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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Environmental Defense versus Duke Energy Corporation. Mr. Donahue.

ORAL ARGUMENT OF SEAN H. DONAHUE
ON BEHALF OF PETITIONERS

MR. DONAHUE: Good morning, Mr. Chief Justice, and may it please the Court:

The Clean Air Act requires that the owner of a major emitting facility obtain a prevention of significant deterioration permit before engaging in a modification, which is defined to include any physical change that increases the amount of any pollutant emitted by such source.

Since 1980, EPA's PSD regulations have measured such increases in terms of actual emissions in tons per year.

CHIEF JUSTICE ROBERTS: That's a disputed point, I gather, central to the case, whether or not the regulations measured PSD emissions through that device rather than the hourly emissions.

MR. DONAHUE: That's correct, Mr. Chief Justice, but the text of the regulations refers pervasively, and I'm referring to the definition of

1 major modification which is in 40 CFR 51.166(b)(2) and
2 subsequent paragraphs of that regulation, refers
3 pervasively to actual emissions and measures emissions
4 exclusively in tons per year.

5 JUSTICE SCALIA: It is a little of an
6 exaggeration, though, to say that EPA has since the
7 issuance of the regulations always interpreted them the
8 way that you prefer. In fact, the director of the PSD
9 program gave two opinions in which he took precisely the
10 interpretation that opposing counsel took.

11 MR. DONAHUE: Yes, Justice Scalia.
12 Respondent has relied heavily on two early applicability
13 determinations.

14 JUSTICE SCALIA: Rightly so, I think. I
15 mean, it was the earliest, application of the
16 regulation by the officer of the agency specifically in
17 charge of the program.

18 MR. DONAHUE: Well, Justice Scalia, as we
19 point out in our brief, Director Reich does not adopt
20 Duke's theory, in fact contradicts it. He doesn't say
21 that a new source performance standard modification must
22 precede a PSD major modification. Instead, in both he
23 relies on the express exclusion in the PSD regulations
24 for increases in hours of operation and the production
25 rate, and as EPA explained in its contemporaneous

1 preamble, that provision by its terms is an exception
2 from the definition of physical change.

3 It is not a provision that says -- increase
4 is attributable to a physical change, to increased hours
5 that are enabled by physical change, are not considered.
6 The plain language of the regulation actually
7 contradicts this reading. These determinations
8 themselves are quite ambiguous, and of course they are
9 two of dozens of such determinations.

10 JUSTICE SCALIA: Well, whatever the reason
11 he gave, was it -- these opinions were out there when
12 the challenge to the regulations, in which Duke did not
13 participate, when that challenge was brought, were
14 these -- were those opinions already out there?

15 MR. DONAHUE: Those opinions were out there
16 but the plain language of the regulation and the
17 preamble which explain that the increased hours exclusion
18 was simply to allow companies to respond to demand and to
19 link the coverage of PSD to construction activity. What
20 we have here is a physical change in the plants, massive
21 renovations of these elaborate networks of pipes and
22 tubes that compose a central component.

23 JUSTICE SCALIA: I understand that, and I
24 think you may have the better of the argument on me on
25 the interpretation of the PSD regulations. But what I

1 am concerned about is that companies can get whipsawed.
2 They don't challenge the regulations when they come out
3 because as far as they know, the agency is interpreting
4 them in a way that they favor. And then some years
5 later, when it turns out the agency is using a different
6 interpretation, you have the jurisdictional bar.

7 MR. DONAHUE: Well, Justice Scalia, these
8 regulations were challenged early on and there was a --
9 as the Court is aware, there was a settlement agreement
10 in 1982 to which Duke was, in fact, a party, that
11 proposed to add the hourly rate test that is completely
12 absent from these regulations.

13 JUSTICE KENNEDY: But could Duke have had a
14 challenge to the 1992 or 2000 regulations? Could they
15 have reopened the issue at that point?

16 MR. DONAHUE: They did in fact precisely that,
17 Justice Kennedy, and that was resolved in the New York
18 proceeding by the D.C. Circuit. Duke didn't challenge
19 the very prominent aspect of the 1980 regulations, which
20 was to move away from the potential emissions test of
21 prior --

22 JUSTICE KENNEDY: I don't want to jump ahead
23 to the jurisdictional argument if you want to talk about
24 the modification substantive point first, but it is not
25 clear to me whether Duke should have acted in 1980,

1 1992 or 2000, or all of the above.

2 MR. DONAHUE: Well, the regulations were
3 clear on their face. I mean, to determine the effect of
4 307 --

5 CHIEF JUSTICE ROBERTS: That's an audacious
6 statement.

7 (Laughter.)

8 JUSTICE SCALIA: We've wrestled with these
9 things for several days. It's disappointing to hear you
10 tell us they're clear.

11 MR. DONAHUE: They're clear in this respect,
12 they did not include an hourly rate test. As Judge Posner
13 in the Cinergy opinion this summer said, the argument
14 that the statute mandates an hourly rate test is a
15 challenge to the validity of these 1980 regulations
16 because they don't say it, they don't provide for it,
17 and they are very specific and detailed, and instead turn
18 on actual annual emissions. And the entire rationale
19 EPA offered was linked to that effort to capture real
20 world changes in emissions.

21 JUSTICE ALITO: If they are so clear, how
22 can you account for Mr. Reich's interpretation? He's an
23 expert in the area.

24 MR. DONAHUE: Right. He misapplied, he
25 didn't adopt this theory, the theory that an NSPS

1 modification precedes at all; in fact, he contradicted
2 it. He misapplied in quite sort of anomalous
3 circumstances the increased hours --

4 JUSTICE ALITO: I know you say he's wrong,
5 but if somebody in his position with his expertise can
6 interpret the regulations in that way, doesn't that show
7 that they're not clear on their face?

8 MR. DONAHUE: We think that this Court can
9 resolve, can interpret, can address the reasonableness
10 of EPA's construction of the increased hours exclusion.
11 What it can't do is certainly what the Fourth Circuit
12 did, which is to say that the PSD regulations must be
13 the same. They are obviously not the same. They are
14 different in multiple respects. And certainly that
15 challenge could have been raised, and certainly that
16 challenge was barred, and of course the court of appeals
17 expressly called the regulations irrelevant, the texts
18 and interpretations of the regulations. That's exactly
19 what a court is supposed to be doing.

20 JUSTICE SCALIA: Right. In deciding whether
21 the regulations are reasonable, however, is it proper
22 for a court to take into account that the regulations
23 must follow the prescription of the statute that the PSD
24 definition be the same as the NSPS -- what is it -- NSPS
25 definition? I mean, that's a usual tool of statutory --

1 or regulatory construction.

2 Cannot a court give great weight to that in
3 interpreting these ambiguous regulations?

4 MR. DONAHUE: Well, that -- they're not
5 ambiguous as to whether they're identical, and to hold
6 that they have to be is certainly an invalidation. And
7 the D.C. Circuit, of course, held that the statute
8 doesn't require identity as between the two sets of
9 regulations. And we're not here on certiorari from the
10 New York decision, we're here on an enforcement action
11 in which a court leapt over the express limitations
12 imposed on it, declared the language of the regulations
13 irrelevant, and indeed misapplied them rather
14 dramatically.

15 JUSTICE SCALIA: Well, I don't think the
16 same argument has necessarily to be made, but the
17 question still before us is how you interpret the
18 regulations. Let's assume that's just a regulatory
19 interpretation question, it's not a statutory question.

