

The History of Ohio's Air Nuisance Rule:

Our Safety Net Against Air Pollution

1970 Clean Air Act (CAA) Amendments

- ▶ USEPA must promulgate National Ambient Air Quality Standards (NAAQS)
 - ▶ NAAQS established for 6 “criteria pollutants” - ozone, particulate matter, carbon monoxide, lead, sulfur dioxide, and nitrogen dioxide
- ▶ States must submit State Implementation Plans (SIPs) - a collection of “enforceable emission limitations and other control measures, means, or techniques” to:
 - ▶ Implement, maintain, and enforce NAAQS
 - ▶ Meet the applicable requirements of the CAA

1970 CAA Amendments

- ▶ USEPA must approve “a State’s choices of emission limitations if they are part of a plan which satisfies the [CAA] standards . . . so long as the ultimate effect of a State’s choice of emission limitations is compliance with the [NAAQS], [because] the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.” *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975) (emphasis added).

All laws and regulations in a SIP are enforceable by citizens in federal court

- ▶ The CAA's citizen suit provision allows “any person” to bring a civil action against “any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of,” *inter alia*, any “standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator.” 42 USC § 7604.

All laws and regulations in a SIP are enforceable by citizens in federal court

- ▶ Congress gave federal district courts jurisdiction to hear citizen suits, “without regard to the amount in controversy or the citizenship of the parties, to enforce [SIP provisions] and to apply any appropriate civil penalties.” 42 USC § 7604.
- ▶ CAA citizen suits are meant to “increase enforcement of public law when the government lacks the resources or will to handle the entire task.” *Sierra Club v. United States EPA*, 60 F.4th 1008, 1018 (6th Cir. 2023).

Ohio's Air Nuisance Rule (ANR)

- ▶ “The emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.”
 - ▶ OAC 3745-15-07(A)

The ANR was part of the SIP from the beginning

- ▶ Ohio deliberately included the ANR in Ohio's first SIP submittal, which USEPA approved in 1974. 39 Fed. Reg. 13,539.

The ANR was part of the SIP from the beginning

- ▶ The ANR was revised and USEPA re-approved it as part of the SIP in 1984. 49 Fed. Reg. 32,181.
- ▶ Stylistic changes were made in 2015 and Ohio EPA rejected industry calls to remove the ANR from the SIP at that time.

The ANR is a safety net

- ▶ NAAQS monitors - too few and too far away
- ▶ NAAQS inadequate - based on years of data averaged over large areas
 - ▶ ANR fills the gap
- ▶ NAAQS limit 6 criteria pollutants - the ANR limits those and more
- ▶ Ohio EPA does not enforce the ANR

History of citizen enforcement

- ▶ *Duren v. Worthington Custom Plastics*
- ▶ *Hertzler v. Vernay Laboratories, Inc.*
- ▶ *Booth v. Georgia-Pacific Corp.*
- ▶ *Arnett and Environmental Community Organization v. Willard Industries, Inc.*
- ▶ *Fisher v. Perma-Fix of Dayton, Inc.*
- ▶ *Graffs and Maddoxes v. Haverhill North Coke Company*
- ▶ *Sampsons and Gannons v. SunCoke Energy, Inc.*
- ▶ *Ballinger and Sierra Club v. AK Steel - Middletown Works*
- ▶ *State of Ohio and City of St. Bernard v. Phthalchem, Inc.*

Lines of evidence to prove an air nuisance

- ▶ Photos
- ▶ Videos
- ▶ Journals
 - ▶ Contemporaneous
 - ▶ Specific and detailed
- ▶ Formal reports to OEPA
- ▶ Citizen science, e.g. air monitoring
- ▶ Experts
 - ▶ Must meet the “*Daubert* standard” for relevance and reliability

The ANR also has deterrent value

- ▶ “Petitioners have pointed to multiple instances where they used the ANR for NAAQS enforcement even when not in active litigation. These uses of the ANR include sending notices of intent to sue that have resulted in facility modifications and consent decrees, and submitting comments in response to proposed EPA action in Ohio.” *Sierra Club v. United States EPA*, 60 F.4th 1008, 1018 (6th Cir. 2023).

History of efforts to dismantle the ANR

- ▶ 1990s - Ohio EPA proposed removal resulting in broad and deep ANR support.
- ▶ 2015 - Industry publicly renews request for ANR removal; Ohio EPA rejects.
- ▶ 2020 - Industry lawyers meet secretly with USEPA and give playbook for removal advocating illegal use of USEPA's "error correction" authority.
- ▶ Despite this improper use of error correction, ANR was removed in 2020.

The Return of the ANR

- ▶ Sierra Club, Ohio Environmental Council, Donna Ballinger and Marilyn Wall petition for review and prevail. *Sierra Club v. United States EPA*, 60 F.4th 1008 (6th Cir. 2023).
- ▶ USEPA reinstates the ANR, effective Feb. 2025, admitting the removal was improper under the CAA.

History of efforts to dismantle the ANR

- ▶ 2025 - Ohio EPA ordered by General Assembly to remove the ANR.
- ▶ The legality of this new removal effort is being litigated on multiple fronts, including the lawsuit *Ohio Environmental Council, et al., v. Ohio*.

CAA dictates and limits changes to SIPs

- ▶ 42 U.S.C. § 7410(k)(6), the “error correction” provision, allows USEPA to revise a state's SIP if USEPA determines that its prior approval of a SIP “was in error.”
- ▶ USEPA may then, “in the same manner” as its prior approval, revise the SIP “as appropriate without requiring any further submission from the State.”
- ▶ “The claimed error can be used to revise a SIP only if the error existed at the time of the SIP's prior approval.” *Sierra Club v. United States EPA*, 60 F.4th 1008, 1013 (6th Cir. 2023).
- ▶ The EPA must provide the basis for its determination to the state and public.

CAA dictates and limits changes to SIPs

- ▶ 42 U.S.C. § 7410(l) allows a state to modify its SIP with “reasonable notice and public hearing.”
- ▶ The state then submits the proposed revisions for approval.
- ▶ USEPA will approve if it ensures the revision will not interfere with “any applicable requirement concerning attainment and reasonable further progress.”
 - ▶ Not interfere with other applicable CAA requirements:
 - ▶ Anti-backsliding
 - ▶ Prevention of significant deterioration of air quality and visibility protection
 - ▶ Not interfere with attainment, maintenance, and enforcement of NAAQS

ANR cause of action unique

- ▶ The ANR is enforced in federal court
 - ▶ Violations of the ANR are violations of the Clean Air Act
 - ▶ Civil penalties
 - ▶ Injunctive relief for the benefit of the public
 - ▶ Recovery of attorneys' fees if you substantially prevail
 - ▶ No damages
- ▶ State nuisance claims are no substitute
 - ▶ Tort causation proof
 - ▶ No civil penalties
 - ▶ Individual relief

Ohio EPA “enforcement”

- ▶ Respond to citizen pollution reports 2-3 days later
- ▶ Blame pollution on skunks
- ▶ Ask citizens reporting pollution why they don't move
- ▶ Strike deals with polluters that don't end the nuisance
- ▶ Inform polluters days in advance of “surprise” inspections