No. 07-867

In the Supreme Court of the United States

NATIONAL PARKS CONSERVATION ASSOCIATION, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
ELLEN DURKEE
R. JUSTIN SMITH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the pre-1985 version of Alabama's Clean Air Act State Implementation Plan (SIP) did not impose an ongoing obligation to comply with the SIP's New Source Review requirements, as implemented through a preconstruction permitting program.

2. Whether the court of appeals erred in concluding that petitioners' claims for equitable relief were subject to the same five-year limitation period that applies to claims for civil penalties under 28 U.S.C. 2462.

3. Whether petitioners' pre-suit notice was sufficiently specific with respect to petitioners' claims under the Clean Air Act's New Source Performance Standards.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulations and rule:

Statutes, regulations and rule—Continued: Page

Statutes, regulations and rule—Continued: Page

In the Supreme Court of the United States

No. 07-867

NATIONAL PARKS CONSERVATION ASSOCIATION, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 502 F.3d 1316. A decision of the district court (Pet. App. 32a-47a) is reported at 413 F. Supp. 2d 1282. Previous orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2007. The petition for a writ of certiorari was filed on January 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). In 1970, Congress added the New Source Performance Standards (NSPS) program, which establishes performance standards for new or modified pollutant-emitting facilities in certain categories. See 42 U.S.C. 7411. In 1977, Congress further amended the CAA by establishing the New Source Review (NSR) program, which addresses the impact on ambient air quality resulting from newly constructed or modified pollutant-emitting facilities. The NSR program has two elements: a Prevention of Significant Deterioration (PSD) program applying in areas of the country that do not violate ambient air quality standards, 42 U.S.C. 7470-7479, and a Nonattainment NSR (NNSR) program for areas that fail to satisfy ambient air quality standards, 42 U.S.C. 7501-7515 (2000 & Supp. V 2005). See generally *Environmental Def.* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1429 (2007) (discussing purpose of NSR program).

Under the PSD program, "[n]o major emitting facility * * * may be constructed" or modified without first meeting several requirements. 42 U.S.C. 7475(a); see 42 U.S.C. 7479(2)(C) ("construction" includes "modification" as defined in 42 U.S.C. 7411(a)); *Duke Energy*, 127 S. Ct. at 1429. Among those requirements, a facility must obtain a permit for the construction or modification "setting forth emission limitations * * * which conform to [the CAA]," and must be "subject to the best available control technology," or BACT, "for each pollutant subject to regulation." 42 U.S.C. 7475(a)(1) and (4).

As relevant here, the NNSR program's requirements are generally similar to those of the PSD program, see, *e.g.*, 42 U.S.C. 7503(a), although the pertinent provisions of the NNSR program require that a source meet the "lowest achievable emission rate" rather than apply BACT, 42 U.S.C. 7503(a)(2).

States may implement many of the CAA's provisions, including the PSD and NNSR programs, by adopting a State Implementation Plan (SIP). SIPs must meet federal standards, are subject to review and approval by the Environmental Protection Agency (EPA), and are federally enforceable once approved. See 42 U.S.C. 7410(a)(2)(D) and (k), 7413, 7471; 40 C.F.R. 51.166(a)(6).

Alabama's SIP has included an EPA-approved PSD program since 1981. 46 Fed. Reg. 55,517 (approving initial Alabama PSD regulations). The SIP's provisions prohibit construction of any major stationary source or major modification without complying with the requirements of the PSD program. Ala. Air Pollution Control Comm'n Reg. § 16.4.8 (1981). Alabama's SIP, including the PSD program, was revised in 1985. Pet. App. 20a.

The United States has authority to enforce SIP requirements in federal court. 42 U.S.C. 7413. The CAA also authorizes citizen suits for, *inter alia*, the violation of any emission standard or limitation established under the Act, including the violation of "any requirement to obtain a permit as a condition of operations." 42 U.S.C. 7604(a)(1) and (f).

2. The Tennessee Valley Authority (TVA) is a corporate agency and instrumentality of the United States, created and existing pursuant to the Tennessee Valley Authority Act of 1933, 16 U.S.C. 831-831ee (2000 & Supp. V 2005). TVA operates numerous electricity generating facilities in the southern United States.

In 1982 and 1983, TVA undertook a project to overhaul Unit 5 of its Colbert Fossil Plant (Colbert Unit 5), a coal-burning facility located in northwestern Alabama. TVA had a general Alabama operating permit for that unit, but did not seek a PSD permit for the new construction. Pet. App. 3a.

In 1999, EPA concluded that modifications to TVA's facilities, including Colbert Unit 5, were in violation of the CAA's NSR requirements and other provisions of law. EPA issued an administrative order directing TVA to comply with the CAA. TVA petitioned for review of that order in the Eleventh Circuit, which concluded that EPA's administrative proceedings, and the CAA provision under which the order was issued, violated due process. *TVA* v. *Whitman*, 336 F.3d 1236, 1244, 1260 (2003), cert. denied, 541 U.S. 1030 (2004). The court then held that the unconstitutionality of the CAA provision meant that EPA's order was not a "final agency action" and that the court of appeals therefore lacked jurisdiction to review it. See *id.* at 1248, 1260.

3. In October 2000, while EPA's administrative order was still being litigated, petitioners sent TVA a letter notifying it of petitioners' belief that Colbert Unit 5 was in violation of the CAA. Pet. App. 133a-152a. The letter asserted that TVA had undertaken a major modification at Colbert Unit 5 without a PSD or NNSR permit, and that the modified Colbert Unit 5 violated the applicable NSPS standards—specifically, "all the requirements of Subpart Da" of 40 C.F.R. Pt. 60. Pet. App. 146a-147a, 148a-149a.

