Arkansas Environmental Federation
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Air Federal Cases/Litigation
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Survey of Clean Air Act “Cases”
which include:

- Judicial/Administrative Decisions
- 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: Eighth Circuit Court of Appeals Rejects EPA's Motion to Transfer Arkansas's Petition

The United States Court of Appeals Eighth Circuit issued an Order on April 25th denying the United States Environmental Protection Agency's Motion to Transfer the State of Arkansas's petition challenging disapproval of the Arkansas State Implementation Plan from the Eighth Circuit to the District of Columbia Circuit ("D.C. Circuit").

EPA had issued a final rule disapproving Arkansas's and a number of other states' SIPs regarding interstate transport for the 2015 8-hour National Ambient Air Quality Standards.

Attorney General Tim Griffin subsequently filed a petition before the Eighth Circuit challenging EPA's disapproval of Arkansas's SIP.

EPA had moved to transfer the petition to the D.C. Circuit.

Interstate Transport/Ozone: Eighth Circuit Court of Appeals Rejects EPA's Motion to Transfer Arkansas's Petition (cont)

The Attorney General's brief in response to EPA's request stated in part:

> . . . EPA's disapproval of Arkansas's plan is not a nationally applicable action. The Clean Air Act's venue provision says as much: "Any denial or disapproval" of a SIP is a "locally or regionally applicable" action, only reviewable in the appropriate regional Circuit Court.

The Eighth Circuit Order issued on April 25th states in response to EPA's request:

> Respondent's motion to transfer or dismiss the petition for review is denied. The briefing schedule is removed from abeyance. Petitioner's brief is due May 25, 2023.

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

Interstate Ozone (Update)

SIP Disapproval

The State of Arkansas challenge in the Eighth Circuit is on schedule to see EPA file its combined/coordinated response brief on or before November 9, 2023.

Arkansas and various state industries previously filed their drafts.

In jurisdictions where the SIP disapproval was not stayed and where the FIP challenge resides in the D.C. Circuit, the FIP will continue forward.

In Arkansas and other states the FIP remains not effective for a couple of reasons:

i. the Eighth Circuit stayed the effectiveness of the SIP disapproval and
ii. EPA published its subsequent FIP amendment declaring the FIP would not go into effect in the State of Arkansas (and other states subject to judicial stays).

Interstate Ozone (Update) (cont.)

EPA published an Interim Final Rule amending the FIP to make clear that the FIP requirements were not effective in a number of states subject to judicial or administrative stays of the applicable SIP disapprovals.

Interstate Ozone (Update) (cont.)

EPA has noted in terms of timing if stay lifted:

At the time of this rulemaking, the EPA cannot predict how the Agency's future action may affect the amendments being finalized in this action. However, for these States, as well as the States covered by the First Interim Final Rule, the EPA generally anticipates that any future action bringing the Good Neighbor Plan's requirements into effect after a stay would phase in the requirements so as to provide lead times to implement the Good Neighbor Plan's identified emissions control strategies comparable to the lead times that the Good Neighbor Plan would have provided in the absence of the stay, thereby giving parties sufficient time to prepare for implementation.

State Implementation Plan/Clean Air Act: Federal Appellate Court Addresses Challenge to Colorado Exclusion of Temporary Emissions

The Tenth Circuit United States Court of Appeals addressed in a September 18th Opinion a petition filed by the Center for Biological Diversity alleging that the U.S. Environmental Protection violated the Clean Air Act when it approved a revision to Colorado's State Implementation Plan See *Ctr. for Biological Diversity v. United States Env't Prot. Agency,* No. 22-9546, 2023 WL 6056417 (10th Cir. Sept. 18, 2023).

EPA had determined that Colorado's Nonattainment New Source Review ("NNSR") permit program meets the requirements of the 2015 National Ambient Air Quality Standard ("NAAQS") for ozone.

State Implementation Plan/Clean Air Act: Federal Appellate Court Addresses Challenge to Colorado Exclusion of Temporary Emissions (cont.)

The Center argued that the SIP's exclusion of "temporary emissions" and "emissions from internal combustion engines" violated the Clean Air Act.

The Center asserted that the EPA should not have approved the Colorado SIP's exclusions of "temporary emissions" and "emissions from internal combustion engines on any vehicle" contrary to the Clean Air Act when determining whether stationary sources of emissions were subject to the NNSR's permit program.

