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ARTICLES

Let the People Speak: Notice-and-Comment Rulemaking (Lessons From the Controversial New Source Review Proposal of the Clean Air Act)

by Victor B. Flatt, Michael M. O'Hear, Mark Squillace, and Robert R.M. Verchick

Sections 165 and 173 of the CAA specifically note that any change in pollution levels from an existing source triggers NSR and accompanying technological upgrades. Nothing in the rulemaking's proposed definition based on cost of changes or maintenance address this clear language of Congress.

—Victor B. Flatt, A.L. O'Quinn Chair in Environmental Law, University of Houston Law Center, written comments submitted to EPA on February 26, 2003.

Taken together, the two proposed exclusions from NSR would allow many grandfathered air polluters to operate indefinitely without installing state-of-the-art pollution control equipment. This would contravene the purpose of NSR, which is to ensure that grandfathered facilities eventually do improve their environmental performance.

—Michael M. O'Hear, Assistant Professor, Marquette University Law School, written comments submitted to EPA on March 2, 2003.

The CAA provides that when existing sources change their facilities in ways that increase their emissions they should be treated as new sources. That should be the end of the matter.

—Mark Squillace, Professor of Law, University of Toledo College of Law, written comments submitted to EPA in March 2003.

The proposed rule undercuts both the plain meaning of the CAA and Congress's underlying intent. It breaches the plain meaning because "modification" is literally defined as "any physical change" that "increases the amount of any air pollutant." Courts take this language literally, permitting exceptions only in de minimus situations [citations omitted].

—Robert R.M. Verchick, Ruby M. Hulen Professor of Law and Urban Affairs, and students of the University of Missouri—Kansas City School of Law, written comments submitted to EPA on March 31, 2003.

Introduction to the Administrative Nature of Environmental Law

The U.S. Environmental Protection Agency (EPA) is a federal agency authorized to promulgate regulations in order to

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implement environmental laws passed by the U.S. Congress. Before promulgating a regulation EPA researches the issue and then proposes a regulation which is published in the *Federal Register*. Members of the public can consider the proposed regulation and send their comments to EPA, which considers the comments and revises the regulation accordingly before issuing a final rule. A final rule is published in the *Code of Federal Regulations* and has the force of law.

In theory, the commenting process is both a tool of democracy and an impetus for sharing ideas. First, it is virtually the only instance where the public has the opportunity to voice its concerns regarding regulations that may have dramatic effects on the quality of the environment and carry the force of law. There is no other instance where the public has a direct say in the implementation of a law. Second, it should be an opportunity for the public to see if the implementation of the law is consistent with the statutes which supposedly direct the implementation. Third, the commenting process assists EPA in seeing the regulations from various points of view. EPA, like many governmental agencies, is often underfunded and may not have the resources necessary to thoroughly research the possible impact of a regulation. The commenting process alleviates such pressures by bringing together interested members of the public to discuss and raise questions regarding the regulations.

Unfortunately, the "notice-and-comment" process is often underutilized and misunderstood. Underutilized in the sense that very few of those affected actually participate in the process, and misunderstood in that the role of commenting in the final substantive result is not clearly defined.

Underutilization is the result of many factors. First and foremost, the process is not widely publicized or explained. Though in theory "notice-and-comment" rulemaking is a statutory method for public involvement and a part of the need for constitutional due process, as a practical matter most of the public is left out.¹ Notices published in the *Federal Register* are effectively unavailable to most persons.² Even when persons have real notice, the procedure necessary to make an effective comment—one that may have an

1. The public may be "represented" by industry groups or public citizen organizations though that is never certain.
2. See Elizabeth D. Mullin, *THE ART OF COMMENTING: HOW TO INFLUENCE ENVIRONMENTAL DECISIONMAKING WITH EFFECTIVE COMMENTS* (Env'tl. L. Inst. 2000).

impact on the substantive law—is never explained. There are various reasons for this, but surely one of them must be that some of those who do understand or control the process wish to maintain hegemony over the outcome.

This is the current state of environmental law in the United States. Most of our environmental laws have very little realistic chance of being altered at the legislative level, as a result, almost any change in the actual impacts of our laws will come through this opaque and confusing administrative process. Despite this result, the administrative process in environmental law is not well explained to the public or even to those law students that are training to practice in the environmental arena.

The New Proposed Definition of Routine Repair and Maintenance (RRAM) Under the Clean Air Act (CAA)

These problems with the role of commenting in environmental laws are exaggerated in a situation in which the executive branch seeks to use the process to make significant changes in environmental administration. Such has occurred in the current Administration of President George W. Bush. Though there are many instances in which certain environmental practitioners and commentators have been alarmed by proposed changes in environmental regulations which have been proposed by the Bush Administration, very few have generated as much controversy as have proposals which would alter the situations in which older air pollution sources would have to upgrade pollution control equipment. Of particular concern has been a proposal, which has just been published as a final rule, in which the definition of RRAM has been altered.³

On December 31, 2002, the Bush EPA put forward a draft rule defining RRAM for purposes of new source review (NSR) of existing air pollution sources which undergo alterations.⁴ The NSR provision of the CAA⁵ requires that all major new sources of air pollution submit to review as a new source and install pollution control equipment which represents the best available control technology (BACT) for sources in attainment areas, and lowest achievable emissions rate (LAER) in nonattainment areas.⁶

A “new source” is defined in the CAA to include already existing sources which are modified after the effective date of these acts.⁷ The statute states that a modification occurs if “any physical change” or “change in method of operation . . . increases the amount of any air pollutant emitted by such source.”⁸ Historically, EPA had exempted those existing sources of air pollution from NSR if they only made changes classified as RRAM. This provision became particularly important recently because under President William J. Clinton, EPA sued several existing sources which they said

violated the Act by making changes which were not RRAM and failing to go through NSR.⁹

The December 31 proposal sought to define RRAM more specifically. It sought to impact which existing stationary sources would have to install pollution control equipment when certain upgrades of these sources were undertaken.¹⁰ The proposal however was extremely controversial because many persons believed that it would illegally exempt existing sources from upgrade requirements under an overbroad definition of RRAM.¹¹

Environmental Law Professors Decide to Act

Because of the importance of this issue, the ongoing concern over the lack of effective public participation in most environmental administration, the understanding of their unique role in influencing the result, and a desire to use this as an opportunity to educate law students, lawyers, and the public on the role of public commenting in the environmental arena, a group of legal scholars, supported by other environmental law professors around the country, decided to jointly participate in the commenting project on this issue. Spearheaded by the University of Houston Law Center’s A. L. O’Quinn Chair in Environmental Law, Prof. Victor B. Flatt, and including Prof. Robert Verchick of the University of Missouri, Kansas City, Prof. Mark Squillace of the University of Toledo School of Law, and Assistant Prof. Michael O’Hear of Marquette University School of Law, these professors came together in 2003 to comment upon the RRAM rule.

The professors chose not to work together on the comments both because of the political nature of the issue and in order to illustrate various perspectives on the commenting process itself. They felt that by doing this, they would provide both EPA and the public different models of the commenting process, the sum of which might be greater and more educational than one joint comment from all four. Now that the commenting process is complete (though certainly before the final resolution of the issues that have been raised by the commenting process), these professors are publishing these comments together (in Appendix A) along with an overview of the process in a journal devoted to educating the public on important environmental law issues. Thus, in addition to providing comments to the Agency, it is the hope of these professors that their comments, and a description of the commenting process, might be an important educational tool to others who would like to be involved in this and future environmental administrative issues which can have such an enormous impact on the environment that we all share.

What Can Be Learned From the Process?

What is remarkable when reading these four comments is that all four professors not only agree in the substance of

3. 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. 80186 (Dec. 31, 2002) (to be codified at 40 C.F.R. pt. 51, 52) [hereinafter PSD/NSR Proposal].

4. *Id.*

5. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

6. *Id.* §§7475(a)(4), 7503(a)(2).

7. *Id.* §7411(a)(2).

8. *Id.* §7602(j).

9. Matthew L. Wald, *Cleaning Coal-Fired Plants: The Debate Burns On*, N.Y. TIMES, Aug. 27, 2002, at D1.

10. PSD/NSR Proposal, *supra* note 3.

11. See, e.g., *Nine States Sue EPA Over New Rules for Industrial Plants; Breaks for Industry Gut Clean Air Act, They Say*, ST. LOUIS POST-DISPATCH, Jan. 1, 2003, at A2; Jeff Nesmish, *Clean Air Act Relaxation Prompts Suit, Power Companies Get Leeway in Upgrading Old Plants Without Expensive Pollution Control*, PITTSBURGH POST-GAZETTE, Jan. 1, 2003, at A7.

their comments but also in the method of approaching the commenting process. This methodology is the result of research in environmental administration and much experience over time in the role of administrative comments in shaping the outcome of environmental policies. Despite the convergence of results from these individual professors, our current environmental law courses rarely deal with this issue so explicitly. And we are not alone. Most environmental law students and professors never reach this level of instruction with commenting on administrative proposals. Yet this process is extremely important. These lessons, therefore, are put forward as a model methodology for commenting in the environmental administrative process. What are these lessons?

