BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY

Reconsideration of Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR) Rules Published on October 27, 2003 and December 24, 2003, 69 Fed. Reg. 40278 (July 1, 2004)	E-Docket ID No. OAR-2002-0068 Legacy Docket ID No. A-2002-04

COMMENTS OF:
NATURAL RESOURCES DEFENSE COUNCIL (NRDC), AMERICAN LUNG ASSOCIATION, COMMUNITIES FOR A BETTER ENVIRONMENT (CBE), ENVIRONMENTAL DEFENSE, SIERRA CLUB, UNITED STATES PUBLIC INTEREST RESEARCH GROUP (US PIRG), ALABAMA ENVIRONMENTAL COUNCIL, CLEAN AIR COUNCIL, GROUP AGAINST SMOG AND POLLUTION, MICHIGAN ENVIRONMENTAL COUNCIL, THE OHIO ENVIRONMENTAL COUNCIL, SCENIC HUDSON, SOUTHERN ALLIANCE FOR CLEAN ENERGY, AND ADIRONDACK MOUNTAIN CLUB

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CONTENTS

INTRODUCTION

In the above-captioned notice, EPA solicits comment on "the contentions that [EPA's] legal basis is flawed, [and] that [EPA's] selection of 20 percent for the cost limit is arbitrary and capricious and lacks sufficient record." 69 Fed. Reg. 40278, 40281 (July 1, 2004). Within the scope of those two issues, EPA makes a particular request for comment "on the recent Supreme Court case, *Nixon v. Missouri Municipal League*," *id.* at 40281/3-82/1, and on "whether it is appropriate to consider approaches used in building code applicability when establishing criteria for RMRR determinations." *Id.* at 40282/2.

By way of comment on the two general issues and the two specific ones, we, the above-listed organizations, incorporate the following appended documents (including their exhibits and attachments) herein: August 26, 2003 Supplemental Comments on the Proposed Rule: "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement" (Attachment 1); August 26, 2003 Letter from the Environmental Integrity Project and NRDC to President George W. Bush (Attachment 2); Environmental Petitioners' November 17, 2003 Motion for a Stay Pending Review (Attachment 3); Environmental Petitioners' December 12, 2003 Reply in Support of Stay Motion (Attachment 4); Environmental Organizations' December 24, 2003 Petition for Reconsideration of the Equipment Replacement Provision ("ERP") (Attachment 5); Environmental Organizations' January 16, 2004 Petition for Reconsideration of the ERP (Attachment 6). Additionally, we submit the comments that appear in the "Discussion" sections below, and we direct EPA's attention to Attachments 7-19, which also bear on the two issues on which the agency seeks comment.

We ask that EPA docket, review, and consider this document, as well as each appended document. Additionally, we ask that EPA respond to each point raised in this document, in our petitions for reconsideration (Attachments 5 and 6), in our stay papers (Attachments 3 and 4), in our supplemental comments (Attachment 1), or in our letter to the President (Attachment 2).

EPA has unlawfully and arbitrarily failed to grant reconsideration on an issue raised in our petitions for reconsideration of the ERP, namely, our objection to the agency's retroactive application of the ERP. We renew our request that EPA reconsider its decision to apply the ERP retroactively, and we direct the agency's attention to the relevant portions of our reconsideration petitions (Attachments 5 and 6) and to the entirety of the letter that environmental organizations sent to Administrator Michael O. Leavitt on February 5, 2004 (Attachment 7).

For the reasons stated below and in the appended documents, we respectfully request that EPA rescind, in their entirety, the rules published at 68 Fed. Reg. 61248 (Oct. 27, 2003) and 68 Fed. Reg. 74483 (Dec. 24, 2003).

DISCUSSION

I. Response to EPA's Specific Comment Requests

In subsections A and B, below, we respond to EPA's request for comment specifically "on the recent Supreme Court case, *Nixon v. Missouri Municipal League*" *id.* at 40281/3-82/1, and on "whether it is appropriate to consider approaches used in building code applicability when establishing criteria for RMRR determinations." *Id.* at 40282/2.

A. Section 111(a)(4)'s Reference to "Any Physical Change" Encompasses Like-Kind Replacements.

EPA's reconsideration notice states:

> With respect to the issue of whether the modifier "any" in the definition of modification compels the agency to adopt the broadest possible construction of "physical change," we solicit comments on the recent Supreme Court case, *Nixon v. Missouri Municipal League*, __ U.S. __, 124 S. Ct. 1555, 1561 (2004). That case noted that Congress's understanding of "any" can differ depending upon the statutory setting. *Id.*

Id. at 40281/3-82/1.

Nixon v. Missouri Municipal League. The *Nixon* case, however, does not support narrowing the meaning of the phrase "any physical change" in section 111(a)(4). In *Nixon*, the Court held that the phrase "any entity" did not encompass political subdivisions of states, 124 S. Ct. at 1559, basing that ruling on circumstances not at issue here.

First, *Nixon* noted that reading "any entity" to encompass states' political subdivisions would lead to a "host" of "incongruities," *id.* at 1563, and accordingly invoked the doctrine against "construe[ing] a statute in a manner that leads to absurd or futile results." *Id.* at 1564 (citation omitted). Here by contrast, EPA has previously espoused an interpretation of "any physical change" that includes items exempted by the ERP, and the ERP preamble announces that the agency "shall continue to seek deference" for that previous interpretation "in ongoing enforcement litigation." 68 Fed. Reg. 61248, 61272/3 n. 14. (Oct. 27, 2003). For that reason and for other reasons previously stated, *see, e.g.*, Environmental Organizations' December 24, 2003 Petition for Reconsideration of the ERP (Attachment 5) at 16-17 (demonstrating that reading "any physical change" as written would not be absurd), the agency cannot credibly claim that such an interpretation is absurd or futile.

Second, *Nixon* noted that reading "any entity" to encompass states' political subdivisions would "interpos[e] federal authority between a state and its municipal subdivisions," thus "threatening to trench on the States' arrangements for conducting their own governments" – a result that "should be treated with great skepticism." 124 S. Ct. at 1565. Federalism issues likewise underlay *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), which is cited in *Nixon*. 124 S. Ct. at 1561. *Raygor* addressed whether the phrase, "any claim" in a statute addressing tolling of statutes of limitations should be read so as to toll state statutes of limitations – a reading that "raises serious constitutional doubt." 534 U.S. at 543 (emphasis added).

Here, EPA does not and could not claim that reading "any physical change" as written would pose any such federalism issues. To the contrary, EPA's brief defending the December 2002 NSR rule opposed federalism arguments raised by an industry petitioner: "Newmont's federalism concerns are . . . meritless. The statute requires EPA to promulgate regulations governing NSR, *e.g.*, 42 U.S.C. § 7503(a)(1), and the agency's compliance with that requirement does not impinge on any State's rights." Brief for Respondent EPA *in State of New York v. EPA*, D.C. Cir. Case No. 02-1387 (Aug. 9, 2004), at 128.

In short, *Nixon* offers no basis for narrowing the reach of the statutory term "any" – or the phrase "any physical change." Thus, EPA must give effect to the statutory language as written by Congress.

Pre-*Nixon* and Post-*Nixon* Caselaw on "Any." Absent the special circumstances at issue in cases like *Nixon* and *Raygor*, this rulemaking is governed by the substantial body of D.C. Circuit and Supreme Court caselaw – both before and after *Nixon* – that has repeatedly emphasized the broad meaning of the word "any." For example:

• In *Harrison v. PPG Industries*, 446 U.S. 578 (1980), the Supreme Court rejected arguments that the phrase "any other final action" in the Clean Air Act's judicial review provision, section 307(b)(1), should be construed to encompass some but not all such action:

> With regard to § 307(b)(1), we discern no uncertainty in the meaning of the phrase, "any other final action." When Congress amended the provision in 1977, it expanded its ambit to include not simply "other final action," but rather "any other final action." This expansive language offers no indication whatever that Congress intended the limiting construction of § 307(b)(1) that the respondents now urge.

Id. at 588-89 (first and third emphasis added). *Accord id.* at 593 ("[t]he language of the statute clearly provides that a decision of the sort at issue here is reviewable in a court of appeals") (emphasis added).

• In *United States v. Gonzales*, 520 U.S. 1 (1997), the Court faced the question

> whether the phrase "any other term of imprisonment" "means what it says, or whether it should be limited to some subset" of prison sentences, *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S. Ct. 2502, 2504, 65 L.Ed.2d 555 (1980) – namely, only federal sentences. Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all "term[s] of imprisonment," including those imposed by state courts. *Cf. United States v. Alvarez-Sanchez*, 511 U.S. 350, 358, 114 S. Ct. 1599, 1604, 128 L.Ed.2d 319 (1994) (noting that statute referring to "any law enforcement officer" includes "federal, state, or local" officers); *Collector v. Hubbard*, 12 Wall. 1, 15, 20 L. Ed. 272 (1871) (stating "it is quite clear" that a statute prohibiting the filing of suit "in any court" "includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense"). There is no basis in the text for limiting § 924(c) to federal sentences.

Id. at 5 (emphasis added). In short, "the straightforward language of section 924(c) leaves no room to speculate about congressional intent." *Id.* at 9. *Accord id.* at 6 ("the straightforward statutory command"), at 11 ("the plain language").

• In *Dept. of HUD v. Rucker*, 535 U.S. 125 (2002), the Court construed a statute providing

> that each "public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(l)(6) (1994 ed., Supp. V). Petitioners say that this statute requires lease terms that allow a local public housing authority to evict a tenant when a member of the tenant's household or a guest engages in drug-related criminal activity, regardless of whether the tenant knew, or had reason to know, of that

> activity. Respondents say it does not. We agree with petitioners.

Id. at 127-28.

Applying *Chevron*, the Court found that "Congress has spoken to the precise question at issue." *Id.* at 136 (citation and internal quotations omitted). Specifically, the statute

> unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity.
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> That this is so seems evident from the plain language of the statute. It provides that "[e]ach public housing agency shall utilize leases which . . . provide that . . . any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(l)(6) (1994 ed., Supp. V). The en banc Court of Appeals thought the statute did not address "the level of personal knowledge or fault that is required for eviction." 237 F.3d, at 1120. Yet Congress' decision not to impose any qualification in the statute, combined with its use of the term "any" to modify "drug-related criminal activity," precludes any knowledge requirement. *See United States v. Monsanto*, 491 U.S. 600, 609, 109 S. Ct. 2657, 105 L.Ed.2d 512 (1989). As we have explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997). Thus, any drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about.

Id. at 130-31 (emphasis added). *Accord id.* at 132-33 ("the en banc Court of Appeals' finding of textual ambiguity is wrong").

• *Holy Land Foundation v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), addressed the International Emergency Economic Powers Act, which authorized the President to block property in which certain nations and individuals have "any interest." The court held that

> the district court correctly rejected HLF's argument that the IEEPA permits blocking of property only where there is a "legally enforceable" interest to be blocked. *See Holy Land*, 219 F.Supp.2d at 67. The plain text of the statute belies HLF's contention because it authorizes the blocking of property in which the designated foreign national or country has "any interest." 50 U.S.C. § 1702(a)(1)(B). The language therefore imposes no limit on the scope of the interest, and OFAC has defined this statutory term, pursuant to explicit authorization from Congress, 50 U.S.C. § 1704, to mean, "an interest of any nature whatsoever, direct or indirect."

Id. at 162 (emphasis added).

• In *Athridge v. Aetna Casualty & Surety Co.*, 351 F.3d 1166 (D.C. Cir. 2003), the court rejected the argument that the phrase "any person" in an insurance contract was ambiguous:

> We find no ambiguity in the term "any person," except in the sense that clever lawyers with strong motivation can always imagine multiple meanings for any word in any context. That is not enough under District of Columbia law. In the District, courts "are to give the words used in an insurance contract 'their common, ordinary, and ... popular meaning.'" *Quadrangle Dev. Corp. v. Hartford Ins. Co.*, 645 A.2d 1074, 1075 (D.C.1994) (citation omitted). Courts should not seek out ambiguity where none exists. *Medical Serv. of Dist. of Columbia v. Llewellyn*, 208 A.2d 734, 736 (D.C. 1965). Here, "any person" is unambiguous and necessarily includes the named insured and his family members, including Jorge. *Compare Smalls v. State Farm Mut. Auto. Ins. Co.*, 678 A.2d 32, 35 (D.C. 1996) (finding policy exclusion for "any bodily injury to . . . any insured or any member of insured's family" clear and unambiguous) (emphasis omitted); *Halt*, 646 N.Y.S.2d at 591 ("The vast majority of courts considering the issue . . . hold that, because the term 'any person' is unambiguous and has no technical or otherwise restricted definition in the policy itself, it should be accorded its common meaning.").

Id. at 1172 (emphasis added).

Indeed, even in a recent case that found ambiguity in the statutory phrase "any employee," the D.C. Circuit nonetheless reversed an agency interpretation as too narrow,

holding that "any employee" included so-called "hiring hall" union members who were on call for possible employment but not currently employed:

> The Supreme Court and this Court have, consistent with the Act's expansive definition covering "any employee," broadly interpreted the term "employee," holding it to include individuals outside direct employment relationships, such as job applicants, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 190-93, 61 S. Ct. 845, 850-52, 85 L. Ed. 1271 (1941), and auxiliary choristers who are "on call" to perform as necessary, *Seattle Opera v. NLRB*, 292 F.3d 757, 761-65 (D.C. Cir. 2002). *See also Town & Country*, 516 U.S. at 90-92, 116 S. Ct. at 453-55 (discussing broad construction of the term "employee"). Most importantly for our purposes, the Supreme Court and the NLRB have squarely held that hiring hall members are "employees" protected by the Act.
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> Importantly, "employee" is explicitly modified only by "any" and "who engages in a strike." "Any" signals that "employee" should receive its broadest statutory definition, which both the Court and the Board have consistently held to include hiring hall registrants and other "on call" workers, regardless of whether they are engaged in a direct employment relationship.

