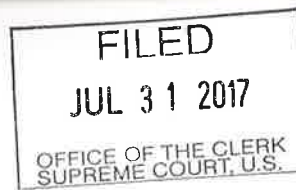


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No. _____

In the
Supreme Court of the United States

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 31, 2017

QUESTION PRESENTED

The Clean Air Act's (CAA) New Source Review (NSR) program regulates industrial growth throughout the country, requiring preconstruction permits for large new industrial facilities and for existing ones that undergo "modification." As Justice Kennedy observed in *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 516-17 (2004) (Kennedy, J., dissenting), "the time for [permit] approval [for a complex project] can take from five to seven years," impacting decisions on industrial improvement and development across the nation.

Because NSR regulates "new" sources of air pollution—projects that increase the amount of emissions and thus deteriorate air quality—these provisions apply to an existing power plant only when it undergoes "modification," which the statute defines as a physical change at the plant that "increases the amount" of pollution. 42 U.S.C. § 7411(a)(4). The U.S. Environmental Protection Agency's (EPA) regulations, in like fashion, state that a change is a "major modification" if it causes a significant increase in emissions. 40 C.F.R. § 52.21(a)(2)(iv)(a), (b); *id.* § 52.21(b)(2). Conversely, a physical change "is not a major modification if it does not cause a significant emissions increase." *Id.* § 52.21(a)(2)(iv)(a).

The question presented here is whether, contrary to the text of the statute and EPA's regulations, the Government can treat a maintenance project that demonstrably has not caused a significant increase in emissions as a major modification that triggers NSR permitting requirements.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the Sixth Circuit:

1. DTE Energy Company and Detroit Edison Company, petitioners on review, were Defendants-Appellees below.

2. The United States of America, respondent on review, was a Plaintiff-Appellant below.

3. The Sierra Club was an Intervenor-Plaintiff-Appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner DTE Energy Company has no parent corporation and no corporation owns 10% or more of its stock. Petitioner Detroit Edison Company, now known as DTE Electric Company, is a wholly owned subsidiary of DTE Energy Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES.....	vii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
I. The Clean Air Act and the Role of “New Source Review”	4
II. The Project-and-Report System for Determining NSR Applicability.....	6
III. Facts and Procedural History.....	14
REASONS FOR GRANTING CERTIORARI	20
I. The Sixth Circuit’s Multiple Opinions Produce a Result That Is Irreconcilable with the Statute, the Regulations, and the Basic Norms of Due Process.	21
A. The Theory on which this Enforcement Action Has Been Permitted to Proceed Violates the Text of the Statute and the Regulations.	21

B. The Enforcement Regime the Sixth Circuit Has Created Violates Due Process.....	24
II. The Decision Below Will Chill Maintenance and Modernization of the Nation's Industrial Base.	26
CONCLUSION	30

APPENDIX MATERIALS:

APPENDIX A: Opinion in Nos. 14-2274, 14-2275 of the U.S. Court of Appeals for the Sixth Circuit (Jan. 10, 2017) (<i>DTE II</i>).....	1a
APPENDIX B: Order in Nos. 14-2274, 14-2275 of the U.S. Court of Appeals for the Sixth Circuit Denying Petition for Rehearing or Rehearing En Banc of DTE Energy Company and Detroit Edison Company (May 1, 2017)	48a
APPENDIX C: Order in Nos. 14-2274, 14-2275 of the U.S. Court of Appeals for the Sixth Circuit Staying the Mandate (May 16, 2017)	50a
APPENDIX D: Order in No. 2:10-cv-13101-BAF-RSW of the U.S. District Court for the Eastern District of Michigan Entering Partial Final Judgment and Staying the Case Pending Appeal (Aug. 5, 2014)	52a

APPENDIX E: Opinion and Order in No. 2:10-cv-13101-BAF-RSW of the U.S. District Court for the Eastern District of Michigan Granting Defendants' Motion for Summary Judgment (Mar. 3, 2014).....	57a
APPENDIX F: Opinion in No. 11-2328 of the U.S. Court of Appeals for the Sixth Circuit (Mar. 28, 2013) (<i>DTE I</i>).....	62a
APPENDIX G: Opinion and Order in No. 2:10-cv-13101-BAF-RSW of the U.S. District Court for the Eastern District of Michigan Granting Defendants' Motion for Summary Judgment (Aug. 23, 2011)	86a
APPENDIX H: Federal Statutes	100a
APPENDIX I: Federal Regulations	101a

TABLE OF AUTHORITIES

	Page
<u>Federal Cases:</u>	
<i>Alaska Dep't of Envtl. Conservation v. EPA</i> , 540 U.S. 461 (2004).....	26, 29
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	29
<i>Christopher v. SmithKline Beecham Corp.</i> , 567 U.S. 142 (2012).....	24
<i>Connally v. Gen. Constr. Co.</i> , 269 U.S. 385 (1926).....	24
<i>Envtl. Def. v. Duke Energy Corp.</i> , 549 U.S. 561 (2007).....	5, 6, 23, 30
<i>Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.</i> , 567 U.S. 239 (2012).....	24
<i>Fri v. Sierra Club</i> , 412 U.S. 541 (1973).....	28
<i>Montana Power Co. v. EPA</i> , 434 U.S. 809 (1977).....	28
<i>New York v. EPA</i> , 413 F.3d 3 (D.C. Cir. 2005).....	5, 23
<i>Sierra Club v. EPA</i> , 540 F.2d 1114 (D.C. Cir. 1976).....	28
<i>Sierra Club v. Ruckelshaus</i> , 344 F. Supp. 253 (D.D.C.), <i>aff'd</i> , 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972).....	28
<i>United States v. Cinergy Corp.</i> , 458 F.3d 705 (7th Cir. 2006).....	6
<i>United States v. Williams</i> , 553 U.S. 285 (2008).....	24

