

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
vs.)	
)	
SOUTHERN INDIANA GAS AND)	CAUSE NO. IP99-1692-C-M/S
ELECTRIC COMPANY,)	
)	
Defendant.)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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UNITED STATES OF AMERICA,)
Plaintiff,)
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vs.) IP 99-1692-C-M/F
)
SOUTHERN INDIANA GAS AND ELECTRIC)
COMPANY,)
Defendant.)

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT
ON THE STATUTE OF LIMITATIONS

Plaintiff, the United States of America (“the Government”), brought this civil action against Southern Indiana Gas and Electric Company (“SIGECO”) pursuant to the Clean Air Act (“the Act”) for injunctive relief and the assessment of civil penalties. SIGECO filed this Motion for Partial Summary Judgment on portions of the Government’s first and third claims, contending that the civil penalties associated with the 1991 and 1992 construction projects are barred by the five-year statute of limitations contained in 28 U.S.C. § 2462. For the reasons set forth below, the Court **GRANTS** SIGECO’s Motion for Partial Summary Judgment.

I. BACKGROUND

A. STATUTORY FRAMEWORK

The Act establishes a regulatory scheme designed “to protect and enhance the quality of the Nation’s air so as to promote the public health and welfare and the productive capacity of its population.”

42 U.S.C. § 7401(b)(1). The Act requires the Administrator of the Environmental Protection Agency (“EPA”) to promulgate regulations establishing national ambient air quality standards (“NAAQS”) for certain air pollutants. *Id.* § 7409. Under the Act, each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant. An area that meets the NAAQS for a particular pollutant is an “attainment” area. To ensure that the attainment areas will continue to maintain the national standards, the Act sets forth requirements for the prevention of significant deterioration (“PSD”) of air quality in these areas. 42 U.S.C. §§ 7470-7492. The federal PSD regulations are set forth at 40 C.F.R. § 52.21.

The Act requires each state to adopt a State Implementation Plan (“SIP”) that contains emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality in attainment areas. *Id.* § 7410. In 1980, the federal PSD regulations were incorporated by reference into the Indiana SIP at 40 C.F.R. § 52.793. SIPs are enforceable by the EPA. 42 U.S.C. § 7413(a)(1).

According to the Government, the primary function of the PSD program is to regulate major new and modified sources in attainment areas. The federal PSD program and the Indiana SIP set forth specific permitting requirements for construction of, or modification to, major stationary sources that will cause significant increases in air pollution in attainment areas. *See* 42 U.S.C. § 7475; 40 C.F.R. § 52.21(i)(1); Indiana APC Regulation 19, § 4 (“APC 19”).

B. FACTUAL AND PROCEDURAL HISTORY

SIGECO owns and is an operator of the F.B. Culley Station (“Culley Station”) coal-fired electric generation plant in Warrick County, Indiana. Compl. ¶12. At various times, SIGECO commenced several

projects¹ at Culley Station, including activities in 1997, 1994, 1992, and 1991, without first obtaining a preconstruction permit. Compl. ¶¶ 65, 78. In counts one and three of its complaint, the Government alleges that SIGECO violated, and continues to violate, the Act by undertaking these four projects and operating its facility after completing these projects without first applying for and obtaining a preconstruction permit as required by 42 U.S.C. § 7475, 40 C. F. R. § 52.21, and APC 19. SIGECO brought this motion for summary judgment, arguing that the civil penalties associated with the 1991 and 1992 projects are barred by the statute of limitations contained in 28 U.S.C. § 2462.

II. SUMMARY JUDGMENT STANDARD

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). *See also United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

¹ The parties disagree over the legal nature of these projects. The Government contends that they constituted “construction of major modifications,” and thus gave rise to certain permitting requirements under the Act and the Indiana SIP. Compl. ¶¶ 65, 66, 67, 78, 79. In contrast, SIGECO argues that these projects constituted “routine maintenance, repair, and replacement activities, as well as pollution control projects”, not “modifications” under the Act and the Indiana SIP, and thus did not give rise to permitting obligations.

judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the Court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *See Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chi. Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary

judgment – even when in dispute. *See Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992).

III. DISCUSSION

SIGECO contends that failure to comply with preconstruction permit regulations results in discrete violations that are complete at the time of construction. Thus, according to SIGECO, the five-year statute of limitations contained in 28 U.S.C. § 2462 bars the Government from seeking monetary damages for claims regarding the construction projects completed in 1991 and 1992.² In opposition, the Government contends that the five-year statute of limitations period has not elapsed with respect to the 1991 and 1992 projects because SIGECO is still operating the source, and thus the violations are continuing violations that extend the limitations period. Essentially, the Government argues that each day of operation at Culley Station constitutes another violation of the preconstruction permit required for major modifications. The Court agrees with SIGECO.

