

# Clean Air Act Litigation Developments

## Table of Contents

	Page Number
Citizen Suits.....	LD-1, LD-33, LD-45, LD-57, LD-83, LD-111, LD-129, LD 151, LD-175, LD-201, LD-217, LD-249
Civil Penalty Amounts .....	LD-8
“Continuing Violation” .....	LD-8, LD-60, LD-86, LD-176, LD-217, LD-249
Criminal Liability.....	LD-47
Disapproval of SIP Provisions.....	LD-61
Environmental Justice.....	LD-48, LD-61, LD-87
Evidence; Burden of Proof.....	LD-11, LD-37
“Fair Notice” Requirement .....	LD-12, LD-39, LD-63, LD-132, LD-217
Global Warming.....	LD-176, LD-217, LD-231, LD-241
Justiciability	LD-14, LD-39, LD-49, LD-63, LD-91, LD-111, LD-134, LD-176, LD-220, LD-243
MACT Standards/Section 112.....	LD-16, LD-49, LD-64, LD-93, LD-115, LD-135, LD-153, LD-220, LD-231
“Major Source” Definition .....	LD-17
Minor NSR Permits .....	LD-18

<b>Monitoring</b> .....	LD-50, LD-66, LD-137, LD-157, LD-177, LD-202, LD-233
<b>NAAQS</b> .....	LD-51, LD-95, LD-116, LD-202, LD-221, LD-234, LD-243, LD-249
<b>NESHAP Enforcement</b> .....	LD-22
<b>New Source Performance Standards</b> .....	LD-67, LD-139, LD-159, LD-222
<b>NSR/PSD Requirements</b> .....	LD-26, LD-41, LD-54, LD-71, LD-99, LD-119, LD-139, LD-161, LD-177, LD-203, LD-222, LD-236, LD-245, LD-251
<b>Nonattainment Designations</b> .....	LD-40, LD-159
<b>NO<sub>x</sub> SIP Call</b> .....	LD-68, LD-97
<b>Overfiling</b> .....	LD-69, LD-98
<b>“Potential to Emit” Definition</b> .....	LD-23
<b>Regional Haze</b> .....	LD-123, LD-211
<b>Section 126 Rule</b> .....	LD-106
<b>SIP Provision Enforcement</b> .....	LD-29, LD-42, LD-75, LD-145, LD-260
<b>Standing</b> .....	LD-168, LD-194, LD-211, LD-226, LD-247
<b>Statute of Limitations</b> .....	LD-30, LD-43, LD-75, LD-110, LD-125, LD-145, LD-196, LD-212, LD-226, LD-247, LD-260
<b>Title V Permit Program</b> .....	LD-30, LD-55, LD-75, LD-110, LD-125, LD-148, LD-172, LD-197, LD-213, LD-229, LD-247, LD-265

# Clean Air Act Litigation Developments 2010

## Citizen Suits

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*See National Parks Conservation Ass'n v. TVA*, No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. March 31, 2010) (NSR/PSD Requirements)

*See Sierra Club v. Dairyland Power Cooperative*, CA No. 10-cv-303-bbc, 2010 WL 294622 (W.D. Wisc. Oct. 21, 2010) (Statute of Limitations)

*See Sierra Club v. Otter Tail Power*, 615 F.3d 1008 (8th Cir. 2010) (NSR/PSD Requirements)

## “Continuing Violation”

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*See Sierra Club v. Dairyland Power Cooperative*, CA No. 10-cv-303-bbc, 2010 WL 4294622 (W.D. Wisc. Oct. 21, 2010) (Statute of Limitations)

*See Sierra Club v. Otter Tail Power*, 615 F.3d 1008 (8th Cir. 2010) (NSR/PSD Requirements)

*See United States v. Midwest Generation, LLC*, 694 F. Supp. 2d 999 (N.D. Ill. 2010) (Statute of Limitations)

## NAAQS

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*North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010)

On July 26, in *North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010), the Fourth Circuit overturned an injunction granted by a North Carolina district court under which TVA would have been required to install controls at four power plants in Alabama and

Tennessee based on the lower court's determination that the TVA plants' emissions constituted a public nuisance in North Carolina. The Fourth Circuit summarized the basis for its decision, as follows:

This ruling [the district court's injunction] was flawed for several reasons. If allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike. Moreover, the injunction improperly applied home state law extraterritorially in direct contradiction to the Supreme Court's decision in *International Paper Co. v. Ouellette* [citation omitted]. Finally, even if it could be assumed that the North Carolina district court did apply Alabama and Tennessee law, it is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance. For these reasons the judgment must be reversed.

Highlights of the Fourth Circuit decision are set out below:

- At the outset, the Court's opinion contains an extensive discussion of the relevant provisions of the Clean Air Act that address attainment and maintenance of National Ambient Air Quality Standards, which the Court indicates it explained at some length "in order to emphasize the comprehensiveness of its coverage."
- The Court states that to "replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country."
- The opinion quotes approvingly from the Supreme Court's decision in *International Paper*, which the Fourth Circuit states "addressed this precise problem of multiplicity" and "emphasized that allowing 'a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.'"
- The Court states that "public nuisance law doubtless encompasses environmental concerns," but states that, if "we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bull fights," we will be "hard pressed to derive any manageable criteria."

- The Court recognizes the existence of the Clean Air Act’s savings clause, but states that the Court “cannot allow non-source states to ascribe to a generic savings clause meaning that . . . Congress never intended.”
- After reviewing the Act’s prescribed role for federal and state agencies and their respective processes, the Court states that “it is not open to this Court to ignore the words of the Supreme Court, overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of source states and permit holders in favor of the nebulous rules of public nuisance.”
- The Court specifically rules that the district court’s decision “compromised principles of federalism by applying North Carolina law extraterritorially to TVA plants located in Alabama and Tennessee and states further that there is “no question that the law of the states where emissions sources are located . . . applies in an interstate nuisance dispute.”
- The Court further states that “TVA’s plants cannot logically be public nuisances under Alabama and Tennessee law where TVA is in compliance with EPA NAAQS, the corresponding state SIPs, and the permits that implement them.”
- Finally, the Fourth Circuit points out that North Carolina has an avenue specifically provided under the Clean Air Act, section 126, under which it can pursue its concerns about interstate pollution.

## NSR/PSD Requirements

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*National Parks Conservation Ass’n v. TVA*, No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. March 31, 2010)

In *National Parks Conservation Ass’n v. TVA*, No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. March 31, 2010), the court ruled that major replacement projects carried out by TVA at its Bull Run plant came within the routine maintenance, repair, and replacement (“RMRR”) exclusion and, accordingly, dismissed plaintiffs’ claims that the projects violated the New Source Review (“NSR”) requirements in the Tennessee SIP. In a prior ruling, the court had dismissed the NSR claims on grounds that they were barred by the statute of limitations, but that decision was overturned by the Sixth Circuit. The decision is notable because of the extent of the work found to constitute RMRR.

The projects under consideration involve the replacement of an economizer and replacement of significant portions of the secondary superheater. The court applied the four-factor RMRR test to reach its decision that the projects constitute RMRR. The four factors reviewed were:

the nature and extent of the project; the purpose of the project; the frequency with which a project of the sort presented is conducted, both at the unit and in the industry as a whole; and the cost of the project.

## **Application of the Four-Factor RMRR Test**

### *Economizer Project*

Key facts reviewed in connection with replacement of the economizer were the following:

- The economizer had not previously been replaced in the 21 years since the Bull Run plant was built in 1967.
- The project work involved replacement of over 67 miles of two-inch diameter tubing, weighing approximately 887 tons.
- TVA had to hire a large number of outside craftsmen and laborers to complete the economizer project.
- The economizer project was predictive in nature, *i.e.*, it was undertaken to avoid failure of the economizer after TVA discovered conditions that it believed would threaten continued operation of the plant.
- The cost of the project was \$6,456,599.
- The project required the approval of TVA's Board of Directors.

