

ORAL ARGUMENT SET FOR JANUARY 25, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1387 (and consolidated cases) COMPLEX

STATE OF NEW YORK, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition for Review of Final Action of the
United States Environmental Protection Agency

FINAL JOINT BRIEF OF AMICI CURIAE SENATORS

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October 26, 2004

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* Indicates the authorities upon which Amici principally rely.

GLOSSARY

1970 CAA	Clean Air Act Amendments of 1970
1977 CAA	Clean Air Act Amendments of 1977
Environmental Pet. Br.	Brief of Environmental Petitioners
Government Pet. Br.	Brief of Government Petitioners
LH	A Legislative History of the Clean Air Act Amendments of 1970 prepared by the Environmental Policy Division of the Congressional Research Service for the Committee of Public Works, U.S. Senate, 93 rd Cong., 2d Sess., Serial No. 93-18, Volumes 1 and 2
NA	Non attainment
NSR	New Source Review, including NSPS, PSD and Non attainment new source review
PSD	New Source Review Applicable to Prevention of Significant Deterioration Areas

INTEREST OF AMICI CURIAE

The Clean Air Trust was established in 1995 by Senators Edmund Muskie and Robert Stafford. Its purposes include defending the Clean Air Act. The Clean Air Trust's access to extensive records at the Muskie Archives can offer helpful guidance to the court by providing an authentic account of the development of the "modification" provisions of the Clean Air Act.

Amici Hillary Rodham Clinton, Charles E. Schumer, Jon S. Corzine, James M. Jeffords, Patrick J. Leahy, Barbara Boxer, Frank R. Lautenberg, John F. Kerry, Christopher J. Dodd, and Jack Reed are members of the United States Senate. They have sought to protect their constituents from the harmful effects of air pollution through legislative work and regulatory oversight. The rule challenged in this litigation frustrates this work by contravening Congressional policy-making. These elected representatives have an interest in seeing to it that EPA implementation of the Clean Air Act respects and conforms to the detailed policy decisions Congress has painstakingly enacted into legislation.

Amici are filing this brief by consent of the parties and pursuant to the Court's February 24, 2004 Order.

SUMMARY OF ARGUMENT

The modification provisions of the Clean Air Act Amendments of 1970 and 1977 (1970 and 1977 CAA) reflect a specific Congressional decision to limit the period within which existing sources could continue to operate without complying with new source review (NSR) requirements.¹ Congress decided to reconcile economic growth with achieving and maintaining air quality by subjecting *all* pollution increasing changes – modifications of existing sources and additional new sources – to identical new source requirements. Congress afforded existing sources a limited grace period because existing sources' limited useful lives would force them to either upgrade or shutdown. EPA's rules illegally substitute an extended immunity from NSR for the statutory regime of equal treatment of all emissions increasing projects.

The statutory definition of modification already establishes that energy efficiency enhancements that reduce emissions below current levels do not trigger NSR. *See* 42 U.S.C. § 7411(a)(4). EPA's rules allow projects that *increase* emissions above current levels to evade NSR.

EPA based its rule on an impermissible consideration, its view that strict adherence to the Act's new source requirements is counterproductive with respect to modified sources. An agency may not base its rule upon disagreement with a fundamental policy choice that elected representatives embody in legislation. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1980) (EPA's view that Congress has chosen a poor means of achieving its goals cannot justify an agency policy judgment). Congress plainly intended to reconcile economic growth and clean air by subjecting existing facilities to new source standards as the need to replace old worn out equipment arose.

¹We use this term to refer to the Act's non attainment (NA) new source review, prevention of significant deterioration (PSD), and new source performance standard requirements. *See* 42 U.S.C. §§ 7411(a)(2), (4), 7475, 7479(2)(C), 7502(c)(5), 7503.

ARGUMENT

I. EPA Has Illegally Converted a Limited Grace Period for Existing Sources Into an Extended Immunity from NSR .

A. The Need to Provide for Economic Growth Meant That Existing Sources Could Only Be Granted a Limited Grace Period Prior to Complying With New Source Standards or Being Shutdown.

In writing the 1970 and 1977 CAA, Congress well understood that as the economy grows, new sources of air pollution exert pressure on achieving and maintaining air quality. Speaking in 1970, Senator Edmund Muskie, chief architect of the 1970 CAA, warned his colleagues that “while we clean up existing pollution we must also guard against new problems.” 116 Cong. Rec. 32902 (Sept. 21, 1970), *reprinted in* 1 LH 227. Requiring new sources to “reduce emissions to a minimum,” S. Rep. No. 91-1196 15(1970), *reprinted in* 1 LH 415, was a key element in Congress’ strategy for accommodating economic growth with a rigorous air quality program.

