

**BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO**

SIERRA CLUB,	:	Case No. ERAC 256002
	:	
and	:	
	:	
OHIO CITIZEN ACTION,	:	Case No. ERAC 186003
	:	
and	:	
	:	
OHIO ACADEMY OF	:	Case No. ERAC 256004
TRIAL LAWYERS,	:	
	:	
and	:	
	:	
ECO (ENVIRONMENTAL	:	Case No. ERAC 316005
COMMUNITY ORGANIZATION),	:	
	:	
and	:	
	:	
BUCKEYE ENVIRONMENTAL	:	Case No. ERAC 256006
NETWORK,	:	
	:	
Appellants,	:	
	:	
v.	:	
	:	
JOSEPH P. KONCELIK, DIRECTOR	:	
OF ENVIRONMENTAL PROTECTION,	:	
	:	
Appellee,	:	
	:	
	:	
OHIO CHAMBER OF COMMERCE,	:	
	:	
and	:	
	:	
OHIO CHEMISTRY	:	
TECHNOLOGY COUNCIL,	:	
	:	
and	:	
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OHIO MANUFACTURERS'	:	
ASSOCIATION,	:	
	:	
Intervening-Appellees.	:	

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**DECISION**

Rendered on February 29, 2012

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*D. David Altman, Esq. and Justin D. Newman, Esq.* for Appellants Sierra Club, Ohio Citizen Action, Ohio Academy of Trial Lawyers, Environmental Community Organization, and Buckeye Environmental Network

*Mike DeWine, Attorney General, Samuel Peterson, Esq. and Christina E. Grasseschi, Esq.* for Appellee Director of Environmental Protection

*David E. Northrop, Esq.* for Intervening Appellees Ohio Chamber of Commerce, Ohio Chemistry Technology Council, and Ohio Manufacturers' Association

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PETERSEN, COMMISSIONER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon the December 20, 2006 Notice of Appeal filed by Appellants Sierra Club, Ohio Citizen Action ("OCA"), Ohio Academy of Trial Lawyers ("OATL"), Environmental Community Organization ("ECO"), and Buckeye Environmental Network ("BEN") (collectively "Appellants"). The action underlying the instant appeal is the Director of Ohio Environmental Protection Agency's ("OEPA," "Ohio EPA," "Agency," "Director") November 20, 2006 promulgation of Ohio Administrative Code ("Ohio Adm.Code") 3745-114-01 and Ohio Adm.Code 3745-31-05. The Commission held a de novo hearing October 26-28, 2010.

Based upon a review of the evidence admitted at the de novo hearing,<sup>1</sup> the Commission's case file, and applicable laws and regulations, the Commission makes the following Findings of Fact, Conclusions of Law, and Final Order.

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<sup>1</sup> No party moved the Certified Record ("CR") into evidence and no stipulations regarding the CR were offered by the parties. Accordingly, the Commission's findings of fact and conclusions of law are based on the testimony and exhibits admitted into evidence at the hearing and the Commission's case file.

## FINDINGS OF FACT

### **I. Background**

{¶1} The primary purpose of the federal Clean Air Act (“CAA”) is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. 7401(B)(1). To achieve these goals, the CAA establishes a comprehensive framework for the protection of air quality standards and provides specific responsibilities for federal and state governments. The United States Environmental Protection Agency (“US EPA”) implements the federal component and is responsible, inter alia, for defining pollutants to be regulated and establishing uniform technology-based standards for significant new and modified emissions sources. State and local governments are given “primary responsibility” to regulate “air pollution control at its source.” CAA Section 101.

{¶2} The CAA requires states to develop a State Implementation Plan (“SIP”) that provides for the implementation, maintenance, and enforcement of National Ambient Air Quality Standards (“NAAQS”), which are nationally uniform maximum “safe” concentrations of “criteria”<sup>2</sup> pollutants.

{¶3} The Ohio Air Pollution Control Act, Ohio Revised Code (“R.C.”) Chapter 3704, is a comprehensive program designed to meet the requirements of the CAA. Rules promulgated pursuant to R.C. Chapter 3704 prescribe allowable emissions for specified sources or categories of sources of air emissions.

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<sup>2</sup> “Criteria” pollutants are pollutants that, in the judgment of the US EPA Administrator, “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare,” and “the presence of which in the ambient air results from numerous or diverse mobile or stationary sources.” 42 U.S. 7408.

{¶4} A permit to install (“PTI”) is required before installation of a new source or modification of an existing source of emissions. However, only certain types of sources and processes are required to obtain a PTI. Testimony Koval; R.C. 3704.03; Ohio Adm.Code 3745-31-03.

{¶5} In 2006, the General Assembly adopted and the Governor signed Am. Sub. SB 265 (“SB 265”), which required the Director to adopt a rule “specifying that a permit to install is required only for new or modified air contaminant sources that emit” certain categories of air contaminants. R.C. 3704.03(F)(3).

{¶6} Among the contaminants (“air toxics”) considered by the General Assembly, and for which the Director was required to adopt a rule mandating that sources obtain a PTI, are those contaminants “that [present], or may present, through inhalation or other routes of exposure, a threat of adverse human health effects, including, but not limited to, substances that are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, or neurotoxic, that cause reproductive dysfunction, or that are acutely or chronically toxic, or a threat of adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, and that is identified in the rule by chemical name and chemical abstract service number.” R.C. 3704.03(F)(3)(c).

{¶7} Prior to passage of SB 265, no formal rule had been promulgated to regulate air toxics in the state of Ohio, nor had Ohio EPA ever prepared a list of regulated air toxics. Testimony Koval.

{¶8} Rather, Ohio EPA regulated air toxics in accordance with a policy known as “Option A.” Option A sets forth a procedure for determining the “maximum acceptable ground level concentration” (“MAGLC”) of a toxic compound, which is

derived from a chemical's threshold limit value ("TLV") as identified by the American Conference of Governmental Industrial Hygienists ("ACGIH"). Option A prohibited permitted source emissions from exceeding the MAGLC at the boundary of the property on which the source was located. Testimony Koval; Director's Exhibit 2.

{¶9} In addition to requiring the Director to promulgate a list of regulated air toxics, SB 265 mandated formal implementation of Option A to evaluate air toxic emissions from new or modified air contaminant sources in Ohio. Testimony Koval.

{¶10} Revised Code 3704.03(F)(4) states in pertinent part:

(a) Applications for permits to install new or modified air contaminant sources shall contain sufficient information regarding air contaminants for which the director may require a permit to install to determine conformity with the environmental protection agency's document entitled 'Review of New Sources of Air Toxics Emissions, Option A,' dated May 1986, which the director shall use to evaluate toxic emissions from new or modified air contaminant sources. The director shall make copies of the document available to the public upon request at no cost and post the document on the environmental protection agency's web site. Any inconsistency between the document and division (F)(4) of this section shall be resolved in favor of division (F)(4) of this section.

