

D.C. Circuit Upholds Key NSR Reforms In 2002 Rule

On June 24, 2005, the D.C. Circuit issued a 73-page decision in the 2002 NSR rule case. *New York v. EPA*, No. 02-1387. The key rulings of the court are:

1. The baseline actual emissions provisions authorizing non-utility sources to select any two years within the past ten years as a baseline and electric utilities to use any two years within the past five years as a baseline are permissible under the Clean Air Act.
2. The authorization to use an actual-to-projected-actual emissions increase test, including the “demand growth” exclusion, is permissible under the Act.
3. The Plantwide Applicability Limitation provisions are lawful under the Act.
4. The “Clean Unit” authorization is impermissible and thus was vacated based upon the court’s ruling that a “potential-to-potential” test is impermissible under the Act.
5. The Pollution Control Project exclusion is impermissible under the Act and thus was vacated, because the court finds that EPA has no authority to establish such an exemption under which collateral emissions increases are not subject to NSR.
6. The recordkeeping and reporting provisions under the actual-to-projected-

actual test under which emissions are to be recorded where there is a “reasonable possibility” of a significant emissions increase are arbitrary and capricious, because the court finds that EPA did not establish a sufficient administrative record to justify such provisions. However, the court did not vacate the “reasonable possibility” provisions, but instead, remanded them for further action by EPA, which may include justifying the provisions adopted or revising the provisions. Until EPA acts, the “reasonable possibility” provisions will remain in place.

7. The court rejected industry’s challenge to the 2002 rule on the grounds that it must include a “first step” NSPS-type modification test.
8. The court ruled that the challenge to the interpretation in the 2002 rule preamble stating that an “actual-to-potential” test is to be applied under the 1980 NSR rule is not ripe for review. The court notes that the 2002 rule has been in place for three years and indicates that any application of the 1980 rule that is problematic can be addressed through judicial proceedings.

The introduction to the opinion primarily contains a summary of the court’s rulings similar to the foregoing. The following sets out a Part-by-Part review of the balance of the opinion. This review will include citations to the slip opinion of the

court (cited as “Op. ___”). Also indicated is which judge wrote each Part of the opinion.

I. Background (Op. 9-23) (Written by Judge Tatel)

This Part of the opinion reviews the statutory, regulatory and case law history of the New Source Review (NSR) provisions of the Clean Air Act. In particular, it reviews the statutory definition of “modification” in section 111(a)(4), the various iterations of the NSPS definitions of “modification” and exceptions to that definition, the initial PSD regulations adopted in 1974, the NSR provisions enacted in 1977, EPA’s regulatory history in implementing the 1977 enactment, the two early *Alabama Power* opinions, and the opinions in the *Puerto Rican Cement* and *WEPCo* cases. The court then reviews the challenges to the 1980, 1992 and 2002 rules, and points out that it will review EPA’s regulations under the *Chevron* two-step process.

II. Industry Challenges (Op. 23-29) (Written by Judge Williams)

The court first briefly reviews industry petitioners’ three main challenges:

1. Industry petitioners maintained that the 2002 rule is unlawful as a result of its failure to include a requirement that there be a NSPS-type modification (*i.e.*, an increase in hourly rate of emissions) in order to trigger NSR permitting. Also, industry argued that the 1980 NSR rule’s definition is unlawful to the extent that it is determined to not contain a requirement that there be an increase in hourly rate of emissions.
2. Industry petitioners contended that the statement in the 2002 preamble that emission increases are to be determined based upon an “actual-to-potential” test is an unlawful interpretation of the 1980 rule.

3. Newmont Mining argued that the elimination of the authorization for states to use “source-specific emissions limitations” as being equivalent to “actual emissions” is unlawful.

With regard to the industry position that NSR applicability must be premised on an increase in hourly rate of emissions, the court initially reviews EPA’s regulatory interpretations of the “modification” statutory definition that preceded Congress’ 1977 enactment of the NSR requirements incorporating the NSPS statutory definition of “modification.” The court disagrees with industry’s statement that there is “abundant indication” of Congress’ intent to incorporate the preexisting NSPS regulatory definition in the NSR program. Op. 24-25. It references industry’s citations to legislative history that the NSPS definition is to “conform to usage in other parts of the act.” Op. 25. The court states that these “usage” phrases refer to uses in the statute, not usage in the regulations. The court also opines that the definitions in 40 C.F.R. §60.2(h) and §60.14 are “two quite differently worded definitions” that were “*within*” the NSPS program at the time of the 1977 amendments. Op. 26. It then indicates “it would take a rather pointed indication from Congress to support the idea that it expressly adopted one of them for NSR.” The court finds no such indication, but then states that “[w]e express no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs,” citing to the Fourth Circuit opinion in the *Duke Energy* case issued on June 15, 2005. *Id.* The court says that this latter argument was not made by industry petitioners in their opening brief and “is therefore waived.” *Id.*

With regard to the “actual-to-potential” interpretation of the 1980 rule in the 2002 preamble, the court reviews the position of industry that this test is “substantially inconsistent” with the 1980 rule and the Act, but finds the challenge to be “unripe.” Op. 27. After reviewing the grounds for a challenge to be ripe, the court states that the 2002 rule “has been applicable for three years now,” and that for “*planning* purposes,” the 1980 rule “appears

moot.” Op. 28. It further states that if there are applications of the 1980 rule “in which EPA attempts to employ the disputed sentence,” namely the statement that an “actual-to-potential” test is to be applied on an across-the-board basis, “judicial proceedings addressed to the application can solve the problem of any affected firm.” *Id.* The court also states that it “seems improbable in light of [EPA’s] express disclaimer” that EPA would take the position that universal application of the actual-to-potential test is required. *Id.*

With regard to Newmont’s claim that EPA acted unlawfully by deleting the provision that source-specific allowable emissions could be treated as equivalent to actual emissions, the court found that EPA had engaged in “reasoned decisionmaking” and dismissed Newmont’s argument that EPA’s rule would encourage sources to continue emitting at high levels to avoid losing the ability to have those levels be considered as the emissions baseline. Op. 28-29.

III. Baseline Emissions (Op. 29-47) (Written by Judge Rogers)

In this Part, the court first reviews the statutory definition of “modification” and then explains that the 2002 rule revised the manner in which baseline emissions are determined. The baseline emissions provisions authorize non-utility sources to select “any consecutive 24-month period” within the 10-year period immediately preceding a change and electric utilities to select “any 2 consecutive years within the 5 years prior to the proposed change.” Op. 30-31. The court points out that government and environmental petitioners raise two sets of challenges: namely, that (1) the 10-year lookback period is impermissible because it allows sources to increase emissions beyond their most recent levels without triggering NSR; and (2) the 10-year lookback period is arbitrary and capricious because it contravenes the statutory purpose of protecting and enhancing air quality. The court states at the outset of this Part that petitioners “fail to overcome the presumption of validity accorded to EPA regulations.” Op. 31.

