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Can't Do That, Grandpa! Environmental Defense v. Duke Energy Corporation

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CAN'T DO THAT, GRANDPA!

*Environmental Defense v. Duke Energy Corporation*¹

I. INTRODUCTION

In the United States, a substantial amount of electric energy is generated by highly polluting but virtually unregulated coal-burning electric power plants, especially grandfathered plants built before 1970.² Air pollutants produced by the energy industry threaten public health and aquatic ecosystems, elevate the acidity level of rainwater, destroy visibility in national parks and wildlife areas and exacerbate greenhouse effect.³ To reduce total pollutants produced by the energy industry, Congress amended the Clean Air Act (“CAA”) in the Seventies so that power plants could be regulated by emission reduction standards imposed to control the total amount of emitted pollutants.⁴ In order to ease the transition of the industry towards more stringent standards, grandfathered plants were allowed to emit higher levels of pollutants than modern plants as long as they would not undertake modifications.⁵

For the past three decades, large energy companies have been taking advantage of the grandfathering regulations by claiming grandfathered status but undertaking major improvement projects to extend grandfathered plants’ daily operational hours and normal life spans. Whether these improvement projects constituted “modifications” under the CAA became the litigated issue after the Environmental Protection Agency (“EPA”) brought actions against large energy companies in

¹ 127 S.Ct. 1423 (2007).

² Thomas Gremillion, Comment, *Environment Defense v. Duke Energy Corporation*, Corporation. 31 HARV. ENVTL.ENVIL. L. REV. 333 (2007). Grandfathered plant is a status of power plants created by grandfathering regulations which allow electric generating units established prior to a specific date to be exempted from new regulations or subject to less stringent requirements. See Robert N. Stavins, *Vintage-Differentiated Environmental Regulation*, 25 STAN. ENVTL.ENVIL. L.J. 29 (2006).

³ *Id.* at 342-43.

⁴ 42 U.S.C. § 7411(b)(1)(B) (1970), Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977).

⁵ Stavins, *supra* note 2, at 30.

federal courts in 2000. In 2006, the U.S. Supreme Court granted certiorari to review one of the complaints, *Environmental Defense v. Duke Energy Corporation*, in which the environmental group requested the Court to interpret the term “modification” as defined in two different parts of the EPA’s regulations.⁶ This note will explore the Court’s analysis, according to the *Chevron* doctrine, leading up to its decision to entrust the power to the EPA and will comment on its effect upon the serious air pollution faced by this nation.

II. FACTS & HOLDING

Duke Energy Corporation (“Duke”), a private energy company, had been running eight coal-fired electric generating plants in North and South Carolina since 1940.⁷ These plants included thirty coal-fired generating units that were placed in service between 1940 and 1975.⁸ Between 1988 and 2000, Duke engaged in twenty-nine projects redesigning and replacing a number of assemblies of its generating units to extend the lives of these units and allow them to run longer hours each day.⁹ In 2000, the EPA brought this action, intervened by the Environmental Defense and several other environmental groups,¹⁰ against Duke for violation of the CAA for undertaking these projects without permits as required by the Prevention of Significant Deterioration program (“PSD”).¹¹ According to the EPA, the PSD permits had been triggered because Duke’s projects constituted “major modifications” causing net increases in actual annual emissions.¹² To calculate net increases in actual annual emissions, the EPA insisted that the net emissions increase be determined by an “actual-to-projected-actual” test comparing the actual pre-project emissions to the projected post-project emissions of the same

⁶ *Duke*, 127 S. Ct. at 1423.

⁷ *Id.* at 1430.

⁸ *United States v. Duke Energy Corp.*, 411 F.3d 539, 544 (4th Cir. 2005).

⁹ *Id.*

¹⁰ *Duke*, 127 S. Ct. at 1430. Other environmental groups are the North Carolina Sierra Club, and North Carolina Public Interest Research Group. Citizen Lobby/Education Fund intervened as plaintiffs and filed a similar claim.

¹¹ *Duke*, 411 F.3d at 544.545.

¹² *Id.*

unit.¹³ In calculating the projected post-project emissions, the extended daily operating hours resulting from these new projects must be considered.¹⁴

Duke moved for summary judgment claiming that none of the projects increased the hourly rate of emissions and could not constitute a major modification.¹⁵ Duke argued that a PSD permit would be necessary only if there was an increase in the hourly rate of emission using an “actual-to-actual” test.¹⁶ Under this test, the hours and conditions of operations before and after the new projects must be held constant when calculating the post-project emissions.¹⁷ In other words, PSD permits would not be necessary even if Duke operated its plants more hours in a year as long as the hourly emissions rate remained the same as it had been before the project.¹⁸ Siding with Duke, the district court granted the summary judgment holding that the PSD major modification only occurred when a project increased the hourly rate of emissions.¹⁹ The court’s decision relied on the statutory language of the CAA, the language of the PSD regulations, and a regulation-explaining letter written by the Director of the Stationary Source Compliance Division, Edward E. Reich.²⁰

The Fourth Circuit affirmed the trial court’s decision, but on a somewhat different ground.²¹ The court requested *sua sponte* a supplemental brief on *Rowan v. United States*²² and relied on this case to hold that “modification,” a term which was defined in different parts of

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Duke*, 127 S. Ct. at 1430-31.

