HISER JOY

New Source Review Updates (and some upcoming policy developments)

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Trends in NSR Source Specific Determinations & Policy

- Source Specific Developments:
  - Completion of the *United States v. Ameren Missouri* litigation, mostly in EPA's favor
  - An unexpected end to *Limetree Bay Terminals*
  - Clarification of "Relaxation" doctrine – *John Deere Dubuque Works*
  - Clarification of "Achievability" in BACT – *Port Arthur LNG*
- Policy Developments:
  - D.C. Circuit decision in *New Jersey v. EPA*, putting an end to the 2002 NSR Reform litigation
  - Denial of reconsideration for Project Emissions Accounting Rule
  - Fugitive Emissions Rule
  - EPA's 2022 policy objectives
- Recent Case of Interest:
  - *Wild Earth Guardians v. Extraction Oil and Gas, Inc.*, 457 F.Supp.3d 936

United States v. Ameren Missouri (8th Cir. 2021)

- Appeal of E.D. Missouri case finding PSD violations at Rush Island plant.
- District Court had:
  - Found violations based on increased utilization, facility bears burden of showing demand growth.
  - Required wet flue gas desulfurization ($500M), application for PSD penalty with possible more stringent controls, and requiring dry sorbent injection at the Labadie power plant to "offset" excess emissions ($165M).
- Eighth Circuit:
  - Rejected challenge that EPA cannot seek injunctive relief for "wholly past" violations;
  - Rejected challenge that SIP definition of "modification" limited PSD definition;
  - Held that facility claiming "demand growth" bears burden of proof;
  - Upheld Koppe/Sahu calculation methodology (essentially, increased use = emissions)
  - Rejected district court's injunction against "innocent" Labadie plant as exceeding authority.

Ameren Post-Appeal Proceedings

- Both Ameren and the United States sought reconsideration of the Eighth Circuit decision.
  - EPA argued that the Eighth Circuit had erred by setting aside its injunctive/mitigative relief at the Labadie Station. EPA's argument relied upon the following points:
    - Enforcement is brought against a "person," not a station and Ameren is the "person."
    - Relief does not depend upon where the "person" is.
    - Government entitled to "complete relief" – including recoupment of 275,000 tons of excess pollutants.
    - The relief ordered against Labadie is "entirely different" from the relief that would have been awarded if Labadie had violated the PSD program. It was only required to install cheap, less effective dry spray injection controls.
- EPA/DOJ likely right on the law and wrong on the equities.
  - DOJ correct that enforcement is against a "person."
  - DOJ forgets, however, that its case is equitable. No evidence of unclean hands at Labadie and it has multiple innocent parties (employees, community).
  - This must be weighed against the general public benefits. Mismatch in burdens versus role in violation concerns courts.

