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## NEW SOURCE REVIEW

### CLEAN AIR ACT

A recent decision by a federal court in Pennsylvania addressing the issue of statutes of limitations has raised what may be a significant barrier to further lawsuits seeking to reach into the distant past to prove violations of the Clean Air Act's prevention of significant deterioration program. This article will examine the legal foundations of the PSD program, how the statute of limitations applies generally to alleged violations, and how the ruling by the U.S. District Court for the Eastern District of Pennsylvania in *New Jersey v. RRI Mid-Atlantic Energy Holdings LLC (MetEd)* affects plaintiffs' ability to bring claims for older plant modifications. The article also suggests steps utilities can take ahead of time to help their defenses in the event the government or a citizens' group pursues legal action.

## EPA's Utility Enforcement Initiative: The MetEd Decision May Pose Problems for Plaintiffs

BY PAUL E. GUTERMANN AND DAVID H. QUIGLEY

**O**n Nov. 3, 1999, Attorney General Janet Reno and EPA Administrator Carol Browner announced that the Department of Justice had filed enforcement actions under the Clean Air Act against seven electric utility companies alleging that the companies had modified their power plants over the years without undergoing new source review. Had they done so, the government alleged, the utilities would have been required to install the best available control technology to

reduce a number of pollutants. Thus, began the "Utility Enforcement Initiative."

According to the EPA press release announcing the filing of the lawsuits:

"[t]he government asserts that the utilities each made major modifications to their plants in order to extend their lives and avoid the cost of building new plants. These projects included replacing large portions of the boilers that are the heart of the plants. Many of these actions cost tens of millions of dollars and took years to

complete. Under the Clean Air Act, modifications of this kind require installation of the “best available control technology,” but the utilities did not do so.”<sup>1</sup>

In the ensuing 13-plus years, states and environmental groups have intervened in additional, similar actions commenced by the federal government and asserted nearly identical claims in actions of their own under the citizen suit provisions of the Clean Air Act. In each case, these plaintiffs were required to show that work conducted as long as 30 years ago constituted a “major modification.”

A recent decision by a federal court in Pennsylvania has raised what may be a significant barrier to further lawsuits seeking to reach into the distant past to prove violations of the Clean Air Act’s prevention of significant deterioration program. This article will examine the legal foundations of the PSD program, how the statute of limitations applies generally to alleged violations, and how the ruling by the U.S. District Court for the Eastern District of Pennsylvania in *New Jersey v. RRI Mid-Atlantic Energy Holdings LLC* (MetEd) affects plaintiffs’ ability to bring claims for older plant modifications. The article also suggests proactive steps utilities can take to buttress their defenses in the event the government or a citizens’ group pursues legal action against them.

## Legal Foundations of the PSD Program

The Clean Air Act requires the U.S. Environmental Protection Agency to establish national ambient air quality standards (NAAQS) for designated pollutants that EPA has determined may cause or contribute to air pollution anticipated to endanger public health or welfare.<sup>2</sup> The PSD program is intended to prevent the deterioration of air quality in areas that meet federal ambient air quality standards and to ensure that economic growth will occur in a manner consistent with preserving existing clean air resources.<sup>3</sup> PSD focuses on new sources of emissions, including both the original construction of sources and actions that change existing sources in a manner that effectively create a “new” source contributing increased emissions. Accordingly, the PSD program covers a newly constructed source and a “major modification” to an existing source that increases pollutant emissions.<sup>4</sup>

Beginning in 1980, EPA promulgated three primary sets of PSD regulations. The 1980 PSD regulations applied to all “major sources,” including power plants. These regulations established basic principles regarding the determination of whether a PSD permit was required for a specific activity based upon the type of modification undertaken and whether an emissions increase resulted. 45 Fed. Reg. 52,676, 52,735 (Aug. 7, 1980). In 1990, the U.S. Court of Appeals for the 7th Circuit held that certain aspects of the PSD program, including how to calculate the increase in emissions, could not be applied to a power plant and also provided detail concerning an exclusion to the PSD program for “routine maintenance, repair, and replacement” activi-

ties.<sup>5</sup> In 1992, EPA revised the PSD regulations as they applied to power plants, reiterating that they did not apply to routine activities. 57 Fed. Reg. 32,314 (July 21, 1992). In 2002, EPA issued new PSD rules as part of an overall PSD reform effort, 67 Fed. Reg. 81,086 (Dec. 31, 2002), applying many of the utility-specific rules in the 1992 regulations to all other sources.<sup>6</sup>

