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CLEAN AIR ACT

The U.S. Court of Appeals for the Third Circuit in *United States v. EME Homer City Generation LP* augmented the consensus of other appellate courts that Prevention of Significant Deterioration violations under the Clean Air Act are one-time and not continuing and cannot be raised in an enforcement proceeding as a collateral attack on the source's Title V permit. The ruling extended the holding of prior decisions to find that neither current nor past owners of facilities are subject to injunctive relief for violations occurring on the past owners' watch, and makes it more difficult for the Environmental Protection Agency to alter the courts' course, and more unlikely the Supreme Court will grant a request for review, the authors of this article say. And, with the Third Circuit ruling that there is no jurisdiction over Title V claims in an enforcement case, EPA or citizen groups still do not have a green light to pursue PSD claims in Title V proceedings.

Third Circuit Extends New Source Review 'Past Violation' Rulings

By Jonathan Martel, Christopher Jaros and Zachary Fayne

On Aug. 21, the U.S. Court of Appeals for the Third Circuit in the *Homer City* case joined and then significantly extended the consensus holdings of three other U.S. courts of appeal that a failure to obtain a Prevention of Significant Deterioration (PSD) permit under the Clean Air Act prior to beginning construction of a new or modified major source of air emissions is a

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past and not continuing violation.[1] The court held that the one-time nature of the violation means that current owners are not liable for violations occurring prior to their ownership, and that former owners are not subject to injunctive relief at facilities they no longer own. The Third Circuit also joined other courts of appeal in holding that allegations that a source failed to include PSD or Best Alternative Control Technology (BACT) requirements in a Title V operating permit must be raised in an appeal from issuance of the permit, and cannot be raised in an enforcement action. This ruling has potentially important implications for companies facing similar enforcement cases brought by the Environmental Protection Agency, states or environmental groups pursuing citizen suits. With this opinion, a total of four circuits to consider this issue all have rejected arguments by EPA and citizens groups that such claims under the federal regulations are continuing, a result that not only may affect EPA's decision whether to assert such claims in other forums, but also lessen the likelihood of Supreme Court review of the issue.

The *Homer City* case is another one among many cases in which EPA has alleged that coal-fired power plants failed to obtain a PSD permit and to install BACT prior to allegedly modifying the plant in a manner that increased emissions of air pollutants. These cases are part of an unprecedented enforcement initiative EPA began in 1999 in which the agency has asserted that coal-fired electric generating plants (and many other industrial sources of air emissions) replaced components that constituted ''major modifications'' without obtaining a PSD permit prior to making the modifications.

The PSD program requirements are spelled out in federal regulations that states are to adopt in their own rules, called a State Implementation Plan (SIP), which upon approval are subject to federal enforcement. State SIPs may have some variation as long as they meet the basic EPA requirements. Some states have adopted EPA's federal rules directly, and in states that have not adopted their own rules either EPA implements the federal rules or has delegated authority to the state to implement the federal rules. *Homer City* involved Pennsylvania regulations that were substantially the same as the federal regulations.

The EPA PSD regulations (and most state PSD regulations), define ''major modification'' to mean any physical change in or change in the method of operation of the major stationary source that would significantly increase emissions.[2] As EPA and state plaintiffs alleged in *Homer City*, EPA (state, or citizen plaintiffs) have alleged in a number of enforcement actions that plants undertook substantial projects to repair or replace failing components that were causing plant outages (plant downtime), which repairs allowed the plants to run more, thus allegedly resulting in higher annual emissions than prior to the repair or replacement. EPA argued that such projects constitute ''major modifications'' for which a plant would be required to obtain a PSD permit before construction, which would require retrofitting the plant with BACT to control the relevant air emissions. Much dispute in the cases has centered on the proper test for determining whether emissions have increased, and whether the repair or replacement fell within the regulatory exclusion for ''routine maintenance, repair and replacement.''

