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6th Circ.'s Impact On EPA Review Of Source Modifications

Law360, New York (April 08, 2014, 5:40 PM ET) -- While more than a decade has passed since the U.S. Environmental Protection Agency promulgated its reform New Source Review ("NSR") program in 2002,[1] there is still very little guidance from federal courts interpreting it. Even many cases currently in litigation are governed by earlier rules promulgated in 1980 for the Prevention of Significant Deterioration ("PSD") program[2] as the underlying allegations stem from conduct predating the EPA's adoption of the 2002 Rule or its incorporation into the relevant state implementation plan. Accordingly, it is only in the last two-to-three years that federal courts have had the opportunity to interpret how the EPA's changes in the NSR program play out in enforcement actions.

This article examines United States v. DTE (2013), litigation generating the first decisions to emerge under the 2002 Rule and how this case employed a dramatically different framework for evaluating NSR allegations. In contrast to the predominant interpretation of the 1980 Rule, the district court in DTE ruled last month that the EPA is foreclosed specifically from "second-guessing" a source's preconstruction projections.[3]

In reaching this conclusion, the court explained that the EPA does not "possess unfettered authority to challenge the methodology and factual assumptions defendants used to predict their postproject emissions," but rather is limited to a "surface review" of such projections in enforcement actions. If followed by other district courts, these limitations on the agency's ability to "second-guess" preconstruction projections have important implications for how companies and practitioners approach defense of NSR claims.

United States v. DTE stems from a 2010 project at DTE Energy's Detroit Edison Monroe, Mich., power generation facility. The EPA filed suit in 2010 and, in the last four years, the Eastern District of Michigan and the Sixth Circuit have issued three significant decisions in the case, including a new decision last month. This most recent decision — the district court's application of guidance from the Sixth Circuit — demonstrates the extent to which United States v. DTE is a potential game changer for defendants.

The EPA alleged that DTE Energy "violated the [Clean Air Act] by renovating electric utility steam generating units ... at their Monroe, [Mich.], power plant without first obtaining a [NSR] permit from the Michigan Department of Environmental Quality" because "the renovations constituted a 'major modification' of the subject units."[4]

Notably, the EPA filed suit only months after the alleged modification and before postconstruction monitoring was complete under the 2002 Rule. Shortly after the case was filed by the EPA, the Eastern District of Michigan granted DTE Energy's motion for summary judgment, reasoning that "[a]t the time of filing of [the] complaint, less than one year postproject, a determination of whether the projects at

issue constitute a major modification is premature."[5] The court reasoned that the EPA could later bring an enforcement action at some point during the "postconstruction monitoring" of the facility.[6]

This early decision by the district court itself was a significant departure from earlier cases finding that postconstruction actual emissions are essentially irrelevant. In finding that the EPA needed to wait for actual emissions data to determine whether a modification occurred, the district court in DTE implicitly adopted a very different view of NSR under the 2002 Rule relative to the 1980 Rule.

This contrast is best shown by two earlier decisions from other district courts in the Sixth Circuit interpreting the 1980 Rule. In United States v. Ohio Edison (2003), the Southern District of Ohio explained that "actual emissions data, while interesting, is not dispositive ... It is the projected net emission increase that the [d]efendant could have predicted prior to the projects being undertaken that determines where there is a CAA violation."[7]

In another case interpreting the 1980 Rule, the Eastern District of Tennessee took this analysis one step further, explaining "[c]onsidering 'actual' postproject data would be inconsistent with the purposes of the CAA."[8] Accordingly, to prove liability in these cases under the 1980 Rule, the government used expert testimony to demonstrate that defendants should have projected that the projects in question would cause an increase in emissions above the applicable PSD threshold as opposed to looking at whether the projections did in fact increase emissions.

This early victory by DTE in the district court was appealed to the Sixth Circuit. In March 2013, the Sixth Circuit largely agreed with the premise of the district court's decision but explained that the lower court's decision was too sweeping. Accordingly, the Sixth Circuit held that "[w]hile the regulations allow operators to undertake projects without having [the] EPA second-guess their projections, [the agency] is not categorically prevented from challenging even blatant violations of its regulations until long after modifications are made."[9] Despite its general guidance that "[the] EPA's enforcement powers must also extend to ensuring that operators follow the requirements in making [preconstruction] projections,"[10] the panel made clear that the agency's review of a preconstruction emissions projections should not be transformed into a "prior approval scheme."[11]

To be sure, the Sixth Circuit opinion did recognize that the EPA could bring enforcement actions absent postconstruction actual emissions data where operators failed to undertake PSD analysis or did not follow the regulation in preparing preconstruction projections. But a fair reading of the court's analysis on this point indicates that enforcement without evidence of an actual increase in emissions should be limited.

Specific examples cited by the court included use of an improper baseline period or use of an incorrect threshold to determine whether a projected emissions increase is significant.

Perhaps one of the most interesting — and telling — aspects of the Sixth Circuit's opinion was the panel's discussion on whether sources could manage operations to avoid an emissions increase. The EPA argued that such an approach was impermissible under the 2002 Rule. The Sixth Circuit disagreed, explaining that such an approach (e.g., purposely managing operations to keep emissions from increasing) would "further the goal of the statute."[12] This passage demonstrates that the Sixth Circuit was primarily focused on actual, postconstruction emissions, not on second-guessing the utility's preconstruction projections.

