



Agency Discretion and Restoring the Reign of Reason to the NSR Program

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On February 23, 2005, the Federalist Society hosted a panel discussion on issues related to the topic of this paper. The panel included Mr. David Doniger of the Natural Resources Defense Council, Professor Lisa Heinzerling from Georgetown University Law Center, Professor Thomas Merrill of Columbia Law School, and Hon. C. Boyden Gray. The panel was moderated by Dr. Michael Greve of the American Enterprise Institute, and a copy of the panel transcript is available at www.fed-soc.org.

I. INTRODUCTION	5
II. THE HISTORY OF NEW SOURCE REVIEW	5
A. Overview Of The New Source Review Program.....	6
B. The New Source Performance Standards Program.....	6
1. The 1970 Clean Air Act Amendments And The 1971 New Source Performance Standards Rule.....	6
2. The 1975 New Source Performance Standards Rule	8
C. Regulatory New Source Review And The 1977 Clean Air Act Amendments.....	9
1. The 1974 New Source Review Program.....	9
2. The 1976 Interpretive Rule For Nonattainment Areas.....	9
3. The 1977 Clean Air Act Amendments	10
4. The 1978 Prevention Of Significant Deterioration Rule: EPA’s Contemporaneous Interpretation Of Modification And Creation Of A New “Major Modification” Requirement	11
D. The 1980 NSR Rule And The Enforcement Initiative	12
1. The 1980 NSR Rule	12
2. EPA’s Practice Since 1980	13
III. THE IRREDUCIBLE MINIMUM OF EPA’S DISCRETION	14
A. The Irreducible Minimum Of EPA’s Authority	14
B. The Irreducible Minimum Of EPA Authority Is Consistent With All Decisions Interpreting Modification For Purposes Of The NSR Program.....	15
1. Decisions Confining EPA’s Authority To Define NSR Modifications To The NSPS Program As It Existed In 1977.....	15
2. Decisions Confining EPA’s Authority To Define NSR Modifications In Lockstep With The NSPS Definition of Modification.....	16
3. Decisions Reaffirming EPA’s Authority To Define NSR Modifications Differently Than NSPS Modifications.....	16
4. <i>New York I</i>	16
a. Except In Rejecting Industry’s Challenge To The 2002 Rule, <i>New York I</i> Only Addressed How Actual Annual Emissions Must Be Measured Under EPA’s “Major Modification” Definition	17
b. Reading <i>New York I</i> As Encroaching On The Irreducible Minimum Of EPA’s Discretion To Define § 111 Modification For Purposes Of Covered Construction Activities Ascribes Errors To The Court’s Opinion.....	17
c. The Clean Units And Pollution Control Projects Provisions Were <i>Sui Generis</i> And It Is Unreasonable To Extrapolate Anything From <i>New York I</i> ’s Rejection Of These Provisions	18
d. Assuming <i>Arguendo New York I</i> Were Inconsistent With The Irreducible Minimum Of EPA Discretion, The D.C. Circuit Recognized That <i>New York I</i> Did Not Comprehensively Address The Definition Of Modification	19



- IV. THE EQUIPMENT REPLACEMENT PROVISION AND MODIFICATIONS 19
 - A. EPA Has Always Excluded Routine Maintenance Under The NSPS Program..... 20
 - B. The ERP Excludes Less Significant Activities Than Many Activities Excluded From The NSPS Program In 1977..... 21
 - 1. Scope Of The Activities Excluded..... 21
 - 2. Size Of The Activities Excluded 21
 - C. The ERP Excludes Less Significant Activities Than Were Excluded Under The 1978 PSD Rule RMRR Exclusion 21

- V. CONCLUSION 22

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I. Introduction

On February 8, 2006, the United States Court of Appeals for the District of Columbia Circuit will hear oral arguments in *New York v. EPA* (“*New York II*”).¹ The court will decide whether EPA acted lawfully in promulgating a key Clean Air Act reform, the Equipment Replacement Provision (“ERP”).² By now, the problems with the Clean Air Act’s 1970s-era command-and-control aspects have been well documented,³ and have prompted corrective actions by EPA. The ERP is part of a series of measures by the Bush Administration revamping outdated programs to enhance air quality benefits, while reducing costs to regulated entities, and to society as a whole.⁴

Beyond passing judgment on the ERP’s balancing of economic and environmental concerns, the disposition of *New York II* could impact greatly both the general precepts governing statutory interpretation and judicial deference accorded to administrative agencies. This is the case because the *New York II* petitioners advance an argument that, if accepted by the court, would dramatically narrow the ambit of agency discretion in interpreting and applying congressionally delegated powers; in many respects, this would be tantamount to a *de facto* overruling of the *Chevron* doctrine, which has been guiding this area of law for over twenty years, and a return to the days where courts substituted their own interpretation of statutes even where Congress did not clearly preclude the agency’s interpretation.⁵ Indeed, the petitioners are essentially claiming that, where Congress defines coverage in a particular regulatory program by explicitly incorporating by reference a preexisting statutory definition from another regulatory program,⁶ and that preexisting definition has been interpreted in a particular way by an administrative agency, not only is the agency not compelled to interpret the new definition

consistently with the preexisting definition, but it is actually *precluded* from doing so. This untenable position has been emphatically rejected by the United States Court of Appeals for the Fourth Circuit. The D.C. Circuit should likewise refuse petitioners’ invitation to engage in such unwarranted judicial adventurism and reject the petitioners’ challenge to the regulation, as should other reviewing courts in any future actions.

II. The History Of New Source Review

While the new source review program (“NSR” or “NSR program”) was enacted as part of the 1977 Clean Air Act Amendments, it draws upon the ample preexisting regulatory efforts. Indeed, over the years, the NSR program has evolved from a general set of EPA directives designed to assist in implementing the national ambient air quality standards (“NAAQS”) and the new source performance standards program (“NSPS program”) in the 1970 Clean Air Act Amendments⁷ to a highly prescriptive regulatory program with thousands of pages of guidance documents.⁸

The NSR program’s historical connection to the NSPS program makes it a regulatory Dionysius, torn from the thigh of the NSPS program. While the NSR program now differs in a great many respects from the NSPS program, their common history and language ensure one irreducible minimum interpretive principle: where the NSR program explicitly incorporates a definition contained in a statutory provision governing the NSPS program, EPA has the discretion to define the term for purposes of the NSR program consistently with its meaning in the NSPS program at the time the 1977 Clean Air Act Amendments were promulgated. Anything less would make a mockery of the Clean Air Act’s plain language.

A. Overview Of The New Source Review Program

Under the Clean Air Act, EPA must promulgate NAAQS for all criteria pollutants.⁹ EPA also divides the country into air quality control regions (“areas”) and classifies each area as either “attainment” or “nonattainment” (or occasionally “unclassifiable”) for each standard. Areas that do not meet the NAAQS for a particular pollutant are deemed nonattainment areas and are subject to stringent environmental regulations designed to ensure that the area will meet the standard. Areas that do meet the NAAQS are deemed attainment areas. To be sure, even these areas do not escape regulation. Instead, they must maintain an increment between their pollution levels and the applicable NAAQS to ensure that the area’s air quality does not significantly erode, and adopt regulatory programs to ensure that new emission-creating activities do not deplete that increment.

One key aspect of the Clean Air Act, sometimes described as “cooperative federalism,” is that it delegates to the states, in which particular areas are located, the responsibility of determining how these areas attain or maintain compliance with the NAAQS, and prevent air quality from eroding.¹⁰ To this end, Congress gave the states the responsibility of creating State Implementation Plans (“SIPs”), which contain a mix of possible control measures—some mandatory, some optional—to meet this goal.

One mandatory SIP program is NSR, the preconstruction review program established by the 1977 Clean Air Act Amendments.¹¹ In fact, there are two distinct NSR programs. The NSR program in nonattainment areas is called the Nonattainment New Source Review (“NNSR”) program. In attainment areas, the NSR program is called the Prevention of Significant Deterioration (“PSD”) program. There are key differences between the two programs, including what emission limitation new or modified sources must meet and whether a source must obtain offsets before beginning construction. However, both the PSD program and NNSR program for existing sources are triggered by the same occurrence: a “major modification,” which is defined virtually identically in the regulations for the two programs.¹²

Significantly, one program for which the Clean Air Act does not provide is *existing* source review. Congress realized that “building control technologies into new plants at time of construction will plainly be less costly

Under the NSR program, a distinction exists between a § 111(a)(4) “modification,” a statutory term with a long regulatory history that defines activities potentially subject to NSR preconstruction review, and a “major modification,” a term created by EPA through rulemaking that limits the NSR program’s coverage to only those § 111(a)(4) modifications that increase a source’s annual emissions.

Understanding this distinction is central to understanding why the ERP raises issues that are separate and distinct from the “major modification” issues recently addressed by the D.C. Circuit in...*New York v. EPA*.

then [sic] requiring retrofit when pollution control ceilings are reached.”¹³ Accordingly, EPA has prescribed detailed requirements for when an existing source is deemed to have undergone a modification, which subjects the existing source to preconstruction review and possible installation of pollution controls.

Under the NSR program, a distinction exists between a § 111(a)(4) “modification,” a statutory term with a long regulatory history that defines activities potentially subject to NSR preconstruction review, and a “major modification,” a term created by EPA through rulemaking that limits the NSR program’s coverage to only those § 111(a)(4) modifications that increase a source’s annual emissions. Understanding this distinction is central to understanding why the ERP raises issues that are separate and distinct from the “major modification” issues recently addressed by the D.C. Circuit in a case also named *New York v. EPA* (“*New York I*”).

B. The New Source Performance Standards Program

1. The 1970 Clean Air Act Amendments And The 1971 New Source Performance Standards Rule

The NSR program has its roots in the NSPS program, which was established by the 1970 Clean Air Act Amendments. In the 1970 Amendments, Congress required EPA to enumerate categories of stationary sources of emissions that cause or contribute significantly to air pollution and “may reasonably be anticipated to endanger public health and welfare.”¹⁴ Once it had done so, the Agency was then required to promulgate new

source performance standards for these sources.¹⁵ The new source performance standards promulgated by EPA reflect the degree of emission limitation achievable by applying the best system of emission reduction that EPA determines has been adequately demonstrated.¹⁶ Moreover, Congress did not require existing sources to retrofit their facilities to meet the performance standards. Instead, Congress concluded that it was more cost-effective to require only new or modified sources to meet the performance standards.¹⁷ In so doing, the NSPS program ensures that newly constructed or modified sources operate efficiently.

Given this congressional mandate, EPA began the process of implementing the NSPS program and clarifying statutory provisions to make the program administrable. In this process, a key term that EPA needed to define was “modification” under § 111. It was clear from the 1970 Clean Air Act Amendments’ language that a “new source” was a greenfield source of pollution, e.g., one constructed after EPA promulgated new source performance standards for that source.¹⁸ It was also clear that existing facilities that were “modified” had to meet new source performance standards, just the same as greenfield sources did. In Clean Air Act § 111(a)(4), Congress defined modification as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”¹⁹ As such, from the very beginning of the NSPS program, there were two key elements that had to be met for an NSPS modification to occur: (1) “any physical change, or change in the method of operation in a stationary source” that (2) “increases the amount of any air pollutant emitted by such source.”

