

No. 05-848

In the Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,

Petitioners,

v.

DUKE ENERGY, ET AL.,

Respondents.

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

**BRIEF OF *AMICI CURIAE* NATIONAL PARKS
CONSERVATION ASSOCIATION
AND OUR CHILDREN'S EARTH FOUNDATION
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST¹

The National Parks Conservation Association (“NPCA”) is a nonprofit citizen organization whose purpose is to protect and enhance the natural and cultural resources of America’s National Park System as well as forests, wilderness, and open space areas through research, public education, advocacy, and litigation. NPCA was founded in 1919 and today has over 450,000 members nationwide. NPCA, with its members, is active in protecting air quality in natural areas of interest.

As part of its activities, NPCA is a plaintiff in two Clean Air Act citizen suits against the Tennessee Valley Authority alleging the same type of violations at issue in this case. *Nat’l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (pending) and *National Parks Conservation v. TVA*, No. 06-10729-J (11th Cir.) (pending). NPCA contends that these alleged violations (from TVA plants located in Alabama and Tennessee) cause hundreds of tons of needless pollution annually and are having a significant adverse impact on protected federal lands, including Great Smoky Mountains National Park.

Our Children’s Earth Foundation (“OCE”), a non-profit membership organization, is dedicated to protecting the public, especially children, from the health impacts of pollution and other environmental hazards and to improving environmental quality for the public benefit. OCE has members in Tennessee, and to protect the interests of its members, particularly from the impact of TVA’s alleged excessive emissions of sulfur dioxide

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than amici curiae or their counsel made any monetary contributions to its preparation or submission. Both Petitioner and Respondent consented to this filing; their letters of consent are being submitted with the brief.

(a precursor to fine particle pollution),² OCE has joined NPCA as a plaintiff in the Clean Air Act citizen suit in Tennessee. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (currently pending).

SUMMARY OF ARGUMENT

The Fourth Circuit's decision in this case did precisely what the Clean Air Act's enforcement scheme was designed to prevent: permit a facial challenge to a regulation in the context of an enforcement action. 42 U.S.C. § 7607(b)(2). This brief in support of the petition focuses on the plain language of the applicable regulations themselves and shows the Fourth Circuit's decision does not comport with that language. Accordingly, this analysis shows that the Fourth Circuit failed to analyze the regulatory text at all, but based its holding instead on a theory that the regulations are inconsistent with the statute. This invalidation of the regulations was proper only in the D.C. Circuit, and that circuit has upheld the regulations. Allowing this type of collateral attack on a validly promulgated regulation would undermine the enforcement scheme created by Congress for the Clean Air Act and many other environmental statutes. Furthermore, given the serious air pollution problems in national parks caused by power plants, and the number of those plants that have allegedly violated the regulations at issue here, this case is of compelling national interest.

² See (Proposed) Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566, 4572 (Jan. 30, 2004) (“Mass associated with ammonium sulfate concentrations make up a significant portion (25 to 50 percent) of the annual average PM_{2.5} mass. The largest sulfate contributions to PM_{2.5} mass occur during the summer season mainly within a large multi-State area centered near Tennessee and Southwest Virginia.”).

ARGUMENT

A. THE UNDERLYING ISSUE IN THE CASE.

Under the Clean Air Act's Prevention of Significant Deterioration program ("PSD"), 42 U.S.C. §§ 7470-79, if an owner of a major stationary source makes a "major modification," then it becomes subject to emission limits known as "Best Available Control Technology" ("BACT"). 40 C.F.R. §§ 51.166 § (i) and (j). In this case, the plaintiffs alleged that Duke Energy had undertaken 29 projects at eight coal-fired power plants between 1988 and 2000, and each of these projects met the definition of "major modification." Pet. App. 25a-26a. Because these projects were "major modifications," Duke Energy should have obtained stringent BACT emission limits for them, but it never did. The plaintiffs seek an order requiring Duke Energy to obtain the emission limits and operate under them, potentially leading to reductions in hundreds of thousands of tons in sulfur dioxide and nitrogen oxide emissions.

In order to have a "major modification" for the purposes of the PSD program, there must be: (1) a physical change in or change in the method of operation at a major stationary source that would (2) result in a significant net emissions increase. 40 C.F.R. § 51.166(b)(2). The Fourth Circuit's opinion focused on this second element. The plaintiffs contended that in order to have a modification, there must be an increase in *annual* actual emissions. Pet. App. 6a-7a. The defendant utility contended that there must be an increase in the *hourly* rate of emissions. Pet. App. 6a-7a. Which test applies has practical real world consequences.

