In its second assignment of error, appellant asserts that ERAC erred by finding the May 31, 2006 incompleteness determination to be reasonable without an

evidentiary hearing Having concluded that ERAC must consider the jurisdictional question further, I would conclude that appellant's second assignment of error is moot

{¶25} In conclusion, the majority having determined that ERAC has jurisdiction under the express terms of R C 3745 04(B) and having sustained appellant's assertion that ERAC erred by addressing the merits of the appeal without a hearing, I respectfully dissent

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Trans Rail America, Inc .

Appellant-Appellant,

v

James J Enyeart, M D , Health  
Commissioner, Trumbull County Health  
Department,

Appellee-Appellee

Nos 07AP-273 and  
07AP-284  
(ERAC No 785917)

(ACCELERATED CALENDAR)

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JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on December 31, 2007, appellant's assignments of error are sustained, and it is the judgment and order of this court that the March 8, 2007 final order of the Environmental Review Appeals Commission is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs assessed against appellee

KLATT & TYACK, JJ , concur

By William A Klatt  
Judge William A Klatt





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This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon a Motion to Dismiss filed by Appellee James J. Enyeart, M.D., Health Commissioner, Trumbull County Health Department ("Health Department") on August 22, 2006. In its motion, Appellee requests that the June 30, 2006 appeal filed by Appellant Trans Rail America, Inc. ("Trans Rail") be dismissed as there has been no final appealable action or act of the Health Department and, thus, the Commission lacks subject matter jurisdiction to hear the appeal.

Appellant Trans Rail is represented by Mr. Michael A. Cyphert, Esq. and Ms. Leslie G. Wolfe, Esq., Walter & Haverfield LLP, Cleveland, Ohio. Appellee Health Department is represented by Mr. Robert C. Kokor, Esq., Ronald James Rice Co., LPA, Hubbard, Ohio. Based upon the pleadings, memoranda and attachments filed by the parties, as well as the relevant statutes, regulations and case law, the Commission issues the following Findings of Fact, Conclusions of Law and Final Order granting Appellee Health Department's Motion to Dismiss.

#### FINDINGS OF FACT

1. Ohio Revised Code Section ("R.C.") 3714.09 provides:

(A) The director of environmental protection shall place each health district that is on the approved list under division (A) or (B) of section 3734.08 of the Revised Code on the approved list for the purposes of issuing permits to install and licenses under this chapter.

2. Further, R.C. 3714.06 states, in part:

(A) No person shall operate or maintain a construction and demolition debris facility without an annual construction and demolition facility operation license issued by the board of health of the health district in which the facility is located or, if the facility is located in a health district that is not on the approved list under section 3714.09 of the Revised Code, from the director of environmental protection.

3. Appellee Trumbull County Health Department is an approved health district authorized, pursuant to R.C. Chapter 3714, to license construction and demolition debris ("C&DD") facilities within its jurisdiction. (Ohio Administrative Code ["OAC"] section 3745-37-08; [http://www.epa.state.oh.us/dsiwm/document\\_lists/approved\\_list\\_of\\_hds.pdf](http://www.epa.state.oh.us/dsiwm/document_lists/approved_list_of_hds.pdf).)

4. On May 21, 2004, Appellee Trumbull County Health Department received a license application to construct a C&DD facility in Hubbard, Trumbull County, Ohio from Appellant Trans Rail. (Case File Item R [Appellant's Brief in Opposition to Appellee's Motion to Dismiss], attachment A2.)

5. On July 16, 2004, Dr. James J. Enyeart, Trumbull County Health Commissioner, sent correspondence to Mr. Fred Hudach of Trans Rail notifying him that Trans Rail's C&DD license application had been reviewed and found to be incomplete. Dr. Enyeart cited OAC 3745-37-02(A)(2) ["[a]n incomplete application shall not be considered"], and documented 31 instances, under specific paragraphs of the C&DD regulations, where complete information had not been provided. Dr. Enyeart's letter closed as follows:

As this application is incomplete on its face, a thorough review of the data supplied in the application has not been undertaken. Once the application has been properly completed, a meaningful technical review can be undertaken.

I suggest that you consider these comments in your application review. The Trumbull County Health Department will be pleased to answer questions regarding your application upon receipt of a written request for same. (Case File Item R, attachment A2.)

6. Approximately one year later, on July 1, 2005, the State's Biennial Budget Bill (Amended Substitute House Bill ["H.B."] 66) became effective. Included in this bill was a provision establishing a six-month moratorium, from July 1, 2005 to December 31, 2005, during which C&DD licenses for certain new facilities could not be issued. The moratorium provision also

created the Construction and Demolition Debris Facility Study Committee to “study the laws of this state governing construction and demolition debris facilities and the rules adopted under those laws and . . . make recommendations to the General Assembly regarding changes to those laws. . . .” (H.B. 66, 126<sup>th</sup> General Assembly.)

