

Clean Air Act Litigation Developments

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Clean Air Act Litigation Developments 2007

Citizen Suits

See National Parks and Conservation Association v. TVA, 502 F.3d 1316 (11th Cir. 2007) (Statute of Limitations)

See Sierra Club v. Johnson, 500 F. Supp. 2d 936 (N.D. Ill. 2007) (Title V Permit Program)

“Continuing Violation”

See National Parks and Conservation Association v. TVA, 502 F.3d 1316 (11th Cir. 2007) (Statute of Limitations)

“Fair Notice” Requirement

See United States v. Cinergy Corp., 495 F. Supp. 2d 892 (S.D. Ind. 2007) (NSR/PSD Requirements)

Global Warming

Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

On April 2, 2007, the Supreme Court in a 5-4 decision reversed the D.C. Circuit’s upholding of EPA’s decision not to regulate carbon dioxide and other greenhouse gas emissions from motor vehicles. The D.C. Circuit in a 2-1 decision had issued a decision in which each of the three judges on the panel wrote separately. One judge agreed that EPA’s exercise of judgment as to whether a pollutant could “reasonably be anticipated to endanger public health or welfare” could be based on scientific uncertainty as well as other factors, including the concern that unilateral U.S. regulation of motor vehicle emissions could weaken efforts to reduce other countries’ greenhouse gas emissions. The second judge joining the majority opined that petitioners failed to demonstrate the required injury to establish standing but nonetheless joined in the judgment on the merits in the case.

Standing

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

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

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

The court points out that EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming, and thus its refusal to regulate such emissions, at a minimum, "contributes to Massachusetts' injuries." The court dismisses EPA's argument that its decision not to regulate would contribute so insignificantly to the petitioners' injuries that there are no grounds for the court to find standing to review the petition. The court states that, while regulating motor vehicle emissions may not by itself reverse global warming, it does not follow that the court lacks jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. Finally, it indicates that it attaches considerable significance to EPA's belief that global climate change must be addressed.

EPA's Authority to Regulate Greenhouse Gases

The Supreme Court rejects EPA's position that carbon dioxide is not an "air pollutant" under section 302 and that it thus has no authority to regulate emissions of such gases from new motor vehicles. The court reviews the statutory definition of "air pollutant" and finds that carbon dioxide comes within the scope of each aspect of the definition. It also states that EPA identified nothing that suggested that Congress meant to curtail EPA's power to treat greenhouse gases as air pollutants. It rejects EPA's contentions regarding Congress' intention that there be interagency collaboration and research to better understand climate change, rather than that EPA undertake

regulation of greenhouse gases, pointing out that the Agency's pre-existing mandate is to regulate "any air pollutant" that may endanger the public welfare. The court also dismisses as a basis for not regulating EPA's argument that regulation of motor vehicle carbon dioxide emissions would require it to tighten mileage standards and the Department of Transportation has authority over such standards, not EPA.

EPA's Decision Not to Regulate Greenhouse Gas Emissions

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

Dissenting Opinions

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

Chief Justice Roberts' dissenting opinion is grounded in his analysis that the petitioners do not have standing. He states that global warming may be a "crisis," and even "the most pressing environmental problem of our time." But, he states that the court's standing jurisprudence nonetheless recognizes that redress of grievances of the sort at issue is the function of Congress and the Chief Executive, not the federal courts. He first points out that a petitioner must allege a personal injury "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." He states that Massachusetts as a sovereign State is not treated any differently than private litigants under the court's precedents. He points out that there must be a "particularized injury" and that global warming seems "inconsistent with this particularization requirement." In addition, Massachusetts' ownership and potential loss of coastal land as an injury creates "insurmountable problems for them with respect to causation and redressability." He points out that petitioners would be unable to trace their alleged injuries back to the emissions that would be regulated under EPA's standards and could not demonstrate the necessary redressability of the alleged injuries by the adoption of motor vehicle standards. He concludes that the majority has engaged in a "sleight-of-hand" in failing to link up the different elements of the three-part standing

test.

