Environmental Review Appeals Commission

House Agriculture and Development Subcommittee

Ann Braam, Budget Analyst

Legislative Service Commission

March 1, 2005

Additional copies are available on our website at ***www.lsc.state.oh.us***
Click on 'Budget Documents' then 'Redbooks'

LSC Redbook

for the

Environmental Review Appeals Commission

House Agriculture and Development Subcommittee

Ann Braam, Budget Analyst

Legislative Service Commission

TABLE OF CONTENTS

Overview 1

Issues and Challenges in FY 2006-2007 1

Executive Recommendation 2

Budget Priorities 2

Proposed FYs 2006-2007 Budget by Expense Type 3

Cost-saving Measures 3

Overall Staffing Levels 4

Analysis of Executive Proposal 5

Requests Not Funded 7

Attachments:

Catalog of Budget Line Items

LSC Budget Spreadsheet By Line Item

March 1, 2005

Environmental Review Appeals Commission

- Due to newly effective federal regulations, EBR's caseload is becoming more complex and time-consuming
- EBR faces equipment upgrade costs in the coming biennium

OVERVIEW

The Environmental Review Appeals Commission (EBR) is an appellate review board whose primary statutory duty is to hear and resolve appeals from certain legal actions taken by state and local governmental entities, including the Ohio Environmental Protection Agency (EPA), the State Fire Marshal, the State Emergency Response Commission, the Department of Agriculture, and county and local boards of health. The majority of cases heard by EBR relate to final actions of the Ohio EPA.

The Commission's office consists of five individuals: three board members appointed by the Governor, one executive secretary who also serves as liaison and fiscal, personnel, and administrative officer, and one clerical support person. Board members serve staggered six-year terms and receive a salary that is set by the Governor. One Commission member's term will expire during the next biennium.

The Environmental Review Appeals Commission is funded entirely by General Revenue Fund (GRF) dollars. The Environmental Review Appeals Commission conducts all hearings itself, and all decisions are researched and written by Commission members. Commission staff also process and handle all of the Commission's normal administrative functions. With the exception of office supplies, all expenses of the Commission are required by statute or are fixed by contract.

In FY 2003, the Commission moved to 309 S. Fourth Street. The new site meets the Commission's needs with regard to adequate space for a hearing room and easy accessibility for parties to an appeal. The Commission's rental payments will remain approximately the same (approximately $45,000 per year) until 2007.

Issues and Challenges in FYs 2006-2007

In the last several years, the Environmental Review Appeals Commission has experienced several challenges as a result of new requirements under the federal Clean Air Act (Title V) that have expanded the regulatory authority of the Ohio EPA. Final actions stemming from these changes in regulations have resulted in a large number of appeals that take longer on average to resolve and that demand a greater portion of staff time. The Commission's caseload continues to grow in legal and scientific complexity.

Unlike other appellate boards, the Commission conducts all hearings itself, and all decisions are researched and written by Commission members. Commission staff process and handle all of the

Commission's normal administrative functions, such as purchasing and vouchering, payroll, acting as liaison between the Commission and the parties to an appeal, day-to-day duties such as typing, mail, copying, telephones, and all other functions for which many agencies have separate departments and personnel. The Commission has been operating at a reduced staffing level over the past few biennia. With the new challenges presented by federal Clean Air Act requirements, staffing is critical.

The following table provides information on the Commission's caseload per year. The number of appeals varies from year to year and does not necessarily correspond to case complexity. Also, the Commission dockets individual appeals of the same action separately, in the event one party decides to withdraw from an action while the other parties desire to continue. The increase in the number of appeals filed with the Commission in FY 2000 reflects such a situation. In other words, a large number of appeals in a given year does not necessarily correlate to a larger or more complex caseload. The type of case has to be taken into consideration to gain a full picture of workload.

