BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

DAVID THOMAS,	:	Case No. ERAC 11-496560
and	:	
LADONNA THOMAS,	:	Case No. ERAC 11-496561
Appellants,	:	
and	:	
ROBERT HIGGINS,	:	
and	:	
BOARD OF TRUSTEES OF PAINT TOWNSHIP, MADISON CO., OHIO,	:	
and	:	
BOARD OF TRUSTEES OF UNION TOWNSHIP, MADISON CO., OHIO,	:	
BOARD OF COMMISSIONERS OF MADISON COUNTY, OHIO,	:	
Intervening-Appellants,	:	
v.	:	
JIM ZEHRINGER, DIRECTOR OF OHIO DEPT. OF AGRICULTURE,	:	
and	:	
RISING SUN DAIRY, LLC,	:	
Appellees.	:	

RULING ON APPELLEE RISING SUN DAIRY'S MOTION FOR SUMMMARY JUDGMENT AND APPELLLEE DIRECTOR'S MOTION TO DISMISS

Rendered on September 20, 2012

John F. Stock, *Orla E. Collier III*, and *Steven A. Oldham* for Appellants David Thomas and LaDonna Thomas

Terrance S. Finn, *Kelly J. Mahon*, and *Michael R. Traven* for Intervening-Appellant Robert Higgins

Steven J. Pronai, Madison County Prosecuting Attorney, for Intervening-Appellants Board of Trustees of Paint Township, Madison County, Ohio, Board of Trustees of Union Township, Madison County, Ohio, and Board of Commissioners of Madison County, Ohio

Mike DeWine, Attorney General, *Aaron S. Farmer*, and *Kelly D. McCloud* for Appellee Jim Zehringer, Director of Ohio Department of Agriculture

Jack A. Van Kley for Appellee Rising Sun Dairy, LLC

{¶1} This matter comes before the Environmental Review Appeals Commission ("Commission," "ERAC") on a Notice of Appeal filed by Appellants David Thomas and LaDonna Thomas (collectively "Appellants") opposing final actions of Appellee Jim Zehringer, Director of the Ohio Department of Agriculture ("Director," "ODA"). Appellants challenge the Director's August 31, 2011 Permit to Install ("PTI") 49-114-PTI-001 and Permit to Operate ("PTO") 49-114-PTO-001 issued to Appellee Rising Sun Dairy, LLC ("Rising Sun"). Case File Items A, I, GG.

{¶2} Robert Higgins ("Higgins") filed a Motion to Intervene in these matters, and separately filed a Notice of Appeal (ERAC Case No. 11-496569) on December 7, 2011. Similarly, the Board of Trustees of Paint Township, Madison County, Ohio ("Paint

Township") and the Board of Trustees of Union Township, Madison County, Ohio ("Union Township") filed Motions to Intervene in these matters and separate Notices of Appeal (ERAC Case Nos. ERAC Nos. 11-496572-73) on December 20, 2011. Case File Items N, Q.

{¶3} On December 23, 2011, Mr. Higgins and Appellees filed a Joint Motion for Consolidation and/or Dismissal in the instant matters. The Joint Motion stated that if the Commission granted Mr. Higgins's Motion to Intervene, his separate appeal should be dismissed. ERAC No. 11-496569, Case File Item C.

{¶4} The Commission granted the motions to intervene filed by Mr. Higgins, Paint Township, and Union Township on January 5, 2012. The Commission also issued a separate ruling dismissing the Higgins's appeal. Case File Item W; ERAC No. 11-496569, Case File Item E.

{¶5} On February 21, 2012, Paint Township and Union Township voluntarily moved for dismissal of their appeals. The Commission granted the motion and dismissed their appeals on February 23, 2012. ERAC Nos. 11-496572-73, Case File Items J, K.

{¶6} The Board of Commissioners of Madison County, Ohio ("Madison County") filed a Motion to Intervene on March 15, 2012. The Commission granted Madison County's motion on April 12, 2012. Case File Items OO, UU.

{¶7} Currently, Mr. Higgins, Paint Township, Union Township, and Madison County are each intervenor-appellants in the present case. None maintains an independent appeal.

{¶8} Before the Commission are Rising Sun's Motion for Summary Judgment and the Director's Motion to Dismiss, both filed April 30, 2012. Rising Sun and the

Director submitted supplemental memoranda in support of their motions on May 2, 2012, and May 7, 2012, respectively. Appellants filed a Memorandum in Opposition to Appellees' motions on June 1, 2012. Mr. Higgins also filed a Memorandum in Opposition on June 1, 2012. Appellees filed replies on June 25, 2012. Rising Sun filed a supplement to its Reply on July 11, 2012. Paint Township, Union Township, and Madison County have not opposed Appellees' motions. Case File Items VV, WW, XX, YY, CCC, DDD, EEE, FFF, GGG, HHH, III.