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

In addition, Justice Scalia argues that, contrary to the majority opinion, EPA has stated at great length that it believes the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming. He includes a lengthy quotation from EPA's Federal Register notice and concludes that he "cannot conceive of what else the Court would like EPA to say."

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

Justiciability

See Sierra Club v. Johnson, 500 F. Supp. 2d 936 (N.D. Ill. 2007) (Title V Permit Program)

MACT Standards/Section 112

NRDC v. EPA, 489 F. 3d 1364 (D.C. Cir. 2007)

On June 19, 2007, the D.C. Circuit issued its decision on environmental group challenges to the plywood and composite wood products MACT. The court held that EPA lacked authority to create a low-risk subcategory and to extend the compliance deadline and vacated those provisions of the rule.

After reviewing the statutory framework for establishing MACT standards, the court briefly reviewed the aspects of the plywood MACT at issue in this challenge. The 2004 plywood MACT created a "low risk" subcategory pursuant to section 112(c)(9)(b) which allowed sources that met the

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statutory criteria and additional requirements of the MACT standard to be relieved of all emissions reductions requirements upon EPA approval of their low-risk eligibility. The criteria to be met were: (1) that the sources in the low-risk subcategory do not emit carcinogens in excess of the one-in-a-million statutory ceiling; (2) that they do not emit non-carcinogens in amounts exceeding a level adequate to protect an ample margin of safety to protect public health; and (3) that no source emitted any HAP or combination of HAPs in amounts resulting in an adverse environmental effect as defined in subsection 112(a)(7).

The 2006 MACT rule reset the MACT standard compliance date from October 1, 2007 to October 1, 2008. In making revisions to the 2004 rule in response to NRDC's reconsideration petition, EPA concluded that the changes to the emissions testing requirements in the 2004 rule had caused many sources to postpone emissions tests necessary to demonstrate eligibility for the low-risk subcategory and to identify their MACT compliance options. As a result, EPA provided an additional year for compliance with the plywood MACT.

The court ruled that "EPA's interpretation of section 112(c)(9) as allowing it to exempt the risk-based subcategory is contrary to the plain language of the statute," and thus fails under Step 1 of the *Chevron* statutory interpretation test. The court explains that, while EPA may have broad subcategorization authority, EPA cannot "sidestep what Congress has plainly prohibited." The court further states that "[w]hatever factors EPA might properly consider for subcategorization, it has no authority to create a low-risk subcategory scheme that allows harmful emissions in a manner contrary to Congress's statutory scheme." It points out that EPA may delete from its source list "any source category." (Emphasis added.) EPA did not make a determination that no source in the category would cause a one-in-one-million lifetime risk of cancer, but rather made that determination with regard to the subcategory. The court rejects EPA's response that Congress used the words "category" and "subcategory" interchangeably. In sum, the court accepts petitioners' argument that delistings are limited to source "categories," as distinct from "subcategories."

The court next ruled on EPA's extending the compliance date by one year when it revised the MACT standard requirements. EPA asserted that it should be authorized to extend the compliance date when it makes "substantial" changes to a MACT standard. The court rules that this is not what Congress envisioned. The court emphasizes that Congress wanted compliance to be "expeditious[]," and that this intent is inconsistent with EPA having the authority to reset compliance deadlines anytime it determines that "substantial" changes were made. The court concludes that, in light of the fact that the emissions standards for the plywood MACT were established in the 2004 rule, and in light of Congress establishing specific exceptions to the 3-year maximum, Congress has spoken on the question and has not provided EPA authority to extend the compliance date in the 2006 rule.

NAAQS

South Coast Air Quality Management District v. EPA, 489 F.3d 1245 (D.C. Cir. 2007)

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On June 8, 2007, the D.C. Circuit issued a decision on petitions for rehearing and requests for revisions of the court's decision vacating EPA's Phase 1 rule implementing the 8-hour ozone NAAQS (*South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006)). In vacating the rule, the court held that EPA must regulate areas with design values for the 8-hour NAAQS in excess of .09 ppm under the prescriptive Subpart 2 of section 181(a)(1), rather than under the more flexible Subpart 1. Under EPA's rule, 76 of the 122 nonattaining areas would have been governed by Subpart 1. In its 2006 decision, the court also held that the 1-hour NSR requirements and certain other Subpart 2 provisions are "control" requirements and could not be exempted from the anti-backsliding provisions.

