

# Client Alert

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## Industry Notches Another New Source Review Victory

On March 3, 2014, Senior Judge Bernard A. Friedman granted DTE Energy Company's renewed motion for summary judgment in *United States v. DTE Energy Co.*, No. 2:10-cv-13101 (E.D. Mich.). This is the first New Source Review (NSR) enforcement initiative case in which the United States Environmental Protection Agency (EPA) has asserted that a maintenance project at a power plant triggered NSR, even though the utility's pre-project analysis showed the project would not result in a significant emissions increase and actual post-project emissions confirmed the utility's projection. The decision marks a significant victory for industry in the ongoing dispute over the proper interpretation and application of those regulations.

The case involves projects undertaken at Unit 2 of DTE's Monroe Power Plant between March and June 2010. EPA claimed that these projects constituted "major modifications" and thus required preconstruction NSR permitting. EPA sought to meet its burden through the testimony of experts, who would have opined that a proper preconstruction projection would have shown an increase in emissions caused by the projects.

DTE moved for summary judgment, arguing that the NSR rules did not allow for enforcement by second-guessing an operator's preconstruction emissions projections. In the absence of an actual significant increase in emissions caused by the challenged projects—and there has been no such increase at Monroe Unit 2 following the 2010 projects—EPA could not meet its burden. The district court agreed with DTE and held that EPA's claims were, at best, premature.

On appeal, the Sixth Circuit concluded that the district court's premises were "largely correct." The NSR rules create a "project-and-report" system. *United States v. DTE Energy Co.*, 711 F.3d 643, 649 (6th Cir. 2013). EPA cannot "enforce" NSR by second-guessing the operator's projection, because that would create, in effect, a "prior approval" system. *Id.* But the Sixth Circuit also allowed room for a narrow category of enforcement actions—i.e., those that would assess whether the operator, "at a basic level ... [made] a projection in compliance with how the projections are to be made." The Sixth Circuit thus remanded the case to allow the district court to consider this question, which it had not addressed in its earlier summary judgment decision.

DTE promptly renewed its motion for summary judgment. DTE had conducted a preconstruction projection and concluded that the challenged projects would not cause an emissions increase. These dispositive facts were not in dispute. EPA opposed, arguing that DTE misapplied the "demand growth exclusion"—the part of the rules that allow operators to exclude from projections increases in emissions that are unrelated to the project. It was not enough, EPA argued, for DTE to show that it excluded emissions attributable to factors other than the projects. EPA could still win, it argued, if it could persuade the court that DTE had excluded too much.

The court rejected EPA's reading of the Sixth Circuit's decision. The court agreed with DTE that EPA "is only entitled to conduct a surface review of a source operator's preconstruction projections to determine whether they comport with the letter of the law," and that "[a]nything beyond this cursory examination

would allow EPA to 'second-guess' a source operator's calculations; an avenue which the Sixth Circuit explicitly foreclosed to regulators." *Id.* at \*3. The court concluded that EPA's challenge to DTE's application of the demand growth exclusion was precisely the type of second-guessing the Sixth Circuit forbade.

The court also noted that, even if it accepted EPA's view of enforcement, it was "bewildered by the prospect of what, if anything, the agency stands to gain by pursuing this litigation." Any contention that DTE had misapplied the demand growth exclusion was "belied by the fact that ... actual post-project emission from Unit 2 never increased." As a result, EPA experts' post-hoc preconstruction emission projections "are now verifiably inaccurate."

DTE was represented by Hunton & Williams LLP. 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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