

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF NEW YORK, et al., :
 :
 Plaintiffs, : Civil Action No. C2-04-1098
 :
 v. : Judge Edmund A. Sargus, Jr.
 :
 AMERICAN ELECTRIC POWER : Magistrate Judge Norah McCann
 SERVICE CORPORATION, et al., : King
 :
 Defendants. :

**ANSWER OF DEFENDANTS, AMERICAN ELECTRIC POWER
SERVICE CORPORATION, APPALACHIAN POWER COMPANY, AND
COLUMBUS SOUTHERN POWER COMPANY**

Defendants, American Electric Power Service Corporation (“AEPSC”),
Appalachian Power Company (“APCo”), and Columbus Southern Power Company
 (“CSP”) (hereinafter collectively referred to as “AEP”), by and through counsel, hereby
respond to the allegations in the Complaint filed by the States of New York, Connecticut,
New Jersey, Vermont, New Hampshire, Maryland, Rhode Island, and the Commonwealth
of Massachusetts (hereinafter the “Plaintiff States”) and deny each and every allegation in
the Complaint, except to the extent expressly admitted below.

INTRODUCTION

The Plaintiff States’ claims concern alleged violations of certain pre-
construction permitting requirements under the federal Clean Air Act (“CAA” or the
“Act”). In particular, the Plaintiff States contend that certain actions undertaken many
years ago by AEP to assure that their existing facilities were ready and able to provide
safe, reliable and adequate electric power to their customers triggered pre-construction

permitting requirements under the Prevention of Significant Deterioration (“PSD”) and Nonattainment New Source Review (“NNSR”) programs and related provisions of the relevant State Implementation Plans (“SIPs”) of Ohio and West Virginia. The PSD and NNSR are collectively referred to here as “New Source Review Programs” or “NSR Programs.”

Decades ago the United States Environmental Protection Agency (“EPA”) promulgated regulations establishing the foundation of the New Source Review Programs which are in existence today. Those regulations provided then, as they do now, that the New Source Review provisions of the Act do not apply to a multitude of measures necessary to maintain facilities which were in existence at the time the New Source Review provisions became effective and to assure the continued safe and reliable operation of those existing facilities consistent with original design characteristics. For years, EPA has interpreted the New Source Review Program regulations in a common-sense manner by evaluating specific projects in light of prevailing industry standards. AEP and others in industry relied upon the plain language of the New Source Review Program regulations, EPA’s historical interpretations and EPA’s repeated public affirmations that the New Source Review requirements are not intended to preclude normal repair and replacement activities that increase efficiency or reliability or lower operating costs at existing sources.

In 1999, ignoring fundamental principles of due process and fair notice, EPA and a number of others, including several of the Plaintiff States, launched an effort to change these longstanding rules by developing and selectively enforcing a new, more restrictive definition. *See, e.g., United States v. Duke Energy Corp.*, 278 F.Supp.2d 619

(M.D. N.C. 2003). Not only are the Plaintiff States attempting to apply, implement and selectively enforce these new rules prospectively, they are attempting to apply, implement and selectively enforce these new rules through enforcement actions for activities undertaken as long as seventeen years ago. EPA and the Plaintiff States were well aware of the nature and scope of the activities undertaken by AEP and others in the utility industry and at no time informed them that such practices were unlawful. Consequently, this lawsuit represents an unwarranted and illegal attempt to reinvent the law.

The Plaintiff States have long sought to assign blame for the air quality problems in the northeastern United States to utility companies located in the Midwest, rather than seeking to adequately control sources of air emissions located in their own States. *See, e.g., State of New York v. Gorsuch*, C.A. no. 82-3426, slip op. (6th Cir. 1983) (finding that Ohio SIP provisions for SO₂ adequately protected the ambient air quality of local and distant air quality regions). In a more recent settlement, EPA acknowledged that a number of the Plaintiff States (New York, New Jersey, Connecticut and Massachusetts) have failed to take appropriate action to control emissions of pollutants that cause or contribute to the formation of ozone in that region, and EPA agreed to take steps to address the shortcomings of the air pollution control programs in those States. *Midwest Ozone Group v. Browner*, C.A. No. 1:00CV01047 (D.D.C. November 3, 2000) (consent decree).

In the meantime, AEP has taken proactive steps to control emissions at many of its facilities, reducing emissions of SO₂ and NO_x through the installation of control equipment, improved combustion techniques, use of alternative fuels, and other

measures. In Ohio alone, SO₂ and NO_x emissions from AEP facilities have been reduced by 51 percent and 44 percent, respectively, since the mid-1990s.

Therefore, even if the Plaintiff States could persuade this Court that this new, more restrictive interpretation of the New Source Review programs should be applied in this case, they cannot demonstrate that the activities that are the subject of their claims triggered the New Source Review requirements of the CAA.

NATURE OF THE ACTION

1. AEP admits that the Plaintiff States purport to bring this action pursuant to 42 U.S.C. §§7604 (a) for alleged violations of the Prevention of Significant Deterioration (“PSD”) and Non-Attainment New Source Review (“NNSR”) provisions of the Clean Air Act (“CAA”), 42 U.S.C. §§ 7470-7479, and 7502-7503, respectively (collectively referred to hereinafter as “NSR”). AEP further admits that AEPSC, APCo and CSP are subsidiaries of American Electric Power Company, Inc. AEP denies each and every other allegation in Paragraph 1 of the Complaint.

