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Clean Air Act's PSD Program Under Scrutiny In Courts

Law360, New York (November 13, 2013, 1:38 PM ET) -- The Prevention of Significant Deterioration ("PSD") Program was added to the Clean Air Act in 1977 in order to ensure that emissions from new and modified stationary sources would not cause a deterioration of air quality in regions of the country already in attainment with applicable National Ambient Air Quality Standards ("NAAQS").[1] One central component of the PSD program is the requirement that new or modified facilities would result in a significant net increase in emissions of a regulated pollutant install "best available control technology" ("BACT").[2]

In the mid-1990s, the U.S. Environmental Protection Agency started ramping up civil enforcement of PSD and began targeting various industrial groups with "PSD enforcement initiatives." These initiatives continue to this day and have resulted in scores of consent decrees or judgments against industrial defendants. So far, in 2013 alone, the EPA has reported nine consent decrees it has entered into with facilities alleged to have violated PSD.[3] Often, these decrees and judgments impose hefty civil penalties and require the installation of expensive pollution controls. For example, one such settlement required the Wisconsin Public Service Corporation to invest approximately $300 million in pollution control technology, pay a civil penalty of $1.2 million and spend $6 million on environmental mitigation projects.[4]

Recent activity in the federal courts may limit the scope of the PSD program and EPA's enforcement power. Two cases, United States v. Midwest Generation LLC[5] and United States v. EME Homer City Generation LLP,[6] restrict the EPA's ability to seek injunctive relief for wholly past violations of the PSD's permitting requirements. And last month the U.S. Supreme Court granted certiorari in Utility Air Regulatory Group v. EPA and related cases to address the question of whether PSD applies to greenhouse gas emissions.

United States v. Midwest Generation

Midwest Generation and EME Homer City present very similar fact patterns. In each case, the government brought a PSD enforcement action against both the former and current owner of an industrial facility years after the modifications alleged to have triggered PSD took place and after the facility was subsequently sold to a third party.

In Midwest Generation, the district court had dismissed the government's enforcement action, holding that no remedy was available against the current owner because it did not violate the Clean Air Act by

undertaking an unpermitted modification and that no remedy was available against the former owner because it had no ability to effectuate pollution controls on a facility it did not own.[7]

On July 8, 2013, the Seventh Circuit affirmed the dismissal, but did so relying primarily on the passing of the statute of limitations. First, the court reaffirmed the prevailing rule that failure to obtain a preconstruction PSD permit does not amount to a continuing violation of the Clean Air Act:

The violation is complete when construction commences without a permit in hand. Nothing in the text of the Clean Air Act even hints at the possibility that a fresh violation occurs every day until the end of the universe if an owner that lacks a construction permit operates a completed facility.[8]

The Seventh Circuit also rejected the government's contention that the alleged PSD violation gives rise to a continuing harm so as to justify the imposition of injunctive relief against the former owner and/or the current owner, despite the fact that the statute of limitations had expired:

Plaintiffs' contention that a continuing injury from failure to get a preconstruction permit (really, from failure to use BACT) makes this suit timely is unavailing. What these plants emit today is subject to ongoing regulation under rules other than §7475. Today's emissions cannot be called unlawful just because of acts that occurred more than five years before the suit began.[9]

On Sept. 20, the Seventh Circuit denied the government's petition for rehearing or rehearing en banc.

United States v. EME Homer City Generation

The Third Circuit reached a similar conclusion in EME Homer City, but on slightly different grounds that take the impact of its holding one step further. There, the government similarly sought civil penalties and injunctive relief against the former and current owners of an industrial facility for modifications allegedly made by the former owner without a PSD permit over a decade before the government brought suit. The district court dismissed the action and the Third Circuit affirmed. As an initial matter, the Third Circuit held that "the District Court correctly dismissed the civil-penalty and injunctive relief sought against the Current Owners" because they had never violated the Clean Air Act.[10] The court concluded that a violation of PSD "'is complete when construction [or modification] commences without a permit in hand'" and does not constitute an ongoing violation of the Act.[11]

The Third Circuit next turned to the claims asserted against the former owners who allegedly violated PSD and held that those claims were also properly dismissed. First, the court held that because the failure to obtain a PSD permit amounts to a one-time violation, injunctive relief is not necessary to bring the modified facility into "compliance" with the Clean Air Act.[12]

Given the absence of any ongoing violation of the Clean Air Act, the Third Circuit then addressed whether prospective injunctive relief is available for a wholly past violation of PSD. Delving deep into the text of the Clean Air Act's remedial provisions found at 42 U.S.C. § 7413, the court held that it is not. "The text of the Clean Air Act does not authorize an injunction against former owners and operators for a wholly past PSD violation, even if that violation causes ongoing harm."[13] Therefore, the Clean Air Act "cannot be read so broadly as to authorize an injunction for completed violations."[14] Rather, "any injunctive relief available" for a PSD violation must be "limited to ongoing violations, consistent with the

specific forward-looking injunctive remedies that precede it."[15]

Finally, the Third Circuit further found that even if an injunction could in some circumstances be issued under the Clean Air Act for a wholly past violation — which the court held it cannot be — such an injunction would not be appropriate in a circumstance where the party alleged to have violated the PSD provisions of the Clean Air Act no longer owned the facility. The court found that "[o]rdering the Former Owners to install BACT on a plant they no longer own, operate, or have access to is just the sort of impossible relief that would not be 'appropriate.'"[16]

Taken together, Midwest Generation and EME Homer City significantly impact the government's ability to seek injunctive relief for historic violations of the PSD permitting requirements, as the EPA has sought to do in its various "enforcement initiatives." Not only do these decisions prevent the EPA from seeking injunctive relief from current and former facility owners after the facility has changed hands, but they may also be read more broadly to prevent the EPA from seeking an injunction in any case where construction on a modification has been commenced and completed without a PSD permit.

