Court: EPA Can Halt Power Plant Modifications

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TRAVERSE CITY, Mich. (AP) — Government regulators can try to halt construction projects at power plants if they think the companies didn't properly calculate whether the changes would increase air pollution, a federal appeals court ruled Thursday, marking the latest twist in a decades-long fight over the Clean Air Act.

The U.S. Environmental Protection Agency sued Michigan-based DTE Energy in 2010, because the company was replacing key boiler parts at its Monroe Unit 2 coal-fired power plant without installing pollution controls. The EPA said the controls were required because the utility was performing a major overhaul, but DTE argued the $65 million project was only routine maintenance and was therefore exempt.

A federal judge threw out the suit, saying the EPA went to court too soon. But the 6th U.S. Circuit Court of Appeals overturned that decision in a 2-1 ruling, saying the law doesn't block the EPA from challenging suspected violations of its regulations until long after power plants are modified.

Thursday's ruling comes amid years of skirmishing between the EPA and the electric power industry over bringing coal-fired plants into compliance with the Clean Air Act. The federal law requires utilities to figure out ahead of time what kind of pollution any proposed changes to their power plants may cause, but the industry, environmental groups and EPA often differ over what circumstances require adding the anti-pollution devices.

DTE performed calculations required under EPA regulations and concluded that after the project, its annual emissions of sulfur dioxide would rise by 3,701 tons and its nitrogen oxide emissions would rise by 4,096 tons. But it contended the increases would result from higher demand for electric power, not the plant modifications. The EPA disagreed, saying the project would cause "a significant net emissions increase."

U.S. District Judge Bernard Friedman agreed with DTE that regulators couldn't take action against the company unless data collected after the project's completion showed the company had miscalculated its future emissions. Friedman threw out the lawsuit last year, but the EPA appealed.

The appeals panel said Friedman erred by overstating the limits on EPA's authority to challenge power plant construction projects before they are finished. The agency can do so if it finds a company didn't follow the rules when projecting its emissions, the court said.

However, the appeals court didn't rule on whether DTE had complied with the regulations. It only returned the case to the district court for further consideration.

"Overall, we're encouraged by the decision of the appellate court," DTE spokesman Alejandro Bodipo-Memba said. He said the ruling dealt with a "narrow procedural issue" and upheld most of Friedman's reasoning.

The court made clear that the EPA cannot second-guess a company's emission projections ahead of construction and can intervene to block such projects only under limited circumstances, said Scott Segal, director of the Electric Reliability Coordinating Council, an industry group.

But that interpretation of the ruling was disputed by Eric Schaeffer, the director of the Washington-based Environmental Integrity Project and a former EPA attorney. He said the appeals court decision allows the EPA to intervene if the agency can produce evidence that a company is underestimating how a construction project will affect its emissions totals without waiting until the work is finished.

A message seeking comment at the U.S. Department of Justice, which represented EPA in the case, wasn't returned Thursday.

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