No. 05-848

In the

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND,
Petitioners,
v.
DUKE ENERGY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF NEW JERSEY, ARIZONA, KENTUCKY, MICHIGAN, WASHINGTON AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The threshold issue presented in this case is whether the Fourth Circuit in *United States v. Duke Energy*[1] erred by ruling on the substantive validity of EPA's nationally applicable regulations governing the Prevention of Significant Deterioration ("PSD") program of the Clean Air Act ("CAA" or "Act").[2] Because the States have the primary responsibility under the CAA for achieving and maintaining the air quality standards to protect the public health of the nation, *see Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 470, 490 (2004), the decision below affects the interests of *amici* States in two fundamental ways.

First, the Fourth Circuit's decision undermines the State Implementation Plan ("SIP") process, the principal mechanism by which States exercise their responsibility for implementing the CAA's regulatory programs, including New Source Review ("NSR"). *See* 42 U.S.C. § 7410. Pursuant to Section 110 of the CAA, States are required to develop, implement, and enforce SIPs, a component of which is the NSR program, to attain and maintain the National Ambient Air Quality Standards ("NAAQS"). *Id.* Section 307(b)'s framework for the judicial review of nationally applicable regulations "only in" the District of Columbia Circuit Court of Appeals ensures uniform and final determinations regarding the validity of rules that

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[1] 411 F.3d 539 (4th Cir. 2005).

[2] The PSD provisions of the CAA, 42 U.S.C. §§7470-7492, cover geographic areas that have already attained the National Ambient Air Quality Standards for an air pollutant. Areas that are in nonattainment for one or more air pollutants are subject to the Act's Nonattainment New Source Review ("NNSR") program, 42 U.S.C §§ 7501-7515. The PSD and NNSR programs are together referred to New Source Review. Although only the PSD requirements are at issue in this case, given the similarity in the two programs, the Fourth Circuit's decision also applies to areas governed by the NNSR program.

form the minimum standards for SIPs.[3] *See* 42 U.S.C. § 7607(b). The States rely on the certainty of this review process in developing their SIPs, a resource-intensive process that must be completed within strict deadlines. *See* 42 U.S.C. §§ 7410(a) and 7502(b). The Fourth Circuit's decision exposes to judicial review – by multiple courts – longstanding EPA regulations on which the States have based the CAA programs in their SIPs for decades. This will inhibit the efficient use of state and judicial resources and undermine the credibility of state regulations implementing CAA programs and determinations made by state environmental officials in reliance on the plain language of EPA's regulations. *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 516 ("[r]egulated persons and entities should be able to consult an agency staff with certainty and confidence") (Kennedy, J., dissenting). This would create "a substantial risk of seriously inconsistent results and an inevitable delay in the effectuation of the important national policies underlying the Clean Air Act." *Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 708 (6th Cir. 1975). Most importantly, it could frustrate state efforts to reduce air pollution to levels that protect the public health with an adequate margin of safety. 42 U.S.C. § 7409.

Second, allowing any court to rule on the validity of nationally applicable regulations in enforcement cases risks creating uneven minimum standards across the nation. Because air pollution recognizes no boundaries, air pollution resulting

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[3] Section 307(b)(2) prohibits judicial review in a civil enforcement proceeding of EPA actions "with respect to which review could have been obtained under paragraph (1)." 42 U.S.C. § 7607(b)(2). Section 307(b)(1), in turn, mandates a petition for review of EPA action within sixty days of the action in, among other things, "promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. § 7607(b)(1). Section 307(b)(1) grants the Circuit Courts of Appeal jurisdiction to review, among other things, EPA actions approving or promulgating SIPs and local or regional EPA final actions, if the petition for review is filed within sixty days of the notice date. *Id.*

from modifications in one state could harm air quality in neighboring States, compromising the ability of downwind States "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of the population." 42 U.S.C. § 7401(b)(1).

SUMMARY OF ARGUMENT

As this Court has noted, the States' development of SIPs to implement the NAAQS is a "lengthy and expensive task." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001). To meet the SIP requirements, each State must (1) develop comprehensive and accurate emissions inventories for all sources of air pollution, *e.g.*, stationary, fugitive, and mobile sources, (2) use sophisticated models to predict emissions from these sources well into the future, taking into account the interstate transport of air pollutants, and (3) develop strategies for meeting the various NAAQS promulgated by EPA. *See* 42 U.S.C. § 7610; 40 C.F.R. pt. 51. The PSD and NNSR programs are just two of the tools that States must have in place – and update as necessary based on regulations EPA issues – to battle air pollution. Not only is the process of updating SIPs complex and resource-intensive, but States are also under strict deadlines to meet the NAAQS and to enact SIP revisions to comply with EPA-mandated changes to NSR and other programs. In addition to meeting their CAA obligations, States must often comply with notice and comment requirements mandated by state administrative laws, adding more time and expense to the process.

