Arkansas Environmental Federation
Air Seminar
May 18, 2023
Air Case Law 2022-2023

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Survey of Clean Air Act “Cases”
which include:

- Judicial/Administrative Decisions/Guidance
- Enforcement/Citizen Suit Actions Filed/Pending
- Consent Administrative Orders

Arkansas Environmental Energy and Water Law Blog

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Three combined posts every business day addressing federal/Arkansas legislation, regulation, administrative/judicial decisions and personnel transitions

Revised Cross-State Air Pollution Update Rule/Ozone: Federal Appellate Court Addresses Challenge to Analytical Technique Utilized by EPA

The United States Court of Appeals for the D.C. Circuit addressed in a March 3rd Opinion a Petition by Midwest Ozone Group challenging the United States EPA's revised Cross-State Air Pollution Update Rule. (Good Neighbor Rule) See Midwest Ozone Group v. EPA.

The CAA Good Neighbor Rule requires upwind states to prohibit their air pollution emissions from contributing significantly to nonattainment in any other downwind state.

The Midwest Ozone Group challenge focused on the analytical techniques utilized by EPA in crafting the Good Neighbor Rule.

Potential relevance to litigation in which Arkansas is currently involved?

Revised Cross-State Air Pollution Update Rule/Ozone: Federal Appellate Court Addresses Challenge to Analytical Technique Utilized by EPA (cont)

EPA in 2016 promulgated the Cross-State Air Pollution Rule Update for the 2008 Ozone National Ambient Air Quality Standards ("NAAQS).

The update was subsequently challenged by environmental groups and the Court remanded it because it was held to improperly allow upwind states to:

> . . . continue polluting beyond statutory deadlines which were still applicable to downwind states.

A Revised Rule was promulgated by EPA in response to the Court's remand.

The Good Neighbor provision requires that each State Implementation Plan ("SIP") prohibit emissions that will:

- Significantly contribute to nonattainment of a NAAQS.
- Interfere with maintenance of NAAQS at a downwind state.

Revised Cross-State Air Pollution Update Rule/Ozone: Federal Appellate Court Addresses Challenge to Analytical Technique Utilized by EPA (cont)

The Midwest Ozone Group filed a Petition with the Court arguing that EPA's haste to meet the court-imposed deadline was accomplished using improper analytical techniques.

MOG's Petition focused on three of the four steps that EPA utilized as its GNP evaluation method in crafting the Revised Rule.

MOG argued that EPA did not utilize what it described as "state of the science" photochemical air quality modeling for the analytical year 2021.

EPA was argued to have deviated from a technique it used in the past.

Revised Cross-State Air Pollution Update Rule/Ozone: Federal Appellate Court Addresses Challenge to Analytical Technique Utilized by EPA (cont)

EPA was noted to have used a linear interpolation technique to predict air quality concentrations at monitors in 2021 in the first step of the four-step process.

In addressing these arguments, the Court stated that its review was narrow because:

> . . . if an action is not contrary to law, agency action simply must be reasonable and reasonably explained.

Equally important, agency determinations based on highly complex and technical matters were deemed "entitled to great deference."

Statistical analysis and computer models were identified by the Court as having a scientific nature that:

> . . . does not usually lend itself to judicial review.

Revised Cross-State Air Pollution Update Rule/Ozone: Federal Appellate Court Addresses Challenge to Analytical Technique Utilized by EPA (cont)

Utilizing this deferential standard, the Court held that EPA:

- Has never been required to use a particular modeling method or adhere to past practice.
- Must simply consider all the relevant factors and demonstrate a reasonable connection between the facts on the record and its decision.
- Has chosen analytical techniques rationally related to the Revised Rule
- Appropriately explained its use of the linear interpolation/subsequent methods for establishing the Revised Rule
- Utilized photochemical modeling as a foundation for projections but "merely layered an additional mathematical function, linear interpolation of the original projected data."
- Performed further data analysis by checking the 2021 interpolated projections against a sensitivity analysis/engineering analytics approach.

