

Arkansas Environmental Federation Convention Emerging Issues

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Discussion will address:

- ▶ “Emerging issues” in a variety of environmental media and programs.
- ▶ A few in areas we do not often discuss.
- ▶ Will try to avoid “emerging issues” discussed in other sessions (e.g., waters of the United States, etc.)



Source of information that often addresses issues relevant to solid/hazardous waste and recycling issues:

Arkansas Environmental, Energy and Water
Law Blog

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

Three posts five days a week

Definition of Harm/Endangered Species Act: United States Fish and Wildlife Service Final Rule

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service recently finalized a rule to rescind the regulatory definition of “harm” in the Endangered Species Act regulations arguing the existing regulatory definition of “harm”, which includes habitat modification, does “not match the single, best meaning of the ESA statute.” 91 Fed. Reg. 43,300, 43,301 (Jul. 14, 2026).

Under the ESA it is unlawful for a person to “take” a listed animal without a permit.

The statute (Section 9) defines “take” to include a broad range of actions that include:

...harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. See 16 U.S.C. § 1532(19).

Harm had been interpreted by the Service as including significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns, 50 C.F.R. § 17.3, an understanding of “harm” upheld by the U.S. Supreme Court some thirty years ago in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

Definition of Harm/Endangered Species Act: United States Fish and Wildlife Service Final Rule

Would arguably greatly shrink ESA's applicability to various activities/projects.

In the final rule, the Service formally rescinds “the regulatory definition of ‘harm’ from the Code of Federal Regulations in Title 50 parts 17 and 222.” 91 Fed. Reg. at 43,300.

According to the Service, the current definition of “harm” is inconsistent with the structure of the ESA, and further states “no replacement definition is needed.” Id. at 43,302.

The Service's finalization of the rule drew immediate legal action from wildlife conservation organizations like the Center for Biological Diversity, Conservation Law Foundation, Sierra Club, and others.

Spectaclecase Mussel/Endangered Species Act: U.S. Fish and Wildlife Service Designates Critical Habitat (Including the Ouachita River)

The United States Fish and Wildlife Service issued a final rule designating critical habitat for the following four mussels that have been listed as endangered or threatened:

- Rayed bean
- Sheepnose
- Snuffbox
- Spectaclecase

See 91 Fed. Reg. 22590.

The critical habitat designation for the spectaclecase mussel includes a portion of the Ouachita River in Arkansas.

Any practical impacts to federal permitting in the relevant area?

Section 7(a)(2) requires every federal agency to ensure any action it authorizes (i.e., permits), funds, or carries out is not likely to jeopardize the continued existence of listed species or adversely modify critical habitat

PM2.5/Clean Air Act: National Association of Manufacturers and other Industrial Groups File U.S. Supreme Court Petition for a Writ of Certiorari

The National Association of Manufacturers and 8 other industrial organizations filed a Petition for a Writ of Certiorari before the United States Supreme Court challenging a 2024 EPA rule revisions the Clean Air Act National Ambient Air Quality Standards for particulate matter.

The Petition challenges the United States Court of Appeals for the District of Columbia Circuit June 26th Opinion in which it denied EPA and the industrial organizations argument that the agency's revision of the PM2.5 NAAQS is based on an erroneous interpretation of the Clean Air Act and exceeded its authority by revising the standard without initiating and completing a thorough review.

The D.C. Circuit denied EPA's Motion for Vacatur and upheld the revised PM2.5 NAAQS.

EPA had modified under the Biden Administration the PM2.5 to a more restrictive 9.0 $\mu\text{g}/\text{m}^3$.

The previous PM2.5 standard was 12.0 $\mu\text{g}/\text{m}^3$.

PM2.5/Clean Air Act: National Association of Manufacturers and other Industrial Groups File U.S. Supreme Court Petition for a Writ of Certiorari

EPA under the Trump Administration argues that the revised PM2.5 NAAQS is:

- ... an unlawful tightening of the annual standard for fine particulate matter (PM2.5) from 12.0 $\mu\text{g}/\text{m}^3$ to 9.0 $\mu\text{g}/\text{m}^3$, without the rigorous, stepwise process that Congress required. EPA now confesses error and urges this Court to vacate the rule before the area designation deadline of February 7, 2026.

The Petition filed by NAM states that two questions are presented which include:

- Whether EPA may revise a NAAQS without the “thorough review” required by section 109(d)(1) simply because it acts “earlier or more frequently” than mandated.
- Whether EPA must consider costs and attainability when exercising discretion to review and revise a NAAQS “earlier or more frequently” than mandated.

This will be a tough argument to make.

Previous precedent makes clear cost and feasibility in setting a NAAQS should not be considered.

PM2.5/Clean Air Act: U.S. Court of Appeals Sets Schedule for EPA Nonattainment Designations

The United States District Court for the Northern District of California in a July 17th Order issued a schedule for the United States Environmental Protection Agency to issue PM2.5 nonattainment designations.

The Order requires that EPA identify air quality control regions by February 6, 2027, that are in violation of the PM2.5 Clean Air Act National Ambient Air Quality Standards.