(1) The most important role of the notice-and-comment process is to set forth clearly and correctly any controlling legal authority that supports your position. EPA, as a federal agency, is bound by the laws which create and control its programs. It is these laws which it must follow. Though opinions as to the desirability of administrative actions may be interesting, federal agencies are granted wide discretion in implementation of laws and are not bound in any way by a citizen's bare preference. A federal agency is only required to follow controlling legal authority. Thus, all of the professors' comments reference the legality of the proposal under the CAA. A careful reading will show that there is little focus on the preferences of any professor as an individual. Indeed, it is possible that one or more of the professors think that as a policy matter, the new RRAM proposal is a good idea. But this is not the main role of commenting. It is instead to alert the agency and any interested party to the legality of the Agency's actions. This is how an agency is held accountable to its controlling statutes. The statutes are not self-executing. Unless some party challenges the legality of the Agency's action, illegal results may occur.

Moreover, such illegality is better pointed out at this stage than for the first time in a later court challenge. This allows the Agency to correct its own mistakes and avoids the appearance of "sandbagging," which might result in a court using its equitable powers to disallow arguments that could or should have been raised in the administrative process.¹²

This lesson must be considered the most important because it is this lesson that is so well obfuscated by the current administrative process. Nowhere in the call for comments, in this or many other environmental proposals, does EPA specify the importance of binding legal authority.¹³ Instead it usually directs those that participate in the process to express their opinions on the subject matter. While an agency that entered into the process with an open mind might benefit and be educated from such an airing of opinions, it is fair to say that our agencies do not generally work with said "open mind." In the RRAM example, the Bush Administration had made it clear long before the proposal that the purpose of the rulemaking was to provide relief to industry and loosen the rules governing NSR.¹⁴ Thus, simply expressing

a disagreement with this as an idea would not be expected to yield much progress. Indeed, the overwhelming number of written and oral comments opposed the RRAM proposal on policy grounds. Based on the finalization of the rule, it does not appear that these comments made a difference, nor will they make much of a difference in the expected legal challenge to the rule.

Related to the legal arguments which can be put forward is the importance of practical effects. Here, perhaps we were not as successful. Certainly other parties who commented were able to show projections of pollution change and cost savings based on the proposal. Since this information goes to the very purpose of the proposal, such actual data can be very effective in requiring Agency consideration. It also makes the process more understandable to include real-world examples of the effects of the proposal.

(2) The second lesson is that public opinion can have some influence on the substantive outcome of an administrative proposal but only to the extent that it provides political pressure. While "opinion" comments may not have an individual effect on the outcome of a decision, a groundswell of public opinion cannot usually be ignored in a functioning democracy. Thus, though the Agency may not be prohibited from taking a certain action by law, extraordinary public disapproval should provide some political pressure either for an alteration of the underlying law, or political pressure on the executive branch as a whole if the current party wishes to stay in power. For example, the extraordinary public reaction to the recent Federal Communications Commission proposals on media ownership has prompted legislation to override that proposal.¹⁵ In the RRAM example here, some of the comments do note the opposition of the public to the proposal.

The recognition that the public can have an impact when truly motivated underscores again the need for public understanding of the issues at stake and the need for our agencies, including EPA, to do a better job of publicizing the issues. Professor Verchick wisely involved a cross-section of student interest groups in his comment, including ethnic minority groups who might be disproportionately affected by this proposal. By doing this, more people are widely educated about the effects of such rulemaking.

(3) The third lesson is that all procedural aspects of a proposal should be examined. This requires a working knowledge of the Administrative Procedure Act (APA)¹⁶ and its rules concerning public participation. For instance, in the RRAM proposal EPA did not specify under which formula it might alter the RRAM exception. The comment letters noted that by failing to do so, EPA was not giving notice of the substance of the proposal in violation of the APA. Though important, it is not even necessary to know every jot and tittle of the APA. Generally, if it seems that a party is not able to participate effectively in the process, even when well informed, there is probably a problem with an APA or procedural violation. Particularly in recent years, as agencies, including EPA, have sought to circumvent public participation, there are good chances that there may be procedural or APA problems with the proposal.

12. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 8 ELR 20288 (1978).

13. The Administrative Procedure Act does, however, require the Agency to clearly state the legal authority upon which it relies. 5 U.S.C. §553, available in ELR STAT. ADMIN. PROC.

14. U.S. EPA, EPA NEWSROOM: EPA ANNOUNCES NEXT STEP IN IMPROVING THE NEW SOURCE REVIEW PROGRAM (2003), available at http://www.epa.gov/newsroom/headline2_082703.htm.

15. See, e.g., Todd Gillman, *FCC Readies for Fight From Opponents to Media Ownership Rules*, DALLAS MORNING NEWS, Sept. 6, 2003.

16. 5 U.S.C. §553, available in ELR STAT. ADMIN. PROC.

(4) The fourth lesson is to utilize the assistance and work of other people. Though as noted above, the professors did not consult on the substance of their comments, they did know that others would be participating and we encouraged each other throughout the process. Interestingly, one of the greatest fears of those who comment publicly is that their comments might not meet some standard of professionalism. Indeed, many of the professors might seek to improve their comments if given another opportunity or if they had had more time. However, the perfect in this case really is the enemy of the good. Many so-called experts fail to address critical issues that come before us because we are unable to craft “the perfect” response. The important thing is simply to participate in an intelligent manner. As noted previously, there are very few comments submitted in the first place. By understanding and commenting about controlling authority on one issue, the commenter has accomplished a great deal. When professors have assigned comment exercises in administrative or environmental law classes, the students are astounded to see that their comments are usually the most insightful and appropriate of the bunch. In many instances they may affect the outcome of the process.

By law, comments that are made are to be publicly available which means that a party that wishes to comment may read or see the comments of another to assist in putting their own comment in context. Unfortunately, agency practice seems to make the accessibility of such comments difficult indeed. EPA for instance published the comments on RRAM on the Internet. Yet, these comments could not be found by doing a search of EPA’s database on NSR or RRAM. Eventually they could be reached by searching under the CAA, but such a search was difficult at best. Nevertheless, the comments of the law professors were found by others and indeed served as a catalyst for more comments, ideas for public hearings, and joint strategies.¹⁷

The last lesson is to make any comment understandable and readable. Though environmental laws can be technically complex, in order to really make an agency accountable, those who seek to comment on the agency’s proposal must be as clear as possible. All of the professor comments letters, though complex, are understandable by a reasonably environmentally informed party. The comments are not of extreme length and focus on the most important issues presented. They clearly set out those parts of the proposal which they challenge and cite the text supporting their arguments in the document itself.

In the final analysis, whether an agency proposal goes forward is decided by a human being, whether that be an agency person, a congressperson, or a judge. If that person does not understand what is being presented, they cannot do what you wish them to do. The agencies have made this difficult indeed by apparently trying to make proposals inaccessible. The original RRAM proposal was over 600 pages long and was not organized or cross-referenced effectively. Perhaps we should have challenged that as well. But there is deference to an agency’s actions in the rulemaking process. So as long as the agency tries to make things more complicated, the more those who wish to bring the public back to the process must make the issues clearer.

Conclusion

We environmental law professors believe that we have succeeded in making the issues in the RRAM clearer, and we believe that these comment letters will assist in the legal challenge to the rule that we feel is inevitable. But we also hope that we have succeeded in making the process of notice-and-comment rulemaking clearer as well. As members of the public, lawyers, law professors, or law students, we all have a responsibility to be a part of our government. That includes standing up and being counted when public participation is allowed. Though various forces have conspired to make it difficult to be involved in the public process in an effective way, we hope that these comments and commentary concerning them will assist in demystifying this process and encouraging others to get involved.

Appendix A—Submitted Comments of Law Professors

Comment of Professor Flatt

February 26, 2003

U.S. Environmental Protection Agency
EPA West (Air Docket)
1200 Pennsylvania Ave. NW
Room B108
Mail Code: 6102T
Washington DC 20460

Re: Docket ID No. A-2002-04
OAR-2002-068

Ladies and Gentlemen:

My name is Victor B. Flatt, and I am the A.L. O’Quinn Chair in Environmental Law at the University of Houston. I teach and do research in the area of environmental law, and in particular the area of environmental administration. Due to my area of expertise, and my duties as a public servant, I wanted to submit a comment on the proposed EPA rule defining routine repair and maintenance (RRAM) for purposes of new source review (NSR) of existing air pollution sources which undergo alterations. As a law professor who has studied these issues over time, I believe that some of my comments might be germane to the viability and legality of this proposed rule.

Under §§165(a), 172, and 173 of the Clean Air Act (CAA), annotated at 42 U.S.C. §§7475(a), 7502, and 7503, major new sources or major modifications of existing sources of criteria air pollutants must submit to review as a new source and are required to install pollution control equipment which represent the best available control technology (BACT) for sources in attainment areas, and Lowest Achievable Emissions Rate in nonattainment areas. 42 U.S.C. §§7475(a)(4), 7503(a)(2). A “new source” is defined in the CAA to include already existing sources which are modified after the effective date of these acts. 42 U.S.C. §7411(a)(2). In pertinent part, a “modification” occurs if “any physical change” or “change in method of operation . . . increases the amount of any air pollutant emitted by such source.” In general, a major source is defined as capable of

17. See Appendix A.

emitting 100 tons of a regulated pollutant annually. 42 U.S.C. §7602(j). With respect to the non-attainment program, “major” is defined as those sources which can emit or have the potential to emit either 100 tons or 250 tons (depending upon the type of source) of certain pollutants. 42 U.S.C. §7479(1).

