No. 06-10729-JJ

IN THE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NATIONAL PARKS CONSERVATION ASSOCIATION and SIERRA CLUB

Plaintiffs-Appellants

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

Amicus Curiae Brief of Alabama Power Company Supporting Tennessee Valley Authority and Affirmance of the District Court

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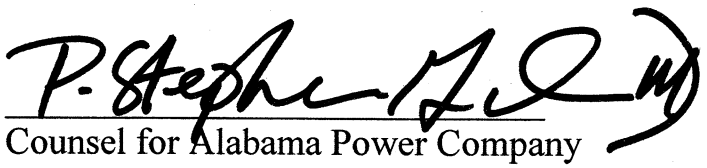
June 28, 2006

National Parks Conservation Assoc. et al. v. Tennessee Valley Authority,
No. 06-10729-JJ

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Alabama Power Company is a wholly-owned subsidiary of Southern Company, a publicly-held company which owns all of the common stock of Alabama Power. No other publicly-held company has a 10% or greater ownership interest in Alabama Power.

Undersigned counsel believes that the certificates of interested persons contained in the briefs filed by the parties and amici curiae are complete.



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STATEMENT OF AMICUS CURIAE

Alabama Power Company files this amicus brief because Appellants National Parks Conservation Association and Sierra Club (jointly, NPCA) and, to a greater extent, their supporting amici are improperly collaterally attacking a decision they do not like that was issued in an entirely separate case pending against Alabama Power. *United States v. Alabama Power Co.*, No. 2:01-cv-0152-VEH (N.D. Ala.) (*Alabama Power*). The *Alabama Power* decision, which has yet to become final, is best reviewed by this Court at the conclusion of the proceedings in that case using the full record developed there. As Tennessee Valley Authority's (TVA) brief explains, this Court does not have jurisdiction over the orders in this case referencing the *Alabama Power* decision. Should this Court decide otherwise, Alabama Power respectfully submits that—as the defendant in that case facing claims for millions of dollars in civil penalties and injunctive relief—its views are significant and would be particularly helpful to this Court. All parties have consented to the filing of this brief.

STATEMENT OF THE ISSUES

This brief explains why the *Alabama Power* decision is correct. The *Alabama Power* decision is challenged primarily in Sections I and II of amici New York et al.'s brief and throughout the entirety of amicus Alabama Environmental Council's (AEC) brief; it is also challenged in Section C of NPCA's principal brief, although NPCA did not challenge it in the District Court.

STATEMENT OF THE CASE

Despite their collateral attack on the *Alabama Power* decision, Appellants and their amici fail to address almost all of the background leading to that decision. Below is a full discussion of the *Alabama Power* case, as well as the related *Duke Energy* case.

I. The *Alabama Power* Case

On January 12, 2001, the U.S. Environmental Protection Agency (EPA) sued Alabama Power in the Northern District of Alabama alleging violations of the Clean Air Act's New Source Review (NSR) provisions at five power plants. Doc.1.[1] AEC moved to intervene as a plaintiff alleging identical claims as EPA (Doc. 6), and the District Court permitted intervention. Doc.13.

[1] Citations to "Doc.#" refer to numbered entries in the *Alabama Power* docket sheet, a copy of which is attached as Appendix A. Selected filings in the case are also attached as Appendices B-H, and cited as "App.__."

Like the case against TVA, the *Alabama Power* case involves activities conducted at power plants in Alabama many years ago. EPA and AEC alleged that certain maintenance, repair, and replacement activities dating back to 1985 were not "routine," but were "major modifications" of four of Alabama Power's existing plants requiring NSR permitting.[2] These "modification" claims are the same types of claims that NPCA makes against TVA here, and which were the subject of EPA enforcement actions against other utilities.[3]

At the outset of the *Alabama Power* case, EPA and Alabama Power identified two key legal issues related to the modification claims, the resolution of which would significantly reduce or eliminate the need for time-consuming and costly discovery. Doc.75 (App.B). These issues were the correct legal tests for 1) "routine maintenance, repair and replacement" and 2) a "significant net emissions increase," the two primary components of the definition of "major modification." *Id*. The District Court ordered the parties to brief these issues (Doc.77), and EPA, Alabama Power, and AEC each filed extensive briefs and voluminous historical

[2] At a fifth plant (Plant Miller), EPA and AEC alleged that Alabama Power's original construction of two units at that four-unit plant took too long; this type of claim is not at issue here.

[3] *See, e.g.*, *United States v. Duke Energy Corp*., 00-1262 (M.D.N.C.); *United States v. Am. Elec. Power Corp.*, No. 99-1182 (S.D. Ohio); *United States v. Cinergy Corp.*, No. 99-1693 (S.D. Ind.).

and factual materials in support of their respective positions. Doc.96, 97, 99-113.[4] Importantly, EPA stipulated that the regulations applicable to its modification claims were the rules in Alabama's Clean Air Act State Implementation Plan (SIP) promulgated by Alabama in 1981 and approved by EPA. Doc.69 (App.C).[5] In its approval, EPA determined that Alabama's rules were "equivalent to EPA's PSD regulations [and] the State has full delegation of authority under these same regulations to carry out the PSD program in Alabama." 46 Fed.Reg. 55,517 (Nov. 10, 1981).