In light of this challenging task, States need clear and expeditious guidance on the "rules of the game." Since the inception of the 1970 CAA, States have come to rely upon EPA to provide guidance and on the D.C. Circuit, pursuant to the Act's judicial review provision, 42 U.S.C. § 7607(b), to provide the needed certainty regarding regulations that are national in scope, as well as the NAAQS themselves, in relatively quick fashion. The preparation and implementation of SIPs would become unworkable if the rules of the game are instead developed on a piecemeal basis in challenges raised against

regulations in enforcement cases throughout the nation. This would be particularly true if courts in different areas of the country were to disagree on the validity of nationally applicable regulations.

Here, the Fourth Circuit's ruling in an enforcement action, effectively invalidating the PSD regulations, conflicts with the judicial review provision's limitations on the scope of substantive challenges to nationally applicable regulations. Specifically, the ruling conflicts with Section 307(b)'s mandate that the D.C. Circuit have exclusive jurisdiction to adjudge the validity of nationally applicable regulations. *See* 42 U.S.C. § 7607(b). As evidenced by this Court's decisions and the legislative history of the Act, Congress wanted to ensure consistent national application of nationwide regulations. This congressional intent will be frustrated if the Fourth Circuit's decision – which directly conflicts with the D.C. Circuit's ruling on the same issue, *see New York v. EPA*, 413 F.3d 3, 19-20 (D.C. Cir.), *reh'g denied*, 431 F.3d 802 (2005) ("*New York I*") – stands. Moreover, in concluding that regulations stemming from the same statutory definition must be interpreted identically, the Fourth Circuit failed to apply this Court's precedent regarding the standard of review afforded an agency's interpretation of its own regulations. Finally, given that several other environmental statutes have nearly identical judicial review provisions, the Fourth Circuit's ruling could also lead to the disruption of other nationwide environmental programs.

ARGUMENT

I. TO SUCCESSFULLY CARRY OUT THEIR PRIMARY RESPONSIBILITY OF ACHIEVING AND MAINTAINING THE NAAQS THROUGH THEIR SIPS, STATES MUST BE ABLE TO RELY ON FINAL DETERMINATIONS REGARDING NATIONALLY APPLICABLE REGULATIONS.

The States are primarily responsible for achieving and maintaining the health-based NAAQS for each of the six criteria pollutants: particulate matter, sulfur dioxide, ozone, nitrogen dioxide, carbon monoxide and lead.[4] 42 U.S.C. § 7408(a)(2). *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 469-70; *Am. Trucking Ass'ns*, 531 U.S. at 465. The States meet this mandate through the development of SIPs, which is a time-sensitive and resource-intensive process. For the SIP framework to work as intended – to timely achieve and maintain the NAAQS, *see Train v. NRDC*, 421 U.S. 60, 66-67 (1975) – the States must be able to develop and implement their SIPs in reliance on clear and conclusive decisions regarding the validity of nationally applicable regulations, as provided by Section 307(b) of the Act. Exposing nationally

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[4] Each of the six criteria air pollutants – particulate matter ($PM_{2.5}$ and PM_{10}), sulfur dioxide, ozone, nitrogen dioxide, carbon monoxide and lead – that are regulated under Title I of the CAA has its own air quality standard. *See* 40 C.F.R. pt. 50. Areas are classified as either having attained (or unable to be classified) or not attained the NAAQS for each air pollutant. 42 U.S.C. § 7407(d). Currently, thirty-one states and the District of Columbia have eight-hour ozone standard nonattainment areas. *See* Green Book Nonattainment Areas for Criteria Pollutants, *available at* http://www.epa.gov/oar/oaqps/greenbk/index.html. Twenty states and the District of Columbia have areas that are in nonattainment of the $PM_{2.5}$ standard. *Id.* Thirteen states and Puerto Rico have areas that are in nonattainment of the PM_{10} standard. Six states and Guam have areas that are in nonattainment of sulfur dioxide. *Id.* Five states have areas that are in nonattainment of carbon monoxide. *Id.* And two states have areas that are in nonattainment of lead. *Id.*

applicable regulations to collateral attack in enforcement cases would undermine the entire federal-state framework of the CAA that is intended to achieve and maintain ambient air quality standards that protect the public health and welfare.

