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EPA Takes Final Action on Reconsideration of the "Regulated Air Pollutant" Interpretation

On April 2, EPA published its reconsideration of the December 2008 memorandum entitled "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (the "Johnson Memorandum"). 75 Fed. Reg. 17,004 (April 2, 2010). EPA takes the following actions:

- EPA affirms its position reflected in the Johnson Memorandum that PSD permitting is not triggered for a pollutant such as greenhouse gases ("GHGs") until a nationwide rule requires actual control of emissions of the pollutant. EPA rejects the four alternative possible interpretations it considered for when a pollutant becomes "subject to regulation"; namely, when monitoring and reporting are required for a pollutant; when state regulatory requirements for a pollutant are included in a SIP; when an EPA finding of endangerment is made; and when EPA grants a section 209 vehicle waiver.

- EPA interprets the time that actual control of emissions will occur as the time that a control requirement "takes effect," rather than at the time of signature, Federal Register publication, or the effective date after publication in the Federal Register.

- EPA states that, for GHGs, "takes effect" will mean January 2, 2011, assuming it finalizes its vehicle standard rule as intended. That date is the earliest that 2012 vehicles could be sold in the United States. While not relevant to GHGs, EPA also states that the interpretation that actual control occurs when a requirement "takes effect" is applicable to other prongs of the "regulated NSR pollutant" definition. It specifically elaborates on timing with regard to NSPSs and NAAQSs.

- EPA states that its interpretation of "subject to regulation" applies for Title V permitting as well as for PSD.

- EPA rejects industry requests that there be "grandfathering" of pending permit applications. EPA states that, if a permit is issued after January 2, 2011, it will have to address GHG emissions, even if applications were filed (and determined complete) prior to that date.

- EPA indicates that state and local permitting authorities are free to consider GHG emissions prior to 2011 (if their programs allow this), and asserts that new and modified large stationary sources must already consider energy efficiency when selecting BACT for non-GHG pollutants.

- EPA takes the position that, because its interpretation of "subject to regulation" is an interpretation of existing statutory and regulatory language, states are not required to revise their own regulations to implement EPA's interpretation and must act in a manner at least as stringent as called for under EPA's interpretation.

EPA does not take final action with regard to its phase-in of permitting of sources of GHG emissions. These decisions will be taken in the PSD and Title V GHG Tailoring Rule, which

EPA indicates will be issued in the near future. However, it seems that EPA plans to take the position that GHGs will potentially be subject to PSD permitting, whether or not PSD permitting is triggered for a criteria pollutant. In other words, EPA apparently intends to reject the argument uniformly made by industry that PSD permitting is not properly triggered for GHGs, unless there is a major modification involving a pollutant regulated under a National Ambient Air Quality Standard (the "NAAQS prerequisite" interpretation). Thus, a physical or operational change resulting in a GHG emissions increase that exceeds the major modification threshold that EPA establishes for GHGs in the Tailoring Rule will trigger PSD permitting.

EPA Proposes Revocation of NSR Aggregation Rule

On March 29, EPA issued its proposed reconsideration of the January 2009 final Aggregation Rule (also referred to as "NSR Aggregation Amendments"). EPA proposes to revoke the rule and requests comment on that proposed action. The Aggregation Rule provided that nominally-separate projects would be aggregated only when the activities are "substantially related." Also, the rule provided that plant changes that are separated by three or more years would be presumed not to be substantially related.

EPA's reconsideration proposal contains a number of statements that are troublesome from the standpoint of their policy implications, and provides little guidance on when nominally-separate projects should be aggregated. In most instances, EPA simply indicates that "related" projects should be aggregated and that prior interpretations, particularly the 3-M Maplewood letter, would be controlling. It does appropriately indicate that historically the focus was on when projects are "split" or when action is taken to "circumvent" NSR applicability. EPA raises a host of questions on which to comment, which generally arise from NRDC's reconsideration petition.

