CATCH ME IF YOU CAN – THE MISAPPLICATION OF THE FEDERAL STATUTE OF LIMITATIONS TO CLEAN AIR ACT PSD PERMIT PROGRAM VIOLATIONS

BY

IVAN LIEBEN*

One of the most important goals of the federal Clean Air Act (CAA) is the maintenance of minimum air quality standards throughout the nation. The air quality standards are known as the National Ambient Air Quality Standards (NAAQS) and cover criteria pollutants, such as nitrogen oxides, sulfur dioxides, and ozone. The Prevention of Significant Deterioration (PSD) permit program, first enacted by Congress in 1977, is one of the United States government's key tools for maintaining minimum air quality in areas already meeting the NAAQS. The PSD program requires that all new or modified major stationary sources obtain a preconstruction permit and apply stringent emissions controls meeting best available control technology (BACT). Sources that construct or modify major stationary sources without complying with the PSD requirements are subject to enforcement by citizens and the United States Environmental Protection Agency (EPA), the federal regulatory body charged with implementing the PSD program.

Defendants of PSD lawsuits increasingly raise as a defense to penalties the application of the five year federal statute of limitations. Since the CAA does not contain an explicit statute of limitations provision, courts generally apply the federal statute of limitations to PSD penalty claims. Defendants seeking dismissal of those claims generally argue that PSD violations are one-time events occurring at the time of construction of new or modified sources. Under this theory, penalties will be barred if the court finds that the unpermitted construction occurred more than five years prior to the filing of the complaint. On the other hand, citizens and the government, seeking to properly punish wrongdoers and deter future PSD violations, argue that

* The author graduated Cum Laude from Lewis & Clark Law School where he was an editor on *Environmental Law*. He currently works for the United States Environmental Protection Agency in San Francisco, California, and is also an adjunct professor at Golden Gate University School of Law. The views expressed in this article are the author's personal views and do not necessarily represent the views of the United States Environmental Protection Agency, the federal government, or any other institution. The author would like to thank Ann Lyons for her generous review and edits to the manuscript and Stefan Schweitzer for his initial research on the topic.

the requirement to have a PSD permit and apply BACT for a new or modified source continues until a source meets those requirements. Under this continuing violation theory, a plaintiff can seek penalties for the five years prior to the filing of the complaint even if the violation first accrued more than five years prior to the commencement of the lawsuit.

In recent years, numerous courts ruling on the issue have been sharply divided as to whether PSD violations are one-time events or ongoing violations for statute of limitations purposes. Indeed, the only two circuit courts to rule directly on the issue, the Sixth and Eleventh Circuits, are also divided on the issue. In these two circuit court cases, the same plaintiffs, the National Parks Conservation Ass'n and Sierra Club, sued the Tennessee Valley Authority (TVA) claiming PSD violations at different TVA power plants. This article examines these numerous court cases, describes the history and nuances of the PSD program, and ultimately takes the position that those courts finding that PSD violations are continuing in nature are correct based upon the broad remedial goals and statutory language of the CAA, the legislative history of the PSD program, EPA's interpretation of the PSD program, and other considerations.

I. INTRODUCTION

The federal Clean Air Act (CAA),[1] with its stated goal "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population,"[2] is one of the most sweeping environmental regulatory statutes ever enacted by Congress. The statute came into existence through a cascade of legislation starting with the enactment of the first CAA in 1955. A key component of the CAA is its prevention of significant deterioration (PSD) program, a subprogram of its new source review (NSR) regulatory program. Title I of the CAA mandates that states divide areas under their jurisdiction into distinct airsheds, or regions,[3] and that air quality in each airshed be measured and compared with the national ambient air quality standards (NAAQS).[4] The NAAQS are established by the United States Environmental Protection Agency (EPA) and govern the discharge of "criteria" air pollutants.[5]

The PSD program, which applies in regions where ambient levels of pollutants meet the NAAQS, requires permits and stringent emissions controls for new or modified "major stationary sources" emitting significant amount of air pollutants.[6] Major stationary sources are some of the largest contributors

1 42 U.S.C. §§ 7401–7671q (2000).

2 *Id.* § 7401(b)(1).

3 *Id.* §§ 7407–08.

4 *Id.* § 7407(a).

5 EPA has promulgated NAAQS for six criteria pollutants: sulfur dioxide, particulate matter, nitrogen oxide, carbon monoxide, ozone, and lead. *See generally* 40 C.F.R. pt. 50 (2007). These pollutants have been determined to cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7408(a(1)(A) (2000).

6 42 U.S.C. § 7475 (2000); *see also* 40 C.F.R. § 52.21 (2007). Although not the topic of this Article, a similar program for major sources—nonattainment new source review (NNSR)—applies in areas not meeting the NAAQS. NNSR also requires preconstruction review. As the program relies upon different statutory and regulatory authorities, however, cases involving

of air pollution in the United States for pollutants such as nitrogen oxides.[7] Notwithstanding the PSD requirements, many sources in attainment areas fail to obtain the necessary permits prior to their construction or modification.[8] Indeed, this failure by major stationary sources to obtain PSD permits and install proper emissions controls serves to undercut one of the most effective and important air quality programs of the CAA.

The CAA empowers regulatory agencies to initiate enforcement actions against those who fail to obtain PSD permits,[9] and this enforcement authority is extended to citizens through citizen suit provisions.[10] The enforcement provisions provide for both injunctive relief, which typically means that sources violating PSD requirements are required to obtain permits and install appropriate controls, as well as the assessment of penalties.[11] The importance of penalties cannot be overstated, as they ensure that the economic benefit of a violation is recaptured, the violator is properly punished, and future violations are deterred.

A number of recent district court opinions and an Eleventh Circuit Court of Appeals opinion—*National Parks Conservation Ass'n, Inc. v. Tennessee Valley Authority* (*NPCA v. TVA I*)[12]—found that penalties for PSD violations are barred by the federal statute of limitations when the construction activity occurred more than five years before the lawsuit was filed.[13] The basic premise of these opinions is that the PSD requirement for a "preconstruction" permit is a one-time obligation that arises prior to a source commencing construction, and the statute of limitations begins to run from that point onwards.[14] While these cases still recognize the

NNSR claims will only be examined to the extent that they are informative to the PSD issues discussed in this article.

7 *See, e.g.*, American Geophysical Union, The Bioatmosphereic N Cycle: N Emissions, Transformations, Deposition, and Terrestrial and Aquatic Ecosystem Impacts II – Biogeosciences [B], E. M. Elliott et al., What can Nitrate Isotopes in Precipitation tell us about NOx Sources, Atmospheric Cycling, and Source Areas? Results from the First National Survey in the United States, American Geophysical Union Fall Meeting 2005, http://www.agu.org/meetings/fm05/fm05-sessions/fm05_B54A.html (last visited July 20, 2008) (describing how stationary fuel combustion sources contribute 40% of nitrogen oxide emissions in the United States, and demonstrating that these sources comprise a bigger contribution to wet deposition of nitrates than nitrogen oxide emissions from vehicles, even though vehicles contribute 54% of overall nitrogen oxide emissions).

8 *See, e.g.*, United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003) (describing how a plant in an attainment area failed to obtain necessary permits prior to modification).

9 *See* 42 U.S.C. §§ 7410(a)(2)(C), 7413 (2000). For example, the CAA mandates that a state implementation plan (SIP) "include a program to provide for the enforcement of the measures described in [the SIP], and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter." *Id.* § 7410(a)(2)(C).

10 *See id.* § 7604.

11 *See id.* § 7413(b).

12 502 F.3d 1316 (11th Cir. 2007), *cert. denied*, 76 USLW 3673 (U.S. June 23, 2008) (No. 07-867), *available at* http://web.knoxnews.com/pdf/0107tva-petition.pdf.

13 *See* discussion *infra* Part V.E.1.

14 *See, e.g.*, *NPCA v. TVA I*, 502 F.3d at 1322–23.

availability of injunctive relief,[15] the application of the federal statute of limitations to PSD violations against major sources—many who are large and sophisticated corporations—delivers a blow to one of the key enforcement tools of the CAA: the ability to collect penalties. Moreover, through these rulings, judges are sending the wrong message to violators that they can get a "free pass" on penalties if they can escape detection for long enough.

Countering this trend, other district court opinions and a Sixth Circuit Court of Appeals opinion—also titled *National Parks Conservation Ass'n, Inc. v. Tennessee Valley Authority* (*NPCA v. TVA II*)[16]—have found that a violation of the CAA's preconstruction permitting program constitutes a continuing violation, and therefore penalties can still be collected even if the initial violation occurred more than five years before the complaint was filed.[17] The basis for these rulings is that certain PSD requirements, such as the control technology requirements, are ongoing and operational in nature, and therefore the violations are continuous until the source obtains proper permits and complies with the PSD requirements.[18] These courts relied, in part, upon the broad air quality goals of the CAA as a basis for their rulings.[19] This article takes the position that these rulings were correctly decided, and provides statutory, legislative history, judicial, and policy arguments supporting these rulings.

II. THE PSD PROGRAM

The PSD program generally requires that an owner or operator of a proposed major source obtain a permit that contains emissions limitations meeting the best available control technology (BACT),[20] calculate and model air quality impacts from projected emissions, and conduct whatever

15 *See, e.g.*, *id.* at 1326.

16 480 F.3d 410 (6th Cir. 2007).

17 *See* discussion *infra* Part V.E.2.

18 *See, e.g.*, *NPCA v. TVA II*, 480 F.3d at 419.

19 *See, e.g.*, United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 652 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated on other grounds sub nom.* Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007) ("Holding that [power plant company's] alleged failure to obtain a preconstruction permit constitutes a continuing violation is consistent with the purpose of the CAA . . . [t]o 'speed up, expand, and intensify the war against air pollution in the United States.'" (citation omitted)).

20 Best available control technology is defined as:

> [A]n emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques for control of each such pollutant.

Clean Air Act, 42 U.S.C. § 7479(3) (2000).

monitoring may be necessary to determine the level of emissions[21] for each regulated pollutant prior to commencing construction. "Construction" under PSD also includes the modification of a source or facility,[22] and "modification" is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."[23]

The basic test for being a "major source" is bifurcated between "designated sources"[24] and all other sources.[25] Designated stationary sources with the potential to emit[26] greater than 100 tons per year (tpy) of any regulated NSR pollutant are categorized as a major source.[27] All other types of stationary sources with the potential to emit greater than 250 tpy of any

21 The pertinent provisions of the CAA preconstruction requirements provide:

> (a) . . . No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
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> (1) a permit has been issued for such proposed facility . . . ;
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> (2) the proposed permit has been subject to a review in accordance with this section . . . ;
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> (3) the owner or operator of such facility demonstrates . . . that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;
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> (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;
>
> (5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;
>
> (6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;
>
> (7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary . . . .

Id. § 7475(a).

22 *Id.* § 7479(2)(C).

23 *Id.* § 7411(a)(4).

24 *See* 40 C.F.R. § 52.21(b)(1)(i)(*a*) (2007).

25 *See id.* § 52.21(b)(1)(i)(*b*).

26 Potential to emit is generally defined as:

> [T]he maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit a pollutant including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

Id. § 52.21(b)(4).

27 *Id.* § 52.21(b)(1)(i)(*a*).

regulated NSR pollutant are also a major source.[28] The reasoning behind the use of potential emissions is that the actual emissions of a source are unknown prior to their construction, so PSD applicability should be based on the highest predicted emissions to ensure that all major sources are subject to the requirements.[29] For a major modification, the test requires a determination as to whether there will be a "physical" or "operational" change at an existing major source.[30]

Once it is determined that a proposed source will be a major source or a modification will occur at an existing major source, PSD applies to all pollutants subject to regulation under the CAA which will be emitted in "significant" amounts from the source.[31] EPA has set these significance thresholds through the regulatory process.[32] Generally speaking, for new construction or new emissions units, the determination as to whether there will be significant emissions increases is based upon the future potential emissions from the new source or emissions unit.[33] For a modification of an existing emissions unit, however, PSD requires that the source compare the premodification actual emissions to the postmodification projected actual emissions to determine whether there will be a significant emissions increase, a test commonly referred to as the "actual-to-future projected actual" test.[34]

The PSD program also allows for source-wide netting, such that there must be a "net" emissions increase to trigger the PSD requirements.[35] Under a netting analysis, significant net emissions increases for a given pollutant from a particular emissions unit at a modifying source can be offset by considering reductions of emissions of the same pollutant elsewhere at the facility within the five year "contemporaneous" period prior to the commencement of construction.[36] As long as those reductions are federally enforceable, a source can credit them against the expected emissions

28 *Id.* § 52.21(b)(1)(i)(*b*).

29 *See, e.g.*, Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380, 26,392 (June 19, 1978) (describing as a rationale that a source employing controls could simply shut them off. therefore the calculation of PTE should not consider such controls).

30 A major modification is defined as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . ." 40 C.F.R. § 52.21(b)(2)(i) (2007).

31 *See, e.g.*, *id.* § 52.21(a)(2)(iv)(*a*) (stating that "a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase . . . and a significant net emissions increase").

32 The significance thresholds for individual pollutants are targeted to exclude increases with only a "de minimis" impact on air quality. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,705 (Aug. 7, 1980). For instance, carbon monoxide has a 100 tpy threshold, nitrogen oxides and sulfer oxides have a 40 tpy threshold, and particulate matter has a 25 tpy threshold. 40 C.F.R. § 52.21(b)(23)(i) (2007).

33 40 C.F.R. § 52.21(a)(2)(iv)(*d*) (2007).

34 This test applies as of the December 31, 2002 PSD regulation amendments. Prevention of Significant Deterioration of Air Quality, 67 Fed. Reg. 80,186, 80,189 (Dec. 31, 2002). The prior test was an actual-to-potential test.

35 40 C.F.R. § 52.21(a)(2)(iv)(a) (2007).