A. The Effective and Efficient Development of State Implementation Plans Requires Extensive Effort and Use of Significant Resources by Each State.

The SIP has been described as the "heart" of the 1970 CAA Amendments. *Union Electric Co. v. EPA*, 427 U.S. 246, 249-50 (1976). The process of developing a SIP is arduous. *See Am. Trucking Ass'ns*, 531 U.S. at 479 (referring to "the lengthy and expensive task of developing state implementation plans"). This is especially true for a NAAQS attainment SIP, which is necessary when EPA formally finds that the air quality in a defined area does not meet the national standard. An attainment SIP is a plan tailored to that nonattainment area designed to achieve the NAAQS within a statutorily prescribed time frame. *See* 42 U.S.C. §§ 7407, 7409. A State with a designated nonattainment area begins the SIP process by developing "a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area" that must be included in the SIP. 42 U.S.C. § 7502(c)(3). The emissions inventory is the foundation for SIPs that implement EPA's ozone, fine particulate matter, and visibility rules, and the federal emission inventory regulations are extensive and complex. *See* 40 C.F.R. pt. 51.

Once the State has its complete emissions inventory, the State then conducts extensive and complex air quality modeling. *See* 40 C.F.R. pt. 51, subpt. G and App. W. The modeling process requires the State to project emissions levels in the year in which the State is required to demonstrate attainment. This requires the State to account for all changes that will reduce (as well as increase) emissions, *e.g.*, known and foreseeable changes in emission standards and rules, and anticipated growth (or decline) of source sectors, including construction of new sources and/or retirement of existing

sources. *See id.* and App. V. The State must also account for air pollution that may enter the State from upwind sources in other States.[5] *See* 42 U.S.C. § 7410(a)(2). Equipped with this and other data,[6] the State must model the ambient levels of pollutants in the nonattainment areas for the statutory attainment year. *See* 40 C.F.R. pt. 51, subpt. G and App. W. If the model does not show attainment in that year, the State must develop and model emission control strategies to demonstrate attainment. These computer simulations are so complex that a single strategy may take weeks or months to process and can produce extraordinary volumes of data that then must be distilled into a decipherable product. Once the State settles on a preferred control strategy to achieve attainment, the State must demonstrate to EPA that the emission reductions will be surplus, quantifiable, enforceable and permanent. *See id.* and App. S. Finally, the State embarks on its rulemaking process to formally adopt these strategies after proposal and public comment. 42 U.S.C. § 7410(a); 40 C.F.R. § 51.102. The rules must then be sent to EPA for approval. 42 U.S.C. § 7410(a).

At a minimum, whether it applies to a nonattainment area or an area that is already attaining the NAAQS, the SIP must include certain mandatory programs. For example, each

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[5] The interstate transport of air pollution has been recognized by Congress, EPA and the courts. *See, e.g.*, 42 U.S.C. § 7426 (Interstate pollution abatement); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001) (recognizing that some air pollution "is caused or augmented by emissions from other states" and upwind region emissions may significantly contribute to downwind attainment).

[6] The State must also collect meteorological data so that the chemical reactions and physical movements of these particles in the air can be modeled as accurately as state of the art tools allow. EPA has provided an "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality (NAAQS) and Regional Haze Regulations," *available at* http://www.epa.gov/ttn/chief/eidocs/eiguid/eiguidfinal_nov2005.pdf.

SIP for a nonattainment area must include the NNSR program and each SIP for an attainment area must include PSD rules. 42 U.S.C. § 7410(a)(2)(J). These minimum program elements must be adopted by each as enforceable state law, which generally requires a full rulemaking proceeding. EPA itself recognized that "[p]erhaps the biggest potential disadvantages to implementing the new applicability provisions as part of our base programs are the time and effort required to revise existing State programs and to have the revised programs approved as part of the SIP." Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR), 67 Fed. Reg. 80,186, 80,241 (Dec. 31, 2002) ("2002 NSR Rule").

B. To Perform Their Role Under the CAA Effectively, the States Require the Finality and Certainty that Section 307(b) is Intended to Provide.

For the SIP framework to function as intended – to attain and maintain the NAAQS within the statutorily required time periods – the judicial review structure mandated by Section 307(b) must be followed. The States' ability to plan for and meet their obligations under the CAA depends on the stability of nationwide regulations. Congress addressed this important need when it demanded that the federal minimum requirements be reviewed, if at all, by filing a petition in the D.C. Circuit within sixty days of notice of EPA's action. 42 U.S.C. § 7607(b)(1). Such rules may not be reviewed in an enforcement proceeding when that review "could have been obtained" by the D.C. Circuit and the validity of such rules will not be disturbed once reviewed by the D.C. Circuit (and this Court). *See* 42 U.S.C. § 7607(b).