The reconsideration notice is quite difficult to summarize because EPA's manner of presentation appears to give credence to NRDC's positions in its reconsideration petition. To give some flavor of this, this article will summarize the notice in a relatively high degree of detail and follow the organization in it.

Overview

At the outset, EPA states that aggregation "describes the process of grouping together multiple, nominally-separate but related physical changes or changes in the method of operation ('nominally-separate changes') into one physical or operational change, or 'project.'" EPA states that "emission increases of the nominally-separate but related changes must be combined" in determining whether a significant emissions increase has occurred from the "project." EPA states that when "undertaking multiple nominally-separate changes, the source must consider whether NSR applicability should be determined collectively (*i.e.*, 'aggregated')" or whether the emissions from each of these changes should be considered separately. This description of "aggregation" reflects a review process that has never been authorized or required under NSR and, thus, at a minimum, has the potential to significantly complicate permitting of projects. By not indicating how "related" the separate projects must be to be aggregated, it has the potential to result in permitting authorities and environmental groups asserting that separate projects that are appropriately permitted on their individual merits should be aggregated.

EPA explains that the aggregation policy has been developed in individual interpretations over time "in response to a need to deter sources from attempting to expedite construction by permitting several changes separately as minor modifications." It further states that, when "related changes are evaluated separately," the source may "circumvent the purpose of the NSR program by showing a less than significant

emission increase" and thereby avoid major NSR permitting.

EPA states that, under its "longstanding aggregation policy" the Agency evaluates "all relevant and objective criteria specific to a case in determining if multiple changes at a source should be aggregated as a single project for NSR purposes." It states that its policy "aims to ensure the proper permitting of modifications that involve multiple physical and/or operational changes." Although the Agency later recognizes that the relevant statutory and regulatory language in the definition of "modification" is "any physical change or change in the method of operation," its overview of its "longstanding aggregation policy" ignores the legal constraint that "any physical change" is to be evaluated separately and, thus, "multiple changes" could properly be reviewed together only if, in fact, they represent a single change that has been split into one or more changes to avoid NSR applicability.

EPA points out that the Aggregation Rule did not revise the NSR rule text, but simply is an interpretation of its regulations. The reconsideration proposal includes a convoluted discussion of why the establishment of the "substantially related" criterion in the final rule for determining when nominally-separate changes should be aggregated represented a change from its aggregation proposal that justifies EPA's granting NRDC's reconsideration petition. Included in this discussion is an argument that the final Aggregation Rule interpretation is not a logical outgrowth of the proposal, which contained an aggregation test based upon whether changes are technically or economically interdependent. It states that the final rule did not satisfy section 307(d)(3)(C) because "portions of the legal basis for the NSR Aggregation Amendments did not undergo comment solicitation, and it is necessary to allow the public an opportunity to comment fully on the basic authority for the rule." It then confusingly states that, "as is the case with many rules, the statutory basis of this rule provides the underpinning for almost every aspect of the rule, and could call into question the legitimacy of other aspects of the rule." It goes on to state: "Therefore, in addition to granting consideration on the legal basis for the rule, we are also taking comment on other aspects of the final rule that are dependent upon a sound legal basis." Thus, EPA states that it seeks "comment on all issues raised by the petitioner."

Key Issues Under Reconsideration

EPA Views on Lack of Adequate Opportunity for Notice and Comment on the Adopted Rule

EPA states that a commenter would not have been on notice of the possibility that the Agency would adopt the "substantially related" test without also amending the rule text, nor would a commenter have been on notice of the need to comment on whether the existing text was susceptible to this interpretation. In addition, EPA notes that it did not raise the issue of whether the existing rule text could support a time-based presumption. EPA seeks comment on virtually every aspect of its establishment of a "substantially related" test; namely, whether the "substantially related" test is the appropriate test to apply when determining whether to aggregate projects; whether, if so, the regulatory text for the definition of "project" should be amended to say that "nominally-separate changes" must be aggregated into a project if they are substantially related; whether a time-based presumption for or against aggregation should be established and, if so, whether new or revised rule language should be included to establish such a presumption. EPA also seeks comment on whether the "substantially related" test adds confusion for sources and permitting authorities, and whether another benchmark would be "more sensible" to be used to determine whether "nominally-separate" changes should be aggregated for evaluating NSR applicability.

