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Big Win for Environmentalists in *New York v. EPA* May Have Limited Impact on Air Quality

*Katherine K. Rankin**

In New York v. EPA, the D.C. Circuit Court evaluated the process by which electrical power companies may make modifications to their plants without installing pollution controls. In 2002, EPA implemented new regulations that allowed electrical power companies to update their facilities without installing pollution controls so long as the total cost of the modifications did not exceed 20 percent of the value of the entire plant. The court held that the 20 percent cutoff violated the plain language of the Clean Air Act. The holding rejected EPA's attempt to exempt the majority of power plants from upgrading their pollution control technology when making modifications. However, in light of the current presidential administration, the holding may be less than significant from an environmental standpoint, and other steps should be taken to improve air quality.

Introduction	838
I. Background.....	840
A. Legal and Judicial Standards Governing Implementation of the CAA.....	840
B. Pollution from Stationary Sources and New Source Review	841
II. D.C. Circuit Holds that the Clean Air Act Precludes EPA's Definition of "Routine Maintenance, Repair and Replacement"	847
A. Facts	847
B. Holding in <i>New York II</i>	848

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* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2008; B.A., Whitman College, 2003. The author would like to thank Leah Granger, Alice Bodnar and Jennifer Martin for their input, support and editorial suggestions.

III. While a Win for the Environment, the Court Could Have Done More.....	849
A. The Court's Invalidation of the 20 Percent Bright Line Rule Is Consistent with the Current Case Law and Statutory Interpretation Principles.....	850
B. The Problem With Grandfathering and De Minimis Exceptions.....	851
C. The Impact of <i>New York II</i> May Not Even Make a Ripple in the Pond.....	856
1. NSR Is Ineffective at Reducing Emissions from Older Power Plants.....	856
2. Clean Air Interstate Rule and Clean Air Mercury Rule: More Rules Recently Introduced by EPA that are Targeted at Air Pollution.....	858
Conclusion.....	860

INTRODUCTION

In October 2003, New York and fourteen other states¹ filed a lawsuit against the Environmental Protection Agency (EPA)² for alleged violation of the Clean Air Act (CAA).³ At issue was EPA's issuance of two new rules concerning the regulation of power plant emissions under the New Source Review (NSR) program.⁴ The first rule altered how plant emissions were measured;⁵ the second rule defined what plant modifications trigger the installation of pollution controls.⁶

New York challenged the implementation of the new rules because of the likely irreparable harm to citizen health and the environment caused by EPA's policy change.⁷ New York et al. argued that the new

1. Fourteen states and the District of Columbia joined New York in the suit: California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Vermont and Wisconsin.

2. Eleven states intervened on behalf of EPA: Alabama, Alaska, Arkansas, Kansas, Missouri, Nebraska, North Dakota, South Dakota, Utah, Virginia and Wyoming.

3. See Press Release, Office of the New York State Attorney General, States Sue Federal Government to Protect Clean Air Act (Oct. 27, 2003) [hereinafter Press Release October 2003], available at http://www.oag.state.ny.us/press/2003/oct/oct27b_03.html.

4. See *New York v. EPA (New York II)*, 443 F.3d 880, 883 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 2127 (2007).

5. See *New York v. EPA (New York I)*, 413 F.3d 3, 9 (D.C. Cir. 2005).

6. See *New York II*, 443 F.3d at 883.

7. See Press Release, Office of the New York State Attorney General, Statement by Eliot Spitzer Regarding the Federal Court Decision Upholding the Clean Air Act (Mar. 17, 2006), available at http://www.oag.state.ny.us/press/2006/mar/mar17b_06.html; Press Release, Office of the New York State Attorney General, Ten States Seek to Put New Dirty Air Rules on Hold (Feb. 6, 2003), available at http://www.oag.state.ny.us/press/2003/feb/feb06a_03.html; Press Release October 2003, *supra* note 3. In 2000, 1,396 old operating units were still running. See James E. McCarthy, *Clean Air Act: A Summary of the Act and Its Major Requirements*, in CLEAN AIR ACT: INTERPRETATION AND ANALYSIS 1, 33 (James P. Lipton ed., 2006). The older

2007] NEW YORK V. EPA MAY HAVE LIMITED IMPACT 839

rules were contrary to the plain language of the CAA;⁸ that EPA acted arbitrarily and capriciously by promulgating the rules;⁹ and that EPA exceeded its statutory authority.¹⁰ The D.C. Circuit Court addressed the legality of EPA's proposed rules in two separate opinions: *New York v. EPA (New York I)*,¹¹ decided in 2005, and *New York v. EPA (New York II)*,¹² decided in 2006. In *New York I*, the court considered the validity of the rule altering the measurement methods of plant emissions and found the rule to be largely valid and not arbitrary or capricious.¹³ In *New York II*, the court¹⁴ addressed the permissibility of a 20 percent threshold exemption for repairs and maintenance to power plants, and held that EPA's new 20 percent threshold exemption was invalid because it was contrary to the plain language of the CAA.¹⁵

This Note focuses on the court's second opinion, *New York II*, and its impact on reducing air pollution. Part I provides a background of the applicable portions of the CAA, EPA's role in the CAA, and how much flexibility EPA is given to set regulations. Part II addresses the holdings in *New York II*. Part III discusses the effects of the *New York II* ruling on several issues, including routine maintenance, repair and replacement (and whether it should still exist), and the Clean Air Interstate Rule, a recent cap system¹⁶ introduced by EPA to control air pollution. Part IV concludes that if the court had ruled in favor of the new regulation, it would likely have had a significant negative impact on the government's ability to regulate air pollution. Even though the *New York II* holding may be labeled as "pro-environment," its effect upon air pollution

operating units can produce up to forty times more criteria pollutants than new facilities. *See id.* Electrical plants also produce ground level ozone which can have severe impacts on the health of our lungs, causing asthma and breathing difficulties. It can also damage trees, plants and reduce crop yields. In 2004, approximately 95 million people were exposed to air filled with fine particulates above the National Ambient Air Quality Standards. *See* U.S. PIRG EDUCATION FUND, POLLUTION ON THE RISE: LOCAL TRENDS IN POWER PLANT POLLUTION 14, 17 (2005), available at http://www.uspirg.org/uploads/ed/5v/ed5vbjzqdDQe8_tNOL0W7w/pollutionontherise.pdf.

