No. 05-848

In the Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL., PETITIONERS

v.

DUKE ENERGY CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

GREER S. GOLDMAN
TODD S. KIM
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

In this enforcement action under the Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act (CAA), the court of appeals held that the Environmental Protection Agency (EPA) must interpret certain PSD regulations construing the statutory term "modification" in a manner consistent with EPA's regulations construing that term in the separate New Source Performance Standards (NSPS) program. The questions presented are:

1. Whether the court of appeals lacked jurisdiction by virtue of Section 307(b) of the CAA, 42 U.S.C. 7607(b), which provides that nationally applicable regulations that EPA issues to implement the CAA may be reviewed only through properly filed petitions for review, not in enforcement actions.

2. Whether the CAA requires EPA to interpret the statutory term "modification" consistently in its PSD and NSPS regulations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 05-848

ENVIRONMENTAL DEFENSE, ET AL., PETITIONERS

v.

DUKE ENERGY CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 411 F.3d 539. The opinion of the district court (Pet. App. 22a-84a) is reported at 278 F. Supp. 2d 619, and an earlier order is reported at 171 F. Supp. 2d 560.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2005. Petitions for rehearing were denied on August 30, 2005 (Pet. App. 20a-21a). On November 17, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 28, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this enforcement action, the United States alleged that Duke Energy Corporation (Duke) failed to comply with the Prevention of Significant Deterioration (PSD) requirements of the Clean Air Act (CAA) when it undertook refurbishment projects at coal-fired power plants in North and South Carolina. Petitioners intervened as plaintiffs. On cross-motions for summary judgment, the district court agreed with Duke's view of the types of projects that constitute "modifications" subject to the PSD program. The Fourth Circuit affirmed. Pet. App. 1a-19a.

1. The Clean Air Act was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). It directs the Environmental Protection Agency (EPA) to promulgate National Ambient Air Quality Standards (NAAQS) specifying allowable concentrations of air pollutants. 42 U.S.C. 7409. States in turn must develop plans to achieve and maintain NAAQS. 42 U.S.C. 7410.

The CAA establishes various additional programs to protect air quality. The PSD program, a part of the larger New Source Review (NSR) program, imposes various requirements that must be satisfied when certain emissions sources are "constructed." 42 U.S.C. 7475(a). The PSD provisions define "construction" to include "modification," which is defined in turn by reference to the statutory provisions for the separate and distinct New Source Performance Standards (NSPS) program. 42 U.S.C. 7479(2)(C) ("The term 'construction' * * * includes the modification (as defined in [the NSPS provisions]) of any source or facility."). The NSPS provisions define the term "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." 42 U.S.C. 7411(a)(4).

Although NSPS and PSD are related in some respects, they have certain differences. The NSPS program, enacted in 1970, directs EPA to promulgate technology-based performance standards for new or modified facilities in certain categories. 42 U.S.C. 7411. Those standards are based on application of the best demonstrated system of emission reduction and apply regardless of the actual effect of a source's emissions on local air quality. *Ibid.* By contrast, Congress enacted PSD in 1977 to prevent a significant decline of air quality in areas where ambient air quality standards were being met. 42 U.S.C. 7470. Unlike NSPS, the PSD program focuses directly on the effect of new construction and modification on local air quality. 42 U.S.C. 7470(1), 7475(a)(3).

Although PSD and NSPS share the statutory definition for the term "modification," EPA has issued regulations interpreting components of that definition differently for the two programs. As relevant, the PSD regulations applicable here differed from existing NSPS regulations on how to measure whether a "change" at a facility "increases" emissions and thus constitutes a modification under 42 U.S.C. 7411(a)(4). The NSPS regulations issued in 1975 considered a change's effect on maximum hourly emission rates (measured in kilograms per hour), while the PSD regulations issued in 1980 considered total annual emissions (tons per year).[1] Compare

[1] The PSD regulations applicable to most of the projects at issue were promulgated in 1980 and recodified in 1986. 45 Fed. Reg. 52,676 (1980); 51 Fed. Reg. 40,656 (1986). Some projects are subject to regulations from 1992, 57 Fed. Reg. 32,314, but the differences are not material here. EPA issued new PSD regulations in 2002 that continue to focus on total annual emissions, not maximum hourly emission rates. 67 Fed. Reg. 80,186; see 68 Fed. Reg. 61,248 (2003). On October 20,

40 C.F.R. 60.14(b) (1976) (NSPS), with 40 C.F.R. 51.24(b)(2), (3), (21) and (23) (1981) (PSD). Thus, under the 1975 and 1980 regulations, a change that would lead to an increase in a unit's hours of operation without changing the hourly emissions rate is a modification under PSD but not NSPS.

