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An Improvident Regulatory Endeavor?

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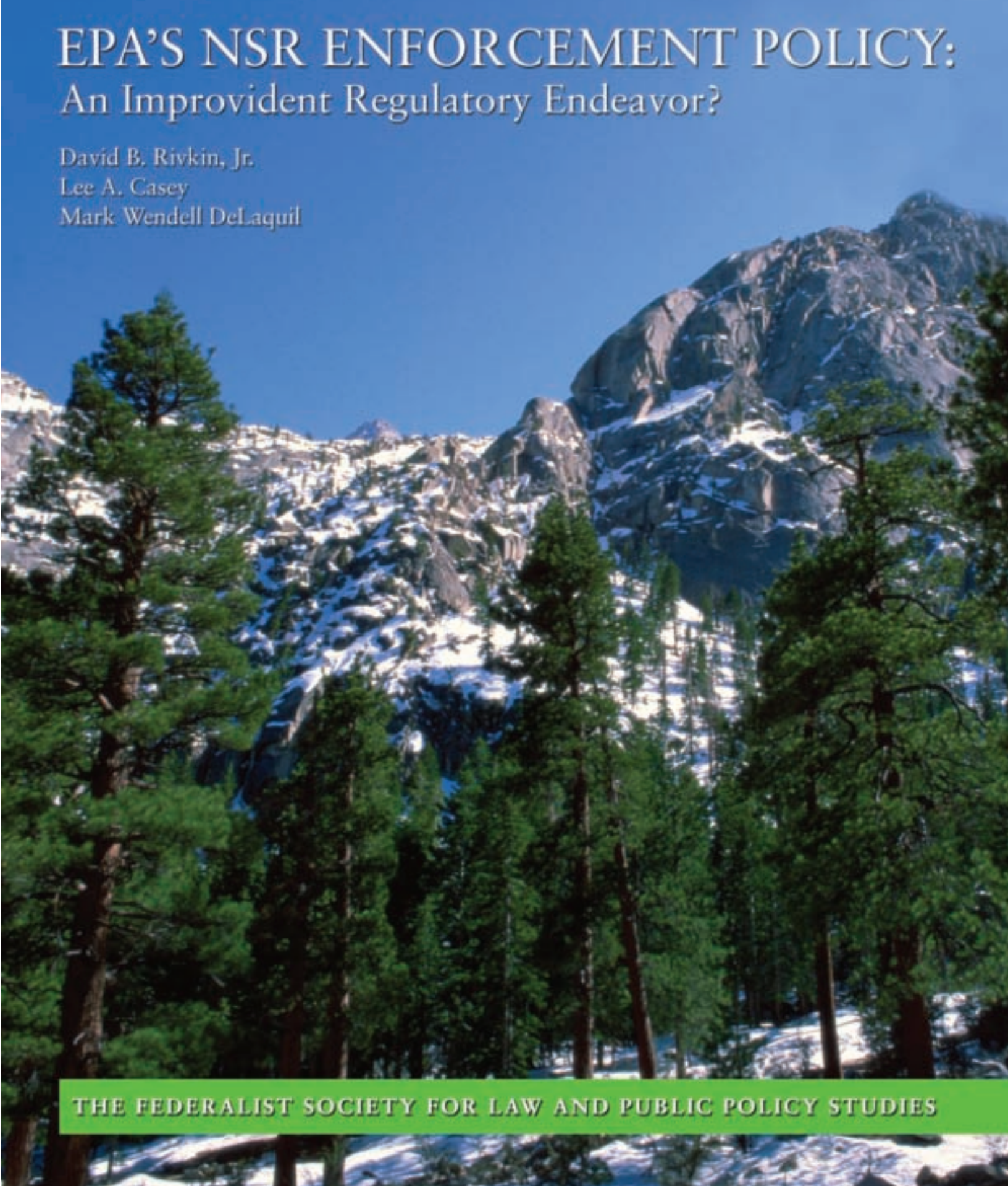

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I. Introduction

On November 1, 2006, the Supreme Court will hear oral argument in *Environmental Defense v. Duke Energy Corp. ("Duke Energy")*.[1] *Duke Energy* is one case in the Environmental Protection Agency's ("EPA" or "the Agency") broad "coal-fired power plant enforcement initiative."[2] Launched in 1999, this initiative is an attempt by EPA to enforce the Clean Air Act's ("the Act") new source review ("NSR") program in a novel way, one disconnected from over twenty years of agency practice and from the practical realities of operating a power plant. *Duke Energy* presents the Court with the opportunity to resolve definitively legal issues surrounding the NSR program, as well as to vindicate Congress' intent to balance environmental and economic concerns in a way that maintains air quality while allowing industrial facilities to achieve emissions reductions in a cost-effective manner, rather than imposing inefficient unit-specific controls on every source.

As its name suggests, the NSR program's primary purpose is to ensure that source owners and operators undergo preconstruction review, and possibly install unit-specific pollution controls or take other measures,[3] when they construct a "new source" of pollution. New sources of pollution include newly constructed or "modified" factories, refineries, power plants, cement kilns, and other industrial facilities.

In bringing this enforcement initiative, EPA does not feature allegations that new power plants were constructed without the proper NSR permits. Instead, the Agency alleges that the owners and operators of existing sources "modified" these sources in ways that created new sources of emissions without undergoing NSR preconstruction permitting. Although the NSR program principally targets "greenfield" sources of pollution, Congress defined "new source" to include existing sources that are "modified." What exactly constitutes a "modification" is the question at the heart of *Duke Energy*. While the Clean Air Act's definition of "modification" may seem technical, it embodies a fundamental policy choice about what kind of activities at an existing source should subject that source to preconstruction permitting as a "new source." Unsurprisingly, EPA and the regulated industry advance two dramatically different visions of the activity that triggers the NSR program.

To illustrate how the present controversy arose, a brief reflection on the history of the NSR program is in order. The Clean Air Act program contains only one definition of "modification," the definition found in the New Source Performance Standards ("NSPS") program. Under the NSPS program as implemented since 1971, modifications occurred only when a source underwent a physical or operational change that altered the fundamental operating parameters of the source. For over twenty years, EPA interpreted the NSR program consistently with the NSPS program, reflecting the Clean Air Act's single definition of "modification" in the NSPS program. That is, EPA did not require NSR preconstruction permitting at existing sources so long as projects at the source did not constitute an NSPS modification, but rather allowed it to continue to operate as constructed and designed.

The coal-fired power plant enforcement initiative marks a dramatic shift away from EPA's established practice. Through litigation, EPA now reads the Clean Air Act to require preconstruction review not only when a source undertakes construction or modification activity, but also whenever a project at the source is "associated" with increased facility utilization. The coal-fired power plant enforcement initiative thus embraces a view of the NSR program as a mechanism for imposing deep pollution cuts at great cost on all existing sources and without any evidence that these cuts are necessary

to advance air quality. Moreover, EPA's NSR paradigm would force utilities to choose between running the risk of perpetual non-compliance with a program that holds them liable for incorrectly "guessing" whether a repair activity is sufficiently "associated" with increased utilization to trigger NSR review, or accept an inevitable decay of their facilities, as repairs go unmade in the face of lengthy permitting delays and the high cost of pollution control equipment. Compelling utilities to install round after round of pollution control equipment to achieve ever diminishing reductions in emissions at mounting cost to consumers would have been an unwise regulatory approach even in the early days of the Clean Air Act, when much of the country had unhealthy air. It is particularly bad policy today, after dramatic gains in air quality have been achieved and EPA has gained considerable experience with efficient, market-based strategies for reducing pollution.

Under the NAAQS system, EPA sets an ambient air quality standard for each pollutant that "may reasonably be anticipated to endanger public health or welfare." These standards are formulated not only to protect public health, but to do so while "allowing an adequate margin of safety."

As the coal-fired power plant enforcement initiative progressed, EPA began to recognize the initiative's adverse effects on the regulated industry and on consumers. Among other things, if the enforcement interpretation of NSR modification were the law, it would require a lengthy and difficult preconstruction permitting process before sources could make efficiency and reliability improvements or conduct common and proper maintenance. As a result, EPA has over the last five years finalized an NSR reform rule designed to alleviate this situation by clarifying a preexisting exclusion from NSR for repair and replacement activities. The Agency has also proposed a second rule that would interpret the NSR program's trigger for existing sources in conformity with its NSPS definition.[4]

Faced with the conflicting imperatives posed by the coal-fired power plant enforcement initiative and closely related legal issues attending EPA's efforts to reform the NSR program, courts throughout the country have split on their consideration of the enforcement actions. Indeed, there is palpable tension between the D.C. Circuit's handling of EPA's NSR reform rules and decisions in the enforcement actions. This tension threatens to leave national air quality laws practically unworkable. Accordingly, in deciding *Duke Energy*, the Supreme Court should embrace a common sense approach to pollution control and reject as bad law and bad policy EPA's unprecedented attempt to use the NSR program to force extra pollution reductions from existing sources.

II. New Source Review And The Clean Air Act's Framework For Regulating Industrial Pollution

A. The NAAQS System: At The Heart Of The Clean Air Act's Regulatory System

The modern Clean Air Act dates from a series of laws known as the 1970, 1977, and 1990 Clean Air Act Amendments to the original Clean Air Act of 1963. The Act, as it currently stands, provides a comprehensive regulatory framework for nearly all sources of air pollution. These include the large stationary sources of air pollution subject to the NSR program, which are regulated on the basis of how much and what kinds of pollution they can emit. The Clean Air Act in general, and the provisions governing "major" stationary sources in particular,[5] are designed to ensure compliance with the national ambient air quality standards ("NAAQS") system established by the 1970 Amendments.

Under the NAAQS system, EPA sets an ambient air quality standard for each pollutant that "may reasonably be anticipated to endanger public health or welfare."[6] These standards are formulated not only to protect public health, but to do so while "allowing an adequate margin of safety."[7] EPA then determines whether each part of the country complies with, or "attains," the NAAQS for each pollutant.[8] Areas that comply are called "attainment" areas; areas that do not are called "nonattainment" areas.

Significantly, the Clean Air Act delegates primary responsibility for attaining the NAAQS to the states, whose attainment strategy is laid out in State Implementation Plans ("SIPs").[9] The Act relegates EPA "to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has

set are to be met."[10] This is because "Congress believed it important that the states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions."[11] Accordingly, the states determine what unit-specific controls are appropriate for the different types of pollution sources in each area.

In addition to setting emissions limits and other measures necessary to ensure attainment of the NAAQS, SIPs must also contain a program for the preconstruction review of new and modified sources of pollution. This program had its origin in the Clean Air Act Amendments of 1970, which required that all SIPs provide for preconstruction review of new and modified sources to ensure compliance with the NAAQS. Congress enacted a more stringent program in the 1977 Clean Air Act Amendments for a subset of sources referred to as "major emitting facilities," which is known as the new source review, i.e., NSR, program. While the NSR program is often treated as a unified whole because of the similarities among its component programs, the NSR program is composed of several individual programs: the prevention of significant deterioration ("PSD") program in attainment areas, and the nonattainment new source review ("NNSR") program in nonattainment areas. Stationary sources and modifications that are not large enough to be considered "major" continue to be reviewed to ensure compliance with the NAAQS under a program sometimes referred to as the "minor" NSR program.

B. Congress Did Not Intend For Repair Activity To Trigger NSR Unless It Causes An Existing Source To Become The Fundamental Equivalent Of A New Source

The controversy about the coal-fired enforcement initiative's legality is ultimately a clash between two conflicting visions of the NSR program. One paradigm envisions the NSR program as a means for states to manage the emissions growth that comes with economic development by requiring preconstruction review of major new pollution sources, while not forcing the installation of pollution control equipment on existing sources unless those sources become the functional equivalent of major "new" sources of pollution. The other vision of the NSR program views it as a way to reduce pollution from existing sources by forcing all of them to periodically install unit-specific pollution control equipment, with existing sources enjoying a limited grandfathering period that has long since expired.[12]

The NSR program's history and structure indicate that the former view is correct. To be sure, the 1977 Clean Air Act Amendments, of which the NSR program was part, were designed to reduce air pollution. However, "[n]o legislation pursues its purposes at all costs. . . . [I]t frustrates, rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be law."[13] The NSR program's intended role was not to reduce pollution from existing sources. Indeed, EPA has itself acknowledged in the preamble to one of its recent NSR reform rules that the purpose of NSR was not to abate pollution, but to manage emissions growth by requiring, *inter alia*, the installation of pollution controls at a time when it otherwise made sense to do so. Confusing the specific goals of one aspect of a regulatory program with the general goals of the program as a whole does nothing but frustrate congressional intent. In its enforcement initiative, EPA seems to have forgotten that Congress, in passing the Clean Air Act, did not simply require that pollution reductions occur, but also required that they be achieved in a particular way.

1. The 1977 Clean Air Act Amendments' Regulation Of Existing Sources Of Pollution

The 1977 Clean Air Amendments codified the Act's basic framework regarding attaining and maintaining air quality, while drawing the important statutory distinction between "attainment" and "nonattainment" areas.

In attainment areas, public health is not considered to be at risk because the ambient air in these areas meets the primary NAAQS and major stationary sources are regulated to ensure continued attainment of the NAAQS. However, Congress intended to ensure that economic growth in these areas did not cause air quality to significantly deteriorate. To this end, the 1977 Clean Air Act Amendments established a PSD "increment" program, under which states may allow new emissions from existing and modified facilities to consume only a portion (or "increment") of air quality better than the NAAQS baseline. This increment is defined by reference to air quality, as measured in terms of a particular "emissions inventory" on a statutorily specified "baseline date." Congress explained the PSD program as a growth management program, intended "to protect

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health and public welfare from any actual or potential adverse effects . . . notwithstanding attainment," but only in a way that would "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources."[14]

In nonattainment areas, the 1977 Clean Air Act Amendments established additional programs designed to reduce pollution from existing major stationary sources to ensure progress towards attainment. Congress' goal in these areas was "reasonable further progress [RFP]," defined as "such annual incremental reductions in emissions of the relevant air pollutant.... for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date."[15] As a result, the Clean Air Act mandated that each SIP require "existing sources [in nonattainment areas] to achieve such reduction in emissions . . . as may be obtained through the adoption, at a minimum, of reasonably available control technology [RACT]."[16] The 1977 Clean Air Act Amendments thus expressly stated the means by which existing sources would reduce pollution to ensure that air quality improved: installation of RACT. Moreover, the Amendments clearly demonstrated that Congress intended the RFP requirements, including the installation of RACT on existing stationary sources, to be sufficient to attain the NAAQS without relying on reductions at existing sources achieved through the NNSR program. This conclusion is supported by the 1977 Amendments' legislative history. In the words of Senator Edmund Muskie, a principal architect of the Amendments, "[i]t is [Congress'] intent that 'reasonable further progress' means pollution control will reduce emissions at a rate that will lead to attainment of the ambient standards in the time required."[17]

As such, Congress specified in what areas and by what means it sought emission reductions from existing sources: (1) in attainment areas, to the extent necessary to attain and maintain the NAAQS and PSD increments; and (2) in nonattainment areas through RACT and RFP requirements. (Congress has also created several nationwide control strategy programs, designed to help states meet their attainment obligations, e.g., reformulated gasoline and automobile tailpipe emission standards.) The carefully calibrated distinctions between these programs would have little, if any, meaning if *all* existing facilities were required to install new source controls at relatively frequent intervals. Rather, Congress' intent was to require the installation of best available control technology ("BACT") or lowest achievable emission rate ("LAER") technology through the preconstruction review program only in the construction of a "new" or "modified" facility whether in attainment or nonattainment areas.

Indeed, under EPA's view of the NSR program reflected in the NSR enforcement initiative, everything that Congress did in 1977 and 1990 was unnecessary. The NSR program alone would have caused the greatest possible emission reductions from every major stationary source and, having done it once, would have continued to do so again and again. Needless to say, an interpretation of an individual statutory provision that renders the rest of the statute entirely unintelligible is not to be favored.

2. Congress Did Not Intend To Expand NSR Program Coverage To Existing Sources That Were Merely Maintained As They Were Constructed And Designed To Operate

The only provision of the 1977 Clean Air Act Amendments in which Congress expressed a clear and unambiguous desire to obtain immediate and concrete reductions from existing major stationary sources of pollution through a control technology retrofit program—i.e., the RACT requirements for existing sources in nonattainment areas—are not at issue in *Duke Energy*. As a result, it is important to determine what was Congress' legislative intent when it used the term "modified" to trigger, in some situations, NSR preconstruction permitting requirements for existing sources. In conducting this inquiry, it is, of course, important to understand the plain language of Congress' "modification" definition. It is equally critical, however, to grasp how the plain language of the term "modification" comports with how Congress intended the NSR program to function when it enacted the 1977 Clean Air Act Amendments.

a. History Of The Term "Modification"

i. Modification Under The 1970 Clean Air Act Amendments And The 1971 NSPS Rule

The term "modification" first entered the Clean Air Act lexicon as part of the 1970 Clean Air Act Amendments' NSPS program. The NSPS program required stationary sources in industrial source categories that EPA determined "may reasonably be anticipated to endanger public health and welfare" to comply with a performance standard determined by EPA.[18] These performance standards reflect the degree of emission limitation achievable by applying the best system of emission reduction that EPA determines has been adequately demonstrated.[19] Significantly, Congress did not require that existing sources retrofit their facilities to meet the new source performance standards. Instead, Congress concluded that it was more cost-effective to require only new sources to meet the NSPS performance standards, and defined a "new" source to include newly constructed and modified sources.[20] Modification was defined in the NSPS program 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."[21]

As noted above, the 1970 Clean Air Act Amendments also required that SIPs include a program for the preconstruction review of the location of new and modified sources to ensure compliance with the NAAQS.[22] Congress specifically provided that this preconstruction review program would apply to facilities subject to the NSPS program, i.e., newly constructed and "modified" facilities under NSPS.[23] As a result, Congress made clear from the origin of the new source programs in 1970 that there was only one concept of "modification" that triggered application of those programs, and that the concept applied both in the context of control technology and in quality review.

The Agency promulgated its first regulations interpreting "modification" in 1971, shortly after enactment of the 1970 Clean Air Act Amendments. In those regulations, EPA defined modification in part by specifying the types of activities that did not constitute a modification: (1) "routine maintenance repair, and replacement" activities, (2) increases "in the production rate, if such increase does not exceed the operating design capacity of the affected facility," (3) an "increase in the hours of operation," or (4) switching to "an alternative fuel . . . if . . . the affected facility is designed to accommodate such alternative use."[24] As these provisions illustrate, EPA interpreted the term modification to cover only activity that caused an increase in emitting capacity, i.e., when the source was changed in a way that would actually permit it to emit more pollution. This interpretation, of course, was consistent with Congress' requirement in the 1970 Clean Air Act Amendments of preconstruction review of new sources of pollution for compliance with the NAAQS, i.e., of pollution that had not already been reviewed and regulated under the SIPs to ensure compliance with the NAAQS. Thus, in one typical determination of this early period, Richard D. Wilson, EPA's Director of Stationary Source Enforcement, informed a regional enforcement director that under the NSPS program there can be "no increase in emissions" if a non-excluded physical or operational change did not increase the source's "productive capacity."[25] In another determination, EPA's Associate General Counsel explained to a member of the California Air Resources Board that "[a]ddition of new capacity to a batch plant or any other change that increases its emissions may, of course, amount to a 'modification' of the plant for purposes of section 111 standards . . . ."[26]

In another determination, EPA's Associate General Counsel explained to a member of the California Air Resources Board that "[a]ddition of new capacity to a batch plant or any other change that increases its emissions may, of course, amount to a 'modification' of the plant for purposes of section 111 standards . . . ."

The activities expressly excluded from the NSPS program in 1971 share a common thread. Under EPA's contemporaneous interpretation of "modification," so long as a source is operating according to its design and without increasing its rate of emission, increased utilization at the source does not trigger preconstruction review. In this way, EPA's interpretation of the term "modification" established a consistent practice of allowing source owners to operate their sources as designed and permitted to operate.

ii. Modification And The 1975 NSPS Rule

In 1975, EPA clarified its 1971 NSPS Rule, further

reinforcing the principle that existing sources were subject to the NSPS Rule *only* when they fundamentally changed their mode of operation. The purpose of the 1975 NSPS Rule was simple: to cure the "confusion [that] exists *outside [EPA]* as to what 'changes' can be made to an existing source without the Administrator considering the source to have been modified."[27] For instance, the "routine maintenance" provision was clarified to indicate that activities that are "routine for a source category" are not modifications. Similarly, EPA clarified that under its 1971 Rule, a modification within the meaning of the Clean Air Act could occur only if an activity caused an increased in emissions measured by comparing the "kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable."[28] As EPA explained, this "clarification] [of] what constitutes an increase in emissions . . . . ha[s] the advantages of being sensitive to increased production capacity and to the overall increase in total emissions to the atmosphere . . . . [while] automatically allow[ing] increases in operating hours as intended by [the 1971 Rule]."[29] The only ways in which a change can increase a source's emission rate is if the change increases the rate at which fuel is introduced into the source for combustion, such as by building a bigger furnace,[30] or if the change increases the amount of pollution emitted per unit of fuel combusted, such as by rebuilding a facility so it can accommodate a more polluting fuel.[31] Conceptually, this would be like grafting a new source onto the existing source—a fundamental change that would require the facility to submit to preconstruction review and potentially to the installation of additional pollution controls.