Environmental Review Appeals Commission – Caseload History by Fiscal Year					
Fiscal Year	**Total Appeals**	**Filings Reviewed**	**Rulings Issued**	**Appeals Concluded**	**Hearings**
1993	178	440	299	3002	2911
1994	174	198	274	2996	3001
1995	135	134	223	2531	2596
1996	251	165	309	3702	3115
1997	224	155	289	3582	3013
1998	208	191	291	3497	2943
1999	126	124	276	2984	2003
2000	583	620	784	4216	3906
2001	262	217	302	3947	3004
2002	189	156	214	3434	2932
2003	185	363	262	3654	3186
2004	288	335	274	3803	3302
2005*	81	51	101	1301	1001

* Figures for FY 2005 are as of December 31, 2004

Executive Recommendation

The executive recommendation is $479,161 in FY 2006 and increases by 1% to $483,859 in FY 2007. The appropriation for FY 2006 represents an 8% increase over estimated FY 2005 spending levels.

Budget Priorities

Staffing. In addition to increasing costs for fringe benefits, the executive secretary and clerical Support staff persons will receive the mandatory state pay increase in July 2005. The Commission has no control over the salary of the new Commission member to be appointed in October 2006. Historically, new appointments receive a salary that is approximately 4% to 5% above that of the most recently appointed Commission member. All of the Commission's costs are fixed by contract or defined in statute. Funding at the recommended level will enable the Commission to fund the mandated FY 2006 pay increase as well as the new Commission appointment.

Technology. The Commission is facing significant technological challenges. The Commission frequently experiences difficulty with various pieces of its aging equipment, all of which is out of

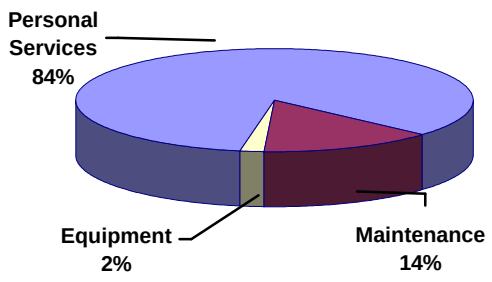
warranty. The newest computer equipment is approximately six years old and nearing the end of its life. The Commission has six computers, including one with dial-up Internet access on which all staff members access Lexis Nexis to conduct legal research. Funding at the recommended level will allow the Commission to replace and upgrade computer equipment and provide Internet access to all Commissioners. It will also allow the Commission to maintain its subscription to Lexis Nexis.

Funding at FY 2005 levels would not allow the Commission to make any computer or equipment upgrades, thus impacting the quality of the Commission's work. It also would be difficult to fund the mandated pay increases and the new Commission appointment. The Commission would be in danger of not fulfilling its statutory duties as a result.

Proposed FYs 2006-2007 Budget by Expense Type

As the pie chart below shows, payroll for five staff accounts for 84% of the Commission's budget, or $400,501 in FY 2006 and $406,707 in FY 2007. Maintenance, which includes rent, Lexis Nexis subscription, postage, and supplies, accounts for 14% of the budget, a total of $66,160 in FY 2006 and $67,152 in FY 2007. The recommendation also provides $12,500 in FY 2006 and $10,000 in FY 2007 for office equipment, a total of 2% of the proposed budget.

Total Budget by Object Code, FYs 2006-2007



Cost-saving Measures

The Commission members themselves hear appeals, perform their own research, and write each opinion. This enables the Commission to limit its hearing expenses while still fulfilling its statutory mandate. In addition, the Commission holds informal Preliminary Prehearing Conferences within 30 days of an appeal being filed. The conference enables all parties and the Commission to discuss informally the specific issues on appeal, to ascertain any existing problems and to encourage settlement discussions among parties. The Commission has found that these prehearing conferences facilitate resolution of some cases prior to the conducting of a *de novo* hearing, which is both costly and time-consuming to all parties involved. Currently, approximately 90% of cases settle and 10% go to *de novo* hearing.

