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ATTORNEYS AND  
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**Environmental Federation of  
Oklahoma**

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

**October 14, 2016**

Presented by: **Donald K. Shandy**



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World Ready

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

A. Participants

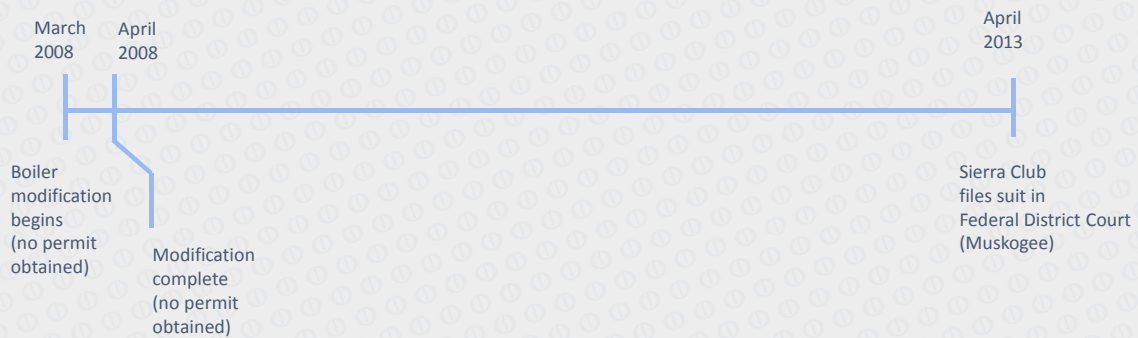


## II. Background

- 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. OG&E 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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