1   IN THE SUPREME COURT OF THE UNITED STATES

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3   ENVIRONMENTAL DEFENSE, ET AL.,   :

4   Petitioner,   :

5   v.   :   No. 05-848

6   DUKE ENERGY CORPORATION, ET AL.   :

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8   Washington, D.C.

9   Wednesday, November 1, 2006

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11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United

13   States at 10:02 a.m.

14   APPEARANCES:

15   SEAN H. DONAHUE, ESQ., Washington, D.C.; on behalf

16   of the Petitioners.

17   THOMAS G. HUNGAR, ESQ., Deputy Solicitor General,

18   Department of Justice, Washington, D.C.; for

19   Respondent United States, in support of the

20   Petitioners.

21   CARTER G. PHILLIPS, ESQ., Washington, D.C.; on

22   behalf of the Respondents.

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C O N T E N T S

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1   P R O C E E D I N G S

2   (10:02 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first this morning in Environmental Defense

5   versus Duke Energy Corporation. Mr. Donahue.

6   ORAL ARGUMENT OF SEAN H. DONAHUE

7   ON BEHALF OF PETITIONERS

8   MR. DONAHUE: Good morning, Mr. Chief

9   Justice, and may it please the Court:

10   The Clean Air Act requires that the owner of

11   a major emitting facility obtain a prevention of

12   significant deterioration permit before engaging in a

13   modification, which is defined to include any physical

14   change that increases the amount of any pollutant

15   emitted by such source.

16   Since 1980, EPA's PSD regulations have

17   measured such increases in terms of actual emissions in

18   tons per year.

19   CHIEF JUSTICE ROBERTS: That's a disputed

20   point, I gather, central to the case, whether or not the

21   regulations measured PSD emissions through that device

22   rather than the hourly emissions.

23   MR. DONAHUE: That's correct, Mr. Chief

24   Justice, but the text of the regulations refers

25   pervasively, and I'm referring to the definition of

1 major modification which is in 40 CFR 51.166(b)(2) and

2 subsequent paragraphs of that regulation, refers

3 pervasively to actual emissions and measures emissions

4 exclusively in tons per year.

5   JUSTICE SCALIA: It is a little of an

6 exaggeration, though, to say that EPA has since the

7 issuance of the regulations always interpreted them the

8 way that you prefer. In fact, the director of the PSD

9 program gave two opinions in which he took precisely the

10 interpretation that opposing counsel took.

11   MR. DONAHUE: Yes, Justice Scalia.

12 Respondent has relied heavily on two early applicability

13 determinations.

14   JUSTICE SCALIA: Rightly so, I think. I

15 mean, it was the earliest, application of the

16 regulation by the officer of the agency specifically in

17 charge of the program.

18   MR. DONAHUE: Well, Justice Scalia, as we

19 point out in our brief, Director Reich does not adopt

20 Duke's theory, in fact contradicts it. He doesn't say

21 that a new source performance standard modification must

22 precede a PSD major modification. Instead, in both he

23 relies on the express exclusion in the PSD regulations

24 for increases in hours of operation and the production

25 rate, and as EPA explained in its contemporaneous

4

1   preamble, that provision by its terms is an exception

2   from the definition of physical change.

3   It is not a provision that says -- increase

4   is attributable to a physical change, to increased hours

5   that are enabled by physical change, are not considered.

6   The plain language of the regulation actually

7   contradicts this reading. These determinations

8   themselves are quite ambiguous, and of course they are

9   two of dozens of such determinations.

10   JUSTICE SCALIA: Well, whatever the reason

11 he gave, was it -- these opinions were out there when

12 the challenge to the regulations, in which Duke did not

13 participate, when that challenge was brought, were

14 these -- were those opinions already out there?

15   MR. DONAHUE: Those opinions were out there

16 but the plain language of the regulation and the

17 preamble which explain that the increased hours exclusion

18 was simply to allow companies to respond to demand and to

19 link the coverage of PSD to construction activity. What

20 we have here is a physical change in the plants, massive

21 renovations of these elaborate networks of pipes and

22 tubes that compose a central component.

23   JUSTICE SCALIA: I understand that, and I

24 think you may have the better of the argument on me on

25 the interpretation of the PSD regulations. But what I

1   am concerned about is that companies can get whipsawed.

2   They don't challenge the regulations when they come out

3   because as far as they know, the agency is interpreting

4   them in a way that they favor. And then some years

5   later, when it turns out the agency is using a different

6   interpretation, you have the jurisdictional bar.

7   MR. DONAHUE: Well, Justice Scalia, these

8   regulations were challenged early on and there was a --

9   as the Court is aware, there was a settlement agreement

10 in 1982 to which Duke was, in fact, a party, that

11 proposed to add the hourly rate test that is completely

12 absent from these regulations.

13   JUSTICE KENNEDY: But could Duke have had a

14 challenge to the 1992 or 2000 regulations? Could they

15 have reopened the issue at that point?

16   MR. DONAHUE: They did in fact precisely that,

17 Justice Kennedy, and that was resolved in the New York

18 proceeding by the D.C. Circuit. Duke didn't challenge

19 the very prominent aspect of the 1980 regulations, which

20 was to move away from the potential emissions test of

21 prior --

22   JUSTICE KENNEDY: I don't want to jump ahead

23 to the jurisdictional argument if you want to talk about

24 the modification substantive point first, but it is not

25 clear to me whether Duke should have acted in 1980,

1   1992 or 2000, or all of the above.

2   MR. DONAHUE: Well, the regulations were

3   clear on their face. I mean, to determine the effect of

4   307 --

5   CHIEF JUSTICE ROBERTS: That's an audacious

6   statement.

7   (Laughter.)

8   JUSTICE SCALIA: We've wrestled with these

9   things for several days. It's disappointing to hear you

10   tell us they're clear.

11   MR. DONAHUE: They're clear in this respect,

12   they did not include an hourly rate test. As Judge Posner

13   in the Cinergy opinion this summer said, the argument

14   that the statute mandates an hourly rate test is a

15   challenge to the validity of these 1980 regulations

16   because they don't say it, they don't provide for it,

17   and they are very specific and detailed, and instead turn

18   on actual annual emissions. And the entire rationale

19   EPA offered was linked to that effort to capture real

20   world changes in emissions.

21   JUSTICE ALITO: If they are so clear, how

22   can you account for Mr. Reich's interpretation? He's an

23   expert in the area.

24   MR. DONAHUE: Right. He misapplied, he

25   didn't adopt this theory, the theory that an NSPS

1   modification precedes at all; in fact, he contradicted

2   it. He misapplied in quite sort of anomalous

3   circumstances the increased hours --

4   JUSTICE ALITO: I know you say he's wrong,

5   but if somebody in his position with his expertise can

6   interpret the regulations in that way, doesn't that show

7   that they're not clear on their face?

8   MR. DONAHUE: We think that this Court can

9   resolve, can interpret, can address the reasonableness

10   of EPA's construction of the increased hours exclusion.

11   What it can't do is certainly what the Fourth Circuit

12   did, which is to say that the PSD regulations must be

13   the same. They are obviously not the same. They are

14   different in multiple respects. And certainly that

15   challenge could have been raised, and certainly that

16   challenge was barred, and of course the court of appeals

17   expressly called the regulations irrelevant, the texts

18   and interpretations of the regulations. That's exactly

19   what a court is supposed to be doing.

20   JUSTICE SCALIA: Right. In deciding whether

21   the regulations are reasonable, however, is it proper

22   for a court to take into account that the regulations

23   must follow the prescription of the statute that the PSD

24   definition be the same as the NSPS -- what is it -- NSPS

25   definition? I mean, that's a usual tool of statutory --

1   or regulatory construction.