Ameren Post-Appeal Proceedings

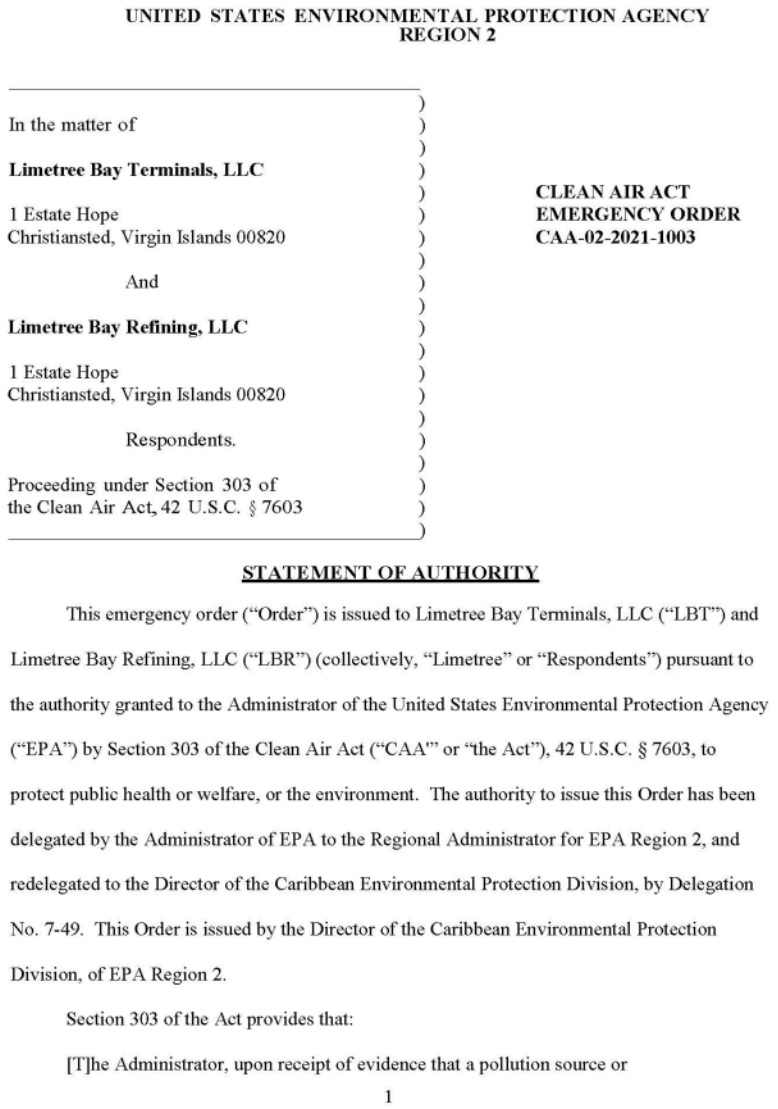
- Ameren's petition for reconsideration rehashed its arguments at trial and before the Eighth Circuit panel:
  - Wrong definition of "modification" – no PSD violation because district court found no "construction" and no "modification" because SIP definition requires an increase in potential to emit, which was not found.
  - EPA and court should not override State decision in how it structures its SIP.
- Ameren is likely wrong on the law
  - Standalone PSD definition of "major modification" would cover its situation.
  - Definition of "net emissions increase" follows federal program and would show an increase for state purposes as well as federal purposes.
  - Ameren's argument depends upon EPA having erred in approving a state program that does not meet the minimum requirements of 40 CFR 51.166.
- Ameren has now petitioned to amend the ruling to allow it to shut down the Rush Island Plant upon approval by its RTO.

United States v. Ameren Missouri

- **Lessons Learned**:
  - Government may “second guess” facility emissions estimates.
  - Any source variance from "approved" methods is grounds for setting aside.
  - If facility’s estimates are not “preconstruction,” essentially disregarded.
  - Any production increase = assumed emissions increase barring new controls.
    - The so-called Koppe/Sahu approach
  - “Demand growth” narrowly construed:
    - Capable of achieving prong: just because achieved in past short-term burst not determinative.
    - “Not related” to project prong: required showing "demand growth" tied to unit and not part of growth related to project
  - Technical regulatory guidance defenses not persuasive with court.
  - Past inconsistent statements by managers/corporate are problematic.
  - Remedy: must meet current BACT for past violations AND potentially mitigate environmental impacts

Limetree Bay Terminals

- Controversial restart of refinery in St. Croix.
- Trump EPA had issued a PAL permit.
- On March 25, 2021, Administrator Regan withdrew the PAL permit EPA had issued in 2020.
- On June 24, 2021, EPA issued an emergency order under Section 303 of the Clean Air Act that "all Refinery Operations cease until termination of this Order" unless EPA stipulations were met.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the matter of

Limetree Bay Terminals, LLC

1 Estate Hope
Christiansted, Virgin Islands 00820

And

Limetree Bay Refining, LLC

1 Estate Hope
Christiansted, Virgin Islands 00820

Respondents.

Proceeding under Section 303 of the Clean Air Act, 42 U.S.C. § 7603

CLEAN AIR ACT
EMERGENCY ORDER
CAA-02-2021-1003

STATEMENT OF AUTHORITY

This emergency order ("Order") is issued to Limetree Bay Terminals, LLC ("LBT") and Limetree Bay Refining, LLC ("LBR") (collectively, "Limetree" or "Respondents") pursuant to the authority granted to the Administrator of the United States Environmental Protection Agency ("EPA") by Section 303 of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7603, to protect public health or welfare, or the environment. The authority to issue this Order has been delegated by the Administrator of EPA to the Regional Administrator for EPA Region 2, and redelegated to the Director of the Caribbean Environmental Protection Division, by Delegation No. 7-49. This Order is issued by the Director of the Caribbean Environmental Protection Division, of EPA Region 2.