The Act specifies no period during which claims thereunder may be brought. Thus, the general federal statute of limitations, 28 U.S.C. § 2462, is applicable to the Act. *See United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1080 (W.D. Wis. 2001); *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 442 (D. Md. 2001). Title 28 of U.S.C. § 2462 provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the

² SIGECO does not seek summary judgement on the Government’s requests for injunctive relief contained in claims one and three of its complaint. *See* Def.’s Brief in Support of Summary Judgment, at 18 (“foreclosing the Government’s claims for civil penalties in this case does not undermine the Government’s ability to seek whatever injunctive relief it may be entitled to as a matter of law and equity”). *See United States v. Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998) (Section 2462 does not bar injunctive relief).

enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued, if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

A claim “first accrues” under § 2642 on the date that a violation first occurs. *3M Co. v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994). However, where a violation is ongoing, the statute of limitations is tolled for so long as the violation continues. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

The parties agree that the Government’s claims regarding the 1991 and 1992 projects first accrued, if at all, more than five years ago. Thus, the issue presented is whether SIGECO’s alleged violations of the preconstruction permit requirements constitute violations that continue into the limitations period.

In claim one, the Government alleges that SIGECO violated and continues to violate the Act, 42 U.S.C. § 7475, and the PSD regulations set forth in 40 C.F.R. § 52.21 by “undertaking . . . major modifications and operating its facility after the modifications without first obtaining a PSD permit as required by 40 C.F.R. § 52.21(i)(1) and 52.21(r)(1).” Compl. ¶ 66. In claim three, the Government alleges that SIGECO violated and continues to “violate provisions of the Indiana SIP . . . by undertaking [the 1991 and 1992] modifications without applying for and obtaining a permit to construct and operate the modification[s] [sic] as required by . . . APC Regulation 19.” Compl. ¶ 79. According to the Government, SIGECO’s violations of the preconstruction permit requirements subjects SIGECO to civil penalties of up to \$25,000 per day for each violation. *See* Compl. ¶ 68 (citing 42 U.S.C. §§ 7413(b) and 7477).

Although the amended complaint refers to SIGECO’s failure to obtain a permit “to construct and operate” a modification, the provisions that the Government cites SIGECO with violating contain

construction permit requirements, not *operation permit* requirements. The distinction between preconstruction permit violations and operation permit violations is crucial. It is generally recognized that failure to obtain an operations permit is a continuing violation for each day of operation without the permit. *Murphy Oil USA, Inc.*, 143 F. Supp. 2d at 1081-83. In contrast, failure to obtain a preconstruction permit is a discrete violation that occurs at the time of construction. *Id.* Therefore, to the extent that the Government is seeking civil penalties for SIGECO's alleged violations of construction permit requirements relating to the 1991 and 1992 projects, the Government's first and third claims for civil remedies are time barred.

The federal and state statutory framework under which the government seeks relief establishes separate permitting programs for construction permits and operation permits. *See Murphy Oil*, 143 F. Supp. 2d at 1082 (citing 42 U.S.C. § 7475 (pre-construction permits) and § 7661 (operation permits)). This distinction is mirrored in the Indiana SIP through separate regulations for preconstruction and operation permits. *See* APC 19, § 4 (construction permits) and APC 19, § 5 (operation permits).

Section 7475 requires owners to obtain a preconstruction permit prior to commencing construction of a major modification. Section 7475, "Preconstruction requirements," provides in relevant part:

(a) No major emitting facilities . . . may be *constructed* in any area to which this part applies *unless--*

(1) a *permit* has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility.

42 U.S.C. § 7475(a) (emphasis added). Operation permits, in contrast, are governed by 42 U.S.C. §

7661. Section 7661 states that “it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate ... a major source ... except in compliance with a permit issued by a permitting authority under this subchapter.” The Indiana statutes in force at the relevant time also distinguished between construction and operation permits. APC 19, provides in relevant part:

1. Section 4. Construction Permit. No person . . . shall commence construction, modification, or reconstruction of any facility without first applying for and obtaining a construction permit from the board.
2. Section 5. Operation Permits. No person shall operate any facility . . . without first applying for and obtaining a permit to operate said facility from the Board.

APC 19, §§ 4, 5.

For whatever reason, the Government chose to allege a violation of the Act’s preconstruction permit requirements contained in 42 U. S. C. § 7475 rather than a violation of the Act’s operating permit requirements as set forth in 42 U. S. C. § 7661. Again, *operating* a facility after it was modified without first obtaining the necessary construction permit may constitute a continuing violation of the relevant *operating permit*, but it does not constitute a continuing violation of the relevant *construction permit*. Regarding the alleged Indiana SIP violation, the Government does not appear to have alleged a violation of the state operating permit requirements contained in APC 19, § 5, likely because, according to both parties, the Indiana SIP did not require an operating permit for modifications constructed prior to December 6, 1994. *See* Amended Compl. ¶ 49.

