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,

Plaintiff-Intervenors,

v.

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

Defendants.

Civil Action No. IP99-1693 C-M/S

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

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[1] To avoid duplication, all exhibits hereto are being filed separately as Joint Exhibits to Cinergy's Memorandum in Opposition to Plaintiffs' Motion Partial Summary Judgment on the Legal Standard for Routine Maintenance, Repair and Replacement and 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.

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Exhibit 51 - EPA, Office of Air Quality Planning and Standards, "DRAFT – New Source Review Workshop Manual" (Oct. 1990) (excerpts only).

Exhibit 52 - 30(b)(6) Deposition of EPA regarding Emissions, *United States v. East Kentucky Power Coop.*, No. 5:04-CV-0034-KSF (E.D. Ky.) (July 20, 2005) (rough transcript).

Exhibit 53 - Letter from E. Glen (EPA Region III) to T. Henderson (Virginia Dep't of Envtl. Quality) (Oct. 21, 1993).

Exhibit 54 - Memorandum from J. Seitz (EPA's Office of Air Quality Planning and Standards) to Regional Air Directors, re: Pollution Control Projects and New Source Review (NSR) Applicability (July 1, 1994).

Exhibit 55 - 30(b)(6) Deposition of EPA regarding Emissions, *United States v. Duke Energy Corp.*, No. 1:00CV1262 (M.D.N.C.) (Oct. 5, 2001).

Exhibit 56 - EPA Enforcement's Post-Trial Memorandum, *In re Tennessee Valley Auth*., Docket No. CAA-2000-04-008 (before the Environmental Appeals Board) (filed Aug. 4, 2000).

Exhibit 57 - Mem. Opp. Ohio Edison's Motion S.J., *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Ohio) (Nov. 29, 2002).

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Exhibit 80 - Deposition of Kevin Hammersmith (July 7, 2004). (SEALED)

INTRODUCTION

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") submit this memorandum in support of Cinergy's Cross-Motion For Summary Judgment On Fair Notice and in opposition to Plaintiffs' Motion For Partial Summary Judgment On Cinergy's Fair Notice Defense (Docket No. 599) ("Plaintiffs' Motion").

The United States Environmental Protection Agency ("EPA") has now admitted – including as recently as *only three weeks ago* – that it did *not* provide "fair notice" of the Clean Air Act ("CAA") New Source Review ("NSR") legal standards that Plaintiffs attempt to apply in this case. Thus, Cinergy is entitled to summary judgment on all claims. At a minimum, Plaintiffs' Motion must be denied because numerous disputed issues of material facts must be resolved by the jury.

For decades, electric utilities have maintained their electric generating units by replacing individual component parts with "like-kind" replacement parts to ensure that the units are consistently able to provide electricity to consumers upon demand. EPA has long known of these practices. Yet, EPA never once suggested that such maintenance practices, like those undertaken by Cinergy, violated the law. Now, in this litigation, Plaintiffs claim for the first time that Cinergy's replacement projects – *some undertaken more than twenty years ago* – were subject to NSR.

However, contrary to the litigation positions advanced by Plaintiffs' lawyers, EPA officially has conceded that the NSR standards Plaintiffs seek to impose in this case *did not* provide fair warning to the regulated community. EPA's binding admissions compel the conclusion that the regulated community, including Cinergy, lacked fair notice of the legal standards urged by Plaintiffs in this case. At the very least, the admissions preclude a finding of summary judgment for Plaintiffs.

In addition, as this Court is aware, the federal courts are divided on whether the specific standards Plaintiffs advocate in this case were the law *at any time*. The conflict among the federal

courts regarding these legal standards is itself compelling evidence that Plaintiffs' positions were not "reasonably ascertainable" at the time any of the Cinergy projects at issue occurred.

Finally, if EPA's admissions and the conflicting judicial decisions do not entitle Cinergy to summary judgment as a matter of law, Plaintiffs' Motion must still be denied. Resolving the fair notice question will require the jury to consider material, disputed facts, to draw inferences from those facts, and to evaluate the weight of the evidence and the credibility of witnesses. Among other things, the fact finder will be required to determine (1) whether EPA's current interpretations were "reasonably ascertainable" at the time that each Cinergy project occurred and (2) whether a reasonable utility company would understand that the projects at issue were proscribed by those legal standards. Moreover, Cinergy demonstrates below that there is substantial evidence favoring Cinergy's position that precludes summary for Plaintiffs.

BACKGROUND AND STATEMENT OF ISSUES

To prove a claim under the NSR[2] rules, Plaintiffs must establish that Cinergy made a "modification" to its electric generating units. A "modification" is a "physical change" to a stationary source that "results" in a "significant net increase in emissions."[3] For decades, the electric utility industry has conducted the types of maintenance, repair and replacement projects at issue in this case to ensure a safe and reliable flow of electricity to consumers. Yet, during that time period, neither EPA nor the states gave any indication that these types of projects would trigger NSR. Rather, Congress, EPA, the states and the regulated community considered such projects to be "routine maintenance, repair and replacement" ("RMRR") activities that are not "physical changes" subject to NSR. They also objectively understood that such projects would not result in significant

[2] The key provisions of the Act that compose the NSR programs are the Prevention of Significant Deterioration ("PSD") program (CAA §§ 160-169B, 42 U.S.C. §§ 7470-7492); and the Nonattainment New Source Review ("NNSR") program (CAA § 171-193, 42 U.S.C. §§ 7501-7516). Both of these programs share the same definition of "modification" as the New Source Performance Standards ("NSPS") program (CAA § 111, 42 U.S.C. § 7411).
[3] 40 C.F.R. §§ 52.21 (federal PSD program), 52.24 (federal NNSR program), 51.166 minimum requirements for State Implementation Plan ("SIPs") PSD programs, and 51.165 (minimum requirements for SIP NNSR programs).

net emissions increases. These indisputable facts, set out in detail below, conclusively demonstrate lack of fair warning of the novel criteria EPA seeks to impose in this litigation.

Plaintiffs have stated that this Court already has resolved the fair notice dispute in Plaintiffs' favor. That is incorrect both with regard to RMRR and the emissions test.

First, in *SIGECo*, the Court did not find that EPA had provided fair notice of the narrow "routine at the unit" standard Plaintiffs now advocate.[4] To the contrary, the Court repeatedly recognized that industry practice is relevant to determining whether a project is "routine." Moreover, since *SIGECo* was decided, EPA has conceded that it has not provided fair notice as required by law. EPA's admissions must be considered before judging Cinergy's defenses here. In addition, regardless of the precise contours of the *SIGECo* rulings, the Court was not asked to and clearly did not address whether the industry had fair notice of the RMRR interpretation EPA now advances *before* 1990. In *SIGECo*, the earliest challenged project occurred in 1990. In this case, at least three of the Cinergy projects in dispute took place before EPA's WEPCo determination in 1988, and another two occurred prior to the Seventh Circuit's decision in 1990.[5]

Second, the Court in *SIGECo* did not rule in any way as to whether industry had fair notice of the "emissions" standard advanced by Plaintiffs. Consequently, this Court has not considered, let alone resolved, that question.

Plaintiffs also misrepresent Cinergy's fair notice defenses. Cinergy does not contend, as Plaintiffs suggest, that a RMRR determination turns *exclusively* on whether a project is frequently undertaken within the *industry*. To the contrary, Cinergy asserts that it lacked fair notice of EPA's position that RMRR turns *exclusively* upon an evaluation of relevant factors *only* at the *unit* level.

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[4] *United States v. So. Ind. Gas & Elec. Co.,* 245 F. Supp. 2d 994 (S.D. Ind. 2003) ("*SIGECo"*) (deferring to EPA's interpretation but finding that industry practice is relevant to the RMRR inquiry).
[5] *United States v. Wisc. Elec. Power Co*., 893 F.2d 901 (7th Cir. 1990) ("*WEPCo*").

That position was not reasonably ascertainable by industry from the time the NSR programs were first implemented through 2001, a fact that EPA now concedes.

Likewise, Cinergy does not contend, as Plaintiffs argue, that annual emissions are *irrelevant* to determining whether a project triggers NSR.[6] Rather, Cinergy maintains that it lacked fair notice of EPA's litigating position that "significant net emission increases" should be determined by predictions of increased availability of a particular component. EPA repeatedly has admitted that it created this emissions formula in a work group so secret that EPA has fought to hide its work from public scrutiny. And, EPA concedes that it never articulated, announced or applied the legal standard for emissions increases that it seeks to impose here to establish liability.

Resolution of the actual issues presented – rather than the straw men set up by Plaintiffs – requires a fact-intensive inquiry covering nearly thirty years of CAA history and an evaluation of Cinergy projects in light of what EPA has said and done (and not said and not done) over those three decades. This critical factual history and evaluation is noticeably absent from Plaintiffs' Motion. Indeed, Plaintiffs offer *only two* EPA statements in support of their Motion. The relevant facts considered in their totality show that no one – not EPA, not Congress, not the states, not industry – ever ascertained the NSR rules to have the meaning that Plaintiffs urge the Court to adopt in this litigation. At a minimum, a significant number of material facts in dispute preclude summary judgment for Plaintiffs.

[6] Cinergy repeatedly has stated that industry understands that the NSR requirements are triggered by an increase in total annual emissions – but measured under constant hours and conditions. *See*, *e.g.*, Memorandum in Support of Cinergy's Cross-Motion for Partial Summary Judgment, at 17-23 (Apr. 25, 2005) (Docket No. 398) and Reply Memorandum in Support of Cinergy's Cross-Motion for Partial Summary Judgment, at 12-14 (July 6, 2005) (Docket No. 476). What the parties dispute, and what is at issue with respect to fair notice, is whether EPA's method[s] for calculating total annual emissions in this case were ascertainably certain.

STATEMENT OF MATERIAL FACTS IN DISPUTE

I. EPA ADMITS THAT THE LEGAL STANDARDS IT ADVOCATES WERE NOT ASCERTAINABLY CERTAIN.

1. On October 27, 2003, EPA promulgated for the first time a specific RMRR rule (the "Equipment Replacement Provision" rule or "ERP").[7] In the rulemaking, EPA conceded that "the NSR regulations have not . . . specified what types of activities are encompassed by the terms RMRR."[8] EPA also admitted that the so-called "WEPCo factors" of nature, extent, purpose, frequency, cost of a project and other relevant factors 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."[9]

2. On October 13, 2005, EPA, in a proposed rulemaking signed by the Administrator, also admitted that the regulated community did not have fair warning of the emissions test that Plaintiffs seek to apply in this case. The rule was published in the Federal Register on October 20, 2005.[10] In the proposed rule, EPA announced its intention to adopt the New Source Performance Standard ("NSPS") hourly emission rate test as the NSR emission test for electric utilities. In other words, a project will cause an "emission increase" under NSR only if it causes an increase in the hourly rate of emissions – just as Cinergy has contended the NSR statute and rules require. EPA emphasized that a chief purpose of the proposal is to eliminate the "uncertainties inherent" in EPA's current interpretation of NSR emission test:

> 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.[11]

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[7] 68 Fed. Reg. 61,248 (Oct. 27, 2003) (Exh. 1).
[8] *Id*. at 61,249 (Exh. 1).
[9] *Id*. at 61,250 (emphasis added) (Exh. 1).
[10] 70 Fed. Reg. 61,081 (Oct. 20, 2005) (Exh. 2).
[11] *Id.* at 61,093 (emphasis added) (Exh. 2).