Petitioners then filed this citizen suit against TVA in the United States District Court for the Northern District of Alabama. Petitioners, asserting that the project at Colbert Unit 5 was a "modification" that triggered the

NSR and NSPS requirements of the CAA, sought civil penalties and declaratory and injunctive relief. See Pet. App. 7a, 53a, 93a-94a. TVA moved to dismiss, asserting, *inter alia*, that claims for civil penalties would be barred by the five-year statute of limitations in 28 U.S.C. 2462; that the claims for injunctive and declaratory relief were accordingly barred as well; and that petitioners had not provided adequate notice of their NSPS claim before filing suit, as required by 42 U.S.C. 7604(b)(1)(A).[1]

The district court agreed and granted summary judgment for TVA. Pet. App. 71a-83a (granting summary judgment on the NSPS claim for failure to provide adequate pre-suit notice); *id.* at 119a-130a (granting summary judgment on the PSD and NNSR claims for failure to comply with the five-year statute of limitations).[2] Petitioners appealed only as to their claims for equitable relief.

4. The court of appeals affirmed. Pet. App. 1a-31a.

---

[1] Petitioners also sought partial summary judgment on the merits, which the district court denied on September 7, 2005, finding that issues of material fact were disputed. Petitioners appealed that decision as well, but the court of appeals did not address the underlying merits because it held the claims time-barred (Pet. App. 31a), and the merits issues are not encompassed within the petition. Petitioners err in describing as "undisputed" their assertion that the 1982-1983 projects "increase[d] the unit's pre-project capacity by 100 megawatts." Pet. 8-9 & n.3. TVA disputed below, and continues to dispute, that assertion. See, *e.g.*, TVA C.A. Br. 50-51.

[2] In a separate proceeding involving Sierra Club and TVA, the court of appeals had held that TVA's sovereign immunity barred petitioners from seeking civil penalties. *Sierra Club* v. *TVA*, 430 F.3d 1337, 1353-1357 (11th Cir. 2005). The district court accordingly dismissed the civil-penalty claims in this case, Pet. App. 89a-90a; plaintiffs did not appeal that issue.

a. Section 2462 provides that a claim for civil penalties is barred "unless commenced within five years from the date when the claim first accrued." Petitioners contended that their NSR claims were not time-barred because TVA's failure to comply with NSR requirements was an ongoing violation of the CAA, accruing anew each day that the unauthorized modification was operated. The court of appeals disagreed.[3]

The court stated that "the Alabama regulations in force at the time of TVA's work on Unit 5 * * * govern our inquiry." Pet. App. 17a. Examining those regulations as they existed in 1982, the court concluded that they had created only "a prerequisite for approval of the modification, not a condition of Unit 5's lawful operation." *Ibid.* Thus, the court held, the Alabama regulations imposed a one-time obligation to satisfy the statute's permitting requirements, not an ongoing one that was violated anew each day. Because the obligation applied only at the time of construction, petitioners' claim had long since become barred by the five-year statute of

---

[3] The court of appeals referred to petitioners' theory as invoking "the continuing violations doctrine." Pet. App. 12a. Variations of that phrase have been used to describe several different legal rules, including a rule that a course of conduct, occurring over time, can constitute a single violation of law. Compare, *e.g.*, *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 118 (2002) ("[T]he incidents constituting a hostile work environment are part of one unlawful employment practice, [and] the employer may be liable for all acts that are part of this single claim."), with *id.* at 125 (O'Connor, J., concurring in part and dissenting in part) ("[A] hostile environment is a form of discrimination that occurs every day; some of those daily occurrences may be time barred, while others are not."). In this case, petitioners contend (Pet. 19-20) that TVA's operation of Colbert Unit 5 amounted to a new violation each day. For clarity, this brief describes the legal issue as whether TVA's alleged actions were an "ongoing" violation.

limitations. *Id.* at 12a-14a. The court of appeals recognized that other courts had found an ongoing obligation to comply with those requirements, but concluded that the state programs in those cases had differed in important respects from the Alabama SIP that was in force in 1982. *Id.* at 14a, 19a. "Were this case governed by [another State's] environmental regulations," the court acknowledged, the outcome might well be different, but "an important difference" in Alabama's SIP "ultimately preclude[d]" the court of appeals from accepting petitioners' ongoing-obligation theory. *Id.* at 16a, 18a-19a. Specifically, the court thought that the Alabama regulations provided no way (and thus no obligation) to obtain a construction permit once a modification had already been completed. See *id.* at 18a.

The court of appeals recognized that in 1985, Alabama had amended its SIP to require an Air Permit as a condition of both construction *and* operation. Pet. App. 20a. The court viewed those amendments as having "no significance" for this case, however, because they had not been in force when Colbert Unit 5 was modified between 1982 and 1983, and because petitioners' pre-1985 *operating* permit grandfathered it into the post-1985 regulatory regime, which did not create retroactive liability. *Id.* at 20a-21a.

b. The court of appeals recognized that Section 2462 applies on its face only to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture," not to claims purely for injunctive relief. Pet. App. 22a. Petitioners therefore argued that neither Section 2462 nor any other statute of limitations should apply to their claims for equitable relief. The court of appeals disagreed. Under the "concurrent remedy doctrine," the court held, "where a party's legal remedies

are time-barred, that party's concurrent equitable claims generally are barred" by the same time limitation. *Ibid.* That doctrine foreclosed petitioners' equitable claims. *Id.* at 22a-25a.

