

ORAL ARGUMENT PRESENTED ON JANUARY 25, 2005

OPINION ISSUED ON JUNE 24, 2005

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1387 and consolidated cases

(COMPLEX)

STATE OF NEW YORK, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

**On Petition for Review of Final Action of the
United States Environmental Protection Agency**

EPA'S PETITION FOR REHEARING OR REHEARING *EN BANC*

AND REQUEST FOR CLARIFICATION

KELLY A. JOHNSON

Acting Assistant Attorney General

HOWARD J. HOFFMAN NORMAN L. RAVE, JR.

CAROL HOLMES ANGELINE PURDY

Office of General Counsel LOIS GODFREY WYE

U.S. Environmental Protection Agency Environmental Defense Section

1200 Pennsylvania Ave., N.W. Environment and Natural Resources Division

Washington, D.C. 20460 United States Department of Justice

P.O. Box 23986

Washington, D.C. 20026-3986

(202) 616-7568

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INTRODUCTION

Respondent United States Environmental Protection Agency (“EPA”) seeks rehearing *en banc*, or, in the alternative, Panel rehearing of the Panel’s vacatur of the Clean Units provision of

the rule under review (“NSR Reform Rule” or “Rule”). Specifically, EPA seeks review of the

Panel’s holding that the definition of “modification” in section 111(a)(4) of the Clean Air Act

(“CAA” or “Act”), 42 U.S.C. § 7411(a), as applied to the New Source Review (“NSR”) program

by 42 U.S.C. §§ 7479(2)(C) and 7501(4), unambiguously requires that EPA determine whether a

modification has occurred at a source (and thus whether the NSR requirements apply) based on

the source’s actual emissions, and that EPA may not base the determination on allowable or

potential emissions. EPA also seeks clarification, but not rehearing *en banc*, that vacatur of the

Pollution Control Project (“PCP”) provision of the NSR Reform Rule applies only prospectively.

En banc consideration on the issue of Clean Units is merited under Fed. R. App. P. 35. Alternatively, panel rehearing is merited under Fed. R. App. P. 40. The question presented by

this case is of exceptional importance: not only does the Panel’s opinion invalidate the Clean

Units provision, which is intended to encourage the use of state-of-the-art pollution control

technology, but the sweeping language of the Panel’s opinion restricts EPA’s ability to tailor the

NSR program to achieve the Act’s goals of improving air quality without undue adverse economic impacts. In promulgating the NSR Reform Rule, EPA determined that changes were

needed in the modification provisions of the NSR regulations to give facilities greater flexibility

to respond to changing market conditions and to remove impediments to investment in efficiency-enhancing improvements while focusing permitting resources on the types of modifications most likely to lead to significant environmental impacts. EPA believes that there

are some circumstances in which a modification test based on potential or allowable emissions

would better serve these policy goals than would a test based on a source’s actual emissions.

^{1/}The statute actually contains two major NSR programs, the Prevention of Significant Deterioration (“PSD”) program that applies to areas that are in attainment of air quality standards

for a pollutant and the Nonattainment New Source Review (“NNSR”) program that applies in

areas that are not in attainment. The differences between the two programs are not relevant to

this petition, and both are referred to collectively as “NSR.”

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The Panel’s holding that the statute allows only tests based on actual emissions thus restricts

EPA’s ability to further reform the NSR program. *Nat’l Cable & Telecommunications Ass’n v.*

Brand X Internet Services, 125 S. Ct. 2688, 2700 (2005) (“A court’s prior judicial construction of

a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior

court decision holds that its construction follows from the unambiguous terms of the statute and

thus leaves no room for agency discretion.”). Furthermore it is inconsistent with thirty years of

EPA practice. This far-reaching impairment of EPA’s ability to implement this important

program is an issue of exceptional importance that merits *en banc* review. Clarification from the Panel that its vacatur of the PCP provision applies prospectively only is merited because the provision has been part of the regulations applicable to utilities since 1992 and has been applied by the Agency to other facilities through guidance since 1994. It would be highly inequitable for sources that have relied on the regulations or EPA's guidance to now be subject to liability for that past reliance.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