Whether Interpretation May Be Inconsistent with Prior D.C. Circuit Decision

EPA states that its aggregation rulemaking process inverted the process required by section 307(b); namely, rather than providing the required statement of basis summarizing major legal interpretations underlying the proposed rule, commenters provided their views of the law and EPA then provided a legal basis in the final rule and in the response-to-comment document. EPA states that the rulemaking did not simply adopt a theory that was a logical outgrowth of the theory suggested in the proposal; rather, EPA points out that the portion of the proposal discussing aggregation was completely silent on how the Agency interpreted section 111(a)(4) (the modification definition) to "authorize aggregation and provided no analysis of the relevant case law." EPA seeks comment on its understanding of the relevant statutory and case law, and what it believes would be the result from its understanding; "*i.e.*, the revocation of the NSR Aggregation Amendments and the reversion to our pre-existing policy on project aggregation."

- **Background for Historic Approach**

EPA states that it has long "recognized that a party seeking to avoid major NSR might attempt to break up a single physical or operational change into nominally-separate changes in order to make the emission increase associated with each change appear to be less than significant." In contrast to many statements and inferences in the reconsideration notice, this statement accurately reflects EPA historic policy and appropriately represents that "breaking up" a single change into nominally-separate changes is a proper basis for aggregation. Unfortunately, this is not the focus of much of the discussion in the proposal and in the 3M-Maplewood interpretation, which EPA later indicates approvingly "remains EPA's most complete statement of the principles regarding grouping nominally-separate changes."

EPA points out that, since the early 1980s, it has issued letters indicating that it may enforce the major source permitting requirements "when a source 'circumvents' major source NSR by dividing one change and its emission increase into nominally-separate physical or operational changes." It states that some of these letters "discussed intent to evade NSR," but focused "more on objective factors such as the closeness in the timing of nominally-separate changes and the integrated planning of these changes." Then, in contrast to its final rule aggregation notice, it seems to implicitly endorse the 3M-Maplewood approach to reviewing nominally-separate changes, specifically referencing certain of the factors there mentioned: "the filing of multiple minor source or minor modification permits for a single source within a short period of time, funding information indicating one project, other reporting on consumer demand and project levels, other statements from the business indicating one project, EPA's assessment of the economic realities of the project, as well as the relationship of the changes to the overall basic purpose of the plant." It then generally references additional letters, without any discussion of their contents, and states that "[c]ollectively, these letters outline an approach where we would look at case-specific facts and the relationship between nominally-separate changes to determine whether they were a single project to be assessed for an emission increase" in determining NSR applicability.

- **EPA's Explanation of Its Authority in the NSR Aggregation Amendments**

EPA points out that the statutory and regulatory definition of modification is premised upon whether "any physical change or change in the method of operation" increases emissions. It notes that some have argued that EPA cannot aggregate "nominally-separate changes" to determine NSR applicability because they can be viewed as multiple changes. EPA states that, in response to this argument, it cited the D.C. Circuit decision on the Equipment Replacement Provision ("ERP") rule. That decision indicates that EPA is to apply NSR whenever a source conducts an emission-increasing activity that "fits within one of the ordinary meanings of 'physical change,'" and EPA states the court's reasoning justifies treatment of substantially related nominally-separate changes as one change. EPA points out that NRDC asserts that, "'aggregation of nominally-separate changes that

are *not* substantially related' also may be within an ordinary meaning of physical change, especially when substantially related is defined in terms of technical or economic interrelationship and dependence." EPA states that it is NRDC's view that the "substantially related test" would omit some of these physical changes from NSR permitting by not aggregating them and thus the NSR Aggregation Amendments impermissibly narrowed the expansive reading of "any physical change" in the D.C. Circuit decision. However, neither NRDC nor EPA in its reconsideration notice describe any changes that are "*not*" substantially related that could properly be aggregated as a single physical change under the statutory and regulatory prerequisite that "any physical change" is to be evaluated for NSR applicability.

