

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

DANIEL E. GRAY

Case No. ERAC 205880

Appellant,

v.

JOSEPH KONCELIK, DIRECTOR  
OF ENVIRONMENTAL PROTECTION, ET AL.

Appellees.

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DECISION

Rendered on February 9, 2010

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*Daniel E. Gray, Appellant Pro Se*

*Richard Cordray, Attorney General, Lauren C. Angell, Esq.*  
for Appellee Joseph Koncelik, Director of Environmental  
Protection

*Ulmer & Berne LLP, J. Gregory Smith, Esq.* for Appellee  
Wal-Mart Stores, Inc.

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RULING ON DISPOSITIVE MOTION of Appellee Wal-Mart Stores, Inc.

SHILLING, COMMISSIONER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon Wal-Mart Stores, Inc.'s ("Wal-Mart") filing of a dispositive motion on February 7, 2007. Wal-Mart moved this Commission to affirm, as a matter of law, Appellee Director of the Ohio Environmental Protection Agency's ("Director," "Ohio



EPA," "OEPA," "Agency") March 16, 2006 issuance of Ohio Isolated Wetland Permit No. 2003-02233(1) and Section 401 Water Quality Certification (collectively, "IW Permit and 401 Certification").

Mr. Gray opposed Wal-Mart's motion on February 23, 2007. On March 1, 2007, the Director filled a memorandum in support of Wal-Mart's motion to which Mr. Gray responded on March 7, 2007.

Based on the pleadings, affidavits<sup>1</sup>, and attachments, along with relevant statutes, regulations, and case law, the Commission hereby issues the following Findings of Fact, Conclusions of Law, and Final Order AFFIRMING the Director's issuance of the IW Permit and 401 Certification to Wal-Mart.

### FINDINGS OF FACT

{¶1} Appellee Wal-Mart proposed to construct a Wal-Mart Supercenter ("Supercenter") on land located south of U.S. Route 2 and west of State Route 66 on North Clinton Street in the city of Defiance, Defiance County, Ohio. The parties agree that the construction of the Supercenter would impact federal wetlands within the jurisdiction of the Army Corpss of Engineers ("Corps"), as well as isolated wetlands under the exclusive jurisdiction of Ohio EPA. See Section 404 of the Clean Water Act ("CWA") (Section 1344, Title 33 U.S.Code) and Section 401 of the CWA (Section 1341, Title 33 U.S.Code). The public notice issued by Ohio EPA identified the impacted wetland as 636 linear feet of streams, 0.1 acres of isolated wetland, and 0.01 acres of

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<sup>1</sup> At the outset, the Commission notes that Appellant Gray failed to attach any affidavits or other authenticated documents to support his claims. As such, the Commission must treat his assertions as unsubstantiated allegations when considering the instant motion.

jurisdictional wetland. Case File Item R, Affidavit of Jeffery Boyles ("Boyles"), Attachment 1.

{¶2} Because construction of the Supercenter was deemed to impact federal wetland and isolated state wetland, Wal-Mart was required to obtain authorization from both the Corps and Ohio EPA before it could commence the project. Accordingly, Wal-Mart submitted applications for the following:

(1) Ohio Isolated Wetland Permit ("IW Permit Application")— Wal-Mart submitted an application to Ohio EPA seeking issuance of an Ohio Isolated Wetland Permit pursuant to Ohio Revised Code ("R.C.") 6111 and Ohio Administrative Code ("Ohio Adm.Code") 3745-1;

(2) Section 401 Water Quality Certification ("401 Certification Application") – Wal-Mart submitted an application to Ohio EPA seeking certification that the construction of the Supercenter complies with applicable provisions of Sections 301, 302, 303, 306, and 307 of the CWA; and

(3) Section 404 Wetland Permit ("404 Permit Application") – Wal-Mart submitted an application to the Corps seeking a permit allowing it to impact federal wetlands within the Corps' jurisdiction pursuant to Section 404 of the CWA, 33 U.S.C. §1344. Case File Item R, Affidavits of Boyles and Nicholas Miller ("Miller").

