NAVIGATING A REGULATORY TWILIGHT ZONE: *SIERRA CLUB V. SANDY CREEK ENERGY ASSOCIATES*

I. INTRODUCTION

When courts overrule agency regulations affecting environmental permitting processes, a "twilight zone" can develop for those entities permitted under the invalidated regulatory standards.[1] While compliance following such a reversal may be seemingly complicated to define or obtain, a regulated entity should not merely rely on its previous compliant status as satisfactory. When such transition periods occur, a regulated entity's chosen path to compliance may affect its ability to quickly and easily resolve legal conflicts and move forward, while the likelihood of environmental lawsuits may render a wait-and-see approach imprudent. Although ambiguities may develop during this twilight period, and paths to compliance differ as entities seek individual solutions, all paths unambiguously lead to some form of adapted compliance. Simply put, the most efficient strategy in response to such a twilight zone is early action. The question for each entity, however, is *when* and *how*? This note will examine this

1. Angela Neville, *EPA's Air Program Still Hazy After All These Years*, POWER (Sept. 15, 2008), http://www.powermag.com/environmental/EPAs-air-program-Still-hazy-after-all-these-years_1346_p4.html.

> There is a fifth dimension beyond that which is known to man. It is a dimension as vast as space and as timeless as infinity. It is the middle ground between light and shadow, between science and superstition, and it lies between the pit of man's fears and the summit of his knowledge. This is the dimension of imagination. It is an area which we call the Twilight Zone.

The Twilight Zone, (CBS Television Series 1959) (Season 1 opening narration).

twilight zone phenomenon by analyzing how one coal-fired power plant increased rather than lessened its own regulatory burden by relying on an invalidated status of compliance.

II. BACKGROUND & CASE HISTORY

Oil- and gas-fired power plants were the subject of one of the most recent regulatory flip-flops in enforcement of the Clean Air Act (CAA). In relevant part, the statute at issue, section 112(g)(2)(B) of the CAA, reads

> [n]o person may construct or reconstruct any major source of hazardous air pollutants [HAPs],[2] unless the Administrator (or the State) determines that the maximum achievable control technology [MACT][3] emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.[4]

In December 2000, the Environmental Protection Agency (EPA) found it "appropriate and necessary"[5] to regulate emissions from coal- and oil-fired electric utility steam generating units (EGUs).[6] Accordingly, the EPA listed these utilities as a source category under section 112(c)(1),[7] subjecting them to section 112(g)'s MACT requirements.[8] While the listing process itself was routine, the sequence of events that followed was not.

A. Listing, Delisting, and Vacatur in New Jersey v. EPA[9]

In March of 2005, five years after initially listing coal- and oil-fired EGUs under section 112, the EPA suddenly delisted them,[10] determining that these

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2. Congress has established an initial list of hazardous air pollutants (HAPs), which are included in 42 U.S.C. § 7412(b)(1) (2012). The Administrator can revise the list and may add pollutants "which present, or may present . . . a threat of adverse human health effects . . . or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition or otherwise." 42 U.S.C. § 7412 (b)(2) (2012).

3. MACT is a technology based control mechanism to limit emissions of hazardous air pollutants according to the standards set forth in 42 U.S.C. § 7412(d)(2). Section 7412(d)(2) states that such standards

> shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section . . . that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies.

Id.

4. 42 U.S.C. § 7412(g)(2)(B).

5. Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000) [hereinafter Utility Air Toxics Determination].

6. An EGU is defined under the Act as "any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale." 42 U.S.C. § 7412(a)(8) (2012). Coal- and oil-fired EGUs are a specific *category* of EGUs.

7. 42 U.S.C. § 7412(c)(1). This is the general provision requiring an updated "list of all categories and subcategories of major sources and area sources." *Id.*

8. Utility Air Toxics Determination, *supra* note 5, at 79,826.

9. New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008).

10. Final Rule, Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, 70 Fed. Reg. 15,994 (2005) (to be codified at 40 C.F.R. pt. 63) [hereinafter Delisting Rule].

EGUs would, instead, be covered under section 111 through a new program, the Clean Air Mercury Rule (CAMR).[11] A host of plaintiffs, including fourteen states, sued to challenge the Delisting Rule, claiming that the EPA had not complied with the CAA's statutory delisting procedure.[12] In *New Jersey v. EPA*, the D.C. Circuit found the EPA's Delisting Rule unlawful and vacated it, along with the CAMR.[13] Due to this regulatory flip-flop, major coal- and oil-fired EGUs once again fell under the MACT requirements of section 112(g).[14] *New Jersey* closed a three-year twilight zone during which construction permits were legally issued to the delisted EGUs without requiring installation of the maximum achievable control technology for the hazardous air pollutants their plants would emit.

B. The Aftermath of New Jersey and Sierra Club's Ensuing Fifth Circuit 'Success'

Environmental organizations sought to expedite enforcement of the revived MACT requirements by swiftly taking action through citizen suits nationwide.[15] After *New Jersey*, Sierra Club sent notices of intent to sue (NOIs) to plants in Arizona, Georgia, Kentucky, North Carolina, Texas, Missouri, and Wyoming.[16] All of these plants were being constructed under permits arguably invalidated by *New Jersey* because they were issued without MACT determinations under the Delisting Rule.[17] A majority of Sierra Club's NOIs resulted in some form of compliance or enhanced mitigation through pre-litigation settlements.[18]

Not so with a partially constructed, 900-megawatt coal-fired plant owned by Sandy Creek Energy Associates (Sandy Creek) in Riesel, Texas.[19] In 2006,

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11. *Id.* at 16,004. EPA argued that the implementation of the CAMR would reduce mercury emissions to levels below that which affect human health in order to support to its decision to remove EGUs from the section 112 list of source categories. *Id.*

12. *New Jersey*, 517 F.3d at 578 (other plaintiffs included various environmental groups, Native American tribes, and industry representatives).

13. *Id.* The D.C. Circuit's Judge Randolph provides an exceptional summary of both the necessity and benefits of complete vacatur rather than mere remand back to an agency in such instances of invalidated rules. Comcast Corp. v. FCC, 579 F.3d 1, 10-12 (D.C. Cir. 2009) (Randolph, J., concurring).

14. Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P., 627 F.3d 134, 137 n.5 (5th Cir. 2010) (citing *New Jersey*, 517 F.3d at 582, holding that "[t]he vacatur of the Delisting Rule means that EGUs are still legally obligated to comply with §112(g)(2)(B)'s MACT requirement for any hazardous pollutant they emit").

15. CAA Citizen Suits gain authority under 42 U.S.C. § 7604. Sierra Club was required to wait sixty days after giving its notice of intent to sue before filing a complaint. 42 U.S.C. § 7604(b)(1)(A) (2012).

16. *Sandy Creek Energy Station*, SIERRACLUB.ORG, http://www.sierraclub.org/environmentallaw/coal/getBlurb.aspx?case=tx-sandy-creek-energy-station.aspx (last visited Mar. 21, 2013).

17. *Id.*

18. Plaintiffs' Memorandum on the Significance of Defendant's Post-Mandate Actions at 3 n.7-8, Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P., No. A-08-CA-648-LY (W.D. Tex. May 16, 2011) (highlighting that another similarly situated Texas plant arrived at a pre-litigation settlement and submitted to TCEQ a MACT demonstration, as did multiple other plants nationwide including, for example, the Dry Fork plant in Wyoming, the Plum Point plant in Arkansas, the Wellington plant in Pennsylvania, and the Big Cajun and Little Gypsy plants in Louisiana). *See also Coal Victories Across the Nation*, SIERRACLUB.ORG, http://www.sierraclub.org/environmentallaw/coal/victories.aspx (last visited Mar. 21, 2013).