The 1975 NSPS Rule made one further change that helps in understanding the meaning of later EPA pronouncements: it clarified the distinction between actual and potential emissions, as understood by EPA and Congress in the 1970s. In EPA's words:

> If any increase in emissions that would result from a physical or operational change can be offset by improving an existing control system or installing a new control system for that facility, such a change would not be considered a modification because there would be no increase in emissions into the atmosphere. The Administrator considered defining "modification" so that changes in precontrolled (potential) emissions would be considered modifications. However, the proposed definition of modification is limited to increases in actual emissions in keeping with the intent of section 111 of controlling facilities only when they constitute a new source of emission.[32]

In EPA's words: If any increase in emissions that would result from a physical or operational change can be offset by improving an existing control system or installing a new control system for that facility, such a change would not be considered a modification because there would be no increase in emissions into the atmosphere.

Over the course of the NSR enforcement initiative, various intervenor groups, including Northeastern states and environmental groups, have claimed that "actual" emissions are emissions measured in tons emitted by a source per year, with no exclusions at all, while "potential" emissions are a source's capacity to emit if it were fully utilized, which they argue is equivalent to its maximum achievable emission rate. These arguments are based on an assumption that is manifestly incorrect with respect to the terms' meaning in the 1970s. At that time, EPA did not differentiate between historic emissions and theoretically possible emissions. Instead, EPA judged whether a modification would occur based on the actual effect of a particular activity on a facility's emission rate.[33] In turn, "potential emissions" were the source's capacity to pollute absent any pollution control equipment, i.e., the "precontrolled . . . emissions" of the source.

iii. Modification And The Regulatory PSD Program

Beginning in the mid-1970s, modification became the trigger for applicability of the regulatory PSD program as well as the NSPS program. As noted above, the 1970 Clean Air Act Amendments required that states include programs for the preconstruction review of new and modified sources (as defined under the NSPS program) in their SIPs, in order to ensure that any proposed new pollution would be regulated to attain and maintain the NAAQS.[34] This preconstruction review program applied only to new and modified sources as defined under NSPS, because existing sources were already subject to regulation to ensure compliance with the NAAQS.

This preconstruction review program of the 1970 Act was supplemented in 1974 by the regulatory PSD program. The 1974 PSD program was a response to litigation over whether the 1970 Clean Air Act Amendments required that SIPs ensure not only that new pollution was reviewed for compliance with the NAAQS, but also that air quality in areas of the country that met the applicable NAAQS did not degrade.[35] As with most other aspects of the 1970 Clean Air Act Amendments, the 1974 program mandated that states include appropriate provisions in their SIPs to prevent air quality in clean areas from eroding.

In formulating the regulatory PSD program, EPA created a program that was minimally intrusive and did not require emission reductions from existing sources in areas that met the NAAQS. This is clear from EPA's statement in the preamble to the 1974 PSD rule, which explained that the regulatory PSD program would have "no practical impact" in areas where the NAAQS were violated because "emissions in such areas are being reduced under the [SIPs], while these regulations provide for limited allowable increases in emissions."[36] It is not plausible to believe that EPA desired or expected a program specifically designed to allow an increased amount of pollution to bring about emissions reductions from existing sources. After all, once air quality is sufficiently good to preserve public health, there is great cost and no appreciable benefit to requiring further reductions from existing sources.

EPA also ensured that the regulatory PSD program would be easily administrable by preserving its congruence with the applicability provisions of the preexisting preconstruction review program under Clean Air Act § 110(a)(2), which applied to new or modified facilities subject to the NSPS program.[37] As EPA explained when it enacted the program:

> Procedurally and administratively, the significant deterioration review is virtually identical to existing new source review procedures included in the implementation plan and, in fact, application could probably be made on the same form. No additional sources would be covered by the significant deterioration review. *The only difference between the two new source reviews is in the tests which must be met before approval will be granted.* Instead of meeting only the emission limitations which are part of the applicable plan, sources covered by the significant deterioration review must also meet an emission limitation which is consistent with the application of best available control technology.[38]

Other EPA statements further affirm this proposition. For instance, EPA noted that the definition of "modification," which was promulgated at 40 C.F.R. § 52.01(d) in the 1974 PSD regulations, was altered between the notice of proposed rulemaking and the final rule "to be more specific and to be consistent with the definition used in Part 60 [governing the NSPS program]. . . . It is the Administrator's intent to change the definition of modification . . . to be consistent with the final definition of the term under Part 60."[39] As explained above, the NSPS program did not provide for pollution reductions from existing sources unless source owners fundamentally changed the way in which their sources were designed to operate to increase the emitting capacity of the source. It is therefore impossible to claim that EPA, by emphasizing the consistent applicability between the regulatory PSD[40] and NSPS[41] programs, expected the regulatory PSD program to provide for such reductions at existing facilities that were not covered by the NSPS program.

iv. Modification And The 1976 Interpretive Rule

The term "modification" was used in one additional place before Congress enacted the 1977 Clean Air Act Amendments: a 1976 interpretive rule applying a particularly stringent derivation of the regulatory PSD program to stationary sources proposing to locate in nonattainment areas.[42] This interpretive rule established a new regulatory requirement subjecting some modified sources to the *additional* requirements of the new nonattainment NSR program. Under this interpretive rule, only "modifications" that were "major" triggered nonattainment NSR. A "major modification" occurred when a source's "allowable emission rate" was increased by 100 tons per year or more,[43] with the "allowable emission rate" based on the "maximum annual-rated capacity of the source" or the applicable new source performance standard. Of course, as with the NSPS rules described above, EPA made clear that routine maintenance, increased hours of operation, and fuel-switching were not activities that would trigger a major modification review. As a result, even this measure, which required pollution reductions from certain modified sources through the imposition of the most stringent pollution

control technology required under federal law, and forced those sources to offset their capacity by purchasing other sources' emission capacity, could apply only to a modified source when the modification created new emissions that exceeded a specific threshold. Simply put, this rule reflected the established understanding of the scope of Clean Air Act preconstruction review because there could be no "major modification" without a "modification."

In its 1976 Interpretive Rule, EPA articulated one more important feature of its nonattainment program: NNSR was not intended to supersede the requirement that states ensure that areas meet the NAAQS through SIP-based control strategies. Although EPA allowed states not to "account for" new source emissions subject to offset requirements in their SIPs, the Agency nevertheless emphasized that this policy was "not intended to replace the requirement for a SIP control strategy to attain and maintain standards."[44] Indeed, states could not even get emission budget credits, retrospectively or prospectively, for implementing SIP provisions that established this program. As such, while the control technology requirements of the nonattainment program might help an area attain the NAAQS, primary responsibility for attainment remained with the states and their SIPs.

b. The 1977 Clean Air Act Amendments And Their Legislative History Suggest That Congress Did Not Intend The NSR Program To Extract Mandatory Pollution Reductions From Existing Sources

This brings us back to the 1977 Clean Air Act Amendments. As previously mentioned, the 1977 Amendments required large existing stationary sources of air pollution, whether located in attainment or nonattainment areas, to undergo NSR preconstruction review and permitting when they were "modified." What then, did Congress mean when it premised preconstruction review of existing sources upon "modification"?

i. Congress Was Familiar With The Well-Established Regulatory Meaning Of Modification

The programs established by the 1970 Clean Air Act Amendments did not require preconstruction review of projects at existing stationary sources of air pollution, unless the sources expanded their capacity to emit, thereby creating new pollution. Moreover, all relevant 1970 Clean Air Act Amendments programs—NSPS, the statutory preconstruction review program, the regulatory PSD program, and the 1976 nonattainment program—ensured through the use of a common term, "modification," that existing sources that undertook activity creating new pollution would be treated as "new" sources, and that sources that did not undertake such activity were left alone.

The question thus becomes whether or not Congress intended to incorporate the well-established meaning of "modification" as activity that creates new and unregulated pollution into the 1977 Clean Air Act Amendments' statutory NSR provisions. In answering this question, it is important to start with the Amendments' text and ask whether or not Congress was familiar with the established meaning that EPA had given the term "modification."

It is apparent from the Clean Air Act's text and history that the 95th Congress was quite familiar with the regulatory program created by EPA since it had last amended the Act. Congress demonstrated its awareness of EPA's regulatory elaboration upon the Act by incorporating key regulatory provisions into the Amendments. This incorporation was not accomplished merely by repeating the preexisting NSPS definition of modification, but by reference to the United States Code section in which the NSPS definition of modification is located, along with specific statutory language making clear Congress' intent that modification "mean the same as the term 'modification' as used in section 111(a)(4) of this title," i.e., the same as the NSPS program.[45] This means of incorporation manifests a specific intent to adopt for NSR purposes the NSPS meaning of the term.

Also, Congress did not vitiate the federal implementation plan provisions (that then applied in all states) of the 1974 PSD Rule. Instead, it stated in the text of the 1977 Amendments that these programs would "remain in effect to prevent significant deterioration of air quality in any such area."[46] And, for sources on which construction commenced between June 1, 1975, and August 7, 1977, Congress did not apply the Clean Air Act Amendments' statutory NSR program at all, instead directing that "review and permitting . . . be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977."[47] And while Congress amended then-effective federal implementation plans to incorporate new requirements of the Act, it did *not* amend, or call for amendment of, the regulatory definition of "modification" located at 40 C.F.R. § 52.01(d). All of these actions by Congress mani-

fest a familiarity with the established regulatory programs governing NSR, and an acceptance of the established meaning of "modification" as a trigger for those programs.

Finally, Congress continued the 1976 Interpretive Rule providing that the more stringent nonattainment requirements of that rule would apply to NSPS modifications that were also "major modifications,"[48] and otherwise made clear in statutory language that an NSPS "modification" would be the trigger for nonattainment NSR review.[49] In other words, Congress endorsed NSPS "modification" as the trigger for NNSR permit review, and also continued the requirement of the 1976 Interpretive Rule that nonattainment NSR requirements would only apply to NSPS "modifications" that were also major modifications until July 1, 1979, unless modified by the Administrator by rule.

While these three provisions explicitly refer to the preexisting regulatory regime and the national federal permit program promulgated under it, other structural features of the 1977 Clean Air Act statutory NSR regime also demonstrate the influence of the preexisting regulatory provisions on Congress. As previously mentioned, the regulatory PSD program did not provide for emission reductions in a particular area—instead, it presupposed that emissions would increase. The regulatory PSD program therefore established a PSD "increment," that is, an amount of pollution (above permitted pollution levels), within which new pollution would be allowed.[50] The statutory PSD and NNSR program carried forward this and other aspects of the regulatory system as well. For instance, the statutory PSD program adopted the Class I-III system of increments in the regulatory PSD program for determining to what extent air quality in a particular area would be permitted to degrade. Similarly, the statutory NNSR program contained offset requirements very similar to those contained in EPA's 1976 Interpretive Rule. All this led to the conclusion reinforced by Representative Stockman in his separate statements on H.R. 6161, the bill that ultimately became the Clean Air Act Amendments of 1977, that the statutory PSD program "is in essence the same approach taken by EPA in its regulations."[51]

In sum, in light of the well-established understanding of the meaning of "modification" across all of the new source programs, Congress' specific incorporation of the NSPS "meaning" and use of "modification" into the NSR programs, and Congress' decision not to revise the PSD or NNSR regulatory definition of "modification" as it had done with other terms used in those programs, such as "commenced" in the definition of BACT, and the numerical increments, it is implausible to conclude that Congress intended to widen the scope of NSR review to cover activities that had never before been considered modifications.

C. EPA Faithfully Followed Congress' Mandate Regarding The Applicability Of New Source Review To Existing Sources In The Aftermath Of The 1977 Clean Air Act Amendments

Following Congress' enactment of the 1977 Clean Air Act Amendments, EPA revised a number of the regulatory definitions in the NSR program to reflect changes made by Congress in the 1977 Clean Air Act Amendments. EPA, however, left in place the well-established definitions of "modification" for NSR, which required an increase in emission rate unaffected by hours of operation for there to be a "modification."[52]

At the same time, EPA promulgated comprehensive regulations carrying forward the 1976 Interpretive Rule's term "major modification," defining that term for both the PSD and NNSR programs. Under these rules, existing sources were subject to NSR preconstruction review only when they undertook "modification" activity consistent with the well-established meaning of that term.

While portions of these regulations were challenged by both industry and environmental petitioners, and were vacated in part by the D.C. Circuit in *Alabama Power v. Costle*,[53] no one challenged the requirement that there be NSPS modification activity (i.e., activity that increased a facility's potential emission rate) before NSR preconstruction review was required. In response to *Alabama Power*, EPA promulgated new regulations defining "major modification" for the NSR program. These regulations have commonly been called the "1980 NSR Rule" in the NSR enforcement actions.

In the "source applicability" section, the 1980 NSR Rule provides that "[n]o stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification will meet those requirements."[54] The

rule continues that "[t]he requirements of paragraphs (j) through (r) . . . shall apply to any major stationary source and any major modification."[55]

Similarly, the 1980 NSR Rule requires that state "plan[s] shall provide that no major stationary source or major modification shall begin actual construction unless, at a minimum, requirements equivalent to those contained in paragraphs (j) through (r) . . . have been met."[56] The rule goes on to provide that "requirements equivalent to those contained in paragraphs (j) through (r) do not apply to a particular . . . major modification"

A "major modification" was then defined as a modification that increased pollution emitted by the source by a certain amount determined by the annualized emission rate. EPA adopted this concept in its 1978 PSD Rule, defining "major modification" as "any physical change in, change in the method of operation of, or addition of a stationary source, which increases the potential emission rate of any air pollutant."

even if there is a "modification," under a number of specific circumstances.[57]

In short, the 1980 NSR Rule applies by its terms only to "modifications" that are "major." "Modification" continues to be defined, as it has been defined since 1974, as activity that increases a facility's emission rate, unaffected by increased hours of operation.[58] "Major modification" is defined as an activity that also causes of "significant net . . . increase" in source-wide annual emissions.[59]

In the years immediately following EPA's 1980 NSR Rule, the Agency interpreted the 1980 NSR Rule consistently with its language and the well-established meaning of the terms "modification" and "major modification." These contemporaneous interpretations of the 1980 NSR Rule are important not only for what they say—they provide powerful support for the electric utilities' interpretation of the 1980 NSR Rule as requiring a "modification," i.e., an activity that increases emitting capacity, to trigger NSR review—but also for their place in the 1980 NSR Rule's regulatory history.

1. **The 1978 PSD Rule Ensured That Existing Sources Were Not Subject To NSR Preconstruction Review If They Were Operated As Originally Constructed**

Following the 1977 Clean Air Act Amendments, EPA promulgated new rules to govern the major NSR program. In so doing, EPA conditioned major NSR program applicability on the term it had created as part of the 1976 Interpretive Rule: a "major modification." As previously mentioned, the 1976 Interpretive Rule ensured that a "major modification" would not occur unless a source owner or operator first made a "modification," that is, undertook an activity that increased the source's emission rate. A "major modification" was then defined as a modification that increased pollution emitted by the source by a certain amount determined by the annualized emission rate. EPA adopted this concept in its 1978 PSD Rule, defining "major modification" as "any physical change in, change in the method of operation of, or addition of a stationary source, which increases the potential emission rate of any air pollutant."[60] Under the 1978 PSD Rule, EPA therefore carried forward the regulatory mechanism it had previously used to ensure that the NSR program did not apply to existing stationary sources of air pollution unless they were changed to create new pollution.

EPA has even explained the 1978 PSD Rule in this manner in its coal-fired power plant enforcement initiative. In its enforcement action against American Electric Power Co., for example, the government has explained that "[u]nder the 1974 and 1978 PSD Regulations, a 'modified source' is one which 'increases the emission rate of any pollutant for which a standard' has been set," with "emission rate" measured in terms of kg/hr.[61] Further, EPA says, determining "if there is an increase in the maximum hourly emissions rate" under these rules requires comparing "the maximum capability of the unit before and after the activity, and then subtract[ing] the pre-change emissions rate from the post-rate projection."[57] There can accordingly be little doubt that the 1978 PSD Rule interprets the term "major modification" to require an NSPS-equivalent emission rate increase before a modification can be "major."

2. ***Alabama Power* Did Not Contradict Congress' Mandate To Adopt The NSPS Modification Definition Into The NSR Program**

As with nearly all major rules promulgated by EPA, both environmental and industry groups petitioned for review of the 1978 PSD Regulations. Petitions for review of the 1978 PSD Rule were consolidated in *Alabama Power v. Costle*.[63] Together, nearly every aspect of the 1978 rule was challenged, except for the requirement

that a physical or operational change must increase the source's potential emission rate before a "major modification" is deemed to have occurred. Despite this fact, the government throughout the coal-fired power plant enforcement initiative has claimed that the D.C. Circuit's decision in *Alabama Power* rejected the requirement that there be a "modification" before there can be a "major modification." Properly understood, *Alabama Power* does no such thing.

One flaw in the 1978 PSD Rule was its definition of "major stationary source," which failed to take into account differences in the way the NSR and NSPS programs defined the "sources" subject to the respective programs. For NSPS purposes, Congress defined "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant."[64] In contrast, sources subject to the NSR preconstruction permitting program are "major emitting facilities," defined as "stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year of any air pollutant from [listed categories of] sources . . . [and] any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant."[65] Furthermore, as the *Alabama Power* court explained, Congress in 1977 defined the term "facility" (one of the component terms of "source") to include entire plants, which can be composed of numerous individual emitting units. As is plain from these statutory provisions, sources subject to the NSPS program could be far smaller than the large stationary sources that are subject to the major NSR preconstruction permitting regime. In fact, major emitting facilities are nearly always a conglomeration of "stationary sources," each of which is individually subject to the NSPS program, but to which NSR program applicability is determined only in aggregate.

As EPA explained in its Notice of Proposed Rulemaking for the 1975 NSPS Rule, the Agency at that time identified potential emissions with precontrolled emissions, and actual emissions with controlled emissions. In *Alabama Power,* however, the D.C. Circuit held that this was not how Congress used the term "potential" in defining a major emitting facility. Instead, the court explained that, in defining a major emitting facility's potential to emit, "EPA must look to the facility's 'design capacity' a concept which not only includes a facility's maximum productive capacity (a criterion employed by EPA) but also takes into account the anticipated functioning of the air pollution control equipment designed into the facility."[66] Otherwise, the court observed, "by assuming operation at full capacity, without any reduction to take into account the operation of the facility's air pollution control equipment . . . potential emissions will always and inherently exceed actual emissions."[67] This, the court explained, would read the word "emit" out of the definition of "major emitting facility" as a facility that "emit[s]" or has the "potential to emit" above 100/250 tons per year. In other words, according to the D.C. Circuit, the word "emit" refers to emissions in excess of the "potential to emit" of a facility, i.e., to actual emissions which occur "when for any reason . . . the 'cleansing' equipment has not been operated, or has been operated at variance from design."[68]

The *Alabama Power* case also vindicated industry petitioners' challenges to EPA's "major modification" definition in another way, by forcing the Agency to allow sources to offset emission increases caused by a change in one part of a source with reductions at another part of the source. Under the 1978 NSR Rule, offsets were allowed for contemporaneous pollution decreases in determining whether to apply BACT, but not in determining whether a modification was "major" in the first place. "The effect of this definition [was] to subject major changes to PSD review, even when they [were] offset by contemporaneous reductions."[69] The D.C. Circuit believed this definition was too strict, however, because there was "no basis in the Act for . . . look[ing] only at net increases for substantive require-

For NSPS purposes, Congress defined "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." In contrast, sources subject to the NSR preconstruction permitting program are "major emitting facilities," defined as "stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year of any air pollutant from [listed categories of] sources . . . [and] any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant."

ments, and . . . look[ing] at all increases, without allowing offsets, for procedural requirements."[70] The court further noted that "[i]f a particular set of industrial alterations is not a 'modification' within the terms of the Act," it is then "subject to neither procedural nor substantive PSD requirements."[71]

At the same time, the *Alabama Power* court clearly did not hold that activity that was not a modification, but merely allowed increased utilization, must trigger the NSR program. To the contrary, the court considered a challenge by the state of Texas and other industry petitioners to an EPA rule that forced states to count, as consumption against the PSD increment, increased pollution from a source that began burning a more-polluting fuel (like high sulfur coal), but was consuming a less-polluting fuel (like low sulfur coal) at the time the baseline air pollution concentration was determined for the area. In such a situation, the court held that a source that was capable of accommodating the more-polluting fuel was excluded from NSR review because such voluntary fuel-switches are not "modifications" under EPA's rules.

The 1980 NSR Rule retained the 1978 NSR Rule's focus on "major modifications," as well as the preexisting regulatory "modification" definition contained at 40 C.F.R. § 52.01(d). EPA interpreted the 1980 NSR Rule to give effect to both the "modification" and "major modification" definitions in a series of contemporaneous applicability determinations.

In so doing, the court recognized that EPA had interpreted Congress' intent as being that the NSR program should permit existing sources to increase their emissions without going through NSR preconstruction permitting so long as the sources were operated as originally designed, and all their emissions were accounted for as "old" pollution.[72] In contrast to the preconstruction review program, the court observed, Congress had written the PSD increment program to apply to increased emissions from existing sources over actual emissions on the historic baseline date, even where those increased emissions resulted from an activity excluded from NSR. In other words, the *Alabama Power* court confirmed that the NSR program applies only to activity that creates new pollution, whereas the increment protection program can extend to increased utilization of existing capacity.

One part of the 1978 NSR Rule that was neither challenged nor vacated in *Alabama Power* was its use of emission rates in determining if a modification had occurred. Indeed, at the time *Alabama Power* was decided, EPA had never defined emissions *as anything other than an emission rate, measured in pollution per hour*. The terms "potential" and "actual" did not speak at all to whether an hourly or annual test was required. Therefore, to the extent that *Alabama Power* is read to require emissions to be measured in "actual" terms, such a reading would be more favorable to regulated entities than a "potential" emissions test.

