

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, et al.,)	Docket No. 03-1380
Petitioners,)	(and consolidated cases)
v.)	
)	EMERGENCY
UNITED STATES ENVIRONMENTAL)	<u>MOTION FOR STAY</u>
PROTECTION AGENCY,)	
Respondent.)	ruling requested by
)	December 26, 2003

The undersigned state and municipal Petitioners (collectively, the “States”) hereby move for a stay pending judicial review of the New Source Review (NSR) rule published by the Environmental Protection Agency (EPA) at 68 Fed. Reg. 61248 (October 27, 2003) (the “Rule”) (Exhibit A). The Rule is a radical departure from twenty-five years of judicial and agency precedent regarding the applicability of the NSR requirements to plant modifications.¹ Contrary to the clear language of the Clean Air Act (the “Act”), which makes the NSR requirements applicable to “*any physical change . . . which increases emissions,*” EPA is now expanding the formerly *de minimis* exemption for routine maintenance, repair and replacement to exempt activities costing well over \$100 million at a typical power plant, even if they increase emissions.

The Rule violates the plain language of the Act, conflicts with Congressional intent behind the NSR provisions, and is contrary to this Court’s seminal decision in *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979), interpreting the NSR requirements. If the Rule is not stayed, many of the nation’s 20,000 major sources of air pollution will use the opportunity to make modifications that would otherwise trigger the NSR requirements. These sources will thereby evade

¹ Two NSR programs are at issue. The prevention of significant deterioration (PSD) requirements (42 U.S.C § 7470, *et seq.*) apply in areas in compliance with National Ambient Air Quality Standards (NAAQS) and the nonattainment NSR requirements (42 U.S.C. § 7502-03) apply where those standards are not met.

applicable pollution control requirements, resulting in significantly greater air pollution, harming public health and the environment for years to come. To prevent the irreparable harm that will result from implementation of the Rule on December 26, 2003,² the Rule should be stayed pending judicial review.

BACKGROUND

Since 1977, the Act's NSR provisions have required all major sources of pollution that are modified to comply with a number of requirements including, most importantly, the requirement that they install state-of-the-art controls.³ Congress defined "modification" broadly in section 111(a)(4) to encompass "any physical change . . . which increases the amount of any air pollutant emitted." 42 U.S.C. § 7411(a)(4).⁴ In 1978, EPA issued a rule that exempted, *inter alia*, activities that qualify as "routine maintenance, repair and replacement." 40 CFR § 52.21(b)(2)(iii)(a). In ruling on challenges to that rule, this Court held that "the term 'modification' is nowhere limited to changes exceeding a certain magnitude" and that EPA's authority to exempt activity from the definition was

² If the Rule is not stayed, it will go into effect on December 26, 2003 in the States governed directly by the federal PSD regulations in whole or in part (including the petitioners California, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania), and on October 27, 2006 elsewhere. 68 Fed. Reg. 61276. On November 13, 2003, EPA denied the States' November 4, 2003 request for a Stay (Exhibit B); in doing so, EPA did not address the States' request for a shorter stay until the Court rules on this motion. Pursuant to Circuit Rule 27(f), the Clerk's office and the Department of Justice have been notified of this motion.

³ The PSD provisions require, *inter alia*, that a new or modified plant implement the best available control technology (BACT). 42 U.S.C. § 7475. The nonattainment NSR requirements are stricter: a new or modified source must meet the lowest achievable emission rate (LAER) and obtain pollution offsets, ensuring that plant modifications reduce emissions. *Id.* at § 7503.

⁴ The PSD requirements apply to "construction" activities, 42 U.S.C. § 7475(a), and "construction" is defined to include "modification." *Id.* at 7469(2)(C). Likewise, the nonattainment NSR provisions apply to "new or modified" sources. *Id.* at § 7502(c)(5).

limited to *de minimis* activity (or administrative necessity). *Alabama Power*, 636 F.2d at 400.⁵

Commencing in the 1980s, EPA adopted a common sense analysis of the routine maintenance exemption, considering several factors in determining whether an activity was routine. *E.g. Wisconsin Electric Power Co. (WEPCO) v. Reilly*, 893 F.2d 901, 905 (7th Cir. 1990). In 1999, EPA commenced NSR enforcement actions against various electric utilities that had replaced major pieces of equipment without complying with NSR requirements. EPA's lawsuits and settlements currently encompass at least 58 power plants that account for approximately 29% of the nation's emissions of sulfur dioxide (SO₂) from power plants. Schoengold Aff't (Tab 1), ¶8. The utilities' primary defense to these enforcement actions is that the equipment replacement activities are just "routine maintenance," exempt from the NSR requirements. In response, EPA has consistently argued that the routine maintenance exemption must be construed narrowly, in accordance with EPA's limited authority to exempt *de minimis* activities from the broad reach of the statutory definition of modification.⁶ *Infra*, at 6-7. As explained below, the courts have agreed.