Intl. Alliance of Theatrical and Stage Employees v. NLRB, 334 F.3d 27, 32, 34 (D.C. Cir. 2003) (second emphasis added).

For reasons discussed above, these pre-*Nixon* cases remain fully viable and applicable here. Moreover, in the short time since *Nixon*, the Supreme Court has handed down at least two decisions emphasizing the breadth of statutory phrases containing "any." In *Engine Mfrs. Assn. v. South Coast Air Quality Management District*, 124 S. Ct. 1756 (2004), the Supreme Court construed Clean Air Act section 209(a)'s provision that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a) (emphasis added). The Court found that this language "is categorical," and that it is "impossible to find in it an exception for standards imposed through purchase restrictions." 124 S. Ct. at 1763. *Accord id.* (the "textual obstacles" to a contrary reading are "insurmountable – principally, the categorical words of § 209(a)"; those words are to be given their "natural meaning").

Likewise, *Intel Corp. v. Advanced Micro Devices*, 124 S. Ct. 2466 (2004), construed a statute providing "that a federal district court 'may order' a person 'resid[ing]' or 'found' in the district to give testimony or produce documents 'for use in a

proceeding in a foreign or international tribunal . . . upon the application of any interested person.'" *Id.* at 2472 (emphasis added; citation omitted).

> Highlighting § 1782's caption, "[a]ssistance to foreign and international tribunals and to litigants before such tribunals," Intel urges that the statutory phrase "any interested person" should be read, correspondingly, to reach only "litigants." . . .
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> The caption of a statute, this Court has cautioned, "cannot undo or limit that which the [statute's] text makes plain." *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947). The text of § 1782(a), "upon the application of any interested person," plainly reaches beyond the universe of persons designated "litigant."

Id. at 2478 (emphasis added).

In short, the caselaw both before and after *Nixon* confirms that – absent special circumstances that are not present here – the use of "any" to modify language indicates comprehensive coverage, and indeed requires broad reading of the modified terms.

Caselaw on Ordinary Meaning of Statutory Terms. Indeed, that conclusion is confirmed by another fundamental principle of statutory interpretation that was cited in the above caselaw. EPA argues that, because the Act does not separately define the terms in the phrase "any physical change," there is a gap or ambiguity that EPA has discretion to fill as it wishes. 68 Fed. Reg. at 61269-71. To the contrary, in the absence of a separate statutory definition, the statutory terms are presumed to have their ordinary meaning. *Aid Assn. for Lutherans v. USPS*, 321 F.3d 1166, 1176 (D.C. Cir. 2003) ("Since the statute does not define 'coverage,' we must presume that Congress intended to give the term its ordinary meaning."). Indeed, cases under the Clean Air Act have repeatedly emphasized the importance of applying the ordinary meaning of statutory terms. *See, e.g., Bluewater Network v. EPA*, 370 F.3d 1, 25 (D.C. Cir. 2004); *Engine Mfrs. Assn. v. South Coast*, 124 S. Ct. at 1761. *Accord, Gonzales*, 520 U.S. at 5. In some circumstances, statutory terms are given a more technical meaning. Specifically, "where Congress has used technical words or terms of art, it is proper to explain them by referring to the art or science to which they are appropriate." *Alabama Power Co. v. EPA*, 40 F.3d 450, 454 (D.C. Cir. 1994) (citations, brackets and internal quotations omitted). Unlike the phrase "low NO_x burners" at issue in the 1994 *Alabama Power* decision, the phrase "any physical change" employs words that are common in everyday usage, and EPA has cited no evidence that Congress intended those words to have anything other than their ordinary meaning.

Here, the ordinary meaning of "any physical change" – both considering the individual words and the collective phrase – requires a broad reading that encompasses

activities physically altering the function of a unit as well as those involving "the replacement of any component a process unit with an identical or functionally equivalent component(s)." 68 Fed. Reg. at 61277/2 (40 C.F.R. § 51.165(h)). Indeed, EPA itself concedes that the ordinary meaning of "change" encompasses the replacement of functionally equivalent components – such as the changing of a car's oil. *Id.* at 61271/3. Given the statutory modifier "any," such changes are included in the scope of section 111(a)(4). *See id.* at 61272 n.15 (using the example of a car, the ERP preamble acknowledges: "'Any' simply means that, once you have decided what a car is, then all objects meeting that definition are encompassed.") (emphasis added).

Caselaw on Not Implying Exemptions to, or Inserting Limiting Language Into, Categorical Statutory Provisions. Also relied on by the above caselaw is another fundamental principle of statutory interpretation, further confirming that "any physical change" must be read as written. Specifically, EPA cannot insert into a statute exceptions or limiting language not enacted by Congress. *See, e.g., Natl. Assn. of Manufacturers v. DOL*, 159 F.3d 597, 600 (D.C. Cir. 1998) ("There is, of course, no such 'except' clause in the statute, and we are without authority to insert one."); *Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997) ("[T]his court has consistently struck down administrative narrowing of clear statutory mandates"). *See also Gonzales*, 520 U.S. at 5; *Rucker*, 535 U.S. at 130-31; *Holy Land*, 333 F.3d at 162.

Here, Congress specified a limitation on the broad scope of "any physical change" – specifically, a physical change is covered only if it "increases the amount of any air pollutant emitted by such source" or "results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Thus, although Congress clearly knew how to craft exclusions from the broad scope of "any physical change," it enacted no such exclusion for like-kind replacements. *See TRW v. Andrews*, 534 U.S. 19, 28 (2001); *Sierra Club v. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002). Given Congress's use of "any," EPA lacks authority to insert a like-kind replacement exclusion into the Act by administrative fiat.

The United States' Position in Recent Supreme Court Briefs. The United States itself has recently emphasized the foregoing principles in briefs submitted to the Supreme Court. In its brief in *Engine Mfrs. Assn. v. South Coast Air Quality Management District*, the United States stated:

> Congress has set out specific conditions for preemption of state or local laws respecting mobile sources of air pollution. Section 209(a), in relevant part, preempts a state or local law if that law constitutes "any standard" that "relat[es] to the control of emissions" from "new motor vehicles." 42 U.S.C. 7543(a). Section 209(a)'s precise terms, particularly when read in light of its statutory context and history, limit the authority of States and their subdivisions to control motor vehicle emissions through

> regulation of the design, production, sale, purchase, or licensing of new vehicles.
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> 1. Section 209(a)'s reference to "any standard" necessarily denotes that federal preemption reaches an extensive range of regulatory activities. The term "standard," in ordinary usage and legal parlance, embraces a broad variety of criteria or rules. For example, *Webster's Third New International Dictionary* (1993), defines a "standard," in pertinent part, as including:
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> > **3 a:** something that is established by authority, custom, or general consent as a model or example to be followed: CRITERION, TEST **b:** a definite level or degree of quality that is proper and adequate for a specific purpose;
> > **4:** something that is set up and established by authority as a rule for the measure of quantity, weight, or quality . . . ; [and]
> > **7 a:** a carefully thought-out method of performing a task <auditing ~*s*> **b:** carefully drawn specifications covering manufacturing material or equipment.
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> *Id.* at 2223. *Black's Law Dictionary* (7th ed. 1999) similarly defines the term "standard" to include a "criterion for measuring acceptability, quality, or accuracy." *Id.* at 1412-1413. See *Black's Law Dictionary* 1259 (5th ed. 1979) ("A measure or rule applicable in legal cases such as the 'standard of care' in tort actions.").
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> Congress did not define the term "standard" for purposes of Section 209(a), but it also expressed no intent in Section 209(a) to limit that provision's preemptive effect to particular types of standards, such as numerical specifications for tailpipe emissions. If Congress had intended that result, it could have easily said so.

Brief for the United States as *Amicus Curiae* Supporting Reversal *in Engine Mfrs. Assn. v. South Coast Air Quality Management District*, S. Ct. Case No. 02-1343 (Aug. 2003), at 13-15 (emphasis added).

Similarly, the United States' brief in a recent Clean Water Act case stated:

> Section 510(12) defines the "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12) (emphasis

> added). Its use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach.

Brief for the United States as *Amicus Curiae* Supporting Petitioner *in South Florida Water Management District v. Miccosukee Tribe*, S. Ct. No. 02-626 (Sept. 2003), at 19 (third and fourth emphasis added).

So here. As EPA recognizes in the final rule's preamble, the ordinary meaning of the term "change" denotes a variety of activities, including those that replace components with identical or functionally equivalent ones. Congress's use of "any" expresses Congress's understanding that the various types of physical changes – including identical or functionally equivalent replacements – are all within NSR's reach, if they increase emissions. While Congress may not have defined the phrase "any physical change" or the words therein, Congress also expressed no intent to limit section 111(a)(4) to particular kinds of emissions-increasing physical changes. If it had intended such a result, it easily could have said so.

In short, "the replacement of any component of a process unit with an identical or functionally equivalent component(s)", *see* 68 Fed. Reg. at 61277/2, falls within the plain meaning of section 111(a)(4)'s reference to "any physical change," and such a replacement must undergo NSR if it "increases the amount of any air pollutant emitted by such source" or "results in the emission of any air pollutant not previously emitted." EPA's attempt to exempt such activities violates the plain meaning of the Act and must be rejected under *Chevron* Step One, or in the alternative is an unreasonable interpretation that must be rejected under *Chevron* Step Two.

EPA characterizes the interpretational issue at hand as "whether the modifier 'any' in the definition of modification compels the agency to adopt the broadest possible construction of 'physical change.'" 69 Fed. Reg. 40281-82. This characterization, however, rests on a false premise: it assumes that only under the "broadest possible construction" would like-kind replacements be included in the phrase "any physical change." To the contrary, as EPA itself recognizes, the ordinary meaning of "change" encompasses like-kind replacements. 68 Fed. Reg. 61271/3. Thus, inclusion of like-kind replacements requires only the ordinary meaning of "physical change" – not the "broadest possible" meaning. Congress's use of "any" expressly confirms that all of the various kinds of emissions-increasing physical changes – not just some of them – are covered.

Moreover, the statutory word "any" does require EPA to adopt a broad interpretation of the modified terms. The D.C. Circuit confirmed as much in *Intl. Alliance of Theatrical and Stage Employees*. In a statute that used the phrase "any employee," "'[a]ny' signals that 'employee' should receive its broadest statutory definition." 334 F.3d at 34 (emphasis added). There the D.C. Circuit reversed an agency

interpretation, and held that "employee" must include individuals who had not been hired, but instead were merely waiting to be hired. Likewise, "any" in the phrase "any physical change" means that "physical change" must be construed broadly. That broad construction necessarily includes like-kind replacements, which are well within the ordinary meaning of "physical change."

B. Construction Building Codes Provide No Support for the ERP.

In its reconsideration notice, EPA solicits comment on "whether it is appropriate to consider approaches used in building code applicability when establishing criteria for RMRR determinations." 69 Fed. Reg. at 40282/2.[1] It is not, and applicability provisions in building codes provide no support for EPA's unlawful rule.

"Any Physical Change." RMRR is an EPA-invented exclusion from the statutory phrase, "any physical change in . . . a stationary source." 42 U.S.C. § 7411(a)(4). None of the cost-cased applicability thresholds in the building codes[2] identified by EPA's contractor stem from the term, "any physical change." EC/R Memorandum. *See Arizona Pub. Service Co. v. EPA*, 211 F.3d 1280, 1291-92 (D.C. Cir. 2000) (differences in wording cited as basis for rejecting analogy to another statute). EPA has not and cannot show that approaches used to define building code terms – *e.g.*, "rehabilitation," "restoration," "remodeling," EC/R Memorandum at 1 – are relevant in interpreting the term at issue here, namely, "any physical change." For example, while

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[1] EPA did not consider approaches used in building code applicability when it crafted the rule at issue here. There is no mention of building codes in the notice of proposed rulemaking, the regulatory impact analysis, the final rule notice, the technical support document (response to comment), or in any of the other docketed materials that reflect EPA's deliberations prior to the rule's promulgation on August 27, 2003. The only document that EPA cites – an "expedited, preliminary investigation of building codes" prepared by EC/R Incorporated ("EC/R Memorandum"), is dated May 4, 2004. The EC/R memorandum states that its purpose was "to identify information you [EPA] requested as you consider potential cost thresholds in New Source Review Rules." EC/R Memorandum at 1 (emphasis added). Considering that EPA already had promulgated a final cost threshold, though, the EC/R memorandum must be taken as an EPA attempt at *post hoc* justification of the twenty-percent threshold in the ERP. Indeed, EPA concedes that the agency did not begin to "examine" building codes until after it received petitions for reconsideration of the final rule. 69 Fed. Reg. at 40282/2. Shortly before the start of a July 14, 2004 meeting at the National Academy of Sciences, counsel for NRDC overheard Bill Wehrum, counsel to the head of EPA's Office of Air and Radiation, tell Norbert Dee of the National Petrochemical and Refiners Association that he – Mr. Wehrum – had come up with the idea of soliciting comment on building code applicability thresholds after the U.S. Court of Appeals for the D.C. Circuit issued a stay of the ERP on December 24, 2003.