<i>U.S. Army Corps of Eng'rs v. Hawkes Co.</i> , 136 S. Ct. 1807 (2016).....	28
--	----

<i>Wis. Elec. Power Co. v. Reilly</i> , 893 F.2d 901 (7th Cir. 1990).....	6, 7, 23
---	----------

Federal Statutes:

28 U.S.C. § 1254(1).....	1
Clean Air Act, 42 U.S.C. §§ 7401 <i>et seq.</i>	
42 U.S.C. § 7411(a)(2).....	4
42 U.S.C. § 7411(a)(4).....	<i>passim</i>

Legislative History:

H.R. REP. NO. 95-294 (1977), <i>reprinted in</i> , 1977 U.S.C.C.A.N. 1077, 1264.....	4
--	---

Federal Regulations:

40 C.F.R. § 52.21(a)(2)(iii).....	11
40 C.F.R. § 52.21(a)(2)(iv)(a).....	2, 3, 5, 13, 21
40 C.F.R. § 52.21(a)(2)(iv)(b).....	10, 13, 22
40 C.F.R. § 52.21(a)(2)(iv)(c).....	10
40 C.F.R. § 52.21(b)(33)(ii) (1993).....	7
40 C.F.R. § 52.21(b)(41)(i).....	10
40 C.F.R. § 52.21(b)(41)(ii)(a).....	10
40 C.F.R. § 52.21(b)(41)(ii)(c).....	11
40 C.F.R. § 52.21(b)(48)(i).....	10
40 C.F.R. § 52.21(r)(6)(i)(a).....	12
40 C.F.R. § 52.21(r)(6)(i)(b).....	12

40 C.F.R. § 52.21(r)(6)(i)(c).....	12
40 C.F.R. § 52.21(r)(6)(ii)	12
40 C.F.R. § 52.21(r)(6)(iii)	12
40 C.F.R. § 52.21(r)(6)(iv).....	12
40 C.F.R. § 52.21(r)(6)(vi)(a)	12
40 C.F.R. § 52.21(r)(6)(vi)(b)	11

Federal Register:

57 Fed. Reg. 32,314 (July 21, 1992).....	7, 8, 14
63 Fed. Reg. 39,857 (July 24 1998).....	9
67 Fed. Reg. 80,186 (Dec. 31, 2002).....	9, 10, 14
72 Fed. Reg. 72,607 (Dec. 21, 2007).....	9, 11, 25

Court Materials:

Brief for Respondent EPA, <i>New York v. EPA</i> , No. 02-1387, 2004 WL 5846388 (D.C. Cir. Oct. 26, 2004)	5, 6
---	------

Miscellaneous:

EPA, <i>New Source Review: Report to the Presi-</i> <i>dent</i> (June 2002), https://www.epa.gov/sites/production/files/2015-08/documents/nsr_report_to_president.pdf ...	27
--	----

EPA, EPA-456/R-03-005, <i>Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration</i> (Oct. 30, 2003), https://www.epa.gov/sites/production/files/2015-12/documents/petitionresponses10-30-03.pdf	5
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**PETITION FOR WRIT OF CERTIORARI
OPINIONS BELOW**

The opinions of the Sixth Circuit Court of Appeals are reported at 711 F.3d 643 (*DTE I*) and 845 F.3d 735 (*DTE II*) and are reproduced at App. 62a-85a and App. 1a-47a, respectively. The opinions of the District Court are unreported but are published at No. 10-13101, 2011 WL 3706585 (E.D. Mich. Aug. 23, 2011) and No. 10-cv-13101, 2014 WL 12601008 (E.D. Mich. Mar. 3, 2014) and are reproduced at App. 86a-99a and App. 57a-61a.

JURISDICTION

The Court of Appeals issued its opinion on January 10, 2017, App. 1a-47a, and denied rehearing en banc on May 1, 2017, App. 48a-49a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Relevant provisions of the CAA, 42 U.S.C. §§ 7401 *et seq.*, are reproduced at App. 100a.

Relevant provisions of EPA's regulations implementing the CAA are reproduced at App. 101a-106a.

STATEMENT

In 2010, DTE replaced worn components on its Monroe 2 power plant. Before starting this maintenance, DTE evaluated whether the projects qualified as "major modifications" that would trigger the Clean Air Act's (CAA) costly and time-consuming New Source Review (NSR). By statute and regulation, a physical change to an existing plant triggers NSR only if it "increases the amount" of pollution. 42 U.S.C. § 7411(a)(4). Accordingly, a project "is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(a). Based on its preconstruction projections, DTE concluded that the projects would not cause an increase in pollution over and above that occurring in the immediate past. And DTE has proven right. In fact, emissions at Monroe 2 *decreased* after the projects.

The Government nonetheless filed this enforcement action after the projects were completed, claiming that the projects were major modifications and demanding millions of dollars in civil penalties for DTE's failure to seek the permits that major modifications require. According to the Government, DTE violated the statute and the regulations by failing to project in advance that the projects would cause a significant emissions increase—even though it is now known as a matter of undisputed fact that they did not actually do so. And to add insult to injury, the Government seeks to *penalize* DTE for failing to make that demonstrably inaccurate preconstruction emissions projection.

The district court and two members of the Sixth Circuit panel that heard the case agreed that this Orwellian type of enforcement action should not be able to proceed. Yet, due to the vagaries (and misap-

plication) of the law-of-the-case doctrine, one of the panel members deemed herself bound by her interpretation of an earlier panel decision from which she dissented to allow the Government to proceed with its novel effort to declare the projects major modifications on the theory that DTE should have erroneously projected an emissions increase that did not actually materialize.¹

That result cannot be reconciled with law, logic, or basic norms of due process. As a matter of common sense, a statute that is triggered only when a project "increases the amount" of pollution, 42 U.S.C. § 7411(a)(4), cannot be triggered by a project that did not increase the amount of pollution. To the extent there were any doubt on that score, the governing regulations eliminate it, as they expressly confirm that a project "is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(a). Simply put, the statute is concerned with whether a project *actually* increases emissions, not with whether the Government *thought* the project would do so. The Government may not use its own demonstrably flawed *projections* to declare a project a major modification after the fact when the project concededly did not *actually* increase emissions.

