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## ENVIRONMENTAL AND ADMINISTRATIVE LAW—The U.S. Supreme Court’s Decision Implements Stricter Regulations for Modifications to Coal-fired Power Plants, *Environmental Defense v. Duke Energy*, 127 S. Ct. 1423 (2007)

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## CASE NOTE

### ENVIRONMENTAL AND ADMINISTRATIVE LAW—The U.S. Supreme Court’s Decision Implements Stricter Regulations for Modifications to Coal-fired Power Plants, *Environmental Defense v. Duke Energy*, 127 S. Ct. 1423 (2007).

Whitney Marquardt\*

#### INTRODUCTION

Between 1988 and 2000, Duke Energy Corporation (Duke) modified and subsequently operated eight of its coal-fired generating plants.<sup>1</sup> However, Duke neglected to seek a determination from the Environmental Protection Agency (EPA) regarding a possible violation of the Clean Air Act (Act) prior to modifying its plants.<sup>2</sup> Consequently, twelve years after the first modification, the EPA alleged the plant owner had violated the Act with the modifications.<sup>3</sup> Furthermore, the EPA claimed the plant owner could not challenge the regulations because the requisite time had passed.<sup>4</sup>

In 2000, the United States brought suit against Duke at the request of the EPA Administrator for a violation of Act.<sup>5</sup> The disputed violation started when Duke placed one of its power plant units, Buck Four, into Extended Cold Storage (ECS).<sup>6</sup> After putting Buck Four into storage, Duke developed a Plant

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<sup>1</sup> United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 623-24 (M.D.N.C. 2003).

<sup>2</sup> See *infra* notes 71-95 and accompanying text describing how the power plant owner failed to seek an applicability determination.

<sup>3</sup> *Duke*, 278 F. Supp. 2d at 625.

<sup>4</sup> See United States v. Duke Energy Corp., 411 F.3d 539, 549 n.7 (explaining there was no question regarding the validity, and, therefore, the time had not passed to challenge the regulations); see *infra* notes 50-70 and accompanying text (explaining how attacks on the validity of a regulations must be challenged within sixty days after promulgation by the agency in the United States Court of Appeals for the District of Columbia).

<sup>5</sup> *Duke*, 278 F. Supp. 2d at 622. The Clinton Administration investigated numerous facilities for non-compliance with the current New Source Review (NSR) program. Thomas Gremillion, Comment, *Envtl. Def. v. Duke Energy Corp.*, 31 HARV. ENVTL. L. REV. 333, 336 (2007). The EPA brought suit against thirty-two utilities allegedly undergoing “modifications” without permits; Duke had eight such complaints brought against it. *Id.*

<sup>6</sup> *Duke*, 278 F. Supp. 2d at 624. During ECS, Duke continuously circulated dehumidified air through the unit’s water, steam, air, and gas passages in an effort to protect the unit during its inactive state. *Id.*

Modernization Program (PMP).<sup>7</sup> Consequently, the United States brought suit alleging Duke's PMP resulted in a "modification" requiring Prevention of Significant Deterioration (PSD) review and permitting, and Duke failed to obtain the required PSD preconstruction review and permit.<sup>8</sup> Duke argued its "modifications" fell under the Routine Maintenance, Repair, and Replacement (RMRR) exemption under the Act, and, therefore, exempted it from PSD review and permitting.<sup>9</sup>

Duke based its arguments on the 1977 congressional amendments to the Act.<sup>10</sup> When Congress amended the Act, it created the New Source Review (NSR) program, which included PSD.<sup>11</sup> Congress designed PSD to ensure air quality of attainment areas did not decline to the minimum level allowed under the National Ambient Air Quality Standards (NAAQS).<sup>12</sup> This requires operators of facilities in attainment areas to limit their emissions to a "baseline rate," which is higher than the minimum levels allowed under the NAAQS, and obtain permits before a source's construction or "modification."<sup>13</sup>

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<sup>7</sup> *Id.* at 625. Duke developed a plan to address a variety of maintenance, repair, and replacement needs, and according to Duke, the PMP would allow a more safe, reliable and cost effective operation for an additional twenty years. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 626, 628; Standards of Performance for New Stationary Sources, 40 C.F.R. § 60.2(h)(1) (1971). The EPA provided exemptions from the "modification" rule for some activities currently underway at already existing and operating facilities. *Duke*, 278 F. Supp. 2d at 628. Under the standard, a modification, did not include any "maintenance, repair, and replacement which the Administrator determines to be routine for a source category." Standards of Performance for New Stationary Sources, 40 C.F.R. § 60.14(e)(1) (1975).

<sup>10</sup> *Duke*, 278 F. Supp. 2d at 628.

<sup>11</sup> *Id.* Although, the NSR program has two parts, only PSD applies to this case. *Id.* at 628. The NSR's two parts consist of PSD and Non-attainment New Source Review (NNSR). *Id.* PSD governs areas of the country with relatively clean air and NNSR governs areas of the country that do not meet air quality standards. *Id.*

<sup>12</sup> *Id.* Congress directed the EPA to develop NAAQS, which specify the maximum allowable concentrations of air pollutant for different areas of the country. *Id.* at 627. Based on the levels of pollution established by the EPA, States had to develop State Implementation Plans (SIPs) that defined source-by-source emission limits so each state could meet the NAAQS. *Id.* at 627-28. An attainment area meets the NAAQS for a particular pollutant where a non-attainment area does not meet the designated NAAQS for a particular pollutant. *Id.* at 628. Congress designed the PSD program to maintain air quality in attainment areas and to not let the air decline to the minimum levels permitted by NAAQS as a result of increases in total annual emissions. *Id.* Therefore, before PSD, a unit could pollute right up to the limit set by the NAAQS. *Id.* However, after PSD a unit subject to those regulations had to emit at a lower level than that established by the NAAQS. *Id.*

<sup>13</sup> *Duke*, 278 F. Supp. 2d at 628. Furthermore, when Congress enacted the PSD program it explicitly incorporated the New Source Performance Standards (NSPS) definition of "modification" into the PSD definition of construction/modification. *Id.* at 629; see *infra* notes 45-49 and accompanying text explaining the 1970 amendments. The 1970 Act amendments incorporated NSPS to regulate pollutants (on an hourly emission rate) from both new sources and "modified" sources. *Duke*, 278 F. Supp. 2d at 628. The NSPS program focuses on the "affected facility," or the

Congress also enacted § 307(b) of the Act, which it first promulgated in 1955.<sup>14</sup> This statute section binds future parties to final agency action unless the party challenges the action within sixty days after promulgation by the EPA in the United States Court of Appeals for the District of Columbia.<sup>15</sup> Congress has directed that proper petitions for review under § 307(b) include any national air quality standard, any other nationally applicable regulation, or any final action.<sup>16</sup> Consequently, if a court determines a party did not properly challenge the regulations under § 307(b), according to the Act that party waives the right to challenge, and the court does not have the jurisdiction to hear the case.<sup>17</sup>

Although § 307(b) could have been an important point for the Court in *Duke*, the *Duke* trilogy did not focus on the jurisdictional issue.<sup>18</sup> Rather, the overarching question was whether Duke should have obtained a PSD permit prior to modifying its facility.<sup>19</sup> The United States District Court for the District of North Carolina granted summary judgment in favor of Duke, and determined an industry's routine standard should govern whether the RMRR exemption applies.<sup>20</sup> The court also determined the regulations allow a reviewing authority to use the period most representative of normal source operations.<sup>21</sup> Meaning, the two years prior to a project do not have to establish the baseline rate, but rather the most representative two years of normal source operations and emissions

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affect on the particular apparatus. *N. Plains Res. Council v. Env'tl. Prot. Agency*, 645 F.2d 1349, 1356 (9th Cir. 1981). Therefore, NSPS is equipment oriented. *Id.* On the other hand, PSD focuses on the location of the plant and its potential impact on its surroundings. *Id.*

<sup>14</sup> *Administrative Proceedings and Judicial Review*, 42 U.S.C. § 7607(b) (1955).

<sup>15</sup> *See infra* notes 50-63 and accompany text (explaining the importance of § 307(b)). Section 307(b)(1) and 42 U.S.C. § 7607(b)(1) are the same. *Administrative Proceedings and Judicial Review*, 42 U.S.C. § 7607(b) (1977). The Act refers to this provision as § 307(b) and this note will refer to it as § 307(b) as well. *Id.* In promulgating a rule under § 307(b), the rule must go through notice and comment. *Id.*

<sup>16</sup> 42 U.S.C. § 7607 (1977).

<sup>17</sup> *Id.* § 7607(b). However, if the party raising the objection can prove to the Administrator the impracticality of raising the objection during the designated time after the period for public comment, and the objection is too central to the outcome of the rule, the Administrator can reconsider the rule and provide the same procedural rights as would have been afforded had the information been available at the time. *Id.* § 7607(d)(7)(B).

<sup>18</sup> *Duke*, 278 F. Supp. 2d at 619; *U.S. v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005); *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007).

<sup>19</sup> *Duke*, 278 F. Supp. 2d at 626.

<sup>20</sup> *Id.* at 626-35. The question is: would this particular unit routinely have this type of maintenance during its lifetime, or would similar units in the industry have the maintenance done only one or two times during their lifetime. *Id.*

<sup>21</sup> *Id.* at 648; *Requirements for Preparation, Adoption, and Submittal of Implementation Plans*, 40 C.F.R. § 51.166(b)(21)(ii) (1987).

prior to a project.<sup>22</sup> The district court did not address, and the United States and Environmental Defense did not argue the jurisdictional issues under § 307(b).<sup>23</sup>

The United States Court of Appeals for the Fourth Circuit held Duke's PMP did not require a PSD permit.<sup>24</sup> Furthermore, the appellate court found the EPA must interpret "modification" congruently with the New Source Performance Standards (NSPS) definition because Congress explicitly defined PSD in terms of NSPS.<sup>25</sup> The appellate court briefly discussed § 307(b), and determined a question as to the validity of the PSD regulations did not exist.<sup>26</sup> Therefore, the appellate court's only concern related to the correct interpretation of the PSD regulation.<sup>27</sup>

The United States Supreme Court granted the petition for certiorari and held an actual, annual increase in emissions triggers the term "modification" under PSD.<sup>28</sup> As a result, the Act now requires power plants to seek PSD review when the facility undergoes a modification that increases its hours of operation or actual, annual production rates.<sup>29</sup> In addressing the jurisdictional issues presented in § 307(b) the Court concluded the appellate court's construction of the 1980 regulations invalidated these issues.<sup>30</sup> The Court also determined the invalidation implicated § 307(b).<sup>31</sup> However, because the appellate court did not reason that § 307(b) applied, the Court determined it had "no occasion at this point to consider the significance of § 307(b)."<sup>32</sup>

This note addresses how the Supreme Court's interpretation of "modification" supports the Act's goals of controlling air quality.<sup>33</sup> The note achieves this by

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<sup>22</sup> *Duke*, 278 F. Supp. 2d at 648. Meaning, the last two functioning years of a unit. *Id.*

<sup>23</sup> *Id.* at 619. In the district court various environmental groups moved to intervene as plaintiffs. *U.S. v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 562 (M.D.N.C. 2001). The court found the environmental groups had a right to intervene pursuant to Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure. *Id.*

<sup>24</sup> *U.S. v. Duke Energy Corp.*, 411 F.3d 539, 551 (4th Cir. 2005).