In further support of the proposal, the Agency emphasized that the "central policy goal" of the NSR program is "not to limit productive capacity of major stationary sources,"[12] 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.[13]

II. MATERIAL FACTS REGARDING ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT ("RMRR")

3. In 1971, EPA proposed the first RMRR provision as part of its NSPS regulations, stating that "[r]outine maintenance, repair, and replacement shall not be considered physical changes."[14]

4. EPA incorporated the RMRR provision into the Agency's first NSR rules in 1974.[15]

5. In August 1975, EPA Region X concluded that a project that involved the addition of pressure parts (*i.e.*, not mere replacements to existing parts) to three boilers at a Weyerhauser pulp and paper facility would not be "RMRR."[16] EPA's 30(b)(6) witness on RMRR has acknowledged that the Weyerhauser project differed from the Cinergy projects because, unlike the Cinergy projects, it involved the *addition* of parts that were not previously present in the boiler.[17]

6. In December 1975, EPA revised the NSPS regulations to make it clear that "modifications" do not include RMRR activities "which the Administrator determines to be routine for a source category."[18]

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[12] *Id*. at 61,083.
[13] *Id*. at 61,099.
[14] 36 Fed. Reg. 15,704, 15,705 (Aug. 17, 1971) (Exh. 3); *see also* 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971) (final NSPS rule incorporating RMRR provision) (Exh. 4).
[15] 39 Fed. Reg. 42,510, 42,514 (Dec. 5, 1974) (Exh. 5).
[16] Regional Counsel Opinion re: "Request for Ruling Regarding Modification of Weyerhauser's Springfield Operations" (Aug. 18, 1975) (Exh. 6).
[17] 30(b)(6) Deposition of EPA regarding "Routine Maintenance, Repair and Replacement", at 62-63 (Feb. 2, 2005) ("30(b)(6) RMRR Dep.") (Exh. 7).
[18] 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975) (codified as 40 C.F.R. §60.14(e) (Exh. 8).

7. In 1978, EPA carried the RMRR provision over into newly promulgated NSR regulations.[19]

8. After promulgating the 1978 NSR rules, EPA identified (in the context of related changes to its NSPS rules) examples of activities that the Agency considered to be RMRR for the electric utility industry.[20] These activities include (1) "[r]eplacement of the pulverizer system of an existing coal-fired unit with a similar system or replacement of component parts of the pulverizer system with similar parts would not be considered a modification"; and (2) maintenance of "feedwater pumps, combustion chamber, watertubes, economizer, and superheat and reheat sections."[21]

9. In October 1978, the Director of EPA's Stationary Source, Enforcement Division, who, as head of EPA air enforcement, had authority to speak on behalf of EPA,[22] stated in a letter that "*[r]outine replacement means the routine replacement of parts*, within the limitations of reconstruction."[23] EPA's 30(b)(6) witness on RMRR acknowledged that the October 1978 letter made no mention of any of the "WEPCo factors."[24]

10. In June 1979, the Director of EPA's Office of Air Quality Planning and Standards Division, the division of EPA responsible for developing CAA rules, confirmed: "Actions which are not considered modifications, regardless of emission increase, include: routine maintenance and

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[19] *See* 43 Fed. Reg. 26,380, 26,382, 26,403-04 (June 19, 1978) (Exh. 9).
[20] EPA, Office of Air, Noise, and Radiation, Office of Air Quality Planning and Standards, Emission Standards and Engineering Division, "Electric Utility Steam Generating Units: Background Information for Proposed Particulate Matter Emission Standards (NSPS) (July 1978) at 5-3 (Exh. 10).
[21] *Id*. at 5-4 to 5-5; *see also* EPA, Office of Air, Noise, and Radiation, Office of Air Quality Planning and Standards, Emission Standards and Engineering Division, "Electric Utility Steam Generating Units, Background Information for Proposed NOx Emission Standards" (July 1978) at 5-4 to 5-5 (signed by Walter Barber) (Exh. 11).
[22] *See*, *e.g*., 30(b)(6) RMRR Dep. at 65-66 (Exh. 6).
[23] Memorandum from Edward E. Reich (Director, EPA Division of Stationary Source Enforcement) to Howard G. Bergman (Director, Enforcement Division, EPA Region IV) (Oct. 3, 1978) (emphasis added) (Exh. 12); *see also* Memorandum from Edward E. Reich (Director, Division of Stationary Source Enforcement) to Stephen A. Dvorkin (Chief, General Enforcement Branch, EPA Region II) (May 11, 1979) (Exh. 13).
[24] 30(b)(6) RMRR Dep. at 68 (Exh. 7).

repair [and] replacement of old equipment with new equipment of the same capacity."[25] Further, EPA "believe[s] . . . most actions at existing plants fall under the exceptions described above."[26]

11. In August 1980, EPA revised the NSR rules in light of the D.C. Circuit's decision in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). However, the RMRR provision remained unchanged,[27] and nothing in the 1980 rulemaking referenced the "WEPCo factors" or identified any of those factors as relevant to a RMRR inquiry.[28] Nor did the rulemaking state that RMRR is determined on a unit basis, rather than on a source category or industry basis.

12. From the late 1970s until the late 1980s, EPA was aware of electric utility life extension projects, yet the Agency continued to evaluate RMRR based (1) on what was "routine" for an industrial source category and (2) whether a project would change the original design capacity of a unit.[29]

13. EPA (including the Agency's Administrator) was aware of the Beckjord Unit 1 life extension project in 1988.[30] In fact, EPA was present at Cinergy's Beckjord Generating Station

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[25] Materials from Walter Barber (EPA) sent to Non-Metallic Mineral Processing Industry regarding proposed NSPS for that industrial sector, at Enclosure 2 (June 18, 1979) (Exh. 14).
[26] *Id.*
[27] 45 Fed. Reg. 52,676, 52,677, 52,730, 52,735, 52,744, 52,747 (Aug. 7, 1980) (final revisions to PSD and NNSR rules) (Exh. 15).
[28] 30(b)(6) RMRR Dep. at 97-98 (Exh. 7).
[29] See, *e.g.*, Memorandum from David Solomon (EPA) to File, Re: Rockwell PSD Applicability Determination, at 4 (May 28, 1981) (Exh. 16) (a change within the "original basic design capacity" of an emitting unit is not a "modification"); Memorandum from Kathy Wertz, Radian Corp. to Dianne Byrne, EPA, Office of Air Quality Planning and Standards, regarding EPA-sponsored "Boiler Life Extension Study," at 3 (July 3, 1986) ("Common repair/replacement jobs include: retubing, replacing waterwalls, air heater, ductwork, or casing, and updating the burner or controls.") (Exh. 17); "Extended Lifetimes for Coal-Fired Power Plants: Effect Upon Air Quality," Pub. Util. Fortnightly 30, at 32-33 (prepared by three EPA policy analysts) (Mar. 20, 1986) (identifying at least ten plants undergoing life extension projects (including one at Cinergy's Beckjord Plant) and making no suggestion that any of those activities was not RMRR or would otherwise trigger NSR) (Exh. 18); Acid Rain and Nonattainment Issues: *Hearing Before the Subcommittee on Environmental Protection of the Committee on Environment and Public Works, United States Senate*, 100th Cong. (testimony of EPA Administrator Lee Thomas) at 27 (Apr. 22, 1987) (acknowledging EPA's awareness of utility life extension projects and expressing the view that such facilities did not need to "put on the [very] stringent control requirements that we impose on the new source performance standards.") (Exh. 19); Letter from Kenneth Eng (Chief, Air Compliance Branch, EPA Region II) to Dale E. Choate (Refinery Mgr, Mobil Oil Corp.) regarding EPA's Concurrence on the Scheduled Replacement of the Regenerator Cyclones at the Paulsboro Refinery, at 1 (Sept. 7, 1988) (finding that the replacement of regenerator cyclones was "routine maintenance" because, at least in part, the new cyclones were functionally equivalent to the equipment replaced) (Exh. 20).
[30] *See*, *e.g.*, 30(b)(6) Deposition of EPA regarding document captioned "Power Plant Modification/Reconstruction Determinations", at 18-26 (June 8, 2005) ("30(b)(6) Modification/Reconstruction Dep.") (Exh. 21).

during the Unit 1 project.[31] David Schulz – who inspected the plant and later became EPA's "Combustion Process National Oracle" – never suggested that NSR requirements were or should have been triggered by that project, which cost approximately $15 million. EPA did not assert any NSR violations in connection with the Beckjord Unit 1 project until it commenced this enforcement action against Cinergy, eleven years later, in 1999.

14. In November 1987, the Wisconsin Department of Natural Resources asked EPA to advise on the applicability of NSR to proposed "life extension" work at WEPCo's Port Washington plant.[32] For nearly one full year, EPA deliberated as to whether the WEPCo project was RMRR, seeking extensive additional information from WEPCo regarding the project, conducting its own informal survey of other life extension projects, and engaging in a dialogue with both EPA, Wisconsin, and the electric utility industry.[33]

15. EPA Administrator William Reilly reported on the findings of EPA's informal survey in response to an inquiry from Congressman John Dingell concerning applicability of NSR requirements in light of the 1988 WEPCo determination. The Administrator stated that EPA had examined a number of other large projects (including the Beckjord Unit 1 life extension project), that seven of ten EPA Regional Offices were aware of such projects, and that EPA's survey of those projects "did not result in the detection of any [NSR] violations."[34] He also emphasized that the terms "renovation" and "life extension" have no regulatory significance and noted that those terms are "not used in the Clean Air Act or EPA's regulations."[35]

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[31] *See* "Inspection Report – Cincinnati Gas & Electric Company," prepared by D. Schulz (Mar. 14, 1988) (describing a $15 million "life extension major overhaul" activity at Unit 1) (Exh. 22).
[32] Letter from D. Theiler (Wisconsin DNR) to S. Rothblatt (Chief, Air and Radiation Branch, EPA Region V) (Nov. 9, 1987) (attaching WEPCo's July 8, 1987 letter to the Wisconsin Public Service Commission) (Exh. 23).
[33] *See*, *e.g.*, Letter from J. Boston (WEPCo) to G. McCutchen (Chief, EPA NSR Section) (May 19, 1988) (responding to additional questions posed by the Agency) (Exh. 24).
[34] Letter from William Reilly (EPA Administrator) to Congressman John D. Dingell, at 2 (Apr. 19, 1989) (Exh. 25).
[35] *Id.* at 2 (Exh. 25).

16. In September 1988, EPA issued an applicability determination regarding the proposed projects at the WEPCo Port Washington facility (the "Clay Memo").[36] In the Clay Memo, EPA evaluated whether the WEPCo project was "routine" within the industry. In addition, EPA set forth for the first time general criteria to guide the Agency in its review (the "WEPCo factors"). EPA stressed, however, that "any such project would need to be reviewed in light of all the facts and circumstances particular to it. Thus, a final decision regarding PSD and NSPS applicability [for WEPCo's Port Washington project] would not necessarily be determinative of coverage as to other life extension projects."[37]

17. EPA articulated the WEPCo factors as follows: "In determining whether proposed work at an existing facility is 'routine,' EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding."[38] Applying the WEPCo factors to the WEPCo project and finding no examples of truly "similar" work at other power plants or even at WEPCo's own plants, EPA concluded that the "highly unusual, if not unprecedented, and costly project" was not "routine."[39]

18. In October 1988, EPA Administrator Thomas affirmed the WEPCo applicability determination.[40] In doing so, he relied primarily, if not exclusively, on industry practices (*including the life extension project at Cinergy's Beckjord Station*). The Administrator emphasized that the WEPCo project was unique and distinguishable from life extension work undertaken by Cinergy and others.