7. In a submission date-stamped December 16, 2005, Mr. Owen J. Karickhoff of CT Consultants, Inc., replied on behalf of Trans Rail to Dr. Enyeart’s July 16, 2004 communication regarding Trans Rail’s incomplete application. Mr. Karickhoff indicated that “[t]his correspondence follows our July 29, 2004 meeting in your office to discuss the license application.” Mr. Karickhoff further stated:

Your comments are attached hereto, each followed by our written response. As suggested in your closing paragraphs, we have supplemented the Facility Design Plan drawings in order to facilitate your review of the application. We have also reduced the active licensed disposal area to five acres.

We trust that the following responses satisfy your concerns regarding completeness of the license application and request that you consider it. (Case File Item R, attachment A3.)

8. Less than a week after this submission, on December 22, 2005, H.B. 397 became effective as an emergency measure. This legislation amended a number of provisions in Ohio’s construction and demolition debris program. Further, uncodified Section 3 of the act contained the following:

**Section 3. (A)** Notwithstanding the amendments to Chapter 3714. of the Revised Code by this act, an application for a license to establish or modify a construction and demolition debris facility submitted to a board of health or the Director of Environmental Protection, as applicable, prior to July 1, 2005, shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005, *if all of the following apply to the applicant for the license:*

(1) The applicant has acquired an interest in the property on which the facility will be located on or before May 1, 2005.

(2) The applicant has begun a hydrogeologic investigation pursuant to section 3745-400-09 of the Ohio Administrative Code prior to submitting the application.

(3) The applicant has begun the engineering plans for the facility prior to submitting the application.

(4) The application submitted by the applicant would have been determined to be complete if the moratorium had not been in effect.

*The Director shall determine whether this division applies to an applicant within forty-five days after receiving an applicant's request for a determination under this division.*

(B) Notwithstanding the amendments to Chapter 3714. of the Revised Code by this act and except as otherwise provided in this division, an application for a license to establish or modify a construction and demolition debris facility submitted to a board of health or the Director, as applicable, on or after July 1, 2005, but prior to or on December 31, 2005, shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005. However, unless division (G)(2) of section 3714.03<sup>1</sup> of the Revised Code, as amended by this act, applies to the facility, a board of health or the Director, as applicable, may apply any of the siting criteria established in section 3714.03 of the Revised Code by this act to such an application and may deny the application if the facility that is the subject of the application will not comply with that siting criteria. \* \* \* (Emphasis added.) (H.B 397, 126<sup>th</sup> General Assembly.)

9. On January 19, 2006, Alan D. Wenger, legal counsel for the Hubbard Township Board of Trustees ("Board") sent a letter to Dr. Enyeart to express the Board's position concerning the applicability of Section 3.(A) of H.B. 397 to the pending license application filed by Trans Rail.

In relevant part, Mr. Wenger stated:

\* \* \* Your office issued a letter on or about July 16, 2004 which indicated that the Trans Rail License Application was incomplete in numerous respects. To our knowledge, Trans Rail did not respond until (at the earliest) a letter dated November 8, 2005 from Trans Rail's consultant, CT Consultants, Inc. which appears to not have actually been submitted until December 19, 2005, when a meeting was held at your office attended by

<sup>1</sup> Revised Code § 3714.03(G)(2) provides:

(G)(2) The siting criteria established in this section by this amendment do not apply to an expansion of a construction and demolition debris facility that was in operation prior to the effective date of this amendment onto property within the property boundaries identified in the application for the initial license for that facility or any subsequent license issued for that facility up to and including the license issued for that facility for calendar year 2005. The siting criteria established in this section prior to the effective date of this amendment apply to such expansion.

Attorney Michael A. Cyphert and CT's Owen Karickhoff on behalf of Trans Rail, which I also attended.

In short, it appears that Trans Rail is seeking to fit within the "grandfather" provisions of the new C&D licensing laws adopted by Amended Substitute House Bill Number 397, effective December 22, 2005. \* \* \*

We submit that regardless of the merits of the December 19, 2005 Trans Rail application effort \* \* \* [the] Trans Rail application is not qualified for the pre-July 1, 2005 grandfather status. \* \* \*

Even if Trans Rail arguably (which is not conceded) met the grandfather requirements of parts 1, 2, and 3, the requirement no. 4 definitely was not met. As clearly evidenced by the Trumbull County Board of Health letter back on July 16, 2004, the 2004 Trans Rail application was not complete long before any state-imposed moratorium went into effect. Furthermore, Tans Rail did not even attempt to address the deficiencies in order to provide a complete application during the moratorium until long after the July 1, 2005 date – not until December 19, 2005. There is obviously no way the Trans Rail application could or would have been determined to be complete by your office before December 31, 2005, when major portions of it were not even submitted until December 19, 2005. (Underlining in original.) (Case File Item R, attachment A1.)