2. AEP denies each and every allegation in Paragraph 2 of the Complaint.

3. Paragraph 3 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 3 of the Complaint.

4. Paragraph 4 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 4 of the Complaint.

5. Paragraph 5 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 5 of the Complaint.

6. Paragraph 6 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 6 of the Complaint.

7. Paragraph 7 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 7 of the Complaint.

8. Paragraph 8 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 8 of the Complaint.

9. Paragraph 9 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 9 of the Complaint.

10. Paragraph 10 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 10 of the Complaint.

11. Paragraph 11 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 11 of the Complaint.

12. Paragraph 12 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 12 of the Complaint.

13. Paragraph 13 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 13 of the Complaint.

14. Paragraph 14 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 14 of the Complaint.

15. Paragraph 15 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 15 of the Complaint.

16. Paragraph 16 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 16 of the Complaint.

17. Paragraph 17 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 17 of the Complaint.

18. Paragraph 18 of the Complaint contains conclusions of law to which no response is required, and no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 18 of the Complaint.

19. Paragraph 19 of the Complaint contains no allegations directed against AEP to which an answer is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 19 of the Complaint.

20. AEP admits that the Plaintiff States purportedly seek the relief set out in Paragraph 20 of the Complaint. AEP denies that any claim has arisen, that AEP has violated or has any liability under the CAA or related regulations, that the CAA authorizes the relief sought, or that the Plaintiff States are entitled to any relief against AEP. Paragraph 20 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 20 of the Complaint.

JURISDICTION AND VENUE

21. AEP admits that this Court would have subject matter jurisdiction over properly pled claims under 42 U.S.C. §§ 7604(a) and 7477, and/or 28 U.S.C. §§ 1331 and 1335. AEP denies that any such claim has arisen, that AEP has violated or has any liability under the CAA or related regulation, that the CAA authorizes the relief sought, or that the Plaintiff States are entitled to any relief against AEP.

22. AEP denies that venue is proper in this District with respect to each Defendant, that each of the Defendants resides or can be found in this District, that each of the Defendants is subject to personal jurisdiction in this District, and/or that any substantial part of the events or omissions giving rise to the claims asserted in the Complaint occurred in this District.

ALLEGATIONS COMMON TO ALL CLAIMS

23. AEP admits that AEPSC is a New York corporation, headquartered in Columbus, Ohio, and a subsidiary of American Electric Power Company, Inc. AEP denies each and every other allegation in Paragraph 23 of the Complaint.

24. AEP admits that APCo is a Virginia corporation with its principal place of business in Roanoke, Virginia, a subsidiary of American Electric Power Company, Inc., and provides electric utility services in Virginia and West Virginia. AEP further admits that APCo owns and operates Unit 2 at the John E. Amos Generating Station, located in St. Albans, West Virginia. AEP denies each and every other allegation in Paragraph 24 of the Complaint.

25. AEP admits that CSP is an Ohio corporation with its principal place of business in Columbus, Ohio, a subsidiary of American Electric Power Company, Inc., and provides regulated electric utility transmission and distribution services in certain portions of Ohio. AEP further admits that CSP owns a portion of Unit 4, owns Units 5 and 6, and operates the Conesville Generating Station located in Coshocton County, Ohio. AEP denies each and every other allegation in Paragraph 24 of the Complaint.

26. AEP admits that American Electric Power Company, Inc. is a New York corporation, and a public utility holding company that owns all outstanding shares of AEPSC and the common stock of APCo and CSP. AEP denies each and every other allegation in Paragraph 26 of the Complaint.

27. Paragraph 27 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 27 of the Complaint.

The “AEP System”

28. AEP denies each and every allegation in Paragraph 28 of the Complaint.

29. AEP admits that certain subsidiaries of American Electric Power Company, Inc. are parties to an interconnection agreement that has been approved by the Federal Energy Regulatory Commission, and that the generating units owned by the parties to that agreement are physically interconnected. AEP denies each and every other allegation in Paragraph 29 of the Complaint.

30. AEP admits that certain subsidiaries of American Electric Power Company, Inc. are parties to a transmission agreement that has been approved by the Federal Energy Regulatory Commission, and that the transmission facilities of the parties to that agreement are physically interconnected. AEP denies each and every other allegation in Paragraph 30 of the Complaint.

31. AEP admits that certain subsidiaries of American Electric Power Company, Inc. are parties to an interim allowance agreement that has been approved by the Federal Energy Regulatory Commission. AEP denies each and every other allegation in Paragraph 31 of the Complaint.

32. AEP admits that certain subsidiaries of American Electric Power Company, Inc. engage in wholesale electric transactions and sales to non-affiliated companies. AEP denies each and every other allegation in Paragraph 32 of the Complaint.