{¶9} Based on the pleadings and relevant statutes, regulations, and case law, the Commission hereby GRANTS Rising Sun's Motion for Summary Judgment and the Director's Motion to Dismiss and issues the following Findings of Fact, Conclusions of Law, and Final Order.

FINDINGS OF FACT

{¶10} Appellee Rising Sun operates a dairy farm located at 8500 Yankeetown-Chenoweth Road, London, Ohio 43140. Case File Item WW.

{¶11} Appellants David and LaDonna Thomas reside at 1700 Dun Road, London, Ohio 43140. Their residence is located approximately 9 miles[1] northeast of Rising Sun's dairy farm, with the City of London situated between the two locations. Case File Item VV.

{¶12} At deposition, Mr. Thomas testified that he plays golf at Deer Creek State Park and wades in certain areas of Deer Creek Lake. Deer Creek State Park and Deer Creek Lake are located approximately 16.5 miles southeast of Rising Sun. Case File Item VV, Appendix A, Exhibit 2.

[1] Appellees contend that the Thomas residence is actually located 11 miles northeast of the Rising Sun facility. The precise distance does not, however, affect the Commission's analysis. Case File Item VV.

{¶13} Additionally, Mr. Thomas serves as the Vice President of Darby Creek Matters, LLC ("Darby Creek Matters"). Darby Creek Matters is a not-for-profit corporation formed for the purpose of promoting conservation and protection of the Darby Creek Watershed Area. Case File Item VV, Appendix B, Exhibit 6; Appendix C.

{¶14} In 2010, Rising Sun sought to expand its dairy farm operations from 699 mature dairy cattle to 2,558 mature dairy cattle. Because the proposed expansion would result in Rising Sun's facility being designated as a concentrated animal feeding facility ("CAFF"), Rising Sun submitted PTI and PTO applications to ODA on April 27, 2010.[2] Case File Item I.

{¶15} After completing its initial review of Rising Sun's PTI and PTO applications, ODA issued draft permits on July 14, 2011. The public notice for the draft permits stated that ODA would conduct a public meeting on August 16, 2011, and would accept written comments until August 23, 2011. Case File Item VV, Appendix B, Exhibit 1.

{¶16} Neither David nor LaDonna Thomas submitted testimony or comments at ODA's August 16, 2011 public meeting. Case File Item VV, Appendix B.

{¶17} On August 19, 2011, David Thomas and Dale King, President of Darby Creek Matters, submitted a letter to ODA. The letter stated in full as follows:

[2] Ohio Revised Code ("R.C") 903.02 and 903.03 prohibit the operation of a CAFF without a PTI and a PTO. Pursuant to R.C. 903.01(M)(1), a CAFF is defined as any animal feeding facility confining 700 or more mature dairy cattle. Case File Items I, WW.

August 19, 2011

Kevin Elder
Livestock Permitting Program
8995 E. Main St.
Reynoldsburg, Ohio 43068

Dear Mr. Elder:

We are writing in response to the article that appeared in the Madison Press on Wednesday, August 17, 2011 concerning the expansion of the Rising Sun Dairy operated by Pieter and Johannes Assen.

We oppose the expansion because of this farm's past record. There have been multiple spills and violations. They have not acted responsibly in the past and there is no reason to believe they will manage 2500 cows in a responsible way. They do not show concern for the neighboring area, streams, people or the roads.

The Department of Agriculture should be well aware of this farm's past record of violations. There seems to be an unwillingness to comply with State Regulations.

Dale R King, President

Dave Thomas, Vice President

Darby Creek Matters
1283 St. Rt. 29 NE
London, Ohio 43140
740-857-1230

Case File Item VV, Appendix B, Exhibit 5.

{¶18} On August 31, 2011, after the close of the public comment period, the Director issued a final PTI and PTO to Rising Sun. Public notice was issued on September 6, 2011. Case File Item VV, Appendix B, Exhibit 3.

{¶19} On October 3, 2011, Appellants sent a letter to both ODA and to ERAC. The letter read in pertinent part:

> Ohio Department of Agriculture,
>
> When one looks at the history of the Assen Dairy (Rising Sun Dairy), how can they get a permit?
>
> * * *
>
> We oppose the expansion because of past history, multiple spills and violations. There is no reason to believe they will manage this CAFO in a responsible way.
>
> Sincerely,
>
> Dave and LaDonna Thomas

Case File Item A.

{¶20} The Commission construed this letter as a notice of appeal, docketed the case, and ordered Appellants to submit an amended notice of appeal in compliance with Ohio Administrative Code ("Ohio Adm.Code") 3746-5-07. Case File Item B.