In its regulatory definition of modification, EPA interpreted modification in a way that subjected to new source performance standards only activity that creates new capacity to pollute, and not activity associated with operation of an existing facility as it was constructed and designed.²⁰ The way that EPA did this was to provide for certain exclusions that, while ostensibly subsumed in either the term “any physical change” or “increases the amount of any air pollutant,” all shared a common underlying principle. They do not constitute a modification because they were consistent with the design capacity of an emitting facility, including exclusions for an increased production rate that does not

exceed the facility’s operating design capacity and the use of alternative fuel that the facility was designed to accommodate.²¹

Among these exclusions was a provision that permitted facilities to increase their hours of operation without becoming subject to new source performance standards.²² By indicating that there cannot be an increase in air pollution for the purposes of triggering the modification provision when a change permits a facility to increase its hours of operation, EPA has underscored its view that only an increase in the facility’s achievable emission rate, i.e., an activity that resulted in “new” pollution, would constitute a modification, triggering the need to comply with new source performance standards.

EPA’s choice in 1971 to limit the reach of the NSPS program was a significant and probative decision for two reasons. First, it demonstrates how the Agency, from the very beginning, chose to construe the Clean Air Act’s seemingly sweeping language—“any physical change”—to make the program reasonable and administrable. Second, EPA’s regulatory restraint is all the more remarkable, precisely because in 1971, unlike today, EPA had few other regulatory tools with which to combat air pollution; stated differently, the NSPS program was the only game in town.

EPA also interpreted the term modification as excluding “routine maintenance, repair and replacement” (“RMRR” or “routine maintenance”).²³ At one level, EPA sensibly excluded routine maintenance activities from the regulatory definition of modification to preclude modification from being construed as potentially encompassing something as benign as removing corrosion from pipes in a boiler, or even changing a light bulb. At the more conceptual level, the RMRR exclusion demonstrated that at the time the 1970 Clean Air Act Amendments were promulgated, EPA fully grasped Congress’ intent not to subject to new source performance standards existing sources that were merely maintained as they were originally designed to operate.

It should be underscored that EPA's choice in 1971 to limit the reach of the NSPS program was a significant and probative decision for two reasons. First, it demonstrates how the Agency, from the very beginning, chose to construe the Clean Air Act's seemingly sweeping language—"any physical change"—to make the program reasonable and administrable. Second, EPA's regulatory restraint is all the more remarkable, precisely because in 1971, unlike today, EPA had few other regulatory tools with which to combat air pollution; stated differently, the NSPS program was the only game in town.

EPA's practice further confirms the fact that the 1971 NSPS Rule was designed to ensure that only *new* pollution was subject to new source performance standards. In an applicability determination made under the auspices of the 1971 NSPS Rule, EPA stated that no modification occurred where an existing component was replaced with another component "with no change in productive capacity" because "there will be no increase in emissions."²⁴ In another applicability determination, EPA noted that "[a]ddition of new capacity to a batch plant or any other change that increases its emissions may, of course, amount to a 'modification' of the plant for purposes of section 111 standards..."²⁵ In yet another applicability determination, EPA stated that "any physical or operational changes to an existing facility which result in an increase in emission rate shall be a modification."²⁶ As such, EPA's practice and regulations reflected the understanding that only activity that increased the capacity of a facility to emit pollution (i.e., that resulted in "new" pollution by increasing the facility's emission rate) constituted a modification.

EPA did not differentiate between historic—i.e., emissions actually achieved by the source at some point in time in the past—and theoretical quantities of emissions. Instead, EPA said the modification test must necessarily focus on the actual effect of a particular activity on a facility's emission rate.

2. The 1975 New Source Performance Standards Rule

In the aftermath of the 1970 Clean Air Act Amendments, EPA itself recognized that "considerable confusion exists *outside the Agency* as to what 'changes' can be made to an existing source without the

Administrator considering the source to have been modified."²⁷ As such, EPA in 1974 proposed a new rule that would clarify the 1971 NSPS Rule's definition of modification. It is important to take note of EPA's statement that confusion exists not within the Agency, but "outside the Agency," because the proposed rule, which was enacted a year later, does not mark a shift in NSPS policy or enforcement; rather, it clarifies for stakeholder benefit Congress' and EPA's view of how to determine if a facility has been modified by a particular activity.

In the proposed rule, EPA stated that

The proposed amended definition of "modification" [] includes a new phrase "emitted into the atmosphere." The new phrase clarifies that for an existing facility to undergo a modification there must be an increase in actual emissions. If any increase in emissions that would result from a physical or operation change...can be offset by improving an existing control system for that facility, such a change would not be considered a modification because there would be no increase in emissions to the atmosphere.²⁸

EPA thus clarified its definition of emissions increase to emphasize that the NSPS program captured only truly *new pollution*, not *extant but redistributed pollution* from a source.²⁹

The 1975 NSPS Rule (and the concomitant 1974 notice of proposed rulemaking) clarify an important concept: how EPA understood the meaning of "potential" and "actual" emissions in the mid-1970s. In this regard, EPA did not differentiate between historic—i.e., emissions actually achieved by the source at some point in time in the past—and theoretical quantities of emissions. Instead, EPA said the modification test must necessarily focus on the actual effect of a particular activity on a facility's emission rate. That is, "actual emissions" refer to what a source could emit to the atmosphere after the application of pollution controls and other transforming effects prior to the ultimate point of release. Emission increases that involve changes in a source's emission rate—i.e., changes in emissions over a common unit of time—by definition measure changes in the actual amount of emissions released to the atmosphere as a result of a project. By comparing changes in the amount of emissions released based on a common unit of time—the definition of an emission rate comparison—the only actual emissions that trigger a modification are those associated with increased emitting capacity.

To this end, EPA further proposed a new section stating that “[t]he unit of measurement proposed for determining whether an increase in emissions has occurred is kilograms per hour.”³⁰ This unit was picked because it will “automatically allow increases in operating hours [to be excluded] as intended by” the increased hours exclusion.³¹ Both changes were enacted in the 1975 NSPS Rule as proposed.³² The 1975 NSPS Rule thus clearly indicates that only an increase in a unit’s maximum achievable emission rate will trigger NSR.

EPA made one other notable change to the NSPS program in the 1975 NSPS Rule: it clarified the RMRR exclusion. The 1971 NSPS Rule had excluded “routine maintenance, repair and replacement.” The 1975 NSPS Rule put meat on the bones of this phrase, excluding “[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category...”³³ By referring to activities that are “routine for a source category,” EPA created a rule of construction for all maintenance activities tacitly incorporating activities that are commonly performed across companies within a particular standard industrial classification.³⁴ It is highly significant that, unlike EPA’s 1990s interpretation of the RMRR exclusion in the NSR program, the Agency, consistent with its overall restrained construction of the NSR program, chose to define the term “routine” very broadly, thus, ensuring that activities that were standard in the industry did not trigger new source performance standards.

C. Regulatory New Source Review And The 1977 Clean Air Act Amendments

While the NSPS program’s statutory framework and consistent regulatory history clearly indicate that the only sources subject to new source performance standards are new greenfield sources and existing sources that have been modified by increasing their capacity to emit, this does not in and of itself answer the question of whether NSR program coverage is the same as NSPS program coverage. In assessing the NSR program’s history, however, one thing that is certain is that, in the first years of the NSR program, EPA understood modifications that triggered coverage under the NSR program to be coextensive with modifications that triggered coverage under the NSPS program.

1. The 1974 New Source Review Program

There was a bevy of litigation brought by regulated entities and environmental advocacy groups in the

aftermath of the 1970 Clean Air Act Amendments. With regard to the NSR program, the most notable case was *Sierra Club v. Ruckelshaus*, where the United States District Court for the District of Columbia held that the 1970 Clean Air Act Amendments required EPA to establish regulations mandating that states include provisions in their SIPs to ensure that air quality in areas meeting the NAAQS does not significantly degrade.³⁵

Pursuant to this mandate, in 1974 EPA promulgated a regulatory Prevention of Significant Deterioration (“PSD”) program.³⁶ Under that program, modification was defined as “any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated...or which results in the emission of any such pollutant not previously emitted.”³⁷ The regulatory PSD program continued to maintain that increasing hours of operation (within permit limits) was not a modification.³⁸ Only an increase in a source’s emission rate can trigger pre-construction review if emissions attributable to increased hours of operation within permit limits are excluded. Moreover, a source’s emission rate can increase only if the source uses a more polluting fuel (or raw material), or increases its fuel burning capacity by expanding in size.³⁹

Perhaps most notably, EPA emphasized that “[i]t is the Administrator’s intent to change the definition of modification under Part 52 [addressing PSD] to be consistent with the final definition of this term under Part 60 [governing the NSPS program].”⁴⁰ The definition of modification to which the PSD program rulemaking refers measures emission rate in kg/hr, holding hours of operation constant. By promulgating the rate-based PSD standard and stating that the standard is designed to conform to the proposed NSPS modification standard (which was later adopted as the 1975 NSPS Rule), EPA has manifested its view that the Clean Air Act clearly permits—if not compels—an interpretation of § 111 requiring an increase in a facility’s emission rate before a modification is deemed to occur.⁴¹

2. The 1976 Interpretive Rule For Nonattainment Areas

In 1976, EPA issued an interpretive rule governing NSR permitting of § 111 emission rate modifications in nonattainment areas.⁴² The 1976 Interpretive Rule established a new regulatory requirement distinct from § 111 modifications: a “major modification.”⁴³ Under the 1976 Interpretive Rule, § 111(a) modifications (i.e., activity

increasing the maximum emission rate of an existing unit) that also increased “allowable” annual emissions by more than 100 tons per year were “major modifications” subject to more stringent permitting requirements than § 111(a)(4) modifications that resulted in increased annual emissions below the 100 ton threshold. The “major modification” requirements under the Interpretive Rule, therefore, could only be triggered by a § 111(a)(4) modification. The “major modification” was thus a creature of EPA policymaking, distinct from § 111 modifications, that imposed more stringent pollution control and offsetting requirements on a subset of § 111(a) NSPS modifications that caused a certain additional amount of pollution.

3. The 1977 Clean Air Act Amendments

In 1977, Congress amended the Clean Air Act. One key component of the 1977 Clean Air Act Amendments was Congress’ codification of the regulatory PSD program and the NNSR program, heretofore formalized by the 1976 Interpretive Rule.⁴⁴

In creating the statutory NSR program in the 1977 Clean Air Act Amendments, Congress did not intend to repudiate the regulatory program and start from scratch. Instead, Congress’ newly enacted requirements manifested its intent to adopt legislatively parts of the regulatory NSR and NSPS programs as they existed at the time. For instance, Congress dictated that SIPs promulgated under the 1974 PSD rule would “remain in effect to prevent significant deterioration of air quality in any such area.”⁴⁵ In addition, for sources that had commenced construction “after June 1, 1975, and prior to August 7, 1977,” Congress directed that the “review and permitting...be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.”⁴⁶

For the NNSR program, Congress decided to continue SIPs that were adopted under the 1976 Interpretive Rule, including the “major modification” requirement created to impose more stringent requirements on § 111 NSPS modifications of a certain magnitude.⁴⁷ Under the SIP requirements in the 1977 Amendments, all § 111 NSPS modifications would meet the *same* requirements regardless of whether or not they were “major modifications” as defined under the Interpretive Rule. In addition, Congress adopted by reference the NSPS definition of modification. Thus, modification for purposes of the NNSR program was defined as follows: “The terms ‘modifications’ and ‘modified’ mean the same as the

term ‘modification’ as used in section 7411(a)(4) of this title.”⁴⁸ As such, the NSPS definition of modification was incorporated in the 1977 Clean Air Act Amendments’ statutory preconstruction permitting regime.

