Afternoon Air Breakout: Hot Topics in Air Quality

The Curious Case of Clean Air Act Civil Monetary Penalty Inflation

Kurt Kissling, Attorney at Law
kisslingk@pepperlaw.com
248-359-7313

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Legal Disclaimer

This presentation is educational and does not constitute legal advice or legal opinions on specific facts.

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The basis and history of Clean Air Act civil monetary penalties

The recent civil penalty revisions
- The new—and massive—disparity between potential administrative and judicial civil penalties under the CAA

What does this mean for enforcement?

The increased importance of the judge
The Statutory Basis For CAA Civil Penalties

The federal Clean Air Act, at 42 U.S.C. §7413(b), specifies **judicial** civil penalties up to $25,000.00 per day per violation
- This subsection was originally added in 1977
- But also included in Congress’ 1990 revisions

The federal Clean Air Act, at 42 U.S.C. §7413(d)(1), specifies **administrative** civil penalties up to $25,000.00 per day per violation
- This subsection was first added in 1990
Historically, both the judicial and administrative monetary civil penalty maximums under the federal Clean Air Act were adjusted together


Multipliers were used to periodically adjust the statutory maximum to account for inflation

- COLA using CPI-U % increase from June-to-June
The History Of CAA Civil Penalty Increases

- A Civil Monetary Penalty Inflation Adjustment [Final] Rule, 78 Fed. Reg. 66,643 (Nov. 6, 2013), confirmed that both administrative and judicial CAA civil monetary penalties were:
  - $25.0k/day/violation until 1/30/97
  - $27.5k/day/violation for 1/31/97 to 3/15/04
  - $32.5k/day/violation for 3/16/04 to 1/12/09
  - $37.5k/day/violation for 1/13/09 to 12/6/13
  - $37.5k/day/violation kept after 12/6/13

- Confirmed by 12/6/13 Cynthia Giles Memo
The Recent Civil Penalty Revisions

- In 2015, Congress drafted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 [not a typo]
- Tacked on to the Bipartisan Budget Act of 2015
- Goals of (1) creating a “catch up” adjustment for a number of statutorily-defined civil penalties and (2) providing for subsequent annual adjustments thereafter
The Recent Civil Penalty Revisions

- The Civil Monetary Penalty Inflation Adjustment Rule, 81 Fed. Reg. 43,091 (July 1, 2016), was issued as an “interim final rule”

- According to EPA, the law does not provide “any discretion,” so EPA did not solicit public comment

- An interim final rule is used when:
  
  When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an “interim final rule,” or “interim rule.”

  A Guide to the Rulemaking Process, prepared by the Office of the Federal Register
The Recent Civil Penalty Revisions

- By comparison, DOJ published a Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,491 (June 30, 2016), i.e., one day earlier.

- The DOJ rule also revised civil monetary fines revised based on the Bipartisan Budget Act of 2015, and therefore was the functional equivalent of the EPA rule “without comment”

- The DOJ rule was an “interim final rule with request for comments”
The Recent Civil Penalty Revisions

- Under EPA’s 8/31/16 Civil Monetary Penalty Inflation Adjustment Rule, EPA raised the CAA monetary civil penalty maximums for violations occurring after 11/2/15 and assessed on or after August 1, 2016.

- For administrative /day/violation penalties, the maximum went from $37.5k to $44,539.

- For judicial /day/violation penalties, the maximum went from $37.5k to $93,750.

- The “catch-up” analysis used 1977 for the judicial penalties in CAA § 113(b), despite that section appearing in the CAA statutory language passed by Congress in 1990, when § 113(d)(1) was added.
The Recent Civil Penalty Revisions

- Given the new annual December 15 adjustment, EPA already modified the June 30, 2016 figures.
- EPA’s subsequent Civil Monetary Penalty Inflation Adjustment Rule, at 82 Fed. Reg. 3,633 (Jan. 12, 2017), issued as a “final rule,” specified the following increases to the /day/violation maximums:
  - For administrative /day/violation penalties, the maximum went from $44,539 to $45,268.
  - For judicial /day/violation penalties, the maximum went from $93,750 to $95,284.
- Another annual change should occur shortly.
What Does This Mean For Enforcement?

- The result: regulated industry has over twice the fine exposure in court compared to administrative actions (i.e., $95.3k vs. $45.3k)
- Does this provide a coercive amount of leverage for EPA during negotiations?
- Might the malleable jurisdictional requirements for administrative enforcement become more rigid or important going forward?
  - First alleged noncompliance ≤ 12 months ago
  - $356,312 soft cap on penalty amounts, which was originally at $200k
What Does This Mean For Enforcement?

- It’s unclear whether industry can or will challenge the “judicial” penalty adjustment based on EPA’s rulemaking without comment
  - Some industry attorneys still expect challenges
  - But, with one update already completed …

- Despite these maximum CAA fine amounts, actual penalty amounts are typically smaller
  - The Clean Air Act Stationary Source Penalty Policy (October 25, 1991) provides a framework that uses lower figures, even after adjusting for inflation (see the 12/6/13 Giles Memo for examples)
The Increased Importance Of The Judge

In *NRDC v. Illinois Power Resources*, No. 13-CV 1181 (C.D. Ill. July 18, 2017), a federal judge held that there is no right to a jury trial for CAA civil penalties:

- CAA/Congress did not create this right
- In *Tull v. United States*, 481 U.S. 412 (1987), SCOTUS ruled that the Seventh Amendment does not require a jury to determine a CWA civil penalty
- This is now the law in the 2nd, 4th, 5th, 7th, and 10th Circuits, and likely elsewhere
Recent revisions more than doubled the civil monetary penalty exposure under the CAA in judicial actions (versus administrative ones)
- EPA assumed a 1977 starting point despite the broad scope of the 1990 amendments
- EPA adopted the adjustment without comment
- The revision is unchallenged … so far

CAA penalty litigation became much riskier

Judges will wield even greater influence when determining CAA civil monetary penalties
Questions & Answers