20 MR. DONAHUE: Right. Right.

21 JUSTICE SCALIA: But in deciding that,
22 whatever was argued in prior cases, it seems to me that
23 we're entitled to take into account the necessity that
24 the regulations comply with the statute. And if they
25 are ambiguous, we should resolve the ambiguity in the

1 direction that it seems to us would provide consistency
2 with the statute. Now does that violate the
3 jurisdictional bar?

4 MR. DONAHUE: No. I have no problem with
5 any of that. If the regulations are ambiguous, take
6 into account the statutory text, structure, policies.
7 What the court below did, of course, was say it doesn't
8 matter what the regulations say, these have to be the
9 same. It forgot that in fact, these regulations were
10 very different. The D.C. Circuit said there's no
11 statutory mandate of identity and that the -- and, of
12 course, Respondent was there in the D.C. Circuit. It
13 was permitted to assert a challenge to this divergence,
14 as the court called it, between NSPS regulations and
15 PSD. And the court said --

16 CHIEF JUSTICE ROBERTS: If the regulations
17 are ambiguous, then the agency can interpret them in
18 different ways and can change its interpretation over
19 time. Of course, what your friend argues happened here
20 is that the agency changed its interpretation in the
21 context of an enforcement program. Now accepting that
22 premise, what is the -- what should Duke have done when
23 that interpretation was changed in an enforcement
24 program?

25 MR. DONAHUE: Accepting that premise, they

1 could have sought an applicability determination. Duke
2 knew very well what EPA's interpretation was because of
3 the WEPCO decision. EPA had been -- and subsequent
4 actions. In fact, Duke's attorneys were vociferously
5 charging that EPA changed the rules and was acting ultra
6 vires.

7 JUSTICE GINSBURG: Mr. Donahue, were there
8 earlier enforcement actions in which EPA was taking the
9 position that it took in this action against Duke?

10 MR. DONAHUE: Well, in the WEPCO decision --
11 I mean, EPA has always taken the position that actual
12 annual emissions is the standard under the 1980 rules.

13 JUSTICE GINSBURG: But were they, in fact,
14 enforcing that standard? So that -- you said that Duke
15 could have asked for a non-applicability ruling, but at
16 the time Duke started up its --

17 MR. DONAHUE: Certainly. I mean, WEPCO was
18 an applicability determination. That was in 1989-90.
19 Puerto Rican Cement was an applicability determination.
20 Duke instead, knowing that EPA believed that increased
21 utilization that is caused by physical change has to be
22 considered under this, as is prescribed in these very
23 detailed regulations, Duke decided not to do that, to go
24 forward, and it didn't, in fact, come to the State or to
25 EPA.

1 Of course, the increased hours -- I
2 understand the Court's concern about the Reich memos.
3 But EPA's construction of the increased hours exception
4 is completely correct under the plain language of the
5 regulations. And in WEPCO the Court upheld. So that
6 there was no question that not only was it consistent
7 with the plain language, but whatever Reich had said,
8 the express language of the regulations was as far as
9 the exception went. There was no further confusion, if
10 those early memos caused confusion.

11 I'd like to reserve the balance of my
12 time. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Donahue.

15 Mr. Hungar.

16 ORAL ARGUMENT OF THOMAS G. HUNGAR,
17 ON BEHALF OF RESPONDENT UNITED STATES

18 MR. HUNGAR: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 The court of appeals exceeded its
21 jurisdiction and misconstrued the Clean Air Act in
22 holding that EPA was required to define the term
23 "modification" identically for the separate NSPS and PSD
24 programs, and on the jurisdictional point I'd like to
25 address the whipsaw question, because in fact it's quite

1 clear that there's no whipsaw issue here for a number of
2 reasons. It's true that there are those ambiguous and
3 cursory 1981 statements from Mr. Reich, who was a
4 subordinate official within EPA. In 1988, the
5 administrator of EPA, the head of the agency, in the
6 WEPCO decision, the applicability determination, made
7 very clear what EPA's position is on the application of
8 the hours of operation exclusion and the fact that this
9 is an annual tons per year test. That's page 44 of the
10 joint appendix. He made that perfectly clear and it has
11 always been clear that that is, in fact, the EPA's official
12 position beginning with the 1980 preamble. But again --

13 CHIEF JUSTICE ROBERTS: Should a challenge
14 to that have been brought in the D.C. Circuit at that
15 time, or would you have argued that's too late?

16 MR. HUNGAR: Well, I'm not sure whether it
17 could have been brought at that time. But the fact of
18 the matter is a challenge was brought on this issue
19 in -- to the 1980 regulations. True, Duke didn't assert
20 it, but General Motors and the steel industry did assert
21 in the 1981 brief they filed in that challenge to the
22 1980 rule --

23 CHIEF JUSTICE ROBERTS: Well, presumably
24 Duke could say, we looked at the Reich memorandum and we
25 were following that and all of a sudden this new 1988

1 thing came up and they are surprised by that. Now
2 you're saying it's already too late because somebody
3 else challenged it in 1980?

4 MR. HUNGAR: Well, they might have that
5 argument, Your Honor, except for the fact that the
6 challenge to the 1980 rules was stayed and was not
7 reopened until 2003.

8 In 2003, Duke and other parties sought to
9 reopen and were granted permission to reopen that
10 challenge to the 1980 rules. They filed a statement of
11 issues in 1984 and a brief in 1984 challenging the
12 regulation on the ground that if EPA's interpretation
13 was correct and that it did not require an increase in
14 maximum total achievable emissions, as the NSPS did,
15 test did, they argued that it was invalid. They raised
16 the very incorporation theory that they advance here,
17 that is the statutory argument that Congress was
18 required to follow for the PSD regulations the same
19 regulatory approach that the NSPS regulations had
20 followed in 1977 with the hourly maximum achievable
21 test. They made that very argument in their brief in
22 the D.C. Circuit in 2004, the D.C. Circuit addressed and
23 rejected that argument on the merits.

24 CHIEF JUSTICE ROBERTS: To be fair to them,
25 that very same argument was more a product of the Fourth

1 Circuit than of Duke. They had a somewhat different
2 approach before the Fourth Circuit and then the Fourth
3 Circuit came up with this insistence on the parallel
4 construction.

5 MR. HUNGAR: Yes. Well, I think it's
6 important to distinguish. There are two statutory
7 arguments here. One is what I would call the
8 incorporation theory. That is the argument that
9 Congress by borrowing the definition, the statutory
10 definition, also necessarily borrowed and mandated
11 adoption of the regulatory definition from the NSPS
12 program. That argument, the incorporation argument, was
13 made by Duke in its brief in 2004 in the D.C. Circuit.
14 The D.C. Circuit addressed and rejected that argument at
15 pages 17 through 19 of its decision in its 2005 New York
16 decision.

17 JUSTICE SCALIA: Why was that rejection
18 wrong? Because this issue is still important to me for
19 purposes of statutory construction. Is it conceivable
20 that when Congress says the word widget in this statute
21 has to mean the same as the word widget in the other
22 statute, that the agency can effectively frustrate the
23 apparent Congressional intent by saying, oh, yes, I
24 mean, yes, that has to mean the same thing, but we can
25 adopt regulations under one statute which regulations

1 say it means one thing, and we can adopt regulations
2 under another statute that says it means something else.
3 I mean, to say that they have to mean the same
4 thing it seems to me means that the regulations have to
5 say they mean the same thing.

