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## News

### Air Pollution

#### Statute of Limitations Could Be Used By Defense in New Source Review Cases

INDIANAPOLIS--Companies that have been sued by the Environmental Protection Agency for alleged new source review violations have a number of defenses available to them, and one of the most effective may be invoking the statute of limitations, a lawyer said June 24 at the Air and Waste Management Association's annual meeting.

Because the Clean Air Act does not contain a specific statute of limitations, the government has five years from the date of the "first accrual" to file a civil lawsuit in connection with the new source review program, according to Paul Amundsen, an attorney with Amundsen & Gilroy in Tallahassee, Fla.

During the Clinton administration, EPA began a series of enforcement actions against companies, claiming they made major upgrades to their industrial facilities without installing the requisite new pollution control equipment.

Under the Clean Air Act's new source review program, power plants and other industrial facilities must install modern pollution controls when they make plant modifications that increase emissions.

#### Several Cases Still Pending

While the Bush administration has announced it will no longer pursue such an aggressive enforcement policy for new source review violations, a number of cases are still wending their way through the courts.

Those companies, along with companies at risk of new source review litigation, should be aware that the government only has five years to file a civil lawsuit in connection with a new source review violation, he said.

"EPA and the [Justice Department] bring cases all the time based on information that's old," Amundsen said.

Moreover, federal district courts have generally held that the date of the alleged violation starts the day that construction begins on the facility in question, he said. So even if the federal government files a suit within five years of an upgraded plant's first operations, the statute of limitations would bar the claim if that suit is filed more than five years after construction began on those upgrades, he said.

But there is a separate legal theory that may counter that defense, Amundsen warned.

#### Continuing Violations

The government could claim that by operating a facility that has not met new source review requirements, the company in question could be in continued violation of the law.

In states that have a Clean Air Act state implementation plan (SIP) that requires joint construction and operating permits for industrial facilities, the government's claim of a continuing violation could work, thus eliminating the statute of limitations defense, he said.

Furthermore, the statute of limitations can only prevent the government from recovering civil damages for violating new source review provisions, he noted. It does not bar the government from seeking injunctive relief, such as asking the court to require the pollution control equipment in question be installed.

Even so, once civil penalties are off the table, companies are in a much stronger position to negotiate a favorable settlement with the government, Amundsen said.

Another effective defense is simply factual. The defendant can claim that the government simply is wrong, or that it did not take into account any number of mitigating factors, he said. Good record-keeping is essential.

Defendants may also rely on a "fair notice" theory, which holds that the government must make clear what its requirements are.

If, for example, a company were to claim that it had obtained what it thought were the required state permits and were operating under those permits, then it could claim a "fair notice" defense, he noted. ↵

*By David Safford*

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