

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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**REPLY 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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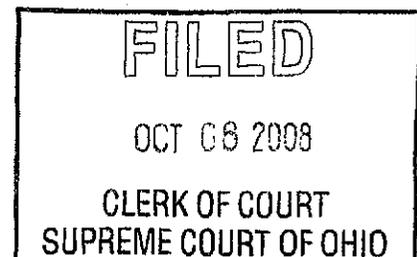
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## INTRODUCTION

This appeal presents two issues: First, whether the Environmental Review Appeals Commission (“ERAC”) has subject-matter jurisdiction to review an action of the Director of Environmental Protection or a board of health that is not yet a final action. Second, whether returning Trans Rail America Inc.’s (“Trans Rail”) application for a license to operate a construction and demolition debris (“C&DD”) landfill as incomplete constitutes an appealable action. The answers to both questions are clear. ERAC has jurisdiction to review only final actions, and a finding of incompleteness is not and has never been a final action. Therefore, the Trumbull County Health Department’s (“TCHD”) May 31, 2006, letter to Trans Rail explaining that Trans Rail’s application was incomplete was not a final, appealable action, and ERAC properly dismissed the appeal for lack of jurisdiction.

## ARGUMENT

### A. ERAC has exclusive jurisdiction only over final acts or actions.

Revised Code 3745.04 creates an exclusive statutory scheme for the review of actions of specified administrative bodies by ERAC. Revised Code 3745.04(B) cannot be read—as the lower court did—without reference to the surrounding statutory scheme. See, e.g., *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, ¶ 33 (“[R]eading [statutes] in pari materia illustrates the intent of the General Assembly.”). Instead, the section must be read in conjunction with all of R.C. 3745.04 and the other statutes that provide a right of appeal to ERAC. These sections make clear that, although ERAC has “exclusive jurisdiction over any matter brought before it,” the only matters that may be brought before ERAC are final acts or actions of the director or board of health.

Both R.C. 3745.04 and R.C. 3745.07, which provide for appeals to ERAC, expressly state that the director or board of health must take some specific action before an act or action of the

director exists for ERAC to review. *Kaple v. Jones*, Case No. ERAC 745596, ¶ 4. Revised Code 3745.04(A) defines “act” and “action” for purpose of the section. This definition does not include a letter documenting the incomplete nature of an application for a license or permit. To invoke ERAC’s review, R.C. 3745.04(D) requires that an appeal “set forth the action complained of.” Furthermore, ERAC’s exclusive jurisdiction extends only to findings that the action appealed from was lawful and reasonable. R.C. 3745.05. Thus, an event that does not constitute an act or action of the director or board of health cannot provide ERAC jurisdiction. See *Inorganic Recycling of Ohio, Inc. v. Shank*, Case No. EBR 252011, ¶ 13, 14.

Trans Rail relies on ERAC’s authority under R.C. 3745.04(B) to order the director or the board “to perform an act,” but the phrase “to perform an act” is not a standalone grant of power. Rather, this phrase gives ERAC authority to order the director or board to perform an act only after ERAC finds that the director or board’s prior action was unlawful or unreasonable. For example, ERAC could order the director or board of health to perform an act where the director or board had denied a license that ERAC determines it should have granted. In that situation, ERAC would not “vacate or modify” the denial, but would instead “order[ing] the director or board of health to perform an act” by ordering the issuance of the license.

Moreover, Trans Rail’s reading of the statute undermines the role the General Assembly has assigned to the director and boards of health. The director and any authorized boards of health are charged with executing Ohio’s environmental regulatory scheme. The director or board has the power to take any action necessary to compel compliance with state and federal environmental laws, and to this end, they are granted broad discretion in the decision to grant or deny permit and license applications. R.C. 3745.01; *State ex rel. Saunders v. Indus. Comm’n* (2004), 101 Ohio St. 3d 125, 2004-Ohio-339, ¶ 41.

