

**Arkansas Environmental Federation
Convention and Tradeshow
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Survey of Pending Clean Air Act Cases**

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Survey of Clean Air Act “Cases” which include:

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



Arkansas Environmental Energy and Water Law Blog

<http://www.mitchellwilliamslaw.com/blog>

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

West Virginia v. EPA

142 S.Ct. 2587 (2022)

Authority of EPA to promulgate Obama Clean Power Plan
Pursuant to Section III(d) of the Clean Air Act Is
Successfully Challenged

- Electric power generation
- Mandatory state goals
 - Reduce the overall tonnage of CO₂, or
 - Reduce the tons of CO₂ per megawatt generated
- Move to natural gas in coal heavy states
- Many states would have to:
 - Expand renewables
 - Increase nuclear
 - Increase efficiency

West Virginia v. EPA

U.S. Supreme Court Addressed Arguments Under Clean Air Act

- Narrowly defined the scope of EPA's Clean Air Act Section III authority to regulate greenhouse gas emissions from coal-fired power plants.
- The states would have regulated activities beyond the fence line pursuant to the Clean Air Act authority.
- Clean Power Plan would force a fundamental change in the industry, (i.e., shut down) coal plants (i.e., forced generation shifting), which the Supreme Court determined goes against the core of the Clean Air Act (Congress did not give EPA this authority)

West Virginia v. EPA (cont.)

However!

Additional Implications for future EPA rulemakings?

- EPA agency power if there is a “major question” requires it and other federal agencies to base their regulations in clear Congressional statutory language
- Limits agency deference if there is economic and political importance
- EPA authority in future rules will be subject to a judicial precedent disallowing overreach (whatever that is?)

West Virginia v. EPA (cont.)

When reviewing an agency's claim of extraordinary power to regulate issues of national importance:

1. Does agency action indicate a major question
2. If so, where in the statute is this power provided?

West Virginia v. EPA

- Whether a regulatory action will have political and economic significance to constitute a “major question” will be subject to different views
- Possibly dependent upon?
 - Economic cost/affect on the economy (i.e., jobs or GDP?)
 - Number of criteria impacted?
- But !!! Will rarely affect typical environmental regulatory actions.
- Congress is argued to only have the power to answer questions with significant economic or social impact that relate to climate change and emissions?

Clean Air Act National Ambient Air Quality Standards

Citizen Suit Actions Driving EPA on NAAQS Issues Example

Earthjustice on behalf of several other environmental organizations filed a Complaint for Declaratory and Injunctive Relief on June 7th against the United States Environmental Protection Agency for an alleged failure to undertake certain Clean Air Act responsibilities. See USDC District of Columbia, Civil Action No. 1:22-cv-1606.

Earthjustice alleges that EPA has not fulfilled its obligation to determine whether certain marginal nonattainment areas associated with 30 cities attained or did not attain the 2015 National Ambient Air Quality Standards ozone by the statutory deadline.

Clean Air Act National Ambient Air Quality Standards (cont)

EPA revised the ozone NAAQS in 2015.

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

Areas are then designated as being either in:

- Attainment
- Unattainment
- Unclassifiable

Earthjustice argues that EPA completed designations and classifications for the 2015 ozone standard on June 4, 2018, for the 30 cities named in the Complaint.

Multiple other citizen suits have and will be filed by environmental organizations against EPA addressing NAAQS addressing:

- Updating/review current NAAQS (See *California v. EPA*, D.C. Cir. No. 21-1014 challenging EPA decision not to revise particulate NAAQS)
- EPA review of state SIPs
- EPA promulgation of FIPs

Regional Haze

In April 2022 a coalition of environmental groups filed a Clean Air Act citizen suit against EPA for failing to enforce a July 2021 deadline for states to submit regional haze implementation plans.

Issues that are debated:

How much do states have to depart from EPA's very detailed BART requirement?

What reasonable further progress does the Clean Air Act require, such as: visibility, reducing emissions?

What discretion or flexibility will states be given in determining what progress is reasonable for the second implementation period?

EPA/Arkansas and other states moving on this issue.

Start Up, Shut Down, Malfunction

State Implementation Plans

The Biden Administration addressed the startup, shutdown, and malfunction (SSM) issue when EPA issued a guidance policy repealing a Trump Administration issued policy that allowed states to retain regulatory exemptions for excess emissions that occurred during SSM.

Biden EPA has put back in place the Obama Administration's policy that required states to remove SSMs from their SIPs.

EPA memo reinstated Obama decision in response to a Sept. 8, 2021, lawsuit filed by the Sierra Club seeking:

. . .to fulfill delayed nondiscretionary duties to correct unlawful loopholes in Clean Air Act state implementation plans. The loopholes at issue cover periods of 'startup, shutdown, and malfunction' at industrial facilities.

