

PBI Environmental Law Forum
2019

Clean Air Act Litigation Cases and Issues

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Closed Case Summary and Discussion

- Overview
- Issue Identification
- Most of these cases were identified as “Active” during last year’s presentation
- Most of the cases settled, so that limits the discussion and analysis unfortunately.



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Closed Case: [PQ Corporation v. DEP, 2016-086-L](#)

- **Overview:** Appeal of Title V Operating Permit conditions included during renewal that relate to monitoring and recordkeeping requirements that include somewhat esoteric information as flame patterns, emission per unit production, and equipment settings such as “burning tip cooling air pressure.”
- **Status:** Opinion denying partial summary judgment. Rest of case settled through issuance of a Plan Approval and amended Title V Permit.
- **Why it may be noteworthy:** The opinion denying summary judgment discusses issues relating to permit renewals— “Perhaps more fundamentally, we fail to see why a permittee or any other adversely affected party should be precluded from challenging the Department’s action, even if that action was an approval of the renewal without any changes.” PQ Corp., 2017 EHB 870, 875.



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Closed Case: [Hatfield Township Municipal Authority v. DEP, 2017-066-L](#)

- **Overview:** Permittee appealed certain conditions in their Title V Operating Permit, the more interesting of which relate to establishing operating parameters through stack testing, the interplay with CMS requirements, and differences between CEMs and CMS data requirements.
- **Status:** This case settled after issuance of a revised Title V Operating Permit.
- **Why it could have been noteworthy:** The stack testing and particularly CMS-CEM interplay.



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Closed Case: [Erie Coke Corp. v. DEP](#), 2018-033-B

- **Overview:** Appeal by Erie Coke of the hourly emission limit set by DEP in their Plan Approval that implemented case-by-case RACT II. The NOx emission limits were lowered to 0.24 lb/MMBtu based on an error in the application, but no change was made to the hourly or annual NOx limits. No analysis supporting the change was included in the application.
- **Status:** This case has settled.
- **Why it could have been noteworthy:** The lack of basis/support for the change in the application or by DEP given the RACT II criteria.



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Closed Case: [Emerald Contura v. DEP](#), 2017-038-R, consolidated with 2017-046-R

- **Overview:** DEP's District Mining Manager issued an order, purportedly under authority of the APCA, that required abatement of a public nuisance (methane emissions from coal mining operations) through a series of very specific actions on a very tight timeline. The order was appealed, and the parties ultimately entered into a COA.
- **Status:** The parties entered into a COA, and after a long delay, the case has been marked closed.
- **Why it could have been noteworthy:** While many of the issues identified in the Notice of Appeal appear to offer the EHB an opportunity to rule on novel issues, no substantive filings were made.



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Notable On-Going Case Identification

- Overview
- Issue Identification
- Why it may be noteworthy
- No opinion/analysis/discussion as they are active cases



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Active Case: [Sonneborn v. DEP, 2018-099-B](#)

- **Overview:** The Company operates a white oil manufacturing facility. It appealed the Plan Approval for its RACT II application.
- **Issues:** Company claims DEP issued permit without making changes that it had agreed to do in a written memo. Secondly, company alleges that DEP inappropriately set annual or hourly emission limits or pound per hour limits for CO, NO_x and VOC in the context of presumptive RACT.
- **Why it may be noteworthy:** May give insight into presumptive RACT issues, including whether DEP has authority to require periodic stack tests for units under 25 Pa. Code 129.97(b) (Presumptive RACT) when the RACT II regulation does not specifically require it.



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**Active Case: [Abington Reldan Metals v. DEP,](#)
2018-114-C**

- **Overview:** In context of renewal application, a recycling company requested DEP use a 3-hour average for compliance demonstration with the minimum temperature requirements for the afterburner exhaust and primary chamber temperature parameters. The company provided monitored temperature data and operational information. DEP subsequently issued an NOV.
- **Issues:** If there is not a temperature averaging condition in the permit, do brief deviations from permit requirements constitute a violation; is the permitted temperature deviation still valid if stack testing proves that permitted emission limits are met?
- **Why it may be noteworthy:** Should further define DEP's enforcement ability in permits with similar conditions.



