

[Cite as *Sierra Club v. Koncelik*, 2013-Ohio-2739.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Sierra Club et al.,	:	
Appellants-Appellants,	:	
(Environmental Community Action et al.,	:	
Appellants-Appellants),	:	No. 12AP-288
	:	(ERAC No. 256002)
	:	No. 12AP-289
v.	:	(ERAC No. 186003)
	:	No. 12AP-290
Joseph P. Koncelik, Director of	:	(ERAC No. 316005)
Environmental Protection,	:	
Ohio Environmental Protection Agency	:	(REGULAR CALENDAR)
et al.,	:	
Appellees-Appellees.	:	

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D E C I S I O N

Rendered on June 27, 2013

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*D. David Altman Co., LPA, and D. David Altman, for appellants.*

*Michael DeWine, Attorney, General, Samuel C. Peterson and Cameron Simmons, for appellees.*

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APPEALS from the Environmental Review Appeals Commission

KLATT, P.J.

{¶1} Appellants, the Sierra Club, Ohio Citizen Action ("OCA"), and Environmental Community Action ("ECO") appeal from an order of the Environmental Review Appeals Commission ("ERAC") concluding that the Director ("Director") of the Ohio Environmental Protection Agency ("Ohio EPA") acted lawfully and reasonably in

promulgating Ohio Adm.Code 3745-114-01 and 3745-31-05. For the following reasons, we affirm in part and reverse in part ERAC's order.

### **Implementation of the Clean Air Act**

{¶2} The primary purpose of the 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). The CAA establishes a framework for the protection of air quality standards and provides responsibilities for federal and state governments. The United States Environmental Protection Agency ("US EPA") implements the federal component and state and local governments are given the primary responsibility to regulate "air pollution control at its source." 42 U.S.C. at 7401(a)(3).

{¶3} States are required pursuant to the CAA to develop a State Implementation Plan ("SIP") that provides for the implementation, maintenance, and enforcement of National Ambient Air Quality Standards ("NAAQS"). The Ohio Air Pollution Control Act, R.C. Chapter 3704, is designed to meet the CAA requirements. In 2006, the Ohio General Assembly adopted Am.Sub.S.B. No. 265 ("SB 265"), which required the Director to adopt a rule in accordance with R.C. Chapter 119 within two years which specifies:

"[T]hat 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.

### **Promulgation of Agency Rules**

{¶4} As the result 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 Best Available Technology ("BAT") Rule, on November 20, 2006. Appellants filed a notice of appeal to ERAC and, after a de novo hearing, ERAC held that the Director acted lawfully and reasonably in promulgating Ohio Adm.Code 3745-114-01 and 3745-31-05. Appellants filed a timely notice of appeal to this court and, on appeal from ERAC, appellants raised the following assignments of error:

First Assignment of Error: The Ohio Environmental Review Appeals Commission (ERAC) erred in holding that the Director's adoption of Ohio Adm.Code 3745-114-01 (Ohio Air Toxics Rule) was reasonable and lawful because binding precedent makes clear that the Director cannot, via rule, enlarge the authority that he is delegated by statute.

Second Assignment of Error: ERAC erred in holding the Director's adoption of the Ohio Air Toxics Rule was reasonable and lawful because the Director's removal of clearly toxic compounds that meet statutory criteria from the air toxics list was based on the Director's ignoring essential health-protective language in the air toxics statute-R.C. 3704.03(F)(3)(c).

Third Assignment of Error: ERAC erred in holding that the Director's adoption of the Ohio Air Toxics Rule was reasonable and lawful because ERAC's holding rests upon incompetent, previously undisclosed "expert" testimony that ERAC abused its discretion by admitting into evidence.

### **Air Contaminant Source—Permits to Install**

{¶5} The state of Ohio requires a permit to install prior to installation or modification of an air contaminant source. *See* R.C. 3704.03(F). Prior to the adoption of the Ohio Air Toxics Rule, the Ohio EPA did not have any established rules regarding regulation of air toxics or even a prepared written list of regulated air toxics. (Tr. 365-66.) The Ohio EPA regulated air toxics based on a policy identified as "Option A."

