A BLUEPRINT FOR EPA: HOW THE AGENCY CAN OVERCOME THE STATUTE OF LIMITATIONS WHEN ENFORCING PSD UNDER THE CLEAN AIR ACT

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INTRODUCTION

This Article presents three legal theories that the Environmental Protection Agency (EPA) could employ in order for it to effectively enforce the Prevention of Significant Deterioration (PSD) requirements for stationary sources under the Clean Air Act (CAA) when the PSD violations are arguably beyond the five-year statute of limitations.1 In doing so, the Article explores various hurdles EPA would encounter. It also presents legal and policy arguments explaining why the courts should allow EPA to enforce PSD despite the statute of limitations.

Consider this hypothetical: a coal-fired power plant, subject to regulation under the CAA, re-constructs a number of its units in order to increase its life expectancy. In modifying its units, the plant operator fails to obtain a pre-construction permit 2 and does not install best available control technology (BACT),3 despite the fact that it is required to do so by the PSD provisions of the CAA.4 This modification results in a significant increase in emissions of sulfur dioxide, nitrogen oxides, and particulate matter—all of which are chemicals that pose a substantial risk of harm to human health5 and the environment.6 For

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3 See id. at § 7475(a)(4).
4 See id. at §§ 7475; 7475(a)(4).
5 See, e.g., Public Health Statement for Sulfur Dioxide, Cas#7446-09-5, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY FOR THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, (Dec. 1998), http://www.atsdr.cdc.gov/ToxProfiles/p116-c1-b.pdf (states that “short-term exposures to high levels of sulfur dioxide can be life-threatening,” citing the “burning of the nose and throat, breathing difficulties, and severe airway obstructions” as symptoms of sulfur dioxide inhalation. Also states that animal studies indicate “decreased respiration, inflammation or infection of the airways, and destruction
example, sulfur dioxide and nitrogen oxides serve as precursors to acid rain and may cause respiratory-related illness and death. In addition, particulate matter often contributes to smog and may lead to lung and heart disease, particularly in older adults and children. Suppose EPA does not find out about the power plant’s PSD violation until after five years have passed, which is common, because the records that are used to discover violators often contain insufficient data to allow EPA to identify sources that meet the criteria of violating PSD. When the statute of limitations becomes applicable, is there any way that EPA can still hold the facility accountable? A number of courts seem to indicate that the facility will avoid accountability.

of areas of the lung” from such inhalation); see also ToxFAQs for Nitrogen Oxides, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, (Apr. 2002), http://www.atsdr.cdc.gov/toxFAQs/facts175.pdf (states that “breathing high levels of nitrogen oxides can cause rapid burning, spasms, and swelling of tissues in the throat and upper respiratory tract, reduced oxygenation of body tissues, a build-up of fluid in your lungs, and death.”); see also Health Consultation: Site Follow-up and Update, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, (Mar. 2008), http://www.atsdr.cdc.gov/HAC/pha/PicatinnyArsenalHC031808/PicatinnyArsenalHC031808.pdf (states that “exposure to [particulate matter] is linked to a variety of health conditions, ranging from aggravated asthma and heart disease to premature death in people with heart and lung disease. . . . Sensitive populations include older adults, people with heart and lung disease, and children.”).

6 See, e.g., Air Pollution: Sulfur Dioxide, CLEAN AIR TRUST (1999), http://www.cleanairtrust.org/sulfurdioxide.html (“Sulfur dioxide and nitrogen oxides are the major precursors of acid rain, which has acidified soils, lakes and streams, accelerated corrosion of buildings and monuments, and reduced visibility.”); see also Region 7 Air Program: Health and Environmental Effects of Particulate Matter, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF AIR AND RADIATION, OFFICE OF AIR QUALITY AND PLANNING STANDARDS (July 1997), http://www.epa.gov/region07/air/quality/pmhealth.htm (states that particulate matter is “a major cause of visibility impairment in many parts of the U.S.” Also states that, particulate matter causes “the U.S. visual range” to be “reduced 70% from natural conditions in many parts of the country.” Also states that “twenty percent of the problem on dirtiest days in [Rocky Mountain National] Park [for example] is attributed to Los Angeles-generated smog” caused by particulate matter. EPA also states that “airborne particles can also cause soiling and damage to materials.”).

7 See supra notes 5–6.

8 See, e.g., Ivan Leiben, Catch Me if You Can – The Misapplication of the Federal Statute of Limitations to Clean Air Act PSD Permit Program Violations, 38 ENVTL. L. 667, 680 (2008); see also Paul Greywall, Preparing for Clean Air Act Section 114 Requests: Procedures of Internal PSD Auditing 3 (2000), http://www.environmental-expert.com/Files/20658/articles/4846/tp_sect114.pdf (discussing how even a major stationary source owner often may have difficulty in accessing its own plant records for internal PSD audits based on a number of factors, including “changed . . . ownership” of power plants over time, facility data not being “tracked until recently,” and many employees not working at facilities over a long-term period).

Many recent district court decisions, as well as the Eleventh Circuit, have held that civil penalty claims for PSD violations are precluded by the statute of limitations when the modifications take place more than five years before EPA initiates the enforcement action. Unfortunately, this judicial trend has significantly interfered with EPA’s PSD enforcement efforts. While these courts still recognize claims by EPA for injunctive relief, such claims fail to substitute for assessing penalties against corporate polluters. Unlike injunctive relief, penalties ensure that “the economic benefit of a violation is recaptured, the violator is properly punished, and future violations are deterred.” The threat of penalties helps assure compliance with the CAA as potential violators may think twice before modifying their units illegally. The threat of penalties also provides corporate polluters with a strong incentive to settle cases early with EPA to ensure lower fines. By adopting an overly strict application of the statute of limitations, however, the courts have “stripped” EPA of its ability to collect fines and have removed EPA’s “leverage for obtaining . . . early settlement . . . as defendants may believe they have better chances of obtaining no or small penalties if they actually litigate the claims.” In effect, “judges are sending the wrong message to violators that they can get a ‘free pass’ . . . if they can escape detection for long enough.”

