

Environmental Law For The Arkansas Lawyer

The practicing lawyer in Arkansas through his experience gains some general knowledge about almost all areas of the practice of law and with time develops an expertise in certain areas of law to serve a specific need for his clients. The practice of environmental law has its own characteristics and requires not only an understanding of environmental laws and regulations but also an understanding of a unique administrative law system and its procedures. Arkansas attorneys unfamiliar with environmental practice may not be aware that the Administrative Procedures Act does not apply to administrative procedures before the Arkansas Pollution Control and Ecology Commission or that this commission and the Arkansas Department of Environmental Quality are separate regulatory bodies with separate functions and roles in the regulation of environmental law.

Clients today are confronted daily with environmental questions and may not understand the consequences of their actions. Understanding the administrative process is imperative to providing effective representation that saves your clients money and resolves their legal problem in a timely manner. This article describes four scenarios with the environmental issues facing fictional clients Tom and Jane.

Scenario 1 – The Inspection.

Your client Tom owns an industrial manufacturing business. This morning he calls in a rather agitated mood to tell you an inspector from the Arkansas Department of Environmental Quality is at the gate requesting access to his facility and the records for emissions from the plant. He is upset that time will be diverted from his daily schedule and that other employees will have to deal with this inspection. Tom wants to tell the inspector, among other things, that this is not a good time and to come back later or not at all. He has his permits from ADEQ but has never met with ADEQ before this morning and he cannot understand why ADEQ is bothering him. He wants you to tell him what he should do before he lets anybody into his facility.

This is not the moment for Tom to get adversarial. Your best advice (in your sudden new role as his environmental attorney) is that cooperation goes a long way in dealing with state regulators and resistance to a routine inspection is a mistake. This inspection occurs for one of two reasons: (1) it is a routine inspection to determine if the facility is meeting the terms and conditions of its permit, or (2) a complaint has been filed with ADEQ, possibly anonymously, claiming that the facility is creating an environmental problem and may be in violation of the law. Resistance by Tom to an inspector may turn a routine inspection into a matter that draws the full attention of ADEQ's enforcement and legal staff.

ADEQ has the statutory authority to obtain an administrative search warrant to enter

private or public property for the purpose of obtaining information or conducting investigations or inspections.¹ Cooperation may minimize a local judge's involvement with the execution of an administrative search warrant. Otherwise, suddenly the routine inspection is now a local news item, with the inference that Tom's facility has something to hide. Tom can lessen the impact of an inspection by his involvement in the inspection process. Tom should accompany the inspector throughout the inspection, answering questions and explaining what the company does, how his systems operate to produce a finished product, and how the wastes and emissions from that process are handled. Advise Tom that, if the inspector takes ground, water, or emission samples, a "split" sample must be made available to the facility, which can test its sample to corroborate or dispute the results of ADEQ's analysis.² The results may confirm the existence of an environmental problem or point out a discrepancy in the test results. At the conclusion of the inspection, the inspector may ask Tom to review and sign his inspection form or may inform Tom that he will return to his office to complete the form before sending Tom a summary of his findings in the inspection.

If the inspection report cites a violation, ADEQ may notify the facility by letter identifying the compliance issue, and instruct the company to remediate the problem. If the violation is serious or considered a significant violation, ADEQ may send Tom a Consent Administrative Order. This enforcement document will set forth the facts and circumstances leading to the discovery of the alleged violation and the remediation plan agreed to by the parties, and it may require the facility to pay an administrative civil penalty. Tom should provide to you a copy of the inspection report and the draft Consent Administrative Order. If it appears ADEQ has discovered an environmental problem which may result in an enforcement action, a meeting with Tom and ADEQ staff should be scheduled to discuss the terms and conditions of the Consent Administrative Order. This meeting provides an opportunity to negotiate the terms of the Consent Administrative Order, including the assessment of an administrative civil penalty. It is the policy of ADEQ, where circumstances warrant, to seek compliance through cooperative efforts and resolve violations through "informal" procedures prior to commencing formal enforcement actions.³ This order will be executed by both the facility and the ADEQ Director and public notice of the Consent Administrative Order is published in a newspaper of statewide circulation to provide the general public the opportunity to comment on the agreed order.⁴

Tom may also wish to take advantage of ADEQ's Supplemental Environmental Project policy to mitigate the administrative civil penalty. A Supplemental Environmental Project is an in-kind service or cash contribution to a project designed to advance environmental interests, which a person agrees to perform in partial settlement of an enforcement action but which the person is not otherwise legally required to perform. The participant retains no monetary benefit.⁵ The Director of ADEQ has the statutory authority to authorize in-kind services or cash contributions as partial mitigation of cash penalties for use in projects or programs designed to advance environmental interests.⁶ Your client will submit a proposal to ADEQ for review and approval outlining the project and describing how the service is to be provided. The project must be approved by ADEQ. It cannot duplicate or augment services already performed by ADEQ or perform a function already required of the client under the terms of a permit.⁷ Generally, ADEQ may approve a supplemental environmental project to mitigate up to thirty-five percent of the

assessed civil penalty.