Option A relied on a chemical's threshold limit value ("TLV"), which is a measurement of exposure developed by the American Conference of Governmental Industrial Hygienists ("ACGIH"). Prior to SB 265, there were approximately 700 chemicals under the air toxics policy. The TLV is:

[A] concentration of a compound that was established by [the ACGIH which is] \* \* \* a group of industrial hygienists that studies the occupational environment and acquires information from the scientific literature to make a determination what concentration someone might be exposed to and it's set for an occupational setting which is typically a 40 hour a week for the lifetime of the worker which would be something from the age of 18 to 19 -- 20 to 65, so it's not a lifetime continuous exposure \* \* \* and that's 8 hours a day 40 hours a week type of exposure.

(Tr. 306-07.)

{¶6} Option A modified the base information from the TLV to apply to an air ambient air pollution standard by dividing the TLV by a safety factor. The safety factor is 10, to adjust between the working population to the general population and account for susceptible populations and a variety of unknowns and mathematically adjust from an 8-hour day to a 24-hour day, 7 days per week and that yields the Maximum Achievable Ground Level Concentration ("MAGLC"). (Tr. 369-70.)

{¶7} This policy attempts to achieve the goal of protecting against adverse health effects by making the ACGIH standard more conservative or more protective of public health by adding the safety factors in the numerical calculation and also provides a modeling process to ensure this exposure level is realistically not exceeded. (Tr. 370.)

### **Implementation of SB 265—Establishing List of Regulated Air Toxics**

{¶8} In 2006, SB 265 required the establishment of a list of regulated air toxics using Option A to evaluate air toxics and emissions in Ohio. Paul Koval, the supervisor of the air toxics unit for the Ohio EPA, testified on behalf of the Director and stated that the Ohio EPA began the process of implementing SB 265 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. (Tr. 87-91.) The list of 639 compounds was created by taking the "mother list" and sorted by TLV by a college intern. (Tr. 377.)

The mother list was dated August 2005 and contained a list of approximately 1,092 chemicals. (Exhibit No. 4.) (Tr. 45; 82.) Compounds with ACGIH TLVs greater than 1,000 milligrams per meter cubed ( $\text{mg}/\text{m}^3$ ) [ $1,000,000 \text{ ug}/\text{m}^3$ ] were removed from the list. (Synopsis of Scientific Justification for Ohio Administrative Code (OAC) 3745-114 Toxic Air Contaminants [State's Exhibit No. 1]).

{¶9} Immediately after the proposed list for interested party comment period, the Ohio EPA employees began examining the compounds in detail in an effort to revise and reduce the list. (Tr. 94-95.) It was only after the initial comment period that the Ohio EPA began creating toxic compound data sheets, which provide a summary of information summarizing the scientific basis upon which the Ohio EPA made the determination for inclusion of the air contaminants in Ohio Adm.Code 3745-114-01.

{¶10} The Ohio EPA consulted ten different databases that contained information regarding the potentially toxic compounds. Then, the Ohio EPA developed a list of screening criteria to further refine the list. Such criteria included things such as grouping the compounds with an expanded class or definition of compounds. The Ohio EPA determined that some compounds belong to a larger class of compounds that better match the description of the toxic compound, containing the specific element of the toxic compound of interest or that some compounds and classes of compounds are grouped together by the US EPA in the CAA or in other programs. (Synopsis of Scientific Justification for Ohio Administrative Code (OAC) 3745-114 Toxic Air Contaminants [State's Exhibit No. 1]).