2. In December 2000, the United States brought suit against Duke for the alleged failure to comply with PSD requirements in conducting certain refurbishment projects. C.A. App. 49-126. Three private groups (petitioners in this Court) intervened as plaintiffs. *Id.* at 153. On cross-motions for summary judgment, the district court issued an opinion adopting legal standards to govern further proceedings. Pet. App. 22a-84a. Of note here, the court held that the PSD requirements apply only when a unit's maximum hourly emission rate increases, regardless of whether total annual emissions increase. *Id.* at 58a-75a. The court's analysis was driven largely by the conclusion that Congress in 1977 incorporated then-existing NSPS regulations into the statutory definition of "modification" for PSD. *Id.* at 62a-67a; see *id.* at 39a-42a. To permit immediate appeal, the United States and the plaintiff-intervenors stipulated that they did not contend that Duke's projects resulted in increases in maximum hourly emission rates, only in hours of operation. C.A. App. 1405-1406. The district court thus entered final judgment for Duke. Pet. App. 87a-95a.

3. The Fourth Circuit affirmed. Pet. App. 1a-19a. It held that Congress's decision to define "modification" in the PSD statutory provisions by cross-reference to the NSPS statutory provisions requires EPA to interpret the term consistently in the two programs. *Id.* at 11a. The court concluded that its statutory analysis was dictated by this Court's decision in

---

2005, however, EPA proposed to revise the emissions test for existing electric generating units subject to PSD to adopt a test similar to the NSPS test. 70 Fed. Reg. 61,081. See pp. 8-9 , *infra*.

Rowan Cos. v. *United States*, 452 U.S. 247 (1981). Pet. App. 11a-18a. The court stated that it was not invalidating the 1980 PSD regulations but rather merely mandating that the *same* interpretation—at present, the interpretation that has long been embodied in the NSPS regulations—be used for both the PSD and NSPS regulations. *Id.* at 15a n.7. The court thus ruled that EPA must interpret the definition of "modification" in the 1980 PSD regulations to require an increase in a unit's maximum hourly emission rate. *Id.* at 18a-19a. Because the United States and the plaintiff-intervenors did not contend that Duke's projects had caused such an increase, the court affirmed. *Ibid.* The court subsequently denied petitions for rehearing en banc, in which the United States and the plaintiff-intervenors contended that the court of appeals overstepped its authority by reviewing nationally applicable CAA regulations and that its analysis of the CAA was unfounded. *Id.* at 20a.

ARGUMENT

Petitioners identify neither a square conflict among the courts of appeals nor any persuasive justification for plenary review by this Court. Further review is not warranted.

1. Petitioners seek review first on the question whether the court of appeals exceeded its authority by reviewing the validity of nationally applicable CAA regulations in this enforcement action. In Section 307(b)(1) of the CAA, Congress directed that petitions for review that challenge the promulgation of nationally applicable CAA regulations or standards may be filed only in the D.C. Circuit, and only within 60 days of their promulgation. 42 U.S.C. 7607(b)(1). Congress further specified that "[a]ction of the Administrator with respect to which review could have been obtained [in the D.C. Circuit in a proper petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42

U.S.C. 7607(b)(2). Because this case is an enforcement action, was not filed in the D.C. Circuit, and began well more than 60 days after the PSD regulations in question were promulgated, the court of appeals did not have authority to review the regulations.

The court of appeals recognized that principle. It stated: "no question as to the validity of the PSD regulations is (or could be, *see* 42 U.S.C. § 7607(b)) presented here." Pet. App. 15a n.7. The court styled its holding as one regarding the proper interpretation of the 1980 PSD regulations, not their validity.[2] *Ibid.*; see *id.* at 18a. Thus, although petitioners claim that the decision below conflicts with the decisions of other courts of appeals holding that Section 307(b) provides the exclusive process for the review of nationally applicable CAA regulations (Pet. 14-15 & nn.7-8), the Fourth Circuit's decision presents no such conflict.

There remains the question whether the court of appeals, having expressly and correctly recognized the force of Section 307(b), nonetheless violated that provision by adopting an interpretation of the 1980 PSD regulations that is inconsistent with the regulatory text. The court of appeals did not dispute that it was bound by the regulatory text, but it held that the 1980 PSD regulations can be interpreted to employ the NSPS test for considering what constitutes an emissions "increase" —that is, a test based on a comparison of maximum hourly

---

[2] Petitioners provide no support for the notion (Pet. 19-20) that EPA's interpretation of the 1980 PSD regulations itself constituted a "final action" under Section 307(b). Although petitioners note (Pet. 20) that Duke could have sought an administrative determination from EPA as to whether PSD requirements applied to the projects at issue and that EPA's resulting determination would have constituted such a final action, see *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586-594 (1980), Duke sought no administrative determination and thus none was at issue in this case.

rates of emissions rather than total annual emissions. Pet. App. 15a n.7. Petitioners contend (Pet. 17-19 & n.9) that such an interpretation is inconsistent with the regulatory text, and that as a result the court of appeals overstepped its authority.

