

THE RAMIFICATIONS OF THE W.H. SAMMIS SETTLEMENT: WHY JOBS ARE BEING LOST, THE AIR REMAINS UNCLEAR, AND THIS LANDMARK SETTLEMENT IS MAKING PROGRESS IN THE WRONG DIRECTION

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*On the evening of October 26, 1948, the people of that working class community went to bed not knowing that a suffocating cloud of industrial gases and dust would descend upon them like some biblical plague during the night.*¹

In 1948, the quaint and once beautiful town of Donora, Pennsylvania suffered one of the worst air-pollution disasters in American history.² In a twenty-four-hour period, smog and air pollutants from the nearby industries killed nineteen people and injured over five hundred.³ Along with mounting pollution concerns nationwide, this disaster provided the impetus for legislation⁴ that would eventually become the Clean Air Act of 1970.⁵ Sadly,

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¹ Press Release, W. Michael McCabe, Regional Adm'r, U.S. Env'tl. Prot. Agency, Donora Disaster was Crucible for Clean Air (Oct. 26, 1998), available at http://www.dep.state.pa.us/dep/Rachel_Carson/crucible.htm.

² Pennsylvania State Archives, The Donora Smog Disaster, <http://www.doheritage.state.pa.us/documents/donora.asp> (last visited Mar. 1, 2007). See also Press Release, W. Michael McCabe, *supra* note 1.

³ The Donora Smog Disaster, *supra* note 2. "[P]eople in the area had complained for years about [sic] the industrial pollutants that 'eats [sic] the paint off your houses' and prevents fish from living in the river . . . [A]n investigation . . . revealed an extraordinarily high level of sulfur dioxide, soluble sulphants, and fluorides in the air on October 30 and 31." *Id.*

⁴ See Jeff Gammage, *20 Died; The Government Took Heed*, PHILADELPHIA INQUIRER, Oct. 28, 1998, http://www.dep.state.pa.us/dep/Rachel_Carson/dead20.htm. "Afterward, federal and state health agencies launched extensive inquiries—the first organized effort to document the dangers of air pollution, according to the EPA. The hard lessons learned here helped produce a federal landmark clean-air act in 1955." *Id.*

⁵ See Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-671 (2007)). The purpose of this Act, as stated by Congress, is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population; [and] to initiate

sixty years after the Donora disaster, citizens still suffer from the negative effects of airborne pollutants.⁶

As recently as 1999,⁷ major power companies in Ohio were producing hundreds of thousands of tons of pollutants⁸ that found their way into the air in Pennsylvania, New York, and other states.⁹ While many of these pollution-producing companies are clearly not in compliance with the law,¹⁰ the situation is further exacerbated by the lack of proper enforcement by the Environmental Protection Agency ("EPA") coupled with mixed messages sent by the Executive Branch.¹¹

and accelerate a national research and development program to achieve the prevention and control of air pollution." 42 U.S.C. § 7401(b). This Act was not the first piece of legislation dealing with air quality in the United States. However, it was a "highly ambitious" law that rewrote preexisting Clean Air Act and was expected to capitalize on the new national consciousness of environmental issues in the early 1970s. American Meteorological Society, *Legislation: A Look at U.S. Air Pollution Laws and Their Amendments*, <http://www.ametsoc.org/sloan/cleanair/cleanairlegisl.html> (last visited Mar. 1, 2007). See Paul G. Rogers, *The Clean Air Act of 1970*, EPA J., Jan.-Feb. 1990, <http://www.epa.gov/history/topics/caa70/11.htm>.

⁶ See American Lung Association, *State of the Air: 2004 Executive Summary*, http://lungaction.org/reports/sota04exec_summ.html (last visited Mar. 1, 2007).

⁷ The lawsuit against the W.H. Sammis Power Station was initiated in 1999. Press Release, Eliot Spitzer, N.Y. Att'y Gen., *States and Federal Government Secure Sharp Air Pollution Reductions at Ohio Coal Power Plants* (Mar. 18, 2005) [hereinafter *Sharp Reductions*], available at http://www.oag.state.ny.us/press/2005/mar/mar18a_05.html. The Attorney General of Connecticut, Richard Blumenthal, and the Attorney General of New Jersey, Peter C. Harvey, also joined in issuing this press release. *Id.* See also Press Release, Eliot Spitzer, N.Y. Att'y Gen., *Spitzer Hails Major Win in Power Plant Air Pollution Case* (Aug. 7, 2005) [hereinafter *Spitzer Hails Major Win*], available at http://www.oag.state.ny.us/press/2003/aug/aug07c_03.html.

⁸ According to the Associated Press, residents of Ohio are at a higher risk from airborne pollutants than the residents of any other state. *Ohio Tops in Pollution Risk*, KY. POST, Dec. 17, 2005. "Factory-laden Ohio has the most health risk from industrial pollution when compared with other states. In fact, some 26 Ohio neighborhoods—measured by U.S. Census tracts—are among the 200 worst in the nation." *Id.* The article goes on to say that "[n]early one-tenth of the total risk is concentrated in Ohio, especially along the heavily industrialized Ohio River corridor." *Id.* See also Greg Wright, *Report Says Ohio has 'Dirty' Dozen of Polluting Power Plants*, GANNETT NEWS SERV., May 12, 2005, http://envirovaluation.org/index.php/2005/05/12/gannett_news_service_via_www_centralohio ("[The plant in] Conesville released more than 88,000 tons of sulfur dioxide last year, making it the 25th highest sulfur dioxide polluter in the nation. . . . Meanwhile the Beckjord plant 20 miles east of Cincinnati discharged 24 pounds of sulfur dioxide per megawatt it produced, the 18th highest rate in the nation.").

⁹ See *Sharp Reductions*, *supra* note 7 ("In 1999, New York and the federal government sued Ohio Edison for multiple violations of the Clean Air Act.").

¹⁰ For a discussion of recent pollution-related lawsuits against major power-producing companies, see *infra* note 13.

¹¹ See *infra* Part II.

Even with a lack of enforcement by the EPA and a lack of support by the Bush Administration, recent lawsuits and settlements forcing polluters into compliance may be establishing a new trend of enforcement.¹² While the future of air pollution in the United States remains unclear, what is certain is that, due to the ramifications of the Clean Air Act lawsuits and settlements¹³ in the recent past, the future of transboundary air pollution in the Northeast, the creation and maintenance of alternative energy resources, and the policies of major power-producing plants in Ohio will all undergo dramatic changes.¹⁴

A lawsuit between the United States government and Ohio Edison Company, and its subsequent settlement, have been influential in effecting these changes.¹⁵ Hailed as a “landmark Clean Air Act case” by the Environmental Protection Agency, the settlement was based on “[violations] of the New Source Review (NSR) Provisions of the Clean Air Act at the W.H. Sammis Station, a coal-fired power plant in Stratton, Ohio.”¹⁶ As a result of this settlement alone, the Northeast can expect a

¹² For example, the final settlement agreement between the W.H. Sammis Plant, the federal government, and Pennsylvania, New York, New Jersey, and Connecticut was reached in 2005. Sharp Reductions, *supra* note 7.

¹³ *Id.* Attorney General Spitzer references some of these recent settlements in his press release:

[1] January 2005 settlements between New York State and Niagara Mohawk, NRG Inc., AES and New York State Electric and Gas Corp. which cut air pollution at the Huntley and Dunkirk coal plants in western New York and at the Greenidge, Hickling, Jennison and Westover power plants in the Finger Lakes and Southern Tier of New York; [2] A June 2003 settlement between New York State and Mirant New York Inc. to install pollution controls at Mirant’s Lovett coal-fired power plant in New York’s Hudson Valley; [3] An April 2003 \$1.2 billion settlement reached by New York, Connecticut, New Jersey and the federal government with Virginia Electric Power Co. requiring the company to retrofit its eight coal-fired power plants with pollution controls; and [4] A January 2002 settlement that New Jersey and the federal government reached with PSEG Fossil LLC which required the company to install pollution controls to sharply reduce sulfur dioxide and nitrogen oxide emissions from its Mercer and Hudson coal-fired power plants in Hamilton and Jersey City.

Id.

¹⁴ *See infra* Part III.

¹⁵ *See supra* note 7 and accompanying text.

¹⁶ Press Release, U.S. Dep’t of Justice, U.S. Announces Settlement of Landmark Clean Air Act Case Against Ohio Edison (Mar. 18, 2005) [hereinafter Landmark Settlement], available at http://www.usdoj.gov/opa/pr/2005/March/05_enrd_129.htm.

