Justices to Hear Environmental Appeal on EPA Emissions Rule

By Charles Lane
Washington Post Staff Writer
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The Supreme Court announced yesterday that it will review a controversial federal court ruling that environmentalists had said would weaken pollution-control requirements for aging power stations across the country.

In a one-line order, the justices said they will hear Environmental Defense's appeal of a June 2005 ruling by the U.S. Court of Appeals for the 4th Circuit, based in Richmond, which said that Duke Energy Corp., a North Carolina utility, could operate refurbished power plants even though their total annual emissions would go up.

The court's decision injects the justices into a half-decade-old battle between environmentalists and the Bush administration, which has sought to ease what it says is an excessive regulatory burden on the nation's utilities.

Lightening the industry's environmental load was a key component of the administration policy adopted by Vice President Cheney's energy task force in 2001.

In the case the court agreed to hear yesterday, *Environmental Defense v. Duke Energy Corp.*, No. 05-848, the specific question is how to measure utilities' compliance with the Environmental Protection Agency's "new source review" rules, which govern emissions from plants that have been modernized or expanded.

Environmental Defense says that about 17,000 facilities are covered by the rules, and it cites studies that show 20,000 premature deaths per year traceable to pollution from coal-fired plants.

The EPA's position traditionally has been that the Clean Air Act requires modified plants to reduce their total annual emissions, and Environmental Defense says that interpretation is correct.

But the 4th Circuit disagreed and said that plants should only have to show a reduction in their hourly rate of emissions. This was a victory for utilities because they could run their updated plants for many more hours than previously.

The case against Duke Energy was one of many initiated by the EPA across the country in the waning days of the Clinton administration.

The Clinton crackdown was bitterly opposed by utilities, and the Bush administration promised to change EPA enforcement policy.

But the EPA continued to press cases that were already pending when the administration took office in 2001, so the Bush EPA and Environmental Defense had been on the same side of the Duke Energy case until the 4th Circuit's ruling.

After the 4th Circuit ruled, the administration proposed new clean air regulations that incorporated the 4th Circuit's decision and would have applied it across the country.

Then the administration asked the Supreme Court not to intervene in the case. The court's decision to take the case over the administration's objection was a surprise; since the adoption of modern environmental legislation in 1970, the court had agreed to hear just two previous cases in which an environmental group was the petitioner.

"The court's decision to grant review despite the administration's request that review be denied constitutes a significant rebuff and places the administration in an awkward position before the court," said Richard Lazarus, professor of environmental law at Georgetown University Law Center.

Environmental Defense, backed by a friend-of-the-court brief from the District, Maryland and 13 other states, argued that the 4th Circuit had acted outside its jurisdiction under the Clean Air Act, and that its ruling clashed with a 2005 decision by the U.S. Court of Appeals for the District of Columbia Circuit, which said that emissions had to be measured on an annual basis.

Though the high court's decision to grant review yesterday was a defeat for Duke Energy, which had urged it to let the 4th Circuit ruling stand, Scott Segal, director of the Electric Reliability Coordinating Council, said in a statement that industry was looking forward to the case.

"Clarity regarding these concepts is essential to improved efficiency, reduced emissions, enhanced workplace safety, and electric reliability," he said. "This Supreme Court has a good track record in support of a reasoned approach to administrative law. We believe the makeup of the court is well positioned to render judgment in a sensible and fair way."

Oral argument will take place in the fall, and a decision is expected by July 2007.