The District Court entered its decision on these two legal issues in a memorandum opinion dated June 3, 2005. Doc.140 (reported at 372 F. Supp. 2d 1283 (N.D. Ala. 2005)). The District Court held:

> 1. The [routine] exclusion applies to projects that are routine within the industry, by which is meant work of a type performed commonly within the industry, although perhaps infrequently at any specific one or more of APC's particular plants; and

[4] Alabama Power alone submitted 97 exhibits (Doc.100, 109, 110), designated as "APC Ex. #" herein and filed with this amicus brief as six separately-bound appendices pursuant to Fed. R. App. P. 32(b). *See* Notices of Filing Exhibits, attached as App.D and App.E.

[5] The current Alabama NSR rules do not differ substantively from the Alabama rules approved by EPA in 1981. The rules were originally designated as subchapter 16.4 of the Alabama Administrative & Procedural Code of Rules and Regulations. In 1989, ADEM's rules were reorganized and are presently found at ALA. ADMIN. CODE r. 335-3-14-.04. This brief provides the current citation. The rules as organized in 1981 are found at Doc.69.

2. Emission increases, for purposes of NSR/PSD analysis, are calculated only on the basis of "maximum hourly emission rates," not "annual actual emissions." Maximum hourly emissions must increase before PSD permitting is triggered; greater annual facility utilization is irrelevant to the analysis.

372 F. Supp. 2d at 1306-07. The District Court entered a companion order referring the parties (including AEC) to mediation. Doc.141.

The mediation was successful, and the parties reached agreements to resolve the case.[6] On the modification claims, EPA and AEC stipulated to facts designed to lead to the entry of summary judgment for Alabama Power under the legal tests adopted by the District Court. The stipulations are:

1. Plaintiffs stipulate that their contention that each of the projects at issue resulted in a significant net emissions increase within the meaning of the relevant PSD regulations (with the exception of the Gorgas Unit 10 balanced draft conversion project) is based solely on their contention that the projects would have been projected to result in increased utilization of the units at issue.

2. Plaintiffs stipulate that they do not contend that any of projects at issue (with the exception of the Gorgas Unit 10 balanced draft conversion project) caused an increase in the maximum hourly rate of emissions at any of the units at issue.

3. Plaintiffs stipulate that the projects at issue (including the Gorgas Unit 10 balanced draft conversion project) involved "work of a type performed commonly within the industry, although perhaps infrequently at any specific one or more of Alabama Power Company's particular plants."

[6] To resolve the Miller claim, the parties signed a partial consent decree (Doc. 154; 71 Fed.Reg. 26,109 (May 3, 2006)), which the District Court approved on June 19, 2006. Doc.160 (App.F).

Doc.155 at ¶¶ 1-3 (App.G).[7]

On May 31, 2006, Alabama Power filed a motion for summary judgment, seeking final judgment on the modification claims based on the legal tests and the stipulated facts. Doc.156. While the District Court has not ruled on that motion as of the filing of this brief, AEC has already told this Court it intends to appeal. AEC's Motion to Intervene, No. 06-10729, at 11 (April 7, 2006) ("AEC strongly disagrees with [the *Alabama Power* decision] and intends to appeal.").[8]

II. The *Duke Energy* Case

EPA sued other companies as part of its "NSR enforcement initiative," including Duke Energy. In *Duke Energy*, the District Court held (like the *Alabama Power* Court) that EPA must prove an increase in maximum *hourly* emission rates for NSR to apply (in addition to a source-wide *annual* increase). *United States v. Duke Energy*, 278 F. Supp. 2d 619, 640 (M.D.N.C. 2003). Because EPA stipulated that it could not prove Duke's activities caused hourly increases, the District Court granted Duke summary judgment. *United States v. Duke Energy*, 2004 WL

[7] EPA was able to make these factual stipulations because Alabama Power produced to EPA tens of thousands of pages of information related to EPA's claims in response to administrative information requests that EPA made pursuant to 42 U.S.C. 7414 before filing its complaint and through informal document exchanges after the case was filed.

[8] Given the stipulations, the *Alabama Power* case, unlike this case, does not involve disputes of material facts.

1118582, at *1-3 (M.D.N.C. April 14, 2004). The District Court in *Duke Energy* (like the *Alabama Power* Court) also adopted a "routine within the industry standard." 278 F. Supp. 2d at 635. However, because EPA did not stipulate to facts on the "routine" issue, the District Court's grant of summary judgment was based only on EPA's inability to prove an hourly emissions increase. 2004 WL 1118582 at *3-4.

EPA appealed. The Fourth Circuit affirmed the District Court's use of an hourly emission test, holding that "because Congress mandated that the PSD definition of 'modification' be identical to the [New Source Performance Standards] definition of 'modification,' the EPA cannot interpret 'modification' under the PSD inconsistently with the way it interprets that term under the NSPS [*i.e.*, using an hourly rate test]." *United States v. Duke Energy*, 411 F.3d 539, 547 (4th Cir. 2005).

