Effective Clean Air Act
Enforcement in the Face of Statute-of-Limitations and Successor Liability Barriers

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Summary

The volume of NO\textsubscript{x} and SO\textsubscript{2} emissions each year from unregulated, grandfathered power plants demonstrates that the goal of the CAA’s PSD program, to ensure that air quality standards under NAAQS do not in effect become a ceiling, has achieved only limited success. One significant challenge under the PSD program is the difficulty associated with identifying major emitting facilities that have made major modifications. This repeatedly results in statute-of-limitations problems for enforcement efforts. To resolve this enforcement difficulty, reviewing courts have split into two competing interpretations of the statutory and regulatory requirements of the PSD program. The proper interpretation of the CAA and EPA’s regulations demands that PSD requirements be interpreted to impose ongoing operational obligations.

The Clean Air Act (CAA)\textsuperscript{1} Amendments of 1970 were signed into law in order “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 the population.”\textsuperscript{2} This legislation was drafted to subject new sources of pollution to strict pollution control,\textsuperscript{3} as well as “guarantee the prompt attainment and maintenance of specified air quality standards.”\textsuperscript{4} However, the Amendments “grandfathered” preexisting pollution sources, thereby permitting them to operate free from federal regulation.\textsuperscript{5} In 1977, the U.S. Congress further amended the CAA, this time strongly suggesting that the grandfathering of preexisting sources should only be temporary.\textsuperscript{6} The 1977 Amendments established both nonattainment new source review (NNSR) and prevention of significant deterioration (PSD), collectively referred to as new source review (NSR).\textsuperscript{7} NNSR and PSD apply to new construction, as well as modifications of preexisting sources, and require the implementation of the lowest achievable emission rate (LAER) and best available control technology (BACT), respectively.\textsuperscript{8} Accordingly, one goal of these provisions was to impose stringent emissions limitations on grandfathered facilities that require modifications to stay in operation, theoretically precluding unregulated, grandfathered facilities from operating in perpetuity.

Today, 36 years after the 1977 Amendments were enacted, grandfathered power plants remain in operation throughout the United States. In 1998, a study prepared for the National Association of Regulatory Utility Commissioners estimated that eliminating grandfathered power plants would reduce total U.S. sulfur dioxide (SO\textsubscript{2}) emissions by 40% and total nitrous oxide (NO\textsubscript{x}) emissions by 15%.\textsuperscript{9} These figures demonstrate that enforcing NSR can dramatically reduce SO\textsubscript{2} and NO\textsubscript{x} emissions in the United States. This Article will analyze two barriers to successful PSD implementation among grandfathered sources. First, there is a split among federal district courts and courts of appeal regarding whether federal statutory

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5. Nash & Revesz, supra note 3, at 1678.
6. Id. at 1682 (noting that legislators were aware that the useful life of a power plant was 30-40 years).
8. Id. at 13.
and regulatory PSD provisions contemplate failure to comply as a single, discrete violation or as ongoing violations for each day a facility operates without complying. Second, several major emitting facilities have sought to shield themselves from liability under the PSD program by transferring ownership of the facility following a failure to comply with PSD requirements.

I. Statutory and Regulatory Framework

The PSD program, codified in 42 U.S.C. §§7470–7479, contains emissions limitations and other measures necessary to prevent significant deterioration of air quality in regions that have been designated as in attainment or unclassifiable. In other words, the PSD program ensures that minimum air quality standards, established under national ambient air quality standards (NAAQS), do not in effect become a ceiling. PSD is administered on major emitting facilities, such as power plants, through preconstruction requirements. However, the term preconstruction requirements is misleading because modifications, as defined in 42 U.S.C. §411(a)(4), are incorporated into any requirement where the term “construction” is used. Thus, preconstruction requirements apply equally to new construction and modifications. PSD preconstruction requirements comprise eight obligations that begin with a source obtaining a permit prior to commencing construction or a modification. These permits are generally referred to as preconstruction permits. Additionally, two other preconstruction requirements that play a pivotal role in PSD enforcement are the following. First, a facility “is subject to BACT for each pollutant regulated under the CAA emitted from the facility.” Second, any person who owns or operates a source for which a preconstruction permit is required must agree to conduct monitoring, following the construction or modification, to determine the effects emissions will have on air quality in any affected area.

The U.S. Environmental Protection Agency (EPA) also has promulgated regulations to implement the PSD program. States are required to develop analogous PSD regulations to incorporate into their respective state implementation plans (SIPs); however, the provisions of the federal regulations are applicable to any SIP that is denied with regard to PSD. EPA has limited the scope of the PSD program on modified sources to instances of major modifications, as defined by the regulations. These regulations also codify the proper implementation of CAA PSD preconstruction requirements, including the following provisions. First, any owner or operator who constructs or operates a source or a modification not in accordance with the terms of a preconstruction permit or who fails to apply for or receive approval to construct or modify the source, shall be subject to an enforcement action. Second, any major modification “shall apply” the BACT standard for each regulated NSR pollutant that results in a significant emissions increase and net emissions increase from the source. Finally, a source must also conduct ambient monitoring following construction or a modification to determine the effect emissions from the source or modification have on the air quality in the area.

The CAA also provides statutory enforcement mechanisms. Under the Act, the EPA Administrator or a state may issue an order or seek injunctive relief necessary to prevent the construction or modification of a source that does not conform with PSD requirements. The EPA Administrator also may seek civil penalties, not more than $25,000 per day [now $37,500 per day], for a source’s failure to comply with preconstruction requirements, including failure to obtain or comply with a preconstruction permit. Any citizen may commence a civil action against any person who proposes to construct or constructs any new or modified major emitting facility without the preconstruction permit required by the PSD program. Finally, as noted above, EPA regulations provide that owners or operators of a facility that begins construction or a major modification without approval are subject to an enforcement action.
II. Analysis

A. Proper Application of PSD Obligations for a Source's Failure to Implement Preconstruction Requirements

A grandfathered power plant that fulfills the definition of a major emitting facility must conform with the preconstruction requirements of the CAA's PSD program prior to making a major modification. However, it is not always clear what physical change or changes in the method of operation of a facility will invoke PSD obligations. As a result, many grandfathered power plants will make physical alterations or changes in their operations without seeking a preconstruction permit. These plants will argue that alterations to their facility did not meet the regulatory definition of a major modification, so there was no need to seek a preconstruction permit. Since the plant never obtained a permit or applied other PSD requirements, such as post-construction monitoring or BACT, these requirements were never attached to the facility's modified operations. EPA, states, and citizen groups are permitted to file enforcement actions against facilities that violate the CAA in this way. However, if a facility does not voluntarily report an alleged modification, it can be very difficult for EPA or citizen groups to discover such a modification, especially one that is only a change in the facility's method of operations. Proving a violation can also be difficult, because without post-construction monitoring there may be no evidence that a modification resulted in a significant emissions increase and significant net emissions increase, as required by federal regulations. This practice creates a considerable burden to PSD enforcement, as well as a large number of unregulated, grandfathered power plants that avoid implementing pollution controls.