**Active Case: [Kinsey v. DEP and New Enterprise,](#)
2018-122-M**

- **Overview:** Third party appealed **General Permit** for asphalt plant operation which increased throughput production. Appellant alleged that the history of odor complaints to DEP precludes allowing an increase in throughput.
- **Issue:** Can DEP approve an increase to operations when there is a history of odor complaints?
- **Why may be noteworthy:** May help define what is compliance history and delineate the extent to which compliance history plays a role in permit issuance as a factor in and of itself. A rare general permit appeal.



Active Case: [East Rockhill Township v. DEP and Pierson, 2019-002-L](#)

- **Overview:** Third party appeal of a Crusher Plan approval.
- **Issues:** Where a township has identified conflicts with the zoning and has denied zoning approval for a quarry operation, can DEP issue an air plan approval for the facility? Do the conditions in the plan approval adequately address the known presence of naturally occurring asbestos at the quarry?
- **Why it may be noteworthy:** Determining the adequacy of asbestos characterization and remedial measures. Land use and zoning interplay.



Active Case: [Clean Air Council and Environmental Integrity Project v. DEP and Sunoco, 2018-057-L](#)

- **Overview:** This is an appeal of Sunoco's issued Plan Approval No. 23-0119H for its installation of a new flare and associated components ("West Warm Flare") and disconnection of the existing Ethylene Complex Flare and associated components.
- **Issues:** The Notice of Appeal details five primary issues of dispute, including Potential to Emit calculations, the LAER determination, Emission Reduction Credit issues, protection of information as Business Confidential, and NSR circumvention.
- **Why it may be noteworthy:** No substantive filings to date, but discovery closes next month, and any or all of the five primary issues may be noteworthy.



Active Case: [Erie Coke Corp. v. DEP, 2019-019-B](#)

- **Overview:** This is an appeal of DEP's Administrative Order dated 2/4/19 requiring Erie Coke to perform stack testing on one control device, imposes new monitoring and recordkeeping requirements on a second device, and implement an extensive investigative plan that includes submission of an application for a new control device.
- **Issues:** The Notice of Appeal attacks DEP's authority and basis for the actions in the Order. The basis for the actions ordered by DEP partially includes the facility's compliance history.
- **Why it may be noteworthy:** Breadth of Order and the extent that its reliance on compliance history is upheld.



Active Case: [Sam Joshi v. DEP, 2017-116-L](#)

- **Overview:** Pro Se Third Party appeal of the renewal and issuance of Title V Operating Permit for Covanta Plymouth Renewable Energy.
- **Issues:** Appellant alleges that the application was not submitted in a timely manner, was not signed by a responsible official, the Air Pollution Control Act Compliance Review Form is incorrect and incomplete, and the DEP has permitted combustion of non-municipal waste without reviewing its impact on the human health and the environment.
- **Status:** Partial summary judgment issued on application timeliness. Rest of case is in post-hearing briefing.



Active Case: [Sam Joshi v. DEP](#), 2017-116-L

- EHB Opinion and Order on Cross Motions for Summary Judgment issued 11/16/2018.
- Timeliness of renewal application:
 - 25 Pa. Code § 127.446(e) renewal applications “shall be submitted at least 6 and not more than 18 months before expiration of the exiting permit.”
 - Permit expired 5/15/2017. DEP received application 11/16/16 (1 day shy of 6 month period.)
 - EHB: A period of time designated in terms of months is generally understood to run from the given day in 1 month to the corresponding date in the specified succeeding month. 1 Pa. C.S. § 1910 (Pennsylvania Statutory Construction Act).



Active Case: [Sam Joshi v. DEP](#), 2017-116-L

- Timeliness – consequences:
 - Goal of renewal application is to provide ample time for DEP to conduct its review, opportunity for public notice and comment, address any necessary changes in the permit. Pg. 6.
 - “Requirement is related to administrative convenience.” Pg. 6.
 - Not ordinarily justify revocation or remand. Pg. 6.

No Zombie Permits!!!!



**Active Case: [Clean Air Council v. DEP and Sunoco](#),
2016-073-L**

- **Overview:** Third-party appeal of the issuance of a Plan Approval E issued to the Sunoco complex located in Marcus Hook, PA.
- **Issues:** The Notice of Appeal alleges 12 objections to the Plan Approval, including various “miscalculations” by DEP of emissions; improper selection of baseline years for the NSR evaluation; circumvention; acceptance of an incomplete application, including Compliance Certification form; and procedural errors relating to the PA Bulletin notice of the proposed Plan Approval.
- **Why it may be noteworthy:** Circumvention and representative emission years.