EPA argued for holding the case in abeyance in terms of designating PM2.5 nonattainment of air quality control regions, noting it was appealing the PM2.5 decision.

PM2.5/Clean Air Act: EPA Notifies Status of Potential Designation

- On October 2 EPA notified all 50 states of its intended approach for area designations under revised PM2.5.
- Agency makes it clear it is not doing so voluntarily.
- Providing states the opportunity to submit information for next 30 days.
- Necessary to comply with the Court to comply with attainment, non-attainment, or unclassifiable by February 6, 2027.

New Source Review/Clean Air Act: U.S. Environmental Protection Agency Proposed Rule Addressing "Begin Actual Construction"

Environmental Protection Agency published in the May 13th Federal Register proposed revisions to the Clean Air Act New Source Review air permitting regulations. See 91 Fed. Reg. 26958.

The proposed rule distinguishes between construction of a stationary source and construction of non-emitting components or structures.

Specifically, the proposed rule addresses the definition of “begin actual construction” in the NSR regulations.

The NSR program is triggered by new major sources of air pollution and existing major sources that are making a significant modification.

Application of NSR permitting can be significant from a timing standpoint.

Section 165(a) of the Clean Air Act states that “no major emitting facility ... may be constructed ... unless a permit has been issued.”

The proposed rule distinguishes between construction of a stationary source and construction of non-emitting components or structures, while clarifying and codifying that the latter can occur before an owner or operator obtains an NSR air permit for a new major stationary source or major modification of an existing major stationary source.

New Source Review/Clean Air Act: U.S. Environmental Protection Agency Proposed Rule Addressing "Begin Actual Construction"

The revisions will update the definition of “begin actual construction” and add a definition of “pollutant-emitting activities” in the Federal NSR regulations.

The proposed rule is stated to be intended to remove some of these restrictions to allow, before obtaining an NSR air permit, construction of components that do not emit air pollutants, such as:

- Utility service infrastructure for a site.
- Concrete pads.
- Some types of buildings and building components.

ADEQ in correspondence has referenced this EPA guidance.

Policy Implementation Update Regarding Startup, Shutdown, and Malfunction Provisions in State Implementation Plans/Clean Air Act: U.S. EPA Issues Guidance Memorandum

The United States Environmental Protection Agency issued a September 1st Guidance Memorandum titled:

- Policy Implementation Update Regarding Startup, Shutdown, and Malfunction (SSM) Provisions in State Implementation Plans.

EPA describes the two cases that addressed SM:

- *Florida Electric* is described as addressing SIP provisions pertaining to excess emissions during periods of startup, shutdown, and malfunction.
- *SSM Litigation Group* is described as addressing affirmative defense provisions that an air agency may elect to include in its SIP.

SSM addresses operational scenarios different from normal, steady-state operations.

To address the operational conditions that vary from normal, steady-state industrial operations in the applicable Clean Air Act regulations/programs has been a difficult issue.

The role of SSM exemptions has been a focus of EPA, states, the regulated community, and environmental organizations for many years.

Policy Implementation Update Regarding Startup, Shutdown, and Malfunction Provisions in State Implementation Plans/Clean Air Act: U.S. EPA Issues Guidance Memorandum

The agency states that doing so will provide State, Tribal, and local air agency partners with clarity about:

- Whether a State requirement during an SSM period must apply continuously in order to meet applicable Clean Air Act requirements.
- How to distinguish between liability for noncompliance generally, and situations where noncompliance occurs because of circumstances beyond a facility's control (stating that "This is in line with the agency's previous actions on affirmative defense").

The Memorandum provides the EPA's view/summary of the impacts of these decisions on SIP provisions, including:

- Automatic exemptions.
- Director's discretion exemptions.
- Affirmative defenses.

The Memorandum also provides EPA's views on how it will evaluate SIP submittals.:

New Source Review/Minor Sources: U.S. Environmental Protection Agency Proposed Rule to Streamline State and Local Permitting Process

The EPA proposed a rule to:

... streamline the New Source Review (“NSR”) permitting process for minor sources by eliminating the minimum federal regulatory requirements for public participation.

The proposed rule is stated to make decisions about public participation requirements for State and local minor NSR programs to be turned over to the respective State and local air agencies.

The focus is to revise the public participation regulatory requirements for sources subject to Clean Air Act NSR programs approved in the State Implementation Plans.

EPA states that in the proposed rule that state and local air quality regulatory authorities determine, pursuant to the CAA, whether, when, and to what extent public participation in minor NSR programs is necessary to assure the NAAQS are achieved.

Environmental groups have submitted extensive comments in opposition.

New Source Review/Minor Sources: U.S. Environmental Protection Agency Proposed Rule to Streamline State and Local Permitting Process

The proposed rule is stated to provide state and local air agencies with greater discretion to identify the requisite level of public participation that is appropriate in their minor NSR programs, which regulate individual authorizations to construct minor stationary sources and minor modifications to existing stationary sources.

The proposed rule is stated to relate specifically to EPA's minimum requirements for approving state and local minor NSR programs to become part of a SIP.

These programs are described as applying to proposed new "minor" stationary sources and "minor" modifications to existing stationary sources, and to propose decisions to authorize their construction.