EPA did not seek Supreme Court review; instead, it has issued a proposed rule to amend its NSR regulations to conform them to the Fourth Circuit's decision. 70 Fed.Reg. 61,081 (Oct. 20, 2005). The Supreme Court, however, granted an intervenor's petition to review whether EPA must use identical regulatory definitions of emissions "increase" under the NSPS and PSD programs and whether the Fourth Circuit's decision improperly invalidates national Clean Air Act regulations. *Envtl. Def. v. Duke Energy*, No. 05-848, 2006 WL 1310699

(May 15, 2006) (order granting petition); 2005 WL 3615991 (Dec. 28, 2005) (petition). The Supreme Court is scheduled to hear argument during its November 2006 argument session.

III. Statutory and Regulatory Background

The overarching question on the merits of this case and *Alabama Power* is whether certain maintenance, repair, and replacement work at existing units were "major modifications" that required New Source Review. Determining whether an activity is a "modification" that is "major" entails interpretation of several regulatory provisions in light of the enabling statute.

A. The Statute: "Modification" Shall "Mean the Same" under NSR as under NSPS

Congress added the "modification" concept to the Clean Air Act in 1970 when it created New Source Performance Standards (NSPS), defining the term as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4). When it later added NSR requirements to the Clean Air Act in 1977, Congress continued the "modification" concept, choosing to keep the same meaning for the term "modification." Specifically, Congress mandated that the NSR definition of "modification" be identical to the existing NSPS definition: "The terms 'modifications' and 'modified' mean the same as the term

'modification' as used in section 7411(a)(4) of this title." 42 U.S.C. 7501(4) (emphasis added).[9] The Fourth Circuit held that the result of this deliberate choice by Congress is that EPA and courts must interpret "modification" under NSR consistently with the NSPS program. *Duke Energy*, 411 F.3d at 547. This specific holding is pending review by the Supreme Court.

B. The Regulations

The statutory definition of "modification" consists of two primary components: 1) a "change," 2) that "increases" emissions. These terms, though not further defined by the statute, have been fleshed out through regulations, three of which are key.

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[9] When Congress added NSR in 1977, it regulated modifications only in areas not meeting air quality standards (*i.e.*, Non-attainment New Source Review (NNSR)). In areas meeting the standards (*i.e.*, Prevention of Significant Deterioration (PSD)), Congress regulated only "construction" (not "modifications"). A few months later, Congress decided to make PSD cover "modifications" like NNSR and NSPS through a "technical and conforming amendment." S. 1528, 95th Congress, Pub. L. No. 95-190 § 14(a)(54) (Nov. 16, 1977) (codified at 42 U.S.C. 7479(2)(C)) (APC Ex. 31). As Senator Muskie explained, "[i]t is not the purpose of these amendments to re-open substantive issues in the Clean Air Act." 123 Cong. Rec. 36252 (1977) (APC Ex. 32). Thus, amici AEC and New York are wrong to suggest that Congress intended to eventually capture all existing sources with PSD. AEC Brief at 8; New York Brief at 15-16. In point of fact, the modification concept (which is the only way existing sources can fall under PSD) was a Congressional afterthought. And, if adding "modification" to PSD was not intended to "re-open substantive issues," as Senator Muskie stated, it would seem most logical to interpret "modification" as something more akin to new "construction" (*i.e.*, expanding a plant) than to repair work intended to keep an existing unit running.

1. "Routine" Exclusion

EPA regulations issued from the outset of the Clean Air Act provided that "[r]outine maintenance, repair, and replacement shall not be considered physical changes." 36 Fed.Reg. 24,876, 24,877 (Dec. 23, 1971) (promulgating 40 C.F.R. 60.2(h)(1)) (APC Ex. 34). A similar "routine" exclusion has always been present in the regulations on "modification," including the Alabama NSR regulations. ALA. ADMIN. CODE r. 335-3-14-.04(2)(b)(3) (APC Ex. 13) ("A physical change or change in the method of operation shall not include: (a) routine maintenance, repair, and replacement. . . .").

2. Hours of Operation Exclusion

The regulations also provide that an increase in the hours of operation of a unit is neither a "physical change" nor a "change in the method of operation" that can give rise to an emissions increase. ALA. ADMIN. CODE r. 335-3-14.-.04(2)(b)(3)(vi).

3. Emission Increase Calculation

i. "Modification" Requires Hourly Rate Increase

From the outset, EPA has interpreted the phrase "increases the amount of any air pollutant" in the statutory definition of "modification" in terms of the hourly rate of emissions. EPA's first NSPS regulations followed the statutory definition of modification without elaboration. 36 Fed.Reg. 24,876, 24,877 (Dec.