The CAA does not establish a statute-of-limitations period for violations of its PSD provisions. Consequently, the general federal statute of limitations, under 28 U.S.C. §2462, applies. Under §2462, a claim for civil penalties must be brought within five years of the date when the claim first accrues. In the instance of a PSD violation, for failure to obtain a preconstruction permit, a claim for civil penalties first accrues on the date that construction or a modification commences. However, as mentioned above, it is frequently difficult for EPA or citizens groups to discover a major emitting facility's failure to seek a preconstruction permit for a major modification. This is illustrated by the fact that EPA, states, and citizens groups have each filed numerous enforcement suits against major emitting facilities more than five years after the facilities' commenced major modifications. These suits have forced federal courts to determine how the five-year statute-of-limitations period applies to a failure to obtain a preconstruction permit. District courts and courts of appeal have split on the proper interpretation of the statutory and regulatory provisions imposing liability under the PSD program. A majority interpretation has emerged stating that a failure to obtain a preconstruction permit is a single discrete violation on the date that construction or modification commences. However, a number of courts have adopted a minority position that each day a facility operates after a major modification without complying with preconstruction requirements is a new and separate violation of the CAA and federal regulations. Courts in seven circuits, including U.S. Court of Appeals for the Eighth Circuit and the U.S. Court of Appeals for the Eleventh Circuit, have taken the majority position that PSD violations are a one-time violation under the statute of limitation. However,

35. *Otter Tail*, 615 F.3d at 1014.
36. 42 U.S.C. §7475(a) (2010) (the jurisdictional trigger for a violation of PSD preconstruction requirements contemplates a “major emitting facility on which construction is commenced”); see also, *e.g.*, *Otter Tail*, 615 F.3d at 1014 (42 U.S.C. §7475(a) clearly contemplates that a claim for violation first accrues upon commencement of the relevant modification); see also, *e.g.*, *TVA*, 502 F.3d at 1323 (observing that violations of 42 U.S.C. §7475(a) occur when construction or a modification begins).
38. *See, e.g.*, United States v. EME Homer City Generation, 823 F. Supp. 2d 247, at *11, *41* 20326, 41 ELR 20326 (W.D. Pa. Oct. 12, 2011) (citing that the majority rule is that “a failure to obtain a PSD permit is a one-time violation and is not a continuing violation”); see also, *e.g.*, United States v. Midwest Generation, 694 F. Supp. 2d 999, 1004-07 (N.D. Ill. 2010) (finding that the majority of circuits have adopted the persuasive position that a PSD preconstruction violation occurs only when actual construction is commenced).
39. *See, e.g.*, Sierra Club v. Dairyland Power Cooperative, No. 10-cv-303-bcc., 2010 WL 4294622, at *10 (W.D. Wis. Oct. 22, 2010) (citing that district courts in at least three circuits found PSD violations to be ongoing for statute-of-limitations purposes); see also, *e.g.*, Sierra Club v. Portland General Electric Co., 663 F. Supp. 2d 983 (D. Or. 2009) (declining to adopt the majority position and holding that the PSD program applies to both construction and operation of a major source).
40. *Dairyland Power*, 2010 WL 4294622, at *9-10; see also *Otter Tail*, 615 F.3d at 1018 (the Eighth Circuit decision that failure to obtain a preconstruction permit is a one-time violation); see also *TVA*, 502 F.3d at 1322 (the Eleventh Circuit deciding that violations of preconstruction requirements occur at the time of construction, not on a continuing basis).
courts in four circuits, including the U.S. Court of Appeals for the Sixth Circuit, have taken the opposite view that PSD violations can be ongoing for statute-of-limitations purposes.41 As a result of this split, PSD requirements are not enforceable for a uniform statute-of-limitations period throughout the country.

I. Proper Construction of Statutory and Regulatory PSD Provisions

The proper application of 28 U.S.C. §2462 to PSD preconstruction requirements depends upon how the statutory and regulatory provisions contemplate a violation of those requirements. If PSD preconstruction requirements only contemplate preconstruction actions by a major emitting source, then enforcement suits are properly preceded five years after construction commences. However, if these requirements demand ongoing operational compliance, then the statute of limitations should not bar an enforcement action filed while the modified facility remains in operation.

The statutory preconstruction requirements of the PSD program are written in 42 U.S.C. §7475(a). This section includes eight conditions that must be satisfied before a major emitting facility may commence construction or a modification.42 The first condition, numerically, is that a facility must obtain a preconstruction permit setting forth emissions limitations.43 Other conditions include implementing BACT and conducting post-construction monitoring.44 Several courts, including the Eighth and Eleventh Circuits, have found the requirement to obtain a preconstruction permit to subsume the remaining seven conditions, meaning no condition should be considered as independent of the permitting process.45 Others have found the preconstruction requirements to be set forth as eight wholly independent conditions.46

The structure of §7475(a) lists each preconstruction requirement as an independently numbered subparagraph.47 No preconstruction requirement is listed as a subparagraph to the first requirement, the responsibility to obtain a preconstruction permit.48 This indicates that §7475(a) was drafted so that each condition would attach exclusively of the others. This reasoning was employed by the District Court for the Western District of New York in New York v. Niagara Mohawk49 and followed by the District Court for the Western District of Wisconsin in Sierra Club v. Dairyland Power.50 Yet, the structure of the federal regulations implementing these preconstruction requirements differs slightly from the statutory language. Under 40 C.F.R. §§52.21(j)(3) and (m)(2), a major modification shall apply BACT and conduct post-construction monitoring of emissions for regulated pollutants, respectively. However, §52.21(a)(2)(ii) states that the requirements of paragraphs (j) through (i) apply to the construction or major modification of a new or existing major emitting source. Several courts, including the Eighth Circuit, have read this provision to demand BACT and other preconstruction requirements be incorporated into a facility’s preconstruction permit.51 These courts bolster their reasoning by explaining that under §7475(a), all eight conditions must be satisfied prior to commencing construction, which is when the permitting process occurs.52

If all preconstruction requirements are subsumed into obtaining a permit, the logical outcome is that failure to obtain such a permit is a single discrete violation. However, the decision in Niagara Mohawk demonstrates that sinking all preconstruction requirements into the permit requirement is not necessary to find a one-time violation of the CAAs PSD provision.53 In Niagara Mohawk, the court held that 42 U.S.C. §7475(a) and 40 C.F.R. §52.21(a)(2) (ii) demand that each preconstruction requirement apply independently and only once at the time of the construction or modification.54 Therefore, Niagara Mohawk achieved the end result of a one-time violation, without sinking all preconstruction requirements into one overall permitting requirement.