Will this standard by applied to the federal court challenges by Arkansas and other states to recent EPA disapproval of their interstate ozone transport SIPs?

Interstate Transport/Ozone: Arkansas Petitions Eighth Circuit Court of Appeals Challenging EPA State Implementation Plan Disapproval

EPA issued a final rule disapproving State Implementation Plan submissions for 19 states regarding interstate transport ("Good Neighbor Plan") for the 2015 8-hour National Ambient Air Quality Standards.

Arkansas's SIP is one of the states included in the disapproval.

Arkansas filed a Petition before the Eighth Circuit Court of Appeals challenging EPA's disapproval of Arkansas's SIP.

The Eighth Circuit rejected EPA's Request to Transfer Petition to the D.C. Circuit.

The Fifth Circuit has granted a request to stay the EPA disapproval of Texas' and Louisiana's SIPs.

Clean Air Act National Ambient Air Quality Standards

Litigation Driving EPA NAAQS and Related Activity

Examples

EPA revised the ozone NAAQS in 2015.

EPA was then required to determine which areas of the country are in attainment or nonattainment.

Areas are designated as either being:

- Attainment
- Unattainment
- Unclassifiable

Earthjustice filed a Clean Air Act citizen suit arguing that EPA had a nondiscretionary duty to complete designations and classifications for the 2015 ozone NAAQS in a timely manner for the 30 cities named in the Complaint.

Clean Air Act National Ambient Air Quality Standards (cont)

Other Examples

California v. EPA challenging agency decision not to revise particulate NAAQS

Earthworks enters into Consent Decree with EPA to resolve citizen suit arguing the agency failed to timely review general control device requirements for flares under Section 111(b) NSPS.

Clean Air Task Force petitions EPA to eliminate startup, shutdown, and malfunction exemption in Section 111 of NSPS.

Sierra Club Notice of Intent to Sue EPA for failure to promulgate a Federal Implementation Plan for SO_2 for two counties in Texas. (Both Texas and a power plant had filed petitions challenging the designation based on modeling but Sierra Club argued designation stays in effect during appeal.)

Ohio State Implementation Plan/Air Nuisance Rule: Challenge to EPA's Removal of Rule

Environmental organizations filed a petition for review of the EPA decision, pursuant to the Clean Air Act's error-correction provision, to remove from the State of Ohio's State Implementation Plan. See *Sierra Club v. EPA.*

EPA removed an Ohio's SIP air nuisance rule that made unlawful the emission of various substances in a manner or amount that endangered public health, safety, or welfare, or caused unreasonable injury or damage to property.

Ohio State Implementation Plan/Air Nuisance Rule: Challenge to EPA's Removal of Rule (cont.)

The Nuisance provision had been in the Ohio SIP for almost 50 years was removed by EPA in 2020 on grounds Ohio had not relied on the rule to implement, maintain, or enforce any NAAQS.

Sierra Club petitioned for review of EPA's removal of the air nuisance rule, arguing that EPA acted arbitrarily and capriciously in removing the ANR from Ohio's SIP.

The court holds EPA should have conducted a further analysis when seeking to modify the Ohio SIP.

Reactivation/New Source Review: EPA Determination that Refinery Must Obtain PSD Permit

EPA stated in a November 16, 2022, letter that an oil refinery on St. Croix in the U.S. Virgin Islands may not resume operations without going through Clean Air Act New Source Review.

The St. Croix oil refinery was built in the 1960s and was shut down approximately 11 years ago.

Port Hamilton had asked EPA whether the existing permits could be used to restart the refinery.

EPA has had in place for a number of years a document known as the "*Reactivation Policy*."

The *Reactivation Policy* presumes that a major stationary source that has been inactive for two years or more is intended to be permanently out of service (i.e., shut down).

Presumption can be rebutted.

Reactivation/New Source Review: EPA Determination that Refinery Must Obtain PSD Permit (cont)

EPA articulates in the November 16th letter the application of its guidance document (*Monroe*) which spells out the factors applied to the Port Hamilton oil refinery to determine whether there is a permanent shutdown.