Nevertheless, acting on the recommendation of the Presidents's National Energy Policy Development Group, EPA issued two new regulations that narrow the meaning of "modification," thereby making it much easier for sources to avoid the NSR requirements. The first rule,

⁵ Subsequent to the *Alabama Power* decision, EPA promulgated a number of thresholds for *de minimis* emission increases, based on an analysis of *de minimis* air quality impacts. 45 Fed. Reg. at 52707-52708 (August 7, 1980) (codified at 40 C.F.R. § 52.21(b)(23)). Emission increases in excess of these thresholds are considered to be "significant," thereby triggering the NSR requirements. *See* 40 C.F.R. §§ 52.21(b)(2) and (b)(23).

⁶ In a 1992 NSR rulemaking, EPA stated that it "has always recognized that the definition of physical or operational change in section 111(a)(4) could, standing alone, encompass the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way that pipe is utilized)." 57 Fed. Reg. 32316 (1992).

promulgated on December 31, 2002, is at issue in Docket no. 02-1387 (and consolidated cases).⁷ The second, the Rule that is the subject of this action, greatly expands the scope of the routine maintenance exemption to encompass equipment replacement activities that cost up to 20% of the process unit's replacement cost, as long as the replacement does not change the unit's "basic design parameters" or exceed other limitations on the unit's emissions. 68 Fed. Reg. 61252.⁸ For example, at a typical 1000 MW power plant unit with a replacement cost of \$800 million, the Rule would exempt (as "routine maintenance") any equipment replacement that costs less than \$160 million, regardless of any increased emissions. *EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source review Program*, GAO 03-947 (Aug. 25, 2003) (Exhibit C) at 18. *See also* Walters Decl. (Tab 2), ¶ 6 (the 20% threshold will allow replacement of virtually any piece of equipment in a power plant). Nothing in the Rule prevents a plant from using the 20% exemption repeatedly, to exempt multiple activities.

In the Rule's preamble, EPA acknowledges that it is abandoning its longstanding interpretation of "modification" and now contends that the statutory definition of modification is vague, thereby allowing EPA to adopt a new interpretation. Contrary to the position that EPA has consistently taken in the rulemaking and enforcement contexts, EPA now contends that its authority to exempt modifications from NSR is not limited to *de minimis* activities. 68 Fed. Reg. 61272.

EPA's own assessments of the effect of the Rule indicate that at least 95-98% of the violations at issue in its NSR enforcement cases would now be exempt from NSR review. Exhibit

⁷ Pending before the Court are the States' motion to consolidate the two related proceedings, and a motion for stay of the December 31, 2002 rule.

⁸ The Rule defines a "process unit" as the combination of structures and equipment used to produce a product, excluding only the pollution controls. 40 CFR § 52.21(b)(55).

C at 18. Examples include at least ten of eleven illegal modifications found by the court in *United States v. Ohio Edison*, 276 F. Supp.2d 829 (S.D. Ohio 2003), and at least thirteen of fourteen violations identified by EPA at Tennessee Valley Authority plants. Schoengold Aff't, ¶¶ 4, 21.⁹ According to EPA's current chief of air enforcement, the Rule's 20% threshold could allow companies to make facility changes without an NSR permit that are much more substantial than *any* of those in dispute in the cases. Exhibit C at 18.

ARGUMENT

A stay is warranted in this case because the States demonstrate that (1) they are likely to succeed on the merits; (2) immediate and irreparable harm will occur absent a stay; (3) there is no harm to third parties if a stay is granted; and (4) a stay is in the public interest. *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (a stay may be granted with a showing of "either a high probability of success and some injury, or vice versa"); *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998).

I. THE STATES ARE LIKELY TO SUCCEED ON THE MERITS

A. EPA's Interpretation is Contrary to the Statutory Language and Congressional Intent

In ruling on a challenge to another exemption from the scope of "modification," this Court held in *Alabama Power* that Congress spoke clearly in defining "modification" to include "any physical change" that increases emissions. 636 F.2d at 400. That decision governs this case. *See*

⁹ Because the \$900/kilowatt (kw) figure used by Schoengold is conservative (compare Walters Decl., ¶6 (\$1300/kw)) and the plant modifications at issue may each have included more than one equipment replacement, each eligible for the 20% exemption, it is likely that the plant owners would contend that all 25 modifications would be exempt. The Rule explicitly allows sources to select a favorable method for calculation of replacement cost. 40 CFR § 52.21(cc)(1).

