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Environmental Federation of Oklahoma

**Federal Statute of Limitations – Recent
Development Impacting Air Quality
Enforcement in Oklahoma**

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Presented by: Donald K. Shandy



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I. Sierra Club v. Oklahoma Gas and Electric Company, United States Court of Appeals for the Tenth Circuit (March 8, 2016).

A. Participants

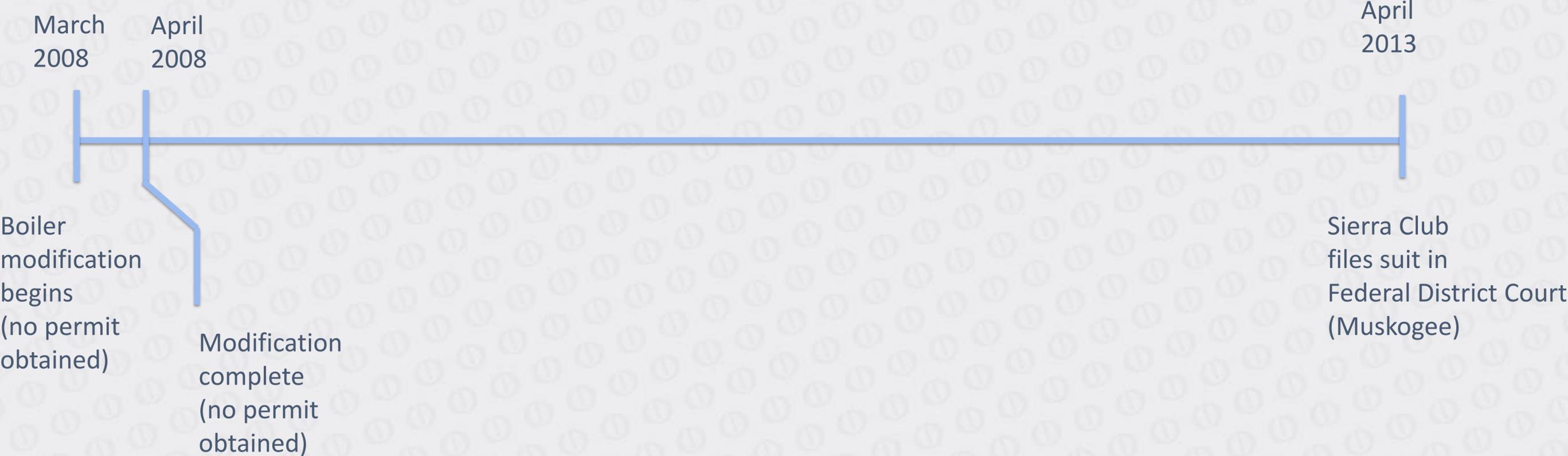


II. Background

- A. Sierra Club filed suit against OG&E in federal district court in Muskogee.
- B. Sierra Club sought civil penalties for alleged violations related to the Prevention of Significant Deterioration (PSD) program. Sierra Club also sought declaratory and injunctive relief (requiring a PSD permit and upgrade of pollution controls).
- C. The federal five-year statute of limitations applied (28 U.S.C. § 2462).



The project timeline and filing of the Lawsuit



II. Background (cont.)

D. The question is whether Sierra Club could maintain a lawsuit **more than 5 years after construction was initiated.**

E. 28 U.S.C. § 2462.

A “. . . suit or proceeding for the enforcement of any civil fine or penalty . . . shall not be entertained **unless commenced within five years from the date when the claim accrued . . .**”

F. The Federal District Court (Judge Payne) dismissed the lawsuit saying that the claim accrued at commencement of the modification of the boiler (i.e. before April 1, 2008).



III. Sierra Clubs position

- A. Sierra Club contended that the statute of limitations was not a bar for civil penalties because OG&E “continued” to violate the federal Clean Air Act until the modification was complete (i.e. after April 1, 2008).
- B. Sierra Club also argued that equitable relief (permitting and new controls) was separate from civil penalties.



IV. Tenth Circuit Ruling

- A. Held that the claim “accrued” when construction was initiated (i.e. prior to April 1, 2008) and upheld the lower court ruling.
- distinction between a single “continuous” violation and repeated, discrete violations.
- B. To “construct” is a single ongoing project and does not constitute repeated, discrete violations.
- C. “Concurrent Remedy Doctrine”
- “... the concurrent remedy doctrine provides that a statute barring a legal claim will also bar an equitable claim when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in and of a legal right.”



V. Practical Implications

- A. Sierra Club v. O&G is now law in Oklahoma, Colorado, Kansas, New Mexico, Utah and Wyoming.
- B. There remains a split federally but the case represents the “majority” view.
- C. Depending upon the facts, USEPA pursuing violations that are more than 5 years old may no longer be a viable position for the government.
- D. Industry should carefully analyze the statute of limitation issue when USEPA and/or a state seeks penalties or equitable relief related to an alleged violation that is more than five years old.



VI. Questions





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