<sup>25</sup> *Id.* at 550. The appellate court found it undisputed that prior to PSD the EPA's promulgation of the NSPS regulations defined the term "modification" to mean "a project that increases the *hourly* rate of emissions. . . ." *Id.*

<sup>26</sup> *Id.* at 549 n.7.

<sup>27</sup> *Id.*

<sup>28</sup> *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-34 (2007); *Administrative Proceedings and Judicial Review*, 42 U.S.C. §7607(b) (1977).

<sup>29</sup> *Env'tl. Def.*, 127 S. Ct. at 1433-34. If a unit increases its production of emissions this will now trigger PSD review and permitting. *Id.*

<sup>30</sup> *Id.* at 1436.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *infra* notes 37-44 and accompanying text describing the purpose of the Clean Air Act.

looking at the Act's initial goals, and more specifically the 1970 and 1977 amendments along with the subsequent 1980 regulations.<sup>34</sup> The principal case section addresses the history of *United States v. Duke Energy Corporation* at the district and appellate levels leading up to the Supreme Court's decision, as well as the Supreme Court's opinion.<sup>35</sup> Furthermore, the analysis discusses two possible improvements to the Court's opinion along with policy considerations.<sup>36</sup>

## BACKGROUND

### *The Clean Air Act's Goals, Amendments, and Changed Regulations*

Congress created the Clean Air Act (Act) to aid in the fight against air pollution.<sup>37</sup> Consequently, the Act directed the EPA to develop National Ambient Air Quality Standards (NAAQS), specifying the maximum allowable concentrations of air pollutant for each area of the country.<sup>38</sup> In 1970, Congress amended the Act to include New Source Performance Standards (NSPS), requiring the EPA to regulate and minimize emissions from "new sources."<sup>39</sup> The NSPS regulates hourly emission rates for both newly constructed facilities and "modifications" to existing facilities.<sup>40</sup> Moreover, the NSPS regulations require a "modified" source to become subject to the NSPS's "technology-based" standards requiring the installation of the best demonstrated pollution control technology.<sup>41</sup> Because of the cost and difficulties in installing new pollution control technologies, the EPA made exemptions to the "modification" rule for activities currently being undertaken by a facility.<sup>42</sup> The first exemption allows for "maintenance, repair, and replacement"

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<sup>34</sup> See *infra* notes 45-49 and accompanying text discussing the relevant amendments and regulations.

<sup>35</sup> See *infra* notes 115-58 and accompanying text discussing the instant case at the district and appellate level, and also at the Supreme Court.

<sup>36</sup> See *infra* notes 159-228 and accompanying text analyzing the Supreme Court's decision.

<sup>37</sup> H.R. REP. NO. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356; U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619, 627 (M.D.N.C. 2003).

<sup>38</sup> *Duke*, 278 F. Supp. 2d at 627.

<sup>39</sup> *Id.* at 628. Congress defined "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations . . . prescribing a standard of performance under this section which will be applicable to such source." Standards of Performance for New Stationary Sources, 42 U.S.C. § 7411(a)(2) (1977).

<sup>40</sup> *Duke*, 278 F. Supp. 2d at 628. Congress defined "modification" as "any physical change in, or change in the method of operation of, a stationary source which increase the amount of 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) (1977).

<sup>41</sup> U.S. v. Duke Energy Corp., 411 F.3d 539, 542 (4th Cir. 2005).

<sup>42</sup> Standards of Performance for New Stationary Sources, 40 C.F.R. § 60.2(h)(1) (1971). Congress wanted to allow older facilities to stay in operation without subjecting them to costly new technologies. *Duke*, 278 F. Supp. 2d at 630.

which the Administrator determines to be routine for a source category,” without requiring compliance under NSPS.<sup>43</sup> The regulations also exempt increases in hours of operation or production rates that are not considered a “modification” as long as the increase is within the operating design of the facility.<sup>44</sup>

In 1977, Congress, once again, amended the Act to include the NSR program.<sup>45</sup> This program included both PSD and NNSR.<sup>46</sup> PSD requires operators of pollutant generating facilities to limit emissions to a “baseline rate” and obtain permits before “construction” or “modification” of a source.<sup>47</sup> A “modification” includes any physical change or a change in the method of operation of a stationary source that significantly increases the amount of emissions from a regulated pollutant.<sup>48</sup> Therefore, according to the statute, a modification results when a physical change has occurred, and when emissions have significantly increased.<sup>49</sup>

### *Section 307(b) of the Clean Air Act*

Unlike many amendments to the Act, § 307(b) does not aid in the fight against air pollution; rather, Congress created § 307(b) to effectuate timely challenges to final agency action.<sup>50</sup> Under § 307(b), when the EPA Administrator promulgates, approves, or takes action that appears in the Federal Register, it binds future parties.<sup>51</sup> However, parties are not bound if a suit challenging the regulations is brought in the United States Court of Appeals for the District of

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<sup>43</sup> 40 C.F.R. § 60.14(e)(1) (1975).

<sup>44</sup> *Duke*, 278 F. Supp. 2d at 628; 40 C.F.R. §§ 60.2(h)(2)(ii), 60.14(e)(2), (3) (1975) (explaining the definition of modification). The 1975 NSPS regulations clarified operating design as an increase in the production rate of an existing facility that can be accomplished without a capital expenditure. *New York v. Env'tl. Prot. Agency* 413 F.3d 3, 12 (C.A.D.C. 2005).

<sup>45</sup> *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1429 (2007).

<sup>46</sup> *Duke*, 278 F. Supp. 2d at 628. NNSR governs areas of the country that do not meet air quality standards, while PSD govern areas of the country that do. *Id.* NNSR does not apply here because the Duke facilities were located in areas of the country governed by PSD or attainment area standards. *Id.* at 628 n.7.

<sup>47</sup> *Id.* at 628.

<sup>48</sup> *Env'tl. Def.*, 127 S. Ct. at 1429; Permit Requirements 40 C.F.R. § 51.166(b)(2)(i) (1987). A “modification” is “any physical change in or change in the method of operation of a major stationary source that would result in significant net emission increases of any pollutant subject to regulations under the Act.” *Env'tl. Def.*, 127 S. Ct. at 1429 (quoting 40 C.F.R. § 51.166(b)(2)(i) (1980)). Both parties agree the 1980 regulations control in this case. *Duke*, 278 F. Supp. 2d at 629.

<sup>49</sup> *Duke*, 278 F. Supp. 2d at 629. The preamble to the 1980 PSD regulations explained companies do not have to obtain a PSD permit for mere increases in operating hours because that would undermine the ability of any company to take advantage of favorable market conditions. *Env'tl. Def.*, 127 S. Ct. at 1435.

<sup>50</sup> H.R. REP. NO. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356; *Administrative Proceedings and Judicial Review*, 42 U.S.C. § 7607(b)(1) (1977).

<sup>51</sup> 42 U.S.C. § 7607(b)(1) (1977).

Columbia within sixty days after promulgation by the agency.<sup>52</sup> In § 307(b)(1), Congress directs petitions for review for any national air quality standard, any other nationally applicable regulation, or any final action may be filed only in the United States Court of Appeals for the District of Columbia within sixty days after promulgation by the EPA's Administrator.<sup>53</sup> Furthermore, § 307(b)(2) states "[a]ction[s] of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."<sup>54</sup> Consequently, if a court determines the validity of regulation, an authoritative interpretation, or a final action is being challenged, that court does not have the jurisdiction to hear the case unless that court is the United States Court of Appeals for the District of Columbia.<sup>55</sup>

Although the D.C. Circuit has the power to hear these kinds of cases, the judicial power to hear a case involving administrative agency action is not inherent in the federal courts.<sup>56</sup> Statutes grant the courts jurisdictional power, and in the absence of a grant of jurisdiction, a federal court may not hear the case.<sup>57</sup> Nevertheless, once a court has determined it has subject-matter jurisdiction, it can entertain any cause of action within the bounds of the regulating statute.<sup>58</sup> However, just because a court finds it has jurisdiction, this does not mean a party has a cause of action and can bring suit.<sup>59</sup> A challenging party can only bring suit if it establishes a cause of action under the Administrative Procedure Act (APA) or the regulating statute.<sup>60</sup> Although a party can bring suit under the APA, § 307(b)

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* § 7607(b)(2).

<sup>55</sup> *Id.* §7607(b); Lower courts have often used § 307(b) to dismiss cases for a lack of jurisdiction. *See Grand Canyon Trust v. Pub. Serv. Co. of N. M.*, 283 F. Supp. 2d 1249, 1253 (D.N.M. 2003). The *Grand Canyon* court held the proper approach to challenging the EPA's decisions regarding PSD permit requirements was through the judicial review provisions of the Act. *Id.* at 1254. The court based its reasoning on three prior decisions. *Id.* at 1253. First, a district court refused to recognize jurisdiction over a collateral attack claim on a permitting decision made by an agency. *Id.* Second, a citizen's suit did not allow a collateral attack on an EPA permit decision. *Id.* Finally, a state court suit impermissibly made a collateral attack on a federal agency's decision and disregarded the court of appeal's exclusive jurisdiction. *Id.*

<sup>56</sup> Charles H. Koch, Jr., *The Structure of the Judicial Process*, ADMINISTRATIVE LAW AND PRACTICE, 2 Admin. L. & Prac. § 8.14 (2d ed.) (2007).

<sup>57</sup> Koch, *supra* note 56; *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

<sup>58</sup> *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979), on remand 612 F.2d 68 (2d Cir. 1979).

<sup>59</sup> *Stockman v. Fed. Election Comm'n.*, 138 F.3d 144, 151 (5th Cir. 1998).