### *Superheater Project*

Key considerations reviewed in connection with the superheater project are as follows:

- Three quarters of the tubing in the finishing superheater at Bull Run was replaced. Combined with the economizer project, this work represented the removal and replacement of more than a quarter of all the tubing in the boiler at Bull Run.
- The purpose was to reduce the number of forced outages and increase the availability and reliability of the unit. It also would extend the life of this section of the boiler by approximately 20 years. Significant secondary superheater projects had been undertaken at the plant, but it was unclear whether others were comparable to this project. The cost of the superheater project was \$1,846,680.

## Conclusions of Law

### *Economizer Replacement*

The following are legal findings made with regard to the economizer replacement:

- The court found the nature and extent of the economizer replacement to be “somewhat significant,” pointing out the extensive work that was required to carry out this project. While the court noted that the project was capitalized, it pointed out that TVA performed more than 2,000 projects at its 11 coal-fired power plants between 1969 and 1988 with costs exceeding \$100,000, and many of these were capitalized. The court concluded that replacing an economizer “is not a small task, but is also not an extraordinary task.” As a result, the court found that the nature and extent factor “favors TVA.”
- The court found that the purpose of the project to reduce the number of forced outages and to extend the life of the economizer by approximately 20 years did not lead it to “consider this finding to weigh against TVA.” It further found that any “‘life extension’ effected as a result of the economizer replacement was thus a byproduct of, rather than the primary purpose of, that replacement.”
- In considering the frequency factor, the court pointed out that testimony had been presented indicating that, in a survey of 219 units, 202 of which were equipped with economizers, 98 had undergone some economizer replacement activity as of the year 2000. Also, quite a few of the coal-fired power plants like Bull Run that were built in the 1960s and 1970s had replaced their economizers by the 1980s. The court indicated that an event occurring once every 20 years would not by itself mean that the project could not be considered “frequent.” The court indicated that the testimony of the plaintiffs “over-emphasize[d] the significance of the number of times a particular type of element is replaced at a single plant, as opposed to the frequency with which such an element is replaced at units across the industry.” The court noted that the frequency survey relied upon by TVA had been included in a report in a formal briefing to the President. The court found that the frequency factor also favored TVA.
- The court reasoned that the cost for the economizer replacement “was not uncommonly high.” It pointed out that in the period from 1969 to 1998, TVA performed 120 capital projects at its coal-fired plants that were more expensive than the economizer replacement. Several of those projects had been at the Bull Run plant. The court concluded that the cost factor also favored TVA.

### *Superheater Replacement*

The court made the following legal findings with regard to the superheater replacement:

- As with the economizer project, the court found that the superheater replacement “was somewhat significant.” It pointed to the significance of the work that was required. It also noted that the project involved replacing the existing tube material with a different type of tube material. It is unclear whether Board approval was required, but the court stated that “the fact that Board approval would be required for a project does not automatically disqualify the project from being RMRR.” It noted that the project was capitalized. On balance, the court found that the nature and extent factor favored TVA.
- While the purpose of the superheater replacement was to reduce the number of forced outages and extend the life of the boiler by approximately 20 years, the court pointed out that the replacement was “not to alter fundamentally this piece of equipment at the Bull Run plant,” even though the material did differ from the original tubing. It did not increase the generating capacity on either a continuous basis or a peaking basis. And, it did not increase the maximum hourly emissions capability of the unit. The court then found that the purpose factor favored TVA.
- The court found that superheater replacements are “common in the industry.” It again pointed out fact that plaintiffs’ testimony focused on frequency of replacement at the unit as opposed to replacement within the industry. The court then found that the frequency factor favored TVA.
- The court stated that the cost for the superheater replacement was “not uncommonly high.” It noted the large number of similar capital projects in the industry and, while the project was capitalized, it indicated that the relevant consideration is the size of the cost as compared “to other capital projects.” Based upon similar projects being conducted in the industry, the court found that the cost factor favored TVA.

### **Holding of the Court**

Based upon its review of the facts and its conclusions of law, the court ruled that the economizer replacement and superheater project constituted RMRR. The court reviewed other cases where other similar projects had been found to constitute RMRR and found grounds for distinguishing those decisions. In particular, the court reviewed the *WEPCO* and *Ohio Edison* cases.

#### ***Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010)**

On August 12, in *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010), the Eighth Circuit issued a ruling on the Sierra Club’s challenge to a number of projects undertaken at Otter Tail’s power plant in Big Stone, South Dakota. Sierra Club had alleged

PSD and NSPS violations. The bulk of the decision focuses on Sierra Club's PSD violations. The Court denied Sierra Club's PSD and NSPS claims, specifically ruling that the federal five-year statute of limitations bars claims for civil penalties for projects undertaken more than five years prior to the action and, under the concurrent remedy doctrine, claims for equitable relief (*i.e.*, BACT) are barred as well. (The concurrent remedy doctrine does not apply in actions brought by the government.)

The projects involve three types of changes at the power plant. The first was a change to the primary fuel from lignite coal to subbituminous coal in 1995. The second was carried out in 1998 to increase the surface area of the primary superheater of the plant's boiler. The third involved changes in 2001 to allow the plant to supply steam to a nearby ethanol plant.

The action was brought by Sierra Club under the citizen suit provision in section 304(a) of the Act. EPA filed an *amicus* brief in support of Sierra Club's legal position that the five-year statute of limitations did not bar its claims.

Highlights of the Court's decision are as follows:

- The Court first reviewed the statutory language and concluded that the PSD requirements and the Act's citizen suit provisions are focused on construction, not operation. The Court noted that other provisions of the Act, in contrast, clearly establish operational conditions. It pointed out that, where "Congress has intended to establish operational conditions under the Clean Air Act, it has clearly said so. But it has not done so for the PSD program."
- The Court rejected Sierra Club's claim that several regulatory provisions establish an ongoing duty for a polluting facility to obtain a PSD permit and to employ BACT as conditions of operation. The Court ruled that "a close reading" of the provisions pointed to by Sierra Club "shows that interpretation is incorrect." The Court's opinion includes a good review of the statutory provisions that EPA and Sierra Club rely on in arguing that the violation of the PSD requirements would be a continuing violation.
- The Court expressly notes that the command to apply BACT "is not a freestanding requirement." It points out that its conclusion is "bolstered by the practical nature of BACT," which results in establishing BACT limits that "are tailored to each facility 'on a case-by-case basis' during the PSD permitting process."
- The Court specifically rules that the Eleventh Circuit's decision finding that the five-year statute of limitations bars claims for civil penalties and that, under the concurrent remedy doctrine, equitable relief is barred as well, properly interprets the Act and EPA's regulations and correctly applies the concurrent remedy doctrine.