Congress' balanced approach, which allows for judicial review but also provides the certainty necessary to stabilize the SIP process, is jeopardized by the Fourth Circuit's decision. Based on what the Fourth Circuit believed to be an irrebutable rule of statutory construction, that court held that the statute requires EPA to interpret the statutory term "modification" for PSD purposes identically to the way it interprets that term in the

context of the NSPS program. *Duke Energy*, 411 F.3d at 550. Finding that the NSPS regulations define "modification" in terms of whether a change increases a facility's hourly emissions rate, the Fourth Circuit concluded that EPA must read its PSD regulations to also establish an hourly rate test. *Id.* In reaching this conclusion, the Fourth Circuit effectively invalidated the PSD regulations' unambiguous annual emission test, replacing it with the NSPS hourly emissions test.[7] *Id.*

The decision reached by the Fourth Circuit in an enforcement proceeding has, to the alarm of the States, shaken the foundation upon which the SIPs are based. The integrity of the state planning process is impaired, as the projections and modeling upon which the State's control strategies and rules are based lack certainty. More fundamentally, the States' ability to assure their citizens healthy air in a timely manner that meets national air quality standards is damaged. *See Lubrizol Corp. v. Train*, 547 F.2d 310, 315 (6th Cir. 1976) ("incessant litigation and inconsistent decisions" would cause "needless delays in the implementation of important national programs").

Review of nationally applicable rules in the several Courts of Appeal will cause the precise evil that Congress sought to avoid when it enacted the judicial review restrictions in Section 307(b).[8] For example, now that the Fourth Circuit

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[7] The Fourth Circuit stated that, consistent with the scope of its jurisdiction under Section 307(b), it did not invalidate the regulations under review. *See Duke Energy*, *supra*, 411 F.3d at 549, n.7. As the United States pointed out, however, in its petition for rehearing, "requiring the EPA to interpret the PSD regulations to adopt the NSPS test for measuring emissions increases is inconsistent with the plain text of the regulations and thus is not an "interpretation" at all, but an invalidation." U.S. Br. at 12. By way of analogy, the Fourth Circuit's decision could be likened to a court holding that EPA regulations that require buses to limit their emissions apply only to double-decker buses; this "interpretation" would leave the regulations on the books, but render them meaningless.

[8] In EPA's proposed rule to change the NSR emissions test for electric generating units to an hourly test, EPA itself noted that the "need to

has ruled that PSD modifications must be determined using the NSPS hourly maximum emissions rate test, States are faced with the question of whether they need to change their PSD regulations to implement the test adopted by the Fourth Circuit, demonstrate that their actual annual test is more stringent than the hourly maximum emissions rate test, or just to ignore the *Duke Energy* decision as an anomaly. Similarly, States must decide whether to allow regulated parties to continue to use "netting," which the D.C. Circuit previously ruled was required under the PSD program's method of determining emissions increases but which is prohibited in determining whether sources have been modified under the NSPS program. Moreover, given that the Seventh Circuit is currently considering, on interlocutory appeal in the enforcement proceeding against Cinergy Corporation, whether to affirm the district court's rejection of the same emissions test argument raised by Duke Energy,[9] it is entirely possible that the Seventh Circuit will reach the opposite result of the Fourth Circuit. If that were to occur, States that have adopted the *Duke Energy* approach may find it necessary to resume the actual annual emissions approach of the PSD regulations. All of this uncertainty and disorder has ensued despite the fact that the D.C. Circuit itself upheld the very PSD regulations that the Fourth Circuit invalidated. *See New York I*, 413 F.3d at 19-20.

The cooperative federalism of the CAA accords States real choices to adopt control measure options and determine the

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provide national consistency for EGUs is apparent" in the wake of the Fourth Circuit decision, which "create[d] a potential disparity in the way we interpret the program in States in the Fourth Circuit compared to States in other Circuits in the country." Prevention of Significant Deterioration, Nonattainment New Source Review, and New Source Performance Standards: Emissions Test for Electric Generating Units, 70 Fed. Reg. 61,081, 61,082 (Oct. 20, 2005) ("2005 NSR Rule").

