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# Mercury Rising? Fifth Circuit Applies Administrative Laws Retroactively Deep in the Heart of Texas. Sierra Club, Inc. v. Sandy Creek Energy Assoc., L.P.

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# Mercury Rising? Fifth Circuit Applies Administrative Laws Retroactively Deep in the Heart of Texas

*Sierra Club, Inc. v. Sandy Creek Energy Assoc., L.P.*[1]

## I. INTRODUCTION

Mercury, a highly toxic substance, is found naturally in the environment but is often added to the environment by human activities.[2] One man-made source of mercury pollution in different areas across the country is the burning of coal, which is done in hundreds of coal-fired power plants across the country.[3] The effects of mercury exposure can be dire.[4] Mercury can damage the nervous and immune system, and infants born to mothers with high levels of mercury exposure have exhibited neurological impairment.[5]

Concerns about mercury exposure led an activist organization, the Sierra Club, to file suit in federal court to stop the construction of a power plant in Texas. The power plant, which did not meet the Environmental Protection Agency's ("EPA") newly reinstated guidelines concerning the amount of mercury emitted each year, had received permission to build when these stricter regulations of mercury emissions were not in place.[6] However, soon after the mercury regulations were reinstated, the Sierra Club sued to force the power plant to implement the stricter standards.[7] The way in which the Fifth Circuit Court of Appeals handled the question of whether an administrative regulation can be applied retroactively was

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[1] 627 F.3d 134 (5th Cir. 2010).
[2] U.S. GEOLOGICAL SURVEY, *Mercury in the Environment*, Oct. 2000, http://www.usgs.gov/themes/factsheet/146-00/.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Sierra Club, Inc. v. Sandy Creek Energy Assoc., L.P., 627 F.3d 134, 137 (5th Cir. 2010).
[7] *Id.* at 137–38.

the crux of this case,[8] and its decision has the potential to change precedent in the United States.

## II. FACTS AND HOLDING

Public Citizen, Inc.[9] and Sierra Club, Inc. (collectively "Sierra Club") sued Sandy Creek Energy Associates, L.P. ("Sandy Creek") in federal district court, claiming Sandy Creek's construction of a coal-fired power plant violated the Clean Air Act ("CAA") by failing to obtain a Maximum Achievable Control Technology ("MACT") determination.[10] Sandy Creek began construction of the coal-fired power plant in 2008 after receiving approval to build by the Texas Commission on Environmental Quality ("TCEQ").[11] Under currently prevailing EPA regulations, a coal-fired power plant of the size Sandy Creek was constructing is considered a "major source"[12] of air pollutants, and Sandy Creek would be required to obtain a MACT determination that the plant uses the most efficient and modern pollution control technology.[13] However, in 2008 when Sandy Creek began construction, the EPA was operating under the Delisting Rule,[14] a Bush Administration rule removing

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[8] *Id.*

[9] Public Citizen, Inc. is composed of a group of concerned citizens in Texas. *Id.*

[10] *Id.* at 139.

[11] *Id.* at 138.

[12] A "major source" is "any stationary source . . . within a contiguous area and under common control that emits . . . 10 tons per year or more of any hazardous air pollutant . . . ." 42 U.S.C. § 7412(a)(1) (2006).

[13] *Sandy Creek*, 627 F.3d at 137 (quoting 42 U.S.C. § 7412(d)(1)–(2)).