Reading the statutory and regulatory PSD provisions to demand that all preconstruction requirements be incorporated into the obligation to obtain a preconstruction permit is an illogical interpretation. The structure of 42 U.S.C. §7475(a) clearly constructs each requirement as an independent subparagraph to subsection (a). Furthermore, 40 C.F.R. §52.21(a)(2)(ii) makes absolutely no mention of preconstruction permits. Section 52.21(a)(2)(ii) limits

41. Dairyland Power, 2010 WL 4294622, at **9-10; see also National Parks Conservation Ass’n v. TVA, 480 F.3d 410 (6th Cir. 2007) (deciding that the TVA’s failure to obtain a preconstruction permit was a series of discrete violations, rather than a single violation of federal regulations and the Tennessee SIP).
43. Id. §7475(a)(1).
44. Id. §7475(a)(4), (7).
45. See, e.g., Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1016-17 (8th Cir. 2010) (finding that BACT limitations are best understood to be incorporated into a facility’s construction plans and PSD permits); see also, e.g., Narl Parks and Conservation Ass’n, Inc. v. Tennessee Valley Authority, 502 F.3d 1316, 1324 (11th Cir. 2007) (the obligation to apply BACT like all PSD obligations is solely a prerequisite for approval of a modification that must be instituted through the preconstruction permit process).
46. See, e.g., New York v. Niagara Mohawk Power Corp., 263 F. Supp. 2d 650, 664-65 (W.D.N.Y. 2003) (the preconstruction requirements are set forth as eight independent subparagraphs to subsection (a), not as subparagraphs to subparagraph (i)); see also, e.g., Dairyland Power, 2010 WL 4294622, at *5 (the eight conditions set forth in 42 U.S.C. §7475(a) are not subsumed by the initial requirement to obtain a preconstruction permit).
48. Id.
49. 263 F. Supp. 2d at 664-65.
51. Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1016-17 (8th Cir. 2010); United States v. Illinois Power Co., 245 F. Supp. 2d 951, 955 (S.D. Ill. 2003) (finding that the requirements of 42 U.S.C. §7475(a) and 40 C.F.R. §52.21 are subsumed as preconstruction permit requirements); United States v. Midwest Generation, 694 F. Supp. 2d 999, 1004 (N.D. Ill. 2010) (finding that EPA regulations, specifically 40 C.F.R. §52.21(a)(2)(ii), prohibit only construction or modification without a preconstruction permit).
52. See Otter Tail, 615 F.3d at 1017 (reasoning that the practical nature of BACT demands that it be tailored to a facility during the permitting process); see also Midwest Generation, 694 F. Supp. 2d at 1007 (holding that the enumerated requirements under 42 U.S.C. §7475(a) are not freestanding, but are tied to the application for a preconstruction permit).
54. Id. at 661.
the application of BACT and post-construction monitoring to instances of construction or a major modification, but a logical reading of this section cannot rewrite those requirements into a permit condition. Section 52.21(a)(2)(ii) is properly read to demand that construction or a modification, and not some other action by a major emitting facility, triggers BACT or post-construction monitoring.\(^55\) The provisions of 42 U.S.C. §7475(a) should be read the same way. No major emitting facility may be constructed or modified unless the enumerated requirements have been met,\(^56\) and it is the construction or modification that triggers a violation. Therefore, preconstruction permitting, BACT, and post-construction monitoring are each triggered by the instances of construction or a modification, but are properly read as independent requirements under the PSD program.

As discussed above, statutory and regulatory PSD provisions contemplate a preconstruction violation occurring at the time when construction or a modification commences. Regardless of a court’s interpretation of the preconstruction permitting process, this interpretation is commonly accepted by courts adopting either the majority or minority approaches to implementing the statute of limitations.\(^57\) Courts aligning with the majority and minority diverge when considering whether violations are complete at the time of construction or a modification, or whether PSD requirements contemplate ongoing operational obligations. Resolving this conflict will require another close analysis of the statutory and regulatory framework of the PSD program. If PSD creates an ongoing violation past the completion of construction or a modification, at least one preconstruction requirement must demand ongoing operational compliance from a facility subject to the program.

The language of 42 U.S.C. §7475(a) makes no mention of operation; instead, it focuses on actions to be taken prior to construction or a modification.\(^58\) Courts taking the majority position have held that the preconstruction nature of the PSD program demands that it only impose obligations when construction or a modification commences.\(^59\) In Sierra Club v. Otter Tail Power Co., the Eighth Circuit concluded that with no mention of operation, the CAA was not designed to impose operational conditions under the PSD program.\(^60\) The Eleventh Circuit made a similar determination, in TVA,\(^61\) that the obligation to apply BACT and other preconstruction requirements are simply prerequisites for approval of a modification, not conditions for lawful operation. Courts in the majority have also relied on 40 C.F.R. §52.21(a)(2)(ii) to hold that post-construction monitoring and BACT requirements only apply to construction or modification.\(^62\) Under this interpretation, §52.21(a)(2)(ii) was drafted by EPA to define requirements such as BACT and post-construction monitoring as conditions for approval of construction or a modification, rather than operational conditions. Finally, courts in the majority finding that preconstruction permits subsume all other preconstruction requirements have determined that BACT and other limitations cannot be ongoing because they are permit conditions that must be applied during the permitting process.\(^63\)

 Courts aligning with the minority interpretation of the PSD program have focused on what each individual preconstruction requirement demands, rather than using timing to interpret the program as a whole.\(^64\) With this analysis in mind, some requirements of the statutory PSD program only contemplate preconstruction review. The provisions of 42 U.S.C. §§7475(a)(2) & (6), for example, relate to proper permitting review, public participation, and air quality analysis. Other provisions, however, indicate ongoing requirements related to a facility’s operation. Both 42 U.S.C. §7475(a)(4) and 40 C.F.R. §52.21(j)(3) establish that a constructed or modified facility shall apply BACT for each regulated pollutant emitted from the facility.

BACT is defined as an emissions limitation based on the maximum degree of reduction of each pollutant . . . emitted from or which results from a major emitting facility . . . taking into account energy, environmental, and economic impacts in “forward-looking” time.” (Niagara Mohawk, 263 F. Supp. 2d at 661 (determining that the Act’s preconstruction requirements apply only at the time of construction, not on a continuing basis)).

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55. “The requirements of paragraphs (j) through (q) of this section apply to the construction . . . or the major modification of a major stationary source. 40 C.F.R. §52.21(a)(2)(ii) (2011). The language “apply to” the demonstrates that the actions of construction or a major modification trigger the requirements of paragraphs (j) through (q).


57. See, e.g., Niagara Mohawk, 263 F. Supp. 2d at 661 (adopting the majority approach that violations of preconstruction requirements apply only at the time of construction or modification); see also, e.g., United States v. Illinois Power, 245 F. Supp. 2d 951, 956 (S.D. Ill. 2003) (aligning with the majority view, stating that preconstruction violations occur when actual construction or modification commences, not at some later point); see also, e.g., United States v. American Elec. Power Service Corp. (AEP), 137 F. Supp. 2d 1060, 1066 (S.D. Ohio 2001) (taking the minority position that preconstruction requirements clearly contemplate limitations after a source is constructed or modified as well as for operation of the facility).


59. United States v. Westavco, 144 F. Supp. 2d 439, 444 (D. Md. 2001) (holding that §7475(a) is entitled “Preconstruction requirements,” and therefore, unambiguously applies to construction, not operation of a major emitting source); Illinois Power, 245 F. Supp. 2d at 957 (finding that the plain language of 42 U.S.C. §7475(a) “demonstrates that any preconstruction violation occurs when actual construction is commenced, not at some later point in time”); Niagara Mohawk, 263 F. Supp. 2d at 661 (determining that the Act’s preconstruction requirements apply only at the time of construction, not on a continuing basis).

60. Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1015 (8th Cir. 2010).


63. Otter Tail, 615 F.3d at 1016-17; Midwest Generation, 694 F. Supp. 2d at 1007 (finding that it is the original failure to obtain a permit that violates PSD provisions, “there is no obligation to apply [BACT] in the abstract”); United States v. EME Homer City Generation, 823 F. Supp. 2d 247, at *6, 12, 41 20526 (W.D. Pa. Oct. 12, 2011) (holding that PSD requirements are “forward-looking” and framed in terms of what utilities must do before commencing construction, and BACT is necessarily a condition of obtaining a permit).

and other costs . . . achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.\textsuperscript{65}

Furthermore, emissions limitation is defined under the Act as

a requirement established by the State or the Administrator which limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emissions reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.\textsuperscript{66}

The District Court for the Western District of Wisconsin, in \textit{Dairyland Power}, determined that once PSD is triggered, the preceding definitions demand that a source apply BACT continuously to the operation of a facility.\textsuperscript{67} Similarly, the District Court for the Southern District of Ohio and the District Court for the Eastern District of Pennsylvania, in \textit{United States v. Ohio Edison} and \textit{New Jersey v. Reliant Energy} held that because BACT is an emissions limitation, a source that invokes the PSD program has an ongoing obligation to implement BACT.\textsuperscript{68}

Both 42 U.S.C. §7475(a)(7) and 40 C.F.R. §52.21(m)(2) demand that the owner or operator of a facility subject to the PSD program conduct post-construction monitoring. This monitoring is meant to determine the effect that emissions from the new or modified facility may have or is having on the air quality in any area affected by the source.\textsuperscript{69} Courts adopting the minority position have also held that the ongoing nature of this requirement demands that the PSD program impose ongoing obligations on a triggered source.\textsuperscript{70} Furthermore, the District Court for the Western District of Wisconsin has also interpreted 42 U.S.C. §7475(a)(3), the requirement that an owner or operator demonstrate that construction or operation of a facility will not violate air quality standards, to further exhibit the PSD program's ongoing emission controls.\textsuperscript{71}

After reviewing the relevant case law, the logic of the minority position is persuasive. The definition of BACT under the statutory and regulatory framework clearly indicates the ongoing nature of the standard. BACT is defined as an emissions limitation, and therefore the definition of emissions limitation under 42 U.S.C. §7602(k) is incorporated by reference. An emissions limitation is not a particular technology that is implemented at the time of construction; rather, it is an emissions rate that must be established on a "continuous basis," including any requirements relating to the operation or maintenance of a source to assure continuous emissions reduction.\textsuperscript{72} This definition clearly conflicts with the majority's conception that BACT only contemplates preconstruction action and analysis. The preceding definition establishes that BACT must be established on a "continuous basis," including requirements relating to the operation of a facility. Under this definition, BACT cannot be achieved by a facility unless it is treated as an ongoing obligation that interacts with a facility's operational emissions. Therefore, for a facility to comply with the PSD program, BACT must be implemented as an ongoing emissions limitation. The majority challenges this application of the BACT standard by asserting that 40 C.F.R. §52.21(a)(2)(ii) demonstrates that EPA chose to limit the application of BACT and other ongoing requirements to construction or major modifications.\textsuperscript{73} The majority's interpretation is flawed, as discussed above. Section 52.21(a)(2)(ii) was drafted to ensure that construction or a major modification, and not some other action by a major emitting facility, triggers responsibilities such as BACT or post-construction monitoring.\textsuperscript{74} The clear statutory design that BACT operate as an ongoing emissions limitation is not rewritten merely because the singular acts of construction or a major modification trigger BACT.

Other preconstruction requirements also demonstrate that the PSD program was drafted to include ongoing operational requirements. Post-construction monitoring, required under the Act and federal regulations,\textsuperscript{75} cannot be completed at the time of construction or a modification. Instead, post-construction monitoring is an obligation designed to coincide with the ongoing operation of a facility. If this monitoring did not contemplate an ongoing obligation, then a facility would not be required to respond to increased emissions and the monitoring results would be useless numbers. Fortunately, the BACT standard is redefined on a "continuous basis," and if monitoring demonstrates a negative effect on air quality, BACT "production processes, systems, and techniques" can be adjusted accordingly. Finally, §7475(a)(3) illustrates the ongoing considerations of the PSD program because the owner or operator of a facility must demonstrate that the facility's


\textsuperscript{67} \textit{Dairyland Power}, 2010 WL 4294622, at *13.

\textsuperscript{68} United States v. Ohio Edison, No. 2:99-CV-1188, 2003 WL 23415140, at *5, 33 ELR 20253 (S.D. Ohio Aug. 7, 2003) (finding that under the Act, the requirement to implement PACT controls construction and operation of the facility); New Jersey v. Reliant Energy Mid-Atlantic Power Holdings, No. 07-CV-5298, 2009 WL 3254438, at *15-16 (E.D. Pa. Sept. 20, 2009) (holding that BACT is an "emission limitation" as defined by the act, and therefore, operates as an ongoing operational requirement); see also Sierra Club v. Portland General Electric Co., 663 F. Supp. 2d 983, 993 (D. Or. 2009) (holding that the obligation, under the PSD program, to utilize BACT as an owner or operator is ongoing).

\textsuperscript{69} 42 U.S.C. §7475(a)(7) (2010); 40 C.F.R. §52.21(m)(2) (2011).

\textsuperscript{70} \textit{Portland General Electric}, 663 F. Supp. 2d at 993 (finding that "ongoing monitoring requirements indicate that a facility is subject to the PSD program post-construction); \textit{Dairyland Power}, 2010 WL 4294622, at *12 (subsection (a)(7) of the PSD program requires ongoing monitoring); \textit{Ohio Edison}, 2003 WL 23415140, at *5 (finding that, in particular, §§7475(a)(7) & (a)(4) regulate a source's ongoing operation under the Act).

\textsuperscript{71} \textit{Dairyland Power}, 2010 WL 4294622, at *12.

\textsuperscript{72} 42 U.S.C. §7602(k) (2010).

\textsuperscript{73} See supra note 62.

\textsuperscript{74} See supra note 55.

\textsuperscript{75} 42 U.S.C. §7475(a)(7) (2010); 40 C.F.R. §52.21(m)(2) (2011).
operations will not violate air quality standards. This provision is another example of the PSD program’s focus on ongoing emissions limitations.

These requirements, taken together, demonstrate that the title “preconstruction requirements” merely describes when these provisions attach, rather than the nature of the requirements themselves. As stated by the District Court for the District of Oregon, “it is difficult to see how the program could effectively prevent significant deterioration of air quality if PSD requirements ceased upon the completion of construction.” The text of the Act and federal regulations as well as the purpose of the PSD program demand that emissions limitations and other measures contemplate ongoing operational compliance from a triggered facility. Therefore, the statute-of-limitations period under 28 U.S.C. §2462 should give consideration to a facility’s failure to implement ongoing operational commands.