This litigation involves consolidated petitions for review of regulations promulgated by EPA to implement the NSR provisions of the CAA. 67 Fed. Reg. 80,186 (Dec. 31, 2002). In

brief, the NSR provisions require that new and modified major sources of air pollutants obtain a permit prior to construction. 42 U.S.C. §§ 7475(a) and 7479(2)(C), 7502(c)(5).^{1/} The issue ^{2/} The NSPS provisions (42 U.S.C. § 7411) require EPA to establish emission standards for certain classes of new and modified stationary sources. These standards apply independently of the NSR permit requirement.

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presented by this petition is the level of discretion EPA has in promulgating regulations defining when a "modification" has occurred that triggers the NSR permit requirement. The NSR provisions, enacted in 1977, define "modification" through cross-references to the definition of the term "modification" in the Act's New Source Performance Standards ("NSPS") provisions.^{2/} 42 U.S.C. § 7479(2)(C) ("The term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility."); *id.* § 7502(4) ("The terms 'modification' and 'modified' mean the same as the term 'modification' as used in section 7411(a)(4) of this title."). "Modification" is defined in section 7411(a)(4), which Congress enacted in 1970, 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." *Id.* § 7411 (a)(4).

This definition sets up a two-step test. The first step asks whether a "change" has been made. The second asks whether the change has led to an increase in, or new, emissions. The NSR Reform Rule was primarily focused on the second step. The Rule altered the methodology

by which sources compare their pre- and post-change emissions, increased to ten years the period that certain sources could look back to establish their baseline level of emissions for determining whether there had been an increase; allowed facilities to establish plantwide applicability limits; revised certain monitoring, recordkeeping, and reporting requirements; established a special applicability test for Clean Units; and excluded pollution control projects from NSR. The Panel upheld the revised methodology, the revised baseline, and the use of 4 plantwide applicability limits, although the Panel remanded part of the Rule's monitoring, recordkeeping, and reporting requirements to EPA. However, the Panel vacated the Rule's provisions related to Clean Units and pollution control projects. The Clean Unit provision established an alternative NSR applicability test for major sources that have received an NSR permit within the previous ten years and for other units that have installed comparable air pollution controls and received an operating permit that incorporates the provisions that qualify the unit as a Clean Unit. Once qualified as a Clean Unit, the unit may make a physical or operational change without triggering NSR requirements as long as the source remains in compliance with the terms and conditions of its permit and does not exceed its allowable emissions. The purpose of the provision is to encourage facilities to install and operate state-of-the-art pollution control equipment by giving them a period of regulatory certainty in which they may make changes in response to market demand without obtaining an NSR permit.

II. SUMMARY OF THE PANEL DECISION

On June 24, 2005, the Panel issued its decision in which it vacated the Clean Units provision on the ground that “the CAA unambiguously defines ‘increases’ in terms of actual emissions.” Slip op. at 62. As a result, according to the Panel, the NSR “modification” definition does not authorize the “allowables” test employed in the Clean Units rule. The Panel reached its conclusion “[u]pon employing ‘traditional tools of statutory interpretation’ under *Chevron* Step 1 to ascertain whether ‘Congress had an intention on the precise question at issue,’ *Chevron* [*U.S.A., Inc. v. NRDC*], 467 U.S. [837,] 843 n.9 [(1984)]. . . .” *Id.* at 62.

Focusing on the phrase “increases the amount of any air pollutant emitted” in the definition of “modification,” the Panel found that the word “emitted” refers to actual emissions.