{¶3} On March 16, 2005, the Corps public noticed Wal-Mart's 404 Permit Application and invited public comment until April 14, 2005. Similarly, on May 13, 2005, Ohio EPA issued a "Public Notice of Receipt of a 401 Application" and advised that the public comment period for Wal-Mart's 401 application would close on June 13, 2005. Case File Item R, Affidavits of Boyles and Miller.

{¶4} In response to the public notices, the Corps and Ohio EPA received comments from the United States Environmental Protection Agency dated April 5, 2005; the Ohio Department of Natural Resources dated April 13, 2005; the Ohio EPA, Division of Surface Water, which included the 401 Water Quality Certification

Worksheet, dated April 14, 2005; the United States Department of the Interior, Division of Fish and Wildlife ("Fish and Wildlife") dated May 6, 2005; and an undated letter from Mr. Gray. Neither Ohio EPA nor the Corps received a request for a public hearing on this matter. See generally, Case File Item R, Affidavit of Boyles, Attachment 3; Affidavit of Miller.

{15} Prior to issuing the IW Permit and 401 Certification, the Director reviewed comments submitted during the public comment period, engaged in negotiations with the Corps, and examined the technical, social, and economic considerations arising from the project's impact on the waters of the state of Ohio. After evaluating the information before him, the Director determined the lowering of the water quality in the Tiffin River watershed was "necessary." Thus, on March 10, 2006, pursuant to R.C. Chapter 6111 and Ohio Adm.Code Chapter 3745-1, Ohio EPA issued an IW Permit and 401 Certification to Wal-Mart. Case File Item R, Affidavit of Boyles, Attachment 4.

{16} Similarly, on March 16, 2006, the Corps issued Permit No. 2003-02233(1), known as the "Corps 404 Permit." The Corps 404 Permit authorized Wal-Mart to "place fill into 636 linear feet of intermittent, unnamed headwater tributaries of an unnamed tributary of the Tiffin River and 0.01 acres of adjacent wetlands, in accordance with the general and special conditions, and the plans and drawings and any additional special condition attached hereto which are incorporated in and made a part of this permit." Case File Item R, Affidavit of Miller, Attachment 1.

{17} Appellant Gray timely filed his Notice of Appeal containing seven numbered assignments of error on March 31, 2006. Mr. Gray's subsequent filings on May 5, 2006, July 26, 2006, December 7, 2006, and February 12, 2007 responding to

various orders of the Commission appear to attempt to supplement his original Notice of Appeal, but lack specificity as to precisely what is being alleged. Taken in totality, the Commission classifies Mr. Gray's concerns into two categories: 1) The first group relates to the Director's issuance of the IW Permit and 401 Certification authorizing Wal-Mart to impact identified wetlands; 2) The second group of assignments of error relate to subjects as diverse as: 1) the placement of a gas line beneath the Supercenter's flooring; 2) miscellaneous water rights and drainage impacts in the area; and 3) alleged violations of the Americans with Disabilities Act ("ADA"). Case File Items A, G, J, N, Q.

{¶8} Encompassed in the first category of assignments of error, and of great concern to Mr. Gray, is an allegation regarding the Indiana Bat. More specifically, Mr. Gray states his claim as follows:

The Indiana Bat. A Federally Endangered Species that is 60% gone from this Earth and according to the Endangered species act (sic), it is a Federal Felony (sic) to disturb or destroy any of the nesting or maternity areas used by same. In allowing the permit to build this store you will destroy a nesting site. A site that is within a stone's throw of a new construction by the Ohio Department of Transportation. An Ohio State office that had its regional director (Kirk Schlusser) freely ADMIT that these bats were here in this area! Thus validating the existence of the species and thus INVALIDATING your authorization of the permit. And how is this going to look when I place this information on the internet and thus allow everyone in the world to know that your office allowed the possible extinction of a protected species, just so Wal-Mart can build a box store?<sup>2</sup> (Capitalization sic.) Case File Item A.