[14] The Delisting Rule was part of the Clean Air Mercury Rule enacted in 2005, which provided that coal and oil-fired electric generating power plants must reduce mercury emissions by a cap-and-trade system, but at the same time the rule removed these power plants from the list of types of power plants that are considered hazardous air pollutants, which are heavily regulated by the EPA. Source Watch, *Clean Air Mercury Rule*, http://www.sourcewatch.org/index.php?title=Clean_Air_Mercury_Rule. The Rule was deemed to violate EPA regulations because once coal and oil-fired power plants were added to the list of hazardous pollutants, they could not be removed from the list without a specific finding that the type of source concerned did not actually negatively affect health. This finding was never done, so the removal of the plants from the list of hazardous sources was found improper. New Jersey v. E.P.A., 517 F.3d 574, 581 (D.C. Cir. 2008).

coal and oil-fired electric generating power plants from the list of "major sources" that require MACT determinations.[15]

One month after Sandy Creek began construction of the power plant, the D.C. Circuit Court vacated the Delisting Rule.[16] The court determined the EPA did not have the authority to issue rules that override the plain language of the statutes enacted by Congress, and therefore the EPA was required to issue MACT determinations for coal and oil-fired power plants.[17] After this ruling, Sierra Club filed their lawsuit claiming that Sandy Creek was in violation of EPA regulations.[18]

The case was filed in federal district court in 2009.[19] Sierra Club motioned for summary judgment, and Sandy Creek claimed that the district court should abstain from deciding the case per the *Burford* rule, which states that federal courts should not decide state court issues when it is unnecessary.[20] Sandy Creek asserted this was a state court issue because the decision under attack, allowing Sandy Creek to begin construction, was made by a state agency, the TCEQ.[21] The district court did not abstain from deciding the issue, and held the requirement of a MACT determination did not apply to Sandy Creek because the requirement was not in force at the time construction began.[22]

Sierra Club then appealed, claiming the district court erred in finding that the MACT determination requirement did not apply to Sandy Creek.[23] In response, Sandy Creek claimed the MACT determination requirement should not apply to them for two reasons.[24] First, it claimed that when the TCEQ issued the construction permit, the commission effectively issued a MACT determination because Sandy Creek submitted

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[15] *Sandy Creek*, 627 F.3d at 137; *see* 42 U.S.C. § 7412(d)(1)–(2) (2006).
[16] *Id.* at 137–38 (citing *New Jersey v. EPA*, 517 F.3d 574, 538 (D.C. Cir. 2008)).
[17] *Id.*
[18] *Id.* at 138.
[19] *Id.*
[20] *Id.*; Burford v. Sun Oil Co., 319 U.S. 315 (1943).
[21] Response Brief for Defendant-Appellee at 53–54, Sierra Club, Inc. v. Sandy Creek Energy Assoc., L.P., No. 09-51079 (5th Cir. Mar. 22, 2010).
[22] *Sandy Creek*, 627 F.3d at 138.
[23] *Id.*
[24] *Id.* at 139.

the same paperwork necessary for a MACT determination when applying for the permit.[25] Second, Sandy Creek argued the text of the statute requires a MACT determination only when construction is "commenced" and does not apply to ongoing construction.[26] Alternatively, Sandy Creek asserted that the district court should have abstained from deciding the issue regarding the need for a MACT determination under the *Burford* rule because to do so was an unnecessary intrusion into a state agency's decision.[27]

The circuit court agreed with Sierra Club and held that a MACT determination was needed to comply with EPA regulations.[28] The court rejected the argument that by merely submitting the proper paperwork, Sandy Creek had essentially complied with the requirement.[29] TCEQ's decision not to give a MACT determination is not the equivalent of giving a MACT determination.[30] Regarding Sandy Creek's claim that the statute does not require a MACT determination for ongoing construction but only for commencement of construction, the court determined that Sandy Creek misinterpreted the statute.[31] The court interpreted the statute to mean that a MACT determination is not needed only at commencement of construction but also must be held throughout the entire construction process.[32] Finally, the court analyzed Sandy Creek's *Burford* rule argument and found that the district court's decision not to abstain was proper.[33]

Consequently, the court held that since the Delisting Rule was vacated, Sandy Creek must come into compliance with EPA regulations.[34] As continuing construction after the Delisting Rule was vacated violated

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[25] *Id.*
[26] *Id.*
[27] *Id.* at 138.
[28] Sierra Club, Inc. v. Sandy Creek Energy Assoc., L.P., 627 F.3d 134, 145 (5th Cir. 2010).
[29] *Id.* at 139–40.
[30] *Id.* at 140.
[31] *Id.*
[32] *Id.* at 141.
[33] *Id.* at 145.
[34] Sierra Club, Inc. v. Sandy Creek Energy Assoc., L.P., 627 F.3d 134, 142 (5th Cir. 2010).

