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No. 07-

IN THE
SUPREME COURT OF THE UNITED STATES

National Parks Conservation Association
and Sierra Club,
Petitioners,
v.
Tennessee Valley Authority,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners filed this Clean Air Act enforcement action in district court, alleging (in accord with the position of the Environmental Protection Agency), that respondent Tennessee Valley Authority (TVA) had violated the Act by making major modifications to its coal fired electric generating unit without first obtaining a permit. The Eleventh Circuit, in a decision that conflicts with decisions of other Circuits, ruled that the suit was barred on statute of limitations and notice grounds. The questions presented are:

1. Whether petitioners' claims for civil penalties under the Clean Air Act's New Source Review program were time-barred under 28 U.S.C. 2462, a general statute of limitations that applies to proceedings for enforcement of civil fines, penalties, or forfeitures,

2. Whether, assuming the New Source Review claims for civil penalties were time-barred, petitioners' claim for injunctive relief was therefore precluded by operation of the "concurrent remedy" doctrine, and

3. Whether National Parks Conservation Association (NPCA) and Sierra Club gave inadequate notice of their New Source Performance Standards claim.

PARTIES TO THE PROCEEDINGS

Petitioners NPCA and Sierra Club were plaintiffs in the district court and appellants in the court of appeals. Defendant TVA was appellee in the court of appeals.

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JURISDICTION

The court of appeals entered judgment on October 4, 2007. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. 2462 provides that "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." (Emphasis added). Other pertinent statutes and regulations are reproduced in the Appendix at App. 153a-180a.

INTRODUCTION

The 1970 and 1977 amendments to the Clean Air Act (CAA) exempted existing stationary sources from various core requirements of the Act – including the New Source Performance Standards (NSPS), the Prevention of Significant Deterioration (PSD), and the Nonattainment New Source Review (NNSR) programs – unless and until the owners of those sources engaged in a "modification" of the facilities. *See Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1429 (2007). In this CAA citizen suit, petitioners NPCA and Sierra Club allege that TVA, beginning in 1982, ended the grandfathered status for Unit 5 of its Colbert plant with a $57 million, 13 month modification. (Doc 80 ¶ 22). Because TVA is operating Unit 5 out of compliance with these programs, petitioners allege that TVA is illegally emitting tens of thousands of tons of sulfur dioxide (SO_2), nitrogen oxides (NO_x), and particulate matter (PM) each year. (Doc 80 ¶ 3). Petitioners seek an injunction to bring TVA's operations into compliance with these three CAA programs, thereby significantly reducing TVA's harmful emissions.

Despite finding that the doctrine of sovereign immunity bars petitioners from obtaining any relief at law, the Eleventh Circuit held that 28 U.S.C. 2462, a limitations provision that applies only to actions for "the enforcement" of civil fines, penalties, or forfeitures, also barred petitioners' equitable claims for injunctive relief. In so doing, the Eleventh Circuit held directly contrary to a decision by the Sixth Circuit involving these same parties. In *NPCA v. TVA*, 480 F.3d 410 (6th Cir. 2007), *reh'g denied*, 2007 U.S. App. LEXIS 21725, the Sixth Circuit recognized that under

the CAA, citizens may bring an action for a source owner's failure to have a permit as as a condition of operations and that TVA is violating such a requirement by operating without a PSD permit. The Sixth Circuit also held that operating without a BACT emission limit is separately actionable. Such an operational violation "manifests itself anew each day a plant operates." *Id.* at 419. Thus, the Sixth Circuit held that 28 U.S.C. 2462 does not bar a CAA citizen suit regarding TVA's PSD violations in Tennessee. The Eleventh Circuit's decision not to follow the Sixth Circuit's lead stemmed from a fundamental failure to recognize that NSR permits, although they must be obtained prior to construction, actually govern operations and that operating without them violates the Act, as manifested through the Alabama SIP.

Even if the Eleventh Circuit was correct in holding that section 2462 barred petitioners' penalty claims, it contravened the plain language of that section by ruling that it also barred petitioners' injunctive relief claims. The Eleventh Circuit's judicial redrafting of section 2462 supplants the CAA's carefully crafted remedial scheme that allows citizens to secure injunctions of ongoing violations. The Eleventh Circuit based its ruling on the rarely-applied concurrent remedy doctrine, and its sweeping application of that doctrine contravenes the settled precedent of this Court. *See Russell v. Todd*, 309 U.S. 280 (1940). The concurrent remedy doctrine is a narrow exception to the general rule that statutes of limitations do not apply in equity, *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). The concurrent remedy doctrine applies when a court is sitting in "concurrent" equitable jurisdiction, but the doctrine does not apply to claims brought in

"exclusive" equitable jurisdiction. Claims for injunctive relief arise only in exclusive equitable jurisdiction, even when legal remedies are also available. 1 Pomeroy's Equity Jurisprudence (Pomeroy's), § 138-39 (5th ed. 1941). Because petitioners' claims for injunctive relief arose in exclusive equitable jurisdiction, they could not be barred under the concurrent remedy doctrine.

Finally, in a decision that conflicts with the applicable regulation, 40 C.F.R. 54.3(b), the Eleventh Circuit upheld the dismissal of petitioners' claim regarding TVA's NSPS violations at Colbert on notice grounds. The court below erred, however, because it did not base its assessment of the adequacy of the notice letter on an evaluation of the pleadings.

STATEMENT OF THE CASE

Statutory and Regulatory Background. Congress adopted the Clean Air Act Amendments of 1970 "to guarantee the prompt attainment and maintenance of specified air quality standards." *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 469 (2004)(*ADEC*). To achieve this goal, the 1970 legislation directed EPA to develop national technology-based standards intended to "force" the development of new and better control technologies. *See Union Elec. v. EPA.*, 427 U.S. 246, 257 (1976). The New Source Performance Standards (NSPS) require new and "modified" sources to meet technology-based standards developed by EPA and applicable to entire categories of equipment. 42 U.S.C. 7411.

The 1970 Amendment also directed EPA to establish National Ambient Air Quality Standards (NAAQS) for

air pollutants at a level requisite to protect human health and the environment. 42 U.S.C. 7409. States are authorized to establish state implementation plans (SIPs) to achieve and maintain the NAAQS. *Id.* 7410.