To reduce research time, the Commission has compiled a "key-word" index for all Commission decisions since 1994. The Commission maintains a file of Interlocutory Orders of the Commission to facilitate responses to motions filed by parties during the pendency of an appeal. To provide additional support at no cost to the state, the Commission has agreed to participate in the Capital Law School Externship

Program, and supervises a legal extern who provides research assistance to the Commission on a semester-by-semester basis.

Finally, the Commission has instituted a number of in-house cost-saving measures, such as circulating limited copies of certain documents to save on copy costs and paper. For example, the Commission does not have funds available to have State Printing copy its Rules; therefore, the Commission copies its Rules on an "as needed" basis on its office copier.

Overall Staffing Levels

The following chart illustrates the Commission's total staffing levels (including appointed Commission members) between FY 2002 and FY 2005, with the numbers for FY 2006 and FY 2007 being estimates.

Environmental Review Appeals Commission Staffing Levels, by Fiscal Year					***Estimated***	
Employee	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**
Chairman	1	1	1	1	1	1
Vice-Chairman	1	1	1	1	1	1
Member	1	1	1	1	1	1
Executive Secretary	1	1	1	1	1	1
Clerical Support	1	1	1	1	1	1
Totals	5	5	5	5	5	5
Prior to FY 2002 EBR's budget supported two clerical support employees.						

Executive order budget reductions in FY 2002 necessitated a staff reorganization that resulted in the loss of one support staff person. The two remaining staff personnel, while continuing to perform their prior duties, have assumed the additional workload that resulted from the elimination of one position. Due to the current biennium's budget reductions, the Commission is no longer able to hire temporary help when a staff person is out. When one of these two staff persons is ill or on vacation, the remaining staff person or one of the Commission members takes on the majority of the administrative duties of the office; however, the assistance the Commission members can provide is limited as a result of the prohibition against *ex parte* communication. Funding at the recommended level will not allow for additional staff.

ANALYSIS OF EXECUTIVE PROPOSAL

Environmental Review Appeals Commission

Purpose:.The Environmental Review Appeals Commission is an appellate review board whose primary statutory duty is to hear appeals of environmental legal actions taken by several state and local government entities.

The Commission is funded entirely by one line item. The following table shows the Governor's funding recommendations.

Fund	ALI	Title	FY 2006	FY 2007
General Revenue Fund				
GRF	172-321	Operating Expenses	$479,161	$483,859
Total Funding: Environmental Review Appeals Commission			**$479,161**	**$483,859**

Environmental Review Appeals Commission

Program Description: The Environmental Review Appeals Commission was created in October 1972. Its purpose is to serve Ohio citizens, the regulated community, and governmental entities affected by environmental final actions and to provide statewide legal precedent and expeditious review of environmental challenges.

The Commission has statewide jurisdiction and is the highest level of administrative appeal from final actions of the Ohio EPA, the State Fire Marshal, the State Emergency Response Commission, the Department of Agriculture, and local boards of health. At any one time, the Commission has approximately 400 active cases pending on its docket. As of December 31, 2004, the Commission has 428 cases pending.

The Commission's duties are prescribed in sections 3745.02 through 3745.07 of the Revised Code. The Commission effectively sits in lieu of local courts of common pleas for environmental matters, creating a consistent body of environmental case law in Ohio, decided by a panel of Commission members with significant environmental expertise and knowledge of complex state and federal environmental laws. All decisions of the Commission are subsequently appealable to the Franklin County Court of Appeals, or, if the appeal arose from an alleged violation of a law or regulation, to the court of appeals for the district in which the violation was alleged to have occurred. Appeals from the courts of appeals' decisions are then appealable to the Supreme Court of Ohio.

Through the Commission's exclusive original jurisdiction, it is able to provide litigants with a more cost effective, efficient, and relaxed forum for review of their environmental disputes than if the action were required to be filed in a court of common pleas. The Commission is empowered to hear appeals from individuals who are party to a proceeding that resulted in an appealable decision, persons who are aggrieved or adversely affected by an appealable decision, and state and local subdivisions.