36 *Id.* § 52.21(b)(3).

increases from a newly constructed or modified unit in order to stay below the PSD threshold for a pollutant.[37]

III. COOPERATIVE FEDERALISM UNDER THE CAA

The CAA creates a partnership between the federal and state governments to achieve most of its programmatic goals. Certain CAA programs are implemented only through the federal CAA statutory provisions and regulations promulgated by EPA, such as the hazardous air pollutant program[38] and the new source performance standards,[39] while other programs, such as attainment and maintenance of the NAAQS, the NSR permitting program, and the Title V operating permits program, contemplate implementation through state or local laws approved by EPA.[40] In regard to programs concerning the NAAQS, section 110(a)(1) requires states to create state implementation plans (SIPs) which provide for the "implementation, maintenance, and enforcement of such primary standard in each air quality control region . . . within such State."[41] Indeed, SIPs serve as the backbone of what is arguably the CAA's most important regulatory program, the national effort to attain and maintain health based national air quality levels for the worst and most pervasive pollutants. The Administrator of EPA has the important task of reviewing and approving all SIP programs.[42] Once approved, SIPs become federally enforceable under section 113 of the CAA[43] and are primarily administered by the states submitting them.[44]

37 *Id.* § 52.21(b)(3)(vi). 40 C.F.R. § 52.21(b)(3) allows for the consideration of emission reductions that are contemporaneous—i.e., occurring within the five years before the modification—in determining whether or not a "net emissions increase" occurred in conjunction with a modification. *Id.*

38 *See* Clean Air Act, 42 U.S.C. § 7412 (2000). Specifically, section 112(d) calls for the EPA Administrator to "promulgate regulations establishing emission standards" for categories of emitters of listed hazardous air pollutants. *Id.* § 7412(d)(1). The promulgated standards must require the "maximum degree of reduction in emissions" of the hazardous air pollutant. *Id.* § 7412(d)(2).

39 *Id.* § 7411(b)(1). The new source performance standards require the Administrator to "publish . . . a list of categories of stationary sources" that cause, or contribute significantly to, air pollution "which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7411(b)(1)(A). After establishing the category, the Administrator within one year "shall publish proposed regulations, establishing Federal standards of performance for new sources within such category." *Id.* § 7411(b)(1)(B).

40 *See id.* §§ 7410(a)(1), 7411(c), 7661a(d).

41 *Id.* § 7410(a)(1). Generally speaking, SIPs for each criteria pollutant must be initially created and approved by EPA within three years after the promulgation of the NAAQS for that criteria pollutant. *Id.*

42 *Id.* § 7410(k) (setting forth the process and criteria for EPA's approval of SIP submittals).

43 *See, e.g.*, *id.* § 7413(a)(1) (establishing that the Administrator can issue a compliance order, issue an administrative penalty action, or bring a civil suit for a violation of a SIP).

44 *Id.* § 7410(a)(2).

IV. VARIOUS MECHANISMS FOR IMPLEMENTATION OF THE PSD PROGRAM

Before 1977, the CAA did not require that a PSD program be included in SIPs. EPA approved the first attainment and maintenance SIPs on May 31, 1972.[45] As these initial plans did not include programs to prevent deterioration of air quality in areas already meeting the NAAQS, Sierra Club brought suit challenging EPA's approval of the SIPs claiming that the CAA required such a program.[46] In ruling on the challenge, the District Court for the District of Columbia found the CAA to implicitly contain a requirement that EPA take steps to prevent significant deterioration of air quality.[47] The court granted Sierra Club injunctive relief preventing EPA from approving SIPs that permitted the degradation of clean air areas.[48]

Pursuant to the court order, on November 9, 1972, EPA disapproved all maintenance SIP programs nation-wide.[49] EPA followed the disapproval with the promulgation of federal PSD standards in 1974 and explicitly incorporated these into the applicable implementation plans for all states.[50] Congress, presumably understanding the importance of such a program, created an explicit statutory PSD program largely mirroring EPA's regulatory program as part of the 1977 CAA amendments. The newly created section 161 of the CAA called upon states to submit PSD programs for inclusion into SIPs.[51] In 1978, EPA updated its PSD regulations at 40 C.F.R. § 52.21 to conform the regulations to the new statutory PSD program and also established SIP-approval criteria at 40 C.F.R. § 51.165 for states seeking to create their own PSD programs.[52]

For states that have not sought to create and seek approval of their own PSD programs, EPA has incorporated by reference the federal PSD regulations into their SIPs.[53] In those areas, EPA is the permitting authority unless EPA delegates the program to a state or local permitting authority to administer.[54] With a delegated PSD program, the permits issued by a state or local permitting authority are still considered EPA permits even though the primary responsibility of issuing and enforcing them now lies

45 Approval and Promulgation of Implementation Plans, 37 Fed. Reg. 10,842 (May 31, 1972).

46 Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973).

47 *Id.* at 256.

48 *Id.* at 257.

49 Significant Deterioration of Air Quality, 37 Fed. Reg. 23,836 (Nov. 9, 1972).

50 *See* Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974).

51 Clean Air Act, 42 U.S.C. § 7471 (2000). The standards for a state adopting PSD requirements into a SIP are found at 40 C.F.R. §§ 51.165, 51.166.

52 Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,388 (June 19, 1978).

53 40 C.F.R. Part 52 Subparts B through DDD explicitly incorporate by reference the federal PSD program for all jurisdictions where there is no SIP-approved PSD program. 40 C.F.R. pt. 52 sub pts. B–DDD (2007). This is called a federal implementation plan (FIP) because EPA, not the states, establishes the requirements that are part of an applicable implementation plan. *Id.* The provisions of 40 C.F.R. § 52.21 are also applicable to all lands owned by the Federal Government and Indian Reservations. *See id.* § 52.21(a)(1).

54 In these circumstances, the state or local agency administers the federal PSD program pursuant to a delegation of authority agreement. *See id.* § 52.21(u).

with the delegated permitting authority.[55] Where a PSD program is SIP-approved, however, states will always have primacy over the program's administration.[56] Currently, thirty-seven states implement SIP-approved PSD programs, nine states implement the delegated federal PSD program, and four states have mixed SIP-approved/delegated programs.[57] EPA retains the primary responsibility of issuing and enforcing PSD permits in only certain counties in California and Indian Country.[58] However, EPA universally maintains the ability to enforce PSD permits and permitting requirements against stationary emissions sources, whether through approved SIPs or the federal PSD program.[59]

V. PSD PERMITTING VIOLATIONS

For any large-scale regulatory program such as PSD, there will always be entities that either intentionally or inadvertently fail to comply with their requirements. The PSD program is no exception.

A. Nature of PSD Violations

The cases surveyed in this article demonstrate a cross sample of the ways that sources violate the PSD requirements. Probably the most egregious violation of PSD, albeit often the easiest to catch, is where a source undertakes new construction or a modification while completely disregarding any permitting or control requirements.[60] This type of

55 A permit issued pursuant to 40 C.F.R. § 52.21 by a delegate agency is still considered a federal PSD permit; all of the federal PSD regulatory requirements still apply, including such provisions as the permit appeals process to the EPA Environmental Appeals Board (EAB). *See generally id.* pt. 124.

56 *See id.* § 52.02(b) ("Any plan or portion thereof promulgated by the [EPA] Administrator substitutes for a State plan or portion thereof disapproved by the Administrator or not submitted by the State, or supplements a State plan or portion thereof.").

57 *See* EPA, EPA New Source Review Where You Live, http://www.epa.gov/nsr/where.html (last visited Mar. 12, 2007) [hereinafter EPA NSR Where You Live].

58 *See* EPA, EPA New Source Review California Permit Contacts, http://www.epa.gov/nsr/live/ca.html (last visited July 20, 2008) (pertaining to California counties); EPA, Tribal Air, http://www.epa.gov/air/tribal/where.html (last visited July 19, 2008) (pertaining to Indian Country).

59 *See* Clean Air Act, 42 U.S.C §§ 7412, 7477 (2000).

60 *See* MICHAEL S. ALUSHIN & EDWARD E. REICH, EPA, EC-G-1998-64, GUIDANCE ON ENFORCEMENT OF PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS UNDER THE CLEAN AIR ACT 5–6 (1983), *available at* http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/prev-deter-rpt.pdf [hereinafter EPA GUIDANCE] (establishing how EPA should address violations of the PSD requirements, including the use of CAA sections 113 and 167 authorities); *see, e.g.*, Detroit Edison Co. v. Mich. Dep't of Envtl. Quality, 39 F. Supp. 2d 875, 875 (E.D. Mich. 1999) (involving a coal-fired power plant that restarted and began operating after a 10-year nonoperational period without seeking a preconstruction permit); *see also* United States v. Brotech Corp., No. Civ.A. 00-2428, 2000 WL 1368023, at *1 (E.D. Pa. Sept. 19, 2000) (involving a chemical processing facility that installed and operated additional equipment without seeking a preconstruction permit); *see also* Ogden Projects, Inc. v. New Morgan Landfill Co., 911 F. Supp. 863, 865–66 (E.D. Pa. 1996) (involving a municipal waste landfill company that constructed a landfill without seeking a preconstruction permit).

violation is so egregious because, given the large size of many of these violators, hundreds to thousands of tons of illegal emissions of pollutants can result from the violation.[61]

However, sources have more nuanced ways of violating the PSD program. One tactic is for a source to falsely claim that an exception to PSD applies to a modification. For example, many coal-fired electric generating units targeted by EPA for PSD violations relating to massive rebuilds of their facilities, including the boilers, claimed that those projects fell under PSD's exception for "routine maintenance, repair and replacement."[62] Given the immense scope of the construction projects at issue, however, EPA did not find sufficiently credible the plants' claims that these rebuilds were "routine," and therefore pursued enforcement.[63] Many of these cases are ongoing.

Sources also illegally avoid PSD regulatory requirements by under-calculating the potential to emit (PTE) or the future actual emissions of a new source or new or modified emissions unit.[64] It is informative to understand how a source might be able to under estimate future emissions. EPA guidance establishes various methods for determining PTE, including use of emission data, vendor data and guarantees, emission limits, AP-42 emission factors, other emission factors, or state emission inventory information.[65] Since PSD applies to new major sources or modifications to an existing major source, there is often no actual emissions data to

61 *See Detroit Edison*, 39 F. Supp. at 878–79 (restricting coal-fired power plant emissions to 453.6 tons per year of carbon monoxide and 113.4 tons per year of nitrogen oxides); *see also Ogden Projects*, 911 F. Supp. at 876 (stating plaintiffs' calculated yearly nonmethane organic compounds and volatile organic compounds emissions for a landfill to be 663 tons, but the court held that the landfill's gas management system kept emissions below the "50 tons per year threshold").

62 The "routine maintenance, repair and replacement" exception is found at 40 C.F.R. § 52.21(b)(2)(iii)(*a*). In the late 1990s, EPA undertook an enforcement initiative against coal-fired electric generating plants that relied upon this exception. *See, e.g.*, United States v. Ohio Edison Co., No. 2:99-CV-1181, 2003 WL 23415140, at *6 (S.D. Ohio Jan. 17, 2003); United States v. Ill. Power Co., 245 F. Supp. 2d 951, 955, 959 (S.D. Ill. 2003); *Duke Energy*, 278 F. Supp. 2d 619, 623–25 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated on other grounds sub nom.* Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007); New York v. Niagara Mohawk Power Corp. (*Niagara Mohawk*), 263 F. Supp. 2d 650, 654–55, 668–69 (W.D.N.Y. 2003); United States v. S. Ind. Gas & Elec. Co. (*SIGECO*), No. IP 99-1692-C-M/F, 2002 WL 1760752, at *1 n.1 (S.D. Ind. July 26, 2002); United States v. Am. Elec. Power Serv. Corp., 137 F. Supp. 2d 1060, 1065–66 (S.D. Ohio 2001).

63 *See, e.g.*, *Duke Energy*, 278 F. Supp. 2d at 624–25 (discussing the extensive work performed on the boilers at a coal-fired electric generating unit).

64 *See, e.g.*, United States v. Louisiana-Pacific Corp., 682 F. Supp. 1122, 1124–28 (D. Colo. 1987) (involving a waferboard manufacturing facility that undercalculated its potential emissions prior to initial construction as demonstrated by later source tests); United States v. Murphy Oil USA, Inc. (*Murphy Oil*), 143 F. Supp. 2d 1054, 1080 (W.D. Wis. 2001) (involving a petroleum refinery applicability determination request prior to modification of its facility on an estimated potential to emit basis that was later demonstrated to be much lower than the actual postmodification emissions of the facility).

65 *See* EPA, DRAFT NEW SOURCE REVIEW WORKSHOP MANUAL: PREVENTION OF SIGNIFICANT DETERIORATION AND NONATTAINMENT AREA PERMITTING A.19 (1990), *available at* http://nsdi.epa.gov/ttn/nsr/gen/wkshpman.pdf [hereinafter EPA DRAFT PERMITTING MANUAL].

consider for the proposed projects.[66] To predict future emissions, sources often multiply an emission factor, which estimates emissions per a certain unit of production or materials processed, by the anticipated production or material processing capacity.[67] A source can evade PSD by undercalculating future predicted emissions, such as through the use of inaccurate emission factors or production level projections. Moreover, it may be difficult for a permitting authority to identify sources undercalculating predicted emissions given the complexity of some of these sources and their emissions profiles.

Finally, sources can violate PSD by obtaining illegal or improperly issued "synthetic minor" permits.[68] A synthetic minor permit limits the emissions from a source—typically through emission limits, limits on hours of operation, or maximum production levels—to levels below the major source threshold, even though the source might otherwise possess the physical and mechanical potential to emit above the threshold.[69] If able to do so, sources almost universally prefer to obtain a synthetic minor permit rather than go through the full-blown PSD process, especially if they are able to add controls that are less than BACT to stay minor.[70] However, if the issuance of the synthetic minor permit is not done in accordance with a SIP-approved program or the source cannot meet the limits in the permit, the existence of the permit does not always shield the source from PSD applicability.[71]

These are only some of the ways, as exemplified by the cases discussed in this article, that some major sources attempt to avoid the PSD requirements.

66 *Id.* at A.5.

