No. 05-848

In the Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL., PETITIONERS

v.

DUKE ENERGY CORPORATION, ET AL.

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

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

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REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

Perhaps the most significant aspect of Duke's brief is what it does not say: Duke offers no defense of the court of appeals' central holding that the New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) regulatory definitions must be identical, and instead characterizes the court's rationale as merely a "straw man" (Br. 31) that does not reflect Duke's position. Also remarkable, however, is what Duke *does* embrace as its position. For the first time ever in this case, Duke asserts that a series of regulatory provisions, whose alleged significance had somehow escaped the attention of the regulators and the regulated alike, requires that a separate regulatory definition of "modification" set forth in a different part of the regulations actually applies of its own independent force in the PSD context, serving as a sort of threshold hourly-rate test that must be met before the PSD definition of "major modification" even comes into play. Br. 23, 28, 33-34. Duke's arguments lack merit, and should be rejected.

Duke seeks to bolster its new and implausible legal arguments by erroneously suggesting that EPA's contrary interpretation was adopted only in 1999 (Br. 2) and by exaggerating the real-world impact of EPA's position. In reality, EPA consistently stated and reaffirmed its current position during the entire time period relevant to this case (see, *e.g.*, U.S. Br. 27-28 & n.9; notes 7-8, 10, *infra*), and that longstanding position has not had the drastic consequences posited by Duke. According to Duke, EPA's interpretation means that PSD "would unavoidably be triggered, repeatedly, during the life of any industrial facility." Br. 46. Under the 1980 and 1992 rules that control this case, however, PSD requirements would not apply to maintenance work performed by Duke at one of its facilities if the work (a) constituted routine maintenance, repair, or replacement;

(b) resulted in emissions increases that were cancelled out by contemporaneous emissions reductions; (c) resulted in emissions increases that were not "significant"; (d) restored a temporarily disabled unit to service; or (e) did not result in increased actual annual emissions. 40 C.F.R. 51.166(b)(2), (3), (21) and (23). (Unless otherwise indicated, this brief cites to the 1987 regulatory recodification.) This Court's review in this case should proceed from the position consistently advanced by EPA and required by its rules, not the caricature offered by Duke and its amici.[1]

I. THE COURT OF APPEALS EXCEEDED ITS JURISDICTION

A. Section 307(b) Precluded The Judgment Below

1. As previously demonstrated (U.S. Br. 35-50), the court of appeals erred in holding that "modification" must "be interpreted identically in the [NSPS and PSD] programs." Pet. App. 17a.[2] But more fundamentally, the court of appeals erred in even reaching that question, because the purported "identical[ity]" requirement would operate to invalidate the regulations. The

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[1] Duke's contention (Br. 3) that it conducted its modifications "in full view and with the knowledge of EPA and the state authorities" is incorrect. Mere knowledge of the existence of a maintenance project does not provide knowledge that the project is a PSD "major modification." For just that reason, States such as North Carolina cannot and do not conduct PSD evaluations as part of routine inspections. See, *e.g.*, J.A. 333 ("[W]ithout doing rather extensive and complex testing you really can't make definitive statements as to whether a facility is in compliance" for PSD.); J.A. 344-345 (State did not perform PSD evaluation during inspections of Duke facilities); J.A. 347 ("[J]ust from the inspection and looking at the boiler, you couldn't say it is subject to PSD or not."); J.A. 363 (PSD "determinations are not made in the field."); see also J.A. 386 (Duke's primary permitting employee never told the State about the projects alleged in the complaint.).

[2] The government reiterates that, because the statutory term "modification" is ambiguous, EPA retains discretion to adopt other reasonable definitions of that term that may differ from those in the 1980 and 1992 PSD regulations. U.S. Br. 47-48 n.18, 50 n.20.

PSD regulations—which do not so much as mention an hourly-rate emissions test, repeatedly refer to "actual emissions," and measure emissions in "tons per year"—cannot be read to apply the hourly test found in the NSPS regulations, and contain provisions for netting and determining significant levels of emissions that are undisputedly absent from the NSPS regulations, as Duke concedes (Br. 34-35). Thus, if the court of appeals were right that Congress required the meaning of "modification"—including the resolution of any ambiguities in that term—to be "identical[]" in the two programs, the effect would necessarily be to invalidate one or the other set of regulations as contrary to the Clean Air Act (CAA). As the Seventh Circuit has recently explained, because the PSD "regulation does not define [modification] as a change in the hourly emissions rate," an argument that it must be defined that way "seems an attack on the validity of the regulation rather than an argument about its meaning, and issues of validity * * * are beyond the jurisdiction of a regional circuit to resolve." *United States* v. *Cinergy Corp.*, 458 F.3d 705, 709 (2006). The court of appeals exceeded its jurisdiction under Section 307(b)(2), 42 U.S.C. 7607(b)(2).

2. The Section 307(b)(2) preclusion is particularly clear in this case, because Duke actually *did* participate in a D.C. Circuit case involving a claim that the 1980 and 1992 PSD regulations were unlawful because the CAA requires EPA to apply a maximum hourly emissions test for PSD. See U.S. Br. 32-35. Review of Duke's current assertions thus "could have been obtained" on a petition for review and is precluded in an enforcement action like this one. 42 U.S.C. 7607(b)(2).

