IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

State of Ohio, *ex rel.* Food and Water Watch and FreshWater Accountability Project,	)	Case No. 14AP-11-958
Relators,	)	
-vs-	)	
State of Ohio, Governor John R. Kasich; James Zehringer, Director, ODNR; Rick Simmers, Chief, ODNR Division of Oil and Gas Resources Management,	)	
Respondents.	)	
	)	

RELATORS' MOTION FOR SUMMARY JUDGMENT AND/OR FOR PEREMPTORY WRIT OF MANDAMUS

Relators Food and Water Watch, ("FWW") and FreshWater Accountability Project ("FWAP") (collectively, "Relators") , proceeding by and through counsel, hereby move for summary judgment, and for

judgment of a peremptory writ of mandamus in their favor, on the ground that there are no issues of material fact. Relators' right to require the performance of the act of promulgating regulations pursuant to statute is clear; no valid excuse exists for the failure of the State of Ohio, Department of Natural Resources to obey the law. Accordingly, Relators are entitled to summary judgment on their Verified Complaint for a Writ of Mandamus as a matter of law.

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I. INTRODUCTION

Relators Food and Water Watch and FreshWater Accountability Project, two nonprofit organizations with members and activities in Ohio, filed a Verified Complaint for Writ of Mandamus ("Verified Complaint") on behalf of their respective members, which include Ohio citizens and

taxpayers from Youngstown and Barnesville who live, work and pursue recreation within proximate to two planned or existing fracking waste treatment and disposal facilities which have been issued Chief's Orders by the State of Ohio, Department of Natural Resources ("ODNR") which allow them to operate. The verified complaint provides affidavit information from executive officers of FWAP and FWW which comprises some of Relator's evidence.

Relators challenge the lawfulness of so-called "Chief's Orders" by Rick Simmers as Chief of the ODNR Division of Oil and Gas Resources Management, absent promulgation of rules which is expressly made a prerequisite via statute.

Simmers' division has principal responsibility, among three state-level agencies, for permitting the operation of facilities which treat and handle solid and liquid wastes from oil and gas drilling, especially including wastes generated by the hydraulic fracturing, or "fracking," method of mineral extraction. Relators allege that no regulatory procedures and requirements have been promulgated to restrict the issuance of Chief's

Orders for these facilities. There are more than twenty-three (23) fracking waste treatment and disposal facilities which have received Chief's orders. They handle solid, semisolid and liquid oil and gas drilling wastes, which typically contain varying amounts of toxic chemicals, heavy metals and radioactive isotopes. Nearly all fracking waste is radioactively contaminated. See slide show attached to the Complaint as "Exhibit B."

The Chief's Orders issued under the authority of O.R.C. § 1509.22 are unlawful because ODNR has failed to promulgate regulations and subjected them to the public approval process enumerated in O.R.C. Chapter 119, Ohio's Administrative Procedure Act. ODNR has undertaken no rulemaking in the approximately sixteen (16) months since § 1509.22 went into effect. Accordingly, Relators are entitled to summary judgment on the law and facts, and by way of relief, to the issuance of a writ of mandamus ordering ODNR to promulgate rules.

II. RELATORS HAVE DEMONSTRATED LEGAL STANDING

Relators may submit affidavit evidence to support claims of their

individual members' standing to sue. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (at the summary judgment state, plaintiff "must . . . 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e)"). The use of affidavits to supplement pleadings for standing is well- recognized. *Earth Island Inst. v. Pengilly*, 376 F.Supp.2d 994, 1000 (E.D. Cal. 2005), *rev'd on other grounds* ("where a plaintiff or group of plaintiffs submits affidavits concerning direct effects to the affiant's 'recreational, aesthetic, and economic interests,' standing is appropriate"), citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000). See also, *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009), citing *Lujan*, 504 U.S. 563 (an "organization lacked standing because it failed to 'submit affidavits . . . showing, through specific facts . . . that one or more of [its] members would be 'directly affected' by the alleged illegal activity").

A. Relator Standing Facts

FWW and FWAP are nonprofit organizations claiming legal standing on behalf of their adversely-affected and aggrieved members. Relator

FWW is a nonprofit organization that advocates for policies that will result in healthy, safe food and access to safe and affordable drinking water and protection of shared public resources, including watercourses, aquifers, land, and lakes. Verified Complaint ¶ 9. Relator FWAP is a nonprofit organization which seeks to hold corporations and governmental officials directly responsible to the public on energy issues which impair the commons of water and land resources. Verified Complaint ¶ 10. Both FWW's and FWAP's members are Ohio taxpayers who object to violations of Ohio law which potentially subject the State of Ohio to fiscal liability for misfeasance and malfeasance in the form of inadequate and unlawful regulatory actions. *Id.* at ¶¶ 9, 10.

ODNR issued Chief's Order No. 2014-52, approved by Respondent Richard J. Simmers, Chief of the Division of Oil and Gas Resources Management ("Chief" of "DORGM") within the ODNR ("ODNR") dated March 6, 2014. Chief's Order No. 2014-52 permits Ground Tech to operate a facility at 240 Sinter Court, Youngstown, Ohio 44510, for radiological characterization of fracking waste, tank cleaning and decontamination,

waste solidification, brine storage, and preparation of drilling wastes from oil and gas extraction for disposal. The waste characterization and handling at Ground Tech is being performed by Austin Master Services, LLC, which holds License for Radioactive Material No. 03219 510000 from the Ohio Department of Health. See Chief's Order No. 2014-52, Verified Complaint Exhibit E; also, "Application to Operate a Facility" (IWC Ground Tech App."), annexed to the "Affidavit of Cheryl Mshar"("Mshar Aff."), and "Affidavit of Hattie Wilkins" ("Wilkins Aff."), both of which were previously filed in this lawsuit.

ODNR's Respondent Simmers issued Chief's Order No. 2014-08, dated January 3, 2014, which grants authority to EnerGreen Holding Company, LLC ("EnerGreen") to construct and operate a facility known as "EnerGreen 360" for the 200-acre surface disposal of wastes from oil and gas drilling (literally by piling up waste heaps) in the East Ohio Regional Industrial Park, located in Warren Township, Belmont County, Ohio, on land controlled by the Belmont County Port Authority. *See* Chief's Order No. 2014-08; also, "Application for facilities to store, recycle, treat, process

or dispose of brine and other waste substances from production operations" ("EnerGreen App."), annexed to the Affidavit of David Barton Castle and Bobbie Sue Castle, previously filed in this lawsuit.

