The Death of the Clean Air Act's PSD Provision: The Practical Implications of Circuit Courts' Failure to Properly Apply Chevron Deference

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INTRODUCTION

America’s increasing environmental consciousness in the 1960s and 1970s led regulators to consider ways to further protect and enhance the nation’s air quality.1 A monumental step occurred when the Clean Air Act of 1970 (“CAA”) was enacted.2 A comprehensive statute, the Act was designed to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population . . . .”3 Despite the CAA’s enactment, pollutants, mostly smog and particulate

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matter, continued to impair visibility in many cities, creating a concern for public health and a desire to protect pure natural areas, like national parks, from similar degradation. A divide between environmental advocates and industry supporters arose during discussions about how to appropriately address these continuing concerns. In response, Congress charged the industrial and environmental influences in the legislature with the difficult task of creating a solution that would alleviate the concerns of both sides. Congress eventually reached a solution, despite the industrial sector’s initial opposition to discussing proposed alterations to the CAA. The solution was the Prevention of Significant Deterioration (“PSD”) provision, which Congress enacted in the 1977 CAA Amendments. The PSD provision regulates emissions from stationary sources into the ambient (outside) air. Congress designed the provision to ensure that attainment areas for a specific pollutant remained in attainment and that the area would not significantly deteriorate through the introduction of new emitting facilities. Thus, the provision both protects air quality and allows for industrial growth. It illustrates a compromise between the two sides of the debate by simultaneously advancing notions of economic development as well as environmental protection. For example, the PSD’s congressional statement of purpose includes the purpose of “insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air


6. The PSD provision allowed for the permitting of new sources of air pollution as long as the owner conducted the proper review and installed appropriate control technology to decrease their expected emissions. See 42 U.S.C. §§ 7470–7479.


8. Under the CAA, an area is in “attainment” if it “meets the national primary or secondary ambient air quality standards for the pollutant [at issue]” and is in “nonattainment” if it does not meet these standards. 42 U.S.C. § 7407(d)(1)(A).

resources . . .”10 The provision’s other stated purposes—the protection of public health and welfare, the preservation and enhancement of special national natural areas, and the assurance that the development of new sources of air pollution will not interfere with a state’s plan to meet federal air quality goals11—demonstrate that, despite this compromise, the CAA’s and PSD’s overarching purpose tilts in favor of environmental protection over economic growth.

Despite the congressional intent for a balance between environmental and economic concerns, and even a preference for environmental protection, companies continue to build or modify facilities without complying with the PSD requirements.12 This is partially due to the high cost and time-intensive nature of compliance.13 Instead of complying with the PSD provision, facilities look for ways to circumvent the requirements of PSD, conceal potential violations, and advocate for revision or revocation of the PSD provision.14 The self-reporting nature of the PSD provision15

11. See 42 U.S.C. § 7470. The purposes of this part are as follows:

   (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipate[d] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all national ambient air quality standards;

   (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

   (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

   (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

   (5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

Id.

13. See MEIBURG, supra note 5, at 229.
14. See id. at 229–30; Hawkins & Ternes, supra note 12, at 127. There are several illegal and pseudo-illegal methods of eluding the requirements. For a full discussion, see Ivan Lieben, Catch Me if You Can – The Misapplication of the Federal Statute of Limitations to Clean Air Act PSD Permit Program Violations, 38 ENVTL. L. 667, 676–78 (2008).
15. A facility is responsible for determining if their activity qualifies under PSD and, if it does, to submit a PSD permit application. See 42 U.S.C. § 7475.
means that this concealment can frustrate Environmental Protection Agency’s (“EPA”) already daunting task of locating and bringing suit against violators.\textsuperscript{16} Failure to obtain a PSD permit and apply the proper control technology can result in hundreds of thousands of tons of illegal emissions.\textsuperscript{17} With high rates of non-compliance coupled with enforcement issues, the massive amounts of pollutants emitted by these sources cause “respiratory illness and heart disease, the formation of acid rain, [and] reduced visibility . . . .”\textsuperscript{18}

Due to the damaging health and environmental consequences of a facility’s failure to comply with the CAA’s PSD requirements, EPA has attempted to enforce compliance through its regulatory powers.\textsuperscript{19} Despite these efforts, courts have increasingly limited EPA’s ability to use its CAA enforcement powers against PSD violators.\textsuperscript{20} Moreover, courts appear to be disregarding the high level of deference generally granted to administrative agencies under \textit{Chevron} v. \textit{NRDC}.\textsuperscript{21} Specifically, a series of recent federal appellate court decisions have continued to both narrow the PSD provision and limit the scope of enforcement under the CAA. This narrowing undermines not only the PSD provision but also the CAA itself. Without proper enforcement, some of the “largest contributors of air pollution” in the United States will be free to emit\textsuperscript{22} pollutants such as sulfur dioxide, nitrogen oxide, smog, particulate matter, carbon monoxide, and volatile organic compounds.\textsuperscript{23}

\textsuperscript{16} See infra Part IV.
\textsuperscript{17} Lieben, supra note 14, at 676–77. The required control technology for sources subject to PSD is the “best available control technology.” 42 U.S.C. § 7475(a)(4).
\textsuperscript{18} Air Enforcement, EPA.GOV, http://www2.epa.gov/enforcement/air-enforcement#nsr (last updated Sept. 2, 2014).
\textsuperscript{19} See generally id. (discussing EPA’s enforcement processes under the CAA).
\textsuperscript{21} 467 U.S. 837 (1984). Under the doctrine set forth in \textit{Chevron}, federal courts conduct a two-step analysis when dealing with an administrative agency’s interpretation of a statute that they are charged with implementing. Under Step One, the court asks whether Congress unambiguously addressed the precise issue. \textit{Id.} at 842–43. If the answer is yes, then the court must adhere to the unambiguous intent of Congress. \textit{Id.} If the answer is no—Congress was silent or ambiguous as to the precise issue—then the federal court should defer to the agency’s reasonable interpretation of the statute. \textit{Id.}
\textsuperscript{22} See Lieben, supra note 14, at 669–70.
\textsuperscript{23} Air Enforcement, supra note 18. Some sources, with high rates of noncompliance with NSR/PSD include: coal-fired electric utility units (emitting 2/3 of sulfur dioxide (SO$_2$)
This Comment argues that when courts fail to properly apply Chevron deference\(^\text{24}\) to EPA’s interpretation of the CAA’s PSD provision, their analyses undermine both the PSD provision and the purpose of the CAA, significantly diminishing EPA’s enforcement capabilities. Part I provides a historical overview of the CAA and the PSD provision, as well as the provision’s general framework. Part II discusses statute of limitations (“SOL”) concerns that have arisen in recent PSD cases. Specifically, this Part discusses whether a violation of the PSD provision is “continuing” or “one-time” for purposes of the SOL. This Part also considers the interactions between the continuing violation theory and injunctive relief. Part III provides a detailed analysis of the recent litigation and highlights logical flaws in the courts’ reasoning. After conducting a more thorough Chevron analysis, this part also discusses how the recent case law is undermining the provision. Finally, Part IV discusses the practical implications of the recent judicial trend concerning EPA’s enforcement capabilities.

I. THE CLEAN AIR ACT

This Part creates a framework to analyze the recent circuit court decisions in United States v. Homer City\(^\text{25}\) and United States v. Midwest Generation.\(^\text{26}\) This Part begins by providing a brief overview of the history of the modern CAA and the impetus behind its enactment. Next, this Part introduces the PSD provision—discussing its creation and 1/3 of nitrogen oxide (NOx) in the U.S.; acid production plants (emitting thousands of tons of NOx, SO\(_2\), and sulfuric acid mist every year); glass manufacturing plants (emitting 200,000 tons per year of NOx, SO\(_2\), and particulate matter (PM)); cement manufacturing plants (emitting over 500,000 tons per year of NOx, SO\(_2\), and carbon monoxide (CO)); and petroleum refineries (emitting NOx, SO\(_2\), benzene, volatile organic compounds (VOCs), and PM). Id.

24. In Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984), the Supreme Court created a two-step process to use when reviewing an administrative agency’s interpretation of a statute it is charged with implementing:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

467 U.S. at 842–43 (footnotes omitted); see infra notes 157–61 and accompanying text.

25. 727 F.3d 274 (3d Cir. 2013).

26. 720 F.3d 644 (7th Cir. 2013).
and the provision’s specific requirements. Together, this information provides an understanding of the underlying purpose and goals of both the CAA generally and the PSD provision specifically.

A. Historical Overview

Although air pollution statutes have existed since the 1950s, they have generally lacked meaningful protection and enforcement mechanisms.27 It was not until Congress enacted the modern CAA in 197028 that real improvements in air quality protection were achieved. Several environmental disasters and increasing public concern over air pollution spurred Congress to act.29 During this time of heightened environmental consciousness, Congress enacted several other key environmental statutes,30 the nation celebrated its first Earth Day,31 and the executive branch established EPA.32 Whereas previous air pollution schemes merely provided funds for scientific research, the CAA implemented its fundamental goal—improving air quality—

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27. Precursors to the Clean Air Act include the Air Pollution Control Act of 1955, Pub. L. No. 84-159, 69 Stat. 322, the 1963 Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392, and the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485. The Air Pollution Control Act did not, in fact, actually control air pollution. Rather, the Act provided federal research money and technical assistance to states that wished to implement air pollution controls. See § 1, 69 Stat. at 322. Increasing concerns over air pollution in the 1960s led to the enactment of the 1963 Clean Air Act, which provided for additional research and grant programs and directed the Department of Health, Education, and Welfare (“HEW”) to take action to abate interstate air pollution. ROY S. BELDEN, CLEAN AIR ACT 5 (2d ed. 2011); see § 1, 77 Stat. at 392–93. A few years later, the first regulatory action to prevent air pollution was developed. See § 101, 81 Stat. at 485. The Air Quality Act of 1967, an amendment to the 1963 Clean Air Act, called for the creation of national air quality criteria to be followed by the states. Id. at § 101, 81 Stat. at 490–91. Despite these efforts, the Act, and its regional approach, were a “notable failure,” mainly due to state inaction and lack of enforcement. Paul G. Rogers, EPA History: The Clean Air Act of 1970, EPA.GOV (Jan.-Feb. 1990), http://www2.epa.gov/aboutepa/epa-history-clean-air-act-1970 (last updated Mar. 16, 2014) (discussing state inaction); see BELDEN, supra, at 6 (discussing lack of enforcement).


29. Rogers, supra note 27.


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through a stronger regulatory approach. 33 For example, under the modern CAA, EPA was charged with creating National Ambient Air Quality Standards ("NAAQS"), 34 setting New Source Performance Standards for new and modified sources, 35 and regulating Hazardous Air Pollutants. 36 Together, these programs required states to comply with more rigorous standards.

