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NSR Enforcement: D'oh

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David G. Mandelbaum

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COMMENTARY

On Oct. 12, Judge Terrence F. McVerry of the U.S. District Court for the Western District of Pennsylvania granted motions by the defendants in *United States v. EME Homer City Generation* to dismiss federal Clean Air Act and Pennsylvania Air Pollution Control Act enforcement actions brought by the U.S., the Commonwealth and the downwind states of New Jersey and New York concerning the Homer City power plant.

The following day, he granted a motion to dismiss a parallel private action, *Jackson v. EME Homer City Generation* . These cases highlight some recurrent problematic themes in enforcement of the nonattainment new source review and prevention of significant deterioration programs under the Clean Air Act specifically, and more generally with enforcement under environmental permitting programs.

Homer City is a coal-fired electric power plant. It has operated since the 1960s, before the current air pollution regulatory programs were in place.

The Clean Air Act requires large air pollution sources like power plants to control the air pollution they emit. New sources or sources that have undergone major modifications must achieve "new source performance standards ... More importantly, prior to construction of a modification that will cause an increase in emission of a pollutant beyond certain thresholds, the owner or operator of the emitting facility must obtain a permit to construct. In Pennsylvania, new air pollution sources, or new air pollution control equipment, requires a permit known as a "plan approval," and the federal requirements for major modifications will be swept into

consideration of that plan approval.

The Clean Air Act also requires the Environmental Protection Agency to establish national ambient air quality standards for certain pollutants. A NAAQS sets the maximum concentration of that pollutant permitted in the ambient air. At any given time, each location in the U.S. is either in "attainment" of the NAAQS for any given pollutant or in "nonattainment."

A plan approval for a modification of a source in an attainment area for a pollutant must comply with the requirements of the "prevention of significant deterioration" program. Among other things, the source must achieve pollution control consistent with installation of "best available control technology" for that pollutant. The source must also demonstrate through air pollution modeling or otherwise that it will not cause the concentration of the air pollutant to exceed a certain increment between the current conditions and the NAAQS. That is, the modified facility must emit pollution at a rate consistent with the best tier of controls currently operating, and it must not make air pollution anywhere more than an acceptable amount worse.

A plan approval for a modification to a facility in a nonattainment area must similarly undergo new source review, or NSR. That review must result in imposition of the "lowest achievable emission rate" and a requirement that emissions be offset by an amount somewhat more than the projected emissions from the modified facility.

This PSD/NSR review is triggered whenever a modification would cause emission of more than a threshold — typically 250 tons per year — amount of any pollutant subject to regulation under the Clean Air Act. Thus, any emissions increase of any regulated pollutant can trigger NSR for the whole facility and imposition of BACT or LAER.

The idea here was that owners of major emitting facilities would install state of the art, or at least very good, pollution control at every facility, but only at the time that the facility was otherwise being modified. Construction projects would then be aligned, and capital would be spent efficiently.

For a variety of reasons, it has not always worked out that way. Some "grandfathered" facilities have never undergone thorough new source review, and are perceived by some as being allowed to over-pollute. Homer City falls into that category.

Homer City had not, however, sought to evade regulation. It had air pollution permits for its emissions. Indeed, following the mandates of the Clean Air Act Amendments of 1990, it had obtained from the Pennsylvania Department of Environmental Protection an operating permit pursuant to Title V of the Clean Air Act. A Title V permit collects all the requirements applicable to a facility and places them in one document.

The litigation arose earlier this year when the governments sought to establish that prior owners of the Homer City plant had modified it impermissibly without undergoing new source review. It had continued to operate without installation of BACT or LAER, and had obtained a Title V permit on the premise that BACT/LAER was not required because the facility had not been modified. The modifications at issue had occurred more than a decade earlier.

The court held that the time at which the prior owners violated the Clean Air Act, if they did, was at the time that they modified the facility without a permit. That event occurred more than five years before commencement of the litigation, and therefore the limitations period had expired. Continued operation of the facility without installation of BACT or LAER was not a violation of the Clean Air Act, and therefore could not be enjoined.