On December 31, 2002, EPA announced its final rule defining “major modification” for purposes of NSR, to be set out in 40 CFR, parts 50 and 51. This rule attempts to define “major modification” as a result of “significant” emissions increase of a regulated NSR pollutant. This rule specifically exempted RRAM from activities which would trigger NSR for existing sources. RRAM is the subject of this rulemaking, and is what these comments address.¹⁸

The definition of modification in 42 U.S.C. §7411 in many ways is quite explicit and clear. However, there are some questions as to what constitutes a source for application or what activities cause emissions increases. Historically, EPA has not defined RRAM for purposes of triggering NSR for alterations of existing sources, preferring to work on a case-by-case basis. In making its determination, EPA has considered the nature, extent, purpose, frequency, and the cost of the work. Those regulated entities that are unsure whether or not NSR and its accompanying technological requirements are triggered, may consult the reviewing authority for assistance in making the determination.

This proposal seeks to create classes of categories, defined by total expenditures as a percentage of capital cost, which would uniformly be considered RRAM.

My comments address two major considerations: (1) the need for this “clarification”; and (2) substantive and procedural problems with the proposal.

I. The Need for a Clarification of RRAM

According to the call for comments, EPA has undertaken this rulemaking because industry believes that the current approach is too uncertain, proving costly since industry may not undertake needed repair and maintenance because of uncertainty about what changes might be allowed without triggering NSR requirements. According to the call for comments, the option of requesting an applicability determination is considered too costly by some in industry. Such applicability determinations also require time and resources from EPA as well.

If it is possible to avoid sacrificing legitimate NSR while introducing more specific guidelines to define RRAM, then it would make sense to do so and would not be inconsistent with the legislation that requires NSR for certain modifications of existing sources. The problem is that the large diversity of industries and situations makes it almost impossible to avoid a case by case approach without making the definition of RRAM both over and under-inclusive. Indeed, the current proposal does not truly eliminate the uncertainty of the procedure. The current proposal posits that an owner or operator “would evaluate on a case-by-case test any activities that did not come within the allowance and that are not otherwise excluded, in order to determine whether they are RMRR.” Furthermore, the proposal might exempt certain

kinds of replacement or maintenance activity or other activity that is not legitimately considered a RRAM, even if it comes within the yearly budget allowance.

The truth is that there is no real way to categorically define all of the activities that could or could not be considered routine repair and maintenance. If that were possible, then Congress would have made that determination itself. Similarly, it could have chosen some percentage expenditure, but it did not. Instead, where Congress has explicitly spoken on the issue, it has stated that the term “modification” means an increase in the amount of “any air pollutant,” 42 U.S.C. §7411(a)(4), and that with respect to certain non-attainment areas, there shall be *no de minimis* exception for increases of volatile organic compounds from existing sources unless it is less than 25 tons over 5 years. 42 U.S.C. §7511a(c)(6) (emphasis added).

Essentially then, the proposed rule would simply exclude certain activities that fall under a specific budget, while still leaving uncertainty as to those activities beyond that budget or activities in which there is any question whether the activity is routine repair and maintenance. However, this does nothing to eliminate the current uncertainty which the purported rule addresses. This is because the “exception” to the annualized budget is no different than the current situation. Under the current regulations, an owner or operator would only need to seek applicability review if the activity is not clearly RRAM. The definition of RRAM is not connected to the expense of the project, but rather the nature of the project, and presumably whether it would operate as an increase to emissions. The new proposal does nothing to eliminate that. If there is uncertainty whether an activity which falls within the annual budget is not really RRAM but instead an upgrade or major modification forbidden by the statute, then applicability review is still required. The only change is that there will now be created a situation in which there is a safe harbor of activities (those under a certain budget) which will not trigger routine scrutiny as opposed to the current situation in which all activities might trigger such scrutiny. Assuming that owners and operators follow the letter of the regulation then virtually all activities that are currently in question will still be in question under the proposed new rules. Therefore the effect of the new rules is simply to allow larger investments in upgrades without scrutiny, subverting the purpose of the statute. This brings us to Part II.

II. Substantive and Procedural Problems With the RRAM

The proposed rule also suffers from substantive and procedural problems in that its implementation may be inconsistent with the CAA and the Administrative Procedures Act (APA).

Sections 165 and 173 of the CAA specifically note that any change in pollution levels from an existing source triggers NSR and accompanying technological upgrades. Nothing in the proposed definition based on cost of changes or maintenance address this clear language of Congress.

Moreover, this proposed definition of RRAM would essentially exempt any modifications of the need to go through NSR. That is because it allows for upgrades that will indefinitely keep existing sources in service without ever having to upgrade to new source requirements.

This problem is recognized in the proposal, which notes that replacement of “existing process units” (which presum-

18. The final rule defining major modification has already been challenged in court, but the overturning of that rule will not affect the process governing this rule. Thus my comments will address this rule as a self-contained proposal.

ably would be an “upgrade” as opposed to a “routine maintenance”) would not qualify for the RRAM exceptions. However, it does allow that “some partial replacements [of existing process units] would qualify for the proposed RRAM exclusion.” But partial replacements over time can easily have the same effect as an entire replacement of an “existing process unit” which the proposal notes would not be RRAM. Under its own terms then, the proposed rule allows changes over the course of years to occur which it supposedly would not allow to occur in one year. Either an activity is RRAM or it is not; it should be immaterial if the activity occurs in the course of one year or five years. It is true that many “partial replacements” may not be disguised upgrades but RRAM, but the only way to determine if piece by piece alterations are not cumulative upgrades is to have case-by-case analysis, which this proposal seeks to eliminate as routine procedure.

The proposed rule is also in direct violation of the enabling statute in noting that changes that would increase “efficiency” of the unit do not automatically qualify as a major modification. This flies directly in the face of the words and spirit of the CAA, and cannot withstand analysis.

As the proposal itself points out, RRAM would usually be expected to encompass simple replacement of parts with identical ones. This proposal seeks to expand this by allowing replacements of similar units or equipment, even if the use of an “improved” version increases the life or preserves the efficiency of the affected unit. (Section VII. A.)

The purpose of allowing existing sources to avoid the imposition of the pollution control equipment for new sources was to recognize the already fixed costs that had been incurred prior to the passage of the CAA. However, it is clear from all contemporaneous debates that this was not meant to be a permanent situation. It was believed that eventually as the older plants reached the end of their useful life, they would be replaced by new plants or significantly upgraded so that new state of the art, pollution control equipment would be installed. If they were not eventually phased out or upgraded, there would not only still be dirty air, but it would also make new, pollution controlling plants, comparably inefficient. Under the CAA, then, even allowing for one to one replacement of parts might be problematic. The only justification for allowing even this is that eventually new plants, parts, and machines would be so much more efficient, that simply substituting one old fashioned part for another in an existing plant, would eventually cease to be economically logical, even when including the costs of significant pollution control upgrades.

The current proposal effectively eliminates the possibility of an existing plant ever having an economic incentive to upgrade by allowing these plants to install replacement equipment that is more efficient. This means that existing plants can continue to modernize, bringing in comparable efficiencies to new plants while at the same time not being required to upgrade pollution control equipment. As noted in the proposal itself (Section VII.B.),

almost any component replacement can be expected to have some beneficial impact on the energy efficiency of the unit and, left unbounded, this approach could result in the replacement of an entire boiler with a new, more efficient boiler without state of the art pollution controls.

This proposal admits that the “replacement” of an entire

boiler should not be considered “routine,” and thus should trigger NSR, but the proposal notes that by allowing replacement of parts with more efficient and newer parts, that in fact this could occur. Thus the proposal itself recognizes that it might be allowing “major modifications” under the proposed rule without triggering NSR, in violation of the enabling statute. Any elimination of pollution control equipment upgrades for existing sources must be undertaken through the legislative process, and not implemented in the guise of an administrative change.

The problem is exacerbated by the lack of specificity in the proposal. The proposal notes that RRAM allowance should be defined as a certain percentage of capital cost per year, but it fails to set out what that percentage will be or how “overall capital cost” will be determined. In this case, the devil is truly in the details. Depending upon how “capital cost” is determined and depending on what percentage is allowed, the number of activities that will qualify for RRAM could vary enormously, even to the point where almost any activity, not excluded as “major modification” by the owner itself will qualify under this “exception.” In addition to the increasing scope with which this would allow more activities that should be considered “major modification” to avoid NSR, it also is procedurally problematic.

In order for this proposal to be implemented in final form, it first must be circulated as a draft in substantially the same form as it will appear as final. Without this, there can be no effective comment as required by the APA, 5 U.S.C. §553, nor effective due process to those who will be affected by the rule. Without sufficient detail, any movement to final rule implementation without more specificity regarding the calculation of “capital costs,” determination of percentage allowance, and determination of time event horizon for calculation would be an APA violation.

III. Conclusion

This lack of specificity frames exactly what is wrong with the proposal. The proposal is being put forward to supposedly solve the problem of uncertainty with respect to what will trigger NSR for repair and maintenance activities. However, its effect cannot be evaluated without more detail as to how any annual allowance would be calculated. Moreover, the proposal has not indicated how it would actually eliminate uncertainty since it still retains an exception for activities which are “not to be considered RRAM.” Since the proposal does not effectively demonstrate how it will be an efficiency improvement over the current case-by-case analysis, but does indicate the likely possibility of currently regulated activities escaping NSR, its implementation must be considered arbitrary and capricious and an abuse of discretion, and thus a violation of the APA. The only substantive proposal, that which anticipates allowing efficiency upgrades to occur with RRAM, violates the spirit and letter of the CAA. Thus, this proposal should not be implemented. EPA should continue with the current case-by-case approach, which is the only solution to analyzing the diversity of air pollutant sources which may trigger NSR.