Duke's contention (Br. 20, 23, 32) that it could not have raised in the D.C. Circuit the issue that the court of appeals decided in this case is wrong. As set forth in our opening brief (at 33), the question whether the Act required an hourly-rate PSD test was raised in the challenge to the 1980 rules in the D.C. Circuit, which resulted in a settlement agreement in which the parties

agreed that EPA would propose *amending* the regulations to delete language requiring an "actual, annual" test and add a test based on "potential to emit (as calculated in terms of pounds of pollutant emitted per hour)." Settlement Agreement at 2 & Exh. B (Petitioner has requested leave to lodge the agreement with this Court per Sup. Ct. R. 32.3.). Ultimately, the D.C. Circuit decided that very challenge in *New York* v. *United States EPA*, 413 F.3d 3 (2005). See *id.* at 19-20 (ruling on industry's challenge to "the 1980 rule's definition of modification in the NSR context to the extent that it differs from the NSPS definition"); U.S. Br. 33-35.

B. Petitioner Offers No Defense Of The Court Of Appeals' Holding

Duke makes no effort to defend the reasoning or holding of the court of appeals. Indeed, in response to the government's showing that the CAA cannot plausibly be read to require EPA to "adopt identical modification regulations for the NSPS and NSR programs," Duke asserts that the government has attacked a "straw man" that "does not accurately describe Duke's position." Br. 31. But, whether or not Duke wishes to defend it, that is precisely what the court of appeals held. See Pet. App. 14a ("Congress intended the statutory definitions of 'modification' in the PSD and NSPS provisions to be interpreted identically"); *id.* at 17a.[3]

Duke thus concedes that the court of appeals' holding was incorrect. Moreover, Duke makes no effort to dispute the government's showing that the court of appeals' holding effectively invalidated the PSD regulations. Accordingly, Duke offers no

[3] The *sole* basis for the court of appeals' ruling was its view that the NSPS and PSD regulations must be "identical[]." Indeed, the court conceded that it would be permissible for the PSD regulations to "be enforced as the EPA urges"—but only if "the NSPS regulations are similarly interpreted and enforced." Pet. App. 15a n.7; see *id.* at 18a.

basis on which this Court could avoid the conclusion that Section 307(b)(2) precluded the court of appeals from undertaking the statutory review that provides the essential underpinning for its judgment. The Court should therefore reverse the judgment of the court of appeals.

II. DUKE'S ARGUMENTS ARE INCONSISTENT WITH THE REGULATORY TEXT AND EPA'S INTERPRETATIONS

It is common ground in this case that PSD review applies only to "[m]ajor modification[s]." 40 C.F.R. 51.166(b)(2)(i). For the first time in this case, however, Duke now advances the argument (Br. 23, 28, 33-34, 36-37) that, by virtue of provisions never previously relied on in this case, a regulatory definition of "modification" set forth in a different part of the regulations applies of its own force as an independent threshold requirement in the PSD context as well. In Duke's latest view, a "major modification" for PSD purposes must first be shown to be a "modification" for NSPS purposes because "[t]he general provisions of both Parts of the 1980 rules define 'modification' as * * * an NSPS 'modification." Br. 34.

Duke's new theory that the regulations impose an independent "modification" requirement in the PSD context is patently incorrect. The text of the regulations, EPA's consistent interpretations, and the relevant case law have uniformly established that PSD "major modifications" are neither a subset nor a superset of NSPS "modifications," but rather are a distinct concept of "modification" that EPA has tailored to the varied needs of the PSD program over time. Duke's belatedly discovered regulatory "modification" argument should be rejected.

A. The Regulations Preclude Duke's New Position

1. Duke's new regulatory theory is irreconcilable with the language and structure of the PSD regulations themselves. Nowhere do those regulations provide or suggest that PSD is triggered only by changes that first qualify as "modification[s]" un-

der the NSPS regulations. Indeed, while the PSD regulations consistently focus on actual, annual increases and measurements in tons per year, the PSD regulations do not even mention the NSPS test or any hourly-rate measurement. Nor can it be argued that EPA somehow intended to apply the NSPS test *sub silentio*; where EPA intended a reference to the NSPS rules, it made that intent explicit.[4]

Far from imposing the NSPS "modification" test as a separate prerequisite for PSD coverage, the PSD regulations instead make clear that a "major modification" is sufficient *in itself* to trigger PSD applicability. See 40 C.F.R. 51.166(i)(1) ("no * * * major modification shall begin actual construction" unless it satisfies the PSD requirements). The PSD regulations define "major modification" without reference to the distinct NSPS "modification" concept, and use terminology that differs in crucial respects from the NSPS regulatory definition. See U.S. Br. 20-23. And to the extent that Duke's argument rests on the suggestion that the regulatory test for "modification" must be read into the "major modification" concept because the latter phrase also uses the word "modification," that suggestion is refuted by the unambiguous regulatory text. "'Major modification' *means* 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." 40 C.F.R. 51.166(b)(2)(i) (emphasis added). There is no room in that definition for an additional threshold inquiry

[4] See, *e.g.*, 40 C.F.R. 51.166(b)(12) (BACT under PSD must comply with "any applicable standard under 40 CFR parts 60 and 61," which govern NSPS); 40 C.F.R. 51.166(b)(16)(i) (PSD emissions standards must be at least as stringent as "[t]he applicable standards as set forth in 40 CFR parts 60 and 61"); 40 C.F.R. 51.166(b)(17) ("*Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61."); 40 C.F.R. 51.166(j)(1)) (requiring a major source or modification to "meet each applicable emissions limitation under the [SIP] and * * * under 40 CFR parts 60 and 61").

under the NSPS test for "modification." Indeed, any such inquiry would render much of the PSD definition entirely superfluous, because the NSPS test likewise requires a physical or operational change. 40 C.F.R. 60.14(a).