[2] The EC/R memorandum actually refers to building, fire, and flood codes. EC/R Memorandum at 1. Our references to "building codes" should be read to refer to building, fire, and flood codes.

the EPA contractor's "cursory review indicates that at least some jurisdictions specify a percentage cost threshold for determining what constitutes a building "improvement," and require such improvements to comply with the current code," 69 Fed. Reg. 40282/2, section 111(a)(4) requires NSR for "any physical change" that increases emissions, regardless of whether such a change constitutes an "improvement." The D.C. Circuit has rejected attempts to import interpretations of language in other federal statutes. *See, e.g., Communications Vending Corp. v. FCC*, 365 F.3d 1064, 1073-74 (D.C. Cir. 2004) (holding that a court's interpretation of the term "accrues" in the Tucker Act "has nothing to do with the question" of whether the FCC reasonably interpreted the same term in the Communications Act). *A fortiori*, EPA's attempt to range even further a-field, into the realm of state and local building codes, must be rejected.

In devising cost-based definitions for building-code terminology, state and local entities were defining terms of their own creation. *See* ER/C Memorandum at 1 ("[P]rimary responsibility for codes governing building construction appears to reside with local governments."). EPA, by contrast, is implementing a term of Congress's creation. Accordingly, EPA is constrained in a way that the authors of cost-based applicability thresholds in building codes were not. Specifically, EPA must effectuate the intent of Congress. The agency has no authority to shunt Congress's language aside and embark upon policy approaches that it finds more to its liking. *See, e.g., Engine Mfrs. Assn. v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) ("Nor, under *Chevron*, may an agency avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy."). *Accord, Sierra Club v. EPA*, 294 F.3d at 161. Even if the issue here were governed by *Chevron* Step Two (which it is not), EPA's task still would be to interpret the statutory language, not to ignore it in favor of an approach of its own choosing. *See, e.g., Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984) (under *Chevron* Step Two, a reviewing court must determine "whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense"); *Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (under *Chevron* Step Two, court must reject an agency interpretation that "diverges from any realistic meaning of the statute"); *Bluestone Energy Design v. FERC*, 74 F.3d 1288, 1295) (1996) (under *Chevron* Step Two, court rejected agency interpretation that produced result "contrary to Congress's instructions"); *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) ("Because the range of permissible interpretations is limited by the extent of its ambiguity, an agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute"); *Natural Resources Defense Council v. Reilly*, 976 F.2d 36, 44 (D.C. Cir. 1992) (Silberman, J., concurring) (agency interpretation "fails the second step of *Chevron* because the agency seeks to exploit the ambiguity rather than resolve it, and to advance its own policy goals rather than Congress'").

Congress did not – to use EPA's phrasing – "consider approaches used in building code applicability when establishing criteria for RMRR determinations," 69 Fed. Reg. at 40282/2, because Congress has never enacted an RMRR exclusion – or any other exclusion, for that matter – from the statutory term, "any physical change in . . . a stationary source." *See* 42 U.S.C. § 7411(a)(4). Moreover, there is no indication that

Congress considered "approaches used in building code applicability" in enacting the statutory definition of "modification." Assuming, *arguendo*, that Congress considered any cost-based applicability thresholds at all (a proposition for which EPA has produced no evidence), it rejected them in favor of a pollution-based threshold, *i.e.*, "any physical change in . . . a stationary source which increases the amount of any air pollutant emitted by such source . . . ." *Id.* (emphasis added).

As demonstrated above and in previous submissions, the statutory language, "any physical change" precludes the ERP's exemption of emissions-increasing like-kind replacements. Similarly, Congress's decision to define "the modification provision . . . without regard to cost," *WEPCO*, 893 F.2d at 908, precludes the ERP's cost-based applicability threshold.

"Increases the Amount of Any Air Pollutant Emitted." EPA's resort to building codes ignores another fundamental feature of section 111(a)(4). While broadly referencing "any physical change," section 111(a)(4) provides that NSR is triggered only if a change "increases the amount of any air pollutant emitted by such source" or "results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Thus, the activities that trigger NSR are ones that themselves harm the purposes of the statute – *i.e.*, emissions-increasing activities.

Building codes operate very differently. Under those codes, the activity to which the cost threshold applies does not itself necessarily harm the goals of the statute. For example, a building renovation typically does not cause a fire, earthquake, or flood. Thus, the issue faced by code-writers is not how to avoid or mitigate adverse impacts caused by the renovation itself. Instead, the issue is whether the renovation – by virtue of the amount of funds invested in it – is an opportune time to require upgrading of the building to provide stronger protection against fires, earthquakes and floods that are not the result of the renovation.

But, as demonstrated above and in prior submissions, NSR applicability is premised on whether a physical or operational change increases emissions, and thus is not limited to those instances when EPA or a state believes it would be an opportune time to install controls. EPA's "opportune time to install controls" argument fails when considered on its own, and the agency cannot lawfully or rationally resurrect that argument through the back door, under the guise of an analogy to state and local building codes.

Disregarding Section 111(a)(4)'s Reference to Operational Changes. EPA's analogy to state and local building codes also ignores section 111(a)(4)'s requirement for NSR in the event of "any" emissions-increasing operational change. *Id.* ("any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted") (emphasis added). Operational changes do not entail the same kinds of substantial financial investments that may be associated with

physical changes – yet Congress has expressly required them to undergo NSR when they increase emissions.

This feature of the statutory language further undermines EPA's reliance on building codes based on investment percentages. Indeed, EPA does not and could not claim that those codes are triggered by operational changes. If the codes exempt operational changes, that exemption further undermines the notion that the codes' approach to physical changes sheds any light on section 111(a)(4).

Disregarding EPA's Own Like-Kind Interpretation of Section 111(a)(4). EPA has not claimed and cannot claim that state and local building codes are focused on the items that EPA asserts authority to exempt – *i.e.*, on "the replacement of any component a process unit with an identical or functionally equivalent component(s)," that "does not change the basic design parameter(s) of the process unit." 69 Fed. Reg. at 61277.

For example, the term "substantial improvement," as used by Horry County, South Carolina, means "any combination of repairs, reconstruction, alteration, or improvements to building, taking place during a five-year period, in which the cumulative cost equals or exceeds fifty percent of market value of the building." EC/R Memorandum at 7 (emphasis added). Thus, this code exempts "alteration[s]" and "improvements," so long as the cost is less than fifty percent of market value. That approach is not lawful even under EPA's unlawfully narrow interpretation of the term, "physical change." Therefore, the percentage figures chosen by state and local governments in furtherance of such an approach offer no lawful or reasoned basis for EPA's rule.

The Twenty-Percent Threshold in the ERP Has More of a De-Regulatory Impact Than the Cost-Based Applicability Thresholds in Building Codes. The building codes that EPA's contractor identifies in its "expedited, preliminary investigation" apply without exception to any construction activity exceeding the cost thresholds. *See* EC/R Memorandum. By contrast, equipment replacement projects can avoid the Clean Air Act's preconstruction permitting requirements even if they exceed the ERP's cost-based threshold. For one thing, EPA's new rule allows equipment replacement projects costing more than the ERP's twenty-percent threshold to qualify as RMRR. 68 Fed. Reg. at 61252/1, 61253/3 n. 7. For another, the Clean Air Act – combined with preexisting EPA regulations – exempts a "physical change in . . . a stationary source" from the preconstruction permitting requirements so long as the change does not increase annual source emissions by "significant" amounts. 42 U.S.C. § 7411(a)(4); 40 C.F.R. § 51.165(a)(1)(v)(A)(2). Consequently, even to the extent that the ERP's percentage-cost applicability threshold is lower than the percentage-cost threshold in a building code, a preconstruction permitting program containing the ERP would have more of a de-regulatory impact in its context than the building code has in its context. This fact alone counsels against considering building code applicability thresholds in evaluating the ERP.

There is an additional reason why the twenty-percent threshold in the ERP has more of a de-regulatory impact in the context of stationary source renovation than higher thresholds do in the context of building renovation. Specifically, whereas EPA concedes that the twenty-percent threshold in the ERP is high enough to exempt "individual replacement activities" and even "limited groupings of these activities," 68 Fed. Reg. at 61257/3 (In fact, according to EPA, only "larger groupings of these activities – groupings that are not usually seen in the industry," would fail to qualify for the ERP. *Id.*), EPA's contractor reports that the "25/50 rule" was so low that it "discouraged the renovation and re-use of existing structures." EC/R Memorandum at 2. EPA's own findings thus reveal that the building context is too different from the stationary source context for the existence of cost-based applicability thresholds in the former to shed any light on the reasonableness of such thresholds in the latter.

The Cost-Based Thresholds in Building Codes Would Not Survive Review Under the Arbitrary-and-Capricious Standard. Finally, the reasoning underlying the percentages selected for building code applicability thresholds would not survive review under the "arbitrary and capricious" standard. Notable in this regard is the observation by EPA's contractor that the 25/50 rule used widely until the late 1970s was found wanting and was replaced in most jurisdictions by a code whose applicability is "based upon the type of work being done" rather than on the cost of the work. *Id.* In 1978, the Senate Banking, Housing and Urban Affairs Committee held a hearing on the impact of building codes that mandated current code compliance for rehabilitated buildings. *Impact of Building Codes on Housing Rehabilitation: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 2nd Sess. (1978). Witnesses testified that the 25/50 rule was "arbitrary," *id.* at 56 (statement of Lawrence B. Simons, Assistant Secretary of Housing – FHA Commissioner), that it "create[d] inconsistencies, and [was] unenforceable," *id.* at 6 (statement of Durwin Ursery, Ad Hoc Committee for Residential Rehabilitation), and that the rule obstructed rehabilitation. *Id. See also id.* at 92 (statement of Alfred Goldberg, President of Goldberg Research and Development Associates Corporation); *id.* at 24 (statement of Charles J. Dinezio, President of the National Conference of States on Building Codes and Standards). The National Institute of Standards and Technology also found that provisions such as a 25/50 rule were impediments to building rehabilitation. Richard N. Wright, U.S. Dep't of Com., *Building and Fire Research at NBS/NIST 1975-2000* 274 (2003), http://www2.bfrl.nist.gov/info/bfrl_history/ (citing NIST Technical Note 998). The publication sparked legal reforms. *See* Charles Euchner and Elizabeth Frieze, *Getting Home: Overcoming Barriers to Housing in Greater Boston* 24 (Jan. 2003), http://www.ksg.harvard.edu/rappaport/downloads/ gettinghome.pdf. In the late 1970's, the 25/50 rule was removed from model codes. Matt Syal *et al.*, *Streamlining Building Rehabilitation Codes to Encourage Revitalization*, Housing Facts & Findings, (Fannie Mae Found., D.C.), 2004, *at* www.fanniemaefoundation.org/programs/hff/ v3i2-streamline.shtml (last visited July 13, 2004). For its part, FEMA seems to have selected fifty percent as its cost-based threshold for "substantial improvement" for the arbitrary reason that fifty percent is halfway between zero and one hundred percent. *See* EC/R Memorandum at 3.

For all of these reasons, it is not appropriate for EPA to consider building code applicability thresholds when defining RMRR.

II. Response to EPA's General Comment Requests

In subsections A though H, below, we respond to EPA's request for comment on "the contentions that [EPA's] legal basis is flawed, [and] that [EPA's] selection of 20 percent for the cost limit is arbitrary and capricious and lacks sufficient record." 69 Fed. Reg. at 40281. We have commented on those issues already, in previous submissions that are appended and incorporated herein, *see* Introduction, *supra*, and section I, *supra*, is also relevant to those issues. The following discussion supplements and supports, but does not supplant, the points we made in those previous submissions and in section I, *supra*.

A. The ERP Exceeds EPA's Discretion to Exempt Physical Changes That Cause No More Than *De Minimis* Emissions Increases.

De minimis non curat lex means "the law does not concern itself about trifles." Black's Law Dictionary, 6th ed. (1990), at 431. In *Alabama Power Co. v. Costle*, the D.C. Circuit held that if "plants increase pollution, they will generally need a permit. Exceptions to this rule will occur when the increases are *de minimis*, and when the increases are offset by contemporaneous decreases of pollutants . . . ." 636 F.2d at 400.

As EPA concedes, the term "physical change" in the Act's definition of "modification" could "encompass a range of activities from periodically replacing filters in production machinery, to once-in-a-lifetime anticipated replacement of a component, to complete replacement of a production unit." 68 Fed. Reg. at 61271/3. Because the entire term that appears in the statute is "any physical change," 42 U.S.C. § 7411(a)(4) (emphasis added), the language of the Act does not authorize EPA to read some physical changes out of the term. *See* Environmental Petitioners' December 12, 2003 Reply in Support of Stay Motion (Attachment 4); Environmental Organizations' December 24, 2003 Petition for Reconsideration of the ERP (Attachment 5). Moreover, none of the recognized tools of statutory construction (*e.g.*, other provisions of the Act, express purposes of the PSD provisions, legislative history) cast doubt on Congress's intent to denote the entire "range of activities" encompassed by the word "change." *See id.*

Thus, as the D.C. Circuit made clear in the passage from the 1980 *Alabama Power* decision quoted above, the *de minimis* principle is the only possible source of authority for EPA's regulatory exclusion of "routine . . . replacement" from the statutory term "any physical change." EPA continues to acknowledge that the RMRR exclusion "could be justified as *de minimis*." 68 Fed. Reg. at 61272/1. Indeed, in the EPA "conformity" regulations that exclude "[r]outine . . . activities" from the Clean Air Act term, "any activity," 42 U.S.C. § 7506(c)(1) ("No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this

title.") (emphasis added), the agency expressly presents "routine" activities, including "[r]outine maintenance and repair activities," as ones that "would result in no emissions increase or an increase in emissions that is clearly de minimis." 40 C.F.R. § 51.853(c)(2) (2003); *see also* 58 Fed. Reg. 63214, 63249-50 (Nov. 30, 1993) (promulgating 40 C.F.R. § 51.853(c)(2)). In promulgating those regulations, EPA has acknowledged that the exclusion of "routine" activities is "based on the premise that such projects are not expected to have significant air impacts," 58 Fed. Reg. 13836, 13843 (Mar. 15, 1993) (preamble to proposed rule), and that "actions which are de minimis should not be required . . . to make an applicability analysis." 58 Fed. Reg. at 63229 (preamble to final rule).

