

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiffs,	)	
	)	
STATE OF NEW YORK, STATE OF NEW	)	
JERSEY, STATE OF CONNECTICUT,	)	
HOOSIER ENVIRONMENTAL COUNCIL,	)	
and OHIO ENVIRONMENTAL COUNCIL,	)	
	)	Civil Action No. IP99-1693 C-M/S
Plaintiff-Intervenors,	)	
	)	
v.	)	
	)	
CINERGY CORP., PSI ENERGY, INC., and	)	
THE CINCINNATI GAS & ELECTRIC	)	
COMPANY,	)	
	)	
Defendants.	)	

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**CINERGY’S CROSS-MOTION FOR SUMMARY JUDGMENT  
ON FAIR NOTICE**

Pursuant to Federal Rule of Civil Procedure 56, Defendants Cinergy Corp., Cinergy Services, Inc., PSI Energy, Inc., and The Cincinnati Gas & Electric Company (collectively, “Cinergy”) cross-move for Summary Judgment On Fair Notice. This motion is appropriate and critically important because the United States Environmental Protection Agency (“EPA”) has finally and unequivocally admitted, that contrary to what the government’s attorneys have repeatedly told this Court, the Agency *has historically failed to* provide “fair notice” of the New Source Review (“NSR”) standards which it seeks to apply to Cinergy in this case. EPA’s admissions are fatal to EPA’s and Plaintiff-Intervenors’ (collectively, Plaintiffs’) case and compel summary judgment for Cinergy on all NSR claims and all other related claims that are predicated upon a tortured and officially repudiated

reading of the NSR regulations.<sup>1</sup>

Cinergy maintains its electric generating units by replacing individual component parts to ensure that its units are available to provide electricity to the public. In this litigation, Plaintiffs claim that a number of Cinergy's component replacements – some undertaken as long as twenty (20) years ago – were “nonroutine” changes that caused “significant net emissions increases” under EPA's NSR rules. Cinergy submits, and EPA's admissions prove, that EPA never provided the regulated community (including Cinergy) with “fair notice” of the legal standards that Plaintiffs seek to apply in this case.

*First*, EPA has admitted that it did not provide fair notice as to what is “routine maintenance, repair and replacement” or RMRR. Specifically, in an October 2003 NSR rulemaking, EPA conceded that “the NSR regulations have not . . . specified what types of activities are encompassed by the terms [routine maintenance, repair and replacement or] RMRR.” 68 Fed. Reg. 61248 (Oct. 27, 2003). EPA also admitted that the so-called “WEPCo factors” of nature, extent, purpose, frequency, cost of a project and other relevant factors upon which Plaintiffs heavily rely in this case had not provided the industry with fair warning of the scope of the RMRR provisions: “[I]t can be difficult for the owner or operator [of an emitting unit] to know with *reasonable certainty* whether a particular activity constitutes RMRR.” *Id.* at 61250 (emphasis added).

*Second*, less than one month ago, EPA candidly admitted that it did not provide fair notice regarding the NSR emission test for evaluating whether an activity will result in a “significant net increase in emissions.” EPA made this admission in a proposed rulemaking sponsored and signed by the EPA Administrator. 70 Fed. Reg. 61081 (Oct. 20, 2005). In the proposed rule, EPA announced its intention to adopt the New Source Performance Standard (“NSPS”) hourly emission rate test as the

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<sup>1</sup> Lack of fair notice also is amply demonstrated in Cinergy's Memorandum in Support of Cross-Motion for Summary Judgment on Fair Notice and in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Fair Notice Defense (filed November 8, 2005).

NSR emission test for electric utilities. In doing so, EPA bluntly acknowledged what Cinergy has been contending in this Court, *i.e.*, that the confusion and uncertainty in the regulated community concerning how to evaluate emissions increases was long standing and wide spread. In EPA's own words:

Uncertainties inherent in the current major NSR permitting approach can exacerbate the reluctance to engage in . . . activities. To elaborate on the uncertainty issues: Unless an owner or operator seeks an applicability determination from his or her reviewing authority, it can be difficult for the owner or operator to know *with reasonable certainty* whether a particular activity would trigger major NSR.

*Id.* at 61093 (emphasis added).<sup>2</sup> In support of EPA's proposal, the Agency emphasized that the "central policy goal" of the NSR program is "not to limit productive capacity of major stationary sources,"<sup>3</sup> as Plaintiffs have argued before this Court. Moreover, EPA states in the proposed rule that adoption of the NSPS hourly emission rate test as the NSR test will effectuate Congress' intent to apply NSR *only to expansions* of existing capacity.<sup>4</sup>

The indisputable truth is that for many years, Plaintiffs have understood that the NSR rules did not clearly prohibit or even suggest that the Cinergy projects were subject to NSR. Despite this fact, EPA has allowed its lawyers to contend otherwise in court, including in the instant case filed against Cinergy. At this very moment Plaintiffs' attorneys from the Department of Justice are still sponsoring contentions which have been unambiguously repudiated by their client, EPA. EPA's conduct is improper, and this Court should no longer tolerate it. In the pursuit of fundamental fairness this Court should demand that the government speak with one voice in court and out of court.

As this Court has acknowledged, the doctrine of fair notice requires that EPA's

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<sup>2</sup> EPA also noted, because of the lack of clarity in the existing NSR emissions test, "there is a possibility that EPA could . . . make a different applicability determination than [a] State has made." *Id.* at 61,094.

<sup>3</sup> *Id.* at 61,083.

<sup>4</sup> *Id.* at 61,099.

regulations objectively state with “ascertainable certainty” what is required or forbidden so that the regulated community can determine whether conduct is permissible or proscribed by such regulations. *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986); *see also United States v. So. Ind. Gas & Elec. Co.*, 245 F. Supp.2d 994, 1010 (S.D. Ind. 2003). EPA’s official and very public admissions make it crystal clear that the Agency has known for years that the NSR regulations have not provided fair warning in so far as those regulations concern the conduct which is at the core of this lawsuit. These admissions also make crystal clear that the government’s lawyers are pursuing regulatory interpretations that have been rejected and abandoned by their client, all of which means that Plaintiffs have *no* case against Cinergy.

Despite these admissions, Plaintiffs persist in their arguments that the NSR rules clearly apply to projects like those undertaken by Cinergy. Such conduct offends the fundamental principle that citizens are entitled to “some minimum standard of decency, honor, and reliability in their dealings with the Government,” particularly, where, as here, Plaintiffs seek to impose huge civil penalties and very costly injunctive relief on Cinergy. *Heckler v. Community Health Servs.*, 467 U.S. 51, 60-61 (1984). In addition, Plaintiffs’ litigating positions are so divorced from EPA’s admission of regulatory confusion that continued litigation of this case has resulted in an unnecessary drain on this Court’s and Cinergy’s resources.

In short, EPA’s actions in light of its recent admissions constitute egregious and sanctionable conduct in this case. Instead of filing a motion for sanctions, however, Cinergy has elected to file this Cross-Motion.<sup>5</sup> Because EPA’s recent admissions indisputably prove, as a matter of law and a matter of fact, that EPA did *not* provide fair notice as required by law, Cinergy is entitled to summary judgment with respect to all Plaintiffs’ NSR claims and all other claims that are predicated on a finding of NSR liability (*e.g.*, State Implementation Plan claims and Title V claims).

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<sup>5</sup> Cinergy reserves its right to file a motion for sanctions.

DATED: November 8, 2005

Respectfully Submitted,

CINERGY CORP, CINERGY SERVICES, INC., PSI  
ENERGY, INC., AND THE CINCINNATI GAS &  
ELECTRIC COMPANY

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