19. In or around 1989, EPA commenced a nationwide survey of its regional offices regarding utility boiler maintenance practices to gather additional information as to whether other

[36] Memorandum from Don R. Clay (Acting Assistant Administrator for Air and Radiation) to David A. Kee (Director, Air and Radiation Division, Region V) (Sept. 9, 1988) ("Clay Memo") (*Pls' Fair Notice Mem., Exh. 1*).
[37] *Id.* at 2 (*Pls' Fair Notice Mem., Exh. 1*).
[38] *Id.* at 3 (*Pls' Fair Notice Mem., Exh. 1*).
[39] *Id.* at 3-4 (*Pls' Fair Notice Mem., Exh. 1*).
[40] Letter from L. Thomas (EPA Administrator) to John W. Boston (WEPCo) (Oct. 14, 1988) (*Exh. 26*).

utilities were engaging in WEPCo-like projects. The survey was referred to as the "1989 Utility Boiler Life Extension/Repowering Survey."[41] EPA's survey generally identified projects at Cinergy's Beckjord, Gallagher and Wabash River Plants.[42] EPA has admitted that at the time it conducted the post-WEPCo survey, EPA did not conclude that NSR applied to any of the projects identified.[43]

20. Also in 1989, EPA sponsored an emissions forecast report to Congress that assumed that all coal-fired power plants would be refurbished at 30 years of age to extend their service lives to 55-65 years and that such refurbishments would not trigger NSR or NSPS requirements.[44]

21. Throughout the 1990s, EPA's official pronouncements unequivocally rejected the proposition that the Agency's WEPCo decision had narrowed the RMRR provision. For example, the General Accounting Office ("GAO") reported that EPA policy officials had confirmed that "WEPCO's life extension project is not typical of the majority of utilities' life extension projects, and concerns that the agency [EPA] will broadly apply the ruling . . . are unfounded."[45] Robert Brenner, then Director of EPA's Office of Policy Analysis and Review and identified as one of the GAO-referenced "EPA officials," testified that the GAO report is consistent with EPA's views at the time.[46]

22. EPA's Assistant Administrator of Air and Radiation confirmed the conclusions set out in the GAO report that NSR would not apply to the replacement of plant components such as those at issue in this case.[47] In June 1991, the Assistant Administrator advised Congress: "As indicated in the GAO report, it is expected that most utility projects will not be similar to the WEPCo situation. That

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[41] Memorandum from Jack R. Farmer (Director, Emission Standards Division) regarding Utility Boiler Life Extension/Repowering (May 10, 1989) (*Exh. 27*).
[42] *Id*. at Attachment 3 (*Exh. 27*).
[43] 30(b)(6) Modification/Reconstruction Dep., at 191-92 (June 8, 2005) (Exh. 21).
[44] ICF Resources, 1989 EPA Base Case Forecasts (May 1989) at 28-29 (*Exh. 28*); Letter from Kenneth A. Schweers, (President, ICF Resources) to Robert A. Beck (Director, Edison Electric Institute) (July 26, 1989) (*Exh. 29*).
[45] GAO, "Electricity Supply: Older Plants' Impact on Reliability and Air Quality," RCED-90-200 at 30-31 (Sept. 1990) (*Exh. 30*).
[46] Dep. of Robert Brenner, *United States v. Duke Energy Corp.,* No. 1:00CV1262 (M.D.N.C.), at 9-16 (Aug. 13, 2002) (Exh. 31).

is, EPA believes that most utilities conduct an ongoing maintenance program at existing plants which prevents deterioration of production capacity and utilization levels. To the extent that life extensions at such plants involve only an enhanced maintenance program, new source requirements may not apply. . . ."[48] He emphasized, "*EPA's WEPCo decision only applies to utilities proposing 'WEPCo type' changes*," and "*the ruling is not expected to significantly affect power plant life extension projects*."[49]

23. The Seventh Circuit affirmed EPA's RMRR conclusion with respect to the WEPCo Port Washington project in early 1990. *WEPCo*, 893 F.2d 901.

24. In 1992, EPA adopted a final rule (the "WEPCo Rule"). In the preamble to that rulemaking, EPA reiterated that RMRR must be determined by reference to industry practice:

> *EPA is today clarifying that the determination of whether the repair or replacement of a particular item of equipment is "routine" under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category*.[50]

This was the first and only formally published pronouncement by EPA regarding the RMRR provision prior to the commencement of this case.

25. Throughout the 1990s, EPA repeatedly assured Congress, the regulated community and the public that activities that are common in the industry, including life extension activities, would not trigger NSR requirements.[51]

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[47] Letter from William Rosenberg (EPA Ass't Administrator for Air and Radiation) to Congressman John Dingell, at 4-6 (June 19, 1991) (Exh. 32).
[48] *Id*. at 5 (Exh. 32).
[49] *Id*. at 6 (emphasis added).
[50] 57 Fed. Reg. 32,314, 32,326 (July 21, 1992) (emphasis added) (Exh. 33).
[51] *See*, *e.g.*, Letter from Mary D. Nichols (EPA Ass't Administrator for Air and Radiation) to W. Lewis (representing industry), at 19 (May 31, 1995) ("EPA believes that the routine maintenance exclusion already included in the existing NSR regulations also has the effect of excluding 'routine restorations.'") (Exh. 34); Letter from John S. Seitz (EPA Director, Office of Air Quality Planning and Standard) to Sen. Robert C. Byrd, at 4 (Jan. 26, 1996) (advising that "no existing unit has become subject to the utility NSPS under either the modification or reconstruction provision . . . . [I]t is anticipated that no existing utility unit will become subject to the [revised NSPS rule] due to being modified or reconstructed…") (Exh. 35); Memorandum from J. Knodel (EPA Region VII) to D. Rodriquez (EPA) (Aug. 15, 1997) (an EPA air official wrote: "I think the agency generally acknowledges that boiler tube replacement is routine.") (Exh. 36).

26. Not once prior to 1999 did EPA publicly state that the WEPCo factors should be applied at the unit level only and without reference to industry practice. In addition, EPA did not publicly announce many of the specific criteria it seeks to apply in this case until May 2000 – *six months after* EPA already had sued Cinergy and a number of other electric utility companies.[52] Some of the "new" factors announced at that time include: (1) whether a project is capitalized versus expensed; (2) whether the components replaced are of a "considerable size"; (3) whether the work must be performed while a unit is out of service; (4) whether the materials required for the project are already stored onsite; (5) whether a project is intended to reduce forced outages; (6) whether the purpose of the work is life extension; and (7) whether the work is performed "frequently in a typical unit's life."[53]

27. In October 2003, EPA promulgated the ERP rule. The ERP rule – unlike EPA's litigating position in this case – was the subject of public notice and comment. The ERP rule generally provides that component replacements – such as those at issue here – are routine so long as (1) the cost of replacing the component is less than 20 percent of the replacement value of the unit; (2) the replacement involves the installation of "functionally equivalent" components; (3) the replacement does not change the unit's basic design parameters; and (4) the unit continues to meet enforceable permit or regulatory limits.[54]

28. In the preamble to the ERP rule, EPA stated that the ERP rule is "meant to be applied broadly and read broadly to include replacements of both large components, such as economizers, reheaters, etc. at a boiler, as well as small items, such as screws, washers, gaskets, etc."[55] For purposes of determining whether a project is RMRR, EPA "does not distinguish between the

[52] Letter from F.X. Lyons (EPA Regional Administrator, Region V) to Henry Nickel (Counsel for Detroit Edison) (May 23, 2000) (Exh. 37).
[53] *Id.*
[54] 68 Fed. Reg. at 61,251 (Exh. 1).
[55] *Id.* at 61,252 n.3 (Exh. 1).

replacement of components that are expected to be replaced frequently or periodically and the replacement of components that may occur on a less frequent or one-time basis."[56]

29. EPA subsequently re-issued the ERP rule without change in 2005.[57] The Agency stated that "'the United States does not rely on any prior statements . . . that a very narrow construction of the 'routine maintenance' exemption is required by the Clean Air Act itself."[58]

30. EPA enforcement personnel involved in this case have testified that they were instructed to consider only the number of times that a replacement project had been undertaken at a specific boiler unit in determining whether the Cinergy projects at issue were RMRR and that they ignored EPA's 1992 WEPCo guidance stating that industry practice must be considered.[59]

31. EPA witnesses have testified that no EPA guidance addresses whether the use of outside contractors or whether materials brought from off-site are criteria relevant to determining RMRR.[60] Similarly, nothing in EPA guidance indicates that forced outages at a boiler or the capitalization of a project are factors that should be considered in the RMRR inquiry.[61]

32. EPA witnesses have testified that that there is no cost benchmark or threshold that indicates whether a project is or is not RMRR and that cost alone is not determinative.[62]

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[56] *Id.* at 61,253 (Exh. 1). In the preamble to the ERP Rule, EPA stated that it had specifically considered a document submitted by the Utility Air Resources Group ("UARG") describing typical replacement and repair activities at utilities. *Id.* at 61,257 (Exh. 1). The list of activities submitted by UARG and acknowledged by EPA to be RMRR include replacement of every component at issue in this case. *See* Comments of UARG on EPA's Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Routine Maintenance, Repair and Replacement Proposed Rulemaking (May 2, 2003) (OAR-2002-0068-1213) and Attachment re: Background Information on Electric Utility Repair and Replacements by Project Family (OAR-2002-0068-1221) (Exh. 38).

[57] 70 Fed. Reg. 33,839 (June 10, 2005) (Exh. 39). The ERP rule remains stayed pending the resolution of petitions for review in the D.C. Circuit.

[58] *Id.* at 33,841 (emphasis added) (Exh. 39).

[59] *See*, *e.g.*, Deposition of Spiros Bourgikos at 43-48 (June 10, 2004) ("Bourgikos Dep.") (Exh. 40) (SEALED); Deposition of Bonnie Bush at 41-42, 51-52, 54, 56-57 (June 15, 2004) ("6/15/04 Bush Dep.") (Exh. 41) (SEALED); Deposition of Sarah Marshall, at 87-89 (Dec. 8, 2004) ("Marshall Dep.") (Exh. 42) (SEALED).

[60] Bourgikos Dep., at 33-35 (Exh. 39); *See*, *e.g.*, 6/15/04 Bush Dep., at 59-60, 66-69 (Exh. 41).

[61] *See*, *e.g.*, Bourgikos Dep. at 37-38, 182-183 (Exh. 40); 6/15/04 Bush Dep., at 62-64 (Exh. 41); Deposition of Loren Denton at 264-265 (Jan. 6, 2005) ("Denton Dep.") (Exh. 43).

[62] Bourgikos Dep. at 77-78 (Exh. 40); 6/15/04 Bush Dep. at 38-39 (Exh. 41).

33. Before EPA began its enforcement initiative, nothing in EPA's public guidance stated that whether a shutdown or "outage" of a unit is required to undertake a project or the length of such a shutdown are relevant factors in determining whether a project is RMRR.[63] Likewise, nothing in EPA's guidance indicated that whether the approval of senior management is needed before a project can proceed is a relevant factor to be considered in making an RMRR determination.[64]

34. EPA witnesses also have acknowledged that the term "life extension" does not appear in the CAA or in the NSR regulations.[65]

35. EPA's 30(b)(6) witness on RMRR testified that during the time period relevant to this action, there was no regulatory definition of the term "routine maintenance, repair and replacement."[66] The first time the WEPCo factors appeared was in the 1988 WEPCo applicability determination.[67]

36. EPA and Plaintiff's RMRR expert have testified that WEPCo factors do not establish any bright line test for "extent," "purpose," "frequency," or "cost" and that no one factor carries more weight than any others.[68]

III. MATERIAL FACTS REGARDING THE NSR EMISSIONS TEST

37. At the time of the promulgation of the 1980 NSR rules, EPA treated "modifications" under the NSR and NSPS programs consistently in its official pronouncements. Specifically, EPA determined in an official "applicability determination" that a proposed project would not cause a significant net increase in annual emissions under the NSR program because it would not cause an

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[63] See, *e.g.*, 6/15/04 Bush Dep. at 88-89 (Exh. 41); Deposition of William MacDowell ("MacDowell Dep."), at 169-70 (Oct. 14, 2004) (Exh. 44) (SEALED).
[64] *See*, *e.g.*, Denton Dep., at 241 (Exh. 43).
[65] *See*, *e.g.*, Bourgikos Dep. at 85-87, 91-92 (Exh. 40); 6/15/04 Bush Dep. at 182 (Exh. 41).
[66] 30(b)(6) RMRR Dep., at 33 (Exh. 7).
[67] *Id*. at 154-55 (Exh. 7).
[68] 30(b)(6) RMRR Dep. at 167-68, 182-83, 188-89, 191-92, 213-14, 220-21, 224-25 (Exh. 7); Deposition of Alan Michael Hekking, at 198-200 (Oct. 5, 2005) (Exh. 45) (SEALED).

increase in the unit's hourly emission rate.[69] EPA followed this same analysis for another project in June 1981, confirming that "PSD applicability is determined by evaluating any change in [hourly] emissions rates caused by" the project at issue.[70]

