

Supreme Court Issues Seminal Decision on Regulation of Greenhouse Gases

On April 2, 2007, the Supreme Court in a 5-4 decision reversed the D.C. Circuit's upholding EPA's decision not to regulate carbon dioxide and other greenhouse gas emissions from motor vehicles. *Massachusetts v. EPA*, ___ S.Ct. ___, No. 05-1120, 2007 WL 957332 (April 2, 2007). The D.C. Circuit in a 2-1 decision had issued a decision in which each of the three judges on the panel wrote separately. One judge agreed that EPA's exercise of judgment as to whether a pollutant could "reasonably be anticipated to endanger public health or welfare" could be based on scientific uncertainty as well as other factors, including the concern that unilateral U.S. regulation of motor vehicle emissions could weaken efforts to reduce other countries' greenhouse gas emissions. The second judge joining the majority opined that petitioners failed to demonstrate the required injury to establish standing but nonetheless joined in the judgment on the merits in the case.

Standing

The Supreme Court's opinion contains a detailed review of the question of whether the petitioners have standing. The court focused primarily on the interests of Massachusetts in bringing the action. The court ruled that each of the elements required to demonstrate standing were present in this case and pointed out that only one petitioner needs to have standing to authorize review.

The court found that Massachusetts has a special position and interest in the action. It is a

sovereign State and the court specifically referenced the fact that the State owns a great deal of territory alleged to be affected. The court ruled that, because Congress has ordered EPA to protect Massachusetts, among others, by prescribing applicable standards and given the State a procedural right to challenge the rejection of its rulemaking petition, the submissions as they relate to Massachusetts satisfied the most demanding standards of the adversarial process. The court finds that EPA's refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent" and there is a substantial likelihood that the relief requested will result in EPA taking steps to reduce that risk.

The court states that the harms associated with climate change are serious and well-recognized and points out that the Government's own objective assessment of the relevant science, together with a strong consensus among qualified experts, indicates that global warming threatens a precipitate rise in sea levels, severe and irreversible changes to natural ecosystems, and other serious consequences.

The court points out that EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming, and thus its refusal to regulate such emissions, at a minimum, "contributes to Massachusetts' injuries." The court dismisses EPA's argument that its decision not to regulate would contribute so insignificantly to the petitioners' injuries that there are no grounds

for the court to find standing to review the petition. The court states that, while regulating motor vehicle emissions may not by itself reverse global warming, it does not follow that the court lacks jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. Finally, it indicates that it attaches considerable significance to EPA's belief that global climate change must be addressed.

EPA's Authority to Regulate Greenhouse Gases

The Supreme Court rejects EPA's position that carbon dioxide is not an "air pollutant" under section 302 and that it thus has no authority to regulate emissions of such gases from new motor vehicles. The court reviews the statutory definition of "air pollutant" and finds that carbon dioxide comes within the scope of each aspect of the definition. It also states that EPA identified nothing that suggested that Congress meant to curtail EPA's power to treat greenhouse gases as air pollutants. It rejects EPA's contentions regarding Congress' intention that there be interagency collaboration and research to better understand climate change, rather than that EPA undertake regulation of greenhouse gases, pointing out that the Agency's pre-existing mandate is to regulate "any air pollutant" that may endanger the public welfare. The court also dismisses as a basis for not regulating EPA's argument that regulation of motor vehicle carbon dioxide emissions would require it to tighten mileage standards and the Department of Transportation has authority over such standards, not EPA.

EPA's Decision Not to Regulate Greenhouse Gas Emissions

The Supreme Court also rejects EPA's alternative basis for its decision not to regulate greenhouse gas emissions – namely that it would be unwise to do so at this time. The court rules that EPA's reasoning is not

permissible under the Agency's statutory mandate. The court agrees that EPA is given the responsibility of making a "judgment," but rules that the judgment must relate to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." The court rules that EPA can avoid promulgating regulations only if it determines that greenhouse gases do not contribute to climate change or if it provides a reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. In order to exercise its discretion not to regulate, EPA must put forward a reasoned justification for declining to form a scientific judgment. The statutory question is whether sufficient information exists for EPA to make an endangerment finding. The court finds that EPA's reasons for not regulating, such as the existence of voluntary programs and impairment of the President's ability to negotiate with developing nations to reduce emissions, are inadequate policy judgments that have nothing to do with whether greenhouse gas emissions contribute to climate change and do not amount to a reasoned justification for not forming a scientific judgment.

