MORRISON | FOERSTER

Legal Updates & News

Bulletins

"Duking" It Out – Supreme Court Decides Major Clean Air Act Case Regarding Modification of Facilities

April 2007

"Duking" It Out – Supreme Court Decides Major Clean Air Act Case Regarding Modification of Facilities

On April 2, 2007, the U.S. Supreme Court addressed what constitutes a "modification" at a facility that will trigger new source review (NSR) under the Clean Air Act (CAA). *Environmental Defense v. Duke Energy Corp*., No.05-848. The decision is "Round One" on the modification question, with the case remanded to the lower court for additional proceedings. A final decision will affect all industrial plants subject to NSR and air permitting under prevention of significant deterioration (PSD) regulations.

Under NSR, *major modifications* – large emission increases resulting from physical changes or changes in the method of operation – at existing facilities require additional emission controls. A modification can include adding or changing a piece of equipment resulting in more emissions.

EPA brought an enforcement action against Duke Energy for upgrading equipment at its plants and its resulting increased hours of operation causing greater annual emissions. Duke argued that its upgrade was exempt from NSR because there were no significant increases in *maximum hourly emission rates* even though total annual emissions were higher.

The legal issue arose from nearly identical wording of the CAA's definitions for "modification" under two different rules, the PSD rules and the new source performance standard (NSPS) rules for specific industrial categories. The NSPS rules defined modifications in terms of increased emission rates, not annual emission quantities. The statutory PSD program which came afterwards arguably incorporated that definition. EPA argued it was free to interpret "modification" differently.

The Court's decision defers to the agency's power to interpret the statute so long as it acts within the "outer limits of what is reasonable." The Court held that – unless other arguments are successful in remand – EPA could enforce the NSR requirements against Duke's plant upgrades; they are not exempt when there are major annual emission increases. Upgrades that do not increase maximum hourly emission rates under NSPS are not modifications requiring permits or new technology; that is unchanged by the Court's decision.

EPA itself has added to the confusion over the years. EPA endorsed Duke's view of the law in proposed regulations for electric generating units. On October 20, 2005, EPA proposed to adopt the Duke interpretation, but wanted to preserve its ability to interpret the statute differently as it did when enforcing against Duke's upgrade program. Under the Court's decision, EPA could still proceed to make that proposal final.

The Court did not decide whether Duke could challenge the meaning of the regulations in this enforcement action rather than challenge the rule in the D.C. Circuit Court of Appeals. Environmental plaintiffs argued that Duke should have done so and is now time-barred. The Court also left room for Duke to press arguments that EPA has taken inconsistent positions over the last 20 years. Finally, the Court speculated that companies may demonstrate that hourly or production rate increases can be exempt from the requirements if the increases are not caused by "physical changes or changes in the method of operation." Such demonstrations may be very difficult to make for equipment changes in the absence of new interpretive guidance from EPA.

On remand, the courts will determine whether the rules are ultimately invalidated or changed in accordance with EPA's new regulatory proposal. Alterations in state air quality rules may be expected as well as in federal rules. Many state air quality NSR or permitting rules apply in all situations involving defined *modifications*, not just those considered major because of the level of emissions. In the future, companies altering their equipment will need to proceed with greater caution and agreement from government as to the regulatory scheme.