{¶11} Another criterion for refining the list included eliminating compounds that were determined to be negligible risk air pollutants, demonstrating low toxicity, or compounds with low inhalation toxicity values. Also, compounds whose TLVs were based upon irritation only were removed from the list. Compounds demonstrating limited evidence for toxic effects in humans, especially through the inhalation route of exposure, were removed from the list. Compounds were removed where inhalation toxicity numbers were derived from a single, or a few, emergency air release events that caused a large dosage to the exposed population, resulting in toxic effects. (Synopsis of Scientific Justification for Ohio Administrative Code (OAC) 3745-114 Toxic Air Contaminants [State's Exhibit No. 1]).

{¶12} Another criterion developed included compounds where the inhalation route was unlikely for realistic exposure scenarios in Ohio, such as compounds with high oral or dermal toxicity and, therefore, not likely to be released to the atmosphere in a manner to cause inhalation exposure. Additionally, compounds no longer produced, manufactured or otherwise used in Ohio or the United States were removed from the list. (Synopsis of Scientific Justification for Ohio Administrative Code (OAC) 3745-114 Toxic Air Contaminants [State's Exhibit No. 1]).

{¶13} Finally, the Ohio EPA removed compounds in consumer products or designated for specific consumer or agricultural uses, including pesticides, or other household or agricultural use pest removal products because the application of many of these products is regulated and licensed by the Department of Agriculture. The Ohio EPA also removed compounds whose route of human exposure results exclusively from use in food, food handling packaging and storage or cosmetic products because the inhalation exposure resulting from the use of these products is unlikely and not covered by the requirements of an air pollution permit. (Synopsis of Scientific Justification for Ohio Administrative Code (OAC) 3745-114 Toxic Air Contaminants [State's Exhibit No. 1]).

{¶14} Through this process of elimination, the initial list of 639 compounds was reduced to 303 compounds. (Director's Exhibit No. 1.) On June 30, 2006, the Director sent a draft of the Ohio Adm.Code 3745-114-01 to interested parties and posted it on the Ohio EPA's website for an informal 30-day comment period. The 30-day comment period was extended for an additional 30 days. On September 15, 2006, Ohio EPA 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 and held a public hearing. JCARR held its hearing on October 30, 2006. (Director's Exhibit No. 7.)

{¶15} On November 20, 2006, the Director promulgated the final version of Ohio Adm.Code 3745-114-01. The rule included 303 chemicals or compounds. It was from the final version that appellants appealed to ERAC and ERAC concluded that the Director acted lawfully and reasonably in promulgating Ohio Adm.Code 3745-114-01 and Ohio Adm.Code 3745-31-05.

### **Standard of Review**

{¶16} In reviewing ERAC orders, R.C. 3745.06 provides that this court "shall affirm the order" if we find "upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, \* \* \* [the court] shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." "Reliable evidence is evidence which can be trusted. In order for evidence to be reliable, there must be a reasonable probability that it is true. Probative evidence is evidence which tends to prove the issue in question, while substantial evidence is evidence which carries weight, or evidence which has importance and value." *Perrysburg v. Schregardus*, 10th Dist. No. 00AP-1403, 2001-Ohio-4085, citing *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992). In determining whether an ERAC order is supported by reliable, probative, and substantial evidence, this court must weigh and evaluate the credibility of the evidence. *Parents Protecting Children v. Korleski*, 10th Dist. No. 09AP-48, 2009-Ohio-4549, ¶ 10. However, in doing so, we must remember that the General Assembly created these administrative bodies to facilitate certain areas of the law by placing the administration of those areas before members with special expertise and, thus, we afford due deference to ERAC's interpretation of rules and regulation and resolution of evidentiary conflicts. *Id.* " 'Unlawful' means that which is not in accordance with law." *Citizens Comm. v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist.1977).