2   Cannot a court give great weight to that in

3   interpreting these ambiguous regulations?

4   MR. DONAHUE: Well, that -- they're not

5   ambiguous as to whether they're identical, and to hold

6   that they have to be is certainly an invalidation. And

7   the D.C. Circuit, of course, held that the statute

8   doesn't require identity as between the two sets of

9   regulations. And we're not here on certiorari from the

10   New York decision, we're here on an enforcement action

11   in which a court leapt over the express limitations

12   imposed on it, declared the language of the regulations

13   irrelevant, and indeed misapplied them rather

14   dramatically.

15   JUSTICE SCALIA: Well, I don't think the

16   same argument has necessarily to be made, but the

17   question still before us is how you interpret the

18   regulations. Let's assume that's just a regulatory

19   interpretation question, it's not a statutory question.

20   MR. DONAHUE: Right. Right.

21   JUSTICE SCALIA: But in deciding that,

22   whatever was argued in prior cases, it seems to me that

23   we're entitled to take into account the necessity that

24   the regulations comply with the statute. And if they

25   are ambiguous, we should resolve the ambiguity in the

 1   direction that it seems to us would provide consistency

 2   with the statute. Now does that violate the

 3   jurisdictional bar?

 4   MR. DONAHUE: No. I have no problem with

 5   any of that. If the regulations are ambiguous, take

 6   into account the statutory text, structure, policies.

 7   What the court below did, of course, was say it doesn't

 8   matter what the regulations say, these have to be the

 9   same. It forgot that in fact, these regulations were

10   very different. The D.C. Circuit said there's no

11   statutory mandate of identity and that the -- and, of

12   course, Respondent was there in the D.C. Circuit. It

13   was permitted to assert a challenge to this divergence,

14   as the court called it, between NSPS regulations and

15   PSD. And the court said --

16   CHIEF JUSTICE ROBERTS: If the regulations

17   are ambiguous, then the agency can interpret them in

18   different ways and can change its interpretation over

19   time. Of course, what your friend argues happened here

20   is that the agency changed its interpretation in the

21   context of an enforcement program. Now accepting that

22   premise, what is the -- what should Duke have done when

23   that interpretation was changed in an enforcement

24   program?

25   MR. DONAHUE: Accepting that premise, they

1 could have sought an applicability determination. Duke

2 knew very well what EPA's interpretation was because of

3 the WEPCO decision. EPA had been -- and subsequent

4 actions. In fact, Duke's attorneys were vociferously

5 charging that EPA changed the rules and was acting ultra

6 vires.

7   JUSTICE GINSBURG: Mr. Donahue, were there

8 earlier enforcement actions in which EPA was taking the

9 position that it took in this action against Duke?

10   MR. DONAHUE: Well, in the WEPCO decision --

11 I mean, EPA has always taken the position that actual

12 annual emissions is the standard under the 1980 rules.

13   JUSTICE GINSBURG: But were they, in fact,

14 enforcing that standard? So that -- you said that Duke

15 could have asked for a non-applicability ruling, but at

16 the time Duke started up its --

17   MR. DONAHUE: Certainly. I mean, WEPCO was

18 an applicability determination. That was in 1989-90.

19 Puerto Rican Cement was an applicability determination.

20 Duke instead, knowing that EPA believed that increased

21 utilization that is caused by physical change has to be

22 considered under this, as is prescribed in these very

23 detailed regulations, Duke decided not to do that, to go

24 forward, and it didn't, in fact, come to the State or to

25 EPA.

1   Of course, the increased hours -- I

2   understand the Court's concern about the Reich memos.

3   But EPA's construction of the increased hours exception

4   is completely correct under the plain language of the

5   regulations. And in WEPCO the Court upheld. So that

6   there was no question that not only was it consistent

7   with the plain language, but whatever Reich had said,

8   the express language of the regulations was as far as

9   the exception went. There was no further confusion, if

10   those early memos caused confusion.

11   I'd like to reserve the balance of my

12   time. Thank you.

13   CHIEF JUSTICE ROBERTS: Thank you,

14   Mr. Donahue.

15   Mr. Hungar.

16   ORAL ARGUMENT OF THOMAS G. HUNGAR,

17   ON BEHALF OF RESPONDENT UNITED STATES

18   MR. HUNGAR: Thank you, Mr. Chief

19   Justice, and may it please the Court:

20   The court of appeals exceeded its

21   jurisdiction and misconstrued the Clean Air Act in

22   holding that EPA was required to define the term

23   "modification" identically for the separate NSPS and PSD

24   programs, and on the jurisdictional point I'd like to

25   address the whipsaw question, because in fact it's quite

1   clear that there's no whipsaw issue here for a number of

2   reasons. It's true that there are those ambiguous and

3   cursory 1981 statements from Mr. Reich, who was a

4   subordinate official within EPA. In 1988, the

5   administrator of EPA, the head of the agency, in the

6   WEPCO decision, the applicability determination, made

7   very clear what EPA's position is on the application of

8   the hours of operation exclusion and the fact that this

9   is an annual tons per year test. That's page 44 of the

10   joint appendix. He made that perfectly clear and it has

11   always been clear that that is, in fact, the EPA's official

12   position beginning with the 1980 preamble. But again --

13   CHIEF JUSTICE ROBERTS: Should a challenge

14   to that have been brought in the D.C. Circuit at that

15   time, or would you have argued that's too late?

16   MR. HUNGAR: Well, I'm not sure whether it

17   could have been brought at that time. But the fact of

18   the matter is a challenge was brought on this issue

19   in -- to the 1980 regulations. True, Duke didn't assert

20   it, but General Motors and the steel industry did assert

21   in the 1981 brief they filed in that challenge to the

22   1980 rule --

23   CHIEF JUSTICE ROBERTS: Well, presumably

24   Duke could say, we looked at the Reich memorandum and we

25   were following that and all of a sudden this new 1988

1   thing came up and they are surprised by that. Now

2   you're saying it's already too late because somebody

3   else challenged it in 1980?

4   MR. HUNGAR: Well, they might have that

5   argument, Your Honor, except for the fact that the

6   challenge to the 1980 rules was stayed and was not

7   reopened until 2003.

8   In 2003, Duke and other parties sought to

9   reopen and were granted permission to reopen that

10   challenge to the 1980 rules. They filed a statement of

11   issues in 1984 and a brief in 1984 challenging the

12   regulation on the ground that if EPA's interpretation

13   was correct and that it did not require an increase in

14   maximum total achievable emissions, as the NSPS did,

15   test did, they argued that it was invalid. They raised

16   the very incorporation theory that they advance here,

17   that is the statutory argument that Congress was

18   required to follow for the PSD regulations the same

19   regulatory approach that the NSPS regulations had

20   followed in 1977 with the hourly maximum achievable

21   test. They made that very argument in their brief in

22   the D.C. Circuit in 2004, the D.C. Circuit addressed and

23   rejected that argument on the merits.

24   CHIEF JUSTICE ROBERTS: To be fair to them,

25   that very same argument was more a product of the Fourth

1 Circuit than of Duke. They had a somewhat different

2 approach before the Fourth Circuit and then the Fourth

3 Circuit came up with this insistence on the parallel

4 construction.

5   MR. HUNGAR: Yes. Well, I think it's

6 important to distinguish. There are two statutory

7 arguments here. One is what I would call the

8 incorporation theory. That is the argument that

9 Congress by borrowing the definition, the statutory

10 definition, also necessarily borrowed and mandated

11 adoption of the regulatory definition from the NSPS

12 program. That argument, the incorporation argument, was

13 made by Duke in its brief in 2004 in the D.C. Circuit.