38. At some point in the 1980s, EPA changed its position and began to apply the so-called "actual-to-potential" test to all non-routine maintenance, repair and replacements at existing units. The "actual-to-potential" test compares pre-change annual average emissions to post-change potential emissions (assuming 8760 hours of operation a year at full capacity).[71] EPA applied the "actual-to-potential" test in the 1988 WEPCo determination to units which the Seventh Circuit later determined had begun normal source operation.[72]

39. In its WEPCo determination, EPA wrote that an "actual-to-projected actual" emissions test for NSR applicability was unsupportable.[73]

40. The Seventh Circuit rejected EPA's application of the "actual-to-potential" test to the WEPCo renovation project and held that it is unreasonable and contrary to the regulations to apply the "actual-to-potential" test to existing, operating facilities. *WEPCo*, 893 F.2d at 916-17. In a subsequent court filing, EPA characterized this portion of the *WEPCo* decision as "faulty."[74] On remand, EPA dismissed the Seventh Circuit's instructions as "incorrect" and declared that it would "*not* rely on the present hours and conditions as conclusive of post-renovation emissions."[75]

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[69] Letter from E. Reich (EPA Director of Stationary Source Enforcement) to Charles Whitmore (Chief Technical Analysis Section, EPA Region VIII) (Jan. 22, 1981) (Exh. 46).
[70] Letter from E. Reich (EPA Director of Stationary Source Enforcement) to A. Gill (General Electric) (June 24, 1981) (Exh. 47).
[71] *See*, *e.g.*, Memorandum from J. Calcagni (Manager, EPA Air Quality Management Division) to W.B. Hathaway (Director, EPA Air, Pesticides and Toxics Division) re: Request for Clarification of Policy Regarding the "Net Emissions Increase," Response to Question 3 (Sept. 18, 1989) (applying the actual-to-potential test to a unit with an operating history) (Exh. 48).
[72] Clay Memo, at 7-9 (*Pls' Fair Notice Mem., Exh. 1*).
[73] Clay Memo., at 7, n.4 (*Pls' Fair Notice Mem., Exh. 1*).
[74] Affidavit of Gregory Foote (EPA), at ¶ 5(b), *Wisc. Elec. Power Co. v. Reilly*, Nos. 88-3264, 88-1339 (7th Cir.) (Jan. 26, 1990) (Exh. 49).
[75] Letter from W. Rosenberg (EPA Ass't Administrator for Air and Radiation) to J. Boston (WEPCo) regarding EPA's Revised PSD Applicability Determination in Response to Court's Remand Order, at 7 (June 8, 1990) (emphasis added) (Exh. 50).

41. In October 1990, EPA released a draft NSR guidance document to the public, in which EPA insisted that an actual-to-potential test be used in evaluating any change to an existing unit.[76]

42. In July 1992 EPA promulgated the WEPCo Rule.[77] In the preamble to the WEPCo Rule, EPA announced that it was "amending its PSD and nonattainment NSR regulations . . . as they apply to utilities to . . . set forth an actual-to-future-actual methodology for determining whether a physical or operational change is subject to NSR[.]"[78] This test applies only where a utility has "opted-in" by complying with the WEPCo rule's reporting requirements.[79]

43. Throughout the mid-1990s, EPA continued to apply an "actual-to-potential" test in evaluating changes at existing units, notwithstanding the Seventh Circuit's instruction to the contrary in WEPCo for units that, like WEPCo, had begun normal operation.[80]

44. In its NSR "enforcement initiative," launched in the late 1990s, EPA has proffered at least five separate emissions tests. In the *TVA* and Duke cases, for example, EPA initially asserted that the "actual-to-potential" test applied to existing facilities.[81] EPA officials testified that EPA's "position [was] that the actual to potential test is *the* methodology that the [1980] regulation requires."[82] EPA later abandoned that position in the midst of the *Duke* litigation and attempted to apply the "actual-to-projected actual" test.[83] In other, related cases, EPA also has offered a variety of

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[76] EPA, Office of Air Quality Planning and Standards, "DRAFT – New Source Review Workshop Manual", at A.24-25 (Oct. 1990) (Exh. 51).
[77] 57 Fed. Reg. 32,314 (Exh. 33).
[78] *Id.* at 32,314-15 (Exh. 33).
[79] *See, e.g.*, 30(b)(6) Deposition of EPA regarding Emissions, *United States v. East Ky. Power Coop.*, No. 5:04-CV-0034-KSF (E.D. Ky.), at 0019-20 (July 20, 2005) (rough transcript) ("30(b)(6) East Ky. Emissions Dep.") (Exh. 52).
[80] *See, e.g.*, Letter from E. Glen (EPA Region III) to T. Henderson (Virginia Dep't of Envtl. Quality), at 1 (Oct. 21, 1993) (referencing, without analysis, EPA's 1990 Draft NSR Workshop Manual) (Exh. 53); Memorandum from J. Seitz (EPA's Office of Air Quality Planning and Standards) to Regional Air Directors, re: Pollution Control Projects and New Source Review (NSR) Applicability, at 15-16 (July 1, 1994) (EPA will apply an actual-to-potential test to projects that increase utilization and emissions) (Exh. 54).
[81] *See United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 640 & nn. 16-17 (M.D.N.C. 2003) ("*Duke Energy I*"); *In re Tennessee Valley Auth.*, 9 E.A.D. 357, 380 (Sept. 15, 2000).
[82] 30(b)(6) Deposition of EPA regarding Emissions, *United States v. Duke Energy Corp.*, No. 1:00CV1262 (M.D.N.C.), at 295-97 (Oct. 5, 2001) (emphasis added) (Exh. 55).
[83] *See Duke Energy I*, 278 F. Supp. 2d at 640 & nn. 16-17.

other tests, including an "actual-to-projected actual test (with pollution control)," any of "three methods of emissions calculation," and the "actual-to-potential and actual-to-projected actual" test.[84]

45. EPA witnesses have admitted that EPA enforcement personnel created their own "emissions increase" tests solely for purposes of the NSR litigation. In fact, the specific "actual-to-projected actual" formula adopted by EPA in the NSR litigation was developed by EPA's enforcement "work group" in 1998-99. The formula had never been used or publicly announced for any purpose prior to 1998-99.[85]

46. The emissions formula advanced by EPA in this case is not set forth in the NSR regulations (including the 1992 WEPCo Rule) and has not been published in the Federal Register or in any EPA guidance.[86]

47. EPA witnesses testified that the NSR rules do not contain specific instructions on how to perform a NSR emissions analysis.[87] They conceded that utilities are not required to use the formula that EPA advances in these cases, and that there is more than one way to calculate emissions for NSR purposes.[88]

48. Although EPA refers to its calculation as an "actual-to-projected actual" test, it is, as a practical matter, an "actual-to-potential" test because it "predict[s] . . . what the potential emissions would be if all of the avoided outage hours were used to produce electricity."[89]

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[84] EPA Enforcement's Post-Trial Memorandum, *In re Tennessee Valley Auth.*, Docket No. CAA-2000-04-008 (E.A.B.), at 116 (before the Environmental Appeals Board) (filed Aug. 4, 2000) (Exh. 56); Mem. Opp. Ohio Edison's Motion S.J., *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Ohio), at 53 (Nov. 29, 2002) (Exh. 57); Mem. Supp. Mot. Partial S.J., *United States v. Duke Energy Corp.*, No. 1:00CV1262 (M.D.N.C.), at 35 (Jan. 31, 2003) (Exh. 58).

[85] *See*, *e.g.*, Bourgikos Dep., at 117-20 (Exh. 40); Deposition of Bonnie Bush, at 288-89 (Dec. 10, 2004) ("12/10/04 Bush Dep.") (Exh. 59) (SEALED); Marshall Dep., at 160-61 (Exh. 42); 30(b)(6) Deposition of EPA regarding Emissions, at 50-56, 62-63 (Dec. 21, 2004) ("30(b)(6) Emissions Dep.") (Exh. 60).

[86] *See*, *e.g.*, Bourgikos Dep., at 117-20 (Exh. 40); 12/10/04 Bush Dep., at 290-92 (Exh. 59); Marshall Dep., at 153-54 (Exh. 42); 30(b)(6) Emissions Dep., at 62-63 (Exh. 60).

[87] 30(b)(6) Emissions Dep., at 43-44 (Exh. 60).

[88] 12/10/04 Bush Dep., at 293-94 (Exh. 59); 6/15/04 Bush Dep., at 171-73 (Exh. 41); 30(b)(6) Emissions Dep., at 121-23, 189-90 (Exh. 60).

[89] 6/15/04 Bush Dep., at 125 (Exh. 41); *see also* Marshall Dep., at 137-39 (Exh. 42) (EPA's formula assumes that all lost hours will be regained by a project); 30(b)(6) Emissions Dep., at 158-59 (Exh. 60) (same).

49. The emission calculation used by Plaintiffs in this case is patently inconsistent and irreconcilable with the emissions calculation that EPA did on remand in the *WEPCo* case.[90]

50. As recently as July 2005, EPA continued to state (contrary to *WEPCo*) that the 1980 regulations require the "actual-to-potential" test, not an "actual-to-projected actual" test.[91] EPA employees have testified that the only exception to the actual-to-potential test applies if a utility "opts in" to the 1992 WEPCo rule.[92]

51. On September 22, 2005, EPA's "National Super NSR Expert" testified that the NSR regulations include no specific formula for emissions calculations and that, during his long tenure with EPA, he has never seen the approach used by Plaintiffs' experts in the Cinergy case.[93]

IV. BEFORE 1999 EPA AND THE STATES NEVER SOUGHT TO ENFORCE NSR REGULATIONS FOR THE TYPES OF COMMON MAINTENANCE, REPAIR AND REPLACEMENT PROJECTS AT ISSUE IN THIS CASE.

52. EPA has long been aware that utilities operating coal-fired boilers were replacing components, such as superheaters, reheaters, cyclones, air heaters and economizers and that some utilities were undertaking life extension projects.[94] Notwithstanding EPA's longstanding awareness of numerous boiler component replacement projects, EPA never brought an enforcement action or an administrative action prior to 1999 against any utility for engaging in the types of equipment maintenance, repair and replacement activities undertaken by Cinergy.[95]

53. Before EPA began its NSR enforcement initiative, Indiana and Ohio state air regulators charged with implementing EPA's NSR programs knew about the types of activities undertaken at Cinergy's plants and other electric generating units and found that they did not trigger

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[90] Rebuttal Expert Report of Matt Harris (on behalf of Cinergy), at 2-4 (Oct. 24, 2005) (SEALED) (Exh. 61).
[91] 30(b)(6) East Ky. Emissions Dep. at 0020-32, 0042 (Exh. 52).
[92] *Id.* at 0018-20 (Exh. 52).
[93] Deposition of David Solomon, at 68-69, 183-86 (Sept. 22, 2005) (Exh. 62).
[94] *See, e.g.*, United States' Objections and Responses to Illinois Power's Second Request for Admissions, *United States v. Illinois Power Co.,* Civil Action No. 99-833-MJR (S.D. Ill.), No. 48 (Mar. 10, 2003) ("Illinois Power Emissions") (Exh. 63).
[95] *See, e.g.*, Illinois Power Admissions, Nos. 3-6 (Exh. 63).

NSR.[96] In fact, Indiana Department of Environmental Management ("IDEM") on January 17, 1997, expressly concluded that a project undertaken at a SIGECO power plant was RMRR. The project involved the replacement of tubed components and turbine blades and cost $15 million. In making this determination, IDEM applied the WEPCo factors, finding it significant that the project was (1) a "like-kind" replacement; (2) the same as or similar to other replacements "periodically" undertaken in the utility industry; and (3) merely involved the replacement of existing components with "functionally similar" components.[97]

54. Plaintiff-Intervenor Northeast States also did not apply NSR to common maintenance, repair and replacement projects like those undertaken by Cinergy.[98] Numerous other states likewise did not understand the NSR rules to have the meaning EPA now ascribes to them.[99]

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[96] *See*, *e.g.*, Deposition of R. Hodanbosi (Director, Ohio EPA), *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Oh.), at 40-46, 52-53, 55, 58-59 (Aug. 22, 2002) (*e.g.*, Ohio EPA has always worked closely with EPA and has never required air permits for boiler tube replacements or pulverizer replacements; EPA never informed Ohio EPA the state was improperly carrying out its NSR authority) (Exh. 64).