Chief Judge Alice M. Batchelder, in dissent, took an even stronger position on the question. In her view,

actual postconstruction emissions would be dispositive in determining whether a "major modification" had occurred: "This project caused no emissions increase and, in fact, resulted in an emissions decrease," leading Chief Judge Batchelder to conclude that, "If true, this fact renders moot the case or controversy about preconstruction emissions projections — there can be no permitting or reporting violation because there was, conclusively, no major modification."[13] Thus, Chief Judge Batchelder would hold "that these subsequent actual results render the present dispute moot."[14]

Last month on remand, the district court applied this guidance from the Sixth Circuit and granted summary judgment for DTE. Under this precedent, the district court explained that its analysis addressed whether DTE Energy "adhered to [the] EPA's regulations governing preconstruction emission projections ..."[15] The court defined the inquiry as "a surface review of a source operator's preconstruction projections" in order to determine whether the method by which the projections were determined "comport[s] with the letter of the law," as opposed to impermissibly "second-guessing" the projections and calculations themselves.[16]

The court rejected "unfettered authority [by the EPA] to challenge the methodology and factual assumptions defendants used to predict their postproject emissions," explaining that the source only needs to "make projections according to the requirements for such projections contained in the regulations."[17] Applying this rule, the court then went on to reject the EPA's challenge to DTE's demand growth exclusion calculations, observing that this was exactly the type of second-guessing precluded by the Sixth Circuit's decision.[18]

Echoing Chief Judge Batchelder's dissent, the district court went on to explain, seemingly as an independent ground for its decision, the dispositive nature of actual postconstruction emissions from the Monroe facility: "Insofar as the government asserts that defendants misapplied the demand growth exclusion [in its preconstruction projection], this contention is belied by the fact that defendants have demonstrated, and the government concedes, that the actual postproject emissions from Unit 2 never increased. Therefore, ... the government is unable to show that the renovations to Unit 2 constituted a major modification."[19]

The trilogy of DTE decisions represents important new precedent interpreting the 2002 Rule and warrant careful analysis by any source facing NSR allegations. Specifically, sources and legal practitioners should consider the following implications from the decision:

- The district court's departure from a detailed evaluation of preconstruction projections in lieu of using actual emissions data is a significant development. It was this "second-guessing" of preconstruction projections under the 1980 Rule that, in part, significantly drove up the cost — as well as the risk — of NSR litigation because this evaluation often required significant expert testimony on both sides.

Accordingly, the court's departure from this framework increases the probability for resolution via motion practice and cost savings for litigants.

The Sixth Circuit's discussion on management of operations to keep emissions under PSD thresholds is an interesting development for operations. Specifically, the court's holding is a curious conceptual contrast to synthetic minor permitting programs. This point was specifically briefed in the Sixth Circuit.

As DTE noted, the tension was addressed in the rulemaking for 2002 NSR Reform. When interested

parties expressed concern that sources “would no longer seek enforceable permit conditions to limit emissions,” the EPA explained that “the environmental benefit of [the existing practice of obtaining] permit limits is effectively preserved because any source projecting no significant actual increase must stay within that projection or face NSR.”[20] DTE’s brief also cites another EPA statement from the rulemaking docket on this point: "Under the NSR Improvement Rule, this source would not need to agree to the permit limitation but would still need to effectively adhere to its projection that actual emissions do not increase after that change."[21]

Apparently, the Sixth Circuit agreed, although it did not explicitly discuss the tension between its holding and synthetic minor permitting programs.

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[1] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002).

[2] Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,718 (Aug. 7, 1980)

[3] United States v. DTE Energy Co., No. 2:10-cv-13101-BAF-RSW, Dkt. No. 196 at ECF 2 (E.D. Mich. Mar. 3, 2014) (Opinion and Order Granting Defendants’ Motion for Summary Judgment)

[4] United States v. DTE Energy Co., No. 2:10-cv-13101-BAF-RSW, 2011 U.S. Dist. LEXIS 95175 at *2-3 (E.D. Mich. Aug. 23, 2011) (Opinion and Order Granting Defendants’ Motion for Summary Judgment)

[5] Id. at *15

[6] Id. at *16 (“Plaintiff may pursue NSR enforcement if and when post-construction monitoring shows a need to do so.”)

[7] United States v. Ohio Edison Co., 276 F. Supp. 2d 829, 882, 884–85 (S.D. Ohio 2003)

[8] National Parks Conservation Ass’n v. TVA, 618 F. Supp. 2d 815, 829 (E.D. Tenn. 2009)

[9] United States v. DTE Energy Co., 711 F.3d 643, 644 (6th Cir. 2013)

[10] Id. at 649

[11] Id. at 650

[12] Id. at 651

[13] Id. at 652–53 (Batchelder, C.J., dissenting)

[14] Id. at 653 (Batchelder, C.J., dissenting)

[15] DTE Energy, No. 2:10-cv-13101-BAF-RSW, Dkt. No. 196 at ECF 2

[16] Id. at ECF 3

[17] Id.

[18] Id.

[19] Id. at ECF 3-4

[20] Brief of Defendant-Appellee DTE Energy, United States v. DTE Energy Co., No. 11-2328 (6th Cir.), Dkt. No. 47 at ECF 70 (quoting EPA, Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules at 14 (Nov. 21, 2002), available at

[21] Id. (quoting EPA, Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules at G-5 (Nov. 21, 2002), available at

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