Because Congress, in enacting the 1977 NSR program, cross-referenced the definition of
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“modification” found in 42 U.S.C. § 7411(a)(4) (which had been added to the statute in 1970),

the Panel compared other provisions that Congress included in the 1977 NSR provisions. The

Panel noted that in section 7479(1), Congress defined “major emitting facilit[ies]” as “stationary

sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or

more of any air pollutant.” *Id.* at 62-63. The Panel stated that –

the juxtaposition of the terms ‘emit’ and ‘potential to emit’ indicates that when Congress enacted the NSR program in 1977, it was conscious of the distinction between actual and potential emissions, using the term ‘emit’ to refer to actual emissions and the term ‘potential to emit’ to refer to potential emissions. Indeed, the court stated in *Alabama Power Co., at al. V. Costle*, that the use of the term ‘emit,’ as opposed to ‘potential to emit,’ is a ‘reference to some measure of actual emission.’ [*Alabama Power Co., at al. V. Costle*,]636 F.2d [323,] 353 [(D.C. Cir. 1979)].

Id. at 63. The Panel found similar support in the definition, included in section 7479(3), of “best

available control technology” as “an emission limitation based on the maximum degree of

reduction of each pollutant . . . emitted from any major emitting facility.” *Id.* at 63.

The Panel concluded, based on these provisions, that --

when Congress enacted the 1977 amendments to the CAA, it distinguished between actual, potential, and allowable emissions. If Congress had intended for “increases” in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to “potential to emit” or “emissions limitations.” The absence of such a reference must be given effect. [citation omitted.]

Id. at 63-64. The Panel added, without further elaboration –

Moreover, even if the word “emitted” does not by itself refer to actual emissions, the phrase “the *amount* of any air pollutant *emitted* by [the] source” plainly refers to actual emissions. [citation omitted] EPA itself came to the same conclusion in the preamble to the 1980 rule. See 45 Fed. Reg. at 52,700.

Id. at 64 (emphasis in original).

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STANDARD FOR *EN BANC* REVIEW

The Federal Rules of Appellate Procedure provide that rehearing *en banc* may be ordered where: “(1) *En banc* consideration is necessary to secure or maintain uniformity of the court’s

decisions; or (2) The proceeding involves a question of exceptional importance.” Fed. R. App.

P. 35(a). Panel rehearing or rehearing *en banc* is warranted here because, as explained *supra* at

1-2, the issue of whether the Clean Air Act CAA requires that the test for a “modification” must

be based on actual emissions is of exceptional importance to fulfillment of Congress’ goals.

ARGUMENT

In holding that the CAA requires, as a matter of *Chevron* Step 1, that whether a “modification” has occurred for NSR purposes must be based on actual emissions, the Panel

made two errors. First, it relied heavily on two provisions of the 1977 Amendments in which

the Panel believed Congress used the term “emit” or “emitted” to refer to actual emissions. Slip

op. at 62-63. From this, the Panel concluded that because the definition of “modification” uses

the word “emitted,” the definition requires actual emissions. The Panel’s reliance on the two

provisions is misplaced because the 1977 CAA Amendments, read more broadly, do not establish the drafting convention that the Panel believed it had found. In any event, while the

NSR program was added to the statute in 1977, the language of the definition of “modification”

was added to the statute in 1970. Thus, “modification” should also be read in light of other 1970

provisions, and doing so makes the Panel’s error clearer.

Second, the Panel simply misread the term “emitted” to dictate how to measure the “increase[.]” that is at the heart of the definition of “modification.” A better reading is that the

word “emitted” is simply intended to distinguish between pollutants that were emitted before the

change at the source and pollutants that were not previously emitted. (The latter are addressed

by the final clause of the definition.) As a result, “emitted” does not prescribed the measure of

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an “increase[in] the amount.” Instead, as the Panel noted in upholding other portions of the

NSR Reform Rule, EPA has considerable discretion to decide how to calculate an “increase[in]

the amount” of emissions. Therefore, there is no basis for the Panel’s holding that EPA’s discretion does not extend to the use of potential or allowable emissions in appropriate circumstances.