The Government argues that SIGECO’s violations of the preconstruction requirements set forth in the Act, the EPA regulations, and the Indiana SIP are ongoing violations that continue into the limitations period. The Government’s contends that the relevant portions of the Act and the EPA’s regulations contain

ongoing obligations, thus rendering any violation of 42 U.S.C. § 7475 and 40 C.F.R. 52.21 continuing. For example, § 7475(a)(4) requires a modified source to install best available control technology (“BACT”). Section 7475(a)(3) requires that the facility’s owner to demonstrate that construction or operation will not violate certain emissions standards. However, these requirements, along with all of the requirements enumerated in § 7475, must be undertaken *prior* to the construction or modification of the facility. See § 7475(a) (providing “[n]o major emitting facilities . . . may be *constructed* in any area to which this part applies *unless*” certain conditions are met); § 7477, “Enforcement,” (providing the “administrator shall . . . take such measures . . . as necessary to *prevent the construction or modification* of a major emitting facility which does not conform to the requirements of this part”) (emphasis added). Thus, the language of the Act makes constructing, not operating, an unpermitted modification a violation. Therefore, a violation of 42 U.S.C. §7475 occurs when construction is commenced, but does not continue on past the date when construction is completed.

The result is the same under the federal regulations contained in 40 C.F.R. § 52.21. See § 52.21(i)(1) (providing “[n]o stationary source or modification . . . shall *begin actual construction* without a permit”); § 52.21(r)(1) (providing in relevant part that “[a]ny owner or operator of a source or modification subject to this section who *commences construction* . . . without applying for an receiving approval hereunder, shall be subject to the appropriate enforcement action”) (emphasis added). Thus, the relevant federal regulations clearly make commencing construction a violation, not operating the unpermitted facility following construction.³ In sum, violations of the prerequisites for obtaining a permit under 42 U.S.C. §

³ An earlier portion of 40 C.F.R. 52.21(r)(1) provides that “[a]n owner or operator who constructs *or operates* a source or modification not in accordance with the application submitted

7475 and 40 C.F.R. § 52.21 accrue at the time of modification. Such violations do not continue past the completion of construction. *Westvaco Corp.*, 144 F. Supp. 2d at 444 (holding “all of the requirements enumerated in § 7475(a) . . . must be undertaken *prior to* the construction or modification of the facility . . . [t]hus, when read in context, none of the prerequisites for obtaining a permit under § 7475(a) creates an ongoing violation) (emphasis in original).

The Government similarly argues that SIGECO’s alleged violation of the Indiana SIP continued into the limitations period. According to the Government, permits issued pursuant to APC 19 during the relevant time period *could* contain ongoing operating conditions “such as emissions limitations.” Pl.’s Memo. in Support of Summary Judgement, at 12. The language the Government relies on states that the construction permit “may,” not “must,” contain emissions limitations. *See* APC 19, § 4(g). While the construction permit that SIGECO was allegedly required to obtain may have contained emissions limitations, this is insufficient to establish a continuing violation. The Court simply cannot assume that the construction permit would necessarily have contained emissions limitations.

A significant majority of district courts that have considered the issue have concluded that violations of PSD preconstruction permits do not constitute violations that continue past the completion of construction.⁴ The United States District Court for the Eastern District of Pennsylvania, for example,

pursuant to this section or with the terms of any approval to construct . . . shall be subject to appropriate enforcement action.” However, this portion of 52.21(r)(1) is not applicable to SIGECO, because SIGECO never applied for or obtained a construction permit. The Government cannot successfully charge that SIGECO failed to operate in accordance with its non-existing construction permit.

⁴ The Court is aware the contrary holding contained in the *United States v. Am. Elec. Serv. Corp.*, 137 F. Supp. 2d 1060 (S. D. Ohio 2001). Nevertheless, the Court follows the greater weight of authority on this issue.

rejected the Government's "continuing violations" theory in the *United States v. Brotech Corp.*, No. Civ. A. 00-2428, 2000 WL 1368023, at *3 (E.D. Penn. Sept. 19, 2000). The court in *Westvaco Corp.* followed the rationale articulated in *Brotech*, and summarized the *Brotech* holding this way:

In *Brotech*, the court rejected the Government's contention that failure to obtain certain construction permits and plan approvals pursuant to the Pennsylvania SIP were continuous stating, in particular, that there was a significant distinction between a failure to obtain preconstruction permits . . . and failure to obtain operating permits. The latter violation would be continuing since every day of operation without an operating permit is another violation. In contrast, a violation for failure to obtain a construction permit does not continue once the unpermitted construction is completed.

