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

STATE OF NEW YORK, *et al.*,	)	
Petitioners,	)	
v.	)	Docket No. 03-1380 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ENVIRONMENTAL PETITIONERS' REPLY IN SUPPORT OF STAY MOTION

Environmental Petitioners file this joint reply to the oppositions to their stay motion filed by respondent Environmental Protection Agency ("EPA") and industry movants for intervention.

I. EPA and Industry Fail to Refute Environmental Petitioners' Strong Showing That They Are Likely to Prevail on the Merits.

The Clean Air Act expressly applies New Source Review ("NSR") to, *inter alia,* "any physical change" in a stationary source which increases the amount of any air pollutant emitted by such source. § 111(a)(4). Far from establishing the legality of the broad exemption promulgated by the challenged rule, EPA's opposition affirmatively confirms its illegality, conceding repeatedly that the exempted activities do fit within the statutory phrase "physical change." EPA Opp. 9 (exempted activities "are 'physical changes'"); 11 (exempted activities "could be literally defined as a 'physical change'"); 12 (analogizing exempted activities to the replacement of a car's transmission, and noting that after such a replacement, "the car has certainly undergone a 'physical change'"). Because the statute expressly encompasses "any physical change" that increases emissions, § 111(a)(4) (emphasis added), EPA lacks authority to

exempt some such changes—*e.g.*, those that represent less than 20% of replacement cost and fit within the facility's original design. *See* Stay Mot. 6-7 (citing cases).

Moreover, contrary to EPA's argument, EPA Opp. 8, judicial deference cannot be given to an agency interpretation that violates the Act's express terms. *See, e.g., Cajun Electric Power Cooperative v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (this Court "ha[s] always seen the first step [of *Chevron*] as one conducted under *de novo* review," and "[a]n agency is given no deference at all on the question whether a statute is ambiguous") (emphasis added). To the contrary, Congress' intent expressed in the plain terms of a statute "is the law and must be given effect." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).

This Court has held that, "for the EPA to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Engine Mfrs. Assn. v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). EPA has fallen far short of the "extraordinarily convincing justification" needed to satisfy this test. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001).

First, EPA has cited no evidence that, as a matter of historical fact, Congress did not mean NSR to encompass "any physical change" that increases a stationary source's emissions. The agency's purported references to legislative history in reality quote the agency's own prior Federal Register notices. *See* EPA Opp. 9, 11.[1]

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[1] The two legislative history citations offered by EPA in the final preamble, *see* 68 Fed. Reg. 61270/1, are unavailing. Both of them relate to new source performance standards, not NSR, and neither supports EPA's attempt to limit the reach of the statutory phrase "any physical change." *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 185 ("[N]ew sources must minimize emissions in order to maximize growth potential"), *id.* ("Building control technology into new plants at the time of construction will plainly be less costly then requiring retrofit when pollution [Footnote continued on next page]

Second, EPA has not demonstrated that, as a matter of logic or statutory structure, Congress almost surely could not have meant to apply NSR to "any physical change" that increases stationary source emissions. As to statutory structure, EPA's sole citation is to § 160(3), which indicates that the "purposes" of PSD include "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." *See* EPA Opp. 9. Nothing in this provision states or suggests that exemptions should be carved out from the phrase "any physical change." To the contrary, Congress believed that new source review promotes economic growth. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 133 (stating that "if each new or modified major source is located, constructed, and operated so as to minimize its impact on available clean air resources, then more and bigger plants will be able to locate in the same area without serious air quality degradation."). Moreover, EPA's exclusive reliance on one of the PSD program's statutory purposes ignores the other four, which express strong intent to protect public health against air pollution (even pollution that does not violate national air quality standards), to prevent deterioration of air quality, and to ensure careful evaluation of "any decision to permit increased air pollution" in clean air areas. § 160(1), (2), (4) and (5).

As to logic, EPA cannot claim that a literal interpretation of "any physical change" is anomalous, given that the very rule under review here characterizes that literal interpretation as "consistent with the relevant language of the CAA and a reasonable effort to effectuate its policies," and announces EPA's intent to continue defending that interpretation in litigation pending under the predecessor rules. 68 Fed. Reg. 61272/3 & n. 14; 61273 n. 16.

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ceilings are reached."). *See also* 116 Cong. Reg. 32918 (September 21, 1970)("The concept is that wherever we can afford or require new construction, we should expect to pay the cost of using the best available technology to prevent pollution.").