The Sixth Circuit's contrary conclusion will have disastrous consequences for the entire regulated industry, as it injects even greater uncertainty—indeed, incoherence—into a regulatory scheme that is hardly known as a model of clarity. Left standing, the decision below threatens to paralyze substantial

¹ The Sixth Circuit has stayed its mandate pending this Court's review. App. 50a-51a.

maintenance projects throughout the nation. If NSR can be triggered, and penalties imposed, even when an operator *correctly* predicts that a project will not increase emissions, then operators are left with no way to meaningfully assess the costs and benefits of proceeding with such projects. That is not the regulatory scheme that Congress envisioned; nor is it the regulatory scheme that this Court's decisions contemplate. The Court should grant certiorari and reject the Government's extraordinary claim that it may penalize an operator for failing to predict an emissions increase that did not come to pass.

I. The Clean Air Act and the Role of "New Source Review"

The CAA regulates new and existing major stationary sources differently. In general, *new* sources must undergo preconstruction review and permitting, dubbed "New Source Review" or "NSR". As part of this process, these new sources may be required to install additional emission controls. Congress imposed these obligations on new sources because it determined that new sources could incorporate more cost-effectively and efficiently those types of emissions controls into their designs as they were being built than could existing sources. See, e.g., H.R. REP. NO. 95-294, at 185 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1264.

For truly new sources, like a brand new power plant, NSR plainly applies. The statute, however, also defines a new source to include existing sources that undergo "modification." 42 U.S.C. § 7411(a)(2), (4). This case concerns when a repair project at an existing plant qualifies as a "modification" (or, in the parlance of the NSR regulations, a "major modification") that triggers NSR.

Under the statute, a triggering "modification" is "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 ...*" 42 U.S.C. § 7411(a)(4) (emphasis added). The statute thus "unambiguously defines 'increases' in terms of actual emissions." *New York v. EPA*, 413 F.3d 3, 38-40 (D.C. Cir. 2005) (*per curiam*).

So do EPA's regulations. The 1980 version of the rules, this Court observed, is "relatively clear" on this point. The rules "require a permit for a modification ... only when it would increase the actual annual emission of a pollutant above the actual average for the two prior years." *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 569 (2007). The 2002 revision to the rules is even clearer: "[A] project is a major modification ... if it causes ... a significant emissions increase The project is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(a).

This unambiguous statutory command has led EPA to emphasize time and again that NSR is directed at limiting emissions increases. "[The] [NSR] program's *limited object is to limit significant emissions increases* from new and modified sources."² The NSR rules are thus designed to ensure "that *only* changes causing a *real* increase in pollution are subject to NSR." Br. for Resp't EPA at 76, *New York v.*

² EPA, EPA-456/R-03-005, *Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration at 105* (Oct. 30, 2003) (emphasis added), <https://www.epa.gov/sites/production/files/2015-12/documents/petitionresponses10-30-03.pdf> (last visited July 28, 2017).

EPA, No. 02-1387, 2004 WL 5846388, at *76 (D.C. Cir. Oct. 26, 2004) (emphases added).

II. The Project-and-Report System for Determining NSR Applicability.

1. While EPA's 1980 regulations may have been "relatively clear" in requiring an annual increase in actual emissions for a major modification to occur, *Duke Energy*, 549 U.S. at 569, they could claim no such clarity regarding the process for assessing in advance whether a project at an existing plant would qualify as a major modification. As construed by the courts, EPA's 1980 rules contemplated a preconstruction judgment of whether a "change" is "projected" to cause a "significant net increase" in emissions over baseline levels. See, e.g., *United States v. Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006).

But the regulations were ambiguous about what this preconstruction judgment should entail. See, e.g., *id.* ("[W]hat is required ... is ... merely a reasonable estimate of the amount of additional emissions that the change will cause."); see also *Duke Energy*, 549 U.S. at 577 (explaining "the 1980 PSD regulations may be no seamless narrative," but "[w]hat these provisions are getting at is a measure of actual operations averaged over time"). At one point, the Government went so far as to argue that the test should measure actual emissions during a baseline period against the maximum potential for the unit to emit in the future. See *Wis. Elec. Power Co. v. Reilly (WEPCo)*, 893 F.2d 901, 918 (7th Cir. 1990). This meant that, for any unit that did not run at full potential during the baseline period—for example, if the unit was not dispatched due to a lack of demand—even changing a light bulb might qualify as a major modification, because the unit's potential to

emit would always be greater than its actual baseline emissions. The Seventh Circuit rejected this extreme theory, *id.* at 918, but the fact that the regulations would tolerate such an argument at all underscored the need for regulatory reform.

2. EPA began those reforms in 1992, taking the first steps toward the project-and-report system that exists today. See 57 Fed. Reg. 32,314 (July 21, 1992). Several aspects of this initial foray are relevant here.

Most significantly, the 1992 revisions specified for electric utilities a clarified emission projection technique that emphasized the importance of determining whether the change—as opposed to other factors, like demand—would cause an increase. Called "the 'representative actual annual emissions' methodology," this procedure required utilities to project future emissions based on anticipated operations. After excluding emission increases not caused by the project (referred to colloquially as the "demand growth exclusion"),³ the projected emissions were

³ The regulations implement the NSR causation requirement by:

Exclud[ing], in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

40 C.F.R. § 52.21(b)(33)(ii) (1993). This causation provision is often referred to as the "demand growth exclusion" because de-

compared to a baseline period to determine whether an increase in actual emissions was projected to occur as a result of the project. EPA coupled this pre-project emission projection with a "post-construction" monitoring requirement for sources opting to use this new emission projection approach. *Id.* at 32,325.

