

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, et al.,)	
)	
Petitioners,)	
v.)	Case No. 03-1380
)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	Complex
Respondent.)	
)	

On Petitions for Review of Final Actions
of the United States Environmental Protection Agency

OPENING BRIEF OF GOVERNMENT PETITIONERS

The States of New York, California, Connecticut, Delaware, Illinois, Maine,
Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico,
Pennsylvania, Rhode Island, Vermont, and Wisconsin, and the District of Columbia,

the South Coast Air Quality Management District,

the City of New York and the City and County of San Francisco, and

The Connecticut municipalities of Cornwall, East Hartford, Easton, Greenwich, Groton,
Hartford, Hebron, Lebanon, Middletown, New Haven, New London, Newtown, North
Stonington, Pomfret, Putnam, Rocky Hill, Salisbury, Stamford, Thompson, Wallingford,
Washington, Waterbury, Westbrook, Weston, Westport, and Woodstock.

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Dated: September 8, 2005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certify as follows:

A. PARTIES AND AMICI

Petitioners

The following parties appear in these consolidated cases as petitioners:

Challenges to the EPA Rule published at 68 Fed. Reg. 61,248 (Oct. 27, 2003)

In case no. 03-1380, filed October 27, 2003, the State of New York, State of Connecticut, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, State of New Mexico, Commonwealth of Pennsylvania Department of Environmental Protection, State of Rhode Island, State of Vermont, State of Wisconsin, the District of Columbia, the City of New York, the City of San Francisco, and the following Connecticut municipalities: the City of Groton, City of Hartford, City of Middletown, City of New Haven, City of New London, City of Stamford, and City of Waterbury, the Town of Cornwall, Town of Easton, Town of Greenwich, Town of Hebron, Town of Lebanon, Town of Newtown, Town of North Stonington, Town of Pomfret, Town of Putnam, Town of Rocky Hill, Town of Salisbury, Town of Thompson, Town of Wallingford, Town of Washington, Town of Westbrook, Town of Weston, Town of Westport, and Town of Woodstock.

In case no. 03-1381, filed October 28, 2003, the Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, Communities for a Better Environment, United States Public Interest Research Group, Alabama Environmental Council, Clean Air Council, Group Against Smog and Pollution, Michigan Environmental Council, The Ohio Environmental Council, Scenic Hudson, and Southern Alliance for Clean Energy.

In case no. 03-1383, filed October 28, 2003, the People of the State of California ex rel. Bill Lockyer, Attorney General of California, and California Air Resources Board.

In case no. 03-1390, filed October 30, 2003, the State of Illinois.

In case no. 03-1402, filed November 6, 2003, the South Coast Air Quality Management District.

In case no. 03-1453, filed December 22, 2003, the Delaware Nature Society.

In case no. 03-1454, filed December 24, 2003, the State of Delaware.

Challenges to the EPA Rule published at 68 Fed. Reg. 74,483 (December 24, 2003)

In case no. 04-1029, filed January 21, 2004, the Natural Resources Defense Council.

In case no. 04-1035, filed January 29, 2004, the State of New York, State of California, State of Connecticut, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of New Jersey, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, State of Wisconsin, the District of Columbia, the City of New York and the City of San Francisco.

In case no. 04-1064, filed February 23, 2004, the South Coast Air Quality Management District.

Challenges to EPA Action on Reconsideration published at 70 Fed. Reg. 33,838 (June 10, 2005)

In case no. 05-1234, filed July 5, 2005, the State of New York, State of Connecticut, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, State of New Mexico, Commonwealth of Pennsylvania Department of Environmental Protection, State of Rhode Island, State of Vermont, State of Wisconsin, the District of Columbia, the City of New York, the City of San Francisco, and the

following Connecticut municipalities: the City of Groton, City of Hartford, City of Middletown, City of New Haven, City of New London, City of Stamford, and City of Waterbury, the Town of Cornwall, Town of Easton, Town of Greenwich, Town of Hebron, Town of Lebanon, Town of Newtown, Town of North Stonington, Town of Pomfret, Town of Putnam, Town of Rocky Hill, Town of Salisbury, Town of Thompson, Town of Wallingford, Town of Washington, Town of Westbrook, Town of Weston, Town of Westport, and Town of Woodstock.

In case no. 05-1287, filed July 12, 2005, the Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, Communities for a Better Environment, United States Public Interest Research Group, Alabama Environmental Council, Clean Air Council, Group Against Smog and Pollution, Michigan Environmental Council, The Ohio Environmental Council, Scenic Hudson, and Southern Alliance for Clean Energy.

Respondent

The United States Environmental Protection Agency is respondent in these consolidated cases.

Intervenors

The following parties have intervened in these consolidated cases:

On the side of Petitioners: the Adirondack Mountain Club.

On the side of Respondent: the Clean Air Implementation Project, Utility Air Regulatory Group, National Environmental Development Association's Clean Air Project, Equipment Replacement Rule Coalition, Alliance of Automobile Manufacturers, Illinois State Chamber of Commerce, Illinois Environmental Regulatory Group, Commonwealth of Virginia, State of Alabama, State of Alaska, State of Arkansas, State of Kansas, State of Missouri, State of

Nebraska, State of North Dakota, State of South Dakota, State of Utah, State of Wyoming, American Iron and Steel Institute, Specialty Steel Industry of North America, and Steel Manufacturers Association.

Amici

The following parties appear as amici in these consolidated cases:

In support of Petitioners: Sen. Hillary Rodham Clinton, Sen. Jon S. Corzine, Sen. James M. Jeffords, Sen. Patrick J. Leahy, Sen. Barbara Boxer, Sen. Frank Lautenberg, Sen. John F. Kerry, Sen. Christopher J. Dodd, Sen. Charles E. Schumer, Sen. Jack Reed, Rep. Edward J. Markey, Calpine Corporation, the American Thoracic Society, American College of Chest Physicians, National Association for the Medical Direction of Respiratory Care, and Atlantic Salmon Federation.

In support of respondent EPA: the State of Indiana, State of Ohio, and Washington Legal Foundation.

B. RULINGS UNDER REVIEW

Government Petitioners in these consolidated cases seek review of three final actions by EPA:

1. A rule entitled “Prevention of Significant Deterioration and Nonattainment New Source Review: Equipment Replacement Provision of the Routine Maintenance, Repair, and Replacement Exclusion,” published at 68 Fed. Reg. 61,248 (Oct. 27, 2003), that amends 40 C.F.R. §§ 51.165, 51.166, 52.21, and 52.24.

2. A rule entitled “Approval and Promulgation of Implementation Plans; Prevention of Significant Deterioration (PSD),” published at 68 Fed. Reg. 74,483 (December 24, 2003), that

amends sections of 40 C.F.R. § 52 to incorporate the provisions of the October 27, 2003 rule into the state implementation plans of certain States. See 40 C.F.R. §§ 52.96, 52.144, 52.181, 52.270, 52.343, 52.382, 52.499, 52.530, 52.632, 52.683, 52.738, 52.833, 52.986, 52.1165, 52.1180, 52.1234, 52.1382, 52.1436, 52.1485, 52.1603, 52.1634, 52.1689, 52.1829, 52.1929, 52.1987, 52.2178, 52.2233, 52.2303, 52.2346, 52.2497, 52.2581, 52.2630, 52.2676, 52.2729, 52.2779, and 52.2827.

3. EPA's decision on reconsideration of these two rules, published at 70 Fed. Reg. 33,838 (June 10, 2005).

C. RELATED CASES

The matter on review has not been previously heard in this or any other court. The Court issued an opinion in a related case, State of New York, et. al. v. EPA (No. 02-1387), on June 24, 2005. Petitions for rehearing and rehearing *en banc* of that decision are currently pending before the Court. On December 24, 2003, the Court granted Government Petitioners' request for briefing of the two cases before the same three-judge panel.

Dated: September 8, 2005

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*Authorities upon which we chiefly rely are marked with an asterisk

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

BACT	Best Available Control Technology
EPA	U.S. Environmental Protection Agency
LAER	Lowest Achievable Emission Rate
NAAQS	National Ambient Air Quality Standard
NSPS	New Source Performance Standards
NSR	New Source Review
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan
WEPCo	Wisconsin Electric Power Company

PRELIMINARY STATEMENT

The state and municipal petitioners (“Government Petitioners”) seek review of the Equipment Replacement Provision (the “Rule”) promulgated by the Environmental Protection Agency (“EPA”). 68 Fed. Reg. 61,248 (Oct. 27, 2003). The Clean Air Act (the “Act”) makes new source review (“NSR”) requirements applicable to existing sources that undergo a “modification,” defined as “*any physical change . . . which increases emissions.*” See 42 U.S.C. § 7411(a)(4). Although the statute provides no exemptions to the broad and unambiguous scope of that definition, EPA’s implementing regulations have always included a *de minimis* exemption for routine maintenance, repair and replacement. EPA now seeks to turn an exemption that was permissible only because it was *de minimis* into a full scale loophole. The Rule would exempt not only the replacement of relatively minor equipment, such as valves and piping, but also the replacement of large plant components, including projects costing well over \$100 *million* at a typical power plant, even if they increase emissions substantially.

The Rule violates the plain language of the Act, is contrary to this Court’s precedent – including its decisions in New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005) and Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979) – and reverses twenty-five years of agency interpretation of the modification definition. It also conflicts with Congressional intent behind the NSR provisions and will allow thousands of utility and industrial sources of air pollution to undertake multi-million dollar capital projects that result in significantly increased emissions without installing the required pollution controls. On December 24, 2003, this Court stayed the Rule, finding that petitioners had demonstrated a likelihood of success on the merits and that the Rule would result in irreparable harm. The Rule should now be vacated.

JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction to review any “nationally applicable regulations promulgated, or any final action taken” under the Act by EPA. 42 U.S.C. § 7607(b). In these consolidated cases, Government Petitioners challenge EPA’s nationally applicable regulations at 68 Fed. Reg. 61,248 (October 27, 2003) and 68 Fed. Reg. 74,483 (December 24, 2003), and its final action on reconsideration of these regulations, at 70 Fed. Reg. 33,838 (June 10, 2005). As set forth in the Certificate as to Parties, *supra* at *i*, Government Petitioners filed petitions for review of these regulatory actions within the 60-day period provided in 42 U.S.C. § 7607(b).¹

STATEMENT OF ISSUES

1. Whether EPA has the authority to exempt activities that increase emissions by more than *de minimis* amounts from NSR pollution control requirements applicable to modifications, where the statutory definition of modification expressly applies to “any physical change or change in method of operation which increases the amount of any air pollutant emitted” by a source of pollution.

2. Whether EPA acted arbitrarily and capriciously by exempting from NSR pollution control requirements industrial plants that increase emissions by replacing plant components if the cost of each modification does not, *inter alia*, exceed 20% of the entire process unit’s replacement value, where the 20% threshold is unsupported by the administrative record and will result in more pollution from grandfathered facilities.