In National Parks Conservation Ass’n v. TVA, the Sixth Circuit held that a source who violates the ongoing requirements of the PSD program actually commits a series of discrete violations, rather than a single violation that may or may not be “continuing.” Each day of operation is a repetitive discrete violation that is independently actionable. Therefore, claims for civil penalties are timely insofar as they are limited to violations that occurred within the five years preceding the initial complaint. This reasoning is echoed by each district court applying the minority interpretation of the PSD program. Moreover, adopting the position of the majority, that a violation of the PSD program constitutes a single discrete violation, would vitiate the penalty provision under 42 U.S.C. §7413(b). A single violation subject to a $37,500 penalty would incentivize noncompliance, because the cost of implementing BACT and other measures would far exceed the potential penalty for violating the PSD program. This interpretation would clearly run counter to the goal of preventing significant deterioration of air quality. Consequently, claims for civil penalties against major emitting facilities, such as grandfathered power plants, that conduct major modifications but do not report these modifications or implement PSD requirements, should not be time-barred five years after the major modification commences. Rather, EPA, states, and citizens groups should be permitted to seek civil penalties for each day that a facility operates without complying with the Act, for the five-year period preceding suit.

2. Title V Permitting Program

The CAA’s Title V permitting program, 42 U.S.C. §7661a(a), specifically prohibits operation of a source except in compliance with the provisions of a Title V permit. Many courts adopting the majority interpretation of the PSD program have focused on this provision to hold that enforcement suits seeking to punish ongoing PSD violations should be brought under the Title V program. However, a detailed analysis of Title V demonstrates that Title V operating permits cannot properly enforce ongoing PSD operational requirements in all cases.

The first problem with the interpretation that ongoing PSD operational requirements should be enforced through Title V operational permits is that this interpretation assumes that all PSD requirements are subsumed into a preconstruction permit. Each court that found Title V permits to be the appropriate enforcement mechanism also found BACT and other operational obligations to be conditions of a preconstruction permit. As discussed previously, this is a flawed interpretation of 42 U.S.C. §7475(a). Preconstruction requirements are drafted as independent obligations, not as conditions of the first requirement, a preconstruction permit. The second problem with enforcement under Title V permits arises because of the nature of PSD violations that lead to statute-of-limitations problems. These violations arise because a facility makes a modification that it feels does not meet the federal regulatory definition of major modification. Consequently, the facility will operate following the modification without implementing any PSD requirements. Title V permits are not a useful enforcement mechanism for this type of violation, because Title V permits do not impose any additional requirements on a source, but rather consolidate all existing applicable requirements into a single document. Therefore, Title V

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77. 480 F.3d 410, 417 (6th Cir. 2007).
78. Id.
79. Id. at 420.
80. See, e.g., United States v. American Elec. Power Service Corp. (A.E.P.), 137 F. Supp. 2d 1060, 1067 (S.D. Ohio 2001) (concluding that 28 U.S.C. §2462 limits time to five years where civil penalties may be sought for days in which the defendant violated the CAA, thus, to the extent plaintiffs seek relief within this time period, a motion to dismiss is without merit); see also, e.g., Portland General Electric, 663 F. Supp. 2d at 994 (holding that each day a facility operates absent BACT and other PSD requirements constitutes a discrete violation of the CAA . . . and noting that this interpretation does not eliminate the statute of limitations, a defendant can only be liable for the five years preceding suit); see also, e.g., United States v. Ohio Edison, No. 2:99-CV-1181, 2003 WL 23415140, at *5-6, 33 ELR 20253 (S.D. Ohio Aug. 7, 2003) (holding that the defendant was liable for each day it operated in violation of PSD requirements . . . and noting that the plaintiffs may not seek civil penalties for days of violation more than five years prior to filing their complaints).
82. 42 U.S.C. §7661a(a) (2010).
84. See, e.g., Illinois Power, 245 F. Supp. 2d at 955 (finding that BACT and other operational obligations are preconstruction permit requirements); see also, e.g., Southern Indiana Gas and Electric, 2002 WL 1760752, at *5 (finding that the Act and relevant federal regulations clearly punish commencing construction, not operating an unpermitted facility following construction).
85. See supra Part II.A.
86. Citizens Against Ruining the Environment v. EPA, 535 F.3d 670, 672 (7th Cir. 2008).
permits do not impose any substantive obligations on a facility; they are merely a mechanism for efficient record-keeping. If a facility never establishes emission limitations or other measures under the PSD program, a Title V permit will not contain any such obligations.

As stated by the U.S. Court of Appeals for the Fifth Circuit in United States v. Marine Shale Processors, “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 preconstruction permits often include limits on a source’s operations.”87 The PSD program is properly interpreted to impose ongoing obligations on facilities that trigger its requirements. If a facility fails to comply with the PSD program by never reporting a modification, the CAA permits an enforcement action to punish ongoing operation in violation of PSD requirements. However, the structure of the Act demands that these suits claim violations of the statutory and regulatory PSD provisions. Title V permits themselves cannot impose PSD obligations independently of the PSD program.

3. Concurrent Remedy Doctrine

By its terms, 28 U.S.C. §2462 applies to claims for “any civil fine, penalty, or forfeiture.” Therefore, if the statute of limitations bars a suit for legal relief five years after construction or a modification is commenced, an enforcement suit seeking equitable remedies, such as an injunction to prevent further operation without implementing PSD requirements, is not necessarily barred. In these instances, the concurrent remedy doctrine must be applied to determine whether a party’s concurrent equitable remedies are time-barred as well. The concurrent remedy doctrine was ascribed by the U.S. Supreme Court’s decision, in Russell v. Todd, that “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.”88 This doctrine is particularly important in the PSD context where courts adopting the majority position strictly enforce the five-year statute of limitations from the date that construction or a modification is commenced.

In Otter Tail and National Parks and Conservation Ass’n v. TVA, the Eighth and Eleventh Circuits each dismissed legal claims for violations of PSD requirements as time-barred under 28 U.S.C. §2462.89 However, in both cases, the citizen plaintiffs also sought injunctive relief against the respective defendant power plants.90 Accordingly, the two circuits applied the concurrent remedy doctrine to determine whether a citizen plaintiff may maintain a suit for equitable remedies if legal remedies are time-barred.91 The citizen plaintiffs urged the courts to adopt the standard of United States v. Cinergy Corp.,92 stating that civil penalties and injunctive relief are not concurrent because the remedies have “different goals and effects.” Both circuits considered the plaintiffs’ standard and ultimately determined that the weight of authority interpreting Russell does not support the plaintiffs’ position.93 In United States v. Tel luride Co. and Nemkov v. O’Hare Chicago Corp.,94 the U.S. Court of Appeals for the Tenth Circuit and the U.S. Court of Appeals for the Seventh Circuit held that the concurrent remedy doctrine bars a suit in equity that can be brought on the same facts as a legal claim. Similarly, in Saffron v. Dep’t of the Navy,95 the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit found that when law and equity are applied to the same legal right, it is the kind of parallelism that the concurrent remedy rule was designed to prevent. The courts in Otter Tail and TVA used these decisions to hold that citizen suits seeking injunctive relief are time-barred under the concurrent remedy doctrine if legal claims for violations of PSD requirements are time-barred under 28 U.S.C. §2462.96