33. AEP denies each and every allegation in Paragraph 33 of the Complaint.

34. AEP denies each and every allegation in Paragraph 34 of the Complaint.

35. AEP denies each and every allegation in Paragraph 35 of the Complaint.

36. AEP denies each and every allegation in Paragraph 36 of the Complaint.

37. Paragraph 37 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 37 of the Complaint.

STATUTORY AND REGULATORY BACKGROUND

38. Paragraph 38 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 38 of the Complaint.

39. Paragraph 39 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 39 of the Complaint.

40. Paragraph 40 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 40 of the Complaint.

41. Paragraph 41 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 41 of the Complaint.

Prevention of Significant Deterioration

42. Paragraph 42 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 42 of the Complaint.

43. Paragraph 43 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 43 of the Complaint.

44. Paragraph 44 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 44 of the Complaint.

45. Paragraph 45 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 45 of the Complaint.

46. Paragraph 46 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 46 of the Complaint.

47. Paragraph 47 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 47 of the Complaint.

48. Paragraph 48 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 48 of the Complaint.

49. Paragraph 49 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 49 of the Complaint.

50. Paragraph 50 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 50 of the Complaint.

51. Paragraph 51 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 51 of the Complaint.

52. Paragraph 52 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 52 of the Complaint.

53. Paragraph 53 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 53 of the Complaint.

54. Paragraph 54 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 54 of the Complaint.

Non-Attainment New Source Review

55. Paragraph 55 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 55 of the Complaint.

56. Paragraph 56 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 56 of the Complaint.

57. Paragraph 57 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 57 of the Complaint.

58. Paragraph 58 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 58 of the Complaint.

59. Paragraph 59 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 59 of the Complaint.

60. Paragraph 60 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 60 of the Complaint.

State Regulatory Provisions

A. Ohio

61. Paragraph 61 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 61 of the Complaint.

62. Paragraph 62 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 62 of the Complaint.

63. Paragraph 63 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 63 of the Complaint.

64. Paragraph 64 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 64 of the Complaint.

65. Paragraph 65 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 65 of the Complaint.

66. Paragraph 66 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 66 of the Complaint.

67. Paragraph 67 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 67 of the Complaint.

B. West Virginia

68. Paragraph 68 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 68 of the Complaint.

69. Paragraph 69 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 69 of the Complaint.

70. Paragraph 70 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 70 of the Complaint.

71. Paragraph 71 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 71 of the Complaint.

72. Paragraph 72 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 72 of the Complaint.

Enforcement Provisions

73. Paragraph 73 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 73 of the Complaint.

74. Paragraph 74 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 74 of the Complaint.

75. Paragraph 75 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 75 of the Complaint.

FIRST CLAIM FOR RELIEF

(Amos Unit 2)

76. AEP admits that the John E. Amos Generating Station (Amos) includes three steam electric generating units, that Unit 1 was placed in service in 1971, that Unit 2 was placed in service in 1972, and that Unit 3 was placed in service in 1973. AEP denies each and every remaining allegation in Paragraph 76 of the Complaint.

77. AEP denies each and every allegation in Paragraph 77 of the Complaint.

78. Paragraph 78 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 78 of the Complaint.

79. Paragraph 79 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 79 of the Complaint.

80. Paragraph 80 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 80 of the Complaint.

81. Paragraph 81 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 81 of the Complaint.

82. Paragraph 82 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that it has or has had any obligation to comply with the PSD permitting requirements at Amos, or that projections of emissions are or were required to be performed. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 82 of the Complaint.

83. Paragraph 83 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 83 of the Complaint.

84. Paragraph 84 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that modifications

occurred or that a PSD permit is or has been required for any activities at Amos. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 84 of the Complaint.

85. Paragraph 85 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that any demonstration of impacts in any air quality control region or any of the other substantive requirements of the referenced provisions of the CAA or related regulations are or have been required for any activities at Amos. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 85 of the Complaint.

86. Paragraph 86 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that any best available control technology (“BACT”) control requirements for SO₂ or NO_x have been or are required to be implemented at Amos. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 86 of the Complaint.

87. Paragraph 87 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 87 of the Complaint.

88. Paragraph 88 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that any PSD permits, BACT controls, or any other substantive requirements of the referenced CAA provisions or related regulatory requirements are or have been applicable to any activities at Amos. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 88 of the Complaint.

89. Paragraph 89 of the complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that any violations of the CAA have arisen or will continue based on the activities at Amos alleged in the Complaint. To the extent any further answer is required, AEP denies each and every allegation in paragraph 89 of the Complaint.

90. Paragraph 90 of the Complaint contains conclusions of law to which no response is required. To the extent that an answer is required, AEP denies each and every allegation in Paragraph 90 of the Complaint.

SECOND CLAIM FOR RELIEF

(Conesville Units 4, 5 and 6)

91. AEP admits that the Conesville Generating Station (“Conesville”) includes six steam electric generating units, that Unit 1 was placed in service in 1959, that Unit 2 was placed in service in 1957, that Unit 3 was placed in service in 1962, that Unit 4 was placed in service in 1973, that Unit 5 was placed in service in 1976, and that Unit 6 was placed in service in 1978. AEP denies each and every remaining allegation in Paragraph 91 of the complaint.

92. AEP denies each and every allegation of Paragraph 92 of the Complaint.

93. Paragraph 93 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 93 of the Complaint.

94. Paragraph 94 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 94 of the Complaint.

95. Paragraph 95 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 95 of the Complaint.

96. Paragraph 96 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 96 of the Complaint.

97. Paragraph 97 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that it has or has had any obligation to comply with the PSD permitting requirements at Conesville, or that projections of emissions are or were required to be performed. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 97 of the Complaint.

98. Paragraph 98 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 98 of the Complaint.

99. Paragraph 99 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that modifications occurred or that a PSD permit is or has been required for any activities at Conesville. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 99 of the Complaint.

100. Paragraph 100 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that any demonstration of impacts in any air quality control region or any of the other substantive requirements

of the referenced provisions of the CAA or related regulations are or have been required for any activities at Conesville. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 100 of the Complaint.

101. Paragraph 101 of the Complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that any BACT control requirements for SO₂ or NO_x have been or are required to be implemented at Conesville. To the extent that any further answer is required, AEP denies each and every allegation in Paragraph 101 of the Complaint.

102. Paragraph 102 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 102 of the Complaint.

103. Paragraph 103 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 103 of the Complaint.

104. Paragraph 104 of the Complaint contains conclusions of law, and contains as an underlying assumption conclusions of law, to which no response is required. AEP denies that any installation of controls, obtaining of emission offsets, certification of compliance, or demonstration of relative costs and benefits is or has been required at Conesville. To the extent any further answer is required, AEP denies each and every allegation in Paragraph 104 of the Complaint.

105. Paragraph 105 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 105 of the Complaint.

106. Paragraph 106 of the complaint contains as an underlying assumption conclusions of law to which no response is required. AEP denies that any violations of the CAA have arisen or will continue based on the activities at Conesville alleged in the Complaint. To the extent any further answer is required, AEP denies each and every allegation in paragraph 106 of the Complaint.

107. Paragraph 107 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, AEP denies each and every allegation in Paragraph 107 of the Complaint.

