

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BUCKEYE POWER, INC.,	:	ERAC No. 12-256582
	:	
and	:	
	:	
THE DAYTON POWER & LIGHT CO.,	:	ERAC No. 12-296583
	:	
and	:	
	:	
DUKE ENERGY OHIO,	:	ERAC No. 12-316584
	:	
and	:	
	:	
FIRSTENERGY,	:	ERAC No. 12-776585
	:	
and	:	
	:	
OHIO POWER COMPANY,	:	ERAC No. 12-256586
	:	
and	:	
	:	
OHIO VALLEY ELECTRIC CORP.,	:	ERAC No. 12-666587
	:	
Appellants,	:	
	:	
v.	:	
	:	
SCOTT NALLY, DIRECTOR OF	:	
ENVIRONMENTAL PROTECTION,	:	
	:	
Appellee.	:	

RULING ON APPELLEE’S MOTION TO DISMISS

Rendered on June 20, 2013

Michael E. Born and Cheri A. Budzynski for Appellants
Buckeye Power, Inc., The Dayton Power and Light Co., Duke
Energy Ohio, FirstEnergy, Ohio Power Co., and Ohio Valley
Electric Corp.

*Michael DeWine, Attorney General, Julianna Bull and Robert
C. Moorman* for Appellee Scott Nally, Director of
Environmental Protection

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed on March 19, 2013, by Appellants Buckeye Power, Inc., The Dayton Power and Light Company, Duke Energy Ohio, FirstEnergy, Ohio Power Company, and Ohio Valley Electric Corporation (collectively, “Appellants”). Appellants challenge the February 16, 2013 promulgation of Ohio Administrative Code (“Ohio Adm.Code”) 3745-501-10(B)(4)(c) by Appellee Scott Nally, Director of Environmental Protection (“Director,” “Ohio EPA”). Case File Item A.

{¶2} On April 1, 2013, the Director filed a Motion to Dismiss, arguing that Appellants lack standing because the challenged regulation is inapplicable to the type of facilities Appellants operate. Appellants filed a Response on April 26, 2013, and the Director filed a Reply on May 6, 2013. Case File Items U, X, AA.

{¶3} Based upon the pleadings and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING Appellee’s Motion to Dismiss and orders that the present appeal be DISMISSED.

FINDINGS OF FACT

{¶4} Appellants are various utility companies that operate residual solid waste disposal facilities. Residual solid waste disposal facilities are regulated under Ohio Adm.Code Chapter 3745-30. Case File Items U, X.

{¶5} The regulations underlying this appeal include Ohio Adm. Code Chapter 3745-500, Chapter 3745-501, and Chapter 3745-503, commonly referred to by the parties as the “multi-program rules.” Ohio EPA designed the multi-program rules to apply to various agency-regulated waste streams, including Ohio EPA’s composting and

residual solid waste programs. Currently, these rules apply to composting facilities only; they have not yet been expanded to cover other waste streams. Case File Items U, X.

{¶6} The multi-program rules are general, procedural rules governing administration, licensing, and financial assurance requirements intended to be applicable to different types of waste streams. Comparatively, individual “program chapters” contain specific substantive requirements applicable to particular categories of facilities. For example, Ohio Adm.Code Chapter 3745-560 contains substantive requirements applicable to composting facilities, and Ohio Adm.Code Chapter 3745-30 contains substantive requirements applicable to residual solid waste disposal facilities. Case File Items U, X.

{¶7} The multi-program rules become applicable to a particular category of facility when referenced within that facility’s program chapter. For example, Ohio Adm.Code 3745-560-100(A), which governs the establishment of Class I composting facilities, provides as follows:

(A) No person shall establish or operate a class I composting facility without first having met the following:

- (1) Obtaining a permit to install in accordance with this rule prior to the construction of a new class I composting facility.
- (2) Obtaining a solid waste license pursuant to Chapter 3745-501 of the Administrative Code.
- (3) Executing the financial assurance instrument pursuant to rule 3745-503-05 of the Administrative Code for an amount not less than the current closure cost estimate established in accordance with rule 3745-560-05 of the Administrative Code.

