

## Supreme Court KO's Duke: Sets Stage for Broader Application of NSR Requirements

In a near-unanimous decision the Supreme Court on Monday reversed industry's victory in the 4th Circuit *Duke Energy* case, effectively undermining industry's most successful defense to EPA's New Source Review ("NSR") enforcement actions. In *Environmental Defense v. Duke Energy Corp.* (No. 05-848) the court ruled that a "modification" occurs (and thus NSR is triggered) if planned changes to emission sources increase annual emissions, thus overruling the 4th Circuit's holding that modifications should be determined only based on an increase in hourly emissions. This decision has the potential to open numerous companies to government or citizen enforcement actions based on a failure to obtain NSR permits for changes to emission sources.

The case has its roots in an eight-year old EPA enforcement initiative aimed at the coal-fired power industry. EPA filed numerous enforcement actions arguing that power companies had made modifications to their units that increased emissions, and therefore should have been permitted under NSR, and should have included the stringent emissions control technology required under the NSR program's Best Available Control Technology requirement. Several power companies targeted by EPA opted to settle their cases, while several others, including Duke, chose to contest EPA's position in court. The district court in the *Duke* case concluded that the emissions test for NSR should be an hourly one (i.e., whether the project increased hourly emissions of the unit) and not an annual one. That decision was upheld on somewhat different grounds by the 4th Circuit. In contrast, the district court in another case involving Cinergy determined that the emissions increase test should be based on whether the project increased annual emissions of the unit, a decision that was upheld by the 7th Circuit (this Circuit split occurred after the Supreme Court decided to hear the *Duke* case).

The emissions increase test is critical to the NSR enforcement cases because an hourly emissions increase test effectively exempts almost all of the types of power plant projects targeted by EPA in its enforcement action, while an annual emissions increase test has the potential to pull all of EPA's targeted projects into the NSR program. That distinction occurs because the power plant projects at issue were largely intended to maintain plant operations, which could have the effect of reducing plant breakdowns (forced outages), thereby increasing annual emissions. In contrast, projects that increase hourly emission largely involve making the unit bigger or capable of burning more fuel than before, and are therefore much less common. By securing a victory on

the emissions increase issue in *Duke*, industry effectively halted EPA's enforcement action against projects designed to reduce outages and improve plant efficiency .

The Supreme Court has now decided conclusively that "the 1980 [NSR] regulations . . . clearly do not define a "major modification" in terms of an increase in the hourly emissions rate." First, the Court held that both the NSR program and related New Source Performance Standard program did not have to have the same emissions applicability test (either hourly or annual), indicating that the emissions tests could be different depending on EPA's view of the matter. This conclusion overturned the 4th Circuit's key determination that Congress intended for the emissions tests under both programs to be the same. Although that conclusion alone could have been sufficient to remand the case back to the 4th Circuit, the Court went further and declared that the current NSR regulations could not be read to apply a maximum hourly test, also overturning the lower courts' conclusions on this point.

Based on past practice, EPA can be expected to continue to pursue the handful of NSR enforcement cases it has already filed . Thus, *Duke*, as well as *Southern*, will likely return to court, and engage on other defenses industry has asserted against EPA. But it is unclear whether the Supreme Court decision will prompt EPA to bring additional NSR enforcement cases. For the past few years, EPA has been operating under guidance that effectively limits new NSR cases to those few where projects result in an increase in hourly emissions . EPA based this enforcement guidance decision in part on the now invalid *Duke* 4th Circuit decision, and in part on its decision to propose a new rule that would formally adopt the hourly emissions increase test for NSR. Since the Supreme Court decision in *Duke* did not address EPA's proposed rule, and perhaps provided some support for it, EPA could decide to maintain its current NSR enforcement posture, which would result in no or few additional cases being filed. However, that enforcement policy was adopted when Republicans controlled both houses of Congress. Now that Democrats are in charge, it can be expected that Congress will pressure will EPA to add additional NSR cases .

In addition , several of the Northeast states, as well as national environmental groups, have also pursued NSR enforcement citizen suit cases against power plants, and have the resources to continue to do so, regardless of what EPA does. There is an expectation that these states and groups will strongly consider bringing additional NSR actions, at least in part because of the ongoing air pollution transport issue that prompted many of their initial suits against Midwestern power plants. In particular, the Northeast states are calling for other states to tighten power plant emission regulations of NO<sub>x</sub> and SO<sub>x</sub> to a level called "CAIR-plus," and those states will be tempted to target power plants in states that do not adopt such tougher emissions standards.

Finally, EPA will continue to propose regulations to codify the NSR emissions increase test based on hourly emissions. As noted, the Supreme Court did not address EPA 's authority to change the emissions test prospectively , although parts of the decision suggest that EPA may have such authority. However, we expect that the current Democratic Congress will pressure EPA to reconsider its proposal. In addition, EPA's proposal, which will have the effect of exempting most projects from NSR, takes on added importance in light of the Supreme Court's recent decision finding that EPA has authority to regulate greenhouse gases. In the event that EPA chooses to regulate greenhouse gas emissions under the CAA, the statute would typically require that

projects that increase greenhouse gases be addressed under NSR. That prospect, which could greatly expand the projects covered under NSR under an annual test, and require unwieldy greenhouse gas emission reduction analyses, will ensure that industry continues to press EPA to revise the NSR emissions test.

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