Chief's Orders are used by ODNR to allow the operation of privately-owned facilities for the storage, recycling, treatment, processing and disposal of brine and other waste substances from oil and gas drilling.

At least twenty-three (23) facilities which handle oil and gas drilling waste substances were issued Chief's Orders during the first half of 2014 to handle large volumes of oil and gas drilling wastes resulting from the fracking. Verified Complaint ¶ 3 and its Exhibit A. These waste handling and treatment facilities deal with solid, semisolid and liquid oil and gas drilling wastes and will contain varying amounts of toxic chemicals, heavy metals and radioactive isotopes. Nearly all such wastes are expected to be radioactively contaminated. Verified Complaint ¶ 4 and its Exhibit B, Weatherington-Rice slide show (Ohio State University geologist's presentation concerning the radioactivity of oil and gas drilling wastes produced from hydraulic fracturing).

On or about June 4, 2014, Relator FWAP sent a letter to Respondent Zehringer, ODNR Director, stating that the practice of issuing Chief's Orders for oil and gas drilling waste facilities was presently unlawful, and demanding that ODNR cease issuance of them until it had complied with the requirements of the Ohio Revised Code. Verified Complaint ¶ 6 and its Exhibit C. Then, about July 16, 2014, Relator FWAP sent a letter to Respondent Governor Kasich, requesting that Kasich stop the practice of using Chief's Orders, and enclosing a copy of Exhibit C. *See* Verified Complaint ¶ 7 and its Exhibit D. No response to Exhibit C has ever been transmitted to Relator FWAP or its legal counsel by Respondent Zehringer. The Governor's office response to Exhibit D was a letter advising FWAP that it had sent its letter to the wrong office. Verified Complaint ¶ 8.

The operations at the IWC/Ground Tech facility in Youngstown, which has been handling fracking waste since early 2014, include radiological waste characterization using *in situ* counting equipment; waste treatment/stabilization and down-blending; pressure washing of waste-hauling trucks and tanks; tank cleaning and decontamination; and

containerized waste storage. Ground Tech performs fracking waste stabilization in a bermed unit at the Sinter Court site, mixing waste with a nonhazardous material and mechanically agitating it to mix it together. Waste is shipped from the plant by trucks carrying open-topped roll-off containers. Tank containers used in the oil and gas industry are to be washed with high-pressure spray devices, and the liquified waste runoff, expected to be radioactive, is to be vacuumed up. Containerized waste is stored onsite, outside the plant on a gravel lot. *See* IWC/Ground Tech Application, attached to Mshar and Wilkins Affidavits.

Part of IWC/Ground Tech's application to ODNR was an Ohio Department of Health License for Radioactive Material which authorizes Austin Master Services, LLC, actual handler of the fracking wastes, to receive various radioactive materials at the site, including Plutonium, Uranium-233, enriched Uranium-235, depleted Uranium, and also, "radioactive materials with atomic numbers 1 to 103," as well as Radium-226 and Radium-228. Ra-226 and Ra-228 are typically present in fracking wastes. There is no explanation of how the other isotopes are

expected to be present at the Ground Tech plant, nor what means will be used to control or stabilize them. *See* IWC Application attached to Mshar and Wilkins affidavits previously filed in this lawsuit. The IWC/Ground Tech application predicts that the facility will store, treat and/or process up to 50,000 tons of fracking wastes annually. *Id.*

Relators' members Hattie Wilkins of Fairmont Avenue, Youngstown, Ohio and Cheryl Mshar of Donald Avenue, Youngstown, Ohio both live near the IWC/Ground Tech facility (see map of Youngstown attached to Wilkins and Mshar affidavits). According to the affidavit facts provided by Cheryl Mschar, she lives .82 mile distant from IWC/Ground Tech, and Hattie Wilkins lives .74 mile away. Mshar Aff. ¶ 3; Wilkins Aff. ¶ 3. The geographical proximity of these members puts them at risk for physical harm from the chemical and radiological pollution which inevitably will emanate from Ground Tech in air and water emissions, even during normal operations.

Mshar and Wilkins each reviewed the IWC/Ground Tech application for the Chief's Order and noted that ODNR "did not require IWC/Ground

Tech to provide any information about the air or water emission volumes, toxicity or hazards of the chemical and radioactive wastes to which" they, their families and visiting friends "will be exposed during routine operations at the facility." Mshar Aff. ¶ 4; Wilkins Aff. ¶ 4. They, their families and visiting friends "will be involuntarily exposed to, and will breathe, chemically polluted and radon-polluted air emitted from fracking waste handled, blended, or held at the facility as a part of routine operations;" "will be involuntarily exposed to chemical and radioactive air pollution, and will have to breathe such in the event there is a waste spill from one of the trucks traveling to and from IWC/Ground Tech;" "will be involuntarily exposed to chemical and radioactive contamination both airborne and waterborne in the event of a spill into the Mahoning River, which runs near the facility and near" their homes; and that "these exposures, even if they are routine and the result of an accident, will, individually and/or cumulatively, subject" their families, visiting friends and themselves "to unnecessary risks to personal health." Mshar Aff. ¶ 6; Wilkins Aff. ¶ 6.

FWAP members David Castle and Bobbie Castle reside on North Chestnut St. in Barnesville, and challenge the validity of Chief's Order No. 2014-08 by which ODNR permitted EnerGreen Holding Company, LLC ("EnerGreen") to operate EnerGreen 360, which will create and fill in a 200-acre dumpsite with oil and gas drilling wastes combined with additives such as coal ash, all of which will be deposited on creek bottom land held by the Belmont County Port Authority. The Castles live 1.7 miles from the proposed EnerGreen dumpsite. Affidavit of David Barton Castle and Bobbie Sue Castle ("Castle Aff.") ¶ 3.

EnerGreen proposes to dump drilling wastes on open land at the rate of 600,000 tons per year, which will contain heavy metals, radioactive elements including radium, thorium, uranium, and will emit radon gas. Chemicals used to extract oil and gas from shale during fracking will contaminate the drilling wastes at EnerGreen. Coal ash will be blended with fracking waste, and is required by Ohio law to be disposed of in a licensed landfill, but EnerGreen will not be operating a licensed landfill and consequently may dump ash on open land with impunity. Nothing in the

EnerGreen process will cause the heavy metals, mercury or concentrated radiation in coal ash to be neutralized, removed or rendered non-dangerous. Castle Aff. ¶ 9. EnerGreen intends to dispose of "vertical cuttings" from oil and gas drilling, which material will inevitably contain heavy metals and radiation. Radium, one of the radiation sources, easily moves around in water. Precipitation will freely penetrate the growing pile of waste and will move radiation into the ground or across the land surface into water supplies. Radon gas will freely escape from the pile. Castle Aff. ¶ 9; Verified Complaint ¶ 13.