DEFENSES

First Defense

The Complaint fails to state any PSD claim upon which relief can be granted because the Plaintiff States cannot prove that each of the activities set out in their Complaint was “non-routine” as required by the PSD regulations and was, therefore, a “major modification” subject to the PSD requirements. EPA’s and the relevant SIP PSD requirements apply only to “*major modifications*” involving certain physical or operational changes. 40 C.F.R. §§ 51.166(b)(2)(i) and 52.21(b)(2)(i). Further, the PSD program does not cover activities involving “routine maintenance, repair or replacement.” 40 C.F.R. §§ 51.166(b)(2)(iii)(a) and 52.21(b)(2)(iii)(a). Therefore, the Plaintiff States are not entitled to relief for a specific PSD claim unless they can show that the change at issue was “non-routine.” Because a showing that a change is “non-routine” is a material element of any PSD claim, the Plaintiff States’ inability to prove such element is fatal to each of the Plaintiff States’ PSD claims.

Second Defense

The Complaint fails to state any PSD claim upon which relief can be granted because the Plaintiff States cannot prove that each of the changes set out in their Complaint was not a permissible increase in the “hours of operation” or “production rate” as authorized by the PSD regulations and was, therefore, a “major modification” subject to the PSD requirements. As stated above, EPA’s and the relevant SIP PSD requirements apply only to “*major modifications*” involving certain physical or operational changes. 40 C.F.R. §§ 51.166(b)(2)(i) and 52.21(b)(2)(i). Further, the PSD program does not cover activities involving merely an increase in the hours of operation or in the production rate. 40 C.F.R. §§ 51.166(b)(2)(i) and 52.21(b)(2)(iii)(f). The Plaintiff States are not entitled to relief for a specific PSD claim unless they can show that each change at issue did not constitute merely an increase in the hours of operation or the production rate. Because a showing that a change is not merely an increase in the hours of operation or the production rate is a material element of any PSD claim, the Plaintiff States’ inability to prove such element is fatal to each of the Plaintiff States’ PSD claims.

Third Defense

The Complaint fails to state any PSD claim upon which relief can be granted because the Plaintiff States cannot prove that each of the activities set out in their Complaint “resulted in” an increase in emissions. In order to show that a specific activity constituted a “major modification” subject to PSD requirements, the Plaintiff States must demonstrate that there was a “causal link” between each activity alleged in the Complaint and any contemporaneous increase in the emission rate of a regulated pollutant as required by the CAA and EPA’s and the relevant SIP PSD regulations. 42 U.S.C.

§§ 7475 and 7479(2)(C); 40 C.F.R. §§ 51.166(b)(2)(i) and 52.21(b)(2)(i). The Plaintiff States cannot make this requisite showing for each alleged activity because any increase in emissions occurring contemporaneously with an alleged activity was attributable to independent factors, including but not limited to weather, demand growth, changes in generation mix or utilization. Here the Plaintiff States have failed even to allege a “causal link” between each activity set out in the Complaint and any contemporaneous increase in emissions in a regulated pollutant. Because such proof of a “causal link” is a material element of any PSD claim, the Plaintiff States’ failure to allege such element and the Plaintiff States’ inability to prove such element are fatal to each of the Plaintiff States’ PSD claims.

Fourth Defense

The Complaint fails to state any PSD claim upon which relief can be granted because the Plaintiff States cannot prove that each of the activities set out in the Complaint resulted in a “significant” net increase in emissions of a regulated pollutant. In addition to demonstrating a causal relationship between an alleged activity and a contemporaneous increase in emissions, EPA’s and the relevant SIP PSD rules and guidance require the Plaintiff States to show that the difference between pre- and post-change emission rates is “significant.” 40 C.F.R. §§ 51.166(b)(2)(i), 51.166(b)(21), 51.166(b)(23), 52.21(b)(2)(i), 52.21(b)(21) and 52.21(b)(23). Because a showing that an activity resulted in a “significant” increase in emissions of a regulated pollutant is a material element of any PSD claim, the Plaintiff States’ inability to prove such element is fatal to each of the Plaintiff States’ PSD claims.

Fifth Defense

The Complaint fails to state any PSD claim upon which relief can be granted because the Plaintiff States cannot prove the emission rates used by the Plaintiff States to calculate any asserted “significant ” net emissions increase associated with a particular activity are “representative” of normal operations at a particular electric steam generating unit. 40 C.F.R. §§ 51.166(b)(2)(i), 51.166(b)(21), 51.166(b)(23), 52.21(b)(2)(i), 52.21(b)(21) and 52.21(b)(23). In addition to demonstrating a causal relationship between an alleged activity and a contemporaneous increase in emissions, EPA’s and the relevant SIP PSD rules and guidance require the Plaintiff States to show that the difference between pre- and post-change emission rates is “significant.” To establish a PSD violation for an electric steam generating unit, the Plaintiff States must prove that (1) the periods used to calculate the pre-change and post-change emission rates are “representative” of normal operations at the unit (40 C.F.R. §§ 51.166(b)(21), 51.166(b)(23), 52.21(b)(21) and 52.21(b)(23)); and (2) the post-change emission rate exceeds the pre-change emissions rate by a “significant” amount. Because a showing that any “ significant” emissions increase is based on a comparison of “representative” pre-change and post-change emission rates is a material element of any PSD claim, the Plaintiff States’ inability to prove such element is fatal to each of the Plaintiff States’ PSD claims.

Sixth Defense

The Complaint fails to state any PSD claim upon which relief can be granted. Specifically, the Plaintiff States cannot prove a material element of each PSD claim – namely, that each alleged “modification” resulted not only in a significant net annual

increase in emissions but also that each such “modification” resulted in an increase in the *hourly pollutant emission rate* of a regulated pollutant. In accordance with the plain language of the CAA and Congressional intent, this requirement (*i.e.*, a showing that a particular activity resulted in an increase in the hourly emission rate), which is a key element of the NSPS definition of “modification,” has been incorporated into the PSD program. 42 U.S.C. §§ 7411 and 7479 (2)(C); 40 C.F.R. § 60.14. Because a showing that a particular activity resulted in an increase in the hourly emission rate of a regulated pollutant is a material element of a PSD claim, the Plaintiff States’ failure to allege it in the Complaint and the Plaintiff States’ inability to prove such element are fatal to the the Plaintiff States’ PSD claims.

