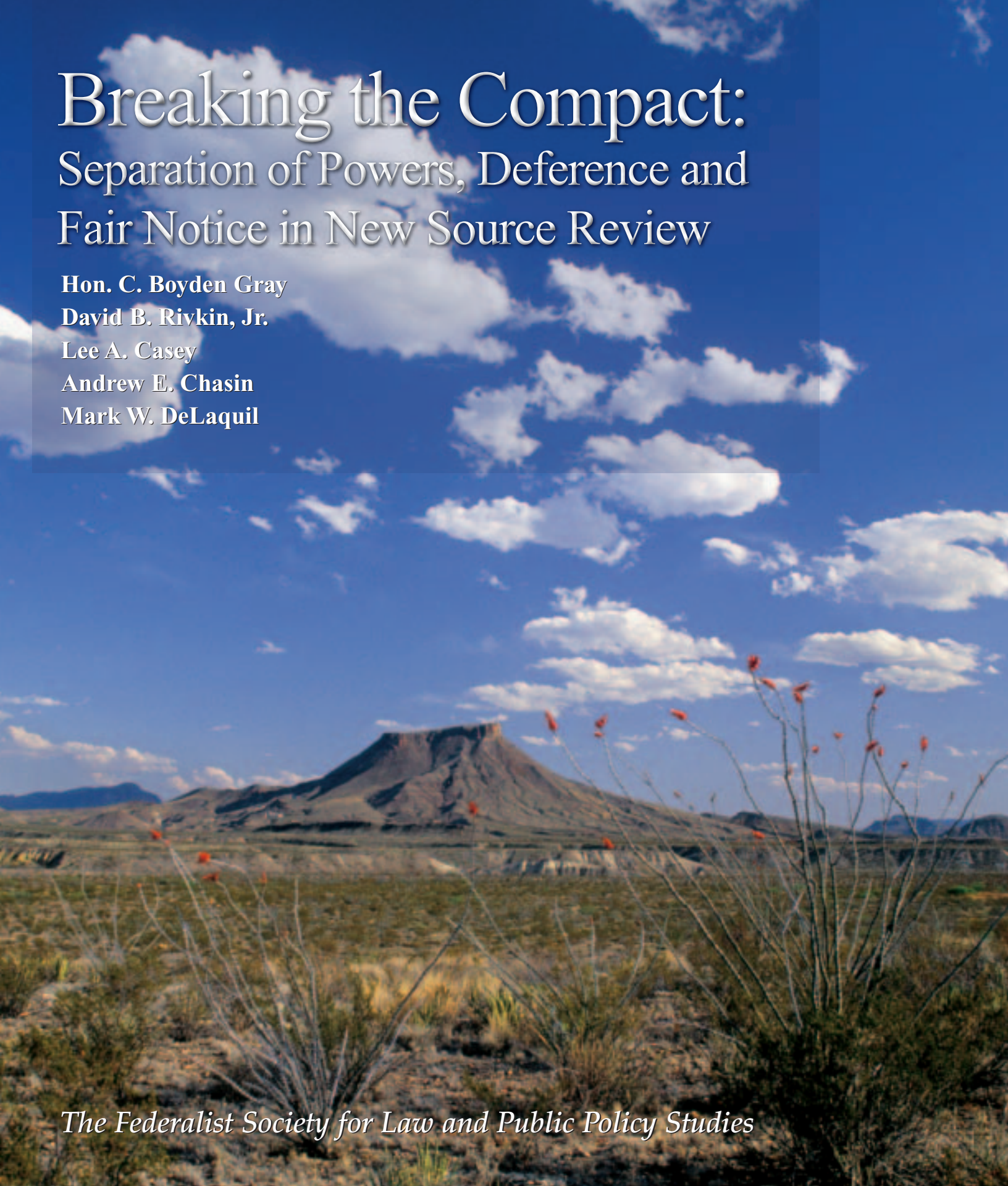

Breaking the Compact:
Separation of Powers, Deference and Fair Notice in New Source Review

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The subject matter of this paper was also discussed in a Federalist Society panel discussion entitled "A Debate on the Clean Air Act," held on October 1, 2004, at the National Press Club in Washington, DC. Panelists Joseph Goffman of the Environmental Resources Trust, Former White House Counsel Hon. C. Boyden Gray of Wilmer Cutler Pickering Hale and Dorr LLP, Henry V. Nickel of Hunton & Williams, John Walke of the Natural Resources Defense Council, and Hon. David M. McIntosh of Mayer Brown Rowe & Mawe offered a variety of perspectives on the issues presented in this paper. The transcript of the panel will be posted online at www.fed-soc.org.

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I. Introduction

A. EPA's NSR Enforcement Initiative

For nearly thirty years, the Clean Air Act's (CAA) New Source Review (NSR) program, as applied to existing industrial facilities, was a backwater of environmental regulation. As its name suggests, Congress designed this program to ensure that major new sources of air pollution, such as factories and power plants, install the latest pollution control devices when they are built. Congress did not impose these same requirements on existing facilities because it believed that the costs, and associated disruption, were not justified by the projected environmental benefit to be gained. Rather, it determined that existing plants would have to go through the NSR process, and install additional pollution controls, only if they undertook projects that increased their actual capacity to emit covered air pollutants. This, at any rate, was the understanding of both EPA and industry, and the basis on which EPA's NSR regulations were adopted.

Those regulations made clear that an existing major source of air pollutant emissions would not trigger NSR requirements when it undertook routine maintenance, repair and replacement (RMRR) activities. EPA confirmed this understanding many times throughout the 1980s and early 1990s. Moreover, during this period, the Agency only brought one enforcement action alleging that an existing power plant had been changed so radically that it was required to undergo NSR. In that instance the utility, Wisconsin Electric Power Company (WEPCO), had substantially rebuilt severely decayed generating units.[1]

Beginning in 1998, however, EPA began to revise its longstanding view of how the NSR requirements should be interpreted—especially with respect to the RMRR exclusion. In 1999, EPA filed, in U.S. District Court, enforcement actions against seven separate electric utilities and issued an Administrative Compliance Order against the Tennessee Valley Authority (TVA)—a United States government agency that produces electricity. An additional suit soon followed against Duke Energy Corporation. According to the Justice Department, by 2002, seventeen enforcement suits were pending nationwide against electric utilities,[2] alleging hundreds of violations at forty-one separate facilities dating back to the mid-1970s.[3] These actions, which allege that the industry as a whole, rather than merely discreet individual generating units, had violated NSR over the past decade, was based upon a new, far more narrow interpretation of the activities falling within the RMRR exclusion. Despite the Agency's claims to the contrary, the scope and unexpectedness of its enforcement initiative alone compellingly demonstrates that EPA, under Administrator Carol Browner, had significantly changed its understanding of the applicable NSR regulations before those cases were brought.[4]

Indeed, the first wave of NSR lawsuits, filed by the Clinton administration between 1999 and 2000, has been widely compared to the federal government's landmark efforts against the tobacco industry and software giant Microsoft Corporation.[5] However, what fundamentally distinguishes NSR from these cases is that, as suggested above, the repair and maintenance practices in the electricity generating industry were no secret. State and federal regulators actively and routinely scrutinize power facilities to ensure their compliance with a complex assortment of environmental and energy regulations. The government has known about utilities' maintenance activities over the past thirty years (these activities were reported to federal and state regulators, not hidden from them) and filed only a single case, the WEPCO action. The government's own electric utility, TVA, interpreted and applied the RMRR exclusion at its various facilities

in exactly the same manner as the rest of the utility industry, and EPA, before the enforcement actions were brought. EPA's pursuit of alleged violations based on activities that were so common, public, and widespread is therefore unprecedented.

Not surprisingly, the government's efforts to force additional air pollution reductions by imposing these new NSR requirements on coal-fired electric generating stations, based upon alleged NSR non-compliance over a period of decades by virtually all of these facilities in the United States, have generated a great deal of public attention and litigation. EPA's claims of widespread noncompliance with a program that, for thirty years, it said had little impact on existing facilities, has raised significant protest from the regulated industries. The affected parties maintain that these enforcement efforts are entirely illegitimate because they conflict with the CAA and applicable regulations, and because the government's enforcement actions are effectively attempting to impose retroactively a reinterpretation of NSR that should have been accomplished through notice and comment rulemaking.

The NSR enforcement initiative, which began during the Clinton administration and was continued by the Bush administration, is certainly the largest and most concerted effort by the Department of Justice (DOJ) to enforce Nixon-era environmental laws. So far, the enforcement initiative has yielded mixed results. The two district courts reviewing virtually identical NSR enforcement cases brought by DOJ reached contradictory conclusions.[6] The courts split on the legal requirements that apply to repair and replacement activities that do not increase the emitting capacity of a facility. In one of these cases, *United States v. Duke Energy Corp.*, the district court questions the very legitimacy of the government's actions in bringing the suits. This paper analyzes the legal and policy issues confronting courts as these cases are heard on appeal.

There are several important legal issues raised by EPA's NSR enforcement initiative that should be addressed at the outset. The first is that, despite EPA's arguments to the contrary, the CAA's Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review provisions, at issue in the NSR enforcement cases, are not vague—instead, Congress, EPA, and the utilities have always understood that the term "modification" did not include routine maintenance, repair and replacement, and that a "net emissions increase" referred to an increase in the facility's baseline capacity to emit.[7] This understanding was embodied in the legislative history of the 1977 Clean Air Act Amendments, as well as in EPA's historical enforcement and interpretive practices.[8]

In addition, as the District Court in *United States v. Duke Energy Corp.* clearly indicated, the manner in which EPA formulated—and has sought to enforce—the Browner interpretation does not present a situation where courts should defer to EPA's view. Although deference is the general judicial response to an agency's interpretation of both statutes and regulations, allowing EPA to use an enforcement initiative, rather than notice and comment rulemaking, to change the modification rules is inconsistent both with the CAA and the interpretation of those regulations that EPA's longstanding enforcement practices embody.[9]

In this regard, EPA's enforcement initiative is deeply troubling. If the government's fundamental shift in its NSR policies, implemented through enforcement actions seeking to impose retroactive liability, is accepted by the courts, this will almost certainly have a corrosive effect on the regulatory environment, breaking the core compact between the regulator and the regulated and violating basic constitutional principles of fairness, due process, and separation of powers. Therefore, the courts should reject EPA's enforcement initiative, and require the agency to address the future of the NSR program through proper notice and comment procedures, thus returning EPA and other administrative agencies to their proper place in the constitutional equilibrium.

Further, this paper will also discuss the policy issues raised by EPA's efforts to use the NSR program as a means of obtaining new air pollutant emissions reductions. As noted above, the NSR program is a relic of the earliest

era in environmental protection. It embodies an inefficient, and counterproductive, "command-and-control" approach that actually has the potential to increase pollution, as facilities are prevented from undertaking routine maintenance activities, or even using modern replacement parts, that increase efficiency. Moreover, it is likely that, if EPA pursues its enforcement cases vigorously, worker safety and jobs in the manufacturing and mining industries will be threatened, energy prices will increase, and America's electricity supply will be destabilized. All of these effects will, of course, disproportionately affect the poor, minorities, and all those residing in rural areas. Overall, EPA's NSR enforcement initiative is legally unsound and flawed as a matter of environmental policy.

B. Regulatory Background of NSR Program

When Congress created the CAA, it concluded that requiring existing sources to install state-of-the-art pollution control devices was an inefficient and costly way to meet air pollution goals. Rather, it recognized that "building control technologies into new plants at time of construction will plainly be less costly then [sic] requiring retrofit when pollution control ceilings are reached."[10] The NSR program was designed accordingly, to ensure that new facilities conform to strict technology-driven pollution controls while imposing new regulatory burdens on existing facilities only when they undergo a "major modification" that increases emissions beyond their original design capacity.[11] In this way, Congress permitted existing sources to conduct activities that are standard in the normal course of business and which merely allow a facility to operate at a level consistent with its original design.

It is important to underscore that the NSR regulatory program was established to limit emissions from *new* sources of pollution, not to force emission reductions from *existing* sources. Realizing that it was not feasible, nor wise as a matter of policy, to decommission existing facilities, Congress anticipated that existing sources would continue to conduct activities undertaken in the normal course of business without having to install costly pollution controls or navigate a complicated and expensive permitting process.[12] Such activities, including repair, replacement, and maintenance of broken or malfunctioning equipment, are necessary to enable existing sources to maintain safe, efficient, and reliable operations and to function at a level consistent with their original design.[13]

As a result, NSR is triggered for an existing facility only on the following conditions: (1) when there has been a "physical or operational change" at the source, and (2) that "change" causes an "increase in emissions" of a regulated pollutant. Significantly, EPA has long recognized that Congress did not mean the term "physical or operational change" to include every alteration. As the Agency noted in its recently-finalized 1996 Rule: "[w]e have recognized that Congress did not intend to make every activity at a source subject to the major NSR program."[14] EPA therefore has always excluded certain activities from NSR as not being "physical or operational changes," including: (1) routine maintenance, repair, and replacement (RMRR) activities; (2) the use of alternative fuel or raw materials that the facility, as originally designed, was capable of accommodating; and (3) an increase in the hours of operation. Fundamentally, these activities have been deemed by EPA not to result in emissions increases because they are consistent with operating an existing facility as designed.

The RMRR exclusion, in particular, is a common sense provision that allows facilities to undertake ordinary and necessary repairs that do not change the basic design parameters of the facility. As the 1992 WEPCO rule, which clarified and codified then-existing NSR policies, explained: "where an improvement involves a routine change, it is excluded from the NSR definition of 'major modification.'"[15] Activities that enhance the efficiency and reliability of plants clearly were included in the original ambit of the term "routine maintenance."[16] The fact that these activities are designed to keep existing plants in service is consistent with Congress' intent in enacting the NSR program. Perhaps the most persistent, and pernicious, myth about NSR is that it was a short-term "grandfathering" provision, granted to existing facilities when the CAA was originally passed, and that the maintenance of existing facilities which have not gone through NSR since that time was somehow inconsistent with Congress' intent, or the law's requirements.

In fact, Congress always understood, and EPA has repeatedly recognized, that power facilities have an expected operating life of up to seventy-five years, with a sixty year average expectancy. For example, in a 1989 air emission trends study, used in calculating the required emissions caps for the CAA Title IV Acid Rain program, the Agency "assumed that net dependable capacity and reliability of existing power plants would

be maintained at design levels for their entire fifty-five to sixty-five year lifetime."[17]

Significantly, many critical components of a unit have shorter life-spans than the facility as a whole—for example, the typical useful-life of tube components can range from five to twenty-five years—and routine industry practice is to replace these components as necessary during a plant's life. These activities do not "extend" the life of a facility beyond what is expected, but merely allow a facility to realize its predicted service life. Nevertheless, although replacement of tube components such as economizers, reheaters, and furnace walls are all predictable maintenance activities from the time a facility begins operation, under the reinterpretation advanced in EPA's recent enforcement cases, they may require NSR permitting. This means that the frequent repair and replacement projects required by facilities will potentially trigger NSR early in a facility's useful life, and frequently thereafter.

Even though EPA has repeatedly said that RMRR is a common sense term that can readily be applied by source owners, EPA presently says that an RMRR determination requires a case-by-case decision weighing a number of factors, such as the nature, extent, purpose, frequency, and cost of the work. EPA also says there are no objective criteria dictating how one does this balancing; it is wholly subjective. This vague and frequently-changing standard has led to great uncertainty. Indeed, if this were the law, electric utility steam generating units might no longer be able to conduct the activities necessary for the safe and reliable operation of plants across the nation. Not surprisingly, one of the central arguments in the enforcement cases is whether there is any legal standard governing EPA's exercise of discretion under its enforcement reinterpretation of RMRR and, if so, what it is. For example, EPA has argued that it will only consider routine those maintenance practices that are small and frequent at an individual unit, while industry counters that EPA must consider the normal practices within the industry as a whole.

The problematic nature of EPA's "routine at the unit" standard is evident from the following example. It is true that tires only need to be replaced every few years. Eventually, however, the wear on the tires reaches a point where their continued use threatens the safe operation of the vehicle. If the car and its tires are considered absent any context, replacing the tires may seem non-routine for that car because the repair occurs infrequently for an individual car and is relatively expensive. Additionally, without considering standard automotive practice, it is unknowable whether replacing the tires will be "routine" the first time it occurs. However, no mechanic, or even recreational driver, would argue that replacing tires is a non-routine repair simply because it is an infrequent repair for a given car. Just like every car eventually needs new tires, sometimes several times over the life of the car, every facility at some point will require new tubing, and major repairs to, or replacement of, the superheater or reheater, for example, because the normal wear on these components diminishes reliability and safety. These repairs are routine in the course of the life-cycle of every generating facility, and occur frequently in the industry. The central issue in these cases is whether, when a utility needs new tires, it should be forced by the government to overhaul its entire engine and install the latest technology—often at a greater cost than the original facility itself.

II. EPA Has Violated the Regulatory Compact

A. Introduction

Despite much public discussion of EPA's NSR enforcement cases, and the Bush Administration's efforts to craft a workable regulatory framework for implementing the NSR program in the future, little attention has been paid to the impact EPA's actions have had on administrative law. At its core, administrative law, and the administrative state it supports, relies on an implicit agreement between the regulated community and the government. The terms of this "regulatory compact" are as follows: (1) the government will act within the bounds of its congressionally-delegated authority; (2) it will not behave punitively by changing the rules of the game without notice; and (3) the regulated community, in addition to other interested parties or "stakeholders," will have an opportunity to participate in the development of agency policies. Together, these principles make palatable (and legal) governmental intrusions into the affairs of private actors that would have been unthinkable at the time of the Founding. EPA's adoption of the Browner Interpretation, announced and implemented through its NSR enforcement actions rather than notice and comment rulemaking, represents a fundamental challenge to the regulatory "compact," having effectively dissolved the protections against unfair and arbitrary

actions by the government, and raising questions regarding whether EPA is in fact respecting its congressional delegation of authority.

Of course, manipulation of the law by administrative agencies is not a new problem. The United States Court of Appeals for the District of Columbia Circuit, the federal court most experienced and authoritative in administrative law matters, cogently described the phenomenon in another case where EPA's implementation of the CAA was challenged:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations…. The agency may also think there is another advantage—immunizing its lawmaking from judicial review.[18]

At its core, administrative law, and the administrative state it supports, relies on an implicit agreement between the regulated community and the government.

Accordingly, Congress and the courts have developed two fundamental checks which preserve the regulatory compact's integrity, ensuring that agencies do not simply make up the law as they go along: the doctrine of "fair notice," and the procedural requirements attendant upon notice and comment rulemaking. Fair notice is grounded in the Constitution's due process principles, and its particulars have been refined by the courts over the past three decades as the federal administrative state has matured.[19] Notice and comment rulemaking is, of course, required both by the Administrative Procedure Act (APA) generally and specifically by the CAA itself. EPA's efforts to impose a new interpretation of the NSR program through enforcement litigation have ignored both of these checks.

B. Due Process and Deference

The Constitution's Due Process Clauses (in the Fifth and Fourteenth Amendments) protect against the arbitrary or unexpected application of government power. "Historically, and legally, the fair warning rule started with the Due Process Clause's void-for-vagueness doctrine. Since then, however, the fair warning rule has expanded, so that the current articulation of the fair warning rule reaches cases beyond this constitutional scope."[20] The fair notice doctrine reflects common sense fairness.[21] First, parties have a right to be aware that conduct is prohibited before they are punished for it, and second, requiring the government to articulate intelligible standards constrains arbitrary use of the government's power through discriminatory enforcement.

1. Fair Notice is Critical in the Regulatory Arena Where Required Conduct or Prohibited Conduct May Be Unclear

The Due Process Clause guaranty of fair notice is often incorrectly perceived to be in tension with the legal maxim that ignorance of the law is no excuse. However, the rise of the administrative state has necessitated a distinction between inherently wrongful acts and acts that are not inherently wrongful, but are prohibited by law. For *malum in se* acts, such as robbery and murder, where it should be obvious that the act is morally and legally wrong, notice is effectively inherent because the wrongfulness is clear.[22] However, fair notice is imperative for *malum prohibitum* acts—acts that are wrong because a government has declared them so, not because they are inherently immoral or hurtful—because the wrongfulness of these acts is not rooted in universal first principles. Violations of administrative rules and regulations are almost always *malum prohibitum*, offenses created by the government for good reasons perhaps, but which are not obviously or inherently "wrong."

As the government has extended its control over more and more activities through an expanding administrative state, it has become harder to tell what activities are unlawful.[23] An expanding list of *malum prohibitum* administrative offenses has made it increasingly difficult for regulated parties to track, and comply with, every aspect of the law.[24] This is particularly true in the environmental area, where determining what activities are allowed frequently requires a Sisyphean review of a multitude of administrative regulations and interpretations.[25] Outside legal counsel specializing in specific environmental areas, whether air, water, or waste management, are now required to ensure compliance with a host of statutes and implementing regulations for basic, routine activities. This task, difficult under normal circumstances, becomes impossible when an agency does not clearly articulate the requirements with which the regulated party must comply.

As a result, courts have used the fair notice doctrine to insulate regulated parties from essentially arbitrary agency action. An appellate court applied for the first time in *Diamond Roofing Co. v. Occupational Safety and Health Review Commission (OSHRC)* the current fair notice doctrine against an agency for failing to notify adequately a regulated party of its construction of a regulation.[26] In *Diamond Roofing,* the Secretary of Labor cited a builder for failing to install guard-rails while constructing a roof—even though the Labor Department's regulations required only that guard-rails be installed during construction of open-sided *floors.* Nevertheless, OSHRC interpreted its regulations to cover roofs as well, and found a violation in this instance. The court did not argue that this interpretation was unreasonable. Instead, it held that the agency violated due process principles because it had never notified builders that "floor" could, in certain circumstances, also mean "roof." As the court noted: "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express."[27]

In explaining its decision, the *Diamond Roofing* Court articulated a compelling justification for applying the fair notice doctrine—to force both Congress and Executive Branch administrative agencies to write clear statutes and rules: "To strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the occupational safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them."[28] As the D.C. Circuit succinctly articulated in another case: "[the regulated party] might have satisfied [the agency] with the exercise of extraordinary intuition or with the aid of a psychic, but these possibilities are more than the law requires."[29] There can be no rule of law where "extraordinary intuition" is necessary for a party to avoid civil or criminal liability.

2. The Fair Notice and "Regulatory Confusion" Doctrines

In the years since *Diamond Roofing* was decided, courts have increasingly accepted the fair notice defense in administrative law cases where regulated parties could not have been aware of an agency's interpretation of a complex regulatory scheme.[30] Commentators have referred to this growing line of cases as explicating a "regulatory confusion" doctrine.[31] Regulatory confusion, and a corresponding lack of fair notice, occur when an agency's regulations, and its interpretation of those regulations, would not be reasonably knowable to a regulated party.[32] As explained by the D.C. Circuit in the leading case of *General Electric Co. v. EPA,* "[i]n the absence of [actual] notice … where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability."[33] In other words, when a regulated party's interpretation of an agency's regulation is as reasonable as the agency's, and the agency has failed to provide either definitive or consistent guidance of its interpretation, the regulated community cannot be said to have had fair notice of the agency's view, and cannot be penalized for failing to comply.