Congress also knew that problems associated with economic growth arise when additional emissions from new sources combine with emissions already coming from existing sources – and thus that maximum control of entirely new sources would eventually be insufficient. E.g., H.R. Rep. No. 94-1175, at 160-65 (1976) (“even use of best available technology by new sources may not be sufficient to prevent serious irreversible environmental damage in the foreseeable future.”) The imperative to “maximize growth potential,” H.R. Rept. 95-294, at 185 (1977), suggested that immediately applying equally stringent controls to existing sources might also be necessary. This was exactly what some urged. *See Ford Motor Company’s Position on the Major Issues of Senator Muskie’s Subcommittee’s Proposed Amended Clean Air Act, reprinted in* 1 LH 746 (arguing that equity supported applying same standards to new and existing sources).

Countervailing considerations counseled against the immediate application of new source standards to existing sources. Importantly, “[f]or some of the older and smaller sources, it is not physically or economically feasible to retrofit ... control technology.” H.R. Rep. No. 94-1175 159 (1976). Equally important, however, was the consideration that existing sources would soon cease to contribute to air quality problems because they had limited useful lives, which meant they

would have to be upgraded or shutdown. E.g., id. (“[I]t is imprudent to backfit FGD into existing plants, especially older units facing retirement within 10-15 years.”)

B. The Broad Definition of Modification and the Finite Lives of Existing Sources Limited the Grace Period for Existing Sources.

Congress did not, however, simply take it on faith that existing plants would cease polluting by closing down within a limited number of years. Instead, it created a *limited and qualified* grace period within which existing plants could continue to operate. Accordingly, the 1970 CAA set up a simple choice for existing sources: either upgrade to new source standards or shut down. Congress wrote this choice into law when it applied new source standards to the “modification” of existing sources, defined as “*any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant ...*” 42 U.S.C. § 7411(a)(1),(4) (emphasis added).

Congress wrote this broad definition into law after considering and rejecting narrower definitions. *Compare* S. 3546 § 3(c), introduced in March, 1970 (no explicit mention of existing sources), *reprinted in* 2 LH 1467; *with* August, 1970 Senate Committee on Public Works Draft §113(a)(4) (“new source” includes “any construction ... which alters the nature or increases the amounts of air pollution”) *reprinted in* 1 LH 651, *with* S. 4358, bill passed by Senate in September, 1970 § 113(4) (same as Committee Print), *reprinted in* 2 LH 554; *with* 1970 CAA, enacted December 1970, P.L. 91-604, § 111(a)(2), (4) (“new source” includes “any physical change in, or change in the method of operation of” an existing source that increases emissions).²

This definition, combined with the fact that every existing source had a limited useful life, created an outer limit on how long existing sources could operate without upgrading to new source standards. That length of time could vary from plant to plant, but it was a definite limit for each existing source. When Congress revisited the CAA in 1977 to create PSD and NA requirements, it wrote the same limited grace period into those programs by incorporating the 1970 CAA’s

² The bill enacted by the House and then sent to Conference, H.R. 17255, contained no comparable provisions.

definition of modification into the PSD and NA provisions that trigger NSR. 42 U.S.C. §§ 7475(a) 7502(c)(5), 7503(a)(2).

Congress' 1977 debate about the problem of "tall stacks" further demonstrates Congress' continuing understanding that the limited useful life of existing sources constrained the amount of time such sources could operate without triggering NSR. The tall stack problem arose because a number of states had submitted implementation plans allowing existing sources to disperse local air pollution by using tall stacks that shot air pollution high into the atmosphere. Federal courts eventually found this dispersion strategy inconsistent with the Act's nondegradation policy. *See e.g., NRDC v. EPA*, 489 F.2d 390 (5th Cir. 1974), *rev'd in part, on other grounds, sub nom. Train v. NRDC*, 421 U.S. 60 (1975).

In 1977, Congress quickly affirmed the courts' interpretation of the Act, and then addressed treatment of those pollution sources that had already built EPA-approved tall stacks. The matter came up for extended discussion at a March 16, 1977, meeting of the Senate Committee on Environment and Public Works to mark up the 1977 bill.³ Senate Howard Baker, R-TN, argued that plants twenty years and older ought to be permitted to continue to rely on tall stacks. He claimed that requiring such plants to install modern technology would impose heavy annual costs on them, because "every powerplant of course has some life expectancy." Mark-Up at 71-7. Later on in the discussion, Senator Baker even provided specific retirement dates for several plants, as provided by the TVA: "Widows Creek, 1992; Shawnee, 1994 ... and Kingston, 1994." *Id.* at 92.