Congress inadvertently omitted one important provision from the statutory PSD program: it neglected to include modification as an event that would trigger preconstruction permitting under SIPs adopted in response to the 1977 Amendments. As enacted, an NSPS modification of an existing source triggered preconstruction review under the 1974 regulatory PSD program, which was continued in effect by the 1977 Amendments but was not explicitly subject to preconstruction permitting under the new PSD SIP requirements. To remedy this and other omissions, Congress promptly enacted a technical and conforming amendment to the 1977 Clean Air Act Amendments.

... because of the way Congress defined modification in the 1977 Clean Air Act Amendments, it is clear that, at the time of the Amendments, Congress understood modifications of existing sources that were potentially subject to preconstruction review under the statutory NSR program to be the equivalent of modifications of existing sources under the NSPS program.

At that time, Congress had yet another, third, chance to indicate that for the purpose of program coverage modifications at existing sources should be defined differently under the statutory PSD program than they were under the NSPS program. Rather than issue such a dictate, however, or even hint that it was required, Congress stated that “[t]he term ‘construction’ when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.”⁴⁹ In a conference committee report explaining the amendment, Congress stated that the term construction was “to conform to usage in other parts of the Act.”⁵⁰ Congress’ use of the term modification to describe the construction activity that could trigger review under both preconstruction review programs was thus derived from the NSPS program.

Accordingly, because of the way Congress defined modification in the 1977 Clean Air Act Amendments, it is clear that, at the time of the Amendments, Congress understood modifications of existing sources that were

potentially subject to preconstruction review under the statutory NSR program to be the equivalent of modifications of existing sources under the NSPS program. That is, in 1977, when the statutory NSR program was created, Congress understood that only constructing a green-field source, or increasing an existing source's maximum achievable emission rate, triggered preconstruction permitting review.

4. The 1978 Prevention Of Significant Deterioration Rule: EPA's Contemporaneous Interpretation Of Modification And Creation Of A New "Major Modification" Requirement

The 1977 Clean Air Act Amendments featured an additional constraint on the applicability of the NSR program: the program would apply only to "major emitting facilities," defined as stationary sources that had the potential to emit more than 100 or 250 tons per year of a regulated pollutant (depending on the source category).⁵¹ To give effect to the new statutory PSD program, EPA provided in the 1978 PSD Rule that only NSPS modifications of existing sources that were deemed to be "major" would be subject to the NSR program.⁵²

A new definition of "major modification" was created, by legislative rule. Under the 1978 PSD Rule, a "major modification" was defined as "any physical change in, change in the method of operation of, or addition to a stationary source, which increases the potential emission rate [i.e., maximum annual emission rate] of any air pollutant..."⁵³ By focusing on emission rate, the new definition incorporated the requirement that there must be an NSPS modification for there to be an NSR "major modification."

To summarize, EPA's definition of "major modification" as contained in the NSR programs of the 1977 Clean Air Act Amendments confirmed its interpretation of modification contained in the 1974 PSD Rule and the 1975 NSPS Rule, except that the emission rate increase had to occur for a major stationary source (not just for a single emission unit at the source). These provisions show that the 1978 PSD Rule emphasized continuity with the regulatory PSD program's and the NSPS program's definition of modification for program coverage purposes. That is, EPA focused on activities that create new emitting capacity as the trigger for review, *not* on variations in how a source used existing capacity.

Indeed, in 2005, EPA emphasized the achievable emission rate-based origins of the NSR program in two different ways. The first way was through an enforce-

ment action brought against an electric utility, seeking to impose liability based on the 1978 PSD Rule. In *United States v. American Electric Power Co.*,⁵⁴ the government stated that "[u]nder the 1974 and 1978 PSD Regulations, a 'modified source' is one which 'increases the emission rate of any pollutant for which a standard' has been set."⁵⁵ To calculate whether an emission increase has occurred under the 1978 PSD Rule, "100% equivalent annual availability, 100% utilization factor, and, therefore, 100% capacity factor is assumed."⁵⁶ As such, "[t]o determine if there is an increase in the maximum hourly emissions rate, a source compares the maximum capability of the unit before and after the activity, and then subtract [sic] the pre-change emissions rate from the post-rate projection."⁵⁷

The second way EPA emphasized the achievable emission rate-based origins of the NSR program is in a notice of proposed rulemaking regarding the Agency's interpretation of the term modification. There, EPA noted that "[i]n the absence of statutory language on how to determine an emissions increase, we initially defined emission increases in terms of allowable or potential emissions."⁵⁸ That is, EPA "modeled [its] early major NSR method for calculating any emissions increases after the existing NSPS program."⁵⁹

The 1978 PSD Rule was challenged by environmental group and regulated industry, and the D.C. Circuit partially vacated the rule in *Alabama Power Co. v. Costle*.⁶⁰ Notably, the 1978 PSD Rule's requirement that, for there to be a "major modification," there must be an activity that increases "the potential emission rate" of any air pollutant was neither challenged nor vacated. This, of course, makes perfect sense. Only one year removed from the 1977 Clean Air Act Amendments and three years from the 1975 NSPS Rule, it would have been risible to suggest that EPA *lacked authority* to define modification consistently for the NSR and NSPS programs. It would have been likewise absurd to suggest that § 111 did not permit a maximum achievable emission rate test—the only way it had ever been construed.

To be sure, Congress emphatically indicated in the 1977 Clean Air Act Amendments that certain aspects of the NSR and NSPS programs must differ.⁶¹ For example, as the D.C. Circuit explained in *Alabama Power*, by defining "major emitting facility" (i.e., groups of individual emitting units), Congress required EPA to allow sources to avoid preconstruction review by reducing emissions at one part of a plant to offset increased emissions

Only one year removed from the 1977 Clean Air Act Amendments and three years from the 1975 NSPS Rule, it would have been risible to suggest that EPA *lacked authority to define modification consistently for the NSR and NSPS programs. It would have been likewise absurd to suggest that § 111 did not permit a maximum achievable emission rate test—the only way it had ever been construed.*

caused by a modification at another part of the plant.⁶² In other words, the statutory definition of “major emitting facility” was held to require a regulatory definition of “major modification” that would not subject NSPS modifications to preconstruction review if they did not result in a significant increase in actual annual emissions from the entire source. This congressionally-blessed opportunity to “bubble” emissions accorded sources additional flexibility and was clearly meant the narrow the range of circumstances in which preconstruction review would be required.

After the court’s decision in *Alabama Power*, EPA implemented this aspect of the 1977 Clean Air Act Amendments through its definition of “major modification” by providing that a source that undertook a modification could still avoid an “emission increase” caused by the modification by translating the increase into tons per year, and then offsetting those tons by enforceable emission reductions elsewhere at the source.⁶³ These developments demonstrate that where Congress did define terms in the NSR program by reference to definitions contained in the NSPS program, EPA, *at an irreducible minimum*, may and did interpret the NSR definitions to encompass activities that were included in EPA’s contemporaneous interpretation of the term under the NSPS program.

D. The 1980 NSR Rule And The Enforcement Initiative

Following *Alabama Power*, EPA changed the definition of “major modification” for the NSR program to focus on what it deemed to be “actual” annual emissions rather than “potential [annual] emissions.”⁶⁴ For an emission unit that underwent a change that was an NSPS modification, EPA defined an increase in “actual emissions” by comparing the unit’s historical annual

emissions to its future potential to emit. Furthermore, EPA provided that reductions in emissions from units at the plant other than the modified unit could be used to offset any emission increase from the NSPS modification by reducing emissions (in tons per year) below the lesser of “actual” or “allowable” emissions.

By contrast, for units that undertook changes that did not constitute an NSPS modification, EPA has advanced disparate interpretations of NSR coverage over the last sixteen years. EPA’s unfortunate wavering was prompted by its desire to secure large additional emission reductions from utility and industrial sources without having to justify its decision, on legal and policy grounds, in a legislative rulemaking. However, the intrinsic force of the argument that Congress incorporated the regulatory NSPS modification as a trigger for the NSR program, has caused numerous courts to reject EPA’s attempts, starting in the late 1990s, to bring enforcement actions against utilities that allegedly undertook “major modifications” at their facilities but without undergoing an NSPS modification at the source.

1. The 1980 NSR Rule

The 1980 NSR Rule emphasizes the broad ambit within which EPA has always viewed its authority to define “major modification” under the NSR program. Noting that the *Alabama Power* court, in supplanting its original opinion, used a set of terms that “suggest[s] changes in actual emissions,” EPA shifted the focus of its “major modification” rule from what it deemed to be “‘potential to emit [annual emissions]’ to ‘actual [annual] emissions.’”⁶⁵ Nowhere in the 1980 rulemaking did the Agency state that it meant to abandon its prior consistent interpretations of the NSR program as requiring § 111 modification activity that increases emission rate in order to trigger a “major modification” analysis.

In 1981, EPA contemporaneously interpreted the 1980 NSR Rule. In an applicability determination involving a project at a General Electric facility, EPA confirmed that “PSD applicability [at a previously operating source] is determined by evaluating any change in emissions rates caused by” the physical or operational change being examined.⁶⁶ Absent a change in the emission rate, EPA concluded, actual emissions “could increase only if there is an increase in the production rate or hours of operation, both of which are specifically exempt from PSD review.”⁶⁷

2. EPA's Practice Since 1980

Between 1983 and 1999, EPA brought no enforcement actions against owners or operators of electric utility steam generating units for performing maintenance activities that did not increase a source's maximum achievable emission rate. The one notable action EPA did take during this time was to refuse the Wisconsin Electric Power Company's ("WEPCO") attempts to undertake at its five-unit Port Washington Plant what were, in the Agency's words, undisputedly "unprecedented" life extension activities. EPA initially found that those activities involved NSPS modifications at all five units.⁶⁸ Yet, in the initial *WEPCO* decision, and before, EPA gave no indication that it believed the Clean Air Act forced it to interpret the regulatory term "major modification" in the NSR program to cover activities performed at a plant that were not NSPS modifications that increased a unit's emission rate. Quite the opposite was true. Before *WEPCO*, Edward E. Reich, EPA's longtime Director of Stationary Source Enforcement, stated in a 1983 applicability determination that, when a major source installs a larger component, "any increase in actual emissions...which will result from the increased capacity provided by the larger [component] must be considered for the purposes of PSD applicability."⁶⁹

Contemporaneous with the *WEPCO* decision, EPA also "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" without installing BACT or LAER in a 1989 air emission trends study used to help calculate the required emissions cap for the 1990 Clean Air Act Amendments' Title IV Acid Rain tradable permits program.⁷⁰ Indeed, the 1990 Clean Air Act Amendments, featuring, among other provisions, the pathbreaking market incentive program of Title IV, came into being only because, as of 1990, EPA had consistently interpreted the NSR program's modification requirements as providing no basis for triggering preconstruction review of existing sources, and securing any large-scale potential emission reductions that would have resulted from the installation of the pollution control technology retrofits driven by such a review.⁷¹

Consequently, in promulgating the Title IV Acid Rain program, Congress assigned sweeping tonnage reductions for all major power plants in what was then the largest pollution cleanup project ever enacted. Unlike the command-and-control NSR program, which

inherently produces only source-by-source reductions, Title IV allowed the plants to reduce emissions in a flexible manner. Utilities were able to trade pollution allowances generated when a given source has exceeded its required reductions, providing them with the incentive to reduce SO₂ emissions in the most cost-effective manner possible. Reductions under the Title IV program are still taking place, and apply regardless of any modifications to a particular power plant.