Westvaco Corp., 144 F. Supp. 2d at 444 (internal citations omitted).

In *United States v. Campbell Soup Co.*, No. S-95-1854, 1997 WL 258894 (E.D. Cal. March 11, 1997), the United States brought an action against Campbell Soup for violations of the Act. The Government alleged that Campbell Soup had failed to obtain the necessary construction permit and was operating certain machines without using the best available control technology. Campbell Soup argued that the statute of limitations bared the Government's claims. In response, the Government relied on the continuing violation doctrine, arguing that "Campbell continues to operate the machines that were built without permission." *Id.* The district court held that the state implementation plan distinguished between building a machine and operating it and that in its notice of violation, the government had not charged Campbell with violating the section of the plan that governed operation. *Id.* at *1. The court concluded that "even if the underlying intent behind the [California state implementation plan] regulation is to assure continuing air quality, the regulation cannot reasonably be construed to mean that building or altering a machine without a permit is a violation that continues as long as the machine still exists or is operated." *Id.*

at *2.

In the *Westvaco Corp.*, the United States brought an action under the Act against the owner of a pulp and paper mill alleging that it failed to obtain PSD preconstruction permits before making various improvements. *Westvaco Corp.*, 144 F. Supp. 2d 439. Westvaco argued that the Government's claims were barred by the statute of limitations. In response, the Government contended that the alleged violations were continuing. The court rejected the Government's argument, noting that the "preconstruction permit violations occur only at the time of the construction or modification of the emitting facility." *Westvaco Corp.*, 144 F. Supp. 2d at 443. Accordingly, the court held that "the statute of limitations bars the Government from bringing claims based on preconstruction permit violations where the construction was completed more than five years prior to commencement of the lawsuit." *Id.* at 444.

In *Murphy Oil*, the United States brought an action against a petroleum refinery seeking injunctive relief and civil penalties for, among other things, the refinery's failure to undergo the PSD construction permitting process. *Murphy Oil*, 143 F. Supp. 2d 1054. The Government argued that Murphy Oil's failure to undergo the PSD permitting process meant that Murphy Oil was operating its sources continually in violation of the restrictions of the Act. In opposition, Murphy Oil asserted that a failure to obtain the proper permit or to use the proper technology was a violation of the Act that accrued only once: on the day construction commenced without the required permit or technology. The court agreed with Murphy Oil, recognizing that the federal and state statutory framework under which the Government sought relief established separate permitting programs for preconstruction permits and operation permits. The court held that violating the construction permit requirements was not a continuing violation, stating that "the statute of limitations for a violation of the pre-construction permit requirements under 42 U.S.C. § 7475 begins

to run at the time of construction and does not continue through the operational life of the modified source.”
Murphy Oil, 143 F. Supp. 2d at 1084.

The Government, on the other hand, relies extensively on the *United States v. Marine Shale Processors*, 81 F.3d 1329 (5th Cir.1996). The United States charged Marine Shale with violating the Act by operating several minor emission sources without a permit. Marine Shale argued that "because emissions from each minor source began more than five years before the United States filed suit, section 2462 bars all minor source fines, even those occurring within five years of the filing of the complaint." *Id.* at 1357. The court disagreed, stating that "[s]ection 7413(b) contemplates a fine for each day a minor source operates in violation of the law[.]" *Id.* However, as noted by the court in *Murphy Oil*, "[i]t is not clear whether the government charged Marine Shale with violating the relevant construction permit requirements or the operation permit requirements or both, a distinction that is crucial in determining the continuing nature of the violation." *Murphy Oil*, 143 F. Supp. 2d at 1083.

In sum, after reviewing the relevant statutory and regulatory provisions and relevant case law, the Court concludes that constructing and operating the 1991 and 1992 projects without first obtaining a preconstruction permit does not result in a continuing violation of 42 U.S.C. § 7475, 40 C.F.R. §52.21, or the Indiana SIP. SIGECO's alleged failure to comply with preconstruction permit requirements resulted, if at all, in discrete violations that were complete at the conclusion of construction. The instant action was brought in 1999, more than five years after the 1991 and 1992 construction projects at Culley Station were completed. Therefore, the civil penalties associated with the 1991 and 1992 projects are barred by the five-year statute of limitations contained in 28 U.S.C. § 2462. Accordingly, the Court **GRANTS** SIGECO's Motion for Partial Summary Judgment on the Government's claims for civil penalties regarding

the 1991 and 1992 projects contained in its first and third claims for relief.

IV. CONCLUSION

For the reasons discussed, the Court **GRANTS** SIGECO's Motion for Partial Summary Judgment on the Government's claims for civil penalties regarding the 1991 and 1992 projects in its first and third claims for relief.

IT IS SO ORDERED this _____ day of July, 2002.

LARRY J. MCKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution attached.

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