

Clean Air Act Litigation Developments

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Clean Air Act Litigation Developments 2005

Citizen Suits

Sierra Club v. TVA, 430 F.3d 1337 (11th Cir. 2005)

On November 22, the Eleventh Circuit Court of Appeals overturned a key portion of a federal district court's dismissal of a citizen suit based upon the lower court's finding that enforcement using continuous opacity monitoring (COM) measurements was subject to a 2% *de minimis* rule. *Sierra Club v. TVA*, 430 F.3d 1337 (2005). The appellate court upheld the portion of the district court's ruling in which it found that COM measurements could not be used as evidence prior to the incorporation of the "credible evidence" rule in Alabama's SIP.

The Sierra Club brought an action against TVA seeking civil penalties and injunctive relief for 9,000 alleged opacity violations, based upon the TVA Tuscumbia plant's COM measurements. Throughout the period, there had been no determination of opacity violations based upon Method 9 observations. The State's SIP provided that opacity violations were to be determined based upon Method 9. A significant portion of the alleged violations occurred before the State's adoption of the "credible evidence" (CE) rule. However, a significant fraction also occurred after its adoption.

The district court ruled that COM measurements could not be considered in determining violations in the period before adoption of the CE rule, because violations could be proved only through Method 9 observations. The Sierra Club argued that the COM data could be taken into account because the plant was required to install a COM and report COM data to ADEM. The Eleventh Circuit ruled that the CE rule could not be applied retroactively, and upheld this portion of the district court's ruling.

With support from the Alabama Department of Environmental Management (ADEM), TVA argued that COM measurements subsequent to adoption of the CE rule did not prove violations, because ADEM had established a "2% *de minimis* rule." The 2% provision initially was reflected in ADEM policy and later was adopted as a formal rule, but it had never been included in the Alabama SIP. Citing a number of cases, the Eleventh Circuit ruled that the 2% *de minimis* provision could not be taken into account in determining violations unless and until it is included in the SIP. Accordingly, the Court found that ADEM's practice of employing the 2% *de minimis* rule was "invalid under Clean Air Act § 110(i)."

The Sierra Club argued that the effective date for taking into account COM data as credible evidence should be the date of EPA's promulgation of the CE regulations, not the date the CE rule was included in the Alabama SIP. The Eleventh Circuit rejected this assertion, pointing out that EPA's regulations specifically contemplated that states would adopt the CE provisions before they would take effect in states.

The final issue addressed was whether TVA was exempt from Clean Air Act civil penalties based upon TVA's claim of sovereign immunity. After reviewing in depth the case law relevant to the doctrine of sovereign immunity and, in particular, its applicability under the Clean Air Act, the Eleventh Circuit upheld the district court's grant of summary judgment to TVA on the Sierra Club's claim for civil penalties for all past opacity violations. Accordingly, the Sierra Club's potential remedy is to obtain injunctive relief from the district court.

Continuing Violation

See National Parks Conservation Ass'n, Inc. v. TVA, No. 3:01-CV-71 (E.D. Tenn. March 2005) (Statute of Limitations)

Global Warming

See Connecticut v. American Elec. Power, No. 04 Civ. 5669 (LAP), 04 Civ. 5670 (LAP), 2005 WL 2347900 (S.D.N.Y. Sept. 22, 2005) (Justiciability)

See Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) (Standing)

Justiciability

Connecticut v. American Elec. Power, No. 04 Civ. 5669 (LAP), 04 Civ. 5670 (LAP), 2005 WL 2347900 (S.D.N.Y. Sept. 22, 2005).

On September 22, 2005, a federal district court issued a decision in an action brought against American Electric Power, Southern Companies, TVA, Xcel Energy, and Cinergy seeking to have the court find that the utilities' emissions of carbon dioxide constitute a public nuisance because of their contribution to global warming. *Connecticut v. American Elec. Power*, No. 04 Civ. 5669 (LAP), 04 Civ. 5670 (LAP), 2005 WL 2347900 (S.D.N.Y. Sept. 22, 2005). The court dismissed the complaint on grounds that it lacks jurisdiction because the complaint presents a non-justiciable political question.

The court first reviews the allegations in the complaint which set forth a lengthy listing of the scientific views that support the conclusion that carbon dioxide emissions are contributing to global warming. The court then reviews the various acts of Congress and EPA statements that address global warming issues. Also, the court presents the views of the Clinton and Bush Administrations regarding the Kyoto Protocol. 2005 WL 2347900 at *1-*3.

The court indicates that the threshold issue is whether the claims presented are justiciable. It indicates that the absence of standing or the presence of a political question "suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Id.* at *4 (citation omitted). The court indicates that the standing issue is inextricably intertwined with the merits and, as a consequence, the court addresses the issue of whether the claim involves a political question. The court points out that "to determine if a case is justiciable in light of the separation of powers

ordained by the Constitution, a court must decide ‘whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.’” *Id.* at *5. The court reviews six different indicia of what would indicate the existence of a non-justiciable political question. The court explains that the indicator of particular interest is whether the court “confronts ‘the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion.’” *Id.* (citation omitted).

The court then reviews the numerous “initial policy determinations” that the defendants indicate would have to be made by the elected branches before any court could address the issues. These relate to: who should bear the societal costs of reducing greenhouse gas emissions; whether all utilities should be responsible, rather than just the five defendants; the implications of the various choices; and the implications for the nation’s energy independence and, by extension, its national security. The court also points out that it would be required to make numerous policy judgments in determining how to fashion a remedy for plaintiffs’ claims, including the level at which to establish a cap of carbon dioxide emissions, the appropriate percentage reduction, a schedule for reduction, and a number of other policy determinations. *Id.* at *6.

The court concludes that “because resolution of the issue presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, ‘an initial policy determination of a kind clearly for non-judicial discretion’ is required.” The court further states that “the questions presented here ‘uniquely demand single-voiced statement of the Government’s views.’” The court then concludes that the actions present non-justiciable political questions that are “consigned to the political branches, not the Judiciary.” *Id.* at *7.

Monitoring

See Sierra Club v. TVA, 430 F.3d 1337 (11th Cir. 2005) (Citizen Suits)

PSD Requirements

United States v. Alabama Power Co., 372 F.Supp.2d 1283 (N.D. Ala. 2005)

On June 3, 2005, Federal District Court Judge Virginia Hopkins issued her decision on the two principal issues before the court in EPA’s NSR enforcement action brought against Alabama Power Company. *United States v. Alabama Power Co.*, 372 F.Supp.2d 1283 (N.D. Ala. 2005). This is one of the actions that EPA brought against electric utilities in connection with its NSR enforcement initiative. The two issues addressed by the court are: (1) the correct legal test for determining routine maintenance, repair and replacement (RMRR); and (2) the correct legal test for determining an emissions increase. The court’s decision on these issues mirrors the holding of the federal district court in the *Duke Energy* case, namely, RMRR is to be determined based upon whether an activity is routine for an industrial category, not for a particular emissions unit, and emissions increases are to be determined based upon whether there is an increase in the emissions rate, not based upon an increase in annual emissions taking into account possible increased utilization.

Court’s Review of Relevant Law

The court first reviews in depth the NSR statutory provisions, the regulatory language and NSR court decisions. The court focuses at length on the *Ohio Edison* and *Duke Energy* decisions and points out that these two cases “illustrate the split in decisions” on the issues before the court. 372 F.Supp.2d 1283, 1292. In contrast to the rulings in *Duke Energy*, the court in *Ohio Edison* ruled (1) that RMRR should be based upon whether a change is routine for a particular unit and other factors that EPA had developed to narrow the RMRR exclusion, and (2) that an emissions increase should be determined based upon an actual-to-projected-actual test, which the court applied in a way similar to an actual-to-potential test.

The *Alabama Power* court’s discussion of the case law is particularly dismissive of the district court’s ruling in the *Ohio Edison* case. It points out that the “*Ohio Edison* court either did not see EPA as having taken various positions over the years on the scope of the RMRR exclusion or, if it did, it chose not to discuss them in any detail.” *Id.* at 1294. The court points out that the *Ohio Edison* court states that the “any physical change” language in the “modification” definition “necessarily requires a narrow reading of any exclusion to that broad statutory language.” *Id.* Similarly, the court says that, in addressing the “fair-notice issues,” “*Ohio Edison* arguably ignored conflicting EPA guidance, again for textual reasons: the word ‘any’ in the statute was clear enough” (the exemption would otherwise “swallow the general rule”). *Id.*

In contrast to its review of the *Ohio Edison* decision, the court reviews favorably the court’s decision in the *Duke Energy* case. It points out that the one similarity is that both courts grounded their RMRR decision in the statute, not in EPA’s regulations or guidance. Yet, the two courts reached diametrically opposed interpretations of the statutory language. It points out that the *Duke Energy* court “considered the context in which Congress adopted the PSD modification provision, saying that prior to the adoption of the statutory PSD program, EPA had already adopted the industry’s argued-for ‘routine within the source category’ RMRR exclusion” in its NSPS regulations. *Id.* It further points out that the *Duke Energy* court “was persuaded that Congress developed the PSD program within this existing regulatory framework and that, when it added ‘modification’ to PSD coverage, Congress did so by specifically adopting the NSPS statutory definition of ‘modification.’” *Id.* at 1294-1295. It also explains that the “sparse legislative history” was synonymous with an expressed intention to “conform” the PSD modification provision to “usage in other parts of the act.” *Id.* at 1295.