If Tom fails to respond to ADEQ, he may be issued a Notice of Violation, a unilateral enforcement action that recites the alleged violations and assesses an administrative civil penalty.⁸ The recipient of a Notice of Violation has twenty days to respond and request an administrative hearing from the Arkansas Pollution Control and Ecology Commission.⁹ This request begins the litigation process before the Commission's Administrative Hearing Officer,¹⁰ who will hold a hearing under the procedures set forth in the Arkansas Pollution Control and Ecology Regulation No. 8,¹¹ taking testimony and evidence from both ADEQ and the recipient before issuing a Recommended Decision to the Commission.¹² This decision is submitted to the Commission for review at a regularly scheduled meeting. The Commission will preside over a de novo review of the record¹³ and the parties may request oral argument before the Commission. The Commission will vote to affirm or reverse the Administrative Hearing Officer's Recommended Decision which shall constitute a final Commission action for purposes of appeal.¹⁴ This decision of the Commission is appealable to the Circuit Court of the county where the facility is located.¹⁵ The Circuit Court's review is on the record and the court's decision is appealable to the Arkansas Supreme Court.

The litigation phase can be avoided in most cases by proactive cooperative interaction with ADEQ. Resolution of enforcement issues by informal procedures generally produces more favorable results for your client.

Scenario 2 – The Permit.

Your client, Jane of Jane's Greenstuff, Inc. invites you to the opening of her new manufacturing facility. As you tour her new building, you notice emission pipes exiting through the ceiling and a discharge pipe from the building to the adjacent trees. You walk to the end of the pipeline and discover it ends in the middle of a creek, with a green colored liquid discharging from the pipe. You ask Jane about her environmental discharge permits and receive the response, "What permits?" What Jane didn't know is that she may be in violation of the Arkansas Water and Air Pollution Control Act for discharging into "waters of the state",¹⁶ and can be assessed a civil penalty of up to \$10,000 per day per violation.¹⁷ As her attorney, advise Jane that she needs to contact ADEQ to initiate the permit process (as to the violations - see Scenario 1). ADEQ will provide an application form for the type of permit required, and it may be necessary for Jane to retain the services of an environmental consultant to assist in the preparation of the technical or scientific information required by ADEQ with regard to proposed emissions or discharge levels established in the permit.

Jane is also required to file a Disclosure Statement¹⁸ with ADEQ, providing the names of all affiliated persons or legal entities holding at least a five percent debt or equity interest in Greenstuff, Inc. Jane must also disclose any history of environmental non-compliance with any environmental laws or regulations for the past ten years.¹⁹ As her attorney, you should review the Disclosure Statement for accuracy, since a permit can be revoked, modified, or suspended for failure to disclose all relevant facts.²⁰ Any history of environmental non-compliance should be

brought to the attention of ADEQ with a full explanation of mitigating circumstances, since a designation of an applicant by ADEQ as a “bad actor” can adversely impact all future permits in Arkansas.

A public notice of the permit application is published by Jane in a newspaper of general circulation in the county where the facility is located,²¹ and any interested person may request within ten days a public hearing on the application.²² Once the application has been reviewed and deemed by ADEQ to be “administratively complete” with all required information properly submitted, upon completion of any public hearings, the Director may propose the issuance (or denial) of a draft permitting decision. Public notice of this draft permit decision is also published in a newspaper of general circulation in the county where the facility is located.²³ The publication of this notice initiates a thirty-day public comment period for ADEQ to accept comments from the public in writing on the draft permitting decision or orally at the public hearing.²⁴ After conclusion of the public comment period, the Director will announce his final permitting decision and include a response to each issue raised by the public comments.²⁵ Other than the applicant, only those interested parties who have submitted comments on the record in writing or orally at the public hearing have standing to appeal the permit decision to the Arkansas Pollution Control and Ecology Commission. The appeal must be filed with the Commission secretary within thirty days of issuance of the final permit decision by the Director.²⁶

It is important that Jane understand the permitting process, her rights, the rights of the general public, and what is expected of her by ADEQ to be issued a permit. It is equally important for her to understand the time involved in the permit process and the possible delays and costs involved if the permit is controversial or has public opposition. Permit appeals are also litigated matters before the Administrative Hearing Officer, with de novo review and oral arguments before the Commission and possible appeals to Circuit Court and the Arkansas Supreme Court.²⁷

Scenario 3 – The Abandoned Property.