¹⁶ *Duke*, 411 F.3d at 545; *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 640 (M.D.N.C. 2003).

¹⁷ *U.S. v. Duke*, 278 F. Supp. 2d 641, at 641.

¹⁸ *Duke*, 411 F.3d at 545.

¹⁹ *Duke*, 127 S. Ct. at 1431.

²⁰ *Duke*, 411 F.3d at 545. In his letter, Mr. Reich explained that: “EPA has interpreted this to mean that for PSD purposes Congress intended the term modification to include all exemptions included in the NSPS regulations promulgated under Section 111 of the Act prior to the date of enactment of Section 169.” *United State. v. Alabama Power Co.*, 372 F. Supp. 2d 1283, 1295 (N.D. Ala. 2005).

²¹ *Duke*, 127 S. Ct. at 1431.

²² *Rowan v. United States*, 452 U.S. 247 (1981).

the CAA, must be interpreted identically because of the “effective irrebuttable presumption.”²³ In response, the EPA argued that the new issue triggered judicial review that was outside the court’s jurisdiction because the issue involved the validity of the 1980 PSD regulation.²⁴ The Supreme Court granted Environmental Defense’s petition for certiorari over the EPA’s opposition.²⁵ The Court vacated the judgment and held that the EPA was not required to interpret the term “modification” identically although “modification” appeared in two different parts of the CAA, namely, the PSD and the NSPS provisions.²⁶ Agreeing that the Fourth Circuit’s analysis attacked the validity of the EPA’s regulation, the Court did not rule on this issue because the Fourth Circuit did not reach the issue.²⁷ The Court allowed Duke to reserve its argument of unfair notice as a result of the EPA’s inconsistent positions and its retroactive attack on well-accepted practice, the actual-to-actual test.²⁸

III. LEGAL BACKGROUND

A. Administrative Interpretation

In 1970, Congress passed amendments to the CAA to promote public health and welfare by protecting the quality of air resources.²⁹ To achieve this goal the Amendments directed the EPA to develop the National Ambient Air Quality Standards (“NAAQS”) for various pollutants and required each state to create and implement a plan to meet the NAAQS.³⁰ The amendments also required that all new or modified stationary sources comply with the New Source Performance Standards

²³ *Duke*, 127 S. Ct. at 1431.

²⁴ *Id.* The judicial review would implicate section 307(b) of the CAA which only allows judicial review in the Court of Appeals for the District of Columbia within 60 days of EPA rulemaking. *See* 42 U.S.C. § 7607(b)(1) (1970); *see also* *United States v. Cinergy Corp.*, 458 F.3d 705, 707 (7th Cir. 2006).

²⁵ *See* *Gremillion*, *supra* note 2, at 338.

²⁶ *Duke*, 127 S. Ct. at 1437.

²⁷ *Id.* at 1436.

²⁸ *Id.* at 1436-37.

²⁹ *See* Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

³⁰ *Id.*; *see* *New York v. United States*, 413 F.3d 3, 11 (D.C.(Fed. Cir. 2005).

("NSPS"), a technology-based control program which required the use of modern emission reduction equipment.³¹ Congress amended the CAA again in 1977 because the NSPS did not achieve the ambitious goals of the 1970 Amendments.³² The 1977 Amendments incorporated into the 1970 Amendments the existing regulatory PSD program and revised the NSPS by requiring a higher standard.³³ Under the PSD, before commencing any construction projects in new or modified existing stationary sources in areas that had already achieved the standard, the NAAQS must obtain a permit from the EPA to prove that the proposed project would not emit excess pollutants.³⁴

To determine the scope of the NSPS, in 1970, Congress first defined modification 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."³⁵ Between 1971 and 1973, the EPA's NSPS regulations defined "modification" in virtually the same words as

³¹ *Duke*, 127 S. Ct. at 1430.

³² *Id.* at 1429 (quoting R. Belden, Clean Air Act 7 (2001)). 1430.

³³ *Id.* at 1429. ³³ PSD was initiated by the EPA following a Supreme Court's action in 1973, requiring that the CAA mandate measures to prevent the significant deterioration of air quality in areas where the NAAQS were being met. *Alabama Power Co. v. Costle*, 636 F.2d 323, 346-47 (D.C. Cir. 1979). Prior to 1973, the EPA did not require states to control new sources of pollution that poses no threat to ambient standards, because Section 110 of the CAA did not explicitly address "potential deterioration of ambient air quality" in those areas where ambient pollutant levels were lower than NAAQS. *Id.* at 346-47.