Utility Air Regulatory Group v. EPA

In Utility Air Regulatory Group v. EPA, the Supreme Court will address the extent to which the Clean Air Act requires a preconstruction PSD permit in the first place. In those related cases, the Supreme Court granted certiorari to address whether the EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles under Title II of the Clean Air Act triggered permitting requirements under the act for stationary sources that emit greenhouse gases. The Clean Air Act's PSD provisions apply to any "major emitting facility," which is defined in the statute as a facility that emits, or has the potential to emit, at least 250 tons per year ("TPY") of "any air pollutant," or at least 100 TPY of "any air pollutant" if the facility is within certain, statutorily enumerated industrial source categories.[17]

Dating back to 1980, the EPA has interpreted the Clean Air Act to mean that a facility is subject to PSD permitting requirements if these emissions thresholds are met with respect to any pollutant regulated under any provision of the Act. Thus, the EPA concluded that when the greenhouse gas emission limits on light duty vehicles it promulgated in 2010 under Section 202(a) of the Clean Air Act[18] became effective, that "triggered" both PSD and Title V permitting requirements for greenhouse gases such as carbon dioxide.[19] However, because applying these low statutory thresholds to carbon dioxide would sweep tens of thousands of sources into the PSD and Title V permitting programs for the first time and at a cost of billions of dollars, the EPA issued a "Tailoring Rule" which revised upwards the statute's numerical permitting thresholds for stationary-source greenhouse gas emissions in order to avoid this admittedly "absurd" result.[20]

Petitioners in the Utility Air Regulatory Group cases have argued that this interpretation is incorrect, and that the "trigger" for stationary source PSD permitting requirements should be limited to pollutants for which the EPA has promulgated a NAAQS. Focusing on the PSD program's definition of "major emitting facility," some of the petitioners argue that the term "air pollutant" in that definition should be given a narrow interpretation to cover just the six NAAQS pollutants.[21] That definition, the argument goes, should be read in conjunction with the overall purpose of the PSD program, which is to prevent a degradation of air quality in regions of the nation that are already in attainment with the NAAQS.

Construing the term “air pollutant” in the PSD provisions to include non-NAAQS pollutants such as greenhouse gases would not further that purpose. Judge Brett Kavanaugh, who dissented from the D.C. Circuit’s denial of rehearing en banc in Coalition for Responsible Regulation v. EPA,[22] agreed with this argument, as he concluded that even though “[g]reenhouse gases may qualify as ‘air pollutants’ in the abstract, ... context tells us that the Prevention of Significant Deterioration program uses the term ‘air pollutant’ to refer only to a subset of all air pollutants (namely, the NAAQS pollutants).”[23]

Although the question presented in the Utility Air Regulatory Group cases is limited to the application of PSD to greenhouse gases, the Supreme Court’s holding on this issue could have broader ramification. If the Supreme Court were to agree with the petitioners on the merits and adopt the reasoning expressed by Judge Kavanaugh that PSD permitting should apply only to NAAQS pollutants, its reasoning could significantly restrict the projects triggering PSD’s permitting requirements.

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[1] Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 567 (2007); Sierra Club v. EPA, 557 F.3d 401, 403 (6th Cir. 2009).

[2] 42 U.S.C. § 7475.

[3] See http://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=1.

[4] See http://www2.epa.gov/enforcement/wisconsin-public-service-corporation-settlement.

[5] 720 F.3d 644 (7th Cir. 2013).

[6] 727 F.3d 274 (3d Cir. 2013).

[7] United States v. Midwest Generation, LLC, 781 F. Supp. 2d 677 (N.D. Ill. 2011).

[8] Midwest Generation, 720 F.3d at 647.

[9] Id. at 648.

[10] Homer City, 727 F.3d at 290-91.

[11] Id. at 285 (quoting Midwest Generation, LLC, 720 F.3d at 647).

[12] Id. at 292.

[13] Id. at 291.

[14] Id. at 292.

[15] Id. at 293.

[16] Id. at 295.

[17] 42 U.S.C. § 7479(1).

[18] Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010)

[19] See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

[20] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

[21] These “criteria pollutants” are carbon monoxide, lead, oxides of nitrogen, ozone, particulate matter (PM10 and PM2.5), and sulfur dioxide.

[22] Coalition for Responsible Regulation, Inc., 2012 WL 6621785 at 14-18 (D.C. Cir. Dec. 20, 2012)

[23] Id. at *19.