Seventh Defense

The Complaint fails to state any NNSR claim upon which relief can be granted because the Plaintiff States cannot prove that each of the activities set out in the Complaint was “non-routine” as required by the NNSR regulations and was, therefore, a “major modification” subject to the NNSR requirements. EPA’s and the relevant SIP NNSR requirements apply only to “*major modifications*” involving certain physical or operational changes. 40 C.F.R. §§ 51.165(a)(1)(v)(A) and 52.24(f)(5). Further, the NNSR program does not cover activities involving “routine maintenance, repair or replacement.” 40 C.F.R. §§ 51.165(a)(1)(v)(C)(1) and 52.24(f)(5)(iii)(a). Therefore, the Plaintiff States are not entitled to relief for a specific NNSR claim unless they can show that the activity at issue was “non-routine.” Because a showing that an activity is “non-routine” is a material element of any NNSR claim, the Plaintiff States’ inability to prove such element is fatal to each of the Plaintiff States’ NNSR claims.

Eighth Defense

The Complaint fails to state any NNSR claim upon which relief can be granted because the Plaintiff States cannot prove that each of the activities set out in the Complaint was something other than a permissible increase in the “hours of operation” or “production rate” as authorized by the NNSR regulations and was, therefore, a “major modification” subject to the NNSR requirements. As stated above, EPA’s and the relevant SIP NNSR requirements apply only to “*major modifications*” involving certain physical or operational changes. 40 C.F.R. §§ 51.165(a)(1)(v)(A) and 52.24(f)(5). Further, the NNSR program does not cover activities involving merely an increase in the hours of operation or in the production rate. 40 C.F.R. §§ 51.165(a)(1)(v)(C)(6) and 52.24(f)(5)(iii)(f). The Plaintiff States are not entitled to relief for a specific NNSR claim unless they can show that each activity at issue did not constitute merely an increase in the hours of operation or the production rate. Because a showing that an activity is not merely an increase in the hour of operation or the production rate is a material element of any NNSR claim, the Plaintiff States’ inability to prove such element is fatal to each of the Plaintiff States’ NNSR claims.

Ninth Defense

The Complaint fails to state any NNSR claim upon which relief can be granted because the Plaintiff States cannot prove that each of the activities set out in the Complaint “resulted in” an increase in emissions. In order to show that a specific activity constituted a “major modification” subject to NNSR requirements, the Plaintiff States must demonstrate that there was a “causal link” between each activity alleged in the Complaint and any contemporaneous increase in the emission rate of a regulated

pollutant as required by the CAA and EPA's and the relevant SIP NNSR regulations. 42 U.S.C. § 7503; 40 C.F.R. §§ 51.165(a)(1)(v)(A) and 52.24(f)(5)(i). The Plaintiff States cannot make this requisite showing for each alleged activity because any increase in emissions occurring contemporaneously with an alleged activity was attributable to independent factors, including but not limited to weather, demand growth, changes in generation mix or utilization. Here the Plaintiff States have failed even to allege a "causal link" between each activity set out in the Plaintiff States' Complaint and any contemporaneous increase in emissions in a regulated pollutant. Because such a showing is a material element of any NNSR claim, the Plaintiff States' failure to allege it in the Complaint and the Plaintiff States' inability to prove such element are fatal to each of the Plaintiff States' NNSR claims.

Tenth Defense

The Complaint fails to state any NNSR claim upon which relief can be granted because the Plaintiff States cannot prove that each of the activities alleged in the Complaint resulted in a "significant" net increase in emissions of a regulated pollutant. In addition to demonstrating a causal relationship between an alleged activity and a contemporaneous increase in emissions, EPA's and the relevant SIP NNSR rules and guidance require the Plaintiff States to show that the difference between pre- and post-change emission rates is "significant." 40 C.F.R. §§ 51.165(a)(1)(v)(A), 51.165(a)(1)(vi), 51.165(a)(1)(x), 52.24(f)(5)(i), 52.24(f)(6) and 52.24(f)(10). Because an allegation that an activity resulted in a "significant" increase in emissions of a regulated pollutant is a material element of any NNSR claim, the Plaintiff States' inability to prove such element is fatal to each of the Plaintiff States' NNSR claims.

Eleventh Defense

The Complaint fails to state any NNSR claim upon which relief can be granted because the Plaintiff States cannot prove that the emission rates used to calculate any asserted “significant” net emissions increase associated with a particular activity are “representative” of normal operations at a particular electric steam generating unit. 40 C.F.R. §§ 51.165(a)(1)(v)(A), 51.165(a)(1)(vi), 51.165(a)(1)(x), 51.165(a)(1)(xii), 52.24(f)(5)(i), 52.24(f)(6), 52.24(f)(10) and 52.24(f)(13). In addition to demonstrating a causal relationship between an alleged activity and a contemporaneous increase in emissions, EPA’s and the relevant SIP NNSR rules and guidance require the Plaintiff States to show that the difference between pre- and post-change emission rates is “significant.” To establish a NNSR violation for an electric steam generating unit, the Plaintiff States must prove that (1) the periods that they use to calculate the pre-change and post-change emission rates are “representative” of normal operations at the unit (40 C.F.R. §§ 51.165(a)(1)(xii) and 52.24(f)(13)); and (2) the post-change emission rate exceeds the pre-change emissions rate by a “significant” amount. Because a showing that any “significant” emissions increase is based on a comparison of “representative” pre-change and post-change emission rates is a material element of any NNSR claim, the Plaintiff States’ inability to prove it is fatal to each of the Plaintiff States’ NNSR claims.

