

Upcoming ELS Activities

Stay up-to-date at:
www.law.uiowa.edu/groups/els

JANUARY

Thursday, January 11

Spring meeting

Recycling Day

Brown bag lunch with City Carton Recycling

Tuesday, January 30 — February 1

Bake Sale!

FEBRUARY

Thursday, 22 at 12:40 PM

Brown bag with Tom Podzimek of Cedar Rapids City Council

MARCH

Saturday, 3rd

Raptor center visit

did you know? environmental facts

read more at www.seac.org (student environmental action coalition)

-  More than 20,000,000 Hershey's Kisses are wrapped each day, using 133 square miles of tinfoil. Not many people realize all that foil is recyclable.
-  McDonald's saves 68,000,000 pounds of packaging per year just by pumping soft drink syrup directly from the delivery truck into tanks in the restaurant, instead of shipping the syrup in cardboard boxes.
-  Rainforests are being cut down at the rate of 100 acres per minute.
-  A single quart of motor oil, if disposed of improperly, can contaminate up to 2,000,000 gallons of fresh water.
-  The U.S. is the #1 trash-producing country in the world at 1,609 pounds per person per year. This means that 5% of the world's people generate 40% of the world's waste.
-  During the time it takes you to read this sentence, 50,000 12-ounce aluminum cans are made.
-  A typical family consumes 182 gallons of pop, 29 gallons of juice, 104 gallons of milk, and 26 gallons of bottled water a year.
-  Approximately 1 billion trees worth of paper are thrown away every year in the U.S.
-  Out of ever \$10 spent buying things, \$1 goes for packaging that is thrown away. Packaging represents about 65% of household trash.
-  Recycling one aluminum can saves enough energy to run a TV for three hours -- or the equivalent of a half a gallon of gasoline.
-  The Washington, DC-based Institute For Local Self-Reliance calculates that recycling creates 36 jobs per 10,000 tons of material recycled compared to 6 jobs for every 10,000 of tons brought to traditional disposal facilities (6 times higher employment!)

United States v. Duke Energy: Jurisdiction and Modification

By Jacob Larson

This fall, the Supreme Court will address two serious issues of the Clean Air Act (CAA) in *United States v. Duke Energy*. First, whether the D.C. Circuit's exclusive jurisdiction over direct review of Environmental Protection Agency's (EPA) nationally applicable rules and regulations limits other circuit's interpretations during an enforcement action.¹ Second, whether a coal-fired power plant's projects constitute "modifications" if there is no increase in the maximum hourly emissions rate.² In the case, the Fourth Circuit affirmed a district courts ruling that Duke did not violate the Prevention of Significant Deterioration (PSD) provisions of the CAA.³

Background

A short history and explanation for certain provisions of the CAA will aid understanding of the issues. This case involves two main sections of the CAA, the PSD program ([42 U.S.C. §§ 7470-92](#)) and the New Source Performance Standards (NSPS) ([42 U.S.C. § 7411](#)), which combine to create the New Source Review (NSR) regulations. The EPA has promulgated regulations under the NSR provisions to ensure attainment of the National Ambient Air Quality Standards (NAAQS), which establish maximum concentrations of allowable pollutants in the air.

Congress enacted the NSPS in 1970 to regulate newly constructed and modified sources of pollution at power plants and 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."⁴ In 1975, the EPA promulgated regulations which used virtually identical definition for "modification" but elaborated upon the definition by reference to an increase in the hourly emission rate.⁵

The NSPS were not entirely successful, and the courts ordered the EPA to establish regulations to prevent the degradation of the air covering areas already in compliance with the NAAQS. The EPA then promulgated the PSD regulations, which Congress codified in 1977. The PSD regulations applied to the "construction" and "modification" of new facilities as used in the NSPS.⁶ The PSD program requires anyone engaged in "major modifications" to obtain a permit.⁷ The EPA has defined "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase."⁸ The EPA measures the average rate, in tons per year, of an actual unit (pollution) emitted.⁹

United States v. Duke Energy

Jurisdiction Issue

The CAA, under § 307(b)(1) of the CAA, states that only the D.C. Circuit may review the EPA's nationally-applicable regulations and standards implementing the CAA.¹⁰ In addition, § 307(b)(2) provides that these regulations may not be subject to judicial review in civil or criminal enforcement proceedings.¹¹ The issue of whether the Fourth Circuit's ruling infringes on the D.C. Circuit's exclusive jurisdiction must be resolved in order to reach the underlying substantive issue. However, if the Supreme Court finds that there was a violation, it is unlikely that it will decide the substantive issue.

