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Sixth Circuit Court of Appeals Rules that U.S. Environmental Protection Agency (USEPA) May Proceed with an Enforcement Action against DTE Energy

Article By:

David M. Loring

On March 28, 2013, the Sixth Circuit Court of Appeals ruled that the **U.S. Environmental Protection Agency (USEPA)** did not need to wait until post-construction emissions data became available to challenge DTE Energy Corp.'s projection that a construction project was not a "major modification," and, thus, did not require a New Source Review (NSR) construction permit under USEPA's Clean Air Act regulations. (*United States v. DTE Energy Co.*, 6th Cir., No. 11-2328). In so ruling, the Sixth Circuit reversed a district court order that provided a safe harbor for owners and operators of sources that complied with pre-project recordkeeping and reporting requirements from USEPA enforcement until and unless post-project **emissions data** demonstrated that the projection was incorrect.

In 2010, DTE undertook construction on a project at its Monroe Power Plant in Monroe, Michigan. Prior to initiating construction, DTE performed the required pre-project emission projections and determined that the project would not increase emissions sufficient to require a permit under the NSR regulations. In accordance with state and federal regulations, DTE submitted its projections to the state permitting agency and began construction. A few months later, USEPA challenged DTE's pre-project projection in federal court, alleging that the project resulted in a "significant net emissions increase" and required a NSR construction permit.

On appeal, the Sixth Circuit confirmed that the NSR regulations cannot be read to provide USEPA with the authority to "second-guess" a source's pre-project projections. Such an interpretation would effectively transform a "project-and-report scheme … into a [required] prior approval scheme," which the court noted was inconsistent with the plain language of the regulations. Nonetheless, the Sixth Circuit found that contrary to the district court's ruling, nothing under the regulations precluded USEPA from bringing an enforcement action at any time to "ensure that the [pre-]project projection [was] made pursuant to the requirements of the regulations." In other words, USEPA does not need to wait until post-construction emissions data becomes available to challenge a source's pre-project emission projections. It is worth noting, however, that the dissent called the majority opinion "logically flawed and … legally incorrect" on grounds that the court's opinion was inherently contradictory. As the dissent explained, the NSR regulations do not require pre-construction approval from USEPA, but "if the USEPA can challenge the operator's scientific preconstruction emission projections in court … that is the exact same thing as requiring prior approval.

Notably, the **Sixth Circuit** did not side with **USEPA** *carte blanche*. The court was quick to point out that its reversal did "not constitute endorsement of USEPA's suggestion[]" that DTE's pre-project projection should have demonstrated that the project constituted a major modification and required an NSR permit. And the court challenged USEPA's suggestion that a source could not intentionally limit generation to limit its post-project emissions that otherwise could retroactively require a NSR permit.

The Sixth Circuit remanded the case to the district court for further proceedings on whether the DTE project did or did not constitute a major modification and require a NSR construction permit.

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