8. Final Opening Brief of Government Petitioners at 10–29, *New York II*, 443 F.3d. 880 (No. 03-1380), 2006 WL 137474.

9. *Id.* at 30–45.

10. *Id.* at 45–46.

11. 413 F.3d 3 (D.C. Cir. 2005).

12. 443 F.3d 880 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

13. 413 F.3d at 10–11, 44. The court upheld the new methods for calculating baseline actual emissions, the new rule's demand growth exclusion, and the use of plant wide applicability limitations, but it struck down EPA's facility exemptions because EPA lacked the power to determine such a status. *Id.*

14. The panel for the first rule consisted of Judge Tatel, Judge Rogers, and Senior Judge Williams. Senior Judge Williams was replaced by Judge Brown in the panel deciding the second rule.

15. 443 F.3d at 883, 890.

16. "Cap" programs address and limit the aggregate pollution released by all emitters. For more information on the Clean Air Interstate Rule, see *infra*, Part III.C.2.

regulation appears to be insignificant unless Congress or EPA take more steps to enforce NSR.

I. BACKGROUND

New Source Review is one of the major air pollution programs in the United States. Yet, since its inception in 1977, it has been criticized as being ineffective at curtailing the nation's air pollution problems.¹⁷ EPA has also been criticized for not effectively enforcing the program.

A. *Legal and Judicial Standards Governing Implementation of the CAA*

President Nixon established EPA in 1970 and charged it with the responsibility of "protecting the environment by abating pollution."¹⁸ The stated mission of EPA is "to protect human health and to safeguard the natural environment—air, water, and land—upon which life depends."¹⁹ As the executive agency responsible for implementing the CAA, EPA develops regulations enforcing the statute. And when the statute is unclear, EPA may interpret its meaning.²⁰ EPA's interpretations must be reasonable and cannot be in conflict with the CAA. Generally when courts review an agency's interpretation of a statute, they apply a test established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²¹ *Chevron* sets forth a two-part test.²² First the court must ask "whether Congress has directly spoken to the precise question at issue."²³ If Congress has spoken directly to the issue, the agency "must give effect to the unambiguously expressed intent of Congress."²⁴ Even if the plain meaning of the statute may appear absurd,

17. See Shi-Ling Hsu, *What's Old Is New: The Problem with New Source Review*, 29 REG. 36, 36 (2006). The grandfathering of existing plants has resulted in, among other things, "retarded turnover of the capital stock, increased the age of plants, driven up the costs of environmental improvement, and had counterproductive effects on emissions in the electricity-generating sector." Robert N. Stavins, *Vintage-Differentiated Environmental Regulation*, 25 STAN. ENVTL. L.J. 29, 55 (2006).

18. See Reorganization Plan No. 3 of 1970, 3 C.F.R. § 199, 199 (1970), *reprinted as amended in* 42 U.S.C. § 4321 note (2006).

19. EPA, History, <http://www.epa.gov/history/> (last visited Sept. 15, 2007). It is EPA's responsibility to implement environmental statutes including but not limited to the CAA.

20. See *generally* *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (laying out the judicial role in determining the relationship between statutes, agencies, and statutory interpretation).

21. *Id.* Please note that the Supreme Court added a "step zero" to the *Chevron* analysis in *United States v. Mead*. 533 U.S. 218 (2001). The D.C. Circuit court did not utilize step zero in its decision, and neither will I in this analysis.

22. *Chevron*, 467 U.S. at 842–43.

23. *Id.* at 842.

24. *Id.* at 843.

2007] NEW YORK V. EPA *MAY HAVE LIMITED IMPACT* 841

the court may require the agency to follow it.²⁵ If the statute is silent or ambiguous with regard to the issue at hand, then the court will apply step two of the *Chevron* test and defer to the agency interpretation as long as the interpretation “is based on a permissible construction of the statute.”²⁶

B. Pollution from Stationary Sources and New Source Review

As the health effects from air pollution became more evident in the mid-twentieth century, Congress enacted a comprehensive air pollution abatement scheme.²⁷ Originally referred to as the Air Quality Act, the scheme was amended and renamed the Clean Air Act in 1970.²⁸ The 1970 amendments charged the EPA with setting and enforcing air quality regulations.²⁹ The CAA also authorized EPA to oversee emissions from new and existing “major stationary sources,”³⁰ including power plants.

25. In *TVA v. Hill* the Supreme Court halted the construction of a nearly-complete multimillion-dollar dam to protect a fish on the endangered species list. 437 U.S. 153, 157–59 (1978). The Court strictly followed the plain language of the Endangered Species Act even though Congress had appropriated more money for the construction of the dam knowing that completion of the dam could eliminate an endangered species. *See id.* at 172–74.

26. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (citations omitted). An agency’s statutory construction must be reasonable to be given deference.

27. Congress passed the Air Quality Act in 1955, which “provided funds for federal research in air pollution.” *See* The Air Pollution Control Act, ch. 360, § 1, 69 Stat. 322 (1955) (current version at 42 U.S.C. § 7401 (2006)); *see also* EPA, Module 7: Regulatory Requirements, <http://www.epa.gov/eogapt1/module7/caa/caa.htm> (last visited Sept. 15, 2007).