¹ Standing is satisfied here because, *inter alia*, the Rule requires States to amend their state implementation plans (“SIPs”) to include the Rule’s provisions and the Rule allows modified sources to increase their emissions, hindering the States’ efforts to comply with applicable national ambient air quality standards (“NAAQS”). See West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004).

3. Whether EPA's mandate that States adopt the Rule violates the Act's reservation of state authority and forces States to weaken their existing air pollution control programs.

STATUTES AND REGULATIONS

The relevant provisions of the Act are 42 U.S.C. §§ 7411(a) (definitions), 7416 (retention of state authority), 7470-79 (prevention of significant deterioration), and 7501-03 (nonattainment NSR). The Rule, which was to be promulgated at 40 C.F.R. §§ 51.165, 51.166, 52.21, and 52.24, was stayed by the Court on December 24, 2003. The Rule language, together with relevant portions of statutory and regulatory provisions and legislative history, are contained in the Addendum.²

STATEMENT OF THE CASE

Petitioners challenge the Rule because it impermissibly exempts plant modifications that increase emissions from NSR permitting and pollution control requirements. Petitioners also seek review of EPA's incorporation of the Rule into the SIPs of those States without federally-approved Prevention of Significant Deterioration ("PSD") programs, 68 Fed. Reg. 74,483; and its actions on reconsideration of the Rule, 70 Fed. Reg. 33,838. By order dated August 12, 2005, this Court consolidated these petitions and designated State of New York v. EPA (No. 03-1380) as the lead case.

² Because the Rule provisions in these regulations are materially the same, this brief cites to, and the Addendum contains, § 52.21 only.

STATEMENT OF FACTS

A. Enactment of NSR Provisions

Congress enacted the 1970 amendments to the Act “to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again.” H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 1 (1970). Because of insufficient progress toward clean air, in 1977 Congress added the NSR provisions, subjecting new and modified industrial plants to NSR permitting and pollution control requirements. NSR consists of two programs: one for areas in attainment with the NAAQS and one for nonattainment areas. In attainment areas, a new or modified source must comply with PSD requirements, including obtaining a preconstruction permit, demonstrating that it will not cause a violation of an air quality “increment” (designed to prevent air quality from deteriorating significantly), and complying with an emission rate equal to the Best Available Control Technology (“BACT”). 42 U.S.C. § 7475. In nonattainment areas, new or modified sources must obtain a preconstruction permit, obtain emission offsets (thereby assuring reasonable progress toward attainment of the NAAQS), and comply with the Lowest Achievable Emission Rate (“LAER”). 42 U.S.C. § 7503.

“Congress meant NSR to apply to both new *and modified* sources.” New York, 413 F.3d at 13 (italics in original). Acknowledging the expense of retrofitting existing sources with pollution controls, and expecting that many older facilities would soon reach the end of their useful lives and be retired, Congress temporarily grandfathered existing plants from NSR requirements, until they undergo a “modification.” Congress did this by defining the “construction” activities that trigger NSR requirements to include “modifications,” which the Act

broadly defines 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.

See 42 U.S.C. §§ 7479(2)(c) and 7501(4) (incorporating definition of “modification” found in 42 U.S.C. § 7411(a)(4)).³

B. NSR Regulations

EPA promulgated regulations implementing these NSR programs in 1978. Although the statute provides no exception to the reach of the modification provision, EPA created a regulatory exemption for routine maintenance, repair and replacement (the “routine maintenance exemption”). 43 Fed. Reg. 26,404 (June 19, 1978). Industry and environmental groups challenged aspects of EPA’s initial NSR regulations. In Alabama Power, this Court vacated an exemption for modifications resulting in emission increases below the new source thresholds (100 or 250 tons per year, depending on source category), holding that “the term ‘modification’ is nowhere limited to changes exceeding a certain magnitude” and that EPA’s authority to exempt activity from the definition is limited to *de minimis* activity (or administrative necessity). Id., 636 F.2d at 400. Subsequently, EPA revised the NSR regulations to establish *de minimis* thresholds based on an analysis of air quality impacts. 45 Fed. Reg. 52,707 (Aug. 7, 1980). Emission increases in excess of these thresholds are “significant,” thereby triggering the NSR requirements. Id. at 52,698 and 52,705-10; 40 C.F.R. §§ 52.21(b)(2) and (b)(23).

EPA maintained the routine maintenance exemption in the 1980 regulations. 45 Fed.

³ The nonattainment NSR provisions apply expressly to “new or modified” sources. 42 U.S.C. § 7502(c)(5).

Reg. at 52,730. Since then, EPA has consistently stated that the routine maintenance exemption is necessarily *de minimis*.⁴ EPA acknowledges that, prior to the present rulemaking, it “generally had interpreted the [routine maintenance] exclusion as being limited to *de minimis* circumstances.” 70 Fed. Reg. 33,841/1.

C. The Rule

Acting on the recommendation of the President’s National Energy Policy Development Group, EPA began a comprehensive overhaul of the NSR program in 2001. At the core of this effort are two new regulations that narrow the meaning of “modification,” thereby enabling sources to bypass NSR requirements. The first rule, promulgated on December 31, 2002, provided sources with ways to avoid emission increases (such as plantwide applicability limits and an exemption for “clean units”); it was upheld in part, and vacated in part, in New York.

The second rule, the subject of this action, was proposed on the same date that the first rule was promulgated. 67 Fed. Reg. 80,290 (Dec. 31, 2002). EPA initially proposed two approaches to broaden its existing regulatory routine maintenance exemption: (1) an “equipment replacement” provision and (2) an annual maintenance allowance (which was ultimately not promulgated). Both approaches proposed exempting, as “routine maintenance,” activities undertaken at a major stationary source that fell below unspecified cost thresholds and met other criteria (*e.g.*, did not cause the facility to exceed permitted emission limits). Id. at 80,294-96.

As finalized, the Rule exempts “equipment replacement” activities that cost up to 20% of

⁴ For example, in its brief in Tennessee Valley Authority v. Whitman, 336 F. 3d 1236 (11th Cir. 2003) (hereafter, “TVA”), EPA stated that “the term ‘any physical change’ suggests sweeping coverage of the term” and, relying on Alabama Power, stated that EPA “has the authority to exempt *only* those activities when the benefits of regulation are trivial (or “*de minimis*”)” (OAR-2002-0068-1244) (JA __) (emphasis in original).

the entire process unit's replacement cost,⁵ subject only to the limitations that the new component "serve the same purpose" as the replaced component, not change the unit's "basic design parameters," and not exceed otherwise applicable limitations on the unit's emissions. 40 C.F.R. §§ 52.21(b)(56) and 52.21(cc). The Rule allows a plant to use the exemption repeatedly, with each component replacement judged independently against the 20% threshold. *Id.*, § 52.21(cc)(1).

Several parties petitioned for reconsideration of the Rule because it differed significantly from the proposed rule. For example, the proposal did not include the 20% threshold or explain the legal theories that EPA ultimately relied upon. After this Court stayed the Rule, EPA granted reconsideration, seeking comment on these and other issues. 69 Fed. Reg. 40,278 (July 1, 2004). On June 10, 2005, EPA issued its decision on reconsideration, in which it decided to proceed with the Rule as written. 70 Fed. Reg. 33,838.

SUMMARY OF ARGUMENT

The Rule fails step one of the analysis required under Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The statutory definition of modification applies unambiguously to any physical or operational change that increases emissions, including the replacement of large factory components. The statute contains no exception to this definition. EPA's contention that the statutory definition of modification is ambiguous and allows the agency to broadly exclude the replacement of plant "equipment" based

⁵ The Rule defines a "process unit" as the combination of structures and equipment used to produce a product, excluding only the pollution controls. 40 C.F.R. § 52.21(b)(53). For an electric power plant, the process unit encompasses all equipment from the coal receiving equipment through the stack, including the boiler and the turbine. *Id.*, § 52.21(b)(53)(iv)(a).

on its cost, rather than the amount of emissions generated by the change, is contrary to this Court's holding in Alabama Power that Congress used "clear language" in defining modification to include "any physical change" that increases emissions. 636 F.2d at 400. The plain language of the statutory definition effectuates several Congressional purposes behind the NSR provisions, including: (1) ensuring that air quality is not harmed by construction activity; (2) limiting the grandfathering of aging, uncontrolled plants; (3) promoting the development of control technologies; and (4) facilitating economic growth without harming air quality.

EPA cannot demonstrate that the statutory definition of modification is ambiguous. Congress specifically defined the term "modification" in the statute, indicating that it did not intend to delegate the definition of "modification" to EPA. Because the statutory definition of modification is unambiguous, EPA's authority to exempt plant activities from the scope of the statute by regulation is limited to truly *de minimis* activities. But EPA cannot, and does not try to, justify the Rule's new exemption under a *de minimis* theory. Nor can EPA demonstrate that Congress could not have intended to regulate component replacement activities that increase emissions.

Even if EPA has authority under the Act to adopt non-*de minimis* exemptions for modifications and use a cost basis to do so, the Rule must be vacated as an arbitrary and capricious action. First, EPA acted arbitrarily in establishing a 20% cost threshold, which would enable sources to undertake virtually any equipment replacement, including those that result in greater emissions, yet avoid NSR pollution control requirements. This threshold is unsupported by the factual record, including documents from EPA's enforcement office and utility commenters, and is contrary to the leading case of Wisconsin Electric Power Co. v. Reilly,

893 F.2d 901, 907 (7th Cir. 1990) (“WEPCo”). In addition, EPA erred by rejecting alternative approaches that could have met the purported need for clarity on “routine maintenance” yet not strayed from congressional intent. Finally, EPA made the Rule unenforceable by not requiring sources to keep records.

Second, EPA acted arbitrarily and capriciously by promulgating a Rule that will lead to greater pollution. Because modifications that reduce emissions do not trigger NSR under the plain language of the statute and current regulations, the only purpose served by the Rule is to exempt plant modifications that *increase* emissions. Moreover, none of EPA’s attempts to demonstrate that the Rule will not result in emission increases can withstand scrutiny. EPA’s modeling is fundamentally flawed because it contains assumptions refuted by the record and focuses on national rather than local emissions. Next, the Rule’s “safeguards” will not prevent emission increases. Few, if any, replacements will fail the “functionally equivalent” criterion because EPA defines any equipment serving the “same purpose” as being “functionally equivalent” to the replaced equipment. Likewise, the record demonstrates that activities that do not alter a plant’s “design parameters” nonetheless increase emissions. The permitted emissions safeguard is also inadequate because many facilities operate well below their permitted limits. Furthermore, other CAA programs will not constrain the emission increases resulting from the Rule.

Finally, by making this broad new exemption mandatory, EPA has violated Section 116 of the Act, which allows States to implement more stringent programs.