### **First Assignment of Error—Director's Authority under Ohio Adm.Code 3745-114-01**

{¶17} By their first assignment of error, appellants contend that ERAC erred in holding that the Director's adoption of Ohio Adm.Code 3745-114-01, the Ohio Air Toxics Rule, was reasonable and lawful because binding precedent makes clear that the Director cannot, via rule, enlarge the authority that he is delegated by statute. Former<sup>1</sup> R.C. 3704.03(F)(3)(c) provided that the Director was required to adopt a rule specifying

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<sup>1</sup> R.C. 3704.03 was amended in 2007 and 2009.

that a permit to install is required for new or modified sources that emit air toxics. The statute provided, as follows:

(3) Not later than two years after the effective date of this amendment, 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:

\* \* \*

(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.

(Emphasis added.)

{¶18} In the Ohio Air Toxics Rule, the Director promulgated the following language: "Except where exempt under division (F)(4) of section 3704.03 of the Revised Code, the director *may* require a permit to install, issued in accordance with Chapter 3745-31 of the Administrative Code, for any new or modified air contaminant sources that emit a toxic air contaminant." (Emphasis added.) Ohio Adm.Code 3745-114-01. Appellants argue that an administrative rule may not add or subtract from a legislative enactment. *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St.3d 376, 2007-Ohio-2201.

{¶19} The Ohio EPA assistant chief in charge of the permitting section, Michael Hopkins, testified that the administrative rule used the word "may" because the Director needs discretion to interpret the legislative intention and the compounds to regulate. Further, the permitting requirements must be understood in the context of all permitting rules and regulations. Some sources are not required to obtain a permit to install, for example de minimis sources are exempt, and R.C. 3704.03(F) does not



change these exemptions, even if they emit a chemical or compound that is contained in Ohio Adm.Code 3745-114-01. (Tr. 666-71.) ERAC agreed.

{¶20} The Ohio EPA emphasizes it is not necessary for the Air Toxics Rule to state specifically when a permit to install is required because the permit to install requirement is provided in other provisions of the administrative code. Ohio Adm.Code 3745-31-02 and 3745-31-03 require "air contaminant sources" to obtain permits to install unless they qualify for an exemption. The term "air contaminant source" is defined in Ohio Adm.Code 3745-31-01 as any operation or activity that "results or may result in the emission of \* \* \* [a] toxic air contaminant as listed in rule 3745-114-01 of the Administrative Code." Thus, the Ohio EPA argues that the Air Toxics Rule is only one part of three to determine whether a permit to install is required. The Air Toxics Rule identifies what types of sources satisfy the definition of "air contaminant source" pursuant to Ohio Adm.Code 3745-31-01 and then Ohio Adm.Code 3745-31-02 and 3745-31-03 set forth the circumstances when an air contaminant source must obtain a permit to install.

{¶21} Interpretation of a statute depends on the legislature's intent in enacting the statute. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶ 20. If reviewing the statute conveys a meaning that is clear, unequivocal, and definite, the statute must be applied as written and the inquiry ends with no further interpretation necessary. *Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, ¶ 26. If the meaning of the statute is subject to different interpretations, the appellate court must invoke the rules of statutory construction to determine legislative intent. *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553 (2000). "There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." *In re Estate of Roberts*, 94 Ohio St.3d 311, 317 (2002), quoting *Vought Industries, Inc. v. Tracy*, 72 Ohio St.3d 261, 265 (1995).

{¶22} Here, the language at issue in Ohio Adm.Code 3745-114-01 is ambiguous because it is unclear whether the rule was intended to create new discretionary authority, which would conflict with the statute, or whether the rule was intended to be

consistent with the other provisions of the administrative code that require permits to install subject to certain exemptions.

{¶23} The Director argues that the use of the word "may" is present to make clear that the exemptions found in Ohio Adm.Code 3745-31-03 apply even when a facility emits a compound found in Ohio Adm.Code 3745-114-01. The Director argues that the rule does not give the Director discretion to negate any other legislative requirement by exempting any facilities from the requirement to obtain a permit other than those already exempted by rule.

