

Southern Environmental Law Center

Clean Air Act Regulatory Update: Enforcement

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CAA Enforcement

- New Source Review (NSR)
- SIP Oversight
- Coal Ash

NSR

- Established 1977
- Older Units grandfathered

Major Modification

Physical or operational
change

(but not routine maintenance, repair or replacement)

+

significant net
emissions increase

NSR Problems

- Difficulty determining NSR applicability
- Identifying non-compliance and taking corrective action **can take years**

NSR (2010)

- 1,485 older units still in operation
 - Almost half of all electricity from fossil fuel units
- 1,201 units uncontrolled for SO₂
- 564 units uncontrolled for NO_x

NSR Successes

EPA/DOJ “Enforcement Initiative”

- 22 settlements covering 263 units
- \$12.8 billion in controls
- \$80 million in civil penalties
- SO₂ reductions: 1.8 million tons annually
- NO_x reductions: 596,000 tons annually

TVA Settlement (2011)

- 92% of coal fleet to be retired or retrofitted
 - 2700 MW retired (largest ever)
 - Another 2800 MW will receive controls or be retired
- \$10 million in civil penalties
- \$350 million for air pollution control projects

Is NSR Dead?

- *U.S. v. Cinergy* (7th Cir. 2010)
- *U.S. v. Alabama Power Co.* (N.D. Ala. 2011)
- *U.S. v. Midwest Generation, LLC* (E.D. Ill. 2010)

Maybe Not

U.S. v. Louisiana Generating, LLC
(M.D. La. 2012)

SIP Oversight

- EPA taking harder line
- Courts upholding EPA

CAA Framework

- EPA sets NAAQS
- States enforce through SIPs
 - Broad authority re methods & strategies
 - Must revise periodically
- EPA review
 - EPA “shall” disapprove of revisions that interfere with NAAQS attainment
 - SIP Call

Excess Emissions (SSM)

- Significant emissions
- Exception that swallows the rule
- Many are planned (i.e., not sudden and unavoidable)

EPA Guidance

(Bennett & Herman Memos)

- All SSM excess emissions = violations
- Planned vs. Unplanned
- Single source & NAAQS

Recent Cases

- Texas
 - *Luminant Generation Co. LLC v. EPA* (July 2012)
- Utah
 - *U.S. Magnesium, LLC v. EPA* (August 2012)

Key Takeaways

- Standard of review is tough
- EPA need not establish causal link
- EPA not bound by prior approvals
- Can rely on non-binding policy memoranda

Georgia & SSM

- August 31st deadline for EPA action
- SIP call likely
- EPA likely to be upheld

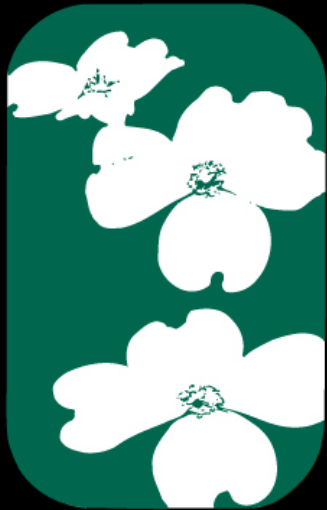
Opacity SIP Revision

Alabama Power Co. v. EPA

11th Circuit

Coal Ash

- NPDES reissuance
- Citizen Suits
 - Clean Water Act
 - RCRA
 - EPCRA
 - State law



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