

## Supreme Court Supports EPA Clean Air Act Interpretation Against Duke Energy

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In deference to EPA's interpretation of two provisions of the Clean Air Act, on April 2, the U.S. Supreme Court ruled against Duke Energy, vacating a 4th Circuit Court of Appeals decision that found Duke Energy did not violate the Clean Air Act in retrofitting its aging coal-fired power plants in North and South Carolina. Justice David Souter wrote the opinion for the Court, with Justice Clarence Thomas concurring in part, holding that "modification" under two different provisions of the Clean Air Act need not be interpreted identically.

The issue at the heart of *Environmental Defense Fund, et al. v. Duke Energy Corp.*, was the interpretation of "modification" used in each of two regulatory schemes: the "New Source Performance Standards" (NSPS) program and the "Prevention of Significant Deterioration" (PSD) requirements. Under the NSPS program, operators of stationary sources of air pollutants must use the best available control technology for limiting pollution both in newly constructed sources and those undergoing "modification." The 1970 amendments to the Act defined "modification" for NSPS purposes as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." U.S.C. § 7411(a)(4). EPA thereafter issued regulations implementing the NSPS program and providing generally that a modification was any such change that would increase the hourly emission rate. 40 C.F.R. 60.14(a) (1976).

In 1977, Congress amended the Act again, creating the PSD program, which was aimed at providing greater protection to certain parts of the country (i.e., those that had already attained compliance with the National Ambient Air Quality Standards or "NAAQS"). This program required a PSD permit and review of post-project emissions prior to construction or modification of a major emitting facility. The 1977 amendments defined "modification" in the PSD program by cross-referencing the NSPS statutory definition. EPA's PSD regulations, however, did not adopt the NSPS regulatory definition of "modification," which keyed to changes in hourly emission rates. Instead, the agency defined "modification" through a series of linked provisions as a major change (above a certain threshold) that could increase the actual annual emission of a pollutant above the actual average for the prior two years.

Between 1988 and 2000, Duke upgraded its eight coal-fired plants in North and South

Carolina by replacing or redesigning tube assemblies to extend the life of the units and allow them to run longer each day, but did not obtain PSD permits. The United States filed an action in 2000 saying Duke violated the Act by failing to obtain such permits (and several environmental groups intervened as plaintiffs). Duke argued that permits were not required because none of the projects increased hourly emission rates. The District Court agreed, and the Court of Appeals affirmed, concluding that by including identical statutory definitions, Congress affirmatively mandated that the term be construed identically in all regulations issued under these provisions.

In its opinion vacating the appellate decision, the Supreme Court concluded that reading the NSPS regulation of “hourly rate of discharge” into the PSD regulations essentially nullified the PSD regulations. It found that absent a rule barring different construction, EPA’s differing interpretations need only be reasonable. Duke had also argued that although annual emissions increased, this increase was exempt from permitting because it resulted from allowing its coal-fired units to operate longer without interruption. It cited a regulation exempting increases in the hours of operation or production rate from permitting requirements. The Court rejected this argument as well, citing lower court opinions that an increase in hours resulting from construction-related activity is not excluded from PSD review and permitting; only a mere increase in hours, standing alone, would qualify for exception. On remand, Duke will now have to defend either that the work done was not a “modification” under the PSD regulations or that the EPA failed to give adequate notice of its interpretation that resulted in the enforcement action.

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