Notably, in response to Congressional concerns that routine maintenance would be subject to NSR following the *WEPCO* decision, EPA clarified that such activities had not, and were not expected, to trigger NSR. Specifically, EPA represented that "it is anticipated that no existing utility unit will become subject to the [NSPS] revision due to being modified or reconstructed."⁷² Similarly, in the preamble to a 1997 proposed rulemaking, EPA said that "[f]ew, if any, changes typically made to existing steam generating units" would subject these units to the modification rule.⁷³ Unfortunately, this well-settled and consistent practice with respect to the implementation of the NSR program came to an abrupt halt in 1999, when EPA referred to the Department of Justice numerous alleged NSR violations for civil enforcement actions against electric utilities involving projects that were not NSPS modifications.

Shortly thereafter, the Justice Department filed enforcement actions against seven coal-fired electric utilities, to be followed by an additional action in 2000.⁷⁴ By 2002, eight enforcement actions were pending against electric utilities in district courts.⁷⁵ The actions alleged hundreds of violations at facilities largely located in the South and Midwest.⁷⁶ Some alleged violations date back to the mid-1970s.⁷⁷

In 2002 and 2003, realizing the deleterious environmental and economic impact of its altered NSR approach, EPA issued two rules revamping the major NSR program. The 2002 NSR Rule introduced a new "major modification" emission increase methodology to better balance economic and environmental considerations.⁷⁸

In the 2002 NSR Rule, however, EPA abandoned the traditional NSPS emission rate increase as the trigger for a "major modification" analysis. The ERP was promulgated in 2003, in response to problems inherent in EPA's erstwhile completely discretionary, case-by-case approach to determining what activities do and do not constitute routine maintenance. The case-by-case approach, as applied to activities that did not increase

emission rates, tended “to have the effect of leading sources to refrain from replacing components, to replace them with inferior components, or to artificially constrain production in other ways.”⁷⁹ Such a result did not advance

the central policy of the major NSR program as applied to existing sources, which 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.⁸⁰

Moreover, EPA simply did “not believe that the outcomes produced” by the case-by-case approach “have significant environmental benefits compared with” the ERP.⁸¹

III. The Irreducible Minimum Of EPA’s Discretion

A thorough examination of the NSR program’s roots, both in EPA’s regulatory enactments and Congressional mandates, demonstrates that the NSR program’s definition of “major modification” does not and cannot exist apart from the NSPS program. In this situation, EPA retains an inviolable core of discretion: EPA may interpret the trigger for a “major modification” analysis under the NSR program consistent with its interpretation of modification under the NSPS program at the time of the 1977 Clean Air Act Amendments (which created the current NSR program).

A. The Irreducible Minimum Of EPA’s Authority

Whatever else might be said about EPA’s authority to interpret modification for purposes of defining the “construction” activities that trigger preconstruction review under the NSR program, when Congress defined modification by reference to § 111, it gave EPA the authority to define that “construction” trigger consistent with EPA’s regulatory definition of § 111 modifications. Under *Chevron v. NRDC*, a court reviewing an administrative agency’s interpretation of a statute being implemented by legislative rule first must ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court...must give effect to the unam-

biguously expressed intent of Congress.”⁸² If Congress has not unambiguously expressed its intent, however, and “the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”⁸³

... when Congress defined modification by reference to § 111, it gave EPA the authority to define that “construction” trigger consistent with EPA’s regulatory definition of § 111 modifications.

In the case of NSPS modifications for purposes of NSR program coverage, Congress had three bites at the apple to define the construction-related triggering event at existing facilities. First, in Clean Air Act § 168, promulgated as part of the 1977 Clean Air Act Amendments, Congress directed EPA to apply the 1974 PSD Rule (which defined emission rate increase as the triggering event), and refused to vitiate SIPs that complied with the Rule. Second, Congress defined modification under the NNSR program as meaning “the same as the term ‘modification’ as used in section 7411(a)(4) of this title.”⁸⁴ Third, given the chance to express contrary intent for the PSD program in a technical and conforming amendment enacted after the 1977 Clean Air Act Amendments, Congress defined the term “construction” in reference to “modification (as defined in section (a) of [Clean Air Act Title I])...”⁸⁵

In other instances where Congress has incorporated by reference one statutory definition into a closely related statute, courts have found that Congress unambiguously intended for the terms to be defined consistently. For instance, where Congress stated that “taxable income from property” for purposes of the Crude Oil Windfall Profit Tax Act of 1980 “shall be determined under section 613(a) [of the Income Tax Act],” the court held that Congress unambiguously directed taxes to be determined according to that section, regardless of intervening caselaw.⁸⁶ In that court’s words, “[i]t is unreasonable to believe Congress intended to allow” regulated entities to ignore the mandates of a statute that “Congress explicitly incorporated by reference” into another statute.⁸⁷

Similarly, where a particular statute references another statute without explicitly referring to the second

statute's definitional sections, Congress unambiguously intends "a 'prior statute's definition of [a] term [to] control if it is natural and reasonable to think that the members of the legislature, in drafting the new statute, were influenced by the prior statute.'"⁸⁸ In the case of the 1977 Clean Air Act Amendments, Congress was not only influenced by the 1970 Clean Air Act Amendments, it clearly enacted the statutory NSR program having been fully aware of, and with specific reference to, the preexisting regulatory NSPS, PSD, and NNSR programs. This makes Congress' explicit adoption of the § 111 definition of modification into two separate preconstruction review programs as the triggering activity, both during the Amendments and in their aftermath, *particularly* meaningful.

In defining the minimum bounds of EPA authority, it is not necessary to determine whether or not Congress incorporated by reference the precise regulatory NSPS definition of modification as it existed in 1977. What is relevant is that, at a minimum, EPA has the authority to propound a definition of modification, for triggering the "major modification" requirement created by legislative rule under the NSR program, that is consistent with the way that modification was defined, by regulation, under the NSPS program and under the PSD and NNSR programs prior to and following adoption of the 1977 Amendments. Preventing EPA from defining the terms identically would do violence to any sensible means of statutory construction.

This is not to say, of course, that other parts of the 1977 Clean Air Act Amendments may not constrict EPA's discretion to define the term modification for the NSR program in exactly the same way as the Agency does for the NSPS program. However, these bounds cannot come from § 111 itself. Congress explicitly referred to § 111 when it defined modification for purposes of triggering the NSR program. The 1978 PSD Rule, EPA's contemporaneous interpretation of the 1977 Clean Air Act Amendments, explicitly required an increase in "the potential emission rate" of an air pollutant. In light of this statutory and regulatory history, and regardless of the merits of the argument that modification for purposes of triggering the NSR program *must* be defined identically to modification for the NSPS program, it is clear that an achievable emission rate-based test for triggering NSR is permissible.

B. The Irreducible Minimum Of EPA Authority Is Consistent With All Decisions Interpreting Modification For Purposes Of The NSR Program

Decisions interpreting "major modification" for the NSR program fall into four categories. First are cases finding that Congress unambiguously intended to incorporate the NSPS regulatory definition of modification into the definition of construction that triggers the NSR program. Second are cases finding that Congress unambiguously intended that modification be defined identically for the NSR and NSPS programs: thus, although EPA can change the modification definition, it must do so consistently for both the NSR and NSPS programs. Third are cases finding that EPA has the discretion to define major modification under the NSR program to cover activities that would not be modifications under pre-1977 NSPS or NSR programs. Fourth are cases considering other aspects of the modification definition that do not reach the question of whether Congress intended that the modification trigger be defined identically for the NSR and NSPS programs. Significantly, in no case has a court trenched on EPA's authority to define a modification trigger consistently for the NSR and NSPS programs.

1. Decisions Confining EPA's Authority To Define NSR Modifications To The NSPS Program As It Existed In 1977

Several courts that have considered EPA's authority to define modifications for the NSR program have found that Congress intended to incorporate the preexisting regulatory NSPS definition of modification into the NSR program as the exclusive trigger for "major modification" under the 1980 NSR Rule. The two cases that have taken this approach are the district court decisions in *United States v. Alabama Power Co.*⁸⁹ and *United States v. Duke Energy Corp.*⁹⁰ In the district court's decision in *Duke Energy*, the court stated that "[w]hen Congress enacted the NSR program, it specifically stated its intent to incorporate the NSPS 'usage' of the term 'modification' into PSD."⁹¹ Thus, "in order to undergo 'construction' as defined in PSD, an existing source *must* also undergo a 'modification' as defined in NSPS."⁹² The *Alabama Power* court concurred in the *Duke Energy* court's conclusions, noting that *Duke Energy* is "clearly more thorough, comprehensive and rigorous in its analysis" than cases reaching an opposite conclusion.⁹³ Both courts found that this

statutory analysis and the regulatory language of the 1980 NSR Rule itself compelled the conclusion that an NSPS emission rate increase was the trigger for a “major modification” analysis.

2. Decisions Confining EPA’s Authority To Define NSR Modifications In Lockstep With The NSPS Definition of Modification

The second approach to assessing modifications as a construction trigger for “major modification” analysis under the 1980 NSR Rule is the one taken by the United States Court of Appeals for the Fourth Circuit in *United States v. Duke Energy Corp.*⁹⁴ In reviewing the district court’s decision in *Duke Energy*, the Fourth Circuit affirmed, “albeit for somewhat different reasons than those relied on by the district court.”⁹⁵ Instead of finding that Congress unambiguously intended to incorporate the preexisting NSPS regulatory usage of modification into the definition of “construction,” as the *Duke Energy* and the *Alabama Power* district courts did, the court held that, “[w]hen Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently.”⁹⁶ Applying the canon of construction that no deference is due to an interpretation of a regulation that is inconsistent with the statute, and finding that EPA’s enforcement action interpretation of the 1980 NSR Rule could not be read consistent with the Clean Air Act, but that the *Duke Energy* district court’s interpretation of the 1980 NSR Rule could, the Fourth Circuit affirmed the district court’s interpretation.

The Fourth Circuit’s approach in *Duke Energy* is clearly consistent with the irreducible minimum of EPA authority, although it goes beyond that. In this regard, the Fourth Circuit holds, in interpreting the 1980 NSR Rule, that EPA is *compelled* to interpret NSR modifications consistently with NSPS modifications,⁹⁷ which clearly gives EPA a delineated sphere of authority permitting the Agency to define the terms consistently. In practical effect, this leads to the same conclusion as the district court’s decision, because the NSPS definition of modification has not changed in relevant part since the mid-1970s. The Fourth Circuit’s decision, however, leaves open the possibility that EPA has the discretion to change in the future the NSPS and NSR definitions of modification, so long as the definitions remain consistent.