[9] *United States v. Cinergy*, No. 1:99-cv-01693-LJM-VSS (S.D. Ind.).

necessary "specific, source-by-source emission limitations" to employ in their SIPs. *See Train v. NRDC*, 421 U.S. at 79; *Michigan v. EPA*, 213 F.3d 663, 686-87 (D.C. Cir. 2000). To be able to effectively exercise their options, States must know what EPA expects, as it is to EPA that the States look for the basic rules. *See New York I*, 413 F.3d at 21 (recognizing that "[w]hile states are responsible for writing SIPs, the Act gives EPA responsibility for developing basic rules for the NSR program . . . ."), Proposed Rule to Implement the Fine Particle National Ambient Air Quality Standards, 70 Fed. Reg. 65,984, 65,990 (Nov. 1, 2005) ("For the States to be successful in developing local plans showing attainment of standards, we must do our part to develop standards and programs to reduce emissions from sources that are more effectively and efficiently addressed at the national level."). To determine whether those rules are valid, the States must be able to rely on a single round of review by the D.C. Circuit and this Court, not the various circuit courts. Without such certainty, the States would be less able to evaluate their choices and determine, for example, whether to adopt the federal regulations, to submit revised SIPs, or to apply for an equivalency determination. Indeed, States would be unable to submit an equivalency determination without knowing with what standards their programs must be "at least as stringent." *See* 42 U.S.C. § 7416. States cannot efficiently or effectively develop their SIPs – or successfully implement the SIPs – until States can rely on the rules of the game.

In short, allowing the validity of nationally applicable regulations to be adjudicated in any enforcement proceeding denies the States any certainty in their own regulatory programs and subjects States to potentially more numerous SIP revisions to account for the ever shifting and conflicting regulatory framework. Such a result directly conflicts with Congress' mandate to conserve judicial resources, prevent duplicative or piecemeal litigation, eliminate the risk of contradictory decisions, *see Virginia v. EPA*, 74 F.3d 517, 525 (4th Cir. 1996), *NRDC v. Reilly*, 788 F. Supp. 268, 273 (E.D. Va. 1992), and ultimately clean our nation's air. This mischief, set in motion, must be undone to restore the integrity of the judicial

review process that Congress mandated, and assure the States of the validity of their own implementing programs.

II. THE FOURTH CIRCUIT'S RULING CONFLICTS WITH THE CLEAN AIR ACT'S REQUIREMENT THAT THE D.C. CIRCUIT DECIDE THE VALIDITY OF NATIONALLY APPLICABLE REGULATIONS.

By ruling that the Act requires EPA to interpret the PSD regulations and NSPS regulations the same for "modifications," the Fourth Circuit effectively invalidated the PSD regulations as written, holding that the NSPS regulations must be applied instead. Despite the Fourth Circuit's attempt to couch its ruling as an "interpretation" of national regulations, *see Duke Energy*, 411 F.3d at 549, n.7, this ruling contravenes Section 307(b) of the Act, which gives the Court of Appeals for the D.C. Circuit exclusive jurisdiction to rule on the validity of nationally applicable regulations in order to ensure "an even and consistent national application" of such regulations, and with this Court's administrative law precedent.

A. Section 307(b)'s Pre-Enforcement Review of CAA Regulations in the D.C. Circuit and the Deferential Standard of Review Afforded EPA Regulatory Interpretations Promote Stability in State Planning and Administration of the Act.

Because Section 307(b) bars challenges to the validity of nationally applicable regulations in enforcement cases, the court's review authority in deciding whether to uphold an EPA interpretation of its regulations is narrowly circumscribed. This structure, combined with this Court's precedent establishing a deferential standard of review of an agency's interpretation of its own regulations, provides States with a measure of stability in their implementation of the Act's complex regulatory requirements.

The States' reliance on the D.C. Circuit having the final word on the validity of nationally applicable regulations, the importance of which is detailed in the preceding section, has firm grounding in Section 307(b)'s structure and legislative history. Pursuant to Section 307(b)(1), challenges to "nationally applicable regulations" must be filed in the D.C. Circuit within sixty days of promulgation. 42 U.S.C. § 7607(b)(1). If an EPA action that is nationally applicable "could have been" challenged in the D.C. Circuit, such an action "shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.*, § 7607(b)(2). As this Court has recognized, the structure of Section 307(b)(1) furthers the congressional purposes of "insur[ing] that the substantive provisions of the [CAA regulations] would be uniformly applied and interpreted and that the circumstances of [their] adoption would be quickly reviewed by a single court intimately familiar with administrative procedures." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978); *see* S. Rep. No. 91-1146, 91st Cong., 2d Sess. 41 (1970) (giving the D.C. Circuit exclusive jurisdiction "[b]ecause many of these administrative actions are national in scope and require even and consistent national application"). *See also Virginia v. United States*, 74 F.3d at 525 (the structure of Section 307(b) is based on a "concern for judicial economy; to wit, the risk of duplicative or piecemeal litigation, and the risk of contradictory decisions") (citation omitted); *United States v. Ethyl Corp.*, 761 F.2d 1153 (5th Cir. 1985) (the plain language shows Congress's intent to avoid protracted and inconsistent adjudications over the validity of EPA's emission standards); *Chrysler Corp. v. EPA*, 600 F.2d 904, 911 (D.C. Cir. 1979) (Congress intended "to limit judicial review as to forum and time so as to assure expeditious, authoritative and central judicial resolution of issues which were national in impact and which could hold up the timely accomplishment of the Act's objectives if not settled at the outset.") (internal quotations and citation omitted).