19. For consistency in this article, "Sandy Creek" refers to both the plant and ownership organization. Sandy Creek Energy Associates was a joint venture between Dynegy Inc. (based in Houston) and LS Power (based in New Jersey), created for the sole purpose of developing the Sandy Creek Energy Station. On December 1, 2009, Dynegy sold the entirety of its interests in Sandy Creek to LS Power. *Dynegy Announces*

during the twilight zone between the Delisting Rule and *New Jersey*, Sandy Creek applied as a major source for a pre-construction permit from the Texas Commission on Environmental Quality (TCEQ).[20] In its application, Sandy Creek requested a MACT determination.[21] However, pursuant to the EPA's Delisting Rule, the TCEQ determined that the Riesel plant did not need the requested MACT determination.[22] Consequently, Sandy Creek commenced construction on January 7, 2008 without reference to MACT in its permit.[23]

The D.C. Circuit decided *New Jersey* only one month later.[24] On August 8, 2008, Sierra Club[25] sued Sandy Creek alleging a violation of the CAA's section 112(g) MACT determination requirement.[26] The Federal District Court for the Western District of Texas granted summary judgment in favor of Sandy Creek, finding that the MACT requirement under section 112(g) did not apply to the plant.[27] Sierra Club appealed to the Fifth Circuit.[28]

The primary question before the Fifth Circuit was whether Sandy Creek's *ongoing* plant construction, without MACT, violated section 112(g) of the CAA in light of *New Jersey*, even though construction *began* during a time when "a MACT determination was not required under the EPA's unlawful Delisting Rule."[29] The court concluded that Sandy Creek's continued construction without

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Completion of Transaction with LS Power, ELECTRICENERGYONLINE.COM (Dec. 2, 2009), http://www.electricenergyonline.com/?page=show_news&id=123755.

20. *Sierra Club*, 627 F.3d at 137. The TCEQ is the Texas agency charged with implementing environmental legislation. The TCEQ's Office of Air oversees all air permitting activities for the agency. *See generally Air*, TCEQ, http://www.tceq.texas.gov/agency/air_main.html (last visited Mar. 25, 2013).

21. *Sierra Club*, 627 F.3d at 137.

22. *Id.* (quoting the TCEQ's language on May 25, 2006 that "[n]o case-by-case MACT determination for the PC boiler is necessary because the type of steam generating unit (PC boiler) that Sandy Creek is proposing is not subject to MACT regulation").

23. *Id.*

24. *Id.* at 138. Following the court's decision to vacate the CAMR and the Delisting Rule in February, interested parties petitioned the D.C. Circuit to expedite issuance of the official mandate so that the vacatur might take effect; the court approved and issued the mandate on March 14th. R. Bruce Barze, Jr. and Alexia B. Borden, *CAMR is on Spring Break (Permanently), available at* http://www.balch.com/files/News/31841484-678e-432d-87be-18c2e25d9aca/Presentation/NewsAttachment/b1c58940-74d8-4c8a-aa8e-1c452ad45b33/BarzeBordenArticle_on_the_Vacation_of_CAMR.pdf (last visited Mar. 21, 2013).

25. Sierra Club was joined by another non-profit plaintiff, Public Citizen. For efficiency, the plaintiffs will be hereinafter collectively referred to as "Sierra Club."

26. *Sierra Club*, 627 F.3d at 138.

27. *Id.* The district court relied on the Supreme Court's decision in *Harper v. Virginia Dept. of Taxation* to conclude (1) that the *New Jersey* case had no retroactive effect on Sandy Creek, and (2) that because the TCEQ's PSD permit from 2006 was affirmed by a Texas state district court, *Harper* did not allow direct review. However, the Fifth Circuit held that *Harper* was inapposite to the facts of the case because *Harper* had not considered retroactivity of a *regulation*. Furthermore, retroactive application of *New Jersey* was not required to find a violation of section 112(g) anyway. The Texas state court had not affirmed a 'MACT' determination, so direct review was not closed on that subject. Direct review of a MACT determination could have, but did not, create a retroactivity issue under *Harper*. Considering all these factors, the Fifth Circuit found the district court's reasoning was erroneous. *Id.* at 142-43 (discussing Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993)).

28. *Sierra Club*, 627 F.3d at 138.

29. *Id.* at 139. Three arguments were initially presented to the Court. The other two arguments were: (1) whether or not TCEQ had in fact made a proper MACT determination by choosing *not* to make a determination, and (2) whether the district court should have abstained. The court held that TCEQ had not made a MACT determination and that the district court was correct in refusing to abstain. *Id.* In fact, months before the Fifth Circuit decision, EPA had formally denounced TCEQ's flexible permitting program as falling

a MACT determination violated section 112(g).[30] The Fifth Circuit reasoned that a plain reading of the statute led to a conclusion that the date of commencement was "irrelevant."[31] Consequently, section 112(g) applied to Sandy Creek's ongoing construction.[32] The question was "not whether Sandy Creek must comply with [section 112(g)], but rather the question [was] *when* and *how*."[33]

C. Beyond the Fifth Circuit's Finding of a Violation

Upon return to the district court, Sandy Creek presented a change in the facts: it alleged that the plant was not a major source under the CAA after all.[34] Two months after the Fifth Circuit decision, the TCEQ amended Sandy Creek's construction permit and reclassified the plant's status to that of an 'area' or 'minor' source.[35] Sandy Creek then argued at the district court level that its change in status mooted Sierra Club's case because the Riesel plant was not, nor had it ever been, a major source of HAPs.[36]

In tandem with its mootness argument in the district court, Sandy Creek filed a petition for certiorari with the Supreme Court,[37] and presented the following question:

> Whether, after construction of a power plant has begun in reliance on the issuance of a lawful preconstruction permit reflecting that there was no Maximum Achievable Control Technology ("MACT") requirement then in force, a new MACT determination requirement can be compelled during construction, contrary to EPA regulations and judicial interpretations of closely-related provisions of the Clean Air Act.[38]

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short of the CAA requirements. *Id.* at 145 n.16. Accordingly, the Fifth Circuit, in upholding the district court's refusal to abstain, stated that "the present case would make for an odd application of [the abstention doctrine] given that the federal district court would be abstaining from ruling when the state-regulatory body may soon lose its federally-granted authority to regulate." *Id.* at 145.

30. *Id.* at 142.

31. *Id.* at 141. The court used a plain text reading to conclude that no construction, whatsoever, is allowed under section 112(g), regardless of a commencement date, unless the MACT emission limitations have been met. "It does not state 'no person may *begin* construction' or '*start* to construct.'" *Id.* The court disagreed additionally with Sandy Creek's argument that because the TCEQ and the EPA conduct the MACT determination during the pre-construction process, any violation post-commencement of construction is not in violation of the statute, concluding that this was "an incorrect reading of the interplay of administrative law and statutory interpretation." *Id.* at 141 n.9.

32. *Id.* at 141.

33. *Id.*

34. Sandy Creek's Memorandum of Law at 1, Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P., No. A-08-CA-648-LY (W.D. Tex. May 16, 2011).

35. *Id.*

36. *Id.* at 2. The MACT requirements of CAA section 112(g) apply only to major sources of HAPs. 42 U.S.C. § 7412(g)(2)(B). A "major source" is defined under section 112 as "any stationary source . . . that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1). An area source, commonly referred to as a minor source, is defined under section 112 of the Act as "any stationary source of hazardous air pollutants that is not a major source." 42 U.S.C. § 7412(a)(2).

37. Petition for Writ of Certiorari, Sandy Creek Energy Assocs., L.P. v. Sierra Club, Inc., 2011 WL 1594690 (No.10-1333) (U.S. Apr. 26, 2010). The Court, in turn, requested an amicus brief from the Solicitor General. Sandy Creek Energy Assocs., L.P. v. Sierra Club, Inc., 132 S. Ct. 82 (2011).

38. Petition for Writ of Certiorari, *supra* note 37, at *i.

In summary, through the TCEQ-enabled change in facts and its petition for certiorari, Sandy Creek argued two possible escape mechanisms after *New Jersey*.[39] First, in its petition for certiorari, Sandy Creek argued that because it received its initial permit following the Delisting Rule, in May 2006, and began construction prior to *New Jersey*, in January 2008, section 112(g) could not apply to its plant.[40] Second, before the district court, Sandy Creek argued that because of the TCEQ's May 2011 declaration that it was a minor source, section 112(g) cannot and never did apply to the plant.[41] If either argument was successful, Sandy Creek was essentially immune from responsibility for any alleged regulatory non-compliance during the five-year interim between its original and amended permits. In effect, Sandy Creek's success on either argument meant that it was, in fact, in compliance with the CAA.