2. Duke's new theory of an independent "modification" requirement is based on three regulatory provisions that are said to make an NSPS "modification" a prerequisite to a PSD "major modification." First, Duke cites 40 C.F.R. 51.166(b)(8)—a provision that it has never previously cited in this case—for the proposition that "'Construction' *means* the 'fabrication, erection, installation, demolition, *or modification*' of a facility." Br. 33 (first emphasis added); see Br. 23, 35. Duke's quotation elides a key word; the regulation does not state that construction "*means*" modification, but rather that construction "means any physical change," "*including*" modification. 40 C.F.R. 51.166 (b)(8) (emphasis added). Thus, the regulation provides no support for Duke's view that PSD is *limited* to NSPS "modifications."

Second, Duke relies (Br. 2, 10, 23, 28, 34) on another regulation it has never previously cited in this litigation, which provides that "all terms not defined herein will have the meaning given them in the Act." 40 C.F.R. 51.100. That provision has no application, because the term "major modification" *is* defined in the regulations (without mention of NSPS or an hourly-rate test). In any event, as the court of appeals recognized, the statutory definition of "modification" at 42 U.S.C. 7411(a)(4) permits either an "hourly rate" test or an "actual, annual increase" test. See Pet. App. 15a n.7, 18a. Thus, even if 40 C.F.R. 51.100 were applicable here, it would not advance Duke's new theory.

Third, Duke cites (Br. 2, 10, 23, 28, 34-35) the definition of "modification" found at 40 C.F.R. 52.01(d). The Part 52 regulations, however, are simply inapplicable in this case. They apply only in the absence of an EPA-approved state SIP, see 40 C.F.R. 52.21(a); 45 Fed. Reg. 52,676 (1980), but the state SIPs in this case were approved by EPA. See U.S. Br. 4 n.2; Duke Br. 10 n.3.

Moreover, state SIPs are required to (and do) incorporate the regulations in Part 51, *not* Part 52. See 40 C.F.R. 51.166(a)(1) and (b); N.C. Admin. Code tit. 15A r.2D.0530; S.C. Code Ann. Regs. 61-62.5, std. 7. And Section 52.01(d) is expressly limited to a narrower category of pollutants than the PSD program covers, so it would be nonsensical to apply it to PSD.

In any event, the Section 52.01(d) definition of "modification" was part of the 1974 PSD regulatory program, which was replaced by EPA's 1978 and 1980 regulations at 40 C.F.R. 51.166 and 52.21. See 45 Fed. Reg. at 52,735. Not surprisingly, then, Duke identifies no relevant instances post-dating promulgation of the 1980 regulations in which EPA has relied on 40 C.F.R. 52.01(d) in the PSD context. Nor, with the exception of one case involving violations of the pre-1980 PSD regime, has Section 52.01(d) been cited at all, for any reason, by any federal court since 1980, with the exception of one case involving violations of the pre-1980 PSD regime. See *United States* v. *Chevron U.S.A., Inc.*, 639 F. Supp. 770, 778 (W.D. Tex. 1985) (1977-1979 violation). Indeed, Duke itself did not make its newfound argument (or cite Section 52.01(d)) in the court of appeals or in its brief in opposition in this Court.[5]

B. Duke's New Theory Conflicts With The Consistent Views Expressed By EPA And The Courts

Duke's new regulatory theory conflicts not only with the PSD regulations themselves, but with EPA's consistent interpretation of those regulations. The first rules proposed after enactment of the 1977 CAA amendments, for example, make clear that PSD

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[5] While Duke did cite Section 52.01(d) once in the district court, in its brief in support of its summary judgment motion (at 6 n.12), it did so in a footnote giving the history of the regulations and in the course of arguing that Congress in 1977 codified the pre-1977 PSD regulations. It did not make its current regulatory argument in the district court or otherwise argue that Section 52.01(d) has continuing effect for PSD purposes.

applicability was determined by reference to the "major modification" definition, not some separate definition of "modification." See, *e.g.*, 42 Fed. Reg. 57,480 (1977) ("Sources subject to PSD review will be those identified in the proposed definitions of 'major stationary source' and 'major modification.'); 44 Fed. Reg. 51,948, 51,952 (1979) ("The term 'major modification' serves as the definition of 'modification' or 'modified' when used in the Act in reference to a major stationary source."). EPA made the same point explicitly when it later adopted rules and amendments. 45 Fed. Reg. at 52,677 (the "primary criterion in determining PSD applicability is whether the proposed project is * * * a major modification"); 57 Fed. Reg. 32,316 (1992) ("The EPA's regulations implementing the PSD and nonattainment programs require preconstruction review for sources undertaking a 'major modification.'"); 70 Fed. Reg. 61,088 (2005) (PSD contains a definition of "major modification" but not "modification"). EPA never discussed an hourly-rate test, or use of the NSPS regulations or definition of modification, in determining the applicability of PSD.