Section 111(a)(4) premises NSR applicability on whether a given change "increases the amount of any air pollutant emitted by such source" or "results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Accordingly, the *de minimis* principle applies only where emissions "increases are *de minimis*," *Alabama Power*, 323 F.2d at 400, and EPA lacks authority to construe "routine . . . replacement" to cover activities that increase emissions by more than *de minimis* amounts. At least two courts have reached this conclusion already. *See, e.g.*, *United States v. SIGECO*, 245 F.Supp. 2d 994, 1009 (S.D. Ind. 2003) (holding that the government-plaintiff's limited construction of RMRR was consistent with the Clean Air Act and that a broad construction "would flout the Congressional intent"); *United States v. Ohio Edison Co.*, 276 F.Supp. 2d 829, 889 (S.D. Ohio 2003) (finding it "ascertainably certain that only *de minimus* activities would serve to trigger the routine maintenance exemption"); *id.* at 890 ("The law has been clear that the routine maintenance exemption is a very narrow exception to the general rule that any physical change resulting in an increase in emissions triggers the obligation to comply with the CAA. Further, the language of the CAA regarding 'modification' when read together with the regulatory exception for 'routine maintenance, repair or replacement' is alone sufficient to make it ascertainably certain that the regulatory exemption is of a limited nature.").

Until it promulgated the current rule, EPA itself asserted that its authority to promulgate the "routine . . . replacement" exclusion derived exclusively from the *de minimis* principle. *See, e.g.*, Brief for Respondent EPA *in Tennessee Valley Authority v. Whitman*, at 65 ("EPA has consistently applied [the *de minimis*] principle to its interpretation of the routine activity exception."); Plaintiff's Opposition to Defendant's Motion for Summary Judgment on Fair Notice in *U.S. v. SIGECO*, at 7-8 ("[T]erm's scope is constrained by EPA's limited authority to create exemptions from the Clean Air Act requirements, a central holding in *Alabama Power Company v. Costle*, 636 F.2d 323 (D.C. Cir. 1980)."); Plainitff's Reply to Defendant's Proposed Findings of Fact and Conclusions of Law (Liability Phase) *in United States v. Illinois Power Co.*, S.D. Ill. Civil Action No. 99-333 (MJR), at 71 ("The *Ohio Edison* court correctly concluded that *Alabama Power* made it ascertainably certain that only *de minimis* activities would serve to trigger the routine maintenance exemption."); 69 Fed. Reg. at 61273/1 ("In *WEPCO*, . . . EPA advanced the view that the term 'modification' is necessarily broad, and that only *de minimis* departures are appropriate."); *id.* at 61273/1 n.16 ("[I]n two of the Agency's pending NSR enforcement cases in the utility sector [against the Ohio Edison Company

and Duke Energy Corporation] . . . the Agency asserted that the then existing RMRR exclusion should be applied in a narrow fashion such that only *de minimis* projects should be excluded under that rule."); *id.* at 61272/3 ("Thus, we generally interpreted the exclusion as being limited to *de minimis* circumstances."). EPA accordingly insisted that it had "extremely limited authority to exempt activities from the definition of 'modification' under the Clean Air Act." Plaintiff's Opposition to Defendant's Motion for Summary Judgment on Fair Notice *in U.S. v. SIGECO*, at 28-29.

The ERP, however, covers activities that result in non-*de minimis* – massive, in fact – emissions increases. *See* Environmental Petitioners' November 17, 2003 Motion for a Stay Pending Review (Attachment 3), at 4-5. EPA and industry admit as much. *See* 68 Fed. Reg. at 61258/1 ("To the extent the activities addressed by ALA qualify for the ERP, we now believe that such activities, if conducted in the future, should be excluded from major NSR."); *see also* SIGECO's Notice of Supplemental Authority on Fair Notice and Routine Maintenance *in U.S. v. SIGECO* (Jan. 8, 2003), at 2 (noting that none of EPA's then-proposed versions of the ERP "can fairly be described as *de minimis* or narrow."); *id.* at 3 (asserting that an ERP with only a five percent ceiling – as opposed to the twenty-percent ceiling ultimately promulgated – would have covered two of the three equipment replacement projects alleged in the case, and that it might have covered the third project at well); *id.* at 3-4 ("Clearly, such a rule extends to much more than a narrow class of *de minimis* projects."); Expert Report of Richard E. Krause, filed on behalf of defendants Ohio Edison Company and Pennsylvania Power Company *in United States v. Ohio Edison*, S.D. Ohio Civil Action No. 99-1181 (Mar. 1, 2004) (Attachment 8) (asserting that the ERP would have covered all of the equipment replacement projects alleged in the case); Chart displayed to the U.S. District Court for the Southern District of Illinois on September 29, 2003 by counsel for the defendant in *U.S. v. Illinois Power Co.*, S.D. Ill. Civil Action No. 99-333 (MJR) (Attachment 9) (same). The rule thus exceeds the bounds of the *de minimis* principle. Because that principle is the only possible source of authority for EPA's regulatory exclusion of "routine . . . replacement" from the statutory term "any physical change," EPA's rule exceeds the agency's statutory authority.

B. EPA's Reinterpretation of "Routine" to Mean "Routine in the Industry" is Unlawful and Also Fails to Explain the ERP.

According to the "Legal Basis" section in EPA's preamble to the final rule, the ERP "states categorically that the replacement of components with identical or functionally equivalent components that do not exceed 20% of the replacement value of the process unit and does [*sic*] not change its basic design parameters is not a change and is within the RMRR exclusion." 68 Fed. Reg. at 61270/1 (emphasis added). Later in the same section of the preamble, EPA explains that the ERP rests upon the agency's reinterpretation of the term, "routine maintenance, repair and replacement." *Id.* at 61270/3 ("Today's rule treats the activities excluded from the definition of 'change' as a category of 'routine maintenance, repair and replacement'. We received many comments as to whether we can and should adopt the ERP as an expansion of the RMRR exclusion. We believe it is appropriate to expand the former RMRR exception. Before

promulgation of today's rule, we interpreted the phrase 'routine maintenance, repair and replacement' to be limited to the day-to-day maintenance and repair of equipment and the replacement of relatively small parts of a plant that frequently require replacement. Today we are expanding the former definition of RMRR through this rulemaking to include other activities covered by the 20 percent cost threshold that are needed to facilitate the efficiency, reliability and safety of affected sources.").

EPA has acknowledged that the word "routine" means "habitual, regular, ordinary." Plaintiff's Opposition to Defendant's Motion for Summary Judgment on Fair Notice *in U.S. v. SIGECO*, S.D. In. Civil Action No. IP99-1692-C-M/S (June 21, 2002), at 7-8. Other synonyms are "typical," "customary," and "everyday." Random House Webster's Unabridged Dictionary, 2d Ed. (1998). As both industry and EPA concede, however, the ERP is so broad as to cover projects that occur only rarely in the lifetime of a unit. *See, e.g.,* Chart displayed to the U.S. District Court for the Southern District of Illinois on September 29, 2003 by counsel for the defendant in *U.S. v. Illinois Power Co.*, S.D. Ill. Civil Action No. 99-333 (MJR) (Attachment 9) (observing that the ERP would cover all the Illinois Power projects alleged in the government's complaint); Plaintiff's Reply to Defendants' Proposed Findings of Fact and Conclusions of Law (Liability Phase) *in U.S. v. Illinois Power Co.* (Sept. 5, 2003), at 8 (stating that the Illinois Power projects alleged in the government's complaint were of a variety that occur only rarely in the lifetime of a unit); *see also* 68 Fed. Reg. at 61272/1 (suggesting that the ERP covers equipment replacements that are "akin to getting a new set of brakes on a car – not something that happens often").

Projects that occur only rarely in the lifetime of a unit are not "habitual," "regular," or "ordinary" for that unit – and EPA does not claim otherwise. Moreover, while current EPA regulations acknowledge that refurbishment activity is not "routine" if it necessitates shutting down a production unit, *see* 40 C.F.R. §§ 63.105, 63.1256 (declaring, in the context of setting forth wastewater management requirements in the NESHAPs for synthetic organic chemical manufacturing and pharmaceutical manufacturing, that "[t]he owner or operator shall prepare a description of maintenance procedures for management of wastewater generated from the emptying and purging of equipment in the process during temporary shutdowns for inspections, maintenance, and repair (i.e., a maintenance turnaround) and during periods which are not shutdowns (i.e., routine maintenance)") (emphasis added), the ERP is so broad as to cover projects that do necessitate shutting down a production unit. Indeed, in previous submissions, we have demonstrated that the ERP would cover virtually all of the modifications at issue in the government's NSR enforcement actions, including the modifications that necessitated shutdowns. *See* August 26, 2003 Supplemental Comments on the Proposed Rule: "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement" (Attachment 1); August 26, 2003 Letter from the Environmental Integrity Project and NRDC to President George W. Bush (Attachment 2); Environmental Petitioners' November 17, 2003 Motion for a Stay Pending Review (Attachment 3); Environmental Petitioners' December 12, 2003 Reply in Support of Stay Motion (Attachment 4); Environmental Organizations' December 24, 2003 Petition for Reconsideration of the ERP (Attachment 5); Environmental

Organizations' January 16, 2004 Petition for Reconsideration of the ERP (Attachment 6). EPA has conceded this point. *See* 68 Fed. Reg. at 61258/1 ("To the extent the activities addressed by ALA qualify for the ERP, we now believe that such activities, if conducted in the future, should be excluded from major NSR."). This broad coverage exempts projects that increase emissions significantly, and thus do not qualify as *de minimis*.

In apparent recognition of that fact that the ERP covers projects that are not routine for a particular unit, industry argues that, as the term is used in the RMRR exclusion, "routine" means "routine in a particular industry." *See* Final Rule TSD at 31-32 (citing comments from industry). Implicitly adopting industry's construction, EPA states that the ERP is designed to exclude only those projects – those "larger groupings" of "replacement activities" – "not usually seen in the industry." 68 Fed. Reg. at 61257/3.

But construing "routine" to mean "routine in a particular industry" goes well beyond *de minimis* principles, for many physical activities that are routine in a particular industry increase emissions by non-*de minimis* amounts. For example, in EPA's NSR enforcement case against SIGECO, the company asserted that the alleged source refurbishments that, EPA found, increased emissions by substantial amounts were routine in the industry. *See* United States' Opposition to Defendant's Motion for Summary Judgment on Fair Notice *in United States v. SIGECO*, at 9 ("*Alabama Power* gives clear notice that EPA must narrowly construe exemptions from the definition of 'modification' in order to remain consistent with the Clean Air Act. This rules out the defendant's broad interpretation [*i.e.*, SIGECO's view that 'routine' in 'routine . . . replacement' means 'routine in the particular industry']"). *See also* Final Order on Reconsideration *in re Tennessee Valley Authority*, CAA Docket No. 00-6 (EAB Sept. 15, 2000), at 50 (while "others in the industry have undertaken" projects like TVA's, those projects nevertheless were "significant, emissions-increasing overhauls"). Because the *de minimis* principle is the only possible source of EPA's authority to exclude "routine . . . replacement" from the statutory term, "any physical change," *see supra*, subsection II.A, EPA lacks authority to reading "routine" to mean "routine in a particular industry." For this reason alone, the ERP is unlawful.

What is more, EPA is unable to present any evidence that – in any industry, much less in every industry – the ERP would cover only projects that are routine in their respective industries. This is not surprising, considering that "there are substantial categories of replacement activities . . . that, <u>if conducted at the same time</u>, cost less than the 20-percent replacement cost threshold." 68 Fed. Reg. at 61270/1-2 (emphasis added). In fact, a study included in EPA's regulatory impact analysis reveals that, in two of six industries examined, the agency's contractor was unable to identify <u>any</u> projects – be they routine in the industry or not – that would fall outside the ERP's coverage. *See* Appendix C to RIA (automobile manufacturing and carbon black manufacturing), *cited in* 68 Fed. Reg. at 61257/2. In one of the remaining four industries, the contractor had to assume that a facility would spend its entire annual budget for repair, maintenance, <u>and</u> replacement on a single activity at a single process in order to postulate an equipment replacement project that would exceed the twenty-percent ceiling. *Id.* (pharmaceutical manufacturing). EPA has thus failed to establish any rational connection between the

ERP and the regulatory term that it supposedly defines. The agency falls far short, then, of explaining its decision to drop its longstanding reading of "routine" to mean "routine at an individual unit," or its decision to replace that construction with a greatly expanded one. *See* Plaintiff's Reply to Defendants' Proposed Findings of Fact and Conclusions of Law (Liability Phase), *in U.S. v. Illinois Power Co.*, (Sept. 5, 2003) ("the new, broader exemption is a departure from the Agency's consistent, prior interpretation of its 1980 'routine maintenance" exemption'); Memorandum in Support of Plaintiff's Motion for Reconsideration *in U.S.*, et al. *v. Duke Energy Corp.*, M.D.N.C. Civil Action No. 00-1262 (Dec. 23, 2003) (noting that, since 1988, if not earlier, industry knew that EPA's interpretation of "routine maintenance" was "routine maintenance at an individual unit") (emphasis added). For this reason alone, EPA's promulgation of the ERP is arbitrary and capricious.