The Castles are concerned that various chemical poisons will become airborne and be breathed by them and by members of their family who live, work and conduct business in and around Barnesville. Castle Aff. ¶¶ 3, 4, 5, 9, 13, 14; EnerGreen 360 Application, attached to Castle Aff. With no measures to stop particles of waste, chemicals, heavy metals and radioactive solid matter and gas from being blown offsite from EnerGreen, and nothing to stop runoff of heavy metals and radiation into water sources, the Castles believe that wind and water will deposit toxic and radioactive

materials throughout Barnesville and into the Barnesville Reservoir, which is south of town. Castle Aff. ¶ 10. In Ohio, naturally-occurring radioactive material ("NORM") is completely unregulated and may be disposed of anywhere without notice, air or water monitoring, or the maintenance of records of its disposal, even though NORM might contain high levels of radium and other radioactive isotopes, and emit radon gas. Castle Aff. ¶ 11. The Chief's Order issued for the EnerGreen dump does not even require EnerGreen to test the contents of wastes dumped in the valley. Castle Aff. ¶ 13.

The Castles are Ohio taxpayers who object to violations of Ohio law which potentially subject the State of Ohio to fiscal liability for misfeasance and malfeasance in the form of inadequate and unlawful regulatory actions. Verified Complaint ¶¶ 13, 14.

B. Legal Arguments Supporting Standing

1. Relator organizations may sue on behalf of their members

Relators' members have articulated "realistic danger arising from the challenged action," per *Olmsted Falls v. Jones*, 152 Ohio App.3d 282,

2003-Ohio-1512, ¶ 21 (10th Dist.). These persons have demonstrated the threat of injury to themselves from ODNR's irresponsibility; they've shown that their interests as Relators' members coincide with the organizational aims of the Relators and finally, they've shown that they, as individual members, need not participate directly in the lawsuit.

Nonprofit organizations such as FWW and FWAP may sue on behalf of their members if "'(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 324 (10th Dist.1998) (abrogated in part on other grounds), *quoting Ohio Academy of Nursing Homes, Inc. v. Barry*, 37 Ohio App.3d 46, 47 (10th Dist.1987).

2. The injuries of Relator's members fall within the 'zone of interests' protected by statute

Relators' members in the instant matter have alleged injuries resulting from the deprivation of their right to rely on the protections of regulations

promulgated pursuant to statute. They assert potential damage to their health and property from present or anticipated harms from IWC/Ground Tech (which currently is operating) and Energreen 360's prospective operations.

Relators' members have standing where the interest they seek to protect "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *State ex rel. Dayton Newspapers v. Phillips,* 46 Ohio St.2d 457, 459 (1976), quoting *Data Processing Services v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827 (1970); *cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 760 (1982) (alleged injury must be to an interest arguably within the zone of interests to be protected by National Environmental Policy Act).

The interests of Relators' members' in this litigation fall within the "zone of interests" of O.R.C. § 1509.22(A)-(C), the statute which sets up the regulatory scheme:

(A) Except when acting in accordance with section 1509.226 of

the Revised Code, no person shall place or cause to be placed in ground water or in or on the land or discharge or cause to be discharged in surface water brine, crude oil, natural gas, or other fluids associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources *that causes or could reasonably be anticipated to cause damage or injury to public health or safety or the environment*. (Emphasis supplied).

(B)(1) No person shall store or dispose of brine in violation of a plan approved under division (A) of section 1509.222 or section 1509.226 of the Revised Code, in violation of a resolution submitted under section 1509.226 of the Revised Code, or in violation of rules or orders applicable to those plans or resolutions.

(2)(a) On and after January 1, 2014, no person shall store, recycle, treat, process, or dispose of in this state brine or other waste substances associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources without an order or a permit issued under this section or section 1509.06 or 1509.21 of the Revised Code or rules adopted under any of those sections. For purposes of division (B)(2)(a) of this section, a permit or other form of authorization issued by another agency of the state or a political subdivision of the state shall not be considered a permit or order issued by the chief of the division of oil and gas resources management under this chapter.

(b) Division (B)(2)(a) of this section does not apply to a person that disposes of such waste substances other than brine in accordance with Chapter 3734. of the Revised Code and rules adopted under it.

© The chief shall adopt rules regarding storage, recycling, treatment, processing, and disposal of brine and other waste substances. The rules shall establish procedures and requirements in accordance with which a person shall apply for a permit or order for the storage, recycling, treatment, processing, or disposal of brine and other waste substances that are not subject to a permit issued under

> section 1509.06 or 1509.21 of the Revised Code and in accordance with which the chief may issue such a permit or order. An application for such a permit shall be accompanied by a nonrefundable fee of two thousand five hundred dollars.

In *Data Processing Services*, the Supreme Court delineated the "zone of interests" means of assessing standing. The plaintiffs claimed that competition from national banks in the business of providing data processing service prospectively might cause them future loss of profits. They sued the federal Comptroller of the Currency, who had formally authorized national banks to make available their data processing equipment or perform data processing services on such equipment for other banks and bank customers. The Court held that standing

> . . . concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus, the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1964 ed., Supp. IV). That interest, at times, may reflect "aesthetic, conservational, and recreational," as well as economic, values. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616; *Office of Communication of United Church of Christ v. FCC,* 123 U.S. App. D.C. 328, 334-340, 359 F.2d 994, 1000-1006. A person or a family may have a spiritual stake in First Amendment

> values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District v. Schempp,* 374 U. S. 203. We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is "likely to be financially" injured, *FCC v. Sanders Bros. Radio Station,* 309 U. S. 470, 309 U. S. 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case.

Data Processing, 397 U.S. at 154.

In the present case, Relators' members allege that the ODNR's failure to promulgate regulations governing issuances of Chief's Orders opens them up to personal injury from unregulated fracking waste processors which "cause[] or could reasonably be anticipated to cause damage or injury to public health or safety or the environment." O.R.C. §1509.22(A). Relators' members have thus met the standing expectations enunciated in *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 16, to-wit: "'the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury' to establish plaintiff's standing," quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62,

112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The Chief's Orders issued for IWC/Ground Tech and EnerGreen 360 *do not even require the applicants to implement the industrial protections they so sparsely describe in their applications*. Surely causation would follow from the complete and total deregulation of a statutorily-regulated activity, and provide Relators and their members with mandamus as a form of redress.