also *WEPCO*, 893 F.2d at 905 (Congress broadly defined the term “modification” to encompass “the most trivial activities – the replacement of leaking pipes, for example . . . if the change results in an increase in the emissions of the facility.”). Consistent with *Alabama Power*, EPA has consistently recognized that the statutory definition of modification precludes a broad interpretation of the routine maintenance exemption. Now, twenty-five years after Congress enacted the NSR provisions, EPA has reversed course and contends that the statutory definition of modification can be read to exclude extensive multimillion dollar equipment replacement projects that increase emissions significantly. Because this interpretation conflicts with the plain language of the statute and clear Congressional intent, it is invalid. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

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

In *Alabama Power*, this Court invalidated an exemption from PSD requirements for activities resulting in emission increases below a 100 ton threshold, holding that EPA was without authority to exempt any non- *de minimis* physical changes from the statutory definition of modification. Although the “[i]mplementation of the statute’s definition of ‘modification’ will undoubtedly prove inconvenient and costly to affected industries . . . the clear language of the statute unavoidably imposes these costs except for *de minimis* increases.” *Id.*, 636 F.2d at 400 (emphasis supplied).

Until its recent rulemaking, EPA has consistently followed *Alabama Power* and interpreted the statutory definition of modification to preclude a broad application of the routine maintenance exemption. For example, in its brief in *Tennessee Valley Authority v. Whitman*, 336 F. 3d 1236 (11th Cir. 2003), EPA stated that “the term ‘any physical change’ suggests sweeping coverage of the term” and, relying on *Alabama Power*, stated that “EPA’s authority to limit the coverage of the statute is

narrow. . . [it] has the authority to exempt *only* those activities when the benefits of regulation are trivial (or “*de minimis*”)” Exhibit E at 61 (italics in original).¹⁰ In *United States v. Southern Indiana Gas and Elec. Co.* (S.D. Ind.), EPA wrote that “the term ‘physical change’ means exactly that” (Exhibit F at 7), thereby requiring that “EPA must narrowly construe exemptions from the definition of ‘modification’ in order to remain consistent with the Clean Air Act.” *Id.* at 9.

EPA now contends that it has the authority, under *Chevron*, to change its interpretation because the statutory language is ambiguous. 68 Fed. Reg. 61271.¹¹ However, under *Chevron* “step one,” it is for the courts to determine whether or not any particular statutory language is ambiguous or whether Congress has otherwise addressed the issue. In this case, because application of traditional tools of statutory construction establishes that “Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron*, 467 U.S. at 841.¹²

First, EPA makes the mistake of construing “any physical change” without regard for the qualifying words “which increases the amount of any air pollutant emitted by such source” that follow in the definition. As EPA recognized in *Ohio Edison*, the “statutory definition of

¹⁰ Likewise, in its administrative decision in a enforcement action against TVA, EPA’s Environmental Appeals Board (EAB) stated: “Recognizing the breadth of the phrase ‘physical change,’ TVA’s replacement of various boiler components and elements clearly constituted physical changes within the meaning of the CAA.” *In re: Tennessee Valley Authority (TVA)*, 9 E.A.D. 357 (EAB 2000) (excerpts at Exhibit D). However, when judged against the Rule, at least 13 of TVA’s 14 replacement activities would no longer qualify as physical changes.

¹¹ EPA concedes that “[i]n some instances, such as in a decision of the EAB [in *TVA*], and in briefs in various enforcement-related cases, we have previously interpreted “change” such that virtually all changes, even trivial ones, are encompassed by the CAA. Thus, we generally interpreted the exclusion as being limited to *de minimis* circumstances.” 68 Fed. Reg. 61272.

¹² In *Mova Pharmaceuticals v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998), this Court held that “review of the agency’s deviation from the statutory text will occur under the first step of the *Chevron* analysis, in which we do not defer to the agency’s interpretation of the statute.”

‘modification’ was plainly intended by Congress to be very broad, encompassing ‘any physical change,’ regardless of its magnitude, if it results in an emissions increase.” Exhibit G at 7 (italics in original). Rather than qualifying the “any physical change” language with reference to the cost of the change, Congress made clear which activities it intended to regulate – those that increase emissions. *WEPCO*, 893 F.2d at 913 (“the modification provision applies to any physical change, without regard to cost, that causes an increase in emissions”) (italics in original). Thus, in *Alabama Power*, this Court held: “If these [existing] plants increase pollution, they will generally need a permit.” 636 F.2d at 400.¹³

Second, EPA mistakenly discounts the importance of the word “any” in “any physical change,” arguing “that the word ‘any’ is simply a modifier that does not change the meaning of the word it modifies.” 68 Fed. Reg. 61273, n.15. To the contrary, the Supreme Court has repeatedly held that the word “any” establishes Congress’s intent that a statute be interpreted expansively. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“‘any’ has an expansive meaning”).¹⁴

Third, accepting EPA’s argument would require the Court to conclude that Congress used ambiguous language to *define* “modification,” a word that is hardly ambiguous in the first place. *See Microwave Communications, Inc. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 228

¹³ In *WEPCO*, the Seventh Circuit rejected an argument that the “physical change” that constitutes a modification under section 111(a)(4) must be a “*basic or fundamental change*,” instead holding that “‘any physical change’ means precisely that.” 893 F.2d at 908. *See also Ohio Edison, supra* (referring repeatedly to the “plain language” of the statutory definition).