The decisions in Otter Tail and TVA do not complete the analysis of the concurrent remedy doctrine’s application to PSD enforcement. Both Otter Tail and TVA were citizen suits rather than government enforcement actions. The Tenth and Eleventh Circuits, in United States v. Banks and Telluride Co., have carved out an exception to the concurrent remedy doctrine for government enforcement in the Clean Water Act (CWA) context; this exception holds that when the government seeks equitable relief in its enforcement capacity, the government is not subject to a time limitation unless Congress explicitly imposes one.98 In TVA, the Eleventh Circuit indicated approval of the Banks exception in the CAA context, although Banks did not directly apply because TVA involved a citizen suit.99 Furthermore, district courts for the Southern District of Ohio, the Western District of Wisconsin, and the Northern District of Illinois have also extended the Banks exception to the CAA context, finding that application of the concur-
rent remedy doctrine is not appropriate in cases where the United States is acting in its governmental capacity.\textsuperscript{100}

The weight of authority interpreting the concurrent remedy doctrine does not demonstrate approval of citizen suits seeking equitable relief when legal relief for the same cause of action is time-barred. The Supreme Court sought to bar suits in equity where “the suit is brought in aid of a legal right.”\textsuperscript{101} This language does indicate that suits seeking equitable remedies for the same legal right as a time-barred legal claim should be barred as a concurrent remedy. Therefore, in the CAA PSD context, a citizen suit whose claims for civil penalties are time-barred is properly precluded from seeking equitable remedies. However, there also seems to be strong acceptance among multiple circuits of the principle espoused in Banks, that the government cannot be precluded from seeking equitable remedies by the concurrent remedy doctrine. The reasoning in Banks is well-supported, because the government has a critically important role in enforcing environmental statutes. Furthermore, the extension of Banks to the CAA context is logical because the government has an identical enforcement role under the CAA as it does under the CWA. Precluding the concurrent remedy doctrine from barring government enforcement can drastically improve the success of the PSD program. Therefore, in circuits where courts strictly enforce the five-year statute of limitations from the date that construction or a modification commences, the government should be allowed to seek an injunction to prevent a facility from further operation in violation of PSD preconstruction requirements. This supports the congressional purpose of the PSD program, to protect public health and welfare from the adverse effects of air pollution.\textsuperscript{102} Finally, it is worth noting that courts who have properly held that PSD preconstruction requirements create ongoing operational obligations have not generally considered the concurrent remedy doctrine, even in citizen suits, because legal remedies were not time-barred by the statute of limitations.\textsuperscript{103}

B. Transfer of Ownership Cannot Operate as a Shield to PSD Enforcement

The federal statute of limitations is not the only barrier to effective PSD enforcement on grandfathered facilities. As noted above, whether physical changes to a facility or a change in a facility’s method of operations actually constitute a major modification within the meaning of federal regulations is often uncertain.\textsuperscript{104} Consequently, these facilities often continue operation following a PSD triggering modification without ever seeking a PSD preconstruction permit or implementing other preconstruction requirements. Such a facility may even change ownership during the period following a violation but before EPA or a citizens group has the opportunity to pursue an enforcement action in response to the PSD violation. If the modification does in fact trigger PSD requirements, who is responsible, the current or former owners? This is a complex problem that requires consideration of whether liability can pass between parties under the CAA as well as whether a party who no longer controls a facility has the ability or responsibility to remedy a violation at that facility. This issue is extremely important to effective PSD enforcement, because if there is a way in which both former and current owners of a violating facility can avoid liability, it would create a loophole in the Act’s PSD program that would essentially perpetuate the grandfathering of major emitting facilities through transfer of ownership.

Several federal courts have faced the issue of resolving liability under the CAA after a PSD triggering facility has transferred owners.\textsuperscript{105} The issue presents two primary questions. First, whether the current owners can be liable under the CAA when they were not the parties who failed to comply with PSD preconstruction requirements at the time of construction or a modification. Second, whether the former owners, who initially violated the Act, can be held accountable for that violation when they no longer own the facility in question and thereby are not themselves continuing to violate the act.

1. Successor Liability of Current Owners for Modifications Occurring Prior to Their Ownership

Asset transfer is a common practice in a free market economy. Private companies frequently buy and sell assets for a multitude of reasons, including financial needs and benefits. Cement kilns, electric-generating utilities, and other entities regulated under the CAA change ownership and operation for these same reasons. Yet, these facilities also are required to operate within the parameters of the CAA once obligations such as PSD preconstruction requirements attach to the facility. For liability to pass from former owners to purchasers, the CAA must permit successor liability and the initial violation must impose a continuing duty to comply with the Act.


\textsuperscript{101} Russell v. Todd, 305 U.S. 280, 289 (1940).


\textsuperscript{103} See, e.g., National Parks Conservation Ass’n v. TVA 480 F.3d 410, 420 (6th Cir. 2007) (the Sixth Circuit finding that because claims for civil penalties were timely under 28 U.S.C. §2462 insofar as they related to violations occurring within five years of when the complaint was filed, there was no need to address the lower court’s application of the concurrent-remedy rule).

\textsuperscript{104} See supra, note 31.

The traditional rule of successor liability in the corporate setting is that when a corporation acquires the assets of another, it does not also acquire the liabilities of the former corporation. However, courts have carved out four exceptions to this general rule: (1) where the purchaser expressly or impliedly agrees to the liabilities of the predecessor; (2) where the transaction amounts to a consolidation or merger of the corporations; (3) when the successor is merely a continuation of the predecessor corporation; and (4) when the transaction was fraudulent or entered into purely to escape debts. These exceptions are generally considered so well-established that many courts have held that Congress would have to expressly exclude their application by statute. Therefore, the first inquiry is to determine whether Congress intended to preclude the transfer of liability under the CAA.

Civil enforcement under the CAA is governed by 42 U.S.C. §7413(b). Under this provision, the Administrator has the power to commence a civil action against any person that is the owner or operator of an affected source, a major emitting facility, or major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty . . . per day for each violation, or both.

Additionally, the citizen suit provision of the Act permits civil actions “against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I,” which is the Act’s PSD program. Finally, the Act defines the term “person” to “include[ ] an individual, corporation, partnership, association, State, municipality. . . .”

The text of the foregoing provisions does not support an argument that Congress expressly excluded the possibility of transfer of liability under the CAA. A logical interpretation of these provisions, particularly the language in §7413(b), stating “in the case of any other person,” demonstrates, if anything, acquiescence to transfer of liability through corporate structures. In United States v. Louisiana Generating, the District Court for the Middle District of Louisiana interpreted the CAA and held “there is nothing in the CAA itself that prohibits the application of the common law doctrine of successor liability.” The District Court for the District of Kansas made a similar finding, in United States v. MPM Contractors, permitting the transfer of liability to a successor corporation under the third exception to the traditional rule against successor liability—where the purchasing corporation is merely a continuation of the former—in a case brought for violation of the CAA. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is also informative to the permissibility of successor liability under the CAA. Transfer of liability is universally accepted in the CERCLA context. CERCLA imposes liability on “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.” Additionally, CERCLA defines “person” to include any “individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity,” just as in the CAA. Liability under the CAA is not limited by the language, “who at the time of disposal,” as is CERCLA, yet even with that language, transfer of liability to successor corporations is universally permitted under CERCLA. Given this textual distinction, it would be illogical to find that Congress expressly prohibited successor liability under the CAA but not under CERCLA. Therefore, the traditional rule as well as exceptions to successor liability should apply to the CAA.

