Un-Clearing the Air: The Effects of Environmental Deregulation

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Who is behind regulatory decisions on how businesses operate safely with regard to environmental and human health? What happens when businesses get to write the rules of engagement with the world around them? How can citizens protect themselves and obtain relief after a corporation's pollution negatively impacts their lives? After the Norfolk Southern train derailment in East Palestine, Ohio, many citizens are rightfully concerned about how the state and federal government could allow such dangerous chemicals to be transported on such unsafe infrastructure with so few safeguards in a populated area.[1] *Sierra Club v. EPA* demonstrates how lobbying efforts by some corporations contribute to environmental deregulation across Republican- and Democrat-led administrations and how such efforts strive to deny citizens a voice when pollution threatens to hurt their health or livelihood.

I. BACKGROUND AND PROCEDURAL HISTORY

Under the Clean Air Act, the Environmental Protection Agency (EPA) has authority to establish national ambient air quality standards (NAAQS), and each state is required to develop a State Implementation Plan (SIP) for EPA review in accordance with those standards.[2] In November 2020, the EPA removed an Air Nuisance Rule (ANR) from Ohio's SIP which, since 1974, prohibited the emission of "smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances . . . [which would] endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property."[3] Notably, the removal process for the nearly fifty-year-old ANR was initiated after tenacious advocacy from Perkins Coie, a law firm representing an energy company called SunCoke Energy.[4] A citizen suit against SunCoke claiming that the company had violated the ANR was pending in the Southern District of Ohio at the time the removal process was initiated.[5]

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[1] Nicki Brown, Artemis Moshtaghian & Travis Caldwell, *East Palestine Survey Reveals Residents Experienced Headaches and Anxiety After Train Derailment*, CNN, https://www.cnn.com/2023/03/03/us/ohio-train-derailment-east-palestine-friday/index.html [https://perma.cc/DDP7-3Q5B] (Mar. 4, 2023).

[2] Sierra Club v. EPA, 60 F.4th 1008, 1012 (6th Cir. 2023).

[3] *Id.* at 1013 (quoting OHIO ADMIN. CODE 3745–15–07(A) (2015)).

[4] *Id.* at 1014.

[5] *Id.* at 1014–15.

The Sierra Club, the Ohio Environmental Council, and two citizens promptly petitioned for review of the ANR removal.[6] In its review, the court focused its analysis on whether to grant a request for a voluntary remand to the EPA and whether to vacate the ANR removal while the agency reconsiders its decision.[7] The discussion below will focus on the analysis of the vacatur question as well as recent effects of environmental deregulation in the Sixth Circuit.

II. TO VACATE OR NOT TO VACATE?

The court's analysis of whether to remand to the agency is short, as both the EPA and petitioners agreed that such a remand is appropriate.[8] The Sixth Circuit noted the broad discretion given to judges to grant agency requests for remand, which allows the courts to conserve judicial resources while the agency reconsiders or modifies the decision at the heart of the legal claim.[9] The review must be completed within a reasonable time;[10] in this case, the EPA intends to complete the remand within twelve months.[11]

While both parties agreed that a remand was appropriate, they disagreed on whether to vacate the removal of the ANR during the twelve-month remand.[12] The Sixth Circuit noted that it is unclear whether the court may vacate the agency's action "without first finding it invalid on the merits."[13] Ultimately, the court decided to follow case law from the D.C. Circuit Court, since the D.C. Circuit frequently rules on litigation concerning federal agencies.[14] The D.C. Circuit has established two factors for determining whether vacatur is appropriate: (1) the "seriousness of the error" and (2) the "disruptive consequences" that would occur upon vacating the rule.[15]

The Sixth Circuit found that the first factor, which depends on the agency's potential to justify its decision or correct its error on remand, advises against vacating the ANR removal.[16] The court reasoned that if the EPA is likely to offer a better justification or comply with procedural rules to achieve ANR removal, it makes less sense to vacate the action.[17]

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[6] *Id.* at 1012.

[7] *Id*. at 1019–22.

[8] *Sierra Club*, 60 F.4th at 1021.

[9] *Id.*

[10] Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta, 375 F.3d 412, 417–18 (6th Cir. 2004).

[11] *Sierra Club*, 60 F.4th at 1020.

[12] *See id.* at 1020–23.

[13] *Id.* at 1021.

[14] *Id.* at 1022.

[15] *See* Long Island Power Auth. v. Fed. Energy Regul. Comm'n, 27 F.4th 705, 717 (D.C. Cir. 2022).