14 The D.C. Circuit addressed and rejected that argument at

15 pages 17 through 19 of its decision in its 2005 New York

16 decision.

17   JUSTICE SCALIA: Why was that rejection

18 wrong? Because this issue is still important to me for

19 purposes of statutory construction. Is it conceivable

20 that when Congress says the word widget in this statute

21 has to mean the same as the word widget in the other

22 statute, that the agency can effectively frustrate the

23 apparent Congressional intent by saying, oh, yes, I

24 mean, yes, that has to mean the same thing, but we can

25 adopt regulations under one statute which regulations

1 say it means one thing, and we can adopt regulations

2 under another statute that says it means something else.

3 I mean, to say that they have to mean the same

4 thing it seems to me means that the regulations have to

5 say they mean the same thing.

6   MR. HUNGAR: Your Honor, it is a fundamental

7 principle of administrative law and deference to agency

8 decisionmaking that when Congress adopts an ambiguous

9 statutory phrase and charges the agency with

10 implementing that phrase the agency has discretion, has

11 a delegation of rulemaking authority and policymaking

12 authority to choose from among the various permissible

13 interpretations.

14   JUSTICE SCALIA: Of course it does, but when

15 Congress says the definition in the two statutes has to

16 be the same, whatever choice the agency makes among

17 those options has to be applied to both, it seems to me.

18   MR. HUNGAR: No, Your Honor, because

19 Congress has not mandated, as it could have done, that

20 the choice of the specific interpretation from among the

21 permissible options must be identical across both

22 programs.

23   JUSTICE SCALIA: Well, then it's meaningless

24 to say the definition has to be the same.

25   MR. HUNGAR: No, Your Honor.

1   JUSTICE SCALIA: Entirely meaningless.

2   MR. HUNGAR: The statutory definition is

3   ambiguous, but within the limits of the ambiguity it

4   imposes constraints on the discretion of the agency.

5   The agency must choose from among the options that are

6   permissible given the range of language that Congress

7   used. But within that range the agency has discretion.

8   Think of it this way, Your Honor. If there were no PSD

9   program, if we were talking only about the NSPS program,

10 Congress gave an ambiguous definition to the agency the

11 agency would have discretion to adopt different tests

12 for determining whether emissions increased for

13 different types of equipment even within that single

14 program, because the statutory definition is ambiguous.

15 The statute therefore does not mandate a one size fits

16 all approach and the agency in its discretion could well

17 determine that one emissions test is appropriate for

18 some types of equipment, another emissions test is

19 appropriate for other types of equipment, as long as

20 both of those tests are within the permissible bounds

21 of the statutory ambiguity. The agency is entitled to

22 do that.

23   JUSTICE GINSBURG: And the ambiguity is the

24 word "increase," which could mean different things?

25   MR. HUNGAR: Yes, Your Honor.

1   JUSTICE GINSBURG: The Government as I

2   understand it now has a proposed regulation that would

3   align the standards with the two programs. It would

4   bring the nonproliferation -- it would bring the

5   standard for the nonproliferation program in line with

6   the new source performance standard.

7   MR. HUNGAR: Yes, Your Honor, with respect

8   to certain types of units, electric generating units

9   like those at issue in this case, that's correct. They

10   would not be identical under the proposal, but would be

11   similar.

12   JUSTICE GINSBURG: Well, since the

13   government is now taking the position that another Duke

14   could do just what was done here and there's an

15   enforcement action pending, would you, if you prevailed

16   in that enforcement action, nonetheless enforce, though

17   it's those against the current government policy?

18   MR. HUNGAR: Your Honor, the 2005 proposal

19   that you're referring to is only a proposal, a notice of

20   proposed rulemaking. It has not been adopted. So the

21   rules as they exist today are the same as the ones we're

22   talking about, although there was a modification in

23   2002. But in any event, what we're talking about here

24   is conduct that occurred from 1988 through 2000 with

25   respect to --

1   JUSTICE KENNEDY: Well, what exactly are you

2   seeking in these enforcement proceedings? An injunction

3   to install the BACT or criminal fines or civil fine, or

4   what?

5   MR. HUNGAR: It is civil enforcement

6   proceedings, Your Honor. There are various remedies,

7   injunctive relief and civil penalties where appropriate,

8   yes.

9   JUSTICE KENNEDY: If you have an enforcement

10   proceeding and there is a legitimate question of whether

11   or not the agency's interpretation is consistent with

12   the statute with Chevron deference and so forth and the

13   court looks at it and says, you know, I have a real

14   problem with the way the agency interpreted the basic

15   statute when it first issued the regulation, the court

16   can't get into that merely because the parties didn't

17   present it earlier?

18   MR. HUNGAR: That's correct.

19   JUSTICE KENNEDY: The court's almost issuing

20   an advisory opinion in a way.

21   MR. HUNGAR: No, Your Honor. It's not an

22   advisory opinion. The court is simply precluded from

23   considering a challenge that would invalidate the

24   regulation because that is the determination Congress

25   made in requiring pre-enforcement review to avoid the

1   problem of inconsistent determinations and circuit

2   conflicts and 700 district judges potentially construing

3   the statute in different ways and tying EPA's hands.

4   The Congress made that determination.

5   JUSTICE KENNEDY: Are there other areas in

6   the law where courts have to take as binding a legal

7   proposition that they think is dead wrong when they --

8   MR. HUNGAR: It's quite common. It's quite

9   common, Your Honor, in any regime where review of an

10   agency decision is relegated to the exclusive

11   jurisdiction of one court, as it is here, and

12   enforcement proceedings are brought in a different

13   court. Hobbs Act agencies, their decisions are

14   reviewable in the court of appeals but often enforceable

15   in the district courts. The district court cannot look

16   behind the determination of the agency to challenge its

17   validity because that rests in the exclusive jurisdiction

18   of the court of appeals. Obviously there's a timing

19   issue in this statute as well because of the requirement

20   of pre-enforcement review. Whatever -- whatever concerns

21   might be raised in a situation where a party could not

22   reasonably have been expected to challenge it at the

23   time it was originally promulgated are addressed by the

24   after-arising provision in section 307(b)(1) which

25   permits challenges that could not have been made within

1   the 60-day period to be brought later in appropriate

2   circumstances. And in any event, if there were some

3   concerns at the outer limits of a provision like this

4   one, they have nothing to do with this case where Duke's

5   challenge, actual challenge to the agency decision, the

6   1980 rule, it was heard in 2005.

7   And so Duke had more opportunity than you

8   could possibly ask for to understand exactly what EPA's

9   position was, understand exactly what the regulation

10 meant and to challenge it in the D.C. Circuit. It did

11 so and it can't do it here.

12   JUSTICE SCALIA: Mr. Hungar, I'm curious.

13 What happens if you have a new company that wasn't around

14 when the regulation was issued? Can it -- can it bring a

15 challenge to the conformity of the regulation to the

16 statute?

17   MR. HUNGAR: Well, I think that's an

18 unresolved question. Presumably, the argument --

19   JUSTICE SCALIA: Well, a nice question. I

20 mean, all you have to do is find a stalking horse. Just

21 have some new company carry your water for you.

22   MR. HUNGAR: Well, presumably the argument

23 would be that the creation of the company and the first

24 applicability of the regulations to it is an

25 after-arising ground. I don't know the answer to that

1   question, but certainly it's not presented here.