In 1977, Congress comprehensively amended the Act, adding two new permitting programs. One, the statutory Prevention of Significant Deterioration (PSD) program, 42 U.S.C. 7470-7479, ensures that air quality in areas meeting the NAAQS (attainment areas) will not degrade. *ADEC*, 540 U.S. at 470-71. Under the PSD program, administered in many states, including Alabama, through the SIP, a new or modified facility cannot obtain a permit unless it demonstrates that it will not cause or contribute to a violation of a NAAQS. 42 U.S.C. 7475(a)(3). Also, the permit must include an emission limit, known as Best Available Control Technology (BACT). 42 U.S.C. 7475(a)(4), 42 U.S.C. 7479(3). The CAA defines BACT not as "technology," but rather as an emission limitation established by the State through a "case-by-case" process. 42 U.S.C. § 7479(3).

The other permitting program Congress added in 1977, the nonattainment new source review (NNSR) program, is the analog to the PSD program in areas failing to meet the NAAQS (nonattainment areas). In these areas, a facility cannot obtain a permit unless it obtains "offsets" to ensure that overall, the facility will not cause an increase in emissions. 42 U.S.C. 7503(a)(1). Furthermore, Congress requires such facilities to comply with the lowest achievable emission rate (LAER), which like BACT, is not defined in terms of technology, but rather as an emission limitation. 42 U.S.C. 7503(a)(1) and 7501(3). When referred to together, PSD and NNSR permits are known as "new

source review" (NSR) permits.

Each of these programs have "modification" provisions requiring that if an owner or operator makes a physical change to a unit that results in an emissions increase, the unit becomes subject to the program's requirements. *See* 40 C.F.R. § 60.14 (NSPS modification); Alabama Air Pollution Control Commission (AAPCC) Reg. 16.3.2(b)(4) (1979) (definition of "major modification" in the NNSR provision that applied at the time), App. 177a; AAPCC Reg. 16.4.2(b)(1)(definition of "major modification" in the PSD provision applicable at the time), App. 178a. As discussed below, Petitioners allege that TVA's 1982-83 rehabilitation project at Colbert 5 caused emissions increases for sulfur dioxide (SO_2), nitrogen oxides (NO_x), and particulate matter (PM). The parties agree that at the time of the project, the plant was located in a non-attainment area for SO_2. (Doc 80 ¶ 19, Doc 83 ¶ 19). Accordingly, the NNSR program governs Colbert 5's emissions of SO_2, while the PSD program governs the emissions of NO_x, and PM. In addition, the 1982-83 rehabilitation project was a reconstruction and modification of Unit 5, making the unit subject to the NSPS regulations for all three pollutants.

Certain consequences followed from the triggering of each of the programs. Under the NSPS program, a modified source becomes subject to a set of emission limitations, such as a requirement to control SO_2 emissions by 90 percent. *See* 40 C.F.R. § 60.43Da(a).

Under the PSD program as implemented in Alabama, modified facilities must obtain an "Air Permit" containing PSD requirements, Ala. Admin. Code Rule 335-3-14-.01(1)(a), App. 179a, and it is illegal to operate without such an Air Permit even if a

source began operating without one. Ala. Admin. Code Rule 335-3-14-.01(1)(c), App. 180a.

Significantly, even though what are now called "Air Permits" in Alabama were known, prior to 1985, as "construction permits" and "operating permits," the Alabama SIP prohibited sources from operating without either. Under pre-1985 SIP Rule 16.1.1, App. 175a-76a, one could not operate a source without an operating permit, one could not obtain an operating permit without a construction permit, and one was required to obtain a construction permit for every modification. Thus, the change of the permitting names in 1985[1] did nothing to change the fundamental requirement that upon making a major modification, one could not operate without a permit containing NSR operational requirements – in particular, emission limits.

Not only does the Alabama SIP prohibit TVA from "presently operating" Unit 5 without an Air Permit related to the 1982-83 modification, but also it prohibits TVA from operating without the emission limitation known as BACT:

> A major modification shall apply BACT for each pollutant subject to regulation under the CAA for

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[1] *See* June 22, 2005 Declaration of Ronald Gore, Chief of the Air Division for the Alabama Department of Environmental Management, explaining that prior to 1985, there were three types of air quality permits in Alabama: construction permits, temporary permits to operate, and permits to operate. Doc 104 – Part 5(Exhibit C) – ¶ 4). In 1985, however, Alabama replaced that tripartite system with a system in which all permits became Air Permits. *Id.* Furthermore, all existing permits to construct and permits to operate became "Air Permits" by operation of law. *Id.* ¶8. *See also* 50 Fed. Reg. 34804 (August 28, 1985)(EPA FR notice approving the change).

which it would result in a significant net emissions increase at the source. . . .

Ala. Admin. Code Rule 335-3-14-.04(9)(c), App. 180a.

With respect to the NNSR permits, the Clean Air Act makes clear that such permits govern not only initial construction, but also plant operation: nonattainment plan provisions "shall require permits for the construction and ***operation*** of new or modified major stationary sources anywhere in the nonattainment area." 42 U.S.C. 7502(c)(5) (emphasis added).[2] Not surprisingly then, although the substantive requirements for permits in the Alabama SIP differ for PSD and NNSR, *compare* Ala. Admin. Code Rule 335-3-14-.04 (PSD) *with* Rule 335-3-14-.05 (NNSR), the requirements discussed above regarding the necessity of an Air Permit in order to operate after a modification apply to both PSD and NNSR permits.

Factual Background. TVA is the nation's largest public power company. (Doc 116 – Fact ¶ 50).[3] It owns and operates 11 coal-fired power plants consisting of 59 units (*Id.* ¶ 51), including one in Colbert County, Tuscumbia, Alabama known as the Colbert Plant. (*Id.* ¶ 2). The Colbert Plant combusts coal in five boilers. This case involves Unit 5. (*Id.* ¶ 4), which has no SO_2 control equipment. (*Id.* ¶ 49). Unit 5 emits a

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[2] Prior to the 1990 CAA Amendments, Pub. L. 101-549 (Nov. 15, 1990), this provision was codified at 42 U.S.C. 7506(b)(6).