¹⁴ *See also United States v. James*, 478 U.S. 597, 605 (1986), abrogated on other grounds by *Central Green Co. v. United States*, 531 U.S. 425 (2001) (the term “any” “undercuts a narrow construction” of the statute); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980); *Missouri Municipal League v. Federal Communications Commission*, 299 F.3d 949, 954 (8th Cir. 2002) (“Time and time again the [Supreme] Court has held that the modifier ‘any’ prohibits a narrowing construction of a statute.”).

(1994) (“modify” has a plain meaning that connotes “moderate,” as opposed to “fundamental” change). Rather than limiting the scope of “modification,” the statutory language establishes that Congress intended that modification would be given the broadest possible construction, encompassing “any physical change or change in method of operation,” subject only to the limitation that the “change” increase emissions.¹⁵ EPA’s contrary reading of that provision fails under *Chevron* step one. *See Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 485 (2001) (“EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.”); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002) (rejecting EPA’s authority to “refine” definitions in a statute).

2. EPA’s new reading of the definition of modification is contrary to Congressional purpose.

The Rule is contrary to Congressional purpose in enacting the NSR provisions. Most fundamentally, the Rule will interfere with Congress’s expectation and intent that existing plants will either be retired, or controlled over time as they are modified. In *Alabama Power*, this Court explained that “[t]he statutory scheme intends to “grandfather” existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program.” 636 F.2d at 400.¹⁶ In fact, Congress understood that many

¹⁵ *See* M. Stephenson, *A Tale of Two Theories: The Legal Basis for EPA’s Proposed Revision to the Routine Maintenance, Repair, and Replacement Exception, and the Implications for Administrative Law*, 33 *Env. L. Rptr.* 10789, 10801 (2003) (“Refusing to read any additional precision into the definitional phrase [any physical change] than is inherent in the original term [modification] would render the congressional effort at definition an exercise in futility.”)

¹⁶ *See also United States v. Southern Indiana Gas & Electric Co. (SIGECO)*, 245 F. Supp. 2d 994, 1009-10 (S.D. Ind. 2003) (“Congress certainly did not intend to allow for companies to make an ‘end run’ on NSR by allowing the routine maintenance exemption to swallow the modification rule. As the Seventh Circuit reasoned in *WEPCO*, provisions in the CAA should not be interpreted in a way that ‘would open vistas of indefinite immunity from the
(continued...)”)

“older units fac[e] retirement in 10-15 years,” meaning that they will have to be refurbished – and controlled – if they are to continue operating. H. Rep. 95-294 (1977), 1977 U.S.C.C.A.N. 1077, 1265.¹⁷

EPA has itself repeatedly recognized that Congress intended grandfathering to be of limited duration. In *TVA*, EPA’s EAB determined that “courts have observed [that] the structure of the Act reflects that this grandfathering was envisioned as a temporary rather than permanent status, in that existing plants were required to modernize air pollution controls whenever they were modified in a way that increased emissions.” Exhibit D at 46-47. Indeed, EPA wrote last year in *Ohio Edison* that Congress intended that “older units would either incorporate the required controls as they underwent ‘modifications,’ or would instead be allowed to ‘die’ and be replaced with new, state-of-the-art units that fully complied with pollution control requirements.” Exhibit G at 5. *See also* EPA’s brief in *TVA* (Exhibit E) at 62.¹⁸

EPA’s new interpretation of the modification definition to exclude equipment replacements, regardless of the resulting emissions, provides sources with “perpetual immunity” from emission control requirements, in direct contravention of Congressional intent that grandfathering would be

¹⁶(...continued)
provisions of NSPS and PSD.”); *Ohio Edison*, 276 F. Supp. 2d at 835, 850.

¹⁷ In enacting the 1990 amendments, the Senate reemphasized that the intent of the NSR provisions was “that older, high-emitting sources gradually will be replaced with newer, lower-emitting ones.” S. Rep. 101-228, at 321, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3704.