6 MR. HUNGAR: Your Honor, it is a fundamental
7 principle of administrative law and deference to agency
8 decisionmaking that when Congress adopts an ambiguous
9 statutory phrase and charges the agency with
10 implementing that phrase the agency has discretion, has
11 a delegation of rulemaking authority and policymaking
12 authority to choose from among the various permissible
13 interpretations.

14 JUSTICE SCALIA: Of course it does, but when
15 Congress says the definition in the two statutes has to
16 be the same, whatever choice the agency makes among
17 those options has to be applied to both, it seems to me.

18 MR. HUNGAR: No, Your Honor, because
19 Congress has not mandated, as it could have done, that
20 the choice of the specific interpretation from among the
21 permissible options must be identical across both
22 programs.

23 JUSTICE SCALIA: Well, then it's meaningless
24 to say the definition has to be the same.

25 MR. HUNGAR: No, Your Honor.

1 JUSTICE SCALIA: Entirely meaningless.

2 MR. HUNGAR: The statutory definition is
3 ambiguous, but within the limits of the ambiguity it
4 imposes constraints on the discretion of the agency.
5 The agency must choose from among the options that are
6 permissible given the range of language that Congress
7 used. But within that range the agency has discretion.
8 Think of it this way, Your Honor. If there were no PSD
9 program, if we were talking only about the NSPS program,
10 Congress gave an ambiguous definition to the agency the
11 agency would have discretion to adopt different tests
12 for determining whether emissions increased for
13 different types of equipment even within that single
14 program, because the statutory definition is ambiguous.
15 The statute therefore does not mandate a one size fits
16 all approach and the agency in its discretion could well
17 determine that one emissions test is appropriate for
18 some types of equipment, another emissions test is
19 appropriate for other types of equipment, as long as
20 both of those tests are within the permissible bounds
21 of the statutory ambiguity. The agency is entitled to
22 do that.

23 JUSTICE GINSBURG: And the ambiguity is the
24 word "increase," which could mean different things?

25 MR. HUNGAR: Yes, Your Honor.

1 JUSTICE GINSBURG: The Government as I
2 understand it now has a proposed regulation that would
3 align the standards with the two programs. It would
4 bring the nonproliferation -- it would bring the
5 standard for the nonproliferation program in line with
6 the new source performance standard.

7 MR. HUNGAR: Yes, Your Honor, with respect
8 to certain types of units, electric generating units
9 like those at issue in this case, that's correct. They
10 would not be identical under the proposal, but would be
11 similar.

12 JUSTICE GINSBURG: Well, since the
13 government is now taking the position that another Duke
14 could do just what was done here and there's an
15 enforcement action pending, would you, if you prevailed
16 in that enforcement action, nonetheless enforce, though
17 it's those against the current government policy?

18 MR. HUNGAR: Your Honor, the 2005 proposal
19 that you're referring to is only a proposal, a notice of
20 proposed rulemaking. It has not been adopted. So the
21 rules as they exist today are the same as the ones we're
22 talking about, although there was a modification in
23 2002. But in any event, what we're talking about here
24 is conduct that occurred from 1988 through 2000 with
25 respect to --

1 JUSTICE KENNEDY: Well, what exactly are you
2 seeking in these enforcement proceedings? An injunction
3 to install the BACT or criminal fines or civil fine, or
4 what?

5 MR. HUNGAR: It is civil enforcement
6 proceedings, Your Honor. There are various remedies,
7 injunctive relief and civil penalties where appropriate,
8 yes.

9 JUSTICE KENNEDY: If you have an enforcement
10 proceeding and there is a legitimate question of whether
11 or not the agency's interpretation is consistent with
12 the statute with Chevron deference and so forth and the
13 court looks at it and says, you know, I have a real
14 problem with the way the agency interpreted the basic
15 statute when it first issued the regulation, the court
16 can't get into that merely because the parties didn't
17 present it earlier?

18 MR. HUNGAR: That's correct.

19 JUSTICE KENNEDY: The court's almost issuing
20 an advisory opinion in a way.

21 MR. HUNGAR: No, Your Honor. It's not an
22 advisory opinion. The court is simply precluded from
23 considering a challenge that would invalidate the
24 regulation because that is the determination Congress
25 made in requiring pre-enforcement review to avoid the

1 problem of inconsistent determinations and circuit
2 conflicts and 700 district judges potentially construing
3 the statute in different ways and tying EPA's hands.
4 The Congress made that determination.

5 JUSTICE KENNEDY: Are there other areas in
6 the law where courts have to take as binding a legal
7 proposition that they think is dead wrong when they --

8 MR. HUNGAR: It's quite common. It's quite
9 common, Your Honor, in any regime where review of an
10 agency decision is relegated to the exclusive
11 jurisdiction of one court, as it is here, and
12 enforcement proceedings are brought in a different
13 court. Hobbs Act agencies, their decisions are
14 reviewable in the court of appeals but often enforceable
15 in the district courts. The district court cannot look
16 behind the determination of the agency to challenge its
17 validity because that rests in the exclusive jurisdiction
18 of the court of appeals. Obviously there's a timing
19 issue in this statute as well because of the requirement
20 of pre-enforcement review. Whatever -- whatever concerns
21 might be raised in a situation where a party could not
22 reasonably have been expected to challenge it at the
23 time it was originally promulgated are addressed by the
24 after-arising provision in section 307(b)(1) which
25 permits challenges that could not have been made within

1 the 60-day period to be brought later in appropriate
2 circumstances. And in any event, if there were some
3 concerns at the outer limits of a provision like this
4 one, they have nothing to do with this case where Duke's
5 challenge, actual challenge to the agency decision, the
6 1980 rule, it was heard in 2005.

7 And so Duke had more opportunity than you
8 could possibly ask for to understand exactly what EPA's
9 position was, understand exactly what the regulation
10 meant and to challenge it in the D.C. Circuit. It did
11 so and it can't do it here.

12 JUSTICE SCALIA: Mr. Hungar, I'm curious.
13 What happens if you have a new company that wasn't around
14 when the regulation was issued? Can it -- can it bring a
15 challenge to the conformity of the regulation to the
16 statute?

17 MR. HUNGAR: Well, I think that's an
18 unresolved question. Presumably, the argument --

19 JUSTICE SCALIA: Well, a nice question. I
20 mean, all you have to do is find a stalking horse. Just
21 have some new company carry your water for you.

22 MR. HUNGAR: Well, presumably the argument
23 would be that the creation of the company and the first
24 applicability of the regulations to it is an
25 after-arising ground. I don't know the answer to that

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

2 JUSTICE GINSBURG: Could it bring it up by a
3 declaration of non-applicability? Could the new
4 company -- how would it --

5 MR. HUNGAR: Well, it could seek a
6 determination of non-applicability, but -- and it could
7 obtain judicial review of that determination. But that
8 would not go to the D.C. Circuit and would not permit a
9 challenge to the regulations. But they could find a
10 petition, they clearly could find a petition for
11 rulemaking with the EPA, saying your regulation is
12 invalid, it's been around for 25 years, but it's still
13 invalid, you need to rescind it, and when the agency
14 declined to do that they could then go to the D.C. Circuit.

