

Implications Of US V. EME Homer City Generation

Law360, New York (November 10, 2011, 2:16 PM ET) -- On Oct. 12, 2011, a federal district judge in Pennsylvania dismissed with prejudice a Clean Air Act lawsuit against current and former owners and operators of the Homer City power plant, brought by the U.S. Environmental Protection Agency, Pennsylvania, New Jersey and New York (collectively, "plaintiffs").

The decision in *U.S. v. EME Homer City Generation LP* by the U.S. District Court for the Western District of Pennsylvania adds to the emerging judicial consensus that allegedly unlawful construction under the act's Prevention of Significant Deterioration program is a point-in-time violation.

Likewise, the court rejected the plaintiffs' attempt to recast their PSD preconstruction-permit claims as Title V operating-permit violations, instead adopting an integrated reading of the statute that acknowledges the distinct functions of PSD and Title V programs as established by Congress.

Finally, in denying the requested injunctive relief, the court considered not only the legal predicates to such relief, but also whether the equities would be served by issuing an injunction against current and former owners in connection with construction undertaken almost two decades ago.

At issue were upgrades made to the plant in the early 1990s. Defendant New York State Electric and Gas Corporation owned the plant from 1968 to 1999, and defendant Pennsylvania Electric Company owned and operated it during that period (former owners).

The current owners consist of EME Homer City Generation and eight owner-lessors who have owned or operated the plant since 1999. Although the former owners undertook upgrades to the plant in the mid-1990s or earlier, the EPA did not issue its first notice of violation until 2008, and did not initiate the enforcement lawsuit until almost three years later.

The plaintiffs claimed that the former owners had violated the CAA's PSD requirements by failing to obtain preconstruction permits prior to initiating projects in 1991, 1994, 1995 and 1996.

The plaintiffs also claimed that the current owners violated the PSD program by failing to implement best available control technology (BACT) at the plant after taking ownership, arguing that the PSD program imposes ongoing obligations at modified facilities.

The plaintiffs also alleged that the Title V Permit applied for in 1999 and issued in 2004 was deficient because it did not mention these projects or incorporate the BACT requirements the plaintiffs believe would have been imposed if the former owners had applied PSD to the projects.

In dismissing all claims against the current and former owners, the court differentiated between the alleged violations of the PSD and Title V programs. The court held that failing to obtain a preconstruction permit constitutes a one-time violation of the PSD program, which has no forward-looking implications. Thus, civil penalties were barred by the act's five-year statute of limitations.

By contrast, alleged violations of the Title V operating permit program, i.e., by operating a plant without the proper operating permit or in violation of such a permit, constitute an ongoing offense. Although PSD and Title V work in conjunction with each other, the court noted that the act does not "incorporate PSD requirements into Title V, but instead carefully distinguishes violations of permits issued under the Title V 'subchapter' from violations of preconstruction permits obtained under the PSD program."

In this case, because the current owners held a facially valid Title V permit, their alleged failure to incorporate BACT requirements from a PSD process the plaintiffs alleged should have been undertaken before the current owners owned the plant failed to state a claim. Because the former owners never owned or operated the plant during the relevant time period, the Title V claims against them also failed.

With regard to the plaintiffs' claims for injunctive relief, the court concluded that because the current owners did not own the plant at the time of the alleged PSD violations, there was no "violation" that could serve as the predicate for an injunction.

The plaintiffs also sought an injunction ordering the former owners to remedy past violations by cooperating to install BACT at the plant, or to purchase and retire pollution credits. The court concluded that this novel form of injunctive relief was not plausible from the facts alleged in the complaints.

In particular, the court emphasized that the purpose of an injunction is to prevent future violations, so a court must find some cognizable danger of a recurrent violation. Because the former owners undisputedly no longer own or operate the plant, the court found no danger of future violations. The court also found the "nearly two-decade delay in enforcement" to undercut the plaintiffs' argument for injunctive relief.

The district court's decision extends a recent trend of courts taking a hard look at Clean Air Act complaints that allege PSD violations arising from projects undertaken many years or decades in the past. Given that the EPA continues to pursue claims regarding historical projects at other power plants, rulings like EME Homer City are likely to impose substantial hurdles for government enforcement efforts.

Such difficulties are likely to be particularly acute when the plant in question has been sold, such that the entities that undertook the project are no longer the owners or operators when the EPA brings its belated PSD enforcement action.

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