

In the  
Supreme Court of Ohio

08-0359

TRANS RAIL AMERICA, INC.,  
Plaintiff-Appellee,

v.

JAMES J. ENYEART,  
HEALTH COMMISSIONER,  
TRUMBULL COUNTY HEALTH  
DEPARTMENT.

Defendant-Appellant.

Case No. \_\_\_\_\_

On Appeal from the  
Franklin County  
Court of Appeals,  
Tenth Appellate District  
  
Court of Appeals Case  
Nos. 07AP-273 and 07AP-284

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**MEMORANDUM OF *AMICUS CURIAE* STATE OF OHIO  
IN SUPPORT OF JURISDICTION OF JAMES J. ENYEART, HEALTH  
COMMISSIONER TRUMBULL COUNTY HEALTH DEPARTMENT**

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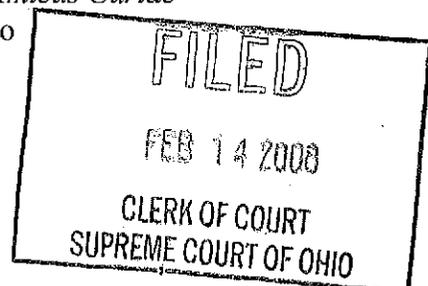


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## INTRODUCTION

This case involves the improper expansion of an administrative commission's jurisdiction, which violates its express statutory authority and abrogates the authority of the agencies for which that commission serves as the administrative reviewing body. The commission at issue is the Environmental Review Administrative Commission ("ERAC"), which hears appeals of decisions by several state agencies and local agencies that regulate environmental issues, including local boards of health. This case deserves the Court's attention because the ruling below threatens Ohio's environmental administrative agencies in three ways: (1) it assigns to ERAC authority legislatively granted to other agencies; (2) it creates an ambiguous administrative procedure that will undermine the implementation of Ohio's environmental laws by the Ohio Environmental Protection Agency ("Ohio EPA"), local boards of health, the Department of Agriculture and the State Fire Marshal's Bureau of Underground Storage Tank Regulations; and (3) it will lead to a flood of administrative appeals unnecessarily litigating the preliminary question of the completeness of permit and license applications.

Here, the decision below improperly expanded ERAC's jurisdiction and diminished that of the other agencies by undermining the requirement that an agency's action must be final before ERAC may review it. That finality issue arose when Plaintiff-Appellant Trans Rail America, Inc. ("Trans Rail") applied for a license to operate a certain type of solid waste management facility, known as a construction and demolition debris ("C&DD") facility. Ohio law empowers the Ohio EPA and approved county boards of health to issue C&DD licenses, and Trans Rail applied at the county level to Defendant-Appellant James J. Enyeart, Health Commissioner of the Trumbull County Health Department ("TCHD"). Enyeart determined that the license could not yet be granted or denied because the application was incomplete. So he sent it back to Trans Rail, telling it what extra information was needed. Trans Rail's second submission was still

incomplete, so Enyeart sent it back again requesting additional information, and when Trans Rail's third submission was still incomplete, he again sent a third letter asking for more information. Trans Rail then purported to "appeal" Reynard's last letter to ERAC, as if it were a license denial.

The Tenth District Court of Appeals overturned the ERAC decision, holding that there need not be a final action for ERAC to "order[] a director or health department to perform an act." In reaching this conclusion, the court of appeals incorrectly applied the statute and rules governing environmental appeals to ERAC and ignored long-standing administrative case law. The Tenth District's decision compromises the efforts of environmental agencies because it allows ERAC to assert jurisdiction before the appropriate agency reaches its final action. This decision forces ERAC to substitute its judgment for that of the appropriate administrative official. Instead of excusing their statutory authority to review submissions and make informed decisions regarding a license or permit, environmental agencies now must face the possibility that an applicant will prematurely appeal a letter regarding the completeness of its application to ERAC, effectively forcing ERAC to substitute its judgment for the judgment of a health commission or Ohio EPA Director. Further, once completeness is determined, ERAC would be faced with a second appeal on the same license or permit relative to the merits of the agency's decision. Moreover, in addition to usurping the legislatively delegated power of the appropriate agencies to make final actions, the appeals court's rule is likely to create a substantial increase in the number of administrative appeals to ERAC, potentially overwhelming it and causing gridlock in the administration of environmental statutes.

