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RECENT FOURTH CIRCUIT ENVIRONMENTAL JURISPRUDENCE

BRIAN M. HENDRICKS*

Each year, the staff of the *William and Mary Environmental Law and Policy Review* prepares a detailed summary of the major decisions of the U.S. Court of Appeals for the Fourth Circuit that implicate environmental law and policy. In prior editions of the *Review*, this has been referred to as the *Fourth Circuit Summary*. This practice is part of the Journal's ongoing effort to serve practicing attorneys and members of the academic community. The Editors selected the cases that follow from the body of environmental cases decided in the Fourth Circuit during 2005.¹

I. CLEAN WATER ACT: *UNITED STATES V. LAPTEFF*² AND *AMERICAN CANOE ASSOCIATION V. MURPHY FARMS, INC.*³

In September of 2005, the U.S. Court of Appeals for the Fourth Circuit heard oral arguments in *United States v. Lapteff*, a case in which a jury in the U.S. District Court for the Eastern District of Virginia convicted the defendant for failing to comply

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¹ The *Fourth Circuit Summary* prepared for Volume 29 contained an analysis of *Harper v. West Virginia Public Service Commission*, 396 F.3d 348 (4th Cir. 2005), decided in January of 2005. For an analysis of *Harper*, see Samuel R. Brumberg & Christopher D. Supino, *Fourth Circuit Summary*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 849, 849-51 (2005).

² *United States v. Lapteff*, No. 03-4850, 2005 U.S. App. LEXIS 28333 (4th Cir. Sept. 19, 2005) (unpublished opinion).

³ *Am. Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 412 F.3d 536 (4th Cir. 2005).

with requirements relating to the operation of a wastewater treatment facility for Christchurch School.⁴ The defendant appealed his conviction, arguing that the District Court improperly admitted evidence of “other crimes,” including a previous conviction for filing a false tax return, and that the district court made findings of fact for sentencing purposes not reviewed by the jury, which violated established Supreme Court precedent.⁵ The appeal is noteworthy because the holding provides that prior conduct relating to the environment may be admissible in subsequent criminal prosecutions, and because it illustrates the role that the Supreme Court’s decision in *United States v. Booker*,⁶ will continue to play in reshaping how lower courts determine sentences in light of the decision to change the United States Sentencing Guidelines from a mandatory framework to an advisory tool.⁷

In 1997, Christchurch School entered into an arrangement with Analytech, Inc. to manage the school’s wastewater facility.⁸ From April of 1997 through March of 2002, Alexander Lapteff operated the facility as an agent for Analytech in a manner that violated the National Pollution Discharge Elimination System Permit (“the permit”) issued to Christchurch School.⁹ Investigators from the Virginia Department of Environmental Quality (“DEQ”) began observing the conduct of Lapteff and Analytech in late 2001, and found a number of ongoing violations of the permit.¹⁰ In early

⁴ *Lapteff*, 2005 U.S. App. LEXIS 28833, at **2-3 (noting that after a federal grand jury returned an eighteen count indictment against the defendant, a jury ultimately convicted him of six charges and a lesser included offense of negligent failure to maintain and properly operate a sewage treatment facility).

⁵ *Id.* at **2.

⁶ *United States v. Booker*, 543 U.S. 22 (2005).

⁷ See Brian Hendricks, *In Pursuit of Environmental Regulatory Compliance: Should We Flex the ‘Public Trust’ Enhancement Muscle?*, 30 WM. & MARY ENVTL. L. & POL’Y REV. 153, 161-63 (2005) (discussing the recent decision in *Booker* in which the Supreme Court held that mandatory sentencing guidelines that require courts to make findings of fact, not otherwise presented to a jury, violates the Sixth Amendment of the United States Constitution).

⁸ See *Lapteff*, 2005 U.S. App. LEXIS 28833, at **3.

⁹ *Id.* at **4.

¹⁰ *Id.* at **3-4.