{¶21} Appellants submitted their Amended Notice of Appeal on October 31, 2011. Case File Item I.

{¶22} In the present Motion for Summary Judgment and Motion to Dismiss, Appellees argue that the appeal should be dismissed because both David and LaDonna Thomas lack standing. Appellees contend that David and LaDonna Thomas did not "appear" before the Director and are not "affected" by the issuance of Rising Sun's PTI and PTO. Therefore, Appellees conclude that Appellants have failed to establish standing. Case File Items VV, WW.

{¶23} As an initial matter, Appellants maintain they need not have "appeared" because the permits were issued without first being issued as a "proposed action." They contend that under Revised Code ("R.C.") 3745.07, if the Director takes an action

without first issuing a "proposed action," a person may establish standing by simply being "aggrieved or adversely affected." Case File Item EEE.

{¶24} Further, Mr. Thomas argues that even if R.C. 3745.07 does not apply to the present matter, his August 19, 2011 letter to ODA constitutes an "appearance" within the meaning of R.C. 3745.04. Mr. Thomas contends that although the letter references Darby Creek Matters, it is most accurately construed as outlining his own personal views rather than those of the limited liability corporation. Mr. Thomas thus asserts that he has satisfied the "appearance" requirement of R.C. 3745.04.[3] Case File Item EEE.

{¶25} In response, Appellees argue that R.C. 3745.07 applies only to appeals from actions of the Director of Environmental Protection ("Ohio EPA") and does not apply to appeals from actions of the Director of Agriculture. Specifically, Appellees cite the portion of R.C. 3745.04 that provides as follows:

> (B) Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission * * *.
>
> * * *
>
> (E) *As used in this section and sections 3745.05 and 3745.06 of the Revised Code*, 'director of environmental protection' and 'director' are deemed to include the director of agriculture and 'environmental protection agency' is deemed to include the department of agriculture with respect to actions that are appealable to the commission under Chapter 903. of the Revised Code.

(Emphasis added).

[3] Mrs. Thomas concedes that she would not have standing under R.C. 3745.04 because she did not "appear" before the Director. Case File Item EEE, at note 3.

{¶26} Comparatively, R.C. 3745.07 provides in pertinent part as follows:

> Before issuing * * * any permit * * *, the *director of environmental protection* may issue a proposed action to the applicant that indicates the director's intent with regard to the issuance * * * of the permit * * *.
>
> * * *
>
> If the director issues * * * a permit * * * without issuing a proposed action, * * * any person who would be aggrieved or adversely affected thereby, may appeal to the environmental review appeals commission within thirty days of the issuance * * *.

(Emphasis added).

{¶27} Thus, pursuant to R.C. 3745.04(E), the "director of environmental protection" is expressly "deemed to include the director of agriculture" for purposes of R.C. 3745.04, 3745.05, and 3745.06. Revised Code 3745.07 contains no such provision. Accordingly, Appellees argue that the scope of R.C. 3745.07 precludes appeals from actions of the Director of Agriculture. Case File Item VV.[4]

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[4] Appellants note that ERAC's website did not distinguish between R.C. 3745.04 and 3745.07. ERAC's website, which has since been revised, stated as follows:

> The Ohio Environmental Review Appeals Commission has exclusive original jurisdiction over any matter that may be brought before it from final actions of:
>
> - The Director of the Ohio Environmental Protection Agency; or
> - The Director of the Ohio Department of Agriculture; or
> - The State Fire Marshal's Office; or
> - The State Emergency Response Commission; or
> - County and local boards of health.
>
> Any person who was a party to a proceeding before any of the above-listed entities may participate in an appeal to the Commission by filing a Notice of Appeal within thirty (30) days of notice of the final action. In addition, if any of the above-listed entities issues * * * a permit * * * without issuing a proposed action, any person who would be aggrieved or adversely affected by the action may file an appeal with the Commission within thirty (30) days of the issuance * * *.

How to File an Appeal, http://erac.ohio.gov/HowtoFileanAppeal.aspx (version on August 14, 2012).

{¶28} In addition, Appellees contend that because Mr. Thomas's August 19, 2011 letter was signed on behalf of Darby Creek Matters, rather than as an individual, he failed to satisfy the "appearance" requirement under R.C. 3745.04. Case File Item VV.

{¶29} Addressing whether Appellants have been "aggrieved or adversely affected" by the Director's issuance of Rising Sun's PTI and PTO, Mr. Thomas argues that potential contamination caused by runoff and spills from manure application at the Rising Sun facility affects his willingness to golf at Deer Creek State Park and wade in Deer Creek Lake. At deposition, Mr. Thomas testified as follows:

> **Q:** * * * If there were instances of pollution from any Rising Sun manure applications in the future, would the fact that those runoffs or spills from manure from Rising Sun farm affect your willingness to swim or wade in Deer Creek [reservoir] in the future?
>
> * * *
>
> **A:** Yes.
>
> * * *
>
> **Q:** How about with respect to your golfing, if there were contaminations of streams or ditches that fed into the Deer Creek golf course area, would that affect your willingness to golf there in the future?
>
> **A:** Yes.