[3] "Doc" citations are to the documents in the District Court record. Unless otherwise indicated, the exposition of the facts in this section is undisputed based upon Petitioners' recitation of proposed undisputed facts in its brief in support of its motion for partial summary judgment on applicability (Doc 116) and TVA's response (Doc 152).

tremendous amount of air pollution. For instance, in 2003, Unit 5 emitted over 35,000 tons of SO_2 and over 5,850 tons of NO_x. (Doc 177 – pg 6). Congress considers a power plant to be a "major emitting facility" if it emits over 100 tons of any air pollutant. 42 U.S.C. § 7479.

Construction of Unit 5 began in 1961 and the unit was designed to produce 500 megawatts (MW) of electricity. (Doc 116 ¶ 11). The boiler was inadequately designed, however, (*Id.* ¶ 12), and a number of significant problems became evident very early in the unit's life. (*Id.* ¶ 13). By 1978, TVA decided to address and correct Unit 5's original design deficiencies. (*Id.* ¶ 15). R. N. Kennedy, Chief of TVA's Power Supply Planning Branch concluded in 1979 that unless TVA undertook a "complete rehabilitation" of Unit 5, TVA could not have kept the unit in service for long and would have been forced to put the unit "in shutdown mode." (*Id.* ¶ 25). The Unit 5 project cost TVA $57 million and kept the unit out of service for 13 months, increasing the unit's pre-project capacity by 100 megawatts. *Id.* ¶¶ 19-23. Because of this capacity increase, Petitioners allege that the project increased emissions on an hourly and annual basis, thereby triggering applicability of the NSR and NSPS programs.(Doc 80 ¶¶ 71, 78, 83). Petitioners also allege that TVA's operation of Unit 5 violates a number of NSPS requirements including the requirement to control SO_2 with a scrubber. *Id.* ¶¶ 85-91.

Procedural Background. In 1999, EPA found that TVA had undertaken 14 projects at its coal-fired fleet that violated NSR or NSPS requirements, or both, and consequently, EPA issued TVA an Administrative Compliance Order. EPA's 1999 finding covered the

Unit 5 project addressed in this case. *See TVA v. United States EPA*, 278 F.3d 1184 (11th Cir. 2002), *opinion withdrawn in part by*, *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030, 124 S. Ct. 2096 (2004).

Concerned that EPA's chosen enforcement option might fail, NPCA sent out a notice letter on October 30, 2000. App. 133a. Sierra Club followed with a notice letter on December 13, 2000, App. 151a. The two groups filed their complaint in this case in February 2001, and amended it twice. (Docs 1, 10, and 80).

EPA's enforcement effort against TVA suffered a major blow when the Eleventh Circuit found EPA's Administrative Compliance Order unconstitutional on procedural due process grounds. *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004). EPA had chosen to issue TVA an administrative order rather than sue TVA in federal court because of concerns by the Department of Justice that the Constitution prohibits the government from suing itself. 278 F.3d at 1193-94. Consequently, though the Eleventh Circuit invited to EPA to take action against TVA in district court, EPA has refused, leaving petitioners to press on alone.

While the EPA-TVA litigation proceeded through the courts, this case was stayed for almost three years (Docs 22 and 43). Once this case began moving again, the district court granted Petitioners' motion for partial summary judgment on standing, and TVA did not appeal that ruling. (Doc 202). Petitioners also moved for partial summary judgment to establish applicability of the NSPS and NSR programs. (Doc 107). TVA moved to dismiss the NSR-related claims on statute of limitations grounds (Doc 99) and the NSPS-

related claims on notice grounds. (Doc 96). In a series of overlapping orders and opinions, the district court ultimately granted TVA's motions and denied Petitioners' motion for partial summary judgment on applicability.

Petitioners then appealed the district court's rulings regarding the statute of limitations, notice, and applicability. The Eleventh Circuit affirmed the district court's rulings on statute of limitations and notice and found that it had no jurisdiction to review the district court's denial of the applicability motion. App. 31a.

More specifically, the Eleventh Circuit ruled that regardless of TVA's sovereign immunity, petitioners could not obtain civil penalties for TVA's alleged PSD and NNSR violations because those claims first accrued in 1982-83. App. 11a. The court rejected petitioners' argument that TVA's operation without an Air Permit related to the 1982-83 modification constituted a current violation of the SIP for three reasons. First, the court stated that it was not clear that NPCA and Sierra Club had alleged a violation of the current SIP rules. App. 20a. Second, the court found that there was no indication that Alabama intended the 1985 SIP rule changes, converting "construction permits" and "operating permits" into Air Permits, to be retroactive. App. 20a. Finally, the court noted that TVA has an "operating permit" from the State of Alabama. Therefore, the Eleventh Circuit rejected petitioners' contention that TVA is operating without an "Air Permit" as an impermissible "collateral attack" on a permit. App. 21a.

The Eleventh Circuit also rejected petitioners' argument that the Alabama SIP imposes an ongoing

obligation upon TVA to operate Unit 5 with BACT emission limits, regardless of the permitting scheme. App. 18a. The court took note of the Sixth Circuit's ruling on the issue, but recognized a distinction between the Alabama and Tennessee SIP rules on this point because the Tennessee SIP provided a mechanism for obtaining a construction permit after construction had commenced, and the court could not find a similar provision in the Alabama SIP. App. 19a. The Eleventh Circuit also specifically rejected the Sixth Circuit's conclusion that the Tennessee BACT regulation by itself created an ongoing obligation to apply BACT. App. 18a, n. 2.

The Eleventh Circuit then went on to rule that since 28 U.S.C. 2462 barred petitioners' legal claims, petitioners' claims for injunctive relief were barred under the concurrent remedy doctrine. App. 24a-25a ("Thus, we have considered whether and to what extent the five-year statute of limitations and the concurrent remedy doctrine bar the legal and equitable New Source Review claims National Parks and Sierra Club assert in this case, and we conclude that the district court correctly dismissed those claims.").

Finally, the court ruled that petitioners' NSPS claim was properly dismissed because their pre-suit notice letter was impermissibly overbroad. App. 29a-30a.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO ADDRESS THE WIDESPREAD, DISPARATE, AND OFTEN ERRONEOUS APPLICATION OF 28 U.S.C. 2462 IN ENVIRONMENTAL ENFORCEMENT CASES.

The court of appeals held that 28 U.S.C. 2462 applies to bar Petitioners' NSR claims because they did not file suit within five years of when TVA commenced construction on the modification. App. 11a.