C. EPA's Claim of Congressional Ratification is Without Merit.

1. EPA's "Zone of Discretion" Claim Has No Merit.

In the "Legal Basis" section of the preamble, EPA argues that because Congress incorporated section 111(a)(4)'s definition of "modification" into the PSD provisions in 1977, EPA's then-prevailing construction of the "any physical change" language "delineates a zone of discretion within which EPA may operate" in its PSD/NSR regulations. *See* 68 Fed. Reg. at 61273/3. We have demonstrated the fallacy of that argument in previous submissions incorporated herein. *See, e.g.*, Attachments 4-6. In particular, we direct EPA's attention to pages 33-36 (subsection I.B.3) of our December 24, 2003 reconsideration petition. Attachment 5 at 33-36. We demonstrated there that EPA's rule exempts physical changes that increase emissions significantly, and that there is no evidence that Congress intended to ratify such a divergence from the plain language of the Clean Air Act. Congress did not, in 1977, express any approval with the RMRR exclusion then in existence. Even if it had, that exclusion – both on its face and as construed by EPA at the time – extended no farther than the bounds of the *de minimis* doctrine. As demonstrated in subsection II.A, *supra*, and in previous submissions incorporated herein, EPA's current rule is not justifiable under the *de minimis* doctrine. We reinforce our previous demonstration with the following additional points.

EPA's Own Characterization of Applicable Statutory Interpretation Principles. EPA's August 2004 brief defending its December 2002 NSR regulation opposed an industry ratification argument. Like the EPA ratification argument advanced in the RMRR preamble, the industry argument relied on Congress's 1977 adoption for NSR purposes of the § 111(a)(4) "modification" definition. According to EPA, industry's ratification argument was wrong:

> To conclude that by incorporating a pre-existing statutory provision, Congress meant to congeal regulations under that provision in statutory language without any specific indication of any such intent, is contrary to both case law and common sense.

First, as a matter of statutory construction, this Court has held that it requires a clear indication of congressional intent to conclude that pre-existing regulatory provisions have been incorporated by reference into a statute. In *Continental Air Lines, Inc. v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988), this Court rejected petitioners' argument that Congress had intended to incorporate by reference a pre-existing regulatory definition of the term "commuter airlines" when it amended a statute. The Court reasoned that "Congress might have defined 'commuter airlines' with greater specificity by explicitly incorporating definitional references to agency regulations, but it chose not to do so. We cannot say that Congress meant to incorporate those regulatory definitions absent indications of its intention to do so in the statute or the legislative history." Id. at 1454. *See also American Airlines, Inc. v. DOT*, 202 F.3d 788, 809 (5th Cir. 2000) (same).

Similarly, had Congress intended to mandate that EPA use the same regulatory definition for both NSPS and NSR, it could have expressly adopted the regulatory provisions by reference along with the statutory definition. Indeed, on several occasions Congress did precisely that in amending the CAA. *See, e.g.*, Section 129(a)(1) of the CAA Amendments of 1977 (uncodified), (incorporating by reference EPA's Federal Register notice incorporating its "offset ruling"); CAA §181(a)(1) (1991) (incorporating "the interpretation methodology issued by the Administrator most recently before November 15, 1990 [the date of enactment of the CAA Amendments of 1990]"); CAA §182(a)(2)(A) (1991) (incorporating EPA pre-1990 guidance on "reasonably available control technology"); CAA §182(a)(2)(B) (1990) (applying EPA pre-1990 guidance to state vehicle inspection and maintenance programs).

By contrast, Congress did not do so here. The passage regarding incorporation of the NSPS definition of modification relied on by Industry Petitioners is a simple technical amendment. The amendment itself states only that it implements an agreement to include "modifications" as well as "construction" "to conform to usage in other parts of the Act." Act of November 1, 1977, P. L. No. 95-190, 1977 U.S.C.C.A.N. Vol. 3 at 3665. The most plausible reading of this amendment is that Congress was simply

> concerned that the PSD provisions it had enacted inadvertently covered only "construction" and therefore might be read to apply only to "new" sources and not to modifications of existing sources. Congress corrected this problem in an expedient manner – by passing a technical amendment to the Act defining "construction" to include "modification" and taking advantage of the pre-existing definition of "modification" in the NSPS provisions. It is unsurprising that such an oversight took place given the haste with which the CAA Amendments were enacted. *See Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 866-67 (D.C. Cir. 1979).

Brief for Respondent EPA *in State of New York v. EPA*, D.C. Cir. Case No. 02-1387 (Aug. 9, 2004), at 38-40.

Thus, the statutory interpretation principles enunciated by EPA itself refute the notion that Congress ratified the pre-existing regulatory exemptions. Indeed, when Congress wished to adopt language appearing in EPA's pre-existing regulations, it was perfectly capable of doing so. For example, Congress enacted the phrase "best available control technology," which appeared in EPA's pre-existing PSD regulations. *Compare* 39 Fed. Reg. 42516 (December 5, 1974) (§ 52.21(d)(2)(ii)) *with* CAA § 165(a)(4). There is no greater basis for assuming Congress ratified pre-existing regulatory exemptions, than for assuming ratification of other aspects of the pre-existing regulations.

The 1977 PSD Provisions Expanded Applicability. EPA concedes that Congress wrote the 1977 PSD provisions to apply much more broadly than the PSD regulations that EPA already had promulgated. *See, e.g.*, Brief for Respondent EPA *in State of New York v. EPA*, D.C. Cir. Case No. 02-1387 (Aug. 9, 2004), at 6 ("The 1977 Amendments to the Act expanded PSD requirements and broadened the applicability of the program. . . . In promulgating regulations pursuant to those amendments, EPA recognized that Congress intended to broaden the reach of the PSD program."). Indeed, industry acknowledged and decried that fact in 1977. For example, the general counsel of American Electric Power told the Senate Energy and Natural Resources Committee:

> [T]he significant deterioration limitations are very severe. In clean air regions, and there are many clean air regions over the country, these limitations could prohibit the building of a powerplant or force it to be built much smaller than its economical size. Now, there are significant deterioration regulations in effect, promulgated by EPA several years ago. <u>They are much less severe than those being proposed in the pending Clean Air Act Amendments</u>.

Hearings Before the Subcommittee on Energy Production and Supply of the Committee on Energy and Natural Resources, United States Senate, 95th Cong, 1st Sess., *reprinted in*

A Legislative History of the Clean Air Act Amendments of 1977, U.S. Senate Committee on Public Works Serial No. 95-46 (Mar. 29, 1977), at 377 (testimony of Joseph A. Dowd) (emphasis added).

Far from ratifying existing EPA regulations in 1977, Congress supplanted them with statutory provisions that applied more broadly and were more environmentally protective.

In 1977, EPA Defined "Routine . . . Replacement" Narrowly. Moreover, Congress could not have ratified a "zone of discretion" large enough to accommodate the broadened "routine . . . replacement" exclusion that EPA has promulgated in this rule, because, in 1977, EPA still defined "routine . . . replacement" very narrowly. By the time Congress amended the Act in 1977, EPA had promulgated a "routine . . . replacement" exclusion in its NSPS rules and in its PSD rules. 36 Fed. Reg. 24876, 24877/3 (Dec. 23, 1971); 39 Fed. Reg. 42510, 42513/1 (Dec. 5, 1974). Even if it could be said, then, that in 1977 Congress meant to ratify the way that EPA defined "any physical change" at the time, the specific issue relevant here would be how EPA defined "routine . . . replacement" in 1977. *See* 68 Fed. Reg. at 61270/1-3 (stating that ERP rests upon an expanded interpretation of "routine . . . replacement").

EPA concedes that it has never before defined "routine . . . replacement" with anything approaching the breadth of the definition promulgated in this rule. *See id.* at 61270/3 ("Before promulgation of today's rule, we interpreted the phrase 'routine maintenance, repair and replacement' to be limited to the day-to-day maintenance and repair of equipment and the replacement of relatively small parts of a plant that frequently require replacement."); *id.* at 61272/3 n.14 ("We have taken positions in numerous court filings concerning the proper interpretation and usage of key statutory terms, such as 'physical change' and 'any physical change.' These positions were based on permissible constructions of the statute of which the regulated community had fair notice, and correctly reflect the Agency's reasonable accommodation of the Clean Air Act's competing policies in light of its experience at the time it adopted the RMRR exclusion in 1980.") (emphasis added); *id.* at 61273/1 ("we followed quite a different interpretation from 1980 until today"); Brief for Respondent EPA *in Tennessee Valley Authority v. Whitman*, 11th Cir. Case No. 00-12310, at 60 ("Since its adoption, EPA has applied this regulatory exception [for RMRR] narrowly.") (emphasis added) (citing a 1975 EPA Region 10 opinion holding that an equipment replacement project at a Weyerhaeuser facility in Springfield, Oregon was not covered by the existing regulatory exclusion for "routine . . . replacement").

By 1977, EPA Had Acknowledged That a Broad Exclusion Could Not Fit Within the Statutory Language. When, in 1974, EPA considered making a "major capital expenditure" the triggering event for application of the PSD requirements at an existing source, the agency did not try to present that departure from the Clean Air Act as a mere interpretation of the statutory term, "any physical change," or even of the term, "modification." 39 Fed. Reg. 31000, 31003-04 (Aug. 27, 1974). Instead, EPA proposed to apply the PSD requirements to new and "expanded" sources, as opposed to new and

modified ones. *Id.* at 31007. In response to negative comments, EPA explained in the preamble to the final rule that its aim had been simply to ensure that fuel switching alone would not trigger the PSD requirements. 39 Fed. Reg. 42510, 42513 (Dec. 5, 1974). In the final rule text, EPA returned to the statutory term, "modification," and to the statutory language defining that term to include "any physical change." *Id.* at 42514. EPA resolved the fuel switching issue by excluding the "[u]se of an alternative fuel or raw material" from the meaning of the term, "change in the method of operation." *Id.* at 42514/2-3.

So the regulatory backdrop for Congress's action in 1977 was not only one in which EPA had never defined "routine . . . replacement" with anything remotely approaching the breadth with which the agency now seeks to define it, but it was also one in which EPA had effectively acknowledged that a cost-based exemption of the type that the agency has now promulgated could not be cast as an interpretation of any of the terms found in the statute.

There is absolutely no basis, then, for EPA's claim that in 1977 Congress ratified a "zone" of permissible "routine . . . replacement" definitions that accommodates EPA's new, expanded definition.

2. The Existence of Regulatory Exclusions from the Statutory Term, "Any . . . Change in the Method of Operation" Does Not Provide Support for the ERP.

In the "Legal Basis" section in EPA's preamble to the final rule, the agency claims that the four regulatory exclusions from "change" that existed at the time Congress enacted the PSD provisions in 1977 were each the product of the agency's authority to interpret an ambiguous statutory term. 68 Fed. Reg. at 61272/2. EPA further asserts that the four exclusions stem from a common interpretive premise, namely, EPA's belief that so long as "the plant will continue to be operated in a manner consistent with its original design," there has been no "change." *Id.* at 61269/1. We have demonstrated the fallacy of that argument in previous submissions incorporated herein. *See, e.g.*, Environmental Petitioners' December 12, 2003 Reply in Support of Stay Motion (Attachment 4); Environmental Organizations' December 24, 2003 Petition for Reconsideration of the ERP (Attachment 5); Environmental Organizations' January 16, 2004 Petition for Reconsideration of the ERP (Attachment 6). We reinforce that demonstration with the following additional points.

The evidence that EPA cites for broad interpretive discretion has no bearing on the exclusion that is at issue here. Moreover, the very regulatory language that EPA cites reveals that the "routine . . . replacement" exclusion lacks the premise that the agency ascribes to it.

In particular, the pre-1977 regulations did not, as EPA suggests, 68 Fed. Reg. at 61269/1, exclude a list of activities from the collective phrase, "physical change . . . or change in the method of operation." Rather, the pre-1977 regulations excluded one list of

activities from the term, "physical change," and a second, non-overlapping list from the term, "change in the method of operation." *See, e.g.*, 36 Fed. Reg. at 24877/2-3 (NSPS); 39 Fed. Reg. at 42514/2-3 (PSD). In fact, he PSD regulations that apply in areas lacking an approved state PSD continue to make clear that "routine . . . replacement" is an exclusion from the specific statutory term, "physical change." 40 C.F.R. § 52.01(d)(1) (2004).

Thus, the two distinct statutory terms led EPA, in its pre-1977 regulations, to develop two distinct lists of exclusions. This is not surprising, for whereas physical changes always carry certain easily recognizable hallmarks, such as the use of tools and replacement parts , the same cannot be said of operational changes. The only regulatory exclusion from "physical change" in 1977 was for "routine maintenance, repair, and replacement." 39 Fed. Reg. at 42514/2 ("Routine maintenance, repair, and replacement shall not be considered a physical change, . . ."). As noted in subsections II.A and II.C.1, *supra*, EPA in 1977 did not define "routine . . . replacement" with anything approaching the breadth necessary to accommodate the ERP. To the contrary, EPA acknowledged that the exclusion's coverage extended only to the bounds of the agency's authority to exempt *de minimis* emissions increases. EPA cannot credibly argue, then, that Congress – assuming, *arguendo*, that it even took notice of the "routine . . . replacement" exclusion in 1977 – meant to ratify an interpretation broad enough to accommodate this rule.

