

Case Highlight

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U.S. District Court Delivers Major New Source Review Victory for Electric Utility Industry in *U.S., et al. v. DTE Energy Company and Detroit Edison Company (E.D. Mich.)*

On August 23, 2011, in *U.S., et al. v. DTE Energy Company, et al.*, C.A. No. 10-13101, the U.S. District Court for the Eastern District of Michigan, in an opinion written by Judge Bernard A. Friedman, held that an electric utility did not violate the Clean Air Act (“CAA”) by undertaking maintenance projects at an electric utility steam-generating unit without first obtaining a New Source Review (“NSR”) permit. The U.S. Environmental Protection Agency (“EPA”) brought the suit in conjunction with its ongoing enforcement initiative against coal-fired power plants. EPA contended that a permit was required because the projects constituted “major modifications” of the unit. Defendants DTE Energy and Detroit Edison (“Detroit Edison”) contended that no such permit was required and that summary judgment should be granted because they met applicable statutory and regulatory obligations. In a case of first impression, the court applied the 2002 NSR rules, as adopted by EPA in 2002 and incorporated in Michigan’s State Implementation Plan.

The projects at issue post-dated implementation of the new NSR rules. Agreeing with Detroit Edison’s analysis, the court held the 2002 NSR rules provide source operators such as Detroit Edison with the option of either getting a permit before commencing their projects, or, where the operators have concluded before commencing the projects that they would not be major modifications, measuring their emissions afterward and running the risk of an enforcement action. Finding that Detroit Edison provided sufficient notice of the projects and submitted appropriate emissions projections to the regulating authority, the court granted defendants’ motion for summary judgment and dismissed the case.

For more than a decade, EPA has pursued an “enforcement initiative” against the electric utility industry under the NSR provisions of the CAA. After bringing some 30 or so cases and experiencing mixed results, including prolonged discovery and lengthy trial proceedings, EPA sought preliminary injunctive relief for the first time, alleging Detroit Edison violated the NSR rules by implementing “renovation” projects at the Monroe Power Plant without first obtaining an NSR permit. EPA, joined by intervenor environmental groups, alleged that the projects constituted “modifications” under applicable regulations (“physical or operational change” that “results in” a “significant emissions increase”). An NSR permit for a project that would constitute a “major modification” requires, among other things, that the modified unit meet a level of emissions reflecting “Best Available Control Technology,” or “BACT.” Permitting and installation of controls can cause long delays and cost hundreds of millions of dollars.

Detroit Edison’s Monroe Power Plant consists of four coal-fired electric generating units placed in service in the early 1970s. More recently, Detroit Edison embarked on a \$2 billion program to install advanced SO₂ and NO_x controls at Monroe. When the program is completed, Monroe will be one of the cleanest and most efficient coal-fired power plants in the country.

Like every other electric utility, Detroit Edison regularly performs maintenance activities to ensure efficient and safe operation of its units. Before commencing such work, Detroit Edison submits a planned outage notification to Michigan’s air permitting authority, explaining in detail the scope and purpose of the project, the length of the outage, whether any significant emissions increase will result and whether the project is

a “major modification” that could trigger NSR obligations. Detroit Edison concluded that the Monroe projects at Unit 2 commencing in March 2010 would not trigger NSR permitting requirements, and Michigan’s permitting authority did not question this determination. The projects were undertaken in a single outage during March–June 2010 and primarily involved replacements of tube component assemblies known as economizers, reheaters and waterwalls.

Citing a local newspaper article, EPA challenged the work in May 2010, calling it a “major modification.” Asserting that an NSR permit was required, EPA issued a Notice of Violation on June 4, 2010. On August 5, 2010, EPA filed its complaint, and a motion for preliminary injunction followed the next day. After extensive briefing and a hearing on January 19, 2011, the court denied EPA’s motion for preliminary injunction. The case was placed on a fast track for discovery and trial.

Prior to the close of discovery, Detroit Edison moved for summary judgment. Under the new 2002 NSR rules, Detroit Edison pointed out, an NSR permit was not required because Detroit Edison met applicable statutory and regulatory obligations. The court noted that NSR requires an owner or operator of a source to obtain a construction permit and install appropriate pollution controls prior to commencing construction of a “major modification to a power source.” The court reviewed the case under the 2002 NSR rules as adopted in Michigan, which provide that a project “is not a major modification if it does not cause a significant emissions increase.” As a result of the 2002 NSR rules changes, the court held, “if a source determines that its project does not constitute a major modification, it may commence its project without an NSR permit subject to certain post-project emissions monitoring requirements.” The court held that once a source submits post-project emissions projections and determines the project will not constitute a “modification,” “it need not obtain an NSR permit before beginning construction.” After the project, “the operator must monitor emissions that could increase as a result of the project,” and records of annual emissions must be kept for a period of five years. A “modification” results if the project causes a significant emissions increase, “and the regulating authorities may pursue a post-project enforcement action ... at that time.”

Finding that Detroit Edison’s pre-project notification letter met the requirements of the new 2002 NSR rules and that following conclusion of the projects on June 20, 2010, Detroit Edison began ongoing post-construction emissions reporting, the court held that whether an NSR violation occurred cannot be determined “until the completion of the first year for which such measurements are required.” Accordingly, the court found that EPA’s action was “premature” and granted summary judgment to Detroit Edison on August 23, 2011. EPA filed a notice of appeal to the Sixth Circuit on October 20, 2011.

The district court’s opinion represents a significant victory for the electric utility industry. The court’s construction of the 2002 NSR rules provides much-needed certainty to source operators who must continue to undertake maintenance projects necessary for safe, reliable and efficient operations, by confirming that companies following the 2002 NSR rules’ pre-project evaluation, recordkeeping and notification (where necessary) requirements, as well as the rules’ post-project monitoring requirements, can proceed with these projects without fear of EPA second-guessing.

Read a copy of [the court’s decision in *U.S., et al. v. DTE Energy Corp., et al.*](#)

Bill Brownell, Makram Jaber and Pete Johnson are members of Hunton & Williams’ environmental team and Mark Bierbower, Brent Rosser and Trey Sibley are members of its litigation team. Since November 1999, they have actively defended numerous electric utilities sued by EPA and various intervenors as part of the EPA’s NSR utility enforcement initiative and have, collectively, more than 50 years of experience in NSR enforcement litigation. Read the [environmental compliance litigation practice description](#).

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