

## ***Shelly* Holding: When One Failed Stack Test Is a Continuing Violation**

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In December 2012, the Ohio Supreme Court dealt a blow to Ohio businesses' ability to comply with the Ohio Air Pollution Control Act. This Act, which aims to "protect and enhance the quality of the state's air resources,"<sup>1</sup> requires facilities that emit air contaminants to obtain a permit that establishes emissions limits.<sup>2</sup> Civil liability attaches to facilities that violate their permits' emissions limits, usually measured through emissions or stack testing.<sup>3</sup> Penalties are assessed "for each day of the violation" after the state has notified the facility.<sup>4</sup> The most stringent penalties result when the state "makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice."<sup>5</sup> If the state can make this prima facie showing, also called a continuing violation, it can collect penalties "for each day of violation," from the facility's notification date to the date on which the facility can establish "continuous compliance."<sup>6</sup> In *State ex rel. Attorney General v. Shelly Holding Co.*, the Ohio Supreme Court ruled that one failed stack test created a reasonable inference that the emitting facility had violated its air pollution control permit every day until it affirmatively demonstrated its compliance—a continuing violation.<sup>7</sup>

The Shelly Company (Shelly) is an Ohio asphalt producer with forty-one asphalt plants and assorted other operations in Ohio and in neighboring states.<sup>8</sup> Between 2002 and 2006, stack tests revealed that emissions in twenty-seven asphalt plants, thirty portable generators, and one liquid asphalt terminal exceeded the limits set forth in Shelly's permits.<sup>9</sup> As required by the permits, the stack tests were "conducted while the emissions unit [was] operating at or near its maximum capacity."<sup>10</sup> Though the trial court concluded that Shelly was

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<sup>1</sup> OHIO REV. CODE ANN. § 3704.02(A)(2) (West 2006).

<sup>2</sup> OHIO REV. CODE ANN. § 3704.05(A) (West 2006).

<sup>3</sup> OHIO REV. CODE ANN. § 3704.06(C) (West 2006). Criminal penalties are also included in the federal Clean Air Act (CAA) legislation. 42 U.S.C. § 7413(c) (2012). Ohio law is construed to be consistent with the federal CAA. OHIO REV. CODE ANN. § 3704.02(B) (West 2006). The federal CAA penalties are, accordingly, incorporated into Ohio's Air Pollution Control Act. OHIO ADMIN. CODE 3745-31-01(AAAAAA)(2)(mmm) (2013).

<sup>4</sup> 42 U.S.C. § 7413(e)(2) (2012).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> No. 11-0252, slip op. at 15–16 (Ohio Dec. 6, 2012).

<sup>8</sup> *About Shelly*, THE SHELLY COMPANY, <http://shellyco.com/about.php> (last visited Feb. 12, 2013).

<sup>9</sup> *State ex rel. Ohio Attorney General v. Shelly Holding Co.*, 191 Ohio App. 3d 421, 424, 2010-Ohio-6526, 946 N.E.2d 295 (Ohio Ct. App. 2010).

<sup>10</sup> *Shelly Holding*, No. 11-0252, slip op. at 3.

civilly liable only for the days on which the facilities failed their stack tests, the appellate court ruled that “the violation continued until the subsequent stack test determined that the plant no longer was violating the permit limitations.”<sup>11</sup> In short, the appellate court ruled that one failed stack test constituted a continuing violation, exposing Shelly to potentially devastating daily penalties.<sup>12</sup>

The Ohio Supreme Court affirmed. To establish a continuing violation, the court noted, the state must show (1) the facility violated its permit, (2) the facility was notified of its violation, and (3) the facility likely continued its noncompliant conduct past the notification date.<sup>13</sup> According to the court, once the state made a prima facie case that the facility continued its noncompliant conduct past the notification date, the burden shifted to the emitting facility to present rebuttal evidence to the contrary.<sup>14</sup> Because Shelly stipulated both to its permit violation and its notification of the violation, only the third requirement—proof that the violation continued—was at issue.