28. The Air Quality Act proved to be ineffective, and Congress amended it in 1963 and again in 1967 and 1970 to more accurately address the problem of air pollution. It was not until the 1970 amendments that a “major shift” occurred in the regulation of air pollution. *See* CHARLES O. JONES, CLEAN AIR: THE POLICIES AND POLITICS OF POLLUTION CONTROL 27 (1975). The 1970 amendments provided the federal and state governments with comprehensive air pollution regulations that could be enforced against violators. It also introduced two new air pollution programs: the National Ambient Air Quality Standards (“NAAQS”) and the New Source Performance Standards. *See* Clean Air Act Amendments of 1977, 42 U.S.C. § 7407 (1977), *amended by* 42 U.S.C. § 7407 (1990).

29. The Clean Air Act Amendments of 1970 required EPA to establish NAAQS for emissions that “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7408(a)(1)(A). The compounds that fit within the NAAQS regulation are termed “criteria pollutants.” *See* EPA, Air Quality, <http://earth1.epa.gov/air/oaqps/cleanair.html> (last visited Sept. 15, 2007). The NAAQS are not to be exceeded in any area of the United States. *See* Richard E. Ayres & Mary Rose Kornreich, *Setting National Ambient Air Quality Standards*, in THE CLEAN AIR ACT HANDBOOK 13, 13 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004). NAAQS consist of both “primary standards” and “secondary standards.” The primary standards set limits for air pollutants that result in public health problems. *See* 40 C.F.R. § 50.2(b) (2007). These standards are to recognize and be inclusive of sensitive groups such as asthmatics, children and the elderly. EPA, National Ambient Air Quality Standards (NAAQS), <http://www.epa.gov/air/criteria.html> (last visited Dec. 16, 2006) [hereinafter NAAQS]. The secondary standards are set at limits that will protect public welfare “from any known or anticipated adverse effects of a pollutant.” *See* 40 C.F.R. § 50.2(b). The domain of public welfare includes “decreased visibility, damage to

When the CAA was again amended in 1977, Congress introduced NSR, a preconstruction permitting program. NSR requires companies to apply for and obtain a permit prior to building a new power plant or “modifying”³¹ an existing plant.³² “Modification,” as applied to NSR, is defined as “*any* physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”³³

In theory, NSR regulates emissions from all stationary sources. Any major³⁴ new or modified facility is required to obtain a preconstruction permit.³⁵ Under Title V of the Clean Air Act Amendments of 1990, the facility is also required to obtain an operating permit.³⁶ The operating permit requires facilities to demonstrate that pollution control devices will be installed and imposes continuing environmental protection

animals, crops, vegetation, and buildings.” NAAQS, *supra*. In the seven years following the enactment of the Clean Air Act, not a single steel mill fully complied with the CAA, and approximately 50 percent of the refineries, pulp mills, and large commercial boilers were not in compliance with the CAA. The ineffectiveness of the 1970 amendments led to more amendments in 1977. Scott Hill, Clean Air Act Amendments of 1977, <http://72.14.253.104/search?q=cache:EACSt8p1DtEJ:www.colorado.edu/MCEN/APControl/CAA1977.pdf+1970+amendments+1977&hl=en&ct=clnk&cd=2&gl=us> (last visited Oct. 30, 2007).

30. Clean Air Act, 42 U.S.C. § 7502(c)(5). Stationary sources under the CAA “means any building, structure, facility, or installation which emits or may emit any air pollutant.” *See id.* § 7411(a)(3).

31. *New York II* focuses on what constitutes a modification under NSR. *See New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

32. *See* 42 U.S.C. § 7411(a)(2); Bernard F. Hawkins, Jr. & Mary Ellen Ternes, *The New Source Review Program: Prevention of Significant Deterioration and Nonattainment New Source Review*, in THE CLEAN AIR ACT HANDBOOK, *supra* note 29, at 131; Environmental Defense, Clean Air Act Timeline, http://www.environmentaldefense.org/documents/2695_cleanairact.htm (last visited Sept. 15, 2007). NSR was enacted to ensure that “new sources are as clean as appropriate technology can make them and existing sources become cleaner over time.” ARNOLD W. REITZE JR., STATIONARY SOURCE AIR POLLUTION LAW 180 (2005).

33. 42 U.S.C. § 7411(a)(4) (2006) (emphasis added).

34. A “[m]ajor stationary source means . . . [a]ny stationary source of air pollutants that emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant, except that lower emissions thresholds shall apply” in areas with elevated levels of air pollution. 40 C.F.R. § 51.165(a)(1)(iv)(A) (2007). *See* 40 C.F.R. § 51.165 for more information on what constitutes a major stationary source.

35. The preconstruction permitting system is a combination of the state implementation program and the federal air operating permitting program. *See* EPA, New Source Review (NSR): Where You Live, <http://www.epa.gov/nsr/where.html> (last visited Sept. 15, 2007). Requiring a preconstruction permit helps ensure that the new or modified source will not result in significant degradation of air quality by assuring that the plant will meet the necessary pollution requirements. *See* EPA, New Source Review (NSR), <http://www.epa.gov/nsr/> (last visited Oct. 30, 2007).

36. Clean Air Act, 42 U.S.C. § 7408(h). “Operating permits are legally enforceable documents that permitting authorities issue to air pollution sources after the source has begun to operate.” EPA, Operating Permits: Basic Facts, <http://www.epa.gov/air/oaqps/permits/index.html> (last visited Sept. 15, 2007) [hereinafter Operating Permits].