EPA and industry and environmental group petitioners filed separate petitions for rehearing seeking to have the court reconsider its initial rulings in the case. The court briefly reviewed the petitions of each petitioner and ruled that it found no reason to revise its original decision.

However, the court did grant the request of EPA and environmental group petitioners that the Phase 1 rule be vacated only to the extent that the court sustained challenges to it, rather than vacate the entire rule as it had done in the original decision. Certain states objected to such a partial vacatur on the ground that it would inequitably exempt areas regulated under Subpart 1 under the original rule while the remand is pending. The court was not persuaded by this objection and explained that complete vacatur "would only serve to stall progress where it is most needed."

New Source Performance Standards

See Environmental Defense v. Duke Energy, 127 S. Ct. 1423 (2007) (NSR/PSD Requirements)

NSR/PSD Requirements

Environmental Defense v. Duke Energy, 127 S. Ct. 1423 (2007)

On April 2, 2007, the Supreme Court vacated the Fourth Circuit's decision ruling that there must be an increase in the hourly emissions rate for there to be a modification under the 1980 NSR regulations (*United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005)). The Supreme Court ruled that the Fourth Circuit's reading of the PSD regulations in an effort to conform them with their NSPS counterparts on "modification" amounted to the invalidation of the PSD regulations. The court explained that judicial review to determine regulations' validity can be obtained only by a petition to the D.C. Circuit within 60 days of EPA's rulemaking.

The Supreme Court rejected the Fourth Circuit's ruling that principles of statutory interpretation mandated that there be an identical regulatory definition of "modification" for NSPS and NSR. The court reviewed various decisions in which it had concluded that differing interpretations of a statutory term were permissible. The Supreme Court found that nothing in the

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text or legislative history of the statutory language that added the cross-reference to the NSPS modification definition suggests that Congress meant to eliminate customary agency discretion to resolve questions about a statutory definition by looking to the surroundings in which the defined term appears. The court held that “EPA’s construction need do no more than fall within the limits of what is reasonable, as set by the Act’s common definition.”

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

The Supreme Court found that the reasons invoked by the Fourth Circuit for its different view are “no match for these textual differences.” The court points out that the district court opinion in the *Duke Energy* case (*United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003), upon which the Fourth Circuit relied, found that “the exclusion for increases in the hours of operation or in the production rate” supported an interpretation of the PSD regulations that calls for emissions increases to be determined based upon a comparison of the pre- and post-change hourly rate of emissions with the hours of operation being “held constant.” The Supreme Court points out that the exclusion for increased hours of operation and production rate is an exclusion from the definition of physical change or change in the method of operation, which is only one component of the definition of “major modification.” The court stresses that the purpose of this exclusion is to allow sources to increase their hours of operation or production rate during unmodified normal operations. “In other words, a mere increase in the hours of operation, standing alone, is not a ‘physical change or change in the method of operation.’”

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

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

not “unembarrassed by any ‘contrary Agency pronouncements.’” The court then references the 1988 EPA memo issued in connection with its review of the WEPCO replacement projects. The court finds the Reich letters to be “an isolated opinion of an agency official” which do “not authorize the court to read a regulation inconsistently with its language.”

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

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

***United States v. Cinergy Corp.*, 495 F. Supp. 2d 892 (S.D. Ind. 2007); 495 F. Supp. 2d 909 (S.D. Ind. 2007)**

On June 18, 2007, the Federal District Court for the Southern District of Indiana issued two opinions in the NSR enforcement action EPA brought against Cinergy Corp. One opinion (495 F. Supp. 2d 982) addressed cross-motions of EPA and Cinergy on whether Cinergy had fair notice of (1) the legal standards for the routine maintenance, repair and replacement (RMRR) exclusion, and (2) the legal standards for determining whether a project will cause a significant emissions increase. The other opinion (495 F. Supp. 2d 909) was issued in response to EPA’s partial summary judgment motion arguing that major replacement projects at five power plants do not fall within the scope of the RMRR exclusion.

