No. 05-6329

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL PARKS CONSERVATION ASSOCIATION, SIERRA CLUB, and OUR CHILDREN'S EARTH FOUNDATION,

Plaintiff-Appellants,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

AMICI CURIAE BRIEF IN SUPPORT OF TENNESSEE VALLEY AUTHORITY'S PETITION FOR REHEARING OR REHEARING *EN BANC* FILED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, THE NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION, AND THE CORN REFINERS ASSOCIATION

April 16, 2007

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National Petrochemical & Refiners Association

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of the 6th Cir. R. 26.1 on page 2 of this form. Sign and date this form.

National Parks Conservation Association, Sierra Club, and Our Children's Earth Foundation

v.

Tennessee Valley Authority

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Chamber of Commerce of the United States of America
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Signature of Counsel

April 16, 2007
Date

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Pursuant to 6th Cir. R. 26.1, National Association of Manufacturers
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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Pursuant to 6th Cir. R. 26.1, Alliance of Automobile Manufacturers
Name of Party

makes the following disclosure:

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v.

Tennessee Valley Authority

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Pursuant to 6th Cir. R. 26.1, National Petrochemical & Refiners Association
Name of Party

makes the following disclosure:

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National Parks Conservation Association, Sierra Club, and Our Children's Earth Foundation

v.

Tennessee Valley Authority

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Corn Refiners Association
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Charles H. Knauss
Signature of Counsel

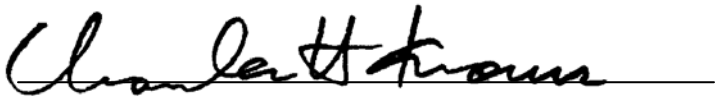
April 16, 2007
Date

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision conflicts with a decision of the United States Supreme Court and of this Court, and consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions:

1. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002);
2. *Delaware State College v. Ricks*, 449 U.S. 250 (1980);
3. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977);
4. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960);
5. *Leffman v. Sprint Corp.*, __ F.3d __, 2007 WL 935705 (6th Cir. 2007);
6. *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934 (6th Cir. 1999);
7. *Noble v. Chrysler Motors Corp., Jeep Div.*, 32 F.3d 997 (6th Cir. 1994);
8. *Anderson v. City of Bristol, Tenn.*, 6 F.3d 1168 (6th Cir. 1993).

In addition, this proceeding involves one or more questions of exceptional importance. In particular, the decision of the panel substantially undermines the purpose of the statute of limitations, opening the door to long-stale claims alleging violations of the Clean Air Act that occurred decades ago.



Charles H. Knauss

Counsel of Record for Amici Curiae the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the Alliance of Automobile Manufacturers, the National Petrochemical & Refiners Association and the Corn Refiners Association

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INTERESTS OF *AMICI*

Amici include trade associations, representing broad sectors of industry, and a business federation. The Chamber of Commerce of the United States of America represents more than three million members of companies of every size and in every industry sector. The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The Alliance of Automobile Manufacturers represents one of the largest industries in the United States. The National Petrochemical & Refiners Association is a national trade association, representing virtually all U.S. refiners and petrochemical manufacturers. The Corn Refiners Association is the national trade association representing the corn refining industry, an important segment of American agribusiness.

Amici are interested in this case because their members operate major stationary sources subject to the Clean Air Act's ("CAA") preconstruction permit requirements. The panel's ruling potentially opens the door to claims for alleged violations of preconstruction permit requirements for projects occurring decades ago, when evidence is long since lost or discarded. Such a ruling, if it stands, would add undue burdens and create substantial uncertainty for a company, even where the company is operating in compliance with permits validly issued by the State. Because of the ruling's potential impacts, *amici* submit this brief in support

of Tennessee Valley Authority's ("TVA") request for panel rehearing or rehearing *en banc*. *Amici* sought leave to file this brief by motion.

BACKGROUND

The CAA requires manufacturing plants that are "major emitting facilities" to obtain preconstruction permits for "modifications." 42 U.S.C. §§7475(a), 7479(2)(C), 7502(c)(5). Following construction, the separate requirements for *operation* of the modified plant are included in operating permits. For purposes of the statute of limitation under 28 U.S.C. §2462, courts have distinguished the CAA's *construction* permit requirements from its *operating* permit requirements to find failure to obtain a preconstruction permit constituted a discrete violation that ended upon completion of the modification.[1] *See, e.g., U.S. v. Ill. Power Co.*, 245 F. Supp. 2d 951, 957 (S.D. Ill. 2003). Rather than following these cases, the panel here looked to the Tennessee State Implementation Plan ("SIP") to find TVA's alleged failure to obtain a preconstruction permit in 1988, almost 20 years ago, resulted in a "series of discrete violations," holding the statute of limitation did not bar these claims.[2] This ruling would put companies in the *perpetual* position of

[1] The majority of courts reaching the issue have so found. *See, e.g., Nat'l Parks Conservation Ass'n v. TVA*, 01-403, slip op. at 23-25 (N.D. Ala. Nov. 29, 2005), *appeal docketed*, No. 06-10729 (11th Cir. Jan. 25, 2006) (listing cases).