[97] Office Memorandum from J. Harney (IDEM) to P. Dubenetzksy *et al*. (Jan. 17, 1997) (Exh. 65). IDEM's conclusions were communicated to SIGECO by letter dated January 27, 1998, from Felicia George (IDEM) (Exh. 66).

[98] *See*, *e.g.*, Dep. of W. John Doolittle, III, *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Oh.) and *United States v. American Elec. Power Service Corp.*, Case No. C2-99-1182 (S.D. Oh.), at 1-3, 58-63, 67-70, 82-108, 116-21, 150-61) (Apr. 17, 2002) (excerpt appended as Exh. 67); Dep. of Anita Paulson, *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Oh.) and *United States v. American Elec. Power Service Corp.*, Case No. C2-99-1182 (S.D. Oh.), at 1-3, 46-54 (Apr. 18, 2002) (excerpt appended as Exh. 68); Dep. of Neil A. Cameron (New Jersey), *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Oh.) and *United States v. American Elec. Power Service Corp.*, Case No. C2-99-1182 (S.D. Oh.), at 1-3, 24-31, 57-58, 73-76, 83-96 (Apr. 25, 2002) (excerpt appended as Exh. 69); Dep. of Michael Cisek (New Jersey), *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Oh.) and *United States v. American Elec. Power Service Corp.*, Case No. C2-99-1182 (S.D. Oh.), at 1-3, 31-32, 37-44 (Apr. 24, 2002) (excerpt appended as Exh. 70); Dep. of Jeffrey Miller and Matthew Zehr (New Jersey), *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Oh.) and *United States v. American Elec. Power Service Corp.*, Case No. C2-99-1182 (S.D. Oh.), at 1-4, 25, 35-36, 48-50, 56-58, 61, 71-72, 79-84, 101-03, 124, 237-38 (Apr. 23, 2002) (excerpt appended as Exh. 71); Dep. of Norman Boyce (New York), *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Oh.) and *United States v. American Elec. Power Service Corp.*, Case No. C2-99-1182 (S.D. Oh.), at 1-2, 28-33 (July 11, 2002) (excerpt appended as Exh. 72); Dep. of Reginald Parker (New York), *United States v. Ohio Edison Co.*, Case No. C2-99-1181 (S.D. Oh.) and *United States v. American Elec. Power Service Corp.*, Case No. C2-99-1182 (S.D. Oh.), at 1-2, 16-18, 51-57 (July 11, 2002) (excerpt appended as Exh. 73).

[99] *See*, *e.g.*, Letter from George Meyer (Sec'y, Wisconsin Department of Natural Resources) to Francis Lyons (EPA Region V Administrator) (Oct. 18, 1999)) (Exh. 74) (stating that EPA is attempting to enforce "retroactively" an inappropriate, newly revised regulatory policy and "[t]o go back now and enforce a revised policy on sources that relied in good faith on decisions by EPA or WDNR is totally inappropriate); Letter from John M. Daniel, Jr. (Director, Air Program Coordination, Virginia Dept. of Envtl. Quality) to Bruce C. Buckheit (EPA Director, Office of Enforcement and Compliance Assurance) (Oct. 29, 1999) ("The way [EPA is] now trying to deal with routine maintenance, repair, and replacement is a significant deviation from the way EPA has considered this since the 1970s . . . If EPA wants to change the way they have [sic] historically looked at routine maintenance, repair, and replacement, they should do it by rulemaking rather than an enforcement initiative that contradicts EPA's own policies for the last 25 years or so.") (Exh. 75).

ARGUMENT

I. FAIR NOTICE REQUIRES PLAINTIFFS TO SHOW THAT EPA'S NSR INTERPRETATIONS WERE ASCERTAINABLY CERTAIN.

The fair notice doctrine is firmly grounded in constitutional due process protections. Courts uniformly have held that the fair notice doctrine prohibits courts from "validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).[100] Agencies must provide fair notice of their interpretations: "[A] regulation cannot be construed to mean what an agency intended but did not adequately express . . . . The [agency] as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards [it] has promulgated." *Gates*, 790 F.2d at 156 (citation omitted) (emphasis added).[101] Thus, courts must simply consider whether an agency has given the regulated community fair notice of its interpretation; they do not consider whether the agency's interpretation is otherwise reasonable or permissible.[102]

Not only must a regulation give fair warning of the conduct it proscribes or requires, but the regulation must also "'provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.'" *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997) (citations omitted). In practical terms, this means that the fair notice inquiry in this case involves resolution of two critical questions: (1) were the interpretations that Plaintiffs seek to impose in this case ascertainably certain at the time each of the projects occurred; and (2) even if the standards were ascertainably certain, would a reasonable utility[103] have understood that the projects in dispute would have triggered NSR requirements under those standards? The facts

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[100] *See SIGECo*, 245 F. Supp. 2d at 1010 (citing *Gates*).
[101] Plaintiffs erroneously urge the court to adopt the "at risk" standard applied in void-for-vagueness challenges. However, this Court has previously rejected that proposition, correctly focusing instead on the standard adopted in administrative cases concerning fair notice. *SIGECo*, 245 F. Supp. 2d at 1010 n. 12.
[102] *See*, *e.g.*, *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).
[103] The fair notice inquiry is based on an objective standard; thus, a defendant's subjective understanding is irrelevant to the

of this case, including the long regulatory history of the NSR rules, demonstrate that the answer to both questions is a resounding "no." At the least, the specific facts set out above show a genuine dispute that must be resolved by the ultimate fact finder – the jury. [104]

II. CINERGY IS ENTITLED TO SUMMARY JUDGMENT BECAUSE EPA HAS ADMITTED THAT INDUSTRY LACKED FAIR WARNING OF THE NSR STANDARDS EPA ADVANCES IN THIS CASE.

EPA has admitted that neither the NSR rules nor prior EPA pronouncements provided fair warning of how the Agency interpreted RMRR prior to 2003, when EPA adopted a new, more explicit RMRR rule (the "Equipment Replacement Provision" or "ERP").[105] In the preamble to the ERP rule, the Agency candidly acknowledged that "it can be difficult for the owner or operator [of an emitting unit] to know with *reasonable certainty* whether a particular activity constitutes RMRR."[106] In a proposed rule released by EPA in October 2005, EPA made this *same admission* with respect to the proper NSR emissions test.[107] In fact, EPA identified regulatory confusion over EPA's prior interpretation of the NSR emission test as a principal justification for the need to promulgate a revised test.[108] Plaintiffs' Motion omits any reference to these critical admissions. But, as much as Plaintiffs would like to ignore these admissions, they are official statements made by EPA in Agency rulemakings and are far more compelling and authoritative than the *ad hoc* litigating positions devised by EPA enforcement staff. Indeed, the D.C. Circuit has held that EPA's proposal of a new "clarifying" regulation, which is precisely what EPA has done here, is conclusive evidence that the

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fair notice question. *See*, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5 (1968) (fair warning does not turn on an "*ad hoc* appraisal of the subjective expectations of a particular defendant.").

[104] Plaintiffs bear the burden of showing that Cinergy had "actual or constructive notice" of EPA's NSR interpretations. *See*, *e.g.*, *Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25, 29 (1st Cir. 2000) ("The burden is on the Secretary to establish that Beaver had actual or constructive notice…."). However, even if the evidentiary burden were assigned to Cinergy, the existence of a genuine issue of material fact precludes summary judgment.

[105] 68 Fed. Reg. 61,248 (Exh. 1).

[106] *Id.* at 61,250 (emphasis added) (Exh. 1).

[107] Statement Of Material Facts In Dispute ("SF") ¶ 2.

[108] *Id.*

"agency itself has recognized that its [prior] interpretation" of the regulation was "not apparent" to the regulated community. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1331 (D.C. Cir. 1995).[109]

EPA's admissions in its recent rulemakings are consistently echoed by EPA witnesses who have been deposed in this case. Those witnesses have uniformly testified that neither the "routine at the unit" interpretation (including the specific factors upon which EPA places great weight) nor the emission test they seek to apply in this case was ever announced in a regulation, EPA guidance or any other Agency statement *prior* to the commencement of EPA's enforcement initiative. [110]

In light of these admissions, Plaintiffs' Fair Notice Motion offends the fundamental principle that citizens are entitled to "some minimum standard of decency, honor, and reliability in their dealings with their Government."[111] More importantly, these admissions are fatal to Plaintiffs' NSR claims and compel entry of summery judgment in favor of Cinergy with respect to all NSR claims. They also indisputably preclude summary judgment for Plaintiffs.

III. THE TOTALITY OF THE FACTS DEMONSTRATE LACK OF NOTICE.

A. Determining Whether EPA Has Provided Fair Notice Requires A Fact-Intensive Inquiry.

If the Court does not agree that EPA's admissions resolve the fair notice issue squarely in Cinergy's favor, the determination whether Cinergy had fair warning of Plaintiffs' NSR positions is an issue that turns on disputed material facts specific to this case.[112] This Court previously recognized that the fair notice question in the NSR enforcement context is fundamentally different from the typical fair notice case, in which an appellate court is presented with a well-developed administrative record and must determine only whether fair notice was provided on the basis of that

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[109] The court went on to state that by clarifying the regulation, EPA lent support to GE's argument that it lacked fair notice of EPA's interpretation. *Gen. Elec. Co.,* 53 F.3d at 1332.
[110] *See* SF ¶¶ 30-36, 45-47, 51.
[111] *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60-61 (1984).
[112] The Seventh Amendment guarantees Cinergy's right to a trial by jury on liability issues. *See Tull v. United States*, 481 U.S. 412 (1987) (finding that a defendant is entitled to a trial by jury on liability whether the government seeks civil

factual record. *SIGECo*, 245 F. Supp. 2d at 1012. Here, the fact finder must carefully examine disputed facts arising during the relevant time period to determine whether EPA provided fair warning that the types of projects undertaken by Cinergy were subject to NSR at the time those projects were undertaken. This includes consideration not only of what EPA has said and done over the past thirty years, but also what EPA has *not* said and *not* done. In addition, the inquiry requires a painstaking assessment of the weight to be given to various evidence, as well as an evaluation of the credibility of witnesses.

This Court has observed: "Although the degree of ambiguity required for a regulation to violate fair notice is unclear, courts have considered a number of factors to be relevant guides in the inquiry." *SIGECo*, 245 F. Supp. 2d at 1011. For example, particularly compelling evidence that a regulation is unclear exists where "the agency's own interpretive bodies were unable to discern clearly" the requirements that the agency sought to enforce. *Gen. Elec. Co.*, 53 F.3d at 1333. In addition, where the "regulations and other policy statements are unclear, where the [regulated entity's] interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished." *Id.* at 1334. Other relevant considerations include, but are not limited to, whether the agency has taken action in the past that conflicts with its current interpretation of a regulation;[113] whether "agency personnel give conflicting advice to private parties about how to comply";[114] what public statements the agency has made regarding the regulatory interpretation; and whether those statements have been clear and

penalties and/or injunctive relief in an environmental case).

[113] *Gen. Elec. Co.,* 53 F.3d at 1329.

[114] *Rollins Envt'l Servs., Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991).

consistent.[115] In *SIGECO* this Court found that factors such as these must be examined in light of the specific facts and circumstances present in that case. *SIGECo*, 245 F. Supp. 2d at 1011.

Given the existence of numerous disputed, material facts and the strong "federal policy favoring jury decisions of disputed fact questions," *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958) , the question of fair notice must be resolved by a jury in this case.

B. The Sharp Disagreement Among The Federal Courts As To The Correct NSR Standards Validates Cinergy's Lack of Fair Notice.