The measure of a power plant's ability to generate power in a particular hour is known as its "capacity." Pet. App. 67a.

A power plant, as it ages, may be able to maintain its maximum capacity when it is operating, but it may not be available to generate power around the clock, particularly because malfunctions, or “forced outages,” cause unplanned shutdowns. *United States v. Ohio Edison Company*, 276 F. Supp. 2d 829, 838 (S.D. Ohio 2003). Accordingly, a power company can undertake massive overhauls that eliminate forced outages, significantly improving a plant’s availability, on an *annual* basis, yet leave its “capacity” to generate power in any particular *hour* when it is operating, unchanged. In this case, Duke Energy argued that its projects did not trigger the PSD regulations because the projects did not increase the facilities’ hourly capacity. Pet. App. 7a. Thus, if the applicable regulations are interpreted to require an increase in *annual* actual emissions, the projects, assuming they are found to be non-routine, triggered the PSD regulations, but if the regulations are interpreted to require an increase in the *hourly* rate of emissions, they did not.

B. THE FOURTH CIRCUIT’S INTERPRETATION CANNOT BE SUPPORTED BY THE LANGUAGE OF THE REGULATIONS.

In this case, the Fourth Circuit, under the guise of “interpreting” the applicable regulations, held that in order to have a “major modification,” a project must lead to an increase in the hourly rate of emissions, not just an increase in annual actual emissions. Pet. App. 6a-7a. The language of the applicable regulations cannot support the Fourth Circuit’s interpretation, however. Accordingly, the only way the Fourth Circuit could have achieved its holding was by invalidating the regulation, something it had no jurisdiction to do. 42 U.S.C. 7607(b)(2). This brief, offered in support of the Petition, closely examines the applicable regulations to show that they cannot support the Fourth Circuit’s result.

In 1980, EPA issued regulations providing guidance to States on how to structure PSD programs in their State Implementation Plans (“SIPs”). 45 Fed. Reg. 52676 (Aug. 7, 1980). (EPA recodified these regulations into 40 C.F.R. § 51.166 in 1987). The states of North Carolina and South Carolina incorporated these federal regulations into their SIPs in 1982. *See* 47 Fed. Reg. 7836, 7837 (Feb. 23, 1982) (North Carolina) and 47 Fed. Reg. 6017 (Feb. 10, 1982) (South Carolina). Thus it is the language of 40 C.F.R. § 51.166 that must be the focus in this case.

The regulations define “major modification,” subject to key exceptions discussed below, as:

[A]ny physical change in or change in the method of operation of a major stationary source that would result in a significant *net emissions increase* of any pollutant subject to regulation under the Act.

40 C.F.R § 51.166(b)(2)(I) (emphasis added). Pet. App. 103a.

“Net emissions increase” is defined as follows:

[T]he amount by which the sum of the following exceeds zero: (a) [a]ny increase in *actual emissions* from a *particular physical change or change in the method of operation* at a stationary source; and (b) [a]ny other increases and decreases in *actual emissions* at the source that are contemporaneous with the *particular change* and are otherwise creditable.

40 C.F.R § 51.166(b)(3)(i)(emphasis added). Pet. App. 104a.

The key analysis under this definition is whether the particular “change” will lead to an increase in “actual

emissions.” This term “actual emissions” has a lengthy definition:

(i) “Actual emissions” means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii)- (b)(21)(iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, *in tons per year*, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is *representative of normal source operation*. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit’s actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) *For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.*

40 C.F.R § 51.166(b)(21) (emphasis added).

Given this language, to determine whether an increase in “actual emissions” will occur, one generally looks to the facility’s annual emissions for the two years preceding the project, 40 C.F.R § 51.166(b)(21)(ii), and compares them to the facility’s emissions after the project. This analysis, of course,

must occur before a project is undertaken, and so EPA, in promulgating the regulation, had to develop some methodology for estimating what actual emissions would be after the project. EPA exercised its discretion and chose to define “actual emissions” for a facility that had not begun “normal operations” to be the facility’s “potential to emit”³ after the project. 40 C.F.R § 51.166(b)(21)(iv). The D.C. Circuit upheld EPA’s decision to interpret the emissions increase test in this way in *New York v. Environmental Protection Agency*, 413 F.3d 3, 18 (D.C. Cir. 2005).