(b) The maximum acceptable ground level concentration of an air contaminant shall be calculated in accordance with the document entitled 'Review of New Sources of Air Toxics Emissions, Option A.' \* \* \*.

{¶11} SB 265 also made a change to the Best Available Technology ("BAT") provisions of R.C. 3704.03(T), creating an exemption for sources emitting less than ten tons per year of an air contaminant for which a NAAQS has been established. R.C. 3704.03(T).

{¶12} As a result of the passage of SB 265, the Director promulgated Ohio Adm.Code 3745-114-01, commonly referred to as the Air Toxics Rule, and amended Ohio Adm.Code 3745-31-05, commonly referred to as the BAT Rule. The Commission will address each of the rules separately.

## II. Development of the Air Toxics Rule

{¶13} Paul Koval, lead toxicologist for Ohio EPA's Division of Air Pollution Control, was placed in charge of the team of Ohio EPA employees responsible for compiling the list of toxic compounds required by SB 265. Mr. Koval has been employed by Ohio EPA since 1987 and has served as supervisor of the air toxics unit since 1992. He received a bachelor's degree in biology, specializing in reproductive endocrinology, and a master's degree in zoology, specializing in toxicology. He has also received training from US EPA on a variety of air toxic issues. The Commission accepted Mr. Koval as an expert witness in the field of air toxicology and in the regulation of air toxics as they relate to the Ohio statutes and regulations on air toxins. Testimony Koval.

{¶14} Testifying on behalf of the Director, Mr. Koval said that Ohio EPA began the process of promulgating Ohio Adm.Code 3745-114-01 by issuing a notice of interested party rulemaking that was accompanied by an initial list of 639 chemicals or compounds that had TLVs assigned to them. This initial list was meant to serve as a starting point for discussions about the scope of the final regulation. Ohio EPA expected that the list would be revised and that the final list would likely be smaller. Testimony Koval.

{¶15} After issuing this initial list for public comment, Ohio EPA personnel vetted the list of the 639 compounds to determine which among them should remain on the final list contained in the air toxics rule. The vetting process was a detailed and multistep scientific approach accompanied by detailed reasons explaining how each step applied and how it related to the protection of human health and the environment. Testimony Koval; Director's Exhibit 1.

{¶16} Ohio EPA staff consulted ten different databases<sup>3</sup> that contained information about potentially toxic compounds or chemicals. These databases summarized primary literature about the compounds or chemicals and contained a peer review synopsis of that primary literature. Likewise, these databases are routinely used across the country by individuals and regulators doing risk assessments in the field of toxicology. *Id.*

{¶17} After consulting the ten databases, Ohio EPA personnel determined that certain compounds posed a negligible risk based on the compounds' TLVs. Compounds with TLVs greater than 1,000 milligrams per meter cubed were removed from the list. *Id.*

{¶18} The next step in Ohio EPA's review process was development of screening criteria to further refine the list. One criterion included grouping individual compounds within an expanded class or definition of compounds where Ohio EPA deemed appropriate. Ohio EPA determined that some compounds belonged to a larger class of compounds that better matched the description of the toxic compound, and that some compounds and classes of compounds are grouped together by US EPA in the CAA or in other programs. *Id.*

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<sup>3</sup> The following is the list of databases consulted:

- US EPA's list of Hazardous Air Pollutants (HAPs) and Health Affects Notebook
- US EPA's Integrated Risk Information System (IRIS)
- US EPA's National Air Toxics Assessment (NATA)
- The Agency for Toxic Substances and Disease Registry (ATSDR) Minimal Risk Levels (MRLs) for Hazardous Substances and Toxicological Profiles
- The American Conference of Government and Industrial Hygienists (ACGIH)
- The International Agency for Research on Cancer (IARC)
- The National Toxicology Program (NTP) (US Dept. of Health and Human Services)
- US EPA's Accidental Release Prevention Program (112r)
- US EPA's Persistent Bioaccumulative and Toxics Pollutant Strategy (PBTs)
- US Department of Health and Human Services Hazardous Substances Data Bank

{¶19} Another criterion considered by Ohio EPA was that certain compounds are negligible risk air pollutants, and thus demonstrate low inhalation toxicity. Compounds with low inhalation toxicity values were removed from the list because they would have to be emitted at excessive and impractical rates to exceed MAGLC. Likewise, compounds whose TLVs were based upon irritation only, and which had either mild or no other human health toxic effects, were removed the list. Compounds demonstrating limited evidence of toxic effects in humans, especially through the inhalation route of exposure, were also removed from the list. Finally, compounds whose inhalation toxicity numbers were derived from a single, or a few, emergency air release events that caused a large dosage to the exposed population were removed from the list. Ohio EPA considered these compounds' toxicity values to be of limited use when applied to the evaluation of a permitted air source that emits pollutants continually for a long period of time. *Id.*

{¶20} The Director also considered whether an inhalation route was likely for realistic exposure scenarios in Ohio. The Director concluded that compounds with high oral or dermal toxicity were not likely to be released into the atmosphere in a manner that would cause inhalation exposure. Likewise, the Director concluded that inhalation of compounds, which are no longer produced, manufactured, or otherwise used in Ohio (or in some cases, the United States), was unlikely. Therefore, those compounds were removed from the list. *Id.*

{¶21} The next criterion considered by the Director was whether a particular compound was used in consumer products or designated for specific consumer or agricultural uses. Pesticides or other household or agricultural use pest removal products were removed from the list because they are generally regulated and licensed by the Department of Agriculture and are emitted through the use of household or

agricultural products rather than through industrial processes. Likewise, compounds whose route of human exposure is primarily through use in food, food handling, packaging and storage, or cosmetic products were removed from the list because inhalation exposure from these products is unlikely and not covered by the requirements of an air pollution permit. *Id.*

{¶22} The Director maintained those compounds listed by US EPA as Hazardous Air Pollutants in the CAA or as “Persistent, Bioaccumulative, or Toxic” in the final version of the rule. *Id.*

{¶23} Mr. Koval testified that through the examination of the various sources and criteria, compounds that Ohio EPA determined would present a significant risk of causing an increase in morbidity, mortality, serious irreversible health effects, or incapacitating temporary health effects through long-term exposure in the ambient air remained on the final list of air toxics. Testimony Koval.

{¶24} Ohio EPA provided documentation supporting its decision to either include or exclude a chemical or compound from the final list. The staff at Ohio EPA prepared a “Toxic Compound Data Sheet” for each chemical or compound. The Toxic Compound Data Sheet provided a summary of information contained in each database reviewed by Ohio EPA and a statement summarizing the scientific reasons supporting the Director’s decision about whether to include or exclude a chemical or compound from the list. Testimony Koval; Director’s Exhibits 10 and 11.