New stationary sources are described as considered "minor" if they do not have the potential to emit air pollutants in an amount equal to or exceeding the "major source" statutory threshold within parts C and D of Clean Air Act Title I.

Streamlining Clean Air Act Title V Operating Permit Process to Expedite Approvals: U.S. Environmental Protection Agency Issues Guidance

The United States Environmental Protection Agency (“EPA”) issued on May 11th a guidance document titled:

Guidance on Streamlining Title V Operating Permit Reviews.

The Guidance clarifies EPA’s position on the following:

- The Agency can concurrently review a proposed permit while the draft permit is going through the required public participation process;
- The Agency can expedite and conclude review of a proposed permit, and permitting authorities can finalize a title V permit, prior to the conclusion of the Agency’s 45-day review period; and
- The correct method for calculating title V permit review deadlines.

Streamlined, Clear, Expeditious Permitting: Arkansas Governor Sanders Signs Executive Order

Arkansas Governor Sanders signed on February 16th an Executive Order 26-04 styled:

EXECUTIVE ORDER TO MAKE ARKANSAS THE BEST STATE IN AMERICA TO DO BUSINESS THROUGH STREAMLINED, CLEAR, AND EXPEDITIOUS PERMITTING PROCESSES THAT PROTECT NATURAL RESOURCES AND FOSTER ECONOMIC DEVELOPMENT.

Each cabinet-level state agency, along with any state board or commission thereof that issues permits, licenses, certifications, or other such regulatory approvals, including but not limited to the Arkansas Department of Agriculture, the Arkansas Department of Energy and Environment, Arkansas Department of Labor and Licensing, and the Arkansas Department of Health, shall conduct a comprehensive review of all such processes within 120 days of this Order.

Within 180 days of this Order, each relevant cabinet-level agency, board, and commission shall submit a written Improvement Plan to the Governor.

Note that AEF has been working with ADEQ on both permit streamlining and possible ways to provide alternatives for expediting permits.

Included in this effort is draft legislation AEF proposed that would setup a program to give ADQ authority to set up a process for expediting permits (all permit media/i.e., ESCA).

Citizen Suit Enforcement/Clean Air Act: U.S. Department of Justice Alleges Constructive Denial of Request to Intervene in NAACP's Challenge to Southaven, MS Data Center

The United States Department of Justice filed a Notice of Appeal on September 18th to the United States Court of Appeals for the 5th Circuit in regard to its previously filed Motion for Intervention and Dismissal in the pending case, NAACP and NAACP MISSISSIPPI STATE CONFERENCE, v. X.AI and MZX TECH LLC. See Case No. 3:26-cv-00074-DMB-JMV.

DOJ previously filed on June 15th in the United States District Court for the Northern District of Mississippi, a Motion for Intervention and Dismissal in the citizen suit action filed by the NAACP and NAACP Mississippi State Conference requesting a preliminary injunction against x.AI and MZX Tech LLC that would prohibit operations that allegedly violate the Clean Air Act.

The NAACP's previously filed complaint alleges that between August and December of 2025, x.AI installed and began operating 27 gas turbines (Colossus II Data Center) in Southaven, Mississippi.

The data center is stated to power the company's chat bot (GROK). Alleged to have begun operating without a permit.

Citizen Suit Enforcement/Clean Air Act: U.S. Department of Justice Alleges Constructive Denial of Request to Intervene in NAACP's Challenge to Southaven, MS Data Center

NAACP asked that the United States District Court determine that x.AI violated the Clean Air Act and require it to:

- Cease operating unpermitted turbines.
- Install best available control technology.
- Pay financial penalties.

DOJ's Motion opposes the NAACP filing and alleges:

- The United States is entitled to intervene in this Clean Air Act citizen suit.
- Consistent with the role of executive power under Article 2 of the Constitution, the United States' right to intervene includes a right to dismiss this entire enforcement action.
- The Clean Air Act does not authorize citizen-enforcement actions that seek relief the government enforcers choose to forego
- Dismissal is required to avoid serious constitutional questions arising from the alternative interpretation of the Clean Air Act.

This issue is getting major attention because of the DOJ argument that the various statutory citizen suit provisions are improper.

Greenhouse Gas Endangerment Finding/Clean Air Act: Environmental Organizations/25 States Notice of Intent to Sue U.S. Environmental Protection Agency

Various environmental organizations, 25 states, and a number of local governments sent a June 12th document to the United States Environmental Protection Agency titled:

Notice of Intent to Sue to Compel Agency Action on Petitions for Reconsideration of the Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act.

The Petitions are stated to have requested that EPA convene a proceeding for reconsideration of the rule entitled:

Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act (See 91 Fed. Reg. 7686 (Feb. 18, 2026)).

EPA in February had finalized a repeal of the endangerment finding in addition to the various greenhouse gas standards that the federal agency had adopted for motor vehicles.

National Historic Preservation Act: National Conference of State Historic Preservation Officers Letter Addressing Section 106 Rules

The National Conference of State Historic Preservation Officers sent an August 3rd letter to members of the Advisory Council on Historic Preservation addressing the Section 106 rules.

The rules implement Section 106 of the National Historic Preservation Act.