By contrast, the pre-1977 exemptions for increases in production rates, increases in hours of operation, and fuel switching – whether or not they comported with Congress's intent – addressed a statutory phrase ("change in the method of operation") that is not at issue here. *See, e.g.*, 39 Fed. Reg. at 42514/2-3 ("The following shall not be considered a change in the method of operation: (i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source; (ii) An increase in the hours of operation; (iii) Use of an alternative fuel or raw material, if prior to the effective date of a Paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use."). Thus, assuming *arguendo* that (contrary to EPA's own above-quoted principles of statutory interpretation) the 1977 Amendments could be read as a ratification of the three preexisting "change in the method of operation" exemptions, that would not justify leaping to the conclusion that Congress intended to authorize dramatic expansion of the preexisting exclusion from "physical change." Such a leap would be irrational, unexplained, and contrary to fundamental principles of statutory interpretation.

EPA claims that all four of the pre-1977 exclusions stemmed from a belief that there is no "change" so long as "the plant will continue to be operated in a manner consistent with its original design." 68 Fed. Reg. at 61269/1. However, as stated above, three of the four exemptions addressed a statutory phrase not at issue here, and the fourth had a scope far narrower than the ERP. EPA's post-hoc effort to identify commonality between the four exemptions cannot change those fundamental realities.

In any event, EPA's characterization of the alleged unifying theme is inaccurate and uncorroborated, again rendering the ERP unlawful and arbitrary and capricious. EPA

has not argued, and cannot credibly argue, that any change within the scope of a unit's original design was *per* se exempt under the four pre-1977 exclusions. To cite just one example, EPA found in 1975 that a boiler upgrade project at a pulp mill was not RMRR even though the agency determined that the post-upgrade state of the boilers was contemplated within their original design. Request for Ruling Regarding Modification of Weyerhaeuser's Springfield Operations, Reg. Counsel, Reg. X (Aug. 18, 1975).

Finally, EPA's unifying theme argument is based on a fundamental error in logic. Even if a change had to stay within a unit's original design in order to qualify for any of the four pre-1977 exclusions, it does not follow that all changes that stayed within original design qualified for any of the exclusions. In other words, even if staying within original design was a necessary condition for a pre-1977 exclusion, it does not follow that it was sufficient to qualify for the exclusion (For example, a physical activity stops being routine long before it takes the source outside the parameters of its design.). Yet that is the illogical conclusion that underlies EPA's unifying theme argument.

D. EPA's Claims Regarding Reliability and Efficiency Are Without Merit.

In the "Legal Basis" section of the preamble, EPA claims that it is "expanding the former definition of RMRR" in order to exempt activities "that are needed to facilitate the efficiency, reliability, and safety of affected sources." 68 Fed. Reg. at 61270/1. *See also id.* at 61250/3 ("In our June 2002 report to the President, we similarly concluded that the NSR program has impeded or resulted in the cancellation of projects that would have maintained and improved the reliability, efficiency, or safety of existing energy capacity."); *id.* ("We are also persuaded that the uncertainties surrounding the scope of the exclusion that are associated with the case-by-case approach tend to . . . discourage replacements that would promote safety, reliability, and efficiency even in instances where, if the matter were brought to EPA, we would determine that the replacement in question was RMRR."); *id.* at 61251/1 ("The effect [of the new rule] should be to remove disincentives to undertaking RMRR activities falling within the rule, thereby enhancing key operational elements such as efficiency, safety, reliability, and environmental performance."); *id.* at 61257/3-61258/1 ("[W]e concluded in our 2002 report to the President that the NSR program – and the RMRR provision in particular – has in fact resulted in delay or cancellation of activities that would have maintained and improved the reliability, efficiency, and safety of existing energy capacity."); *id.* at 61264/2 ("[W]e expect the rule to result in significant improvements in safety, reliability, and other relevant operational parameters."); *id.* at 61276/2 ("Today's rule improves the ability of sources to maintain the reliability of production facilities, and effectively utilize and improve existing capacity.").

We have demonstrated the fallacy and irrelevance of that claim in our original comments on the proposed rule, *see, e.g.*, American Lung Ass'n, *et al.*, Comments on the Proposed Rule (May 2, 2003), and in other submissions incorporated herein. *See, e.g.*, Environmental Organizations' December 24, 2003 Petition for Reconsideration of the

ERP (Attachment 5). We reinforce that demonstration here with the following additional information.

1. Correspondence Between American Electric Power and DOE

The official EPA docket for the ERP contains an email with attachments that Douglas Carter, director of planning and environmental analysis at DOE's Office of Fossil Energy, sent to EPA on September 27, 2002. Attachment 10 (Document No. II-F-18). At that time, DOE was working to shape the ERP, which EPA formally proposed on November 22, 2002. One of the attachments to the September 27 email is a memorandum prepared by Mr. Carter. The Carter memorandum takes as its starting point the claim that EPA's rule would remove impediments to increased efficiency and reliability at power plants. In the memorandum, Mr. Carter explores the question whether increases in efficiency and reliability would mean lower or higher aggregate emissions from power plants. He concludes (1) that increased reliability at power plants would likely lead to increased air pollution from those plants and (2) that increased efficiency at power plants would also likely lead to increased air pollution from those plants. *Id.*

Bruce Braine, vice president for strategic policy analysis at AEP, had sent an email to Mr. Carter on September 13, 2002, two weeks before Mr. Carter sent his memorandum to EPA. Attachment 11.[3] AEP was, and continues to be, the defendant in an NSR enforcement action brought by environmental organizations, the United States, and several individual states. Mr. Carter had apparently sent Mr. Braine a draft of his memorandum because, in his email to Mr. Carter, Mr. Braine conveyed his reactions to the paper, as well as the reactions of both John Norris, AEP's senior vice president of operations and technical services, and Steve Fotis, a partner at Van Ness Feldman, a corporate law firm that represented AEP.

In the comments that Mr. Braine pasted into his email to Mr. Carter, Mr. Norris wrote:

> NSR changes will have VERY LITTLE IF ANY [emphasis in original] affect on reliability. Thru on-going maintenance improvements the units are being made more reliable now (as shown in the (Doug Carter) attachments). There is [*sic*] very little if any reliability improvements being stopped today by recent politically motivated NSR interpretation revisions.

Id.

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[3] NRDC received the September 13, 2002 email from DOE on February 17, 2003, pursuant to an August 14, 2003 Freedom of Information Act request.

AEP's senior vice president of operations and technical services was thus conceding that neither the NSR requirements as they then existed, nor the enforcement actions that EPA had filed (against AEP and other electric utility companies) to enforce those requirements, had had any significant negative impact on the reliability of power plants.

More importantly, the concession contained in Mr. Braine's September 2002 email reveals that, at the time EPA used the electric utilities' complaints about supposed restraints on reliability improvements as attempted justification for greatly expanding the RMRR exemption, the administration knew that the complaints were spurious.

In the comments that Mr. Braine pasted into his email to Mr. Carter, Mr. Fotis of Van Ness Feldman addressed Mr. Carter's concession that increased efficiency at power plants would likely lead to increased air pollution from those plants. Mr. Fotis wrote:

> As discussed below, situations where a particular plant's annual output (and emissions) might increase is irrelevant so long as the unit is compliance with applicable permit limits and other SIP obligations. I make this point because environmental groups will claim that substantial emissions increases (spikes) will occur at specific plant due to increased annual utilization. Such claims may be hard to refute on a plant-specific basis because some power plant changes may remove a operational constraint that has been temporarily limiting short-term production. . . . Also, as noted in several of Doug Carter's examples, certain maintenance projects could increase substantially the annual output due to increased availability and increased dispatch (by improving unit economics).

Attachment 11 (emphasis added).

AEP's attorney was thus conceding that the then-proposed ERP would allow pollution increases at individual facilities. The AEP email thus provides further confirmation of the fact that the ERP exempts like-kind replacements that cause emissions increases, thereby contravening the Act's requirement of NSR for "any" emissions-increasing physical change.

EPA has never publicly acknowledged the AEP-DOE correspondence described above, much less explained how the ERP possibly can be justified notwithstanding that information. For that reason alone, EPA's promulgation of the ERP was arbitrary and capricious.

2. DOE's Chart on Coal-Fired Power Plant Efficiency

The docket of EPA's proposed rule to regulate mercury emissions from fossil fuel-fired power plants contains another damning document from the files of Douglas Carter at DOE's Office of Fossil Energy. The document is a one-page bar graph on which someone at DOE or EPA has written, "Coal-fired power plant efficiency has not changed in practice since 1965." Item II-B-12, EPA Air Docket A-92-55 (Attachment 12) (emphasis in original). The chart supports that statement. In fact, it indicates that the efficiency of this country's fleet of coal-fired power plants has not changed appreciably since the early 1950s. *Id.* Of course, Congress did not enact the PSD/NNSR provisions of the Clean Air Act until 1977. The DOE chart thus gives lie to EPA's oft-repeated claim that the agency's pre-ERP regulations bore responsibility for a lack of significant efficiency improvements at existing coal-fired power plants. Actually, the chart casts doubt on the possibility – under any regulatory conditions – of significant efficiency gains occurring at this country's existing fleet of coal-fired power plants. As Calpine Corporation's expert stated in the D.C. Circuit stay proceedings concerning this very rule, "Breakthrough efficiency gains do not come from maintaining and repairing 50-year-old plants but instead come when new plants are brought on line." *See* Declaration of Donald B. Walters, filed on behalf of *Amicus Curiae* Calpine Corporation *in State of New York v. EPA*, D.C. Cir. Case No. 03-1380 (Nov. 13, 2003) (Attachment 13), at 2.

EPA has never publicly acknowledged the findings reflected in the DOE chart, much less explained how the ERP can be justified notwithstanding those findings. For that reason alone, EPA's promulgation of the ERP was arbitrary and capricious.

3. EPA's Expert Reports From Its NSR Enforcement Cases

Expert reports submitted on EPA's behalf in the agency's NSR enforcement cases echo DOE's and industry's acknowledgment, *see* subsection II.D.1, *supra*, that many changes that increase efficiency and/or reliability at stationary sources also increase emissions. In a November 30, 2001 report filed in EPA's NSR enforcement action against the Ohio Edison Company, for example, an EPA expert named Robert Koppe describes one way in which changes that increase efficiency and/or reliability at electric utility plants can increase emissions:

> Utilities operate their more efficient generating units first and only operate the less efficient units when use of electricity by customers in higher. If the efficiency of a unit improves after a planned outage, the unit may move up in the hierarchy of units (the dispatch order). In this case, the recently overhauled unit will be asked to generate more electricity. The increase in total coal consumption that results from increased generation could easily exceed any decrease in coal consumption resulting from the improvement in efficiency.

Expert Report of Robert H. Koppe, filed on behalf of Plaintiff United States *in United States v. Ohio Edison Co.*, D.C. Ohio Civil Action No. 99-1181 (Nov. 30, 2001) (Attachment 14), at 33-34.

In the same report, Mr. Koppe describes other ways in which changes that increases efficiency can increase emissions:

> Generally, I would expect that a decrease in coal consumption at a unit would result in a decrease in emissions. However, this might not always be the case. One example involves Ohio Edison's replacement of all pulverizers at Sammis 6 in 1998. A major problem with the original pulverizers was that they did not grind the coal finely enough. Because of this, some of the carbon that was fed to the boiler fell out of the boiler with the coal ash and was never burned. The new pulverizers grind the coal more finely so that very little carbon remains with the coal ash. With the new pulverizers, essentially the same amount of carbon is burned. Efficiency is improved because the unit no longer throws out some of the coal with the ash and not because any less coal is actually burned.
>
> With the old pulverizers, some of the coal that went into the furnace was disposed of with the ash and never burned. It is possible that some or all of the ash, nitrogen, and sulfur in the unburned coal was also thrown away and did not contribute to emissions. In this case, the fact that less coal is being put into the furnace since the pulverizers were replaced would not increase [In light of the context, it appears that Mr. Rosen meant to write "decrease" rather than "increase" here.] emissions. Also, decreasing the amount of excess coal put into the furnace might have increased the temperature of the flame, increasing NO_x emissions.
>
> Replacement of burners in some units (e.g. Sammis 5 in 1984) was expected to increase unit efficiency and this might have resulted in a need for less excess air. Reduction in the amount of excess air would have increased the flame temperatures and thereby increased NOx emissions.

Expert Report of Robert H. Koppe, filed on behalf of Plaintiff United States *in United States v. Ohio Edison Co.* (Attachment 14), at 34.

In other reports filed in the cases against Ohio Edison and AEP, an EPA expert named Richard Rosen describes in detail the way in which a change that increases an

electric utility unit's "availability," *i.e.*, its reliability, can increase the unit's emissions. Expert Report of Richard A. Rosen, filed on behalf of Plaintiff United States *in United States v. Ohio Edison Co.*, D.C. Ohio Civil Action No. 99-1181 (Nov. 30, 2001) (Attachment 15), at 15-17; Expert Report of Richard A. Rosen, filed on behalf of Plaintiff United States *in United States v. American Electric Power Service Corp.*, S.D. Ohio Civil Action No. 99-1182 (Aug. 2, 2004), at 29-31.[4] Moreover, in his August 2, 2004 report filed in EPA's NSR enforcement action against AEP, Mr. Koppe explains that reliability improvements at an electric utility unit can, just like efficiency improvements, move the unit up the dispatch order, causing a coal consumption increase that raises the unit's emissions. Expert Report of Robert H. Koppe, filed on behalf of Plaintiff United States *in United States v. American Electric Power Service Corp.*, S.D. Ohio Civil Action No. 99-1182 (Aug. 2, 2004), at 29.[5]

The descriptions in the EPA expert reports closely track the DOE and industry concessions quoted in subsection II.D.1, *supra*. The experts' descriptions reveal EPA's cognizance of the fact that some changes that increase efficiency and/or reliability at stationary source units also increase emissions from those sources. EPA's description of its rule as an effort to exempt activities that facilitate efficiency and reliability improvements thus amounts to a concession that the rule facilitates emissions increases. The agency has made no attempt to explain how its effort to exempt changes that, by its own admission, increase emissions can be consistent with Congressional intent. For that reason alone, EPA's promulgation of the ERP was arbitrary and capricious.