{¶25} Through this vetting process, the initial list of 639 compounds was reduced to 303 chemicals or compounds that the Director believed were appropriate for regulation under Ohio’s air toxics program. Director’s Exhibit 1.

{¶26} On June 30, 2006, the Director sent a draft of Ohio Adm.Code 3745-114-01 to interested parties and posted it on Ohio EPA’s website for an informal 30-day comment period. On July 19, 2006, Ohio EPA staff notified interested parties that the informal comment period would be extended an additional 30 days. On September 15, 2006, Ohio EPA proposed and filed with the Joint Committee on Agency Rule Review (“JCARR”) its proposed version of Ohio Adm.Code 3745-114-01. Ohio EPA accepted public comments on the proposed rule and held a public hearing on October 23, 2006. JCARR held its hearing on October 30, 2006. Director’s Exhibit 5.

{¶27} Following the JCARR hearing, the Director promulgated the final version of Ohio Adm.Code 3745-114-01 on November 20, 2006. The rule included 303 chemicals and compounds that the Director believed were appropriate for regulation under Ohio’s air toxics program.

{¶28} On December 20, 2006, Appellants timely appealed the Director’s promulgation of Ohio Adm.Code 3745-114-01 and raised the following twenty-two assignments of error related to the Director’s promulgation of the rule:<sup>4</sup>

- The Director erred and/or abused his discretion by ignoring mandatory duties of the Director found in [R.C.] 3704.03.
- The Director erred and/or abused his discretion by enacting [Ohio Adm.Code] 3745-114-01, which provides the Director ‘may’ require a permit-to-install for sources emitting any of the listed chemicals. [Revised Code] 3704.03 provides that a permit-to-install ‘is required’ for any source emitting a chemical listed by the Director. The Director is, via regulation, changing a mandatory ‘shall’ to a discretionary ‘may’. The Director is without authority to change the wording of a statute via regulation. Consequently, the Director’s actions are unreasonable and unlawful.

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<sup>4</sup> An Amended Notice of Appeal was filed on October 5, 2007, to correct typographical errors to the statutory citations in the original Notice of Appeal. Case File Item GG.

- The Director erred and/or abused his discretion by failing to list chemicals for regulation that meet the standard set forth in [R.C.] 3704.03(F)(3). [Revised Code] 3704.03(F)(3)(c) requires that the Director list chemicals that ‘may’ present a ‘threat of adverse health effects’ or that ‘present a threat of adverse environmental effects whether through ambient concentrations, bioaccumulations, deposition, or otherwise \* \* \*.’ [Revised Code] 3703.03(F)(3)(c), the enabling statute, requires that **all** sources that release chemicals meeting the statutory standard obtain a permit-to-install before construction of that source and employ BAT to reduce emissions. However, the Director has exempted many chemicals via regulation by failing to list all chemicals that ‘may present a threat of an adverse health effect’ or ‘a threat of an adverse environmental effect,’ as required by [R.C.] 3704.03(F)(3)(c). In so doing, the Director has acted unlawfully and unreasonably.
- The Director has a duty under [R.C.] 3704.03 to identify all chemicals that meet the statutory standard. Even the proposed list of 639 chemicals failed to carry out the Director’s duty. Yet, rather than expanding the list, the Director narrowed the already deficient list to 303 chemicals. As part of this process, the Director failed to review the Ohio EPA’s own case files, federal case files, and publicly-available databases created by the numerous private organizations [sic] that study such chemicals to identify the chemicals that meet the standard. The Director erred and/or abused his discretion when he failed to include additional chemicals on the list. His actions are unreasonable and unlawful.
- The Director originally found that 639 compounds met the standard in [R.C.] 3704.03. The Director erred and/or abused his discretion when he subsequently removed 336 chemicals from the list (leaving only 303 compounds to be regulated under [R.C.] 3704.03). The Director has no sound basis, in either law or science, for reversing his initial conclusion that the other 336 compounds met the standard of Senate Bill 265. The Director’s reversal is unreasonable and unlawful.
- The Director erred and/or abused his discretion when he decided to limit the list of chemicals meeting the [R.C.] 3704.03 standard to the chosen 303 contaminants. His decision is not based on the relevant factors and is not supported by a reasonable basis. Rather, the Director’s decision to limit the listed chemicals to the 303 chosen chemicals is based on arbitrary assumptions that lack a valid foundation and that otherwise violate the legal standard. The Director’s actions are unreasonable and unlawful.
- The Director erred and/or abused his discretion when he used dosage-related analyses as a basis for determining which chemicals to list

- under [R.C.] 3704.03. The use of dosage related-analyses is not rationally related to the purpose of the rule and cannot serve as a basis for the Director not to list chemicals under the standard set forth in [R.C.] 3704.03. The Director's failure to include chemicals in [Ohio Adm.Code] 3745-114-01 based on that analysis is unreasonable and unlawful.
- The reasoning provided by the Director for determining which chemicals to list under [R.C.] 3704.03, set forth in 'Synopsis of Scientific Justification in Draft Language for Ohio Administrative Code 3745-114, Toxic Air Contaminant,' is without a basis in fact or science, is not rationally related to the purpose of the legislation, and is otherwise unreasonable and unlawful and/or an abuse of discretion.
  - The Director's failure to list chemicals based on unsupported conclusions that exposure through inhalation is 'unlikely' in Ohio is without a basis in fact or science, is not rationally related to the purpose of the legislation, and cannot be used as the basis for not listing chemicals under the standard set forth in [R.C.] 3704.03. The Director's reliance on such reasoning is unreasonable and unlawful and/or an abuse of discretion.
  - The Director's failure to list chemicals based on the assumption that those chemicals are not likely to be released into the atmosphere in a manner that will lead to inhalation exposure is without a basis in fact or science, is not rationally related to the purpose of the legislation, and cannot [act] as the basis for not listing chemicals under the standard set forth in [R.C.] 3704.03. The law specifically requires that the Director consider exposure routes other than just inhalation. Additionally, the law requires the Director to list chemicals that threaten the environment. Accordingly, the Director's actions are unlawful and unreasonable and/or an abuse of discretion because of the Director's failure to consider relevant factors set forth in the statute.
  - The Director's failure to list chemicals because they are 'no longer produced, manufactured, or otherwise used in Ohio' is without a basis in fact or in science, is not rationally related to the purpose of the legislation, and cannot serve as the basis for not listing chemicals under the standard set forth in [R.C.] 3704.03. The Director's actions based on such reasoning are unreasonable and unlawful and/or an abuse of discretion.
  - The Director's arbitrary use of a 'screening analysis' to reduce the list to 303 chemicals is without a basis in fact or science, is not rationally related to the purpose of the legislation, and is otherwise unreasonable and unlawful. The 'screening analysis' is the wrong analysis for

determining what chemicals may present a threat to human health or which present a threat to the environment. As such, the Director cannot use the 'screening analysis' as the basis not to list chemicals under the standard set forth in [R.C.] 3704.03. The Director's actions based on the 'screening analysis' are unreasonable and unlawful and/or an abuse of discretion.