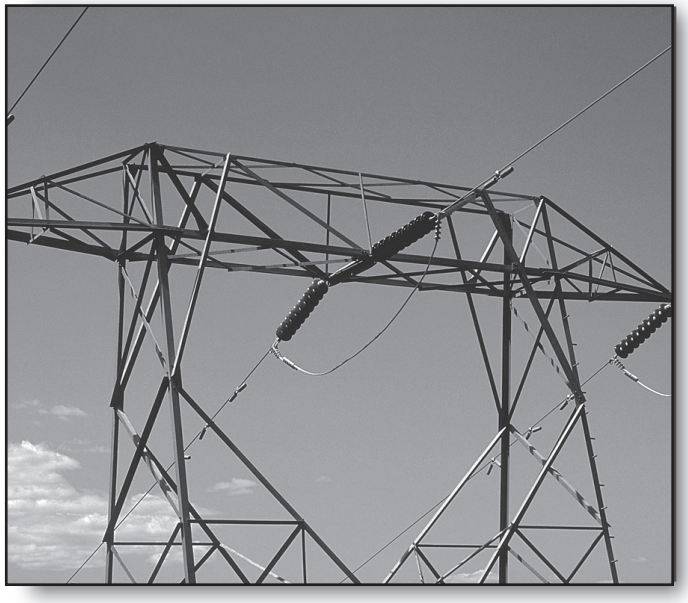
Moreover, any notice of the agency's position must be sufficient to enable a regulated party, acting in good faith and reviewing the regulations and other public statements of the agency, to identify with "ascertainable certainty" the standards to which the agency expects parties to conform.[34] According to the *General Electric* Court, four common situations where fair notice is lacking are when: (1) the regulations at issue are themselves contradictory or confusing; (2) the agency's interpretation, although not unreasonable, is also not obvious; (3) where different offices or officials of an agency have taken inconsistent or contradictory positions regarding the interpretation and application of the agency's regulations; or (4) when the agency itself struggles to provide a definitive reading of the regulatory requirements.[35] If an

agency fails to provide fair notice, the court must reverse the agency's attempt to penalize a regulated party, though, as described below, the court may allow the agency to apply the interpretation prospectively.

3. The Fair Notice Doctrine Is a Vital Check on The Arbitrary Exercise of Governmental Power, and is a Necessary Concomitant to Judicial Deference

As a fundamental, and constitutionally required, constraint on the exercise of arbitrary governmental power, the fair notice doctrine is fully consistent with the deference due to an agency's interpretation of the statutes it is charged with implementing, and is particularly critical when courts extend deference to an agency's interpretation of its own regulations.[36] Regarding interpretations of statutes, the Supreme Court recognized, and explained, this deference in the landmark case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[37] and has more recently refined this principle in *United States v. Mead*.[38] In *Chevron*, which also involved a challenge to EPA's interpretation of the CAA, the Court ruled that if an agency's interpretation constitutes a reasonable construction of the language at issue, *and* if Congress has not "directly spoken to the precise question at issue," the courts cannot overturn the agency's interpretation merely because there may be other interpretations which the judiciary believes might better achieve the legislative purpose.[39] This deference to the decisions of the Executive Branch is designed to ensure political accountability, efficiency, and to avoid continuous litigation over every agency action.

However, as the Court explained in *Mead*, this deference also requires that an agency develop its interpretation in a manner that ensures political accountability, *i.e.*, through rulemaking or another formal and fair process. "The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[40] This justification is entirely absent, however, when an agency promulgates vague regulations and then asserts the right to change its interpretation of those regulations at will.[41] The Supreme Court has recognized in other, related contexts that where an agency does not follow notice and comment rulemaking, the agency's interpretations of a statute it administers receives less deference from the courts.[42] An unblinking application of *Chevron* to regulatory interpretations that



subsumes fair notice would, in fact, give agencies an incentive to promulgate vague regulations to avoid judicial oversight.[43] This, of course, is the point at which the regulatory compact breaks down.[44]

An agency's interpretation of its own regulations is also accorded deference by courts. *Bowles v. Seminole Rock & Sand Co.* is the counterpart to *Chevron* in this area; it states that an administrative interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[45] However, much as *Mead* directs courts to grant less deference to an agency that takes less care in interpreting a statute, courts need not accord *Seminole Rock* deference to agencies that do not interpret their regulations in a reasonable manner. For instance, "an agency's interpretation of a statute *or regulation* that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view."[46] Just as *Chevron* deference, if improperly granted, may swallow fair notice, *Seminole Rock* deference can insulate an agency from judicial oversight, greenlighting arbitrary action, if courts refuse to closely scrutinize reinterpretations of regulations.

Thus, while *Chevron* and *Seminole Rock's* assurances that the judiciary cannot micro-manage administrative decisions on how to implement an ambiguous statute are crucial to administrative efficiency,[47] deferring to an agency's reinterpretation of its regulations would allow a politically-motivated, or merely careless, agency to upset the regulatory compact. Indeed, so long as it

cloaks its actions under an arguably rational construction of the relevant rule, judicial deference applied in the regulatory context could permit an agency to alter its interpretation and enforcement of punitive laws without providing notice to regulated parties, raising severe constitutional issues.

The Constitution's separation of powers principles, which have constrained the arbitrary exercise of government power for more than two centuries, would be undermined by the fusion of unreviewable lawmaking and law-interpretation authority in a single administrative body. However, were courts to defer to an agency's interpretation, and then reinterpretation, of its own regulations, agencies would be permitted to play the role of law-maker, law-interpreter, and law-enforcer.[48] This independence from external controls gives agencies unchecked power over regulated parties.[49] This is not just a theoretical problem; it is a serious detriment to the regulated community because an agency may be able to immunize from substantive challenge regulations that are not clear on their face and any corresponding interpretive rules:

> If an agency's rules mean whatever it says they mean (unless the reading is plainly erroneous), the agency effectively has the power of self-interpretation. This authority permits an agency to supply the meaning of regulatory gaps or ambiguities of its own making and relieves the agency of the cost of imprecision that it has produced. This state of affairs makes it that much less likely that an agency will give clear notice of its policies either to those who participate in the rulemaking process prescribed by the Administrative Procedure Act (APA) or to the regulated public. The present arrangement also contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties.[50]

This joining of power in one entity was rejected by our Founders as an instrument of tyranny. For this reason, the Supreme Court has dealt harshly with legislative schemes that aggregated to Congress the ability to promulgate and enforce the laws,[51] or to evade enforcement decisions of executive branch officials.[52] Limiting the deference provided to increasingly powerful agencies when they promulgate, interpret, and then seek to reinterpret and enforce vague regulations would, in fact, provide incentives for agencies to develop the clear language necessary to give regulated parties fair notice of their legal obligations. This, in turn, is certain to promote a better compliance culture and advance the public policy goals that underlie the relevant statutory scheme.

4. An Agency Cannot Use the Courts to Create Retroactive Liability Under a Wholly Subjective, Case-By-Case Standard That Gives No Notice of What Conduct is Prohibited

There is an additional, and perhaps more invidious, separation of powers problem underlying EPA's advancement of the Browner interpretation, which involves a subjective, case-by-case NSR standard. Ordinarily, liability can be imposed only after an exercise of agency discretion and, under basic principles of due process, that exercise of discretion must involve notice and an opportunity to be heard. At the same time, when a regulatory standard is as completely discretionary as the Browner interpretation, involving a multitude of factors that are not tied to any measurable baseline, nor even quantifiable amongst themselves, the test's application cannot be meaningfully scrutinized by the judiciary. Similarly, according deference to a regulatory interpretation embracing such a test would permit agencies to co-opt the coercive power of the courts, while avoiding the concomitant scrutiny that would otherwise accompany that power. The judiciary cannot, consistent with due process and separation of powers principles, create liability on an *ad hoc* basis long after the conduct in question occurred. However, through the NSR enforcement cases, EPA has asked the courts to do exactly that.

This problem, of course, can be alleviated by judicial refusal to enforce such discretionary standards through application of the fair notice doctrine. In such a case, EPA and parties subject to the hopelessly standardless "standard" would be put on equal constitutional footing, as neither the regulated party nor EPA could use the judiciary in an inequitable manner; EPA would be forced to promulgate regulations that conform to the rule of law and which allow regulated parties certainty in ordering their affairs.

5. The Fair Notice Doctrine Supplements the Presumption Against the Retroactive Application of a Rule

Under the APA, a rule by definition has prospective application only. A rule is defined as "an agency statement of general or particular applicability *and future effect*…."[53] Moreover, retroactivity is generally disfavored in the law and,[54] as the Supreme Court explained

in *Bowen v. Georgetown University Hospital*, a rule will not apply retroactively absent clear and specific authorization from Congress.[55] On the other hand, a court may allow an agency to fill in a regulatory gap if it believes that the issue presented to the agency merely seeks to explicate established law. Such action is not retroactive in nature:

> An interpretive rule may be applied to transactions which occurred before the development of the interpretation *because it merely explains what the law required since enactment*. Thus, according to this theory, when a regulatory law is translated by an agency, the translation *should be neither novel nor unanticipated* by the regulated party. Hence, administrative adjudicatory interpretations which give retroactive application to agency rules by interpreting existing legislative mandates *are not really retroactive lawmaking*.[56]

This reasoning does not apply, however, when a regulation has already been interpreted by the relevant agency,[57] at a time when the agency should have known that the interpretation was an issue that would arise in the course of administering a statute or regulation,[58] or when a regulated party had previously engaged in an activity that the agency subsequently decided raised concerns requiring an interpretive rule.[59] In these instances, the courts are properly less deferential to an agency's claim that it has merely given force to an implicit understanding already present in the regulation. This is because the agency should have been on notice of the gap in the regulation and the regulated parties may have a reliance interest in the agency's previous inaction. Indeed, if an agency has acted to give meaning to its rule through interpretation, deferring to a *change* in that interpretation would wholly subvert the APA's rulemaking requirements.

When taken together with other important judicial rulings, such as *Paralyzed Veterans of America v. D.C. Arena L.P.*[60] and *Alaska Professional Hunters Ass'n v. FAA*,[61] which prohibit an agency from changing its interpretations of its regulations without undergoing APA rulemaking procedures, as well as cases like *United States v. Hoechst Celanese Corp.*[62] and *United States v. Chrysler Corp.*,[63] which guarantee fair notice of agency interpretations before enforcement, a trend has emerged whereby courts are limiting an agency's ability to promulgate regulations in ways that might avoid substantive judicial oversight.

Judicial scrutiny of EPA's NSR enforcement cases is especially critical. It is doubtful that any federal agency has ever contemporaneously brought a series of industry-wide enforcement actions in an attempt to establish retroactively a new interpretation of a longstanding regulatory program. An agency's decision to impose retroactively its new interpretation on an entire industry in one fell swoop becomes a *de facto* legislative rulemaking. Courts accord deference to agencies to ensure that Congress' purpose is efficiently implemented, and when an agency attempts to abuse that deference, the courts must use their authority to pull upon the reins. Refusing deference is an effective means to this end; applying the fair notice doctrine is another.[64]

6. Recent Examples of the Fair Notice Doctrine Applied as a Check on Retroactive Interpretation of Agency Regulations

As noted above, courts can ensure that the regulated community has legally adequate notice of changing agency views by denying deference or by declining to penalize parties for non-compliance where the parties lacked fair notice. The United States Court of Appeals for the Fourth Circuit's decision in *United States v. Hoechst Celanese Corp.* illustrates the latter method.[65] *Hoechst Celanese* involved EPA's interpretation of the National Emission Standards for Hazardous Air Pollutants for Benzene. The relevant provisions established extensive requirements for industrial facilities that would "produce or use" more than 1,000 megagrams of benzene per year. Facilities that used less than this amount were exempt from these regulations.

In *Hoechst Celanese*, the defendant's facility used benzene as a coolant and reflux agent, and recycled the benzene constantly so that there was never more than 1,000 megagrams in use at the facility. Believing itself exempt on this account, the defendant never filed reports or complied with the relevant monitoring requirements. For its part, EPA decided that, in the context of these regulations, the word "use" would be interpreted to require that the same benzene be recounted each time it cycled through the plant's system—and sought substantial fines and penalties from the defendant for failing to comply with the regulation's requirements. The Fourth Circuit concluded that this interpretation of "use" was not "nonsensical," and upheld EPA's interpretation of the term as a matter of judicial deference.[66]

The court was then left with the "more difficult" question of when, and if, the defendant had received

fair notice of EPA's interpretation. It considered a number of factors in this analysis, "including: 1) the plain meaning of the regulation; 2) inconsistencies in the regulation; 3) contradictory agency interpretations; and 4) communications between the agency and the regulated party."[67] The court recognized the well-known adage that "ignorance of the law or mistake of the law is no defense."[68] At the same time, it concluded, nothing in the regulations themselves, or in EPA's statements about these regulations, would have clearly indicated to regulated parties the Agency's understanding of the relevant terms. In so doing the court emphasized that the question of fair notice must be considered from the perspective of the regulated party, not the Agency. "[I]n addressing whether a party has received fair notice, we look at the facts as they appear to the party entitled to the notice, not to the agency."[69]

In this connection, the defendant in *Hoechst Celanese* offered evidence that several regional EPA offices, those actually charged with enforcing the regulations, had interpreted the relevant regulation inconsistently. Moreover, the company had, in fact, sought an opinion from the state officials in charge of overseeing one of the affected facilities as to whether EPA's regulations applied. The state relied on an EPA memo saying that "use" did not include recycled product, and concluded—like the defendant—that the facility was exempt.[70] Because the defendant could reasonably rely on these statements, the court found that the defendant did not have fair notice of EPA's interpretation until another official, responsible for regulatory compliance, had notified the defendant of EPA's view that recycled benzene *did* have to be continually re-counted in determining the amount "used" or in use at a given facility. Therefore, the court concluded, the defendant could not be penalized for its actions before proper notice was provided.[71]

In the NSR enforcement cases, EPA provided guidance to utilities, through numerous documents and twenty-five years of enforcement practice, suggesting that undertaking normal repair activities would not trigger NSR requirements. This information was widely known throughout the industry, and many, many utilities relied upon it in making their repair, maintenance, and replacement decisions. EPA did not challenge a single normal repair activity until the Agency launched the enforcement actions in the late 1990s. Even then, EPA offered a variety of different views on what is or might be "routine," ultimately clarifying through a legislative rule promulgated in October, 2003, that the activities at issue in the current NSR enforcement actions are in fact routine.[72] Although deferring to EPA's enforcement reinterpretation would certainly permit it to expand NSR coverage in the future, a proper application of the fair notice doctrine prohibits the Agency from imposing this reinterpretation retroactively, unfairly penalizing the regulated community for relying on the Agency's earlier position (which has subsequently been reaffirmed through rulemaking).

C. The Government's Position

1. The Justice Department Memorandum on New Source Review

In 2001, DOJ was asked by the National Energy Policy Development Group—a high-level interagency body, tasked with reviewing various energy and environmental policy issues—to review pending NSR enforcement actions to ensure that they were consistent with the CAA's requirements. In particular, DOJ analyzed whether it could "properly advance in court EPA's views as being consistent with the CAA and applicable regulations."[73] Specifically avoiding the policy merits of EPA's position, the Justice Department concluded that it *could* advance EPA's interpretation in the context of litigation.[74] Unfortunately, DOJ's legal justifications for advancing EPA's interpretations were internally inconsistent and, ultimately, appear to be untenable.

The Justice Department could not, of course, have argued that EPA had consistently construed the NSR Program's requirements expansively, requiring a very narrow RMRR exclusion, as EPA's enforcement record contradicts this argument. DOJ instead posited that the existing NSR regulations are so ambiguous that they could support either a broad or narrow interpretation. Assuming *arguendo* that EPA's broad application of the NSR Program in the future would be protected by judicial deference,[75] an administrative law conundrum with respect to the past—the critical period for the pending enforcement cases—was still created. As a matter of simple due process, an agency cannot create regulations that are inherently contradictory, both allowing and prohibiting the activity in question—and an agency certainly cannot then enforce both positions against the regulated community.

Not surprisingly, the DOJ Memorandum almost entirely avoided the issue of fair notice, raising it only in

a footnote. DOJ sought to justify its failure to grapple with this core issue by asserting that the industry itself did not, in its fair notice claims, "allege that EPA acted outside the scope of the CAA and its regulations."[76] Of course, this assertion is a *non sequitur* because the central question addressed by the DOJ Memorandum was whether, in adopting and advancing the Browner interpretation in court, EPA obeyed its statutory mandate which, in turn, requires an analysis of compliance with the APA and other administrative and constitutional law concerns, including due process. DOJ's failure to address fair notice allowed it to take a position on the lack of authority of EPA's prior statements without addressing the apparent, and problematic, implications of this position for the purposes of compliance with the fair notice and due process requirements, thereby rendering its analysis necessarily incomplete. Once DOJ's position is critically analyzed, it becomes apparent that EPA's position in the enforcement cases cannot be reconciled with the Due Process Clause's fair notice requirement.

2. EPA Failed to Make Plain its Supposed Interpretation of the NSR RMRR Exclusion for More Than Thirty Years

DOJ and EPA are in a difficult bind. Setting aside the lack of fair notice, EPA's failure to formulate the Browner interpretation for more than thirty years raises due process concerns under the "void for vagueness" doctrine.[77] This is an outgrowth of the same Due Process Clause guarantees that created and support the requirement of fair notice. As the Supreme Court has explained:

> Vague laws offend several important [due process] values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[78]

Numerous courts have held that a regulation cannot be enforced against a party when its terms are so vague as to allow arbitrary or unpredictable application by the government.[79] In general, a statute or regulation is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[80] The DOJ Memorandum effectively forces the relevant NSR regulations into this category by arguing, in order to support EPA's position, that the existing rules "do not contain a definition of 'routine maintenance' that EPA now seeks to shirk. Even taking the reading least favorable to EPA, the regulations are silent on this and other critical terms."[81]

Significantly, a regulation can also be demonstrated to be vague by an agency's failure to interpret and apply it consistently.[82] At this point, if EPA were correct that, after thirty years of consistent enforcement history it *still* has discretion to finally give substance to the RMRR exclusion, then the regulations must *per se* have been vague. Similarly, a lack of fair notice can be indicated by an agency's own internal confusion over the proper interpretation of a regulation, and courts regularly consider guidance documents and the agency's public statements to determine whether the agency had consistently interpreted its regulations and provided the regulated industry with fair notice.[83]

3. The Government's Position Also Would Fail a Fair Notice Analysis

The Government's position, of course, also fails fair notice analysis. As discussed *supra,* fair notice requires that a regulated party have some warning of the agency's interpretation before it can be penalized for failing to comply. The DOJ Memorandum suggested that EPA could adopt a narrow view of the existing RMRR exclusion because it never before defined the term "routine maintenance." If that were true, however, then EPA cannot enforce such a narrow definition against the industry until it has given the regulated community fair notice of this construction. However, when the historical record is examined, it is clear that EPA had consistently applied the RMRR exclusion, until the time of its enforcement initiative, broadly. Indeed, the Agency had frequently explained that common industry repair and replacement projects were "routine"—even if they required capital expenditures and occurred infrequently in the life of a given facility.

For example, EPA in 1978 made clear that "routine replacement means the replacement of parts, within the limits of reconstruction, and would not include the

replacement of an entire facility."[84] Also in 1978, EPA said that replacement of a coal pulverizer (a large and expensive utility boiler component) does not trigger the modification rule.[85] In 1985, EPA explained that examples of "[r]outine maintenance, repair and replacement" include "replacement or refurbishing of components subject to high abrasion and impact."[86] In 1986, an EPA contractor reported that common boiler "repair/replacement jobs include: retubing, replacing waterwalls, air heater, ductwork, or casing, and updating the burners or controls."[87] In 1992, EPA confirmed that whether replacement of equipment is "routine" is to be judged based on whether that "type of equipment" is replaced by other "sources" in the "relevant industrial category."[88] In 1995, EPA addressed projects that involve "restoration of lost capacity" (which are necessarily substantial replacement projects) and said: "EPA believes that the routine maintenance exclusion already included in the existing NSR regulations also has the effect of excluding 'routine restorations.'"[89] State permitting agencies, like EPA itself, have applied the RMRR exclusion in a manner consistent with EPA's established, historical rule.[90] By contrast, in the NSR enforcement litigation, EPA's lawyers have advanced a completely different view, emphasizing either that "a physical change is 'routine' only if it occurs at a large percentage of units in the industry and it occurs repeatedly at such units,"[91] or that it is "a narrow exception that focuses on application of the WEPCo factors at an individual unit."[92]

Thus, if EPA did have a longstanding and settled view of RMRR, the Agency's own enforcement record before 1998 would support only a broad exclusion akin to that claimed by the industry and promulgated by EPA in an October 2003 clarifying rule, and EPA's enforcement actions constitute an attempt to reverse its longstanding interpretation of RMRR without notice and comment rulemaking (or fair notice).[93] Regardless of EPA's true position, its enforcement initiative violates either due process guarantees or the APA.[94]

4. The Justice Department's Analysis in Recent District Court Opinions

Because DOJ, through its strained analysis, approved EPA's actions, EPA's enforcement scheme is now before the courts. The two district courts squarely confronting the propriety of EPA's retroactive enforcement have reached conflicting results. In *United States v. Duke Energy Corp.*,[95] the court provided a dispassionate legal analysis of the statutory and regulatory issues presented by the case and found that EPA's position in the enforcement cases was inconsistent with the regulatory requirements. The court in *United States v. Ohio Edison Co.*[96] instead offered a result-oriented assessment that breaks down under close analysis. While the *Duke Energy* Court did not address the fair notice doctrine because it found EPA's interpretation to be unlawful, *Ohio Edison* incorrectly applied fair notice principles to agency action.[97]

a. Brief Review of the Evidence Considered by the Courts

The evidence considered by the courts clearly shows that, before launching its NSR enforcement initiative, EPA had never articulated the Browner interpretation of the RMRR exclusion. Indeed, although EPA had promised more specific guidance on its understanding of the exclusion, it confirmed that it would follow its historic approach in the interim. As noted in 1992 by EPA in the preamble to one of the most significant NSR rulemakings:

> A few commenters requested that EPA define or provide guidance on "routine repair, replacement and maintenance" activities. The … proposal did not deal with this aspect of the regulations, nor do the regulatory changes promulgated today. However, the issue has an important bearing on today's rule because a project that is determined to be routine is excluded by EPA regulations from the definition of major modification. For this reason, EPA plans to issue guidance on this subject as part of a NSR regulatory update package which EPA presently intends to propose by early summer.[98] *In the meantime, EPA is today clarifying* that the determination of whether the repair or replacement of a particular item of equipment is "routine" under the NSR regulations, while made on a case-by-case basis, *must be based on the evaluation of whether that*

type of equipment has been repaired or replaced by sources within the relevant industrial category.[99]

After 1992, EPA repeatedly provided the regulated community with informal guidance confirming a broad view of the RMRR exclusion. For example, in 1995, EPA deferred acting on a "restoration exclusion," which would have exempted activities undertaken to restore an electric power generating unit to the highest capacity achievable in the previous five years, because the Agency believed these activities were *already* excluded as RMRR. In a letter from Mary Nichols, then EPA's Assistant Administrator for Air Programs, the Agency said plainly that "EPA believes that the routine maintenance exclusion already included in the existing NSR regulations also has the effect of excluding 'routine restorations.'"[100]