³⁴ *New York*, 413 F.3d at 12;. Initially, the PSD program applied to new sources only. Months later, Congress corrected it by expanding the definition of "construction" under the PSD provisions to include modified existing sources through "technical and conforming amendments" to the CAA. Pub. L. No. 95-190, 91 Stat. 1293, 1402 (1977). The 1977 Amendments also required preconstruction review process for new or modified major sources in areas that failed to meet NAAQS, the nonattainment areas. *New York*, 413 F.3d at 12. Collectively, the Nonattainment New Source Review Program (NNSR) and the PSD program were known as New Source Review program (NSR). *Id.* at 12-13. 12.

³⁵ Emily Miller, *New York v. United States Environmental Protection Agency: The United States Court of Appeals for the District of Columbia Circuit Provides Clarification on the EPA's 2002 clean Air Act Ruling*, 13 U. BALT. J. ENVTL. L. 101, 102 (2005).

the statute.³⁶ In 1974, because of the implementation of the regulatory PSD program, the EPA introduced the term "emission rate" in its definition.³⁷ The regulation's preamble stated that the definition of modified source was meant to be the same as the definition used in the NSPS.³⁸ In 1975, the EPA amended the NSPS and adopted two different definitions of "modification."³⁹ The first definition included "any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant...emitted into the atmosphere by that facility."⁴⁰ The same term modification was also defined as "'any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any [regulated] pollutant,' measured not in tons per year, but in kilograms per hour."⁴¹

In 1977, when Congress incorporated the regulatory PSD program into the Amendments, the definition of modification was cross-referenced to the definition provided in the NSPS.⁴² The PSD statutory definition incorporated not only the NSPS statutory definition of modification, but also the regulations implementing the NSPS program.⁴³ At that time, the 1975 NSPS regulations were still in effect.⁴⁴ In 1978, the EPA promulgated its PSD regulation which defined a new term "major modification" as "physical change, change in the method of operation of, or addition to a stationary source which increases the potential emission rate of any air pollutant regulated under the Act."⁴⁵ By doing so, the EPA

³⁶ *Id.*

³⁷ *New York*, 413 F.3d at 12. "Modification" or "modified source." means "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." *Id.* (quoting 39 Fed.Reg. 42,510, 42,514 (Dec. 5, 1974)).

³⁸ *Id.* (quoting 39 Fed. Reg. 42,513).

³⁹ *Duke*, 411 F.3d at 543.

⁴⁰ 40 Fed.Reg. at 58,418 (Dec. 16, 1975), (codified at 40 C.F.R. § 60.2(h) (1976)).

⁴¹ See 40 Fed. Reg. 58,419,58,416, (Dec. 16, 1975) (codified at 40 C.F.R. § 60.14(a)-(b) (1976)).

⁴² See generally Gremillion, *supra* note 2, at 335.

⁴³ *United States v. Alabama Power Co.*, 372 F. Supp. 2d 1283, 1295 (N.D. Ala. 2005).

⁴⁴ *New York v. United States*, 413 F.3d 3, 19 (D.C. Cir. 2005).⁴⁴

⁴⁵ Prevention of Significant Air Quality Deterioration, 43 Fed.Reg. 26,388,26,380, 26,403-04 (June 19, 1978).

limited the PSD permit requirement to major modifications only. The reason for this limitation could be explained by the ruling of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in 1979 where the definition of "major emitting facility" was challenged by industry petitioners.⁴⁶ In its opinion, the District of Columbia Circuit made a conclusion that Congress intended to regulate stationary sources based on their sizes because these sources were the primary pollution sources of the nation's air and were financially capable of bearing the substantial regulatory cost imposed by the PSD permit requirement.⁴⁷ Disagreeing with the EPA, the D.C. Circuit held that major emitting facilities should not be regulated based on future "potential" to emit.⁴⁸

Because of the court's ruling, the EPA revised its regulation in 1980 defining major modification as any change that would result in a significant increase in "actual" emissions after netting.⁴⁹ The regulation further defined actual emissions of a particular date as the average rate in tons per year actually emitted in a two-year period.⁵⁰ Actual emission was to be calculated by using "the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted" during the particular two-year period. For those emissions units which had not begun normal operations on that particular date, actual emissions were to "equal

⁴⁶ *Alabama Power Co.*, 636 F.2d at 351.

⁴⁷ *Id.* at 352-53.

⁴⁸ John Manuel Rawicz, Note, *Options Available to Reduce the Potential to Emit of a Stationary Source under Section 112 and Title V of the Clean Air Act*, 2 ENVTL. LAW.L. 537, 540 (1996).