10. In mid-January 2006, the Health Department contracted with Bennett & Williams Environmental Consultants, Inc. ("Bennett & Williams") to provide a technical review of Trans Rail's revised application, received on December 16, 2005. In a January 17, 2006 letter<sup>2</sup> from Linda Aller, Executive Vice President of Bennett & Williams, to Dr. Enyeart she described her firm's experience relative to C&DD facilities, as follows:

We have had extensive experience in assisting Health Departments in reviewing Construction and Demolition Debris Applications, reviewing permitting and ground-water monitoring information and in conducting training programs relating to construction and demolition landfills. We have reviewed information on existing sites as well as proposed facilities. We have looked at approximately 15 different construction and demolition debris landfills under the statewide rules since they were promulgated by Ohio EPA. Our primary role has been to assist local health departments on these sites.

In addition, we are familiar with the history of the recently-adopted legislation on construction and demolition debris landfills and have offered testimony in support of sound technical additions and funding for local health departments to perform this

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<sup>2</sup> In this letter, Ms. Aller noted that Bennett & Williams had reviewed the original application for this site on behalf of a citizen's group (H.E.L.P.) and provided written comments to the Health Department. (Case File Item R, attachment A5.)

program. We have been involved in special 'interested party' meetings designed to work on recently passed legislation on construction and demolition debris landfills (HB 397). We are familiar with the geology and hydrogeology of Trumbull County and have reviewed two applications for new construction and demolition debris sites specifically in Trumbull County. We have also provided litigative support for some sites and can perform these services, if necessary. (Case File Item R, attachment A5.)

11. Pursuant to this contract, Ms. Aller and Mr. Michael D. Robison, also of Bennett & Williams, provided written technical comments in a report on Trans Rail's revised application to the Health Department on February 15, 2006. Specifically, Ms. Aller and Mr. Robison concluded "[t]he application should be considered as incomplete \* \* \*" In support of this conclusion, the letter set forth two pages of "General Comments," as well as 68 "Specific Comments," spanning 16 pages, in which inadequacies in various aspects of the application submissions were discussed, with applicable regulatory citations noted where relevant. The "General Comments" section included the following discussion regarding H.B. 397:

As you are aware, the passage of HB 397, signed into law on December 22, 2005 by the Governor, will change some provisions of the current construction and demolition debris rules. One provision of the bill allows applications that were submitted prior to July 1, 2005 to be considered under the existing rules at the time if four criteria are met as determined by the director of the Ohio Environmental Protection Agency (OEPA). According to the bill, *'The director shall determine whether this division applies to an applicant within forty-five days after receiving an applicant's request for a determination under this division.'* To the best of our knowledge, the applicant has made no such application to the director and the director has made no such determination. Without such a determination from the director, the application is subject to the siting criteria in section 3714.03 of the Revised Code and must either demonstrate that the new siting criteria are met or revise the application to meet the siting criteria. This application contains no such demonstration, therefore the siting criteria must be addressed in the application.

Similarly, if the application is deemed to have been a new application that was submitted on December 19, 2005, the Board of Health *'may apply any of the siting criteria established in section 3714.03 of the Revised Code by this act to such an application and may deny the application if the facility that is the subject of the application will not comply with that siting criterion.'* The applicant has not demonstrated which of the siting criteria are met. (Emphasis in original.) (Case File Item R, attachment A4.)

12. On February 15, 2006, Dr. Enyeart once again notified Mr. Hudach that Trans Rail's application had been found to be incomplete, in part, as follows:

Upon review, the application was found to be incomplete; and thus the board of health cannot consider it. Attached to this letter is a copy of a report conducted by Bennett & Williams, a consulting firm hired by the Board of Health to review the above referenced application. The document outlines the sections of the application found to be incomplete. These items must be adequately addressed prior to consideration by the Board of Health. (Case File Item R, attachment A4.)

13. In separate replies dated March 30, 2006, Mr. Karickhoff, CT Consultants, and Mr. Stephen L. Tomkins, HzW Environmental Consultants, Inc. ("HzW Environmental"), specifically responded to the Health Department regarding the comments contained in the February 15, 2006 Bennett & Williams report. Prior to providing explicit remarks addressing the alleged inadequacies outlined in the report, Mr. Karickhoff stated:

You should reconsider your finding the C&DD application of Trans Rail America, Inc. incomplete based, apparently, solely upon the report by Bennett & Williams that you attached to your letter. The Administrative Code is well written by the Ohio EPA and straightforward in meaning; yet, Bennett & Williams' first three comments refer to paragraphs of OAC 3745-400-11 which concern "operation of facilities" and are not relevant to initial licensure of a facility. Bennett & Williams advise you to consider the application incomplete based upon page after page of non-technical discussion from which it is difficult to extract legitimate concerns. What is missing from the Bennett & Williams 'technical' review of the license application is an understanding of the licensure and permitting process associated with construction and demolition debris facilities.