Twelfth Defense

The Complaint fails to state any NNSR claim upon which relief can be granted. Specifically, the Plaintiff States cannot prove a material element of each NNSR claim – namely, that each alleged “modification ” resulted not only in a significant net annual increase in emissions but also that each such “modification” resulted in an increase in the

hourly pollutant emission rate of a regulated pollutant. In accordance with the plain language of the CAA and Congressional intent, this requirement (*i.e.*, a showing that a particular activity resulted in an increase in the hourly emission rate), which is a key element of the NSPS definition of “modification,” has been incorporated into the NNSR program. CAA §§ 111 and 171(4), 42 U.S.C. §§ 7411 and 7501(4); 40 C.F.R. § 60.14. Because a showing that a particular activity resulted in an increase in the hourly emission rate of a regulated pollutant is a material element of a NNSR claim, the Plaintiff States’ failure to allege it in the Complaint and the Plaintiff States’ inability to prove such element is fatal to the Plaintiff States’ NNSR claims.

Thirteenth Defense

The Complaint fails to state any PSD claim concerning federal “Class 1” areas upon which relief can be granted because the Plaintiff States cannot prove a material element of their claim – namely, that any Plaintiff State is a federal trustee or land manager of such “Class 1” areas and, accordingly, is empowered to bring such a claim. *See, e.g.*, 42 U.S.C. § 7473(b)(1) and 7475(d). The Plaintiff States’ inability to prove that they are federal trustees or land managers for such areas under the Act is fatal to the Plaintiff States’ PSD claims regarding “Class 1” areas.

Fourteenth Defense

The Complaint fails to state any SIP general permitting claim upon which relief can be granted because the Plaintiff States cannot prove that each activity alleged in the Complaint violated applicable provisions set out in the Ohio and West Virginia SIPs. The Plaintiff States’ inability to prove that each activity violated the applicable provisions of the relevant SIP is fatal to the Plaintiff States’ SIP claims.

Fifteenth Defense

The Complaint fails to state any federal PSD or NNSR claim upon which relief can be granted. During the relevant time period covered by the Complaint, some of the relevant States (*i.e.*, the States of Ohio and West Virginia) had in place federally approved SIPs that operated in lieu of the federal NSR program provisions. Because the Complaint fails to properly allege a violation of the relevant SIP provisions the Complaint fails to state a claim upon which relief can be granted.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Plaintiff States cannot maintain this action as it relates to activities at Amos because venue is improper in this District.

Second Affirmative Defense

The Plaintiff States cannot maintain this action as it relates to Defendant APCo because the Court lacks personal jurisdiction over APCo.

Third Affirmative Defense

The Plaintiff States may not maintain this action as it relates to PSD violations associated with emissions of nitrogen oxides (“NOx”) because EPA never complied with the requirements of the CAA, 42 U.S.C. § 7476(a) and (c), to provide “specific numerical measures against which permit applications may be evaluated.” Specifically, EPA has never established, through notice-and-comment procedures required by the Administrative Procedure Act, numerical measures for NOx increments that satisfy the criteria set out in the CAA. More than twenty years after Congress directed EPA to establish such standards for NOx, EPA has made only one attempt to regulate NOx

pollutants under the PSD program in 1988, and that attempt was soundly rejected by the D.C. Circuit in 1990 as inconsistent with the statutory mandate of the CAA.

Environmental Defense Fund, Inc. v. EPA, 898 F.2d 183 (D.D.C. 1990). Therefore, because of the Agency's disregard for its statutory obligation and its failure to adhere to public notice-and-comment requirements established by § 553 of the Administrative Procedure Act, 5 U.S.C. § 553, the Plaintiff States lack the authority under the PSD program to enforce PSD claims with respect to NO_x emissions.

Fourth Affirmative Defense

The Plaintiff States' purported collateral attacks on and interference with State NSR and other SIP determinations is unlawful and in violation of the due process clause of the Fifth Amendment of the United States Constitution and §§ 113, 167, 171-178 and 182 of the CAA, 42 U.S.C. §§ 7413, 7477, 7501-08, 7511a and 7604(a). For many of the activities alleged in the Complaint, the applicable State SIP was interpreted in a manner contrary to that now apparently claimed by the Plaintiff States. The Plaintiff States are not allowed to retroactively change another State's interpretation of its own SIP. Indeed, it is a State's interpretation of its own SIP that deserves deference, not the Plaintiff States' interpretation. Thus, where a State has determined that its SIP did not apply to certain types of activities, the Plaintiff States cannot now second-guess that interpretation.

Fifth Affirmative Defense

The claims asserted against AEP are barred by the applicable statute of limitations, 28 U.S.C. § 2462, because the Plaintiff States assert these claims more than five years after the violations alleged in the Complaint first accrued. The "continuing

offense” doctrine is inapplicable to these alleged PSD, NNSR and SIP violations because the obligation to comply with the PSD, NNSR and SIP provisions ceased upon the commencement of construction, and the CAA explicitly does not convert such actions into “continuing” violations. 42 U.S.C. §§ 7470-7492 (PSD); 42 U.S.C. §§ 7501-7515 (NNSR); and 42 U.S.C. § 7410 (governing SIP provisions). Furthermore, 28 U.S.C. § 2462, on its face and by virtue of the “concurrent remedy” doctrine, bars the Plaintiff States’ claims for both civil penalties and injunctive relief for all of the alleged PSD and NNSR violations occurring more than five years ago.

Sixth Affirmative Defense

The claims asserted against AEP are barred by fundamental principles of due process and fair notice because the AEP is prejudiced by the Plaintiff States’ failure to raise claims, some of which relate to activities which occurred more than fifteen (15) years ago, until now. Accordingly, the legal principles of due process and fair notice bar the Plaintiff States’ claims for both civil penalties and injunctive relief for all of these stale claims.