⁴⁹ 45 Fed. Reg. 52,676, 52,700, 52,735 (Aug. 7, 1980). Netting is part of the EPA's emissions trading program which "allows the exchange of emission rights both externally (between firms) and internally (within a single firm)." Robert W. Hahn & Gordon L. Hester, *Where Did all The Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 Yale J. ON REG. 109, 113, 118 (1989). "Netting permits an internal trading, not external trading." *Id.* at 132 n.125. It allows a facility to modify an existing emission source without reaching a "significant net emissions increase," and thus allows the facility to avoid the costly PSD permit requirement. Justin Savage, *Confiscation of Emission Reduction Credits: The Case for Compensation under the Taking Clause*, 16 VA. ENVTL. L.J. 227, 234 (1997). However, Netting does not allow a facility to avoid NSPS requirement. *Id.*

⁵⁰ 45 Fed. Reg. 52,735-37 (Aug. 7, 1980) (to be codified at 40 C.F.R. 51, 52, 124).

the potential to emit of the unit on that date.”⁵¹ Further, “significant” meant an emission rate that would equal or exceed one or another enumerated threshold expressed in “tons per year.”⁵² Finally, for permit purposes, a mere increase in operation hours of or in the production rate would not amount to a “modification.”⁵³

In the preamble of the 1992 regulations, the EPA clarified that the PSD analysis focused on “significant net emissions increases in total annual emissions resulting from a physical change to the unit,” whereas the NSPS analysis focused on the maximum potential hourly emissions immediately before and after the change.”⁵⁴ “Emissions increased for NSPS purposes were determined by changes in the hourly emissions rates at maximum physical capacity. On the other hand, the [PSD] regulations examined total emissions to the atmosphere.”⁵⁵

B. The Chevron Doctrine

In our modern administrative state, the legislative branch is responsible for writing statutes and the judicial branch and executive branch, in the form of courts and administrative agencies, such as the EPA, respectively, share responsibility for interpreting them.⁵⁶ When a court reviews administrative decisions, the different interpretive voices produced by these two branches often clash because of institutional differences in political accountability, functions, roles, and expertise.⁵⁷ The problem of inconsistent interpretative voices is further complicated by inconsistent standards in the choice of interpretations adopted by different courts.⁵⁸ Fortunately, the confusion and inconsistency in federal courts had

⁵¹ *Id.*

⁵² *Duke*, 127 S. Ct. at 1429 (quoting 40 C.F.R. § 51.166(b)(23)(k)).

⁵³ 40 C.F.R. § 51.166(b)(2)(iii)(f).

⁵⁴ 57 Fed.Reg. 32,314, 32,316 (July 21, 1992) (to be codified at 40 C.F.R. 51, 52, 60)..

⁵⁵ *Id.*

⁵⁶ See Ellen P. Aprill, Symposium, *Theories of Statutory Interpretation*, 38 LOY. L.A. L. REV. 2081 (2005).

⁵⁷ *Id.* at 2084.

⁵⁸ Steven S. Davis, *The Federal Chevron Doctrine: Once and Future Law in Missouri?* 55 J. MO. B. 126 (1999). The author points out that some courts assert de novo review and others apply objective test. *Id.*

long been solved in 1984 by the ruling of the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel*.⁵⁹

Under the *Chevron* doctrine, a federal court need not defer to administrative interpretation if Congress has directly spoken to the specific issue in question.⁶⁰ The Court reasoned that when the statute is clear, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁶¹ However, if a court determines that Congress is silent or the statute is ambiguous with respect to the specific issue, the court must determine “whether the agency’s answer is based on a permissible construction of the statute.”⁶² The *Chevron* ruling is justified on two grounds: first, the power is specifically delegated to administrative agencies by Congress, second, the recognition that administrative agencies are more competent than courts because of political accountability and agencies’ expertise in their area.⁶³

C. Judicial Interpretation

It was well-settled that “to determine whether a physical change constitutes a modification for purposes of the NSPS, the EPA must determine whether the change increases the facility’s hourly rate of emission.”⁶⁴ However, for purposes of the PSD permit, disputes arose as to how to determine whether a change increased the facility’s actual emissions under the EPA’s 1980 final rule.⁶⁵ The industry insisted that the PSD permit was triggered only when a facility’s maximum hourly emissions rate went up because of a physical or operational change.⁶⁶ According to the EPA, the PSD permit was triggered when a facility’s past

⁵⁹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

⁶⁰ *Id.* at 842-43.

⁶¹ *Id.*

⁶² *Id.* at 843.

⁶³ William Andersen, *Chevron in the State: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1017-18 (2006).