Since EPA commenced its enforcement initiative, a number of federal courts have considered whether the NSR interpretations now advanced by EPA were the "law" at any time prior to 1999. Those courts are split as to whether EPA's current articulation of the law – with respect to both RMRR and the emissions test – was in fact the law. The mere existence of this indisputable disagreement among the courts is itself clear and convincing evidence that the legal standards which Plaintiffs seek to enforce here were not – and could not have been – ascertainably certain at the time that any of the Cinergy projects were undertaken.

Plaintiffs cannot avoid these facts by contending that Cinergy's fair notice defenses were resolved by this Court's prior ruling in *SIGECo*. This Court's ruling in *SIGECo* is not dispositive here for a number of reasons. First, the Court addressed SIGECo's motion claiming that SIGECo lacked notice of EPA's position that the RMRR determination *did not turn* predominantly on whether an activity was commonplace or frequent in the industry. Cinergy does not, and has not maintained, that RMRR is measured exclusively by frequency within the industry. Second, the Court focused on a relatively limited time period – 1988 to 1997 – because all of the SIGECo projects were post-WEPCo. Third, the Court issued its ruling before the recent authoritative EPA actions that fatally undermine Plaintiffs' litigating position. Fourth, as noted below, two recent federal district court decisions have faulted EPA for seeking to implement newly-minted interpretations in its NSR

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[115] *SIGECo*, 245 F. Supp. 2d at 1011.

litigation. Fifth, to the extent that the Court deferred to EPA's position on RMRR in the *TVA* case, that position was nullified by the Eleventh Circuit and is not entitled to deference.[116] Finally, the Court in *SIGECo* was not presented with the question of whether industry had fair notice of the emissions test advanced by EPA.

1. The Federal Courts Disagree Regarding The Legal Standard For RMRR.

Only one federal court has held that EPA's position that RMRR is to be evaluated based solely on what is "routine" at an electric generating unit is correct. *See United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) ("*Ohio Edison*") (concluding that the statute compels the narrow interpretation espoused by EPA). Even that court recognized the "abysmal breakdown in the administrative process following the passage of the landmark Clean Air Act," noting that "[f]or thirty-three years, various administrations have wrestled with and, to a great extent, have avoided a fundamental issue addressed in the Clean Air Act, that is, at what point plants built before 1970 must comply with new air pollution standards."[117]

Two federal courts in three separate opinions have held that, consistent with legislative intent and longstanding EPA regulations and practice, RMRR (including the application of the WEPCo factors) must be evaluated based exclusively on industry practice. *See Duke Energy I*, 278 F. Supp. 2d at 638 ("[T]he WEPCo factors – nature and extent, purpose, frequency, and cost – must be analyzed and applied in reference to the source or industry category"); *Alabama Power*, 372 F. Supp. 2d at 1307 ("The RMRR exclusion applies to projects that are routine within the industry, by which is meant work of a type performed commonly within the industry, although perhaps infrequently at any specific one or more . . . plants"); *National Parks Conservation Ass'n v. Tennessee Valley Auth.*, No. 01-403-VEH, slip op. (N.D. Ala. Sept. 7, 2005) (Exh. 76).

[116] *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003).
[117] *Id*. at 832.

In early 2003, before EPA issued the ERP rule and presented with a more limited time period, this Court adopted a hybrid approach. *See United States v. So. Ind. Gas & Elec. Co.*, 2003 WL 446280 (S.D. Ind. 2003) (deferring to EPA but finding that industry practice is also relevant to the RMRR inquiry); *see also SIGECo*, 245 F. Supp. 2d 994 (concluding, on the specific facts of that case, that SIGECO had fair notice of EPA's test after WEPCo for its post-WEPCo projects).

The fact that there is now a disagreement among the federal courts on the RMRR standard is strong evidence that EPA, through its regulations and public statements, did not make its interpretation of RMRR ascertainably certain. At a minimum, it demonstrates that there is a genuine issue of material fact for the jury regarding whether EPA gave regulated parties fair notice of its interpretation.

2. The Federal Courts Also Disagree On The Legal Standard For Evaluating Emission Increases Under The NSR Rules.

The federal courts which have addressed the specific emissions test that is required by the NSR rules also are split. The courts disagree whether the statutory definition of "modification" in CAA § 111(a) compels that hours and conditions of operation be held constant when determining whether a project will cause a significant net emissions increase under the NSR rules (*i.e.*, whether there first must be an increase in the hourly emission rate). The disagreement among the courts further supports the conclusion that EPA's interpretation of the NSR emissions increase test is not ascertainably certain.

Three federal courts have rejected the test advanced by EPA in this case, holding that the term "modification" must be interpreted the same for both NSPS and NSR purposes and, consequently, that hours and conditions of operations must be held constant in determining whether a particular project will result in a significant net emissions increase.[118] Two courts, including this Court, have

[118] *See United States v. Duke Energy Corp.*, 411 F.3d 539, 550 (4th Cir. 2005) (the CAA mandates that EPA interpret "modification" in the same manner for NSPS and NSR regulatory purposes) (*"Duke Energy II"*); *Duke Energy I*, 278 F.

reached the opposite conclusion, embracing the NSR emissions test advanced by EPA.[119] This Court, however, has observed that the proper emission test is "reasonably contested" and that Cinergy's position is "not without support."[120]

In sum, the disagreement between the federal courts as to the proper emissions test under the NSR rules supports a finding that EPA's interpretation was not ascertainably certain at the time the Cinergy projects occurred. At the very least, this disagreement also raises a genuine and material dispute between the parties that must be resolved by the jury.

C. EPA's Non-Enforcement Against Utilities Is Compelling Evidence That The NSR Regulations Did Not Have The Meaning EPA Now Ascribes To Them.

EPA never brought a single NSR enforcement action against a utility company in nearly thirty years[121] even though projects like those at issue here were common throughout the industry and well known to EPA.[122] Long standing Supreme Court decisions clearly establish that EPA's wholesale failure to take enforcement action for more than twenty (20) years is powerful evidence that the interpretations EPA now espouses were not the "law" and were not ascertainably certain at the time that any of the Cinergy projects took place.

The Supreme Court has held that an agency's long history of non-enforcement that contradicts an agency's current interpretation of law is compelling evidence that the law did not have the meaning that the agency presently ascribes to it. *See BankAmerica Corp. v. United* States, 462 U.S. 122 (1983); *Federal Power Comm'n v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).[123]

Supp. 2d at 640 (The CAA compels that "a net emissions increase can result only from an increase in the hourly rate of emissions"); *Alabama Power*, 372 F. Supp. 2d at 1307 ("Emission increases, for purposes of NSR/PSD analysis, are calculated only on the basis of 'maximum hourly emission rates', not 'annual actual emissions'. Maximum hourly emissions must increase before PSD permitting is triggered; greater annual facility utilization is irrelevant to the analysis.").

[119] *See United States v. Cinergy Corp.*, Order on Cross-Motions For Partial Summary Judgment Regarding The Applicable Test For Emissions Increases, No. 1:99-cv-01693 (Aug. 29, 2005) (Docket No. 553) (disagreeing with district court decision in *Duke Energy* and adopting the actual-to-potential test espoused by EPA); *Ohio Edison*, 276 F. Supp. 2d 829 (adopting EPA's "actual-to-projected actual" test with limited statutory and regulatory analysis).

[120] Order on Defendants' Motion To Certify (Oct. 4, 2005) (Docket No. 612).

[121] *See* SF ¶ 52; *see also* 62 Fed. Reg. 36948, 36947 (July 9, 1997) (Exh. 77).

[122] *See* SF ¶ 53.

[123] *See also Nat'l Classification Comm'n v. United States*, 746 F.2d 886 (D.C. Cir. 1984) (applying the reasoning of the

EPA cannot blithely chalk up almost three decades of inaction to prosecutorial discretion; rather, EPA's conduct in this case amounts to "awesome inaction"[124] that prohibits enforcement of the interpretations EPA advances in this case.

Generally, the "[a]uthority actually granted by Congress . . . cannot evaporate through lack of administrative exercise." *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941). However, the existence of a well-established, long-held practice of non-enforcement establishes that the NSR regulations, as historically interpreted and applied, did not give EPA the authority to enforce the interpretations it seeks to impose here. When confronted with similar attempts to enforce a statutory or regulatory provision in a way that contradicts a longstanding practice of non-enforcement, the Supreme Court has consistently rejected the new interpretation advanced by an agency. For instance, in 1949, the Supreme Court held that an agency's "[f]ailure to use [its enforcement] power for [over ten years] indicates to us that the [agency] did not believe the power existed." *Federal Power Comm'n*, 337 U.S. at 513. In reaching this decision, the Supreme Court relied on the fact that the agency, like EPA here, was well aware that industry had historically engaged in the very practices the agency currently sought to proscribe. *Id.*

The Supreme Court reached the same conclusion in the *BankAmerica* case, declining to adopt a Federal Trade Commission ("FTC") interpretation of law on the grounds that the FTC failed for over sixty years to enforce the law in the manner it sought the court to adopt. 462 U.S. at 131. In that case, the Court was sharply critical of the FTC's conduct: "We find it difficult to believe that the Department of Justice and the [FTC], which share authority for enforcement of the Clayton Act, and the Congress, which oversees those agencies, would have overlooked or ignored the pervasive and open practice . . . had it been thought contrary to the law." *Id.* at 130-31. The Court further opined:

"[J]ust as established practice may shed light on the extent of power

BankAmerica decision).

[124] *Nat'l Classification Comm'n*, 746 F.2d at 892.

> conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

Id. at 131 (quoting *Bunte Bros.*, 312 U.S. at 352). In short, where, as here, an "agency offers an interpretation fundamentally at odds with that which its consistent past behavior defined as the scope of the [law]," courts must reject the new interpretation of law urged by the agency. *Nat'l Classification Comm.* , 746 F.2d at 892. This is especially true where, as in this case, the agency's new legal interpretation is announced for the first time in litigation.

IV. EPA DID NOT PROVIDE CINERGY WITH FAIR NOTICE OF THE RMRR PROVISION AS THE AGENCY SEEKS TO APPLY IT HERE.

A. Nothing In The Statute, The Regulations, EPA Guidance, Agency Pronouncements Or EPA's Prior Conduct Provides Fair Notice Of EPA's Current RMRR Interpretation.

In addition to EPA's own admissions and the fact that the federal courts are in conflict, the specific facts set out in the Statement Of Material Facts In Dispute and discussed further below demonstrate that the electric utility industry, including Cinergy, lacked notice of the novel RMRR interpretation that EPA seeks to impose.

1. Neither The CAA Nor The Regulations Provide Fair Notice Of EPA's RMRR Interpretation.

The first question facing the court is "whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations." *Gen. Elec. Co.*, 53 F.3d at 1329. This Court has already concluded that the meaning of the RMRR provision is not clear on its face, finding that the provision is "ambiguous" and that EPA's interpretation is not "'ascertainably certain' to people of good faith solely based on its text." *SIGECo*, 245 F. Supp. 2d at 1013. The Court further stated that "it would be difficult for a regulated party to know with 'ascertainable certainty' from this brief clause how the EPA would interpret the routine maintenance exemption and apply it to industry projects." *SIGECo*, 245 F. Supp. 2d at 1014.

With the regulation failing to provide fair notice, EPA resorts to arguing that Cinergy had fair notice because the RMRR "exclusion under the 1980 and 1992 rules applies to a narrow range of activities." Pls.' Fair Notice Mem. at 18. This argument is groundless. Indeed, for EPA to make this argument in its brief is astonishing given the EPA Administrator's official and very public disavowal of that position. Indeed, the Administrator, in the preamble to the ERP rule, declared in 2003 that "there is nothing in the legislative history of the 1977 Amendments, which created the NSR program, to suggest that Congress intended to force all then-existing sources to go through NSR."[125] The Agency reiterated this position only five months ago when it reconsidered and "finalized" the ERP rule, stating that the Agency "no longer interpret[s] the language or structure of the NSR provisions of the Act as an expression of Congress' intent to limit 'grandfathering' through the indirect means of the 'modification' provision rather than through other provisions that clearly can reach all existing sources," such as the Clean Air Act Acid Rain Program.[126] Moreover, EPA relied on its express authority under the CAA to adopt a more expansive interpretation of RMRR that, if applied here, would require dismissal of the case.