¹⁸ A similar conclusion was reached by the National Academy of Public Administration (NAPA) in its Report to Congress regarding the NSR program: “A vital aspect of this grandfather provision was the clear assumption of Congress that older, high-emitting sources would gradually be upgraded or phased out. Then, once a grandfathered facility makes any changes or is replaced, NSR is triggered and requires it to install improved technologies that will prevent or control pollution.” Exhibit H (excerpts from NAPA Report) at 14.

of limited duration. Those sources just have to ensure that none of the individual component replacements exceed 20% of the cost of an entirely new process unit, a threshold that EPA designed expressly to exempt most equipment replacements. 68 Fed. Reg. 61257.¹⁹

EPA acknowledges, but now disagrees with, Congress's determination that the time for installation of controls is when the plant is being modified. *Id.* at 61270. Because EPA states – without any factual support – that it does not “believe it plausible” that a source will replace equipment if it has to install control equipment as a result, EPA declares that “replacement of that equipment is not an opportune time for installation of such controls.” *Id.*²⁰ However, regardless of what EPA now believes, it has no power to alter the statutory scheme that Congress enacted. *See WEPCO*, 893 F.2d at 909 (the “purpose of the modification rule is to ensure that pollution control measures are undertaken when they can be most effective, at the time of new or modified construction”).

EPA also attempts to justify its reinterpretation of the modification provision based on its identification of Congressional intent to promote the nation's “productive capacity.” *Id.* at 61273. However, Congress chose to balance economic and environmental interests in the NSR program in a different manner. Congress intended that compliance with NSR emission control requirements by modified sources would facilitate economic growth by allowing room for new sources without

¹⁹ As explained in Point II.A, *infra*, the additional qualification that the equipment replacement not alter the basic design parameters of the unit or cause the unit to exceed any legally enforceable emission limitation will not inhibit replacements that result in significant emission increases.

²⁰ EPA's view that equipment replacement activities do not present an “opportune” time for installation of controls is belied by the equipment replacements in *Ohio Edison*, which were planned months in advance, and required shutdown of the unit for periods ranging from 5 weeks to 8 ½ months. 276 F. Supp. 2d at 856-57.

harming air quality, thereby furthering Congressional intent “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(3). As the House Committee Report explained, “if each new or modified major source is located, constructed, and operated so as to minimize its impact on available clean air resources, then more and bigger plants will be able to locate in the same area without serious air quality degradation.” H.Rep. 95-294 (1977), 1977 U.S.S.C.A.N. at 1212.²¹

In the NSR provisions, Congress made clear its intent that any plant modifications that increase emissions trigger NSR requirements. Because Congress has spoken, the Agency is required to “give effect to the unambiguously expressed intent of Congress,” *Chevron*, 467 U.S. at 842-43.

3. EPA does not, and cannot, justify the Rule as a *de minimis* exemption.

EPA’s decision not to attempt to justify the Rule as a *de minimis* exemption is unsurprising considering that EPA cannot show that regulation of the exempted activities would be of trivial value. *Alabama Power*, 636 F.2d at 360-61.²² The exempted activities can result in significant

²¹ In the preamble, EPA states that it is choosing to balance economic and environmental interests by leaving regulation of existing sources to state discretion, rather than the NSR program. 68 Fed. Reg. 61273. Again, however, this view is contrary to clear Congressional intent that NSR plays a key role in protecting air quality not only in the state where a new or modified source is located, but also in neighboring states. 42 U.S.C. § 7470(4). Indeed, EPA’s new interpretation is contrary to the position it took a few months ago in the Supreme Court where EPA contended in *Alaska Dept. of Env. Conservation v. EPA*, U.S. Supreme Court No. 02-658, that Alaska does not have “carte blanche” to disregard NSR requirements, even if it believes it can protect its air quality in other ways. Exhibit I (excerpts from brief) at 38.

²² See also *Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2001) (“EPA must cite information to explain why it exempted certain sources as *de minimis*, and ‘without data . . . we owe no deference to EPA’s line-drawing.’”) (citation omitted); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998). Moreover, in exempting *de minimis* activities, an agency “may deviate no further from the statute than is needed to protect Congressional intent.” *Mova* (continued...)

emission increases, as explained below. Indeed, one modification in *Ohio Edison* that would be exempt under the Rule increased SO₂ emissions by over 12,000 tons per year (3,759 tons for nitrogen oxides (NO_x)), over 300 times the *de minimis* level of 40 tons. 276 F.Supp. 2d at 882. Because the emissions from exempted activities are by no means “trivial,” the exemption cannot be justified under a *de minimis* theory.

B. Even if the Statutory Definition is Ambiguous, EPA’s Interpretation is Not Reasonable

Even if the statutory language could be considered ambiguous, EPA’s interpretation is entitled to deference only if “it is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. EPA’s decision to exclude multi-million dollar refurbishment activities that cause emission increases cannot stand because “it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” *Id.* at 845 (quoting from *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)). See also *American Trucking Ass’n*s, 513 U.S. at 481 (rejecting an interpretation that “goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear.”); *Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (rejecting, under *Chevron* step two, an interpretation that diverged “from any realistic meaning” of the statute).²³

II. THE STATES WILL BE IRREPARABLY HARMED

If the Rule is not stayed, scores of industrial sources will undertake plant modifications that increase emissions, unencumbered by the need to obtain an NSR permit or install emission controls.