The court’s opinions mirror its opinions in its consideration of EPA’s enforcement action brought against Southern Indiana Gas & Electric. *U.S. v. Southern Indiana Gas & Electric Co.*, 245 F. Supp. 2d 994 (S.D. Ind. 2003) (*SIGECO*). As in *SIGECO*, the court ruled that Cinergy had fair notice of the legal standards for the RMRR exclusion and for determining whether a significant emissions increase would result. In addition, the court granted EPA’s motion for summary judgment on the multiple projects at the five power plants, finding that none of the projects comes within the scope of the RMRR exclusion. The court had previously ruled on the appropriate tests to be applied in this case to determine the applicability of the RMRR exclusion and whether an emissions increase test would result. *U.S. v. Cinergy Corp.*, 384 F. Supp. 2d 1272 (S.D. Ind. 2005).

In the fair notice opinion, the court first ruled on Cinergy’s claim that it lacked fair notice that the RMRR exclusion rests exclusively on a “frequency at the unit” analysis. The court rejects this characterization of the RMRR test and finds that EPA advocates a “multi-factor test, which is the correct standard.” The court also noted that “Cinergy does not contest that determining whether a project fits the RMRR exclusion is fact sensitive and requires a case-by-case approach.” The court pointed to numerous EPA memos and other documents which it says put the regulated community

on notice that “extensive replacement and life extension projects” may not fall within the RMRR exclusion. The court also notes the absence of any evidence that Cinergy ever sought an applicability determination prior to beginning construction of any of the projects. Furthermore, the court ruled that Cinergy could not use EPA’s “silence” on its activities to establish that it lacked fair notice. The court rules, as it did in *SIGECO*, the regulated community had been “explicitly notified” that EPA considered routine maintenance to be a “narrow exemption.” *SIGECO*, 245 F. Supp. 2d 1019.

The court also found that Cinergy had fair notice that emissions increase under NSR should not be determined based upon an hourly emissions increase test. The court noted that EPA had incorrectly applied the emissions increase test which led to the decision in the *WEPCO* case, finding that an actual-to-actual, not an actual-to-potential, test should be applied. However, the court ruled that EPA’s improper application of the test did not deprive Cinergy of fair notice of the standards to be applied. The court found that EPA’s application of the wrong test was harmless because application of the “actual-to-potential” test was more likely to result in a finding that a PSD permit was required than under the actual-to-actual test which is to be applied.

In ruling on EPA’s RMRR summary judgment motion, the court first rejected Cinergy’s claim that summary judgment would not be appropriate because the RMRR analysis is fact-sensitive. The court found that there were no genuine issues of material fact and the ultimate question of whether the changes were routine within the meaning of the RMRR exclusion is a question of law. The court rejected what it characterized as “Cinergy’s attempt to obfuscate the multi-factor analysis for the RMRR exclusion.” It specifically referenced Cinergy’s argument that the court should consider whether a project was “massive” and “unprecedented,” and whether a project would “significantly or fundamentally change a unit.” The court ruled that it would instead apply the four (very ambiguous) factors that EPA had argued should be applied (nature and extent, purpose, cost, and frequency). The court explicitly noted that it is relevant whether outside contractors and vendors are used, the absolute amount of the cost, whether costs are capitalized, and other factors Cinergy argued should not be considered in determining whether the projects are routine. After reviewing the projects, which reflected a number of factual patterns and including ones costing as little as several hundred thousand dollars and as much as twenty million dollars, the court ruled that each of the projects on which EPA sought summary judgment does not come within the RMRR exclusion.