- The 'screening analysis,' used by the Director, also fails to take into account environmental threats, including bio-accumulation in rivers and soils and adverse impacts on fish, microvertebrae, and other flora and fauna. The Director is required to list chemicals that pose such threats under the plain wording of the statute. Consequently, the Director's use of the 'screening analysis,' which led to the Director not listing chemicals in [Ohio Adm.Code] 3745-114-01 that pose environmental threats, is unreasonable and unlawful and/or an abuse of discretion.
- The Director's use of Threshold Limit Values (TLVs) or other inapplicable standards as a basis for determining whether chemicals should be listed is without a basis in fact or science, is not rationally related to the purpose of the legislation, and cannot serve as the basis for not listing chemicals under the standard set forth in [R.C.] 3704.03. The Director's use of TLVs or other similar standards is unreasonable and unlawful and/or an abuse of discretion.
- [Revised Code] 3704.03 requires consideration of health effects through routes of exposure beyond just inhalation. Contrary to this mandate, the Director has, in developing the list of air contaminants, ignored other routes of exposure, including dermal contact and ingestion. Additionally, the Director ignored other routes of exposure including exposure that occurs when chemicals drop out of the air (or wash out of the air during rainfall) and fall on soils and water. The Director's failure to consider these routes of exposure when listing chemicals is contrary to the plain wording of the statute, is without a basis in fact or science, and is not rationally related to the purpose of the legislation. The Director's reasoning cannot be used to keep chemicals off the list under the standard set forth in [R.C.] 3704.03. The Director's failure to include chemicals in [Ohio Adm.Code] 3745-114-01 based on such reasoning is unreasonable and unlawful and/or an abuse of discretion.
- The Director has removed chemicals from the list under [R.C.] 3704.03 because their toxicity numbers are taken from 'larger events' (i.e. events in which large quantities of the chemicals were released at once). The Director's reasoning is without a basis in fact or science, is not rationally related to the purpose of the legislation, and cannot serve as a basis for not listing chemicals under the standard set forth in

- [R.C.] 3704.03. The Director's failure to include chemicals in [Ohio Adm.Code] 3745-114-01 based on such reasoning is unreasonable and unlawful and/or an abuse of discretion.
- The Director's decision not to include chemicals on the list, created pursuant to [R.C.] 3704.03, based on the unsubstantiated conclusion that 'the risk of low level chronic exposure to \* \* \* [those] compound[s] is minimal' is without a basis in fact or science, is not rationally related to the purpose of the legislation, and cannot serve as a basis for not listing chemicals under the standard set forth in [R.C.] 3704.03. The Director's failure to include chemicals in [Ohio Adm.Code] 3745-114-01 based on that reasoning is unreasonable and unlawful and/or an abuse of discretion.
  - The new rules promulgated by the Director contain no mechanism to verify that a new source will not emit one of the listed chemicals. Failure to promulgate a regulation that would allow the Ohio EPA to verify whether a new source is emitting a regulated chemical is unreasonable and unlawful and/or an abuse of discretion.
  - The Director's hasty issuance of the list of chemicals required under [R.C.] 3704.03 was driven by external political occurrences and was not in furtherance of the requirements of, or the purpose of, the statute of the protection of public health and the environment. The Director's issuance of [Ohio Adm.Code] 3745-114-01 is unreasonable and unlawful and/or an abuse of discretion.
  - The Director's listing of chemicals without specific chemical names and/or Chemical Abstract System (CAS) numbers (which there is one), leaves unnecessary ambiguity that will invite noncompliance and an excuse not to file a permit-to-install because Ohio EPA lacks a mechanism to verify a facility's 'secret' determination that no permit-to-install is necessary. The Director's listing of chemicals without specific names and/or CAS Numbers is, therefore, unreasonable and unlawful and/or an abuse of discretion.
  - The Director has erred and/or abused his discretion by failing to regulate small storage tanks in his new rules. The Director is without a valid factual basis for doing so because the Director is aware that some industries use multiple small storage tanks to circumvent regulations that are applicable to larger storage tanks, thereby increasing emissions to Ohio's air. The Director's furtherance of and/or failure to remove the small storage tank exemptions is unreasonable and unlawful.<sup>5</sup>

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<sup>5</sup> In Appellants' Prehearing Brief in Support of Appeals of the Director's Promulgation of the Ohio BAT Exemption and the Air Toxics Rule, Appellants informed the Commission that they would not

- The Director has erred and/or abused his discretion in his handling of air contaminants – such as silica and silica-related emissions and operations – that he is attempting to ‘regulate’ in his new rules. Although he acknowledges, for example, the toxicity of silica and commits to list it as an air contaminant, the Director has allowed an exemption of silica emissions, sand emissions (sand contains silica) and transfer operations from permitting and, therefore BAT requirements. Exempting silica, sand, and coal dust emissions and transfer operations directly contradicts any listing of crystalline silica as an air contaminant. The Director’s furtherance of and/or failure to remove these exemptions is unreasonable and unlawful.

{¶29} At the de novo hearing, Dr. George Leikauf testified on behalf of Appellants. Dr. Leikauf is a professor of environmental and occupational health at the Graduate School of Public Health at the University of Pittsburgh. Dr. Leikauf has been an inhalation toxicologist for over 30 years. He has a bachelor’s degree from the University of California, as well as a master’s degree and Ph.D. in environmental sciences from New York University. The Commission accepted Dr. Leikauf as an expert witness in the areas of inhalation toxicology, environmental health science, air pollution, and public health. Testimony Leikauf.

{¶30} Dr. Leikauf testified that he reviewed the language of SB 265, the initial list of 639 compounds, and the final version of Ohio Adm.Code 3745-114-01. In Dr. Leikauf’s opinion, the Director did not have a valid scientific justification for removing the compounds he did from the initial list. Dr. Leikauf opined that the compounds removed might pose a threat of adverse human health or environmental effects. *Id.*

{¶31} Dr. Leikauf testified that certain chemicals excluded from the final list were “acutely toxic,” which can trigger asthma attacks and heart attacks. He opined that the Director lacked scientific justification to exclude them. *Id.*

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pursue Assignment of Error 22 at the de novo hearing. Indeed no evidence was presented. Accordingly, the Commission construes this Assignment of Error as having been withdrawn by Appellants.