²²(...continued)
Pharmaceuticals, 140 F.3d at 1068.

²³ Furthermore, EPA’s new interpretation “is ‘entitled to considerably less deference’ than a consistently held agency view.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

Furthermore, those modified sources will not have to install emission controls that would result in extensive emission reductions, in many cases more than 90-95%. The increased emissions resulting from implementation of the Rule will cause harm to public health and the environment. Even if the Rule is ultimately vacated, there will be no way of undoing the harm that will occur if the Rule is not stayed. By undertaking life extension activities that will be allowed under the Rule, many sources will perpetuate their grandfathered status, resulting in elevated emissions for decades.

A. In the Absence of a Stay, Industrial Sources Will Undertake Projects that Increase Emissions Without Having to Undergo NSR Permitting.

As EPA candidly recognizes, the purpose of the Rule is to facilitate equipment replacement activity without the need for compliance with the NSR requirements. 68 Fed. Reg. 61251, 61254.²⁴ The NSR enforcement cases demonstrate that a typical power plant unit undertakes every 5-10 years, on the average, an equipment replacement activity that would not have constituted “routine maintenance” prior to the Rule.²⁵ In the preamble, EPA asserts that many major sources have postponed undertaking activities that would have triggered NSR requirements. *Id.* at 61257-58.²⁶ For example, the National Association of Manufacturers, in its comments on the proposed Rule,

²⁴ In an interview on the MacNeil-Lehrer News Hour the day the Rule was issued, EPA’s Assistant Administrator for Air and Radiation stated that “We hope and expect that it will allow [plant operators] to undertake projects that they’ve been putting off. . .” (Exhibit J).

²⁵ For instance, at each of the seven units at the Sammis plant, Ohio Edison undertook one or two non-routine projects that increased emissions in the 15 years between 1984 and 1998. 276 F. Supp. 2d at 856-57. Southern Company reported to EPA that every 18-24 months, on the average, one of the units at each of its plants undertakes a project considered by the agency to trigger NSR requirements prior to this Rule. Excerpts at Exhibit K (3d page of Attachment A).

²⁶ It is not surprising therefore that manufacturers of emission control equipment experienced a sharp drop off in orders for their equipment in the first half of 2003, after this Rule was proposed. E. Shogren, *Relaxed Air Rules Choke an Industry*, Los Angeles Times (Aug. 31, 2003) (Exhibit L) (reporting drop off in sales of pollution control equipment from \$800 million in 2001 to \$75 million in first half of 2002).

stated that manufacturers ordinarily undertake thousands of repair and replacement projects a year, many of which are being foregone because of the former NSR requirements. Exhibit M at 5, 13-14. *See also* EPA's *Report to the President* (Exhibit N) at 10 (industrial facilities undertake thousands of repair and replacement projects each year).²⁷ Given the backlog of repair projects dating back to when the Rule was proposed in December 2002, or even earlier, hundreds of the nation's 20,000 major sources²⁸ will undoubtedly use the opportunity to undertake equipment replacement activities before the Court determines the Rule's validity.²⁹ Indeed, industry comments on the proposed Rule invariably requested EPA to promulgate the Rule expeditiously to allow sources to take prompt advantage of the new exemption.³⁰

²⁷ One industry commenter stated that it wanted to undertake "several boiler modification projects, but the NSR rules are holding [them] back." Exhibit O. Published statements of industry representatives (Exhibit P) reveal that they will take advantage of the Rule without delay. For example, an Edison Electric Institute (EEI) spokesperson stated that power plants will now move forward with activities that have been postponed because of the "uncertainty and delay that has characterized the NSR program in recent years." *EPA Issues Final Rule 'Clarifying' NSR Restrictions*, Inside Energy (September 1, 2003). The director of the Electric Reliability Coordinating Council stated that "repairs and maintenance at dozens of power plants throughout the country" that can now proceed will be deferred if the Rule is "blocked." *EPA Lacks Data to Ease Pollution Rules*, Atlanta Journal-Constitution (August 26, 2003).

²⁸ *See* EPA's NSR 90-Day Review Background Paper (July 22, 2001) (<http://www.epa.gov/nsr/bkgrnd/nsr-review.pdf>), at pg. 7. More than 5,000 of those 20,000 sources are located in States where the Rule will be effective on December 26, 2003, including many of the States seeking a stay of the Rule. For example, Pennsylvania has 820 major sources (Slade Aff't, ¶8); New York has 523 (Johnson Aff't, ¶28) and Massachusetts has approximately 200-215 sources (Braczyk Aff't, n.1), most of which are subject to NSR requirements.