2007] NEW YORK V. EPA *MAY HAVE LIMITED IMPACT* 843

requirements.³⁷ The purpose of the permits³⁸ is to ensure that the implemented technology meets the minimum standards set forth in the CAA.³⁹

At the time NSR was first implemented in 1977, Congress was concerned about the economic burdens many existing facilities would face if they were subject to new pollution requirements.⁴⁰ In order to ease the economic hardship associated with reducing pollution, lawmakers allowed existing facilities to continue operating at their current levels of pollution, a practice commonly referred to as “grandfathering.”⁴¹ The idea was that older facilities would trigger the NSR permitting requirements when they modified their plants in the normal course of business.⁴²

In addition to the grandfathering exception established by Congress, EPA allowed a de minimis exception for existing plants engaged in “routine maintenance, repair, and replacement.”⁴³ This exception is triggered when a plant makes a modification to its plant but the modification is considered a routine maintenance, repair or replacement, and the modification only results in a de minimis increase in air pollution.⁴⁴ EPA did not define what constitutes a routine maintenance, repair or replacement, and left the practical application broad and unclear.

37. See Operating Permits, *supra* note 36.

38. The permits are legally binding on the facility owners and operators and set forth “what construction is allowed, what emission limits must be met, and how often the emissions source must be operated.” EPA, New Source Review (NSR), <http://www.epa.gov/nsr/> (last visited Sept. 15, 2007).

39. See Clean Air Act, 42 U.S.C. § 7410 (2006). Each state must develop a state implementation plan that “provides for implementation, maintenance, and enforcement of” emissions standards that meet the minimum NSR requirements. *Id.* § 7410(a)(1). The installed pollution devices must comply with the state implementation plan. If a state does not implement its own plan, it must comply with a federally delegated program. Approximately three-quarters of the states have implemented their own programs. See REITZE, *supra* note 32, at 181.

40. See Victor B. Flatt & Kim Diana Connolly, ‘Grandfathered’ Air Pollution Sources and Pollution Control: New Source Review Under the Clean Air Act, 504 CTR. FOR PROGRESSIVE REG. WHITE PAPER 1 (2005), available at http://www.progressivereform.org/articles/NSR_504.pdf; see also Hsu, *supra* note 17, at 36.

41. See Flatt & Connolly, *supra* note 40, at 1; see also Hsu, *supra* note 17, at 36–37.

42. See Flatt & Connolly, *supra* note 40, at 1.

43. The routine maintenance, repair and replacement exception has been recognized since NSR was first implemented. See Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974) (codified at 40 C.F.R. § 52.01(d)(1) (2007)).

44. See 40 C.F.R. § 52.21(i)(5)(i)–(ii) (2007); see also Memorandum from Don R. Clay, Acting Assistant for the Office of Air & Radiation, U.S. EPA, to David A. Kee, Director, Air & Radiation Div., U.S. EPA, at 3 (Sept. 9, 1988), available at http://www.epa.gov/ttn/nsr/psd1/pdf/p4_37.pdf. The exception was created because the EPA thought that it would be absurd to require a plant to install million-dollar pollution controls when it was just replacing an old hose.

In *Wisconsin Electric Power Co. (WEPCo)*, the Seventh Circuit established that “routine maintenance, repair and replacement” should be determined on a case-by-case basis taking into consideration “the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding.”⁴⁵ In *WEPCo*, a plant submitted plans to update its Port Washington Units. The updates were needed to extend the life of the units. The court declared that the updates triggered NSR because the modifications did not fall under the routine maintenance, repair and replacement exception when the above factors were considered.⁴⁶

Neither environmentalists nor the industrial sector have been satisfied with the implementation of the NSR program or the case-by-case approach to the routine maintenance, repair and replacement exception.⁴⁷ After ten years of brainstorming, research, and pilot studies,⁴⁸ EPA issued revised NSR permitting schemes for stationary sources in 2002 and 2003.⁴⁹ Part of the 2003 revisions introduced a new NSR scheme called the Equipment Replacement Program.⁵⁰ This program provides a bright line rule that allows electrical companies to update older plants without installing pollution controls as long as the costs of the

45. *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 910 (7th Cir. 1990) (citing Memorandum from Don R. Clay, *supra* note 44, at 3).

46. *Id.* at 912.

47. See Howard Gruenspecht & Robert Stavins, *A Level Field on Pollution at Power Plants*, BOSTON GLOBE, Jan. 26, 2002, at A15; see also Inho Choi, *Is the U.S. Environmental Protection Agency's Revised New Source Review Rule Moving in the Right Direction?: A Deepened New Source Bias, and the Need for Pursuing Sustainable Energy Development in Air Pollution Control Law*, 35 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,316, 10,319 (2005).

48. See EPA, *New Source Review (NSR): Fact Sheet, New Source Review Report and Improvements*, <http://www.epa.gov/nsr/facts.html> (last visited Aug. 19, 2007). In the early 1990s, EPA came to the consensus that NSR was ineffective and needed reform. In 1993, EPA formed a subcommittee to the Clean Air Act Advisory Committee to research the issue. See Choi, *supra* note 47, at 10,319.

49. See *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR)*, 67 *Fed. Reg.* 80,186 (Dec. 31, 2002) (final rule) (codified at 40 C.F.R. pts. 51, 52); *Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR)*, 68 *Fed. Reg.* 61,248 (Oct. 27, 2003) (final rule) (codified at 40 C.F.R. pts. 51, 52); Darren Samuelsohn, *Clean Air: Bush Admin. Rolls Out NSR Changes*, GREENWIRE, June 13, 2002. When EPA revised NSR, it focused on defining parts that were previously unclear rather than addressing the air pollution problems created by grandfathering old plants. *Id.*

50. The Equipment Replacement Program states:

Without regard to other considerations, routine maintenance, repair and replacement includes, but is not limited to, the replacement of any component of a process unit with an identical or functionally equivalent component(s), and maintenance and repair activities that are part of the replacement activity . . . [It also] establishes that the fixed capital cost of the replacement component(s) cannot exceed 20 percent of the replacement value of the process unit . . .