<sup>60</sup> *Id.* The Supreme Court reaffirmed in 1999 that the APA does not create subject-matter jurisdiction. *Your Home Visiting Nurse Servs. v. Shalala*, 525 U.S. 449, 457-58 (1999). The APA is the Act created by Congress that defines the procedural rights of people outside of government and guides the manner in which decisions are made inside the government. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 22 (Thomson West 2006) (1997).

does not use the APA to create a cause of action.<sup>61</sup> Rather, it uses its own statutory authority to create subject-matter jurisdiction.<sup>62</sup> Therefore, a party cannot bring suit to challenge a regulation under § 307(b) through the APA, it must do so through the language of the statute itself.<sup>63</sup>

Not only does the D.C. Circuit have the power to hear these kinds of cases, it also has the obligation to do so.<sup>64</sup> This obligation is based on a 2006 decision by the U.S. Supreme Court concluding a court cannot waive subject-matter jurisdiction.<sup>65</sup> Furthermore, the Court found all courts, including the Supreme Court, have “an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.”<sup>66</sup> Because of the importance in ensuring that a court has subject matter jurisdiction, the Federal Rules of Civil Procedure additionally state a party can object to a court’s lack of subject-matter jurisdiction at any stage in the litigation, even after the entry of judgment.<sup>67</sup> In the instant case, the Supreme Court found the appellate court’s interpretation of the 1980 PSD regulations an invalidation of the regulations.<sup>68</sup> As discussed above, under § 307(b) invalidations of regulations can only be heard in the D.C. Circuit within sixty days after promulgation.<sup>69</sup> Therefore, if a court finds a party is challenging the validity of regulations outside the D.C. Circuit, the court must dismiss on the basis of a lack of jurisdiction and not hear the case.<sup>70</sup>

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When a statute does not provide a party with a specific review provision, § 702 of the APA becomes the fall back. *Id.* at 408. Section 702 establishes a cause of action for a person suffering because of agency action. *Id.*

<sup>61</sup> Funk, *supra* note 60, at 408.

<sup>62</sup> Funk, *supra* note 60, at 408. Specific judicial review provisions can create both jurisdiction and a cause of action. *Id.* Section 307(b) does not use the APA to create a cause of action, it uses its own statutory authority in § 307(b)(2) to create subject-matter jurisdiction which applies to § 307(b)(1). *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* “Congress has broadly authorized the federal courts to exercise subject-matter jurisdiction over ‘all civil actions arising under the Constitution, laws, or treaties of the United States.’” *Id.* at 505 (quoting Federal Question, 28 U.S.C. § 1331 (2006)).

<sup>67</sup> *Arbaugh*, 546 U.S. at 506; FED. R. CIV. P. 12(b)(6), (h)(3).

<sup>68</sup> *Env’tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1436 (2007).

<sup>69</sup> Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b)(1) (1977).

<sup>70</sup> *Id.*

### *Applicability Determinations*

As stated, § 307(b)(1) requires challenges to final agency action be brought within sixty days after promulgation.<sup>71</sup> An applicability determination is one example of final agency action.<sup>72</sup> In *Wisconsin Electric Power Company v. Reilly* the United States Court of Appeals for the Seventh Circuit reviewed just such an applicability determination.<sup>73</sup> Wisconsin Electric Power Company (WEPCO) sought an applicability determination; however, when the agency issued the determination, WEPCO sought review in the federal courts.<sup>74</sup> When a party, like WEPCO, seeks an applicability determination, that party submits a proposal to the appropriate agency and waits for a determination.<sup>75</sup> If the party is not satisfied with the agency's determination, the party may then challenge the agency's result in the appropriate court pursuant to the relevant statute.<sup>76</sup>

In *Wisconsin*, the EPA made an applicability determination as to whether proposed changes at a Wisconsin power plant would qualify as a "modification" under NSPS and/or PSD.<sup>77</sup> The EPA determined a "modification" that increased

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<sup>71</sup> Gremillion, *supra* note 5, at 345. A petition for review of any EPA Administrator's action that is locally or regionally applicable may be filed only in the United States Court of Appeal for the appropriate circuit. 42 U.S.C. § 7607(b) (1977).

<sup>72</sup> Gremillion, *supra* note 5, at 345.

<sup>73</sup> *Wis. Elec. Power. Co. v. Reilly*, 893 F.2d 901, 905-12 (7th Cir. 1990).

<sup>74</sup> *Id.*

<sup>75</sup> *See generally Wisconsin*, 893 F.2d at 901 (describing the process for an applicability determination).

<sup>76</sup> *Id.* In *Chevron v. Natural Resource Defense Council*, petitioners sought review from the Court to determine if the EPA gave a permissible interpretation to the term "stationary sources." *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). The Court in *Chevron* established a two prong test that gives deference to agencies. *Id.* at 866. First, when a court reviews an agency's interpretation of a statute that it administers, it asks whether Congress has addressed the precise question at issue. *Id.* at 842. If the court finds Congress has addressed the question at issue, the court defers to the congressional intent as law. *Id.* at 843 n.9. However, if the court determines Congress has not addressed the issue directly, then the court does not impose its own interpretation, but instead determines whether the agency gave a permissible interpretation. *Id.* at 842-43.

<sup>77</sup> *Wisconsin*, 893 F.2d at 901. During an applicability determination, the EPA makes a case-by-case decision to determine if a unit qualifies for the RMRR exemption. *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 632 (M.D.N.C. 2003). The EPA looks at the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors. *Id.*; *Wisconsin*, 893 F.2d at 905. WEPCO conducted a study and determined both its air heaters and rear steam drums needed renovation to continue operation of its plant. *Wisconsin*, 893 F.2d at 905. WEPCO submitted the proposed project to the appropriate state agency, which then consulted the EPA to determine whether WEPCO needed a PSD and/or NSPS permit. *Id.* at 905-06. A PSD permit means a unit has to comply with stricter standards than the NAAQS, while NSPS means the unit only has to meet the NAAQS standards. *Duke*, 278 F. Supp. 2d at 628.

the facility's hourly rate of emissions triggered NSPS.<sup>78</sup> Conversely, to trigger PSD, the "modification" must increase the total amount of emissions.<sup>79</sup>

However, the EPA decided under some circumstances a unit can avoid PSD.<sup>80</sup> A unit can avoid PSD if the EPA determines that a project is routine, therefore, qualifying for the RMRR exemption.<sup>81</sup> To determine how routine a project is, the EPA developed a multi-factor test in *Wisconsin*.<sup>82</sup> The factors included the nature, extent, purpose, frequency, and cost of the project.<sup>83</sup> After weighing these factors, the EPA found the project at Wisconsin Electric Power Company (WEPCO) not routine.<sup>84</sup> As a result, the project did not fall under the exception to the "modification" rule, and the EPA required the facility to obtain a PSD permit.<sup>85</sup> The EPA relied on WEPCO's potential to emit in concluding the plant's subjectivity to PSD review.<sup>86</sup> The EPA also found WEPCO subject to NSPS because the EPA determined the renovation projects would increase the plant's hourly rate of emissions.<sup>87</sup> However, WEPCO did not agree with the EPA's determination and challenged the decision.<sup>88</sup> By challenging an agency decision with an applicability determination, a party can have assurance it has properly interpreted a regulation and it will not be subject to litigation in the future.<sup>89</sup>

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<sup>78</sup> *Wisconsin*, 893 F.2d at 905.

<sup>79</sup> *Id.* Relevant exceptions to the modification rule are: 1) routine maintenance, repair, and replacements for a source category, and 2) increases in the hours of operation. *Id.*

<sup>80</sup> *Id.* at 911-12.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Wisconsin*, 893 F.2d at 910. The EPA observed the substantial nature and extent of the project, and, furthermore, that WEPCO wanted to perform an unprecedented project. *Id.* at 911. Additionally, WEPCO admitted they typically scheduled equipment changes and routine maintenance simultaneously. *Id.*

<sup>84</sup> *Id.* at 910-11.

<sup>85</sup> *Id.* at 911-12. The EPA did not find, and WEPCO did not identify, even one facility which had undergone similar work. *Id.* WEPCO argued forty air heaters in other plants had been replaced without NSPS and PSD review, but the EPA concluded the heaters at the WEPCO facility had to be replaced in whole, while the other plants only replaced parts. *Id.* at 912.

<sup>86</sup> *Id.* at 916. WEPCO appealed to the Seventh Circuit Court of Appeals. *Id.* at 906. The "potential to emit" calculation used by the EPA troubled the appellate court partly because the EPA based its calculation on the plant operating continuously. *Id.* at 917. The court concluded the EPA may not rely on assumed continuous operations as a basis for finding an emissions increase, and thus the plant could not be subject to PSD review until WEPCO made data available to the EPA so a determination could be made on whether the renovated plant would cause a significant net emissions increase. *Id.* at 918.

<sup>87</sup> *Id.* at 914.

<sup>88</sup> See *Wisconsin*, 893 F.2d at 906 (explaining how WEPCO challenged the EPA's decision); see *supra* note 71 and accompanying text (detailing which circuit is appropriate).

<sup>89</sup> See *id.* at 901 (describing the process for seeking an applicability determination).

A proper understanding of the law also created the central issue in *Chaganti & Associates v. Nowotny*.<sup>90</sup> In *Chaganti*, a suit arose, but, prior to trial, the parties reached a settlement agreement.<sup>91</sup> When it came time to execute the agreement, the plaintiff refused to sign, and the United States District Court for the Eastern District of Missouri held the plaintiff in contempt.<sup>92</sup> The plaintiff argued the court order did not identify all the required documents, and was, therefore, unclear.<sup>93</sup> However, the court found the meaning should have been clear based on previous pleadings and discussions.<sup>94</sup> Thus, the court concluded even if the terms were unclear, the plaintiff had the “obligation to seek clarification of the court’s order,” rather than maintain a studied ignorance of the law.<sup>95</sup> Although the *Duke* trilogy did not focus on § 307(b) nor applicability determinations, this issue is important because Congress has shown a desire to utilize § 307(b) and ensure that final actions, such as applicability determinations, are promptly challenged.<sup>96</sup>

### *Statutory Interpretation*

The district court in *Duke*, relied heavily on *Wisconsin Electric Power Company v. Reilly* to conclude a routine within the industry standard should determine whether the RMRR exemption applies.<sup>97</sup> Conversely, both the appellate court and Supreme Court in *Duke* primarily focused on the correct statutory interpretation of the term “modification.”<sup>98</sup> The Supreme Court found the appellate court’s reliance on the presumption that identical words must have the same construction too rigid.<sup>99</sup> In *Atlantic Cleaner & Dyers v. United States*, the Court found it natural to assume identical words used in different parts of the statute required identical meanings, but this presumption was not rigid.<sup>100</sup> In *Atlantic*, the Court reasoned most words have different “shades of meaning,” and can have a different

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<sup>90</sup> *Chaganti & Assoc’s. v. Nowotny*, 470 F.3d 1215, 1218 (8th Cir. 2006).