As a result of this structure, it is a long-established practice for the D.C. Circuit to decide, in direct appeals of EPA rulemakings, whether CAA regulations of national applicability are consistent with the Act and supported by the administrative

record. Given that regulatory challenges must be filed within sixty days of a rule's promulgation and are based on the administrative record, these cases proceed to decision relatively quickly.[10] States rely on the judicial review process set forth in Section 307(b) to carry out their responsibilities under the Act. *See* Point I, *supra*.

Next, this Court's administrative law precedent – as the Fourth Circuit has recognized – sets a formidable bar for a defendant in an enforcement proceeding seeking to overturn an agency interpretation of its own regulations. In this context, an agency's interpretation of its regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (citations omitted); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *see Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) ("The reviewing court does not have much leeway in undertaking this interpretation . . . because the agency is entitled to interpret its own regulation.").

Thus, in light of Section 307(b)'s limit on substantive regulatory challenges and the standard of review under this Court's precedent, the only question in a CAA enforcement case where the defendant has challenged an EPA interpretation of its regulations is whether the agency's interpretation is "plainly erroneous or inconsistent with the regulation."[11]

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[10] The D.C. Circuit's review of the validity of the 1980 PSD regulations was delayed by twenty years pursuant to an unusual settlement agreement between EPA an industry. Such a lengthy delay is the exception to the rule of prompt review. *See, e.g.*, *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (ruling on validity of EPA regulations less than three years after promulgation of final rule, which included an approximately one-year delay for administrative reconsideration of the regulations).

[11] The court may also have to address the question of whether the defendant had to challenge the EPA interpretation in the D.C. Circuit.

Thomas Jefferson Univ., 512 U.S. at 512. As an initial matter, the district court should look to the plain meaning of the regulations (as expressed in the regulatory language and preamble), the purpose of the regulations, the practical consequences of suggested interpretations, and the agency's previous interpretations. *See, e.g., Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 910-18 (7th Cir. 1990) (hereinafter, *"WEPCo")* (using these tools in reviewing EPA's interpretation of its PSD regulations). If the court finds that the Agency's interpretation in the proceeding to enforce its regulations is consistent with the regulations, there is no basis for the court to look to the statute or legislative history.[12] As long as the agency's interpretation of its regulation in the enforcement proceeding is not plainly erroneous, the court's inquiry is at an end and it must give "controlling weight" to the agency's regulatory interpretation against defendant's attack. *See Thomas Jefferson Univ.*, 512 U.S. at 512; *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

If, however, the agency's interpretation does not follow from the plain meaning of a regulation and the regulatory preamble (*e.g.*, one or more relevant terms in the regulation is ambiguous), reference to the statute and legislative history, as well as decisions of this Court and of the D.C. Circuit, may be appropriate in addressing a defendant's argument that EPA's interpretation of its own regulation is erroneous. *See Seminole Rock*, 325 U.S. at 414 ("The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various [agency] constructions."); *see also WEPCo*, 893 F.2d at 917-18 (relying on the D.C. Circuit's statutory interpretation set forth

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See New York I, 413 F.3d at 20-21 (discussing proper forum for challenging EPA statement in preamble that explained provision in 1980 PSD regulations).

