

## Which Version Do You Believe?

### A COMPARISON OF THE SHIFTING POSITIONS BY DUKE ENERGY AND UTILITY INDUSTRY DEFENDANTS

Duke Energy's litigation position before the Supreme Court in 2006 asserts that air pollution clean-up equipment is required under the Clean Air Act's "prevention of significant deterioration" (PSD) permitting program only when:

- (1) Company activities increase "hourly" emission rates – even if a plant can thereby operate more frequently, increase *annual* emissions by tens of thousands of tons and escape cleanup responsibilities; and
- (2) Company activities increase a plant's physical "capacity to emit" or "maximum achievable" emissions – even if actual emissions increase by massive amounts.

These positions would allow Duke Energy to avoid cleaning up tens of thousands of tons of extra air pollution each year, and allow the utility industry as a whole to avoid controlling *millions* of additional tons.

For that reason, EPA since 1980 has required PSD pollution controls when *actual annual* emissions increase:

- (1) "Annual" emissions go up, in tons per year – even if hourly emission rates do not increase – when construction allows a plant to operate more frequently, for example; and
- (2) "Actual" emissions to the atmosphere increase – even if a plant's capacity to emit does not expand.

The clean air enforcement cases against power plants have uncovered documents that reveal the utility industry's longstanding awareness that the legal positions it is now asserting are erroneous, and that EPA's actual-annual legal position is and has been correct. As a result, utility company attorneys have fought to keep even more documents concealed from the public.

#### **What Utility Industry Defendants Are Saying Before Supreme Court in 2006**

"[I]t is very clear that the understanding of everyone in the industry, outside the industry, from 1980, candidly well beyond 1988 all the way up to 1999, was that these [PSD] regulations didn't apply under any circumstances in the absence of an increase in the capacity. And you had to demonstrate that there would be an increase in the hourly rate of emissions."

#### **What Utility Industry Officials Were Doing and Saying in 1980's and 1990's That Flatly Contradict Their Litigation Claims**

In 1982, Duke Energy signs a settlement agreement with EPA requiring the agency to consider *amending* the law to adopt the hourly-capacity test that Duke now claims has been the law since 1980. EPA has never amended the law in accordance with Duke's wishes.

In 1988, an attorney from Duke Energy's outside law firm -- whose name appears on the Duke Energy Supreme Court (cont.)

## What Utility Industry Defendants Are Saying Before Supreme Court in 2006

"Our basic argument is that all along, [EPA has] interpreted [the PSD regulations] in a certain way. And then 19 years later, they reversed course."

Attorney for Duke Energy, 11/1/06

"[T]he interpretation of modification under NSPS and under the regulatory PSD was identical."

Attorney for Duke Energy, 11/1/06

Duke Energy argues for the very first time in the Supreme Court argument that a certain regulatory provision requires emissions increase under the PSD program to be measured in terms of hourly rates. Duke Energy did not even see fit to make this argument before the district or appellate courts.

Duke Supreme Court Brief, September 2006, and Attorney for Duke Energy, 11/1/06

To find an emissions increase, EPA must compare past actual emissions with future "maximum achievable" emissions or "capacity to emit."

Duke Supreme Court Brief, September 2006

## What Utility Industry Officials Were Doing and Saying in 1980's and 1990's That Flatly Contradict Their Litigation Claims

brief in 2006 – authors a memo concluding that "The PSD modification rule, though patterned after the NSPS rule, differs from it in several respects. A change is not a modification under the PSD rule unless the change results in a significant net actual emissions increase, measured in tons per year." No mention of PSD requiring hourly rate or capacity increases.

Compare *id.*

This same 1988 memo notes that "[u]nlike the NSPS modification rules, however, the PSD rules . . . use tons per year (tpy) *instead of* kg per hour to measure emission increases." (emphasis added)

This 1988 memo also acknowledges that the regulatory provision first relied upon by Duke before the Supreme Court in 2006 (40 CFR § 52.01(d)) does not "appl[y] to the PSD program."

In 1988, a memo to the "Edison Electric Institute Plant Life Extension Task Force" – of which Duke Energy and its outside law firm were members -- reports on an EPA ruling that PSD does not require an increase in a plant's capacity.

In 1989, an AEP official reports on a utility association task force – "formerly named the Plant Life Extension Task Force" – in which Duke Energy's outside attorneys explained PSD and a recent federal court decision. The AEP official wrote: "The term 'life extension' has become a very sensitive and potentially incriminating term. It has been recommended that utilities not use the term publicly as EPA has, and will apparently stretch the language of (cont.)

## **What Utility Industry Officials Were Doing and Saying in 1980's and 1990's That Flatly Contradict Their Litigation Claims**

the PSD and NSPS requirements to the point where it will become extremely difficult to refute arguments requiring additional pollution control in conjunction with 'life extension' projects."

In 1990, a memo from Illinois Power Co. – also a defendant in the enforcement cases -- acknowledges that PSD turns on "annual emission" increases (emphasis in original), and NSPS turns separately on emission rate increases in "pounds per hour." Notes that "[l]ife extension" projects are not acceptable. No mention of PSD requiring hourly rate or capacity increases.

In 1991, an internal Duke compliance manual recognizes that PSD is based on "annual emissions" and controls are required if a unit "operate[s] more frequently" due to construction. No mention of PSD requiring hourly rate or capacity increases.

In 1991, another internal Duke training guide recognizes that PSD requirements are based on "annual emissions from facility" and NSPS on "hourly emissions" increases. No mention of PSD requiring hourly rate or capacity increases.

In 1991, an attorney with Duke Energy's outside law firm authors an article recognizing that under PSD "EPA must compare past actual emissions with a realistic projection of future actual emissions." He also notes that EPA applies PSD requirements to facilities "that do not increase the facility's original design capacity." No mention of PSD requiring hourly rate or capacity increases.

In 1995, internal Duke Energy memo shows clear understanding that PSD turns on "annual" rate increases and a separate regulation (New Source Performance (cont.))

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Standards or NSPS) turns on "hourly" rates. Memo notes generally that "PSD regs disallow an increase in hr of operation" absent circumstance not at issue in Duke Energy enforcement case.

In 1996, the attorneys representing Duke Energy in the Supreme Court advise the American Electric Power Co. that PSD turns on emission increases in "actual average tons per year" and that NSPS turns on increases in "maximum hourly emissions." No mention of PSD requiring hourly rate or capacity increases.