The lawsuit alleged that EPA failed to fully remove SSM exemptions from SIPs that are required by the Clean Air Act.

Start-up, Shutdown, Malfunction

Section III New Source Performance Standards

Section III New Source Performance Standards

On September 13th Earthjustice petitioned EPA to eliminate SSM exceptions in Clean air Act Section III New Source Performance Standards.

Earthjustice argues Section III New Source Performance Standards unambiguously require that EPA promulgate standards of performance that require continuous emission reduction.

Does previous case law interpreting Section III standards indicate that they have to take into account the source's ability to meet the standards during SSM?

Title V

Similar EPA action-April 1, 2022. See 85 Fed Reg. 19042

Ozone Exceptional Events Rule

NAAQS Non-Attainment

In *Bahr v. Regan*, 64th 1059, the Ninth Circuit upheld EPA's application of the 2016 Exceptional Events Rule to exclude six monitored exceedances of the ozone NAAQS in the Phoenix area.

Pursuant to 42 U.S.C. section 7619(b) Arizona had submitted its ozone state implementation plan to EPA requesting the exclusion of the six elevated ozone readings asserting they were caused by a 2015 wildfire in southeastern California.

Arizona supported its request with information required in EPA's 2016 Exceptional Events Rule demonstrating a causal connection between the wildfire and the exceedances.

The court held that EPA did not act arbitrarily in concluding that there was a causal relationship between the wildfire and the exceedances.

EPA Clean Air Act Enforcement

EPA Undertaking Various Enforcement Initiatives

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 in EA 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)

Stationary Engine Enforcement Initiative

The EA 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

Arkansas Air Enforcement

2022 Examples of Violations Cited in Various Consent Administrative Orders

- Failure to maintain records onsite of monthly inspections of all baghouse bags for leaks
- Failure to maintain records onsite of visible emissions
- Failure to maintain equipment in good condition
- Open burning of waste materials (subsequently obtained air curtain incinerator permit)
- Reports submitted after due date
- Absence of accurate throughput rate
- Installation of equipment without air permit modification
- Failure to maintain monthly and 12-month rolling total records
- Failure to submit Notice of Intent for General Permit coverage
- Failure to renew Interim Authority for certain activities
- Failure to account for all emissions
- Causing or permitting air contaminants to become airborne
- Failure to conduct emissions testing

Arkansas Air Enforcement (cont.)

2022 Examples of Violations Cited

- Failure to install a continuous chart recorder
- Failure to provide records of VOC emissions
- Use of HAP containing unpermitted components
- Failure to conduct initial opacity testing
- Exceedances of emission limit
- Failure to provide maintenance records
- Failure to prepare annual compliance certification
- Failure to properly perform visible emissions
- Failure to maintain minimum temperature
- Exceedance of hours limitation for certain equipment

Clean Air Act Criminal Enforcement

Recent Federal Examples

- 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

-Note-

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

Coal-Fired Power Plant/Mine/Common Control: Federal Appellate Court Addresses Challenge to Title V Permit Renewal

Common Control Issue

The United States Court of Appeals for the Eighth Circuit addressed in an August 31st Opinion a challenge to the renewal of a Title V Clean Air Act operating permit for a coal-fired electric generating plant. See *Voigt v. U.S. Environmental Protection Agency*, 2022 WL 3905812.

A lignite coal-fired power plant that is located in Mercer County, North Dakota. Coyote Station receives all of its coal from the nearby Coyote Creek Mine.

Large parts of the Coyote Creek Mine are stated to be located on property leased to Coyote Creek Mining Company by the Voigts who have a ranch next door.

Coyote Station is the Mine's sole customer which transports coal to Coyote Station via a conveyor belt that runs between the two facilities.

Coal-Fired Power Plant/Mine/Common Control: Federal Appellate Court Addresses Challenge to Title V Permit Renewal (cont)

The Voigts submitted comments arguing that a draft Title V permit was not compliant because the Mine and its emissions were excluded from the Title V permit.

The Voigts argued that the Mine and Coyote Station should be considered a single source for purposes of the Title V permit.

This would result in the imposition of fugitive specific emission limits on the Mine that would otherwise not be required.

The Voigts argued the Mine and Coyote Station are facilities under common control.

Based on an assertion that Coyote Station exerts complete control over the Mine through the terms of their Lignite Sales Agreement.

The determination that operations in the vicinity of each other should be aggregated for Clean Air Act permitting purposes is an issue that periodically arises.

Coal-Fired Power Plant/Mine/Common Control: Federal Appellate Court Addresses Challenge to Title V Permit Renewal (cont)

The Voigts argued that the ND's stationary source determination (memo drafted by ND) cherry-picked parts of the [Lignite Sales Agreement] and ignored almost all of the provisions cited by the Voigts herein.