STANDARD OF REVIEW

The Court should reverse an agency action if it is arbitrary, in excess of statutory authority, or without observance of procedure required by law. 42 U.S.C. § 7607(d)(9). An agency rule is arbitrary and capricious if the agency relied on factors that Congress did not intend it to consider, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the record, or is so implausible that it could not be the product of agency expertise. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (“State Farm”).

In evaluating EPA’s interpretation of the statute, the Court must first “determine whether, based on the Act’s language, legislative history, structure, and purpose, ‘Congress has directly spoken to the precise question at issue.’ If so, EPA must obey.” New York, 413 F.3d at 18 (quoting Chevron, 467 U.S. at 842). If that evaluation is inconclusive, EPA’s interpretation must nevertheless must be rejected under Chevron step two if “it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” Id., at 845.

ARGUMENT

POINT I

EPA’S INTERPRETATION IS CONTRARY TO THE STATUTE

A. The Unambiguous Statutory Definition of “Modification” Forecloses EPA’s New Interpretation.

Congress specified in the modification definition that the fundamental inquiry in determining whether a source has been modified, and must comply with NSR requirements, is

whether emissions increase: “If [existing] plants increase pollution, they will generally need a permit.” Alabama Power, 636 F.2d at 400. Because the Rule excludes “equipment replacement” activities based on their cost, regardless of their emissions, it contravenes the plain language of the statute. In addition, the Rule allows existing uncontrolled sources to continue operating in perpetuity without installing pollution controls, contrary to Congressional intent to protect air quality, limit grandfathering of existing sources, and allow economic growth without harming air quality. Because “Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” Chevron, 467 U.S. at 841.

1. The plain language of the statutory definition encompasses “equipment replacement” activities that increase emissions.

The statutory definition of modification is straightforward: “any physical change or change in method of operation which increases the amount of any air pollutant emitted . . .” 42 U.S.C. § 7411(a)(4). This “clear language,” Alabama Power, 636 F.2d at 400, reaches broadly to encompass the full spectrum of activities that may be undertaken by industrial sources, including changes in design, additions of production lines, and – key to this case – the replacement of equipment. In this context, Congress’s use of “any” demonstrates its intent to cover “indiscriminately” each of these possible types of changes, as long as they increase emissions. United States v. Gonzales, 520 U.S. 1, 5 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, one or some indiscriminately of whatever kind.”).⁶

⁶ See also Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd., 125 S.Ct. 385, 397 (2004) (same; quoting from Gonzales); Department of Housing and Urban Development v. Rucker, 535 U.S. 125, 130-31 (2002) (holding that “Congress’ decision not to impose any qualification in the statute, combined with its use of the term ‘any’ to modify ‘drug-related activity,’ precludes any knowledge requirement”); United States v. James, 478 U.S. 597, 605

(continued...)

Until it issued this Rule in 2003, EPA had for a quarter century adhered to the position that “any physical change” includes the replacement of equipment. For example, EPA stated in a 1992 NSR rulemaking that it “has always recognized that the definition of physical or operational change in Section 111(a)(4) could, standing alone, encompass the most mundane activities at an industrial facility (even the repair or *replacement of a single leaky pipe*, or a change in the way that pipe is utilized).” 57 Fed. Reg. 32,316/2 (July 21, 1992) (italics supplied). Likewise, EPA’s Environmental Appeals Board (EAB) stated that “TVA’s replacement of various boiler components and elements clearly constituted physical changes.” In re: Tennessee Valley Authority, 2000 EPA App. LEXIS 25, *75 (EPA Env. App. Bd. 2000) (hereafter “In re TVA”).⁷ The courts have agreed that “any physical change” encompasses the replacement of plant equipment. See Alabama Power, 636 F.2d at 400 (“replacement of depreciated capital stock” that results in more than a *de minimis* emission increase); WEPCo, 893 F.2d at 905 (“any physical change” includes “the most trivial activities – the replacement of leaking pipes, for example”). Thus, WEPCo held that “under the plain terms of the Act, WEPCo’s [equipment] replacement program constitutes a ‘physical change.’” Id. at 907.

The Rule’s focus on the cost of the change is contrary to the plain language of the statute,

⁶(...continued)

(1986), abrogated on other grounds by Central Green Co. v. United States, 531 U.S. 425 (2001) (the term “any” “undercuts a narrow construction” of the statute); Harrison v. PPG Industries, Inc., 446 U.S. 578, 588-89 (1980). The Supreme Court’s decision in Nixon v. Missouri Municipal League, 124 S.Ct. 1555 (2004) is not to the contrary, as explained *infra* at 20-21.

⁷ Although the Eleventh Circuit subsequently held that it lacked jurisdiction to review the case because the administrative compliance order was invalid on constitutional grounds, see TVA, 336 F. 3d 1236, EAB’s opinion remained the official position of EPA on the meaning of physical change.

which focuses instead on emissions. Rather than qualifying the “any physical change” language with reference to the cost of the change, Congress made clear which changes it intended to regulate – those that increase emissions. WEPCo, 893 F.2d at 913 (“the modification provision applies to *any* physical change, *without regard to cost*, that causes an increase in emissions”) (emphasis in original); Alabama Power, 636 F.2d at 400 (“Implementation of the statute’s definition of ‘modification’ will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for *de minimis* increases.”). EPA cannot replace Congress’s air quality-based trigger with one that is based on dollars.⁸ See Natural Resources Defense Council v. EPA, 822 F.2d 104, 113 (D.C. Cir. 1987) (“To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision’s applicability is, we should have thought, an entirely unacceptable method of construing statutes.”). See also Whitman, 531 U.S. at 485 (“EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.”).

In New York, this Court determined, under Chevron step one, that the plain language of the modification definition encompasses pollution control projects within the scope of the physical changes subject to the definition, if they increase emissions of another pollutant.

⁸ In contrast to the definition of modification, which does not reference costs, Congress provided for consideration of control costs in determining what controls are required as BACT at a new or modified source. 42 U.S.C. § 7479(3) (“taking into account energy, environmental and economic and other costs”); Alabama Power, 636 F.2d at 361, n.90 (“Apart from its limited *de minimis* exemption authority, EPA has flexibility to consider costs and benefits in deciding what is ‘best available control technology’ for any situation”). See also Whitman v. American Trucking Ass’ns, Inc., 531 U.S. 457, 466-68 (2001) (EPA has no authority to consider costs in *setting* the NAAQS where Congress provided for consideration of costs only in *implementing* the NAAQS).

413 F.3d at 40-41. Thus, this Court rejected EPA’s exclusion of pollution control projects from the scope of “any physical change.” The Court’s holding is equally applicable here: “EPA lacks authority to create an exemption from NSR by administrative rule.” *Id.* at 41.

2. The plain language of the definition of modification is consistent with clear expressions of Congressional intent.

Because the plain language of the statute is clear, there is no need to consider other indications of Congressional intent. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (improper to “resort to legislative history to cloud a statutory text that is clear”). Even if the statutory definition were not determinative, however, other indicia of Congressional intent confirm that Congress intended the NSR emission control requirements to apply to the plant refurbishments exempted by the Rule.

a. Preservation of air quality

Congress enacted the PSD provisions to “protect public health and welfare” from air pollution “notwithstanding attainment and maintenance of all national ambient air quality standards.” 42 U.S.C. § 7470(1). More specifically, Congress expressed its intent “to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision. . . .” 42 U.S.C. § 7470(5). EPA has recognized that the nonattainment NSR provisions are designed to “positively reduce emissions” in areas with dirtier air, rather than just maintain air quality. *See* 45 Fed. Reg. 52,697/2. Thus, when EPA initially promulgated the nonattainment NSR regulations, it acknowledged that “Congress indicated that construction of *replacement equipment* should be subject to NSR under nonattainment programs without regard to the

offsetting reductions.” 44 Fed. Reg. 51,932/3 (Sept. 5, 1979) (*italics supplied*).

The Rule excludes from the NSR pollution control requirements modifications that increase air pollution substantially. The record of EPA’s enforcement cases reveals that thousands of tons of increased emissions can result from the type of modifications exempted by the Rule.⁹ Indeed, one modification in Ohio Edison that would be exempt under the Rule increased emissions of nitrogen oxides by 3,759 tons per year, and sulfur dioxide emissions by over 12,000 tons per year, over *300 times* the *de minimis* level of 40 tons. 276 F. Supp.2d at 882. EPA may not subordinate the fundamental air quality goal of the statute in pursuit of other ends. American Petroleum Institute v. EPA, 52 F.3d 1113, 1120 (D.C. Cir. 1995) (vacating regulation intended to further energy conservation where emissions of volatile organic compounds could increase).¹⁰

b. Limiting the grandfathering of old, uncontrolled plants

The modification provision also implements Congressional intent that existing sources will lose their grandfathered status over time as they continue to operate. In enacting the PSD requirements in 1977, Congress understood that many “older units fac[e] retirement in 10-15 years,” meaning that they will have to be refurbished – and controlled – if they are to continue operating. H.R. Rep. No. 95-294, 95th Cong. 1st Sess. 186 (1977). In New York, this Court once again explained that Congress intended these older sources to be controlled as they are modified:

⁹ See United States v. Ohio Edison Co., 276 F. Supp.2d 829, 869-876, 882 (S.D. Ohio 2003) (finding projected emission increases of up to 5,200 tons per year, and actual increases of 1,000 tons or more associated with five modifications); In re TVA, 2000 EPA App. LEXIS 25, *198 (actual emission increases of more than 1,000 tons at seven units).

¹⁰ As explained in more detail below (at 38-45), EPA’s purported air quality justifications for the Rule are unsupported by the record.

In Alabama Power, the court recognized that the “statutory scheme intends to ‘grandfather’ existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit.”

413 F.3d at 27 (quoting Alabama Power, 636 F.2d at 400). In reaffirming that interpretation, this Court also referred to WEPCo, in which the Seventh Circuit determined that exempting major equipment replacements from NSR requirements “would open vistas of indefinite immunity from the provisions of NSPS [new source performance standards] and PSD,” contrary to Congressional intent:

Were we to hold that the replacement of major generating station systems – including steam drums and air heaters – does not constitute a physical change (and is therefore not a modification), the application of NSPS and PSD to important facilities might be postponed into the indefinite future. There is no reason to believe that such a result was intended by Congress.

WEPCo, 893 F.2d at 909-10 (cited in New York, 413 F.3d at 27).¹¹

Prior to promulgating the Rule, EPA had repeatedly recognized that the NSR modification provision ensures that grandfathering will not be permanent.¹² Under the Rule,

¹¹ The National Academy of Public Administration (NAPA) reached a similar conclusion in its Report to Congress: “A vital aspect of this grandfather provision was the clear assumption of Congress that older, high-emitting sources would gradually be upgraded or phased out. Then, once a grandfathered facility makes any changes or is replaced, NSR is triggered and requires it to install improved technologies that will prevent or control pollution.” NAPA Report (OAR-2002-0068-1244) at 14 (JA __). NAPA concluded that “grandfathering has clearly persisted much longer than Congress envisioned or intended.” Id. at 91 (JA xx).