Dissenting Opinions

Two dissenting opinions were issued in the case – one by Chief Justice Roberts and the other by Justice Scalia. Each of the four dissenting justices joined in the two opinions.

Chief Justice Roberts' dissenting opinion is grounded in his analysis that the petitioners do not have standing. He states that global warming may be a "crisis," and even "the most pressing environmental problem of our time." But, he states that the court's standing jurisprudence nonetheless recognizes that redress of grievances of the sort at issue is the function of Congress and the Chief Executive, not the federal courts. He first points out that a petitioner must allege a personal injury "fairly

traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." He states that Massachusetts as a sovereign State is not treated any differently than private litigants under the court's precedents. He points out that there must be a "particularized injury" and that global warming seems "inconsistent with this particularization requirement." In addition, Massachusetts' ownership and potential loss of coastal land as an injury creates "insurmountable problems for them with respect to causation and redressability." He points out that petitioners would be unable to trace their alleged injuries back to the emissions that would be regulated under EPA's standards and could not demonstrate the necessary redressability of the alleged injuries by the adoption of motor vehicle standards. He concludes that the majority has engaged in a "sleight-of-hand" in failing to link up the different elements of the three-part standing test.

Justice Scalia's dissenting opinion argues that, even if petitioners' had standing, the court should uphold EPA's decision not to regulate. He agrees that, if EPA decides to regulate, it must make the requisite findings indicated in the majority opinion. Also, he accepts that EPA must have a reasonable basis for deferring judgment. However, he stresses that the statute says "*nothing at all*" about the reasons for EPA to "*defer*" making a judgment. He points out that the reasons EPA gave are surely considerations executive agencies "*regularly*" take into account (and "*ought* to take into account") when deciding whether to consider entering a new field. He argues that EPA is entitled to deference in declining to make a judgment and would uphold EPA's decision on that ground alone.

In addition, Justice Scalia argues that, contrary to the majority opinion, EPA has stated at great length that it believes the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse

gases contribute to global warming. He includes a lengthy quotation from EPA's Federal Register notice and concludes that he "cannot conceive of what else the Court would like EPA to say."

Finally, Justice Scalia disagrees with the majority's finding that carbon dioxide and other greenhouse gases are necessarily an "air pollutant." He parses the definition and concludes that EPA's position that its historical regulation of air pollution problems that occur primarily at ground level or near the surface of the earth provides a basis for upholding EPA's interpretation that carbon dioxide and other greenhouse gases are not "air pollutants." He argues that the majority never explains why EPA's interpretation that air pollution cannot be interpreted to encompass global climate change is incorrect, "let alone so unreasonable as to be unworthy of *Chevron* deference." □

Supreme Court Vacates Fourth Circuit *Duke Energy* Decision

On April 2, 2007, in *Environmental Defense v. Duke Energy*, the Supreme Court vacated the Fourth Circuit's decision ruling that there must be an increase in the hourly emissions rate for there to be a modification under the 1980 NSR regulations. ___ S.Ct. ___, No. 05-848, 2007 WL 957002 (April 2, 2007). The Supreme Court ruled that the Fourth Circuit's reading of the PSD regulations in an effort to conform them with their NSPS counterparts on "modification" amounted to the invalidation of the PSD regulations. The court explained that judicial review to determine regulations' validity can be obtained only by a petition to the D.C. Circuit within 60 days of EPA's rulemaking.