Faced with almost the same parties and an almost identical fact pattern (involving a different TVA plant, Bull Run) the Sixth Circuit found otherwise. *NPCA v. TVA*, 480 F.3d 410, 419 (6th Cir. 2007) ("TVA's subsequent and continuing failures (1) to apply BACT and (2) to obtain a construction permit containing emissions limitations under the Tennessee SIP's PSD provisions are actionable."), *reh'g denied*, 2007 U.S. App. LEXIS 21725.

This split between the Sixth and Eleventh Circuits reflects a larger conflict involving dozens of decisions about the proper application of 28 U.S.C. 2462 in the context of environmental enforcement. Cases holding that 28 U.S.C. 2462 would not bar the imposition of a penalty in the CAA permitting context include *United States v. Marine Shale Processors*, 81 F.3d 1329, 1355-57 (5th Cir. 1996); *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 651 (M.D.N.C. 2003), *aff'd* 411 F.3d 539 (4th Cir. 2005), *rev'd on other grounds in Environmental Defense v. Duke Energy Corp.,* 127 S. Ct. 1423 (2007); *United States v. American Elec. Power Serv. Corp.*, 137 F. Supp. 2d 1060, 1066 (S.D. Ohio 2001); *Sierra Club v. Dayton Power & Light,*

2:04-CV-905, slip op. at 5 (S.D. Ohio August 12, 2005); *United States v. Ohio Edison Co.*, 2003 U.S. Dist. LEXIS 2357 (S.D. Ohio Jan. 17, 2003);[4] *Detroit Edison Co. v. Michigan Dep't of Envt'l. Quality,* 39 F. Supp. 2d 875, 877 (E.D. Mich. 1999); *Idaho Conservation League v. Boer*, CV-04-250-S-BLW, slip op. at 15 (D. Idaho Sept. 27, 2004); *United States v. Titanium Metals Corp.*, CV-S-98-682, slip. op. at 1-2 (D. Nev. Sept. 21, 1998).

Cases finding that 28 U.S.C. 2462 bars the assessment of a civil penalty when construction commenced more than five years before the complaint was filed include *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 443 (D. Md. 2001) ; *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003); *United States v. Illinois Power Co.*, 245 F. Supp. 2d 951, 957 (S.D. Ill. 2003); *United States v. Southern Ind. Gas & Elec. Co.*, 2002 WL 1760752, at *4 (S.D. Ind. 2002); *United States v. Brotech Corp.*, 2000 WL 1368023, at *3 (E.D. Pa. 2000); *United States v. Campbell Soup Co.*, 1997 WL 258894, at *2 (E.D. Cal. 1997); *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863, 876 (E.D. Pa. 1996); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1130 (D. Colo. 1987).

The question of the proper application of 28 U.S.C. 2462 has also arisen outside the CAA permitting context. *See, e.g., 3M v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994)(28 U.S.C. 2462 applies to violations of the Toxics Substances Control Act and bars the assessment of a penalty for violations that occurred outside the

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[4] *Dayton Power, Ohio Edison*, and *AEP* were all decided by the same district court judge, Edmund A. Sargus, Jr.

limitations period, but not violations that occurred within the period); *Newell Recycling Co. v. United States EPA*, 231 F.3d 204 (5th Cir 2000)(under Toxics Substances Control Act, 28 U.S.C. 2462 did not bar imposition of civil penalty even though excavation and stockpiling of PCB laden soil occurred more than 5 years before complaint because stockpiled soil remained); *United States v. Reaves*, 923 F. Supp. 1530 (M.D. Fla. 1996)(ruling, in enforcement action under the Clean Water Act and the Rivers and Harbors Act, that 28 U.S.C. 2462 did not bar the civil penalties for defendant's unpermitted discharge of dredged or fill materials into wetlands as long as the fill remained).

Because of the plethora of litigation involving the application of 28 U.S.C. 2462 and the varied, inconsistent results, the Court should grant review of the Eleventh Circuit's decision, which, as shown below, was erroneous .

A. In Applying 28 U.S.C. 2462 in the NSR Context, the Court Below, like Some other Lower Courts, Relied on a False Distinction Between "Construction" and "Operating" Permits.

The court of appeals, like some other federal courts, relied upon a fundamentally mistaken legal framework for evaluating the applicability of 28 U.S.C. 2462 in cases involving alleged failures to obtain permits required under the NSR programs.

The central error underlying these decisions is a false distinction between "preconstruction" permits and "operating" permits. The Eleventh Circuit here, and other courts that have barred the imposition of civil penalties in NSR cases, have reasoned that: (1) PSD permits must be obtained before construction; (2) the Act specifically prohibits construction without that

permit; (3) the illegal "act" is therefore the commencement of construction without a permit, and (4) the statute of limitations begins to accrue at the commencement of construction. These courts also acknowledge that if "operation" without a permit was illegal, then there would be no statute of limitations problem. For example, the court below stated acknowledged that there would be no statute of limitations problem if a source commits "a discrete violation every time it operates." App. 17a. As the Sixth Circuit put it, the violation "manifests itself anew each day." 480 F.3d at 419.[5] *See also Illinois Power*, 245 F. Supp. 2d at 957 ("Preconstruction permits have a finite existence while operational permits can be ongoing violations.").

The Eleventh Circuit erred because it concluded that if a permit governs construction, it does not also govern operation, or in other words, while it is illegal to commence construction without a preconstruction permit, it is not illegal to ***operate*** without one. The Fifth Circuit recognized the fallacy of this thinking: "[t]he 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

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[5] This Court has recognized that a statute of limitations will not bar a claim when a series of repeated, wrongful events has occurred within the limitations period. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)("Each discrete discriminatory act starts a new clock for filing charges alleging that act.").

source's operations." *Marine Shale,* 81 F.3d 1355-56. With this in mind, the *Marine Shale* court found the notion that 28 U.S.C. 2462 would bar the imposition of civil penalties because the unpermitted construction had begun more than five years before the complaint "frivolous." *Id.* 1357. *See also American Elec. Power.*, 137 F. Supp. 2d at 1066 (It is "illogical to conclude that a defendant may only be held liable for constructing a facility, rather than operating such facility, without complying with the [PSD] permit requirements.").