In analyzing whether EPA’s baseline provisions contravene the statute, the court first reviews petitioners’ arguments that “increases” must be measured against the period immediately preceding the change and their analogies of interpretations of “increases” in other contexts. It then outlines EPA’s response showing that immediately preceding periods might not be appropriate. Also, the court pointed out that the predecessor baseline requirements do not mandate use of a period immediately preceding a change. After this brief review, the court concluded that the Act is “silent or ambiguous” on how to calculate baseline emissions and thus the issue of the provisions legality is determined by whether they are based on a “permissible interpretation” of the statute under *Chevron* Step 2. Op. 32-33.

The court then reviews the standard for review under *Chevron* Step 2. It points out that EPA’s interpretation must represent “a reasonable accommodation of conflicting policies that were committed to [EPA’s] care by the statute.” Op. 33 (citation omitted). The court states that EPA’s interpretation is entitled to deference when “the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involved reconciling conflicting policies.” *Id.* The court then points out that “[t]here can be no doubt that EPA is entitled to balance environmental concerns with economic and administrative concerns, at least to a point.” It then quotes approvingly from the *Chevron* case in which the Supreme Court stated “Congress sought to accommodate the conflict between economic interest in permitting capital improvements to continue and the environmental interest in improving air quality,” and “delegated the responsibility of balancing those interests to EPA.” *Id.* It then points out that different interpretations of the term “increases” may have “different environmental and economic consequences” and “EPA has the authority to choose an interpretation that balances those consequences.”

The court next reviews the record upon which EPA based its decision to establish the 10-year lookback period. It notes the complexity with the

prior “actual emissions” definition, the desire to “simplify and streamline the NSR program without sacrificing air quality,” and the support of ten states concurring with EPA’s conclusion that the NSR program has been “broken for many years and [is] long overdue to be fixed.” Op. 34. The court also reviews EPA’s view that the 10-year lookback period “promotes economic growth and administrative efficiency” and the reasoning underlying EPA’s conclusion. Additionally, the court reviews in depth EPA’s business cycle study and government and environmental petitioners’ challenges of that study.

The court also reviews environmental petitioners’ contention that the 10-year lookback period violates the court’s interpretation in the *Alabama Power* case that sources can only net out emissions decreases if the offsetting “changes” are “substantially contemporaneous.” Op. 39. The court points out, though, that the *Alabama Power* case does not require that baselines be “substantially contemporaneous,” but that the “changes” must be substantially contemporaneous. The court notes that EPA did not change the contemporaneous period in the regulations and that changes to be netted out must still occur within the 5-year contemporaneous period, even though the baseline emissions level for a change is calculated using the 10-year lookback period.

In concluding its analysis of the statutory interpretation challenge to the baseline provisions, the court finds that Congress has left to EPA the authority to “fill in” the gap relating to calculation of “increases” in emissions, “while balancing the economic and environmental goals of the statute.” Op. 39-40. The court finds that “petitioners failed to demonstrate that EPA’s policy determination is impermissible,” and thus it defers to EPA’s statutory interpretation under *Chevron* Step 2.

Next, the court reviews the government and environmental petitioners’ contention that EPA’s choice of a 10-year lookback period is arbitrary and capricious “because it allows sources to increase their emissions to historic levels without triggering NSR, thereby harming air quality and public health.” Op. 40. They note that

environmental petitioners also challenge the 5-year lookback period for electric utilities, “but provide no evidence or analysis to support” this challenge. *Id.* The court then reviews EPA’s response to petitioners’ claims, which is heavily based on the Environmental Impact Analysis that EPA performed and on which comment was taken in connection with EPA’s reconsideration of aspects of the 2002 rule. The court notes that EPA “acknowledges that fewer changes will trigger NSR under the 1980 rule” but then explains why EPA believes that the magnitude of any increase or decrease in emissions from the baseline emission provisions would likely be “very small.” Op. 45. The court ultimately concludes that “EPA’s predictive judgment is entitled to deference,” and that “[i]complete data does not necessarily render an agency decision arbitrary and capricious.” Op. 47. It then indicates that “EPA explained the available evidence and offered a ‘rational connection between the facts found and the choice made.’” *Id.* (citation omitted). Accordingly, it ruled that petitioners did not provide a basis for the court to conclude that EPA’s 10-year lookback period is an impermissible implementation of the Act.

IV. Methodology and Enforceability (Op. 47-56) (Written by Judge Tatel)

This Part of the opinion addresses the government and environmental petitioners’ challenges to two features of the 2002 rule’s projected-actual-emissions methodology: (1) the exclusion from the emissions projection of any emissions due to increased demand; and (2) the “reasonable possibility” trigger for the rule’s recordkeeping and reporting requirements.

The court first reviews the provisions in the post-change emissions calculation that excludes any emissions increases that “an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth.” 40 C.F.R. §52.21(b)(41)(ii)(c). Petitioners had argued that EPA failed to address the fact that its 1998

notice of availability “expressed provisional dissatisfaction” with the demand growth exclusion. Op. 48. The court then reviewed EPA’s having “*tentatively* concluded” that the demand growth exclusion was not appropriate and noted EPA’s statement that “in a market economy, all changes in utilization – and hence emissions – might be characterized as a response to market demand.” *Id.* The court points out that, contrary to petitioners’ assertions, EPA did address these concerns when it adopted the 2002 rule. The court explains that EPA described in its reconsideration Technical Support Document that numerous industry comments explained how demand growth emissions increases often can be distinguished from emissions increases resulting from other causes. The court concluded that there is no basis for binding EPA to its tentative 1998 conclusions and that EPA adequately explained its reasons for extending the demand growth exclusion to all industries “so long as the growth is unrelated to the change.”

With regard to EPA’s basing the requirement for non-utility sources to keep records and make reports upon whether there would be a “reasonable possibility” of a significant increase in emissions, the court finds serious problems with EPA’s use of the “reasonable possibility” trigger for recordkeeping and reporting. The court notes that EPA pointed out that emissions information can be obtained through inspections, minor NSR, Title V permit reports and certifications, and through requests for information. However, the court is unpersuaded that EPA will have an adequate basis for enforcement. In particular, it finds that “EPA fails to explain how emissions reported under Title V can be traced to a particular physical or operation change.” The court seems to accept the contention of government petitioners that sources will escape NSR because they are “allowed to destroy the data crucial” to determining NSR applicability. It ultimately concludes that “[w]ithout paper trails, . . . enforcement authorities have no means of discovering whether the exercise of [a source’s] judgment was indeed ‘reasonable.’” Op. 55-56. Finding EPA’s explanation inadequate, the court remanded the recordkeeping and reporting provisions applicable to non-utility sources for

EPA “either to provide an acceptable explanation for its ‘reasonable possibility’ standard or to devise an appropriately supported alternative.” Op. 56.