The factors used include:

- Length of time the facility has been shut down
- Time and capital needed to restart
- Evidence of intent and concrete plans to restart
- Cause of the shutdown
- Status of permits
- Maintenance and inspection during shutdown

Scope of Title V Petition to Object Review

Can Clean Air Act Title I preconstruction permitting issues be considered?

Are challenges to permit conditions based on preconstruction permitting authority under Title I of the CAA considered by EPA in reviewing or considering a petition to object to a Title V operating permit?

EPA addressed this question a few years ago in an Order involving an objection petition filed by Nucor involving the Big River Steel plant.

EPA concluded that the Title V permitting process was not the appropriate forum to review preconstruction permitting issues even when the NSR permit terms were developed at the same time as the Title V permit and included in the same permit document.

Especially relevant to Arkansas since we use this consolidated permit.

Title V/Clean Air Act: U.S. EPA Grants in Part and Denies in Part Two petitions Objecting to a Crossett, Arkansas, Papermill Renewal

Recent Review of Arkansas Air Permit Language (March 2023)

Two sections of the Order granting objection permit compliance assurance/monitoring methodology language might be of interest.

Claim II(D).1: The Permit's Production/Process Limits are Insufficient to Assure Compliance with the Applicable Pound per Hour Emission Limits.

EPA grants in part and denies in part the Petitioner's objection on this claim.

EPA directs DEQ to revise the permit and/or permit record to ensure it contains sufficient monitoring and/or recordkeeping to assure compliance with all federally enforceable applicable requirements.

This is stated to include certain emission limits identified by the Petitioner.

Title V/Clean Air Act: U.S. EPA Grants in Part and Denies in Part Two petitions Objecting to a Crossett, Arkansas, Papermill Renewal (cont)

EPA suggests that DEQ could accomplish this by way of example:

- Revising the permit to align the time periods associated with emission limits and the production or process limits designed to assure compliance with the emission limits (and the monitoring associated with those production or process limits)

- Specifically explain why the time periods associated with the permit's compliance assurance provisions are sufficient to assure compliance with the hourly emission limits

- If determined that it is impossible for the source to violate an emission limit, explain the technical basis for this conclusion and consider whether any assumptions underlying this conclusion should be embodied in enforceable permit terms.

Title V/Clean Air Act: U.S. EPA Grants in Part and Denies in Part Two petitions Objecting to a Crossett, Arkansas, Papermill Renewal (cont)

Claim II(D).2: The Permit Fails to Specify a Monitoring Methodology for Determining Compliance with the Permit's Various Production/Process Limits and Fails to Require Monitoring Results to be Provided for the Relevant Time Period of the Applicable Requirement.

EPA grants in part and denies in part Petitioner's objection on this claim.

EPA states that DEQ must revise the permit and permit record to ensure that it contains sufficient monitoring and/or recordkeeping to assure compliance with all federally enforceable applicable requirements (including the specific production of process limits identified by Petitioner).

Title V/Clean Air Act: U.S. EPA Grants in Part and Denies in Part Two petitions Objecting to a Crossett, Arkansas, Papermill Renewal (cont)

EPA again provides examples of how DEQ may be able to address this requirement stating:

- Clearly identify what parameters the facilities must keep records of
- Consider whether the permit should specify additional details regarding monitoring or recordkeeping requirements
- Revise the permit to align time periods associated with the rolling 30-day production or process limits and the accompanying monthly monitoring or recordkeeping provisions designed to assure compliance with such limits
- Specifically explain why the monthly time periods associated with the permit's compliance assurance provisions are sufficient to assure compliance with the rolling 30-day production process limits
- If DEQ determines it is possible for the source to violate a production or process limit, explain the technical basis for this conclusion and consider whether any assumptions underlying this conclusion should be embodied in enforceable permit terms.