The consent decree agreed to by Ohio Edison will reduce emissions of harmful sulfur dioxide (SO₂) and nitrogen oxides (NO_x) from the

significant boost in the creation of alternative energy resources funded by Ohio Edison, a cut in airborne pollutants that should lead to a reduction of the pollution-based illnesses in the Northeast, higher air quality and an overall cleaner environment.¹⁷

It is important to note that this trend of piecemeal enforcement is not completely positive, however. This settlement also has major ramifications for Ohio Edison's operations in Ohio, one of which may be cut-backs and layoffs for many Ohio workers,¹⁸ not to mention a possible exodus of major energy-producing plants from Ohio.¹⁹ As Judge Sargus explained, "[t]hirty-three years later, the air is still not clean, tens of thousands of jobs have been lost, and enforcement by the EPA has been highly inconsistent."²⁰ While this settlement will certainly set an example for other major power plants and will lead to the reduction of airborne pollutants, in order to properly balance employment and pollution concerns, the Clean Air Act must be strengthened and properly enforced to better serve as a means of prevention.

Part I of this Note discusses the history and background of the W.H. Sammis's Plant, its production of pollutants that contribute to transboundary air pollution, and the events that led to this landmark settlement. Part I also briefly explores the settlement agreement itself.

Part II discusses present enforcement of the Clean Air Act and the effect the current administration has had on bringing polluters into compliance. Part II also analyzes the Clear Skies Act and its ties to transboundary air pollution and the W.H. Sammis settlement. Finally, Part II explains how the lack of stern consequences for polluters in the current Clean Air Act, coupled with shaky enforcement procedures utilized by the Environmental Protection Agency, has exacerbated the transboundary air pollution problem.

Sammis plant, as well as from other Ohio Edison and FirstEnergy coal-fired power plants, by over 212,000 tons per year. The pollution controls and other measures required by the consent decree are expected to cost approximately \$1.1 billion.

Id.

¹⁷ See Sharp Reductions, *supra* note 7 ("Ohio Edison will spend a total of \$10 million over five years on clean air and alternative energy projects in New York, Connecticut and New Jersey. \$6.1 million will be available for projects in New York, including the installation of solar photovoltaic systems on municipal buildings.")

¹⁸ See *infra* Part III.D.

¹⁹ See *United States v. Ohio Edison Co.*, 276 F. Supp. 2d. 829, 833 (S.D. Oh. 2003). "From an employment perspective, Ohio Edison has chosen to . . . [adopt] a strategy which in conjunction with other utilities has caused a huge loss of coal mining and related jobs in Ohio." *Id.*

²⁰ *Id.*

Part III discusses the ramifications of the W.H. Sammis settlement on Ohio Edison, the plant's parent company, with a particular focus on employment concerns. In addition, Part III further examines the effects that the settlement will have on other major pollution-producing companies and the future of alternative energy sources in the Northeast. The settlement should lead to a significant reduction in the transboundary transportation of pollutants such as nitrogen oxide and sulphur dioxide.

After addressing the long-term effects of the settlement, this Note suggests an alternative solution to the transboundary air pollution problem in the Northeastern United States. By strengthening and enforcing the Clean Air Act so that it better functions as a preventative mechanism, both employment and pollution concerns may be properly balanced while avoiding the negative effects of piecemeal lawsuits. If industry is put on notice that reducing toxic air pollutants is a priority, and that the Clean Air Act will be rigorously enforced and supported, there will be less of a need for major lawsuits against individual companies that can devastate employment in America's small towns.

I. TROUBLE AT THE W.H. SAMMIS POWER STATION

A major indication of the future of air pollution enforcement and its ramifications came in the form of a settlement between several northeastern states, the federal government, and Ohio Edison's W.H. Sammis coal power plant.²¹ In this lawsuit, New York, Connecticut, and New Jersey alleged that Ohio Edison's Power Plants in Ohio were contaminating their skies through transboundary air pollution.²² In an effort to avoid the ramifications of a liability suit that it lost in 2003, the W.H. Sammis Power Station agreed to a settlement.²³

²¹ See *supra* note 7 and accompanying text.

²² *Ohio Edison Co.*, 276 F. Supp. 2d. at 832. While the W.H. Sammis Plant was built before the passage of the 1970 Clean Air Act and thus would be provided with an exemption, Judge Sargus explains that, "[t]he Clean Air Act requires plants constructed after 1970 to meet stringent air quality standards, but the Act exempts old facilities from compliance with the law, unless such sites undergo what the law identifies as a 'modification.'" *Id.* at 832. In the lawsuit that ultimately led to this settlement, the Plaintiffs were able to prove that the activities that the W.H. Sammis plant had participated in were indeed "modifications" under the Act. *Id.* at 829.

²³ Sharp Reductions, *supra* note 7.

A. *The W.H. Sammis Power Station*

To fully understand how this suit arose and the ramifications of its settlement, it is important to understand the history of the Power Station. The W.H. Sammis Power Station was completed over a number of years, beginning in 1959.²⁴ Over the next few decades, Ohio Edison built seven separate generating units.²⁵ The Sammis plant has four smokestacks, one of which is 1,000 feet tall.²⁶ By contrast, the Chrysler Building in New York City is 1,048 feet tall.²⁷ As can be imagined, the Sammis Power Station has been a major concern of environmentalists for years.²⁸

Interestingly, the history of legislation introduced to protect the United States from air pollution coincides with the development of many of America's dirtiest energy-producing plants. This is certainly true for Ohio Edison's W.H. Sammis Power Station. In 1967, the same year that the Sammis Plant built one of its largest units,²⁹ Congress passed its first serious attempt to regulate air pollution, the Air Quality Act of 1967.³⁰ Even the Environmental Protection Agency recognized this Act

²⁴ See J.R. Pegg, *Judge Rules Ohio Utility Violated Clean Air Act*, ENVTL. NEWS SERV., Aug. 8, 2003, <http://www.ens-newswire.com/ens/aug2003/2003-08-08-10.asp>.

²⁵ Sharp Reductions, *supra* note 7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ The Environmental Integrity Project has ranked the W.H. Sammis Plant as the second highest producer of SO₂ pollution. ENVTL. INTEGRITY PROJECT & PUB. CITIZEN'S CONG. WATCH, AMERICA'S DIRTIEST POWER PLANTS: PLUGGED INTO THE BUSH ADMINISTRATION 3 (2004), available at http://www.whitehouseforsale.org/documents/dirtiest_plants2.pdf. See also Scorecard: The Pollution Information Site, Environmental Release Report: W.H. Sammis Plant, http://www.scorecard.org/env-releases/facility.tcl?tri_id=43961FRSTNSTATE#major_chemical_releases (last visited Mar. 1, 2007). Scorecard has compiled data from various sources and has rated the W.H. Sammis plant as among the worst in the country as far as its "cancer risk score," its "non-cancer risk score," and "total environmental releases." *Id.* For a list of the quantity of each chemical that W.H. Sammis releases into the air, see ENVTL. PROT. AGENCY, MULTISYSTEM REPORT: FIRST ENERGY GENERATION CORP.—SAMMIS SOUTH PLANT (2005), available at http://oaspub.epa.gov/enviro/multisys2.get_list?facility_uin=110000591609. For extremely comprehensive year to year reports, see Right-to-Know Network, Facility Report: W.H. Sammis Plant, http://www.rtknet.org/new/tri/fac.php?reptype=f&facility_id=43961FRSTNSTATE&reporting_year=2003&email=&detail=3&datatype=T&dbtype=C (last visited Mar. 1, 2007).

²⁹ First Energy Corp., W.H. Sammis Plant: Facts at a Glance, http://www.firstenergycorp.com/environmental/files/Fact_Sheets/whsammis.pdf (last visited Mar. 1, 2007).

³⁰ Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967). See also Rogers, *supra* note 5 ("[The Air Quality Act of 1967] authorized the Secretary of Health, Education, and Welfare . . . to designate so-called air quality regions throughout the country; the states were given primary responsibility for adopting and enforcing pollution control standards within those regions.").

as a failure.³¹ Paul Rogers explained that, “[o]ne of the reasons the 1967 Air Quality Act failed and thus spurred Congress to enact a tough national air quality program in 1970 was the almost complete lack of enforcement of the earlier statute.”³² He went on to say, “[a] similar fate . . . has continued to plague implementation of the Clean Air Act ever since.”³³ Proper enforcement continues to be a problem to this day,³⁴ and the trend that may have been set by the W.H. Sammis Power Station is not a step in the right direction.

