Colin Schimmelfing and Matt Koller, ESM 207 Memo #2, May 4, 2021

Georgia Pacific (GP) is currently in violation of §165 of the Clean Air Act (CAA) for operating 26 plywood plants without appropriate permits. Given updated EPA guidance, it is clear that the plants constitute *"major emitting facilities"* (CAA §169) and thus require permits to operate. GP should immediately retrofit existing facilities and follow appropriate permitting procedures to achieve compliance as soon as possible. The EPA could at any time impose an injunction (CAA §113b) on company plywood operations, which would be extremely costly and embarrassing to the company.

However, it is currently unclear whether the company or its agents are liable for past violations. Civil charges related to the EPA's enforcement against GP plants for permit violations could total nearly $2 billion, while criminal charges could include fines and prison time for company executives and scientists.

GP's current defense relies on the fact that the EPA's earlier guidance to the wood pulp industry in a document known as AP-42 accidentally underestimated actual VOC emissions. Since the company was primarily using this document to determine whether permits were necessary for their facilities, GP was not aware that the company was in violation of the CAA. However, this ignorance is not a complete shield and the company and its officers might still be liable, as discussed below.

Company Agent Criminal Liability. Criminal liability hinges on whether GP's scientists and/or executives were aware of the findings of the wood industry's "Technical Bulletin 405", a report demonstrating that the EPA's guidance (AP-42) underestimated actual VOC emissions by 90%, and thus would mean that GP facilities are in fact "major emitting facilities". Based on CAA §113, section c1, *"Any person who knowingly violates any requirement or prohibition of… section 7475(a) of this title (relating to preconstruction requirements)"… shall, upon conviction, be punished by a fine… or by imprisonment for not to exceed 5 years, or both".*

Company agents are liable for the most serious consequences if EPA can prove intentional omission or violation. Our understanding is that company scientists did not understand the ramifications of Technical Bulletin 405 and that any documents that EPA could subpoena would support this. This is especially understandable given that the EPA scientists themselves did not realize that AP-42 contained inaccurate methodology for 9 years after receiving the same bulletin.

Civil Liability. CAA §165 (Preconstruction Requirements) states that *"no major emitting facility… may be constructed… unless… a permit has been issued…,"* meaning that each of GP's 26 unpermitted plants has been in violation of the CAA since they were constructed. Using accurate measurements (as opposed to incorrect estimates via AP-42) these facilities emit enough VOCs to qualify as "major" sources, and thus require a permit before operation. Assuming that GP has been continuously processing plywood and waferboard since 1985, as of spring 1993 (~3,000 days of operation) GP could be responsible for $73 million in fines per facility (at $25,000/day for unpermitted operation), per section (B) CAA §113.

EPA Notification. GP may argue in court that it was following agency guidance in good faith during the period of violation. This argument *might* help avoid fines for past violations, however past case law has established that plaintiffs can be held liable for compliance with government statutes *even when they were following the erroneous advice of government agents* (Schweiker v. Hansen, 450 U.S. 185 (1981); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)).

On the other hand, in General Electric v. EPA (53 F.3d 1324 (D.C. Cir. 1995)), the court found that GE was not liable for civil penalties assessed by the EPA because EPA did not provide GE with fair warning of the agency's interpretation of the regulations. In the case, the opinion held that *"if, by reviewing the regulations and other statements issued by the agency, a regulated party acting in good faith would be able to identify... the standards with which the agency… expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation."* Similar logic can be applied to this case; EPA could only provide GP with fair warning of its new method of calculating compliance with CAA statutes *after* it found that AP-42 was incorrectly assessing emissions, and all violations up until now have occurred in the period before this notice. Since the EPA did not provide fair warning of the agency's interpretation *before* the period of time under question, then a court may possibly vacate the finding of liability and set aside the fine.

It is unclear whether a court would actually vacate any EPA fine and an approach relying on such a ruling would, at best, require years of litigation and bad press for GP. Thus, relying on this approach is highly risky even with the existence of the GE precedent. However, the existence of this precedent (for the EPA requirement to provide fair warning or risk vacation of ordered fines) does strengthen GP's hand at the negotiating table and can be a useful tool during the negotiation process.

Strategy Considerations / Suggestions. Responding to EPA actions must account for political and business considerations. GP's potential fine is 180 times the largest CAA penalty to date. Therefore, the actual amount that EPA would fine GP will be determined by political considerations, rather than just a simple calculation.

GP should approach the negotiating table with the EPA with the following approach:

1) GP should maintain they had no knowledge of past violations
2) GP should immediately show a willingness to correct current violations
3) GP should not admit any wrongdoing for past violations, and should publicly and aggressively assert GP was following EPA guidance in good faith. Official requests for guidance from state and federal officials at the time of facility construction bolster this case.
4) GP should use its political assets (supportive politicians, threats of future litigation, and public opinion) to pressure the EPA for a smaller and more discreet penalty (or no penalty at all).

However, such aggression should not be taken too far. The EPA does have the power to order an injunction on all GP plywood manufacturing facilities with its attendant business costs and public opinion. Animosity on behalf of the EPA could also negatively affect other parts of GP's business that require interaction with the agency. Finally, the EPA could bring about a criminal probe into potential intentional obfuscation or violations. This probe would be extremely costly and distracting to GP, provide extremely poor public relations, and could of course result in convictions if our understanding of the good-faith actions of company agents is incorrect.

Conclusions. We recommend that GP negotiate a settlement with the EPA whereby GP admits no fault and pas no penalties, but works with the EPA to transparently implement modifications that comply with CAA regulations. GP should be prepared to pay a financial penalty as part of this settlement, however, GP should make no mention of this willingness to EPA during negotiations. This is a delicately balanced argument but will allow GP to pay minimal fines, avoid negative press, and continue to operate a profitable business unit while complying with CAA regulations.