Similarly, in 1996, John Seitz, EPA Director of Air Quality Planning and Standards, responded to a letter from Senator Robert Byrd regarding the CAA's NSPS requirements, saying in part:

> Another concern you expressed was the potential impact of the revision on existing units. Under the General Provisions (40 CFR 60, subpart A) for new source performance standards, an affected facility is defined as a unit which commences construction, modification, or reconstruction after the date of proposal. To date, no existing unit has become subject to the utility NSPS under either the modification or reconstruction provision. *Since it is anticipated that no existing utility unit will become subject to the revision due to being modified or reconstructed, as defined under the general provisions, no change to the applicability of the revision is currently planned for this rulemaking.*[101]

It is, therefore, hardly surprising that both before and after the unprecedented WEPCO projects, EPA found no electric utility sources to be in violation of the RMRR provision until the Agency unilaterally determined to revise, *sub silencio,* its understanding of that exclusion's reach.

b. *United States v. Duke Energy Corp.*

In its enforcement action against Duke Energy Corp., EPA alleged that between 1988 and 2000 the utility had engaged in twenty-nine separate projects, at eight different facilities, each of which should have resulted in an NSR permitting process. In ruling on a motion for summary judgment in the case, the court held that the regulatory construction underlying EPA's enforcement cases, *i.e.,* the Browner interpretation, contradicted the statutory framework implementing NSR, as well as EPA's enforcement history and was, therefore, unlawful. As a result, the court never reached the issue of fair notice. However, the court's findings in *Duke Energy* would have been more than sufficient to support a fair notice ruling against the government if it had reached the issue. The court ruled that not only was EPA's current interpretation of the relevant NSR provisions unclear, but that it directly contradicted the Agency's prior position:

> Through the EPA's statements in the Federal Register, its statements to the regulated community and Congress, and its conduct for at least two decades the EPA has established an interpretation of RMRR under which routine is judged by reference to whether a particular activity is routine in the industry. Accordingly, "once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."[102]

The two district courts squarely confronting the propriety of EPA's retroactive enforcement have reached conflicting results. In *United States v. Duke Energy Corp.*, the court provided a dispassionate legal analysis of the statutory and regulatory issues presented by the case and found that EPA's position in the enforcement cases was inconsistent with the regulatory requirements. The court in *United States v. Ohio Edison Co.* instead offered a result-oriented assessment that breaks down under close analysis.

c. *United States v. Ohio Edison Co.* and *United States v. SIGECO*

In contrast to *Duke Energy*, the court in *Ohio Edison* addressed the utility's fair notice defense. Although the court acknowledged that EPA, and the relevant state enforcement agencies, had adopted conflicting interpretations, the judge nevertheless concluded that Ohio Edison Co. had not sufficiently established a fair notice defense. Similarly, a district court in Indiana also addressed a fair notice issue in the context of EPA's enforcement initiative.[103] Unlike *Duke Energy* and *Ohio Edison,* where the courts considered whether the utility

had notice of EPA's "routine at the unit" standard for evaluating the so-called *WEPCO* factors—laid out by the United States Court of Appeals for the Seventh Circuit in the *WEPCO* case—the court in *SIGECO* addressed whether the utility had notice of the *WEPCO* factors themselves. The reasoning of these opinions cannot withstand critical analysis.

i. *United States v. Ohio Edison Co.*

The court in *Ohio Edison* denied the defendant utility's fair notice claim—even though the court itself made a compelling case that fair notice was lacking. Referring to the regulatory definitions under NSR, the first page of *Ohio Edison* lamented the fact that it took three decades for EPA "to finally resolve this fundamental issue under the Act."[104] The court even recognized that "[i]t is clear to this Court that at various times since 1970 officials of the EPA have been remiss in enforcing the law and clarifying its application to certain projects."[105] Nevertheless, having acknowledged that EPA had never properly clarified its position with respect to NSR enforcement, the *Ohio Edison* Court still found that the utilities should have been on notice of the Agency's interpretation. The court briefly addressed EPA's conflicting statements, but then essentially ignored the Agency's enforcement history and what it termed an "abysmal breakdown" in the administrative process by saying that the "language of the CAA" alone is sufficient to put parties on notice that the exclusion is narrow.[106] "Agency statements are not of great significance if the statements address provisions of the law that are not ambiguous [and] [t]he law has been clear …."[107]

This conclusion is not only startling, it directly contradicts every case that has examined the NSR program's requirements, including the *Duke Energy* and *WEPCO* decisions.[108] The *Ohio Edison* Court even noted in its opinion that "there is no regulatory definition for what is 'routine.'"[109] In fact, *Ohio Edison's* introduction and reasoning strongly indicate that the court undertook a "results-based" analysis, wherein it determined to find that coal-fired power plants, concededly a major source of air pollutant emissions, were guilty of violating the CAA. In this regard, the court noted that: "[b]y any standard, the enforcement of the Clean Air Act with regard to the Sammis Plant has been disastrous.... [T]hirty-three years after passage of the Act, the plant to this day emits on an annual basis 145,000 tons of sulphur dioxide, a pollutant injurious to the public health."[110] Deciding cases based on policy implications is of course not the proper role of the judiciary. It is also the case that focusing simply on the emissions emanating from a particular source and asserting that such emissions, large as they are, must harm the public health, reflects the most primitive and unscientific approach to air quality management. If a given geographical area meets health-based ambient air quality standards, the fact that a source or two located within this area emits thousands of tons of air pollution does not amount to a health threat. Indeed, reducing air emissions just for the sake of obtaining additional reductions is, at best, a waste of scarce societal resources and, at worst, can create environmental problems of its own.

More to the point, it simply is inappropriate for a court to consider the policy implications of an agency's interpretation in deciding whether or not the regulated community had fair notice of that interpretation. In *United States v. Trident Seafoods Corp.*,[111] for example, the United States Court of Appeals for the Ninth Circuit overturned a lower court's finding of a CAA violation where the appellant had failed to notify officials of its intent to remove asbestos from a cannery site. The Ninth Circuit specifically rejected the district court's reliance on policy arguments when fair notice was at issue:

> [W]e have no quarrel with the district court's analysis of the policy considerations supporting advance notification.
>
> There is a competing argument, however, that notwithstanding policy concerns, the agency had both the opportunity and the obligation to state [the requirements] clearly in its regulations…. Thus, reliance on policies underlying a statute cannot be treated as a substitute for the agency's duty to promulgate clear and definitive regulations.[112]

Thus, a court addressing a fair notice argument should not consider the policy implications of its decision or the nature of the regulations at issue, only the clarity of the agency's statements in relation to the enforcement action. If this rule is applied dispassionately, the decision in *Ohio Edison* cannot stand.

ii. *United States v. SIGECO*

In its discussion of fair notice, the *SIGECO* Court reached the following conclusion: "The Court finds the language of the [RMRR] exemption ambiguous, and cannot conclude that the EPA's interpretation would be 'ascertainably certain' to people of good faith solely on the basis of its text."[113] This finding clearly met the stan-

dard, set forth by the United States Court of Appeals for the District of Columbia Circuit, in determining whether a regulation has failed to give fair notice.[114] However, the court then went on to misinterpret the facts, and the law, to find that the regulated community somehow should have been on notice of EPA's interpretation.[115] In this respect, the *SIGECO* Court awkwardly sidestepped the most telling evidence of a fair notice violation: It refused to take into consideration a non-applicability determination by the Indiana Department of Environmental Management (IDEM), even though it fully acknowledged that SIGECO had contacted IDEM about the project at issue in the case, and the agency issued a non-applicability determination stating that NSR would not be triggered by the activity.

> IDEM has determined that these activities will not trigger the Clean Air Act requirements under the prevention of significant deterioration (PSD) nor the new source performance standards (NSPS) programs…. Specifically, we have determined that the replacement of the existing steam tubes and turbine blades can be considered a "like-kind replacement" under [Indiana's SIP] for purposes of PSD. Additionally, this activity by SIGECO falls under the "maintenance, repair, and replacement" exemption for [Indiana's SIP] for NSPS…. No permit review is necessary at this time for either prevention of significant deterioration or new source performance standards.[116]

Thus, even though the state agency designated under the CAA to oversee implementation of the NSR program had *approved* the project at issue, EPA later sued the utility for an alleged violation. The *SIGECO* court dismissed this fact simply because the state's non-applicability determination was finalized only after the repairs at the facility were completed.[117] It took this position after recognizing in its own opinion that "[c]onfusion within the enforcing agency as to the proper interpretation of a regulation is also relevant evidence to show a lack of fair notice."[118] The court even cited to the District of Columbia Circuit's observation that "it is unlikely that regulations provide adequate notice when different divisions of the enforcing agency disagree about their meaning."[119]

Thus, the court inexplicably ignored the crucial point. Although a non-applicability determination issued after completion of the relevant projects could not, by itself, bar EPA's pursuit of a later enforcement action, it is legally relevant to the fair notice issue. The fact that IDEM, which had been trained by EPA, read every EPA guidance, and had been instructed as to the enforcement of NSR, construed the regulations in a way directly contradictory to the Browner interpretation, surely established that, at a minimum, there *was* confusion over the meaning of the RMRR regulation.[120] This is undeniable evidence that the manner in which EPA interpreted routine maintenance is at best unclear, and at worst shows that the interpretation advanced in the enforcement cases diametrically opposed past, consistent agency practice.[121]

Nevertheless, the *SIGECO* court ultimately declined to grant the fair notice defense because EPA relied on the five factor test announced in *WEPCO*.[122] The court reasoned that because *SIGECO* was aware that this five factor test would be applied, there was no fair notice problem regarding application of the regulation. The court summarized its conclusion by asserting that "[t]he Clay memo [issued in WEPCO's applicability determination] and WEPCO's discussion of routine maintenance made it 'ascertainably certain' that the EPA would make a case-by-case determination by weighing the nature, extent, purpose, frequency, cost, and other relevant factors, to make a common-sense finding."[123] This, of course, again missed the point. SIGECO did not argue that it was unaware of the five factor test; SIGECO argued that it did not have fair notice of how the test would be applied, making it impossible to determine "what is expected of it."[124] The question was never what factors would apply, but what legal standard would apply to evaluation of those factors and therefore, what types of activities would be exempted as a matter of course, considering the RMRR exclusion as a whole. By focusing on the narrow question of *what* factors applied, rather than *how* those factors apply—whether they will be judged on a unit-by-unit or industry source category basis—the court failed to confront the evidence demonstrating that the government changed its approach to NSR without providing the industry fair notice.

Indeed, the test formulated in *WEPCO* and acknowledged in *SIGECO* is so vague and unpredictable that a regulated party might never have fair notice of its requirements. The concept of fair notice presupposes that a regulated party is capable of conforming its activity to meet the requirements of law if it has notice of the law's existence and method of application.

When a regulatory standard encompasses numerous factors, none of which are tied to an ascertainable baseline, all that exists is a regulatory mush, tailor-made to facilitate arbitrary enforcement.

The real-world practicalities of the NSR program amplify the negative effects of this regulatory mush. Under NSR, regulated actors are themselves responsible for determining when NSR is triggered. If *SIGECO* is taken at face value, and a party must know with ascertainable certainty exactly what "due weight would be given to each factor" by EPA without any guidance as to what "due" is,[125] then they cannot be held liable for inadvertently deciding one factor is more "due" than the others. Forcing a regulated party to stand in the shoes of EPA and then penalizing them for incorrectly applying a test that IDEM, an organization whose officials were specifically trained by EPA to implement NSR, was unable to apply to EPA's liking, is, in addition to being a violation of the fair notice requirement, the very picture of an "arbitrary" and "capricious" action.

d. EPA Unlawfully Announced its Reinterpretation Through Enforcement Actions

In addition, the courts in *SIGECO* and *Ohio Edison* failed to consider sufficiently the fair notice implications of EPA's decision to announce its revised NSR interpretation through an industry-wide series of enforcement actions. For instance, neither opinion mentions the Supreme Court's decision in *Martin v. OSHRC*,[126] which directly bears upon this point. Although *Martin* is largely devoted to the statutory question of which government agency has the right to interpret ambiguous regulations in the Occupational Health and Safety Act,[127] in resolving this claim, the Court commented on the question it determined to remand to the appellate court—whether the government had reasonably interpreted the regulation at issue, and, critically, whether the parties had sufficient notice of that interpretation.

Rather than focus on the *content* of the interpretation and its consistency with legislative intent, the *Martin* Court concentrated on the *process* by which the interpretation was promulgated in order to determine its reasonableness. Significantly, the Court said that the timing of an agency's announcement of a new interpretation, and whether parties had sufficient notice of the interpretation, will determine to what extent the Court will defer to the interpretation. In this regard, the Court noted that a new interpretation, announced in an enforcement case, may not receive judicial deference:

> [T]he decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties, on the quality of the Secretary's elaboration of pertinent policy considerations, and on other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers.[128]

The *Trident Seafoods* Court similarly refused to defer to an agency's interpretation of a regulation that had been introduced by the filing of a lawsuit, concluding that this was not inconsistent with *Chevron.* In rejecting EPA's interpretation of a regulation it promulgated under the CAA, the court explained that "[o]ur conclusion is not inconsistent with the proposition that deference is ordinarily owed to an agency's interpretation of its own regulations. No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position."[129]

EPA's actions in notifying the regulated parties of the Browner interpretation through a series of enforcement actions, brought against numerous utilities, were obviously in conflict with the Supreme Court's statements in *Martin.* Going beyond the Court's previous rulings, which held that policy positions announced for the purpose of litigation do not deserve *Seminole Rock* deference, *Martin* makes a common sense pronouncement that informing regulated parties that an agency has reinterpreted its regulations by filing lawsuits against them denies the regulated parties the fair notice of the agency's interpretation that due process requires.[130]

D. EPA Should Have Effected its Reinterpretation of the RMRR Exclusion Through Notice and Comment Rulemaking

In fact, because the Browner interpretation, which supports EPA's NSR enforcement cases, would impose substantive, binding obligations on the regulated community, as well as modify a prior agency understanding, EPA could have legally adopted it only through a proper rulemaking process. Under the CAA, EPA must follow the established procedures of informal notice and comment rulemaking, at a minimum, when it promulgates or revises the regulations governing NSR.[131] As has been noted with respect to the comparable exceptions from notice and comment rulemaking under the APA:

> The purposes of according notice and comment opportunities were twofold: to reintroduce public

> participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies, and to assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.[132]

Although agencies are permitted to use interpretive rules, which are not subject to notice and comment, under certain circumstances, the exceptions to APA rulemaking procedures were intended to be narrow ones.[133] The purpose of the exceptions was to "accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense."[134] Significantly, as noted above, when EPA properly submitted the question of how best to implement the policies of the CAA to the public through notice and comment rulemaking, EPA decided that RMRR should encompass the routine maintenance activities at issue in the NSR enforcement cases in order to ensure efficiency and safety at utilities. Indeed, because parties were caught unawares by EPA's switch to the Browner interpretation, they have overwhelmingly challenged EPA's policies in court.

1. Notice and Comment Rulemaking was Required Because EPA's Reinterpretation Imposed Substantive Obligations on Regulated Parties

Although agencies are free to issue interpretive rules without going through notice and comment rulemaking procedures, if the new rule "create[s] new law, rights or duties, the rule is properly considered to be a legislative rule," which can be adopted only after an appropriate rulemaking process.[135] In determining whether a particular proposal must be adopted through notice and comment procedures, its practical effect is more important than the agency's characterization of the measure.[136] As noted by the United States Court of Appeals for the District of Columbia Circuit in *Appalachian Power Co. v. EPA:* "It is well-established that an agency may not escape the notice and comment requirements … by labeling a major substantive legal addition to a rule a mere interpretation."[137] In *Appalachian Power,* the court concluded that a "guidance" document, issued by EPA to interpret provisions of the CAA, should have been subject to notice and comment rulemaking. It rejected the Agency's argument that the document was not a final rule, subject to judicial review, because it was not "binding." The court instead looked at the regulation's actual effect on regulated parties and concluded that the rule was binding and final, fully subject to judicial review. In this respect it noted that:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, *if it bases enforcement actions on the policies or interpretations formulated in the document*, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes binding.[138]

Because the guidance document had legal consequences for companies who were subject to enforcement under the rule, the court set aside the document.

2. Enforcement Actions Can Establish a Rule's Legislative Character

EPA's enforcement actions themselves may establish the legislative nature of a rule subject to notice and comment requirements. As explained by Robert Anthony:

> In general, a nonlegislative document is binding as a practical matter if the agency treats it the same way it treats a legislative rule—that is, as dispositive of the issues that it addresses…. Obviously, agency *enforcement action* based upon nonobservance of the nonlegislative document, or the threat of such action, bespeaks a clear intent to bind and indeed puts it into execution. Here the eating is the proof of the pudding.[139]

The United States Court of Appeals for the Fourth Circuit applied this logic in *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission* (CPSC), finding that a change in enforcement policy required a legislative rule.[140] In that case, the CPSC's Compliance and Administrative Litigation Staff had originally interpreted an exception to consumer safety rules broadly, so as to exclude from regulation a number of different types of toy components. It later reinterpreted the exception more narrowly, thereby enveloping more products within the scope of the regulation. The CPSC enacted the change through an interpretive statement, which was challenged. The court found that this reinterpretation was a rule because (in language which could easily apply to EPA's actions in the enforcement cases) it "ha[d] the clear intent of eliminating a former exemption and of

providing the Commission with power to enforce violations of a new rule."[141] The court emphasized, as illustrated above, that "[t]he fact that the statement altered a long-standing position cannot readily be discounted. If 'interpretation' is a process of 'reminding' one of existing duties, a decision to modify former duties demands close scrutiny by a reviewing court."[142]

…an agency's prolonged failure to enforce a regulation may itself represent an "interpretation" that requires notice and comment rulemaking to change.

Obviously, the NSR enforcement actions brought against utilities have legal consequences for utilities at least as significant as those at issue in *Jerri's Ceramic Arts.* The reinterpretation of the RMRR rule, which forms the basis of these actions, was never vetted through a notice and comment rulemaking process, and the fact that EPA has sought to impose the relevant obligations through a series of unprecedented enforcement actions makes clear the legislative character of EPA's interpretation. This is a fatal flaw.

3. Judicial Restraints on Agency Reinterpretation of Regulation in the Absence of Notice and Comment Rulemaking

Moreover, courts have frequently rejected agencies' arguments that they have the authority to reinterpret their own rules without providing any formal justification, or notice, of the change.[143] In fact, a growing line of cases has articulated a standard that grants judicial deference to an agency's original interpretation of its own regulations, but which also provides a backstop that prohibits the agency from reinterpreting a rule without notice and comment rulemaking—ensuring that the regulated community has the opportunity to participate in the reinterpretation.[144] As the United States Court of Appeals for the District of Columbia Circuit has explained:

> [T]here is, to be sure, an outer limit to that deference imposed by the Administrative Procedure Act. A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal "interpretations." That technique would circumvent section 553, the notice and comment procedures of the APA.[145]

The importance of restraining an agency's ability to enforce a new interpretation of its regulations without notifying the regulated community was confirmed and explained in *Alaska Professional Hunters Ass'n v. FAA.*[146] In rural Alaska, hunting and fishing guides would also serve as pilots, taking customers to remote lodges and wilderness areas. Since 1963, the FAA consistently advised these pilots that they were *not* governed by the regulations that applied to commercial pilots. More than thirty years later, the FAA concluded that it had "misread" the regulations, and decided to treat these pilots as commercial operators. The agency argued that it had complete discretion to reinterpret rules it promulgated without following APA rulemaking procedures. The court flatly rejected this argument, saying that "[t]hose regulated by an administrative agency are entitled to know the rules by which the game will be played."[147] It reasoned that allowing an agency to alter its enforcement regime every time it has second thoughts about a policy choice would create an untenable situation for the regulated community. "The FAA's current doubts about the wisdom of the regulatory system followed in Alaska for more than thirty years does not justify disregarding the requisite procedures for changing that system."[148] The agency must allow affected parties to participate in changes to the existing regulations.

Just as the FAA had told Alaska's bush pilots, for over thirty years, that they were not subject to the agency's regulations, EPA told electric utilities (also over a thirty year period) that routine maintenance activities of the type challenged in the enforcement cases were excluded from NSR.[149] To the extent that there was confusion about the RMRR exclusion's scope, the ultimate responsibility lies with EPA. "Having written the regulations, the Director is responsible for their text. If the meaning is not clear on a reasonably objective basis, then the regulations should be changed so that no ambiguity remains."[150] The Agency wrote the NSR regulations and interpreted them in the first instance to give force to their original intent. Having embarked on an enforcement campaign fundamentally inconsistent with thirty years of established practice, the presumption must be that EPA has abandoned that intent, and reinterpreted its rules without the required procedures.[151]

4. EPA's Failure to Enforce the Browner Interpretation

In this connection, it is important to note that an agency's prolonged failure to enforce a regulation may itself represent an "interpretation" that requires notice and comment rulemaking to change. Justice Clarence Thomas noted this possibility, dissenting on behalf of four members of the Supreme Court, in *Thomas Jefferson University v. Shalala*.[152] That case involved the Department of Health and Human Service's (HHS) Medicare reimbursement regulations, and the extent to which a teaching hospital could claim certain expenses related to its educational activities. The Court ruled that, in disallowing expenses that had not previously been claimed by a program participant, the agency had properly interpreted its regulations.

Justice Thomas, joined by Justices Stevens, O'Connor, and Ginsburg, argued that the Secretary of HHS's failure to give the relevant regulation any substantive effect for twenty years constituted a "settled course of behavior," rendering implausible HHS's sudden reinterpretation of a regulation governing the reimbursement of Medicare expenses.[153] Two decades of consistent action "certainly constitutes a 'settled course of behavior,' and I find it difficult to believe the Secretary would permit such a persistent—and costly—error in the application of [these] rules."[154] Following the adage that "doing nothing is doing something," Justice Thomas pointed out that HHS's longstanding policy of non-enforcement was equivalent to a presumptively preferred interpretation, the reversal of which is "suspect."[155] The agency cannot, in accordance with administrative law and basic notions of fairness, penalize regulated parties for relying on the agency's original guidance, and inaction can provide that guidance. Thus, although the failure to enforce a regulation would not estop the agency from changing its construction of the rule in the future, it should not be applied to past conduct.

The majority in *Thomas Jefferson University* did not directly address Justice Thomas's argument because it concluded that HHS's interpretation had not been inconsistent over the years. However, while all of the dissenters remain on the Supreme Court today, Justice Blackmun—who made up the fifth vote to form a majority in this case—has been replaced by Justice Stephen Breyer. Although it is impossible to predict how Justice Breyer would have voted in *Thomas Jefferson University,* it is entirely possible that the dissent would become the majority if a similar case were presented today.