[2] Tennessee's prevention of significant deterioration program distinguishes *constructing or operating* a source or modification in violation of the "application submitted" or "terms of any approval" from *commencing construction* "without applying for and receiving approval." Tenn. Comp. R. & Regs. 1200-3-9-

proving that they had *not* modified their facilities as a result of work completed decades ago.

ARGUMENT AND AUTHORITIES

The Panel's Ruling Merits Reconsideration Because It Allows Claims for Decades-Old Activities in Contravention of the Purposes of the Statute of Limitations

As TVA's Petition for Rehearing or Rehearing *En Banc* explains, the panel's ruling is contrary to other Sixth Circuit cases and to Supreme Court precedent.[3] TVA Pet. at 6-13. Also, under the panel's ruling, the "search for truth," which a statute of limitation is intended to protect, has been substantially undermined. *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

First, the panel's ruling, if it stands, could revive stale claims, requiring courts to determine the impacts of events occurring long ago. "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and

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.01(4)(a)(3). As there is no violation of any permit terms here, the only issue is the alleged violation of commencing construction without a permit.

[3] As found by Judge Batchelder, rather than those cases cited by the panel, the proper line of cases are those that held "if the discrimination alleged is solely the result of a single violation that occurred outside the statute of limitations, the later effect of this act does not constitute a continuing violation of the statute." *Anderson v. City of Bristol, Tenn.*, 6 F.3d 1168, 1174-75 (6th Cir. 1993) (citation omitted); *Leffman v. Sprint Corp.*, __ F.3d __, 2007 WL 935705, at *5 (6th Cir. 2007); *Noble v. Chrysler Motors Corp., Jeep Div.*, 32 F.3d 997, 1000-01 (6th Cir. 1994).

witnesses have disappeared." *Willis v. U.S.*, No. 91-4111, 1992 WL 180181, at *9 (6th Cir. July 29, 1992) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). This key policy is of particular import here because the underlying act at issue is the alleged failure to obtain a preconstruction permit as a result of activities occurring almost 20 years ago.

The claims at issue here – and in all cases alleging that a modification of a manufacturing facility occurred – involve significant factual inquiries that depend on substantial amounts of data, witness testimony, and other documentary evidence. In the first instance, and most importantly, the court must make a determination if a modification has occurred. This determination is made on a case-by-case basis. It involves a complex multi-step analysis: (1) whether a physical or operational change occurred; (2) whether that activity is excluded from the modification requirements (*e.g.*, routine maintenance, repair and replacement); (3) what the emissions were before the change – *i.e.*, the baseline emissions; (4) a projection of the emissions following the change – *i.e.*, future actual emissions; and (5) whether an independent factor, like demand growth, caused the increase in emissions.[4] A project may be determined not to be a modification because it qualifies as maintenance, it would not cause an actual emissions increase, or both, or for some other reason.

[4] These requirements also depend on whether emissions were elsewhere.

These determinations are based on data that existed at the time of the activity, which are not required to be retained for over 10 or 20 years until suit is finally brought. Also, employees conducting these analyses likely have left the facility by such time, either for other employment or retirement or may even be deceased.[5] Under the panel's ruling, companies would be at a severe disadvantage to defend themselves against allegations of a "modification," unless they had retained all of the information needed to show how it was determined that a particular change was not a modification. This is a substantial burden for operations and any litigation.[6]

Second, the panel's ruling places each facility in this Circuit at substantial risk of facing vexatious litigation for acts occurring decades ago, casting a cloud

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[5] Similar cases involved activities occurring well over 10 years prior to the suit being filed. *See, e.g., Ill. Power Co.*, 245 F. Supp. 2d at 952 (alleging modifications 17 years earlier); *U.S. v. Westvaco, Corp.*, 144 F. Supp. 2d 439 (D. Md. 2001) (alleging modification 19 years earlier); *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 665 (W.D.N.Y. 2003) (alleging modifications 20 years earlier); *Sierra Club v. Dayton Power & Light, Inc.*, No. 04-905, 2005 WL 1972549 (S.D. Ohio Aug. 12, 2005) (alleging modifications almost 30 years earlier).