Very truly yours,

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Comment of Professor O'Hear

March 2, 2003

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Re: Docket ID No. A-2002-04

Dear Sir or Madam:

These comments are addressed to the proposed rule for routine maintenance, repair, and replacement (RMRR). I am a professor at Marquette University Law School, where my teaching responsibilities include Environmental Law, Natural Resources, and Legislation.¹⁹

Summary

The proposed rule is inconsistent with the statutory purposes of new source review (NSR). Specifically, the Agency has proposed two new categories of activities that would be treated as RMRR per se, and hence shielded from the Agency's traditional case-by-case approach to NSR. The first category encompasses activities within a new annual maintenance, repair, and replacement allowance. The second encompasses the replacement of existing equipment within certain cost limitations. Taken together, the two proposed exclusions from NSR would allow many grandfathered air polluters to operate indefinitely without installing state-of-the-art pollution control equipment. This would contravene the purpose of NSR, which is to ensure that grandfathered facilities eventually do improve their environmental performance.

Loopholes in the proposed rule would provide ample opportunity for sources to construct major modifications without adopting new pollution control technology. Changes to the proposed rule might reduce the scope of some of the loopholes, but a more fundamental objection would remain: cost-based approaches, as the Agency here proposes, distract attention from more important considerations. In particular, NSR should focus on whether a contemplated activity (whatever its cost) represents a suitable opportunity for concurrent improvements in pollution control technology.

If the Agency nonetheless decides to proceed with one or both of its cost-based exclusions, the Agency should also consider an additional cost-based safeguard: a lifetime cap on expenditures that are treated as RMRR per se.

Analysis

Purposes of NSR and RMRR

In structuring the Clean Air Act (CAA), Congress chose to impose different environmental performance standards on

new and existing sources of air pollution. This decision stemmed from the recognition that "[b]uilding control technology into new plants at time of construction will plainly be less costly [than] requiring retrofit."²⁰ However, Congress did not intend that the grandfathered existing facilities would forever be exempt from enhanced pollution control requirements. Congress thus chose to apply the new source standards to old sources when they underwent "modifications."²¹ The logic was obvious: while a pollution control retrofit might be unduly burdensome for a facility busily engaged in productive activities, the same retrofit might be far less costly and intrusive if performed in conjunction with other activities that significantly interrupted production and involved restructuring of equipment and workflows.²² Existing plants, with deteriorating and increasingly obsolete equipment, would inevitably either shut down or undergo modification, thus triggering a duty to install state-of-the-art pollution control technology.

In order to implement this scheme, the Agency chose to create a safe harbor for RMRR. Unfortunately, RMRR has from the beginning presented a subtle risk of distraction: the standard invites regulators (and industry) to focus on the semantics of "routine"—a term found nowhere in the statute and only tangentially related to the real objective, namely, ensuring that all existing facilities enhance their environmental performance at some time when it is relatively less burdensome for them to do so. Indeed, with clever engineering and an aggressive interpretation of "routine," a facility may dramatically lengthen its productive life without ever adopting stringent pollution control measures.

The subtle risks implicit in RMRR have become quite explicit in the present proposed rule. Where the original RMRR rule only suggested that grandfathered sources might retain their favored status indefinitely, the new proposal plainly codifies the policy. Step by the step, the question for environmental protection shifts from "when" to "if."

Criteria for Evaluation

Any proposed reform of RMRR should be evaluated under at least three criteria: (1) consistency with statutory text; (2) consistency with statutory purposes; and (3) consistency with the spirit of RMRR. As to text, the CAA indicates that NSR should be triggered by the "modification" of any stationary source. "Modification," in turn, is defined broadly as "any physical change" that increases air emissions.²³

As to purposes, while Congress chose to grandfather existing sources in light of the costs of retrofitting old plants, Congress' implicit intent in adopting NSR was to ensure that the old plants would eventually adopt new controls at an opportune time.

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

21. See 42 U.S.C. §7411(a)(2) (defining "new source" to include modifications).

22. See Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, 909, 20 ELR 20414 (7th Cir. 1990) (discussing purpose of "modification" rule). Indeed, the Agency makes much the same point in a portion of its explanation for the proposed rule. See 67 Fed. Reg. 80296, 80301 (Dec. 31, 2002) (concluding that activity should be excluded from RMRR protection because "it is the kind of activity that would likely be a logical point for owners or operators to install state-of-the-art controls").

23. 42 U.S.C. §7411(a)(4) (emphasis added).

19. Please note that these comments are mine alone, and do not necessarily reflect the views of my academic institution.

Finally, while the Agency is not bound by existing regulations in the same way that it is bound by statutory text and purpose, the Agency should be sensitive to the fact that the proposed rule has been offered as an elaboration on the concept of RMRR. Thus, in the interests of candor and informed public discussion, the proposed rule should not reach beyond the scope of what can plausibly be considered RMRR.

As detailed below, both aspects of the proposed rule (the annual allowance and the equipment replacement provision) fail with regard to all three criteria. The proposed rule potentially shields from NSR many activities that would normally be considered “modifications” or are otherwise plainly not “routine.” In so doing, the proposed rule invites sources to replace and even upgrade equipment indefinitely without implementing new pollution controls.

Annual Allowance

The annual allowance proposal uses expenditures as a proxy for determining what is “routine.” The Agency’s approach is subject to manipulation and might allow many major modifications to escape NSR. A few specific concerns are highlighted below.

1. A source’s annual maintenance allowance is not based on that source’s actual maintenance needs. The allowance is calculated based on (1) the source’s replacement cost, and (2) a uniform industrywide “maintenance percentage.” However, there is no reason to believe that sources within an industry have any uniformity in their actual maintenance needs. Indeed, needs likely vary considerably based on such factors as age, prior maintenance history, intensity of use, raw materials used in production processes, climate, and local labor costs. Many sources will thus likely have excess allowances, which may be used to shield from NSR significant equipment upgrades and other physical changes that are not in any conventional sense “routine.”

2. Calculating allowances on an annual basis invites manipulation of expenditures. A source wishing to shield a major equipment upgrade from NSR in one year might crowd genuine routine maintenance into a prior or subsequent year. Granted, if the source exceeded its annual allowance in the “maintenance year,” then its activities that year might be subject to case-by-case NSR. However, because the reviewed activities would be genuine routine maintenance, the activities would not likely trigger heightened performance standards. Meanwhile, the real changes that might actually fail NSR would never even be reviewed (assuming they cost less than the annual allowance).

3. Quite apart from manipulation, the Agency itself notes that multiyear maintenance cycles are routine in some industries, with major maintenance activities concentrated in just one year.²⁴ For some petroleum refineries, for instance, major maintenance activities are conducted once every eight years.²⁵ If allowances are calculated on an annual basis, then such sources would be expected to have significant excess allowances seven out of every eight years.

4. Costs are attributed to the year in which they are incurred, even if they arise from a multiyear activity. A source may thus shield a major modification from NSR by dividing the project into discrete components such that the costs are incurred over more than one year.²⁶ If the source’s allowance exceeds its actual maintenance expenses over the time period, case-by-case review might never be triggered. Even if case-by-case review were triggered in a given year, the modification might still escape review if the project’s costs in that year were lower than any of the source’s routine maintenance expenses. (This is because, under the Agency’s proposal, case-by-case review is conducted from most-expensive to least-expensive.)

5. Because the allowance is determined on a source-wide basis, sources may trade off expenses across process units. A source planning a major modification at one process unit might, in effect, acquire excess allowances by discontinuing routine maintenance at another process unit. This might eventually lead to the deterioration and closure of the undermaintained process unit, but a source might find the loss of one process unit to be an acceptable price for an NSR-shielded major upgrade at another.

The foregoing concerns all arise from a fundamental weakness of the Agency’s proposal: generic expenditure standards can serve as only a very crude proxy for “routine maintenance” (or “major modification”). Some of the specific concerns may be marginally ameliorated by better tailoring allowances to the realities on the ground (e.g., developing a multiyear allowance for industries with multiyear maintenance cycles; determining allowances on a process unit, instead of a source-wide, basis). But adopting such changes would make the proposal considerably more difficult to develop and administer, and might undermine some of the transparency and flexibility objectives that the proposal is intended to advance.

Equipment Replacement

The equipment replacement proposal also misdirects the NSR inquiry, likewise potentially allowing sources to operate indefinitely without installing state-of-the-art pollution controls. At least three concerns merit particular consideration.

First, through careful planning, a source may over time replace an entire process unit, piece by piece, without ever triggering NSR. The source would only need to take care that the unit’s “basic design parameters” remain unchanged and that no particular project costs more than 50% of the unit’s overall replacement cost.²⁷ At the end of the replacement period, the source would, in effect, have a brand-new process unit without the pollution controls that would nor-

24. 67 Fed. Reg. at 80296.

25. *Id.*

26. If the timing were planned carefully, this might not even result in any meaningful delay in implementing a modification. For instance, for a source using a calendar year system, new equipment might be purchased in December and labor costs for installing the equipment incurred in January. Separately, the two pieces might each squeeze under the applicable annual allowance, even though they might not if conducted over any other two-month period during the year.

27. This assumes the Agency adopts 50% as the applicable standard, as the Agency suggests it may do. 67 Fed. Reg. at 80301. A lower percentage might make it marginally more difficult for a source to achieve this result, but the basic concern remains the same.

mally be expected of a new process unit. Yet, as the Agency's proposal itself recognizes, replacement of a process unit (even with an identical new unit) is, in fact, "the kind of activity that would likely be a logical point for owners or operators to install state-of-the-art controls."²⁸ There is no apparent reason to treat differently the source that replaces a process unit all at once and the source that divides total replacement into smaller discrete projects over time.