One curious aspect of the court’s analysis of the “reasonable possibility” provisions is the view of the author of this section of the opinion (Judge Tatel) that the prior rules established an “actual-to-potential” test for determining NSR applicability for non-utility sources. The court rejects the argument of EPA and industry intervenors that the 2002 rule “*increases*” recordkeeping requirements for non-utilities, and in doing so, the court dismisses the significance of this “technically correct” fact by indicating recordkeeping would be so much less significant under the prior rule, because “sources other than utilities evaluated post-change emissions under the onerous actual-to-potential test, which presumed that sources would operate at their maximum post-change potential to emit.” Op. 52-53. The court then states that, “[g]iven that assumption, sources’ actual post-change emissions could not, by definition, exceed their potential-to-emit, making records of these actual emissions unnecessary for the purpose of ascertaining whether post-change emissions increased beyond expectations.” Op. 53. The court concludes this part of its analysis stating that, “under the pre-2002 regime, non-utilities either accepted the rigors of the actual-to-potential test, eliminating the need for recordkeeping, or subjected their actual emissions to monitoring by state permitting authorities.” *Id.* The court does not explain how it concluded that there has been an alternative to the actual-to-potential test under which sources’ future actual emissions would be subjected to monitoring by state permitting authorities. Nor does the court attempt to reconcile its apparent acceptance of the actual-to-potential test as the accepted way of implementing the 1980 rule with its statements in Part II of the opinion (authored by Judge Williams) that EPA’s reference to an “actual-to-potential” test under the 1980 rule was simply a “short-hand reference to the 1980 rule, not a formal interpretation” and that it is “improbable in light of its express disclaimer” that EPA would attempt to uniformly apply the actual-to-potential test. Op. 27-28.

V. *Plantwide Applicability Limitations (Op.56-61) (Written by Judge Rogers)*

In this Part of the opinion, after reviewing the regulatory authorization for Plantwide Applicability Limitations (PALs), the court explains that government and environmental petitioners contend that the PAL provision is arbitrary and capricious because sources can increase their emissions beyond their most recent levels without triggering NSR. It indicates that this challenge fails for the same reasons that petitioners' challenge to the 10-year lookback period fails. It further states that environmental petitioners also challenge the validity of the 10-year PAL term and environmental impact of PALs, but that they fail to demonstrate that PALs are based on an impermissible statutory interpretation or are otherwise arbitrary and capricious.

The court reviews the reasoning in the *Alabama Power* case indicating that the netting of emissions must take into account increases and decreases that are "substantially contemporaneous." It notes that EPA, after initially explaining that PALs do not rely on the netting of emissions from individual units, did acknowledge in its brief that the term of the PAL could be considered to constitute the "contemporaneous" period. After reviewing EPA's basis for selecting a 10-year period, rather than a 5-year period for the PAL term, the court notes that EPA chose the 10-year PAL term "in an effort to balance the need for regulatory certainty, the administrative burden, and the desire to align the PAL renewal with the Title V permit renewal." Op. 59. The court states that this policy choice "is entitled to deference because it involves a balancing of the environmental, economic, and administrative goals" of the Act, which "environmental petitioners fail to demonstrate is impermissible" under the Act. *Id.*

The court then reviews the six pilot projects discussed in EPA's Environmental Impact Analysis and points to the fact that the sources with PALs had reduced their emissions significantly below PAL levels. The court also

noted that, under the PAL provisions, sources are not permitted to increase emissions up to the "significant" level each time they make a change, as they are under the basic NSR applicability provisions, and that EPA estimated "such benefits would be potentially large." Op. 60. Concluding that it "must defer to EPA's assessment of the environmental benefits of PALs," the court upholds the PAL provision as "a reasonable exercise of EPA's authority" under the Act.

VI. *Clean Units (Op. 61-64) (Written by Judge Rogers)*

After reviewing the key elements of the "Clean Unit" applicability test, the court states that petitioners argue that the provision contravenes the plain meaning of the Act because it measures "increases" in terms of Clean Unit status instead of actual emissions. Op. 62. EPA responded that the Act is silent on how "increases" in emissions are to be measured and that they should be measured "in terms of actual emissions, potential emissions or some other currency." EPA accordingly argues that its interpretation of the ambiguous term "increases" is entitled to deference under *Chevron* Step 2. The court rules, however, that:

Upon employing "traditional tools of statutory interpretation" under *Chevron* Step 1 to ascertain whether "Congress had an intention on the precise question at issue," citation omitted, we conclude that the CAA *unambiguously defines "increases" in terms of actual emissions* (emphasis added). Op. 62.

The court bases its ruling that increases must be measured in terms of actual emissions principally on its review of Congress' use of "emit," "potential to emit," and "emitted" elsewhere in the Clean Air Act. It notes that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

intentionally and purposefully in the disparate inclusion or exclusion.” *Id.* The court then indicates that when Congress enacted the NSR program in 1977, “it was conscious of the distinction between actual and potential emissions, using the term ‘emit’ to refer to actual emissions and the term ‘potential to emit’ to refer to potential emissions.” Op. 63. The court points out that Congress defined best available control technology as “an *emission limitation* based on the maximum degree of reduction of each pollutant . . . *emitted* from any major emitting facility (emphasis added).” Op. 63 (citation omitted). The court states that Congress used the term “emitted” to refer to actual emissions and the term “emission limitation” to refer to allowable emissions.

In reviewing the statutory definition of “modification,” the court notes that Congress provided that a modification would be a physical or operational change that “increases the amount of any air pollutant *emitted* by [the] source (emphasis added).” Op. 63. The court then states that “[i]f Congress had intended for ‘increases’ in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to ‘potential to emit’ or ‘emission limitations.’” *Id.* “[E]ven if the word ‘emitted’ does not by itself refer to actual emissions, the phrase ‘the *amount* of any air pollutant *emitted* by [the] source’ plainly refers to actual emissions.” Op. 64. Based upon this statutory interpretation, the court concludes that the plain language of the Act “indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions,” and holds that “EPA lacks authority to promulgate the Clean Unit provision.” The court vacates that portion of the 2002 rule “as contrary to the statute under *Chevron* Step 1.” *Id.*

The court’s statutory construction ruling that increases in emissions must be based exclusively on actual emissions should be overturned. To begin with, the word “emitted” on which the court’s analysis hinges, modifies “air pollutant” and serves two, and only two purposes. First, the word in the past tense is needed to reflect the fact that an “increase” can only be determined for an

“air pollutant” that has been “emitted” in the past. The second and related point is that the use of “emitted” in the first part of the definition of “modification” is to distinguish between pollutants emitted in the past and those addressed in the second part of the definition “not previously emitted.” The court reads the definition as though it states that modifications are to be based upon increases in the “amount . . . emitted,” rather than the “amount of any air pollutant emitted.” The court’s analysis of the best available control technology definition is similarly flawed. While correct that the term “emission limitation” is a measure of “allowable emissions,” the use of the word “emitted” in that definition is simply to indicate that an emission limitation is only established for an air pollutant *emitted* from a facility. It is in no way referencing “actual emissions,” nor is it used to distinguish between actual emissions and allowable emissions.

