

# Clean Air Act Litigation Developments

## Table of Contents

	<b>Page Number</b>
<b>Citizen Suits</b> .....	LD-1, LD-33, LD-45, LD-57, LD-83
<b>Civil Penalty Amounts</b> .....	LD-8
<b>“Continuing Violation”</b> .....	LD-8, LD-60, LD-86
<b>Criminal Liability</b> .....	LD-47
<b>Disapproval of SIP Provisions</b> .....	LD-61
<b>Environmental Justice</b> .....	LD-48, LD-61, LD-87
<b>Evidence; Burden of Proof</b> .....	LD-11, LD-37
<b>“Fair Notice” Requirement</b> .....	LD-12, LD-39, LD-63
<b>Justiciability</b> .....	LD-14, LD-39, LD-49, LD-63, LD-91
<b>MACT Standards/Section 112</b> .....	LD-16, LD-49, LD-64, LD-93
<b>“Major Source” Definition</b> .....	LD-17
<b>Minor NSR Permits</b> .....	LD-18
<b>Monitoring</b> .....	LD-50, LD-66
<b>NAAQS</b> .....	LD-51, LD-95
<b>NESHAP Enforcement</b> .....	LD-22
<b>New Source Performance Standards</b> .....	LD-67
<b>Nonattainment Designations</b> .....	LD-40

**NO<sub>x</sub> SIP Call** ..... LD-68, LD-97

**Overfiling** ..... LD-69, LD-98

**“Potential to Emit” Definition** ..... LD-23

**PSD Requirements** ..... LD-26, LD-41, LD-54, LD-71, LD-99

**Section 126 Rule** ..... LD-106

**SIP Provision Enforcement** ..... LD-29, LD-42, LD-75

**Statute of Limitations** ..... LD-30, LD-43, LD-75, LD-110

**Title V Permit Program** ..... LD-30, LD-56, LD-75, LD-110

# Clean Air Act Litigation Developments 2001

## Citizen Suits

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***Communities for a Better Environment v. Cenco Refining Co.***, No. CV 00-5665 (C.D. Cal., June 22, 2001 (180 F. Supp. 2d 1062) and September 26, 2001 (179 F. Supp. 2d 1128))

In two separate decisions, a federal district court judge ruled on a number of issues concerning the ability of a group to bring a citizen suit challenging the reactivation of a refinery as well as issues regarding the extent to which the reactivation is subject to NSR requirements. Among other things, the court ruled that the citizen group was entitled to bring the citizen suit and granted a preliminary injunction requiring the refinery owner to comply with NSR requirements. However, the court denied the group's motions for summary judgment and a permanent injunction because it concluded that there are triable issues of fact concerning the applicability of NSR.

The case involves the reactivation of a petroleum refinery in Los Angeles County. In June 1995, the previous owner of the refinery, Powerine, informed the South Coast Air Quality Management District (SCAQMD) that it would be shutting down the refinery within a month. Refining operations were suspended in July 1995. However, in December 1995, Powerine informed state agencies that it might resume operation of the refinery at some point in the future. In July 1998, Powerine applied to SCAQMD to reactivate its expired permits for the facility. In August 1998, Cenco purchased the refinery from Powerine. SCAQMD subsequently reactivated Powerine's expired operating permit and made Cenco the holder of the permit.

Communities for a Better Environment (CBE) brought a citizen suit under section 304 of the Clean Air Act against Cenco, SCAQMD, and the City of Santa Fe Springs in August 2000. In its complaint, CBE alleged numerous violations of federal and state law. Its primary contentions were that the reactivation of the shutdown refinery triggered major NSR requirements, that the reactivation should be treated as the construction of a new major source, and therefore that BACT should be installed on every unit emitting regulated pollutants.

### Citizen Suit Rulings

In its initial opinion, the court addressed the issues raised in the defendants' motions to dismiss the citizen suit. Each ruling is summarized below.

*Standing* -- The defendants maintained that CBE had failed to demonstrate that its members had suffered an "injury-in-fact" sufficient to establish standing to bring suit in that refinery operations had not yet resumed. However, the court concluded that the CBE's allegations that preliminary activities at the refinery had resulted in odors and smoke were sufficient to withstand a motion to dismiss. The court noted that certain CBE members live and work in the vicinity of the refinery and that their declarations allege concrete and actual injuries.

*Subject matter jurisdiction* -- The defendants argued that a Clean Air Act citizen suit must involve allegations that an “emission standard or limitation” has been violated and that none of CBE’s allegations involve a specific claim that a *numerical* standard or limitation has been violated. The court rejected the defendants’ arguments for two reasons. First, the court disagreed with the contention that only numerical standards or limitations may be enforced through a citizen suit. Based on relevant case law, the court determined that allegations that objective requirements set forth in SIP provisions had been violated were sufficient. Second, the court concluded that because “emission standard or limitation” is defined in section 304(f) of the Act as including “any other standard, limitation, or schedule . . . under any applicable [SIP],” it should be read broadly to encompass non-numerical standards or limitations.

*Exhaustion of state administrative remedies* -- The defendants contended that CBE had failed to exhaust its administrative remedies because it had not sought administrative review of certain permitting decisions under state law. However, the court concluded that because the administrative review procedures had not been incorporated into the SIP, it would not require that they be pursued. It concluded that providing notice 60 days before filing suit as required by section 304 satisfied any general requirement to exhaust administrative remedies.

*Abstention* -- The defendants additionally argued that the district court should abstain from deciding this case until the D.C. Circuit has rendered a decision in a case brought against EPA by Cenco. The district court ruled that it would not abstain because (1) the citizen suit was filed first and (2) the reactivation policy is not the sole basis for CBE’s NSR claims.

### **NSR Rulings**

In its second decision, the court concluded that CBE is entitled to a preliminary injunction requiring Cenco to comply with NSR requirements before reopening the refinery. At the same time, it denied CBE’s motions for a permanent injunction and for summary judgment because it found that triable issues of fact remained.

*Permit was not voided by change in ownership.* -- CBE contended that, under a particular SIP provision, the refinery’s existing operating permit should have been voided by the change in ownership from Powerine to Cenco. According to CBE, this meant that Cenco had to obtain a new operating permit and NSR should apply to the facility as a whole. However, the court read the relevant SIP provision as not voiding a permit because of a mere change in ownership. Instead, the court agreed with defendants’ interpretation of the provision, i.e., a permit cannot be transferred to a new entity without first applying to the SCAQMD but the permit does not become void if procedures are not followed.

*Expiration of permit did not trigger NSR.*-- CBE additionally maintained that the alterations of equipment undertaken increased emissions because the relevant baselines for NSR purposes should be zero. According to CBE, this is because the operating permit had expired in 1998 and operations had been suspended for five years by the owners. But the court concluded that the expiration of a permit due to non-payment of fees did not by itself subject a source to NSR. Although CBE argued that the relevant baseline was zero for the equipment in question because operations had been suspended, the court concluded that, although actual emissions were zero, the units’ PTE had not changed during this period.

*CBE made strong showing that permanent shutdown subjects entire facility to NSR.* -- CBE separately maintained that because Powerine indicated an intent to permanently shut down the refinery, the refinery was shutdown for five years, and the refinery will utilize different equipment upon reactivation, the reactivated refinery must be regarded as a “new source” for NSR purposes. CBE based its position on the relevant SIP

provision as well as EPA's "reactivation policy." Although the court did not issue a definitive ruling on CBE's contentions, it found that CBE had made a "strong showing" that it would prevail on its contentions -- a showing that was sufficient to warrant the granting of preliminary injunction. In particular, the court found that CBE had made a strong showing that EPA's reactivation policy is a reasonable interpretation of EPA's regulations that does not conflict with any aspect of the NSR program. In addition to finding that CBE had demonstrated a likelihood of success on the merits, the court also found that the other requisites for a preliminary injunction had been satisfied.

***National Parks Conservation Ass'n v. Tennessee Valley Authority***, 175 F. Supp. 2d 1071 (E.D. Tenn. 2001)

In a November 26 decision, a federal district court dismissed a Clean Air Act citizen suit against the Tennessee Valley Authority (TVA) because the citizen suit plaintiff sought, in effect, to challenge the validity of SIP provisions and relevant permit terms. The court also ruled that, in any event, the case should be dismissed because the plaintiff had failed to satisfy applicable citizen suit notice requirements. The decision is significant in that it strongly confirms the principle that a federal enforcement action cannot be used to collaterally attack the terms of a facially valid state permit.

The complaint of the National Parks Conservation Association (NPCA) in this action alleged that two of TVA's coal-fired electric generating facilities had violated opacity requirements in the Tennessee SIP more than 6,500 times between 1996 and 2000. In alleging the violations, the NPCA relied upon data generated by continuous opacity monitors (COMs) installed at the facilities. However, the complaint did not specify the precise dates on which the alleged violations occurred.

Tennessee's approved SIP provides for a general opacity standard of 20% but authorizes opacity levels to exceed 20% once per hour for any reason. In addition, opacity levels may exceed 20% during "routine start up and shut down conditions" and during malfunction conditions. The state and the regulated party may agree to establish a more restrictive emission limit and to require the use of COMs. Where a more restrictive standard is used, the standard is to be incorporated into a state operating permit issued pursuant to the SIP.

TVA agreed to use COMs at the two facilities in question. The state operating permits for the facilities provide that emissions may exceed the 20% opacity level 2% of the time during each calendar quarter and that exceedances during startup, shutdown, or malfunction conditions are also excused.

**Failure to Satisfy Citizen Suit Notice Requirements**

The court stated that strict compliance with citizen suit notice requirements is a jurisdictional requirement for maintaining a citizen suit under the Clean Air Act. The court then concluded that the 60-day notice letter sent to TVA, the State, and EPA was deficient in two principal respects: (1) it failed to specify the dates of the alleged violations and to identify the facilities at which the alleged violations occurred as required by EPA's regulations; and (2) it did not provide adequate notice of the NPCA's legal theory in the subsequent citizen suit, i.e., that the State had unlawfully issued permits to TVA. Because the court concluded that the notice requirements had not been satisfied, it ruled that it had no jurisdiction over the citizen suit.