This would, in fact, be consistent with the Court's previous decision in *BankAmerica Corp. v. United States.* There, the Court held that the Government could not prohibit interlocking directorates between banks and insurance companies.[156] The Supreme Court stated, in rejecting an interpretation of the Clayton Act that would prohibit this practice, that "the Government's failure for over 60 years to exercise the power it now claims under § 8 [of the Clayton Act] strongly suggests that it did not read the statute as granting such power."[157] Of particular import was the fact that the Government agencies charged with administering the act had for years "overlooked or ignored the pervasive and open practice of interlocking directorates between banks and insurance companies," which the Court found implausible "had it been thought [the practice was] contrary to the law."[158] Similarly, EPA overlooked the maintenance activities conducted by coal-fired power facilities for over thirty years. Only once, in the *WEPCO* case, which involved projects of unprecedented scope, did the Agency bring an NSR enforcement action against a utility. Moreover, it affirmatively told utilities that projects of the type now at issue in the enforcement cases were properly excluded from the program. EPA's "failure to use such an important power for so long a time," to paraphrase the Supreme Court, "indicates the [Agency] did not believe the power existed."[159]

An additional factor that weighs in the favor of utilities in the current NSR enforcement initiative is the Supreme Court's refusal in *BankAmerica* to "depart from [its] long-held policy of giving great weight to the contemporaneous interpretation of a challenged statute by

an agency charged with its enforcement."[160] Here, the Court rejected the Government's interpretation of the Clayton Act against a background of great deference. As demonstrated earlier, courts reviewing EPA's reinterpretation of NSR need not accord great deference to the reinterpretation, if any at all, because it is inconsistent with earlier practice. It follows that EPA will bear the same heavy burden borne by the Government in *BankAmerica,* necessitating that it prove a consistency of interpretation of the RMRR exclusion that simply does not exist.

III. The Federal Government's Internal Inconsistency: EPA v. TVA

A. The Browner Interpretation Was a Surprise Even to Other U.S. Government Agencies

EPA has, of course, argued forcefully that the Browner interpretation was its longstanding view of the RMRR exclusion, and that the regulated community in general, and the utility industry in particular, should have known this. In assessing this claim, it is highly significant that TVA does not appear to have gotten that message. Like EPA, TVA is an agency of the United States Government. It was created in 1933, as a centerpiece of Franklin Roosevelt's "New Deal," and charged by law with the generation, transmission, and sale of affordable power to the Tennessee River Valley—at the time, one of the poorest and least developed regions in the Nation.[161] TVA has been operating coal-fired plants since the 1940s—more than half a century. Indeed, fossil fuel plants produced about 60 percent of TVA's total generation in fiscal year 2003, and the agency is now the largest purchaser of coal in the Nation, buying some 45 million tons annually, and spending more than $1.3 billion each year to supply its needs.

TVA's particular mandate is to provide electricity at low rates. This, of course, requires the production of power at the lowest possible cost,[162] and maintenance of TVA's facilities is a key factor in achieving this goal. Across TVA's spectrum of power facilities, including nuclear, hydroelectric, and coal, "maintenance has been and continues to be the key to reliable operation of a unit throughout its useful life."[163] Conducting routine maintenance avoids large capital expenditures necessitated by major repairs. Also, pursuant to the least-cost dispatch system of generation, if the lowest-cost facilities are unavailable because of equipment failures, generation needs must be met by facilities with higher production costs.

As the U.S. government agency with the most extensive practical experience in the power generation area, TVA was fully aware of EPA's historical interpretation of NSR and the requirements of all applicable regulations. Nevertheless, EPA claimed, based on the Browner interpretation, that TVA committed extensive NSR violations at fourteen coal-fired generating units at nine of TVA's eleven plants. Indeed, EPA investigated TVA's maintenance activities dating back to 1978 and alleged that—for over two decades—its sister agency had consistently and repeatedly violated the law at its coal-fired facilities. It is striking that a government agency would have willfully flouted the law so egregiously without any notice from its fellow agency, EPA, during that time.

EPA's failure to notify TVA that it was violating federal regulations is even more remarkable because TVA, as a federal agency, has worked closely with EPA to achieve its environmental compliance responsibilities. TVA is also required by law to report periodically on its experience with engineering and technical issues related to this mission. TVA's status and statutory responsibilities are especially relevant, given EPA's repeated statements, issued prior to the enforcement initiative, that source owners can determine for themselves whether an activity is a "modification" subject to NSR. According to EPA, this determination calls for common sense engineering judgment. TVA is, of course, the government agency in the best position to exercise that judgment.

Significantly, instead of acceding to the Browner interpretation, TVA has actively opposed EPA's actions, arguing that they are bad law and bad policy. As John Shipp, TVA's Vice President of Environmental Policy and Planning, commented, "New Source Review is not about whether TVA should or will reduce its emissions…. We have been reducing our emissions and will continue to do so. NSR is about whether we can continue to operate our plants safely and reliably."[164] Similarly, in its annual environmental report, TVA said:

> TVA complies with all requirements of the Clean Air Act. It also routinely maintains its generating plants to maximize their efficiency and improve their performance—a practice that supports system reliability and helps keep electricity costs as low as possible. But recently the EPA began viewing this

> routine maintenance as creating a 'new source' of emissions…. This change reflects a dramatic shift in the way the EPA has interpreted these regulations for the past 20 years.[165]

B. TVA's Consistent Understanding of the RMRR Exclusion as Much Broader Than the Browner Interpretation is Supported by Reports Dating to 1972

As long ago as 1972, even before the present NSR program was adopted by Congress, TVA reported on routine industry maintenance, repair and replacement practices.[166] This report discussed that agency's policy of implementing a comprehensive "preventive maintenance program to provide the highest possible reliability."[167] This included regular repair and replacement of turbines, furnaces, feedwater heaters, fly-ash removal equipment, and tubing necessary to keep steam powered electricity generating units in good working condition. While these replacements left the basic design of the facilities unchanged, these activities were intended to improve the reliability or efficiency of the generating units within the constraints of its design capacity.

TVA's views are the same today as they were then. TVA issued another report in 2000 similarly describing the practices necessary to maintain reliable and safe operation of utility generating units.[168] The 2000 report surveyed maintenance practices across the industry and found that a broad range of component replacements were routinely undertaken.[169] These replacements did not take place at regular intervals, but varied widely within TVA and the industry as a whole. Those activities include the component replacements at issue in the enforcement cases.

Significantly, TVA's report also confirmed that it has been standard practice to replace worn-out components with parts that serve the same purpose, but use more modern technology.

> It has been the practice within TVA and the utility industry for decades to replace components and systems with state-of-the-art equipment that is often more reliable or more efficient than the original, sometimes obsolete, component. It is also typical for maintenance activities to include improved maintenance and operational practices that respond to conditions experienced during actual operation of the unit.[170]

The decision rendered by EPA's own Environmental Appeals Board (EAB), although declared "legally inconsequential" by the United States Court of Appeals for the Eleventh Circuit on review, demonstrates that TVA, not EPA, has maintained a consistent position on the meaning of RMRR.

TVA in these reports confirms that the maintenance practices targeted by the Browner interpretation have been openly acknowledged and discussed since the 1970s. The fact that EPA never commented on these practices, or took the opportunity to warn industry that its policies violated supposedly "clear" legal requirements, strongly suggests that it is EPA's position, and not industry's, that has changed.

C. EPA's EAB Decision Affirms That TVA, and Not EPA, Has Maintained a Consistent Position

The decision rendered by EPA's own Environmental Appeals Board (EAB), although declared "legally inconsequential" by the United States Court of Appeals for the Eleventh Circuit on review, demonstrates that TVA, not EPA, has maintained a consistent position on the meaning of RMRR. The EAB adjudicated an administrative compliance order (ACO), that had been issued by EPA, asserting that TVA had violated the NSR program by making changes to its plants without obtaining preconstruction permits. The EAB concluded that TVA had violated the NSR program's requirements.[171] However, the Eleventh Circuit subsequently vacated the EAB's decision, ruling that CAA § 113 (the statute's federal enforcement provisions) violated the Due Process Clause as applied by EPA against TVA.[172] As a result, the EAB's opinion has no legal force. Nevertheless, its findings and reasoning are instructive because, ironically, they support TVA's position on the RMRR exclusion's proper interpretation.

In this regard, the EAB rejected TVA's fair notice claim because, it concluded, EPA's interpretation of the

NSR regulations should have been "ascertainable" to TVA. The board curiously cited, as evidence that TVA should have know that its activities were subject to NSR, a TVA official's statement that, "[i]f modifications proposed are extensive enough to be considered reconstruction, EPA might try to apply the *new source performance standards.*"[173] The EAB concludes from this that TVA had "ample notice" that the agency was engaged in "conduct that would be questionable."[174]

In fact, however, the TVA statement suggests that TVA thought NSPS would apply only if the project was extensive enough to trip the "reconstruction rule," which automatically triggers application of new source performance standards if a facility expends 50% of the unit's original costs on repairs. Triggering the reconstruction rule therefore requires a major refurbishment of a facility. The TVA official cited by the EAB was, in fact, simply stating what that agency, along with the rest of the electric utility industry, consistently believed—only major repairs that exceed the reconstruction threshold would trigger the new source performance standards. This is precisely what EPA, through its Enforcement Director, had been telling industry regarding the RMRR standard: "[r]outine replacement means the replacement of parts, within the limits of reconstruction."[175]

The EAB also criticized TVA's failure to seek applicability determinations for its maintenance activities. The EAB acknowledged, however, that, "[i]t may well be that TVA's choice to assume the risk was influenced by the fact that, historically, EPA had not pressed the point through enforcement actions."[176] The opinion then goes on to say that EPA's lack of enforcement was "immaterial to TVA's claim that it did not have notice of the regulation's import."[177] However, it is inconceivable that TVA, a government agency under a duty to provide its citizens with a stable and affordable supply of electricity, would have "assumed a risk" of billions of dollars in mandatory retrofitting expenses and penalties if it believed it was violating the applicable regulations.[178] Indeed, as an energy producer, TVA has been very proactive in understanding and complying with environmental regulations, spending billions of dollars to comply with other environmental programs. The explanation that most readily accounts for the actions of all the parties involved in this case is that, because EPA had consistently interpreted the RMRR exclusion in the same way as TVA, and the rest of the industry, there had been no need for it to approach EPA on that issue. EPA simply had never questioned TVA's prior actions or given it cause to doubt its understanding and seek guidance. The agencies' understanding of the NSR program's requirements diverged only after EPA adopted the Browner interpretation.

D. TVA Invested Considerably in Pollution Controls Before the Enforcement Actions

Although TVA has actively opposed the EPA enforcement initiative, it has also acted on its own to reduce dramatically emissions at its facilities in response to other environmental programs.[179] Clearly, TVA has not opposed the goal of reducing air pollutant emissions, but only EPA's use of the Browner interpretation of RMRR as a means of forcing these reductions retroactively. TVA invested more than $1 billion to comply with the acid rain control program established in the Clean Air Act Amendments of 1990. Additionally, in 1998, TVA adopted a clean air strategy to reduce nitrogen oxide (NOx)[180] emissions at a cost of between $800–$900 million *above* the cost required to comply with the 1990 amendments. TVA has estimated that it spends almost $1 million a day on additional controls at its coal-fired power plants.[181]

As a result of TVA's efforts, the agency has achieved an 85 percent overall reduction in sulfur dioxide emis-

sions at its fossil-fuel plants since the late 1970s. NOx emissions have been reduced by about 50 percent, from mid-1990 levels,[182] and the agency has stated that the addition of five more scrubbers—along with switching some units to lower-sulfur coals—will reduce its sulfur dioxide emissions 85 percent by the end of this decade. Evidently, the locations of these scrubbers have been chosen to provide cost-effective environmental benefits and to improve air quality in east Tennessee and western North Carolina, areas that face particularly severe pollution problems. "While TVA believes that it must continue to reduce emissions, the agency is focusing its resources where they will produce the most substantial environmental improvements."[183]

IV. ECONOMIC IMPACT

A. The Browner Interpretation Would Result in Lost Jobs, Higher Energy Prices, and Decreased Reliability

The overriding controversy regarding how the NSR program should be interpreted and enforced is not whether air quality will continue to improve—it will—but how these improvements will be implemented, and more importantly, at what cost to productivity, reliability, the price of electricity, and, ultimately, American manufacturing jobs. A narrow RMRR exclusion, resulting in a more rigid attitude towards NSR enforcement overall, will in time precipitate a cascade of adverse consequences, including threats to the stable supply of power, higher energy costs, lost jobs, stunted economic development, and decreased workplace safety. If suppliers are forced to decommission facilities and build replacement capacity, a major capital investment, or are required to install expensive pollution control technology, the cost will ultimately be passed on to ratepayers. Moreover, forced outages resulting from neglected maintenance, lost generating capacity, or numerous plants going off-line to install pollution-control equipment could cause electricity shortages and price spikes during peak periods of demand. Finally, shutting down power facilities because of NSR enforcement will upset the balance that Congress established between environmental goals and economic growth.

1. EPA's Enforcement Cases Will Increase Electricity Prices

EPA's NSR enforcement cases come at a particularly troubling time, as recent increases in oil prices have driven up energy costs for both business and the average consumer. According to the Department of Energy's Energy Information Agency (EIA), even small increases in the price of oil directly impact the nation's economy.[184] As a matter of energy policy, the enforcement cases (and the Browner RMRR reinterpretation that underlies them), will force generators to use more expensive and volatile sources of fuel at a time when energy costs are already high. For example, as the use of coal facilities is restricted, increased demand for natural gas will raise fuel costs even more than already expected by utilities. The Utility Commission of New Mexico, for example, has forecast a 15 to 30 percent increase in the cost of natural gas in the winter of 2004–2005 because of low supply and high demand.[185] It is an economic truism that the fuel cost for alternative energy sources will increase substantially if utilities increase demand at a time of short supply. With oil prices at an all-time high, forcing generators to switch from coal-fired facilities, a domestic fuel with a relatively low and stable price, to petroleum-fired facilities, with much more volatile fuel costs, at a time when supplies are already limited, is a recipe for severe price spikes and increased costs to consumers for gas as well as electricity.

Forcing best available control technology (BACT) or lowest achievable emission reduction (LAER) retrofits on existing coal-fired facilities through NSR will require many existing facilities to choose between retrofitting these aging facilities with extremely expensive and inflexible pollution control devices or shutting down. TVA alone has estimated that it will cost more than $3 billion to comply with the lawsuits already filed against it by EPA.[186] This does not include retrofitting costs for its coal-fired facilities not challenged in the first round of lawsuits, which will be required if EPA's reinterpretation prevails. The expense of compliance with inflexible BACT and LAER requirements will render some facilities unprofitable. If these facilities become unprofitable, price increases are inevitable because utilities will either seek them directly from their regulators, or will shut these facilities down, increasing costs as less efficient, unrepaired facilities are dispatched more frequently (whereupon the utilities will seek price increases from their regulators to cover increased costs).

2. The Cost of Additional "NSR" Pollution Reductions

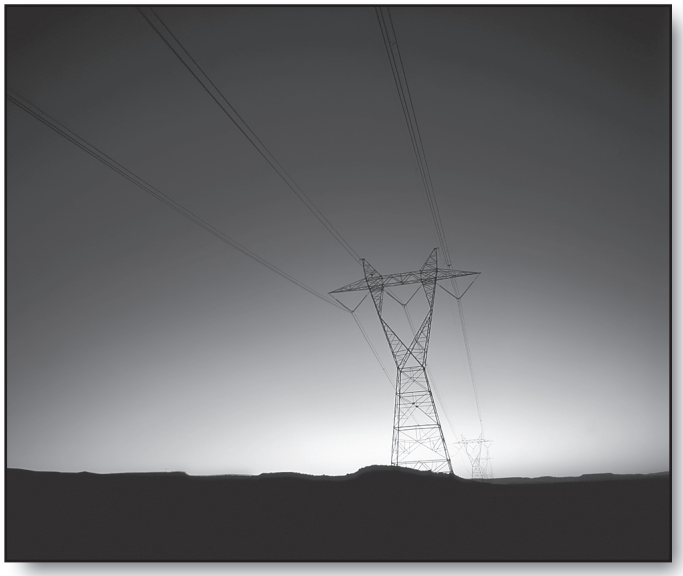
Irrespective of the manner in which power companies decide to comply with NSR, the impact will be felt most by those who can least afford it. The prospects of

...forcing vulnerable workers to shoulder the burdens of pollution reduction is a policy choice that should be squarely confronted by elected officials in public rather than quietly imposed by bureaucrats in the halls of administrative agencies.

increased unemployment are, of course, not limited to jobs directly tied to the production of electricity; the increased cost of electricity resulting from the Browner interpretation will also cause layoffs in energy-intensive industries such as manufacturing and refining. Working class and lower income families will be most affected by these job losses caused by NSR. While the economy still struggles to rebound, and factory jobs are rapidly traveling overseas to take advantage of marginally-cheaper production costs, forcing vulnerable workers to shoulder the burdens of pollution reduction is a policy choice that should be squarely confronted by elected officials in public rather than quietly imposed by bureaucrats in the halls of administrative agencies.

Representatives of labor and industry, as well as urban and rural interests, have all strongly objected to EPA's actions. These representatives understand the real-world impact of the enforcement cases. The National Association of Manufacturers (NAM) opposes EPA's reinterpretation of NSR in these enforcement proceedings. NAM objects not only to the potential loss of jobs from enforcement initiatives, it also emphasizes manufacturers' needs to make efficiency improvements to their own pollution-emitting plants.[187] In the face of the Browner interpretation, these kinds of improvements would be significantly more difficult to undertake, and the labor that would normally be required to perform them would go unemployed.

Labor advocates in the energy sector have similarly underscored this concern by pointing out the potential loss of employment for reasons unrelated to immediate shutdowns. In a letter to Senator John Edwards in January 2003, the International Brotherhood of Boilermakers explained one reason that many jobs would be put at risk without NSR reform:



> [W]hen NSR is applied in an unclear and inflexible manner to existing facilities…. facilities are discouraged from undertaking appropriate actions for fear of huge penalties or long delays or both. By applying NSR in that way, we are pretty sure that Boilermakers won't have the opportunity to work on projects that we know are extremely important to energy efficiency. Further, by reducing the useful economic life of boilers or by inaccurately setting baselines, the existing NSR confusion undermines the competitiveness of American job sites. And that means some of the almost 20 million manufacturing jobs at stake in heavy industry are placed at risk.[188]

The Boilermakers' comments show that the potential job loss would not just be a one-time shock; the competitive disadvantage the Browner interpretation would create would continue to plague energy-sector workers after the initial wave of layoffs.

3. Imposing Additional Costs Through NSR Enforcement Will Hurt the Most Economically Vulnerable

a. The Browner Interpretation Disproportionately Injures Rural Development and Interests

In addition to harming industries nationwide by increasing energy costs, using the NSR program to achieve additional emission reductions would likely disproportionately affect rural development. According to a 2002 study, businesses operating in non-metropolitan areas spend considerably more on electricity than their metropolitan counterparts.[189] "Not only do rural

businesses across all industries spend a higher proportion of their total outlays on electric utility services, the industries that are most highly concentrated in rural communities are, on average, the largest consumers of electric services."[190] Among these industries are agriculture and mining, historic mainstays of rural economies, and manufacturing, considered by many to be the future of sustainable economic development in rural America.[191] In terms of electric service expenditures as a percent of total industry outlays, these three industries are the largest consumers of electricity.[192] As a result, rural businesses are especially sensitive to changes in energy costs.

The NSR enforcement cases may harm rural populations by reducing electric service providers' contributions to local development. "Investor-owned and cooperative electric utilities are usually the leaders in organizing and funding economic development efforts in rural communities."[193] For example, "[e]lectric service providers often provide incentives to businesses looking to locate or expand in rural or distressed communities through targeted rate discounts."[194] They also often "provide funding for downtown revitalization efforts, develop new industrial parks, promote tourism, and serve as a clearinghouse for the information needs of prospective businesses."[195] NSR enforcement may cause these electric service providers to forego some such efforts in order to keep up with rising costs. Thus, one additional disincentive to locate a factory or some other business to a rural area will emerge.

b. Urban Areas and Minority Communities Will Also Suffer

The Browner interpretation of RMRR would also disproportionately harm urban and minority interests. In fact, a coalition of African American and Native American mayors and business leaders wrote to President Bush in May, 2002, calling for NSR reform. The mayors wrote that "local facilities that provide our communities with jobs and economic opportunity must be able to perform routine maintenance and add process improvements to keep their operations safe, reliable, productive and, importantly, to improve energy efficiency, decrease emissions and maintain competitive flexibility."[196] "In our view," the group noted, "the current NSR program, as applied, has a disparate impact on urban and minority communities by placing at risk economic and energy security and improvements in air quality."[197] The mayors, who are undoubtedly more in touch with local realities than EPA, argued that the misuse of the NSR program would hurt both jobs *and* air quality. While economic consequences always result from a choice to impose pollution reductions, no policymaker should support an initiative that would result in increased costs and *more* pollution. The concern over NSR enforcement is therefore put in stark relief.

c. Rising Prices Disproportionately Impact the Poor

Increased electricity prices will be shouldered predominantly by the poor. The lowest-income households pay a significantly higher proportion of their total earnings for electricity usage. In terms of average annual electric energy expenditures, households with incomes of less than $10,000 spend 6.28 percent of their incomes on electricity. Households with incomes from $10,000 to $29,999 spend 2.57% of their incomes on electric energy. By comparison, households with $30,000 to $49,999 spend only 1.84% of their incomes on electricity.[198] According to the EIA, therefore, those living at or below the poverty line pay at least 3.5 times the percentage of their income for power as those in higher income brackets. In areas already plagued by joblessness and other economic woes, NSR will increase the already heavy energy burdens on the poor. Advocates of misusing the NSR program therefore hurt those least able to afford it.

4. The Browner Interpretation Threatens Stable and Reliable Electricity Supplies

With electricity demand growing rapidly, and siting new power generation facilities remaining a contentious and time-consuming process, the Browner interpretation of RMRR also poses a serious threat to the stable and reliable supply of electricity. As the workhorses of the electric generating industry, coal-fired facilities are critical to the supply of electricity in the United States. According to the EIA, "[c]oal is the nation's primary fuel for electricity generation, representing 40 percent of generating capability."[199] Coal facilities produce "over half (52 percent) of the generation because coal is used as a baseload fuel."[200] If these plants are forced to shut down before the end of their predicted useful lives, or go off-line to install pollution controls, the nation's energy supply will be dramatically reduced. An analysis by TVA indicates that, if the Browner interpretation were legally adopted and implemented, within the first three years there would be a loss of 10.45 percent of the total electrical capability of their fossil fuel system. Within twenty years, the loss would increase to more than 32 percent. The widespread difficulties in siting new facili-

ties and the long lead time necessary to bring new facilities on-line will therefore create power shortages and substantial price increases.

Additionally, according to the EIA, demand for electricity over the next two decades is expected to increase by more than 70 percent over 1990 levels.[201] At the same time that the demand for electricity continues to grow, a restrictive application of NSR along the lines of the Browner interpretation is expected to result in the loss of a third of TVA's coal-fired generating capabilities, enough to supply 2.3 million homes.[202] In this connection, it would take ten new 500 megawatt electricity generating plants to make up for TVA's shortage alone.[203] A severe energy shortfall would be a distinct possibility as utilities across the country face the same burdens. In short, if EPA continues to bring enforcement cases for violations of NSR against coal-fired facilities, dramatic effects on the nation's energy supply are likely, if not imminent.

Of course, the East Coast blackout of 2003 powerfully demonstrated the effects a small disruption in electricity supply can have on the nation and the economy. The largest blackout in American history was caused by a brief shutdown in a single facility, yet it left 40 million people in eight states, about one in seven Americans, without electricity. Financial losses related to the outage were estimated at $6 billion. Current NSR enforcement policies magnify the risk that a similar occurrence will take place. If EPA's enforcement actions prevent facilities from engaging in routine repairs that ensure their facilities will remain operational, outages of the type that started the blackout will become more frequent.