The ACHP voted on July 24th in favor of a Notice of Proposed Rulemaking regarding revisions to the regulations.

The August 3rd letter to members of the ACHP is stated to be in response to its call to provide input regarding Section 106 regulation changes by August 3.

National Historic Preservation Act: National Conference of State Historic Preservation Officers Letter Addressing Section 106 Rules

The NCSHPO indicates it convened a working group to identify points of concern and generate a broad list of discussion concepts to address perceived problems with the Section 106 process.

The discussion concepts were then submitted to the broader NCSHPO membership of 59 State Historic Preservation Officers for feedback. The August 3rd letter summarizes their conclusions as related to the five questions NCSHPO were asked to consider.

The 106 rules are often material issues in various projects involving federal permitting, etc.

Various historic preservation groups and state historic preservation officers have expressed major concerns.

Application of the RCRA to Telecommunications Cables: U.S. Environmental Protection Agency Interpretive Letter

The EPA Office of Resource Conservation and Recovery addressed in a July 23rd interpretive letter:

... the application of the Resource Conservation and Recovery Act (RCRA) to telecommunications cables that "remain[] in their original place of installation."

The interpretive letter responds to Mr. Israel's September 10, 2025 letter that stated in part:

... RCRA should not apply to these "in-place" lead-clad telecommunications cables (including accessory equipment).

EPA states that the purpose of the interpretive letter is to convey the agency's interpretation of the application of RCRA to the circumstances generally described in Mr. Israel's letter in which:

- Telecommunications cables remain in their original place of installation;
- have not fallen from it nor been removed; and,
- the telecommunications infrastructure on which they have been placed remains in use.

Application of the RCRA to Telecommunications Cables: U.S. Environmental Protection Agency Interpretive Letter

Lead sheath power and telecom cables have been the subject of some attention over the past few years in part due to a Wall Street Journal article:

... America Is Wrapped in Miles of Toxic Lead Cables, (July 9, 2023).

Subsequent to this article, the Environmental Defense Fund and two other organizations sent a July 17, 2023 letter to EPA asking that the federal agency investigate.

EPA states in its July 23rd interpretive letter that:

... Consistent with past guidance and practice, EPA does not interpret RCRA to apply to telecommunications cables that have not fallen from their place of installation and remain affixed to the unabandoned telecommunication pole and cables.

The federal agency further notes that telecommunications cables that have neither been removed nor fallen from their place of installation, which itself remains in use, have not been discarded, nor are they "garbage," "refuse," or "sludge."

In contrast, EPA states that such cables that are removed for disposal, may become solid waste within the scope of RCRA.

Scrap Tires Combusted in Cement Kilns/Non-Hazardous Secondary Materials Regulations: EPA Proposed Designation as Non-Waste Fuel

The EPA proposed a rule designating scrap tires (including previously abandoned scrap tires) that are combusted in cement kilns as non-waste fuel. See 91 Fed. Reg. 13804 (March 23, 2026).

EPA is also proposing to revise the definition of a tire collection program to include abandoned scrap tires that are recovered for use as fuel so they can be managed in the same manner as collected scrap tires.

Tires are a pain...

Will this have any impact if finalized/upheld?

Outdoor/Indoor Heat-Related Hazards: Occupational Safety and Health Administration Announces Updated National Emphasis Program

The Occupational Safety and Health Administration announced in an April 10th news release that it was updating a National Emphasis Program for:

Outdoor and Indoor Heat-Related Hazards.

In other words, Trump Administration did not eliminate this Biden era program.

OSHA NEPs are temporary programs that focus its resources on particular hazards on what it believes are high-hazard industries.

Existing and potential new NEPs are evaluated by OSHA using inspection data, injury and illness data, National Institute for Occupational Safety and Health reports, peer-reviewed literature, analysis of inspection findings, and other available information sources.

Outdoor/Indoor Heat-Related Hazards NEP's purpose has been described as protecting:

... employees from heat-related hazards and resulting injuries and illnesses in outdoor and indoor workplaces in general industry, construction, maritime, and agriculture.

The NEP when issued was stated to expand on OSHA's ongoing heat-related illness prevention initiative by setting forth what it stated was a targeted enforcement component and reiterating compliance assistance and outreach efforts.

U.S. Environmental Protection Agency Deployment of Artificial Intelligence: Public Employees for Environmental Responsibility Appeals Freedom of Information Act Denial

The Public Employees for Environmental Responsibility filed a September 15th appeal of a determination issued by the United States Environmental Protection Agency regarding a Freedom of Information Act request.

PEER states that their request sought two tranches of information regarding EPA's use of Artificial Intelligence tools and its compliance with OMB and other legal requirements regarding such tools.

The organizations filed an FOIA request seeking records related to EPA's chemical assessments and use of AI.

This is stated to have included the AI screening tools used for seven chemicals.

PEER asserts that under OMB Memorandum M-25-21, federal agencies are required to complete an impact assessment before deploying any AI tools classified as "high-impact."

The OMB Memorandum is further stated to indicate that AI is considered "high-impact" when its output serves as a principal basis for decisions with legal, material, or significant effects on public health, safety, or rights.