I. THE PANEL ERRED IN FINDING THAT THE 1977 CAA AMENDMENTS MANDATE AN “ACTUALS” INTERPRETATION FOR A PHRASE THAT INCLUDES A BARE REFERENCE TO “EMITTED”

The statutory definition of “modification” reads:

The term ‘modification’ means 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). The Panel focused on the first use of the word “emitted” and cited two

provisions of the 1977 CAA Amendments (when the section 7411 definition of “modification”

was applied to NSR) as cases where it believed Congress distinguished between pollutants that a

source “emit[s]” or “emitted” (*i.e.*, actual emissions) and either potential emissions or emission

limitations (*i.e.*, allowable emissions). Slip op. at 62-63. Finding that in the 1977 CAA Amendments, Congress “distinguished between actual, potential, and allowable emissions,” the

Panel indicated that Congress intended a provision with a bare reference to “emitted,” without

any qualification, to refer to actual emissions. *Id.* at 63. The Panel then concluded that Congress’ use of the word “emitted” in the definition of “modification” unambiguously requires

the use of an actual emissions test for purposes of the NSR program. *Id.* at 64.

The Panel’s reading of the statute is incorrect. While the section 7411(a)(4) definition of “modification” was applied to the NSR program by the same Congress that drafted the 1977

Clean Air Act Amendments, the actual language of the definition was part of the 1970 Clean Air

Act.^{3/} For further evidence that Congress in 1977 did not adopt the Panel’s drafting convention, see

section 7602(j) (“directly emits”); Pub. L. No. 95-95, § 129, 42 U.S.C. 7502 note (“reduction in

emissions actually being attained”); *id.* § 224 (adding CAA section 202(a)(3)(A)(ii)(II) (“actually

measured emissions”)).

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Act. Thus, both the 1970 and 1977 Amendments are relevant to determining the meaning of

“modification” in this context. Any drafting conventions of the 1977 Congress alone are an

unreliable guide to language drafted by Congress in 1970.

Most importantly, Congress did not apply a uniform drafting convention to differentiate among actual, allowable, or potential emissions in either the 1970 or 1977 Amendments.

In

particular, Congress did not intend every use of the terms “emit,” “emitted,” or “emissions” to

refer only to actual emissions. If that were the case, then Congress would have had no need to employ the term “actual” in conjunction with “emissions.” However, both the 1970 and 1977

CAA Amendments contain provisions in which Congress, in referring to measurements of

emissions, included explicit references to actual emissions.

Specifically, in 1970, Congress added section 7521(b)(1)(B), which then provided,

The regulations under subsection (a) applicable to emissions of oxides of nitrogen from light duty vehicles and engines manufactured during or after model year 1976 shall contain standards which require a reduction of at least 90 percentum from the **average of emissions of oxides of nitrogen actually measured from** light duty vehicles manufactured in model year 1971 which are not subject to any Federal or State emission standard for oxides of nitrogen. Such average of emissions shall be determined by the Administrator on the basis of measurements made by him.

(Emphasis added.) Similarly, in 1977, Congress added current 42 U.S.C. § 7502(c)(3) (originally 42 U.S.C. § 7502(b)(4)), which specifies that a State’s emissions inventory is to be of

“actual emissions.”^{3/} If Congress believed that the word “emissions” by itself indicates actual

emissions, it would not have required the qualifier. These 1970 and 1977 provisions confirm

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that particular provisions, such as the definition of “modification,” should be analyzed on their

own terms, without reference to the perceived drafting convention advanced by the Panel.

The 1990 CAA Amendments further refute the Panel’s holding that “modification” unambiguously refers to actual emissions. In 1970, Congress added provisions for hazardous air

pollutants in section 7412, and included a definition of “modification” (in then- section 7412(a)(3)) that cross-referenced the section 7411(a)(4) definition of “modification.” In the

1990 Amendments, however, Congress revised the section 7412 definition of “modification” to

any physical or operational change which “increases the actual emissions of any hazardous air

pollutant emitted by such source.” 42 U.S.C. § 7412(a)(5) (emphasis added). Had

Congress

believed that the pre-existing definition of “modification” under section 7412 referred to actual

emissions, it would have had no need to revise this definition to specify “actual.”

