

## **1.01 Organization of Environmental Responsibility**

### 1. State Agencies

- Ohio EPA - key environmental state agency established in 1972. Headquartered in Columbus with 5 districts located throughout the state
  - Manages a wide range of regulatory programs including chemical emergency planning, public awareness, toxic chemicals, air pollution, water pollution (surface, drinking, groundwater, water supplies, resource management), solid, hazardous, infectious, industrial, C&DD waste
- Department of Agriculture - pesticides and certain discharged from CAFOs
- Department of Natural Resources - wild, scenic, and recreational river areas, geological surveys, wells, oil & gas, state parks, watercrafts, hunting license
- Others: Air Quality Development Authority, Emergency Response Commission, Ohio Water Development Authority, Power Siting Board, State Fire Marshal

### 2. Municipal Role

- Ohio has 3 types of muni gov't - cities, townships, & villages.
  - Manage planning & zoning. Some have environmental ordinances for noise, forest & soil conservation,
  - May have water districts, soil districts, health districts, conservancy districts, sewer districts, license landfills.

### 3. Federal Role

- Ohio is in Region V (Chicago) of USEPA. Region V approves State Implementation Plans under CAA, reviews water quality standards and plans under CWA, provide review & expertise to Ohio EPA. Sets national priority for SuperFund sites. Support for Ohio EPA.

## **1.02 Organization of State Court System**

### 1. Structure of Judiciary

- Trial Court in Ohio called Common Pleas. One in each 88 county,
- Appeals from trial go to appellate court (12 district courts in Ohio).
- Highest court is the Supreme Court.

### 2. Most challenges to environmental actions go to ERAC. (Where Shilling serves)

- Party to proceeding before the Director. Aggrieved or adversely affected. ERAC can affirm, vacate, or modify actions of the director.
- ERAC can only determine whether the Director acted lawfully or reasonably.
- Appeals from ERAC go to District then to Supreme.

## 1.03 - n/a

### 1.04 Enforcement Procedures

1. Judicial Proceedings - Ohio EPA, through the Attorney General, enforces Ohio's environmental laws. (Environmental Enforcement attorneys have their own section in the AGOs office.)

- Courts of common pleas hear cases on injunctive relief and payment of civil penalties.
- Criminal proceedings are available, too and will be covered in Ch. 22

2. Administrative Procedures - In-house Ohio EPA actions, known as Director's Final Findings and Orders. (DFFOs)

- The Director orders compliance with Ohio laws and regulations relating. DFFO
- The Director may also modify, suspend or revoke a permit, if violations occur. DFFO
- Verified Complaints can be filed by persons alleging violations of environmental laws.
  - Once filed the Director undertakes an investigation to determine whether a violation occurred or dismiss the complaint.
  - If violation occurred, then Director can undertake appropriate proceedings to correct or gain compliance.
- This process is frequently used in Ohio instead of citizen suits

3. Self-Audit Privileges - privilege of non-disclosure in criminal, civil and administrative proceedings for companies that voluntarily undertake environmental audit, so long as the volunteer submits the information in a form and as requested by Ohio EPA. (Think about why this might be done? What does it encourage?)

### 1.05 Permitting Procedures

1. Permit Applications - most permits are filed in one of the 5 district offices where they are reviewed and mostly transferred to Central Office for final review and issuance

- Ohio EPA must issue a permit or offer the applicant and administrative hearing as to why it declined to issue. I.e. anyone who is aggrieved or adversely affected by the agency's refusal to issue a permit or finds the terms unacceptable may request a hearing. (Administrative Procedure Act)
  - If hearing requested, a hearing officer will hold a mini-trial and issue a report & recommendation to Director, who can adopt, modify or reject the report.
  - Director's decision appealable to ERAC
- If Director issues a permit, her (Laurie Stevenson) decision is entered into the journal. (Available on the web). ANY person who is aggrieved or adversely affected may appeal to ERAC.

2. Permit Review by Ohio EPA Certified Engineers - legislative permit review alternative called at "compliance review." An applicant for a permit under specific laws may submit a written request to the director to have the compliance review conducted by a certified engineer. Ohio EPA will approve or disapprove this request w/in 7days. If Ohio EPA fails to respond, it is presumed that the request is approved, including selection of engineer. (This is interesting, but rarely used.)

## **1.06 Freedom of Information & Open Meetings**

1 Freedom of Information - is federal. Ohio has Public Records Act.

- Requires “public records” to be made available to public upon request.
  - “Public records” must be made available for inspection, or copies made at reasonable cost during regular business hours.
  - “Public records” do not include confidential law enforcement investigatory, medical or trial preparation records. Also, no trade secrets.