The Eleventh Circuit has held that the concurrent remedy doctrine does not apply to "claims brought by the federal government in its sovereign capacity." Pet. App. 22a (quoting *United States* v. *Banks*, 115 F.3d 916, 919 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1998)). Petitioners contended that the same rule should apply to them because their citizen suit is in the nature of a "private attorney general" action. The court of appeals disagreed, because under the CAA petitioners were "acting 'on [their] own behalf.'" *Id.* at 23a (quoting 42 U.S.C. 7604(a)). The court accordingly declined to "expand[] the governmental exception" to the concurrent remedy doctrine. *Ibid.*

c. As to petitioners' NSPS claims, the court of appeals held that the pre-suit notice letter was inadequate because it was too broad and general. In the court's view, petitioners had "failed to provide enough information to permit TVA to identify the allegedly violated standards, dates of violation, and relevant activities with the degree of specificity required by the regulations." Pet. App. 29a. The notice "broadly alleged daily violations of an entire set of regulations," Subpart Da, "without specifically identifying the individual alleged violations and dates." *Id.* at 25a. Subpart Da sets emission standards and other requirements for three pollutants. The suit alleged only noncompliance with the sulfur dioxide standard, which was "a much narrower claim" not particularly identified in petitioners' notice letter. See *id.* at 29a. Accordingly, the court of appeals affirmed

the dismissal of the NSPS claim for lack of proper pre-suit notice. *Id.* at 30a.

ARGUMENT

Further review is not warranted in this case. Although the court of appeals incorrectly treated petitioners' allegations as stating only a past violation, it did so principally in reliance on a misunderstanding regarding now-superseded provisions of a single State's pollution-control regulations.[4] That error is narrowly cabined and does not create a square conflict among the circuits that calls for resolution by this Court at this time. The court of appeals' other holdings—that private claims for equitable relief are subject to a time limit and that the particular pre-suit notice filed in this case was insufficiently specific—do not conflict with any decision of this Court or any other court of appeals or otherwise warrant this Court's plenary consideration.

1. The court of appeals misunderstood a number of features of the pre-1985 Alabama SIP provisions and the CAA scheme within which they operated, and the court's conclusion that those provisions did not create an ongoing obligation to comply was accordingly erroneous. The

---

[4] The Eleventh Circuit has held that TVA has independent litigating authority in the lower courts, a conclusion with which the United States disagrees. See Pet. at 23-27, *Leavitt* v. *TVA*, 541 U.S. 1030 (2004) (No. 03-1162). Here, TVA argued to the district court and the court of appeals that petitioners' claims were time-barred because they did not allege a violation of an ongoing obligation. The Solicitor General, pursuant to his statutory and regulatory authority to determine the litigating position of the United States and its agencies and instrumentalities in cases brought before this Court (see 28 U.S.C. 516, 518(a), 519; 28 C.F.R. 0.20(a)), has considered competing views within the Executive Branch in arriving at a single, unified position for the federal government as a whole, which is set forth in this brief.

court acknowledged, however, that petitioners' claims likely would not be time-barred if Alabama's SIP were structured to create an ongoing obligation, and it expressly declined to apply the provisions of Alabama's amended SIP to this case. The court's conclusion that Section 2462's time bar applied was therefore based on the interpretation of now-superseded state regulations, an issue that does not warrant further review.[5]

a. The court of appeals reasoned that Alabama's pre-1985 SIP did not create a continuing obligation because the court was "not aware" of any provision in that SIP allowing a construction permit to be issued after completion of an unauthorized major modification or construction. Pet. App. 19a. That omission, the court of appeals asserted, showed that the SIP did not condition the lawful operation of a modified source on compliance with PSD requirements. See *id.* at 18a-19a. In the court's view, it was therefore "preclude[d]" from following the Sixth Circuit's holding in *National Parks Conservation Ass'n* v. *TVA*, 480 F.3d 410 (2007) (*National Parks*). Pet. App. 19a. In that case, petitioners challenged an overhaul at another TVA plant (in Tennessee). The Sixth Circuit concluded that although the alleged modification had taken place more than five years before the complaint was filed, the operation of the unpermitted modification (assuming *arguendo* that it was a "modification" for PSD purposes) was a recurring violation, and a violation therefore had occurred within the five-year limitation period. 480 F.3d at 417, 418-419. The court

---

[5] Petitioners' complaint and the parties' briefs addressed claims arising under both the PSD and the NNSR provisions of the CAA. The court of appeals stated that "[t]he distinction between these two programs does not affect our analysis." Pet. App. 5a n.1.

based that conclusion on a provision of the Tennessee SIP allowing an unpermitted source to obtain a preconstruction permit after operations have begun. The different holding here, the Eleventh Circuit stated, was based on the "important difference in the states' plans." Pet. App. 19a.