This test is commonly known as the “actual to potential” test, Pet. App. 57a, and it sweeps many sources into the PSD program because of its inherent assumption that sources, after making a modification, will operate “24 hours per day, 365 days per year.” *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 916 (7th Cir. 1990). The Seventh Circuit, however, rejected the application of this test, holding that if a power plant is engaged in a “like-kind replacement,” then EPA cannot properly say that the source making the modification has not commenced normal operations. *Id.* (interpreting 40 C.F.R § 51.166(b)(21)(iv)).

After the Seventh Circuit’s 1990 ruling, EPA created a special emissions increase test exclusively for power plants that allows a plant owner to determine whether emission increases

³ The regulations define “potential to emit” as: “the 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 the 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. Secondary emissions do not count in determining the potential to emit of a stationary source.” 40 C.F.R § 51.166(b)(4).

will occur by comparing actual emissions prior to the change with its projection of what annual emissions will be after the change, but only if it reports to EPA on its post-project emissions. 57 Fed. Reg. 32314, 32335 (July 21, 1992)(adding 40 C.F.R § 51.166(b)(21)(v)). This special test, (the “actual-to-projected-actual test”) has no application in this case because at the time most of the projects occurred, the rule change was not incorporated into the North Carolina and South Carolina SIPs. Furthermore, Duke Energy never reported on its post-project emissions, so it could not benefit from the rule’s provisions in any event.

Whether the “actual emissions” definition, 40 C.F.R § 51.166(b)(21), is interpreted as imposing an “actual-to-potential” test, or an “actual-to-future-actual” test is, for the purposes of this case, irrelevant.⁴ Both tests compare annual emissions before and after a project; the regulatory language does not support an interpretation yielding an hourly emissions test. See 40 C.F.R § 51.166(b)(21)(ii)(“[A]ctual emissions . . . shall equal the average rate, in *tons per year*, at which the unit actually emitted the pollutant . . .”).

The Fourth Circuit, as mentioned above, never discussed the actual language of the regulations, but the district court did, finding that an exception contained within the definition of “major modification,” 40 C.F.R § 51.166(b)(2)(iii)(f), (the “increased hours” exclusion) imposes, despite the language set forth above, the hourly emissions test. Pet. App. 72a. The language focused upon by the district court is as follows:

(2)(i)“Major modification” means any physical change in or

⁴ EPA was prepared to proceed in the case using the actual-to-projected-actual test. Pet. App. 58a, n. 17.

change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair, and replacement;

(b) Use of an alternative fuel or raw material by reason of any order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) Use of an alternative fuel or raw material by a stationary source . . . ;

(f) ***An increase in the hours of operation or in the production rate***, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975,

pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166.

...

40 C.F.R § 51.166(b)(2)(emphasis added). The district court ruled that the “increased hours” exclusion required “that in calculating post-project emissions, the EPA must hold the pre-project and post-project hours and conditions of operation constant.” Pet. App. 72a.

The district court’s analysis was incorrect. As mentioned above, the “modification” test has two elements. First, a source must determine whether a physical or operational change will occur. 40 C.F.R. 51.166(b)(2)(i). Second, if so, the source must determine whether that change will result in a significant net emissions increase. *Id.* By its explicit terms, the “increased hours” exclusion applies at the first step of the analysis, not the second step. Furthermore, the definition of “net emissions increase,” 40 C.F.R. § 51.166(b)(3)(i), analyzes whether “a particular physical change or change in the method of operation” at a source has increased emissions. A project that falls within the “increased hours” exclusion could never qualify as the type of “change” that subsection (b)(3)(i) addresses. To put it another way, if the “increased hours exclusion” applies to a project, it would be unnecessary to go on and conduct the “emissions increase” analysis because the activity in question would have already been found exempt.

Thus the plain language of the regulations does not support a conclusion that the “increased hours” exclusion affects the calculation of a “net emissions increase.” As the court said in *United States v. Cinergy Corp.*, 384 F. Supp. 2d 1272, 1278 (S.D. Ind. 2005): “the plain meaning of the increased hours exclusion is that an increase in hours or production rate are not

a ‘physical change’ and thus cannot, alone, be a modification. Increased hours and production rate are not excluded from the definition of ‘modification’; that is, if a physical change results in an increase in hours of operation that causes a net emissions increase, a modification has occurred.”⁵

Accordingly, what the Fourth Circuit should have done in this case is determine, by carefully reading the regulations, whether the district court’s interpretation of the regulations was correct. Instead, the Fourth Circuit failed to “interpret” the regulations at all. Instead, it examined whether the regulations comported with its view of what the statute required, and that type of review was reserved by Congress for the D.C. Circuit, which upheld the regulations in the *New York* case, 413 F.3d 3.