3. The 1980 NSR Rule Carried Forward The Capacity-Based Test

In response to *Alabama Power,* EPA revised its "major modification" NSR applicability rule, and left its NSR "modification" definition unchanged. The regulations that resulted from this revision apply to nearly every alleged modification at issue in the coal-fired power plant enforcement initiative.[73] The 1980 NSR Rule retained the 1978 NSR Rule's focus on "major modifications," as well as the preexisting regulatory "modification" definition contained at 40 C.F.R. § 52.01(d).[74] EPA interpreted the 1980 NSR Rule to give effect to both the "modification" and "major modification" definitions in a series of contemporaneous applicability determinations. In the coal-fired power plant enforcement initiative EPA has embraced new religion, however, and repudiated its original interpretation of the 1980 NSR Rule, claiming that that rule repealed the definition of "modification" and required "major modification" analysis for thousands of "non-modification" activities.

a. The 1980 NSR Rule

EPA promulgated the 1980 NSR Rule as a direct response to the D.C. Circuit's decision in *Alabama Power*. Most important to EPA's coal-fired power plant enforcement initiative is the Agency's attempt to make the "netting" provisions of the 1980 "major modification" definition reflect "actual," rather than "potential," emissions. Realizing that *Alabama Power* had used verbiage that "suggest[s] changes in actual emissions," EPA sought to refocus the source-wide netting calculation from "'potential to emit' to 'actual emissions.'"[75]

In relevant part, EPA altered its "major modification" definition to correspond with this change in focus.

As previously mentioned, "construction" is the trigger for NSR applicability generally, with "modification" being the particular statutory trigger for NSR applicability to existing sources. In contrast to the definition of "modification" (i.e., activity that increases emission rate, unaffected by increased hours of operation), a "major modification" is defined as activity that "would result in a significant net emission increase of any pollutant."[76] "Net emission increase" is defined as "[a]ny increase in *actual emissions* from a particular physical change or change in method of operation at a stationary source," subject to requirements for netting source-wide increases and decreases in *actual emissions* that are not at issue in the NSR enforcement initiative.[77]

For determining whether net source-wide actual emissions have increased, EPA divided the existing source world into two different classes. The first class consisted of those emitting units that have not begun normal operations. "For any emissions unit which has not begun normal operations . . . actual emissions shall equal the potential to emit of the unit on that date."[78] As a result, where a facility has not begun normal operations (i.e., a newly constructed or modified source), the "actual emissions" that are included in the netting calculation are the emitting unit's "potential to emit."

The second class consisted of those facilities at the source that have begun normal operations. For these sources, the "actual emissions" that are used as the basis for determining whether there are emissions increases and decreases for netting purposes are computed as follows: "actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes [sic] the particular date and which is representative of normal source operation. . . ."[79] Furthermore, the tons per year calculation is to be based on actual hours and conditions of operation during that representative period. No methodology for calculating post-change emissions is provided, because none is needed.

That is, in the enforcement cases, EPA argues that the "major modification" definition, and in particular the definition of "actual emissions," requires NSR for facilities that merely increase their utilization after a repair or replacement project. EPA reaches this conclusion by ignoring the "modification" definition and reading into the "major modification" definition a requirement to project future annual emissions (which emissions increase methodology supposedly displaces the emission rate test of the NSR "modification" rule).

On its face, however, the 1980 major modification rules does *not* provide for annual emission projections. Indeed, EPA said as much in its 1988 WEPCo determination, stating that the 1980 "PSD regulations provide no support for this view" that EPA should "compare representative actual emissions prior to the change with 'projected' actual emissions after the renovations."[80]

Rather, the "major modification" rule simply provides a netting methodology to determine whether a "modification" is "major." Under this, to provide netting credit, emissions increases and decreases from existing units must be embodied in an enforceable SIP provision or permit term.[81] The amount of netting credit one must take is computed by comparing this enforceable level of emissions with historical actual baseline emissions, calculated based on actual, representative hours and conditions of operation.[82] In short, as EPA itself has said, the "major modification" rule provides no basis for projecting future annual emissions, because this was never the purpose of this provision.

In contrast to the definition of "modification" (i.e., activity that increases emission rate, unaffected by increased hours of operation), a "major modification" is defined as activity that "would result in a significant net emission increase of any pollutant."

By contrast, EPA in 1980 retained its long-standing separate definition of "modification." In that portion of the regulations, which dates to the regulatory PSD program, EPA stated that a "modification" was "any physical change in, or change in the method of operation of, a stationary source which increases *the emission rate* of any pollutant for which a national standard has been promulgated . . . or which results in the emission of any such pollutant not previously emitted," and specifically excluded increased hours of operation from this calculation.[83] This definition, which was promulgated as part of the 1974 PSD program and authoritatively interpreted to mean an hourly emission rate, was easily understood and implemented by regulated entities. Determining whether there is an emission rate increase under this interpretation is a simple engineering calculation that

source owners and operators have long made to determine NSPS and regulatory PSD applicability, and required no further explication from EPA.

Reading each part of the NSR applicability rules for what they say, therefore, provides a straightforward and understandable approach for determining when a project at an existing source triggers NSR preconstruction review and permitting. First, there must be a "modification," defined as activity that increases the emitting units' hourly emission rate. Second, there must be a "major modification," defined as a source-wide net increase in annual emissions. The "major modification" rule provides a specific methodology for this netting calculation which, as EPA recognized prior to the enforcement initiative, does not provide for projections of annual emissions.

On the other hand, if EPA in 1980 had desired to break completely from past regulatory practice and require source owners and operators to project future annual emissions that might follow a physical or operational change to a source, the Agency would have had to promulgate some sort of projection methodology. In fact, EPA did just that in 1992 and 2002. Projecting future emissions requires the source to determine what its future demand will be, as well as providing a means for sequestering future emissions that are caused by market demand rather than by a physical or operational change that alters the electric utility's dispatch model. The lack of emission projection methodology demonstrates that the 1980 NSR Rule does not provide for the actual-to-projected-actual emission increase test EPA currently claims in the enforcement cases is required.

b. Contemporaneous Applicability Determinations

This common sense interpretation of "modification" under the 1980 NSR Rule is supported by a series of applicability determinations issued by EPA in the immediate aftermath of the Rule's promulgation. These applicability determinations clearly indicate that, for the PSD program to apply, a source owner or operator must change a source in a way that increases its emitting capacity. Given the NNSR program's identical "modification" and "major modification" definitions, it follows that the activity that triggers NNSR review is the same for this program as well.

For instance, in a 1981 applicability determination, Edward E. Reich, EPA's Director of Stationary Source Enforcement and the official charged with making applicability determinations for the NSR program,[84] stated that "PSD applicability [at a source that had begun normal operations] is determined by evaluating any change in the emissions rates caused by" the change.[85] If the emission rate did not change, actual emissions "could increase only if there is an increase in the production rate or hours of operation, both of which are specifically exempt from PSD review."[86] Reich reiterated this position in a 1982 applicability determination, stating that increasing the number of hours that a source can operate in a year does not constitute a "major modification" under the 1980 NSR Rule.[87] The next year, in 1983, EPA again stated in an applicability determination that, when a source owner or operator changes a source by installing a larger component, "any increase in actual emissions . . . which will result from the increased capacity provided by the larger [component] must be considered for the purposes of PSD applicability."[88]

This is also how EPA's Regions were telling states to implement the NSR program based upon the 1980 NSR Rule. For example, in 1982, EPA's Region IV Chief of the Air & Waste Management Division issued a report "to all state and local agency directors" addressing a situation where (i) a source was modified for SO2 purposes, (ii) hours of operation would increase after the modification, and (iii) there would be "no increase in the hourly particulate emissions" as a result of the modification. EPA Region IV told the states that "[s]ince the modification does not cause any increase in [hourly particulate] emissions, no increase in annual emissions should be calculated."[89] This EPA memorandum illustrates another important point: NSR applies on a pollutant-by-pollutant basis.[90] EPA's enforcement theory would also repeal this aspect of the NSR program because, under that theory, once hours of operation were projected to increase, NSR would apply to *all* regulated pollutants (not just those pollutants for which there was an emission rate increase).

These applicability determinations and guidance memoranda illustrate the longstanding continuity in the Agency's interpretation of "modification"—a modification requires an increase in emitting capacity, which EPA has measured historically as an increase in a source's maximum hourly emission rate. These contemporaneous interpretations of the 1980 NSR Rule have myriad effects on the coal-fired power plant enforcement initiative that are discussed at length below. At a

bare minimum, however, they demonstrate two considerations key to the Supreme Court's assessment of the enforcement initiative. First, contrary to the petitioners' and the government's arguments, they demonstrate that the 1980 NSR Rule can be interpreted to require that a physical or operational change increase a source's maximum emission rate, unaffected by increased hours of operation, before there can be a major modification. Second, they demonstrate that the interpretation of the 1980 NSR Rule advanced by EPA in the coal-fired power plant enforcement initiative contradicts the language of the rules as well as the Agency's past interpretation of the 1980 NSR Rule.

4. In *Chevron v. Natural Resources Defense Council,* The Supreme Court Recognized That There Must Be A Modification Before There Can Be A Major Modification

It is not surprising that industry understood EPA's NSR program to apply only to NSPS "modifications" that were "major" based on an analysis of source-wide emissions, because that was how EPA explained the rules to the Supreme Court shortly after they were issued. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* the Supreme Court addressed EPA's "major modification" rule for the nonattainment NSR program.[91] Justice Stevens explained the program by quoting EPA's own description: Under this rule, "the plan requirements for major *modifications* may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions."[92] As the Court observed, according to EPA "there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions," i.e., if the modification is not "major."[93] Thus, as the Court explained, "an existing plant that contains several pollution-emitting devices may . . . modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant."[94]

The Supreme Court's understanding that a "modification" occur before there can be a "major modification" was also shared by the lower court and by EPA in formulating its "major modification" definition for nonattainment areas. In the decision below, *National Resources Defense Council v. Gorsuch,* then-Judge Ginsburg explained the major modification rule in the same way, noting that under EPA's nonattainment NSR rule "a 'major' new or modified source would be allowed to locate in a nonattainment area 'only if (certain) stringent conditions' [imposed by that program] could be met."[95] In the rulemaking that resulted in these rules, EPA also explained that the concept of "major modification" was narrower than "modification," not, as the *Duke Energy* petitioners assert, broader. Thus, for example, EPA explained that it did not view the fact that the major modification rule would exempt some modifications from NSR as problematic, because "New Source Performance Standards (NSPS) will continue to apply to many . . . modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review."[96] In other words, NSPS "modifications" trigger NSPS and may also trigger NSR, provided that the modification is "major."

D. Since 1989, EPA Has Deviated From Congress' Mandate In Its Attempts To Turn The NSR Program Into A Grandfathering Program That Requires Existing Sources To Retrofit New Source Pollution Controls

While EPA's contemporaneous interpretation of the 1980 NSR Rule was consistent with both the Rule's text and Congress' intention to create a program that did not apply to existing sources so long as they were not changed in a way that increased their emitting capacity, EPA has deviated from these basic precepts of the NSR program. Since that time, EPA has formulated several tests designed to extend "major modification" review to thousands of projects that are not "modifications." At the same time, however, a succession of EPA Administrators has rejected these interpretations in public statements and testimony before Congress.

1. Wisconsin Power And Electric Company: EPA Rejects The "Modification Requirement" In Favor Of An Actual-To-Potential Test For Existing Units That Have Begun Normal Operations

Six years of silence from EPA followed the applicability determinations that correctly applied the 1980 NSR Rule in accordance with its plain meaning. During these six years, regulated utilities knew with certainty what their obligations were under the Rule. Then,

in considering an applicability determination requested by the Wisconsin Electric Power Company ("WEPCo"), EPA reinterpreted the 1980 NSR Rule in effect to repeal the "modification" rule, by saying that any non-excluded physical or operational change to a source would be deemed to increase emissions, and therefore represent a "major modification."

EPA delegated this broad prosecutorial discretion to itself by extending a narrow presumption that it had created as part of the 1980 "major modification" source-wide netting methodology to become the new test for whether an activity constituted a "modification" in the first place. That is, as previously mentioned, under the 1980 NSR Rule, source-wide net emission increases are calculated using an emitting unit's "potential to emit" when a source has yet to begin normal operations. Most such sources are greenfield facilities, but some may be replacement facilities (such as a dry cement kiln that has been converted into a wet cement kiln) and others may be "modified" facilities.

The "potential to emit" presumption is justified in the case of sources that have no representative past operations. The presumption that such sources will operate at maximum capacity in the future accords with Congress' general intent in creating the NSR program because an activity that creates new, unregulated pollution needs to be reviewed and regulated to ensure compliance with the NAAQS, PSD increments, and other Clean Air Act requirements. Because sources are almost never operated close to their maximum operating capacity because of fluctuations in demand, the importance of reserve capacity, and the need to conduct maintenance activities while sources are not operating, reviewing new sources based on their "potential to emit" ensures that those sources have the necessary flexibility to operate in the future in compliance with Clean Air Act requirements.

WEPCo's proposed project would have restored five boilers that had been formally derated, and that operated in that derated state for over 5 years, to their original design capacity, and also permitted them to operate past their scheduled retirement dates. Its scale was so enormous that "WEPCo did not identify, and EPA did not find, even a single instance of renovation work at any electric utility generating station that approached the Port Washington life extension project in nature, scope or extent."

In *WEPCo v. Reilly*,[97] WEPCo requested an applicability determination that a planned "life-extension" project to its Port Washington power plant would not constitute a modification under the NSPS and PSD programs. WEPCo's proposed project would have restored five boilers that had been formally derated, and that operated in that derated state for over 5 years, to their original design capacity, and also permitted them to operate past their scheduled retirement dates. Its scale was so enormous that "WEPCo did not identify, and EPA did not find, even a single instance of renovation work at any electric utility generating station that approached the Port Washington life extension project in nature, scope or extent."[98]

EPA disagreed with the utility, declaring that WEPCo's plans amounted to physical changes (not routine maintenance activities) that would increase the source's potential emissions, and were thus "major modifications" for PSD purposes. In its final determination, EPA refused WEPCo's suggestion that the Agency permit it to project actual emissions following the change. In the Agency's words:

> The WEPCo . . . contends that EPA should . . . compare representative actual emissions prior to the change with "projected" actual emissions after the renovations. The PSD regulations provide no support for this view. Where, as here, a source is not currently subject to a PSD permit containing operational limitations, EPA must presume that the source will operate at its maximum capacity and, hence, its maximum potential to emit.[99]

Thus, EPA confirmed in 1988 that the 1980 NSR Rule did not provide for an actual-to-projected-actual test for determining a "modification"—the exact test which EPA now says in the enforcement cases has *always* been provided by the 1980 NSR Rule.

EPA did find that each of the five WEPCo units had triggered PSD, however, by comparing past actual emissions of the units in their deteriorated state with the future potential to emit of the units once the refurbishment work had been completed. EPA called this test, which it found in the 1980 NSR Rule, the "actual-to-

potential" test for determining a "modification." As previously explained, under the "actual-to-potential" test, a physical or operational change is deemed to increase emissions if emissions before the change, under actual operating conditions, are less than potential post-change emissions, assuming the source operates at 100 percent capacity. As a result, the actual-to-potential test will nearly always lead to the conclusion that a physical or operational change is a modification unless the change drastically increases efficiency or reduces maximum operating capacity.

WEPCo petitioned the Seventh Circuit for review of this applicability determination. In reviewing EPA's WEPCo determination, the Seventh Circuit held that the actual-to-potential test was not the trigger for PSD review. In particular, the court explained that EPA's reasoning in interpreting the 1980 NSR Rule to contain an actual-to-potential test for existing sources was "circular: in order to demonstrate that the . . . like-kind replacement project constitutes a modification, the EPA applies the potential to emit concept (to show an increase in emissions). And in order to apply the potential to emit concept to like-kind replacement, the EPA assumes that the plant is a 'modified' unit."[100] The court found that no deference is due an agency interpretation that assumes what it seeks to prove. Moreover, the court found "no support in the regulations for the EPA's decision wholly to disregard past operating conditions at the [source].'"[101] The court therefore refused to defer to EPA's interpretation of the Rule. The Seventh Circuit accordingly set aside EPA's WEPCo PSD determination because it was unsupported by "existing regulations," i.e., the 1980 NSR Rule.[102]

After *WEPCo,* EPA was left with two tasks. First, it had to respond to the WEPCo court's remand order, which permitted WEPCo to submit additional information to EPA that would allow the Agency to "conclude whether the renovated plant would cause a significant net emission increase if it were operated under present hours and conditions," i.e. ,whether the activity would increase emission rate, unaffected by hours of operation. In its revised WEPCo applicability determination, however, EPA refused to "calculate WEPCo's post-modification emission increases based on 'present hours and conditions.'"[103] Indeed, one EPA official went so far as to call the Seventh Circuit's remand instruction "absurd" and to boast that "EPA properly ignored it in [the] WEPCo remand."[104] However, EPA's revised applicability determination was never challenged by WEPCo—the only party with standing to do so—because the Agency ultimately found that the alleged modifications did not require installation of pollution controls for physical changes that did not increase the source's maximum hourly emissions, and the controversy was settled favorably for the company.

The court found that no deference is due an agency interpretation that assumes what it seeks to prove. Moreover, the court found "no support in the regulations for the EPA's decision wholly to disregard past operating conditions at the [source].'" The court therefore refused to defer to EPA's interpretation of the Rule. The Seventh Circuit accordingly set aside EPA's WEPCo PSD determination because it was unsupported by "existing regulations," i.e., the 1980 NSR Rule.

Second, to comply with the Seventh Circuit's vitiation of EPA's interpretation of the 1980 NSR Rule in the aftermath of the court's finding of no authority in the 1980 NSR Rule for a projected emissions approach, the Agency promulgated a new actual-to-projected-actual methodology in 1992 as a revision to the "major modification" rule.[105] This new rule, which is often called the WEPCo Rule, allowed a source that had undertaken a modification (i.e., that had undertaken activity that resulted in new emitting capacity) to nevertheless avoid NSR if it could project that annual emissions from the source following a physical or operational change would decrease (e.g., because utilization of the source would decrease). However, the WEPCo Rule only applied to "electric utility steam generating units," and then only if the source committed to provide post-project reports confirming its annual emission projections.

Given the timing of EPA's NSR enforcement initiative, it would seem likely that the WEPCo Rule would feature prominently in *Duke Energy.* This was not the case, however, because as EPA itself has explained, electric utilities were permitted to "opt out" of the WEPCo Rule because the rule did not actually require electric utilities to use its actual-to-projected-actual methodology.[106] Indeed, there was no incentive for utilities to do so

The government alleged that since the mid 1970s hundreds of projects at facilities across the South and Midwest had violated the major NSR, without EPA or state inspectors who had seen these projects saying anything about this program. The coal-fired power plant enforcement initiative represents an eleventh-hour attempt by the Clinton-era EPA to rewrite the NSR program in accord with its policy preferences. In seeking to do so, and to impose costs in the billions of dollars upon the regulated industry, EPA has had to distort the NSR program's history.

if they did not engage in "modification" activity under the 1980 NSR Rule.

Although the WEPCo Rule is not at issue in the enforcement actions, it is important to their proper resolution. EPA currently claims that the 1980 NSR Rule requires an actual-to-projected-actual emission increase methodology for all industries to determine whether a "modification" occurs. As the WEPCo Rule shows, however, in 1992 the Agency clearly understood that the 1980 NSR could not support this position. The authors of this Paper believe that this contradiction supports the regulated utilities' reading of the 1980 NSR Rule. At the very least, it demonstrates that the plain language of the 1980 NSR Rule is susceptible to multiple interpretations, although only a reading that requires that applies NSR to activity that creates unregulated pollution is consistent with the Clean Air Act.

2. The Coal-Fired Power Plant Enforcement Initiative: Rewriting The NSR Program's History

The coal-fired power plant enforcement initiative began in 1999 when, at EPA's behest, the Department of Justice brought enforcement actions against seven coal-fired electric utilities. Another action followed in 2000.[107] By 2002, eight enforcement actions were pending in the district courts.[108] The government alleged that since the mid 1970s hundreds of projects at facilities across the South and Midwest had violated the major NSR, without EPA or state inspectors who had seen these projects saying anything about this program.[109] The coal-fired power plant enforcement initiative represents an eleventh-hour attempt by the Clinton-era EPA to rewrite the NSR program in accord with its policy preferences. In seeking to do so, and to impose costs in the billions of dollars upon the regulated industry, EPA has had to distort the NSR program's history. Despite half-hearted denials by its trial attorneys, EPA's litigation reinterpretation is so blatant that, in the words of the federal district judge hearing the enforcement action against Alabama Power, "I do not see how anyone can say with a straight face that EPA's 1999 interpretation of [routine maintenance, repair and replacement] and emissions, as set out in *Alabama Power* and the other 1999 EPA enforcement actions, one being *Duke Energy*, was the same interpretation as" SIP regulations that mirrored EPA's 1980 NSR Rule.[110]

a. EPA Tested Various Enforcement Strategies Before Settling On The Actual-to-Projected-Actual Test It Had Rejected In *WEPCo*

Following the WEPCo Rule, the state of play was simple. For sources that had not undertaken NSPS modifications, the law remained as it was under the 1980 NSR Rule—that is, NSR could not apply because there was no "modification" to trigger a "major modification" analysis. Electric utility steam generating units that undertook modification activity and that chose to submit the data necessary to avail themselves of the 1992 WEPCo Rule, however, had another option for avoiding NSR: they could employ an actual-to-projected-actual methodology and, if they projected lower annual emissions after the modification, NSR would not apply. For all other existing sources, including all other electric utility steam generating units, the source-wide netting requirements of the 1980 NSR Rule would continue to apply. After the Seventh Circuit rejected the actual-to-potential test and EPA rejected the actual-to-projected-actual test, electric utilities reasonably expected the Agency to do the sensible thing and return to its legally defensible interpretation of the 1980 NSR Rule as explained by EPA contemporaneously with promulgation of those rules.