In reality, however, the Alabama SIP provisions in effect at the time of the alleged modifications in this case *did* contain provisions imposing an ongoing obligation to comply with PSD requirements. The regulations had a section captioned "Types of Permits," with paragraphs captioned "Permit to Construct" and "Permit to Operate" respectively. Paragraph (a) provided that any person "erecting, altering, or replacing" regulated equipment was required to obtain a Permit to Construct, which "shall remain in effect until the Permit to Operate the equipment for which the application was filed is granted or denied." Ala. Air Pollution Control Comm'n Reg. § 16.1.1(a) (1979), Pet. App. 175a. Paragraph (b), captioned "Permit to Operate," provided in turn that any regulated equipment described in Paragraph (a) could not be operated or used without an operating permit, and that "[n]o Permit to Operate shall be granted for any article, machine, equipment, or contrivance described in paragraph (a), constructed or installed without authorization as required by paragraph (a), until the information required is presented to the Director," and the equipment in question was brought into compliance with applicable standards. Ala. Air Pollution Control Comm'n Reg. § 16.1.1(b) (1979), Pet. App. 175a-176a.

Those provisions, read together, imposed an ongoing requirement to comply with the PSD program, because a modified source could not lawfully be operated except after compliance with the SIP's preconstruction require-

ments. Under Paragraph (a), a facility that had been "erect[ed], alter[ed], or replac[ed]" was required to obtain a construction permit; under Paragraph (b), that altered facility could not be operated until it obtained an operating permit, through a process that refers back to Paragraph (a). Paragraph (b) even set forth a specific procedure for facilities constructed without advance authorization, further demonstrating that Alabama intended to create an ongoing obligation.

The court of appeals did not discuss or cite the relevant language of Section 16.1.1 of the Alabama regulations as applicable at the time of the alleged modification, presumably because petitioners did not cite that regulation to the court. Briefing in the court of appeals had focused primarily on interpretation of the Alabama SIP as amended in 1985 and in force today. See Pet. C.A. Br. 26-32; Pet. C.A. Reply Br. 4-7. The court, however, undertook to examine the Alabama regulations in force at the time of the alleged modification. See Pet. App. 17a ("The complaint charges TVA with violating the Alabama regulations in effect at the time of TVA's work on Unit 5, and these regulations govern our inquiry."). In that review the court found no provision "creating an ongoing obligation to comply with requirements of the preconstruction permitting process," Pet. App. 19a; it did not discuss the pre-1985 Section 16.1.1 in its opinion or explain whether or why that provision failed to perform the function the court of appeals thought was missing from the pre-1985 SIP.

The Alabama regulations in effect at the time of the alleged modification also imposed an ongoing obligation to apply BACT. Pet. App. 15a-16a (quoting Ala. Air Pollution Control Comm'n Reg. § 16.4.9(c) (1981), which provided that a major modification "shall apply"

BACT).[6] The court of appeals concluded that, because the SIP directed that BACT apply "to each *proposed* emissions unit," that requirement must have applied only to "proposed" modifications. Pet. App. 17a (quoting Ala. Air Pollution Control Comm'n Reg. § 16.4.9(c) (1981)). In fact, the term "proposed emissions unit" simply indicated that in the ordinary course, approval occurs before construction. The single word "proposed" was inadequate support for the court of appeals' construction, particularly because the BACT obligation by definition applies (continuously) to the *operation* of sources under the CAA framework. See p. 14, *infra*.

b. That the court of appeals misconstrued the pre-1985 Alabama SIP is confirmed by a correct understanding of the CAA framework within which the SIP operated. A SIP should be interpreted with due regard for the underlying CAA requirements, because SIPs must meet minimum standards set forth in the CAA and EPA's implementing regulations, are subject to EPA review and approval, and are federally enforceable once approved. *Navistar Int'l Transp. Corp.* v. *EPA*, 858 F.2d 282, 288 (6th Cir. 1988), cert. denied, 490 U.S. 1039 (1989); see also *Sierra Club* v. *Administrator, U.S. EPA*, 496 F.3d 1182, 1186 (11th Cir. 2007) (deferring to EPA's reading of a SIP); *American Cyanamid Co.* v. *United States EPA*, 810 F.2d 493, 498 (5th Cir. 1987) (same).

Here, there is strong structural and textual evidence that Congress, in enacting the PSD provisions, and

---

[6] The Alabama PSD program imposed other ongoing obligations as well. See, *e.g.*, Ala. Air Pollution Control Comm'n Reg. § 16.4.12(b) and (c) (1981) (owner shall conduct air quality monitoring following construction).

EPA, in implementing them, intended to create an ongoing obligation. As a result, even if a SIP is ambiguous on the subject, a source remains in violation of the law until it has fulfilled PSD requirements.

i. The PSD provisions are by their terms ongoing requirements applicable to the operation of major emitting facilities. The most significant of those requirements provides that a permit must set forth "emission limitations" identified by the reviewing authority as "best available control technology." 42 U.S.C. 7475(a)(1) and (4). BACT is defined as an "emission limitation based on the maximum degree of reduction of each pollutant" emitted from a facility. 42 U.S.C. 7479(3). An "emission limitation" is defined in turn as a "requirement * * * which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*, including any requirement relating to the operation or maintenance of a source to assure *continuous* emission reduction." 42 U.S.C. 7602(k) (emphases added). The use of the word "continuous" demonstrates that BACT is a continuing requirement that does not apply only at the time of construction. Thus, to meet the BACT requirement, a facility must both install and operate the required control technology.[7]

Other PSD provisions also make clear that they apply on an ongoing basis to a source's operation, rather