2. EPA's Public Pronouncements Demonstrate That EPA's Current RMRR Interpretation Was Not Ascertainably Certain.

Plaintiffs urge this Court to look no further than the WEPCo applicability determination and the Seventh Circuit's ruling concerning WEPCo for notice of EPA's current RMRR interpretation. The RMRR provision, however, has a thirty year history, and WEPCo adds but one small piece to the RMRR fair notice puzzle. In any event, (i) WEPCo obviously could not provide notice for any activity that occurred before EPA issued the WEPCo determination; and (ii) WEPCo does not provide fair notice of the specific positions Plaintiffs have taken in this litigation. Thus, the jury in

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[125] 68 Fed. Reg. at 61,273 (Exh. 1).
[126] 70 Fed. Reg. at 33,840 (Exh. 39).

this case must consider not only WEPCo, but also what EPA said and did both before and after WEPCo.

The RMRR provision has been a significant part of the NSR programs since the first of those programs, the NSPS program, was implemented three decades ago. Until the initiation of EPA's enforcement action against a number of electric utility companies in 1999, the plain language of the rule and EPA's repeated statements and actions established a clear and consistent understanding of RMRR that is in direct conflict with EPA's current RMRR-at-the-unit test.

i. From The 1970s Until 1988 EPA Interpreted Routine Based On Industry Practice And Whether An Activity Would Affect Original Design Capacity.

The RMRR provision was incorporated into the NSPS regulations in the early 1970s, making it clear that activities that were RMRR "for a source category" were not "physical changes."[127] That provision remains part of the NSPS rules today and served as the basis for the RMRR provision that was promulgated as part of the NSR regulations in 1974.[128] From 1974 until 1988, EPA made a number of public statements about the meaning of RMRR. All these statements reiterated three main points:

- The replacement of old equipment with equipment of the same capacity is RMRR;[129]
- Replacements that are less than "reconstruction," a term defined in the NSPS rules[130], are RMRR;[131] and
- RMRR is based on industry practice and the replacement of pulverizers with equipment of similar design, economizers, superheaters, reheaters, watertubes, feedwaters and combustion chambers are RMRR for the electric utility

[127] SF ¶¶ 3, 6.
[128] *See* SF ¶ 4; *see also SIGECo*, 245 F. Supp. 2d at 1008, n. 10 (EPA did not intend any differences between the NSPS and NSR definitions of "RMRR").
[129] SF ¶ 10.
[130] The term "reconstruction" means, in pertinent part, the replacement of components at a fixed capital cost that "exceeds fifty percent of the fixed cost that would be required to construct a comparable facility." 40 C.F.R. § 60.15(b).
[131] SF ¶ 9.

industry.[132]

These were the *only* authoritative statements available to the regulated community. And, nothing EPA said or did between 1974 and 1988 contradicted or undermined these authoritative statements, let alone suggested the extremely narrow RMRR interpretation that EPA advocates today.

In light of these statements, a reasonable utility company would not, and should not, have concluded that the types of projects at issue in this case – functionally-equivalent (*i.e.*, like kind) replacements that did not increase the units' capabilities beyond their original design[133] – did not constitute RMRR. Thus, Plaintiffs' view that the projects at Beckjord Units 1, 2 and 3, the three projects at issue that were conducted before 1988, were not RMRR was far from ascertainably certain at the time those projects occurred.

ii. WEPCo Did Not Provide Fair Notice Of EPA's New "Routine-At-The-Unit" Interpretation.

Plaintiffs argue that WEPCo applicability determination and the Seventh Circuit's *WEPCo* decision put the regulated community on notice of EPA's RMRR-at-the-unit only interpretation in 1990. While Plaintiffs characterize the WEPCo determination and Seventh Circuit decision in 1990 as watershed events, neither EPA's applicability determination in WEPCo nor the Seventh Circuit decision in that matter provided fair notice that RMRR would be evaluated based solely on maintenance practices at a particular unit, rather than with reference to maintenance practices within the electric utility industry. Those decisions adopted, for the first time, general criteria that could be used to evaluate RMRR based on industry practice, but they did not signal a departure from EPA's longstanding interpretation and application of the RMRR provision. Nor did they establish any bright line test for making RMRR determinations. Even if the *WEPCo* decisions did reflect a newer, narrower interpretation of RMRR, nothing in those decisions suggests that the small, individual

[132] SF ¶¶ 8 and 12.
[133] *See* SF ¶¶ 8, 10, 12.

component replacement projects like those at issue here rose to the level of the "massive" and "unprecedented" WEPCo projects.[134]

Moreover, Plaintiffs' claim that the WEPCo administrative determination resolved, once and for all, the interpretation of the RMRR provision cannot be reconciled with the plain language of the EPA WEPCo documents or with the Seventh Circuit decision that followed. Although RMRR at the unit was one factor considered by EPA, it did not predominate the Agency's RMRR analysis.[135] The Clay Memorandum, which held that the Port Washington project did not qualify for the RMRR provision, stated that the proposed work was of a type "that would normally occur only once or twice during a unit's expected life cycle" and that it involved one component that had "[n]ever been replaced at any of [WEPCo's] coal-fired electrical generating facilities.[136] However, in affirming the conclusions in the Clay Memo, the EPA Administrator found WEPCo's proposed activity was unprecedented in the industry as a whole. Based on a survey of forty power plant life extension projects, "EPA did not find, even a single instance of renovation work at any electric utility generating station that approached the Port Washington life extension project in nature, scope or extent…."[137] This agency survey was cited approvingly by the Court of Appeals in upholding EPA's finding.[138]

Of course, if EPA had applied the RMRR provision to WEPCo as it seeks to do here, there would have been no need to spend more than one year evaluating whether the Port Washington project was RMRR, and there would have been no need to compare the Port Washington project to, and distinguish that project from, life extension activities undertaken at forty other power plants, *including* Cinergy's Beckjord Unit 1.[139] Similarly, if the Seventh Circuit, in affirming EPA's

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[134] *See* SF ¶¶ 21-22 and 24-26.
[135] *See* SF ¶¶ 14-18.
[136] Clay Memo, at 3 (*Pls' Fair Notice Mem., Exh. 1*).
[137] *WEPCo, supra.,* 893 F.2d at 911 (citing Respondent's Brief at 44).
[138] *Id.*
[139] *See* SF ¶¶ 18-19.

applicability determination, had applied the test EPA advances here, a substantial portion of that appellate decision would be surplusage.

In addition, EPA witnesses deposed in this case and other NSR cases repeatedly and consistently have testified that the "WEPCo factors" provide no meaningful guidance – *e.g.*, no one factor weighs more than any other – and that other criteria, unspecified as of 1999 when EPA commenced this action, are relevant to the RMRR inquiry.[140] Indeed, as the facts above demonstate, determining whether a project is or is not RMRR is subject entirely to the whims of EPA staff, and even individual EPA staff members can reach opposing conclusions. In light of this testimony, it is evident that the WEPCo factors do not themselves provide fair warning of any new or different RMRR standard.[141]

iii. After WEPCo, EPA Reassured Congress And The Public That Its Interpretation of RMRR Based On Industry Practice Remained Unchanged.

After WEPCo, EPA repeatedly assured Congress, the electric utilities and the public that the Agency had not adopted a narrower, more stringent RMRR interpretation and that utility maintenance projects like those in dispute here would not trigger NSR requirements unless they were similar to WEPCo.[142] The EPA Administrator wrote to Congress that the Agency was aware of other life extension projects, including the Beckjord Unit 1 project, but that it had not detected any NSR violations in connection with those projects.[143] Among other pronouncements, EPA policy officials confirmed that "WEPCo's life extension project is not typical of the majority of utilities' life

[140] *See* SF ¶¶ 30-36.
[141] Plaintiffs' citation to two communications from a lawyer for an industry trade group do not establish "fair notice." *See* Letter from Utility Air Resources Group, Edison Electric Institute, *et al*. to U.S. Dep't of Energy (June 1989) (Pls. Exh. 19); and H. Nickel (Counsel for Utility Air Resources Group) to W. Reilly (EPA Administrator) (Jan. 1990) (Pls. Exh. 21). EPA's public statements and its conduct after *WEPCo* – including EPA's official statements in the *Federal Register* – demonstrate that any concerns industry had about a possible narrower reading of *WEPCo* were unfounded.
[142] *See* SF ¶¶ 15-16, 18-25.
[143] SF ¶ 15.

extension projects, and concerns that the agency will broadly apply the ruling . . . are unfounded,"[144] and they further advised Congress that "USEPA's WEPCo decision applies only to utilities proposing 'WEPCo type' changes" and "the ruling is not expected to significantly affect power plant life extension projects."[145]

In 1992, EPA adopted a final rule, known as the "WEPCo Rule."[146] In the preamble to that rule, EPA reiterated that the WEPCo decisions did not reflect a change in EPA policy and that RMRR determinations continued to turn "on a case-by-case" inquiry "*based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.*"[147] Although Plaintiffs attempt to dismiss the significance of this authoritative statement from EPA, this was the first and only formally published statement by the Agency prior to the commencement of this case.[148]

Not once prior to 1999 did EPA state or even hint to the regulated community that RMRR must be determined exclusively based on unit-specific practices. Moreover, the majority of specific criteria EPA seeks to apply in this case (*e.g.*, whether a project is capitalized, whether the work must be done during an "outage," whether the component replaced is of a "considerable size") were not identified as relevant factors in WEPCo and were not publicly announced by EPA *until a full six months after Cinergy and other utilities were sued in 1999.*[149]

Finally, the states (including Indiana, Ohio and Plaintiff-Intervenor States) which are charged with implementing the NSR programs under EPA oversight had the same understanding as the

[144] SF ¶ 21.
[145] SF ¶ 22.
[146] 57 Fed. Reg. 32,314 (Exh. 33).
[147] *Id.* at 32,326 (emphasis added) (Exh. 33).
[148] EPA has recently confirmed that the preamble to the WEPCo Rule represented EPA's official approach to RMRR. 68 Fed. Reg. 61,248 (Exh. 1).
[149] *See* SF ¶ 26.

electric utility industry – like-kind replacement projects such as those undertaken by Cinergy were RMRR and would not trigger NSR requirements.[150]

At bottom, the totality of the evidence that the electric utility industry (including Cinergy) lacked fair notice of the RMRR interpretation advanced here is substantial and compelling, demonstrating a genuine dispute that can be resolved only by the jury.

B. Even If The RMRR Standard Was Ascertainably Certain, A Reasonable Utility Would Not Have Understood It To Prohibit The Projects In Dispute.

It is not enough for Plaintiffs to show that the RMRR-at-the-unit-only standard was reasonably ascertainable. They must also prove that a reasonable utility would have understood that the projects in dispute would not have been RMRR under that standard. The facts set out above unequivocally show that a reasonable utility, such as Cinergy, would not have concluded that its projects were not RMRR based on all available information at the time. For instance, (1) each project in dispute involved the replacement of a component (or portion thereof) with a functionally equivalent component that did not impact the original design capabilities of the units; (2) each project was substantially smaller in size, scope and cost than the WEPCo project; and (3) EPA explicitly identified all of the components replaced in this case (*e.g.*, replacement of pulverizers and tubed components) as RMRR because they are common in the industry.[151] In addition, EPA itself recognized that the WEPCo project was different from what Plaintiffs consider to be one of the most significant projects at issue in this case – the Beckjord Unit 1 project.[152] Based on these uncontestable facts, Plaintiffs' claims of fair warning fail.

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[150] *See* SF ¶¶ 53-54.
[151] *See* SF ¶ 8.
[152] *See*, *e.g.*, Clay Memo (*Pls' Fair Notice Mem., Exh. 1*).