In addition, courts addressing the scope of the PSD program have relied solely on the regulatory term "major modification." See *New York*, 413 F.3d at 14 (noting that in 1980 "EPA changed its definition of modification. The final 1980 rule defined the term as follows: '"[m]ajor modification" means any physical change in or change in the method of operation.'");[6] *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 915 (7th Cir. 1990)

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[6] In *New York*, Duke itself recognized that, under the 2002 PSD regulations, "a project is deemed a 'modification' if it is expected to cause a significant net increase in annual emissions, *even if it does not increase the unit's maximum hourly emission rate and there is no increase in the facility's permitted capacity*," and Duke unsuccessfully attacked the regulations on that very basis. Industry Br. at 23, *New York*, *supra* (emphasis added); see *New York*, 413 F.3d at 20. None of the provisions on which Duke relies for its new regulatory argument—40 C.F.R. 51.100, 51.166(b)(8), 52.01(d)—was altered in 2002.

(*WEPCO*) (PSD regulations "define their key term" in "major modification" definition); *Puerto Rican Cement Co.* v. *United States EPA*, 889 F.2d 292, 295-297 (1st Cir. 1989) (Breyer, J.) (finding unit subject to PSD based on "actual emissions" provision of "major modification"); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 399-400 (D.C. Cir. 1980) (PSD review is limited to "major modification," which is "EPA's [r]egulatory [d]efinition of '[m]odification'"). In short, as the Seventh Circuit recently concluded in *Cinergy*, Duke's newly minted regulatory theory is "makeweight." 458 F.3d at 711.

C. Duke's Other Arguments That The PSD Regulations Require An Hourly-Rate Test Are Mistaken

Apparently as an alternative to its new regulatory theory, Duke argues (Br. 35-39) that an hourly-rate test is also required by two provisions in the PSD definition of "major modification" itself—namely, the "hours of operation" exclusion and the definition of "actual emissions." Duke's interpretation of the "major modification" test fares no better than its newly devised substitute theory.

1. As previously explained (U.S. Br. 26-28), the plain language of the "hours of operation" exclusion makes clear that it has no bearing on a case like this one. The exclusion is expressly limited to the physical-or-operational-change prong of the PSD definition of major modification, and provides that "[a]n increase in the hours of operation" will not itself satisfy that prong. 40 C.F.R. 51.166(b)(2)(iii)(*f*). It has no application when a change *other than* an increase in hours of operation is at issue. Thus, once a physical change has been identified, as here, the exclusion by its own terms can do no further work.[7]

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[7] Duke contends (Br. 39) that EPA's 1996 proposal to add the words "standing alone" to the "hours of operation" exclusion somehow confirms Duke's contention about the meaning of the exclusion. In 1996, EPA did consider making such an amendment in order "to make the existing exclusion

Ultimately, Duke rests (Br. 36-39) its "hours of operation" argument on the two isolated examples of a contrary interpretation by Mr. Reich in 1981. Mr. Reich's misreading of the hours of operation exclusion cannot trump the plain language of the regulation or EPA's statements repeatedly confirming the limited scope of the exclusion. Duke baldly asserts (Br. 28) that "there are no contrary Agency pronouncements," but that assertion is patently incorrect, as it ignores the long history of authoritative agency explanations expressly taking the same position advocated by EPA here.[8] Those explanations are plainly entitled to deference, because they reflect the agency's interpretation of its own regulations. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

2. Duke also contends (Br. 23-24, 35) that the proper test for "major modification" must measure a unit's "actual emissions" by keeping the hours of operation constant based on pre-change hours of operation. In Duke's view, EPA must ignore net pollution increases caused by a source's increased hours of operation resulting from a physical change even when, as here, increasing the number of hours the source can operate is the express purpose of the change. See J.A. 230; Pet. App. 27a-28a.

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explicitly clear," but it also expressly reaffirmed its longstanding "view that the regulatory exclusion for certain increases in a source's * * * hours of operation applies only when such an increase is unaccompanied by construction or modification activity." 61 Fed. Reg. 38,254 (1996).

[8] See, *e.g.*, J.A. 44 (1988 determination that PSD is triggered by "increases in emissions due to increases in hours of operation or production rate where, as here, such operational or production increases are closely related to physical or operational changes"); J.A. 257-258 (1988 determination that increases in "hours of operation" "inextricably intertwined with the physical changes" should be considered under PSD); J.A. 294 (1989 determination that increased hours of operation "if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes"); U.S. Br. 26-28 & n.9; pp. 8-10, *supra*; p. 14 & note 10, *infra*.

Duke is mistaken. Measuring "actual emissions" based on "actual operating hours," 40 C.F.R. 51.166(b)(3)(i) and (21)(ii), requires post-change emissions for units that have begun normal operations to be measured based on their projected actual operating hours after the change. See U.S. Br. 20-23; *Cinergy*, 458 F.3d at 708 (concluding that the "natural reading" of the "major modification" regulation "is that any physical change or change in operating methods that increases *annual emissions* is covered," and that annual emissions are measured based on "the *total number of hours* that the plant is in operation") (emphasis added); 56 Fed. Reg. 27,633 & n.10 (1991).

