

Appellate Court Rules for EPA in Groundbreaking New Source Review Case

APRIL 1, 2013

Last week the Sixth Circuit introduced even more uncertainty to the electric utility industry in its long-standing battle with EPA's new source review enforcement initiative. The decision places great uncertainty on industry's ability to rely on preconstruction emissions analyses. In *United States v. DTE Energy*, No. 11-2328 (6th Cir. 2013), EPA challenged a district court's grant of summary judgment in favor of DTE, holding that EPA could not bring an enforcement action until post-project emissions data showed that DTE's emissions analysis was incorrect. DTE's analysis projected an emissions increase, but DTE determined the increase was due to electricity demand growth, and therefore excluded them in accordance with the regulations.

The Sixth Circuit reversed, holding that although the Clean Air Act does not require Agency approval of a post-project emissions projection prior to construction, EPA could bring an enforcement action for failing to follow the regulatory requirements for making a projection of post-project emissions. As pointed out by Chief Judge Batchelder's dissent, the court's decision will introduce significant uncertainty over the validity of emissions projections by allowing the government to challenge these projections. Notably, post-project actual emissions data revealed that emissions had actually *decreased*. Judge Batchelder argued that these results rendered the case moot, since the preconstruction permitting obligation only applies if the modification causes an emissions increase.

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