Section 303 of the Act provides that:

[T]he Administrator, upon receipt of evidence that a pollution source or

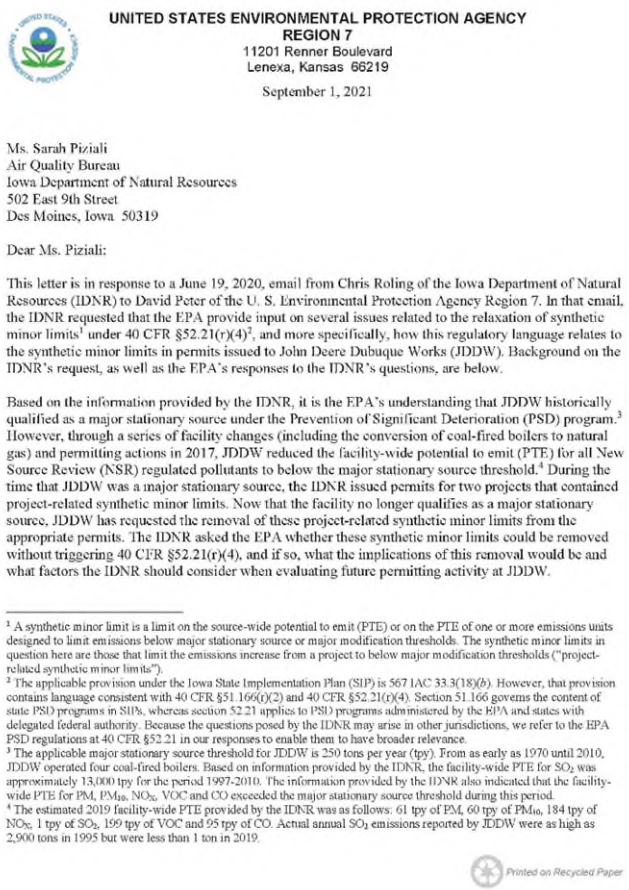
1

Limetree Bay Terminals

- On July 12, 2021, DOJ filed a complaint for injunctive relief against Limetree Bay Terminals. The complaint seeks an injunction ordering:
  - Order Defendants to continue to comply with the requirements set forth in the EPA Order for an additional period as appropriate to ensure that the Refinery operations will not continue to present an imminent and substantial endangerment.
  - Order Defendants to take all measures necessary to eliminate the imminent and substantial endangerment posed by the Refinery before restarting Refinery operations, including but not limited to implementing and complying with measures in the Corrective Action Plan upon its approval by EPA and installing and operating ambient air monitoring equipment for H2S and SO2 in appropriate locations potentially downwind of the Refinery to demonstrate that the Refinery no longer presents an imminent and substantial endangerment.
- Limetree Bay Terminals has filed a plan to restart Flare #8 as part of a long-term decommissioning activity.

Clarification of 40 CFR 52.21(r)(4) “relaxation”

- In a September 1, 2021, letter addressed to the Iowa DNR, EPA Region 7 clarified “relaxation.”
- John Deere Dubuque Works had taken limits in the past on certain equipment. The plant subsequently became a PSD minor. It requested to remove the former PSD avoidance limits while remaining minor.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 Renner Boulevard
Lenexa, Kansas 66219

September 1, 2021

Ms. Sarah Piziali
Air Quality Bureau
Iowa Department of Natural Resources
502 East 9th Street
Des Moines, Iowa 50319

Dear Ms. Piziali:

This letter is in response to a June 19, 2020, email from Chris Roling of the Iowa Department of Natural Resources (IDNR) to David Peter of the U. S. Environmental Protection Agency Region 7. In that email, the IDNR requested that the EPA provide input on several issues related to the relaxation of synthetic minor limits[1] under 40 CFR §52.21(r)(4)[2], and more specifically, how this regulatory language relates to the synthetic minor limits in permits issued to John Deere Dubuque Works (JDDW). Background on the IDNR's request, as well as the EPA's responses to the IDNR's questions, are below.

Based on the information provided by the IDNR, it is the EPA's understanding that JDDW historically qualified as a major stationary source under the Prevention of Significant Deterioration (PSD) program.[3] However, through a series of facility changes (including the conversion of coal-fired boilers to natural gas) and permitting actions in 2017, JDDW reduced the facility-wide potential to emit (PTE) for all New Source Review (NSR) regulated pollutants to below the major stationary source threshold.[4] During the time that JDDW was a major stationary source, the IDNR issued permits for two projects that contained project-related synthetic minor limits. Now that the facility no longer qualifies as a major stationary source, JDDW has requested the removal of these project-related synthetic minor limits from the appropriate permits. The IDNR asked the EPA whether these synthetic minor limits could be removed without triggering 40 CFR §52.21(r)(4), and if so, what the implications of this removal would be and what factors the IDNR should consider when evaluating future permitting activity at JDDW.