In response to this dilemma, this Article, in Part I, describes the framework for the five-year statute of limitations. Subsequently, Part II presents three theories that EPA could pursue in order to overcome the statute of limitations when enforcing a PSD penalty claim. These theories would allow EPA to collect civil penalties against PSD violators, despite the existence of the statute of limitations. After exploring each theory in turn, Part III of this Article rebuts the arguments that industry groups would make against these theories. If EPA employs these theories, the agency may prevent power plants from obtaining a blank check to pollute the air illegally when the plants have successfully evaded detection for over five years after violating PSD.

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12 See, e.g., Lieben, supra note 8, at 670–71.

13 Id. at 670.

14 Id.

15 Id. at 699.

16 Id. at 671.
I. THE FIVE-YEAR STATUTE OF LIMITATIONS

Before the reader can understand the legal theories this Article presents, it is necessary to understand the statute of limitations itself. The CAA does not contain a limitations period in which EPA must bring forth a claim for a violation of its provisions. Therefore, courts have consistently applied the default five-year statute of limitations for federal agency enforcement proceedings to causes of action arising under the CAA, including claims for penalties under PSD. The statute provides that “[e]xcept as otherwise provided by [an] 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 . . . .” Courts generally apply the statute to both judicial enforcement actions and administrative proceedings.

Courts also generally find that a claim “first accrues” under the statute of limitations on the date that a violation first occurs. For example, if a plant owner “constructs a building foundation or some other permanent structure” or installs “underground pipework” to support a plant unit without applying for a pre-construction permit, doing so would constitute a violation that would trigger the statute of limitations for PSD claims. By contrast, courts do not apply the statute of limitations under the continuing violation doctrine, when a violation is ongoing in nature. An example of such an ongoing violation is a Title V operating permit

20 See, e.g., 3M Co. v. Browner, 17 F.3d 1453, 1458 n. 7 (D.C. Cir. 1994); see also United States v. Meyer, 808 F.2d 912, 914 (1st Cir. 1987) (government and defendant agreed that five-year statute of limitations applied to administrative proceedings); Williams v. United States Dep’t of Transp., 781 F.2d 1573, 1578 n. 8 (11th Cir. 1986) (court assumed, without discussion, that statute of limitations covered agency proceedings) reh’g denied 794 F.2d 687 (11th Cir. 1986).
21 Browner, 17 F.3d at 1462; See also Wilcox v. Plummer’s Ex’rs, 29 U.S. 172 (1830); United States v. Core Labs., Inc. 759 F.2d 480 (5th Cir. 1985).
Title V operating permits are essentially all-inclusive permits that apply to all facilities, on a source-by-source basis. Title V does not create new substantive requirements under the CAA. Rather, the goal of the permitting program is to consolidate all applicable CAA requirements into a single document. The consolidated document makes it easy for EPA, states, and citizens to identify exactly what rules apply to a source during its operations and whether those rules are being satisfied. When a plant violates such a permit, government agencies can recover penalties for each day of the ongoing violation that occurs at least partially within the five-year limitations period. In other words, the agencies may recover penalties even though the agencies have brought the claim after five years have passed since the date of the original violation.

When a plant violates a PSD pre-construction permit, as in the hypothetical scenario presented earlier, however, the courts are split on whether to apply the continuing violation doctrine. Under PSD, any major source that replaces a significant component of its units must, among other requirements, obtain a pre-construction permit and install BACT. If a source fails to meet these requirements, they may be subject to penalties.

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26 Whitman, 321 F.3d at 320.
27 Id.
28 Courts have applied this doctrine in various federal environmental contexts, including the Toxic Substances Control Act (TSCA) and the Clean Water Act (CWA). See, e.g., United States v. Reaves, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996) (dealing with the CWA); Newell Recycling Co. v. EPA, 231 F.3d 204, 206-07 (5th Cir. 2000), reh’g denied, 247 F.3d 243 (5th Cir. 2001), cert. denied, 534 U.S. 813 (2001) (dealing with the TSCA).
29 See supra Introduction.
31 40 C.F.R § 52.21(b)(1)(i) (2010) (defining a “major source” as either a source that belongs to one of 28 listed source categories that has a “potential to emit” 100 tons per year or more of a regulated pollutant or any other source that has a “potential to emit” 250 tons per year or more of a pollutant).
32 See 42 U.S.C. § 7479(3) (2006) (Best Available Control Technology is chosen for a plant based on several criteria including “the maximum degree of [pollutant] reduction . . . which the [state] permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [the] facility.”).
requirements, the CAA grants EPA the authority to pursue a variety of enforcement options. EPA may “issue an order requiring” a power plant “to comply.”\(^{33}\) The agency may also “bring a civil action” in the appropriate district court.\(^{34}\) Most relevantly for this paper, EPA may also seek civil penalties “of up to $25,000,\(^{35}\) per day of violation, whenever . . . the Administrator find[s] out that such person . . . attempts to construct or modify a major stationary source,” and, in doing so, violates the PSD provisions of the CAA.\(^{36}\)

When EPA overlooks a source’s failure to obtain a PSD pre-construction permit for more than five years facilities will often raise the statute of limitations in a motion to dismiss or through a summary judgment motion.\(^{37}\) In response, EPA has attempted to use the continuing violation doctrine to argue that its enforcement action is timely. The majority of courts, however, decline to take this approach, holding that failing to obtain a pre-construction permit is a single, discrete violation, and that the cause of action accrues on the day that the violation first occurs.\(^{38}\) The majority trend makes a distinction between pre-construction permit violations and operating permit violations which they hold as continuing in nature, finding the timing of pre-construction permit violations significant.\(^{39}\) Specifically, they note that PSD violations “occur at the time of the construction, modification, or installation of the equipment or facility.”\(^{40}\) To support this, some courts have cited the language of EPA’s implementing regulations. For instance, 40 C.F.R. § 52.21(r)(1) provides that “any owner or operator of a source or modification . . . who commences construction . . . without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.”\(^{41}\) In addition, 40 C.F.R. § 52.21(i)(1) states that “no stationary source or modification . . . shall  


\(^{34}\) Id. § 7413(a)(5)(C).

\(^{35}\) The penalty amount is currently up to $37,500 per violation due to inflation. See 40 C.F.R. § 19.4 (2009).