C. ALLOWING A COLLATERAL ATTACK OF AN ENVIRONMENTAL REGULATION IN THE CONTEXT OF AN ENFORCEMENT ACTION WOULD UNDERMINE THE ENFORCEMENT SCHEME OF MANY ENVIRONMENTAL STATUTES.

Allowing the type of collateral attack on the regulations that occurred in this case would not only undermine the Clean Air Act’s enforcement scheme, but similar restrictions on judicial review established by Congress in many other environmental statutes. Examples abound:

⁵ Indeed, if the hours-of-operation exclusion were interpreted to include increases in hours of operation that resulted from actual physical modifications, it would lead to the following anomalous result: if a project made physical changes to a source that increased the source’s capacity to produce in any particular hour, but did not increase the source’s availability to operate more hours, then that project would trigger PSD, but if the project increased *both* capacity and availability, it would not.

- *Clean Air Act*. 42 U.S.C. § 7607(b)(1) provides in pertinent part (emphasis added) that:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . .

42 U.S.C. § 7607(b)(2) provides in pertinent part that:

Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. . . .

Applying these provisions, the Third Circuit, in the context of a criminal proceeding for violations of asbestos removal work practice standards, refused to entertain an argument that the regulation was invalid. *See United States v. Ho*, 311 F.3d 589, 607 (5th Cir. 2002), *cert. denied* 539 U.S. 914, 123 S. Ct. 2274 (2003). *See also Getty Oil Co.*

(Eastern Operations), Inc. v. Ruckelshaus, 467 F.2d 349, 359 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (“Failure to utilize the section 307 proceeding forecloses review in a civil or criminal proceeding for enforcement.”); *Commonwealth of Virginia v. United States*, 74 F.3d 517, 525 (4th Cir. 1996) (“Because Congress wanted prompt and conclusive review in air quality controversies, it channeled (to the courts of appeals) all challenges, regardless of their basis, of EPA rules and final actions.”); *Madison Gas & Electric v. U.S. E.P.A.*, 4 F.3d 529 (7th Cir. 1993) (Challenge to national feature of acid rain program, such as tradability of emission allowances, may be brought only in Court of Appeals for the District of Columbia Circuit, even if impact of program varied greatly across the country).

- ***Clean Water Act***. 33 U.S.C. § 1369(b)(2); *see Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) (“Reviewability under section 1369 carries a peculiar sting. . . . If an EPA action is reviewable under section 1369(b)(1), then it “shall not be subject to judicial review in any civil or criminal proceeding for enforcement.” 33 U.S.C. § 1369(b)(2).”); *see also American Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288-89 (7th Cir. 1989) (“the Clean Water Act bars review in enforcement proceedings of actions that could have been reviewed earlier”); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.* 702 F. Supp. 690, 693 (N.D. Ill. 1988) (“Section 1369(b)(1)(F) permits review of an EPA action issuing or denying a permit only in the Circuit Court of Appeals. Section 1369(b)(2) then expressly bars review of an EPA-issued or EPA-denied permit in any District Court enforcement proceeding.”);
- ***Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)***, 42 U.S.C. § 9613(a); *see*

U.S. Ecology, Inc. v. Carlson, 638 F. Supp. 513, 518-19 (C.D. Ill. 1986)(challenge to a listing on the National Priorities List can only be brought in the D.C. Circuit);

- ***Toxic Substances Control Act (“TSCA”)***, 15 U.S.C. § 2618(a); *see Dow Chemical Co. v. Costle*, 484 F. Supp. 101, 104 (D. Del. 1980)(court ruled it had no jurisdiction because, although chemical company claimed it was challenging interpretation and application of regulation imposing a ban on manufacture, it was in fact challenging validity of regulation itself);
- ***Resource Conservation and Recovery Act (“RCRA”)***, 42 U.S.C. § 6976(a)(2);
- ***Safe Drinking Water Act***, 42 U.S.C. § 300j-7(a).

In statute after statute, Congress has consistently established a sensible system for judicial review. Challenges to regulations must be brought in the D.C. Circuit, and usually within 90 days of promulgation. Enforcement actions are not to be hindered by such challenges. The Fourth Circuit’s decision upsets this carefully crafted system for the administration of justice.

D. THE OUTCOME IN THIS CASE COULD HAVE BROAD IMPLICATIONS ON THE AIR QUALITY IN THE NATION’S NATIONAL PARKS.

The nation’s national parks are threatened by air pollution. A report issued by the amici NPCA and OCE, along with another organization, Appalachian Voices, details the damage being caused throughout the park system by air pollution focusing on Great Smoky Mountains National Park, Shenandoah National Park, Mammoth Cave National Park,

Sequoia and Kings Canyon National Parks, and Acadia National Park. *See* National Parks Conservation Ass’n, et. al, “Code Red: America’s Five Most Polluted National Parks” (September 2002).⁶ This report focuses on three types of impact: haze, ground level ozone, and acid precipitation. *Id.* at 1.