**Failure to Allege Proper Citizen Suit Claims**

The district court also ruled, in the alternative, that the NPCA's complaint failed to allege proper citizen suit claims under the Clean Air Act. The court found that the NPCA had not identified a single exceedance during the relevant time period that was not allowed under the terms of TVA's permits from the State. According to the court, "plaintiff's lawsuit is in effect a collateral attack on a facially valid permit issued by the state enforcement agency." After analyzing the statutory language and relevant case law, the court concluded that citizen suits cannot be used to collaterally attack facially valid state permits.

Moreover, the court rejected the NPCA's argument that the permits were not facially valid because Tennessee did not seek EPA's approval of the 2% de minimis exception for each quarter. The court ruled that the SIP expressly allowed the State to impose more restrictive opacity requirements without obtaining specific EPA approval.

***See United States v. American Electric Power Service Corp.***, 136 F. Supp. 2d 808 (S.D. Ohio 2001); ***United States v. American Electric Power Service Corp.***, 137 F. Supp. 2d 1060 (S.D. Ohio 2001).

## **"Continuing Violation"**

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***See United States v. Westvaco Corp.***, 144 F. Supp. 2d 439 (D. Md. 2001) (PSD Requirements).

***See United States v. Murphy Oil USA Inc.***, 143 F. Supp. 2d 1054 (W.D. Wisc. 2001) (PSD Requirements).

***See United States v. American Electric Power Service Corp.***, 136 F. Supp. 2d 808 (S.D. Ohio 2001); ***United States v. American Electric Power Service Corp.***, 137 F. Supp. 2d 1060 (S.D. Ohio 2001) (PSD Requirements).

## **Environmental Justice**

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***Alexander v. Sandoval***, 532 U.S. 275 (2001)

On April 24, 2001, the U.S. Supreme Court, in a 5-4 decision, ruled that there is no private right of action under Title VI of the 1964 Civil Rights Act to enforce "disparate impact" regulations promulgated by federal agencies under Title VI. Such "disparate impact" regulations target actions taken by recipients of federal financial assistance that unintentionally have the effect of discriminating against certain individuals or groups. Under the Supreme Court's decision, disparate impact regulations can only be enforced under Title VI through suits by federal agencies, not by private citizens.

The Supreme Court's decision is expected to have a substantial impact on the way in which environmental justice issues are considered by the courts and by governmental agencies. Private citizens and groups have brought environmental justice cases in federal court against state or local agencies and have alleged that particular actions by those agencies, e.g., permitting decisions, violate EPA's environmental justice regulations, which are disparate impact regulations promulgated under Title VI. The Supreme

Court's decision holds that no private right of action under Title VI to bring such suits exists. However, some uncertainty still remains as to whether such plaintiffs can use a separate, independent civil rights provision -- 42 U.S.C. § 1983 -- to enforce EPA's environmental justice regulations.

The *Sandoval* case involved a class action by a Spanish-speaking woman challenging Alabama's decision to administer drivers' license examinations only in English. She argued that the effect of the state's decision is to subject non-English speakers to discrimination based on national origin in violation of regulations promulgated by the Department of Justice (DOJ) pursuant to section 602 of Title VI of the 1964 Civil Rights Act. Section 601 of Title VI provides that no person shall be subjected to discrimination based on race, color, or national origin with regard to any program or activity covered by Title VI. Section 602 authorizes federal agencies to promulgate regulations which "effectuate the provisions" of Section 601. Lower courts ruled that the plaintiff could bring a private action under section 602 to enforce DOJ's disparate impact regulations.

The Supreme Court, in a decision written by Justice Scalia, reversed the appellate decision below and ruled that Title VI does not explicitly or implicitly authorize private citizens to enforce disparate impact regulations promulgated under Section 602. In so ruling, the Court drew a clear distinction between Sections 601 and 602 of Title VI. The majority opinion set forth three basic principles that would guide the Court in deciding the case: (1) private citizens may sue to enforce Section 601; (2) Section 601 prohibits only intentional discrimination; and (3) for purposes of this case, it is assumed that federal agencies may promulgate regulations under Section 602 that validly proscribe activities that have a disparate impact on racial or ethnic groups. Based on an analysis of its precedents and the statutory language, the majority concluded that the Court has never held that there is a private right of action to enforce Section 602 and that the text of Title VI does not support the existence of such a right. Accordingly, the majority concluded that disparate impact regulations promulgated under Section 602 may be enforced only by federal agencies.

Justice Stevens wrote an opinion on behalf of the four dissenting justices in which he maintained that the majority misread prior Supreme Court decisions and the language of Title VI. He concluded that Congress intended that individuals be able to enforce Title VI regulations promulgated by federal agencies. In addition, he suggested that 42 U.S.C. § 1983 could provide a separate basis for private enforcement of disparate impact regulations promulgated under Section 602.

***South Camden Citizens in Action v. New Jersey Department of Environmental Protection***, 145 F. Supp. 2d 505 (D. N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001)

A federal district court judge in New Jersey ruled that, even though the Supreme Court held that Title VI does not authorize individuals to enforce disparate impact regulations promulgated under Section 602, plaintiffs may instead rely upon 42 U.S.C. § 1983 to enforce EPA's environmental justice regulations.

(As discussed in the next case summary below, the district court's decision was subsequently reversed by the U.S. Court of Appeals for the Third Circuit.) In so ruling, the judge relied heavily on a statement in Justice Stevens' dissenting opinion indicating that Section 1983 would provide a separate basis for private individuals to enforce disparate impact regulations. Section 1983 authorizes suits to remedy deprivations, under color of state law, of rights secured by the Constitution and laws of the United States.

This case arose when a citizens group and certain individuals in Camden, New Jersey, brought suit against the New Jersey Department of Environmental Protection (NJDEP) to challenge that agency's issuance of a state air permit to a company for construction of a new cement plant. The plaintiffs

contended, among other things, that the NJDEP had violated Title VI and EPA's implementing regulations by failing to consider the adverse, disparate effect of its decision on the nearby minority community.

In a decision issued on April 19, 2001 -- only five days before the Supreme Court issued its decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001) -- the district court ruled that the plaintiffs could bring an action under Section 602 of Title VI to enforce EPA's environmental justice regulations. The court also issued a preliminary injunction preventing the company from proceeding with construction of the plant and an order vacating and remanding the permits to the NJDEP.

In his May 10 supplemental decision, the district court judge held that Section 1983 provides a cause of action for the plaintiffs' claims and that the preliminary injunction should remain in place. The judge concluded that nothing in the majority decision in *Sandoval* precludes reliance on Section 1983 to enforce disparate impact regulations and that Congress did not intend to foreclose reliance on that provision. After concluding that EPA's environmental justice regulations create a "federal right" to be free of adverse, disparate impacts caused by recipients of federal funds, he ruled that plaintiffs could rely on Section 1983 to enforce that right.

***South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3rd Cir. 2001)**

On December 17, 2001, the U.S. Court of Appeals for the Third Circuit issued a major decision concluding that plaintiffs may not sue to enforce EPA's environmental justice regulations by invoking 42 U.S.C. § 1983. (Section 1983, which was enacted by Congress following the Civil War, authorizes citizens to bring suit against any person who deprives them of "any rights . . . secured by the Constitution and laws . . .") In so ruling, the court of appeals reversed a district court decision preliminarily enjoining operation of a new cement plant and remanding its state air construction permit to the state permitting agency. The Third Circuit's decision also answers a question left unresolved by the Supreme Court in its recent decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), i.e., whether parties may rely on Section 1983 to enforce "disparate impact" regulations promulgated by federal agencies under Section 602 of the 1964 Civil Rights Act.

The Third Circuit's decision is very significant because, if the ruling is not overturned and is uniformly followed, disparate impact regulations -- such as EPA's environmental justice regulations -- could only be enforced, if at all, by the federal agency responsible for implementing the regulations. The decision would foreclose citizen groups and individuals from bringing various types of lawsuits to enforce such regulations.

This case arose when a citizen group and certain individuals in Camden, New Jersey, brought suit in federal district court against the New Jersey Department of Environmental Protection (NJDEP) to challenge that agency's issuance of a state air permit to a company for construction of a new cement plant. The plaintiffs contended, among other things, that the NJDEP had violated Title VI of the 1964 Civil Rights Act and EPA's environmental justice regulations implementing Title VI by failing to consider the adverse, disparate impact of its permitting decision on the nearby minority community. EPA's environmental justice regulations provide, in relevant part, that "[n]o person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin . . ." The regulations prohibit unintentional discrimination, i.e., discrimination resulting from the disparate impact of agency actions, as well as intentional discrimination.

In a decision issued on April 19, 2001, the district court ruled that the plaintiffs could bring an action under Section 602 of Title VI to enforce EPA's environmental justice regulations. The court also issued a preliminary injunction preventing the company from proceeding with construction of the plant and an order remanding the permit to the NJDEP.

Five days later, the Supreme Court issued its decision in *Sandoval* and held that such a private right of action under Section 602 did not exist. The majority opinion did not address the separate question of whether Section 1983, which was not relied on in that case, would provide an independent basis for enforcing disparate impact regulations. However, a statement in Justice Stevens' dissenting opinion suggested that Section 1983 would provide an independent basis for private individuals to enforce disparate impact regulations.

One day after the Supreme Court issued its decision in *Sandoval*, the plaintiffs in the *South Camden* case moved to amend their complaint to allege an action under Section 1983. In his subsequent supplemental decision, the district court judge held that Section 1983 provides a cause of action for the plaintiffs' claims and that the preliminary injunction should remain in place. After concluding that EPA's environmental justice regulations create a "federal right" to be free of adverse, disparate impacts caused by recipients of federal funds, he ruled that plaintiffs could rely on Section 1983 to enforce that right. Both the NJDEP and the intervenor cement company appealed the district court's decision to the Third Circuit.