As it has throughout its history, the PSD program applies to an existing facility only if the facility owner undertakes a “major modification.”<sup>7</sup> The regulations define a major modification to be a “physical change in or change in the method of operation” that would cause a “significant net emissions increase” of a regulated pollutant.<sup>8</sup> For the most part, enforcement actions involving coal-fired power plants commenced by EPA or brought pursuant to the citizen suit provisions target emissions of particulate matter (PM), sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>). The regulations provide that the level at which an increase is considered “significant” for PM, SO<sub>2</sub> and NO<sub>x</sub> is 40 tons per year. If an owner or operator of a power plant plans a physical or operational change that the owner or operator determines would reasonably be expected to cause a significant net emissions increase, PSD requires the owner or operator to seek a preconstruction permit before commencing construction.<sup>9</sup> Conversely, if the owner or operator does not expect the project to increase net emissions above a significance level, or the project is otherwise not covered or is subject to an exclusion from the PSD program, the owner or operator does not need to apply for a PSD permit.<sup>10</sup> (“Significant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed . . . 40 tpy. . . .”) In either case, the owner or operator is not required by the PSD program to seek input from EPA concerning the potential increase in emissions.

## Operation and Maintenance of a Coal-Fired Boiler

Electricity is generated in a coal-fired power plant by the combustion of coal in a large boiler consisting of a complex configuration of metal tubes. Within the boiler, water is boiled and the resulting steam is further heated and pressurized. The hot pressurized steam turns the turbine, which turns the generator, which produces electricity. The steam returns to the boiler where it is again heated and then returns to help turn the turbine. The steam exits the turbine to the condenser and starts around the circuit once again.

The water/steam path in a boiler consists of a number of components. The water/steam flows sequentially through these components. Each component consists of hundreds of tubes. Depending on its location and design, any one tube may be anywhere from less than one inch to as much as two or three inches in diameter. Coal-fired boilers typically operate in the following manner:

<sup>5</sup> *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 917 (7th Cir. 1990).

<sup>6</sup> 40 C.F.R. § 52.21(b)(48)(i) (2002). See 227 DEN AA-1, 11/25/02.

<sup>7</sup> *Id.* §§ 52.21(a), (b)(2).

<sup>8</sup> *Id.* § 52.21(b)(2).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* 40 C.F.R. § 52.21(b)(23).

<sup>1</sup> See <http://op.bna.com/env.nsf/r?Open=jsun-98bkxw>.

<sup>2</sup> 42 U.S.C. §§ 7408 and 7409.

<sup>3</sup> *Id.* § 7470.

<sup>4</sup> *Id.* §§ 7475(a); 7479(2)(C).

1. Feedwater passes through an economizer, and combustion gases that already have passed through much of the boiler and are relatively cool pass over the outside of the economizer tubes.
2. Water is turned into steam by passing through the waterwall tubes, which line much or all of the walls of the boiler, including the walls of the furnace.
3. The steam then travels to the primary and secondary superheaters, where it is further heated.
4. The steam next goes to the high pressure section of the turbine, where some of its energy is used to help turn the generator.
5. The steam returns to the boiler, where it passes through the primary and secondary reheaters.
6. Reheated steam goes back to the turbine, where it passes through the intermediate and low pressure sections and provides more energy to turn the generator.

The metal tubes inside a coal-fired boiler are subject to a high-temperature, high-pressure environment that promotes a number of failure mechanisms generally categorized by erosion and corrosion. These mechanisms inevitably lead to tube failure, ranging in form from a pinhole leak to a total rupture. Failure of a single tube can lead to failures of adjacent tubes or even tubes in other sections of the boiler.<sup>11</sup> For these reasons, unit operators often remove the generating unit from service upon detection of a tube leak to repair the leak and avoid any subsequent damage that may occur.

Periodically, each generating unit is shut down on a planned schedule to repair equipment that has failed and, in regular instances, to replace all or part of a component in an effort to minimize future tube failures. EPA's Utility Enforcement initiative, and the subsequent actions by states and environmental groups, targeted component replacements, alleging that such component replacements were "modifications" subject to PSD permitting.

### The Targeted Projects

The enforcement cases commenced by EPA, states, and environmental groups alleged that current and former power plant owners and operators undertook maintenance projects from the 1980s onward for which they should have obtained NSR permits. Thus, even the initial suite of cases commenced in December 1999, involved not only contemporaneous construction projects, but also ones that had been undertaken 20 or more years earlier. More recently filed cases have followed the same playbook, asserting noncompliance for projects of both recent and ancient vintage. In reaching back to assert claims concerning projects that occurred so many years before, EPA and citizen plaintiffs exponentially increased the complexity of the legal and factual issues, and needlessly increased substantially litigation and related transactions costs. They did this for little benefit to the public — proving additional multiple violations in the distant past, when more recent viola-

tions also are alleged, is not likely to lead to any stricter emissions controls. Put another way, injunctive relief secured to remedy a recent project would subsume any remedy obtained for a similar project concluded decades ago. An example, drawn from facts alleged in the filed cases, highlights the issues.