¹² In In re TVA, EPA’s EAB determined that “the structure of the Act reflects that this grandfathering was envisioned as a temporary rather than permanent status, in that existing plants were required to modernize air pollution controls whenever they were modified in a way that increased emissions.” 2000 EPA App. LEXIS 25, *79. EPA wrote in Ohio Edison that Congress intended that “older units would either incorporate the required controls as they underwent ‘modifications,’ or would instead be allowed to ‘die’ and be replaced with new, state-of-the-art

(continued...)

however, plants can be rebuilt component-by-component, as long as none of the component replacements exceed 20% of the cost of an entirely new process unit, a threshold that EPA designed expressly to exempt most such activities. 68 Fed. Reg. 61,257/2.¹³ Thus, EPA's new interpretation of the modification definition to exclude the replacement of large plant components, regardless of the resulting emissions, provides sources with the "perpetual immunity" from emission control requirements that the modification provision was designed to prevent.

c. Development of emission control technologies

Applying the NSR requirements to replacement activities that increase emissions also promotes the development of emission control technologies. The Senate Report accompanying the 1977 amendments states that "[t]hroughout this bill there is a philosophy of encouragement of technology development. It is an encouragement to induce, to stimulate, and to augment the innovative character of industry in reaching for more effective, less-costly systems to control air pollution." S. Rep. No. 95-127, 95th Cong., 1st Sess. 18 (1977). That Report identifies both the PSD and nonattainment NSR provisions as effectuating this goal. *Id.* The technology-forcing nature of the Act prompted the court in WEPCo to observe that "the development of emissions control systems is not furthered if operators could, without exposure to the standards of the 1977

¹²(...continued)
units that fully complied with pollution control requirements." United States' Brief in Ohio Edison, at 5 (OAR-2002-0068-1244) (JA __). See also United States Brief in TVA, at 62 (OAR-2002-0068-1244) (JA __).

¹³ As explained in Point II.B.3, *infra*, the additional qualifications that the replacement be functionally equivalent, not alter the basic design parameters of the unit, or cause the unit to exceed any legally enforceable emission limitation will not prevent significant emission increases.

Amendments, increase production (and pollution) through extensive replacement of deteriorated generating systems.” 893 F.2d at 909-10.

The Rule will significantly reduce the role of the NSR provisions in stimulating technology development, as existing sources will be largely rebuilt without the need to install control technologies. While technological development of emission controls for new sources will continue, the development of retrofit technologies will largely cease if the Rule is upheld.

d. Allowing room for economic growth

Congress determined that applying NSR emission control requirements to modified sources promotes economic growth by allowing room for new sources without harming air quality, thereby furthering Congressional intent “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(3). See New York, 413 F.3d at 13 (applying NSR pollution control requirements to new and modified sources balances environmental improvement and economic growth). As the House Committee Report explained, “if each new or modified major source is located, constructed, and operated so as to minimize its impact on available clean air resources, then more and bigger plants will be able to locate in the same area without serious air quality degradation.” H.R. Rep. No. 95-294, at 133. This purpose is furthered by regulating all plant changes that increase emissions, as required by the plain language of the modification definition, regardless of whether they are “equipment replacements” or other plant modifications.

In sum, just as the statutory language does not provide for any exemptions to the broad reach of the modification provision, the purposes of the NSR provisions are not served by treating the replacement of plant components and other equipment differently from other plant

modifications that may have an equal effect on air quality. To the contrary, Congress's intent to regulate activities that extend the life of a grandfathered plant is as applicable to such replacements as to any other modifications. Likewise, modifications that increase emissions by thousands of tons (as in Ohio Edison and In re TVA) are harmful to the environment, regardless of the nature of the change. *Supra* at 15, n.9. The Rule must therefore be rejected as contrary "to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43.

3. EPA's efforts to find ambiguity in the Act fail.

In light of the plain meaning of the statutory definition of modification and the clear Congressional intent broadly to regulate plant activities that increase emissions, EPA's quest to find ambiguity – which may entitle its reading to some deference – is in vain.

Initially, the premise that Congress, by using ambiguous language, signals its intent to delegate definition of ambiguous terms to the agency, see Smiley v. Citibank, 517 U.S. 735, 740-41 (1996), is inapplicable in the face of an express statutory definition. See Time Warner v. FCC, 56 F.3d 151, 190 (D.C. Cir. 1995) ("In the face of a clear statutory definition, however, there is no occasion for deference."); League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1190 (9th Cir. 2002) (rejecting EPA's authority to "refine" definitions in a statute). Thus, because Congress expressly defined "modification," a term that the Supreme Court has found to be unambiguous even in the absence of a definition, see Microwave Communications, Inc. v. American Telephone & Telegraph Co., 512 U.S. 218, 228 (1994) ("modification" unambiguously connotes "moderate," not "fundamental," change), it cannot be concluded that Congress intended

to delegate to EPA the definition of modification.¹⁴ See M. Stephenson, *A Tale of Two Theories: The Legal Basis for EPA's Proposed Revision to the Routine Maintenance, Repair, and Replacement Exception, and the Implications for Administrative Law*, 33 *Env. L. Rptr.* 10789, 10801 (2003) (a finding that the definition of "modification" is ambiguous "would render the congressional effort at definition an exercise in futility.").

Nevertheless, EPA tries to find ambiguity by divorcing the words "any physical change" from the qualifying language "which increases the amount of any air pollutant emitted." As explained above, read holistically, the statutory language explicitly makes the NSR requirements applicable to any plant activities that increase emissions, regardless of whether they are physical changes or changes in method of operation. See *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

EPA erroneously discounts the importance of the word "any" in "any physical change," arguing that it "is simply a modifier that does not change the meaning of the word it modifies." 68 *Fed. Reg.* 61,273 n.15. To the contrary, as explained above (*supra* at 11, n.6), the Supreme Court has repeatedly held that the word "any" establishes Congress's intent that a statute be interpreted expansively. EPA's reliance on the Supreme Court's recent decision in *Nixon*, which emphasizes context in construing "any," is unavailing. See 70 *Fed. Reg.* 33,842/1. In *Nixon*, the Court considered a statute barring States from enacting laws that prohibit "any entity" from engaging in telecommunications activities; the Court determined that reading "any entity" to encompass state political subdivisions would preempt traditional state powers, 124 S.Ct. at 1559,

¹⁴ As this Court found in *New York*, Congress did give EPA some leeway in defining how to determine whether emissions increase. Id. at 23-24.

and would lead to “absurd” results. Id. at 1564. To avoid that outcome, the Court limited the scope of “any entity” to private, non-governmental entities. No such narrowing of the plain language of the statute is needed in the instant case. EPA cannot contend that the plain language of the modification provision has “absurd” consequences; indeed, EPA concedes that its former interpretation, to which it adhered for twenty-five years, is “reasonable.” 68 Fed. Reg. 61,272 n.14. Furthermore, as EPA acknowledges, “the Nixon line of cases . . . support[s] looking for indications in the statute that suggest a more limited meaning of the modified term is possible or intended.” 70 Fed. Reg. 33,842/2. In this case, Congress itself limited the broad meaning of “any,” directing that only those physical changes that *increase emissions* will trigger NSR requirements. See International Alliance of Theatrical and Stage Employees v. NLRB, 334 F.3d 27, 34 (D.C. Cir. 2003) (reading “any employee” broadly where the only limitation imposed by statute is that the employee “engages in a strike”).¹⁵ Therefore, no other limitation can be implied. Shays v. FEC, 414 F.3d 76, 108 (D.C. Cir. 2005) (agency cannot add an additional element to an express statutory definition).

EPA’s other arguments are equally unpersuasive. The fact that there are slight *syntactical* differences in EPA’s routine maintenance exclusions in the NSR and NSPS regulations does not render the statutory phrase “any physical change” ambiguous. 70 Fed. Reg. 33,842/3.¹⁶

¹⁵ Because Nixon does not effect a change in the law, see Norfolk Southern 125 S.Ct. at 397 (reaffirming the holding in Gonzales that “‘any’ has an expansive meaning”), there is no merit to EPA’s claim that Nixon “calls into question the . . . discussions in WEPCo that construed ‘any’ to compel a broad view of what is a ‘physical change.’” 70 Fed. Reg. 33,843/1.

¹⁶ While the PSD regulations exempt simply “routine maintenance, replacement and repair,” the NSPS regulations exempt “maintenance, replacement and repair which the Administrator determines to be routine for a source category.” 60 C.F.R. § 60.14(e)(1).

Furthermore, those exclusions have been described by EPA as *de minimis* exemptions from the scope of the statutory definition. See 70 Fed. Reg. 33,841/1 (EPA “generally had interpreted the [routine maintenance] exclusion as being limited to *de minimis* circumstances”). Therefore, they simply do not constitute different interpretations of “any physical change.”

EPA’s argument is also inherently illogical. EPA’s retention of its authority to regulate replacement activities costing more than 20% of replacement value flatly contradicts its conclusion that equipment replacements are not physical changes at all. If replacements are not changes, EPA would not have authority to regulate *any* replacements under NSR. Given that EPA admits that equipment replacements that exceed the 20% threshold *are* physical changes, the Agency’s position that replacements that fall beneath this threshold are not physical changes cannot be sustained.¹⁷ Alabama Power, 636 F.2d at 400.

Finally, in attempting to justify the Rule, EPA suggests that plants subject to the exemption are not “fundamentally changed,” 70 Fed. Reg. 33,841/3. However, the massive projects allowed by the Rule are fundamental and, more important, the plain language of the statute is applicable to *any* changes that increase emissions, not just *fundamental* changes. See WEPCo, 893 F.2d at 908 (rejecting an argument that the “physical change” that constitutes a modification must be a “*basic or fundamental* change,” instead holding that “any physical

¹⁷ EPA’s reliance on Time Warner v. FCC, 240 F.3d 1126 (D.C. Cir. 2001), in arguing that it has the authority to develop a “bright line” test, is misplaced. See 70 Fed. Reg. 33,843/3. In Time Warner, the 5% threshold adopted by the FCC was an attempt to define a threshold for large shareholders who could be in a position to influence corporate decisions. That decision is inapplicable here where the statute reaches not just large physical changes – in which case, EPA might have the authority to define a threshold for what is large – but *any* physical change that increases emissions. Furthermore, EPA has already promulgated bright lines, based on emission thresholds, distinguishing between modifications that are major (to which NSR requirements apply) and those that are not. *Supra* at 5.

change’ means precisely that”).