Seventh Affirmative Defense

The interpretations of the PSD and NNSR requirements espoused by the Plaintiff States in the Complaint (*e.g.*, its interpretation of “routine maintenance, repair or replacement”) are unsupported by the current regulations implementing the CAA. In order to enforce these interpretations as legally valid, binding norms, EPA must promulgate new rules in accordance with the public notice-and-comment requirements set out in § 553 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553. Because EPA has

failed to adhere to those APA requirements here, the Plaintiff States' interpretations of the PSD and NNSR requirements as advanced in this case are invalid and unenforceable.

Eighth Affirmative Defense

The claims asserted against the AEP Companies are barred by principles of due process and fair notice that prohibit the retroactive application of a statute and an agency's implementing regulations. The Plaintiff States are legally bound by contemporaneously effective definitions, regulations, policies and test methods. In the absence of express statutory authority, the Plaintiff States cannot retroactively impose definitions, regulations, policies and test methods to allege past violations of the CAA. The CAA provides no such authority. *See* 42 U.S.C. §§ 7411, 7470, 7501-08 and 7511a; 40 C.F.R. §§ 51.165, 51.166, 52.21, 52.24 and 60.14. For instance, the Plaintiff States may not retroactively apply their apparent current interpretation of the term "routine maintenance, repair and replacement," 40 C.F.R. §§ 51.166(b)(2)(iii)(a) and 52.21(b)(2)(iii)(a) (PSD program); and 40 C.F.R. §§ 51.165(a)(1)(v)(C)(1) and 52.24(f)(5)(iii)(a) (NNSR), to evaluate past plant changes where, as here, that interpretation is inconsistent with EPA's historic interpretation and concludes, *inter alia*, that certain changes are presumptively non-routine (*e.g.*, any project relating to life extension regardless of the nature, purpose, extent or frequency of the change at a particular plant or within a given industry).

Ninth Affirmative Defense

AEP has been denied due process of law by EPA's failure to provide adequate notice to industry of EPA's new interpretations of PSD and NNSR statutory and regulatory requirements as required by the First, Fifth and Fourteenth Amendments of the

United States Constitution and by the APA, 5 U.S.C. §§ 551-53. For example, the PSD and NNSR programs do not extend to physical or operational changes at a plant which constitute “routine maintenance, repair or replacement.” 40 C.F.R. §§ 51.166(b)(2)(iii)(a) and 52.21(b)(2)(iii)(a) (PSD program); and §§ 51.165(a)(1)(v)(C)(1) and 52.24(f)(5)(iii)(a) (NNSR program). In the absence of an express regulatory definition, the determination of what is “routine” must be made by drawing, for instance, on the commonly accepted meaning of this term, congressional intent, judicial decisions and examples from EPA guidance and applicability determinations. These interpretative guidelines have historically been used both by the Agency and industry to determine whether a particular change triggers PSD or NNSR requirements. In this case, the Plaintiff States ignore these prior guidelines, attempting to apply a significantly more restrictive interpretation of what is “routine maintenance, repair or replacement.” However, the Plaintiff States cannot apply their current interpretation as though it was the normative standard at the time the plant changes alleged in the Complaint were undertaken. Having told industry, as well as Congress, how EPA intended to interpret the term as far back as the early 1980s, the Plaintiff States can now reverse course and attempt to sue AEP using a different, more restrictive standard. In addition, EPA failed to give constitutionally adequate “fair warning” of its current interpretation of the term “routine maintenance, repair or replacement.” Consequently, the Plaintiff States’ interpretation of this term may not be applied or enforced with respect to the activities alleged in the Complaint.

Tenth Affirmative Defense

The Plaintiff States' current interpretations of the PSD and NNSR statutory and regulatory requirements are so vague as to allow for arbitrary and discriminatory enforcement of the law. Consequently, the Plaintiff States' newly minted interpretation of the law fails to provide industry with adequate notice of statutory and legal requirements in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution and by the APA, 5 U.S.C. §§ 551-53.

Eleventh Affirmative Defense

The Plaintiff States' current interpretations of the PSD and NNSR statutory and regulatory requirements (*e.g.*, "routine maintenance, repair or replacement" and "demand growth" exclusions) as applied to coal-fired electric generating plants are arbitrary, capricious or otherwise not in accordance with law because they represent marked changes from EPA's historic interpretations and applications of those requirements, which changes were not the subject of prior public notice and comment. 5 U.S.C. §§ 553 and 706; 42 U.S.C. § 7607(d)(9).

Twelfth Affirmative Defense

The Plaintiff States' PSD and NNSR claims are barred because the CAA and related regulations do not authorize the Plaintiff States to maintain an enforcement action against AEP for operating without PSD or NNSR permits or air pollution controls at each of the plants referenced in the Complaint. 42 U.S.C. §§ 7413, 7475, 7477, 7503 and 7604; 40 C.F.R. §§ 51.165, 51.166, 52.21 and 52.24.

Thirteenth Affirmative Defense

Section 304(a) of the CAA, 42 U.S.C. § 7604(a), provides that the Court may enforce an emission limitation or standard and apply any “appropriate” civil penalties for violations of the Act. Thus, the statute allows the Court flexibility to determine the appropriate relief in a given case, taking into account the specific facts before it, the goals of the particular program at issue and other relevant factors. There is no requirement in the CAA or EPA’s implementing regulations that allows the Plaintiff States to seek specific and identical relief for any alleged violation of the CAA or its implementing regulations.

Fourteenth Affirmative Defense

The Plaintiff States’ claims for injunctive relief are barred, in whole or in part, because AEP is not in current violation of applicable law, and actual emissions from Conesville and Amos are below their allowable levels.