In the wake of the 2003 blackout, numerous bills, seeking to impose broad reliability standards and severe penalties on the electric utility industry, were introduced in Congress. While Congress is considering these proposals, and working to pass reliability legislation, the EPA enforcement initiative continues to undercut Congress's effort—by enforcing NSR in a manner that effectively prevents utilities from undertaking maintenance activities necessary to maintain the reliable supply of electricity. Rigid NSR enforcement, based on the Browner interpretation, may also prevent facilities from engaging in repairs necessary to meet their existing legal duty to provide a stable supply of electricity. Utilities that own and operate electricity-generating stations have long been under a legal duty to maintain and operate their facilities in a way that ensures the safe, reliable, and efficient supply of electricity to their consumers. This legal duty was created by the utilities' compacts with the public service or public utility commissions that oversee their operations. EPA's enforcement cases, therefore, put facilities in a "Catch-22." They must forego preventive maintenance, and eventually be subjected to state and local fines for failing to maintain the electricity supply, or go through the costly and time consuming NSR process on a regular basis. State authorities, of course, have put an emphasis on reliable electricity supply. This fact once again demonstrates the divide between state authorities and the federal EPA on the enforcement cases.

B. The Browner Interpretation of RMRR Makes Safety Repairs and Replacement Increasingly Uneconomical

As the Boilermakers Union explained in its 2003 letter to Senator Edwards, the Browner interpretation would also have an important impact on workplace safety. "Industrial and utility boilers harness tremendous forces: superheater tubes exposed to flue gases over 2000 degrees; boilers under deteriorating conditions; and parts located in or around boilers subjected to both extreme heat and pressure."[204] Any EPA interpretation that creates incentives to delay maintenance "is simply unacceptable to our workers."[205] In fact, EPA itself has accepted the Boilermakers contention that its enforcement initiative discouraged facilities from undertaking routine maintenance that would avoid the catastrophic failures that could severely injure workers: "Delaying or foregoing maintenance could lead to failure of the production unit and may create or add to safety concerns."[206] When these complex, aging, and overworked facilities are forced to forego maintenance, the potential hazards to worker safety are apparent.[207]

Thus, the "all or nothing" approach mandated by a narrow understanding of RMRR creates perverse incentives for industry—incentives to postpone or forego activities that would promote safety and dependability, without a corresponding benefit to the environment.[208] A brief examination of the real world impact of the Browner interpretation and the enforcement cases based upon that interpretation of NSR demonstrates that EPA's position threatens worker safety, and will generate job losses in manufacturing and mining industries, increase energy prices, and disproportionately impact the poor and those in rural areas. When coupled with the general inefficacy of NSR in decreasing pollution (NSR may actually increase pollution by preventing maintenance that could improve

efficiency), the real impact of NSR is evident. As EPA itself concluded in its report to the President: "concern about the scope of the routine maintenance exclusion is having an adverse impact on projects that affect availability, reliability, efficiency, and safety."[209] Put simply, the enforcement cases are the worst kind of bad policy: the kind that works against its own goals.

V. New Source Review Is An Ineffective Pollution Reduction Measure

There is little doubt that EPA's NSR enforcement cases are premised upon a fundamental misconstruction of the program's purposes. Environmental activists routinely claim that existing industrial facilities in general, and power plants in particular, were merely "grandfathered" when the current CAA regime was adopted in 1970, with the NSR program ultimately serving as the means to force the decommissioning of such facilities after a certain lifespan. In fact, however, nothing in the CAA—including the NSR program—was designed to force older facilities to be decommissioned, or, more particularly, to prevent their continuing repair and maintenance so as to ensure the safety, efficiency, and reliability of their operations. Nor, for that matter, was NSR ever envisioned as an "existing source review" program to force emissions reductions from facilities as they age. Rather, NSR was established as a means of *managing emissions growth*; *i.e.*, to ensure that existing sources did not increase their original capacity to emit regulated pollutants, and to ensure that such facilities installed additional pollution controls when, and if, a plant was modified to create new and previously unregulated emissions.[210] The "grandfathered" paradigm promoted by activists and by the Browner interpretation of NSR turns this carefully crafted system on its head.

A. The Browner Interpretation of NSR Violates Congress' Conception of the CAA

Perhaps the most persistent and pernicious misconception about NSR is that it was a short term "grandfathering" provision, a grace period granted upon passage of the CAA to existing facilities. In fact, Congress has always understood, and EPA has repeatedly recognized, that power facilities have an expected operating life of up to 75 years, with a 60 year average-life expectancy. For example, in a 1989 air emission trends study used in calculating the required emissions caps for the CAA's Title IV Acid Rain program, the Agency "assumed that net dependable capacity and reliability of existing power plants would be maintained at design levels for their entire 55 to 65 year lifetime."[211] EPA provided this analysis to Congress, and consistently assumed that refurbishments would take place as necessary to achieve these average life spans without triggering NSR.

In fact, when it enacted the CAA in 1970 and then adopted the current NSR program in 1977, Congress concluded that requiring existing air emission sources to install state-of-the-art pollution control devices was an inefficient and costly way to regulate air pollution. Rather, it recognized that "building control technologies into new plants at time of construction will plainly be less costly than requiring retrofit when pollution control ceilings are reached."[212] As a result, the NSR program was designed to ensure that *new* facilities conform to strict pollution controls, while imposing new regulatory burdens on existing facilities only when they undergo a "modification"—permitting existing sources to conduct activities that are in the normal course of business and that merely allow a facility to operate at a level consistent with its original design. The reason there are a number of broad exclusions from the NSR program, including the "pollution control" exclusion (allowing pollution control devices to be installed without triggering NSR), the hours of operation exclusion (allowing an increase in hours of operation and a resulting increase in actual emissions), and the fuel switching exclusion (allowing a facility to use other fuels it was designed to accommodate), is because they are all fully consistent with NSR's modest regulatory purpose—to require installation of pollution control equipment when non-routine projects are undertaken that will increase the capacity of a facility to emit.[213]

The RMRR exclusion was, of course, created in this context—to permit activities that were expected to be undertaken in the normal course of business and that simply allow a facility to operate in a manner consistent with its original design. Significantly, many critical components of a unit, including tube components, have much shorter life-spans than the facility as a whole. It has long been routine industry practice to replace these major components when they deteriorate or break during a plant's life. These activities do not "extend" the expected life of a facility, they merely allow a facility to realize its predicted service life. Indeed, almost 50% of units currently operating had to undergo such an

As EPA concluded in its report to the President, even if the projects would ultimately be approved by EPA, utilities are "likely to forego efficiency improvements in order to avoid the uncertainty, delays and potential costs associated with NSR applicability."[220]

activity within five years of coming on-line.[214] Moreover, on average, every generating unit undergoes at least one of these activities every year. Nevertheless, although replacement of economizers, reheaters, portions of furnace walls, and other components are all predictable maintenance activities from the time a steam electricity generating facility goes on-line, under the Browner interpretation they would require NSR permitting. This means that the frequent repair and replacement projects needed to keep facilities operating safely and reliably throughout their useful lives would trigger NSR over and again.[215]

The implications of EPA's stance in the enforcement cases become even more problematic when its applicability to all major sources, including factories, industrial facilities, and utilities, is considered. If NSR were intended to force the decommissioning of power plants, it would also require decommissioning most industrial facilities, including all heavy manufacturing facilities that rely on industrial boilers for their output. There is nothing in the CAA's legislative history suggesting any intent by Congress to create an NSR program that would effectively "phase out" American industry. NSR's purpose was, and is, very straightforward: new facilities should install up-to-date pollution control equipment during construction and existing facilities should meet those standards if and when they construct new emitting capacity, *i.e.,* when they are "modified." NSR was not designed to require constant updates to pollution control equipment every time a plant was repaired.

B. NSR Was Not Intended to Force Emissions Reductions

Moreover, the purpose of the NSR program was not to force additional "emissions reductions" from power plants, or any other existing facilities. EPA itself has acknowledged that the program's purpose was only to prevent pollution increases:

> [T]he purpose of the NSR provisions is not to compel emissions *reductions* from existing sources, but to limit emissions *increases* resulting from physical or operation changes. This is evident from the statutory requirements. The NSR provisions are triggered only where a new source or a modification to an existing source results in a significant *increase* in emissions. If Congress had intended NSR to compel *decreases* in emissions, it would be irrational for the requirement to be triggered only when a facility, in fact, *increases* its emissions.[216]

EPA has, therefore, abused its administrative discretion, in violation of the APA and due process guarantees, by using its enforcement authority to transform the NSR program into one of the most costly, inflexible, and inequitable environmental programs in history.[217] This pollution reduction "strategy" is ill-suited to forcing pollution reductions because the costs of reductions will be spread asymmetrically across the industry, depending on which companies EPA decides to target. Moreover, the all-or-nothing costs of NSR prevent facilities from choosing the most efficient and cost-effective reductions.

C. The Browner Interpretation of NSR Would Harm the Environment by Discouraging Innovation

In a recent assessment of the NSR program, EPA concluded that, at least as implemented using the Browner interpretation, it would discourage facilities from undertaking activities that would benefit the environment and reduce emissions.[218] In particular, EPA estimated that the cost and delay of the NSR process "can add a year or more to the time needed to review proposed plant modifications, and cost over $1 million."[219] As EPA concluded in its report to the President, even if the projects would ultimately be approved by EPA, utilities are "likely to forego efficiency improvements in order to avoid the uncertainty, delays and potential costs associated with NSR applicability."[220] Each foregone project is a lost opportunity to reduce emissions or to increase power generation without increasing emissions.

For example, under the Browner interpretation, EPA concluded that it was *not* RMRR for a generating facility to replace old worn turbine blades with a new, more efficient turbine (known as "Dense Pack") that would have increased generating efficiency without increasing

fuel consumption. A unit's efficiency represents the relationship between the units of electricity produced per unit of fuel. Thus, if a facility increases efficiency, it can meet its generation requirement using less fuel and generating fewer emissions. In using NSR rules to discourage the use of more efficient technology, EPA bluntly admitted that the Browner interpretation served to prevent plants from increasing their efficiency, even though increased efficiency benefits the environment:

> The purpose of the Dense Pack project, *to significantly enhance the present efficiency* of the high pressure section of the steam turbine, signifies that the project is not routine…. *It would result in greater efficiency* above the level that can be reached by simply replacing deteriorated blades with ones of the same design and, in addition, *will substantially increase efficiency* over the original design. Specifically, the Dense Pack upgrade would not only *restore the 7 percent of the efficiency* rating lost over the years at each unit but *would improve the unit's efficiency by an additional 5 percent* over its original design capacity.[221]

EPA thus effectively acknowledged that it was using NSR to encourage facilities to install old, inefficient technology that increases pollution. Under a cap-and-trade program, or any modern method of pollution control, the government would encourage facilities to undertake projects like this turbine replacement.[222] However, the shortsighted, all-or-nothing approach inherent in the Browner interpretation threatens to punish facilities that attempt to reduce pollution if those reductions are not achieved exclusively through installation of expensive "end-of-pipe" retrofits. Any policymaker, member of industry, or environmentalist can plainly see that this policy is worse than inefficient: it is destructive.

In fact, activities that enhance the efficiency and reliability of plants clearly were included in the original ambit of the term "routine maintenance."[223] The RMRR exclusion is a common-sense provision, which allows facilities to undertake ordinary and necessary repairs that do not change the basic design parameters of the facility. As the 1992 WEPCO rule explained: "where an improvement involves a routine change, it is excluded from the NSR definition of 'major modification.'"[224] The fact that these activities are designed to keep existing plants in service is consistent with Congress's purpose and intent in enacting the NSR program. The Browner interpretation of the RMRR exclusion is thus both contrary to the CAA's legislative history and counterproductive as a policy matter.

1. Congress Has Abandoned Obsolete "Command-and-Control" Strategies

Significantly, EPA's efforts to transform NSR into a new engine for achieving emissions reductions is inconsistent with Congress's later, more effective pollution control measures. For example, when deciding how to

best reduce sulfur dioxide (SO_2) emissions as part of the 1990 Clean Air Act Amendments, Congress enacted a cap-and-trade program in Title IV of the CAA. It specifically rejected imposing a case-by-case BACT retrofit requirement on every affected source of SO_2 emissions, which is exactly the policy now advocated by EPA in the enforcement cases.[225]

Those market-based pollution control measures, which apply to existing facilities, have reduced emissions far more than NSR, and at a much lower cost. The Congressional Research Service (CRS) concluded that cap-and-trade programs developed since NSR was enacted in 1977 have proved far more effective at reducing pollution than NSR. Specifically, CRS noted that Title IV of the CAA reduced SO_2 emissions more in its first year of implementation than NSR has in its 20 year existence.[226] Existing facilities have exceeded the goals of Title IV, resulting in significant reductions in pollution from existing sources with almost entirely voluntary compliance.

In short, the NSR program is a relic of the outdated and inefficient command-and-control policies of the past, and any attempt to make it a centerpiece of clean air strategies, through a series of enforcement cases based on the Browner interpretation or otherwise, is unwarranted and threatens the success of Title IV and similar strategies. As facilities are required, whether through ordinary NSR processes or as a result of consent decrees resulting from EPA enforcement actions, to install the most stringent pollution controls, the market for Title IV credits produced by others is reduced, undercutting the entire system. Byron Swift, Director of the Energy and Innovation Center at the Environmental Law Institute, made this point in an article arguing that technology-neutral cap-and-trade systems should replace rate-based standards because market systems have proven to be more effective at reducing air pollution overall.[227]

In this regard, Swift has persuasively argued that current NSR regulations decrease investment in innovation, discourage operational changes that can be highly cost-effective in favor of expensive capital investments, and restrict technology choice by favoring end-of-pipe solutions over other, cleaner processes.[228] Moreover, he noted that "[a] final irony is that in a cap-and-trade situation, or in nonattainment areas where the CAA requires any new source to fully offset its emissions with matching reductions from existing sources, there are no

actual environmental benefits as there are no net NOx reductions even after the very high cost imposed by NSR."[229] EPA's Assistant Administrator for Air and Radiation, Jeffrey R. Holmstead, echoed this view, explaining that "[i]n the context of a stringent cap program of the kind that I know the President has proposed … the New Source Review program becomes entirely redundant. It honestly has no additional benefit to the environment."[230] Indeed, imposing unit-by-unit controls leaves no room for emissions trading. This is the inevitable consequence of the wrong-headed policies being advocated in enforcement actions.

2. Non-NSR Pollution Control Programs Are Working

Even absent NSR requirements, existing facilities have consistently and dramatically reduced emissions. According to a September, 2004, report prepared for the Foundation for Clean Air Progress, "[m]any areas that previously violated [National Ambient Air Quality Standards (NAAQS)] are in full compliance—and, while portions of the U.S. continue to experience periodic violations of the NAAQS, both the frequency and severity of those violations have declined."[231] This stands in contrast to "the common misimpression that the nation's air quality is poor and becoming poorer."[232] While electricity generation has increased by 66 percent since 1980 and the usage of coal as a fuel source has increased by 74 percent, SO_2 emissions from coal-burning power plants have dropped by 26 percent. Further, emissions of NO_x have been reduced by 19 percent, and those of particulate matter by 76 percent. This is because existing generating facilities are still required to implement comprehensive pollution control measures to comply with various state and federal requirements.[233]

Overlapping statutory and regulatory requirements provided by federal and state regulations are now in place to ensure that pollution reductions continue. EPA itself made this point in its brief in support of the Equipment Replacement Rule, which demonstrates that numerous other programs serve to prevent existing sources from increasing emissions:[234]

> Emission sources are subject to numerous requirements under the Clean Air Act, none of which are changed by the ERP Rule. Examples of these constraints include a cap on sulfur dioxide emissions from electric utilities imposed through the acid rain program mandated by Title IV of the Act, regional controls on volatile organic compounds and NOx designed to control ozone in the Northeast, and category-specific controls such as New Source Performance Standards. The National Emissions Standards for Hazardous Air Pollutants ("NESHAP") establish limitations on emission of hazardous air pollutants from large and small stationary sources. Moreover … sources in upwind states that contribute to ozone non-attainment … are also subject to controls on NOx emission that will take effect in 2004 as a result of EPA's "NOx SIP Call."
>
> In addition to the many federal programs to control emissions of different pollutants, the states retain powerful tools to impose further limitations. If a state were to determine that an emission increase at a particular source—which under the old rule would have triggered NSR, but which under the ERP rule does not—would impair attainment of the NAAQS or PSD increments, or otherwise pose a threat to human health or the environment, the state must address those emissions through numerous mechanisms available to it.[235]

Additionally, in implementing the NAAQS established by EPA at a level adequate to protect the public health, each State must assume that the sources within its non-attainment areas will operate at their full capacity to emit—even though this is rarely the case.[236] Thus, any increase in operation at a facility will remain within that facility's permitted capacity to emit, as taken into account in formulating the applicable SIP. By contrast, NSR, under the Browner interpretation, artificially forces such plants into deteriorated performance by discouraging, and even preventing, routine maintenance.

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The proposed Clean Air Interstate and Mercury rules provide additional regulatory mechanisms that will continue to reduce utility emissions. The Clean Air Interstate Rule, for instance, will dramatically reduce SO_2 and NOx emission in the Eastern United States through a cap-and-trade system.[237] The proposed rules mirror, in many respects, the President's Clear Skies program, which would provide a national cap-and-trade system for these emissions. As EPA has said, the President's proposal will reduce emissions "faster, cheaper, and with more certainty" than alternative programs.[238] EPA acknowledged that this mechanism is better than command-and-control regulations like NSR because "[t]he Clear Skies approach would deliver guaranteed emissions reductions of SO_2, NOx, and mercury at a fraction of command-and-control costs, increasing certainty for industry, regulators, consumers and citizens, while maintaining energy diversity and affordable electricity."[239]

Thus, overall, EPA has reinterpreted the RMRR exclusion in a way that fundamentally departs from the congressionally-mandated program, overstepping their constitutional authority and ignoring Congress's mandate that the NSR program apply only to facilities that undertake projects that increase maximum emitting capacity. The Browner interpretation is unsupportable as a matter of administrative law, but, perhaps more importantly, is an inefficient and ineffective way to protect the environment, one contraindicated by modern market-based approaches to reducing pollution.

VI. Federalism

EPA's NSR enforcement cases also implicate important federalism concerns. From the earliest days of federal air pollution regulation, Congress has primarily looked to the States to enforce the CAA, and this has especially been the case for NSR.[240] States have, in fact, consistently interpreted their NSR programs (which must include the RMRR exclusion) to permit like-kind replacements that do not increase the baseline capacity of a generating

unit.[241] When EPA challenged this understanding of the exclusion by bringing the enforcement cases, the Agency undercut the fundamental balance that had existed between state and federal authorities in enforcing the CAA. This assertion of federal control over state responsibilities conflicts with the CAA's history and purpose, and poses a significant threat to the principles of federalism, without which the current national pollution control strategy contained in the CAA could not work.

A. Enforcing the CAA is Primarily a State Responsibility

The CAA is premised on state control over pollution reduction decisions. As Congress determined in enacting the statute, "air pollution prevention … at its source is the primary responsibility of States and local governments."[242] The result has been a unique, and highly successful, federal/state partnership.[243] Although the federal government establishes national air quality standards by promulgating NAAQS, the States are responsible for developing and implementing individual State Implementation Plans (SIPs) to meet those requirements.[244] In frequently-cited language, the Supreme Court described this arrangement as follows:

> [EPA] is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, *it is relegated by the Act to a secondary role* in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met…. *The Act gives the Agency no authority to question the wisdom of a State's choices* of emission limitations if they are part of a plan which satisfies those standards [of the CAA.][245]

Indeed, so long as a State's air quality plan meets federal standards, EPA must approve a state's proffered SIP.[246]

Congress's decision to permit EPA to modify a State's SIP only under certain, limited circumstances is a clear manifestation of its intent that the Agency exercise a secondary role in CAA implementation and enforcement decisions.[247] That role was reaffirmed in 1990 when the CAA was last amended. As noted by the Senate floor managers of the legislation that became the Clean Air Act Amendments of 1990, with respect to the proposed CAA permitting program under what would become Title V:

> The permit program is predicated on the principle that the primary responsibility for its day-to-day administration will rest squarely with the state and local air pollution agencies. While EPA has an important role of providing guidance and oversight, *the agency should not unduly interfere with the states' implementation of the permit program.*[248]

Thus, because the NSR program is a part of each state's SIP, states are responsible for enforcing its requirements, and the Federal Government is relegated to a "secondary role."[249]

In contrast, the NSR enforcement cases represent an attempt to strengthen the federal government's authority over these quintessentially state decisions. By reinterpreting the RMRR exclusion, and bringing numerous enforcement actions based on that reinterpretation, EPA is asserting its primacy in enforcing this important CAA program. This claim represents a fundamental break from the CAA's structure and design, with severe consequences for the way in which regulated parties, the States, and the Federal Government currently interact.[250]

B. The Regulated Community is Entitled to Rely on Interpretations Proffered by State Authorities

Thus, the legal battle over the meaning of the RMRR exclusion is fundamentally a dispute about who has the right to interpret SIPs, and whether regulated sources are entitled to rely on interpretations provided to them by the state authorities actually charged with administering and enforcing those programs. Courts adjudicating the relationship between the Federal Government and States under the CAA have found that the States' interpretation controls because each of the SIPs are, in fact, a species of state law. For example, in *Florida Power & Light Co. v. Costle,* the United States Court of Appeals for the Fifth Circuit rejected EPA's attempt to revise Florida's SIP, finding that state authorities have the primary role in interpreting and enforcing that law.[251] As the court noted: "EPA is to be accorded no discretion in interpreting state law. Quite the contrary is true: '(the United States) should defer to the state's interpretation of the terms of its air pollution control plan when said interpretation is consistent with the Clean Air Act.'"[252] Therefore, the court concluded, EPA had abused its discretion by "entangl[ing] itself in a matter beyond its proper concern."[253]

Over the past thirty years, the RMRR exclusion has, in fact, been interpreted and enforced by the States in a

For nearly thirty years, federal officials had not questioned the States' sanctioning of routine maintenance activities, until EPA's enforcement initiative not only told states that they were improperly interpreting the RMRR exclusion, but also began imposing retroactive liability on the regulated parties who had relied on the States' interpretations.

consistent manner, permitting both like-kind replacements and other activities necessary to keep electricity generating units operating in a safe, efficient, and reliable manner. As clearly suggested by the *Florida Power & Light* Court, such existing interpretations of SIP provisions control, at least until EPA has adopted a different or contradictory interpretation through the notice and comment rulemaking process, because the construction of state law is, first and foremost, a matter for state officials. The federal government's attempt to force the Browner interpretation on the States, through widespread and simultaneous enforcement actions, represents an attempt to "usurp state initiative in the environmental realm, and thus to disrupt the balance of state and federal responsibilities that undergird the efficacy of the Clean Air Act."[254]

C. Many State Officials Have Objected to EPA's Actions

Not surprisingly, state officials across the country have confirmed that EPA's actions in the enforcement cases are inconsistent with their own construction of the RMRR exclusion. Indeed, in an effort to preserve the CAA's cooperative federalism, nine states intervened to support EPA's ERP Rule. In this context, the States reiterated that they "are responsible for implementing and enforcing the Act's New Source Review requirements."[255] These nine states also confirmed that the Browner interpretation contradicts their previous understanding of NSR, saying that the policies EPA advocated in their enforcement cases "will have a negative effect on them—*inter alia*, by increasing the costs of enforcement, constricting their enforcement options, and frustrating the achievement of the Act's pollution control goals in a more efficient and cost-effective manner."[256]

Similarly, the court's fair notice opinion in *SIGECO* cited numerous state officials responsible for overseeing NSR compliance of the facilities in question who actively challenged EPA's "enforcement case" interpretation of the RMRR exclusion. For example, George Meyer, the former Secretary of the Wisconsin Department of Natural Resources, testified that he was "troubled" by the "retroactive enforcement" of EPA's enforcement initiative, noting that:

> Guidance had been given by the delegated agency, ourselves, based on what our—what we thought the regulations and guidance to be and that we thought that was informed advice, informed advice because our people had gone through training from U.S. EPA on this. And in some cases, in individual decisions, specific concurrence had been given by U.S. EPA, and to go back and question those decisions and then base an enforcement action on it troubled me. As I headed our enforcement division for a dozen years, that's something that I clearly was troubled by.[257]

The confusion and concern of these state officials is understandable considering that many had understood EPA's prolonged silence regarding their well-settled implementation of the RMRR exclusion to represent an endorsement of their actions. For nearly thirty years, federal officials had not questioned the States' sanctioning of routine maintenance activities, until EPA's enforcement initiative not only told states that they were improperly interpreting the RMRR exclusion, but also began imposing retroactive liability on the regulated parties who had relied on the States' interpretations.

