

No. 04-1763

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB;
NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP,
Plaintiff-Intervenor-Appellants,

v.

DUKE ENERGY CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES (PAGE-PROOF VERSION)

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GLOSSARY OF ABBREVIATIONS

| | |
|--------|--|
| BACT | best available control technology |
| CAA | Clean Air Act |
| CR | Clerk's Record |
| DX | Duke Summary Judgment Exhibit |
| EPA | Environmental Protection Agency |
| JA | Joint Appendix |
| PSD | Prevention of Significant Deterioration |
| NAAQS | National Ambient Air Quality Standards |
| NSPS | New Source Performance Standards |
| NSR | New Source Review |
| RMRR | routine maintenance, repair, and replacement |
| SIGECO | Southern Indiana Gas and Electric Company |
| SIP | state implementation plan |
| USX | United States Summary Judgment Exhibit |
| WEPCo | Wisconsin Electric Power Company |

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331. This Court has jurisdiction under 28 U.S.C. 1291 over the final judgment of April 15, 2004. The notices of appeal filed on June 10, 2004, were timely under 28 U.S.C. 2107.

STATEMENT OF ISSUES

The issues in this enforcement action against a power plant corporation for multiple violations of the Prevention of Significant Deterioration (“PSD”) requirements of the Clean Air Act (“CAA”) are:

1. Whether the Environmental Protection Agency (“EPA”) in administering the CAA can interpret the statutory term “modification” under PSD differently from how EPA interpreted that term under a separate CAA program in 1977;
2. Whether a physical change that increases total annual emissions is a “modification” (per EPA’s reading of the regulations) or instead may constitute a “modification” only if it increases the maximum hourly rate of emissions; and
3. Whether the regulatory exclusion for “routine maintenance, repair, and replacement” (“RMRR”) depends on whether a project’s nature, extent, purpose, frequency, and cost indicate that the project is routine in the life of the particular type of unit at issue (per EPA’s reading of the regulations) or instead on an analysis of whether the project is routine as compared to “similar” projects in the industry as a whole.

STATEMENT OF THE CASE

The United States brought this enforcement action against Duke Energy Corporation (“Duke”) for its failure to comply with PSD before conducting twenty-nine massive refurbishment projects that allowed longer hours of operation and more air pollution at eight coal-fired power plants in North and South Carolina. The United States contends that these projects were physical changes that significantly increased emissions and hence were “modifications” triggering PSD. On cross-motions for summary judgment, the district court issued legal rulings regarding how to measure emissions increases and how to construe a regulatory exclusion for “routine maintenance, repair, and replacement.” No other court has issued the same rulings, which contradict EPA’s interpretation of the applicable regulations and articulate an unduly narrow view of what are “modifications” triggering PSD. After the parties entered into a factual stipulation based on those rulings, the court entered final judgment.

1. Statutory and regulatory background.

a. CAA overview. — The CAA was enacted “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. 7401(b)(1). It directs EPA, which administers the Act, to promulgate National Ambient Air Quality Standards (“NAAQS”) specifying allowable concentrations of air pollutants. Id.

7409. States in turn must develop state implementation plans (“SIPs”) to achieve and maintain NAAQS. Id. 7410.

The CAA establishes various additional programs to protect and improve air quality. The Prevention of Significant Deterioration program, a part of the larger New Source Review (“NSR”) program, imposes various requirements to protect local air quality when emissions sources are “constructed” or “modified.”^{1/} Id. 7470–7479.

b. PSD. — Congress enacted PSD to “protect public health and welfare from any actual or potential adverse effect” of air pollutants “notwithstanding attainment and maintenance of” NAAQS, “insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources,” and “assure” that decisions “to permit increased air pollution” follow “careful evaluation of all the consequences” and “adequate procedural opportunities for informed public participation.” Id. 7470(1), (3), (5).

The core provision of PSD reads: “No major emitting facility * * * may be constructed in any area to which this part applies unless” various requirements are met. Id. 7475(a). These requirements include that “a permit has been issued * * * setting forth emission limitations,” with interested persons able to participate in

^{1/} PSD applies to areas designated as attaining NAAQS or as unclassified. 42 U.S.C. 7471. The NSR program includes PSD and analogous requirements for non-attainment areas. 42 U.S.C. 7501–7515.

permit proceedings; that the owner or operator demonstrate that emissions will not contribute to a NAAQS violation; and that “the proposed facility is subject to the best available control technology [(“BACT”).” Id. 7475(a); see id. 7410(a)(2)(C) (SIPs must contain NSR programs), 7479 (defining terms).

The PSD provisions define “construction” to include “modification,” which is defined in turn by reference to the statutory provisions for the separate New Source Performance Standards (“NSPS”) program. Id. 7479(2)(C). Those provisions define the crucial term “modification” as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” Id. 7411(a)(4).

c. Differences between NSPS and PSD. — Although NSPS, like PSD, is a CAA program applying in some respect to “new” sources of air pollution, the programs differ in vital respects. The NSPS program, enacted in 1970, directs EPA to promulgate technology-based performance standards for new or modified facilities in certain categories. Id. 7411. These standards are based on application of the best demonstrated system of emission reduction and apply regardless of the actual effect that a source’s emissions has on local air quality. Id.

In contrast, when Congress enacted PSD in 1977, its purpose was to prevent a significant decline of air quality in areas where ambient air quality standards

were already being met.^{2/} Id. 7470; see Ala. Power v. Costle, 636 F.2d 323, 346–51 (D.C. Cir. 1979). Such a decline can occur when the addition of new sources or modification of existing sources increases the overall annual load of pollutants. Thus, rather than focus on technology-based performance standards like NSPS does, the PSD program focuses directly on the effect of new construction and modification on local air quality. 42 U.S.C. 7475(a)(3). In other words, Congress enacted PSD to regulate sources that might contribute to the significant degradation of local air quality despite NSPS and other CAA provisions. Id. 7470(1); see Ala. Power, 636 F.2d at 346–51; 44 Fed. Reg. 51,924, 51,931 (1979).

Thus, in developing regulations after PSD’s enactment, EPA understood that the two programs had different purposes and structures and that PSD regulations need not adopt NSPS-based definitions and interpretations. In particular, EPA concluded that the term “modification” could be interpreted differently in the PSD and NSPS contexts. E.g., 43 Fed. Reg. at 26,394. The definition of “modification” under PSD has continued to differ from that for NSPS in critical respects.

^{2/} PSD was initially a regulatory program resulting from a lawsuit. 39 Fed. Reg. 42,510 (1974). Congress significantly expanded this program’s requirements and scope in 1977. 43 Fed. Reg. 26,388, 26,390 (1978).

The PSD regulations applicable to most of the Duke projects at issue here, which occurred between 1988 and 2000, are those promulgated in 1980 and recodified in 1987. 45 Fed. Reg. 52,676 (1980); 40 C.F.R. 51.166 (1987). Some projects are subject to another set of regulations issued in 1992, 57 Fed. Reg. 32,314 (1992), but the differences are not material to this appeal. EPA published new PSD rules in 2002 and 2003 with prospective effect. 67 Fed. Reg. 80,186 (2002); 68 Fed. Reg. 61,248 (2003). Those rules apply only to activities that occur after the rules' effective dates. Thus, when this brief refers to the PSD program generally or to specific elements of that program, we refer solely to the 1980 regulations as interpreted by EPA.

d. Physical changes and the RMRR exclusion. — The first step in determining whether a planned activity is a “modification” triggering PSD is evaluating whether it is a “physical change or change in the method of operation.” 42 U.S.C. 7411(a)(4). EPA regulations provide that certain kinds of activities, such as “[r]outine maintenance, repair and replacement” and “[a]n increase in the hours of operation or in the production rate,” are not physical changes or changes in the method of operation. 40 C.F.R. 51.166(b)(2)(iii).

The 1980 regulations do not define “routine maintenance, repair, and replacement,” but EPA has issued interpretations of this PSD exclusion and its NSPS analogue. E.g., United States Summary Judgment Exhibit (“USX”)

USX159:6. Most notably, in 1988, EPA provided the Wisconsin Electric Power Company (“WEPCo”) with guidance on whether PSD and NSPS would apply to proposed renovations at a coal-fired power plant. EPA intended its analysis, which was officially adopted by EPA’s Administrator in a final applicability determination, to serve as guidance for other utilities who might assert the RMRR exclusion. USX73:2; Duke Summary Judgment Exhibit (“DX”) DX29.

The WEPCo Determination establishes that EPA interpreted the exclusion under the 1980 regulations to be “very narrow” and applied on a “case-by-case” basis, taking into account the “nature, extent, purpose, frequency, and cost” of the activity “to arrive at a common-sense finding.” USX73:3. Applying that analysis, EPA concluded that WEPCo’s proposed projects were not routine. USX73:3–6. WEPCo and other utilities (including Duke) challenged EPA’s interpretation of the RMRR exclusion in the Seventh Circuit, which deferred to and upheld EPA’s analysis. WEPCo v. Reilly, 893 F.2d 901, 910–13 (7th Cir. 1990); USX74.