²⁹ An industry publication referenced in the administrative record of the Rule estimates that the capacity of grandfathered coal-fired power plants can be increased 20% (from 200,000 to 240,000 megawatts) within 36 months of the issuance of the Rule. *See* Exhibit Q.

³⁰ *See, e.g.*, excerpts from the comments of Southern Company (Exhibit K), Class of '85 Regulatory Response Group (Exhibit R), and Southern California Edison (Exhibit S).

All these activities can be expected to increase emissions because activities that do not increase emissions would not trigger the NSR requirements even without the new exemption.³¹ The enforcement cases make clear that the emission increases can be substantial; for example, three of the projects at issue in *Ohio Edison* resulted in actual SO₂ emission increases of 5,306 tons, 10,641 tons, and 12,255 tons. 276 F.Supp. 2d at 882 (activities 5, 7 and 11).

Perhaps more importantly, opportunities will be lost for the installation of state-of-the-art controls on grandfathered sources undertaking modifications in reliance on the Rule. Implementation of state-of-the-art technology for control of NO_x and SO₂ emissions typically result in emission reductions of 90-98%. Braczyk Aff't (Tab 3), ¶¶7-11. Settlements of NSR enforcement actions have required the installation of controls that will result in hundreds of thousands of tons of emission reductions annually, Bhandutia Aff't (Tab 4), ¶¶ 5,7, and completion of the enforcement cases will result in even more reductions.³²

The opportunity for similar emission reductions will be lost as many plants undertake plant refurbishments while the Rule is under review. EPA has taken the position that even if the Rule is ultimately vacated, no enforcement can be taken against sources undertaking life extension activities in reliance on the Rule. Exhibit T. Accordingly, emission sources will extend their grandfathered status for decades, avoiding the installation of controls, even if the Rule is ultimately found to exceed EPA's authority. Even if EPA is wrong and emission-increasing activities done during the period of judicial review may be the subject of enforcement, the lack of any record-keeping

³¹ Furthermore, in the preamble, EPA asserts that the December 31, 2002 rule already removed purported impediments to many efficiency projects. 68 Fed. Reg. 61268.

³² Implementation of emission controls at the power plants at issue in EPA's enforcement cases will reduce annual emissions by over one million tons of NO_x and over three million tons of SO₂ (more than 25% of the nations SO₂ emissions from power plants). Schoengold Aff't, ¶8.

requirements in the Rule will make such enforcement virtually impossible. Johnson Aff't (Tab 5), ¶27.

EPA's claim that the environment will not be harmed by the Rule is erroneous. As explained in the Affidavit of Richard Rosen (Tab 6), whose testimony for EPA established the emission increases in *Ohio Edison*, there is no merit to EPA's contention that increased emissions attributable to the Rule will be outweighed by emission reductions associated with efficiency improvements that purportedly are being discouraged by NSR requirements. Because by definition the only activities regulated by NSR are those that *increase* emissions, any efficiency improvements that are environmentally beneficial – because they *reduce* emissions – will not trigger NSR requirements. *Id.*, ¶10. Indeed, the historical record demonstrates that equipment replacement activities increase emissions, notwithstanding any associated efficiency improvements.³³ *Id.*, ¶¶12-14; Schoengold Aff't, ¶¶19,20. Furthermore, the modeling that EPA relies upon is replete with numerous erroneous assumptions, including the assumption that existing sources will *never* undertake activities triggering NSR requirements. Rosen Aff't, ¶5.

The Rule's "safeguards" requiring sources to comply with permit limits or not alter their basic design do not provide sufficient protection against increased emissions. Permit limits for power plants, the largest emission sources, are in most cases significantly higher than current emissions, allowing, for example, increases in annual SO₂ emissions of at least 495,000 tons in Ohio

³³ For example, three of the eleven activities at issue in *Ohio Edison* (activities 4, 9 and 10) included replacements of components identified by the Utility Air Regulatory Group (UARG) as likely improving efficiency. Bhandutia Decl., Ex. D. Notwithstanding any efficiency improvements associated with these activities, actual NO_x emissions increased. 276 F.Supp. 2d at 882.

and 257,000 tons in Illinois. Schoengold Aff't, Attachments G and H.³⁴ Therefore, without the limitation on increased emissions provided by NSR, existing permit limits will not constrain emission increases from replacement activities.³⁵