[1] A synthetic minor limit is a limit on the source-wide potential to emit (PTE) or on the PTE of one or more emissions units designed to limit emissions below major stationary source or major modification thresholds. The synthetic minor limits in question here are those that limit the emissions increase from a project to below major modification thresholds ("project-related synthetic minor limits").
[2] The applicable provision under the Iowa State Implementation Plan (SIP) is 567 IAC 33.3(18)(*b*). However, that provision contains language consistent with 40 CFR §51.166(r)(2) and 40 CFR §52.21(r)(4). Section 51.166 governs the content of state PSD programs in SIPs, whereas section 52.21 applies to PSD programs administered by the EPA and states with delegated federal authority. Because the questions posed by the IDNR may arise in other jurisdictions, we refer to the EPA PSD regulations at 40 CFR §52.21 in our responses to enable them to have broader relevance.
[3] The applicable major stationary source threshold for JDDW is 250 tons per year (tpy). From as early as 1970 until 2010, JDDW operated four coal-fired boilers. Based on information provided by the IDNR, the facility-wide PTE for SO_2 was approximately 13,000 tpy for the period 1997-2010. The information provided by the IDNR also indicated that the facility-wide PTE for PM, PM_{10}, NO_X, VOC and CO exceeded the major stationary source threshold during this period.
[4] The estimated 2019 facility-wide PTE provided by the IDNR was as follows: 61 tpy of PM, 60 tpy of PM_{10}, 184 tpy of NO_X, 1 tpy of SO_2, 199 tpy of VOC and 95 tpy of CO. Actual annual SO_2 emissions reported by JDDW were as high as 2,900 tons in 1995 but were less than 1 ton in 2019.

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40 CFR 52.21(r)(4) “relaxation”

- Region 7 gave the following answers:
  - Do PSD “avoidance” limits apply for the life of the equipment or can they be extinguished?
  - Based on the definition of “major source” and the wording of 52.21(r)(4), Region 7 concluded that:
    - Because, by definition, a major modification can only occur at a major stationary source, a relaxation or removal of a synthetic minor limit would not trigger 40 CFR 52.21(r)(4) or any other requirements under the PSD regulations at a non-major source. Circumvention review is still required.
  - IDNR noted that some prior EPA decisions had suggested that the length of time between the avoidance limit and the subsequent event is important.
    - EPA Region 7 responded:
      - “Sources are not obligated to be classified as a minor source for a minimum amount of time before a project-related synthetic minor limit can be relaxed or removed.” BUT IT ALSO SAID
      - “There is no minimum time that would render a source seeking to evade preconstruction review immune from enforcement if that source demonstrates an intent to circumvent.”
      - If a source becomes “major” again because the limits that made in minor are themselves relaxed, that relaxation would trigger 52.21(r)(4) but EPA clarified that other limits do not “spring back into life” if this occurs.

BACT "Achievability" Clarification

- In August 31, 2022, comments on "Initial Application for Permit for the Port Arthur LNG Facility," EPA Region 6 commented directly adverse to the TCEQ Executive Director (ED) in comments to the Commission.
  - Region 6 states that the "NSR Workshop Manual … do[es] not support the ED's suggestion that a BACT limitation must be operational to be considered technically feasible and achievable, and mischaracterizes EPA's recommendation for evaluating technical feasibility of a control technology and/or alternative as expressed in the [1990] NSR Workshop Manual."
  - EPA states that the ED's position "is only the first question in a two-step analysis."
  - EPA states test is whether a technology is "available" and "applicable"
    - "Available" means commercially available. EPA later states "soon to be available" means required in a permit.
    - "Applicable" means that there are no physical or chemical characteristics of the emissions stream that prevent the application.
  - A control technology in another permit that is applicable is achievable, particularly if supported by a vendor guarantee.
  - ED's position that operational and demonstrated achievement "is required without exception for an otherwise permitted limit … is inconsistent with EPA's recommended method for determining BACT…."