One court, the District Court for the Northern District of Illinois, in United States v. Midwest Generation, interpreted the CAA to not permit successor liability. However, the court did not dispute that Congress did not expressly prohibit transfer of liability; instead, the court held that the CAA is a “quasi-criminal” statute, and therefore liability can only attach to those who actually violated the statute. This decision was based on the “context” of the statute rather than the language used by Congress. While the CAA does provide for potential criminal penalties, the court’s reasoning in Midwest Generation is misplaced. Criminal enforcement under the CAA is permitted under 42 U.S.C. §7413(c). This section authorizes the imposition of criminal liability on “[a]ny person who knowingly violates any requirement or prohibition of . . . section 7475(a) of this title (relating to preconstruction requirements) or under section 7477 of this title (relating to preconstruction requirements). . . ." This section does use the term “any person,” yet it omits that particularly important element of §7413(b), stating “in the case of any other person.” Furthermore, §7413(c) adds a scienter requirement, a knowing violation, compared with strict liability under §7413(b). The

107. Id.; see, e.g., Mozingo v. Correct Mfg., 752 F.2d 168, 174 (5th Cir. 1985).
108. See, e.g., United States v. Mexico Feed and Seed Co., 980 F.2d 478, 486, 23 ELR 20461 (8th Cir. 1992) (“corporate successor liability is so much part and parcel of corporate doctrine, it could be argued that Congress would have to explicitly exclude successor corporations”); see also, e.g., Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1246, 21 ELR 20497 (6th Cir. 1991) (describing corporate successor liability as well-settled law); see also, e.g., North Shore Gas v. Salmon Inc., 152 F.3d 642, 28 ELR 21500 (7th Cir. 1998) (compiling cases applying successor liability in the CERCLA context, reed on other grounds, Envision Healthcare, Inc. v. PreferredOne Ins. Co., 204 F.3d 983 (7th Cir. 2010).
111. Id. §7602(c) (2010) (emphasis added).
115. North Shore Gas v. Salmon Inc., 152 F.3d 642, 649, 28 ELR 21500 (7th Cir. 1998) (compiling cases permitting successor liability under CERCLA); see also, e.g., United States v. Carolina Transformer Co., 978 F.2d 832, 23 ELR 20369 (4th Cir. 1992); see also, e.g., Anspec Co. v. Johnson Controls Inc., 922 F.2d 1240, 21 ELR 20497 (6th Cir. 1991).
117. Id. §9601(21).
118. 781 F. Supp. 2d 677, 688, 41 ELR 20123 (N.D. Ill. 2011).
119. Id.
120. 42 U.S.C. §7413(c) (2010).
court in *Midwest Generation* erred by considering the CAA as a whole a “quasi-criminal” statute; criminal and civil enforcement are provided for separately. Therefore, transfer of liability should be permissible under the Act, and the case law supporting that reasoning is persuasive.

The second inquiry to determine whether a successor owner of a facility has failed to comply with CAA preconstruction requirements necessarily depends on whether that violation was a discrete past violation or is ongoing. Several courts, adopting the majority position discussed in Part II.A.,112 have held that liability cannot pass to successor owners because the violation was complete prior to their ownership.112 As discussed at length in Part II.A. of this Article, the Act’s PSD preconstruction requirements contemplate ongoing obligations and thereby lead to continuing violations for each day of operation without complying. Under this interpretation, the purchaser is buying a facility that is operating out of compliance and thereby itself violates the Act when operating that facility. Although the purchaser may have had no intention to avoid PSD compliance, it purchased a facility exposed to environmental liability, and that party violates the Act by operating a facility not in compliance with the CAA. Therefore, we must determine whether an exception to the traditional rule against successor liability exists.

The first well-accepted exception to the rule against successor liability is, “(1) where the purchaser expressly or impliedly agrees to the liabilities of the predecessor.”115 Environmental liabilities are commonly transferred when facilities, such as grandfathered power plants, are sold.124 If the purchasing corporation agrees to accept the environmental liabilities associated with the facility they purchase, this agreement should be honored by courts, and the purchaser should be responsible for bringing the facility into compliance. The reasoning in *Louisiana Generating* is persuasive. If the terms of the contract of sale dictate the purchasing corporation assumed CAA liability, then that liability should pass accordingly under the contract.125 As noted previously, most courts refusing to permit the transfer of liability to current owners have based this decision on the flawed interpretation that the violation is complete at the time of construction.126 This reasoning is mistaken and should not be used as a basis to prevent the transfer of liability to a purchaser who expressly accepts it. In *Reliant Energy*, the District Court for the Eastern District of Pennsylvania went even further and found the purchaser liable without even considering successor liability under an asset transfer agreement.127 In *Reliant Energy*, the court noted that violations of the CAA are often difficult to detect, and in cases not filed by the United States, the plaintiffs’ claims for civil penalties do not accrue until they reasonably discovered the alleged violations; the court applied the Discovery Rule to attach liability to the current owners who purchased the violating facility after the alleged modification occurred.128 It is rare that a court would have to go this far in attaching liability to a purchaser, and many courts may not be likely to accept this reasoning, even in the case of citizen suits. Yet, this decision gives weight to the purpose of the Act, improving our nation’s air quality.

In conclusion, courts must permit transfer of liability to a purchaser where an asset transfer agreement assigns those liabilities to the purchaser; refusing to do so could create an enormous and environmentally costly hole in the CAA. The decision in *Reliant Energy* is an environmentally conscious one, yet it does not fully square with the traditional rule against successor liability, and it would make more sense to assign liability to the former owners of the violating facility.

2. Liability to Former Owners After Transfer of Ownership of a Modified, Grandfathered Facility

If a facility regulated under the CAA transfers owners and the asset transfer agreement assigns environmental liabilities to the current owner, that liability should pass to that accepting purchaser. However, these transfer agreements are made in a free market, and such a provision is not a legal requirement of sale. Consequently, there may be instances where a purchaser refuses to agree to accept environmental liabilities of the former owner and the sale is completed without such a provision. Some party must be accountable for the ongoing PSD violation in this instance; otherwise the sale of the facility would create a perverse incentive for neither party to allocate environmental responsibilities, because failing to do so would allow both to avoid both responsibility.