23, 1971) (codified at 40 C.F.R. 60.2(h) (1971)). In 1974, responding to "considerable confusion" over what "modification" meant, EPA clarified that the phrase "increases the amount of any air pollutant" means an hourly rate increase by adopting a regulation that specified that emission rates "shall be expressed as kg/hr [kilograms per hour]." 39 Fed.Reg. 36,946, 36,949/1 (Oct. 15, 1974).

Less than two months later, EPA promulgated final pre-1977 PSD regulations with a definition of "modification" substantially the same as that in the NSPS rules, explaining: "It is the Administrator's intent to change the definition of modification under Part 52 to be consistent with the definition used in Part 60 [*i.e.*, NSPS]." 39 Fed.Reg. 42,510, 42,513-14 (Dec. 5, 1974) (defining "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant") (emphasis added). Accordingly, when Congress added NSR to the statute in 1977, the term "modification" was defined consistently in the existing NSPS and PSD regulations—in terms of hourly emission rates.

ii. "Major" Modification Also Requires Annual Increase

When EPA subsequently promulgated new regulations to implement the statutory NSR requirements added in 1977, it did not change its long-standing general definition of "modification" requiring an increase in "emission rate" "consistent with the definition used in Part 60." 39 Fed.Reg. at 42,513. What EPA

did do was add a definition of "major modification" to define the scope of NSR coverage. 45 Fed.Reg. 52,676, 52,735 (Aug. 7, 1980) (codified at 40 C.F.R. 52.21(b)(2)(i) (1980)). This new definition applies to a subset of modifications (*i.e.*, ones that are "major") that also result in a "significant net emissions increase," defined in terms of source-wide tons of emissions per year.

SUMMARY OF THE ARGUMENT

The *Alabama Power* decision setting forth the applicable tests for "routine" and "emissions increase" is correct and, if considered by the Court, should be affirmed. The tests adopted are grounded in the plain language and history of the Clean Air Act, the plain language of the regulations, and repeated and unambiguous interpretive statements by EPA.

ARGUMENT

I. The *Alabama Power* Decision is Correct

A. "Routine" is Defined Relative to the Industrial Category

This Court has succinctly explained the dispute over "routine":

> A central disagreement between TVA and EPA is whether "routine" should be defined relative to an industrial category or to a particular unit. TVA contends that a maintenance or replacement project that may need to be undertaken only once or twice during the life of a particular unit—and so in that sense is not routine—is nonetheless routine within the industrial category, since it has to be done once or twice within the life of every such unit. According to TVA, EPA formerly used the "industrial category" as the baseline and is now treating the individual unit as the frame of reference instead.

TVA I, 278 F.3d at 1189 n.3.

According to EPA regulations and guidance, "routine" is to be judged by "whether that type of equipment has been repaired or replaced by sources within the relevant industrial category." 57 Fed.Reg. 32,314, 32,326/1 (July 21, 1992) (emphasis added) (APC Ex. 2)*; see also* 40 Fed.Reg. 58,416, 58,419/3 (Dec. 16, 1975) (promulgating 40 C.F.R. 60.14(e)(1)) ("routine" defined in NSPS regulations relative to "source category") (APC Ex. 35). Similarly, the one appellate court to apply the "routine" exclusion looked to whether the types of activities at issue had occurred at other plants in the industry, not just at the particular unit. *See Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (*WEPCO*). In *WEPCO*, the Seventh Circuit found a "modification" only after EPA demonstrated that the work was "highly unusual" and "unprecedented" and that "EPA did not find [ ] even a single instance of renovation work at any electric generating station that approached [this] project in nature, scope or extent." *Id.* at 911 (emphasis added).

The "routine at the individual unit" test is an invention of EPA's NSR enforcement litigation started in 1999 that is now being parroted by NPCA and its supporting amici. This litigating position (also put forth by EPA enforcement staff

in the now-discredited EAB decision involving TVA[10]) should not be followed. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate."). In fact, EPA has not even consistently advocated a "routine at the individual unit" test as its litigating position—it started off the *Alabama Power* case asking for a "routine at the plant" test[11] and has postulated all sorts of different tests to other courts.[12] Such inconsistent and *ad hoc* litigating positions should be viewed skeptically and given no deference.

In this case, NPCA bases its "routine" argument almost exclusively on two Background Information Documents (BIDs) produced by EPA's Emission Standards and Engineering Division for its 1978 NSPS Subpart Da rulemaking.

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[10] *See TVA II*, 336 F.3d at 1245-46 ("[The EAB decision], to say the least, lacked the virtues of most agency adjudications. . . .[T]he EAB and ALJ manufactured the procedures they employed on the fly, entirely ignoring the concept of the rule of law.").

[11] *See* Notice of Violation at 14, ¶55, *In re Southern Company Services et al.*, EPA-CAA-2000-04-0006, *available at* http://www.epa.gov/compliance/resources/novs/civil/caa/nov-coal-southern.pdf ("The modifications at [Alabama Power's] plants do not fall within the [routine] exemption. . . . Each of these changes was an expensive capital expenditure performed infrequently at the plant . . . .") (emphasis added). Power "plants" are comprised of multiple generating "units."

[12] Doc.99 at 8-9.