2   JUSTICE GINSBURG: Could it bring it up by a

3   declaration of non-applicability? Could the new

4   company -- how would it --

5   MR. HUNGAR: Well, it could seek a

6   determination of non-applicability, but -- and it could

7   obtain judicial review of that determination. But that

8   would not go to the D.C. Circuit and would not permit a

9   challenge to the regulations. But they could find a

10   petition, they clearly could find a petition for

11   rulemaking with the EPA, saying your regulation is

12   invalid, it's been around for 25 years, but it's still

13   invalid, you need to rescind it, and when the agency

14   declined to do that they could then go to the D.C. Circuit.

15   CHIEF JUSTICE ROBERTS: In the midst of the

16   enforcement action that's being brought against them by

17   EPA? What's supposed to happen in the enforcement

18   action, if that's the vehicle through which EPA is

19   implementing its new interpretation --

20   MR. HUNGAR: If this completely speculative

21   and hypothetical situation were ever to arise, a court

22   might well exercise its equitable discretion to stay

23   proceedings pending review in the D.C. Circuit.

24   JUSTICE BREYER: Can I ask you about an

25   argument I think they did make? I think they made this

1   argument. On page 26 of your brief, I think it's

2   explained well. You set out the regs and the reg says

3   that a major modification is "any physical change in the

4   method of operation that would lead to a significant net

5   emissions increase." Then you have little (iii), which

6   is an exception, and it excepts a physical change which

7   leads to -- is just an increase in the hours of

8   operation or the production rate.

9   So that's out of it. Now, the question is

10   what's in it? If that's out of it, what's in it? I

11   think what they've said is, if you think about that,

12   we'll tell you what must be out of it is a physical

13   change that does nothing to increase the capacity, but

14   just means you can run it more hours. And they say their

15   proof of that is that that was the EPA's interpretation

16   for years and years and years. Indeed, we did what we

17   did thinking that was it.

18   And then after we did what we did, they

19   pulled the rug out from under us and said no, that isn't

20   it; now it means any physical change, like you change a

21   nut, or a bolt, or a tube, even though there's no increased

22   capacity to emit more. It's just you run it more hours.

23   Now, that they say is basically unfair, it's

24   not what this reg has been about. And they made that

25   argument, according to them, very strongly and the

1   Fourth Circuit took the argument and changed it all

2   around and made some propositions of law that it's hard

3   for even them to defend.

4   All right. Now, that's what I think, that's

5   what I think is lying -- maybe that's lying at the

6   heart of it. And if it is, what do you say?

7   MR. HUNGAR: There are several things, Your

8   Honor. First of all the language of the regulation

9   simply does not support that interpretation. What the

10   regulation says is that hours of -- a change in hours of

11   operation is not a physical change. Fine. But we have

12   a physical change here. It is undisputed that Duke made

13   physical changes to its facilities, major modifications,

14   sort of using that term in the non-regulatory sense, but

15   substantial replacements of physical equipment at the

16   facilities. So physical change has occurred. The hours

17   of operation exclusion, therefore, has no longer any

18   relevance because it applies only at the physical change

19   step of the analysis.

20   There has been a physical change here

21   regardless of whether hours of operation changed or not.

22   Therefore, the hours of operation exclusion no longer

23   applies. The next question is whether the -- if the

24   physical change that did occur resulted in a significant

25   net emissions increase. Here it did under the plain

1   language of the regulations and under the test that EPA

2   applies. It is true that 1981 they were arguably

3   mistaken to the extent one can discern what the,

4   Mr. Reich was actually saying, they seem to be simply a

5   mistake in interpretation. But in 1988, the

6   administrator of the agency, the head of the agency,

7   made very clear EPA's position, the very same position

8   it is taking here today on the hours of operation

9   exclusion. The First Circuit in the Puerto Rican Cement

10   case, as Your Honor knows, upheld that interpretation in

11   1989. The Seventh Circuit in footnote 11 in the WEPCO

12   decision upheld that determination in 1990. It was

13   restated by the EPA again and again and it is well

14   established.

15   Thank you, Your Honor.

16   CHIEF JUSTICE ROBERTS: Thank you,

17   Mr. Hungar.

18   Mr. Phillips.

19   ORAL ARGUMENT BY CARTER G. PHILLIPS,

20   ON BEHALF OF RESPONDENT

21   MR. PHILLIPS: Thank you Mr. Chief Justice,

22   and may it please the Court:

23   I think I am inclined instead of starting

24   with the jurisdictional issue to focus initially on the

25   regulatory history immediately in the wake of the 1980

1   rules. Because it seems to me it is very clear that the

2   understanding of everyone in the industry, outside the

3   industry, from 1980, candidly well beyond 1988 all the

4   way up until 1999, was that these regulations didn't apply

5   under any circumstances in the absence of an increase in

6   the capacity. And you had to demonstrate that there

7   would be an increase in the hourly rate of the

8   emissions.

9   JUSTICE GINSBURG: Then why were some

10   companies asking for declarations of nonapplicability?

11   MR. PHILLIPS: To confirm precisely that

12   interpretation. That's exactly why GE went to Mr. Reich

13   and asked for a determination of applicability, and was

14   told categorically PSD applicability is determined by

15   evaluating any change in emissions rates caused by the

16   conversion.

17   JUSTICE GINSBURG: But Mr. Donahue said that

18   there were nonapplicability applications after those

19   early ones that came out the other way. So there were

20   companies --

21   MR. PHILLIPS: No. Well --

22   JUSTICE GINSBURG: -- who asked for a

23   declaration of nonapplication and then EPA took the

24   position that it is currently taking.

25   MR. PHILLIPS: As I heard Mr. Donahue, he

1 was talking about WEPCO. Understand the context of

2 WEPCO. WEPCO was a situation where every one of the

3 changes was a modification within the meaning of NSPS.

4 And then the question is were they also modification --

5 major modifications within the -- within the meaning of

6 the PSD. And that's what they analyzed. So it didn't

7 say anything about the argument we've been making which

8 is what is a modification. The only statements that I

9 know of that are out there are the two Reich statements

10 which I just quoted to you, says exactly our

11 interpretation. But even more powerful at least in my

12 view is the quotation from the amicus brief from the

13 State of Alabama and the 12 States that relied on the

14 Region 4 statement and that's on pages 7 and 8 of that

15 amicus brief and the answer, the question is -- you

16 know -- how do you determine what is a modification?

17 You know does something that doesn't increase the hours,

18 the emissions per hour, constitute it? It says no.

19 Since the modification does not cause any increase in

20 the hourly particulate emissions, no increase in annual

21 emissions should be calculated. They could not have said

22 that any more clearly than --

23   JUSTICE SCALIA: Who was saying that?

24   MR. PHILLIPS: That is the -- it is the

25 chief of the air and waste management division, James

1   Wolburn, giving guidance to Region 4. Region 4 is not

2   only Alabama, it is also North Carolina and South

3   Carolina. And then, in the wake of this, right? 1982,

4   North Carolina and South Carolina submit their SIPs and

5   in their SIPs, certainly the South Carolina SIP

6   expressly incorporates the concept of modification.

7   North Carolina a little less expressly incorporates the

8   entirety of the regulatory scheme under title 50 -- under

9   part 51 of the Code of Federal Regulations.

