

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN**

SIERRA CLUB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>Civil Action No. 1:08-cv-1183</b>
	)	Paul L. Maloney
CITY OF HOLLAND, MICHIGAN, and HOLLAND BOARD OF PUBLIC WORKS	)	Chief U.S. District Judge
	)	
	)	
Defendants.	)	
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**DEFENDANTS’ NOTICE OF SUPPLEMENTAL AUTHORITY IN CONNECTION  
WITH MOTIONS FOR SUMMARY JUDGMENT**

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Defendants City of Holland and Holland Board of Public Works (“Holland”) respectfully submit this notice of supplemental authority in support of their Cross-Motion for Partial Summary Judgment (Jan. 18, 2011) [Doc. #94], their Motion for Total Summary Judgment as to All PSD Claims (Mar. 15, 2011) [Doc. #111], and their Opposition to Plaintiff’s Second Motion for Partial Summary Judgment (Jan. 18, 2011) [Doc. #95]. With one narrow exception, every pending Count of Sierra Club’s Amended Complaint and every issue raised by any of the pending Summary Judgment Motions is resolved by plain-language enforcement of the federal five-year statute of limitations found at 28 U.S.C. § 2462.<sup>1</sup> *United States v. Midwest*

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<sup>1</sup> See Holland’s Memorandum in Support of Motion for Total Summary Judgment as to All PSD Claims (Mar. 15, 2011) [Doc. #112] at 2-3 (explaining how application of the statute of limitations resolves pending claims and motions). Count 2 has been dropped by Sierra Club and is no longer pending. See Order Dismissing Count 2 of the Am. Compl. (Mar. 16, 2011) [Doc. #146]. The only pending count remaining that would not be resolved by application of the statute of limitations – the narrow **exception** – is Count 5. In Count 5 the Sierra Club claims that Defendants violated the Clean Air Act by failing to submit an application for a MACT limit to be

*Generation, LLC*, Nos. 12-1026 & 12-1051, 2013 U.S. App. LEXIS 13709 (7th Cir. July 8, 2013), attached hereto as Exhibit A, is the **third** circuit court to address application of the statute of limitations to new source review/PSD permitting requirements like the ones at bar, and **all three circuit courts** have held that an alleged violation of the PSD permit requirement is complete (and therefore the statute of limitations begins to run) when construction commences without a permit in hand. Because the latest alleged construction project at issue in this case commenced more than five years before the case was filed, Holland's Motion for Total Summary Judgment as to All PSD Claims should be granted.

*Midwest Generation* was decided July 8, 2013, and the Court of Appeals held that a PSD violation begins and ends when construction commences without a permit in hand. *See id.* at \*6-7 ("The violation is complete when construction commences without a permit in hand. Nothing in the text of §7475 even hints at the possibility that a fresh violation occurs every day until the end of the universe if an owner that lacks a construction permit operates a completed facility."). As noted above, this holding is consistent with both other Circuit Courts of Appeals that have decided this issue. *See Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010); *National Parks and Conservation Association Inc. v. Tennessee Valley Authority*, 502 F.3d 1316 (11th Cir. 2007).

In so holding, *Midwest Generation* confronted **and rejected** both of the counter-arguments that Plaintiff Sierra Club relies on here. Specifically, Sierra Club claims (1) that the PSD regulations create an ongoing obligation to apply BACT (*see* Pl.'s Resp. Opp'n Defs.' Mot.

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included in Defendants' Renewable Operating Permit. Am. Compl. at 17. Although this claim is not barred by the statute of limitations, Defendants were not required to submit a MACT Hammer application in the first place, and substantial questions exist regarding Plaintiff's standing to bring this claim. *See* Defs.' Opp'n to Pl.'s Third Mot. for Partial Summ. J. Regarding Jurisdiction and Hazardous Air Pollutant Limits (May 20, 2011) [Doc. #163].

Summ. J. as to All PSD Claims (Apr. 12, 2011) [Doc #155] at 6-9), and (2) that failure to obtain a permit constitutes repeated, discrete, and ongoing daily violations of the Clean Air Act (*id.* at 11-12, 14-16). The Seventh Circuit directly rejected both of those claims. *Midwest Generation*, 2013 U.S. App. LEXIS at \*6-10.

Even more significantly, *Midwest Generation* effectively overrules *Sierra Club v. Dairyland Power Coop.*, No. 10-cv-303-bbc, 2010 U.S. Dist. LEXIS 112817 (W.D. Wis. Oct. 21, 2010), a district court case from within the Seventh Circuit that the Sierra Club cited **repeatedly** in support of its statute of limitations arguments. *See, e.g.*, Resp. Opp'n Defs.' Cross Mot. Partial Summ. J. (Mar. 1, 2011) [Doc #104] at 5, 8, 9, 10, 11, 12, 13; Pl.'s Resp. Opp'n Defs.' Mot. Summ. J. as to All PSD Claims (Apr. 12, 2011) [Doc #155] at 8, 10, 11, 12. *Dairyland* can no longer be considered good law, because it runs contrary to the law of the Seventh Circuit decided in *Midwest Generation* on July 8, 2013. In short, although a minority of district courts that have addressed the appropriate statute of limitations for PSD cases have found limited exceptions to the plain language of 28 U.S.C. § 2462, most district courts and **every** Circuit Court have come out the other way.

Finally, *Midwest Generation* persuasively explains why the Sixth Circuit's decision in *National Parks and Conservation Association Inc. v. Tennessee Valley Authority*, 480 F.3d 410 (6th Cir. 2007), is limited to construction projects in Tennessee only. Contrary to the Sierra Club's claims in the case at bar, *Midwest Generation* stressed that *National Parks* "rests on Tennessee statutes and implementation plans that require certain sources to *use* the best available control technology." *Midwest Generation*, 2013 U.S. App. LEXIS at \*8 (emphasis in original). That was exactly the same conclusion the Eighth Circuit and Eleventh Circuit reached in the cases cited above. And that was exactly the point made by Holland in briefing on the pending

Summary Judgment Motions – namely, the relevant Tennessee State Implementation Plan provisions do **not exist** in Michigan; therefore, the Sixth Circuit’s *National Parks* decision does not apply. *See* Defs.’ Reply Br. in Supp. of Mot. for Total Summ. J. as to All PSD Claims (Apr. 26, 2011) [Doc. #157] at 6-9.

For these reasons, Defendants respectfully request that the Court consider the July 8, 2013, opinion in *Midwest Generation* in deciding Defendants’ and Plaintiff’s pending Motions for Summary Judgment, and grant Defendants’ Motion for Total Summary Judgment as to All PSD Claims, together with such further and other legal and equitable relief as may be just under the circumstances.

Dated: July 22, 2013

Respectfully submitted,

/s/ Margrethe K. Kearney

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