**II. HOW EPA CAN AVOID TROUBLE WITH THE FIVE-YEAR STATUTE OF LIMITATIONS WHEN ENFORCING PSD CLAIMS**

**A. Application of the Continuing Violation Doctrine for PSD Claims: The Minority Approach**

Despite the majority trend of courts, EPA has repeatedly argued that courts should apply the continuing violation doctrine to a PSD claim where the construction occurred more than five years prior to the filing of the complaint. In contrast to the majority described above, a minority of courts contend that the failure to obtain a PSD permit does trigger the continuing violation doctrine. For example, in *United States v. American Electric Power Service Corp*, fourteen environmental organizations sued the operators of coal-fired electric power plants, seeking penalties for PSD violations. The citizens alleged that the plants

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42 *Id.* at § 52.21(i)(1) (emphasis added).
43 *Id.* at § 52.21(b)(11).
44 *Louisiana-Pacific*, 682 F. Supp. at 1130.
45 See, e.g., *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1083-84 (W.D. Wis. 2001); *Ill. Power*, 245 F. Supp. 2d at 957.
46 See, e.g., *Murphy Oil*, 143 F. Supp. 2d at 1083.
47 See supra Part I.
49 137 F. Supp. 2d at 1062.
underwent several modifications without obtaining pre-construction permits or installing BACT. The defendants moved to dismiss, claiming that the five-year statute of limitations time-barred the citizens’ claims.

In applying the continuing violations doctrine, the court cited two statutory provisions of the CAA. First, the court discussed § 7604(a)(3) of the CAA, which allows citizens to bring a cause of action against any person who operates a facility “in violation of any condition required by a permit.” In applying § 7604(a)(3), the court found that the power plant was being operated in violation of PSD requirements because the plant operator had never obtained a pre-construction permit. The court did not distinguish between operating and pre-construction violations for this analysis.

Second, the court analyzed the PSD provisions in § 7479(2)(C) that contain further emissions limitations on power plants, even after the source completes its modification. Specifically, the court held that the term “modification” is defined to include “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.” The court also found that, “pursuant to 40 C.F.R. § 52.21(w)(1), a permit remains in effect unless or until it expires or is rescinded.” The court concluded that it would be “illogical . . . that a defendant may only be held liable for constructing a facility, rather than operating such [a] facility, without complying with the [PSD] permit requirements.” From a policy standpoint, these courts reason that the continuing violation doctrine prevents power plants from being able to pollute in perpetuity, unchecked by anyone.

EPA has argued that the courts should apply the continuing violation doctrine by relying on the enforcement provisions of the CAA, rather than the citizen suit.
provisions that the court cited in the *American Electric Power* case. The courts should accept this approach and apply the continuing violation doctrine. In fact, some commentators argue that the minority trend is indeed the correct approach, citing the statutory language of the CAA, the legislative history of the PSD program, EPA’s interpretation of the program, and policy considerations.  

For example, environmental law professor Ivan Lieben asserts that characterizing the PSD program as a “pre-construction” program overlooks the “true nature of the program’s robust ongoing pollution control requirements,” as well as “the program’s overall goals to maintain air quality.”  

He contends that the “clear language of the CAA evidences the operational nature of the PSD requirements,” and that there is convincing evidence of “legislative intent that the PSD requirements include operational requirements.” Lieben also argues that “EPA regulations and guidance support the proposition that PSD violations are continuous and ongoing” and that “the ability to collect penalties is critical to ensuring widespread compliance with PSD permitting requirements.” He concludes that the courts should adopt the minority approach.

For all these reasons, when courts consider timeliness issues in connection with EPA’s enforcement of PSD requirements those courts should apply the continuing violation doctrine as the minority of courts have done. PSD violations are properly understood as ongoing in nature, and this approach allows EPA to proceed with the vigorous enforcement of PSD violations, as Congress intended.

### B. Application of the Continuing Violation Doctrine Under Title V

As an alternative to asserting the minority approach to the continuing violation doctrine, EPA could assert violations of Title V permits as a legal route to bring an enforcement action against a power plant for PSD violations that occur more than five years before EPA files the complaint. This approach emphasizes the fact that PSD requirements are incorporated into Title V permits, and that it is

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62 Lieben, *supra* note 8, at 697.

63 *Id.* at 699.

64 *Id.* at 701.

65 *Id.* at 704.

66 *Id.* at 698.

67 *Id.* at 704.


well-settled that the continuing violation doctrine applies to Title V claims. \(^{70}\) The argument is, as with other types of Title V violations, that the limitations period never begins running for PSD claims because there is no point of completion of the violations that would trigger the clock.

Consider another hypothetical fact-pattern. Assume that a power plant modifies its facility without undergoing PSD review or installing BACT. As a consequence, the State does not incorporate any BACT or other PSD requirements into the power plant’s Title V permit through a permit amendment or at the time of the next renewal. Suppose that EPA fails to bring any enforcement action against the plant for over five years after the modification takes place. EPA then decides to bring an enforcement action, alleging that the plant violated Title V by failing to ensure that BACT and other PSD requirements were among the applicable requirements included in the permit and by operating the facility under an inadequate permit. By characterizing the PSD violations as Title V violations in this manner, EPA could avoid the statute of limitations because it is well established that the continuing violation doctrine applies to Title V violations.

Precedent exists to support this approach. \(^{71}\) In *U.S. v. East Kentucky Power Cooperative (EKPC)*, EPA brought an action against Eastern Kentucky Power Cooperative, an energy cooperative, alleging that the power plant had been operating under a deficient Title V permit. \(^{72}\) According to EPA, the plant had modified several of its units, without obtaining a pre-construction permit and installing BACT. \(^{73}\) The plant subsequently applied to the state of Kentucky for an operating permit, \(^{74}\) however, the plant never informed the state permitting authority that it had modified several of its units without obtaining a pre-construction permit or employing BACT. \(^{75}\) As a result, the state issued the plant a permit without PSD requirements.

EPA argued that the Title V permit did not contain “all applicable requirements”—in this case being the necessary schedules for complying with PSD. \(^{76}\) The agency claimed that for every day that the power plant operated under the inadequate permit, it violated Title V. \(^{77}\) In other words, EPA argued that these

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\(^{72}\) EKPC, 498 F. Supp. 2d at 1014.

\(^{73}\) Id. at 1016.

\(^{74}\) Id.

\(^{75}\) Id. at 1015.