67 *See*, EPA, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, Emissions Factors & AP 42, http://www.epa.gov/ttn/chief/ap42 (last visited July 20, 2008) (describing the nature of an emissions factor and how it is used to determine emissions); *see also* EPA, COMPILATION OF AIR POLLUTION EMISSION FACTORS, VOLUME I: STATIONARY POINT AND AREA SOURCES 1 (5th ed. 1995), *available at* http://www.epa.gov/ttn/chief/ap42/c00s00.pdf. For a PTE calculation, the source should also assume 8,760 hours per year of operation to predict the maximum amount of emissions.

68 *See, e.g.*, United States v. Marine Shale Processors, 81 F.3d 1329, 1334 (5th Cir. 1996); *Louisiana-Pacific Corp.*, 682 F. Supp. at 1124–28.

69 *See, e.g.*, *Marine Shale Processors*, 81 F.3d at 1352.

70 *See* EPA, Guide to Regulated Facilities, http://www.epa-echo.gov/echo/guide_to_regulated_facilities.html (last visited July 19, 2008) (listing approximately 22,000 synthetic minor permits as compared to approximately 16,000 Major Title V Facilities permits). *See also* Mark Wayner, EPA Region 4, Synthetic Minor Versus Title V Permits, http://www.epa.gov/Region3/presentations/2005colloquium/Compliance/SynMinor.ppt (last visited July 20, 2008) (discussing advantages and disadvantages of synthetic minor permits).

71 *See* 40 C.F.R. § 52.21(r)(4) (2007). *See generally* TERRELL E. HUNT & JOHN S. SEITZ, EPA, GUIDANCE ON LIMITING POTENTIAL TO EMIT IN NEW SOURCE PERMITTING 10-16 (1989), *available at* http://www.epa.gov/ttn/atw/pte/june13_89.pdf (setting forth guidance about what comprises a "sham" permit and what the enforcement remedy is for a source relying upon such a permit).

B. Enforcement Against PSD Violators

Section 113(a)(1) of the CAA empowers EPA to initiate an enforcement action against a violator of any provision of a SIP or a CAA-issued permit; thus EPA retains the ability to enforce against all manner of PSD violations.[72] For PSD violations, the CAA allows for civil administrative penalties, compliance orders, and judicial actions for penalties and injunctive relief.[73] Citizens can also enforce CAA provisions. Specifically, section 304(a) authorizes citizens to commence a civil action for penalties and injunctive relief for violations of "an emission standard or limitation under" the CAA or an "order issued by the Administrator or a State with respect to such a standard or limitation."[74] This provision authorizes a citizen suit against a major PSD source that constructs without a PSD permit or is in violation of a PSD permit.[75]

States are also required to have ample enforcement authority as part of their SIPs.[76] Section 110 of the CAA requires that each SIP include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of [the Act]"[77] and that the state include a "program to provide for the enforcement" of those measures.[78] EPA has elaborated on these requirements by promulgating regulations which establish the minimum enforcement legal authority that a state must maintain to receive EPA approval of its SIP.[79] As a result, all states with approved SIPs must be able to enforce their SIPs, including the ability to investigate potential violations, seek penalties, and obtain injunctive relief.

C. Assessment of Penalties

The CAA allows for the assessment of penalties of up to $32,500 per day per violation.[80] In assessing CAA penalties, EPA must consider certain

72 Clean Air Act, 42 U.S.C. § 7413(a)(1) (2000).

73 *Id.* § 7413(a)(5). In addition, the Administrator must request representation from the U.S. Attorney General for any civil action. *Id.* § 7605.

74 *Id.* § 7604(a)(1).

75 *Id.* § 7604(a)(3).

76 *Id.* § 7410(a).

77 *Id.* § 7410(a)(2)(A).

78 *Id.* § 7410(a)(2)(C).

79 These regulations set, as the floor for states seeking SIP approval, the "legal authority" to: "[e]nforce applicable laws, regulations, and standards, and seek injunctive relief; [a]bate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons . . . [p]revent construction, modification, or operation" of a source that could result in emissions of air pollutants preventing attainment or maintenance of the NAAQS; "[o]btain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards . . ."; and "[r]equire owners or operators of stationary sources to install, maintain, and use emission monitoring devices, and to make periodic reports to the state on the nature and amounts of emissions . . . ." 40 C.F.R. § 51.230 (b)–(f) (2007).

80 As enacted, the CAA established a maximum penalty of $25,000 per day of violation. 42

statutory factors including the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.[81] These criteria are clearly aimed at recovering any economic benefit that a violator gained from his or her violations, as well as to assess an additional component that is based on the "gravity" of the violation for punitive and deterrent purposes. EPA has embodied these factors in a penalty policy issued in 1991 that covers CAA violations [hereinafter CAA Penalty Policy].[82]

D. Catching Violators

Catching PSD violators can be difficult. Large companies owning major stationary air sources are typically sophisticated regarding regulatory requirements and often, whether intentionally or inadvertently, conceal PSD violations.[83] What makes it so difficult to catch PSD violators is that information in the public record may not be sufficient to identify violating sources.[84] In these cases, regulatory agencies or citizens would have to obtain nonpublic information or data to determine whether a source is a major source and when it triggered the PSD permitting requirements.[85] This is especially true for major modifications, where first a physical or operational change must be identified.[86] Moreover, merely identifying the existence of a physical or operational change is not enough, since it needs to

U.S.C. § 7413(d)(1) (2000). The Debt Collection Improvement Act of 1996 mandated each federal agency to adjust for inflation its maximum penalties through rulemaking, and readjust every four years thereafter. *See* 31 U.S.C. § 3701 (2000). EPA first adjusted the maximum penalty of most of its penalty provisions by 10%, effective Jan. 30, 1997, through the Civil Monetary Inflation Adjustment Rule. 61 Fed. Reg. 69,360 (Dec. 31, 1996). As a result, the CAA penalty rose to $27,500. *See* 40 C.F.R. § 19.4 (2007). Subsequent adjustments for inflation brought the CAA maximum penalty to $32,500 effective Mar. 15, 2004. *Id.*

81 *See* 42 U.S.C. § 7413(e)(1) (2000).

82 *See* WILLIAM G. ROSENBERG & EDWARD E. REICH, EPA, CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY 1–2 (1991), *available at* http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf [hereinafter CAA PENALTY POLICY].

83 *See generally* STEVEN A. HERMAN, EPA, FINAL FY 2000/2001 OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE MEMORANDUM OF AGREEMENT GUIDANCE 9–10 (1999), *available at* http://www.epa.gov/oecaerth/resources/policies/data/planning/y2kmoa.pdf [hereinafter OECA MOA GUIDANCE] (identifying EPA Office of Enforcement and Compliance Assurance goals for the fiscal year 2000 and 2001, including those pertaining to PSD enforcement).

84 *See* PAUL GREYWALL, PREPARING FOR CLEAN AIR ACT SECTION 114 REQUESTS: PROCEDURES OF INTERNAL PSD AUDITING 7–10 (2000), *available at* http://trinityconsultants.com/downloads/Preparing for the Clean Air Act Sect 114-Rev.pdf (discussing uses of public records and private information by companies with PSD concerns).

85 *See id.* at 2 (identifying ways that sources of air emissions can perform internal audits and prepare for PSD investigations by EPA).

86 *See id.* at 7 (discussing use of corporate Authorizations for Expenditures to determine what changes have occurred).

be connected to a significant emissions increase.[87] This requires both enough emissions data to make the determination that such an increase occurred, as well as the technical expertise to understand the causation between the modification and the emissions increase.

EPA in recent years has increased its efforts to identify PSD violators, especially coal-fired power plants, refineries, and plants manufacturing sulfuric acid, nitric acid, cement, and glass.[88] EPA's Office of Enforcement and Compliance Assurance (OECA), located in Washington D.C., spearheads these national efforts.[89] EPA can investigate PSD violations through the use of CAA section 114 information requests.[90] This provision grants EPA authority to require any person who owns or operates an emissions source to "install, use, and maintain" monitoring equipment, sample air emissions, "submit compliance certifications," make reports, and "provide such other information as the Administrator may reasonably require."[91]

Even after EPA identifies a PSD violator, costly and time-consuming litigation can ensue, further extending the time that illegal emissions continue.[92] Even in those cases that ultimately settle, it may take the parties many years before a resolution is agreed upon and effectuated through the

87 Clean Air Act, 42 U.S.C. § 7411(a)(4) (2000).

88 *See* OECA MOA GUIDANCE, *supra* note 83, at 9–10. This Guidance established the following PSD enforcement goals for the fiscal year 2000 and 2001:

> 1) Identify plants or facilities to be evaluated for possible significant violations of New Source Review (NSR) or Prevention of Significant Deterioration (PSD) requirements, particularly focusing on the coal-fired electric utility industry (refer to the Petroleum Refining priority area section for guidance on specific petroleum refinery NSR/PSD priority activities). Other industry sectors that, upon evaluation, appear to demonstrate NSR or PSD violations can be included in this priority.
>
> 2) Initiate investigations.
>
> 3) Develop a list of modifications or additions (either physical or operational) that the facility may have undergone without appropriate state or Federal review.
>
> 4) Inspect plants and issue Clean Air Act 114 requests and/or conduct administrative depositions of key plant personnel to identify those activities that may be NSR or PSD modifications.
>
> 5) Initiate enforcement actions and/or provide compliance assistance/incentives, as appropriate.

Id. at 9. *See also* GRANTA Y. NAKAYAMA, EPA, FISCAL YEAR (FY) 2008 NATIONAL PROGRAM MANAGER GUIDANCE 6 (2007), *available at* http://www.epa.gov/oecaerth/resources/policies/data/planning/npmguidance2008.pdf [hereinafter OECA NATIONAL PROGRAM MANAGER GUIDANCE] (setting forth OECA compliance and investigatory priorities for FY 2008, including NSR/PSD priorities to focus enforcement on other industrial areas that "display similar patterns [compared to the coal-fired power plants] of noncompliance with NSR/PSD requirements and have the potential to produce significant human health and environmental benefits").

89 *See* OECA NATIONAL PROGRAM MANAGER GUIDANCE, *supra* note 88, at 6 (indicating OECA's responsibility for PSD enforcement).

90 42 U.S.C. § 7414 (2000).

91 *Id.* § 7414(a)(1).

92 *See, e.g.*, Notice of Lodging of Consent Decree Pursuant to the Clean Air Act, 60 Fed. Reg. 54,518 (Oct. 24, 1995) (indicating the filing of a consent decree in an action filed in 1983, with an amended final judgment entered in 1992, and the consent decree following in 1995).

filing of a consent decree.[93] It is not difficult to envision why PSD lawsuits are often filed five years or more after the occurrence of construction, thereby laying the basis for defendants to argue the application of the statute of limitations.

E. Statute of Limitations Defense Against Penalties

The CAA does not specify a period during which claims of violation must be brought by EPA or a citizen. Thus, courts have universally applied the general federal five-year statute of limitations to CAA causes of action for penalties, including PSD penalty claims.[94] The federal statute of limitations provides that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ."[95] Courts generally find that a claim "first accrues" on the date that a violation first occurs.[96]

Despite the application of the statute of limitations to a penalty claim, courts also recognize that where a violation is ongoing, the statute of limitations can be tolled for as long as the violation continues.[97] Under this theory, as long as the violation is a "continuing violation," penalties can be recovered for each day of violation occurring within the five-year statute of limitations period even if the first day of violation occurred outside that period. Courts have extended the application of the "continuing violation" theory to the environmental context for numerous federal programs, including the CAA, the Clean Water Act[98], and the Toxic Substances Control Act.[99]

The statute of limitations defense against penalties in PSD lawsuits is typically raised by defendants in a motion to dismiss under Federal Rules of Civil Procedure (FRCP) Rule 12 or through a summary judgment motion filed by defendants under FRCP Rule 56.[100] In addressing whether or not a

93 *Id.*

94 *See, e.g.*, *Murphy Oil*, 143 F. Supp. 2d 1054, 1080 (W.D. Wis. 2001); United States v. Westvaco Corp., 144 F. Supp. 2d 439, 442 (D. Md. 2001).

95 28 U.S.C. § 2462 (2000).

96 *See, e.g.*, 3M Co. v. Browner. 17 F.3d 1453. 1462 (D.C. Cir. 1994).

97 *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982) ("Statutes of limitations . . . are intended to keep stale claims out of the courts. Where the challenged violation is a continuing one, the staleness disappears."). Note, however, that the continuing violation theory only applies to continual unlawful acts, not a continual harm from the original violation. *See, e.g.*, Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1166 (4th Cir. 1991) (quoting Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981)).

98 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

99 15 U.S.C. §§ 2601–2692 (2000). *See* United States v. Reaves, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996) (applying the continuing violation theory to an illegal wetland fill under the Clean Water Act); Newell Recycling Co. v. EPA, 231 F.3d 204, 206–07 (5th Cir. 2000) (applying the continuing violation theory to the stockpiling of PCB material under the Toxic Substance Control Act).

100 *See, e.g.*, *NPCA v. TVA I*, 502 F.3d 1316, 1318 (11th Cir. 2007), *cert. denied*, 76 USLW 3673

PSD violation is continuing for statute of limitations purposes, courts have been inconsistent in their rulings.[101] Courts have grappled with the CAA's explicit labeling of the PSD permitting program as a "preconstruction" program.[102] Those courts finding that the PSD violations are one-time violations focus on the preconstruction nature of PSD to the exclusion of all other components of the program.[103] Contrary to this trend, courts have also found that the application of the "continuing violation" theory is appropriate for PSD claims due to the existence of operational requirements in the program that continue past the construction phase.[104]

The ramifications of this debate are significant. If plaintiffs—typically federal, state or local governments, or citizen groups—can overcome the statute of limitations defense, they will be able to assess penalties against a violator regardless of when a source undertook construction or modification, thus maintaining their full enforcement arsenal against PSD violators. The plaintiffs would argue that this is important to maintain a high level of deterrence and fully punish wrong-doers. If the defendants—typically comprising large corporations that own or operate the largest air emissions sources in this nation—prevail, they will be able to avoid assessment of penalties if they can avoid detection for at least five years from the date of construction or modification.[105] These defendants may argue that this is appropriate in order to provide them regulatory certainty and prevent stale claims from being brought against them. Both points of view have their merits, but only one can be correct given the nature of the PSD program.