EPA regulations, the court ordered Sandy Creek to cure this violation by obtaining a MACT determination.[35]

## III. LEGAL BACKGROUND

The court faced two distinct issues in deciding this case: whether the MACT requirement of the CAA applied retroactively, and whether the court should have abstained from deciding the case. Each of these questions stems from a rich background of precedent, both judicial and legislative, which sheds light on the questions faced by the court.

### A. *Clean Air Act MACT Requirement*

Congress originally enacted the CAA[36] in 1963 in response to several decades of air pollution potentially linked to the illnesses and deaths of people all over the world, including in American industrial towns.[37] Initially, the CAA was intended to fund research to determine how to control and clean up air pollution.[38] Over the decades, the CAA has changed substantially, most notably in 1970 when it was amended to be the complete federal policy on air pollution.[39] In 1970, Congress also created the EPA, to which Congress entrusted the responsibility of regulating air pollution across the country by enforcing the CAA.[40] As time has passed, Congress continued to broaden both the EPA's authority and the scope of the CAA.[41] In 1990, Congress expanded the CAA and gave the EPA an extensive range of regulatory power.[42]

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[35] *Id.* at 141–43.
[36] 42 U.S.C. §§ 7401–7671 (2000).
[37] U.S. E.P.A., *The Plain English Guide to the Clean Air Act*, http://www.epa.gov/air/caa/peg/understand.html.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

Although the CAA now applies across the entire country, it is dependent upon state agencies to enforce its provisions in each state.[43] State agencies monitor air pollution and compliance with CAA regulations, and control the permitting of projects under the authority of the EPA.[44] One specific aspect of each state's responsibilities under the CAA is to ensure that groups applying to build power plants meet the requirements of the CAA by issuing MACT determinations.[45]

A MACT determination guarantees that CAA air pollution limits are met by verifying "major sources" of emissions use the most advanced technology available to control their air pollution.[46] A "major source" of air pollutants is defined as any source with the capability of emitting ten tons or more of any one hazardous air pollutant.[47] The MACT determination requires each source of pollutants to maximize the reduction of air pollutants possible for that source.[48] Congress noted the requirements of a MACT determination are strict because MACT determinations are only required for "major sources" that emit the most hazardous air pollutants.[49]

Normally, the requirement to obtain a MACT determination applies when any potential source of pollutants is determined to be a "major source."[50] However, the EPA altered this rule when it enacted the Delisting Rule in March 2005,[51] removing coal and oil-fired power plants from the list of sources that are regulated by the CAA.[52] It was during the

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[43] U.S. E.P.A., *The Plain English Guide to the Clean Air Act*, http://www.epa.gov/air/caa/peg/understand.html.

[44] *Id.*

[45] 42 U.S.C. § 7412(g)(2)(B) (1999).

[46] *Id.*

[47] 42 U.S.C. § 7412(a)(1) (1999).

[48] *Id.* § 7412(d)(2); *see also* Nat'l Mining Ass'n v. E.P.A., 59 F.3d 1351, 1353 (D.C. Cir. 1995) ("For example, major sources must comply with technology-based emission standards requiring the maximum degree of reduction in emissions EPA deems achievable, often referred to as 'maximum achievable control technology' or MACT standards.").

[49] S. Rep. No. 101-228, at 140 (1989).

[50] 42 U.S.C. § 7412(a)(1) (1999).

[51] Sierra Club Inc., v. Sandy Creek Energy Assoc., 627 F.3d 134, 137 (5th Cir. 2010).