This test, in particular the so-called "demand growth exclusion" causation requirement, concerned some commenters. How would EPA guard against the possibility that a utility might understate—either innocently or intentionally—the company's expectation regarding future emissions? EPA found this concern misplaced, because the post-construction monitoring would "guard against the possibility that significant increases in actual emissions attributable to the change may occur under this methodology." *Id.* at 32,325. EPA explained further that "NSR applies only where the emissions increase is caused by the change," and "[i]f ... the reviewing authority determines [based on post-project data] that the ... emissions have in fact increased significantly over baseline ... as a result of the change, the source would become subject to NSR requirements *at that time.*" *Id.* (emphasis added).

In the years that followed, EPA evaluated the effectiveness of these reforms and pondered whether to keep them. EPA worried that the project-and-report system gave operators too much leeway in making projections:

[T]he demand growth exclusion is problematic because it is *self-implementing and self-policing*. Because *there is no specific test*

mand growth is explicitly listed in it as an example of an independent factor that is unrelated to the change.

available for determining whether an emissions increase indeed results from an independent factor such as demand growth, versus factors relating to the change at the unit, each company with a utility unit presently adopts its own interpretation. Interpretations may vary from source to source, as well as from what a permitting agency would accept as appropriate.

63 Fed. Reg. 39,857, 39,861 (July 24, 1998) (emphases added). EPA thus proposed not only to eliminate the demand-growth exclusion, but also to require the operator to submit its projection to the permitting authority for approval and the imposition of permit limits based on the projection. *Id.* at 39,862. Given the incompatibility of such an approach with the statutory causation requirement and with the need for timely industrial repair and maintenance, 67 Fed. Reg. 80,186, 80,244 (Dec. 31, 2002), EPA in its 2002 rulemaking not only kept the demand growth exclusion, but also expanded its availability. As EPA noted, a robust regime of pre-construction projections and post-construction monitoring of *actual* emissions is more than sufficient for permitting authorities to police sources' application of the demand growth exclusion. 72 Fed. Reg. 72,607, 72,610-11 (Dec. 21, 2007).

3. The 2002 revisions to the rules, which govern the present dispute, clarified some aspects of the 1992 rules and beefed up the reporting requirements.

First, the 2002 rules clarify how emissions should be projected before a project is commenced and how that projection will be judged after the project is completed. Under the rules, the "procedure for calculating (before beginning actual construction)

whether a significant emissions increase ... will occur depends upon the type of emissions units being modified." 40 C.F.R. § 52.21(a)(2)(iv)(b). For projects like those at issue here that only involve existing emissions units:

[a] significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions ... and the baseline actual emissions ... for each existing emissions unit, equals or exceeds the significant amount for that pollutant.

Id. § 52.21(a)(2)(iv)(c).⁴

Reflecting the causation requirement of the statute and regulations,⁵ the "projected actual emissions" rule requires that the owner/operator "[s]hall exclude, in calculating any increase in emissions that

⁴ "Baseline actual emissions" is defined as "the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding when the owner or operator begins actual construction of the project." 40 C.F.R. § 52.21(b)(48)(i). "Projected actual emissions" is defined as the "maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit" a regulated PSD pollutant "in any one of the 5 years (12-month period) following the date the unit resumes regular operation after the project." *Id.* § 52.21(b)(41)(i). In determining projected actual emissions before the project, "the owner or operator ... [s]hall consider all relevant information," including the "company's own representations," its "expected business activity," and its "filings with the State or Federal regulatory authorities." *Id.* § 52.21(b)(41)(ii)(a).

⁵ 67 Fed. Reg. at 80,203 ("Both the statute and ... regulations indicate that there should be a causal link between the proposed change and any post-change increase in emissions.").

results from [t]he particular project, that portion of the unit's emissions following the project" that the unit "could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions ... and that are also unrelated to the particular project, including any increased utilization due to product demand growth." *Id.* § 52.21(b)(41)(ii)(c).

The result of the projection dictates what happens next. If the operator projected that its project would cause a significant net emissions increase, the operator must get a permit. See 40 C.F.R. § 52.21(a)(2)(iii). At the other end of the spectrum are projects not projected to cause a significant increase or even a reasonable possibility of one. For those projects, the operator must monitor and report emissions as required by other CAA rules. See *generally* 72 Fed. Reg. at 72,612-13 (describing the numerous other monitoring and reporting requirements applicable to emissions sources). But for those projects, the NSR rules do not require the operator to maintain a record of its preconstruction analysis or monitor post-construction emissions.

In the middle are projects that the operator does not expect to cause a significant net emissions increase but that nonetheless create a "reasonable possibility" of such an increase. These projects trigger additional reporting obligations.⁶ For all such rea-

⁶ A "reasonable possibility" exists if one of two criteria are satisfied: (1) the projection shows an emissions increase of at least 50% of the significant amount before accounting for causation (*i.e.*, before excluding increases in emissions that the unit was capable of accommodating but that are unrelated to the project), 40 C.F.R. § 52.21(r)(6)(vi)(b); or (2) the project is projected to cause an emissions increase for any pollutant of at

sonable-possibility projects, “[b]efore beginning actual construction ..., the owner or operator shall document and maintain a record” that contains the “projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(c) ... and an explanation for why such amount was excluded,” as well as a “description of the project” and an “[i]dentification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project.” *Id.* § 52.21(r)(6)(i)(a)-(c). And in some instances, “before beginning actual construction, the owner or operator” must also provide its preconstruction analysis to the permitting authority. *Id.* § 52.21(r)(6)(ii).