2002, an investigator from DEQ discovered discrepancies between the log book entries detailing daily maintenance activities at the facility and the activities that investigators actually observed.¹¹ Investigators also discovered that a number of log books were missing from the facility.¹²

At trial, prosecutors offered information relating to past misconduct by the defendant into evidence. Specifically, prosecutors offered (1) a 1982 communication between the Virginia State Water Control Board and Lapteff admonishing him for withholding data from a water quality report,¹³ (2) information relating to a 1991 revocation of Lapteff's Class I wastewater operating license as the result of a mistaken chlorine discharge,¹⁴ (3) and Lapteff's 1992 conviction for filing a false tax return, which the prosecution successfully argued bore on the current charges and could be used for impeachment purposes because it was a conviction for a crime involving dishonesty or false statements.¹⁵ The jury convicted Lapteff on three counts of making false statements in a log book, two counts of making false statements in a discharge monitoring report, one count of failure to maintain proper records relating to monitoring activities, and one count of negligent failure to maintain and properly operate a sewage treatment facility.¹⁶ The district court sentenced Lapteff to thirty-six months in prison followed by a year of supervised release, \$5,000 in fines, and a \$625 special assessment.¹⁷

¹¹ *Id.* at **4.

¹² *Id.* at **5.

¹³ The communication from the Virginia State Water Control Board was a letter from Eugenia Grandstaff informing Lapteff that his report omitted data on the reason for performing a specific water quality test and that misrepresenting data, or failing to report data, was a falsification of records and a criminal offense. *Id.* at **7.

¹⁴ Defense counsel argued that admitting evidence relating to the chlorine discharge, which resulted in a significant "fish kill," was "emotive and unfairly inflamed the passions of the jury." *Id.* at **9.

¹⁵ See *Lapteff*, 2005 U.S. App. LEXIS 28833, at **11.

¹⁶ *Id.* at **2.

¹⁷ *Id.*

Ultimately, the U.S. Court of Appeals for the Fourth Circuit found that all of the evidence admitted against Lapteff met the requirements of Federal Rules of Evidence 403 and 404(b).¹⁸ Notably, the government conceded that Lapteff's actual sentence violated the holding in *Booker* because it was imposed under a mandatory sentencing regime.¹⁹ The court affirmed the conviction and remanded for sentencing consistent with the holding in *Booker*.²⁰ The re-sentencing is noteworthy because it may provide an indication of how judges operating under advisory sentencing guidelines, at least in the Fourth Circuit, will use information relating to defendant conduct in crafting sentences for environmental crimes. Prior to the *Booker* decision, judges would look to specific sections of the United States Sentencing Guidelines that related to environmental crimes, including §§ 2Q1.1-2Q1.4 and § 2Q2.1, to determine if individual defendant conduct merited an upward or downward sentencing adjustment.²¹ The *Lapteff* decision reenforces the idea that judges can no longer simply rely upon the sentencing guidelines, but must instead adhere to the *Booker* framework to avoid sentencing remands.

In May of 2005, the U.S. Court of Appeals for the Fourth Circuit heard arguments in an appeal from a judgement of the U.S. District Court for the Eastern District of North Carolina in which the court ruled that a plaintiff group met the statutory requirements²² necessary to file a citizen suit for violations of the Clean Water Act.²³ This appeal resulted from a narrow issue remaining

¹⁸ See *id.* at **7.

¹⁹ *Id.* at **14.

²⁰ *Id.* at **15.

²¹ See Hendricks, *supra* note 7, at 160 and nn.44-45 (discussing the sentencing guidelines relating to environmental crimes and the availability of conduct-specific sentencing adjustments).

²² *Am. Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 412 F.3d 536, 537 (4th Cir. 2005) (*Am. Canoe Ass'n II*).