Adding modern controls to older plants could add as much as 50% to their annual costs because capital costs could only be amortized over their limited remaining lives. *Id.* at 71-7. Imposing such costs seemed unjustified in part because such plants would be used less as they aged. "Typically, a plant will be phased down gradually to the place where, instead of being a base load power plant operating more or less continuously, it will become a peak load plant and

³Committee on Environment and Public Works, U.S. Senate, Transcript of Clean Air Act Amendments Mark-Up, March 16, 1977(Mark-Up), available at the Edmund S. Muskie Archives and Special Collections Library, Bates College, 70 Campus Avenue, Lewiston, Maine 04240-6018. Folder SE3042-5.

the total amount of electricity generated by that plant will be reduced.” Id. at 74.

In response to a question from Senator Peter Domenici, R-NM, regarding what the Senate actually knew about plant life expectancies, a staff member affirmed the essentials of Senator Baker’s argument (which were also essentially the same arguments advanced during the 1970 deliberations - see pp. 3-4, above): “[O]n the basis of average life expectancy, they would last for an average of five to 15 years... [B]ut they would be operating at old capacity levels during this period because they generally start phasing these plants down to phase them in with other plants, newer plants in the system.” Id. at 82-83.

Of course, Congress recognized that facility owners could extend the lives of plants by changing old equipment for new, rather than simply shutting down plants. When such a modification occurred, however, it would trigger new source requirements if it increased emissions either through physical or operational changes. Responding to a question on just this point by Senator Burdick, D-ND, Senator Baker replied that “if they change out the boilers, for instance ... you would have new standards on that.” Id. at 87-88.

The same understanding of the declining use and eventual shutdown of existing source was thus a constant throughout the 1970-77 period.⁴ The Act’s broad definition of modification as “any physical” or “operational” change would result either in existing sources closing down or undergoing an upgrade-requiring “modification” within a limited time period. Once either of these two events occurred, the excessive contributions of existing sources to new air quality problems (excessive when compared to sources operating with new source controls) would be eliminated.

Recent enforcement actions and independent studies now conclusively show that sources in existence in 1970 and 1977 continue to operate to this day – well beyond the grace period provided by the Act – without having upgraded their emissions controls to new source standards.⁵

⁴ This understanding has not changed. Congress refused to change the definition of modification when it last enacted significant amendments to the CAA. In 1990 Congress was under some pressure to give utility companies relief from the WEPCO decision, which had upheld the application of NSR to a powerplant life extension project, but it declined to alter the statute. See *Environmental Pet. Br.* at 6.

⁵ The TVA powerplants at Widows Creek, Shawnee and Kingston are illustrative. Despite telling Senator Baker in 1977 that these plants would be retired in 1992 and 1994, they are still going strong, see http://www.tva.gov/sites/sites_ie2.htm (Last visited April 27, 2004),

Any revisions to NSR that result in further extensions of time, more than three decades after the 1970 CAA became law, can have no statutory legitimacy. Since EPA's rule changes have this effect, *see* Government Pet. Br. at 20, they must be rejected.

II. Regulating Existing Sources Less Strictly than New Sources Discourages Innovation and Contravenes Congressional Intent.

EPA has undone the Congressional decision to treat all projects increasing emissions alike. Owners of brand new facilities must undergo NSR, because the project of constructing a source leads to increased emissions. Operators constructing an identical emission increasing project at an existing source can claim that it does not increase emissions, because the existing source's emissions were once higher a decade ago. *See* Environmental Pet. Br. at 12-13. This approach disfavors brand new sources that could drive environmental innovation.

Because energy efficiency projects decreasing emissions below current levels do not trigger NSR under the statutory modification definition, *see* 42 U.S.C. § 7411(a)(4) (emission increase required for modification), EPA's rules only serve the purpose of allowing projects that increase emissions above current levels to escape NSR. Strict application of NSR cannot discourage modernization, because pollution sources must replace equipment when it wears out to avoid a shutdown. While subverting the modification provision does nothing to encourage emission decreasing innovation, even good policy reasons cannot suffice to administratively defeat the specific Congressional decision to apply NSR to all emission increasing physical and operational changes.