Most states failed to meet the stringent goals set by the 1970 CAA. 37 Notably, many states were unsuccessful in attaining the NAAQS. 38 As a result, Congress enacted the 1977 Amendments to the CAA. 39 These amendments divided the country into "attainment" and "nonattainment" areas, based on whether or not they met the NAAQS for each regulated pollutant. 40 The 1977 amendments also created the PSD provision, which placed limitations on new and modified sources located in attainment areas. 41 More recently, Congress amended the CAA again in 1990 42 and added several new provisions and programs, including the acid rain provisions, the Title V permit program, and the stratospheric ozone program. 43

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33. Id.
34. 42 U.S.C. § 7409 (2012). The CAA requires EPA to set NAAQS for certain harmful pollutants, known as "criteria" pollutants. National Ambient Air Quality Standards (NAAQS), EPA.gov, http://www.epa.gov/air/criteria.html (last updated Oct. 21, 2014). There are two types of NAAQS—primary and secondary standards. Id. Primary standards are geared towards protecting the public health, whereas the secondary standards are geared towards protecting public welfare. Id.
37. BELDEN, supra note 27, at 7.
38. Id.
40. Hawkins & Ternes, supra note 12, at 126. NAAQS are established for each criteria pollutant at a level requisite to protect public health and welfare. See 42 U.S.C. § 7409. Due to different potentials to harm public health and welfare, each criteria pollutant has a separate NAAQS. See National Ambient Air Quality Standards (NAAQS), supra note 34 (providing a list of NAAQS for each criteria pollutant).
43. See BELDEN, supra note 27, at 8. These new provisions are located at 42 U.S.C. §§ 7651–7651o (acid rain), §§ 7661–7661f (Title V), and §§ 7671–7671q (stratospheric ozone).
B. PSD’s Creation

The creation of the PSD provision in the 1977 amendments created a monumental change to the environmental regulatory scheme. The PSD program is technically a subpart of the CAA’s New Source Review (“NSR”) program. The NSR program supports air quality goals by “focus[ing] on controlling and limiting the emissions of criteria pollutants” from major stationary sources that have a “potential to emit” significant levels of CAA regulated pollutants.\(^44\)

NSR has three subparts, which depend on the source’s size and location: (1) PSD, applicable to major sources in attainment areas; (2) nonattainment NSR, applicable to major sources in nonattainment areas; and (3) minor NSR programs, applicable to minor sources in all areas.\(^45\)

PSD was initially created through judicial interpretation of the CAA.\(^46\) In Sierra Club v. Ruckelshaus,\(^47\) the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) interpreted the CAA’s stated goal—to “protect and enhance” air quality—to include a requirement to prevent the “significant deterioration” of air quality, even in areas which have attained the national standards, or NAAQS.\(^48\) This holding created the initial PSD requirement that states must include in their State Implementation Plans (“SIPs”)\(^49\)—preconstruction review requirements for new and

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\(^{44}\) See Hawkins & Ternes, supra note 12, at 136.

\(^{45}\) Id. at 125.


\(^{47}\) 344 F. Supp. 253 (D.C. Cir. 1972). Environmentalists brought the case seeking to prevent EPA from promulgating regulations which would allow for degradation of clean air areas. Id. at 253.

\(^{48}\) See id. at 256 (emphasis added). The court stated that part of EPA’s regulation demonstrates “the Administrator’s doubts as to his authority to impose” a policy which would require states, in their State Implementation Plans (SIPs), to provide for “nondegradation of clean air.” Id. Furthermore, the court concluded that

[h]aving considered the stated purpose of the Clean Air Act of 1970, the legislative history of the Act and its predecessor, and the past and present administrative interpretation of the Acts, it is our judgment that the Clean Air Act of 1970 is based in important part on a policy of non-degradation of existing clean air. . . .

\(^{49}\) SIPs are plans created by the states that demonstrate how the state will meet the NAAQS. 42 U.S.C. § 7410(a)(1) (2012).
modified sources located in attainment areas.\textsuperscript{50} Two years later, in response to \textit{Ruckelshaus}, EPA enacted PSD regulations.\textsuperscript{51}

The purpose of PSD is to ensure that attainment areas for a specific pollutant remain in attainment and that areas do not significantly deteriorate through the introduction of new emitting facilities to the area.\textsuperscript{52} This both protects air quality and allows for industrial growth. To reach this dual goal, the provision requires companies to set emission limitations and standards for new major sources or major modifications using “state-of-the-art pollution control technologies.”\textsuperscript{53} The required pollution control technology is known as the “best available control technology” (“BACT”).\textsuperscript{54}

Congress grandfathered existing sources into the new PSD regime.\textsuperscript{55} It made this decision based primarily on public policy concerns, including the high costs of retrofitting existing facilities and the desire to “avoid penalizing operators that entered into contracts to construct facilities prior to the promulgation of the NSR regulations.”\textsuperscript{56} Congress did not intend to permanently exclude these sources.\textsuperscript{57} Instead, Congress believed that within a decade or so, most of these existing sources would either be out of operation or be forced to make major modifications in order to continue operating and that

\textsuperscript{50} Hawkins & Ternes, supra note 12, at 126.

\textsuperscript{51} See Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974) (codified at 40 C.F.R. § 52.21 (2014)). The 1977 Amendments eventually codified many of the requirements of the 1974 EPA regulations. See Belden, supra note 27, at 54. Because the new statutory PSD provision was not completely in line with the existing regulations, EPA enacted new PSD regulations in 1980. 45 Fed. Reg. 52,676 (Aug. 7, 1980) (amending 40 C.F.R. parts 51, 52, and 124). See generally 45 Fed. Reg. at 52,679 (providing a general overview of the progression of PSD rules and regulations up until the 1980 regulations). Although there were some changes to the PSD regulations in 2002, they are outside the scope of this paper, and this Comment will thus rely solely on the 1980 regulations. Some of the 2002 regulations included emission increase calculations, baseline emissions calculations, and plant-wide applicability limitations. Belden, supra note 27, at 54.

\textsuperscript{52} 42 U.S.C. § 7470 (Congressional Declaration of Purpose). According to an EPA press release, issued by then-Administrator Douglas M. Costle, the PSD regulations would “help insure that clean air areas of the country remain clean and will provide the States with a mechanism for accommodating industrial growth within these areas . . . .” Press Release, Envtl. Prot. Agency, supra note 9.

\textsuperscript{53} Belden, supra note 27, at 53.

\textsuperscript{54} 42 U.S.C. § 7475(a)(4).

\textsuperscript{55} Hawkins & Ternes, supra note 12, at 140.

\textsuperscript{56} Id.

the PSD regulations would attach at that time.\textsuperscript{58} Therefore, Congress initially intended that, within a decade or so, the underlying goals of PSD and its statutory requirements would be applied to all major stationary sources.\textsuperscript{59}

C. PSD Requirements

Although the PSD provision has a relatively simple purpose, the specific statutory and regulatory requirements are quite complex. The main statutory requirements are located in § 7475(a) of the CAA, which sets forth eight separate requirements that must be completed before constructing or modifying a major stationary source of air pollution.\textsuperscript{60} In particular, the statute mandates that “[n]o major emitting facility . . . may be constructed . . . unless: (1) a permit has been issued . . . setting forth emission limitations; . . . [and] (4) the proposed facility is subject to best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility.”\textsuperscript{61} Accordingly, a facility must fulfill

\textsuperscript{58.} \textit{Id.} (citing Rachel H. Cease, \textit{Adverse Health Impacts of Grandfathered Power Plants and the Clean Air Act: Time to Teach Old Power Plants New Technology}, 17 J. NAT. RESOURCES & ENVTL. L. 157, 162–63 (2002–2003)) (“Based on the typical forty-year lifespan of a coal-fired facility, Congress anticipated that many existing plants would be upgraded within a reasonable time after 1977 to reduce their harmful air pollutants. Congress further expected that at the time of these upgrades, NSR would be triggered and the facilities would either be retired from service or would be fitted with the best available control technology existing at that time.”).

\textsuperscript{59.} \textit{See id.}

\textsuperscript{60.} Section 7475 is structured to provide a subsection (a), which is then followed by eight separate subparagraphs numbered one through eight. New York v. Niagara Mohawk Power Corp., 263 F. Supp. 2d 650, 664–65 (W.D.N.Y. 2003). If the BACT requirement was intended to be subsumed under the permit requirement, then the statute would have been constructed accordingly. For example, Congress could have written the BACT requirement as an additional subparagraph under (a)(1) (i.e., 7475(a)(1)(i)). \textit{See id.} (stating that if § 7475(a)(1) “encompass[ed] the requirements that a facility be subject to BACT set forth in § 7475(a)(4) would make § 7475(a)(4) superfluous. Absent a clear Congressional command otherwise, statutes are not to be construed in ‘any way that makes some of its provisions surplusage.’ ” (citation omitted)); see also Sierra Club v. Dairyland Power Coop., 2010 U.S. Dist. LEXIS 112817, at *12–13 (W.D. Wis. Oct. 22, 2010) (“[T]he individual requirements in 42 U.S.C. § 7475(a) ‘are not subsumed by the initial requirement to obtain a preconstruction permit.’ ”) (citing \textit{Niagara Mohawk}, 263 F. Supp. 2d at 664).

\textsuperscript{61.} 42 U.S.C. § 7475(a). The provision is as follows:

No major emitting facility on which construction is commenced . . . may be constructed . . . unless: (1) \textit{a permit has been issued . . . setting forth emission limitations . . . ;} (2) the proposed permit has been subject to review in accordance with this section . . . ; (3) the owner or operator of such facility demonstrates . . . that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of . . . [NAAQS] . . . ; (4) the
several requirements, including both obtaining a permit and installing BACT, before it can begin construction on a new source.\(^6^2\)

The PSD requirements apply “to the construction of any new major stationary source.”\(^6^3\) A facility is a “major stationary source” if it falls within one of the twenty-six listed categories of sources and emits or has the potential to emit one hundred tons or more of any regulated pollutant per year.\(^6^4\) The law also considers a facility not among the listed categories as a major stationary source if it emits, or has the potential to emit, two hundred fifty tons per year or more of any regulated pollutant.\(^6^5\) Constructions subject to PSD requirements also include “modifications,”\(^6^6\) defined as “any physical change in, or change in the method of operation” that results in a significant net increase of air emissions.\(^6^7\) The law exempts a physical change or change in the method of operation from the definition of major modification if it is merely “routine maintenance, repair and replacement.”\(^6^8\)

The PSD-permitting provision states that a permit must be obtained before actual construction or modification begins on an proposed facility is subject to best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility; (5) the provisions of subsection (d) . . . have been complied with for such facility; (6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such a facility; (7) the person who owns or operates . . . [a qualified] facility . . . agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have . . . on air quality . . . ; and (8) in the case of a source which proposes to construct in a class III area . . . the Administrator has approved the determination of [BACT] . . . .

\(^{Id.}\) (emphasis added).

\(^6^2\) See id.

\(^6^3\) 40 C.F.R. § 52.21(a)(2) (2014).

\(^6^4\) § 52.21(b)(1)(i)(a).

\(^6^5\) § 52.21(b)(1)(i)(b).

\(^6^6\) § 52.01(d).

\(^6^7\) Id.

\(^6^8\) § 52.21(b)(2)(iii)(a). The regulations further state that modifications do not trigger compliance if they constitute “[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.” \(^{Id.}\) Although there is no regulatory definition of the term “routine,” EPA’s narrow interpretation of the exception has generally been upheld. \(^{See\ United States v. Ohio Edison Co., 276 F. Supp. 829, 854–55 (E.D. Ohio 2003)\) (discussing the deference given to EPA’s interpretation in Wis. Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990) (en banc)). Accordingly, the routine maintenance and repair exception is determined “on a case-by-case basis, taking into account the nature, extent, purpose, frequency and cost of the activity.” \(^{Id.}\) at 850.
applicable source. Actual construction or modification begins at the “initiation of physical on-site construction activities on an emissions unit which are of a permanent nature.” To obtain a permit, the owner or operator must demonstrate that the proposed construction (1) will not have an adverse impact on air quality and (2) will employ BACT for every regulated pollutant that the source has the potential to emit in significant amounts.