#### **STATEMENT OF AMICUS INTEREST**

The interests of the State of Ohio, represented by Ohio Attorney General Marc Dann, specifically include those of ERAC and the state administrative agencies whose actions are

appealed to ERAC, including the Ohio EPA; the State Fire Marshal's Bureau of Underground Storage Tank Regulations; and the Ohio Department of Agriculture. See R.C. 3745.04. The State of Ohio and these agencies in particular have a strong interest in upholding the integrity of the administrative and judicial review processes. The General Assembly carefully designed Ohio's environmental protection laws, vesting decision-making authority in the director of appropriate state agencies or the commissioners of approved health districts to take those actions necessary to implement the statutes and rules they administer. ERAC is specifically charged to review those actions. The Tenth District's decision compromises this carefully constructed statutory scheme.

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

**A. Trans Rail applied for a license to operate a C&DD facility, and the Trumbull County Health Department repeatedly said that the application was incomplete.**

On May 21, 2004, Trans Rail applied to the TCHD for a license to establish a C&DD facility in Hubbard, Ohio. On July 16, 2004, the TCHD Commissioner informed Trans Rail that its application was incomplete, and therefore, pursuant to O.A.C. 3745-37-02, the TCHD could not grant or deny Trans Rail's application. The Commissioner specifically identified the parts of the application that did not meet the relevant regulations. On December 16, 2004, Trans Rail's environmental consultants, CT Consultants, delivered to the Commissioner written responses and additional documents required, in their opinion, to complete the application. On February 15, 2006, the Commissioner informed Trans Rail that the application remained incomplete and attached a letter enumerating the areas in the application which remained defective. In two later letters, Trans Rail's consultants responded to the Commissioner's requests and submitted further information regarding the proposed C&DD facility. On May 31, 2006, the Commissioner again concluded that Trans Rail's application lacked requisite information and again returned the

application to Trans Rail. As in previous letters, the Commissioner outlined the information that was still needed before he could process the application.

**B. Trans Rail appealed TCHD's letter to ERAC, and ERAC dismissed the appeal for lack of subject-matter jurisdiction.**

Rather than supplementing its application to the TCHD, on June 30, 2006, Trans Rail appealed TCHD's May 31, 2006 letter to ERAC and asserted that the TCHD erred in determining that their C&DD license application was incomplete. ERAC dismissed Trans Rail's appeal for lack of subject-matter jurisdiction. ERAC explained that the letter was an "intermediate step in the continuing application process" and, thus, not a final appealable action. *Trans Rail America, Inc. v. Enyeart* (March 8, 2007), Case No. ERAC 785917 Conclusions of Law, ¶ 15 (attached as Ex. iii to Enyeart's Mem. in Support of Jurisdiction).

**C. The Tenth District Court of Appeals reversed, holding that no finality was required to trigger ERAC's jurisdiction.**

Trans Rail appealed the ERAC ruling to the Tenth District Court of Appeals. The Tenth District ruled that ERAC could review the Enyeart letter. *Trans Rail Am., Inc. v. Enyeart* (10th Dist.), 2007 Ohio App. Lexis 6247, 2007-Ohio-7144, ¶ 11. Further, the Tenth District said that if ERAC thought the application was incomplete, it did not need to limit itself to simply ordering the TCHD to consider the Trans Rail application; instead, said the court, ERAC could proceed to consider the merits of the application. Specifically, the court held that "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." *Id.* at ¶ 10. The court justified this result by dividing R.C. 3745.04(B), the statute defining ERAC's jurisdiction, into two parts and concluding that a final action is required only when an appellant asks ERAC to vacate or modify an action. *Id.* When, however, an appellant seeks an order requiring the performance of an act, no finality is required. *Id.* at ¶ 11.

Judge French dissented, because in her view “[n]ot 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.” *Id.* at ¶ 27 (French, J., dissenting).

### **THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

**A. The decision below undermines the administrative decision-making process by forcing ERAC to review an issue before the assigned agency has reached a final action.**

Judge French observed that the majority opinion below sets a far-reaching precedent by allowing administrative and judicial review in derogation of the exclusive statutory scheme created in R.C. 3745.04 through 3745.06. The decision allows parties to ask ERAC to compel the Director of the Ohio EPA (“Director”) or the commissioner of an approved health district to issue, deny, modify, or revoke a license, permit, lease, variance, or certificate, even before the relevant agency has fully considered an application.