2. Open Meetings - applicable to all public bodies, including Ohio EPA.

- Meetings must be open to public at all times with certain exceptions, like executive, and minutes must be properly recorded.

**END OF CHAPTER 1**

## **Chapter 15**

### **15.01 Scope**

TOPICS: Ohio’s court system & ERAC, Ohio EPA enforcement authority & mechanisms, including settlement, citizen suits, fact & expert discovery, common law claims, insurance.

## **OVERVIEW OF COURT SYSTEM**

### **15.02 Organization of State Court System**

See 1.02 - But also consider --- Why not environmental courts in the 88 counties? Fun Facts about ERAC & Franklin County.

### **15.03 Environmental Review Appeals Commission**

1. Jurisdiction - statewide jurisdiction over certain actions by the Director of Ohio EPA, Department of Ag, local boards of health and a few others. It’s located in Columbus.

- An “action” of the Director include the
  - adoption, modification, or repeal of a rule or standard,;
  - the issuance, modification, or revocation of any lawful order other than emergency order;
  - the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certification;
  - or the approval or disapproval of plans and specification.

2. Composition of the Commission - 3 members, appointed by governor & confirmed by senate to staggered 6- year terms. No more than 2 of same party. Must have extensive expertise in environmental law.

3. Scope of Authority - Final actions of Director of Ohio EPA, Dir of Ag, local boards of health, etc . . . The Commission may affirm, vacate, or modify the action under appeal. May remand the action back for action consistent with its opinion.
4. Procedural Rules - not bound by rules of evidence, but would never know it. Looks and acts just like a court without a jury.
  - Notice of Appeal filed within 30 days. \$70 but waived for hardship. Appellant, person filing appeal must also give notice to Ohio EPA.
  - Appellees - The Attorney General's Office will represent Ohio EPA.
  - Appellants - People may represent themselves. Organizations must have an attorney. Ohio law
  - Once filed, you can go on Joint Status Report or directly to Case Management Schedule, which includes discovery (documents & depositions) and motion practice.
    - Most cases are resolved sometime during this process. Few go to hearing
5. Certification of Record - Director must file a copy of what occurred (documents, correspondences, record of proceedings, etc . . . ) at the Agency relating to pending matter within 7 days. Never happens in 7 days. Extensions routinely granted.
6. Evidentiary Rules, Including Expert Testimony - Ohio Rules of Evidence not applicable. But evidence submitted must be reliable and probative. Allow some heresay to aid in efficiency, but too much heresay is prohibited.
7. Burden of Proof - Whether the Director's action was reasonable and lawful. Reasonable means valid factual foundation and lawful means whether in accordance with the law.
  - Director must satisfy both or action is vacated.
  - ERAC may not stand in director's shoes and decide what is best. Can only determine if action was reasonable and lawful.
  - Deference goes to the director.
8. Right to Appeal ERAC's decision - Appealed to the 10th District, Newly discovered evidence allowed. Court will affirm if supported by reliable, probative, and substantial evidence to be affirmed. Court may affirm, reverse, modify, remand.
9. Deliberative Privilege - Not in Ohio agencies, but judicial mental process protects deliberation.

## **ENVIRONMENTAL ENFORCEMENT BY THE AGENCIES**

### **15.04 Environmental Enforcement By The Agencies**

1. Federal Enforcement Role - US EPA enforces fed laws & regulations. Most programs are sent to the state to manage, so most of the action is at the state level.

2. State Enforcement Role - The Attorney General is the Chief Law Officer of the State. It handles civil (court or administrative) & criminal actions for state level violation. All actions must be started within 5 years of violation - Statute of Limitations

3. Federal Oversight & Over Filing - If states fail to administer their laws as the fed requires, the fed can step in.

- If states are really bad at managing their programs, the feds can pull their designation
- If state not handling a matter correctly, the fed can Over File, meaning it steps in to address the violations. Mostly occurs if the state & violator have settled a suit and the feds want to pursue the violator anyway.

4. Notices of Violation and Director's Final Findings & ORders - enforcement is an escalating scheme,

- Ohio EPA starts small and builds the case. Goal is not to blindside the regulated community with enforcement. NOV's & DFFOs come first, unless emergency.
- NOV - issued by District offices or air agency when an alleged violation occurs.
  - Goal is to ID the violation and put the violator on notice that its actions violate state law.
  - May require a written response, and are intended to open a dialogue bw OEPA & company. May lead to settlements codified in DFFOs
  - NOV's are NOT final actions, thus not appealable to ERAC.
- DFFOs - orders from the Director. Can be unilateral or mutual. Considered an official enforcement action. Goal is to get company to abate or correct the violation
  - Will have numerous statements of fact and steps that must be taken
  - DFFOs ARE final action and appealable to ERAC
  - Administrative but can be a step toward civil or criminal action