One issue in continuing dispute is whether the WEPCo Determination’s multi-factor analysis, and in particular the “frequency” factor, turns on what is routine maintenance, repair, or replacement for an individual unit in the relevant industrial category or what is routine practice for the industry as a whole. In making its case-by-case determinations, EPA looks to how frequently the work occurs in the lives of individual units, not how prevalent the type of project is in

the industry as a whole. E.g., USX100:49–53.^{3/} Industry parties contend instead that a project that is routine for the industry as a whole qualifies for the exclusion regardless of whether that type of work happens routinely within the life of an individual unit.

e. Emissions increases. — The second step in the “modification” analysis is evaluating whether a physical or operational change “increases the amount of any air pollutant emitted” or “results in the emission of any air pollutant not previously emitted.” 42 U.S.C. 7411(a)(4). PSD regulations require a “significant net emissions increase,” where a “net emissions increase” is determined in terms of “actual emissions,” which are measured in “tons per year.” 40 C.F.R. 51.166(b)(2), (3), (21). By contrast, NSPS refers to emission rates measured in kilograms per hour. Id. 60.14(b). Thus, in PSD but not NSPS, the question whether there has been an emissions increase depends on annual utilization (that is, hours of operation per year) as well as hourly emissions rates.

^{3/} In dismissing petitions for review of this decision by EPA’s Environmental Appeals Board, the Eleventh Circuit questioned the constitutionality of other parts of the CAA. TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 124 S.Ct. 2096 (2004). That opinion does not bear upon the issues presented here. Although the Eleventh Circuit found EPA’s decision “legally inconsequential” for enforcement purposes, id. at 1239–40, the decision deserves deference at least under Skidmore v. Swift & Co., 323 U.S. 134 (1944), and EPA believes it remains a statement of agency position deserving normal deference, Humanoids Group v. Rogan, 375 F.3d 301, 306 (4th Cir. 2004).

Under PSD regulations, pre-change “actual emissions” equal “the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation” and are “calculated using the unit’s actual operating hours, production rates,” and other pertinent information. Id. 51.166(b)(21)(ii). The regulations also provide: “For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.” Id. 51.166(b)(21)(iv). Thus, emissions increases at units that have “not begun normal operations” are measured by comparing past actual emissions with the future potential to emit — the “actual-to-potential” test.

In WEPCo, the Seventh Circuit concluded on the facts before it that a modified source had “begun normal operations” where a history of operations was available. 893 F.2d at 916–18. On remand, EPA thus estimated WEPCo’s future total annual emissions “based on all the available facts in the record,” taking into account how much the unit was likely to be used and what the rate of emissions would be — the “actual-to-projected-actual” test. DX33:6–8; 57 Fed. Reg. at 32,317 & n.10. This test is still used under the 1980 regulations and other regulations issued in 1992. Id. at 32,335.

f. Further rulemaking. — In October 2003, EPA adopted a rule taking a somewhat narrower view of the term “modification” and a somewhat broader view

of the RMRR exclusion. The new rule, which is prospective and thus not at issue here, provided that the replacement of components of a process unit with identical or “functionally equivalent” components will not be deemed a “modification” and instead will be deemed RMRR if (1) the replacement does not change the basic design parameters of the unit; (2) the replacement does not cause the unit to exceed applicable emission or operation limits; and (3) the cost of the replacement activity does not exceed twenty percent of the replacement value of the process unit. 68 Fed. Reg. at 61,252. EPA stated that it intended this new rule to “provide greater regulatory certainty without sacrificing the current level of environmental protection and benefit.” *Id.* at 61,248. The new rule was stayed by the D.C. Circuit and is under reconsideration by EPA. 69 Fed. Reg. 40,274 (2004); 69 Fed. Reg. 40,278 (2004). EPA noted that it believed that both the 1980 regulations and the new rule represent reasonable approaches within its rulemaking authority.^{4/} 68 Fed. Reg. at 61,248, 61,251. Indeed, EPA made explicit that it “continue[s] to believe that [its] prior narrower and entirely case-by-case approach,” which applies to projects that, like the Duke projects at issue, were undertaken before the

^{4/} EPA indicated on granting reconsideration that it wanted to ensure that all parties had a sufficient opportunity to comment but that those petitioning for reconsideration had not yet provided information persuading EPA that the new rule was “erroneous or inappropriate.” 69 Fed. Reg. at 40,281.

new rule's effective date, "was consistent with the relevant language of the CAA and a reasonable effort to effectuate its policies." 68 Fed. Reg. at 61,251.

2. District court proceedings. — In December 2000, the United States filed suit against Duke. Clerk's Record ("CR") 1. The complaint stated fifty-eight claims: one for a PSD violation and one for a non-PSD violation for each of twenty-nine "modifications" at coal-fired plants in North and South Carolina. CR1:14–76. The complaint sought injunctive relief and a civil penalty. CR1:76–77. Duke answered the complaint and stated three counterclaims based on alleged inconsistency in EPA's administration of the CAA. CR3. Three private groups intervened as plaintiffs and filed a complaint-in-intervention incorporating the United States' claims. CR25–26. After lengthy discovery, the United States and the plaintiff-intervenors sought summary judgment on several liability issues and Duke sought summary judgment on the entire case. CR128, 130, 132.

On August 26, 2003, the district court denied the summary judgment motions in relevant respects.^{5/} CR234 (published at U.S. v. Duke Energy, 278 F. Supp. 2d 619 (M.D.N.C. 2003)). The court withheld judgment on any claim but issued legal rulings to govern future proceedings. It adopted Duke's broad

^{5/} The court granted the United States summary judgment on Duke's statute-of-limitations defense. CR234:70–81.

“routine in the industry” interpretation of the RMRR exclusion and allocated the burden of proof regarding the exclusion to the United States. CR234:21–47. The court also agreed with Duke that PSD applies only when a unit’s maximum hourly rate of emissions increases, whether or not total annual emissions increase. CR234:47–66. The court later denied the United States’ motion to reconsider the order or certify it for interlocutory appeal. CR294.

To obviate the need for trial and permit appeal of these legal rulings, the parties negotiated and submitted stipulations with a motion for entry of final judgment while reserving their rights to appeal. CR309–311. The parties stipulated to the dismissal of the plaintiffs’ non-PSD claims and Duke’s counterclaims. CR311:2. The United States and the plaintiff-intervenors also entered stipulations regarding emissions increases^{6/} that allowed resolution of the

^{6/} 1. Plaintiff and Plaintiff-Intervenors stipulate that their contention that each of the projects at issue in this case resulted in a significant net emissions increase within the meaning of the relevant PSD regulations is based solely on their contention that the projects would have been projected to result in an increased utilization of the units at issue.

2. Plaintiffs and Plaintiff-Intervenors stipulate that they do not contend that the projects at issue in this case caused an increase in the maximum hourly rate of emissions at any of Duke Energy’s units.

CR311:1–2.

PSD claims as a matter of law, and thus the district court entered final judgment on April 15, 2004. CR313.

STATEMENT OF FACTS

Duke is an international company that provides electricity in North and South Carolina. CR234:3. It operates thirty coal-fired generating units at eight plants in the Carolinas that began service between 1940 and 1975. CR234:3–4. The United States contends that Duke executed twenty-nine modifications at these plants between 1988 and 2000 without complying with PSD. CR1:14–76.

The legal issues in this appeal require no factual analysis, but we describe one of Duke's projects to provide context. In 1984, Duke decided to place Unit 4 at its Buck plant ("Buck 4"), along with several other coal-fired generating units, in "extended cold shutdown." CR234:7; USX22. An internal Duke memo indicates that these units were placed in this non-operational status due to "their age (27–43 years) and condition." USX22; see USX13:66; USX21:32. The units had deteriorated such that they could "no longer provide reliable service" without a "total rehabilitation." USX13:89–90; USX18:53–54; USX19:45–50.

Duke began a program to determine the "necessary plant modifications and maintenance to make these units reliable if they return to service." USX22.

Although Duke historically would have "retired and scrapped" units of Buck 4's age and condition, it viewed its Plant Modernization Program as a cost-effective

alternative to building new plants. CR234:8–9; USX13:90; USX21:32; USX25.

Thus, Duke decided to renovate Buck 4 to extend its life by an “additional 20 years,” “well beyond [its] expected retirement.” USX23; USX26:5.

Duke ultimately spent approximately \$17.7 million dollars to modernize and rehabilitate Buck 4 — more than seven times the original cost of the unit.

USX5:8; USX44. This work included an “extensive boiler redesign” in which the “entire backpass” (including both generating banks, all floor screen tubes, and the entire superheater) and all 10,000 or so feet of waterwall tubing (excluding header supply tubes) were replaced. USX39A; CR234:6 n.3; see USX7:24; USX36.

Duke also replaced feedwater heaters and upgraded the boiler controls system from an old pneumatic system to a new computerized system. USX8:48;

USX9:34–35. The boiler work alone took two years to complete. USX40;

USX45:86. Buck 4 finally resumed commercial operation in 1995, more than a decade after it was placed in shutdown status. USX49; USX50.

STANDARD OF REVIEW

This Court reviews questions of law de novo. U.S. v. Deaton, 332 F.3d 698, 703–04 (4th Cir. 2003). Under the Chevron analysis, courts ask “whether Congress has directly spoken to the precise question at issue” and, if Congress has instead been “silent or ambiguous,” whether “the agency’s regulation reflects a reasonable construction of the statute.” Chevron U.S.A. v. NRDC, 467 U.S. 837,

842–43 (1984). When the meaning of a regulation itself is in doubt, courts give substantial deference to the agency’s interpretation, which carries “controlling weight” unless “plainly erroneous or inconsistent with the regulation.” Deaton, 332 F.3d at 709. The interpretation need not be the best one, only “a reasonable construction.” Dist. Mem’l Hosp. v. Thompson, 364 F.3d 513, 519 (4th Cir. 2004). “The principle of deference has particular force where, as is the case here, the subject being regulated is technical and complex.” WEPCo, 893 F.2d at 907.

