IN THE SUPREME COURT OF THE UNITED STATES

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ENVIRONMENTAL DEFENSE, ET AL., :

Petitioner, :

v. : No. 05-848

DUKE ENERGY CORPORATION, ET AL. :

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Washington, D.C.

Wednesday, November 1, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Respondents.

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1992 or 2000, or all of the above.

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

CHIEF JUSTICE ROBERTS: That's an audacious statement.

(Laughter.)

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

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

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

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

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

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

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

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

or regulatory construction.

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

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

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

MR. DONAHUE: Right. Right.

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

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

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

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

MR. DONAHUE: Accepting that premise, they

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Donahue.

Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR,

ON BEHALF OF RESPONDENT UNITED STATES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HUNGAR: No, Your Honor.

JUSTICE SCALIA: Entirely meaningless.

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

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

MR. HUNGAR: Yes, Your Honor.

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

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

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

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

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

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

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

MR. HUNGAR: That's correct.

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

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

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

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

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

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

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

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

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

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

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

question, but certainly it's not presented here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Hungar.

Mr. Phillips.

ORAL ARGUMENT BY CARTER G. PHILLIPS,

ON BEHALF OF RESPONDENT

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

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

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

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

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

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

MR. PHILLIPS: No. Well --

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

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

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

JUSTICE SCALIA: Who was saying that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Because?

MR. PHILLIPS: Because --

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

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

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

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

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

MR. PHILLIPS: Oh, I see.

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

MR. PHILLIPS: Right.

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: That's the NSPS section.

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

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

not this case.

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

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

MR. PHILLIPS: Okay.

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

MR. PHILLIPS: The way that would apply --

JUSTICE SCALIA: Part 51, in other words.

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

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

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

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

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

situations than you would for SIP situations?

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

JUSTICE SCALIA: That occurred to me when--

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

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

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

JUSTICE SCALIA: You're quoting page 9?

MR. PHILLIPS: Page 9 of their reply brief.

JUSTICE SCALIA: Oh, in their reply brief?

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

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

MR. PHILLIPS: Substantively different?

JUSTICE STEVENS: Substantively different.

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

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

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

as defined in, and they did it twice.

JUSTICE STEVENS: Your answer is no?

MR. PHILLIPS: My answer is no.

(Laughter.).

MR. PHILLIPS: I thought I said that first.

JUSTICE SCALIA: It's definitely no.

(Laughter.)

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

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

MR. PHILLIPS: For all of it?

JUSTICE STEVENS: Yes.

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

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

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

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

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

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

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

definition.

What's wrong with that?

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: Sure.

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

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

didn't have to use modification as defined --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: Yes. You're right.

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

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

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

MR. PHILLIPS: Absolutely.

JUSTICE SCALIA: -- to the PSD?

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

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

MR. PHILLIPS: Yes.

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

MR. PHILLIPS: The other side has not argued

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

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

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

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

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

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

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

JUSTICE BREYER: That's what it is.

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

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

MR. PHILLIPS: As long as they are consistent?

JUSTICE STEVENS: Yes.

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

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

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

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

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

that led to the enforcement action?

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

Mr. Donahue, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF SEAN H. DONAHUE

ON BEHALF OF PETITIONER

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

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

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

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

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

JUSTICE SCALIA: You don't give them that.

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

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

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

MR. DONAHUE: Correct.

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

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

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

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

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

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

JUSTICE SCALIA: Where is "rate" defined?

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

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

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

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

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

Thank you very much.

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

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

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