40 C.F.R. § 52.21(cc) (2007); see also Matthew H. Snell, *Major Modifications and Routine Maintenance: Does the EPA's New Exclusion Equal More Pollution*, 39 *NEW ENG. L. REV.* 207, 214–15 (2004).

2007] NEW YORK V. EPA *MAY HAVE LIMITED IMPACT* 845

modifications do not exceed 20 percent of the current replacement value of the process unit regardless of any increase in emissions that might result.⁵¹ The replacement value can be established using one of four methods: (1) the total replacement cost of the new process unit; (2) invested cost, adjusted for inflation; (3) the insurance value of the equipment, where the insurance value covers complete replacement of the process unit; or (4) other accounting procedure, based on Generally Accepted Accounting Principles.⁵² Because the Equipment Replacement Program creates a bright line rule as to what constitutes routine maintenance, repair or replacement, it would eliminate the case-by-case approach established by *WEPCo*. EPA did not introduce any conclusive evidence to prove that the new Equipment Replacement Program would result in a reduction of emissions.⁵³ Rather, the new regulations appeared to be welcomed by the electrical plants,⁵⁴ and rejected by the environmentalists as “creat[ing] a gigantic loophole that thwarts the original intent of the CAA.”⁵⁵

Regardless of the test being applied to the routine maintenance, repair and replacement exception, it is difficult for either EPA or states to know when plants make modifications.⁵⁶ The plants determine whether or not they want to report their modifications to the applicable state agent or EPA. When deciding whether or not to comply, “the ‘rational’ choice [for a power company is] to do as your competition does and run the risk of detection” because the modification is unlikely to be detected by EPA’s limited enforcement program—the NSR permitting process takes a lot of time and money.⁵⁷ The self-monitoring requirement in the NSR Program has contributed to “only partial[] achieve[ment of] the goal of cost-effectiveness while weakening environmental protection.”⁵⁸

51. See 40 C.F.R. § 52.21(cc)(i) (2007).

52. EPA, *EPA Announces Next Step to Improve the New Source Review Program*, EPA NEWSROOM, Aug. 27, 2003, available at <http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/42b84905a294bf5f85256d8f00686347>.

53. See NATIONAL RESEARCH COUNCIL, *NEW SOURCE REVIEW FOR STATIONARY SOURCES OF AIR POLLUTION 2* (2006), available at http://www.nap.edu/catalog.php?record_id=11701.

54. For a detailed description of why the regulated parties were in favor of the new regulations, see Mary Ellen Hogan, *Making Sense of the New Source Review*, OCCUPATIONAL HAZARDS, May 13, 2004, available at <http://www.occupationalhazards.com/News/Article/36991/ArticleDraw.aspx>.

55. Snell, *supra* note 50, at 207.

56. See Jamison E. Colburn, *The Future of Air Pollution Control in the Corporatist State*, 34 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,577, 10,601 (2004).

57. See *id.*; see also Howard K. Gruenspecht & Robert N. Stavins, *New Source Review Under the Clean Air Act: Ripe for Reform*, 147 *RESOURCES* 19, 21 (2002), available at <http://www.rff.org/Documents/RFF-Resources-147-newsources.pdf>.

58. Todd B. Adams, *New Source Review Under the Clean Air Act: Time for More Market-Based Incentives?*, 8 *BUFF. ENVTL. L.J.* 1, 14 (2000).

The only time a major plant modification will be discovered by EPA or a state is when either one decides to conduct an investigation of a plant. During the Clinton administration, both the EPA⁵⁹ and state governments⁶⁰ instigated numerous investigations against power companies. Many of the audited plants made past modifications that triggered the NSR permitting process, but the plants did not apply for permits or install the necessary pollution control equipment. These NSR violations resulted in the U.S. Department of Justice filing multiple lawsuits against power companies near the end of Clinton's term, in 1999 and 2000.⁶¹ Some of these suits were settled. A few companies chose to litigate the issue. Before all of the cases were decided or the continuing investigations completed, President Bush took office, and the EPA began drafting the 20 percent exception rule. The new rule, exempting modifications of up to 20 percent the value of the entire plant, undermined most of these lawsuits. EPA's Office of Compliance and Enforcement Assurance estimated that with the introduction of this rule, only five small power plants would still be in violation of the NSR permitting process.⁶² EPA dropped all of the ongoing investigations once the new NSR rules were promulgated.⁶³

The solution to reducing air pollution from older power plants is neither easy nor obvious. Power plant proponents assert that if the NSR regulations are strictly enforced then many plants will be forced to shut down or operate at an inefficient level because they cannot afford to make the required environmental upgrades.⁶⁴ Retrofitting old electrical plants can cost a company hundreds of millions of dollars. The power industry has been relatively successful thus far in its fight to keep

59. See *Clean Air Violators Off the Hook*, ENVIRONMENT NEWS SERVICE, Nov. 6, 2003, available at <http://www.ens-newswire.com/ens/nov2003/2003-11-06-02.asp>. Before the Clinton administration's efforts to enforce NSR against power companies, NSR enforcement focused on facilities other than the power companies. See DEP'T OF JUSTICE, *NEW SOURCE REVIEW: AN ANALYSIS OF THE CONSISTENCY OF ENFORCEMENT ACTIONS WITH THE CLEAN AIR ACT AND IMPLEMENTING REGULATIONS*, at i (2002) [hereinafter DOJ REPORT].