NPCA Brief at 51-52.[13] These documents are irrelevant and unhelpful. At most, they suggest that projects like those at issue here should be "evaluated to determine if modification regulations should apply." BID at 5-5. Obviously, this "evaluation" could conclude that such regulations "should" not apply, because the project at issue is commonly performed within the industry. The BIDs do not say that the types of projects at issue are non-exempt modifications, nor do they discuss the proper frame of reference (*i.e.*, the industry or the unit). Finally, the BIDs are informal in nature and must yield to the more formalized and direct EPA statements on "routine." 57 Fed.Reg. at 32,326/1 ("the relevant industrial category" is the proper frame of reference); *see Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (stating that informal agency interpretations are not due the type of deference due formal interpretations).

Amici AEC's reliance on *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (*New York II*) is also misplaced. AEC Brief at 20-25. *New York II* involved petitions for review of the validity of EPA's 2003 Equipment Replacement Provision (ERP) rulemaking, 68 Fed.Reg. 61,248 (Oct. 27, 2003). That rule was prospective in application only (68 Fed.Reg. at 61,272-73) and would never have applied to the *Alabama Power* case or the present case. Further, the ERP rule did

[13] As an initial matter, it is odd that NPCA relies so heavily on this NSPS document for the meaning of "routine" under NSR, given that it tries so hard elsewhere to distinguish NSR from NSPS.

not address whether the appropriate frame of reference for "routine" was the unit or the industrial category. It sought to establish other criteria (*e.g.*, the cost of the project, its effect on the fundamental design parameters of the unit, etc.) for determining whether a project qualifies as a "routine replacement." *See* 68 Fed.Reg. at 61,270. The D.C. Circuit ruled these criteria to be outside EPA's statutory authority. The fact that this different "routine" exclusion was struck down has no bearing on the "routine" exclusion in the rules at issue here, which remain fully applicable. Moreover, the D.C. Circuit did not discuss, much less decide, whether "routine" should be judged using an industry or a unit frame of reference. The case is inapposite.[14]

AEC argues that the D.C. Circuit's application of the statutory definition of "modification" to the 2003 ERP rule in *New York II* must be followed by this Court as "binding intervening precedent" with respect to the existing Alabama SIP and 1980 federal NSR rules. AEC Brief at 20. AEC's position is preposterous. The question in the *Alabama Power* enforcement case is how to apply the existing "routine" exclusion—not whether to invalidate or vacate it (which the District Court properly recognized it could not do, 372 F. Supp. 2d at 1299, n. 34). Moreover, the District Court in *Alabama Power* fully considered the meaning of

[14] The case is also not over. EPA's position is that the panel in *New York II* erred in assigning the broadest possible meaning to the word "any" in the phrase "any physical change," and has petitioned for rehearing or rehearing *en banc*, 2006 WL 1547034 (D.C.Cir. May 1, 2006).

the statutory phrase "any physical change," and agreed with the D.C. Circuit that the phrase is extremely broad. *Id.* at 1289. While accepting the broad nature of the statutory phrase "any physical change," the District Court nonetheless properly held that the existing and valid "routine" exclusion should be applied with the relevant industrial category as the frame of reference. Nothing about *New York II* changes the soundness of this conclusion.

B. An "Emissions Increase" Under NSR Requires an Hourly Rate Increase

The District Court in *Alabama Power* also correctly interpreted and applied the language of the implementing regulations to require an increase in the hourly rate of emissions for NSR to apply. And the Court properly rejected the notion that increased utilization after an alleged change—*i.e.*, increased hours of operation—is enough to show an "emissions increase" from the change.

1. The Plain Language of the Regulations Requires an Hourly Increase

NSR applies only to "major modifications," and a "major modification" requires a "significant net emissions increase." ALA. ADMIN. CODE r. 335-3-14-.04(2)(b). Determining a "significant net emissions increase" is a multi-step process.

To calculate a "net emissions increase," the starting point is the unit's "actual emissions" before the change. ALA. ADMIN. CODE r. 335-3-14-.04(2)(c).

This "before" figure for "actual emissions" (known as the baseline) is "the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the given data [sic] and which is representative of normal source operation." ALA. ADMIN. CODE r. 335-3-14-.04(2)(u)(1).

There is no comparable "after" figure specified in the regulations. What the regulations do say is that the "before" baseline figure must increase "from [the] particular physical change or change in the method of operation . . . ." ALA. ADMIN. CODE r. 335-3-14-.04(2)(c)(1)(i). Mathematically speaking, baseline annual emissions from a unit can increase in only two ways: 1) the hourly rate of emissions can increase, or 2) the hours of operation over the course of the year can increase. Under the rules, any activity that by definition is not a "physical change or change in the method of operation" cannot be included in the calculation. ALA. ADMIN. CODE r. 335-3-14-.04(2)(b)(1) (requiring that a "change" must "result in" an "emissions increase") (emphasis added). Thus, because any "increase in the hours of operation" is expressly not a "change" under the rules, hours of operation must be held constant. ALA. ADMIN. CODE r. 335-3-14.-.04(2)(b)(3)(vi) ("A physical change or change in the method of operation shall not include. . . .[a]n increase in the hours of operation."); *see also WEPCO*, 893 F.2d at 918 n.14 (instructing EPA to determine an emissions increase as "if [the unit] were operated under present hours and conditions"). Thus, the practical and intended result is