Client Jane calls to tell you her business is booming and she needs room to expand. She would like to build her own facility, but there are no available parcels with a location that fits her needs. Jane mentions how great it would be to obtain the old defunct battery factory site. This site has long been unused, and local banks have resisted financing an environmental risk. The abandoned site was once used to manufacture automobile batteries before environmental regulation, and concerns now exist that the site is contaminated. The site is convenient to the interstate highway, but Jane is concerned about acquiring real property with costly environmental problems. She certainly doesn’t want to be held responsible for an environmental problem she did not cause. Since you have successfully advised Jane on her previous environmental issues, she now wants your advice on what to do.

As her new environmental lawyer, you inform her about the Arkansas Voluntary Clean-up Act, which promotes the redevelopment of abandoned industrial, commercial, or agricultural sites. This program, known as Brownfields Redevelopment,²⁸ may be the solution for Jane. As a prospective purchaser of an abandoned site, Jane will not be held responsible for any preexisting pollution or contamination at the site acquired through the Brownfields Redevelopment program.²⁹ For Jane to acquire a property under the program, a comprehensive site assessment will be performed to establish a baseline of contamination.³⁰ ADEQ will review and approve the assessment, and Jane and ADEQ will enter into an Implementing Agreement to set forth the agreed clean-up liabilities and obligations at the site, as determined by the baseline level of contamination. The Implementing Agreement will also describe the nature of the activity that Jane proposes for the property.³¹ Public notice is also provided the general public of the proposed use of the property, the proposed clean up decisions or remedial action, and to provide an opportunity to comment and request a public hearing prior to the selection of a final remedy for the site by ADEQ.³²

Once Jane has acquired title to the property, a plan for remedial action approved by ADEQ will be implemented and attached as an amendment to the Implementing Agreement.³³ This remedial action may be limited in scope where contaminants do not pose an unacceptable risk based on the intended use of the site, which will be protective of public health and the environment.³⁴ If it is necessary for Jane to acquire the property before the site assessment is completed, she may submit to ADEQ a Letter of Intent to Participate and still retain her eligibility for participation in the voluntary cleanup program.³⁵ A restriction shall be placed on the deed to Jane's new property restricting the use to activities and compatible uses that protect the integrity of any remedial action implemented on the property.³⁶ A notice of the Implementing Agreement will be filed with the circuit clerk as part of the property's chain of title.³⁷

The Brownfields Redevelopment program in Arkansas provides prospective purchasers the opportunity to obtain abandoned property, remediate the environmental problems to an acceptable level that is protective of human health and the environment, and reuse or redevelop the property without incurring the responsibility for remediating preexisting contamination beyond that identified in the comprehensive site assessment.

Scenario 4 – The Tank.

While you were on the telephone advising Jane on the acquisition of the abandoned industrial tract under the Brownfields Redevelopment program, Tom called back. His facility includes two underground storage tanks for dispensing diesel fuel for his trucks. This morning diesel fuel was observed around the fuel island, and inventory control records showed a discrepancy in the volume of fuel in the tanks and pumped to the trucks. Tom concluded the loss of diesel fuel is the result of a leak in the underground storage tanks or the underground piping system. Tom has called an environmental remediation firm to make repairs or excavate the tanks

and remediate the contaminated site. Tom wants to know from you if there is anything else he should be doing, since he has never had a problem like this before. He needs your help to make the correct decisions to comply with environmental laws and regulations. Since you successfully guided Tom through his inspection, you are now his environmental attorney.

Accidental releases from underground storage tanks are not uncommon. However, compliance with the laws and regulations governing regulated storage tanks can be confusing, and a misstep could cost your client significant dollars. When Tom discovered the suspected release from the underground storage tank, as the owner or operator of the tank, he was required to notify ADEQ and undertake to collect and remove the release and restore the area.³⁸ Failure to do so can result in his liability to ADEQ for the cost of corrective action or can result in an enforcement action due to a release of a regulated substance from a storage tank.³⁹ ADEQ has the authority to assess an administrative civil penalty not to exceed ten thousand dollars per day for each tank.⁴⁰ Tom has wisely proceeded to begin remediation of the release immediately, but is unaware that his actions may affect his trust fund eligibility and cause him significant financial consequences.