Additionally, the PSD provision requires installation of a control technology called BACT. BACT is “an emissions limitation . . . based on the maximum degree of reduction for each pollutant subject to regulation under [the] Act,” to be determined “on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs . . . .” Section 52.21(j) is dedicated to “control technology review,” and reiterates the separate BACT requirement found in § 7475(a)(4) of the CAA by stating that “[a] new major stationary source [and a major modification] shall apply [BACT] for each regulated NSR pollutant that it would have the potential to emit in significant amounts.” The term “shall,” as used in the regulation, places a mandatory requirement on facilities to install BACT in order to comply with the CAA’s PSD provision.

This regulatory mandate is not linked to or subsumed under a rule requiring a facility to apply for a PSD permit. This emphasis indicates that installing BACT is a mandatory requirement for PSD compliance, separate from any other PSD requirement—including the requirement to apply for a PSD permit.

Section 7477 provides for the enforcement of PSD requirements by mandating that EPA “shall . . . take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility

69. 42 U.S.C. § 7475(a)(1) (2012); 40 C.F.R. § 52.21(a)(2)(iii) (“No new major stationary source or major modification . . . shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.”).
70. 40 C.F.R. § 52.21(b)(11).
71. See 42 U.S.C. § 7475(a)(1) (stating that the permit must “set[] forth emission limitations for such facility which conform to the requirements” of the provision).
72. 40 C.F.R. § 52.21(b)(12).
73. Id.
74. Id. § 52.21(j)(2)–(j)(3) (emphasis added).
75. See id.
76. See generally id. § 52.21 (setting forth independent requirements—subsection (a) through subsection (cc)). There is no mention of a permit requirement in the independent subsection setting forth the mandatory BACT requirements. See id. § 52.21(j).
which does not conform to the requirements of” the CAA.\textsuperscript{77} Furthermore, EPA has general enforcement capabilities against violators of any CAA requirement\textsuperscript{78}. EPA may issue an administrative penalty order, issue an order requiring compliance, bring a civil action, or request that the Attorney General commence a criminal action.\textsuperscript{79} Therefore, by its terms, the CAA appears to grant EPA a wide array of enforcement tools it can use against facilities that violate the above requirements by failing to apply for a PSD permit or neglecting to install a BACT prior to construction.

Although the CAA in its entirety is an intricate and technical statute, PSD is considered “among the most complex [programs] in all of government.”\textsuperscript{80} This Part briefly explained the CAA’s history and the PSD provision’s creation. Additionally, it provided a framework for this Article’s analysis by introducing the substance and specific requirements of the provision.

II. STATUTE OF LIMITATIONS CONCERNS

One of the overarching issues in the recent PSD case law concerns the federal statute of limitations (“SOL”).\textsuperscript{81} For many PSD violations, enforcement under the statute hinges on whether the SOL has already run, thereby barring relief, or whether an exception to the SOL applies, tolling the clock past the SOL period. This Part begins by explaining such an exception—the continuing violation theory—and the recent judicial interpretation of its application to PSD violations. Next, this Part discusses the implications of these interpretations on EPA’s ability to obtain injunctive relief.

A. Continuing violation Theory

An important aspect of recent PSD violation cases involves whether the case is barred by the federal five-year SOL. This question turns on whether the violation falls under the continuing violation

\textsuperscript{77} 42 U.S.C. § 7477.

\textsuperscript{78} See id. § 7413 (stating that if EPA finds someone who has violated a requirement or prohibition of the CAA, EPA may issue an administrative penalty, issue an order requiring compliance, bring a civil action, or request a criminal action be brought).

\textsuperscript{79} Id. § 7413(3).

\textsuperscript{80} MEIBURG, supra note 5, at 16.

\textsuperscript{81} Because the CAA itself does not contain a statute of limitations, courts have applied the federal five-year period. 28 U.S.C. § 2462 (2012) (“Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .”).
theory. 82 This theory acts as an exception to the SOL by stating that the SOL does not apply if the violation is ongoing. 83 In essence, an ongoing violation is a violation that continues to occur every day until the issue is rectified. 84 Therefore, under the continuing violation theory, the SOL renews each day that the violation continues. Conversely, if courts do not consider PSD violations ongoing in nature, the SOL begins to run once construction commences without a PSD permit and does not renew each day.

Recent judicial interpretations of PSD have focused on whether failures to obtain a PSD permit and install BACT constitute a “continuing violation” for purposes of the SOL. 85 Although there has been some split between the circuits, and even inconsistencies within the same circuit, courts are increasingly answering this question in the negative. 86 Relying on statutory construction and interpretations that often do not reflect the provision’s purpose, 87 these courts have held that PSD violations, for purposes of the SOL, are one-time violations and are therefore barred if brought over five years after construction commenced. 88 So far, courts in ten federal circuits have addressed the

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82. See supra note 81.
84. See United States v. Midwest Generation, LLC, 720 F.3d 644, 647 (7th Cir. 2013), reh’g & reh’g en banc denied (“The continuing violation argument is that every day a plant operates without a § 7475 permit is a fresh violation of the Clean Air Act.”).
85. The Continuing violation Doctrine essentially acts as an exception to the statute of limitations—the SOL does not apply if the violation is ongoing in nature. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380–81 (1982). Since the doctrine only applies to violations that are ongoing in nature, the interpretation of whether a doctrine has operational requirements—as is the debate in PSD cases—is paramount to this decision. See New York v. Niagara Mohawk Power Corp., 263 F. Supp. 2d 650, 660 (W.D.N.Y. 2003) (holding that failure to obtain a PSD permit is not continuing, and differentiating between “continual unlawful acts” and “continual ill effects from a single violation”).
86. See infra note 90 and accompanying text (one-time violation). But see infra note 91 and accompanying text (continuing violation).
87. See infra Part III.B. An example of these inconsistent interpretations is the Seventh Circuit’s assertion that, under the statutory requirements of PSD, a facility could install BACT and then rip it out or deactivate it once construction was complete, without violating § 7475. Midwest Generation, 720 F.3d at 647. It is hard to imagine how a statute meant to protect air quality and a provision meant to ensure that clean air remains clean in light of industrial growth are consistent with an interpretation that merely requires the act of installing the control technology (which does not have any effect until operation commences) without a subsequent requirement that the control technology be used to actually control air emissions.
88. See, e.g., United States v. EME Homer City Generation, L.P., 727 F.3d 274, 289 (3d Cir. 2013); Midwest Generation, 720 F.3d at 647.
continuing violation and SOL questions.\(^89\) District courts in six circuits have held that PSD violations constitute a one-time violation,\(^90\) while district courts in five circuits have held these violations to be ongoing.\(^91\) The most recent cases, however, have taken place at the circuit court level. Prior to the summer of 2013, only three circuits—the Sixth, Eleventh, and Eighth—had decided the issue. The Sixth Circuit, relying partially on Tennessee’s SIP provisions, held that PSD violations were continuing in nature and therefore not barred by the SOL.\(^92\) Conversely, the Eighth and Eleventh Circuits found the PSD violations to constitute one-time violations.\(^93\) During the summer of 2013, however, the Third and Seventh Circuits weighed in on the issue, holding that the violations are one-time occurrences.\(^94\)

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89. The continuing violation question has been addressed by courts (either district or appellate) in the following circuits: Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh. See infra notes 90–93 and accompanying text.


92. See Nat’l Parks Conservation Ass’n v. TVA, 480 F.3d 410, 418–19 (6th Cir. 2007) (stating that the language found in the PSD BACT requirement “creates an ongoing obligation to apply BACT”).

93. See Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1014 (8th Cir. 2010) (applying the PSD analysis to the citizen suit provision of the CAA); Nat’l Parks Conservation Ass’n v. TVA, 502 F.3d 1316, 1322 (11th Cir. 2007) (“[V]iolations of the preconstruction permitting requirements occur at the time of construction, not on a continuing basis.” (citation omitted)).

94. In what can only be described as a terse and relatively hostile (or at least contemptuous) opinion, the Seventh Circuit led the way in what this Comment refers to as the “recent” PSD case law on the issue. See United States v. Midwest Generation, LLC, 720 F.3d 644 (7th Cir. 2013). The case dealt with a company (Commonwealth Edison Co.) that modified five coal-fired power plants between the years of 1994 and 1999 without first obtaining a PSD permit or installing BACT. Id. at 645. However, a PSD suit was not brought against the facility until 2009 at which point the facility had already been sold to Midwest Generation. Id. at 646. Without reference to EPA’s longstanding interpretations of the PSD requirements and subsequently the application of Chevron deference, the
One-time violation courts generally rely on the fact that a PSD permit is referred to as a “pre-construction permit.” Therefore, the requirements are only applicable before construction and the SOL begins to run once a source commences construction without obtaining a permit. It is important to note that these cases, although recognizing the PSD BACT requirement, interpret BACT as merely a part of the permitting requirement, not a separate requirement of its own. Accordingly, BACT is subsumed under the permit requirement and does not impose obligations on a facility unless a permit has been issued. Consequently, the one-time violation conclusion—and the analysis used to support it—encourages facilities to continue operating in violation of PSD so long as they can evade court held that failure to obtain a PSD permit was a one-time violation and was therefore barred by the SOL. Id. at 648. Answering the successor-liability issue, the court stated that “Midwest cannot be liable when its predecessor in interest would not have been liable had it owned the plants continuously.” Id. at 646. Chief Judge Easterbrook’s opinion quickly became infamous among EPA and environmental scholars, due in part to its apparent application of the SOL to injunctive relief (discussed in detail below) and partially to several illogical and somewhat dubious assertions made by the court including: “If the owners ripped out or deactivated the best available control technology after finishing construction that would not violate § 7475,” and “once the statute of limitations expired, Commonwealth Edison was entitled to proceed as if it possessed all required construction permits.” Id. at 647–48.

After the confusion and concern created by Midwest Generation, EPA Region 4 hoped that the upcoming Third Circuit decision in United States v. Homer City would contradict the Seventh Circuit or, at the very least, shed some light on the decision in Midwest Generation. Unfortunately for EPA, the court—agreeing with the Seventh Circuit—held a PSD violation to be one-time. United States v. EME Homer City Generation, L.P., 727 F.3d 274, 284 (3d Cir. 2013). Similar to Midwest Generation, this case involved a past owner or operator who made modifications to a coal-fired power plant without obtaining a PSD permit or installing BACT. Id. at 277. Likewise, EPA did not file suit until over a decade after the alleged violations occurred and the facility had subsequently been sold to a successor company. Id. Although containing a similar fact pattern and conclusion as the Seventh Circuit, Homer City is essential to this debate because it—unlike Midwest Generation—actually contained a full and detailed analysis of the court’s decision making process. See infra Part III.

95. See, e.g., Homer City, 727 F.3d at 284 (stating that the statute “does not exactly try to hide its exclusive link to construction” because “after all, the section is titled ‘Preconstruction Requirements’”); Midwest Generation, 720 F.3d at 647 (“Section 7475 bears the caption ‘Preconstruction requirements’ . . . .”); United Sates v. Westvaco Corp., 144 F. Supp. 2d 439, 444 (D. Md. 2001) (highlighting the title of the provision).

96. Lieben, supra note 14, at 670.

97. See, e.g., Homer City, 727 F.3d at 287 (“The BACT requirement is simply part of § 7475’s prohibition on construction—not operation.”); Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1016–17 (8th Cir. 2010) (“The context of [40 C.F.R.] § 52.21(j)(3) shows that the command to apply BACT is not a freestanding requirement. Rather, it is tied specifically to the construction process.”); see also infra note 175.
EPA detection until the SOL has run. Furthermore, for reasons discussed below, running the SOL from the time that construction commences “delivers a blow to one of the key enforcement tools of the CAA”—the PSD provision. The requirement that EPA discover violations and bring suits within five years further exacerbates the practical limitations on EPA’s ability to enforce PSD requirements.