Allowing premature attacks on the administrative decision-making process, like the ERAC appeal filed by Trans Rail, undermines the traditional precept that administrative agencies are best qualified to make decisions concerning the substantive matters which they regulate, including whether sufficient information has been provided with an application for the agency’s action. This Court has long recognized that “an agency that has accumulated substantial expertise in the particular subject area and to which the General Assembly has delegated the responsibility of implementing the legislative command deserves tremendous deference in formulating and applying its own rules.” *State ex rel. Saunders v. Indus. Comm’n* (2004), 101 Ohio St.3d 125, 2004-Ohio-339, ¶ 41 (quotation marks omitted). Environmental agencies,

staffed with technical experts in both science and relevant regulations, are quintessential examples of the expertise that the General Assembly has sought to empower.

By contrast, ERAC's expertise is in evaluating evidence to support a finding that a final action was both lawful and reasonable. ERAC has not been granted authority to make substantive determinations within the many statutes administered by the various environmental agencies. "The [Environmental Board of Review, precursor to ERAC,] initially does not stand in the place of the Director upon appeal, and is not entitled to substitute its judgment for that of the Director, but is limited to a determination of whether the action taken by the Director is unreasonable or unlawful." *Citizens Comm. to Preserve Lake Logan v. Williams* (1977), 56 Ohio App. 2d 61, 69; see also R.C. 3745.05. Only when there is a final action can ERAC review the merits of the decision; even then, it does so under the deferential *Lake Logan* standard. This deference is a vital component to the timely and efficient decision-making required in the administration of environmental laws and rules on a daily basis. But if an agency has not reached a final action, any ERAC review will have to be de novo review, as there is not an agency decision to which to defer.

The Tenth District's ruling effectively abolishes decades of law and procedures created by R.C. Chapter 3745. Revised Code 3745.04 establishes the process the Ohio EPA must follow when issuing, denying, modifying, revoking or renewing a license. The Director of the Ohio EPA "must issue his decisions in conformance with the requirements of R.C. 119.06 wherever possible and practicable." *Gen. Motors Corp. v. McAvoy* (1980), 63 Ohio St. 2d 232, 238. However, appeal of those decisions is dictated by the specific statutory provisions of R.C. 3745.04, which makes it clear that only "actions" of the Director are appealable. The statute goes on to provide a specific definition for an action. This same definition of "action" is

repeated in R.C. 3745.07, which provides for an appeal when of actions in instances where an R.C. 119 adjudication hearing has been held prior to the Director's issuance of the action. Despite this statutory mandate, the Court of Appeals erroneously held that, "[o]ur analysis does not require consideration of whether the Commissioner's May 31, 2006 letter constitutes a final action." *Trans Rail*, 2007-Ohio-7144 at ¶ 11. This holding contradicts decades of precedent regarding review of environmental decision making. See *U.S. Tech. Corp. v. Korleski* (10th Dist.), 2007 Ohio App. Lexis 5191, 2007-Ohio-5922;; *Dayton Power and Light Co. v. Schregardus* (10th Dist. 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.

Additionally, if agencies receive incomplete applications, they might feel compelled to act on the incomplete information, and grant or deny a license, rather than ask the applicant for follow-up information. Agencies will feel this compulsion because they will know that if they refuse to decide and ask for more information, the party could rush to ERAC and take the decision out of the agency's hands.

**B. The decision below will create administrative gridlock.**

The decision below is not limited to the narrow issue of this appeal. The Ohio EPA, the Department of Agriculture, the State Fire Marshal's Bureau of Underground Storage Tank Regulations, and other boards of health all participate in the exclusive administrative review procedures set forth in R.C. Chapter 3745. These environmental agencies receive applications for permits, licenses, leases, variances, certificates, and plans and specifications as well as daily requests for modifications, revisions, and revocations of these applications. The appellate court's ruling will extend to all such actions before these agencies and will allow any party

dissatisfied with a notice of deficiency during the application process an appeal to ERAC for a ruling on completeness. Allowed to stand, this ruling could open the floodgates to an abundance of frivolous appeals by any party wanting an immediate answer from the agency on the status of its application, regardless of information provided. That process could be repeated several times for every notice of deficiency in any application for agency action until the application was indeed deemed complete.

Moreover, the Tenth District's ruling determined that ERAC must conduct a de novo hearing pursuant to R.C. 3745.05 every time it faces an appeal in a case where no adjudicatory hearing was held pursuant to R.C. 119.02. In a situation like the one here, a section 119 adjudicatory hearing will never have been held at the agency, because an agency that considers an application still incomplete will of course not yet have held a hearing. This is so because license or permit negotiations are merely draft actions and do not arise to the level of a proposed action by the director. Thus, according to the lower court's decision, every time an aggrieved party appeals a document, event, or bit of correspondence that the director has not formally issued or even looked at, ERAC will be required to have a hearing on the merits of the appeal. Not only is this action arbitrary, but it is duplicative and costs enormous amounts of agency time and money.