III. EPA Illegally Based its Rule on its Disagreement with Congressional Judgment Regarding the Value of New Source Review.

Congress did not delegate its authority to determine whether or not application of NSR to

without having undergone NSR. *See* In Re: Tennessee Valley Authority, 9 E.A.D. 357, 2000 WL 1358648 (E.P.A. Environmental Appeals Board, Sept. 17, 2000) (sustaining administrative compliance order charging NSR violations at these facilities), *set aside on other grounds*, TVA v. Whitman, 336 F.3d. 1236 (11th Cir. 2003) (CAA provisions authorizing ACO declared unconstitutional).

all modifications constitutes good policy. *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (EPA would enjoy “limitless hegemony” if statutes were construed to delegate powers not mentioned); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979) (section 301 does not confer “carte blanche” authority to promulgate rules “in any manner that the Administrator wishes.”). *Cf. Appalachian Power Co. v. EPA*, 135 F.3d 791, 807-808 (D.C. Cir. 1998) (permitting general policy considerations to enter into construction of statutory provision allowing administrator to make a choice about whether to revise regulations). Instead, these elected officials voted to require application of these requirements to all emissions increasing physical and operational changes. This left EPA with a fairly narrow technical task: to determine how to accurately measure emission increases. EPA did not undertake that task, but instead based its decision on disagreement with fundamental Congressional policy judgments. This approach produced a decision that neglected important considerations, relied upon impermissible factors, and violated the law.

A. EPA Illegally Failed to Consider Which Methodology Most Reliably Measured Emission Increases.

EPA did not make any findings regarding whether its rule would reliably subject all modifications to NSR. It did not find that its methodology constituted the most reliable means of capturing all emission increasing physical and operational changes in the new source review rulemaking. *Cf. Richard Ayres & Richard Parker, The Proposed WEPCO Rule: Making the Problem Fit the Solution*, 22 *Env't'l L. Rep.* 10201, 10206-07 (1992) (discussing problem of measuring emission increases).

Failure to consider significant relevant factors renders a rulemaking arbitrary and capricious. *See Citizens to Save Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). EPA simply failed to consider the most important question before it: whether it has chosen the most reliable means of implementing the Congressional decision regarding the emission increase trigger. *Cf. id.* at 411 (Secretary of Transportation failed to find that there was no feasible alternative route to a highway under a statute making such a finding essential).

B. EPA Impermissibly Based Its Rulemaking on a View that New Source Requirements Were Counterproductive.

In Congressional hearings, EPA's top air pollution control official characterized application of NSR to modified sources as counterproductive, stating that it hindered rather than helped cleanup of pollution. *See* S.Hrg. 107-868, at 30, 40-41 (2002) (statement of Jeffrey Holmstead, Assistant Administrator for Air and Radiation, U.S. EPA) (Holmstead Testimony). This view conflicted with the information career staff had given the agency and Congress. *See, e.g.*, Memorandum from Bryan Hubbell, U.S. EPA, "Benefits Associated with Electricity Generating Emissions Reductions Realized Under the NSR Program" (June 20, 2001)[J.A. 2665] (PSD program alone had produced approximately 400,000 tons of sulfur dioxide reductions and 822,000 tons of nitrogen oxide reductions *per year*).⁶ Nevertheless, EPA's political appointee suggested to Congress that legislation should repeal or radically revise the program. Holmstead Testimony at 41-42. While EPA officials may advocate any legislative changes they think appropriate in Congress, they have a duty to faithfully execute existing law when they write rules implementing the Clean Air Act.

EPA did not, however, faithfully execute the Act's modification provisions. Instead of acting consistently with the Congressional view that new source requirements improved environmental quality, EPA gutted the program.

EPA based its rulemaking upon an impermissible consideration: an opinion, contrary to that of the Congresses that created the program, that new source requirements were counterproductive. Reliance upon this consideration renders its rule arbitrary and capricious and contrary to law. Disagreement with a fundamental policy choice of Congress cannot be a reasonable basis for writing a rule implementing that policy.

EPA designed this rule to subject "fewer projects" to NSR permitting requirements. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR).

⁶ Even if Hubbell's benefit estimates were sharply discounted, they would still show that the modification provisions were productive, not counterproductive. *See id.* at 1, 5-6 [J.A. 2665, 2669-70] (using modification data to help generate benefit estimate and noting that benefit's analysis excludes benefits of nonattainment NSR requirements).