The court of appeals' holding that the 1980 PSD regulations can in fact be interpreted to adopt the NSPS emissions test does not merit further review. EPA issued new NSR regulations in 2002 that supersede the 1980 PSD regulations for activities occurring after the effective date of the 2002 regulations. 67 Fed. Reg. 80,186 (2002). States are required to adopt the 2002 regulations or some alternative at least as stringent. 42 U.S.C. 7471, 7502. Therefore, as the D.C. Circuit recently observed in upholding the relevant provisions of the 2002 regulations, "[f]or planning purposes the 1980 rule appears moot." *New York* v. *EPA*, 413 F.3d 3, 20-21 (2005) (emphasis omitted). For the same reason, the question whether those regulations can be interpreted to adopt the NSPS emissions test has no continuing importance for activities occurring in the future.

In addition, although the 2002 NSR regulations are similar to the 1980 PSD regulations in that they focus on total annual emissions, not maximum hourly emission rates, 40 C.F.R. 51.166(b)(2), (3), (21) and (23) (2003), EPA has recently proposed new NSR rules for electric generating units. Those rules would establish a test for measuring emissions increases that is similar to the NSPS test. 70 Fed. Reg. 61,081 (2005).[3]

---

[3] The emissions test for PSD purposes under the proposed rules "is the same as that in the New Source Performance Standards (NSPS) program." 70 Fed. Reg. at 61,081. The proposed regulation "would establish a uniform emissions test nationally under the NSPS and NSR [including PSD] programs for existing" electric generating units. *Ibid.* At the same time, EPA is seeking public comment on a number of alternatives and related issues. See *ibid.*

Thus, the Fourth Circuit's view as to the proper interpretation of the 1980 regulations is of limited practical import now.[4]

2. Petitioners also seek review of the question whether the court of appeals erred in holding that the CAA requires EPA to interpret the statutory term "modification" consistently in its PSD and NSPS regulations. Petitioners identify no square conflict between the Fourth Circuit's statutory holding and the holding of any other court of appeals. In particular, although petitioners identify decisions that are in tension with the Fourth Circuit's decision, none addressed the particular theory of statutory interpretation that the Fourth Circuit adopted. For instance, in its recent decision in *New York* v. *EPA*, *supra*, the D.C. Circuit rejected the argument that Congress in 1977 incorporated then-existing NSPS regulations into the PSD statutory provisions but found that the parties had waived the argument that the CAA required EPA to use the same definition of "modification" under both regulatory programs. 413 F.3d at 19-20; see *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400-402 (D.C. Cir. 1979) (allowing different emissions "increase" tests in PSD and NSPS without directly addressing the theory of statutory interpretation adopted by the Fourth Circuit).

Petitioners also argue (Pet. 27-29) that the Fourth Circuit's statutory holding is exceptionally important, and they emphasize that EPA referred to the court of appeals' decision in recently proposing new NSR rules for electric generating units that would establish a test for measuring emissions increases similar to the NSPS test. See 70 Fed. Reg. at 61,083.

---

[4] Petitioners contend that the Fourth Circuit's interpretation of the 1980 PSD regulations is "contrary to analysis" in decisions by other courts of appeals (Pet. 19), but not that it conflicts with any other court's holdings. The decisions that petitioners cite do not address the particular question of statutory interpretation that the Fourth Circuit found controlling.

EPA made clear that, while it "continue[s] to respectfully disagree with the Fourth Circuit's decision" in this case and "continue[s] to believe that [it] ha[s] the authority to define "modification" differently in the NSPS and NSR programs," it "believe[s] that [proposing a set of revised rules] is an appropriate exercise of [its] discretion." *Id.* at 61,083 n.3.[5] Far from indicating that this Court's review is necessary, the fact that EPA has proposed new regulations indicates that the agency believes it can address any difficulties caused by the court of appeals' decision through rulemaking, and obviates any need for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

GREER S. GOLDMAN
TODD S. KIM
Attorneys

MARCH 2006

---

[5] For purposes of the proposed rulemaking, EPA noted the relevance of "the substantial emissions reductions from other CAA requirements that are more efficient than major NSR," and it also noted that "[t]he current major NSR approach discourages sources from replacing components, and encourages them to replace components with inferior components or to artificially constrain production in other ways," practices that do "not advance the central policy goals of the major NSR program." 70 Fed. Reg. at 61,083. EPA stated that "[t]he central policy goal is not to limit productive capacity of major stationary sources, 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." *Ibid.*