

ALERTS**Seventh Circuit Deals Major Blow To EPA's New Source Review Enforcement**

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On Monday, July 8, 2013, the U.S. Court of Appeals for the Seventh Circuit released its decision in *United States v. Midwest Generation, LLC* and held violations of the preconstruction permit requirements of the Clean Air Act's New Source Review program are subject to a five-year statute of limitations. The Court rejected U.S. EPA's argument that violations of the New Source Review preconstruction permitting requirements, specifically 42 U.S.C. §7475(a), are "continuing violations." The Seventh Circuit is the fourth Federal Appellate Court to take up this longstanding issue, and the decision bolsters arguments the regulated community has been making for years. The decision is an important win for the regulated community and may help curtail U.S. EPA's New Source Review enforcement. However, the Seventh Circuit left open alternative arguments U.S. EPA could make in some New Source Review enforcement cases, so the full impact of the decision is not yet clear.

The Seventh Circuit's Decision

When "major" emitting facilities undertake "major" modifications, they may be required to obtain a preconstruction permit and install new and expensive emission controls, termed the "best available control technology" or "BACT." What constitutes a "major" modification is a longstanding subject of dispute and requires a facility specific analysis. In *United States v. Midwest Generation, LLC*, ComEd modified five of its coal-fired power plants between 1994 and 1999 without obtaining preconstruction permits or installing BACT. In 2009, 10 years after ComEd completed its final modifications, U.S. EPA brought an enforcement action against ComEd for failing to obtain preconstruction permits or install BACT. ComEd argued the modifications did not trigger §7475(a) and in any case the enforcement action was untimely. *United States v. Midwest Generation, LLC*, No. 12-1026, 2013 WL 3379319, *1 (7th Cir. July 8, 2013). Although some additional U.S. EPA claims remained pending with the district court, the district court entered partial final judgment on the §7475(a) claim, finding the action untimely, which allowed U.S. EPA to appeal that decision to the U.S. Court of Appeals for the Seventh Circuit.

U.S. EPA's and Illinois' primary argument was that ComEd's failure to obtain permits pursuant to §7475(a) resulted in "continuing violations" and that "every day a ComEd plant operate[d] without a §7475 permit [was] a fresh violation of the CAA." *Id.* at *2. Although U.S. EPA and Illinois did not argue their delay in discovering the modifications tolled the statute of limitations period, the Court was quick to point out such an argument would be invalid as the Supreme Court has held, "the time for the United States to sue under [28 U.S.C. §2462, the general federal statute of limitations,] begins with the violation, not with a public agency's discovery

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of the violation.” Id. at *4 (citing *Gabelli v. SEC*, 133 S. Ct. 1216 (2013)). Instead, Plaintiffs argued that because the cause of action accrued anew each day, the statute of limitations period would not bar U.S. EPA’s claims.

The Court held failure to obtain a preconstruction permit or install BACT was not a continuing violation of §7475(a) and that §7475(a) did not create an independent requirement to operate BACT. The Court rested its decision on the plain meaning of §7475(a), and found that statute “deals only with conditions precedent to [a facility’s] construction or modification,” and does not deal with a facility’s operations. *Midwest Generation, LLC*, 2013 WL 3379319 at *3. Based on its reading of §7475(a), the Court ruled “the violation [was] complete when construction commence[d] without a permit in hand.” Id. at *2.

The Court explained its decision was in agreement with similar decisions in the Eighth and Eleventh Circuit Courts of Appeals, which have both found §7475(a) claims brought outside of the five-year statute of limitations period were not continuing violations and were invalid. *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1014 (8th Cir. 2010); see also *Nat’l Parks & Conservation Ass’n, Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1322-23 (11th Cir. 2007). The Plaintiffs argued the Court should instead follow precedent in the Sixth Circuit, specifically *Nat’l Parks Conservation Ass’n, Inc. v. Tennessee Valley Auth.*, which the Plaintiffs argued stood for the proposition that violations of §7475(a) were continuing violations. 480 F.3d 410, 411 (6th Cir. 2007). However, the Court considered the Sixth Circuit’s analysis distinguishable from ComEd’s case and from the Eighth and Eleventh Circuits’ decisions because the Sixth Circuit’s decision rested on that court’s finding of a violation of Tennessee’s state implementation plan (“SIP”), which “required sources to use [BACT].” *Midwest Generation, LLC*, 2013 WL 3379319, at *6 (emphasis in original). Whether Illinois’ SIP also required sources to use BACT was not at issue before the court, but the court did go so far as stating, “enduring consequences of acts that precede the statute of limitations are not independently wrongful.” Id. at *3.

Future Implications

With three Courts of Appeals now finding violations of §7475(a) are subject to a five-year statute of limitations, U.S. EPA’s nationwide enforcement of legacy New Source Review violations may become increasingly untenable. U.S. EPA or Illinois may submit a petition for rehearing, a petition for an en banc rehearing, or petition for writ of certiorari to the U.S. Supreme Court.

The Plaintiffs could argue there is a split between the Sixth Circuit and the Seventh, Eighth, and Eleventh Circuits. There are also several Federal District Court cases that have found violations of §7475(a) are continuing. See e.g., *Club v. Dairyland Power Co-op.*, 10-CV-303-BBC, 2010 WL 4294622 (W.D. Wis. Oct. 22, 2010); *Sierra Club v. Portland General Electric Co.*, 663 F.Supp.2d 983 (D. Or. 2009); *United States v. Duke Energy Corp.*, 278 F.Supp.2d 619 (M.D.N.C.2003) (vacated on other grounds); *United States v. Ohio Edison Co.*, 2003 WL 23415140 (S.D. Ohio Jan.17, 2003).

Regardless of the Plaintiffs’ ultimate decision to appeal, U.S. EPA is likely to step up New Source Review enforcement activities for those alleged

violations that are nearing the five-year statute of limitations deadline. There is also likely to be increased litigation over whether various SIPs require sources in those states to “operate” BACT. Barnes & Thornburg’s Air Quality Practice Group is continuing to monitor developments in this case and other New Source Review enforcement actions nationwide.

For more information, contact the Barnes & Thornburg attorney with whom you work, or one of the following attorneys in the firm’s Environmental Law Department: Tony Sullivan at tony.sullivan@btlaw.com or 317-231-7472; Charles Denton at charles.denton@btlaw.com or 616-742-3974; or Michael Elam at michael.elam@btlaw.com or 312-214-5630.

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