(U.S. June 23, 2008) (No. 07-867) (motion to dismiss); *NPCA v. TVA II*, 480 F.3d 410, 411 (6th Cir. 2006) (motion for summary judgment); *Niagara Mohawk*, 263 F. Supp. 2d 650, 663 (W.D.N.Y. 2003) (motion to dismiss); *Murphy Oil*, 143 F. Supp. 2d. at 1079 (motion for summary judgment); *Westvaco*, 144 F. Supp. 2d. at 441 (motion to dismiss).

101 *See, e.g.*, *NPCA v. TVA I*, 502 F.3d at 1318 (finding no continuing violation); *NPCA v. TVA II*, 480 F.3d at 411 (finding a continuing violation).

102 *See, e.g.*, *NPCA v. TVA II*, 480 F.3d at 1322; *Illinois Power*, 245 F. Supp. 2d 951, 957 (S.D. Ill. 2003).

103 *See, e.g.*, *NPCA v. TVA II*. 480 F.3d at 1322: *Illinois Power*. 245 F. Supp. 2d at 957.

104 *See, e.g.*, *Duke Energy*, 278 F. Supp. 2d 619, 651 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated on other grounds sub nom.* Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007).

105 Defendants occasionally argue that 28 U.S.C. § 2462 should also bar injunctive relief under one of two theories: 1) Injunctive relief should be considered a "penalty" for purposes of the statute of limitations, or 2) the concurrent remedy rule should bar the claim because "equity will withhold its relief in such cases where the applicable statute of limitations would bar the concurrent legal remedy." United States v. Cinergy Corp., 397 F. Supp. 2d 1025, 1032 (S.D. Ind. 2005). On the first theory, courts have universally held that an injunction is not considered punitive, therefore it is not a penalty. *Id.*; *see also Niagara Mohawk*, 263 F. Supp. 2d at 663 n.22; *Illinois Power*, 245 F. Supp. 2d at 957 n.3; *Westvaco*, 144 F. Supp. 2d at 443 n.2; United States v. Am. Elec. Power Serv. Corp. (*Am. Elec. Power*), 136 F. Supp. 2d 808, 811 (S.D. Ohio 2001). On the second theory, courts have universally held that the concurrent remedy cannot be held to bar injunctive relief claims by the U.S. government acting in its official enforcement capacity when penalty claims are dismissed. *See Cinergy*, 397 F. Supp. 2d at 1032; *Am. Elec. Power*, 136 F. Supp. 2d at 811; *Murphy Oil*, 143 F. Supp. 2d at 1087. *But see NPCA v. TVA I*, 502 F.3d at 1316, (finding that the concurrent remedy rule bars injunctive relief claims in CAA citizen suits when the penalty claims are time barred).

To fully understand the current legal status of this issue, it is highly informative to survey the judicial rulings on it. In a nutshell, courts in nine different judicial circuits have opined on the issue.[106] District courts in seven of those circuits—the Second, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits—have ruled that PSD violations are one-time violations for statute of limitations purposes. District courts in four circuits—the Fourth, Fifth, Sixth, and Ninth Circuits—have found that PSD violations can be ongoing for statute of limitations purposes. Only two of these circuits, the Fourth and Ninth, have internally conflicting district court rulings on the issue. Also, two circuit courts of appeals, the Sixth and Eleventh Circuits, have ruled on the issue. Both cases are entitled *National Park Conservation Ass'n v. the Tennessee Valley Authority*, as they involve the same plaintiffs and defendants albeit for different air sources, and the courts have issued conflicting opinions. This sharp divide in the judiciary, especially amongst circuit courts, has resulted in an area of unsettled law and potentially sets up the issue for resolution by the United States Supreme Court.

1. Cases Finding the Statute of Limitations Bars Penalties

a. Second Circuit

The Second Circuit has one district court case opinion issued in 2003 on point. In *New York v. Niagara Mohawk Power Corporation* (*Niagara Mohawk*),[107] the of State New York sued Niagara Mohawk Power Corporation for failing to obtain PSD permits for two of its power plants prior to modifying their turbines.[108] In finding the penalty claims time-barred, the court rationalized that "by its plain terms, [the PSD program] governs the conditions under which a major emitting facility 'may be constructed.' Thus, these requirements must be fulfilled prior to construction."[109] The court found compelling that the CAA contains both a preconstruction permit program, the PSD program, and an "operating permit program," the Title V program, which requires ongoing compliance with PSD requirements.[110] The court reasoned that the operating permit

106 While the focus of this article is on PSD violations, some of the cases also involve the application of the statute of limitations to NNSR claims. Even though these cases are not dispositive in the PSD context, they are informative, so therefore will be discussed in this section.

107 263 F. Supp. 2d 650 (W.D.N.Y. 2003).

108 Under the citizen suit provisions of the CAA, New York cited violations of the federal PSD program. *Id.* at 666. From the case, it is unclear whether the State of New York had an approved or delegated PSD program. In all likelihood, the State of New York cited the federal requirements because state law has a less favorable three-year statute of limitations that applies to both penalties and iniunctive relief. *Id.* at 654.

109 *Id.* at 657. As part of its analysis, the court also pointed out that in the "applicability procedures" of 40 C.F.R. § 52.21(a)(2)(i)–(ii), the PSD regulations state that they "apply to the construction of any new major stationary source," and that 40 C.F.R. § 52.21(a)(iii) prohibits anyone from beginning "actual construction without a permit" that meets the requirements of 40 C.F.R. § 52.21. *Id.*

110 *Id.* at 657 (citing 42 U.S.C. § 7661b(1)).

program is the right program to cite for ongoing violations of PSD.[111] While New York argued that the statute of limitations clock should be restarted each day that a facility operates without the right permit,[112] the court was troubled by the fact that, if true, such an allowance would effectively eliminate the statute of limitations for PSD violations.[113] The court recognized some ambiguity as to the precise timing of a violation in that the preconstruction permitting requirements apply throughout the construction phase.[114]

b. Third Circuit

At least three district courts in the Third Circuit have addressed this issue, but none of the opinions contain much legal analysis and at least one was not for a PSD claim. In an older opinion issued in 1996, *Ogden Projects, Inc. v. New Morgan Landfill Co., Inc.*,[115] the court considered claims by citizens and a landfill competitor that a Pennsylvania municipal waste landfill had been constructed in violation of the nonattainment NSR requirements.[116] The court dismissed the lawsuit on nonstatute of limitations grounds,[117] and only reached the ongoing violation issue in dicta by stating "[w]e agree that a violation of the Part D permitting requirement occurs at the time of construction as the statute requires a preconstruction permit."[118]

More directly on point, in 2000 the district court in *United States v. Brotech Corp.*[119] found that "[v]iolations of the various requirements to obtain construction permits or plan approvals occur at the time of the construction, modification, or installation of the equipment or facility."[120] Without much discussion, the court dismissed as time barred the United States and Philadelphia's penalty claim against a plastic manufacturing company for alleged violations of the requirement to obtain a SIP-required construction permit.[121] As with *Ogden Projects*, the court made little attempt to rationalize its holding other than the fact that the CAA contains requirements for both operating and construction permits, and the duty to obtain a construction permit is a one-time requirement.[122]

111 *Id.* at 662.
112 *Id.* at 661.
113 *Id.*
114 *Id.* at 665.
115 911 F. Supp. 863 (E.D. Pa. 1996).
116 *Id.* at 865.
117 The court dismissed the citizens' suit for lack of standing, specifically finding that they had not satisfied their burden of proving injury in fact. *Id.* at 870. With regard to the corporate plaintiff, the court found on the merits for the defendant, noting that the facility did not have the potential to emit above the regulatory threshold. *Id.* at 876.
118 *Id.*
119 No. Civ.A. 00-2428, 2000 WL 1368023, at *1 (E.D. Pa. Sept. 19, 2000).
120 *Id.* at *3.
121 *Id.*
122 *Id.*

Finally, in the most recent Third Circuit district court opinion issued in 2006, *Pennsylvania v. Allegheny Energy*,[123] various states including Pennsylvania, Connecticut, New Jersey, New York, and Maryland sued Allegheny Energy Services Corporation claiming that Allegheny modified several of its Pennsylvania coal-powered power plants from 1993 through 1999 without undergoing proper PSD and nonattainment NSR permitting. The court ruled favorably on defendant's motion to dismiss based on the statute of limitations by relying upon *Niagara Mohawk* and other cases without much new analysis.[124] The court found compelling from the *Niagara Mohawk* decision the concept that "[a] given construction or modification project occurs only once [and] . . . the requirement to secure a preconstruction permit applies *prior* to construction or modification."[125] The plaintiffs also raised the "discovery" rule as a defense to the motion to dismiss and the court agreed that the discovery rule could apply to CAA violations.[126] Therefore, the court allowed the lawsuit to proceed for additional fact-finding on that issue.[127]

c. Fourth Circuit

District courts in the Fourth Circuit are split on the application of the continuing violation theory. In a 2001 case, *United States v. Westvaco Corp.*,[128] a Maryland district court put importance on section 165(a) of the Act, entitled "Preconstruction requirements," which states that "[n]o major emitting facility on which construction is commenced after August 7, 1977, *may be constructed* in any area to which this part applies unless [a permit meeting certain criteria has been issued]."[129] Westvaco owned and operated a pulp and paper mill in a town in Maryland that it allegedly modified between 1981 and 1991.[130] In dismissing the EPA lawsuit charging a PSD major modification, the court found significant that the PSD enforcement provisions found at section 167 seem to limit enforcement to the prevention of "*construction or modification of a major emitting facility*" not in conformance with the PSD requirements, a seemingly one-time violation.[131] In coming to its ruling, the court dismissed the government's argument that the PSD requirements contained ongoing requirements such as the requirement in section 165(a)(3) that "emissions from construction or operation" of a facility will "cause, or contribute, to air pollution in excess of" the NAAQS or any other applicable standard.[132] The court saw

123 No. Civ.A. 05-885, 2006 WL 1509061, at * 1 (W.D. Pa. Apr. 19, 2006).
124 *Id.* at *4.
125 *Id.* (citing *Niagara Mohawk*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003)).
126 *Id.* at *4–5.
127 *Id.* at *4.
128 144 F. Supp. 2d 439 (D. Md. 2001).
129 *Id.* at 444 (citing 42 U.S.C. § 7475(a) (2000)).
130 *Id.* at 441. At the time of the violation, the federal PSD regulations applied in Maryland.
131 *Id.* at 444–45.
132 *Id.* at 445 n.3.

these references to operation simply as steps that must be taken prior to construction rather than ongoing obligations.[133]

d. Seventh Circuit

In another 2001 district court case in the Seventh Circuit, *United States v. Murphy Oil USA, Inc.* (*Murphy Oil*),[134] EPA sued a petroleum refinery located in Wisconsin for violating a number of federal environmental requirements, including that the facility failed to obtain a PSD permit when it modified its facility in the early 1990s.[135] The facility had received a minor source permit for the modification, but had not applied for a PSD permit.[136] In response to a summary judgment motion, the court found that "the statute of limitations for a violation of the pre-construction permit requirements under 42 U.S.C. § 7475 begins to run at the time of construction and does not continue through the operational life of the modified source."[137] The court found it significant that the CAA's and Wisconsin's air programs distinguished between preconstruction and operating permit programs, and that the operating permit program contained the ongoing operational requirements for the source.[138]

In another slightly more recent 2002 district court case, *United States v. Southern Indiana Gas and Electric Co.* (*SIGECO*),[139] the United States sued the Southern Indiana Gas and Electric Company (SIGECO) for modifying one of its Indiana coal-fired electric generation plants numerous times in the early 1990s without first obtaining a PSD permit.[140] The court found that the United States only cited SIGECO for failure to obtain a construction permit, and that this sort of violation is "a discrete violation that occurs at the time of construction" as there are "separate permitting programs for construction permits and operation permits."[141] In reaching this conclusion, the court reasoned that the operating permit program worked as the operating arm of the PSD program, and therefore that is the program that should have been cited.[142] In regard to the section 165(a)(3) requirements that a facility owner demonstrate that construction or operation will not violate certain emissions standards, the court found that these are simply requirements that must be

133 *Id.*

134 143 F. Supp. 2d 1054 (W.D. Wis. 2001).

135 In its complaint, the United States cited both federal and state permitting requirements, as the state of Wisconsin was delegated to implement the federal PSD program at the time. *See* Prevention of Significant Deterioration; Delegation of Authority to State Agency; Wisconsin, 53 Fed. Reg. 18,983 (May 26, 1988).

136 *Murphy Oil*, 143 F. Supp. 2d at 1094.

137 *Id.* at 1083–84.

138 *Id.* at 1081–82.

139 No. IP 99-1692-C-M/F, 2002 WL 1760752, at *1 (S.D. Ind. July 26, 2002).

140 *Id.* The federal PSD program applied in Indiana at the time. *Id.* SIGECO raised the statute of limitations defense in a summary judgment motion. *Id.* at *3.

141 *Id.* at *4.