The Petroleum Storage Tank Trust Fund provides reimbursement for taking corrective action or to compensate owners and operators for claims by third parties for injury and property damage caused by accidental releases from qualified storage tanks. To be eligible for reimbursement from the Petroleum Storage Tank Trust Fund, Tom must ensure that each of his petroleum storage tanks is registered with ADEQ, the annual storage tank fees are paid in full, he maintains evidence of financial responsibility in the amount of seven thousand five hundred dollars, and has completed and mailed the annual self-inspection audit form to ADEQ.⁴¹ Additionally, to insure coverage under the trust fund for corrective action of an accidental release, Tom must also give ADEQ “timely” notice of the release, defined as within twenty-four hours of discovery of the release.⁴² It is important that Tom call ADEQ immediately to report the release followed by a written notice within three business days of the telephone call.⁴³ Reimbursement will not commence until he has spent seven thousand five hundred dollars on corrective action.⁴⁴ Once proof of payment of this “deductible” has been provided to ADEQ, and he has met all other eligibility requirements, Tom may begin to submit an application for reimbursement for corrective action costs to the Advisory Committee on Petroleum Storage Tanks, which advises and makes recommendations to the Director of ADEQ regarding claims for payment.

As his attorney, your knowledge of the requirements of the Petroleum Storage Tank Trust Fund statute and regulations will assist Tom in his eligibility and in the reimbursement for funds spent for corrective action. Failure to meet the trust fund eligibility requirements can mean the denial of trust fund reimbursement for thousands of dollars in tank removal and remediation costs.

Conclusion.

These scenarios are common examples of the types of environmental issues facing business clients every day. Understanding the procedures developed by statute and regulation is fundamental to providing effective representation that protects your clients interests and saves them money.

ENDNOTES

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1. Ark. Code Ann. § 8-1-107(a)
 2. Id. § 8-1-107(d)(4)
 3. Ark. Pollution Control and Ecology Commission Regulation No. 8, § 2.3.1(a).
 4. Id. § 2.3.6.
 5. Arkansas Department of Environmental Quality SEP Policy and Proposal Guidelines.
 6. Ark. Code Ann. § 8-4-103(f)(3)(A)
 7. Id. § 8-4-103(f)(3)(c)
 8. Arkansas Pollution Control and Ecology Commission Regulation No. 8, § 2.3.2.
 9. Id. § 2.3.2(b)(5).
 10. Id. § 2.5.8.
 11. Id. § 2.5.11.
 12. Id. § 2.5.16.
 13. Id. § 2.5.18(a).
 14. Id. § 2.5.18(d).
 15. Ark. Code Ann. § 8-4-223(a)(1).
 16. Id. § 8-4-217(a)(1).
 17. Id. § 8-4-103(b)(4).
 18. Id. § 8-1-106(b)(1).
 19. Id. § 8-1-106(a)(2)(D).
 20. Id. § 8-4-204(2).
 21. Id. § 8-4-203(b)(1) and (d)(1).
 22. Id. § 8-4-203(b)(2).

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23. Id. § 8-4-203(c)(1)(A)(i).
 24. Id. § 8-4-203(c)(1)(B).
 25. Id. § 8-4-203(c)(2)(A)(i).
 26. Id. § 8-4-205(b)(1) and Regulation No. 8, § 2.5.5 (a).
 27. Arkansas Pollution Control and Ecology Commission Regulation No. 8, § 2.5.18.
 28. Arkansas Pollution Control and Ecology Commission Regulation No. 29.
 29. Ark. Code Ann. § 8-7-1102(a)(5).
 30. Id. § 8-7-1104(b).
 31. Id. § 8-7-1104(d)(5).
 32. Arkansas Pollution Control and Ecology Commission Regulation No. 29, § 29.501.
 33. Ark. Code Ann. § 8-7-1104(j)(1).
 34. Id. § 8-7-1104(j)(3)(A).
 35. Arkansas Pollution Control and Ecology Commission Regulation No. 29, § 29.604.
 36. Ark. Code Ann. § 8-7-1104(n).
 37. Id. § 8-7-1104(q)(3).
 38. Id. § 8-7-807(a)(1).
 39. Id. § 8-7-807(b).
 40. Id. § 8-7-806(c) and (d)(3).
 41. Arkansas Pollution Control and Ecology Commission Regulation No. 12, §12.302.
 42. Id. § 12.305(a).
 43. Id. § 12.305(c)(1).
 44. Ark. Code Ann. § 8-7-907(a).