- The Court distinguishes the Sixth Circuit’s decision in *National Parks & Conservation Association v. TVA*, explaining that the Tennessee SIP contains a provision that was read to require an ongoing BACT requirement.
- After concluding that civil penalties are barred under the five-year statute of limitations, the Court next reviews the legal principles under which equitable remedies are barred where civil penalty provisions are statutorily barred. The Court approvingly quotes the Eleventh Circuit’s decision in which it stated that “where a party’s legal remedies are time-barred, that party’s concurrent equitable claims generally are barred’ as well.” The Court then reviews Sierra Club’s argument that the concurrent remedy doctrine was improperly applied in the Eleventh Circuit’s decision and rules that the Eighth Circuit’s interpretation of the concurrent remedy doctrine is “in accord with” the Eleventh Circuit’s decision and others that it cites.
- Finally, the Court rejects Sierra Club’s claim that the 2001 ethanol plant project triggered NSPS. The Court finds that the proper time for Sierra Club to challenge the absence of NSPS limits was when Otter Tail obtained its permit for the ethanol plant project. In addition, the Court ruled that Sierra Club’s claim, at this point, represents an impermissible collateral attack on Otter Tail’s Title V operating permit. The Court finds that Sierra Club’s challenge would be properly brought in the first instance in the appellate court, and the district court would not have jurisdiction to consider Sierra Club’s Title V claim. The Court finds that, by virtue of the fact that Sierra Club could have raised its NSPS claim during the permitting process and did not do so, its challenge is not subject to review in the enforcement action. The Court rules that Congress effectively foreclosed the alternative avenue of citizen suit enforcement by creating an avenue of judicial review under section 307.
- The Court points out that the interpretation that Sierra Club urges “would allow plaintiffs either to challenge permitting authorities’ applicability determination during the permitting review process or to wait and raise the same issues in an enforcement action.” It further points out that such a scheme “could lead to simultaneous suits by multiple parties raising the same or similar issues” and thus “would not only waste judicial resources, but could also result in inconsistent decisions.”
- Sierra Club also argues that the district court’s interpretation effectively “excises the ‘permit shield’ provision.” It bases it on the fact that, although the permitting authority determined that NSPS did not apply to the 2001 modifications, it did not explicitly incorporate that determination in the facility’s permit. The Court states that the district court’s interpretation may restrict the permit shield’s applicability, but “this does not persuade” the Court that its interpretation is erroneous. The Court then rules that its jurisdictional provisions govern and that a “fundamental rule of construction holds that [the Court] must not expand federal court jurisdiction in service to a broad reading of the permitting shield.”

## *United States v. Cinergy Corporation*, 623 F.3d 455 (7th Cir. 2010)

On October 12, 2010, the U.S. Court of Appeals for the Seventh Circuit issued a decision in *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010), addressing issues that will be of significance in connection with future greenhouse gas (GHG) and new source review (NSR) permitting. In reaching a decision that the federal district court could not apply an annual emissions increase test for determining SO<sub>2</sub> increases, the court ruled that EPA had not approved an amended state implementation plan (SIP) providing for such a test and thus the SIP's hourly emissions increase test would apply. In ruling on an issue relating to an increase in annual NO<sub>x</sub> emissions, the court held that future projections in annual emissions must be based upon realistic projections of emissions for the cycling power plant at issue, rather than for a continuously-operated baseload plant.

The case before the Seventh Circuit involved EPA's NSR enforcement action against the Cinergy power plant that was initiated more than a decade ago. In the most recent round of litigation, a jury had ruled that Cinergy would be liable for NSR violations with respect to only four of the fourteen units at issue. In an earlier appeal to the Seventh Circuit, the court ruled that an annual emissions increase test would apply to units modified after 1994 and the case was returned to the district court for the jury trial applying this test. In the current appeal, the projects at issue were ones that were undertaken prior to 1994 when the annual emissions increase test was substituted in the SIP for the hourly increase test previously approved by EPA.

### **SIP Interpretation Issue**

The first issue addressed by the court was whether increases in SO<sub>2</sub> should be determined in connection with projects undertaken between 1989 and 1992 based upon an hourly increase test or an annual emissions test. The court reviewed the history of Indiana's relevant SIP provisions and pointed out that Indiana adopted a definition of modification to conform to the actual emissions standard prior to EPA's actual approval of an hourly emissions increase test in 1982. However, Indiana did not submit a SIP revision for many years, which EPA approved in 1994.

The court reviews the approved language in the pre-1994 SIP and concludes that it provided for an hourly emissions increase test. EPA points out, however, that it had informed Indiana that it was necessary to adopt an annual increase test prior to EPA's approval of the hourly test and Indiana had agreed to revise its definitions to conform to EPA's interpretation. Indeed, EPA had stated that it would “rule-make on these revised [State] regulations . . . upon their submittal” in its approval of Indiana's 1981 SIP submission. Thus, EPA argued that Cinergy was on notice that an annual emissions increase test would apply.

The district court accepted this argument, but the Seventh Circuit found it “untenable.” The Seventh Circuit points out that the Clean Air Act does not authorize the imposition of sanctions for conduct that complies with a SIP that EPA has approved. The court rules that the fact that Cinergy was on notice that the SIP would be changed does not change the legal reality that the SIP provisions that applied were the ones calling for an hourly emissions increase test. The court indicates its support for the reasonableness of an annual emissions increase test and states that EPA should have disapproved the hourly test. Since EPA did not disapprove the hourly test, the court rules that “the agency must live with it,” even though the “blunder was unfortunate.”

### **Significance of SIP Ruling for GHG PSD Permitting**

While the Seventh Circuit’s ruling is only applicable in states in that circuit, it is a significant ruling with regard to the interpretation and application of SIP provisions. For GHG PSD permitting, the bottom line is that EPA will be bound by a state’s *approved* SIP in making determinations regarding GHG permitting, unless EPA finalizes a FIP addressing GHGs for the state. The actual implications, however, must be determined on a state-by-state basis. The possible implications are numerous. If a state’s PSD program only applies to specific air pollutants, and does not apply to GHGs, then it would seem that PSD permitting could not be required by EPA for GHGs until an approved SIP or FIP provision is adopted. States, however, are able to apply state permitting provisions to GHGs when they adopt or interpret their existing provisions to cover GHGs. One question not addressed by the court’s ruling is the permissibility of states interpreting their unamended programs to allow use of the major source and major modification thresholds in the PSD and Title V Tailoring Rule. Some states, with EPA support, have indicated that they are planning to interpret their existing rules to allow the application of the Tailoring Rule GHG thresholds. They would presumably do this by finding that the “subject to regulation” interpretation in the Tailoring Rule, which provides for GHGs not to be regulated pollutants unless they are at or above the thresholds, can be incorporated into their programs through interpretation until such time as they adopt the Tailoring Rule provisions as revisions to their existing PSD programs.

### **Application of the Annual Emissions Increase Test**

The second issue addressed by the Seventh Circuit was whether the actual emissions increase test was properly applied in determining NO<sub>x</sub> emissions increases. (All parties agreed it was applicable to NO<sub>x</sub>.) The basic question was whether the district judge properly allowed EPA’s experts to present testimony based upon a formula used for baseload power plants, rather than one for a cycling plant such as existed at the Wabash facility. The court explained the differences between baseload, cycling, and peaking plants. It pointed out that EPA’s experts predicted increases that will be proportionally equal to the increase in capacity, rather than other methods that are used for predicting increased generation from standby capacity. After explaining why EPA’s testimony was not appropriate, the court ruled that EPA could

not prevail based upon an estimate of emissions for a baseload plant when a cycling plant was at issue. (Appellees filed a Petition for Rehearing on November 29, asserting that the plant in fact is a baseload plant, and the court granted the petition on December 1, 2010.)

### Significance of NSR Ruling

The court's ruling will obviously be most significant in a circumstance where a cycling or peaking plant is at issue in determining annual emissions increases at a power plant. However, the reasoning in the court's opinion supports the logical interpretation that projected emissions increases must be based upon factors that reasonably apply for a particular plant. Thus, the court's ruling should be a helpful precedent in convincing courts that EPA is not permitted to make unrealistic projections in determining projected annual emissions increases.

#### *United States v. Westvaco Corp.*, No. MJG-00-2602, 2010 WL 4068745 (D. Md. Sept. 1, 2010)

On September 1, 2010, the Federal District Court for Maryland issued a decision in EPA's action against Westvaco Corporation in connection with the Agency's NSR enforcement initiative. *United States v. Westvaco Corp.*, No. MJG-00-2602, 2010 WL 4068745 (D. Md. Sept. 1, 2010). The ruling was the judge's "second phase decision" in the case and addressed the proper baseline period and post-change emissions determination method to be used in deciding whether Westvaco violated NSR when it constructed its Digester Expansion Project in 1981. Unfortunately, the judge concluded that an "actual-to-potential" test should be applied to determine whether a major modification had been undertaken.