<sup>91</sup> *E.g., id.* (noting there are other cases which stand for a similar proposition).

<sup>92</sup> *Id.* at 1220.

<sup>93</sup> *Id.* at 1224.

<sup>94</sup> *Id.*

<sup>95</sup> *Chaganti*, 470 F.3d at 1224 n.2. Similarly, in *Islip v. Eastern Air Lines, Inc.*, the trial court found the defendant in noncompliance with a permanent injunction. *Islip v. E. Air Lines, Inc.*, 793 F.2d 79, 80 (2nd Cir. 1986). However, on appeal, the court vacated the judgment of contempt because the trial court’s orders failed to give the defendant a clear understanding of the requirements, and the defendant had tried to clarify the ambiguous orders. *Id.* at 83. Since the defendant did not maintain a studied ignorance, the vacated contempt order was proper. *Id.* at 85.

<sup>96</sup> Brief for the Petitioners at 27-28, *Env’tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006) (No. 05-048) [hereinafter Brief for the Petitioners, July 21st]; *Duke*, 278 F. Supp. 2d at 623-24.

<sup>97</sup> *Duke*, 278 F. Supp. 2d at 626-35.

<sup>98</sup> See generally *Duke*, 411 F.3d 539; *Env’tl. Def.*, 127 S. Ct. 1423 (discussing the correct interpretation for the term “modification”).

<sup>99</sup> *Env’tl. Def.*, 127 S. Ct. at 1432.

<sup>100</sup> *Atlantic Cleaner & Dyers v. U.S.*, 286 U.S. 427, 433 (1932).

construction when used in separate parts of a statute.<sup>101</sup> Consequently, if one could reasonably interpret the words as having different meanings because of the subject matter to which the words refer or the conditions in which one uses the words, the “meaning well may vary to meet the purpose of the law.”<sup>102</sup>

Further emphasizing its point that identical phrases do not require identical interpretation, the Court relied on the context of a statute to determine the meaning of a term.<sup>103</sup> In *Robinson v. Shell Oil Company*, the Court decided if a term is ambiguous, standing alone, then analyzing the context to see whether the context gives the term further meaning would resolve the dispute.<sup>104</sup> Similarly, the D.C. Circuit found in *New York v. Environmental Protection Agency*, that because of the different regulatory definitions of the term “modification” for New Source Review (NSR) and New Source Performance Standards (NSPS) it would take a strong indication from Congress it intended to apply an identical definition.<sup>105</sup> The Supreme Court used the above cases to illustrate identical words may have different meanings when the statutory context supplies different objectives.<sup>106</sup>

#### PRINCIPAL CASE

##### *Summary of the Case*

The United States and Environmental Defense sued Duke for an alleged violation of the PSD provision of the Act.<sup>107</sup> The parties brought this suit based on Duke’s conduct over a span of twelve years.<sup>108</sup> During this time, Duke engaged in a Plant Modernization Program (PMP) to conduct maintenance and upgrade its

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997).

<sup>104</sup> *Id.*

<sup>105</sup> *New York v. Env'tl. Prot. Agency* 413 F.3d 3, 20 (C.A.D.C 2005). At the time of the 1977 amendments, § 60.2(h) defined modification to include “any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant;” however, § 60.14(a) defined modification as “any physical or operational change to an existing facility which results in an increase in the emissions rate to the atmosphere of any pollutant.” *Id.* at 19-20. Once again, in *United States v. Cleveland Indians Baseball Company*, the Court found words within different codes can have different meanings. *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 200 (2001). The Court found no direct relation between an identical term used in both social security law and the tax code, and thus, the different context led the Court to conclude a symmetrical construction of the term was not necessary. *Id.* at 212-13.

<sup>106</sup> *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1432-33 (2007).

<sup>107</sup> *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 622 (M.D.N.C. 2003); *see supra* note 23 and accompanying text (explaining that environmental groups intervened as plaintiffs in the district court).

<sup>108</sup> *Id.* at 624-25.

operating units.<sup>109</sup> The case's central issues concerned the appropriate interpretation of the term "modification" for PSD.<sup>110</sup> Then, depending on the interpretation, whether Duke's maintenance and upgrades constituted "modifications," which should have triggered PSD review and permitting.<sup>111</sup> Duke argued an hourly increase in emissions triggered PSD, regardless of the effect on the annual emissions rate.<sup>112</sup> Conversely, the United States and Environmental Defense argued PSD should be triggered by an actual, annual increase in the discharge of pollutants.<sup>113</sup> Ultimately, the Supreme Court held the term "modification" does not require the same interpretation for both PSD and NSPS, and the EPA's actual, annual increase in pollutants was the correct standard to trigger PSD.<sup>114</sup>

### *District Court*

The district court decided two sub-issues.<sup>115</sup> First, the district court determined a routine within the industry standard was the appropriate standard to use when determining whether a project qualifies for the RMRR exemption.<sup>116</sup> Second, the district court found post-project emission levels should be calculated based on the last two years a unit operated.<sup>117</sup> The court granted summary judgment to Duke and the government appealed.<sup>118</sup>

### *United State Court of Appeals for the Fourth Circuit*

The appellate court decided the issue of whether a plant "modification" that does not increase the hourly rate of emissions production, but does increase the number of hours a plant operates, requires a permit under PSD.<sup>119</sup> The appellate court found no requirement for a PSD permit as long as a plant's hourly rate

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 625.

<sup>111</sup> *Id.*

<sup>112</sup> *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1430 (2007).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1435-36.

<sup>115</sup> *Duke*, 278 F. Supp. 2d at 626, 640.

<sup>116</sup> *Id.* at 626, 635.

<sup>117</sup> *Id.* at 648-49. According to the district court, a net emission increase can only result from an increase in hourly emission rates. *Id.* The district court used statements made by Edward E. Reich, the EPA's director of the Division of Stationary Source Enforcement, in its finding that increase in annual emissions do not trigger PSD. *Id.* at 641-42. Reich stated that only an hourly emission rate would trigger PSD, and thus, the district court determined these statements deserved substantial weight because Reich headed the division responsible for interpreting questions relating to PSD. *Id.*

<sup>118</sup> *U.S. v. Duke Energy Corp.*, 411 F.3d 539, 542 (4th Cir. 2005).

<sup>119</sup> *Id.* at 542-47.

of production did not increase.<sup>120</sup> The issue of § 307(b) was first raised in the appellate court, but the court disregarded the argument.<sup>121</sup>

### *United States Supreme Court*

The Environmental Defense appealed, and the Supreme Court granted its petition for certiorari.<sup>122</sup> The Court vacated the appellate court's decision and remanded the case.<sup>123</sup> Justice Souter's opinion for the Court was unanimous, except for one portion, which Justice Thomas did not join for reasons explained in his opinion, concurring in part.<sup>124</sup> The Supreme Court considered the issue of whether to measure an air pollutant emitted in terms of an hourly rate of discharge, the way NSPS regulations specify, or whether the EPA can interpret PSD with a different regulatory interpretation.<sup>125</sup> The Court determined identical interpretations were not required for the term "modification" under both PSD and NSPS.<sup>126</sup>

### *Overview*

The Environmental Defense argued under PSD, a "modification" should be measured in terms of the actual, annual discharge of the pollutant regardless of the hourly emissions rate after the modification.<sup>127</sup> Agreeing, the Supreme Court relied on a more lenient rule of statutory construction and a different interpretation of "modification" for PSD than NSPS.<sup>128</sup>

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<sup>120</sup> *Id.* at 550. The appellate court used *Chevron* to determine Congress directly addressed the question at issue when it defined "modification" in NSPS and then "expressly directed that the PSD provisions of the Act employ this same definition." *Id.* at 546. The appellate court's conclusion that Congress had spoken directly to the question at issue ended the matter under the first prong of *Chevron*. *Id.* at 547 n.3.

<sup>121</sup> *Id.* at 549 n.7.

<sup>122</sup> *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1428, 1432 (2007); Gremillion, *supra* note 5, at 338. The Bush Administration declined to petition to the Supreme Court, stating that the 2002 NSR regulations made the Fourth Circuit's ruling of little importance in a practical setting. *Id.*

<sup>123</sup> *Env'tl. Def.*, 127 S. Ct. at 1437. On remand, Duke can argue the EPA has taken inconsistent positions and is retroactively targeting the last twenty years of practice. *Id.*

<sup>124</sup> *Id.* at 1423, 1428, 1437.

<sup>125</sup> *Id.* at 1430.

<sup>126</sup> *Id.* at 1436.

<sup>127</sup> *Id.*

<sup>128</sup> *Env'tl. Def.*, 127 S. Ct. at 1423.

*The Statutory Cross-Reference Does Not Mandate a Singular Regulatory Construction*

Contrary to the appellate court's interpretation of statutory construction, the Supreme Court found the rule of statutory construction less rigid.<sup>129</sup> The Court reiterated that words have different "shades of meaning," and can have a different construction when used in separate parts of a statute.<sup>130</sup> Furthermore, the Court found it natural to assume identical words used in different parts of the statute required identical meanings, but this presumption, the Court stated, is not absolute.<sup>131</sup> If the words could reasonably be interpreted as having a different meanings because of the subject matter to which the words refer or the conditions in which the words are used, the "meaning well may vary to meet the purpose of the law."<sup>132</sup>

Based on this reasoning, the Court found the EPA could interpret the term "modification" differently in PSD and NSPS.<sup>133</sup> The Court found no "effectively irrebuttable" presumption similar terms need identical interpretations.<sup>134</sup> Consequently, the Court concluded that NSPS and PSD can have different interpretation of the term "modification."<sup>135</sup>

*PSD Regulations Cannot Be Interpreted Consistently With an Hourly Emission Test*

The Court further determined that basing PSD review and permitting on an hourly rate of emissions invalidated the PSD regulations.<sup>136</sup> First, the Court found the 1980 PSD regulations did not define "major modification" in terms of

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<sup>129</sup> *Id.*

<sup>130</sup> *Atlantic Cleaner & Dyers v. United States*, 286 U.S. 427, 433 (1932); *see supra* notes 100-02 and accompanying text (explaining the *Atlantic* case).