Federally Permitted Releases/CERCLA: Federal Court Addresses Status of Emissions from Shipped Lead-Acid Batteries Covered by Smelter's Clean Air Act Permit

A United States District Court addressed in a March 22nd Order an issue arising out of the CERCLA exemption for federally permitted releases. See *California Department of Toxic Substances Control et al. v. NL Industries, Inc., et al.*

The question addressed was whether a company that allegedly arranged or transported spent lead-acid batteries to a smelter was exempt from the cost recovery provisions of CERCLA because any associated air emissions were encompassed by a Clean Air Act permit.

Section 101(10) of CERCLA defines "federally permitted releases" in terms of releases permitted under a number of other environmental statutes. Releases that are federally permitted are exempt from the CERCLA cost recovery provisions.

Federally Permitted Releases/CERCLA: Federal Court Addresses Status of Emissions from Shipped Lead-Acid Batteries Covered by Smelter's Clean Air Act Permit (cont)

Certain plaintiffs alleged that Quemetco was liable as an arranger or transporter under CERCLA because it shipped spent lead-acid batteries to a lead smelter located in Vernon, California.

CERCLA cleanup costs were incurred at the Vernon Plant.

Quemetco argued it could not be liable for such response cost because the cost recovery provisions of CERCLA do not apply to federally permitted releases.

Federally Permitted Releases/CERCLA: Federal Court Addresses Status of Emissions from Shipped Lead-Acid Batteries Covered by Smelter's Clean Air Act Permit (cont)

Further argued that any air emissions from the Vernon Plant that could be connected to its spent lead-acid batteries transported to the Vernon Plant were subject to the facility's Clean Air Act Title V permit.

The permit was stated to cover both stack and fugitive emissions.

Quemetco therefore argued that all of its emissions after May 9, 2000 (when the Title V permit was issued) were federally permitted.

Federally Permitted Releases/CERCLA: Federal Court Addresses Status of Emissions from Shipped Lead-Acid Batteries Covered by Smelter's Clean Air Act Permit (cont)

The Court notes that federally permitted releases are defined to include:

- any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections ....

The plaintiffs conceded that aerial releases from the Vernon Plant made between May and June 2021, were federally permitted.

The Court identified as the primary question whether plaintiffs raised a genuine issue of material fact through a 1995 uniform hazardous waste manifest that Quemetco made a non-permitted release.

Title VI of the Civil Rights Act/South Coast Air Quality Management District: Earthjustice Complaint Submitted to United States EPA

Earthjustice submitted a March 6th Complaint under Title VI of the Civil Rights Act of 1964 addressing the South Coast Air Quality Management District in California.

Earthjustice states that because SCAQMD receives federal financial assistance, its alleged discriminatory practices are therefore subject to Title VI.

Title VI prohibits recipients of federal funding from creating policies that have disparate impact on communities of color.

Title V of the Civil Rights Act/South Coast Air Quality Management District: Earthjustice Complaint Submitted to United States EPA (cont)

The Complaint criticizes what it describes as SCAQMD's credit program (used as alternative to fees) that is utilized by major stationary sources in a severe nonattainment area.

Allows credits for activities designed to reduce VOCs on NOx (examples – vehicle/engine fueling infrastructure or advanced technology development)

Earthjustice argues that instead fees should be imposed on major stationary sources to drive reduction of nitrous oxide and volatile organic carbons that will incentivize reductions (required by Section 185 in severe non-attainment areas).

A related expressed concern is that unlike emission reduction obligations, adversely affected communities do not have remedies.

Title V of the Civil Rights Act/South Coast Air Quality Management District: Earthjustice Complaint Submitted to United States EPA (cont)

Four hundred major stationary sources are stated to be overwhelming low-income communities and communities of color.

SCAQMD's practices are alleged to have had a disparate, adverse impact on communities of color which violates Title VI and EPA's implementing regulations.

Earthjustice requests that the EPA Office of Civil Rights accept the Complaint and investigate whether SCAQMD has violated and/or continues to violate Title VI and to require SCAQMD to adopt a nonattainment program that reduces emissions in low-income communities and communities of color where such facilities are located.