that an increase in actual emissions (although converted to source-wide annualized emissions in tons per year for final comparative purposes as discussed below) must come from an increase in the hourly rate of emissions at the specific unit. *See Duke Energy*, 278 F. Supp. 2d at 640 ("[I]n calculating post-project emissions levels, the hours and conditions of operation must be held constant. Accordingly, a net emissions increase can result only from an increase in the hourly rate of emissions.").

Next, assuming the activity in question caused the maximum hourly rate of emissions at the unit to increase, "[a]ny other increases or decreases in actual emissions at the source that are contemporaneous with the particular change" must be factored in. ALA. ADMIN. CODE r. 335-3-14-.04(2)(c)(1)(ii). This step is known as "netting." Finally, assuming a positive number results after netting, that final annual emissions figure must be above "significance" thresholds. ALA. ADMIN. CODE r. 335-3-14-.04(2)(w)(1).

The only real argument offered to support an "increased utilization" test is that the "hours of operation" exclusion must be applied in a vacuum—that is, absent any contemporaneous physical change. AEC Brief at 10; New York Brief at 25. The major problem with this argument is that it seeks to impose an additional requirement not found in Alabama's EPA-approved SIP. The regulations state that an increase in the hours of operation is <u>not</u> a change that can

result in an emissions increase—period. ALA. ADMIN. CODE r. 335-3-14-.04(2)(b)(1) (requiring that a "change" must "result in" an "emissions increase"); ALA. ADMIN. CODE r. 335-3-14.-.04(2)(b)(3)(vi) ("A physical change or change in the method of operation shall not include. . . .[a]n increase in the hours of operation."). As such, any attempt to change and limit the hours of operation exclusion in contravention of the Alabama SIP's plain language is "tantamount to an unapproved modification" of the Alabama SIP; and, as this Court has recently made clear, an "unapproved revision of any part of a SIP is invalid under § 110(i) of the Clean Air Act." *Sierra Club v. TVA*, 430 F.3d 1337, 1346-7 (11th Cir. 2005) (emphasis added); *see also Duke Energy*, 278 F. Supp. 2d at 641 ("Such a limitation on the application of [the hours of operation] exclusion [] is not provided for in the plain text of the regulations [and the court] cannot simply defer to the EPA's interpretation when that interpretation imposes an additional condition on a regulatory exemption."). If NPCA wants to limit the reach of the hours of operation exclusion in the Alabama SIP, it must go through the SIP revision process, not file an enforcement action challenging activities conducted over a decade ago. *See Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1355 (11th Cir. 2006) (allowing use of emissions exclusion contained in Georgia SIP as a defense in an enforcement case, stating: "If the EPA believes that its current interpretation of the Clean Air Act requires Georgia to modify its [EPA-approved

SIP], the EPA should require the state to revise its SIP to conform to EPA policy.").

2. Contemporaneous Guidance from EPA Confirms the Hourly Rate Test

Guidance disseminated by EPA just after its adoption of the 1980 federal NSR rules and its approval of the Alabama SIP confirms the hourly rate test. For example, in 1982, EPA's Region 4 (which includes Alabama) prepared and forwarded a guidance memorandum to state and local air directors to apprise them of "recent policy decisions [and] interpretations of EPA regulations." Wilburn Memorandum at 1 (APC Ex. 16). The guidance, presented in question and answer format, reads:

> Question: A source to be modified will be subject to PSD due to a significant increase in SO_2 emissions. **After the modification there will be no increase in the hourly particulate emissions.** The source presently operates at 4,000 hours per year. If the [source's] permit would allow 7,000 hours per year, would this be judged a significant increase in particulate emissions, and cause the source to be subject to PSD for particulate?
>
> Answer: **No**. Since the modification does not cause any increase in emissions, no increase in annual emissions should be calculated.

Id. at 3 (underline in original) (bold typeface added). In other words, if the hourly rate of emissions for a pollutant (in this example, particulate matter) does not increase, NSR is not triggered for that pollutant even if the unit runs more after the change (so long as hours after the change are within permitted limits). EPA's

guidance to ADEM is clear—an increase in the hourly rate of emissions is a prerequisite to NSR applicability;[15] if there is no hourly rate increase, then there is no need even to calculate annual emissions.[16]

This contemporaneous EPA guidance (which EPA has not rescinded) should be given much more weight by the Court than what EPA may now say to advance its enforcement litigation initiative. *See Comm'r of Internal Revenue v. Schleier*, 515 U.S. 323, 345 (1995).