{¶32} Dr. Leikauf also opined that certain compounds were excluded because they were irritants only. He believed that this reasoning was flawed because irritants can potentially be life threatening to both normal and susceptible populations, such as the elderly, children, the sick, and those with preexisting conditions. *Id.*

{¶33} Furthermore, Dr. Leikauf believed that the Director lacked a valid scientific basis for excluding chemicals that were only demonstrated to be harmful through animal studies. According to Dr. Leikauf, many air standards exist solely through animal studies. In his opinion, chemicals that are determined to be toxic through animal studies may present a threat to the environment. *Id.*

{¶34} Dr. Leikauf also opined that the Director should not have excluded chemicals that are initially toxic only in solid or liquid form at room temperature. Dr. Leikauf believed that the Director should have included those chemicals because the possibility exists that they could be ground up into small particles and transported through the air or become gaseous when heated or as part of an industrial process. *Id.*

{¶35} Additionally, Dr. Leikauf disagreed with the Director's exclusion of chemicals because they are no longer manufactured or used in Ohio. He believed that the Director's exclusion of these chemicals lacked a scientific basis because it was impossible to predict what compounds would come into use in Ohio at a future time. *Id.*

{¶36} Dr. Leikauf opined that the Director's process for evaluating and excluding certain chemicals was not based on sound science for the following reasons: (1) failure to review primary literature, (2) failure to use an interdisciplinary team of professionals, (3) allowing a time period of only 7 months to pass the final rule, which was too short to thoroughly consider the compounds that should be included on the final list, and (4) failure to review other sources of information on air toxics, including the National

Institute of Occupational Health and Safety's Immediately Dangerous to Life and Health list. *Id.*

### III. Changes to the Best Available Technology Rule

{¶37} With the passage of SB 265, the Director also made changes to Ohio's BAT rule, Ohio Adm.Code 3745-31-05.

{¶38} The amended BAT rule was also promulgated on November 20, 2006.

{¶39} The primary change to the rule is the inclusion of subparagraph (A)(3)(b), which states:

(A) The director shall issue a permit to install \* \* \* if he determines the installation or modification and operation of the air contaminant source will:

(3) Employ BAT, except:

\* \* \*

(b) When the new or modified air contaminant source is installed or modified on or after August 3, 2006, and has the potential to emit, taking into account pollution controls on the source, less than ten tons per year of emissions of an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the Clean Air Act.

{¶40} Appellants timely appealed the amendment to Ohio Adm.Code 3745-31-05 on December 20, 2006, raising a single assignment of error with respect to this rule: "The Director erred and/or abused his discretion when reissuing rule 3745-31-05 with the BAT exemptions. The Director's modifications of the BAT requirement in rule 3745-31-05 violate federal law and are, therefore, unreasonable and unlawful." Case File Item A.

{¶41} The Ohio Chamber of Commerce, Ohio Chemistry Technology Council, and Ohio Manufacturer's Association ("Intervening Appellees") moved the Commission

for summary affirmance of the amendment to the BAT rule on April 27, 2007. Intervening Appellees argue that the amendment to the BAT rule was an exact recitation of R.C. 3704.03(T) and is therefore lawful and reasonable under Ohio law. Moreover, Intervening Appellees contend that the Commission lacks jurisdiction to determine whether or not the change to the BAT rule violated federal law. Case File Item M.

{¶42} The Director filed a response in support of Intervening Appellees' motion in which the Director also argues that the Commission must affirm the BAT rule change because it is a recitation of statutory language. The Director posits that the Commission must affirm the Director's promulgation of a rule so long as that rule falls within the statutory framework granted to the Director. Case File Item V.

{¶43} Appellants filed a response to Intervening Appellees' Motion for Summary Affirmance, arguing that the Commission has the authority to determine whether the Director's action in amending the BAT rule was consistent with federal law, namely the CAA and its SIP approval process. Case File Item U.

{¶44} Appellants filed a memorandum in reply to the Director's response. Further, Intervening Appellees filed a reply memorandum in support of their motion. Case File Items Y, Z.

{¶45} On July 31, 2008, the Commission ruled on Intervening Appellees' motion, informing the parties that it would grant the motion and that Findings of Fact and Conclusions of Law related to this issue would be incorporated in the Commission's final order in this case. Case File Item CCC.

{¶46} On August 27, 2010, Appellants filed a Motion to Summarily Vacate the Director's Adoption of the Ohio BAT Exemption. The basis behind Appellants' motion

was the fact that the United States District Court for the Southern District of Ohio<sup>6</sup> found that Ohio's BAT Exemption violates the CAA and Ohio's SIP because the exemption is less stringent than the BAT requirements that are in the federally-approved SIP for Ohio. Case File Item IIII.

{¶47} The Director filed a response in opposition to Appellants' motion on September 8, 2010. In his response, the Director continues to argue that the Commission does not have jurisdiction to determine whether the BAT exemption complies with federal law. Case File Item RRRR.

{¶48} Likewise, Intervening Appellees filed a response to Appellants' motion on September 9, 2010, continuing to assert their positions that the Commission does not have jurisdiction to determine whether the BAT rule change complies with federal law and that the change is a verbatim recitation of state law. Case File Item TTTT.

{¶49} Without ruling on the merits of Appellants' Motion to Summarily Vacate the Director's Adoption of the Ohio BAT Exemption, the Commission ruled that it would suspend its July 31, 2008 ruling granting Intervening Appellee's Motion for Summary Affirmance until resolution of the Director's appeal to the United States Court of Appeals for the Sixth Circuit. Case File Item HHHHH.<sup>7</sup>

#### **IV. Standing**

{¶50} In their Proposed Findings of Fact and Conclusions of Law, the Director and Intervening Appellees contend that Appellants failed to establish standing. With

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<sup>6</sup> Sierra Club sued the Director in the United States District Court for the Southern District of Ohio (Case No. 2:08-cv-856) under the citizens suit provision of the CAA. Sierra Club argues that the Director was violating the CAA by implementing the ten-ton exemption and failing to require below ten-ton sources to install BAT. Sierra Club further contends that Ohio's SIP does not contain a ten-ton exemption. The Court ruled in favor of Sierra Club and enjoined the Director from enforcing the exemption. The Director appealed the Court's decision, and the matter is currently pending before the United States Court of Appeals for the Sixth Circuit.

<sup>7</sup> See note 6, *supra*.

respect to Appellants Ohio Citizens Action, Ohio Academy of Trial Lawyers, and Buckeye Environmental Network, the Director and Intervening Appellees argue that these parties should be dismissed because no witness testified that they were a member of the organization and has suffered or would suffer injury as a result of these regulations. With respect to the other appellants, the Director and Intervening Appellees suggest that the evidence presented at the de novo hearing was insufficient to establish a concrete injury in fact. Case File Items AAAAAA, BBBB.