Duke's reliance (Br. 35) on the regulatory language defining actual emissions by reference to emissions during a "representative" period is unavailing, because that language merely describes how to establish the *pre-change* emissions baseline. 40 C.F.R. 51.166(b)(21)(ii); see 57 Fed. Reg. at 32,316-32,317 (provision establishes baseline); *WEPCO*, 893 F.2d at 916 (same). The PSD regulations require an examination of the "increase in *actual* emissions" over that baseline (40 C.F.R. 51.166(b)(3)(i)(*a*) (emphasis added)), and thus mandate consideration of the *actual* projected or potential future emissions (see U.S. Br. 6-7), not a counterfactual assessment of what future emissions *would* be if post-change hours of operation were held to pre-change levels.

3. As explained (U.S. Br. 7-8), the 1992 regulations provide that most projects at electric utilities are evaluated under an actual-to-projected-actual test that expressly considers "the effect [a] change will have on increasing or decreasing the hourly emissions rate and *on projected capacity utilization*." 40 C.F.R. 51.166(b)(32) (1993) (emphasis added). Even if there were any uncertainty about the meaning of the 1980 regulations, such uncertainty would have been eliminated in the 1992 regulatory

amendments, which govern some of the projects at issue in this case. See U.S. Br. 20 n.4.[9]

4. Duke repeatedly asserts (Br. 1-3, 15-16, 28-29, 36-37) that its interpretation of the regulations has been obvious to all since 1980. That resort to revisionist history is irrelevant to the question presented here, which turns on the regulations' plain language and EPA's explanations. In any event, Duke's assertion that the government is now advancing only an "enforcement position" (Br. 2, 16, 28) and that the 1980 rules "clearly provided that a PSD 'major modification' first requires an NSPS 'modification'" (Br. 28) is refuted by the actual history, which shows EPA's longstanding adherence to its "enforcement position."

EPA announced in 1980 that the regulations measure increases in "actual emissions," calculated in "tons per year." 45 Fed. Reg. at 52,677, 52,700, 52,705; U.S. Br. 23-24. By the late 1980s, EPA was issuing PSD applicability determinations that unquestionably applied a total annual emissions test without requiring an increase in hourly emissions before a "major modification" could be found. See note 8, *supra*. Indeed, the *WEPCO* and *Puerto Rican Cement* suits were actions brought against EPA based on its application of that very standard, which both

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[9] Duke is wrong to imply (Br. 14 n.4) that the government has changed positions with respect to whether the 1992 rules apply in this case. The government has consistently argued that the 1992 rules apply to projects undertaken after the time those rules were incorporated into the applicable SIP. Gov't C.A. Br. 6; Gov't Opp. to Duke Summ. J. Mot. 7-8. Duke also errs in contending (Br. 14) that, if industry fails to submit records as required by the 1992 regulations, the analysis defaults to an NSPS-type test under which hours of operations must, counterfactually, be deemed to remain constant. As discussed in text, the 1980 PSD regulations take increases in hours of operation into account in assessing emissions increases. The 1992 amendments merely allow utilities to avoid undergoing the fact-intensive regulatory analysis of whether they have "begun normal operations" to determine whether they must apply the actual-to-potential test or the more favorable actual-to-projected-actual test. 57 Fed. Reg. at 32,317; U.S. Br. 7-8.

courts upheld. *WEPCO*, 893 F.2d at 916 & n.11; *Puerto Rican Cement*, 889 F.2d at 296-298; see *New York*, 413 F.3d at 15. Later, in 1990, EPA specifically rejected any test limited to a comparison of maximum hourly rates as "not fairly discernible from any reading of the [1980] regulations." J.A. 67. EPA confirmed shortly thereafter that the actual-to-projected-actual test would continue to apply under the 1980 regulations when a unit has begun normal operations. 56 Fed. Reg. at 27,633 & n.10. EPA has regularly reiterated that the PSD regulations apply an actual, annual emissions test that could be triggered by physical or operational changes that increase emissions due to their effect on hours of operation.[10]

In fact, the record reflects that Duke and the rest of the utility industry understood EPA's interpretation. The settlement of the original D.C. Circuit challenge to the 1980 regulations, which required EPA to consider *amending* the regulations to authorize an hourly-rate test, makes that point clear. So do numerous other documents in the record dating from as early as 1989.[11]

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[10] 56 Fed. Reg. at 27,630 (stating that unlike NSPS, "the NSR regulations examine total emissions into the atmosphere"); *ibid*. (demonstrating that the methodology for calculating emission increases for NSPS and PSD is entirely different); 57 Fed. Reg. at 32,316, 32,328, 32,335; 61 Fed. Reg. 38,254 (1996) (PSD emissions calculation involves determination of "how many hours per year the source will be operated"); 63 Fed. Reg. 39,858-39,859 (1998) (confirming the emissions test depends on total annual emissions, not maximum hourly rates); J.A. 68 (PSD can be triggered by changes in "capacity utilization"); J.A. 72-75 (PSD applicability determined by examination of the changes in the actual annual emissions, not the hourly rate); J.A. 155 (1991 EPA statement to Congress that emissions increases are measured "on an hourly basis (for NSPS purposes) or an annual basis (for PSD and nonattainment new source review purposes)").