SUMMARY OF ARGUMENT

This Court should reverse and remand for further proceedings under the proper legal standards. Based on its misreading of the legislative history, the district court erroneously concluded that EPA lacked discretion to interpret the term “modification” for PSD purposes. The court also misread the applicable regulations and failed to defer to EPA’s authoritative regulatory interpretation. Thus, when the court considered how to measure emissions increases and how to apply the RMRR exclusion under the 1980 PSD rules, it issued legal rulings that were incorrect and unreasonable, as well as contrary to the rulings of every other court to consider these issues.

1. The district court’s analysis relied largely on the unsupported proposition that Congress required EPA to define the term “modification” as it was defined in the NSPS regulations in 1977. As this Court has recognized, however, PSD and

NSPS are different programs with different purposes, and EPA thus can interpret common statutory terms differently for the two programs. Other courts have agreed with this common-sense understanding.

That understanding holds true for the term “modification” in particular. As originally enacted, PSD statutory provisions applied to the construction of facilities but made no explicit mention of modifications to facilities. Congress corrected that omission through a technical amendment defining “construction” to include “modification” and then defining “modification” by reference to the pre-existing definition of the term in the NSPS statutory provisions. A summary of amendments introduced in the Congressional Record explains that this amendment “[i]mplements conference agreement to cover ‘modification’ as well as ‘construction’ by defining ‘construction’ in [PSD] to conform to usage in other parts of the Act.” The district court took this explanation to mean that Congress was incorporating NSPS regulations, but neither the statutory language nor the legislative history even mentions those regulations. Congress expressed no intent to incorporate any regulations, let alone intent of sufficient clarity under relevant case law to mandate one particular interpretation of “modification” for PSD. Instead, EPA retains its usual rulemaking authority.

2. The district court determined that the emissions increase necessary to trigger PSD under the 1980 rules must be an increase in the maximum hourly rate

of emissions. To the contrary, an emissions increase under those rules includes any increase in total annual emissions caused by a physical or operational change, whether or not the maximum hourly rate of emissions changes.

Because Congress did not specify how to measure an emissions increase, EPA regulations govern. The district court misread the 1980 regulations, which by their plain language turn on a “significant net emissions increase,” where a “net emissions increase” includes “[a]ny increase in actual emissions from a particular physical change” and “actual emissions” are measured in “tons per year.” The regulations thus require a comparison of total annual emissions before and after the project. The amount of total annual emissions depends, of course, not only on the hourly rate of emissions but also on the hours per year of emissions.

The district court concluded otherwise based on an inapplicable portion of the regulations, known as the “increased hours” exclusion. It provides that a “physical [or operational] change * * * shall not include” an “increase in the hours of operation.” This exclusion does not indicate that hours of operation should be held constant in assessing emissions, as the court thought. Rather, it indicates that an increase in hours of operation standing alone will not be considered a “change” for PSD purposes. If a physical change like the massive refurbishment projects at Duke’s plants causes an increase in hours of operation, that increase is plainly

relevant under the 1980 regulations to whether there is an increase in total annual emissions, as every court save this district court has recognized.

Furthermore, even if the district court's interpretation of the regulations were plausible, EPA's interpretation controls. That interpretation of the regulations, made clear in the preamble to those regulations and in later EPA pronouncements like the WEPCo Determination, is that PSD applicability depends on total annual emissions, not maximum hourly rates of emissions. Although the court cited two informal statements by an EPA employee that it read to indicate otherwise, any such position in those statements was inconsistent with the regulatory text and with the preamble's authoritative pronouncement of EPA's interpretation. Moreover, even if the employee's statements were valid "precedents," EPA has repeatedly explained its rejection of those precedents and Duke has repeatedly acknowledged EPA's true interpretation. That interpretation is neither plainly erroneous nor inconsistent with the regulations, and thus it controls.

Finally, even if EPA's interpretation of the 1980 regulations were not mandated by the regulatory language and deference principles, it is more reasonable than the district court's interpretation. EPA's concern with the total amount of emissions rather than the rate of emissions corresponds with PSD's purpose of preventing significant deterioration of air quality. The court's

interpretation simply does not account for the fact that a project that enables a source to operate for longer hours could significantly increase total emissions without affecting hourly rates.

3. The district court also misinterpreted the regulatory exclusion for “routine maintenance, repair, and replacement.” EPA construes this exclusion in the 1980 regulations very narrowly. It considers the nature, extent, purpose, frequency, and cost of a project to make a common-sense determination of whether it is routine in the life of the particular type of unit. The court wrongly held that the exclusion applies when an activity is “routine in the industry” as a whole — in essence, when the activity is common business practice.

Because Congress has not addressed the RMRR exclusion, the regulatory text and EPA’s reasonable interpretation control. That interpretation was set forth in the WEPCo Determination, which the district court misread in three basic ways. First, the court ignored the multi-factor nature of EPA’s inquiry by focusing improperly on the “frequency” factor. That is only one of the factors EPA considers. Even a project that is frequently performed in the life of a particular type of unit may not fall within the RMRR exclusion if the project’s nature, extent, purpose, and cost indicate otherwise.

Second, the district court unjustifiably found that EPA had to compare the project in question against “similar industry projects” for each of the factors. The

“frequency” factor is the only one to which EPA views general industry practice as relevant under the 1980 rules. The applicable analysis entails consideration of the nature, extent, purpose, and cost of the project in question, not a consideration of whether other industry projects are similar in nature, extent, purpose, or cost.

Third, the district court erroneously found that EPA considers “frequency” under the 1980 regulations based on whether a project is prevalent in the industry as a whole rather than frequent in the life of a particular type of unit. The court emphasized that EPA did not end its analysis of the “frequency” factor in the WEPCo Determination simply by accepting WEPCo’s admission that the type of work proposed generally would “occur only once or twice during a unit’s expected life cycle,” but rather continued to consider evidence of industry practice. Contrary to the court’s analysis, however, that does not imply that EPA thereby adopted a “routine in the industry” test. General industry practice can be relevant to the question whether a particular action is frequent in the life of a particular type of unit.

Furthermore, EPA’s interpretation of the RMRR exclusion in the applicable regulations is more reasonable than the district court’s interpretation. The analysis in EPA’s case-by-case determinations represents a reasonable interpretation of the word “routine” and comports with the purposes of the CAA in general and in particular with Congress’s instruction to apply PSD to both new sources and

modifications of existing sources. By contrast, the court would allow even major modifications of power plants to escape PSD simply because other power plants have undergone similar modifications. Indeed, by giving controlling weight to whether an activity is comparable to “similar industry projects,” the court established a circular analysis predisposed to find virtually any project routine.

ARGUMENT

As the district court recognized, a project is a “modification” subject to PSD if “two criteria [are] satisfied: (1) there must be a ‘physical change’ and (2) there must be a ‘significant net emissions increase.’” CR234:20. Relying heavily on the conclusion that the statutory definition of “modification” requires EPA to define PSD requirements by reference to the distinct NSPS program, the court issued erroneous legal rulings regarding the RMRR exclusion from the definition of “physical change” and the calculation of emissions increases. CR234:21–66. These two rulings conflict with longstanding decisions of the First and Seventh Circuits and, as the district court acknowledged, recent decisions by two other district courts in similar cases. CR234:24 n.10, 59 n.23. No other court has issued these same rulings.

This Court should reverse these rulings, which improperly limit the PSD program. In Part I, we show that EPA has discretion to interpret the statutory term “modification” for PSD. In Part II, we show that the basis for the final judgment

— the ruling on what constitutes an emissions increase triggering PSD — was incorrect. Although that error itself requires reversal, we also show in Part III the error in the court’s expansion of the narrow RMRR exclusion because, if left uncorrected, that error will infect proceedings on remand.

I. EPA HAS DISCRETION TO INTERPRET THE STATUTORY TERM “MODIFICATION” DIFFERENTLY FOR PURPOSES OF THE SEPARATE PSD AND NSPS PROGRAMS.

A. The Differences Between PSD and NSPS Justify Different Regulatory Interpretations of Common Statutory Terms.

PSD and NSPS have vital differences. Both are CAA programs applying to “new” pollution and both have the ultimate end of improving or maintaining the quality of the air we breathe, but they take markedly different approaches to this end. As its name indicates, the PSD program exists to prevent significant deterioration of air quality in covered areas. 42 U.S.C. 7470(1). Thus, PSD focuses directly on the total amount of each pollutant that newly constructed or modified sources may emit. *Id.* 7475(a). By contrast, as its name indicates, the NSPS program establishes new source performance standards — that is, requirements that new sources implement particular technologies to limit emissions. *Id.* 7411. Unlike PSD, NSPS applies regardless of a source’s effect on air quality. *Id.*

Given the fundamental differences between PSD and NSPS, this Court and others have confirmed that EPA may interpret statutory terms common to the two programs differently based on each program's unique aspects. In Potomac Electric Power v. EPA, 650 F.2d 509 (4th Cir. 1981), this Court rejected a utility company's argument that a unit was not subject to NSPS because that result supposedly would be inconsistent with a decision addressing PSD requirements. Id. at 516–18. This Court explained: “EPA has, we believe, pointed out a significant difference between the PSD and NSPS programs that justifies a different construction of the definition of ‘stationary source’ that is to be applied to the two programs.” Id. at 518; see id. at 517 n.2. The “significant difference” was that PSD's purpose “is to preserve existing air quality” in areas attaining NAAQS and thus “the emphasis in that program should be upon the net emissions from an entire plant resulting from construction or modification of one or more emitting sources within the plant,” while NSPS “require[s] the use of the best demonstrated pollution control technology in the construction or modification of a pollutant-emitting facility without regard to the effect the emissions from that facility will have on overall air quality.” Id. at 518.