Thus, the relevant program chapter refers to the multi-program rules, thereby making the multi-program rules applicable to a particular facility type - in this example, composting facilities. Case File Items U, X.

{¶8} The Director issued a draft version of the multi-program rules for public comment in early 2011, and Appellants submitted comments opposing the draft rules on three occasions between April 2011 and January 2012. Appellants generally objected to the process through which Ohio EPA intended to promulgate the multi-program rules and argued that it was not “appropriate or feasible” to require multiple categories of facilities to operate under uniform procedural rules. Case File Items U, X.

{¶9} The Director issued final multi-program rules on February 16, 2012. Appellants timely filed their Notice of Appeal on March 19, 2012. Case File Items A, U, X.

{¶10} In the present appeal, Appellants challenge the multi-program rule governing license renewals. Specifically, Appellants challenge Ohio Adm.Code 3745-501-10(B)(4)(c), which provides in pertinent part as follows:

(B) License application and application procedures.

(4) Time frame for application submittal.

(a) A license application shall be submitted to the licensing authority in accordance with the following:

(i) For a facility that has not previously received a license, the applicant shall submit a license application not later than ninety days prior to the proposed date for accepting solid waste.

(ii) For a facility that will continue operations beyond the expiration date of the current license, the applicant shall submit a license application on or before September thirtieth of the year preceding that for which the renewal license is sought.

(b) Any complete solid waste facility renewal license application submitted to the licensing authority between October first and December thirty-first of the current license period shall be considered by the licensing authority if the owner or operator pays the license application fee and the late fees specified in paragraph (B)(1) of this rule.

(c) Any renewal license application not submitted to the licensing authority by December thirty-first of the current license period shall not be

considered for approval or denial, and the facility will be subject to all applicable closure requirements.

Case File Item A.

{¶11} Appellants argue that it is unreasonable and unlawful for the Director to decline to consider a license application submitted to Ohio EPA more than three months after the deadline for submission. In their Notice of Appeal, Appellants raise the following single assignment of error:

The Director's promulgation of Ohio Adm.Code 3745-501-10(B)(4) is unlawful and unreasonable because it grants, without discretion, the Director the authority to close a solid waste facility should a permittee fail to file its solid waste facility permit renewal application by December 31st.

Case File Item A.

{¶12} On April 1, 2013, the Director filed a Motion to Dismiss, arguing that Ohio Adm.Code Chapter 3745-30, the program chapter under which Appellants operate, does not currently incorporate the multi-program rules. Thus, the multi-program rules are inapplicable to Appellants' facilities. Accordingly, the Director argues that Appellants have not suffered any concrete harm as a result of the Director's promulgation of the multi-program rules and therefore lack standing to maintain the present appeal. Case File Item U.

{¶13} In their Response, Appellants initially argue that the relevant issue is more properly framed in terms of ripeness rather than standing. In other words, Appellants contend that the relevant question is not whether an injury has occurred, but rather whether the imminent harm from the promulgation of the multi-program rules is fit to address at the present time. Case File Item X.

{¶14} Appellants acknowledge Ohio Adm.Code 3745-501-10 is currently inapplicable to their facilities. Nonetheless, Appellants argue that their ability to pursue

this matter rests on Ohio EPA's intent to make the multi-program rules applicable to residual solid waste disposal facilities at some point in the future. Because Revised Code ("R.C.") 3745.04 and 3745.07 require parties to bring an appeal before ERAC within thirty days of the Director's action, Appellants reason that they will be unable to challenge the "substance" of the underlying multi-program rules at the time those rules become applicable to residual solid waste facilities. Appellants argue that an appeal brought at a later date would limit their challenge to the "applicability" of the rules to residual solid waste disposal facilities, and they would be unable to challenge the underlying substance of the multi-program rules. Appellants contend that an appeal filed at a later date would be insufficient to redress the alleged harm and that the present appeal is therefore ripe for review. Case File Item X.