The statutory scheme for C&DD facilities set forth in R.C. 3714 and the rules promulgated thereunder support this notion of discretion. Particularly, R.C. 3714.06 requires that any license to operate a C&DD facility “may be issued with such terms and conditions as the board or the director, as appropriate, finds necessary to ensure that the facility will comply with this chapter and the rules adopted under it and to protect the public health and safety and the environment.” Further, Ohio Administrative Code 3745-37-02(A)(2) and (A)(3) specifically forbid the director or board from considering an incomplete application. Instead, the director or board must notify the applicant of the deficiency, have the applicant supply additional information as a precondition to determine whether the application satisfies the requirements of O.A.C. Chapters 3745-400 and 3745-37, and refuse to consider the application until the deficiency is rectified.

Contrary to the statutory scheme, the Tenth District’s ruling grants ERAC the same discretionary authority to determine completeness that is reserved for the director or board of health. But ERAC, as established by R.C. 3745.04, has merely administrative review authority. It lacks the scientists, engineers, geologists, ground water specialists, consultants, and other environmental specialists who all participate in the application review at the Ohio EPA or a board of health to determine completeness. Vesting ERAC with independent responsibility of determining whether an application is complete is inconsistent with the statutory duties that the General Assembly has established for the Ohio EPA and ERAC. See R.C. 3714.06; O.A.C. 3745-37-02(A)(2) and (A)(3); *Harmony Envrl. Ltd. v. Morrow County Dist. Bd. of Health* (10th Dist.), 2005 Ohio App. Lexis 2920, 2005-Ohio-3146, ¶ 19.

Additionally, allowing an applicant to appeal prematurely will create administrative gridlock. If this Court adopts Trans Rail’s reading of the statute, all permit and license applicants could appeal to ERAC every time the director or board of health asks for necessary

supplemental information. Thus, every applicant would have at least two appeals: one for any claimed deficiency in the application, and a second to review the director's or board's final action.

**B. Incomplete applications are outside the scope of ERAC's subject-matter jurisdiction.**

Appellees and their amici curiae continue wrongfully to characterize TCHD's determination of incompleteness as a "decision," "act," or "action." But Commissioner Enyeart's actions and case law make clear that Trans Rail's application was incomplete and therefore not appealable to ERAC.

In *Harmony Environmental Limited v. Morrow County District Board of Health*, 2005-Ohio-3146, the Tenth District addressed a situation similar to the one here. The Morrow County District Board of Health denied two C&DD applications, but ERAC vacated the denials because the applications were incomplete and therefore should not have been reviewed as required by OAC 3745-37-02(A)(2). *Id.* at ¶ 4. On the board's appeal, the Tenth District affirmed ERAC's ruling and held that because the applications did not include the required regulatory components, the applications were incomplete and therefore the board should not have considered the applications. *Id.* at ¶¶ 13, 17; see also *id.* at ¶ 9 ("OAC 3745-37-02(A)(2) and (A)(3) make it clear that the decision whether to issue an operating license for a C&DD facility should be based upon the merits of a complete application."). The court went on to explain that an application denial should not be based on "technical deficiencies" or on information that is "too inadequate in content and scope to allow the agency to reach an informed decision." *Id.* at ¶ 9. Finally, the court noted that "the application process should not be utilized as a method for denying a permit." *Id.* at ¶ 21.

Appellee ignores *Harmony* and other on-point precedent and instead relies on *Cain Park Apartments v. Nied*, 1981 Ohio App. Lexis 12873 (unreported), to argue that *any* incomplete

application is essentially a denial that is appealable to ERAC. In *Cain Park Apartments*, however, the court reasoned that a return of a defective registration application under Ohio's air pollution rule OAC 3745-35-02(B)(9) was a denial because there was no opportunity for further hearing or procedure, and the statute permitted the Ohio EPA to treat the application "as if it had never been filed." *Id.* at \*7. Unlike the air pollution rule at issue in *Cain Park Apartments*, Ohio Administrative Code 3745-37-02(A)(2) and (A)(3) require the director or board of health to reject an incomplete application and allow a C&DD applicant a second chance to fix any deficiencies. See *Harmony*, 2005-Ohio-3146 at ¶ 19.