E. EPA's Refusal to Recognize Efficiency as a Design Parameter Contravenes the Clean Air Act and is Arbitrary and Capricious.

The ERP states that an equipment replacement activity does not qualify for the ERP if it "change[s] the basic design parameter(s) of the process unit to which the activity pertains." 68 Fed. Reg. at 61277/3 (40 C.F.R. § 51.165(a)(1)(xlvi)(h)(2)). At the same time, however, the rule declares that "[e]fficiency of a process unit is not a basic design parameter." *Id.* at 61278/1 (40 C.F.R. § 51.165(a)(1)(xlvi)(h)(2)(v)). The rule thus excludes a physical activity from the statutory term, "any physical change in . . . a stationary source," even if the activity changes the efficiency of the source.

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[4] In preparing these comments, David G. McIntosh, counsel for NRDC, reviewed Mr. Rosen's report in the *AEP* case. Mr. McIntosh is a signatory to the confidentiality agreement that is in effect pursuant to a protective order in that case. Pages 29-31 are not among the pages stamped "Confidential Business Information" in Mr. Rosen's *AEP* report.

[5] In preparing these comments, David G. McIntosh, counsel for NRDC, reviewed Mr. Koppe's report in the *AEP* case. Mr. McIntosh is a signatory to the confidentiality agreement that is in effect pursuant to a protective order in that case. The text accompanying this footnote does not convey any information subject to a claim of confidentiality.

Even if it could be assumed (which it cannot) that EPA is authorized to exclude from "physical change" "the replacement of any component a process unit with an identical or functionally equivalent component(s)" that "does not change the basic design parameter(s) of the process unit," EPA's exclusion of efficiency-increasing physical upgrades from "any physical change" would still contravene the Clean Air Act. Physical work that alters a process unit's efficiency would be a "physical change" even under EPA's unlawfully narrow definition of that phrase, and Congress required "any" emission-increasing physical change to undergo NSR.

EPA claims that it "need not and should not treat efficiency as a basic design parameter" because the agency does "not believe NSR was intended to impede industry [from] making energy and process efficiency improvements." *Id.* at 61253/2. As we have demonstrated elsewhere in these comments and in previous submissions, however, EPA has not offered and cannot offer any rational basis for its claim that the NSR program has impeded industry from making energy and process efficiency improvements. *See, e.g.*, American Lung Ass'n, *et al.*, Comments on the Proposed Rule (May 2, 2003); Environmental Organizations' December 24, 2003 Petition for Reconsideration of the ERP (Attachment 5). Moreover, EPA's speculations about Congressional intent cannot substitute for the actual statutory language providing that "any" emissions-increasing physical change must undergo NSR, or for the legislative history evidencing Congress's intent to protect public health and welfare against increases in air pollution and to ensure "that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(1), (3).

As EPA and industry concede, equipment replacement projects that increase source efficiency can also increase emissions. 68 Fed. Reg. at 61259/2 ("[A]n equipment replacement that improves a process unit's efficiency . . . can qualify as RMRR even if current actual emissions increase as a result."); *see also* subsection II.D, *supra*. If an equipment replacement increases emissions, then it is precisely the type of physical change for which Congress intended NSR. EPA therefore contravenes the Clean Air Act when it extends the ERP's categorical exclusion to projects that increase efficiency.

Furthermore, EPA has acted unreasonably (if the issue is governed by *Chevron* Step Two) as well as arbitrarily and capriciously, in that the agency lacks a rational basis for its refusal to recognize efficiency as a design parameter. According to EPA, the agency has excluded changes in "basic design parameters" from the ERP because, even under the agency's new, expanded interpretation, RMRR covers just those physical activities that are "inherent to both the design and purpose of the process unit." 68 Fed. Reg. at 61253/1. RMRR "contemplate[s]," in EPA's view, "that the plant will continue to be operated in a manner consistent with its original design." *Id.* at 61269/1. *See also id.* at 61271/3 ("[A]s long as the facility is operated as designed and permitted, we would not consider . . . such changes to be physical or operational 'changes' for purposes of administering the NSR program."). If EPA is to reason consistently with its own interpretation, then, the agency must define a unit's "basic design parameter" as a specification of the unit's original design.

Efficiency is a design specification for stationary source units. One of the country's major power producers, Calpine Corporation, has said as much in its comments on this very rulemaking:

> [W]e believe that efficiency is a critical and fundamental aspect of a power generating unit's ability to maintain financial viability, particularly for those facilities participating in competitive markets, and should be considered as a key design parameter for all power plants in the future. . . . Calpine's extensive experience in operating power plants fully reconfirms the essential role that efficiency plays in evaluating plant performance. Along with unit output capability, efficiency is one of perhaps the two most critical performance parameters cited in contracts for new power generating equipment and systems.

Comments of Calpine Corporation (May 1, 2003), at 29-30. Corroborating Calpine's position, the vendors of stationary source units identify efficiency as a design specification of such units. *See, e.g.*, Attachment 16 (available at http://www.globalspec.com/goto/PDFViewer?pdfURL=http%3A%2F%2Fwww%2Emiuraboiler%2Ecom%2FdownloadAUG%2Fsteam%5Fboilers%2FEXseries%2Epdf) (advertising "85% fuel-to-steam efficiency" under "design"); Attachment 17 (available at http://www.globalspec.com/specifications/spechelpall?name=boilers_industrial&comp=1939) (listing "efficiency" under "performance specifications"); Attachment 18 (available at http://www.burnham.com/pdfs/V11.pdf) (advertising "combustion efficiencies up to 85%"); Attachment 19 (available at http://www.frankirounds.com/firetube.html) (guaranteeing efficiency "of up to 85% on gas and up to 88% on oil").

EPA has never acknowledged, much less resolved, the fundamental contradiction in its position. Nor has the agency acknowledged, much less refuted, the evidence undermining its position. In short, the agency's exemption of efficiency-enhancing, emissions-increasing physical upgrades is unlawful and arbitrary and capricious.

F. Recent EPA Statements Belie the Reading of Congressional Intent That Underlies the ERP.

Another flaw in EPA's legal basis for the ERP is the agency's contention that "the purpose of the NSR provisions is simply to require the installation of controls at the appropriate and opportune time." 68 Fed. Reg. at 61,270/3. EPA posits – without offering any record support – that a typical source owner will not replace equipment that is valued at less than twenty percent of the process unit if the replacement project would trigger NSR, and instead will either repair the equipment or artificially constrain production. *Id.* at 61,270/2. "Therefore," writes EPA, "the replacement of that equipment is not, in fact, an opportune time for the installation of [state-of-the-art pollution] controls." *Id.* As we have previously demonstrated, that argument is refuted

by, *inter alia*, the language of section 111(a)(4), which focuses on increases (*i.e.*, whether a change "increases the amount of any air pollutant emitted by such source"), as well as by the statutory context and purposes. *See, e.g.*, Attachments 4-6. We have incorporated those previous submissions herein. *See* Introduction, *supra*. In particular, we direct EPA's attention to subsection I.C.2 of our December 24, 2003 reconsideration petition. Attachment 5 at 17-33. Here we add the following points.

EPA's argument that the purpose behind NSR is to schedule pollution control upgrades for "appropriate and opportune" moments conflicts with positions that the agency took prior to its promulgation of the ERP, as well as with positions it has taken since. In its August 2004 response to the legal challenges to the 2002 NSR rule revisions, for instance, EPA concedes that "the purpose of the NSR provisions is . . . to limit emissions increases resulting from physical or operational changes." *See* Brief of Respondent EPA *in State of New York v. EPA*, D.C. Cir. Case No. 02-1387 (Aug. 9, 2004), at 73-74 (emphasis in original). The agency adds that

> the purpose of New Source Review is to require that facilities making changes that increase their emissions meet emission limits that reflect state-of-the-art control technology, analyze the increased emissions from their facilities to ensure that they will not adversely affect air quality, and, in nonattainment areas, offset their emissions increases with emission reduction credits.

Id. at 74. EPA's acknowledgment in its response brief that Congress intended NSR to "limit emissions increases" and "require that facilities . . . meet emission limits" directly belies the assertion that the agency makes in the ERP preamble that "the purpose of the NSR provisions is simply to require the installation of controls at the appropriate and opportune time." The discrepancy between these two interpretations of Congressional intent undermines the agency's claim that it has reasonably interpreted the Act pursuant to its discretion under *Chevron*. 68 Fed. Reg. at 61,270/3 ("[T]he purpose of the NSR provision is simply to require the installation of controls at the appropriate and opportune time. The kind of replacements that automatically fall within the equipment replacement provision established today do not represent an appropriate and opportune time. Accordingly, and given that it is consistent with the meaning of 'change' to treat this kind of replacement as not being a 'change,' we believe that excluding them on that basis from the definition of 'modification' as used in the NSR program is well calculated to serve all of the policies of the NSR provisions of the CAA, and is therefore a legitimate exercise of our discretion under *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), to construe an ambiguous term."). Furthermore, the interpretation presented in EPA's response brief – that NSR was designed to limit emissions increases – reveals the unlawfulness of EPA's decision to exempt equipment replacement projects from NSR, even if those projects result in emissions increases well above the agency's significance levels.

In its final rule implementing the 8-hour Ozone NAAQS, 69 Fed. Reg. 23951 (April 30, 2004), the agency again confirms that the essential focus of NSR is on limiting

emissions increases, thus revealing the fallacy of the position it takes in the preamble to the ERP. In the passage excerpted below, EPA repeatedly describes NSR as a tool for combating new emissions:

> [O]ur revised approach is more consistent with our longstanding treatment of NSR as a growth measure. We have historically treated control measures differently from measures to control growth. We provided no rationale in our proposal for treating control measures and growth measures in the same manner for purposes of the 8-hour standard, in contrast with our historical approach.
>
> Unlike control requirements such as RACT and I/M, the NSR program is a growth measure and is not specifically designed to produce emissions reductions. Instead, its purpose is to allow new source growth to occur without interfering with an area's ability to attain. The statute and regulatory history identify nonattainment NSR as a growth measure.

Id. at 23986/1. By insisting that NSR is a "growth measure" and not a "control measure" or "control requirement," EPA fatally undermines its assertion in the ERP preamble that NSR is simply about installation of "controls." 68 Fed. Reg. at 61270/3. EPA's recognition that NSR was designed to limit emission increases further undermines the equipment replacement provision, which would allow emissions increases that implicate the concerns about emissions growth expressed in the ozone NAAQS implementation rule.

The concessions found in EPA's post-ERP statements belie the reading of Congressional intent that EPA attempts to put forward in the ERP preamble. In the ERP context, EPA appears to be formulating expediency-based interpretations tailored to its present agenda, rather than trying to ascertain what Congress actually intended when it enacted the NSR provisions and the definition of "modification." *See Natural Resources Defense Council v. Reilly*, 976 F.2d at 44 (Silberman, J., concurring) (agency interpretation was unsustainable where "the agency seeks to exploit the ambiguity rather than resolve it, and to advance its own policy goals rather than Congress'").

G. The ERP Unlawfully Exempts the Full Reconstruction of a Process Unit, and Even of an Entire Facility.

In the preamble to the ERP, EPA affirms that the complete reconstruction of an emissions source would trigger NSR if the project resulted in an emissions increase. The agency's assertions are flatly contradicted by the actual language of its rule, however, which would allow source owners to use accounting gimmicks to avoid NSR while fully reconstructing their facilities. This aspect of the rule violates the language and the purpose of the Clean Air Act's NSR provisions, and threatens public health and the

environment. Furthermore, the stark inconsistency between the words of the preamble and the regulatory text renders the rule unreasonable (if the issue is governed by *Chevron* Step Two) as well as arbitrary and capricious.

The preamble acknowledges that an emissions-increasing reconstruction of a unit is necessarily a "modification," as that term is used in section 111(a)(4) of the Act. 68 Fed. Reg. at 61256 ("It is logical and practical to conclude, as some of the commenters do, that by using the word 'modification' the CAA intended to capture activities on a smaller scale than reconstructions."). As written, however, the rule allows an entire process unit (or even an entire facility) to be reconstructed, either simultaneously or sequentially, without triggering the preconstruction permitting requirements, no matter how much emissions increase as a result. *See* 40 C.F.R. §§ 51.165(h), 51.166(y).

The regulatory text of the ERP provides that the twenty-percent ceiling applies to the replacement of one part with another, plus "the cost of any associated maintenance and repair activities that are part of the replacement." 40 C.F.R. §§ 51.165(h)(1)(i), 51.166(y)(1)(i). Nothing in the rule prevents more than one exempt "replacement" from occurring simultaneously at a single process unit, however. In fact, the rule explicitly states that multiple exempt replacements may occur at the same process unit at the same time. 68 Fed. Reg. at 61258/2 ("[T]wo or more replacement activities that occur at the same time are not automatically considered to be a single activity because they happen at the same time. For example, a steam turbine rotor replacement project and a boiler tube replacement project would not be aggregated simply because they occur during the same maintenance outage and on the same process unit."). So long as each replacement, along with its associated maintenance and repair, does not cost more than twenty percent of the replacement cost of the entire process unit in question, the replacement is exempt from NSR irrespective of whether other replacements occur at the same time, at the same process unit. 40 C.F.R. §§ 51.165(h), 51.166(y). Nothing in the rule prevents the owner or operator of a facility from simultaneously replacing every "part" at a unit – or at the whole facility – so long as each replacement costs less than twenty percent of the replacement cost of its associated process unit. By changing the focus from "any change" – the focus required by the Act – to any replacement costing no more than twenty-percent of a broadly defined "process unit," the ERP exempts emissions-increasing changes – and emissions-increasing reconstructions, for that matter – from NSR.