EPA rejected the Voigts' contention, stating that such determinations:

. . . require highly fact-specific analyses, and the EPA does not substitute its judgment for that of the permitting authority.

The Voigts did not attempt to rebut the reasoning in a ND Stationary Source Determination memorandum they were deemed to have failed to demonstrate that the state agency's justification was unreasonable or that the decision was contrary to the Clean Air Act.

The Eighth Circuit concludes that EPA's interpretation that the Title V term "demonstrates" in § 7661d(b)(2) imposes upon the Voigts the obligation to discuss the specific points in the NDDOH permit to which they object is entitled to deference.

Federally Permitted Releases/CERCLA: Federal Appellate Court Addresses Whether a Clean Air Act Permit Notification Qualifies

The United States Court of Appeals for the Third Circuit in a June 21st Opinion interpreted the Superfund phrase “federally permitted releases.” See *Clean Air Council v. United States Steel Corporation*, 2021 WL 2521588.

The Court addressed whether unpermitted emissions associated with a steel mill fire were “federally permitted” if addressed by a Clean Air Act permit notification.

The importance of the question is driven by the fact that if such emissions are “federally permitted” as defined by CERCLA, they are exempt from the statutes’ hazardous substances release reporting requirement.

Federally Permitted Releases/CERCLA: Federal Appellate Court Addresses Whether a Clean Air Act Permit Notification Qualifies (cont.)

Section 101(10) of CERCLA defines “federally permitted releases” in terms of releases permitted under a number of other environmental statutes.

The scope of this phrase has not been defined by EPA regulations and has been the subject of litigation.

Releases that are federally permitted are exempt not only from the CERCLA Section 103 reporting requirements but also the Emergency Planning and Community Right-to-Know Act Section 304 notification requirements.

Section 103(a) of CERCLA requires the person in charge of a vessel or facility to immediately notify the National Response Center if there is a release of hazardous substances in an amount equal to or greater than the reportable quantity for that substance.

Federally Permitted Releases/CERCLA: Federal Appellate Court Addresses Whether a Clean Air Act Permit Notification Qualifies (cont.)

Two fires occurred at a Pennsylvania United States Steel Corporation (“U.S. Steel”) plant. Certain air pollutants (i.e., emissions) apparently were released because of the fires.

Such emissions were reported to the Allegheny County Health Department which had been delegated certain Pennsylvania Clean Air Act authorities.

The reports were required to be provided in the event pollution control equipment breaks down and a source is substantially likely to emit air contamination.

Federally Permitted Releases/CERCLA: Federal Appellate Court Addresses Whether a Clean Air Act Permit Notification Qualifies (cont.)

The reports were required to be provided in the event pollution control equipment breaks down and a source is substantially likely to emit air contamination.

An environmental organization argued that the emissions (i.e., coke oven emissions, benzene, and hydrogen sulfide) were not federally permitted releases because they were not subject to the plant's Clean Air Act permits.

The Court held that the emissions were federally permitted releases.

The rationale was the plant was “governed by” and therefore “subject to” the Clean Air Act permit.

Environmental Justice Actions

- ❑ Both federal authorities (EPA and U.S. Department of Justice) actions are increasingly considering disproportionate environmental impacts on low income communities and people of color.

- ❑ Examples of Federal/Environmental Actions/Petitions:
 - Sierra Club petition to EPA alleging deficiencies in TCEQ air program related to public participation and environmental justice.
 - Earthjustice request for action by EPA per Title VI of the Civil Rights Act alleging violations by Louisiana Department of Environmental Quality. (Alleging black residents of St. John Parish subject to disproportionate impacts from ethylene oxide facility)
 - EPA accepts Title VI Administrative complaint from Southern Environmental Law Center alleging violation by North Carolina Department of Environmental Quality (Alleging discriminatory impacts on Black/Latino populations in two counties in permitting three swine management facilities)
 - U.S. Department of Justice environmental justice investigation into City of Houston's operations, policies and practices related to illegal dumping and possible discrimination against Black and Latino communities.

Title V Operating Permits/EPA Objections (cont.)

The past two years have arguably seen EPA granting many more objections to various state issued Title V permits on various grounds such as:

- Failure to include and assure compliance with all requirements
- Permit record does not establish a relationship between monitoring of CO₂ and O₂ levels in permit's parametric monitoring scheme to ensure compliance with hourly VOC emission limit
- Record unclear as to how facility is required to calculate heat input to demonstrate compliance with PM10 limit.
- Reliance on an emission factor based on limited data

Title V Operating Permits/EPA Objections (cont.)

- Failure to specify a method to assure compliance with emission limits
- Failure to incorporate all requirements applicable to facility
- Record unclear as to compliance with an emission limit
- Failure to include specific monitoring, recordkeeping, and reporting requirements