The Supreme Court rejected the Fourth Circuit's ruling that principles of statutory interpretation mandated that there be an identical regulatory definition of "modification" for NSPS and NSR. The court reviewed

various decisions in which it had concluded that differing interpretations of a statutory term were permissible. The Supreme Court found that nothing in the text or legislative history of the statutory language that added the cross-reference to the NSPS modification definition suggests that Congress meant to eliminate customary agency discretion to resolve questions about a statutory definition by looking to the surroundings in which the defined term appears. The court held that “EPA’s construction need do no more than fall within the limits of what is reasonable, as set by the Act’s common definition.”

After finding that the implementation of the “modification” definition under PSD need not be identical to the NSPS definition, the Supreme Court held that the Fourth Circuit’s construction of the 1980 PSD regulations was not a permissible reading of their terms. The court explained that the Fourth Circuit’s reasoning that the PSD regulations must conform to their NSPS counterparts had “led the court to read those PSD regulations in a way that seems to us too far a stretch for the language used.” The court stated that “the 1980 PSD regulations may be no seamless narrative, but they clearly do not define a ‘major modification’ in terms of an increase in the ‘hourly emissions rate.’” The court pointed out that, while the “major modification” definition in the PSD regulations specifies no rate at all, when a rate is mentioned, as in the regulatory definitions of the terms “significant” and “net emissions increase,” the rate is “annual not hourly.” The court further emphasizes that “‘actual emissions’ must be measured in a manner that looks to the number of hours the unit is or probably will be actually running.” It concludes stating that “[w]hat these provisions are getting at is a measure of actual operations averaged over time, and the regulatory language simply cannot be squared with a regime under which ‘hourly rate of emissions’ . . . is dispositive.”

The Supreme Court found that the reasons invoked by the Fourth Circuit for its different view are “no match for these textual differences.” The court points out that the district court opinion in the *Duke Energy* case, upon which the Fourth Circuit relied, found that “the exclusion for increases in the hours of operation or in the production rate” supported an interpretation of the PSD regulations that calls for emissions increases to be determined based upon a comparison of the pre- and post-change hourly rate of emissions with the hours of operation being “held constant.” The Supreme Court points out that the exclusion for increased hours of operation and production rate is an exclusion from the definition of physical change or change in the method of operation, which is only one component of the definition of “major modification.” The court stresses that the purpose of this exclusion is to allow sources to increase their hours of operation of production rate during unmodified normal operations. “In other words, a mere increase in the hours of operation, standing alone, is not a ‘physical change or change in the method of operation.’”

The Supreme Court points out that the *Duke Energy* district court “assumed that increases in operating hours (resulting in emissions increases at the old rate per hour) must be ignored even if caused or enabled by an independent” change. The court ruled that this reading “turns an exception to the first component of the definition into a mandate to ignore the very facts that would count under the second [component], which defines ‘net emissions increase’ in terms of ‘actual emissions.’”

The Supreme Court also finds that the second reason invoked by the Fourth Circuit for its interpretation, the early 1980s EPA staff opinions by Edward Reich indicating that a change increasing a source’s hours of operation, “without an increase in the hourly emissions rate, cannot be a PSD ‘major modification.’” The court states that these brief and conclusory

statements are not “heavy ammunition” and their “persuasiveness is elusive.” Also, the court points out that they are not “unembarrassed by any ‘contrary Agency pronouncements.’” The court then references the 1988 EPA memo issued in connection with its review of the WEPCO replacement projects. The court finds the Reich letters to be “an isolated opinion of an agency official” which do “not authorize the court to read a regulation inconsistently with its language.”

After reviewing the Fourth Circuit’s reasoning and finding it unpersuasive, the Supreme Court states that “[i]n sum, the text of the 1980 PSD regulations on ‘modification’ doomed the Court of Appeals’s attempt to equate those regulations with their NSPS counterpart.” As a result, it sees the Fourth Circuit’s interpretation of the PSD regulations “as an implicit invalidation of those regulations,” which is a form of judicial review which could only be obtained in the D.C. Circuit within 60 days of EPA rulemaking.