After readily determining that the baseline period for determining NSR applicability would be the two years immediately prior to construction of the project, the judge turned to the question of what emissions increase test should be applied in determining whether NSR was triggered. He first reviewed the language in the NSR regulations that defines "actual" emissions and pointed out that the relevant regulations provide that, when determining the post-change emissions rate, actual emissions shall equal the potential to emit for any emissions unit which "has not begun normal operations." The judge then reviewed the holdings in the *Puerto Rican Cement*, *WEPCO*, and *Murphy Oil* NSR cases. He stressed that the decision in *Murphy Oil* distinguished *WEPCO* and found that an "actual-to-potential" comparison was appropriate where there had been physical changes that "went beyond replacing old parts with equivalent new ones." 143 F. Supp. 2d 1054, 1104 (W.D. Wis. 2001).

Based upon his review of the three prior cases, the judge stated that he had concluded that the post-project emissions rate should be calculated based upon the source's post-project potential to emit. The judge indicated, however, that it would be necessary to determine how potential to emit should be computed and that there were at least three possible measures: (1) the absolute legal maximum emissions; (2) the physical potential to emit, assuming no emission

limits; and (3) a maximum anticipated physical actual rate. He deferred the decision on how to compute the post-change potential to emit until subsequent proceedings.

The ruling in this case diverges from recent decisions on the relevant test to be applied under the 1980 NSR regulations. Recent decisions have found that a version of an “actual-to-projected-actual” test would be appropriate for determining emissions increases for projects involving changes at existing emissions units. However, these cases have generally involved repair and replacement projects at electric utilities. In the *Westvaco* case, the judge distinguishes the *WEPCO* case, in which an actual-to-potential test was rejected, on the grounds that *WEPCO* involved like-kind replacements. Instead, he relies heavily on the *Murphy Oil* case where the project did not simply involve replacing existing components. The judge quotes approvingly the statement in *Murphy Oil* that “although the ‘actual-to-potential’ test may not be the fairest measure of emissions increases, defendant has failed to cite any legal authority that would support a different test in this case.” 143 F. Supp. 2d at 1105. In *Murphy Oil*, the Court found that the changes were sufficiently significant to justify a determination that the unit had not begun normal operations. Here, the changes resulted in increased production capability.

*See Sierra Club v. Dairyland Power Cooperative*, CA No. 10-cv-303-bbc, 2010WL 4294622 (W.D. Wisc. Oct. 21, 2010) (Statute of Limitations)

## SIP Provision Enforcement

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*See United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010) (NSR/PSD Requirements)

## Statute of Limitations

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*Sierra Club v. Dairyland Power Cooperative*, CA No. 10-cv-303-bbc, 2010 WL 4294622 (W.D. Wisc. Oct. 21, 2010)

On October 21, 2010, the U.S. District Court for the Western District of Wisconsin issued a decision in *Sierra Club v. Dairyland Power Cooperative*, CA No. 10-cv-303-bbc, 2010WL 4294622 (W.D. Wisc. Oct. 21, 2010) that finds that violations of the prevention of significant deterioration (PSD) permitting requirements are ongoing violations and thus civil penalties can be obtained for PSD violations for the five years prior to the filing of an action, regardless of when the projects at issue were constructed. The court also ruled that the

requirement to install best available control technology (BACT) is a requirement under the Clean Air Act that is independent of the requirement to obtain a PSD permit.

In a lengthy opinion, Federal Judge Barbara Crabb rejects the majority view of federal appellate and district courts that the five-year statute of limitations should begin to run at the time of commencement of construction of a project, with the effect that civil penalties would be precluded for violations of PSD permitting requirements for projects for which construction had been commenced more than five years prior to a complaint being filed. Judge Crabb had previously ruled in *U.S. v. Murphy Oil*, 155 F. Supp. 2d 1117 (W.D. Wis. 2001), that the statute of limitations would preclude PSD civil penalty claims for projects undertaken more than five years before the action, unless the defendant had taken actions to conceal its violations. There, the judge found that the plant's violations had been concealed.

Before addressing the legal issues before the court, the judge states that “defendant modified and thereafter operated each of the eight boilers at [its Alma and Genoa stations] without obtaining appropriate permits authorizing the construction, without meeting [BACT] emissions limits, and without installing appropriate technology to control emissions of pollutants.” Thus, the legal questions were whether defendant would be subject to the requirements to install BACT and payment of civil penalties for the 20 out of 22 projects at issue that were undertaken more than five years prior to the action.

### **BACT As An Independent Violation**

After generally reviewing the PSD permitting requirements, the judge first addresses whether the best available control technology and air quality demonstration requirements are independent claims from the requirement to obtain the permit itself. The judge lists the conditions under PSD that must be fulfilled before a major source “may be constructed.” Without any real analysis, the judge concludes that the various individual requirements are not subsumed by the requirement to obtain a preconstruction permit. She rules that the Clean Air Act and Wisconsin regulations establish that the BACT and air quality analysis requirements are independent obligations regardless of what the PSD permit requires, and the plaintiff may bring separate claims for defendant's alleged failure to apply BACT and submit air quality demonstrations.

### **Discovery Rule**

Next, the judge considered whether the discovery rule applies under the federal five-year statute of limitations (i.e., the statute of limitations would not begin to run until the plaintiff discovers the violation). The judge points out that she had ruled in the *Murphy Oil* case that the discovery rule would not apply in that instance because the government should have been able to detect violations under the facts there. However, the judge states that, in general, the discovery rule would apply and the plaintiff could rely on it to toll the statute of limitations if

the defendant had taken actions to conceal its violations. After also pointing out that there was a split in the federal courts as to whether the discovery rule would apply in actions for civil penalties under a federal statute, the judge rules that the policy reasons that motivated other courts to apply the discovery rule in environmental cases are applicable in this case, particularly noting the difficulty with which environmental groups would have in identifying violations.

### Ongoing Violations

The judge next reviews whether the PSD violations are “ongoing violations.” She states at the outset of this section of the opinion that, “[e]ven if the discovery rule did not apply in this setting, there is another reason why defendant’s statute of limitations defense fails at this stage: defendant’s alleged violations have been ongoing.” She then points out that under the ongoing violation theory, “even where the statute of limitations applies to a claim for civil penalties, the statute of limitations does not bar [claims for] violations that are ongoing.” The judge points out that the Seventh Circuit has not addressed the question of whether the PSD requirements impose liability for the “operation, rather than only the construction,” of a facility that has failed to comply with PSD. She then notes that a division exists among the courts that have addressed the continuing nature of a PSD violation for statute of limitations purposes. Two Federal appellate courts, the Eighth and Eleventh Circuits, have ruled that PSD violations are one-time violations and the Sixth Circuit has ruled that the violation [under the Tennessee permitting laws] is ongoing. She states that district courts in at least seven Circuits have ruled that PSD violations are one-time violations and not ongoing ones. She also states that a number of district courts in the Seventh Circuit (which the Wisconsin court is in) have found that PSD violations are not continuing in nature.

The judge points out that the district courts finding that PSD violations are one-time violations have focused on the “preconstruction” title of the statutory section, the distinction between construction and operating permits, and the language that defines a PSD violation as “*construction*, not *operation*,” of a new source or modification without a PSD permit. However, the judge points out that district courts in at least three Circuits have found that PSD violations can be ongoing for statute of limitations purposes. She explains that these courts concluded that the preconstruction and operating requirements under the Act are not separated exclusively into either the PSD program or Title V program, but are intertwined.