Because actual emissions will be the decisive factor, the operator is not “require[d] ... to obtain any determination from the Administrator before beginning actual construction” for any project, including those with a reasonable possibility of an increase *Id.* Rather, once pre-project analysis and recordkeeping requirements are met (*i.e.*, notification is sent to the permitting authority or records are maintained, as applicable under the rules), the rules provide that construction may begin. When construction is complete, the operator then must calculate and maintain a record of emissions in tons per year of any NSR-regulated pollutant and (for electric generating units) report those emissions to the relevant regulatory authority annually. *Id.* § 52.21(r)(6)(iii)-(iv).

4. As explained above, the 2002 rules state unequivocally that “a project is a major modification for a regulated NSR pollutant if it causes ... a signifi-

least 50% of the significant amount (but less than 100% of that amount), *id.* § 52.21(r)(6)(vi)(a).

cant emissions increase ... and a significant net emissions increase.” 40 C.F.R. § 52.21(a)(2)(iv)(a). And in the very next sentence, the rules make clear that a “project is *not* a major modification *if it does not cause a significant emissions increase.*” *Id.* (emphases added). Just so; that is what the statute says, too.⁷

But EPA also clarified in the 2002 revisions that *projections* are not the ultimate measure of whether a project is, in fact, a major modification. After describing how an operator should project post-project emissions, EPA makes clear that, “[r]egardless of *any such* preconstruction projections, a major modification” depends on whether “the project *causes a significant emissions increase.*” *Id.* § 52.21(a)(2)(iv)(b) (emphases added). This provision applies expansively to “any such” projection, whether it is the actual preconstruction projection performed by the operator or, instead, is a post-hoc preconstruction projection prepared by the government in an attempt to show that the operator should have projected an increase.

The monitoring and recordkeeping requirements imposed on “reasonable possibility” projects underscore the primacy of actual post-project data over preconstruction projections. The rules identify those projects that present a greater risk of causing an increase and impose independent monitoring requirements to help determine whether a major modification has taken place. As EPA previously had explained, this type of post-project monitoring and reporting “provide[s] a reasonable means of determining whether a significant increase ... resulting from a proposed change ... occurs within the 5 years [or 10

⁷ 42 U.S.C. § 7411(a)(4).

years] following the change.” 57 Fed. Reg. at 32,325. So if, irrespective of any pre-project determination of no increase due to the project, the agency “determines that the source’s emissions have *in fact* increased significantly over baseline levels as a result of the change, the source would become subject to NSR requirements *at that time*.” *Id.* (emphases added).⁸

III. Facts and Procedural History.

1. From March to June 2010, DTE shut down its Monroe 2 power plant to replace older boiler tubes. As required by the regulations, DTE performed the projected actual emissions test to determine whether the replacement would qualify as a major modification. DTE concluded that the planned maintenance projects would not cause a significant net emissions increase but that there may be a reasonable possibility of one. So DTE provided the required notice to the State of Michigan and then commenced construction. After construction was complete, DTE monitored its emissions. In the years since the project, emissions at Monroe 2 have decreased substantially.

2. The Government filed this enforcement action in August 2010, mere weeks after DTE had completed the projects and resumed operations—well before annual data were available to show whether Monroe

⁸ EPA reaffirmed this feature of the 2002 rules when it explained that it is unnecessary to treat pre-project projections as enforceable limits. “The Act provides ample authority to enforce the major NSR requirements if your ... change results in a significant net emissions increase.” 67 Fed. Reg. at 80,204. Thus, if post-project annual emissions “differ[] from your projection of post-change emissions ... then you must report this increase.” *Id.* at 80,197. This, EPA said, “[e]nsures [t]hat ... [a] project is not a major modification.” *Id.*

2 had emitted any regulated pollutant at greater-than-baseline levels, much less whether the projects had *caused* emissions to increase. The Government sought to substitute for that required proof the opinion testimony of litigation-retained experts, who would testify that DTE should have projected an increase.

The district court granted DTE summary judgment. In the absence of evidence of a significant increase in actual emissions, the court concluded that the Government could not meet its burden of proving that a major modification had occurred.⁹ The Government then appealed, and in a 2-1 decision, the Sixth Circuit reversed.¹⁰

3. Judge Rogers, writing for the majority in *DTE I*, found the district court’s 2011 analysis “largely correct.”¹¹ But he concluded that judgment was premature, because the district court had not considered a subordinate question the Government had not presented—whether DTE had followed the “instructions” in EPA’s NSR regulations for making preconstruction projections.¹² As Judge Rogers explained, the Government should not be allowed to second-guess the manner in which DTE performed the projection, because that would turn a project-and-report scheme into a very different prior approval scheme.¹³ But because NSR is a preconstruction permitting program, he concluded that the lower court should assess whether, at a basic level, DTE

⁹ App.96a-97a.

¹⁰ App. 62a-85a.

¹¹ App. 74a.

¹² App. 80a.

¹³ App. 75a.

followed the “instructions” in the regulations for making preconstruction projections.¹⁴

Judge Rogers thus endorsed a significant distinction. An operator could violate the projection regulations—perhaps by performing no projection at all or otherwise using “an improper baseline period”—without necessarily rendering the project a major modification.¹⁵ Should the Government prove that the operator failed to follow these basic instructions, the remedy would not be to treat the project as a major modification that should have required a permit, or to penalize the operator for proceeding without one. Instead, the remedy would simply be an injunction requiring the operator to “do the projection right.”¹⁶

Judge Batchelder dissented and would have affirmed, because the projects had not (and still have not) caused a significant increase in emissions. Under the plain text of the regulations, Judge Batchelder explained, this undisputed fact precludes any finding that the projects were, in fact, major modifications.¹⁷ In her view, the question the majority remanded the case for the district court to consider was not even part of the case. The Government, she noted, did not contend that DTE had failed to follow the instructions for making projections. Instead, the Government contended that the 2010 projects at Monroe 2 were, in fact, major modifications, based on its experts post hoc preconstruction emission projec-

¹⁴ App. 80a.