B. EPA Has No Authority to Create an Exemption to the Plain Language of the Act.

EPA makes a number of policy arguments in an attempt to justify its dramatic expansion of the routine maintenance exemption from a *de minimis* exemption to a broad exemption of most industrial refurbishments, regardless of the resulting emissions. However, EPA concedes that it cannot justify the Rule under its *de minimis* authority and it cannot show that Congress could not have meant to include “equipment replacements” within the scope of the definition of modification. See Appalachian Power Co. v. EPA, 249 F.3d 1032, 1041 (D.C. Cir. 2001).

1. EPA does not, and cannot, justify the rule as a *de minimis* exemption.

EPA concedes that it cannot justify the Rule under its inherent authority to enact *de minimis* exemptions. 68 Fed. Reg. 61,272/3. See Alabama Power, 636 F.2d at 360-61 (EPA can exempt activities from NSR only upon a showing that regulation of those activities would be of trivial value).¹⁸ In that regard, changes exempted by the Rule will result in emission increases of hundreds or even thousands of tons of pollution annually, *supra* at 15, well in excess of the *de minimis* values that EPA developed after Alabama Power. But EPA errs in contending that Alabama Power’s limitation of EPA’s authority to create exemptions is inapplicable to the “any physical change” language. 70 Fed. Reg. 33,840/3. See Environmental Defense Fund (EDF) v. EPA, 82 F.3d 451, 465-66 (D.C. Cir. 1996) (upholding an exemption of “routine maintenance

¹⁸ In exempting *de minimis* activities, an agency “may deviate no further from the statute than is needed to protect Congressional intent.” Mova Pharmaceuticals Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (noting also that “review of the agency’s deviation from the statutory text will occur under the first step of the Chevron analysis, in which we do not defer to the agency’s interpretation of the statute.”).

and repair activities” from another provision of the Act “because the emissions increases they produce, if any, are *de minimis*”); National-Southwire Aluminum Co. v. EPA, 838 F.2d 835, 840 (6th Cir. 1988) (NSPS pollution control exemption is a *de minimis* exemption); Ohio Edison, 276 F. Supp.2d at 888 (relying on Alabama Power in construing scope of “routine maintenance” exception).

2. EPA has provided no valid basis for rejecting the plain meaning of the Act.

Unable to justify the exemption under a *de minimis* theory, EPA attempts to justify the Rule based on its policy preferences. These efforts fail, however, because EPA cannot “avoid the Congressional intent clearly expressed in the [statutory] text simply by asserting that its preferred approach would be better policy.” Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1089 (D.C. Cir. 1996). “[F]or the EPA to avoid a literal interpretation at Chevron step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.” Id. The Court “will not . . . invoke this rule to ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification.” Appalachian Power, 249 F.3d at 1041. In this case, EPA cannot make that “extraordinarily convincing justification” necessary to disregard the plain meaning of the statutory definition of modification.

EPA has made clear that it intends the Rule to encourage all replacement activities that maintain or improve, *inter alia*, “availability, or efficiency of process units.” See 68 Fed. Reg. 61,257/3.¹⁹ But the agency cannot demonstrate that Congress could not have wanted to apply

¹⁹ “Efficiency” refers to the amount of power produced per quantum of fuel and

(continued...)

NSR requirements to plant refurbishments that increase efficiency and availability – if those projects increase emissions. Indeed, EPA has consistently acknowledged that projects that increase *efficiency* “are the very types of projects that Congress intended to address in the new source modification provisions” because of the economic incentive to increase utilization of the modified plant. Memorandum from John Seitz, EPA OAQPS, to EPA Regional Directors (July 1, 1994) (OAR-2002-0068-1167) at 11 (JA ____); see also Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 297 (1st Cir. 1989) (upholding EPA’s determination that efficiency project triggered NSR because “a firm’s decision to introduce new, more efficient machinery may lead the firm to decide to *increase the level of production*, with the result that, despite the new machinery, overall emissions will increase.”) (emphasis original); Detroit Edison Applicability Determination cover letter (OAR-2002-0068-0013) at 4 (JA ____) (“[A] physical change . . . which provides for the more economical production of electricity, would be expected to result in the increased utilization of the affected units, and thus, increased emissions.”). As a result of the 2002 NSR Rule, only those efficiency projects predicted to increase actual emissions trigger NSR requirements. See 40 C.F.R. § 52.21(b)(48)(d)(ii). Likewise, EPA’s NSR enforcement cases demonstrate that replacements of large-scale components that allow power plants or old factories to improve their *availability* by operating more hours can result in more pollution. See, e.g., Ohio Edison, 276 F. Supp.2d at 856-57. See *infra* at 31.

Faced with similar policy arguments in New York, this Court found that EPA had not met its burden of establishing that Congress could not have intended to subject pollution control

¹⁹(...continued)
“availability” refers to the hours that a plant is available to operate.

projects to NSR requirements, because such projects may increase emissions of some pollutants. 413 F.2d at 40 (“Because EPA fails to present evidence of such Congressional intent, the plain meaning of the statute is conclusive.”). Likewise, in this case, EPA cannot show that Congress could not have intended the NSR requirements to apply to equipment replacement projects that increase emissions and thereby harm air quality, regardless of whether they may also increase efficiency or availability.

EPA’s other policy arguments fare no better. Largely ignoring the environmental purposes of the NSR provisions addressed above, *supra* at 14, EPA emphasizes economic considerations, arguing that its new construction of the modification provision balances economic and environmental goals. 70 Fed. Reg. 33,844/2. Congress, however, did not allow EPA to use such balancing to rewrite the statute. Instead, as explained above, the modification provisions promote economic goals because reducing emissions from modified plants allows room for economic growth without harming air quality. *Supra* at 18. EPA erroneously relies on a supposed Congressional intent to promote the “productive capacity of the nation,” 68 Fed. Reg. 61,273/3, citing to 42 U.S.C. § 7401(a)(3)(b)(1), which states that a purpose of the Act is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” But this sentence clearly states that the productive capacity of the nation’s population will benefit from clean air, not that economic goals should take priority over clean air.

EPA claims that the modification provision should be given a narrow interpretation in order to prevent the deterioration of existing sources. 70 Fed. Reg. 33,844/1. But EPA cites to nothing in the statute or the legislative history to suggest that Congress intended to preserve

existing, grandfathered sources at the expense of air quality. To the contrary, as this Court found in Alabama Power, the ability of sources to replace deteriorating equipment without harming the environment is preserved by allowing replacements that result in *de minimis* emission increases only and by NSR's netting provisions, which allow plant refurbishments as long as emissions from the plant as a whole do not increase: "These two exceptions, we believe, will allow for improvement of plants, technological changes, and replacement of depreciated capital stock, without imposing a completely disabling administrative and regulatory burden." 636 F.2d at 401.

EPA also contends that replacement of plant components is not "an opportune time for installation of such controls" because it does not "believe it plausible" that a source will replace equipment if it must also install control equipment. 68 Fed. Reg. 61,270/2; 70 Fed. Reg. 33,844/2. This conclusion conflicts with Congress's express determination to require controls when a source makes any change that increases emissions, no matter how "inconvenient and costly to affected industries." Alabama Power, 636 F.2d at 400; see also WEPCo, 893 F.2d at 909 (the "purpose of the modification rule is to ensure that pollution control measures are undertaken when they can be most effective, at the time of new or modified construction").²⁰

Nor does EPA's preference for other regulatory programs allow it to rewrite the statute. For example, EPA's rationale that economic and environmental interests are balanced by leaving regulation of existing sources to the non-NSR state regulation, 68 Fed. Reg. 61,273/3, is contrary

²⁰ Even if it were legally relevant, EPA's view that "equipment replacements" do not present an "opportune" time for installation of controls is belied by the outages of several weeks to more than a year required for the massive replacements at issue in Ohio Edison and TVA. The component replacements in Ohio Edison were planned months in advance, and required shutdown of the unit for periods ranging from 5 weeks to 8 ½ months. See 276 F. Supp.2d at 856-57. Likewise, TVA's modifications required outages lasting from 2 to 13 months. In re TVA, 2000 EPA App. LEXIS 25, *49.

to express Congressional intent that NSR plays a key role in protecting air quality not only in the State where a new or modified source is located, but also in neighboring States. 42 U.S.C. § 7470(4). EPA's position is also contrary to the position the agency took in Alaska v. EPA, 540 U.S. 461 (2004), where EPA contended that Alaska does not have "carte blanche" to disregard NSR requirements, even if Alaska can protect its own air quality in other ways. United States' Brief in Alaska v. EPA (OAR-2002-0068-1244) at 38 (JA __). It is also belied by the administrative record, which demonstrates the inadequacy of state regulation as a substitute for NSR. *Infra* at 43-45.

Likewise, the structure and history of the Act demonstrates that Congress did not share EPA's belief that air quality will be adequately protected by other programs that reduce emissions from existing facilities, including the acid rain provisions of Title IV of the Act adopted in 1990. 70 Fed. Reg. 33,841/2.²¹ In 1990, Congress expressly rejected an amendment that would have exempted from NSR requirements the replacement of equipment at power plants covered by Title IV. See A Legislative History of the Clean Air Act Amendments of 1990, vol. 4, at 6950-52 (text of McClure Amendment) and 6978-79 (defeat of the McClure Amendment). Senator Chafee, one of the two Senate sponsors of the 1990 amendments, explained that the failed amendment would have allowed refurbishment of old plants to evade NSR review, "no matter how much pollution resulted," contrary to the intent of the NSR provisions. Id. at 6966-67. Indeed, the 1990 Senate Report reemphasized the need to limit grandfathering, explaining that the Title IV allowance program is consistent with the intent of the pre-1990 Act "that older,

²¹ In addition, the factual record does not support EPA's belief that Title IV and other emission-trading programs will prevent emission increases allowed by the Rule. *Infra* at 43-45.

high-emitting sources gradually will be replaced with newer, lower-emitting ones.” S. Rep. No. 101-228, 101st Cong., 2d Sess. 321 (1990). See North Haven Bd. of Education v. Bell, 456 U.S. 512, 535 (1982) (When Congress has not altered an agency interpretation of which it is aware, despite amending other aspects of the statute, “then presumably the legislative intent has been correctly discerned.”).

In sum, EPA cannot show that Congress did not mean what it said when it enacted the definition of “modification” – that the NSR pollution control requirements are triggered by any physical or operational change that increase emissions, regardless of the cost of the change. As in New York, EPA cannot create an exemption from the plain meaning of the statute.

C. EPA’s Interpretation is Not One that Congress Would Have Sanctioned.

Even if EPA is correct that the statutory definition of modification is ambiguous, its interpretation of the definition to exclude from NSR most equipment replacement activities, regardless of the resulting emissions, 68 Fed. Reg. 61257/2, is contrary to the design of the statute to protect air quality by requiring emission controls when a plant’s emissions increase. *Supra* at I.A.²² Accordingly, even if the statutory definition is ambiguous, the Rule must be vacated because, applying Chevron step two, “it appears from the statute [and] its legislative history that the accommodation is not one that Congress would have sanctioned.” Chevron, 467 U.S. at 845.