⁶⁴ See Symposium, *Is a Rule by Any Other Name Still a Rule? Case Answers under the Clean Air Act*, 18 N. KY. L. REV. 271, 279 (1991). The hourly rate is expressed in kg/hr as opposed to ton/year expressing the annual emissions rate. *Id.*

⁶⁵ *New York v. United States*, 413 F.3d 3, 15 (D.C. Cir. 2005).

⁶⁶ *Id.*

two-year average annual emissions was less than future annual emissions expressed in ton/year after netting.⁶⁷ In short, the battle between the EPA and the industry was whether the future emissions should have been calculated by the “actual-to-projected-actual” test or by the “actual-to-actual” test.⁶⁸

The “actual-to-projected-actual” test on which EPA insisted in *Duke* was developed by the Seventh Circuit in *Wisconsin Electric Power Company v. Reilly* (“*WEPCO*”).⁶⁹ In *WEPCO*, the court held that for PSD permit purposes mere increase in operation hours or in production rates did not constitute a physical change or a change in the method of operation.⁷⁰ This “production rate/operation hours” exclusion was to allow facilities to take advantage of fluctuating market conditions.⁷¹ The *WEPCO* court also held that the “actual-to-potential” test adopted by the EPA to calculate the plant’s post-project emissions was not supported by existing regulations.⁷² Under the actual-to-potential test, the post-project emissions were calculated assuming the source would operate at its full capacity in the future.⁷³ In *WEPCO*, the EPA projected the post-project emissions on the basis of non-stop, continuous operations because *WEPCO* had the potential to run 24 hours per day, 365 days per year.⁷⁴ The court concluded that in projecting post-project emissions, the EPA must consider future operations as the source intended and as it was normally operated.⁷⁵

The EPA responded to *WEPCO*’s decision by adopting the “actual-to-projected-actual” test comparing actual emissions before the change to the projected actual future emissions.⁷⁶ This test was followed in 2003 by *United States v. Ohio Edison Company*.⁷⁷ In this case, Edison undertook

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Wis. Elec. Power Company v. Reilly*, 893 F.2d 901 (7th Cir. 1990) [hereinafter *WEPCO*].

⁷⁰ *Id.* at 901 n.11.

⁷¹ See 45 Fed.Reg. 52676, 52704 (Aug. 7, 1980).

⁷² *WEPCO*, 893 F.2d at 918.

⁷³ *Id.* at 916.

⁷⁴ *Id.*

⁷⁵ *Id.* at 918 (citing *Ala. Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)).

⁷⁶ *New York v. United States*, 413 F.3d 3, 16 (D.C. Cir. 2005).

⁷⁷ *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003).

eleven construction projects replacing major components to extend the lives of units built before 1970.⁷⁸ The court rebutted Edison's "actual-to-actual" test noting that it would allow utility companies to undertake modifications without a PSD permit, a position that was expressly rejected by Congress.⁷⁹ The court confirmed that the production rate/operation hours exclusion was applicable only when there was no physical or operational change at an electric generating unit.⁸⁰ It rejected the "actual-to-actual" test for three reasons: first, it failed to accurately reflect the obligation imposed by the CAA to project future emissions; second, it failed to measure emissions in tons per year to determine whether the PSD compliance was triggered; and finally, a wait-and-see approach to determine if the post-project actual emissions increased or decreased conflicted with the legislative intent of pre-construction review.⁸¹ With respect to Edward Reich's interpretation, the court viewed it as contrary to the plain language of the CAA and EPA's regulations.

In 2005, relying on *Duke*,⁸² *United States v. Alabama Power Company* took the opposite position of the *Edison* court holding that the EPA's interpretation was not entitled to deference under the *Chevron* doctrine.⁸³ The court compared *Duke* and *Edison* concluding that *Duke*'s decision was more persuasive because its analysis was "clearly more thorough, comprehensive and rigorous."⁸⁴

In *New York v. U.S.E.P.A.*, the D.C. Circuit held that there was no indication that Congress had intended to incorporate the NSPS regulatory definition of "modification" into the PSD statute.^{85,86} The court came to this conclusion relying on the fact that there were two different definitions of "modification" in the 1975 regulations and Congress did not expressly indicate one or the other.⁸⁷ Therefore, under the *Chevron* doctrine the EPA

⁷⁸ *Id.*

⁷⁹ *Id.* at 875.

⁸⁰ *Id.* at 876.

⁸¹ *Id.* at 882.

⁸² *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 627 (M.D.N.C. 2003).

⁸³ *United States v. Alabama Power*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005).

⁸⁴ *Id.* at 1305-06.

⁸⁵ *New York v. United States*, 413 F.3d 3 (D.C. Cir. 2005).

⁸⁶ *Id.* at 19-20.

