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Client Alert: Ohio Supreme Court Decision on Civil Penalties for Air Permit Violations

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The Ohio Supreme Court recently decided a case involving the appropriate method for calculating civil penalties for violations of an air permit. In *State ex rel. Ohio Atty. Gen. v. Shelly Holding Co.*, Slip Opinion No. 2012 – Ohio – 5700 (Dec. 6, 2012), the Court was asked to determine whether a violation of an air permit could be considered a continuous violation until the permit holder demonstrated compliance. The violation arose because Shelly's asphalt plant failed a stack test required by its air permit. The central issue presented was whether the violation was considered a continuing violation for assessment of civil penalties.

Shelly argued that the stack test was not representative of normal operations because it required testing at maximum capacity to test worst-case emissions. Shelly thus argued that the plant's normal operations were within its permit limits and that the violation should be limited to the day of the failed stack test. The state countered that the violation was continuous and that the penalty should be assessed for each day Shelly operated until: it passed a subsequent stack test; it obtained a new permit; or it could show it would pass a subsequent stack test because of intervening plant modifications. According to the state, Shelly was required to demonstrate compliance in order to stop the assessment of the civil penalties.

The Ohio Supreme Court agreed with the state's argument and held that the facility was in violation and subject to a civil penalty from the date of the failed stack test until the Company demonstrated compliance with the permit terms. The Court did allow Shelly the opportunity to present evidence to the trial court on remand to prove that the violation was not continuous by virtue of a subsequent stack test or a new permit.

Based upon the Court's ruling, once a plant fails a stack test, it is important that the plant demonstrate compliance as soon as possible after the failed stack test. That demonstration can be by a subsequent stack test, a modified permit or a plant modification that later proves to reestablish compliance.