- **The Act Requires Aggregation of Nominally-Separate Changes When They Collectively Can Be Seen As One Change**

EPA's discussion of when nominally-separate changes should be aggregated begins with a discussion that seems reasonable, but diverges into a troublesome analysis when it starts to talk about specific factors to be considered in determining whether such changes should be aggregated. EPA states that the term "any physical change" should "encompass any change that reasonably can be considered an ordinary meaning of the phrase." It notes that much of the emphasis in the D.C. Circuit decision in the ERP case was on whether EPA can exclude small changes from being considered potential modifications. EPA then states that the court's reasoning "also applies to a rule that would split apart one change into separate changes in order to limit the applicability of NSR." EPA states that it cannot pick and choose among meanings of the phrase "any physical change" if "it would result in omitting a common meaning that would subject an emission increase to review."

EPA states that it has historically analyzed the question of whether "nominally-separate changes are one change by using a case-by-case review of all relevant and objective factors that looks for 'indicia' or indicators of these changes being one common aggregate change." As an example it specifically references the 3M-Maplewood memorandum, but points out that one concern about that memo has been that "one portion of the analysis suggests that any set of nominally-separate changes that are consistent with 'the plant's overall basic purpose' can be aggregated." In a footnote then EPA states that it does not believe the 3M letter "relies solely on this portion of its analysis." As noted above, notwithstanding EPA's acknowledgement of the concern with the 3M-Maplewood memo's focus on the plant's overall basic purpose, it then proceeds to indicate that that analysis "remains EPA's most complete statement of the principles regarding grouping nominally-separate changes."

Next, EPA's notice contains a paragraph with analysis that uses an assumption to prove a conclusion. EPA first begins by pointing out that "if" the term "substantially related" would "omit an ordinary common meaning of physical change that would bring an emission-increasing project under review, then the definition would eliminate a type of physical change that Congress intended to cover (*i.e.*, the change that consists of the group of nominally-separate changes that comprises a project but do not qualify as 'substantially related')." EPA, however, neither here nor anywhere else in the notice sets forth or references an NRDC statement setting forth types of changes that do not qualify as substantially related" that should be aggregated. Nonetheless, EPA then states that "[i]n effect, the interpretation in the NSR Aggregation Amendments is unreasonable because it would create a carve-out from the scope of the statutory definition of modification." In other words, because of the assumed, but unsupported, exclusion of changes that are "*not* substantially related" that could conceivably be considered to be a part of the same physical change, EPA states that the interpretation in the Aggregation Rule is unreasonable.

EPA seeks comment on a number of questions that build on this proposition. The most

fundamental among them is: "Are there 'ordinary meanings' of physical or operational change that do not fit within 'substantially related' as we describe it in the NSR Aggregation Amendments."

EPA follows this discussion with an acknowledgement that "a nominally-separate physical or operational change is a change by itself" and that the Aggregation Rule takes the position that any such change that is aggregated as a part of a larger change also "meets a common understanding of a single 'change.'" However, EPA states that it does "not consider the potential for a nominally-separate change to be either a change by itself or a change that is part of a larger change to be an ambiguity that would allow it to select the less inclusive meaning."

