

In the  
Supreme Court of Ohio

TRANS RAIL AMERICA, INC., : Case No. 2008-0359  
: :  
Plaintiff-Appellee, : :  
: : On Appeal from the  
v. : : Franklin County  
: : Court of Appeals,  
JAMES J. ENYEART, : : Tenth Appellate District  
HEALTH COMMISSIONER, : :  
TRUMBULL COUNTY HEALTH : : Court of Appeals Cases  
DEPARTMENT. : : Nos. 07AP-273 and 07AP-284  
: :  
Defendant-Appellant.

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**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO  
IN SUPPORT OF DEFENDANT-APPELLANT JAMES J. ENYEART, HEALTH  
COMMISSIONER, TRUMBULL COUNTY HEALTH DEPARTMENT**

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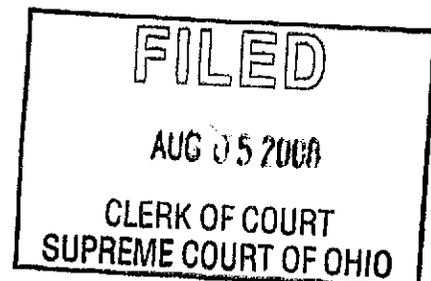
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## INTRODUCTION

The Environmental Review Appeals Commission (“ERAC”) is a statutorily created entity designed to resolve appeals from a final judgment. ERAC does not have jurisdiction to rule in mandamus-like actions on non-final orders of the director or health department. Here, the appeals court ignored the plain language of R.C. 3745.04(B) and overturned three decades of precedent when it improperly expanded ERAC’s jurisdiction. According to the Tenth District, no final action need exist for ERAC to assert its jurisdiction and “order[] a director or health department to perform an act.” *Trans Rail Am., Inc. v. Enyeart* (10th Dist.), 2007 Ohio App. Lexis 6247, 2007-Ohio-7144, ¶ 10. If allowed to stand, this incorrect interpretation will transfer technical decision-making authority away from environmental agencies that are authorized and equipped to render permitting and licensing decisions and to administrative review tribunals. In effect, the lower court’s decision places ERAC in the position of substituting its judgment for that of the Director of the Ohio Environmental Protection Agency (“director”) or health department before the appropriate agency has had the opportunity to issue a final action on a matter.

The decision also raises the possibility that an applicant will prematurely appeal a letter regarding the completeness of its application to ERAC, and, once ERAC determines completeness, ERAC would then be faced with the merit appeal of the same license or permit. The court’s opinion thus opens the floodgates for countless unripe appeals to ERAC. This will substantially increase the number of administrative appeals to ERAC, potentially overwhelming it and causing gridlock in the administration of environmental statutes.

Finally, the decision ignores Trans Rail America, Inc’s (“Trans Rail”) appropriate remedy. If Trans Rail’s application was truly complete, Trans Rail should have pursued an original action for a writ of mandamus, not an appeal to ERAC. The writ would be the proper remedy because,

without a final act to review, ERAC does not have jurisdiction to order the director or a health department commissioner to act. If, however, the director or a commissioner neglects his duty to rule on a complete application, an applicant can sue for a writ ordering the director or commissioner to rule on the application.

ERAC was correct in dismissing Trans Rail's appeal when it determined that it did not have subject-matter jurisdiction over the health commissioner's letter. Accordingly, the Tenth District's decision to give ERAC authority outside its statutorily granted jurisdiction should be reversed.

### 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 returned the application as incomplete.**

Trans Rail planned to construct a construction and demolition debris ("C&DD") landfill in Hubbard, Ohio. In accordance with Ohio's environmental rules, Trans Rail applied to the Trumbull County Health Department ("TCHD") for a license to operate the proposed C&DD facility. The TCHD Commissioner ("Commissioner") informed Trans Rail that its application was incomplete, and therefore, pursuant to O.A.C. 3745-37-02, the TCHD could neither approve nor deny Trans Rail's application. In his letter, the Commissioner specifically identified the parts of the application that did not meet the relevant rules. Trans Rail's environmental consultants provided to the Commissioner written responses and additional documents required, in their opinion, to complete the application. The Commissioner informed Trans Rail that the application remained incomplete and again delineated the areas in the application that 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. The application remained

incomplete, and the Commissioner again returned the application to Trans Rail. As in previous letters, the Commissioner outlined the information that was needed before he could act upon the application.