142 *Id.* at *5.

undertaken "*prior* to the construction or modification of the facility."[143] The court supported its conclusion by looking at EPA's regulations. For instance, 40 C.F.R. § 52.21(i)(1) provides that "[n]o stationary source or modification . . . shall *begin actual construction* without a permit" and 40 C.F.R. § 52.21(r)(1) provides that "[a]ny owner or operator of a source or modification subject to this section who *commences construction* . . . without applying for an [sic] receiving approval hereunder, shall be subject to the appropriate enforcement action."[144]

In a 2003 case, *United States v. Illinois Power Co.*,[145] EPA alleged that between 1982 and 1994 Illinois Power modified and then operated three electric generating units at a coal-fired electricity generating power plant without first obtaining the necessary PSD construction permits. The district court found the penalty claim time barred based on two theories. First, consistent with other rulings, the court noted that the Act has separate preconstruction and operating permit programs.[146] Second, the plain language of both the Act and the regulations focus the violation at the commencement of construction, and "not some later date."[147] The court reasoned that although

> the underlying intent behind the Act, the EPA regulations, and the Illinois SIP is to assure continuing air quality, these provisions cannot reasonably be construed to mean that building or altering a machine without a permit is a violation that continues as long as the machine exists or is operated."[148]

The most recent Seventh Circuit district court case was in 2005, *United States v. Cinergy Corp.*,[149] and involved a lawsuit brought by the United States on behalf of EPA against Cinergy Corporation and related entities alleging violations of PSD for multiple physical changes performed at four of Cinergy's Ohio coal-fired power plants from 1986 through 1992.[150] On a motion for summary judgment, the same judge who ruled in the *SIGECO* case dismissed many of the claims based on the same statute of limitations reasoning without much additional legal analysis.[151]

143 *Id.*
144 *Id.* (citing 40 C.F.R. § 52.21(i)(1), 52.21(r)(1)).
145 245 F. Supp. 2d 951 (S.D. Ill. 2003).
146 *Id.* at 957.
147 *Id.*
148 *Id.*
149 397 F. Supp. 2d 1025 (S.D. Ind. 2005).
150 *Id.* at 1028–29.
151 The court also dismissed arguments made by the United States that the NNSR claims should not be subject to the statute of limitations because section 173(c)(5) calls for permits to "construct and operate" as opposed to the "preconstruction" permits of the PSD program. *Id.* at 1030. The court found that "the owner or operator is still required to obtain the permit *prior to* construction," and therefore Cinergy cannot be liable for failing to operate according to a non-existent preconstruction permit. *Id.*

e. Ninth Circuit

United States v. Campbell Soup Co.,[152] one of the older cases to rule on this issue in 1997, involved a claim by EPA against the Campbell Soup Company for modifying parts of its tin can manufacturing machines between 1983 and 1988 without first obtaining preconstruction permits, called authorities to construct (ATC), under the Sacramento Valley SIP-approved program.[153] In ruling that the penalty claims were time barred,[154] the court pointed out that the controlling SIP provisions clearly delineated between building a source and its operation.[155] In essence, the SIP had bifurcated the nonattainment NSR program into ATCs, which cover solely construction aspects of a project, and permits to operate (PTO), which cover operation of the source after construction.[156] The court opined that "[t]he government's attempt to draw out of the statutory language a legislative command that failures to obtain an ATC be treated as violations of a permit to operate is baffling and unpersuasive."[157] This case may only have limited relevance in the PSD analysis, however, because it involved a nonattainment NSR claim.

f. Tenth Circuit

In *United States v. Louisiana-Pacific Corp.*,[158] a 1987 case and one of the earliest rulings addressing when a PSD violation occurs, a district court in Colorado held that a PSD violation occurs only at the time that construction occurs. Here, the United States sued Louisiana-Pacific claiming that it had failed to obtain PSD preconstruction permits prior to making modifications at two of its waferboard manufacturing plants.[159] In dismissing the significance of state permits issued post construction in calculating PTE for the sources, the court found that a PSD preconstruction permit violation occurs when an operator "begins to lay underground pipework or construct building foundations or other permanent structures for a major source without a PSD permit."[160] Therefore, since the "violation occurs when the actual construction is commenced, and not at some later point in time," a source cannot "after the fact" receive a state permit to limit PTE and thereby avoid major source requirements.[161] As with other cases, the court also found

152 No. CIV-S-95-1854 DFL, 1997 WL 258894, at *1 (E.D. Cal. Mar. 11, 1997).

153 *Id.* at *1.

154 *Id.*

155 *Id.* While the court found that the government could continue to seek injunctive relief, the court curtailed this review by establishing that the "lapse of time will surely be relevant to the court's decision whether or not to grant any injunctive or other equitable relief." *Id.* at *3.

156 *Id.* at *1.

157 *Id.* The court, in part, relied upon a prior ruling where the Ninth Circuit found that failure to make a new source performance standard notification of asbestos removal was a one-time violation. *See* United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995).

158 682 F. Supp. 1122 (D. Colo. 1987).

159 *Id.* at 1124.

160 *Id.* at 1130 (citing 40 C.F.R. § 52.21(i)(1)).

161 *Id.*

it significant that the section 167 PSD enforcement provisions only reference the construction of a source.[162] Even though this case was not a statute of limitations case, it bears upon the same paramount legal issue of whether PSD requirements are ongoing after the construction of a source.

g. Eleventh Circuit

In one of the most significant court rulings addressing this issue, in 2007 the Eleventh Circuit Court of Appeals in *NPCA v. TVA I*[163] upheld a lower court ruling dismissing as time barred claims brought by the National Parks Conservation Association (NPCA) and the Sierra Club against the Tennessee Valley Authority (TVA) claiming that work performed in 1982 on one of TVA's coal fired boilers located in Alabama violated PSD requirements. EPA had previously issued an Administrative Compliance Order (ACO) against TVA for this and other plants seeking compliance with PSD, and that order had been upheld by EPA's Environmental Appeals Board (EAB).[164] However, the Eleventh Circuit had vacated the EAB order as unconstitutional,[165] and EPA had not judicially renewed its enforcement case due to concerns that one branch of the federal government could not sue another branch of the federal government under the unitary theory of government.[166]

Consequently, NPCA and Sierra Club filed their lawsuits against TVA for violating PSD requirements in the various jurisdictions where the plants were located, including in Alabama.[167] In *NPCA v. TVA I*, after the district court dismissed both the penalty claims (under a sovereign immunity theory) and the injunctive relief claims (as being time-barred through concurrent remedy), the plaintiffs appealed the dismissal of the injunctive relief claims to the Eleventh Circuit Court of Appeals.[168] In finding that the statute of limitations barred the penalty action and consequently the injunctive relief claims,[169] the Eleventh Circuit focused on the specific

162 *Id.* (citing 40 C.F.R. § 52.21(r)).

163 502 F.3d 1316 (11th Cir. 2007), *cert denied*, 76U.S.L.W. 3673 (U.S. June 23, 2008).

164 *See In re* Tenn. Valley Auth., 9 E.A.D. 357 (2000), *available at* http://www.epa.gov/eab/disk11/tva.pdf.

165 *See* Tenn. Valley Auth. v EPA, 278 F.3d 1184 (11th Cir. 2002), *modified by* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003).

166 *See* Tenn. Valley Auth. v. Whitman, 336 F.3d at 1245 n.19.

167 *See id.* ("Two of these were filed in the district court below, the present suit and a separate a suit filed by the Sierra Club and the Alabama Environmental Council.").

168 *See id.* (indicating that in the separate suit, the court "affirmed the dismissal of the plaintiffs' claim for civil penalties as barred by TVA's sovereign immunity but remanded for reconsideration of whether the plaintiffs were entitled to injunctive and declaratory relief for claims arising from the Plant's violations of the opacity limitation."). The plaintiffs in the immediate suit did not appeal the sovereign immunity portion of the dismissal, as that issue had been previously affirmed by the Eleventh Circuit in a related case. *See* Sierra Club v. Tenn. Valley Auth., 430 F.3d 1337, 1357 (11th Cir. 2005).

169 The Eleventh Circuit decided not to extend the general exception to the concurrent remedy rule for "claims brought by the federal government in its sovereign capacity" to the Sierra Club and National Parks Conservation Association as "private attorneys general." *See NPCA v. TVA I*, 502 F.3d 1316, 1327 (11th Cir. 2007), *cert denied*, 76U.S.L.W. 3673 (U.S. June 23,

language of the CAA, namely section 165(a), which requires that "'no major emitting facility . . . may be constructed . . . unless' the proponent of the construction or modification fulfills [certain] enumerated requirements."[170] To the circuit court, this language indicated that violations of PSD occur only at the time of construction.[171] The court found that this interpretation was reinforced by Alabama's SIP, which "utilize[s] separate construction and operating permit systems."[172]

In coming to its ruling, the Eleventh Circuit distinguished another recent circuit court ruling in the Sixth Circuit, *NPCA v. TVA II*,[173] which found that some penalty claims for PSD violations were not time barred under Tennessee law. In that case, discussed in Part V.E.2.c, the Sixth Circuit found that BACT was a stand-alone requirement which did not depend on the issuance of a permit, and that each day a source failed to apply BACT was a separate violation of the PSD requirements.[174] The Eleventh Circuit distinguished this case by pointing out that the Tennessee SIP had a mechanism for the issuance of an after-the-fact construction permit for violating sources, whereas Alabama did not have such a provision.[175] The court concluded that "[u]nlike Tennessee, Alabama limited the obligation to apply [BACT] to proposed modifications, with no caveat continuing the obligation for the operating life of the source if it was not met during the construction phase."[176]

2. Cases Finding Penalties Are Still Actionable

a. Fourth Circuit

In *United States v. Duke Energy Corp.*,[177] EPA challenged modifications to eight coal-fired electrical generating plants in North and South Carolina charging that they violated the SIP-approved PSD requirements of the CAA.[178] The EPA alleged that twenty-nine projects undertaken by Duke at these facilities from 1988 through 2000 should have been considered major modifications.[179] In a 2003 opinion denying a motion for summary judgment, the court declined to follow what it termed "the majority rule" and held that the statute of limitations does not bar recovery

2008).

170 *Id.* at 1322 (citing 42 U.S.C. 7475(a) (2000)).

171 *See id.*

172 *Id.* at 1323.

173 *See NPCA v. TVA II*, 480 F.3d 410, 419 (6th Cir. 2006) (discussed in Section V.E.2.c).

174 *See id.*

175 *See NPCA v. TVA I*, 502 F.3d at 1324.

176 *See id.* at 1325.

177 278 F. Supp. 2d 619 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated on other grounds sub nom.* Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007).

178 *Id.* at 622. Various environmental groups, including Environmental Defense, North Carolina Sierra Club, and the North Carolina Public Interest Research Group intervened in the case. *Id.*

179 *Id.* at 623–24.

of penalties.[180] The court reasoned that the courts in the majority camp "focus on [preconstruction aspects] of the PSD permit process to the exclusion of the language in the statute stating that the PSD permit shall set forth emission limitations for that source following the construction activity."[181] The court opined that the establishment of BACT emission limits for a source is just as important as the preconstruction analysis and review, as the failure to install such limits results in the emissions of excess pollutants.[182] The court also found that if the violation of a preconstruction permitting requirement is only a one-time requirement for purposes of calculating a penalty, a source would have little incentive to settle a PSD case, as penalties would not increase during the pending litigation.[183]

The court blamed many of the opposite court opinions on the confusion resulting from the existence of two distinct programs establishing two types of permits: Title V operating permits and "preconstruction" permits.[184] The court concluded that the PSD program was not supplanted by the Title V permitting program, as Title V does create any additional substantive requirements beyond those preexisting requirements.[185] Moreover, the court pointed out that Title V does not provide a permit shield against provisions not included in a Title V permit, such as avoided PSD requirements, and in fact Title V explicitly calls out construction and modification requirements as provisions from which a source does not receive automatic protection.[186]

b. Fifth Circuit

Only one case in the Fifth Circuit, *United States v. Marine Shale Processors*,[187] has any significance to the issue. There, in 1996, the Fifth Circuit found that Marine Shale Processors, a hazardous waste treatment facility, violated numerous requirements of the Clean Water Act, the CAA, and the Resource Conservation and Recovery Act.[188] With respect to the CAA violations, the United States alleged that Marine Shales was operating various minor sources without first obtaining permits and that its main kiln

180 *Id.* at 649 n.2, 652. Along with the statute of limitations issue, the court considered and opined upon the proper standard for determining routine maintenance, repair, and replacement and "whether a post project net emissions increase should be calculated assuming constant hours of operation or increased utilization." *Id.* at. 622–23 n.1.

181 *Id.* at 650.

182 *Id.* at 651.

183 *Id.* at 652.

184 *Id.*

185 *Id.* at 651–52. The court cited the Title V preamble for this proposition. *Id.* (citing Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992)).

186 *Id.* at 652 (citing 42 U.S.C. §§ 7661a(a), 7661b(d) (2000)).

187 81 F.3d 1329 (5th Cir. 1996).

188 *See generally id.* (discussing each statutory violation); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2000) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat.992).

stack, its only major source, should have obtained a PSD permit.[189] In deciding on whether a synthetic minor operating permit made the main kiln nonmajor for PSD purposes, the court found that the permit could contain operational requirements and still be considered federally enforceable, thus making it valid.[190] In coming to this ruling, the court quipped the following memorable quote: "The CAA statutory scheme contemplates at least two different types of air permits unhappily named 'preconstruction permits' and 'operating permits,' with confusion easily resulting from the fact that preconstruction permits often include limits upon a source's operations."[191] Without any useful discussion of much significance to the PSD statute of limitations issue, the court also found that the statute of limitations did not apply to the minor source permitting violations.[192]

c. Sixth Circuit

The Sixth Circuit has a few cases pertaining to the issue, including the only other circuit court ruling on it after the Eleventh Circuit. In *United States v. American Electric Power Service Corp.* (*American Electric Power*),[193] the United States and fourteen environmental groups sued in federal district court the American Electric Power Service Corporation (AEP), the operator of numerous coal-fired electric power plants in Ohio, Indiana, West Virginia, and Virginia, for violating the CAA, including the PSD requirements. As with other lawsuits, the plaintiffs claimed that the plants made numerous modifications without first obtaining preconstruction permits.[194] Responding to a motion to dismiss by AEP,[195] in a 2001 opinion, the court sided with the plaintiffs on the statute of limitations issue.[196]

The court provided various bases for its ruling, including the plain language of the statute, in that the CAA section 304(a)(3) citizen suit provision creates a cause of action against any person "who is alleged to have violated . . . *or to be in violation* of any condition of [a] permit."[197] The court viewed the operation of a source *in violation* of the preconstruction requirements as falling under this provision.[198] The court also pointed out that the CAA defines "modification" to include "any physical change in, *or*

189 *Marine Shale Processors*. 81 F.3d at 1352.

190 *Id.* at 1353–54. The court found that the synthetic minor permit had been issued to Marine Shales pursuant to a Louisiana-SIP program, which made it a federally enforceable preconstruction permit limiting PTE even if it contained operational requirements. *Id.*

191 *Id.* at 1355–56.