²² Because the agency’s new interpretation represents an abrupt reversal in its long established interpretation, it would be entitled to little, if any, deference under Chevron step two even if the statutory language were ambiguous. See Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) (“the consistency of an agency’s position is a factor in assessing the weight that position is due”); INS v. Cardoza-Fonseca, 480 U.S. 421, 446, n.30 (1987) (agency interpretation that conflicts with agency’s earlier interpretation is entitled to considerably less deference than a consistently held view).

POINT II

EPA ACTED ARBITRARILY AND CAPRICIOUSLY BY PROMULGATING AN NSR EXEMPTION THAT IS BASED ON AN UNREASONABLE COST THRESHOLD AND WILL CAUSE MORE POLLUTION

Even if the Court were to conclude that EPA could adopt non-*de minimis* exemptions for modifications, the Rule must be vacated as an arbitrary and capricious exercise of such authority. First, EPA erred by establishing a cost threshold that would enable sources to undertake virtually any equipment replacement, including those that EPA admits will result in greater emissions. Second, EPA erred by arbitrarily promulgating a Rule that will cause more, not less, pollution. As a result, the Rule should be vacated. See State Farm, 463 U.S. at 43 (describing the kinds of considerations that would render an administrative decision arbitrary and capricious).

A. The Rule's Exemption of Large-Scale Capital Projects that Do Not Exceed 20% of Replacement Costs Is Arbitrary and Capricious.

As discussed above in Point I, EPA lacks the authority to exempt modifications from NSR on the basis of cost. Moreover, the Rule's 20% cost threshold itself is arbitrary. EPA's enforcement office, utility commenters, and the WEPCo case all refute the 20% threshold, and the bases EPA cites are unpersuasive. EPA also acted arbitrarily by promulgating the 20% threshold despite the existence of less extreme approaches to meet the purported need for clarity on "routine maintenance" and by failing to require sources to keep records of their determinations that replacements do not exceed the threshold.

1. The 20% threshold is unreasonable for equipment replacements in the utility industry.

The record refutes EPA's contention that the 20% cost threshold is reasonable. EPA based the 20% threshold in large part on the costs of equipment replacement in the utility

industry. See 68 Fed. Reg. 61,256-57. But, as applied to power plants, the largest stationary sources of air pollution, the overbreadth of the 20% threshold is particularly striking. The Government Accountability Office (“GAO”) concluded that at a typical 1,000 megawatt power plant unit with a replacement cost of \$800 million, the Rule would exempt replacement of any plant component that costs less than *\$160 million*. GAO, “New Source Review Revisions Could Affect Utility Enforcement Cases and Public Access to Emissions Data,” (“GAO Report”) (OAR-2002-0068-2608) at 18 (JA ____).

Even if EPA could, on a cost basis, lawfully exempt emissions-increasing projects from NSR, EPA’s chosen threshold is arbitrary. The 20% threshold would have exempted 95-98% of the violations at issue in EPA’s NSR enforcement cases against utilities had the Rule been in place at the time. GAO Report at 18-19 (JA xx). Indeed, the 20% threshold is more than *twenty-five times higher* than the 0.75% level recommended by EPA’s enforcement office to ensure that emissions-increasing replacements do not avoid NSR. See Office of the Inspector General, “New Source Review Rule Change Harms EPA’s Ability to Enforce Against Coal-fired Electric Units,” (“OIG Report”) (OAR-2002-0068-2733) at 10-11 (JA ____). This recommended level recognized that many of the modifications in the enforcement cases involved large-scale component replacements that improved availability of the plants, which in turn caused significant emission increases. See, e.g., Ohio Edison, 276 F. Supp.2d at 856-57, 869-82. However, EPA failed to consider this key information. See OIG Report at 18 (JA xx). By ignoring these findings and failing to explain why emission-causing replacements should be exempted from NSR, EPA failed to engage in reasoned decision-making. See State Farm, 463 U.S. at 43.

Furthermore, the 20% threshold is a full *five times higher* than the 4% level that would

exempt all but one of the fourteen large-scale replacement projects at issue in EPA's enforcement case against TVA. See 68 Fed. Reg. 61,257-58.²³ EPA's EAB rejected the claim that TVA's projects were "routine maintenance," because "TVA's view of the breadth of the exception would . . . swallow the rule that subjects existing sources to the requirement to install modern pollution controls when physical changes that increase emissions are made to these plants." See In re TVA, 2000 EPA App. LEXIS 25, *49. Of these fourteen modifications, EAB found projected emission increases for thirteen and actual emission increases for ten. Id., 2000 EPA App. LEXIS 25, *197-98, *217. However, when commenters pointed out to EPA that the 20% threshold would allow these projects to avoid NSR, EPA responded that "we now believe that such activities, if conducted in the future, should be excluded from major NSR." 68 Fed. Reg. 61,258/1.²⁴ EPA's failure to provide a reasoned analysis regarding exemption of TVA's emissions-increasing projects further evidences the agency's lack of reasoned decision-making. State Farm, 463 U.S. at 57; see Louisiana Public Service Comm'n v. FERC, 184 F.3d 892, 897 (D.C. Cir. 1999) ("For the agency to reverse its position in the face of [agency] precedent it has not persuasively distinguished is quintessentially arbitrary and capricious.") (citing State Farm).

Moreover, the 20% threshold is *four times higher* than the 5% level advocated by several of the country's largest utilities. In public comments, a coalition of twenty-three utilities advised EPA that a 5% threshold would enable them to continue to maintain their plants:

²³ Likewise, at least ten of the eleven projects at issue in Ohio Edison would have fallen below the 20% threshold. See Schoengold Aff. (OAR-2002-0068-2609), ¶ 4 (JA ___).

²⁴ Among the TVA projects that would have been exempt had the Rule been in place was a burner and tube replacement project that cost nearly \$30 million and required construction of a monorail system. Id. at *288 -*291.

Based on an evaluation of some of the replacement projects that electric generating units routinely undertake: turbine blades; sections of waterwall tubes, reheaters; superheaters and economizers . . . a cost threshold of five percent would allow electric generators to continue to maintain their plants for safe, efficient and reliable operation.

Comments of Class of '85 Regulatory Response Group (OAR-2002-0068-2568) at 3 (JA ____)
(the group includes some of the country's largest utility owners, including Xcel Energy and Pacific Gas & Electric Co., which operate hundreds of power plants).

EPA also cannot find support for the Rule's 20% threshold in its WEPCo applicability determination or in the Seventh Circuit's decision in that case. Initially, EPA's assertion that the WEPCo project would not have qualified under the Rule because it exceeded the 20% threshold is unsubstantiated. EPA is only able to reach its 22-29% figure cited in the Rule's preamble by aggregating at each unit the cost of *all* equipment replacements. See WEPCo, 893 F.2d at 912 (noting that the air heater replacements by themselves would cost "less than six percent of a wholly new facility."²⁵ Although EPA states that it rejected a "component-by-component" approach in favor of an "activity" approach to determining whether replacements exceed the 20% threshold, see 68 Fed. Reg. 61,258/2, there is nothing in the Rule language itself that requires facilities to aggregate the cost of replacements undertaken together; each replacement can be evaluated separately against the 20% threshold. See 40 C.F.R. § 52.21(cc)(1).²⁶ Finally, the

²⁵ The 22-29% replacement cost figure now cited by EPA also appears nowhere in EPA's WEPCo applicability determination. See WEPCo Applicability Determination (OAR-2002-0068-1058) at 6 (JA ____) ("[R]enovation costs represent approximately 15 percent of [sic] replacements costs").

²⁶ Although EPA contends that under its "current policy of aggregation" plants must aggregate the costs of related replacements, see 70 Fed. Reg. 33,845-46, the Rule language does
(continued...)

Rule's establishment of a cost threshold within a couple of percentage points of the WEPCo project (even with aggregation) is inconsistent with cases that have found that the WEPCo project was far from routine. See United States v. Southern Indiana Elec. & Gas Co., 245 F. Supp.2d 994, 1017 (S.D. Ind. 2003) (“WEPCo was an easy case on routine maintenance – the EPA and the Seventh Circuit quickly disposed of the defendant’s arguments that it qualified for routine maintenance”); Ohio Edison, 276 F. Supp.2d at 860 (same).

As EPA derived the Rule’s 20% threshold in large part from the costs of replacing equipment in the utility industry, this threshold, which is many times higher than the level necessary to exempt such activities, “runs counter to the evidence before the agency.” State Farm, 463 U.S. at 43.

2. Neither the Abt Associates’ reports on equipment replacements nor the costs of installing pollution controls supports the 20% threshold.

EPA cites two other bases for the 20% cost threshold: the Abt Associates’ reports on equipment replacements in six industries and the costs of installing pollution controls.²⁷ Neither supports EPA’s conclusion.

The Abt reports, which as merely a “scoping assessment,” 68 Fed. Reg. 61,257/2, could

²⁶(...continued)

not promulgate, describe, or even refer to this “current policy.” Indeed, “two or more replacement activities that occur at the same time are *not* automatically considered a single activity solely because they happen at the same time.” 68 Fed. Reg. 61,258/2 (emphasis added).

²⁷ EPA also relies to a limited degree on the 50% threshold for “reconstruction,” which triggers applicability of NSPS. 68 Fed. Reg. 61,255-56. EPA acknowledges, however, that given that “reconstruction” and “modification” are two different concepts, it would be inappropriate to set the thresholds at the same level. Id. at 61,256/2; see also WEPCo, 893 F.3d at 913 (discussing the “fundamental differences” between the reconstruction and modification provisions). Moreover, Abt identified *zero* equipment replacements in the six industries studied that even approached this threshold.

not form the basis for EPA's dramatic expansion of the routine maintenance exemption, in fact demonstrate the overbreadth of the 20% threshold. In two of the six industries studied, Abt was unable to identify *any* equipment replacements that would not be exempted by a 20% cut-off. See Report on automobile assembly industry (OAR-2002-0068-2208) at 17 (JA ____); Report on carbon black manufacturing (OAR-2002-0068-2209) at 18-19 (JA ____). For pulp and paper plants, all eight replacement activities fell below the 20% threshold using the higher estimated boiler replacement cost. Report on pulp and paper industry (OAR-2002-0068-2213) at 26 (JA ____). For pharmaceuticals, Abt found that "most [equipment replacements] would likely fall below [even] a ten percent threshold." See Report on pharmaceutical industry (OAR-2002-0068-2212) at 1 (JA ____). In the natural gas transport industry, the average cost of six of the seven replacement activities reviewed fell below the 20% threshold. See Report on natural gas transport industry (OAR-2002-0068-2212) at 15-17 (JA ____).²⁸ As a result, the Abt reports confirm that the 20% threshold is unreasonably broad.