The question at the heart of the case was what evidence satisfied the state’s prima facie burden. Shelly argued that one failed stack test did not constitute a violation likely to continue past the notification date. The court disagreed, averring “a reasonable inference arises that if a Shelly facility failed the stack test on one day, and if no changes were made, it would fail the same test on a subsequent day.”<sup>15</sup> Without a change in operating conditions, the court continued, presuming the facility’s compliance would be illogical.<sup>16</sup> For support, the court cited the section of the federal Clean Air Act describing a continuing violation.<sup>17</sup> The court read a failed stack test into this definition with no more than a “reasonable inference.”<sup>18</sup> Thus, with one failed stack test, “a prima facie showing is made that the violation is likely to continue.”<sup>19</sup> In other words, a violation on one occasion is a violation in perpetuity, absent a facility’s affirmative evidence to the contrary.

A single violation is, however, only prima facie evidence of a continuing violation: the emitting facility may rebut this presumption. Passing a subsequent stack test, changing the facility’s operating conditions, repairing mechanical failures, changing raw materials or fuels, and scheduling retests were cited by the court as permissible rebuttal evidence.<sup>20</sup> The court explicitly rejected Shelly’s normal operations defense as adequate rebuttal evidence.<sup>21</sup> Under

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<sup>11</sup> *Shelly Holding*, 191 Ohio App. 3d at 442.

<sup>12</sup> Shelly’s liability totaled \$350,123.52 after the trial court’s ruling, *without* allowing for daily penalties for a continuing violation. *Id.* at 424.

<sup>13</sup> *Shelly Holding*, No. 11-0252, slip op. at 14.

<sup>14</sup> *Id.* at 14–15.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 16–17 (citing 42 U.S.C. § 7413(e)).

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.* at 15–16.

<sup>20</sup> *Shelly Holding*, No. 11-0252, slip op. at 17.

<sup>21</sup> *Id.* at 18.

Shelly's permit, its stack tests were conducted at "maximum operating conditions and utilizing the worst-case fuels and materials."<sup>22</sup> Maximum operating conditions, argued Shelly, did not represent its normal operations. Rather, stack testing was a snapshot of Shelly's operations on a single day, at "maximum, worst-case testing conditions."<sup>23</sup> Shelly argued that the state should carry the burden of proving its violation was likely to continue on non-stack testing days.<sup>24</sup> The court rejected this defense, stating that Shelly presented no "actual evidence" that it complied with its emissions limits on non-stack testing days or any other day.<sup>25</sup> The court remanded the case, requiring Shelly to present specific evidence that its permit violation was not a continuing violation.<sup>26</sup>

After the Ohio Supreme Court's decision in *Shelly Holding*, the state carries a low burden of proof in making a prima facie case for a continuing violation. The state may rest a continuing violation on one failed stack test. The state does not need to prove "the conduct or events giving rise to the violation are likely to have continued *each day*."<sup>27</sup> The government only has to produce noncompliant conduct on *one day*. Further, this one day of noncompliant conduct may not, and likely does not, represent a facility's day-to-day operations or emissions. Unconcerned that facility conditions on stack testing day do not reflect the facility's normal operating conditions, the court will nevertheless assume as much. For the purpose of calculating emissions penalties, every day is stack testing day.

As a result of the decision in *Shelly Holding*, when an Ohio facility fails one stack test, it can now expect to be penalized each day thereafter, unless it offers evidence of compliance. The facility will have to schedule another costly and time consuming stack test and may have to wait months for all the necessary personnel to attend said stack test.<sup>28</sup> All the while, civil penalties pile higher and higher.

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<sup>22</sup> Brief for Defendants-Appellants at 3, State ex rel. Ohio Attorney General v. Shelley Holding Co., 2012-Ohio-5700 (Ohio Dec. 6, 2012) (No. 11-0252).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 7–8.

<sup>25</sup> *Shelly Holding*, No. 11-0252, slip op. at 18.

<sup>26</sup> *Id.* at 18.

<sup>27</sup> *Shelly Holding*, No. 11-0252, slip op. at 21 (Lanzinger, J., dissenting) (emphasis added).

<sup>28</sup> Brief for the Ohio Chamber of Commerce, et al. as Amici Curiae Supporting Defendant-Appellant at 4, State of Ohio ex rel. Ohio Attorney General v. Shelly Holding Co., 2012-Ohio-5700 (Ohio Dec. 6, 2012) (No. 11-0252).