[52] *Id.*; *see also* New Jersey v. E.P.A., 517 F.3d 574, 581 (D.C. Cir. 2008).

enforcement of this rule that Sandy Creek submitted its proposal for a permit to build the power plant.[53] The TCEQ determined that because of the Delisting Rule, no MACT determination was required as the Sandy Creek plant was now exempt from CAA regulation.[54]

However, the Delisting Rule was short-lived. In 2008, the Circuit Court for the District of Columbia vacated the rule, holding the EPA violated the CAA when it removed certain sources of pollutants from the list of those normally regulated.[55] The court held the EPA violated the CAA by not following the specific rules Congress set forth for removing a source of pollutants from the list of those regulated.[56] The CAA requires that once a source is added to the list of regulated pollutants, the Administrator cannot remove it from the list unless he or she first proves the source does not harm individuals or the environment.[57] Vacating the Delisting Rule forced the EPA to resume regulation of coal and oil-fired power plants across the country.[58]

Upon reversal of the Delisting Rule, uncertainty erupted as to whether builders of "major sources" of pollutants who were given construction permits without a MACT determination during the period of the Delisting Rule were in violation of the CAA. Because no authority specifically answered this question, the *Sandy Creek* district court looked to *Harper v. Virginia Dept. of Taxation*[59] for help with this issue.[60]

In *Harper*, the state of Virginia collected tax on retirement benefits for former federal employees, while benefits given by the state to retired state officials were not.[61] A similar practice in Michigan was determined unconstitutional in *Davis v. Michigan Dept. of Treasury*,[62] resulting in a

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[53] *Sandy Creek*, 627 F.3d at 137.
[54] *Id.*
[55] New Jersey v. E.P.A., 517 F.3d 574, 583 (D.C. Cir. 2008).
[56] *Id.*
[57] 42 U.S.C. §§ 7412(c)(9), (b)(3)(C)–(D) (1999).
[58] *New Jersey*, 517 F.3d at 583. EGU's are "electric utility steam generating units" of which coal and oil-fired power plants are one type. *Id.* at 577.
[59] 509 U.S. 86 (1993).
[60] *Sandy Creek*, 627 F.3d at 142.
[61] *Harper*, 509 U.S. at 86.
[62] 489 U.S. 803 (1989).

state tax refund to the retired federal employees in that state.[63] Relying on *Davis*, the former federal employees in *Harper* claimed they should get a tax refund of their retirement benefits as well.[64] In reaching its decision, the *Harper* Court had to determine whether judicial rulings can apply retroactively.[65] It held that judicial decisions generally cannot apply retroactively, but do apply to cases still open on "direct review."[66] The Court reasoned that judicial decisions cannot apply retroactively because the judiciary lacks the privilege to make their decisions apply retroactively, only the legislature has this ability.[67] The one exception is that a judicial ruling will apply retroactively to cases that are under "direct review" at the time of the ruling, regardless of whether the events in the case occurred before or after the applicable ruling.[68]

### B. Abstention Challenge

The interplay between federal and state governments and courts can be convoluted at best, and one particular issue that creates confusion is determining when federal courts should abstain from deciding a case because the issue is truly a state court matter. The general rule is federal courts are obligated to exercise the jurisdiction given to them.[69] Based on this rule, the U.S. Supreme Court noted that abstention from exercising the federal court's jurisdiction is an exception to the general rule, and is only allowed in very narrow circumstances.[70]

One such circumstance allowing abstention is when a case involves a state issue that the state should address to protect "the rightful independence of state governments in carrying out their domestic policy."[71] The Fifth Circuit Court of Appeals has stated additional factors

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[63] *Id.* at 804–05.
[64] *Harper*, 509 U.S. at 86.
[65] *Id.* at 97.
[66] *Id.*
[67] *Id.* at 95.
[68] *Id.* at 97.
[69] Colo. River Water Conservation Dist. v. U.S., 424 U.S. 800, 817 (1976).
[70] *Id.* at 813.
[71] Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943).