In reviewing EPA’s interpretations of the RMRR exclusion, the court points out that EPA does not dispute the history presented by *Duke Energy* and *Alabama Power*, but simply states that there are “more persuasive” examples of EPA’s interpretations. 372 F.Supp.2d at 1295 n.22. The court then states that the “existence of EPA statements and regulations that can be, and are, cited by both sides is evidence in and of itself that EPA has been neither consistent nor clear.” *Id.*

In reviewing the emissions increase analysis in *Ohio Edison* and *Duke Energy*, the court finds a “similar dichotomy.” 372 F.Supp.2d at 1297. As noted above, it points out that the *Ohio Edison* court accepted EPA’s argument that an “actual-to-projected-future-actual” test should be applied. The court explained, however, that the “EPA increased emission test is problematic because the reason to perform maintenance or repair work at a plant is to prevent future equipment failures. *Id.* The test becomes a self-fulfilling prophecy because emission increases are inevitable: the less down times or power outages, the more operating hours; the more operating hours, the more emissions.” *Id.* It further pointed out that the effect of the *Ohio Edison* court’s rulings would be that PSD would

“apply to virtually any capitalized maintenance or repair project that prevented enough down time to breach the emissions increase thresholds.” *Id.*

As with the RMRR analysis, the *Alabama Power* court reviews favorably the analysis in the *Duke Energy* decision regarding how emissions increases should be determined. At the outset, it points out that the court in *Duke Energy* “looked to a different statutory context for guidance: the legislative context of the PSD modification program’s creation and its origins in the NSPS program.” *Id.* at 1298. It further points out that once Congress decided to require “EPA to adopt the NSPS RMRR exclusion, the court had little difficulty concluding that Congress also intended that EPA employ the NSPS ‘maximum hourly emissions’ test advocated by Duke Energy.” *Id.* Further, the court states approvingly that the *Duke Energy* court said “EPA’s regulatory ‘hours of operation’ exclusion required EPA to hold hours of operation constant, effectively creating a maximum hourly emissions rate test.” *Id.* The court then proceeds to review other aspects of the *Duke Energy* court’s emissions increase analysis.

At the conclusion of its review of the *Duke Energy* ruling, the *Alabama Power* court states that:

Still, when one lays *Ohio Edison* and *Duke Energy* side by side, *Duke Energy’s* observation that Congress clearly intended EPA to adopt the NSPS emissions increase test appears more firmly grounded in the CAA.

372 F.Supp.2d 1283, 1298.

The court then points out that EPA’s initial PSD regulatory program and initial post-1977 Clean Air Act Amendment regulations also provided for emissions increases to be determined based upon a maximum hourly test. The court then indicated that it “cannot tell if EPA thought about whether the maximum hourly emissions increase test would still be available for PSD applicability purposes” under the 1980 NSR rules. *Id.* at 1299. It further states that:

And, as *Duke Energy* notes, the only emissions test actually in EPA’s regulations at the time was the largely discredited “actual to potential” test, which means that prior to the 1992 WEPCO rule implementing the “actuals to future actuals” test, EPA had, for many modifications, no lawful emissions increase test at all in its regulations.

Id.

Review of the 2003 NSR Rule

The court next discusses EPA’s revision of the RMRR provisions of NSR by adopting the Equipment Replacement Rule in 2003. The court points out, however, that the 2003 rule is not to be imposed retroactively. Thus, even though the D.C. Circuit’s ruling on the validity of the 2003 EPA rule would be binding on the court, the court explains that the D.C. Circuit’s decision is irrelevant for purposes of the current case. *Id.* at 1299-1300.

The court also notes that the Utility Air Regulatory Group has filed a brief before the D.C. Circuit in which it also argues that the 1980 NSR rule should be interpreted to require an emissions increase test based upon maximum hourly emissions rate and, if not so interpreted, should be found unlawful. The *Alabama Power* court confuses somewhat the case that has been briefed, which only addresses the 2002 NSR rule reforms, and the case in which the Equipment Replacement Rule is

challenged. Nonetheless, the court indicates that it intends to proceed to make a judgment regarding applicable law without awaiting the outcome of the litigation before the D.C. Circuit. *Id.* at 1300-1301.

The court briefly discusses the Clean Air Interstate Rule (CAIR) and states that “even the most ardent proponent of strict statutory construction or textual analysis would have difficulty reconciling EPA’s prior rulemaking or litigation positions with CAIR.” Nonetheless, the court points out that CAIR also is not retroactive and thus not relevant for the pending litigation. *Id.* at 1301.

Deference Due EPA’s Interpretation

Next, the court reviews the case law holding that “courts typically grant substantial deference to the EPA’s interpretation” of the Act and its implementing regulations. *Id.* at 1301. It points out, however, that EPA does not have “unbridled discussion” to interpret the Act “free from judicial oversight.” *Id.* (citation omitted). It then proceeds to discuss the question of “how much deference” is to be accorded to EPA. *Id.* at 1302. It then quotes extensively from the Supreme Court’s decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), which addresses at length the degree of deference to be granted to an agency and sets out a more limited view of the deference to be given agency interpretations. *Id.* at 1302-1304.

Review of *WEPCO* and Subsequent EPA Statements

The court next discusses the *WEPCO* decision in which “life extension” projects were considered and, in that instance, were determined not to constitute RMRR. The court indicates that the applicability of NSR and PSD regulations to life extension plants is . . . the core dispute” of this case and other utility enforcement actions. *Id.* at 1305. The court points out that EPA issued numerous statements following the *WEPCO* decision in which it indicates that the decision would “have limited applicability at most.” It points out that, in the *Ohio Edison* opinion, there is an absence of any indication of “the reasons the EPA’s post-*WEPCO* statements and actions (inaction may be a better choice of words) count for so little.” The court then states that “if there is a countervailing case to be made to the *Duke Energy* analysis, the court cannot find it in *Ohio Edison*.” *Id.*

The court speculates whether the Eleventh Circuit, which will hear any appeal of the *Alabama Power* decision, would grant substantial deference to EPA’s interpretations. It concludes that there is no case that indicates what degree of deference the appellate court would give EPA. It points out that:

Were the [*Alabama Court*] court convinced that *Ohio Edison* is better researched and reasoned than *Duke Energy*, the choice would be harder. The issues are the same, the arguments overlap to a great degree, and there are pros and cons to the arguments of both sides. Having said that, the court finds *Duke Energy* clearly more thorough, comprehensive and rigorous in its analysis and therefore the more persuasive decision on the two (2) issues discussed here.

Id. at 1305-1306.

The court also indicates that it believes that the Eleventh Circuit “is much more likely to approach the EPA’s arguments and its enforcement posture here with *Mead*-like skepticism than it is

to approach it with *WEPCO*-like deference.” *Id.* at 1306. The court says that EPA’s arguments sound more in “litigation position,” which is never entitled to Chevron deference.” *Id.* “Given the EPA’s zigs and zags represented by its contradictory post-*WEPCO* statements and rules, followed by the 2003 amendments, and now the 2005 CAIR, the court cannot say that EPA’s interpretation of its rules is due to be afforded *Chevron* deference.” *Id.* The court further justifies denying *Chevron* deference here because “one office of EPA [is] attempting to expand and clarify the RMRR provisions through rulemaking, while another is attempting to redefine them through enforcement actions and litigation.” *Id.* The court adds in a footnote:

EPA has indicated that it will only bring additional enforcement cases against utilities for projects that violate the 2003 NSR Rule. Citation omitted. This leaves the anomaly of utilities, like APC, being prosecuted for conduct that, if engaged in now, would not be prosecuted. Put another way, this action is a sport, which is not exactly what one would expect to find in a national regulatory enforcement program.

372 F.Supp.2d 1283, 1306 n. 44.

Court’s Rulings

The court’s final rulings are:

- The RMRR exclusion applies to projects that are routine within the industry, by which is meant work of a type performed commonly within the industry, although perhaps infrequently at any specific one or more of APC’s particular plants; and
- Emission increases, for purposes of NSR/PSD analysis, are calculated only on the basis of “maximum hourly emission rates”, not “annual actual emissions”. Maximum hourly emissions must increase before PSD permitting is triggered; greater annual facility utilization is irrelevant to the analysis. 372 F.Supp.2d 1283, 1307.

Concurrently with the court’s decision, it also ordered that the case be referred to mediation and stayed until the completion of mediation. The date in the order for mediation to be completed is September 9, 2005, with provision for an extension if determined appropriate.