Unfortunately, the courts did not have an opportunity to address the merits of either argument regarding Sandy Creek's classification or compliance status. In December of 2011, Sandy Creek and Sierra Club entered a consent decree in the District Court for the Western District of Texas and the petition for certiorari was withdrawn.[42] While not admitting liability, Sandy Creek was required through the consent decree to request significant alterations to its permit from the TCEQ, stipulate to sizeable penalties for future noncompliance, sponsor a local environmental project, and pay attorneys' fees and costs to Sierra Club.[43]

This settlement leaves open a host of twilight zone questions for the future. How far does reliance on a prior legal status reach? When does such reliance simply become non-compliance? What is the best legal approach to compliance during a twilight zone? The following analysis will attempt to address these questions by returning to the one question remanded and left unanswered by the Fifth Circuit: "*when* and *how*"[44] compliance with the CAA was, or should have been, required. Many of these questions remain unanswered, and there are arguably multiple solutions to each unique scenario. However, the following facts and accompanying analysis seek to demonstrate that timely steps towards compliance, although not the path chosen by Sandy Creek, may serve as the best business and legal strategy for entities that find themselves in a similar, regulatory twilight zone.

III. ANALYSIS

This section will present a critical look at Sandy Creek's legal strategy since the Delisting Rule's promulgation by embedding the progression of Sandy Creek's case within a broader timeline of nationwide responses to the Delisting Rule and *New Jersey*. The timeline presented in Part A is significant for two closely related reasons. On one hand, the surrounding events should have suggested to Sandy Creek that its reliance approach was growing progressively

39. *New Jersey*, 517 F.3d at 583.

40. Petition for Writ of Certiorari, *supra* note 37, at *2.

41. Sandy Creek's Memorandum of Law, *supra* note 34, at 2.

42. Consent Decree, Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P., No. 1:08-cv-00648-LY (W.D. Tex. Dec. 9, 2011); Sandy Creek Energy Assocs., L.P. v. Sierra Club, Inc., 132 S. Ct. 872 (2011) (dismissal pursuant to Rule 46.1 of the Rules of the Supreme Court).

43. Consent Decree, *supra* note 42, at 3-7, 9-10.

44. *Sierra Club*, 627 F.3d at 141.

less likely to succeed in the courts. Additionally, the same progression of events and contextual indicators made the Fifth Circuit's eventual decision increasingly predictable.

Part B of this analysis will address why the outcome of this case has left Sandy Creek with a state of compliance that remains tainted by the twilight zone. By examining the events following the Fifth Circuit decision, and considering where the parties stand after the settlement agreement, this analysis will address how and why that outcome came about. Finally, this comment will look beyond Sandy Creek and Sierra Club and consider the future for industry in light of the outcome of this twilight scenario. Overall, this analysis seeks to utilize the broader facts and outcome of this case to further the argument that regulated entities should not embrace Sandy Creek's legal strategy in the face of future regulatory reversals.

A. Behavior in a Twilight Zone: When and How to Comply

Sandy Creek was arguably presented with multiple options as to *when* and *how* it could comply with the CAA following *New Jersey* and the Fifth Circuit's decision. The following timeline presents the facts and surrounding events as they relate to Sandy Creek's chosen path to compliance. At some point in this timeline, the twilight zone ends. Admittedly, differing minds may settle on alternative conclusions as to *when* and *how* exactly this transition occurs. This analysis seeks to illustrate that, regardless of an entity's chosen path through a regulatory twilight zone, what most minds may safely agree upon is that an *end does in fact occur*, and compliance necessitates some form of action or adaptation following a regulatory reversal. Reliance alone is not a successful exit strategy.

1. Delisting Rule to *New Jersey*: March 2005-February 2008.[45]

The three-year period between the Delisting Rule and *New Jersey* was a twilight zone because *when* and *how* a plant complied with the CAA did not technically involve a MACT determination.[46] From the moment of its publication, the regulatory decision that allowed such MACT-less permits stood on unsteady ground.[47] At least one court later suggested that "[a]s early as June 2005," when the rule was challenged, entities constructing new oil- and gas-fired EGU's should have been put on notice that the EPA's Delisting Rule was procedurally defective.[48] The conflict over the delisting suggested it would be wise to proceed with caution through that period.[49]

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45. The *New Jersey* opinion publication date was February 8th, 2008. The mandate issued on March 14th, 2008.

46. Delisting Rule, *supra* note 10.

47. New Jersey v. EPA, 517 F.3d 574, 575-77 (D.C. Cir. 2008) (listing challenges by states, environmental groups, industry representatives, and Native American tribes).

48. Southern Alliance for Clean Energy v. Duke Energy Carolinas, L.L.C., 2008 WL 5110894, at *4 (W.D.N.C. Dec. 2, 2008) (stating that "[a]s early as June 2005, Duke undoubtedly knew that the delisting of EGUs was being challenged and that the required delisting procedure had not been followed by the EPA").

49. *See generally EPA's Action Takes Toxics Worries Off Utilities' Minds, but Lawsuits Aim to Reverse Agency*, ELECTRIC UTIL. WK. (Apr. 4, 2005), *available at* 2005 WLNR 6045457, *and Challenge to EPA's Mercury 'Delisting' Awaits Court Ruling; Leahy Readies Motion in Senate*, ELECTRIC UTIL. WK. (July 25, 2005), *available at* 2005 WLNR 12452402 (highlighting that a senator had secured thirty-two Senate

Sandy Creek submitted its application for a construction permit in 2004.[50] The application originally included a request for a MACT determination, although the TCEQ ultimately found that to be unnecessary when the final permit was issued in 2006,[51] pursuant to the 2005 Delisting Rule. While preparing for construction over the next two years, arguments against the Delisting Rule's legality were being made at the D.C. Circuit.[52] The challengers in *New Jersey v. EPA* presented a simple yet persuasive argument: the EPA's delisting was procedurally unlawful and did not comply with the CAA.[53] The D.C. Circuit agreed.[54]

Notably, Sandy Creek began construction of its plant on January 7, 2008—one month after final arguments concluded at the D.C. Circuit.[55] The plant had been in construction for, at most, thirty-two days before *New Jersey* was decided on February 8, 2008.[56] Sandy Creek had technically commenced its construction process under the Delisting Rule, when compliance with the law did not require a MACT determination.[57] However, even during this time, the matter was in the spotlight, under litigation, and impending regulatory change seemed likely.[58] Breaking ground in this twilight zone surrounding *New Jersey* placed a new plant like Sandy Creek, with a MACT-less construction permit, in uncertain territory.[59]

2. *New Jersey* to the Fifth Circuit Opinion: February 2008 to November 2010[60]

A twilight zone developed in the wake of *New Jersey* because it was unknown how courts would apply its holding to plants that began construction

signatures on a "resolution of disapproval" of the Delisting Rule that could come up for Senate vote, and that environmental groups were asking for a stay of the rule).

50. *Sierra Club*, 627 F.3d at 137.

51. *Id.*

52. *See generally States, Environmentalists Challenge EPA Mercury Rules*, CLEAN AIR REP. (June 2, 2005), *available at* 2005 WLNR 8666941.

53. *New* Jersey v. EPA, 517 F.3d 574, 581 (D.C. Cir. 2008).

54. *Id.*

55. *Sierra Club*, 627 F.3d at 137; *New Jersey*, 517 F.3d at 574.

56. *Sierra Club*, 627 F.3d at 137; *New Jersey*, 517 F.3d at 574.

57. *Sierra Club*, 627 F.3d at 137.

58. Neville, *supra* note 1 (discussing *New Jersey*, and noting that the "ruling has serious implications for coal-fired power plants that are seeking permits or have already received permits because they now have to achieve at least a 90% mercury removal rate. This regulatory back flip underscores the need for utilities to develop more effective mercury capture systems as soon as feasible."). *See also EPA's Action Takes Toxics Worries off Utilities' Minds, but Lawsuits Aim to Reverse Agency*, *supra* note 49, *and Challenge to EPA's Mercury 'Delisting' Awaits Court Ruling; Leahy Readies Motion in Senate*, *supra* note 49, *and States, Environmentalists Challenge EPA Mercury Rules*, *supra* note 52.

