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Fourth Circuit Derails EPA's Clean Air Act Enforcement Action Against Duke Energy

Court Holds for Hunton & Williams Client, Repudiates Legal Premise of EPA's NSR Enforcement Initiative

In a decision that has significant implications for all of American industry subject to the Environmental Protection Agency's (EPA) ongoing New Source Review ("NSR") enforcement initiative, the U.S. Court of Appeals for the Fourth Circuit has affirmed the final judgment by the U.S. District Court for the Middle District of North Carolina in *U.S. v. Duke Energy Corporation*. In his decision below, U.S. District Judge Frank Bullock granted summary judgment to Duke Energy on the grounds that EPA's Clean Air Act enforcement action was predicated on an unlawful interpretation of the NSR "modification" rules. In a unanimous opinion issued on June 15, 2005, the Fourth Circuit agreed.

At the heart of the dispute was the question whether refurbishment activity undertaken at an existing facility could be deemed to constitute a "major modification" under the Clean Air Act Prevention of Significant Deterioration ("PSD") program, triggering new source permitting requirements and requiring the installation of additional pollution controls, where the activity at issue merely allowed the electric generating unit to operate more hours than it had been able to do prior to the refurbishment. EPA alleged that such activity constituted a "major modification" under the PSD rules. Duke Energy, in turn, maintained that the PSD requirements were triggered only where the activity in question resulted in an increase in the unit's maximum hourly emission rate

— *i.e.*, the capacity of the unit to emit as measured on an hourly basis. This distinction was critical, in that EPA conceded that none of the 29 projects Duke Energy had undertaken at eight of its power plants had resulted in any increase in a unit's maximum hourly emission rate.

In agreeing with Duke Energy's reading of the Clean Air Act's PSD provisions, the Fourth Circuit found that Congress had spoken directly to the question at hand. Following the line of argument Duke Energy had advanced before the district court, the Fourth Circuit observed that the Clean Air Act specified that, for PSD purposes, the term "modification" was to be defined in the same way that the term was defined under the Clean Air Act's New Source Performance Standards ("NSPS") provisions. In implementing those NSPS provisions through rulemaking, the Fourth Circuit continued, EPA had always construed an NSPS "modification" as requiring that there be an increase in a unit's maximum hourly emission rate. Given this, and relying on U.S. Supreme Court precedent in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), the Fourth Circuit concluded that EPA was without discretion under the Clean Air Act to define the term "modification" differently for purposes of the NSPS and NSR programs. "As long as Congress mandates that 'modification' be defined identically in the NSPS and PSD statutes," the Fourth Circuit stated, "EPA must

interpret that term in a consistent manner in the NSPS and PSD regulations.”

The Fourth Circuit’s ruling deals a heavy, perhaps fatal, blow to EPA’s NSR enforcement initiative. In many, if not most, of the court actions that EPA has brought to date, the challenged projects involved activities that did not result in an increase in the existing units’ maximum hourly emission rate, but simply allowed the units to operate more hours

following the activities in question. The Fourth Circuit’s decision demolishes the fundamental foundation of EPA’s theory of liability in those cases.

The Fourth Circuit’s opinion was written by Circuit Judge Diana Motz. Also on the three-judge panel and joining Motz’s opinion were Circuit Judge Michael Luttig and District Judge Samuel Wilson (Western District of Virginia, sitting by designation).

Bill Brownell, a partner from the Washington, D.C. office of Hunton & Williams, argued the case on behalf of Duke Energy. In addition to Brownell, the Hunton & Williams team included partners Henry Nickel, Mark Bierbower and Makram Jaber from the Washington, D.C. office, and partners Tom Cottingham and Nash Long from the Charlotte office.

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