\(^{76}\) Id. at 1015.

violations made Eastern Kentucky Power Cooperative subject to civil penalties for each day of violation.78

The district court denied a partial summary judgment motion by the plant, holding that a genuine issue of material fact existed regarding whether the plant had identified all the applicable PSD requirements in its Title V permit applications.79 Therefore, the court acknowledged that, under Title V, PSD-derived obligations are “applicable requirements” that must be incorporated into Title V permits.80 Another case, New York Public Interest Research Group v. Whitman, concurs with this approach.81 In Whitman, the court stated that Congress intended such Title V permits to include “all applicable requirements,” including PSD, in order to make it easier for EPA to enforce these requirements.82

Using Title V as a means to enforce PSD also has some indirect support in other case law. Some of the majority courts have ruled against applying the continuing violation doctrine directly to PSD penalty claims by relying on the theory that the violations are not ongoing because all operational requirements should be contained in the Title V permit.83 In other words, these courts have based their decisions to deny untimely PSD claims in part because EPA had the alternative option to “. . . allege a violation . . . of the Act’s operating permit requirements . . . .”84 In New York v. Niagara Mohawk Power Co,85 the plaintiff brought suit against the operator of a major emitting facility alleging that its failure to obtain a pre-construction permit before modifying its facilities violated the CAA.86 The plaintiff based its arguments only on the PSD provisions, without citing to Title V.87 In dismissing the claims, the district court stated in dicta that the plaintiffs should have cited to Title V for continuing violations, rather than the PSD requirements.88 Specifically, the court stated that EPA still had the alternative of taking the Title V approach.89 The court, citing a case from another jurisdiction, United States v. Southern Indiana Gas and Electric Co,90 specifically stated that

78 Id. at 1016.
79 Id. at 1018-19.
82 Id. at 320.
85 263 F. Supp. 2d at 652.
86 Id. at 654.
87 Id. at 662, n.21.
88 Id.
89 Id.
“operating a facility after it [is] modified without first obtaining the necessary construction permit may constitute a continuing violation of the relevant operating permit.” 91 Similarly, the court in Southern Indiana Gas, without analyzing the issue further, stated that plaintiffs should have “allege[d] a violation . . . of the Act’s operating permit requirements,” rather than having relied on PSD. 92 In other words, these courts have used the existence of the Title V option to bolster their decisions to dismiss the PSD claims.

Indeed, these arguments open the door for EPA to successfully use Title V as a route to enforce PSD penalty claims by arguing that the continuing violation doctrine applies—making the statute of limitations irrelevant. Accordingly, in order to avoid trouble with the statute of limitations, whenever a facility modification has occurred more than five years prior to the filing of a complaint, EPA should be sure to frame its PSD enforcement action as a Title V enforcement action.

C. Application of the Equitable Tolling Doctrine

EPA may also want to argue, in the alternative, that courts should toll the running of the limitations period under the equitable tolling doctrine. Unlike the continuing violation argument, 93 equitable tolling concedes that the statute of limitations does apply and that a PSD enforcement action would normally be time-barred, but for equitable reasons, the court should toll the running of the limitations period. Under this doctrine, the courts should toll the statute of limitations for a power plant’s PSD violations if the plant fails to disclose to the state authorities that it undertakes a major modification. 94 Such a failure would constitute fraudulent concealment because a duty to disclose this information exists. 95 PSD requires stationary sources to apply for pre-construction permits when undertaking a major modification, 96 thus creating a statutory duty for the plant to disclose its modification to the applicable permitting authority.

The equitable tolling doctrine would certainly be relevant here. The United States Supreme Court in Holmberg v. Armbrecht held that equitable tolling “is read

93 See supra Part II.A–B.
into every federal statute of limitation.” Furthermore, various courts have recognized the viability of an equitable tolling claim in the environmental context under the CAA, Toxic Substances Control Act (TSCA), and the Resource Conservation Recovery Act (RCRA).

To persuade a court to toll the statute of limitations, EPA must establish fraudulent concealment on the part of the defendant. This can be proven in one of two ways. A defendant must either actively misrepresent facts that conceal the relevant cause of action, or, more importantly for this case, fail to disclose the truth when there is a duty to speak. In such cases, the courts will stop the clock on the running of the limitations period until the plaintiff discovers, or reasonably should discover, the existence of the cause of action.

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97 327 U.S. 392, 397 (1946).
102 See Tillson, 2004 WL 2403114 at *22.
103 EPA would not prevail under a traditional “discovery rule” theory in this case. The discovery rule applies in cases where a plaintiff has no actual or constructive knowledge about a defendant’s violation, regardless of the defendant’s fraud. In such cases, the claim does not accrue and the limitations period does not begin to run. A vast majority of courts, however, have held that the discovery rule does not apply in CAA cases due to the nature of the statute’s regulatory scheme. See, e.g., Murphy Oil, 143 F. Supp. 2d at 1084-85 (holding that for the discovery rule to apply, EPA must rely solely on self-reporting by a defendant to learn of violations and EPA uses other mechanisms in addition to self-reporting under the CAA), reh’g denied, No. 00-C-0-0409-C, 2001 WL 34371758 (W.D. Wis. July 31, 2001); S. Ind. Gas, No. 99-1692-C-M/F, 2002 WL 1760752 at *3 (S.D. Ind. July 26, 2002) (holding that “a claim ‘first accrues’ under § 2642 on the date that a violation first occurs.”); United States v. Ill. Power Co, 245 F. Supp. 2d 951, 955 (S.D. Ill. 2003). In addition, some courts emphasize that applying the discovery rule in an enforcement action is inconsistent with the rationale of the rule. See, e.g., Browner, 17 F.3d at 1460 (holding that the discovery rule is “inapposite” to enforcement actions where the cause of action is complete at the time of the alleged violation because the discovery rule developed from cases in which “latent injuries or injuries difficult to detect” prevented plaintiffs from having a “tenable claim for the recovery of damages” until the plaintiff learned of the harm); Murphy Oil, 143 F. Supp. at 1085; but see L.E.A.D. v. Exide Corp., No. Civ-96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999) (applying discovery rule in CAA case, comparing its approach to cases where courts have applied the discovery rule to CWA enforcement actions, stating that “[w]e do not see why the so-called ‘discovery rule’ should not apply to claims brought under CAA, as air pollution violations are also difficult for the public to detect, and the CAA’s goal is similarly broad in its purpose ‘to protect and enhance the quality of the Nation’s air resources.’”); N.J. v. Reliant Energy Mid-Atlantic
Various courts have recognized that a statutorily-imposed duty to speak, if violated, may serve as a basis for an equitable tolling claim. For instance, the Third Circuit acknowledged that defendants may have a statutory duty to disclose information that may lead a plaintiff to discover a cause of action and that if defendants fail to disclose such information then plaintiffs have a claim for equitable tolling. In addition, the Sixth Circuit in Pinney Dock & Transp. Co. v. Penn Cent. Corp. recognized that a statutory duty claim could form the basis of an equitable tolling claim. Furthermore, the district court in U.S. ex rel. Tillson v. Lockheed Martin Energy Sys. Inc. held that a statutory duty to speak may exist in the environmental realm for the purposes of proving fraudulent concealment as a basis for equitable tolling. In that case, the United States brought a RCRA claim against a corporate polluter. The court found that the United States adequately pled the elements of fraudulent concealment. In doing so, the court relied heavily on the fact that the entity may have violated its statutory duty to self-report any waste disposal violations under RCRA.