¹⁵ App. 76a.

¹⁶ App. 77a.

¹⁷ App. 82a-83a; see also App. 15a-16a (Batchelder, J., concurring).

tions—even though those projections were at odds with DTE’s actual post-construction emissions. So in spite of the express language limiting the scope of the remand, Judge Batchelder posited that the majority had secretly—and contrary to the express language of the majority’s opinion—concluded that the Government could meet its burden by second-guessing DTE’s preconstruction projection.¹⁸

4. On remand, the district court followed the Sixth Circuit’s mandate and evaluated whether DTE had complied with the projection regulations. The Government, the court explained, does not “contend that [DTE] violated any of the agency’s regulations when [it] computed the preconstruction emission projections from Unit 2.”¹⁹ The Government instead challenged DTE’s judgment in applying the “demand growth exclusion”—the Government would have applied the exclusion differently.²⁰ This, held the district court, was “second-guessing,” which the Sixth Circuit put out of bounds.²¹ The district court observed further that based on post-project data, the Government’s “own preconstruction emission projections are now verifiably *inaccurate*.”²² Thus, not only was the Government seeking to second-guess DTE’s projection, it was doing so on the basis of its own demonstrably incorrect projection.

The artificiality of the Government’s position is best illustrated in this simple point. Ignoring reality entirely, the Government used experts to project *hy-*

¹⁸ App. 83a-85a.

¹⁹ App. 59a-60a.

²⁰ App. 60a.

²¹ App. 60a.

²² App. 60a.

pothetical emissions *after* the projects were completed, instead of using the actual emissions that were observable by the time. Worse still, the government *projected* that emissions would increase when, as a matter of proven fact, they had actually decreased.

The Government again appealed.

5. By a 2-1 vote, with no opinion commanding a majority, the Sixth Circuit reversed.²³

Judge Rogers, author of *DTE I*, voted to affirm. In his view, the district court had faithfully applied the Sixth Circuit's mandate.²⁴

Judge Daughtrey voted to reverse and authored an opinion that bears scant resemblance to the opinion she joined in *DTE I*.²⁵ She opined that DTE failed to provide sufficient information in its preconstruction notice to the State of Michigan, even though the majority in *DTE I* concluded that the notice was sufficient.²⁶ She dismissed as, "technically speaking, *dictum*" the *DTE I* majority's repeated instructions that the Government should not be allowed to second-guess DTE's preconstruction projection.²⁷ She then asserted that "the panel unanimously agrees" that post-construction emissions are irrelevant, even though the *DTE I* majority devoted several pages to the importance of post-construction emissions,²⁸ and Judge Batchelder in *DTE I* consid-

²³ App. 1a-47a.

²⁴ App. 33a-34a.

²⁵ App. 2a-12a.

²⁶ App. 74a.

²⁷ App. 6a.

²⁸ App. 11a-12a; App. 77a-79a.

ered the absence of a post-construction emissions increase dispositive.²⁹

Judge Batchelder did not join Judge Daughtrey's flawed opinion, but nonetheless voted to reverse. Accorded the opportunity to write on a blank slate, she would have affirmed.³⁰ But she considered herself bound by her reading of the majority's holding in *DTE I*—i.e., that "USEPA may use its own expert's pre-construction predictions to force DTE to get [an NSR] construction permit (or to punish DTE for failing to get [an NSR] permit), even if USEPA's disagreement is based on debatable scientific or technical reasons and even if actual events have proven USEPA's prediction wrong."³¹

* * *

So the final tally in the lower courts is 3-1 in favor of DTE. The district court, Judge Rogers, and Judge Batchelder each concluded that DTE is entitled to judgment as a matter of law. More specifically, each concluded that, under the plain text of the statute and EPA's regulations, a project that has not caused a significant increase in emissions cannot be a "major modification." Yet, due to an application of the law of the case doctrine that was itself incorrect, the Sixth Circuit has nonetheless allowed the case to proceed on the theory that the projects could constitute a major modification even though emissions not only did not increase, but have actually decreased.

²⁹ App. 83a.

³⁰ App. 13a-14a.

³¹ App. 19a.

REASONS FOR GRANTING CERTIORARI

The Sixth Circuit's suite of opinions over two appeals has produced a result that is irreconcilable with the text of the statute and the regulations, and represents a clear departure from this Court's precedent. The statute and regulations could not be more emphatic that, if a project does not increase emissions, then it does not qualify as a major modification. Yet this enforcement action has been allowed to proceed on the theory that whether a project actually increased emissions is *irrelevant* to the major modification analysis. Instead, all that matters is whether the Government thinks the operator should have *predicted* that the project would increase emissions—even if post-construction data have proven that such a prediction would have been incorrect. The controlling decision below did not begin to explain how that bizarre result could be reconciled with the text of the statute or the regulations, let alone with the reality that the Government is the first one to invoke actual emissions data when those data show an emissions *increase* triggering NSR. That is because neither the statute nor the regulations allow the Government to invoke actual emissions data when they support its position, then turn around and declare those data irrelevant when they do not.

The decision below is not only demonstrably wrong, it also injects uncertainty into an important and far-reaching regulatory program that applies to every major industrial development. The ambiguity created by the multiple opinions below and the lower court's mandate creates a choke point on the route to innovation and economic expansion. This Court has not hesitated to intervene when the lower courts have injected untenable uncertainty and unpredicta-

bility into the NSR program in the past, and it should not hesitate to do so again here.