NRDC's Questioning the Need for a Policy Change

EPA points out that NRDC's petition states that EPA's 2006 aggregation proposal failed to identify any actual problems or inconsistencies "with longstanding aggregation policy as applied and explained in the 3M Maplewood letter." EPA then states that it did not request comment on the various factors it historically applied in determining project aggregation and "[g]iven that we now view the state of the record differently," it is requesting comment on the need for a change in policy. The effect of EPA's tying the 3M-Maplewood letter to its request for comment on its historical policy again gives the impression that the 3M-Maplewood letter is the best statement of EPA's aggregation policy.

EPA states that there is little factual support in the record for the NSR Aggregation Amendments for the contention that its historical approach has caused confusion and what there is is merely "anecdotal." EPA says that parties supporting a change in policy failed to provide it "with any characterization of the overall level of uncertainty or other problems resulting from the existing policy on aggregation." Indeed, EPA states that there was "countervailing testimony from permitting agencies and other stakeholders that contended that there was little confusion" in the application of its policy.

EPA then requests comment on whether there is a "bona fide" need for added clarity over and above what the prior aggregation policy provided. It also asks that, if clarity is believed to have been lacking, comment be provided on whether the NSR Aggregation Amendments achieved added clarity. EPA states that it has been its experience that the "few applicability determinations" where aggregation was a central issue have not been contested on appeal and that, in its view, this supports a belief that there was not significant confusion or controversy with its historic policy.

State Plan Adoption

EPA states that it agrees with NRDC's assertion that the state and local implementation requirements of the NSR Aggregation Amendments are unclear. It states that the question of whether a SIP amendment is required when the CFR is unchanged is likely to cause confusion for reviewing authorities and other stakeholders. It then states that it views the "difficulties as clear support for the need to have the [aggregation] rule not be effective until the completion" of its reconsideration proceeding. EPA asks for comment on when and how reviewing authorities with EPA-approved plans can implement the new policy interpretation given that there are no CFR changes to use as a basis for drafting amendments to their plans. EPA also asks for comment on whether reviewing authorities have adopted new interpretations in their implementation plans when EPA issues interpretive rules and, at any rate, what the proper mechanism is for state adoption of an interpretive rule when there is no change to the CFR.

Proposal to Revoke Rule

NRDC's petition requested that EPA "withdraw and abandon the final rule." EPA states that "[w]hile rare, the Administrator has in the past withdrawn or revoked, a promulgated rule prior to its effective date." It states that an "overarching

concern" of EPA is that its original policy goal for developing the NSR Aggregation Amendments was to "provide improved clarity in making aggregation determinations" and that this "does not appear to have been achieved." EPA states that this "concern is reflected in the petition for reconsideration," and the Agency "believes [the petition] has sufficient merit that we must consider whether retaining the NSR Aggregation Amendments is justified." EPA states that "on balance," it believes that the prior Agency policy "may" provide "a more reasonable interpretation than the policy interpretation contained in the final rule" and therefore the Agency is "proposing as our preferred option to revoke the final rule." EPA states that, if it ultimately decides to revoke the NSR Aggregation Amendments, it believes it should restore the past policy for making case-by-case aggregation determinations. It also asks for comment on whether the old policy framework for aggregation is adequate and then asks whether the D.C. Circuit ERP decision "helped to improve the understanding of the past policy direction in 3M-Maplewood and other relevant memoranda."

Proposal to Extend Effective Date

Finally, EPA indicates that it proposes to further extend its previous extension of the effective date of the NSR Aggregation Amendments. The current extension ends on May 18, 2010. EPA proposes to extend this by an additional six months, until November 18, 2010. EPA also asks for comment on a longer delay of 9 to 12 months.

Comment Due Date

Comments will be due on the aggregation reconsideration notice 30 days after the notice is published in the Federal Register.

District Court Upholds Application of RMRR

On March 31, in *National Parks Conservation Ass'n, et al. v. TVA*, No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. March 31, 2010), the court ruled that major replacement projects carried out by TVA at its Bull Run plant came within the routine maintenance, repair, and replacement ("RMRR") exclusion and, accordingly, dismissed plaintiffs' claims that the projects violated the New Source Review ("NSR") requirements in the Tennessee SIP. In a prior ruling, the court had dismissed the NSR claims on grounds that they were barred by the statute of limitations, but that decision was overturned by the Sixth Circuit. The decision is notable because of the extent of the work found to constitute RMRR.