The Court ruled that the EPA violated the Clean Air Act by permitting the exclusion of temporary emissions.

State Implementation Plan/Clean Air Act: Federal Appellate Court Addresses Challenge to Colorado Exclusion of Temporary Emissions (cont.)

It upheld EPA's determination that the Colorado SIP's exclusion of "emissions from internal combustion engines on any vehicle" was permissible.

EPA argued that it was appropriate to use its interpretation that "a stationary source's potential to emit includes 'continuous operating emissions of a stationary source and not temporary emissions or emissions associated with construction.'

The regulation was noted to only exclude secondary emissions and certain fugitive emissions from potential-to-emit determinations, and the "secondary emissions" definition was deemed to "not plainly encompass all temporary emissions."

State Implementation Plan/Clean Air Act: Federal Appellate Court Addresses Challenge to Colorado Exclusion of Temporary Emissions (cont.)

The Court found that the EPA should not have approved Colorado's exclusion of temporary emissions under its NNSR permit program.

The Court determined EPA was within its rights to authorize Colorado "to exclude emissions from internal combustion engines on any vehicle under its permit program." NNSR permit programs only regulate major stationary sources, which do not include emissions from "nonroad engine[s]."

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 could be rebutted.

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

EPA articulated 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

Refinery Challenged EPA Determination and Federal Appellate Court Overturned EPA's Decision in *Port Hamilton Refining v. EPA*

- Court determined that EPA determining a new PSD permit must be obtained prior to restarting operations was incorrect.
- EPA was held to have exceeded its Clean Air Act authority.
- EPA reactivation policy was held to contradict unambiguous language in the Clean Air Act that PSD only applies to stationary sources constructed or modified after August 7, 1977, regardless of operational status.

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 a few months ago 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.

Nitrogen/Clean Air Act: Center for Biological Diversity Notice of Intent to Sue EPA for Failure to Review National Ambient Air Quality Standards

The Center for Biological Diversity sent a July 11th Notice of Intent to Sue to the United States Environmental Protection Agency alleging a failure to undertake a mandatory obligation under the Clean Air Act.

CBD alleges that EPA has failed to undertake a review of the National Ambient Air Quality Standards for Nitrogen Oxides.

The Clean Air Act requires that EPA review every five years both the air quality criteria and the NAAQS (108 and 109).

Nitrogen/Clean Air Act: Center for Biological Diversity Notice of Intent to Sue EPA for Failure to Review National Ambient Air Quality Standards (cont.)

CBD alleges that it has been more than five years since EPA last completed such a review of the primary NAAQS for. NOx Consequently, the organization states that EPA should have completed a review of the primary NOx NAAQS no later than May 18, 2023.

Clean Air Act National Ambient Air Quality Standards (cont)

Other Examples

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

2.) 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.

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

4.) 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.)

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.

Whistleblower Complaint/Safe Drinking Water Act: OSHA Addresses Alleged North Dakota Dept. of Environmental Quality Retaliation Against Staff Environmental Scientist

OSHA issued an August 23rd news release summarizing the results of a whistleblower investigation that it undertook regarding the North Dakota Department of Environmental Quality.

OSHA alleges that NDEQ retaliated against an environmental scientist that had reported safety concerns about a public water system to both management and subsequently the United States Environmental Protection Agency.

The following federal environmental statutes include whistleblower protection provisions:

- Clean Water Act
- Clean Air Act
- Safe Drinking Water Act (“SDWA”)
- Toxic Substances Control Act
- Solid Waste Disposal Act
- Comprehensive Environmental Response, Compensation, and Liability Act

Whistleblower Complaint/Safe Drinking Water Act: OSHA Addresses Alleged North Dakota Dept. of Environmental Quality Retaliation Against Staff Environmental Scientist (cont.)

The SDWA prohibits employers from retaliating against employees for engaging in protective activities pertaining to alleged violations of actual or potential drinking water from above or underground sources designed for consumption.

Coverage extends to all private sector, federal, state, and municipal employees.

The SDWA prohibits the discharge or in any manner retaliation against an employee because the employee:

- Provided (or is about to provide) information relating to a violation of the SDWA to the EPA or other appropriate federal agency or department;
- Testified (or was about to testify) on any such proceeding under the statute;
- Refused to perform duties in good faith, based on a reasonable belief that the working conditions are unsafe and unhealthful;
- Participated or assisted in a proceeding under the SDWA

Whistleblower Complaint/Safe Drinking Water Act: OSHA Addresses Alleged North Dakota Dept. of Environmental Quality Retaliation Against Staff Environmental Scientist (cont.)