As an example, paragraph (B) of 3745-400-07 simply states 'The owner or operator shall comply with all applicable construction specifications and performance standards required in this rule.' And, for clarity, the paragraph is followed by this regulatory comment:

[Comment: The owner or operator need not reiterate all the construction specifications and performance standards that are in this rule in the facility design plan. The owner or operator, in accordance with rule 3745-400-11 of the Administrative Code, is required to follow the applicable specifications as part of facility operations. If the owner or operator does not follow the specifications, a violation of rule 3745-400-11 of the Administrative Code will result.]

This '*Wise Comment*' is the regulatory tone that encourages positive working relationships between a regulated facility and the responsible regulator and should be

aspired toward throughout this licensure process as well. \* \* \* (Emphasis in original.)  
(Case File Item R, attachments A6 and A7.)

14. On May 31, 2006, Dr. Enyeart again sent correspondence to Mr. Hudach notifying him that Trans Rail's most recent license application submission had been determined to be incomplete. In support of this finding, Dr. Enyeart attached a May 30, 2006 report prepared by Bennett & Williams in which those portions of the application found to be incomplete during a technical review were specifically outlined. The 31 page report contained discussions captioned "Siting Criteria Provisions," "General Comments," "New Comments," "Summary Comments" and "Specific Comments." In the section titled "Siting Criteria Provisions," the report reiterated the comments relating to H.B. 397, set out in paragraph 11 above, with the following addition:

Although the letter from Michael Cyphert<sup>3</sup> does appear to express his opinion that the Application should be considered under the grandfather provision, and therefore under the rules and laws as they existed on July 1, 2005, there is no indication that a determination by the director of OEPA has been requested or is pending. Lacking this determination (that only the director can make), we can only review the application as though it is subject to the new siting criteria. We have the following comments with regard to the siting criteria contained in Amended Substitute HB 397 as adopted. Based on information submitted to date by the Applicant the following siting criteria are not met:

- 1) A portion of the facility is within the boundaries of a one-hundred year floodplain;
- 2) The proposed limits of debris placement are within five hundred feet of a residential supply well; and
- 3) The proposed limits of debris placement are within five hundred feet of an occupied dwelling.

In addition, information on other siting criteria is not included in the application materials that allow determination of compliance with other siting criteria. This information needs

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<sup>3</sup> In addition to the referenced letter from Michael Cypert, which was not included in the case file, Response 44 in the report submitted by HzW Environmental contained the following conclusory statement:

Trans Rail's C&DD license application was submitted in 2004 prior to the July 1, 2005 cut-off and, therefore, should qualify for 'grandfather' status. The C&DD rules effective December 22, 2005 are not applicable.

to be included to ensure that those criteria are met:

- 1) Are there any parks within 500 feet of the proposed limits of debris placement?
- 2) Are there any natural areas within 500 feet of the proposed limits of debris placement?
- 3) Are there any lakes or reservoirs within 500 feet of the proposed limits of debris placement?
- 4) Are there any state forests within 500 feet of the proposed limits of debris placement?
- 5) Are there any historical landmarks within 500 feet of the proposed limits of debris placement?
- 6) Is the access road within 500 feet of an occupied dwelling? \* \* \* (Case File Item O [Motion to Dismiss of Appellee], attachment A.)

15. Further, under "General Comments" the Bennett and Williams report provided:

\* \* \* Apparently the respondent takes issue with questions raised in the Bennett & Williams [February 15, 2006] letter. Many of the comments in the Bennett & Williams letter attached to the Health District letter were designed to gain a more complete understanding of the site characterization and engineering design elements proposed for the site. This, in turn, allows the Health District to view the permit application holistically.

Specifically, OAC 3745-37-02(A)(3) states that "*if the licensing authority determines that information in addition to that required by this rule is necessary to determine whether the application satisfies the requirements of Chapters 3745-400 and 3745-37 of the Administrative Code, the license applicant shall supply such information as a precondition to further consideration of the license application.*" The information requested is important to the Health District for a determination under OAC 3745-37-03(D) which states "*The licensing authority of a construction and demolition debris facility may impose such special terms and conditions as are appropriate or necessary to ensure that the facility will comply with Chapter 3714. of the Revised Code and Chapter 3745-400 of the Administrative Code, and to protect public health and safety and the environment.*" Therefore, where questions and comments have not been addressed by the latest responses, we recommend that the Health District request answers again.