VII. Pollution Control Projects (Op. 64-67) (Written by Judge Rogers)

In this section of the opinion, the court begins with a review of the Pollution Control Project (PCP) exclusion under which a project that reduces emissions of a “primary” pollutant, but increases emissions of a “collateral” pollutant, is not deemed to be a change subject to NSR if its net effect is “environmentally beneficial.” Op. 64. As with the NSPS-type modification test, the court finds nothing to indicate that Congress intended to incorporate preexisting NSPS regulations into the NSR program. It states that EPA’s only other support for the PCP exemption is its view that it would be “absurd” for Congress to discourage PCPs by subjecting them to NSR. In response, the court states that “there is nothing inherently ‘absurd’ about increasing the regulatory cost of projects that increase collateral emissions, and EPA does not demonstrate otherwise.” Op. 65. It notes that environmental petitioners state that Congress would have exempted PCPs explicitly if it intended to do so, as it did for clean coal technology. The court states that “[a]bsent clear Congressional delegation, . . . EPA lacks authority to create an exemption from NSR by administrative rule.” Op. 66. The court finds no

such delegation and vacates the PCP exemptions in the 1992 and 2002 rules.

VIII. State and Local Authority (Op. 67-72) (Written by Judge Williams)

This section of the opinion reviews two substantive and one procedural challenge of government petitioners, as follows:

1. Allegations that the 2002 rule unlawfully precludes states from adopting more stringent criteria and thereby violates section 116 of the Act, which preserves state authority to adopt alternative pollution standards or limitations, except that state standards may not be “less stringent” than EPA standards or limitations;
2. Allegations that the 2002 rule violates the anti-backsliding provision in section 193 of the Act, which precludes EPA’s relaxation of control requirements in effect in nonattainment areas before November 15, 1990; and
3. Allegations that EPA failed to give adequate notice that it might adopt a rule not giving states authority to pick and choose among the innovations from the prior rule and that the rule adopted was not a “logical outgrowth” of the noticed proposals.

The opinion addresses these challenges in a summary fashion. The claim that states are precluded from adopting more stringent requirements is reviewed and, although finding some inconsistency in EPA’s statements, the court notes that several statements reflect that EPA would approve more stringent provisions. Despite government petitioners argument that the choice EPA offers is “illusory,” the court indicates that, “until EPA has rejected a newly submitted SIP, we think the issue is unripe.” Op. 69. Similarly, the court finds the “anti-backsliding” challenge to be unripe, noting that the “environmental effects of less sweeping NSR are

ambiguous: more sweeping NSR will tend to assure improved emission controls on qualifying ‘modifications’ but may also deter change and thereby preserve firms’ use of older, dirtier technologies.” *Id.* The court states that it is “in no position to say which effects predominate here.” *Id.* With regard to the inadequate notice claim, the court rules that petitioners had adequate notice that EPA may not adopt a “menu of alternatives,” and instead may refrain from taking the proposed action.

Concurring Opinion of Judge Williams

Judge Williams’ concurring opinion contains two paragraphs. One addresses the fact that the remand regarding the recordkeeping and reporting elements of the 2002 rule requires EPA “to analyze the trade-off between compliance improvement and the burdens of data collection and reporting,” and “[i]n making its choice on some specific degree and type of collection in reporting, it must articulate a reasoned judgment as to why any proposed additional burden would not be justifiable in terms of the likely enhancement of compliance.”

In the Judge’s second paragraph, he states his support for “emission charges or marketable pollution entitlements” that “provide incentives for firms to use – *at any and every plant* – all pollution control methods that cost less per unit than the emission charge or the market price of an entitlement, as the case may be.” The Judge contrasts this with “command-and-control” regulations “where emission control is typically far more expensive, per unit of pollution, when accomplished by retrofitting old plants than by including state-of-the-art control technology in new ones.” □

Fourth Circuit Issues Opinion In *Duke Energy* NSR Case

On June 15, 2005, the Fourth Circuit Court of Appeals issued its opinion on EPA's appeal of the federal district court decision in the *Duke Energy* NSR case. *U.S. v. Duke Energy Corp.*, No. 04-1763, 2005 U.S. App. LEXIS 11248 (4th Cir. June 15, 2005). This case was brought by EPA as a part of its NSR enforcement initiative. EPA argued that Duke Energy had violated the PSD requirements of the Clean Air Act by undertaking a number of major replacement projects at eight power plants. In a unanimous decision of the three-judge panel, the Fourth Circuit upheld the district court's ruling that there must be an increase in the maximum emissions rate for a change to potentially trigger NSR permitting. It did not rule on the district court's holding that a determination of whether a replacement project comes within the routine maintenance, repair and replacement exclusion is to be based on whether the activity is routine within the industrial source category. The court concluded that it need not reach this question.

After reviewing the statutory and regulatory framework, the nature of the projects at issue, and the district court's decision, the Fourth Circuit's opinion sets out the basis for the court's ruling affirming the lower court decision. Initially, the court points out that it would engage in a modified *Chevron* analysis. The first step in that analysis is to determine "whether Congress has directly spoken to the precise question at issue." The court pointed out that "[o]nly if the statute is silent or ambiguous on the point is Congress deemed to have delegated authority to the agency to clarify the point in its regulations." After noting that EPA and intervenors in support of EPA acknowledge that the *Chevron* principles govern review of the case, the court states that they "fail to understand, however, that straightforward application of these principles can lead to only one conclusion: affirmance of the judgment of the district court."

The court points out that Congress has indeed "directly spoken to the precise question at issue."

As EPA had conceded, the critical first question is whether EPA can interpret the statutory term "modification" under PSD differently from how EPA interpreted that term under NSPS. The court explains that Congress "expressly defined 'modification' in the NSPS provisions of the Clean Air Act, . . . and then expressly directed that the PSD provisions of the Act employ this same definition." It further ruled:

When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently. Thus, because Congress mandated that the PSD definition of "modification" be identical to the NSPS definition of "modification," the EPA cannot interpret "modification" under the PSD inconsistently with the way it interprets that term under the NSPS.