In the scenario at hand, a power plant would violate its statutory duty to speak under the PSD program if it were to fail to turn over evidence of its modifications. PSD imposes an affirmative duty on stationary sources to apply for a pre-construction permit before they undergo a major modification that results in a significant emissions increase. Submitting a PSD application would, of course, require a plant to communicate its intent to modify its units. If a power plant were to fail to disclose its modifications to the state permitting authority or EPA, this would constitute fraudulent concealment, which in turn would give courts a basis for applying the equitable tolling doctrine.

Furthermore, if a permittee were to engage in fraudulent concealment in the PSD permitting context, EPA would be unable to learn of the defendant’s

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104 Tillson, 2004 WL 2403114, at *22.
105 In addition to statutory duties to speak, courts generally have held that a violation of a fiduciary duty to speak may constitute fraudulent concealment. See, e.g., In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation, 352 F. Supp. 2d 533, 543 (E.D. Pa. 2004); Tillson, 2004 WL 2403114, at *22; Pinney Dock and Transp. Co. v. Penn Central Corp., 838 F.2d 1445, 1465 (6th Cir. 1988), cert. denied, 488 U.S. 880 (1988).
107 838 F.2d at 1474 n.20.
108 Id.
109 Id., 2004 WL 2403114.
110 Id. at 22.
111 Id.
112 Id.
113 Id.
concealment through reasonable diligence. To establish fraudulent concealment, most courts require plaintiffs to show that they could not have reasonably discovered a defendant’s violation that gave rise to the cause of action, despite the defendant’s failure to disclose its acts.\footnote{See, e.g., Wood v. Carpenter, 101 U.S. 135, 140 (1879); In re Milk Products Antitrust Litigation, 84 F. Supp. 2d 1016, 1022 (D. Minn. 1997).} In the PSD enforcement context, EPA would not be able to learn of such violations because it lacks the resources to do so on a regular basis.\footnote{UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, \textit{NEW TRENDS IN AIR QUALITY MONITORING}, available at http://www.epa.gov.tw/FileLink/FileHandler.ashx?file=12866 (describing EPA’s annual budget of $222 million in 2009 for air quality monitoring as “limited.”); EPA’s Difficult FY12 Budget, (2010), INSIDE EPA.COM, http://stevens.vermontlaw.edu:2067/secure/docnum.asp?docnum=3262010_difficult&f=epa_2001.ask (describing how “EPA has begun preliminary internal discussions on how to prioritize its resources for what it expects to be a ‘difficult’ fiscal year 2012 due because of the president’s freeze on budget increases for non-defense spending.”).} As noted by the Eleventh Circuit, “accurate self-reporting is critical to the effective enforcement of environmental laws” because (as EPA itself stated) “government resources are limited [and] universal compliance cannot be achieved without active efforts by the regulated community to police themselves.”\footnote{Griffin Indus. Inc. v. Irvin, 496 F.3d 1189, 1206-07 (11th Cir. 2007), reh’g denied, 255 Fed. Appx. 504 (11th Cir. 2007), cert. denied, 128 S.Ct. 2055 (2008).}

In addition, it would contravene the Congressional intent underlying the CAA to hold EPA responsible for enforcement when the states do not adequately enforce the CAA against polluters. The statute places the primary duty for implementing the CAA on the states.\footnote{See \textit{42 U.S.C.} § 7407(a) (2003); see also \textit{42 U.S.C.} §§ 7401(a)(3), (b)(3).} Specifically, when EPA delegates a state with permitting authority, the state is the primary issuer of permits and enforcer of the CAA, although EPA retains enforcement authority as a backup measure.\footnote{See generally \textit{42 U.S.C.}§ 7661a (authorizes state-run permit programs, subject to the approval of EPA, for major stationary sources of air pollution).} Unfortunately, despite the CAA’s system of cooperative federalism, many states often fail to help alleviate the administrative burden on EPA because they do not effectively enforce the CAA.\footnote{See, e.g., CLEAN WATER ACTION ET AL., \textit{CONTINUING DERELICTION OF DUTY: HOW MICHIGAN’S ENVIRONMENTAL AGENCY DEFIES THE LAW AND THE PUBLIC} 4, 16 (Feb. 8, 2001), available at http://web.archive.org/web/200610032047/http://www.meprotec.org/eqreport2.pdf (report that describes how the Michigan Department of Environmental Quality’s (DEQ) decisions favor “polluters and developers over the public interest” by not adequately enforcing environmental statutes, including the CAA); \textit{States Fail to Implement Clean Air Permitting Programs}, OMB WATCH (Apr. 16, 2002), http://www.ombwatch.org/node/65 (“. . . many states have failed to adequately issue operating permits to facilities in their jurisdiction, as required by the 1990 amendments to the Clean Air Act. For instance, Texas has neglected to issue permits for 445 facilities; Wisconsin has 317 uncovered facilities; and New Jersey has 267.”).} This dereliction of duty is unsurprising and can be traced either to
negligence or reliance on the economic benefits that flow from the regulated entities to the states.\textsuperscript{121} It would be naïve to disregard the conflicts of interest that many state regulators may have when deciding how (or whether) to regulate facilities, such as a local provider of electricity. It is, at the very least, conceivable that state government officials may desire to avoid the political backlash that would result from causing electricity costs to be passed on to local consumers. In any case, holding EPA responsible for enforcing against all stationary sources that violate the CAA when the states fail to do so themselves would run counter to the clear intent of Congress in placing the primary obligations of the statute on the states.