Moreover, EPA's claim that a literal reading would interfere with "necessary, efficient, and ultimately environmentally beneficial replacement projects," EPA Opp. 9, overlooks the Act's express terms, which—as EPA itself points out elsewhere in its opposition—apply NSR only to those physical changes that increase emissions. *See* EPA Opp. 11, n.10. Indeed, under EPA's pre-existing regulations, even emissions-increasing physical changes do not trigger NSR unless the emissions increases exceed specified significance levels. Stay Mot. 12.

Relevance of the WEPCO and Alabama Power Decisions. EPA misleadingly claims its new rule "is consistent with *WEPCO*" and that the Seventh Circuit "did not have before it, and did not purport to rule on . . . the permissibility of any interpretation of 'physical change' other than the one advanced by WEPCO and rejected by the court." EPA Opp. 17. The agency neglects to mention that the argument "advanced by WEPCO and rejected by the court" is the same argument that EPA now makes in support of its new rule. *See* Stay Mot. 7. Moreover, the Seventh Circuit rejected that argument as inconsistent with the plain meaning of the statutory phrase "any physical change." *Id.*

EPA's further argument that this Court's decision in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) was superseded by *Chevron*, EPA Opp. 16, rests on a fundamental mischaracterization of *Alabama Power*. That decision did not "proceed[] from the view that an agency's authority to interpret a statute, or to exempt from regulation any activity even arguably reached by the statute, is extremely limited," *see* EPA Opp. 16, but to the contrary repeatedly recognized the doctrine of judicial deference to agency interpretations. *See, e.g, Alabama Power*, 636 F.2d at 353, 360. At the same time, *Alabama Power* noted that that the courts disfavor "[c]ategorical exemptions from the clear commands of a regulatory statute." *Id.* 358.

Chevron reinforced, not superseded, that principle, *see* p. 2, *supra*, as this Court's post-*Chevron* precedent amply confirms. Stay Mot. 7 (quoting *Sierra Club v. EPA*).

EPA and Industry likewise err in asserting (EPA Opp. 15-16; Industry Opp. 5-6) that *Alabama Power* did not take the "any physical change" portion of the "modification" definition into account in reaching its decision. *See* 636 F.2d. 400-401 (examining the entire definition of "modification" and indicating that by itself, the first prong would encompass a broad array of activities, including "replac[ing] depreciated capital goods").

Ratification. There is no merit to Industry's argument that Congress ratified the statutory interpretation adopted by EPA here. EPA's opposition admits that that interpretation is a "change of position," and makes no attempt to argue that Congress ratified it. EPA Opp. 13-14. Indeed, because the new rule's categorical exemption has never before appeared in EPA regulations implementing the Act's NSR or New Source Performance Standard ("NSPS") programs, Congress has never had an opportunity to ratify it.

Moreover, EPA and industry are unable to identify any statement in the legislative history indicating that Congress intended to convert the unambiguous statutory term "any physical change" into a vague standard subject to broad agency discretion. Legislative intent "to conform to usage in other parts of the Act," 123 Cong. Reg. 36331 (daily ed.) (Nov. 1, 1977) (emphasis added), *cited in* Ind. Opp. 4, falls far short of ratifying NSR exemptions that appeared in NSPS regulations. Even if Congress had stated that it intended to ratify the then-existing regulatory exemptions, such a statement could not be read to ratify in advance the then-unknown contours of the 2003 rule's broad categorical exemption.

II. EPA and Industry Fail to Refute Environmental Petitioners' Strong Showing That Irreparable Injury Will Result in the Absence of a Stay.

Neither EPA nor industry denies that, in the absence of a stay, the new rule will govern activities at thousands of major air pollution sources in this country starting on December 26, 2003.[2] *See* Stay Mot. 13. Moreover, neither EPA nor industry denies that these thousands of major sources will undertake hundreds, if not thousands, of equipment replacement projects in 2004. *See* Stay Mot. 13-14, 17; *see also* Sagady Decl. ¶¶ 18-26. Finally, neither EPA nor industry denies that the new rule will allow equipment replacement projects to result in significant net emissions increases that would not be allowed to result under the existing rules.[3] *See* Stay Mot. 14-16.

Environmental Petitioners have presented evidence sufficient to establish that many of the hundreds, if not thousands, of equipment replacements occurring in 2004 at sources immediately governed by the new rule will generate significant net emissions increases as a result of the freedom that the new rule affords. *Id.* 13-17. For example, Environmental Petitioners have offered (1) a survey, conducted by one of the industry movant-intervenors, finding that a coal-fired power plant unit undertakes annually, on average, at least one physical activity that does not qualify as "routine" maintenance, repair, or replacement under the existing rules, *id.* 14 n.6; (2) a statement by the National Association of Manufacturers that "existing sources must undertake thousands of routine repair and replacement projects every year," and

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[2] EPA does not deny that what it calls "relatively few" is actually a number exceeding 5,000. EPA Opp. 21. While industry's expert takes issue with certain entries in Environmental Petitioners' list of areas where the new rule will govern as of December 26, he does not contest the fact that the rule will govern physical activities at thousands of sources as of December 26. McCutchen Decl., ¶¶ 11-23.