⁸⁷ *Id.* at 20.

did not unlawfully interpret prior statutory definitions and rules by taking account of the high level of technical expertise.⁸⁸ However, unlike *Duke*, the court purposefully avoided to address if Congress intended to interpret identically across the NSPS and PSD programs.⁸⁹

When the Seventh Circuit revisited the issue in *U.S. v. Cinergy Co.* in 2006, it affirmed the district court's decision that the net emission rate was to be calculated based on an annual, rather than an hourly, emission rate.⁹⁰ The court first stated that "actual operating hours" was more naturally read to mean the total number of hours that the plant was in operation.⁹¹ Next, the court noted that Cinergy's interpretation would discourage replacement of old emitting facilities by allowing the facilities to undertake physical change to increase output by longer operation hours each day without taking measures to prevent increased pollution generated by the enhanced output.⁹² The court pointed out that the *Duke* court stepped out of bounds because *Duke*, as well as *Cinergy*, was not arguing on the meaning but the validity of EPA's regulations which was beyond a regional circuit's jurisdiction.⁹³ Finally, the court stated that the same word could mean different things in different parts of a statute if it was employed with different intent.⁹⁴ The NSPS was intended to be an "inputs" (technical) oriented program, whereas the PSD was an "output" (pollution) oriented program.⁹⁵ Therefore, it was natural to interpret "modification" under the PSD provisions broadly to "prevent loophole that would allow pollution to soar unregulated."⁹⁶

⁸⁸ *Id.* at 18, 20.

⁸⁹ *Id.* at 20.

⁹⁰ *United States v. Cinergy Co.*, 384 F.3d 705 (7th Cir. 2006).

⁹¹ *Id.* at 708.

⁹² *Id.* at 709.

⁹³ *Id.* at 709-10.

⁹⁴ *Id.* at 710 (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

⁹⁵ *Id.* at 710-11.

⁹⁶ *Cinergy*, 384 F.3d at 711.

D. Fair Notice

In *Edison* and *Cinergy*, both courts held that energy companies had “fair notice” regarding the methodology for calculating emissions increase.⁹⁷ In *Edison*, the court concluded that fair notice of precise computation was not an issue so long as Edison could have predicted that its projects would result in substantial emissions increase.⁹⁸ Agreeing with *Edison*’s conclusion, the *Cinergy* court further concluded that the plain language and most logical reading of the EPA’s regulations, that the PSD permit was triggered by annual emission rate, sufficed to show fair notice.⁹⁹ The court bolstered its ruling by the fact that *Cinergy* should have been fairly notified by *WEPCO* decision and could have sought an applicability determination from the EPA had it been uncertain about whether its projects needed PSD permits.¹⁰⁰

IV. INSTANT DECISION

In *Duke*, the Supreme Court held that the EPA was not required to interpret the term “modification” identically in two different parts of the CAA, namely, the PSD provisions and the NSPS provisions.¹⁰¹ It began with a rebuttal of the “effectively irrebuttal presumption” asserted by the Fourth Circuit, stating that in the same statute a given term, sharing the same definition, may take on “distinct characters” to serve “distinct statutory objectives calling for different implementing strategies.”¹⁰² Based on this conclusion, the Court reconciled *Robinson v. Shell Oil Co.*¹⁰³ and *Rowan Cos. v. United States*¹⁰⁴ by pointing out that the inconsistent outcomes were derived from different facts with the same

⁹⁷ *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 878 (S.D. Ohio 2003); *see also Cinergy*, 495 F. Supp. 2d at 905.

⁹⁸ *Edison*, 276 F. Supp. 2d at 880.

⁹⁹ *Cinergy*, 495 F. Supp. 2d at 907.

¹⁰⁰ *Id.* at 906.

¹⁰¹ *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423,, 1437 (2007) (citing *Atlantic Cleaners & Dyers, Inc. v. United States*, U.S., 286 U.S. 427, 433 (1932)).

¹⁰² *Id.* at 1432-33.

¹⁰³ *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

¹⁰⁴ *Rowan Cos. v. United States*, 452 U.S. 247 (1981).

underlying statutory interpretation principle.¹⁰⁵ Being unable to ascertain the legislative intent of the cross-reference through examination of the text and history of the technical amendment, the Court concluded that “EPA’s interpretation needed only to fall within the limits of what was reasonable as set by the CAA’s common definition.”¹⁰⁶ However, this conclusion was challenged by the concurring opinion which stated that the EPA was barred from adopting different interpretations of the term “modification” because Congress had explicitly linked the PSD’s definition of modification to the NSPS.¹⁰⁷