PEER argues in the appeal that EPA made "numerous" public statements that the agency is growing its use of AI to improve administrative efficiency and testing the use of AI on chemical safety assessments.

Data Center Development and Nexuses to Clean Water Act Program Implementation: Association of Clean Water Administrators Memorandum

The Association of Clean Water Administrators published a memorandum titled:

Data Center Development and Nexuses to CWA Program Implementation.

It notes that the “rapid expansion of data centers associated with artificial intelligence, cloud computing, and digital infrastructure is creating a new and increasingly complex set of implementation challenges under the Clean Water Act.”

Further, it states that data centers have historically received “limited attention within water quality regulatory programs.” This is causing state and federal regulators to reevaluate how existing Clean Water Act frameworks apply to these developments because of data center:

- Scale.
- Concentration.
- Operational demands.

Issues noted include:

- Water-intensive cooling systems.
- Large wastewater flows.
- Growing reliance on reclaimed water.
- Significant supporting energy infrastructure.

Data Center Development and Nexuses to Clean Water Act Program Implementation: Association of Clean Water Administrators Memorandum

Described as primary Clean Water Act implementation issues in the Memorandum include:

- Water Supply Issues
 - Source Water Depletion / Evaporative Losses
 - Transparency in Water Use
 - Strains on POTW Capacity
- Water Quality Standards
 - Temperature and Thermal Criteria
 - Chemical and Narrative Criteria
 - Antidegradation Policies
 - Designated Uses and Changing Demand
 - Water Reuse and Water Quality Standards
 - PFAS
 - Nitrates

Developing Water Reuse Regulations/A State-Level Guide: Water Reuse Association Issues Guide

The Water Reuse Association issued a document titled:.

Developing Water Reuse Regulations: A State-Level Guide

EPA is currently pushing water reuse as a key priority, especially in relation to data centers.

The Guide, by way of introduction, states that water reuse is increasingly being explored across the United States to:

- Address water supply reliability.
- Support economic development.
- Protect environmental resources.
- Enhance community resilience.

Successful adoption of water reuse is stated to depend on a combination of factors, including:

- Public confidence.
- Technical and scientific understanding.
- Funding and implementation support.
- Governance structures.
- Regulatory frameworks.

Developing Water Reuse Regulations/A State-Level Guide: Water Reuse Association Issues Guide

Note:

- Water reuse is primarily state-led.
- States vary in their approaches.
- Water reuse takes many forms.

Different types of water reuse:

- Potable.
- Non-potable.
- Industrial.
- Onsite water reuse applications.
 - Commercial.
 - Residential.

PFOA/PFOS/CERCLA: D.C. Circuit Court of Appeals Upholds U.S. EPA Final Rule Designating as Hazardous Substances

The United States Court of Appeals for the District of Columbia Circuit addressed in an August 18th Opinion a challenge to the EPA designation of Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid as hazardous substances under CERCLA.

The final rule was promulgated at 89 Fed. Reg. 39124 (July 2024).

The D.C. Circuit denied the Petitioner's challenge of the CERCLA hazardous substance designation.

The Trump Administration United States Department of Justice subsequently, on behalf of EPA, as part of ongoing litigation related to this designation defended the listing and stated it intended to retain the rule that had been promulgated during the Biden Administration.

CERCLA authorizes EPA to promulgate regulations designating as hazardous substances:

... elements, compounds, mixtures, solutions, and substances which, when released in the environment, may present substantial danger to the public health or welfare of the environment.

PFOA/PFOS/CERCLA: D.C. Circuit Court of Appeals Upholds U.S. EPA Final Rule Designating as Hazardous Substances

Seven interest groups for various companies that use, transport, or discharge PFOA and PFOS in their manufacturing, transportation, and waste management petitioned the D.C. Circuit to vacate the CERCLA hazardous substance designation.

The D.C. Circuit rejects their arguments.

Note that the upholding of the CERCLA hazardous substance designation will likely spur additional efforts by various organizations to address passive liability concerns through legislation.

The designation as hazardous substance triggers certain corresponding CERCLA requirements such as:

- Application of the potentially responsible liability categories (i.e., current owner or operator, former owner or operator [in certain circumstances], transporter [in certain circumstances], and generators).
- Hazardous substances release reporting requirements (if reportable quantities are released).

PFOA/PFOS/CERCLA: D.C. Circuit Court of Appeals Upholds U.S. EPA Final Rule Designating as Hazardous Substances

Water, wastewater, and waste management sectors have expressed concern about their potential liability despite the self-described status as passive receptors.

The National Waste and Recycling Association and Solid Waste Association of North America have stated that regulation under CERCLA would assign environmental cleanup liability to essential public services and their customers.

Simultaneously with the hazardous substance designation, EPA released a document titled:

PFAS Enforcement Discretion and Settlement Policy Under CERCLA.

The problem is it would have no impact on private CERCLA contribution actions.

Reducing Risk from PFOA and PFOS in Biosolids: US Environmental Protection Agency Issues Draft Guidance

EPA on June 29th issued a document titled:

Draft Guidance for Reducing Risk from Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonic Acid (PFOS) in Biosolids.