{¶51} At the de novo hearing, Martha Sinclair testified on behalf of Appellants. Ms. Sinclair is a resident of Hamilton County, Ohio, and has been for 12 years. Testimony Sinclair.

{¶52} She stated that she was a member of Sierra Club and the ECO. She has been a member of Sierra Club since 1992 and has been a co-chair of the National Sierra Club's environmental strategy team. She is also chair of the Sierra Club's National Clean Air Team. She has served on the Ohio chapter's executive committee as a conversation co-chair and as the environmental justice legal chair. *Id.*

{¶53} Ms. Sinclair has been a member of ECO for 6 years. During that time, she has served as a director and as a volunteer. *Id.*

{¶54} Ms. Sinclair has asthma and testified that her son also suffers from severe asthma. Ms. Sinclair stated that she has seen, tasted, and smelled air she believed was polluted. She said her family has refrained from activities in Ohio, such as visiting the zoo, because of concerns about air pollution in the state. She also testified that her family avoids eating certain fish because of concerns about contamination from air pollution. *Id.*

{¶155} Attached to Appellants' Memorandum in Opposition to the Director's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment are affidavits submitted by Teresa Mills and Melissa English. Case File Item PPPP.

{¶156} Ms. Mills is a founding member of BEN and has been a member since 1996. Ms. Mills resides in Grove City, Franklin County, Ohio, within approximately one mile of known industrialized areas of Columbus, Ohio. She attests that she drives through highly industrialized areas in Franklin County on a daily basis. *Id.*

{¶157} Ms. Mills stated that she regularly breathes chemicals from Ohio facilities and that she is within the air sheds of these facilities. She also said that she has difficulty breathing on smog alert days when air toxics in the air are more noticeable. She averred that on many of these days, she smells and breathes chemicals that leave a metallic taste in her mouth. *Id.*

{¶158} Ms. English has been a member of OCA since 1997. She serves as the Southern Ohio Campaign Director for OCA. She resides in Cincinnati, Hamilton County, Ohio. *Id.*

{¶159} Ms. English stated that she lives in within the air shed of companies and industrial facilities that commonly emit toxics and pollution. She averred that she is exposed to air toxics, smog, soot, ozone, and other air pollution on a daily basis. As a result, she suffers from allergies and sinus problems. *Id.*

## **CONCLUSIONS OF LAW**

### **I. Standing**

{¶160} Prior to addressing the merits of the appeal, the Commission will address the issue of standing as raised by the Director and Intervening Appellees. These parties

assert that none of the Appellants demonstrated standing to prosecute the appeal. With respect to Appellants OCA, OATL and BEN, the Director and Intervening Appellees argue that no evidence, be it oral or written, was presented to suggest that these parties had standing. Moreover, with respect to Appellants Sierra Club and ECO, the Director and Intervening Appellees argue that no evidence was presented at the hearing that members of Sierra Club or ECO would be injured by the Director's promulgation of the rules under appeal.

{¶61} “Standing is a threshold jurisdiction issue that must be resolved before an appellant may proceed with an appeal to [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, 217 (1987). Appellants bear the burden of demonstrating standing. *Olmsted Falls v. Jones*, 152 Ohio App.2d 282, 2003-Ohio-1512 (10th Dist.).

{¶62} In order to establish standing before the Commission, a party must demonstrate that he or she was a “party to a proceeding before the director.” R.C. 3745.04. The Tenth District Court of Appeals has defined a “party to a proceeding before the director” using the following two-prong test: (1) did the person appear before the Director, presenting his arguments in writing or otherwise; and (2) was the person “affected” by the action or proposed action. *Martin v. Schregardus*, 10th Dist. No. 96APH04-433 (Sept. 30, 1996), citing *Cincinnati Gas & Elec. Co. v. Whitman*, 11 O.O.3d 192, 198 (10th Dist. 1974); see also, *Olmsted Falls v. Jones*, 152 Ohio App.2d 282, 2003-Ohio-1512, ¶¶18-19 (10th Dist.).

{¶63} In *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Services of Ohio II, LLC*, 10th Dist. No. 07AP-599, 2009-Ohio-2143, ¶22, the Tenth District Court of Appeals stated:

In order to establish standing, a person must demonstrate that the challenged action has caused or will cause him or her injury in fact, economic or otherwise, and that the interest sought to be protected is within the sphere of interests protected or regulated by the statute in question. *Johnson's Island*, citing *Franklin Cty. Regional Solid Waste Mtg. Auth. v. Schregardus* (1992), 84 Ohio App. 3d 591, 599, 617 N.E.2d 761. The alleged injury must be concrete, rather than abstract or suspected; a party must show he or she has suffered or will suffer a "specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction." *Johnson's Island*, quoting *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, 424, 8 Ohio B. 544, 457 N.E.2d 878. The alleged injury in fact may be actual and immediate, or threatened. *Id.*, citing *State ex rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App.3d 44, 46-47, 8 Ohio B. 47, 455 N.E.2d 1331. A party who alleges a threatened injury, however, must demonstrate a realistic danger arising from the challenged action. *Id.*, citing *Babbitt v. United Farm Workers Natl. Union* (1979), 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed.2d 895.

{¶64} For an association to establish standing, it must "demonstrate that any one of their members is suffering immediate or threatened injury arising from the challenged action, and the nature of the claim advanced and relief sought does not necessitate individual participation of each injured party in order to arrive at a proper resolution of the case." *Johnson Island Property Owners' Assn. v. Schregardus*, 10th Dist. No. 96APH10-1330 (June 30, 1997).

{¶65} Ms. Sinclair testified that she lives in Ohio and is a member of both Sierra Club and ECO. She further testified that she suffers from asthma and that she has seen, tasted, and smelled air she believed was polluted. She stated that her family has refrained from activities in Ohio, such as visiting the zoo, because of concerns about air pollution in the state. She also testified that her family avoids eating certain fish because of concerns about contamination from air pollution.

{¶66} The Commission finds that Ms. Sinclair's testimony is sufficient to establish an actual or threatened injury. Because she testified that she is an active

member of Appellant Sierra Club and ECO, her testimony is sufficient to establish associational standing for those two appellants.

{¶67} Through her affidavit, Ms. Mills stated that she lives in Ohio and is a member of BEN. She stated that she has trouble breathing on smog days and that she smells air toxics and has a metallic taste in her mouth from these chemicals.

{¶68} Through her affidavit, Ms. English said that she lives in Ohio and is a member of OCA. She said that she lives close to companies and industrial processes that expose her to smog, air toxics, ozone, and other air pollutants. As a result, she has suffered from allergies and sinus problems.