The D.C. Circuit, which has exclusive jurisdiction to review regulations implementing the CAA, 42 U.S.C. 7607(b), has also recognized that the important differences between the programs can justify different regulatory interpretations of

common statutory terms. That court's seminal decision in Alabama Power stated: "EPA has latitude to adopt definitions of the component terms of 'source' [for PSD purposes] that are different in scope from those that may be employed for NSPS and other clean air programs, due to differences in the purpose and structure of the two programs." 636 F.2d at 397-98; see Nat'l Mining Ass'n v. EPA, 59 F.3d 1351, 1358 (D.C. Cir. 1995) ("Different programs have different objectives and structures. EPA is not bound to any one definition of 'major source.'"). Other courts have agreed that EPA can take different regulatory approaches in PSD and NSPS. E.g., WEPCo, 893 F.2d at 913-18 (approving "fundamentally distinct" applicability tests); N. Plains Res. Council v. EPA, 645 F.2d 1349, 1355-57 (9th Cir. 1981) (finding PSD definition of term "commenced" inapplicable to NSPS); U.S. v. Ohio Edison, 276 F. Supp. 2d 829, 875-76 (S.D. Ohio 2003); U.S. v. S. Ind. Gas & Elec. Co. ("SIGECO"), 245 F. Supp. 2d 994, 998 (S.D. Ind. 2003). Thus, this Court and others understand that common statutory terms can be defined differently in the regulations implementing the two programs.

B. Congress Has Not Spoken to the Precise Meaning of the Statutory Term "Modification."

Despite the differences between PSD and NSPS, the district court read the relevant statutory language and legislative history to require that the NSPS regulations existing in 1977 define "modification" for PSD. CR234:18-19,

23–26, 53–54, 58–59. To the contrary, EPA retains authority to issue regulations defining “modification” under PSD.

As originally enacted in August 1977, PSD statutory provisions applied to “construction” of major emitting facilities, with no explicit mention of modifications thereto. Pub. L. No. 95-95, § 127(a), 91 Stat. 685, 735. Three months later, Congress enacted a set of eighty-four “Clean Air Act Technical and Conforming Amendments.” Pub. L. No. 95-190, § 14, 91 Stat. 1393, 1399–1404. One of these amendments added the statutory language at issue: “The term ‘construction’ when used in connection with any source or facility, includes the modification (as defined in section 111(a)) of any source or facility.” *Id.* § 14(54). Section 111 establishes the NSPS program, and thus “modification” has the same statutory definition under PSD and NSPS.

As their title indicates, these amendments were not substantive, but “Technical and Conforming” in nature — they dealt with mundane matters like punctuation — and the chairman of the responsible Senate subcommittee, Senator Muskie, was careful to explain that it was “not the purpose of these amendments to re-open substantive issues” in the CAA or “to resolve issues that were not resolved” in the original legislation. 123 Cong. Rec. 36,250, 36,252 (1977). Consistent with this understanding and with the statutory language, a summary of amendments introduced into the Congressional Record by Senator Muskie and

Representative Rogers indicates that the choice to define “modification” by reference to NSPS “[i]mplements conference agreement to cover ‘modification’ as well as ‘construction’ by defining ‘construction’ in [PSD] to conform to usage in other parts of the Act.”^{7/} Id. 36,253, 36,331, available at 1977 U.S.C.C.A.N. 3665.

The most plausible reading of this amendment is that Congress was simply concerned that the PSD provisions it had enacted inadvertently covered only “construction” and so might be read to apply only to “new” sources and not to modifications of existing sources. Congress corrected this problem in an expedient manner: a technical amendment that explicitly defined “construction” to include “modification” and that sensibly referenced the pre-existing statutory definition of “modification” in the NSPS provisions. The statutory language and legislative history never even mention any regulations, let alone express any intent to incorporate them into the PSD statutory provisions.

The district court overread the word “usage” in the summary of amendments in the Congressional Record. The court read the word to prove Congress’ intent to incorporate NSPS regulations. E.g., CR234:25, 58–59. That conclusion reads far more into the word than can be justified. The reference to “usage in other parts of the Act” plainly contemplates the fact that these “other parts of the Act” applied as

^{7/} The district court incorrectly indicated that this language came from a conference report. CR234:18–19.

a statutory matter to both “construction” and “modification” of sources. 42 U.S.C. 7411(a)(2). By expanding the definition of “construction” under PSD to cover “modification,” Congress “conform[ed]” PSD “to usage in other parts of the Act.” 123 Cong. Rec. 36,253.

EPA has taken this language also to indicate that the NSPS regulations existing at that time represent an acceptable interpretation of “modification,” and indeed one that may have some bearing on how “modification” should be understood in the PSD program, e.g., 68 Fed. Reg. at 61,269, 61,273; 49 Fed. Reg. 43,211, 43,213 (1984); 43 Fed. Reg. at 26,396–97, but that does not demonstrate, as the district court thought, that those regulations represent the only acceptable interpretation. “[E]xpress congressional approval of an administrative interpretation” is necessary if that interpretation “is to be viewed as statutorily mandated.” AFL-CIO v. Brock, 835 F.2d 912, 915 (D.C. Cir. 1987). Had Congress intended to incorporate the regulations underlying NSPS into the PSD statutory provisions, it would have referred to those regulations in the statutory language or, at the very least, in the legislative history.^{8/} The absence of any such reference indicates that there was no such intent. Cf. Girouard v. U.S., 328 U.S.

^{8/} Indeed, Congress on several occasions has explicitly incorporated administrative positions into the CAA. E.g., Pub. L. No. 95-95, § 129(a)(1), 91 Stat. at 745; 42 U.S.C. 7511(a)(1).

61, 69 (1946) (“It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.”).

At the very least, the legislative history shows no congressional intent clear enough to conclude that Congress has spoken to the precise meaning of the statutory term “modification” for purposes of the Chevron analysis. Congress did nothing to divest EPA of its continuing authority to issue regulations effectuating the CAA. 42 U.S.C. 7601(a)(1). Indeed, Congress enacted a special provision authorizing EPA to issue regulations specifically for PSD purposes. Id. 7476; see also id. 7411(b) (separate NSPS rulemaking authorization). This Court has held:

Congressional reenactment of a statutory provision that is subject to a longstanding administrative interpretation of which Congress was aware at the time of reenactment may well create a presumption that Congress has accepted that interpretation as a permissible one; it does not preclude the administrative agency, in the exercise of its rulemaking authority, from later adopting some other reasonable and lawful interpretation of the statute.

McCoy v. U.S., 802 F.2d 762, 766 (4th Cir. 1986) (emphasis added); see Helvering v. Reynolds, 313 U.S. 428, 432 (1941). But see U.S. v. Westvaco Corp., No. MJG-00-2602, slip op. at 36 (D. Md. Aug. 27, 2004) (Congress’ adoption of NSPS definition of “modification” for PSD showed that Congress “presumably” intended NSPS rules to apply to PSD). More clearly, the mere act of referencing (rather than reenacting) the statutory definition of “modification” in NSPS does not preclude EPA from interpreting the term for PSD purposes.

The district court's conclusion also contradicts common sense. The idea that Congress intended to deprive EPA of its rulemaking authority through one of eighty-four technical and conforming amendments, without making that change clear in the statutory language or discussing the reasons for the change in the legislative history, is simply not plausible. According to the district court, the meaning of "modification" for purposes of PSD is statutorily defined by the NSPS regulations existing in 1977, even though the court's logic would not preclude EPA from altering those regulations for NSPS itself — a bizarre result.

Furthermore, the district court was incorrect to find support for its statutory analysis from EPA statements. This Court considers Congress' intent without reference to agency views. Kentuckians for Commonwealth v. Rivenburgh, 317 F.3d 425, 443 (4th Cir. 2003). Moreover, EPA has never construed the CAA to require NSPS and PSD to have identical "modification" tests. The district court cited a 1984 notice of proposed rulemaking by EPA stating that the reference in the legislative history to "usage in other parts of the Act" referred "most probably" not only to NSPS statutory provisions but also to NSPS regulations in effect in 1977. CR234:19. EPA did not thereby indicate, however, that Congress required "modification" under PSD to be defined by those regulations. Instead, EPA's statement indicates that Congress had "most probably" approved the NSPS

regulations as one acceptable interpretation of the term. 49 Fed. Reg. at 43,213; see 68 Fed. Reg. at 61,273.

The court also repeatedly cited a statement in an internal EPA memorandum from 1983 that “for PSD purposes Congress intended the term modification to include all exemptions included in the NSPS regulations promulgated * * * prior to * * * [PSD’s] enactment.”^{9/} CR234:19, 25, 53 n.20. The statement is not binding, but even if it were, it indicates only that PSD could have the same general exemptions as NSPS, not that “modification” tests under NSPS and PSD would be identical in every respect. Nor could that be EPA’s official position. If it had been, EPA presumably would have referenced NSPS regulations or reproduced them verbatim for PSD purposes. Instead, the PSD “modification” rules have always differed from the NSPS modification rules in crucial respects, consistent with the understanding that EPA need not adopt PSD regulations that conform to NSPS regulations but instead can exercise the rulemaking authority explicitly granted by Congress.