## ARGUMENT

### *Amicus Curiae* State of Ohio's Proposition of Law No. 1:

*Under R.C. 3745.04(B), ERAC may review only final actions of statutorily designated agencies. Therefore, ERAC may order a director or board of health "to perform an act" only after that director or board of health has performed a final action.*

Revised Code 3745.04 governs appeals to ERAC, giving ERAC authority to review acts or actions of specified administrative bodies. In particular, the statute gives ERAC the authority to review all actions of the director of the Ohio EPA, the actions of health commissioners from

certain districts approved to administer R.C. Chapters 3714 and 3734, actions of the Director of Agriculture in the administration of R.C. Chapter 903, and actions of the State Fire Marshal in the administration of Chapter 3737. ERAC's jurisdiction over these administrative bodies, however, is limited as defined by R.C. 3745.04(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.

Despite this plain language, the Tenth District seemingly reads R.C. 3745.04(B) to provide two distinct types of appeals. On one hand, an appellant may ask ERAC to vacate or modify an agency's action, and for those appeals—and according to the Tenth District, only for such appeals—the agency must have reached a final action. But, on the other hand, a second type of appeals now exists, under the Tenth District's view. When an appellant seeks to have ERAC “order a director or board of health to perform an act,” no final action is needed at all. See *Trans Rail*, 2007-Ohio-7144 at ¶ 9.

The more logical view, as Judge French explained, is that the final clause in the statute, referring to ERAC's power to order an agency to act, is not a freestanding grant of power, independent of the authority to review actions. ERAC's “grant of power is not in isolation,” and references throughout the section “make clear that there must first be a final ‘act’ or ‘action’ to trigger ERAC jurisdiction.” *Trans Rail*, 2007-Ohio-7144 at ¶ 21 (French, J., dissenting). Instead that clause is true for the common-sense purpose of allowing ERAC, when it reverses the denial of a license, to affirmatively order the issuance of the license, as vacating the denial would be incomplete relief.

Further, the principle that the final action requirement applies to all appeals is supported by the General Assembly's decision to define "action" or "act" to give further meaning to the requirement. Revised Code 3745.04(A) provides that, as used in R.C. 3745.04:

"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.

This definition of "action" or "act" applies throughout the section. For example, 3745.04(C) permits the director to appeal an action of a local board of health to ERAC "for an order vacating or modifying the action of the board" or for an "order requiring the local board of health to act." Because the definition of "act" or "action" applies throughout the section, the director may not appeal to ERAC before the local board of health performs a final, appealable act. Likewise, when "any person" appeals to ERAC under 3745.04(B), ERAC may assert jurisdiction only if there is a final act to review.

This reading of R.C. 3745 also comports with case law. In deciding whether it has jurisdiction, ERAC must conclude whether it "determines or adjudicates *with finality* any legal rights and privileges of the appealing party or parties." *Dayton Power & Light Co. v. Schregardus* (1997), 123 Ohio App. 3d 476, 479 (quotations omitted, emphasis added). The Tenth District recently applied *Dayton Power & Light* in *U.S. Technologies v. Korleski*, 2007-Ohio-5922, where the court held that a letter may "constitute a final action if in substance it *finally adjudicates* [the appellant's] legal rights." *Id.* at ¶ 7 (emphasis added). In *U.S. Technologies*, the Tenth District went to great lengths to determine whether the letter at issue in that case was a final action and examined a list of factors including: (1) if the Ohio EPA Director signed the letter, (2) if the letter identifies itself as a final action, (3) if the letter notifies

the party of its appeal rights, and (4) if the letter suggests that it was entered into the Director's journal as a final action. *Id.* at ¶ 11. The court recognized that the letter was an interim step of "advising and investigating" that did "not rise to the level of a final action," and, accordingly, affirmed ERAC's dismissal of the appeal. *Id.* at ¶¶ 16, 17.

Despite this recent ruling by the same District Court of Appeals, the crux of the ruling below is that ERAC has authority to review actions by the Director even if those actions are not final. *Trans Rail*, 2007-Ohio-7144 at ¶ 11. Mysteriously and incorrectly, the court cites *U.S. Technologies* for this proposition. *Id.* However, that case holds that ERAC has jurisdiction *only* to hear final actions under R.C. 3745.04. Under *U.S. Technologies*, ERAC must determine whether an action is final in all appeals, not only where an aggrieved party requests that ERAC vacate or modify an action. *U.S. Tech.*, 2007-Ohio-5922 at ¶ 6. Therefore, *U.S. Technologies* correctly holds that if ERAC determines that an action is not final, it does not have jurisdiction to hear the appeal.