Thus, when EPA began its coal-fired power plant enforcement initiative in 1999, the Agency had a problem on its hands: the enforcement actions amounted to lawsuits in search of a legal theory. Unsurprisingly in such a situation, EPA advanced several different theories in different enforcement actions. EPA's search for a legal theory so blatantly distorted past Agency practice that the aforementioned judge in the *Alabama Power*

action stated that:

> [U]nder any standard of administrative deference, to say grace over the retroactive agency interpretation of regulations affecting a huge, nationally regulated industry where the new interpretation will result in the expenditures, collectively, of billions of dollars trying to do retrofit work that wasn't designed to meet the standards now being imposed. It may be, how do I say it, expedient from a regulatory point of view, but I view [Supreme Court precedent refusing to defer to such reinterpretations] in part as the judiciary's response to the "that was then, this is now" approach to such regulation.[111]

The first test EPA attempted to use in the NSR enforcement initiative was the actual-to-potential test rejected by the Seventh Circuit. In *Duke Energy*, for example, the government initially argued for the applicability of the "actual-to-potential" test. At the summary judgment hearing, however, the government made a sudden volte-face, embracing the actual-to-projected-actual test that it had previously rejected in the WEPCo rulemaking.[112] While a litigant, including an administrative agency, may certainly advance legal arguments in the alternative, it should not be permitted to claim that its regulations have alternate meanings in order to make those alternative arguments.

EPA also argued for the "actual-to-potential" test in its administrative enforcement action against the Tennessee Valley Authority ("TVA"). In its proceeding against TVA, EPA issued a Notice of Violation and an Administrative Compliance Order against the government utility, before holding an ad hoc hearing before its Environmental Appeals Board. In rendering its decision, the appeals board noted that EPA's Notice of Violation based "its allegations of NSR violations . . . upon an emission increase test commonly referred to as the 'actual-to-potential' test." EPA abandoned that test in its TVA Compliance Order, however, instead arguing "that actual pre-modification emissions are compared with 'projected actual emissions' after the modification, in order to establish an NSR violation." There, as in *Duke Energy*, EPA attempted to have it both ways.

It should be no surprise, therefore, that EPA personnel routinely contradict the Agency's positions in the Rule 30(b)(6) depositions that accompany every enforcement action.[113] In just one example from EPA's enforcement action against the East Kentucky Power Cooperative, an EPA official deposed by the defendant admitted, contrary to EPA's coal-fired power plant enforcement initiative interpretation, that the 1980 NSR Rule "contained no methodology for calculating emission increases for units that had begun normal operations."[114] If this deponent is to be believed, EPA correctly stated the obvious in its original WEPCo determination: the 1980 NSR Rule does not provide for an "actual-to-projected actual" test, and thus offers no basis for nearly all of the government's claims in the NSR enforcement initiative, and, indeed, all claims against *Duke Energy*.

Similarly, in the *Duke Energy* case, it is uncontested that EPA employees (in addition to state regulators) were fully aware of the projects EPA later claimed violated its NSR regulations. In the words of the *Duke Energy* district court:

> EPA was aware of the utility industry practice of engaging in life extension projects as early as the 1980s. For example, EPA inspection reports from the 1980s indicate that projects were being performed that involved "major work aimed at upgrading and extending the operating life of [the] boilers" at an "estimated ... cost of $ 50 million." Another report stated that a unit was out for a "13 week life extension major overhaul, estimated to cost approximately $ 15 million." Furthermore, a 1989 EPA-directed study designed to assess future utility air emission trends assumed that existing coal-fired power plants would continue to operate at original capacity for fifty-five to sixty-five years, being "refurbished" around age thirty. In March 1986, three EPA policy analysts pub-

EPA was aware of the utility industry practice of engaging in life extension projects as early as the 1980s. For example, EPA inspection reports from the 1980s indicate that projects were being performed that involved "major work aimed at upgrading and extending the operating life of [the] boilers" at an "estimated ... cost of $ 50 million."

lished an article in which they listed ten "life extension" projects of which they were aware, including *Duke Energy*'s PMP projects at the Dan River and Allen Plants. That same year, an EPA official attended an Electric Power Research Institute ("EPRI") conference on "Life Extension and Assessment of Fossil Plants." (EPRI published the proceedings of the conference in an 1,100-page publication in which utilities, including *Duke Energy*, presented detailed descriptions of many "life extension" projects.)[115]

To be sure, an administrative agency is not legally bound by mere litigation positions or by its employees' actual knowledge of the projects it later claims violated the law. At the same time, it also seems evident that when an administrative agency begins the largest enforcement initiative in its history after knowing about the conduct at issue for twenty years, and is incapable of articulating a consistent rationale for doing so, the Agency acts neither responsibly nor legally.

b. EPA's Enforcement Positions Contradict Agency Statements That The NSR Program Was Not Designed To Force Existing Sources To Retrofit With New Source Control Technology As A Matter Of Course

An added consideration looms far larger than just EPA's varying and contradictory interpretations of the 1980 NSR Rule, or even the specific knowledge of mid-level EPA officials: prior to the launch of the enforcement initiative, high-ranking EPA officials, including several Administrators, offered repeated public assurances that the NSR program was not intended to preclude the types of activities at existing sources that have become the subject of enforcement actions in the initiative.

The first of these statements was made at a 1980 conference on acid rain. Though almost forgotten by now, "acid rain was the great transboundary pollution controversy of the 1970s" and largely divided states until the success of the 1990 Clean Air Act Amendments' Title IV Acid Rain tradable permits program.[116] In 1980, EPA's Assistant Administrator for Air (and later Administrator) Lee Thomas stated that the Clean Air Act's modification definition did not include "activities at a plant which tend to extend the useful life of that plant or tend to increase the total emissions generated over the total life of that plant."[117] Thomas reaffirmed this message as Administrator, noting at a 1987 hearing that there was no "basis [for Congress or EPA] to go in and suggest that all of those [sources that had not installed NSPS-level controls] should put on very stringent control requirements that we impose on the new source performance standards."[118]

Given EPA's public assurances that existing sources were not subject to the NSR (or NSPS) program merely for engaging in life extension activities, Congress considered and rejected several bills that would have required existing sources to install (at least) NSPS-level controls.[119] These bills were premised on the assumption that the NSR program would not force most existing sources to retrofit with new source control technology. For example, several bills introduced in 1989 specifically require new controls *only* for existing facilities not subject to new source programs. Thus, one bill declares that "[t]he purpose of this part is to achieve a nationwide reduction in annual emissions of sulfur dioxide from fossil fuel fired electric utility steam generating units which are not subject to standards of performance for sulfur dioxide emissions under section 111 [NSPS]."[120] (New source controls required under the NSR programs—BACT for PSD and LAER for NNSR—are at least as stringent as any applicable NSPS. Thus, any unit that installs such controls as a result of triggering NSR would be subject to NSPS also.) The bill further states that "[t]he State implementation plan and plan revisions under this part may provide for compliance with the requirements of this section through any action which results in emission reductions from fossil fuel fired electric utility steam generating units not subject to standards of performance under section 111."[121]

Another bill would have required, by December 31, 2000, unit-by-unit emission limits at least as stringent as the Subpart D NSPS (1.2 lb/mmBtu SO2) for all electric generating units that commenced operation before 1985.[122] Obviously, such a requirement would be meaningless if most existing electric generating units were intended to become subject to NSR (with control standards more stringent than NSPS) as a result of repairing deteriorated components.

When Congress finally enacted the acid rain cap-and-trade program as part of the 1990 Clean Air Act Amendments, it did so based EPA's assumption "that net dependable capacity and reliability of existing power plants would be maintained at design levels for their entire fifty-five to sixty-five year lifetime" without

installing BACT or LAER.[123] This was not the conduct of an EPA (or a Congress) that believed all existing sources would eventually be subject to the NSR program.

The debate over acid rain was not the only context in which EPA disclaimed authority under the existing Clean Air Act regulatory scheme to force existing sources to install control technology. In the preamble to a 1997 proposed rulemaking, EPA said that "[f]ew, if any, changes typically made to existing steam generating units" would subject these units to the modification rule.[124] In response to Congressional concerns that routine maintenance would oblige utilities to install control technology following the WEPCO decision, EPA clarified that such activities had not, and were not expected, to trigger NSR. When interviewed by Government Accounting Office ("GAO") officials, EPA officials stated that they "do not consider WEPCo's project typical of most utility life extension projects, and they expect that the ruling will not significantly effect utilities' decisions to undertake power plant life extension projects."[125] EPA did not say this to merely placate the GAO: "EPA's 1989 emissions forecast assumed that the *WEPCo* decision would not result in a significant number of additional power plants having to comply with the NSPS and the PSD program requirements."[126] Indeed, following *WEPCo*, EPA's regional offices informally investigated whether any other utilities' life extension projects had been conducted in violation of the 1980 NSR Rule. The Agency informed Congress that this survey "did not result in the detection of any violations."[127]

Unfortunately, once the coal-fired power plant enforcement initiative was launched, EPA's well-settled understanding as to what activities did and did not constitute modifications under the NSR program ended abruptly, with EPA referring to the Department of Justice hundreds of alleged NSR violations based on electric utility life extension projects, projects that did not change the fundamental way in which the sources operated but instead reduced the incidence of forced outages for each source, permitting them to operate as they had previously been able to operate.

c. EPA's Enforcement Positions Were Rejected By The Agency In The Context Of Other Statutory Programs That Incorporate The Single Definition Of Modification

Finally, the position EPA espouses in the coal-fired power plant enforcement initiative is very similar to positions that EPA rejected in the context of its national emission standards for hazardous air pollutants ("NESHAP") program under Clean Air Act § 112. As previously mentioned, the 1970 Clean Air Act Amendments established a single definition of "modification" in the NSPS program that was incorporated into the NSR program by Congress in the 1977 Clean Air Act Amendments. In addition, the 1970 Clean Air Act Amendments themselves incorporated an NSPS "modification" as the trigger for applicability of the NESHAP program to existing sources.[128] To implement this mandate, EPA defined the term "modification" in its NESHAP regulations identically to the 1974 PSD definition of "modification," by using an increase in emission rate unaffected by any change in hours of operation.[129] In 1985, EPA clarified this definition to require an increase in the source's hourly emission rate.[130] In clarifying its definition, EPA rejected arguments that the term "modification" in Clean Air Act § 112 should be interpreted consistent with the "major modification" definition in the 1980 NSR Rule because it believed that an increase the source's capacity to emit should be sufficient alone to trigger applicability of the NESHAP program, without also requiring an annual emission increase of a certain magnitude.[131] EPA's refusal to adopt a "major modification" definition that exempted certain "modifications" from the NESHAP program further undercuts EPA's litigation position in the coal-fired power enforcement initiative.

The debate over acid rain was not the only context in which EPA disclaimed authority under the existing Clean Air Act regulatory scheme to force existing sources to install control technology. In the preamble to a 1997 proposed rulemaking, EPA said that "[f]ew, if any, changes typically made to existing steam generating units" would subject these units to the modification rule. In response to Congressional concerns that routine maintenance would oblige utilities to install control technology following the WEPCO decision, EPA clarified that such activities had not, and were not expected, to trigger NSR.

EPA's understanding is buttressed by the 1990 Clean

Air Act Amendments. Congress disagreed with EPA's refusal to adopt a "major modification" definition for the NESHAP program, and as a result defined a "modification" for Clean Air Act § 112 purposes consistent with the NSR regulatory definition of "major modification" in the 1990 Clean Air Act Amendments. In so doing, however, Congress did not make a similar change to the definition of "modification" that continued to govern the applicability of the NSPS, PSD, and NNSR programs. This decision, in addition to the plain language of the 1977 Clean Air Act Amendments, underscores Congress' intent that activity that constitutes an NSPS "modification" trigger applicability of NSR preconstruction permitting and review to existing sources.

E. Problems with the Coal-Fired Enforcement Initiative Interpretation

If courts were to accept EPA's coal-fired power plant enforcement initiative interpretation of the 1980 NSR Rule, they would be retroactively forcing sources into an NSR program for which they had no fair notice and with which compliance was impossible. The regulatory program at issue in the coal-fired power plant enforcement initiative is, all parties agree, EPA's 1980 NSR Rule. Yet EPA has never been able to locate in its 1980 Rule any methodology for measuring emission increases from existing major stationary sources of air pollution that have begun normal operations and not undertaken an NSPS "modification." This is unsurprising in light of the 1980 NSR Rule's history. But EPA has nevertheless tried interpreting the rule in a series of different ways designed to ensure that a regulated entity can never prove that a non-excluded physical or operational change would *not* cause an emission increase. The absence of any such methodology from the Rule should prove fatal to the enforcement initiative.

1. Obscuring The Question: EPA Attempts To Make The Issues More Technical In An Attempt To Hide Its Reinterpretation

One strategy EPA has employed in litigating the enforcement initiative is to attempt to focus the courts, including the Fourth Circuit in *Duke Energy*, on the seemingly technical question of how emission increases should be measured for purposes of the NSR program. By emphasizing the mind-numbing potential-to-potential, actual-to-potential, and actual-to-projected-actual emission increase tests, each of which can be measured in hourly or annual terms, EPA hopes to move the dispute to the heartland of its regulatory authority: determining highly technical matters committed by Congress to the Agency.

However, as described above, the key consideration for any court reviewing an NSR enforcement action, and hence the key question before the Supreme Court in *Duke Energy*, is whether Congress intended for repair and maintenance activities that do not change or expand the source's emitting capacity to trigger NSR review. Clean Air Act § 111's definition of "modification" compels a resoundingly negative answer by ensuring that activity that allows a source to operate as it was constructed and permitted to operate before the change, and to meet increases in demand, does not trigger NSR review.

It is in this way that the Clean Air Act's fundamental distinction between new stationary sources, which are sources of unregulated pollution, and existing stationary sources, which absent a change that creates new pollution do not emit unregulated pollution, is preserved. As previously discussed, the Clean Air Act delegates to the states the primary duty to ensure that air quality meets the NAAQS. The states do this by formulating SIPs, which regulate every significant source of air pollution in its territory. In the SIP, the state calculates the amount of emissions it can permit in a particular area and still meet the NAAQS. This is called an "emissions inventory" or "emissions budget." The state then compares the emissions inventory with the projected baseline "business as usual" emissions levels. After doing so, the state is able to determine the required aggregate emission reductions, and assigns detailed emissions limitations to existing sources to achieve this required quantity of reductions.

When the state creates its "emissions inventory" and assigns any necessary emission reductions among the sources in an area, it does not simply assume that each source will operate as it had in the previous year, or previous two years. Instead, the state assumes the *maximum potential* emissions from each existing source, i.e., the emissions that would result if the source operated around the clock at its maximum productive rate, or at its maximum legal limit if the source is subject to an enforceable permit term. As such, the SIP must demonstrate that a particular area will attain the NAAQS for the relevant criteria pollutant by the required attainment

date even with all sources operating at maximum capacity.

Hence, if sources operate within their constructed and permitted capacity and do not install or create new capacity, attainment is ensured and air quality is preserved, no matter how many hours the source operates or what repairs are made to continue such operation. It is duplicative to review these sources again unless the sources are changed in a way that creates new, heretofore unregulated emissions. This is why Congress specifically intended the term "modification" to encompass only activity that increases the emitting capacity of a facility—not the use of existing capacity as designed and permitted. As a result, existing air pollution capacity has already been taken into account by the relevant SIP in a way designed to attain and maintain the NAAQS. These emissions are, by definition, not "increase[d] pollution," and existing sources should not be forced to undergo NSR preconstruction permitting until they undertake the kind of change that makes installing new source control technology viable: an increase in emitting capacity. This was the basic policy bargain behind the enactment of the 1977 Clean Air Act Amendments. It is this balance between competing interests in drafting the Act that truly reflects the will of Congress.

2. EPA's Enforcement Initiative Interpretation Would Completely Undermine The NAAQS System By Rendering All Other Control Measures Unnecessary

The NAAQS system is the backbone of the Clean Air Act. Attainment or nonattainment status determines how stationary sources of pollution will be regulated in a given area. The coal-fired power plant enforcement initiative would render this central structural feature of the Act moot by forcing all existing large stationary sources of pollution to retrofit new source pollution controls merely to be allowed to continue to operate their sources.

As EPA has stated in published applicability determinations, the compatibility of a particular agency action with the NAAQS system and Clean Air Act regulations as a whole must be assessed in determining its propriety.[132] Pursuant to EPA's position in the enforcement initiative, sources in attainment areas will be forced to retrofit costly new source pollution controls despite the fact that EPA has concluded that pollution levels in these areas do not threaten public health. Simultaneously, the requirement that sources in nonattainment areas install RACT would be largely superfluous given that LAER, the new source control technology requirement for nonattainment areas, is far more stringent than RACT. The drafters of the Clean Air Act could not have intended either result.

Opponents of this view will argue that the NSR program's focus on clean economic growth and "limited" grandfathering complement the RFP requirements' focus on bringing areas into attainment. The problem is that forcing sources in areas that have already attained the NAAQS to repeatedly retrofit costly new source pollution control technology serves no purpose. By definition, the pollution in these areas is at a level "requisite to protect the public health" with "an adequate margin of safety."[133] Furthermore, under the Clean Air Act, EPA must review and, if appropriate, promulgate revised NAAQS every five years.[134] Similarly, if emissions from sources in attainment areas are interfering with attainment in another state, the state may file a petition under Clean Air Act § 126.[135]

It would be similarly senseless to require existing sources in nonattainment areas to reduce pollution through the NSR program. While the authors of this paper could imagine a regulatory scheme that forced all existing sources in nonattainment areas to retrofit new source control technology, the major NSR program is simply not such a scheme. The NNSR program (i.e., the NSR program in nonattainment areas) is triggered by the exact same occurrence as the PSD program (i.e., the NSR program in attainment areas): a Clean Air Act § 111 modification.

Indeed, the Clean Air Act's structure is antithetical to an interpretation of the major NSR program that requires all existing major stationary sources of pollution to retrofit new source control technology. Perhaps most prominently, the 1990 Clean Air Act Amendments, particularly the Title IV SO_2 cap-and-trade program, were necessary because, in 1990, EPA had not yet advanced its enforcement interpretation of the NSR program as requiring preconstruction review of existing sources for merely maintaining their operating capacity. Accordingly, the pollution reductions now demanded by the coal-fired power plant enforcement initiative would properly not be considered required by law.

To reduce pollution from existing sources under the pre-1990 Clean Air Act, Congress mandated massive

reductions in SO_2 emissions from all major electric utilities in the largest and most ambitious pollution cleanup project in American history. While previous Clean Air Act programs were creatures of their time—that is, they were based on a command-and-control regulatory model—the SO_2 cap-and-trade program permitted electric utilities to reduce pollution in whatever manner was most cost-effective for a particular utility. Some utilities did little more than reconfigure their least-cost dispatch system. Others, most notably Illinois Power, carried on with business as usual while purchasing additional pollution allowances. The Title IV program continues to this day, and has been joined by other programs created in the aftermath of Title IV's success, including the NOx SIP Call, which created a cap-and-trade program for nitrogen oxides in states with particularly difficult ozone transport issues. It would have been senseless for Congress and EPA to spend the better part of the 1980s working on the 1990 Clean Air Act Amendments when such reductions could have been secured merely by enforcing a preexisting regulatory program—NSR—based on activity that EPA knew was taking place at the time.

One flaw in EPA's enforcement initiative interpretation of the 1980 NSR Rule is that electric utilities could not have projected their annual emissions into the future based on a methodology that, even EPA admitted, is not contained in the 1980 NSR Rule. Indeed, the reason EPA found in 1988 that the 1980 NSR Rule does not authorize the actual-to-projected actual emission increase test is because there are no regulatory provisions in the 1980 NSR Rule that allow for a projection of future emissions.

3. It Is Impossible For Electric Utilities To Comply Retrospectively With EPA's Enforcement Initiative Interpretation

In practice, the actual-to-projected-actual test now advocated by EPA in the enforcement cases has proven as impossible to apply as the Agency's previous actual-to-potential test. Not only does the 1980 NSR Rule lack any methodology for the emission projection EPA now claims is "required," but EPA's irrebuttable presumption that any increased utilization following a physical or operational change was "caused" by that change makes the actual-to-projected-actual emission increase test the functional equivalent of the actual-to-potential test in a world of growing electricity demand. For these reasons, EPA's enforcement reinterpretation of the 1980 NSR Rule as containing an actual-to-projected-actual test offers hardly a "kinder and gentler" alternative to the actual-to-potential test. In short, EPA's enforcement reinterpretation would subject utilities to NSR preconstruction permitting whenever they undertake a project to reduce forced outages.

a. The 1980 NSR Rule Contains No Methodology For Projecting Future Emissions

One flaw in EPA's enforcement initiative interpretation of the 1980 NSR Rule is that electric utilities could not have projected their annual emissions into the future based on a methodology that, even EPA admitted, is not contained in the 1980 NSR Rule.[136] Indeed, the reason EPA found in 1988 that the 1980 NSR Rule does not authorize the actual-to-projected-actual emission increase test is because there are no regulatory provisions in the 1980 NSR Rule that allow for a projection of future emissions. In particular, the 1980 Rule does not contain any requirement calling for estimating future annual emissions, as the 2002 NSR Rule does. Nor does the 1980 Rule contain a process by which, or an authority to whom, the utility must submit "projections," as the 2002 rule does.[137] Likewise, the 1980 NSR Rule differs from the 1992 and the 2002 NSR Rules, both of which similarly contain a comprehensive methodology for projecting future emissions.[138] As a result, electric utilities are subjected to liability by a projection unknown when the sources conducted the projects at issue in the coal-fired power plant enforcement initiative. Perhaps unsurprisingly, EPA has been able to argue that none of the electric utilities "complied" with this recently invented methodology. Like the actual-to-potential methodology rejected in *WEPCo*, this "test" simply vests vast discretion in EPA, and retrospectively places regulated entities entirely at the Agency's mercy.[139]

b. The Coal-Fired Enforcement Initiative Interpretation Of "Major Modification" Assumes What It Seeks To Prove

Insofar as sources conduct repairs in order to maintain their ability to conduct normal operations (generally by reducing the number of forced outages at a source), EPA's favored actual-to-projected-actual

methodology suffers from the same flaw as the actual-to-potential interpretation: it assumes what it seeks to prove. Electric utilities perform repairs to allow a source to handle increased demand for power and to reduce the number of forced outages, consistent with its constructed and permitted capacity. As a result, an actual-to-projected-actual test that presumes increased utilization following a change results from the change will do exactly what the discredited actual-to-potential test does: result in a projected emission increase in all situations where utilization might increase. Complicating this issue is the fact that over the last twenty years, electricity demand has grown by over 50 percent, a figure expected to rise to 90 percent in the next ten years.[140] Many utilities have increased their hours of operation to meet this increased demand.