^{9/} The court also relied on a former EPA official’s expert report prepared for litigation, CR234:25 n.11, but this Court places “no weight” on such statements by former agency employees. U.S. v. Hoechst Celanese, 128 F.3d 216, 223 n.5 (4th Cir. 1997).

II. AN EMISSIONS INCREASE UNDER PSD INCLUDES ANY INCREASE IN TOTAL ANNUAL EMISSIONS CAUSED BY A PHYSICAL OR OPERATIONAL CHANGE, WHETHER OR NOT THE MAXIMUM HOURLY RATE OF EMISSIONS CHANGES.

The basis for the final judgment was the district court's holding that there can be an increase in emissions for PSD purposes only when there is an increase in the maximum hourly rate of emissions. CR234:47-66, 313:4. Under the 1980 rules, however, PSD applies to any physical change that results in a significant increase in total annual emissions, even if the maximum hourly rate of emissions does not change. That is the most natural reading of the text of the regulations, as well as EPA's longstanding interpretation. Moreover, this reading better effectuates the purposes of PSD than the district court's view that a physical change is automatically beyond PSD's reach unless it results in not only a significant increase in total emissions, but also an increase in the emissions rate.

A. Congress Has Not Spoken to the Precise Question of How to Measure Emissions Increases.

As discussed above, Congress has not spoken to the precise meaning of the term "modification" for PSD purposes. In particular, though Congress established that a "physical change" does not constitute a "modification" unless it "increases the amount of any air pollutant emitted by such source," 42 U.S.C. 7411(a)(4), 7479(2)(C), Congress did not establish how to measure increases. It thus left EPA discretion to promulgate appropriate regulations.

B. Under the Plain Language of the PSD Regulations and EPA's Interpretation, Emissions Increases Are Defined in Terms of Total Annual Emissions, Not Maximum Hourly Emission Rates.

1. Plain language. — The 1980 regulations speak of a “significant net emissions increase,” where a “net emissions increase” includes “[a]ny increase in actual emissions from a particular physical change” and “actual emissions” are measured in “tons per year.” 40 C.F.R. 51.166(b)(2)(i), (3), (21). The source’s baseline pre-change emissions are average actual annual emissions based on a two-year period before the project that is “representative of normal source operation” and that uses “the unit’s actual operating hours, production rates,” and other pertinent information. Id. 51.166(b)(21). The baseline amount is then compared with predicted^{10/} annual emissions after the project to determine whether there is a significant net emissions increase. Id. 51.166(b)(23).

The regulations on their face thus require a comparison of total annual emissions before and after the project, not merely a comparison of maximum

^{10/} PSD is a pre-construction permitting program, under which sources predict the effect of physical changes on emissions to determine whether a permit is required rather than taking a wait-and-see approach. CR234:10; 42 U.S.C. 7470(5) (PSD is intended to “assure that any decision to permit increased air pollution * * * is made only after careful evaluation of * * * consequences”), 7475(a)(1) (construction cannot begin until “permit has been issued”); 40 C.F.R. 51.166(b)(2) (looking at emissions increase that “would result”); USX100:107–12.

hourly rates of emissions.^{11/} That is why the regulations refer to “[a]ny increase in actual emissions” and incorporate a tons-per-year standard. PSD is different in this critical respect from NSPS, which employs an “emission rate” test with a kilograms-per-hour standard of measurement rather than tons-per-year. 40 C.F.R. 60.14(b). As EPA explained in 1992:

In the first step, which is largely the same for NSPS and NSR, the reviewing authority determines whether a physical or operational change will occur. If so, the reviewing authority proceeds in the second step to determine whether the physical or operational change will result in an emissions increase over baseline levels. In this second step, the applicable rules branch apart, reflecting the fundamental distinctions between the technology-based provisions of NSPS and the air quality-based provisions of NSR.

57 Fed. Reg. at 32,316.

Indeed, every court save this district court has confirmed that the 1980 PSD regulations require consideration of total annual emissions, not hourly emission rates. *E.g.*, WEPCo, 893 F.2d at 915 (“Unlike NSPS, PSD is concerned with changes in total annual emissions, expressed in tons per year.”); Puerto Rican Cement v. EPA, 889 F.2d 292, 297–98 (1st Cir. 1989) (holding that PSD can apply

^{11/} As required by the regulations, the different methods for quantifying post-change emissions are based on total annual emissions, not hourly rates of emissions. The “actual-to-projected-actual” test calculates total annual emissions based on a project’s predicted effects on both the hourly rate and hours of operation. CR234:47–48. The “actual-to-potential” test calculates total annual emissions as if the source emitted continuously at the predicted maximum hourly rate after the project. CR234:47 n.17, 49 n.18. In this case, EPA seeks to apply the former test, which is more favorable to Duke.

if physical change leads to increase in total annual emissions even if rate of emissions would decrease); Ohio Edison, 276 F. Supp. 2d at 875–76 (contrasting NSPS and PSD and rejecting hourly rate test for PSD); SIGECO, 245 F. Supp. 2d at 998 (“For the PSD program, * * * the EPA regulations provide that an increase in the total amount of annual emissions activates the modifications provisions.”). And, again, this Court has agreed with EPA that PSD is unlike NSPS in that “the emphasis in [PSD] should be upon the net emissions from an entire plant resulting from construction or modification of one or more emitting sources within the plant.” Potomac Elec. Power, 650 F.2d at 518.

The district court largely ignored the applicable part of the PSD regulations and instead reached a different result based on a misreading of an inapplicable part, known as the “increased hours” exclusion. Under that exclusion, “[a] physical change or change in the method of operation shall not include” an “increase in the hours of operation or in the production rate.” 40 C.F.R. 51.166(b)(2)(iii). The court thus reasoned:

Because an increase in emissions must result from a “physical [or operational] change,” which by definition excludes “[a]n increase in the hours of operation or in the production rate,” post-project emissions levels must be calculated assuming the same pre-project “representative” conditions of operation, i.e., hours and rates of production. Under the 1980 PSD regulations, therefore, only if the project increases the hourly rate of emissions will there be an annual emissions increase.

CR234:49.

This analysis is incorrect. As the district court recognized, the “modification” test has two steps. CR234:20–21. First, a source must determine whether a physical or operational change will occur. 40 C.F.R. 51.166(b)(2)(i). Second, if so, the source must determine whether the change will result in a significant net emissions increase. Id. By its explicit terms, the “increased hours” exclusion applies at the first step of the analysis, not the second step — that is, it affects whether something is a “change,” not how to calculate emissions increases. Id. 51.166(b)(2)(iii)(f). The fact that the regulations exclude increases in “the hours of operation or in the production rate” from the definition of a physical or operational change does not imply that such changes are also excluded from the analysis of what constitutes an emissions increase. Rather, the exclusion merely indicates that an increase in hours of operation will not itself be considered a “change” for PSD purposes.

Thus, every court save this district court has recognized the plain import of the “increased hours” exclusion: it “clearly creates an exemption to the definition of ‘physical change’ that applies when there is an increase in hours of operation unaccompanied by physical construction to the unit itself.” Ohio Edison, 276 F. Supp. 2d at 876; see WEPCo, 893 F.2d at 916 n.11; Puerto Rican Cement, 889 F.2d at 298. Here, the United States contends that the “physical changes”

necessary to trigger PSD were not mere increases in hours of operation, but the massive refurbishment projects at Duke's units. The fact that those projects allowed increases in hours of operation is plainly relevant to the question whether the projects result in increases in total annual emissions under the 1980 rules.

2. Deference. — As explained, the plain language of the regulations establishes a test based on total annual emissions, not maximum hourly emission rates. But even were that not so, deference is due to EPA's regulatory interpretation, which carries "controlling weight" unless it is "plainly erroneous or inconsistent with the regulation." Deaton, 332 F.3d at 709.

EPA promulgated the applicable regulations in 1980. The preamble never suggests any test based on an hourly rate of emissions. Instead, it explains, consistent with the regulatory text, that the test depends on "actual emissions," calculated in tons per year. 45 Fed. Reg. at 52,677, 52,680, 52,698–99 (increases and reductions in emissions "will be quantitatively assessed on the basis of an 'actual emissions' baseline"). The preamble's discussion of the "increased hours" exclusion also contradicts the district court's interpretation:

This exclusion stems largely from EPA's decision that the definitions of "major modification" should focus on changes in "actual emissions." While EPA has concluded that as a general rule Congress intended any significant net increase in such emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to get a NSR permit before it could lawfully change hours or rate of operation.

Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions.

Id. at 52,704. As this passage makes clear, the exclusion addresses increases in “hours or rate of operation” due not to physical changes, but rather to business decisions to increase output from existing units based on factors like “favorable market conditions.” Id. EPA’s interpretation of the regulations is neither plainly erroneous nor inconsistent with the regulatory text, and thus it controls.

Without discussing the preamble, the district court refused to defer to EPA’s interpretation because of two later statements by Edward Reich, the Director of EPA’s Division of Stationary Source Enforcement. CR234:51. For instance, in 1981, based on the “increased hours” exclusion, he stated in a letter to an interested company that emissions increases for PSD purposes depended on emissions rates. DX23. That conclusion is, however, inconsistent with the plain text of the regulations. Reich’s interpretation of the regulations is thus invalid, as the Ohio Edison court held.^{12/} 276 F. Supp. 2d at 876–77.