10   JUSTICE BREYER: It looks like -- I went

11   back and read the Puerto Rico cement case. And it

12   certainly looks as if -- though the issue was somewhat

13   different. It looks as if the interpretation that the

14   EPA is taking there is not consistent with what you are

15   reading now and is consistent with what they're saying

16   today. And that was in 1988-89, I guess. They must have

17   been starting on that in '87. So it seemed to me we have a

18   mixed bag. Some people were saying the one thing. Some

19   people were saying the other thing. And the later in time

20   seems to be the Puerto Rico cement. And that was at

21   least 17 years ago. And --

22   MR. PHILLIPS: Well, Justice Breyer, I think

23   Puerto Rico cement is a somewhat complicated problem.

24   Because what you are dealing with there is the

25   elimination of two existing units, the two kilns, and a

1   replacement with a brand-new unit, which would have been

2   a modification under any -- I think under anybody's

3   theory, because there would have been an increase in the

4   hourly emissions anyway. So it would have been a NSPS

5   subject to the PSD. It didn't get analyzed that way but

6   the truth is it would have been fully -- the way that

7   decision came out would have been exactly

8   consistent with the way that they analyzed it.

9   JUSTICE BREYER: The analysis which was

10 probably pretty much based on what they said, I think

11 was that the reason there was increased potential here

12 to pollute, was really because this change would permit

13 the plant to be run more intensively or more hours,

14 something like that.

15   MR. PHILLIPS: But that was based on the

16 question of involving you know, normal operations or

17 non-normal operations. The Court really didn't have to

18 address -- and I don't think did address the question of

19 how do you relate --

20   JUSTICE BREYER: No, we didn't address it.

21 I'm not taking it as evidence of that. I'm taking it as

22 evidence that the EPA then had a basic position similar

23 to what they have now.

24   That's what I'm using it as a basis for

25 thinking that they were not saying to have a change, the

1   word "change" includes only a change in physical

2   facilities that increases the amount of emission per

3   hour. Am I right? Or --

4   MR. PHILLIPS: I don't think they were

5   really arguing that particular point. I mean, that's

6   not the way I would have read the argument that EPA was

7   making. But, and the bottom line is they didn't address

8   this issue in WEPCO. To the extent they came close to

9   addressing this issue in WEPCO they lost it in the

10 Seventh Circuit because WEPCO adopted an interpretation

11 that's much closer to what we are asking for.

12   The answer given on the other side at this

13 point, that we should have -- we should have sought a

14 determination. Well, the problem with that, of course,

15 is every one of these projects was being inspected. The

16 record is replete with examples from North Carolina and

17 South Carolina and EPA inspectors on site looking at

18 every one of these projects.

19   JUSTICE BREYER: So then they'll say your

20 argument here, even if you are right, I think they think

21 you're wrong -- but even if you're right, they'll say

22 well, that's an argument that it is arbitrary, capricious

23 abuse of discretion for them to change horses in the

24 middle of the stream, i.e., for them to take an

25 interpretation of a reg that was longstanding and without

1   adequate notice and comment and so forth radically

2   reverse that interpretation. Now that's not the issue in

3   front of us now.

4   MR. PHILLIPS: But that is the issue in

5   front of you, I believe.

6   JUSTICE BREYER: Because?

7   MR. PHILLIPS: Because --

8   JUSTICE BREYER: They say because the Fourth

9   Circuit didn't go really on that, it went on some

10 statutory thing, and --

11   MR. PHILLIPS: To be sure, but that's the

12 opinion. That's not the judgment. The judgment of the

13 court of appeals is that this enforcement--

14   JUSTICE STEVENS: May I ask a question, Mr.

15 Phillips? Focusing on this question in the amicus brief

16 which the EPA representative answered no. Supposing

17 the EPA had answered yes at that time. Would that have

18 been a permissible answer within the meaning of the

19 statute?

20   MR. PHILLIPS: If -- I'm not sure I

21 understood the predicate of the question, Justice Stevens.

22 Which question are you asking?

23   JUSTICE STEVENS: You know -- what's that,

24 page 7 and 8 of the -- of a source to modified

25 have to have a significant increase in the SO2 elements.

31

1   MR. PHILLIPS: Oh, I see.

2   JUSTICE STEVENS: And they answered no. You

3   say they were right.

4   MR. PHILLIPS: Right.

5   JUSTICE STEVENS: I'm just asking -- want to

6   know, under the statute, could they have answered yes

7   and would that have been a permissible answer?

8   MR. PHILLIPS: No, our position would be no.

9   That would have been an -- inappropriate under the

10   rationale of Justice Scalia.

11   JUSTICE STEVENS: So you're not basically

12   relying on the fact that you were misled, you're

13   basically relying on the fact that they have interpreted

14   the statute incorrectly.

15   MR. PHILLIPS: Yes, actually we're

16   making both arguments. Our basic argument is that all

17   along, they have interpreted it in a certain way. And

18   then 19 years later, they reversed course. And that is

19   arbitrary and capricious, Justice Breyer, and it is a

20   basis on which to defend the judgment of the court of

21   appeals.

22   JUSTICE KENNEDY: Well, is what the government

23   is saying here is that suppose the regulation can be

24   interpreted to say X or Y. X would hurt the company; Y

25   would not. Is the government saying, if it is

32

1   foreseeable that the agency might take the

2   unfavorable position, you then must challenge it in the

3   D.C. Circuit?

4   MR. PHILLIPS: I think that's exactly what

5   they have to be arguing. And it seems to me that that

6   cannot be what 307(b)(1) means. Justice Kennedy, you

7   asked a great question. Should we have raised this in

8   1980, 1992, 2000? When were we supposed to bring this

9   up? And the truth is in 1980 we interpreted this

10 statute, the regulation, exactly the same way EPA did.

11 It would have been silly for us to raise that. It is

12 true that this issue comes up 25 years later in a

13 bizarre proceeding. But that's not what 307(b)(2) is

14 all about. It says you are precluded from making a

15 challenge in an enforcement action if the action of the

16 administrator was subject to challenge. Well, the

17 action of the administrator was not subject to challenge

18 in 1980. And when we did have the subsequent

19 rulemaking --

20   CHIEF JUSTICE ROBERTS: Just a pause, under

21 your view or the Fourth Circuit's view? If you read

22 Judge Tatel's opinion in New York versus EPA, he

23 suggests -- suggests, he says that EPA adopted different

24 interpretations of modification from the outset. And so

25 if what you are saying couldn't have been challenged,

1   was the Fourth Circuit's view, that may not be accurate.

2   But if you are saying what couldn't have been

3   anticipated was the argument you actually made to the

4   Fourth Circuit, that might be a different story.

5   MR. PHILLIPS: Yes. Well, I think that, that

6   is precisely what we are saying. But you know, Judge

7   Tatel, with all due respect to him, is dead wrong.

8   Because the interpretation of modification under NSPS

9   and under the regulatory PSD was identical. The

10   regulations couldn't be any clearer in that regard

11   because if you look at 15a of our appendix, you know,

12   the modification, this is the NSPS definition -- I'm

13   sorry, better go back a page. 17a. 60.14

14   modification defines emission rate and the emission rate

15   is expressed as kilogram per hour. So that is

16   absolutely clear that that is the NSPS --

17   Dobbs modification.

18   JUSTICE SCALIA: That's the NSPS section.

19   MR. PHILLIPS: That's the NSPS section.

20   Then you go two pages earlier to 15a and you have the

21   PSD regulatory definition, and it comes right back to

22   emission rate, or the regulatory history that says the

23   emission rate as used in this provides is identical --

24   JUSTICE SCALIA: They say that that

25   provision only applies when there is no SIP. And that's

1 not this case.

2   MR. PHILLIPS: Well, in the first place it

3 would apply in at least South Carolina immediately

4 because there is a SIP that incorporates exactly the

5 same language. And second of all, the notion that this

6 regulation is inoperative on one side and fully

7 operative on the other side make no sense. It makes

8 much more sense to recognize that modification is the

9 trigger for construction which is in part 51(2) and that

10 that incorporates this entire modification language.

