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**IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT**

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State of Ohio ex rel.)
AEP Ohio, etc. et al.)
)
Relators,)
)
and)
)
Natural Resources Defense Council,)
National Parks Conservation Association,)
Ohio Environmental Council,)
Sierra Club, and SunCoke Watch, Inc.)
)
Intervenor-Relators,)
)
v.)
)
The Ohio Environmental Review)
Appeals Commission, et al.)
)
)
Respondents.)

No. 09AP-839
Regular Calendar

(PROPOSED) COMPLAINT

For their Complaint (“Petition”) for Writ of Mandamus, Intervenor-Relators Natural Resources Defense Council, National Parks Conservation Association, Ohio Environmental Council, Sierra Club, and SunCoke Watch, Inc. (collectively, “Citizen Groups”) plead as follows:

NATURE OF THE ACTION

1. This is an original action in mandamus, pursuant to R.C. Ch. 2731, to compel the respondent Environmental Review Appeals Commission (“ERAC” or “Commission”) to comply with its constitutional and statutory duties to afford the Citizen Groups a meaningful opportunity

to be heard and present evidence in their pending appeals before the Commission. In response to the recent passage by the Ohio General Assembly of House Bill 1, which established tight deadlines for ERAC to decide all appeals pending before it, ERAC has limited de novo hearings in over 300 pending cases to only one hour per appellant. Such schedule leaves each appellant with a maximum of twenty minutes to argue its case and present evidence, as the one hour time is split between the appellant, the Director of Ohio EPA, and the permitted party appellee. Those time limits, along with other restrictions that ERAC has placed on its de novo hearings, deprive the Citizen Groups from being able to adequately develop their arguments and present evidence in the cases identified below and, therefore, represent a clear violation of the rights granted by the due process clauses of the federal and state constitutions. The Citizen Groups have no other adequate remedy at law but through the issuance of the requested writ of mandamus.

JURISDICTION

2. This Court has original jurisdiction pursuant to R.C. 2731.02 and Article IV, Section 3(B)(1)(b) of the Ohio Constitution.

PARTIES

3. The Citizen Groups are public interest, non-profit environmental organizations, each of which has numerous members in Ohio. Combined, the Citizen Groups and their member organizations have nineteen (19) appeals pending before ERAC.

4. NRDC is a national, non-profit, environmental organization with more than 420,000 members nationwide, including 13,853 members in Ohio. NRDC is dedicated to the protection of the environment and public health and, as part of achieving its mission, has actively supported effective enforcement of the Clean Air Act, Clean Water Act, and other environmental

statutes on behalf of its members for over 30 years. NRDC currently has four (4) appeals pending before ERAC. (ERAC Case Nos. 996158, 996243, 996259, and 996266).

5. The National Parks Conservation Association (“NPCA”) is a national non-profit organization that works to protect and enhance America’s National Parks. NPCA has 325,000 members nationwide, including 12,247 members in Ohio. NPCA currently has one (1) appeal pending before ERAC. (ERAC Case No. 996161).

6. The Ohio Environmental Council (“OEC”) is a statewide non-profit environmental organization with 97 member environmental/conservation organizations and 2,842 individual members throughout Ohio. OEC currently has three (3) appeals pending before ERAC (ERAC Case Nos. 255727, 256159, and 256260), and OEC’s member organizations have four (4) appeals pending. (ERAC Case Nos. 256004, 256032, 256033, and 546372).

7. Sierra Club is the nation’s oldest grassroots environmental organization, with approximately 641,000 members nationwide, including approximately 17,500 members in Ohio. Sierra Club’s mission is to explore, enjoy, and protect the wild places of the earth, and to educate and enlist humanity to protect and restore the quality of the natural and human environment. The Sierra Club currently has six (6) appeals pending before ERAC. (ERAC Case Nos. 995633, 996002, 996160, 996244, 996261, and 996267).

8. SunCoke Watch, Inc. is a non-profit organization based in Monroe, Ohio that is dedicated to preserving the environment and health of residents in the areas surrounding metallurgical coke plants. SunCoke Watch has dozens of members and affiliates, and has one (1) appeal pending before ERAC. (ERAC Case No. 296268).

9. Respondent Environmental Review Appeals Commission is an administrative agency established by R.C. 3745.02, and is afforded jurisdiction to hear and determine appeals of

actions of the Director of Environmental Protection and other public officials and agencies.

Actions of the Director include the issuance and denial of applications for permits, the adoption of rules, and issuance of orders.

10. Respondent Director of Environmental Protection is one of the appellees in all of the Citizen Groups' pending ERAC appeals.

