

6th Circuit Sends EPA Rule Cut Back For Reconsideration

By Tom Lotshaw

Law360 (February 10, 2023, 11:05 PM EST) -- A Sixth Circuit panel ordered the U.S. Environmental Protection Agency to reevaluate its removal of a nearly 50-year-old air nuisance rule environmental groups say is an important tool for Ohio communities to fight pollution, in a dispute Perkins Coie LLP apparently sparked with outreach to the agency.

The EPA had asked the Sixth Circuit to send its decision back to it for **additional review**, and a three-judge panel agreed to do that on Friday.

The Sierra Club, Ohio Environmental Council and Ohio residents Donna Ballinger and Marilyn Wall challenged the EPA's action, which was undertaken through an error-correction provision of the Clean Air Act.

Sierra Club attorney Megan Wachspress said she hopes the EPA will now recognize the rule's importance in improving air quality and protecting fence line communities.

"We urge the EPA to act quickly to reinstate the rule," Wachspress said, "so Ohioans like Donna Ballinger can address the ongoing harms of air pollution in their communities."

According to the panel, the rule had been in place since 1974 as part of Ohio's state implementation plan for national ambient air quality standards, or NAAQS. It made unlawful the emissions of various substances that endanger health, safety or welfare or cause unreasonable injury or property damage.

The panel noted the EPA proposed to remove the rule in March 2020, shortly after meeting and corresponding with Perkins Coie, which had asked a regional EPA administrator to "correct an error" in Ohio's state implementation plan by removing the rule.

The firm claimed the rule was not sufficiently related to the attainment or maintenance of NAAQS to be part of Ohio's state implementation plan, according to the panel, and that the error was harmful to business.

Perkins Coie was providing services to SunCoke Energy in connection with a securities offering at the time, the panel said. And SunCoke Energy was facing a pending citizen suit claiming its facility had violated the air nuisance rule.

In proposing to remove the rule, the EPA said it found no information indicating the state had relied on or ever intended to rely on the rule for the attainment or maintenance of NAAQS, according to the panel, and referenced an Ohio EPA email confirming that. The EPA approved the rule's removal in November 2020, after it had received more than 1,800

comments opposing its proposed action, according to the panel.

Less than a day before oral arguments in the case last October, Wachspress said the Ohio EPA disclosed it had, in fact, brought a lawsuit against a facility in 2021 for violating the air nuisance rule, pointing to its exceedance of lead standards.

"We really think on remand the EPA has to take this back and say, 'We were wrong, we got bad information from Ohio EPA, the decision-making process may have been influenced by industry lobbying and people like Donna Ballinger and Marilyn Wall should have a right to protect themselves,'" Wachspress said.

Wachspress also said the rule is a powerful gap-filling measure for Ohio residents who are facing pollution issues from neighboring facilities. "Even Ohio EPA has used it in this way," she said.

D. David Altman, an attorney who represented Ballinger and Wall, told Law360 on Friday that he also represented the Portsmouth area families who were using the air nuisance rule to sue SunCoke Energy over its emissions.

Altman described the whole situation as "outrageous."

"For about 50 years, this was a tool that Ohio citizens had and used, and we used it on behalf of a lot of them," Altman said of the air nuisance rule. "It needs to be returned, and the faster that can happen the better. That tool is now missing for the people who need it most."

The panel declined to vacate the EPA's decision to remove the rule, however, noting the agency's promise to reevaluate its decision within 12 months.

"Specifically, the EPA seeks to reevaluate whether the error-correction provision was the most appropriate way to remove the ANR from Ohio's SIP, whether the EPA should have conducted the fuller analysis required when a state seeks to modify its SIP, and whether Ohio's disclosure of a 2021 lawsuit against an iron and steel manufacturer for violating the ANR affects the claimed basis for the EPA's action," the panel said in its opinion.

U.S. Circuit Judges Richard Allen Griffin, Julia Smith Gibbons and Jane Branstetter Stranch sat on the panel for the Sixth Circuit.

Representatives for EPA, Ohio EPA, Perkins Coie and SunCoke Energy did not immediately respond to requests for comment on Friday.

The Sierra Club and Ohio Environmental Council are represented by Megan Wachspress of the Sierra Club.

Marilyn Wall and Donna Ballinger are represented by D. David Altman, Justin D. Newman and Amy J. Leonard of Altman Newman Co. LPA.

The EPA is represented by Todd Kim and Elliot Higgins of the U.S. Department of Justice Environment and Natural Resources Division.

The case is Sierra Club et al. v. EPA et al., case number 21-3057, in the U.S. Court of Appeals for the Sixth Circuit.