In its decision, the Third Circuit ruled, by a 2 to 1 vote, that "an administrative regulation cannot create an interest enforceable under section 1983 unless that interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a [section] 1983 action under the EPA's disparate impact regulations." In so ruling, the court of appeals relied heavily on the reasoning in the Supreme Court's *Sandoval* decision, where the majority ruled that Section 602 did not provide a basis for enforcing disparate impact regulations promulgated under that provision. The Third Circuit further concluded that the Supreme Court has never found that a valid federal regulation can by itself create a right enforceable under Section 1983. The Third Circuit additionally concluded that the district court had erred in reaching a contrary conclusion. In the case primarily relied upon by the district court, the Supreme Court had found that the enforceable right in question had been conferred by the statute, not by the regulation that further defined the right. The court of appeals also distinguished a number of other decisions relied upon by the district court.

***Save Our Summers v. State of Washington Dept. of Ecology***, No. CS-99-269-RHW (E.D. Wash. June 15, 2001)

In a decision addressing novel issues under the Clean Air Act and the Americans with Disabilities Act (ADA), a federal district judge in Washington State ruled that the ADA cannot be used to challenge a state agency's implementation of the Clean Air Act unless a party can demonstrate that intentional discrimination has occurred. The ruling is significant in that it prevents parties from relying on the ADA to compel state agencies to develop more stringent standards and permits than required by the Clean Air Act because certain sensitive individuals will otherwise be disparately impacted by current provisions.

The case arose when the plaintiff organization, Save Our Summers (SOS), which consists of individuals with asthma and other respiratory ailments, brought suit against the Washington Department of Ecology (Department), claiming that the agency's regulation of agricultural burning practices violates the ADA. SOS specifically challenged the Department's issuance of permits authorizing the seasonal burning

of wheat stubble. SOS's complaint alleged that the Department's permits authorizing such burning denied disabled individuals the use of public facilities such as schools and parks in contravention of their rights under the ADA. The ADA provides in relevant part that a public entity must make "reasonable modifications" to a program to ensure that disabled persons are not denied benefits.

In its decision, the court concluded that the Department's "failure to control or eliminate agricultural burning did not constitute discrimination against the plaintiffs on the basis of their disabilities." At the same time, the court found that SOS had indeed established that "agricultural burning disproportionately impacts Plaintiffs because of their disabilities." The court concluded that the ADA and the Rehabilitation Act "do not create a substantive right in disabled persons to adequate health protection from air pollution; instead, the statutes just create a right to be free from discrimination." The court stated that, even though agricultural burning may have a disparate impact on disabled persons, that impact is being caused by third persons, not by the Department's conduct. In other words, proof of a disparate impact from regulatory actions or inactions involving air pollution is not sufficient to establish a violation of the ADA. To establish such a violation, a plaintiff must show an intent to discriminate -- not merely that the plaintiff is affected more severely than the general public.

The court then concluded that "there is no evidence that the disparate impact [of the burning practices] is caused by discriminatory animus or any other deliberate or reckless action taken because Plaintiffs are disabled." According to the court, "although the manner in which Defendants are operating their permitting program might *result* in harm to Plaintiffs, there is no evidence that this program is being operated as it is *because* Plaintiffs are disabled." Because the court concluded that SOS had failed to establish a violation of the ADA, the court granted summary judgment in favor of the Department.

***See In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxydol, LLC***, Petition No. II-2000-07 (May 2, 2001) (PSD Requirements).

## **Justiciability**

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***Alaska v. EPA***, 244 F.3d 748 (9<sup>th</sup> Cir. 2001)

The U.S. Court of Appeals for the Ninth Circuit rejected EPA's position that administrative compliance orders and similar enforcement orders issued by the Agency under the Clean Air Act are immune from judicial review because they are not "final agency actions." The court ruled that three orders issued to the Alaska Department of Environmental Conservation (ADEC) and Cominco Alaska Inc., a mining company, constitute "final agency actions" for purposes of judicial review.

The case involved a PSD permit issued by ADEC to Cominco authorizing the construction of a generator at one of its mines. In December 1999, EPA issued an order to ADEC under sections 113(a)(5) and 167 of the Act directing ADEC to withhold issuance of a proposed PSD permit to Cominco. However, ADEC issued the PSD permit as it had been proposed, notwithstanding EPA's objections. EPA subsequently issued an administrative compliance order to Cominco "to prevent any further construction of modification at the . . . mine facility." In a third enforcement order, EPA modified the previous order to allow certain limited summer construction activities.

Both ADEC and Cominco filed petitions for review of EPA's orders in the court of appeals. EPA argued that the court lacked jurisdiction because the orders did not constitute final agency actions.

The Ninth Circuit, in addressing the jurisdiction argument, applied the two-part test for finality most recently set forth in *Whitman v. American Trucking Ass'ns*, S.Ct. No. 99-1257 (Feb. 27, 2001). Under that test, two conditions must be met for an agency action to be “final” for purposes of judicial review: (1) the action must mark the “consummation” of the agency’s decision-making process; and (2) it must “be one by which rights or obligations have been determined, or from which legal consequences will flow.” The court stated that it had “little trouble” concluding that these conditions had been met in this case. First, because EPA itself contended that its position regarding what constitutes BACT here will not change, the court concluded that the agency decision-making process has been consummated. Second, the court concluded that “rights and obligations” have been determined (Cominco is to stop construction of the generator) and “legal consequences will flow” (Cominco will be subject to civil penalties if it violates the orders).

Having concluded that the orders are final and reviewable, the court gave EPA the choice of three options. Under the decision, EPA may either (1) submit a complete administrative record so that the court can consider the lawfulness of the orders, (2) withdraw the orders, or (3) file an enforcement action under section 113 in federal district court. The Ninth Circuit also stated that, in order to provide a full record justifying the orders, EPA might be required to submit not only documentary evidence but also “affidavits of the Administrator or her delegates as needed to permit review.”

***See Whitman v. American Trucking Ass'ns***, 531 U.S. 457 (2001) (NAAQS).

***See Communities for a Better Environment v. Cenco Refining Co.***, C.D. Cal., June 22, 2001 (180 F. Supp.2d 1062) and September 26, 2001 (179 F. Supp.2d 1128) (Citizen Suits).

## **MACT Standards/Section 112**

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***Cement Kiln Recycling Coalition v. EPA***, 255 F.3d 855 (D.C. Cir. 2001).

In a decision that appears to broadly affect EPA’s promulgation of section 112(d) standards, the D.C. Circuit held that EPA’s general approach to determining the “MACT floor” is unlawful and that it may result in standards that are not sufficiently stringent. The decision came in the context of challenges to the hazardous waste combustor MACT standard.

In sustaining a challenge by the Sierra Club, the court ruled that EPA, in determining the “emissions floor” for existing sources in a category, must ensure that the floor reflects the emissions levels achieved in practice by the best performing existing sources -- not merely the emissions levels achieved by all existing sources in the category that use the control technology identified as the “maximum achievable control technology” (MACT). Because the decision addresses EPA’s general approach to setting section 112(d) standards, it may have a significant impact on certain MACT standards that have not yet been promulgated and may raise issues regarding already-promulgated standards.

The litigation involved numerous challenges to the hazardous waste combustor MACT standard by the Sierra Club and by various industry petitioners. The Sierra Club argued, among other things, that: (1) the MACT floor approach used by EPA resulted in standards that are inconsistent with the statute because they fail to reflect emission levels achieved in practice by the best-performing sources in the

category; and (2) EPA improperly based the standards on RCRA test data generated under worst case conditions.

To develop the challenged standards, EPA began by setting “MACT floors” for new and existing sources in the category. After assembling a database of sources and their emission levels recorded primarily during RCRA compliance tests, the Agency went through the following steps for each HAP. For existing sources, EPA identified the best-performing 12 percent of sources, creating what it called the “MACT pool.” EPA then identified the primary emission control technology used by sources in the MACT pool with emission levels equivalent to or lower than the pool’s median. It labeled that technology the “MACT control.” EPA next expanded the MACT pool to include all sources using the MACT control and set the MACT floor at the worst emission level achieved by any source in that expanded pool. For new sources, EPA used the same methodology but chose as the MACT control the technology used by the best-performing source for which it had information.

The Sierra Club maintained that, although section 112(d)(2) states that EPA is to require the “maximum emissions reduction” that it determines is achievable, the scope of the word “achievable” is limited by the language of section 112(d)(3)(A). That provision states that “emission standards promulgated . . . for existing sources . . . shall not be less stringent . . . than the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information) . . . .” According to the Sierra Club, regardless of what technology is identified as MACT or whether all those sources using MACT could meet the final standard, EPA must set a final standard based on the emissions levels actually achieved by the best-performing sources.

EPA argued in response that section 112(d)(3) did not alter section 112(d)(2)’s achievability requirement and that its MACT floor approach reasonably assured that the final standard would be achievable through use of MACT. EPA also contended that its approach is a reasonable means of addressing the “inherent process variability in pollution control devices.”

The D.C. Circuit agreed with the Sierra Club that EPA had misconstrued the language of section 112(d) in determining the “emissions floors” for MACT standards. According to the court, Congress had clearly spoken, and “EPA may not deviate from section 112(d)(3)’s requirement that floors reflect what the best-performing sources actually achieve by claiming that floors must be achievable by all sources using MACT technology.” In rejecting EPA’s “variability” argument, the court concluded that “because factors other than MACT technology affect emissions, emissions of the worst-performing MACT sources may not reflect what the best-performers actually achieve.” Thus, “if factors other than MACT technology do indeed influence a source’s performance, it is not sufficient that EPA considered sources using only well-designed and properly operated MACT controls.”

The court gave EPA general directions concerning how it is to promulgate section 112(d) standards in the future. “[N]othing in the statute requires the Agency to use the MACT approach. Section [112](d)(3) requires only that EPA set floors at the emissions level achieved by the best-performing sources. If EPA cannot meet this requirement using the MACT methodology, it must devise a different approach capable of producing floors that satisfy the Clean Air Act.”

With regard to the Sierra Club’s other arguments, the court rejected the contention that EPA violated the Act by relying on “worst-case data” to develop the standards. The court pointed out that the Act states that EPA is to set emission floors based on the “emissions information” it has regarding the best-performing sources and that EPA has “wide latitude” in determining what data-gathering is necessary.