Review of the plain and unambiguous language of the CAA's NSR program reveals that NSR permits, although properly obtained prior to construction, actually govern source operation and are required "as a condition of operations," 42 U.S.C. 7604(f)(4), or more colloquially, "operating permits." The CAA's text emphatically demonstrates that Congress intended PSD permits under 42 U.S.C. 7475 to restrict on-going operations post-construction. Section 7475(a)(1) provides that PSD permits must contain "emission limitations." Section 7475(a)(4) specifies that PSD permits must require facilities to utilize "best available control technology" (BACT) to reduce their air emissions once in operation, and BACT is *defined* as an "emission limitation." 42 U.S.C. 7479(3). Section 7475(d) provides that PSD permits must include elaborate, specific limitations on air pollution emissions from operating facilities. Section 7475(e) further specifies provisions that PSD permits must have for monitoring the emissions of operating facilities. Similarly, with respect to NNSR permits, Congress requires that SIPs contain provisions that "require permits for the construction and ***operation*** of new or modified major stationary sources anywhere in

the nonattainment area." 42 U.S.C. 7502(c)(5) (emphasis added).[6] The statutory text therefore leaves no doubt that PSD permits govern source operation.[7]

The Eleventh Circuit's basic misunderstanding of the CAA permitting regime rested in part on the panel's myopic focus on 42 U.S.C. 7604(a)(3). That subsection authorizes citizens to take action "against any person who proposes to ***construct or constructs*** any new or modified major emitting facility without a permit." (emphasis added) However, contrary to the court's inference that *only* unlawful construction is actionable, subsection (a)(1) expressly authorizes citizens to take action against anyone who is violating "an emission standard or limitation," and that phrase is specifically defined to include "any requirement to obtain a permit as a *condition of operation*." 42 U.S.C. 7604(f)(4) (emphasis added). Thus, the Eleventh Circuit's approach defies the Act's plain language.

Requirements to obtain NSR permits are

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[6] *See Duke* 278 F. Supp. 2d at 651 ("[B]ecause the PSD permitting provisions provide both preconstruction obligations and subsequent obligations on operations, Duke Energy's alleged violation of failing to undergo the PSD permitting process does not terminate upon the completion of construction activity.").

[7] That NSR permits constrain source operation, and not just construction, is further confirmed by the addition to the Clean Air Act in 1990 of the Title V operating permit program. Title V permits consolidate all CAA permitting requirements into one place and do not create new substantive requirements. *See* Final Operating Permits Rule Preamble, 57 Fed. Reg. 32250 (1992). Thus, a source cannot obtain operational BACT or LAER emission limitations through the Title V permitting process. It must obtain an NSR permit first. Furthermore, NSR permits, once issued, never expire, unless rescinded. *See* 40 C.F.R 52.21(w).

"requirements to obtain permits as a condition of operation" because, as shown above, these permits must contain conditions that govern operation. Indeed, the BACT or LAER provisions in NSR permits only take effect once a source has begun operation. Subsection 7604(f)(4) applies to "any" requirement to obtain a permit as a condition of operation. Such requirements can be stated in a number of ways. Such a requirement might be worded: "thou shall not operate without permit X," or one might also say, "if thou has made a major modification, thou shall obtain permit X." Both forms require permit X to be obtained, and if permit X must contain operational restrictions (and NSR permits must), then both forms are "requirements to obtain permits as a condition of operations."

Thus, it does not matter whether the NSR program is implemented through a two-step permitting process such as the one now in Tennessee (where the result of the extensive process for establishing BACT, *see ADEC*, 540 U.S. 461, is first incorporated into a "preconstruction" permit and later poured over to an "operating" permit) or whether the program is implemented though a one-step permitting process such as the one now in Alabama, where the owner need only apply for an Air Permit. Under either scenario, the bottom line is that the owner of a new or modified source must obtain these permits, and these permits must contain operational restrictions. Thus, operating without such a permit is violating a requirement to have a permit as a condition of operation.

Not surprisingly, the prohibition against operation without an NSR permit is actually explicitly stated in the Alabama SIP that applies in this case. Ala. Admin.

Code Rule 335-3-14-.01(1)(a), App. 179a, provides, *inter alia,* that any person altering equipment that may increase the emission of air contaminants must obtain an "Air Permit." Subsection (c) provides that any equipment described in Subsection (a)(and this would include sources like Unit 5 that have had modifications that have increased emissions) that is "presently operating . . . without an Air Permit may continue to operate . . . only if its owner or operator obtains an Air Permit." App. 180a. Thus, one of the remedies Petitioners seek through this suit is for TVA to apply for and obtain an "Air Permit" from the State of Alabama for the 1982-85 modification.

The Eleventh Circuit disregarded the import of this section because it was not clear that Petitioners had alleged a violation of the current rules. Review of the Second Amended Complaint shows, however, that plaintiffs alleged the following:

> Since 1982, TVA has ***operated*** the Colbert Plant ***without a PSD permit*** . . . . Accordingly, TVA has violated and ***continues to violate*** the Act and ***the Alabama SIP*** by making this "modification" and ***operating*** the Colbert Plant power plant ***without obtaining a PSD permit***.

(Doc 80 ¶¶ 71-72 (emphasis added)). *See also id.* ¶¶ 79-80. Clearly, the complaint spells out that Citizens are alleging a violation of the current SIP. The complaint is not the place to set out specific statutory or regulatory citations. *See Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992)("Instead of asking whether the complaint points to the appropriate statute, a court should ask whether relief is possible under any set of facts that could be established consistent with the allegations." *Conley v. Gibson*, 355

U.S. 41, 45-46 (1957).").

The Eleventh Circuit also ruled that the current SIP's restriction on operating without an Air Permit does not cover TVA's modification because "[t]here is no indication that the 1985 amendments were to apply retroactively, reviving TVA's obligation to obtain a preconstruction permit specifying emission limitations." App. 20a-21a These 1985 amendments eliminated the construction permit/operating permit dichotomy and made all permits "Air Permits" by operation of law. *See* 50 Fed. Reg. 34804 (Aug. 28, 1985). The court of appeals focused on this point because it noted that the Tennessee SIP contains a specific provision that allows sources who have skipped out of the preconstruction permitting process to go back and get a preconstruction permit once operation has begun, but it could not find an analogous provision in the Alabama SIP. App. 19a.