3. Decisions Reaffirming EPA’s Authority To Define NSR Modifications Differently Than NSPS Modifications

The third approach to assessing modifications under the NSR program is the one taken by several district courts in the footprint of the Sixth and Seventh Circuits: *United States v. Southern Indiana Gas & Electric Co.* (“*SIGECO*”)⁹⁸ and *United States v. Cinergy Corp.*,⁹⁹ decided by the same judge, and *United States v. Ohio Edison Co.*¹⁰⁰ Under this approach, the courts have held that EPA can enforce its late-1990s interpretation of the 1980 NSR Rule’s “major modification” requirement to cover construction activities that do not increase a source’s emission rate, but increase annual emission solely because the activity will enable the source to operate more hours, and that those activities are not RMRR applying an amorphous, multifactor test.¹⁰¹

Although *Ohio Edison* and *SIGECO* were decided before contrary decisions in *Duke Energy* and *Alabama Power*, *Cinergy* explicitly rejected the conclusions reached by the District Court and the Fourth Circuit in *Duke Energy*. In so doing, the court stated that “[w]hen Congress altered the definition of ‘construction’ to include ‘modification’ under PSD as it is used for NSPS, it did not, expressly or otherwise, incorporate the regulatory definition.”¹⁰² This is not to say that EPA lacks discretion to do so, however, and the *Cinergy* court has not made any arguments to the contrary.

4. New York I

Finally, concluding that there is, when it comes to the NSR program, the irreducible minimum of EPA authority—that it has discretion to define NSR modification-triggering activities the same as NSPS emission rate increase modifications under § 111—is consistent with the D.C. Circuit’s decision in *New York I*.¹⁰³ Petitioners in the pending action considering the ERP’s legality, *New York II*, hold out the D.C. Circuit’s 2005 decision as an insurmountable bar to the ERP’s defense. A careful reading of the decision belies these claims, and instead supports EPA’s discretion to define the term modification for the NSR program consistent with its usage in the NSPS program (and regulatory NSR programs) in 1977.

a. Except In Rejecting Industry’s Challenge To The 2002 Rule, *New York I* Only Addressed How Actual Annual Emissions Must Be Measured Under EPA’s “Major Modification” Definition

In *New York I*, the D.C. Circuit focused exclusively on the regulatory “major modification” definition and held that the term “increases” in the statutory NSR program’s definition of modification must be measured in terms of actual annual emissions.¹⁰⁴ In so doing, the court first noted other Clean Air Act sections enacted in the 1977 Clean Air Act Amendment that mention potential annual emissions.¹⁰⁵ The court then noted that the definition of modification under the statutory PSD program referred to the NSPS definition of modification, which defines emission increases by “the amount of any air pollutant emitted by [the] source.”¹⁰⁶ From these premises, the court drew the conclusion that “if Congress had intended for ‘increases’ in [annual] emissions to be measured in terms of potential [annual] or allowable [annual] emissions, it would have added a reference to ‘potential to emit’ or ‘emission limitations.’”¹⁰⁷

As discussed in relation to the 1975 NSPS Rule’s preamble,¹⁰⁸ the phrase “emitted into the atmosphere” is a permissive one that precludes a reading of the term “increase the amount of any air pollutant” that would prevent emission increases to be offset by improving existing control systems. Indeed, these offsets (or “netting”) were what the *Alabama Power* court held statutorily-mandated for the NSR program.¹⁰⁹ Further, in its interpretation of § 111’s definition of modification, EPA promulgated a rule clarifying its longstanding position that the concept of “emitted into the atmosphere” can (if not must) be measured in kg/hr, holding hours of operation constant. It follows that, even under the *New York I* court’s reasoning, the phrase “emitted” does not preclude a rate-based interpretation of modification for purposes of determining the NSPS modification activities that trigger a “major modification” analysis.

A definition of NSPS modification activity that compares the source’s maximum emission rate (over a period of time, e.g., one hour) for some period of time before change and what the maximum rate (over the same period of time) would be as the result of a change is not an annual “potential to emit” test; it is an assessment of a source’s actual achievable emission rate. Nowhere in *New York I* does the D.C. Circuit preclude such a test. To the contrary, the court rejected a challenge by a consortium of environmental petitioners claiming that it was

unlawful for EPA to define modification under the NSPS program in terms of maximum hourly emissions achievable,¹¹⁰ or in a way that would allow existing facilities to restore deteriorated capacity.¹¹¹

Finally, in rejecting Industry Petitioners challenge to the 2002 NSR Rule’s expansion of “major modification” coverage to include projects that were not NSPS emission rate increase modifications, the court held that EPA had discretion to adopt such a rule. This holding cannot, of course, be transformed into a holding that EPA *lacked* discretion to require an NSPS emission rate increase activity as a trigger for the “major modification” analysis. Indeed, the court suggested the 2002 NSR Rule could have been challenged by industry on “reasonableness” grounds, but “industry makes no [such] attack...”¹¹²

Overall, it is clear that *New York I* did not hold that EPA lacks the discretion to define modifications for purposes of triggering the “major modification” analysis under the NSR program consistently with NSPS modifications as interpreted in 1977. That case is thus consistent with the other types of cases finding that, at an irreducible minimum, EPA may define § 111 modification triggering activity consistently with its mid-1970s regulatory usage.

b. Reading *New York I* As Encroaching On The Irreducible Minimum Of EPA’s Discretion To Define § 111 Modification For Purposes Of Covered Construction Activities Ascribes Errors To The Court’s Opinion

Thus, *New York I* is consistent with the proposition that EPA may interpret the NSR program’s definition of modification for purpose of NSR coverage consistently with EPA’s 1970s interpretation of Clean Air Act § 111: the *New York I* Court simply did not confront the question. Reading *New York I* inconsistently with the irreducible minimum of EPA’s discretion to define § 111 modification for purposes of NSR coverage would ascribe to the court a series of errors that the D.C. Circuit did not make. The consideration of these hypothetical errors further buttresses the conclusion that the *New York I* court’s opinion should not be to be read inconsistently with the irreducible minimum of EPA’s discretion.

The first, and perhaps most inexcusable, flaw that would arise from reading *New York I* inconsistently with the notion that there exists a zone of discretion in which EPA may operate pursuant to § 111 is that it implies that

the court drew conclusions about an earlier Congress' intent from the actions of a later Congress. One key to the *New York I* court's holding that "major modifications" under the NSR program require an increase in actual annual emissions is that the 1977 Clean Air Act Amendments distinguished between the terms "emitted" and "potential to emit," making the phrase "emitted into the atmosphere" an unambiguous indicator that Congress was speaking in terms of actual emissions. However, neither the PSD nor the NNSR program contain a freestanding definition of modification. Instead, Congress referenced the definition or usage of Clean Air Act § 111 (42 U.S.C. § 7411), which was enacted in 1970. The Court clearly indicates elsewhere in the opinion that it would not make such an obvious error: "We note that...the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."¹¹³ As such, under the Court's own logic, it would be unwarranted to draw any inferences about the 1977 Congress' unambiguously expressed intent from language enacted by the 1970 Congress. Indeed, given the thrust of *New York I*, if Congress in 1977 intended to assign a new meaning to the term modification, such that EPA could no longer define it in the context of the NSR program in the same manner it did in the context of the NSPS program, it would have made no sense for it to reference the 1970 statutory language that was the basis for the NSPS definition.

Reading *New York I* inconsistently with the irreducible minimum of EPA's discretion to define § 111 modification for purposes of NSR coverage would ascribe to the court a series of errors that the D.C. Circuit did not make.

Reading *New York I* inconsistently with the zone of discretion in which EPA has to operate pursuant to § 111 in defining program coverage also would make that court's decision inconsistent with its own prior decisions. The decision notes that "the NSPS regulations adopted in 1975 and in force at the time of the 1977 CAA amendments themselves used two different (and possibly inconsistent) definitions of modification."¹¹⁴ Yet, the two regulatory provisions to which the court refers, 40 C.F.R. § 60.2(h) and 40 C.F.R. § 60.14(a), are complementary—§ 60.14(a) clarifies the § 60.2(h) definition,¹¹⁵ and the two provisions were *never* enforced differently by

EPA. Moreover, these provisions were subject to judicial review before the D.C. Circuit, and the court there, while invalidating certain parts of the definition, never suggested that the definitions were inconsistent.¹¹⁶

Even if the two definitions were in fact different, both expound on Clean Air Act § 111's definition of modification. This demonstrates that Congress could not have unambiguously indicated that § 111 modifications must be measured in terms of increases in actual tons emitted per year, and not in another way, for instance in terms of activities that increase a source's emission rate over a shorter timeframe. The court, of course, avoids this problem by never stating that actual emissions must be measured by reference to actual annual emissions in tons per year, and it does the court a great disservice to suggest otherwise.

It would likewise ignore Clean Air Act § 111's consistent regulatory history to use that statute's very terms to preclude an NSR definition of modification activity that triggers a "major modification" analysis of annual emissions that was limited to activities that increase emission rate. As previously discussed at length, the regulatory history of § 111 indicates that modifications under that section have *always been and are still measured as a rate*, holding the hours of operation constant.

c. The Clean Units And Pollution Control Projects Provisions Were *Sui Generis* And It Is Unreasonable To Extrapolate Anything From *New York I*'s Rejection Of These Provisions

Contrary to the *New York II* petitioners' assertions, *New York I*'s holdings invalidating the 2002 NSR Rule's "Clean Unit" and "Pollution Control Projects" ("PCP") provisions and do not govern the instant case. In both instances, EPA claimed discretion to cut component terms of § 111's definition of modification from its moorings, and the court's entirely proper rejection of these provisions does not impinge on the irreducible minimum of EPA's discretion to define the term § 111 modification for program coverage purposes to require projects that increase a unit's emission rate.

The *New York I* court found that the PCP exception unlawfully deviates from Congress' unambiguously expressed intent because it exempts from new source review activities that "EPA concedes" are "'changes' in the literal sense."¹¹⁷ The PCP exception also involves activities that admittedly "increase emissions of a 'collateral' pollutant," that is, increases in emission rate

above original design levels.¹¹⁸ Pollution control projects were thus excluded by EPA not on the basis that the underlying activity does not constitute a “change” that does not increase emission rate, but, rather, on the policy grounds that activities “which ‘do not render the unit less environmentally beneficial’ are not ‘physical or operational changes’ and hence, are not ‘modifications.’”¹¹⁹ The ERP involves neither situation. Unlike the PCP exception, it is not a change in the literal sense of the word to permit functionally equivalent components to be installed at a source.¹²⁰ Similarly, the ERP only involves activities that do not increase a source’s maximum achievable emission rate, the same basic test used under the NSPS program.

The D.C. Circuit’s invalidation of the Clean Unit provision likewise does not undermine the ERP’s legal basis. The Clean Unit provision was “an innovative approach to NSR applicability” that exempted from NSR for a period of 10 years facilities that installed new source pollution control technologies, so long as the facility did not exceed the emission limitations established based on that new source technology.¹²¹ To that end, it excluded from the NSR definition of modification activities that were, by EPA’s own admission, physical or operational changes that could increase the source’s actual emission rate, focusing exclusively on the emission limit established to reflect the unit’s “Clean Unit” status.¹²² While it may be within EPA’s irreducible minimum of discretion to define “increases” using different ways of evaluating a source’s actual emissions, it is a completely different situation than the one featured in the ERP to admit that physical or operational changes will occur and then to ignore entirely the consequences of that change for the facility’s actual emissions, instead evaluating NSR applicability based solely on the unit’s status.

d. Assuming *Arguendo* *New York I* Were Inconsistent With The Irreducible Minimum Of EPA Discretion, The D.C. Circuit Recognized That *New York I* Did Not Comprehensively Address The Definition Of Modification

The D.C. Circuit’s decision in *New York I* does not conflict with EPA’s discretion to define NSR program modifications for program coverage purposes consistent with the historical regulatory usage of NSPS modification as requiring an emission rate increase. However, even if the decision did conflict, *New York I* is not, by the Court’s own admission, the final word on the matter.