EPA Policy Developments

- EPA had a recent policy win in the courts:
  - *New Jersey v. EPA* – "reasonable possibility" test
- EPA has released a proposed "fugitive emissions" rule.
  - Published at 87 Fed. Reg. 62322 (Oct. 14, 2022).
  - Formally repeals the 2008 Fugitive Rule (mostly stayed since its promulgation)
    - 2008 Fugitive Rule stated that you don't consider fugitives from non-categorical sources in determining whether a "major modification" has occurred.
  - Formally repeals that part of the administrative stay that has reinstated the 1980 rule.
- New EPA position:
  - "Fugitives" only discounted for non-categorical source "major stationary source" determinations.
  - All pollutants, regardless of type, considered for "major modification" determination programs.
  - States and Locals must revise their program rules within 3 years to reflect this change.
  - Problematic "clarification" of what is a fugitive emission:
    - Any emission that actually "passes through" an "opening"
    - No consideration of cost of controls.

EPA Policy Developments

- EPA released a new "Guidance for Ozone and Fine Particulate Matter Permit Modeling" on July 29, 2022.
  - The Guidance sets forth how a source "may demonstrate that it will not cause or contribute to a violation" of the Ozone and $PM_{2.5}$ NAAQS.
  - Guidance is generally welcome and provides good steps for sources and consultants to use in preparing applications.
    - Generally reaffirms the MERPs approach while providing additional guidance on chemical transport model (CTM) use.
    - Establishes "holistic approach" for PM2.5: if trigger SER for $PM_{2.5}$ direct, NOx precursor or SO_2 precursor, modeling analysis consider ALL THREE. Same rule applies for ozone.
    - Has helpful language that "primary" and "secondary" $PM_{2.5}$ impacts typically don't interact either spatially or temporally.
  - Guidance does have some issues:
    - In Step 1 modeling (project significance), does not address how to handle emissions decreases in part of a multi-pollutant family (ozone or $PM_{2.5}$).
    - Loose language in examples and charts talks about "source" when should say "increase."
    - Litigation-breeding comment about "must consider trends" in data and not merely rely on existing data.

EPA Policy Agenda

- EPA announced some significant policy goals/objectives for 2022/2023:
  - **No "second guessing" memo.** EPA is ***reconsidering*** former Administrator Pruitt's "Actual to Projected Actual Applicability Test" memorandum.
    - Reliance is at extreme peril.
  - **Project Emissions Accounting rule/memo**. EPA ***denied*** the petitions for reconsideration of this rule and memo. However, EPA ***plans to initiate a discretionary rulemaking*** to address concerns in the petitions for reconsideration.
    - Environmental community dislikes but bound up in their win in *New York II.*
  - **Potential to Emit.** EPA has announced ***plans for a new rule*** to redefine consistently across all air programs potential to emit what constitutes "legally and practicably enforceable."
    - EPA consistently seeking to limit state programs to *federal* authorities only.
  - **Minor NSR programs.** EPA is looking at what it perceives are weak or inadequate state/local minor NSR programs.

Wild Earth Guardians v. Extraction Oil and Gas, Inc., 457 F.Supp.3d 936

- Wild Earth Guardians challenged seven oil and gas company permits operating under Colorado SIP's "deferred" permit provision. Colorado SIP provision, as interpreted by CDPHE, allows sources to start construction so long as they file a synthetic minor application within 90 days of starting operation and never actually emit more than "major source thresholds.
- Wild Earth Guardians filed citizen suit alleging that since companies had a potential to emit greater than major source threshold, they are required to comply with the major source NSR programs because they are "major sources" until the synthetic minor permit granted.
- Companies defended that minor source permit took effect immediately upon their decision to use and that other provisions limited the potential to emit.

Wild Earth Guardians v. Extraction Oil and Gas, Inc., 457 F.Supp.3d 936

- Court held on Procedural Issues:
  - No abstention appropriate under *Burford* or other doctrine.
  - Not clear this is a state program because done under auspices of federal law
  - Will give some deference to CDPHE where its actions are well reasoned and consistent with federal law.
- Court held on merits:
  - Not persuaded that Wild Earth Guardians are correct that synthetic minor program does not "relate back" to start of operation because requirements apply beginning with first day of operation, including controls, recordkeeping etc. That is CDPHE position.
  - Not persuaded by companies' arguments that they do not "actually emit" greater than major source threshold amounts and hence liable for citizen suit for violating Colorado SIP – issue is a triable issue of fact.

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