Second, while the proposal suggests treating equipment replacement costing up to one-half the value of an entire process unit as RMRR, it is hard to believe that such projects would commonly fit anyone's understanding of "routine." Indeed, other regulations promulgated by the Agency characterize 50% of the replacement cost as the expenditure threshold for what constitutes "reconstruction."²⁹ Surely, some significant range of costs must separate "reconstruction" from "routine." At a minimum, more study is needed to determine a lower, more realistic replacement cost percentage on an industry-by-industry basis, reflecting practices that are, in fact, routine.

Third, the proposal makes no distinction for replacement activities that represent an ideal opportunity for upgrading pollution controls. For instance, when equipment is replaced that is directly connected to pollution control equipment, or that otherwise imposes limits on the source's ability to implement new control technologies, a retrofit might be especially timely. In such circumstances, the NSR process should not be artificially constrained by cost-based safe harbors, or by other extrastatutory concepts like "routine" and "functionally equivalent."

Lifetime Cap on Cost-Based Exclusions

The Agency should reject cost-based safe harbors from NSR because, among other things, the inquiry into cost issues misses the real point of NSR. Cost-based exclusions raise at least two overlapping risks, both of which have been noted above: (1) such exclusions may allow sources to avoid a pollution control retrofit even at those times that a retrofit could be performed with minimal disruption; and (2) such exclusions may allow sources to operate indefinitely without implementing state-of-the-art control technology. Both of these eventualities would contravene the underlying objectives of NSR.

If the Agency nonetheless decides to adopt one or both of its proposed cost-based exclusions, the Agency should consider an additional safeguard: a lifetime cap on expenditures that qualify for the cost-based protections. The cap might be set on any of a number of potential bases. For instance, the cap might be determined by multiplying an annual maintenance allowance (calculated as the Agency has suggested in the present proposal) by the number of years representing a process unit's expected useful life. Alternatively, the cap might be based directly on a process unit's replacement cost.

However calculated, when a process unit exceeds its lifetime cap, it should no longer qualify for special cost-based exclusions. By that time, the process unit will be presumptively beyond the realm of RMRR, and instead presumptively engaged in extraordinary life-extending measures. Subsequent expenditures might still be treated as RMRR af-

ter case-by-case review, but should be subject to at least a rebuttable presumption that they are not RMRR.

A lifetime cap would emphasize that RMRR is a finite concept and that grandfather status should not last forever. This, in turn, might encourage sources to look for the optimal time for a retrofit, knowing that a retrofit (or shutting down) will eventually be required.

A lifetime cap would reduce incentives for some of the types of manipulation discussed above. For instance, under the annual allowance proposal, sources might spread the costs of a major modification over a period of several years in order to avoid NSR. The incentives for doing so might be lessened if all of those costs would be counted against the source under a lifetime cap, potentially drawing closer the day of reckoning under NSR.

Conclusion

For the foregoing reasons, the Agency should reconsider its annual allowance and equipment replacement proposals, and, more generally, its cost-based approaches to NSR. If the Agency does proceed with one or both of the cost-based proposals, the Agency should refine the proposals so as to minimize the likelihood that major modifications and other nonroutine activities will be conducted under the guise of RMRR. As an additional safeguard, the Agency should also consider implementing a lifetime cap on expenditures that qualify for the cost-based exclusions.

Thank you for the opportunity to comment on the pending proposal.

Sincerely,

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Comment of Professor Squillace

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U.S. Environmental Protection Agency
Docket ID No. A-2002-04
Comments on Proposed Rules

The following are my personal comments and do not necessarily reflect the views of my employer, the University of Toledo College of Law. My affiliation with the University of Toledo is provided for identification purposes only.

I appreciate the opportunity to comment on EPA's proposed rules published at 67 Fed. Reg. 80290 (2002). These proposed rules would amend the current rules governing routine maintenance, repair, and replacement (RMRR), and the extent to which such activities should be excepted from the new source review (NSR) program. In general, I oppose the proposed rules because they fail to promote clean air,

28. *Id.*

29. 40 C.F.R. §60.15(b).

and fail to adhere to the spirit, if not the letter, of the Clean Air Act (CAA). My reasons follow.

I. The Proposed Rules Are at Fundamental Odds With Congressional Intent Under the CAA

One of the more problematic aspects of the CAA as passed by Congress in 1970, and as amended in 1977, was its failure to impose any specific emission limits on existing sources of air pollution. While states could mandate pollution control in their state implementation plans, in many cases, existing facilities faced few, if any, controls. As a result, emission limits under the NSR and [the new source performance standards (NSPS)] programs were generally imposed only on new facilities, or those facilities that were modified in such a way as to cause an increase in air emissions. While this dichotomy between new and existing sources was arguably unfair, Congress assumed that over a relatively short period of time, most facilities would either be retired or modified in such a way that most if not all would fall under one or both of the point source emission programs.

To help promote this result, Congress defined "modification" at §111(a)(4) to encompass "any . . . change . . . which increases the amount of air pollution emitted . . ." The statute provides no exception for "routine maintenance, repair, or replacement." Moreover, this is not a situation where the language of the statute is unclear, such that the courts should defer to EPA's construction of the law, as it did in the *Chevron* [*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984)] case. The statute flatly prohibits *any* change which increases emissions.

Even today, Congress' assumption that changes at existing facilities would bring most or all major facilities under the umbrella of the new source program seems eminently reasonable. Yet EPA's proposed rules continue a long-standing and failed policy of promoting life-extension projects for facilities that should have been retired or brought into the mainstream of air pollution regulation years ago. Providing existing pollution sources with increasingly generous ways to avoid new source status negatively impacts the entire air pollution control system. It grants existing and more polluting sources a powerful incentive to extend the life of their existing facilities. And, because they are not required to install and maintain modern air pollution control equipment, it gives these sources a significant competitive advantage over facilities that are subject to new source standards. As a result, older, more polluting facilities remain on-line long beyond what would otherwise have been their useful life, while newer sources, which must comply with strict pollution control requirements, remain at an economic disadvantage.

The CAA provides that when existing sources change their facilities in ways that increase their emissions they should be treated as new sources. That should be the end of the matter. The CAA was passed to protect public health and Congress was well aware that in accomplishing this goal some existing sources might be forced to shut down.³⁰ EPA

should enforce the plain language of the statute. If changes at a facility will cause an increase in emissions, then the facility should choose either to meet the standards for new sources or shut down.

II. The Proposed Rule Is Wholly Unnecessary to Address Routine Changes and Maintenance at Existing Facilities

The fundamental premise of the proposed rules (and indeed, the existing rules), is that some accommodation is needed to address the RMRR changes that frequently occur at air pollution sources. But if the changes are truly routine, then someone should explain to the public why these changes are causing an increase in air pollution. If the changes are merely replacing existing parts or maintaining preexisting operational efficiency, one would not expect air pollution to increase. Moreover, at least two other aspects of EPA's current rules freely accommodate minor increases in pollution that might result from those maintenance and repair matters that are truly "routine."

The first such rule is the one that allows changes at a source that increase air emissions without being treated as a "modification" subject to the NSR program so long as the increase is not "significant" as defined under EPA rules.³¹ The threshold for significance under these rules is very generous to existing facilities, and arguably at odds with the court of appeals decision in *Alabama Power Co. v. Costle*, 636 F.2d 323, 10 ELR 20001 (D.C. Cir. 1979).³² Thus, truly minor increase in pollution that are caused by routine maintenance and repair are accommodated by these generous allowances for "de minimis" increases.

The second rule that accommodates increases that might result from routine maintenance and repair is that adopted under the final rules promulgated on the same day that these rules were proposed. Under these rules, an existing source may determine its baseline emissions, from which increases are calculated, using any two consecutive years during the preceding 10 year period. 67 Fed. Reg. at 80189. Thus, the RMRR of worn or defective components that might improve operational efficiency, and thereby increase emissions, would not be treated as a modification if these changes simply restored the operational efficiency of the system as it existed for any 2-year period over the preceding 10 years.

In those cases where these generous allowances are inadequate to allow a facility that has made changes to avoid be-

30. S. REP. NO. 91-1196, at 2-3 (1970). (Commenting on the problem posed by existing sources for ambient air quality, the Senate Committee stated that "'existing' sources of pollutants either should meet the standard of the law or be closed down.") See also *Union Elec. Co. v. EPA*, 427 U.S. 246, 6 ELR 20570 (1976).

31. 40 C.F.R. §51.166(b)(23). Under these rules, sources can make changes to a facility that increase emission of nitrogen oxide (NO_x), sulfur dioxide (SO₂), or volatile organic compounds (VOCs) by 40 tons per year, particulate matter with a diameter of 10 microns or less (PM₁₀) by 15 tons per year, PM by 25 tons per year, and carbon monoxide (CO) by 100 tons per year, without being treated as a new source.