Among the court rulings that PSD violations are not continuing or ongoing violations was the decision by Judge Crabb in *Murphy Oil*. However, the Judge now rules that *Murphy Oil* was decided incorrectly with respect to this issue. She focuses primarily on the fact that the PSD requirements to be included in a preconstruction permit are ones that have continuing operation implications. Much of the Court’s analysis on this issue is confusing and not well-reasoned. At bottom, though, the fact that the source obtaining a PSD permit is subject to continuing obligations, such as the obligation to install and operate best available control

technology, was persuasive in convincing the judge to find that PSD violations are ongoing ones. She specifically rules that each day a facility operates absent a PSD permit and absent best available control technology, it is committing a violation of the Clean Air Act and cites approvingly the *National Parks* Sixth Circuit case, in which the Court ruled that the failure to obtain a PSD permit “‘presents a series of discrete violations rather than a single violation that may or may not be ‘continuing’ in nature.’” She then makes another confused ruling: “This is a sensible interpretation of the ongoing violation doctrine that does not eliminate the statute of limitations.” [Obviously, even when PSD violations are found not to be ongoing in nature, the statute of limitations is not “eliminated.”] The judge then states that the plaintiff is permitted to seek civil penalties “only for the five years preceding suit.” The judge seems to suggest that there could be some other possible interpretation of the “five-year” statute of limitations.

### **Title V**

The judge also addressed two issues with regard to plaintiff’s claims under Title V. Plaintiff makes a number of claims with regard to the filing of incomplete permit applications. The judge rules that, to the extent the submission of allegedly incomplete permit applications is the focus of plaintiff’s claim, she agrees with defendant that plaintiff was required to use the objection or appeal process under Title V. However, she notes that plaintiff also argues that defendant violated its Title V permits by falsely certifying compliance after permits had been issued and failed to submit an application for a Title V revision because of its plant modifications. She rules that these are not collateral attacks on defendant’s permits and thus plaintiff may proceed with its Title V claim “to the extent it is challenging defendant’s false certifications and failure to submit applications and amendments, rather than defects in defendant’s Title V permit.”

### **Significance of Decision**

As Judge Crabb’s opinion acknowledges, her rulings on the ongoing violation issues are in conflict with the overwhelming majority of court rulings, both at the appellate and district court level. Decisions of panels in the Eighth and Eleventh Circuits and numerous federal district courts have ruled that the statute of limitations begins to run on PSD violations at the time of commencement of construction. Also, there are no independent requirements for installing BACT and carrying out air quality demonstrations on which to base an ongoing violation claim if five years have elapsed between the filing of the action and the commencement of construction. In contrast to the Sixth Circuit decision finding an ongoing violation under the Tennessee NSR requirements, Judge Crabb does not point to any unique provisions in the Wisconsin regulations that would justify distinguishing them from the provisions that were considered in the Eighth and Eleventh Circuit decisions.

While Judge Crabb's reasoning is not clear in certain portions, other parts set out the basic argument relied on by courts that have ruled that violations of the PSD permitting requirements are not one-time violations, but rather involve a series of discrete violations for which civil penalties can be obtained for the five-year period immediately preceding the filing of the action. As noted above, the principal focus is on the fact that the PSD permit itself would have contained a requirement to install BACT which, if required, would continue in effect unless and until amended in a subsequent permit. Judge Crabb's rulings seem to generally indicate an orientation towards accepting PSD interpretations that would result in requirements to install BACT, as reflected in the *Murphy Oil* decision where she found that the actual-to-potential test should be applied in determining whether an expansion of a sulfur recovery unit should have been subject to PSD permitting. In this case, the judge points out that, if the concurrent remedy doctrine were to be found applicable, injunctive relief (i.e. installation of BACT) would not be required if claims for civil penalties were barred under the statute of limitations. In light of her finding that PSD violations are ongoing ones, it was not necessary for her to rule on whether the concurrent remedy doctrine would apply if the statute of limitations had run.

In sum, the Eighth Circuit and Eleventh Circuit decisions and the majority position in federal district courts are encouraging with regard to whether the five-year statute of limitations would bar claims for NSR violations associated with projects undertaken more than five years prior to the bringing of an action. However, the rulings in the minority of cases, including Judge Crabb's decision, means that the issue will continue to be one subject to case-by-case rulings in all Circuits but the Eighth and Eleventh, until there are either additional Circuit Court rulings or a definitive ruling by the U.S. Supreme Court.

***United States v. Midwest Generation, LLC*, 694 F. Supp. 2d 999 (N.D. Ill. 2010)**

In granting a motion to dismiss, on March 9, 2010 an Illinois district court in *United States v. Midwest Generation, LLC*, 694 F. Supp. 2d 999 (N.D. Ill. 2010), held that the failure to obtain a PSD permit prior to carrying out major replacement projects at six coal-fired power plants is a discrete, not a continuing, violation under the Clean Air Act, which occurs at the time construction begins. Applying this interpretation, the district court rejected federal and state PSD permitting claims brought outside the five-year federal statute of limitations.

Construction on five of the plants at issue in *Midwest Generation* occurred prior to the company's acquisition of the plants in 1999. The court ruled that, as a result, EPA could not bring an enforcement action against Midwest Generation as the current owner for operating the plants without having obtained PSD permits. In addition, the court held that the five-year statute of limitations barred claims for civil penalties as a result of Midwest Generation's having commenced construction of modifications on a sixth plant without having sought a PSD permit.

Although the court ruled that the statute of limitations does not apply to injunctive relief, it held that no injunctive relief could be sought against Midwest Generation based on projects undertaken at five plants by the previous owner. As a result of the court's rulings, plaintiffs are limited to pursuing a claim for injunctive relief against Midwest Generation for having modified one plant without a PSD permit.

The *Midwest Generation* decision mirrors the interpretation of the statute of limitations in the Eleventh Circuit's 2007 decision, *Nat'l Parks & Conservation Ass'n v. TVA*, 502 F.3d, 1316, 1322 (11th Cir. 2007), in which the court concluded "violations of the preconstruction permitting requirements occur at the time of construction" (quoting *New York v. Niagara Mohawk Power Corp.*, F. Supp.2d 650, 661 (W.D.N.Y. 2003)).

The Sixth Circuit, in *Nat'l Parks Conservation Assoc., Inc. v. TVA*, 480 F.3d 410, 418-419 (6th Cir. 2007), held that civil penalties could be sought for failure to obtain a PSD permit, even though construction was undertaken more than five years prior to the citizen suit. The court ruled that Tennessee's SIP imposes an ongoing obligation on major emitters to apply BACT and obtain a PSD permit throughout operations, even after construction is complete. *Id.* The Illinois district court distinguished the Sixth Circuit's ruling because of the different permitting requirements in the Tennessee SIP.

*See Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010) (NSR/PSD Requirements)

## **Title V Permit Program**

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*See Sierra Club v. Dairyland Power Cooperative*, CA No. 10-cv-303-bbc, 2010 WL 4294622 (W.D. Wisc. Oct. 21, 2010) (Statute of Limitations)

**Clean Air Act  
Litigation Developments  
Cumulative Index of Cases**

**Page Number  
LD-**

<i>Adair v. Troy State University of Montgomery</i> , 892 F. Supp. 1401 (M.D. Ala. 1995) .....	2, 22
<i>Alaska v. EPA</i> , 244 F.3d 748 (9 <sup>th</sup> Cir. 2001).....	91, 106, 119
<i>Alaska v. EPA</i> , 298 F.3d 814 (9 <sup>th</sup> Cir. 2002).....	119
<i>Alaska v. EPA</i> , 540 U.S. 983 (2004).....	161
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	87
<i>American Corn Growers Ass’n v. EPA</i> , 291 F.3d 1 (D.C. Cir. 2002).....	123
<i>American Farm Bureau Federation v. EPA</i> , 559 F.3d 512 (D.C. Cir. 2009).....	243
<i>American Forest and Paper Ass’n v. EPA</i> , 294 F.3d 113 (D.C. Cir. 2002) .....	115
<i>American Trucking Ass’ns v. EPA</i> , 175 F.3d 1027 (D.C. Cir. 1999) .....	51
<i>American Trucking Ass’ns v. EPA</i> , 195 F.3d 4 (D.C. Cir. 1999).....	52
<i>American Trucking Ass’ns v. EPA</i> , 283 F.3d 355 (D.C. Cir. 2002) .....	116
<i>Anderson v. Farmland Industries, Inc.</i> , 45 F. Supp.2d 863 (D. Kan. 1999).....	45, 49
<i>Anderson v. Farmland Industries, Inc.</i> , 70 F. Supp.2d 1218 (D. Kan. 1999).....	46, 49
<i>Appalachian Power Co. v. EPA</i> , 208 F.3d 1015 (D.C. Cir. 2000).....	64, 66, 75
<i>Appalachian Power Co. v. EPA</i> , 249 F.3d 1032 (D.C. Cir. 2001).....	106
<i>Appalachian Power Co. v. EPA</i> , 251 F.3d 1026 (D.C. Cir. 2001).....	97

