

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

Pepper Hamilton LLP
Attorneys at Law

Wednesday, November 8, 2017 – Lansing (LCC-West Campus)

Presentation Only

Legal Disclaimer

- ▶ This presentation is educational and does not constitute legal advice or legal opinions on specific facts
- ▶ Please consult an attorney before acting on any information in this presentation

Presentation Outline

- ▶ 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

The History Of CAA Civil Penalty Increases

- ▶ Historically, both the judicial and administrative monetary civil penalty maximums under the federal Clean Air Act were adjusted together
 - Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §2461 note, §4, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. §3701 note
- ▶ 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
 - Pub. L. 114-74, title VII, §701b, (Nov. 2, 2015), 129 Stat. 599
- ▶ 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 \leq 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

Key Takeaways

- ▶ 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