Because the many comments contained within the February 15, 2006 letter

have not been addressed by the provided comments, we have chosen to repeat the comments contained in that letter with a notation in bold underneath the comment as to the disposition of the comment and whether or not it has been addressed. We found many of the responses to be argumentative, hostile and non-responsive. We have tried to again reiterate the technical issues that remain regarding the Application. This Application remains incomplete in several areas. Because of the limited information provided in the Application, the items listed may not be all of the concerns, particularly if changes are made to the Application. Changes may prompt additional questions or highlight other areas of concern. (Emphasis in original.) ((Case File Item O.)

16. On June 30, 2006, Appellant Trans Rail filed an appeal with the Commission in which it alleged the Health Department erred in determining that its license application was incomplete and could not be considered under the requirements of OAC 3745-37-02(A)(2). (Case File Item A.)

17. A Motion to Dismiss was filed with the Commission by Appellee Health Department on August 22, 2006. In its motion, Appellee asserts the Commission lacks jurisdiction to hear the instant appeal as the Health Department has taken no final appealable action or act. Specifically, Appellee maintains: 1) The May 31, 2006 letter from Dr. Enyeart to Trans Rail does not meet the definition of an "action" or "act" set out in R.C. § 3745.04 and OAC § 3746-1-01; 2) The May 31, 2006 letter does not contain the requisite traditional indicia of a final action; and 3) The May 31, 2006 letter does not adjudicate with finality any legal rights or privileges of Appellant Trans Rail. (Case File Item O.)

18. A Brief in Opposition to Appellee's Motion to Dismiss was filed by Appellant Trans Rail on September 12, 2006. In its brief, Trans Rail responds: 1) Revised Code § 3745.04 does not set forth an exclusive list of appealable "acts" or "actions" and Ohio courts have broadly interpreted this statute to confer jurisdiction over a wide range of agency decisions which constitute a final adjudication of a party's rights; 2) The May 31, 2006 letter contains substantial

evidence of finality based upon both form and substance; and 3) The May 31, 2006 letter is a final adjudication of Trans Rail's right to a decision on the merits of its license application.

(Case File Item R.)

### CONCLUSIONS OF LAW

1. Ohio Revised Code Section 3745.04 authorizes certain appeals to the Commission as follows:

(B) Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. \* \* \*<sup>4</sup>

2. Further, this statute defines "action" or "act" as follows:

As used in this section, 'action' or 'act' includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

3. An event that does not constitute an action or act of the Director cannot form the jurisdictional basis for an appeal to the Commission. *Inorganic Recycling of Ohio, Inc. v. Shank*, ERAC Case No. 252011, (November 30, 1989); *National Lime and Stone Co. v. Shank*, ERAC Case No. 321960, (January 17, 1990).

4. In the instant case, the Commission must determine whether the May 31, 2006 letter from Dr. Enyeart informing Trans Rail that its C&DD license application had been found to be

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<sup>4</sup> Similarly, Ohio Administrative Code § 3746-1-01(A) provides:

"Action" or "Act" includes the adoption, modification, or repeal of a regulation, resolution, or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or regulation.

incomplete is a final action or act of the Health Department and, thus, appealable to the Commission.

5. In making such a determination, the Commission first turns to the explicit wording of R.C. 3745.04 and notes that a finding that an application is incomplete does not fall within the items explicitly enumerated as an "action" or "act" in R.C. 3745.04. However, as correctly pointed out by Trans Rail, the list contained in R.C. 3745.04 is illustrative, not exhaustive. Thus, the mere fact that a determination of incompleteness is not specifically set out as a matter constituting an "action" or "act" of the Health Department is not dispositive. See *e.g.*, *Ohio Lime, Inc. v. Jones, et al.*, ERAC Case No. 744754, (February 14, 2001).

6. If the contents of a document fall outside the enumerated matters in R.C. 3745.04, the Commission next examines the form and substance of the document to determine whether it constitutes an appealable action or act. In conducting its analysis relative to form, the Commission has traditionally identified the following factors as indicia that a document comprises a final action: 1) it is signed by the Director; 2) it contains language identifying it as a final action; 3) it sets out information advising the recipient of the right to appeal; and 4) it has been entered into the Director's journal. See *e.g.*, *Wheeling-Pittsburgh Steel Corp. v. Jones*, (2002) 2002 Ohio ENV LEXIS 6; *Dr. Kevin Lake v. Jones*, (2003) 2003 Ohio ENV LEXIS 11.