192 *Id.* at 1357.

193 137 F. Supp. 2d 1060 (S.D. Ohio 2001).

194 *Id.* at 1062.

195 *Id.* In addition to the statute of limitation defense, AEP also argued that the Constitution and the CAA barred the citizen suit and that the CAA did not authorize injunctive relief. The court found both of these arguments to be without merit. *Id.* at 1065–67.

196 *Id.* at 1067.

197 *Id.* at 1063 (emphasis added).

198 *Id.* at 1066.

change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."[199] Finally, the court found compelling the regulatory PSD permit rescission provisions of 40 C.F.R. § 52.21(w)(1), which state that a permit is effective "unless or until it expires or is rescinded."[200] Given these provisions, the court found it illogical to conclude that the CAA only contemplated violations for construction and not operation of a source in violation of PSD, and thus ruled that the violations were continuing in nature.[201]

The same district court judge affirmed his ruling in *United States. v. Ohio Edison Co.*[202] in 2003. In this case, the United States, Connecticut, New Jersey, and New York sued Ohio Edison for PSD violations at its Jefferson County, Ohio facility, citing thirty-four illegal modifications.[203] In considering a motion for partial judgment on the pleadings, the judge followed his earlier ruling, thus denying the motion, and expanded on the rationale.[204] The judge found that certain PSD provisions, such as those in section 165(a)(7) establishing a monitoring program and section 165(a)(4) establishing the BACT requirements, were continuing obligations of a source.[205] The court agreed with the United State's policy argument that the "purpose of the PSD preconstruction permit requirement affects the timing, but not the substance, of Defendant's obligations under the CAA."[206] The court also found it inconsistent to require a source that actually obtained a PSD permit to comply with the operational requirements of that permit while those sources completely failing to obtain a permit could escape enforcement simply by waiting out the five year statute of limitations period.[207] The court dismissed rulings from other circuits finding PSD violations to be one-time violations as "an oversimplified reading of the CAA provisions."[208]

In 2005, the same district court judge once again confirmed his earlier rulings in *Sierra Club v. Dayton Power & Electric Light, Inc.*[209] In this case, citizen litigants, including the Sierra Club, sued Dayton Power & Light, Inc., Cincinnati Gas & Electric Co., and Columbus Southern Power Co. for operating a large coal-fired power plant in Adams County, Ohio, in violation of the PSD requirements due to numerous "modifications" of the facility.[210] Tracking the rationale in its earlier rulings, the court found these violations to be continuing in nature for statute of limitations purposes.[211]

199 *Id.* (emphasis added).
200 *Id.*
201 *Id.*
202 No. 2:99-CV-1181, 2003 WL 23415140, at *1 (S.D. Ohio Jan. 17, 2003).
203 *Id.* at *1.
204 *Id.*
205 *Id.* at *5.
206 *Id.*
207 *Id.*
208 *Id.*
209 No. 2:04 CV 905, 2005 WL 1972549, at *1 (S.D. Ohio Aug. 12, 2005).
210 *Id.* at *1.
211 *Id.* at *2–3.

The only other circuit court to rule on the statute of limitations issue was the Sixth Circuit Court of Appeals in 2007. In *NPCA v. TVA II*,[212] the Sixth Circuit found that PSD violations continue as "discrete violations" each day until the PSD requirements are met.[213] This case is closely tied to the Eleventh Circuit case in that it was the same litigants disputing the legal impact of similar modifications to TVA power plants. In this case, the plaintiffs alleged that TVA replaced about a quarter of the tubing in one of its boilers at its Clinton, Tennessee plant, thus triggering the modification provisions of PSD.[214] As in the Alabama lawsuit with the same litigants, TVA challenged the environmentalists' claims at the district court level on both statute of limitations and sovereign immunity grounds.[215] The district court first ruled on the statute of limitations issue, finding that it barred penalties, and this decision was appealed by the plaintiffs to the circuit court level.[216] In reversing the lower court, the Sixth Circuit Court of Appeals distinguished a continuing violation, which tolls the statute of limitations, from "repetitive discrete violations, which constitute independently actionable individual causes of action."[217]

As Tennessee's PSD program was SIP-approved, the court focused on the state's PSD provisions.[218] The court first and foremost found the BACT requirement, as translated in Tennessee's SIP, to be an independent requirement "regardless of what terms a preconstruction permit may or may not contain."[219] The court found critical the language that a major modification "shall apply" BACT for a pollutant that has a significant emissions increase.[220] Also of significance to the court, the Tennessee SIP contains both an explicit preconstruction requirement and an explicit ongoing requirement that permits be obtained for sources that have already been constructed or modified.[221] Based upon these provisions, the court concluded that, "like the alleged failure to apply BACT, this alleged violation manifests itself each day the plan[t] operates."[222]

212 480 F.3d 410 (6th Cir. 2007).

213 *Id.* at 417.

214 *Id.* at 414.

215 *Id.* at 415.

216 *Id.*

217 *Id.* at 417. For purposes of this article, the Sixth Circuit's holding that PSD violations are discrete and accrue daily is materially the same as a finding that PSD violations are ongoing and continuous, in that both prevent penalty claims from being time barred and are premised on the same legal rationale. The only potential difference resulting from these nuanced rulings is that numerous discrete violations may merit higher penalties than a single, albeit continuing, violation under EPA's CAA Penalty Policy.

218 *Id.* at 418.

219 *Id.*

220 *Id.*

221 *Id.* at 419. The Tennessee SIP language states that "[i]n the case where a source or modification was constructed without first obtaining a construction permit, a construction permit may be issued to the source or modification to establish as conditions of the permit, the necessary emissions limits and requirements to assure that these regulatory requirements are met." *Id.* (citing TENN. COMP. R. & REGS. § 1200-3-9-.01(1)(e) (2006)).

222 *Id.* Judge Batchelder, in her dissent, viewed the ongoing injury as an ongoing "harm" rather than an ongoing "violation." *Id.* at 420. Under her theory, it does not make sense to base

Since *NPCA v. TVA II*, at least one district court in the Sixth Circuit has ruled on the issue. In *United States v. East Kentucky Power Cooperative*,[223] the United States claimed that the defendant had made illegal physical modifications to two of its Kentucky power plants in the late 1990s without first obtaining PSD permits.[224] The defendant moved for partial summary judgment on statute of limitations issues, and in a 2007 opinion the court denied the motion with a finding that the violations were ongoing.[225] In coming to its ruling, the court found that the SIP-approved program in Kentucky was sufficiently analogous to the SIP-approved program in Tennessee to make the *NPCA v. TVA II* case precedential.[226] For instance, both SIPs specified that a "major modification *shall apply*" BACT, which makes the control requirement an ongoing requirement irrespective of the permitting status of the source.[227] The court also pointed to specific language in the Kentucky SIP explicitly establishing PSD violations as continuing, namely a provision that allows for an enforcement action against a source that "constructs or *operates* a source or *modification* not in accordance with the application submitted to the cabinet . . . or under the terms of an approval to construct . . . ."[228]

d. Ninth Circuit

Two cases in the Ninth Circuit have directly addressed the statute of limitations issue in the context of PSD, with *United States v. CEMEX California Cement, LLC* (*CEMEX*)[229] being the most important case. Here, the United States claimed that CEMEX twice modified its portland cement manufacturing plant located in Victorville, California without first obtaining PSD permits or applying BACT.[230] The first modification involved upgrades to one kiln and the second involved the swap-out of a new kiln for an old kiln. In response to a motion to dismiss by CEMEX based upon the statute of limitations, the court in a 2007 opinion agreed with the United States that the PSD violations were continuing and denied CEMEX's motion to dismiss.[231] Relying upon *NPCA v. TVA II* from the Sixth Circuit, the court concluded

the claim on when the "harm" occurred because, depending on the type of violation, a claim may not accrue until well after the actual violation occurred. *Id.* For instance, a source could be constructed but then not operate for a number of years, in which case a claim could not be brought until the source actually began operating. *Id.* at 421.

223 498 F. Supp. 2d 970 (E.D. Ky. 2007).

224 *Id.* at 971.

225 *Id.* at 976.

226 *Id.* at 974.

227 *Id.*

228 *Id.*

229 No. EDCV07-223-GW(JCRx), slip op. at 1 (C.D. Cal. July 10, 2007).

230 *Id.*

231 *Id.* at 12. The United States had also alleged that CEMEX violated the Title V requirements because it was operating with a "deficient" permit that did not contain PSD requirements, and CEMEX moved to dismiss this claim as well on the grounds that the "permit shield" provisions of Title V applied. The court granted CEMEX's motion to dismiss for this claim only. *Id.* at 12–16.

that "[w]hether or not a PSD permit is to be considered a 'pre-construction permit,' there can be no question but that the PSD permit provisions contain some operational components."[232] The court found that the CAA's definition of BACT, which defines an emission limit as "any requirement relating to the *operation* or maintenance of a source to *assure continuous emission reduction*," while "much less clearly an ongoing requirement than the language quoted in *National Parks*," contains enough "operational components" to make the PSD violations continuing.[233] The court agreed that while certain PSD provisions "read in a vacuum" might support the argument that the program is only a "pre-construction" program, the "statutory and regulatory language . . . clearly also contain operational requirements."[234] The court then opined, consistent with *Duke Energy*, that these operational requirements are just as integral as the preconstruction requirements in "achieving the objectives of PSD." [235]

The only other case in the Ninth Circuit directly on point was a much earlier one that did not have a published opinion. *United States v. Titanium Metals Corporation*[236] involved a PSD claim brought by the United States against Titanium Metals Corporation (TIMET) for operating a carbon monoxide burner without first obtaining a PSD permit. The court denied TIMET's motion to dismiss based on the statute of limitations by finding that, even though construction first occurred outside the limitations period, "[t]he failure to obtain regulatory approval is a continuing violation."[237] The court did not delve deeper into the issue.

VI. THE MISAPPLICATION OF THE STATUTE OF LIMITATIONS TO PSD PERMITTING PENALTY CASES

As can been seen by a survey of the cases, courts are sharply divided on whether a PSD violation is continuing or not for statute of limitations purposes. This lack of clarity in the law has negative implications for efforts to ensure PSD compliance. More troubling is the fact that, for the reasons described in this article, the legal position that a PSD violation is continuing in nature is more compelling, thus the other courts are wrongly construing the law. In short, while it may be true that the PSD program was "unhappily" termed a "preconstruction" program, the title of the program does not properly reflect the true nature of the program's robust ongoing pollution control requirements, or the program's overall goals to maintain air quality. Indeed, by looking no further than the title of the program to dismiss lawsuits, courts are missing the forest for the trees.

232 *Id.* at 5.

233 *Id.* at 8 (citing 42 U.S.C. §§ 7479(3), 7602(k) (2000)) (second emphasis added).

234 *Id.* at 9.

235 *Id.* (quoting *Duke Energy*, 278 F. Supp. 2d 619, 650 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated on other grounds sub nom.* Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007)).

236 No. CV-S-98-682-HDM (RLH), slip op. at 1 (D. Nev. Sept. 21, 1998).

237 *Id.* at 2.

A. The Ability to Collect Penalties Is Critical to Ensuring Widespread Compliance with PSD Permitting Requirements

The ability to collect penalties is vital to the CAA's ability to meet its programmatic goals. Underlying the statutory penalty authorities of the CAA as well as EPA's penalty policy for CAA violations is the concept of "Deterrence Theory," which theorizes that sufficiently high penalties are necessary to deter violations.[238] Under this theory, the probability of detection multiplied by the penalty assessed must surpass the "violator's benefits from noncompliance" to obtain optimal deterrence.[239] Stated another way, in complex regulatory programs with more sophisticated violators who are more likely to avoid detection, violators actually caught should be subject to sufficiently high penalties to deter other potential violators.[240]

This approach is reflected in the CAA penalty scheme. EPA has established that penalties should, at a minimum, recover the actual economic benefit enjoyed by the company[241] enhanced for deterrence purposes by some additional amount based on other equitable factors.[242] These additional penalties beyond the recovery of the economic benefit are termed the "gravity" component of the penalty.[243] Indeed, the CAA Penalty Policy embodies these generalized penalty goals by having as a general goal the recovery of "the economic benefit of noncompliance and a gravity component . . . using the most aggressive assumptions supportable."[244] Moreover, Appendix I of the CAA Penalty Policy, which is specifically targeted at PSD violations, increases penalties very quickly for those violators with longstanding violations who enjoyed a higher economic benefit from the violation.[245]

Beyond Deterrence Theory, EPA has determined that the ability to collect penalties meets other goals of the CAA's regulatory program.[246] For

238 *See* BARRY BOYER, ERROL MEIDINGER, JOHN THOMAS & JASBINDER SINGH, THEORETICAL PERSPECTIVES ON ENVIRONMENTAL COMPLIANCE I-2 (1987).

239 *See id.* (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968))

240 *See id.* at I-2 to I-3.

241 Economic benefit can be costs saved to install control equipment as well as annual expenses to operate and maintain that control equipment. *See* CAA PENALTY POLICY, *supra* note 82, at app. I, 2 n.1 ("'Total cost of air pollution control' should include, where relevant, pollution control equipment costs, design costs, operation and maintenance costs, differential cost of complying fuel v. noncomplying fuel, and other costs pertaining to adequate control of the new source.").

242 *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, POLICY ON CIVIL PENALTIES: EPA GENERAL ENFORCEMENT POLICY #GM–21 3 (1984) [hereinafter POLICY ON CIVIL PENALTIES].

243 EPA assesses a gravity penalty for CAA violations based upon considerations of actual or possible harm from the violation, the importance of the violation to the overall regulatory scheme, a consideration of the size of the violator, and miscellaneous other adjustments. CAA PENALTY POLICY, *supra* note 82, at 8–19.

244 *Id.* at 2.

245 *Id.* app. I at 1-5.