**Active Case: [Clean Air Council v. DEP and Sunoco](#),
2016-073-L**

- EHB Adjudication issued Jan 9, 2019
 - Remand Plan Approval E.
 - **Major issue:** Project Aggregation.
 - **Conclusion:** DEP erred in concluding that work permitted under one of several plan approvals sought by a major facility was a stand alone project that did not need to be aggregated with other work at the facility for purposes of determining PSD and NSR applicability.



**Active Case: [Clean Air Council v. DEP and Sunoco](#),
2016-073-L**

- Sunoco appealed decision to Commonwealth Court – Feb 13, 2019 stating the EHB failed to apply the doctrine of administrative finality in 2 ways:
 - Plan Approvals 1, A through D and RFD were never appealed and therefore administratively final before the issuance of Plan Approval E.
 - Plan Approvals and RFDs that post date Plan Approval E and were never appealed are administratively final.
 - EHB erred by ordering on the remand of Plan Approval E that DEP consider the emissions from the non appealed actions in evaluating the applicability of PSD and NSR.



**Single Source Determination vs. Project
Aggregation**

- Single Source Determination
 - At the most basic level, when should two (or more) facilities be treated as one facility for permitting purposes.
- Project Aggregation
 - At the most basic level, when should two projects at a single facility be treated as one project for permitting purposes.



Single Source Determination

- Three criteria:
 - Pollutant-emitting activities being to the same industrial grouping;
 - Located on contiguous properties; and
 - Under the control of the same person.

Nat'l Fuel Gas Midstream Corp. v. DEP, 2015 EHB 909,922-24, *rev'd on other grounds*, No. 116, 2017 Pa. Commw. Unpub. LEXIS 400 (Pa. Commw. Jun 2, 2017).



Single Source Determination EPA Policy Change

- US EPA issues applicability determinations upon request.
- Major shift in how US EPA views this issue: Meadowbrook Energy LLC determination issued by US EPA to PA DEP, dated April 30, 2018:
 - “EPA has previously interpreted the term ‘common control’ in a manner that may support viewing the Meadowbrook and KSL facilities as a single ‘stationary source’ or ‘major source.’”
 - “the agency believes clarity and consistency can be restored to source determinations if the assessment of ‘control’ for title V and NSR. permitting purposes focuses on **the power or authority of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements.**”



Single Source Determination: The New Test

- “common sense notion of a plant,” and to minimize the potential for entities to be held responsible for decisions of other entities over which they have no power or authority.
- Test:
 - *Control means the power or authority to dictate decisions.*
 - *Focus should decisions that affect the applicability of, or compliance with, relevant air pollution regulatory requirements.*
 - *Dependency relationships should not be presumed to result in common control.*



Concept of Project Aggregation

- Already clear there is only 1 facility.
- **Question:**
 - Whether multiple, nominally separate but apparently related physical or operational changes at a facility should be deemed a single project for purposes of determining whether the facility has triggered NSR and/ or PSD applicability.



Concept of Project Aggregation

- What DEP must do:
 - DEP must define the project.
 - Perform an applicability determination when it receives an application for a plan approval at a major facility. 25 Pa. Code § 127.203a; 40 C.F.R. § 52.21.
 - DEP must calculate the total emissions “from the project” to determine whether the thresholds for when NSR and/or PSD requirements apply have been exceeded.



Concept of Project Aggregation

- What DEP did as outlined in the Adjudication:
 - DEP performed an applicability determination and concluded Project E is a stand-alone project.
 - Was this reasonable? Is it supported by facts?
 - EHB Concluded:
 - Projects 1 through E and RFD 526 are all part of the same “project” and the emissions from all of the components of that project should have been aggregated.



Factor Test for Project Aggregation

- No Bright-line rule - No one Factor is dispositive and the list is not intended to be exclusive. The EHB recognizes openly that the Department makes a judgment call and has discretion.
 - Physical Proximity;
 - Temporal Proximity;
 - Interdependence of Phased Projects;
 - Common Plan and Shared Objective; and
 - Other Relevant Factors.



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Marcus Hook Project



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Project Aggregation - Physical Proximity

- Pg 39-40, 54 - Good example of photograph “A picture is worth a thousand words.” There is a reason why we have clichés.
- Pg 54 - Not surprising given the functional interdependence of the various components and the fact that various components are literally linked by common infrastructure.