15 CHIEF JUSTICE ROBERTS: In the midst of the
16 enforcement action that's being brought against them by
17 EPA? What's supposed to happen in the enforcement
18 action, if that's the vehicle through which EPA is
19 implementing its new interpretation --

20 MR. HUNGAR: If this completely speculative
21 and hypothetical situation were ever to arise, a court
22 might well exercise its equitable discretion to stay
23 proceedings pending review in the D.C. Circuit.

24 JUSTICE BREYER: Can I ask you about an
25 argument I think they did make? I think they made this

1 argument. On page 26 of your brief, I think it's
2 explained well. You set out the regs and the reg says
3 that a major modification is "any physical change in the
4 method of operation that would lead to a significant net
5 emissions increase." Then you have little (iii), which
6 is an exception, and it excepts a physical change which
7 leads to -- is just an increase in the hours of
8 operation or the production rate.

9 So that's out of it. Now, the question is
10 what's in it? If that's out of it, what's in it? I
11 think what they've said is, if you think about that,
12 we'll tell you what must be out of it is a physical
13 change that does nothing to increase the capacity, but
14 just means you can run it more hours. And they say their
15 proof of that is that that was the EPA's interpretation
16 for years and years and years. Indeed, we did what we
17 did thinking that was it.

18 And then after we did what we did, they
19 pulled the rug out from under us and said no, that isn't
20 it; now it means any physical change, like you change a
21 nut, or a bolt, or a tube, even though there's no increased
22 capacity to emit more. It's just you run it more hours.

23 Now, that they say is basically unfair, it's
24 not what this reg has been about. And they made that
25 argument, according to them, very strongly and the

1 Fourth Circuit took the argument and changed it all
2 around and made some propositions of law that it's hard
3 for even them to defend.

4 All right. Now, that's what I think, that's
5 what I think is lying -- maybe that's lying at the
6 heart of it. And if it is, what do you say?

7 MR. HUNGAR: There are several things, Your
8 Honor. First of all the language of the regulation
9 simply does not support that interpretation. What the
10 regulation says is that hours of -- a change in hours of
11 operation is not a physical change. Fine. But we have
12 a physical change here. It is undisputed that Duke made
13 physical changes to its facilities, major modifications,
14 sort of using that term in the non-regulatory sense, but
15 substantial replacements of physical equipment at the
16 facilities. So physical change has occurred. The hours
17 of operation exclusion, therefore, has no longer any
18 relevance because it applies only at the physical change
19 step of the analysis.

20 There has been a physical change here
21 regardless of whether hours of operation changed or not.
22 Therefore, the hours of operation exclusion no longer
23 applies. The next question is whether the -- if the
24 physical change that did occur resulted in a significant
25 net emissions increase. Here it did under the plain

1 language of the regulations and under the test that EPA
2 applies. It is true that 1981 they were arguably
3 mistaken to the extent one can discern what the,
4 Mr. Reich was actually saying, they seem to be simply a
5 mistake in interpretation. But in 1988, the
6 administrator of the agency, the head of the agency,
7 made very clear EPA's position, the very same position
8 it is taking here today on the hours of operation
9 exclusion. The First Circuit in the Puerto Rican Cement
10 case, as Your Honor knows, upheld that interpretation in
11 1989. The Seventh Circuit in footnote 11 in the WEPCO
12 decision upheld that determination in 1990. It was
13 restated by the EPA again and again and it is well
14 established.

15 Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Hungar.

18 Mr. Phillips.

19 ORAL ARGUMENT BY CARTER G. PHILLIPS,

20 ON BEHALF OF RESPONDENT

21 MR. PHILLIPS: Thank you Mr. Chief Justice,
22 and may it please the Court:

23 I think I am inclined instead of starting
24 with the jurisdictional issue to focus initially on the
25 regulatory history immediately in the wake of the 1980

1 rules. Because it seems to me it is very clear that the
2 understanding of everyone in the industry, outside the
3 industry, from 1980, candidly well beyond 1988 all the
4 way up until 1999, was that these regulations didn't apply
5 under any circumstances in the absence of an increase in
6 the capacity. And you had to demonstrate that there
7 would be an increase in the hourly rate of the
8 emissions.

9 JUSTICE GINSBURG: Then why were some
10 companies asking for declarations of nonapplicability?

11 MR. PHILLIPS: To confirm precisely that
12 interpretation. That's exactly why GE went to Mr. Reich
13 and asked for a determination of applicability, and was
14 told categorically PSD applicability is determined by
15 evaluating any change in emissions rates caused by the
16 conversion.

17 JUSTICE GINSBURG: But Mr. Donahue said that
18 there were nonapplicability applications after those
19 early ones that came out the other way. So there were
20 companies --

21 MR. PHILLIPS: No. Well --

22 JUSTICE GINSBURG: -- who asked for a
23 declaration of nonapplication and then EPA took the
24 position that it is currently taking.

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

1 was talking about WEPCO. Understand the context of
2 WEPCO. WEPCO was a situation where every one of the
3 changes was a modification within the meaning of NSPS.
4 And then the question is were they also modification --
5 major modifications within the -- within the meaning of
6 the PSD. And that's what they analyzed. So it didn't
7 say anything about the argument we've been making which
8 is what is a modification. The only statements that I
9 know of that are out there are the two Reich statements
10 which I just quoted to you, says exactly our
11 interpretation. But even more powerful at least in my
12 view is the quotation from the amicus brief from the
13 State of Alabama and the 12 States that relied on the
14 Region 4 statement and that's on pages 7 and 8 of that
15 amicus brief and the answer, the question is -- you
16 know -- how do you determine what is a modification?
17 You know does something that doesn't increase the hours,
18 the emissions per hour, constitute it? It says no.
19 Since the modification does not cause any increase in
20 the hourly particulate emissions, no increase in annual
21 emissions should be calculated. They could not have said
22 that any more clearly than --

23 JUSTICE SCALIA: Who was saying that?

24 MR. PHILLIPS: That is the -- it is the
25 chief of the air and waste management division, James

1 Wolburn, giving guidance to Region 4. Region 4 is not
2 only Alabama, it is also North Carolina and South
3 Carolina. And then, in the wake of this, right? 1982,
4 North Carolina and South Carolina submit their SIPs and
5 in their SIPs, certainly the South Carolina SIP
6 expressly incorporates the concept of modification.
7 North Carolina a little less expressly incorporates the
8 entirety of the regulatory scheme under title 50 -- under
9 part 51 of the Code of Federal Regulations.

10 JUSTICE BREYER: It looks like -- I went
11 back and read the Puerto Rico cement case. And it
12 certainly looks as if -- though the issue was somewhat
13 different. It looks as if the interpretation that the
14 EPA is taking there is not consistent with what you are
15 reading now and is consistent with what they're saying
16 today. And that was in 1988-89, I guess. They must have
17 been starting on that in '87. So it seemed to me we have a
18 mixed bag. Some people were saying the one thing. Some
19 people were saying the other thing. And the later in time
20 seems to be the Puerto Rico cement. And that was at
21 least 17 years ago. And --

22 MR. PHILLIPS: Well, Justice Breyer, I think
23 Puerto Rico cement is a somewhat complicated problem.
24 Because what you are dealing with there is the
25 elimination of two existing units, the two kilns, and a

1 replacement with a brand-new unit, which would have been
2 a modification under any -- I think under anybody's
3 theory, because there would have been an increase in the
4 hourly emissions anyway. So it would have been a NSPS
5 subject to the PSD. It didn't get analyzed that way but
6 the truth is it would have been fully -- the way that
7 decision came out would have been exactly
8 consistent with the way that they analyzed it.