**FACTS DEMONSTRATING THAT THE COURT SHOULD ISSUE A WRIT OF
MANDAMUS**

11. Ohio law provides that any person who is "aggrieved or adversely affected" by an action of the Director of the Ohio EPA, R.C. 3745.07, or who was a party to a proceeding before the Director, R.C. 3745.04(B), may appeal the Director's action to ERAC. If the Director did not hold an adjudication hearing regarding the challenged action, ERAC will typically hold a de novo hearing on the appeal. R.C. 3745.05. At the request of a party, the Commission is required to issue subpoenas for witnesses, documents, or records relevant to the proceeding. *Id.* The Commission is required to create a record of all testimony and evidence presented at the hearing, to vacate or modify the Director's action if the evidence shows that it was unlawful or unreasonable, and to affirm the Director's action if the evidence shows that it was lawful and reasonable. *Id.* Appeals from ERAC decisions are to this Court, which is generally "confined to the record as certified to it by the commission" in hearing the appeal. R.C. 3745.06.

12. De novo hearings before the Commission commonly address complicated issues of fact and law, involve the presentation of expert testimony, and routinely require several days or weeks to complete. The Citizen Groups' pending ERAC appeals are of this nature. For example, in ERAC appeal numbers 996158, 256159, 996160, and 996161, in which Citizen Groups' NRDC, OEC, NPCA, and Sierra Club are jointly challenging a Clean Air Act permit

issued by the Director, the parties have identified approximately 30 witnesses, including up to 20 expert witnesses, in order to present evidence regarding more than 50 assignments of error. ERAC had previously scheduled a three-week long hearing in that proceeding, but that hearing has now been replaced by one hour of hearing time for each appellant at a de novo hearing scheduled for December 1, 2009.

13. The Ohio General Assembly recently passed H.B. 1, Ohio's biennial budget bill, which took effect on July 17, 2009. The bill added language to R.C. 3745.05(F) that imposes strict deadlines on the Commission to issue final decisions and orders in all appeals, whether currently pending or to be filed in the future. The amendment reads:

The commission [ERAC] shall issue a written order affirming, vacating, or modifying an action pursuant to the following schedule:

(1) For an appeal that was filed with the commission before April 15, 2008, the commission shall issue a written order not later than December 15, 2009.

(2) For all other appeals that have been filed with the commission as of October 15, 2009, the commission shall issue a written order not later than July 15, 2010.

(3) For an appeal that is filed with the commission after October 15, 2009, the commission shall issue a written order not later than twelve months after the filing of the appeal with the commission.

Am H.B. No. 1. There are no qualifiers to the ERAC deadlines to account for discovery disputes, motion practice, or other procedural delays, or to provide appellants with a full and fair opportunity to present their cases. Additionally, the amendment provides no explanation of what would happen if ERAC does not meet the new review deadline.

14. In reaction to H.B. 1, ERAC has, in each of the Citizen Groups' pending appeals, issued Orders canceling previously scheduled hearings, suspending case management schedules, noting that a one hour de novo hearing would be held in the appeal, and announcing that it would

not rule on any discovery disputes or dispositive motions in the proceedings. For the Citizen Groups' appeals that were filed before April 15, 2008, the ERAC issued Orders that scheduled de novo hearings of one hour per appellant, announced that the Commission would not consider any requests for hearing continuances, and limited pre-hearing briefs to five pages in length. ERAC scheduled approximately 300 such one hour long de novo hearings to occur between September 8, 2009 and December 1, 2009.

15. The Citizen Groups have appeals that fall under the deadlines for pending cases filed before April 15, 2008 and for those filed on or after April 15, 2008. In each such appeal, the Citizen Groups have received or expect to receive one of the Orders described in Paragraph 14 scheduling a one-hour de novo hearing and setting other limits on such hearings. Pursuant to these Orders, the Commission has already scheduled the following one-hour de novo hearings in appeals brought by the Citizen Groups:

NRDC:	Case No. 996158 – Dec. 1, 2009 at 8am
NPCA:	Case No. 996161 – Dec. 1, 2009 at 12:30pm
OEC:	Case No. 255727 – Oct. 19, 2009 at 12:30 pm
	Case No. 256159 – Dec. 1, 2009 at 9:15am
Sierra Club:	Case No. 996002 – Nov. 6, 2009 at 9:15am
	Case No. 996160 – Dec. 1, 2009 at 10:30am

16. This Court and other courts have held that a party has a due process right in a cause of action, *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 102 S. Ct. 1148, 71