3. The members' threatened direct injuries are not speculative

The potential for injury to Relators' members from the present and anticipated operations of IWC/Ground Tech and EnerGreen establishes legal standing. Respondents suggest that the general threats cited by Relators' members, who have only the skimpy information appearing in applications for Chief's Orders to go by, should cause the denial of standing. But it is the dodgy disclosures of the chemicals, radiation and processes at fracking waste facilities which impede the public's ability to recognize some of the possible injuries or threats of injury. Relators' members, however, also can point to genuine threats to their health and

safety from unknown, but routine toxic air emissions from ongoing IWC/Ground Tech operations, as well as from chemical and radioactive waste spills by trucks traveling to and from the IWC/Ground Tech plant on adjoining neighborhood streets near the homes of Relator's members. Similarly, Relators' members will experience continuous airborne toxic exposures in the vicinity of the EnerGreen dump in Barnesville, and long-term potential contamination of groundwater with chemicals and radiation.

Standing based on being "threatened with direct and concrete injury" is well-recognized in Ohio. *Ohio Trucking Association v. Charles*, 134 Ohio St.3d 502, 2012-Ohio-5679 (2012) ("threatened injury" exists when prospective higher governmental fee for driver abstracts is alleged to violate constitutional restrictions on proceeds). Threatened injuries suffice to establish standing when a realistic danger arising from the challenged action has been demonstrated. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgmt. Dist. v. Republic Waste Servs. Of Ohio II, LLC,* 10th Dist. No. 07AP-599, 2009-Ohio-2143, 2009 Ohio App. LEXIS 1799, ¶ 49 (testimony that fractures beneath landfill created a pathway for contaminants to an

aquifer suggested noncompliance of landfill with OAC requirements; "Such evidence demonstrates that there is a real potential that the expansion will endanger the District's residents and environment"). Also, see *Johnson's Island Prop. Owners' Ass'n v. Schregardus,* 97-LW-3066, 10th Dist. No. 96APH10-1330, 1997 Ohio App. LEXIS 2839 (June 30, 1997). In *Johnson's Island*, the court noted that opponents of a sewer system construction project facing only a "slight" risk of property damage from the shaking caused by blasting undertaken as part of the construction nonetheless had standing:

> Although the evidence of actual injury to members of JIPOA, such as their homes being shaken by the construction blasting, is slight, and some of the threatened injury borders on the overly speculative, the evidence, when viewed in its totality, supports a finding that members of JIPOA have suffered an 'injury in fact' for purposes of establishing their standing to bring their claim against appellant."

Id.

Because chemical and radiological spills, and routine and non-routine toxic and radioactive air and water emissions from fracking waste facilities are possible, and since the ODNR's Chief's Orders do nothing to

ameliorate such threats of injury, the issue is whether ODNR's refusal to follow explicit statutory mandates has or will cause a near-term harm to Relators' members. *American Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000) (Sierra Club must show "that EPA's alleged failings have caused a traceable 'concrete and particularized' harm to their members that is 'actual or imminent'" (*quoting Louisiana Envtl. Action Network v. EPA,* 172 F.3d 65, 71 (D.C. Cir. 1999) (*LEAN*)). Relators have made that showing.

4. The redressability component is satisfied where plaintiffs demonstrate a 'substantial probability' of harm

Relators' members have alleged facts tending to show that their alleged injuries will be redressed by the rulemaking they seek. When the party seeking judicial review challenges an agency's regulatory failure, the petitioner need not establish that, but for that misstep, the alleged harm certainly would have been averted. Rather, the petitioner need demonstrate only a "substantial probability" that local conditions will be adversely affected, and thus will harm members of the petitioner organization. *Sierra*

Club & Louisiana Environmental Action Network v. Environmental Protection Agency, 755 F.3d 968 (D.C. Cir. 2014), *quoting American Petroleum Inst. v. EPA*, 216 F.3d 50, 63, 342 U.S.App. D.C. 159 (D.C. Cir. 2000); see also *Sierra Club v. EPA,* No. 13-1014, at *15 (D.C. Cir. June 13, 2014) ("Because '[e]nvironmental and health injuries often are purely probabilistic,' the court has 'generally require[d] that petitioners claiming increased health risks to establish standing demonstrate a substantial probability that they will be injured[.]'") (quoting *Natural Resources Defense Council v. EPA*, 464 F.3d 1, 6, 373 U.S.App. D.C. 223 (D.C. Cir. 2006)).

ODNR's failure to promulgate regulations increases the possibility that Relators' members will be injured both by routine and non-routine emissions of air and spills of water pollution and radiation. Relators' members have a personal stake in not being forced to breathe toxic air, or in risking exposure to tainted water, or of facing increased prospects of contracting industrially-caused diseases. The members' physical proximity to the sources of unmeasured, concealed exposures, coupled with the other

polluting effects of these sparsely-detailed industrial installations, pose a threat of injury, by reason of which Relators should be allowed to proceed to litigate on behalf of their members.

Notably, the IWC/Ground Tech application admits the likelihood that workers at the plant will face some degree of radiation exposure. The application does not explain how radioactivity will be contained within the plant, nor is there any assurance provided that the facility structure will contain radioactive spills and their air- or waterborne emissions. Though IWC/Ground Tech will perform blending and mixing of drilling wastes, there is no provision in the Chief's Orders for any identification, analysis or measurement of the ensuing air and water pollution which such activities will cause. But for purposes of determining standing, the threat of chemical and radioactive emissions on public health must be seen as effectively conceded.

At the proposed EnerGreen dump, coal ash, which is radio-toxic and carcinogenic and requires disposal in a licensed landfill, will be mixed with radio-toxic and carcinogenic drilling wastes. EnerGreen is not required to

have any landfill features such as monitoring wells to track migration of toxins into the groundwater, nor any air monitors. There will be no liners to slow the unabated leaching of poisoned, radioactive water into groundwater. Dumped material will be constantly exposed to the elements. The half-life of radium 226 is about 1600 years,[1] and it will require thousands of years beyond that for the radium deposited in 200 acres of unlined dump to decay to background levels and cease to pose a public health hazard. Radium when taken up in the body is mistakenly recognized as calcium and deposited into bones, from whence it irradiates surrounding cells and can cause bone cancers.