B. The W.H. Sammis Power Station and Transboundary Air Pollution

Transboundary air pollution is a term used to describe the release of pollutants, such as nitrogen oxide and sulfur dioxide, which have the capacity to travel long distances through the air.³⁵ According to the Encyclopedia of Atmospheric Environment, “[i]t is now well established that this air pollution is transported over hundreds or even thousands of kilometres. Consequently, when acidic pollution is finally deposited, its environmental impacts are felt in areas far removed from their sources.”³⁶

It is important to note that transboundary air pollution is not a new problem. The United Nations Economic Commission for Europe has had a Convention on Long-Range Transboundary Air Pollution in place since 1979, which “has substantially contributed to the development of international environmental law and has created the essential framework for controlling and reducing the damage to human health and the environment

³¹ Rogers, *supra* note 5. “Some of us involved in the enactment of the 1967 statute had significant doubts as to the viability of the regional approach to air pollution control. . . . By 1970, fewer than three dozen air quality regions had been designated, as compared to an anticipated number in excess of 100.” *Id.*

³² *Id.*

³³ *Id.*

³⁴ See *infra* Part II.C.

³⁵ See National Atmospheric Emissions Inventory, Transboundary Air Pollution, http://www.naei.org.uk/issuedetail.php?issue_id=2 (last visited Mar. 1, 2007). “Transboundary air polutants [sic] cause a number of different problems: e.g[.] formation of particles, ground level ozone which are hazardous to health, the formation of acid rain which can damage buildings and sensitive ecosystems and some that are toxic to human health and the environment.” *Id.* Among the pollutants that are classified as capable of transboundary effects are ammonia, arsenic, cadmium, carbon monoxide, chromium, copper, lead, mercury, nickel, nitrogen oxide, selenium, sulfur dioxide, and zinc. *Id.*

³⁶ Encyclopedia of Atmospheric Environment, Transboundary Pollution, <http://www.ace.mmu.ac.uk/eae/english.html> (follow “Acid Rain” hyperlink; then follow “Transboundary Pollution” hyperlink) (last visited Mar. 1, 2007).

caused by transboundary air pollution.”³⁷ Transboundary air pollution is a major concern in the United States as well. However, recent lawsuits and settlements have suggested that, rather than following the example set by the United Nations Economic Commission for Europe, transboundary air pollution will be attacked in the United States through piecemeal litigation.³⁸

It is hardly a surprise that officials chose to target the W.H. Sammis plant. The W.H. Sammis Power Station is one of the fifty largest electric plants in the United States.³⁹ It has also been described as one of the dirtiest,⁴⁰ “emitting a total of about 205,000 tons of [sulphur dioxide] and [nitrogen oxide] in 2003,”⁴¹ which is “more than sixty percent as much air pollution as all of New York’s 56 power plants combined.”⁴² According to the Environmental Protection Agency, “[s]ulfur dioxides [SO₂] and nitrogen oxides [NO_x] cause severe respiratory problems and contribute to childhood asthma. These pollutants are also significant contributors to acid rain, smog and haze.”⁴³ Given the facts about transboundary pollution

³⁷ United Nations Economic Commission for Europe, Convention on Long-Range Transboundary Air Pollution, http://www.unece.org/env/lrtap/lrtap_h1.htm (last visited Mar. 1, 2007).

³⁸ See *supra* note 13.

³⁹ Energy Information Administration, 100 Largest Electric Plants, <http://www.eia.doe.gov/neic/rankings/plantsbycapacity.htm> (last visited Mar. 1, 2007).

⁴⁰ See The W.H. Sammis Power Plant: Stratton, Ohio, SPROL, June 17, 2005, <http://www.sprol.com/?p=62>. “More than 145,000 tons of sulfur dioxide per year actually comes from this one facility, the W.H. Sammis plant. . . . More pollution comes out of these chimneys than all of the power generating stations in New Jersey and Connecticut, combined.” *Id.*

⁴¹ Press Release, U.S. Dep’t of Justice, *supra* note 16.

⁴² Sharp Reductions, *supra* note 7. See also Spitzer Hails Major Win, *supra* note 7 (“In 2002, the Sammis plant emitted 145,113 tons of sulfur dioxide and 38,617 tons of nitrogen oxide. By comparison, in 2000 all the coal-fired power plants in New York combined emitted a total of 187,677 tons of sulfur dioxide and 42,706 tons of nitrogen oxide.”).

⁴³ Landmark Settlement, *supra* note 16. See also U.S. Environmental Protection Agency, Ohio Edison Company—Sammis Plant Clean Air Act Civil Settlement Fact Sheet, <http://www.epa.gov/compliance/resources/cases/civil/caa/ohioedison-fcsht.html> (last visited Mar. 1, 2007) [hereinafter Settlement Fact Sheet]. This fact sheet explains that “Nitrogen Oxide causes a variety of health problems and adverse environmental impacts, such as ground-level ozone, acid rain, particulate matter, global warming, water quality deterioration, and visual impairment.” *Id.* It goes on to state that “[h]igh concentrations of sulfur dioxide affect breathing and may aggravate existing respiratory and cardiovascular disease. Sensitive populations include asthmatics, individuals with bronchitis or emphysema, children and the elderly.” *Id.* The Natural Resources Defense Council (“NRDC”) has stated that SO₂ and NO_x are major contributors to premature death, asthma, and acid rain. Natural Resources Defense Council, Dirty Skies: The Bush Administration’s Air Pollution Plan, <http://www.nrdc.org/air/pollution/qbushplan.asp> (last visited Mar. 1, 2007) [hereinafter Dirty Skies].

and the W.H. Sammis plant's large emissions of these chemicals, the plant created a great test case for Clean Air Act enforcement litigation.

C. *United States v. Ohio Edison Co.*⁴⁴

At issue in this suit was whether eleven actions taken by the W.H. Sammis plant in an effort to improve components in the plant⁴⁵ were actually "modifications"⁴⁶ that resulted in increased emissions, or whether they were best categorized as "routine maintenance."⁴⁷ Under the Clean

In the eastern United States, [SO₂] is the primary component of fine particles that can be inhaled deeply into the lungs, and are linked with respiratory disease and premature death. Power plants emit two-thirds of U.S. sulfur dioxide pollution and are responsible for shortening the lives of an estimated 30,000 Americans each year.

Id. The NRDC also discusses the role of nitrogen oxides in polluting our air: Nitrogen oxides are major ingredients in ozone pollution (smog). During 1999, ozone pollution levels rose above the level the EPA deems healthy more than 7,694 times in 43 states and the District of Columbia. Smog and fine particle pollution are especially damaging for the 14.9 million asthma sufferers in this country, including 5 million children. In 1997, smog triggered more than 6 million asthma attacks and sent almost 160,000 people to the emergency room in the eastern United States alone.

Id.

⁴⁴ 276 F. Supp. 2d. 829 (S.D. Oh. 2003).

⁴⁵ *Id.* at 840.

The eleven activities are made up of thirty-four parts replacements to the units. The parts that were replaced were both pressure and non-pressure components. The pressure parts of the Sammis boilers include the furnace water wall tubes, economizer tubes, superheater tubes and reheater tubes. The economizer, superheater and reheater function as heat exchangers with water or steam flowing on the inside and the hot boiler combustion gases passing on the outside. The non-pressure parts are comprised of burners, coal pipes, pulverizers and low pressure turbine rotors.

Id. at 840 (citations omitted).

⁴⁶ *Id.* at 834. Under the Clean Air Act, "modifications" are defined as, "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies." 40 C.F.R. § 60.14 (2007).

⁴⁷ *Ohio Edison Co.*, 276 F. Supp. 2d. at 834.

If the projects were modifications, as used in the Clean Air Act, Ohio Edison was required *prior* to construction to project and calculate post-construction emissions to determine if the new standards applied. Further, if the projects were modifications, Ohio Edison was required to obtain a pre-construction permit. Because the company contended the projects were not modifications but were instead "routine maintenance, repair and replacement," neither of those courses was pursued. The EPA and state

Air Act, regulated entities are not required to get a permit for simple maintenance or repair.⁴⁸ Judge Sargus explained that “[t]his case highlights an abysmal breakdown in the administrative process following the passage of the Clean Air Act in 1970.”⁴⁹ He went on to state that “[f]or thirty-three years, various administrations . . . 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.”⁵⁰

The court concluded that W.H. Sammis’s eleven activities, which all occurred after the passage of the 1970 Clean Air Act, resulted in an increase in the emissions produced by the plant.⁵¹ In addition, the court found that these increases in emissions were made without the requisite permits.⁵² Judge Sargus stated, “[i]t is undisputed that the Defendant failed to obtain PSD permits for the activities at issue. For each of the activities, the Court finds the Defendants liable under the CAA.”⁵³ He went on to say, “[p]ursuant to the Court’s previous Order, the appropriate civil penalties and injunctive relief will be determined following a remedy phase trial.”⁵⁴ This meant that Ohio Edison could face severe penalties if it did not settle the case.⁵⁵

It is important to note that the court did not take into consideration the possible consequences of its decision on employment in Ohio,⁵⁶ or the EPA’s previous failures to enforce the Clean Air Act,⁵⁷ but focused on strictly legal issues.⁵⁸ However, Judge Sargus hinted that determining the amount of a damage award in the remedy phase would not be as straightforward a decision.⁵⁹

plaintiffs contend that all eleven projects constituted modifications.

