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Air Pollution

Decisions on Air Permits, MATS Rules Are Some Cases to Watch, Conference Told

By Nora Macaluso

April 23 — Cases involving time limits for the government to take action against companies accused of failing to get Clean Air Act permits to modify facilities are among issues worth watching in Michigan, along with challenges to federal emissions rules, attorneys said April 23 at a conference on air issues sponsored by the Michigan Manufacturers Association and State Bar of Michigan.

A decision April 18 by the chief judge for the U.S. District Court for the Northern District of Illinois said that a five-year statute of limitation bars federal and state governments from seeking an injunction against U.S. Steel Corp. in a case that involves modifications made in 1990 is almost sure to be challenged, Nathan Dupes, an attorney at Bodman LLP in Detroit, said at the conference in Lansing, Mich. (*United States v. U.S. Steel Corp.,* N.D. Ind., No. 2:12-00304, 4/18/14; (78 DEN A-2, 4/23/14).

Judge Philip Simon noted in his decision, which reversed an earlier ruling from the same court, that he was bound by a ruling from the U.S. Court of Appeals for the Seventh Circuit in a similar case.

The Clean Air Act's new source review provision requires industrial facilities to install updated pollution controls, known as best available control technology (BACT), when they make major modifications that increase emissions of certain pollutants. Disputes arise when companies and regulators disagree over the nature of modifications.

One issue is how the statute of limitations, which courts have held to be five years, is calculated, Dupes said.

Circuit Court Split on Issue

Circuit courts are split on the issue, with the Sixth Circuit being an "outlier," calculating the time limit based on the view that the alleged emissions are a "series of discrete violations" occurring right up to the time the complaint is filed, he said.

Other circuits generally hold that a violation occurs at the time of construction, Dupes said.

"The district court basically invited us to appeal" the U.S. Steel case, Michigan Assistant Attorney General Neil Gordon said, noting the judge's decision contained a reference to being bound by the Seventh Circuit decision because the "hierarchical"court system required him to follow it.

The case, which also involves alleged exceedances of opacity requirements, is in discovery, and an appeal may be filed after the case is concluded, Gordon said.

A "strategic wrinkle" in some Michigan cases is whether a facility's operating permit is required to include exceedance, Dupes said. Michigan's Natural Resources and Environmental Protection Act says an operating permit must include "operation requirements and limits that ensure compliance with all applicable requirements at the time of permit issuance," which he said "might be a hook" for the argument that BACT requirements "should make their way into the operating permit."

The Sixth Circuit and other courts, however, found that the permitting program for prevention of significant deterioration doesn't prohibit the operation of a facility without BACT or a PSD permit, he said.

Air Toxics, Mercury Rules

Two recent decisions from the District of Columbia circuit—one that upheld EPA air toxics standards for cement kilns but not its limiting of the authority of federal district courts to impose civil penalties for emissions violations during equipment malfunctions (*NRDC v. EPA,* D.C. Cir., No. 10-1371, 4/18/14), and another upholding the EPA's mercury and air toxics standards for power plants (*White Stallion Energy Center LLC v. EPA,* 2014 BL 103957, D.C. Cir., No. 12-1100, 4/15/14)—will have implications for industry, said S. Lee Johnson, an attorney with Honigman Miller Schwartz and Cohn LLP in Detroit. A dissenting opinion arguing that the EPA's refusal to consider costs in setting the rule "is likely to be the focus of an appeal," he said.

In Michigan, which relies on coal for much of its energy needs, the mercury decision is a particular concern, Gordon said.

"We're concerned about the potential economic impact of that rule on the price of electricity and the reliability of electricity" and whether the rule will result in the premature retirement of power plants, he said. The likelihood of

an en banc reconsideration is "probably a long shot," but given the number of parties interested in the case, he said, there is "strong motivation" to ask the Supreme Court for a review.

Other Cases Worth Watching

A case involving a Sierra Club challenge to the permit for DTE's Monroe, Mich., power plant also bears watching, the attorneys said. The Michigan Court of Appeals found in a pair of cases that the Michigan Department of Environmental Quality was within its rights when it granted the permit, rejecting the Sierra Club's argument that the department should have used one-hour averages, rather than a 24-hour limit, in calculating emissions of particulate matter (*Sierra Club v. Department of Environmental Quality,* Mich. Ct. App., Nos. 308072, 314152, *unpublished opinion* 11/21/13).

Though the court sided with the DEQ, the issue of whether one-hour standards for sulfur dioxide and nitrogen dioxide should be used is "something that may come up generally in future situations," Gordon said. "It wouldn't surprise me if in the future there are cases" in which historical emissions data can show exceedances, he said. The EPA has issued guidance memos referring to the new, one-hour standards, he said.

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