B. Application to Injunctive Relief

The most concerning aspect of the recent PSD cases is their application of the SOL to injunctive relief. Due to the conclusion that PSD violations are one-time violations for purposes of the SOL, some courts have implied that the SOL applies to injunctive relief as well as to civil penalties. Until Midwest Generation and Homer City, the SOL in PSD cases only barred EPA’s collection of civil penalties. At minimum, injunctive relief under PSD means the installation and operation of BACT or a change in process that results in the emission

98. See Lieben, supra note 14, at 671 (stating that the one-time violation conclusion “send[s] the wrong message to violators that they can get a ‘free pass’ on penalties if they can escape detection for long enough”).

99. Id.

100. See infra Part IV.

101. Based on the Seventh and Third Circuits’ holdings, it is unclear whether the SOL does bar injunctive relief as well as civil penalties. See infra note 102. However, the fact that the courts did not grant EPA’s request for injunctive relief in both cases opens the door for facilities in future litigation to claim that the SOL does bar injunctive relief. The issue is further complicated by the fact that both cases dealt with successor liability—EPA was suing the former owner (company that initially violated PSD) and the current owner (company that purchased the facility). See supra note 94. EPA will likely argue that these cases can be distinguished on that basis. However, not only are successor issues prominent in many of the PSD cases where the SOL is an issue, this rationale would also allow companies to escape their liability and the liability of successor corporations by simply selling the facility after constructing the facility in violation of PSD, essentially allowing for unpermitted and uncontrolled emissions for the remainder of the facility’s life. See infra Part III.C.

102. See United States v. EME Homer City Generation, L.P., 727 F.3d 274, 289 (3d Cir. 2013) (stating that EPA cannot obtain injunctive relief against successor companies if the violation occurred over five years ago), United States v. Midwest Generation, LLC, 720 F.3d 644 (7th Cir. 2013) (implying throughout that the SOL applies to injunctive relief by failing to grant EPA’s request for it).

103. See Lieben, supra note 14, at 670–71 (acknowledging that cases holding that PSD violations are one-time only “still recognize the availability of injunctive relief” and stating that courts have universally held that the concurrent-remedy doctrine cannot be used to bar injunctive relief claims by the government (citations omitted)); Julie Martin, Note, Enforcement for Construction Without PSD Permit and BACT Compliance, 16 N.Y.U. ENVT'L. L.J. 563, 614 (2008) (“Even if civil penalties are barred by the statute of limitations, most courts agree that injunctive relief may still be awarded since suits by the government or citizens are grounded in concerns about the public interest.”).
reductions equivalent to BACT. If, however, a facility fails to obtain a PSD permit and its actual, post-construction emissions exceed the major-source threshold, then injunctive relief is likely to include full compliance with the PSD provision.

Courts uniformly have held that (1) an injunction is not punitive and therefore not a penalty; and (2) the concurrent-remedy doctrine does not bar injunctive relief claims by the U.S. government when acting in its official enforcement capacity. Similarly, EPA has always operated according to the belief that the federal five-year SOL does not bar injunctive relief. Nonetheless, in Midwest Generation, the Seventh Circuit’s cursory opinion failed to discuss EPA’s claim for injunctive relief. However, the court completely denied EPA relief when EPA was seeking both penalties and an injunction. It can be inferred from these facts that the court at least implied an application of the SOL to injunctive relief. The subsequent decision in Homer City failed to add much clarity to the SOL issue, as the decision was unclear and somewhat contradictory. For instance, the Third Circuit qualified its assertion that injunctive relief was available by stating that if five years have passed since the end of construction and the facility has new owners, “the [CAA] protects [the new owners’] reasonable investment expectations.” The Third Circuit’s assertion is based on the interpretation that injunctive relief may only

105. Id. at 3.
106. Lieben, supra note 14, at 683 n.105. Under the concurrent-remedy doctrine, “when the equity jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations.” Paul Wierenga, Effective Clean Air Act Enforcement in the Face of Statute-of-Limitations and Successor Liability Barriers, 43 ELR 10607, 10614 (July 2013) (quoting Russell v. Todd, 309 U.S. 280, 289 (1940)). An exception to the doctrine, providing that “when the government seeks equitable relief in its enforcement capacity, the government is not subject to the time limitations unless Congress explicitly imposes one,” has subsequently been applied to the CAA. Id.
108. See generally United States v. Midwest Generation, LLC, 720 F.3d 644 (7th Cir. 2013) (failing to discuss injunctive relief).
109. See id.
110. See supra note 102.
be “forward-looking” and therefore “must be limited to ongoing violations.”

In comparison, the courts’ analysis of CAA liability for current versus past owners and operators is distinct from Congress’s approach under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). CERCLA, enacted after the CAA, is useful to this analysis because it demonstrates the absence of congressional intent to allow certain loopholes for current owners of a facility. CERCLA imposes strict liability for current owners or operators of a contaminated site regardless of whether they actually contributed to the harm. The statute does, however, provide an exception for “innocent” purchasers, so long as they conducted due diligence before purchasing the property. Although the statute and case law do not address such an exception for PSD, there is a plausible argument for a similar application of an innocent purchaser exemption. A reasonable purchaser or new operator should conduct an investigation to determine if the facility is in compliance with all major federal laws, including the CAA. Without a due diligence requirement, new owners can facilitate a former owner’s escape from liability by purchasing the facility without inquiry into any potential statutory violations. Simultaneously, the new owners will be ensuring that they will not face liability for the former owner’s violation. Consequently, failure to conduct this due diligence should be considered a violation, or at the very least, act as a bar to an “innocent owner” defense. This defense is especially relevant in situations where the failure to conduct due diligence leads to the running of the SOL, thereby forever barring a claim against the current or past owners or operators. For example, according to the one-time violation courts, once a facility has been sold, injunctive relief can no longer be sought against the former owner because he or she no longer owns the facility, and at the same time, the new owners cannot be liable for a violation they did not commit. This large loophole allows facilities to potentially escape liability. A due

112. Id. at 292–93.
115. See infra Part III.A.
118. See United States v. Midwest Generation, LLC, 720 F.3d 644, 646 (7th Cir. 2013) (stating that the current owner or operation “cannot be liable when its predecessor in interest would not have been liable had it owned the plants continuously”).
diligence requirement would close the loophole by forcing new owners to properly investigate and, in good faith, assert that the facility is not violating the CAA in order to escape liability as a new or current owner.

III. RECENT LITIGATION

Despite EPA’s reliance on the continuing violation theory discussed in Part II, recent court cases have interpreted the PSD provision in an increasingly narrow manner. This Part begins by providing an overview of the narrowing case law—focusing on the reasoning and conclusions of the one-time violation courts. Next, the following subpart attempts to refute these conclusions and highlight flaws in the courts’ reasoning. This Part’s analysis of the courts’ questionable interpretations is somewhat brief due to the well-established literature on the topic. Instead, this Comment focuses on the implications of the courts’ failure to properly apply Chevron deference to EPA’s enforcement capabilities and what that means for the future of PSD.

A. Case Law Analysis

When concluding that violations of the PSD provisions are one-time violations, the courts focus on statutory language. One example is the absence of the word “operate” from the statute and regulations. Section 7475 prohibits construction of a facility in violation of the requirements, but does not include the word “operation” in its directive. Courts have reasoned that if Congress intended for PSD violations to be continuing, the provision would contain operational requirements, not merely preconstruction requirements. To accomplish this feat, according to these courts,

119. See, e.g., United States v. EME Homer City Generation, L.P., 727 F.3d 274 (3d Cir. 2013) (interpreting the provision to not include operational requirements and therefore to not constitute a continuing violation for purposes of the SOL); New York v. Niagara Power Corp., 263 F. Supp. 2d 650, 660 (W.D.N.Y 2003).

120. See generally Lieben, supra note 14, at 699–705 (arguing that the statutory language, legislative history, and EPA regulations and guidance on PSD agree with the courts holding PSD violations as continuing); Cole, supra note 83 (discussing both sides of the debate and their analyses); Martin, supra note 103, at 587 (claiming that the construction of the statute and statutory and regulatory language demonstrate that the BACT requirement is separate from the permit requirement).


122. Homer City, 727 F.3d at 284 (stating that § 7475 “prohibits ‘construct[ing]’ a facility without obtaining a PSD permit or using BACT, and while ‘construction’ is defined to include ‘modifications’ . . . it does not include ‘operation.’ ”).

123. See id.
the statute should read, “[n]o major emitting facility . . . may be constructed or operate . . . .” Similarly, in the PSD enforcement provision, there is no mention of the CAA providing enforcement options against someone who “operates” a facility in violation of PSD. 124 Section 7477 merely states that EPA can “take such measures . . . as necessary to prevent the construction or modification” of a facility. 125

Furthermore, the citizen suit provision—which allows individuals to bring suit for CAA violations—only authorizes a suit “against any person who proposes to construct or constructs” a facility in violation of PSD. 126 The courts also point out that the PSD regulations likewise do not include “operation” in their directives. 127 One PSD regulation states that “[a]ny owner or operator who constructs or operates a source or modification not in accordance with the [PSD] application submitted . . . or any owner or operator of a source or modification . . . who commences construction . . . without applying for and receiving approval . . . , shall be subject to appropriate enforcement action.” 128 The first part of the regulation refers to facilities that properly received a PSD permit (referred to in the regulation as a PSD application)—incorporating all § 7475 requirements, including BACT—and then violated that permit in some manner. In this regard, the regulatory language indicates that one cannot operate a facility contrary to the requirements set forth in the permit. 129 The second part of the regulation deals with the situations discussed in this Comment—when an owner or operator fails to obtain a permit prior to commencing construction. In these situations, the regulatory language does not include the term “operation”; instead, it only explicitly prohibits construction of a facility without a permit. 130 According to the courts’ argument, if EPA intended its regulations to provide for enforcement against those companies that operate facilities in violation of PSD, it should have included the word “operate” in the second half of the regulation. 131

125. Id. (emphasis added).
126. Id. § 7604(a)(3).
127. See, e.g., Homer City, 727 F.3d at 287.
129. Id. (stating that an owner or operator who constructs or operates a facility in violation of a permit is subject to enforcement actions).
130. Id. (stating that an owner or operator who constructs a facility without a PSD permit is subject to enforcement actions).
131. See, e.g., Homer City 727 F.3d at 287.
This argument also hinges on the fact that the word “operate” is included in other sections of the CAA. These courts believe that the absence of the word “operate” from the PSD provision evidences Congress’s intent to limit its effect. Therefore, the courts reasoned that since PSD does not include express operational conditions and other provisions do, Congress did not intend PSD to have operational requirements. However, this argument fails to take into account various reasons why Congress may have intentionally or unintentionally omitted the word “operate” from the statute. One possible reason is simple: Congress mistakenly failed to include the word “operate” in the PSD regulations. A similar unintentional omission of a word occurred during the drafting of CERCLA, where Congress used the phrase “owner and operator” in section 107(a)(1), while using the phrase “owner or operator” in the rest of the statute. In this instance, inclusion of the word “and” instead of “or” is generally considered a drafting mistake, and courts usually act as if section 107(a)(1) reads “owner or operator.” Alternatively, the word “operate” could have been intentionally omitted by Congress because, at the time of enactment, Congress did not consider the possibility that facilities would fail to obtain a PSD permit prior to construction and thereby operate in violation of the permit and other PSD requirements.