D. The States That Support EPA's Enforcement Cases are Attempting to Impose Their Regulatory Choices on Other States

There are, of course, a number of States—largely in the Northeast—that support EPA's NSR enforcement cases, and that have opposed the Agency's effort to further clarify the RMRR exclusion's metes and bounds with the ERP Rule. However, these States' motives are far from pure—they are in fact attempting to shift the burden of the environmental choices they have made onto States that have made different choices. The genius of the CAA is that it establishes national air quality requirements that are then implemented by

each of the States based on local circumstances. All roads may lead to Rome under the CAA, but there are many different routes to take. Under this system, the States are entitled to choose how to distribute the burdens and costs necessary to meet federal requirements most equitably among their own populations. Some States have chosen to impose significant costs on stationary sources of regulated pollutant emissions, which are then passed along indirectly to the consumer or born by the shareholders of the relevant companies. Others have chosen to impose these burdens more directly on all citizens by, for example, adopting stricter motor vehicle inspection and maintenance requirements. Neither choice is more or less legitimate under the CAA, although each entails different social and political costs. In addition, especially in the area of electricity generation, certain States have additional environmental requirements, or economic circumstances, that result in higher prices than elsewhere.

States that have made the choice to impose greater burdens on stationary sources should not be permitted to off-load part of the very real costs of those choices onto States that have made different choices, or that have different social and economic circumstances. This, however, would be the result if the States that argue for national application of the Browner interpretation are permitted to prevail in either advancing EPA's enforcement actions or in challenging the 2003 ERP Rule itself. Moreover, not only would this permit the policy choices made by a few, predominantly northeastern, States to be imposed on the rest of the country (in direct contravention of the CAA's own federalism principles) but it would result in disproportionate costs being retroactively imposed on States that had, for nearly three decades, taken a broad view of the RMRR exclusion consistent with congressional intent.

Neither EPA, nor those States that have been unable to achieve their policy ends—for some, the ultimate phase-out of coal-fired electricity generating units—through failed amendments to the CAA should be permitted to impose their preferred policy outcomes by reinterpreting the existing rules, effectively avoiding the fair and open policy debate inherent in the legislative process. This has, of course, been tried before, with no success.[258] Instead, Congress has consistently supported the continued use of existing coal-fired facilities while encouraging implementation of pollution reduction through both regional and national cap-and-trade programs. This choice must be both respected and defended by EPA and the States.

VII. Conclusion

Over the past six years, EPA has pursued its NSR enforcement cases, based on the Browner interpretation, without regard to either the legal or policy implications of its actions. This initiative conflicts with thirty years of well-settled enforcement practices, and is based on a reinterpretation of agency regulations that allows the government near-limitless discretion in choosing against whom it will enforce NSR. The Agency's actions violate the fundamental compact, requiring fair notice and an opportunity to participate in administrative rulemaking, between the government and the regulated community.

EPA's efforts to portray these cases as an attempt to reduce pollution from "grandfathered" sources misrepresents both the history and intent of the NSR Program. Congress created NSR to control new sources of air pollutant emissions, not to force reductions from existing sources. EPA itself has recognized that NSR, as interpreted in the enforcement cases, may result in increased pollution as plants are prevented from undertaking maintenance activities that will preserve or increase the efficiency of existing facilities. Additionally, modern and efficient cap-and-trade programs have demonstrated the ability to reduce pollution far more effectively than old command-and-control programs like NSR.

Even in the midst of the enforcement cases, EPA returned to its historical understanding of NSR when it promulgated the ERP Rule. Despite the ERP Rule's rejection of the policy rationale underlying the enforcement cases, EPA continues to prosecute utilities for common and routine repairs made at their facilities over the last two decades. Courts reviewing EPA's actions should follow *Duke Energy* and reject EPA's actions as a matter of law. The courts can in this way sustain the regulatory compact and important principles of administrative law, while also protecting the stable, affordable, and efficient supply of electricity across the nation.

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1 *See* WEPCO v. Reilly, 893 F.2d 901 (7th Cir. 1990). *WEPCO* involved an "unprecedented" life extension project involving taking various units out of commission for nine-month periods in order to rebuild deteriorated capacity. In EPA's own description, "WEPCO did not identify, and EPA did not find, even a single instance of renovation work at any electric utility generating station that approached the Port Washington life extension project in nature, scope or extent." *Id.* at 911.

2 *See* OFF. OF LEGAL POL'Y, DEP'T OF JUST., NEW SOURCE REVIEW: AN ANALYSIS OF THE CONSISTENCY OF ENFORCEMENT ACTIONS WITH THE CLEAN AIR ACT AND IMPLEMENTING REGULATIONS apps. 1-2, at 41-43 (2002) [hereinafter DOJ MEMORANDUM].

3 *See id.* app. 3, at 44-51.

4 This revised interpretation is referred to herein as the "Browner interpretation" because it was developed under Administrator Browner. However, as noted below, the Bush Administration continued to apply this interpretation until 2003.

5 *See, e.g.*, Darren Samuelsohn, *Second Wave of NSR Cases Await Bush Administration Action,* Greenwire (July 14, 2004), *at* http://www.eenews.net/sr_nsr.htm.

6 *Compare* United States v. Duke Energy Corp., 278 F. Supp. 2d 619 (M.D.N.C. 2003), *with* United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003). Two other courts issued decisions related to EPA's Environmental Appeals Board (EAB) decision regarding TVA projects. Relying on the EAB decision, a district court in Indiana deferred to EPA's use of the multi-factor WEPCO test. United States v. S. Ind. Gas & Elec. Co. (SIGECO), 245 F. Supp. 2d 994 (S.D. Ind. 2003). The Eleventh Circuit subsequently declared the EAB decision "legally inconsequential," TVA v. Whitman, 336 F.3d 1236, 1239 (11th Cir. 2003), and district courts have since declined to rely on it. *See, e.g., Duke Energy,* 278 F. Supp. 2d 619.

7 *See Duke Energy,* 278 F. Supp. 2d at 630-32, 640-44; *id.* at 640 ("[B]ased on the PSD rules, the contemporaneous interpretations of the PSD rules, and the statutory language incorporating the NSPS concept ... a net emissions increase can result only from an increase in the hourly rate of emissions.").

8 *See id.* at 630-32, 640-44.

9 *See, e.g., id.* at 637 (commenting on the impossibility of reconciling EPA's "litigation position" with both EPA's "statements in the Federal Register" and "common sense"); *id.* at 641 ("refusing to defer to EPA's interpretation of 'significant net emissions increase' because that interpretation would allow EPA to impose 'an additional condition on a regulatory exemption' ").

10 WEPCO v. Reilly, 893 F.2d 901, 909 (7th Cir. 1990) (quoting H.R. REP. NO. 95-294, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1264).

11 The term "major modification" is defined under NSR as "any physical change in or change in the method of operation of a major stationary source that would result in a significant emissions increase ... of a regulated NSR pollutant." 40 C.F.R. § 51.166(b)(2)(i) (2004). Activities that are not "major modifications", including "[r]outine maintenance, repair and replacement," do not trigger NSR. 40 C.F.R. §§ 51.165(a)(1)(v)(C)(1), 51.166(b)(2)(iii)(a) (2004).

12 To be sure, in order to meet health-based national ambient standards, all existing sources had to undertake appropriate emission reductions.

13 In the case of manufacturing facilities and American industry, the ability to conduct normal repairs is essential to maintaining their competitive position in world markets and avoiding the transfer of manufacturing production and related jobs abroad.

14 Prevention of Significant Deterioration and Nonattainment New Source Review Regulations, 67 Fed. Reg. 80,186, 80,187 (Dec. 31, 2002).

15 Standards of Performance for New Stationary Sources, 57 Fed. Reg. 32,314, 32,327 (July 21, 1992).

16 After the 1990 decision in *WEPCO*, where EPA enforced NSR against a utility that made "massive" and "unprecedented" renovations at a facility, EPA explained that its decision in that case would not affect other more common "life extension" projects undertaken by utilities. In response to Congressional concerns that routine maintenance would be subject to NSR, EPA clarified that such activities had not, and were not expected, to trigger NSR. In a letter to Senator Robert Byrd, EPA said that "it is anticipated that no existing utility unit will become subject to the [NSPS] revision due to being modified or reconstructed." Letter from John S. Seitz, Director, EPA OAQPS, to Senator Robert C. Byrd (January 26, 1996), *quoted in* United States v. SIGECO, 245 F. Supp. 2d 994, 1003 (S.D. Ind. 2003). Similarly, in a preamble to a proposed rule, the EPA said that "[f]ew, if any, changes typically made to existing steam generating

units" would subject these units to the modification rule. Proposed Revisions to Regulations for New Fossil-Fuel Fired Steam Generating Units, 62 Fed. Reg. 36,948, 36,957 (July 9, 1997).

17 Letter from Kenneth A. Schweers, President, ICF Resources Inc., to Robert A. Beck, Director, Clean Air, Fossil Fuels and Natural Resources, Edison Electric Inst. (July 26, 1989) (on file with authors).

18 Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000). In *Appalachian Power,* EPA attempted to evade judicial review of its regulations by asserting they were unreviewable because they were not "final." *Id.* As discussed below, the Department of Justice has also been forced to make this argument in enforcement cases to avoid having to reconcile the NSR enforcement cases with thirty years of conflicting agency guidance.

19 Professor John Manning argues that undue deference to interpretations of vague regulations "disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it. In these respects, it undermines the rule-of-law values served by the separation of lawmaking from law-exposition." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 669 (1996).

20 Kieran Ringgenberg, Comment, United States v. Chrysler: *The Conflict Between Fair Warning and Adjudicative Retroactivity in D.C. Circuit Administrative Law,* 74 N.Y.U. L. REV. 914, 925 (1999). Although fair notice originally was only required for criminal penalties, it now includes civil and regulatory violations. *See,* e.g., Trinity Broad. of Fla., Inc., v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000).

> Because due process requires that parties receive fair notice before being deprived of property, we have repeatedly held that in the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.

Id. (internal quotations omitted); United States v. Chrysler Corp., 158 F.3d 1350, 1354 (D.C. Cir. 1998) ("[A] regulation carrying penal sanctions must give fair warning of the conduct it prohibits or requires." (citing Rollins Envtl. Servs. Inc. v. EPA, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991))); *id.* at 654 n.1 (Edwards, J., concurring in part and dissenting in part) ("It is basic hornbook law in the administrative context that the application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited.") (internal quotation omitted); Satellite Broad. Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."); Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) ("[T]he due process clause prevents ... the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.").

21 "Fair notice ... goes to the very heart of the principle of the rule of law—that individuals should be treated in accordance with articulated legal standards." Albert C. Lin, *Refining Fair Notice Doctrine: What Notice is Required of Civil Regulations?,* 55 BAYLOR L. REV. 991, 996 (2003).

22 *See, e.g.,* Cheek v. United States, 498 U.S. 192, 199 (1991) ("Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law.").

23 As the Supreme Court said in a case involving the application of complicated tax laws, "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the[ir] duties and obligations ...." *Id.* at 199-200; *see also* Manning, *supra* note 19, at 682:

> The concerns about unchecked power that animate the separation [of powers] norm surely have no less, and perhaps far more, purchase in a complex twentieth-century society whose government pervades our daily lives in a way that few could have imagined in 1787. With administrative agencies exercising delegated lawmaking authority, as well as performing executive and adjudicative functions, it is crucial to have some meaningful external check upon the power of the agency to determine the meaning of the laws that it writes.

24 Indeed, the claim in most current administrative fair notice cases is not that parties were unaware of the law, it is that they were unaware of the agency's subsequent interpretation of that law. *See* Jason Nichols, Note, *Sorry! What the Regulation Really Means Is ...": Administrative Agencies' Ability to Alter an Existing Regulatory Landscape Through Reinterpretation of Rules*, 80 TEX. L. REV. 951, 968 (2002) ("Fair notice dictates that rules may not be enforced unless they clearly state what is required. 'Ignorance of the law,' alternatively, is based upon a lack of knowledge that a law exists, rather than confusion over the interpretation of an existing law.").

25 "Environmental … schemes are notoriously ambiguous. Agencies have different divisions and offices which often disagree. They operate under a history of different administrations with inconsistent philosophies. They also have a habit of offering unclear or even conflicting guidance in regulations, Federal Register preambles, and separate guidance documents." Timothy A. Wilkins, *Regulatory Confusion, Ignorance of Law, and Deference to Agencies:* General Electric Co. v. EPA, 49 SMU L. REV. 1561, 1577 (1996).

26 528 F.2d 645, 649 (5th Cir. 1976).

27 *Id.*

28 *Id.* at 650.

29 United States v. Chrysler Corp., 158 F.3d 1350, 1357 (D.C. Cir. 1998). The cases in this area can be broken down into three broad categories: (1) where the agency is interpreting a regulation for the first time, the court will defer to the agency so long as the interpretation is reasonable and not applied in a way that violates principles against retroactivity; (2) if the defendant received notice of a new interpretation from an appropriate agency, fair notice will not be available as an affirmative defense; (3) where an agency has inconsistently interpreted its regulations, or changed its interpretation without proper notice, the agency's enforcement will be found unlawful. See Nichols, *supra* note 24, at 970.

30 *See, e.g.*, Beaver Plant Operations, Inc. v. Herman, 223 F.3d 25, 29 (1st Cir. 2000) (placing burden on agency to prove that defendant had constructive notice of its interpretation); *Chrysler Corp.*, 158 F.3d 1350 (ruling that car manufacturer did not have fair notice of crash test requirements when agency attempted to force recall of cars without elaborating on the ambiguous regulations the manufacturer was found to have violated); Upton v. SEC, 75 F.3d 92, 98 (2d Cir. 1996) (no fair notice when agency "took no steps to advise the public that it believed the practice was questionable"); United States v. Trident Seafoods Corp., 60 F.3d. 556, 559 (9th Cir. 1995) (refusing to adopt agency's interpretation of a regulation because "the agency had both the opportunity and the obligation to state [its interpretation] clearly in its regulations."); Gen. Elec. Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) (finding that lack of fair notice negated both the penalty and finding of liability); Ga. Pac. Corp. v. OSHRC, 25 F.3d 999, 1005 (11th Cir. 1994) (per curiam) (vacating safety standard because vague and unreasonable); Rollins Envtl. Servs. Inc. v. EPA, 937 F.2d 649 (D.C. Cir. 1991) (deferring to agency's interpretation of TSCA regulations, but refusing to impose civil penalty because appellant lacked fair notice of EPA's interpretation of the regulation); Dep't of Labor v. Gardner, 882 F.2d 67, 70 (3d Cir. 1989) ("Our deference to an agency's consistent interpretation of its regulations, however, is tempered by our duty to independently insure that the agency's interpretation comports with the language it has adopted."); Dravo Corp. v. OSHRC, 613 F.2d 1227, 1234 (3d Cir. 1980) (declining to sanction employer for non-compliance with safety standards "without adequate notice in the regulations of the exact contours of his responsibility"). *See also* Manning, *supra* note 19, at 671 (noting that this approach has "gained currency" in appellate courts as a way to deal with agencies' promulgation of vague regulations that do not provide sufficient notice).

31 Margaret N. Strand, *The "Regulatory Confusion" Defense to Environmental Penalties: Can You Beat the Rap?*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,330 (May 1992).

32 A party "proceeding in good faith should not be subjected to a trap brought about by an interpretation of a regulation hidden in the bosom of the agency." *Gardner,* 882 F.2d at 71.

33 53 F.3d at 1328-29.

34 *Id.* at 1329.

35 *See id.* at 1330-34. As discussed *infra*, EPA's recent revisions to the RMRR rule, providing for a more robust exclusion, help illustrate the Agency's inability to solidify its interpretation.

36 *See* Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) (finding agency's enforcement action unlawful because it did not provide "constitutionally adequate notice" of its interpretation). "Courts must give deference to an agency's interpretation of its own regulations. Where the imposition of penal sanctions is at issue, however, the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Id.* (internal citations omitted).

37 467 U.S. 837 (1984).

38 533 U.S. 218 (2001).

39 *Chevron*, 467 U.S. at 842.

40 *Mead*, 533 U.S. at 228.

41 *See generally* Manning, supra note 19, at 654-80.

42 *See, e.g., Mead*, 533 U.S. 218.

43 *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1318 (1992) ("The prospect of avoiding legislative procedures encourages the agency to be cagey rather than candid, and to state its rules loosely rather than precisely.").

44 *See* Nichols, *supra* note 24, at 952 ("Courts' complicity with agency interpretations contrasts with the common law's fair-notice doctrine and its hostility for enforcement of laws devoid of reasonable notice.").

45 325 U.S. 410, 414 (1945); *see also* Auer v. Robbins, 519 U.S. 452, 461-62 (1997).

46 Miller v. AT&T Corp., 250 F.3d 820, 832 (4th Cir. 2001) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)); *see also* Pauley v. BethEnergy Mines, 501 U.S. 680, 698 (U.S. 1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.").

47 The D.C. Circuit has granted policy-level deference even when finding that the agency did not provide sufficient notice of an interpretation to allow enforcement. *See* Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995) ("Through this policy of deference, agencies, not courts, retain control over which permissible reading of the regulation they will enforce. Appropriately so, since it is the agencies, not the courts, that have the technical expertise and political authority to carry out statutory mandates.").

48 James Madison famously warned of the self-aggrandizement that would result from combination of powers in the hands of one government body; "[The] accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961), *quoted in* Manning, *supra* note 15, at 674.

49 *See* Christopher D. Pixley, *Finding Middle Ground on Federal Retroactive Regulatory Lawmaking*, 27 CAP. U. L. REV. 255, 270 (1999):

> [T]he profound authority conferred by the [*Chevron*] doctrine may violate the separation of powers principle of the federal Constitution. The concern is the legislative power which the Constitution confers upon Congress may be usurped by the power of administrative agencies to make determinations of law, thereby giving the agencies the power to create law. Further, the *Chevron* doctrine may also usurp judicial authority. A judicial approach entailing stricter scrutiny of agency interpretations would rein-in the broad quasi-executive, quasi-legislative and quasi-judicial powers of administrative agencies only so far as it would place greater checks on the agency decision-making process.

50 Manning, *supra* note 19, at 617. Manning provides a thorough and compelling constitutional, statutory, and policy argument for requiring stricter judicial oversight of agency interpretations of their own regulations to provide "some meaningful external check upon the power of the agency to determine the meaning of the laws that it writes." *Id.* at 682. Manning argues that providing clear rules will lower costs both to the regulated community and agencies because clear rules will make it easier for parties to determine what the law requires, and enforcement costs will decrease when the laws are transparent. *See id.* at 655-56.

Similarly, Justice Thomas addressed this point in his four-member dissent in *Thomas Jefferson University:*

> By giving substantive effect to such a hopelessly vague regulation, the Court dis-

> serves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to resolve ... ambiguity in a statutory text.... It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

512 U.S. at 525 (Thomas, J., dissenting); *see also infra* notes 139-42 and accompanying text; 2 KENNETH CULP DAVIS & RONALD J. PIERCE, ADMINISTRATIVE LAW § 11.5, at 204 (3d ed. 1994) ("An agency whose powers are not limited either by meaningful statutory standards or ... legislative rules poses a serious potential threat to liberty and to democracy"), *quoted in Thomas Jefferson Univ.*, 512 U.S. at 525.

51 *See* Bowsher v. Synar, 478 U.S. 714 (1986).

52 *See* INS v. Chadha, 462 U.S. 919 (1983).

53 5 U.S.C. § 551(4) (2000) (emphasis added).

54 *See* Nichols, *supra* note 24, at 953:

> A preference for the rule of law is not surprising within the context of agency overreaching. Recent fair-notice cases, together with the APA, demonstrate an institutional acknowledgment that individual liberties justify this limited utilization of the fair-notice doctrine and rule of law. Three primary benefits arise from this policy choice. First, if the courts rid administrative law of the possibility of sudden reworkings of enforcement regulations, businesses will be able to plan for the substantive requirements of the legislation, thus allowing a more gradual and more economically efficient move toward compliance. Second, the policy choice will ease the burden on the agency, the regulated party, and the courts by reducing after-the-fact litigation. Finally, a requirement for notice of rulemaking in the wake of reasonable reliance upon an agency's previous interpretation would provide for greater connections between rules and realities. With the increased public involvement inherent in traditional APA rulemaking, agencies will create achievable regulations with less litigation following in their wake.

55 48 U.S. 204 (1988); *see also id.* at 216 (Scalia, J., concurring) ("Rule 'means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy….") (quoting 5 U.S.C. § 551(4)) (alteration in original).

> The only plausible reading of the italicized phrase is that rules have legal consequences only for the future…. A rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule—may for that reason be arbitrary or capricious and thus invalid.
>
> *Id.* at 216, 220 (internal quotations omitted).

56 Pixley, *supra* note 49, at 258 (emphasis added).

57 *See* Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation … through the process of notice and comment rulemaking."); Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1332 (D.C. Cir. 1995) (stating that a previous agency interpretation of its regulations, even if erroneous, is evidence "that the agency's interpretation of its own regulations could not possibly have provided fair notice"). *Cf.* United States v. Chrysler Corp., 158 F.3d 1350, 1356 (D.C. Cir. 1998) (stating that "an agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation").

58 *See Paralyzed Veterans of Am.*, 117 F.3d at 588 ("If the statute or rule to be interpreted is itself very general, using terms like 'equitable' or 'fair,' and the 'interpretation' really provides all the guidance, then the latter will more likely be a substantive regulation.").

59 *See Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1035-36.

60 117 F.3d 579 (D.C. Cir. 1997).

61 177 F.3d 1030 (D.C. Cir. 1999).

62 128 F.3d 216 (4th Cir. 1997).

63 158 F.3d 1350 (D.C. Cir. 1998).