for federal courts to consider in determining when to abstain and withdraw jurisdiction.[72] The five factors to weigh are:

> (1) [W]hether the cause of action arises under federal or state law (finding abstention inappropriate where the case did not involve a state-law claim); . . . (2) [W]hether the case requires inquiry into unsettled issues of state law, or into local facts; . . . (3) [T]he importance of the state interest involved; . . . (4) [T]he state's need for a coherent policy in that area; . . . and (5) [T]he presence of a special state forum for judicial review.[73]

Based on these factors, a federal court should abstain only if the case involves a state law issue and the outcome of the case will significantly impact the state's policies.

Abstention decisions are to be made based upon these five factors and will rarely be overturned because the appellate court applies an "abuse of discretion" standard to such a question of law and this standard grants great deference to the trial court's reasoning.[74] Against this background, the district court in *Sandy Creek* essentially had to decide if the case involved only state law claims requiring the court to abstain, or if the case involved federal claims as well.[75]

## IV. INSTANT DECISION

Upon reviewing the district court's findings, the Fifth Circuit Court of Appeals determined that Sandy Creek was in violation of the CAA because it failed to obtain a MACT determination.[76]

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[72] Wilson v. Valley Elec. Membership Corp., 8 F.3d 311, 314 (5th Cir. 1993).
[73] *Id.*
[74] Sierra Club v. City of San Antonio, 112 F.3d 789, 793 (5th Cir. 1997).
[75] Sierra Club Inc. v. Sandy Creek Energy Assoc., L.P., 637 F.3d 134, 145 (5th Cir. 2010).
[76] *Id.* at 145.

### A. *MACT Requirement*

The court first considered whether the TCEQ made a MACT determination when processing the paperwork to approve construction of the power plant.[77] It then analyzed whether a MACT determination was required after the Delisting Rule was reversed.[78]

Sandy Creek claimed the TCEQ actually made a MACT determination when the company filed the paperwork for State approval of the plant.[79] The court concluded there was no MACT determination for several reasons. First, the court found the paperwork Sandy Creek submitted was deficient because it did not list all of the required information needed for a proper MACT determination.[80] Second, while a MACT determination requires assessment of every potentially hazardous pollutant the plant may emit, the court determined the alleged MACT determination done by the TCEQ analyzed only Mercury output.[81] Third, the court looked at evidence that the TCEQ itself noted in its preliminary decisions on approval of the power plant that because of the "Delisting Rule," no MACT determination was necessary.[82] While Sandy Creek could produce a letter from the TCEQ stating the requirements for a MACT determination were satisfied, the court determined this letter was not sufficient proof of an actual MACT determination when viewed in light of the evidence against it.[83]

Once the court concluded that no MACT determination was given, the court had to determine whether the requirement for a MACT determination was applicable against Sandy Creek even though it started construction while the "Delisting Rule" was in effect.[84] To resolve that

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[77] *Id.* at 139.
[78] *Id.*
[79] *Id.*
[80] *Id.* ("Sandy Creek's . . . submissions were deficient, in that the application's proposed MACT limits did not include a MACT floor.").
[81] Sierra Club Inc. v. Sandy Creek Energy Assoc., L.P., 637 F.3d 134, 140 (5th Cir. 2010).
[82] *Id.*
[83] *Id.*
[84] *Id.*

issue, the court looked to the plain language of the statute describing the MACT determination.[85] The statutory language states, "no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met."[86] The court determined that, because the statute says, "no person may construct," rather than, "begin construction" or "start construction," the statute must be interpreted to mean that a company must be in compliance with the statute for the entire period of construction, not just at the beginning.[87] In interpreting this statute, the court, in addition to considering the plain language of the statute, also considered the Code of Federal Regulations ("CFR").[88] The CFR states that any violation of the MACT determination requirement puts the owner or builder in violation of the CAA at any point throughout construction.[89] Therefore, the court found all construction completed after the abrogation of the Delisting Rule violated the statute.[90]