60. See Andrew C. Revkin, *In New Tactic, State Aims to Sue Utilities Over Coal Pollution*, N.Y. TIMES, Sept. 15, 1999, at A1. States do a lot of the permitting and enforcement under the NSR. In 1999, Eliot Spitzer, New York State Attorney General, sent notices of intent to sue to seventeen power plants. *Id.*

61. See DOJ REPORT, *supra* note 59, apps. I, III.

62. OFFICE OF INSPECTOR GENERAL, *EVALUATION REPORT: NEW SOURCE REVIEW RULE CHANGE HARMS EPA'S ABILITY TO ENFORCE AGAINST COAL-FIRED ELECTRIC UTILITIES* (2004), at iii, available at <http://www.epa.gov/oigearth/reports/2004/20040930-2004-P-00034.pdf>.

63. See *Clean Air Act Violators Off the Hook*, *supra* note 59. States still have the ability to pursue these suits against the violating plants. However, state enforcement does not solve the problem created by air pollution originating from out of state power plants.

64. Some companies may be forced to choose between upgrading or shutting down. However, most beneficial pollution controls do not come without a price tag attached. See generally *The Cost of Cleaner Air is Well Worth Paying*, USA TODAY, Nov. 29, 1996, at 12A.

2007] NEW YORK V. EPA *MAY HAVE LIMITED IMPACT* 847

grandfathered power plants in a pre-NSR-program state⁶⁵ even though these older plants contribute a higher ratio of emissions to electricity than the new plants that are required to install pollution controls.⁶⁶ It is more economical for plants to restructure their operations so that upgrades can be shoehorned into the routine repair and maintenance definitions and exempted from NSR permitting requirements.⁶⁷

II. D.C. CIRCUIT HOLDS THAT THE CLEAN AIR ACT PRECLUDES EPA'S DEFINITION OF "ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT"

A. *Facts*

EPA finalized the new NSR rules on October 27, 2003, which were to become effective on December 26, 2003.⁶⁸ However, on November 14, 2003, New York⁶⁹ challenged the regulations, and the D.C. Circuit Court granted an emergency stay.⁷⁰ The petitioners, comprised of a coalition of states, cities, environmental groups, and health advocates, alleged that the rule involving routine maintenance, repair and replacement was contrary to the plain language of the statute.⁷¹ Both parties agreed that the phrase "physical change" includes equipment replacements.⁷² At issue was the definition of "modification." The CAA defines modification as "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."⁷³ The parties disagreed as to the significance of the qualifier "any" immediately preceding the words "physical change."⁷⁴ The petitioners argued that the qualifier "any" means that "physical change" includes every physical change that increases emissions.⁷⁵ Both parties agreed that "physical change" is "susceptible to multiple meanings," and EPA asserted that it is no less ambiguous when "any" is placed before

65. See McCarthy, *supra* note 7, at 35.

66. See NATIONAL RESEARCH COUNCIL, *supra* note 53, at 4.

67. Larry B. Parker & John E. Blodgett, Air Quality and Electricity: Enforcing New Source Review (Cong. Res. Serv., CRS Report for Congress Order Code RL30432, Jan. 31, 2000), available at <http://ncseonline.org/nle/crsreports/air/air-35.cfm>.

68. See EPA, Final Rule to Reflect the Court Stay of EPA's New Source Review Equipment Replacement Provision, <http://www.epa.gov/NSR/documents/factstay629.pdf> (last visited Sept. 16, 2007) [hereinafter EPA's Final Rule].

69. New York was joined by fourteen other states, the District of Columbia and other environmental organizations. See *supra* note 1.

70. See EPA's Final Rule, *supra* note 68.

71. Final Opening Brief of Government Petitioners, *supra* note 8, at 10-14.

72. New York v. EPA, 443 F.3d 880, 885 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 2127 (2007).

73. Clean Air Act, 42 U.S.C. § 7411(a)(4) (2006) (emphasis added).

74. See *New York II*, 443 F.3d at 884-85.

75. See Final Opening Brief of Government Petitioners, *supra* note 8, at 11.

it.⁷⁶ EPA thus argued that step one of *Chevron* was met (the statute is ambiguous), and that under step two, the court should apply substantial deference to the agency's interpretation.⁷⁷

On March 17, 2006, the D.C. Circuit, applying *Chevron*, rejected EPA's argument and held that the plain language of the CAA was unambiguous.⁷⁸

B. Holding in New York II

The D.C. Circuit Court reasoned that EPA's argument failed on a variety of grounds.⁷⁹ First, "previous judicial interpretations of [the CAA] section 111(a)(4) have all reached the conclusion that the [CAA] text must be read broadly."⁸⁰ In *Alabama Power Co. v. Costle*, the court concluded that modification should be read broadly and that it is "nowhere limited to physical changes exceeding a certain magnitude."⁸¹ The court in *WEPCo* found that "the purposes of the 1977 amendments to the Act required an expansive reading of the plain language of section 111(a)(4)" of the CAA.⁸² In the instant case, the D.C. Circuit Court asserted that the expansive reading of section 111(a)(4) of the CAA supports the argument that the plain language of the statute does not allow for the new equipment replacement rule.⁸³

The court also relied on the language in *TRW Inc. v. Andrews* where the Supreme Court asserted that effect must be given to each word of a statute.⁸⁴ To follow EPA's reasoning that "any" does not affect how "physical change" is interpreted would give "virtually no role for 'any' to play" and make the word "'insignificant' if not 'superfluous.'"⁸⁵ EPA's reading of the statute would violate several canons of statutory interpretation including: interpreting statutes in accordance with their

76. *New York II*, 443 F.3d at 885.