II. THE PANEL ERRED IN READING “EMITTED” TO DICTATE AN “ACTUAL

EMISSIONS” TEST FOR “MODIFICATION”

In addition, the Panel did not parse the definition of “modification” correctly, and as a

result, mis-identified how Congress employed “emitted.” In the definition of “modification” the word “emitted” is used simply to identify what pollutants are being considered, specifically to differentiate those pollutants emitted before a physical change from those that are newly emitted after the change. That this is the better reading of the provision is demonstrated by consideration of the last clause of the provision, which was not considered by the Panel. Section 7411(a)(4) states that a “modification” occurs if a physical or operational change “increases the amount of any air pollutant emitted by such source” or if it “results in the emission of any air pollutant not previously emitted.” (Emphasis added.) Considering the language of the statutory provision as a whole, the word “emitted” in the first clause does not modify the word “amount” as the Panel believed, but rather modifies the words “air pollutant.” Thus the word “emitted” is not intended

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to mandate that NSR applicability be based on an actual emissions test, but rather is intended to distinguish between pollutants that are emitted both before and after the change and those that are newly emitted after the change. The Panel’s contrary reading renders the second clause surplusage because any amount of a newly emitted pollutant will be an increase over its previous actual emissions of zero. Examination of other provisions added to the CAA in both 1970 and 1977 demonstrates that Congress used the word “emitted” simply to identify what pollutants were relevant (*i.e.*, those “emitted”) rather than to distinguish between actual emissions and potential or allowable emissions. For example, in 42 U.S.C. § 7521(e) (enacted in 1970), Congress authorized the Administrator to postpone certification of “a new power source or propulsion system for new motor vehicles or new motor vehicle engines” until the Administrator has “prescribed standards for **any air pollutants emitted by such vehicle or engine.**” (Emphasis added.) The highlighted phrase is very similar to the phrase “any air pollutant emitted by such source” in the definition of

“modification.” Yet clearly, in section 7521(e), the term “emitted” is not intended to mandate

how emissions are to be measured but serves simply to identify the air pollutants that are the subject of the provision.

Similarly, in the 1977 Amendments, Congress enacted 42 U.S.C. § 7475(a)(4), which provides that under PSD, proposed facilities must be “subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results

from, such facility.” Again this provision employs the word “emitted” simply to identify one set

of pollutants subject to control, but signifies no congressional intent as to the nature of the

standards applicable to those pollutants. Moreover, in one of the 1977 provisions cited by the

panel, *i.e.*, 42 U.S.C. § 7479(3), the word “emitted” is also better read as referring to what

⁴The Panel was also incorrect in asserting that EPA had previously concluded that the statute unambiguously requires a test based on actual emissions. Slip op. at 64, citing 45 Fed.

Reg. 52,676, 52,700 (Aug. 7, 1980). While EPA adopted an actual emissions test in the 1980

rulemaking it did so because it found at the time that such a test better served the statutory

purpose. 45 Fed. Reg. at 52,700 col. 3. The Agency did not, however, conclude that it lacked

discretion to adopt a different test if circumstances warranted it.

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pollutants are subject to control than as dictating the nature of those controls. The statutory

provision states in relevant part:

The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority . . . determines is achievable

42 U.S.C. § 7479(3). Rather than demonstrating a distinction between allowable and actual

emissions, as the Panel believed, slip op. at 63, the use of the word “emitted” in this provision

simply identifies what pollutants are subject to control. It is not intended to mandate the nature

of the controls.

Thus, a broader review of how Congress used the word “emitted” in both the 1970 and 1977 Acts demonstrates that Congress did not use the term to distinguish between actual emissions and potential or allowable emissions. Rather its meaning depends on context, and in

most contexts it is used simply to indicate what pollutants are the subject of the provision.