Furthermore, from a normative policy perspective, holding EPA responsible for the states’ dereliction of duty would impose an undue administrative burden on EPA. It would be unreasonable and unfair for courts to require EPA to oversee and control every state that fails to adequately enforce against polluters. Given the fact that tolling is an equitable doctrine,\textsuperscript{122} the courts have wide discretion to fashion a just result. Accordingly, the courts should not hold EPA responsible for the states’ dereliction because doing so would curtail federal environmental enforcement efforts.

\textit{D. Adoption of a “Remedial” Characterization of PSD Penalties}

In addition to the equitable tolling doctrine, EPA could make another argument which would allow it to bring an enforcement action against a power plant for PSD violations beyond the five year limitations period. Specifically, the remedial nature of EPA’s civil penalties makes the statute of limitations inapplicable to some of the penalties that EPA would assess against a power plant.

The five-year statute of limitations applies only to an enforcement action for a “fine, penalty, or forfeiture.”\textsuperscript{123} Courts have generally interpreted this phrase to imply a punitive action by a government agency, rather than a remedial measure.\textsuperscript{124} For example, in \textit{Coghlan v. National Transport Safety Bd.}, the Eleventh Circuit defined the term “penalty,” as “a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant’s action.”\textsuperscript{125} In \textit{Coghlan}, the court concluded that the statute of limitations did not apply to the Federal Aviation Administration’s revocation of an airline transport pilot (ATP) certificate. The

\begin{itemize}
  \item\textsuperscript{121} David M. Konisky, \textit{Regulatory Competition and Environmental Enforcement: Is There a Race to the Bottom?} 51 AM. J. POL. SCI. 854 (2007) (suggests that “state-elected officials may have . . . [electoral] . . . incentives to relax environmental regulation.”).
  \item\textsuperscript{122} See, e.g., Honda v. Clark, 386 U.S. 484, 500 (1967), remanded to 303 F. Supp. 213 (D.D.C. 1968).
  \item\textsuperscript{123} 28 U.S.C. § 2462 (2006).
  \item\textsuperscript{124} Coghlan v. Nat’l Transp. Safety Bd., 470 F.3d 1300, 1305 (11th Cir. 2006); (citing Johnson v. SEC, 87 F.3d 484, 488 (D.C. Cir. 1996)).
  \item\textsuperscript{125} Id.
\end{itemize}
court concluded that revoking the ATP certificate was a remedial measure because the pilot lacked the “necessary qualifications,” and that the revocation was ordered for “safety,” not punitive, reasons.126

Similarly, the Tenth Circuit held that the statute of limitations did not apply to actions in which the United States sought a restorative Clean Water Act (CWA) injunction requiring a point source to restore damaged wetlands to their prior condition and to create new wetlands to replace those that could not be restored.127 The court reasoned that “just because a developer would be forced to spend significant sums, without a showing of actual damages suffered, this did not make the restorative injunction sought by the government . . . a ‘penalty’ covered by the five-year statute of limitations for government civil enforcement actions.”128 It held that “a lack of precise symmetry between the actual costs and the costs of mitigation did not change the nature of the remedy, and the developer’s belief that the sanction was costly or painful did not make it punitive.”129

Similar to Coghlán and Telluride, EPA takes a restorative approach, in part, in assessing a civil fine when responding to PSD violations. Under 42 U.S.C. § 7413(e), EPA takes two factors into account when determining a penalty.130 The first factor EPA considers is the “the economic benefit of non-compliance.”131 This amount is the bare minimum that EPA must recover.132 Secondly, EPA factors in the gravity of the violation by considering its seriousness in order to assess additional penalties.133 When considering the economic benefit component, EPA assesses a penalty amount that equals the economic benefit that a power plant receives while out of compliance with PSD.134 For example, when a power plant fails to employ BACT it receives a windfall profit for avoiding the cost of having to retrofit the power plant and install, operate, and maintain the pollution control technology.135 This puts other power plants that comply with PSD at a competitive economic disadvantage. Imposing a fine on the violator for the amount of those profits restores the economic balance with the compliant plants that suffered the disadvantage and serves as an economic incentive for continued compliance.136

Similar to the measures pursued in Coghlán and Telluride, the government’s intent behind assessing the penalties for the plant’s economic benefit of non-compliance

126 Id. at 1307.
127 United States v. Telluride, 146 F.3d 1241, 1247 (10th Cir. 1998).
128 Id.
129 Id.
131 Id.
132 Id.
133 Id.
134 Id. at 4–5.
135 Id. at 5–6.
136 United States Environmental Protection Agency, supra note 130, at 7.
is to restore other persons who suffer injury as a result of the defendant’s illegal violations. Unlike the gravity component, the economic benefit component is not intended to be a punitive assessment. Therefore, courts should look beyond the label “penalty” and analyze the way it is assessed. Ultimately, they should conclude that the civil penalties calculated under the economic benefit analysis are not time-barred. This approach would allow EPA to collect some penalties by avoiding the statute of limitations.

To summarize, this section has explored three very different types of approaches to overcoming the apparent applicability of the statute of limitations to a PSD enforcement action. The continuing violation approach asserts that the statute of limitations does not apply at all and allows EPA to collect a full amount of penalties. By contrast, the equitable tolling approach concedes that the statute of limitations does apply, but that the courts should toll the statute for equitable reasons. This approach achieves the same result of collecting full penalties as under the continuing violation approach. Lastly, characterizing the economic benefit portion of civil penalties as remedial would allow EPA to achieve at least partial success in enforcing PSD violations because the statute of limitations only applies to punitive actions rather than such remedial measures.

III. HOW EPA CAN REBUT INDUSTRY ARGUMENTS

A. The Collateral Attack Defense Must Not Carry the Day

Industry groups have argued that EPA’s enforcement of PSD requirements through Title V constitutes a collateral attack on the State’s approval of the Title V permit where the permit has already been issued and the plant fully complies with it. This argument fails when the power plant, in obtaining the permit, does not disclose to the state that PSD applies.