59. *See generally* Cathy Cash, *Question on Mercury at this Point Seems to be When, Not Whether, Control Regs Will be Written*, ELECTRIC UTIL. WK. (Jan. 5, 2009), *available at* 2009 WLNR 911574 (highlighting that the common view was that the Supreme Court would not take an EPA petition for certiorari and "electric utilities are already preparing to comply with existing state mercury standards as well as a likely national MACT"), *and* Chris Holly, *Expect New Mercury Rules by 2011*, COAL POWER MAG. (Dec. 10, 2009), http://www.coalpowermag.com /environmental/231.html.

60. Feb. 8, 2008/March 14, 2008 (*New Jersey* Opinion/Mandate) to Nov. 23, 2010/Feb. 4, 2011 (5th Cir. Opinion/Mandate).

between the Delisting Rule and the D.C. Circuit's vacatur.[61] The National Resources Defense Council reported that thirty-two coal-fired plants located in thirteen different states would be "shaken up" in some way by *New Jersey*.[62] In May of 2008, Sierra Club sent NOIs to various plants, many of which resulted in agreements to obtain MACT determinations or otherwise settled out of court and out of the spotlight.[63] Other environmental organizations also sent out NOIs during that time, yet only four significant federal opinions, including *Sierra Club*, resulted from these efforts.[64] The three other federal opinions were initially decided before Sandy Creek and Sierra Club reached the Fifth Circuit.[65] All together, the other opinions indicated that, in light of *New Jersey*, some form of MACT determination was necessary for compliance.[66] When the question was finally presented to the Fifth Circuit, the court's finding that Sandy Creek was in violation of the CAA by continuing construction without MACT[67] was a logical and seemingly predictable extension of the relevant case law.

Sierra Club's NOI campaign resulted in compliance by multiple other plants, including a public settlement reached with another Texas plant.[68] Indeed,

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61. Given the unique position of the D.C. Circuit as the court with exclusive jurisdiction over administrative regulations such as the Delisting Rule, *Natural Res. Def. Council, Inc. v. EPA*, 512 F.2d 1351, 1356-57 (D.C. Cir. 1975), there was little disagreement over whether the vacatur applied in all circuits. "[I]t is clear, and no party contests, that the D.C. Circuit's vacatur of the Delisting Rule applies unequivocally throughout all of the Federal Circuits." *Sierra Club*, 627 F.3d at 138 n.6. *See also* WildEarth Guardians v. Lamar Utils. Bd., 2013 WL 1164324, at *2 n.3 (D. Colo. Mar. 21, 2013).

62. Press Release, Natural Res. Def. Council, 32 Coal-Fired Power Plants in 13 States Now Up in the Air After Major Court Ruling on Mercury (Feb. 28, 2008), http://www.nrdc.org/media/2008/080228.asp.

63. Plaintiffs' Memorandum on the Significance of Defendant's Post-Mandate Actions, *supra* note 18, at 3, *see also* Press Release, Luminant, Luminant Announces Agreement with Sierra Club and Public Citizen (Dec. 9, 2008), http://www.luminant.com/news/newsrel/detail.aspx?prid=1123 (noting the settlement between Luminant Power and Sierra Club which resulted in the only other 'twilight permitted' plant in Texas applying for a MACT determination from the TCEQ), *and Coal Power Related Developments for Dynegy, Luminant, the FutureGen Alliance, and Sunflower Electric*, POWERMAG.COM (Dec. 7, 2008), http://www.powermag.com/POWERnews/Coal-Power-Related-Developments-for-Dynegy-Luminant-the-FutureGen-Alliance-and-Sunflower-Electric_1604_p3.html (noting Dynegy's rethinking of coal power, sale to LS Power of Sandy Creek, and quoting Luminant's General Counsel as saying: "This agreement gives us greater legal and regulatory certainty as we complete the Oak Grove generating station, which will help meet growing Texas electricity demand.").

64. *Sierra Club*, 627 F.3d at 138 (complaint filed Aug. 8, 2008); WildEarth Guardians v. Lamar Utils. Bd., 2010 WL 3239242 (D. Colo. Aug. 13, 2010) (complaint filed Dec. 21, 2009); WildEarth Guardians v. Pub. Serv. Co. of Colo., 698 F. Supp. 2d 1259, 1262 (D. Colo. Mar. 9, 2010) (complaint filed July 2, 2009); Southern Alliance for Clean Energy v. Duke Energy Carolinas, L.L.C., 2008 WL 5110894 (W.D.N.C. Dec. 2, 2008) (complaint filed July 16, 2008).

65. *Lamar Utils. Bd.*, 2010 WL 3239242 (D. Colo. Aug. 13, 2010); *Pub. Serv. Co. of Colo.*, 698 F. Supp. 2d 1259 (D. Colo. March 9, 2010); *Southern Alliance for Clean Energy*, 2008 WL 5110894 (W.D.N.C. Dec. 2, 2008).

66. *Lamar Utils. Bd.*, 2010 WL 3239242, at *5 (declining to accept defendant's interpretation of section 112(g) as inapplicable because the project was continuing construction and finding a violation); *Pub. Serv. Co. of Colo.*, 698 F. Supp. 2d at 1264 (abstaining only because defendant had complied with requests for MACT determinations post-*New Jersey* and the state agency's process was on-going); *Southern Alliance for Clean Energy*, 2008 WL 5110894, at *9 ("Defendant is continuing with the construction of Unit 6 without the required § 112 MACT determination. . . . Duke is simply refusing to comply with controlling law.").

67. *Sierra Club*, 627 F.3d at 143-44 (holding that "Sandy Creek's continued construction of a major source constitutes a violation of § 112(g)(2)(B)").

68. Plaintiffs' Memorandum on the Significance of Defendant's Post-Mandate Actions, *supra* note 18, at 3 n.8 (including a non-exhaustive list of plants that had settled).

settlement appeared to be the solution of choice for similarly situated plants.[69] In spite of these developments, Sandy Creek chose not to enter into early settlement agreements with Sierra Club or approach the TCEQ to request a MACT determination while it continued construction.[70] Instead, in August of 2008,[71] Sandy Creek sought a TCEQ affirmation that it had successfully fulfilled its MACT determination requirements and explained why it believed the record indicated as much.[72] The TCEQ acknowledged that Sandy Creek had "satisfied the relevant requirements," but later rebuked this statement's significance, insisting the affirmation was not "agency action."[73]

The twilight zone developing around the plant grew deeper during that time because settlements and other court decisions continued to strengthen Sierra Club's case. A chronological discussion of the representative warning signs, cases, and regulatory input leading up to the Fifth Circuit's decision follows. While each decision was unique in its own right, and courts differed in their treatment of the situation, one constant emerged: inaction was not an option.

a. *Southern Alliance for Clean Energy v. Duke Energy Carolinas, L.L.C.*[74]

The *Alliance* case was filed a month before *Sierra Club*.[75] Duke Energy (Duke) had received its construction permit, without a MACT determination, just ten days before *New Jersey* was decided.[76] Following *New Jersey*, and compelled by a state agency request, Duke submitted documents which it termed

69. *Id*. *See also supra* note 63 (highlighting Luminant's statement that its own agreement increases certainty).

70. Sierra Club, in its opposition to the petition for certiorari, noted itself that Sandy Creek could have continued construction while getting a MACT determination at this point. Brief in Opposition to Sandy Creek's Petition for Certiorari., Sandy Creek Energy Assocs. L.P. v. Sierra Club, Inc., No. 10-1333, 2011 WL 2593463, at *28 n.13 (U.S. June 29, 2011). Courts enforced this conclusion as well. *See, e.g.*, *Pub. Serv. Co. of Colorado*, 698 F. Supp. 2d at 1263 (noting than neither EPA nor the state agency ordered any halt in construction while Xcel's MACT determination was finalized).

71. The same month Sierra Club filed its complaint against Sandy Creek in district court. *See supra* notes 25-26 and accompanying text.