{¶9} Appellees counter that Mr. Gray's claim must fail as a matter of law. Wal-Mart points out that concern for the Indiana Bat was first raised during the public

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<sup>2</sup> The Commission discerns this assignment of error to mean that during the permit process Wal-Mart and the Director failed to properly address issues relating to the preservation of the Indiana Bat and its habitat. Case File Item A.

comment period by Fish and Wildlife. In a comment submitted to Ohio EPA, Fish and Wildlife listed the important habitat features for Indiana Bats as “dead or live trees and snags with peeling or exfoliating bark, split tree trunk and/or branches or cavities,” but noted that the summer habitat requirements for the Indiana Bat were not well-defined. Fish and Wildlife also recommended that the habitat and surrounding trees be saved wherever possible and that “suitable bat roost trees should not be cut between April 15 and September 15.” Fish and Wildlife further commented, “[i]f desirable trees are present and must be cut, mist net or other surveys may be warranted to determine if bats are present.”<sup>3</sup> Case File Item R, Affidavit of Boyles, Attachment 3.

**{¶10}** Significantly, Wal-Mart asserts and affidavits support that any trees removed from the site where the Supercenter was to be built were removed during the winter months of 2004-2005 by the land owner who sold the property to Wal-Mart. Thus, no trees were cut during the time period of April 15 to September 15, and any trees that were cut, were cut prior to the closing of the land transaction between the seller and Wal-Mart. Case File Item R, Affidavit of Miller.

**{¶11}** Mr. Gray also appears to assert, without specificity, that Ohio EPA ignored pertinent Ohio statutes and regulations and thus, failed to properly protect wetlands in the state of Ohio. Case File Item A.

**{¶12}** Regarding Mr. Gray's concerns about wetland protection, Appellees believe that the wetland impact mitigation terms incorporated into the wetland permits issued by the Corps and Ohio EPA are in excess of what is required by law and thus,

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<sup>3</sup> In response to Fish and Wildlife's comments, the Corps specifically incorporated language very similar to Fish and Wildlife's Indiana Bat comments directly into the 404 Certification. Case File Item R, Affidavit of Miller, Attachment 1.

are protective of area wetlands. In its application, Wal-Mart proposed three alternative plans addressing impacts to wetlands as required by Ohio Adm.Code 3745-1-54 [Wetland antidegradation.]. Wal-Mart's preferred alternative would have impacted 0.01 acres of jurisdictional wetland and 943 linear feet of streams across the site; while its minimal degradation alternative proposed to impact 0.01 acres of jurisdictional wetland and 636 linear feet of streams at the building site. Wal-Mart also proposed a non-degradation alternative that would have had no direct impact on water resources at the site. Case File Item R, affidavit of Boyles, attachment 1, 5.

**{¶13}** The Director selected and Wal-Mart agreed to include the minimal impact scenario (0.01 acres of jurisdictional wetland and 636 linear feet of streams) in the terms of the IW Permit and 401 Certification. To offset proposed wetland impacts, Wal-Mart agreed to place a 300 foot wide conservation easement along 3,600 linear feet of the Tiffin River located east of the intersection of Schnick Road and Evansport Road, Tiffin Township, Defiance County, Ohio. The conservation easement, executed between Wal-Mart and Ohio EPA, was filed with the Defiance County Recorder's Office. Wal-Mart asserts that this easement constitutes a 6:1 mitigation ratio and exceeds the requirements found in Ohio Adm.Code 3745-1-54. Case File Item R, affidavit of Boyles, attachment 1, 5.