In fact, review of the pre-1985 rules shows it has never been legal for TVA to operate without a "construction permit" containing NSR requirements. Under the pre-1985 rules, an owner had to obtain a Permit to Construct for each modification. Rule 16.1.1(a), App. 175a. Furthermore, an owner was not allowed to operate after the modification without a Permit to Operate, and one could not obtain a Permit to Operate without first obtaining a Permit to Construct. Rule 16.1.1(b), App. 176a. Finally, the same rule provided that no one "presently operating . . . without a Permit to Operate, may continue to operate." *Id.* Thus, if an owner was operating a source without a Permit to Operate associated with a modification, the rules clearly contemplated that the owner could not continue to operate without first

obtaining a Permit to Construct. The 1985 change simply changed the names of the required permits from "Permit to Construct" and "Permit to Operate" to "Air Permit."

The Eleventh Circuit also asserted that because TVA has an operating permit, this case is an invalid collateral attack on that permit. App. 21a. As the review of the regulations above shows, an owner must obtain a permit for each modification. TVA never obtained, or attempted to obtain, a permit for the 1982 modification. Thus, Petitioners are not attacking TVA for the permit that it has. They are attacking TVA for the permit it lacks. By mentioning "collateral attack," the Eleventh Circuit implies that Petitioners somehow missed out on a permitting process where they should have raised their concerns. In the case cited by Eleventh Circuit, *United States v. AM Gen. Corp.*, 34 F.3d 472 (7th Cir. 1994), there had been an opportunity for the plaintiff there, EPA, to weigh in on the issues of concern through a permitting process. Here, TVA has *never applied for a permit for the challenged modification.* Thus, there was never any "process" in which Petitioners could have participated.

As shown above, NSR permits, although they must be obtained prior to the commencement of construction, are permits that govern operation or are, in short, "operating permits." In Alabama, and everywhere else in the United States, once the requirement to obtain one of these permits attaches, one cannot operate without one. Consequently, claims for penalties for operation (without an NSR permit) within five years of the filing of the complaint, are not barred by 28 U.S.C. 2462. Clarification of these principles, recognized in some circuits and rejected by the court below and by

some other federal courts, is essential to the effective enforcement of the Clean Air Act's critically important protections for public health and welfare.

B. The Writ Should Also be Granted to Clarify the Split Between the Sixth and the Eleventh Circuits Over the Import of the Independent BACT Requirement, a Provision that is Common to All PSD Programs.

The Sixth Circuit found that regardless of the Tennessee SIP's permitting rules, the SIP independently prohibits TVA from operating the facility there (Bull Run) without the emission limitation known as BACT. 480 F.3d at 418-19. The Sixth Circuit further found that TVA's current operations violate this requirement, meaning 28 U.S.C. 2462 would not bar action for TVA's illegal operations over the five years prior to the filing of the complaint. *Id.* Although the Alabama SIP contains essentially the same provision, *see Ala. Admin Code* 335-3-14-.04(9)(c), App. 180a, the Eleventh Circuit ruled otherwise, App. 18a-19a.

That both the Tennessee and Alabama SIPs contain this provision is unsurprising given that the federal version of the PSD regulation also contains the same provision. *See* 40 C.F.R 52.21(j). This very issue has therefore been addressed in other decisions. *See, e.g., United States v. Campbell Soup Co.*, 1997 WL 258894 (E.D. Cal. 1997)(consistent with the 6th Circuit approach).

The Eleventh Circuit's decision rests on the perceived absence in the Alabama SIP of a provision present in the Tennessee SIP, namely Tenn. Comp. R. & Regs. § 1200-3-9-.01(1)(e). This provision allows an owner to obtain a "construction" permit after a source

has already been constructed without that permit. As explained above, the Alabama SIP has always had a similar regulatory mechanism. The existence of either mechanism, however, is irrelevant. As the Sixth Circuit correctly ruled, the BACT requirement in the SIP stands on its own:

> This provision, by its own terms, creates an ongoing obligation to apply BACT, ***regardless of what terms a preconstruction permit may or may not contain***. Even if TVA had obtained a construction permit that did not require BACT, such an approval "shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions under [the Tennessee SIP] and any other requirements under local, State, or Federal law." *Id.* § 1200-3-9-.01(4)(a)(5). Because the SIP requires that modified sources apply BACT, TVA may not rely on any preconstruction approval to justify its post-construction failure to comply with this provision. . . .

480 F.3d at 418 (emphasis added).

As in Tennessee, the BACT requirement in Alabama, and indeed in the federal PSD regulation, stands alone. Under the language of the SIP, each day TVA operates Unit 5 without BACT emission limits is a new violation that falls within the five year period established by 28 U.S.C. 2462. Thus, this statute of limitations is no bar to this action.

II. EVEN IF 28 U.S.C. 2462 BARS PETITIONERS' LEGAL CLAIMS, THE ELEVENTH CIRCUIT'S RULING BARRING THEIR CLAIMS FOR INJUNCTIVE RELIEF HAS NO STATUTORY BASIS AND CONTRAVENES THE DECISIONS OF THIS COURT.

Even if the Eleventh Circuit was correct that 28 U.S.C. 2462 would bar petitioners' claims for civil penalties, to the extent they had any,[8] the Eleventh Circuit misapplied this statute and contravened the decisions of this Court by ruling that section 2462 bars petitioners' claims for injunctive relief.

The Eleventh Circuit acknowledges that section 2462, by its "plain language . . . applies only to claims for legal relief; it does not apply to equitable remedies." App. 22a. Therefore, the Eleventh Circuit should have concluded, as did the court in *United States v. Hobbs*, 736 F. Supp. 1406, 1407 (E.D. Va. 1990), that section 2462 does not bar claims for injunctive relief. *See also American Elec. Power*, 137 F. Supp. 2d at 1067 ("The statute, by its terms, applies only to suits for civil penalties."); *Westvaco*, 144 F. Supp.2d at 443 n. 2

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[8] In another case between TVA and Sierra Club, the Eleventh Circuit ruled that in CAA enforcement cases, TVA has sovereign immunity from the imposition of civil penalties. *Sierra Club v. TVA*, 430 F.3d 1337, 1353-57 (11th Cir. 2005). In light of that decision, petitioners elected not to appeal the district court's decision that TVA has not waived sovereign immunity from civil penalties in this case. *See* App. 89a and App. 10a. Thus, the only reason the question of civil penalties is relevant here is because the district court and court of appeals have applied 28 U.S.C. 2462, a limitations provision that by its express terms applies to actions for civil penalties and says nothing about actions for injunctive relief, to bar citizens' claims for injunctive relief.