²³ Section 505(a) of the Clean Water Act, appearing at 33 U.S.C.S. § 1365(a) (LexisNexis 2006) permits a citizen group to bring a suit if they allege that there is either a state of continuous or intermittent violations, which is essentially a reasonable likelihood that a past polluter will continue to pollute in the future. *Am. Canoe Ass'n II*, 412 F.3d at 539.

from lengthy prior litigation, which is detailed in *American Canoe Association, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 509-12 (4th Cir. 2003).²⁴ The citizen groups involved in this decision originally filed suit against Murphy Farms, Inc. and D.B. Farms of Rosehill in 1998, arguing that the farms lacked a National Pollution Discharge Elimination System permit but nevertheless engaged in the practice of spilling swine wastewater into North Carolina rivers.²⁵ The United States government intervened in subsequent litigation and, as a result, the parties entered into a consent decree.²⁶ At the time, the ability of the citizen groups to participate in the consent decree, which would provide them with attorney's fees, remained contingent on their ability to show that they had standing to file their initial complaint.²⁷

The United States District Court for the Eastern District of North Carolina heard the initial request of the citizen groups to establish standing and ruled that the groups had satisfied both the jurisdictional requirements for bringing a suit and possessed Article III standing.²⁸ The U.S. Court of Appeals for the Fourth Circuit initially ruled that the district court's finding with respect to Article III standing was proper, but remanded the case for factual findings relating to the satisfaction of the jurisdictional requirements of Section 505(a).²⁹ The district court held on remand that the facts presented by the citizen groups established that "there was a continuing risk of recurrence in intermittent or sporadic violations

²⁴ *Id.* at 537.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (noting that to show standing, the citizens groups needed to satisfy the jurisdictional requirements of § 505(a) of the Clean Water Act for bringing a citizen suit).

²⁸ *Am. Canoe Ass'n II*, 412 F.3d at 537. Note that Article III standing refers to the subject matter jurisdiction of a court under Article III of the United States Constitution. *See Am. Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 515, 517-18, 520-21 (4th Cir. 2003) (*Am. Canoe Ass'n I*) (discussing Article III standing generally and detailing the need to demonstrate personal injury and traceability to satisfy standing under Article III; and finding that the citizen groups satisfied the elements necessary to acquire Article III standing).

²⁹ *Id.*

at the time [the citizen groups] filed [their] complaint" and that as a result, the citizen groups had satisfied the jurisdictional requirements to bring a citizen suit.³⁰

On remand, the district court examined five specific spill events in which the defendants "discharged or nearly discharged" swine wastewater into a nearby waterway and sprayed the wastewater onto agricultural fields as fertilizer.³¹ Two of the spills occurred before the filing of the complaint, while the other three occurred after the filing of the complaint.³² In each of the five spill events, the court ruled that "there were fewer responsible *and* competent land techs employed and/or on duty than were required to operate the hog waste management system in compliance with the Clean Water Act."³³ The personnel shortage satisfied the district court that there was a risk of recurrence, allowing the citizen groups to meet the jurisdictional requirements.³⁴

In reviewing the defendants' objections to the district court's finding of jurisdiction, the U.S. Court of Appeals for the Fourth Circuit reiterated its prior holdings. Speaking about the need for a citizen group to prove that there is an ongoing violation, the court quoted from its holding in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988):

Citizen-plaintiffs may accomplish this [proof of an ongoing violation] either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not

³⁰ *Am. Canoe Ass'n II*, 412 F.3d at 538 (quoting *Am. Canoe Ass'n I*, 326 F.3d 505).

³¹ *Id.*

³² *Id.*

³³ *Id.* (quoting *Am. Canoe Ass'n I*).

³⁴ *Id.*

cease to be ongoing until the date when there is no real likelihood of repetition.³⁵

The occurrence of the three post-complaint spills satisfied both the district court and the appellate court that the defendants had not effectively eliminated the “real likelihood of repetition” of Clean Water Act violations.³⁶ Notably, the court passed on the opportunity to pronounce whether a single post-complaint occurrence is sufficient to establish an on going violation.³⁷

The defendants also objected to the fact that, in their view, the district court failed to credit their “good-faith remedial efforts” to correct the causal factors that produced the spills.³⁸ The court rejected this argument, claiming that the defendants proposed that “we graft an exemption onto the jurisdictional requirements of section 505(a) to shield from suit those past violators who have undertaken good-faith remedial efforts”³⁹ The court cited to the Supreme Court’s holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987), in which the Supreme Court pronounced that a defendant remains a violator while there exists an actual likelihood of recurring violations, essentially regardless of what the defendant has done to reduce the risk or lessen his current “subjective culpability for that risk.”⁴⁰

The ultimate holding of the U.S. Court of Appeals for the Fourth Circuit in this case essentially reaffirms two important and notable points. A citizen group wishing to file a complaint for violations of the Clean Water Act may simply follow the road map laid out by the court during the course of the *American Canoe* litigation and show that there is a threat of ongoing violations for which it seeks recognition to sue. Second, and perhaps more troubling, good-faith remedial efforts to correct the causes of Clean

³⁵ *Id.* at 539 (alteration in original).