Oakland Athletics Strike Out: California Appellate Court Rejects Team's Petition Seeking Regulation of Metal-Shredding Operation Under California Hazardous Waste Law

The California Court of Appeals addressed The Oakland Athletics' argument that the California Department of Toxic Substances Control must regulate what is described as a metal-shredding operation under the California Hazardous Waste Control Law.

The Athletics alleged that the Department failed to comply with amendments to the HWCL that subjected metal shredders to certain provisions of the statute.

Schnitzer Steel Industries maintains a metal-shredding operation in West Oakland, California, next to the Athletics' office and where a new ballpark would be built.

The Petition stated that the Facility's metal shredder had for a number of years been exempted from the HWCL because of a variance (an "f letter") issued by the Department from the HWCL.

The Athletics argued that a legislative directive required that the Department rescind any operative "f letters."

Oakland Athletics Strike Out: California Appellate Court Rejects Team's Petition Seeking Regulation of Metal-Shredding Operation Under California Hazardous Waste Law (cont)

The Petition requested that the Superior Court of California (for the County of Alameda) require that the Department rescind the "f letter" for the previously referenced class of facilities.

The California Court of Appeals held that once a legislatively-mandated study by the Department confirmed that metal-shredding waste has been appropriately treated, that it could be safely handled and disposed of as nonhazardous.

The Department had undertaken such study and therefore the Court of Appeals stated that there is:

> . . . no threat to human health or the environment from managing treated metal-shredder waste as nonhazardous.

STRIKE 3.

EPA Clean Air Act Enforcement (cont)

EPA Undertaking Various Enforcement Initiatives Including those related to the Clean air Act

Example

Stationary Engines Enforcement Initiative

40 CFR Part 63 ZZZZ
40 CFR Part 60 III
40 CFR Part 60 JJJJ

Serious violations identified by EPA include:

- Failure to retrofit existing engines with necessary pollution controls
- Failure to conduct testing in accordance with regulatory requirements on the installed pollution controls

EPA Clean Air Act Enforcement

EPA Stationary Engine Enforcement Initiative

EPA provides what it describes as recent examples of the types of facilities that have been the subject of enforcement:

- Electric utility operating two diesel engines (violation of Subpart ZZZZ)
- Sand and gravel plant using two diesel engines (violation of Subpart ZZZZ)
- Concrete and stone producer using three diesel engines (violation of Subpart ZZZZ)
- Metal shredder utilizing a diesel engine (violation of Subpart ZZZZ)
- Compressor station using a 760 horsepower engine (violation of Subpart JJJJ)

Other EPA Clean Air Enforcement Initiatives

Current

- Flares (Chevron/petro-chemical plants assessed $3.4 million penalty and perform $118 million for pollution upgrade)
- Cement manufacturing
- Glass manufacturing
- Fertilizer manufacturing
- Explosive manufacturing
- Refineries

Criminal Enforcement/Clean Air Act – False Statement/Risk Management Program

United States charged Defendant Terri Settle with making a false statement in violation of 42 U.S.C. § 7413(c)(3), a provision of the Clean Air Act.

Settle was the Director of Human Resources and Environmental Coordinator at Airosol Company, Inc., a manufacturer of chemical aerosol and liquid products in Neodesha, Kansas.

Indictment alleges that on October 3, 2016, Settle submitted a Risk Management program (40 CFR Part 68) to EPA which falsely stated that various environmental regulatory requirements had been met.

Approximately seven weeks later, the Airosol plant experienced an extensive fire, which led to subsequent investigations by OSHA and EPA.

United States of America v. Terri Settle (cont.)

The fan used by Airosol employees in the flammable drum storage area on or about Nov. 22, 2016, was not designed for use in an environment where explosive fumes could gather.

Airosol had not compiled required process safety information for its mixing or transfer process, nor had it conducted a process hazard analysis that would have revealed such dangers.

-Note-

- Impact on or endangering employees can be a trigger for federal environmental criminal enforcement (often in combination with OSHA)

- Extensive 112(r) EPA civil enforcement including El Dorado facility issued penalty for failure to update Risk Management Plan.

Environmental Criminal Enforcement (cont.)