[12] Indeed, where a court does resort to evaluating congressional intent, it is not interpreting the meaning of the regulations, but is instead addressing the regulations' validity under the statute.

in *Alabama Power Co. v. Costle*, 636 F.2d 323, 379 (D.C. Cir. 1979) to construe the concept of "potential to emit" under the PSD regulations). But given the structure of Section 307(b), the consideration of congressional intent should be limited to dealing with the specific regulatory issue left open, *e.g.*, a single vague regulatory term should not open up the Agency's entire regulatory approach to challenge. This follows from the corollary principle that a defendant may not, in the guise of challenging an EPA "interpretation," invoke the statute or legislative history to challenge the validity of regulations themselves. *See Ethyl Corp.*, 761 F.2d at 1155-57 (the district court lacked subject matter jurisdiction to consider the substantive validity of EPA's CAA regulations); *Potomac Electric Power Co. v. EPA*, 650 F.2d 509, 513 (4th Cir. 1981) (hereinafter, "*PEPCo*") (under Section 307(b), the Fourth Circuit lacks jurisdiction to rule upon arguments that "may be read as challenging not only the EPA's interpretation of its regulations but also the regulations themselves."). As discussed above, such an approach promotes stability in States' implementation of the Act.

B. The Fourth Circuit Did Not Follow Section 307(b) or this Court's Administrative Law Precedent.

Applying the principles discussed in Point II.A, the Fourth Circuit should have limited its review to determining whether the district court erred in holding that EPA's reading of its PSD regulations as establishing an actual annual emissions increase test for determining PSD applicability was plainly erroneous.[13] Instead, the Fourth Circuit began – and ended – its analysis based on what it believed was required by the definition of "modification" in the Act and by this Court's

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[13] Specifically, this analysis would have included an assessment of whether EPA's interpretation of the "increased hours of operation exclusion," 40 C.F.R. § 51.166(b)(2)(iii)(f), does not apply to increased hours of operation made possible by the equipment replacement project.

decision in *Rowan Cos. v. United States*, 452 U.S. 247 (1981). *Duke Energy*, 411 F.3d at 547-51.

The Fourth Circuit's approach conflicts with Section 307(b) of the Act because it ruled on the merits of an argument that could have been, and in fact was, raised before the D.C. Circuit in a challenge to the validity of the PSD regulations. Duke Energy argued below that when Congress enacted the PSD program in 1977, it incorporated by reference EPA's regulatory definition of "modification" under the NSPS program, which only applies if the modification would cause an increase in the unit's maximum hourly emissions rate. *See* Brief in Support of Duke Energy's Motion for Summary Judgment in *United States v. Duke Energy Corp.* (M.D.N.C., Case No. 1:00 CV 1262) (Jan. 31, 2003) at 5 ("Congress adopted the NSPS concept of 'modification' into the NSR program enacted in the 1977 Clean Air Act Amendments.").[14] Duke Energy had in fact made the very same argument before the D.C. Circuit in challenging the validity of the PSD regulations. *See* Joint Brief of Industry Petitioners in *New York v. EPA* (D.C. Cir., Case No. 02-1387) (Oct. 26, 2004) at 6 ("Congress adopted the NSPS concept of 'modification' into the NSR program enacted in the 1977 CAA Amendments.").[15] The D.C. Circuit rejected this argument, finding that Congress's adoption by reference of the definition of modification in the NSPS provisions did not mandate an hourly emissions rate test for NSR. *New York I*, 413 F.3d at 19-20. Having had the opportunity to raise that issue in proper forum – the D.C. Circuit – Duke Energy may not challenge the same regulation in an enforcement action. 42 U.S.C. § 7607(b)(2). *See Monongahela Power Co. v. Reilly*, 980 F.2d 272, 275 (4th

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[14] Based on this premise, Duke Energy contended that no modifications of its power plant had occurred because the equipment replacement projects were not expected to increase the maximum hourly emissions rate.

[15] Duke Energy was involved in the *New York* litigation as a member of the Utility Air Resources Group ("UARG").

Cir. 1992) ("Because [Section 307(b)(1)] embodies a grant of exclusive jurisdiction, it appears that if the District of Columbia [Circuit] has jurisdiction over the present action, the district court does not."); s*ee also WEPCo*, 893 F.2d at 914, n.6 (the Seventh Circuit lacks jurisdiction "to review the propriety of the NSPS regulations themselves"); *PEPCo*, 650 F.2d at 513 (the Fourth Circuit lacks jurisdiction to rule upon arguments that "may be read as challenging not only the EPA's interpretation of its regulations but also the regulations themselves."); *cf. Waste Mgmt. of Illinois, Inc. v. EPA*, 714 F. Supp. 340 (N.D. Ill. 1989) (pursuant to Resource Conservation and Recovery Act's judicial review provision, modeled after Section 307(b)(1) and (2) of the CAA, district court lacked jurisdiction because although Waste Management styled its complaint as challenge to an EPA interpretation, challenge was in fact to the validity of the regulations themselves, which could only be brought in the D.C. Circuit).

