Environmental Defense v. Duke Energy Corp.: 
Administrative and Procedural Tools in Environmental Law

by Ryan Petersen *

On November 2, 2006 the U.S. Supreme Court hears oral arguments in a case with important ramifications for how and when many environmental cases can be challenged in court. In Environmental Defense v. Duke Energy Corp., the Court is faced with two major questions. First, the Court will decide the jurisdictional issue of whether the Fourth Circuit can indirectly invalidate an Environmental Protection Agency’s (EPA) regulation by reinterpreting the meaning of a valid statute. The D.C. Circuit was granted exclusive jurisdiction to hear challenges to the validity of EPA rules. To this point, however, courts have not clearly distinguished between the validity of a rule and the proper interpretation of a rule. Both the Fourth and Seventh Circuits have reviewed EPA enforcement cases where the litigation seemed directed to the validation of the rule even though the courts expressly stated that they were only “interpreting.”

Second, the Court will decide whether the EPA must use the same definition of the word “modification” in different parts of the Clean Air Act (CAA). In doing so, the Court may address two issues. First, there is some confusion as to the correct application of *Chevron* analysis to the facts of *Duke Energy*. The Court may also look at whether terms in different CAA provisions must carry the same meaning and definitions. While agencies must typically

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3 42 U.S.C. § 7607(b)(1).
5 *Id.*
use congruous definitions, the may be able to use differing definitions in order to best carry out the legislative intent of a law.\footnote{Alabama Power Co. v. Costle, 636 F.2d 323, 396 (D.C. Cir. 1979).}

_Duke Energy_’s facts are very specific and unlikely to reoccur often. However, this case may have deeper implications for environmental litigation. The arguments before the Court are mostly administrative and procedural. As is common in many environmental lawsuits, central to the case is the interpretation of vague statutory language as applied to specific, individualized facts. _Duke Energy_ is a prime example of the power of procedure and administrative law in environmental litigation.

**I. Facts and History**

The facts of the case are relatively simple. Upon passage of the Prevention of Significant Deterioration program (PSD) under the CAA in 1977,\footnote{42 U.S.C. §§ 7470–92.} coal power plants were not required to immediately retrofit to meet the new air quality standards.\footnote{United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 628 (2003).} Instead, they were allowed to continue using antiquated technology with the expectation that as equipment aged, it would be replaced with the new air-friendly equipment.\footnote{Alabama Power, 636 F.2d at 346.} The language of the statute, however, mandates the implementation of such equipment only upon a “modification” (or “construction”) of a plant.\footnote{42 U.S.C. §§ 7475(a), 7479(2)(c).} Furthermore, in order to “modify” a power plant, an energy company must first seek a permit from the EPA.\footnote{Id.}

Between 1988 and 2000, Duke Energy was faced with aging coal power plants. The company made the decision to do extensive repair work on the existing equipment of many of their plants instead of replacing it with new, cleaner technology. Duke Energy did not seek PSD
permits to perform the maintenance on its plants. The EPA, Environmental Defense, and other environmental organizations filed an enforcement action, claiming that Duke Energy’s failure to obtain the permits and upgrade the equipment violated the PSD. According to the EPA, these plants were “modified” because the repairs made it possible for the plants to be operated for increased hours each day. Duke Energy disagreed, arguing that the repairs were not “modifications” because they did not increase the plants’ hourly pollution output.

This dispute over the definition of modification arises under two provisions of the CAA that contain similar language. First, the New Source Performance Standards (NSPS), implemented in 1970, requires new and modified pollutant sources to adopt technology standards set by the EPA. Second, the PSD, which was “designed to ensure that the air quality in . . . areas that are already ‘clean’ will not degrade,” requires that whenever pollutant sources construct or modify their operations, they must implement the best available pollution control technology. When Congress passed the PSD, it adopted by reference the NSPS definition of modification: “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.”

Although “modification” has the same definition in both statutes, the agency regulations interpreting the two standards vary. Both interpretations define a modification as a change resulting in an increase in the amount of pollutant emitted by the source. However, under the PSD, the increase is measured on a yearly basis; under the NSPS, it is measured on an hourly

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13 Id. § 7411.
16 Id. § 7479.
17 Id. § 7411(a)(4).
18 Id. §§ 7411(a)(4), 7479.
19 40 C.F.R. § 51.166(b)(2)(i).
basis. Thus, under the NSPS regulation, a source is not making a modification if it increases yearly pollution output by operating the source for more hours while holding the hourly pollution output constant, whereas that same action would be a modification under the PSD.