Indeed, that is what happened here. Commissioner Enyeart enumerated deficiencies in Trans Rail's application and gave Trans Rail the opportunity to supply additional information. Unfortunately, each time the Commissioner requested additional information, Trans Rail failed to submit the required documents. Thus, according to OAC 3745-37-02(A)(2) and (A)(3) and *Harmony*, the Commissioner could not have granted nor denied the license based on the submitted application because it was incomplete.

**C. Commissioner Enyeart's letter was not a final action because it did not finally adjudicate Trans Rail's rights.**

The appropriate analysis for determining whether the Commissioner's requests for additional information give rise to a final appealable action under R.C. 3745.04 is whether the form of the action indicates finality and whether the action adversely affects appellant's rights. *U.S. Tech. Corp. v. Korleski* (10th Dist.), 173 Ohio App. 754, 2007-Ohio-5922; *Dayton Power & Light v. Schregardus* (10th Dist. 1997), 123 Ohio App. 3d 476.

In *U.S. Technology Corp. v. Korleski*, the Tenth District recognized the requirement that there must be a final action before ERAC has jurisdiction. The court analyzed a letter to determine if it was a final action and held that a final action occurs if the "event or document in

question determines or adjudicates with finality any legal rights and privileges of the appealing party or parties.” 2007-Ohio-5922 at ¶ 6 (quoting *Dayton Power & Light*, 123 Ohio App. 3d at 479). The court enumerated four factors to determine whether a letter adjudicates “with finality” and is a final appealable action: (1) if the 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. *U.S. Tech.*, 2007-Ohio-5922 at ¶ 7. The court concluded that the letter in *U.S. Technology* was not a final action because it did not meet all four factors and was simply “the latest in a series of meetings and letters addressing issues” between the parties. *Id.* at ¶ 11.

Trans Rail attempts to avoid *U.S. Technology* by citing *Dayton Power and Light*, but that case is distinguishable. In *Dayton Power & Light*, the court found that a final action existed because the director placed appellant’s property on a Master Sites List (“MSL”) of contaminated properties, thus potentially affecting the site’s property value, since “government officials and businesses rely on the listings in the MSL when evaluating property.” *Id.* at 479-80. Because the MSL was widely disseminated in a public annual report, and the MSL had no standards governing the placement of sites on the list, appellant’s only recourse was an appeal to ERAC for a de novo hearing to determine the lawfulness and reasonableness of putting its site on the MSL. *Id.*

Here, Commissioner Enyeart’s letter did not finally adjudicate Trans Rail’s rights because the letter was merely part of the interactive license process. The Commission took no action that adversely affected Trans Rail’s rights. Rather, the May 31, 2006, letter was completely consistent with the give and take contemplated in the license application process and recognized by the rule. See O.A.C. 3745-37-02(A). Had Trans Rail complied with the letter, the board of

health would have been able to take final action on its license application. Moreover, the letter did not identify itself as a final action, did not notify Trans Rail of its appeal rights, and was not journalized as a final action. See *U.S. Tech.*, 2007-Ohio-5922 at ¶ 7.

Finally, Trans Rail's application was not complete in time to be considered under the grandfathering clause of H.B. 397. House Bill 397 section 3 (uncodified), required that, to be grandfathered under the C&DD rules that existed on July 1, 2005, an application for a license to establish a C&DD facility be submitted to a board or the director before July 1, 2005. The provision also required that "the application submitted by the applicant would have been determined to be complete if a moratorium had not been in effect." H.B. 397, Section 3(A). Therefore, if an incomplete application was submitted before July 1, 2005, the application would be deemed complete if the applicant submitted the requisite additional documents by the time the moratorium ended on December 31, 2005.