EPA has moved away from a command-and-control approach to regulation in which the Agency forces sources to adopt what it deems the best available technology, and towards market-based approaches that are not only more economical, but also more effective at achieving reductions from existing sources.

In order to ensure that electric utilities could not defend their conduct by pointing to this increased demand and tying it to the increased source utilization, EPA applied another heretofore unannounced wrinkle—the Agency read all causation requirements out of the 1980 NSR Rule. That is, in the enforcement initiative, the government announced that, in assessing whether a non-excluded physical or operational change caused an emission increase, it would apply an irrebuttable presumption that any increased emissions following the change are caused by that change unless the projected increase in emissions would be "completely unrelated to the . . . change and entirely caused by independent factors."[141]

As a practical matter, electric utilities cannot meet increased demand without conducting maintenance activities at their sources, and it will always be impossible to prove that any projected increase in utilization is "completely unrelated to the . . . change." Electric utilities determine what sources will or will not operate at a particular time to meet electric demands on a system on a least-cost dispatch basis. This system depends heavily not only on the number of forced outages a particular source will suffer if a repair is or is not made to the source, but also on a multitude of other variables, including fluctuations in the price of fuel, the reliability of the electric transmission system, unplanned outages at other units, and the like. At the same time, a smaller than one percent increase in electric demand at a large power plant can cause emissions in excess of the NSR "major modification" significance level for a particular pollutant and would, at least under the enforcement interpretation, trigger NSR review.

4. The Coal-Fired Power Plant Enforcement Initiative Is A Costly And Ineffective Means Of Reducing Pollution From Existing Sources

In addition to frustrating Congress' intent in enacting the 1977 Clean Air Act Amendments, EPA's coal-fired enforcement initiative is simply bad policy. The regulatory approach embodied by the coal-fired power plant enforcement initiative eschews any attempt to achieve cost-effective pollution reductions from existing sources. Instead, it requires expensive source retrofits based upon the occurrence of a long ago event that was nearly impossible for a regulated entity to predict. In this regard, it is significant to note that since the 1977 Clean Air Act Amendments, EPA has moved away from a command-and-control approach to regulation in which the Agency forces sources to adopt what it deems the best available technology, and towards market-based approaches that are not only more economical, but also more effective at achieving reductions from existing sources. The coal-fired power plant enforcement initiative is worse than an attempt by EPA to regulate through litigation. It is an attempt to do so in an ineffective and discredited way.

a. The NSR Program Is An Inefficient Regulatory Tool

As a matter of first principles, few experts actually believe that the NSR program represents a good way to control air pollution. Academic criticism of the 1970's era command-and-control air regulation dates back almost to the enactment of the Amendments themselves, and finds particular fault with the Amendments' focus on forcing sources to install the best available technology.[142] In the words of one commentator:

> The best and most comprehensive solution would be to replace existing standards with a

> stringent emission cap and allowance trading system, created on a national or regional basis, that includes all sources. This solution would not only be extremely effective environmentally, but also would eliminate virtually all of the problems . . . that are caused by the use of rate standards.[143]

After thirty years of national air quality regulation, it would be simply disingenuous to suggest that the NSR program represents an efficient strategy for reducing air pollution.

b. U.S. Air Quality Improved Dramatically During The Time EPA Claims That Nearly All Industry Failed To Comply With The NSR Program

Ironically, during the nearly thirty years in which EPA alleges that industry has defied the NSR program by undertaking "unpermitted" projects that were known to, and in fact required by, regulators,[144] the Clean Air Act has largely succeeded in improving air quality throughout the United States. For instance, "average NO_2 concentrations are well below the NAAQS and are currently at the lowest levels recorded in the past 20 years. All areas of the country that once violated the NAAQS for NO2 now meet that standard."[145] While "[o]nly 10 percent of monitored counties and 5 percent of the monitored population met the 1-hour [ozone] NAAQS in 1980—this has increased to 90 percent of monitored counties and 70 percent of the monitored population in 2003."[146] In 2001, only .01 percent of the United States population lived in areas that had failed to attain the NAAQS for carbon monoxide.[147] Lead pollution is similarly a non-issue, with only .003 percent of the United States population living in areas that had NAAQS exceedances for lead.[148] While there are eighteen areas currently classified as nonattainment for SO_2, none registered a NAAQS exceedance in 2001.[149]

This is not to say that there is no room for air quality to improve, or to deny that some areas are still unable to comply with the NAAQS for one or more pollutants. Conditions in certain urban areas may make compliance with a particular NAAQS standard—often ozone—nearly impossible. Nor does this analysis address the controversial topic of carbon emissions, which are not regulated under the Clean Air Act. Yet the fact remains that air quality in the United States has dramatically improved in the three decades of the Clean Air Act—three decades during which, as EPA would have it, the entire electric utility industry and other industries refused to comply with the NSR permitting program.

Ironically, during the nearly thirty years in which EPA alleges that industry has defied the NSR program by undertaking "unpermitted" projects that were known to, and in fact required by, regulators, the Clean Air Act has largely succeeded in improving air quality throughout the United States. For instance, "average NO_2 concentrations are well below the NAAQS and are currently at the lowest levels recorded in the past 20 years.

c. Existing Sources Are Subject To Numerous Other Clean Air Act Programs, Many Of Which Are More Effective At Reducing Pollution Than NSR

Electric utilities, the target of the coal-fired power plant enforcement initiative, are subject to a host of air quality programs. Since the NSR program's enactment, Congress and EPA have together enacted two major regional cap-and-trade programs, the NOx SIP Call and the Title IV SO_2 trading program. Under these programs, any increased power plant utilization unaccompanied by the installation of pollution control equipment must be matched by offsetting pollution reductions elsewhere, and the sources from which pollution control allowances are purchased must reduce their pollution by an equal amount. These trading programs do not merely redistribute emissions, however, they reduce emissions across-the-board reduction as the overall amount of pollution allowances are reduced throughout the life of the programs.

Meanwhile, the Clean Air Act's Best Available Retrofit Technology ("BART") program forces sources that impair visibility in certain areas, particularly national parks, to install pollution control equipment that ensures the source's compliance with a stringent emission limitation requirement. (In at least one case, this requirement has necessitated retrofitting billion dollar pollution controls.[150]) Moreover, to the extent that these sources are located in nonattainment areas, they would also be subject to RACT requirements, as well as any more stringent requirements that state authorities

may chose to impose to ensure reasonable further progress towards attainment. Sources will be subject to even more stringent requirements once the recently promulgated Clean Air Interstate Rule ("CAIR") takes effect.[151] CAIR, which has been finalized, but the operative provisions of which have not yet become mandatory, is a cap-and-trade program that will amplify the pollution reductions that have accrued through the NOx SIP Call and the Title IV SO_2 program. The existence of these programs undermines the claim that sources would dramatically increase pollution by operating their sources near maximum capacity if source owners and operators are permitted to make repairs that reduce the number of forced outages at a source. Moreover, all of these programs (with the possible exception of BART and RACT requirements) reduce pollution far more cost-effectively than the NSR program.

As applied to the electric utility industry—the target of the coal-fired power plant enforcement initiative—these programs have proven effective in reducing pollution. For example, over the last 20 years, during which time the nationwide demand for electricity grew over 56 percent, total emissions of NOx from the electric utility sector have been reduced by 21 percent and SO_2 by 32 percent.[152] Unit-specific rates for each pollutant have been cut even further, by 48 and 55 percent, respectively.[153] Simply put, the parade of horribles bandied about by enforcement officials and environmental groups in these enforcement cases does not fit the facts.

From the first days of the NSR program, EPA and the courts have realized that sources could, in certain circumstances, increase their emissions without undergoing NSR so long as the sources operated as originally intended. This principle is perhaps best demonstrated by the D.C. Circuit's decision in *Alabama Power v. Costle*.

Even if the aforementioned environmental gains did not occur as quickly as Congress expected in promulgating the Clean Air Act, a final irony is that the coal-fired power plant enforcement initiative has not occurred at a time when retrofitting new source pollution controls on existing sources of air pollution would have generated environmental benefits, albeit in a costly and inefficient way. In 1977, air quality across the United States was far worse than it is today, with much of the country failing to attain one or more of the NAAQS and the level of compliance with attainment-related obligations, such as RACT, left much to be desired. Today, air quality has improved greatly and sources are subject to a variety of far more cost-effective market-based pollution control programs. Were there, as a policy matter, ever a "right time" for what the coal-fired power plant enforcement initiative seeks to accomplish, that time is not today.

d. The Coal-Fired Power Plant Enforcement Initiative Is Not Necessary To Prevent Increased Emissions From Existing Sources

It is true that allowing a source to maintain its constructed and permitted capacity to emit without undergoing NSR preconstruction permitting could allow the source to increase the amount of pollution it emitted, from time to time, by operating for more hours in a year. But because the Clean Air Act regulates existing sources based on their capacity to emit, longer hours of operation do not, as a matter of law, add a single pound of unregulated emissions.

The suggestion that emissions from existing stationary sources could increase with no stopping point, merely because of the inapplicability of NSR, grossly mischaracterizes the ways in which existing sources are regulated under the Clean Air Act. These sources are all subject to the restrictions described above—restrictions that will become even more stringent as the CAIR program goes into effect.

From the first days of the NSR program, EPA and the courts have realized that sources could, in certain circumstances, increase their emissions without undergoing NSR so long as the sources operated as originally intended. This principle is perhaps best demonstrated by the D.C. Circuit's decision in *Alabama Power v. Costle*.[154] The *Alabama Power* court rejected a challenge by the state of Texas and industry petitioners to EPA's method for calculating ambient air baseline pollution concentrations because it was inconsistent with well-accepted modification methodology. The *Alabama Power* court emphasized that the PSD increment and the PSD preconstruction permitting program have different yet complementary functions. Not all "construction" activity is meant to be included within the ambit of the NSR program *even if it consumes the PSD increment*. This, of course, was a rejection of an argument eerily similar to one made by many defenders of the coal-fired power

The grandfathering argument derives from a distortion and misunderstanding of the Rule's history and purpose. Various interlocutors have relied on a House report quoting an industry representative's statement that "[p]roven FGD [flue gas desulfurization] systems are justified for new plants utilizing higher sulfur fuel where sizable emission reductions are needed to meet new source performance standards.

plant enforcement initiative today—that activity that is not subject to NSR preconstruction review cannot be allowed to consume the PSD increment.

After *Alabama Power,* EPA understood as much. In the preamble to the 1980 NSR Rule, the Agency recognized that some "gas-fired boilers" in the "Gulf Coast area" could switch their fuel from natural gas to oil, and that if they did so, "SO_2 increment violations would occur."[155] However, rather than claim that this is a change that increased the amount of emissions emitted by an existing source, thereby triggering NSR, EPA admitted that "neither a SIP revision nor a PSD Permit would be required for the sources to make the fuel switches."[156] Similarly, EPA recognized that some sources "may have high allowable [pollution] limits that would permit sources to . . . increase[] actual emissions to levels allowed under the SIP or permits," causing increment violations.[157] If this happened, "[b]ecause no PSD review of SIP revision would be required, neither the state nor EPA would know of the violations until a PSD application was filed or a periodic assessment occurred."[158] Rather than address this possibility, EPA stated that "increment violations due to allowed but unreviewed emission increases, and consequent construction delays, are only potential problems."[159] EPA thus concluded that it would be "premature to promulgate remedial regulations to prevent such theoretical violations."[160]

EPA went on in the preamble to explain how states could address, under existing law, increment violations due to increased emissions from existing sources. In this discussion, EPA recognized the possibility of "increment violations due to allowed but unreviewed emissions increases," and stated that because this problem is "potential . . . it is premature to promulgate remedial regulations to prevent such theoretical violations."[161] Where this possibility was a serious concern, EPA suggested that states implement reporting requirements for emission increases, or revise the operating permits of sources in the area to lower their allowable emissions.[162] Significantly, this discussion recognizes that increased utilization did not trigger NSR, absent an enforceable limit on operations. This discussion clearly indicates that, contrary to petitioners' claims, the preconstruction review and PSD increment programs in the 1980 NSR Rule were simply not congruent.

e. The NSR Program Was Never Meant To Ensure That Existing Sources Retrofitted New Source Pollution Controls After A Limited Grandfathering Period

Contrary to countless statements about the NSR program, neither the Clean Air Act nor its legislative history indicate that Congress intended the NSR program to effect the de-grandfathering of existing sources after a limited period of time lapsed. Instead, the Act's history and structure demonstrate that Congress intended for existing sources to undergo new source review only when a source's owner or operator undertook activity that created new unregulated pollution.

The grandfathering argument derives from a distortion and misunderstanding of the Rule's history and purpose. Various interlocutors have relied on a House report quoting an industry representative's statement that "[p]roven FGD [flue gas desulfurization] systems are justified for new plants utilizing higher sulfur fuel where sizable emission reductions are needed to meet new source performance standards. [I]t is imprudent to backfit FGD into existing plants, especially older units facing retirement within 10-15 years" as evidence that Congress intended for sources to retrofit at some time.[163] In doing so, those parties blatantly distort the statement. The House report proposed complete grandfathering of all existing sources from any NSR preconstruction permitting, subjecting them only to the NSPS program, and did not provide for calculating the baseline ambient air concentrations on actual air quality.[164] In contrast, the Senate approach, which was ultimately adopted by the Conference and formed the basis of the 1977 Clean Air Act Amendments, calculated baseline emissions based on ambient air quality at the time the first source underwent preconstruction review, while excluding from the definition of "modification" activities at a source that

did not change the way the source was designed to operate. It is utterly implausible to view this particular House report, reflecting an approach to NSR that was partially rejected by Congress, as indicating the legislative intent of the whole Congress as reflected in the legislation that did pass, to grandfather sources for a limited period of time.

Furthermore, the statement on its face does not even stand for the proposition for which various interlocutors quote it. That is, this statement only makes the point that it is particularly cost-ineffective to retrofit new source controls on plants that have 10-15 years of remaining life. This is not a statement that existing industrial facilities should be grandfathered for only a limited period of time.

Alabama Power Co. v. Costle is also often cited to support the view that the 1977 Clean Air Act Amendments were intended "to 'grandfather' existing industries," and not to create a "a perpetual immunity from all standards under the PSD program."[165] However, although the *Alabama Power* court referred to changes that "increase pollution," the court did not say that a change that failed to increase the capacity of a source to pollute would "increase pollution." "Increased pollution" had always previously meant new pollution due to activity that caused an "emission rate" increase under EPA's regulations, including the regulation being reviewed by the *Alabama Power* court. This aspect of EPA's regulation was not even challenged in *Alabama Power*, and the court's decision must therefore be read in light of its regulatory context. As a result, what the *Alabama Power* court meant by this statement was that, unlike H.R. 6161, which, as described above, excluded existing sources from the NSR program entirely, existing sources were not immune from the PSD program *if they increased their capacity to emit*—an unremarkable proposition with which no one disagrees.

The court reasoned that under such an approach, "the application of NSPS and PSD to important facilities might be postponed into the indefinite future," and open "vistas of indefinite immunity from the provisions of NSPS and PSD."

Finally, the enforcement initiative's proponents take out of context a particular statement made by the Seventh Circuit in *Wisconsin Electric Power Co. v. Reilly* ("*WEPCo*"). There, the court rejected an interpretation of the term "physical change" as not including a massive and unprecedented renovation project. The court reasoned that under such an approach, "the application of NSPS and PSD to important facilities might be postponed into the indefinite future," and open "vistas of indefinite immunity from the provisions of NSPS and PSD."[166] This is in no way a statement that Congress legislated only a limited life for existing industrial facilities, unless those facilities retrofit new source controls.

To be sure, many other persons have advanced the view that the NSR program provided existing sources with a limited grandfathering period based on some sort of penumbral view of the Clean Air Act, untethered to any particular statutory provision or legislative history. The structural inference drawn by these commentators is flawed because it ignores the most compelling evidence that Congress did not intend a limited grandfathering period for existing sources: "modification," the term it adopted to trigger preconstruction review. Congress was clearly aware of how EPA had interpreted that term in the NSPS and regulatory PSD programs, in which modification activity was never deemed to occur so long as a source stayed within its maximum capacity to emit, even when utilization levels increased beyond historic levels. In light of the fact that Congress chose to incorporate this term across the PSD and NNSR programs, which were themselves created to be easily cross-administrable with the NSPS program, the proper inference is that Congress wanted to legislate the same trigger for all programs. That grandfathering would somehow occur in such a situation is at best the belief of certain legislators—not legislative intent to subject existing sources to NSR preconstruction permitting for maintaining their sources as they were constructed and permitted to operate.

Significantly, where Congress intended the Clean Air Act to embody a definite grandfathering program, rather than simply to premise pollution controls on an event that might or might not occur, it did so explicitly. One such example can be found in Clean Air Act § 112, which gives existing sources three years to comply with Maximum Available Control Technology ("MACT") standards for air toxics (and also grants EPA the ability to extend the deadline on a source-by-source basis).[167] If Congress really believed that all existing sources, in

order to operate normally, should be forced to undergo NSR preconstruction permitting at some point in the relatively near future, it could simply have forced them to retrofit, as it did with the MACT requirements. Congress did not do so, however, and its decision in that regard should be respected. Rewriting the NSR program to import an imagined grandfathering requirement does not vindicate Congress' intent in enacting the Clean Air Act.

Indeed, at least three later Congresses considered amending the Clean Air Act to mandate new source control technology retrofits to existing coal-fired sources, including power plants.[168] These proposals were rejected in favor of the Title IV cap-and-trade approach, which reflects Congress' understanding that limited grandfathering from NSR was not the program embodied in the Clean Air Act.

Perhaps the best that can be said for the grandfathering argument is that some members of the 95th Congress may have held some sort of legislative "expectation" that over time some number of existing sources would be replaced by new sources. However, by imposing such stringent costs on new sources under the various new source programs, Congress in fact induced source owners to do more to maintain their existing sources. There is nothing in the Clean Air Act that would prevent them from doing so.

F. EPA Promulgates Rules That Allow Sources To Operate As They Were Constructed And Permitted To Operate

While pursuing its coal-fired power plant enforcement initiative, EPA has also attempted to change prospectively its NSR regulations to permit the very activity it seeks to penalize in the initiative. EPA has finalized one rule, and proposed another, that would allow sources to conduct repair and replacement activities that enable a source to continue to operate at its designed utilization levels. The first of these rules is known as the Equipment Replacement Provision ("ERP Rule").[169] The ERP Rule created a safe harbor in the longstanding routine maintenance, repair, and replacement exclusion from the NSR program for certain like-kind part replacements at a source that did not change the way in which the source was designed to operate. The second rule, which EPA proposed in 2005, would revise a "major modification" rule EPA adopted in 2002 to allow sources to conduct physical or operational changes that do not alter the source's maximum hourly emissions rate without undergoing NSR review, making the "modification" test for NSPS and NSR once again consistent.[170]

The rationale behind both the ERP Rule and the 2005 Proposed NSR Reform Rule is simple: confirm that NSR "major modification" review is triggered by "modification" activity. The rules have the salutary effect of clarifying for regulated entities when NSR preconstruction permitting will be required.

1. The ERP Rule

The ERP Rule, which EPA finalized in 2003, clarified the longstanding routine maintenance, repair and replacement exclusion from NSR to ensure that certain replacement activities at a source would not trigger NSR preconstruction permitting. The ERP did so by creating a safe harbor for "the replacement of any component of a process unit with an identical or functionally equivalent component,"[171] so long as "the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement [do] not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced."[172] In addition to these requirements, the ERP Rule's safe harbor was limited to activities that do not "change the basic design parameter(s) of the process unit to which the activity pertains,"[173] or activities that increased the source's allowable emissions.[174] The ERP Rule's safe harbor did not constrict the existing routine maintenance exclusion, and allowed sources to conduct other activities that were routine maintenance, repair or replacement but which did not qualify for the ERP rule's safe harbor.