The court noted that the Sierra Club wanted the challenged standards to be left in place until EPA can develop new standards consistent with the court's opinion. However, the court decided that it would vacate the standards in light of the fact that industry petitioners have "potentially meritorious claims" that the court did not rule upon. The court invited the parties to file motions addressing questions concerning whether the current standards should instead be left in place or EPA should be allowed additional time to develop interim standards.

## NAAQS

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### ***Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001)**

In a major decision addressing EPA's legal authority to establish and implement National Ambient Air Quality Standards (NAAQSs), the U.S. Supreme Court unanimously rejected industry petitioners' arguments that EPA must consider implementation costs in setting NAAQSs. The Court also reversed the decision of the D.C. Circuit holding that EPA's revised ozone and particulate matter (PM) standards are unlawful because they violate the constitutional doctrine of nondelegation. The Court ruled, however, that EPA's announced policy for implementing the revised ozone standard is unlawful.

#### **Consideration of Implementation Costs**

The Court's opinion, authored by Justice Scalia, explains that industry's arguments that the costs of implementing a NAAQS must be considered in setting that standard are "made against the natural reading" of the Act and a long line of contrary D.C. Circuit precedents. The Court's opinion states that, since the decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), the D.C. Circuit has consistently ruled that "economic considerations [may] play no part in the promulgation of ambient air quality standards under Section 109" of the Act. The opinion explains that section 109(b)(1) directs EPA to set primary standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety." According to the Court, nowhere in section 109(b)(1) are the costs of achieving a standard expressly made part of the process of setting the health-based standard.

The Supreme Court rejected industry's argument that the term "public health" can be read in this context to include factors such as economic conditions that "might produce health losses sufficient to offset health gains achieved in cleaning the air -- for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent on those industries." Instead, the Court concluded that the term must be given its ordinary meaning: "the health of the public."

#### **Nondelegation Doctrine**

The "nondelegation doctrine" establishes the constitutional principle that Congress cannot delegate its legislative powers to an administrative agency. The Court's opinion stated that the D.C. Circuit had been confused in its approach to applying the doctrine. According to the D.C. Circuit, the revised standards

violate the doctrine because EPA had not articulated any “intelligible principles” that would limit its authority in setting standards under section 109(b)(1). However, the Supreme Court’s opinion stated that the question is instead whether the statute itself sets forth “intelligible principles.” According to the Court, EPA’s construction of the statute has no bearing on whether it is constitutional -- the Agency cannot save an otherwise unconstitutional provision.

The Court then concluded that the “limits on the EPA’s discretion are strikingly similar to” ones that the Court has upheld in many other situations. The Supreme Court reversed the D.C. Circuit’s ruling on the nondelegation doctrine issue and remanded the case to that court to dispose of any other “preserved challenge.”

### **Finality of EPA’s Ozone Standard Implementation Policy**

EPA argued that the D.C. Circuit had erred in reviewing its implementation policy for the revised ozone standard because it was not a final agency action and was otherwise not ripe for review. The Court’s opinion rejected EPA’s position and stated that “[w]e have little trouble concluding that this constitutes final agency action subject to review under § 307” of the Act. The Court states that EPA’s published interpretation of Subparts 1 and 2 of Part D of the Act marked the consummation of a decisionmaking process and therefore constitutes a final agency action. The Court similarly rejected EPA’s ripeness argument. The opinion states that the issue is “fit” for review in that the issue is merely one of statutory interpretation and that hardships are being imposed on states subject to the policy.

### **Lawfulness of EPA’s Ozone Standard Implementation Policy**

The opinion concluded that Part D of the Act is ambiguous as to how EPA is to implement a revised ozone standard. At the same time, the Court concluded that EPA’s interpretation of the relevant provisions of Part D is not a permissible reading. Subpart 1 of Part D contains general language authorizing EPA to address nonattainment problems for any NAAQS. Subpart 2, which was added by the 1990 Amendments, sets forth a detailed scheme for addressing ozone nonattainment, including a classification system, specific deadlines, and prescribed sanctions. EPA’s implementation policy is based on its interpretation that Subpart 2 applies to ozone nonattainment areas only until they achieve attainment with the “old” 1-hour ozone standard. EPA asserted that, at that point, Subpart 1 authorizes it to prescribe different measures for implementing the “revised” 8-hour standard.

The Court determined, among other things, that Congress did not intend that Subpart 2 be completely superseded upon the revision of the 1-hour ozone standard -- particularly since Congress knew at the time that it was passing the 1990 Amendments that a revision of the 1-hour standard was being considered. Although the court acknowledged that some elements of Subpart 2 are “ill-fitted” for implementing a revised standard, “[t]he EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” After concluding that EPA’s interpretation of the relationship between Subparts 1 and 2 is unlawful, the Court did not indicate what a permissible interpretation would be. Instead, the Court stated that “it is left to the EPA to develop a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to the revised ozone NAAQS.”

# NOx SIP Call

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## ***Appalachian Power Co. v. EPA*, 251 F.3d 1026 (D.C. Cir. 2001)**

On June 8, the D.C. Circuit issued an opinion directing EPA to reconsider the growth factors for electric generating units (EGUs) that it used in arriving at the state emissions budgets contained in its NOx SIP call rule. The case involved challenges by industry and state petitioners to certain “technical amendments” promulgated by EPA in 1999 and 2000 which revised the original 1998 NOx SIP call rule. In upholding the challenge to the growth factors for EGUs, the court relied in large part on the reasoning in its May 15, 2001 decision remanding portions of EPA’s Section 126 rule -- a rule in which EPA had taken a similar approach to regulating NOx emissions.

### **Ruling on EGU Growth Factors in the NOx SIP Call**

In developing an emissions budget for each state subject to the 1998 NOx SIP call, EPA determined projected emissions for each state for 2007 using a computer model. The projected emissions for 2007 were calculated by applying growth factors for different types of sources to an emissions database. After determining what emissions reductions could be achieved by the use of “cost-effective” controls, EPA subtracted those reductions from the projected emissions for 2007 to arrive at the allowable emissions budget for each state.

Following the promulgation of the 1998 NOx SIP call rule, EPA requested additional public comments on the state emissions budgets contained in the rule so that it could correct any errors and update information used to calculate the budgets. In May 1999 and March 2000, EPA published two sets of “technical amendments” to the rule. The technical amendments involved adjustments to the emissions budgets to reflect updated information and corrections to baseline inventories and growth factors for certain non-EGU sources. Numerous petitions were filed challenging the two sets of technical amendments.

In challenging the growth factor methodology used in the technical amendments and the 1998 rule, the petitioners argued: (1) that the 2007 projections reflect the unreasonable assumption that EGU utilization growth will be linear; (2) that EPA arbitrarily used 2001-2010 growth rates to estimate growth over a 1996-2007 period; and (3) that EPA’s growth factors resulted in unrealistic utilization estimates. With regard to the last argument, the petitioners pointed out that EPA projected that EGU utilization rates in certain states would be lower in 2007 than in 1998. The petitioners also maintained that EPA had ignored more representative estimates for particular states that were available.

EPA argued in response that the petitioners could not challenge the growth factor methodology used in the technical amendments because the identical growth factor methodology in the 1998 rule had not been challenged. EPA specifically maintained: (1) that the petitioners’ challenge was untimely in that it should have been brought within 60 days of the promulgation of the 1998 rule; and (2) that petitioners’ claim was barred by the doctrine of res judicata because the methodology was implicitly upheld in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), the decision involving review of the 1998 rule.

The D.C. Circuit rejected both of EPA’s arguments. The court concluded that the issue of whether the growth factors were lawful was reopened when EPA sought public comment on the accuracy of the state emissions budgets set forth in the 1998 rule and subsequently issued the technical amendments.

According to the court, consideration of the state budgets necessarily included consideration of growth factors because projected emissions were the product of a growth factor and current emissions levels. The court concluded that, because the growth factor issue had been reopened by the Agency, EPA's timeliness and res judicata arguments were not applicable.

With regard to the merits of the challenges to the growth factors, the D.C. Circuit agreed that the 2007 growth factors should be remanded to EPA because they are arbitrary and capricious. The court indicated that, although there might be a reasonable basis for EPA's growth factor methodology, the Agency had failed to explain what it was.

In a related argument, petitioners claimed that EPA's findings that sources in the states subject to the SIP call "contribute significantly" to nonattainment problems in downwind states should be remanded because those findings were also based on unsupported growth factors. However, the court concluded no party had raised this specific significant contribution issue during the public comment period provided by EPA. The court ruled that, therefore, petitioners were foreclosed from raising the issue in this judicial challenge.

### **Ruling on Arguments Raised by Non-EGU Petitioners**

Certain non-EGU, i.e., industrial, petitioners separately attacked the growth factors and emissions calculations for non-EGU sources on two grounds. First, they argued that EPA had failed to provide notice regarding possible errors in the factors for non-EGU sources before finalizing them in the technical amendments. Second, they argued that the budgets used in the technical amendments are unlawful because they are still based on definitions of EGUs and non-EGUs remanded by the court in the *Michigan* decision.

The court stated that the errors in the non-EGU growth factors constituted "harmless errors" and thus did not warrant additional notice. With regard to the unlawful definitions, the court agreed with petitioners that EPA had continued to rely on the remanded definitions in promulgating the technical amendments. Accordingly, the court remanded those portions of the technical amendments to EPA for further action consistent with the *Michigan* decision.

## **Overfiling**

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***See United States v. Murphy Oil USA Inc.***, 143 F. Supp. 2d 1054 (W.D. Wisc. 2001) (PSD Requirements).

## **PSD Requirements**

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***United States v. Westvaco Corp.***, 144 F. Supp. 2d 439 (D. Md. 2001)

In April 1999, EPA issued a notice of violation to Westvaco in which it alleged that the company had violated various PSD, NSPS, and minor NSR requirements in connection with four different projects undertaken at one of its pulp and paper mills between 1981 and 1991. In August 2000, EPA filed a complaint in federal district court which asserted, among other things, that the company had failed to obtain necessary PSD or minor NSR permits on four separate occasions. The company moved to dismiss the

corresponding counts of EPA's complaint on the grounds that those claims for civil penalties are barred by the five-year statute of limitations in 28 U.S.C. § 2462.