Judge French's dissent here not only got the law right, but it also explained the consequences of the majority's mistake. Judge French aptly pointed out that the majority's ruling creates a "dangerous precedent" for interference with the comprehensive statutory scheme established for the issuance of environmental permits or licenses. *Trans Rail*, 2007-Ohio-7144 at ¶ 27 (French, J., dissenting). Instead of allowing this "dangerous precedent" to stand, this Court should accept jurisdiction and interpret R.C. 3745.04(B) to give ERAC authority to order the director or board of health to "perform an act" only where ERAC has already determined that a final action was taken.

**Amicus Curiae State of Ohio's Proposition of Law No. 2:**

*The Commissioner's letter to Trans Rail requesting more information was not a final appealable action, so ERAC properly dismissed Trans Rail's appeal for lack of jurisdiction.*

The Tenth District's mistake, as explained above, was holding that the finality requirement did not apply here. Once that mistake is corrected and the finality requirement is applied, the question becomes whether the finality requirement was satisfied. Here, the answer is plainly no, as the letter asking for more information does not meet the established tests for finality of agency action. ERAC has determined repeatedly that a letter that is merely an "intermediate step" evincing "details of an interactive process engaged in by the parties to resolve an ongoing matter" is not a final action. *U.S. Tech.*, 2007-Ohio-5922 at ¶ 16. This is the case here: the letter requiring more information was nothing more than an intermediate step in an ongoing process that would help the board of health to determine whether to accept, and ultimately grant or deny, Trans Rail's license application.

O.A.C. 3745-37-02 governs applications for a C&DD facility. It expressly contemplates that some applications might be incomplete and instructs agencies how to deal with them:

An incomplete application shall not be considered. Within . . . 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 applications completed.

If the licensing authority determines that additional information is needed to determine whether the application complies with the Administrative Code, "the license applicant shall supply such information as a precondition to further consideration of the license application." *Id.* From the plain reading of the regulation, the director or board of health has the obligation to review applications and determine their completeness; this duty does not rest with ERAC. Trans Rail anticipated and knew that a letter would be part of the evaluation process that would ultimately

lead to either the issuance or denial of its license. When a board of health or other agency notifies a party that an application is incomplete and when the agency gives concrete examples of what documentation is still needed to finalize the application, the parties should communicate and negotiate to finalize the situation. If the party does not agree with the board of health's position, it does not have to follow it, but it can instead expect the board of health to deny its application.

Considering this administrative scheme and following the four-part test to determine the finality of a letter, *supra* at 10-11, ERAC properly concluded that there was no final action for it to review. *Trans Rail*, Case No. ERAC 785917, Conclusions of Law at ¶ 15 (finding that TCHD's determination regarding Trans Rail's application was "an intermediate step in a continuing process"). In particular, ERAC considered that the letter did not contain language indicating that it was a final action, the letter did not advise Trans Rail of a right to appeal, and there was nothing to indicate that the letter was journalized or documented. *Id.* at ¶ 7. Cf. *Aristech Chem. Corp. v. Shank* (July 25, 1989), EBR Case No. 441977 at ¶ 4-5 (holding that a letter from the Ohio EPA directing Aristech to undertake a particular course of action with regards to a drilling site was an "intermediate step" and not a final action).

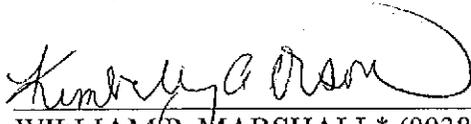
Instead of working within the legislative scheme, Trans Rail deviated from the statutorily mandated process and appealed a letter—one that merely sought more information and was not a final action—to ERAC. Unfortunately, the Tenth District put its stamp of approval on Trans Rail's deviation, and the court's endorsement of Trans Rail's actions will undoubtedly encourage other applicants to do the same.

## CONCLUSION

For the above reasons, this Court should review this case and reverse the decision below.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

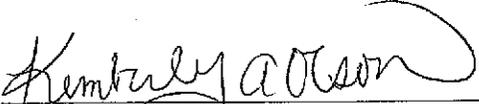
I certify that a copy of the foregoing Memorandum of *Amicus Curiae* State of Ohio in Support of Jurisdiction of James J. Enyeart, Health Commissioner Trumbull County Health Department was served by U.S. mail this 14th day of February, 2008, upon the following counsel:

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