In reaching this ruling, the Fourth Circuit relied heavily on *Roman Cos. v. United States*, 452 U.S. 247 (1981). There the Supreme Court "faced the situation strikingly similar to the one at hand," and held that when Congress established "substantially identical" statutory definitions of a term in different statutes, "the agency charged with enforcing the statutes could not interpret the statutory definitions 'differently.'" *Id.* at 257. The court reviewed in some depth the *Roman* case, which involved tax law provisions that contain the defined term "wages." The court then points out that the Clean Air Act provides "even stronger evidence" that Congress intended the statutory definitions of "modification" in the PSD and NSPS provisions to be interpreted identically.

While Congress used only "substantially the same language in the statutory definitions at issue in *Roman*, *id.* at 255, here Congress mandated that the definition of "modification" in

the PSD provisions precisely mirror the definition of “modification” in the NSPS provision.

The court then reviews certain legislative history and concludes that this history “does not in any way suggest that Congress intended the identical statutory definitions to receive different interpretations.” The court notes that EPA emphasized in its briefs “vital differences” between PSD and NSPS. The court said that it did not “ignore or minimize those differences.” It pointed out that the Fourth Circuit and other courts have approved different regulatory definitions for an identical statutory term in the PSD and NSPS statutes because of the “significant difference[s] between the PSD and NSPS programs.” In one case, the court pointed out that the term at issue “stationary source” had been defined in the NSPS provisions but had not been defined in the PSD provisions. It also pointed to another case involving the term “commenced,” which had been interpreted differently in the NSPS and PSD regulations, but where the term was defined under PSD and not under NSPS. The court said that these cases illustrate the principle that where the same word or phrase is used it will generally be presumed to have the same meaning when it is used in different parts of a statute, but that this “presumption of the uniform usage . . . relents” when there is “a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.”

The court then explained that here the “presumption of uniform usage has become effectively irrebuttable because Congress’ decision to create identical statutory definitions of the term ‘modification’ has affirmatively mandated that this term be interpreted identically in the two programs.” The court stated that the “different purposes of the NSPS and PSD programs cannot override that mandate.” The court concludes by pointing out that “[n]o one disputes that prior to enactment of the PSD statute, that EPA promulgated NSPS regulations that define the term ‘modification’ so that only a project that

increases a plant’s *hourly* rate of emissions constitutes a ‘modification.’” The court further stated that “EPA must, therefore, interpret its PSD regulations defining ‘modification’ congruently.” The court did indicate, however, that “[o]f course, this does not mean that this regulatory interpretation must be retained indefinitely.” The court pointed out that EPA could “amend and revise” the “modification” definition but that, as long as the term is defined identically in the NSPS and PSD statutes, “EPA must interpret that term in a consistent manner in the NSPS and PSD regulations.” □

EPA Finalizes Reconsideration of NSR Equipment Replacement Rule

On June 6, 2005, EPA finalized its reconsideration of the Equipment Replacement Provision (ERP) of the Routine Maintenance, Repair and Replacement (RMRR) exclusion without making any changes to the final ERP rule (not yet published in the Federal Register). A number of states and environmental groups filed petitions for reconsideration of the ERP rule in the period between December 2003 and February 2004. In July 2004, EPA granted reconsideration and requested comment on three issues raised by petitioners: the contentions that (1) EPA’s legal basis is flawed, (2) EPA’s selection of 20% for the cost limit is arbitrary and capricious and lacks a sufficient record, and (3) EPA should provide an opportunity for comment on the revised format for incorporating the PSD FIP into state plans. 69 Fed. Reg. 40278 (July 1, 2004).

Legal Basis of the ERP Rule

EPA’s legal rationale for the ERP rule was premised on the basic principle of administrative law under the *Chevron* case, under which EPA has the discretion to reasonably interpret ambiguous statutory terms and such interpretations are due deference. EPA explained that the word “change”

in the phrase “any physical change or change in the method of operation,” a prerequisite for there to be a “modification” in section 111(a)(4), is ambiguous. In the reconsideration notice, EPA indicates that the “word itself is ambiguous, and the use of ‘any’ as a modifier, in the context of the statute, simply requires EPA to include . . . changes as potential modifications once EPA defines the ambiguous term ‘change.’” EPA further states that the ERP, which establishes criteria for determining what equipment replacement activities do not constitute physical changes, “is a rational interpretation of ‘physical change’ in the definition of ‘modification.’”

In granting reconsideration, EPA asked for comments on a number of legal arguments various commenters had made on the meaning of the statutory definition of “modification.” EPA pointed out that some commenters, principally industry, asserted that the plain meaning of the “modification” definition required that all functionally equivalent equipment replacement should not be deemed to be changes and, therefore, be deemed RMRR. Other commenters took the opposite view about the plain meaning of the statute, arguing that all changes, whether ones that involved functionally equivalent replacements or not, must be treated as “physical changes” under the statute. Another group of commenters argued that only “*de minimis*” exceptions could be allowed under the Act. Others argued that, under administrative law, an agency is allowed to establish “bright line” criteria only to reduce regulatory burden and provide certainty.

In the final reconsideration notice, EPA reviews Congressional intent and analyzes the text of the modification definition and concludes that the ERP rule is fully supported under Congress’ original intent and the plain language of the definition. EPA states again that, with respect to existing sources, “the purpose of the NSR provisions is simply to require the installation of controls at the appropriate and opportune time.” EPA concludes that the kind of replacements that “automatically fall within the Equipment Replacement Provision . . . do not represent such an appropriate and opportune time.” EPA also states that “given that it is consistent with the

meaning of ‘change’ to treat this kind of replacement as not being a ‘change’ we believe excluding them on that basis from the definition of ‘modification’ as used in the NSR program is well calculated to serve all of the policies of the NSR provisions by the CAA, and is therefore a legitimate exercise of our discretion” under the *Chevron* case to construe an ambiguous term.

EPA also reviews policy objections that petitioners had presented. In particular, in response to arguments that all sources should ultimately be required to be subject to NSR permitting, EPA stated that it does not believe that the modification provisions should be interpreted to “ensure that all major facilities either must eventually trigger NSR or must degrade in performance, safety, and reliability.” It further pointed out that such an interpretation cannot be squared with the plain language of the Act. The modification definition only provides for an existing source to trigger NSR if it makes a physical or operational-method change that results in an emissions increase. Thus, EPA notes that a facility “can conceivably continue to operate indefinitely without triggering NSR making as many physical or operational changes as it desires as long as the changes do not result in emissions increases.” EPA also points out that “there is nothing in the legislative history of the 1977 Amendments, which created the NSR program, to suggest that Congress intended to force all then-existing sources to go through NSR.”