***United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005)**

On June 15, 2005, the Fourth Circuit Court of Appeals issued its opinion on EPA’s appeal of the federal district court decision in the *Duke Energy* NSR case. *United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005). This case was brought by EPA as a part of its NSR enforcement initiative. EPA argued that Duke Energy had violated the PSD requirements of the Clean Air Act by undertaking a number of major replacement projects at eight power plants. In a unanimous decision of the three-judge panel, the Fourth Circuit upheld the district court’s ruling that there must be an increase in the maximum emissions rate for a change to potentially trigger NSR permitting. It did not rule on the district court’s holding that a determination of whether a replacement project comes within the routine maintenance, repair and replacement exclusion is to be based on whether the activity is routine within the industrial source category. The court concluded that it need not reach this question.

After reviewing the statutory and regulatory framework, the nature of the projects at issue, and the district court's decision, the Fourth Circuit's opinion sets out the basis for the court's ruling affirming the lower court decision. Initially, the court points out that it would engage in a modified *Chevron* analysis. The first step in that analysis is to determine "whether Congress has directly spoken to the precise question at issue." The court pointed out that "[o]nly if the statute is silent or ambiguous on the point is Congress deemed to have delegated authority to the agency to clarify the point in its regulations." 411 F.3d 539, 546. After noting that EPA and intervenors in support of EPA acknowledge that the *Chevron* principles govern review of the case, the court states that they "fail to understand, however, that straightforward application of these principles can lead to only one conclusion: affirmance of the judgment of the district court." *Id.*

The court points out that Congress has indeed "directly spoken to the precise question at issue." *Id.* at 546 (citation omitted). As EPA had conceded, the critical first question is whether EPA can interpret the statutory term "modification" under PSD differently from how EPA interpreted that term under NSPS. The court explains that Congress "expressly defined 'modification' in the NSPS provisions of the Clean Air Act, . . . and then expressly directed that the PSD provisions of the Act employ this same definition." *Id.* It further ruled:

When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently. Thus, because Congress mandated that the PSD definition of "modification" be identical to the NSPS definition of "modification," the EPA cannot interpret "modification" under the PSD inconsistently with the way it interprets that term under the NSPS.

Id. at 546-547.

In reaching this ruling, the Fourth Circuit relied heavily on *Rowan Cos. v. United States*, 452 U.S. 247 (1981). There the Supreme Court "faced the situation strikingly similar to the one at hand," and held that when Congress established "substantially identical" statutory definitions of a term in different statutes, "the agency charged with enforcing the statutes could not interpret the statutory definitions 'differently' *Id.* at 257." The court reviewed in some depth the *Rowan* case, which involved tax law provisions that contain the defined term "wages." The court then points out that the Clean Air Act provides "even stronger evidence" that Congress intended the statutory definitions of "modification" in the PSD and NSPS provisions to be interpreted identically.

While Congress used only "substantially the same language" in the statutory definitions at issue in *Rowan*, *id.* at 255, here Congress mandated that the definition of "modification" in the PSD provisions precisely mirror the definition of "modification" in the NSPS provision.

Id. at 548.

The court then reviews certain legislative history and concludes that this history "does not in any way suggest that Congress intended the identical statutory definitions to receive different interpretations." *Id.* The court notes that EPA emphasized in its briefs "vital differences" between PSD and NSPS. The court said that it did not "ignore or minimize those differences." *Id.* at 549. It

pointed out that the Fourth Circuit and other courts have approved different regulatory definitions for an identical statutory term in the PSD and NSPS statutes because of the “significant difference[s] between the PSD and NSPS programs.” *Id.* In one case, the court pointed out that the term at issue “stationary source” had been defined in the NSPS provisions but had not been defined in the PSD provisions. *Id.* at 550. It also pointed to another case involving the term “commenced,” which had been interpreted differently in the NSPS and PSD regulations, but where the term was defined under PSD and not under NSPS. The court said that these cases illustrate the principle that where the same word or phrase is used it will generally be presumed to have the same meaning when it is used in different parts of a statute, but that this “presumption of the uniform usage . . . relents” when there is “a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.” *Id.*

The court then explained that here the “presumption of uniform usage has become effectively irrebuttable because Congress’ decision to create identical statutory definitions of the term ‘modification’ has affirmatively mandated that this term be interpreted identically in the two programs.” *Id.* The court stated that the “different purposes of the NSPS and PSD programs cannot override that mandate.” The court concludes by pointing out that “[n]o one disputes that prior to enactment of the PSD statute, that EPA promulgated NSPS regulations that define the term ‘modification’ so that only a project that increases a plant’s *hourly* rate of emissions constitutes a ‘modification.’” *Id.* The court further stated that “EPA must, therefore, interpret its PSD regulations defining ‘modification’ congruently.” *Id.* The court did indicate, however, that “[o]f course, this does not mean that this regulatory interpretation must be retained indefinitely.” *Id.* The court pointed out that EPA could “amend and revise” the “modification” definition, *Id.*, but that, as long as the term is defined identically in the NSPS and PSD statutes, “EPA must interpret that term in a consistent manner in the NSPS and PSD regulations.” *Id.* at 551.

***New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005)**

On June 24, 2005, the D.C. Circuit issued a decision in the 2002 NSR rule case. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) The key rulings of the court are:

- The baseline actual emissions provisions authorizing non-utility sources to select any two years within the past ten years as a baseline and electric utilities to use any two years within the past five years as a baseline are permissible under the Clean Air Act.
- The authorization to use an actual-to-projected-actual emissions increase test, including the “demand growth” exclusion, is permissible under the Act.
- The Plantwide Applicability Limitation provisions are lawful under the Act.
- The “Clean Unit” authorization is impermissible and thus was vacated based upon the court’s ruling that a “potential-to-potential” test is impermissible under the Act.
- The Pollution Control Project exclusion is impermissible under the Act and thus was vacated, because the court finds that EPA has no authority to establish such an exemption under which collateral emissions increases are not subject to NSR.

- The recordkeeping and reporting provisions under the actual-to-projected-actual test under which emissions are to be recorded where there is a “reasonable possibility” of a significant emissions increase are arbitrary and capricious, because the court finds that EPA did not establish a sufficient administrative record to justify such provisions. However, the court did not vacate the “reasonable possibility” provisions, but instead, remanded them for further action by EPA, which may include justifying the provisions adopted or revising the provisions. Until EPA acts, the “reasonable possibility” provisions will remain in place.
- The court rejected industry’s challenge to the 2002 rule on the grounds that it must include a “first step” NSPS-type modification test.
- The court ruled that the challenge to the interpretation in the 2002 rule preamble stating that an “actual-to-potential” test is to be applied under the 1980 NSR rule is not ripe for review. The court notes that the 2002 rule has been in place for three years and indicates that any application of the 1980 rule that is problematic can be addressed through judicial proceedings.

The introduction to the opinion primarily contains a summary of the court’s rulings similar to the foregoing. The following sets out a Part-by-Part review of the balance of the opinion and an indication of which judge wrote each Part of the opinion.

I. Background (413 F.3d 3 at 11-18) (Written by Judge Tatel)

This Part of the opinion reviews the statutory, regulatory and case law history of the New Source Review (NSR) provisions of the Clean Air Act. In particular, it reviews the statutory definition of “modification” in section 111(a)(4), the various iterations of the NSPS definitions of “modification” and exceptions to that definition, the initial PSD regulations adopted in 1974, the NSR provisions enacted in 1977, EPA’s regulatory history in implementing the 1977 enactment, the two early *Alabama Power* opinions, and the opinions in the *Puerto Rican Cement* and *WEPCo* cases. The court then reviews the challenges to the 1980, 1992 and 2002 rules, and points out that it will review EPA’s regulations under the *Chevron* two-step process.

II. Industry Challenges (413 F.3d 3 at 18-21) (Written by Judge Williams)

The court first briefly reviews industry petitioners’ three main challenges:

- Industry petitioners maintained that the 2002 rule is unlawful as a result of its failure to include a requirement that there be a NSPS-type modification (*i.e.*, an increase in hourly rate of emissions) in order to trigger NSR permitting. Also, industry argued that the 1980 NSR rule’s definition is unlawful to the extent that it is determined to not contain a requirement that there be an increase in hourly rate of emissions.
- Industry petitioners contended that the statement in the 2002 preamble that emission increases are to be determined based upon an “actual-to-potential” test is an unlawful interpretation of the 1980 rule.
- Newmont Mining argued that the elimination of the authorization for states to use “source-specific emissions limitations” as being equivalent to “actual emissions” is unlawful.