246 Indeed, a recent study of environmental enforcement suggests that the application of Deterrence Theory to environmental violations may not be as straightforward as suggested by the theory, nor as important. *See* Dorothy Thornton, Neil A. Gunningham & Robert A. Kagan,

instance, EPA issued a general policy in 1984 which described the following three key goals underlying the assessment of penalties for its media-specific policies: 1) deterrence, 2) fair and equitable treatment of the regulated community, and 3) swift resolution of environmental problems.[247] The first goal, as discussed earlier, tends to advocate for higher penalties.[248] The other two goals, however, are targeted at providing EPA with flexibility in assessing penalties to encourage early settlement, for instance.[249] Under these provisions, EPA has the ability to pre-settle cases with a lower penalty than it would otherwise seek in litigation, thus providing a strong incentive for sources to settle claims.[250] The stripping away by courts of the potential to assess PSD penalties in judicial proceedings, however, removes this important leverage for obtaining early settlement of PSD claims, as defendants may believe they have better chances of obtaining no or small penalties if they actually litigate the claims.

B. The Clear Language of the CAA Evidences the Operational Nature of the PSD Requirements

The clear language of the CAA supports the concept that PSD violations should be considered ongoing and continuous. The primary and most telling indication of the intent of Congress in enacting the PSD requirements can be found in the "Congressional declaration of purpose" in section 160 of the CAA, which introduces the PSD program.[251] Indeed, of the five purposes set forth in that section, the most pertinent one to the continuing violation argument is the fifth, which focuses on the preconstruction review for issuance of a permit.[252] Its stated goal is to "assure that any decision to permit increased air pollution" is made only after "careful evaluation of all the consequences."[253] If a source increases its air pollution without a proper

General Deterrence and Corporate Environmental Behavior, 27 LAW & POL'Y 262 (2006) (addressing the importance of "general deterrence" in environmental compliance by surveying 233 firms regarding their knowledge about EPA enforcement including seven specific "signal cases"). The study indicates that an enforcement presence is important for reasons other than pure deterrence, such as reminding sources of the sense of duty they feel to comply with laws, or deterring not through threat of sanctions, but rather through a general reminder of pre-existing commitments to comply with laws, or reassuring companies that have taken costly efforts to comply that they will not be put at a competitive disadvantage because violators will be caught. *Id.* at 264–67. In particular, the study found evidence suggesting that firms are not compelled by direct knowledge about any particular enforcement case, but rather may be more compelled by a general knowledge about enforcement and past enforcement actions. The study concludes that enforcement also serves as a reminder to firms to stay in compliance and reassures those companies attempting to comply with environmental laws that they are taking proper measures. *Id.* at 282–83.

247 *See* POLICY ON CIVIL PENALTIES, *supra* note 242, at 3–6.

248 *Id.* at 3.

249 *See id.* at 5–6.

250 *See* Clean Air Act PENALTY POLICY, *supra* note 82, app. I at 3.

251 CAA, 42 U.S.C. § 7470 (2000).

252 *Id.* § 7470(5).

253 *Id.*

review, however, it has violated this purpose and will continue to violate it until such emissions are reviewed and controlled as necessary. To bolster this purpose, three of the other purposes relate to the need to control air pollutants or emissions.[254] The first purpose relates to protecting "public health and welfare" from potential impacts of "air pollution."[255] The second purpose sets forth a goal to "preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments" and other areas of ecological value.[256] The fourth purpose is to prevent emissions from sources in one state from impacting efforts to maintain the NAAQS in neighboring states.[257] All of these indicate that the CAA's PSD mandate is a broad and far-reaching one to control air quality through proper source review and emissions controls. Such goals cannot be achieved if the failure to obtain a PSD permit, with proper emission controls, is viewed as a "one-time" event that cannot be enforced at a later time.

The actual statutory PSD provisions likewise evidence the ongoing nature of the PSD program. Although the PSD statutory section, section 165, is labeled "preconstruction requirements," the more compelling argument, as stated in the *Ohio Edison* opinion, is that the title refers to the timing of the initial application for a PSD permit and not whether its requirements are one-time or ongoing for statute of limitations purposes.[258] Indeed, courts placing ultimate importance on the "preconstruction" title rarely look to the specifics of the PSD requirements, such as in *Niagara Mohawk*, *Westvaco*, and *SIGECO*.[259] While it is true that various components of section 165 are clearly related to preconstruction review—such as subsection (a)(2), which requires a proper analysis and public participation in the permitting process, and subsection (a)(3), which requires preconstruction modeling to ensure that air emissions from the new source or modification will not violate the "increment" requirement or push emissions in the area over the NAAQS—others clearly create ongoing requirements. For example, subsection (a)(1) requires a permit "setting forth *emission limitations*."[260] Subsection (a)(4) requires that the source be subject to BACT.[261] Finally, subsection (a)(7) sets forth ongoing monitoring requirements "as may be necessary to determine the effect which emissions" from the facility have on air quality.[262] Taken together, as described by the *Ohio Edison* and *Duke Energy* opinions, these

254 *See id.* § 7470(1)–(2), (4).
255 *Id.* § 7470(1).
256 *Id.* § 7470(2).
257 *Id.* § 7470(4).
258 *See Ohio Edison*, No. 2: 99–CV–1181, 2003 WL 23415140, at *5–6 (S.D. Ohio Jan. 17, 2003) ("This Court is of the [view] that the PSD provisions contemplate not only certain preconstruction obligations but also subsequent operation after modification. Thus, this Court concludes that Plaintiffs' claims for civil penalties under the PSD provisions of the CAA are not barred by the statute of limitations.").
259 *See Niagara Mohawk*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003); *Westvaco*, 144 F. Supp. 2d 439, 443–44 (D. Md. 2001); *SIGECO*, No. IP 99–1692–C–M/F, 2002 WL 1760752, at *8 (S.D. Ind. July 26, 2002).
260 42 U.S.C. § 7475(a)(1) (2000) (emphasis added).
261 *Id.* § 7475(a)(4).
262 *Id.* § 7475(a)(7).

provisions properly illuminate the true nature of the PSD program's ongoing emissions controls.

It is also instructive to analyze the BACT requirement itself more closely. Section 165(a)(4) states that "no major emitting facility . . . may be constructed in any area to which [PSD] applies unless . . . the proposed facility is subject to the best available control technology for each pollutant subject to regulation under [the PSD program] emitted from, or which results from, such facility."[263] BACT is defined in the CAA as "an *emission limitation* based on the maximum degree of reduction of each pollutant subject to regulation . . . ."[264] The general definitions of the CAA define "emission limitation" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*, including any requirement *relating to the operation* or maintenance of a source . . . ."[265] This language, which the *CEMEX* opinion found compelling,[266] demonstrates that PSD sources must continuously apply the BACT emission limit after PSD applies to it. A view that sees a PSD violation as a one-time preconstruction violation misses the true nature of this important requirement.

C. Legislative Intent that the PSD Requirements Include Operational Requirements

Jimmy Carter, upon signing the 1977 CAA Amendments into law, extolled that "[w]ith this legislation, we can continue to protect our national parks and our major national wilderness areas and national monuments from the degradation of air pollution. Other clean air areas of the country will also be protected, at the same time permitting economic growth in an environmentally sound manner."[267] The 1977 Amendments established the PSD program, among other programs.[268] The Amendments also established higher penalties to reduce the economic benefit from noncompliance and

263 *Id.* § 7475(a)(4).

264 *Id.* § 7479(3) (emphasis added).

265 *Id.* § 7602(k) (emphasis added).

266 United States v. CEMEX Cal. Cement, L.L.C. (*CEMEX*), No. CV 07-00223, slip op. at 2–12 (C.D. Cal July 10, 2007).

267 Clean Air Act Amendments of 1977 Statement on Signing H.R. 6161 Into Law, 2 PUB. PAPERS 1460 (Aug. 8, 1977), *available at* http://www.presidency.ucsb.edu/ws/index/php?pid=7946 [hereinafter Carter Signing Statement].

268 A 1972 district court decision found that the CAA implicitly contained a requirement that EPA force states to create antideterioration programs for areas meeting the NAAQS. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 4 ERC 1815 (D.D.C. 1972), *aff'd by an equally divided court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973). This decision was appealed to the D.C. Circuit Court of Appeals which affirmed the decision. *Id.* In 1974, EPA issued regulations in response to the court ruling, which established the first PSD program. *See* Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974). It was against this backdrop that Congress preempted litigation on the 1974 rules by passing the 1977 CAA Amendments containing a statutory PSD program. For a very in-depth and instructive summary of the background congressional activity leading up to the 1977 Amendment, *see* Craig N. Oren, *Prevention Of Significant Deterioration: Control-Compelling Versus Site-Shifting*, 74 IOWA L. REV. 1 (1988).

established a mobile source program.[269] After one failed attempted by Congress in 1976, the final bill that Congress enacted and which was signed into law by the President was H.R. 6161.[270] EPA revised its regulations in 1978 to incorporate the statutory provisions of the 1977 Amendments.[271] After litigation on these revisions[272] where some of the regulations were found to be inconsistent with the statutory provisions, EPA again revised the rule and finalized them in August 1980.[273] The PSD regulations have remained in effect largely unchanged until major revisions finalized at the end of 2002.[274]

Regarding specific discussion in the legislative materials for the 1977 Amendments, there is limited discussion on the nature of the permitting program. However, the limited discussion is very telling. For instance, the May 12, 1977 House Report leading up to the conference between the House

269 Carter Signing Statement, *supra* note 267; H.R. REP. No. 95-294, at 69–79 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1147–57.

270 H.R. REP. No. 95-294, at 69–79 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1147–57.

271 Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380 (June 19, 1978); 1977 Clean Air Act Amendments to Prevent Significant Deterioration, 43 Fed. Reg. 26,388 (June 19, 1978). Defining the date these new rules became effective is quite a difficult issue. *See* Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1034, 1035–37 (1st Cir. 1982); Citizens to Save Spencer County v. EPA (*Spencer County*), 600 F.2d 844, 858–59 (D.C. Cir. 1979).

272 The D.C. Circuit issued three related opinions in 1979 on the challenges to the pre-Alabama Power regulations. First, the court split off industry and environmental group challenges to the date chosen by EPA to put the PSD program into effect and upheld EPA's choice as a reasonable accommodation of conflicting statutory language. *Spencer County*, 600 F.2d at 874. The court then issued a per curiam opinion tersely describing its holdings on challenges to the remainder of the regulations. Alabama Power Co. v. Costle, 606 F.2d 1068, 1075 (D.C. Cir. 1979). Six months later, the panel issued three opinions, one by each member of the panel, disposing of the case in detail. Alabama Power Co. v. Costle, 636 F.2d 323, 343 (D.C. Cir. 1979).

273 *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980). The former regulations define the minimum elements that states must include in their SIPs if they wish to take over responsibility for the program; the latter apply to states that have not assumed responsibility. Users of previous editions of the Code of Federal Regulations should be aware that EPA reorganized Parts 51 and 52. *See* Air Quality Implementation Plans; Restructuring SIP Preparation Regulations, 51 Fed. Reg. 40,656 (Nov. 7, 1986).

274 EPA first promulgated revisions to the 1980 PSD regulations in 1989. Requirements for Implementation Plans, 54 Fed. Reg. 27,274 (June 28, 1989). These revisions only dealt with the "federal enforceability" of emissions controls and limitations at a source. *Id.* In 1992, EPA again promulgated revisions that, among other small changes, adopted an "actual-to-future actual" test for electric utility steam generating units. Requirements for Implementation Plans; Standards of Performance for New Stationary Sources, 57 Fed. Reg. 32,314 (July 21, 1992). Finally, in 2002, EPA significantly revised the PSD regulations to change how baseline emissions are determined, extended the "actual-to-future-actual" applicability test to all source categories, created plant-wide applicability limits, and added two provisions ultimately overturned by the D.C. Circuit: the creation of "clean unit" and "pollution control project" exemptions. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR), 67 Fed. Reg. 80,186 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51–52 (2007)). EPA proposed these changes to the PSD regulations on July 23, 1996. *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR), 61 Fed. Reg. 38,250 (proposed July 23, 1996).

and Senate bills was very direct in pointing out the purposes of the PSD permit program.[275] That Report states that:

> Only new or modified major stationary sources are required to obtain a State permit prior to construction. . . . The permit program is to be operated by States. *The purpose of the permit is to assure that the allowable increments and allowable ceilings will not be exceeded as a result of emissions from any new or modified major stationary source.*[276]

This discussion focuses the primary importance of the issuance of PSD permits on protecting ceilings and increments from *emissions* from new or modified sources. In other words, the whole focus of the program is to establish appropriate emission limits that would ultimately protect air quality when the source is operating. The August 3, 1977 Joint Conference Report issued just before enactment of the legislation, which largely adopted the House statutory language as well as its public law number, reinforced this point of view through its discussion of enforcement. That Joint Conference Report states:

> The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit. . . . The definitions of 'baseline' and 'commenced construction' of the Senate bill were accepted, with a slight modification of the 'commenced construction' definition to clarify the intent that *a source must have approval before construction may begin, and that any source that has begun construction without approval may not argue that construction activity alone within the meaning of clauses (i) and (ii) is adequate to meet the requirement of paragraph (A).*[277]

This section of the joint report recognizes that there will be instances where sources will construct without "approval," and in such a case a source cannot rely as a defense upon the actual construction by arguing that the source is somehow grandfathered due to the construction activity. This is exactly what defendants are doing when they raise the statute of limitations defense, in that they seek to peg the violation to the time of actual construction, which ultimately limits their exposure to penalties. These provisions, taken together, demonstrate the intent of Congress in enacting the PSD program to focus on emission controls and overall air quality as opposed to the mere permitting of sources.

D. EPA Regulations and Guidance Support the Proposition that PSD Violations are Continuous and Ongoing

EPA, since its early inception, has likewise interpreted the CAA to require "preconstruction" PSD permits with ongoing operational

275 H.R. REP. NO. 95-294, at 9 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1087.

276 *Id.* (emphasis added).