As is true of many NSR cases, McVerry's opinions highlight how clumsy NSR has become as a tool to require all significant air pollution sources to achieve modern air pollution control standards. The Clean Air Act was amended to impose these requirements in 1977. It has been a while. The statute cannot be said at this point to be imposing BACT/LAER requirements abruptly on sources grandfathered since then. Some

trigger for bringing those sources to a higher level of pollution control and some schedule for doing so other than a modification might be appropriate now.

Notice that the one thing that the Homer City litigation did not address, at least not in McVerry's opinions, is the degree of control that might be appropriate for the Homer City plant. The primary legal issue in many NSR cases is whether NSR is triggered at all, not the more environmentally and economically productive question of how much control should be imposed and when given technology, cost and environmental consequences.

McVerry's opinion also joins a growing number of federal cases in which the court denies an injunction sought by the U.S.

Here, McVerry found the violations "wholly past," typically a defense to citizen suits, not governmental enforcement. Other grounds for denying injunctions include the national security concerns raised by the Supreme Court in *Weinberger v. Romero-Barcello* , an early Clean Water Act case, and more recently in *Winter v. Natural Resources Defense Council Inc.* , a preliminary injunction case under the National Environmental Policy Act.

However, this year a judge in the Eastern District of Wisconsin has twice denied a preliminary injunction to the U.S. to require compliance with a unilateral administrative order issued under the federal Superfund statute. In that case, two parties began to implement a multi-year remedy by funding a single purpose entity. When the U.S. could not establish a likelihood that one of those two parties was liable under the Comprehensive Environmental Response, Compensation and Liability Act and that party refused to authorize the single purpose entity to do further work, the court in *United States v. NCR Corp.* held last summer that it could not issue an injunction requiring the liable one of the two to direct the entity it did not control to complete the year's work.

Finally, notice that neither the parties nor the court in the Homer City case considered whether an enforcement action was an appropriate vehicle to challenge the facility's permit obligations. The Homer City plant held a Title V permit issued with administrative regularity by the Pennsylvania DEP. That permit became final. If an appeal to the Environmental Hearing Board was filed by the U.S., New Jersey or New York, McVerry does not mention it. The governments alleged that the Title V permit was not valid because the application failed to disclose the alleged prior modifications. But if the permit were revocable because of an omission on the application, or even fraud, the ordinary approach would be for the regulator, DEP, to revoke the permit. That would have left the owners to appeal the revocation to the EHB.

A federal trial court is a peculiar place for parties to litigate the validity of a state permit, particularly if that permit has become administratively final. Generally, failure to assert a ground for appeal after notice of the permit waives that ground for appeal. A permitting program cannot effectively operate if enforcing entities, both the regulator and others, can bypass the permit scheme and seek to treat a permit as if it were never issued.

The risk increases when citizen suit plaintiffs are permitted to do the same thing. To be sure, citizen suits are intended to allow private persons to enforce environmental requirements when the regulators do not enforce. But that does not mean that private persons ought to have citizen suit rights to seek by enforcement litigation to establish what permit conditions are or ought to be. Permits collect and record the obligations imposed on a regulated entity. If they are not right, there is a process for litigating them. In Pennsylvania, that process begins with an appeal to the EHB. A trip to federal court long after the permit has become final makes doing business quite difficult both for the regulated entity, the regulator and any other third person who wants to figure out what the requirements are that apply.

Whatever you believe about the amount that we as a society ought to devote to pollution control, you ought to agree that we should have a regular, predictable process for figuring out what each facility should do. The NSR program often does not really do that. •

David G. Mandelbaum *is national co-chair of the environmental practice group of* ***Greenberg Traurig*** *in*

Philadelphia. He teaches "Oil and Gas Law," "Environmental Litigation: Superfund" and "Global Climate Change" in rotation at Temple Law School and serves as vice chair of the Pennsylvania Statewide Water Resources Committee. He attended Harvard College and Harvard Law School.