3. The Hourly Rate Test Avoids Conflict with the Statute

NPCA's "increased utilization" interpretation is in conflict with Congress' statutory mandate that "modification" must "mean the same" under NSR as under NSPS. 42 U.S.C. 7501(4); 42 U.S.C. 7479(2)(C). In contrast, interpreting the NSR regulations as requiring an hourly rate increase, as the *Alabama Power* Court did, avoids this conflict.

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[15] ADEM interprets its regulations in accordance with this EPA guidance. *See, e.g.*, Declaration of Ronald W. Gore, Chief, ADEM Air Division, at 5 (APC Ex. 14) ("For purposes of this PSD permitting requirement, ADEM interprets 'major modification' to include only those projects or activities that increase the maximum capacity of a unit or facility to emit more pollution on an hourly basis.").

[16] Earlier guidance from EPA also confirmed that NSR/PSD requirements would be triggered only where there was an increase in the hourly rate of emissions. *Duke Energy*, 278 F. Supp. 2d at 641 (quoting Reich / Gill Letter (APC Ex. 63)).

Courts "do not construe a regulation in a manner that would place it in conflict with the statute by which it is authorized." *United States v. Giancola*, 783 F.2d 1549, 1552 (11th Cir. 1986); *see also United States v. Marte*, 356 F.3d 1336, 1341 (11th Cir. 2004) ("When a regulation implements a statute, the regulation must be construed in light of the statute . . . ."); *Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994), *superseded by statute, in part, by* 38 U.S.C. 7111("[Regulations] must be construed to avoid conflict with a statute if fairly possible.").

In this case, the statute directs that "modification" "mean the same" under NSR as under NSPS. 42 U.S.C. 7501(4); 42 U.S.C. 7479(2)(C). As the Fourth Circuit noted, "No one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification.'" *Duke Energy*, 411 F.3d at 550 (emphasis in original); *see also* 40 C.F.R. 60.14(b). Thus, to give effect to Congress's direction, NSR must also use an hourly rate test.

Courts have reached different conclusions as to whether this statutory mandate was an outright incorporation of EPA's existing NSPS regulations defining "modification." *Compare United States v. Westvaco*, No. 00-2602, slip op. at 36 (D. Md. Aug. 27, 2004) (App.H) ("Congress must be presumed to have

been aware of the extensive NSPS regulations interpreting § 7411(a)(4)'s definition of 'modification.' Thus, when Congress adopted § 7411(a)(4) by reference into the PSD part of the statute, it presumably intended for these NSPS rules to apply in the PSD context.") *with New York I*, 413 F.3d at 19 ("Congress's failure to use [] an express incorporation of prior regulations for 'modification' cuts against the proposed inference."). This precise point, however, need not be decided by the Court here. This Court's task, if it reaches the merits, is simply to interpret the applicable regulations using traditional tools of construction. Congress surely had *some* reason for using the words "mean the same as" when defining "modification" in the statute. Interpreting the regulations to impose an hourly rate test for NSR as did the District Court in *Alabama Power* gives effect to Congress's words; using NPCA's "increased utilization" test does not.[17] The choice is clear.

II. Section 307(b) Does Not Apply

NPCA's amici argue that the *Alabama Power* decision somehow impermissibly encroaches upon the D.C. Circuit Court of Appeals' exclusive

[17] Requiring an underlying increase in the unit's hourly rate also squares with Congress's intent as revealed in the legislative history. As Congress explained, the purpose of PSD is to provide a "mechanism [ ] to assure that before new or expanded facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S. Rep. No. 95-127, at 55 (May 10, 1977) (emphasis added) (Doc. 96 at Ex. 4). An "expanded" source is one that increases its hourly emissions rate, not one that maintains its ability to operate at its original design rate.

jurisdiction to hear petitions for review of EPA rulemakings under section 307(b) of the Clean Air Act, 42 U.S.C. 7607(b). AEC Brief at 14-26; New York Brief at 20-22. The plain language of section 307(b) and this Court's precedent easily refute this argument.

Section 307(b) says, in relevant part: "A petition for review of action of the Administrator in promulgating . . . any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. 7607(b)(1). And further: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.* 7607(b)(2).

This language has no application to the *Alabama Power* case or this case. First, neither Alabama Power nor TVA have filed a "petition for review;" instead, they were sued under the federal enforcement (section 7413) and citizen suit (section 7604) provisions of the statute, respectively, which place jurisdiction in the district courts. Second, neither is seeking review of administrative action "promulgating any . . . regulations;" instead, both TVA and Alabama Power are advocating a particular *interpretation* and *application* of the regulations in an effort to defend themselves. Third, the applicable regulations were not promulgated "by the Administrator." Instead, the regulations applicable to the *Alabama Power*

decision are those found in the Alabama SIP as *promulgated* by ADEM and *approved* by EPA. Doc.69. Promulgation of these Alabama regulations could never have been challenged in the D.C. Circuit under section 307(b), but instead would have to be challenged through the state court system. ALA. CODE 22-22A-7(c)(6), 41-22-20(b).[18] Moreover, EPA's approval of the Alabama SIP (which of course has no applicability outside of Alabama) would be challenged in this Court, not the D.C. Circuit. 42 U.S.C. 7607(b)(1) (second sentence). For all these reasons, the regulatory interpretations addressed in the *Alabama Power* decision are not "[a]ction of the Administrator with respect to which review could have