Another reason courts cite for the one-time violation conclusion relies on the actual structure of the statute. In particular, the PSD provision is located under a heading titled “Preconstruction...
requirements.”138 The courts have seized on this heading to conclude that the provision obviously does not include operational requirements because the title does not say so.139 Illustratively, according to the Third Circuit, § 7475 “does not exactly try to hide its exclusive link to construction and modification: after all, the section is titled ‘Preconstruction Requirements’—not ‘Preconstruction and Operational Requirements.’ ”140 Therefore, the courts conclude that Congress further demonstrated its intent for PSD not to include operational requirements by the structure of the statute.141

Additionally, the courts conclude that the PSD provision does not contain any operational requirements independent from the PSD permit requirement.142 Looking again to the citizen suit provision, the CAA authorizes suits for violations of “an emission standard or limitation,”143 which is defined as, among other things, “any requirement to obtain a permit as a condition of operations.”144 This language supports the conclusion that BACT, as an emission standard or limitation, is a condition of operation that happens to be specified in the PSD permit. Despite the language in this definition, the Third Circuit stated that it “merely creates a private cause of action against a person who is required to (but does not) obtain a permit as a condition of operation. It does not say that PSD is, in fact, a condition of operation.”145 In other words, obtaining the permit itself is a condition of operation, but the PSD provision in its entirety—including the BACT requirement—is not. This somewhat confusing explanation of “condition of operation” relies on the courts’ interpretation of the structure of § 7475 to mean that the technology requirements, such as BACT, are subsumed within the permit requirement.146 Hence, the PSD provision itself does not create

139. See, e.g., United States v. EME Homer City Generation, L.P., 727 F.3d 274, 284 (3d Cir. 2013).
140. Id.
141. Id.
142. The courts are relying on the construction aspects of the provision and interpreting the several operational aspects, such as the BACT requirement, as only provisions of the permit themselves that do not create any requirements outside of the permit. See infra text accompanying note 155.
144. Id. § 7604(f)(4) (emphasis added).
145. Homer City, 727 F.3d at 286.
operational requirements; it is the permit that “sets some operating conditions.”\textsuperscript{147} Therefore, PSD does not “require[] a source without a permit to comply with operating conditions.”\textsuperscript{148}

To counter EPA’s claim that the operational requirements of § 7475(a)(4) are not subsumed within § 7475(a)(1), the Third Circuit proclaimed that “Ockham’s Razor reminds us that simplicity in argument, without more, is no barometer of merit.”\textsuperscript{149} Apart from not actually explaining the court’s interpretation, the court’s assertion is also a misapplication of the principle. Contrary to the court’s statement, Ockham’s razor is a logical and scientific principle that states, all things being equal, the simpler explanation is usually correct.\textsuperscript{150} The court, without explanation, also stated that even though § 7475(a)(4)’s use of the present tense (a “proposed facility is subject to” BACT)\textsuperscript{151} appears to create an ongoing obligation, that appearance is incorrect.\textsuperscript{152} Rather, the requirement to install BACT is part of the “prohibition on construction—not operation.”\textsuperscript{153}

Finally, the one-time violation courts have refused to take into account public policy arguments because they believe—based on the above analysis—the statutory language is unambiguous.\textsuperscript{154} Although barely addressing\textsuperscript{155} \textit{Chevron v. NRDC},\textsuperscript{156} the courts appear to be

\begin{itemize}
  \item \textsuperscript{147} Homer City, 727 F.3d at 286.
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} See R.H. Helmholz, \textit{Ockham’s Razor in American Law}, 21 TUL. EUR. & CIV. L.F. 109, 110–11 (2006) (quoting the original principle as: “[P]lurality should not be assumed without necessity”). The original principle of Ockham’s Razor has been interpreted to mean that “[s]impler explanations are to be preferred.” Id. at 111.
  \item \textsuperscript{151} 42 U.S.C. § 7475(a)(4) (2012) (emphasis added).
  \item \textsuperscript{152} See Homer City, 727 F.3d at 287 (stating that even though the “present-tense language might seem to create an ongoing obligation to use BACT regardless of a PSD permit’s terms or existence,” it does not because the statute does not include the term “operation”).
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} See, e.g., id. at 290–91 (stating that “§ 7475(a) unambiguously prohibits only constructing or modifying a facility without meeting PSD requirements.”); Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1014 (8th Cir. 2010) (“This language unambiguously indicates that the PSD requirements are conditions of construction, not operation.”).
  \item \textsuperscript{155} For example, the Seventh Circuit’s analysis did not discuss or cite to \textit{Chevron} deference at all, even though it was analyzing EPA’s interpretation of the CAA, while the only discussion of \textit{Chevron} deference in the Third Circuit’s opinion is in a footnote. See Homer City, 727 F.3d at 291 n.17. Furthermore, of the courts holding a one-time violation, see supra note 90 and accompanying text, only one mentioned \textit{Chevron} deference; even then, it only was discussed for purposes of another statute. See United States v. Murphy Oil USA, Inc., 143 F. Supp. 2d 1054, 1117 (W.D. Wis. 2001) (discussing the application of \textit{Chevron} deference to the Resource Conservation and Recovery Act (“RCRA”)). Similarly, only one of the two previous circuit court decisions holding a one-time violation
avoiding, without explanation, a policy and legislative history analysis, which should be conducted in a proper *Chevron* analysis.\textsuperscript{157} Under *Chevron*, an agency’s interpretation of its governing statute is given significant deference unless that interpretation is arbitrary, capricious, or otherwise not in accordance with law.\textsuperscript{158} Under the doctrine, if Congress unambiguously addressed the precise question at issue, then the court must follow Congress’s intent (*Chevron* Step One Analysis).\textsuperscript{159} If, however, Congress was ambiguous or silent on the issue, the court must then decide whether the agency’s interpretation of the statute is reasonable (*Chevron* Step Two Analysis).\textsuperscript{160} It is at this stage that courts look to the legislative history and policy rationales of the statute to determine the reasonableness of the agency’s interpretation.\textsuperscript{161} In these cases, the courts used *Chevron* analysis as a means of undermining what it was created to protect—an agency’s interpretation of its governing statute. For example, without analyzing the legislative history, the Third Circuit stated that “[w]here, as here, the language of a provision . . . is sufficiently clear in context and not at odds with the legislative history . . . [there is no occasion] to examine the additional considerations of policy that may have influenced the lawmakers in their formulation of the statute.”\textsuperscript{162}

Based on the above-mentioned interpretations, several courts have held that PSD violations are not continuing in nature and are therefore barred by the five-year SOL.\textsuperscript{163} A majority of courts that have addressed the issue have equated this broader holding with their more narrow conclusion that “failing to obtain a pre-construction permit is a single, discrete violation, and that the cause of action accrues on the day that the violation first occurs.”\textsuperscript{164} In doing so, these

\textsuperscript{156} 467 U.S. 837 (1984).
\textsuperscript{157} The court, in *Midwest Generation*, completely fails to address the application of *Chevron* deference to the issue. See 720 F.3d 644 (7th Cir. 2013). Although the courts in *Homer City* and *Sierra Club* do mention *Chevron*, their analyses were only contained in brief footnotes stating that the statutory language is unambiguous and therefore *Chevron* deference does not apply. See *Homer City*, 727 F.3d at 291 n.17; *Sierra Club*, 615 F.3d at 1018 n.7; supra notes 154–55 and accompanying text.
\textsuperscript{158} See *Chevron*, 467 U.S. at 843–44.
\textsuperscript{159} Id. at 842–43 (describing what is now referred to as Step One analysis).
\textsuperscript{160} Id. at 843 (describing what is now referred to as Step Two analysis, or deference).
\textsuperscript{161} See id. at 851–52 (analyzing the legislative history and policy rationales of the governing statute).
\textsuperscript{162} See *Homer City*, 727 F.3d at 288 (quoting Rodriguez v. United States, 480 U.S. 522, 526 (1987)) (alteration in original) (internal quotation marks and citations omitted).
\textsuperscript{163} See Cole, supra note 83, at 186.
\textsuperscript{164} Id. (emphasis added).
courts have failed to take into account the operational components of a PSD violation—namely, the failure to install BACT. To reach the broader conclusion, however, the courts have distinguished preconstruction and operation permit violations. 165 For example, the CAA's Title V program consolidates all of a facility's operational requirements into one operating permit, violations of which are ongoing. 166 Contrarily, a PSD permit is violated “at the time of the construction, modification, or installation of the equipment or facility” and not during its subsequent operation. 167 Since, as discussed above, the BACT requirements are considered subsumed within the permit requirements, 168 courts need only look to the failure to obtain a permit and not to the failure to install BACT in order to determine if a violation is continuing. 169

Therefore, even though courts have conceded that the intent behind the CAA is air quality protection, 170 they have nevertheless used the above-mentioned language and construction analyses to determine that the statute is unambiguous and therefore cannot be interpreted—in accordance with EPA's claims—as creating a continuing violation. 171

B. Flaws in Reasoning / Chevron Analysis

The courts' analyses of the PSD provision and EPA's interpretation of it should have followed the scheme set up in Chevron. Although some courts alluded to Chevron by stating that no further analysis is necessary when the language is unambiguous, this

165. See id.
166. Title V created a national operating permit program. Generally, it requires a consolidation of all of a facility's CAA requirements into one document. See 42 U.S.C. § 7661–7661(f) (2012).
168. See supra note 146 and accompanying text.
169. This conclusion rests on the theory that the PSD provision requires a proposed facility be subject to BACT in order to even receive a permit before construction. See 42 U.S.C. § 7475(a)(4) (2012) (“No major emitting facility . . . may be constructed . . . unless . . . the proposed facility is subject to the best available control technology for each pollutant.”).
170. E.g., Lieben, supra note 14, at 688 (“Although the underlying intent behind the [CAA], the EPA regulations, and the Illinois SIP is to assure continuing air quality, these provisions cannot reasonably be construed to mean that building or altering a machine without a permit is a violation that continues as long as the machine exists or is operated.”) (quoting United States v. Ill. Power Co., 245 F. Supp. 2d 951, 957 (S.D. Ill. 2003)).
171. See, e.g., United States v. EME Homer City Generation, L.P., 727 F.3d 274 (3d Cir. 2013); United States v. Midwest Generation, LLC, 720 F.3d 644 (7th Cir. 2013).
Comment argues that this conclusion, and the interpretations used to support it, are incorrect. Furthermore, the importance of *Chevron* analysis in this instance is well established and should have been conducted out in the open—not hidden in a vague footnote.\(^\text{172}\) Through a proper *Chevron* analysis, this subpart explains why these courts’ interpretations fail to defer to EPA’s expertise and consequently do not follow the bounds of the doctrine set forth in *Chevron*.

Under a traditional *Chevron* analysis, the first inquiry is whether Congress expressly addressed the precise question at issue.\(^\text{173}\) Here, the precise question is whether the PSD provision contains operational components separate from the permit requirement. There is a plausible argument that Congress unambiguously answered that question in the affirmative,\(^\text{174}\) based on the way it structured the PSD provision into eight separate and equal requirements.\(^\text{175}\) However, at the very least, the PSD provision contains some ambiguity because it apparently contains both operational and construction requirements but is located under the title “Preconstruction Requirements.”\(^\text{176}\) For example, the operational requirements—those that concern or have an effect on the operation of the facility—include the installation and maintenance of a pollution control measure (BACT),\(^\text{177}\) whereas the construction requirements—those that apply prior to or during the construction of the facility—include applying for and obtaining a preconstruction permit.\(^\text{178}\) Furthermore, the Third Circuit conceded

172. *See Homer City*, 727 F.3d at 291 n.17 (3d Cir. 2013) (stating that deference is not warranted because the statute and regulations are unambiguous).


174. *See Lieben*, supra note 14, at 705 (“[T]he CAA is at worst ambiguous as to whether PSD requirements are ongoing and operational, and at best expressly establishes such obligations.”).