***Sierra Club v. Morgan*, No. 07-C-251-S, 2007 WL 3287850 (W.D. Wisc. November 7, 2007)**

On November 7, the federal district court judge in *Sierra Club v. Morgan* issued a decision in an action alleging that defendants failed to obtain PSD permits in connection with a number of repair and replacement projects at a plant that provides heating and cooling for several buildings in Madison, Wisconsin. The judge ruled on whether the projects constituted routine maintenance, repair, and replacement (RMRR) and, if not, whether they resulted in a significant emissions increase. The judge interpreted the RMRR exclusion in an even more narrow fashion than in some of the least favorable electric utility decisions and concluded that the “actual-to-potential” test should be applied to most of the replacement projects.

In applying the RMRR exclusion, the court applied the 4-factor *WEPCO* test. Of the five repair and replacement projects reviewed by the judge, only one was considered to come within the

RMRR exclusion. Of the four projects found not to constitute RMRR, the cost of two of them was less than \$100,000 each. In the case of one of the projects, the judge found that the fact that boiler tube failures had been frequent and replacement was necessary to increase availability and reliability, the fact that the tubes replaced had never been worked on as a single project in 36 years, and the fact that the \$77,000 cost was paid from a spending authorization rather than an annual maintenance and operating budget, all weighed against having the project treated as RMRR. In the case of another project, the court ruled that the fact that feeders had been in need of continuous repair to deal with plugging, the fact that the project was the second time the feeders had been replaced, and the fact that the \$90,700 cost was paid with funds authorized by a building commission and not from the operating and maintenance budget all weighed against the project being treated as constituting RMRR.

In ruling on whether specific projects would result in a significant emissions increase, the court held that “any physical change not excluded from the CAA under some exemption like RMRR is presumed to be sufficiently significant to support a finding that normal operations have not begun before the physical change occurred and fall under the ‘actual-to-potential’ test.” The court stated that “showing that the physical change is a ‘like-kind replacement’ is not determinative but a factor that weighs in favor of normal operations having begun before the change.” The court cites the *Murphy Oil* decision for this proposition. Of particular note, *Murphy Oil* was decided by the same court as this *Sierra Club* decision.

In applying the court’s presumption, it finds that only one of the four projects not excluded as RMRR should be subject to the “actual-to-projected-actual” test. The court finds various types of improvements in the replacement equipment in the other three projects are sufficient that the “presumption in favor of [the projects] having been sufficiently significant is not defeated.” Thus, the court finds that the “actual-to-potential” test should be applied. Applying that test, the court, not surprisingly, concluded that a significant emissions increase would result from each of the three projects.

***New York v. American Electric Power Service, Inc.*, Nos. 2:04-CV-1098, 2:05-cv-360 (S.D. Ohio February 15, 2007)**

On February 15, 2007, the Ohio Federal District Court issued a ruling in the *American Electric Power* (AEP) case denying the defendant’s partial summary judgment motion based on the routine maintenance, repair and replacement (RMRR) exclusion. AEP argued that the applicable standard is “whether the replacement work is routine within the relevant industry.” The court accepted the plaintiffs’ (EPA and states) argument that the correct standard is to examine the exemption’s applicability on a case-by-case basis by considering the nature and extent of the activity, the activity’s purpose, its frequency, and its cost.

The court indicated that it agreed with the relevant analysis contained in a “line of persuasive-authority cases” that include the *Ohio Edison* case (276 F. Supp. 2d 829 (S.D. Ohio 2003)). The court then expressly adopted and incorporated the relevant portions of the opinion and order in *Ohio Edison*. In agreeing that the multi-factored case-by-case approach is the correct standard, the

court did say that “industry practices necessarily [will] inform[] that inquiry.”

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

***See National Parks and Conservation Association v. TVA*, 502 F.3d 1316 (11th Cir. 2007)
(Statute of Limitations)**

Standing

See Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

See Sierra Club v. Johnson, 500 F. Supp. 2d 936 (N.D. Ill. 2007) (Title V Permit Program)