After the District Court ruled in favor of Duke Energy, the EPA appealed to the Fourth Circuit, which introduced an additional complication sua sponte. The Fourth Circuit requested supplemental briefs addressing whether the Supreme Court’s decision in *Rowan Cos. v. United States* should apply. In *Rowan*, the Court “held that when Congress itself provided ‘substantially identical’ statutory definitions of a term in different statutes, the agency charged with enforcing the statutes could not interpret the statutory definitions ‘differently.’” The EPA argued that its different definitions of modification were justifiable to implement the varying purposes of the PSD and the NSPS. Ultimately, the Fourth Circuit agreed with Duke Energy, stating that “the presumption of uniform usage has become effectively irrebuttable because Congress’ decision to create identical statutory definitions of the term ‘modification’ has affirmatively mandated that this term be interpreted identically in the two programs. The different purposes of the NSPS and PSD programs cannot override that mandate.”

On appeal, the EPA also raised the issue of jurisdiction. Section 307(b) of the CAA limits review of the validity of agency rules to the D.C. Circuit. Although only the D.C. Circuit may uphold or invalidate a regulation promulgated under the CAA, any federal court may rule on

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20 40 C.F.R. § 60.14(a)–(b).
21 In addition to differences in the definition of modification, the PSD also has an exception for any physical change due to routine maintenance. 40 C.F.R. § 51.166(b)(2)(iii)(a). The definition of “routine maintenance” was a source of litigation on the District Court level. *Duke Energy Corp.*, 278 F. Supp. 2d at 642. Those arguments, however, were not addressed by the appellate court. *Duke Energy Corp.*, 411 F.3d at 544.
24 *Duke Energy Corp.*, 411 F.3d at 547 n.4.
25 *Id.* at 547 (quoting *Rowan*, 452 U.S. at 255).
26 *Id.* at 549.
27 *Id.* at 550.
the reasonableness of its application. The Fourth Circuit claimed jurisdiction by purposing to “interpret” the PSD rather than invalidate it.\footnote{29}{Duke Energy Corp., 411 F.3d at 549 n.7.}

Thus, the issues before the Supreme Court are whether the validity of the EPA’s regulation defining modification in the PSD was improperly challenged outside the D.C. Circuit, and whether the EPA must define modification under the PSD in the same way that it defines modification under the NSPS. After the Fourth Circuit’s decision, however, the EPA declined to continue litigating the case and decided instead to rectify the apparent loopholes in their regulations by formal rule-making.\footnote{30}{Brief for the Petitioners, supra note 2, at 23 n.17 (citing Emissions Test for Electric Generating Units, 70 Fed. Reg. 61,081, 61081, 61,083 & n.3 (proposed Oct. 20, 2005).}} Nonetheless, Environmental Defense appealed to the Supreme Court and was granted certiorari.\footnote{31}{Duke Energy Corp., 126 S. Ct. at 2019.}

II. Jurisdiction: Validity or Interpretation?

There is some dispute as to what reviewability limits are imposed by section 307(b) of the CAA,\footnote{32}{See e.g., United States v. Ethyl Corp., 761 F.2d 1153, 1154 (5th Cir. 1985); Cinergy Corp., 458 F.3d at 707–708.} which provides that the D.C. Circuit shall have exclusive jurisdiction over the validity of EPA regulations promulgated to interpret the CAA.\footnote{33}{42 U.S.C. § 7607(b)(2). In fact, the D.C. Circuit has reviewed the validity of the regulations at issue in Duke Energy and decided to uphold. New York v. U.S. EPA, 413 F.3d 3, 20 (D.C. Cir. 2005).} Moreover, the statute specifically states that regulations “shall not be subject to judicial review in civil or criminal proceedings for enforcement.”\footnote{34}{42 U.S.C. § 7607(b).} While the section appears to be fairly unambiguous, both the Fourth and the Seventh Circuits have interpreted it as not precluding courts in enforcement proceedings from determining the proper interpretations of CAA rules.\footnote{35}{Duke Energy Corp., 411 F.3d at 549 n.7; Cinergy Corp., 458 F.3d at 707–708.} The difference between validating a rule and interpreting a rule, however, is not well defined.
When determining the validity of a rule, the D.C. Circuit looks at a broad range of factors, such as the rule-making procedures and the rationality of the rule. In *Duke Energy*, however, the Fourth circuit did not undertake such a broad review. Although it looked at some aspects of the rationality inquiry by considering the history and language of the rule, the Fourth Circuit did not delve into other aspects typically associated with validating a rule, such as looking at whether relevant data was considered and arbitrary and capricious analysis. It is difficult to know how deep of an inquiry is proper for reviewing courts.