The Draft Guidance states that if finalized, it will provide:

- Recommendations that may be helpful to operators of wastewater treatment plants and related facilities, landowners and farmers, state and Tribal water agencies, and the public.
- Voluntary recommendations for potential ways to mitigate risks from perfluorooctanoic acid and perfluorooctane sulfonic acid involving land application of biosolids.

The Draft Guidance addresses (or replaces) the version that was issued by EPA on January 14th, 2025, by the Biden Administration.

The July 6th Draft Guidance states in regard to the Biden version:

... After careful review of the comments provided by stakeholders, the EPA has determined that the Draft Risk Assessment exhibited a number of serious flaws that have caused confusion among the public and the regulated community.

EPA Interim Guidance on the Destruction and Disposal of PFAS and Materials Containing PFAS/2026 Version: National Association of Clean Water Agencies Comments

EPA issued Interim Guidance on the Destruction and Disposal of PFAS and Materials Containing PFAS – 2026 Version. See EPA-HQ-OLEM-2020-0527.

EPA states that the Interim Guidance's 2026 update provides the currently available information on the destruction and disposal of Perfluoroalkyl and Polyfluoroalkyl substances and materials containing PFAS.

The Interim Guidance focuses on updates to the current state of science and what it describes as associated uncertainties for three large-scale capacity technologies that can destroy PFAS or control PFAS release into the environment, which include:

- Thermal treatment
- Landfills
- Underground injection

The Interim Guidance also discusses:

- Emerging technologies
- Framework for evaluating these technologies for PFAS destruction or disposal

SENATE PERMITTING REFORM BILL

On September 30, 2026 leaders of the Senate Environment and Public Works Committee and the Energy and Natural Resources Committee introduced the most comprehensive permitting bill to date.

Unique because both Senate Republican and Democratic Committee Chairmen are part of the deal.

There is widespread recognition that a permitting system created to protect the environment against industrial pollution more than 50 years ago has some issues.

The Bill is 417 pages and includes:

- Procedural Changes to NEPA
- Scope of Review (Sections 1101-1106)
- Fewer projects trigger NEPA (Section 1102)
- Substituting other reviews
- Reusable analysis
- Statutory deadlines for permitting decisions
- Deadlines for application review
- Deadline enforcement and Dispute Resolution

SENATE PERMITTING REFORM BILL

- Predictable public comment periods
- NEPA Judicial Review
- National Historic Preservation Act
- Transmission Siting and Permitting
- Transmission Planning
- Ratepayer Protection from Data Centers
- Behind-the-Meter Resources Market Access
- Advanced Transmission Technologies
- Expediting Generator Interconnection Queues
- Grid Data Access
- Power Marketing Administrations
- FERC Fee Assessments
- Data Center Energy Data
- Clean Water Act
- Reforms to Section 401
- Reforms to Section 402
- Reforms to Section 404
- Permitting Certainty
- Endangered Species Act

Solid Waste Removal Service/Temporary Waste Projects: Arkansas Supreme Court Addresses Whether City of Holiday Island Can Exclude Supplemental Waste Management Services

The Supreme Court of Arkansas addressed in a December 4th Opinion an issue involving a municipality's authority to exclude other waste management providers. See 2025 Ark. 194.

The question considered is whether the Arkansas Solid Waste Management Act provides the municipality the ability to select a waste provider and exclude all other providers.

Steven Hendrick and X-Dumpsters filed a Complaint in Carroll County, Arkansas Circuit Court against the City of Holiday Island, Arkansas alleging a violation of civil rights under the Arkansas Constitution. See Case NO. 08WCV-23-85.

The Complaint alleged that an ordinance adopted by the Holiday Island City Council violates the Arkansas Constitution's prohibition on monopolies and guarantees Plaintiffs' due process.

The Plaintiffs' business is described as delivering portable dumpsters to job sites for individuals to dispose of construction or other waste.

Solid Waste Removal Service/Temporary Waste Projects: Arkansas Supreme Court Addresses Whether City of Holiday Island Can Exclude Supplemental Waste Management Services

The business is stated to be licensed under the Solid Waste Hauler Licensing Program of the Carroll County Solid Waste District to collect/dispose of solid waste in Carroll County.

Individuals rent the dumpsters to be filled and subsequently picked up by Plaintiffs within 10 days unless otherwise agreed upon.

The Complaint alleged that Ordinance 202-004, which was adopted by the Holiday Island City Council, requires all residents and businesses within the City to contract with a selected entity for the collection of solid waste in Holiday Island.

The Ordinance authorizes the City Council to award an exclusive franchise for the collection of solid waste.

The selected contractor is the Carroll County Solid Waste District.

The Complaint alleged that:

- There is no legitimate basis for the exclusive monopoly granted to Carroll County Waste Management District.
- Violation of the Arkansas Constitution's prohibition against monopolies.
- Violation of the Arkansas Constitution's guarantee of due process.
- Violation of the Arkansas Constitution's guarantee of the fundamental of life, liberty, and property.

Solid Waste Removal Service/Temporary Waste Projects: Arkansas Supreme Court Addresses Whether City of Holiday Island Can Exclude Supplemental Waste Management Services

The SCT framed the issue as whether:

- ... the General Assembly has authorized Holiday Island's actions – and only if it has to do what we need to decide the broader Constitutional question about whether Holiday Island's actions violates the prohibition on monopolies.