11   JUSTICE SCALIA: I don't understand that.

12 It seems to me each part has had different definitions

13 and this definition only applies to part 52 which

14 applies when there is no SIP.

15   MR. PHILLIPS: Okay.

16   JUSTICE SCALIA: I don't know how you can

17 say it automatically applies when there is a SIP.

18   MR. PHILLIPS: The way that would apply --

19   JUSTICE SCALIA: Part 51, in other words.

20   MR. PHILLIPS: Right. Go back to then -- you

21 have to go back to 12(a), I think it is where we talk

22 about the interpretation and we get to construction.

23 This is (b)(8), construction means a modification, okay,

24 of an emissions unit. So that -- and modification, if it

25 is undefined in title 51, right? According to 15.100,

1   means whatever it means under the statute. So that just

2   takes you back to the statute. And this is the

3   interpretation under the statute. The 52 interpretation

4   is also an interpretation under the statute.

5   So it is completely circular and brings you

6   right back to the same definition. I agree by its terms

7   it doesn't apply to 51. But going through the

8   definitional provision in part 51 through the definition

9   of the trigger for construction, which is modification,

10   it takes you right back to the same meaning of the same

11   provisions.

12   So there is no difference between the two.

13   And to me, it is really critical. And it seems to me

14   there are sort of two points to make here. One is

15   nobody on the Petitioner's side of this case answers the

16   State -- the dozen States who say we relied upon you

17   when we adopted these SIPs. We realized that you are

18   asking us to take on enormous burdens. And you should

19   have told us that before we went down this path in the

20   first place.

21   JUSTICE SCALIA: Mr. Phillips, before you

22   get away from this section 52, because I think that is

23   the best section for your case, 52.01(d), is there, is

24   there any sensible reason why you would want to have a

25   different definition of modification for non-SIP

1   situations than you would for SIP situations?

2   MR. PHILLIPS: No. Absolutely not. I mean,

3   you would -- you -- there is no rational --

4   JUSTICE SCALIA: That occurred to me when--

5   MR. PHILLIPS: And I have not heard the other

6   side make an argument that there is a rational

7   distinction between the two. And the truth is if EPA

8   wanted to achieve what it thought it was achieving, that

9   is to eliminate the concept of modification, what it

10   should have done is two things.

11   It should have -- it should have deleted

12   52.01. And it should have adopted the proposed

13   regulation that it didn't adopt from the 1979 regs.

14   This is on page 9 of their brief. This statement is

15   astonishing to me. "The term major modification serves

16   as the definition of modification or modified when used

17   in the act in reference to a major stationary source."

18   If they had adopted that regulation in 1980, I

19   wouldn't had to litigate this issue 25 years later.

20   We would have litigated this question in 1980 because

21   then we would have said that's flatly inconsistent with

22   the statutory scheme because you're not entitled.

23   JUSTICE SCALIA: You're quoting page 9?

24   MR. PHILLIPS: Page 9 of their reply brief.

25   JUSTICE SCALIA: Oh, in their reply brief?

1   MR. PHILLIPS: The SG's reply brief, I apologize.

2   The gray brief. Where they seek to get some support for

3   the idea that modification was dropped out of this

4   analysis. But the truth is, that was a proposed rule

5   that would have done exactly what they say that the 1980

6   rule did without adopting that particular regulation.

7   JUSTICE STEVENS: Mr. Phillips, can I ask

8   another sort of basic question? In your view, would it

9   be permissible for the agency to interpret the word --

10   to adopt a regulatory interpretation of the -- in the

11   PSD regulations of the word "modification" that was

12   different from the definition it used under the new

13   source regulations?

14   MR. PHILLIPS: Substantively different?

15   JUSTICE STEVENS: Substantively different.

16   MR. PHILLIPS: No, I think that would be

17   impermissible

18   JUSTICE STEVENS: You think the statute

19   required the regulation to be identical?

20   MR. PHILLIPS: Yes. I don't understand how

21   it's possible that Congress says in the statute that you

22   take the NSPS trigger -- remember, this is not just some

23   random definition we're talking about. Construction is

24   the trigger for this part of this entire regulatory

25   scheme, and modification is the trigger, and say it is

1 as defined in, and they did it twice.

2   JUSTICE STEVENS: Your answer is no?

3   MR. PHILLIPS: My answer is no.

4   (Laughter.).

5   MR. PHILLIPS: I thought I said that first.

6   JUSTICE SCALIA: It's definitely no.

7   (Laughter.)

8   MR. PHILLIPS: That's a no with some

9 emphasis.

10   JUSTICE STEVENS: Would it have been

11 permissible for the agency to adopt one definition for

12 10 years and then change the definition to the other

13 definition for all programs?

14   MR. PHILLIPS: For all of it?

15   JUSTICE STEVENS: Yes.

16   MR. PHILLIPS: Yes. I think there is plenty

17 of room within that --

18   JUSTICE STEVENS: So either definition could

19 comply with the statute?

20   MR. PHILLIPS: Yes. I think as long as you

21 maintain consistency between the two, there is a fair

22 amount of discretion for --

23   JUSTICE BREYER: The obvious reason to do it

24 is, I guess you have an area of the country, let's say,

25 which is quite clean in the air. And there is a power

1   plant. And what somebody works out, which is normal, is

2   demand for electricity is increasing. And so what we

3   will do is we're going to take these turbines and

4   system, and we're going to change it really radically.

5   It doesn't produce one more particle per hour, but now

6   we can run it 24 hours a day and previously we'd run it

7   12 hours a day. So there's going to be twice as much

8   pollution in the air. Now the whole idea of the PSD

9   system is you don't have twice as much pollution in the

10   air, and I guess that's why they wanted to do it.

11   MR. PHILLIPS: Well, I think the premise of

12   that is, the real question is, if Congress had meant

13   that, why would Congress have adopted the same word,

14   modification, as the construction trigger that existed

15   in NSPS?

16   JUSTICE BREYER: Because you can use the

17   same word, you can apply the same word in different

18   places differently, depending on what your basic object

19   is in the different place. It's very hard to say what

20   kind of modification might exist over here, there, the

21   other place. And you put your finger on a very

22   difficult question for power companies, because those

23   turbines do go at different amounts of rates and so

24   forth during a day, during a month, during a year, so

25   it's hard for them. Therefore, you have a complex

1   definition.

2   What's wrong with that?

3   MR. PHILLIPS: Because by the time the

4   statute came up for review by Congress, and the PSD

5   program, the new source review, there was already a very

6   extensive regulatory history about the meaning of the

7   term "modification."

8   JUSTICE SCALIA: Well, I think what's wrong

9   with it is that you could have achieved that same result

10   by simply not saying that modification in one program

11   has to mean the same as modification in the other. If

12   you didn't say that, that would be the result. You give

13   modification whatever meaning you think is reasonable

14   here. You give it whatever reading you think is

15   reasonable in the other place. But when you say the two

16   have to be the same, it seems to me you have something

17   else in mind.

18   MR. PHILLIPS: And it also seems to me,

19   Justice Breyer, it clearly creates an obligation on the

20   part of EPA to be very explicit if it's, in fact, going

21   to do what you say it's going to do. You don't go about

22   saying I am going to define modification in one statute

23   fundamentally different from the way I define

24   modification in another statute without discussing the

25   word modification.

1   And to put this in context, you'll remember,

2   these regulations were adopted in the wake of the Alabama

3   Power decision. Alabama Power didn't deal with the

4   issue of modification. That wasn't before the court.