The district court agreed with the company that Section 2462 applies to EPA's claims that the company had failed to obtain necessary preconstruction permits and that the limitations period began to run in each instance from the date of violation. The court further stated that "[f]ederal district courts have uniformly held that preconstruction permit violations occur only at the time of the construction or modification of the emitting facility." Moreover, the court rejected EPA's contention that the failure to obtain a preconstruction permit constitutes a "continuing violation" and therefore that each day of operation without a permit is a separate violation. The district court concluded that there is a significant distinction between the failure to obtain a preconstruction permit and the failure to obtain an operating permit. "In contrast [to the failure to obtain an operating permit], a violation for failure to obtain a construction permit does not continue once the unpermitted construction is complete." Accordingly, the court dismissed the claims for civil penalties based on preconstruction permit violations where the construction was completed more than five years prior to the commencement of the enforcement action.

Although the court stated that the statute of limitations directly applies only to the claims for civil penalties, it indicated that EPA's delay in bringing suit would be relevant in determining whether its requested relief should be granted. The court quoted from *United States v. Campbell Soup Co.*, 1997 WL 258894, at \*3 (E.D. Cal. March 11, 1997), where that court stated that "the lapse of time [in bringing an enforcement action] will surely be relevant to the court's decision whether or not to grant any injunctive or other equitable relief." The *Westvaco* court ruled that EPA's claims for injunctive relief would not be dismissed at that juncture because issues of fact must still be resolved.

### ***United States v. Murphy Oil USA Inc.*, 143 F. Supp. 2d 1054 (W.D. Wisc. 2001)**

A federal district court in Wisconsin issued a decision addressing a number of issues concerning enforcement of PSD and other Clean Air Act provisions. In the 131-page opinion, the court ruled, among other things, that the general federal statute of limitations barred certain EPA claims, that the company's state permit could bar EPA enforcement claims so long as relevant information had been fully disclosed to the state, and that EPA is generally required to exhaust its administrative remedies if it believes that state permit terms may be unlawful. However, the court also ruled that EPA may engage in "overfiling" under the Clean Air Act and that, under the facts of this case, EPA could use the "actual-to-potential" test in determining PSD applicability.

#### **Whether the Statute of Limitations Applies**

In June 2000, EPA filed a complaint alleging, among other things, that the company had modified its refinery in 1988 and 1992 without obtaining necessary PSD permits or applying BACT. The company moved to dismiss the relevant claims for civil penalties, based on the five-year statute of limitations in Section 2462. EPA opposed the company's motion by contending (1) that the failure to obtain a preconstruction permit is a "continuing violation," (2) that the statute of limitations should not begin to run until EPA becomes aware of the violation, i.e., a "discovery rule" should apply, and (3) that the statute of limitations should not have run because the company allegedly engaged in "fraudulent concealment" of the violation, i.e., the principle of "equitable estoppel" should apply.

The district court rejected all of EPA's arguments regarding why the statute of limitations should not be deemed to have begun running. First, the court ruled that "the statute of limitations for a violation

of the preconstruction permit requirements . . . begins to run at the time of construction and does not continue through the operational life of the modified source.” The court also ruled that it made no difference that the State of Wisconsin, the permitting authority here, issues integrated PSD and operating permits. To accept EPA’s argument that such integrated permits support its continuing violation theory would “put form over substance.”

Second, the district court concluded that the “discovery rule” should ordinarily not apply to enforcement actions under the Clean Air Act. The district court determined that nothing in Section 2462 indicates that Congress intended that the limitations period would depend on the degree of difficulty in detecting violations.

Third, the court rejected EPA’s equitable estoppel/fraudulent concealment argument. According to the court, this doctrine applies only if a plaintiff has discovered a violation but does not bring suit before the limitations period expires because the defendant has, for example, hidden evidence or indicated that it will not invoke the statute of limitations as a defense. The court found that EPA had not alleged facts that would support such a claim and that EPA was merely raising its “discovery rule” argument under a different name.

In addition, the court concluded that Section 2462 applies only to civil penalty claims and would not bar claims for injunctive relief brought by EPA to vindicate a public interest. The court did not discuss whether EPA’s delay in bringing suit might adversely affect its ability to obtain the relief that it seeks.

### **EPA’s Ability to Engage in Overfiling**

The company argued that certain EPA claims that PSD requirements had been violated are barred because the company and the Wisconsin Department of Natural Resources (WDNR) had entered into a settlement resolving those alleged violations. According to the company, the state court-approved settlement barred EPA from relitigating the claims under the doctrine of res judicata (claims involving particular parties that are resolved by a court cannot be relitigated by those parties). For purposes of deciding the motions, the court assumed that the federal and state claims in question were identical. However, the court ruled that res judicata did not apply because it found that the interests of EPA and the WDNR were not sufficiently similar to conclude that the WDNR’s actions should be binding on EPA.

In addition, the court expressly rejected the company’s argument that the reasoning of the Eighth Circuit in *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (language of RCRA prohibits EPA from overfiling), should apply here. The court concluded that the Clean Air Act does not contain the kind of language relied on by the Eighth Circuit in *Harmon* and that Congress intended that EPA be able to bring enforcement actions under the Clean Air Act where state enforcement had been inadequate.

### **Effect of Permit Shields**

The company argued that, because a state operating permit issued in 1992 specifically stated that PSD requirements did not apply to certain projects, both federal and state permit shields barred EPA from now contending that the projects triggered PSD. Before addressing legal issues concerning the permit shield argument, the court stated that the company could not prevail unless it could establish as a factual matter, that it had fully disclosed all relevant information to the WDNR in connection with the 1992 permit.

Although that factual issue could not be resolved without a trial, the court went ahead to address the permit shield question.

The court ruled that the company could not rely on the Title V permit shield provision because the 1992 permit was not issued under the authority of Title V -- Wisconsin's Title V program was not approved until 1994. However, the court concluded that the separate state permit shield, which is contained in the Wisconsin SIP, should apply and that it "prohibits plaintiff from prosecuting defendant for alleged violations of [PSD] standards," assuming that the company can meet its burden of showing as a factual matter that the permit is based on accurate information.

### **Whether EPA Failed to Exhaust Administrative Remedies**

The company maintained that the WDNR notified EPA regarding a 1990 PSD non-applicability determination and the issuance of the 1992 operating permit but that EPA failed to appeal either of those decisions. According to the company, EPA is now foreclosed from challenging the determination and permit because it failed to "exhaust its administrative remedies" as required by applicable regulations.

The court agreed with the company that EPA was required to exhaust its administrative remedies under Wisconsin regulations. The court relied primarily on *United States v. AM General Corp.*, 34 F.3d 472 (7th Cir. 1994). In that case, the Seventh Circuit dismissed an EPA enforcement action because EPA had failed to exercise alternative remedies -- such as appealing the issuance of a permit by a local agency -- before initiating an action against a source that relied on that permit. The court ruled that, if the company can show that the basis for the permit is valid, it will rule that EPA is barred from pursuing the claims.

### **EPA's Reliance on the "Actual-to-Potential" Test**

The court ruled that, based on the facts of this case, EPA could permissibly use the "actual-to-potential" test -- rather than the "actual-to-actual" test urged by the company -- to determine whether changes to the facility's sulfur recovery unit (SRU) triggered PSD requirements. Citing the preamble to the 1992 WEPCO final rule, the court stated that the question is whether the changes were sufficiently significant so that "normal operations" had not begun before the changes. The court then distinguished the decision in *Wisconsin Electric Power Co. v. EPA*, 893 F.2d 901 (7th Cir. 1990), by stating that WEPCO involved "like-kind replacements" of components, whereas the instant case involved an increase in the capacity of the SRU and other functional changes. According to the court, "[u]sing a literal definition of 'normal operations,' I conclude that each set of the changes was significant enough to make the post-construction unit effectively a new unit that had not begun normal operations at the start of construction." In addition, the court stated that the company's alternative position that a "potential-to-potential" test should be used conflicted with the regulatory language.

In short, the court did not adopt EPA's current position that the "actual-to-potential" test applies to all modified units. Instead, the court ruled that the particular changes to the SRU were so significant that the modified unit should be regulated as a new unit.

### ***United States v. Murphy Oil USA, Inc.*, 155 F. Supp. 2d 1117 (W.D. Wisc. 2001)**

A federal district court held that, because a company withheld information relevant to PSD applicability from the state permitting authority, the general federal statute of limitations in 28 U.S.C. § 2462 would not bar EPA from seeking civil penalties. This decision followed a May 18 decision (see above)

in which the judge ruled that the statute of limitations would bar EPA from seeking civil penalties for alleged violations occurring at the company's refinery more than five years before EPA brought the enforcement action unless EPA could establish that the company had concealed relevant information from the state permitting authority, the Wisconsin Department of Natural Resources (WDNR). The judge made her finding that relevant information had been withheld following a trial that took place in June 2001.

The opinion deals primarily with various changes made to the refinery's sulfur recovery unit (SRU) during two different time periods: 1987-1988 and 1991-1993. EPA brought its enforcement action in 2000. Among other things, EPA alleged that PSD requirements were triggered during both periods and that NSPS requirements were triggered in 1993.

### **1987- 1988 Projects**

The court concluded that, because EPA conceded that the company had not withheld information concerning the 1987-1988 projects that would have led to the discovery of violations, EPA's claims for civil penalties for alleged PSD violations were barred by the five-year statute of limitations in 28 U.S.C. § 2462. With regard to the substance of EPA's claims, the court concluded that the changes (various modifications to the SRU to improve its operational efficiency) triggered PSD permitting requirements. In reaching this decision, the court applied the "actual-to-potential" test in accordance with its decision of May 18, 2001.

Although the court found that the failure to obtain a PSD permit was a violation, it concluded that the violation was a "one-time" violation, not a "continuing" violation. Because EPA did not allege that the company had withheld documents that would have enabled EPA or the WDNR to discover the violations, it ruled that the five-year statute of limitations barred EPA from seeking civil penalties for the violations. The court stated that the question of whether EPA is entitled to injunctive relief would be resolved after phase two of the trial.