³⁶ *Am. Canoe Ass’n II*, 412 F.3d at 539.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 540.

Water Act violations will not shield a defendant from subsequent suit in the event future violations occur. That is, once a defendant is accused of past violations through a complaint, even taking corrective actions will not stave off liability if at least one subsequent violation occurs because that subsequent violation allows a citizen group to argue that a "a continuing likelihood of recurrence" exists.⁴¹ The impact of such a position on the number of companies willing to undertake voluntary remediation may be quite significant.

II. NATIONAL ENVIRONMENTAL POLICY ACT: *NATIONAL AUDUBON SOCIETY V. DEPARTMENT OF THE NAVY*⁴²

A collection of concerned environmental groups and two counties filed suit against the Department of the Navy and several federal officials in connection with the proposed construction of a military landing field in Washington and Beaufort Counties in North Carolina.⁴³ The Navy undertook an effort to modernize its fighter aircraft and made a decision to station its new F/A-18 E/F Super Hornet aircraft on the East coast to replace older models.⁴⁴ This decision required the Navy to determine where to house the aircraft and where to operate an Outlying Landing Field ("OLF") to conduct Field Carrier Landing Practice.⁴⁵

Throughout 2002 and 2003, the Navy attempted to meet the requirements of the National Environmental Policy Act ("NEPA"), particularly the requirements relating to the preparation of Environmental Impact Statements ("EIS").⁴⁶ The Navy released a draft EIS in August of 2002 for public comment in which it recommended "Site C" in Beaufort and Washington Counties as one of the two preferred sites for the OLF.⁴⁷ In July of 2003, the Navy issued

⁴¹ See *supra* note 30 and accompanying text.

⁴² Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174 (4th Cir. 2005).

⁴³ *Id.* at 183.

⁴⁴ *Id.* at 181.

⁴⁵ *Id.*

⁴⁶ *Id.* at 182.

⁴⁷ *Id.*

its final EIS analyzing eight different “home basing alternatives” and six “potential OLF siting alternatives.”⁴⁸ The Navy’s Record of Decision set forth its final conclusions with respect to placement issues in September of 2003.⁴⁹ The final “homebasing decision” was alternative six, which involved stationing eight Super Hornet fleet squadrons and a Fleet Replacement Squadron at Naval Air Stations Oceana in Virginia Beach, Virginia, and two squadrons at the Marine Corps Air Station Cherry Point in Havelock, North Carolina.⁵⁰ The ultimate siting for the OLF placed it within five miles of the Pocosin Lakes National Wildlife Refuge (“NWR”).⁵¹ The plaintiffs, a number of concerned environmental groups and both Beaufort and Washington Counties, filed suit claiming that the Navy failed to follow the requirements of NEPA because they failed to “adequately assess the environmental impacts of its decision to place an OLF . . .” at the selected site.⁵²

The plaintiffs alleged that the Navy’s siting decision “threatens the waterfowl at the NWR and the eco-tourism to the counties that the NWR provides.”⁵³ In particular, the plaintiffs alleged that the presence of the aircraft in NWR might lead to “flush[ing]” the birds causing them to take flight, actual striking of the birds in flight, and other alterations to the nesting and feeding behaviors of the birds, leading to a reduction in their populations.⁵⁴ The district court entered an injunction to halt efforts by the Navy to advance the planned OLF, stating that the Navy’s EIS “did not adequately address the impacts of an OLF at [S]ite C on migratory waterfowl.”⁵⁵ The Navy appealed the district court decision to the U.S. Court of Appeals for the Fourth Circuit arguing that the Navy had complied

⁴⁸ *Nat’l Audubon Soc’y*, 422 F.3d at 182.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 182-83 (noting that NWR is a 115,000-acre wetlands area “highly populated by nature and thinly populated by man” and was “established specifically as an inviolate waterfowl sanctuary”).