175. *See 42 U.S.C. § 7475(a) (2012).* Congress, in drafting the provision, created eight requirements that must be met before construction may commence. Several of these requirements, including BACT, are operational in nature and therefore support the conclusion that PSD includes operational components. *See supra* note 60 and accompanying text. The argument claiming that PSD does not contain operational components relies on the incorrect conclusion that the BACT requirement is subsumed under the permitting requirement.


177. *See id.* § 7475(a)(4) (“[T]he proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility . . . .” (emphasis added)). The “subject to” language used in the statute indicates that this requirement is imposed on the facility during its operation. Since a facility does not start emitting regulated pollutants (or any pollutants for that matter) until it begins operation, this statutory language would be meaningless if it did not apply to a facility’s operation.

178. *See id.* § 7475(a)(1) (setting forth the preconstruction permit requirement).
that there is “some evidence that whenever the topic of the PSD permitting process arose, Congress simply assumed that a PSD permit would be issued before construction or modification began.”

Congress’s assumption supports the conclusion that Congress did not explicitly address the possibility of construction or modification occurring without following the PSD requirements and therefore never addressed the question of a facility operating in violation of PSD. Congress seemed to stay silent, or at least was ambiguous, on this precise issue.

Counterarguments to the courts’ interpretations also demonstrate an inherent ambiguity in the provision. For example, the courts’ fixation on the placement of the PSD provision under the title “Preconstruction Requirements” is conclusory. There is a valid argument that the title refers to the time at which PSD becomes applicable. Consequently, § 7475(a) can be viewed as a rule of timing that starts the PSD review process at the time of construction but does not necessarily restrict the provision’s application.

Furthermore, characterizing the PSD program as a “‘preconstruction’ program overlooks the true nature of the program’s robust ongoing pollution-control requirements, or the program’s overall goals to maintain air quality.” If all eight of the requirements of § 7475(a) were only applicable prior to construction, then the purposes for which they were created—protecting air quality through emission controls and limitations—would be undermined; the only time a facility emits pollutants is during operation, and the emission controls would not be required during operation. Therefore, focusing on the “preconstruction” heading inaccurately restricts the intended application of PSD. Also, there is evidence that Congress did not intend to exclusively withhold operating requirements from the PSD provision. When Congress enacted the PSD provision, there were no other CAA provisions that dealt exclusively with

180. According to the Third Circuit, this is the argument made by EPA in support of its position. Id. at 287. PSD review is the process by which a facility determines if it is subject to PSD requirements and, if so, how the facility will adhere to its requirements. See Martin supra note 103, at 572.
181. Lieben, supra note 14, at 697.
182. See id. at 692–93. See generally United States v. Marine Shale Processors, 81 F.3d 1329, 1355–56 (5th Cir. 1996) (“The CAA statutory scheme contemplates at least two different types of air permits unhappily named ‘preconstruction permits’ and ‘operating permits,’ with confusion easily resulting from the fact that the preconstruction permits often include limits upon a source’s operation.”).
operating conditions.\textsuperscript{183} The Title V operating provision—often used as evidence against the operational requirements of PSD\textsuperscript{184}—was not enacted until 1990, and it is therefore entirely plausible that Congress intended for PSD to include operational requirements. A majority of courts addressing the issue are thus focusing exclusively on the aspects of PSD that create preconstruction requirements without giving any weight to “the language in the statute stating that the PSD permit shall set forth emission limitations for that source following the construction activity.”\textsuperscript{185}

For these reasons, the courts’ analyses should have continued to Chevron Step Two: Is EPA’s interpretation of the statute reasonable? Under a proper Chevron analysis, the term “reasonable” is treated very broadly, such that an agency’s interpretation is essentially upheld unless it is impermissible.\textsuperscript{186} At issue is EPA’s longstanding interpretation of the PSD provision as containing operational conditions and, therefore, violations of the provision are continuing in nature.\textsuperscript{187}

Many scholars and some courts believe PSD violations should not be barred by the SOL because they are continuous in nature.\textsuperscript{188} This conclusion is based on the CAA’s statutory language and legislative history, EPA’s interpretation of the program, and certain policy rationales. The longstanding EPA interpretation of PSD is that EPA may pursue enforcement actions against facilities that operate in

\textsuperscript{183}. See Lieben, supra note 14, at 706–07 n.297.

\textsuperscript{184}. See id. at 706–07 (“Certain courts . . . have, in part, based decisions to dismiss PSD penalty claims on the theory that the violations are not ongoing because all operational requirements of the PSD program should be contained in the operating permit program of Title V of the CAA. [Therefore] . . . plaintiffs should be citing to Title V for continuous violations, rather than PSD requirements.”).

\textsuperscript{185}. Id. at 692 (quoting United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 650 (M.D.N.C. 2003)).

\textsuperscript{186}. See David Kemp, Chevron Deference: Your Guide to Understanding Two of Today’s SCOTUS Decisions, JUSTIA.COM: L., TECH. & LEGAL MARKETING BLOG (May 21, 2012), onward.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions/ (stating that the reasonableness standard “is a very low threshold of deference”); see also DANIEL T. SHEDD & TODD GARVEY, CONG. RESEARCH SERV., R43203, CHEVRON DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTES 6–7 (2013), available at https://mspbwatcharchive.files.wordpress.com/2013/10/chevron-deference-court-treatment-of-agency-interpretations-of-ambiguous-statutes-aug-28-2013.pdf (“Oftentimes, in order to discern whether the agency’s interpretation is reasonable, a court will consider whether the agency’s position comports with the overall purpose and goal of the statute in question.”) (emphasis added)).

\textsuperscript{187}. See infra note 189 and accompanying text.

\textsuperscript{188}. See Lieben, supra note 14, at 704–07; Martin, supra note 103, at 565.
violation of PSD. To support this enforcement authority, EPA cites the Congressional Record. EPA uses the Congressional Record to both substantiate its interpretation of PSD and to demonstrate the reasoning behind Congress’ deliberate omission of the word “operate” from the CAA’s § 7477 enforcement provision. Congress omitted “operate” not because it wished to prohibit EPA enforcement of PSD violations, but because it believed that EPA already possessed enforcement authority. The record states that “the agreement recognizes existing law which allows EPA to initiate enforcement actions against sources that are being constructed or modified in violation of new source requirements, and leaves intact the current interpretation of the Agency that allows action against sources that are operating in violation of new source requirements.” Despite this unambiguous explanation of Congressional intent, recent court decisions do not view the statement as supporting EPA’s 189. The preamble to the PSD regulations, EPA’s past enforcement techniques, and EPA Guidance documents all evidence EPA’s interpretation that the PSD provision contains operational components (mainly that BACT is separate from the permit requirement), that PSD violations are continuing in nature, and that EPA can enforce against owners that operate a facility in violation of PSD requirements. See 40 C.F.R. § 52.21(n)(1)(iii) (2014) (stating that, in order to meet the BACT requirement, a source is required to submit a “detailed description as to what system of continuous emissions reduction is planned for the source or modification”); id. § 52.21(r)(1) (creating liability for any source that “constructs or operates a source or modification not in accordance” with PSD); 43 Fed. Reg. 26,380 (June 19, 1978) (“This preconstruction review in addition to limiting future air quality deterioration that required that any source subject to the requirements would apply [BACT].”); Memorandum from Michael S. Alushin, Assoc. Enforcement Counsel for Air, & Edward E. Reich, Dir. Of Stationary Source Compliance Div., Env’t Prot. Agency, to Reg’l Counsels Regions I-X, EPA (Dec. 14, 1983), available at http://www.epa.gov/region7/air/nsr/nsrmemos/partc.pdf (“To allow commencement or continuation of operation out of compliance would defeat the intent of the Act by sanctioning levels of pollution in the PSD area greater than those established by Congress as the maximum allowable limits.” (emphasis added)); Memorandum from Stephen L. Johnson, Adm’r, Env’t Prot. Agency, to Reg’l Adm’rs (Dec. 18, 2008), available at http://epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf (“Under the federal PSD permitting regulations” specific facilities “are subject to the requirements of the PSD program, including the requirement to install the best available control technology . . . .” (emphasis added)); Press Release, Env’t Prot. Agency, EPA Issues “Significant Deterioration” Regulations (Nov. 27, 1974), available at http://www2.epa.gov/aboutepa/epa-issues-significant-deterioration-regulations (“The [PSD] review is designed to insure that emissions from facilities will not violate the allowable deterioration increments and that [BACT] is employed.”).

192. Id.
interpretation. In *Homer City*, the Seventh Circuit stated, “[a]s is always the case with Congress’s rejection of an amendment, its meaning is elusive.” Although many scholars believe that statutory omissions cannot properly evidence congressional intent, the literature and case law suggest otherwise. Additionally, where Congress explains the reason for the omission—as is the case with PSD—that reason should be given effect.

In this circumstance, where EPA has consistently interpreted the CAA in a specific manner and Congress has acquiesced to that interpretation, courts should give EPA’s interpretation significant deference. Also, if EPA interpreted violations of the statute and the regulations as continuing violations, then there was no need for either EPA, in the regulations, or Congress, in the statute, to clarify that EPA could enforce against a facility for “operating” in violation of PSD. If EPA believed that a statute clearly gave it authority and Congress expressly left that interpretation intact, why would Congress act to clarify it?

C. Undermining PSD

The courts that have reached a continuing violation conclusion have, to an extent, used the “broad air quality goals of the CAA as a basis for their rulings.” During this stage of the *Chevron* analysis,

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194. See, e.g., *Homer City*, 727 F.3d, at 286 n.15 (“But proof it is not.”).
195. *Id.*
196. Traditionally, legislative inaction was believed to contain no reliable interpretive value with regard to legislative intent. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 68 (1988–1989). Although that is often still the case, at times the Supreme Court is willing to apply several interpretive doctrines in order to determine the meaning behind legislative inaction. *See id.* at 69–88. One of these rules—the acquiescence rule—states that if Congress does not overturn a judicial or administrative interpretation, then it probably acquiesces to it. *Id.* at 69. Furthermore, if Congress is made aware of an agency’s construction of a statute and has failed to take action against that interpretation, despite making other amendments to the statute, then the Supreme Court has been willing to attribute significance to legislative inaction. *Id.* at 74. Considering the extreme contention and debate, even among Congress, concerning the PSD provision, there is not a plausible argument that Congress is unaware of EPA’s interpretations. When coupled with the fact that Congress has made a subsequent amendment to the CAA without altering PSD, it appears that the acquiescence rule could be used to shed some light on legislative intent. Although the Supreme Court has been inconsistent in its interpretation of legislative inaction, the acquiescence rule plus Congress’s express statement is more than sufficient to evidence its intent.
197. *See id.* at 69.
198. *See supra* note 196 and accompanying text (demonstrating Congress’s acquiescence to EPA’s interpretation that it can enforce against facilities that operate in violation of PSD).
199. *See Lieben, supra* note 14, at 671.
the court permissibly relied on Congress’s intent when enacting the statute.200 Since there is clear “legislative intent that the PSD requirements include operational requirements,”201 and because EPA’s interpretation adheres to this intent, there is no basis for courts to override it. Even though there is ample evidence that EPA’s interpretation is the correct interpretation, the court does not have to agree: Chevron only requires the agency’s interpretation to be “reasonable.”202