Assume that a coal-fired power plant constructed in the early 1960s has two 500 Mw coal-fired boilers, referred to as Units 1 and 2. The owner of the power plant replaced the economizer on Unit 1 in 1982, performed a series of waterwall replacements between 1987 and 1994, and replaced the primary superheater in 1997. The owner also replaced the boiler floor on Unit 2 in 1986, and the primary and secondary reheaters in 1991 and 1998, respectively. The owner of the plant did not seek or obtain a PSD permit before commencing any of these projects. In the complaints alleging PSD violations, EPA and a group of "downwind" states filed complaints in U.S. District Court, alleging that PSD permits were required for each project and seeking civil penalties and injunctive relief in the form of an order to install pollution controls on the units.

To obtain a court order requiring the payment of civil penalties and the addition of controls to the units, the plaintiffs need demonstrate only that one project on each unit should have been subject to PSD permitting. But, by alleging that projects of the entire period from 1982 through 1998 violated PSD, the plaintiffs introduced several unnecessary legal issues and litigation costs.

Allegations that projects in the 1980s had violated PSD required the power plant owner to search for documents from at least as far back as 1977 (i.e., five years before the 1982 economizer project) and identify persons with knowledge of the facts and circumstances relevant to the company's consideration of PSD rules in determining to undertake the project. By the same token, including such allegations required EPA and the state plaintiffs to search for documents and identify persons with knowledge of the agency's understanding and application of PSD regulations that pre-dated even the 1980 regulations. Moreover, because the 1980 regulations applied to the 1980s vintage projects and the WEPCo rules applied to the 1990s vintage projects, the parties would have to conduct discovery concerning two different sets of rules that included fundamental differences in how the PSD program applied to power plants.

While EPA and citizen suit plaintiffs have obtained significant civil penalties in settlement of Utility Enforcement Initiative cases, their primary stated objective in commencing the actions was to compel the construction of pollution control equipment. PSD permits require the owner or operator of a power plant modifying a coal-fired boiler to install best available control technology (BACT) on the emissions unit. The capital costs of installing such equipment, on top of additional operating expenses, dwarfs even the largest penalty figures, making the plaintiffs' decision to pile on the number of violations, and their litigation costs, even more dubious.<sup>12</sup>

<sup>11</sup> A high velocity stream of water, steam, or a water/steam mixture can impinge on adjacent tubes with such energy that it cuts or breaks the adjacent tubes, compounding the failure. A large leak can disrupt the flow balance through sets of parallel tubes, essentially starving the adjacent tubes of cooling water. This can result in overheating of the adjacent, un-cooled tubes, loss of strength in those tubes, and ultimately to failure.

<sup>12</sup> Under the best of circumstances, negotiating the control equipment that will serve as BACT is a difficult exercise. In the context of enforcement litigation, the difficulties expand exponentially. The legal issues involved in litigating which controls would constitute BACT are both complex—is BACT determined

## The Statute of Limitations in PSD Cases

The Clean Air Act does not contain any provisions establishing a statute of limitations period for EPA commencing enforcement litigation or citizens commencing a citizen suit for alleged PSD violations. Accordingly, the general federal statute of limitations applies. That statute provides, in pertinent part, that:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued. . . .<sup>13</sup>

The issue then becomes determining when a claim that a project was required to undergo PSD permitting “first accrued.”

The PSD regulations provide that no person may commence construction of a new emissions source or modify an existing source without obtaining a PSD permit.<sup>14</sup> Owners and operators of power plants have argued that a claim that a source has been constructed or modified without a permit “accrues” when the construction commences. EPA and citizen suit plaintiffs have argued that construction and operation of a new or modified emissions source is a “continuing violation” because the regulations require a new or modified source to apply BACT and, by continuing to operate without BACT, each day constitutes a new violation, effectively restarting the limitations clock.

While some courts have accepted the continuing violation argument,<sup>15</sup> the majority of courts to consider the issue in the context of the Utility Enforcement Initiative have held that violations of the PSD permitting requirements are one-time violations that occur at the time of construction.<sup>16</sup> As a result, and in an effort to avoid the

as of the date on which the project occurred or on the date of trial; may the source demonstrate that it would have taken a synthetic minor permit or must it construct the most stringent controls – and beyond the scope of this article. Suffice it to say, however, that the caselaw is minuscule, the disputes between the regulatory agencies and power plant owners and operators are immense, and the challenges in presenting the various options to a court daunting. Moreover, including allegations concerning projects that occurred years before the complaint is filed introduces additional legal issues over the statute of limitations.