The nation’s parks are suffering these injuries even though Congress sought to remedy the air pollution problem in parks almost 30 years ago with the Clean Air Act Amendments of 1977. Pub. L. 95-95, 91 Stat. 685 (1977). This Act granted special protections to National Parks. *See* 42 U.S.C. § 7472 (designating national parks over 6000 acres in size as Class I areas) and 42 U.S.C. § 7475(d) (requiring additional measures to insure that new and modified sources seeking permits under the PSD program do not adversely impact Class I areas). Indeed, the Act contains an entire program dedicated to improving and protecting visibility in Class I areas. 42 U.S.C. §§ 7491-92.

Twenty-nine years ago, Congress stated: “[the] visibility problem is caused primarily by emission into the atmosphere of sulfur dioxide, oxides of nitrogen and particulate matter, especially fine particulate matter, from inadequate[ly] controlled sources.” H.R. Rep. 294, 95th Cong. (1977), at 204, 1977 U.S.C.C.A.N. 1077, 1283 (1977). According to the National Research Council, emissions of sulfur oxides from electric utilities “alone are responsible for slightly more than one-half of anthropogenic light extinction. This is because sulfates are the predominant component of anthropogenic haze in the East and electric utilities are the predominant emitter of SO₂ (sulfur

⁶ Available at: http://www.npca.org/across_the_nation/visitor_experience/code_red/codered.pdf (last visited March 5, 2005).

dioxide) in the East. National Research Council, “Protecting Visibility in National Parks and Wilderness Areas” (1993), at 216.

Although EPA has recently developed two rulemakings to curb park-harming emissions from power plants, the Regional Haze Rule, 64 Fed. Reg. 35714, (July 1, 1999) and 70 Fed. Reg. 39104 (Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations), and the Clean Air Interstate Rule (“CAIR”), 70 Fed. Reg. 25162 (May 12, 2005), those rules do not supersede the New Source Review rules, and they do not take effect until 2015. *See* 70 Fed. Reg. 39145 (2005).

As Congress debated the 1977 Amendments to the Clean Air Act, it believed that old, uncontrolled plants were being phased out:

There are in the United States approximately 200 old coal-fired power plants over 20 years of age. These plants are moving into the second half of their useful service life. They are operating at reduced capacity factors--some are used on cyclical or peaking loads only and most operate at less than 50 percent of their stated capacity. They are typically among the most expensive units to operate on a system. Most will be totally phased out of operation in the next 5 to 20 years.

S. Rep. No. 127, 95th Cong. (1977), at 128 (Statement of Senator Baker). Thus, as the D.C. Circuit noted in 1980:

Implementation of the statute’s definition of “modification” will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for *de minimis* increases. The

statutory scheme intends to “grandfather” existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit. Exceptions to this rule will occur when the increases are de minimis, and when the increases are offset by contemporaneous decreases of pollutants. . . .”

Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1980); *see also Ohio Edison*, 276 F. Supp. 2d at 850 (“Congress chose to ‘grandfather’ existing pollution sources from the NSPS and NSR provisions at the time the statute was enacted. . . . Congress did not, however, intend that such existing sources be forever spared the burden and expense of installing pollution control devices.”).

This case and others filed by the Department of Justice and citizens seek to bring into compliance sources that have attempted to evade New Source Review requirements on a massive scale. In 1999, along with this case, the Department of Justice filed actions against six other utility companies covering 17 power plants. U.S. Department of Justice, U.S. EPA, “U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act,” press release, November 3, 1999.⁷ At that time, EPA issued administrative orders and notices of violation covering an additional 15 plants. *Id.* EPA and the Department of Justice estimated that the failure of the identified utilities to comply with the New Source Review regulations had “resulted in tens of millions of tons of sulfur dioxide, nitrogen oxides, and particulate matter illegally emitted into the air.” *Id.*

⁷ Available at: <http://www.usdoj.gov/opa/pr/1999/November/524enr.htm> (last visited March 5, 2006).

Given the seriousness of the air pollution problems in the national parks caused by power plants and other industrial sources, and given the allegations by EPA and the Department of Justice of violations of the New Source Review Regulations by the utility sector, amici urge the Court to grant review of the Fourth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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