



July 15, 2009

Honorable Ted Strickland
Governor, State of Ohio
Ohio Statehouse – First Floor
Columbus, OH 43215

Subject: Veto Request of ERAC Review Deadline

Dear Governor Strickland,

We want to thank you, Members of the General Assembly, and all of the staffers that have worked for many months on balancing Ohio's new two-year operating budget in these tough economic times. We especially would like to thank everyone for the many important instances of environmental-conservation progress achieved in the final Biennial Operating Budget Bill.

POLICY PROGRESS

We are deeply grateful for the strong leadership of your Administration and of the General Assembly for:

- securing more adequate funding for the protection of clean air, safe drinking water, and clean water through an increase in disposal fees on municipal solid waste;
- establishing a sustainable revenue stream for Ohio's Scenic Rivers program, through an increase in canoe and kayak registration fees;
- protecting our state parks, nature preserves, and other public lands from oil and gas drilling;
- keeping Ohio's Renewable Energy Standard viable for investment in clean and safe energy by rejecting the attempts to weaken the definition of renewable energy with polluting energy sources such as burning solid waste, and black liquor;
- giving homeowners an option for low-cost financing of roof-top solar projects;
- establishing a pilot project to convert part of the state vehicle fleet to propane fuel;
- rejecting the effort to adopt a one-sided "regulatory reform" law;
- establishing more secure funding for food safety inspection;
- maintaining public involvement in port authority projects that involve public funding; and
- creating the Disease and Cancer Commission.

These are substantial accomplishments that truly serve the public interest, and we thank the Administration and the General Assembly for them.

POLICY REGRESS

We are deeply disappointed, though, that more progress was not achieved for adequate funding of natural resource conservation and public health protection and that some important opportunities to protect human health were declined, through:

- the deep cuts in GRF funding to the Ohio DNR, especially the complete elimination of GRF funding in FY 2011 for the Division of Natural Areas and Preserves and the Division of Geological Survey;
- the deep cuts in funding for soil and water conservation projects that will result from the rejection of the proposed increase in disposal fees on construction and demolition debris;
- continuing to burden GRF taxpayers with \$1.2 million in tax burden to fund regulatory oversight of coal mining, through the rejection of the coal extraction fee that asked for \$1.2 million in fees from an industry that reported mining \$655 million of product in CY 2007;
- the deep cuts to GRF funding for public transportation and to rail development, which will burden even more strapped public transit agencies and will impede local rail freight development projects;
- suspending the implementation of the strengthened Household Sewage Treatment System law, adopted in 2007;
- weakening the School Health and Safety Network law, which protects schoolchildren from unsafe classroom and building conditions and exposure to environmental threats;
- rejecting the proposal to strengthen Ohio's asbestos abatement laws;
- prohibiting state and local inspections of certain shipments of radioactive materials; and
- allowing methane from coal mines to qualify as a renewable energy resource for the purpose of Ohio Air Quality Development Authority Funding.

We urge the Administration and the General Assembly to revisit these issues in the upcoming months.

VETO REQUEST

We respectfully but firmly request that you veto a provision that was added by the Conference Committee to mandate a time deadline on the review of appeals by the Environmental Review Appeals Commission (ERAC)—see amended O.R.C. Sections 3745.03 and 3745.05.

The amendment establishes statutory deadlines by which ERAC must issue written orders regarding appeals pending before the commission. Further, it specifies that an air contaminant source that is the subject of an installation permit must be installed or modified in accordance with the permit not later than 18 months after the permit's effective date at which point the permit must terminate unless any of specified circumstances exists.

Our first objection is that the amendment was added by the Conference Committee with no opportunity for public review and debate. We believe that this is reason in and of itself for you to veto the provision.

Our second objection is that the amendment is inconsistent with Federal regulations and will inevitably be litigated, forcing the State to spend money defending an indefensible position. Federal

Clean Air Act regulations specify that a facility must commence construction no later than 18 months after the permit's effective date, regardless of whether preliminary contracts may have been signed in the interim period, and regardless of whether the permit has been appealed by a third party, unless the deadline is extended by the permitting agency. We therefore recommend a veto of 3704.03 (F)(2)(b) as unnecessarily bringing the State into conflict with existing federal regulations.