72. Letter from Scott Carver, Sec'y, Sandy Creek Energy Assocs., to Richard Hyde, Dir., Air Permits Div., TCEQ (Aug. 27, 2008) (on file with author). In this letter, Sandy Creek also acknowledged its awareness of the post-*New Jersey* controversy. "We recognize that there are differing positions on whether such a [MACT] determination is legally required in the wake of litigation concerning MACT standards for electric generating units, and we are not asking for TCEQ's legal position on that question." *Id.*

73. Letter from Richard Hyde, Dir., Air Permits Div., TCEQ, to Scott Carver, Sec'y, Sandy Creek Energy Assocs. (Sept. 5, 2008), No. A-08-CA-648-LY, Doc. 29-5, at 70 (W.D. Tex. 2011) ("We consider this [best available control technology] review [of other HAPS] as equivalent to a MACT review."). Sierra Club highlighted that "Once in litigation over this letter, the TCEQ recanted and acknowledged: 'It was not agency action. It did not establish any rights or responsibilities of Sandy Creek or any other person or entity.'" Plaintiffs' Memorandum on the Significance of Defendant's Post-Mandate Actions, *supra* note 18, at 3-4. Furthermore, the Fifth Circuit directly addressed this letter's lack of authority and incorrectness. *Sierra Club*, 627 F.3d at 140 (stating that "[a] letter from an employee deeming the MACT determination requirement satisfied is clearly insufficient to make up for these inadequacies in the alleged MACT determination").

74. Southern Alliance for Clean Energy v. Duke Energy Carolinas (*Alliance I*), 2008 WL 5110894 (W.D.N.C. Dec. 2, 2008). Alliance was joined by plaintiffs Environmental Defense Fund, National Parks Conservation Association, Natural Resources Defense Council, and Sierra Club.

75. *Id.* at *1.

76. *Id.* at *4.

"MACT-like" assessments.[77] However, Duke continued to argue that section 112(g) did not apply to the plant and refused a *full* MACT determination.[78] The North Carolina District Court found that Duke was "simply refusing to comply with controlling law" by continuing construction without a MACT determination and gave the plant ten days to comply fully with section 112(g).[79] *Alliance* was the first court decision to lend direct support to Sierra Club's contention's that Sandy Creek required a MACT determination to come into compliance with the CAA.

b. EPA Chimes In: The Meyers Memo

Up until this point in the timeline, federal guidance was absent from the post-*New Jersey* picture. However, on January 7, 2009, the EPA finally spoke directly to the status of those EGUs affected by this twilight zone surrounding the Delisting Rule and *New Jersey*.[80] The Meyers Memo, addressed to regional EPA administrators, revealed the EPA's opinion regarding post-mandate compliance, and acceptance of the D.C. Circuit's decision.[81] The Memo stated:

> [A]lthough these EGUs may have relied in good faith on rules that EPA issued that were subsequently vacated, the Agency believes that these EGUs are legally obligated to come into compliance with the requirements of [s]ection 112(g) . . . . We therefore request that the appropriate State or local permitting authority commence a process under [s]ection 112(g) to make a new-source MACT determination in each of these cases.[82]

According to the EPA, these plants, including Sandy Creek, required further technology determinations because they began, but did not complete, construction prior to *New Jersey* with permits granted under the Delisting Rule. The Meyers Memo also revealed the agency's acknowledgement of some

77. *Id.* at *5.

78. *Id.*

79. *Id.* at *9-10 (denying plaintiff's request for injunctive relief while noting that "such a drastic measure [was] justified by Defendant's refusal to comply with the plain requirements of current law"). In March of 2009, the state agency issued Duke a revised minor permit that Alliance challenged before an administrative law judge. Because of this challenge, the district court judge, finding that "two separate and independent courts [were] now being asked to decide the same issue," abstained under the *Burford* Doctrine. Southern Alliance for Clean Energy v. Duke Energy Carolinas, L.L.C., 2009 WL 1940048, at *3, *5 (W.D.N.C. July 2, 2009) (relying on *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943), which states generally that a court must "exercise [its] discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy"). The story, and its relationship to the *New Jersey* decision, was written about in widely distributed trade journals. *See, e.g.*, Amena Saiyid, *Cliffside Plant 'Minor Source' of Air Pollutants*, COAL TRADER, SECTION: EMISSIONS ROUNDUP (Mar. 17, 2009), *available at* 2009 WLNR 6021149 (summarizing district court holding and noting challenges to minor permit). Alliance was later awarded attorney's fees and costs for its challenge up until the December 2008 ruling because the court found the plaintiffs had prevailed by requiring Duke to participate in the MACT process, even though the federal case was later dismissed on abstention basis. Southern Alliance for Clean Energy v. Duke Energy Carolinas, L.L.C., 2009 WL 2767128, at *4 (W.D.N.C. Aug. 27, 2009), *aff'd*, 630 F.3d 401 (4th Cir. 2011).

80. Memorandum from Robert J. Meyers, Office of Air and Radiation, EPA, for Regional Administrators: Application of CAA Section 112(g) to Coal- and Oil-Fired Electric Utility Steam Generating Units that Began Actual Construction or Reconstruction Between March 29, 2005 and March 14, 2008 (Jan. 7, 2009) [hereinafter Meyers Memo], *available at* http://www.epa.gov/region7/air/nsr/nsrmemos/112gcoal.pdf.

81. *Id.*

82. *Id.* at 1-2 (the EPA "urge[d] permitting authorities to undertake § 112(g) reviews without delay").

flexibility for construction completed prior to *New Jersey*.[83] However, the Memo specifically insisted that consideration should be given only for physical construction that took place in reasonable reliance on the Delisting Rule *prior* to February 8, 2008 (issuance of the D.C. Circuit opinion).[84] Although the EPA allowed for leeway based on early reasonable reliance, the Agency insisted that compliance with *New Jersey* and the CAA required some reasonable MACT determination process.[85] Applying the Memo to the facts at hand, only one month of Sandy Creek's construction was considered by the EPA to have been in "reasonable reliance" on the Delisting Rule.[86]

c. WildEarth Guardians' Colorado Cases

In July and December of 2009, WildEarth Guardians[87] filed complaints in the District of Colorado against two additional entities: the Public Service Company of Colorado (d/b/a Xcel Energy) and the Lamar Utilities Board (Lamar), respectively.[88] The first case, *WildEarth Guardians v. Public Service Co. of Colorado (Xcel)*,[89] was clearly distinguishable from Sandy Creek. Although Xcel was granted a MACT-less, post-delisting permit in 2005, the utility had a 2004 settlement in place that required it to have MACT-level limitations on both new and existing units.[90] Following the Meyers Memo, and in response to requests from both Colorado permitting authorities and the regional EPA office, Xcel received a modified permit *with* a formal MACT determination while finalizing construction, and began operation in 2009.[91] The district court chose to abstain from any additional review of the ongoing permitting process with the state agency, and requested additional briefing on whether *New Jersey* should apply retroactively to Xcel's ongoing construction in interim periods between permits for civil penalty purposes.[92]

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83. The Memo stated specifically:

> Section 112(g) proceedings ordinarily are concluded before the commencement of any construction activity, so it is reasonable for the permitting authority—under these unique and compelling circumstances, and within the bounds of its discretion under Clean Air Act Section 112(g) and EPA's section 112(g) regulations—to give consideration to the effect of prior construction, undertaken in *reasonable reliance* on now-vacated rules, in making the case-by-case determination of applicable MACT requirements.

Id. at 2 (emphasis added).

84. *Id.* (noting further that "permitting authorities should not consider any MACT options to have been foreclosed simply by the prior issuance of permits, the progress of administrative processes, nor by obligation of contract").

85. *Id.*; *see also supra* text accompanying note 83.

86. Meyers Memo, *supra* note 80; *Sierra Club*, 627 F.3d at 137 (noting that Sandy Creek began construction on January 7, 2008).

87. WildEarth Guardians is a New Mexico based environmental non-profit with additional offices in Colorado and Arizona. WILDEARTH GUARDIANS, http://www.wildearthguardians.org (last visited Mar. 22, 2013).

88. Wildearth Guardians v. Pub. Serv. Co. of Colo., 698 F. Supp. 2d 1259 (D. Colo. Mar. 9, 2010); Wildearth Guardians v. Lamar Utils. Bd., 2010 WL 3239242 (D. Colo. Aug. 13, 2010).

89. *Pub. Serv. Co. of Colo.*, 698 F. Supp. 2d 1259.

90. *Id.* at 1261-62. The court stated that "one could conclude that Xcel always was required to have a MACT determination regardless of the Delisting Rule." *Id.* at 1265.

91. *Id.* at 1262-63.