B. The States' Residents and Environment Will Be Harmed by the Increased Emissions

The increased emissions allowed by the Rule will have serious consequences for human health and the environment. *See generally* Brown and Allan Aff'ts (Tabs 8, 9). For example, SO₂ emissions result in the formation of sulfates, tiny particles that cause respiratory distress and premature mortality. Underhill Aff't (Tab 10), ¶12; Brown Aff't, ¶¶4,7. Those emissions also contribute to the acid rain that plagues northeastern states, and to the haze that impairs the view in parks and mountains around the country. Underhill Aff't, ¶12. NO_x emissions contribute to the urban smog that chokes most American cities. Brown Aff't, ¶5; Allan Aff't, ¶11,13. Even if the States take action to reduce emissions from their own sources, they are powerless to address increased emissions resulting from modifications in upwind states. Underhill Aff't, ¶¶10-18.³⁶ Clearly, the death, disease and environmental harm that will result from unpermitted plant

³⁴ *See also* Slade Aff't (Tab 7), ¶12,19 (SO₂ and NO_x emissions in Pennsylvania); Johnson Aff't, ¶10 (NO_x emissions in New York); Bhandutia Decl., ¶13,14 (New Jersey).

³⁵ EPA's reliance on the nationwide cap on SO₂ emissions as a basis for its claim that the Rule will not harm the environment is misplaced. 68 Fed. Reg. 61265. That cap does not limit emissions of pollutants other than SO₂ or apply to facilities other than power plants; and it provides no protection against the local pollution increases that NSR is intended to address. Furthermore, although nationwide SO₂ emissions are capped, the cap does not foreclose the SO₂ *reductions* that should follow from implementation of NSR requirements.

³⁶ The resulting increase in emissions will not only harm the States' residents and environment, but it will make it more difficult for the States to meet their obligations to comply with the ozone and particulate matter NAAQS. *E.g.* Allan Aff't, ¶10,16. *See* 42 U.S.C. § 7470(4) (PSD program is intended "to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State.").

modifications, in the absence of a stay, is irreparable. *See Amoco Prod. Co. v. Gambrell*, 480 U.S. 531, 545 (1987).

C. Harm to the States' Permitting Programs Will Result if a Stay Is Not Issued

Absent a stay, the Rule will become effective on December 26, 2003 in several States that believe the Rule to be illegal and bad air pollution policy. *Supra.*, n.2. Notwithstanding the Act's bedrock principle that the states are primarily responsible for maintaining air quality (42 U.S.C. § 7401(a)(3)), these States will be powerless to reduce the excess emissions that will result from the Rule in the near future. Even if these States wish to develop and seek approval of their own, more stringent, PSD programs, it is impossible for them to do so by December 26.

In addition, unless the Rule is stayed, the States with state regulations approved by EPA will have to expend significant public resources to develop their own, more stringent programs, in a time where resources are scarce. *See, e.g.*, *Johnson Aff't*, ¶14-25; *Allan Aff't*, ¶9. In light of the likelihood that the States will prevail in their arguments on the merits, they should not be required to engage in this process until the Court rules on the legality of the Rule.

III. BALANCING OF THE HARMS AND THE PUBLIC INTEREST SUPPORT THE ISSUANCE OF A STAY

In contrast to the irreparable harm that will likely be suffered by the States and their residents, EPA will not be harmed by a stay. Issuance of a stay will actually relieve EPA of the burden of administering NSR programs in those states that will decline to implement an NSR program that includes the expansive new exemption. *Allan Aff't*, ¶6.

The only potential harm to industrial sources from a stay is that sources planning to undertake modifications that increase emissions while the Rule is being reviewed will do so at their own risk. However, these sources can accept enforceable permit limitations to ensure that emissions

do not increase or further postpone modifications that would trigger NSR until the Court decides the Rule's validity. Furthermore, many businesses that use clean technology and made business decisions in reliance on the assumption that their high-polluting competitors will eventually have to come into compliance will be harmed if a stay is *not* issued. Walters Decl., ¶7.

In any case, the environmental damage and harm to public health that will result from the Rule's implementation greatly outweighs any purely economic harm to business from complying with the statutory NSR requirements while judicial review is taking place. The public will also benefit from a stay to the extent it allows the States not to squander limited resources on development of the State programs required by the Rule. Finally, the public benefits from a competitive marketplace where all industrial sources are held to the same standards. Walters Decl., ¶¶11-13. Accordingly, the balancing of the hardships and public interest clearly support the issuance of a stay.³⁷

Conclusion

For the reasons set forth above, the Court should stay the Rule pending judicial review.

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Respectfully submitted,

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³⁷ If a stay is granted, it would make sense for expedited briefing of this case to occur together with the expedited briefing ordered by the Court in docket no. 02-1387. The latter case, as explained in the November 10, 2003 motion for consolidation, also concerns a challenge to an EPA rulemaking regarding the scope of the statutory NSR "modification" provision.

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