Energy

Duking It Out Over The Environment

Jessica Holzer, 11.01.06, 6:00 AM ET

WASHINGTON, D.C. - The Clinton administration's zeal for cracking down on smoke-spewing power plants is matched only by the Bush administration's resolve to ease their environmental burden.

So it may come as a surprise that the Bush Environmental Protection Agency is siding with Environmental Defense--and against electric power giant Duke Energy--in the landmark air pollution case going before the Supreme Court on Wednesday.

But the government's support of the environmental group is in fact only, not in spirit. The EPA's stance in the case can best be described as: It was against the power industry before it was for it, and now it's against it again, but only for the moment.

The government's tortured turnaround in the case and on the issue of air pollution as a whole will be on full display in the courtroom.

At issue in the case are 25-year old regulations that forced utilities to install expensive pollution controls when they renovate aging coal-fired power plants. Duke Energy was one of several power companies targeted by the Clinton-era lawsuits for allegedly flouting the regulations.

Somewhat surprisingly, the Bush administration carried on with the case, arguing the Clinton-EPA line that modernized plants must cut their annual emissions. Duke Energy countered that the law only required them to cut hourly emissions when they refurbished their plants. On appeal, the Fourth Circuit agreed.

The power industry cheered the ruling, which they said freed them to improve the safety and efficiency of their plants without installing the costly pollution controls. Meanwhile, the Bush administration seemed hardly disheartened by the loss.

Environmental Defense, which had joined the EPA as a plaintiff in the case, wanted to appeal the ruling to the Supreme Court. But the Bush administration demurred and even wrote a brief to persuade the high court not to review the case. It also proposed a new rule that would essentially adopt the industry position in the future.

As a result, the EPA will be awkwardly advocating an interpretation of the Clean Air Act before the high court that it no longer supports simply to be consistent with its stance in the lower court.

The power industry desperately hopes that the justices will reject outright the more rigid view of the law which they claim results in the postponement of plant repairs. They deny that the looser hourly standard would result in increased pollution levels on the grounds that plants will be more apt to make improvements that improve their efficiency if they don't have to retrofit them with costly pollution controls.

As in the case of a car belching blue smoke, if the cost of repairs is too high, "the rational driver ⟩ would just keep driving," says Kevin Newsom, Alabama's Solicitor General, who has joined attorneys representing rate-payers in ten other states in

filing a brief in support of Duke Energy.

But it's not at all clear that the justices will even get to the merits of the case. Not since 1971 has the Supreme Court granted review on a case at the exclusive request of an environmental group and over the objections of the EPA. That has fueled suspicion that the justices are more interested in the jurisdictional aspects of the case.

Congress decreed that all challenges to Clean Air Act regulations must be funneled through one appellate court, the D.C. Circuit, and made promptly, not decades after the fact. Environmental Defense claims that Duke Energy lost its chance when it didn't successfully challenge the regulations for aging plants back in the 1980s, when they were handed down.

"The justices care a great deal about these jurisdictional issues and that's probably where this case is going to end," argues Richard Lazarus, a professor at Georgetown Law Center.

Scott Segal, a lobbyist for the electric power industry, disagrees. As he sees it, the argument would have been stronger if Duke Energy had sued the EPA. But instead, the agency went down to North Carolina and sued Duke. "If this jurisdictional argument were to succeed, it would be very unfair," he says.