<sup>131</sup> *Atlantic*, 286 U.S. at 433.

<sup>132</sup> *Id.*

<sup>133</sup> *Envtl. Def.*, 127 S. Ct. at 1432. First, the Court examined *Robinson* where it held each section of the Civil Rights Act had to be analyzed using the context around the term to determine whether the issue could be resolved within the framework. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997); *see supra* notes 103-04 and accompanying text (describing the significance of *Robinson*). Next, the Court used its decision in *Cleveland Indians*, to emphasize that similar terms do not require the same statutory interpretation. *Envtl. Def.*, 127 S. Ct. at 1433. In *Cleveland Indians*, the Court "rejected the notion that using the phrase 'wages paid' in both 'the discrete taxation and benefits eligibility context' can, standing alone, 'compel symmetrical construction.'" *Envtl. Def.*, 127 S. Ct. at 1433 (quoting *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001)).

<sup>134</sup> *Envtl. Def.*, 127 S. Ct. at 1433 (referring to *U.S. v. Duke Energy Corp.*, 411 F.3d 539, 550 (4th Cir. 2005)).

<sup>135</sup> *Envtl. Def.*, 127 S. Ct. at 1436.

<sup>136</sup> *Id.* at 1436.

an increase in the “hourly rate of emissions.”<sup>137</sup> In fact, the regulations gave no rate at all.<sup>138</sup> In addition, the Court found a unit’s actual operating hours should be calculated using actual emissions, and actual emissions should be calculated using the hours the unit actually runs.<sup>139</sup> Therefore, according to the Supreme Court, increases in actual hours of operations which increase the annual emission rate of a unit should trigger PSD permitting and review.<sup>140</sup>

Finding that annual emission rate increases should trigger PSD, the Court defined “major modification” as having two separate components that must be satisfied.<sup>141</sup> The first component is, “any physical change in or change in the method of operation.”<sup>142</sup> The second component requires a “significant net emissions increase.”<sup>143</sup> Finding two necessary components to the term “major modification,” the Court found the appellate court’s construction invalidated the 1980 regulations.<sup>144</sup>

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<sup>137</sup> *Id.* at 1434.

<sup>138</sup> *Id.* The regulation only mentioned a rate in terms of annual emissions, not hourly. *Id.* The regulations described “significant” in tons per year. Prevention of Significant Deterioration of Air Quality, 40 C.F.R. §51.166(b)(23)(i)(1980). A “net emissions increase” for “actual” emissions measures the “average” emission rate, prior to the project, measured in “tons per year.” *Id.* at § 51.166(b)(21)(ii); *Envtl. Def.*, 127 S. Ct. at 1434.

<sup>139</sup> *Envtl. Def.*, 127 S. Ct. at 1434.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1434.

<sup>143</sup> *Id.* (quoting 40 C.F.R. § 51.166(b)(2)(i)(1980)). The district court thought an increase in the hourly emission rate was a necessary prerequisite to a PSD “major modification” because of a provision in the 1980 PSD regulations. *Envtl. Def.*, 127 S. Ct. at 1435. The relevant provision excluded increased hours of operation or production from the scope of a physical change or a change in the method of operation. *Id.* Using this exclusion, the district court assumed that increases in hours of operation, which result in a significant increase in emissions, must be ignored if caused by a physical change or a change in the method of operation. *Id.* The Supreme Court read the 1980 PSD regulations as requiring a difference between the two separate components of the regulation. *Id.* The Court agreed a mere increase in the hours of operation was not a “physical change or change in the method of operation.” *Id.* However, the Court disagreed with the appellate court’s reliance on the district court’s interpretation that an increase in operating hours, resulting in an emission increase, must be ignored if caused by a “physical change or change in the method of operation.” *Id.* The Supreme Court found this reading “turns an exception to the first component . . . into a mandate to ignore the very facts that would count under the second.” *Id.*; Prevention of Significant Deterioration of Air Quality, 40 C.F.R. § 51.166(b)(21)(ii) (1980).

<sup>144</sup> *Envtl. Def.*, 127 S. Ct. at 1437; Administrative Proceedings and Judicial Review 42 U.S.C. §7607(b) (1980). The Court aligned itself with both the District of Columbia and the Seventh Circuit with its decision to vacate and remand the appellate court’s decision. The District of Columbia in *New York* and the Seventh Circuit in *United States v. Cinergy Corporation* both held that an actual, annual increase in emissions should trigger PSD. *New York v. Env’tl. Prot. Agency*, 413 F.3d 3 (C.A.D.C. 2005); *U.S. v. Cinergy Corp.*, 458 F.3d 705 (7th Cir. 2006); *see also Env’tl. Def.*, 127 S. Ct. at 1437 (agreeing with both the court in *New York* and the Seventh Circuit).

When the appellate court found that there was no question relating to the validity of the PSD regulations for it to resolve, it dismissed the § 307(b) argument.<sup>145</sup> However, the Court found there was an issue relating to the validity of the 1980 regulations, and furthermore, the appellate court's construction invalidated the 1980 regulations.<sup>146</sup> Thus, the Supreme Court concluded the appellate court overstepped its authority because invalidations of regulations are addressed under § 307(b) of the Act in the Court of Appeals for the District of Columbia within sixty days of EPA rulemaking.<sup>147</sup> However, since the appellate court disregarded the applicability or effect of § 307(b), the Court found no reason to consider the importance of § 307(b) in this case.<sup>148</sup>

### *Justice Thomas' Concurring Opinion*

Justice Thomas wrote to address his grievances with the dicta in the portion of the opinion stating: “[T]he statutory cross-reference does not mandate a singular regulatory construction.”<sup>149</sup> In Justice Thomas's opinion Congress had explicitly linked the PSD statute's definition of the term “modification” to the NSPS's definition of “modification.”<sup>150</sup> This explicit linkage prevented the EPA from defining “modification” differently in each statute.<sup>151</sup> Instead, Justice Thomas used the presumption that repeating the same words in different parts of the statute means the words have identical meanings.<sup>152</sup>

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<sup>145</sup> U.S. v. Duke Energy Corp., 411 F.3d 539, 549 n.7 (4th Cir. 2005).

<sup>146</sup> *Env'tl. Def.*, 127 S.Ct at 1436.

<sup>147</sup> *Id.*; see also Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b) (1980) (requiring invalidations to be addressed within sixty days after EPA promulgation).

<sup>148</sup> *Env'tl. Def.*, 127 S. Ct. at 1436. Duke's final argument was if the 1980 regulations entitled the EPA to define PSD “modification” as it had done, then the EPA has taken an inconsistent stand and is “retroactively targeting the last twenty years of practice.” *Id.* at 1436-37. This claim was not addressed by any of the earlier courts and the Supreme Court found it was an issue Duke can press on remand. *Id.* at 1437.

<sup>149</sup> *Env'tl. Def.*, 127 S. Ct. at 1437 (Thomas, J., concurring).

<sup>150</sup> *Env'tl. Def.*, 127 S. Ct. at 1437 (Thomas, J., concurring). The cross-reference in 42 USC § 7479(2)(C), explicitly links the definition of “modification” in PSD and NSPS and makes them identical. *Id.* (Thomas, J., concurring).

<sup>151</sup> *Id.* (Thomas, J., concurring). Justice Thomas found in *Atlantic* a word could have a different statutory meaning if Congress repeated the word in a different context, but he distinguished *Atlantic* from the instant case because Congress's incorporation of PSD into the NSPS definition of “modification” demonstrated the congressional intent that both have the same definition regardless of the context surrounding each. *Id.* (Thomas, J., concurring); *Atlantic Cleaner & Dyers v. U.S.*, 286 U.S. 427, 433 (1932). Thus, Justice Thomas did not find *Cleveland Indians* relevant because it analyzed the repetition of terms in different statutory contexts. *Env'tl. Def.*, 127 S. Ct. at 1437 (Thomas, J., concurring). Additionally, Justice Thomas found *Robinson* inapplicable because there was no contextual difference which implied a reason to define PSD differently from NSPS. *Id.* at 1438 (Thomas, J., concurring).

<sup>152</sup> *Env'tl. Def.*, 127 S. Ct. at 1437 (Thomas, J., concurring) (referring to *Atlantic*, 286 U.S at 433).

According to Justice Thomas, the Court explained why the instant case did not require identical interpretations of the language in all situations.<sup>153</sup> However, the Court did not overcome the general presumption that the same words, repeated in different parts of the statute, require interpreting the terms to mean the same thing.<sup>154</sup> Accordingly, the Court needed to explain further why the general presumption did not apply in this case.<sup>155</sup>

### *Summary*

The Supreme Court held the EPA was not required to interpret the term “modification” the same for PSD as it does for NSPS.<sup>156</sup> The Supreme Court’s decision sets a standard for what constitutes a “modification” under the 1980 PSD regulations.<sup>157</sup> This holding will no longer allow older power plant operators to avoid PSD review by increasing their annual emissions, but not their hourly emissions rate.<sup>158</sup>

### ANALYSIS

The Supreme Court made the correct decision in holding that older power plants will now be subject to PSD review for any increase in their annual emissions rate.<sup>159</sup> The holding aligns the PSD regulations with Congress’s intent and the goals of the Act.<sup>160</sup> Although the Court’s holding effectuates Congress’s intent in passing the Act, the Court should have dismissed the case because Duke did not comply with § 307(b).<sup>161</sup> Rather than taking the action that it did, Duke should have invalidated the PSD regulations in accordance with § 307(b).<sup>162</sup> Not only should the Court have dismissed the case based on Duke’s non-compliance

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<sup>153</sup> *Envtl. Def.*, 127 S. Ct. at 1438 (Thomas, J., concurring). Justice Thomas agreed with the majority that the term “modification” did not require an identical definition under PSD and NSPS. *Id.* at 1437. However, Justice Thomas wanted the majority to further explain why this case should be distinguished from the general presumption. *Id.*

<sup>154</sup> *Id.* at 1438 (Thomas, J., concurring).

<sup>155</sup> *Id.* (Thomas, J., concurring).

<sup>156</sup> *Id.* at 1433-36 (majority opinion).

<sup>157</sup> *Id.* at 1435-37.

<sup>158</sup> *Envtl. Def.*, 127 S. Ct. at 1435-37.

<sup>159</sup> *Id.* at 1423.

<sup>160</sup> Gremillion, *supra* note 5, at 333; *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 627-28 (M.D.N.C. 2003).