[11] See J.A. 243 (1991 Duke compliance manual statement that PSD is based on "annual emissions" and can be triggered if a change causes a unit to be "*operated more frequently*") (emphasis added); see also J.A. 269, 274, 275 (6/5/89 industry letter recognizing EPA requires PSD review where there is no increase in emission rates); J.A. 496 (1/90 study contrasting PSD regulations

III. THE ACT DOES NOT REQUIRE AN HOURLY-RATE TEST

Duke contends (Br. 41-47) that Congress specifically limited PSD coverage to projects that result in an increase in a unit's hourly emissions rate. That argument is barred by Section 307(b)(2), because it would require invalidation of the PSD regulations. Moreover, in order to trump the deference ordinarily due to an agency's interpretation of a statute under *Chevron*, Duke's argument requires finding in the statutory cross-reference an "unambiguously expressed intent of Congress" to require use of an hourly-rate test in the PSD program. *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). No such intent is discernible here.

A. Congress Expressed No Intent To Condition PSD Modifications On A Finding Of An NSPS Modification

Duke's argument distorts the natural reading of the statutory cross-reference at 42 U.S.C. 7479(2)(C). That PSD provision provides that "construction when used in connection with any source or facility, includes * * * modification (as defined in section 7411(a)(4) of this title)." Section 7411(a)(4) is a statute governing NSPS; it contains no reference to or incorporation of

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with NSPS); J.A. 380 (11/28/90 e-mail stating that in evaluating whether a project is a "major modification," "[t]he primary consideration should be whether the work will allow any greater utilization (more emissions)"); J.A. 376 (11/2/90 internal Duke memo noting that application of PSD "will also depend on the projected use of the new boilers versus the old boilers"); J.A. 371 (1995 internal training materials noting, under heading "avoiding PSD," "no increased capacity utilization, except for increased power demand"); J.A. 368 (2/13/95 internal Duke memo noting that "PSD regs disallow an increase in hr of operation not attributed to increased electric demand"); see also *WEPCO*, 893 F.2d at 916 n.11 ("Despite WEPCO's protestations, we note initially that the EPA's refusal to apply the 'production rate/hours of operation' exclusion was proper.").

the NSPS regulations.[12] Duke's assertion (Br. 5) that Congress intended by that cross-reference to "include[] only activities that in essence create a 'new source'" is improbable. Congress's evident purpose in cross-referencing the pre-existing statutory definition of "modification" was to ensure that PSD requirements apply not only to new construction (as would be the case if the cross-reference did not exist), but also to changes at *existing* sources that increase emissions. *New York*, 413 F.3d at 13. In addition, by adopting the definitional cross-reference, Congress ensured that the term "modification" incorporated certain statutory qualifications. See 42 U.S.C. 7411(a)(8) (certain coal conversions not a "modification" for purposes of Section 7411(a)(4)).

According to Duke (Br. 45), Congress showed no intention that PSD should apply to "projects at existing power plants that neither NSPS nor regulatory PSD" reached prior to 1977. But Congress simply did not address the question, and in any event, with respect to sources and pollutants that are potentially subject to both programs, the regulations provide that the category of "modifications" for PSD purposes is different from—but not necessarily broader or narrower than—NSPS "modifications." In some respects the PSD category is broader, in that some physical or operational changes may result in increased utilization (and therefore in PSD applicability) even though they do not result in an increased hourly rate of emissions that triggers NSPS. But the PSD category is substantially narrower in other respects, because it permits "netting" of contemporaneous emis-

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[12] Contrary to Duke's argument (Br. 43), the statute does not "define[] 'modification' for PSD as that term is 'defined' and 'used' for NSPS." Instead, it defines "modification" for PSD as that term is defined and used in the NSPS *statute*. The difference is significant, because the NSPS statute (as opposed to the regulations) is entirely agnostic as to the use of an hourly-rate test or an actual, annual emission test. See *New York*, 413 F.3d at 19; Pet. App. 15a n.7.

sions increases and decreases, and applies only to "significant" increases. See U.S. Br. 22-23, 30-31.

Nor is Duke's position bolstered by its passing reference (Br. 42-43) to the "identical terms" canon. As the government has explained (U.S. Br. 38-46), that canon lacks force in this context. Tellingly, moreover, Duke's reliance on that canon reflects substantial ambivalence: Duke carefully avoids any suggestion that the NSPS and PSD regulations must actually define the statutory term "modification" in an identical manner, as would be required if the "identical terms" canon were applicable here. Duke's reluctance is no doubt attributable to the fact that Duke desires to extend the NSPS hourly-rate test to the PSD context, but without thereby depriving itself of the substantial *benefits* conferred by other differences between the NSPS and PSD definitions, such as the "netting" provision. See Duke Br. 34-36; U.S. Br. 23, 30-31. Duke understandably wishes to have its cake and eat it too, but canons of statutory construction must be applied evenhandedly, or not at all.[13]

In any event, Congress's failure to express a clear intent regarding the scope of the statutory term "modification" does not *deprive* EPA of authority; such ambiguity *confers* on EPA the discretion to interpret that definition by regulation. See U.S. Br. 45-46 & n.17. That conclusion follows from a straightforward application of *Chevron*, and no case cited by Duke holds otherwise. See *Cinergy*, 458 F.3d at 711.

