

# Supreme Court Overturns Fourth Circuit's Interpretation of the Definition of "Modification" in EPA's NSR Regulations

April 4, 2007

On April 2<sup>nd</sup>, the Supreme Court unanimously overturned the Fourth Circuit's decision interpreting the Environmental Protection Agency's (EPA) New Source Review (NSR) regulations in *Environmental Defense v. Duke Energy Corp.*, Case No. 05-848. At issue was the meaning of the term "major modification" in EPA's 1980 regulations under the Clean Air Act (CAA) for the Prevention of Significant Deterioration (PSD) program, which applies to emissions from stationary sources. The Supreme Court held that the Fourth Circuit's construction of the PSD regulatory definition "major modification" amounts to an implicit invalidation of the regulations. In so ruling, the Court held that the Fourth Circuit engaged in a "form of judicial review" that the CAA reserves to the exclusive jurisdiction of the D.C. Circuit. Although the Supreme Court's holding was limited to this jurisdictional question, in resolving it the Court rejected the Fourth Circuit's interpretation of the PSD regulations test for measuring emissions increases, declaring that the regulations "clearly do not define a 'major modification' in terms of an increase in the 'hourly emission rate.'" This aspect of the Court's decision is likely to make it more difficult for Duke Energy and other industry defendants to fend off NSR enforcement actions involving alleged major modifications to existing stationary sources.

## Background

This case originated as an NSR enforcement action brought by EPA against Duke Energy, which was filed in a federal district court in December 2000. EPA alleged that Duke Energy violated the CAA when it failed to obtain NSR permits before undertaking 29 separate projects to repair or replace existing power plant components. According to EPA, each of these projects constituted a "major modification" that triggered the NSR permitting requirements because the projects increased the plant's *annual* emissions due to increases in *daily hours of operation*. Duke Energy contended that the NSR permitting requirements did not apply because even if annual emissions increased, none of the projects increased a "unit's maximum *hourly* rate of emissions," as measured under the emissions increase test used in the New Source Performance Standards (NSPS) program. The Fourth Circuit agreed with Duke Energy. It based its ruling on Congress' decision to adopt identical definitions of the term "modification" in the NSPS and PSD provisions of the Act. In light of these identical statutory definitions, the Fourth Circuit held that EPA was required to "interpret the term 'modification' in its [NSR] regulations to conform with its earlier NSPS regulations," which requires only that a "physical change" increase maximum *hourly* emissions.

In order to reach the merits of the case, the Fourth Circuit had to find that its decision did not impinge on the D.C. Circuit's exclusive jurisdiction, conferred by CAA § 307(b)(1), or violate CAA § 307(b)(2). Section 307(b)(1) of the CAA provides that EPA's nationally-applicable regulations and standards implementing the CAA may be reviewed only in the D.C. Circuit. Section 307(b)(2) provides that CAA rules "shall not be subject to judicial review in civil or criminal proceedings for enforcement." The Fourth Circuit reasoned that § 307(b) was not implicated because the circuit court was not directly reviewing the PSD regulations' definition of "modification." Instead, it was simply correcting EPA's "interpretation" of its regulations in order to conform that interpretation with the statute and congressional intent.

## The Decision

Environmental interveners in the Fourth Circuit proceeding successfully petitioned the Supreme Court to grant certiorari on two issues: (1) whether the Fourth Circuit encroached on the D.C. Circuit's exclusive jurisdiction under the CAA by reviewing nationally applicable regulations in an enforcement proceeding; and (2) whether the CAA requires EPA to interpret the statutory term "modification" consistently in its NSR and NSPS regulations.

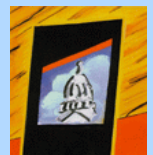
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1050 Thomas Jefferson  
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(202) 338-2416

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719 Second Avenue  
Suite 1150  
Seattle, Washington  
98104  
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The Supreme Court held that the Fourth Circuit's construction of the 1980 PSD regulation was an "implicit declaration" that the PSD regulations were invalid as written. Such invalidation, it ruled, necessarily implicated a review of national regulations over which the Fourth Circuit would have no jurisdiction because of § 307(b)'s limitation. The Court expressly noted, however, that because the Fourth Circuit "did not believe that its analysis reached validity, it did not consider the applicability or effect of that limitation. We have no occasion at this point to consider the significance of § 307(b) ourselves." Thus on remand, the Fourth Circuit will have to reconsider its jurisdiction. The Court also noted that its ruling did not bar Duke Energy from contending on remand, "to the extent that it is not procedurally foreclosed," that EPA's construction of PSD "modifications" reflects a retroactive change of position inconsistent with 20 years of accepted practice.

In concluding that the Fourth Circuit had invalidated the PSD regulations, the Supreme Court addressed the test for emissions increases under those regulations. That test has been a much litigated legal issue in EPA's on-going NSR enforcement initiative. Notably, the Court rejected the Fourth Circuit's legal determination that the "PSD regulations must conform to their NSPS counterparts," finding that the Fourth Circuit had "read those PSD regulations in a way that seems...too far a stretch for the language used." According to the Court, the "PSD regulations on 'modification' simply cannot be taken to track the agency's regulatory definition under the NSPS." While the Court conceded that the 1980 PSD regulations are hardly "a seamless narrative," it ruled that they "clearly do not define a 'major modification' in terms of an increase in the 'hourly emissions rate.'"

### **Implications**

While the Supreme Court's decision represents a victory for the environmental groups that sought review by the Court, it does little to answer the question of how emissions increases are measured under the NSR program. The Supreme Court categorically rejected Duke Energy's NSPS "maximum hourly" emissions test. However, the decision provides virtually no guidance as to how lower courts should apply an annual emissions test based on the projected future operation of the emissions unit. Moreover, the Court has left the door open for Duke Energy, provided it is not procedurally foreclosed, to pursue its claim on remand that EPA has taken inconsistent positions and that the agency's actions constitute an impermissible retroactive application of PSD requirements.

Because the issue was not before it, the Supreme Court's decision also does not address the other major legal issue in pending NSR enforcement actions: whether projects like Duke Energy's are excluded from NSR under the exclusion for "routine maintenance, repair and replacement."

Uncertainty as to the elements of the annual emissions test and the scope of excluded "routine maintenance" activities means industry still lacks clear guidance for projects at existing facilities that may trigger NSR.

### **For Additional Information**

Van Ness Feldman regularly assists energy companies to understand air quality and emissions matters. For information about these regulations or related legislation, please contact Stephen Fotis, Dick Penna, Britt Fleming, or any member of our Environmental practice at (202) 298-1800.

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