5   Nobody had challenged modification's definition. The

6   hourly emissions rate was a perfectly valid one. What

7   the court in Alabama Power said is, you can't use this

8   threshold for major modification. And then the case --

9   so then the matter comes back, and if EPA immediately

10   adopts a new set of regulations that deal what, with

11   what? Major modification, not with modification.

12   And then they go through this entire

13   elaborate analysis of major modification, none of which,

14   candidly, do we challenge. We have no quarrel with

15   their interpretation of the concept of major

16   modification. If anybody does, my guess is the State

17   environmental groups would.

18   JUSTICE STEVENS: They make a kind of

19   interesting argument, major modification is not a subset

20   of modification.

21   MR. PHILLIPS: Yeah. And if the Solicitor,

22   and if EPA had enacted the regulation that they proposed

23   but didn't enact, that says major modification means

24   modification, then we might have an argument there. But

25   the concept that when you have modification as a core

1   baseline construction -- I mean trigger for the

2   applicability of this portion of the scheme, and then

3   you take that same -- and you not only do it once but

4   you do it twice, and you do it in the context of an

5   entire regulatory scheme that was designed to implement

6   this statutorily -- or implement this before the statute

7   was enacted, and you have Congress saying well, you

8   didn't get that right, but you did get this right, and

9   they leave this language exactly in the way it is, the

10   only fair inference you can draw from that, it seems to

11   me --

12   JUSTICE BREYER: Why? Because the language,

13   I don't see anywhere in the statute where -- the words

14   of modification are, it's a physical changing or change

15   in a method of operation which increases the amount of

16   any air pollutant. Now those words, "physical change

17   which increases the amount of any air pollutant," could

18   mean different things in different places.

19   MR. PHILLIPS: Sure.

20   JUSTICE BREYER: Where does it say in the

21   statute that they can't?

22   MR. PHILLIPS: Where it says in the statute

23   is where it makes this specific cross-reference, because

24   if all they wanted to do was get that definition, all

25   they had to do was use the word modification. They

43

1   didn't have to use modification as defined --

2   JUSTICE STEVENS: Mr. Phillips, I want to be

3   sure I understand your position. Are you saying the

4   statutory text in effect says every regulation using the

5   word modification must employ the same definition, or

6   are you relying on a general principle that when the

7   same word is used it should be used in the same way?

8   MR. PHILLIPS: It's a general principle

9   that --

10   JUSTICE STEVENS: So there's nothing in the

11   statute itself that says that principle shall apply to

12   this case?

13   MR. PHILLIPS: No, but the general principle

14   is that if the same language is used in two different

15   portions, you presume they have the same meaning. When

16   you go beyond that -- because otherwise, their

17   interpretation rendered superfluous the specific

18   cross-references to as defined in and as used in; and

19   while I know some don't like the legislative history,

20   the legislative history is quite clear that they had in

21   mind, and regulatory history as well --

22   CHIEF JUSTICE ROBERTS: Your answer is you

23   are not relying simply on the general principle. It is

24   not just that they used the word modification in one

25   place and the word modification in the other. It's that

1   in the latter place, they said modification as defined

2   in the first place.

3   MR. PHILLIPS: It depends on which general

4   principle, I suppose you're talking about. I'm not

5   relying on the mere presumption. I think this is much

6   stronger than the mere presumption.

7   JUSTICE STEVENS: But your reference of

8   modification as defined elsewhere merely defines the

9   scope of the statutory meaning. That's not the same as

10 saying every regulation that is a modification must be

11 the same no matter what the program.

12   MR. PHILLIPS: I think if you read it in

13 context, when you recognize that what Congress was doing

14 is adopting a statutory scheme that overlays on a

15 regulatory scheme that was well established with very

16 specific meanings, and where Congress quite clearly

17 picked and chose -- I think that's the way to say it --

18 from the regulatory scheme, and said we'll take these

19 and not take those, and has a provision at the end --

20 168 says, all the regulations remain in effect until

21 they get changed at some point, suggesting --

22   JUSTICE STEVENS: Let me just be sure I

23 understand the point. If instead of saying as defined

24 in X, the second statute had merely quoted the same

25 words that were in X, would your argument be the same?

1   MR. PHILLIPS: No. It would not be nearly

2   as strong as it is. We would still have a

3   presumption --

4   JUSTICE STEVENS: So you're saying that if

5   you used the definition as defined in another statute,

6   that implicitly says all regulations defining this term

7   must be identical.

8   MR. PHILLIPS: I don't know if I have to go

9   quite that far because I have more evidence than that in

10   this particular case, because I have the fact that they

11   say as used in, which suggests that it's more than just

12   a definitional point. We do have a legislative history

13   that seems to have in mind this regulatory background;

14   and we've been told by EPA that when Congress

15   incorporated modification, it really did incorporate

16   that luggage, baggage as well.

17   JUSTICE STEVENS: This is very helpful to

18   me, because the government has accused you of abandoning

19   the court of appeals approach to the case, and I think

20   you're endorsing the court of appeals.

21   MR. PHILLIPS: I do endorse it. The only

22   question I have -- I mean, I don't think that it

23   necessarily has to be -- that every word has to be

24   identical in the two provisions, but I do think they

25   have to be congruent. And so, that's the strong version

1   of our argument, and that's pretty close to where the

2   Fourth Circuit was.

3   The weaker version of our argument, which

4   gets I think some mileage on the arbitrary and

5   capricious part of the argument, is at a minimum, if

6   Congress adopts as the trigger point the same word in

7   two statutes, and EPA then purports to be implementing

8   that statute, it has some obligation to explain how it

9   is that they're doing a 180 with respect to the term

10   modification. And the reason --

11   JUSTICE SCALIA: It's not just a matter of

12   using the same word.

13   MR. PHILLIPS: Yes. You're right.

14   JUSTICE SCALIA: It's a matter of a statute

15   which says it shall have the same meaning.

16   MR. PHILLIPS: Right. They owe us some

17   responsibility to explain, how do you not follow that

18   course.

19   JUSTICE KENNEDY: Well, could they have said

20   that construction means both modification and then come

21   up with a new word, alteration? Because the statute

22   says the term construction includes modification, so

23   I -- construction can be broader. Could it be an

24   alteration, they would come up with a new term of art,

25   and add that --

1   MR. PHILLIPS: Absolutely.

2   JUSTICE SCALIA: -- to the PSD?

3   MR. PHILLIPS: Could they have gotten away

4   with that? I mean, that would have been a much stronger

5   argument. It seems to me the better argument, and --

6   but see, the point here is if they had done that, or if

7   they had done what they proposed in 1979, which is just

8   to simply redefine major modification to be

9   modification, then we would have taken that issue

10 directly to the D.C. Circuit at that point in time.

11   JUSTICE BREYER: But you do have a brief

12 here. You have a brief filed in the D.C. Circuit, which

13 is Brief For Industry Petitioners on Actual Emissions

14 Definition.

15   MR. PHILLIPS: Yes.

16   JUSTICE BREYER: And throughout that brief

17 it refers again and again to the problem, their proposed

18 reg is not taking, i.e., the potential capacity, which

19 is change the machine so it puts out more per minute or

20 whatever, but rather, it's using actual emissions even

21 though you don't change the capacity of the machine.

22 There's a whole brief on that. So you already argued

23 that whole brief, that what they were doing was

24 inconsistent with the statute, et cetera.

25   MR. PHILLIPS: The other side has not argued

1   collateral estoppel, if that's the argument you're

2   trying to make, Justice Breyer.

3   JUSTICE BREYER: No. As being outside the

4   statute at that time, and you did.