### **1991-1993 Projects**

The district judge ruled that all projects undertaken during the 1991-1993 period should be aggregated and treated as one project for PSD purposes. She thus rejected the company's contention that the projects started in 1991 were not undertaken with the intention that a project to route the distillate unifier to the SRU would be undertaken later. According to the court, it was significant that the company started discussions with the state concerning the distillate unifier project only six months after completion of the initial projects.

The court concluded that, based on use of the "actual-to-potential" test, the projects involving the SRU undertaken during the 1991-1993 period constituted a "major modification" and required that the company obtain a PSD permit. In addition, the court concluded that, when the company applied for a minor NSR permit in 1992, it did not provide to the WDNR certain consultants' reports prepared for the company that discussed, among other things, the appropriate emissions baseline for the two years preceding the projects -- information that was relevant in applying the "actual-to-potential" test. The judge then found that, if the information had been provided to the WDNR, the WDNR would not have issued the minor NSR permit to the company and it would have concluded that the NSPS had been triggered. As a result, the court held that EPA's enforcement claims were not barred by the statute of limitations or by the state permit shield provision in the minor NSR permit.

***United States v. American Electric Power Service Corp.***, 136 F. Supp. 2d 808 (S.D. Ohio 2001);  
***United States v. American Electric Power Service Corp.***, 137 F. Supp. 2d 1060 (S.D. Ohio 2001)

This litigation consists of two consolidated cases: (1) an enforcement action brought by EPA in November 1999 alleging, among other things, that six companies had failed to obtain PSD/NSR permits for numerous projects involving five coal-fired power plants; and (2) a citizen suit under section 304 of the Act jointly brought by 14 different environmental groups (“Citizens”) alleging similar violations. The allegations involved 34 different units, and the oldest of the projects took place in 1978. In this decision, the district court addressed the companies’ motion to dismiss numerous claims of the Citizens seeking payment of civil penalties because the claims are allegedly barred by the five-year statute of limitations in Section 2462.

The district court ruled that the Citizens could seek payment of civil penalties under these claims for the failure to obtain PSD/NSR permits but only for daily violations occurring less than five years before they filed their complaint. Surprisingly, the district court apparently never decided the issue of whether the failure to obtain a PSD/NSR permit is a “continuing violation.” According to the judge, “whether or not the Citizens satisfy the elements of [the] continuing violation doctrine is not germane . . . . In the Court’s view, the relevant inquiry is the extent of the civil penalties which may be imposed in the event the Citizens prevail upon their claims.” Although the court’s reasoning is unclear, the effect of this approach is to assume that the failure to obtain a PSD/NSR permit gives rise to a continuing violation without directly deciding the issue.

At another point in the opinion, the court stated that operating a facility in violation of a permit condition constitutes a violation of PSD requirements and that it would be “illogical to conclude that a defendant may only be held liable for constructing a facility, rather than operating such facility, without complying with the permit requirements.” However, the court did not recognize the distinction between not obtaining a preconstruction permit before undertaking a project and continually violating the conditions of a permit that has been obtained. In any event, the court apparently does not rely on this reasoning when it addresses the statute of limitations issue. Perhaps most surprisingly, the court’s opinion failed to recognize that several district courts have addressed the same issue in detail and concluded that Section 2462 completely bars claims for civil penalties for alleged failures to obtain PSD/NSR permits more than five years before a judicial action is commenced. In addition, the court ruled that the statute of limitations would not bar the Citizens’ requests for injunctive relief.

The district court’s decision also addressed certain other issues regarding the ability of plaintiffs to bring citizen suits under section 304 of the Act. The court ruled that the 60-day notice requirement in section 304(b) does not apply to citizen suits brought under section 304(a)(3), which authorizes citizen suits against a person who constructs a “new or modified major emitting facility” without obtaining a necessary PSD/NSR permit or who is alleged to have violated such a permit or to be in violation of a condition of such a permit. The court also ruled that an action under (a)(3) can be brought even if the violation is a wholly past violation so long as it occurred more than once.

In a separate decision in the same case issued on the same day, the district court addressed the companies’ motion to dismiss various claims of EPA and northeastern states that had intervened as plaintiffs. In that decision, the court took the same basic approach to applying the statute of limitations. The second opinion did not contain any detailed analysis of the issue and did not cross-reference the opinion addressing the Citizens’ claims. Instead, the court merely assumed that EPA could seek to recover civil penalties if a facility that had allegedly failed to obtain a PSD/NSR permit was still operating in the five-year period preceding the filing of EPA’s complaint, regardless of when the failure to obtain the permit occurred.

***In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC***, Petition No. II-2000-07 (May 2, 2001)

In a matter involving numerous petitions for objections to a Title V permit for a waste disposal/chemical processing facility, Administrator Whitman issued a decision rejecting almost all the petitioners' challenges. Among other things, the Administrator ruled that the New York State Department of Environmental Conservation (NYSDEC) had properly determined that construction of the new facility would not trigger PSD requirements and that petitioners' environmental justice claims should be denied.

The matter involved NYSDEC's issuance of a permit under its combined Title V/ NSR permitting program to Pencor-Masada Oxynol ("Masada") authorizing the construction of a new facility. The facility will process municipal solid waste and, through use of a novel technology, produce ethanol for commercial use. In issuing the permit, NYSDEC determined that the facility should be considered a refuse disposal facility for PSD purposes and that potential emissions from the new facility would not exceed the applicable threshold levels for any regulated pollutant.

A total of 35 petitions were filed by individuals and a corporation requesting that the Administrator object to the issuance of the permit pursuant to section 505(b)(2) of the Clean Air Act. The petitions raised numerous procedural and substantive claims concerning the validity of the permit.

We summarize two key rulings of the Administrator below.

**Non-Applicability of PSD Requirements**

In finding that the construction of the facility did not trigger PSD requirements, the Administrator addressed three principal issues: (1) whether the "primary activity" of the facility will be refuse disposal or chemical manufacturing (which determines the PSD major source threshold level); (2) whether the facility will contain an "embedded source," i.e., a chemical process plant, that could separately trigger PSD requirements; and (3) whether the facility's potential to emit (PTE) will be properly limited so that the relevant PSD major source threshold will not be exceeded.

With regard to the "primary activity" issue, the petitioners claimed that the facility will be primarily a "chemical process plant" because it will utilize various chemical processes to produce ethanol. Under the statute and regulations, a "chemical process plant" has a major source cutoff of 100 tpy, while a refuse disposal plant has a cutoff of 250 tpy. The Administrator determined that there was no basis for overturning NYSDEC's finding that the primary activity will be refuse disposal. Both the Administrator and NYSDEC relied principally on evidence indicating that 70 percent of the facility's revenues are projected to result from refuse disposal fees and 30 percent from chemical product sales.

The Administrator then analyzed the situation in light of EPA's "embedded source" interpretation of the PSD regulations. Under this interpretation, a facility whose primary activity makes it subject to a 250 tpy cutoff should be analyzed to determine whether a portion of the facility -- an "embedded source" -- could be classified as falling into one of the categories with a 100 tpy cutoff. The Administrator concluded that, although there is an "embedded" chemical process plant at the Masada facility, the emissions from that source would not exceed the 100 tpy cutoff.

The petitioners also argued that the PTE limits upon which the permit is based are speculative for a number of reasons and are not likely to be met. They specifically contended that the permit improperly

relies upon after-the-fact monitoring, rather than engineering practices, test data, or vendor guarantees, to assure that emissions stay below major source cutoff levels. The Administrator ruled that such an approach is an effective way to limit the facility's PTE and rejected petitioners' contrary claims.

### **Environmental Justice Claims**

Certain petitioners alleged that the permit should be overturned because NYSDEC and EPA did not comply with Executive Order 12898, which directs federal agencies to make environmental justice part of their missions by addressing any adverse effects of their programs, policies, or activities on minority and low-income populations. The Administrator stated that the Order applies only to actions of federal agencies and therefore does not apply to NYSDEC's actions. Accordingly, she concluded that the Order provides no basis for EPA to object to NYSDEC's issuance of the permit. However, the Administrator further stated that petitioners are free to raise environmental justice concerns by filing a complaint under Title VI of the 1964 Civil Rights Act and EPA's Title VI regulations if they believe NYSDEC discriminated against them in violation of those laws.

***See Alaska v. EPA***, 244 F.3d 748 (9<sup>th</sup> Cir. 2001) (Justiciability).

***See Communities for a Better Environment v. Cenco Refining Co.***, No. CV 00-5665 (C.D. Cal., June 22, 2001 (180 F. Supp. 2d 1062) and September 26, 2001 (179 F. Supp. 2d 1128)) (Citizen Suits).

## **Section 126 Rule**

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***Appalachian Power Co. v. EPA***, 249 F.3d 1032 (D.C. Cir. 2001)

On May 15, 2001, the D.C. Circuit issued a decision upholding EPA's regulations under section 126 of the Act imposing NO<sub>x</sub> emissions reductions on numerous major sources in twelve "upwind" states. However, the court remanded two aspects of the Section 126 Rule to EPA for further consideration because the Agency had failed to explain the basis for its determinations: (1) the growth factors used to project the utilization of electric generating units (EGUs) in 2007; and (2) EPA's classification and treatment of cogeneration units, i.e., units that produce steam partly for industrial use and partly for generation of electricity.

The basis for the litigation arose when eight northeastern states filed petitions with EPA pursuant to section 126(b) of the Act. That subsection, as read by EPA, provides that a state may petition EPA to take action if a major source or group of stationary sources in another state "contributes significantly" to its nonattainment with respect to a national ambient air quality standard (NAAQS). The petitions alleged that emissions from designated sources in various "upwind" states were contributing significantly to nonattainment with the ozone NAAQS in the petitioning states. In response to the petitions, EPA issued the Section 126 Rule, in which the Agency found that designated major sources in upwind states were contributing significantly to ozone nonattainment in some of the petitioning northeastern states and imposed NO<sub>x</sub> emissions reductions requirements on those sources. The final rule was challenged in the D.C. Circuit by numerous electric utility parties, "upwind" states, and non-EGU parties.