{¶15} Alternatively, Appellants argue that if the Commission grants the Director's Motion to Dismiss, the Commission should order Ohio EPA to "re-promulgate" the multi-program rules each time they are made applicable to a particular agency-regulated waste-stream. This, Appellants assert, would ensure the opportunity for meaningful review of the multi-program rules when they become applicable to new categories of facilities. Case File Item X.

CONCLUSIONS OF LAW

{¶16} Although not strictly bound by the Ohio Rules of Civil Procedure ("Civ.R."), the Commission has historically applied those rules when appropriate to assist in the resolution of appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010).

{¶17} A Civ.R. 12(B)(6) motion to dismiss is a procedural motion designed to test the sufficiency of a complaint or cause of action. *Thompson v. Central Ohio*

Cellular, Inc., 93 Ohio App.3d 530, 538, 639 N.E.2d 462 (8th Dist. 1994), citing *Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545 (1992).

{¶18} The Ohio Supreme Court explained, “* * * [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *O'Brien v. University Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). Further, “[u]nder Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3rd 190, 532 N.E.2d 753 (1988).

{¶19} The question of standing is a threshold issue of jurisdiction, which must be resolved before an appellant may proceed with an appeal before the Commission. *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶22, citing *New Boston Coke v. Tyler*, 32 Ohio St.3d 216 (1987). The standing requirement ensures that each appellant has a personal stake in the outcome of the controversy. *Merkel v. Jones*, ERAC Case Nos. 185274-75 (Oct. 23, 2003).

{¶20} Two avenues exist for a person to establish individual standing before the Commission. First, under R.C. 3745.04, a person may establish standing to appeal a final action of the Director by showing that he is “affected” by the Director’s action and that he was a “party to a proceeding before the director.” *Girard Bd. of Health v. Korleski*, 193 Ohio App.3d 309, 2011-Ohio-1385, ¶13. To be a “party to a proceeding before the director,” a person must have “appeared” before the Director. *Id.*

{¶21} Second, pursuant to R.C. 3745.07, certain circumstances allow persons who are merely “aggrieved or adversely affected” by the Director’s final action to establish standing. In such circumstances, a person need not be a “party to a proceeding before the Director.”

{¶22} Here, the parties do not dispute that Appellants were “parties to a proceeding before the Director.” Thus, Appellants’ standing rests on whether they are “affected” or “aggrieved or adversely affected.”

{¶23} The Tenth District stated that a person is “affected,” or “aggrieved or adversely affected,” by the Director’s final action if: “(1) the challenged action will cause injury in fact, economic or otherwise, and (2) the interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged.” *Girard*, at ¶15, quoting *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, 10th Dist. No. 06AP–836, 2007-Ohio-2649.

{¶24} Further, the injury in fact must be “concrete, rather than abstract or suspected.” *Id.* In other words, a party must show “that he or she will suffer a specific injury, even slight, from the challenged action or inaction, and that the injury is likely to be redressed if the court invalidates the action or inaction.” *Id.* The alleged injury may be actual and immediate, or threatened. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Servs. of Ohio, II, L.L.C.*, 10th Dist. No. 07AP-599, 2009-Ohio-2143, at ¶24, quoting *Johnson’s Island Property Owners’ Ass’n v. Shregardus*, 10th Dist. No. 96APH10-1330 (June 30, 1997). However, a party who alleges a threatened injury “must demonstrate a realistic danger arising from the challenged action.” *Id.*

{¶25} A threatened injury, such as the one alleged here, also frequently implicates the ripeness doctrine. Ripeness has been described as “peculiarly a question of timing.” *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 694 N.E.2d 459 (1998). Its origin is rooted in Article III of the United States Constitution and is motivated in part by the need “to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Id.* In determining whether a claim is ripe for review, a tribunal must evaluate “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967).