77. See Final Brief of Respondent United States Environmental Protection Agency at 97-99, *New York II*, 443 F.3d 880 (No. 03-1380), 2006 WL 137472.

78. EPA filed a petition for a writ of certiorari with the Supreme Court on November 27, 2006, which was denied on April 30, 2007. See *New York v. EPA*, 127 S. Ct. 2127 (2007); Petition for a Writ of Certiorari, *New York II*, 127 S. Ct. 2127 (No. 06-736), 2006 WL 3419830.

79. See *New York v. EPA*, 443 F.3d 880, 886 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007). The court relied on *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), *Wis. Elec. Power Co. v. Reilly (WEPCo)*, 893 F.2d 901 (7th Cir. 1990), and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

80. *New York II*, 443 F.3d at 886.

81. *Alabama Power*, 636 F.2d at 400.

82. *New York II*, 443 F.3d at 886 (citing *WEPCo*, 893 F.2d at 908-10).

83. See *id.*

84. 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citations omitted)).

85. *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

2007] NEW YORK V. EPA *MAY HAVE LIMITED IMPACT* 849

plain meaning, doing the least violence to the text possible, and avoiding absurd results.⁸⁶ Additionally, EPA's approach "would require Congress to spell out all the applications covered by a definition before a court could conclude that Congress had directly spoken regarding a particular application, ignoring the fact that a definition, like a general rule, need not list everything it covers."⁸⁷ The court stated that if EPA's argument were valid, the definition of "modification" would be required to have qualifier language such as "regardless of size, cost, frequency, effect, or other distinguishing characteristic[s]."⁸⁸

The court agreed with the petitioners' arguments regarding the significance of the qualifier "any."⁸⁹ The definition of "any physical change" is limited to those changes that "increase[] the amount of any air pollutant emitted by such source or which result[] in the emission of any air pollutant not previously emitted."⁹⁰ Because Congress specifically identified this limitation based upon "physical changes," the court found that it "must presume that Congress acted 'intentionally and purposely' when it did not include others."⁹¹ Thus, "any" has significant meaning. The court stated that when "any" is placed before a phrase, the phrase will encompass all the meanings that it may hold and "the agency may not pick and choose among them."⁹²

The court vacated the Equipment Replacement Program based on its inconsistency with the plain language of the statute.

III. WHILE A WIN FOR THE ENVIRONMENT, THE COURT COULD HAVE DONE MORE

Although the holding in *New York II* is consistent with previous case law, it does little to help NSR become a more effective air pollution program.

86. *See id.*; *see also* WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 721, 819–20 (3d ed. 2001).

87. *New York II*, 443 F.3d at 887 (citing *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 229 (D.C. Cir. 2001)).

88. *Id.*

89. *See id.*

90. Clean Air Act, 42 U.S.C. § 7411(a)(4) (2006).

91. *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)), *cert. denied*, 127 S. Ct. 2127 (2007).

92. *Id.* at 888.

*A. The Court's Invalidation of the 20 Percent Bright Line
Rule Is Consistent with the Current Case Law
and Statutory Interpretation Principles*

The holding in *New York II* is consistent with the D.C. Circuit Court's earlier holding in *Alabama Power* and the NSR legislative history.

In *Alabama Power*,⁹³ the D.C. Circuit court addressed the types of changes that qualify as "modifications" under NSR.⁹⁴ Similar to *New York II*, EPA issued rules expanding the modification exemption. The exemptions covered any plant changes resulting in increased emissions up to fifty tons per year.⁹⁵ EPA justified its stance not on the fact that the exemption was consistent with the plain language of the Clean Air Act, but that the exemption was more cost effective.⁹⁶ The court disagreed with EPA's approach, stating: "Implementation of the statute's definition of 'modification' will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs with an exception for *de minimis* increases."⁹⁷ Following the reasoning in *Alabama Power*, *New York II* limited NSR permitting exemptions to routine projects that result in *de minimis* emissions increases.

The holding in *New York II* also tracks the legislative intent of the CAA. The 1970 CAA amendments were enacted to "speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again."⁹⁸ In the debates during the passage of the Clean Air Act Amendments of 1977, Senator Muskie commented that "[a] source . . . is subject to all the nonattainment requirements as a modified source if it makes *any physical change* which increases the amount of any air pollutant."⁹⁹ Had the court upheld EPA's new rule, it would have been contrary to the congressional intent of the CAA.¹⁰⁰ Some studies have shown that more than 90 percent of all the power plants inspected for NSR violations would be exempt under EPA's new rule.¹⁰¹ Although the legislative history acknowledges a concern for economic burdens,¹⁰²

93. *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979).

94. *See id.* at 400.

95. *See id.* at 356.

96. *See id.*

97. *Id.* at 400.

98. H.R. REP. NO. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356.

99. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 853 (1984) (quoting 123 CONG. REC. H26847 (1977) (statement of Rep. Muskie)) (emphasis added).

100. Although courts tend to give more weight to the plain language of a statute when interpreting it, the legislative intent may also affect the final interpretation.

101. OFFICE OF INSPECTOR GENERAL, *supra* note 62, at 11.

102. H.R. REP. NO. 95-294, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1090.

2007] NEW YORK V. EPA *MAY HAVE LIMITED IMPACT* 851

implementation of the equipment replacement rule would contradict the enactment of the CAA because it would in essence render the NSR moot.