The ERP Rule was a direct response to the problems caused by the vision of the NSR program embodied in the coal-fired power plant enforcement initiative. Although directly targeted at the routine replacement portion of the NSR rule, which the *Duke Energy* district court considered but is not before the Supreme Court, the ERP Rule's safe harbor would have encompassed many or all of the activities at issue in *Duke Energy*. EPA described the problems caused by its enforcement initiative approach to NSR in the ERP Rule:

> The approach we have been taking . . . tends to have the effect of leading sources to refrain from replacing components, to replace them with inferior components, or to artificially constrain production in other ways. We are persuaded that none of these outcomes advance

> the central policy of the major NSR program as applied to existing sources, which is not to cut back on emissions from existing major stationary sources through limitations on their productive capacity, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so. We also do not believe the outcomes produced by the approach we have been taking have significant environmental benefits compared with the approach we are adopting today and, indeed, we believe our new approach may well produce environmental improvements as compared to the old one.[175]

Legally, EPA justified the rule on the basis of its *Chevron* discretion to interpret the term "physical change." Despite the fact that the ERP Rule would be permissible under the *Duke Energy* court's rationale because it only excluded activities that did not increase the source's maximum hourly emissions, the D.C. Circuit vacated the ERP Rule in *New York v. EPA* without reaching this argument.[176] In so doing, the court did not say that any of the activities to which the ERP Rule safe harbor applies are modifications—only that the safe harbor was not permissible.[177] While the authors of this paper believe that the court's reasoning in vacating the ERP was incorrect, and the court's holding so limited as to make its decision in essence advisory in nature, the Rule's promulgation alone demonstrates EPA's recognition that the coal-fired power plant enforcement initiative is bad policy.

2. The Proposed 2005 NSR Reform Rule

Following the Fourth Circuit's decision in *Duke Energy*, EPA attempted to return to its original understanding of the 1977 Clean Air Act Amendments, and proposed revising its "major modification" methodology to return to a "maximum achievable hourly emissions" test. EPA explained that synchronizing the NSR and NSPS modification definitions would "allow owners/operators to make changes that, without increasing existing capacity, promote the safety, reliability, and efficiency of EGUs."[178] As with the ERP Rule, EPA reaffirmed its belief that reforming the NSR program to conform to the *Duke Energy* court's decision would have similar environmental effects as its coal-fired power plant enforcement initiative approach.[179]

Ironically, then, even while the Supreme Court entertains *Duke Energy*, EPA has admitted that affirming the Fourth Circuit's judgment would cause no adverse environmental effects. The Supreme Court should remember this in evaluating the "parade of horribles" mounted against the Fourth Circuit's decision.

III. The Issues The Supreme Court Has Certified For Review In *Duke Energy* Threaten To Cloud The Issues Actually Present In The Case

In its petition for *certiorari*, Environmental Defense stated that the issues presented for review are:

> 1. Whether the Fourth Circuit's decision violated Section 307(b) of the [Clean Air] Act, which provides that national Clean Air Act regulations are subject to challenge "only" in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and "shall not be subject to review" in enforcement proceedings, 42 U.S.C. 7607(b); and
>
> 2. Whether the Act's definition of "modification," which turns on whether there is an "increase" in emissions and which applies to both the NSPS and PSD programs, rendered unlawful EPA's longstanding regulatory test defining PSD "increases" by reference to actual, annual emissions.[180]

However, the two issues certified for review in *Duke Energy*, as formulated by Environmental Defense, misstate the nature of the dispute. In presenting the question of whether the Fourth Circuit's decision was barred by Clean Air Act § 307, Environmental Defense misstates EPA's NSR regulations in order to turn a merits dispute into a jurisdictional squabble. Furthermore, in presenting the question of whether EPA's enforcement initiative interpretation of the 1980 NSR Rule violates the unambiguous intent of Congress in formulating the Clean Air Act, Environmental Defense manufactures an issue that was never in dispute in the court below.

A. Environmental Defense Misstates The Jurisdiction Limiting Provisions Of Clean Air Act § 307

Environmental Defense has badly misstated Clean Air Act § 307(b)(3)'s jurisdiction limiting provisions in an attempt to convince the Court that the Fourth Circuit erred in reviewing EPA's enforcement initiative-driven and unprecedented interpretation of the 1980 NSR Rule. First, Clean Air Act § 307 only specifies the D.C. Circuit as the venue for a challenge to nationally applicable EPA agency action, making EPA's and the intervenors' failure to raise this issue in the proceedings below fatal to their claims in the Supreme Court. Second, Clean Air Act § 307 does not prohibit a court entertaining an enforcement action from declaring what the law is, particularly where the agency itself has offered various interpretations of its regulations in the same proceeding.

1. Clean Air Act § 307's Forum Selection Element Is Not Jurisdictional

Environmental Defense claims that national Clean Air Act regulations are subject to challenge "only" in the D.C. Circuit. This is true only inasmuch as EPA objects to nationally-applicable regulations being challenged outside the D.C. Circuit. If EPA does not object, then the requirement is waived because entertaining the regulations in the D.C. Circuit is a matter of venue, not a jurisdictional element of the statute.

Clean Air Act petitions for review challenging "locally or regionally applicable" final actions "may be filed only in the United States Court of Appeals for the appropriate Circuit," subject to certain exceptions.[181] However, the courts that have considered this issue have determined that Clean Air Act § 307(b)(1) does not affect the jurisdiction of courts other than the D.C. Circuit to entertain petitions for review of nationally applicable regulations.[182] In the words of one court, "[s]ection 307(b)(1) can be read as prescribing the choice among circuits and not the power of a particular federal circuit court to hear a claim. This reading is supported by the provision's reference to where a petitioner may 'file,' and by its unequivocal characterization in the legislative history as a venue provision."[183] Indeed, during the drafting of the 1977 Clean Air Act Amendments, the House Interstate and Foreign Commerce Committee described one of the purposes of its revisions to Clean Air Act § 307 as ensuring that where "an action of the Administrator is found by him to be based on a determination of nationwide scope or effect . . . then *exclusive venue for review* is in the U.S. Court of Appeals for the District of Columbia."[184]

Environmental Defense and EPA, in the face of applicable precedent, mischaracterize the venue provisions of Clean Air Act § 307 for one simple reason: EPA and the intervenors have long since waived any objections to venue in this action. Neither EPA nor the intervenors contested *Duke Energy*'s arguments in support of summary judgment on the basis that they involved a challenge to nationally applicable regulations. In their principal briefs, replies, and supplemental brief in the Fourth Circuit, neither the intervenors nor EPA ever claimed that affirming the District Court, or relying on *Rowan Cos. v. United States*,[185] constituted impermissible review of a nationally applicable regulation. It was not until the rehearing stage that EPA and the environmentalists raised this argument.

To be sure, the intervenors' and EPA's failure to raise this argument is not dispositive as to the parts of Clean Air Act § 307 that are jurisdictional. However, their failure is certainly fatal to their claim that Clean Air Act § 307 requires *Duke Energy*'s defensive challenge to EPA's litigation interpretation of the 1980 NSR Rule to be entertained in the D.C. Circuit.

2. Clean Air Act § 307 Only Bars Courts Entertaining Enforcement Actions From Reviewing Final Action That Could Have Been Reviewed In A Petition for Review

In addition to arguing in the face of clear precedent and legislative history that the forum-selection provisions of Clean Air Act § 307 are jurisdictional, Environmental Defense misconstrues § 307's provisions precluding a party from challenging the validity of agency action in an enforcement action as applying in all cases, when they only apply in cases where a petition for review could have been had. Section 307(b)(2) states that: "Action of the Administrator *with respect to which review could have been obtained* under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."[186] For the Fourth Circuit to have been precluded from determining if EPA's litigation interpretation of the 1980 NSR Rule was consistent with the regulations and the Clean Air Act, *Duke Energy* would have had to have been able to bring a petition at the time of the Rule's promulgation for review of that interpretation as "final action of the Administrator" under Clean Air Act § 307(b)(1). As will be discussed in great detail later, *Duke Energy* could not have done so.

As a result, the *Duke Energy* court was not precluded from reviewing the legality of EPA's litigation interpretation of the 1980 NSR Rule.

B. EPA's Enforcement Initiative Interpretation Of The 1980 NSR Rule Is Not Longstanding And Misconstrues The NSR Program's Coverage

Environmental Defense similarly misstates the second question presented, thus camouflaging EPA's regulatory flip-flopping, and obscuring the vital question in *Duke Energy*: exactly what activities at existing sources should obligate those sources to undergo NSR preconstruction permitting?

As an initial matter, it is simply incorrect to say that the lower court's decision "rendered unlawful EPA's longstanding regulatory test defining PSD 'increases' by reference to actual, annual emissions." In fact, the lower court *agreed* that the PSD test is based on actual annual emissions: "The court finds, based on the PSD rules . . . [that] post project emissions must be calculated on an annual basis, measuring emissions in tons per year . . . ."[187] What *is* at issue in this case is whether a "modification" is required to trigger the source-wide annual emissions analysis of the PSD major modification rule. As the lower court explained:

> Unlike NSPS which is always triggered whenever there is an increase in the hourly rate of emissions, PSD is potentially triggered when there is an increase in the hourly emissions rate but only if the annualized emissions increase: (1) exceeds the significance levels . . . and (2) is not offset by contemporaneous decreases at the source.[188]

In other words, the lower court found that a NSPS "modification" is required to trigger a "major modification" analysis, and this is the position EPA's enforcement interpretation rejects.

Second, it is also incorrect to describe EPA's enforcement interpretation that "major modification" review is triggered by non-modification activity as "longstanding." As discussed in great detail *supra*, EPA has espoused disparate and irreconcilable interpretations of its 1980 NSR Rule. Nor were these alternate interpretations of the 1980 NSR Rule longstanding: As recently as a 2002 rulemaking, EPA stated that "[p]rior to today, the regulations applied an actual-to-future-actual applicability test for EUSGUs [Electric Utility Steam Generation Units] and an actual-to-potential applicability test for all other emissions units."[189] Given that the actual-to-future-actual test was specifically created via the 1992 WEPCo Rule, which all parties to *Duke Energy* agree is not at issue in that action, it is hard to see how EPA's latest "actual-to-projected-actual" interpretation of the 1980 NSR Rule could possibly be described as longstanding.

Environmental Defense (and even EPA) may find it expedient to pretend that their coal-fired power plant enforcement initiative interpretation of the 1980 NSR Rule was not created for the purposes of that litigation alone. It is not, however, true.

Environmental Defense (and even EPA) may find it expedient to pretend that their coal-fired power plant enforcement initiative interpretation of the 1980 NSR Rule was not created for the purposes of that litigation alone. It is not, however, true.

IV. The Fourth Circuit Had Jurisdiction To Decide That EPA Must Interpret Its PSD Regulations Consistently With Its NSPS Regulations

The argument that Clean Air Act § 307 barred the *Duke Energy* court from determining whether EPA's litigation interpretation of the 1980 NSR Rule was inconsistent with the regulation and the Clean Air Act both misconstrues the plain language of § 307 and ignores fundamental principles of administrative law. To be sure, Congress arguably need not vest courts with jurisdiction to review any of the potential issues in the action. However, if Congress wishes to strip courts of their jurisdiction to review agency action for consistency with authorizing federal statutes, it must do so clearly: "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[190] In the case of Clean Air Act § 307, the type of jurisdiction stripping that could preclude a court from considering *Duke Energy*'s challenge to EPA's litigation interpretation of the 1980 NSR Rule—not the interpretation given by the Agency when the Rules were promulgated—did not occur.

A. The *Duke Energy* Court Did Not Violate Clean Air Act § 307 Because The Court Did Nothing But Determine The Meaning Of The 1980 NSR Rule

1. Courts Entertaining Clean Air Act § 113 Enforcement Actions Have A Duty To Determine What The Law Is

Federal district courts hearing civil judicial enforcement actions brought under Clean Air Act § 113 have a duty to determine the meaning of the legal principles governing the enforcement action, that is, to "say what the law is." This duty is independent of and unaffected by the existence of jurisdiction-limiting provisions like Clean Air Act § 307(b).

a. The Administrative Procedure Act Requires Courts To Determine The Meaning Of Agency Action

A court hearing an enforcement action must decide what law governs the agency action at issue and what that law means. Section 307 notwithstanding, the fundamental principle of our judicial system is that "it is emphatically the province and duty of the judicial department to say what the law is."[191] In the case of civil judicial enforcement actions based on violations of an administrative scheme, the provisions under which the government attempts to impose liability must come either from a statute, or from a regulation having the force and effect of law[192]

While courts have a duty to interpret regulations when questions about the meaning of agency action are presented, this does not mean that they will do so without respect for the agency's interpretation. A court must defer to an agency's interpretation of its regulation so long as that interpretation is not "plainly erroneous or inconsistent with the regulation."[193] This principle, known as *Seminole Rock* deference, prevents judges from substituting preferred interpretations of a regulation for the agency's unless the agency's interpretation is plainly erroneous, inconsistent with the regulation, or *Seminole Rock* deference is not otherwise due, as when there is "reason to suspect that the [agency's] interpretation [of its regulations] does not reflect the agency's fair and considered judgment on the matter in question."[194] Far from interfering with a courts' duty to determine what the law is, *Seminole Rock* deference is predicated on it, and can, by its own logic, only be paid after a court has made some inquiry into a given regulation's possible meanings.

Nothing in Clean Air Act § 307 affects the general presumption that a court entertaining an enforcement action may interpret the regulation under which the action is premised. Thus, interpretation can only be barred if it is "review" of agency action. This could be the case if a regulation were susceptible only of the meaning advanced by the agency, and the court selected another meaning.

Nothing in Clean Air Act § 307 affects the general presumption that a court entertaining an enforcement action may interpret the regulation under which the action is premised. Thus, interpretation can only be barred if it is "review" of agency action. This could be the case if a regulation were susceptible only of the meaning advanced by the agency, and the court selected another meaning. It cannot be the case if the regulation is susceptible to multiple interpretations (even if the interpretation advanced in defense is not a permissible one).

This conclusion comports with the principle that Article III courts have jurisdiction to determine their jurisdiction.[195] If the district court could not determine the meaning of the regulation, it would be helpless to determine whether a particular legal argument raised in defense represented a permissible attempt to interpret the regulation or a prohibited collateral attack on the rule itself. Thus, if the *Duke Energy* court were truly precluded from interpreting the regulation, it would have been left unable to determine that it lacked jurisdiction. So absurd a result demonstrates the error of the government's arguments regarding Clean Air Act § 307.

The Court cannot simply be asked to accept the government's characterization of a regulation without making its own inquiry into that regulation's meaning. In *Adamo Wrecking Corp. v. United States*, in which the Supreme Court considered the effect of a previous version of § 307(b), the Court noted that § 307 "in precluding judicial review of the validity of emission standards, does not relieve the Government of the duty of proving, in a prosecution under § 113(c)(1)(C), that the regulation

allegedly violated is an emission standard."[196] While the *Adamo Wrecking* court used the "rule of lenity" in the criminal context in reaching this conclusion, the civil nature of *Duke Energy* does not change this analysis. The rule of lenity applies not only to penal statutes, but also to punitive civil statutes such as Clean Air Act § 113(c), under which the government brought the *Duke Energy* enforcement action.[197] Even if the rule of lenity did not apply to punitive enactments, the rule that Congress must demonstrate "clear and convincing evidence of legislative intent" to restrict the right of an aggrieved person to seek judicial review,[198] would force Congress to indicate explicitly that courts could not inquire into what the law applicable to a civil judicial enforcement action meant.

Applicable case law from the D.C. Circuit supports this conclusion. The D.C. Circuit is the venue designated by Clean Air Act § 307(b)(1) and many other statutes for preenforcement review of regulations. The Circuit has made it abundantly clear that while the court will hear challenges to agency action under § 307, it will not hear disputes over the meaning of that action. For instance, in *Utah Power & Light Co. v. EPA*, the court ruled that a challenge to EPA's interpretation of its PSD regulations (promulgated as part of the regulatory PSD program) was "not cognizable [in the D.C. Circuit] under § 307(b)(1)."[199] Therefore, the D.C. Circuit suggested "that if federal review of the . . . [interpretation] is available at all, it should be sought in the district court."[200] This is consistent with the Supreme Court's view, expressed in *INS* v. *Nat'l Center for Immigrants' Rights, Inc.*, that just because a regulation's may be invalid *as applied* to the facts of certain "cases . . . does not mean that the regulation is facially invalid."[201]

2. In Determining What The Law Is, Courts Should Construe Regulations Not To Conflict With A Federal Statute If Such Construction Is Possible

It is a well-accepted principle of administrative law that courts should whenever possible construe regulations to avoid conflict with a statute. In so doing, courts necessarily ought not to defer to agency interpretations of regulations that conflict with federal statutes, provided the regulations can be construed to avoid such a conflict. When such an erroneous interpretation is advanced in a civil enforcement action, the court must independently interpret the regulation, and hold the regulated entity's conduct up to this standard.

a. The Principle That Courts Should Interpret Regulations So As Not To Conflict With Statutes Is Firmly Established

The *Federal Reporter* is replete with cases holding that courts ought to interpret regulations so as to avoid conflicts with the statutes under which those regulations were promulgated. This proposition is sometimes formulated as "if fairly possible, legislative regulations must be construed to avoid conflict with a statute,"[202] sometimes as "[i]n interpreting a regulation, courts will ordinarily avoid a construction which raises doubt as to the validity of the regulation,"[203] and sometimes by observing that a court must attempt to reconcile "seemingly discordant statutes and regulations," and only "disregard the regulations" when this proves impossible. [204] This principle is binding precedent in at least eight Circuits—the Third Circuit, Fourth Circuit, Fifth Circuit, Eighth Circuit, Ninth Circuit, Tenth, Eleventh Circuit, and District of Columbia Circuit.[205]

The Circuit has made it abundantly clear that while the court will hear challenges to agency action under § 307, it will not hear disputes over the meaning of that action. For instance, in *Utah Power & Light Co. v. EPA*, the court ruled that a challenge to EPA's interpretation of its PSD regulations (promulgated as part of the regulatory PSD program) was "not cognizable [in the D.C. Circuit] under § 307(b)(1)." Therefore, the D.C. Circuit suggested "that if federal review of the . . . [interpretation] is available at all, it should be sought in the district court."

This principle applies equally when the regulations interpret statutes with a jurisdictional bar to review as when statutes contain no such limitations. One good example of the application of this principle where statutes do not preclude judicial review is in *DRG Funding Corp. v. Secretary of the United States Dep't of Housing and Urban Development*.[206] The federal statute at question in *DRG Funding Corp.* "mandate[d] that a coinsured lender bear at least 10% of the insured loss when a borrower defaults."[207] However, under the plain language of the regulations governing coinsurance through issuance of debentures, which was at issue in the case, it

was possible for a coinsured lender to bear less than 10% of a loss. Over HUD's objection, the court accepted an "alternative construction[] of the regulation that avoid[ed] conflict with that statutory provision." There are, of course, numerous other examples of courts interpreting regulations to avoid a conflict with the statutes governing them.[208]

The existence of a jurisdiction-limiting statutory provision does not change this general principle. In *League of Wilderness Defenders v. Forsgren*,[209] the Ninth Circuit refused to accept the Forest Service's interpretation of an EPA regulation that was supported by EPA. Although the Clean Water Act's jurisdiction-limiting bar arguably applied, the court explained that it did not invalidate the regulation, but merely "reject[ed] the Forest Service's *interpretation* of the regulation and [gave] it a construction consistent with its administrative history, case law, and the governing statute."[210] That a challenge to the regulation itself would have been time-barred was of no consequence because the court was interpreting the regulation, not reviewing it.

The Supreme Court has made clear that courts must independently interpret a regulation when an agency's interpretation does not merit *Seminole Rock* deference. For instance, in *Commissioner v. Schleier*, the Court refused to defer under *Seminole Rock* because the agency's position in that case clearly contradicted past agency interpretations of the regulation.

The combination of *League of Wilderness Defenders* and *DRG Funding* is particularly meaningful because it shows that courts construe regulations so as not to conflict with statutes both where there are and are not jurisdiction-limiting statutes. As such, this canon is not simply a way to avoid jurisdiction-limiting statutes, it is the default position of the courts whenever an agency attempts to enforce its interpretation of a regulation and there is no administrative proceeding to which the court can remand an interpretation.

b. Construing Regulations To Avoid Conflicts With Statutes Is Fully Consistent With The *Seminole Rock* Principle

The canon that regulations must be interpreted to avoid conflicts with federal statutes does not contradict the *Seminole Rock* admonition that courts should generally defer to an agency's interpretations of its regulations. *Seminole Rock* itself states that an agency's interpretation of one of its regulations "becomes of controlling weight" only when it is not "plainly erroneous or inconsistent with the regulation," and that "[t]he intention of Congress . . . in some situations may be relevant in . . . choosing between various constructions."[211] As the Supreme Court recently stated in *Stinson v. United States*, one way a regulatory interpretation may be plainly erroneous is if it "run[s] afoul of . . . a federal statute."[212]

The Supreme Court has made clear that courts must independently interpret a regulation when an agency's interpretation does not merit *Seminole Rock* deference. For instance, in *Commissioner v. Schleier*,[213] the Court refused to defer under *Seminole Rock* because the agency's position in that case clearly contradicted past agency interpretations of the regulation. Despite withholding deference, the Court ultimately accepted the agency's interpretation, but only because it was the "correct" interpretation of the regulation at issue. In *North Haven Board of Education v. Bell*,[214] the Court described its task differently, stating that in "construing regulations, the Court normally defers to the agency's interpretation. . . . [when] however, that interpretation has fluctuated from case to case, and even as this case has progressed. . . . [T]here is no consistent administrative interpretation of the Title IX regulations for us to evaluate." The *North Haven Board* Court thus determined the law applicable to the action by interpreting the regulations and arriving at an independent construction of the regulations based on the plain language of the authorizing statute.

The best interpretation of a regulation is one that comports with both the regulatory text and the statutory text—not merely one or the other. Holding so in the face of a regulatory interpretation that contradicts the governing statute is not error.

c. Construing Regulations To Avoid Conflicts With Statutes Is Good Regulatory Policy

Construing regulations to avoid conflicts with the statutes under which they were promulgated is not only good law, but also good regulatory policy. If a court applying a regulation were forced to either accept or reject an agency's interpretation of the regulation, without the authority to interpret the regulation independ-

ently, the court would have no law to apply in cases where the agency's interpretation was incorrect. It would accordingly be forced to dismiss the complaint, and the agency would then be forced to bring the action again, assuming it was not otherwise barred. This would do nothing to encourage judicial economy, and would not be "agency-friendly" either.