92. *Id.* at 1264-65. Eventually, the district court found retroactive application inequitable under the facts of the case considering Xcel's continued cooperation and compliance as well as its consistently present

WildEarth's concurrent case, against the Lamar Utilities Board, lent the most analogous support to Sierra Club's arguments against Sandy Creek.[93] Lamar received a permit in February 2006, after the Delisting Rule, authorizing the modification of the city's existing power plant.[94] Even though Lamar asserted ongoing discussions with the state "exploring a MACT determination," the court chose not to abstain or entertain a collateral attack argument.[95] The court ultimately denied Lamar's motion to dismiss, finding that the MACT requirement of section 112(g) could simply not be avoided.[96] More pointedly, the court held that "nothing in the text [of the CAA] indicates that the operator is relieved of the responsibility of complying with the statute after construction begins."[97] Even further, the court found that "[o]nce the *New Jersey* decision was issued and the defendants were put on notice that [section] 112(g) applied to EGUs, assessing penalties for a failure to seek a MACT determination after that point would not be to apply the case retroactively."[98]

e. *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.*[99]

On appeal of Sierra Club's case, the Fifth Circuit, unlike the district court, gave consideration to the EPA's understanding of the twilight situation as well as the concurrent case law, including the additional *WildEarth Guardians* cases.[100] Accordingly, the appellate court allowed leniency for construction completed before the *New Jersey* decision, but implied there was little room for

(and eventually increased) MACT standards and dismissed the case. WildEarth Guardians v. Pub. Serv. Co. of Colorado, 805 F. Supp. 2d 1134, 1139-40 (D. Colo. 2011). On appeal, the Tenth Circuit dismissed the case as moot and did not review the merits of the retroactivity decision noting, however, that other courts had concluded that "the retroactivity doctrine is not applicable to any construction activity occurring after [*New Jersey*] was finalized." WildEarth Guardians v. Pub. Serv. Co. of Colo., 690 F.3d 1174, 1181 n.5 (quoting Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P., 627 F.3d 134, 143 (5th Cir. 2010)).

93. *Lamar Utils. Bd.*, 2010 WL 3239242.

94. *Id.* at *2. The Court noted that the parties "hotly dispute" the major source status of the project, yet deferred consideration of that issue to later stages of litigation. *Id.* at *2 n.2.

95. *Id.* at *4-5. Lamar initially argued that the district court lacked jurisdiction to address what Lamar considered an attack by WildEarth against the State of Colorado's decision to issue it a permit. However, the court found that WildEarth was not challenging the state permitting process, but merely alleging that the defendants now required a MACT to continue construction, so such a collateral attack argument was improper. The court found further that abstention under *Burford* was inappropriate because no state-law claim was involved. The court distinguished *Xcel* by noting that the mere assertion of ongoing discussions with the state was not the same as Xcel's actual permit including a MACT determination, and the defendants had "not explained why such an ongoing process would present the complex issues of state law necessary to render *Burford* abstention appropriate." *Id.* at *4.

96. *Id.* at *5.

97. *Id.* The court stated additionally that "'[C]onstruct or reconstruct' are active verbs that have force after the permit is issued and after construction or reconstruction has begun." *Id.* The Fifth Circuit noted this similar ruling to support its own analogous decision. *Sierra Club*, 627 F.3d at 141 n.10.

98. *Lamar Utils. Bd.*, 2010 WL 3239242, at *6.

99. Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P., 627 F.3d 134 (5th Cir. 2010).

100. *Id.* at 142 n.12 (discussing the Meyers Memo), *and id.* at 141 n.10 (highlighting that a 10th Circuit appellate judge, sitting on the district court in Colorado had reached a similar conclusion in the *Lamar* case). In considering the impact of the Meyers Memo on its analysis, the Fifth Circuit noted that EPA's interpretation effectuated "the congressional purpose behind § 112(g)—that is, ensuring that these new major sources of congressionally listed [HAPs] will be constructed with the '[MACT] limitation.'" *Id.* at 142 n.12.

compromise thereafter.[101] Reliance on the Delisting Rule, from this point forward, was not supported by the controlling circuit court.

In fact, the Fifth Circuit's ruling in *Sierra Club* was arguably a predictable and logical extension of the above-discussed case law. District courts in the Fourth and Tenth Circuits, as well as the EPA's Meyers Memo, gave credence to the Fifth Circuit's finding that Sandy Creek was violating the CAA by continuing construction without a MACT determination; though they varied in conclusions, none of the previous case law allowed the defendant to simply refuse to participate in the MACT process.[102]

3. The Aftermath of the Fifth Circuit Ruling[103]

While Sandy Creek did eventually take action in response to its loss at the Fifth Circuit, it did not take the path of least resistance. Sandy Creek and Sierra Club spent more than a year in litigation following the decision before a settlement was finally reached.[104] Arguably, Sandy Creek could have approached the TCEQ to revive its originally submitted MACT determination, allowing the plant to continue construction while the determination was finalized.[105] Instead, shortly after the Fifth Circuit's decision, Sandy Creek applied to amend its permit, declaring itself a minor source of HAPs.[106] The application was approved by the TCEQ on May 5, 2011, six months after the circuit decision.[107] Sandy Creek and the TCEQ, without outside input,[108] had

101. In fact, the Fifth Circuit was even more lenient than the Meyers Memo. The Court held that construction prior to the March 14, 2008 mandate would not be considered in violation of section 112(g), while the Meyers Memo considered the opinion publication, on February 8, 2008, the relevant date. *Id.* at 141-42.

102. WildEarth Guardians v. Lamar Utils. Bd., 2010 WL 3239242, at *5 (D. Colo. Aug. 13, 2010) (finding that "nothing in the text indicates that the operator is relieved of the responsibility of complying with the statute after construction begins"); WildEarth Guardians v. Pub. Serv. Co. of Colo., 698 F. Supp. 2d 1259, 1261 (D. Colo. Mar. 9, 2010) (citing EPA's Meyers Memo as "accept[ing] the result of *New Jersey*"); Southern Alliance for Clean Energy v. Duke Energy Carolinas, L.L.C., 2008 WL 5110894, at *9 (W.D.N.C. Dec. 2, 2008) (finding that "Duke is simply refusing to comply with controlling law").

103. Nov. 23, 2010 (Fifth Circuit opinion) to May 5, 2011 (amended minor permit issued), and beyond.

104. November 23, 2010 (Fifth Circuit opinion) to December 16th, 2011 (consent decree filed).

105. Sandy Creek submitted a MACT determination with its original permit application. *Sierra Club*, 627 F.3d at 137. It seems unlikely that the TCEQ would have required Sandy Creek to halt during the determination, and at least one other court has noted stopping was not required. *Pub. Serv. Co. of Colo.*, 698 F. Supp. 2d at 1263 (the court noted that neither the EPA nor the state agency "ordered Xcel to stop construction pending the MACT analysis and determination"). It also seems implied in the Meyers Memo that the EPA predicted such an adaptable solution. Meyers Memo, *supra* note 80 (recognizing challenges involved and allowing discretion in the process). Sierra Club notes this opportunity to continue construction also. Brief in Opposition to Sandy Creek's Petition for Certiorari, *supra* note 70, at *28 n.13. Such a decision may have furthered timely completion and avoided some monetary losses. Petition for Writ of Certiorari, *supra* note 37, at *25-26 (highlighting investments by stakeholders, a total commitment of two billion dollars for construction, engagement of contractors and subcontractors, power purchase agreements, and the need for a timely completion to meet customer demands).

106. Sandy Creek's Memorandum of Law, *supra* note 34, at 4. Sandy Creek argued that as a relatively new generation plant, it had simply originally overestimated its output. *Id.* at 3. Given that plants of similar design had applied with HAP emission levels below the major source threshold since its original 2006 permit, Sandy Creek argued that its permit should be amended accordingly. *Id.*

107. Texas Commission on Environmental Quality Air Quality Permit (May 5, 2011), Sierra Club v. Sandy Creek Energy Assocs., L.P., No. 1-08-cv-00648-LY, Doc. 89-1 (W.D. Tex. May 16, 2011) [hereinafter 2011 Permit].

effectively resolved the Fifth Circuit's *when* and *how* question of section 112(g) compliance by deciding the statute did not apply to Sandy Creek given its new status as a minor source.[109]

Sandy Creek's decision to pursue minor source status opened the door for further conflict, litigation, and delay. Sandy Creek made no mention of the possibility that its plant was anything other than a major source from the moment of its original application in 2004 until its minor source application in 2011. Sierra Club argued that judicial estoppel should prevent Sandy Creek from claiming minor source status.[110] Furthermore, details of the new permit were greatly contested. Sierra Club argued that the new TCEQ permit was not legally and practically enforceable[111] and that the lack of opportunity for public comment created additional procedural issues.[112] Specifically, Sierra Club questioned the fact that the new permit lowered allowable HAP emissions without requiring any changes to the plant's design.[113]

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108. The public, including Sierra Club and Public Citizen, had no opportunity to comment on the amended permit. Plaintiff's Memorandum in Response at 4, Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P., No. 1-08-cv-00648-LY, Doc. 92 (W.D. Tex. May 23, 2011).