7. Applying these criteria to the May 31, 2006 letter under appeal, the Commission finds:

1) while the letter was signed by Dr. Enyeart in his capacity as Trumbull County Health Commissioner, the highest officer of the Health Department, the letter did not contain language indicating that it represented a final action of the Health Department; 2) the letter did not advise Trans Rail of a right to appeal its contents; 3) there is nothing to indicate that the letter was journalized, or in any other way documented as a final action, by the Health Department. As

such, the Commission finds Dr. Enyeart's May 31, 2006 letter does not possess the requisite form to qualify as a final action of the Health Department.

8. Even if a document does not, in form, constitute a final action it may still be a final action if the substance of the document adjudicates with finality any legal right or privilege of the appealing party. Conversely, if the document represents an intermediate step in a continuing process, or if the contents of the document indicate that it is only a segment of an evaluation that will ultimately lead to a final action, then, at that juncture, no final appealable action has occurred. Thus, the final inquiry the Commission must make is whether Dr. Enyeart's May 31, 2006 letter adjudicates with finality any legal right or privilege of Appellant Trans Rail. See *e.g.*, *Inorganic Recycling of Ohio, Inc. v. Shank*, ERAC Case No. 252011, (November 30, 1989); *Auburn Community Church v. Schregardus*, ERAC Case No. 284060, (February 11, 1999).

9. Trans Rail argues that the Health Department's May 31, 2006 determination that its application is incomplete constitutes a final adjudication of Trans Rail's right to a decision on the merits of its license application, which materially and adversely affected its property rights. In support of its position, Trans Rail relies primarily upon *CECOS International, Inc. v. Shank* (1989), 1989 Ohio ENV LEXIS 10, affirmed in part, reversed in part and remanded by the Tenth District Court of Appeals in *CECOS International, Inc. v. Shank* (1991), 74 Ohio App.3d 43.

10. *CECOS* involved the Director's denial of a hazardous waste permit renewal application submitted by *CECOS*. The denial was based, in part, upon the Director's determination that *CECOS* had failed to submit a complete and adequate application as required by OAC §§ 3745-50-40 and 3745-50-51. *CECOS* appealed the Director's denial and the Commission reversed the action of the Director, finding that *CECOS'* application was complete. Specifically, the

Commission concluded that the evidence did not support the Director's determination that CECOS' application was incomplete, as follows:

2. The question of when an application is complete is, ultimately, a question of fact to be determined by a review of all circumstances surrounding the application or submittal.
3. The mere fact that the Director or staff of the Ohio EPA does not agree with the information or the fact that the information submitted may not be adequate to demonstrate that the applicant is either in compliance or entitled to the permit applied for, is not, in itself, determinative of whether the application as submitted is complete.
4. An application will be deemed to be complete when it is determined that all the statutorily and regulatorily enumerated and mandatory components of the application have been reasonably and fully answered, submitted or responded to by the applicant and that any required attachments, exhibits and appropriate data have been included. The fact that the application may ultimately be denied by the reviewing authority on the basis of the quality of the information contained in the application or that the OEPA would want other information, is not necessarily relevant in determining completeness.
5. The record in the present case demonstrates that while the Director and the employees of the Ohio EPA did not agree with portions of the material submitted by Appellant with its application and in support of it, the essential statutory and regulatory requirements of the application had been met and fulfilled. The record demonstrates that the Director had in the application and its voluminous attachments and exhibits responses to all aspects of the statutes and regulations controlling applications. While there were vast differences of opinion regarding the quality of the information and while a permit might ultimately be granted or denied based on the quality of the information submitted, all areas of the application had been reasonably addressed by Appellant.
6. The application submitted by Appellant in this case was complete. *CECOS International, Inc. v. Shank* (1989), 1989 Ohio ENV LEXIS 10.

11. On appeal, the Tenth District Court of Appeals affirmed the Commission's finding that

CECOS' application was complete, with the following pertinent discussion:

Initially, this court is called upon to review EBR's<sup>5</sup> conclusion that the director's definition of complete was unreasonable and unlawful. R.C. 3734.05(H)(1) requires hazardous waste facility permit holders who wish to renew their permit to ' \* \* \* submit a completed application for an installation and operation permit renewal and any necessary accompanying general plans, detail plans, specifications, and such information as the director may require to the director no later than one hundred eighty days prior to the expiration of the existing permit \* \* \*.' Although the Revised Code does not define what

<sup>5</sup> The Environmental Board of Review ("EBR") was the predecessor to ERAC.

constitutes a 'complete application,' Ohio Adm. Code 3745-50-41(C)<sup>6</sup> specifies that in cases such as this, where the permit applicant is seeking a modification to an existing hazardous waste facility, the director is prohibited from transmitting to the Hazardous Waste Facility Board an incomplete permit application. This section defines a completed permit application as:

'(1) A permit application is complete:

(a) When the director receives an application form and any supplemental information which are complete to his satisfaction \* \* \*.'