<i>Appalachian Power Co. v. EPA</i> , No. 99-1200 (D.C. Cir. Aug. 24, 2001).....	109
<i>Arteva Specialties v. EPA</i> , 323 F.3d 1088 (D.C. Cir. 2003).....	135
<i>Cement Kiln Recycling Coalition v. EPA</i> , 255 F.3d 855 (D.C. Cir. 2001) .....	93
<i>Chemical Manufacturers Association v. EPA</i> , 70 F.3d 637 (D.C. Cir. 1995) .....	4, 24, 25
<i>Citizens Legal Environmental Network v. Premium Standard Farms</i> , No. 97-6073-CV-SJ-6, 2000 WL 220464 (W.D. Mo. Feb. 23, 2000) .....	58
<i>Clean Air Implementation Project v. EPA</i> , 1996 WL 393118 (D.C. Cir. June 28, 1996) .....	26, 31
<i>Clean Air Implementation Project v. EPA</i> , 150 F.3d 1200 (D.C. Cir. 1998).....	37
<i>Color Communications, Inc. v. The Illinois Pollution Control Board</i> , 680 N.E.2d 516 (Ill. 1997) .....	17, 31
<i>Communities for a Better Environment v. Cenco Refining Co.</i> , 180 F. Supp. 2d 1062 (C.D. Cal. 2001).....	83, 92, 106
<i>Communities for a Better Environment v. Cenco Refining Co.</i> , 179 F. Supp. 2d 1128 (C.D. Cal. 2001).....	83, 92, 106
<i>Connecticut v. American Electric Power Company</i> , 2005 WL 2347900 (S.D. N.Y. Sept. 22, 2005).....	176
<i>Connecticut v. American Electric Power Company</i> , 582 F.3d 309 (2d Cir. 2009).....	241, 243, 247
<i>Covington v. Jefferson County</i> , 358 F.3d 626 (9th Cir. 2004).....	153, 168
<i>Deseret Power Electric Cooperative (Bonanza)</i> , Appeal No. PSD 07-03, 13 E.A.D. ____ (Nov. 13, 2008).....	231, 239
<i>Dubois v. U.S. Dept. of Agriculture</i> , 20 F. Supp.2d 263 (D.N.H. 1998) .....	36, 39
<i>Ellis, et al. v. Gallatin Steel Co., et al.</i> , 390 F.3d 461 (6 <sup>th</sup> Cir. 2004) .....	151, 168
<i>Environmental Defense v. Duke Energy</i> , 127 S. Ct. 1423 (2007) .....	222
<i>Fried v. Sungard Recovery Services, Inc.</i> , 900 F. Supp. 758 (E.D. Pa. 1995) .....	3, 22

<i>Fried v. Sungard Recovery Services, Inc.</i> , 916 F. Supp. 465 (E.D. Pa. 1996) .....	5
<i>Friends of the Earth v. Laidlaw Environmental Services</i> , 149 F.3d 303 (4th Cir. 1998).....	34, 39
<i>Friends of the Earth v. Laidlaw Environmental Services, Inc.</i> , 120 S.Ct. 693 (2000) .....	57, 64
<i>General Electric Co. v. EPA</i> , 53 F.3d 1324 (D.C. Cir. 1995) .....	12
<i>General Electric Lighting v. Koncelik</i> , Nos. 05-AP-310, 05 AP-323, 2006 WL 832527 (Ohio App. 10th App. Dist. March 31, 2006).....	215
<i>Glazer v. American Ecology Environmental Services Corp.</i> , 894 F. Supp. 1029 (E.D. Tex. 1995) .....	2, 29, 30
<i>Honeywell International, Inc. v. EPA</i> , 374 F.3d 1363 (D.C. Cir. 2004).....	170
<i>In re Commercial Cartage Company</i> , CAA Appeal No. 97-9 (EAB, July 30, 1998) .....	38
<i>In re Commonwealth Chesapeake Corp.</i> , PSD Appeal Nos. 96-2 et seq. (EAB, Feb. 19, 1997).....	26
<i>In re EcoElectrica, L.P.</i> , PSD Appeal Nos. 96-8 and 96-13 (EAB, April 27, 1997) .....	27
<i>In re Encogen Cogeneration Facility</i> , PSD Appeal Nos. 98-22 through 98-24 (EAB, March 26, 1999), 1999 WL 198914 (E.P.A.) .....	54
<i>In re Hawaiian Electric Light Co.</i> , PSD Appeal Nos. 97-15 through 97-23 (EAB, Nov. 25, 1998) .....	41
<i>In re Kawaihae Cogeneration Project</i> , PSD Appeal Nos. 96-9 (EAB, April 28, 1997) .....	28
<i>In re Knauf Fiber Glass, GmbH</i> , PSD Appeal Nos. 98-3 through 98-20 (EAB, Feb. 4, 1999), 1999 WL 64235 (E.P.A.).....	48, 55
<i>In re Knauf Fibert Glass, GmbH</i> , PSD Appeal Nos. 99-8 through 99-72 (EAB, March 14, 2000) .....	62, 75
<i>In re Maui Electric Company</i> , PSD Appeal No. 98-2 (EAB, Sept. 10, 1998).....	41
<i>In Re: Rochester Public Utilities</i> , PSD Appeal No. 03-03, EAB , August 3, 2004 .....	166
<i>In re RockGen Energy Center</i> , PSD Appeal No. 99-1 (EAB, Aug. 15, 1999), 1999 WL 673244 (E.P.A.).....	54

<i>In re Steel Dynamics, Inc.</i> , PSD Appeal Nos. 99-4 and 99-5 (EAB, June 22, 2000).....	74
<i>In re Tennessee Valley Authority</i> , CAA Docket No. 00-6 (EAB, Sept. 15, 2000) .....	63, 71
<i>In the Matter of Commercial Cartage Co.</i> , No. CAA-93-H-002 (EPA) (Aug. 19, 1997).....	11
<i>In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC</i> , Petition No. II-2000-07 (May 2, 2001).....	91, 105, 110, 126
<i>In the Matter of Pacific Coast Building Products, Inc.</i> , Permit No. A00011 (Jan. 10, 2000) .....	75, 77
<i>In the Matter of PacifiCorp’s Jim Bridger and Naughton Utility Steam Generating Plants</i> , Petition No. VIII-00-1 (Nov. 16, 2000).....	66, 79
<i>In the Matter of Polypropylene Unit, Baton Rouge Polyolefins Plant, Exxon Chemical Americas</i> , Petition No. 6-00-1, 65 Fed. Reg. 26,380 (May 9, 2000) .....	62, 78
<i>In the Matter of Roosevelt Regional Landfill, Regional Disposal Co.</i> , Permit No. DE 98AOP-C242 .....	55
<i>In the Matter of Umetco Minerals Corp.</i> , No. CAA-(113)-VIII-92-03 (EPA) (March 29, 1996) .....	8, 10, 22
<i>LaFleur v. Whitman</i> , 300 F.3d 256 (2d Cir. 2002) .....	125
<i>Longleaf Energy Associates, LLC v. Friends of the Chattahoochie, Inc.</i> , 681 S.E. 2d 203 (Ga. App. 2009) .....	244, 246
<i>Louisiana Environmental Action Network v. Browner</i> , 87 F.3d 1379 (D.C. Cir. 1996) .....	14, 16
<i>Massachusetts v. EPA</i> , 415 F.3d 50 (D.C. Cir. 2005) .....	176, 194
<i>Massachusetts v. EPA</i> , 127 S. Ct. 1438 (2007) .....	217, 226
<i>Michigan v. EPA</i> , 213 F.3d 663 (D.C. Cir. 2000).....	68
<i>Michigan Manufacturers Ass’n v. Browner</i> , 230 F.3d 181 (6th Cir. 2000).....	61
<i>National Lime Association v. EPA</i> , 233 F.3d 625 (D.C. Cir. 2000) .....	64, 66
<i>National Mining Association v. EPA</i> , 59 F.3d 1351 (D.C. Cir. 1995) .....	5, 16, 18, 23, 25