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

Rather than submitting a complete application to the TCHD, on June 30, 2006, Trans Rail appealed 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 Am., 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. In its 2-1 decision, the Tenth District reversed ERAC's dismissal and ruled that ERAC could—and should—review the application. *Trans Rail Am., Inc. v. Enyeart* (10th Dist.), 2007 Ohio App. Lexis 6247, 2007-Ohio-7144, ¶ 11. Further, the majority held that if ERAC found the application to be incomplete, it did not need to limit itself to 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 TCHD to issue or deny Trans Rail a license." *Id.* at ¶ 10.

Appellant James Enyeart, Health Commissioner, TCHD, appealed the decision of the Tenth District on the following question of law: Whether, pursuant to R.C. § 3745.04(B), ERAC may

review only final actions of statutorily designated agencies, and that letters requesting further information from those agencies are not final actions, and therefore cannot be reviewed. This Court accepted Appellant's discretionary appeal on June 4, 2008.

## 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.*

Ohio Revised Code Section 3745.04(B) provides one mechanism by which a party may bring an appeal before ERAC.<sup>1</sup> Specifically, that section states:

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.

Explicit in R.C. 3745.04 is the prerequisite that the "director [of EPA] must take some affirmative action relative to a permit or permit application ('issue, deny, modify, revoke, or renew') before there is an act or action of the Director which is appealable to the Commission." *Kaple v. Jones* (Dec. 16, 2004), ERAC No. 745596, ¶ 4 (holding that ERAC does not have jurisdiction to review a public notice because such a notice is not a final action). ERAC has jurisdiction only to determine whether the director's action was "lawful and reasonable;" then and only then can ERAC make a "written order affirming the *action*" or a "written order vacating or modifying the *action* appealed from." R.C. 3745.05 (emphasis added). ERAC is not vested with the authority or expertise to substitute its judgment for that of the director's. Instead, ERAC "must give due deference to an administrative interpretation formulated by an agency that has

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<sup>1</sup> A *non*-party who is aggrieved can seek ERAC's review of a director's action if the party files a timely appeal consistent with R.C. 3745.07.

accumulated substantial expertise in the particular subject area and to which the General Assembly has delegated the responsibility of implementing the legislative command.” *State ex rel. Saunders v. Indus. Comm’n* (2004), 101 Ohio St.3d 125, 2004-Ohio-339, ¶ 41 (internal quotations omitted).

Ignoring precedent and R.C. 3745.04’s plain language, the Tenth District improperly 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.” *Trans Rail Am., Inc.*, 2007-Ohio-7144 at ¶ 10.

**A. The plain language of R.C. 3745.04(B) and the legislative scheme governing appeals to ERAC permit appeals of final actions only.**

R.C. 3745.04 governs appeals to ERAC, giving ERAC authority to review acts or actions of the Director of the Ohio EPA, the health commissioners of districts approved to administer R.C. Chapters 3714 and 3734, the Director of Agriculture in the administration of R.C. Chapter 903, and the State Fire Marshal in the administration of Chapter 3737. R.C. 3745.04(B), however, limits ERAC’s jurisdiction in these cases to review of final actions—a crucial limitation the Tenth District ignored.

The Tenth District misread R.C. 3745.04(B) to permit two distinct types of appeals. In one type of appeal, 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 those appeals—the agency must have reached a final action. But, although they had considered similar questions previously, for the first time in this case the Tenth District created a second type of appeal. According to the appellate court, when an appellant seeks to have ERAC “order a director or board of health to perform an act,” no final action is needed for ERAC to step in. See *Trans Rail*, 2007-Ohio-7144 at ¶ 9. Moreover, the Tenth District concluded that this second type of appeal gives ERAC

jurisdiction not only to order the director or board of health to act generally, but to order the director or board of health to take a particular action.