It is axiomatic that, where a suit is not founded on defective legal premises, such as a repealed statute, the suit is framed by the parties’ controversy, not “the court’s notion of the logical way to think about a legal problem.”¹²³ This is because “[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”¹²⁴ To this end, the D.C. Circuit explicitly recognized that the *New York I* decision would not be the last word on EPA’s discretion to interpret modifications under the NSR program, noting that the Court “express[es] no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs.”¹²⁵ The legal question of whether Congress intended EPA to have the authority to define modification under the NSR program consistent with the term’s preexisting definition for the NSPS program is just as attenuated from the *New York I* decision as the question of whether Congress intended EPA to use identical regulatory definitions of modification. This theory therefore does not conflict with the conclusion that, at a minimum, EPA has the discretion to define modification under Clean Air Act §§ 169 and 172 (the program coverage provisions) consistent with its previous interpretation of § 111.

IV. The Equipment Replacement Provision And Modifications

The ERP is clearly within the irreducible minimum of EPA discretion because the activities it excludes from the NSR program’s coverage would not be deemed modifications under the NSPS regulatory definition of modification. As EPA stated in the ERP preamble, “[a]lthough we do not assert that the NSPS interpretation is the only one we could have adopted for NSR purposes...at the very least it delineates a zone of discretion within which EPA may operate.”¹²⁶ While the exact bounds of EPA’s discretion to expound on § 111 are not necessarily clear, this “zone of discretion” has its core in the 1975 NSPS Rule, the 1974 and 1978 PSD Rules, the 1976 Interpretive Rule, and the 1980 NSR Rule and necessarily must permit the Agency discretion to define “major modification” triggering activities under the NSR program consistent with those rules.

A. EPA Has Always Excluded Routine Maintenance Under The NSPS Program

As a historical matter, it is clear that EPA has always taken the position that it can define Clean Air Act § 111's phrase "physical change" to exclude activities that are consistent with the proper operation and maintenance of an existing facility. As EPA notes in the ERP's preamble:

As early as our 1971 NSPS regulations, we have made clear that many activities that do not affect the contemplated operation of a unit in a manner consistent with its original design are not physical or operational changes. Specifically, in our 1971 NSPS regulations, we determined that physical or operational changes do not include: (1) 'Routine maintenance, repair, and replacement' of equipment...¹²⁷

To be sure, there was a general dearth of applicability determinations and other examples of EPA practice regarding the RMRR exclusion between the 1970 and 1977 Clean Air Act Amendments. However, it is instructive that, in its notice of proposed rulemaking for the 1975 NSPS Rule, EPA stated that it was clarifying confusion "outside the Agency," rather than altering its preexisting understanding of § 111 modification coverage.¹²⁸

While the exact bounds of EPA's discretion to expound on § 111 are not necessarily clear, this "zone of discretion" has its core in the 1975 NSPS Rule, the 1974 and 1978 PSD Rules, the 1976 Interpretive Rule, and the 1980 NSR Rule and necessarily must permit the Agency discretion to define "major modification" triggering activities under the NSR program consistent with those rules.

This conclusion makes good sense. Section 111's language is doubly ambiguous regarding the term "any physical change." The first ambiguity in § 111 is that it is not clear from the plain language of the statute whether Congress intended the word "any" to modify only the first step in determining whether a modification has occurred—the phrase "physical change in, or change in the method of operation, in a stationary source"—or whether Congress intended "any" to modify the definition in its entirety—"physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air

pollutant not previously emitted." Even if the former reading of § 111 is correct, Congress arguably intended to encompass every single physical change to a source within the definition of modification but, as discussed below, there still is ambiguity as to what is a "change in a...stationary source."¹²⁹ If the latter reading of § 111 is correct, and the definition is read holistically, then "any" merely means that if an activity is within the definition of a modification it should be treated as such.

As noted above, § 111 is also ambiguous because "physical change...in a stationary source" is an unclear term. The word "change" is susceptible to a wide variety of definitions. One need not open a dictionary to see that change could mean that an activity altered or made the source different, or the activity may only need to substitute for something, or there may need to be a baseline transformation. Indeed, there are far broader terms that Congress could have used than "change" if it wished any activity at a source that increased the source's emissions to trigger NSR review. For instance, Congress could have said "any physical *activity* at a stationary source" rather than "any physical *change*...in a stationary source." Congress could likewise have said that a modification occurs "any time" there is an increase in emissions. Either of these definitions would clearly have indicated that every single activity at the facility that increases emissions is a modification. Congress did not unambiguously express its intent to do this, and it pays no solicitude to Congress' expressed intent to pretend that it did.

Aside from its inconsistency with the statutory language and regulatory history, the other great conceptual difficulty with reading "any physical change...in a stationary source" as "any physical activity at a stationary source" is that it divorces the "any physical change" language from "change in the method of operation." The term "physical change" is no less ambiguous than the term "change in the method of operation," and the latter's ambiguity serves to emphasize the fact that Congress did not unambiguously intend anything specific with the term "physical change," except that EPA could read modifications for the NSR program consistently with the preexisting regulatory definition of modification. If "any...change in the method of operation" encompasses every single construction-related alteration in the way a source operates,¹³⁰ there would be no principled basis on which to distinguish a "modified" source from an "existing source." However, no one has

ever seriously questioned certain non-controversial portions of the definition of modification, like the provision that permits a source to use an alternative fuel that the source was originally designed to accommodate.¹³¹ In this way, the RMRR exclusion is consistent with other non-controversial exclusions from the “change in the method of operation” language.

B. The ERP Excludes Less Significant Activities Than Many Activities Excluded From The NSPS Program In 1977

As shown by the foregoing, EPA indisputably had the discretion to exclude certain activities from § 111(a)(4)’s definition of modification at the time Congress enacted the 1977 Clean Air Act Amendments, and had judiciously exercised that discretion to ensure that any new pollution triggered a source’s obligation to comply with new source performance standards. This historical interpretation of § 111(a)(4) was far broader than the ERP, both in the number of activities excluded and the size of the excluded activities.

1. Scope Of The Activities Excluded

The NSPS RMRR exclusion allowed and allows the owners and operators of affected facilities to engage in a broader array of activities than receive the benefit of the ERP’s “safe harbor.” The NSPS regulations applicable at the time Congress enacted the 1977 Clean Air Act Amendments excluded “[m]aintenance, repair, and replacement which the Administrator determines to be *routine for a source category*.”¹³² It is abundantly clear that standard practice in the electric utility industry has been to replace worn-out components with parts that serve the same purpose, but use more modern technology. For instance, a 1972 report issued by the Tennessee Valley Authority described standard industry practice:

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.¹³³

Rather than automatically excluding from new source review all maintenance, repair, and replacement activities that are routine within a source category, the

ERP limits its bright-line exclusion only to “the replacement of any component of a process unit with an identical or functionally equivalent component(s), and maintenance and repair activities that are part of the replacement activity.”¹³⁴ In addition to this requirement, however, the ERP did not create a bright-line exclusion for like-kind changes that meet this requirement, but that “change the basic design parameter(s) of the process unit to which the activity pertains.”¹³⁵ Nowhere is or was the NSPS RMRR exclusion so limited.

2. Size Of The Activities Excluded

The NSPS RMRR exclusion permitted the owners and operators of affected facilities to engage in activities that are far more costly than the activities the ERP automatically excludes from the NSR program. Under the NSPS RMRR exclusion, if an activity was routine in a particular source category, there was no limit on how costly the activity could be, except that, under the NSPS “reconstruction” provision, new source performance standards were triggered when “[t]he fixed capital cost of the [activity] exceeds 50 percent of the capital cost that would be required to construct a comparable entirely new facility.”¹³⁶ In contrast, the ERP creates a bright line exclusion for activities only where “the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement [do] not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced.”¹³⁷ Not only is the ERP’s 20 percent limit far lower than the reconstruction rule’s 50% trigger—a factor EPA considered in promulgating the ERP¹³⁸—but the cost being considered is smaller as well.

C. The ERP Excludes Less Significant Activities Than Were Excluded Under The 1978 PSD Rule RMRR Exclusion

The routine maintenance activities the ERP safe harbor excludes are less significant than activities that were excluded under the 1978 PSD Rule, and the same exclusion carried over in the 1980 NSR Rule. While the 1978 PSD Rule was vitiated in part by the D.C. Circuit in *Alabama Power v. Costle*,¹³⁹ no petitioner in that action challenged EPA’s ability to exclude routine maintenance, repair and replacement activities from the purview of modification and no petitioner challenged it when recodified in 1980.

In a guidance document issued less than four months subsequent to the 1978 PSD Rule's promulgation, EPA stated that "[r]outine replacement means the routine replacement of parts, within the limitations of reconstruction..."¹⁴⁰ In another guidance document issued in May 1979, EPA again stated that "routine replacement means the replacement of parts, within the limits of reconstruction," and that it "would certainly not include the replacement of an entire 'facility'..."¹⁴¹ As EPA practice contemporaneous with the 1977 Clean Air Act Amendments indicates, the Agency read the original NSR routine maintenance exclusion as being coextensive with the NSPS exclusion.

To summarize, the NSPS RMRR exclusion is broader than the ERP's automatic exclusion for certain like-kind replacements. The fact that, in 1978, EPA adopted for NSR purposes this broader definition—and that it was neither challenged nor vitiated in *Alabama Power v. Costle*—indicates that the ERP is well within the historic basis of EPA's discretion.

V. Conclusion

In the nearly thirty years since the 1977 Clean Air Act Amendments created the statutory PSD and NNSR programs, and over thirty-five years since the 1970 Clean Air Act Amendments promulgated § 111, the words contained in these statutes have taken on lives of their own. The statutes were enacted at the inception of comprehensive national environmental regulation, and the regulatory tools used to do so were still being refined. Throughout that period, EPA has defined § 111 modification to cover only construction activities that increased a source's maximum emission rate. First in 1976, and later beginning in 1978, EPA created a regulatory requirement, "major modification," that further limited NSR requirements to only certain § 111 modification activities.

If the Clean Air Act provisions enacted in the 1970s are decoupled from Congress' historical understanding of certain terms, the distinction between the statutory modification activities that potentially trigger the NSR program, and the regulatory term "major modification" that determines whether an NSR preconstruction permit is required, will be lost. This is why it is so important in considering this issue to recognize that, when Congress expressly incorporates the usage or definition of one statutory term of art into a related program, it does not

necessarily intend that the incorporated statutory definition would delimit an administrative agency's discretion to interpret the term less expansively than the term was interpreted under the original program.