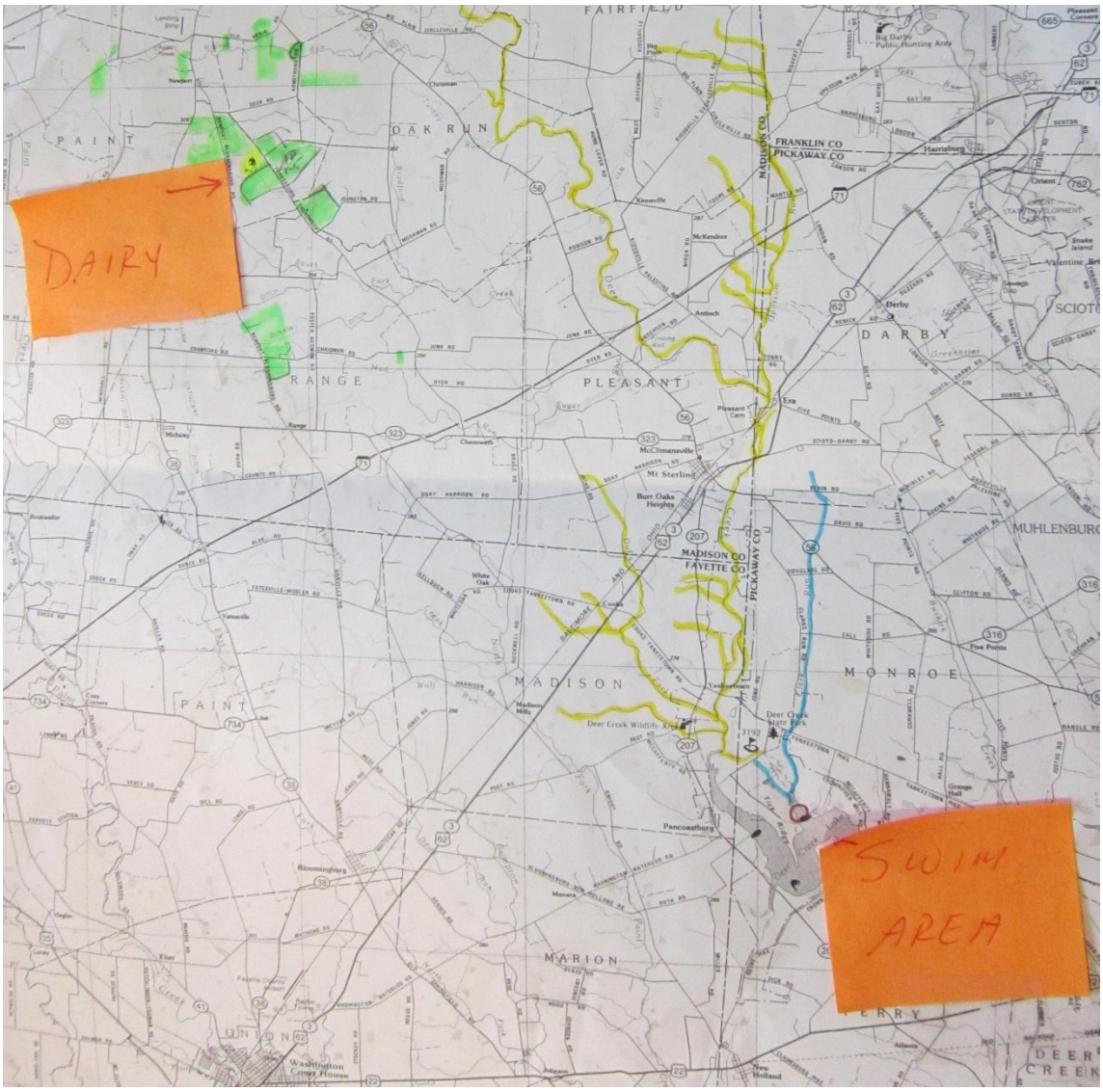
Case File Item EEE.

{¶30} Further, both David and LaDonna Thomas argue that they have been "aggrieved or adversely affected" because the Director's issuance of the PTI and PTO will cause increased damage to local roads, which will ultimately lead to increased taxes to the Thomases and others. Case File Item EEE.