[18] The question of what regulations apply (and therefore where to file a challenge to their promulgation) is separate and distinct from the question of what agency, if any, is entitled to judicial deference when those regulations are interpreted. AEC's brief confuses these two issues, AEC Brief at 12 n.7, which may explain why it misses the obvious point that section 307(b) doesn't apply here because state regulations control. In any case, as to the deference issue, in a state like Alabama where EPA has delegated to the state full authority to implement the Clean Air Act, courts should defer to the *state's* interpretation of its own SIP if that interpretation is reasonable and consistent with the statute. *See Florida Power & Light Co. v. Costle*, 650 F.2d 579, 588 (5th Cir. Unit B 1981) (holding that federal courts "should defer to the state's interpretation of the terms of its air pollution control plan when said interpretation is consistent with the Clean Air Act") (internal quotation omitted); *Alabama Air Pollution Control Comm'n v. Republic Steel*, 646 F.2d 210, 214 (5th Cir. Unit B 1981) (deferring to the state agency's interpretation of the Alabama Clean Air Act state implementation plan). Alabama Power respectfully disagrees with the District Court's *dicta* suggesting otherwise. *Alabama Power*, 372 F. Supp. 2d at 1291. Nevertheless, the issue of deference need not be reached because the applicable regulations—whether federal or state—are not ambiguous. *See* Section I.B.1., *supra*.

been obtained" under section 307(b)(1), and thus there is no bar to judicial review of those interpretations by the District Court or this Court. 42 U.S.C. 7607(b)(2).

Moreover, this Court has held that it has jurisdiction to consider whether EPA's regulation conflicts with an act of Congress in a case similar to this one. *See Siegelman v. EPA*, 911 F.2d 499, 502 n.6 (11th Cir. 1990). *Siegelman* involved a challenge by the State of Alabama to a hazardous waste permit issued by EPA under the Resource Conservation and Recovery Act (RCRA). EPA had relied on one of its RCRA regulations providing that it need not comply with the National Environmental Policy Act (NEPA) when issuing permits. *Id.* at 502. Alabama argued that EPA must comply with the NEPA statute despite the regulation. *Id.* EPA's response was that its regulations could only be challenged in the D.C. Circuit. This Court rejected that argument:

> Under RCRA, parties wishing to challenge an EPA regulation must file a petition for review in the District of Columbia Circuit Court of Appeals within ninety days after promulgation. *See* 42 U.S.C. § 6976(a)(1). EPA argues here that, because petitioners never directly challenged regulation section 124.9(b)(6) in this statutorily required manner, they may not now challenge the regulation indirectly by appealing EPA's decision to grant a permit to the Emelle facility. We disagree. This court would have no jurisdiction to entertain a challenge to a RCRA regulation on the ground that EPA did not follow proper procedures in promulgating the regulation. But we do have jurisdiction to consider the argument that EPA's regulation conflicts with an act of Congress.

Siegelman, 911 F.2d at 502 n.6 (emphasis added). The same reasoning applies here.[19] Neither NPCA, AEC, nor the New York amici alert this Court to the *Siegelman* case, despite their strenuous arguments about the D.C. Circuit's "exclusive" jurisdiction.[20]

Finally, the section 307(b) argument fails as a factual matter because the District Court did not "invalidate" any regulations or step on the D.C. Circuit's turf; it simply interpreted the applicable regulations in the enforcement case before it. 372 F. Supp. at 1299-1300*; accord Duke Energy*, 411 F.3d at 549 ("[N]o question as to the validity of the PSD regulations is (or could be, see 42 U.S.C. § 7607(b)) presented here.").

[19] In fact, *Siegleman* is *binding* precedent in this case, given that Congress crafted the RCRA judicial provision in that case "to follow comparable provisions in the Clean Air and Water Acts [*i.e.*, § 307(b)(1)]." S. Rep. No. 96-172, at 5 (1980), *as reprinted* in 1980 U.S.C.C.A.N. 5019, 5024.

[20] *Siegelman* is consistent with the D.C. Circuit's view of the limited scope of its own exclusive jurisdiction. *See Utah Power & Light Co. v. EPA*, 553 F.2d 215, 217-18 (D.C. Cir. 1977) ("[CAA] Section 307(b)(1) grants exclusive jurisdiction to courts of appeals 'to hear challenges to a *limited* class of actions taken by the Administrator' [citation omitted] . . . . [C]hallenges to the validity of certain agency regulations are directly reviewable by courts of appeals, whereas challenges to interpretations of those regulations are not.") (emphasis in original).

CONCLUSION

For all these reasons, the *Alabama Power* decision is correct and, if considered by the Court, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 6,919 words, excluding the parts of the brief exempted by Fed. R.App.P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was served on the parties to this appeal by placing a copy in the United States first-class mail postage paid on June 28, 2006, addressed to their counsel as follows:

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