I. The Sixth Circuit's Multiple Opinions Produce a Result That Is Irreconcilable with the Statute, the Regulations, and the Basic Norms of Due Process.

The theory on which this enforcement action has been allowed to proceed is untethered to the statutory trigger of the NSR program—actual emissions increases. Instead, it would substitute for the unambiguous definition of major modification in EPA's regulations—*i.e.*, a project that causes a significant increase in emissions—an ad hoc definition that changes with every case. This approach violates due process and does not even command support from a majority of the Sixth Circuit panel below.

A. The Theory on which this Enforcement Action Has Been Permitted to Proceed Violates the Text of the Statute and the Regulations.

1. As a matter of historical fact, DTE's projects did not cause a significant increase in emissions. That should be the end of this case. Certainly so under the statute, which defines an NSR-triggering "modification" as a project that "increases the amount of any air pollutant emitted by" Monroe 2. See 42 U.S.C. § 7411(a)(4). So too under EPA's regulations, which states in the plainest of terms that a "project is not a major modification if it does not cause a significant emissions increase." See 40 C.F.R. § 52.21(a)(2)(iv)(a).

The Sixth Circuit has nonetheless allowed this enforcement action to proceed, on the theory that whether a project increases emissions within the

meaning of the statute depends not on whether the project *actually* increases emissions, but on whether the Government thinks the operator should have *predicted* that the project would increase emissions—even if it is clear by the time of the enforcement action that any such prediction would have proven incorrect. In other words, so long as the Government can find some experts willing to say they would have reached a different conclusion than the operator had they been tasked with making the *preconstruction* projection, then the project's actual *post-construction* emissions are irrelevant even if they conclusively prove that the government's oxymoronic "postconstruction preconstruction projection" is wrong.

That is truly bizarre. Elevating the importance of retrospective "projections" over that of real-world data not only ignores the statutory and regulatory triggers for NSR, it also defies the regulations' command that projections take a back seat to reality. "Regardless of *any such* preconstruction projections, a major modification" depends on whether "the project *causes a significant emissions increase ...*" *Id.* § 52.21(a)(2)(iv)(b) (emphases added). When post-construction emissions data prove that a project actually did increase emissions, then the project will qualify as a major modification no matter how reasonable or thorough the operator's preconstruction projection may have been. By the same token, when post-construction data prove that emissions did not increase, then any quarrels with the operator's preconstruction predictions no longer matter. Real-world data do not suddenly become irrelevant just because it is the Government, not the operator, whose projections have proven mistaken.

2. This redefining of what constitutes an NSR-triggering change is problematic for the additional reason that it constitutes a clear departure from this Court's precedent and the consistent holdings from the Courts of Appeals regarding the primacy of actual emissions when evaluating whether a maintenance project triggers NSR.

In *Duke Energy*, this Court held that the 1980 NSR regulations were clear that NSR is triggered when actual annual emissions increase. 549 U.S. at 569, 577-78.

In *WEPCo*, the Seventh Circuit rejected the Government's contention that a major modification occurs when a unit's hypothetical maximum potential to emit is greater than its emissions in the baseline period. 893 F.2d at 916-18. This definition was too removed from the statutory and regulatory definition of modification, which must assess the unit's actual operations and impact on air quality.

And in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (*per curiam*), the D.C. Circuit rejected a regulatory definition of "major modification" that did not include an evaluation of whether the project caused an increase in emissions. The court observed that "the CAA unambiguously defines 'increases' in terms of actual emissions." *Id.* at 39. Thus, "the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions." *Id.* at 40.

While the precise question presented differed among these cases, each emphasized that the trigger for statutory and regulatory NSR is whether the project causes an *actual* increase in emissions. In sharp contrast, the decision below allows a "major modifi-

cation” to be proven even in the conceded absence of an actual increase in emissions.

B. The Enforcement Regime the Sixth Circuit Has Created Violates Due Process.

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). “A ... punishment fails to comply with due process if the statute or regulation under which it is obtained ... ‘is so standardless that it authorizes or encourages seriously discriminatory enforcement.’” *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). Thus, when an agency leaves a governing regulation vague, it cannot, consistent with due process, exploit that vagueness to establish a hitherto unpublished standard of liability.

It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 158-59 (2012).

The Government’s approach to enforcement here violates these principles. Specifically, it seeks to penalize DTE by proving that the projects at Monroe 2 were “major modifications” using an unpublished

projection methodology as its standard of liability—even when that methodology has proven incorrect. By endorsing this approach, the Sixth Circuit panel majority judges erred yet further.

The administrative history behind the regulations the Government relies upon only deepens the insult to due process. As detailed above, *supra* at 8-9, when EPA originally proposed the revisions to the NSR rules ultimately promulgated in 2002, the agency specifically considered doing away with the portion of the rule requiring that an increase be “caused” by a project because it did not include a specific methodology for applying it. But in the end, EPA not only kept the causation requirement, it expanded its availability. By 2007, EPA concluded that “[i]n most cases, it is unlikely that ‘demand growth’ emissions could ultimately be found to be related to changes made at a facility,” and that the record-keeping and reporting requirements of the rule would be “sufficient ... to verify post-project demand growth,” and whether there is “ultimately ... a significant emissions increase” caused by the project. 72 Fed. Reg. at 72,610-11.

EPA thus expressly recognized at the time of their adoption that the very provision in the regulations that the Government contends DTE misapplied is expressly designed to allow for a multiplicity of approaches in real-world application that may deviate from what the agency would choose. And rather than eliminate this potential for varying approaches as a means of regulatory control, it instead expressly adopted as a better means of insuring overall fidelity to the statute the record-keeping requirements that would provide the actual data necessary to demon-

strate whether a project did, in fact, cause a significant increase in emissions.

Thus, the ambiguity the Government would exploit here—a projection methodology that leaves room for operator judgment and differing results—is one the Government itself created and endorsed.