Ohio courts confer standing when parties are threatened by genuine, even if minor, physical harm from an industrial activity. In *Citizens Against Megafarm Dairy Development, Inc. v. Dailey*, 2007-Ohio-2649, 06AP-836 (Franklin App. 2007), the Franklin County Court of Appeals ruled that:

> {¶7} A proposed action "affects" a party if (1) the challenged action will cause injury in fact, economic or otherwise, and (2) the

[1]http://www.epa.gov/radiation/radionuclides/radium.html

> interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged. *Olmsted Falls v. Jones*, 152 Ohio App.3d 282, 2003-Ohio-1512, ¶21, citing *Franklin Cty. Regional Solid Waste Mgmt. Auth. v. Schregardus* (1992), 84 Ohio App.3d 591. The alleged injury must be concrete, rather than abstract or suspected. A party must show that he or she will suffer a specific injury, even slight, from the challenged action or inaction, and that the injury is likely to be redressed if the court invalidates the action or inaction. *Id.* If a threatened injury is alleged, the party must demonstrate a realistic danger arising from the challenged action. *Id*.
>
> {¶8} Here, CAMDD consists of approximately 20 citizens whose homes are located within one to two miles southeast of the proposed dairy. The citizens use wells to draw groundwater for their personal consumption. Evidence adduced at the *de novo* hearing before ERAC revealed that if the dairy released contaminants into the ground, it would take over 45 years for the contaminants to reach the citizens' wells. Although Hijma Dairy contends that, through decay and attenuation, the threat of the contaminants would lessen over this time period, *a realistic, albeit slight, danger remains that the dairy's operations could contaminate the citizens' wells*. Because CAMDD challenges the director's actions regarding the dairy's compliance with the aquifer siting criteria, a statute aimed at protecting the groundwater that the dairy's contiguous citizens use, CAMDD has standing to appeal this case. (Emphasis added).

Even if the physical effects of breathing polluted air from fracking are not evident for many years, the mere presence of toxic chemical emissions and/or radiation in the air represents "a realistic, albeit slight, danger" to the health of Relators. Consequently, allegations of an insufficiently protective

regulatory agency response can comprise a sufficient showing of concrete injury. Also, see *Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246, 1259 (D.C. Cir. 1994):

> The environmental groups among the CASE petitioners allege that the BIF Rule is an unlawful interpretation of the Bevill Amendment which exposes their members to greater risks than they would face if all Bevill wastes were regulated under Subtitle C. *If the EPA were required to regulate Bevill wastes as Subtitle C hazardous wastes, those wastes would be subject to a more stringent regulatory regime than the current BIF Rule imposes, providing greater protection to petitioners' members.*
>
> Because the environmental organizations among the CASE petitioners have standing, we hold that the CASE petitioners as a group also have standing to challenge the BIF Rule. (Emphasis added).

Id. at 1259. Here, Relators' members allege that Chief's Orders impose no regulatory restrictions, and that the ODNR is simultaneously evading the mandated rulemaking processes of O.R.C. Chapter 1509. They also claim that the Chief's Orders do not account impose terms and conditions such as the likely applicability of the federal Clean Water Act or federal Clean Air Act to projects, even though the ODNR is the principal and lead state regulator overseeing fracking waste disposal facilities. Absent the objective

standards that might be imposed via regulations, Chief's Orders impose no regulations which protect the public from reasonably anticipated air and water emissions of toxic chemicals and radiation from fracking waste handling operations and associated waste transport. Regulation, even if weak or arbitrary, is preferable to the present situation of utter lack of regulation. "[S]tanding will lie where 'a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise.'" *Am. Trucking Ass'n v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 248 (D.C. Cir. 2013) (*quoting Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (*en banc*)).

Where the granting of a permit threatens a protected interest, the claimant of that interest should be allowed to present evidence. In *Girard Bd. Of Health v. Korleski*, 193 Ohio App.3d 309, 951 N.E.2d 1072, 2011-Ohio-1385 (10th Dist Franklin 2011), the Environmental Review Appeals Commission ("ERAC") had dismissed an appeal by a municipal board of health which had challenged a license application approved by the Ohio

EPA for the establishment of a new construction and demolition debris facility. ERAC reasoned that the board of health did not have standing because the injury was too attenuated and general. The Franklin County Court of Appeals, however, reversed on the issue of standing, holding that the granting of a license for the facility "threatens a protected interest and that [the board of health] should be afforded the opportunity to present evidence before ERAC as to whether the director abused its discretion in finding that TWL satisfied the requirements" of the statute at issue. *Id*. at ¶ 23.

Ohio courts have applied a "totality" assessment to ascertain standing. In *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Servs. Of Ohio, II, LLC*, 2009-Ohio-2143, Case No: 07AP-599, 2009 WL 1263623 (Franklin App. 2009), Republic applied for a permit to install an addition to its landfill. The waste management district argued that the expansion of the landfill would harm ambient water quality and would create a substantial risk of contamination. *Id*. at ¶ 4. The court adopted a "totality" assessment for determining standing, recognizing that the group

could gain standing simply "by virtue of being a resident of the county in which the landfill was to be constructed," *Id*. at ¶ 27, if it were coupled with a threatened or actual injury. *Id*. at ¶ 31. Viewing the evidence in totality, the court found enough suggestion of threatened injury to the district's residents and the environment to support a finding of injury-in-fact for purposes of standing. *Id.* at ¶ 39.

5. Relators' members have standing to pursue their claims as a matter of public right

Relators' members also have "public right" or "public action" standing. The "public action" theory is recognized "'where the question is one of public right and the object of the mandamus is to procure the enforcement of public duty, the people are regarded as the real party and the relator need not show that he has any . . . special interest in the result, since it is sufficient that he is interested as a citizen or taxpayer in having the laws executed and the duty in question enforced.'" *State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4, 35 O.O.2d 1, 3, 215 N.E.2d 592, 595, quoting 35 Ohio Jur. 2d (1959) 426, § 141.