The more logical view and the interpretation established by years of consistent precedent, as Judge French explained in her dissenting opinion, is that the second clause of the statute—“or ordering the director or board of health to perform an act”—allows ERAC to order the director or board of health to act *after* ERAC determines that the director or board’s actions was unreasonable or unlawful. The ability to order a director or board of health to act is not a freestanding grant of power, independent of the authority to review actions. *Trans Rail*, 2007-Ohio-7144 at ¶ 21 (French, J., dissenting) (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.”). For example, ERAC may order the director to perform an act consistent with ERAC’s findings after it determines that the director or board of health acted unlawfully or unreasonably, and that a license that was denied should have been granted. Cf. *General Motors Corp. v. McAvoy* (1980), 63 Ohio St. 2d 232 (ordering the director to act only after determining that the director’s actions were unreasonable).

Here, there has been no final action. R.C. 3745.04(A) defines “action” or “act” to include, among other things, “the issuance, denial, modification, or revocation of a license.” This definition of “action” or “act” applies throughout the section. *Id.* Indeed, the entire legislative scheme presupposes that only final actions will be appealed to ERAC.

First, “action” or “act” is used throughout the chapter when outlining the appeals process. For example, R.C. 3745.04(D) requires appeals to be in writing and to “set forth the *action* complained of.” (emphasis added). Subsection D also requires an appellant to appeal within “thirty days after notice of the *action*.” (emphasis added). Similarly, R.C. 3745.07 states that a

party may request the director to hold an adjudicatory hearing for a “proposed action” of the director before the director finally issues, denies, modifies, revokes, or renews any permit, license, or variance, which again presupposes that only final actions—and not proposed actions or letters—are appealable to ERAC.

Second, R.C. 3745.04 establishes the process that an aggrieved party must follow when Ohio EPA issues, denies, modifies, revokes, or renews a license. Under R.C. 3745.04(B), ERAC has jurisdiction over the case. “However, the director has and retains jurisdiction to modify, amend, revise, renew, or revoke any permit, rule, order, or other action.” R.C. 3745.04(B). If there has been no action, the director has nothing to modify, amend, revise, renew, or revoke.

The Tenth District’s holding also contradicts decades of precedent interpreting ERAC’s jurisdiction. Time and again, Ohio courts have concluded that ERAC may consider only actions that adjudicate with finality an appellant’s legal rights and privileges. See, e.g., *U.S. Tech. Corp. v. Korleski* (10th Dist.), 2007 Ohio App. Lexis 5191, 2007-Ohio-5922, ¶ 16-17 (holding that ERAC properly dismissed the appeal because the letter at issue was not a “final action”); *Dayton Power and Light Co. v. Schregardus* (10th Dist. 1997), 123 Ohio App. 3d 476, 479 (“In determining whether or not the event or document in question is an appealable action, one of the issues the Board must determine is whether or not the event or document in question determines or adjudicates with finality any legal rights and privileges of the appealing party or parties.”); *Youngstown Sheet and Tube Co. v. Maynard* (1984), 22 Ohio App. 3d 3 (requiring an “action” to trigger EBR’s jurisdiction).

When considering whether a document—like the letter at issue here—constitutes a final, appealable action, ERAC “begin[s] by examining both the substance and the form of the letter as well as the circumstances and events surrounding the document.” *Dr. Kevin Lake v. Jones* (Nov.

20, 2003), ERAC Nos. 255300-255301; see also *Coal. for a Safe Env't and Citizens Action, et al. v. Schregardus, et al.* (Oct. 5, 1999), ERAC Nos. 483934-483936; *County Waste Co., Inc. v. Schregardus, et al.* (Aug. 6, 1998), ERAC No. 043952. In deciding whether it has jurisdiction, ERAC considers the form of the letter and examines 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 journalized as a final action. *U.S. Tech. Corp.*, 2007-Ohio-5922 at ¶ 11.