⁵² *Id.* at 183.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Nat’l Audubon Soc’y*, 422 F.3d at 183.

with NEPA and that the district court's grant of a permanent injunction was an improper remedy.⁵⁶

The U.S. Court of Appeals for the Fourth Circuit noted that NEPA is a procedural statute requiring an agency to take a "hard look" at environmental impacts before taking major actions.⁵⁷ The court also noted that the core provision of NEPA compels an agency of the federal government to:

[I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i)the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁵⁸

The foregoing requires the preparation of an EIS, which the court noted must occur in stages that provide the opportunity for feedback from the general public and other agencies.⁵⁹ In this particular case, the Navy argued that each of the procedural steps had been followed and that therefore the district court erred in finding that the Navy failed to comply with NEPA.⁶⁰

The U.S. Court of Appeals for the Fourth Circuit began its review of the district court decision by noting that "[w]hat consti-

⁵⁶ *Id.*

⁵⁷ *Id.* at 184.

⁵⁸ *Id.* (quoting the National Environmental Policy Act, 42 U.S.C. §4332(2)(c) (2000)).

⁵⁹ *See id.* at 185.

⁶⁰ *See id.*

tutes a 'hard look' cannot be outlined with rule-like precision."⁶¹ The court continued by stating that "[a]t the least, however, it encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail."⁶² While the court notes that it cannot use its review of an agency decision as a "guise for second-guessing" decisions within an agency's discretion, it eschews the opportunity to become a "rubber stamp."⁶³ Ultimately, the court looked to the congressional expression made in the legislation creating the NWR at Pocosin Lakes to provide "unique opportunities for observing and interpreting the biological richness of the region's estuaries and wetlands."⁶⁴ According to the court, the Navy's hard look needed to take care to "evaluate how its actions will affect the unique biological features of this congressionally protected area."⁶⁵ Ultimately, the Navy failed to satisfy the court that it met the hard look standard and the court noted that none of the Navy's deficiencies alone would invalidate the EIS but that taken together, the deficiencies indicate the Navy did not conduct a hard look analysis.⁶⁶ As a result, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's grant finding that the Navy failed to comply with NEPA but vacated the injunction and remanded the case with instructions to narrow the injunction in accordance with the decision.⁶⁷

Effectively, the decision in this case reaffirms the Fourth Circuit's position that in conducting a hard look analysis, the

⁶¹ *Nat'l Audubon Soc'y*, 422 F.3d at 185.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 187.

⁶⁵ *Id.*

⁶⁶ *See id.* The court goes into great detail in the balance of its opinion outlining the major components of the Navy's EIS and how each component failed to meet requirements of NEPA. Examples include reaching the conclusion that the OLF citing would have only a minor impact on snow geese and tundra swans without conducting detailed analysis on the species and the properties of the surrounding habitat. *Id.*

⁶⁷ *Nat'l Audubon Soc'y*, 422 F.3d at 207.

agency must follow the steps required by NEPA, including properly prepared EIS documents, and that the analysis must not have "limited the choice of reasonable alternatives."⁶⁸ In this particular case, the Navy appeared overzealous in its execution and went through the process of preparing the EIS and subsequent documents without engaging in the type of thorough and deliberate analysis required to satisfy NEPA.

III. CLEAN AIR ACT: *UNITED STATES V. DUKE ENERGY CORP.*⁶⁹

In February of 2004 the U.S. Court of Appeals for the Fourth Circuit heard oral arguments in *United States v. Duke Energy*.⁷⁰ The United States Environmental Protection Agency ("EPA") brought an enforcement action against Duke Energy, alleging that on numerous occasions Duke Energy modified the furnaces at several of its plants without obtaining the necessary permits, a violation of the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act.⁷¹ The district court granted summary judgement to Duke Energy and the EPA appealed.⁷²

From 1988 to 2000, Duke Energy carried on a plant modernization program consisting of twenty-nine projects on its coal-fired generating units.⁷³ The projects, consisting largely of replacing or redesigning boiler tube assemblies, would extend the life of the generating facilities and allow the units to stay in use for longer periods each day.⁷⁴ Duke Energy did not apply for, or receive, permits from the EPA for any of these projects.⁷⁵ In December of 2000, the government filed suit alleging that the life extension projects constituted "major modifications" under the PSD statutory

⁶⁸ *Id.* at 206 (quoting 40 C.F.R. §1506.1(a)(2) (2005)).