("The five-year statute of limitations applies to claims for civil penalties only."); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1087 (W.D. Wis. 2001) (same); *Lefebvre v. Central Maine Power Co.*, 7 F. Supp. 2d 64, 68 (D. Me. 1998)(section 2462 is inapplicable to a RCRA citizen suit seeking equitable relief); *A-C Reorganization Trust v. E.I. DuPont De Nemours*, 968 F. Supp. 423, 428 (E.D. Wis. 1997); *Catellus Dev. Corp. v. L.D. McFarland Co.*, 910 F. Supp. 1509, 1518 (D. Or. 1995). *See also Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412, 423 (1915)(predecessor to 24620; *United States v. Perry*, 431 F.2d 1020, 1025 (9th Cir. 1970); *SEC v. Rind*, 991 F.2d 1486, 1492-93 (9th Cir.1993), *cert. denied*, 510 U.S. 963 (1993).[9]

The Eleventh Circuit's judge-made expansion of Section 2462 runs counter to congressional intent. The legislative history of the Act shows that Congress intended that the relief available through citizen suits should be co-extensive with that available through government enforcement. *See* S. Rep. No. 91-1196, p. 38 (1970)("There should be no inconsistency in the enforcement of such standards.").[10] The language of

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[9] *But see United States v. Telluride Co.*, 884 F. Supp. 404, 409-10 (D. Colo. 1995), *rev'd*, 146 F.3d 1241 (10th Cir. 1998); *United States v. Windward Properties, Inc.*, 821 F. Supp. 690, 693 (N.D. Ga. 1993); *National Parks Conservation Association v. TVA*, No. 3:01-CV-71, 2005 U.S. Dist. LEXIS 44601, at *26-28 (E. D. Tenn. March 11, 2005), *rev'd*, 480 F.3d 410 (6th Cir. 2007).

[10] Accordingly, since both the Tenth and Eleventh Circuits have held that claims for injunctive relief should not be barred, neither should actions brought by citizens. *See United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997); *Telluride Co.*, 146 F.3d at 1244-49.

the Act itself further shows that Congress viewed the availability of injunctive and civil penalty relief to be distinct. *See* 42 U.S.C. 7413 (In this section governing EPA enforcement, the Act states: "The Administrator shall, as appropriate . . . commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty . . . or both."); *see also* 42 U.S.C. 7604(a)(In the citizen suit section, the Act states: "The district courts shall have jurisdiction . . . to enforce such an emission standard or limitation . . . and to apply any appropriate civil penalties."). Despite these provisions discussing the availability of injunctive relief, the only limitations provision discussed in the Act is Section 2462,[11] which again, specifically refers only to penalty actions. Had Congress wished to time-bar separate actions or claims for injunctive relief, it would have done so. Thus, the Eleventh Circuit invented a limit on CAA remedies that has no basis in law and runs counter to Congress's intent to allow citizens to enforce the Act's protections for public health and welfare.

The basis for the Eleventh Circuit's improper judicial redrafting of section 2462 was the concurrent remedy doctrine, a doctrine rarely addressed by this Court since the advent of the modern federal rules of civil procedure and a doctrine that this Court has never applied so as to limit injunctive remedies expressly provided for by Congress as part of a comprehensive statutory scheme like the Clean Air Act. Even where it properly applies, the concurrent remedy doctrine in narrow in scope, covering claims arising in concurrent equitable jurisdiction. *See*

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[11] *See* 42 U.S.C. 7413.

Russell v. Todd, 309 U.S. 280, 287 (1940).

The Eleventh Circuit should not have invoked the concurrent remedy doctrine to supplant Congress's carefully crafted remedial scheme, one that allows citizens to secure injunctions of ongoing violations of the Act. But the court of appeals compounded its error by proceeding to adopt a sweeping version of the concurrent remedy doctrine that is inconsistent with the doctrine's traditional tenets. Under the Eleventh Circuit's approach, the doctrine applies whenever "an action at law or equity could be brought on the same facts." App. 24a. Under the proper approach, application of the doctrine turns not on whether the same facts can make out a claim at law or in equity, but rather whether the facts make out a claim arising in concurrent, rather than exclusive, equitable jurisdiction. This Court explained this distinction in *Russell v. Todd*, 309 U.S. 280 (1940):

> In federal courts of equity the doctrine of laches was early supplemented by the rule that when the question is of lapse of time barring relief in equity, such courts, even though not regarding themselves as bound by state statutes of limitations, will nevertheless, ***when consonant with equitable principles***, adopt and apply as their own, the local statute of limitations applicable to the equitable causes of action in the judicial district in which the case is heard.
>
> Even though there is no state statute applicable to similar equitable demands, when ***the jurisdiction*** of the federal court ***is concurrent*** with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations. It thus stays its hand

> in aid of a legal right which, under the Rules of Decision Act, would be unenforcible [sic] in the federal courts of law as well as in the state courts.
>
> ***But where the equity jurisdiction is exclusive*** and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling.

Id. at 288-89 (emphasis added, citations omitted). *See also Cope*, 331 U.S. at 463-64 (finding that even though the case arose in equity, the statute of limitations barred the claim because "the scope of the relief sought and the multitude of parties sued [gave] ***equity concurrent jurisdiction*** to enforce the legal obligation [there] asserted")(emphasis added); *Hughes v. Reed*, 46 F.2d 435, 438 (10th Cir. 1931)("Where the jurisdiction of law and equity are concurrent, the applicable statute of limitations of the state governs, and not the equitable doctrine of laches. There is some confusion in the authorities upon the point, ***growing out of a failure to distinguish a purely equitable action*** against corporate officers, as to enforce a trust, and a legal action seeking money damages for a breach of statutory or common-law duty, brought in equity for convenience. ***It is only in the latter case that concurrent jurisdiction exists.***" [emphasis added])..

As explained in Pomeroy's at § 139, "concurrent" equity jurisdiction "embraces all those civil cases in which the primary right, estate, or interest of the complaining party sought to be maintained, enforced, or redressed is one which is *cognizable by the law*, and in which the remedy conferred is of the same kind as

that administered, under the like circumstances, *by the courts of law*– being ordinarily a recovery of money in some form." ***The existence of concurrent equitable jurisdiction*** is founded on the inadequacy of a concurrent legal remedy, *i.e.*, a remedy "of the same general nature" as an equitable remedy, which may be applied to supplement a legal remedy and provide complete relief. *Id.* at §§ 173, 175, 139. "The very definition of . . . [concurrent equitable] jurisdiction assumes that the remedies administered under a given state of circumstances, by equity and by the law, are ***substantially the same***, – recoveries of money, or of specific tracts of land, or of specific chattels." *Id.* at § 173 (emphasis added).[12]

On the other hand, "exclusive" equity jurisdiction was exercised when the remedy was one equity courts alone could confer, even where legal remedies were also available for the same violation. *Id.* at § 138.

> Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the exclusive jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give some remedy. Thus a suit to compel the specific performance of a contract falls under the exclusive jurisdiction of equity, although a legal right also arises from the contract, and courts of law will give the remedy of damages for its violation.

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[12] *See* Pomeroy's at §§ 185-188 (examples of actions falling within concurrent jurisdiction, including contribution, exoneration and accounting).

Id.

Injunctive relief, including injunctive relief addressing nuisances, *id.* at ¶ 221a, was always considered part of an equity court's "exclusive jurisdiction" and not "concurrent jurisdiction." *Id.* at §§ 136 ("remedies granted . . . of a kind which are peculiar to equity courts [include] . . . injunction"), 110, 170, 172, 221, 221a; *see also Federal Election Commission v. Christian Coalition*, 965 F. Supp. 66, 71 (D.D.C. 1997)("injunctive relief is based solely on equity's 'exclusive jurisdiction'"); *Gruca v. U.S. Steel Corp.*, 495 F.2d 1252, 1258 (3d Cir. 1974)(jurisdiction is "exclusive" and not "concurrent" when the remedy sought cannot be achieved at law).

The critical mechanism for distinguishing between exclusive and concurrent equity jurisdiction has never been an examination of the substantive right forming the basis of the action because exclusive equitable jurisdiction may exist where an underlying right is purely legal, such as a case premised on a statutory right (like the case here).

> The remedies particular to equity are not confined to cases in which the primary right of the complaining party, whatever be its kind, is equitable; they are given in numerous classes of instances where such a right ... is wholly legal. Thus a legal estate in land may be protected by the exclusively equitable remedy of injunction against nuisances . . . . Again, the particular fact or event which gives rise to the right to such a remedy, may also be the occasion of a legal remedy and a legal remedial right simultaneous with the equitable one. This is especially true with reference to fraud, mistake, and accident.

> Fraud may at the same time be the occasion of the legal remedy of damages and of the equitable relief of cancellation. These two cases cannot, however, be regarded or treated as belonging to the concurrent jurisdiction; such a mode of classification could only be productive of confusion.

Pomeroy's at § 138. Thus, to distinguish between exclusive and concurrent equitable jurisdiction, one assesses whether the remedy involved "is given by courts of equity alone," in which case the action falls under exclusive jurisdiction, not concurrent jurisdiction. *Id.*

Had the court of appeals properly applied the decisions of this Court, it would have concluded that the concurrent remedy doctrine has no application. The doctrine only operates when there are two remedies, one at law and one within concurrent equity jurisdiction, which are "of the same general nature" in terms of the relief to be provided. *See, e.g.*, Pomeroy's at § 175. Not only does the injunctive relief remedy not fall within concurrent equity jurisdiction, but also it is a remedy wholly different in nature.

Given that petitioners' claims for injunctive relief arise in exclusive equitable jurisdiction, neither the concurrent remedy doctrine nor the statute of limitations apply. *See Holmberg*, 331 U.S. at 463-64. Accordingly, petitioners ask this Court to grant review so that TVA's illegal and harmful operation of Colbert 5 without an NSR permit will not continue to go unchecked.

III. THE ELEVENTH CIRCUIT'S RULING DISMISSING PETITIONERS' NSPS CLAIM FOR INADEQUATE NOTICE GROUNDS IS AN UNSUPPORTED RESTRICTION ON CITIZEN SUITS INCONSISTENT WITH CAA REGULATIONS.

In finding petitioners' pre-suit notice inadequate, the Eleventh Circuit imposed restrictions not required by law. As the Eleventh Circuit noted, App. 26a, EPA regulations specify that notice letters must provide "sufficient information to permit the recipient to identify" the specific standard being violated, the violative activity and the responsible persons, the date and location of the alleged violation, and the name and address of the person giving the notice. 42 U.S.C. 54.3(b). The Eleventh Circuit acknowledged that petitioners' notice letters provided all of this information, but because it found the notice requirement must be "strictly construed" to give the alleged violator the opportunity to fix the problem, the court faulted the letter as overbroad. App. 29a.

The Eleventh Circuit erred because although it acknowledged that the notice letter must be reviewed *de novo*, the court never compared the notice letter with the complaint. It is true that the notice letter made the broad assertion that TVA had violated all of Subpart Da's requirements since 1982, App. 29a, but the complaint makes exactly the same assertion. (Doc 80 ¶ 91). More importantly, petitioners had a good faith belief when they issued the notice letter that because TVA denied, and indeed denies to this day, that it is subject to Subpart Da, that TVA was violating all of subpart Da's requirements. Petitioners also

based this good-faith belief on the fact that EPA made the very same allegation when it issued its administrative order to EPA regarding the same modification in 1999. *See In re TVA,* 2000 WL 1358648 (see text preceding fn19], 9 E.A.D. 357, 378 (EPA ALJ Sep 15, 2000), *motion to dismiss denied by, TVA v. United States EPA,* 278 F.3d 1184 (11th Cir. 2002), *opinion withdrawn in part by, TVA v. Whitman,* 336 F.3d 1236 (11th Cir. 2003), *cert. denied,*541 U.S. 1030 (2004).

During the course of discovery, petitioners learned, and acknowledged, that although much of what they had alleged in the notice letter was true, *i.e.*, that TVA had become subject to Subpart Da for all pollutants and had never complied with the emission limits for SO_2 or any of the recordkeeping and reporting requirements, TVA actually had been complying, at times, with Subpart Da's emission limitations for NOx and particulate matter. Nevertheless, because petitioners had a good-faith basis for the allegations in the notice letter, and because the notice letter's allegations matched those in the complaint, petitioners' NSPS claim should not have been dismissed. Accordingly, petitioners seek review to clarify that the adequacy of notice letters must be evaluated based on the pleadings and whether plaintiffs had a good-faith basis for the allegations in the notice letter when the complaint was filed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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