With regard to the industry position that NSR applicability must be premised on an increase in hourly rate of emissions, the court initially reviews EPA's regulatory interpretations of the "modification" statutory definition that preceded Congress' 1977 enactment of the NSR requirements incorporating the NSPS statutory definition of "modification." The court disagrees with industry's statement that there is "abundant indication" of Congress' intent to incorporate the preexisting NSPS regulatory definition in the NSR program. 413 F.3d 3 at 19. It references industry's citations to legislative history that the NSPS definition is to "conform to usage in other parts of the act." *Id.* The court states that these "usage" phrases refer to uses in the statute, not usage in the regulations. *Id.*

The court also opines that the definitions in 40 C.F.R. §60.2(h) and §60.14 are "two quite differently worded definitions" that were "within" the NSPS program at the time of the 1977 amendments. *Id.* at 20. It then indicates "it would take a rather pointed indication from Congress to support the idea that it expressly adopted one of them for NSR." *Id.* The court finds no such indication, but then states that "[w]e express no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs," citing to the Fourth Circuit opinion in the *Duke Energy* case issued on June 15, 2005. *Id.* The court says that this latter argument was not made by industry petitioners in their opening brief and "is therefore waived." *Id.*

With regard to the "actual-to-potential" interpretation of the 1980 rule in the 2002 preamble, the court reviews the position of industry that this test is "substantially inconsistent" with the 1980 rule and the Act, but finds the challenge to be "unripe." *Id.* After reviewing the grounds for a challenge to be ripe, the court states that the 2002 rule "has been applicable for three years now," and that for "planning purposes," the 1980 rule "appears moot." *Id.* at 20-21. It further states that if there are applications of the 1980 rule "in which EPA attempts to employ the disputed sentence," namely the statement that an "actual-to-potential" test is to be applied on an across-the-board basis, "judicial proceedings addressed to the application can solve the problem of any affected firm." *Id.* at 21. The court also states that it "seems improbable in light of [EPA's] express disclaimer" that EPA would take the position that universal application of the actual-to-potential test is required. *Id.*

With regard to Newmont's claim that EPA acted unlawfully by deleting the provision that source-specific allowable emissions could be treated as equivalent to actual emissions, the court found that EPA had engaged in "reasoned decision-making" and dismissed Newmont's argument that EPA's rule would encourage sources to continue emitting at high levels to avoid losing the ability to have those levels be considered as the emissions baseline. 413 F.3d at 21.

III. Baseline Emissions (413 F.3d 3 at 21-31) (Written by Judge Rogers)

In this Part, the court first reviews the statutory definition of "modification" and then explains that the 2002 rule revised the manner in which baseline emissions are determined. The baseline emissions provisions authorize non-utility sources to select "any consecutive 24-month period" within the 10-year period immediately preceding a change and electric utilities to select "any 2 consecutive years within the 5 years prior to the proposed change." 413 F.3d 3 at 22. The court points out that government and environmental petitioners raise two sets of challenges: namely, that (1) the 10-year lookback period is impermissible because it allows sources to increase emissions beyond their most recent levels without triggering NSR; and (2) the 10-year lookback period is arbitrary and capricious because it contravenes the statutory purpose of protecting and enhancing air

quality. The court states at the outset of this Part that petitioners “fail to overcome the presumption of validity accorded to EPA regulations.” *Id.*

In analyzing whether EPA’s baseline provisions contravene the statute, the court first reviews petitioners’ arguments that “increases” must be measured against the period immediately preceding the change and their analogies of interpretations of “increases” in other contexts. It then outlines EPA’s response showing that immediately preceding periods might not be appropriate. Also, the court pointed out that the predecessor baseline requirements do not mandate use of a period immediately preceding a change. After this brief review, the court concluded that the Act is “silent or ambiguous” on how to calculate baseline emissions and thus the issue of the provisions legality is determined by whether they are based on a “permissible interpretation” of the statute under *Chevron* Step 2. *Id.* at 23.

The court then reviews the standard for review under *Chevron* Step 2. It points out that EPA’s interpretation must represent “a reasonable accommodation of conflicting policies that were committed to [EPA’s] care by the statute.” *Id.* (citation omitted). The court states that EPA’s interpretation is entitled to deference when “the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involved reconciling conflicting policies.” *Id.* The court then points out that “[t]here can be no doubt that EPA is entitled to balance environmental concerns with economic and administrative concerns, at least to a point.” It then quotes approvingly from the *Chevron* case in which the Supreme Court stated “Congress sought to accommodate the conflict between economic interest in permitting capital improvements to continue and the environmental interest in improving air quality,” and “delegated the responsibility of balancing those interests to EPA.” *Id.* It then points out that different interpretations of the term “increases” may have “different environmental and economic consequences” and “EPA has the authority to choose an interpretation that balances those consequences.” *Id.* at 23-24.

The court next reviews the record upon which EPA based its decision to establish the 10-year lookback period. It notes the complexity with the prior “actual emissions” definition, the desire to “simplify and streamline the NSR program without sacrificing air quality,” and the support of ten states concurring with EPA’s conclusion that the NSR program has been “broken for many years and [is] long overdue to be fixed.” *Id.* at 24. The court also reviews EPA’s view that the 10-year lookback period “promotes economic growth and administrative efficiency” and the reasoning underlying EPA’s conclusion. *Id.* Additionally, the court reviews in depth EPA’s business cycle study and government and environmental petitioners’ challenges of that study. *Id.* at 25-26.

The court also reviews environmental petitioners’ contention that the 10-year lookback period violates the court’s interpretation in the *Alabama Power* case that sources can only net out emissions decreases if the offsetting “changes” are “substantially contemporaneous.” *Id.* at 26. The court points out, though, that the *Alabama Power* case does not require that baselines be “substantially contemporaneous,” but that the “changes” must be substantially contemporaneous. The court notes that EPA did not change the contemporaneous period in the regulations and that changes to be netted out must still occur within the 5-year contemporaneous period, even though the baseline emissions level for a change is calculated using the 10-year lookback period. *Id.* at 26-27.

In concluding its analysis of the statutory interpretation challenge to the baseline provisions, the court finds that Congress has left to EPA the authority to “fill in” the gap relating to calculation of “increases” in emissions, “while balancing the economic and environmental goals of the statute.”

Id. at 27. The court finds that “petitioners failed to demonstrate that EPA’s policy determination is impermissible,” and thus it defers to EPA’s statutory interpretation under *Chevron* Step 2. *Id.*

Next, the court reviews the government and environmental petitioners’ contention that EPA’s choice of a 10-year lookback period is arbitrary and capricious “because it allows sources to increase their emissions to historic levels without triggering NSR, thereby harming air quality and public health.” *Id.* They note that environmental petitioners also challenge the 5-year lookback period for electric utilities, “but provide no evidence or analysis to support” this challenge. *Id.* The court then reviews EPA’s response to petitioners’ claims, which is heavily based on the Environmental Impact Analysis that EPA performed and on which comment was taken in connection with EPA’s reconsideration of aspects of the 2002 rule. The court notes that EPA “acknowledges that fewer changes will trigger NSR under the 1980 rule” but then explains why EPA believes that the magnitude of any increase or decrease in emissions from the baseline emission provisions would likely be “very small.” *Id.* at 28-29. The court ultimately concludes that “EPA’s predictive judgment is entitled to deference,” and that “[in]complete data does not necessarily render and agency decision arbitrary and capricious.” *Id.* at 31. It then indicates that “EPA explained the available evidence and offered a ‘rational connection between the facts found and the choice made.’” *Id.* (citation omitted). Accordingly, it ruled that petitioners did not provide a basis for the court to conclude that EPA’s 10-year lookback period is an impermissible implementation of the Act.

IV. Methodology and Enforceability (413 F.3d 3 at 31-36) (Written by Judge Tatel)

This Part of the opinion addresses the government and environmental petitioners’ challenges to two features of the 2002 rule’s projected-actual-emissions methodology: (1) the exclusion from the emissions projection of any emissions due to increased demand; and (2) the “reasonable possibility” trigger for the rule’s recordkeeping and reporting requirements. 413 F.3d 3 at 31.

The court first reviews the provisions in the post-change emissions calculation that excludes any emissions increases that “an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth.” 40 C.F.R. §52.21(b)(41)(ii)(c). *Id.* Petitioners had argued that EPA failed to address the fact that its 1998 notice of availability “expressed provisional dissatisfaction” with the demand growth exclusion. *Id.* The court then reviewed EPA’s having “‘tentatively’ concluded” that the demand growth exclusion was not appropriate and noted EPA’s statement that “‘in a market economy, all changes in utilization – and hence emissions – might be characterized as a response to market demand.’” *Id.* at 31-32.

The court points out that, contrary to petitioners’ assertions, EPA did address these concerns when it adopted the 2002 rule. The court explains that EPA described in its reconsideration Technical Support Document that numerous industry comments explained how demand growth emissions increases often can be distinguished from emissions increases resulting from other causes. The court concluded that there is no basis for binding EPA to its tentative 1998 conclusions and that EPA adequately explained its reasons for extending the demand growth exclusion to all industries “so long as the growth is unrelated to the change.” *Id.* at 33.