Holiday Island argued that the Act provides it the power to select a single waste-removal provider and bar anyone from providing any kind of solid-waste-removal services.

The SCT states that nothing in the Act states that a municipality opting to contract with a single provider can bar City residents from using other providers to collect solid waste.

It is interpreted to simply permit municipalities to contract with one or more contractors capable of collecting and disposing of the City's solid waste.

The SCT interprets the Act as merely requiring:

- ... the city to ensure a trash collection, and no one suggests that the existence of supplemental providers, like X-Dumpsters, prevents the city from doing that.

Solid Waste Removal Service/Temporary Waste Projects: Arkansas Supreme Court Addresses Whether City of Holiday Island Can Exclude Supplemental Waste Management Services

Therefore, the SCT rejects Holiday Island's argument that Section 8-6-211 of the Act authorizes it to bar alternative supplemental solid-waste-removal providers.

The City is held to have lacked the statutory authority to enact the portion of the Ordinance barring City residents from contracting with X-Dumpsters or to provide solid-waste-removal services.

Lithium Batteries: Association of State and Territorial Solid Waste Issue 2026 Position Paper

The Association of State and Territorial Solid Waste Management Officials issued a document titled:

ASTSWMO 2026 Lithium Battery Position Paper

ASTSWMO created a Lithium Battery Workgroup because of the organization's concerns regarding various issues associated with these batteries such as:

- Energy density has the potential to harm human health and the environment.
- Propensity for thermal events (just ask scrap facilities, landfills, and MRFs).
- Complex emergency response activities.
- Potentially catastrophic outcomes if improperly handled.

The Position Paper notes that the organization has also:

- Provided early feedback on Environmental Protection Agency's Solar Panel and Lithium Battery Universal Waste Proposed Rule.
- Surveyed States' and Territories' solid waste/materials management program staff and hazardous waste program staff to identify major challenges they face in managing end-of-life management of lithium batteries.

Lithium Batteries: Association of State and Territorial Solid Waste Issue 2026 Position Paper

45 States are indicated to have responded to the survey with all of them identifying nearly identical challenges:

- Inadequate regulatory framework.
- Insufficient recovery infrastructure.
- Emergency response difficulties.

ASTSWMO takes the position that EPA should implement RCRA universal waste regulations that establish:

- Appropriate notification requirements.
- Proper segregation and storage requirements.
- Allowable handler activities.
- Emergency preparedness, prevention, and response procedures.
- Financial assurance requirements.

Oregon Plastic Pollution and Recycling Modernization Act: National Association of Wholesaler-Distributors Files Judicial Challenge

The National Association of Wholesaler-Distributors filed a Complaint for Declaratory and Injunctive Relief on July 30th in the United States District Court for the District of Oregon against the Oregon Department of Environmental Quality and Oregon Environmental Commission challenging the Oregon Plastic Pollution and Recycling Modernization Act. See Case No. 3:25-cv-01334-SB.

The Act is an example of extended producer responsibility” legislation that places some responsibility for management of the end-of-life of products to the producer of those products.

The Act requires companies that make packaging, paper products, and food serviceware to fund recycling programs and facilitate the recycling of their materials.

Federal Judge rejected arguments that law was unconstitutional.

Lubricant and Related Product Producer Responsibility: Illinois General Assembly/SB3157

Senate Bill 3157 has been introduced into the Illinois General Assembly, which is titled:

Lubricant and Related Product Producer Responsibility Act.

The stated purposes of the Act is to provide for the safe and proper management of antifreeze, oil-based lubricants, grease, engine additives, and other petroleum and related fluids typically used in automotive, transportation, and mechanical applications, as well as the original packaging containing these products, at household hazardous waste facilities in the State.

In general, it requires the development of a program which will include management and recycling/disposal of covered products at household hazardous waste collection locations available to the public.

Antitrust/Consumer Protection: Five State Attorney Generals Allege Violations by Environmental Organizations Promoting Recycling Standards

Attorney Generals for five states transmitted letters to several environmental organizations alleging that they are violating federal and state antitrust laws.

The Attorney Generals from the following states signed the letters:

- Florida
- Texas
- Iowa
- Nebraska
- Montana

The organizations receiving the letters include:

- U.S. Plastics Pact Inc.
- The Consumer Goods Forum
- Green Blue Institute

Antitrust/Consumer Protection: Five State Attorney Generals Allege Violations by Environmental Organizations Promoting Recycling Standards

The AG's allege that the three Environmental Organizations are pressuring corporations to align on restrictive plastic production and packaging standards. They further allege that such actions could unlawfully:

- Restrain competition.
- Increase costs.
- Limit consumer choice.

The Environmental Organizations are alleged to be doing so by collectively dictating what materials are deemed “recyclable” and setting uniform production and packaging targets, distorting product quality and driving up prices for consumers.