Furthermore, even if the position that Reich advanced were a possible reading of the regulations, an EPA employee could not change EPA’s position through such informal and unofficial statements issued without notice and

^{12/} Similarly, though WEPCo relied upon Reich’s statements, the Seventh Circuit rejected that view of the “increased hours” exclusion. WEPCo, 893 F.2d at 916 n.11; USX145:64.

comment. See Blaustein & Reich v. Buckles, 365 F.3d 281, 290 (4th Cir. 2004); U.S. v. Boynton, 63 F.3d 337, 342 (4th Cir. 1995). In the preamble, EPA announced its definitive interpretation of the regulations and, in particular, the “increased hours” exclusion. Although the district court reasoned that Reich’s statements were “contemporaneous interpretations provid[ing] compelling evidence of the rules’ original meaning,” CR234:52, that reasoning ignores the fact that EPA’s preamble was truly contemporaneous with the regulations and represents the definitive statement of their original meaning.

As the district court further noted, an agency “must either follow its precedents or explain why it departs from them.” CR234:52. That proposition shows, however, that Reich’s statements are invalid, since they did not explain their inconsistency with the preamble. Indeed, in the very decision the court cited, the First Circuit held that reliance on such “deviant” interpretations is inappropriate when “EPA materials written both before, and after, * * * are consistent with [EPA’s] present interpretation.” Puerto Rican Cement, 889 F.2d at 299. That court also sagely observed: “No large agency can guarantee that all its administrators will react similarly, or interpret regulations identically, throughout the United States.” Id.

Moreover, to the extent that Reich’s statements represented a valid “precedent,” EPA has repeatedly explained its rejection of the position this agency

employee expressed and has consistently interpreted the “increased hours” exclusion to apply only to increases in hours or rate of operation that are unrelated to any physical or operational change.^{13/} For instance, EPA stated in the WEPCo Determination that “the exclusion for increases in hours of operation or production rate does not take the project beyond the reach of PSD coverage if those increases do not stand alone but rather are associated with non-excluded physical or operational changes.” USX73:7. EPA explained that conclusion in depth, citing the preamble, and reaffirmed the conclusion both in the Administrator’s final determination and on reconsideration. USX73:8; USX98:9–10; DX29:4–5. Then, on remand from the Seventh Circuit, EPA stated:

[F]or WEPCO’s “like-kind replacements,” EPA will compare representative actual emissions for the baseline period to estimated future actual emissions based on all the available facts in the record. Specifically, in calculating post-renovation actual emissions, this approach takes into account 1) physical changes and operational restrictions that would affect the hourly emissions rate following the renovation, 2) WEPCO’s pre-renovation capacity utilization, and 3) factors affecting WEPCO’s likely post-renovation capacity utilization.

^{13/} E.g., 57 Fed. Reg. at 32,328 (“[A]n increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review.”); USX100:98 n.80 (“[EPA] for many years has interpreted the hours of operation/production rate exception as applicable to operational changes where there is no other change * * * .”); USX116:13 (“The purpose of this ‘increase in hours’ exception was to avoid undue disruption by allowing routine increases in production during the normal course of business in order to respond to market conditions.”).

DX33:7–8. The reference to “capacity utilization” indicates that EPA’s analysis considered the projects’ effect on both the hourly emissions rate and hours of operation. As EPA later explained, it “compar[ed] WEPCO’s representative actual emissions for the baseline period to estimated future actual emissions based on all the available facts in the record.” 57 Fed. Reg. at 32,317 n.10. The same test applies here.

Nonetheless, the district court cited the Seventh Circuit’s decision in WEPCo for support of its reading. CR234:59–61. The court relied on a footnote stating that, on remand, WEPCo “should make * * * data available” relating to “whether the renovated plant would cause a significant net emissions increase if it were operated under present hours and conditions.” WEPCo, 893 F.2d at 918 n.14. The Seventh Circuit was troubled not by EPA’s reliance on hours of operation to predict emissions increases resulting from the WEPCo project, however, but rather by “EPA’s assumption of continuous operations” where a more realistic prediction of future operations was possible. Id. at 917–18. Indeed, earlier in the decision, the Seventh Circuit recognized: “Unlike NSPS, PSD is concerned with changes in total annual emissions, expressed in tons per year.” Id. at 915. It also explicitly rejected the district court’s reading of the “increased hours” exclusion. Id. at 916 n.11. WEPCo thus does not contradict the plain import of the regulations; indeed, if the Seventh Circuit thought PSD applicability

depended on maximum hourly rates of emissions, remand would have been unnecessary given EPA's assumption that any emissions increases "would come not from an increase in emission rate, but rather from increases in production rate or hours of operation." *Id.* at 916. In any event, to the extent WEPCo could be read as a basis for the district court's interpretation, EPA clearly rejected that interpretation on remand, and it is the agency's regulatory interpretation — not that of the district court or the Seventh Circuit — that receives deference.

The fact that the district court's interpretation of the regulations is not and has not been the controlling interpretation is made plain by Duke's own acknowledgment of how the regulations would be applied. For instance, Duke understood the import of the WEPCo proceedings:

Q. But you know, in fact, that WEPCo had, indeed, proposed a methodology where you hold capacity factor constant pre-change and post-change, and that EPA, indeed, rejected that approach, correct?

A. I understand that EPA rejected that approach.

USX107:133–34; see USX82. Duke has consistently and repeatedly recognized that PSD and NSPS employ different emissions tests, and that PSD requires consideration of capacity utilization. *E.g.*, USX93A; USX146:30; USX147:26; USX148; USX149:10,304; USX151:149–50. For example, a 1991 Duke compliance manual taught that NSPS is triggered by increases in "Hourly

Emissions” while PSD is based on “Annual Emissions” and “Net Emissions Increase.” USX57:1002–03, 1042. The manual recognizes that PSD is triggered if a change causes a unit to be “operated more frequently.” USX57:1043.

EPA’s interpretation merits the substantial deference due when an agency interprets its own regulations. Reich’s informal statements could not alter the regulatory text and EPA’s official position and, even to the extent it could, the interpretation in those statements has been repeatedly rejected. And even if EPA had unresolved inconsistency in its administrative approach, that would not mean that no deference is warranted, just lesser deference. Miller v. AT&T, 250 F.3d 820, 832 (4th Cir. 2001); see Deaton, 332 F.3d at 711 (“An agency is allowed to change its mind, so long as its new interpretation is reasonable.”); cf. Malcomb v. Island Creek Coal, 15 F.3d 364, 369 (4th Cir. 1994) (no deference if “record of unexplained inconsistent interpretation is particularly egregious”).

C. EPA’s Reading of the Regulations Is Consistent with Congressional Intent and More Reasonable Than the District Court’s Reading.

Finally, even if EPA’s interpretation were not mandated by the regulatory language and by the deference it is due, it is more reasonable than the district court’s interpretation. The focus in the PSD regulations on the total amount of emissions rather than the rate of emissions better corresponds with the program’s

purpose of preventing significant deterioration of air quality.^{14/} 42 U.S.C. 7470; WEPCo, 893 F.2d at 904–05; Puerto Rican Cement, 889 F.2d at 296–98; Ala. Power, 636 F.2d at 346–51. A project that enables a source to increase its hours of operation could significantly increase total emissions without affecting hourly rates. The court’s interpretation simply does not address this possibility.

The district court found EPA’s interpretation unreasonable because the regulations do not explicitly set forth that the analysis should consider the effect a physical change would have on the utilization of a unit. CR234:63–65. As explained above, however, the regulatory text requires an inquiry into the effect of a physical change on total annual emissions. Considering how a physical change affects both the utilization of a unit — that is, how many hours the unit will be operated — and the hourly rate of emissions is plainly a reasonable way of making that inquiry. EPA’s interpretation certainly does not run “so far afield of the regulation’s text as to constitute a ‘de facto new regulation,’” as would be necessary to deny the interpretation normal deference. Humanoids Group, 375 F.3d at 306. The court’s analysis, by contrast, is inconsistent with the regulatory text as well as EPA’s controlling interpretation.

^{14/} Of course, EPA need not necessarily adopt the single interpretation that maximizes emissions benefits but instead can use its rulemaking authority to adopt an approach that is reasonable overall. Chevron, 467 U.S. at 863. In the 1980 regulations, however, EPA adopted an approach turning on total annual emissions.

As the district court acknowledged, a 1992 rulemaking made it unmistakably clear that utility projects resulting in increased hours of operation could trigger PSD without increasing maximum hourly rates of emissions. CR234:64–65; see 57 Fed. Reg. at 32,335. That rulemaking does not imply, as the court stated, that the regulations previously did not allow the consideration of hours of operation. CR234:64–65. Rather, the rulemaking made explicit what was already a common-sense reading of the 1980 regulations, as explained by EPA on remand from the Seventh Circuit’s WEPCo decision and in the preamble to the 1992 rules. DX33:6–8; 57 Fed. Reg. at 32,316–17 & n.10, 32,323.

The district court nonetheless proposed that interpreting PSD to incorporate a maximum-rate-of-emissions analysis rather than a total-emissions analysis was consistent with PSD’s purposes:

Unlike NSPS which is always triggered whenever there is an increase in the hourly rate of emissions, PSD is potentially triggered when there is an increase in the hourly emissions rate but only if the annualized emissions increase: (1) exceeds the significance levels * * * and (2) is not offset by contemporaneous decreases at the source. These two conditions for PSD applicability — significance levels and netting — effectuate the air quality purpose of the PSD program.