Id.

⁴⁸ *Id.*

⁴⁹ *Id.* at 832.

⁵⁰ *Id.*

⁵¹ *Id.* at 840.

⁵² *Id.* at 890.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Sharp Reductions, *supra* note 7.

⁵⁶ See *infra* Part III.D.

⁵⁷ See *infra* Part II.C.

⁵⁸ *Ohio Edison Co.*, 276 F. Supp. 2d. at 833-34. The opinion stated, “[i]n the next phase of this case, the remedies the Court may consider . . . involve a[n] . . . equitable analysis, requiring the Court to consider . . . employment consequences. The Court may also consider the less than consistent efforts of the EPA to apply and enforce the Clean Air Act.” *Id.*

⁵⁹ *Id.* at 834. There is an indication from Judge Sargus that both “economic impact” and “employment consequences” would be an important consideration. *Id.* However, as Ohio

D. The Settlement Agreement

Rather than deal with the consequences of the remedy phase of the trial, Ohio Edison chose to agree to a settlement.⁶⁰ This settlement was hailed as a major victory in the fight against transboundary air pollution.⁶¹ Connecticut Attorney General Richard Blumenthal stated that “[w]e compelled Ohio Edison to move from defiance to compliance.”⁶² He went on to threaten, “[h]ere’s a powerful signal to similar polluters: The Clean Air Act standards are alive and well, and we will enforce them relentlessly, even as the Bush administration abandons them. I will continue to fight polluters that foul our air.”⁶³ Blumenthal’s comments are noteworthy because he has a long history of fighting industrial polluters and is one of the strongest enforcers of environmental standards under the Clean Air Act today.⁶⁴

The settlement, which followed from the liability suit described above, was announced on March 18, 2005.⁶⁵ Attorneys from New York, New Jersey, and Connecticut declared that, under the settlement, Ohio Edison would pay damages to the government and the individual plaintiff states, fund alternative energy projects, and severely reduce the pollutant emission levels at their plants.⁶⁶ The settlement also forced Ohio Edison to spend \$1.1 billion over the next seven years⁶⁷ to “install pollution controls at the Sammis plant that will reduce air pollution, . . . [and]

Edison chose to settle, how the court would have taken these factors into consideration during the remedy phase remains unknown. *Id.* at 833-34.

⁶⁰ Sharp Reductions, *supra* note 7.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* Blumenthal called the settlement “a giant step toward clearing and cleaning our air, allowing us to breathe easier. Long overdue scrubbers and other anti-pollution equipment will save lives and spare countless citizens asthma attacks and respiratory illnesses.” *Id.*

⁶⁴ See Connecticut Attorney General Richard Blumenthal’s Biography, <http://www.ct.gov/ag/cwp/view.asp?A=2178&Q=295440> (last visited Mar. 1, 2007).

⁶⁵ See Sharp Reductions, *supra* note 7.

⁶⁶ *Id.*

⁶⁷ Settlement Fact Sheet, *supra* note 43.

Under the settlement, Ohio Edison will spend \$1.1 billion between now and 2012 on various pollution controls to substantially decrease emissions at the Sammis plant and other nearby Ohio Edison power plants. The Sammis plant must comply with an annual tonnage cap for sulfur dioxide (SO₂) and nitrogen oxides (NO_x) emissions that declines over time.

Id.

install pollution controls at other plants . . . so that in total sulfur dioxide emissions will be cut by 104% and nitrogen oxides will be cut by 101%.”⁶⁸

While there is little doubt that this settlement will ameliorate some of current the transboundary air pollution problems,⁶⁹ it is less clear that the settlement was entirely positive. Improving the quality of the air and the environment are essential, but the method of enforcement can be equally important. Piecemeal lawsuits are not the most effective method of enforcement; other methods would do a better job of balancing employment and environmental concerns.⁷⁰

II. ENFORCEMENT OF THE CLEAN AIR ACT

A. *Resistance from the Bush Administration*

The ramifications of the W.H. Sammis settlement are important both as an indication of both the present enforceability of the Clean Air Act and the future of air pollution and alternative energy in the Northeast. While this suit was one of over a dozen similar suits filed against major energy-producing plants,⁷¹ there is an indication that during this time period it was difficult to bring major plants into compliance with the Clean Air Act because of a lack of support from the Bush Administration.⁷²

⁶⁸ Sharp Reductions, *supra* note 7.

⁶⁹ As the Sammis Power Station is a major plant and a major polluter, remedying their actions alone should have positive effects on the environment. *See supra* notes 39-42 and accompanying text.

⁷⁰ *See infra* Part III.

⁷¹ Clean Air Now, *Defending Our Air: Key Court Cases*, <http://cleanairnow.org/cleanairnow.asp?id2=10971&id3=cleanairnow> (last visited Mar. 1, 2007).

Starting in late 1999, several states and the federal government began to sue, or threaten to sue, more than a dozen power companies for violation of the “new source review” provisions on the Clean Air Act. Under that provision, plants making “major modifications” that result in increased emissions are treated as “new” plants that must meet tighter, modern standards applicable to plants built today. In most cases, those new standards require 75 percent less emissions.

Id.

⁷² *See* Sharp Reductions, *supra* note 7. Richard Blumenthal, the Connecticut Attorney General, has said that “[t]he Clean Air Act standards are alive and well, and we will enforce them relentlessly, even as the Bush administration abandons them.” *Id.* *See also* THE NAT'L CAMPAIGN AGAINST DIRTY POWER, *THE OHIO EDISON CASE IN CONTEXT* (2003), available at http://www.net.org/air/NSR_Ohio_Edison.pdf (“While these suits were pending . . . the Bush Administration unveiled its plans to make significant regulatory changes to the New Source Review program, basically gutting it. The Agency . . . published a proposed rule that would significantly weaken the very provisions on which the enforcement suits were based.”).

In 2003, the Bush administration made an effort to change the definition of what was considered “routine maintenance” of coal-powered plants such as the W.H. Sammis Power Station.⁷³ The proposed change stated “that any modification costing up to 20 percent of the replacement cost of the unit will be considered routine maintenance—and therefore exempt from pollution controls, even if the plant modification results in much higher levels of air pollution.”⁷⁴ This proposal is in contrast to the law used in the W.H. Sammis Settlement, where a “modification” was any change or addition that results in higher emissions.⁷⁵ President Bush, in support of this change, stated that:

⁷³ Press Release, U.S. Dep’t of Justice, Lautenschlager Announces States Sue Federal Government to Protect Clean Air Act (Oct. 27, 2003) [hereinafter States Sue Federal Government], available at http://www.doj.state.wi.us/newsarchive/nr102703_PL.asp. See also *Dirty Skies*, *supra* note 43.

In 1977, Congress amended the Clean Air Act to strengthen pollution controls, but did not require plants already in existence to meet the new standards, expecting that these plants would soon be retired and replaced with newer, cleaner plants. As a safeguard, however, the law included the New Source Review provision, which requires that if an older plant undergoes changes that increase its emissions, it must also install modern air pollution controls. Without New Source Review, much of the nation’s industrial base—power plants, chemical plants, incinerators, iron and steel foundries, paper mills, cement plants, and a broad array of manufacturing facilities—would be excluded from modern clean air requirements.

President Bush’s campaign to let dirty power plants pollute more began early in his administration. In 2001, the president convened an energy policy task force, chaired by Vice President Cheney. The task force sought extensive advice from energy industry executives and incorporated many of their recommendations into its plan. In an email sent in early 2001 to an Energy Department official, a lobbyist for the Southern Company, an Atlanta-based electric utility, suggested that the administration weaken the New Source Review requirements. The task force subsequently recommended a review of New Source Review regulations. In November 2002 the administration announced new rules that severely undercut the program, and in August 2003 the EPA adopted further changes that weaken the effectiveness of the program as it applies to approximately 20,000 facilities nationwide. NRDC is challenging both sets of rules in court, but if Congress passes the Clear Skies bill, provisions that would similarly hamstring efforts to cut pollution from old plants would become law.