In the late 1990s, when the enforcement initiative began, EPA focused its enforcement on coal-fired power plants in the South and in the Ohio Valley, which commonly had undertaken maintenance programs in the 1980s to improve availability in response to increasing demand for electricity and the loss of anticipated generation from nuclear power after the Three Mile Island accident. Thus, given that the alleged ''major modifications'' were undertaken more than five years before the lawsuits were filed, a threshold question has been the applicability of the five-year federal statute of limitations.[3] At issue has been whether the alleged modifications were one-time violations under the Clean Air Act and applicable state or EPA PSD regulations, or whether the statute and regulations prohibit ongoing operation of the plant without the PSD permit and without installing BACT. The consensus view has been that the Clean Air Act and EPA regulations prohibit construction without a PSD permit, and not ongoing operation either without the permit or without installing BACT. Accordingly, courts have dismissed claims for civil penalties as barred by the statute of limitations.[4]

Questions on Extent of Liability

The court of appeals in *Homer City* joined in the conclusion that a PSD violation is a one-time occurrence and not continuing, but extended that holding to a new question. Although the alleged violations had taken place more than a decade before EPA filed suit, the court was not so much concerned with the statute of limitations bar against civil penalties, but rather with the fact that the owners at the time of the alleged violations had sold the plant during the intervening period. The Clean Air Act authorizes enforcement only against an owner or operator who ''has violated, or is in violation of'' requirements or prohibitions.[5] As EPA was seeking civil penalties and an injunction to obtain a PSD permit and to install BACT against the current owners, the current owners could only be liable if there was a continuing violation that they had committed after acquiring the plant. Agreeing with the other courts

[1] *United States* v. *EME Homer City Generation, L.P.*, __ F.3d. __ (3d Cir. Aug. 21, 2013). *See also* 163 DEN A-11, 8/22/13.

[2] *See* 40 C.F.R. § 52.21(b)(2)(i).

[3] Because the Clean Air Act does not contain a statute of limitations, the general federal five-year statute of limitations applies to any claim for civil penalties. *See* 28 U.S.C. § 2462 (establishing a general five-year statute of limitations for ''an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise'').

[4] *See United States* v. *Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013); *Sierra Club* v. *Otter Tail Power Co.*, 615 F.3d 1008, 1015 (8th Cir. 2010); *National Parks Conservation Ass'n* v. *Tennessee Valley Authority*, 502 F.3d 1316, 1323 (11th Cir. 2007). *See also* 156 DEN A-5, 8/16/10. The one court of appeals that has held that the violation was ongoing and thus civil penalties were not barred by the statute of limitations involved PSD regulations in the Tennessee SIP, which differ from the federal regulations and the court of appeals interpreted to impose an obligation to obtain a construction permit as an ongoing obligation as a condition of operation. *See National Parks Conservation Ass'n* v. *Tennessee Valley Authority*, 480 F.3d 410, 419 (6th Cir. 2007).

[5] *See* 42 U.S.C. § 7413(b); *see also* 42 U.S.C. § 7604(a) (authorizing citizen suits against ''any person . . . who is alleged to have violated . . . or to be in violation'' or ''who proposes to construct or constructs'').

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of appeal that found no continuing violation (either to obtain a PSD permit or to install or operate with BACT), the Third Circuit found that the current owners were not liable because they did not modify the plant.

This, of course, raised the additional question of whether former owners and operators could be liable. The Third Circuit held that they could not. Because the alleged violations were not continuing and occurred more than five years before suit, the statute of limitations barred civil penalties as to them. EPA nevertheless sought an injunction against the former owners, either to install BACT at the plant they no longer owned, or to purchase emissions credits and retire them to reduce emissions. Although the district court had dismissed on the grounds that the Clean Air Act only authorized injunctions for ongoing violations, the court of appeals simply held that the statute does not authorize an injunction against former owners and operators for a wholly past PSD violation, even if that violation causes ongoing harm. The court of appeals found that the Clean Air Act grant of jurisdiction to award injunctive relief[6] is limited to restraining violations, assessing civil penalties, collecting fees owed the United States, and to awarding ''other appropriate relief.'' In an extensive analysis, the court of appeals interpreted ''other appropriate relief'' to mean relief of a similar, forward-looking nature, and not to encompass steps to mitigate harm resulting from a past violation.

In addition, the court of appeals meaningfully addressed the implications of its holding that PSD violations are one-time and not continuing for the extent of civil penalties that could apply. EPA argued that Congress could not have intended that a PSD violation should be treated as one-time because such an interpretation would render the statute's $37,500 per day maximum penalty inadequate. As part of its one-time violation analysis, the court of appeals considered the statutory prohibition against ''construction.''[7] EPA contended that a modification would be subject only to a penalty of $37,500, which it called ''laughably inadequate to encourage PSD compliance.'' That concern has particular grounding in EPA's own regulations, which provide: ''No new major stationary source or major modification . . . shall begin actual construction'' without a PSD permit, where ''begin actual construction'' means ''initiation of physical on-site construction activities.''[8] The court of appeals, however, was not bothered by this, explaining first that penalties possibly could apply for every day that construction continues, but that even ''if EPA is correct that only a single daily fine applies,'' that was not laughably inadequate because Congress gave EPA other authority to deter violations, such as injunctive relief and criminal penalties for knowing violations.