III. PROPERLY READ, THE TERM “INCREASES THE AMOUNT” IS AMBIGUOUS, AND EPA HAS DISCRETION TO APPLY AN ALLOWABLE OR POTENTIAL TEST

Once the Panel’s erroneous gloss on the word “emitted” is removed, the term “increases the amount” becomes ambiguous. Slip op. at 64.⁴⁷ The phrase is inherently ambiguous because, in order to determine whether an amount has been increased, EPA must specify, among other things, how the amount is to be determined and how to determine the pre-change baseline and the post-change amount. Thus, EPA has discretion to determine how such increases should be determined, including the discretion to base a test on potential or allowable emissions. Furthermore, when Congress adopted the 1977 Amendments it was aware that EPA had previously promulgated regulations that adopted a test for modifications that was based on allowable emissions. 41 Fed. Reg. 55,524, 55,528 (Dec. 21, 1976). In fact, Congress adopted those regulations as a transition provision. Pub. L. No. 95-95, § 129(a)(1), 42 U.S.C. 7502 note; see slip op. at 25. Given that Congress was aware that EPA’s existing regulations were based on allowable emissions, it is unlikely that Congress would have adopted a provision that prohibited such a test without comment. More likely, Congress would have utilized a more explicit method than simply adopting the section 7411(a)(4) provision by reference. In upholding the revised baseline provision of the NSR Reform Rule, the Panel recognized that EPA has considerable discretion in determining how an increase should be determined. Slip op. at 39-40. Specifically, the panel said: In enacting the NSR program, Congress did not specify how to calculate “increases” in emissions, leaving EPA to fill in that gap while balancing the economic and environmental goals of the statute. . . . we defer to EPA’s statutory interpretation under *Chevron* Step 2

Id. The Panel also recognized that EPA has the discretion to determine emission increases on a source-wide basis and to implement plantwide applicability limits. Specifically, the Panel stated, “The CAA is silent on how to calculate emissions increases.” Slip op. at 57. As demonstrated above, the Panel’s holding that EPA’s discretion is limited to applicability tests based on actual emissions is based on an inappropriate reliance on drafting conventions of the 1977 Congress which resulted in an erroneous parsing of the statute. Once

the erroneous reliance on other provisions of the 1977 Amendments is removed, there is no basis for the Panel's conclusion that EPA's discretion to determine what constitutes an increase is

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limited to actual emissions. The concepts of "increase" and "amount" are inherently ambiguous, and nothing in the statute indicates that Congress intended to restrict EPA's discretion to utilize

potential or allowable emissions in determining whether a "modification" has occurred for NSR

purposes when doing so is consistent with the goals of the statute.

Both this Court and the Supreme Court have recognized that EPA has the authority under the NSR provisions to balance environmental and economic considerations. *Chevron U.S.A.,*

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 851, 865 (1984); *State of New York*, slip

op. at 33. There is no reason why that authority should not extend to the use of a potential or

allowable emissions test for modifications, and there is no evidence that Congress intended to so

limit EPA's discretion. By erroneously relying on selected provisions of the 1977 Amendments

to determine that, under *Chevron* step 1, the Clean Air Act unambiguously prohibits an NSR

applicability test based on potential or allowable emissions, the Panel has deprived EPA of the

flexibility to adapt the NSR program to respond to environmental and economic developments.

Although the Panel did not reach the question of whether the Clean Unit provision is a reasonable interpretation of the statute under Step 2 of *Chevron*, EPA's determination that the

use of an allowable emissions test is appropriate for Clean Units is a reasonable interpretation of

the ambiguous statutory term because it encourages the adoption of state-of-the-art technology

resulting in environmental benefits while also providing regulatory certainty. The Clean Unit

provisions thus reasonably accommodate both the environmental and economic considerations

that Congress was concerned about in enacting the NSR provisions.