II. The Decision Below Will Chill Maintenance and Modernization of the Nation's Industrial Base.

1. Left standing, the decision below will have grave consequences. NSR applicability assessment is the gateway to improvement for major power plants and manufacturing facilities throughout the country. Yet, the ambiguity in the meaning of rules that govern the assessment of NSR applicability traps operators between the Scylla of lengthy and costly permitting and the Charybdis of arbitrary and unpredictable enforcement.

If an operator concludes that NSR does not apply, it avoids a costly, protracted, and uncertain permitting process. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 516-17 (2004) (*Alaska DEC*) (Kennedy, J., dissenting) (noting that some companies “spend up to \$500,000 on the permit process and ... the time for approval [for a complex project] can take from five to seven years”). But given the Orwellian approach to enforcement taken by the Government here—one that perversely would allow an operator that correctly projected that its maintenance project would not cause an emissions increase to be found liable for constructing a major modification without a permit—the operator proceeds with its project at its great peril.

That is all the more problematic given that the 2002 regulations were specifically designed to alleviate that very concern. In June of that year, EPA concluded in a report to President Bush that the unpredictability of the NSR program had “impeded or resulted in the cancellation of projects which would maintain and improve reliability, efficiency and safety of existing energy capacity. Such discouragement results in lost capacity, as well as lost opportunities to improve energy efficiency and reduce air pollution.”³²

That concern led to the 2002 reforms to the rules that the Sixth Circuit has misapplied here. The plain text of those revised rules confirms (a) that a project that does not cause a significant increase in emissions is not a major modification; and (b) that projections are subordinate to actual post-construction emissions when evaluating whether a major modification has occurred. Fairly applied, those rules give operators the certainty to undertake efficiency-improving projects with confidence; while they may not be able to predict the impacts of their projects with absolute certainty, at least they know that whether those projects trigger NRS will be controlled by real-world data, not by a “battle of experts” over whose predictions were better prepared. The decision below frustrates that objective, as it allows the Government, not the actual emissions with which Congress was concerned, to dictate what does or does not trigger NRS. Worse still, it would allow the Government to seek penalties for non-compliance

³² EPA, *New Source Review: Report to the President* at 1 (June 2002), https://www.epa.gov/sites/production/files/2015-08/documents/nsr_report_to_president.pdf (last visited July 28, 2017).

with standards that are “notoriously unclear.” Cf. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring).

2. Recognizing the importance of clarity in this pervasive regulatory regime, this Court has not hesitated to intervene to resolve past ambiguities surrounding the CAA’s NSR requirements. The Court should do so again, and restore the measure of certainty that the 2002 regulations were intended to provide to the countless operators impacted by NSR.

First, in 1972, the U.S. District Court for the District of Columbia issued a preliminary injunction ordering EPA to establish a PSD program. See *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972). The D.C. Circuit affirmed, without opinion. 4 Env’t Rep. Cas. (BNA) 1815 (D.C. Cir. 1972). This Court granted certiorari and, without a written opinion, remanded the case to the District Court through a 4-4 decision. See *Fri v. Sierra Club*, 412 U.S. 541 (1973) (*per curiam*). The regulatory PSD program adopted in December 1974 resulted from that remand.

Second, industry challenged the 1974 PSD rules in the D.C. Circuit. The D.C. Circuit affirmed those rules in 1976. See *Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976). This Court again granted certiorari to review the D.C. Circuit’s decision. Before that case was decided, however, Congress in 1977 enacted the statutory PSD program, and the petition was dismissed without opinion. See *Montana Power Co. v. EPA*, 434 U.S. 809 (1977).

Third, when EPA in 1981 revised the rules governing NSR in nonattainment areas pursuant to the 1977 CAA, the Natural Resources Defense Council challenged those rules in the D.C. Circuit. The D.C.

Circuit vacated the rules and ordered EPA to adopt rules that would expand coverage of the nonattainment NSR program. This Court granted certiorari and reversed the D.C. Circuit. Highlighting the importance of actual emissions to NSR applicability, the Court affirmed EPA’s nonattainment NSR “major modification” rule. EPA properly “exempt[ed] modifications of existing facilities [from NSR] that are accompanied by intrasource offsets so that there is no increase in emissions” [*i.e.*, no “major” modification]. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 854 (1984) (quoting EPA’s rule-making description of the rule); see also *id.* at 840 (Under the “major modification” rule, a source “may install or modify one piece of equipment without meeting [NSR] ... if the alteration will not increase the total emissions from the plant.”).

Fourth, in *Alaska DEC*, this Court granted certiorari to address EPA’s authority to review state determinations under the PSD program. 540 U.S. at 469.³³ In his dissent, Justice Kennedy noted the central role of PSD in “Congress’ design to grant States a significant stake in developing and enforcing” the CAA, and the substantial impacts of PSD on individual companies and the economy. *Id.* at 516, 517.

And of course, most recently, this Court granted certiorari to the Fourth Circuit to address whether the 1980 regulations could tolerate a definition of “modification” that was not based on an assessment

³³ Although not central to its decision, the Court recognized that emissions *increases* are fundamental to the PSD program: “Modifications to major emitting facilities that increase nitrogen oxide emissions in excess of 40 tons per year require a PSD permit.” *Alaska DEC*, 540 U.S. at 472.

of actual annual emissions. The Court concluded that it could not.³⁴

As these decisions underscore, this is not an area in which ambiguity can be left to persist. It is time yet again for this Court to step in and resolve the confusion created by the manifest errors of the court below with respect to the emissions increase provisions of the statute and the current (*i.e.*, 2002) NSR regulations. This issue bears upon all of American industry; it is of great importance to economic development in this country, at a time when the Nation is poised for evolution and expansion of its industrial capacity.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

³⁴ *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).

Respectfully submitted,

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