9 JUSTICE BREYER: The analysis which was
10 probably pretty much based on what they said, I think
11 was that the reason there was increased potential here
12 to pollute, was really because this change would permit
13 the plant to be run more intensively or more hours,
14 something like that.

15 MR. PHILLIPS: But that was based on the
16 question of involving you know, normal operations or
17 non-normal operations. The Court really didn't have to
18 address -- and I don't think did address the question of
19 how do you relate --

20 JUSTICE BREYER: No, we didn't address it.
21 I'm not taking it as evidence of that. I'm taking it as
22 evidence that the EPA then had a basic position similar
23 to what they have now.

24 That's what I'm using it as a basis for
25 thinking that they were not saying to have a change, the

1 word "change" includes only a change in physical
2 facilities that increases the amount of emission per
3 hour. Am I right? Or --

4 MR. PHILLIPS: I don't think they were
5 really arguing that particular point. I mean, that's
6 not the way I would have read the argument that EPA was
7 making. But, and the bottom line is they didn't address
8 this issue in WEPCO. To the extent they came close to
9 addressing this issue in WEPCO they lost it in the
10 Seventh Circuit because WEPCO adopted an interpretation
11 that's much closer to what we are asking for.

12 The answer given on the other side at this
13 point, that we should have -- we should have sought a
14 determination. Well, the problem with that, of course,
15 is every one of these projects was being inspected. The
16 record is replete with examples from North Carolina and
17 South Carolina and EPA inspectors on site looking at
18 every one of these projects.

19 JUSTICE BREYER: So then they'll say your
20 argument here, even if you are right, I think they think
21 you're wrong -- but even if you're right, they'll say
22 well, that's an argument that it is arbitrary, capricious
23 abuse of discretion for them to change horses in the
24 middle of the stream, i.e., for them to take an
25 interpretation of a reg that was longstanding and without

1 adequate notice and comment and so forth radically
2 reverse that interpretation. Now that's not the issue in
3 front of us now.

4 MR. PHILLIPS: But that is the issue in
5 front of you, I believe.

6 JUSTICE BREYER: Because?

7 MR. PHILLIPS: Because --

8 JUSTICE BREYER: They say because the Fourth
9 Circuit didn't go really on that, it went on some
10 statutory thing, and --

11 MR. PHILLIPS: To be sure, but that's the
12 opinion. That's not the judgment. The judgment of the
13 court of appeals is that this enforcement--

14 JUSTICE STEVENS: May I ask a question, Mr.
15 Phillips? Focusing on this question in the amicus brief
16 which the EPA representative answered no. Supposing
17 the EPA had answered yes at that time. Would that have
18 been a permissible answer within the meaning of the
19 statute?

20 MR. PHILLIPS: If -- I'm not sure I
21 understood the predicate of the question, Justice Stevens.
22 Which question are you asking?

23 JUSTICE STEVENS: You know -- what's that,
24 page 7 and 8 of the -- of a source to modified
25 have to have a significant increase in the SO2 elements.

1 MR. PHILLIPS: Oh, I see.

2 JUSTICE STEVENS: And they answered no. You
3 say they were right.

4 MR. PHILLIPS: Right.

5 JUSTICE STEVENS: I'm just asking -- want to
6 know, under the statute, could they have answered yes
7 and would that have been a permissible answer?

8 MR. PHILLIPS: No, our position would be no.
9 That would have been an -- inappropriate under the
10 rationale of Justice Scalia.

11 JUSTICE STEVENS: So you're not basically
12 relying on the fact that you were misled, you're
13 basically relying on the fact that they have interpreted
14 the statute incorrectly.

15 MR. PHILLIPS: Yes, actually we're
16 making both arguments. Our basic argument is that all
17 along, they have interpreted it in a certain way. And
18 then 19 years later, they reversed course. And that is
19 arbitrary and capricious, Justice Breyer, and it is a
20 basis on which to defend the judgment of the court of
21 appeals.

22 JUSTICE KENNEDY: Well, is what the government
23 is saying here is that suppose the regulation can be
24 interpreted to say X or Y. X would hurt the company; Y
25 would not. Is the government saying, if it is

1 foreseeable that the agency might take the
2 unfavorable position, you then must challenge it in the
3 D.C. Circuit?

4 MR. PHILLIPS: I think that's exactly what
5 they have to be arguing. And it seems to me that that
6 cannot be what 307(b)(1) means. Justice Kennedy, you
7 asked a great question. Should we have raised this in
8 1980, 1992, 2000? When were we supposed to bring this
9 up? And the truth is in 1980 we interpreted this
10 statute, the regulation, exactly the same way EPA did.
11 It would have been silly for us to raise that. It is
12 true that this issue comes up 25 years later in a
13 bizarre proceeding. But that's not what 307(b)(2) is
14 all about. It says you are precluded from making a
15 challenge in an enforcement action if the action of the
16 administrator was subject to challenge. Well, the
17 action of the administrator was not subject to challenge
18 in 1980. And when we did have the subsequent
19 rulemaking --

20 CHIEF JUSTICE ROBERTS: Just a pause, under
21 your view or the Fourth Circuit's view? If you read
22 Judge Tatel's opinion in *New York versus EPA*, he
23 suggests -- suggests, he says that EPA adopted different
24 interpretations of modification from the outset. And so
25 if what you are saying couldn't have been challenged,

1 was the Fourth Circuit's view, that may not be accurate.
2 But if you are saying what couldn't have been
3 anticipated was the argument you actually made to the
4 Fourth Circuit, that might be a different story.

5 MR. PHILLIPS: Yes. Well, I think that, that
6 is precisely what we are saying. But you know, Judge
7 Tatel, with all due respect to him, is dead wrong.
8 Because the interpretation of modification under NSPS
9 and under the regulatory PSD was identical. The
10 regulations couldn't be any clearer in that regard
11 because if you look at 15a of our appendix, you know,
12 the modification, this is the NSPS definition -- I'm
13 sorry, better go back a page. 17a. 60.14
14 modification defines emission rate and the emission rate
15 is expressed as kilogram per hour. So that is
16 absolutely clear that that is the NSPS --
17 Dobbs modification.

18 JUSTICE SCALIA: That's the NSPS section.

19 MR. PHILLIPS: That's the NSPS section.
20 Then you go two pages earlier to 15a and you have the
21 PSD regulatory definition, and it comes right back to
22 emission rate, or the regulatory history that says the
23 emission rate as used in this provides is identical --

24 JUSTICE SCALIA: They say that that
25 provision only applies when there is no SIP. And that's

1 not this case.

2 MR. PHILLIPS: Well, in the first place it
3 would apply in at least South Carolina immediately
4 because there is a SIP that incorporates exactly the
5 same language. And second of all, the notion that this
6 regulation is inoperative on one side and fully
7 operative on the other side make no sense. It makes
8 much more sense to recognize that modification is the
9 trigger for construction which is in part 51(2) and that
10 that incorporates this entire modification language.

11 JUSTICE SCALIA: I don't understand that.
12 It seems to me each part has had different definitions
13 and this definition only applies to part 52 which
14 applies when there is no SIP.