[3] In fact, EPA concedes that some sources will be able to "generate more annual emissions" under the new rule. EPA Opp. 23.

that "many" of these projects trigger NSR under the existing rules, *id.*; and (3) statements in which industry representatives express eagerness to begin taking advantage of the new rule as soon as possible in order to carry out projects without limiting net emissions increases. *Id.* 16-17.[4] Industry does not deny in its opposition that source owners will act on that eagerness in 2004 if the rule goes into effect on December 26.

To reinforce their demonstration, Environmental Petitioners have offered Mr. Sagady's list of seven specific candidates for 2004 equipment replacements that will increase net emissions significantly, would trigger NSR under the existing rules, and will not trigger NSR under the new rule. *Id.* 17; Sagady Decl., ¶¶ 10-17.[5] Most of these candidates remain unrefuted, despite industry's apparently exhaustive effort to discredit them.[6]

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[4] EPA's reliance on *Nat'l Treasury Empl's Union v. U.S.*, 927 F.2d 1253 (D.C. Cir. 1991), *see* EPA Opp. 19, is therefore misplaced. In that case, the Court found that the movants had offered no evidence that the rule in question would cause injury during the period in which the rule was under judicial review. *Id.*1255.

[5] *See also* Sagady Decl., ¶¶ 18, 19-26 (number of projects that will meet the relevant criteria is much higher than seven).

[6] Industry's expert does not take issue with the fact that the new rule will, as of December 26, govern physical activities at sources located in the parts of New Jersey, New York, and Pennsylvania attaining any of the various NAAQS. McCutchen Decl., ¶ 24. Accordingly, he does not claim that any of the information he presents in paragraph 24 of his declaration disqualifies any of the seven candidate projects in those states. *Id.*, ¶¶ 24, 30, 32, 34-36. General Chemical's declarant does not deny that the company will refurbish the furnace at its New Jersey facility in 2004. Hunsucker Decl., ¶ 2. Moreover, he offers no factual support for his assertion that this project would qualify as routine under the existing rules. *Id.* ¶ 3. Finally, he believes that the 2004 project will not trigger NSR under the new rule. *Id.* ¶ 4. Industry's expert declares that "[n]o replacement activity is planned for the heat recovery steam generator" at the Bergen power plant in New Jersey, but he says nothing of the other components in Mr. Sagady's 2004 project description. *Compare* McCutchen Decl., ¶ 30 *to* Sagady Decl., ¶ 11. Moreover, his statement that "EPA determined that a similar project was not subject to PSD," McCutchen Decl., ¶ 30, falls short of a demonstration that the project at issue would not trigger NSR under the existing rules. Industry's expert offers nothing other than self-serving, hearsay statements from Dynegy Midwest Generation that the 2004 project at the Baldwin power plant in Illinois would qualify as "routine" under the existing rules. EPA has found that Dynegy has previously labeled projects at the Baldwin plant "routine" even when they did not qualify for that exemption under the existing
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EPA erroneously suggests that Environmental Petitioners cannot establish irreparable injury without demonstrating "that any hypothetical emissions increase would cause an area to exceed the primary NAAQS." EPA Opp. 19. The very first of the five enumerated purposes of the PSD program is to protect against public health and welfare impacts that may result from air pollution "notwithstanding attainment and maintenance of all national ambient air quality standards." § 160(1). *See also* H.R. Rep. No. 294, 95th Cong., 1st Sess. 141 (1977) ("by allowing air quality deterioration all the way up to the ambient standards, the [EPA] regulations fail to provide an adequate margin of safety from potential serious health effects of air pollution at levels below these standards"). EPA itself has documented substantial health impacts occurring below the level of NAAQS, *see, e.g.*, 62 Fed. Reg. 38865 (July 18, 1995), and indeed has recognized that its NAAQS have not been set at levels sufficient to prevent all health risks. *Id.* 38867; *American Trucking Associations v. EPA*, 283 F.3d 355, 359-60 (D.C. Cir. 2002).

