Recent Developments Regarding EPA’s NSR Enforcement Authority

Bill Hefner & Jeremy Greenhouse
The Environmental Law Group, Ltd.
CSWEA & A&WMA-UMS
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I. LEGAL FRAMEWORK
PSD 101

- “Prevention of Significant Deterioration” (PSD), 42 U.S.C. §§ 7470-7492
- Applies to new major stationary sources or major modifications at existing sources
- Applies in areas that are “in attainment” with the National Ambient Air Quality Standards (NAAQS)
- Must demonstrate will not cause or contribute to a violation of the NAAQS
- Implemented through “state implementation plans” (SIPs)
- Minnesota has “delegated authority”
PSD Requirements

“No major emitting facility ... may be constructed” or significantly modified unless:

◆ obtains a permit setting forth applicable emission limitations
◆ subject to BACT (“best available control technology”)

42 U.S.C. §§ 7475(a)
“The Administrator shall...commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than [$37,500] per day for each violation, or both....”

“An action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture ... shall not be entertained unless commenced within five years from the date when the claim first accrued....”

28 U.S.C. § 2462
Nothin’ to worry about....
“An action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture ... shall not be entertained unless commenced within five years from the date when the claim first accrued....”

28 U.S.C. § 2462
When Does PSD Violation Occur?

**One-Time Violation**
- PSD requirements are pre-construction obligations.
- PSD violation occurs solely at the time of construction.

**Continuing Violation**
- PSD requirements are ongoing obligations.
- PSD violation continues for as long the source operates without having fulfilled PSD requirements.
II. KEY FEDERAL APPELLATE COURT HOLDINGS
Nat ’l Parks Conservation Assoc. v. TVA (6th Cir. 2007)

- Citizen suit
- Allegation: Modification w/o PSD permit, BACT
- Held: Ongoing “series of discrete violations”
- Reasoning: Permit and BACT requirements exist after construction under TN regulations
Nat ’l Parks Conservation Assoc. v. TVA (11th Cir. 2007)

- Citizen suit
- Allegation: Modification w/o PSD permit, BACT
- Held: PSD is *pre-construction* requirement; SOL applies
- Reasoning: Both CAA and AL regs specify PSD applies to *construction*, not operation
Sierra Club v. Otter Tail Power Co. (8th Cir. 2010)

- Citizen suit
- Allegation: Modification w/o PSD permit, BACT
- Held: PSD is *pre-construction* requirement; SOL applies
- Reasoning: Same CAA and state analysis as 11th Cir.; adds 40 CFR 52.21 analysis
40 C.F.R. § 52.21

• (r)(1): “Any owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct . . . shall be subject to appropriate enforcement action.”

• (j)(3): “A major modification shall apply best available control technology for each regulated NSR pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.”
U.S. v. Midwest Generation, LLC
(7th Cir. 2013)

- EPA and State enforce action
- Allegation: Modification by prior owner w/o PSD permit, BACT
- Held: Neither current nor former liable for pre-construction PSD violations past SOL
- Reasoning: Same as 11th and 8th
U.S. v. EME Homer City Generation
(3rd Cir. 2013)

- EPA and State enforce. action
- Allegation: Modification by prior owner w/o PSD permit, BACT
- Held: Same as 7th – neither liable, SOL precludes
- Reasoning: Same as 11th, 8th, and 7th
III. THOUGHTS & OBSERVATIONS
Hmmmm...

- **Case Law** Trends
- Ongoing **Enforcement** Considerations
  - What’s **Next?**
IV. QUESTIONS?
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