Moreover, regulatory interpretations are not transitive. That is, simply because an agency's interpretation of its regulation is consistent with a regulation, and the regulation is consistent with the statute, does not mean that the agency's interpretation of the regulation is consistent with the statute. Courts that interpret regulations, rather than making a binary choice between accepting the agency's interpretation or vacating the agency action, will better ensure that agencies conform to the will of Congress. Judicial construction of regulations promulgated by an agency exercising delegated power ensures that delegated power stays within its proper statutory bounds, while permitting the agency to make the policy decisions incumbent in promulgating the regulations themselves.

3. The *Duke Energy* Court Correctly Construed The 1980 NSR Rule Not To Conflict With The Clean Air Act

a. The *Duke Energy* Court Interpreted The 1980 NSR Rule Consistently With The Clean Air Act

The Fourth Circuit's decision in *Duke Energy* did not violate Clean Air Act § 307 because the Fourth Circuit merely did what every court entertaining a civil judicial enforcement action must do: the court determined what the law was, and applied that law to the facts before it.

Despite various mischaracterizations of the Fourth Circuit's decision, the court was clear about the question it was addressing: "whether [EPA] 'can interpret the statutory term modification under PSD differently from how' it has interpreted that term under NSPS."[215] The court's answer was that EPA could not interpret the regulation differently because Congress required that modification be defined consistently between the PSD and NSPS programs. Having determined that EPA's interpretation of the regulation was inconsistent with the statute, the court did what it was supposed to—the court construed the regulation to be consistent with the statute. The court's construction in *Duke Energy* was, of course, identical to previous EPA constructions of the regulation.

That the Fourth Circuit declined to engage in a pedantic exposition of each provision of the lengthy 1980 NSR Rule does not modify this description of the court's action. As the Duke Energy court noted, the district court had already explained at great length how its interpretation of the 1980 NSR Rule was consistent with the regulatory text, EPA's historic interpretation of the rule, and the Clean Air Act.

What the Fourth Circuit did not do was address the validity of the 1980 NSR Rule. In fact, the court acknowledged that it lacked the authority to do so, stating that "no question as to the validity of the PSD regulations is (or could be, *see* 42 U.S.C. § 7607(b)), presented here" and that the "PSD regulations remain fully intact and enforceable."[216] The *Duke Energy* court's decision was made at the level of competing interpretations of regulations, rather than at the level of competing regulatory interpretations of statutes. Accordingly, Clean Air Act § 307 did not strip the court of jurisdiction.

That the Fourth Circuit declined to engage in a pedantic exposition of each provision of the lengthy 1980 NSR Rule does not modify this description of the court's action. As the *Duke Energy* court noted, the district court had already explained at great length how its interpretation of the 1980 NSR Rule was consistent with the regulatory text, EPA's historic interpretation of the rule, and the Clean Air Act.[217] The Fourth Circuit selected this interpretation because, unlike EPA's litigation position, it was consistent with the Clean Air Act's requirement that modification be defined consistently across the NSPS and NSR programs.

Finally, the ultimate test for whether the Fourth Circuit has interpreted the 1980 NSR Rule or judicially reviewed those rules is whether or not the rules are enforceable in the footprint of the Fourth Circuit. According to the *Duke Energy* court, the 1980 NSR Rule is certainly enforceable so long the regulations are construed in a manner consistent with the NSPS program. As it turns out, this construction does not allow the government to state a viable claim for NSR violations against *Duke Energy*. However, in other enforcement

actions, most prominently the enforcement action against American Electric Power, utility defendants are alleged to have conducted projects that increased a source's maximum hourly emissions. If EPA were to discover such projects in the Fourth Circuit, it would rightly be able to bring civil judicial enforcement actions based on this conduct. The fact that EPA has discovered no such projects does not mean that the 1980 NSR Rule is unenforceable.

b. The District Court's Decision And The Reich Determinations Demonstrate That EPA's Contemporaneous Interpretation Of The 1980 NSR Rule Is Consistent With The Rule's Text

The *Duke Energy* district court decision and EPA's Reich determinations, which were issued in the immediate aftermath of the 1980 NSR Rule, refute the government's arguments that the Fourth Circuit improperly circumvented § 307's restrictions on judicial review by adopting an interpretation of the 1980 NSR Rule that is unsupported by the regulatory text. Completely aside from the Fourth Circuit's reliance on the district court's analysis of the 1980 NSR Rule's text, which eliminated the need for the Fourth Circuit to engage in a voluminous reading of complicated regulatory texts, the regulatory history of the 1980 NSR Rule demonstrates several key points that refute the government's arguments.

First, the regulatory history of the 1980 NSR Rule refutes the government's claim that EPA is not interpreting Clean Air Act § 307 in any given enforcement actions. The most charitable characterization of EPA's practice with regards to the 1980 NSR Rule is that the Rule is susceptible to multiple interpretations and that EPA has at different times espoused all of them. More accurately, however, the regulatory history clearly indicates that the interpretation adopted by the Fourth Circuit and the district court in *Duke Energy* is a permissible reading of the regulatory text while EPA's litigation interpretation is not.

B. Clean Air Act § 307 Does Not Bar Courts That Entertain Enforcement Actions From Ensuring That EPA's Interpretation Of Its Regulations Is Consistent With The Statutory Text

The second reason that Clean Air Act § 307 did not bar the Fourth Circuit from determining that EPA's litigation position on the meaning of the 1980 NSR Rule conflicted with Congress' unambiguously expressed intent is that § 307 is not implicated when courts review an Agency's interpretation of a regulation, rather than the validity of the regulation itself.

This principle is explicitly codified in the Administrative Procedure Act ("APA"). APA § 10(e) requires a court reviewing agency action to "determine the meaning or applicability of the terms of an agency action."[218] Moreover, the Supreme Court has reviewed whether an agency's litigation interpretation of its regulation is consistent with its governing statute where the litigation position is advanced "in a form provided for by Congress."[219] Clean Air Act § 113 enforcement actions are, of course, a form for which Congress has provided.

Contrary to some suggestions, APA § 10's admonition that the chapter applies "except to the extent that . . . statutes preclude judicial review" is inapplicable to this situation. As the *Attorney General's Manual on the Administrative Procedure Act* explains: "the introductory clause of section 10 provides a most important principle of construction for reconciling the provisions of the section with other statutory provisions relating to judicial review."[220] This clause means that "some other statute, while not precluding review altogether, will have the effect of preventing the application of some of the provisions of section 10."[221] This means both that some types of relief enumerated by APA § 10 could be unavailable in certain statutory contexts, and that even a statute precluding judicial review generally like Clean Air Act § 307(b)(2) only bars review under APA § 10 to the extent dictated by its statutory terms.

It is true that § 307 requires facial challenges to the validity of nationwide air quality regulations to be brought in the D.C. Circuit (unless EPA waives this venue provision) within sixty days of the regulations' publication in the *Federal Register*.[222] However, as the Fourth Circuit held in *Potomac Electric Power Co. v. EPA*, this prohibition has no effect on the ability of a court hearing an enforcement action "to review . . . the EPA's interpretation of [its] regulations," when "the scope of that review is limited to whether the EPA's interpretation is plainly erroneous."[223] Indeed, Clean Air Act § 307(b)(2) precludes review only of "*[a]gency action* with respect to which review could have been obtained."[224] Thus the plain language of § 307 does not bar review in a district court of an *interpretation of a regulation* that did not reflect final agency action. Even if review of the regulation itself is unavailable because its promulgation constituted final agency action, review of the regulatory interpretation must be available because the interpreta-

tion was not yet agency action at the time the rule was promulgated, unless the interpretation is capable of only one reading and that reading is the one espoused by the agency in its enforcement action. After all, courts can only review actual "agency action," not an agency's legal interpretations, even if those interpretations could later be espoused elsewhere, whether within or without the reviewing court's ambit.

One way that an agency's interpretation of its own regulation may be "plainly erroneous" is to "run afoul of the Constitution or a federal statute."[225] Most regulations are susceptible to multiple interpretations. In the words of Judge Richard Posner, "unless a statute or regulation is of crystalline transparency, the agency enforcing it cannot avoid interpreting it."[226] It is impossible to create rules that are sufficiently prescriptive to encompass all situations, and our administrative law accordingly gives agencies the opportunity to definitively interpret their regulations. By affording administrative agencies this opportunity, however, courts accept a corresponding duty to review these interpretations for consistency with applicable law.

It follows that, absent clear congressional intent, courts should not read preenforcement review provisions in a way that would force a regulated entity to petition for review of a regulation based on the possibility that the agency could interpret it in a way that contradicted a federal statute. A contrary rule would undermine good administrative governance by reducing agencies' incentives to provide clear guidance to regulated entities. Instead, agencies would be tempted to draft ambiguous rules, and then apply those rules through civil (or criminal) enforcement proceedings without the moderating check of judicial review. Such a rule would also undermine the general presumption in favor of judicial review which forms so central a bulwark of citizens' liberties against the power of the regulatory state.

Clean Air Act § 307 need not, and should not, be read to cause either of these undesirable results. Congress enacted the predecessor statute to Clean Air Act § 307(b)(2) because it realized the importance of limiting the time period in which regulated entities could seek direct review of agency actions. Congress did not mean for this limitation to affect defensive challenges to agency action before courts hearing judicial enforcement actions. Rather, as the Senate Committee on Public Works stated in its report on S. 4358, which was adopted nearly in whole as the 1970 Clean Air Act Amendments, regulated entities "would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to [them] alone."[227]

Indeed, EPA's and Environmental Defense's entire argument that the Fourth Circuit lacked jurisdiction to rule that EPA's enforcement initiative interpretation of the 1980 NSR Rule violates the Clean Air Act is based on sleight of hand. For instance, the government argues that "[t]he court of appeals' jurisdictional theory is flawed" because "[t]he only reasonable reading of the PSD regulations is that they define 'modification' differently from the NSPS regulations."[228] In fact, it is undisputed that EPA has interpreted the same Rules as requiring a "modification" to trigger a PSD "major modification" analysis. Also, although EPA now disputes their validity, EPA issued a series of determinations made by its Director of Stationary Source Enforcement at the time of the Rule's promulgation which interpreted the Rule in the same way as the Fourth Circuit does now—as containing a "modification" trigger that requires a capacity-based test that excludes from emission increase calculus physical changes that merely increase the hours that a source operates. All of these interpretations represent what has at one time been the agency's position and demonstrate that the Fourth's Circuit's interpretation lacks neither reason nor precedent.

This regulatory history should put to rest the claim that the Fourth Circuit's review of EPA's interpretation-of-the-moment was somehow an attack on the 1980 NSR Rule itself.

These examples also demonstrate the intellectual bankruptcy of efforts to transform a merits dispute into a jurisdictional quibble. The Supreme Court should affirm the Fourth Circuit's jurisdiction to determine if EPA's enforcement initiative interpretation of the 1980 NSR Rule is consistent with the Clean Air Act.

C. Clean Air Act § 307 Only Bars Judicial Review In An Enforcement Action When A Petition For Review Was Available And Foregone

Finally, even if the Supreme Court were to credit the government's characterization of the Fourth Circuit's holding as an attack on the validity of the 1980 NSR Rule, review would have properly been available in *Duke Energy* because it could not have been obtained before the enforcement action.

As described above, Clean Air Act § 307 only prohibits judicial review of an EPA regulation by a court hearing an enforcement action where such review could have been obtained prior to the enforcement action. *Duke Energy* could not, however, have obtained review of EPA's 1980 NSR Rule on the grounds that the "actual-to-projected-actual" test contravened the Clean Air Act's plain language until after the onset of the coal-fired power plant enforcement initiative. Indeed, even the government does not argue that review was available before the D.C. Circuit's decision in *New York v. EPA*,[229] which was argued and decided *after* the Fourth Circuit's argument and decision in *Duke Energy*, and long after EPA began the coal-fired power plant enforcement initiative.

Despite the fact that many different entities petitioned for review of the 1980 NSR Rule immediately after it was promulgated, review of EPA's current litigation interpretation was unavailable at that time. The petitions for review of the 1980 NSR Rule were consolidated in *Chemical Manufacturers Ass'n v. EPA* ("*CMA*"). [230] In *CMA*, a very small subset of industry petitioners, which did not include any electric utilities, challenged the source-wide emissions netting methodology of the 1980 NSR Rule on the ground netting based on source-wide "actual emissions" (as opposed to source-wide "potential emissions") was inconsistent with the Clean Air Act. To resolve this conflict, EPA agreed to publish a variety of proposed changes to the 1980 NSR Rule in the *Federal Register*, including changing the rule's methodology for calculating whether a "major modification" had taken place to focus on the source's "potential emission rate" (as in the 1979 proposed rule), as opposed to source-wide actual emissions.

The electric utilities declined to join this early challenge to the 1980 NSR Rule's "major modification" methodology for a simple reason: by the time the *CMA* consent decree was executed in 1982, EPA had already issued two applicability determinations, in June 1981[231] and January 1982,[232] interpreting the 1980 NSR Rule's provisions to mean that a physical or operational change would have to increase a source's productive capacity before a "major modification" could occur. The electric utilities naturally relied upon EPA's determinations and thus had no reason to read the 1980 Rules in a different manner. Thus, although the government and Environmental Defense have since tried to argue that the *CMA* consent decree's proposed revisions to the source-wide netting analysis of the major modification rule somehow implicates *Duke Energy*'s argument that a modification was required to trigger the major modification analysis, two points are evident from this background. First, *Duke Energy*'s claims are different from those made in *CMA* and addressed in the *CMA* consent decree. Second, *Duke Energy* had no reason to construe the 1980 NSR Rule to encompass an interpretation that EPA itself had rejected in final applicability determinations.

Following the *CMA* settlement—at which time EPA was interpreting the 1980 NSR Rule in accordance with the contemporaneous Reich determinations—EPA took no action of which *Duke Energy* had the opportunity to petition for review. The first time EPA interpreted the 1980 NSR Rules and subjected existing sources to preconstruction review and permitting for activity that did not increase the emitting capacity of a source was in the WEPCo applicability determination. There, however, the Seventh Circuit vacated EPA's PSD determination because it was based on the now discredited "actual-to-potential" emission increase test.

Moreover, the *CMA* challenge was stayed for various regulatory proceedings *for twenty years*, until EPA finally rejected it in 2002. When the coal-fired power plant enforcement initiative began in 1999, industry petitioners could not have revived the *CMA* challenge because EPA was still in the process of considering the revisions to the 1980 NSR Rule it had proposed as part of its duties under the *CMA* consent decree. It was only after EPA formally discharged its duties under the consent decree, i.e., that the Agency refused to finalize its proposed revisions to the "major modification" language, that industry groups could, and did, revive their challenge to the 1980 NSR Rule.

By the time the coal-fired power plant enforcement initiative interpretation of the 1980 NSR Rule crystallized into final agency action subject to challenge by *Duke Energy*, the enforcement action had been pending against the company for several years. It would be truly perverse to read § 307 to allow EPA to delay a petition for review indefinitely, bring an enforcement action during the pendency of that challenge, but then preclude the defendant from challenging EPA's interpretation of its regulation because of the stayed case. Equally, a the-

oretical review of the various emission increase tests asserted by EPA would not give the reviewing court a good idea of the type of projects that would subject a source to preconstruction review. As just one example, the folly of the "actual-to-projected-actual" test applied by EPA in the enforcement actions does not become readily apparent without the contextual knowledge that it would subject existing facilities to repeated NSR preconstruction permitting simply by maintaining existing permitted capacity.

V. Conclusion

EPA has spent the last seven years prosecuting a coal-fired power plant enforcement initiative premised on an interpretation of the governing regulations that is divorced from the regulatory text and inconsistent with the Clean Air Act. For five of those years, EPA has simultaneously attempted to reform the NSR program to ensure that the activities at issue in the enforcement initiative are no longer subject to NSR preconstruction permitting and review, and has adjusted its enforcement policies accordingly. In the words of one court entertaining a coal-fired power plant enforcement action, the enforcement initiative presents the "anomaly of utilities . . . being prosecuted for conduct that, if engaged in now, would not be prosecuted. Put another way, [the enforcement initiative] is a sport, which is not exactly what one would expect to find in a national regulatory enforcement program."[233]

The Supreme Court has the opportunity to end this "sport" by affirming the Fourth Circuit's decision in *Duke Energy*. The crux of the issue presented to the Supreme Court is that in 1977, Congress was unwilling, rightly or wrongly, to subject existing major stationary sources to the NSR program unless they changed the way they operated to a way in which they were not depenalizes doing so, sources have made the conscious decision to maintain existing units to avoid triggering the NSR program. To address this very situation, Congress enacted Title IV of the Clean Air Act to require substantial emission reductions through a market-based program, and in the process rejected the very type of universal, new source control retrofit program sought by EPA's enforcement interpretation. For those who disagree with Congress' choice, the proper recourse is not for EPA to reinterpret the rules of the game and launch a massive enforcement initiative, but to return to Congress and attempt to change the system the same way it was created—by amending the Clean Air Act.

1 United States v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005), *cert. granted sub nom.*, Envtl. Def. v. Duke Energy Corp., 2006 U.S. LEXIS 3936 (U.S. May 15, 2006) (No. 05-848).

2 Other electric utilities against which the government brought suit as part of the coal-fired power plant enforcement initiative include American Electric Power, Cinergy, Ohio Edison, Illinois Power, Southern Indiana Gas & Electric ("SIGECO"), the Southern Company, and Tampa Electric. *See* Makram B. Jaber, *Utility Settlements in New Source Review Lawsuits*, 18 NAT. RESOURCES & ENV'T 22, 22 (Winter 2004).

3 One significant measure apart from installing pollution control technology is the requirement that a modified source obtain pollution offsets from other sources operating in the region. *See* 42 U.S.C. § 7503(a)(1)(A).

4 EPA finalized the Equipment Replacement Provision, which is often called the ERP Rule, *see* Prevention of Significant Deterioration (PSD) and Non Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248 (Oct. 27, 2003) [hereinafter ERP Rule], and has proposed a new emission increase test, *see* Prevention of Significant Deterioration and Nonattainment New Source Review, and New Source Performance Standards: Emissions Test for Electric Generating Units, 70 Fed. Reg. 61,081, 61,099 (Oct. 20, 2005) [hereinafter Proposed NSR Reform Rule]. In 2002, EPA also finalized a separate NSR Reform Rule that did not make fundamental changes to the NSR program. *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-To-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002) [hereinafter 2002 NSR Rule]

5 What is commonly called a "major stationary source" is called by the Clean Air Act a "major emitting facility." A major emitting facility is defined by the Act as a stationary source which emits, or has "the potential to emit, one hundred tons per year of any air pollutant" if the source is included in an enumerated industrial source category for which EPA had promulgated a new source performance standard at the time of the 1977 Clean Air Act Amendments, or if it is not in that source category, has "the potential to emit two hundred and fifty tons per year or more of any air pollutant." 42 U.S.C. § 7479(1).

6 42 U.S.C. § 7408(a)(1)(A).

7 42 U.S.C. § 7409(b)(1).

8 For purposes of determining attainment with the NAAQS, the country is divided into different air quality control regions ("areas"). The determination of the attainment status of these regions was made pursuant to Clean Air Act § 107, 42 U.S.C. § 7407, and they are listed at 40 C.F.R. Pt. 81.

9 *See* 42 U.S.C. § 7407(a) ("Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State within the entire geographic area comprising such State . . . ."). Even more generally, the Clean Air Act states that "air pollution prevention . . . at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3).

10 United States v. Gen. Motors Corp., 876 F.2d 1060, 1062 (1st Cir. 1989).

11 Train v. Natural Resources Def. Council, 421 U.S. 60, 79 (1975).

12 These devices include flue gas desulphurization systems (also known as "scrubbers") to reduce SO_2 emissions and selective catalytic reduction devices to reduce NO_x emissions.

13 Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis added).

14 42 U.S.C. § 7470.

15 42 U.S.C. § 7501(1).

16 Pub. L. No. 95-95, § 129(a)

17 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 18019 (1977).

18 42 U.S.C. § 7411(b)(1)(A).

19 *See* 42 U.S.C. § 7411(a)(1).

20 *See* S. Rep. No. 1196, 91st Cong., 2d Sess., at 16 (1970).

21 42 U.S.C. § 7411(a)(4).

22 *See* Pub. L. No. 91-604 § 110(a)(2)(D).

23 *Id*. § 110(a)(4).

24 Standards of Performance for New Stationary Sources, 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971).

25 Letter from Richard D. Wilson, Director, Division of Stationary Source Enforcement, EPA, to James O. McDonald, Director of Enforcement Division, EPA Region V (Nov. 18, 1975).

26 Letter from Gerald K. Gleason, Acting Associate General Counsel, EPA, to Harmon Wong Koo, California Air Resources Board (Aug. 6, 1975).

27 Standards of Performance for New Stationary Sources: Modification, Notification, and Reconstruction, 39 Fed. Reg. 36,946, 36,946 (Oct. 15, 1974) (emphasis added) [hereinafter Proposed 1975 NSPS Rule].

28 Standards of Performance for New Stationary Sources: Modification, Notification, and Reconstruction, 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975) [hereinafter 1975 NSPS Rule].

29 Proposed 1975 NSPS Rule, 39 Fed. Reg. at 36,947.

30 This rate is called the source's "throughput."

31 This rate is called the source's "instantaneous rate."

32 Proposed 1975 NSPS Rule, *supra* note 27, at 36, 946.

33 *See id.*

34 *See* Pub. L. No. 91-604 §§ 110(a)(2)(D) (requiring that State Implementation Plans ("SIPs") include "a procedure . . . . for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply"), -(a)(4) (requiring the § 110(a)(2)(D) procedure for review to "provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance . . . will apply," and to "require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary" to make the determination of NAAQS compliance).