The one-time violation courts should have conducted a full Chevron analysis and found that EPA’s interpretation satisfied the reasonableness standard.203 The judicial interpretations that led to the implied failure to pass (or even reach) Step Two of the Chevron analysis are inconsistent with the purpose of the PSD provision, its legislative history, and its longstanding interpretation by EPA. The PSD judicial trend and its subsequent application undermine the provision and the CAA as a whole.204 The PSD provision’s Congressional Declaration of Purpose includes a focus on the preconstruction review for issuing a permit.205 It states that a purpose of PSD review is to “assure that any decision to permit increased air pollution” is only made after “careful evaluation of all the consequences.”206 Taken together, the CAA’s overall purpose to “protect and enhance” air quality and the Declaration’s focus on the use of review and controls to maintain air quality207 provide a regulatory foundation for the PSD to allow industrial growth without sacrificing clean air.208 Recent cases undermine the stated purposes of

200. See SHEDD & GARVEY, supra note 186, at 6 (“[I]t is common practice to consider legislative history during the first step of the Chevron test.”).
201. See Lieben, supra note 14, at 701–03; supra Part III.B.
203. See Lieben, supra note 14, at 705.
204. The purpose of the CAA is to protect air quality and the purpose of the PSD provision is to protect air quality while allowing for industrial growth. See 42 U.S.C. §§ 7470–7475 (2012). The goal of protecting air quality is frustrated when more sources are allowed to emit air pollutants (or current sources are allowed to increase their pollutants) without using appropriate control technologies. By interpreting violations of the PSD provision as a one-time violation, the courts are allowing for an increase in air pollution by sources intended to be limited by the PSD provision.
206. Id.
207. See Lieben, supra note 14, at 700 (“[T]he CAA’s PSD mandate is a broad and far-reaching one to control air quality through proper source review and emissions controls.”).
208. 42 U.S.C. § 7470(3) (“[T]o insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.”).
PSD and the CAA by significantly diminishing—if not eliminating—EPA’s ability to enforce against PSD violators, thereby allowing unfettered increases in emissions. Lack of proper enforcement increases incentives for owners or operators to make changes to their facilities without applying for a PSD permit or installing the proper control technology, as long as they can escape EPA detection for five years.

The judicial trend also goes against the legislative history of the PSD provision. At the time of enactment, the country faced the dilemma of balancing the need for economic and industrial development with the concern over worsening air quality. A House Report demonstrates Congress’s intended solution by stating that “[t]he purpose of the [PSD] permit is to assure the allowable increments and allowable ceilings will not be exceeded as a result of emissions from any new or modified major stationary source.” The dual industrial and environmental benefits of the provision were further fortified when President Carter signed into law the 1977 Amendments, which included the PSD provision. He proclaimed:

> With this legislation, we can continue to protect our national parks and our major national wilderness areas and national monuments from the degradation of air pollution. Other clean air areas of the country will also be protected, at the same time permitting economic growth in an environmentally sound manner.

The judiciary’s rejection of EPA’s interpretation not only undermines this solution but also fails to take into account the legislative history discussing the provision’s usefulness and purpose during a source’s operation. According to the House Report, the

209. See id.; Memorandum from David G. Hawkins, Assistant Adm’r for Air, Noise, and Radiation, EPA to Regional Adm’rs, I-X, EPA (Jan. 4, 1979) (“The primary purpose of BACT is to optimize consumption of PSD air quality increments thereby enlarging the potential for future economic growth without significantly degrading air quality.”), available at http://www.epa.gov/NSR/ttnnsr01/psd1/p8_8.html.


212. EPA’s interpretation that PSD contains operational requirements grants EPA authority to enforce against facilities that operate without a permit and BACT. This interpretation is consistent with the dual-approach of the PSD provision because it allows for economic growth so long as the facilities obtain a permit and apply specific control technologies necessary to protect air quality. By rejecting EPA’s interpretation, courts are essentially tipping the balance in favor of industry by allowing growth without contemporaneously limiting emissions.
focus of PSD is to establish emission limits through PSD review and permit conditions in order to protect air quality during the source’s operation. 213 Additionally, the Joint Conference Report addressed the operational issue—when discussing the chance of construction of a source occurring without a permit, the Report stated that “a source cannot rely as a defense upon the actual construction by arguing that the source is somehow grandfathered due to the construction activity.” 214 Accordingly, it is illogical to assume, as the court in Midwest Generation did, that a source could comply with the PSD requirements by installing BACT prior to construction and then immediately ripping it down. 215 This practice—apart from being impractical and wasteful—does not accomplish the express goal of enhancing air quality and does not achieve the intent of Congress. Furthermore, the extreme expense involved in installing technology such as BACT makes it improbable that a facility would choose to install BACT merely to rip it down immediately afterwards.

Finally, this judicial trend is contrary to long-held EPA interpretations of both the CAA and EPA’s own implementing regulations. EPA has always interpreted the PSD provision to include operational requirements. 216 EPA did not expressly include operational language in its regulations because it believed that the regulation and the statute, as they stood, already included those requirements. 217 For example, the PSD regulation’s “source obligation” section creates liability for any source which “constructs or operates a source or modification not in accordance” with PSD. 218 Moreover, the regulatory explanation of BACT includes operational emissions limits. 219 In order to meet the BACT requirements, the regulations require a source to submit a “detailed description as to what system of continuous emissions reduction is planned for the source or modification.” 220 Inclusion of the phrase “continuous emissions reductions” demonstrates EPA’s intent that BACT be

215. United States v. Midwest Generation, LLC, 720 F.3d 644, 647 (7th Cir. 2013) (“If the owners ripped out or deactivated the best available control technology after finishing construction that would not violation § 7475 . . . .”)
217. Lieben, supra note 14, at 704.
219. Lieben, supra note 14, at 704.
220. 40 C.F.R. § 52.21(n)(1)(iii) (emphasis added).
applied throughout the source’s operation for two reasons. First, BACT has no purpose before a source begins operation. At this stage, the source has no emissions to reduce and, therefore, imposing BACT requirements would fail to serve the statutory provision’s purpose. Second, the term “continuous” refers to emission reductions that will occur unceasingly. This indicates that emissions-related requirements must extend beyond construction into the actual operation of the source.

When one takes into account the PSD provision’s purpose, legislative history, and interpretations by EPA, only one question remains: What role has Chevron deference played in recent litigation? The courts should have applied a traditional Chevron analysis and upheld—under Step Two’s reasonableness standard—EPA’s interpretation of PSD requirements as ongoing and operational, and, therefore reasonable. Instead, courts departed from this Chevron analysis, coming to the opposite conclusion. The courts appear to be avoiding a full Chevron analysis by going through countless canons of “statutory interpretation” in order to conclude that the language is unambiguous. Interestingly, in these cases, courts are indirectly using a doctrine, originally created to defer to and protect an agency’s reasonable interpretation, to ultimately undermine not only the agency, but also the statutory provision itself.

IV. PRACTICAL IMPLICATIONS

The CAA gives EPA the authority to take enforcement action against a violator of any provision of a SIP- or EPA-issued permit. For example, section 113 enforcement would come into play if a facility obtained a PSD permit, incorporated the permit into a state’s SIP, and then failed to comply with one of the permit’s conditions, including emission limitations. On the other hand, § 7475—in the PSD provision—authorizes EPA enforcement to “prevent the

221. Lieben, supra note 14, at 705 (“[T]he CAA is at worst ambiguous as to whether PSD requirements are ongoing and operational, and at best expressly establishes such obligations.”).

222. See, e.g., United States v. EME Homer City Generation, L.P., 727 F.3d 274, 288, 292 (3d Cir. 2013) (citing several interpretative canons, including: “[a] statute should be construed . . . so that no party will be inoperative or superfluous” and ejusdem generis—the rule that a “series of specific terms . . . is confined to covering subjects comparable to the specifics it follows”).


construction or modification” of a facility in violation of PSD.\textsuperscript{225} In general, CAA enforcement provisions allow for both civil penalties and injunctive relief.\textsuperscript{226}

Although the statute grants EPA these enforcement capabilities, the agency is faced with several practical limitations that affect its ability to enforce PSD. To begin with, PSD violators are extremely difficult to identify and catch because violators—usually large companies—often conceal potential violations.\textsuperscript{227} With the large number of sources potentially subject to PSD,\textsuperscript{228} EPA’s limited resources,\textsuperscript{229} and the statute’s focus on self-reporting,\textsuperscript{230} it is easy to understand how sources can fall through the cracks and fail to be discovered within five years.

The high costs of complying with PSD create incentives for sources to hide or fail to report their potential qualifications for PSD. EPA is then faced with the task of identifying which facilities qualify for and are in violation of PSD. Information contained in the public record, however, is insufficient to identify violations.\textsuperscript{231} Therefore, EPA must often obtain nonpublic information to make these determinations.\textsuperscript{232} In this context, gathering information involves obtaining a significant amount of emissions data from sources, usually through section 114 information requests, and then having technical experts analyze the data.\textsuperscript{233} Even once a violation is discovered, litigation can be long and expensive.\textsuperscript{234} The settlement process alone

\begin{itemize}
\item \textsuperscript{225} Id. § 7477.
\item \textsuperscript{226} Id. § 7413(b).
\item \textsuperscript{227} Lieben, supra note 14, at 680 (“Large companies owning major stationary air sources are typically sophisticated regarding regulatory requirements and often, whether intentionally or inadvertently, conceal PSD violations.”).
\item \textsuperscript{228} See Facilities and Enforcement Activities Related to the Clean Air Act Stationary Source Program, EPA.GOV, http://www.epa.gov/Compliance/data/results/performance/CAA/index.html (last updated Mar. 19, 2014) (“As of March 2010, there are 14,795 active major sources, and 145,236 active synthetic minor and other minor sources (collectively referred to as non-major sources).”).
\item \textsuperscript{229} See Martin, supra note 103, at 618 (stating that a proactive search for PSD violators “would be overwhelmingly time-consuming and would require huge amounts of resources that are not available to EPA or the state agencies”).
\item \textsuperscript{230} See id. at 620 (discussing the problems associated with the CAA’s self-reporting mechanism); Clean Air Act Requirements, EPA.GOV, http://www.epa.gov/dfe/pubs/pwbtech_rep/fedregs/regsecta.htm (last updated Sept. 24, 2013) (noting the self-reporting requirements of NSR permits).
\item \textsuperscript{231} See Cole, supra note 83, at 182 (“[T]he records that are used to discover violators often contain insufficient data to allow EPA to identify sources that meet the criteria of violating PSD.”); Martin, supra note 103, at 620.
\item \textsuperscript{232} Lieben, supra note 14, at 680.
\item \textsuperscript{233} Id. at 680–81.
\item \textsuperscript{234} Id. at 681.
\end{itemize}
can take years and if, after that time, an agreement cannot be reached, the litigation process would begin.\textsuperscript{235} Due to the costs involved, EPA generally attempts to settle the case with the facility.\textsuperscript{236} However, if a settlement cannot be reached, a suit must be filed. Based on the above limitations, “[i]t is not difficult to envision why PSD lawsuits are often filed five years or more after the occurrence of construction, thereby laying the basis for defendants to argue the application of the statute of limitations.”\textsuperscript{237}

The recent judicial trend supports the argument that failure to obtain a PSD permit and install BACT is a one-time violation that accrues when construction commences.\textsuperscript{238} The SOL therefore begins to run immediately upon the initiation of construction, and suits must be brought within a five-year window. The PSD program relies on a system of self-reporting. It is the duty of the owner or operator to determine if their facility qualifies for PSD, conduct the review, and apply for a permit.\textsuperscript{239} Since the responsibility to report potential violations or apply for a permit falls on the facility and EPA practically cannot oversee this process, the added incentive of a finite SOL (one that accrues at the time of construction) means that facilities are more likely to conceal their violations. In reality, the case law now encourages facilities to disregard the PSD requirements as long as they can hide the construction or modification for five years. This encouragement essentially allows for perpetual violations of air pollution control requirements if the facility can manage to elude EPA for five years.

