



**April 4, 2007**

## **SUPREME COURT UPHOLDS EPA CLEAN AIR ACT ENFORCEMENT ACTION** *(Environmental Defense v. Duke Energy Corp.)*

The Supreme Court unanimously ruled in favor of the Environmental Protection Agency (EPA) earlier this week and overturned a court of appeals ruling in favor of Duke Energy Corporation regarding EPA's controversial interpretation of one of its major Clean Air Act regulations.

In *Environmental Defense v. Duke Energy Corp.*, the EPA filed an enforcement action against Duke Energy in 1999 in federal court in North Carolina claiming that the power company violated EPA's 1980 Prevention of Significant Deterioration (PSD) rule by failing to get a permit when it modified its power plants. At issue was the EPA's recent interpretation of its 1980 PSD Rule that would require power companies to comply with the rule and incur huge costs, even though the modification would result in *less* emissions from its power plant. The district court and the U.S. Court of Appeals for the Fourth Circuit ruled in favor of Duke Energy, stating that EPA's application of rule violates the plain language of both the Clean Air Act and rule itself.

In the Supreme Court, the environmental groups and the EPA argued that the lower courts were not only wrong, but were precluded from even reaching the merits of Duke Energy's defense because as a jurisdictional matter, challenges to EPA's action or rule under the Clean Air Act can only be brought in the U.S. Court of Appeals for the D.C. Circuit within 60 days after a final rule or action is taken. Because the Supreme Court ruled that the EPA's interpretation of its rule was permissible, it did not reach the jurisdictional issue of whether the court of appeals was precluded from hearing a challenge to the EPA rule, an issue which WLF had addressed in its brief.

The decision can potentially increase the cost to power plants and require retrofitting of facilities when a "modification" is made to the facility. There is also likely to be future litigation over the otherwise exempted "routine maintenance" provision under the New Source Review (NSR) regulatory scheme. Finally, proposed rulemaking by the EPA on the NSR permitting program which is pending may likely be modified based on this recent decision.

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