<sup>13</sup> 28 U.S.C. § 2462.

<sup>14</sup> 42 C.F.R. § 52.21(a)(2).

<sup>15</sup> *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 480 F.3d 410, 418; 63 ERC 2025 (6th Cir. 2007) (PSD provision requiring that a major modification shall apply BACT “creates an ongoing obligation to apply BACT” regardless of what terms a preconstruction permit may or may not contain); *United States v. Ohio Edison Co.*, No. 2:99-cv-01181 (S.D. Ohio 2003) (“the statute itself provides for the requirement of a preconstruction permit as well as ongoing operation in compliance with Clean Air Act standards for sources ‘for which a permit is required,’ not simply those sources for which a permit has been granted.” (citing 42 U.S.C. § 7475(a)(7)).

<sup>16</sup> “[V]iolations of the preconstruction permitting requirements occur at the time of construction, not on a continuing basis.” *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d at 661, 56 ERC 1992 (2003); *accord Brotech Corp., (United States v. Brotech Corp.*, No. 00-2428 (E.D. Pa., 2000). “Once the construction or modification is complete, the window in which to apply for and obtain a preconstruction permit is gone. Thus, a violation of the Clean Air Act’s preconstruction permit requirement is singular in nature, and does not constitute an ongoing violation.” *Niagara Mohawk*, 263

resulting starting of the clock, EPA and citizen suit plaintiffs began to argue that the five-year deadline for filing a complaint has been tolled by operation of the so-called “discovery rule” or the doctrine of equitable tolling. They argue that under the discovery rule, the statute of limitations for bringing an action does not accrue until the underlying harm is discovered, even if decades later. Equitable tolling, according to these plaintiffs, stops the running of the statute of limitations where the defendant actively misled the plaintiff about the cause of action, or extraordinary circumstances prevent the plaintiff from asserting his or her rights. The MetEd decision evaluated and rejected these latest attempts by plaintiffs to avoid “starting the clock” at the commencement of construction, and so further hampers their ability to reach back across decades of regulatory inaction to allege violations of PSD permitting requirements in the growing majority of “one-time” courts.

## MetEd Decision

In December 2007, the state of New Jersey filed a Clean Air Act citizen suit in the U.S. District Court for the Eastern District of Pennsylvania against the current and former owners and operators of a coal-fired power plant situated along the Delaware River in eastern Pennsylvania (*New Jersey v. RRI Mid-Atlantic Energy Holdings LLC*, No. 07-cv-05298 (E.D. Pa.)). Connecticut intervened in the litigation and the two states alleged that projects from 1982 through 2005, spanning several different owners and operators of the plant, violated PSD. The original plant owner, Metropolitan Edison Co. (MetEd), had sold the plant in November 1999, more than five years before New Jersey commenced the litigation and moved to dismiss the claims on statute of limitations grounds. MetEd argued that the discovery rule did not apply in Clean Air Act enforcement cases and that the plaintiffs’ complaints failed to allege facts showing that either the discovery rule or the equitable tolling doctrine applied.

On Sept. 30, 2009, the court partially granted MetEd’s motion to dismiss, ruling that 28 U.S.C. § 2462 barred the states’ claims unless they could show either that the discovery rule or the doctrine of equitable tolling applied.<sup>17</sup> After nearly three years of discovery, in June 2012, MetEd filed for summary judgment that neither exception applied and arguing that judgment for MetEd should be entered on all of the states’ claims against it. MetEd presented evidence that information available to the public was sufficient to have put the states on inquiry notice that possible PSD violations had occurred and that the states failed to adduce any factual support for an equitable tolling claim.

On March 28, 2013, the court entered summary judgment for MetEd.<sup>18</sup> The *RRI Mid-Atlantic* court applied the recent Supreme Court of the United States decision in *Gabelli v. SEC*, 568 U.S. 133 (2013), to bar citizen suits under the Clean Air Act for claims arising out of power plant construction projects that occurred more than five years before the complaint was filed. In *Ga-*

*F. Supp. 2d at 661, 56 ERC 1992 (2003); accord Illinois Power Co.*, 245 F. Supp. 2d at 951, 56 ERC 1788 (2003).

<sup>17</sup> *New Jersey v. RRI Mid-Atlantic Energy Holdings LLC*, No. 07-cv-05298, (E.D. Pa. Sept. 30, 2009) (*RRI Mid-Atlantic*).