If accompanied by extremely clear extrinsic statutory language, this perhaps could be accomplished, but such restrictions cannot spring from the incorporated definition itself. Pretending that Congress "virtually" defined the term modification when it explicitly adopted the definition or usage of a term that was well established under the NSPS program, and then restricting the Agency's discretion to define the term according to what Congress in 1977 might have understood the same

At the time petitioners' restrictive reading of modification would have generated some cost-effective pollution reductions, EPA (and contemporary environmentalists) understood that the view was unfounded. Today, when market-based trading schemes promise far greater emission reductions at far less cost than could be achieved under a 1970s-era best available technology scheme, petitioners' ignore this history and attempt to force on the American public an anachronism that never really existed.

words to mean if it had crafted them at the time, is not a legitimate act of statutory interpretation. Yet this is what the state of New York, the Natural Resources Defense Council, and the other *New York II* petitioners challenging the ERP's legality would have the D.C. Circuit do. Based on the words contained in Clean Air Act § 111, the petitioners would have the *New York II* court strike down a rule that is clearly permissible under the program § 111 governs, and clearly would have been permissible at the time Congress adopted § 111's words.

The petitioners' legal folly is also ironic in its potential consequences. At the time petitioners' restrictive reading of modification would have generated some cost-effective pollution reductions, EPA (and contemporary environmentalists) understood that the view was unfounded. Today, when market-based trading schemes promise far greater emission reductions at far less cost than could be achieved under a 1970s-era best available technology scheme, petitioners' ignore this history and attempt to force on the American public an anachronism

that never really existed. Petitioners' attempts to rewrite the Clean Air Act should be rejected and the ERP's legality upheld.

- 1 See *New York v. EPA*, No. 03-1380 (D.C. Cir. 2006) [hereinafter *New York II*]. There are two cases captioned *New York v. EPA* that will be discussed in this White Paper. *New York II* considers the ERP's legality; *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (per curiam) [hereinafter *New York I*], addresses the 2002 NSR Rule's legality. For a discussion of the 2002 NSR Rule, see *infra* note 78 and accompanying text.
- 2 See 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 (Oct. 27, 2003) [hereinafter ERP Rule].
- 3 See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988).
- 4 These reforms include the Clean Air Interstate Rule, see Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 70 Fed. Reg. 25,162 (May 12, 2005), and the Clean Air Mercury Rule, see Standards of Performance for New and Existing Stationary Sources: Electric Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005).
- 5 See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.1, at 139 (2002).
- 6 In this case, Congress used Clean Air Act § 111(a)(4)'s definition of "modification" to define the construction activities at existing sources that are potentially subject to preconstruction New Source Review ("NSR").
- 7 See Pub. L. No. 91-604 §§ 110(a)(2)(D) (requiring that State Implementation Plans ("SIPs") include "a procedure...for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply"), -(a)(4) (requiring the § 110(a)(2)(D) procedure for review to "provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance...will apply," and to "require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary" to make the determination), 84 Stat. 1676, 1680, 1681 (1970).
- 8 See Env'tl. Council of the States, Resolution No. 01-12 (August 28, 2001).
- 9 The six criteria pollutants for which EPA has promulgated NAAQS are carbon monoxide, nitrogen oxides (NO_x), sulfur dioxide (SO₂), lead, ozone, and particulate matter.
- 10 See 42 U.S.C. § 7407(a) ("Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State..."). One court dubbed the Clean Air Act "a bold experiment in cooperative federalism." *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982).
- 11 42 U.S.C. § 7410(a)(2)(D); cf. *Greenbaum v. EPA*, 370 F.3d 527 (6th Cir. 2004).
- 12 Compare 40 C.F.R. § 52.21(b)(2) (PSD definition of "major modification"), with 40 C.F.R. § 51.165(a)(1)(v) (NNSR definition of "major modification"). The authors shall, where appropriate, collectively refer to the PSD and NNSR programs as the "NSR program."
- 13 H.R. Rep. No. 95-294, 95th Cong., 1st Sess., reprinted in 1977 U.S.C.C.A.N. 1077, 1264.
- 14 42 U.S.C. § 7411(b)(1)(A).
- 15 See 42 U.S.C. § 7411(b)(1)(B).
- 16 See 42 U.S.C. § 7411(a)(1).
- 17 See S. Rep. No. 1196, 91st Cong., 2d Sess., at 16 (1970).
- 18 See 42 U.S.C. § 7411(a)(2) ("The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations... prescribing a standard of performance under this section which will be applicable to such source.") (emphasis added).
- 19 42 U.S.C. § 7411(a)(4).
- 20 EPA defined modification as "[a]ny physical change in, or change in the method of operation of, an affected facility which increases the amount of any air pollutant (to which a standard applies) emitted by such facility or which results in the emission of any air pollutant (to which a standard applies) not previously emitted." 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971) (codified at 40 C.F.R. § 60.2(h)) [hereinafter 1971 NSPS Rule].
- 21 See *id.*

End Notes

- 22 See 40 C.F.R. § 60.2(h)(2)(ii) (1971).
- 23 40 C.F.R. § 60.2(h)(1) (1971).
- 24 Letter from Richard D. Wilson, Director of Stationary Source Enforcement, EPA, to James O. McDonald, Director of Enforcement Division, EPA Region V (Nov. 18, 1975).
- 25 Letter from Gerald K. Gleason, Acting Associate General Counsel, EPA, to Harmon Wong Koo, California Air Resources Board (Aug. 6, 1975).
- 26 Letter from Richard D. Wilson, Director of Stationary Source Enforcement, EPA, to William A. Finke, Wisconsin Electric Power Company (Dec. 13, 1974). In the letter, EPA states that the increase in emission rate is a requirement of 40 C.F.R. § 60.14(a). However, § 60.14(a) did not enter into force until December 16, 1975. As such, the applicability determination reflects the fact that, as EPA noted in the 1975 NSPS Rule's Notice of Proposed Rulemaking, the rule clarified EPA's preexisting definition of modification for the benefit of entities other than EPA to better reflect the Agency's consistent understanding of the program. For a description of the 1975 NSPS Rule, see *infra* notes 32-34 and accompanying text.
- EPA issued other applicability determinations that were premised on the 1971 NSPS Rule's rate-based standard. For instance, in one NSPS applicability determination, EPA stated that its
- determination that the plant will not be covered by NSPS as a result of the planned change is contingent upon the performance of tests in accordance with specified NSPS procedures both before and after the planned change, and the demonstration by those tests that emission of sulfur dioxide and acid mist from the plant did not increase after the change.
- Letter from Thomas P. Harrison II, Director, Air Compliance Branch Enforcement Division, EPA Region VI, to T.D. Turley, Olin Corporation (Oct. 8, 1975). If an emission increase were not measured in terms of capacity to emit, but instead hinged on whether there would be a projected increase in tons of pollution emitted per year, these tests would not be necessary.
- 27 Standards of Performance for New Stationary Sources: Modification, Notification, and Reconstruction, 39 Fed. Reg. 36,946, 36,946 (Oct. 15, 1974) (emphasis added) [hereinafter Proposed 1975 NSPS Rule].
- 28 *Id.*
- 29 One obvious way in which the existing pollution from a source could be redistributed would be a situation where the source had multiple emission points and, while the overall source emissions remained unchanged, allocation of emissions among the different emission points changed.
- 30 *Id.* at 36,947.
- 31 *Id.*
- 32 See Standards of Performance for New Stationary Sources: Modification, Notification, and Reconstruction, 40 Fed. Reg. 58,416, 58,416 (Dec. 16, 1975) [hereinafter 1975 NSPS Rule].
- 33 *Id.* at 58,419 (codified at 40 C.F.R. § 60.14(e)(1) (1976)).
- 34 The term "source category" refers to classifications contained in the *Standard Industrial Classification Manual*. See OFFICE OF MGMT. AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL: 1972 (1972).
- 35 344 F. Supp. 253 (D.D.C. 1972), *aff'd* 4 ERC 1815 (D.C. Cir. 1972) (per curiam), *aff'd by an equally divided court sub nom., Fri v. Sierra Club*, 412 U.S. 541 (1973).
- 36 See Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974) [hereinafter 1974 PSD Rule].
- 37 *Id.* at 42,514 (emphasis added) (codified at 40 C.F.R. § 52.01(d)).
- 38 See *id.* (codified at 40 C.F.R. § 52.01(d)(2)(ii)).
- 39 As a general proposition, a source's emission rate is the product of its maximum "product rate" (i.e., the "throughput" or rate at which a fuel or raw material is introduced into a unit for combustion or processing) multiplied by its "instantaneous rate" (i.e., the amount of a pollutant emitted per unit of fuel or raw material combusted or processed). Projects that increase either the product rate or instantaneous rate will cause the source's emission rate to increase.
- 40 *Id.* at 42,513. See also ERP Rule, 68 Fed. Reg. at 61,269 (EPA reference to NSPS modification decision "was a deliberate choice").
- 41 This is precisely the position EPA has taken repeat-

- edly both in court filings and in the *Federal Register*. See, e.g., Prevention of Significant Deterioration and Nonattainment New Source Review, and New Source Performance Standards: Emissions Test for Electric Generating Units, 70 Fed. Reg. 61,081, 61,099 (Oct. 20, 2005) [hereinafter Proposed 2005 NSR Rule] (“[W]e modeled our early major NSR method for calculating any emissions increases after the existing NSPS program.”); Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Standards of Performance for New Stationary Sources, 57 Fed. Reg. 32,314, 32,316 (July 21, 1992) (NSPS emission increases “are determined by changes in the hourly emission rates at maximum physical capacity”); Plaintiff’s Proposed Conclusions of Law ¶ 251, *United States v. Am. Elec. Power Co.*, No. C2-99-1182, (S.D. Ohio Sept. 1, 2005) (1974 PSD regulations “did not define emission rate, but EPA indicated in the 1974 preamble that the modification definition was to be construed consistently with the existing NSPS rules...Thus for a project to be a modification under the 1974 regulations, it must result in increased pollution on an hourly basis.”).
- 42 Requirements for Preparation, Adaption [sic], and Submittal of Implementation Plans: Air Quality Standards; Interpretive Ruling, 41 Fed. Reg. 55,524 (Dec. 21, 1976) (“1976 Interpretive Rule”).
- 43 See *id.* at 55,528.
- 44 The PSD program is codified in Title I, Part C, of the Clean Air Act, 42 U.S.C. §§ 7470-7479; the NNSR program is codified in Title I, Part D, of the Clean Air Act, 42 U.S.C. §§ 7501 *et seq.*
- 45 42 U.S.C. § 7478(a).
- 46 42 U.S.C. § 7478(b).
- 47 See Pub. L. No. 95-95, § 129(a)(1), as amended by Pub. L. No. 95-190, §§ 14(b)(2), -(b)(3), 42 U.S.C. § 7502 note.
- 48 42 U.S.C. § 7501(4).
- 49 Pub. L. No. 95-190, § 15(a)(64), 91 Stat. 1393, 1402 (1977), 42 U.S.C. § 7479(2)(C). Congress also amended the provision governing hazardous air pollutants to mandate that modification “shall have the same meaning as...under section 111(a).” 42 U.S.C. § 7412(a)(5).
- 50 123 Cong. Rec. H11956 (daily ed., Nov. 1, 1977) (A193).
- 51 42 U.S.C. § 7479(1).
- 52 See Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380 (June 19, 1978) [hereinafter 1978 PSD Rule].
- 53 *Id.* at 26,403 (emphasis added).
- 54 *United States v. Am. Elec. Power Co.*, No. C2-99-1182, (S.D. Ohio).
- 55 Plaintiff’s Proposed Conclusions of Law ¶ 250, *Am. Elec. Power Co.* (S.D. Ohio Sept. 1, 2005).
- 56 *Id.* ¶ 252.
- 57 *Id.* (emphasis in original).
- 58 Proposed 2005 NSR Rule, 70 Fed. Reg. at 61,097.
- 59 *Id.* at 61,099.
- 60 636 F.2d 323 (D.C. Cir. 1979).
- 61 For instance, sources in attainment areas that modify their facilities must install BACT. In defining BACT, EPA charged the relevant permitting authority with the responsibility to balance “energy, environmental, and economic impacts and other costs,” and stated that “[i]n no event shall application of [BACT] result in emissions of any pollutants which will exceed the emissions allowed by any applicable [new source performance standard]. 42 U.S.C. § 7479(3).
- 62 636 F.2d at 401.
- 63 See, e.g., Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,666, 52,698-705 (Aug. 7, 1980) (codified at 40 C.F.R. § 52.21(b)(3)) [hereinafter 1980 NSR Rule].
- 64 *Id.* at 52,700.
- 65 *Id.*
- 66 Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Amasjit S. Gill, Gas Turbine Div., General Electric 1 (June 24, 1981) [hereinafter GE Applicability Determination]. Reich said the same thing about increased hours of operation not being a modification in a PSD applicability determination regarding changes at Cargill’s Eddyville, Iowa, plant. See Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Charles Whitmore, Chief of Technical Analysis, EPA Region VII (Jan. 22, 1982). In both of these cases,

physical and operational changes were being made to the units; these were not stand alone increases in the hours of operation that took place without any construction activity.