CR234:55–56. That reasoning is unsound. The provisions regarding “significance levels” and “netting” limit the universe of regulated entities — that is, projects are relieved of PSD requirements if emissions increases do not exceed

established significance levels or are offset by other changes. 40 C.F.R. 51.166(b)(3), (23). These provisions thus appropriately exclude some projects that would not significantly affect air quality, but they do not ensure that all projects that would lessen air quality are regulated. They do not by themselves “effectuate the air quality purpose of the PSD program,” as the district court stated.^{15/} CR234:55–56. Instead, that purpose requires consideration of projects’ likely effect on overall emissions, without which there can be no assurance that air quality will not deteriorate. Without additional protections, sources could undergo projects to extend operating hours that would send increased amounts of pollutants into the air. In short, the rate-of-emission analysis adopted by the district court would make the 1980 rule a poor effort to carry out the fundamental purpose of the PSD program of “insur[ing] that economic growth will occur * * * consistent with the preservation of existing clean air resources.” 42 U.S.C. 7470(3); see WEPCo, 893 F.2d at 916 n.11; Puerto Rican Cement, 889 F.2d at 293–94, 297–98; USX73:8; DX29:4; DX33:6–7.

Finally, if EPA had meant to adopt a hourly emission rate test for PSD, it is most odd to suppose that it would have done so through such a convoluted mechanism. Had that been EPA’s intent, there would have been no plausible

^{15/} Furthermore, these provisions have no NSPS counterparts. If the court were correct that “modification” for purposes of PSD is defined by reference to NSPS regulations, as discussed above, then the provisions would be invalid.

reason to require sources to consider increases in total annual emissions but then, in an entirely separate part of the regulations, require sources to do so while ignoring the effect of any increase in the hours of operation. As discussed above, that demonstrably was not EPA's intention in enacting the regulations, nor has it been EPA's interpretation since that time.

III. THE EXCLUSION FOR "ROUTINE MAINTENANCE, REPAIR, AND REPLACEMENT" DEPENDS ON WHETHER THE ACT IN QUESTION IS ROUTINE IN THE LIFE OF THE PARTICULAR TYPE OF UNIT.

The district court's interpretation of the RMRR exclusion was also erroneous. EPA construes this regulatory exclusion under the 1980 regulations very narrowly. EPA considers the nature, extent, purpose, frequency, and cost of a project to make a common-sense determination of whether it is RMRR. This evaluation is done on a case-by-case basis, focusing on the particular type of unit at issue. For instance, the "frequency" factor refers to whether the project in question is frequent in the life of the particular type of unit rather than merely prevalent in the industry as a whole.

The court rejected EPA's interpretation and held that the exclusion applies when an activity is "routine in the industry" as a whole — in essence, when the activity is common business practice. CR234:21-44. That ruling unduly expands the very narrow exclusion under the 1980 regulations, in direct conflict with

EPA's longstanding interpretation. Although the ruling was not a basis for the judgment, we respectfully suggest that this Court address the error now to avoid the waste of resources that would occur on remand if the parties proceeded to trial based on that erroneous ruling. Cf. Morris v. City of Danville, 744 F.2d 1041, 1047–49 (4th Cir. 1984) (providing guidance for remand).

A. Congress Has Not Directly Spoken to the Scope of the RMRR Exclusion.

The district court's primary reason for rejecting EPA's interpretation of the RMRR exclusion was its conclusion that Congress meant the term "modification" for PSD purposes to incorporate the NSPS regulations construing that term.

CR234:23–27. Again, that conclusion was incorrect.

Furthermore, even assuming that Congress intended PSD to track NSPS regulations precisely, those regulations do not establish the district court's "routine in the industry" test. The NSPS version of the exclusion covers "[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category," 40 C.F.R. 60.14(e)(1), and the court found the reference to what is "routine for a source category" to be dispositive.

CR234:25–26. That language is, however, perfectly consistent with EPA's interpretation of the RMRR exclusion. The question whether a project is routine maintenance, repair, or replacement at a particular type of unit depends on what

“source category” (that is, what type of industry) is at issue. What is routine maintenance for an electric plant may not be routine maintenance for a pulp mill or a smelter. The reference in the NSPS regulations to what is “routine for a source category” recognizes that basic fact; it does not incorporate a “routine in the industry” test and, more clearly, does not do so unambiguously enough to conclude that Congress has required that test under PSD. Indeed, EPA applies the same multi-factor, common-sense analysis for NSPS as it does for PSD, asking whether the activity is routine maintenance, repair, or replacement for a unit in that particular source category, not whether the activity is common practice within that source category as a whole. WEPCo, 893 F.2d at 910; SIGECO, 245 F. Supp. 2d at 1008–10 & n.10; USX73:10.

B. EPA’s Interpretation of the RMRR Exclusion Under the 1980 Regulations Is Controlling.

EPA has announced its authoritative interpretation of the regulatory exclusion for “routine maintenance, repair, and replacement” on several occasions. Most notably, in the WEPCo proceedings, EPA provided guidance, adopted by the Administrator in a final applicability determination, on whether proposed major renovations at a coal-fired power plant would qualify for the exclusion. USX73; DX29. EPA’s interpretation of the exclusion is not plainly erroneous or inconsistent with the regulation and thus should control. Deaton, 332 F.3d at 709.

The WEPCo Determination makes explicit that the RMRR exclusion in the 1980 regulations is “very narrow.” USX73:3. It adds that the “clear intent” of those regulations “is to construe the term ‘physical change’ very broadly, to cover virtually any significant alteration to an existing plant.” Id. The application of the RMRR exclusion depends on a “case-by-case” analysis taking into account the “nature, extent, purpose, frequency, and cost” of the activity “to arrive at a common-sense finding.” Id.

With these understandings established, EPA explained that WEPCo’s proposed project could not be considered routine:

[This project is] far from being a regular, customary, or standard undertaking for the purpose of maintaining the plant in its present condition. Rather, this is a highly unusual, if not unprecedented, and costly project. Its purpose is to completely rehabilitate aging power generating units whose capacity has significantly deteriorated over a period of years, thereby restoring their original capacity and substantially extending the period of their utilization as an alternative to retiring them as they approach the end of their useful physical and economic life.

USX73:3–4. EPA analyzed WEPCo’s proposal under the multi-factor test:

Nature/extent: “The project would involve the replacement of numerous major components,” including “components essential to operation of” the plant. It required long unit outages and was not “repetitive maintenance * * * normally performed during scheduled equipment outages.”

Purpose: “The purpose of the project is to significantly enhance the * * * efficiency and capacity of the plant and substantially extend its useful economic life.”

Frequency: “The work called for under the project is rarely, if ever, performed.” It would involve work items “that would normally occur only once or twice during a unit’s expected life cycle.”

Cost: “The work called for under the project is costly” both relative to the cost of a new plant of equivalent size and in absolute terms.

USX73:4–6. WEPCo and other utilities challenged this interpretation of the RMRR exclusion in the Seventh Circuit, which deferred to and upheld EPA’s analysis.^{16/} WEPCo, 893 F.2d at 910–12.

The district court did not dispute that the WEPCo Determination presented an authoritative interpretation of the RMRR exclusion, but the court read it quite differently from how EPA does. CR234:27–37. The court made three fundamental errors.

1. Overemphasis of “frequency” factor. — First, the district court ignored the multi-factor nature of EPA’s inquiry by reducing that inquiry, in essence, to the “frequency” factor. Despite acknowledging that this factor should not be “conclusive,” CR234:42, the court at various points indicated that the factor would be just that. Thus, the court stated: “Projects that are repeatedly performed at a particular unit will be routine in the industry, as will projects performed at a number of units within the industry.” CR234:35. Similarly, the court reasoned

^{16/} EPA continues to apply this analysis under the 1980 regulations. E.g., USX100:48–53; USX101:2–4; USX131.

that if a particular project “were frequently performed at an individual unit” it would “therefore” constitute “routine repair.” CR234:34; see CR234:31, 36.

The WEPCo Determination establishes that frequency is only one of several factors that go into EPA’s “common-sense,” “case-by-case” analysis. USX73:3. Depending on the facts of the particular project at issue, frequency could be the most important factor. But even a project that is frequently performed at a particular type of unit may not be RMRR if the nature, extent, purpose, and cost of the project indicate that it is not. Id.

2. Improper reference to industry practice regarding “nature,” “extent,” “purpose,” and “cost” factors. — Second, the district court unjustifiably found that the project in question should be compared to “other similar industry projects” for each of the factors. CR234:42–43. The court explained:

For example, if a proposed project were estimated to cost \$50 million dollars, that figure must be analyzed against what other projects within the industry have cost. If projects within the industry routinely cost \$20 million, the \$50 million cost of the proposed project may be one consideration in support of a finding that the project is not RMRR. This inquiry must be performed for each WEPCO factor.

CR234:42.

The “frequency” factor is, however, the only one to which EPA has considered general industry practice relevant under the 1980 rules. EPA has never intimated, for instance, that a project tends to be RMRR if it does not cost more

than similar projects elsewhere in the industry. To the contrary, the WEPCo Determination considered the absolute cost of the project in question and its cost relative to the expense of building a new plant. USX73:6; see WEPCo, 893 F.2d at 912 (looking at absolute cost of proposed project instead of cost relative to other industry projects); Ohio Edison, 276 F. Supp. 2d at 861–62 (same). The WEPCo Determination similarly considered the purpose of the project in question — “to significantly enhance the present efficiency and capacity of the plant and substantially extend its useful economic life” — without reference to whether that was a common purpose for other industry projects. USX73:4–5. Per the authoritative interpretation in the WEPCo Determination, application of the RMRR exclusion entails a “common-sense” consideration of the nature, extent, purpose, and cost of the project — not a consideration of whether those factors are different for the activity in question than for other industry projects. USX73:3–6.