Trans Rail sent its initial application to TCHD on May 21, 2004. On July 16, 2004, TCHD responded that the application was incomplete, identified a list of deficiencies, and asked for additional information to complete the application. Trans Rail responded to this notice of incompleteness on December 16, 2005. TCHD found, however, that the December 16, 2005 submittal did not complete the application, and on February 15, 2006, TCHD responded that the application was still incomplete and identified a list of deficiencies and additional required documentation. On December 31, 2005, the moratorium ended, and any incomplete applications were ineligible to be grandfathered under the July 1, 2005, rules. On February 15, 2006, TCHD found that Trans Rail's application was still incomplete, and Trans Rail did not contest that determination. Instead, Trans Rail responded by sending additional documents to TCHD on March 30, 2006, but again failed to include all the information required, including the landfill's

siting criteria. In sum, because Trans Rail's May 21, 2004 application was not complete by December 31, 2005, Trans Rail could not have been grandfathered into the July 1, 2005 rules.

**D. ERAC's exclusive jurisdiction does not include the power of mandamus.**

ERAC is a creation of the General Assembly with specific administrative review powers and responsibilities. Those powers do not include mandamus. See R.C. 3745.04. Rather, ERAC's authority is confined to the review of final actions of the director or boards of health for lawfulness and reasonableness. R.C. 3745.04(D). Had the General Assembly intended ERAC to have such authority, it could have created it.

By comparison, ERAC's jurisdiction is distinguishable from the Ohio Elections Commission's jurisdiction as set forth in *Ohio Democratic Committee v. Blackwell*, 111 Ohio St. 3d 246, 2006-Ohio-5202. The relevant statutes in *Blackwell*, R.C. 3517.151 and R.C. 3517.153, give the Ohio Elections Commission exclusive jurisdiction over "acts and failures to act." *Id.* at ¶ 5. In that case, this Court held that, because the statute gives a clear right to the Ohio Elections Commission to review "failures to act," a writ of mandamus was improper and the Ohio Elections Commission could hear a complaint filed against public officials alleging violations of election provisions. *Id.* at ¶ 48. Nowhere in R.C. 3745.04 does ERAC have any similar authority to review "failures to act."<sup>1</sup>

Giving ERAC mandamus power will disrupt the statutory scheme that governs ERAC. ERAC is responsible for determining the lawfulness and reasonableness of the director's or a board's actions. See R.C. 3745.04(D). Only after ERAC determines that the action was unlawful or unreasonable does ERAC have the exclusive jurisdiction to order the director or

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<sup>1</sup> As amicus for Appellee, the Construction and Demolition Association of Ohio, Inc. concedes in footnote 2 of its merit brief that Trans Rail's logic is circular as to why a court of common pleas should not hear a writ of mandamus. Because ERAC does not have jurisdiction to order

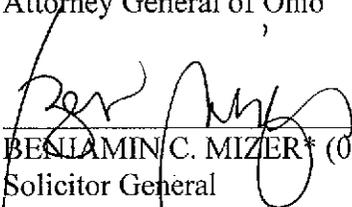
board to take a different action. ERAC itself recognized that mandamus authority is inconsistent with the General Assembly's express statutory scheme. In *Miller v. Schregardus*, ERAC noted that "while the allegations of the Appellant might very well constitute an appropriate basis for an action in mandamus," unless the pleadings show that "the failure to perform certain duties amounts to an act or action of the Director, . . . [ERAC] has no jurisdiction to consider the appeal." Case No. EBR 132470, ¶ 5.

### CONCLUSION

For the above reasons, the Court should reverse the decision below.

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the director or a board of health to act before the director or board has issued a final action, no other adequate remedy at law bars Appellee from filing a writ of mandamus.

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply 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 6th day of October, 2008 upon the following counsel:

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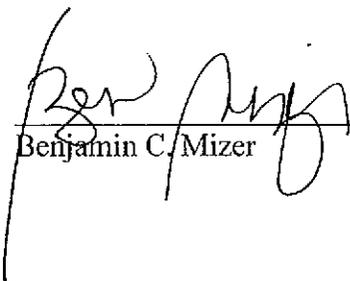
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