BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

SIERRA CLUB, ET AL.,	:	Case No. ERAC 256002
	:	Case No. ERAC 186003
Appellants,	:	Case No. ERAC 316005
	:	
v.	:	
	:	
JOSEPH KONCELIK, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.,	:	
	:	
Appellees.	:	

FINAL ORDER ON REMAND

Rendered on October 1, 2013

{¶1} On February 29, 2012, the Commission issued a Decision in the above-captioned cases, in which it affirmed the action of Appellee Director Joseph Koncelik, Director of Environmental Protection ("Director") promulgating Ohio Administrative Code ("Ohio Adm.Code") 3745-114-01 and 3745-31-05. Case File Item HHHHHH.

{¶2} On March 30, 2012, Appellants Sierra Club, Ohio Citizen Action, and Environmental Community Organization (collectively "Appellants")[1] filed a Notice of Appeal with the Commission stating they had appealed the Commission's February 29, 2012 Decision to the Tenth District Court of Appeals. Case File Item IIIIII.

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[1] The Commission's February 29, 2012 Decision applied to five appellants: Sierra Club (ERAC No. 256002), Ohio Citizen Action (ERAC No. 186003), Ohio Academy of Trial Lawyers (ERAC No. 256004), Environmental Community Organization (ERAC No. 316005), and Buckeye Environmental Network (ERAC No. 256006). However, only three of the five appellants—Sierra Club, Ohio Citizen Action, and Environmental Community Organization—appealed the Commission's Decision to the Tenth District. Case File Items HHHHHH, IIIIII.

{¶3} In their appeal to the Tenth District, Appellants raised three assignments of error:

> First Assignment of Error: The Ohio Environmental Review Appeals Commission (ERAC) erred in holding that the Director's adoption of Ohio Adm.Code 3745-114-01 (Ohio Air Toxics Rule) was reasonable and lawful because binding precedent makes clear that the Director cannot, via rule, enlarge the authority that he is delegated by statute.
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> Second Assignment of Error: ERAC erred in holding the Director's adoption of the Ohio Air Toxics Rule was reasonable and lawful because the Director's removal of clearly toxic compounds that meet statutory criteria from the air toxics list was based on the Director's ignoring essential health-protective language in the air toxics statute-R.C. 3704.03(F)(3)(c).
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> Third Assignment of Error: ERAC erred in holding that the Director's adoption of the Ohio Air Toxics Rule was reasonable and lawful because ERAC's holding rests upon incompetent, previously undisclosed "expert" testimony that ERAC abused its discretion by admitting into evidence.

Sierra Club v. Koncelik, 2013-Ohio-2739 (10th Dist. 2013), at ¶4.

{¶4} In its decision, the Tenth District overruled Appellants' first and third assignments of error. However, the Tenth District sustained Appellant's second assignment of error, finding that "the Director's categorical exclusion of compounds demonstrated toxic through non-inhalation routes of exposure and those compounds not currently used or produced in Ohio is inconsistent with the express statutory language." *Id.* at ¶40. The Court instructed the Director to "examine each individual compound in these two categories and determine if the compound is required to be placed on the [air toxics] list." *Id.*

FINAL ORDER

{¶5} Accordingly, the Commission VACATES the portions of its February 29, 2012 Decision relating to compounds demonstrated toxic through non-inhalation routes of exposure and compounds not used or produced in Ohio. The Commission hereby REMANDS the instant matter to the Director for action consistent with the Tenth District's opinion in *Sierra Club v. Koncelik*, 2013-Ohio-2739 (10th Dist. 2013).

{¶6} 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 October, 2013.

_____
Melissa M. Shilling, Chair

_____
Shaun K. Petersen, Vice-Chair

_____
Michael G. Verich, Member

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