Finally, the Supreme Court points out that Duke Energy “charges that the agency has taken inconsistent positions and is now ‘retroactively targeting 20 years of accepted practice.’” The court states that neither the district court nor the First Circuit has considered this claim and that, “to the extent it is not procedurally foreclosed, Duke may press it on remand.”

There are several implications of the Supreme Court’s decision that are noteworthy beyond the central ruling that the 1980 NSR regulations do not provide for “major modifications” to be based upon whether there is an increase in a source’s hourly emissions rate. First, in the court’s review of the NSPS regulations, it in no way suggests that EPA acted improperly in basing the NSPS “modification” definition on whether a change results in an increase in the hourly emissions rate. The court notes that all parties accept the interpretation that the NSPS “rate” means “the maximum rate possible for the technology.” The implicit acceptance of

basing the modification definition on whether there is an increase in the maximum hourly emissions rate conflicts with the D.C. Circuit ruling that the statutory definition of “modification” compels that the emissions increase determination be based upon whether there is an increase in “actual emissions.” Thus, it would seem that the Supreme Court’s decision provides support for the legality of EPA’s adoption of an NSR “modification” definition for electric utilities as proposed (and potentially for non-utility sources) based upon whether there is an increase in the maximum hourly emissions rate.

Another interesting feature of the Supreme Court’s reasoning is that it implicitly recognizes that the 1980 NSR regulations call for an emissions increase to be determined based upon an “actual-to-projected-actual” test (not an “actual-to-potential” test). As noted above, the court points out that “‘actual emissions’ must be measured in a manner that looks to the number of hours the unit is *or probably will be* actually running (emphasis added).” However, the court recognizes, in a footnote discussing the consideration of future increases in hours of operations resulting from a change that, as stated in the *Puerto Rican Cement* case, it is permissible to “‘use the potential output of *new* capacity as a basis for calculating an increase in emissions levels’ (emphasis in original).” □

EPA Issues NSR “Reasonable Possibility” Remand Proposal

On February 28, 2007, EPA issued its proposal to respond to the D.C. Circuit’s remand of the “reasonable possibility” recordkeeping and reporting standard of the 2002 NSR reform rules. In *New York v. EPA*, the D.C. Circuit remanded for EPA either to provide an acceptable explanation for its “reasonable possibility” standard or to devise an appropriately-supported alternative. In response to the Court’s remand, EPA is

proposing two alternative options to clarify what constitutes “reasonable possibility” and when the “reasonable possibility” recordkeeping requirements apply. EPA characterizes the two options as the “percentage increase trigger” and the “potential emissions trigger.”

Under the NSR reform rules, a source relying on the “actual-to-project-actual” emissions increase test to determine non-applicability of the NSR permitting provisions is required to (1) keep certain records describing its non-applicability determination prior to construction, and (2) monitor emissions, calculate annual emissions, and maintain records of emissions for five years (or ten years in certain cases) once the change is completed, if the source believes there is a “reasonable possibility” that the change may result in a significant emissions increase. If annual emissions in the five (or ten) year period differ from pre-construction projections, the source is required to file a report with EPA.

EPA’s preferred option is the “percentage increase trigger.” Under this option, the trigger of whether there would be a “reasonable possibility” of a significant emissions increase would be based upon whether the source projects an increase of 50 percent of the significance level for the relevant regulated NSR pollutant. This increase would be determined based upon a review of the proposed project prior to any netting that may be taken into account. EPA solicits comment on using a different percentage to trigger recordkeeping and reporting, “such as 25, 33, 66, or 75 percent.” EPA notes that, while records would not be required if the projected increase is less than 50 percent of the significance threshold, numerous other types of records are typically maintained by sources that would give EPA “an adequate basis” to investigate possible NSR violations.