{¶31} Appellees respond that neither Mr. Thomas's golfing nor his wading are impacted by any of Rising Sun's operations. Specifically, Appellees argue that runoff from the manure application fields for Rising Sun Dairy does not impact streams

running through the golf course at Deer Creek State Park or the area of Deer Creek Lake in which Mr. Thomas wades. Case File Item VV.

{¶32} In support of their argument, Appellees introduced the following map:



Case File Item VV, Appendix A, Exhibit 1 (cropped).

{¶33} On Appellees' behalf, Gary Zwolinski, Livestock Environmental Engineer for ODA's Division of Livestock Environmental Permitting, averred that all runoff from the manure application fields for Rising Sun Dairy (highlighted in green) flows into Deer Creek (highlighted in yellow, along with some of its tributaries). Further, Mr. Zwolinski

averred that the creeks that run through the golf course at Deer Creek State Park flow *into* Deer Creek, rather than receiving water from it, and therefore, they are not impacted by runoff from Rising Sun. Case File Item VV, Appendix A.

{¶34} Finally, Mr. Zwolinski averred that the area of Deer Creek Lake in which Mr. Thomas wades (circled in red and labeled as "swim area") is fed by two tributaries (highlighted in blue), and that runoff from the manure application fields for Rising Sun Dairy does not reach either of these tributaries. Case File Item VV, Appendix A.

{¶35} Thus, Mr. Zwolinski concluded that absent "catastrophic flooding," runoff from the manure application fields for Rising Sun cannot impact Mr. Thomas's wading in Deer Creek Lake. Case File Item VV, Appendix A.

{¶36} Regarding potential damage to the roads leading to increased taxes, Appellees argue that these alleged injuries have not been supported by admissible evidence and are not within the zone of interests protected by applicable environmental laws. Accordingly, Appellees argue that allegations of possible damage to roads and increased taxes are insufficient to establish standing. Case File Item VV, FFF.

{¶37} Significantly, Appellants did not offer affidavits or deposition testimony specifically rebutting Mr. Zwolinski's assertions. Instead, Appellants simply challenged the admissibility of Mr. Zwolinski's affidavit on the basis that his statements were not based on personal knowledge. Specifically, Appellants allege that manure is being applied in areas not approved as a part of Rising Sun's permit, and that Mr. Zwolinski is unaware of where such unauthorized application is occurring. Thus, Appellants argue that Mr. Zwolinski lacks the requisite knowledge on which to base his conclusion that runoff from manure application for Rising Sun will not affect Mr. Thomas's golfing or wading. Case File Item EEE.

{¶38} As a final matter, Intervenor-Appellant Higgins argues that even if the Commission finds that Appellants do not have standing, it should preserve the case and allow Mr. Higgins to continue the appeal as an Intervenor-Appellant. Case File Item CCC.

CONCLUSIONS OF LAW

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

{¶40} Here, although the Director's Motion is styled as a Civ.R. 12(B)(6) motion to dismiss, the Commission finds it is more appropriately examined as a motion for summary judgment. Accordingly, the Commission will examine both Rising Sun's and the Director's motions under the framework of Civ.R. 56.

{¶41} Civ.R. 56(C) states in pertinent part:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * *

{¶42} Under Civ.R. 56, "[t]he moving party has the burden of showing that there is no genuine issue as to any material fact as to critical issues." *Stockdale v. Baba*, 153 Ohio App.3d 712, 2003-Ohio-4366, 795 N.E.2d 727, at ¶23. However, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response * * * must set forth specific facts showing that there is a genuine issue for trial." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65. All doubts and evidence should be construed against the moving party, and "[s]ummary judgment may not be rendered unless it appears that reasonable minds can come to but one

conclusion and that conclusion is adverse to the parties against whom this motion is made." *Stockdale*, 2003-Ohio-4366, at ¶32.

I. Scope of R.C. 3745.04 and 3745.07

{¶43} First, the Commission will address the scope of R.C. 3745.04 and 3745.07 as applicable in this matter. Together, these two sections establish ERAC's jurisdiction, with each section containing distinct criteria that an appellant must satisfy to establish standing. *See* R.C. 3745.04(B) and 3745.07.

{¶44} Appellees argue that R.C. 3745.07 applies only to appeals from Ohio EPA actions and does not apply to appeals from ODA actions. Conversely, Appellants contend that although R.C. 3745.07 does not expressly extend to appeals from actions of the Director of Agriculture, ERAC has previously applied it to ODA permits in *Askins v. Boggs*, ERAC No. 876032-34 (April 15, 2010), at ¶27.

{¶45} The Commission finds R.C. 3745.07 inapplicable to appeals from actions of the Director of Agriculture. As Appellees correctly observe, the statute expressly applies only to appeals from actions of the "director of environmental protection." Further, although R.C. 3745.04(E) does contain a provision in which the "director of environmental protection" is "deemed to include the director of agriculture," this provision applies only to R.C. 3745.04, 3745.05, and 3745.06.