With regard to EPA’s basing the requirement for non-utility sources to keep records and make reports upon whether there would be a “reasonable possibility” of a significant increase in emissions, the court finds serious problems with EPA’s use of the “reasonable possibility” trigger for

recordkeeping and reporting. The court notes that EPA pointed out that emissions information can be obtained through inspections, minor NSR, Title V permit reports and certifications, and through requests for information. *Id.* at 34-35. However, the court is unpersuaded that EPA will have an adequate basis for enforcement. In particular, it finds that “EPA fails to explain how emissions reported under Title V can be traced to a particular physical or operation change.” *Id.* at 35. The court seems to accept the contention of government petitioners that sources will escape NSR because they are “allowed to destroy the data crucial” to determining NSR applicability. It ultimately concludes that “[w]ithout paper trails, . . . enforcement authorities have no means of discovering whether the exercise of [a source’s] judgment was indeed ‘reasonable.’” *Id.* Finding EPA’s explanation inadequate, the court remanded the recordkeeping and reporting provisions applicable to non-utility sources for EPA “either to provide an acceptable explanation for its ‘reasonable possibility’ standard or to devise an appropriately supported alternative.” *Id.* at 35-36.

One curious aspect of the court’s analysis of the “reasonable possibility” provisions is the view of the author of this section of the opinion (Judge Tatel) that the prior rules established an “actual-to-potential” test for determining NSR applicability for non-utility sources. The court rejects the argument of EPA and industry intervenors that the 2002 rule “increases” recordkeeping requirements for non-utilities, and in doing so, the court dismisses the significance of this “technically correct” fact by indicating recordkeeping would be so much less significant under the prior rule, because “sources other than utilities evaluated post-change emissions under the onerous actual-to-potential test, which presumed that sources would operate at their maximum post-change potential to emit.” *Id.* at 34. The court then states that, “[g]iven that assumption, sources’ actual post-change emissions could not, by definition, exceed their potential-to-emit, making records of these actual emissions unnecessary for the purpose of ascertaining whether post-change emissions increased beyond expectations.” *Id.*

The court concludes this part of its analysis stating that, “under the pre-2002 regime, non-utilities either accepted the rigors of the actual-to-potential test, eliminating the need for recordkeeping, or subjected their actual emissions to monitoring by state permitting authorities.” *Id.* The court does not explain how it concluded that there has been an alternative to the actual-to-potential test under which sources’ future actual emissions would be subjected to monitoring by state permitting authorities. Nor does the court attempt to reconcile its apparent acceptance of the actual-to-potential test as the accepted way of implementing the 1980 rule with its statements in Part II of the opinion (authored by Judge Williams) that EPA’s reference to an “actual-to-potential” test under the 1980 rule was simply a “short-hand reference to the 1980 rule, not a formal interpretation” and that it is “improbable in light of its express disclaimer” that EPA would attempt to uniformly apply the actual-to-potential test. *Id.* at 20.

V. Plantwide Applicability Limitations (413 F.3d 3 at 36-38) (Written by Judge Rogers)

In this Part of the opinion, after reviewing the regulatory authorization for Plantwide Applicability Limitations (PALs), the court explains that government and environmental petitioners contend that the PAL provision is arbitrary and capricious because sources can increase their emissions beyond their most recent levels without triggering NSR. It indicates that this challenge fails for the same reasons that petitioners’ challenge to the 10-year lookback period fails. It further states that environmental petitioners also challenge the validity of the 10-year PAL term and environmental impact of PALs, but that they fail to demonstrate that PALs are based on an impermissible statutory interpretation or are otherwise arbitrary and capricious. 413 F.3d 3 at 36.

The court reviews the reasoning in the *Alabama Power* case indicating that the netting of emissions must take into account increases and decreases that are “substantially contemporaneous.” *Id.* at 37. It notes that EPA, after initially explaining that PALs do not rely on the netting of emissions from individual units, did acknowledge in its brief that the term of the PAL could be considered to constitute the “contemporaneous” period. After reviewing EPA’s basis for selecting a 10-year period, rather than a 5-year period for the PAL term, the court notes that EPA chose the 10-year PAL term “in an effort to balance the need for regulatory certainty, the administrative burden, and the desire to align the PAL renewal with the Title V permit renewal.” *Id.* The court states that this policy choice “is entitled to deference because it involves a balancing of the environmental, economic, and administrative goals” of the Act, which “environmental petitioners fail to demonstrate is impermissible” under the Act. *Id.*

The court then reviews the six pilot projects discussed in EPA’s Environmental Impact Analysis and points to the fact that the sources with PALs had reduced their emissions significantly below PAL levels. The court also noted that, under the PAL provisions, sources are not permitted to increase emissions up to the “significant” level each time they make a change, as they are under the basic NSR applicability provisions, and that EPA estimated “such benefits would be potentially large.” *Id.* at 37-38.. Concluding that it “must defer to EPA’s assessment of the environmental benefits of PALs,” the court upholds the PAL provision as “a reasonable exercise of EPA’s authority” under the Act. *Id.* at 38.

VI. Clean Units (413 F.3d 3 at 38-40) (Written by Judge Rogers)

After reviewing the key elements of the “Clean Unit” applicability test, the court states that petitioners argue that the provision contravenes the plain meaning of the Act because it measures “increases” in terms of Clean Unit status instead of actual emissions. 415 F.3d 3 at 38-39. EPA responded that the Act is silent on how “increases” in emissions are to be measured and that they should be measured “in terms of actual emissions, potential emissions or some other currency.” EPA accordingly argues that its interpretation of the ambiguous term “increases” is entitled to deference under *Chevron* Step 2. The court rules, however, that:

Upon employing “traditional tools of statutory interpretation” under *Chevron* Step 1 to ascertain whether “Congress had an intention on the precise question at issue,” citation omitted, we conclude that the CAA *unambiguously defines “increases” in terms of actual emissions* (emphasis added).

Id. at 39.

The court bases its ruling that increases must be measured in terms of actual emissions principally on its review of Congress’ use of “emit,” “potential to emit,” and “emitted” elsewhere in the Clean Air Act. It notes that “when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.” *Id.* The court then indicates that when Congress enacted the NSR program in 1977, “it was conscious of the distinction between actual and potential emissions, using the term ‘emit’ to refer to actual emissions and the term ‘potential to emit’ to refer to potential emissions.” Op. 63. The court points out that Congress defined best available control technology as “an *emission limitation* based on the maximum degree of reduction of each pollutant . . . *emitted* from any major emitting facility. . . . (emphasis added).” *Id.*

(citation omitted). The court states that Congress used the term “emitted” to refer to actual emissions and the term “emission limitation” to refer to allowable emissions. *Id.*

In reviewing the statutory definition of “modification,” the court notes that Congress provided that a modification would be a physical or operational change that “increases the amount of any air pollutant *emitted* by [the] source (emphasis added).” *Id.* at 40. The court then states that “[i]f Congress had intended for ‘increases’ in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to ‘potential to emit’ or ‘emission limitations.’” *Id.* “[E]ven if the word ‘emitted’ does not by itself refer to actual emissions, the phrase ‘the *amount* of any air pollutant *emitted* by [the] source’ plainly refers to actual emissions.” *Id.* Based upon this statutory interpretation, the court concludes that the plain language of the Act “indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions,” and holds that “EPA lacks authority to promulgate the Clean Unit provision.” The court vacates that portion of the 2002 rule “as contrary to the statute under *Chevron* Step 1.” *Id.*

The court’s statutory construction ruling that increases in emissions must be based exclusively on actual emissions should be overturned. To begin with, the word “emitted” on which the court’s analysis hinges, modifies “air pollutant” and serves two, and only two purposes. First, the word in the past tense is needed to reflect the fact that an “increase” can only be determined for an “air pollutant” that has been “emitted” in the past. The second and related point is that the use of “emitted” in the first part of the definition of “modification” is to distinguish between pollutants emitted in the past and those addressed in the second part of the definition “not previously emitted.” The court reads the definition as though it states that modifications are to be based upon increases in the “amount . . . emitted,” rather than the “amount of any air pollutant emitted.” The court’s analysis of the best available control technology definition is similarly flawed. While correct that the term “emission limitation” is a measure of “allowable emissions,” the use of the word “emitted” in that definition is simply to indicate that an emission limitation is only established for an air pollutant *emitted* from a facility. It is in no way referencing “actual emissions,” nor is it used to distinguish between actual emissions and allowable emissions.

VII. Pollution Control Projects (413 F.3d 3 at 40-42) (Written by Judge Rogers)

In this section of the opinion, the court begins with a review of the Pollution Control Project (PCP) exclusion under which a project that reduces emissions of a “primary” pollutant, but increases emissions of a “collateral” pollutant, is not deemed to be a change subject to NSR if its net effect is “environmentally beneficial.” 413 F.3d 3 at 40. As with the NSPS-type modification test, the court finds nothing to indicate that Congress intended to incorporate preexisting NSPS regulations into the NSR program. It states that EPA’s only other support for the PCP exemption is its view that it would be “absurd” for Congress to discourage PCPs by subjecting them to NSR. In response, the court states that “there is nothing inherently ‘absurd’ about increasing the regulatory cost of projects that increase collateral emissions, and EPA does not demonstrate otherwise.” *Id.* at 41. It notes that environmental petitioners state that Congress would have exempted PCPs explicitly if it intended to do so, as it did for clean coal technology. The court states that “[a]bsent clear Congressional delegation, . . . EPA lacks authority to create an exemption from NSR by administrative rule.” *Id.* The court finds no such delegation and vacates the PCP exemptions in the 1992 and 2002 rules. *Id.* at 41-42.