Similarly, nothing in the rule prevents a source from effectively undergoing a reconstruction by carrying out a series of sequential replacement projects that individually fall below the rule's twenty-percent cost threshold. EPA expressly refuses to set any temporal limit on how many projects at a process unit can qualify for the equipment replacement exemption within a given timeframe, 68 Fed. Reg. at 61258/2 (rejecting an annual basis for applying the 20% threshold on grounds that doing so would require "after-the-fact determinations"), thereby allowing a source to execute multiple replacement projects in the space of one year or some other short period. So long as the reconstruction is undertaken in a series of nominally independent projects, the ERP enables the complete reconstruction of a source to occur without triggering NSR. Thus,

for example, a source owner, staffed with reasonably sentient accountants, could reconstruct an entire process unit through a series of five projects carried out sequentially over a relatively short period of time – without triggering NSR.

Nothing in the rule prevents a facility from carrying out several of these *de facto* reconstruction projects simultaneously at multiple process units. Under EPA's rule, an entire power plant, refinery, or factory could be reconstructed – in a short period of months or a year or two – without triggering NSR, so long as the full enterprise is described as an assortment of separate projects taking place at different process units, with each project conforming to the twenty-percent threshold for its particular process unit.

The rule's failure to prevent source reconstruction is an especially egregious violation of the statutory requirement of NSR for "any" emissions-increasing physical change. It is also unreasonable and arbitrary and capricious, in that it diverges from any realistic meaning of the statute, and stands in stark contrast to the agency's acknowledgment that a reconstruction is necessarily a modification.

Finally, the rule ignores *Alabama Power*'s admonition that "[t]he statutory scheme intends to 'grandfather' existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program." 636 F.2d at 400. By allowing source owners to completely reconstruct their facilities through a set of nominally distinct projects carried out either simultaneously or serially, the ERP opens "vistas of indefinite immunity" from NSR. *See WEPCO*, 893 F. 2d at 909.

H. Additional Legislative History

1970 Amendments. Further confirming the error in a restrictive reading of "any physical change" is Congress's rejection of restrictive language in the deliberations that led to enactment of section 111(a)(4). In sharp contrast to the enacted version of section 111(a)(4), the 1970 Senate bill would have defined "modification" as "any construction (other than pollution abatement facilities as determined by the Secretary or appropriate State agency) which may alter the nature or may increase the amounts of air pollution agents or combination of such agents emitted by a stationary source." Committee Print §6(b) (inserting new section 113(a)(4)), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1970, vol. 1 (U.S. Senate Committee on Public Works Serial No. 93-18, 93d Cong., 2d Sess.), at 554. "Construction" was defined as "any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparatory work at such premises." *Id.* (inserting new section 113(a)(3)).

In conference, this definition was abandoned in favor of the "modification" definition that survives to this day: "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted

by such source or which results in the emission of any air pollutant not previously emitted." Conference Report No. 91-1783, U.S. House of Representatives, 91st Cong., 2d Sess. (accompanying H.R. 17255), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1970, vol. 1 (U.S. Senate Committee on Public Works Serial No. 93-18, 93d Cong., 2d Sess.), at 159.

In short, Congress considered but rejected attempts to hinge the existence of a "modification" on whether there has been "placement, assembly, or installation of facilities or equipment." Instead, Congress opted for a broader concept of modification under which "any physical change" – regardless of whether it involves the placement, assembly, or installation of facilities or equipment – constitutes a modification if it increases emissions. The evolution of the "modification" definition refutes EPA's attempt to narrow the scope of "any physical change" to exclude massive equipment replacement projects.

1971 Proceedings. A 1971 American Mining Conference letter in the record of the Senate Environment and Public Works Committee confirms the expansive scope of section 111(a)(4)'s phrase, "any physical change in, or change in the method of operation of." The May 12, 1971 letter, which is addressed to the then-associate commissioner of EPA's Air Pollution Control Office, reads in part:

> The terms "source," "new source," and "existing source" are defined in Sections 1.0.15, 1.8.8, 1.0.4, respectively of Appendix B of the proposed regulations. Under these definitions, any installation which is "altered, replaced, or rebuilt" after the effective date of the state regulations is a "new source." . . . The proposed regulations appear to mean that an installation which is "altered" in any way, and without creating a new increase in the amount of emissions from that source, does by such alteration become "a new source." (Indeed, the regulation even considers the purchase or lease of equipment, without any physical change at all, to render the equipment a new source!) . . . As these consequences indicate, the proposed definition of "new source" is totally unsupportable by the Clean Air Act. The kind of "modification" which renders a source a "new source" is specifically defined in Section 111(a)(4) to mean any physical change or change in the methods of operation "which <u>increases</u> the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant <u>not previously emitted</u>." (Emphasis supplied.) This language takes account of the obvious fact that industrial operations of every type are frequently changing equipment and processes, for example, in so commonplace a measure as the replacement of worn out capability.

May 12, 1971 letter from J. Allen Overton, Jr. to Associate Commissioner, Air Pollution control Office, U.S. Environmental Protection Agency, *reprinted in* Implementation of the Clean Air Act Amendments of 1970, pt. 2 (U.S. Senate Committee on Public Works Serial No. 92-H31, 92d Cong., 2d Sess.), at 471 (emphasis in original).

Thus, while a physical or operational change need undergo NSR only if it increases emissions or results in the emission of a pollutant not previously emitted, the statutory phrase, "any physical change in, or change in the method of operation of," is an expansive one.

1990 Amendments. That EPA's new interpretation of "modification" contravenes Congressional intent is further corroborated by the legislative history of the 1990 Amendments. In rejecting a floor amendment, Congress further confirmed its intent that NSR would be triggered by any physical changes that result in emissions increases – even if the changes do not alter the source's original design or increase its potential to emit. Senator Chafee, one of the primary drafters of the 1990 Amendments, addressed this issue in relation to a proposed amendment that embodied an approach similar to the one underlying the equipment replacement provision.

> The amendment that is currently before us exempts a utility modification from new source performance treatment if the modification does not result in an increase in the modified plant's maximum potential to emit. That is what this amendment talks about. If there is no increase in the maximum potential to emit, then it is exempt as compared to that of the plant before the modification.
>
> This approach sounds like it precludes any increase in emissions, but this is not the case. In other words, you think, well, you are not going to go above its potential, so therefore you are not changing what the situation used to be. The problem with this approach is that it does not reflect the practical effect of the modification. A modification would take – I think it is important to follow this, Mr. President – an old, underutilized plant with relatively low emissions, transform it into a "just like new plant" and enable it to operate much more extensively and produce many more emissions.
>
> According to EPA, average actual – we are not talking potential, we are talking actual – SO[2] or NO[x] emissions from existing utilities are only 37 percent of potential emissions and particulates are only 44 percent of potential emissions. This is because the older plants are operating well below their maximum capacity. To allow a

> refurbished utility to emit at its old potential levels could permit an almost twofold increase in emissions.
>
> What we are pointing out is that plants have not been operating at their potential. They have been operating at an actual. So you then take an old plant and you fix it up, refurbish it, and suddenly it is not operating at the old, relatively low actual emissions, but you are much higher, you are up far closer to the so-called potential. In other words, you are getting, in some instances, twice as much emissions than you previously had from this plant.
>
> So this amendment could permit a powerplant, even one where its emissions directly affected a national park, for example, to refurbish or add a new boiler, to double its NO[x] and particulate emissions, triple its SO[2] emissions and cover these SO[2] emissions by purchasing allowances and never have to demonstrate what impact this would have on visibility or other air quality standards.
>
> Similarly, a powerplant could increase emissions in a nonattainment area. Let us take Houston or Boston, any city. Take my home city of Providence. A powerplant could increase emissions in one of these nonattainment areas and neither have to demonstrate air quality impacts nor be required to offset these increases of emissions as they are required to do under existing law.

April 3, 1990 Senate Debate on S. 1630 (McClure Amendment), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, vol. 4 (U.S. Senate Committee on Public Works, S. Prt. 103-38, 103d Cong., 1st Sess.), at 6966-67.

The amendment of which Senator Chafee spoke was defeated, *Id.* at 6978-79, and Congress preserved the then- and still-existing definition of "modification." Accordingly, any emissions-increasing physical change to a source, including a replacement project involving identical or functionally equivalent parts, is a "modification" – even if the change does not alter the source's basic design or increase its potential to emit.

This amendment and its defeat are notable for several reasons, each of which further underscores the unlawfulness of the ERP. First, it is revealing that both the proponents of the amendment and Senator Chafee understood that the then- and still-existing "modification" definition did not exclude changes that allowed a source to return to its maximum potential to emit or original design capacity. Were that not the case, the amendment would have been unnecessary. Second, the amendment's defeat confirms, as does Senator Chafee's explanation, that the Clean Air Act's "modification" provision –

then and now – is concerned with *actual* emissions increases. Third, Senator Chafee's statements read like a direct refutation of EPA's present-day arguments that physical changes that improve a source's reliability or efficiency – no matter how much emissions increase – are exempt from NSR. Plainly that is not the case.

Senator Chafee's statement also underscores the error in EPA's claim that the "safeguards" built into the equipment replacement provision will sufficiently protect the environment. *See* 68 Fed. Reg. at 61255. Changes to a source that involve "functionally equivalent" replacement parts and that do not alter the source's "basic design parameters" can nevertheless result in unhealthy emissions increases. As Senator Chafee explained, such changes can transform an "old, underutilized plant with relatively low emissions" into one that is "just like new," thus allowing it to double or triple its emissions while evading the statutory requirement that it install modern pollution controls. April 3, 1990 Senate Debate on S. 1630 (McClure Amendment), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, vol. 4, at 6966.

CONCLUSION

For the reasons stated above and in the appended documents, we respectfully request that EPA rescind, in their entirety, the rules published at 68 Fed. Reg. 61248 (Oct. 27, 2003) and 68 Fed. Reg. 74483 (Dec. 24, 2003).

Dated: August 30, 2004

APPENDIX

Attachment 1	August 26, 2003 Supplemental Comments on the Proposed Rule: "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement."
Attachment 2	August 26, 2003 Letter from the Environmental Integrity Project and NRDC to President George W. Bush.
Attachment 3	Environmental Petitioners' November 17, 2003 Motion for a Stay Pending Review.
Attachment 4	Environmental Petitioners' December 12, 2003 Reply in Support of Stay Motion.
Attachment 5	Environmental Organizations' December 24, 2003 Petition for Reconsideration of the ERP.
Attachment 6	Environmental Organizations' January 16, 2004 Petition for Reconsideration of the ERP.
Attachment 7	February 5, 2004 Letter from Environmental Organizations to EPA Administrator Michael O. Leavitt.
Attachment 8	Expert Report of Richard E. Krause, filed on behalf of defendants Ohio Edison Company and Pennsylvania Power Company *in United States v. Ohio Edison*, S.D. Ohio Civil Action No. 99-1181 (Mar. 1, 2004).
Attachment 9	Chart displayed to the U.S. District Court for the Southern District of Illinois on September 29, 2003 by counsel for the defendant in *U.S. v. Illinois Power Co.*, S.D. Ill. Civil Action No. 99-333 (MJR).
Attachment 10	September 27, 2002 Email with Attachments from Douglas Carter, Director of Planning and Environmental Analysis at DOE's Office of Fossil Energy, to EPA (Document No. II-F-18).
Attachment 11	September 13, 2002 Email from Bruce Braine, Vice President for Strategic Policy Analysis at AEP, to Douglas Carter, Director of Planning and Environmental Analysis at DOE's Office of Fossil Energy.
Attachment 12	Graph, "Coal-fired power plant efficiency has not changed in practice since 1965." Item II-B-12, EPA Air Docket A-92-55.

Attachment 13	Declaration of Donald B. Walters, filed on behalf of *Amicus Curiae* Calpine Corporation *in State of New York v. EPA*, D.C. Cir. Case No. 03-1380 (Nov. 13, 2003).
Attachment 14	Expert Report of Robert H. Koppe, filed on behalf of Plaintiff United States *in United States v. Ohio Edison Co.*, D.C. Ohio Civil Action No. 99-1181 (Nov. 30, 2001).
Attachment 15	Expert Report of Richard A. Rosen, filed on behalf of Plaintiff United States *in United States v. Ohio Edison Co.*, D.C. Ohio Civil Action No. 99-1181 (Nov. 30, 2001).
Attachment 16	Advertisement for Miura EX Gas/Oil Series High Pressure Steam Boiler (available at http://www.globalspec.com/goto/PDFViewer?pdfURL=http%3A%2F%2Fwww%2Emiuraboiler%2Ecom%2FdownloadAUG%2Fsteam%5Fboilers%2FEXseries%2Epdf).
Attachment 17	Performance Specifications *listed by* Global Spec, the Engineering Search Engine (available at http://www.globalspec.com/specifications/spechelpall?name=boilers_industrial&comp=1939).
Attachment 18	Advertisement for Burnham Commercial V11 Series Hot Water or Steam Boiler (available at http://www.burnham.com/pdfs/V11.pdf).
Attachment 19	Advertisement for Frank I. Rounds Model CB "LE" Firetube Boiler (available at http://www.frankirounds.com/firetube.html)