### B. *Preclusion of MACT Requirement*

The Fifth Circuit held that the district court erroneously determined, regardless of the text of the statute, that the MACT determination requirement could not be applied against Sandy Creek after the "Delisting Rule" was vacated.[91] The district court had based its decision on the U.S. Supreme Court's decision in *Harper*, in which the Court held a judicial decision can be applied retroactively only in cases "still open on direct review."[92] In contrast, the Fifth Circuit noted the *Harper* case considered only the retroactive effect of judicial decision and

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[85] *Id.*
[86] *Id.* at 140–41; *see also* Clean Air Act, 42 U.S.C. § 7412(g) (2006).
[87] Sierra Club Inc. v. Sandy Creek Energy Assoc., L.P., 637 F.3d 134, 141 (5th Cir. 2010).
[88] *Id.* at 141–42.
[89] 40 C.F.R. § 63.43(l)(2) (1996).
[90] *Sandy Creek*, 627 F.3d at 142.
[91] *Id.* (citing Harper v. Va. Dept. of Taxation, 509 U.S. 86 (1993)).
[92] *Id.*

did not address whether the reversal of administrative decisions can have retroactive effect.[93] Regardless of whether *Harper* applies, the court determined the statute requires compliance throughout the entire construction phase and not just at the outset; therefore, the decision in *Harper* did not alter the application of the MACT determination statute.[94]

### C. *Abstention Challenge*

Finally, Sandy Creek claimed the federal district court abused its discretion when it refused to abstain pursuant to *Burford* because the case contained only state matters.[95] In *Burford*, the U.S. Supreme Court determined when it is appropriate for a federal court to abstain from deciding cases with state law claims.[96] According to the Court, a federal court can abstain from decision if a consideration of five factors proves the issue is only a state issue with particularly strong state policy implications.[97]

The court considered the five factors, and determined abstention would be inappropriate because Sierra Club's claim was a congressionally created cause of action against a regulatory body applying federal law and there was no actual state law claim.[98] Additionally, the court noted the issue in this case pertains to the application of federal law, not state law, further indicating that abstention would be inappropriate.[99] Based on these findings, the court affirmed the district court's decision not to abstain from deciding this case and rejected Sandy Creek's claim that the district court should have abstained.[100]

The court concluded the MACT determination requirement applied against Sandy Creek during all phases of construction; thus, because the

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[93] *Id.* at 142–43.
[94] *Id.* at 143.
[95] *Id.* at 144.
[96] *Id.* (citing Burford v. Sun Oil Co., 320 U.S. 214 (1943)).
[97] Sierra Club Inc. v. Sandy Creek Energy Assoc., L.P., 627 F.3d 134, 144 (5th Cir. 2010) (citing Wilson v. Valley Electric Membership Corp., 8 F.3d 311 (5th Cir. 1993)).
[98] *Id.* at 144–45.
[99] *Id.*
[100] *Id.*

TCEQ had not issued a MACT determination, Sandy Creek was in violation of the statute and must attain compliance before continuing construction.[101] Furthermore, the court determined the requirement to obtain a MACT determination is not precluded by the prohibition against retroactively applying judicial decisions; therefore, the district court appropriately applied its jurisdiction and Sandy Creek must adhere to the statute.[102]

## V. COMMENT

Though possibly beneficial for the environment, the court's decision to force Sandy Creek to comply with the newly reinstated MACT requirement is not without criticism. Commentators have offered three main criticisms about the decision, each of which will be discussed in turn. Additionally, this note examines potential outcomes had the Fifth Circuit decided differently, and finally offers a determination as to what is needed to resolve these disputes.