Id.

⁷⁴ States Sue Federal Government, *supra* note 73.

⁷⁵ *Ohio Edison Co.*, 276 F. Supp. 2d. at 829.

[W]e're meeting new air quality standards by fixing some old regulations that weren't working very well. It's what they call New Source Review regulations. See, we want to encourage our companies to invest in new technologies and modernize equipment, where possible, so that we can produce more electricity and pollute less. . . . Unfortunately, old regulations discourage companies from doing that. We had only regulations on the books that made it very difficult for utilities to make wise decisions.⁷⁶

The Sammis lawsuit and settlement, however, seem to contradict this statement. In that case, the eleven activities that could constitute what President Bush calls "invest[ing] in new technologies and moderniz[ing] equipment"⁷⁷ were all found to create higher, rather than lower, levels of air pollution.⁷⁸

The Bush Administration's proposed change was not welcomed or appreciated in many states, and resulted in a coalition of twelve states filing a lawsuit against the EPA.⁷⁹

⁷⁶ President's Remarks on Proposed Clear Skies Legislation, 39 WEEKLY COMP. PRES. DOC. 1230 (Sept. 16, 2003). President Bush went on to say:

As a matter of fact, it made it difficult for them to even have routine repairs or replace old equipment. You see, if power plants or other companies wanted to make a change they could afford, under the old regulations, regulators would come in and order all kinds of changes. They would make—they would make it such that there would be a multi-year bureaucratic battle. See, the rules were so complex that they were open for interpretation.

Complex rules also opens [sic] decisions to litigation. You know, when something's really complex, it makes a—makes it easy for lawyers to sue and tie things up. Plant managers weren't able to put the latest technology in place to improve the quality of our air because of fear of bureaucratic battle and lawsuit. That didn't seem to make any sense to us in this administration, because we understand when plants become inefficient and old and stale and tired, the cost to the consumer goes up, reliability of energy supplies is decreased, jobs are lost. In fact, the spirit of the Clean Air Act is disregarded.

Id.

⁷⁷ See President's Remarks on Proposed Clear Skies Legislation, *supra* note 76.

⁷⁸ See *supra* Part I.C.

⁷⁹ Once again Attorney Generals Spitzer and Blumenthal led the charge. Press Release, Eliot Spitzer, N.Y. Att'y Gen., States Sue Federal Government to Protect Clean Air Act (Oct. 27, 2003), available at http://www.oag.state.ny.us/press/2003/oct/oct27b_03.html.

Supporting the lawsuit, New York Attorney General Eliot Spitzer stated that “[t]he President is taking the nation in the wrong direction on environmental policy. We should not be relaxing emission control standards when air pollution continues to cause such devastating health and environmental problems.”⁸⁰ Using harsher language, Connecticut Attorney General Richard Blumenthal claimed that “[t]he rollback is probably the single worst environmental policy decision by any administration ever. It leaves the administration without a fig leaf of credibility on environmental issues.”⁸¹

B. The Clear Skies Act

In the wake of these lawsuits, the Bush Administration introduced the Clear Skies Act,⁸² which would reportedly “reduce power plant emissions of sulfur dioxide (SO₂), nitrogen oxides (NO_x), and mercury by setting a national cap on each pollutant.”⁸³ President Bush stated in his

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Clear Skies Act of 2003, S. 485, 108th Cong. (2003).

⁸³ Environmental Protection Agency, Clear Skies, <http://www.epa.gov/clearskies> (last visited Mar. 1, 2007). The EPA explains that:

While the Clean Air Act has significantly improved some of these issues, additional reductions in emissions of SO₂, NO_x, and mercury are necessary to address persistent public health and environmental problems. Because these pollutants move beyond state and regional boundaries, individual states . . . experiencing the direct environmental effects cannot always control them.

Environmental Protection Agency, Clear Skies: Basic Information, <http://www.epa.gov/clearskies/basic.html> (last visited Mar. 1, 2007). In justifying the need for the Clear Skies Act, the EPA stated that:

[C]urrent law tends to address each environmental problem independently, even if one pollutant contributes to several problems. To more effectively address the environmental problems caused by power generation, there is a need for a national program that would take advantage of the benefits that would result from controlling multiple pollutants at the same time.

Clear Skies would do this. It is a simple, cost-effective way of improving air quality over broad, multi-state areas in a way that makes sense for everyone. The Clear Skies approach would deliver guaranteed emissions reductions of SO₂, NO_x, and mercury at a fraction of command and control costs, increasing certainty for industry, regulators, consumers and citizens, while maintaining energy diversity and affordable electricity.

Id.

2005 State of the Union Address: "My Clear Skies legislation will cut powerplant pollution and improve the health of our citizens. And my budget provides strong funding for leading-edge technology, from hydrogen-fueled cars to clean coal to renewable sources such as ethanol. Four years of debate is enough."⁸⁴ In another speech, President Bush explained that the goal of his legislation was to reduce sulfur dioxide emissions by seventy-three percent and nitrogen oxide emissions by sixty-seven percent.⁸⁵

However, critics of the Clear Skies legislation⁸⁶ have stated that the Clear Skies Act will harm the environment and reverse the progress already made in reducing power-plant emissions of nitrogen oxide and sulfur dioxide.⁸⁷ According to the National Resources Defense Council:

Clear Skies" is a clear misnomer, because if Congress passes the Clear Skies bill, the result will be to weaken and delay health protections already required under the

⁸⁴ President's Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126, 127 (Feb. 2, 2005).

⁸⁵ President's Remarks on Proposed Clear Skies Legislation, *supra* note 76.

This legislation sets mandatory limits on the pollution that contributes heavily to smog, to acid rain, and nitrogen deposits that damage our streams and our bays. Our goal over the next 15 years is to reduce sulfur dioxide emissions by 73 percent, nitrogen oxide emissions by 67 percent, and to have mandatory limits on mercury emissions, cutting those emissions by 69 percent. These standards will be set and our power plants will have the flexibility to meet the standards.

Id.

⁸⁶ Interestingly, two of the major groups that opposed Bush's Clear Skies legislation were ordered to turn their financial records over to the Senate, leading to allegations of "intimidation and bullying." Alan C. Miller & Tom Hamburger, *Opponents of 'Clear Skies' Bill Examined*, L.A. TIMES, Feb. 19, 2005, <http://www.commondreams.org/headlines05/0219-02.htm>. The two groups, The State and Territorial Air Pollution Program Administrators, and The Association of Local Air Pollution Control Officials, have claimed that the Clear Skies legislation would, in effect, work to worsen air pollution in America. *Id.* Andrew Wheeler, the majority staff director for the Senate Environment and Public Works Committee, denied a connection between the groups' stances on the Clear Skies bill and the request for financial records; however, some politicians disagree:

Rep. Henry A. Waxman of Los Angeles, the senior Democrat on the House Government Reform Committee, said: "There is not even any subtlety about this. This is a blatant attempt at intimidation and bullying so that experts will be afraid to speak out about a bill that rolls back air pollution protections for all Americans."

Id.

⁸⁷ Dirty Skies, *supra* note 43.

law. . . . Compared to current law, the Clear Skies plan would allow three times more toxic mercury emissions, 50 percent more sulfur emissions, and hundreds of thousands more tons of smog-forming nitrogen oxides. It would also delay cleaning up this pollution by up to a decade.⁸⁸

Further criticism of the Clear Skies legislation came from fourteen environmental organizations that compiled a document comparing the current Clean Air Act to the administration's proposed legislation.⁸⁹ This group found that the Clear Skies legislation would be especially harmful to the effort to reduce transboundary air pollution.⁹⁰ Under the Clean Air Act, "[w]hen power plants in upwind states cause violations of air pollution health standards in downwind states, the downwind states can force those plants to cut their pollution."⁹¹ However, under the proposed legislation, "[t]he Bush plan would prohibit downwind states from pursuing any pollution reductions from power plants in upwind states before 2012. The ad-

⁸⁸ *Id.* The NRDC has stated that the single worst source of "industrial air pollution" comes from electric power plants. *Id.* "In 1998, power plants were responsible for 67 percent of the annual total sulfur dioxide, more than one-quarter of the nitrogen oxides, 33 percent of the mercury and 40 percent of the carbon dioxide emissions in the United States." *Id.*

⁸⁹ Natural Resources Defense Council, The Bush Administration's Air Pollution Plan, <http://www.nrdc.org/air/pollution/fclearsk.asp> (last visited Mar. 1, 2007).