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 1999-Ohio-123, 86 Ohio St.3d 451, 470 (1998), the Supreme Court observed that "'[s]tate courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits,'" quoting 59 Am. Jur. 2d (1987) 415, Parties, § 30. The Court further noted that it "has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties." *Sheward* at 471. The Court cited cases spanning 115 years of Ohio jurisprudence to make the point that at times a plaintiff "may maintain a proper action predicated on his citizenship relation to such public right" (quoting from *Newell v. Brown* (1954), 162 Ohio St. 147, 150-151, 54 O.O. 392, 122 N.E.2d 105). *Viz.*, *In re Assignment of Judges to Hold Dist. Courts* (1878), 34 Ohio St. 431, 439 (laws which undertook to reconstruct the common pleas districts of the state found "subversive of the judicial system established by the constitution"; constitutionality decided

solely upon the briefs of *amici curiae*); *State v. Brown*, 38 Ohio St. 344, syll.¶ 1 (1882) ("[a] proceeding in mandamus to compel the sheriff to give notice and make proclamation to the qualified voters of a county to elect a judge of the court of common pleas therein is properly instituted upon the relation of an elector of such county"); *State ex rel. Meyer v. Henderson*, 38 Ohio St. 644, 648-649 (1883) (clerk of city could be compelled to advertise pursuant to an ordinance for sealed proposals to construct a street railway in citizen suit because "the people at large are the real party in interest" and "the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and, as such, interested in the execution of the laws"); *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, syll.¶ 1 and 615, 64 N.E. 558 (1902) (action in mandamus to compel governor to fill vacant office of lieutenant governor created by resignation; "a private citizen may be the relator in a mandamus proceeding to enforce the performance of a public duty affecting himself as a citizen and the citizens of the state at large"); *State ex rel. Cater v. N. Olmsted*, 69 Ohio St.3d 315, 322-323, 631 N.E.2d 1048, 1054-1055 (1994)

(taxpayer standing to enforce public's right to proper execution of city charter removal provisions, regardless of any private or personal benefit; public-right doctrine exists independent of any statute authorizing invocation of the judicial process).

Public action standing must be conferred "where the alleged wrong affects the citizenry as a whole, involves issues of great importance and interest to the public at large, and the public injury by its refusal would be serious." *Bowers v. Ohio State Dental Bd.*, 2001-Ohio-1316, 142 Ohio App.3d 376, 381, 755 N.E.2d 948 (Ohio App. 10 Dist. 2001).

In the instant matter, the deliberate failure by Respondents to promulgate regulations which would impose constraints and regulatory insight on the issuance of Chief's Orders has allowed the imposition of no fewer than 23 potentially or actually polluting industrial facilities upon the physical environment in many Ohio counties, with unknown but very possible effects on the public health of Ohio's citizens. The putative failure of the Kasich Administration to follow an explicit statute, discussed in detail *infra*, is a failing by Respondents which "affects the citizenry as a

whole, involves issues of great importance and interest to the public at large, and the public injury by" refusing to issue a writ of mandamus "would be serious." Relators should be accorded standing based upon public right.

III. RELATORS HAVE DEMONSTRATED THE PREREQUISITES FOR AN AWARD OF SUMMARY JUDGMENT

A. Relators Lack An Adequate Remedy At Law

Relators seek an express order to Chief Simmers, Director Zehringer and Governor Kasich for rules to be promulgated and for the statutory requirement to be fulfilled. That statutory requirement is found in O.R.C. § 1509.22(C), which states as follows:

> (C) The chief shall adopt rules regarding storage, recycling, treatment, processing, and disposal of brine and other waste substances. *The rules shall establish procedures and requirements in accordance with which a person shall apply for a permit or order* for the storage, recycling, treatment, processing, or disposal of brine and other waste substances that are not subject to a permit issued under section 1509.06 or 1509.21 of the Revised Code and in accordance with which the chief may issue such a permit or order. An application for such a permit shall be accompanied by a nonrefundable fee of two thousand five hundred dollars. (Emphasis supplied).

As the highlighted wording reveals, promulgation of rules pursuant to O.R.C. Chapter 119 is required by explicit statutory language and as such is a nondiscretionary public duty that can be enforced via mandamus, which lies to compel the performance of duties that are ministerial in nature and do not require the exercise of official judgment and discretion. *State ex rel. Armstrong v. Davey,* 130 Ohio St. 160, 163.

The writ of mandamus is an extraordinary remedy that arose historically to deal with situations where courts were left to review agency action and place limits on the exercise of discretion to ensure that discretion were not exercised arbitrarily, or abused, by a regulatory agency. O.R.C. § 2731.02 states that "The writ of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas and shall be issued by the clerk of the court in which the application is made."

Moreover, the power to issue writs of mandamus has not been confided to the Oil and Gas Commission, but only to the courts of Ohio. While the statutory avenue of appealing issuances of Chief's Orders under O.R.C. § 1509.36 to the Ohio Oil & Gas Commission exists, the Oil & Gas

Commission does not have the power to declare ODNR in violation of an explicit statutory mandate to promulgate rules, nor to order as a remedy that Chapter 119 rule promulgation take place. Relators have no other adequate remedy at law.

B. There Is A Legal Duty To Promulgate Regulations

According to O.R.C. § 1501.01(A), the Director of Natural Resources (A) "shall formulate and institute all the policies and programs of the department of natural resources" except where otherwise provided. Even if Chief Simmers is the sole responsible person under O.R.C. § 1509.22(C) for the promulgation of regulations governing oil and gas waste disposal facilities, he may not enter into any . . . agreement, or understanding unless it is approved by the director." By O.R.C. § 121.03(L), Respondent Governor Kasich appointed Respondent Director Zehringer as Director of the Ohio Department of Natural Resources, and Zehringer holds his office during the term of Governor Kasich and is subject to removal at the pleasure of the governor.

C. Mandamus Suffices To Require Performance

Mandamus will lie to compel the performance of duties that are ministerial in nature and do not require the exercise of official judgment and discretion. *State ex rel. Armstrong v. Davey*, 130 Ohio St. 160, 163 (1935). The writ of mandamus is an extraordinary remedy that arose historically to deal with situations where it is left to a court to review agency action and place limits on the exercise of discretion to ensure that discretion is not exercised arbitrarily, or abused, by a regulatory agency.

D. The Statutory Scheme For Chief's Orders According To The General Assembly

By O.R.C. § 1509.22(C), the Ohio General Assembly required the ODNR to adopt rules "regarding storage, recycling, treatment, processing, and disposal of brine and other waste substances." Subsection C requires that "The chief ***shall adopt*** rules regarding storage, recycling, treatment, processing, and disposal of brine and other waste substances . . . ." And those rules "***shall establish*** procedures and requirements in accordance with which a person shall apply for a permit or order for the storage, recycling, treatment, processing, or disposal of brine and other waste

substances that are not subject to a permit issued under section 1509.06 or 1509.21 of the Revised Code and in accordance with which the chief may issue such a permit or order." (Emphasis added).