<i>National Parks and Conservation Ass’n v. Tennessee Valley Authority</i> , 175 F. Supp. 2d 1071 (E.D. Tenn. 2001) .....	85
<i>National Parks Conservation Ass’n v. Tennessee Valley Authority</i> , No. 3:01-CV-71 (E.D. Tenn. March 2005).....	176, 193, 196, 200
<i>National Parks Conservation Association v. TVA</i> , 502 F.3d 1316 (11 <sup>th</sup> Cir. 2007).....	217, 226
<i>National Parks Conservation Ass’n v. Tennessee Valley Authority</i> , No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. March 2005).....	249, 251
<i>Natural Resources Defense Council v. EPA</i> , 194 F.3d 130 (D.C. Cir. 1999) .....	49, 50, 56
<i>Natural Resources Defense Council v. Southwest Marine Inc.</i> , 28 F. Supp.2d 584 (S.D. Cal. 1998).....	36, 40
<i>Natural Resources Defense Council v. EPA</i> , 489 F. 3d 1364 (D.C. Cir. 2007) .....	220
<i>Natural Resources Defense Council v. EPA</i> , 529 F.3d 1077 (D.C. Cir. 2008) .....	231
<i>Natural Resources Defense Council v. EPA</i> , 559 F.3d 561 (D.C. Cir. 2009).....	244
<i>New York v. American Elec. Power Serv. Corp.</i> , Nos. 2:04-cv-1098 and 2:05-cv-360, 2006 WL 1331543 (S.D. Ohio March 21, 2006) .....	203, 212
<i>New York v. American Electric Power Service, Inc.</i> , Nos. 2:04-CV-1098, 2:05-cv-360 (S.D. Ohio February 15, 2007).....	226
<i>New York v. EPA</i> , 413 F.3d 3 (D.C. Cir. 2005).....	183
<i>New York v. EPA</i> , 443 F.3d 880 (D.C. Cir. 2006) .....	203
<i>New York v. Niagara Mohawk Power Corp.</i> , 263 F. Supp. 2d 650 (W.D.N.Y. 2003) .....	129, 145, 147
<i>New York Public Interest Research Group v. Whitman</i> , 321 F.3d 317. (2d Cir. 2003).....	148
<i>New York Public Interest Research Group v. Johnson</i> , 427 F.3d 172 (2d Cir. 2005).....	193, 197
<i>North Carolina v. EPA</i> , 531 F.3d 896 (D.C. Cir. 2008).....	234
<i>North Carolina v. TVA</i> , 615 F.3d 291 (4th Cir. 2010).....	249

<i>Ohio Public Interest Research Group v. Whitman</i> , 386 F.3d 792 (6 <sup>th</sup> Cir. 2004) .....	172
<i>Ogden Projects, Inc. v. New Morgan Landfill Co.</i> , 911 F. Supp. 863 (E.D. Pa.1996) .....	4, 22, 26, 60
<i>Public Service Company of Colorado v. EPA</i> , 225 F.3d 1144 (10th Cir. 2000) .....	63, 75
<i>Save Our Summers v. State of Washington Dept. of Ecology</i> , No. CS-99-269-RHW (E.D. Wash. June 15, 2001).....	90
<i>St. Bernard Citizens for Environmental Quality v. Chalmette Refining</i> , 399 F. Supp. 2d 726 (E.D. La. 2005) .....	201, 202
<i>Sierra Club v. Dairyland Power Cooperative</i> , No. 10-cv-303-bbc, 2010 WL 4294622 (W.D. Wisc. Oct. 22, 2010) .....	249, 260, 265
<i>Sierra Club v. EPA</i> , 167 F.3d 658 (D.C. Cir. 1999) .....	49
<i>Sierra Club v. EPA</i> , 292 F.3d 895 (D.C. Cir. 2002) .....	111
<i>Sierra Club v. EPA</i> , 353 F.3d 976 (D.C. Cir. 2004) .....	153
<i>Sierra Club v. EPA</i> , 356 F.3d 296 (D.C. Cir. 2004) .....	159
<i>Sierra Club v. EPA</i> , 536 F.3d 673 (D.C. Cir. 2008) .....	233
<i>Sierra Club v. EPA</i> , No. 02-1135 (D.C. Cir. Dec. 19, 2008).....	233
<i>Sierra Club v. Johnson</i> , 436 F.3d 1269 (11th Cir. 2006) .....	202, 211, 213
<i>Sierra Club v. Johnson</i> , 500 F. Supp. 2d 936 (N.D. Ill. 2007).....	217, 220, 226, 229
<i>Sierra Club v. Morgan</i> , No. 07-C-251-S, 2007 WL 3287850 (W.D. Wisc. November 7, 2007) .....	225
<i>Sierra Club v. Otter Tail Power Company</i> , 615 F.3d 1008 (8th Cir. 2010).....	249, 254, 265
<i>Sierra Club v. Public Service Co. of Colorado</i> , 894 F. Supp. 1455 (D. Colo. 1995) .....	1, 6, 12, 29
<i>Sierra Club v. Tri-State Generation and Transmission Association</i> , 173 F.R.D. 275 (D. Colo. 1997) .....	6, 29
<i>Sierra Club v. TVA</i> , Case No. CV-02-HS-2279-NW (N.D. Ala.) .....	157

<i>Sierra Club v. TVA</i> , 430 F.3d 1337 (11th Cir. 2005) .....	175, 177
<i>Sierra Club v. Whitman</i> , No. 01-01991 (D. D.C. January 30, 2002) .....	111, 127
<i>Sierra Club v. EPA</i> , 588 F.3d 401 (6th Cir. 2009) .....	247
<i>South Camden Citizens in Action v. New Jersey Department of Environmental Protection</i> , 145 F. Supp. 2d 505 (D. N.J. 2001), <i>rev'd</i> 274 F.3d 771 (3rd Cir. 2001) .....	88
<i>South Camden Citizens in Action v. New Jersey Department of Environmental Protection</i> , 274 F.3d 771 (3rd Cir. 2001) .....	89
<i>South Coast Air Quality Management District v. EPA</i> , 472 F.3d 882 (D.C. Cir. 2006) .....	202
<i>South Coast Air Quality Management District v. EPA</i> , 489 F.3d 1245 (D.C. Cir. 2007) .....	221
<i>Southwestern Pennsylvania Growth Alliance v. Browner</i> , 144 F.3d 984 (6th Cir. 1998) .....	40
<i>Star Enterprise and Texaco Inc. v. EPA</i> , 235 F.3d 139 (3rd Cir. 2000) .....	67
<i>Steel Co. v. Citizens For A Better Environment</i> , 118 S. Ct. 1003 (1998) .....	33, 39
<i>Sur Contra La Contaminacion v. EPA</i> , 202 F.3d 443 (1st Cir. 2000) .....	61, 75
<i>Tennessee Valley Authority v. EPA</i> , 278 F.3d 1184 (11 <sup>th</sup> Cir. 2002) .....	112, 123
<i>Tennessee Valley Authority v. Whitman</i> , 336 F.3d 1236 (11th Cir. 2003) .....	134
<i>Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.</i> , Civil No. H-97-2427, 1998 U.S. Dist. LEXIS 16146 (S.D. Tex., Aug. 3, 1998) .....	35
<i>Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.</i> , 207 F.3d 789 (5th Cir. 2000) .....	59, 64
<i>United States v. Alabama Power Company</i> , 372 F.Supp.2d 1283 (N.D. Ala. 2005) .....	177
<i>United States v. Alabama Power Company</i> , No. 2:01-cv-00152-VEH (N.D. Ala. August 14, 2006) .....	208
<i>United States v. Alabama Power Company</i> , No. 2:01-cv-00152 (N.D. Ala. July 24, 2008) .....	236