Finally, the Third Circuit agreed with the Seventh, Eighth and Ninth Circuits that allegations that failure to include PSD requirements and BACT controls in the facility's Title V operating permit can only be raised during review of the Title V permit and not in an enforcement case.[9] As the court of appeals explained, the Title V permitting program consolidates into a single operating permit all of the clean air requirements applicable to a particular source but does not generally impose new substantive air quality control requirements. Like the PSD program, the Clean Air Act and EPA regulations spell out the permitting program requirements for states to adopt for EPA approval in their SIPs, and absent a state program EPA can implement or delegate to the state implementation of the federal Title V program. States must submit proposed permits to EPA for review, EPA can object to issuance of the permit either on its own or in response to a petition to object, and stakeholders can challenge EPA's decision in the courts of appeal, but not in enforcement proceedings.[10] The court of appeals considered EPA's claims that the current owners' Title V permit was missing PSD and BACT requirements and the former owner's Title V application was defective for omitting those requirements. The court held that those claims constituted allegations that the permit was not in compliance, which was a collateral attack on the permit that could only be made in the permit proceeding and in a challenge to the permit in the court of appeals.

Significantly, the court observed that the problem of parallel suits could arise if the adequacy of the Title V permit could be raised in both the Title V permitting process *and also* in an enforcement case. This could result in a waste of resources or inconsistent results. Of course, the court did not consider or address whether the specific claims of wholly past PSD violations could be raised in a Title V permit challenge at all, as such one-time and past violations arguably are no longer ''applicable requirements'' of the Clean Air Act that must be addressed in a Title V permit.[11] Indeed, were such an alleged past failure to obtain a PSD permit or to install BACT to be considered in a Title V permitting proceeding, consideration of the obligations to obtain a PSD permit could still be in parallel to an enforcement action in which those same issues might be litigated at the same time.

Conclusion

The *Homer City* decision is significant in adding to the consensus that PSD violations are one-time and not continuing, and cannot be raised in an enforcement proceeding as a collateral attack on the source's Title V permit. The growing consensus not only limits EPA's (and citizen plaintiffs') ability to convince courts of appeals otherwise, but makes the Supreme Court unlikely to grant a request for review. Further, the *Homer City* decision significantly extended the impact of the ''one-

[6] *See* 42 U.S.C. § 7413(b).

[7] *See* 42 U.S.C. § 7475(a) (''No major emitting facility . . . may be constructed in any area to which this part applies unless . . . a permit has been issued. . . .'').

[8] *See* 40 C.F.R. § 52.21(a)(2)(iii) and (b)(11).

[9] *See Otter Tail*, 615 F.3d at 1020; *Romoland Sch. Dist.* v. *Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 742-43 (9th Cir. 2008); *United States* v. *AM General Corp.*, 34 F.3d 472, 475 (7th Cir. 1994).

[10] *See* 42 U.S.C. §§ 7661d (EPA review and objection process), 7607(b)(1) (authorizing review of EPA decision in the court of appeals) and 7607(b)(2) (prohibiting review in civil or criminal enforcement proceedings of EPA action that could have been subject to review under paragraph (b)(1) in the court of appeals).

[11] *See* 42 U.S.C. §§ 7661b(b) (requiring compliance plan for ''all applicable requirements under this Act'') and 7661c (requiring conditions of permit to assure compliance with ''applicable requirements under this Act'').

time'' holding to find that purchasers of facilities after the time of the alleged violations are not liable, and that past owners at the time of the alleged violation are not subject to injunctive relief. And the court offered significant commentary on the further implication that PSD violations that might have occurred only on the one day construction was initiated, or even during a limited number of days that it might take to complete a modification, are subject to a low maximum civil penalty. Finally, the court held that there is no jurisdiction over Title V claims in an enforcement case because jurisdiction in direct appellate review of the Title V permitting process is exclusive, and thus did not address whether a one-time and past failure to obtain a PSD permit even remains an applicable requirement in Title V permitting. Thus, the *Homer City* decision cannot be read as a green light for EPA or citizen groups to pursue PSD claims in Title V permit proceedings.

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