---

[7] The BACT requirement is both a requirement applied through permitting and a freestanding requirement to install and operate the required control technology. Both requirements are ongoing, and are separately actionable. 42 U.S.C. 7475(a)(4); 40 C.F.R. 51.166 (j)(3); 45 Fed. Reg. 52,722 (1980) (stating that "Section 165 of the Act provides in part that any 'major emitting facility' constructed in a PSD area must apply best available control technology"); see also *id*. at 52,683; *National Parks*, 480 F.3d at 418.

than only for a finite time to the source's construction or modification. For example, the statute allows issuance of a permit only if "the owner or operator of such facility demonstrates * * * that emissions from construction *or operation* of such facility" will not compromise compliance with applicable air quality standards. 42 U.S.C. 7475(a)(3) (emphasis added). The statute also requires an owner or operator to submit to appropriate monitoring requirements, 42 U.S.C. 7475(a)(7); those, too, are ongoing, operational requirements. EPA's regulations for the federal PSD program (that is, the program applicable in areas that lack an approved SIP) therefore incorporate EPA's view that the Act is properly construed to impose a continuing statutory obligation to obtain a PSD permit even after construction.[8] Thus, the CAA does not itself draw the sharp distinction between preconstruction requirements and operating requirements that the court of appeals saw in the pre-1985 Alabama SIP.

The language of the CAA's enforcement provisions further confirms the foregoing analysis. For instance, 42 U.S.C. 7604(a)(1)(A) authorizes citizen suits for any "violation of * * * an emission standard or limitation," a category that includes "any requirement to obtain a permit as a condition of operations," 42 U.S.C. 7604(f)(4). Cf. 136 Cong. Rec. 36,083, 36,084 (1990)

---

[8] See 40 C.F.R 52.21(r)(1) ("Any owner or operator who * * * operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct * * * shall be subject to appropriate enforcement action."). Under that provision, an owner or operator that secures an operating permit based on a particular description of its facility, and then makes a modification to that facility, is under an ongoing obligation to obtain a corrected permit.

(Senate managers' statement) (stating, with regard to the similarly structured governmental enforcement provisions, that the 1990 CAA amendments "confirm[] existing law," which allows EPA to "take[] enforcement action against operating sources that are in violation of [NSR] requirements" and to "halt the construction or modification of new sources that are violating new source review requirements").[9] The citizen and federal enforcement provisions of the CAA also permit civil penalties to be imposed for each day a violation continues. 42 U.S.C. 7413(b) and (e)(2). These provisions further support the view that the CAA creates ongoing obligations. *United States* v. *Marine Shale Processors*, 81 F.3d 1329, 1357 (5th Cir. 1996) (*Marine Shale*).

ii. The court of appeals also misperceived the framework of the CAA, incorrectly concluding that the statutory scheme sharply distinguished between preconstruction permits and operating permits. The court of appeals relied on that purported distinction in concluding that only the Alabama operating-permit requirements were ongoing and that the preconstruction requirements applied only at the time of construction.

---

[9] The court of appeals found that distinct language of the citizen suit provision, 42 U.S.C. 7604(a)(3), which authorizes citizens to bring suit "against any person who proposes to construct or constructs" without a permit, signaled that Congress did not intend to allow suits based on ongoing violations during a facility's operation. Pet. App. 13a. To the contrary, 42 U.S.C. 7604(a)(1) provides precisely that remedy, as the definition contained in 42 U.S.C. 7604(f)(4) makes clear. Construing 42 U.S.C. 7604(a)(1) in accordance with its plain text to permit challenges to ongoing violations of the preconstruction requirements does not render 42 U.S.C. 7604(a)(3) superfluous; although the two provisions overlap somewhat by design, each of the two provisions also applies in circumstances where the other does not.

In reality, the CAA's PSD program creates a single permitting requirement, which is ordinarily satisfied before construction or modification of a facility. That approach allows emission-control requirements to be taken into account early in the design and construction process. A preconstruction permit, once issued, either serves as an operating permit for the facility in question or establishes conditions on the operation of the source that must be incorporated into the operating permit. Although some SIPs require separate construction and operating permits, the PSD requirements themselves impose conditions on a source's operations. *Marine Shale*, 81 F.3d at 1355-1356.[10]

The court of appeals cited the permitting provisions appearing in Title V of the CAA, 42 U.S.C. 7661 *et seq.*, which it described as the Act's operating-permit provisions. Pet. App. 13a. But Title V was not enacted until 1990, well after the alleged violations at issue in this case originated (and 13 years after the PSD program was enacted). Moreover, the function of Title V permits is to collect the requirements appearing elsewhere in the CAA, including but not limited to PSD requirements, into a single permit. See 42 U.S.C. 7661c(a) and (b); *United States* v. *Duke Energy Corp.*, 278 F. Supp. 2d 619, 651-652 (M.D.N.C. 2003), aff'd on other grounds, 411 F.3d 539 (4th Cir. 2005), vacated on other grounds *sub nom. Environmental Def.* v. *Duke Energy Corp.*, 127 S. Ct. 1423 (2007). The provisions of Title V generally do "not impose substantive new requirements." 40 C.F.R. 70.1(b); *Sierra Club* v. *Georgia Power Co.*, 443

---

[10] The NNSR provisions of the CAA are even clearer in regulating both construction and subsequent operation. See 42 U.S.C. 7503(a) ("permits to construct and operate").