EPA's argument that the Rule's threshold is reasonable because 20% of replacement value is the approximate cost of retrofitting boilers with emission controls, 68 Fed. Reg. 61,258/1, also fails. EPA reasons that a source will not spend more money on controls than on replacement activity, so a 20% threshold will not deter replacements. Id. The flaw in EPA's logic – aside from its lack of statutory basis – is that a source will undertake an equipment replacement if the value of the project exceeds the cost of the project, *including* any required

²⁸ For a "model" petroleum refinery, Abt concluded that if the threshold were set at 25%, the Rule would cover "most, if not all" minor equipment replacements while "potentially not covering some" major equipment replacements. Report on petroleum refiners, (OAR-2002-0068-2211) at 21 (JA ____).

controls. Thus, a source would not weigh the cost of controls against the cost of the project, it would include the cost of controls in the cost of the project, and then weigh the total costs and benefits. For example, if the benefit of a project is \$12 million and the cost of controls is \$7 million, a source would undertake the project if it costs less than \$5 million, even though that amount is less than the cost of controls. Even if EPA's reasoning were logical, its assumption that the cost of controls is approximately 20% of replacement value is unsupported by the record. Indeed, EPA concedes that the relative costs of controls vary widely for facilities other than electric utilities and industrial boilers. 68 Fed Reg. 61,258/1. In addition, for utilities and industrial boilers, EPA errs by failing to distinguish between controls for different pollutants.

3. EPA rejected other approaches that could have added more clarity without contravening congressional intent.

EPA could have chosen less extreme approaches to satisfy the purported need for clarity on the "routine maintenance" exemption. For example, in 1994 EPA drafted a definition of "routine maintenance, repair, and replacement" that would have accomplished that goal:

43)(i) Routine maintenance, repair and replacement means: an activity normally performed during regularly scheduled equipment outage involving minor maintenance and repair of minor parts and components or the replacement of minor parts or components with identical or functionally identical items. (ii) Routine maintenance, repair, and replacement does not include: (A) An activity that either increases or affects: emissions of any pollutant, the present efficiency, capacity, operating rate, utilization, or fuel adaptability of the source or any emission unit; (B) An activity that substantially extends the useful economic life of the emission unit; or (C) A reconstruction as defined in 40 C.F.R. 60.15.

Regional Air Pollution Control Agency Comments (OAR-2002-0068-1205) at 2 (JA ____); see also EPA New Source Review Reform, Excerpts of Preliminary Staff Draft (OAR-2002-0068-

1168) at 116-19 (JA ____) (discussing the limited number of activities that would be exempted under this rule language). Alternatively, EPA could have issued a rule or guidance listing the types of activities that qualify and/or do not qualify for the exemption. See 68 Fed. Reg. 61,267-68. Instead, EPA chose the equivalent of “an adventurous transplant operation in response to [alleged] blemishes in the statute that could have been alleviated with more modest corrective surgery.” Mova Pharm. Corp., 140 F.3d at 1069. This approach, as shown above, is refuted by the record.

4. The Rule is unenforceable because it authorizes sources to exempt themselves from NSR but keep no records of their determinations.

Despite EPA’s experience in the NSR enforcement cases with sources stretching the routine maintenance exemption beyond all reasonable limits, EPA refused in the Rule to require sources to record *any* determinations that their equipment replacements qualify for the Rule. See 68 Fed. Reg. 61,263/3. Given EPA’s stated reliance on its “current policy of aggregation” to prevent sources from separately counting related replacements against the 20% cost threshold, see supra at II.A.1, recordkeeping must be mandatory for such an approach to have integrity. See New York, 413 F.3d at 35 (“Without paper trails . . . enforcement authorities have no means of discovering” whether industry has properly determined NSR applicability). Mandatory recordkeeping is further necessitated because the Rule allows sources to use any number of accounting approaches to increase even further the likelihood that they will avoid NSR. 40 C.F.R. § 52.21(cc)(1)(i)-(iii). In light of these facts, EPA’s decision to require no recordkeeping whatsoever was arbitrary. See State Farm, 463 U.S. at 43.

B. The Rule Is Arbitrary and Capricious Because It Will Result in More Pollution.

Given that under current law, equipment replacements that decrease emissions do not trigger NSR, the Rule is not necessary to promote such projects; the only purpose served by the Rule is to exempt equipment replacements that *increase* emissions. EPA's attempts to show otherwise are illogical and unsupported by the record. Contrary to EPA's assertions, neither the Rule's purported safeguards nor other programs will prevent these emission increases.

1. EPA's position that the Rule is necessary to promote equipment replacements that will reduce emissions is illogical and unsupported.

Under the plain language of the statute and current regulations, only equipment replacements that *increase* emissions trigger NSR. See 42 U.S.C. § 7411(a)(4); 40 C.F.R. § 52.21(b)(2)(i) (requiring that the change significantly increase net emissions). Thus, under current law, if a facility determines that a replacement will improve efficiency, and that emissions after the replacement will either decrease, stay the same, or increase insignificantly (as measured using the applicable pre- and post-project periods), it can undertake the replacement without obtaining an NSR permit. See, e.g., Report to the President (OAR-2002-0068-0004) at 16 (JA ____) (Detroit Edison project did not trigger NSR because emissions were not projected to increase).²⁹

EPA's contention that the Rule is nonetheless necessary to facilitate efficiency improvements is unpersuasive because it is based on unverified anecdotes from industry. See

²⁹ By contrast, physical changes that increase emissions – even if such changes may have other beneficial effects – are “modifications” under the plain meaning of the statute. New York, 413 F.3d at 40-41 (pollution control project exemption invalid because it exempted changes that increased emissions of collateral pollutants); see also Point I, *supra*.

GAO, “EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program” (OAR-2002-0068-2608) at 16-17 (JA ____) (“[B]ecause EPA relied on anecdotal information rather than a statistically valid sample or industrywide survey, the agency’s findings do not necessarily represent NSR’s effect on energy efficiency projects throughout the industries subject to the program.”). But even these anecdotes do not help EPA. Only a third of the anecdotes support the conclusion that emissions would have decreased as a result of the projects, and only then if the facilities decided not to increase production afterwards. *Id.* at 21 (JA xx). The latter finding is completely consistent with EPA’s previous interpretation of routine maintenance. *Supra* at 25.

Furthermore, the Rule is unnecessary because EPA has already promulgated two other rules that it contends will allow efficiency projects to proceed unhindered without increasing emissions. Plantwide applicability limits (“PALs”) enable sources “to avoid the major NSR permitting process when [they] make alterations to the facility or individual emissions units” as long as plantwide emissions stay below the PAL. 67 Fed. Reg. 80,189/3. Also, the ten-year baseline provision allows equipment replacements to proceed at non-utilities if these replacements restore the operational efficiency of the plant as it existed for any two-year period over the preceding ten years. *See* 40 C.F.R. § 52.21(b)(48)(d)(ii). Given that these two provisions were upheld in New York, EPA’s assertion that the Rule is necessary rings hollow.

2. EPA’s models fail to show that the Rule will not increase emissions.

EPA relies on its modeling of electric utilities (and similar modeling by the Department of Energy) to demonstrate that the Rule will not result in more pollution. Although conceding that it lacks “adequate information to predict with confidence which modeled scenario is most

likely to occur,” 68 Fed. Reg. 61,264/2, EPA asserts that national emissions of sulfur dioxide would remain “essentially the same” under the Rule and that “modest relative decreases in some cases and modest relative increases in other cases” would occur for nitrogen oxides. Id.

These models have three major flaws. First, their focus on national emission impacts is misplaced because NSR is primarily concerned with local and regional emission impacts. See, e.g., 42 U.S.C. § 7475(a)(6) (to obtain PSD permit, source must analyze air quality impacts projected for the surrounding area as a result of increased emissions from the modification). As this Court noted in New York, “even ‘small’ increases in emissions can harm public health.” 413 F.3d at 30. Here, EPA possessed information gathered in the NSR enforcement cases – such as the costs of equipment replacements and resulting emission impacts – to evaluate the Rule’s impact on local and regional emissions. However, because EPA ignored this evidence and chose to focus on national emissions, the models have no value in determining whether projects exempted under the Rule will increase emissions on a local or regional basis.

Second, the models overstate national emissions that can be expected in the future under current law (*i.e.*, without the Rule) because EPA assumes wrongly that existing sources will *never* undertake activities triggering NSR. See 68 Fed. Reg. 61,264-65. Dr. Richard Rosen, one of EPA’s leading experts in its NSR enforcement cases, explained that this assumption is unfounded given evidence in cases such as Ohio Edison that power plants undertake numerous “modifications” requiring the installation of pollution controls, thereby reducing emissions. See Rosen Affidavit (OAR-2002-0068-2610), ¶ 5 (JA ____). Regardless of whether companies voluntarily undergo NSR or are required to do so, emission reductions are achieved through pollution controls. These reductions are not, however, reflected in the modeling. National

emissions expected under current law are also inflated by EPA's erroneous assumption that power plant capacity would not deteriorate with age, even if modifications triggering NSR are not undertaken. Id., ¶ 6 (JA xx). As plants age, availability – and emissions – will generally decrease unless they undergo life extension, which will likely trigger NSR and require controls that reduce emissions, as explained above. Id., ¶ 7 (JA xx).

Third, the models overstate emission reductions that might occur under the Rule. EPA relies primarily on the Department of Energy model to conclude that equipment replacements would reduce emissions because improvements in heat rate (a measure of efficiency) would more than offset increased emissions from availability improvements. See 68 Fed. Reg. 61,264/2. The historical data refute the model's assumption that replacements would result in 5, 10, or 15% improvements in heat rates. In the 1982-1999 period, during which utilities undertook many equipment replacements that the Rule would now exempt from NSR, average coal plant heat rates improved by approximately 2.4%, while availability increased by an average of 9.8%. See Rosen Affidavit, ¶¶ 12-14 (JA xx). Thus, emission impacts from availability improvements are likely to overwhelm those from efficiency improvements. Id., ¶ 14 (JA xx).³⁰ This was borne out in Ohio Edison. See 276 F. Supp.2d at 834.

Given EPA's misplaced focus on national emissions and erroneous assumptions

³⁰ Also, the heat rate improvements assumed in the models likely exceed what can be achieved from an engineering perspective, much less from a cost effective one. Rosen Aff., ¶ 16 (J.A. xx). As EPA admits, a heat rate improvement of 10% would be on par with improvement expected from a *new plant*, and a 15% improvement would *exceed* that of a new plant. See Regulatory Impact Analysis (OAR-2002-0068-2207) at 30 (JA ____). Furthermore, heat rate improvements from aging power plants pale in comparison to those that result when a fifty-year old plant is replaced with a new, state-of-the-art facility. See Calpine Comments (OAR-2002-0068-2589), at 12-13 (JA ____).

regarding emissions under the current program versus under the Rule, its modeling should be rejected because it “bears no rational relationship to the reality it purports to represent.” Sierra Club v. EPA, 167 F.3d 658, 662 (D.C. Cir. 1999) (citation omitted); see also Chemical Mfrs. Ass’n v. EPA, 28 F.3d 1259, 1265-66 (D.C. Cir. 1994) (rejecting EPA model where there was no rational relationship between the model and the known properties of air pollutant to which it was applied).