The CAA provides that compliance with an issued operating permit “shall be deemed compliance with the other applicable [provisions of the Act].” This is known as the “permit shield” provision. Some plant owners and operators have argued that EPA cannot challenge the plant’s Title V permit for failing to contain

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137 See, e.g., ARNOLD W. REITZE JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT, 536 (Environmental Law Institute 2001).

138 But see United States v. Project on Gov’t Oversight, 484 F. Supp. 2d 56, 63-64 (D.D.C. 2007) (court held that “a suit by the United States seeking what Congress has designated a ‘civil penalty’ qualifies as an action for enforcement of a ‘penalty,’ . . . .”); see also Nat’l Parks Conservation Ass’n., Inc. (NPCA II) v. Tenn. Valley Auth., 480 F.3d 410, 415-16 (6th Cir. 2007) (court applied rule in CAA context), remanded to 618 F. Supp. 2d 815 (E.D. Tenn. 2009); United States v. Walsh, 8 F.3d 659, 662 (9th Cir.1993) (court applied rule in CAA context), cert. denied, 511 U.S. 1081 (1994).


140 Id. Similarly, 40 CFR § 70.6(f) (2009) of EPA’s rules contains language indicating that a plant shall be deemed in compliance as of the date the permit was issued.
“all applicable requirements.” Their argument asserts that doing so would constitute a collateral attack imposing retroactive liability when the state has already issued the plant a facially-valid permit.

Industry groups have argued that this “permit shield” provision is “intended to preclude a collateral attack on permits . . . and to protect sources from liability for operating under a permit issued in accordance with Title V procedures.” This argument lacks merit in cases where the plant fails to disclose material information that would lead the state authority to include PSD-derived requirements in the permit.

The court articulated this rule in *EKPC*. As mentioned above, EPA sued Eastern Kentucky Power Cooperative, alleging that the power plant had been operating under a deficient Title V permit when it had modified several of its units without obtaining a pre-construction permit and installing BACT. When the plant subsequently applied to the state of Kentucky for an operating permit, the plant failed to inform the state that it had violated PSD. As a result, the state issued the plant a permit without PSD requirements.

Eastern Kentucky moved for summary judgment, claiming that EPA’s Title V claim amounted to an impermissible collateral attack on a facially valid permit issued by the Kentucky permitting agency. According to the power plant, EPA was trying to impose retroactive liability on the source—after the state already granted the source the permit. The plant argued that EPA should not be able to impose liability after the fact.

The court agreed with EPA’s contentions that the plant’s “failure to disclose major projects at [its units] . . . constitute[d] a failure to submit a complete application.” The court adopted EPA’s argument that “[t]he Part 70 rules required [the power plant] . . . to make a ‘reasonable inquiry’ in identifying applicable requirements in its application . . . [and] it would have been reasonable for [the plant] to at least question whether PSD . . . might apply to the massive expansion projects it had undertaken.” The court also agreed with EPA that the plant “was on notice its [modification] might trigger PSD requirements based on correspondence between [the plant] and the [state permitting authority].” Accordingly, the court denied the power plant’s motion for summary judgment.

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142 *Id.* at 1014.
143 *Id.* at 1018.
144 *See supra* notes 72–80 and accompanying text.
145 *Id.* at 1016.
146 *Id.* at 1014.
147 *Id.* at 1016.
148 *Id.*
149 *EKPC*, 498 F. Supp. 2d at 1015.
150 *Id.*
151 *Id.* at 1015.
because a genuine issue existed regarding whether the power plant had failed to submit a complete application to the state. 152

The court held that the power plant had a duty to disclose that it modified several of its units, and that failing to do so resulted in a deficient, or invalid, operating permit. 153 Although the plant complied with the terms of the permit that was issued by the state, the very terms of the permit were issued under false pretenses. 154 Thus, the permit was inadequate because it did not contain “all applicable requirements.” 155 Therefore, EPA should be able to defeat any collateral attack defense that a plant may assert where the source fails to disclose material facts to the state at the time of permitting or renewal.

EPA would be unable, however, to successfully overcome the collateral attack defense where the source does disclose evidence of its modification to the state and the state simply fails to require the plant to include the applicable requirements in the Title V permit. In such a case, EPA would have to settle for re-opening and revising the permit and including a compliance schedule for unmet CAA requirements through monitoring and record-keeping requirements. 156 National Parks Conservation Assn v. Tennessee Valley Authority would preclude EPA from collecting retroactive penalties. 157

As with EKPC, EPA in National Parks brought suit against a power plant for operating under a deficient permit. 158 Unlike in EKPC, however, the power plant did disclose all of the relevant facts regarding its CAA compliance to the state permitting authority. 159 Specifically, the power plant reported to the state each time it exceeded its applicable opacity standards. 160 Regardless of the plant’s disclosures,

154 In EKPC, the court allowed an attack on the operating permit’s validity. It is unclear, however, whether the court would have allowed this attack if all of the underlying PSD violations had been time-barred. In EKPC, only certain violations were found to be time-barred. The court still allowed EPA to attack the operating permit based on underlying PSD violations that were still in play. The court did not specify, however, whether the underlying PSD violations were the ones that had been time-barred or the ones that still existed. The court had the discretion to allow the attack on the operating permit because there were still valid PSD claims remaining. Therefore, it is not clear whether this case, read in isolation, stands for the proposition that EPA can challenge a permit for not having applicable PSD requirements despite the PSD claims themselves being time-barred in the enforcement context. Even if the statute of limitations is overcome, however, a plant could still bring forth the collateral attack defense.

156 40 C.F.R. § 70.6(b)(2) (2009).
158 Id.
159 Id.
160 Id.
the state declined to take action against the plant due to the provisions of the State Implementation Plan (SIP) and operating permit terms. EPA nevertheless argued that, as with EKPC, it had broad enforcement authority to attack the permit and collect civil penalties.161

The court disagreed, holding that EPA’s suit against the power plant constituted an impermissible collateral attack on the power plant’s permit.162 The court reasoned that it was unreasonable for EPA to interpret the CAA to authorize it to impose retroactive liability on a power plant for violating the CAA when the State had already granted the plant a permit, essentially assuring the source that it was complying.163 The court held that EPA’s dispute was with the State permitting authority.164 The power plant, on the other hand, was “caught in the midst of a conflict between the two government entities.”165 The court concluded that EPA would have to resolve its differences with the State without imposing penalties on the source.166

If EPA were to bring an enforcement action against a source through Title V for PSD violations, it would effectively impose the same retroactive liability on a source that National Parks prohibits. Instead, EPA should include a compliance schedule for the power plants in the Title V permits. Doing so would be a forward-looking, as opposed to a retroactive, measure.