F.3d 1346 (11th Cir. 2006). The Title V program therefore could not properly be viewed as the operating-permit arm of the PSD program. The PSD program's ongoing operational requirements must be included in Title V permits, but those requirements exist independently, by virtue of the PSD provisions of the CAA. In suggesting that the PSD program's operating requirements derive from Title V, instead of from the PSD provisions themselves, the court of appeals misunderstood the relationship between the two programs. That error contributed to the court's failure to appreciate that the PSD program itself creates ongoing operational requirements.

iii. A reading under which the PSD requirement is ongoing also properly reflects Congress's intent in enacting the statute. The common-law analogue to Clean Air Act remedies is an action to abate a nuisance. At common law, such an action remains available during the continuation of the nuisance.[11] Thus, permitting obligations like those contained in the CAA are presumptively treated as ongoing in nature. See *Newell Recycling Co.* v. *United States EPA,* 231 F.3d 204 (5th Cir. 2000), cert. denied, 534 U.S. 813 (2001); *Carr* v. *Alta Verde Indus., Inc.*, 931 F.2d 1055, 1063 (5th Cir. 1991)); *Harmon*

---

[11] "[E]ach day's continuance of a temporary nuisance creates a new cause of action," and therefore "the statute of limitations begins to run day by day, and plaintiff may at any time recover for the nuisance committed during the statutory period next before the bringing of the action." 1 Fowler V. Harper et al., *The Law of Torts* § 1.30, at 1:139 (3d ed. 1996); see also William L. Prosser, *Handbook of the Law of Tort*s § 90, at 616 (3d ed. 1964) (noting that "a continuing trespass, such as the erection of a structure on the plaintiff's land, affords a continuing cause of action, which can hardly be distinguished from nuisance").

Indus., Inc. v. *Browner*, 19 F. Supp. 2d 988, 998 (W.D. Mo. 1998), aff'd, 191 F.3d 894, 904 (8th Cir. 1999).

Indeed, the very concept of "Prevention of Significant Deterioration"—which appears in the name of the program, 42 U.S.C. Ch. 85, Subch. I, Pt. C—suggests an ongoing requirement of compliance. When the PSD program was established, existing facilities were grandfathered, that is, allowed to defer installing emissions controls. But Congress intended that modification of those facilities would trigger the requirement to install such controls. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979); *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 909 (7th Cir. 1990); *United States* v. *Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006), cert. denied, 127 S. Ct. 2034 (2007). Congress could not simultaneously have intended that PSD requirements would apply only at the time of construction. Rather, once a facility has been modified, it has forfeited any subsequent claim to defer installing emissions controls. An ongoing requirement to apply PSD, with civil penalties for violations, is necessary to ensure a level playing field for all emitting sources, and to prevent emissions from one State from interfering with other States' efforts to comply with the CAA's standards. 42 U.S.C. 7470(4).[12]

c. Despite the court of appeals' misinterpretation of the pre-1985 Alabama SIP, that issue does not warrant plenary review at this time. The court of appeals' princi-

[12] The legislative history of the NSR provisions contemplates that preconstruction requirements will subsequently be enforceable, stating that "[t]his preconstruction review process should help minimize the need for enforcement or other actions under the State implementation plan requiring additional post-construction control measures on the permitted plants." H.R. Rep. No. 294, 95th Cong., 1st Sess. 145 (1977).

pal error—*i.e.*, its failure to discuss or analyze the operative SIP provision, Section 16.1.1 of the pre-1985 Alabama regulations—was attributable to petitioners' failure to cite that provision to the court. Moreover, that error involves a particular provision of a single State's implementation plan, a plan that was amended more than twenty years ago to change the provisions on which the court's decision turned. That narrow holding does not require further review by this Court.

Not only does the court of appeals' decision not affect post-1985 construction in Alabama, it also lacks significance for the other two States within the circuit. Those States' SIPs have for many years contained provisions that explicitly condition the lawful operation of a source on compliance with the PSD program. See, *e.g.*, Ga. Comp. R. & Regs. r. 391-3-1-.02(1)(c) (1992); Fla. Admin. Code Ann. r. 62-212.400(7)(b) (2005); 44 Fed. Reg. 54,047 (1979) (approving Georgia provision); 48 Fed. Reg. 52,713 (1983) (approving Florida provision, which then appeared at Fla. Admin. Code Ann. r. 17-2.500(6)(c)). And even if Alabama, Georgia, or Florida were to amend its SIP in a way that implicated the court of appeals' reasoning, and even if EPA were to approve that modification without speaking to the existence of continuing obligations, other provisions in the State's air rules might well make this case distinguishable. Because the ongoing requirement to comply with PSD is an integral part of the CAA's scheme, that requirement may manifest itself in other parts of a SIP.

Petitioners principally claim that review is necessary because the Eleventh Circuit declined to follow the Sixth Circuit's reasoning in *National Parks*. The two decisions are not in direct conflict, however, as is apparent from their analysis. The court of appeals' decision in

this case was based on a close (albeit erroneous) reading of the wording of the SIPs; the court concluded that Alabama's SIP lacked an element that Tennessee's SIP contained, and that the difference was determinative. Pet. App. 19a. Thus, on the face of the court's opinion, there is no square conflict with the Sixth Circuit's decision. The Sixth Circuit found in Tennessee's SIP a provision making clear that compliance with PSD requirements is a condition of the lawful operation of a modified source. Such a provision appears in Alabama's current SIP. Accordingly, a failure to comply with either State's current requirements would be treated as an ongoing violation to the same extent in both circuits.