EPA also stresses that the NSR program is not an emissions reduction program. It points out that there are other Clean Air Act programs that are specifically aimed at requiring emissions reductions from existing utility and non-utility sources. It specifically focuses on the Clean Air Interstate Rule, the MACT standard requirements, and RACT requirements.

20 Percent Replacement Cost Threshold

EPA presents two principal arguments in support of the 20 percent replacement cost threshold. First, EPA stresses that a project must meet four

separate requirements before it is automatically excluded from NSR under the ERP rule. The replacement cost provision is only one of the four requirements. EPA stresses that the three other criteria require that the replaced component: (1) be identical or functionally equivalent; (2) does not alter the basic design parameters of the process unit; and (3) does not cause the process unit to exceed any emissions limitation or operational limitation (that has the effect of constraining emissions) that applies to any component of the process unit and that is legally enforceable. A replacement project that satisfies the replacement cost threshold, but does not satisfy one of the other three criteria, must be evaluated under the “multi-factor” RMRR approach.

Second, EPA points out that it received substantial supporting data from electric utilities and other industry sectors that support a decision to set the threshold at 20 percent. It points out that the data show that many like-kind replacement occurring at facilities typically cost less than 20 percent of the process unit’s value and do not increase emissions. EPA notes that it received additional comment in the reconsideration process from a number of industries that supports the 20 percent cost threshold.

Revisions to Format for Incorporating PSD FIP Into Plans

EPA indicates that it received no adverse comments on its revision to its methodology for incorporating relevant paragraphs of 40 C.F.R. 52.21 in individual FIPs. EPA’s revised approach eliminates the need for it to refer to all the individual paragraphs in the Federal rules and allows updates to the rules to be included automatically in FIPs.

Remaining Issues in Petitions for Reconsideration

EPA denies reconsideration on all issues other than the three briefly discussed above. It concluded that petitioners failed to show that it was impracticable to raise their objections during

the comment period or that the grounds for their objections arose after the close of the comment period; and/or that their concern is of central relevance to the outcome of the rule. Among these other petitioner claims was the argument that EPA retroactively applied the ERP. EPA confirms in the final reconsideration notice that it is not applying the ERP rule revisions retroactively and that the ERP is stayed and not currently effective in any jurisdiction. □

EPA Proposes Changes to NESHAP SSM General Provisions

On June 30, 2005, EPA released its proposed action on its reconsideration of the startup, shutdown, and malfunction (SSM) provisions in the NESHAP General Provisions. EPA’s action was in response to a reconsideration petition filed by NRDC on July 29, 2003. The reconsideration notice proposes significant changes to the SSM provisions. Among them would be elimination of the right for members of the public to request and obtain copies of SSM plans that had not already been provided to permitting authorities.

Background

EPA first promulgated the NESHAP General Provisions on March 16, 1994. Numerous industry trade organizations challenged the General Provisions and settlement negotiations ensued for much of the balance of the 1990s. EPA proposed revisions in March 2001 and finalized them in April 2002. The Sierra Club filed a petition for review challenging the revisions and also filed a reconsideration petition. A principal focus of Sierra Club’s reconsideration petition was the SSM provisions in the final rule.

In a settlement negotiated with Sierra Club, EPA agreed to issue a proposal under which all sources required to prepare SSM plans would be required to submit them to the permitting authority, instead of only when requested as EPA had provided in the April 2002 final rule. After numerous industry commenters strongly opposed

the proposed new requirement, EPA issued final amendments that provided that a source must promptly submit a copy of its SSM plan to its permitting authority, if and when the permitting authority requests that the plan be submitted. Also, the permitting authority was required to obtain a copy of the plan from a facility if a member of the public makes a “specific and reasonable” request to examine or receive a copy. Subsequently, NRDC filed the reconsideration petition on which EPA is now proposing final action. NRDC’s petition requested that EPA reconsider the public access aspects of the SSM provisions. Specifically, NRDC opposed the criteria for the public to obtain access to SSM plans, *i.e.*, that a plan may be obtained only if a request is “specific and reasonable.”

EPA’s Proposed Action on NRDC’s Reconsideration Petition

EPA’s notice points out that the requirement in the General Provisions to develop SSM plans is an implementation mechanism in response to the “general duty” clause, which requires that “at all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions.”

EPA explains that the general duty clause in the NESHAP General Provisions is modeled on the general duty clause in the NSPS General Provisions. As with the NSPS General Provisions, the NESHAP General Provisions require that, if standards cannot be met during a period of SSM, then the source must take steps to minimize emissions to the extent practicable. EPA explains that the NSPS relies solely on the general duty clause to minimize emissions during SSM periods, whereas the NESHAP General Provisions requires that owners or operators develop and implement a written SSM plan that describes procedures for operating and maintaining the source during periods of SSM, and a program of corrective action for

malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standards.

While sources are required to develop and implement an SSM plan, the plan itself does not become part of the source’s Title V permit. Thus, the provisions in the plan are not “applicable requirements.” The applicable requirement during periods of SSM is the “general duty” to minimize emissions.

EPA states that “[t]o clarify and emphasize that the applicable requirement is the general duty to minimize emissions and not the specifics in the SSM plan itself,” it is “proposing to retract the requirement to implement the plan during periods of SSM.” EPA explains that this is consistent with the concept that the plan specifics are not applicable requirements and thus cannot be required to be followed. The general duty to minimize emissions remains intact and is the applicable requirement. EPA states that the determination of whether a source meets its obligation during periods of SSM can be made in part by whether a source followed an adequate plan. While the source is not required to follow the SSM plan, it still must report periods of SSM and whether the plan was followed. EPA further states that “if, during an SSM event, a source is not in compliance with the emission limits or parameter values applicable under normal operations and has not followed its SSM plan, this may be evidence that the source has not complied with the general duty clause obligation.” EPA notes, however, that the source may be able to “offer a defense for following an alternative approach that is more effective.” EPA additionally points out that following the SSM plan is not a safe harbor if the plan itself is found to be deficient.

As noted above, the SSM plan is tied to recordkeeping and reporting requirements. All periods of SSM must be reported. The other reporting and recordkeeping requirements with respect to SSM plans continue in place, including those relating to the source’s not taking actions provided for under the SSM plan.

EPA also proposes to make a conforming change to startup and shutdown recordkeeping consistent with a reporting change to startups and shutdowns made in the May 30, 2003 revisions. In that rule, EPA relieved the source from detailed reporting for startups and shutdowns when the applicable standards are not exceeded. In this notice, EPA proposes to make similar changes for startup and shutdown recordkeeping, but recordkeeping for malfunctions would not be revised.

EPA's notice also stresses that it is neither reasonable nor necessary to require that permitting authorities review SSM plans for adequacy prior to implementation. The burden associated with such a requirement "would be enormous." EPA stated that the proposed SSM reporting regime accomplishes the same result, but in a much more efficient way for identifying poor performance and inadequate plans.