5. Verified Complaints - any person or gov't entity that is aggrieved or adversely affected can file a VC alleging a violation

- Director must investigate in a reasonable time
- If Director determines that a violation has or will occur, she can request that AG initiate action. Also, a VC can be dismissed if no violation is present.
- VC are final, appealable actions

6. Exception to Enforcement: Privilege of Non-Disclosure - Voluntary corrective action

- Information that results from qualifying environmental audit is deemed privileged and not admissible as evidence or subject to discovery.
- Not Applicable if not asserted by the person who holds the privilege; the privilege holder voluntarily testifies; court finds privilege does not apply; info is otherwise public or required by govt; fraud;
- WHY disclose this info - immunity from action stemming from info disclosed.
- But, disclosure must be voluntary -
  - Made promptly
  - Reasonable effort to achieve compliance
  - Owner cooperates during audit
  - Disclosure not otherwise required
  - Unaware that investigation was underway or imminent

- Compliance is achieved quickly
- Not available to repeat offenders or fraudulent actors.

7. Use of SEPS as Settlement Strategy - Supplemental Environmental Projects - voluntary projects an owner undertakes to resolve a matter w agency. Must meet these requirements:

- Can not be inconsistent with underlying statute
- Penalty payments mad
- Must advance tenants of statue and have adequate nexus, meaning it will reduce the likelihood of future violations
- Reduce adverse impact to public health,
- EPA not involved in managing funds to complete SEP
- Type & scope of project must be designed in the settlement

8. Criminal Enforcement Process - only prosecutor can bring criminal action. Most environmental criminal actions will be a collaboration between local, county & state prosecutors.

- Usually starts with AG & investigations by OEPA / BCI.
  - Then investigatory agency refers to AG or prosecutor for prosecution
- In severe cases, will involve feds USEPA/USAG

### **15.05 Citizen's Suits**

Most statutes allow for a Citizen Suit when US/Ohio EPA is not already pursuing the matter. State/Feds may intervene. And the Citizen must have standing (aggrieved adversely affected, connected to the group's purpose). Most citizens use the Verified Complaint process, rather than Citizen Suits.

### **15.06 Fact & Expert Discovery**

1. Ohio Rules Governing Discover (consult with your attorney.) Beyond scope of this class EXCEPT FOR (e) Public Records and (f) Privileges

(e) Ohio Public Records Act - applies to Public Records, which are records kept by a public office.

- What is a Public Record
  - Must contain info that is stored on a fixed medium (papert, computers) and be created, received or sent under the jurisdiction of a public office.
  - Must document the business of the agency.
  - No requirement to create a record, even if simply compiling info from already existing records.
- Who can request
  - Any person, corporation, even other government agencies. Doesn't even need to live in Ohio
  - Doesn't need to be in writing
- The Agency must
  - Provide prompt inspection of records
  - Provide copies of records (but does not have to provide them for free)

(f) The Attorney Client Privilege and the Attorney Work Product Privilege

- Ohio law protects private communications between a client and attorney. Same for corporations.

- Absolute protection unless waived by client.
- Attorney work product is protected too. Atty work product protects materials made by attorneys for parties “in anticipation of litigation. They are only discoverable upon good cause.

## **15.07 Common Law Claims, Damages, and Statute of Limitations**

### 1. Common Law Claims

- a. Negligence - To prove negligence one must prove 1. Duty 2. Breach of Duty 3. Proximate cause 4. Injury
  - i. Duty - “which an ordinarily careful and prudent person would exercise or observe under that same or similar circumstances.
  - ii. 4-year statute of limitations
  
- b. Nuisance - unreasonable interference with the use and enjoyment of their property, which caused real, material and substantial injury.
  - i. Public v. private -
    1. public is an unreasonable interference with a right common to the public but just because it interferes doesn't make it a nuisance. Must be unreasonable. (ruin water that supplies water to municipality)
    2. Private - nontrespassory invasion of another's use and enjoyment of land. (ruins private well)
  
- c. Trespass - must show 1 an intrusion onto his property 2. That intrusion interferes with the right to the exclusive possession of that property and 3. Substantial damage of that property
  - i. Reducing property value alone is not enough
  - ii. Mere presence of chemical or pollutant is not enough. Must cause damage  
(*skip ahead to h*)
  
- h. Indemnification - arises from contracts, expressed or implied, allows you to recover money that you had to pay to cover obligation of another.

### 2. Damages

Types - Property (loss of use and diminution of value), Stigma (public perception), Personal (e.g. cancer claims), Injunctive Relief (Likely that you will win, so judge gives you a temporary stop to whatever is happening to you), Punitive (punishment).

## **15.08 Insurance for Environmental Claims (no specific notes require)**

**END OF CHAPTER 15**