<sup>18</sup> *New Jersey v. RRI Mid-Atlantic Energy Holdings LLC*, No. 07-cv-05298, 2013 BL 86719 (E.D. Pa., March 28, 2013). See 62 DEN A-12, 4/1/13.

*belli*, the Supreme Court held that the “discovery rule” does not apply to the general five-year federal statute of limitations, 24 U.S.C. § 2462. This is significant for Clean Air Act cases because, as described above, the act has no statute of limitations, thus the general statute of limitations applies.

The *RRI Mid-Atlantic* court ruled that Gabelli bars not only enforcement actions commenced by federal agencies, but also Clean Air Act citizen suits for alleged violations of the PSD permitting program. The court reasoned that to hold otherwise “would make little sense,” both because it “would create an untenable scenario in which the statute of limitations would bar the government’s claim under the Clean Air Act, but the government could intervene in a citizen suit deemed timely based on the discovery rule” and because citizens “stand in the shoes” of the federal government.<sup>19</sup>

### Why the MetEd Decision Is Important

*RRI Mid-Atlantic* demonstrates the broad ramifications that *Gabelli* may have on all actions to which the general federal statute of limitations period applies, particularly in the context of citizen suit environmental enforcement actions. Moreover, *RRI Mid-Atlantic* went beyond *Gabelli*, holding that the doctrine of equitable tolling did not apply to salvage the claims by New Jersey and Connecticut. In rejecting the states’ arguments, the court ruled that they had presented no facts that MetEd had actively misled them and that, to support equitable tolling, they needed to show that MetEd “took steps beyond the challenged conduct itself to conceal that conduct.” The states failed to make that showing and the court entered judgment for MetEd on all claims.

The decision magnifies the uncertainty with respect to the benefits of EPA and citizen suit plaintiffs piling on historical modifications in an effort to strengthen their case. As described above, the benefits of citing historical examples are small. Prevailing on an older project does not allow the plaintiffs to seek any more copious or stringent pollution controls (in fact, they would only add the less stringent controls available at the time of the earlier project). Moreover, to the extent the plaintiffs reach back beyond five years to build their case, they now risk defeat, and perhaps prejudice to their arguments surrounding more recent modifications. In the MetEd case, for example, within weeks after this decision, New Jersey and Connecticut settled all remaining claims against the other defendants.

The effect of the decision on how defendants approach these cases is more nuanced. While the hard-and-fast look-back period of five years seemingly obviates the need to revisit older projects and maintain defenses thereto, to assert the *RRI Mid-Atlantic* defense does require sufficient documentation to confirm that a defendant did not actively mislead or otherwise conceal its conduct.

<sup>19</sup> Slip op. at 30-31.

In *RRI Mid-Atlantic*, the plaintiffs failed to make any claim or showing of active misleading, choosing to rely upon assertions related to the simple failure to obtain a permit. In a post-*RRI Mid-Atlantic* world, expect plaintiffs to more diligently pursue concealment akin to a fraud argument. Since *Gabelli* involved fraud allegations, it remains to be seen how successful such an approach can be. Nevertheless, defendants would be wise to establish and maintain the documentation that plaintiffs knew, or could have known with reasonable diligence, about the facts giving rise to their claims five or more years before filing their complaints.<sup>20</sup> This can include pointing to state-required public utility commission filings, annual reports, capital investment plans, and rate case testimony.

Where defendants no longer have such information, and where it is no longer publicly available, expert testimony may be used to establish that it would have been so at the time of the projects. Such testimony likely is admissible to “assist the trier of fact” in “understand[ing] the evidence” and “determin[ing] a fact in issue,” namely, the extent to which the documents were publicly available.<sup>21</sup> By keeping such documentation in its files, or by reproducing through testimony the fact of the documentation’s existence, defendants will be poised to take advantage of *RRI Mid-Atlantic* if and when the plaintiffs adapt to its findings.

### Conclusion

The road back-in-time has become more difficult for plaintiffs. Plaintiffs can no longer rely on the discovery rule to ignore courts that hold PSD allegations accrue one time, that time being the commencement of construction. Still, history teaches that these plaintiffs will continue to drive backwards, undeterred. Defendants will need, in the least, to confirm they did not mislead regulators or actively conceal their conduct.

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The opinions in this article do not represent the views of *Bloomberg BNA*, which welcomes other points of view.

<sup>20</sup> *c.f. Romero v. Allstate Corp.*, 404 F.3d 212, 222 (3d Cir. 2005).

<sup>21</sup> See *United States v. Morman*, 413 F.3d 372, 380 (3d Cir. 2005).