\* \* \*

In reviewing the director's determination that appellee's application was incomplete, EBR did not specifically define what constitutes a 'completed application.' However, EBR did find that appellee's application was complete because it addressed all statutory and regulatory requirements. \* \* \* In so finding, EBR inferred that an application for a part B permit is complete if the applicant supplies all of the information required by both statute and regulation. *We believe this definition is too restrictive in light of the various statutory and regulatory requirements imposed upon hazardous waste facility owners and operators.*

This court finds merit in the argument advanced by the director regarding the definition of a 'completed application.' As the director points out, R.C. 3745.05(H)(1) specifically empowers the director to request additional information with respect to a specific hazardous waste site. Although Ohio Adm. Code 3745-50-44 contains a plethora of information required of a part B applicant, that rule also contemplates that the director will require additional information. See Ohio Adm. Code 3745-50-44(A)(20) and (C)(9)(e)<sup>7</sup>. Moreover, even the specific provisions of this rule are not so precise as to

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<sup>6</sup> At the time of this decision, OAC § 3745-50-41(C) stated:

(C) The Director shall not transmit an incomplete permit application to the Board [Hazardous Waste Facilities Board]. A permit application is complete when the Director receives an application form and any supplemental information which are complete to his satisfaction. . . .

<sup>7</sup> Ohio Administrative Code § 3745-50-44(A)(20) provided:

(A) The following information is required for all hazardous waste facilities, except as rule 3745-54-01 of the Administrative Code provides otherwise: \* \* \*

(20) Applicants may be required to submit such information as may be necessary to enable the director to carry out his duties under other laws.

Similarly, OAC § 3745-50-44(C)(9)(e) stated:

(C) The following additional information is required from owners or operators of specific types of hazardous waste facilities that are used or to be used for storage, treatment or disposal. \* \* \*

define for the applicant the specificity which the director may require for proper review of the application.

For example, Ohio Adm. Code 3745-50-44(C)(2)(d), requires the applicant to provide a ' \* \* \* diagram of piping, instrumentation, and process flow for each tank system.' The regulation does not specify whether the diagram of the piping is to be drawn to scale, or whether the diagram of the piping should specify the type of connector used to connect the pipes to one another or to the tanks. Such information could well be relevant to the director's review of a particular application given the nature of the site and the type of materials to be handled at the site. *The director must be free to amplify the statutory and regulatory requirements imposed upon part B applicants as the need arises.* Thus, the director does have the authority to require an applicant to amplify the information specified in Ohio Adm. Code 3745-50-44 as the exigencies of a particular site may require. Accordingly, an application for renewal of a permit to operate a hazardous waste facility is complete to the director's satisfaction under R.C. 3734.05(H)(1) when all statutory and regulatory requirements, *as amplified by the director*, have been fulfilled. (Emphasis added.)

12. The court continued as follows:

While the director has the authority to direct a permit applicant to submit additional or more detailed information in order to comply with the statutory requirement that a 'completed application' be submitted, *it is the director's obligation to specify the information sought.* An applicant cannot be faulted for attempting to comply with the director's request for additional information which is nonspecific or ambiguous. \* \* \* The submission of a completed application should not require an applicant to guess what information is being requested. To the extent the director intends to utilize his power to require an applicant to submit additional information, the director should specify the precise and particular information sought to enable an applicant to comply. The application process should not be utilized, as it appears to have been utilized in this case, as a method for denying a permit. Rather, it is the director's function to ensure, rather than to frustrate, compliance with the statutory requirement that an applicant submit a 'completed application.' (Emphasis added.)

13. Similar to the regulations addressed in *CECOS*, OAC § 3745-37-02(A)(2) and (3) provide

as follows:

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(9) Except as otherwise provided in rule 3745-57-90 of the Administrative Code, owners and operators of facilities that treat, store, or dispose of hazardous waste in miscellaneous units must provide the following additional information: \* \* \*

(e) Any additional information determined by the director to be necessary for evaluation of compliance of the unit with the environmental performance standards of rule 3745-57-91 of the Administrative Code.

(2) *An incomplete application shall not be considered.* Within thirty days of the receipt of an incomplete application or sixty days in the case of an incomplete construction and demolition debris facility license application, the applicant shall be notified of the nature of the deficiency and of refusal by the director or the board of health to consider the application until the deficiency is rectified and the application completed; and

(3) For construction and demolition debris facilities, *if the licensing authority determines that information in addition to that required by this rule is necessary to determine whether the application satisfies the requirements of Chapters 3745-400 and 3745-37 of the Administrative Code, the license applicant shall supply such information as a precondition to further consideration of the license application.* (Emphasis added.)