Even if the document at issue does not satisfy the four-prong test relating to the document's form, ERAC may nevertheless conclude that the document is an appealable final action if it "determines or adjudicates *with finality* any legal rights and privileges of the appealing party or parties." *Dayton Power & Light Co. v. Schregardus* (10th Dist. 1997), 123 Ohio App. 3d 476, 479 (quotations omitted, emphasis added). Conversely, if the letter simply represents an "intermediate step in a continuing process, if the subject matter of the document indicates that it is part of a contemplated review or evaluation which will ultimately lead to a final action by the director, or it is merely explanatory of an OEPA policy or position, then no final action which may be appealed to this Commission has occurred." *Dr. Kevin Lake v. Jones*, ERAC Nos. 255300-255301 at ¶ 7.

The Tenth District recently recognized this distinction, when the court held that a letter may "constitute a final action if in substance it finally adjudicates [the appellant's] legal rights." *U.S. Tech. Corp. v. Korleski*, 2007-Ohio-5922 at ¶ 7 (citing *Dayton Power & Light*, 123 Ohio App. 3d at 479). In *U.S. Technology*, the Tenth District recognized that a letter that does not adjudicate final rights 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 *Trans Rail* majority held that ERAC has authority to review actions by the Director even if those actions are not final. *Trans Rail*, 2007-Ohio-7144 at ¶ 11. The appeals court improperly cited *U.S. Technology* for this proposition. *Id.* That case, however, holds that ERAC has jurisdiction *only* to hear final actions under R.C. 3745.04. Under *U.S. Technology*, 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. Technology* correctly holds that if ERAC determines that an action is not final, ERAC does not have jurisdiction to hear the appeal.

**B. The Tenth District’s ruling sets dangerous precedent by giving ERAC authority to order the director or board of health to perform an act when neither has yet acted.**

Judge French’s dissent not only got the law right, but it also accurately predicted 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).

The role of ERAC should not be confused with the roles of the statutorily designated agencies that ERAC reviews. The director and boards of health, on one hand, are authorized to issue, deny, modify, or revoke a license, permit, lease, variance, or certificate, or approve or disapprove of plans and specifications. ERAC, on the other hand, is authorized to review actions of the director or board of health to determine its lawfulness and reasonableness, and to order the director to change his action if it was unreasonable or unlawful. The Tenth District’s ruling creates the dangerous precedent that ERAC can now (1) issue, deny, modify, or revoke a license

or permit that is exclusively in the purview of local boards of health, the Ohio EPA, the Bureau of Underground Storage Tank Regulations (“BUSTR”), or the department of Agriculture, and (2) hear frivolous appeals as to the completeness of an application before the director has made any formal decision.

**1. The Tenth District’s ruling abrogates the administrative process by preempting an agency’s statutory duty to make decisions.**

Reading R.C. 3745.04(B) to mean that ERAC can hear only final actions of the director or board of health supports the traditional understanding that administrative agencies are best qualified to make decisions concerning the substantive matters that they regulate, including whether an applicant has provided sufficient information for agency 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*, 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 the decision of the director or board of health and determining whether that decision was lawful and reasonable. ERAC does not have 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 a final action exists can ERAC review the merits of the decision; even then, it does so under the deferential *Lake Logan* standard. This deference is vital for administering environmental laws efficiently because it is the experts—and not members of ERAC or other courts—who have the knowledge to make environmental determinations.

**2. The Tenth District’s ruling will cause administrative gridlock by allowing any party dissatisfied with a director’s or board of health’s notice of deficiency to appeal to ERAC.**

The decision below extends well beyond 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 out in R.C. Chapter 3745. These environmental agencies routinely receive and process 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 premature 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. Judge French accurately stated this sentiment in her dissent when she noted that, “[r]ather 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.” *Trans Rail*, 2007-Ohio-7144 at ¶ 15 (French, J., dissenting).

Moreover, the Tenth District’s ruling determined that ERAC must conduct a de novo hearing under R.C. 3745.05 every time ERAC faces an appeal in a case where no adjudicatory hearing was held under R.C. 119.02. In a situation like the one here, a section 119 adjudicatory hearing would 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 on the merits of the application. This is so because license or permit negotiations are merely draft actions and do not rise 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. That action is not only arbitrary and unnecessary, but it would cost enormous amounts of agency time and money.