The Fourth Circuit's failure to follow Section 307(b) is further evidenced by the court's misapplication of the *Rowan Cos.* case. In *Rowan Cos.*, the Treasury Department's regulations at issue were subject to review under 28 U.S.C. § 1346(a)(1), which provides in relevant part that the district court shall have original jurisdiction (concurrent with the United States Court of Federal Claims) of "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." Unlike judicial review pursuant to Section 307(b) of the Act, there was no statutory bar in *Rowan Cos.* on the district court ruling on the validity of the regulations that the government sought to apply. The Fourth Circuit's failure to recognize this important difference in the scope of jurisdiction resulted in it misapplying *Rowan Cos.* to the case at bar.

In addition, the Fourth Circuit's willingness to expand the scope of arguments that defendants can raise in CAA enforcement cases is inconsistent with congressional intent that judicial review in such cases be limited to challenges to the agency's application of its regulation to a particular defendant's

conduct. For example, when Congress broadened the D.C. Circuit's jurisdiction in the 1977 CAA amendments to encompass "any other nationally applicable regulations promulgated . . . by the Administrator under [the Act]," *see Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 590 (1980), it also explicitly rejected a recommendation by an advisory group, the Administrative Conference of the United States, that Section 307(b) be amended to permit the validity of a regulation to be challenged as a defense in an enforcement proceeding. *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 324 (1977) (referring to the rejection of recommendation D.1, which would have allowed defendants to challenge the validity of a regulation in defending an enforcement action). The Fourth Circuit's decision to allow a challenge concerning the validity of a regulation in an enforcement case directly contravenes this congressional intent. *See* S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 ("Of course, the person regulated would not be precluded from seeking review at the time of enforcement insofar as the subject matter applies to him alone.") (emphasis added).

III. THE FOURTH CIRCUIT'S RULING THREATENS THE UNIFORMITY AND CERTAINTY OF NATIONWIDE REQUIREMENTS UNDER OTHER ENVIRONMENTAL LAWS.

Allowing the Fourth Circuit's decision to stand could frustrate the implementation of other environmental laws in light of the fact that Congress gave the D.C. Circuit exclusive jurisdiction to review the validity of national regulations in other statutes as well. *See* 33 U.S.C. § 2717(a) (Oil Pollution Prevention Act) ('OPPA"); 42 U.S.C. § 300j-7(a)(1) (Safe Drinking Water Act); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act) ("RCRA"); 42 U.S.C. § 9613(a) (Comprehensive Environmental Response, Compensation, and Recovery Act) ("CERCLA"); *see also* 30 U.S.C. § 1276(a)(1) (Surface Mining Control and Reclamation Act). Similar to Section 307(b) of the CAA, these statutory provisions establish a limited period to petition for review to

challenge the validity of regulations, ranging from forty-five days under the Safe Drinking Water Act to ninety days under OPPA, RCRA, and CERCLA. *See id.*

In interpreting the judicial review provisions under these statutes, courts look to decisions interpreting Section 307(b) for guidance. For example, in *Halogenated Solvents Indus. Alliance v. Thomas*, 783 F.2d 1262, 1265 (5th Cir. 1986), in which an industry group sought to challenge EPA's adoption of Recommended Maximum Contaminant Levels ("RMCLs") under the Safe Drinking Water Act, the court looked to the legislative history of Section 307(b) of the CAA in deciding whether to transfer the case to the D.C. Circuit. After concluding that the statutory language was not conclusive as to whether this type of challenge had to be brought in the D.C. Circuit, the court reasoned that having the D.C. Circuit rule on the challenge would further congressional intent. Like promoting Congress' intent for an "even and consistent national application" of CAA regulations, the court reasoned that "[s]ince the RMCLs are national in scope . . . [a] needless conflict would result if were we to retain jurisdiction over this petition, invalidate the RMCLs as arbitrary, capricious, or not based on substantial evidence, and the D.C. Circuit then reviewed and upheld the revised primary regulations." *Id.* at 1265; *see also Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 916, n.60 (D.C. Cir. 1985) (citing Section 307(b) in interpreting CERCLA's judicial review provision so as to promote "prompt, uniform, 'pre-enforcement' review of CERCLA regulations").

As a result, if the Fourth Circuit's decision stands, the uniformity and certainty of nationwide requirements applicable under these other environmental regulations could be threatened. Regional judicial review of agency actions regarding regulations of national application would result in a failure to achieve uniform and reliable minimum national standards. In addition, this Court would be called upon more often to settle different interpretations among the circuit courts regarding the validity of various provisions in several environmental laws.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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