

Ohio Supreme Court Clarifies Air Pollution Penalty Calculation

December 7, 2012

[Full text of the Court's opinion](#)

On December 6, 2012, the Ohio Supreme Court issued its widely anticipated decision in *State ex rel. Ohio Attorney General v. Shelly Holding Co.* The case involved the proper method of calculating the civil penalty against an industrial facility for non-compliance with the terms of its air pollution control permit. In affirming the appellate court's decision, the Ohio Supreme Court held that the civil penalty calculation started on the date of the violation, as demonstrated by the failure of a stack test, until the permit holder demonstrated compliance with the permit terms. In essence, the state did not need to prove that the facility was operating out of compliance for each intervening day; such non-compliance was presumed.

The state asserted that the penalty should be assessed for each day a facility was out of compliance with its permit, which would be from the day it failed the stack testing and continuing until the facility demonstrated that it had passed the stack test as required by the permit in question. According to the state, the penalty calculation ran until (1) the day on which the facility conducts a subsequent stack test and the facility emissions are within the allowable limits of the permit, (2) the day on which the Ohio Environmental Protection Agency (EPA) issues a new permit for the facility with revised emission limits that are the same as or greater than the emission released on the day when the facility conducted its initial stack test, or (3) the day on which the facility could show that it would pass a subsequently conducted stack test because intervening facility modifications were made.

The defendant argued that the Court cannot presume that the facility would exceed its emission limits unless the state first makes a prima facie showing that the violation is likely to be ongoing or continuing. In essence, the defendant argued that the state had to prove that the facility exceeded its emission limits for each day for which a penalty could be imposed. The Court, however, noted that the burden is on the violator to prove by a preponderance of the evidence that there were intervening days on which no violation occurred or that the violation was not continuing in nature.

In summary, the Court concluded that the beginning date for calculating a civil penalty for an air pollution control violation is the first date of demonstrated non-compliance. The penalty calculation continues to run until return-to-compliance is demonstrated by the violator. It will be presumed that the facility is in non-compliance during the intervening period unless the violator proves otherwise. This analysis should also apply to violations of other environmental regulations, and is not necessarily limited to air pollution control violations.

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