### **Erroneous Cross-Reference to Section 110(a)(2)(D)**

The court rejected industry and state petitioners' argument that, because section 126 does not cross-reference the provisions in section 110(a)(2)(D) that specifically address significant contributions to nonattainment by other states, EPA had no authority to grant the section 126 petitions and provide any relief. After analyzing the statutory language, the court concluded that EPA's interpretation of the statute was entitled to deference and should be followed. In particular, the court believed that it is highly unlikely that Congress would have intended to repeal most of the pre-1990 regulatory regime for addressing interstate air pollution with no indication in the legislative history or the new statutory text. The court concluded that the lack of a proper cross-reference to the post-1990 statute was merely a "scrivener's error," i.e., a drafting mistake, and did not change Congress' intent that section 126 petitions could be used to require EPA to impose additional requirements on sources in upwind states.

### **Relationship Between Section 126 Rule and NO<sub>x</sub> SIP Call**

The court rejected petitioners' arguments that EPA was not authorized to address ozone nonattainment simultaneously through the NO<sub>x</sub> SIP call process and the section 126 petition process and that, even if EPA has such authority, it must give precedence to the SIP call process. The court concluded that Congress had intended that EPA have the authority to address nonattainment problems under either or both provisions. It disagreed with petitioners that federalism principles dictate that states first have the opportunity to develop their own SIP provisions in response to a SIP call before EPA determines emissions reductions for numerous sources by granting section 126 petitions. According to the court, the section 126 process provides certain limitations on what a state may do in revising its SIP, but the state still retains significant discretion in developing SIP provisions.

### **Determination of "Significant Contributions"**

The court ruled that EPA's approach in the section 126 rulemaking to determining whether sources are "contributing significantly" to downwind ozone nonattainment is reasonable and entitled to deference. EPA used essentially the same two-step process that it used for determining "significant contributions" in the NO<sub>x</sub> SIP call rulemaking. Petitioners argued that, because section 126 focuses on emissions from individual major sources or groups of stationary source rather than on aggregate emissions from particular states, EPA's "significant contribution" approach was invalid for purposes of section 126. They argued that EPA was required to find that specified stationary sources within a state meet a threshold for a "significant contribution." However, the court believed that EPA could aggregate emissions because section 126 refers to a "group of . . . sources" that "contributes significantly" to downwind nonattainment problems. Although the court recognized that EPA's reliance on its findings for the SIP call was not the only approach it could have taken, the court concluded that it was "at least reasonable" and entitled to deference by the court.

### **Reasonableness of Emissions Limitation Determinations**

In order to allocate NO<sub>x</sub> emissions allowances to individual sources under the Section 126 Rule, EPA made state-by-state emissions projections for 2007 based on a computer model. The court upheld EPA's general approach to determining state NO<sub>x</sub> emissions budgets in the face of petitioners' arguments that EPA's use of the computer model was arbitrary and capricious and inconsistent with more detailed projections made by certain states. The court ruled that, even assuming that state-specific projections may be more accurate than EPA's general computer model applied to those states, EPA's approach is entitled to deference because of its expertise and petitioners' failure to show that EPA's approach is unreasonable.

### **Remand of EPA's Growth Factors**

Although the court upheld EPA's general approach to determining emissions limitations, it concluded that EPA had failed to justify the growth factors it used to project the utilization of electric generating units (EGUs) in 2007. The court concluded that "[i]n this case, the EPA has not fully explained the bases upon which it chose to use one set of growth-rate projections for costs and another for budgets, nor has it addressed what appear to be stark disparities between its projections and real world observations." Because of EPA's failure to explain its selection of growth factors, the court remanded the issue to EPA for further explanation.

### **Non-EGU Budget Determinations**

Petitioners argued that EPA had violated the Act's notice and comment rulemaking requirements in promulgating the emissions budgets for non-EGUs, i.e., industrial generating units. They pointed out that the final rule contained several changes to the budgets in the proposed rule even though EPA provided commenters no opportunity to comment on the changes and provided no notice that such changes might occur. Rather than addressing the issue of whether EPA had violated notice and comment requirements, the court ruled that petitioners had waived their claims because they had failed to file a petition for reconsideration with EPA raising this objection after promulgation of the final rule.

### **EPA's Treatment of Cogenerators**

The court agreed with petitioners that EPA had failed to adequately explain why its treatment of cogenerators in the Section 126 Rule was significantly different from its treatment of cogenerators in prior rules. In the Section 126 Rule, EPA based its emissions reductions for large EGUs on a more stringent emissions rate (.15 lb/mmBTU) than that for large non-EGUs (.17 lb/mmBTU). EPA also defined "large EGU" so that a greater number of cogenerators qualified as "large EGUs" as compared to prior rules. Although the court indicated that there might be a reasonable basis for EPA's approach to cogenerators in the rule, it concluded that EPA had not provided a discernible basis for its classification of cogenerators. Accordingly, the court vacated this aspect of the final rule and remanded it to EPA.

### ***Appalachian Power Co. v. EPA*, No. 99-1200 (D.C. Cir. August 24, 2001)**

On August 24, the D.C. Circuit granted a motion filed by electric utility petitioners seeking to extend indefinitely the compliance date for EPA's Section 126 Rule as it applies to electric generating units (EGUs). In the Section 126 Rule, EPA had granted the petitions of certain northeastern states to impose stringent NO<sub>x</sub> controls on designated EGUs and industrial boilers in 22 states. One likely effect of the court's order will be to extend the compliance date for EGUs until at least May 2004. The promulgated compliance date was May 2003.

The D.C. Circuit's order came in the aftermath of its May 15, 2001 decision, in which the court upheld most aspects of the Section 126 Rule but remanded certain provisions to EPA. *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001). In particular, the court concluded that EPA had failed to justify the growth factors it used to project the utilization of EGUs in 2007, which provided the basis for determining what emissions reductions must be achieved by EGUs. The court remanded the EGU growth factors to EPA but did not vacate them nor provide any deadline for responding to the remand.

In their motion, the electric utility petitioners requested that the court vacate the EGU growth factors or, alternatively, extend the three-year compliance date (May 2003) for meeting the rule's requirements. The petitioners contended, among other things, that until EPA completes the remand proceedings and sources know precisely what their obligations will be under the rule, sources could not intelligently plan for taking necessary steps to achieve compliance.

The court's August 24 order consists of only three short paragraphs and does not explain the reasoning for granting the motion. The order provides in relevant part that "as of May 15, 2001, the date of this court's decision, the three-year compliance period for emissions limitations applicable to EGUs under the § 126 rule is tolled, pending EPA's resolution of the remand of EGU growth factors ordered by this court." The court's order also clarified that the rule is vacated for separate reasons insofar as it applied to certain cogenerators.

## **Statute of Limitations**

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***See United States v. Westvaco Corp.***, Civ. No. MJG-00-2602 (D. Md. April 23, 2001) (PSD Requirements).

***See United States v. Murphy Oil USA Inc.***, 143 F. Supp. 2d 1054 (W.D. Wisc. 2001) (PSD Requirements).

***See United States v. Murphy Oil USA, Inc.***, 155 F. Supp. 2d 1117 (W.D. Wisc. 2001) (PSD Requirements).

***See United States v. American Electric Power Service Corp.***, 136 F. Supp. 2d 808 (S.D. Ohio 2001); ***United States v. American Electric Power Service Corp.***, 137 F. Supp. 2d 1060 (S.D. Ohio 2001) (PSD Requirements).

## **Title V Permit Program**

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***See In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC***, Petition No. II-2000-07 (May 2, 2001) (PSD Requirements).

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

	<b>Page Number</b>
	<b>LD-</b>
<i>Adair v. Troy State University of Montgomery</i> , 892 F. Supp. 1401 (M.D. Ala. 1995) .....	2, 22
<i>Alaska v. EPA</i> , 244 F.3d 748 (9 <sup>th</sup> Cir. 2001) .....	91, 106
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001) .....	87
<i>American Trucking Ass'ns v. EPA</i> , 175 F.3d 1027 (D.C. Cir. 1999) .....	51
<i>American Trucking Ass'ns v. EPA</i> , 195 F.3d 4 (D.C. Cir. 1999) .....	52
<i>Anderson v. Farmland Industries, Inc.</i> , 45 F. Supp.2d 863 (D.Kan. 1999) .....	45, 49
<i>Anderson v. Farmland Industries, Inc.</i> , 70 F. Supp.2d 1218 (D. Kan. 1999) .....	46, 49
<i>Appalachian Power Co. v. EPA</i> , 208 F.3d 1015 (D.C. Cir. 2000) .....	64, 66, 75
<i>Appalachian Power Co. v. EPA</i> , 249 F.3d 1032 (D.C. Cir. 2001) .....	106
<i>Appalachian Power Co. v. EPA</i> , 251 F.3d 1026 (D.C. Cir. 2001) .....	97
<i>Appalachian Power Co. v. EPA</i> , No. 99-1200 (D.C. Cir. Aug. 24, 2001) .....	109
<i>Cement Kiln Recycling Coalition v. EPA</i> , 255 F.3d 855 (D.C. Cir. 2001) .....	93
<i>Chemical Manufacturers Association v. EPA</i> , 70 F.3d 637 (D.C. Cir. 1995) .....	4, 24, 25
<i>Citizens Legal Environmental Network v. Premium Standard Farms</i> , No. 97-6073-CV-SJ-6, 2000 WL 220464 (W.D. Mo. Feb. 23, 2000) .....	58
<i>Clean Air Implementation Project v. EPA</i> , 1996 WL 393118 (D.C. Cir. June 28, 1996) .....	26, 31
<i>Clean Air Implementation Project v. EPA</i> , 150 F.3d 1200 (D.C. Cir. 1998) .....	37
<i>Communities for a Better Environment v. Cenco Refining Co.</i> , 180 F. Supp. 2d 1062 (C.D. Cal. 2001) .....	83, 92, 106
<i>Communities for a Better Environment v. Cenco Refining Co.</i> , 179 F. Supp. 2d 1128 (C.D. Cal. 2001) .....	83, 92, 106
<i>Color Communications, Inc. v. The Illinois Pollution Control Board</i> ,	