14. On its face, OAC § 3745-37-02(A)(3) appears to afford a licensing authority a wide degree of latitude to request additional information when considering a C&DD license application. The report prepared by Ms. Aller and Mr. Robison of Bennett & Williams specifically cited a number of items in Trans Rail's application that required clarification or supplementation.<sup>8</sup> Although it is clear that Mr. Karickhoff of CT Consultants and Mr. Tomkins of HzW Environmental Consultants, Inc. attempted to respond to these concerns, it is equally clear that Ms. Aller and Mr. Robison considered their responses inadequate. The Commission believes it is appropriate for the Health Department to seek outside review of technical matters and to rely on such an assessment conducted by an independent environmental consulting firm with extensive experience relative to C&DD facilities, e.g., Bennett & Williams. Thus, applying OAC § 3745-37-02(A)(2) and (3) and the court's reasoning in *CECOS, supra*, to the facts presented herein, the Commission finds the Health Department's determination that Trans Rail's application was incomplete was reasonable and its request for additional information was well

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<sup>8</sup> Perhaps most troubling, in the view of the Commission, is the portion of the report which indicates that the information provided by Trans Rail is completely devoid of any discussion regarding the potentially significant effect of the siting criteria changes enacted by H.B. 397 on Trans Rail's application. Specifically, it appears Trans Rail must either document that the new siting criteria are inapplicable to its application because the Director has determined that Section 3.(A)(1) – (4) of H.B. 397 have been satisfied, or it must provide information demonstrating that the siting criteria have been met.

within its regulatory authority.<sup>9</sup> See also, *Harmony Environmental Ltd. v. Morrow County District Board of Health* and *Washington Environmental Ltd. v. Morrow County District Board of Health* (2005), 2005 Ohio App. LEXIS 2920, in which the Franklin County Court of Appeals affirmed the Commission's finding that C&DD license applications filed by Harmony Environmental Ltd. and Washington Environmental Ltd. were incomplete and should not have been considered by the Morrow County District Board of Health.

15. In keeping with the above, the Commission finds the Health Department's determination regarding Trans Rail's application was not a final appealable action, but rather, represents an intermediate step in a continuing process. Accordingly, Appellee Health Department's Motion to Dismiss is hereby granted.

FINAL ORDER

Based on the foregoing, the Commission hereby GRANTS Appellee Trumbull County Health Department's Motion to Dismiss and further ORDERS Appellant Trans Rail America, Inc.'s appeal DISMISSED.

The Commission, in accordance with Ohio Administrative Code Section 3746-13-01, informs the parties that:

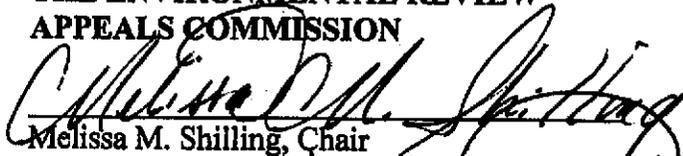
Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date

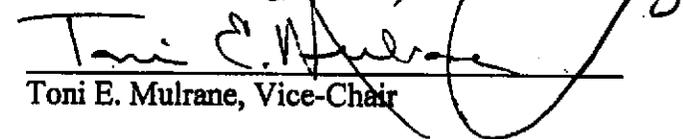
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<sup>9</sup> In its ruling today, the Commission does not intend to imply that repeated, unreasonable requests for additional information by a licensing authority could never be found to rise to the level of a final appealable action, however, we find that that is not the factual situation presented today.

upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

**THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION**

  
Melissa M. Shilling, Chair

  
Toni E. Mulrane, Vice-Chair

Entered in the Journal of the  
Commission this 8th  
day of March, 2007.

**COPIES SENT TO:**

TRANS RAIL AMERICA, INC.  
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Leslie R. Avery, Esq.       [Complementary]  
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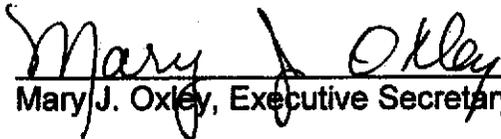
[CERTIFIED MAIL]  
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RULING AND  
FINAL ORDER

Case No. ERAC 785917

**CERTIFICATION**

I hereby certify that the foregoing is a true and accurate copy of the RULING ON  
MOTION TO DISMISS AND FINAL ORDER in **TRANS RAIL AMERICA, INC. v.**  
**JAMES J. ENYEART, M.D., HEALTH COMMISSIONER, TRUMBULL COUNTY**  
**HEALTH DEPT.** Case No. ERAC 785917 entered into the Journal of the Commission  
this 8<sup>th</sup> day of March, 2007.

  
\_\_\_\_\_  
Mary J. Oxley, Executive Secretary

Dated this 8<sup>th</sup> day of  
March, 2007, at Columbus, Ohio.