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112. See supra note 38.
113. New York v. Niagara Mohawk Power Corp., 263 F. Supp. 2d 650, 668-69 (W.D.N.Y. 2003) (the purchaser had “neither the obligation nor the ability to comply with the mandates of 42 U.S.C. §7475(a)” and such a violation “does not give rise to a cause of action against the [purchaser]”); United States v. EME Homer City Generation, 823 F. Supp. 2d 247, 285, 41 20326 (W.D. Pa. Oct. 12, 2011) (“in the context of grandfathered facilities, that have changed ownership, it is reasonable to construe §7475(a) in accordance with its plain text as being directed to the initial decision of whether or not to obtain a preconstruction PSD permit”); Sierra Club v. Morgan, No. 07-C-251-S, 2007 WL 3287850, at *7 (W.D. Wis. Nov. 7, 2007) (“those persons who will be responsible for failing to obtain proper permits under the CAA must be the same persons who are responsible for actually obtaining the permits under the CAA”).
114. See, e.g., United States v. Louisiana Generating, No. 100-JJB-CN, 2011 WL 6012997, at *1 (M.D. La. Dec. 1, 2011) (the “Fifth [Asset Purchase Agreement] APA called for the Defendant to assume any environmental liabilities that attached to the owner of the acquired assets’); see also, e.g., United States v. Midwest Generation, 781 F. Supp. 2d 677, 689, 41 ELR 20123 (N.D. Ill. 2011) (asset sale agreement including a provision stating “(a) Environmental liabilities . . . (1) responsibility for compliance and liability for any non-compliance by the assets with environmental law (including fines, penalties and costs to correct) . . . whether occurring, existing or arising on, before or after the closing”).
116. See, e.g., Niagara Mohawk, 263 F. Supp. 2d at 669; see also, e.g., *EME Homer*, 823 F. Supp. 2d at 287; Morgan, 2007 WL 3287850, at *7.
118. Id.
If the former owner of a CAA-violating facility fails to assign its environmental liabilities as part of the sale, that former owner should be accountable for those violations under the Act. First, a former owner cannot be liable for legal penalties more than five years after they transfer ownership of the plant. Even if a court properly recognizes that a PSD violation is ongoing, the former owner is no longer the party operating the plant. If a suit is brought in time to attach legal penalties to a former owner, that does provide some incentive to comply with the CAA. However, it is the judiciary’s power under the Act to issue an injunction ordering compliance with the Act that will cure the violation. This issue has been raised in several cases considering transfer of ownership following a PSD violation, yet none have enjoined a former owner. These courts have struggled with assigning injunctive relief to former owners because they no longer own the violating facility nor have the authority to implement controls, such as BACT, at the plant. Furthermore, these courts have found that ordering a former owner to fund pollution control implementation amounts to a “legal penalty” rather than injunctive relief.

The CAA grants courts broad authority to fashion relief for violations. Under §7413(b), the Administrator may fashion such relief “as appropriate, in the case of any person that is the owner or operator of an affected source . . . and may, in the case of any other person, commence a civil action for a permanent or temporary injunction. . . .” This provision authorizes federal courts to enjoin, not only the owner or operator of a facility, but also any other person necessary to effectuate the goals and requirements of the Act. In this scenario, the former owner, due to limitations on successor liability, may retain responsibility for the original failure to comply with PSD preconstruction requirements and also may be legally responsible for that facility’s ongoing noncomplying operation. The challenge to federal courts and parties seeking to enforce the Act is to fashion a form of relief against a violator who no longer owns the noncomplying facility.

In Reliant Energy and Midwest Generation, the district courts’ primary basis for precluding injunctive relief was that such a remedy amounted to a legal penalty. These courts reasoned that because the former owners no longer had control of the facilities, they could not retrofit the plants themselves, and an order merely seeking the payment of money was akin to a legal penalty. However, as noted by Judge Richard Posner in United States v. Apex Oil Co., “[t]hat equitable remedies are always orders to act or not to act, rather than to pay, is a myth; equity often orders payment.” In Apex Oil Co., an injunction was issued against an oil company under the Resource Conservation and Recovery Act to clean up a contaminated site. Yet, Apex was no longer a refining company and would have to hire an outside company to clean up the site for them in order to comply with the injunction. Judge Posner held that forcing the defendants to incur the cost to remediate the waste site was within the court’s equitable authority because an equitable remedy may impose a cost on a party whether the decree requires them to do something or refrain from doing something. A court can fashion a similar remedy here. The former owners no longer own or control the noncomplying facility, yet a court can remedy the violation by ordering specific performance of the original duty to implement PSD preconstruction requirements. Such an order would require the former owners to finance the project bringing the facility into compliance. The court in EME Homer acknowledged that such a remedy was possible under the court’s equitable power, but decided against issuing such an injunction because the PSD violation was not a recurrent violation. This raises the issue of whether a court should issue an injunction against the former owner of a noncomplying facility.

A court’s equitable power to issue an injunction should not be exercised in every case. Traditionally, a plaintiff must demonstrate through a four-factor test that an injunction is an appropriate remedy; the plaintiff must demonstrate the following: (1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) an equitable remedy is warranted considering the balance of hardships between the plaintiff and defendant; and (4) the public interest would not be disserved by an injunction. Balancing these considerations in the instance of a noncomplying CAA major emitting source supports the issuance of an injunction. A noncomplying power plant can emit hundreds of tons per year of damaging pollutants that cannot be recaptured, and money damages cannot prevent the environmental harm these pollutants cause. The very pur-
pose of the PSD program is to ensure that NAAQS do not become a ceiling.\textsuperscript{144} Furthermore, an injunction bringing a facility into compliance with the CAA serves the public interest by ensuring prospective compliance with the law, as well as by improving the quality of our nation’s air.

Successor liability is a well-established doctrine that is properly applied in the CAA context. If the purchaser of a noncomplying facility impliedly or expressly assumes CAA liability, that party should be required to comply with the ongoing requirements of the Act’s PSD program. Otherwise, the former owner of the facility has not relieved himself of the burden of complying with the Act, and should be subject to an injunction designed to facilitate compliance with the Act.

III. Conclusion

The sheer volume of NO\textsubscript{2} and SO\textsubscript{2} emissions each year from unregulated, grandfathered power plants demonstrates that the goal of the CAA’s PSD program, to ensure that air quality standards under NAAQS do not in effect become a ceiling,\textsuperscript{145} has achieved limited success. One significant challenge under the PSD program is the difficulty associated with identifying major emitting facilities that have made major modifications. This repeatedly results in statute-of-limitations problems for enforcement efforts. To resolve this enforcement difficulty, reviewing courts have split into two competing interpretations of the statutory and regulatory requirements of the PSD program. This Article demonstrates that the proper interpretation of the CAA and EPA’s regulations demands that PSD requirements be interpreted to impose ongoing operational obligations. Consequently, a failure to implement these ongoing operational requirements constitutes a new, discrete violation for each day a facility operates without complying. Therefore, for statute-of-limitations purposes, enforcement actions are not time-barred insofar as they only claim violations for the five years preceding suit. A second emerging problem is the transfer of ownership of noncomplying, major emitting facilities. Courts have struggled with the proper allocation of liability among former owners and purchasers. The CAA is properly construed to permit successor liability, and in the event of an asset transfer agreement passing liability to the purchaser, that party should be accountable for the ongoing PSD violations. In the alternative, if the former owner fails to pass liability to the purchaser, the former owner should be subject to civil penalties, if the action is filed within five years of the sale, or subject to an injunction designed to bring the facility into compliance with the Act.

\textsuperscript{144} Sierra Club v. Thomas, 828 F.2d 783, 785, 17 ELR 21198 (D.C. Cir. 1987).
\textsuperscript{145} Id.