B. Using Title V as a Legal Route to Collect Penalties Would Not Constitute an End Run Around the Statute of Limitations

There is little merit to the arguments that EPA’s use of Title V as a route to enforce PSD constitutes an impermissible end-run around the statute of limitations. Industry groups may argue that, if a PSD penalty claim is time-barred at the enforcement phase, EPA should not be allowed to circumvent the statute of limitations by simply disguising a PSD claim as a Title V permit enforcement action. This argument reflects a misunderstanding of the relationship between the PSD and Title V programs. The courts should allow EPA’s approach because it fully comports with the statutory scheme, as well as the important public purposes, of the CAA.

Industry groups would likely emphasize the fairness principles behind the statute of limitations. The statute of limitations seeks to achieve fairness by avoiding trials where evidence is lost because witnesses move away or die or

161 Id.
162 Id.
163 Nat’l Parks, 175 F. Supp. 2d at 1078-79.
164 Id. at 1078.
165 Id.
memories fade.\textsuperscript{168} Industry groups would argue that this concern would be problematic here because EPA would bring an enforcement action after a considerable passage of time. These concerns would not amount to much of an issue in this context, however, because of the types of evidence that EPA would use to prove a PSD claim.

The documentary nature of the evidence involved in a PSD claim would obviate any concerns regarding forgetful memories. To prevail on a PSD claim, EPA must demonstrate that a major source undertakes a “major modification,” namely, a “physical change or change in the operation” that results in a “significant net emissions increase” of a regulated pollutant.\textsuperscript{169} For example, EPA commonly proves a “physical or operational change” by showing an increase in a unit’s production rate or hours of operation where such increases exceed the unit’s design capacity.\textsuperscript{170} In other cases, EPA may show that a power plant has added a new unit to its facility, or has “expanded the productive capacity of an existing facility beyond its original design.”\textsuperscript{171} To prove their claims, both sides would bring forth emissions calculations based on modeling results, engineering data, and other technical forms of proof.\textsuperscript{172} Unlike eye-witness testimony, where the number of available witnesses is usually limited, this sort of documentary data typically is interpreted by the parties’ choice of expert witnesses. The concern of forgetful memories would not apply here because the experts would simply review the data and arrive at their conclusions, regardless of any passage of time.

Furthermore, the concerns relating to lost evidence would not be problematic here either. It is unlikely that any evidence would actually become lost in this digital age. In everyday practice, a lot of evidence is contained in digital format, on CDs, or within e-mails.\textsuperscript{173} This holds particularly true for PSD claims, often due to the technical nature of the evidence.\textsuperscript{174} Even when evidence is on paper, an electronic copy is often scanned and kept as a back-up in order to help facilitate

\textsuperscript{168} Id. (in applying the statute of limitations, the court recognized “the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after [the] alleged violations are finally discovered.”).


\textsuperscript{171} Id.

\textsuperscript{172} REITZE JR., supra note 139, at 536.

\textsuperscript{173} Robert Rachlin, Examining the Perils of E-mail, NORTHERN NEW ENGLAND’S TECHNOLOGY NEWSPAPER, Jan. 2002, at 19, 27.

\textsuperscript{174} Environmental and Natural Resources Division for the United States Department of Justice, Summary of Litigation Accomplishments (2002), UNITED STATES DEPARTMENT OF JUSTICE http://www.justice.gov/enrd/ENRD_2002_Lit_Accomplishments.html (describes its protocol for electronic document management, including the opening of a “scanning lab” to “scan digital images of case related documents.” ENRD frequently brings PSD enforcement claims against polluters on behalf of EPA.).
long-distance communication between attorneys. The relatively long-lasting nature of this evidence makes it far less likely that it would become lost over time. Accordingly, the statute of limitations concerns regarding lost evidence would not be implicated to the same degree as some other claims.

Moreover, approving of EPA’s approach would accord with Congress’s intent underlying the PSD provisions of the CAA. As mentioned above, PSD obligations are more accurately characterized as operational requirements, as demonstrated by the language of the CAA and its legislative history. Also, EPA regulations and guidance indicate that PSD violations are ongoing and continuous. Similarly, Title V, by its very nature, imposes ongoing, operational requirements. Therefore, EPA’s Title V approach is not strained or inconsistent with the CAA—it merely recognizes the operational nature of PSD.

Additionally, the public health and environmental objectives of the CAA weigh heavily in favor of strong enforcement by EPA and against an unduly strict application of the statute of limitations. Under the present set of facts, the policies underlying statute of limitations principles are greatly outweighed by the imperative of preventing power plants and other major stationary sources from degrading air quality unchecked. Failing to hold facilities accountable for causing air pollution in such cases would run counter to the fundamental goal of the CAA to “protect and enhance the quality of the Nation’s air resources,” and “prevent and control air pollution.” Therefore, the courts should utilize the continuing violations doctrine and other approaches described above to allow EPA to enforce PSD violations against power plants without being hindered inappropriately by the statute of limitations.

CONCLUSION

A number of courts have interfered with EPA’s ability to effectively enforce PSD violations by adopting an overly strict and inappropriate interpretation of the five-year statute of limitations. This obstacle, in effect, provides corporate polluters a blank check to violate the law indefinitely. EPA can, however, bring forth a variety of strong arguments to support its view that the statute of limitations either does not apply to PSD enforcement actions, should be equitably tolled, or at

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175 *Id.*
176 See 42 U.S.C. § 7401(b)(1) (2003); *Id.* at § 7401(a)(4).
177 *See supra* Part II.
178 *Id.*
the very least does not preclude recovery of economic benefit. Despite possible opposition to these positions, courts should adopt these principles because doing so would comport with the language and structure of the CAA and EPA regulations, as well as settled case law and strong congressional intent to protect public health and the environment from harmful air pollution.