64 *Cf.* Dep't of Labor v. E. Associated Coal Corp., 54 F.3d 141, 147, 149 (3d Cir. 1995) ("[A]ny deference [] is tempered by our duty to independently insure that the agency's interpretation comports with the language it has adopted…. We reiterate that we cannot accord more deference to the Director's interpretation of the regulation than to the actual regulation.").

65 128 F.3d 216.

66 *Id.* at 221; *see also* Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (stating that an agency's interpretation of its own regulations should receive "a high level of deference" and regulated parties face "an uphill battle" in overcoming this standard).

67 Diana R. Miller, Note, United States v. Hoechst Celanese Corporation: *Can the Agency Deference Doctrine Withstand a Regulatory Confusions Defense?*, 27 N. KY. L. REV. 577, 592 (2000). The author notes that the court granted the fair notice defense even though it believed that the agency's interpretation was the better of the two possible readings. Thus, under an objective analysis of the fair notice doctrine, the existence of another permissible reading is sufficient to justify a finding of regulatory confusion if the regulated party did not have notice of the agency's interpretation. *See id.* at 596.

68 *Hoechst Celanese Corp.*, 128 F.3d at 224 (quoting Cheek v. United States, 498 U.S. 192, 199 (1991)).

69 *Id.* at 226; *see also* Ringgenberg, *supra* note 20, at 924 (stating that a fair notice analysis "centers on the perspective of the defendant, not the agency, in that it only inquires into the defendant's ability to predict the agency's interpretation").

70 The Court did not object to the fact that this ruling applied to similar operations at another facility since defendant did not "fail to make any inquiry" and was provided a reasonable basis to believe that the regulations did not apply. *Hoechst Celanese Corp.*, 128 F.3d at 226.

71 In a strongly worded partial concurrence and dissent, Judge Niemeyer disagreed with the majority opinion, which found that penalties could be imposed once the company was contacted by the office responsible for enforcement, because the statements of one EPA region should not be considered an "authoritative" agency interpretation where there was significant internal confusion within the Agency.

> I have no difficulty with enforcing any consistent and rational EPA interpretation prospectively, but to impose penalties in the circumstances of this case is tantamount to punishment on the unfocused whim of a bureaucracy that could not itself agree on the proper reading of its own regulation.... [T]his notice should not, against the background of inconsistent EPA interpretation over time and throughout the different regions, constitute a definitive agency-wide EPA notice such that penalties could be imposed for non-compliance with one interpretation.

Id. at 230, 233 (Niemeyer, J., concurring in part and dissenting in part).

72 Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,271 [hereinafter ERP Rule]. Even after the ERP Rule's creation, EPA has continued to prosecute enforcement actions based on its late 1990s reinterpretation of RMRR.

So far, only one appellate court, the Eleventh Circuit in *TVA v. Whitman,* has heard an appeal of an enforcement case. 336 F.3d 1236 (11th Cir. 2003). This case was an appeal from a decision of the EAB, which found that TVA had violated NSR. EPA's administrative action against TVA, itself a government agency, demonstrates that even power facilities owned and operated by the government engaged in routine maintenance that EPA has now decided violated NSR. *See infra* Part III.

Although the Eleventh Circuit did not reach the fair notice issue, it cites Nichols, *supra* note 24, "for a thorough analysis of TVA's fair notice claim." *TVA,* 336 F.3d at 1245. The note endorses a fair notice claim to prevent agencies from unfairly changing regulations, saying in part, "where the agency changes that interpretation such that a regulated party's reliance upon an earlier interpretation is put in jeopardy, or where the agency's sudden change substantially impacts the regulated party, the rule of law as

embodied in the APA takes over and guards the individual's liberty." Nichols, *supra* note 24, at 981.

73 DOJ MEMORANDUM, *supra* note 2, at 2.

74 Suggesting that the policy merits of EPA's position are at least questionable, DOJ concluded its report by emphasizing that the report "does not attempt to address whether the Department or EPA could have chosen other methods of achieving reductions in air pollution emissions. In addition, the review leaves untouched any policy implications the new source review enforcement actions may have on the national energy policy of the United States." *Id.* at 39. This is a suggestive statement, considering that the Justice Department memorandum cited EPA's report to the President on NSR, which concluded that

> [a]s applied to existing power plants and refineries ... the NSR program has impeded or resulted in the cancellation of existing projects which would maintain and improve reliability, efficiency and safety of existing energy capacity. Such discouragement results in lost capacity, as well as lost opportunities to improve energy efficiency and reduce air pollution.

ENVTL. PROT. AGENCY, NEW SOURCE REVIEW: REPORT TO THE PRESIDENT 1 (2002) [hereinafter EPA REPORT].

75 This is truly a hypothetical situation, as EPA has since passed through notice and comment rulemaking NSR rules that embody a vision of NSR different than that taken by the NSR enforcement cases, and which conform to EPA's pre-enforcement initiative implementation of the rules. *See* ERP Rule, *supra* note 72.

76 DOJ MEMORANDUM, *supra* note 2, at 5 n.24.

77 EPA's failure to act to enforce its interpretation can be equivalent to final action that will provide for judicial review. *See* Telecomm. Research and Action Ctr. v. FCC, 750 F.2d 70, 75 (D.C. Cir. 1984) (asserting jurisdiction over claim of unreasonable delay when the lack of a final order was the core of the petitioner's complaint).

78 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

79 *See, e.g.*, Boutilier v. INS, 387 U.S. 118, 123 (1967) (stating that the void for vagueness doctrine applies when the rule or standard is so ambiguous that a clear standard cannot be extracted from the language); Ga. Pac. Corp. v. OSHRC, 25 F.3d 999, 1005 (11th Cir. 1994) (per curiam) (holding that when the Secretary of an agency is unable to settle upon a single definition of a critical term or phrase of his agency's own regulation, the regulation is unconstitutionally vague for failing to give sufficient guidance); Kropp Forge Co. v. OSHRC, 657 F.2d 119, 123 (7th Cir. 1981) (finding that a regulation is unconstitutionally vague when it does not provide reasonable notice of the conduct prohibited "in light of the common understanding"); Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157, 161 (3d Cir. 1978) (noting that the Secretary of an agency has the responsibility and means to promulgate clear and unambiguous standards).

80 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926), *cited in Ga. Pac. Corp.*, 25 F.3d at 1005.

81 DOJ MEMORANDUM, *supra* note 2, at 38.

82 Serious separation of powers concerns are also raised by vague regulations since a court will ultimately have to review and endorse the agency's position based on the court's reading of ambiguous regulations. For that reason, a court should require an agency to cure the vagueness problem through remand to the agency rather than attempt effectively to write the regulations through judicial opinion. "When a regulation fails in its purpose because of vagueness, the Secretary should remedy the situation by promulgating a clearer regulation rather than forcing the judiciary to press the limits of judicial construction." *Ga. Pac. Corp.*, 25 F.3d at 1006.

83 *See, e.g.*, United States v. Hoechst Celanese Corp., 128 F.3d 216, 226 (4th Cir. 1997) (considering EPA letter to facility in different region persuasive in proving no fair notice of agency interpretation); Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1332 (D.C. Cir. 1995) (conflicting letters from EPA enforcement regions evidence of confusion); Sekula v. FDIC, 39 F.3d 448, 456-57 (3d Cir. 1994) (statements in pamphlets issued by agency were relevant to fair notice defense).

84 Memorandum from Edward E. Reich, Director, EPA Division of Stationary Source Enforcement, to Howard G. Bergman, Director, EPA Enforcement Division Region VI (Oct. 3, 1978) (on file with authors). "Reconstruction" is defined as a capital expenditure that exceeds 50 percent of the cost of a comparable unit.

85 OFF. OF AIR QUALITY PLANNING AND STANDARDS, ENVTL. PROT. AGENCY, ELECTRIC UTILITY STEAM GENERATING UNIT BACKGROUND INFORMATION FOR PROPOSED PARTICULATE

EMISSION STANDARDS, at 5-4 (1978).

86 OFF. OF AIR QUALITY PLANNING AND STANDARDS, ENVTL. PROT. AGENCY, CALCINERS AND DRYERS IN MINERAL INDUSTRIES—BACKGROUND INFORMATION FOR PROPOSED STANDARDS, at 5-2 (1985).

87 Memorandum from Kathy Wertz, Radian Corp., to Dianne Byrne, Off. of Air Quality Planning & Standards, Envtl. Prot. Agency 3 (July 3, 1986) (on file with authors).

88 Standards for Performance for New Stationary Sources, 57 Fed. Reg. 32,313, 32,326 (1992).

89 United States v. SIGECO, 245 F. Supp. 2d 994, 1003 (S.D. Ind. 2003).

90 For example, in 1991, the Massachusetts Department of Environmental Protection explained that replacement of economizer and superheater tube banks is "maintenance related." Letter from James E. Belsky, Air Quality Sec. Chief, Mass. Dep't of Envtl. Prot., to Andrew H. Aitken, Dir. of Envtl. Aff., New England Power 1 (Mar. 29, 1991) (on file with authors); *see also* Letter from Andrew H. Aitken, Dir. of Envtl. Aff., New England Power, to James A. Belsky, Air Quality Sec. Chief, Mass. Dep't of Envtl. Prot. 1 (Mar. 6, 1991) (on file with authors). In 1988, the Indiana agency said that superheater and reheater replacement and turbine restoration is routine. *See* Letter from Felicia George, Ind. Dep't of Envtl. Mgmt., to Anthony C. Sullivan, Barnes & Thomburg (Jan. 27, 1998) (replacing superheater and reheater tubes and turbine blades fall under the maintenance, repair and replacement exclusion) (on file with authors). In 1997, the Illinois agency said replacement of boiler floor tubes, reheater, cyclone burners, and air heater retubing is not a modification. *See* Ill. Envtl. Prot. Agency, Construction Permit, Commonwealth Edison Co., Kincaid Generating Station 1 (Nov. 21, 1997) (on file with authors); Letter from Scott B. Miller, Supervisor of Air Quality, Ill. Envtl. Servs. Dep't, to Donald E. Sutton, Permit Sec. Manager, Ill. Envtl. Prot. Agency 2 (Aug. 25, 1997) (on file with authors). These examples are representative of many other state permitting agency interpretations of the RMRR exclusion that comport with EPA's long-held interpretation.

91 Plaintiffs' Reply Memorandum in Support of Early Liability Trial on a Representative Plant, United States v. Am. Elec. Power Serv. Corp., (S.D. Ohio 2001) (No. C2-99-1182) (on file with authors).

92 EPA Memorandum in Support of Motion for Reconsideration, United States v. Duke Energy, 278 F. Supp. 2d 619 (M.D.N.C.) (04-1763)

93 *See infra* notes 125-59 and accompanying text.

94 The best understanding of the guidance issued by EPA on NSR was that EPA interpreted the exclusion to apply narrowly, *i.e.,* to activity that creates new and unregulated emissions capacity, with a few out-of-place rulings scattered among an otherwise consistent understanding.

95 278 F. Supp. 2d 619.

96 276 F. Supp. 2d 829 (S.D. Ohio 2003).

97 One commentator who analyzed the enforcement cases and the fair notice requirement concluded:

> [T]he fair-notice cases demonstrate an emerging consensus among the federal appeals courts: If an interpretation changes overnight or damages a reliance interest, fairness bars retroactive enforcement. In the present enforcement action, because EPA's reinterpretation of the routine modification was applied retroactively, interests of fairness—as reflected by ample authority—should bar its enforcement against the utilities for conduct performed before the rule revision.

Nichols, *supra* note 24, at 982.

98 Though promised in 1992 "by early summer," EPA did not provide substantive guidance until the RMRR Rule was promulgated in October of 2003.

99 Standards of Performance for New Stationary Sources, 57 Fed. Reg. 32,314, 32,326 (1992) (emphasis added).

100 United States v. SIGECO, 245 F. Supp. 2d 994, 1003 (S.D. Ind. 2003).

101 *Id.* (emphasis added).

102 *Duke Energy Corp.,* 278 F. Supp. 2d at 638 (quoting Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999)) (internal citations omitted).

103 *See SIGECO,* 245 F. Supp. 2d 994.

104 276 F. Supp. 2d at 833.

105 *Id.* Despite EPA's lack of enforcement and undeniable confusion among both the regulators and the regulated regarding the scope of the routine mainte-

nance exclusion, the court in *Ohio Edison* found that the regulations at issue are "clear." *Id.* at 889. Finding the utilities guilty on this basis, the court still said that it would take the "less than consistent" enforcement efforts into account in the penalty phase. *Id.* at 834.

106 *Id.* at 855.

107 *Id.* at 889.

108 *See, e.g.*, WEPCO v. Reilly, 893 F.2d 901, 908 (7th Cir. 1990) (finding that the language in the regulations was "anything but plain"). *WEPCO* applied *Chevron* to determine the scope of the "routine maintenance" exemption, and found that "[t]he EPA is entitled to substantial deference in interpreting the technical provisions of the Act and its own regulations. We cannot grant deference, however, where the EPA has attempted to implement the Act's lofty goals in contravention of its own statutory regime." *Id.* at 919.

109 276 F. Supp. 2d at 850.

110 *Id.* at 833.

111 60 F.3d 556 (9th Cir. 1995).

112 *Id.* at 559.

113 245 F. Supp. 2d at 1013.

114 In *United States v. Chrysler Corp.*, the D.C. Circuit clearly states that the proper inquiry to determine whether there was fair notice is if "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expected parties to conform." 158 F.3d 1350, 1355 (D.C. Cir. 1998) (quoting Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

115 For example, the court notes that Congress defined the term "modification" broadly enough to encompass almost any activity, including the replacement of leaky pipes. As acknowledged in the *WEPCO* decision, EPA promulgated the routine maintenance exclusion to prevent the rule from swallowing every activity at a plant. In reasoning that is dizzyingly circular, the court concludes from this that the RMRR exclusion could not be read broadly because it "would flout the Congressional intent evidenced by its broad definition of modification." *SIGECO*, 245 F. Supp. 2d at 1009. The court in one step acknowledges that the RMRR exclusion was promulgated to narrow the potentially broad reach of the term "modification," but then denies that this exclusion should have any substance.

116 *Id.* at 1004 (quoting IDEM non-applicability determination).

117 The Court also suggests that the state agency's decision was legally invalid because it excluded "like-kind" replacements at the facility, and there is no "like-kind" exclusion from the NSR program. *Id.* at 1022. This is another example of the strained reasoning of the court—"like-kind" replacement is a simple shorthand, used throughout the history of NSR enforcement, to indicate an equivalent equipment replacement—which is by definition routine repair and replacement.

118 *Id.* at 1011 (citing *Gen. Elec. Co.*, 53 F.3d at 1332).

119 *Id.* at 1021; *see also* Strand, *supra* note 31, at 10,343.

> EPA faces a monumental task to administer the vast environmental programs that Congress has enacted, and much of the authority for enforcement is spread among the ten EPA regional offices. The many separate EPA offices scattered around the country must regularly provide interpretations of regulations as they administer their programs; they may provide inconsistent or conflicting interpretations. At the same time, administrative, civil, and criminal enforcement of the environmental programs are expanding. *The ingredients are all present for the issue of confusion over the scope and meaning of regulatory requirements to arise more frequently in enforcement actions.*

Id. (citation omitted) (emphasis added).

120 SIGECO also offered testimony from state officials who objected to the Agency's enforcement of NSR because it contradicted past guidance. The former Secretary of the Wisconsin Department of Natural Resources, George Meyer, objected to the "retroactive enforcement" of NSR, saying:

> Guidance had been given by the delegated agency, ourselves, based on what our—what we thought the regulations and guidance to be and that we thought was informed advice, informed advice because our people had gone through training from U.S. EPA on this. And in some cases, in individual decisions, specific concurrence

had been given by U.S. EPA, and to go back and question those decisions and then base an enforcement action on it troubled me. As I headed our enforcement division for a dozen years, that's something I clearly was troubled by.

SIGECO, 245 F. Supp. 2d at 1006.

121 This decision also raises substantial federalism concerns because the court effectively reduced the state agency's determination to dicta even though Congress intended such agencies to have primary enforcement responsibility for the NSR program under the CAA. *See* Christopher S. Decker, *Corporate Environmentalism and Environmental Statutory Permitting,* 46 J.L. & ECON. 103, 107 (2003).

122 *See* WEPCO v. Reilly, 893 F.2d 901, 910 (7th Cir. 1990).

123 *SIGECO,* 245 F. Supp. 2d at 1023.

124 United States v. Chrysler Corp., 158 F.3d 1350, 1354 (D.C. Cir. 1998).

125 *SIGECO,* 245 F. Supp. 2d at 1023.

126 499 U.S. 144 (1991).

127 *Martin* focused on the interpretation of the concededly ambiguous term "respiratory protection program" and the extent of procedures required to find a violation. *Id.* at 148.

128 *Id.* at 158 (citations omitted). The Court also emphasized that agency positions taken during litigation are not entitled to deference.

> Our decisions indicate that agency 'litigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court. Because statutory and regulatory interpretations [were] furnished … *after* agency proceedings have terminated, they do not constitute an exercise of the agency's delegated lawmaking powers.

Id. at 156-57. *Cf.* David M. Gossett, Comment, Chevron, *Take Two: Deference to Revised Agency Interpretations of Statutes,* 64 U. CHI. L. REV. 681, 691-92 (1997):

> If courts deferred to litigation positions, agencies would almost never lose cases. All that an agency would have to do to win a case would be to "interpret" the statute in its brief, regardless of the agency's actual interpretation of that statute or the position it had argued to the court in a previous case.

129 *Trident Seafoods Corp.,* 60 F.3d at 559 (citation omitted).

130 The holding is even more notable because Justice Thurgood Marshall, who was generally sympathetic to environmental causes in his decisions, favorably cites a portion of Justice Scalia's concurrence in *Bowen v. Georgetown University Hospital,* which says that an agency cannot, under the APA, change the law retroactively, and that "[a] rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary or capricious,' and thus invalid." 488 U.S. 204, 220 (Scalia, J., concurring) (citation omitted). Scalia's opinion strongly suggests that EPA's actions in penalizing utilities for their reliance on preexisting agency rules not only violated fair notice, but might also render the entire enforcement regime arbitrary and capricious.

131 *See* 42 U.S.C. § 7607(d) (2000); *see also* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (2000).

132 Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987)

133 *See id.*

134 *Id.* at 1045.

135 Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) ("An interpretative rule simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.") (citations omitted); *see also* Anthony, *supra* note 43, at 1328 (stating that a rule is legislative if "parties are reasonably led to believe that failure to conform will bring adverse consequences, such as an enforcement action or denial of an application").

136 *See* Anthony, *supra* note 43, at 1355:

> [T]he illustrative judicial decisions … support this simple proposition: If a document

expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures. The legislative rulemaking process must be utilized if the document is to have the binding effect the agency has in view.

137 208 F.3d 1015, 1024 (D.C. Cir. 2000).

138 *Id.* at 1021 (emphasis added) (citing Anthony, *supra* note 43, at 1328-29).

139 Anthony, *supra* note 43, at 1328.

140 874 F.2d 205 (4th Cir. 1989).

141 *Id.* at 208.

142 *Id.*

143 Courts do not treat interpretive rules as requiring notice and comment because they are giving force to what Congress has already enacted through its legislative powers. "The courts do not treat interpretations as making new law, on the theory that they merely restate or explain the preexisting legislative acts and intentions of Congress." Anthony, *supra* note 43, at 1324 (citing Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (stating that legislative rules "merely explicat[e] Congress' desires")). This understanding is supported by *Chevron* itself, which involved the interpretation of a statutory provision by an agency for the first time, not a reinterpretation of an agencies own regulations. The Court specifically noted that it did not believe an earlier interpretation enforced by the agency was properly attributable to the agency. Instead, the Court concluded "that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency." Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 864 (1984). Thus, *Chevron* holds only that agencies deserve deference when they interpret a statute for the first time.

144 Notice and comment requirements "serve two purposes: (1) to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules." McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (internal quotations omitted).

145 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) (citation omitted). It is, of course, important to note that *Paralyzed Veterans* and its progeny do not prevent an agency from revising its regulations. However, they do require that agencies notify the regulated community of these changes through notice and comment rulemaking.

146 177 F.3d 1030 (D.C. Cir. 1999). The D.C. Circuit's position has subsequently been supported in other cases and in other circuits. *See, e.g.,* Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 629 (5th Cir. 2001) ("We agree with the reasoning of the D.C. Circuit; the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation.") (quoting *Alaska Prof'l Hunters Ass'n,* 177 F.3d at 1034 ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.")); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements…. by labeling a major substantive legal addition to a rule a mere interpretation."). *Cf.* New York v. Shalala, 119 F.3d 175, 183 (2d Cir. 1997) (noting that enforcement contradicting prior agency interpretations could create "manifest injustice" that would defeat fair notice); *Jerri's Ceramic Arts*, 874 F.2d at 207 (stating that the greater the change from a previous interpretation, "the less likely the change can be considered merely interpretive").

147 *Alaska Prof'l Hunters Ass'n,* 177 F.3d at 1035 (internal quotation omitted).

148 *Id.*

149 *See, e.g.,* United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 636-37 & n.13; *supra* notes 81-86 and accompanying text.

150 Dep't of Labor v. Gardner, 882 F.2d 67, 71 (3d Cir. 1989).

151 When an agency seeks to change its interpretation of a rule, it is not exercising its interpretive authority as

an extension of Congress' legislative authority. Rather, the agency is acting legislatively to create new obligations on the public. "[*W*]*hen an agency uses rules to set forth new policies that will bind the public, it must promulgate them in the form of legislative rules.*" Anthony, *supra* note 43, at 1314.

152 512 U.S. 504, 518 (1004) (Thomas, J., dissenting).

153 *Id.* at 524 n.3. The dissenters also recognized that when agency guidance documents and implementation decisions, rather than the text of the regulation itself, provided the primary source of agency law, the availability of "adequate notice concerning the agency's understanding of the law" was jeopardized. *Id.* at 525; *see also* Manning, *supra* note 19, at 674.

154 *Thomas Jefferson Univ.,* 512 U.S. at 524 (Thomas, J., dissenting)

155 *Id.* at 524 n.3.

156 462 U.S. 122 (1983).

157 *Id.* at 130.

158 *Id.* at 130-31.

159 *Id.* at 131 (quoting FPC v. Panhandle E. Pipe Line Co., 337 U.S. 498, 513 (1949)).

160 *Id.* at 130.

161 *See* 16 USC §§ 831-831ee (2000). Today, TVA is the largest public electricity provider in the country, serving more then eight million customers in seven southeastern states—now one of the Nation's most economically vibrant areas. It operates three nuclear plants, eleven coal-fired plants, twenty-nine hydroelectric plants, six combustion turbine plants, and one pumped-storage plant. JERRY GOLDEN, TENN. VALLEY AUTH., ROUTINE MAINTENANCE OF ELECTRIC GENERATING STATIONS 2 (2000).

162 TVA predicts that the NSR enforcement actions will have severe consequences for its generating capacity, estimating an immediate loss of more than 10 percent of coal-fired generating capacity, or more than 12 million megawatt-hours a year, and a long-term loss of more than 30 percent of its coal-fired generating capabilities, or more than 34 million megawatt-hours a year. Tenn. Valley Auth. Homepage, TVA Court "Victory" vs. EPA Doesn't Curtail Commitment (July 2003), *at* http://www.tva.com/retireeportal/retiree_news/insidetva/july03/court.htm [hereinafter *TVA Court "Victory"*]. It would require ten new 500 megawatt plants, at a significant cost, to make up this loss. Tenn. Valley Auth. Homepage, Federal Appeals Court Hears TVA-EPA Case, *at* http://www.tva.gov/environment/ongoing.htm#victory (last visited Oct. 4, 2004) [hereinafter *Federal Appeals Court Hears TVA Case*].