So before ODNR may consider facility applications under O.R.C. § 1509.22(C), ODNR first must promulgate and publish rules which delineate the permit types, establish how one may apply, specify the informational detail required for a considered decision, and other standards governing the decision to issue or deny a request for a Chief's Order. These rules must be promulgated according to Ohio's Administrative Procedure Act: O.R.C. § 1509.03(A) requires that "(t)he chief of the division of oil and gas resources management shall adopt, rescind, and amend, in accordance with Chapter 119. of the Revised Code, rules for the administration, implementation, and enforcement of this chapter."

No rules have been promulgated pursuant to the mandates of O.R.C. § 1509.22(C) under O.R.C. Chapter 119. Relators request that the Court take judicial notice of the absence of regulations. Morever, the Court can consider the Respondents' clear admission that no rules have been

promulgated. *See* pp. 25-26 of the "Motion to Dismiss of Respondents," where they threaten to continue to refuse to enforce O.R.C. § 1509.22(C):

> To the contrary, the relief that Relators seek leaves open the possibility that rules could be passed that allow the two waste substance facilities near their members (or the twenty-one other facilities currently operating) to continue operating just as they do now or in another manner the named members would deem equally concerning.

Within this none-to-subtle threat, the Court should note the judicial admission that no rules exist. The statutory authority for Chief's Orders in unambiguous in requiring that Ohio Administrative Code regulations be formulated before the Department of Natural Resources may entertain requests to permit fracking waste facilities.

The issuance of Chief's Orders without promulgated rules means that there is presently no legislative direction over the approval of oil and gas waste handling and treatment facilities, and further, that the ODNR is acting *ultra vires* the legislative authorization it was given. Chief's Orders are being issued *ad hoc* and without public protection and without the benefit of properly promulgated rules.

The two Chief's Order exemplars which Relators have attached to their Verified Complaint, Exhibits E and F, amount to boilerplate permits to operate which neither control nor limit the operations or management of the oil and gas waste facilities they purport to regulate. The orders do not even require the IWC/Ground Tech and EnerGreen 360 waste facilities to operate consistently with the process descriptions described in their applications to ODNR for orders. These two Chief's Orders do not contemplate continuing ODNR oversight of any kind, nor do they empower ODNR representatives to venture onto facility property to investigate compliance; no regulations allowing such have been promulgated. There are no means of establishing what inspection or verification protocols might be needed, nor what records must be kept to ensure that there isn't illegal dumping or unverified disposal of drilling wastes. These Chief's Orders are viewed as the sole and exclusive permit required under state law for oil and gas drilling waste facilities, yet they are being issued entirely beyond the reach of statutory control.

The present methods of approval and issuance by the ODNR of

Chief's Orders are unlawful and unreasonable, because Chief Simmers has failed to consistently incorporate restrictions for the protection of the public health and the environment by means of the permits. ODNR's dereliction violates requirements of Ohio law which prohibit administrative agencies from acting in an arbitrary and capricious manner. Chief Simmers has unlawfully and unreasonably approved the orders by utilizing general, but unknown and unspecified, standards for approval that amount to *ad hoc* "rules." Chief Simmers calls Exhibits E and F "temporary approvals," yet they are open-ended and do not specify a date when the open authority of the order would terminate in the event that the Chief does not adopt any regulations governing fracking waste management facilities. Without any but *ad hoc* regulatory criteria, the Chief cannot reasonably and lawfully conclude that the facilities he is allowing to operate will not cause adverse effects to public health and safety by contamination of water and air in the vicinity of the approved facilities.

The Chief acted unlawfully and unreasonably in issuing the orders contained in Exhibits E and F because he failed to include in them any

enforceable requirements for the operation of the facilities covered, and omitted to control the final waste products of the treatment processes used by IWC/Ground Tech and EnerGreen 360. As a result, ODNR is enabling the unregulated contamination of the environment, and endangerment of human health.

E. Unambiguous Statutory Language Must Be Enforced

The cited language of O.R.C. § 1509.2(C) is unambiguous and explicit. When interpreting statutes, the court's primary concern is to give effect to legislative intent. *Griga v. DiBenedetto*, 1st Dist. No. C-120300, 2012-Ohio-6097, ¶ 10. The legislature "will not be presumed to have intended to enact a law producing unreasonable or absurd consequences." *State v. Steele*, 1st Dist. No. C-100637, 2011-Ohio-5479, ¶ 13, quoting *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 92 N.E.2d 390 (1950), syll. ¶ 1. In the absence of statutory ambiguity, the court may not resort to rules of statutory interpretation. *See State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 186, 2000 Ohio 294, 724 N.E.2d 771 (2000) (no need to apply interpretive rules to unambiguous statutory

language); *State v. Krutz*, 28 Ohio St.3d 36, 37-38, 28 Ohio B. 96, 502 N.E.2d 210 (1986) (*in pari materia* rule applies only when a statute is ambiguous or the significance of its terms is doubtful).

There being no ambiguity to the statute under scrutiny in this suit, the Court is free, indeed, required, to enforce it as worded.

F. Obligatory Language Respecting Rule Formulation Must Be Followed

This is not the first time that an agency's activities have been curtailed because a court has found that administrative regulations were not promulgated. In *State ex rel. United Auto Aerospace & Agricultural Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 768 N.E.2d 1129, 95 Ohio St.3d 408, 2002-Ohio-2491 (2002) ("*UAW*"), the Ohio Supreme Court ruled that, "In the absence of a rule promulgated pursuant to the procedures set forth in R.C. Chapter 4123, the Administrator of Workers' Compensation is without authority to refund or reduce premiums pursuant to R.C. 4123.32(A)." Syll. The *UAW* Court noted that obligatory language in O.R.C. §4123.32 must be enforced. Section 4123.32 provided:

> The administrator of workerss' compensation, with the advice and consent of the workers' compensation oversight commission, *shall adopt rules* with respect to the collection, maintenance, and disbursements of the state insurance fund including all of the following:
>
> (A) a rule providing that in the event there is developed as of any given rate revision date a surplus of earned premium over all losses which, in the judgment of the administrator, is larger than is necessary adequately to safeguard the solvency of the fund, the administrator may return such excess surplus to the subscriber to the fund in either the form of cash refunds or a reduction of future premiums. (Emphasis added.)