[16] *Sierra Club*, 60 F.4th at 1022 (citing Heartland Reg'l Med. Ctr. v. Sebelius, 556 F.3d 193, 197 (D.C. Cir. 2009)).

[17] *Id.* at 1022–23.

However, the court determined that the second factor weighs in favor of vacatur: since the ANR had been in place since 1974 and such a rule is familiar to all parties, vacating the agency removal of the rule would not result in disruptive consequences.[18] The Sixth Circuit also noted that petitioners might be prejudiced by waiting to seek relief for violations of the rule, while the EPA's arguments about regulatory uncertainty following vacatur were unpersuasive.[19]

Balancing these two factors, the Sixth Circuit determined that vacating the EPA's action was not appropriate.[20] This ruling was influenced by the EPA's promise to review the action within twelve months, thereby temporally limiting citizens' inability to seek relief under the ANR.[21] We are left with a promise from a federal agency to review their own decision expeditiously and a group of petitioners unable to bring claims under a rule that had been in place for nearly half a century.[22]

III. THE PROCESS OF DEREGULATION

First, it is necessary to highlight the circumstances in which the ANR removal occurred. Perkins Coie, the law firm that began to advocate for removal of the ANR in 2019, did so while representing a company called SunCoke Energy.[23] In Ohio and other states throughout the Midwest, SunCoke operates plants that makes a product called coke, which is core ingredient in blast furnace steel production.[24] Unfortunately for residents who live close to SunCoke-operated plants in Ohio, air emissions from the plants which cause adverse health effects increased in the mid-to-late 2010s at such a rate that four residents sued SunCoke in federal court for a violation of the ANR in 2017.[25] Against the backdrop of that lawsuit and a securities offering for SunCoke worth potentially $750 million, Perkins Coie lawyers began writing letters to the EPA stating that the nearly fifty-year-old ANR, which had been reaffirmed multiple times since 1974 and used in numerous civilian lawsuits, was simply "an error that has had the unintended consequence of harming businesses in Ohio."[26] More letters and

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[18] *Id.* at 1023.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *See Sierra Club*, 60 F.4th at 1023.
[23] *Id.* at 1014.
[24] *Coke Business*, SUNCOKE ENERGY, https://www.suncoke.com/English/our-business/coke-business/default.aspx [https://perma.cc/CH9N-PYPW].
[25] *TRI Toxics Tracker: Facility Summary For Haverhill Coke Co. LLC*, EPA https://subscriber.politicopro.com/eenews/f/eenews/?id=0000017f-97e2-d137-abff-f7e21aee0000 [https://perma.cc/K3UN-QMVU]; Complaint at 14–18, Sampson v. Haverhill Coke Co., LLC, No. 1:17-cv-00658-MRB (S.D. Ohio 2017).
[26] Sean Reilly, *Industry Pressured EPA to Scrap Key Ohio Air Quality Rule*, E&E NEWS (Mar. 17, 2022), https://www.eenews.net/articles/industry-pressured-epa-to-scrap-key-ohio-air-quality-rule/ [https://perma.cc/CN34-LJDG].

meetings between the EPA and Perkins Coie followed, which ultimately resulted in the ANR removal at issue in this case.[27]

The removal of the ANR came at a time when environmental deregulation reached a fever pitch during the Trump administration.[28] Under the Trump administration, the EPA made major revisions to air quality standards requiring power plants to reduce mercury and toxic pollutants, revoked an act making it unlawful to pollute a navigable waterway without a permit, reversed a ban on a food pesticide that impairs child brain development, and successfully rolled back a number of other environmental protections too numerous to list here.[29] Since it appears that the federal government is continuing to defend the EPA's decision to remove Ohio's ANR in *Sierra Club*, it seems that the EPA under the Biden administration is continuing this trend.

IV. CONCLUSION

We need more, rather than fewer, environmental regulations in Ohio. The current set of regulations is failing Ohioans in unprecedented ways. One recent example of this is the Norfolk Southern train derailment that happened in East Palestine, Ohio in February 2023.[30] Instead of focusing on Norfolk Southern, a company that has lobbied heavily against environmental and safety regulations, figures in both political parties began pointing fingers at each other while offering no solutions and little governmental help for residents—Republicans began faulting Democrats for not visiting East Palestine in the aftermath of the disaster, while Democrats began faulting the Trump administration for rescinding rules that likely would not have affected the train in the first place.[31]

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[27] *Id.*

[28] *See* Cayli Baker, *The Trump Administration's Major Environmental Deregulations*, BROOKINGS (Dec. 15, 2020), https://www.brookings.edu/blog/up-front/2020/12/15/the-trump-administrations-major-environmental-deregulations/ [https://perma.cc/HK27-JAWX].