32. In *Alabama Power*, the court struck down EPA's definition of "major modification." That definition would have allowed changes at an air pollution source without making it subject to the NSR program so long as any *increase* in emissions did not exceed the 100 ton per year or 250 ton per year threshold for major emitting facilities established under §169(1) of the CAA. The court held that "no reasonable basis can be found in the statute" to support this rule. "[T]he term 'modification' is nowhere limited to physical changes exceeding a certain magnitude." 636 F.2d. at 400. The court went on to indicate that EPA had discretion to exempt from PSD review emission increases on the grounds of de minimis or administrative necessity. It is not at all clear, however, that the increase allowed in the current rules, which are described above, meet this standard.

ing treated as a new source, that facility may still accommodate additional pollution increases, and avoid NSR, by using a facility-wide bubble and netting out of such review. The RMRR exception is wholly unnecessary to accommodate truly routine changes at a facility. Moreover, it is fundamentally at odds with the language of the CAA, and congressional intent under that Act. Accordingly, EPA should simply scrap its RMRR rules and insist that facilities comply with new source requirements whenever they make changes that increase their emissions.

III. The Proposed Rules Introduce an Unnecessary and Overly Complex Accounting Requirement Into the Rules That Will Divert Attention From the Underlying Legal Issue

Under the proposed rules each air pollution source is allowed “a percentage of the replacement value of the process unit as a threshold for applying the equipment replacement provision.” 67 Fed. Reg. at 80296. Replacements that are truly “replacements” and do not exceed this cost threshold would automatically be treated as RMRR. *Id.*

As noted above, if all the facility is doing is restoring the original equipment to working order, then there is no reason that air emissions should increase sufficiently to trigger the modification requirements of the law. If, on the contrary, the replacements are causing significant increases in emissions then there is no lawful basis for allowing a facility to avoid treatment as a new source. Under EPA’s proposal, however, a facility can “replace” equipment in any manner that increases emissions by virtually any amount, so long as it can show that its expenditures on the replacement equipment do not exceed a certain “threshold” amount. Thus, instead of focusing on whether the change is truly routine—the original intent behind these rules—the proposed rules would shift the focus to what the changes cost and whether they exceed a certain threshold as determined under an elaborate accounting system that would be established under the new rules. Offering comments on a proposed system that is so at odds with the statute only lends credence to them. Suffice it to say that the last thing that the CAA needs is another complex program that will invite conflict and litigation, and provide myriad opportunities for creative accounting, and perhaps even fraud. EPA needs to revisit this entire issue.

IV. The Proposed Rules Are Inconsistent With the Existing Rules That Define “Reconstruction”

For many years EPA had defined “reconstruction” for purposes of the NSPS program to mean replacement of a substantial portion of an existing facility’s components. 40 C.F.R. §60.15. “A reconstruction is defined as . . . A reconstruction is treated as a new source irrespective of the impact that any changes to the facility may have on emissions.” Yet, EPA’s proposed rules appear to allow changes that could eventually result in reconstruction of an entire facility without treating that facility as a new source. Thus, the proposed rules appear to be inconsistent with the existing rules that define reconstruction. Unlike the proposed rules, the existing rules plainly recognize that at some point, the changes to a facility become so substantial that it is unreasonable to allow the facility to avoid new source standards.

EPA’s reconstruction rules seem to have fallen into desuetude in recent years. EPA should rediscover these rules and avoid the promulgation of new rules that would allow a facility to effectively avoid the reconstruction rules.

V. EPA Should Convene an Advisory Committee, Perhaps in Conjunction With the National Academy of Sciences, to Rethink the CAA

The problems with the current rules are emblematic of the problems with the CAA itself. As originally adopted in 1970 the Act was a relatively coherent, if somewhat flawed, piece of legislation. In the more than 30 years that has followed, EPA and Congress have stuck with the structure of the original law, even while they were fundamentally changing it. The result is a patchwork of increasingly complex and detailed requirements that are sometimes innovative and effective but that too often lack coherence. Moreover, the historic practice of patching rather than rethinking the law has resulted in a set of laws and regulations that are far more complex and cumbersome than is necessary. Why, for example does the law define “major stationary source” and “major emitting facility” to mean the same thing in one part of the law (§302(j)), but then redefine the same terms to mean something different from the original definition as well as something different from each other (§§169(1), 169A(g)(7), 182(c), (d), and (e)). How can the public possibly be expected to participate meaningfully in a program that has grown so confusing and unwieldy?

Another example of unnecessary complexity comes from the NSR program itself. In the 1977 Amendments, Congress established separate permitting and [state implementation plan (SIP)] standards for [prevention of significant deterioration (PSD)] and nonattainment areas. Since nonattainment areas are pollutant-specific, and since every area of the country is a PSD area for some criteria pollutants, the PSD provisions essentially set a floor for all areas that must be exceeded only for those pollutants for which an area is out of attainment. While Congress might not have foreseen how the law would evolve, the benefit of more than 25 years of experience suggests that it would now make more sense to develop a single NSR program that addresses both PSD and nonattainment issues. The permitting requirements might be moved to Title V; SIP requirements could be moved to §110.

The important public policies that are promoted by the CAA merit broad participation by the interested public, but the public’s ability to participate meaningfully is hampered by a law that has grown out of control. To be sure, the issues addressed in the CAA are complex and cannot all be addressed with simple requirements. But the law does not need to be as complicated or confusing as it is.

From its inception, the CAA has served as a testing ground for new ideas and programs. The law should be called on again to test the possibility of a simpler and more coherent regulatory scheme. EPA should convene an advisory committee, perhaps with the assistance of the National Academy of Sciences, and assign to it the task of drafting a content-neutral revision of the law and regulations that avoids unnecessary complexity. The task will be daunting but the alternative road of ever-increasing complexity and confusion, has to end.

I appreciate the opportunity to submit these comments and I hope that EPA will find them helpful as it considers further action on its proposal.

Respectfully submitted,

Mark Squillace

Comment of Professor Verchick et al.

March 31, 2003

U.S. Environmental Protection Agency
EPA West (Air Docket)
1200 Pennsylvania Ave. N.W.
Room B108, Mail Code: 6102T
Washington DC 20460

Re: Docket ID No. A-2002-04

Ladies and Gentlemen:

We direct our comments to the proposed rule redefining routine maintenance, repair, and replacement (RMRR). All of us have experience in studying air pollution regulations and/or the health effects caused by air pollution. Robert R.M. Verchick is Ruby M. Hulen Professor of Law and Urban Affairs at the University of Missouri at Kansas City (UMKC), where he teaches and writes about environmental regulation and environmental justice. The other contributors are J.D. candidates at UMKC, where they are studying environmental issues; in addition some of these students have previous educational or professional experience in the areas of chemistry, public health, and industrial chemical manufacturing. We offer these comments on behalf of ourselves individually and on behalf of the Black Law Students Association at UMKC, the Environmental Law Society at UMKC, the Health Law Society at UMKC, the Hispanic Law Students Association at UMKC, and the Public Interest Law Association at UMKC. Our comments are *not* intended to reflect the views of UMKC School of Law, UMKC, or the University of Missouri system.

The new source review (NSR) program applies to the construction of new major emitting industrial facilities and to existing facilities that make major modifications that significantly increase pollution emissions. The program requires that new plants and major modifications of existing plants obtain a permit before construction. Such a permit will only be issued if the new plant or major modification includes pollution control measures that reflect the best available control technology for sources in attainment areas and the lowest achievable emissions rate in nonattainment areas.³³ The Clean Air Act (CAA or the Act) defines “new source” to include existing sources that later undergo “modifications.”³⁴ A “modification” is “any physical change” or “change in method of operation . . . which increases the amount of any air pollutant emitted by such source.”³⁵ Courts have consistently read this definition to mean exactly what it says: *any* change is a “modification” so long as the

change is physical and increases air pollution.³⁶ The only exemption involves truly trivial changes representing “routine maintenance, repair, and replacement.” [The U.S. Environmental Protection Agency (EPA)] created the exception to relieve itself of the impossible burden of having to enforce new source requirements for even minimal repairs.³⁷ The U.S. Court of Appeals for the District of Columbia Circuit validated the routine maintenance exemption on the grounds that its effects were de minimus.³⁸ Thus, so long as EPA construes this exemption narrowly, the rule is legal.

The new proposed rule abandons EPA’s narrow, case-by-case determinations of de minimus maintenance exemptions in favor of a much more liberal program that automatically exempts certain categories of modification by defining them as RMRR per se. These per se categories eschew any reference to trivial or de minimus effects and instead appear designed only to relieve regulators of case-by-case analyses. One per se category would exclude from new regulation all projects that fall within an as yet undetermined “annual allowance” to be defined by total expenditures as a percentage of capital cost. A second per se category would exclude from new regulation all projects involving the replacement of existing equipment with functionally equivalent new equipment.

Because it abandons the required de minimus standard, the proposed rule stretches EPA’s original maintenance exemption beyond the breaking point. In addition the proposed rule will increase pollution, intensifying damaging health and environmental effects. The possibility of increased air pollution also creates the possibility of increased environmental justice concerns. Finally, the proposed rule also hamstring state and local governments in protecting their local airsheds, a result at odds with this Administration’s own preference for federalism and local autonomy. We take each objection in turn.

A. The Proposed Rule Is Inconsistent With the CAA

The proposed rule undercuts both the plain meaning of the CAA and Congress’ underlying intent. It breaches the plain meaning because “modification” is literally defined as “any physical change” that “increases the amount of *any* air pollutant.”³⁹ Courts take this language literally, permitting exceptions only in de minimus situations.⁴⁰ The proposed exemptions require *no* limits on new pollutants, as both the text and the courts require. Instead, EPA focuses on expenditure/capital cost ratios and functional equivalency of added equipment, elements which appear *nowhere* in §7411’s definition of “modification.”