- 67 GE Applicability Determination, *supra* note 66 (citing 40 C.F.R. §52.21(b)(2)(iii)(f)).
- 68 *See* Wis. Elec. Power Co. v. Reilly, 893 F.2d 901, 911 (7th Cir. 1990) [hereinafter *WEPCO*]. The government noted in its brief that “*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.* (emphasis added).
- 69 Memorandum from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Michael M. Johnston, Chief of Air Operations, EPA Region X (July 28, 1983).
- 70 Letter from Kenneth A. Schweers, President, ICF Resources Inc., to Robert A. Beck, Director, Clean Air, Fossil Fuels and Natural Resources, Edison Electric Institute (July 26, 1989) (on file with authors).
- 71 Any other interpretation of NSR program, under which existing sources, not responsible for creating new pollution, would have still been required to undergo preconstruction review every time they undertook some physical or operational activities, e.g., maintenance operations, while varying their actual emissions from time to time, would have inevitably caused these sources to install repeatedly new pollution control equipment. As a result, within a relatively short timeframe, the entire universe of existing major sources would have been forced to install the most technologically advanced pollution controls, securing in the process the largest technologically feasible emission reductions. In this regulatory universe, it would have made no sense for Congress and EPA to spend years working on developing and enacting the 1990 Clean Air Act Amendments, which featured numerous provisions, designed precisely to secure large additional reductions in air pollution.
- 72 Letter from John S. Seitz, Director of Office of Air Quality Planning and Standards, EPA, to Senator Robert C. Byrd 4 (January 26, 1996).
- 73 Proposed Revisions of Standards of Performance for NO_x Emissions from New Fossil-Fuel Fired Steam Generating Units; Proposed Revisions to Reporting Requirements for Standards of Performance for New Fossil-Fuel Fired Steam Generating Units, 62 Fed. Reg. 36,948, 36,957 (July 9, 1997).
- 74 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, at iii (2002)
- 75 *See id.* app. 1, at 41.
- 76 *See id.* app. 3, at 44-51.
- 77 *See id.*
- 78 Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-To-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002) [hereinafter 2002 NSR Rule].
- 79 ERP Rule, 68 Fed. Reg. at 61,250.
- 80 *Id.*
- 81 *Id.*
- 82 467 U.S. 837, 842-43 (1984).
- 83 *Id.* at 843.
- 84 42 U.S.C. § 7501(4).
- 85 42 U.S.C. § 7479(2)(C).
- 86 *See* Union Tex. Int’l Corp. v. Comm’r, 110 T.C. 321, 344-45 (1998).
- 87 *Id.* at 345.
- 88 *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 494 n.13 (3d Cir. 2003) (first alteration in original) (emphasis added) (quoting *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 171 F.3d 818, 823-24 (3d Cir. 1999)).
- 89 372 F. Supp. 2d 1283 (N.D. Ala. 2005).
- 90 278 F. Supp. 2d 619 (M.D.N.C. 2003).
- 91 *Id.* at 631. *Duke Energy* refers to the PSD program rather than the NSR program generally because the activities at issue in the suit occurred at sources in attainment areas. However, the decision’s reasoning applies equally to the NNSR program.
- 92 *Id.* at 642 (emphasis added).
- 93 372 F. Supp. 2d at 1306.
- 94 411 F.3d 539 (4th Cir. 2005).
- 95 *Id.* at 542.
- 96 *Id.* at 546-47.

- 97 While the *Duke Energy* Court says at one point that modification cannot be defined “differently” for the PSD and NSPS programs, the Court also says that it cannot be defined “inconsistently.” *See id.*
- 98 245 F. Supp. 2d 994 (S.D. Ind. 2003).
- 99 384 F. Supp. 2d 1272 (S.D. Ind. 2005).
- 100 276 F. Supp. 2d 829 (S.D. Ohio 2003).
- 101 *Id.* at 834. The RMRR test advanced for the first time by EPA in the *WEPCO* applicability determination is that:
- In determining whether proposed work at an existing facility is “routine” EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding.
- Id.* at 852 (quoting Memorandum from Ron R. Clay, Acting Assistant Administrator for Air and Radiation, EPA, to David A. Kee, Director, Air and Radiation Division, EPA Region V, at 3 (Sep. 9, 1988)). Unlike the position later advanced by EPA in the enforcement actions it caused to be brought in the late 1990s, EPA considered the key factor to be that the activities *WEPCO* claimed were routine maintenance were unprecedented within the industry when it made its applicability determinations. *See WEPCO*, 893 F.2d 901, 911 (7th Cir. 1990).
- 102 *Cinergy*, 384 F. Supp. 2d at 1276. Instead, the *Cinergy* court claimed it was following the *New York I* court’s lead in rejecting the Fourth Circuit’s conclusions, even though the court in *New York I* explicitly said that it was reaching neither the meaning of the 1980 NSR Rule nor the rationale of the Fourth Circuit in *Duke Energy*.
- 103 413 F.3d 3 (D.C. Cir. 2005).
- 104 *Id.* at 40.
- 105 *See id.* at 39.
- 106 *Id.* at 39-40. The D.C. Circuit likewise repeatedly recognized in *Alabama Power Co. v. Costle* that the definition of NSR modification was drawn from Clean Air Act § 111—the NSPS definition of modification. *See* 636 F.2d 323, 396 (D.C. Cir. 1979):
- Since several key sections of the Act apply PSD to the construction of new facilities, those sections thereby incorporate the definition of ‘stationary source’ used in section 111, at least with regard to source “modification.” The PSD provisions thus indirectly incorporated the section 111 definition of “source” concerning modifications...
- See also id.* at 399 (“Standards for PSD review of construction of facilities apply also to the ‘modification’ of any source or facility, as defined by section 111(a)(4).”).
- 107 *New York I*, 413 F.3d at 40.
- 108 *See supra* text accompanying note 62.
- 109 *Alabama Power*, 636 F.2d at 401.
- 110 *See* Final Opening Brief of Environmental Petitioners at 45-46, *New York I*, 413 F.3d 3.
- 111 *See New York I*, 413 F.3d at 27-28.
- 112 *Id.* at 20.
- 113 *Id.* at 41 (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 794 (D.C. Cir. 2004)).
- 114 *Id.* at 19.
- 115 *See* Proposed 1975 NSPS Rule, 39 Fed. Reg. at 36,949.
- 116 *See ASARCO v. EPA*, 578 F.2d 319 (D.C. Cir. 1978).
- 117 413 F.3d at 40.
- 118 *Id.*
- 119 Brief of the Env. Prot. Agency at 118, *New York I*, 413 F.3d 3. Significantly, the Agency did not claim that establishing the PCP exception could be justified on the basis of its inherent power to adopt *de minimis* exceptions.
- 120 *See* ERP Rule, 68 Fed. Reg. at 61,272
- 121 2002 NSR Rule, 67 Fed. Reg. at 80,222.
- 122 *See New York I*, 413 F.3d at 39.
- 123 *Ind. Ins. Agents of Am. v. Clarke*, 965 F.2d 1077, 1079 (D.C. Cir. 1992) (Silburman, J., dissenting from denial of rehearing en banc), *rev’d sub nom.*, *United States Nat’l Bank v. Ind. Ins. Agents of Am.*, 508 U.S. 439 (1993).
- 124 *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).
- 125 413 F.3d at 20.
- 126 ERP Rule, 68 Fed. Reg. at 61,273.
- 127 *Id.* at 61,269. *See also* 2002 NSR Rule, 67 Fed. Reg. at 80,187 (“We have recognized that Congress did not intend to make every activity at a source subject to

End Notes

- the major NSR program.”).
- 128 Proposed 1975 NSPS Rule, 39 Fed. Reg. at 36,946.
- 129 42 U.S.C. § 7411(a)(4).
- 130 The NSR programs are preconstruction review programs, *see* 42 U.S.C. §§ 7475(a) (PSD program), 7503(a) (NNSR program), and if there is no construction, there is nothing to review before construction.
- 131 Indeed, Congress in 1977 expanded the regulatory “alternative fuel” exclusion to include mandatory coal conversions ordered under other statutes. *See* 42 U.S.C. § 7411(a)(8).
- 132 40 C.F.R. § 60.14(e)(1) (emphasis added). Two courts have found that this “industrial category” restriction applies under the 1978 PSD Rule’s and 1980 NSR Rule’s “routine maintenance” exclusion. *See United States v. Alabama Power Co.*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005); *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003).
- 133 T.H. GLADNEY & H.S. FOX, TENN. VALLEY AUTH., TVA’S POWER PLANT MAINTENANCE PROGRAM—PHILOSOPHY AND EXPERIENCE 12 (1972).
- 134 ERP Rule, 68 Fed. Reg. at 61,277 (proposed 40 C.F.R. § 51.165(h)). A functionally equivalent component is “a component that serves the same purpose as the replaced component.” *Id.* (proposed 40 C.F.R. § 51.165(a)(1)(v)(C)(1)(xliv)).
- 135 *Id.* (proposed 40 C.F.R. § 51.165(h)(2)).
- 136 40 C.F.R. § 60.15(b)(1).
- 137 ERP Rule, 68 Fed. Reg. at 61,277 (proposed 40 C.F.R. § 51.165(h)(1)).
- 138 *Id.* at 61,255-56.
- 139 Memorandum from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Stephen A. Dvorkin, Chief of General Enforcement Branch, EPA Region II (May 11, 1979).
- 140 Memorandum from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Howard G. Bergman, Director of Enforcement, EPA Region VI (Oct. 3, 1978).
- 141 Memorandum from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Stephen A. Dvorkin, Chief of General Enforcement Branch, EPA Region II (May 11, 1979).



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