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[13] Duke argues (Br. 43) that "[t]his case does not turn on *Rowan* [*Cos.* v. *United States*, 452 U.S. 247 (1981),] alone," and it offers *IBP, Inc.* v. *Alvarez*, 126 S. Ct. 514, 523 (2005), as further support for its position. The court of appeals, however, did rely exclusively on *Rowan*, see Pet. App. 11a-18a, which cannot be read to authorize the irrebuttable presumption of identical meaning applied by the court of appeals. See U.S. Br. 38-46. And *IBP* provides no support for Duke's (or the court of appeals') argument. *IBP* stands for the unremarkable proposition that a reference to "*said* principal activity or activities" means the same principal activities referred to earlier in the statute. 126 S. Ct. at 523-524 (emphasis added).

B. Congress Did Not Incorporate Any Regulatory Definition of Modification Into The PSD Provisions

Because the statutory language says nothing about an hourly-rate test or how to measure emissions increases, Duke argues (Br. 44) that Congress either incorporated or ratified the pre-existing regulatory interpretation of "modification," which did apply an hourly test. As the D.C. Circuit concluded in *New York*, however, there is no indication that, by incorporating a pre-existing *statutory* provision, Congress meant to codify and freeze in place the pre-existing *regulations* governing modifications. *New York*, 413 F.3d at 18-19; see U.S. Br. 50 n.20. While Congress no doubt tacitly approved the NSPS hourly-rate test as one permissible approach for PSD, it did not *mandate* that test. *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941). This Court has concluded that Congress's use of a pre-existing statutory term demonstrated its intent to incorporate a pre-existing regulatory definition only when it has found additional clear demonstrations of such congressional intent in the statute or legislative history. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998) (citing statutory language prohibiting use of lesser standard than incorporated in agency regulations); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437-438 (1986) (noting legislative history specified that statutory definition included prior existing regulatory definition). Duke cites no such indications in the statutory PSD provisions.

Moreover, Duke's insistence that Congress in 1977 expressed a detailed "awareness of * * * the pre-existing regulatory PSD program" (Br. 44) merely underscores that Congress would have made explicit any intent to mandate an approach to modifications, as it did with other regulatory provisions. *New York*, 413 F.3d at 19. To be sure, one provision of the 1977 amendments, 42 U.S.C. 7478(a), did, as Duke says (Br. 44), "instruct[] that the bulk of the pre-existing rules 'shall remain in effect' and

amended other provisions" of the pre-existing PSD rules. Duke's quotation of Section 7478(a), however, is selective. Section 7478(a) provides that, "[u]ntil such time as an applicable implementation plan is in effect for any area," most of the pre-existing rules "shall remain in effect." 42 U.S.C. 7478(a). The full statutory text makes clear Congress's intent that, once state implementation plans were in place, EPA would be free to retain or change the pre-existing regulations.

C. Duke's Remaining Arguments Ignore The Plain Language Of The Act

Duke further contends (Br. 45-46) that EPA's interpretation violates a purported congressional intent to limit PSD application to "newly constructed or expanded units." Duke cites no statutory language to support the proposition that PSD can apply only to new or expanded facilities, and the legislative history it describes as focusing only on such facilities was created before the term "modification" was added to the PSD statutory program. See *Alabama Power*, 636 F.2d at 400 n.47 (legislator's statement that PSD has no effect on "existing sources" absent an "expansion program" was overridden by addition of "modification" to statute). Congress understood that "expansion" and "modification" may mean two different things; had Congress intended PSD to apply only to expanded sources, the definition of "construction" would have referred to "expanded"—as opposed to "modified"—sources. See, *e.g.*, 42 U.S.C. 7475(b) (exempting the "expansion or modification of a major emitting facility" from PSD ambient air quality impact analysis).

Duke also contends (Br. 49) that the purposes of NSPS do not differ from PSD, because NSPS focuses on ambient air quality and was designed "to protect the NAAQS." In enacting the PSD provisions, however, Congress authorized EPA to apply PSD "notwithstanding attainment and maintenance of" the NAAQS. 42 U.S.C. 7470(1). While certainly complementary and sharing

similar goals, the NSPS and PSD programs are not identical, and it is untenable to argue that Congress deprived EPA of its discretion to regulate emissions increases under PSD that are not regulated under NSPS.

In any event, Duke's argument fundamentally distorts the applicable deference analysis. Duke asserts (Br. 49) that its emissions test reasonably "effectuates both the technology and air quality purposes of PSD." That may well be true with respect to power plants in 2006, due to developments such as the creation of more recent programs aimed at reducing their emissions, 70 Fed. Reg. at 61,083-61,088, but it does not follow that it would also have been true in 1980. And even if Duke's preferred approach would have been reasonable in 1980, that would not invalidate EPA's decision to adopt a different, but equally reasonable, approach. *Chevron*, 467 U.S. at 843-845.