{¶24} As a general matter, this court affords due deference to ERAC's interpretation of rules and regulations. *Parents Protecting Children* at ¶ 10. Here, where ERAC's interpretation is both logical and consistent with statutory construction, we defer to ERAC's special expertise and adopt its interpretation. *Id.* at ¶ 28. Appellants object to the use of the word "may" rather than "shall" in the rule because they contend the word "may" expands the Director's discretion and authority to issue permits to install. ERAC rejected appellants' interpretation of the rule and agreed with the Director that the rule does not enlarge his discretion and authority.

{¶25} ERAC's acceptance of the Director's interpretation of the rule is consistent with case law. In *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102 (1971), the Supreme Court of Ohio set forth that "[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage." *Id.* at paragraph 2 of the syllabus. The *Dorrian* court cited *Dennison v. Dennison*, 165 Ohio St. 146 (1956), for the proposition that the statutory use of the word "may" generally is construed to make a provision optional, permissive or discretionary if there is nothing in the language of the provision to require an unusual interpretation. The word "shall" is usually interpreted to make a provision mandatory. *Dorrian*. Even though "shall" and "may" are typically not used interchangeably, "in order to serve the basic aim of construction of a statute—to arrive at and give effect of the intent of the General Assembly—it is sometimes necessary to give to the words 'may' and 'shall' as used in a statute, meanings different from those given them in ordinary usage (State v. Budd (1901), 65 Ohio St. 1, 60 N.E. 988; State ex rel. Myers v. Board of

Edn. (1917), 95 Ohio St. 367, 116 N.E. 516) and one may be construed to have the meaning of the other (*State v. Budd, supra*; *State ex rel. Myers v. Board of Edn, supra*; *Gallman v. Board of County Commrs. (1953), 159 Ohio St. 253, 112 N.E.2d 38.*" *Dorrian* at 107-08. However, the intent must be clear. The Director's interpretation of Ohio Adm.Code 3745-114-01 does not modify the mandatory nature of the permit to install requirements when read in context with the other relevant administrative code provisions. Therefore, we find that Ohio Adm.Code 3745-114-01 does not conflict with R.C. 3704.03(F)(3)(c) and we overrule appellants' first assignment of error.

### **Second Assignment of Error—Removal of Certain Categories of Compounds**

{¶26} By the second assignment of error, appellants contend that ERAC erred in holding the Director's adoption of the Ohio Air Toxics Rule was reasonable and lawful because the Director's removal of clearly toxic compounds that meet statutory criteria from the air toxics list was based on the Director's ignoring essential health-protective language in the air toxics statute—R.C. 3704.03(F)(3)(c).

{¶27} Former R.C. 3704.03(F)(3)(c) provided:

[A] permit to install is required only for new or modified air contaminant sources that emit any of the following air contaminants:

\* \* \*

(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  
\* \* \*.

{¶28} The Ohio EPA argues that the General Assembly did not intend when it enacted R.C. 3704.03(F)(3) that the Ohio EPA create an all-inclusive list of chemicals or compounds that create a threat to human health or the environment. The Ohio EPA argues that the General Assembly intended when developing the Air Toxics Rule that the Ohio EPA would focus on threats posed by chemicals that are released in a manner that

is regulated by Ohio air pollution control laws. The Ohio EPA argues that this intent of the General Assembly is expressed in the words it chose when describing situations in which a permit to install would be required. R.C. 3704.03(F) requires a permit to install "only for new or modified air contaminant sources that emit any of the following air contaminants." The terms "air contaminant source," "emit," and "air contaminants" are terms of art related to air pollution control and the General Assembly's usage of those terms demonstrates that it intended for the Ohio EPA to focus on Ohio's existing air pollution control authority when drafting the Air Toxics Rule. As an example, Ohio EPA notes that the word "emit" is defined in former R.C. 3704.01(H) as "the release into the ambient air of an air contaminant." Thus, the Ohio EPA argues that, given the definition in R.C. 3704.01(H), and as used in R.C. 3704.03(F)(3), emit does not include all possible routes of exposure, occupational exposure, threats from explosion or risks from ingestion.