VIII. State and Local Authority (413 F.3d 3 at 42-44) (Written by Judge Williams)

This section of the opinion reviews two substantive and one procedural challenge of government petitioners, as follows:

- Allegations that the 2002 rule unlawfully precludes states from adopting more stringent criteria and thereby violates section 116 of the Act, which preserves state authority to adopt alternative pollution standards or limitations, except that state standards may not be “less stringent” than EPA standards or limitations;
- Allegations that the 2002 rule violates the anti-backsliding provision in section 193 of the Act, which precludes EPA’s relaxation of control requirements in effect in nonattainment areas before November 15, 1990; and
- Allegations that EPA failed to give adequate notice that it might adopt a rule not giving states authority to pick and choose among the innovations from the prior rule and that the rule adopted was not a “logical outgrowth” of the noticed proposals.

The opinion addresses these challenges in a summary fashion. The claim that states are precluded from adopting more stringent requirements is reviewed and, although finding some inconsistency in EPA’s statements, the court notes that several statements reflect that EPA would approve more stringent provisions. Despite government petitioners’ argument that the choice EPA offers is “illusory,” the court indicates that, “until EPA has rejected a newly submitted SIP, we think the issue is unripe.” 413 F.3d 3 at 42-43. Similarly, the court finds the “anti-backsliding” challenge to be unripe, noting that the “environmental effects of less sweeping NSR are ambiguous: more sweeping NSR will tend to assure improved emission controls on qualifying ‘modifications’ but may also deter change and thereby preserve firms’ use of older, dirtier technologies.” *Id.* at 43. The court states that it is “in no position to say which effects predominate here.” *Id.* With regard to the inadequate notice claim, the court rules that petitioners had adequate notice that EPA may not adopt a “menu of alternatives,” and instead may refrain from taking the proposed action. *Id.* at 44.

Concurring Opinion of Judge Williams

Judge Williams’ concurring opinion contains two paragraphs. One addresses the fact that the remand regarding the recordkeeping and reporting elements of the 2002 rule requires EPA “to analyze the trade-off between compliance improvement and the burdens of data collection and reporting,” and “[i]n making its choice on some specific degree and type of collection in reporting, it must articulate a reasoned judgment as to why any proposed additional burden would not be justifiable in terms of the likely enhancement of compliance.” 413 F.3d at 44.

In the Judge’s second paragraph, he states his support for “emission charges or marketable pollution entitlements” that “provide incentives for firms to use – *at any and every plant* – all pollution control methods that cost less per unit than the emission charge or the market price of an entitlement, as the case may be.” The Judge contrasts this with “command-and-control” regulations “where emission control is typically far more expensive, per unit of pollution, when accomplished by retrofitting old plants than by including state-of-the-art control technology in new ones.” *Id.* at 45.

***United States v. Cinergy Corp.*, 384 F.Supp.2d 1272 (S.D. Ind. 2005)**

On August 29, 2005, the federal judge hearing the NSR enforcement action brought against Cinergy by EPA issued a ruling on cross-motions for partial summary judgment regarding the applicable test for determining emissions increases. *United States v. Cinergy Corp.*, 384 F.Supp.2d 1272 (S.D. Ind. 2005). In a brief memorandum opinion, the judge granted EPA's motion and denied Cinergy's, ruling that emissions increases are to be determined based upon an "actual-to-projected-actual" test. Cinergy had argued that there must be an increase in the hourly emissions rate in order to trigger NSR applicability, relying on the Fourth Circuit decision in the *Duke Energy* case.

The judge's opinion first briefly summarizes the decisions in the principal NSR cases that have been decided to date. In particular, the court summarized the recent D.C. Circuit ruling on the 2002 NSR rule, the *WEPCO* decision, and the *Duke Energy* opinion.

As noted above, the principal issue that the court addressed is how emissions increases are to be determined under EPA's 1980 NSR regulations. The judge ruled that there is nothing in the Congressional history that indicates that Congress intended to incorporate the NSPS regulatory definition of "modification," which requires an increase in the hourly emissions rate. He further ruled that Congress did not limit EPA's authority to define modification "as it deemed fit to serve the purposes of the PSD program." 384 F.Supp.2d 1272 at 1276. The judge rejects Cinergy's argument that EPA's current litigation position is contrary to its own earlier acknowledgements that Congress intended for EPA to conform the meaning and usage of modification in PSD to that in NSPS. *Id.* The judge indicates that EPA's references were to narrow specific issues and not to the issue of whether there must be an hourly emissions rate increase in order for the change to constitute a modification. *Id.* at 1277. The judge also finds that EPA's current interpretation is not inconsistent with the *WEPCO* decision or EPA's own earlier interpretations. *Id.*

The judge summarily dismisses the holding of the Fourth Circuit in the *Duke Energy* case, which held that "a net emissions increase can result only from an increase in the hourly rate of emissions." See *Duke Energy*, 278 F. Supp. 2d at 640." 384 F.Supp.2d 1272 at 1277. The judge states that the *WEPCO* decision in rejecting the actual-to-potential test contemplated that there would be a projection of future actual emissions in determining whether there is an emissions increase and that a facility's operations would not be held constant in projecting future annual emissions. *Id.*

The judge indicates that Cinergy was concerned that EPA's interpretation of "modification" would eliminate the "causation element." The judge ruled, however, that the exclusion for increased hours of operation would preclude an increase in hours or production rate unrelated to a physical change. However, the court's ruling implicitly seems to accept the fact that, if there is a change, any subsequent increased operations can properly be deemed to result from the change. *Id.* at 1277-1278.

In the *Duke Energy* decision, the district court and appellate court had relied heavily on the interpretations issued by Edward Reich shortly after the 1980 regulations were promulgated. In those interpretations, Reich indicated that a change would not trigger NSR if the increase in emissions were attributable to increased hours of operation. The judge indicated his agreement with the decision in the *Ohio Edison* case (276 F.Supp.2d 829 (S.D. Ohio 2003)), in which the court ruled that the Reich interpretations "are contrary to the plain language" of the Act and EPA's regulations. *Id.* at 1278.

***United States v. Cinergy Corporation*, No. 199CV1693LJMVSS, 2005 WL 3018688 (S.D. Ind. Nov. 9, 2005)**

On November 9, 2005, the federal district court ruled on EPA's motion for summary judgment regarding the demand growth exclusion in the Agency's NSR enforcement action brought against Cinergy Corporation. *U.S. v. Cinergy Corp.*, No. 499CV1693LJMVSS, 2005 WL 3018688 (S.D. Ind. Nov. 9, 2005). EPA filed the motion seeking a purely legal determination interpreting the NSR demand growth exclusion under which the projection of future emissions does not take into account "that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change" 57 Fed. Reg. 32,334." 2005 WL 3018688 at *1. Cinergy argued that the issue is not relevant and that the Court need not make a determination because Cinergy is not relying on the demand growth exclusion.

Although the Court concluded that it is not clear that there is a "ripe" dispute regarding interpretation of the demand growth exclusion, the Court stated that Cinergy disagrees with EPA's proposed standard of causation and decided to determine the causation standard to be used at trial. The Court noted that the parties appear to agree that a physical change must cause the emissions increase, but that they disagree on the precise language to explain the causation. EPA takes the position that "to exclude an increase, it must be completely unrelated to the physical change and entirely caused by independent factors." On the other hand, Cinergy argued that the increase should be included in the calculation only if it could not have occurred "but for" the physical change. Cinergy disputed that an independent factor must be the complete cause of an increase for the increase to be excluded. *Id.* at *3.

The Court ruled that "[f]or the sake of clarification, the Court must grant [EPA's] motion and rule that an increase in emissions may be excluded from the 'actual to projected actual' calculation if (1) the unit could have accommodated the increase before the physical change and (2) the increase is unrelated to the physical change." The Court then adds that the demand growth exclusion "applies to emissions increases that could have been predicted or projected regardless of whether a physical change was to occur." It would seem that the Court's last statement is confused and that the Court should have stated that the exclusion would apply to emissions increases that could have been "accommodated," rather than ones that could have been "predicted or projected." *Id.* Although the Court grants EPA's motion and does not endorse Cinergy's "but for" test, the Court did not state that it accepts EPA's view that an "independent factor" must be the complete cause of an increase for the increase to be excluded. Indeed, the Court's ruling does nothing more than restate the language of the exclusion without seeming to accept either EPA's interpretation or that of Cinergy.