680 N.E.2d 516 (Ill. 1997) .....	17, 31
<i>Dubois v. U.S. Dept. of Agriculture</i> , 20 F. Supp.2d 263 (D.N.H. 1998) .....	36, 39
<i>Fried v. Sungard Recovery Services, Inc.</i> , 900 F. Supp. 758 (E.D. Pa. 1995) .....	3, 22
<i>Fried v. Sungard Recovery Services, Inc.</i> , 916 F. Supp. 465 (E.D. Pa. 1996) .....	5
<i>Friends of the Earth v. Laidlaw Environmental Services</i> , 149 F.3d 303 (4th Cir. 1998) .....	34, 39
<i>Friends of the Earth v. Laidlaw Environmental Services, Inc.</i> , 120 S.Ct. 693 (2000) .....	57, 64
<i>General Electric Co. v. EPA</i> , 53 F.3d 1324 (D.C. Cir. 1995) .....	12
<i>Glazer v. American Ecology Environmental Services Corp.</i> , 894 F. Supp. 1029 (E.D. Tex. 1995) .....	2, 29, 30
<i>In re Commercial Cartage Company</i> , CAA Appeal No. 97-9 (EAB, July 30, 1998) .....	38
<i>In re Commonwealth Chesapeake Corp.</i> , PSD Appeal Nos. 96-2 et seq (EAB, Feb. 19, 1997) .....	26
<i>In re EcoElectrica, L.P.</i> , PSD Appeal Nos. 96-8 and 96-13 (EAB, April 27, 1997) .....	27
<i>In re Encogen Cogeneration Facility</i> , PSD Appeal Nos. 98-22 through 98-24 (EAB, March 26, 1999), 1999 WL 198914 (E.P.A.) .....	54
<i>In re Hawaiian Electric Light Co.</i> , PSD Appeal Nos. 97-15 through 97-23 (EAB, Nov. 25, 1998) .....	41
<i>In re Kawaihae Cogeneration Project</i> , PSD Appeal Nos. 96-9 (EAB, April 28, 1997) .....	28
<i>In re Knauf Fiber Glass, GmbH</i> , PSD Appeal Nos. 98-3 through 98-20 (EAB, Feb. 4, 1999), 1999 WL 64235 (E.P.A.) .....	48, 55
<i>In re Knauf Fibert Glass, GmbH</i> , PSD Appeal Nos. 99-8 through 99-72 (EAB, March 14, 2000) .....	62, 75
<i>In re Maui Electric Company</i> , PSD Appeal No. 98-2 (EAB, Sept. 10, 1998) .....	41
<i>In re RockGen Energy Center</i> , PSD Appeal No. 99-1 (EAB, Aug. 15, 1999), 1999 WL 673244 (E.P.A.) .....	54
<i>In re Steel Dynamics, Inc.</i> , PSD Appeal Nos. 99-4 and 99-5 (EAB, June 22, 2000) .....	74
<i>In re Tennessee Valley Authority</i> , CAA Docket No. 00-6 (EAB, Sept. 15, 2000) .....	63, 71
<i>In the Matter of Commercial Cartage Co.</i> , No. CAA-93-H-002 (EPA) (Aug. 19, 1997) .....	11

<i>In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC,</i> Petition No. II-2000-07 (May 2, 2001) .....	91, 105, 110
<i>In the Matter of Pacific Coast Building Products, Inc.,</i> Permit No. A00011 (Jan. 10, 2000) .....	75, 77
<i>In the Matter of PacifiCorp's Jim Bridger and Naughton Utility Steam Generating Plants,</i> Petition No. VIII-00-1 (Nov. 16, 2000) .....	66, 79
<i>In the Matter of Polypropylene Unit, Baton Rouge Polyolefins Plant, Exxon Chemical Americas,</i> Petition No. 6-00-1, 65 Fed. Reg. 26,380 (May 9, 2000) .....	62, 78
<i>In the Matter of Roosevelt Regional Landfill, Regional Disposal Co.,</i> Permit No. DE 98AOP-C242 .....	55
<i>In the Matter of Umetco Minerals Corp.,</i> No. CAA-(113)-VIII-92-03 (EPA) (March 29, 1996) .....	8, 10, 22
<i>Louisiana Environmental Action Network v. Browner,</i> 87 F.3d 1379 (D.C. Cir. 1996) .....	14, 16
<i>Michigan v. EPA,</i> 213 F.3d 663 (D.C. Cir. 2000) .....	68
<i>Michigan Manufacturers Ass'n v. Browner,</i> 230 F.3d 181 (6th Cir. 2000) .....	61
<i>National Lime Association v. EPA,</i> 233 F.3d 625 (D.C. Cir. 2000) .....	64, 66
<i>National Mining Association v. EPA,</i> 59 F.3d 1351 (D.C. Cir. 1995) .....	5, 16, 18, 23, 25
<i>National Parks Conservation Ass'n v. Tennessee Valley Authority,</i> 175 F. Supp. 2d 1071 (E.D. Tenn. 2001) .....	85
<i>Natural Resources Defense Council v. EPA,</i> 194 F.3d 130 (D.C. Cir. 1999) .....	49, 50, 56
<i>Natural Resources Defense Council v. Southwest Marine Inc.,</i> 28 F. Supp.2d 584 (S.D. Cal. 1998) .....	36, 40
<i>Ogden Projects, Inc. v. New Morgan Landfill Co.,</i> 911 F. Supp. 863 (E.D. Pa.1996) .....	4, 22, 26, 60
<i>Public Service Company of Colorado v. EPA,</i> 225 F.3d 1144 (10th Cir. 2000) .....	63, 75
<i>Save Our Summers v. State of Washington Dept. of Ecology,</i> No. CS-99-269-RHW (E.D. Wash. June 15, 2001) .....	90
<i>Sierra Club v. EPA,</i> 167 F.3d 658 (D.C. Cir. 1999) .....	49
<i>Sierra Club v. Public Service Co. of Colorado,</i> 894 F. Supp. 1455 (D. Colo. 1995) .....	1, 6, 12, 29
<i>Sierra Club v. Tri-State Generation and Transmission Association,</i> 173 F.R.D. 275 (D. Colo. 1997) .....	6, 29
<i>South Camden Citizens in Action v. New Jersey Department of Environmental Protection,</i>	

145 F. Supp. 2d 505 (D. N.J. 2001), <i>rev'd</i> 274 F.3d 771 (3rd Cir. 2001) .....	88
<i>South Camden Citizens in Action v. New Jersey Department of Environmental Protection</i> , 274 F.3d 771 (3rd Cir. 2001) .....	89
<i>Southwestern Pennsylvania Growth Alliance v. Browner</i> , 144 F.3d 984 (6th Cir. 1998) .....	40
<i>Star Enterprise and Texaco Inc. v. EPA</i> , 235 F.3d 139 (3rd Cir. 2000) .....	67
<i>Steel Co. v. Citizens For A Better Environment</i> , 118 S.Ct. 1003 (1998) .....	33, 39
<i>Sur Contra La Contaminacion v. EPA</i> , 202 F.3d 443 (1st Cir. 2000) .....	61, 75
<i>Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.</i> , Civil No. H-97-2427, 1998 U.S. Dist. LEXIS 16146 (S.D. Tex., Aug. 3, 1998) .....	35
<i>Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.</i> , 207 F.3d 789 (5th Cir. 2000) .....	59, 64
<i>United States v. American Electric Power Service Corp.</i> , 136 F. Supp. 2d 808 (S.D. Ohio 2001) .....	86, 87, 103, 110
<i>United States v. American Electric Power Service Corp.</i> , 137 F. Supp. 2d 1060 (S.D. Ohio 2001) .....	86, 87, 103, 110
<i>United States v. Brotech Corp.</i> , No. Civ.A. 00-2428, 2000 WL 1368023 (E.D. Pa. Sept. 19, 2000) .....	60, 75
<i>United States v. Campbell Soup Co.</i> , No. CIV-S-95-1854, 1997 WL 258894 (E.D. Cal., March 11, 1997) .....	20, 29, 30, 31
<i>United States v. Chrysler Corp.</i> , 158 F.3d 1350 (D.C. Cir. 1998) .....	39
<i>United States v. Hanousek</i> , 176 F.3d 1116 (9th Cir. 1999) .....	47
<i>United States v. Harmon Industries, Inc.</i> , 191 F.3d 894 (8th Cir. 1999) .....	70
<i>United States v. Hoechst Celanese Corp.</i> , 128 F.3d 216 (4th Cir. 1997) .....	12, 13, 22
<i>United States v. LTV Steel Co.</i> , 118 F. Supp. 2d 827 (N.D. Ohio 2000) .....	70, 75
<i>United States v. LTV Steel Co.</i> , 116 F. Supp. 2d 624 (W.D. Pa. 2000) .....	71, 75
<i>United States v. Marine Shale Processors</i> , 81 F.3d 1329 (5th Cir. 1996) .....	8, 18, 30
<i>United States v. Murphy Oil USA Inc.</i> , 143 F. Supp. 2d 1054 (W.D. Wisc. 2001) .....	87, 98, 99, 110
<i>United States v. Murphy Oil USA Inc.</i> , 155 F. Supp. 2d 1117 (W.D. Wisc. 2001) .....	102, 110

<i>United States v. Pan American Grain Manufacturing Co.</i> , 29 F. Supp.2d 53 (D. P.R. 1998) .....	42
<i>United States v. Reaves</i> , 923 F. Supp. 1530 (M.D. Fla. 1996) .....	9, 30
<i>United States v. Telluride Co.</i> , 146 F.3d 1241 (10th Cir. 1998) .....	43
<i>United States v. Trident Seafoods Corp.</i> , 60 F.3d 556 (9th Cir. 1995) .....	8, 10, 22
<i>United States v. Westvaco Corp.</i> , 144 F. Supp. 2d 439 (D. Md. 2001) .....	86, 87, 99, 110
<i>U.S. Public Interest Research Group, et al. v. Bayou Steel Corp.</i> , Civ. No. 96-0432 (E.D. La. Sept. 16, 1997) .....	7, 29
<i>Western States Petroleum Association v. EPA</i> , 87 F.3d 280 (9th Cir. 1996) .....	30
<i>Whitman v. American Trucking Ass'ns</i> , 531 U.S. 457 (2001) .....	92, 95