15 MR. PHILLIPS: Okay.

16 JUSTICE SCALIA: I don't know how you can
17 say it automatically applies when there is a SIP.

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

19 JUSTICE SCALIA: Part 51, in other words.

20 MR. PHILLIPS: Right. Go back to then -- you
21 have to go back to 12(a), I think it is where we talk
22 about the interpretation and we get to construction.
23 This is (b)(8), construction means a modification, okay,
24 of an emissions unit. So that -- and modification, if it
25 is undefined in title 51, right? According to 15.100,

1 means whatever it means under the statute. So that just
2 takes you back to the statute. And this is the
3 interpretation under the statute. The 52 interpretation
4 is also an interpretation under the statute.

5 So it is completely circular and brings you
6 right back to the same definition. I agree by its terms
7 it doesn't apply to 51. But going through the
8 definitional provision in part 51 through the definition
9 of the trigger for construction, which is modification,
10 it takes you right back to the same meaning of the same
11 provisions.

12 So there is no difference between the two.
13 And to me, it is really critical. And it seems to me
14 there are sort of two points to make here. One is
15 nobody on the Petitioner's side of this case answers the
16 State -- the dozen States who say we relied upon you
17 when we adopted these SIPs. We realized that you are
18 asking us to take on enormous burdens. And you should
19 have told us that before we went down this path in the
20 first place.

21 JUSTICE SCALIA: Mr. Phillips, before you
22 get away from this section 52, because I think that is
23 the best section for your case, 52.01(d), is there, is
24 there any sensible reason why you would want to have a
25 different definition of modification for non-SIP

1 situations than you would for SIP situations?

2 MR. PHILLIPS: No. Absolutely not. I mean,
3 you would -- you -- there is no rational --

4 JUSTICE SCALIA: That occurred to me when--

5 MR. PHILLIPS: And I have not heard the other
6 side make an argument that there is a rational
7 distinction between the two. And the truth is if EPA
8 wanted to achieve what it thought it was achieving, that
9 is to eliminate the concept of modification, what it
10 should have done is two things.

11 It should have -- it should have deleted
12 52.01. And it should have adopted the proposed
13 regulation that it didn't adopt from the 1979 regs.
14 This is on page 9 of their brief. This statement is
15 astonishing to me. "The term major modification serves
16 as the definition of modification or modified when used
17 in the act in reference to a major stationary source."

18 If they had adopted that regulation in 1980, I
19 wouldn't had to litigate this issue 25 years later.
20 We would have litigated this question in 1980 because
21 then we would have said that's flatly inconsistent with
22 the statutory scheme because you're not entitled.

23 JUSTICE SCALIA: You're quoting page 9?

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

25 JUSTICE SCALIA: Oh, in their reply brief?

1 MR. PHILLIPS: The SG's reply brief, I apologize.
2 The gray brief. Where they seek to get some support for
3 the idea that modification was dropped out of this
4 analysis. But the truth is, that was a proposed rule
5 that would have done exactly what they say that the 1980
6 rule did without adopting that particular regulation.

7 JUSTICE STEVENS: Mr. Phillips, can I ask
8 another sort of basic question? In your view, would it
9 be permissible for the agency to interpret the word --
10 to adopt a regulatory interpretation of the -- in the
11 PSD regulations of the word "modification" that was
12 different from the definition it used under the new
13 source regulations?

14 MR. PHILLIPS: Substantively different?

15 JUSTICE STEVENS: Substantively different.

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

18 JUSTICE STEVENS: You think the statute
19 required the regulation to be identical?

20 MR. PHILLIPS: Yes. I don't understand how
21 it's possible that Congress says in the statute that you
22 take the NSPS trigger -- remember, this is not just some
23 random definition we're talking about. Construction is
24 the trigger for this part of this entire regulatory
25 scheme, and modification is the trigger, and say it is

1 as defined in, and they did it twice.

2 JUSTICE STEVENS: Your answer is no?

3 MR. PHILLIPS: My answer is no.

4 (Laughter.)

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

6 JUSTICE SCALIA: It's definitely no.

7 (Laughter.)

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

10 JUSTICE STEVENS: Would it have been
11 permissible for the agency to adopt one definition for
12 10 years and then change the definition to the other
13 definition for all programs?

14 MR. PHILLIPS: For all of it?

15 JUSTICE STEVENS: Yes.

16 MR. PHILLIPS: Yes. I think there is plenty
17 of room within that --

18 JUSTICE STEVENS: So either definition could
19 comply with the statute?

20 MR. PHILLIPS: Yes. I think as long as you
21 maintain consistency between the two, there is a fair
22 amount of discretion for --

23 JUSTICE BREYER: The obvious reason to do it
24 is, I guess you have an area of the country, let's say,
25 which is quite clean in the air. And there is a power

1 plant. And what somebody works out, which is normal, is
2 demand for electricity is increasing. And so what we
3 will do is we're going to take these turbines and
4 system, and we're going to change it really radically.
5 It doesn't produce one more particle per hour, but now
6 we can run it 24 hours a day and previously we'd run it
7 12 hours a day. So there's going to be twice as much
8 pollution in the air. Now the whole idea of the PSD
9 system is you don't have twice as much pollution in the
10 air, and I guess that's why they wanted to do it.

11 MR. PHILLIPS: Well, I think the premise of
12 that is, the real question is, if Congress had meant
13 that, why would Congress have adopted the same word,
14 modification, as the construction trigger that existed
15 in NSPS?

16 JUSTICE BREYER: Because you can use the
17 same word, you can apply the same word in different
18 places differently, depending on what your basic object
19 is in the different place. It's very hard to say what
20 kind of modification might exist over here, there, the
21 other place. And you put your finger on a very
22 difficult question for power companies, because those
23 turbines do go at different amounts of rates and so
24 forth during a day, during a month, during a year, so
25 it's hard for them. Therefore, you have a complex

1 definition.

2 What's wrong with that?

3 MR. PHILLIPS: Because by the time the
4 statute came up for review by Congress, and the PSD
5 program, the new source review, there was already a very
6 extensive regulatory history about the meaning of the
7 term "modification."

8 JUSTICE SCALIA: Well, I think what's wrong
9 with it is that you could have achieved that same result
10 by simply not saying that modification in one program
11 has to mean the same as modification in the other. If
12 you didn't say that, that would be the result. You give
13 modification whatever meaning you think is reasonable
14 here. You give it whatever reading you think is
15 reasonable in the other place. But when you say the two
16 have to be the same, it seems to me you have something
17 else in mind.

18 MR. PHILLIPS: And it also seems to me,
19 Justice Breyer, it clearly creates an obligation on the
20 part of EPA to be very explicit if it's, in fact, going
21 to do what you say it's going to do. You don't go about
22 saying I am going to define modification in one statute
23 fundamentally different from the way I define
24 modification in another statute without discussing the
25 word modification.

1 And to put this in context, you'll remember,
2 these regulations were adopted in the wake of the Alabama
3 Power decision. Alabama Power didn't deal with the
4 issue of modification. That wasn't before the court.
5 Nobody had challenged modification's definition. The
6 hourly emissions rate was a perfectly valid one. What
7 the court in Alabama Power said is, you can't use this
8 threshold for major modification. And then the case --
9 so then the matter comes back, and if EPA immediately
10 adopts a new set of regulations that deal what, with
11 what? Major modification, not with modification.

