



# THE ADMINISTRATIVE WATCH

ADMINISTRATIVE WATCH ADDRESSES ENVIRONMENTAL, HEALTH & SAFETY ISSUES

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## U.S. Supreme Court Vacates Fourth Circuit in Duke Energy New Source Review Case

The U.S. Supreme Court issued a unanimous opinion on April 2, 2007 in the Environmental Defense et al. v. Duke Energy Corp. et al. (“Duke”) New Source Review case, in which it vacated the Fourth Circuit’s June 15, 2005 opinion (United States v. Duke Energy Corp., 411 F.3d 539 (4<sup>th</sup> Cir. 2005)) and remanded the matter to the lower court for further consideration. The genesis of the Duke case is a 2000 enforcement action brought by the USEPA in the waning days of the Clinton administration alleging Duke conducted various “life extension” projects at its coal-fired power plants in violation of the Clean Air Act’s (“CAA”) Prevention of Significant Deterioration (“PSD”) regulations. Projects triggering PSD require an analysis of additional air pollution control options. The Supreme Court’s substantive review focused on whether Congress intended the definition of “modification” to be the same under both PSD and the New Source Performance Standards (“NSPS”) programs, which were enacted separately. The high court’s decision is based on two related grounds.

First, the Supreme Court rejected the Fourth Circuit’s statutory interpretation that Congress intended the definition of “modification” to be identical under both the PSD and NSPS programs. Duke had argued that USEPA was statutorily bound to apply the NSPS “hourly emissions” rate test to the PSD “modification” analysis. The Supreme Court found the 1980 PSD regulations did not define “major modification” in terms of “hourly emissions” rate as does the NSPS. The Supreme Court rejected the Fourth Circuit’s reasoning that the same term used in different parts of a statute must have an identical meaning.

Second, the Supreme Court determined that the Fourth Circuit implicitly invalidated the 1980 PSD regulations when it determined that the word “modification” in the PSD rules must be construed the same as “modification” under the NSPS. The Supreme Court determined this was a form of judicial review that *may* be governed by section 307(b) of the CAA, which limits challenges to the validity of a regulation during an enforcement proceeding when review of the issue could have been brought before the D.C. Circuit Court of Appeals within 60 days of issuance of the PSD regulations at issue. However, the Supreme Court deferred consideration of the merits of judicial review in this case to the lower court.

Although raised by Duke in the alternative, the Supreme Court did not address the argument whether USEPA has construed the PSD definition of “modification” differently over time, thereby retroactively applying a new interpretation of the CAA. The opinion preserved this argument for Duke to the extent it remains procedurally available.

For additional information about the Supreme Court’s opinion in the Duke case or to discuss New Source Review or other Clean Air Act matters, please contact Michael H. Winek at (412) 394-6538 or [mwinek@bccz.com](mailto:mwinek@bccz.com) or Seth A. Rice at (412) 394-5490 or [srice@bccz.com](mailto:srice@bccz.com).

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