Petitioners also assert (Pet. 23-24) that the Eleventh and Sixth Circuits are in disagreement as to whether the obligation to install controls that meet BACT levels is ongoing. But as set out above, the Eleventh Circuit's BACT analysis appears to be tainted by its misunderstanding of SIP and PSD operational requirements and the relationship between the PSD and Title V programs. The Court's analysis may also have been tied to its misreading of the provisions of the Alabama SIP; it described the obligation to apply BACT as "solely a prerequisite for approval of the modification, not a condition of Unit 5's lawful operation, *under the relevant Alabama State Implementation Plan*." Pet. App. 17a (emphasis added).

In a footnote, the court of appeals did express doubts about the Sixth Circuit's reading of the BACT language of the Tennessee SIP. Pet. App. 18a n.2. But the court of appeals attached significance to the Tennessee SIP provision creating an ongoing duty to meet preconstruction requirements, *ibid.*, suggesting that this aspect of

the court's decision, too, depended on particular SIP language.

Petitioners' assertions (Pet. 13-14) of a "larger conflict" on this question rely principally on district court opinions, which generally are not a basis for seeking review in this Court. See Sup. Ct. R. 10(a). Petitioners also cite (Pet. 14-15) a handful of cases interpreting other statutes, but the Eleventh Circuit's interpretation of the CAA and the Alabama SIP does not implicate the reasoning of those decisions.

Because the Eleventh Circuit in this case relied on a perceived omission that no longer exists (and in fact did not exist even at the relevant time), the significance of the decision below is likely to be limited or nonexistent. For those reasons, this case is not a suitable vehicle for resolving abstract questions (divorced from their implementation in SIPs) about the nature of NSR obligations under the CAA.[13] If the courts of appeals come into direct conflict that is not readily susceptible to resolution through the regular SIP amendment process, then the issue may become ripe for this Court's review.[14]

---

[13] An additional complicating factor is that, in an action brought by EPA, the agency would be entitled to deference in its interpretation of the Act and of SIP provisions that it has approved. Because this is a citizen action, no such deference was due to the views of either litigant. In future proceedings relating to the ongoing effect of NSR requirements, the responsible agencies may have an opportunity in the course of the litigation to explicate the appropriate interpretation of applicable SIP provisions. An action involving TVA is uniquely unsuited to that purpose, because TVA has a degree of insulation from enforcement by EPA (particularly in light of the lower court's prior ruling regarding administrative remedies, see p. 4, *supra*).

[14] To be sure, a genuine dispute between courts of appeals about the meaning or significance of particular SIP provisions might not be easily

2. Petitioners also renew their contention that even if claims for penalties would be time-barred, they should still be permitted to sue for equitable relief. The court of appeals' conclusion—that private citizens' claims for equitable relief under the CAA are subject to the same five-year limitation period specified in Section 2462—is correct, and petitioners do not identify any circuit conflict on that issue. Further review of that dependent question therefore is not warranted.

When Congress creates a private civil cause of action but does not expressly identify a limitation period or clearly specify that no time limit shall apply, it implicitly directs the federal courts to fashion an appropriate limitation period for private parties from analogous law—sometimes federal law, otherwise state law. See, *e.g.*, *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 33-35 (1995).[15] Petitioners' contention that *no* statute of limitations should apply to their equitable claims (Pet. 32) is wholly unsupported and implicates no split among the circuits.[16]

---

resolved through SIP amendments, and a dispute over SIP interpretation that genuinely implicated the meaning of the underlying statutory and regulatory requirements on which SIPs are based likely could not be addressed by modifying the SIPs. In this case, however, the amendment process has already addressed the question presented, by eliminating the perceived aspect of the pre-1985 Alabama SIP on which the court of appeals based its decision.

[15] That principle is even clearer for statutes enacted after 1990. Such statutes are governed by 28 U.S.C. 1658 (Supp. V 2005), which provides a presumptive four-year limitation period for any federal statute enacted thereafter.

[16] Petitioners also point (Pet. 26-27) to the existence of separate civil-penalty and injunctive remedies in the CAA, and to a passing statement in legislative history, in support of their claim that Congress intended

The court of appeals reached the correct result by applying Section 2462's five-year limitation period to equitable claims under the CAA. In this case the court came to that conclusion by resort to the concurrent remedy doctrine. Pet. App. 22a (citing *Cope* v. *Anderson*, 331 U.S. 461, 464 (1947)). Petitioners claim that the court's reasoning was erroneous, citing various fragments of equity doctrine. But that argument for error correction is inapposite here, because the court of appeals could have reached the same result applying a straightforward "borrowing" analysis, under which the analogous federal limitation period set out in Section 2462 provides the time limit for injunctive claims. Cf. *Public Interest Research Group of N.J., Inc.* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74-75 (3d Cir. 1990) (Clean Water Act), cert. denied, 498 U.S. 1109 (1991); *Sierra Club* v. *Chevron U.S.A., Inc.*, 834 F.2d 1517, 1520-1521 (9th Cir. 1987) (same). Any variation in the courts of appeals' *reasoning* for applying Section 2462, however, does not warrant review at this time. Petitioners fail to identify a single court of appeals that has adopted their position that citizen suits for equitable relief under the CAA (or the Clean Water Act, or any other federal statute permitting private citizens to sue both for a civil penalty and for equitable relief) are not subject to any limitation period. Nor do petitioners

---

that private injunctive claims be subject to no limitation period. Those isolated indications are not the sort of plain statement that is required in order to demonstrate that Congress intended to take the unusual step of creating a private remedy with no limitation period.

point to any variation in the limitation period that does apply.[17]