Under the alternative approach, the “potential emissions trigger,” the source would be required

to maintain records if the “project’s post-change potential emissions are at or above significance levels.” I am assuming that the intent is that the difference between the baseline emissions and the potential emissions of the affected units would be equal to or greater than the significance levels. However, EPA does not phrase the “potential emissions trigger” in this way and thus it would appear that if the total potential emissions of the project are equal to or greater than the significance levels, reporting and recordkeeping would be required. EPA gives this option short shrift and it is clear that it is not oriented towards adopting the “potential emissions trigger.” □

Sixth Circuit Hands Down Significant NSR Statute of Limitations Decision

On March 2, 2007, the Sixth Circuit Court of Appeals issued a 2-1 decision in *National Parks Conservation Association v. TVA*, in which it ruled that the 5-year statute of limitations does not bar claims for civil penalties for PSD permitting violations involving projects constructed more than five years prior to an action being filed. The federal district court in Tennessee had held that the statute of limitations had run on the claim for civil penalties and that the concurrent-remedy doctrine barred the claim for injunctive relief. As you know, the majority rule of courts considering the applicability of the statute of limitations to PSD pre-construction claims has been that the statute of limitations bars claims for civil penalties for projects constructed more than five years prior to the time an action is filed. The single construction project at issue here was a tube replacement at a TVA power plant that occurred in 1988.

The court stated that the parties framed the dispute as one as to whether there was a “continuing violation” of the Act. The court

stated that the continuing violation doctrine permits the court to “consider as timely all relevant violations ‘including those that would otherwise be time[-]barred.’” The court noted that the *Duke Energy* court had concluded that PSD violations did involve “continuing violations,” while the courts in the *Niagara Mohawk* and *Westvaco* cases had found that PSD violations are not continuing violations.

The court said it need not decide whether the continuing-violation doctrine applies because it concluded that there was a “series of discrete violations rather than a single violation that may or may not be ‘continuing’ in nature.” It pointed out that courts “have long distinguished continuing violations, which toll the applicable statute of limitations, from repetitive discrete violations, which constitute independently actionable individual causes of action.”

Based upon its review of the PSD regulations, the court rules that the requirement to apply BACT for any pollutant resulting in a significant net emissions increase “creates an ongoing obligation to apply BACT, regardless of what terms a preconstruction permit may or may not contain.” Thus, even if TVA had obtained a construction permit that did not require BACT, that approval would not relieve TVA from its requirement to comply with BACT. The court ruled that “failing to apply BACT is actionable, and this cause of action manifests itself anew each day a plant operates without BACT limits on emissions.” The court then ruled that claims for penalties for the five years prior to plaintiffs’ filing their action are timely and ones for periods prior to that are time-barred.

In addition to the failure to apply BACT, the court also found that TVA violated “its ongoing requirement to obtain the appropriate construction permit after completing construction.” The court stated that, under Tennessee’s SIP, the obligation to obtain a construction permit applies even to those sources that did not obtain the appropriate

permits before construction. It quotes a provision in the Tennessee SIP which provides that where a source or modification “was constructed without first obtaining a construction permit, a construction permit may be issued to the source or modification to establish as conditions of the permit, the necessary emissions limits and requirements to assure that these regulatory requirements are met.” The court finds that this provision creates a duty not only to obtain a construction permit prior to construction but, if not obtained, to obtain one containing proper emissions limits post-construction as well. The court thus is relying on a provision intended to allow sources to rectify failure to obtain a construction permit through a post-construction submission to find an ongoing obligation to obtain a permit after construction.

Tennessee’s post-construction provision includes what the court recognizes as “seemingly permissive language (‘may be issued’).” However, the court states that the subsequent sentence requiring that air quality standards and other regulatory requirements “will be met” shows that the post-construction permit provision is, in effect, a mandatory requirement. As a consequence, the court finds that a violation for failure to obtain a construction permit “manifests itself each day the plant operates.”

The court majority finds it unnecessary to address the district court’s application of the concurrent-remedy doctrine. The district court ruled that that doctrine barred claims for injunctive relief because it had found that the statute of limitations had run on claims for civil penalties.