<sup>161</sup> *See Chaganti & Assoc. v. Nowotny*, 470 F.3d 1215, 1224 n.2 (8th Cir. 2006) (discussing the importance of a party not maintaining a studied ignorance of the law); *see Administrative Proceedings and Judicial Review*, 42 U.S.C. § 7607(b)(1) (1977) (explaining how final agency action must be brought within sixty days after promulgation in the D.C. Circuit).

<sup>162</sup> *Grand Canyon Trust v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1253-54 (D.N.M. 2003).

with § 307(b), the Court also should have dismissed the case based on Duke's failure to obtain an applicability determination from the EPA as to whether its projects would trigger PSD review and permitting.<sup>163</sup> A decision by the Court to dismiss could have made this decision much more significant.<sup>164</sup> Dismissing may have reduced litigation in the future by encouraging industry to take proactive measures, and by aligning industry with the intent of the Act.<sup>165</sup>

### *Utilization of § 307(b) of the Clean Air Act*

According to § 307(b) of the Act, the United States Court of Appeals for the District of Columbia may address a regulation's invalidation within sixty days of any EPA final action.<sup>166</sup> In this case, the appellate court did not consider the effect of § 307(b) because it found that rather than determining PSD's validity, it was, instead, interpreting PSD regulations.<sup>167</sup> However, the Supreme Court concluded the appellate court did determine the validity of the regulations and in doing this, the appellate court overstepped its jurisdictional authority.<sup>168</sup> Nevertheless, instead of dismissing the case for lack of jurisdiction, the Court did not address the § 307(b) issue.<sup>169</sup> Furthermore, it found no reason to consider the importance of § 307(b).<sup>170</sup> As it stands, the Court diminished the § 307(b) requirements.<sup>171</sup>

When a party wishes to challenge the EPA's final action, it must do so pursuant to § 307(b).<sup>172</sup> Section 307(b) gives a federal court, which has limited jurisdiction, the jurisdiction to hear a case involving a challenge to final agency action.<sup>173</sup> In addition, a court has an obligation to determine whether subject-matter jurisdiction exists.<sup>174</sup> Therefore, if a federal court has limited jurisdiction

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<sup>163</sup> *Id.*

<sup>164</sup> *See infra* notes 166-221 and accompanying text describing how this case could have had a more meaningful affect with a dismissal by the Court.

<sup>165</sup> *See supra* note 37 and accompanying text (describing the goals of the Act).

<sup>166</sup> Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b) (1977). However, if the grounds for review arise sixty days after promulgation, then a petition must be filed within sixty days after such grounds arise. *Id.*

<sup>167</sup> Gremillion, *supra* note 5, at 338.

<sup>168</sup> *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1436 (2007).

<sup>169</sup> *Id.* at 1436-37.

<sup>170</sup> *Id.*

<sup>171</sup> *See Utah Power & Light Co. v. Env'tl. Prot. Agency*, 553 F.2d 215, 218 (D.C. Cir. 1977) (explaining when an issue comes before a court, it must determine if the validity or a particular interpretation or application of a regulation is under attack).

<sup>172</sup> Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607 (1977).

<sup>173</sup> *See Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 125 S. Ct. 2611, 2616 (2005) (noting U.S. district courts are limited in their jurisdiction to the powers granted to them by the Constitution and statutes).

<sup>174</sup> *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

and an obligation to determine whether jurisdiction exists, that court should not ignore the statute granting it jurisdiction.<sup>175</sup> Nevertheless, this is exactly what occurred in this case.<sup>176</sup> Here, the Court only had jurisdiction to hear a case which involved enforcement proceedings.<sup>177</sup> Instead both the district and appellate court heard this case and made a determination on the merits.<sup>178</sup> This was inappropriate, and every court along the way had the opportunity and obligation to determine whether jurisdiction existed at the outset of the challenge.<sup>179</sup>

If a court finds itself determining the validity or a particular interpretation of an agency's regulations, the court must dismiss the case on jurisdictional grounds under § 307(b)(1).<sup>180</sup> However, Duke argued this case did not involve a challenge to any rule, rather the issue was the interpretation of the 1980 PSD regulations.<sup>181</sup> Moreover, both lower courts only struck down the EPA's application/interpretation of the 1980 regulation, but did not invalidate the regulation itself; therefore, Duke argued § 307(b) did not apply.<sup>182</sup> Furthermore, Duke argued the EPA never promulgated an authoritative interpretation or took final action regarding the NSR regulations, and therefore, Duke never had an opportunity to seek review.<sup>183</sup>

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<sup>175</sup> See *id.* at 514 (asserting a court has an obligation to ensure it has the proper jurisdiction, even if the parties do not raise it).

<sup>176</sup> Brief for the Petitioners, July 21st, *supra* note 96, at 27.

<sup>177</sup> Brief for the Petitioners, July 21st, *supra* note 96, at 27. An enforcement proceeding does not involve a challenge to any rule; rather, it involves an interpretation of a rule. Brief for Respondent Duke Energy Corporation in Opposition at 3, *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006) (No. 05-848) [hereinafter Brief for Respondent, March 8th].

<sup>178</sup> *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003); *U.S. v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005). The Supreme Court concluded the appellate court did not interpret the 1980 regulations, but instead invalidated the regulations by ignoring the two required components of the definition of "major modification." *Env'tl. Def.*, 127 S. Ct. at 1434, 1436.

<sup>179</sup> *Arbaugh*, 546 U.S. at 514.

<sup>180</sup> Brief for the Petitioners, July 21st, *supra* note 96, at 29-30. "[U]nless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule." *Id.* at 30 n.21 (quoting H.R. REP. NO. 95-294 at 322).

<sup>181</sup> Brief for Respondent, March 8th, *supra* note 177, at 24. Duke argued the lower courts had three different interpretations of actual emissions that the EPA had advanced. *Id.* at 16. Of the three interpretations, Duke argued that both the district court and appellate court chose to uphold the "actual-to-actual" interpretation. *Id.* at 16-17. The third test was an "actual-to-potential" test for units that had not yet begun normal source operations. *Id.*

<sup>182</sup> Gremillion, *supra* note 5, at 339; see also Brief for Respondent Duke Energy Corporation at 26, *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006) (No. 05-848) [hereinafter Brief for Respondent, September 15th] (arguing the EPA's subsequent interpretation of the 1980 rules was improper, not that the rules were invalid).

<sup>183</sup> Gremillion, *supra* note 5, at 339; see also Brief for Respondent, September 15th, *supra* note 182, at 26. According to Duke, the appellate court had the jurisdiction to review the validity of an

Conversely, Environmental Defense argued any claim asserting the plain language of the Act required an identical interpretation of PSD and NSPS was purely a question of law (i.e. an attack on the validity of the regulation), and Duke should have challenged it in the D.C. Circuit within sixty days as required by § 307(b).<sup>184</sup> Congress created § 307(b) for the specific purpose of forcing parties to challenge regulations shortly after promulgation by the EPA.<sup>185</sup> Congress wanted to avoid prolonged and conflicting adjudication involving nationally applicable regulations and the Court could have helped to promote this interest by a dismissal in this case.<sup>186</sup>

A dismissal in this case could have assisted Congress with its desire for courts to utilize § 307(b).<sup>187</sup> The desire became evident in 1977 when numerous proposals gave Congress the opportunity to narrow the scope of § 307(b), but instead Congress chose to expand the grant of exclusive jurisdiction to the D.C. Circuit.<sup>188</sup> Congress established this exclusive grant of jurisdiction based on its desire to exploit the D.C. Circuit's special expertise in administering complex regulatory statutes.<sup>189</sup> Congress worried if different circuits could rule on the same regulation, courts could create uncertainty regarding the legality of the regulation.<sup>190</sup> Likewise, Congress desired assurance that regulatory programs

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EPA regulatory interpretation which arose in the Fourth Circuit. Brief for Respondent, March 8th, *supra* note 177, at 24.

<sup>184</sup> Brief for the Petitioners, July 21st, *supra* note 96, at 29-30. Environmental Defense argued that Duke had adequate notice of an authoritative interpretation in the 1980 preamble to the PSD regulations published in the Federal Register. *Id.* at 31. The preamble stated that the focus of the PSD program had shifted from "potential to emit" to "actual emissions." *Id.*; Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. at 52700 (Aug. 7, 1980) (to be codified at 40 C.F.R. pts. 51, 52, 124). The EPA explained the departure from the 1979 proposed regulations, which would trigger PSD if a unit increased its potential to emit. Brief for the Petitioners, July 21st, *supra* note 96, at 31-32.

<sup>185</sup> Brief of the States at 12-13, *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006) (No. 05-848).

<sup>186</sup> *Id.* at 13.

<sup>187</sup> Brief for the Petitioners, July 21st, *supra* note 96, at 27-28.

<sup>188</sup> *Id.* at 27.

<sup>189</sup> *Id.* Additionally, Congress established a uniform and final forum which would make final decisions with the exception of review by the Supreme Court. *Id.* at 28.

<sup>190</sup> Brief of the States, *supra* note 185, at 13. A number of states had reservations about their State Implementation Plans (SIPs) based on the uncertainty of the proper standard for PSD after the appellate court's ruling. *Id.* Reservations of States regarding their SIPs was not Congress's intent; rather, Congress wanted to "avoid protracted and inconsistent adjudication over the validity of nationally applicable EPA regulations" with the creation of § 307(b). *Id.* at 13 (citing *U.S. v. Ethyl Corp.*, 761 F.2d 1153 (5th Cir. 1985)). The appellate court's holding made many States hesitant about how to fulfill their obligation under federal environmental regulations. *Id.* at 13-15. The concern among States was that the national PSD regulations they relied on to implement their SIPs were illegal. *Id.* at 13. The Act's judicial review provision is meant to ensure that the

would either be followed or promptly challenged in the proper court.<sup>191</sup> With the creation of § 307(b), Congress did not intend for industry to not comply with the Act's regulations only to have them later invalidated by local courts during enforcement interpretation proceedings.<sup>192</sup> By not enforcing Congress's desires regarding § 307(b), this decision could lead to obscurity and uncertainty in other areas of environmental law as well.<sup>193</sup> Furthermore, if the Court had dismissed this case and enforced a broad reading of § 307(b), it could have reduced both uncertainty and waste of overlapping adjudication concerning environmental statutes, and ensure that final actions are promptly challenged in the proper court.<sup>194</sup>

### *Applicability Determination*

In addition to the jurisdictional issues presented in § 307(b), the Court could have bolstered its opinion by addressing Duke's behavior in neglecting to obtain an applicability determination.<sup>195</sup> Duke never sought an applicability determination and instead waited until the EPA brought an enforcement action before it challenged the EPA's PSD regulations.<sup>196</sup> Duke argued the EPA's view of the PSD regulations was an "enforcement interpretation" that Duke could not have challenged in the D.C. Circuit because it was not a final action.<sup>197</sup> However,

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validity of a regulation for national application has the correct standard before States must adopt regulations to implement them. *Id.* If the appellate court's reasoning became the standard, it would have led to administrative confusion along with wasted resources to promulgate SIPs which may have mistakenly relied on the validity of a federal regulation. *Id.* Furthermore, the appellate court's decision guaranteed, contrary to congressional intent, that federal Clean Air Act programs will not have uniform implementation across the United States. *Id.* at 14-15.