<i>United States v. American Electric Power Service Corp.</i> , 136 F. Supp. 2d 808 (S.D. Ohio 2001) .....	86, 87, 103, 110
<i>United States v. American Electric Power Service Corp.</i> , 137 F. Supp. 2d 1060 (S.D. Ohio 2001).....	86, 87, 103, 110
<i>United States v. Brotech Corp.</i> , No. Civ.A. 00-2428, 2000 WL 1368023 (E.D. Pa. Sept. 19, 2000) .....	60, 75
<i>United States v. Campbell Soup Co.</i> , No. CIV-S-95-1854, 1997 WL 258894 (E.D. Cal., March 11, 1997) .....	20, 29, 30, 31
<i>United States v. Chrysler Corp.</i> , 158 F.3d 1350 (D.C. Cir. 1998) .....	39
<i>United States v. Cinergy Corporation</i> , 384 F.Supp.2d 1272 (S.D. Ind. 2005) .....	192
<i>United States v. Cinergy Corporation</i> , 458 F.3d 705 (7th Cir. 2006).....	206
<i>United States v. Cinergy Corporation</i> , 2005 WL 3018688 (S.D. Ind. Nov. 9, 2005) .....	193
<i>United States v. Cinergy Corporation</i> , 495 F. Supp. 2d 892 (S.D. Ind. 2007) .....	217, 223
<i>United States v. Cinergy Corp.</i> , 495 F. Supp. 2d 909 (S.D. Ind. 2007) .....	223
<i>United States v. Cinergy Corp.</i> , No. 99-1693, 2008 WL 4585421 (S.D. Ind. Oct. 14, 2008) .....	237
<i>United States v. Cinergy Corp.</i> , No. 99-1693 (S.D. Ind. Dec. 18, 2008) .....	238
<i>United States v. Cinergy Corp.</i> , 618 F. Supp. 2d 94 (S.D. Ind. 2009) .....	245, 247
<i>United States v. Cinergy Corp.</i> , 623 F.3d 455 (7th Cir. 2010) .....	257, 260
<i>United States v. Duke Energy Corp.</i> , 278 F. Supp.2d 619 (M.D.N.C. 2003) .....	135, 139, 148
<i>United States v. Duke Energy Corp.</i> , 411 F.3d 539 (4 <sup>th</sup> Cir. 2005).....	181
<i>United States v. Hanousek</i> , 176 F.3d 1116 (9th Cir. 1999) .....	47
<i>United States v. Harmon Industries, Inc.</i> , 191 F.3d 894 (8th Cir. 1999) .....	70
<i>United States v. Hoechst Celanese Corp.</i> , 128 F.3d 216 (4th Cir. 1997) .....	12, 13, 22
<i>United States v. LTV Steel Co.</i> , 118 F. Supp. 2d 827 (N.D. Ohio 2000) .....	70, 75

<i>United States v. LTV Steel Co.</i> , 116 F. Supp. 2d 624 (W.D. Pa. 2000) .....	71, 75
<i>United States v. Marine Shale Processors</i> , 81 F.3d 1329 (5th Cir. 1996) .....	8, 18, 30
<i>United States v. Midwest Generation, LLC</i> , 694 F. Supp. 2d 999 (N.D. Ill. 2010) .....	249, 264
<i>United States v. Murphy Oil USA Inc.</i> , 143 F. Supp. 2d 1054 (W.D. Wisc. 2001) .....	87, 98, 99, 110
<i>United States v. Murphy Oil USA Inc.</i> , 155 F. Supp. 2d 1117 (W.D. Wisc. 2001) .....	102, 110
<i>United States v. Ohio Edison Co.</i> , 2003 U.S. Dist. LEXIS 2357 (S.D. Ohio, Jan. 17, 2003) .....	145
<i>United States v. Ohio Edison Co.</i> , No. 2:99-CV-1181, S.D. Ohio, January 23, 2003 .....	145
<i>United States v. Ohio Edison Co.</i> , 276 F. Supp. 2d 829 (S.D. Ohio 2003) .....	134, 142, 148
<i>United States v. Pan American Grain Manufacturing Co.</i> , 29 F. Supp.2d 53 (D. P.R. 1998) .....	42
<i>United States v. Reaves</i> , 923 F. Supp. 1530 (M.D. Fla. 1996) .....	9, 30
<i>United States v. Southern Indiana Gas and Electric Co.</i> , No. IP 99-1692-C-M/F, 2002 WL 1629817 (S.D. Ind. July 18, 2002) .....	114, 120, 122
<i>United States v. Southern Indiana Gas and Electric Co.</i> , No. IP 99-1692-C-M/F, 2002 WL 1760699 (S.D. Ind. July 26, 2002) .....	114, 120, 122
<i>United States v. Southern Indiana Gas and Electric Co.</i> , No. IP 99-1692-C-M/F, 2002 WL 1760752 (S.D. Ind. July 26, 2002) .....	114, 120, 121, 125
<i>United States v. Southern Indiana Gas and Electric Co.</i> , No. IP 99-1692-C-M/F, 2002 WL 31427523 (S.D. Ind. October 24, 2002) .....	114, 120
<i>United States v. Southern Indiana Gas and Electric Co.</i> , 245 F. Supp. 2d 994 (S.D. Ind. 2003) .....	132, 139, 145
<i>United States v. Telluride Co.</i> , 146 F.3d 1241 (10th Cir. 1998) .....	43
<i>United States v. Trident Seafoods Corp.</i> , 60 F.3d 556 (9th Cir. 1995) .....	8, 10, 22
<i>United States v. Westvaco Corp.</i> , 144 F. Supp. 2d 439 (D. Md. 2001) .....	86, 87, 99, 110

<i>United States v. Westvaco Corp.</i> , CA No. MJG-00-2602 (D. Md. Aug. 27, 2004) .....	159, 164
<i>United States v. Westvaco Corp.</i> , CA No. MJG-00-2601, 2010 WL 4068745 (D. Md. Sept. 1, 2010) .....	259
<i>U.S. Public Interest Research Group, et al. v. Bayou Steel Corp.</i> , Civ. No. 96-0432 (E.D. La. Sept. 16, 1997) .....	7, 29
<i>United Steelworkers of America v. Oregon Steel Mills, Inc.</i> , 322 F.3d 1222 (10th Cir. 2003).....	131, 139, 144
<i>Utility Air Regulatory Group v. EPA</i> , 320 F.3d 272 (D.C. Cir. 2003) .....	137, 150
<i>Utility Air Regulatory Group v. EPA</i> , No. 05-1252 (D.C. Cir. December 12, 2006) .....	211
<i>Western States Petroleum Association v. EPA</i> , 87 F.3d 280 (9th Cir. 1996) .....	30
<i>Whitman v. American Trucking Ass'ns</i> , 531 U.S. 457 (2001) .....	92, 95, 116