The EPA rule promulgated under the PSD defines modification as “any physical change in the method of operation of a major stationary source that would result in: a significant emissions increase” as measured in “tons per year.” The Fourth Circuit did not expressly invalidate that rule, but its interpretation of the rule—that an “emissions increase” may only be measured by the hourly rate of emissions as in the NSPS definition—certainly alters significantly the definition found in the rule. Whether this “interpretation” is effectively the same as invalidation, and whether section 307 permits circuit courts other than the D.C. Circuit to have that much flexibility in interpreting agency regulations, is a matter for the Supreme Court.

**III. What is a “Modification”?**

The second issue before the Court is whether the EPA must use the same definition of modification in the PSD as it does in the NSPS. This issue has two components. First, what is the relevance of the *Rowan Cos. v. United States*, which requires that identical terms in statutes

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37 *New York*, 413 F.3d at 17–18.
38 *Duke Energy Corp.*, 411 F.3d at 546.
39 *See New York*, 413 F.3d at 17–18.
40 40 C.F.R. § 51.166(b)(2)(i).
41 Brief for the Petitioners, *supra* note 2, at 1 (summarizing regulations defining modification under the PSD).
carry identical meanings, must be considered?\textsuperscript{42} Second, should the EPA’s interpretation of the statute be given \textit{Chevron} deference?\textsuperscript{43}

\textbf{A. Competing Definitions Under Rowan}

The Fourth Circuit queried whether it is even permissible to have two interpretations of the same term.\textsuperscript{44} In \textit{Rowan}, the Supreme Court established the doctrine that words in statutes should carry the same meaning throughout unless there is a justifiable reason for different definitions.\textsuperscript{45} In \textit{Duke Energy}, there are two issues relevant to this inquiry. First, the PSD and the NSPS both use the same statutory language.\textsuperscript{46} The definitional difference arises not in the statutes but in the interpretive regulations of the EPA. There may be flexibility for terms to carry different meanings upon application to individualized circumstances. Second, even if the definitions are different within the meaning of \textit{Rowan}, this does not automatically invalidate the definitions. The differences in the goals and natures of the two acts may justify the different meanings of the term “modification.”\textsuperscript{47}

The Fourth Circuit ruled that there was not a valid reason to have different definitions of “modification” under the PSD and the NSPS.\textsuperscript{48} The PSD and the NSPS are both under the CAA

\textsuperscript{42} \textit{Rowan}, 452 U.S. at 255.
\textsuperscript{43} \textit{See \textit{Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.}, 467 U.S. 837, 861 (1984). To further complicate the issue, it is not clear if the EPA actually had an official interpretation of modification under the PSD before bringing enforcement proceedings against \textit{Duke Energy} and other power-related entities. The EPA had many conflicting statements as to the correct definition of modification. For example, the EPA has not historically enforced the yearly definition of modification. \textit{Energy Corp.}, 458 F.3d at 710–711. Also, in a 1981 opinion letter, a previous mid-level director of the EPA, in referring to the PSD, had had used the hourly definition of modification instead of the yearly definition. \textit{Id.} However, the EPA did define “modification” on a “net” or yearly basis in its regulations. Furthermore, many agencies use adjudication as a means of passing new rules. \textit{United States v. Mead Corp.}, 533 U.S. 218, 231 n.12 (2001). In addressing the modification and \textit{Chevron} issues, the Court may also address this subject.
\textsuperscript{44} \textit{Duke Energy Corp.}, 411 F.3d at 547 n.22.
\textsuperscript{45} \textit{Rowan}, 452 U.S. at 255.
\textsuperscript{46} 42 U.S.C. § 7479.
\textsuperscript{47} \textit{Alabama Power}, 636 F.2d at 396.
\textsuperscript{48} \textit{Duke Energy Corp.}, 411 F.3d at 550.
and are very closely related. Moreover, the court cited the history of the PSD and emphasized that Congress referenced the definition of the NSPS when drafting the statutory language.49

However, the PSD and the NSPS may have different functions.50 The NSPS is designed to regulate technology. Thus, the hourly system is natural to track differences in technology because the NSPS seeks operational efficiency.51 In contrast, the PSD was designed to prevent deterioration of a clean environment.52 Environmental Defense thus argues that the PSD naturally defines modification on a yearly basis.53 Ultimately, the Fourth Circuit did not see a sufficient difference, but the Supreme Court may disagree.54