Enforcement

- Risk Management Plan/Cape Cod Ice fined $90,000 and three years probation for allegedly failing to implement a RMP for Rhode Island facility to address accidental release of anhydrous ammonia.

- Negligent Endangerment/U.S. Minerals admitted to a count of negligent endangerment under Clean air Act relating to allegedly negligently releasing inorganic arsenic that exposed employees.

- Negligent Endangerment/Hydro Extrusion USA aluminum processing facility charged with Clean Air Act negligent endangerment because:

  > . . .While operating, air emissions from the company's furnaces were open to the interior of the building and did not pass through any pollution control devices before reaching employees or being vented to ambient air

State Criminal Enforcement

Defendant Blankenship convicted in Hood County, Texas of unlawful burning.

Texas charged Class A misdemeanor because they alleged burning was under the statute “chemical wastes, heavy oils, asphalt materials, potentially explosive materials.”

Appellate Court reduced to Class C misdemeanor because of his burning of “treated wood, soda cans, and bottles” did not fit within that definition.

Unmanned Aerial Vehicle Systems/Landfill Methane Leak Detection: EPA Approves Alternative Test Method (SnifferDRONE)

December 15, 2022 letter approves new method that can be used as an alternative to the surface emission monitoring procedures currently set forth in certain Federal landfill regulations:

EPA's December 15th letter states that the new method would be used as an alternative to the surface emission monitoring procedures currently set forth in the following Federal landfill regulations:

- 40 CFR Part 60, Subparts WWW, XXX, and Cf (Emission Guidelines),
- 40 CFR Part 62, Subpart OOO (Federal Plan), and
- 40 CFR Part 63, Subpart AAAA.

Unmanned Aerial Vehicle Systems/Landfill Methane Leak Detection: EPA Approves Alternative Test Method (SnifferDRONE) (cont)

The referenced regulations require that certain affected landfills (i.e., some with a gas collection and control system installed to comply with the applicable landfill standard) perform SEM test procedures on a quarterly basis to demonstrate compliance with the 500 parts per million above background concentration operational standard at the surface of the landfill.

Sniffer requested approval for use of a UAS-based alternative to conduct the SEM.

The alternative was stated to replicate the SEM-related testing requirements.

Specifically, it would replicate Method 21 in the Federal landfill regulations to the extent possible that use a UAS-based approach:

> . . . in order to improve safety and performance by automating a portion of the SEM procedures.

Arkansas Air Enforcement Examples

Type of Facilities Involved Over Last 12 Months:

- Hot Mix Facility
- Lumberyard/Sawmill
- Hazardous Flooring Manufacturing Plant
- Tire Manufacturing
- Natural Gas Compression Station
- Commercial Bakery
- Energy Recovery Facility
- Steel Mill
- Building Products
- Lumberyard/Sawmill
- Coal-Fired Generating Station
- Papermill
- Packaging Company
- Bath Manufacturing
- Natural Gas-Fired Power Plant
- Custom Manufacturing/Product Purification

Arkansas Air Enforcement Examples

Type of Violations:

- Failure to maintain records of monthly inspections of bags for leaks
- Failure to maintain records of visible emissions
- Failure to maintain dust recovery auger in good condition
- Failure to operate cyclone properly
- Failure to provide documentation of implementation of a maintenance and housekeeping plan
- Use of unauthorized hazardous pollutants
- Quarry Exceedance of Opacity and PM emission limits, NOx, HCL, CO
- Untimely submission of compliance test
- Construction or modification of a stationary source without obtaining an air permit and/or modification

Arkansas Air Enforcement Examples (cont)

Type of Violations:

- Late submission or failure to complete compliance certification or semi-annual monitoring report
- Failure to maintain monthly records/12-month rolling totals of total hazardous air pollutants
- Failure to correctly operate CEMS
- Failure to maintain equipment in good condition
- Allowing unnecessary amounts of air contaminants to become airborne
- Failure to undertake performance test
- Violating threshold limit value for hazardous air pollutant

Note: Continued use of ADEQ voluntary disclosure policy.