In short, faced with an admittedly ambiguous statutory definition, the court of appeals should have deferred to EPA's reasonable conclusion that a project that results in increased total emissions because it leads to increased hours of operation can properly be viewed as a change that "increases the amount of any air pollutant emitted by [the] source." 42 U.S.C. 7411(a)(4). The court of appeals' rejection of that reasonable interpretation was erroneous.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

REGULATORY PROVISIONS INVOLVED

1. 40 C.F.R. 51.100 (1987) provides, in pertinent part:

§ 51.100. Definitions.

As used in this part, all terms not defined herein will have the meaning given them in the Act * * *.

* * * * *

2. 40 C.F.R. 51.166 (1987) provides, in pertinent part:

§ 51.166. Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions*. All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

* * * * *

(2)(i) "Major modification" means 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 of any pollutant subject to regulation under the Act.

* * * * *

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or § 51.166.

* * * * *

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

* * * * *

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

* * * * *

(8) Construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

* * * * *

(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

* * * * *

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy of particulate matter emissions.
15 tpy of PM_{10} emissions.

Ozone: 40 tpy of volatile organic compounds

Lead: 0.6 tpy

Asbestos: 0.007 tpy

Beryllium: 0.0004 tpy

Mercury: 0.1 tpy

Vinyl chloride: 1 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide (H_2S): 10 tpy

Total reduced sulfur (including H_2S): 10 tpy

Reduced sulfur compounds (including H_2S): 10 tpy

* * * * *

(i)(1) The plan shall provide that no major stationary source or other major modification shall begin actual construction unless, as a minimum, requirements equivalent to those in paragraphs (j) through (r) of this section have been met.

* * * * *

3. 40 C.F.R. 52.01 (1987) provides, in pertinent part:

§ 52.01. Definitions

All terms used in this part but not defined herein shall have the meaning given them in the Clear Air Act and in Parts 51 and 60 of this chapter.

* * * * *

(d) The phrases "modification" or "modified source" mean 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 under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

4. 40 C.F.R. 52.21(a) (1987) provides, in pertinent part:

(a) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant

deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards.

(b) *Definitions*. For the purposes of this section:

* * * * *

(2)(i) "Major modification" means 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 of any pollutant subject to regulation under the Act.

* * * * *

5. 40 C.F.R. 60.2 (1987) provides, in pertinent part:

§ 60.2. Definitions.

The terms used in this part are defined in the Act or in this section as follows:

* * * * *

"Modification" means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.

* * * * *

6. 40 C.F.R. 51.166(b) (1993) provides, in pertinent part:

§ 51.166. Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions*. All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state

specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

* * * * *

(2)(i) *Major modification* means 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 of any pollutant subject to regulation under the Act.

* * * * *

(iii) A physical change or change in the method of operation shall not include:

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or § 51.166.

* * * * *

(3)(i) *Net emissions increase* means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

* * * * *

(4) *Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and

operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

* * * * *

(21)(i) *Actual emissions* means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (b)(21)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit following the physical or operational change, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

* * * * *

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy of particulate matter emissions.
15 tpy of PM_{10} emissions.

Ozone: 40 tpy of volatile organic compounds

Lead: 0.6 tpy

Asbestos: 0.007 tpy

Beryllium: 0.0004 tpy

Mercury: 0.1 tpy

Vinyl chloride: 1 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide (H_2S): 10 tpy

Total reduced sulfur (including H_2S): 10 tpy

Reduced sulfur compounds (including H_2S): 10 tpy

Municipal waste combustor organics (measured as total tetra-through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): 3.2×10^{-6} megagrams per year (3.5×10^{-6} tons per year)
Municipal waste combustor metals (measured as articulate matter): 14 megagrams per year (15 tons per year) Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)

* * * * *

(32) *Representative actual annual emissions* means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the reviewing authority determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the reviewing authority shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory

authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

7. 40 C.F.R. 60.14 (1993) provides, in pertinent part:

§ 60.14. Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. * * *

* * * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source

category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

* * * * *

(h) No physical change, or change in the method of operation, at an existing electric utility steam generating unit shall be treated as a modification for the purposes of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the 5 years prior to the change.

* * * * *

8. 40 C.F.R. 52.21 (2003) provides, in pertinent part:

§ 52.21. Prevention of significant deterioration of air quality.

(a)(1) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part.

Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(2) *Applicability procedures.* (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(a) through (f) of this section.

(*a*) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major

modification results if the project causes a significant emissions increase and a significant net emissions increase.

(*c*) *Actual-to-projected-actual applicability test for projects that only involve existing emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*d*) *Actual-to-potential test for projects that only involve construction of a new emissions unit(s).* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*e*) *Emission test for projects that involve Clean Units.* For a project that will be constructed and operated at a Clean Unit without causing the emissions unit to lose its Clean Unit designation, no emissions increase is deemed to occur.

(*f*) *Hybrid test for projects that involve multiple types of emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(*c*) through (*e*) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of

this section). For example, if a project involves both an existing emissions unit and a Clean Unit, the projected increase is determined by summing the values determined using the method specified in paragraph (a)(2)(iv)(*c*) of this section for the existing unit and using the method specified in paragraph (a)(2)(iv)(*e*) of this section for the Clean Unit.

* * * * *