{¶29} In addition, the Director notes that only air contaminants that pose a threat of "adverse human health effects" are required to be on the list. The Director's definition of "adverse human health effects" was as follows: "[H]ealth affects [sic] when the federal and state programs does not include the same interpretation regarding acute health effects or irritant health effects. A compound is defined under federal and state level as being causing adverse health effects if it can cause an increase in measurable morbidity, measurable mortality, or serious irreversible health effects -- health effects or incapacitating reversible health effects." (Tr. 362.) Later, Koval added to the definition by stating:

Within the context of air permitting within the State of Ohio which is based on USEPA requirements for air permitting, irritant only health effects are not included with the same weight or seriousness as the health effects I previously described, morbidity, mortality, serious irreversible health effects or incapacitating temporary health effects are what's included in the regulatory evaluation of air toxics for permitting in the State of Ohio and many other states.

(Tr. 432.)

{¶30} Koval testified that every compound excluded or included on the final list was evaluated and a compound substance data sheet was created for every compound. The toxic compound data sheet included a summation of the evaluation process and the reasoning behind the decision. The information examined was also included. (Tr. 444.)

{¶31} Appellants argue that the Director unlawfully excluded certain categories of compounds that met the statutory definition. Appellants contend that the list of compounds must include those 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." R.C. 3704.03(F)(3)(c). Appellants argue that by excluding entire categories of compounds, the Ohio EPA failed to closely examine each compound to determine if it was hazardous and may have resulted in the exclusion of some compounds that met the statutory definition. Appellants challenge the Director's exclusion of five categories of compounds from the list as unlawful. We separately address each category.

### **Irritants**

{¶32} Appellants contend that the Director's definition of adverse human health effects excluded "irritant only" as a category. Koval testified that eye irritation and nasal irritation are adverse human health effects, along with asthmatic attacks and/or weakening of a person's immune system. (Tr. 97.) However, he testified that for a compound to be classified as an "irritant only" it meant that it "would cause a health effect that would be immediately or right after succession of exposure to cease. In general it would be defined within the permitting context and the health effects context by USEPA and Ohio EPA would be a compound that does not cause an increase of morbidity or mortality and does not cause severe irreversible health -- health effects or incapacitating reversible health effects." (Tr. 423.) When Koval was asked if irritants could cause the pulmonary system to swell and the person to expire because they cannot breathe if that would be the result of breathing irritants, he responded that such a compound would not be considered "irritant only," even though it would be a compound

with irritant effects. (Tr. 571.) If a compound causes increased morbidity or mortality, then it is not categorized as "irritant only." (Tr. 572.)

{¶33} Thus, Koval testified that compounds classified as "irritant only" did not have to be included on the list because this category of compounds did not have "adverse human health effects," as that phrase is interpreted by Ohio EPA. Given the Director's reasonable interpretation of the phrase "adverse human health effects," his exclusion of "irritant only" from the list was not unlawful.

### **Acute Exposure Events**

{¶34} Appellants argue that the Ohio EPA's interpretation of Ohio Adm.Code 3745-31-01 also resulted in the exclusion of acutely toxic compounds or compounds whose potential threat arises only in cases of acute exposure, which are exposures that are sudden and of short duration, such as those caused by emergency release events including explosions or catastrophic malfunction. Appellants contend that these compounds should not have been excluded. The Ohio EPA argues that the regulatory authority at issue relates to the issuance or denial of permits to install. Permits to install are based on the maximum normal operation of the source. Acute exposure events are by definition irregular and unpredictable and, therefore, not regulated by permits to install. (Tr. 651.)

{¶35} Given that permits to install are not issued for acute exposure events, this category of compounds does not fall within the purview of the air permitting regulation. Therefore, the exclusion of this category of compounds from the list was not unlawful.