[6] The panel also found a violation of BACT requirements "manifests itself anew each day a plant operates without BACT limits on emissions." Slip Op. at 8. But given that BACT requires balancing of a number of fact-intensive criteria, *see* 42 U.S.C. §7479(3), determining BACT some 20 years after the fact would be difficult at best and separately warrants application of the statute of limitations. Moreover, EPA policy provides that controls are only required on units being physically changed, 71 Fed. Reg. 54,235, 54,240 (Sept. 14, 2006) ("[R]ules do not require BACT or LAER at unchanged units..."), but determining which units were physically changed during a project is also a factual determination that would be difficult to reconstruct years after a project was completed. The defendant then would be forced not to defend current operations, but rather events that took place long ago and thus, the search for truth is "seriously impaired," and the defendant is prejudiced. *Kubrick*, 444 U.S. at 117 (citations omitted).

over each such facility, even one that legitimately believes its activities, at the time conducted, were not "modifications" requiring a preconstruction permit. This cloud could be present indefinitely until the facility ceases operation. Statutes of limitation, however, are intended to secure repose to allow defendants to "go about their business, after a definite time, untroubled by fear of being sued." *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990); *see also Archer v. Sullivan County, Tenn.*, No. 95-5214, 1997 WL 720406, at *4 (6th Cir. Nov. 14, 1997) ("entire purpose of statutes of limitations is to provide finitude to liability for wrongs"). Statutes of limitation "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Kubrick*, 444 U.S. at 117 (citation omitted).

A society's interest in repose is based "on the theory that the uncertainty and insecurity caused by unsettled claims hinder the flow of commerce." *Jones v. Texaco, Inc.*, 945 F. Supp. 1037, 1041 (S.D. Tex. 1996) (citation omitted). A facility cannot operate under the fear that decades-old activities could still be subject to suit. Enforcement actions under the CAA pose significant potential liabilities. In settlement of a new source review suit, for example, Dynegy Midwest Generation was subject to $9 million in civil penalties, not including required mitigation, such as control installation. Under this panel's view, companies would not be able to

assess their potential liabilities, and would be restricted in their ability to operate, invest, and even undergo business transactions.

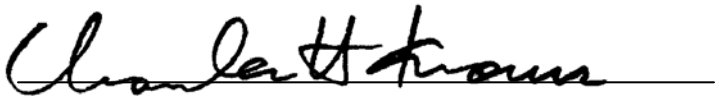
Finally, this panel's ruling allows plaintiffs to sit on their rights. Courts "are not free to construe [a statute of limitation] so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117 (citation omitted). This is particularly apt for citizen suit cases designed to allow prosecution of alleged CAA violations where EPA has been inert. 42 U.S.C. §7604(b). Moreover, manufacturing plants can easily operate for upwards of 50 years. The panel's ruling gives license to fishing expeditions to uncover any potential "modifications" throughout the life of a facility. Surely, this result cannot be squared with the purposes of the statute of limitations.

In light of the important policies behind them, statutes of limitation "must be strictly adhered to by the judiciary." *Kavanagh v. Noble*, 332 U.S. 535, 539 (1948) (citation omitted). An accrual rule that "lengthens the limitations period dramatically … conflicts with a basic objective – repose – that underlies limitations periods." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (citations omitted). The panel's ruling here raises the concerns identified by a New York District Court, which, in rejecting a similar argument, found that this position "taken to its logical end, suggests a *de facto* elimination of any statute of limitation, for the limitation period would never begin to accrue as long as the facility remained in

operation." *Niagara Mohawk Power Corp.*, 263 F. Supp. 2d at 661. On the other hand, the purposes of the CAA are not diminished by applying a statute of limitation in this case where a modification occurred years before the suit is filed. These units would be subject to an operating permit with limitations intended to meet the air quality standards of the area.[7] Therefore, because of the potential adverse implications of the panel's ruling, reconsideration is warranted.

[7] For example, Tennessee may seek the "appropriate enforcement action" to ensure compliance with national ambient air quality standards, the State's control strategy, or the attainment or maintenance of air quality in neighboring states or other regulatory requirements. Tenn. Comp. R. & Regs. 1200-3-9-.01(1)(e). This does not create an "ongoing obligation" to obtain a permit.

Respectfully submitted,



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Dated: April 16, 2007