5   MR. PHILLIPS: Well, you have to put that

6   into context. We're talking about a matter that was

7   closed for 25 years and then was reopened. And this

8   argument -- and it is true, a variant of this argument

9   was made. I don't think it's the full argument that

10 we've made before this Court. And it was rejected by

11 the D.C. Circuit. But if you're arguing that as a

12 307(b) argument, my answer to that is this is still not

13 action by the administrator that would trigger a 307(b)

14 bar. If you're asking about collateral estoppel, my

15 argument is --

16   JUSTICE BREYER: No. I was just thinking,

17 then you're left with what you called the weak argument,

18 arbitrary, capricious, et cetera, because I don't see

19 how you make the stronger one, what you think is

20 stronger, since you made it before, or a version of

21 it before the D.C. Circuit.

22   MR. PHILLIPS: Well, again, if you are

23 arguing that as a matter of collateral estoppel, then --

24   JUSTICE BREYER: No, not collateral

25 estoppel, but you know, I'd be repeating myself.

1   MR. PHILLIPS: But if it's not collateral

2   estoppel and it's not 307(b)(2), then --

3   JUSTICE BREYER: That's what it is.

4   MR. PHILLIPS: So you are doing it as --

5   see, I don't think it -- I think if you read 307(b)(2)'s

6   language, it talks about action of the administrator,

7   and what action of the administrator are we, in fact,

8   challenging here? Nothing. Because in our view, the

9   1980 regulation quite clearly says what we want it to

10   say. The only thing that's changed is that the

11   preambles have interpreted the 1980. We challenged that

12   and the D.C. Circuit said no, we're not going to address

13   that issue. That's an issue when you get back up, when

14   you get back on your enforcement action. Then you can

15   complain about that aspect of it. That issue is not

16   ripe. And that is exactly what we are trying to argue

17   in this case. And it's a variant of what I think --

18   JUSTICE STEVENS: Mr. Phillips, can I go

19   back for a second to the meaning in (a) includes the

20   same meaning as in (b). Is it not correct under your

21   view of the statute that that meaning can include either

22   of the two definitions that the two regulations

23   identify? So that either -- whether you start with (a)

24   or the second statute, either statute includes both --

25   may include both alternative regulations?

1   MR. PHILLIPS: As long as they are

2   consistent?

3   JUSTICE STEVENS: Yes.

4   MR. PHILLIPS: Yes. That is my position,

5   Justice Stevens.

6   CHIEF JUSTICE ROBERTS: Could you explain to

7   me again why this isn't a 307(b) problem? You said this

8   is an action by the administrator?

9   MR. PHILLIPS: Right. Because there is no

10   action of the administrator that we would challenge.

11   The only action of the administrator was the 1980

12   regulation, which we interpret as not changing

13   modification. If you read 52.01(d), it clearly retains

14   modification. We have no quarrel, then, with what the

15   administrator did in 1980.

16   Then they adopt preambles to the subsequent

17   regs. We do challenge those, but the D.C. Circuit said

18   we're not entitled to do that, that's got to wait for an

19   enforcement action. The only thing that's left out

20   there is this sort of inchoate interpretation by the

21   administrator. But there's no final action by the

22   administrator for us to challenge. Then the only

23   question would be, do we have some obligation --

24   CHIEF JUSTICE ROBERTS: You can't challenge

25   in the D.C. Circuit the administrator's interpretation

1   that led to the enforcement action?

2   MR. PHILLIPS: I don't know how that's a

3   final action. The filing of a complaint, as this Court

4   held in Harrison, is not a final action. So that

5   doesn't trigger it, and I don't know what else is out

6   there for us to serve as a hook. I would think at a

7   minimum the Court would want to be very, very loathe to

8   jump on a expansive interpretation of 307(b) where it

9   operates in a context like this as a pure gotcha. You

10   adopt regulations that nobody has a quarrel with, you

11   change the regulation afterwards and then you come back and

12   you say you can't challenge it at this point. That just

13   cannot be a sensible interpretation of that statute.

14   If there are no further questions, I would

15   ask the Court to affirm the Fourth Circuit. Thank you.

16   CHIEF JUSTICE ROBERTS: Thank you, Mr.

17   Phillips.

18   Mr. Donahue, you have 3 minutes remaining.

19   REBUTTAL ARGUMENT OF SEAN H. DONAHUE

20   ON BEHALF OF PETITIONER

21   MR. DONAHUE: Thank you, Mr. Chief Justice.

22   You just can't read the 1980 regulations to

23   achieve the result Duke is seeking here. There is no

24   hourly rate in there, and it's important to note that

25   these provisions that they now state misled them into

1   their non-challenge, they didn't even cite to the Fourth

2   Circuit or the district court, and on their face,

3   they're not -- it's not plausible that these provisions,

4   which are totally nonspecific, were intended to vary the

5   very detailed and specific instructions on how to

6   measure an emissions increase laid out. And the

7   preamble --

8   JUSTICE SCALIA: Well, the one in part 52

9   surely does. You have to give them that.

10   MR. DONAHUE: No, I don't give them that.

11   JUSTICE SCALIA: You don't give them that.

12   MR. DONAHUE: Because it says rate, and the

13   1980 PSC regulations say that the relevant rate is tons

14   per year. They use the word "rate" pervasively.

15   I would also say the preamble to the rule

16   makes conclusively clear that "major modification" is

17   EPA's definition of the statutory term. This idea that

18   EPA, it's completely inconsistent with not only --

19   CHIEF JUSTICE ROBERTS: Major -- when you say

20   the statutory term, you mean "modification"?

21   MR. DONAHUE: Correct.

22   CHIEF JUSTICE ROBERTS: So then why weren't

23   those proposed regulations saying just that, adopted?

24   MR. DONAHUE: I don't know the answer to

25   that, but it's absolutely clear. EPA has never said

53

1   otherwise. And of course the idea that an NSPS

2   modification is required first, it would have been a big

3   deal. There is no sign of it, and in fact there are

4   specific examples. The example cited at page 23 of the

5   government's opening brief in the preamble is a PSD

6   major modification that would not be an NSPS --

7   CHIEF JUSTICE ROBERTS: That's a tough sell,

8   isn't it? I mean, the idea is you propose regulations

9   saying major modification means modification. Those

10   regulations are not adopted, and then the industry is

11   supposed to be on notice that that's still what you

12   mean?

13   MR. DONAHUE: I think that there's no other

14   reading of what EPA meant from the regulations. No one

15   was confused by this, Chief Justice Roberts. No one was

16   confused.

17   This argument, it's a new argument in this

18   Court about how to read the rules, the 30 -- 52.01(d),

19   51.100, and 51.166(b)(8), all uncited below. It's really

20   not plausible. The Court would have to abandon a lot of

21   very basic principles of how to interpret legal texts to

22   read the rules this way, and I think Judge Poisner was

23   right on that. He was right to say this is the natural

24   reading of the rules.

25   JUSTICE SCALIA: Where is "rate" defined?

1 I'm still troubled by 52.01(b). Where is -- you say

2 "rate" is defined. Where?

3   MR. DONAHUE: "Rate" is used as an annual

4 rate in 51.166(b) (21) and (b)(23).

5   JUSTICE SCALIA: It's not defined. You

6 say it's just used that way.

7   MR. DONAHUE: It's the only -- it's tons

8 per year consistently.

9   The other thing I would point out, as the

10 Court is aware, is that 307(b) applies it bars courts in

11 enforcement actions, which includes this Court. This

12 case is not up on cert from the D.C. Circuit in New

13 York.

14   Thank you very much.

15   CHIEF JUSTICE ROBERTS: Thank you,

16 Mr. Donahue. The case is submitted.

17   (Whereupon, at 11:02 a.m., the case in the

18 above-entitled matter was submitted.)

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