***See National Parks Conservation Ass'n, Inc. v. TVA*, No. 3:01-CV-71 (E.D. Tenn. March 2005) (Statute of Limitations)**

***See New York Public Interest Research Group (NYPIRG) v. Johnson*, 427 F.3d 172 (2d Cir. 2005) (Title V Permit Program)**

Standing

Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005)

On July 15, 2005, the D.C. Circuit issued its opinion in a case in which state, local government, and environmental group petitioners sought to have the court overturn EPA's denial of a petition asking it to regulate CO₂ and other greenhouse gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). In a split decision, the court upheld EPA's denial of the petition to regulate greenhouse gas emissions. Three separate opinions were issued in the case: a majority ruling issued by Judge Randolph; an opinion dissenting in part and concurring in the judgment issued by Judge Sentelle; and a dissenting opinion issued by Judge Tatel. The three opinions are briefly summarized below.

Majority Opinion of Judge Randolph

After first concluding that EPA's denial of the petition to regulate greenhouse gas emissions constitutes final agency action, Judge Randolph indicates that the next issue to be addressed is whether petitioners have Article III standing to bring the action. The judge reviews the numerous affidavits submitted by petitioners alleging injury from greenhouse gases, but decides not to make a final ruling on standing, noting that, as the Supreme Court explained in a prior decision, "the merits inquiry and the statutory standing inquiry often overlap." 415 F.3d 50, 57 (citation omitted). As a consequence, the judge proceeds to the question of whether EPA properly denied the petitioners' request to regulate greenhouse gas emissions.

Judge Randolph declines to make a ruling as to whether EPA has the statutory authority to regulate greenhouse gases from new motor vehicles. Instead, he assumes, for purposes of his analysis, that EPA has such authority and thus addresses whether EPA properly declined to exercise that authority. The judge then summarizes the scientific authority with regard to global warming and notes that EPA based its decision not to regulate primarily on the scientific uncertainty about the cause and effects of greenhouse gases on future climate and upon "policy" considerations that the Administrator believed warranted "regulatory forbearance" at this time. He then pointed out that a "determination of endangerment to public health" is "necessarily a question of policy that is to be based on an assessment of risk and that should not be bound by either the procedural or the substantive rigor proper for questions of fact." He further stated that the court will uphold agency conclusions based on policy judgment when the agency must resolve issues "on the frontiers of scientific knowledge." *Id.* at 58. Based on this reasoning, the judge concluded that the EPA Administrator properly exercised his discretion under section 202(a)(1) in denying the petition for rulemaking. *Id.* at 58-59.

Dissent in Part and Concurrence in the Judgment of Judge Sentelle

Judge Sentelle states that he would dismiss petitioners' challenge on the grounds that they lack standing to bring the action. He reviews various Supreme Court decisions in which the Court has indicated that:

[A] plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and

tangibly benefits him than it does the public at large – does not state an Article III case or controversy.

Id. at 59 (citation omitted).

After reviewing cases making similar points, Judge Sentelle states that, “even in the light most favorable to the petitioners, in the end [their allegations and affidavits] come down to this: Emission of certain gases that the EPA is not regulating may cause an increase in the temperature of the earth – a phenomenon known as ‘global warming.’” He then points out that this is “harmful to humanity at large,” and appears to him “to be neither more nor less than the sort of general harm eschewed as insufficient to make out an Article III controversy.” *Id.* at 60.

After explaining that his disagreement with Judge Randolph’s analysis means that the three judges have different views on how the case should be disposed of, Judge Sentelle indicates that he would join in the majority ruling that denies the petitions challenging final action by EPA. *Id.* at 61.

Dissenting Opinion of Judge Tatel

Judge Tatel indicates at the outset of his dissent that it is his opinion that at least one petitioner, the Commonwealth of Massachusetts, has standing and that EPA has failed to offer a lawful explanation for its decision. *Id.* Before proceeding to the legal issues presented, his dissent sets out a more lengthy review of the scientific evidence related to global warming than the majority opinion of Judge Randolph. In the balance of his dissent, he states the following positions:

- Massachusetts satisfies each element of Article III standing and specifically has demonstrated that it would suffer “‘harm particularized to’” itself. *Id.* at 65.
- In addressing the merits of whether EPA is required to regulate greenhouse gases under section 202(a)(1), Judge Tatel first states that greenhouse gases are “air pollutants.” He rejects EPA’s argument that Congress would have provided specific authority to regulate greenhouse gases and not simply call for study of climate change, if Congress intended for EPA to regulate greenhouse gases under the Clean Air Act. Judge Tatel bases his reasoning on statutory language that specifically refers to carbon dioxide as an air pollutant and provides that EPA has authority to regulate welfare effects that include effects on “climate.” *Id.* t 67. He also rejects a series of other EPA arguments as to why the Act should be read not to grant EPA authority to regulate greenhouse gases. *Id.* at 68.
- After stating that EPA has authority to regulate greenhouse gases, Judge Tatel then rejects EPA’s reasons for declining to grant the petition for rulemaking. Judge Tatel asserts that the EPA Administrator is required to “‘prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which, in his judgment, cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.’” *Id.* He states that EPA’s discretion is limited to judging whether there is a reasonable anticipation of endangerment to public health or welfare and not whether EPA believes such regulation would be “bad policy.” *Id.* at 74. Based upon precedents that he cites, he indicates that “EPA may withhold an endangerment finding only if it needs more information to determine whether the statutory standard has been met.” *Id.* at 76. For EPA to make a finding of no endangerment, he states that EPA “must ground that conclusion in the statutory standard and may not rely on unrelated policy considerations.” *Id.* He states

that EPA never suggests that scientific uncertainties prevent it from determining whether greenhouse gases may reasonably be anticipated to endanger welfare and states his doubts that “EPA could credibly conclude that it needs more research to determine whether [greenhouse gas-caused] global warming ‘may reasonably be anticipated to endanger’ welfare.” *Id.* at 77 (citation omitted).

- Judge Tatel’s ultimate conclusion is that “EPA has both misinterpreted the scope of its statutory authority and failed to provide a statutorily-based justification for refusing to make an endangerment finding” and thus he would grant the petitions for review. *Id.* at 82.

Statute of Limitations

***National Parks Conservation Ass’n, Inc. v. TVA*, Case No. 3:01-CV-71 (E.D. Tenn. March 2005).**

In March 2005, a federal district court ruled that claims brought by environmental groups alleging that a major overhaul project at TVA’s Bull Run plant in 1988 are barred by the five-year statute of limitations. *National Parks Conservation Ass’n, Inc. v. TVA*, Case No. 3:01-CV-71 (E.D. Tenn. March 2005). The Court found that claims for both civil penalties and injunctive relief were time-barred. A substantial majority of courts have ruled that the five-year statute of limitations precludes PSD claims for civil penalties for projects undertaken more than five years ago, but it is rare for a court to rule that claims for injunctive relief for such projects are barred as well.

The principal factual issue addressed by the Court was whether the Tennessee PSD program is only a preconstruction permit program or whether it is an operating permit program as well. After reviewing the history of the State’s PSD preconstruction program and its operating permit program, the Court concluded that the permit programs were separate and distinct and not a single program. The Court pointed out that construction permits are effective for only a limited period of time and, after construction is completed, sources are required to obtain an operating permit.

Continuing Violation

The Court first reviewed the PSD case law history in which the issue of the applicability of the five-year statute of limitations has been addressed. The Court pointed out that TVA claimed that the statute of limitations barred plaintiffs’ claim for civil penalties because the cause of action accrued in 1988 when TVA failed to obtain a preconstruction permit. The environmental group plaintiffs asserted that TVA’s alleged violations were ongoing, continuing violations and thus they would be entitled to seek civil penalties for the last five years. After reviewing the case law considering whether the failure to obtain a PSD preconstruction permit is a continuing violation, the Court pointed out that the majority view is that such violations are not continuing ones where state programs involve a separate construction and operating permit scheme. The Court indicated that the *Duke Energy* decision, in which another federal court had found claims for civil penalties to not be time-barred, involved the States of North Carolina and South Carolina, which have integrated construction and operating permit programs.

Discovery Rule

Next, the Court considered whether TVA's statute of limitations defense failed because of the discovery rule, *i.e.*, the statute of limitations does not begin to run until the injured party discovers or reasonably should have discovered the harm. The Court pointed out that the only Clean Air Act case to address the issue had rejected application of the discovery rule. After reviewing that case, the Court also concluded that "the discovery rule does not allow plaintiffs to circumvent the statute of limitations."