Modification Issue

Duke Energy is a coal-fired power plant that provides en-

ergy to North and South Carolina.¹² As a result of aging infrastructure, Duke undertook twenty-nine projects to repair or replace existing power plant components, which would allow the units to increase their daily hours of operation.¹³ It is not disputed that Duke did not apply for new PSD permits from the EPA for the construction projects, which gave rise to the current enforcement action.

The EPA brought an enforcement action against Duke Energy alleging that the projects violate the PSD provisions of the CAA. The EPA argues that the projects constitute "major modifications" under the PSD, which includes any "physical changes leading to a significant net emissions increase."¹⁴ The EPA is not claiming that the hourly emission rate increased, but that the annual net emissions increased because of the increased hours of operations for the units.¹⁵ Duke has countered that it has not violated the PSD requirements because there was no increase in the unit's levels of emissions, and that under the PSD, a "net emission" increase will only result if there is an increase in the hourly rate of emissions.¹⁶ Thus, Duke maintains that they were not required to obtain the PSD permits.

The Fourth Circuit agreed with Duke based on Congress's incorporation of the NSRS definition for "modification," which requires a physical change to create an hourly increase in emissions, into the PSD definitions in 1977.¹⁷ The Court cited Congress's express definition of "modification" in the NSPS, and then Congress's express direction to incorporate the definition for "modification" into the PSD program.¹⁸ Furthermore, the Court pointed out that, under *Chevron* analysis, where Congress has spoken on an issue it is the end of the matter.¹⁹ Here, Congress has ordered that the agency define one term identically for two different statutory provisions, the agency is not allowed to re-interpret the definition.²⁰

The EPA emphasizes the vital differences between the NSRS and PSD provisions as a reason to use different interpretations.²¹ The PSD program exists to prevent degradation of air quality in clean areas, whereas the NSRS exists to ensure that sources, wherever they are located utilize specific pollution control technologies. The EPA points out that these differences have led this and other courts to approve different regulatory definitions for an identical statutory term in the two statutes.²² However, the Court reasoned that in the prior cases, there was a definition for the term in one statutory provision, but not in the other.²³ The Court distinguished the prior cases from the present one because here, there is a definition for the term in one statutory provision, and the other statutory provision is directed to utilize the same definition.²⁴

The Supreme Court has granted *certiorari*, and oral arguments were held on November 1, 2006.

FOOTNOTES

¹ *U.S. v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005).

² Van Ness Feldman, P.C., Supreme Court to Address Lower Courts' Jurisdiction to Review the Definition of "Modification" in EPA's NSR and NSPS Regulations, [http://www.vnf.com/content/alerts/alert060106_last visited October 19, 2006](http://www.vnf.com/content/alerts/alert060106_last%20visited%20October%2019%202006).

³ *U.S. v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005) (last visited October 19, 2006).

⁴ *U.S. v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005).

⁵ *42 U.S.C. § 7411(a)(4)* (1990).

⁶ *U.S. v. Duke Energy*, 411 F.3d 539 (4th Cir. 2005) *petition for cert. granted*.

⁷ *Id.* at 543.

⁸ *Id.*

⁹ *40 C.F.R. § 51.166(b)(2)(i)* (1987).

¹⁰ *40 C.F.R. § 51.166(b)(2)(iii)* (1987).

¹¹ See Van Ness Feldman.

¹² See Van Ness Feldman.

¹³ *U.S. v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005).

¹⁴ *Id.*

¹⁵ *40 C.F.R. § 51.166(b)(2)(i)* (2006).

¹⁶ *Duke Energy*, 411 F.3d at 544.

¹⁷ *Id.* at 545.

¹⁸ *Id.* at 550.

¹⁹ *Id.* at 547.

²⁰ *Id.* at 548.

²¹ *Id.*

²² *Id.* at 549.

²³ *Id.*

²⁴ *Duke Energy*,

411 at 550.

²⁵ *Id.*

Serious issues about the Clean Air Act are before the Supreme Court this fall.