To show that the PSD permit requirement for a “major modification” was not based on an increase in hourly rates of emission, the Court engaged in a lengthy textual analysis of relevant provisions. It pointed out that the regulatory definitions of the 1980 PSD regulations were specified either in terms of “annual rate” or “actual emissions averaged over time”, which “[could] not be squared with a regime under which ‘hourly rate of emissions’ is dispositive.”¹⁰⁸ The court also refuted the trial court’s interpretation of the production rate/operation hours exclusion that an increase in the hourly rates of emission was a prerequisite to a PSD permit.¹⁰⁹ According to the Court, the exclusion was to allow private companies to take advantage of favorable market conditions by simply adjusting operation hours.¹¹⁰ Finally the Court discredited the EPA official’s letter as unpersuasive by referring to a

¹⁰⁵ *Id.* at 1432-33. In *Robinson*, the definition of the term “employee” was “consistent with either current or past employment,” the Court held that each section of Title VII must be examined for further meaning to resolve the issue in question. *Robinson*, 519 U.S. at 343-44. In *Rowan*, with respect to the term “wages”, the Court held that “the income tax treatment was the proper one across the board,” because of a “congressional concern of the interest of simplicity and ease of administration.” *Rowan*, 452 U.S. at 247.

¹⁰⁶ *Duke*, 127 S. Ct. at 1433-34 (citing *New York v. United States*, 413 F.3d 3, 19 (D.C. Cir. 2005)).

¹⁰⁷ *Id.* at 1437.

¹⁰⁸ *Id.* at 1434. Under 40 CFR §§ 51.166(b)(21)(ii), (23)(i), and (b)(3) the terms “significant” and “net emissions increase” were specified in annual rate. § 51.166(b)(21)(ii) was to provide a measuring formula to determine the total emission of the actual operation. *Id.*

¹⁰⁹ *Id.* at 1435.

¹¹⁰ *Id.* (citing the preamble to the 1980 PSD regulations).Amendment.

memorandum written by Don R. Clay, Acting Assistant EPA Administrator for Air and Radiation.¹¹¹

Regarding the Fourth Circuit's implicit challenge on the validity of the EPA's regulations, the Court agreed that it triggered the judicial review that could only be obtained during enforcement proceedings in the D.C. Circuit within sixty days of the EPA rulemaking.¹¹² However, the Court did not rule on the validity of the EPA's regulations because the Fourth Circuit did not believe that its analysis triggered validity issues and did not rule on its effect.¹¹³

V. COMMENT

The U.S. Supreme Court's ruling on *Environmental Defense v. Duke Energy Corp.* is a victory to the EPA and environmental groups who have been devoted to protecting the nation's air resources.¹¹⁴ *Duke* is a case of judicial review of administrative decisions, governed by the *Chevron* doctrine.¹¹⁵ Although the Court did not mention the *Chevron* doctrine in its opinion, it laid out the scheme for the Fourth Circuit to follow accordingly. Under the *Chevron* doctrine, the first step is to ascertain whether Congress had directly spoken to the specific issue in question.¹¹⁶ Applying this rule to *Duke*, the question was whether Congress had directly spoken to, for purposes of the PSD permit requirement, the definition of modification by making a cross-reference to the section defining the same term for the NSPS purposes. According to the majority's opinion, neither the text nor the legislative history suggested that Congress had directly spoken to the issue and a cross-reference alone was not an unambiguous congressional code.¹¹⁷ When a

¹¹¹ *Id.* at 1436 (“[W]hen ‘plans to increase production rate or hours of operation are inextricably intertwined with the physical changes planned,’ they are ‘precisely the type of change in hours or rate of[f] operation that would disturb a prior assessment of a source’s environmental impact and should have to undergo PSD review scrutiny.’”).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *United States v. Alabama Power Co.*, 372 F. Supp. 2d 1283, 1292 (N.D. Ala. 2005)..

¹¹⁵ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹¹⁶ *Id.* at 842-43.

¹¹⁷ *Duke*, 127 S. Ct. at 1433.

court determines that the statute is ambiguous, the *Chevron* doctrine requires the court to determine whether the agency's decision is based on a permissible construction of the statute."¹¹⁸ The *Duke* court pointed out that the EPA's interpretation deserved deference as long as it was reasonably permissible within the limits set by the CAA's common definition.¹¹⁹ In ascertaining the reasonableness of the PSD regulations, the statutory interpretation principle was that the EPA was not required to interpret "modification" identically across the PSD and NSPS programs. In other words, for purposes of the PSD permit the total emission level was allowed to be measured in ton/year as long as it was reasonably permissible by the CAA.