OSHA stated that it determined that the NDEQ employee:

> . . . raised safety concerns to their supervisor over a six-month period and alerted the EPA about defects in reporting and data collection and concerns that sanitary violations were being downgraded to minor violations.

The NDEQ supervisor is stated to have requested that the employee stop communicating with EPA and issued a written reprimand for doing so.

OSHA has ordered NDEQ to remove the written reprimand from the employee's personnel file.

NDEQ and the employee may file objections or request a hearing with the Office of Administrative Law Judges within 30 days of receiving OSHA's order.

Cryptocurrency Mining Facility/Natural Gas-Fired Electric Generating Plant: New York ALJ Upholds Denial of Clean Air Act Title V Permit Renewal

A New York Administrative Law Judge issued a decision (Ruling on Issues and Party Status upholding the State of New York Department of Conservation decision to deny a Clean Air Act Title V permit renewal for Greenidge Generation, LLC.

GGL had filed an application to renew a Title V air permit for the continued operation of a natural gas-fired electric generating facility in the Town of Torrey, New York.

The Facility is described as a primarily natural gas-fired electric generating plant. Generating capacity is estimated to be approximately 107 megawatts with a maximum heat input limited to 1,117 million BTUs per hour.

Cryptocurrency Mining Facility/Natural Gas-Fired Electric Generating Plant: New York ALJ Upholds Denial of Clean Air Act Title V Permit Renewal (cont.)

The Facility's primary purpose has been described as providing energy behind-the-meter to a cryptocurrency mining operation.

NYDEC is stated to have determined that the Facility is operating primarily to meet a significant new energy load caused by its GGL PoW cryptocurrency mining operation.

The NYDEC denied GGL's application for the Title V air permit renewal in 2022.

The denial was based on application of New York's Climate Leadership and Community Protection Act ("CLCPA").

Cryptocurrency Mining Facility/Natural Gas-Fired Electric Generating Plant: New York ALJ Upholds Denial of Clean Air Act Title V Permit Renewal (cont.)

The CLCPA requires NYDEC to establish a statewide greenhouse gas emissions limit as a percentage of 1990 emissions. A 60% reduction of 1990 emissions is required by 2030 and 15% of 1990 emissions by 2050.

The NYDEC permit renewal denial was stated to be based on the determination that the Facility would not comply with the requirements of the CLCPA. Factors that NYDEC are stated to have considered in the denial included:

- Increase in greenhouse gas emissions from the Facility since the passage of the CLCPA
- Referenced increase driven by the change in the primary purpose of its operations

Cryptocurrency Mining Facility/Natural Gas-Fired Electric Generating Plant: New York ALJ Upholds Denial of Clean Air Act Title V Permit Renewal (cont.)

An issue considered by NYDEC was the Facility's change from primarily providing energy to New York's electricity grid to instead providing energy behind-the-meter to support the demands of GGL's cryptocurrency mining operations.

The ALJ upheld the NYDEC's decision that the GGL Facility's operations will interfere with the greenhouse gas emissions limits of the CLCPA. The ALJ stated:

> . . . the increasing actual GHG emissions from the facility, and Greenidge's projections that the actual GHG emissions would continue to increase to match the maximum permitted PTE [Potential to Emit], were sufficient to establish that renewal of the facility was inconsistent with the GHG emissions goal of the CLCPA.

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.

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

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 (cont.)

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

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

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:

- Forest Products
- 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

Arkansas Air Enforcement Examples (cont.)

Type of Facilities Involved Over Last 12 Months:

- Natural Gas-Fired Power Plant
- Custom Manufacturing/Product Purification
- Rendering Plant
- Coke Processing
- Asphalt Production
- Crude Oil Handling Facility
- Tubing Manufacturing Facility
- Cotton Gin
- Bulk Oil Plant
- Meat Processing Facility

Arkansas Air Enforcement Examples (cont.)

Type of Violations:

- Exceedance of opacity limit
- Failure to list emissions in air permit
- 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

Arkansas Air Enforcement Examples (cont.)

Type of Violations:

- 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
- Create a nuisance (odors)
- Emission exceedance
- Untimely submission of air permit renewal application
- Failure to keep records five years

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.