

## **THE SAME, BUT DIFFERENT: DEFINING MAJOR MODIFICATION AND EMISSION INCREASES UNDER THE CAA**

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On Nov. 1, 2006, the Supreme Court heard oral arguments in the case of *Environmental Defense v. Duke Energy Corp.*, No. 05-848. The Court granted *certiorari* on two issues, one substantive and the other jurisdictional.

The substantive legal issue before the Court deals with the definition of major modifications under the Clean Air Act's New Source Review (CAA's NSR) regulations. The NSR regulations require pollution sources to install modern pollution controls when they make major modifications at plants. Major modifications are defined as physical or operational changes that result in emission increases. 40 C.F.R. § 51.166(b)(2)(i). However, two programs under the CAA—the New Source Performance Standard (NSPS) and the Prevention of Significant Deterioration (PSD)—define increases in emissions differently.

The 1970 amendments to the CAA were enacted for the purpose of "protect[ing] and enhance[ing] the quality of the Nation's air resources" and "promot[ing] the public health and welfare." 42 U.S.C. § 7401(b)(1). Under these amendments, the Environmental Protection Agency (EPA) was directed to promulgate National Ambient Air Quality Standards (NAAQS). These NAAQS establish maximum concentrations of criteria pollutants, which are allowable in each region of the United States. 42 U.S.C. § 7409. Six criteria pollutants exist: (1) sulfur dioxide; (2) particulate matter; (3) nitrogen oxide; (4) carbon monoxide; (5) ozone; and (6) lead. 40 C.F.R. Part 50. EPA sets nationally applicable primary standards for these pollutants. EPA also sets secondary standards on these pollutants to protect visibility and prevent damage to animals, crops, vegetation and buildings. Two components of the

1970 amendments, were state implementation plans (SIPs) and the NSPS program. SIPs ensure that states comply with its air quality standards by controlling criteria pollutant emissions from existing sources. The NSPS program, however, established a special set of standards for certain new and modified sources of pollution at power plants. 42 U.S.C. § 7411. Under the NSPS program, increases in emissions are defined in terms of *hourly* emission rate increases.

The NSPS program, alone, was not entirely successful. Therefore, Congress enacted the 1977 CAA amendments, including the PSD program, which supplements the NSPS program. 42 U.S.C. § 74701(1). The PSD program is intended to protect air quality in areas that have met or exceeded the NAAQS. Under the PSD program, a power plant, prior to engaging in a major modification, must acquire a permit from EPA. 45 Fed. Reg. 52,676. Unlike the NSPS program, the PSD program defines increases in emissions in terms of *annual* emission rate increases.

Duke Energy operates eight plants in the Carolinas, which include a total of 30 coal-fired generating units. *United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005). Between 1988 and 2000, Duke Energy made upgrades to 29 of these coal-fired generating units. *Id.* These upgrades extended the life of the generating units and allowed the units to increase their daily hours of operation. *Id.* Duke Energy did not apply for PSD permits from the EPA for these upgrades. *Id.*

In 2000, EPA alleged that Duke Energy violated the CAA by failing to obtain PSD permits because its *annual* emissions increased as a result of the upgrades. However, Duke contends EPA should have applied the *hourly* emission rate test under the NSPS program. Because Duke's hourly emissions rates did not increase as a result of the upgrades, they contend the upgrades did not constitute a major modification and therefore, they did not have to obtain PSD permits.

During oral arguments, Justice Scalia's comments appeared consistent with Duke Energy's assertions. Justice Scalia expressed concern over the impact of the different regulatory definitions on companies. It was his concern that companies would "get whipsawed." Chief Justice John Roberts, while recognizing EPA's authority to interpret ambiguous regulations differently over time, also expressed concern about how changes in interpretation would impact companies, such as Duke Energy.

However, Environmental Defense and the government argue that where there is an ambiguous statutory definition, EPA possess authority to interpret different definitions for different purposes and that such interpretation is reasonable in light of the different purposes of the NSPS and PSD programs.

The second issue taken up by the Court is jurisdictional. Specifically, the issue pertains to whether EPA "can interpret that statutory term 'modification' under PSD differently" from how it interprets that term under the NSPS and whether district and/or appellate courts possess jurisdiction over EPA's clean air enforcement actions. Duke Energy argues that EPA acted outside its authority in defining the statutory term differently under its PSD and NSPS regulations. Duke Energy also contends the district and appellate courts possess the requisite jurisdiction to invalidate EPA regulations.

While the majority of the Justices' questions during oral argument appeared to focus in on the substantive legal issue, Justice Anthony Kennedy did pose the question of whether district courts reviewing EPA enforcement actions would be precluded from ruling on EPA's interpretation of statutory requirements. Environmental Defense contended that pursuant to Section 307(b) of the CAA, jurisdiction to invalidate EPA regulations rests solely with the United States Court of Appeals for the District of Columbia. They also argue that Section 307(b) limits the time period within which challenges to EPA's rules may be brought. Therefore the district court and the United States Court of Appeals for the Fourth Circuit had no authority to invalidate EPA's interpretation of its own regulations. From a policy perspective, Environmental Defense argued that

allowing district courts to rule on EPA's interpretation of statutory requirements would result in inconsistent judicial outcomes and circuit splits, which in turn would hamper EPA's enforcement efforts. A ruling from the Court is expected in early 2007.