Even more alarming is the fact that the rationale of the Tenth District decision is easily extended beyond administrative appeals of environmental actions. As one small example, the Ohio Department of Education licenses teachers and others who work in the field of education. Routinely, applications are sent to the Office of Professional Conduct within that Department which are reviewed by the Department for sufficiency and substance. It is very common for investigators within the Office of Professional Conduct to solicit more information than that submitted with the application in order to have sufficient information with which to evaluate the application prior to any administrative hearing. The ill-reasoned rationale of the Tenth District majority could easily be adapted to allow an appeal of an incomplete application to a common pleas court pursuant to Chapter 119.

**C. If Trans Rail’s application was complete and the Commissioner had a duty to act, Trans Rail’s proper remedy was to file a writ of mandamus.**

The lower court’s decision gives ERAC authority to command the director or board of health to perform an act without the initial finding that ERAC has jurisdiction over the appeal. Ohio Revised Code Chapter 2731 vests Ohio’s courts of common pleas, courts of appeal, and the Ohio Supreme Court with exclusive authority to issue writs of mandamus. See Ohio Const. IV section 2(B)(1)(b) and section 3(B)(1)(b). Neither the Ohio Constitution nor its governing statutes grant ERAC original jurisdiction to issue writs of mandamus. Instead, a relator may properly bring such an action in a court of common pleas, a court of appeals, or the Ohio Supreme Court. *Id.*; see also *State ex rel. Ohio Ass’n of Pub. Sch. Emp./AFSCME, Local 4, AFL-CIO v. Batavia Local Sch. Dist. Bd. of Educ.* (2000), 89 Ohio St. 3d 191.

Here, if Trans Rail’s application was truly complete and the Commissioner had a duty to act, Trans Rail’s proper remedy was to file a writ of mandamus. Indeed, case law supports a relator’s right to order the director or a board of health to act through a writ of mandamus. In *State ex rel. Northeast Ohio Sewer District v. Ohio EPA* (8th Dist.), 2007 Ohio App. Lexis 754, 2007-Ohio-834, relators filed a writ of mandamus with the court of common pleas to order the director to issue a permit-to-install when the director failed to act within the statutory time frame. *Id.* at ¶ 2. On appeal, the Eighth District affirmed the trial court’s dismissal of the writ because the relator did not have a clear legal right to seek an order compelling the director to issue a permit. *Id.* at ¶ 7. The court noted, however, that if the relator had sought an order compelling the director to consider the application and take *some action* within the director’s statutory discretion (rather than ordering the director to take the particular action of issuing the permit) then a writ of mandamus would lie. *Id.* at ¶ 7, 21. Judge Gallagher, concurring, stressed the importance of allowing a relator to file a writ of mandamus in this situation because “[EPA’s]

failure to make a timely decision, with clarity, works to the detriment of the NEORS [Northeast Ohio Regional Sewer District], which, like the EPA, has commitments and responsibilities to the public that must be addressed. *Id.* at ¶ 25 (Gallagher, J., concurring).

Trans Rail has a clear legal right for the director or board of health to act—at some point—to approve or deny a complete application to operate a C&DD landfill. O.A.C. 3745-37-02 gives the director or board of health discretion to ask for more information if it is necessary to process the application and not to consider an incomplete application. But when the director or a commissioner of a board of health has a complete application, he must act on it. And if he fails to do so, a court may issue a writ ordering him to act. See *State ex rel. Benton's Vill. Sanitation Serv., Inc. v. Usher* (1973), 34 Ohio St. 2d 59, 61 (“Mandamus will lie to compel an administrative officer or board to exercise discretion, but it will not lie to control discretion.”). Thus, a court could issue a writ of mandamus ordering a board of health to exercise its discretion and rule on a complete application. A court could not, however, order a board of health to exercise its discretion in a particular way. In other words, a court could not order a board of health to issue a permit.