Although there is some dispute in the courts of appeals concerning whether equitable claims *by the United States* can be barred by the concurrent remedy doctrine, that issue is not presented here.[18] The Eleventh Circuit correctly rejected petitioners' argument that as "private attorneys general" they are entitled to be treated as the

---

[17] Petitioners cite (Pet. 25-26) several district court decisions as disagreeing with the decision of the court below. Any disagreement among district courts can be resolved in the first instance by the courts of appeals. And petitioners' cases are inapposite in any event: First, several in fact involve the United States as plaintiff. As discussed below, the Eleventh Circuit agrees that the concurrent remedy doctrine does not apply to cases brought by the government. Second, two of the cited cases involved an allegation of continuous, ongoing harm, rather than a contention that injunctive claims could reach backward in time without limit. See *Lefebvre* v. *Central Me. Power Co.*, 7 F. Supp. 2d 64, 68 (D. Me. 1998); *A-C Reorganization Trust* v. *E.I. DuPont de Nemours & Co.*, 968 F. Supp. 423, 428 (E.D. Wis. 1997). In petitioners' final case, the district court in fact applied a borrowing analysis using the principles discussed above. See *Catellus Dev. Corp.* v. *L.D. McFarland Co.*, 910 F. Supp. 1509, 1518 (D. Or. 1995). Thus, none of those decisions actually supports petitioners' proposed approach.

[18] Compare *United States* v. *Telluride Co.*, 146 F.3d 1241, 1248 (10th Cir. 1998) (rejecting "the concurrent remedy rule's application to the Government when it seeks equitable relief in its enforcement capacity"), and *United States* v. *Banks*, 115 F.3d 916, 919 (11th Cir. 1997) ("[T]he properly constructed rule is that—absent a clear expression of Congress to the contrary—a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity."), cert. denied, 522 U.S. 1075 (1998), with *FEC* v. *Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (briefly concluding that Section 2462 applies to actions for injunctive relief, without addressing whether that rule applies to sovereign claims by the government), cert. denied, 522 U.S. 1015 (1997). See generally Gov't Amicus Br. at 25-33, *San Francisco Baykeeper* v. *Cargill Salt Div.*, 263 F.3d 963 (9th Cir. 2001) (No. 99-16032).

United States for time-limit purposes.[19] As the court of appeals observed, the CAA provides that citizen plaintiffs proceed "on [their] own behalf," and it does not place those plaintiffs into the government's shoes. Pet. App. 23a (quoting 42 U.S.C. 7604(a)); see also, *e.g.*, 42 U.S.C. 7604(c)(2) ("A judgment in an action under this section to which the United States is not a party shall not * * * have any binding effect upon the United States."). There is no disagreement among the circuits on that question. And petitioners have no quarrel with the Eleventh Circuit's holding that the concurrent remedy doctrine does not apply to claims truly brought by the government. Pet. App. 22a (citing *United States* v. *Banks*, 115 F.3d 916, 919 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1998)). This case therefore does not present any conflict calling for resolution by this Court.

3. Petitioners also briefly argue (Pet. 33-34) that the court of appeals erred in affirming dismissal of their NSPS claim on the ground that the pre-suit notice they provided was insufficiently specific. Certiorari is not warranted on that issue, which is closely tied to the particular facts of this case and creates no conflict on any broader legal question.

The basic legal standards governing the pre-suit notice provisions of the environmental laws are well established. "[C]ompliance with the 60-day notice provision

---

[19] Absent an express statement by Congress, there is a presumption that claims by the United States are governed by no limitation period. "[A]n action on behalf of the United States in its governmental capacity * * * is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *E.I. DuPont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924); accord *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U.S. 120, 125 (1886); *United States* v. *Knight*, 39 U.S. (14 Pet.) 301, 315 (1840).

is a mandatory, not optional, condition precedent for suit," and any claim brought without the proper notice "must be dismissed." *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 26, 31 (1989); see also *id.* at 23 & n.1 (explaining that the CAA's notice provision was the model for the notice provision at issue in that case). Under EPA's regulation implementing the CAA's notice provision, a notice to an alleged violator must include, *inter alia*, "sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated." 40 C.F.R. 54.3(b); see also 40 C.F.R. 135.3(a) (same, for Clean Water Act). The question here is whether petitioners' notice, which asserted that TVA was violating "all of the requirements of Subpart Da," Pet. App. 149a, was sufficiently specific to comply with Section 54.3(b).

Petitioners apparently do not take issue with the court of appeals' holding that an undifferentiated reference to Subpart Da *could* be insufficient to put an alleged polluter on notice of a violation pertaining only to one of the pollutants governed by that subpart.[20] Rather, petitioners suggest (Pet. 33-34) that the sufficiency of their undifferentiated notice should turn on whether, at the time they filed the complaint, they had a "good faith belief" that TVA was in violation of all of Subpart Da's requirements. Further review is not warranted on the entirely fact-bound question of petitioners' subjective good-faith belief, and petitioners identify no

---

[20] The court of appeals relied for that proposition on *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 487 (2d Cir. 2001), a Clean Water Act case. Pet. App. 29a. The applicability of that holding on the facts of this case is open to question, but because petitioners do not address it, the issue is not presented.

conflicting authority that decides the sufficiency of notice based on those subjective grounds. In the absence of a circuit conflict, that question does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RONALD J. TENPAS
Assistant Attorney General

ELLEN DURKEE
R. JUSTIN SMITH
Attorneys

MAY 2008