Final Rule and Proposed Rule, 67 Fed. Reg. 80185, 80192, 80242 (December 31, 2002). EPA defended this exemption of projects from NSR on grounds that the exemptions offered greater “operational flexibility.” *Id.* at 80242. Any decision to exempt any firm from any environmental requirement increases the firm’s “operational flexibility.” Absent pollution control requirements, facilities have the flexibility to operate with or without controlling emissions. Regulatory requirements impair operational flexibility by limiting pollution, thereby requiring some changes in operation. Reliance upon flexibility alone cannot be a reasonable basis for Clean Air Act rulemaking, for Congress wrote the Act in order to regulate, not deregulate, pollution sources. *Cf. Motor Vehicles Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 49 (1983) (National Traffic and Motor Safety Act necessary because industry was not sufficiently responsive to safety concerns). The heart of EPA’s affirmative case for this rule relies upon an arbitrary preference for deregulation in the form of NSR avoidance. EPA established plantwide applicability limits to provide “you with ... the ability to manage facility-wide emissions without triggering NSR.” *See* 67 Fed. Reg. at 80206. EPA wrote that the Clean Unit Test provides “operational flexibility. You may make changes without having to obtain a NSR permit.” *Id.* at 80222. The Pollution Control Project Exclusion allows certain projects “to avoid” major NSR permitting requirements “for their collateral emissions increases.” *Id.* at 80232. EPA’s goal of aiding NSR avoidance conflicts with the Congressional decision to regulate all emission increasing changes. *Cf. Am. Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1, 1, 6-7 (D.C. Cir. 1987) (rejecting reliance on industry self-regulation as basis for failure to fully implementing legislative prohibition of injuring show horses to improve performance); *Sierra Club v. EPA*, 719 F.2d 436, 462 (D.C. Cir. 1983) (prohibition upon allowing dispersion techniques to affect emission limitations precludes attempt to define dispersion techniques narrowly).

Congress never delegated authority to EPA to consider, let alone give controlling weight to, “operational flexibility” in implementing the statute’s straightforward requirement that emission increasing changes trigger new source review. *Cf. Ethyl Corp.*, 51 F.3d at 1060 (refusing to presume delegation of power to consider public health, when relevant statutory provision does not explicitly mention it as a factor); *California v. Watt*, 668 F.2d 1290, 1303-1304 (D.C. Cir. 1981)

(Secretary of Interior may not designate California as lease site to enhance “flexibility” in light of legislative directive to make lease site designations as specific as possible); *Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001) (EPA’s general CAA rulemaking authority does not grant it a “roving commission” to go beyond a specific statutory directive). Congress clearly believed that regulation would benefit the environment and that deregulation of modified sources would not. Yet, EPA opined that this exemption of NSR projects from regulation will “in some respects” benefit the environment. 67 Fed. Reg. at 80192. The “new test” [for emission increases], wrote EPA, “will remove disincentives that discourage sources from” improving “operating efficiency,” implementing “pollution prevention projects,” and “other environmentally beneficial changes.” *Id.* Thus, EPA aligned itself with those who have urged NSR’s repeal on the grounds that it discourages environmental improvement.

This view of NSR as counterproductive might justify an EPA attempt to convince Congress to repeal the program, but it is not a permissible justification for a rule that should implement a Congressional decision to regulate all emission increasing changes. *See Lyng*, 812 F.2d at 6-7. *Cf. Sierra Club v. EPA*, 294 F.3d 155, 160-162 (D.C. Cir. 2002) (reversing agency extension of attainment deadlines deemed impracticable by the agency, because Congress chose these deadlines as a means of bringing clean air). As this court explained in *Alabama Power*, courts must reject actions substituting agency “analysis of policy considerations for those enunciated by Congress.” *Alabama Power*, 636 F.2d at 359 n. 85.

CONCLUSION

In order to reconcile pollution control and economic growth, Congress decided specifically to require imposition of new source controls upon pollution sources that choose not to shut down when their equipment wears out and requires emission increasing replacement. EPA has impermissibly based its rule on its disagreement with that policy decision. For that reason, this Court should reverse EPA's decision.

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with the Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Brief Amici Curiae of Clean Air Trust and Senators Hillary Rodham Clinton, Charles E. Schumer, Jon S. Corzine, James M. Jeffords, Patrick J. Leahy, Barbara Boxer, Frank R. Lautenberg, John F. Kerry, Christopher J. Dodd, and Jack Reed contains 3744 words, as counted by counsel's word processing program.

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