12 And then they go through this entire
13 elaborate analysis of major modification, none of which,
14 candidly, do we challenge. We have no quarrel with
15 their interpretation of the concept of major
16 modification. If anybody does, my guess is the State
17 environmental groups would.

18 JUSTICE STEVENS: They make a kind of
19 interesting argument, major modification is not a subset
20 of modification.

21 MR. PHILLIPS: Yeah. And if the Solicitor,
22 and if EPA had enacted the regulation that they proposed
23 but didn't enact, that says major modification means
24 modification, then we might have an argument there. But
25 the concept that when you have modification as a core

1 baseline construction -- I mean trigger for the
2 applicability of this portion of the scheme, and then
3 you take that same -- and you not only do it once but
4 you do it twice, and you do it in the context of an
5 entire regulatory scheme that was designed to implement
6 this statutorily -- or implement this before the statute
7 was enacted, and you have Congress saying well, you
8 didn't get that right, but you did get this right, and
9 they leave this language exactly in the way it is, the
10 only fair inference you can draw from that, it seems to
11 me --

12 JUSTICE BREYER: Why? Because the language,
13 I don't see anywhere in the statute where -- the words
14 of modification are, it's a physical changing or change
15 in a method of operation which increases the amount of
16 any air pollutant. Now those words, "physical change
17 which increases the amount of any air pollutant," could
18 mean different things in different places.

19 MR. PHILLIPS: Sure.

20 JUSTICE BREYER: Where does it say in the
21 statute that they can't?

22 MR. PHILLIPS: Where it says in the statute
23 is where it makes this specific cross-reference, because
24 if all they wanted to do was get that definition, all
25 they had to do was use the word modification. They

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

2 JUSTICE STEVENS: Mr. Phillips, I want to be
3 sure I understand your position. Are you saying the
4 statutory text in effect says every regulation using the
5 word modification must employ the same definition, or
6 are you relying on a general principle that when the
7 same word is used it should be used in the same way?

8 MR. PHILLIPS: It's a general principle
9 that --

10 JUSTICE STEVENS: So there's nothing in the
11 statute itself that says that principle shall apply to
12 this case?

13 MR. PHILLIPS: No, but the general principle
14 is that if the same language is used in two different
15 portions, you presume they have the same meaning. When
16 you go beyond that -- because otherwise, their
17 interpretation rendered superfluous the specific
18 cross-references to as defined in and as used in; and
19 while I know some don't like the legislative history,
20 the legislative history is quite clear that they had in
21 mind, and regulatory history as well --

22 CHIEF JUSTICE ROBERTS: Your answer is you
23 are not relying simply on the general principle. It is
24 not just that they used the word modification in one
25 place and the word modification in the other. It's that

1 in the latter place, they said modification as defined
2 in the first place.

3 MR. PHILLIPS: It depends on which general
4 principle, I suppose you're talking about. I'm not
5 relying on the mere presumption. I think this is much
6 stronger than the mere presumption.

7 JUSTICE STEVENS: But your reference of
8 modification as defined elsewhere merely defines the
9 scope of the statutory meaning. That's not the same as
10 saying every regulation that is a modification must be
11 the same no matter what the program.

12 MR. PHILLIPS: I think if you read it in
13 context, when you recognize that what Congress was doing
14 is adopting a statutory scheme that overlays on a
15 regulatory scheme that was well established with very
16 specific meanings, and where Congress quite clearly
17 picked and chose -- I think that's the way to say it --
18 from the regulatory scheme, and said we'll take these
19 and not take those, and has a provision at the end --
20 168 says, all the regulations remain in effect until
21 they get changed at some point, suggesting --

22 JUSTICE STEVENS: Let me just be sure I
23 understand the point. If instead of saying as defined
24 in X, the second statute had merely quoted the same
25 words that were in X, would your argument be the same?

1 MR. PHILLIPS: No. It would not be nearly
2 as strong as it is. We would still have a
3 presumption --

4 JUSTICE STEVENS: So you're saying that if
5 you used the definition as defined in another statute,
6 that implicitly says all regulations defining this term
7 must be identical.

8 MR. PHILLIPS: I don't know if I have to go
9 quite that far because I have more evidence than that in
10 this particular case, because I have the fact that they
11 say as used in, which suggests that it's more than just
12 a definitional point. We do have a legislative history
13 that seems to have in mind this regulatory background;
14 and we've been told by EPA that when Congress
15 incorporated modification, it really did incorporate
16 that luggage, baggage as well.

17 JUSTICE STEVENS: This is very helpful to
18 me, because the government has accused you of abandoning
19 the court of appeals approach to the case, and I think
20 you're endorsing the court of appeals.

21 MR. PHILLIPS: I do endorse it. The only
22 question I have -- I mean, I don't think that it
23 necessarily has to be -- that every word has to be
24 identical in the two provisions, but I do think they
25 have to be congruent. And so, that's the strong version

1 of our argument, and that's pretty close to where the
2 Fourth Circuit was.

3 The weaker version of our argument, which
4 gets I think some mileage on the arbitrary and
5 capricious part of the argument, is at a minimum, if
6 Congress adopts as the trigger point the same word in
7 two statutes, and EPA then purports to be implementing
8 that statute, it has some obligation to explain how it
9 is that they're doing a 180 with respect to the term
10 modification. And the reason --

11 JUSTICE SCALIA: It's not just a matter of
12 using the same word.

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

14 JUSTICE SCALIA: It's a matter of a statute
15 which says it shall have the same meaning.

16 MR. PHILLIPS: Right. They owe us some
17 responsibility to explain, how do you not follow that
18 course.

19 JUSTICE KENNEDY: Well, could they have said
20 that construction means both modification and then come
21 up with a new word, alteration? Because the statute
22 says the term construction includes modification, so
23 I -- construction can be broader. Could it be an
24 alteration, they would come up with a new term of art,
25 and add that --

1 MR. PHILLIPS: Absolutely.

2 JUSTICE SCALIA: -- to the PSD?

3 MR. PHILLIPS: Could they have gotten away
4 with that? I mean, that would have been a much stronger
5 argument. It seems to me the better argument, and --
6 but see, the point here is if they had done that, or if
7 they had done what they proposed in 1979, which is just
8 to simply redefine major modification to be
9 modification, then we would have taken that issue
10 directly to the D.C. Circuit at that point in time.

11 JUSTICE BREYER: But you do have a brief
12 here. You have a brief filed in the D.C. Circuit, which
13 is Brief For Industry Petitioners on Actual Emissions
14 Definition.

15 MR. PHILLIPS: Yes.

16 JUSTICE BREYER: And throughout that brief
17 it refers again and again to the problem, their proposed
18 reg is not taking, i.e., the potential capacity, which
19 is change the machine so it puts out more per minute or
20 whatever, but rather, it's using actual emissions even
21 though you don't change the capacity of the machine.
22 There's a whole brief on that. So you already argued
23 that whole brief, that what they were doing was
24 inconsistent with the statute, et cetera.

25 MR. PHILLIPS: The other side has not argued

1 collateral estoppel, if that's the argument you're
2 trying to make, Justice Breyer.