The proposed exemptions breach Congress’ intent because the proposed rule will *increase* air pollution and sig-

36. See *Alabama Power Co. v. Costle*, 636 F.2d 323, 400, 10 ELR 20001 (D.C. Cir. 1979) (“‘modification’ is nowhere limited to physical changes exceeding a certain magnitude”); *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 905, 20 ELR 20414 (7th Cir. 1990) (“the potential reach of these modifications is apparent: the most trivial activities—the replacement of leaky pipes, for example—may trigger the modification provisions if the change results in an increase in the emissions of a facility”).

37. See 40 C.F.R. §52.21(b)(2)(iii).

38. *Alabama Power*, 636 F.2d at 360-61.

39. 42 U.S.C. §7411(a) (emphasis added).

40. *Alabama Power*, 636 F.2d at 360-61.

33. 42 U.S.C. §§7475(a)(4), 7503(a)(2).

34. *Id.* §7411(a).

35. *Id.*

nificantly *delay* any future application of modern pollution-control technology to existing plants. It is already widely acknowledged that the Administration's "Clear Skies" initiative, taken as a whole, would allow 36% more nitrogen, 50% more sulfur dioxide (SO₂), and 190% more mercury into the air by 2018 than would existing regulations.⁴¹ The proposed maintenance rule, which would apply to roughly 17,000 plants nation-wide, would contribute to this problem.⁴²

Specifically, the proposed rule's "annual allowance" would lead to *increases* in criteria pollutants in some attainment and nonattainment areas. The proposed rule's "functional equivalency" exemption would allow indefinite upgrading of existing equipment without ever requiring new pollution controls.

1. The "Annual Allowance" Increases Pollution

The "annual allowance" exemption threatens to increase criteria pollutants by encouraging newer plants to augment their facilities in ways that increase production and pollution. The reason lies in EPA's preference for across-the-board capital-cost formulae. To see why, consider the exemption's effect on two competing plants, an older existing plant and a newer existing plant. The older source will have a lower replacement cost and therefore a lower RMRR allowance. The newer source will have a higher replacement cost and therefore a higher RMRR allowance. The older source will have relatively higher maintenance costs than the newer one with similar production levels, since its equipment is older and requires more frequent repair.

If the older source has greater maintenance requirements but a smaller RMRR allowance, it may use its entire allowance for necessary retrofits. Indeed, the most likely scenario is that it will "max-out" its allowance and be required to submit to case-by-case review by EPA. Meanwhile, the newer existing source, which has a much lower maintenance requirement, will enjoy a surplus in its RMRR allowance. This surplus creates an incentive for the newer source to use its surplus allowance to augment its production capacity and *increase* its air emissions, knowing that such an increase—however significant—will not be subject to the most recent new source standards. Some in EPA have insisted the "annual allowance" exemption is not intended to increase pollution and, in practice, will not. If this is so, we urge EPA to honor this understanding by inserting an explicit *de minimus* cap on new emissions that occur in conjunction with RMRR.⁴³

As the new source provisions make clear, Congress never intended to permit non-*de minimus* increases in pollution in nonattainment areas. Similarly, it did not intend significant

increases of pollutants in attainment areas. (And neither per se category prohibits even *significant* increases.)

Even if the "annual allowance" exemption did not up-end congressional intent, it would still not relieve EPA of its enforcement challenges—one of the touted advantages of the "annual allowance" exemption. As pointed out, the older existing plants (which make up the majority) will still require case-by-case review by EPA because the annual allowances, if calculated in relation to capital cost, will seldom be enough to cover necessary repairs. Thus, case-by-case review will continue to represent a significant proportion of EPA's investigative and enforcement work. This is appropriate; indeed, we would like to see more case-by-case review. EPA's real challenge is *not* that it has too much work, but that the current Administration has not provided the Agency enough workers. Thus, according to government records obtained through the Freedom of Information Act, the number of EPA inspectors and enforcement officials was cut more than 12% last year.⁴⁴ Indeed, the current staffing at EPA's Office of Enforcement and Compliance Assurance is now the lowest since the government began keeping records in 1996. The "annual allowance" exemption cannot make up for this deficit.

2. The "Functional Equivalence" Exemption Would Lead to Indefinite Upgrading and More Pollution

The "functional equivalence" exemption would allow indefinite upgrading of existing equipment without new controls by allowing facilities to replace different parts of a system incrementally over a series of years without ever triggering NSR. This effect would undercut the intent of Congress. Congress specifically adopted new source standards with the understanding that they would lead to an incremental "dying off" of older plants (retrofitted or not) and their later replacement with more tightly regulated new facilities. By allowing operators to indefinitely prolong the lives of older plants, the proposed rule would make it harder for new plants to enter the market and compete, thus *reversing* the very effects (new plants replacing old plants) Congress intended to pursue. The preservation of older plants in this regulatory scheme virtually ensures that airsheds will be more polluted than would have been the case otherwise.

3. The Courts Will Not Defer to EPA's Judgment Where Such Legislative Opposition Exists

Without an explicit cap on emissions resulting from RMRR, the proposed rule would surely meet stiff resistance in the federal courts. The proposed rule's inconsistency with the Act is so fundamental that the courts' traditional deference to agency rulemaking would not save it. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴⁵ the U.S. Supreme Court made clear that where an agency rule violates a statute's unambiguous meaning, it is invalid.

The Supreme Court decision, *City of Chicago v. Environmental Defense Fund*⁴⁶ indicates three points to be considered that are relevant here: (1) the statute's "plain meaning"; (2) the neighboring sections of the statute; and (3) the stated

41. See, e.g., Jim O'Neil, *Bush Misleads on Air Pollution*, OREGONIAN, Feb. 1, 2003.

42. See Editorial, *Clean Politics*, PHILA. INQUIRER, Feb. 3, 2003; Natural Resources Defense Council, Inc. (NRDC), *Clean Air & Energy: Bush Record*, at http://www.nrdc.org/bushrecord/airenergy_powerplants.asp#1196. [hereinafter NRDC, *Record*].

43. One might respond by saying that such a cap would reduce the regulatory efficiency of the per se categories by again requiring attention to individual context. This response ignores two points. First, case-by-case review of older facilities will still be necessary even with the "annual allowance," as we discuss later. Second, efficiency, while an appropriate goal, does not trump the plain meaning and intent of the Act.

44. NRDC, *Record*, *supra* note 42.

45. 467 U.S. 837, 14 ELR 20507 (1984).

46. 511 U.S. 328, 24 ELR 20810 (1994).

goals of the statute.⁴⁷ As discussed earlier, the statute's plain meaning could not be clearer: the proscription of an increase of "any" pollutant means just that. The Act's neighboring provisions, which require state implementation plans to *reduce* pollutants in nonattainment areas and to *prevent* increases in attainment areas corroborates the plain meaning of §7411. As for the Act's purpose, Congress declared its objective was to "protect public health and welfare . . . preserve protect and enhance air quality . . . [and] preservation of existing air resources."⁴⁸ The proposed rule is inconsistent with these objectives.

B. Because the Proposed Rule Will Increase Pollution, It Will Intensify Damaging Health and Environmental Effects

Thirty thousand Americans already die early deaths because of air pollution in today's skies.⁴⁹ EPA bears a legal and ethical responsibility to prevent further such damage tomorrow. Exposure to pollution is damaging to the human body. Studies show that multiple or consecutive exposures to pollution lead to serious health concerns, and even disease. The proposed changes to the CAA will likely increase pollution, especially in the form of particulate emissions from coal-fired plants. Among the most harmful to humans are nitrogen oxides (NO_x) and SO₂. Power plants that emit these particulates are adding to an ozone layer that lies close to the ground, commonly referred to as smog. The combination of smog and particulate matter causes detrimental health effects.

The list of medical problems associated with airborne pollution is exhaustive. The respiratory system is the most commonly attacked area of the body, but pollution effects are not limited to the lungs. Complaints associated with pollution exposure include asthma, bronchitis, eye irritation, colds, stomach irritation, suffocation, claustrophobia, allergies, decrease in body energy and efficiency, and decreased lung capacity and function.⁵⁰

Exposure to particulate pollution in great enough amounts or over an extended period of time can turn complaints into serious medical problems and diseases. The most common diseases are heart and lung disease, but stomach cancer, emphysema, and heart attacks have also been linked to pollution inhalation.

Statistical data collected from patients exposed to pollution are frightening. Chronic exposure to particulate pollution can shorten life by up to three years, lower lung capacity by 15 to 20%, and damage the lungs roughly equal to smoking one-half pack of cigarettes a day.⁵¹ Risk of early death increases 15 to 17% where particulate matter pollution creates smog.⁵² Lung disease alone kills 335,000 Americans yearly, and deaths from asthma related attacks have doubled between 1980 and 1993.⁵³ Lung, heart, and other bodily diseases associated with inhaled pollution result in deterioration of the total body system, and possibly death.

47. *Id.* at 332-39.

48. 42 U.S.C. §7041.

49. NRDC, *Clean Air and Energy: Air Pollution in Brief*, at <http://www.nrdc.org/air/pollution/fnsr.asp#1>.

50. W. David Slawson, *The Right to Protection From Air Pollution*, 59 S. CAL. L. REV. 672, 684-87, 695 (1986).

51. Public Health Report 1997; 112; 366-67.

52. *Id.*

53. *Id.*

The effect that smog-based pollution has on children is of primary importance. Ground-level ozone is responsible for 15,000 premature deaths and one million lung function problems in children annually.⁵⁴ Children have different oxygen and blood requirements than adults so the effects of pollution on their bodies are even more devastating. Since children are still growing and generally more active than adults, their body systems require more blood and oxygen than that of an adult.⁵⁵ Children breathe on average 50% more air per pound of body weight than adults.⁵⁶ Asthma has become the leading chronic illness in children, as well as the leading cause for hospital admissions among the nation's youth. The world is not ours; we are merely borrowing it from our kids. The proposed changes to the Act will likely increase pollution levels and result in our leaving a dirtier planet with air that is harder to breathe for our children.