The administration plan would delay deadlines for meeting public health standards, allowing violations of soot and smog health standards to continue until 2015 or later. Power plant pollution cuts would be delayed and diluted. Tens of millions of people would be denied healthy air, even as late as 2020 and beyond. The administration plan would allow *more than twice as much* SO₂ for nearly a decade longer (2010-2018), compared with faithful enforcement of the current Clean Air Act. After 2018, SO₂ emissions would still be *one and a half times* higher than if current law is enforced. The administration plan would allow *more than one and a half times as much* NO_x for nearly a decade longer (2010-2018) and *one third more* NO_x than current law, even after 2018. The full pollution reductions are likely to be further delayed, to as late as 2025, because of emissions "banking" provisions.

Id. Among the groups that contributed to the document are the American Lung Association, Clean Air Task Force, Clean Water Action, Clear The Air, League of Conservation Voters, National Environmental Trust, National Parks Conservation Association, National Wildlife Federation, Natural Resources Defense Council, Physicians for Social Responsibility, Environmental Integrity Project, Sierra Club, Union of Concerned Scientists, U.S. Public Interest Research Group, and the World Wildlife Federation. *Id.* For a detailed comparison of Bush's Clear Skies Initiative and the Clean Air Act, see tbl.1.

⁹⁰ *Id.*

⁹¹ *Id.*

ministration bill would increase the burden of proof after 2012, making [it] nearly impossible to prove that upwind power plants are causing downwind pollution.”⁹²

Essentially, these critics make a strong argument that the Bush Administration’s attempts to promote industry compliance do not help the environment.⁹³ By attempting to modify the New Source Review Regulations to give industry a more lenient standard,⁹⁴ the administration is sending a message to industries that emissions of sulfur dioxide and nitrogen oxide are sometimes acceptable. This message does not accord with the law, which may lead to multi-million dollar lawsuits such as the one settled by Ohio Edison.⁹⁵

While using piecemeal lawsuits to enforce the Clean Air Act may work to reduce pollution and protect the environment, this strategy can also cause serious employment-related concerns.⁹⁶ Currently, the Bush Administration is at odds with many environmentalists and certainly with Attorneys General Blumenthal and Spitzer.⁹⁷ Industry is getting one message from the administration, while being sued by others for non-compliance. These mixed messages may explain why, as Judge Sargus

⁹² *Id.* See also Clear the Air, Why Polluters Love “Clear Skies” Legislation: Top Ten Ways S. 131 Weakens Current Clean Air Safeguards, <http://www.cleartheair.org/sweetheartdeal/factsheets/sweetheartdeal.pdf> (last visited Mar. 1, 2007)

The bill eliminates states’ authority to pursue upwind polluters. The legislation would eliminate protections against interstate air pollution by prohibiting states from asking EPA for relief from upwind polluters in other states. Section 126 of the Clean Air Act currently allows downwind states to pursue pollution reductions from upwind plants that are fouling their air. The legislation bars this state right until 2015, no matter how badly out-of-state pollution is fouling a victim state’s air quality. Even then, the legislation creates an impossible showing to make sure downwind states will remain unprotected—the bill forces victimized states to make an exhaustive showing that they have examined and accomplished every other cost-effective pollution reduction from small businesses, the driving public and other industries in their state before seeking additional reductions from out-of-state power plants.

Id.

⁹³ See Sharp Reductions, *supra* note 7.

⁹⁴ See *supra* notes 86-92 and accompanying text.

⁹⁵ See Sharp Reductions, *supra* note 7.

⁹⁶ See *infra* Part III.D.

⁹⁷ *Id.*

stated, “the air is still not clean, tens of thousands of jobs have been lost, and enforcement by the EPA has been highly inconsistent.”⁹⁸

C. *Lack of Enforcement by the EPA*

The ability of Clean Air Act enforcement, as it currently exists, to bring companies into compliance has been called into question.⁹⁹ Judge Sargus explained that “[w]hile the law has always been clear, the enforcement strategies of the EPA have not. It is clear to this Court that at various times since 1970 officials of the EPA have been remiss in enforcing the law and clarifying its application to specific projects.”¹⁰⁰ He further admonishes the EPA by stating that “[w]hat should be unexpected and condemned, however, is an agency unwilling to enforce a clear statutory mandate set forth in an act of Congress.”¹⁰¹ The concern here is that the Clean Air Act is simply not being consistently and universally enforced.¹⁰² By strengthening the Clean Air Act, supporting it, and universally enforcing it (as any law should be supported and enforced), the Clean Air Act would be able to prevent pollution problems in the future, rather than simply providing a vehicle for penalization.¹⁰³

III. RAMIFICATIONS OF THE W.H. SAMMIS SETTLEMENT

The W.H. Sammis settlement will have a particularly strong impact not only on Ohio Edison and its operation of the W.H. Sammis Power station, but also on the Ohio workforce,¹⁰⁴ the air quality and cleanliness the Northeastern United States,¹⁰⁵ the operating procedures of powerful

⁹⁸ *Ohio Edison Co.*, 276 F.Supp.2d at 833.

⁹⁹ *Id.*

¹⁰⁰ *Id.* Judge Sargus also stated that “[t]his Court takes note of the fact that three decades after passage of the Clean Air Act the EPA finally moved, through this and several other lawsuits, to finally resolve this fundamental issue under the Act.” *Id.* Despite this criticism of the EPA, Judge Sargus made it clear that “the EPA’s failures in enforcement do not absolve Ohio Edison from liability under a law that has always been clear.” *Id.*

¹⁰¹ *Id.* “It is also evident from the record . . . that various electric utilities . . . have sought within legal bounds to influence the conduct of the EPA. Given the enormous cost of retrofitting an older electric power plant with new pollution control devices, this strategy should not be unexpected in the . . . administrative process.” *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See infra* Part III.D.

¹⁰⁵ *See infra* Part III.A.

pollutant-producing companies in Ohio and elsewhere,¹⁰⁶ the future of alternative energy resources,¹⁰⁷ and the sources of funding for these projects.¹⁰⁸ There is no doubt that this settlement strikes a major win in the fight against air pollution.¹⁰⁹ However, the forcing of individual plants into compliance through extensive lawsuits is a less than ideal method of enforcement and can be extremely detrimental to the workforce.

This Note does not suggest that all of the ramifications of the W.H. Sammis lawsuit settlement are negative. It is important to note that the settlement will lead to a reduction in pollution, the creation of alternative energy resources, and may send a message to other polluters that there are still parties willing to enforce the Clean Air Act.¹¹⁰ However, in observing some of the detrimental effects that piecemeal litigation against major companies located in small cities can have on a workforce, this Note suggests that these benefits come at a heavy cost. The effects of this settlement, outlined in the consent decree that Ohio Edison agreed to sign to avoid the liability of a remedy phase trial, and the ramifications of these effects are discussed below.¹¹¹

A. *Pollution Reduction*

Of the many changes that Ohio Edison was compelled to agree to, first and foremost was that, "Ohio Edison will install pollution controls at the Sammis Plant that will reduce air pollution from that plant by 70-80 percent."¹¹² A seventy to eighty percent reduction in air pollution at this plant alone should not be underestimated. As previously discussed, W.H. Sammis is one of the fifty largest power plants in the nation as well

¹⁰⁶ Due to the proximity and size of the W.H. Sammis plant and the ramifications of this settlement, other powerful polluters are likely to scrutinize this case closely. *See infra* Part III.C.

¹⁰⁷ *See infra* Part III.B.

¹⁰⁸ Sharp Reductions, *supra* note 7; Spitzer Hails Major Win, *supra* note 7.

¹⁰⁹ Sharp Reductions, *supra* note 7.

¹¹⁰ *Id.*

¹¹¹ Proposed Consent Decree, *United States v. Ohio Edison Co.*, No. C2-99-1181 (S.D. Oh. Mar. 18, 2005), available at http://www.oag.state.ny.us/press/2005/mar/Ohio_Edison_Consent_Decree.pdf.