163 GOLDEN, supra note 161, at 3.

164 *TVA Court "Victory," supra* note 162.

165 TENN. VALLEY AUTH., ANNUAL ENVIRONMENTAL REPORT 11(1999), *at* www.tva.com/environment/reports/envreport/1999aer.pdf [hereinafter TVA 1999 REPORT]. TVA also confirmed in comments to the EPA in support of the ERP Rule that EPA had previously supported a narrow understanding of NSR and a broad reading of the RMRR exclusion.

> Construing the pertinent statutory language, EPA has always taken the position that Congress did not intend to make every activity at an industrial source subject to NSR requirements. Successive amendments of the statute and congressional consideration of the scope of the NSR programs have validated EPA's historical position and interpretations.

Tenn. Valley Auth., Comments on Equipment Replacement Rule 4 (April 30, 2003) (Docket No. A-2002-04) [hereinafter TVA Comments].

166 *See* T.H. GLADNEY & H.S. FOX, TENN. VALLEY AUTH., TVA'S POWER PLANT MAINTENANCE PROGRAM-PHILOSOPHY AND EXPERIENCE (1972).

167 *Id.* at 23.

168 Although TVA, as a government agency, does have a special relationship with the government, TVA stated that it "is no different from other electric utilities in its maintenance practices. Others in the industry routinely perform the projects performed by TVA." GOLDEN, *supra* note 161, at 36.

169 These routine repairs included cyclone replacements (43% replaced industry-wide), reheater replacements (121% industry-wide), and economizer replacements (49% industry-wide). *Id.* at 1.

170 *Id.* at 12.

171 *See* Tenn. Valley Auth., 9 E.A.D. 357 (2000). This decision is available online at http://www.epa.gov/eab/disk11/tva.pdf.

172 *See* TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003).

173 *Tenn. Valley Auth.*, 9 E.A.D. at 395.

174 *Id.* at 414.

175 Memorandum from Edward E. Reich, *supra* note 84.

176 *Tenn. Valley Auth.*, 9 E.A.D. at 415 n.56.

177 *Id.*

178 TVA estimates that the cost of complying with EPA's enforcement effort could exceed $3 billion. TENN. VALLEY AUTH., ANNUAL REPORT (2000), *at* www.tva.com/finance/reports/annualreport_00/00_mandis4.htm.

179 TVA "has already spent more than $4 billion on emission reductions at its plants and is in the process of spending almost $2 billion more through the end of this decade on additional reduction equipment." *Steve Cook, Supreme Court Refuses to Hear Appeal of Bar to Clean Air Act Enforcement on TVA*, 85 Daily Rep. for Executives (BNA) A-29, A-29 (May 4, 2004).

180 NOx is a precursor to ground level ozone pollution.

181 TVA Comments, *supra* note 165, at 23.

182 *See* Tenn. Valley Auth. Homepage, Fossil-Fuel Generation, *at* http://www.tva.gov/power/fsslfax.html (last visited Oct. 6, 2004):

> TVA has reduced emissions of nitrogen oxide (NOx) by installing low nitrogen oxide burners or overfire air on 40 of its 59 coal-fired units. TVA is installing selective catalytic reduction (SCR) systems on 25 of its units in a project to be completed by the summer of 2005 at a cost of more than $1 billion. When all the systems are operational in 2005, NOx emissions during the May-September ozone season will be reduced by 75 percent.

183 TVA 1999 REPORT, *supra* note 165, at 11.

184 EIA estimates that "[b]ased on a sustained increase in the price of oil, each 10% increase in the price of oil could lower the real U.S. GDP growth rate by between 0.05 and 0.1 percentage points relative to its baseline level." Energy Info. Admin. Homepage, Rules of Thumb for Oil Supply Disruptions, *at* http://www.eia.doe.gov/emeu/security/rule.html (last modified Sept. 2, 2004).

185 *See* Associated Press, *PNM Says Gas Prices May Climb 15 to 30 Percent this Winter,* ALBUQUERQUE J. ONLINE, September 7, 2004, *at* http://www.abqjournal.com/news/state/appnm09-07-04.htm.

186 *See supra* note 178.

187 *See* Nat'l Ass'n of Mfrs., Comments On Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement: Proposed Rule (May 2, 2003) (Docket Number A-2002-4) [hereinafter NAM 2003], *available at* http://www.nam.org/s_nam/doc1.asp?TrackID=&SID=1&DID=226451&CID=201561&VID=2&RTID=0&CIDQS=&Taxonomy=False&specialSearch=False.

188 108 CONG. REC. S1215-16. (daily ed. Jan. 21, 2003) (Letter from Ande Abbott, Director of Legislation, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, to Senator John Edwards) (read into record during statement of Senator James M. Inhofe).

189 *See* BERNARD L. WEINSTEIN & TERRY L. CLOWER, THE EPA'S REINTERPRETATION OF NEW SOURCE REVIEW RULES: IMPLICATIONS FOR ECONOMIC DEVELOPMENT IN RURAL AMERICA 11 (2002), *available at* http://www.unt.edu/cedr/NSR.pdf.

190 *Id.* at 13

191 *See id.*

192 *Id.*

193 *Id.* at 14.

194 *Id.* at 15.

195 *Id.*

196 Steve Cook, *Air Pollution: Black Mayors, Native American Group Call for Quick Action on New Source Review,* 93 Daily Rep. for Executives (BNA) A-33, A-34 (May 14, 2002) (quoting letter from the National Conference of Black Mayors, the National Indian Business Association, and three other African-American groups). The letter cites as an example an urban "facility that sought to improve its wastewater treatment system. The upgrade would have cost $10,000, while resulting in an estimated 40 percent improvement in energy efficiency and a 6 percent-to-8 percent reduction in emissions." *Id.* The mayors said that the project was abandoned when NSR was applied, raising the cost of the upgrade to $750,000 and requiring a 12-to-18 month permitting process. *Id.*

197 *Id.*

198 *See* Energy Info. Admin. Homepage, Total Energy Expenditures in U.S. Households by Household Income, *at* http://www.eia.doe.gov/emeu/recs/recs2001/ce_pdf/enduse/ce1-3e_hhincome2001.pdf (last visited Sept. 15, 2004). The percentages are based on calculations made using top of scale incomes, so the costs faced by individuals within each given bracket will almost always be greater than the percentages listed.

199 ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, THE CHANGING STRUCTURE OF THE ELECTRIC POWER INDUSTRY 2000: AN UPDATE (2000), http://www.eia.doe.gov/cneaf/electricity/chg_stru_update/chapter3.html.

200 *Id.*

201 *See* ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, INTERNATIONAL ENERGY OUTLOOK: 2001, app. A, tbl. A-9, at 184 (2001).

202 *Federal Appeals Court Hears TVA Case*, *supra* note 162.

203 *See id.*

204 108 CONG. REC. S1216 (daily ed. Jan. 21, 2003) (Letter from Ande Abbott, Director of Legislation, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, to Senator John Edwards) (read into record during statement of Senator James M. Inhofe).

205 *Id.*

206 Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement, 67 Fed. Reg. 80,290, 80,3000 (Dec. 31, 2002); *see also* EPA REPORT, *supra* note 74, at 12 n.25 ("Electric generating plant personnel have been placed in the untenable position of not being able to correct and improve the reliability and efficiency of their plants, resulting in compromised safety to plant employees and the general public, without risking an enforcement action.") (quoting Class of '85 Group Comments).

207 A long list of members of industry from across the country, including the U.S. Chamber of Commerce, wrote in support of NSR reforms, saying that, "[s]ound maintenance practices and productivity improvements are essential to good environmental performance, economic progress, job creation, and worker safety." Letter from U.S. Chamber of Commerce et al., to Michael Leavitt, Adm'r, Envtl. Prot. Agency 1 (March 17, 2004), *at* http://www.nopa.org/Communications/march2004/31704%20Letter,%20Coalition%20to%20EPA%20Administrator%20Leavitt%20re%20Equipment%20Replacement%20Provision%20Rule.pdf.

208 *See infra* Part V.

209 EPA REPORT, *supra* note 74, at 11.

210 *See* ERP Rule, supra note 72, at 61,250:

> [T]he central policy of the major NSR program as applied to existing sources ... is not to cut back on emissions from existing major stationary sources through limitations on their productive capacity, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so.

211 *See* Letter from Kenneth A. Schweers, *supra* note 17.

212 WEPCO v. Reilly, 893 F.2d 901, 909 (7th Cir. 1990) (quoting H.R. REP. NO. 95-294, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1264). The 1977 House Report verified that this was Congress' intent in shaping NSR:

> Building control technology into new plants at the time of construction will plainly be less costly than requiring retrofit when pollution ceilings are reached. For example, testimony from the electric utility industry indicates that it costs about 25 percent less to purchase and install flue gas desulfurization technology on a new plant than it would cost to retrofit that plant subsequently.

H.R. REP. NO. 95-294, at 185 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1264.

213 Controls become economically feasible either when a new greenfield source is being built or when the existing source is being modified in a major way, such that it is taken out of service for a considerable period of time and the modification is carried out at a considerable cost, comparable to the cost on a per unit of output basis with the cost of a new unit.

214 EPA REPORT, *supra* note 74, at 10.

215 The CAA itself requires facilities to perform more frequent maintenance than otherwise would be required. One result of controls in place on the emission of NOx is increased boiler slagging and tube wastage. This requires facilities to replace reheaters and boiler tubes more frequently. It would be unfair for EPA to impose these mandates without allowing the subsequent maintenance necessary to accommodate these requirements. Moreover, utilities have a legal obligation to provide safe, secure, and economic electricity for consumers. They are therefore under a legal duty to conduct RMRR to ensure this duty is met.

216 Brief for Respondent United States Environmental Protection Agency at 73-74, New York v. EPA (D.C. Cir. 2004) (No. 02-1387).

217 Senator Hillary Clinton confirmed that NSR is being used to force pollution reductions, saying:

> I know that the NSR program has been instrumental in New York state's effort to fight power plant pollution both in state and out-of-state.
>
> New York State, other northeast states, the federal EPA under previous Administrations and various environmental organizations have used the NSR program … to address air pollution harms by going to their source.

Sen. Hillary Rodham Clinton, Statement before the Senate Democratic Policy Committee Hearing, "Clearing the Air: An Oversight Hearing on the Administration's Clean Air Enforcement Program" (Feb. 6, 2004).

218 *See* EPA REPORT, *supra* note 74, at 1.

219 Envtl. Prot. Agency Homepage, New Source Review Fact Sheet, *at* http://www.epa.gov/nsr/facts.html (last visited Sept. 15, 2004).

220 EPA REPORT, *supra* note 74, at 15.

221 Letter from Francis X. Lyons, Reg'l Adm'r, Envtl. Prot. Agency, to Henry Nickel, Counsel for the Detroit Edison Co. 2-3 (May 23, 2000) (emphasis added). This letter, which accompanied the Detroit Edison Applicability Determination, is available along with that determination on EPA's website at http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/detedisn.pdf (last visited Sept. 15, 2004).

222 EPA's subsequent reform of the routine maintenance exclusion implicitly recognized that the Browner interpretation was counterproductive, acknowledging "that a functionally equivalent replacement can result in an increase in efficiency and, consequently, productivity. In fact, one of our goals is to promote such outcomes." ERP Rule, *supra* note 72, at 61,255.

223 *See supra* text accompanying note 213.

224 Standards of Performance for New Stationary Sources, 57 Fed. Reg. 32,314, 32,327 (July 21, 1992).

225 In fact, the legislative proposals rejected by Congress were less punitive than the Browner interpretation, as existing facilities were given thirty years before having to choose between shutting down or applying new source requirements. *See, e.g.*, S. 321, 100th Cong. (1987); S. 316, 100th Cong. (1987); S. 300, 100th Cong. (1987); S. 2813, 99th Cong. (1986); S. 2203, 99th Cong. (1986); S. 2200, 99th Cong. (1986); H.R. 4567, 99th Cong. (1986); S. 52, 99th Cong. (1985); H.R. 5555, 97th Cong. (1982).

226 LARRY B. PARKER & JOHN E. BLODGETT, CONG. RES. SERV., AIR QUALITY AND ELECTRICITY: ENFORCING NEW SOURCE REVIEW (2000), http://www.ncseonline.org/NLE/CRSreports/Air/air-35.cfm?&CFID=15984371&CFTOKEN=81066576.

227 *See* Byron Swift, *Command Without Control: Why Cap-and-Trade Should Replace Rate Standards for Regional Pollutants*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,330 (Mar. 2001). Swift concludes:

> The best and most comprehensive solution would be to replace existing standards with a stringent emission cap and allowance trading system, created on a national or regional basis, that includes all sources. This solution would not only be extremely effective environmentally, but also would eliminate virtually all of the problems mentioned above that are caused by the use of a rate standards….

Id. at 10,340.

228 *Id.* at 10,337-38; *see also* Gregory Gotwald, Note, *Cap-and-Trade Systems, With or Without New Source Review? An Analysis of the Proper Statutory Framework for Future Electric Utility Air Pollution Regulation*, 28 VT. L. REV. 423, 465 (2004) ("Pollution reduction is best accomplished through a properly constructed cap-

and-trade system generally exempt from the New Source Review Program.").

229 Swift, *supra* note 227, at 10,336:

> Ironically, the environment also does not benefit from the inflexible NSPS standard. Despite the costs imposed by the NSPS standard, it creates no net environmental benefits as total emissions are now governed by the emissions cap under Title IV. Nor are there significant local benefits, as sources must already comply with SO[2] standards pursuant to Title I of the CAA that protect against local ambient concentrations. The continued use of the inflexible rate-based methodology under the SO[2] NSPS therefore makes little sense today when there is a national emissions cap on SO[2].

230 *New Source Review Policy, Regulations and Enforcement Activities: Hearing Before the Senate Comm. on Env't and Pub. Works and the Senate Comm. on the Judiciary,* 107th Cong. 41 (2002) (statement of Jeffrey Holmstead, Assistant Adm'r for Air and Radiation, U.S. Envtl. Prot. Agency); *see also* Envtl. Prot. Agency Homepage, New Source Review Questions and Answers, *at* http://www.epa.gov/nsr/questions.html (last visited Sept. 15, 2004) ("For power plants under the Clear Skies initiative, NSR would no longer be necessary to ensure pollution reductions. Nor would it be necessary to require a NSR permit every time a plant modifies its equipment ....").

231 FOUND. FOR CLEAN AIR PROGRESS, AMBIENT AIR QUALITY TRENDS: AN ANALYSIS OF DATA COLLECTED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY 1 (2004).

232 *Id.*

233 An article reviewing EPA's enforcement cases asked the following question:

> [E]ven if EPA's interpretation holds, is it appropriate to rely on projects from many years ago as the basis for imposing current norms in massive and costly pollution control to further reduce NO[x] and SO[2] emission levels? *These units often already have sophisticated control equipment in place and have been reducing air emissions for years, in diligent compliance with state and federal air pollution-control regimes.*

Elliot Eder & Robin L. Juni, *Has EPA Fired Up Utilities to Clear the Air?*, 15 NAT. RESOURCES & ENV'T., Summer 2000, at 8, 11 (emphasis added).

234 *See* Brief for Respondent United States Environmental Protection Agency at 79, New York v. EPA (D.C. Cir. 2004) (No. 02-1387):

> Over the last 10 years facilities have reduced their emissions due to the imposition of numerous CAA requirements, none of which is changed by the revisions in the NSR rules. Examples of these requirements include category-specific controls such as NSPS and Maximum Achievable Control Technology regulations for hazardous air pollutants, and controls imposed by specific SIPs. Facilities that have reduced their emissions because of these requirements would be unlikely or unable to increase them to former levels.

235 EPA's Opposition to Motions for Stay of the Equipment Replacement Rule at 25-26, New York v. EPA (D.C. Cir. 2003) (No. 03-1380) (citation omitted). An analysis of the settlement agreements reached in a number of the enforcement cases revealed that the utilities sued by EPA already had plans to invest significantly in pollution reduction before being sued.

> [T]here is persuasive evidence that the controls and emissions limitations that these settlements require reflect little more, if anything, than what the settling companies had already started doing for business and regulatory reasons under other CAA programs and what they expect to do in the next decade to satisfy upcoming environmental regulations. Indeed, some companies have said so publicly.... This reality undermines EPA's claim, oft-repeated by EPA as a basis for its enforcement initiative, that existing electric-generating stations not previously subject to NSPS or NSR—"grandfathered power plants," as EPA sometimes calls them—would be virtually uncontrolled were it not for NSR.

Makram Jaber, *Utility Settlements in New Source Review Lawsuits*, 18 NAT. RESOURCES & ENV'T, Winter 2004, at 22, 29.

236 *See* Cleveland Elec. Illuminating Co. v. EPA, 572 F.2d 1150, 1160 (6th Cir. 1978) (approving EPA's use of air quality model based "on the assumption that the plants concerned operate 24 hours a day at full capacity").

237 This is the approach advocated in the congressionally-mandated Clean Air Act review by the National Research Council, which concluded that, in addition to strengthening the science underlying the Act, EPA should expand the "use of performance-oriented, market-based (where appropriate) multi-pollutant control strategies" and "transform the SIP process into a more dynamic and collaborative performance-oriented, multipollutant air quality" process. *Executive Summary* to NAT'L RES. COUNCIL, AIR QUALITY MANAGEMENT IN THE UNITED STATES 6 (2004), at http://www.nap.edu/execsumm_pdf/10728.pdf.

238 Envtl. Prot. Agency Homepage, Clear Skies Basic Information, at www.epa.gov/air/clearskies/basic.html (last visited Sept. 15, 2004).

239 *Id.*

240 The NSR program adopted in most SIPs has been approved by EPA, with the exception of the following states, or portions of states: portions of Arizona, California, Florida, Pennsylvania, and Nevada, as well as all of American Samoa, the District of Columbia, Guam, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, the Northern Mariana Islands, New Jersey, New York, Puerto Rico, South Dakota, and the Virgin Islands, and, for certain types of facilities, Washington state. *See* Envt'l Prot. Agency Homepage, New Source Review, *at* http://www.epa.gov/nsr/where.html (last visited Sept. 14, 2004). In these areas, the federal NSR program is directly applicable, although this is generally administered through state authorities and are known as "delegated" programs.

241 The dispute between state and federal authorities over the interpretation of routine maintenance evidences both the vagueness and inconsistent interpretation of NSR regulations. *See, e.g.*, United States v. SIGECO, 245 F. Supp. 2d 994, 1021-22 (S.D. Ind. 2003) (recounting the conflicting between IDEM and EPA).

242 42 U.S.C. § 7401(a)(3) (2000); *see also* 42 U.S.C. § 7407(a) (2000) ("Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State ....").

243 The CAA has, in fact, been accurately described as "a bold experiment in cooperative federalism." Connecticut v. EPA, 696 F.2d 147, 151 (2d Cir. 1982); *see also* Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451, 468-69 (D.C. Cir. 1996) (discussing CAA's regime of state and federal cooperation and integrated planning).

244 *See* United States v. Gen. Motors Corp., 876 F.2d 1060, 1062 (1st Cir. 1989):

> The division of responsibility is straightforward and logical. The EPA, the federal agency charged with administering the Act, has the task of establishing National Ambient Air Quality Standards (NAAQS). The states then have the responsibility of submitting for EPA approval state implementation plans (SIPs) designed to achieve and maintain these uniform standards.

245 Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 79 (1975) (emphasis added).

246 *See* 42 U.S.C. § 7410 (2000).

> Congress believed it important that the states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions. The EPA, therefore, may not reject a SIP unless it finds that the plan fails to satisfy the substantive requirements set out in the Act, the principal one of which is that the plan be designed to attain national standards as quickly as practicable. So long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

Gen. Motors Corp., 876 F.2d at 1062-63 (internal citations omitted); *see also* Fla. Power & Light Co. v. Costle, 650 F.2d 579, 581 (5th Cir. 1981) ("The state is 'at liberty' to devise the particular components of its pollution control plan so long as the plan is adequate to meet the standards mandated by EPA.").

247 *Cf.* Harmon Indus. v. Browner, 191 F.3d 894, 899 (8th Cir. 1999) (drawing similar conclusion about EPA's authority to enforce state hazardous waste program under RCRA from the structure of EPA's oversight authority).

248 136 CONG. REC. S16,983 (daily ed. Oct. 27, 1990) (quoting H.R. CONF. REP. NO. 101-952) (emphasis added). EPA further said that "[t]he intent of title V is not to second guess the results of any NSR program." Matthew Cohen, *Fading Federalism and Source Specific Limits*, 18 NAT. RESOURCES & ENV'T, Winter 2004, at 39, 42.

Cohen reviews attempts by the federal government to interfere with state implementation of CAA programs, and found that "[f]or the regulated community, EPA oversight [of state SIP administration] has increased the cost of compliance and reduced regulatory certainty." *Id.* at 45. Cohen concludes by stating that it may be "time to reinvigorate Clean Air Act federalism by restoring to the states the authority to administer their own state implementation plans." *Id.*

249 Under certain circumstances, states that do not comply with the CAA are required to implement a Federal Implementation Plan, or FIP. Under those limited circumstances, the federal government would have more control over the state's pollution-control strategy, since the state has demonstrated that it could not effectively implement a pollution control program.

250 *See* Eder & Juni, *supra* note 233, at 59:

> Because EPA's enforcement initiative is premised on a fundamentally altered reading of NSR program requirements, success by federal enforcers would amount to unofficial coopting of authorized states' NSR/PSD programs, without EPA's having to pursue a politically charged process such as withdrawing state authorization or proposing new regulations. Thus, in terms of state program autonomy, EPA's efforts can be seen as an assault on each host state's NSR/PSD program as much as the defendant utility in each enforcement action.

251 650 F.2d 579 (5th Cir. 1981).

252 *Id.* at 588 (quoting United States v. Interlake, Inc., 432 F. Supp. 985, 987 (N.D. Ill. 1977)).

253 *Id.* at 589.

254 *Id.*

255 Motion of the Commonwealth of Virginia et al. for Leave to Intervene at 1-2, New York v. EPA (D.C. Cir. 2003) (No. 03-1380). The states argued that their interests in the litigation were not fully represented by EPA because it "does not have the enforcement and implementation responsibilities under the Act to which the [states] are subject." *Id.* at 3.

256 *Id.* at 2.

257 United States v. SIGECO, 245 F. Supp. 2d 994, 1006 (S.D. Ind. 2003). The SIGECO opinion also cites John M. Daniel, Director of Air Program Coordination for Virginia's Department of Environmental Quality, who testified that "it appeared to me this approach [to routine maintenance and replacement] was entirely different than what EPA had been historically using over the last twenty or so years." *Id.* at 1005. Similarly, Justin P. Wilson, Deputy Governor for Policy for Tennessee, testified that EPA had "reinterpreted NSR requirements to find that many common maintenance repair and replacement projects at utilities and other industries should be subject to the lengthy NSR permitting process." *Id. See also supra* note 87.

258 *See supra* note 225 (describing failed votes on proposals to limit operation of existing sources to 30 years before requiring retrofit with new source technologies).

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