109. *See supra* text accompanying note 36 (noting that the MACT requirements of CAA section 112(g) apply only to major sources of HAPs. 42 U.S.C. § 7412(g)(2)(B).). It was not contested that the plant applied initially as a major source for a MACT determination from the TCEQ and conceded that the section 112(g) MACT requirement applied to its plant prior to the Delisting Rule. *Sierra Club*, 627 F.3d at 137 & n.3 (The Fifth Circuit chose only to address this matter in a footnote stating that "[t]he question of whether Sandy Creek's Riesel plant qualifies as a 'major source' under section 112 is not before this Court since both parties agree the plant will emit enough tons of mercury to qualify the plant as a 'major source' under the Act." *Id.* at n.2.). Sandy Creek itself notes that it "had no reason to investigate . . . any later-available data on expected HAP emissions until the Fifth Circuit opinion, because no adverse legal consequences flowed from nominal major source status until then." Sandy Creek's Reply Memorandum at 3, Sierra Club v. Sandy Creek Energy Assocs., No. A-08-CA-648-LY, Doc. 93 (W.D. Tex. May 31, 2011).

110. Plaintiff's Memorandum in Response, *supra* note 108, at 4 (including an analysis arguing that Sandy Creek satisfied all three elements for judicial estoppel recognized by the Fifth Circuit: "(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure [of the present position] must not have been inadvertent." (citing to Superior Crewboats, Inc., v. Primary P&I Underwriters, 374 F.3d. 330, 335 (5th Cir. 2004))). Equitable estoppel could have been argued as well, considering the three years Sierra Club spent pursuing compliance from what it believed to be a major source in violation of section 112(g)'s MACT requirements because of Sandy Creek's out of court admissions, such as its original major permit application. Minerals & Chemicals Phillipp Corp. v. Milwhite Co., 414 F.2d 428, 430 (5th Cir. 1969) ("The essentials of equitable estoppel are (1) words and admissions, or conduct, acts and acquiescence, or all combined causing another person to believe in existence of certain state of things; (2) in which person so speaking, admitting, acting and acquiescing did so willfully, culpably, or negligently, and (3) by which such other person is or may be induced to act so as to change his own previous position injuriously.").

111. Plaintiff's Memorandum in Response, *supra* note 108, at 4. *See also* Friends of the Chattahoochee, Inc. v. Longleaf Energy Assocs., Inc., Final A.L.J. Decision, No. OSAH-BNR-AQ-1115157-60-Howells (OSAH Ga. Apr. 19, 2011) (upholding portions of plaintiff's challenges to the legal and practical enforceability of Longleaf's reclassification from a major to minor source).

112. Plaintiff's Memorandum in Response, *supra* note 108, at 4.

113. Sandy Creek's Memorandum of Law, *supra* note 34, at 4. Sandy Creek's initial, March 2006, permit from the TCEQ allowed for emissions of a combined seventy-one tons/year of Hydroflourides (HF) and Hydrochlorides (HCl). Texas Commission on Environmental Quality Air Quality Permit (July 18, 2006) at 31, Sierra Club v. Sandy Creek Energy Assocs., L.P., No. 1-08-cv-00648-LY, Doc. 4-13 (W.D. Tex. Sept. 9, 2008). Its second permit maintained the same or similar emission limits for all pollutants except for HF and HCL, which it then limited to 9.7 tons/year each. 2011 Permit, *supra* note 107, at 35. Sierra Club, in briefing to the district court, highlighted this as an issue with the permit because "it simultaneously 'limits' emissions of those pollutants to 10.7 tons *combined*." Plaintiff's Memorandum in Response, *supra* note 108, at 4.

It took over a year after the Fifth Circuit decision for Sandy Creek and Sierra Club to finally decide they should "avoid the costs, delays, and uncertainty of further litigation."[114] The December 2011 consent decree required Sandy Creek to submit alterations to its minor source permit from the TCEQ revising the limits for mercury and particulate matter;[115] reducing those allowable emissions by 50% and 25%, respectively;[116] and increasing testing, monitoring, and reporting requirements for hydrochloride (HCl), hydroflouride (HF), and organic HAPs.[117] The parties agreed to penalties if Sandy Creek exceeded the specified annual limits for HAP emissions.[118] Additionally, Sandy Creek was required to commit $400,000 to a local school for the installation of solar panels and pay up to $441,000 in attorney's fees and costs.[119] The petition for certiorari to the Supreme Court was later dismissed by agreement.[120]

B. Looking Back on a Twilight Zone

The regulatory twilight zone presented in this note is rare, though not unique. Regulatory reversals are not uncommon,[121] and industry and other players involved must be able to adapt efficiently and quickly to these changes.

1. Sierra Club and Sandy Creek: Not a Lose-Lose Situation

Though disguised as a compromise, the result of this case left an apparent winner when the dust settled. Sandy Creek had agreed to comply with more stringent CAA standards, major source or not, and while an official outcome will remain unknown, the "uncertainty of further litigation" appeared heavily tilted

114. Consent Decree, *supra* note 42, at 2.

115. *Id.* at 4.

116. Housley Carr, *LS Power, Sierra Club Agree to Kill One Coal Plant, Delay Another*, ENGINEERING NEWS-RECORD (Jan. 9, 2012), http://enr.construction.com/infrastructure/environment/2012/0109-65279settlement-shifts-plants-schedules.asp.

117. Consent Decree, *supra* note 42, at 4-6.

118. *Id.* at 6. For the first three exceedances, the penalty is $60,000. If there are more than three violations in any twelve-month period, the penalty is $150,000 for the fourth and any additional violations in that period. *Id.* The penalties expire upon termination of the consent decree or following a rolling twelve-month compliance period. *Id.*

119. *Id.* at 7-9. This award was similar to that in the *Alliance* case against Duke Energy, which eventually resulted in an award of $483,073.88 for the time between its complaint in July 2008 to its successful summary judgment motion in December 2008. The non-profit, in that case, was joined by three additional plaintiffs. S. Alliance for Clean Energy v. Duke Energy Carolinas, L.L.C., 650 F.3d 401, 404-05 (4th Cir. 2011). The civil penalty in this instance is possibly higher than what would have been required by the courts, which rarely require the maximum civil penalties. As a recent example, in *Sierra Club v. Franklin County Power of Illinois, L.L.C.*, the court demanded a civil penalty of $100,000 which was only 0.2% of the potential amount. These penalties were enforced even though the plant in question had never been completed and never emitted pollutants. 670 F. Supp. 2d 825, 830-31 (S.D. Ill. 2009), *aff'd sub nom.* Sierra Club v. Khanjee Holding (US) Inc., 655 F.3d 699 (7th Cir. 2011).

120. Sandy Creek Energy Assocs., L.P. v. Sierra Club, Inc., 132 S. Ct. 872 (2011).

121. While not a mirror image of the commonly referred to "midnight regulation," the conclusion of this comment is equally relevant to such situations, and environmental regulations are particularly susceptible. For an exemplary discussion of the midnight regulations of the George W. Bush administration, including testimony from environmental non-profits, see *Midnight Rulemaking: Shedding Some Light*: *Hearing before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 4 (prepared statement from Earthjustice), *available at* http://judiciary.house.gov/hearings/hear_090204.html.

against Sandy Creek.[122] While the consent decree insisted that it should not be construed as "an admission of liability, a violation of the Act," or any other permitting or regulatory failure by Sandy Creek,[123] the Fifth Circuit's holding that, as a major source, Sandy Creek had violated the CAA, remains.[124]

Additionally, the consent decree did not completely eliminate the risk of future litigation with Sierra Club. While Sierra Club agreed to various restraints on their ability to sue the plant during its continued construction,[125] the consent decree did not prevent Sierra Club from seeking relief for violations of the special conditions in the air permit regarding emission limitations.[126] Overall, Sierra Club succeeded in holding Sandy Creek to its self-assumed minor status, further decreasing the emission allowances beyond those in the original amended permit, and setting stiff penalty provisions for violations of the consent decree and the permit.[127]

The consent decree with Sandy Creek, however, was not the only result of this twilight zone litigation. In a far-reaching arm of the settlement, LS Power, owner of Sandy Creek, agreed to cancel its long-disputed 1,200-MW Longleaf coal plant in Georgia,[128] and delay for at least five years another coal plant in Arkansas[129] in exchange for Sierra Club's agreement to the terms of the consent decree.

