

Client Alert

February 2014

Industry Wins Another CAA Enforcement Case

The United States District Court for the Western District of Pennsylvania has brought an end to a long-running Clean Air Act (“CAA”) enforcement action against Allegheny Energy, Inc. (“Allegheny”), concerning three of its coal-fired power plants. *Commonwealth of Pennsylvania Department of Environmental Protection v. Allegheny Energy, Inc.*, No. 2:05-cv-885-JFC (W.D. Pa.).

The Commonwealth of Pennsylvania Department of Environmental Protection, joined by the states of New York, New Jersey, Connecticut and Maryland, filed suit in 2005 pursuant to the citizen suit provisions of the CAA, 42 U.S.C. § 7604(a), alleging that projects performed by Allegheny at three of its power plants in the 1990s — the Armstrong Station, the Hatfield’s Ferry (“Hatfield”) Station and the Mitchell Station — constituted “major modifications” triggering the Prevention of Significant Deterioration (“PSD”) program. Plaintiffs also contended that projects performed at the Armstrong Station triggered the separate New Source Performance Standards (“NSPS”) requirements for “reconstruction” of existing units. Finally, plaintiffs alleged that Allegheny had violated the CAA’s Title V operating permit program by failing to include these projects — and failing to list PSD and NSPS as “applicable requirements” — in the stations’ permit applications. The litigation theories advanced by the plaintiffs against Allegheny were similar to those being utilized by the U.S. Environmental Protection Agency in its industry-wide “enforcement initiative” against coal-fired power plants, petroleum refineries, and the mining & acid manufacturing industries.

The United States District Court for the Western District of Pennsylvania conducted a multiweek bench trial of these claims in September 2010. In Findings of Fact and Conclusions of Law issued on February 6, 2014, Chief Judge Joy Flowers Conti found that the plaintiffs had failed to prove any of their claims and, as such, entered judgment for Allegheny:

- With respect to the PSD claims at Armstrong, Chief Judge Conti held that plaintiffs cannot prevail because no relief was available. She held that the claims for injunctive relief were moot because the plant has been shut down (and cannot be reactivated). Moreover, the claims for civil penalties are time barred under 28 U.S.C. § 2462, because the doctrine of equitable tolling did not apply.
- With respect to the PSD claims at Hatfield and Mitchell, Chief Judge Conti held that the projects did not trigger PSD, because Allegheny had carried its burden of proving that the boiler tube replacement projects at issue were “routine maintenance, repair, and replacement” (“RMRR”) and therefore excluded from PSD requirements.
- With respect to the NSPS claims at Armstrong, Chief Judge Conti held that the projects did not constitute “reconstructions” because they did not exceed 50 percent of the cost of a “comparable entirely new facility” as required by the NSPS regulations. In so finding, she specifically rejected the calculation methodology advanced by the plaintiffs’ experts — based upon the original installed cost — and credited the calculations by Allegheny’s expert, which relied upon an EPRI methodology to calculate the cost of a “comparable entirely new facility.”

- Finally, Chief Judge Conti dismissed the Title V claims for lack of jurisdiction.

The result was a complete victory for Allegheny on all claims.

Allegheny was represented by Hunton & Williams LLP and other law firms. Hunton & Williams LLP obtained the favorable pretrial rulings that defined the legal standards for trial, and Hunton & Williams partner Nash Long handled the RMRR and NSPS case at trial. For further information about this decision or EPA's national enforcement initiative in the utility, petroleum, mining or acid industry sectors, please contact one of the lawyers listed below.

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