### A. *Criticisms*

#### 1. Halting All Construction

According to critics, the *Sandy Creek* precedent will allow other courts to stop construction of power plants considered "major sources" that began during the period of the Delisting Rule.[103] It follows logically that this precedent may also encourage environmental activist groups to file suits to stop plant construction that began during the three-year Delisting Rule enforcement period.[104]

Such actions could cause a flood of litigation, forcing the affected coal-fired power plants to halt construction. Other consequences could

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[101] *Id.*
[102] *Id.*
[103] McGuire Woods, *5th Circuit Rules CAMR Permitted Power Plant Still Covered by MACT*, Dec. 6, 2010, http://www.mcguirewoods.com/news-resources/item.asp?item=5300.
[104] *Id.*

follow. Power plant builders could suffer millions of dollars of losses, from fines stemming from their non-compliance with the statute to paying employee wages and attorney's fees. Conversely, the benefits of bringing these facilities into MACT compliance include reduced mercury output leading to a healthier and cleaner environment.

### 2. Retroactive Applicability

The second major criticism arises from court's decision to apply the reinstatement of the MACT determination rule retroactively.[105] Allowing courts to force "major sources" to get a MACT determination when those sources legally held construction permits without MACT determinations leads to the conclusion that any change in EPA policy could apply retroactively to a party currently constructing a "major source."[106] Therefore, if MACT determination rules change at all during any step in construction, power plants currently under construction and holding valid MACT determinations will be forced to obtain new or updated MACT determinations in order to stay in compliance with the CAA.[107] Essentially, the court has opened the door to the possibility that a party with a successfully obtained a construction permit may, at any point during construction, be forced to get a new permit because of a regulatory change in the application of the CAA.[108]

The potential consequences of this mirror those described in the discussion above. Power plants suddenly out of compliance with the CAA will have to halt construction and apply for new or updated permits. This will cost valuable time and money. The EPA estimates that getting a permit can take between six months to one year depending on the type of source being constructed, how controversial it is, and in what state it is located.[109] A halt in construction for that length of time could potentially

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[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] E.P.A., *Frequently Asked Questions: Permits*, http://www.epa.gov/region9/air/permit/pmfaq.html#faq5 [hereinafter E.P.A. FAQ].

cost the plant's builder millions of dollars. Builders may eventually pass this cost on to consumers of the energy.

### 3. Permit Uncertainty

Finally, critics claim *Sandy Creek* makes the permit process, an already confusing and uncertain area of the law, even more baffling because it undermines the supposed finality of the federal permit system.[110] The permit is supposed to be the final document to cover all requirements needed to build a "major source" and should not need amending.[111]

Currently, when a permit holder violates the terms of its permit, it can be subjected to "penalties or corrective action" to force permit compliance.[112] Theoretically, this could change due to the fallout from this case. A party could now violate its permit without even realizing it. With one change of a regulation, a permit issued under the regulation regime could become outdated and the actions at a site could become illegal. The difficulty in tracking all these regulations would cost energy producers millions of dollars in legal fees. Also, if the owner's permit inadvertently violates a regulation, the owner may have to wait another six months to a year to receive a new permit. Currently, the rules state that permits for new sources need not be changed if the law changes,[113] but in light of this case, that principle may change.

Other potential consequences are seemingly endless and similar to those stated above. The costs to builders for having to get new permits, pay employees for extended construction and delay the opening of the power plant are unthinkable. Permit processes need to be fluid and final so that once one is obtained, construction can progress accordingly without major problems for the owners.

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[110] Woods, *supra* note 103.
[111] *Id.*
[112] E.P.A. FAQ, *supra* note 109.
[113] E.P.A., *Frequently Asked Questions About Air Permits: If Laws Change, do Permits Need to be Revised?*, http://www.epa.gov/region9/air/permit/pmfaq.html#faq5.

The criticisms of this case are convincing, however if the Fifth Circuit had decided the case differently, the consequences could have been equally serious.