In its reconsideration petition, NRDC argued that SSM plans must be made available to the public because they are "compliance plans" within the meaning of sections 502(b)(8) and 503(e) of the Clean Air Act. EPA explains why the SSM plan is not a "compliance plan." EPA notes, however, that statements in the March 2001 and December 2002 proposed rules could be interpreted to indicate that SSM plans are compliance plans.

EPA's notice states that the EPA Administrator or an authorized permitting authority may at any time require a facility to submit a copy of an SSM plan under section 114(a) of the Act. Also, under section 114(c), the public may also obtain a copy of any SSM plan obtained by EPA or a permitting authority under section 114(a). EPA points out that NRDC cited a technical support document accompanying the May 2003 final rule, which suggested that, under sections 114(c) and 503(e), there is a general obligation to provide public access to SSM plans, regardless of whether EPA or the permitting authority had obtained an SSM plan from a source under section 114(a). EPA indicates that it no longer believes this to be a correct interpretation of those sections.

In sum, EPA concludes that an SSM plan is not part of a permit application or a permit and is not
July 2005

a compliance plan, a schedule of compliance, an emissions or compliance monitoring report, or a certification within the meaning of section 503(e). As a consequence, EPA concluded that the Act does not require EPA or permitting authorities to obtain SSM plans at the request of the public, nor does the Act provide EPA with authority to impose such a requirement on permitting authorities. The public is entitled to have access to SSM plans only if EPA or a permitting authority takes action to obtain such a plan under section 114(a) of the Act. EPA explains that it believes that mandating public access could lead to SSM plans being less effective because a source might be less likely to include sensitive details about its operations in the plan details that are likely to be effective in minimizing emissions during periods of SSM.

EPA proposes to remove the provision in 40 C.F.R. 63.6(e)(3)(v) that requires a permitting authority to obtain an SSM plan upon receipt of a "specific and reasonable" request. Accordingly, EPA proposes to deny NRDC's request to revise the NESHAP General Provisions to allow unlimited public access to a source's SSM plan. EPA states that any mechanisms and conditions under which a permitting authority would decide to respond to a request that it obtain an SSM plan "is best left at the local level." EPA also notes that Flint Hills Resources is working with EPA in a collaborative project intended to reduce SSM plans from the company's refineries and chemical manufacturing facilities. □

Federal District Court Accepts Industry Interpretation of NSR Rules in *Alabama Power* Case

On June 3, 2005, Federal District Court Judge Virginia Hopkins issued her decision on the two principal issues before the court in EPA's NSR enforcement action brought against Alabama Power Company. *U.S. v. Alabama Power Co., C.A. No.-01-152-VEH*, 2005 U.S. Dist. LEXIS 10909 (N.D. Ala. June 3, 2005). This action is one of the actions EPA brought against electric utilities in

connection with its NSR enforcement initiative. The two issues addressed by the court are: (1) the correct legal test for determining routine maintenance, repair and replacement (RMRR); and (2) the correct legal test for determining an emissions increase. The court's decision on these issues mirrors the holding of the federal district court in the *Duke Energy* case, namely, RMRR is to be determined based upon whether an activity is routine for an industrial category, not for a particular emissions unit, and emissions increases are to be determined based upon whether there is an increase in the emissions rate, not based upon an increase in annual emissions taking into account possible increased utilization.

Court's Review of Relevant Law

The court first reviews in depth the NSR statutory provisions, the regulatory language and NSR court decisions. The court focuses at length on the *Ohio Edison* and *Duke Energy* decisions and points out that these two cases "illustrate the split in decisions" on the issues before the court. In contrast to the rulings in *Duke Energy*, the court in *Ohio Edison* ruled (1) that RMRR should be based upon whether a change is routine for a particular unit and other factors that EPA had developed to narrow the RMRR exclusion, and (2) that an emissions increase should be determined based upon an actual-to-projected-actual test, which the court applied in a way similar to an actual-to-potential test.

The *Alabama Power* court's discussion of the case law is particularly dismissive of the district court's ruling in the *Ohio Edison* case. It points out that the "*Ohio Edison* court either did not see EPA as having taken various positions over the years on the scope of the RMRR exclusion or, if it did, it chose not to discuss them in any detail." The court points out that the *Ohio Edison* court states that the "any physical change" language in the "modification" definition "necessarily requires a narrow reading of any exclusion to that broad statutory language." Similarly, the court says that, in addressing the "fair-notice issues," "*Ohio Edison* arguably ignored conflicting EPA guidance, again for textual reasons: the word 'any' in the statute

was clear enough" (the exemption would otherwise "swallow the general rule").

In contrast to its review of the *Ohio Edison* decision, the court reviews favorably the court's decision in the *Duke Energy* case. It points out that the one similarity is that both courts grounded their RMRR decision in the statute, not in EPA's regulations or guidance. Yet, the two courts reached diametrically opposed interpretations of the statutory language. It points out that the *Duke Energy* court "considered the context in which Congress adopted the PSD modification provision, saying that prior to the adoption of the statutory PSD program, EPA had already adopted the industry's argued-for 'routine within the source category' RMRR exclusion" in its NSPS regulations. It further points out that the *Duke Energy* court "was persuaded that Congress developed the PSD program within this existing regulatory framework and that, when it added 'modification' to PSD coverage, Congress did so by specifically adopting the NSPS statutory definition of 'modification.'" It also explains that the "sparse legislative history" was synonymous with an expressed intention to "conform" the PSD modification provision to "usage in other parts of the act."

In reviewing EPA's interpretations of the RMRR exclusion, the court points out that EPA does not dispute the history presented by *Duke Energy* and *Alabama Power*, but simply states that there are "more persuasive" examples of EPA's interpretations. The court then states that the "existence of EPA statements and regulations that can be, and are, cited by both sides is evidence in and of itself that EPA has been neither consistent nor clear."

In reviewing the emissions increase analysis in *Ohio Edison* and *Duke Energy*, the court finds a "similar dichotomy." As noted above, it points out that the *Ohio Edison* court accepted EPA's argument that an "actual-to-projected-future-actual" test should be applied. The court explained, however, that the "EPA increased emission test is problematic because the reason to perform maintenance or repair work at a plant is to prevent future equipment failures. The test

becomes a self-fulfilling prophecy because emission increases are inevitable: the less down times or power outages, the more operating hours; the more operating hours, the more emissions.” It further pointed out that the effect of the *Ohio Edison* court’s rulings would be that PSD would “apply to virtually any capitalized maintenance or repair project that prevented enough down time to breach the emissions increase thresholds.”