Fifteenth Affirmative Defense

The Plaintiff States’ claims for injunctive relief are barred, in whole or in part, because the CAA does not authorize injunctive relief to improve general environmental conditions unrelated to the alleged violations.

Sixteenth Affirmative Defense

The Plaintiff States’ claims for injunctive relief are barred, in whole or in part, because the equities of this case weigh against such relief.

Seventeenth Affirmative Defense

The Plaintiff States, in this and other lawsuits directed at coal-fired electric power generation plants located in the Midwest and South, have impermissibly and

discriminatorily singled out facilities located in these regions of the United States for its CAA enforcement activities. Such action by the Plaintiff States violates the Due Process Clause of the 5th Amendment to the U.S. Constitution and is arbitrary, capricious or otherwise not in accordance with law. 5 U.S.C. § 706; 42 U.S.C. § 7607(d)(9).

Eighteenth Affirmative Defense

The Plaintiff States' claims for injunctive relief are barred because they have failed to join all other parties needed for a just adjudication as required under Fed. R. Civ. P. 19.

Nineteenth Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because the Plaintiff States' construction of the CAA and rules promulgated thereunder in support of its claims effects an unconstitutional delegation of legislative power.

Twentieth Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, by the doctrines of laches, estoppel and waiver.

Twenty-First Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, by the doctrines of *res judicata* and collateral estoppel.

Twenty-Second Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because the AEP facilities operate in accordance with permits issued pursuant to the requirements of the federal Title V program of the CAA and under the oversight and approval of EPA.

Twenty-Third Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because the AEP facilities have had continuously in force a valid operating permit, issued by state agencies, with EPA oversight, authorizing operation of each unit, plant and source listed in the Plaintiff States' Complaint. EPA is in privity with the States of Ohio and West Virginia in the administration of the CAA, and the States of Ohio and West Virginia have previously made determinations that some or all of the activities identified in the Plaintiff States' Complaint were not subject to NSR requirements and were in compliance with the relevant provisions of the Ohio and West Virginia SIPs.

Twenty-Fourth Affirmative Defense

The Plaintiff States' claims for injunctive relief are barred, in whole or in part, because the emissions from Amos and Conesville are less than or equivalent to the baseline emissions from these facilities at the time one or more of the projects occurred, for one or more pollutants.

Twenty-Fifth Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because the Plaintiff States' enforcement action and the claims asserted in the Complaint are in violation of the Federal Register Act, 44 U.S.C. § 1501 *et seq.*

Twenty-Sixth Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because the Plaintiff States' enforcement action and the claims asserted in the Complaint are in violation of 5 U.S.C. § 801 *et seq.*, Congressional Review of Agency Rulemaking.

Twenty-Seventh Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because the Plaintiff States' legal position as reflected in the Complaint represents a material change in EPA's previously publicly-stated positions and interpretations of the CAA without fair notice and, consequently, constitutes an effort to enforce an *ex post facto* law in contravention of Article I, Section 9 of the United States Constitution.

Twenty-Eighth Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because the Plaintiff States failed to issue adequate notices sixty days in advance of bringing this suit as required by 42 U.S.C. § 7604(b).

Twenty-Ninth Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because this enforcement action and the claims herein usurp State authority to provide and regulate an essential public service in violation of the Tenth Amendment of the United States Constitution.

Thirtieth Affirmative Defense

EPA has granted exclusive authority to the States in which the AEP facilities are located to regulate sources of air emissions in those States. The Plaintiff States' claims are barred, in whole or in part, because this enforcement action and the claims hereunder impermissibly seek to usurp the authority of the States of Ohio and West Virginia to regulate sources in those States.

Thirty-First Affirmative Defense

The plaintiff States' claims are barred, in whole or in part, because this enforcement action and the claims asserted hereunder render the States of Ohio and West Virginia instruments of unlawful federal policy in violation of the Tenth Amendment and Article IV, Section 4 of the United States Constitution.

Thirty-Second Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because they seek to impose an excessive fine in violation of the Eighth Amendment to the United States Constitution.

Thirty-Third Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because the Plaintiff States' attempts in this enforcement action to impose regulatory costs and burdens for air emission controls that do not serve a legitimate federal interest under the Commerce Clause of Article I, Section 8 of the United States Constitution.

Thirty-Fourth Affirmative Defense

The Plaintiff States' claims are barred, in whole or in part, because they constitute an unconstitutional attempt to establish barriers to interstate trade by discriminating against out-of-state producers of electric power and in favor of in-state producers of electric power.

Thirty-Fifth Affirmative Defense

All of the Plaintiff States' claims against AEPSC are barred in their entirety because AEPSC is neither the "owner" nor the "operator" of Amos or Conesville against

whom an enforcement action is authorized under the CAA. 42 U.S.C § 7411; *United States v. Alabama Power Co.*, C.A. No. 1:99-CV-02859-JEC (August 1, 2000) (order).

Thirty-Sixth Affirmative Defense

Because the Plaintiff States' action is unreasonable and without merit, the Court should award AEP its litigation costs and expenses (including reasonable attorney and expert witness fees) pursuant to 42 U.S.C § 7413(b).

Thirty-Seventh Affirmative Defense

AEP will rely on any and all further defenses that become available or appear during discovery proceedings in this action and specifically reserves its right to amend this Answer for purposes of asserting additional defenses.

WHEREFORE, the AEP Companies respectfully ask that the Court:

- (1) Dismiss the Plaintiff States' Amended Complaint with prejudice;
- (2) Enter judgment in favor of AEP and against the Plaintiff States; and
- (3) Grant AEP such other and further relief as this Court deems just and proper.

Respectfully submitted,

s/ D. Michael Miller

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 31, 2005, the foregoing *Answer Of Defendants, American Electric Power Service Corporation, Appalachian Power Company, and Columbus Southern Power Company* was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all Counsel of record.

s/ Alvin J. McKenna
Alvin J. McKenna