The projects under consideration involve the replacement of an economizer and replacement of significant portions of the secondary superheater. The court applied the four-factor RMRR test to reach its decision that the projects constitute RMRR. The four factors reviewed were: the nature and extent of the project; the purpose of the project; the frequency with which a project of the sort presented is conducted, both at the unit and in the industry as a whole; and the cost of the project.

Application of the Four-Factor RMRR Test

Economizer Project

Key facts reviewed in connection with replacement of the economizer were the following:

- The economizer had not previously been replaced in the 21 years since the Bull Run plant was built in 1967.
- The project work involved replacement of over 67 miles of two-inch diameter tubing, weighing approximately 887 tons.
- TVA had to hire a large number of outside craftsmen and laborers to complete the economizer project.

- The economizer project was predictive in nature, *i.e.*, it was undertaken to avoid failure of the economizer after TVA discovered conditions that it believed would threaten continued operation of the plant.

- The cost of the project was $6,456,599.

- The project required the approval of TVA's Board of Directors.

Superheater Project

Key considerations reviewed in connection with the superheater project are as follows:

- Three quarters of the tubing in the finishing superheater at Bull Run was replaced. Combined with the economizer project, this work represented the removal and replacement of more than a quarter of all the tubing in the boiler at Bull Run.

- The purpose was to reduce the number of forced outages and increase the availability and reliability of the unit. It also would extend the life of this section of the boiler by approximately 20 years. Significant secondary superheater projects had been undertaken at the plant, but it was unclear whether others were comparable to this project. The cost of the superheater project was $1,846,680.

Conclusions of Law

Economizer Replacement

The following are legal findings made with regard to the economizer replacement:

- The court found the nature and extent of the economizer replacement to be "somewhat significant," pointing out the extensive work that was required to carry out this project. While the court noted that the project was capitalized, it pointed out that TVA performed more than 2,000 projects at its 11 coal-fired power plants between 1969 and 1988 with costs exceeding $100,000, and many of these were capitalized. The court concluded that replacing an economizer "is not a small task, but is also not an extraordinary task." As a result, the court found that the nature and extent factor "favors TVA."

- The court found that the purpose of the project to reduce the number of forced outages and to extend the life of the economizer by approximately 20 years did not lead it to "consider this finding to weigh against TVA." It further found that any "'life extension' effected as a result of the economizer replacement was thus a byproduct of, rather than the primary purpose of, that replacement."

- In considering the frequency factor, the court pointed out that testimony had been presented indicating that, in a survey of 219 units, 202 of which were equipped with economizers, 98 had undergone some economizer replacement activity as of the year 2000. Also, quite a few of the coal-fired power plants like Bull Run that were built in the 1960s and 1970s had replaced their economizers by the 1980s. The court indicated that an event occurring once every 20 years would not by itself mean that the project could not be considered "frequent." The court indicated that the testimony of the plaintiffs "over-emphasize[d] the significance of the number of times a particular type of element is replaced at a single plant, as opposed to the frequency with which such an element is replaced at units across the industry." The court noted that the frequency survey relied upon by TVA had been included in a report in a formal briefing to the President. The court found that the frequency factor also favored TVA.

- The court reasoned that the cost for the economizer replacement "was not uncommonly high." It pointed out that in the period from 1969 to 1998, TVA performed 120 capital projects at its coal-fired plants that were more expensive than the economizer replacement. Several of those projects had

been at the Bull Run plant. The court concluded that the cost factor also favored TVA.