B. Exceptions to Chevron Deference

The applicability of agency deference is also an issue in this case.55 Chevron analysis requires a two-part inquiry for a court reviewing an agency’s interpretation of a statute.56 First, the court must look at whether Congress has spoken on the issue.57 Second, if Congress has not spoken, the inquiry shifts to whether the agency has developed a reasonable interpretation entitled to deference.58

According to the Fourth Circuit, the EPA’s yearly definition fails this test under the first Chevron requirement because Congress already spoke to the issue.59 When Congress implemented the PSD, they borrowed the “modification” language from the NSPS. Therefore, the Fourth circuit determined that Congress intended for the definition of modification to be the

49 Id.
50 Cinergy Corp., 458 F.3d at 710–711.
51 Brief for the Petitioners, supra note 2, at 47.
52 Cinergy Corp., 458 F.3d at 710–711.
53 Brief for the Petitioners, supra note 2, at 41.
55 Id. at 546.
56 Chevron, 467 U.S. at 861.
57 Id. at 842.
58 Id. at 843.
59 Duke Energy Corp., 411 F.3d at 547.
same under the two acts, and that the EPA’s existing interpretive regulations must carry out that intent.\(^{60}\)

The EPA claims that, although the general definition of modification must be the same, the agency is nonetheless free to develop interpretive regulations that treat the two definitions differently.\(^{61}\) There does seem to be a split in the circuit courts on this particular point.\(^{62}\) In contrast to the Fourth Circuit, the Seventh Circuit has determined that there was no Congressional intent to rigidly treat the interpretation of modification equally under the PSD and NSPS.\(^{63}\) The EPA further claims that the differences in the goals and nature of the PSD versus the NSPS render its differing interpretations reasonable.\(^{64}\)

**IV. Future Implications**

Given the EPA’s willingness to promulgate new PSD regulations and the nature of the *Duke Energy* facts, the Supreme Court’s holding will likely be very narrow. However, the reasoning of the Court may have broad consequences. It may be too early to conclude that the Court will decide the contentious issue of whether pollution should be measured by a yearly or hourly rate under the PSD. If the Court finds that the Fourth Circuit did not have jurisdiction, the Court may remand the case without even reaching the modification issue.

Regardless, the jurisdictional issue is of great importance. If the Court decides to rigidly interpret section 307, entities affected by such regulations may have to effectively anticipate potential regulation problems when rules are promulgated because those problems would not be addressable once enforcement proceedings commence. This would place greater importance on rule-making and challenges to EPA regulations. If, however, the Supreme Court rules that the

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\(^{60}\) *Id.*

\(^{61}\) *Id.* at 549 n.7.

\(^{62}\) *See Cinergy Corp.*, 458 F.3d at 707–708; *Duke Energy Corp.*, 411 F.3d at 549 n.7.

\(^{63}\) *Cinergy Corp.*, 458 F.3d at 710–711.

\(^{64}\) *Duke Energy Corp.*, 411 F.3d at 549 n.7.
Fourth Circuit was only interpreting the regulations and not passing on their validity, there may be greater opportunities to litigate regulations generally. Thus, if section 307 is viewed as permitting the sort of review undertaken by the Fourth Circuit, every case involving the CAA may include an attack on the validity of the governing EPA regulations. Indeed, this was the fear expressed by Justice Stewart in Adamo Wrecking Co. v. U. S.\(^6\)

The Supreme Court may also need to clarify the Rowan decision. Definitions are an important part of any regulatory scheme. This is not the first time courts have had to rule on the appropriateness of dual definitions under the CAA. In Potomac Electric Power Co. v. EPA,\(^6\) the Fourth Circuit was faced with a similar definitional problem under the NSPS. In that case, the court determined that the differences between provisions under the CAA justified different definitions. This issue is likely to arise again in future litigation.

Lastly, Chevron deference is very important in environmental litigation. Almost every environmental law is regulated by some type of governmental agency. The Fourth Circuit’s decision in Duke Energy seems to contradict a similar case in the Seventh Circuit.\(^6\) Thus, it is important to clarify the correct application of the Chevron steps.

V. Conclusion

The Duke Energy case is important because of the administrative and procedural issues raised. While the public’s interest in environmental cases such as Duke Energy often hinges on “hot” issues such as pollution and air quality, the mechanics of the case often turn to procedural or administrative rules and regulations. The questions before the Supreme Court will significantly affect environmental litigation in all fields.

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\(^6\) Cinergy Corp., 458 F.3d at 710-711.