### **Non-inhalation Routes of Exposure**

{¶36} Appellants contend that the Ohio EPA's exclusion of compounds that are toxic through non-inhalation routes of exposure is contrary to the statute. R.C. 3704.03(F)(3)(c) covers compounds that present or may present a threat of adverse human health effects or adverse environmental effects through both inhalation and "other routes of exposure." Koval admitted that compounds were removed from the list if the route of exposure was "dermal or such" or "based on inhalation being unlikely." (Tr. 435.) Because R.C. 3704.03(F)(3)(c) expressly includes compounds that present or may present adverse human health effects through inhalation *or other routes of exposure*, the Director's exclusion of this entire category of compounds was unlawful.

The Director should not eliminate this category, but look to each compound therein to determine if it meets the statutory criteria. Therefore, we sustain this portion of appellant's second assignment of error.

### **Consumer Products**

{¶37} Appellants argue that the Director considered screening criterion that were factors not intended by the legislature in enacting R.C. 3704.03(F)(3)(c), including the exclusion of compounds based on their route of exposure being primarily through consumer products. Koval testified that consumer cleaners are not covered by the air pollution permit program. (Tr. 650.) Compounds used in household products are licensed by different departments and agricultural uses, such as pesticides, are regulated by the Ohio Department of Agriculture and not regulated through permits for the air pollution program. (Tr. 440-41.) We agree with the Ohio EPA that it was not unlawful to exclude from the list compounds contained in consumer products because they are not regulated through permits to install pursuant to the air pollution control law.

### **Compounds Not Currently Used in Ohio**

{¶38} Appellants argue that the Director unlawfully excluded from the list compounds not currently used or produced in Ohio. Appellants contend that if such compounds meet the statutory criteria, they must be put on the list. We agree.

{¶39} The Director argued that if a compound was to be emitted in the state of Ohio, the source would apply for a permit to install or a permit to operate and list the compounds to be emitted from the source on the permit and any compound not currently being regulated could be subject to rule-making steps and added to the list of regulated compounds. (Tr. 121-22.) This argument does not account for the fact that further rule-making steps could involve a significant amount of time, perhaps years. That would result in a time period where the source would be emitting the hazardous compound, but would not be regulated by a permit to install or permit to operate. Simply because the compounds are not currently being emitted in the state of Ohio does not alter their hazardous state. The Director should not eliminate this category, but look to each individual compound to see if it meets the statutory criteria.

{¶40} In summary, we conclude that the Director's categorical exclusion of irritants, acutely toxic compounds and compounds whose route exposure is primarily

through consumer products was not inconsistent with R.C. 3704.03(F)(3)(c), and therefore, not unlawful. Therefore, we overrule those portions of appellants' second assignment of error. However, we find that the Director's categorical exclusion of compounds demonstrated toxic through non-inhalation routes of exposure and those compounds not currently used or produced in Ohio is inconsistent with the express statutory language. Therefore, we sustain those portions of appellants' second assignment of error that challenge those actions. The Director should examine each individual compound in these two categories and determine if the compound is required to be placed on the list.

### **Third Assignment of Error—Expert Testimony**

{¶41} By their third assignment of error, appellants contend that ERAC erred in holding that the Director's adoption of the Ohio Air Toxics Rule was reasonable and lawful because ERAC's holding rests upon incompetent, previously undisclosed "expert" testimony that ERAC improperly admitted into evidence. Appellants argue that ERAC abused its discretion in admitting the testimony of Ohio EPA employee Paul Koval as an expert.

{¶42} Appellants argue that Koval's testimony should be excluded because appellants did not receive prehearing discovery of his expert opinions. Appellants complain because they did not receive a detailed summary of Koval's opinions and, during his deposition, Koval admitted he had not been asked to provide expert opinions. Even during the hearing, ERAC commissioners stated during his testimony that Koval was not testifying as an expert. (Tr. 420; 428.) At the end of his testimony, the Ohio EPA moved to have Koval designated as an expert and ERAC found that his testimony "contains opinions as part of his duties and responsibilities of Ohio EPA. As such, the Commission will accept Mr. Koval as an expert in the field of air toxicology in the regulation of air toxics in Ohio EPA and USEPA as they relate to the Ohio statutes and regulations on air toxins." (Tr. 495.)