3. Improper standard regarding “frequency” factor. — Third, the district court erroneously interpreted the WEPCo Determination and related documents in the WEPCo proceedings to establish that EPA considers “frequency” based on whether a project is prevalent in the industry as a whole rather than frequent in the life of a particular type of unit. CR234:30–37. The court emphasized that EPA did not end its analysis of the “frequency” factor in the WEPCo Determination simply by accepting WEPCo’s admission that the type of work proposed generally

“would normally occur only once or twice during a unit’s expected life cycle,” but rather continued to consider evidence of industry practice. CR234:31. The court concluded: “The only way in which both experience at a unit and in the industry at large can be relevant is under a routine within the industry standard.” CR234:35.

That analysis is mistaken. EPA interprets the RMRR exclusion to entail an inquiry into whether the act in question is frequent in the life of the particular type of unit rather than prevalent in the industry as a whole — that is, what matters is how often a particular type of unit typically undergoes the procedure, not what percentage of that type of unit in the industry has ever undergone the procedure. The focus of this inquiry does not imply, as the district court thought, that general industry practice is irrelevant. As the SIGECO court recognized, general industry practice can inform the analysis of whether a particular action is routine for an individual unit. 245 F. Supp. 2d at 1009. For instance, a company that conducts a certain type of repair for the first time may be able to show that others in the industry have conducted that type of repair frequently at that same type of unit. (By analogy, one who has her first cavity late in life could argue that fillings are nonetheless “routine” by referring to other people’s teeth.) The mere fact that a type of project is prevalent in the industry as a whole does not indicate, however, that it is routine for a particular unit in that industry. (Heart transplants are not “routine” merely because many people have that surgery every year.)

Two hypothetical examples illustrate how, contrary to the district court's reasoning, industry practice may be relevant in EPA's analysis of the "frequency" factor. First, assume that a company performs a particular equipment replacement for the first time at a unit where comparable equipment at comparable units industry-wide has been replaced, on average, every two years. Second, assume the same situation except that comparable units industry-wide have replaced comparable equipment, on average, only once every twenty years. Industry practice distinguishes these two situations and informs the analysis of whether the equipment replacement truly is frequent in the life of that particular type of unit rather than merely prevalent in the industry as a whole.

This distinction between "frequency" and "prevalence" is consistent with EPA's approach in the WEPCo proceedings. WEPCo argued that its projects were routine maintenance, repair, or replacement because they were established business practice — that is, because they were prevalent within the industry. EPA rejected WEPCo's interpretation, noting that the work proposed by WEPCo "was not frequently done" because it "would normally occur only once or twice during a unit's expected life cycle." USX73:5; see SIGECO, 245 F. Supp. 2d at 1018 ("[T]he analysis in the [WEPCo Determination] gave the regulated community sufficient notice that the EPA considered how often an activity takes place at a unit to be a significant factor."). WEPCo later identified forty supposedly

“similar” projects in the industry, but EPA noted in response that the cited work was dissimilar, that forty units were a small fraction of the total units in the industry, and that even at those forty units, the activity was “not routine repair” because it was a “one-time occurrence.”^{17/} USX98:7 & n.6. The Seventh Circuit upheld EPA’s interpretation of the RMRR exclusion and specifically noted that the work “would normally occur only once or twice during a unit’s expected life cycle.” WEPCo, 893 F.2d at 911–13.

Indeed, Duke and the greater utility industry understood at the time that EPA analyzed the frequency prong of the RMRR test on an individual unit basis, not an industry-wide basis. SIGECO, 245 F. Supp. 2d at 1019. A Duke witness testified that Duke knew as much in 1989. USX71:287–88; see USX72:542–45. Duke also recognized in an amicus brief to the Seventh Circuit that EPA’s RMRR test applied only to work that was “undertaken ‘for the purpose of maintaining the plant in its present [i.e., deteriorated] condition.’” USX74:13–14 (citing WEPCo Determination). And counsel for Duke and the greater Utility Air Regulatory

^{17/} The district court found telling that EPA had rejected WEPCo’s attempt to compare its project to certain other industry projects because those projects were different in nature rather than simply focusing on those projects’ frequency. CR234:36. Of course, the fact that a project is not comparable means that it is irrelevant to the “frequency” analysis. The court also relied on evidence that EPA had conducted an “informal survey” of industry practice regarding steam drum replacement. CR234:29. EPA used that survey to respond to the separate equitable claim that WEPCo was being unfairly singled out from other utilities, not to consider the RMRR exclusion. DX29:3–4.

Group also lobbied the Department of Energy to reverse the WEPCo Determination, describing EPA's interpretation as covering only those activities that, among other requirements, "are frequently done at that plant." USX76:3.

The district court also found support for the "routine in the industry" test from EPA statements that the WEPCo Determination should not significantly affect utility life extension projects. The court cited a 1990 report of the General Accounting Office and a 1991 letter from an EPA official that predicted that the WEPCo ruling would not be broadly applied. CR234:37-41. It is not reasonable to infer from these statements that EPA assumed that any power plant refurbishment project would be exempt so long as it was routine in the industry. Perhaps the EPA officials anticipated that other projects would be factually distinguishable, or perhaps they were wrong in predicting that the WEPCo ruling would not have a broad effect. See SIGECO, 245 F. Supp. 2d at 1019-20. In any event, none of their statements does anything to change the WEPCo Determination's authoritative interpretation of the RMRR exclusion. Id.

Finally, the district court mistakenly ruled that EPA acknowledged Congress' intent to require a "routine in the industry" standard. In the preamble to a 1992 rule making changes to the NSR program but not the RMRR exclusion, EPA stated that the application of the exclusion "must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within

the relevant industrial category.” 57 Fed. Reg. at 32,326 (emphasis added). The court interpreted this sentence to adopt the “routine in the industry” test.

CR234:26–27. To the contrary, as EPA has explained, the sentence means just that EPA will consider whether an activity is routine maintenance, repair, or replacement in the context of the “relevant industrial category” — that is, the particular industry in which the activity is planned. USX100:52; USX131; see SIGECO, 245 F. Supp. 2d at 1021; cf. Hoechst Celanese, 128 F.3d at 223 (deferring to agency interpretation despite arguably inconsistent preamble language). The sentence is perfectly consistent with EPA’s interpretation of the exclusion.

C. EPA’s Reading of the Regulations Is Consistent with Congressional Intent and More Reasonable Than the District Court’s Reading.

EPA’s interpretation of the RMRR exclusion under the 1980 regulations is manifestly reasonable. The regulatory language “routine maintenance, repair, and replacement” easily accommodates EPA’s “case-by-case” analysis of the “nature, extent, purpose, frequency, and cost” of the activity “to arrive at a common-sense finding,” where the “frequency” factor depends on how often the activity typically occurs at that type of unit. USX73:3–6. That analysis represents a reasonable interpretation of the word “routine” and comports with the purposes of the CAA in general and PSD in particular. 42 U.S.C. 7401, 7470.

The district court's interpretation of the exclusion is less reasonable. It would be surprising indeed if even major modifications of power plants could escape PSD requirements simply because other power plants have undergone similar modifications.^{18/} SIGECO, 245 F. Supp. 2d at 1009–10; USX100:50. The court's analysis implies that industry parties working in concert could ensure that any project qualifies for the RMRR exclusion, or alternatively that industry parties could claim the exclusion as long as a few scapegoats undertake a new type of project first. The court's analysis ignores the common-sense factors articulated by EPA and would exempt virtually any activity that the utility industry decides to make routine, regardless of how massive or costly the activity is and regardless of how commonly the activity is performed at individual units. Cf. WEPCo, 893 F.2d at 909.

Moreover, by giving controlling weight to a comparison with "similar industry projects," the district court has established a circular analysis that necessarily makes the RMRR exclusion broad, contrary to EPA's express statement in the WEPCo Determination that the exclusion in the 1980 regulations

^{18/} The district court stated that the RMRR exclusion "was designed to achieve the congressional intent of not subjecting existing sources to the costly requirements of installing advanced pollution control devices." CR234:23. Of course, Congress did not exempt existing sources entirely but rather extended PSD to cover them when they are modified. 42 U.S.C. 7475(a), 7479(2)(C); see WEPCo, 883 F.2d at 905, 907–10; Ohio Edison, 276 F. Supp. 2d at 854.

is very narrow. USX73:3. Similar industry projects on similar sources will by definition have similar characteristics, and the district court's analysis knows no bounds. The effect of the court's analysis is to allow almost any project to be exempt from the definition of "physical change" as long as that project is preceded in the industry.^{19/}


^{19/} The district court also erred in assigning the United States the burden of proof to show that Duke's modifications were not routine maintenance, repair, or replacement, contrary to EPA's interpretation of the 1980 rules. CR234:44-47; USX100:45 n.31. The party claiming the benefit of an exception generally bears the burden of proof, NLRB v. Ky. River Cmty. Care, 532 U.S. 706, 711 (2001), and thus Duke should bear the burden regarding the RMRR exclusion. Ohio Edison, 276 F. Supp. 2d at 856. The court concluded based on dicta from EEOC v. Chicago Club, 86 F.3d 1423 (7th Cir. 1996), that this proposition does not hold true when the argument is about "an exclusion from a statutory definition" rather than "an exception to a statutory prohibition." CR234:44-46. That decision has not been followed by this Court or other courts. Moreover, the exclusion at issue in that decision was set forth in the statute itself, not in separate regulations, 86 F.3d at 1430, and thus the decision's reasoning is inapplicable here.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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