Project Aggregation – Temporal Proximity

- Pg. 52 - “Closeness in timing and functional interdependence strike us as particularly significant.”
- Pg 55 - Multiple plan approval applications within a short period is a red flag. Board emphasized in review of timeline how they were within months of each other. (Don’t need an expert to testify to this. Facts speak for themselves.)



Project Aggregation – Interdependence of Phased Projects

- Footnote 8 pg. 56 - Expert testimony not required when interdependence of the projects is obvious and overwhelming based on the evidence.
- **Evidence:** Plan Approval application materials (states it was fully incorporating all sources and emissions increased associated with projects; same process is evidence of single project); DEP review memo.
- Present evidence using a common sense approach.
- Concisely summarized in FOF 282-295. The use of repetitive language highlights the multiple overlapping connections and relatedness that show the separate plan approvals were not for stand alone projects. “Sunoco uses the same..” “Sunoco uses the same...” “ not be independently viable” “are all components of an overarching, cohesive project.”



Project Aggregation - Common Plan and Shared Objective

- Pg. 60 - EHB notes this is more subjective than close timing and interconnectedness factors.
- Pg. 60 - Facility developer sees various construction phases as 1 project.
- **Pg. 61 - Intent: Intent to evade regulatory requirements is not a prerequisite to find that nominally separate projects are actually parts of 1 large project.**
- Pg. 61 - Goal of project was to turn Marcus Hook into an NGL hub. All plan approvals were part of the conversion goal.
- Evidence example: Public Announcements.



Project Aggregation – Other Relevant Factors

- Consider holistically legislative intent to capture project such as this.
- Pg. 65 - Trust but Verify – can't rely on permittee vague assurance. Need to show supporting evidence. (stating new customers in application alone is not enough to overcome aggregation.)
- FOFs 37 & 38 - New customer demand for the same product is an irrelevant factor.
- Factors that are not relevant: only stating there are new customers; mode of delivery (blue truck vs. red truck, or railcars vs pipeline).



EHB's view on circumvention:

- Pg. 51 - Even if the prior plan approvals are administratively final, as in this case, DEP must evaluate those plan approvals not for purposes of reopening the earlier approvals, but for purposes of defining the boundaries of the project as properly delineated for the plan approval application currently under review.
- Pg. 51 - Looking back at earlier plan approvals, as well as known future projects, in order to define the proper scope of the project currently under review is precisely the point of project aggregation.
- Pg. 51-52 - Allowing a facility to subdivide a project in any way it sees fit, based on its business plan or otherwise would render the regulatory thresholds meaningless. Without constraints, any project could be divided up in such a way that each divided part falls below the applicability thresholds.



Circumvention 127.216

- Regardless of the exemptions provided in this subchapter, an owner or other person may not circumvent this subchapter by causing or allowing a pattern of ownership or development, including the phasing, staging, delaying or engaging in incremental construction, over a geographic area of a facility which, except for the pattern of ownership or development, would otherwise require a permit or submission of a plan approval application.
- Subchapter E - New Source Review.
- Sunoco and DEP argued regulation only applies for NSR not PSD (Subchapter D).



Circumvention

- Chapter 121 – General Provisions:
 - 25 Pa. Code § 121.9 Circumvention:
 - No person may permit the use of a device, stack height which exceeds good engineering practice stack height, dispersion technique or other technique which, without resulting in reduction of the total amount of air contaminants emitted, conceals or dilutes an emission of air contaminants which would otherwise be in violation of this article, except that with prior approval of the Department, the device or technique may be used for control of malodors.
- Subchapter B – Plan Approval Requirements.
- 25 Pa. Code § 127.12b Plan approval terms and conditions:
 - (e) Temporary operation will not be authorized or extended under this section which may circumvent the requirements of this chapter.



Circumvention 40 C.F.R. § 52.21 Prevention of Significant Deterioration (PSD) of Air Quality

- 40 C.F.R. § 52.21(j)(4).
- For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.



Circumvention

Bottom line: General presumption in regulations against circumvention in approaching air quality obligations.



Project Aggregation



Modification

- The EHB having determined there was only 1 project, EHB suggested DEP needed to consider what sources if any needed to be modified.
- EHB however points out lack of authority or guidance for how DEP would make this determination and instead leaves it up to DEP in the first instance to determine how it should determine the emission units in a post facto aggregation situation as here... more to come.



