

05-848 ENVIRONMENTAL DEFENSE V. DUKE ENERGY CORPORATION

DECISION BELOW:411 F3d 539

LOWER COURT CASE NUMBER: 04-1763

QUESTIONS PRESENTED:

In this civil enforcement action under the Clean Air Act, the Fourth Circuit ruled that EPA's definition, embodied in a 1980 regulation, of emissions "increases" for purposes of the Prevention of Significant Deterioration (PSD) program violates the Act because it differs from a regulatory definition EPA employs to measure emissions increases under another program under the Act, the New Source Performance Standards (NSPS). Both the court's holding and its analysis of the statute conflict with decisions of other courts, including a decision rendered by the D.C. Circuit rejecting challenges to the very regulations at issue in this case, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). The questions presented are:

1. Whether the Fourth Circuit's decision violated Section 307(b) of the Act, which provides that national Clean Air Act regulations are subject to challenge "only" in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and "shall not be subject to judicial review" in enforcement proceedings, 42 U.S.C. 7607(b); and
2. Whether the Act's definition of "modification," which turns on whether there is an "increase" in emissions and which applies to both the NSPS and PSD programs, rendered unlawful EPA's longstanding regulatory test defining PSD "increases" by reference to actual, annual emissions.

CERT. GRANTED 5/15/2006