V. CINERGY DID NOT HAVE FAIR NOTICE OF THE EMISSION TEST ADVOCATED BY PLAINTIFFS.

A. The Emissions Test EPA Advances In This Litigation Was Not Ascertainably Certain When Cinergy Undertook The Projects In Question.

In an effort to divert attention from its made-for-litigation emissions formula, Plaintiffs erroneously contend that Cinergy claims it lacked fair notice that the NSR emission test is based on total annual emissions.[153] Plaintiffs wholly mischaracterize Cinergy's position. Cinergy lacked fair notice of Plaintiffs' method for calculating annual emissions – including Plaintiffs' failure to hold hours and conditions of operation constant and Plaintiffs' selection of a specific increase test to apply in this case.

This Court's Order of September 8, 2005 (Docket No. 558) (holding that the CAA and NSR Rules do not require holding hours and conditions of operation constant) did not resolve these fair notice issues. This Court did not address the question of whether the test it adopted or the specific methods by which Plaintiffs seek to apply that test in this case were ascertainably certain to the public at the time the projects at issue in this case took place. Nor did this Court determine whether a utility would have concluded with reasonable certainty that the projects at issue would have resulted in a significant net emissions increase under Plaintiffs' test. This Court did, however, note that there was support for divergent views and that the proper test is "reasonably contested."[154]

Although the CAA defines "modification" the same for the NSPS programs, EPA recognizes that "[t]he Act is silent . . . on the issue of how one is to determine whether a physical change or operational change increases the amount of any air pollutant emitted by the source."[155] The NSR regulations at issue, which have been in place since 1980, shed little additional light on the test to be applied in determining whether a project will increase emissions within the meaning of the rules. The

[153] Pls.' Mem. at 13.
[154] Order On Defendants' Motion To Certify, at 2 (Docket No. 612).
[155] 67 Fed. Reg. 80,186, 80,199 (Dec. 31, 2002) (Exh. 78).

rules simply require a comparison of pre-project "actual emissions" to anticipated post-project "actual emissions." The NSR rules define "actual emissions" as:

> the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date [of the project] and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.[156]

The rules provide no further guidance on specific data to be used, assumptions to be made, or methodology to be applied.

From the mid-1980s to the present EPA has been completely inconsistent regarding the appropriate emissions test to be applied under the NSR rules. Contemporaneous with the promulgation of the 1980 NSR rules, EPA made it clear that the first step in calculating annual emissions was to assess whether a project would result in an hourly emission rate increase.[157] By the mid to late 1980s, EPA adopted a different test – the "actual-to-potential" test – and applied that test to new construction, as well as projects undertaken at existing units.[158] In 1990, the Seventh Circuit soundly and unequivocally rejected application of the actual-to-potential test to units that had begun normal source operations, such as the Cinergy units at issue.[159] Yet, EPA immediately disavowed the test enunciated by the Seventh Circuit, calling it "faulty" and "incorrect."[160] From 1990 until recently, EPA has continued to advocate the actual-to-potential test for all sources and has even advanced application of that test in the NSR cases against utilities.[161]

EPA's uncertainty and equivocation is readily apparent in the NSR enforcement cases. Indeed, EPA has urged different courts to apply different approaches and, in many instances, has

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[156] 45 Fed. Reg. at 52,732 (Exh. 15).
[157] *See* SF ¶ 37.
[158] *See* SF ¶ 38.
[159] SF ¶ 40, *WEPCo*, 893 F.2d at 916-17.
[160] SF ¶ 40.
[161] *See* SF ¶ 41-44, 48, 50.

advanced multiple, and strikingly different, approaches in the same case.[162] By EPA's own admission, the specific test or tests that it seeks to apply in this case are not contained in the NSR rules or any EPA guidance and did not even exist until 1998 or 1999 when EPA was developing its NSR enforcement strategy against Cinergy and other utilities.[163]

Plaintiffs argue that, regardless of contradictory facts, by 1992 EPA had provided explicit notice of the test it seeks to apply here through the WEPCo Rule.[164] In that rulemaking, EPA adopted an alternative, optional test for utilities to determine whether projects would result in a significant net increase in emissions. However, EPA has acknowledged that this new test applies only to those who "opt-in" to the 1992 WEPCo Rule.[165] For all other utilities and other industrial sources, EPA continued to advocate applying the actual-to-potential test – contrary to *WEPCo*. Even if the WEPCo test could be applied to Cinergy, EPA witnesses in this case have admitted that the specific formula they seek to apply was never publicly announced prior to the commencement of this litigation and is nothing more than the "actual-to-potential" test dressed in sheep's clothing.[166]

Plaintiffs' claims of fair notice also are contravened by EPA's admission that it has not provided fair warning of the specific legal test for determining whether an activity will result in an emissions increase and that "it can be difficult for the owner or operator to know with reasonable certainty whether a particular activity would trigger major NSR."[167] In sharp contrast to the unsupported litigating statements of Plaintiffs, this admission was made by the EPA Administrator and EPA officials with responsibility for developing and implementing CAA NSR programs, and was publicly released as part of the formal rulemaking process.

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[162] *See* SF ¶ 44.
[163] *See* SF ¶¶ 45-48.
[164] 57 Fed. Reg. 32,314 (Exh. 33).
[165] *See* SF ¶ 42.
[166] *See* SF ¶ 45-48.
[167] SF ¶ 2.

These facts and the additional facts set out in the Statement Of Material Facts In Dispute above raise a genuine dispute between the parties and preclude a finding of summary judgment in Plaintiffs' favor.

B. A Reasonable Utility Would Not Have Concluded That The Cinergy Projects Would Result In Emission Increases Under Plaintiffs' Emission Test.

A reasonable utility would not have concluded with ascertainable certainty that any of the Cinergy projects would have triggered NSR requirements for a variety of reasons.

First, Plaintiffs' own emission calculations in this case undermine their claims of fair notice. Currently, there are now approximately twenty-nine component replacement projects in dispute.[168] Plaintiffs, using their own formulae, fail to calculate – and indeed cannot show – an anticipated significant net increase in (1) any regulated pollutant (*i.e.*, nitrogen oxides, sulfur dioxide or particulate matter) resulting from six of the twenty-nine projects in dispute; (2) nitrogen oxide emissions resulting from seventeen of the twenty-nine projects at issue; (3) sulfur dioxide emissions resulting from six of the twenty-nine projects; and (4) particulate matter emissions resulting from twenty-six of the twenty-nine projects.[169] In fact, for a number of projects, Plaintiffs project substantial *decreases* in annual emissions. A test method that predicts emission increases *less* than half of the time cannot be said to provide ascertainable certainty to the regulated community that the Cinergy projects would be expected to trigger NSR if that test is applied.

In addition, Cinergy witnesses have testified that regardless of the specific test that applied, they had no reason to expect that the projects undertaken would have resulted in *any* increase in emissions on either an annual or hourly basis. This is because the projects involved like-kind (*i.e.*, functionally equivalent) replacements that merely maintained the units at or near their original

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[168] The number of projects in dispute is "approximate" because Plaintiffs appear to aggregate multiple projects together and treat other projects as separate, independent projects. Moreover, Plaintiffs have dropped a number of claims.

[169] *See* Expert Report of Dr. Richard Rosen, at 34-36 (May 19, 2005) (Exh. 1 to Cinergy's Memorandum In Support Of Motion For Summary Judgment On Claims Based On Projects For Which Plaintiffs Show No Emissions Increase (Docket

operating capabilities.[170] In the words of one Cinergy witness, the approach that EPA seeks to impose here is "naïve" and does not reflect the way that coal-fired generating units are maintained and operated within the Cinergy system or elsewhere in industry.[171] Therefore, even if the emissions test that Plaintiffs advocate were ascertainably certain, Cinergy engineers had no reason to believe that any of the Cinergy projects would trigger NSR requirements under Plaintiffs' test or any other test. States charged with implementing the NSR program reached the same conclusion for similar utility equipment maintenance, repair and replacement projects.[172]

The soundness of Cinergy's conclusions is corroborated by recent analyses performed by EPA and the Department of Energy ("DOE") in support of the ERP rulemaking. In connection with the ERP rulemaking, EPA, DOE and others conducted modeling analyses to evaluate the potential emissions impacts of the ERP rule if implemented. The studies conclusively demonstrate that projects like those undertaken by Cinergy are likely to have no adverse emissions impact and, in many cases, will result in emission reductions. EPA's own study of the power industry revealed that treating projects *precisely like those in dispute here* as RMRR "will *not* have a significant impact, up or down, on emissions from the power sector."[173] Analyses conducted by DOE for EPA similarly found that "efficiency improvements resulting from increased maintenance, repair and replacement are expected to decrease emissions, whereas availability improvements are expected to increase emissions. . . . [However,] the emissions reductions from assumed reductions in heat rates tended to dominate the corresponding effects of the assumed availability increases."[174] Thus, EPA has in fact determined that equipment maintenance, repair and replacement projects like those in dispute are not expected to have any adverse emissions consequences, regardless of how emissions are measured.

No. 573)).

[170] *See*, *e.g.*, 30(b)(6) Deposition of Cinergy regarding Gibson Station, at 101 (June 6, 2005) (Exh. 79) (SEALED).

[171] Deposition of Kevin Hammersmith, at 166-67 (July 7, 2004) (Exh. 80) (SEALED).

[172] *See* SF ¶¶ 53-54.

[173] 68 Fed. Reg. at 61,264 (emphasis added) (Exh. 1).

[174] *Id.*

These ERP analyses support the reasonable conclusions reached by industry (including Cinergy) and sharply contradict the conclusion that Plaintiffs ask the fact finder in this case to reach – namely, that Cinergy should have known that its projects were likely subject to NSR requirements under EPA's proffered emission test.

VI. CINERGY WAS NOT ON ACTUAL NOTICE.

As an argument of last resort, Plaintiffs contend that Cinergy had actual notice of the RMRR and emissions test advanced by Plaintiffs. That contention is wrong.

Plaintiffs base their claims of actual notice on two statements by a Cinergy environmental engineer. In 1988, the environmental engineer (then employed by PSI) wrote that "[i]f [EPA's WEPCo] determination stands it will have a severe impact on the industry and could possibly affect the company's equipment optimization work."[175] During the same environmental engineer's deposition, he acknowledged that the NSR rules are triggered by a significant net increase in annual emissions.[176] Neither of these statements supports a finding that Cinergy had notice of EPA's RMRR or emission test interpretations.

First, the fact that an individual employee was aware of general agency statement about the meaning and application of the agency's regulations cannot establish that Cinergy was on actual notice that EPA contended that Cinergy's conduct was prohibited under those interpretations.[177] Rather, by law, actual notice can exist *only* where EPA explicitly communicates to the regulated party that its specific conduct is subject to regulation.[178] Because EPA never provided that notice here, EPA has not offered, and indeed cannot offer, any evidence of actual notice to Cinergy. To the

[175] Pls' Fair Notice Mem., Exh. 20.
[176] Pls' Fair Notice Mem., Exh. 25.
[177] *Hoechst Celanese*, 128 F.3d at 226 (a company's awareness of general agency statements about the meaning and application of its regulations does not establish actual notice).
[178] *Id*. at 228-29.

contrary, EPA's specific actions regarding Cinergy's Beckjord Station in fact indicated that EPA did *not* believe the projects triggered NSR.

Second, as discussed above, there is no dispute that NSR requirements are triggered by a significant net increase in total annual emissions. The dispute has been and remains what the proper emissions test is for determining whether a project is expected to result in an increase in total annual emissions. Consequently, the engineer's acknowledgement has no bearing on whether Cinergy had fair notice regarding the specific formulae and methodologies that Plaintiffs urge the Court to adopt here. For this additional reason, Plaintiffs' claims of actual notice fail.

CONCLUSION

For the foregoing reasons, Cinergy's Cross-Motion should be granted. Alternatively, Cinergy has demonstrated that there is a genuine dispute for trial and that there is substantial, probative evidence favoring Cinergy for a jury to return a verdict for Cinergy on its fair notice defenses. Accordingly, Plaintiffs' Fair Notice Motion must be denied.

DATED: November 8, 2005

Respectfully Submitted,

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

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