<sup>191</sup> *Id.* at 13.

<sup>192</sup> Brief for the Petitioners, July 21st, *supra* note 96, at 29.

<sup>193</sup> Brief of the States, *supra* note 185, at 15. By not dismissing the appellate court's reasoning, other areas of environmental law could be affected. *Id.* at 14-15. Other areas of environmental law contain statutes concerning provisions similar to § 307(b). *Id.* at 14. Other possibly affected environmental statutes are the Clean Water Act, the Comprehensive Environmental Response Compensation and Liability Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act. Brief of Amici Curiae National Parks Conservation Association and Our Children's Earth Foundation in Support of Petitioner at 13-14, *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006) (No. 05-848). Time and time again Congress has established a uniform system for judicial review for environmental statutes and a proper forum to challenge them. *Id.* at 14.

<sup>194</sup> Gremillion, *supra* note 5, at 345.

<sup>195</sup> Gremillion, *supra* note 5, at 345.

<sup>196</sup> Gremillion, *supra* note 5, at 345. If the grounds for petition arise after the sixtieth day, then the petition must be filed within sixty days after such grounds arise. Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b) (1977).

<sup>197</sup> Reply Brief for the Petitioners at 2 *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006) (No. 05-048) [hereinafter Reply Brief for the Petitioners, October 19th]. Section 307(b) prohibits challenges to final agency action during an enforcement proceeding. Gremillion, *supra* note 5, at 345.

even if this argument was substantiated, this should not alleviate Duke of its responsibility to seek out the correct interpretation of the PSD regulations before undergoing a PMP.<sup>198</sup> Under the 1990 Act amendments and Title V Operating Permit Program, self-monitoring and reporting is emphasized.<sup>199</sup> Congress may have waited until later amendments to stress the importance of industry taking initiative and responsibility, but the 1990 amendment became effective during the span of Duke's PMP.<sup>200</sup> Therefore, Duke's "wait-and-see" behavior was something the Supreme Court should have addressed in its opinion.<sup>201</sup>

The law has established a party may not maintain a studied ignorance of the law, or just "wait-and-see" to postpone compliance.<sup>202</sup> Arguably, Duke chose ignorance to avoid costly compliance.<sup>203</sup> Instead of plunging forward, Duke should

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<sup>198</sup> *Chaganti & Assoc. v. Nowotny*, 470 F.3d 1215, 1218 (8th Cir. 2006); see *supra* notes 90-95 and accompanying text (explaining that a party may not maintain a studied ignorance of the law). *Chaganti* stood for the proposition that if the terms of a court order are unclear, a party has an obligation to seek clarification rather than maintain a studied ignorance of the law in order to postpone compliance. *Chaganti*, 470 F.3d at 1224 n.2. The *Chaganti* case did not involve an applicability determination, but it does seem realistic to apply the reasoning in *Chaganti* to other areas of the law. *Id.* Accordingly, any uncertainty about the term "modification" should have resulted in Duke's active clarification in the form of an applicability determination. See *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (sorting through the cloud of uncertainty surrounding the term "modification" in both industry and the agency). Because the EPA has limited time and resources, it is industry's responsibility to obtain the appropriate permit under the 1990 Act amendments. *Gremillion*, *supra* note 5, at 345; *Voices of the Wetlands v. Cal. State Water Res. Control Bd.*, 157 Cal. App. 4th Supp. 1268, 1299 (Cal. Ct. App. 2007). The 1990 amendments to the Act, mandate that a new, modified sources obtain air pollution permits meeting uniform federal requirements, such as a PSD permit. *Voices*, 157 Cal. App. 4th Supp. at 1299. Additionally, Duke should have consulted with the EPA before engaging in hundreds of millions of dollars worth of improvements. *Gremillion*, *supra* note 5, at 345. If industry continually engages in this type of behavior, industry will prove victorious because the EPA and other agencies do not have adequate funding to compete. *Id.*

<sup>199</sup> Peter Hsiao & Siegmund Shyu, *Clean Air Act Litigation and Enforcement*, ALI-ABA COURSE OF STUDY MATERIALS, ENVIRONMENTAL LITIGATION, Vol. 2 (2003). The 1990 amendment to the Act by Congress created Title V. *Sierra Club v. Ga. Power Co.*, 365 F. Supp. 2d 1297, 1299 (N.D. Ga. 2004). Title V's goal is to impose stricter requirements on stationary sources in non-attainment areas by implementing new operating permits for stationary sources. *Id.* Additionally, Congress hoped to achieve ease in administration by creating a single document usable by the state and federal government and the public to monitor compliance. *Id.*

<sup>200</sup> See *Gremillion*, *supra* note 5, at 345 (noting a party should not wait-and-see to avoid compliance).

<sup>201</sup> *Gremillion*, *supra* note 5, at 345.

<sup>202</sup> *Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc.*, 646 F.2d 800, 808 (2nd Cir. 1981). In *Chaganti*, the court did not discuss applicability determinations, but it does not seem too far of a jump to require industry to seek applicability determinations and no longer allow ignorance of the law to postpone compliance. *Chaganti & Assoc. v. Nowotny*, 470 F.3d 1215, 1224 n.2 (8th Cir. 2006).

<sup>203</sup> See Hsiao & Shyu, *supra* note 199, at 2 (explaining that the 1990 amendments intended to strengthen compliance with the Act because many were not complying).

have sought an applicability determination before undertaking its first project.<sup>204</sup> This would have enabled the EPA to clarify, for Duke, the standard for triggering PSD review.<sup>205</sup> Furthermore, if Duke had sought an applicability determination, it could have challenged the agency's final results pursuant to § 307(b) before it engaged in a PMP.<sup>206</sup>

However, Duke did not seek an official applicability determination, but instead insisted it relied upon statements made by Edward Reich that only an hourly increase in emissions triggers PSD.<sup>207</sup> Edward Reich headed the EPA's Division of Stationary Source Enforcement (DSSE), the lead office responsible for making applicability determinations.<sup>208</sup> The statements Reich made were not an official applicability determination; rather, the statements were the opinion of one high ranking individual.<sup>209</sup> Thus, Duke did not frivolously rely on Reich's statements, but the Supreme Court's finding the statements were not "heavy ammunition" illustrates the EPA's needs to implement a rule regarding the proper use of applicability determinations.<sup>210</sup> Using the Act's goals, the EPA could require mandatory applicability determinations in some situations.<sup>211</sup> A dismissal by the

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<sup>204</sup> See *Wis. Elec. Power. Co. v. Reilly*, 893 F.2d 901, 905-06 (7th Cir. 1990) (seeking an applicability determination to determine if its facility's life extension project would subject the plant to PSD review and permitting).

<sup>205</sup> *Id.*

<sup>206</sup> *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 623-24 (M.D.N.C. 2003). Wisconsin Electric Power Company (WEPCO) sought an applicability determination regarding whether or not it needed to obtain a PSD permit for a life extension project it wanted to undertake at its facilities. *Wisconsin*, 893 F.2d at 905-06. The EPA determined that the plant was subject to both the NSPS and PSD requirements. *Id.* WEPCO did not agree with this determination, and the company brought suit in *Wisconsin*. *Id.* The Seventh Circuit had the jurisdiction under § 307(b)(1) to hear an appeal for the EPA's final determination. *Id.* at 906. The Seventh Circuit used *Chevron*, and determined that the agency correctly decided that NSPS applied to the WEPCO project, but the agency acted improperly when it subjected WEPCO to PSD review. *Id.* at 906, 909-11, 918.

<sup>207</sup> See *supra* note 117 and accompanying text (describing the statements of Reich which condoned triggering PSD for only an increase in the hourly emissions rate). *U.S. v. Duke Energy Corp.*, 411 F.3d 539, 546 (4th Cir. 2005). If a regional office could not answer a company's questions concerning regulations under the Act, the regional office would refer the question to Mr. Reich's office. Brief of Walter C. Barber as Amicus Curiae Supporting the Respondent at 6-7, *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006) (No. 05-848). The EPA has tried to have consistent treatment of stationary source regulations. *Id.* at 9-11. The EPA has strived for consistency by having one headquarter office take the lead on applicability determinations. *Id.* During the time period in question, Mr. Reich's office had that duty. *Id.*

<sup>208</sup> Brief of Walter C. Barber, *supra* note 207, at 9-11.

<sup>209</sup> See Brief of Walter C. Barber, *supra* note 207, at 9-11 (explaining Reich's position within the EPA).

<sup>210</sup> *Env'tl. Def.*, 127 S. Ct. at 1436. The Court found the Reich Statements unpersuasive with "neither of them containing more than one brief and conclusory statement supporting Duke's position." *Id.* Furthermore, the Court states that an isolated opinion by an agency official does not authorize a court to read the regulatory language inconsistently. *Id.*

<sup>211</sup> See H.R. REP. NO. 91-1146, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 5356, 5356. Congress's goals in implementing the Act were to clean the nation's air. *Id.* When Duke did not

Court could have drawn attention to this issue and encouraged the EPA to act in the future with a rule regarding applicability determinations.<sup>212</sup>

### *Possible Future Actions by the EPA*

Encouraging the EPA to act in the future with a rule clarifying the use of applicability determinations could lead to less litigation and a proper application of the law.<sup>213</sup> Currently, industry does not often seek applicability

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seek an applicability determination, tons of pollutants were emitted into the atmosphere for years; however, the EPA could end this “studied ignorance” of the law by requiring applicability determinations under the Clean Air Act. *Id.*; see *infra* note 213 and accompanying text (describing when the EPA should require applicability determinations).

<sup>212</sup> See Gremillion, *supra* note 5, at 345 (noting Duke never sought an applicability determination and the company should not be relieved of its responsibility to seek out an official EPA opinion).