**{¶14}** Further, Wal-Mart agreed to purchase mitigation credits from the White Star Mitigation Bank to restore 0.3 acres of high quality wetland. Wal-Mart contends that Ohio Adm.Code 3745-1-54 requires a 1.5:1 mitigation ratio for isolated wetland, and its mitigation ratio for the isolated wetland is 3:1, double what is required. Case File Item R, affidavit of Boyles, attachment 1, 5.



**{¶15}** The second category of Mr. Gray's assignments of error contains a variety of allegations that Wal-Mart asserts are outside the Commission's jurisdiction. More specifically, Wal-Mart contends that in the instant case, the Commission may only determine whether the Director's act in issuing the IW Permit and 401 Certification was unlawful or unreasonable; in other words, the Commission may not consider issues beyond the scope of the Director's action. In the interest of brevity, the Commission has categorized and condensed Mr. Gray's remaining assignments of error as follows:

- Allegations relating to a "recent 6<sup>th</sup> US District Court decision granting water rights to people that own property in this area whose water table may be lowered or endangered by the construction of this new box store."
- Allegations that Wal-Mart and the Director violated unspecified ADA laws and regulations relating to an increase in traffic near Mr. Gray's residence, denial of the use of existing sidewalks, and lack of sidewalk availability.
- Concerns about the alleged destruction of a specific drainage point into the Tiffin River that will affect drainage in the northwest portion of the City of Defiance and places "in peril" a new hospital, "three HUD housing projects," and "over 400 homes."
- Concerns about the impact of a "natural gas line that would be placed directly under the backside of the store and up to 15 feet inside the store." Case File Item A.

### **CONCLUSIONS OF LAW**

**{¶16}** Initially, the Commission will address Mr. Gray's various assignments of error categorized as the second group of assignments of error. As noted previously, Wal-Mart asks the Commission to find these assignments of error beyond the Commission's jurisdiction.

{¶17} Ohio Revised Code ("R.C") 3745.04(B) provides the scope of the Commission's jurisdiction on matters arising from final actions of the Director and states:

Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act.

{¶18} An "action" or "act" of the director appealable to the Commission is defined as follows:

\* \* \* As used in this section, "action" or "act" includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder. R.C. 3745.04(A)

{¶19} It is undisputed that Mr. Gray possesses standing as a proper party to the appeal because he became a "party to a proceeding before the director" when he submitted comments to the Director during the public comment period. After reviewing the breadth of the miscellaneous matters assembled in this group of assignments of error, the Commission finds that these allegations and concerns do not constitute final actions of the Director. It is axiomatic that the Commission may not consider matters outside its statutorily prescribed jurisdictional framework. *Joel Helms v. Korleski* (October 30, 2007), ERAC Case No. 765966. Accordingly, the Commission is precluded from entertaining the varied matters raised in Mr. Gray's second category of assignments of error as they are not final actions of the Director.

{¶20} Having delineated which assignments of error are properly before it, the Commission turns to the remaining issues presented by Wal-Mart in its motion for summary disposition.

{¶21} Ohio Civil Rule ("Civ.R.") 56 governs summary judgment, a procedural mechanism to terminate litigation when a resolution of factual disputes is unnecessary. *Chalfant v. P.W. Motel Management*, 2000 Ohio App. LEXIS 1308, 1309. Although not strictly bound by the Ohio Rules of Civil Procedure, the Commission has historically applied Civ.R. 56, by analogy, when addressing motions for summary disposition. *Waste Management of Ohio, Inc. v. Board of Health of the City of Cincinnati* (September 29, 2005), ERAC Case Nos. 315713, 315743; *General Electric Lighting v. Jones* (August 21, 2003), ERAC Case No. 185017; *Belmont County Defenders, et al. v. Jones* (November 21, 2001), ERAC Case Nos. 074914-074919.

{¶22} Specifically, Civ.R. 56(C) provides, in relevant part:

\* \* \* Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶23} It is well-established that for a motion for summary judgment to be successful, the following three factors must be demonstrated:

\* \* \* 1) there is no genuine issue as to any material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the

party against whom the motion for summary judgment is made, which is entitled to have the evidence construed most strongly in his favor. *Daily v. Am. Family Ins. Co.*, 2008 Ohio 3082, 3083.