As indicated above, one judge dissented from the court’s ruling. (Interestingly, the majority opinion was written by a Clinton appointee and joined by a Carter appointee; the dissenting judge is a Reagan appointee.) The dissenting judge states that she does not agree that the case involves a “series of discrete violations.” The

case “involves, at most, a single violation that occurred in 1988,” and therefore, the statute of limitations expired five years later. She points out that, under Tennessee law, TVA is required to obtain two separate permits: a construction permit and an operating permit. She states that the case only involves a claim of a failure to obtain a construction permit prior to a plant modification in 1988 and that no one has alleged a violation of TVA’s operating permit. She states that she would rule that, if the plaintiffs’ allegation is true, the situation involves a “series of discrete *harms* and not a series of discrete *violations*.” She concludes that the “discrete violations” approach is the “plaintiffs’ strained attempt to circumvent their failure to act within the statute of limitations.” However, she adds that, if plaintiffs “have a claim that the TVA is violating its operating permit by emitting pollutants in excess of BACT levels, then they should file that claim.”

This decision is one of potentially far-reaching ramifications. To my knowledge it is the first federal appellate court decision ruling on whether the 5-year statute of limitations bars claims for civil penalties for PSD construction violations occurring more than five years prior to the filing of an action. EPA and environmental groups will feel much more emboldened in seeking civil penalties for PSD construction claims arising in the first instance more than five years prior to the time of an action, at least until another federal appellate court reaches a contrary decision or the Sixth Circuit decision is overturned on rehearing or successfully appealed to the Supreme Court. □

Ohio District Court Rules on Scope of RMRR Exclusion

On February 15, 2007, the Ohio Federal District Court issued a ruling in the *American Electric Power* (AEP) case denying the defendant’s partial summary judgment motion

based on the routine maintenance, repair and replacement (RMRR) exclusion. AEP argued that the applicable standard is “whether the replacement work is routine within the relevant industry.” The court accepted the plaintiffs’ (EPA and states) argument that the correct standard is to examine the exemption’s applicability on a case-by-case basis by considering the nature and extent of the activity, the activity’s purpose, its frequency, and its cost.

The court indicated that it agreed with the relevant analysis contained in a “line of persuasive-authority cases” that include the *Ohio Edison* case. The court then expressly adopted and incorporated the relevant portions of the opinion and order in *Ohio Edison*. In agreeing that the multi-factored case-by-case approach is the correct standard, the court did say that “industry practices necessarily [will] inform [] that inquiry.”

After indicating its reliance on the *Ohio Edison* analysis, the court stated that the RMRR exclusion “targets a *narrow* scope of activity that produces *de minimis* emission effects and not potentially infrequent physical changes as determined by the very industry that the statutory scheme targets.” The court further stated that to “conclude otherwise and consider *only* industry practices would be to ignore the plain language of the statutory regulations by judicially erecting a curious scheme in which the regulated determine the applicability of the regulations without an indication of supporting legislative intent. Finally, the court concluded that “[s]uch a construction would in fact thwart legislative intent, and it is the intent of Congress and the plain language of the statutes, the implemented regulations and the Environmental Protection Agency interpretation that control.” □

Kentucky District Court Issues Rulings on RMRR and Statute of Limitations

Two rulings were recently issued in *U.S. v. East Kentucky Power Coop. (EKPC)*, CA No. 04-34-KSF (E.D. KY, Central Division).

RMRR Ruling

On March 29, 2007, the court issued an opinion ruling on how the routine maintenance, repair and replacement (RMRR) exclusion should be applied in an EPA NSR enforcement action. EPA had brought a motion for summary judgment seeking to have the court rule that the RMRR exclusion should be applied based upon whether activities are “routine at the unit.” In response, EKPC took the position that the determination should be based upon whether activities are “routine in the industry.”