{¶46} Moreover, R.C. 903.09(F), which governs the issuance of ODA PTIs and PTOs, states in pertinent part as follows:

> * * * [A]n order issuing a permit without a prior proposed action may be appealed to the environmental review appeals commission under *sections 3745.04 to 3745.06* of the Revised Code.

(Emphasis added).

{¶47} Thus, under both Chapter 3745 and Chapter 903 of the Revised Code, appeals from actions of the Director of Agriculture may be brought pursuant to R.C. 3745.04 through 3745.06, but not pursuant to R.C. 3745.07.

{¶48} Appellants cite to *Askins* for support that appeals from final actions of the Director of Agriculture may be brought pursuant to R.C. 3745.07. The Commission notes, however, that *Askins* did not turn on the distinction between the two paths to an appeal contained within the Revised Code. In *Askins*, the parties did not dispute that the appellants were a party to the proceeding and could therefore seek jurisdiction under R.C. 3745.04. *Askins,* at ¶28. Thus, the Commission's discussion regarding the relationship between R.C. 3745.04 and R.C. 3745.07 was simply a broad statement that two distinct paths exist rather than an analysis of standing under each provision. Because the issue was not specifically litigated in *Askins*, the Commission need not grant it undue weight with regard to the distinction at issue here. Accordingly, the Commission holds that R.C. 3745.07 does not apply to appeals taken from actions of the Director of Agriculture.

{¶49} The parties agree that Rising Sun's PTI and PTO were issued by ODA, not Ohio EPA. Thus, the Commission finds that the present appeal does not fall within the scope of jurisdiction set out in R.C. 3745.07. The Commission will, therefore, examine Appellants' standing under the jurisdictional framework of R.C. 3745.04.

II. Standing Under R.C. 3745.04

{¶50} 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). Accordingly, each appellant bears the burden of establishing his or her own independent standing. *Moffitt v. Korleski*, ERAC Nos. 216172-75 (Aug. 27, 2009), citing *Olmsted Falls v. Jones*, 152 Ohio App.2d 282, 2003-Ohio-1512 (10th Dist.).

{¶51} Revised Code 3745.04 sets out a two-pronged test to determine whether a person has established standing to appeal a final action of the Director. The individual must demonstrate that he was "affected" by the director's final 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.

{¶52} To be a "party to a proceeding before the director," a person must have "appeared" before the Director. *Id.* The Tenth District has stated that a person "appears" before the Director if he "appears in person, or by his attorney, and presents his position, arguments, or contentions orally or in writing, or who offers or examines witnesses or presents evidence tending to show that said proposed rule, amendment or rescission, if adopted or effectuated, will be unreasonable or unlawful." *Girard*, at ¶12, quoting *Cincinnati Gas & Elec. Co. v. Whitman*, 10th Dist. No. 74AP–151 (Nov. 19, 1974).

{¶53} A person is "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.

{¶54} 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.*

III. LaDonna Thomas

{¶55} The Commission finds that LaDonna Thomas failed to establish standing because she did not "appear" before the Director. As discussed above, the Tenth District has stated that a person "appears" before the Director if he "appears in person, or by his attorney, and presents his position, arguments, or contentions orally or in writing, or who offers or examines witnesses or presents evidence tending to show that said proposed rule, amendment or rescission, if adopted or effectuated, will be unreasonable or unlawful." *Girard*, at ¶12.

{¶56} Here, the undisputed evidence indicates that Mrs. Thomas did not present her opinion, orally or in writing, before the PTI and PTO were issued. Moreover, Mrs. Thomas concedes that she cannot establish standing under R.C. 3745.04. Footnote Three in Appellants' Memorandum in Opposition reads as follows:

> If the Commission ultimately determines that the Thomases are unable to proceed with the appeal pursuant to R.C. 3745.07, then *Appellants concede that LaDonna Thomas would not have standing in this appeal, as she was not a party to the proceeding before the Director.*

> Nevertheless, the Thomases maintain that LaDonna Thomas' right to appeal pursuant to R.C. 3745.07 has not been foreclosed, as she was aggrieved and adversely affected by the actions of the Director.

Case File Item EEE (emphasis added).

{¶57} Accordingly, the Commission finds that Appellant LaDonna Thomas failed to establish standing in this appeal.

IV. David Thomas

{¶58} Mr. Thomas argues that his August 19, 2011 letter satisfies the "appearance" requirement under R.C. 3745.04. Further, Mr. Thomas argues that he is "affected" by the Director's actions because the expansion of Rising Sun's facility will impact his golfing and his wading activities, as well as damage the roads upon which he drives, thereby increasing his taxes.