### B. *Consequences of a Different Decision*

Had the circuit court held that construction at the Sandy Creek power plant could have continued despite the absence of a MACT determination as to the levels of the plant's mercury emissions, the potential consequences are astonishing. These consequences are important to analyze because they provide perspective into the court's holding and why it was the best decision in this situation.

Currently, coal-fired power plants emit approximately forty-eight tons of mercury into the environment every year in the United States. It only takes one seventieth of a teaspoon of mercury to contaminate a twenty-five-acre lake severely enough to make the fish unsafe for consumption.[114] Based on these facts, it is arguable that society benefits from any standard that will reduce a power plant's mercury emissions without banning the power plants altogether. The Delisting Rule created a loophole in CAA regulations that essentially allowed coal-fired power plant construction without applying the toughest regulations possible. Therefore, those plants produced more pollution than previously allowed.[115] If power plant owners who operate under permits issued during the enforcement of the Delisting Rule are not brought into compliance with current regulations, their power plants will produce excess mercury. Due to how quickly the environment may become contaminated by mercury, it seems necessary to bring these power plant owners into compliance with the current regulations sooner rather than later.

The potential costs of the court's decision compared with the possible consequences of an alternative holding are stark. While the

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[114] Dashka Slater, *This Much Mercury . . . How the coal industry poisoned your tuna sandwich*, SIERRA, Nov/Dec 2011, http://www.sierraclub.org/sierra/201111/mercury.aspx.

[115] *Id.*

current holding may make the process of obtaining and following a permit more difficult and time consuming, if the court had found differently, power plants would pump even more mercury into the atmosphere, further endangering our lives and the environment.

### C. *Future Needs*

The biggest criticism of this case is that new regulations will now apply retroactively.[116] The court clearly stated there was no case law about the retroactive effect of administrative decisions; therefore it made its own rule.[117] The U.S. Supreme Court has only offered guidance as to the retroactive effect of judicial decisions.[118] A Supreme Court decision as to the retroactive effect of administrative decisions would greatly clarify the current jurisprudence on the subject. When courts are unclear about the state of the law, they tend to apply it inconsistently across the circuits and districts, leading to an increase in both confusion and litigation. The entire case turns on whether the regulation can be applied retroactively, and much of the speculation about the case's legitimacy would not exist if there were a prevailing case on point.

Following this decision, a petition for certiorari was filed and subsequently dismissed by the Supreme Court.[119] This is unfortunate because a country with as many administrative regulations as the U.S. needs clear rules as to the retroactive effect of new regulations. Hopefully, the legislature will take control of the situation and begin incorporating statements about the retroactive effect of administrative decisions into the legislation creating the regulatory agencies.

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[116] *5th Circuit Rules CAMR Permitted Power Plant Still Covered by MACT*, MCGUIRE WOODS (Dec. 6, 2010), http://www.mcguirewoods.com/news-resources/item.asp?item=5300.

[117] Sierra Club, Inc. v. Sandy Creek Energy Assoc., L.P., 627 F.3d 134, 142–43 (5th Cir. 2010).

[118] *Id.* (citing Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 95 (1993)).

[119] Sandy Creek Energy Assoc., L.P. v. Sierra Club, Inc., 132 S.Ct. 872 (U.S. Dec. 16, 2011).

## VI. CONCLUSION

The full consequences of this case have yet to be seen across the country. It is still unclear whether administrative decisions can universally have retroactive effect. If they can, the potential for faster change in the country, including cleaner air, is tremendous; however, the backlash could cause financial difficulties for owners and builders, and could lead to splits among courts as to which regulatory decisions can be applied retroactively and when. The *Sandy Creek* case is potentially the beginning of the fallout from the revocation of the "Delisting Rule." More cases are sure to come from emboldened environmental groups who see this recent victory and will want to require other power plants to obtain new permits for construction. Controlling precedent on this matter could keep dockets clear of these cases and keep the courts from splitting as to their opinions on the matter.

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