As with the RMRR analysis, the *Alabama Power* court reviews favorably the analysis in the *Duke Energy* decision regarding how emissions increases should be determined. At the outset, it points out that the court in *Duke Energy* “looked to a different statutory context for guidance: the legislative context of the PSD modification program’s creation and its origins in the NSPS program.” It further points out that once Congress decided to require “EPA to adopt the NSPS RMRR exclusion, the court had little difficulty concluding that Congress also intended that EPA employ the NSPS ‘maximum hourly emissions’ test advocated by Duke Energy.” Further, the court states approvingly that the *Duke Energy* court said “EPA’s regulatory ‘hours of operation’ exclusion required EPA to hold hours of operation constant, effectively creating a maximum hourly emissions rate test.” The court then proceeds to review other aspects of the *Duke Energy* court’s emissions increase analysis.

At the conclusion of its review of the *Duke Energy* ruling, the *Alabama Power* court states that:

Still, when one lays *Ohio Edison* and *Duke Energy* side by side, *Duke Energy’s* observation that Congress clearly intended EPA to adopt the NSPS emissions increase test appears more firmly grounded in the CAA.

The court then points out that EPA’s initial PSD regulatory program and initial post-1977 Clean Air Act Amendment regulations also provided for emissions increases to be determined based upon a maximum hourly test. The court then indicated that it “cannot tell if EPA thought about whether the maximum hourly emissions increase test

would still be available for PSD applicability purposes” under the 1980 NSR rules. It further states that:

And, as *Duke Energy* notes, the only emissions test actually in EPA’s regulations at the time was the largely discredited “actual to potential” test, which means that prior to the 1992 WEPCO rule implementing the “actuals to future actuals” test, EPA had, for many modifications, no lawful emissions increase test at all in its regulations.

Review of the 2003 NSR Rule

The court next discusses EPA’s revision of the RMRR provisions of NSR by adopting the Equipment Replacement Rule in 2003. The court points out, however, that the 2003 rule is not to be imposed retroactively. Thus, even though the D.C. Circuit’s ruling on the validity of the 2003 EPA rule would be binding on the court, the court explains that the D.C. Circuit’s decision is irrelevant for purposes of the current case.

The court also notes that the Utility Air Regulatory Group has filed a brief before the D.C. Circuit in which it also argues that the 1980 NSR rule should be interpreted to require an emissions increase test based upon maximum hourly emissions rate and, if not so interpreted, should be found unlawful. The *Alabama Power* court confuses somewhat the case that has been briefed, which only addresses the 2002 NSR rule reforms, and the case in which the Equipment Replacement Rule is challenged. Nonetheless, the court indicates that it intends to proceed to make a judgment regarding applicable law without awaiting the outcome of the litigation before the D.C. Circuit.

The court briefly discusses the Clean Air Interstate Rule (CAIR) and states that “even the most ardent proponent of strict statutory construction or textual analysis would have difficulty reconciling EPA’s prior rulemaking or litigation positions with

CAIR.” Nonetheless, the court points out that CAIR also is not retroactive and thus not relevant for the pending litigation.

Deference Due EPA’s Interpretation

Next, the court reviews the case law holding that “courts typically grant substantial deference to the EPA’s interpretation” of the Act and its implementing regulations. It points out, however, that EPA does not have “unbridled discussion” to interpret the Act “free from judicial oversight.” It then proceeds to discuss the question of “how much deference” is to be accorded to EPA. It then quotes extensively from the Supreme Court’s decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), which addresses at length the degree of deference to be granted to an agency and sets out a more limited view of the deference to be given agency interpretations.

Review of WEPCO and Subsequent EPA Statements

The court next discusses the *WEPCO* decision in which “life extension” projects were considered and, in that instance, were determined not to constitute RMRR. The court indicates that the applicability of NSR and PSD regulations to life extension plants is . . . the core dispute” of this case and other utility enforcement actions. The court points out that EPA issued numerous statements following the *WEPCO* decision in which it indicates that the decision would “have limited applicability at most.” It points out that, in the *Ohio Edison* opinion, there is an absence of any indication of “the reasons the EPA’s post-*WEPCO* statements and actions (inaction may be a better choice of words) count for so little.” The court then states that “if there is a countervailing case to be made to the *Duke Energy* analysis, the court cannot find it in *Ohio Edison*.”

The court speculates whether the Eleventh Circuit, which will hear any appeal of the *Alabama Power* decision, would grant substantial deference to EPA’s interpretations. It concludes that there is no case which indicates what degree of

deference the appellate court would give EPA. It points out that:

Were the [*Alabama Court*] court convinced that *Ohio Edison* is better researched and reasoned than *Duke Energy*, the choice would be harder. The issues are the same, the arguments overlap to a great degree, and there are pros and cons to the arguments of both sides. Having said that, the court finds *Duke Energy* clearly more thorough, comprehensive and rigorous in its analysis and therefore the more persuasive decision on the two (2) issues discussed here.

The court also indicates that it believes that the Eleventh Circuit “is much more likely to approach the EPA’s arguments and its enforcement posture here with *Mead*-like skepticism than it is to approach it with *WEPCO*-like deference. The court says that EPA’s arguments sound more in “litigation position,” which is “never entitled to *Chevron* deference.” “Given the EPA’s zigs and zags represented by its contradictory post-*WEPCO* statements and rules, followed by the 2003 amendments, and now the 2005 CAIR, the court cannot say that EPA’s interpretation of its rules is due to be afforded *Chevron* deference.” The court further justifies denying *Chevron* deference here because “one office of EPA [is] attempting to expand and clarify the RMRR provisions through rulemaking, while another is attempting to redefine them through enforcement actions and litigation.” The court adds in a footnote:

EPA has indicated that it will only bring additional enforcement cases against utilities for projects that violate the 2003 NSR Rule. Citation omitted. This leaves the anomaly of utilities, like APC, being prosecuted for conduct that, if engaged in now, would not be prosecuted. Put another way,

this action is a sport, which is not exactly what one would expect to find in a national regulatory enforcement program.

Court's Rulings

The court's final rulings are:

1. The RMRR exclusion applies to projects that are routine within the industry, by which is meant work of a type performed commonly within the industry, although perhaps infrequently at any specific one or more of APC's particular plants; and
2. Emission increases, for purposes of NSR/PSD analysis, are calculated only on the basis of "maximum hourly emission rates", not actions and litigation."

"annual actual emissions". Maximum hourly emissions must increase before PSD permitting is triggered; greater annual facility utilization is irrelevant to the analysis.

Concurrently with the court's decision, it also ordered that the case be referred to mediation and stayed until the completion of mediation. The date in the order for mediation to be completed is September 9, 2005, with provision for an extension if determined appropriate.

Concurrently with the court's decision, it also ordered that the case be referred to mediation and stayed until the completion of mediation. The date in the order for mediation to be completed is September 9, 2005, with provision for an extension if determined appropriate. □