Reinforcing a Compliance First Orientation for Compliance Assurance in Civil Enforcement Activities: U.S. Environmental Protection Agency Memorandum

The Memorandum is stated to reinforce:

- ... a “compliance first” orientation as the guiding principle for the U.S. Environmental Protection Agency’s (EPA) Office of Enforcement and Compliance Assurance (OECA) and all related civil enforcement and compliance programs within the regional offices (collectively, the enforcement program).

The policy is stated to reinforce prioritizing environmental compliance across all OECA civil judicial and administrative enforcement actions in the most efficient, most economical, and swiftest means possible, while ensuring that our actions align with the clearest, most defensible interpretations of our statutory and regulatory mandates.

Practical relevance to Arkansas a delegated state?

U.S. Department of Justice Civil Environmental Enforcement in the Past Year: Public Employees for Environmental Responsibility Report

Public Employees for Environmental Responsibility issued a January 22nd report titled:

The Collapse of Environmental Enforcement Under Trump's EPA - Department of Justice Civil Prosecutions of Illegal Pollution Plummet in Past Year.

The Report takes the position that civil prosecutions of illegal pollution “plummeted to historically low levels during the first year of President Trump’s second administration.”

The figures are stated to reflect what is characterized as a “sharp decline in Department of Justice action on cases referred by the EPA.”

Table 1 of the Report provides settlement figures for 7 federal environmental statutes.

U.S. Department of Justice Civil Environmental Enforcement in the Past Year: Public Employees for Environmental Responsibility Report

The PEER Report states that EPA's online Enforcement and Compliance History Online database identifies 2,374 major sources of air pollution that have not had a full compliance evaluation in at least five years.

The same ECHO database is stated to reflect nearly 900 sources reported exceeding their wastewater discharge limits fifty or more times over the past 24 months.

Note that the State of Arkansas has been delegated almost every federal environmental program. Therefore, Arkansas handles almost all environmental enforcement.

Nevertheless, the federal government does on occasion undertake enforcement in the state..

Environmental Criminal Enforcement: Eugene, Oregon Wood Treatment Facility Operators Sentenced for Alleged Hazardous Waste/Clean Air Act Violations

The United States Department of Justice issued an April 23rd news release stating that a federal judge in Oregon sentenced two companies responsible for the operation of the J.H. Baxter wood treatment facility in Eugene, Oregon, and their president, for hazardous waste and Clean Air Act violations.

J.H. Baxter & Co. Inc. and J.H. Baxter & Co., A California Limited Partnership are stated to have previously pleaded guilty to charges of illegally treating hazardous waste and knowingly violating the Clean Air Act's regulations for hazardous air pollutants.

The president of the company is stated to have pleaded guilty to two counts of making false statements in violation of the Resource Conservation and Recovery Act.

DOJ states that on more than 100 different days:

- ... J.H. Baxter knowingly and illegally boiled off hazardous waste, emitting the discharge into the air.

The news release further states that the president made false statements about the unlawful practice.

Environmental Criminal Enforcement/Clean Air Act: Erie, Pennsylvania Coke Manufacturing Plant Owner Guilty Plea

The United States Attorney's Office, Western District of Pennsylvania issued a June 20th news release stating that Erie Coke Corporation has pleaded guilty in federal court to two counts related to alleged criminal air emission violations.

ECC is stated to own and formerly operate a now-shuttered coke manufacturing plant in Erie, Pennsylvania.

The news release alleges that ECC:

...conspired with its employees to violate the Clean Air Act by, among other things, removing caps on heating flues atop the coke oven batteries in order to allow combustion gases to vent directly into the air and avoid the plant's environmental monitoring system.

The results of such actions are stated to have been the emission of pollutants in violation of specific provisions of the Title V Permit governing:

- Opacity limits.
- Discharge of raw coke oven gas.

Environmental Criminal Enforcement/Clean Air Act: Erie, Pennsylvania Coke Manufacturing Plant Owner Guilty Plea

ECC is stated to have subsequently knowingly submitted emissions monitoring data to regulators each quarter that did not reflect the actual amount of emissions.

ECC has agreed to pay a fine of \$700,000.00.

The fine called for under the plea agreement is stated to have been determined in part based on the funds currently available to the corporation, which ceased business in 2019.

Aboveground Storage Tanks/Unmanned Aircraft Systems: Louisiana Department of Environmental Quality Approves Drones for Visual Inspections

The Louisiana Department of Environmental Quality issued a May 21st news release stating that it has approved the use of unmanned aircraft systems (i.e., “drones”) to conduct visual inspections of aboveground storage tanks.

A number of state environmental agencies (including Arkansas) have utilized drones for various purposes for a number of years.

For example, an Environmental Council of the States report notes that state environmental agencies have used drones to undertake activities such as:

- Surveillance.
 - Enforcement.
 - Permit support documentation.
 - Waste and landfill inspections.
 - Illegal dumping of chemicals, oils, or waste tires.
 - General emergency response functions including at facility discharges, train derailments, truck accidents, and oil spills.
 - Investigation of unusual events.
-
- LDEQ states that drone technology utilized in semiannual AST inspections has the potential to save Louisiana’s regulated community an estimated \$4 million annually by reducing the need for traditional methods such as scaffolding, cranes or manned access equipment.
 - Worker risk and more timely identification response to environmental concerns is accomplished.