277 H.R. REP. NO. 95-564, at 153 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 1502, 1533 (emphasis added).

requirements. This point of view is undeniably demonstrated by the fact that EPA has not created a separate operating permit program alongside its PSD "preconstruction" permit program.[278] Indeed, the preconstruction permits issued under the federal PSD regulations serve as both construction and operating permits. For instance, 40 C.F.R. § 52.21(n) requires a source to submit "a detailed description as to what system of continuous emissions reduction is planned for the source or modification" in order to meet BACT.[279] This detailed description by definition must comprise ongoing, operational emissions limitations. In addition, the "source obligation" requirements of 40 C.F.R. § 52.21(r) create liability for any source that "constructs or *operates* a source or modification not in accordance" with the PSD program, including the requirement to obtain a permit.[280] This provision also establishes that a source with PTE limits becomes a major source simply by relaxation of an "enforceable limitation,"[281] thereby making it clear that PSD obligations are ongoing in that they may be triggered after the actual time of construction. If this occurs, a source would have to undergo PSD permitting "as though construction had not yet commenced on the source or modification."[282]

As discussed in the *American Electric Power* decision[283], the PSD regulations also have explicit provisions pertaining to rescission of a permit at 40 C.F.R. § 52.21(w)(1).[284] Those provisions require that a PSD permit "shall remain in effect, unless and until it expires under paragraph (s) of this section or is rescinded."[285] The grounds for rescission are very limited under this provision, thus highlighting that PSD permits are not only ongoing once issued, but are difficult to terminate due to their importance. Finally, the PSD regulations also establish the categories for what constitutes a violation of the CAA. Specifically, a source is in violation of section 113 of the CAA if it fails to comply with any part of the PSD regulations, fails to comply with any PSD permit condition, or fails to comply with any *operating* permit condition issued under a SIP.[286] The reference to an operating permit condition in the PSD regulatory enforcement provisions undeniably evidences EPA's view that the PSD requirements are continuous in nature.

278 Some courts have argued that the Title V program is the operating arm of the NSR program. However, for the reasons outlined in Section VI.E, this argument lacks merit.

279 40 C.F.R. § 52.21(n)(iii) (2007).

280 *Id.* § 52.21(r)(1) (emphasis added).

281 *Id.* § 52.21(r)(4).

282 *Id.*

283 United States v. Am. Elec. Power Serv. Corp., 137 F. Supp. 2d 1060, 1066 (S.D. Ohio 2001).

284 40 C.F.R. § 52.21(w)(1) (2007).

285 *See id.* Strangely, section 52.21(s) refers to the completion of environmental impact statements. In all likelihood, this reference is a typo and should instead refer to section 52.21(r) where a permit "expires" if a source does not construct within eighteen months of issuance of a PSD permit. In fact, looking at the 1978 final PSD rules, 43 Fed. Reg. 26,388, 26,409 (June 19, 1978), which were ultimately challenged and invalidated in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), section 52.21(s) historically contained the source obligations. Therefore, this reference must be a carryover from the old regulations when the final regulations were promulgated in 1980, and EPA simply missed the erroneous cross-citation.

286 40 C.F.R. § 52.23 (2007).

Taken as a whole, these provisions establish that PSD permits create ongoing obligations.

EPA has supported its regulatory interpretation that the PSD statutory program contains operational requirements through guidance.[287] The sum of the regulations and the guidance establish EPA's interpretation of the nature of the PSD program as a program with ongoing obligations. Courts should give deference to these interpretations based on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* (*Chevron*),[288] establishing such deference where the statutory language is not clear on its face. In a *Chevron* analysis, a court must first determine "whether Congress has directly spoken to the precise question at issue."[289] If the statute is silent or ambiguous on the direct point at issue, then Congress meant to delegate to the agency the authority to decide the meaning of the statutory provision, which is typically accomplished through regulations.[290] At this point, an agency's regulation should be found definitive if based upon a permissible construction of the statute.[291] Here, as discussed in Section VI.B, the CAA is at worst ambiguous as to whether PSD requirements are ongoing and operational, and at best expressly establishes such obligations. In either case, EPA's interpretation through its regulations should be considered definitive.

E. Courts Have Confused the Title V Operating Program with the Operating Requirements Contained in the PSD Program

Certain courts, such as those in *Niagara Mohawk* in the Second Circuit and *Murphy Oil*, *SIGECO*, and *Illinois Power* in the Seventh Circuit, have, in part, based decisions to dismiss PSD penalty claims on the theory that the violations are not ongoing because all operational requirements of the PSD program should be contained in the operating permit program of Title V of the CAA.[292] Under this line of reasoning, plaintiffs should be citing to Title V for continuing violations, rather than PSD requirements.[293] These cases,

287 *See* EPA DRAFT PERMITTING MANUAL, *supra* note 65, at B.56 (establishing that BACT requirements "must be included in the proposed permit submitted for public comment, as well as the final permit" and "*must be met on a continual basis at all levels of operation . . . .*") (emphasis added); *see also* EPA GUIDANCE, *supra* note 60, at 1 (explaining "[s]ection 167 should be used in situations where a source is constructing or operating without a valid permit or in violation of a valid permit").

288 467 U.S. 837 (1984).

289 *Id.* at 842.

290 *Id.* at 843–45.

291 *Id.* at 843.

292 For a discussion of the rationale, *see Illinois Power*, 245 F. Supp. 2d 951, 955 (S.D. Ill. 2003); *see also Niagara Mohawk*, 263 F. Supp. 2d 650, 662 n.21 (W.D.N.Y. 2003).

293 For example, in *SIGECO*, the court opined that "*operating* a facility after it was modified without first obtaining the necessary construction permit *may constitute* a continuing violation of the relevant *operating permit . . . .*" *SIGECO*, No. IP 99-1692-C-M/F, 2002 WL 1760752, at *5 (S.D. Ind. July 26, 2002) (emphasis added). However, by and large, this language is dicta, and hence does not by itself create a cause of action. Some courts, such as the *Niagara Mohawk* court, also find compelling that permitting agencies may have other Title V avenues to administratively ensure that a source complies with PSD, such as revising a Title V permit to

however, are misguided in using Title V as a rationale for barring penalties under PSD.

Under the Title V program, EPA approves state or local operating permit programs that meet the minimal federal criteria for a Title V permitting program set forth in the statutory Title V CAA provisions and its implementing regulations at 40 C.F.R. pt. 70. Title V requires that subject air emission sources, including major stationary sources, apply for and obtain an operating permit that includes all "enforceable emission limitations" and "such other conditions as are necessary to assure compliance with applicable requirements" of the CAA.[294]

Given case law and the nature of the Title V operating permit program, there are at least two major reasons why it is flawed to base a decision on an argument that the Title V operating permit somehow embodies the operational requirements of PSD. First, courts relying upon the existence of the Title V program to dismiss PSD penalty claims are confused as to the nature of the Title V operating permit program. As pointed out by the *Duke Energy* court and delineated in the Title V statutory and regulatory provisions, the Title V operating permit program does not establish new requirements but rather serves as a vehicle to bring together all "applicable requirements" that otherwise apply to a source.[295] The purpose of this is to enhance the understanding as to what requirements apply to any given source among regulated communities, permitting authorities, and the public.[296] As such, Title V could not possibly be the "operating arm" of the PSD program because it has no ability to craft, modify, or by itself embody PSD operational requirements beyond what is already contained in a properly issued PSD permit.[297]

The second main reason why courts have acted improperly by relying upon the existence of the Title V permit program in dismissing PSD cases is the lack of clarity as to whether a Title V claim for failure to comply with PSD requirements is even actionable. A successful Title V claim for PSD violations would likely be based upon a claim that a violator does not have a

"require the implementation of BACT." *Niagara Mohawk*, 263 F. Supp. 2d at 662 n. 21. However, it is unlikely that the threat of "a permit revision" would create the same deterrence as the assessment of a penalty through an enforcement action.

294 *See* Clean Air Act, 42 U.S.C. §§ 7661a(a), 7661c(a)–(b) (2000); *see also* 40 C.F.R. § 70.1(b) (2007) (requiring permit for all sources subject to the specific regulations in order to ensure compliance with all applicable requirement by the source).

295 The *Duke Energy* court stated that "the Title V operating permit program does not supplant the PSD program. Title V does not establish additional substantive requirements, but merely brings together applicable requirements, such as the PSD provisions, into one permitting scheme." *Duke Energy*, 278 F. Supp. 2d 619, 651–52 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated on other grounds sub nom.* Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007); *see also* Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (explaining how the program will generally clarify what requirements apply to a source so as to encourage compliance).

296 Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992).

297 Another factor arguing against congressional intent that the Title V program serves as the "operating arm" of the PSD program is that the Title V program was established as part of the 1990 CAA Amendments, which was 13 years after the creation of the PSD program.

proper Title V permit because it does not contain all of the "applicable requirements" for the source, namely the PSD requirements. In the alternative, a plaintiff could also claim that a violator submitted a deficient permit application that did not contain the PSD requirements.[298] While some courts have found such claims actionable,[299] at least one court case in California, *CEMEX*, resulted in the dismissal of the Title V claims for PSD violations on the basis that the Title V permit shield barred the action.[300] Given the uncertainty as to whether Title V claims are actionable for PSD violations, courts are misguided in relying upon that potential claim as a basis for dismissing penalty claims under the PSD program.

F. Courts Should Construe Similar SIP-Approved PSD Provisions More Uniformly

Since the PSD program must ultimately be approved into a SIP, the cooperative federalism nature of the CAA creates a situation where each state may create a slightly different PSD program.[301] For PSD purposes, a SIP must generally "contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region . . . ."[302] In short, this means that a SIP typically must contain a local permitting program that meets the basic requirements set forth in section 165 of the Act and 40 C.F.R. § 51.165. As discussed in Section IV, states could choose to simply rely upon the federal PSD regulations. However, most states have opted for a SIP-approved PSD program.[303]

Because states create and implement local programs, the nature of the program will differ from state to state. For instance, some state or local governments have created PSD programs that explicitly contain an operating permits program, such as the Sacramento Valley Air Quality Management District, the permitting authority involved in *Campbell Soup*.[304] In these circumstances, it is appropriate for an enforcement agency or citizen group plaintiff to cite violations of the operating permit requirement of the SIP in addition to and maybe instead of the construction permit requirements.[305]

298 Section 503(c) of the CAA requires that a Title V source submit an application along with a certification of the accuracy information contained in that application. 42 U.S.C. § 7661b(c) (2000). EPA's implementing regulations require that the application be "complete." *See* 40 C.F.R. § 70.5(a) (2007).

299 *See* United States v. E. Ky. Power Coop., 498 F. Supp. 2d 1010, 1013, 1018–19 (E.D. Ky. 2007); Pennsylvania v. Allegheny Energy, Inc., No. Civ. A. 05-885, 2006 WL 1509061, at *8 (W.D. Pa. Apr. 19, 2006).

300 *CEMEX*, No. EDCV07-223-GW(JCRx), slip op. 12–16 (C.D. Cal. July 10, 2007).

301 *See generally* EPA NSR Where You Live, *supra* note 57 ("States may develop unique NSR requirements and procedures tailored for the air quality needs of each area as long as the program is at least as stringent as EPA's requirements.").

302 42 U.S.C. § 7471 (2000).

303 *See generally* EPA NSR Where You Live. *supra* note 57.

304 No. CIV-S-95-1854 DFL, 1997 WL 258894, at *1 (E.D. Cal. Mar. 11, 1997).

305 In *Campbell Soup*, after the court ruled on the statute of limitations issue, the Government filed an amended complaint citing violations of the SIP-approved operating permits

Where there is not a clear PSD "operating permit" program approved as part of a SIP, courts should strive to interpret SIP-approved PSD permitting programs consistent with the federal PSD program. For instance, the Sixth Circuit in *NPCA v. TVA II* focused in part on a specific provision in the Tennessee SIP that requires that a source that has already constructed or modified to obtain a PSD permit.[306] Other courts, such as the Eleventh Circuit in *NPCA v. TVA I*, have used the absence of such provisions as a basis for dismissing lawsuits.[307] Given that all of these SIP programs are implementing the same federal program, namely the PSD program, and these SIP programs generally contain other similar operational requirements, such as the requirement that a "major modification shall apply" BACT[308], courts have ample basis for consistent rulings. In sum, the large difference in how courts are applying the statute of limitations to PSD penalty claims ultimately results in similarly-situated sources in different judicial jurisdictions being treated disparately regarding their potential liability for PSD violations. Courts should be cognizant of the potential inequities caused as a result of their differing application of the statute of limitations to PSD violations state-by-state, and should strive to make their rulings more consistent.

VII. CONCLUSION

In conclusion, judicial application of the five-year federal statute of limitations to PSD penalty claims is inconsistent and has created an area of legal ambiguity as to the viability of PSD penalty claims. As discussed in this Article, the broad air quality goals of the CAA as well as the statutory and regulatory provisions of the PSD program argue for the ability of governmental agencies and citizens to collect penalties for PSD violations regardless of when those violations first accrued based upon the "continuing violation" theory. Despite this, many courts are dismissing such claims as being time barred because they are deemed to be "one-time" violations. Indeed, the only two circuit courts of appeals to address the issue, the Sixth and Eleventh Circuits, have split on their application of the statute of limitations to PSD violations, thus leaving the issue ripe for the U.S. Supreme Court to resolve once and for all.

program, which allowed the lawsuit to proceed at that point. *Id.* at *1, *3.

306 *NPCA v. TVA II*, 480 F.3d 410, 419 (6th Cir. 2007). Although this requirement is not mirrored in the CAA, it is mirrored to a certain degree in the federal regulations at 40 C.F.R. § 52.21(r) which cover source obligation. 40 C.F.R. § 52.21(r) (2007). This provision requires that "any owner or operator who constructs or *operates* a source or modification not in accordance with [an] approval to construct . . . shall be subject to appropriate enforcement action." *Id.* (emphasis added).

307 *NPCA v. TVA I*, 502 F.3d 1316, 1324 (11th Cir. 2007), *cert. denied*, 76 U.S.L.W. 3673 (U.S. June 23, 2008).

308 *See, e.g.*, United States v. E. Ky. Power Coop., 498 F. Supp. 2d 970, 974 (E.D. Ky. 2007).