{¶69} Although Ms. Mills and Ms. English's affidavits were not admitted as evidence at the de novo hearing, the Commission is entitled to consider them for purposes of establishing standing. *Earth Island Inst. v. Pengilly*, 376 F. Supp.2d 994, 1000 (E.D.Cal. 2005), reversed on other grounds ("where a plaintiff or group of plaintiffs submits affidavits concerning direct effects to the affiant's 'recreational, aesthetic, and economic interests,' standing is appropriate"), citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000).

{¶70} The Commission finds that the affidavits of Ms. Mills and Ms. English are sufficient for BEN and OCA to establish standing.

{¶71} The Commission notes that OATL offered no witness at the de novo hearing and did not submit an affidavit from one of its members that would establish an actual or threatened injury. Through their Proposed Findings of Fact and Conclusions of Law, Appellants attempt to overcome this deficiency by arguing that Ohio Academy of Trial Lawyers filed comments with the Director on the proposed rules. While that may be true, mere participation before the Director is insufficient to establish standing in

accordance with the test outlined in *Johnson Island Property Owners' Assn.* As a result, the Commission finds that Ohio Academy of Trial Lawyers does not have standing to prosecute this appeal. Accordingly, the Commission dismisses it from the case.

## II. **The Director's Promulgation of Ohio Adm.Code 3745-114-01**

{¶72} Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. The statute provides, in relevant part, that “[i]f, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.”

{¶73} This standard does not permit ERAC to substitute its judgment for that of the Director as to factual issues. *CECOS Internatl., Inc. v. Shank*, 79 Ohio App.3d 1, 6 (10th Dist. 1992). The term “unlawful” means “that which is not in accordance with law,” and the term “unreasonable” means “that which is not in accordance with reason, or that which has no factual foundation.” *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977). “It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the Director’s action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by [ERAC] upon the de novo hearing is whether there is a valid factual foundation for the Director’s action and not whether the Director’s action is the best or most appropriate action, nor whether the board would have taken the same action.” *Id.*

{¶74} The Commission is required to grant “due deference to the Director’s ‘reasonable interpretation of the legislative scheme governing his Agency.’ ” *Sandusky*

*Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982, citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State ex rel. Celebrezze v. National Lime & Stone Co.*, 68 Ohio St. 3d 377 (1994); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App. 3d 331 (2nd Dist. 1984). The deference is not, however, without limits. See e.g., *B.P. Exploration and Oil, Inc., et al v. Jones*, ERAC Nos. 184134-36 (March 21, 2001) (in which the Commission noted that such deference must be granted to the Director’s interpretation and application of his statutes and rules, “particularly if the Director’s interpretation is not at variance with the explicit language of the regulations”).

{¶75} In challenging the Director’s promulgation of Ohio Adm.Code 3745-114-01, Appellants bear “the burden of proof to demonstrate that there was no factual or legal basis upon which the director could promulgate the [rule] as he did.” *Buckeye Power v. Korleski*, 183 Ohio App. 3d 179, 2009-Ohio-2232, ¶14 (10th Dist.).

{¶76} With the passage of SB 265, R.C. 3704.03(F)(3) now states:

Not later than two years after August 3, 2006, the director shall adopt a rule in accordance with Chapter 119. of the Revised Code specifying that a permit to install is required only for new or modified air contaminant sources that emit any of the following air contaminants:

(a) An air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act;

(b) An air contaminant for which the air contaminant source is regulated under the federal Clean Air Act;

(c) An air contaminant that presents, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects, including, but not limited to, substances that are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, or neurotoxic, that cause reproductive dysfunction, or that are acutely or chronically toxic, or a threat of adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or

otherwise, and that is identified in the rule by chemical name and chemical abstract service number.

The director may modify the rule adopted under division (F)(3)(c) of this section for the purpose of adding or deleting air contaminants. For each air contaminant that is contained in or deleted from the rule adopted under division (F)(3)(c) of this section, the director shall include in a notice accompanying any proposed or final rule an explanation of the director's determination that the air contaminant meets the criteria established in that division and should be added to, or no longer meets the criteria and should be deleted from, the list of air contaminants. The explanation shall include an identification of the scientific evidence on which the director relied in making the determination. Until adoption of the rule under division (F)(3)(c) of this section, nothing shall affect the director's authority to issue, deny, modify, or revoke permits to install under this chapter and rules adopted under it.

{¶77} The parties do not dispute that R.C. 3704.03(F)(3)(c) requires the Director to promulgate a rule requiring a PTI for sources that emit contaminants having the characteristics outlined in that subsection. The statute is clear that the Director has the obligation to do so. Where the parties disagree, however, is to what extent the Director has the discretion to include certain chemicals and exclude others.

{¶78} The second paragraph of R.C. 3704.03(F)(3) states that the Director may add to or delete air contaminants from the list contained in the rule promulgated under that section (Ohio Adm.Code 3745-114-01). In doing so, the Director is required to include a notice with the proposed or final rule explaining his determination that the air contaminant meets the criteria established in R.C. 3704.03(F)(3)(c) and should be added, or no longer meets the criteria and should be deleted from the list of contaminants.

{¶79} Based upon this plain language, the Commission finds that the General Assembly gave the Director discretion to include or exclude chemicals that, in his determination, do or do not meet the criteria contained in R.C. 3704.03(3)(F)(c).

{¶80} Having found that the Director has the discretion to determine which chemicals and compounds should be included on the list, the Commission must determine whether or not the Director had a valid factual basis for including and excluding the chemicals and compounds that he did.

{¶81} Mr. Koval testified extensively about the multi-step process Ohio EPA followed to evaluate which chemicals should be included on the list and thus in the rule. The databases selected for review by Ohio EPA contained information relevant to the protection of human health and the environment. Furthermore, these databases contained information that allowed the Director to make a reasoned judgment about what chemicals should be included in the final version of the rule.

{¶82} Moreover, the Director provided detailed justifications for his determinations whether a chemical or compound should be included or excluded from the rule. As noted above, the staff at Ohio EPA prepared a “Toxic Compound Data Sheet” for each chemical or compound that provided a summary of the information contained in each database reviewed by Ohio EPA and a statement summarizing the scientific reasons supporting the Director’s decision to either include or exclude a chemical or compound from the list.

{¶83} Although Appellants’ expert disagreed with many of the Director’s determinations, such a disagreement is not sufficient for the Commission to find the Director’s determinations lacked a valid factual foundation. In cases “[w]here qualified, credible expert witnesses disagree on a matter within their expertise, the Commission defers to the decision of the Director.” *Tube City Olympic of Ohio v. Jones*, ERAC No. 994681 (Mar. 5, 2003); *see also, Copperweld Steel Co. v. Shank*, EBR No. 781787 (Oct 24, 1989) (where “the question of what levels of treatment or design are necessary to

protect public health or ground water are the subject of legitimate debate or dispute between qualified experts, the [Commission] will defer to the action of the Director where that action is otherwise reasonable and lawful”).