L.Ed.2d 265; *In re Cleveland Clinic Found.* (1994), 94 Ohio App.3d 348, 355, 640 N.E.2d 900; *Salazar v. Ohio Civil Rights Comm'n* (1987), 39 Ohio App.3d 26, 29, 528 N.E.2d 1303, such as the right of an aggrieved or adversely affected party to appeal a final action of the Director of the Ohio EPA as provided by R.C. 3745.04(B), 3745.07. In administrative hearings, such as the Citizen Groups' appeals pending before ERAC, the applicable due process protections require providing a party a "fair and open hearing," *Clayman v. State Medical Bd. of Ohio* (1999), 133 Ohio App.3d 122, 126-27, 726 N.E.2d 1098 (Franklin County), at which the party must generally have "the opportunity to submit its own . . . evidence," *LTV Steel Co. v. Industrial Comm'n* (2000), 140 Ohio App.3d 680, 690, 748 N.E.2d 1176 (Franklin County), "at a meaningful time and in a meaningful manner," *Gralewski v. Bureau of Workers' Compensation* (2006), 167 Ohio App.3d 468, 481, 855 N.E.2d 879 (Franklin County). Denial of the ability to present admissible evidence conflicts with such due process requirements. *Gibraltar Mausoleum Corp. v. Cincinnati* (1981), 1 Ohio App.3d 107, 110, 439 N.E.2d 922 (Hamilton County).

17. Given the de novo hearing system of appeals established by state law as the only means for challenging the actions of the Director, the ERAC Orders imposing one hour time limits and other restrictions on those de novo hearings in the Citizen Groups' pending appeals is a plain deprivation of the Citizen Groups' due process rights. A one-hour hearing, with no opportunity to settle discovery disputes, no opportunity to argue important procedural questions and no effective opportunity to present or challenge witnesses and evidence, plainly does not constitute a meaningful opportunity for the Citizen Groups to be heard in the de novo hearings or to develop an adequate record for ERAC or an Appellate Court to decide the appeal. In addition, by requiring ERAC to decide hundreds of pending appeals by the arbitrary deadlines of December 15, 2009 and July 15, 2010, H.B. 1's amendment to R.C. 3745.05(F) is

unconstitutional on its face and as applied because it effectively required ERAC to establish the time limits and other restrictions that violate due process. Such constitutional infirmities are especially problematic given that the Citizen Groups' members will be subjected to health and environmental impacts associated with excessive pollution emissions that are inconsistent with the Clean Air Act and Clean Water Act if the deficiencies in the actions of the Director that are challenged in the Citizen Groups' pending appeals are not rectified.

18. A writ of mandamus is the appropriate tool by which relief can be provided to the Citizen Groups here. A writ may be issued where there is no plain and adequate remedy in the ordinary course of law, and where a respondent has the clear legal right to the requested relief. *State ex rel. Liberty Mills, Inc. v. Locker* (1986), 22 Ohio St.3d 102, 104, 488 N.E.2d 883. Those conditions are plainly met here. Absent mandamus, the Citizen Groups would be limited to presenting only a very small piece of their evidence at a severely truncated hearing, would obtain a flawed final order from the Commission based on an incomplete record, and then would almost certainly have to engage in appeals to this Court in all nineteen of the ERAC proceedings that the various Citizen Groups are appellants in. Such an approach would be highly wasteful for the Citizen Groups, ERAC, and this Court, and is unnecessary given the clear and wholesale deprivation of due process caused by H.B. 1 and the resulting time limits and other restrictions on de novo hearings in pending ERAC appeals.

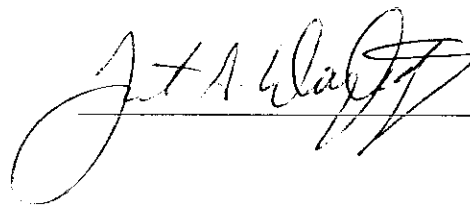
WHEREFORE, the Citizen Groups respectfully request that this Court issue:

A peremptory writ of mandamus compelling the Commission to vacate the one-hour time limits and other restrictions discussed in Paragraphs 14 and 15 above on the opportunity of the Citizen Groups to present their case in pending ERAC appeals, and requiring the Commission to

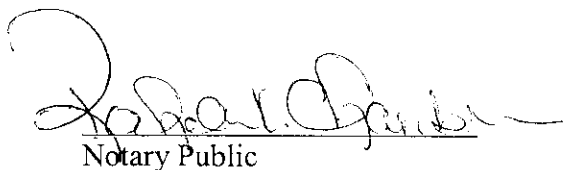
comport with due process requirements in scheduling hearings and in addressing other procedural and discovery matters in such pending appeals.

VERIFICATION

In accordance with R.C. 2731.04, I hereby state that I have personal knowledge of the facts set forth in the above petition and that such facts are true to the best of my knowledge and belief.



Sworn to and subscribed in my presence this 16 day of September, 2009.



Notary Public



Rochelle K Chambles
Notary Public, State of Ohio
My Commission Expires 06-11-2014