EPA catalogs other non-NSR legal provisions that promote air quality. EPA Opp. 25-27. But the agency does not – and cannot – claim that these provisions will prevent the occurrence, in 2004, of net emissions increases sufficiently large to cause irreparable injury. *See* Stay Mot. 14-15, 17; Schoengold Decl. ¶¶ 11-15; Attachments F-H to Schoengold Decl. For example, state "minor" NSR programs impose only those limits "necessary to assure that national ambient air quality standards are achieved," 42 U.S.C. § 7410(a)(2)(C), and there is no indication that any

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rules. *See* Pl.'s Reply to Def's' Proposed Findings and Conclusions (Liability Phase), filed on Sept. 5, 2003 in *U.S. v. Illinois Power and Dynegy Midwest Generation*, Civil Action No. 99-833 (MJR) (S.D. Ill.). Industry's expert provides no factual support for his assertion that Graymont's 2004 project at its lime manufacturing operation in Pennsylvania "would not meet the 20 percent capital cost threshold criterion" in the new rule, McCutchen Decl., ¶ 34, and industry offers nothing to rebut Mr. Sagady's conclusion that Graymont could withdraw its pending application and, after the new rule has taken effect, replace its kilns without an NSR permit.

state SIP will be revised in any way that could compensate for the significant net emissions increases that will result from the new rule in 2004 absent a stay. *See, e.g., Sierra Club v. USEPA*, 129 F.3d 137, 139 (D.C. Cir. 1997) (though "alternative protective measures might limit the harm caused by the relaxation of regulatory provisions," petitioner's members "would suffer harm at least until remedial measures offsetting emissions from nonconforming activities were implemented").[7]

The agency is left with the irrelevant argument that "it does not inevitably follow that an increase in emissions at a particular facility will result in an overall emission increase." EPA Opp. 24. A significant net emissions increase at a source inflicts irreparable injury on the individuals living downwind of that source even if the aggregate amount of pollution emitted nationwide does not increase as a result.[8]

For its part, industry claims that, "[b]ecause the new rule does *not* exclude from NSR projects that increase capacity, it cannot possibly result in irreparable harm." Industry Opp. 12 (emphasis in original). To the contrary, if the new rule takes effect on December 26, then industry will generate significant net emissions increases in 2004 that it could not have generated under the existing rules. *See, e.g.*, Stay Mot. 16 n. 11 (quoting an official of the Edison Electric Institute as saying that "there are a lot of companies that held back on what we consider routine maintenance out of fear of triggering New Source Review actions"). The significant net emissions increases will be large enough to inflict injury on the public even though they will not

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[7] For the reasons stated in *Sierra Club* and in our Motion, Stay Mot. at 17-18, 18 n.12-n.15, there is likewise no merit in EPA's uncorroborated assertion (EPA Opp. 27) that "[a]ny adverse impact of the Rule is temporary at best, and certainly not irreparable."

[8] EPA does not – and cannot – assert that the new rule's national impact will be a *decrease* in emissions, or even that it is *likely* to be a decrease. The most the agency can assert is that the new rule's national impact "*may* even be a decrease in emissions." EPA Opp. 23.

exceed the original-maximum-operating-capacity limits found in some of the existing operating permits that some sources have. *See* Stay Mot. 14-15, 17; Schoengold Decl. ¶¶ 11-15; Attachments F-H to Schoengold Decl. No order from the Court vacating the new rule at the conclusion of this litigation will be able to undo the injury to public health. *See* Stay Mot. 18 n.15. Therefore, a stay is necessary to avert irreparable injury even though the new rule does not exempt projects that increase capacity.

III. EPA and Industry Fail to Refute Environmental Petitioners' Remaining Demonstrations.

EPA simply should not be heard to argue that this Court would serve the public interest by allowing a rule that violates the Clean Air Act to enter into effect. *See* Stay Mot. 19 (citing caselaw). Moreover, EPA's statement that the public has an interest in rules that make affected sources safer, more reliable, and more efficient only emphasizes the need for a stay of this rule. *See* EPA Opp. 27; *see also* Industry Opp. 19. By providing old, inefficient, destructive facilities with "indefinite immunity from the provisions of . . . PSD," *see WEPCO*, 893 F.2d at 909, the new rule puts newer, cleaner, more efficient facilities at a competitive disadvantage and stalls their entry into the market. *See* Walters Decl., ¶ 8.

EPA does not claim that a stay would inflict irreparable injury on anyone. *See* EPA Opp. 27-28. The most industry can claim is that "[d]elaying such projects [*i.e.*, projects that would trigger NSR under the existing rules but not under the new rule] would harm workers." Ind. Opp. 19. The fact remains, however, that a source owner can undertake any safety improvement without triggering NSR under the existing rules as long as the owner ensures that the improvement does not result in a significant net emissions increase.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Environmental Petitioners' Reply in Support of Stay Motion has been served by United States first-class mail (or, where an email address is set forth, electronically pursuant to written consent obtained under Fed. R. App. P.25(c)(1)(D)) this 12th day of December 2003, upon the following:

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