{¶59} The Commission finds Mr. Thomas failed to establish standing because he was unable to demonstrate that he is "affected" by the Director's actions in this appeal. The alleged road damage and increased taxes would be generalized injuries borne by all residents of Madison County. And further, Mr. Thomas has failed to rebut Appellees' evidence regarding the scope of Rising Sun's impact on golfing and wading activities at Deer Creek State Park.

A. Road Damage Leading to Increased Taxes

{¶60} The Commission finds that Mr. Thomas's allegations regarding damage to roads and increased taxes are insufficient to establish standing because they are generalized injuries that would be borne by all residents of Madison County. The Tenth District has stated, "[a]n injury that is borne by the population, and which does not affect the plaintiff in particular, is not sufficient to confer standing. *ProgressOhio.org v. JobsOhio*, 10th Dist. No. 11AP-1136, 2012-Ohio-2655 (noting"), quoting *Baker v. Carr*,

369 U.S. 186 (1962). Here, Mr. Thomas failed to allege how his injuries with regard to increased taxes would differ from those of any other taxpayer in Madison County.

{¶61} Further, as noted above, an alleged injury must be "concrete, rather than abstract or suspected." *Girard,* at ¶15. Courts have consistently held that in order to establish standing, an alleged injury must be "actual or imminent" rather than merely "hypothetical" or "conjectural." *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

{¶62} Here, Mr. Thomas merely alleges that Rising Sun's operations have damaged roads in the past. Significantly, however, he provides no support for this assertion or for his allegation that Rising Sun's expansion is likely to cause further road damage in the future. Moreover, even assuming that Rising Sun's expansion would cause damage to the roads in Madison County, Mr. Thomas failed to support his conclusion that this would likely result in increased taxes.

{¶63} Accordingly, the Commission finds that Mr. Thomas's allegations regarding road damage leading to increased taxes are insufficient to establish standing.

B. Golfing and Wading

{¶64} The Commission also finds that Mr. Thomas failed to demonstrate that his golfing and wading activities will be adversely impacted by the Director's action issuing Rising Sun's PTI and PTO.

{¶65} In their Motion to Dismiss, Appellees attach Mr. Zwolinski's affidavit, in which he avers that absent catastrophic flooding, neither the golf course at Deer Creek State Park nor the area of Deer Creek Lake in which Mr. Thomas wades will be affected by runoff from the manure application fields for Rising Sun Dairy.

{¶66} By submitting this affidavit, which is of the type of evidence listed in Civ.R. 56(C), Appellees shifted the burden to Mr. Thomas to produce admissible evidence rebutting the factual contentions contained in Mr. Zwolinski's affidavit. Civ.R. 56(E). Mr. Thomas failed to meet this reciprocal burden.

{¶67} Instead, Mr. Thomas merely challenges the admissibility of Mr. Zwolinski's affidavit on the grounds that it was not based on personal knowledge. *See* Civ.R. 56(E). Specifically, Mr. Thomas contends that Mr. Zwolinski is unaware of manure application in areas not authorized by Rising Sun's permit. Thus, Mr. Thomas argues that Mr. Zwolinski's conclusion—that the areas of Deer Creek State Park at issue would be unaffected by runoff from the manure application fields for Rising Sun Dairy—is not based on personal knowledge.

{¶68} Critically, however, the alleged injury must be caused by the activity authorized by the PTI or PTO. Rising Sun's PTI and PTO allow for manure application in specific areas; manure application beyond the permitted area is not authorized by Rising Sun's PTI or PTO and thus, would violate terms of the PTI and PTO. The Tenth District has instructed that in the absence of reliable, probative, and substantial evidence to the contrary, the Commission is to presume that a permittee will comply with the conditions of a permit once it has been issued. *CECOS International, Inc. v. Shank*, 79 Ohio App.3d 1, 9-10 (10th Dist. 1992).Thus, any impact to the golf course or the lake as a result of such unpermitted manure application is not at issue herein and does not impact the Commission's standing analysis.

{¶69} Mr. Thomas failed to set forth affirmative facts rebutting Mr. Zwolinksi's assertion that runoff from the manure application fields for Rising Sun Dairy, as permitted by the PTI and PTO, will not impact Mr. Thomas's golfing and wading

activities. Accordingly, the Commission finds that Mr. Thomas failed to establish that his golfing or wading activities are "affected" by the Director's action, and therefore, Mr. Thomas lacks standing.

{¶70} Having found that Mr. Thomas lacks standing because he failed to establish that he is "affected" by the Director's action, the Commission need not address whether Mr. Thomas was a party to a proceeding before the Director.