The *Chevron* doctrine recognizes that administrative agencies are more competent than courts because of political accountability and their expertise.¹²⁰ In *Duke*, the core problem for which the EPA's expertise was held politically accountable was to address the serious air pollution caused by large energy companies.¹²¹ These energy companies were financially capable of bearing the substantial regulatory cost imposed by the PSD permit requirement but chose not to do so and wrongfully took advantage of their grandfathered status.¹²² The meaning of "modification" has taken on such a particular significance simply because grandfathering regulations in the CAA subject unmodified existing sources, power plants built before 1970, to less stringent requirements than their modified counterparts.¹²³ The real and original purpose of these grandfathering regulations was to ease the transition of the energy industry into the next generation of power plants.¹²⁴ Members of Congress had once optimistically estimated that the transition would have been completed in five to ten years.¹²⁵ However, the actual-to-actual test arguably provided a loophole which was gripped by large energy companies as a free permit to

¹¹⁸ *Chevron*, 467 U.S. at 843. .

¹¹⁹ *Duke*, 127 S. Ct. at 1433.

¹²⁰ William Andersen, *Chevron in the State: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1017-18 (2006).

¹²¹ Gremillion, *supra* note 2, at 333.

¹²² *Id.*

¹²³ *New York v. United States EPA*, 413 F.3d 3, 11 (D.C. Cir. 2005)..

¹²⁴ Gremillion, *supra* note 2, at 343.

¹²⁵ *Id.*

extend total operation hours of grandfathered plants without investing in new pollution-abatement technologies that prevent increased pollution generated by physical and/or operational changes.¹²⁶ If the actual-to-actual test was recognized by circuit courts, the PSD permit program would be successfully twisted by the industry into a program providing “perverse incentives” to allow grandfathered plants to emit even more pollutants than without the program.¹²⁷ The test would strongly discourage the replacement of old emitting facilities and delay the energy industry as a whole from moving toward a modern and cleaner generation.¹²⁸

Before the Supreme Court handed down its opinion, some environmentalists worried that if the Court would reach the merits of Duke’s claim, the Court’s ruling, regardless of its outcome, would threaten the integrity of the exclusive subject matter jurisdiction of the D.C. Circuit and the temporal limitations mandated by the CAA.¹²⁹ The serious consequence would be pervasive litigations as a result of multi-jurisdictions. Because the Court engaged in a lengthy textual analysis of the EPA’s regulations, it appeared that the Court would reach the merit of Duke’s claim. However, the Court skillfully avoided infringing the exclusive jurisdiction of the D.C. Circuit by a narrow holding on a statutory interpretation principle. The Court did not just stop there; it informed the Fourth Circuit that its analysis did indeed trigger the form of judicial review only available in the D.C. Circuit which must be done within sixty days of the EPA’s rulemaking.¹³⁰ Therefore, on remand the Fourth Circuit is bound by section 307(b) of the CAA and, should the Fourth Circuit insist on pursuing the same route, it does not have the jurisdiction to rule on the issue. In other words, the D.C. Circuit will no longer be available to Duke or other energy companies even if the circuit courts hold the EPA’s regulations invalid.

The fair notice claim argued by Duke is unlikely to stand. Among all of the reasons provided by the circuit courts in their opinions, the strongest one is the nature of the pre-construction review required by the

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *United States v. Cinergy Corp.*, 458 F.3d705, 709 (7th Cir. 2006).

¹²⁹ *Gremillion*, *supra* note 2, at 333.

¹³⁰ *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1436 (2007).

PSD program. As long as Duke had known about the pre-construction review and, although it had been uncertain about the regulation, it had the good faith intent to comply, it could have always sought an applicability determination from the EPA.¹³¹

By holding that the EPA was not required to interpret the term “modification” identically in two different parts of the CAA, the Supreme Court entrusted the power to the EPA to interpret the term “modification” as the EPA saw fit to battle serious air pollution generated by grandfathered power plants. When the term “modification” can be interpreted differently to provide the functions essential to the NSPS program and the PSD program, the highly polluting grandfathered plants will then be regulated under the dual systems as Congress originally designed in the Seventies. Only under the interplay of the NSPS and the PSD, the grandfathered plants will be replaced with modern facilities and the power industry as a whole will be moving towards a modern and cleaner generation.

VI. CONCLUSION

The recent decision of the U.S. Supreme Court in *Duke* is a victory to the EPA and environmental groups who have been battling with serious air pollution caused by highly polluted but virtually unregulated coal burning electric power plants for over three decades. By holding that the EPA is not required to interpret the term “modification” in different parts of the CAA identically, the Supreme Court entrusted the power to EPA to interpret the term as the agency saw fit to achieve the goals set by Congress when enacting the Amendments to the CAA in the seventies. When “modification” can be interpreted differently to serve the desired functions of the NSPS program and the PSD program, the EPA will be better equipped to deal with the serious air pollution caused by the grandfathered power plants. By maintaining the integrity of the exclusive subject matter jurisdiction of the D.C. Circuit, the Court’s ruling encourages the energy industry to move on from grandfathered status towards a modern and cleaner new generation.

Hannah Tien

¹³¹ *Cinergy*, 495 F. Supp. 2d at 906.