Environmental Review Appeals Commission

Senate Finance and Financial Institutions Committee

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Legislative Service Commission

May 24, 2007

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for the

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May 24, 2007

Environmental Review Appeals Commission

- Due to newer state and federal regulations, EBR's caseload is becoming more complex and time-consuming
- With the recommended funding, EBR will hire one additional attorney to assist with cases

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 Commission members appointed by the Governor, one administrative assistant, 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 expired in October 2006 and they were replaced in December 2006. The salary remains the same for the new member.

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.

Issues and Challenges in FYs 2008-2009

Expanded jurisdiction. Recent environmental legislation expanded the jurisdiction of the Commission (e.g., the Voluntary Action Program, the regulation of construction and demolition debris landfills, and the Ohio Department of Agriculture's recent jurisdiction over animal feeding facilities). Additionally, a number of existing programs have been amended, such as Title V of the federal Clean Air Act. Overall, 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 reports that its caseload continues to grow in legal and scientific complexity.

Continued administrative functions. Unlike other appellate boards, the Commission conducts all hearings itself, and all decisions are researched and written by Commission members. Under the recommended budget, Commission staff will continue to 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. Further, an added responsibility and increase in workload is performing all the tasks that are required for participation in the Ohio Administrative Knowledge System (OAKS).

Caseload. 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**	**Appeals Concluded**	**Hearings**	**Filings Reviewed**	**Rulings Issued**
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	132	148	239	2846	2904
2006	158	174	317	3307	3496
2007*	130	79	239	2603	2141

* Figures for FY 2007 are as of March 6, 2007.

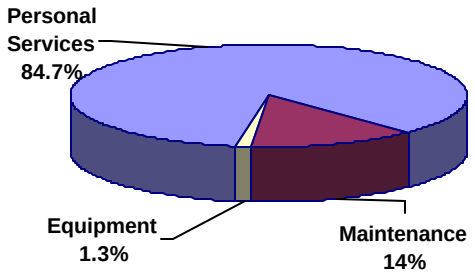
Executive Recommendation for FYs 2008-2009

The executive recommendation is $574,375 in FY 2008 and $573,575 in FY 2009. The appropriation for FY 2008 represents an 18.7% increase over estimated FY 2007 spending levels. Funding at the recommended level will allow the Commission to maintain its subscription to Lexis Nexis, and allow for one additional computer to be purchased for a new attorney.

Proposed FYs 2008-2009 Budget by Expense Type

As the pie chart below shows, payroll for five staff accounts for 84.7% of the Commission's budget, or $480,228 in FY 2008 and $491,359 in FY 2009. Maintenance, which includes rent, Lexis Nexis subscription, postage, and supplies, accounts for 14% of the budget, a total of $84,147 in FY 2008 and $77,216 in FY 2009.

Total Budget by Object Code, FYs 2008-2009



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 80% of cases settle and 20% go to *de novo* hearing, although this number fluctuates year to year.

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 begun circulating limited copies of certain documents to save on copy costs and paper. For example, the Commission does not have State Printing copy its Rules; instead, 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 2004 and FY 2007, with the numbers for FY 2008 and FY 2009 being estimates.

Environmental Review Appeals Commission Staffing Levels, by Fiscal Year						
					Estimated	
Employee	2004	2005	2006	2007	2008	2009
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**

ANALYSIS OF EXECUTIVE PROPOSAL

Single Program Series **Operating Expenses**

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 governmental entities.

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

Fund	ALI	Title	FY 2008	FY 2009
General Revenue Fund				
GRF	172-321	Operating Expenses	$574,375	$573,375
Total Funding: Environmental Review Appeals Commission			**$574,375**	**$573,375**

Hearing/Determination Process

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 March 19, 2007, the Commission had 502 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 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 can then be sent to the Supreme Court of Ohio.

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.

Whenever a statute or regulation is enacted or significantly amended in the environmental arena, there are numerous 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. Nearly 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. 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 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: Recommended funding is $574,375 for FY 2008 and $573,375 for FY 2009. Funding at these levels 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. Further, the recommended funding amount will allow the Commission to continue its subscription to Lexis Nexis, hire one additional attorney, and provide the extra necessary office space as well as a computer work station for an attorney position.

Temporary and Permanent Law Provisions

None

REQUESTS NOT FUNDED

The Governor's proposal fully funds the Environmental Review Appeals Commission's budget request of $574,375 in FY 2008 and $573,575 in FY 2009.

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General Revenue Fund

GRF 172-321 Operating Expenses

2004	2005	2006	2007 Estimate	2008 House Passed	2009 House Passed
$418,166	$437,472	$455,655	$483,859	**$483,859**	**$487,000**
	4.6%	4.2%	6.2%	**0.0%**	**0.6%**

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 2008 - FY 2009

Fund	ALI	ALI Title	Estimated 2007	As Introduced 2008	House Passed 2008	% Change Est. 2007 to House 2008	As Introduced 2009	House Passed 2009	% Change House 2008 to House 2009
EBR		**Environmental Review Appeals Commission**							
GRF	172-321	Operating Expenses	$483,859	$ 574,375	$ 483,859	0.0%	$ 573,575	$ 487,000	0.6%
General Revenue Fund Total			**$ 483,859**	**$ 574,375**	**$ 483,859**	**0.0%**	**$ 573,575**	**$ 487,000**	**0.6%**
Total All Budget Fund Groups			***$ 483,859***	***$ 574,375***	***$ 483,859***	***0.0%***	***$ 573,575***	***$ 487,000***	***0.6%***