Superheater Replacement

The court made the following legal findings with regard to the superheater replacement:

- As with the economizer project, the court found that the superheater replacement "was somewhat significant." It pointed to the significance of the work that was required. It also noted that the project involved replacing the existing tube material with a different type of tube material. It is unclear whether Board approval was required, but the court stated that "the fact that Board approval would be required for a project does not automatically disqualify the project from being RMRR." It noted that the project was capitalized. On balance, the court found that the nature and extent factor favored TVA.

- While the purpose of the superheater replacement was to reduce the number of forced outages and extend the life of the boiler by approximately 20 years, the court pointed out that the replacement was "not to alter fundamentally this piece of equipment at the Bull Run plant," even though the material did differ from the original tubing. It did not increase the generating capacity on either a continuous basis or a peaking basis. And, it did not increase the maximum hourly emissions capability of the unit. The court then found that the purpose factor favored TVA.

- The court found that superheater replacements are "common in the industry." It again pointed out fact that plaintiffs' testimony focused on frequency of replacement at the unit as opposed to replacement within the industry. The court then found that the frequency factor favored TVA.

- The court stated that the cost for the superheater replacement was "not uncommonly high." It noted the large number of similar capital projects in the industry and, while the project was capitalized, it indicated that the relevant consideration is the size of the cost as compared "to other capital projects." Based upon similar projects being conducted in the industry, the court found that the cost factor favored TVA.

Holding of the Court

Based upon its review of the facts and its conclusions of law, the court ruled that the economizer replacement and superheater project constituted RMRR. The court reviewed other cases where other similar projects had been found to constitute RMRR and found grounds for distinguishing those decisions. In particular, the court reviewed the *WEPCO* and *Ohio Edison* cases.

District Court Rules on PSD Statute of Limitations

In granting a motion to dismiss, an Illinois district court in *U.S. and State of Illinois v. Midwest Generation, LLC*, Case No. 09-cv 5277 (N. Ill., Mar. 9, 2010), held that the failure to obtain a PSD permit prior to carrying out major replacement projects at six coal-fired power plants is a discrete, not a continuing, violation under the Clean Air Act, which occurs at the time construction begins. Applying this interpretation, the district court rejected federal and state PSD permitting claims brought outside the five-year federal statute of limitations.

Construction on five of the plants at issue in *Midwest Generation* occurred prior to the company's acquisition of the plants in 1999. The court ruled that, as a result, EPA could not bring an enforcement action against Midwest Generation as the current owner for operating the plants without having obtained PSD permits. In addition, the court held that the five-year statute of limitations barred claims for civil penalties as a result of Midwest Generation's having commenced construction of modifications on a sixth plant without having sought a PSD permit.

Although the court ruled that the statute of limitations does not apply to injunctive relief, it held that no injunctive relief could be sought against Midwest Generation based on projects against Midwest Generation for having modified one plant without a PSD permit.

The *Midwest Generation* decision mirrors the interpretation of the statute of limitations in the Eleventh Circuit's 2007 decision, *Nat'l Parks & Conservation Ass'n v. TVA*, 502 F.3d, 1316, 1322 (11th Cir. 2007), in which the court concluded "violations of the preconstruction permitting requirements occur at the time of construction" (quoting *New York v. Niagara Mohawk Power Corp.*, F. Supp.2d 650, 661 (W.D.N.Y. 2003)).

The Sixth Circuit, in *Nat'l Parks Conservation Assoc., Inc. v. TVA*, 480 F.3d 410, 418-419 (6th Cir. 2007), held that civil penalties could be sought for failure to obtain a PSD permit, even though construction was undertaken more than five years prior to the citizen suit. The court ruled that Tennessee's SIP imposes an ongoing obligation on major emitters to apply BACT and obtain a PSD permit throughout operations, even after construction is complete. *Id.* The Illinois district court distinguished the Sixth Circuit's ruling because of the different permitting requirements in the Tennessee SIP.

undertaken at five plants by the previous owner. As a result of the court's rulings, plaintiffs are limited to pursuing a claim for injunctive relief