{¶26} Regarding the relationship between ripeness and standing in cases involving threatened injury, the Sixth Circuit Court of Appeals noted as follows:

There is unquestionably some overlap between ripeness and standing. When the injury alleged is not actual but merely threatened, standing and ripeness become more difficult to distinguish. A threatened or imminent injury may satisfy standing’s injury-in-fact requirement, yet the *claim may still be unripe if the issues are not fit for judicial review*, perhaps because future events may greatly affect the outcome of the litigation and the cost of waiting is not particularly severe. The converse is also true. * * *

Airborne, Inc. v. ABX Air, Inc., 332 F.3d 983 (6th Cir. 2003) (internal citations omitted) (emphasis added).

{¶27} Here, Appellants argue they are aggrieved or adversely affected, and the appeal is ripe for review, because Ohio EPA will apply the multi-program rules to residual solid waste disposal facilities at some undetermined time in the future. Significantly, however, Appellants do not specify any potential timeframe for incorporation, nor do they assert that the Ohio EPA’s application of the multi-program rules to residual solid waste disposal facilities is imminent. Instead, Appellants merely contend that the rules will apply “at some time in the future.”

{¶28} Thus, it is unclear to the Commission when or if the Director will apply the multi-program rules to residual solid waste disposal facilities. Further, because Ohio EPA retains the authority to amend its administrative regulations, it is also unclear whether the current version of Ohio Adm.Code 3745-500-10 will still be in effect at the time the multi-program rules become applicable to residual solid waste disposal facilities. Accordingly, the Commission finds that Appellants have not demonstrated a realistic danger arising from the challenged action and have thus failed to establish standing.

{¶29} Additionally, the Commission finds that the present matter is not ripe for review. The issue is not fit for judicial review because future events may greatly affect the outcome of the litigation and the cost of waiting to challenge the multi-program rules until such time when they become applicable to residual solid waste disposal facilities is not particularly severe. The underlying rules in question may be modified or may never be incorporated into the program chapters. Further, the distinction between a challenge to the “substance” of the multi-program rules and a challenge to the “applicability” of the multi-program rules appears to be a distinction without a difference.

{¶30} If and when Ohio EPA amends the residual solid waste disposal facility program chapter to incorporate the multi-program rules, regulated entities will be afforded the opportunity to challenge the amendment to the program chapter, which will allow such entities the opportunity to contest the as-applied lawfulness and reasonableness of the multi-program rules. Specifically, a regulated entity would be afforded the opportunity to challenge the as-applied lawfulness of the multi-program rules through a challenge to the lawfulness of the amendment to the program chapter.

And similarly, regulated entities would have the opportunity to challenge the as-applied reasonableness of the multi-program rules through a challenge to the reasonableness of the amendment to the program chapter.

{¶31} In other words, Appellants will be afforded an opportunity to challenge the provision at issue if and when it becomes applicable to residual solid waste facilities. Therefore, because future events may greatly affect the outcome of the litigation and the cost of waiting to challenge the multi-program rules until such time when they become applicable to residual solid waste disposal facilities is not particularly severe, the present matter is not ripe for review.

{¶32} Additionally, the Commission declines to order the Director to re-promulgate the multi-program rules each time they are made applicable to a new category of facility. Such an order is unnecessary because, as discussed above, Appellants will be afforded an opportunity to challenge the substance of Ohio Adm.Code 3745-501-10 through an appeal to this Commission if and when the regulation is made applicable to residual solid waste facilities.

FINAL ORDER

{¶33} Accordingly, for the foregoing reasons, the Commission hereby GRANTS the Director’s Motion to Dismiss and ORDERS that the present appeal be DISMISSED.

{¶34} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

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 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**

Entered into the Journal of the
Commission this _____ day of June
2013.

Melissa M. Shilling, Vice Chair

Shaun K. Petersen, Member

Michael G. Verich, Member

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SCOTT NALLY, DIRECTOR OF ENVIRONMENTAL PROTECTION	[CERTIFIED MAIL]
Michael E. Born, Esq.	
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Robert C. Moorman, Esq.	