Statute of Limitations

***National Parks and Conservation Association v. TVA*, 502 F.3d 1316 (11th Cir. 2007)**

On October 4, the Eleventh Circuit issued a decision holding that the five-year statute of limitations under federal law precludes the granting of civil penalties in actions involving failure to obtain PSD permits for projects undertaken more than five years prior to the filing of the action. The court also ruled that the concurrent remedy doctrine precluded granting of injunctive relief (i.e., requirements to install controls) in actions brought by private citizens or citizen groups, but not claims brought by the federal government in its sovereign capacity. The court specifically distinguished the Sixth Circuit decision finding that the failure to obtain PSD construction permits was a continuing violation and thus plaintiffs could obtain civil penalties and injunctive relief for PSD claims based upon projects undertaken more than five years prior to the action. The Eleventh Circuit distinguished the Sixth Circuit ruling on the grounds that the Tennessee provision in its State Implementation Plan established a continuing obligation to obtain a preconstruction permit and thus it provided a basis for the Sixth Circuit to find a series of discrete violations, rather than a single violation that occurred when construction began.

Statute of Limitations

The case involved TVA's undertaking a \$50 million overhaul in 1982-83 of the coal-fired boiler at its power plant in Colbert County, Alabama. The principal elements of the appeal were based upon the district court's granting TVA's motion to dismiss plaintiffs' PSD claims for civil penalties and injunctive relief. The Eleventh Circuit reviewed *de novo* the court's orders granting TVA's motions to dismiss all claims.

After reviewing the statutory framework under which the PSD claims arose, the court reviewed the basic positions of plaintiffs and TVA. Plaintiffs argued that the failure to obtain PSD permits constituted a "continuing violation," whereas defendants argued that the failure to obtain the permit was a one-time violation. The court noted that plaintiffs had not argued that TVA had failed to comply with its operating permit, but rather that its violation constituted a failure to obtain a PSD preconstruction permit. The court pointed out that "numerous district courts" have held that violations of the preconstruction permitting process do not constitute continuing violations of the Clean Air Act.

Next, the court reviewed plaintiffs' claim that the alternative line of cases characterizing violations of the requirement to obtain preconstruction permits as continuing violations supported their claims. The Eleventh Circuit found that only the district court opinion in *Duke Energy* offered a rationale for treating such violations as continuing violations and pointed out that the case was not directly analogous because the state regulations at issue in *Duke Energy* integrated construction and operating permits such that "compliance with preconstruction permitting requirements was a condition for the legal operation of the source." The court concluded that this was not the situation with Alabama's program.

Plaintiffs also argued that their basic claim was that TVA failed to operate without best available control technology after its allegedly illegal modification. Plaintiffs pointed to the Sixth Circuit decision as supporting its claim that their action was not time-barred. After reviewing the "divided panel" Sixth Circuit decision, the court pointed out that the Sixth Circuit had ruled that the Tennessee regulations created an ongoing obligation to install best available control technology. The Eleventh Circuit ruled that the Sixth Circuit decision would be "persuasive authority" if the case were governed by Tennessee's regulations. The Eleventh Circuit ruled that "the obligation to apply Best Available Control Technology – like all the violations alleged in the New Source Review counts of the complaint in this suit – was solely a prerequisite for approval of the modification, not a condition of [the unit's] lawful operation." Thus, the court ruled that plaintiffs' PSD claim was "completely time-barred." The court additionally noted that the obligation to install best available control technology was, under the Alabama regulations, a set of source-specific emissions limitations determined by the Alabama air director before construction begins and "apparently do not provide a way for a party who had undertaken a modification to obtain such a determination outside the preconstruction process."

Accordingly, the court ruled that the obligation to install BACT was to be met at the time of construction in 1982 and "was not an ongoing duty." The court further ruled that it could not say that TVA's failure to apply BACT constitutes a series of discrete violations as the Sixth Circuit held was the case under the Tennessee regulations.

The court also ruled that, where “TVA has not been accused of violating its operating permit,” the unit’s present pollutant emissions “have significance in this case only as a current ill effect of its past failure to fulfill the requirements of Alabama’s preconstruction permitting program in 1982.” “That is not sufficient to bring [plaintiffs’] New Source Review claims within the five-year statute of limitations, which serves several important purposes including barring stale claims and protecting expectations that have settled over time.”