Additionally, a writ of mandamus is distinguishable from an action seeking declaratory or injunctive relief of the director or board of health’s regulatory programs. While a common pleas court does not have jurisdiction to consider setting aside an order of the director or board of health through a declaratory judgment action, a common pleas court does have jurisdiction to order a writ of mandamus to order the director or board of health to act in a situation where he has failed to discharge a clear duty. Compare *Warren Molded Plastics, Inc. v. Williams* (1978), 56 Ohio St. 2d 352, and *Cincinnati ex rel. Crotty v. Cincinnati* (1977), 50 Ohio St. 2d 27 (holding that a court of common pleas does not have subject matter jurisdiction in an action

against the director of an agency seeking declaratory and injunctive relief), with *State ex rel. Liberty Mills, Inc. v. Locker*, 22 Ohio St. 3d at 104; *State ex rel. Baker v. Cuyahoga County Bd. of Comm'rs* (1988), 46 Ohio App. 3d 39 (holding that a court of common pleas can issue a writ of mandamus to order the director of an agency to act).

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

*The Commissioner's letters to Trans Rail requesting more information were not final appealable actions, 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 is not required for all appeals to ERAC. 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, because the letter asking for more information does not meet the established test for finality of agency action.

**A. Before the director or board of health considers a C&DD application, Ohio Administrative Code 3745-37-02 requires that the application be complete.**

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

(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 3 745-400 and 3 745-37 of the Administrative Code, the license applicant shall supply such information as a precondition to further consideration of the license application.*

(Emphasis added). The text makes clear that the director or board of health has the obligation to review applications and determine their completeness; this duty does not rest with ERAC. In

addition, the director or board of health has the statutory obligation to ask for more information as a precondition to making any final decision on the application. The Tenth District's ruling essentially disregards the plain language of O.A.C. 3745-37-02 and allows a license applicant to appeal to ERAC to vacate the director or board of health's decision that the license application is incomplete, and order the director or board of health to "act" by considering the application on its merits, when in fact the director or board of health had only used the discretion afforded to him by O.A.C. 3745-37-02 to return an incomplete application.

Trans Rail anticipated and knew that a deficiency letter could 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 health board's position, it does not have to follow it, but it can instead risk the possibility that the director or board of health will not act on its application.

**B. A letter, like the one the Commissioner sent to Trans Rail, is not a final action but merely an intermediate step in the application process.**

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. In *U.S. Technology*, the Tenth District Court of Appeals affirmed ERAC's dismissal of appellant's appeal of a letter. It reasoned that, based on the four-prong test governing whether an event or document is an appealable action, the letter did not "finally adjudicate rights" because the letter was the latest in a series of meetings and letters addressing issues between appellant and Ohio EPA; the letter "outlined a proposal which U.S. Technology should have already implemented"; and the letter concluded by advising that

Ohio EPA would continue to monitor appellant's compliance with Ohio's environmental laws. *Id.* at ¶ 11-13. That 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.

Considering this administrative scheme and following the four-part test to determine the finality of a letter, see *supra* at 8, 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; accord *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 regard to a drilling site was an "intermediate step" and not a final action).

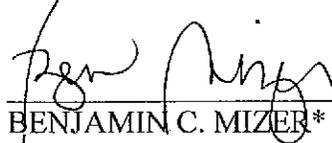
Instead of working within the legislative scheme, Trans Rail circumvented the statutorily mandated process and appealed a letter—one that merely sought more information and was not a final action—to ERAC. Unfortunately, the Tenth District put its stamp of approval on Trans Rail's deviation, and the court's endorsement of Trans Rail's actions will undoubtedly encourage other applicants to do the same. The ramifications of this decision upon the efficient administration of Ohio's environmental laws could well be devastating.

## CONCLUSION

For the above reasons, this Court should reverse the judgment below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit brief of *Amicus Curiae* State of Ohio in Support of Defendant-Appellant James J. Enyeart, Health Commissioner, Trumbull County Health Department was served by U.S. mail this 5th day of August, 2008, on the following counsel:

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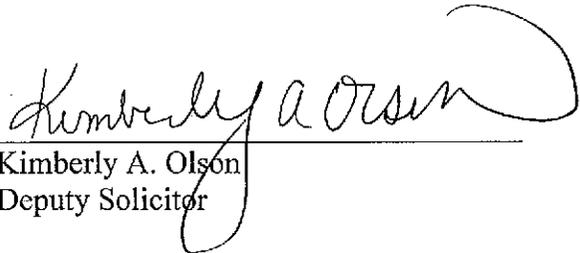
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