¹¹² Sharp Reductions, *supra* note 7 ("Specifically, because of space constraints at the Sammis plant, Ohio Edison will put full controls on the two largest Sammis units accounting for over half of the plant's capacity and equipment for significant pollution control on the remaining five units at the plant.").

as one of the dirtiest polluters.¹¹³ In addition to this, “Ohio Edison will . . . reduce pollution at its Burger coal plant in Ohio, its Mansfield coal plant in Pennsylvania and the First Energy coal plant in East Lake, Ohio.”¹¹⁴ A reduction in pollution from these plants will be extremely important to the fight to reduce transboundary air pollution as Ohio and Pennsylvania are the two worst contributors to air pollution in the United States.¹¹⁵ Furthermore, “Ohio Edison will install pollution controls at other plants as well to achieve additional reductions so that in total [SO₂] emissions will be cut by 104% and [NO_x] will be cut by 101%.”¹¹⁶ Without a doubt, this settlement scores a major victory for reducing levels of dangerous emissions. However, much of the settlement focused on the creation of alternative energy resources as well, which is a creative punishment that works to help the environment while penalizing Ohio Edison.¹¹⁷

B. *Creation of Alternative Energy Resources*

Along with reducing the pollution at the Sammis Plant and elsewhere, Ohio Edison agreed to spend millions of dollars on the creation of alternative energy resources.¹¹⁸ The decree stated that in addition to the penalty that Ohio Edison had to pay to the Government,¹¹⁹ “Ohio

¹¹³ See *supra* notes 39-42 and accompanying text.

¹¹⁴ Sharp Reductions, *supra* note 7.

¹¹⁵ See *infra* note 127 and accompanying text.

¹¹⁶ Sharp Reductions, *supra* note 7.

¹¹⁷ *Id.*

¹¹⁸ *Id.* The two major sources of alternative energy that Ohio Energy will be required to fund are solar and wind energy. *Id.* Solar energy has been criticized as too weak to be a legitimate alternative:

Solar energy . . . requires huge installations. It has been estimated that an area of 60 square miles in relatively clear central Oregon would have to be covered with solar cells in order to meet the present electric needs of that State. About 10% of the cells have to be replaced each year.

Walter Youngquist, *Alternative Energy Sources—Myths and Realities*, ELEC. GREEN J., Dec. 1998, <http://egj.lib.uidaho.edu/egj09/youngqu1.html>. However, wind power has been growing enormously in the past years. “The total installed wind power capacity now stands at 59,084 MW worldwide, an increase of 24% compared to 2004.” Press Release, Global Wind Energy Council, Record Year for Wind Energy: Global Wind Power Market Increase By 43% in 2005, (Feb. 17, 2006), available at http://www.gwec.net/uploads/media/06-02_PR_Global_Statistics_2005.pdf. Furthermore, “[i]n terms of new installed capacity in 2005, the US was clearly leading with 2,431 MW, followed by Germany (1,808 MW), Spain (1,764 MW), India (1,430 MW), Portugal (500 MW) and China (498 MW).” *Id.*

¹¹⁹ Proposed Consent Decree, *supra* note 111, at 39. “Ohio Edison will pay a penalty of \$8.5 million to the federal government within 30 days.” Sharp Reductions, *supra* note 7.

Edison will spend a total of \$10 million over five years on clean air and alternative energy projects in New York, Connecticut and New Jersey.¹²⁰ Specifically, Ohio Edison agreed that, "\$6.1 million will be available for projects in New York, including the installation of solar photovoltaic systems on municipal buildings [and that] \$2.8 million will be available in New Jersey; and \$1.1 million will be available in Connecticut."¹²¹ Finally, "Ohio Edison will pay \$400,000 to Allegheny County, Pennsylvania . . . for solar projects; and \$215,000 to the National Park Service for environmental monitoring projects; and Ohio Edison will fund the development of almost 100 megawatts of wind power in western Pennsylvania."¹²² Time was a critical factor in the specifics of the consent decree on this issue, requiring Ohio Edison to agree to enter into contracts within four years.¹²³

This funding is a major boost for the alternative energy industry in the Northeast and may be an indication of how alternative energy will grow in the future. If it becomes economically infeasible for major power producers to continue to pollute in violation of the law and respond to lawsuits, they may choose to invest in alternative energy sources. Sources such as wind power emit zero sulfur dioxide or nitrogen oxide, and are environmentally ideal.¹²⁴ However, rather than achieving these goals through a punishment, legislation should be enacted that encourages power stations to invest in alternative energy resources before they are forced to by litigation.

C. *Ramifications for Other Major Power-Producing Companies*

This settlement is also likely to have major ramifications for other powerful power companies that are not in compliance with the Clean Air Act. The settlement with W.H. Sammis Power Station is

¹²⁰ Sharp Reductions, *supra* note 7.

¹²¹ *Id.*

¹²² *Id.* One hundred megawatts of power is enough to power a home for more than eight years. See Wright, *supra* note 8 ("A megawatt is enough electricity to power the average Midwest home for a month.").

¹²³ Proposed Consent Decree, *supra* note 111, at 37 ("Within three and a half years after entry of this Consent Decree, Ohio Edison shall provide proof to the plaintiffs that it has entered into one or more contracts with providers of wind energy for purchase of at least 93 megawatts.").

¹²⁴ See American Wind Energy Association, Comparative Energy Air Emissions of Wind and Other Fuels, <http://www.awea.org/pubs/factsheets/EmissionKB.PDF> (last visited Mar. 1, 2007) ("Wind energy's most important environmental benefit is its lack of omissions of both air pollutants and greenhouse gases when compared with alternative methods of generating electricity.").

particularly important as a signpost to other companies because of its location and size.¹²⁵ In this particular settlement, Pennsylvania joined other Northeastern states to bring an action against an Ohio company.¹²⁶ However, major polluters are not exclusive to Pennsylvania or the Northeast. For example, “[t]he 10 states with the heaviest concentrations of the dirtiest power plants—in terms of pounds of sulfur dioxide emissions per megawatt hour of electricity generated—are: Pennsylvania (nine, including five of the 10 dirtiest plants); Ohio (nine); [and] Indiana, (six, including two of the top three dirtiest plants).”¹²⁷ Furthermore, “[p]lants in Indiana, Ohio, Illinois, Michigan, Wisconsin, and Minnesota are among the nation’s worst sulfur dioxide and nitrogen oxide polluters.”¹²⁸ By reaching this settlement with one of the nation’s biggest polluters, Spitzer, Blumenthal and the other plaintiffs in this action have sent a message that the Clean Air Act can be successfully enforced. While there are mixed signals concerning the Clean Air Act coming from different authorities, the W.H. Sammis settlement shows many industrial companies who are similar in size and location that there can be serious consequences for non-compliance.

D. Ramifications for the Ohio Workforce

The W.H. Sammis Power Station settlement will have serious effects on the Ohio Workforce. As Judge Sargus lamented in his opinion, we are reaching a point where major power-producing companies are finding it more attractive to leave Ohio than to comply with the Clean Air Act regulations.¹²⁹ Judge Sargus observed, “[f]rom an employment perspective, Ohio Edison has chosen to meet other statewide and regional air quality standards by switching to out of state, low sulphur coal, a strategy which in conjunction with other utilities has caused a huge loss of coal mining and related jobs in Ohio.”¹³⁰ Much of the problem, however, stems from the fact that complying with EPA regulations is extremely

¹²⁵ See *supra* notes 39-42 and accompanying text.

¹²⁶ Sharp Reductions, *supra* note 7.

¹²⁷ Press Release, Env’tl. Integrity Project, Dirty Kilowatts: America’s 50 Dirtiest Power Plants Emit up to 20 Times More Pollution Than Plants with State-of-Art Controls (May 11, 2005), available at <http://www.environmentalintegrity.org/pub315.cfm>. New York and Maryland are also among the highest on the list. *Id.*

¹²⁸ *Id.* (quoting Bruce Niles of the Sierra Club’s Great Lakes Clean Air Program).

¹²⁹ See *Ohio Edison Co.*, 276 F. Supp. 2d. at 833.

¹³⁰ *Id.*

expensive. Sargus went on to explain that “[f]rom the standpoint of Ohio Edison, since 1970, the company has invested over \$450 million to install pollution control devices on the Sammis units yet still fails to meet the new source pollution standards.”¹³¹ The Sammis Plant, due to mixed messages, made major modifications to its Power Station that actually increased the amount of pollution it was producing.¹³² If compliance with the Act is already expensive, piecemeal enforcement through litigation may be devastating. Consistent support and enforcement of the Clean Air Act by the Executive Branch should rectify much of this problem.

Eban Goodstein, an Associate Professor of Economics at Lewis and Clark College, has suggested that in reality, complying with environmental regulations does not hurt the workforce as much as people may think.¹³³ He states that, “[t]his point runs so counter to the conventional wisdom that it is worth repeating: there is a solid research consensus in the economics profession that at the economy-wide level, there is simply no trade-off between jobs and the environment.”¹³⁴ Professor Goodstein goes on to posit that it is industry’s influence on the media that creates this illusion in the minds of workers.¹³⁵ However, Goodstein is also quick to admit that “the knowledge that a national trade-off is non-existent will provide little solace to a worker who has lost her job as a result of environ-

¹³¹ *Id.* at 832.