Id., ¶¶ 8-9. While holding that the reduction of a premium which had not yet accrued could not possibly be a "future premium," the Court held that there were "additional grounds for granting the writ of mandamus." ¶ 11. Specifically:

> As noted, the magistrate for the court of appeals found that in reducing the premiums without first promulgating a rule allowing him to do so, the administrator exceeded his authority. R.C. 4123.32 provides that the administrator of the BWC "shall adopt rules" providing for the refund or reduction of premiums from the state insurance fund. It is undisputed that prior to March 11, 1999, the administrator had not adopted such rules. The authority to refund and/or reduce premiums granted by R.C. 4123.32(A) is not excepted from compliance with the administrative rulemaking procedures of R.C. Chapter 119. R.C. 119.01(A). The purpose of the administrative rulemaking process provided for by R.C. Chapter 119 is "to permit a full and fair analysis of the impact and validity of a proposed rule."

> *Condee v. Lindley* (1984), 12 Ohio St.3d 90, 93, 12 OBR 79, 81, 465 N.E.2d 450, 452. *The administrator failed to promulgate rules pursuant to R.C. Chapter 119 in accordance with the mandates of R.C. 4123.32(A) and thereby prevented a full and fair analysis of the impact of the proposed premium reduction credit.* (Emphasis added).

Id. The *UAW* Court further distinguished two of its earlier decisions, *Dressler Coal Corp. v. Call*, 4 Ohio App.3d 81, 85, 4 OBR 161, 166, 446 N.E.2d 785, 789 (1981) (agency permissibly enforced standards with internally developed criteria where previously adopted rules had been enjoined and new rules had not yet been promulgated), and *State ex rel. Hoover Co. v. Mihm*, 76 Ohio St.3d 619, 624, 669 N.E.2d 1130, 1134 (1996) (prior to the adoption of new administrative rules, agency permissibly enforced new statutory requirements regardless of whether the new statute invalidated existing agency rules). The distinction between that precedent and *UAW* was clear to the Court:

> In both *Dressler* and *Hoover*, the agencies had promulgated rules as required by statutory mandates. *In the case at bar, the administrator disregarded the mandates of R.C. 4123.32(A) and did not promulgate rules providing for the premium credit.* In *Hoover*, 76 Ohio St.3d at 624, 669 N.E.2d at 1134, the court noted that the invalidation of an administrative rule does not leave an agency "rudderless" to carry out statutory duties. However, *in the case at*

> *bar, BWC was not left "rudderless" due to the invalidation of an administrative rule, but rather, the administrator simply neglected to promulgate rules mandated by R.C. 4123.32(A).* Thus, we find that the rationale of *Dressler* and *Hoover* does not support appellants' contention that an administrator of a state agency may disregard statutory mandates to promulgate agency rules.
>
> Accordingly, we hold that, *in the absence of a rule promulgated pursuant to the procedures set forth in R.C. Chapter 119*, the Administrator of Workers' Compensation is without authority to refund or reduce premiums pursuant to R.C. 4123.32(A). (Emphasis added).

Id., ¶¶ 13-14.

An essentially identical situation is revealed in the facts of the instant case. The Director of ODNR has disregarded the mandate of O.R.C. § 1509.22(C) and has not promulgated rules which would allow for the issuance of lawful chief's orders. This is not a trivial omission. ODNR has deprived Relators of substantive rights accorded to them by O.R.C. Chapter 119. The ODNR Chief has failed to promulgate rules pursuant to R.C. Chapter 119 in accordance with the mandates of O.R.C. § 1509.22(C) and thereby, ODNR has "prevented a full and fair analysis of the impact"[2] of

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[2] *State ex rel. United Auto Aerospace & Agricultural Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 2002-Ohio-2491, ¶ 11.

rules which would govern the issuance, content and enforcement of Chief's Orders. Perhaps rulemaking might cure one remarkable failing of the current *ad hoc* approach: nothing presently requires Chief's Orders even to hold the waste treatment and disposal firms to perform the process and other activities they describe in their application papers.

IV. CONCLUSION: A PEREMPTORY WRIT OF MANDAMUS SHOULD ISSUE

The ODNR's issuance of Chief's Orders *ultra vires* the requirements of statute comprises a continuing abuse of discretion that must be corrected by a specific mandate from the Court. That mandate must vindicate the rights of Relators and halt ODNR's serial, ongoing abuses of discretion.

Pursuant to O.R.C. § 2731.06, "[w]hen the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance, may allow a peremptory mandamus." A peremptory writ is granted when the pertinent facts are uncontroverted and it appears beyond doubt that the relator is entitled to the requested relief. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118

Ohio St.3d 368, 2008-Ohio-2637, ¶ 14.

In determining the substance of the writ, a court must scrutinize pleadings in order to determine whether the pleadings in an action filed by a party requesting mandamus as a remedy are consistent with the form and the substance of the relief sought. *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 132, 568 N.E.2d 1206 (1991). A writ of mandamus compels action or commands performance of a duty; a decree of injunction restrains or forbids a performance of a specific act. *State ex rel. Smith v. Indus. Comm*., 139 Ohio St. 303, 22 O.O. 349, 39 N.E.2d 838, syll. ¶ 2 (1942).

Here, the Relators seek to compel performance of a duty. The first sentence of the prayer of their Complaint states:

> WHEREFORE, Relators pray the Court issue a writ of mandamus pursuant to R.C. Chapter 2731 which requires Respondents to comply with the requirements of statute and to promulgate formal regulatory requirements as an obligatory prerequisite to the consideration and issuance of Chief's Orders.

There is no other remedy at law which will provide the relief being sought by Relators. They are entitled to a writ of mandamus to compel the ODNR

to comply with O.R.C. §§ 1509.03(A), 1509.22(C) and Chapter 119.

WHEREFORE, Relators pray the Court find that the material facts are undisputed and that as a matter of law they are entitled to a summary judgment. They further pray that the Court's rendition of summary judgment serve as the basis for issuance of a peremptory writ of mandamus requiring the Ohio Department of Natural Resources to commence promulgation of regulations governing the issuance of Chief's Orders, as obligated by O.R.C. § 1509.22(C).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically and served upon the following parties electronically, according to the electronic case filing protocols of the Court on this 27th day of February, 2015: Bridget C. Coontz, Esq. Ryan L. Richardson, Esq., Sarah E. Pierce, Esqs., Brett A. Kravitz, Esq., Daniel J. Martin, Esq., Assistant Attorneys General,

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