{¶43} Evid.R. 101(A) does not list administrative agencies as forums to which the rules apply. Therefore, any question regarding the admission or exclusion of expert testimony is reviewed under the abuse of discretion standard. *Waste Mgt. of Ohio, Inc. v. Bd. of Health*, 159 Ohio App.3d 806, 2005-Ohio-1153, ¶ 53 (10th Dist.). An abuse of



discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶44} In *Burket v. North Olmsted*, 8th Dist. No. 40605 (June 19, 1980), quoting *State ex rel. Brown v. Rockside Reclamation, Inc.*, 48 Ohio App.2d 157, 179-80 (8th Dist.1975), the court explained that "[t]he legislature created the environmental protection agency consisting of a staff of experts to investigate alleged complaints, to conduct hearings on these complaints and to make determinations as to whether the laws in regard to air and water pollution and sewage disposal are being violated." Administrative agencies are entitled to considerable deference when reviewing an agency's interpretation of rules and regulations. *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health*, 10th Dist. No. 04AP-1338, 2005-Ohio-3146, ¶ 8. As stated previously, the General Assembly created these administrative bodies to facilitate certain areas before members with special expertise and that is why they are entitled to deference. *Parents Protecting Children*, at ¶ 10.

{¶45} Koval was not retained as an expert witness in this case, but testified as Ohio EPA's senior toxicologist, who was responsible for overseeing the development of Ohio Adm.Code 3745-114-01 as part of his regularly assigned duties.

{¶46} Appellants argue that they did not receive prehearing discovery of Koval's expert opinions. While it is true that during his deposition, Koval testified that he had not been asked to provide expert opinions, appellants did conduct a full deposition and were aware of his testimony and opinions before the hearing. Koval testified in his deposition about the development of the Air Toxics Rule, the process and the decisions made by the Ohio EPA in promulgating the Rule and his testimony was consistent at the hearing.

{¶47} Ohio Adm.Code 3746-6-01(A)(3) provides that:

Any party may require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or other party, facts or data known, or opinions held by the expert which are relevant to the stated subject matter.

{¶48} The Ohio EPA met the requirements of Ohio Adm.Code 3746-6-01(A)(3) since Koval was identified as a witness and appellants were able to depose him. Although Koval was confused during his deposition regarding his role as an expert and the classification of his opinions, he was able to testify regarding the development of the Air Toxics Rule and his testimony was consistent with his testimony at the hearing.

{¶49} Appellants argue they were prejudiced by the ruling that Koval was an expert. They argue that the ruling deprived them of the right to cross-examine Koval on his opinions before the hearing. However, they were able to depose Koval prior to the hearing and cross-examine him and present their own expert to rebut Koval's conclusions.

{¶50} Finally, appellants contend the ruling was an error because ERAC deferred to Koval as an expert. However, as discussed, the EPA as an agency is comprised of experts regardless of whether Koval was designated or qualified as an expert. Thus, appellants have not demonstrated prejudice by ERAC's ruling that Koval was an expert. Appellants' third assignment of error is overruled.

{¶51} For the foregoing reasons, appellants' first and third assignments of error are overruled and the second assignment of error is sustained in part as to: (1) the compounds demonstrated toxic through non-inhalation routes of exposure, (2) those compounds no longer used or produced in Ohio, and overruled as to: (a) irritant only, (b) compounds which are acutely toxic, and (c) compounds whose route of exposure is primarily through consumer products. We note that former R.C. 3704.03 granted the Director the power to modify the rule pursuant to (F)(3)(c) to add or delete air contaminants.

*Order affirmed in part; reversed in part;  
cause remanded.*

CONNOR and DORRIAN, JJ., concur.

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