The court’s opinion is primarily a detailed review of decisions in other cases on how the RMRR exclusion should be applied. After reviewing the decisions in *WEPCO*, *SIGECO*, *Ohio Edison*, *Duke Energy*, *Alabama Power*, and *American Electric Power*, the court found that “the *Duke Energy* case presents a persuasive rationale for rejecting EPA’s position.” The court denied EPA’s motion and ruled that it will “ultimately determine whether EKPC’s projects fall under the RMRR exclusion by applying the *WEPCO* multi-factor test -- nature and extent, purpose, frequency, and costs -- with reference to the industry as a whole, not just the particular EKPC unit at issue.” The court further ruled that this “does not mean that a particular project will be considered routine simply because it has been performed by another entity within the industry.” The court explained that the *WEPCO* 4-factor test should be applied taking into account work conducted at the particular EKPC unit, the work conducted by others in the industry, and the work conducted at other individual units within the industry.

The court also considered whether EPA or EKPC would bear the burden of proof in connection with the question of whether particular projects come within the scope of the RMRR exclusion. After finding that only two courts had considered this issue and had split -- one ruling that EPA should bear the burden and the other that the source should -- the court concluded that the RMRR exclusion is an exemption and thus EKPC should bear the burden of proving its availability once EPA has demonstrated that there was a “modification” -- *i.e.*, “a physical change that resulted in a net emissions increase.” In so ruling, the court rejected the ruling in *Duke Energy* that EPA should bear the burden of proving that a project did not come within the RMRR exclusion.

Statute of Limitations Ruling

On March 27, 2007, the judge in the *EKPC* case issued a ruling on the statute of limitations defense. EKPC filed a partial summary judgment motion seeking to have the court find that the statute of limitations barred claims for civil penalties based upon alleged NSR modifications constructed more than five years prior to the time of the filing of EPA’s action.

The court reviewed a number of district court decisions holding that the statute of limitations bars such claims for civil penalties and noted that one court described this finding as the majority rule. The court pointed out, however, that other district courts have concluded that such claims are not barred by the statute of limitations.

The court then proceeded to review the Sixth Circuit decision in *National Parks Conservation Ass’n v. TVA*. The court specifically referenced one of the provisions at issue in the *TVA* case, which provides that a “major modification *shall apply* best available control technology for any pollutant for which it would result in a significant net emissions increase at the source.”

In *TVA*, the Sixth Circuit ruled that failing to apply BACT was actionable and that the cause of action manifested itself anew “each day a plant operates without BACT limits on its emissions.” The Sixth Circuit then ruled that claims for penalties based upon failure to apply BACT in the most recent five years as a result of construction undertaken more than five years before would not be time-barred.

The judge in the *EKPC* case indicated that Kentucky has an almost identical provision to that addressed in the *TVA* case. The court proceeded to rule that, as in *TVA*, the plaintiff (EPA) could seek penalties for failing to implement BACT within the past five years based upon projects undertaken more than five years before.

The Sixth Circuit in *TVA* also addressed the timeliness of the plaintiff’s claim that the defendant violated an alleged ongoing requirement to obtain an appropriate construction permit even after construction was completed. In *EKPC*, even though Kentucky did not have language such as that in the Tennessee SIP providing for construction permits to be obtained after construction had been undertaken, the court referenced a Kentucky provision which requires construction and operation in accordance with the application for a permit and the terms of an approval to construct and concluded that this Kentucky regulation also resulted in there being a violation that manifests itself each day the plant operates. The Kentucky court rejected *EKPC*’s argument that the absence of a provision such as the one in the Tennessee SIP should result in a different outcome than in the *TVA* case.

The court next reviewed *EKPC*’s summary judgment motion on the NSPS claims. The court ruled that the five-year statute of limitations does bar alleged violations based

upon notice and reporting requirements. The court indicates that *EKPC* did not argue that the statute of limitations barred claims for failure to operate under the terms of the NSPSs at issue and thus it did not specifically rule on this issue.

The bottom line is that the Sixth Circuit decision in *National Parks Conservation Ass’n v. EPA* is already having a significant effect on district court rulings on whether the statute of limitations bars claims for civil penalties for construction undertaken more than five years prior to the time an enforcement action is filed. □