3. The Rule’s purported safeguards are inadequate to disqualify equipment replacements that increase emissions.

EPA argues that the Rule’s three other criteria offer sufficient safeguards to prevent emissions-increasing replacements that meet the 20% cost threshold from avoiding NSR. 70 Fed. Reg. 33,845. These purported safeguards are illusory.

Initially, the requirement that equipment replacements be “functionally equivalent,” 40 C.F.R. § 52.21(b)(56), is unlikely to disqualify projects. To be functionally equivalent, the replacement need only “serve the same purpose” as the previous piece of equipment. Id. Under this broad definition, few, if any, component replacements or upgrades would fail to meet this criterion.

Next, disqualifying equipment replacements that “change the basic design parameter(s) of the process unit,” 40 C.F.R. § 52.21(cc)(2), such as the maximum hourly heat input, will not screen out emissions-increasing replacements. If the new component is more reliable than the replaced one, it will break down less or need less maintenance, thus increasing plant availability, and, consequently, emissions. As discussed above, the NSR enforcement cases primarily involved like-kind replacements that did not alter the design parameters of the units, but still

caused significant emission increases. See Point II.A.1, *supra*. Again, EPA fails to explain a “rational connection between the facts found and the choice made.” State Farm, 463 U.S. at 43 (citation omitted).

Likewise, the Rule’s requirement that equipment replacements not cause a facility to exceed permitted emission levels, 40 C.F.R. § 52.21(cc)(3), is inadequate. EPA does not and cannot claim that all facilities even have enforceable emission limits. Moreover, the actual emissions of many facilities are well below their permitted levels, meaning that they could undertake equipment replacements resulting in hundreds or thousands of tons more of emissions, yet stay within permitted limits. For example, power plants in Ohio could increase their annual sulfur dioxide emissions by at least 495,000 tons per year (“tpy”), yet stay within permitted levels. See Schoengold Aff., *supra*, Attachments E and G (JA xx); see also NESCAUM, “An Analysis of EPA’s Changes to the Routine Maintenance, Repair and Replacement Exclusion of the New Source Review Program,” (OAR-2002-0068-2556) at 3-8 (JA ____) (finding permitted emissions from 125 power plants in six states to be collectively higher than actual emissions by 3,857,166 tpy for sulfur dioxide, 379,826 tpy for nitrogen oxides, and 385,797 tpy for particulate matter). The same holds true for other industries. See NESCAUM report at 3-7 (JA xx). Without the limitation on increased emissions provided by NSR, existing permit limits will not constrain emission increases from replacement activities.

4. Other programs will not prevent the significant emission increases allowed under the Rule.

EPA asserts that the Rule furthers “the appropriate role” for NSR, which the agency casts as extremely limited given that other programs require stationary sources to reduce emissions.

See 70 Fed. Reg. 33,844; Reconsideration Technical Support Document (OAR-2002-0068-2818) at 28 (JA ____). However, it is for Congress, not EPA, to determine “the appropriate role” for programs under the Act. EPA lacks the authority to issue regulations that would effectively write the “modification” provision out of the statute to further the agency’s new policy preference. North Broward Hosp. Dist. v. Shalala, 172 F.3d 90, 93 (D.C. Cir. 1999) (“[A]n agency’s policy choices are necessarily constrained by the statute pursuant to which it acts”); see Point I.B.2, *supra*.

Moreover, EPA’s premise that NSR is superfluous with respect to emission reductions is erroneous. NSR requires sources to meet emission control requirements that are more stringent than imposed by the other programs EPA relies upon. Although EPA cites SIPs as providing for emission reductions that allow States to meet the NAAQS, the PSD provisions are intended to prevent further deterioration of air quality resulting from modifications in areas that *already* meet the NAAQS. See H.R. Rep. No. 95-294, at 106 (“[A] combination of ambient standards with a policy for prevention of significant deterioration of air quality is necessary to provide for maximum feasible protection of the public health.”). Moreover, States rely on nonattainment NSR provisions such as LAER and offsets as tools to help achieve attainment. See 42 U.S.C. § 7410(a)(2)(C). By enabling sources to use the Rule to avoid triggering nonattainment NSR, EPA would force States to make up for lost emission reductions by implementing new control requirements for stationary sources – a difficult and time-consuming process – or by requiring other sources to adopt further, and likely less cost-effective, controls. See STAPPA/ALAPCO Comments (OAR-2002-0068-1268) at 3 (JA ____).

In addition, unlike cap-and-trade programs (*e.g.*, Title IV, “NO_x SIP call,” Clean Air

Interstate Rule), NSR requires that each modified source reduce its emissions (to the equivalent of BACT or LAER), rather than simply purchasing emission allowances.³¹ Finally, Section 112's Maximum Achievable Control Technology requirements apply only to certain toxic pollutants and source categories. These other programs are not substitutes for NSR, and are therefore unlikely to prevent emission increases allowed by the Rule.

In summary, EPA's failure to engage in reasoned decision-making requires that the Rule be vacated. See 42 U.S.C. § 7607(d)(9).

POINT III

EPA EXCEEDED ITS STATUTORY AUTHORITY BY MANDATING THAT STATES ADOPT THE RULE, WHICH IS NECESSARILY LESS STRINGENT THAN THE STATES' CURRENT ROUTINE MAINTENANCE EXEMPTION

Under Section 116 of the Act, 42 U.S.C. § 7416, States and localities may adopt or maintain any emission standard or control requirement – including NSR requirements – as part of a SIP, “*unless* the state or local provision is ‘less stringent’ than the [corresponding] EPA provision.” New York, 413 F.3d at 42 (emphasis original); H.R. Rep. No. 95-294, at 136-37; see also 40 C.F.R. § 51.166(a)(7)(iv) (requiring EPA to approve different NSR SIP provisions that are more stringent than or at least as stringent as the corresponding EPA provision). Contrary to Section 116, EPA has mandated that States adopt the Rule, denying them their statutory right to maintain the more stringent routine maintenance exemption in their SIPs.

EPA acknowledges in the preamble that the Rule broadens the existing routine

³¹ Furthermore, Title IV does not cap emissions of pollutants other than sulfur dioxide or apply to facilities other than power plants (and, as discussed above, does not prevent local emission increases). The NO_x SIP Call is applicable to only a portion of the country and just limits summertime emissions of nitrogen oxides. The Clean Air Interstate Rule is currently being challenged, so it is unclear whether reductions under this rule will ever be realized.

maintenance exemption. See 68 Fed. Reg. 61,251/1 (“Our new equipment replacement approach will allow owners or operators to replace components under a wider variety of circumstances than they have been able to do under our prior RMRR approach.”) and 61,270/3 (“Today we are expanding the former definition of RMRR . . .”). Moreover, the Rule is mandatory. See id. at 61,276/2 (“To be approvable under the SIP, state and local agency programs implementing Part C (PSD permit program in § 51.166) or Part D (nonattainment NSR program in § 51.165) must include today’s changes as minimum program elements.”).

Furthermore, unlike in New York, Government Petitioners’ Section 116 claim is ripe. In finding Government Petitioners’ claim unripe in New York, this Court found significant that EPA included “wiggle room” in the preamble allowing for the possibility that States could fulfill their obligations by just submitting their current SIPs to EPA. See 413 F.3d at 42-43. By contrast, there is no “wiggle room” in the Rule’s preamble. Furthermore, in its response to comments, EPA rejected that Section 116 affords States a basis to maintain their current exemptions for routine maintenance. See Rule Technical Support Document (OAR-2002-0068-2230) at 1-2 - 1-3 (JA ____) (Despite Section 116, “States must include the final changes as minimum program elements.”). Given that Government Petitioners’ claim is ripe and EPA cannot show that the Rule is less stringent or not required, if the Court upholds the Rule, its mandatory aspect should be vacated. Cf. American Corn Growers v. EPA, 291 F.3d 1, 8 (D.C. Cir. 2002) (rejecting EPA’s attempt to circumscribe the authority Congress provided to States); Duquesne Light Co. v. EPA, 166 F.3d 609, 613 (3d Cir. 1999) (dismissing, on standing grounds, utility’s challenge to EPA’s approval of Pennsylvania’s definition of “actual emissions” because Pennsylvania’s definition was more stringent and “EPA may not require less stringency”).

CONCLUSION

Because EPA exceeded its statutory authority and acted arbitrarily and capriciously, Government Petitioners respectfully request that the Court vacate the Rule, vacate the December 24, 2003 regulations that implement the Rule in certain States, and vacate EPA's decision to make the Rule mandatory for States.

Dated: September 8, 2005

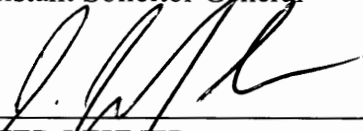
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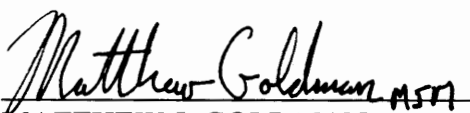


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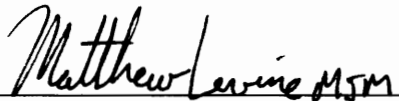


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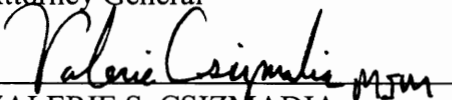
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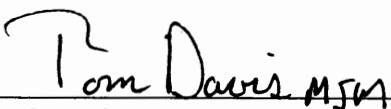
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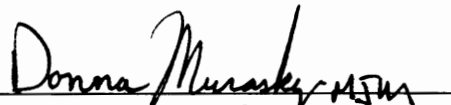

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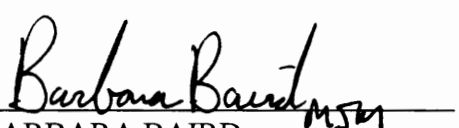
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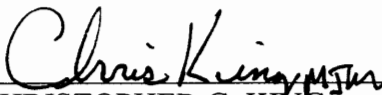
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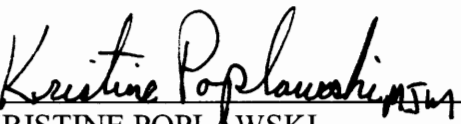
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CERTIFICATE OF COMPLIANCE WITH WORD-VOLUME LIMITATIONS

I hereby certify that the foregoing brief of Government Petitioners complies with Fed. R. App. P. 32(a)(7), as modified by the Court's August 31, 2005 Order. The word count function of the word processing system used to prepare this brief indicates that it contains 13,988 words (inclusive of footnotes and citations but exclusive of certificate as to parties, rulings and related cases, tables of contents and authorities, glossary, attorney's certificates, and addendum).


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