Masias v. EPA and Union Electric Co. and Utility Air Regulatory Group, 906 F.3d 1069

- **Overview:** The U.S. Court of Appeals, D.C. Cir., issued an opinion denying the petitions for review filed by a public utilities board, environmental advocacy groups, and individuals who sought review of EPA's determination to designate as unclassifiable certain areas in Colorado, Kansas, and Ohio for sulfur dioxide NAAQS. (Oct. 2018).
- **Issues/Why noteworthy:**
 - Whether public utilities board has standing to challenge unclassifiable designation.
 - Preservation of issues during comment period.
 - Representativeness of meteorological data
 - **Practice Pointer:** Evidentiary documentation for meteorological data multi-factor test.



Standing

- Court noted that for a power plant operator, the Board's claim is unusual.
- The Court concluded that the designation of "unclassifiable" would not subject the Board to regulatory burden beyond those applicable under the Board's preferred designation – "attainment."
- Standing was not met because the Board could not show it had an injury or that the Court could provide redress.



Public Comment Provisions

- Court’s review of rulemakings is expressly limited to only those objections that “were raised with reasonable specificity during the public comment.” 42 U.S.C. § 7607(d)(7)(B).
- “EPA is not required ‘to cull through all the letters it receives and answer all of the possible implied arguments.’”
- Although EPA must examine key assumptions even if not raised during the comment period, upon court review a litigant has an obligation to spell out its argument “squarely and distinctly, or else forever hold its peace.”
- **Example:** single conclusory sentence in a brief or expert report are not enough.



Public Comment Provisions

- **Note:** In PA, the APCA doesn’t require one to comment to preserve the issue. However, the EHB has noted the omission of comments from public commenters that were later raised in an appeal. See *Logan v. DEP and Perdue*, 2018 EHB 81.
- **Section 10.2 Appealable Actions** states that “any person who participated in the public comment process for a plan approval or permit shall have the right, within 30 days from actual or constructive notice of the action, to appeal the action.”

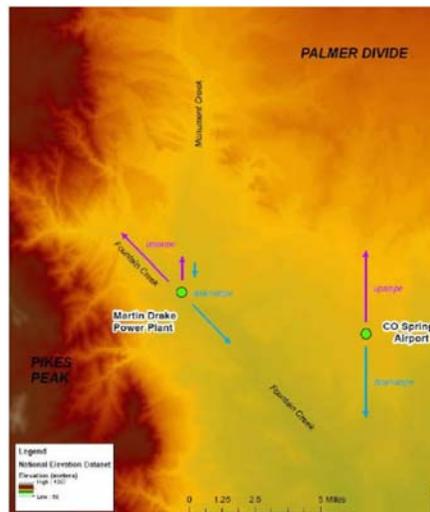


Multi-Factor Tests – Meteorological Data

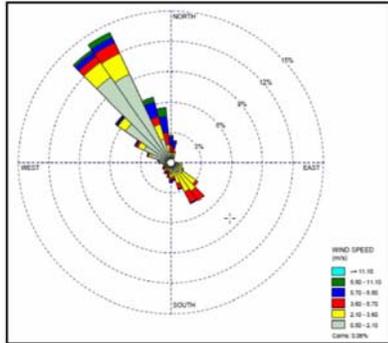
- EPA’s holistic assessment; multi-factor test to analyze wide variety of data on a case-by-case basis; discrete data points are not determinative.
- EPA’s guidelines for air quality - meteorological data used as inputs should be selected on the basis of spatial and climatological representativeness, including proximity of monitoring site, complexity of the terrain, exposure of the monitoring site, time period under which data are collected.
- Ex: Significant differences in terrain/elevation and wind patterns between monitoring sites.



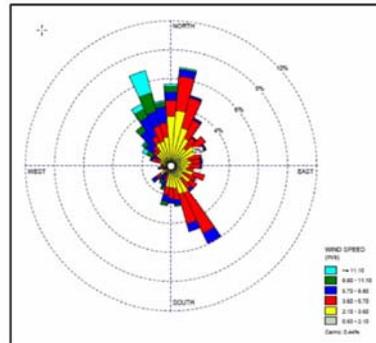
Practice Pointers: Effective Use of Exhibits



Practice Pointers: Effective Use of Exhibits



Meteorological Data from Drake Plant



Meteorological Data from Colorado Springs Airport



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Questions or Comments?

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