Concurrent Remedy Rule

The final issue addressed by the Court was whether the environmental group plaintiffs' claim for injunctive relief and declaratory judgment should be dismissed under the "concurrent remedy rule." Under this doctrine, equitable remedies are barred because the plaintiffs' legal remedy (the claim for civil penalties) is time-barred. Plaintiffs and TVA agreed that the statute of limitations itself does not apply to the claims for injunctive relief. Plaintiffs argued that they "stand in the shoes of the EPA" to enforce the Clean Air Act and therefore the concurrent remedy rule does not apply, just as it would not apply if the government brought the case. The Court pointed out that the plaintiffs' claims all arise from the Clean Air Act and, thus, if plaintiffs were successful, they would recover both legal and equitable relief for the same alleged violation of the Act. Under this circumstance, the Court concluded that, because it had determined the civil penalties claim to be time-barred, plaintiffs "should not be permitted to avoid the statute of limitations by seeking declaratory or injunctive relief." Citing another decision, the court stated that "to hold otherwise would allow the plaintiffs to 'mak[e] a mockery of the statute of limitations by the simple expedient of creative labeling'" (citation omitted).

Accordingly, the Court dismissed the environmental group plaintiffs' claim for declaratory and injunctive relief, as well as their claim for civil penalties.

Title V Permit Program

New York Public Interest Research Group (NYPIRG) v. Johnson, 427 F.3d 172 (2d Cir. 2005).

On October 24, 2005, the Second Circuit Court of Appeals issued a decision addressing several important Title V issues. *New York Public Interest Research Group (NYPIRG) v. Johnson*, 427 F.3d 172 (2d Cir. 2005). NYPIRG's principal challenge was to EPA's decision not to object to issuance of Title V permits to power plants which had been issued a notice of violation (NOV) finding that the plants had violated the PSD permitting requirements. The court vacated EPA's decision, finding that (1) EPA was required to object to the proposed permits because the permitting authority did not include PSD emission limits; and (2) the issuance of the NOV required that a compliance schedule be established for addressing the violations alleged in the NOV. The court also held that semiannual reporting of opacity and other emission deviations did not comply with the "prompt reporting" requirement of Title V. The court accepted EPA's position that quarterly reporting of SO₂ and NOx deviations was permissible as "prompt reporting."

Factual Background

In May 2000, the New York Department of Environmental Conservation (DEC) issued a NOV to the Huntley and Dunkirk power plants owned by NRG Energy, stating that the plants had been modified without obtaining PSD permits. The plant changes targeted by the NOV primarily included replacement of components in the power plants. DEC issued the plants' Title V permits without any reference to the PSD NOV. NYPIRG submitted comments asserting that the Title V permits should include PSD limits and a compliance schedule. DEC responded that the final determination of PSD applicability had not been made and that neither PSD limits nor a compliance schedule was required to be included in the permits. After DEC issued the proposed permits, NYPIRG petitioned EPA to object to the Title V permits. EPA denied NYPIRG's petition on the grounds that it was not necessary to include PSD limits or a compliance schedule until a final determination of PSD applicability was made. Subsequently, DEC brought an enforcement action in federal district court alleging that the plants were in violation of the PSD requirements.

NYPIRG also petitioned EPA to object to reporting provisions in the Title V permit, alleging that they did not comply with the "prompt reporting" requirements of Title V. The permit provided for quarterly reporting for SO₂ and NO_x emissions and opacity data. All other reporting was to be done semiannually. EPA also denied this objection request.

Demonstration of PSD Non-Compliance

The threshold issue that the court addresses is whether the issuance of the NOV constitutes a sufficient finding of a violation to require that the "violation" be addressed in the Title V permit. EPA explained that the NOV is, by its nature, only "accusatory," rather than a conclusive document. Since litigation had not been concluded, the nature of PSD requirements, if any, could not be determined. The court rejected EPA's position and held that "the DEC's issuance of these NOVs and commencement of the suit is a sufficient demonstration to the Administrator of non-compliance for purposes of the Title V permit review process." 427 F.3d 172 at 180. The court then reviews the authority of EPA and DEC to initiate enforcement actions and, amazingly, finds significance in the fact that both federal and state law provide for "direct enforcement for a 'violation' not merely for allegations." *Id.* at 181.

The court next asserts that "the DEC, as the administering agency, has a certain expertise which distinguishes its NOVs and complaints from, for instance, allegations by a private citizen or by a non-profit organization." *Id.* The court later states that:

The access guaranteed to the DEC, its authority to find and remedy violations, and the specificity of its NOVs and complaints, all indicate that the DEC can not reasonably claim to be uncertain as to what emission limits apply to the Huntley and Dunkirk plants.

Id.

The court further states that "[s]ince we are confident that the DEC does not issue NOVs lightly, we see no reason why its findings for purposes of issuing NOVs . . . do not suffice to demonstrate non-compliance for purposes of objections" under Title V. *Id.*

The court rejects EPA's position that it is "premature to include PSD limits in a permit before they are determined by the permitting authority to be applicable." *Id.* It states that "[i]t is not premature, precisely because we believe that the DEC, in issuing the NOV and filing suit, has determined that these standards are, indeed, applicable." *Id.* The court finds EPA to be in the "rather strange role of minimizing – if not outright denying – the legal significance of the DEC's NOV and complaint." *Id.* The court then makes a modest concession to the reality that PSD limits have not been determined to be applicable, stating that "we are not called on to determine whether it is reasonable for the EPA to exclude contested PSD limits from permits when the permitting authority has not yet determined those limits applicable – [because] this case does not present that problem." *Id.*

The Second Circuit nowhere discusses the body of case law that has developed over time, which has addressed whether NOV's represent a final determination that a violation has occurred. In these cases, courts consistently find that an NOV is not a "final agency action." Obviously, the importance of conducting adjudicatory proceedings from which an appeal is authorized is particularly critical when the violation allegations involve New Source Review. The court's opinion reflects a total lack of appreciation for the complexity of NSR and the uncertainty regarding how proceedings that ensue following issuance of NSR NOV's will be resolved.

Permit Compliance Schedule

Having concluded that the NOV reflected a final determination of a PSD violation, the court then addressed NYPIRG's claim that EPA should have granted its request for an objection on the grounds that the permit did not include a compliance schedule addressing the PSD NOV. Here again, the court states that "[i]ssuance of a NOV indicates that the DEC has concluded that a source is non-compliant." *Id.* at 182. The court then, with little additional analysis, holds that "[f]or essentially the same reasons we concluded that it was unreasonable for the EPA to discount the NOV and complaint as evidence that the source was in violation of the Act, we also conclude that it was inconsistent with the Act for the EPA to deny NYPIRG's petition insofar as it complained of the absence of a compliance schedule." *Id.* The court then notes that EPA had required compliance schedules "in similar past situations," specifically referencing EPA's objection to a permit Kentucky issued to the Gallatin Steel Company without a compliance schedule. *Id.*

Prompt Reporting of Deviations

The court next addressed whether reporting of deviations quarterly for certain requirements and semiannually for others complied with the requirement for "prompt reporting" under Title V. EPA responded to NYPIRG's objection by first pointing out that the permitting authority has discretion to define promptness for each particular source. EPA indicated that the quarterly reporting "is efficient and more prompt reporting would not lead to greater compliance." In defense of the semiannual reporting requirement, EPA argued that the fact that "two separate provisions require reporting" does not mean that "their timing cannot coincide." *Id.* at 183.

The court explains that DEC does have authority to define "prompt" in permits and need not establish one standard of prompt to be used consistently in all permits. However, the court states that quarterly reporting "certainly contradicts both Congress' explanation of prompt as meaning 'without delay,' . . . as well as the EPA's own explanation of prompt as two to ten days. Clean Air Act Proposed Interim Approval of Operating Permits Program: State of New York, 61 Fed. Reg. 36,617-02, 39,619 (July 30, 1996)." *Id.* at 183-184.

The court then reviews the quarterly reporting requirements for SO₂ and NO_x. The court notes EPA's justification for SO₂ quarterly monitoring, which was tied to the unlikelihood that fuel oil outside of specifications would be delivered and used. The NO_x justification was tied to the fact that the plants are subject to limits for five facilities considered together, not individually. The court accepted EPA's finding that quarterly reporting for SO₂ and NO_x is "prompt," and granted *Chevron* deference to EPA's position.

The court rejected EPA's justification for quarterly reporting of opacity requirements. It indicates that EPA justified quarterly reporting on the grounds that "heightened reporting would not heighten compliance." *Id.* at 184. The court indicated that the purpose of prompt reporting is "not exclusively to ensure compliance," but "to alert the EPA and the public to emissions violations." The court then pointed out that the plants had a "rich history of violating opacity requirements." Based on the history of non-compliance, the court indicated that EPA had failed to demonstrate reasonableness and remanded the opacity quarterly reporting requirements to EPA "to determine reporting requirements consistent with the Act's promptness mandate." *Id.*

The court next considered whether semiannual reporting of deviations of other requirements complied with the Title V prompt reporting requirement. The court gave short shrift to EPA's position that, even though the semiannual monitoring requirements and prompt reporting requirements are contained in two separate provisions, their timing may permissibly coincide. The court holds that "[t]o give both provisions meaning, prompt must be interpreted at the very least as with greater speed than every six months." *Id.* at 185.

***See National Parks Conservation Ass'n, Inc. v. TVA*, Case No. 3:01-CV-71 (E.D. Tenn. March 2005) (Statute of Limitations).**

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