REQUEST FOR CLARIFICATION THAT THE COURT'S RULING ON POLLUTION

CONTROL PROJECTS APPLIES ONLY PROSPECTIVELY

The Pollution Control Project ("PCP") exclusion was designed to address the problem

faced by sources when air pollution control technology decreases emissions of one pollutant

^{5/}The clarification EPA seeks will ensure that all sources that have relied on the PCP exclusion

are treated equally. This case thus does not raise any concerns regarding the “selective” retroactive application of a court’s ruling. *Compare Harper v. Va. Dep’t. of Taxation*, 509 U.S.

86, 96-97 (1993) (Court cannot allow law to “shift and spring” based on equities of individual

parties’ claims of reliance; Court’s approach to retroactivity is based on admonition that Court

cannot “disregard current law *or treat similarly situated litigants differently*”) (emphasis added);

National Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1288-89 (D.C. Cir.1995)

(same). At a

minimum, the vacatur should not be applied to permitting decisions that are no longer subject to

review. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S.749, 758 (1995) (recognizing that “[n]ew

legal principles, even when applied retroactively, do not apply to cases already closed.”).
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while increasing collateral emissions of a different pollutant. In such cases the addition of pollution control equipment could trigger NSR, even if the controls produce a net environmental

benefit. EPA concluded that this possibility discourages sources from voluntarily installing

environmentally beneficial control technology. See Slip op. at 64.

EPA has thus long excluded the installation of certain pollution control projects from NSR. Until 1992, when EPA introduced the first formal PCP exclusion (applicable only to

electric utilities), this was done on a case-by-case basis. In 1994 EPA issued guidance under

which non-utility sources were also potentially eligible for the PCP exclusion. Finally, in the

2002 Rule, EPA formally extended the PCP exclusion to all industries. The Court ruled that

EPA lacked authority to create a PCP exclusion, and vacated the PCP exclusions in both the

1992 and 2002 Rules. Slip op. at 67.

If the holding in this case is applied retroactively, sources that relied on the longstanding PCP exclusion to their detriment in undertaking pollution control projects could now be found to

be in violation of NSR requirements. It would be inequitable to penalize sources that voluntarily

installed environmentally beneficial pollution control equipment based on their good-faith

reliance on EPA's regulations and guidance.⁵ Nor would a purely prospective application of the vacatur of the PCP exclusion have any negative impact on air quality. States are required to develop state implementation plans ("SIPs") that include measures necessary to achieve or maintain national ambient air quality standards. 42 U.S.C. § 7410(a). Any emissions from facilities that have installed PCPs in reliance on the PCP exclusion should already be accounted for in each state's current SIP or future SIP planning.

EPA thus requests that the Panel clarify that its holding vacating the PCP provisions of the 1992 and 2002 rules applies only prospectively. *Cf. Joseph v. United States Civil Service*

Commission, 554 F.2d 1140, 1157 (D.C. Cir. 1977) (although court held regulation exempting

certain local elections from Hatch Act invalid, any individual who relied on that exemption prior

to date of decision could assert it as a defense to charge of violating Act); *Pickus v. United States*

Board of Parole, 507 F.2d 1107, 1114 (D.C. Cir. 1974) (opinion holding that Parole Board rules

should have been promulgated pursuant to APA notice-and-comment procedures did not invalidate past Board determinations on merits of particular cases).

CONCLUSION

For the reasons stated above, rehearing or rehearing en banc should be granted on the Panel's vacatur of the Clean Units provision of the NSR Reform Rule. Furthermore, the Panel

should clarify that its vacatur of the Pollution Control Project provision applies only prospectively.

Respectfully submitted,

KELLY A. JOHNSON

Acting Assistant Attorney General

NORMAN L. RAVE, JR.

LOIS GODFREY WYE

ANGELINE PURDY

Environmental Defense Section

Environment & Natural Resources Division

United States Department of Justice

P.O. Box 23986

16

Washington, D.C. 20026-3986

(202) 616-7568

Of Counsel:

HOWARD J. HOFFMAN

CAROL HOLMES
Office of General Counsel
U.S. Environmental Protection Agency
August 8, 2005.