⁶⁹ *United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005).

⁷⁰ *Id.*

⁷¹ *Id.* at 542.

⁷² *Id.*

⁷³ *Id.* at 544.

⁷⁴ *See id.*

⁷⁵ *Duke Energy Corp.*, 411 F.3d at 544.

provisions and regulations and that Duke Energy needed permits for these modifications.⁷⁶

The EPA argued that by comparing the “actual pre-project emissions from a unit to the projected post-project emissions,” the actual yearly emissions would increase as a result of the projects because the plants would each run for more hours each day.⁷⁷ Duke Energy argued that the projects did not increase the actual emissions of each unit for PSD purposes because a net emissions increase would only result if there was an increase in the hourly rate of emissions.⁷⁸ Duke Energy reasoned that since its projects did not ultimately raise the emissions above pre-project levels, it did not need to obtain permits.⁷⁹ The district court ruled that a modification subject to PSD only occurs when the post-project hourly emissions increase.⁸⁰ The district court also stated that the EPA’s interpretation of the PSD regulations is at odds with the plain language of the regulations because it excludes a much smaller group of projects from the definition of “major modification.”⁸¹

The U.S. Court of Appeals for the Fourth Circuit stated that where an agency’s interpretation of its regulations is at issue, a court must undertake a “modified *Chevron* analysis.”⁸² The EPA argued that the definition of the term “modification” contained in the PSD was not identical to that contained in the New Source Performance Standards (“NSPS”), a complimentary provision also contained in the Clean Air Act.⁸³ Under the modified *Chevron*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 544-45.

⁷⁹ *Id.* at 545.

⁸⁰ *Id.*

⁸¹ *Duke Energy Corp.*, 411 F.3d at 545.

⁸² *Id.* at 546 (noting that *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), provides that a court needs to determine “whether Congress has directly spoken to the precise question at issue” (citation omitted)). Only where a statute is silent or ambiguous on the point at issue is Congress deemed to have delegated discretion to the agency to clarify the matter in its regulations. *Id.*

⁸³ The New Source Performance Standards provisions are located at 42 U.S.C.S. § 7411 (LexisNexis 2006). *Duke Energy Corp.*, 411 F.3d at 542.

analysis, the court felt that Congress had indeed “directly spoken to the precise question at issue,” which in this case was the correct interpretation of the statutory term “modification.”⁸⁴ Further, the court held that the “presumption of uniform usage [of the term modification] has become effectively irrebutable,” and as a result, the EPA could not interpret the term differently in applying the PSD provisions to Duke Energy’s modernization program.⁸⁵ The differing purposes of the PSD and the NSPS cannot effectively override a congressional mandate for the consistent application of the term “modification.”⁸⁶

The EPA promulgated its NSPS regulations such that the term “modification” applies only to the extent that a project increases the hourly rate of emissions and the court held that the EPA must also interpret its PSD regulations in this manner.⁸⁷ If the EPA wants to alter this regulatory interpretation, the court notes that it may do so through proper rulemaking procedures, but until it does so it must interpret and apply the PSD and NSPS regulations defining “modification” congruently.⁸⁸

As a practical matter, the holding in this case provides needed clarification to entities seeking to make alterations or undertake projects on pollution-emitting facilities. The EPA is required to apply its PSD and NSPS regulations consistently and may only require an entity to secure permits under PSD if the project will increase the hourly rate of emissions of the facility.

⁸⁴ *Id.* at 546.

⁸⁵ *Id.* at 550.

⁸⁶ *Duke Energy Corp.*, 411 F.3d at 550.

⁸⁷ *Id.*

⁸⁸ *Id.*