35 *See Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd* 4 ERC 1815 (D.C. Cir. 1972) (per curiam), *aff'd by an equally divided court sub nom.*, *Fri v. Sierra Club*, 412 U.S. 541 (1973).

36 Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510, 42,511 (Dec. 5, 1974) [hereinafter 1974 PSD Rule].

37 *See supra* note 32 and accompanying text.

38 1974 PSD Rule, *supra* note 36, at 42,512 (emphasis added).

39 *Id.* at 42,513. EPA has recognized this fact on later occasions as well. *See* ERP Rule, *supra* note 4, at 61,269 (noting that EPA's reference in the regulatory PSD rule the to NSPS modification decision "was a deliberate choice," not a matter of happenstance).

40 *See* 40 C.F.R. § 51.01(d).

41 *See* 40 C.F.R. § 60.14.

42 Requirements for Preparation, Adaption [sic], and Submittal of Implementation Plans: Air Quality Standards; Interpretive Ruling, 41 Fed. Reg. 55,524 (Dec. 21, 1976) [hereinafter the "1976 Interpretive Rule"].

43 The exception to the 1976 Interpretive Rule's general requirement that a "major modification" occurred when a source increased its emissions by more than 100 tons per year occurs in the case of carbon monoxide, where no major modification was deemed to occur unless the change increased carbon monoxide emissions by more than 1000 tons per year.

44 1976 Interpretive Rule, *supra* note 42, at 55,527.

45 42 U.S.C. § 7501(4); *see also id.* § 7479(2)(c) ("'[C]onstruction' . . . includes the modification (as defined in section 111(a) of this title) of any source or facility.").

46 42 U.S.C. § 7478(a).

47 42 U.S.C. § 7478(b).

48 Pub. L. No. 95-95, § 129(a)(1).

49 *Id.* § 128(a), *codified at* Clean Air Act § 172(b)(6) (SIPs must require permits for construction of "new and modified" major stationary sources), *codified at* § 171(4) (the "term[ ] … 'modified' mean[s] the same as used in section 111(a)(4)")

50 This description is somewhat simplistic. For instance, each area is classified into one of three categories, and the amount of air quality degradation that is permitted in each of these areas varies accordingly.

51 H.R. Rep. No. 95-294, at 534 (1977).

52 *See* 40 C.F.R. § 52.01(d).

53 636 F.2d 323 (D.C. Cir. 1979).

54 40 C.F.R. § 52.21(i)(1).

55 40 C.F.R. § 52.21(i)(2).

56 40 C.F.R. §51.166(i)(1).

57 *See* 40 C.F.R. §§ 52.21(i)(4)-(8).

58 40 C.F.R. § 52.01(d).

59 40 C.F.R. § 52.21(b)(3).

60 Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380, 26,403 (June 19, 1978) [hereinafter 1978 NSR Rule].

61 Plaintiff's Proposed Conclusions of Law ¶ 250, United States v. Am. Elec. Power Co., No. C2-99-1182 (S.D. Ohio Sept. 1, 2005).

62 *Id.* ¶ 252.

63 636 F.2d 323 (D.C. Cir. 1979).

64 42 U.S.C. § 7411(a)(3).

65 42 U.S.C. § 7479(1).

66 *Alabama Power*, 636 F.2d at 353.

67 *Id.*

68 *Id.*

69 *Id.* at 402.

70 *Id.* at 403.

71 *Id.*

72 *See id.* at 377-78 ("EPA has held, first, that voluntary fuel switches by emissions sources which were designed to accommodate the alternate fuel prior to January 6, 1975, *do not constitute modifications within the meaning of Section 111(a)(4)*, and accordingly that such changeovers are not subject to the review and permitting strictures imposed by Section 165.") (emphasis added).

73 *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980) [hereinafter 1980 NSR Rule].

74 *See* 40 C.F.R. §§ 51.100 (requiring that all terms not defined in the part, which includes the term modification, must be given the same meaning as in the Clean Air Act), 52.01(d) (defining modification as a change that increases a source's emission rate).

75 *Id.*

76 1980 NSR Rule, *supra* note 73, at 52,735.

77 *Id.* at 52,736 (emphasis added).

78 *Id.* at 52,737.

79 *Id.*

80 Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, EPA, to David A. Kee, Air and Radiation Division, EPA Region V, at 7 n.4 (Sept. 9, 1988).

81 *See* 40 C.F.R. § 52.21(b)(3).

82 *See* 40 C.F.R. § 52.21(b)(21).

83 40 C.F.R. § 52.01(d) (emphasis added).

84 Reich "was not a low-level employee from an irrelevant division," but "the head of the division at the EPA responsible for 'providing guidance for interpretations which address the implementation of [the PSD] regulations.'" United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 642 (M.D.N.C. 2003).

85 Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Amasjit S. Gill, Gas Turbine Div., General Electric 1 (June 24, 1981).

86 *Id.* (citing 40 C.F.R. §52.21(b)(2)(iii)(f) (1981)).

87 Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Charles Whitmore, Chief of Technical Analysis, EPA Region VII (January 22, 1982).

88 Memorandum from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Michael M. Johnston, Chief of Air Operations, EPA Region X (July 28, 1983).

89 Memorandum from James T. Wilburn, Chief of Air Management Branch, EPA Region IV, to All State and Local Agency Directors, at 3 (July 12, 1982).

90 *See generally* 40 C.F.R. § 52.21.

91 467 U.S. 837 (1984).

92 *Id.* at 854 (emphasis added).

93 *Id.* at 854 n.26.

94 *Id.* at 840.

95 685 F.2d 718, 721n.13 (DC Cir. 1982).

96 Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 46 Fed. Reg.

16,280, 16,281 (March 12, 1981); *see also* Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766, 50,768 (Oct. 14, 1981).

97 893 F.2d 901 (7th Cir. 1989).

98 *Id.* at 911.

99 Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, EPA, to David A. Kee, Air and Radiation Division, EPA Region V, at 7 n.4 (Sept. 9, 1988).

100 *Id.* at 917.

101 *Id.*

102 *Id.* at 918.

103 Letter from William G. Rosenberg, Assistant Administrator for Air and Radiation, EPA, to John Boston, President, WEPCo, at 6 (June 8, 1990).

104 United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 646 (M.D.N.C. 2003).

105 *See* 57 Fed. Reg. 32,314, 32,317 (July 21, 1992).

106 *See Duke Energy*, 278 F. Supp. 2d at 647 n.25 (citing EPA's summary judgment brief for the proposition that electric utilities could "opt-out" of the WEPCo Rule's emission increase methodology by declining to submit certain data to EPA).

107 OFF. OF LEGAL POL'Y, DEP'T OF JUST., NEW SOURCE REVIEW: AN ANALYSIS OF THE CONSISTENCY OF ENFORCEMENT ACTIONS WITH THE CLEAN AIR ACT AND IMPLEMENTING REGULATIONS, at iii (2002)

108 *See id.* app. 1, at 41.

109 *See id.*

110 Memorandum Opinion on Sierra Club Motion to Reconsider Stay and Referral to Mediation 9, Sierra Club v. TVA, No. CV-02-2279-VEH (N.D. Ala. July 5, 2005).

111 *Id.*

112 278 F. Supp. 2d 619, 640 nn. 16-17 (M.D.N.C. 2003).

113 In a Rule 30(b)(6) deposition, a party may depose various entities, including government agencies, through one of its officers, agents, or employees. *See* Fed. R. Civ. Proc. 30(b)(6). The person deposed is responsible for testifying "as to matters known or reasonably available to the organization." *Id.*

114 United States v. E. Ky. Power Coop., No. 5:04-cv-00034 (E.D. Ky. filed Jan. 28, 2004), Little Dep. at 57 (July 20, 2005).

115 *Duke Energy,* 278 F. Supp. 2d at 636 n.13.

116 Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 314 (2005).

117 ENVTL. PROT. AGENCY, PROCEEDINGS OF THE ACID RAIN CONFERENCE, APRIL 8-9, 1980 (1980).

118 *Acid Rain and Nonattainment Issues: Hearing Before the Subcomm. on Environmental Protection of the H. Comm. on Env't and Public Works*, 100th Cong., 27 (statement of Lee Thomas, Admin., EPA).

119 *See, e.g.*, S. 316, 100th Cong. (1987); S. 2813, 99th Cong. (1986); S. 52, 99th Cong. (1985); H.R. 5555, 97th Cong. (1982).

120 H.R. 144 , 101st Cong. § 181(a) (1989).

121 *Id.* § 182(c)(1); *see also* H.R. 2586, 101st Cong. § 182(c)(1) (1989) (same); H.R. 3316 § 405(c)(1) (similar language).

122 *See* H.R. 3211, 101st Cong. § 402(a) (1989).

123 Letter from Kenneth A. Schweers, President, ICF Resources Inc., to Robert A. Beck, Director, Clean Air, Fossil Fuels and Natural Resources, Edison Electric Institute (July 26, 1989) (on file with authors).

124 Proposed Revisions of Standards of Performance for NO_x Emissions from New Fossil-Fuel Fired Steam Generating Units; Proposed Revisions to Reporting Requirements for Standards of Performance for New Fossil-Fuel Fired Steam Generating Units, 62 Fed. Reg. 36,948, 36,957 (July 9, 1997).

125 Electric Supply: Older Plants' Impact on Reliability and Air Quality, GAO Report to the Chairman, Subcomm. on Energy and Commerce. U.S. House of Reps 30-31 (1990).

126 *Id.*

127 Letter from William K. Reilly, Admin., EPA, to John D. Dingell, Chairman, House Subcomm. on Oversight and Investigations, House Energy and Commerce Comm. 2 (April 19, 1989).

128 *See* Pub. L. 91-604, § 112(3) (stating that the term modification "shall have the same meaning" as the term has "under section 111(a)" governing the

NSPS program).

129 *See* National Emission Standards for Hazardous Air Pollutants: Asbestos, Beryllium, and Mercury, 38 Fed. Reg. 8820, 8826-27 (Apr. 6, 1973).

130 *See* National Emission Standards for Hazardous Air Pollutants; Amendments to General Provisions, 50 Fed. Reg. 46,284, 46,294 (Nov. 7, 1985) ("Emission rate shall be expressed as kg/hr [of] any hazardous air pollutant discharged into the atmosphere for which a standard is applicable.").

131 *See id.* at 46,288-89.

132 *See, e.g.*, Control of Emissions from New Highway Vehicles, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003).

133 42 U.S.C. § 7409(b)(1).

134 *See* 42 U.S.C. § 7409(d).

135 *See* 42 U.S.C. § 7426(b) ("Any State or political subdivision may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollution in violation of the prohibition against [interfering with pollution control measures in other states].").

136 *See* Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, EPA, to David A. Kee, Air and Radiation Division, EPA Region V, at 7 n.4 (Sept. 9, 1988).

137 *See, e.g.*, 40 C.F.R. § 51.165(a)(1)(xxvii) (2006) (defining "projected annual emissions").

138 *See, e.g.*, 40 C.F.R. § 51.165(a)(1)(xxi) (1993).

139 In this regard, EPA has shown no compunction in bringing enforcement actions after much time has passed, even where a regulated entity has obtained a determination from its state permitting authority that an activity was permitted. While the Supreme Court recently suggested that it is "confident" that EPA would "not indulge in the inequitable conduct . . . while the federal courts sit to review EPA's actions" by invalidating state determinations long after they are made, *see* Alaska Dep't of Envtl. Conserv. v. EPA, 540 U.S. 461, 495 (2003), that is, in fact, exactly what EPA has done in the coal-fired power plant enforcement initiative.

140 FOUND. FOR CLEAN AIR PROGRESS, AMBIENT AIR QUALITY TRENDS: AN ANALYSIS OF DATA COLLECTED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY 73 (2004).

141 United States v. Cinergy Corp., 2005 U.S. Dist. LEXIS 28755 *11 (No. 1:99-cv-1693) (S.D. Ind. 2005).

142 *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988).

143 Byron Swift, *Command Without Control: Why Cap-and-Trade Should Replace Rate Standards for Regional Pollutants*, 31 Entl. L. Rep. (Envtl. L. Inst.) 10,330, 10,340 (Mar. 2001).

144 Electric utilities have "duty to serve" obligations imposed by their respective state public utility commissions, and maintaining the reliability of their sources is necessary to comply with these obligations. *See, e.g.*, Ind. Code § 8-1-2-4.

145 EPA Air Trends Nitrogen Dioxide, *at* http://www.epa.gov/airtrends/nitrogen.html.

146 FOUND. FOR CLEAN AIR PROGRESS, *supra* note 140, at 2.

147 *Id.* at 10.

148 *Id.*

149 *Id.* at 12.

150 In this instance, the Navajo Power Plant was required to install scrubbers to prevent visibility impairment in the Grand Canyon. *See* 40 C.F.R. § 52.145(d).

151 *See* Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005).

152 FOUND. FOR CLEAN AIR PROGRESS, *supra* note 140, at 73-75.

153 *Id.* at 76.

154 636 F.2d 323 (D.C. Cir. 1979).

155 1980 NSR Rule, *supra* note 73, at 52,720.

156 *Id.*

157 *Id.* at 52,721.

158 *Id.*

159 Id.

160 *Id.*

161 *Id.*

162 *See id.* at 52,721-22.

163 H.R. Rep. No. 95-294, at 186 (1977).

164 *See id.* at 144 (noting that "[n]o [PSD] permits are required for existing sources, *since they* and their emissions' capacity are 'grandfathered'.").

165 636 F.2d 323, 400 (D.C. Cir. 1979); *see also* New York v. EPA, 413 F.3d 3, 27 (D.C. Cir. 2005) (per curiam) (quoting *Alabama Power*).

166 893 F.2d 901, 909-10 (7th Cir. 1990).

167 42 U.S.C. § 7412(i)(3).

168 *See, e.g.*, S. 316, 100th Cong. (1987); S. 2813, 99th Cong. (1986); S. 52, 99th Cong. (1985); H.R. 5555, 97th Cong. (1982).

169 *See* ERP Rule, *supra* note 4.

170 *See* Proposed NSR Reform Rule, *supra* note 4, at 61,099.

171 ERP Rule, *supra* note 4, at 61,277. A functionally equivalent component is "a component that serves the same purpose as the replaced component." *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.* at 61,250.

176 443 F.3d 880 (D.C. Cir. 2005).

177 *See id.* at 888 n.4 ("The court has no occasion to decide whether part replacements or repairs necessarily constitute a 'modification' under the definition taken as a whole.").

178 *See* Proposed NSR Reform Rule, *supra* note 4, at 61,093.

179 *See id.* at 61,094.

180 Environmental Defense Petition for a Writ of Certiorari, Environmental Defense v. Duke Energy, No. 05-848 (U.S. 2006).

181 42 U.S.C. § 7607(b)(1).

182 *See* New York v. EPA, 133 F.3d 987, 990 (7th Cir. 1998); Texas Mun. Power Agency v. EPA, 89 F.3d 858, 867 (D.C. Cir. 1996) (per curiam).

183 *Texas Mun. Power Agency*, 89 F.3d at 867 (citing H.R. Rep. No. 95-294, at 323-24 (1977)).

184 H.R. Rep. No. 95-294, at 324 (1977) (emphasis added).

185 452 U.S. 247 (1981).

186 42 U.S.C. § 7607(b)(2) (emphasis added).

187 United States v. Duke Energy Corp., 278 F. Supp. 2d 618, 640 (M.D.N.C. 2003).

188 *Id.* at 640.

189 2002 NSR Rule, *supra* note 4, at 80,199.

190 *E.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967).

191 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

192 *See, e.g.*, Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995) ("Interpretive rules . . . do not have the force and effect of law and are not accorded that weight in the adjudicatory process.").

193 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

194 Auer v. Robbins, 519 U.S. 452, 462 (1997).

195 *See, e.g.*, United States v. United Mine Workers, 330 U.S. 258, 291 (1947):

> It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. But even if the Circuit Court had no jurisdiction to entertain [] petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it.

196 434 U.S. 275, 284 (1978).

197 "The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous *punitive* statutes." United States v. Thompson/Center Arms Co., 504 U.S. 505, 525 (1992) (Stevens, J., dissenting) (emphasis added); *see also* United States v. One 1973 Roll Royce By and Through Goodman, 43 F.3d 794, 801 (3d Cir. 1994).

198 Bd. of Governors v. McCorp. Fin., Inc., 502 U.S. 32, 44 (1991).

199 553 F.2d 215, 219 (D.C. Cir. 1977).

200 *Id.*

201 502 U.S. 183 (1991).

202 Exxon Corp. v. United States, 40 Fed. Cl. 73, 90 (1998); Bhada v. Comm'r, 89 T.C. 959, 973 (1987) (same).

203 N. Natural Gas Co. v. O'Malley, 277 F.2d 128, 134 (8th Cir. 1960), *cited in* Steen v. Comm'r, 508 F.2d 268, 270 (5th Cir. 1975).

204 LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Mgmt. Comm'n, 866 F.2d 616, 623 (3d Cir. 1989).

205 United States v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005), *cert. granted sub nom.*, Environmental Def. v. Duke Energy Corp., 2006 U.S. LEXIS 3936 (U.S. May 15, 2006) (No. 05-848); League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002); Joy Techs. Inc., v. Secretary of Labor, 99 F.3d 991, 996 (10th Cir. 1996), *cert. den'd*, 520 U.S. 1209 (1997); DRG Funding Corp. v. Secretary of the United States Dep't of Housing and Urban Dev., 898 F.2d 205 (D.C. Cir. 1990); *LaVallee Northside Civic Ass'n*, 866 F.2d 616; *Steen*, 508 F.2d 268; *O'Malley*, 277 F.2d 128. *Steen* is binding precedent in both the Fifth and Eleventh Circuits.

206 898 F.2d 205.

207 *DRG Funding*, 898 F.2d at 209.

208 *See Joy Techs.*, 99 F.3d at 996 (rejecting interpretation of a regulation that was "not reasonable and consistent with the statute that the regulation implemented"); May v. Nicholson, 19 Vet. App. 310, 320 (Ct. Vet. Claims 2005) (construing regulation so that it would not exceed Secretary of Veterans Affairs' statutory authority); Carrete-Michel v. INS, 575 F. Supp. 150, 155 (W.D. Mo. 1983) (rejecting government's construction of regulation in order to avoid statutory questions which would endanger the validity of the regulation); Fuller Brush Co. v. United States, 262 F. Supp. 989, 999 (D. Conn. 1966) (construing tax regulation so as not to conflict with plain language of statute); Parker v. Sec'y of Health and Human Servs., 1984 U.S. Dist. LEXIS 19706 (D. Mass. 1984).

209 309 F.3d 1181.

210 *Forsgren*, 309 F.3d at 1190 n.8. (emphasis added).

211 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

212 508 U.S. 36, 46 (1993).

213 515 U.S. 323 (1995).

214 456 U.S. 512 (1982).

215 *See* United States v. Duke Energy Corp., 411 F.3d 539, 549 n.7 (4th Cir. 2005).

216 *See id.*

217 *See id.* at 545-56.

218 5 U.S.C. § 706.

219 *See* Martin v. OSHRC, 499 U.S. 144, 157 (1991) (Supreme Court deemed the issuance of an administrative citation containing an agency's interpretation of its regulations as "agency action" to which deference may be due because the citation is "a form expressly provided for by Congress").

220 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 95 (1947).

221 *Id*.

222 *See* 42 U.S.C. § 7607(b)(1).

223 650 F.2d 509, 513 (4th Cir. 1981).

224 42 U.S.C. § 7607(b)(2) (emphasis added).

225 Stinson v. United States, 508 U.S. 36, 46 (1993); *see also* Parsons v. Pitzer, 149 F.3d 734, 738 (7th Cir. 1998) (noting that an agency's interpretation its regulations may not violate a federal statute).

226 Hoctor v. USDA, 82 F.3d 165, 170 (7th Cir. 1996).

227 S. Rep. No. 91-1196, at 41 (1970). The full paragraph from which this sentence is taken is as follows: Administratively developed standards, rules and regulations under the Act and under this bill would clearly affect the interests of persons. The courts are increasingly adapting this test to what administrative actions are reviewable. In several recent cases *[Environmental Defense Fund, Inc. v. Hardin* (C.A. No. 23,813, May 28, 1970); *Barlow v. Collins* (397 U.S. 159, 167 (1970)); *Abbott Laboratories v. Gardiner* (387 U.S. 136, 140-41 (1967))] the Courts have held that even in matters committed by statute to administrative discretion, preclusion of judicial review "is not lightly to be inferred . . . it requires a showing of clear evidence of legislative intent." (*E.D.F. v. Hardin, supra,* p. 7.) The Courts have granted this review to those being regulated and to those who seek "to protect the public interest in the proper administration of a regulatory system enacted for their benefit." (*E.D.F. v. Hardin supra*, p.6.) Since precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review within con-

trolled time periods.

Of course, the person regulated would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone.

Id. at 40-41.

228 Brief of the United States 19-20, Environmental Defense v. Duke Energy Corp., No. 05-848 (U.S. 2006).

229 413 F.3d 3 (D.C. Cir. 2005) (per curiam).

230 No. 79-1112 (D.C. Cir.).

231 Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Amasjit S. Gill, Gas Turbine Div., General Electric 1 (June 24, 1981).

232 Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Charles Whitmore, Chief of Technical Analysis, EPA Region VII (January 22, 1982).

233 United States v. Alabama Power Co., 372 F. Supp. 2d 1283, 1306 n.44 (N.D. Ala. 2005).

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