3 JUSTICE BREYER: No. As being outside the
4 statute at that time, and you did.

5 MR. PHILLIPS: Well, you have to put that
6 into context. We're talking about a matter that was
7 closed for 25 years and then was reopened. And this
8 argument -- and it is true, a variant of this argument
9 was made. I don't think it's the full argument that
10 we've made before this Court. And it was rejected by
11 the D.C. Circuit. But if you're arguing that as a
12 307(b) argument, my answer to that is this is still not
13 action by the administrator that would trigger a 307(b)
14 bar. If you're asking about collateral estoppel, my
15 argument is --

16 JUSTICE BREYER: No. I was just thinking,
17 then you're left with what you called the weak argument,
18 arbitrary, capricious, et cetera, because I don't see
19 how you make the stronger one, what you think is
20 stronger, since you made it before, or a version of
21 it before the D.C. Circuit.

22 MR. PHILLIPS: Well, again, if you are
23 arguing that as a matter of collateral estoppel, then --

24 JUSTICE BREYER: No, not collateral
25 estoppel, but you know, I'd be repeating myself.

1 MR. PHILLIPS: But if it's not collateral
2 estoppel and it's not 307(b)(2), then --

3 JUSTICE BREYER: That's what it is.

4 MR. PHILLIPS: So you are doing it as --
5 see, I don't think it -- I think if you read 307(b)(2)'s
6 language, it talks about action of the administrator,
7 and what action of the administrator are we, in fact,
8 challenging here? Nothing. Because in our view, the
9 1980 regulation quite clearly says what we want it to
10 say. The only thing that's changed is that the
11 preambles have interpreted the 1980. We challenged that
12 and the D.C. Circuit said no, we're not going to address
13 that issue. That's an issue when you get back up, when
14 you get back on your enforcement action. Then you can
15 complain about that aspect of it. That issue is not
16 ripe. And that is exactly what we are trying to argue
17 in this case. And it's a variant of what I think --

18 JUSTICE STEVENS: Mr. Phillips, can I go
19 back for a second to the meaning in (a) includes the
20 same meaning as in (b). Is it not correct under your
21 view of the statute that that meaning can include either
22 of the two definitions that the two regulations
23 identify? So that either -- whether you start with (a)
24 or the second statute, either statute includes both --
25 may include both alternative regulations?

1 MR. PHILLIPS: As long as they are
2 consistent?

3 JUSTICE STEVENS: Yes.

4 MR. PHILLIPS: Yes. That is my position,
5 Justice Stevens.

6 CHIEF JUSTICE ROBERTS: Could you explain to
7 me again why this isn't a 307(b) problem? You said this
8 is an action by the administrator?

9 MR. PHILLIPS: Right. Because there is no
10 action of the administrator that we would challenge.
11 The only action of the administrator was the 1980
12 regulation, which we interpret as not changing
13 modification. If you read 52.01(d), it clearly retains
14 modification. We have no quarrel, then, with what the
15 administrator did in 1980.

16 Then they adopt preambles to the subsequent
17 regs. We do challenge those, but the D.C. Circuit said
18 we're not entitled to do that, that's got to wait for an
19 enforcement action. The only thing that's left out
20 there is this sort of inchoate interpretation by the
21 administrator. But there's no final action by the
22 administrator for us to challenge. Then the only
23 question would be, do we have some obligation --

24 CHIEF JUSTICE ROBERTS: You can't challenge
25 in the D.C. Circuit the administrator's interpretation

1 that led to the enforcement action?

2 MR. PHILLIPS: I don't know how that's a
3 final action. The filing of a complaint, as this Court
4 held in Harrison, is not a final action. So that
5 doesn't trigger it, and I don't know what else is out
6 there for us to serve as a hook. I would think at a
7 minimum the Court would want to be very, very loathe to
8 jump on a expansive interpretation of 307(b) where it
9 operates in a context like this as a pure gotcha. You
10 adopt regulations that nobody has a quarrel with, you
11 change the regulation afterwards and then you come back and
12 you say you can't challenge it at this point. That just
13 cannot be a sensible interpretation of that statute.

14 If there are no further questions, I would
15 ask the Court to affirm the Fourth Circuit. Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr.
17 Phillips.

18 Mr. Donahue, you have 3 minutes remaining.

19 REBUTTAL ARGUMENT OF SEAN H. DONAHUE
20 ON BEHALF OF PETITIONER

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

22 You just can't read the 1980 regulations to
23 achieve the result Duke is seeking here. There is no
24 hourly rate in there, and it's important to note that
25 these provisions that they now state misled them into

1 their non-challenge, they didn't even cite to the Fourth
2 Circuit or the district court, and on their face,
3 they're not -- it's not plausible that these provisions,
4 which are totally nonspecific, were intended to vary the
5 very detailed and specific instructions on how to
6 measure an emissions increase laid out. And the
7 preamble --

8 JUSTICE SCALIA: Well, the one in part 52
9 surely does. You have to give them that.

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

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

12 MR. DONAHUE: Because it says rate, and the
13 1980 PSC regulations say that the relevant rate is tons
14 per year. They use the word "rate" pervasively.

15 I would also say the preamble to the rule
16 makes conclusively clear that "major modification" is
17 EPA's definition of the statutory term. This idea that
18 EPA, it's completely inconsistent with not only --

19 CHIEF JUSTICE ROBERTS: Major -- when you say
20 the statutory term, you mean "modification"?

21 MR. DONAHUE: Correct.

22 CHIEF JUSTICE ROBERTS: So then why weren't
23 those proposed regulations saying just that, adopted?

24 MR. DONAHUE: I don't know the answer to
25 that, but it's absolutely clear. EPA has never said

1 otherwise. And of course the idea that an NSPS
2 modification is required first, it would have been a big
3 deal. There is no sign of it, and in fact there are
4 specific examples. The example cited at page 23 of the
5 government's opening brief in the preamble is a PSD
6 major modification that would not be an NSPS --

7 CHIEF JUSTICE ROBERTS: That's a tough sell,
8 isn't it? I mean, the idea is you propose regulations
9 saying major modification means modification. Those
10 regulations are not adopted, and then the industry is
11 supposed to be on notice that that's still what you
12 mean?

13 MR. DONAHUE: I think that there's no other
14 reading of what EPA meant from the regulations. No one
15 was confused by this, Chief Justice Roberts. No one was
16 confused.

17 This argument, it's a new argument in this
18 Court about how to read the rules, the 30 -- 52.01(d),
19 51.100, and 51.166(b)(8), all uncited below. It's really
20 not plausible. The Court would have to abandon a lot of
21 very basic principles of how to interpret legal texts to
22 read the rules this way, and I think Judge Poinsner was
23 right on that. He was right to say this is the natural
24 reading of the rules.

25 JUSTICE SCALIA: Where is "rate" defined?

1 I'm still troubled by 52.01(b). Where is -- you say
2 "rate" is defined. Where?

3 MR. DONAHUE: "Rate" is used as an annual
4 rate in 51.166(b) (21) and (b) (23).

5 JUSTICE SCALIA: It's not defined. You
6 say it's just used that way.

7 MR. DONAHUE: It's the only -- it's tons
8 per year consistently.

9 The other thing I would point out, as the
10 Court is aware, is that 307(b) applies it bars courts in
11 enforcement actions, which includes this Court. This
12 case is not up on cert from the D.C. Circuit in New
13 York.

14 Thank you very much.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Donahue. The case is submitted.

17 (Whereupon, at 11:02 a.m., the case in the
18 above-entitled matter was submitted.)

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