V. Robert Higgins

{¶71} Finally, Mr. Higgins argues that even if the Commission grants the present motions for summary judgment, it should allow him to continue to proceed with the underlying claim as an intervenor-appellant. Mr. Higgins relies on *U.S. Steel v. EPA*, 614 F.2d 843 (3rd Cir. 1979), in which the Third Circuit Court of Appeals allowed an intervenor to continue to pursue the petitioner's claim after the petitioner voluntarily dismissed its action.

{¶72} In *U.S. Steel*, Scott Paper Company ("Scott"), an intervenor, did not file its own petition for review within the 60-day deadline imposed by the federal Clean Air Act. *U.S. Steel*, 614F.2d at 846. It did, however, timely intervene in U.S. Steel's petition for review. *Id.* After U.S. Steel voluntarily dismissed its action, Scott sought to continue as a litigant. *Id.* The court ruled in Scott's favor, based largely on Scott's compliance with the statutory intervention requirements, the fact that EPA had been placed on notice of Scott's position, and the fact that EPA did not object to Scott's motion to intervene. *Id.* at 846. The court also cited the policy considerations of judicial economy and the prompt disposition of litigation. *Id.*

{¶73} The Commission notes, however, that courts have limited the rule in *U.S. Steel* as follows:

> In setting standards for determining when an intervening party may continue to litigate after the original party has been dismissed, most circuits have adopted the approach of *Fuller v. Volk*, 351 F.2d 323, 328-29 (3d Cir.1965):
>
> > [A] court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor. *This discretionary procedure is properly utilized in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in unnecessary delay*. By allowing the suit to continue with respect to the intervening party, the court can avoid the senseless 'delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are.'

Benavidez v. Eu, 34 F.3d 825, 830 (9th Cir. 1994) (emphasis in original), quoting *Fuller v. Volk*, 351 F.2d 323, 328-29 (3rd Cir. 1965). Thus, an intervenor must be able to maintain separate and independent jurisdiction in order to continue as a litigant after the original appellant's claim has been dismissed. *Id.*

{¶74} Here, the Commission finds that Mr. Higgins cannot establish and maintain separate and independent jurisdiction. The Ohio Department Agriculture issued Rising Sun's PTI and PTO on August 31, 2011, and public notice was given on September 6, 2011. Mr. Higgins did not file his Motion to Intervene and his Notice of Appeal until December 7, 2011—well past the 30-day deadline imposed by R.C. 3745.04.

{¶75} The Commission has consistently held that the 30-day deadline is jurisdictional in nature. *See, e.g.,* Ruling on Motion to Dismiss, *Skye Metals Recovery, Inc.*, ERAC No. 12-076593 (August 16, 2012). Thus, because Mr. Higgins failed to satisfy the 30-day deadline, this Commission lacks jurisdiction to hear his claim.

{¶76} This case is also easily distinguishable from *U.S. Steel* in that federal courts derive their jurisdiction from Article III of the United States Constitution. Thus, although Scott could not have brought its own petition for review because it failed to

comply with the *statutory* requirements of the Clean Air Act, the court nonetheless maintained *jurisdiction* to entertain the action. *U.S. Steel*, 614 F.2d at 846 (noting that "Scott's intervention was not an attempt to cure a jurisdictional defect"). Here, ERAC's jurisdiction is limited to that which is conferred upon it by statute. As noted above, the 30-day deadline contained in R.C. 3745.04 is jurisdictional in nature. And because the Commission lacks jurisdiction to hear Mr. Higgins's appeal, it cannot permit him to continue litigation as an intervenor after the original appellants have been dismissed.

{¶77} The Commission notes that the purpose of intervention is to enable a party to preserve an interest affected by another party's litigation. *See* Civ.R. 24(A)(2). It is not intended to allow for the circumvention of jurisdiction requirements such as the 30-day filing deadline contained in R.C. 3745.04. Intervention cannot create jurisdiction where it does not already exist. *See Fuller v. Volk*, 351 F.2d 323, 328-29 (3rd Cir. 1965).

{¶78} The Commission finds it lacks jurisdiction over Mr. Higgins's appeal because he failed to comply with the thirty-day filing deadline contained in R.C. 3745.04. Having already found that both David and LaDonna Thomas lack standing, the Commission may not, therefore, allow Mr. Higgins to continue to pursue this appeal. Similarly, the Commission cannot allow Paint Township, Union Township, or Madison County to continue as intervenor-appellants in this matter.

FINAL ORDER

{¶79} For the foregoing reasons, the Commission hereby GRANTS Rising Sun's Motion for Summary Judgment and the Director's Motion to Dismiss, and ORDERS that the present appeals be DISMISSED.

{¶80} 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 September 2012.

Melissa M. Shilling, Vice Chair

Shaun K. Petersen, Member

Copies Sent to:

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LADONNA THOMAS	[CERTIFIED MAIL]
ROBERT HIGGINS	[CERTIFIED MAIL]
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