Concurrent Remedy Doctrine

In considering the applicability of the concurrent remedy doctrine, the court first points out that the statute of limitations, by its plain language, applies only to claims for legal relief; it does not apply to equitable remedies. However, the court points out that “where a party’s legal remedies are time-barred, that party’s concurrent equitable claims generally are barred under the concurrent remedy doctrine.” Plaintiffs argued that the concurrent remedy doctrine did not bar their claims because of the exception for claims brought by the federal government. However, the court pointed out that the exception is for “claims brought by the federal government in its sovereign capacity” as an enforcer of the environmental regulations. Plaintiffs argue that that exception should be extended to them because they are acting as “private attorneys general” to enforce environmental regulations for the public benefit. The court finds no authority for expanding the governmental exception to preclude application of the concurrent remedy doctrine in the plaintiffs’ action. It points out that private attorneys general “do not represent the public at large in the same way the government does when it brings suit to enforce the statute.”

Plaintiffs also argued that their legal and equitable claims were not “concurrent remedies,” urging the court to adopt the reasoning articulated by the Indiana district court in the *Cinergy* case. The court there held that the concurrent remedy doctrine did not bar a citizen suit seeking injunctive relief that was paired with time-barred claim for civil penalties. The court there ruled that “the separate claims were not concurrent because the remedies had ‘different goals and effects.’” The Eleventh Circuit explained that it is “not aware of other authority for this novel distinction and are not persuaded that it is a meaningful one.” It proceeded to find that the claims for civil penalties and equitable relief are concurrent because “an action at law or equity could be brought on the same facts.”

Plaintiffs also argued that their claim for equitable relief was not a concurrent remedy because of TVA’s sovereign immunity on claims for civil penalties. The court rejected this argument finding that the fact that “TVA has sovereign immunity by no means renders its statute of limitations defense superfluous.”

Accordingly, the court ruled that the concurrent remedy doctrine barred plaintiffs’ claim for equitable relief.

Title V Permit Program

***Sierra Club v. Johnson*, 500 F. Supp. 2d 936 (N.D. Ill. 2007)**

On May 21, 2007, an Illinois federal district court issued a ruling on environmental groups' claim that EPA is required to issue or deny a Title V permit once a state fails to act on an EPA Title V permit objection. The principal issue in the case was whether EPA's duty to issue or deny the permit is a nondiscretionary one on which citizens with standing to sue can initiate a lawsuit to compel EPA to act.

The court reviewed the timetable in the Clean Air Act on which Title V permit-related actions are to be taken. The plaintiffs petitioned EPA to object to the Title V permit for the Onyx Facility in Sauget, Illinois. After EPA failed to grant or deny plaintiffs' petition within sixty days, plaintiffs filed suit in federal court and the court required EPA to respond pursuant to a consent decree it entered.

Subsequently, EPA issued objections to the permit, but the Illinois EPA did not submit a revised permit within ninety days. Plaintiffs then filed suit to require the Administrator to issue or deny the Title V permit, arguing that the Administrator's requirement to act is a nondiscretionary duty under the Act.

On the day EPA was due to file an answer in this case, a letter was sent to Onyx requiring the facility to submit an application for a Title V federal operating permit. EPA indicated that it was initiating a process to issue or deny a Title V permit but that its letter did not represent final Agency action to issue or deny a permit.

In this action, EPA first argued that the letter requiring that an application be filed showed that the Agency was conducting Title V proceedings and therefore the plaintiffs' claims were moot. The court ruled that until the Title V permit was issued or denied there was a case or controversy and thus the action was not moot.

Next, EPA argued that the Clean Air Act only waives the sovereign immunity of the United States granting district courts jurisdiction where there is a nondiscretionary duty under the Act, and that the requirement to "issue or deny a permit" is not a nondiscretionary duty. EPA argued that the duty is "*mandatory, but not discretionary*" (italics in original). The court ruled that Congress did not allow EPA to conduct a new permit process once it issues an objection to a Title V permit. The court held that, instead, EPA has a nondiscretionary duty to issue or deny the permit.

In conclusion, the court ordered EPA to appear thirty days after the court's order and report "the date by which you will issue or deny the Title V permit."

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