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122. Consent Decree, *supra* note 42, at 2. Pertinently, WildEarth Guardians recently prevailed over Lamar Utilities Board, which eventually utilized a similar minor-source exit strategy and took a comparable set of facts to court. *See supra* note 95. Lamar's third modified permit, post *New Jersey*, classified it as a minor source and Lamar then argued that it had never been a major source and that it had only been so conservative in its original application due the unimportance of major status under the Delisting Rule. WildEarth Guardians v. Lamar Utils. Bd., 2013 WL 1164324, at *6 (D. Colo. Mar. 21, 2013). The court concluded that Lamar was a major source from the time of its first permit application until it received its minor source status, and that the plant had been in violation of section 112(g) from the D.C. Circuit's mandate until the minor source permit. *Id.* at *8-9.

123. Consent Decree, *supra* note 42, at 10. Paragraph twenty-four reads:

> Nothing in contained in this Consent Decree shall be construed as an admission of liability, a violation of the Act, a failure to obtain a required environmental permit or other regulatory approval, or a failure to comply with state or federal laws or regulations pertaining to anything related to the construction and operation of the Plant.

124. *Sierra Club*, 627 F.3d at 141-42 (holding representatively that "[t]he day Sandy Creek actually commenced construction is, therefore, irrelevant to § 112(g)(2)(B)'s current application to Sandy Creek's concurrent and ongoing construction, since § 112(g)(2)(B) prohibits the act of construction itself— and not the *commencement* thereof;" and "[h]owever, the Delisting Rule has since been vacated, and consequently, Sandy Creek must now come into compliance with § 112(g)(2)(B). Accordingly, we conclude that Sandy Creek's ongoing construction of a coal-fired power plant—for which no MACT determination has been made—is in violation of § 112(g)(2)(B).").

125. Sierra Club agreed to a covenant not to sue regarding "facts known or reasonably knowable" up until the date of the consent decree, and agreed not to participate in or challenge the Title V proceedings or other permitting proceedings unless they are unrelated or inconsistent with the terms of the consent decree. Consent Decree, *supra* note 42, at 9-11.

126. *Id.* at 4.

127. *Id.* at 3-7.

128. Sierra Club had been opposing the Georgia plant since 2001. Carr, *supra* note 116.

129. *Id.*

2. The Impact of *Sierra Club v. Sandy Creek* on Future Twilight Zones

Pursued correctly, these twilight zones do not require such costly investment risks or losses as experienced by Sandy Creek and LS Power.[130] Sandy Creek originally contended that the Fifth Circuit ruling would cloud the legal status of all the other plants permitted according to the Delisting Rule, and would upset "reasonable investment-backed expectations."[131] Sandy Creek argued that if upheld, "[t]he Fifth Circuit's opinion would compel what the EPA has studiously avoided, which is to make construction illegal overnight."[132] Admittedly, this case raises concerns that future, similar regulatory shifts could suddenly turn investment-backed projects into CAA violations mid-construction.[133] However, the entirety of this analysis suggests that this is an avoidable result. In this instance, plant owners had notice of the impending regulatory change, and both the EPA and the courts agreed that leniency for construction undertaken in reasonable reliance on the Delisting Rule prior to *New Jersey* was expected and acceptable—within narrow limits. The most costly outcomes fell on those who chose to press the envelope on what could be characterized as 'reasonable reliance.'

While Sandy Creek eventually reached a settlement with Sierra Club, the Fifth Circuit's decision, along with the other discussed federal decisions and settlements, remain as strong precedent for parties arguing against the 'reliance' approach in future similar regulatory reversal scenarios.[134] Such regulatory reversals, and their associated twilight zones, will inevitably occur. In these 'over-night' scenarios, while the new compliance date may be a hard line in the sand, the required path to that compliance has been shown to be much more flexible—as long as one pursues compliance at all.[135] In this instance, Sandy

130. In a recent interview after settlement, LS Power's project manager for Sandy Creek noted that the nearly complete plant, originally set to go on-line by the peak season in 2012 will be delayed until at least early 2013 due to "'issues with the boiler.'" Carr, *supra* note 116.

131. Petition for Writ of Certiorari, *supra* note 37, at *23-24.

132. Reply Brief for Petitioner, Sandy Creek Energy Assocs., L.P. v. Sierra Club, Inc., 2011 WL 2838023, at *9 (U.S. July 15, 2011).

133. The EPA has apparently attempted to preemptively avoid this exact outcome by recently structuring new regulations so as to simply exclude any plants that would be caught in the twilight zone of a regulatory change—what the EPA has termed "transitional sources." Standards of Performance for Greenhouse Gas Emissions from New Sources: Electric Generating Units, 77 Fed. Reg. 22,392, 22,395 (proposed April 13, 2012). This proposed regulation, including the transitional source exemption, was quickly contested in the D.C. Circuit by several coal-fired power plants, lead by Texas's Las Brisas Energy Center. The EPA, backed by a motion to intervene by multiple environmental petitioners, including Sierra Club, requested that the case be dismissed as premature. *See, e.g.*, *Groups Spar in Utility NSPS Suit*, CLEAN ENERGY REP. (Sept. 17, 2012), *available at* 2012 WLNR 19749526. The D.C. Circuit granted the motion to dismiss, finding that the proposed rule was not subject to review, and not final agency action. Order, Las Brisas Energy Center v. EPA (No. 12-1248) (D.C. Cir. Dec. 13, 2012).

134. For a discussion of the pressurizing effect on future cases and outcomes of a such a tradition of settlement in the face of risky litigation, see Ben Deporter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 974-983 (2010).

135. *See, e.g.*, Southern Alliance for Clean Energy v. Duke Energy Carolinas, 650 F.3d 401, 407 (4th Cir. 2011) (Duke Energy was allowed to eventually pursue a minor source permit, although it paid attorney's fees for the delay), *and* WildEarth Guardians v. Pub. Serv. Co. of Colo., 698 F.Supp.2d 1259, 1265 (D. Colo. 2010) (Xcel was allowed to continue construction while it settled out its MACT determinations both in and out of court and was granted a dismissal), *and* WildEarth Guardians v. Lamar Utils. Bd., 2010 WL 3239242 (D. Colo. 2010) (Lamar lost its original case due to a complete failure to address the regulations).

Creek made no effort to pursue compliance until it was already involved in fighting a protracted, losing battle. Simply put, without swift action by the regulated, flexibility in these instances can evaporate quickly.

The consent decree in this case strongly suggests that reliance on a previously legal compliance status following a regulatory reversal can be taken too far. Sandy Creek's legal approach merely delayed, rather than avoided, an inevitable result of adaptation to the new regulation. Unlike Sandy Creek, regulated entities in the future should carefully consider the risks involved in the pursuit of a reliance-based argument and grow more inclined to negotiate early for more reasonable and efficient solutions while organizations and courts are likely to be more flexible. Knowledge of surrounding litigation and similar challenges should not be taken lightly, particularly where the results conflict with a reliance-based, or other alternative argument, as with Sandy Creek. As reinforced throughout this note, the best outcome industry can create for itself in response to a regulatory reversal will come from earlier, rather than later, efforts to adapt and comply.

IV. CONCLUSION

A twilight zone is, by definition, transitory in nature. Simply put, the decision of *when* and *how* the uncertainty might end is in the hands of the parties involved. While no exclusive legal strategy is clearly correct in the face of sudden regulatory changes, the outcome for Sandy Creek demonstrates the folly of swimming against the current.

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