{¶24} In the instant action, Wal-Mart asserts and Mr. Gray does not contest that there are no issues of material fact in dispute; therefore, the Commission finds that resolution through summary disposition is appropriate in this matter. The Commission will now apply the relevant statutes, regulations, and case law to the undisputed facts presented herein.

{¶25} The crux of Mr. Gray's allegations is grounded in the Director's issuance of an IW Permit and 401 Certification authorizing Wal-Mart to impact wetlands at the Supercenter construction site. Legal authority for the Director's action rests in Ohio R.C. 6111.021 [General and individual isolated wetland permits.]. Specifically, R.C. 6111.021 states:

(A)(1) The director of environmental protection shall issue a general state isolated wetland permit or permits to cover activities within this state for purposes of section 6111.022 of the Revised Code. A general permit is effective for five years. Upon the expiration of a general permit, the director shall issue a new general permit.

(2) The director may issue an individual state isolated wetland permit for purposes of sections 6111.023 and 6111.024 of the Revised Code. An individual permit issued under either of those sections is effective for five years.

(B) A person that proposes to engage in an activity that involves the filling of an isolated wetland shall apply to the director for coverage under a general state isolated wetland permit or shall apply for an individual state isolated wetland permit, as applicable, in accordance with sections 6111.02 to 6111.027 of the Revised Code. No person shall engage in the filling of an isolated wetland unless authorized to do so by a general or individual state isolated wetland permit. \* \* \*

(C) The issuance of a general or individual state isolated wetland permit constitutes the issuance of a section 401 water quality certification for purposes of the Federal Water Pollution Control Act.

**{¶26}** Because the construction of the Supercenter would impact wetlands, Wal-Mart submitted an application to Ohio EPA for an IW Permit and 401 Certification. After reviewing Wal-Mart's application and other relevant documents, the Director issued the IW Permit and 401 Certification authorizing Wal-Mart to impact wetlands at the proposed Supercenter site. Mr. Gray objects to these impacts.

**{¶27}** In his first assignment of error, Mr. Gray challenges the Director's action presumably arguing that the issuance of the IW Permit and 401 Certification did not properly account for the habitat of the Indiana Bat in a manner consistent with the recommendations made by Fish and Wildlife during Ohio EPA's public comment period.

**{¶28}** Through Mr. Miller's affidavit and attachments, Wal-Mart rebutted Mr. Gray's claim and stated that any trees cut at the site were cut by the previous owner prior to Wal-Mart taking ownership of the property.

**{¶29}** The Commission finds that the affidavits and attachments support Wal-Mart's contention and concludes that Wal-Mart did not and could not have acted contrary to Fish and Wildlife's recommendations submitted to Ohio EPA during the public comment period, as they did not own the land at the time the trees were cut. Correspondingly, because the trees were already cut by the previous owner prior to the Director's issuance of the IW Permit and 401 Certification, the Commission finds the Director's action of omitting requirements relating to the Indiana Bat did not violate applicable statutes or regulations.

**{¶30}** Secondly, the Commission believes that Mr. Gray intends to challenge the lawfulness of Wal-Mart's wetland mitigation efforts contained in the IW Permit and 401

Certification, yet he fails to assert any specific provision that the Director failed to satisfy. In its response, Wal-Mart asserts that its mitigation efforts exceed the requirements prescribed in Ohio Adm.Code 3745-1-54, but does not offer a full analysis of the mitigation and credit computations.

{¶31} The facts support that Wal-Mart's application proposed three different levels of wetland mitigation. The Director determined that preservation and restoration efforts resulting in the creation of a 300 wide conservation easement along 3600 linear feet of the Tiffin River (6:1 mitigation ratio), along with purchased credits to restore 0.3 acres of high quality wetlands (3:1 mitigation ratio), would properly mitigate the impacted wetlands in that area in accordance with the provisions set out in Ohio's wetland antidegradation rule, Ohio Adm.Code 3745-1-54.