[29] *Id.*

[30] John Seewer, *Ohio Sues Norfolk Southern over Toxic Train Derailment*, ASSOCIATED PRESS (Mar. 14, 2023), https://apnews.com/article/ohio-train-derailment-lawsuit-norfolk-southern-07a9727b4cdf8f6758a7d834431a38c1 [https://perma.cc/ULK3-72VF].

[31] *See* Jamie Ostroff, *Norfolk Southern Doles out Millions of Dollars in Lobbying Efforts*, NBC4I (Mar. 9, 2023), https://www.nbc4i.com/news/investigates/norfolk-southern-doles-out-millions-of-dollars-in-lobbying-efforts/ [https://perma.cc/9KJ8-SCU6]; Emily Brooks & Rachel Frazin, *Finger-Pointing Flies from Lawmakers over Ohio Train Derailment and Spill*, KTSM.COM (Feb. 17, 2023), https://www.ktsm.com/hill-politics/finger-pointing-flies-from-lawmakers-over-ohio-train-derailment-and-spill/ [https://perma.cc/MG5T-EFFG]; James Bickerton, *Is Donald Trump To Blame for Ohio Train Derailment?*, NEWSWEEK (Feb. 14, 2023), https://www.newsweek.com/donald-trump-blame-ohio-train-derailment-1781163 [https://perma.cc/3XSE-SXLW]; D'Angelo Gore, *NTSB Chair Contradicts Posts That Wrongly Claim Trump to Blame for Ohio Train Wreck*, FACTCHECK.ORG (Feb. 28, 2023), https://www.factcheck.org/2023/02/ntsb-chair-contradicts-posts-that-wrongly-claim-trump-to-blame-for-ohio-train-wreck/ [https://perma.cc/LN6U-MVWC].

Once the dust settled, most politicians rightly pinned the blame on Norfolk Southern, a company with immense profits that fails to upgrade and maintain its infrastructure while actively lobbying against government oversight.[32] While the EPA ordered Norfolk Southern to clean up and dispose of hazardous materials, the accident could have been avoided in the first place by requiring rail companies to maintain and ensure safety of the proprietary rail infrastructure.[33] Politicians and regulators of both parties should be doing more to not just hold bad actors accountable, but to regulate corporations proactively so as to prevent avoidable environmental disasters even if such regulations might cut into Norfolk Southern's ability to put billions of dollars into stock buybacks or SunCoke's ability to emit harmful chemicals in the air.[34] It appears that bipartisan rail safety legislation is in the works—yet even President Biden says that "we need to do even more."[35]

For Ohioans who have high hopes for a future in this state, the federal government's capricious removal of a rule designed to give civilians a legal remedy for injuries suffered by polluting corporations hurts. Hopefully the EPA will reinstate Ohio's ANR and, in the future, Congress and federal agencies will provide better regulatory safeguards to prevent environmental disasters.

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[32] *See* Ostroff, *supra* note 31; Dave "Dino" DeNatale, *President Biden on Norfolk Southern Derailment Responsibility in East Palestine: 'This Is Their Mess. They Should Clean It Up.'*, WKYC (Feb. 21, 2023), https://www.wkyc.com/article/news/special-reports/train-derailment/president-biden-norfolk-southern-train-derailment-responsibility-east-palestine/95-4ae9cd02-4f0f-4683-a2d8-6e51a0e7bc60 [https://perma.cc/5Z8T-DBFE].

[33] DeNatale, *supra* note 32.

[34] *See* Chris Isodore, *Norfolk Southern Is Paying $6.5 Million to Derailment Victims. Meanwhile, It's Shelling Out $7.5 Billion for Shareholders*, CNN BUS. (Feb. 22, 2023), https://www.cnn.com/2023/02/22/investing/norfolk-southern-share-repurchases/index.html [https://perma.cc/4TGS-9DH4].

[35] Press Release, Statement from President Joe Biden on the Bipartisan Railway Safety Act of 2023, The White House (Mar. 2, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/02/statement-from-president-joe-biden-on-the-bipartisan-railway-safety-act-of-2023/ [https://perma.cc/Q29Y-C9QM].