{¶84} Even if the evidence is reasonably debatable as to whether the Director should have promulgated this rule as he did, the Commission cannot substitute its judgment for that of the Director’s and must affirm the Director’s decision to promulgate the rule as he did. *Buckeye Power*, ¶15.

{¶85} The Commission finds that the Director had a valid factual foundation to include the list of chemicals and compounds found in Ohio Adm.Code 3745-114-01 and exclude others. Therefore, the Commission finds that the Director acted lawfully and reasonably in promulgating the rule as enacted.

{¶86} Because Assignments of Error 1, 3-17, and 19 all concern the Director’s process and/or determinations to include or exclude chemicals and compounds from Ohio Adm.Code 3745-114-01, the Commission finds these Assignments of Error are not well-taken.

{¶87} Appellants’ Assignments of Error 18 and 23 are not related to the rulemaking that is the subject matter of this appeal. Each alleges that the Director should have taken a specific action but did not do so. In Assignment of Error 18, Appellants claim that the new rules “contain no mechanism to verify that a new source will not emit one of the listed chemicals.” In Assignment of Error 23, Appellants allege that the Director did not regulate silica emissions, sand emissions, and coal dust emissions, as well as transfer operations.

{¶88} Because the Commission’s jurisdiction is limited to actions of the Director, such as the adoption, modification, or repeal of a rule or standard, the Commission does

not have jurisdiction to consider inaction by the Director. Even if the Commission did have jurisdiction, as stated above, the Director has the discretion to determine which chemicals to include or exclude from the rule, and the Commission finds that the Director had a valid factual foundation for promulgating the rule as he did. Therefore, Assignments of Error 18 and 23 are not well-taken.

{¶89} In Assignment of Error 2, Appellants challenge Ohio Adm.Code 3745-114-01 on grounds that the rule states the Director “may” require a permit to install for any source emitting a chemical listed by the Director. Appellants suggest that this language contradicts the language in R.C. 3704.03(F), which states that a permit to install “is required” for a source emitting a chemical listed by the Director.

{¶90} The permitting requirements of R.C. 3704.03(F) must be understood in the context of all permitting rules and regulations. Under certain circumstances, sources that would otherwise be required to obtain a permit to install are not required to do so. For example, de minimis sources are exempt from obtaining a permit to install, as are other sources contained in Ohio Adm.Code 3745-31-03. Revised Code 3704.03(F) does not change any of these exemptions, even if they emit a chemical or compound contained in Ohio Adm.Code 3745-114-01.

{¶91} Accordingly, the Commission finds that the Director’s use of the word “may” in Ohio Adm.Code 3745-114-01 was neither unlawful nor unreasonable, and Assignment of Error 2 is not well-taken.

### **III. The Director’s Amendment to Ohio Adm.Code 3745-31-05**

{¶92} The Commission is cognizant of the fact that it previously ruled to suspend its July 31, 2008 ruling granting Intervening Appellees’ Motion for Summary Affirmance pending a decision of the United States Court of Appeals for the Sixth

Circuit. The Commission is also cognizant of the fact that the Court has not yet issued an opinion. However, the Commission has determined that it need not wait on the Court's decision to rule on the issue presented before it. Therefore, in the interest of judicial economy, the Commission will lift the suspension and reinstate its July 31, 2008 order granting Intervening Appellees' Motion for Summary Affirmance.

{¶93} Revised Code 3704.03(T) required the Director to promulgate a rule with the following provision:

Best available technology requirements shall not apply to an air contaminant source that has the potential to emit, taking into account air pollution controls installed on the source, less than ten tons per year of emissions of an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act.

{¶94} The Director fulfilled this statutory obligation through the promulgation of Ohio Adm.Code 3745-31-05(A)(3)(b). Intervening Appellees and the Director correctly point out that the language in the rule is verbatim to language contained in the statute, a point Appellants do not dispute.

{¶95} The ten-ton exemption in the BAT rule is, in reality, a creation of the General Assembly in R.C. 3704.03(T). Because the Director's recitation of the exemption in the rule is verbatim to that contained in the statute, an attack on the language contained in the rule is an attack on the statute itself. The Commission has ruled on multiple occasions that it lacks jurisdiction to adjudicate the lawfulness of Ohio statutes. *Kays v. Schregardus*, EBR No. 673886 (May 26, 1999); *Lund v. Koncelik*, ERAC No. 015795 (February 28, 2006).

{¶96} The essence of Appellants' contention with the adoption of Ohio Adm.Code 3745-31-05(A)(3)(b) is that it violates federal law. Appellants point to the

United States District Court for the Southern District of Ohio ruling as proof of their position.<sup>8</sup>

{¶97} By presenting this argument, Appellants are raising a constitutional question for which the Commission lacks jurisdiction. Appellants are essentially arguing that the BAT rule change violates federal law, which, under the Supremacy Clause of the United States Constitution, invalidates the state statute and consequently the BAT rule change itself.

{¶98} It is well settled that the Commission does not have jurisdiction to hear constitutional challenges to rules or statutes. *BP Exploration & Ohio, Inc. v. Jones*, ERAC No. 184134 (March 21, 2001).

{¶99} Even if Appellants ultimately prevail in the federal litigation, the outcome in that case is irrelevant to the issue before the Commission. By including the statutory language in the rule verbatim, the Director's action at the time the BAT rule was promulgated was lawful and reasonable as a matter of state law. If the federal courts later determine that R.C. 3704.03(T), and thus Ohio Adm.Code 3745-31-05(A)(3)(b), violate federal law, that decision does not change the fact that the Director's action at the time the rule was promulgated was lawful and reasonable under state law.

{¶100} Accordingly, the Commission finds that Assignment of Error 21 is without merit.

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<sup>8</sup> See note 6, *supra*.

**FINAL ORDER**

Based upon the foregoing, the Commission finds that Appellee Director acted lawfully and reasonably in promulgating Ohio Adm.Code 3745-114-01 and Ohio Adm.Code 3745-31-05.

The Commission also hereby lifts its previous suspension and reinstates its July 31, 2008 order granting Intervening Appellees’ Motion for Summary Affirmance with respect to Ohio Adm.Code 3745-31-05.

The Commission, in accordance with Ohio Adm.Code Section 3746-13-01, informs the parties that:

Any party adversely affected by an order of the commission may appeal to the Court of Appeals For Franklin County, or if the appeal arises from an alleged violation of 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.

ESCHELMAN AND SHILLING, COMMISSIONERS, CONCUR

**The Environmental Review  
Appeals Commission**

Entered into the Journal of the  
Commission this \_\_\_\_\_ day  
of February 2012.

\_\_\_\_\_  
Lisa L. Eschleman, Chair

\_\_\_\_\_  
Melissa M. Shilling, Vice Chair

\_\_\_\_\_  
Shaun K. Petersen, Member

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