The appeals heard by the Commission are generally highly technically and legally complex. Historically, whenever a statute or regulation is enacted or significantly amended in the environmental arena, there is a proliferation of cases related to this area filed with the Commission, which continues until precedents are established for the new law or rule. In the past few years, environmental legislation has significantly

expanded the regulatory authority of the Ohio EPA and created a number of new laws and programs to be administered by the Ohio EPA. Virtually all of the final actions stemming from these legislative changes are appealable to the Commission.

With each appeal that is filed with the Commission, the Revised Code requires the Ohio EPA or the originating agency to file its certified record with the Commission. These certified records can be lengthy filings, at times consisting of several thousand documents. The administrative duties of the Commission (i.e., docketing, indexing, and maintaining certified records) are necessary for the development of each case. In addition, there are numerous legal filings and pleadings that are made throughout the pendency of a case. The Revised Code requires the Commission to send, via certified mail, notice of the various actions taken by the Commission to all parties to an appeal.

Am. Sub. H.B. 95 of the 125th General Assembly increased the filing fee on all appeals filed with the Commission to $70. The Commission also charges and collects a fee for photocopies. The Commission estimates that these fees total approximately $6,000 per year. Because the Commission is funded solely by the GRF, any fees collected by the Commission are deposited into the GRF and serve to offset a portion of the state's cost for operating the Commission.

Funding Source: GRF

Line Items: 172-321, Operating Expenses

Implication of Executive Recommendation: The Executive recommended funding is $479,161 for FY 2006 and $483,859 for FY 2007.

Funding at the recommended level will allow the Commission to continue to fulfill its statutory duties in hearing and resolving appeals from certain legal actions taken by state and local governmental entities. The recommended funding amount will allow the Commission to make needed computer/equipment upgrades, to continue to subscribe to Lexis Nexis, and to cover the mandated FY 2006 pay increases as well as the new Commission appointment in October 2006.

Temporary and Permanent Law Provisions: There are no temporary or permanent law provisions with fiscal effects on this Commission.

REQUESTS NOT FUNDED

The Executive recommends fully funding the Environmental Review Appeals Commission at requested levels of $479,161 in FY 2006 and $483,859 in FY 2007. This allows for the acquisition of some new computer and other office equipment to replace old hardware.

General Revenue Fund

GRF 172-321 Operating Expenses

2002	2003	2004	2005 Estimate	2006 Executive Proposal	2007 Executive Proposal
$440,299	$427,758	$418,166	$439,109	**$479,161**	**$483,859**
	-2.8%	-2.2%	5.0%	**9.1%**	**1.0%**

Source: GRF

Legal Basis: ORC 3745.02 through 3745.06

Purpose: This line item provides funds for personnel, maintenance and equipment expenses for the Environmental Review Appeals Commission. This includes Commission members' salaries and staff payroll. The majority of maintenance expenses are for rent, with the remaining maintenance expenses used for the subscription to Lexis Nexis, office supplies, telephone bills, and postage.

LSC Budget Spreadsheet by Line Item, FY 2006 - FY 2007

Fund	ALI	ALI Title	2004	Estimated 2005	Executive 2006	% Change 2005 to 2006	Executive 2007	% Change 2006 to 2007
EBR Environmental Review Appeals Commission								
GRF	172-321	Operating Expenses	$ 418,166	$439,109	$ 479,161	9.1%	$ 483,859	1.0%
General Revenue Fund Total			**$ 418,166**	**$ 439,109**	**$ 479,161**	**9.1%**	**$ 483,859**	**1.0%**
Total All Budget Fund Groups			***$ 418,166***	***$ 439,109***	***$ 479,161***	***9.1%***	***$ 483,859***	***1.0%***