

May 5, 2004

The Honorable Michael O. Leavitt  
Administrator  
U.S. Environmental Protection Agency  
c/o Office of Congressional and Intergovernmental Relations  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dear Administrator Leavitt:

According to news reports, the Supreme Court has declined to consider a case involving the authority of the Environmental Protection Agency (EPA) to issue administrative compliance orders to the Tennessee Valley Authority (TVA). This is a case in which EPA concluded that the TVA violated the Clean Air Act (CAA) when it undertook fourteen rehabilitation projects at nine coal-fired electric power plants without obtaining permits. EPA concluded that the projects triggered several statutory requirements including New Source Review and New Source Performance Standards.

Last year, I wrote to then Acting Administrator Horinko to inquire what EPA was doing to address the serious health problems associated with the pollution from these plants after a decision of the 11<sup>th</sup> Circuit Court of Appeals which had ruled that EPA must “prove the existence of a CAA violation in district court, including the alleged violation that spurred the EPA to issue the [administrative compliance order] in this case.”<sup>1</sup> (See attached letter.) In other words, the 11<sup>th</sup> Circuit ruled that EPA could not pursue this case administratively as it apparently preferred to do. EPA sought Supreme Court review of this decision, and apparently its efforts to take legal action to stop the TVA pollution remained in abeyance during the pendency of this effort. This is the case which the press yesterday reported the Supreme Court has declined to review.

According to estimates for premature mortality and asthma attacks prepared by EPA’s own consultant, the TVA plants subject to New Source Review enforcement actions contribute to 900 premature deaths and 19,300 asthma attacks annually. In addition, the air quality of one of great national parks, the Great Smoky Mountains National Park, is seriously impaired in part by emissions from these plants. Visibility has been reduced from an average

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<sup>1</sup> *Tennessee Valley Authority v. Whitman*, 336 F. 3d. 1236, 1267 (11<sup>th</sup> Cir. 2003).

of 113 miles (under natural conditions) to an annual average of 25 miles.<sup>2</sup> TVA releases more than 4,400 pounds of mercury each year. Last year, Great Smokey Mountains Park began to monitor mercury pollution for the first time, with preliminary data indicating that the park will be one of the top 10% nationwide for mercury deposition.<sup>3</sup>

In response to my questions regarding the status of EPA's enforcement actions, EPA stated:

EPA continues to pursue its enforcement of TVA's alleged violations with the goal of reducing emissions from its facilities. We will continue to coordinate with the Department of Justice as to the United States' appropriate course of action in this case, as we have with other similar cases that the Agency continues to pursue.<sup>4</sup>

The health of our citizens and the future of our most visited national park continue to be at risk. Hence, I remain very concerned about the status of EPA's efforts to provide needed protection. Accordingly, I would appreciate your specific responses to the questions which I previously posed:

- 1) Please identify the actions which EPA is taking to insure that pollution from the plants does not continue to endanger public health.
- 2) Has EPA referred this matter to the Department of Justice so that it may prove in court that the violations occurred? If so, when did the referral occur and what has been the result? If not, why not?

Thank you for your prompt attention to this matter. I would appreciate a response to this inquiry by close of business on May 12, 2004.

Sincerely yours,

Joseph I. Lieberman  
Ranking Member

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<sup>2</sup> National Parks Conservation Association, *Great Smoky Mountains National Park*.

<sup>3</sup> Testimony of Don Barger, Senior Director, Southeast Regional Office, National Parks Conservation Association before the Tennessee Valley Authority Caucus, Knoxville, Tennessee, July 21, 2003.

<sup>4</sup> Letter to The Honorable Joseph I. Lieberman, United States Senate, from John Peter Suarez, Assistant Administrator for Enforcement and Compliance Assurance, Environmental Protection Agency, Washington, D. C., November 20, 2003.