Smog is generally viewed as an urban city haze and is common in areas of industrialization. Common effects on the planet include decreases in crop production, increases in acid rain, and devastating effects on plants and wildlife. Acid rain is responsible for rendering lakes and streams too acidic to support plant and fish life, aids in the destruction of monuments and buildings, impairs visibility, and kills many of the large canopy trees in the northeastern states.⁵⁷

Killing the large canopy trees creates special concerns in the Northeast, as they are responsible for producing the oxygen that we breathe. High concentrations of ground-level ozone make it harder for trees to produce the oxygen people need and makes it harder for humans to inhale what oxygen they do produce. Ground-level ozone is responsible for increased radiation exposure from the sun. Smog, under certain conditions, has the effect of intensifying the amount of radiation that hits the earth and trapping it there, creating perilous effects on plants, animals, and humans.

C. The Possibility of Increased Air Pollution and Health Problems Creates the Possibility of Increased Environmental Justice Concerns

Under the Executive Order on Environmental Justice, EPA is required to "make achieving environmental justice part of its mission" and to consider the effects of its policies and decisions on the health and environment of low-income or minority neighborhoods.⁵⁸ Over the last 20 years, ample evidence throughout the United States suggests that the brunt of environmental burdens—including air pollution and geographic proximity to industrial facilities—are borne by the poor and people of color.⁵⁹

54. Vickie Patton, Environmental Defense, *Court Affirms Historic Clean Air Standards* (Mar. 26, 2002), at <http://www.environmentaldefense.org/article.cfm?contentid=1868>.

55. Public Health Report 1997; 112; 366-67.

56. *Id.*

57. Attorney General Sorrell Joins AGs From Northeast States to Press Bush Administration for Clean Air, at <http://www.state.vt.us/atg/press01082002.htm>.

58. Executive Order No. 12898, 3 C.F.R. §859 (1995), ADMIN. MAT. 45075; see generally Denis Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898 on Environmental Justice*, 31 ELR 11133 (Oct. 2001).

59. See Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1289-90 nn.277-80 (1977) (citing multiple sources).

Given market forces (which direct polluting facilities to poorer areas), current housing patterns (in which people of color are more likely to live near many kinds of polluting facility), and the realities of political power (in which the poor and people of color often have less ability to successfully lobby their local governments for protection), one can expect that any environmental fallout from the proposed rule will be visited to a disproportionate degree on the poor and on people of color—individuals who, incidentally, are the least likely to have knowledge about the risks they face and the medical resources to address them.

Empirical data support this view. Consider the states of New York, Pennsylvania, and New Jersey, which, in addition to seven other states, have challenged EPA's proposed rule in federal court.

In New York's Albany County, the ratio of air-polluting facilities, e.g., facilities that emit criteria pollutants, located near minority residents as compared to those located near white residents is 2.45 to 1.⁶⁰ The ratio of such facilities near "low-income" and "high-income" residents is 2.46 to 1.⁶¹

In Pennsylvania's Allegheny County, the ratio of air-polluting facilities located near minority residents as compared to those located near white residents is 2.44 to 1.⁶² The ratio of such facilities between "low-income" and "high-income" residents is 2.05 to 1.⁶³

In New Jersey's Camden County, the ratio of air-polluting facilities located near minority residents as compared to those located near white residents is 5.38 to 1.⁶⁴ The ratio of such facilities between "low-income" and "high-income" residents is 1.18 to 1.⁶⁵

Given this *clear knowledge* of air pollution inequalities based on race and class, EPA should avoid any rule that would impose additional health risks on members of these vulnerable groups.

D. The Proposed Rule Hamstrings State and Local Governments in Protecting Their Local Airsheds, a Result at Odds With This Administration's Own Preference for Federalism and Local Autonomy

The proposed rule is particularly damaging to state and local autonomy, a principle the Bush Administration purports to hold in high esteem. This is because as the *per se* exemptions work to increase air pollution, states (and their local governments) will have fewer options in meeting the federally mandated national ambient air quality standards (NAAQS) and will be even more threatened by spill-over pollution coming from neighboring states.

60. Environmental Defense Fund (EDF), *Scorecard*, at http://www.scorecard.org/community/ej-summary.tcl?fips_county_code=36001#dist (using data from the 1990 U.S. Census).

61. *Id.*

62. EDF, *Scorecard*, at http://www.scorecard.org/community/ej-summary.tcl?fips_county_code=42003#dist (using data from the 1990 U.S. Census).

63. *Id.*

64. EDF, *Scorecard*, at http://www.scorecard.org/community/ej-summary.tcl?fips_county_code=34007#dist (using data from the 1990 U.S. Census).

65. *Id.*

1. States Will Have Fewer Options in Meeting the NAAQS

In general, it is the states *not* the federal government that bears the responsibility of ensuring compliance with the NAAQS.⁶⁶ The imposition of this burden is justified on the grounds that states know best how to achieve and maintain air quality in the local airshed. Thus Congress and EPA have traditionally given states broad flexibility in their regulations as long as the states meet the air standards. The proposed *per se* exemptions deprive states of one of the strongest tools they have in controlling emissions: federally uniform restrictions on modifications to existing sources. Without such restrictions, states will then be pushed to allow maintenance modifications that increase pollution and to offset those increases by imposing tighter restrictions on some other emission sources. This will be exceedingly difficult, given that existing stationary sources are responsible for so much of states' air pollution problem. The result, we fear, is that the number of nonattainment areas will simply increase, exposing states to even more federal reprisals for air pollution problems that the federal government helped to make worse.

2. States Will Be Even More Threatened by Spill-Over Pollution Coming From Neighboring States

Many downwind states are unable to meet their NAAQS because upwind power plants disregard their pollution's transboundary effects. This lack of respect for state boundaries limits the ability of downwind states to maintain clean air and thus intrudes upon their political autonomy. The course of action provided to the states, either through §126 petitions or individual state litigation, has led to governmental and judicial backlog, ineffective results in reducing air pollution, and a decrease in state resources. Because the proposed rule would increase pollution and weaken state's ability to comply with the NAAQS, one should expect transboundary air pollution disputes to grow even uglier, an event that would further erode state and local autonomy.

Transboundary pollution involves the deposition of particulate matter in a state other than where it was emitted. It is more difficult for northeastern states to meet their NAAQS requirements because wind patterns carry particulates eastward.

a. Section 126 Petitions

Section 126 of the CAA provides downwind states a measure of recourse against upwind states that are responsible for their failure to meet the requirements of NAAQS. A state that does not meet its emission cap can file a §126 petition with the EPA. Section 126 petitions are often met with frustration and unsatisfactory results.

EPA and the U.S. Department of Justice (DOJ) have limited time and resources to handle the continually growing §126 petitions that have been filed by various northeastern states. These §126 petitions require EPA to test power plants in upwind states for higher than allowed emissions or require plants to submit emissions data. This is a long and

66. 42 U.S.C. §§7404, 7410.

complicated process that potentially involves multiple states and over 300 power plants.⁶⁷

In the past, EPA has been reluctant to intervene in transboundary pollution issues between states, preferring states to work issues out on their own.⁶⁸ Often negotiations between states break down because of the high standards in the Northeast and low standards the Midwest and South want to adopt.⁶⁹ The proposed regulations would allow power plants in the Midwest and South to have greater emissions, making it even harder for the northeastern states to meet their NAAQS caps. This intrudes upon the autonomy of northeastern states and limits their ability to negotiate.

The number of §126 petitions has increased over the last couple of years and has resulted in litigation to address ever-growing problems between states. Several suits, brought by EPA and enforced by the DOJ, have ended in awards or settlements against power plants in upwind states that cause nonattainment in downwind states. Unfortunately, the new revisions proposed by EPA impede litigation, and the rollback the revisions allow cause current settlements to be nullified.

The new regulations will result in a greater number of §126 petitions being filed and bury EPA further in litigation. This would be a considerable draw on resources and does not deter violating power companies and upwind states from emitting too much pollution.

b. Lawsuits Brought by States

Frustrated by the §126 process, some states have pooled resources to sue violating power plants. Northeastern states, such as New York, began suing individual plants. Some of these cases have been settled, but with the potential new regulations, the current litigation is on hold. Industry lawyers have urged EPA to make its proposed rule retroactive so that power companies can avoid liability under these suits. Allowing retroactive regulations would be disastrous for the downwind states and would further erode their ability to protect the health and welfare of their citizens.

E. Conclusion

For these reasons, we urge EPA to reconsider its proposed rule on RMRR in its entirety. At the very least, we urge that EPA add a de minimus cap on increases of air pollution permitted for RMRR modifications and that the rule's effects not be made retroactive.

67. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 31 ELR 20635 (2001).

68. Christina C. Caplan, *The Failure of Current Legal and Regulatory Mechanism to Control Interstate Ozone Transport: The Need for New National Legislation*, 28 *ECOLOGY L.Q.* 169, 187 (2001).

69. *Id.*

Thank you for considering our comments.

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The Black Law Students Association, UMKC
The Environmental Law Society, UMKC
The Health Law Society, UMKC
The Hispanic Law Students Association, UMKC
The Public Interest Law Association, UMKC