¹³² *See supra* notes 45-47 and accompanying text.

¹³³ Eban Goodstein, *Environmental Regulation and Jobs: Myth and Reality*, UNCOMMON SENSE, Sept. 1996, <http://www.njfac.org/us12.htm>.

¹³⁴ *Id.*

¹³⁵ *Id.* Goodstein explains that:

The myth persists because of the corporate world’s ability to spin the media. Reporters uniformly report . . . the absurdly high job loss predictions that industry think tanks regularly churn out. More profoundly, journalists . . . are looking for someone to blame for rising income inequality, corporate downsizing, and increasing middle class insecurity.

Id. Whether it is truly a myth or not, the concern does persist: “In a 1990 poll, one third of the respondents believed that they personally were somewhat or very likely to lose their job as a result of environmental regulation.” *Id.* However, it is not just the general public who assumed that the Clean Air Act would lead to the termination of employees. Goodstein mentions a study done before the 1995 Amendments to the Clean Air Act were passed to determine how many jobs they believed would be lost. The study concluded that there was “little doubt that a minimum of two hundred thousand (plus) jobs [would] quickly be lost, with plants closing in dozens of states. This number could easily exceed one million jobs—and even two million jobs” *Id.* (quoting ROBERT HAHN & WILBUR STEGER, CONSAD RESEARCH CORP., AN ANALYSIS OF JOBS AT RISK AND JOB LOSSES FROM THE PROPOSED CLEAN AIR ACT AMENDMENTS 15 (1990)).

mental regulation.”¹³⁶ Furthermore, Goodstein notes that his theory should not, “downplay the devastating impact that layoffs have in communities—especially small resource-dependent communities.”¹³⁷ For example, employment in the small town of Beverly, Ohio, was severely hurt by Clean Air Act regulations:

[T]he more stringent emission reductions required by the implementation of the next phase of the Clean Air Act will reduce our ability to continue using the high-sulfur coal produced at the Muskingum mine These employment losses at Central Ohio Coal are largely related to AEP’s efforts to meet federal emissions limits.¹³⁸

Like in Beverly, the W.H. Sammis settlement, and similar actions against major plants in small towns, could lead to a situation where employment concerns become devastating. As previously discussed, a combination of elements have led to lawsuits being the only way to keep major power producers in compliance with the law.¹³⁹ However, litigation against individual companies resulting in multi-million dollar settlements is exactly the type of environmental regulation that could cause serious job loss.¹⁴⁰ By specifically penalizing W.H. Sammis in the small town of Stratton, employment concerns may become a very important consideration regardless of the statistics on the national level.

A message must be sent that it is not permissible to violate the Clean Air Act. As Judge Sargus stated, enforcement of the Act has been questionable at best.¹⁴¹ It is not difficult to see that questionable enforcement can lead to purposeful non-compliance. By enforcing the Act on individual companies, often located in small towns, the effects on employees can be devastating.¹⁴² However, it is not the employees who should be punished. The Clean Air Act should be strengthened and enforced by the Executive Branch so that it is more economically intelligent to comply with the Act than to

¹³⁶ *Id.*

¹³⁷ *Id.* See also Press Release, Am. Elec. Power, AEP’s Central Ohio Coal Announces Plans to Reduce Workforce at Muskingum Mine (Aug. 11, 1999), available at <http://www.aep.com/newsroom/newsreleases/default.asp?dbcommand=displayrelease&ID=610>.

¹³⁸ Press Release, Am. Elec. Power, *supra* note 137.

¹³⁹ See *supra* Part II.

¹⁴⁰ See, e.g., Nat’l Ass’n of Mfrs., *Ozone and Taxes*, CLEARING THE AIR, April 2004, at 2, 3, available at http://www.nam.org/s_nam/bin.asp?CID=136&DID=230836&DOC=FILE.PDF; Press Release, Am. Elec. Power, *supra* note 137.

¹⁴¹ *Ohio Edison Co.*, 276 F. Supp. 2d at 833.

¹⁴² See, e.g., Press Release, Am. Elec. Power, *supra* note 137.

violate it. If the Clean Air Act is a high priority for the Executive Branch, major lawsuits that affect only one company at a time will not be necessary and layoffs, cutbacks, and terminations should become less prevalent.

CONCLUSION

A recent study by the Environmental Working Group has shown that “[m]ore than 39 percent (227 out of 575) of all major U.S. facilities in auto assembly, iron and steel, petroleum refining, pulp manufacturing, and the metal smelting and refining industries violated the CAA between January 1997 and December 1998.”¹⁴³ Violations of the law to this extent can only be understood if it is more economically intelligent for these companies to break the law than comply with it. In support of this idea, the study went further to show that “[t]he average fines for a ‘significant violator’ of the CAA for the past two years nationwide was \$318,290. The average net earnings of the corporations that owned these facilities in 1998 were \$24.2 billion.”¹⁴⁴ Even more unsettling is the finding that “[i]n thirteen of the nineteen states with five or more violators, more than 50 percent of all facilities violating the Clean Air Act in the past two years escaped with no fines.”¹⁴⁵

The W.H. Sammis lawsuit is an example of one instance where the provisions of the Clean Air Act were strictly enforced.¹⁴⁶ However, the method of enforcement—an individual lawsuit against Ohio Edison—can have severe negative repercussions on workers.¹⁴⁷ Bringing multi-million dollar lawsuits against polluters does help to clean up the environment,¹⁴⁸ but it can also lead to the sudden loss of many jobs.¹⁴⁹ If the W.H. Sammis settlement is indicative of the future of Clean Air Act enforcement, it is likely that many innocent employees will lose their jobs because of violations by major corporations. However, if the settlement is a sign of the future, it may also mean a significant drop in transboundary air pollution and a significant increase in investment in alternative energy resources.

¹⁴³ JOHN COEQUYT, RICHARD WILES & CHRISTOPHER CAMPBELL, ENVTL. WORKING GROUP, ABOVE THE LAW: HOW THE GOVERNMENT LETS MAJOR AIR POLLUTANTS OFF THE HOOK 1 (1999), available at http://www.ewg.org/reports_content/abovethelaw/abovethelaw.pdf. Furthermore, “[a]ll of these infractions fit the U.S. EPA definition of ‘significant’ violations of the law.” *Id.*

¹⁴⁴ *Id.* at 2.

¹⁴⁵ *Id.*

¹⁴⁶ See *supra* Part I.C-D.

¹⁴⁷ See *supra* Part III.D.

¹⁴⁸ See *supra* Part III.A.

¹⁴⁹ See *supra* Part III.D.

There is no doubt that the settlement has both positive and negative effects. However, the positive changes that were mandated can be achieved through means other than litigation, avoiding the negative effects altogether.

Weakening the Clean Air Act through the implementation of the Clear Skies Act or through President Bush's proposed modification of the New Source Review regulations is not the solution.¹⁵⁰ Rather, by strengthening the Act to make it clear that modifications to a plant that increase pollution levels are impermissible, and by giving priority to enforcing these provisions, companies will begin to find it expensive to fail to comply with the act, instead of the other way around.¹⁵¹

The reason that "[t]hirty-three years later, the air is still not clean, tens of thousands of jobs have been lost, and enforcement by the EPA has been highly inconsistent,"¹⁵² is that errors in enforcement and mixed messages have plagued the Clean Air Act's history. In order to properly balance employment and environmental concerns, piecemeal lawsuits against major violators cannot be the norm of the future. There must be significant indications from the Executive Branch and from Congress that the Clean Air Act will be enforced, and that companies must comply. As discussed above, environmental regulations do not hurt employment unless a situation like the Sammis settlement puts a sudden large financial strain on a company.¹⁵³ With proper enforcement of the Clean Air Act, it would not have been economically feasible for Ohio Edison to take the chances it did. However, with the enforcement statistics as they currently are,¹⁵⁴ it likely made more economic sense for Ohio Edison to violate the Act.

Piecemeal lawsuits against companies simply fail to balance environmental and employment concerns. In order to reach all of this nation's goals, a serious effort must be made to strengthen the Clean Air Act and transform it into a means of preventing, rather than simply threatening to penalize, actions that pollute our air.

¹⁵⁰ See *supra* Part II.

¹⁵¹ See Rogers, *supra* note 5 ("Congress, of course, can only pass laws; it is up to the Executive Branch to enforce them.").

¹⁵² *Ohio Edison Co.*, 276 F. Supp. 2d at 833.

¹⁵³ See *supra* Part III.D.

¹⁵⁴ See *supra* Part II.C.