<sup>213</sup> Gremillion, *supra* note 5, at 345.; see *supra* note 211 and accompanying text (describing how when Congress implemented the Act, the goal was to clean the nation’s air). Pursuant to the goal of the Act, Congress gave the EPA the authority to improve and protect the nation’s air. Congressional Findings and Declaration of Purpose 42 U.S.C. § 7401(b)(1) (1995). Mandatory applicability determinations could aid this objective. See *Wisconsin Elec. Power. Co. v. Reilly*, 893 F.2d 901, 905-06 (7th Cir. 1990) (showing how applicability determination can lead to the correct application of the law). Title V has led to discussions of including mandatory applicability determinations. Hsiao & Shyu, *supra* note 199, at 10. Accordingly, applicability determinations could be incorporated into Title V as part of the permitting process. Hsiao & Shyu, *supra* note 199, at 10. Currently, States administer the Title V program, but the EPA has extensive oversight. *U.S. v. E. Ky. Power Coop. Inc.*, 498 F. Supp. 2d 1010, 1012 (E.D. Ky. 2007). For example, the EPA receives a copy of each Title V permit application and it then has the opportunity to comment and object. *Id.* When the EPA objects, the state permitting authority may not issue the permit unless it is revised in accordance with the EPA regulation. *Id.* The problem with the Title V program is that emission facilities are divided into two categories, major and minor sources. HQ Air Force Center for Environmental Excellence, *PROACT Fact Sheet*, PROACT ENVIRONMENTAL SOLUTIONS, TECHNOLOGY, AND GUIDANCE, available at <http://www.afcee.brooks.af.mil/pro-act/fact/titlev.asp> (last visited March 9, 2008). A major source is defined as a facility that produces more than one-hundred tons of pollutant per year. *Id.* Some sources that have the physical and operational capacity to emit large amounts of pollutants, can achieve minor status under state law, and, therefore, avoid Title V permitting. *Id.* It is possible that if these programs were in place when Duke first underwent its PMP, it could have classified itself as having minor status, avoiding Title V. See *id.* (explaining what constitutes a minor emitter). Consequently, even with Title V in place, a case similar to Duke’s could arise. *Id.* Therefore, if a facility has minor status, it should still be required to submit to the EPA a proposal for the work at a new or modified facility and have the EPA make an applicability determination. See Charles F. Mills III, Comment, *Clearing the Air: Use of Chevron’s Step One to Invalidate EPA’s Equipment Replacement Provision*, 33 FLA. ST. U. L. REV. 259, 265-66 (2005) (describing industry’s confusion relating to the NSR program). This mandatory applicability determination process would be very similar to the process described above for Title V, with the difference being that a minor emitter would be required to obtain an applicability determination to ensure they are not a major emitter misconstruing the regulations. See *Eastern Kentucky*, 498 F. Supp. 2d at 1012 (explaining the Title V process). Even though Title V was not an issue in this case, a dismissal may have shown possible flaws in Title V which could lead to future litigation. See HQ Air Force Center for Environmental Excellence, *PROACT Fact Sheet*, PROACT ENVIRONMENTAL SOLUTIONS, TECHNOLOGY, AND GUIDANCE, available at <http://www.afcee.brooks.af.mil/pro-act/fact/>

determinations.<sup>214</sup> Furthermore, when industry does seek these determinations, there can be ambiguity as to their meaning.<sup>215</sup>

The EPA could solve these issues in two ways.<sup>216</sup> First, the EPA must standardize the way it makes an applicability determination to create less confusion amongst members of the agency and industry.<sup>217</sup> It must also take steps to ensure that an applicability determination gives a clear, final answer that represents, not only the opinion of one person, but that of the entire agency.<sup>218</sup> Second, the EPA could require that industry obtain an applicability determination when a facility does not believe it is subject to Title V.<sup>219</sup>

Once again, a dismissal could have encouraged the EPA to implement a rule that would require industry to take proactive measures to ascertain the applicable law.<sup>220</sup> In a case such as *Duke*, an applicability determination, early on, would have avoided years of litigation and saved tons of pollutants from being emitted into the environment because Duke would have installed the Best Available Control Technology (BACT) as required by PSD.<sup>221</sup>

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titlev.asp (last visited March 9, 2008) (explaining how minor emitters are not subject to the Title V permitting process). As stated above, it is possible that if Title V was present when Duke first engaged in a PMP, it may have been able to qualify as a minor emitter, and therefore, avoided Title V oversight. *Id.* This could result in the same type of litigation today as in the past. *Id.*

<sup>214</sup> See Brief of Walter C. Barber, *supra* note 207, at 9-11 (describing Edward Reich's role in applicability determinations). The district court and Duke used statements made by Reich, in its finding that increase in annual emissions do not trigger PSD. *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 642 (M.D.N.C. 2003). However, the Court found the Reich Statements unpersuasive relating to PSD. *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1436 (2007).

<sup>215</sup> See Brief of Walter C. Barber, *supra* note 207, at 9-11 (describing Edward Reich's role in applicability determinations).

<sup>216</sup> Brief of Walter C. Barber, *supra* note 207, at 9-11.

<sup>217</sup> Brief of Walter C. Barber, *supra* note 207, at 9-11.

<sup>218</sup> Brief of Walter C. Barber, *supra* note 207, at 9-11.

<sup>219</sup> See Hsiao & Shyu, *supra* note 199, at 2 (explaining that the 1990 amendments intended to strengthen compliance with the Act because many were not complying). If a facility is subject to Title V, the EPA will have an opportunity to review a facilities permit and monitor compliance. HQ Air Force Center, *supra* note 213. However, if a facility can classify itself as a minor emitter, it is not subject to Title V. *Id.*

<sup>220</sup> Congressional Findings and Declaration of Purpose, 42 U.S.C. § 7401(b)(1) (1995); see *Wis. Elec. Power. Co. v. Reilly*, 893 F.2d 901, 905 (7th Cir. 1990) (seeking an applicability determination as to whether it needed a PSD permit before commencing a repair and replacement program).

<sup>221</sup> *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 623-24 (M.D.N.C. 2003). By becoming subject to PSD in 1988, the year of Duke's first PMP, Duke would have been required to install Best Available Control Technology (BACT); therefore, eliminating the amount of emissions it emitted annually. *Id.*; Preconstruction Requirements, 42 U.S.C. § 7475(a)(4)(1980).

*Congress's Intent for New Technology*

New technologies have been discovered which significantly decrease the amount of pollutant emitted into the air while still utilizing coal.<sup>222</sup> Use of new technologies is exactly what Congress expected when it initially created the Routine Maintenance Repair and Replacement (RMRR) exemption.<sup>223</sup> Congress expected older facilities to run only for a few more years.<sup>224</sup> In creating the exemption, Congress wanted to prevent older facilities, which would soon be out of commission, from having to undergo costly repairs that would bring the plants up to the current standards for air pollution control.<sup>225</sup> Instead of this exemption operating as Congress intended, facilities scheduled life extension projects into their routine maintenance and identified them as rehabilitation programs.<sup>226</sup> Industry abused the RMRR exemption by making modifications and not installing the BACT as required by PSD.<sup>227</sup> Once again, an applicability determination could have provided guidance as to whether a facility qualifies for an RMRR exemption.<sup>228</sup>

## CONCLUSION

Ultimately, the Supreme Court's holding was correct regarding the substantive law.<sup>229</sup> The decision informed coal-fired power plant owners of exactly what

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<sup>222</sup> See Lory Hough, *King Coal Comes Clean*, KENNEDY SCHOOL BULLETIN, summer 2006, available at <http://www.ksg.harvard.edu/ksgpress/bulletin/summer2006/features/coal.htm> (last visited September 6, 2007). Instead of industry wasting money on litigation, industry could apply its wealth towards a new technology that has been discovered to burn cleaner coal in a process known as "coal gasification." *Id.*

<sup>223</sup> Mills, *supra* note 213, at 264.

<sup>224</sup> Mills, *supra* note 213, at 264.

<sup>225</sup> Mills, *supra* note 213, at 264.

<sup>226</sup> Mills, *supra* note 213, at 268. In *Wisconsin*, the facility underwent a life extension project. *Wisconsin*, 893 F.2d at 906. Wisconsin Electric Power Company (WEPCO) submitted a proposed replacement program, which it called a "life extension" project to the appropriate state agency. *Id.* In its proposal, WEPCO explained that it had to renovate a unit to keep it operational past its planned retirement date. *Id.* Professional literature has stopped using the term life extension project and now refers to these projects as rehabilitation programs. Larry Parker, *Congressional Research Serv., Clean Air and New Source Review: Defining Routine Maintenance*, CRS REPORT FOR CONGRESS, January 14, 2004, available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8199:1> (last visited at February 9, 2008).

<sup>227</sup> American Lung Association et al., *Comments on the Proposed Rule: "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement,"* AMERICAN LUNG ASSOCIATION, ET AL., May 2, 2003, available at [http://www.catf.us/press\\_room/20030501-Final\\_Comments\\_on\\_Proposed\\_Rule.pdf](http://www.catf.us/press_room/20030501-Final_Comments_on_Proposed_Rule.pdf) (last visited at February 29, 2008).

<sup>228</sup> See *supra* notes 195-212 and accompanying text (describing why applicability determinations are important).

<sup>229</sup> See *supra* notes 28-29, 129-35 and accompanying text (describing why the holding was correct).

constitutes a modification triggering PSD review and permitting.<sup>230</sup> However, a dismissal would have emphasized the importance of the procedural requirements of § 307(b) and sent a message to industry that any uncertainty in a regulation must be promptly challenged.<sup>231</sup> Furthermore, courts would know the importance of watching for § 307(b) jurisdictional violations and promptly dismiss cases they do not have jurisdiction to hear.<sup>232</sup> With a dismissal, the Court could have emphasized to the EPA the importance of ascertaining the applicable law with an applicability determination and pushed the EPA in the direction of mandatory applicability determinations.<sup>233</sup> As demonstrated throughout this note, this decision could have had a more meaningful and lasting effect with a dismissal based on § 307(b).<sup>234</sup>

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<sup>230</sup> See *supra* notes 129-35 and accompanying text (explaining the Court's reasoning regarding the proper interpretation for a modification under PSD).

<sup>231</sup> See *supra* notes 166-94 and accompanying text (showing the importance of § 307(b)).

<sup>232</sup> See *supra* notes 166-94 and accompanying text (demonstrating the importance of utilizing § 307(b)).

<sup>233</sup> See *supra* notes 195-212 and accompanying text (explaining why the EPA needs to utilize applicability determinations).

<sup>234</sup> See *supra* notes 166-94 and accompanying text (demonstrating the importance of a proper utilization of § 307(b)).