{¶32} Ohio Adm.Code 3745-1-54(A)(1) states:

The wetland designated use shall be maintained and protected such that degradation of surface waters through direct, indirect, or cumulative impacts does not result in the net loss of wetland acreage or functions in accordance with paragraphs (D) and (E) of this rule.

{¶33} Ohio Adm.Code 3745-1-54, sections (D) [Wetland avoidance, minimization, and compensatory mitigation.] and (E) [Compensatory mitigation ratio, replacement category, and mitigation location requirements. \* \* \*] set forth specific qualifications, characterizations, and calculations for analysis and determination of eligibility for specific wetland mitigation requirements.

{¶34} Following a comprehensive review of Ohio Adm.Code 3745-1-54, the Commission finds that, regardless of the precise classifications and calculations selected, the wetland mitigation plan as described in the IW Permit and 401 Certification complies with the tenets of Ohio Adm.Code 3745-1-54.

{¶35} In sum, the Commission finds that the Director acted lawfully when he issued to Wal-Mart an IW Permit and 401 Certification that omitted the recommendations made by Fish and Wildlife and included the wetland mitigation terms and condition as set forth in the IW Permit and 401 Certification.

**ESCHLEMAN AND MULRANE, COMMISSIONERS, CONCUR**

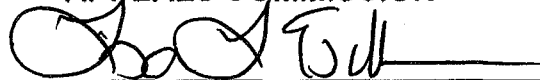
**FINAL ORDER**

Based on the foregoing, the Commission hereby AFFIRMS the Director's March 10, 2006 issuance of the IW Permit and 401 Certification to Wal-Mart.

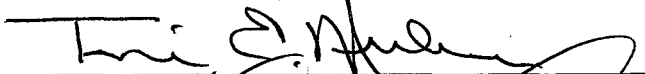
The Commission, in accordance with Ohio Administrative Code Section 3746-13-01, informs the parties that:

Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

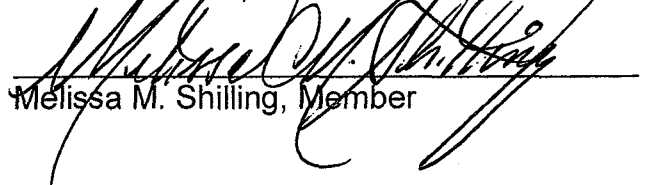
**THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION**



Lisa L. Eschleman, Chair



Toni E. Mulrane, Vice-Chair



Melissa M. Shilling, Member

Entered into the Journal of the  
Commission this 9<sup>th</sup>  
day of February, 2010.

COPIES SENT TO:

DANIEL E. GRAY  
CHRIS KORLESKI, DIRECTOR  
WAL-MART STORES, INC.  
Lauren C. Angell, Esq.  
J. Gregory Smith, Esq.

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DECISION

Case No. ERAC 205880

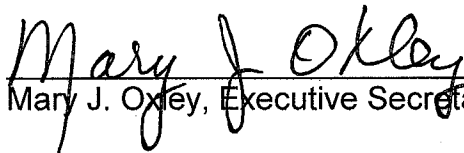
**CERTIFICATION**

I hereby certify that the foregoing is a true and accurate copy of the DECISION in

**DANIEL E. GRAY V. JOSEPH KONCELIK, DIRECTOR OF ENVIRONMENTAL**

**PROTECTION, ET AL.** Case No. ERAC 205880 entered into the Journal of the

Commission this 9<sup>th</sup> day of February, 2010.

  
Mary J. Oxley, Executive Secretary

Dated this 9<sup>th</sup> day of  
February, 2010, at Columbus, Ohio.

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ENVIRONMENTAL ENFORCEMENT