Under the new judicial scheme, EPA will have to completely alter its enforcement strategy to maintain some enforcement authority over PSD violations.\textsuperscript{240} The courts,

\begin{quote}
[b]y adopting an overly strict application of the statute of limitations . . . have “stripped” EPA of its ability to collect fines
\end{quote}

\begin{flushright}
\textsuperscript{235} Id. at 681–82.
\textsuperscript{236} Cf. Memorandum from Michael S. Alushin, supra note 189, at 8 (“In civil actions filed under both § 167 and § 113, against pre-operationals as well as post-operational sources, a likely outcome of the actions will be consent decrees.”); SUEDEEN G. KELLY, WHITE PAPER: EPA ENFORCEMENT INITIATIVES AND PROPOSED RULES AFFECTING THE ELECTRIC GENERATING SECTOR 4 (2011), available at http://www.pattonboggs.com/ViewpointFiles/c692af2b-697e-4893-87ef-0003f67633a8/Kelly_White%20Paper.pdf (“In the face of costly and contentious litigation, a number of utilities have settled with the United States.”).
\textsuperscript{237} Lieben, supra note 14, at 682.
\textsuperscript{238} See supra Part III.A.
\textsuperscript{240} See Cole, supra note 83, at 183 (stating that the current PSD case law has “significantly interfered with EPA’s PSD enforcement efforts”).
\end{flushright}
and have removed EPA’s “leverage for obtaining . . . early settlements . . . as defendants may believe they have better chances of obtaining no or small penalties if they actually litigate the claims.”

Faced with this reality, EPA may also be less willing to conduct time-consuming negotiations due to a fear of the SOL running. Consequently, they may be quicker to bring suits without having fully solidified the case and, thus, will be less likely to win.

The Third Circuit provided a potential solution to the impending enforcement consequences of its holding: increased reliance on section 114 information requests. According to the court, EPA can and should use its section 114 abilities to request the pertinent information from virtually all facilities. In support for this idea, the court stated that

sources are not required to report or obtain a PSD permit for routine maintenance that they believe falls below a “major modification.” But that does not consign the EPA to playing whack-a-polluter by guessing which sources should be the target of its enforcement efforts. The EPA is statutorily empowered to require any source owner or operator, regulated party, or any person “who the Administrator believes may have information necessary” for implementing the Clean Air Act and determining violations—that is nearly anyone in the United States—“on a one-time, periodic, or continuous basis” to keep records, make reports, and submit to inspections, monitoring, and emissions sampling, and “provide such other information as the Administrator may reasonably require.”

The court continued by concluding that “[g]iven the breadth of these powers, we see no reason why EPA and States lack authority to require the advance reporting of some or all proposed changes to

241. Id. (quoting Lieben, supra note 14, at 699).
242. See Dawn Reeves, Ruling Expected to Curtail EPA’s NSR Enforcement Against Energy Sector, CARBON CONTROL NEWS, July 29, 2013, available at Factiva, Doc. No. CARCON0020130729e97f0000k (stating that the Seventh Circuit’s ruling “makes it less likely that EPA would be interested in settlement discussion in lieu of a lawsuit due to the five-year time limit to file a case”).
243. See id. (questioning whether the outcome may “force [EPA] to bring suit earlier or when they might not have done so . . . It might force the United States to litigate before it has settled a matter for fear of letting the statute of limitations run”) (quoting United States v. Midwest Generation, L.L.C., 720 F.3d 644 (7th Cir. 2013)).
244. See United States v. EME Homer City Generation, L.P., 727 F.3d 274, 289 (3d Cir. 2013).
245. Id.
246. Id.
facilities, whether or not they rise to a modification.” 247 This interpretation of EPA’s authority, although technically correct, fails to take into account the practical implications of doing as the court says as well as other federal laws prohibiting such action. 248 The argument is not that EPA lacks the authority under the CAA to issue 114 requests to all facilities, but rather that it lacks the practical capacity to do so. 249 The immense number of facilities plus the possibility of multiple modifications at each facility, coupled with the lack of EPA manpower and resources would create an administrative nightmare. It is not practical, and arguably not possible, for EPA to inspect all these facilities, create and send out all these requests, and then analyze the resulting data within any useful time frame. Additionally, EPA is constrained by federal laws such as the Paperwork Reduction Act, 250 which places a limitation on EPA’s ability to send the same request to more than ten individuals or facilities. 251

In order to follow the suggestion of the Third Circuit, EPA would need to substantially increase its manpower. This addition further requires an act of Congress to increase EPA’s budget and resources—a situation which is not likely to occur anytime soon. 252 Even with increased resources and manpower, EPA would need to create a system to filter and organize the different sources potentially subject to PSD requirements so that section 114 requests could be sent out to the highest number of facilities at the earliest possible time. EPA would also have to find a loophole to the Paperwork Reduction Act, without significantly increasing their already-heavy workload. EPA’s lack of resources, inability to comply with the Third Circuit’s suggestions, and difficulty identifying violators in the first

247. Id.
249. See id.; Martin, supra note 103, at 618 (commenting on EPA’s scarce resources).
251. Summary of the Paperwork Reduction Act, EPA.GOV, http://www2.epa.gov/laws-regulations/summary-paperwork-reduction-act (last updated July 10, 2014) (“The [Paperwork Reduction] Act generally provides that every federal agency must obtain approval from the Office of Management and Budget (OMB) before using identical questions to collect information from 10 or more persons. If EPA decides to gather information, we must prepare an Information Collection Request (ICR), which: [d]escribes the information to be collected, [g]ives the reason the information is needed, and [e]stimates the time and cost for the public to answer the request.”).
place combine to drastically impair EPA’s ability to enforce against PSD violators.

CONCLUSION

Faced with the realities of Homer City and Midwest Generation, few options remain for EPA to take enforcement action against PSD violations. One possibility, asserted by the Third Circuit in Homer City, is criminal prosecution.253 This, however, is also an impractical solution. Due to the complexities involved in criminal prosecution for PSD violations,254 EPA’s criminal department has not brought any criminal violations for PSD.255 Obtaining injunctive relief is technically still an option for EPA, but the implications of Homer City and Midwest Generation are far reaching and at least suggest that this is no longer an option. As a result, EPA would have to rely on distinguishing the Seventh and Third Circuits’ opinions based on the fact that they dealt with successor liability and then only attempt enforcement against sources that have not changed hands.

Unfortunately, regaining enough enforcement capabilities to ensure proper compliance with PSD and therefore “protect and enhance” air quality seems unlikely after these recent holdings. EPA filed for a rehearing and rehearing en banc in Midwest Generation, both of which were denied.256 EPA did not file for rehearing in Homer City. At this point, the ninety-day period in which to petition the Supreme Court for certiorari has passed for both cases. EPA could wait for a subsequent similar circuit court holding and then file for certiorari; however, at that point making the case of a valid circuit split will be difficult. In all likelihood, EPA did not petition for certiorari because of the fear of a negative decision. Without a Supreme Court decision, there is still the hope that other Circuits will align their decisions with EPA’s past interpretations and that EPA will therefore be better equipped to make a claim before the Supreme


256. United States v. Midwest Generation, LLC, 720 F.3d 644 (7th Cir. 2013), reh’g & reh’g en banc denied.
Court. As it is now, however, EPA does not have much support in the case law. Additionally, even though a negative decision may alert Congress to clarify their intent in the PSD provision, there is often a concern among environmentalists of opening up these controversial and very complicated statutes to a Congress that is not necessarily friendly on environmental issues.

Finally, congressional action clarifying the operational and ongoing nature of the PSD provision would finally answer the continuing violation question. Congressional action, however, would require another amendment to the CAA. With the current state of congressional decision making, it is not likely that an amendment will occur. Further, opening up the CAA to an amendment could create negative consequences. There is a legitimate fear that it would lead the way to massive statutory changes and a realignment of the Act’s goals. Similarly, EPA could decide to promulgate new regulations

257. Even though there is some argument that a circuit split exists over the continuing violation PSD issue, the period for EPA to petition the Supreme Court for review has already passed on both circuit court cases discussed in this paper. If EPA chose to take the case to the Supreme Court it would need to wait for another adverse circuit court decision. However, an additional adverse opinion would bring the total of one-time violation circuit courts to five, whereas only one circuit has held these violations to be ongoing. See supra notes 92–94 and accompanying text. At that point, the judicial trend will more clearly favor the one-time violation argument and would therefore decrease the argument of a valid circuit split. Additionally, some commentators view the recent cases more narrowly, thereby asserting that a circuit split does not even exist for this particular issue. See Seth Jaffe, The Final Nail in the Coffin on EPA’s Enforcement Initiative Against Historic PSD Violations? The Third Circuit Agrees that PSD Violations Are Not Ongoing, L. & THE ENV’T BLOG (Aug. 23, 2013), http://www.lawandenvironment.com/2013/08/23/the-final-nail-in-the-coffin-on-epas-enforcement-initiative-against-historic-psd-violations-the-third-circuit-agrees-that-psd-violations-are-not-ongoing/ (“Even if DOJ were to seek Supreme Court review, it’s not obvious that they’d get it. There is no circuit split and the issue seems to be a plain vanilla piece of statutory construction. There may be a lot at stake for EPA, but I don’t think that the Supreme Court would say that there is anything with which it must grapple.”).

258. See Frank James, Lawmakers in Name Only? Congress Reaches Productivity Lows, NPR BLOG (Dec. 3, 2013, 6:28 PM), http://www.npr.org/blogs/itsallpolitics/2013/12/03/248565341/lawmakers-in-name-only-congress-reaches-productivity-lows (comparing the low number of laws passed by the current Congress with the “do-nothing” 80th Congress, which passed 906 laws).


260. With a relatively unsympathetic Congress, environmentalists may have valid concerns over the potential environmentally harmful results that may result from congressional action on the various environmental statutes. Cf. Suzanne Goldenberg, Last Congress Was Most Hostile to Environmental Causes, Say Activists, THE GUARDIAN (Feb. 20, 2013), http://www.theguardian.com/environment/2013/feb/20/congress-low-score-league-of-conservation-voters (discussing the League of Conservator Voters’ report card on
that reinforce and expressly state its enforcement capabilities. However, based on the recent judicial interpretations of the statute, any new EPA regulations would likely face suits by industry forces claiming that the new regulations are “not in accordance with law,” as required under the Administrative Procedure Act.\(^\text{261}\) Despite this fact, regulatory clarification is likely the best option EPA has to ensure that the courts enforce its interpretation.

Unfortunately, environmentalists and the industrial sector are fighting a hard battle because of their perception that their interests are mutually exclusive. This perception, however, is not true. The PSD provision itself was an attempt to meet the goals of both sides by allowing for and promoting economic growth while also protecting the nation’s air quality.\(^\text{262}\) By essentially condoning sources’ perpetual and unregulated emissions (as long as they elude EPA for at least five years), the courts are tipping the scales heavily in favor of industrial growth. The incorrect interpretations taken by recent circuit courts undermine the purpose of the CAA, the goal of PSD, and EPA’s ability to take enforcement action against violators. These interpretations led to a skewed attempt to apply \textit{Chevron} in a manner that circumvents EPA’s interpretation of the Clean Air Act’s Prevention of Significant Deterioration provision.

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environmental issues based on “dozens of votes in the House to dismantle the Environmental Protection Agency’s authority, defund climate science education, weaken drinking water standards, open up the Arctic for drilling, remove protections for endangered sea turtles and fast-track the Keystone XL pipeline project, among other issues”).

\(^\text{262}\) 42 U.S.C. § 7470(3) (2013) (stating that the purpose of the provision is “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources”).

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