Our third objection is that the deadline mandate on ERAC is totally and practically unworkable. Such deadlines will in no way alleviate the current or future backlog of ERAC appeals, and in fact will cause only further problems with the effectiveness of ERAC.

For a Commission with 700 cases pending before it at a given moment to hold a hearing (which typically last between 4 days to 6 weeks) on each case, then produce detailed and defensible findings and orders (currently written orders range from 30 pages to 125 pages), with no staff to research and help draft the opinions (just the commissioners) in merely 12 months, is an impossible deadline. The amendment fails to contemplate the high probability of extended discovery disputes and other unforeseen delays. Furthermore, more than one-fourth of the proposed mandatory year of review would be consumed by the Ohio EPA, which consistently takes 60-120 days to complete its required certified record—a fling which must be completed before any discovery can effectively commence. This will further hobble citizens and their ability to have their day in court.

Furthermore, there are no qualifiers to the ERAC deadlines to account for discovery disputes, incessant motion practice, or other procedural delays. This amendment would effectively reward the worst behavior by lawyers. An ERAC appeal will become a battle of attrition, where the party with means can use motions and discovery to keep the other party mired in procedural issues to make sure that ERAC does not get the chance to hear (and effectively rule on) the substance of the appeal. Therefore, the amendment would further kill appeals by citizen groups who already barely have the resources to prosecute the appeals under current ERAC timelines.

Additionally, the amendment provides no explanation of what would happen if ERAC does not meet the new review deadline. Does the action go back to EPA? Does the appellant automatically win? Does the Agency win? These are important questions that, since not addressed, will only cause all ERAC decisions to be directly appealed to the Court of Appeals where more time and legal costs will be spent. Ultimately, the entire validity of ERAC will come into question.

The appeals backlog that exists at ERAC is a function of inadequate resources; with the exception of the three ERAC commissioners, themselves, the ERAC has zero legal staff. This is the problem that must be addressed to resolve the backlog in a responsible way. The false “solution” offered by the amendment will only exacerbate the problem—to the detriment of the severe detriment of the public interest.

Though we may not agree with all of the regulatory reforms that your Administration has advocated, we have appreciated the transparency of those reforms. This amendment is a slap in the face at transparency, and does nothing to further regulatory efficiency. Respectfully, we cannot overstate how vigorously we urge you to veto this amendment.

ADDENDUM

This letter faithfully expresses our interests and concerns about major provisions regarding environmental-conservation and public health protection, as best as we can understand the Conference Committee report as adopted by the House and Senate. The fact that the whole Conference Committee report—let alone the composite bill—still is not available in a complete or searchable form on the General Assembly’s web site has made it difficult to give a full and faithful appraisal of the final budget bill.

Thank you for your consideration.

Sincerely,

Jack Shaner
Deputy Director
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
Cell: 614-446-1693
Jack@theOEC.org
www.theOEC.org

Jennifer Miller
Conservation Program Coordinator
Sierra Club Ohio Chapter
131 N. High St. #605
Columbus, OH 43215
Office: 614-461-0734 x304
Jennifer.Miller@SierraClub.org
www.Ohio.SierraClub.org

Amy Gomberg
Program Director
Environment Ohio
203 E. Broad St. Suite 3
Columbus, OH 43215
Office: 614-460-8732
AGomberg.EnvironmentOhio.org
www.EnvironmentOhio.org

cc: Ohio Senate President Bill Harris & Ohio Senate Finance Committee Chair John Carey
Ohio House Speaker Armond Budish & Ohio House Finance Committee Chair Vernon Sykes
Ohio Senate Minority Leader Capri Cafaro & Ohio Senate Finance Ranking Member Dale Miller
Ohio House Minority Leader Bill Batchelder & Ohio House Finance Ranking Member Ron Amstutz