Even if the court had agreed with EPA that the phrase “any physical change” is ambiguous and proceeded to the second step of the *Chevron* analysis, the result would have likely been the same. A bright line rule that exempts from NSR any modification costing less than 20 percent of the current replacement value of the process unit would essentially eliminate the NSR program and would have been unreasonable—there would be almost no modification that would trigger NSR permitting. It must be assumed that Congress enacted the statute with the intention of it being enforced, not discarded.¹⁰³ Thus, the court would likely have found EPA’s construction of the statute to be unreasonable and discarded the new rule.

B. The Problem With Grandfathering and De Minimis Exceptions

The grandfathering of old plants was not intended to exempt plants from pollution controls indefinitely. There were both economic and expectation incentives¹⁰⁴ at the time of NSR’s enactment to allow for the continuous operation of the plants without installation of the appropriate pollution controls. However, it was not anticipated that the exemption would “constitute a perpetual immunity from all standards under the PSD [Prevention of Significant Deterioration] program.”¹⁰⁵ The idea behind grandfathering was that plants would eventually need to update and make “modifications” to keep running or be required to shut down.¹⁰⁶ Thus, the necessary modifications would trigger the NSR permitting program. EPA perpetuated the industry’s ability to avoid NSR permitting by allowing modifications that fell under routine maintenance, repair and replacement to be exempt. In practice, the NSR program gives plant operators a perverse incentive to spread maintenance out over time so that each individual modification qualifies under the routine maintenance, repair and replacement exception. This behavior effectively eliminates any difference between a “modification” and “routine maintenance.”¹⁰⁷

103. The fact that EPA dropped investigations against seventy of the power plants once the new NSR regulations were created shows the overreaching effects of eliminating the NSR program. See Christopher Drew & Richard A. Oppel Jr., *Lawyers at E.P.A. Say It Will Drop Pollution Cases*, N.Y. TIMES, Nov. 6, 2003, at A1.

104. “[A] dramatic and sudden regulatory change [would] frustrate[] the expectations of owners of existing facilities and would discourage investment.” Hsu, *supra* note 17, at 36.

105. *Alabama Power v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). The PSD program specifies the criteria such that emitters are in compliance with NSR. See EPA, New Source Review (NSR), Prevention of Significant Deterioration (PSD) Basic Information, <http://www.epa.gov/nsr/psd.html> (last visited Oct. 23, 2007).

106. See Flatt & Connolly, *supra* note 40, at 1.

107. See Parker & Blodgett, *supra* note 67.

After the holding in *New York II*, the standard for determining whether a modification triggers NSR returns to the case-by-case analysis established by *WEPCo*.¹⁰⁸ The case-by-case approach may not render NSR meaningless on its face, but there is always the question of how EPA conducts the case-by-case reviews.¹⁰⁹ Because the reviews are conducted behind closed doors, it is possible that EPA “applies” all of the factors, but still uses the 20 percent cost cutoff as the indicator of when NSR is triggered.

How EPA conducts the case-by-case analysis is only significant if EPA decides to initiate the NSR review process in the first place or if a citizen suit actively seeks out a company that may be in violation. EPA is responsible for a multitude of issues and is constrained by time, money and resources as to how many power plants and which ones it actively regulates. The administration determines where to put its time and effort, which may not be towards NSR enforcement.¹¹⁰ It was not until the early 1990s that EPA made a significant effort to ensure power companies were complying with NSR.¹¹¹

The problems of initiating NSR review and figuring out how EPA conducts NSR review may be lessened if the de minimis exception were eliminated altogether. In *New York II*, the D.C. Circuit Court explicitly chose not to address EPA’s application of de minimis exceptions, stating that it “expresses no opinion regarding EPA’s application of the *de minimis* exception”¹¹² The decision not to address the de minimis exception may be due to the fact that EPA did not argue that the Equipment Replacement Program fell under the de minimis exception and/or that it would have been very controversial for the court to change how the de minimis exception has been applied over the past couple of decades. Whatever the court’s reasoning for not addressing the de minimis exception, it was within the court’s jurisdiction to interpret “any physical change” even more broadly and eliminate the de minimis exception altogether.

The de minimis exception was first introduced by EPA based on the background legal principle that “the law cares not for trifles.”¹¹³

108. *Wis. Elec. Power Co. v. Reilly (WEPCo)*, 893 F.2d 901, 910 (7th Cir. 1990). On March 29, 2007, a federal district court in Kentucky held that routine maintenance, repair and replacement is determined by the criteria set forth in *WEPCo*. See *United States v. E. Ky. Power Coop., Inc.*, 498 F. Supp. 2d 976, 993 (E.D. Ky. 2007).

109. And any determination made is given significant deference.

110. Prior to the 1990s, EPA focused its NSR enforcement on facilities outside of the electrical business. See DOJ REPORT, *supra* note 59, at ii.

111. See Colburn, *supra* note 56, at 10,598–99 (seven enforcement cases were filed in 1999 and another twelve in 2000); see also DOJ REPORT, *supra* note 59, at ii.

112. *New York v. EPA*, 443 F.3d 880, 888 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

113. See *id.* at 888.

Application of the de minimis exception makes sense with small equipment updates like hose replacements.¹¹⁴ Yet this exception has allowed over 1,300 grandfathered power plants to remain operating thirty years after passage of the CAA without the installation of pollution controls. These plants emit a disproportionate amount of the current air pollution¹¹⁵ resulting in substantial damages exceeding the “nominal damages” that characterize de minimis exceptions.¹¹⁶

Although the de minimis exception may have resulted in minimal environmental impacts when NSR was first enacted in 1977, the exception has now led to environmental damage that is no longer “too small to bother with.” Grandfathered sources under the CAA “were eventually expected to either cease operation from age or, if changes were made to modernize or upgrade them, only continue with the addition of modern pollution controls required of all new sources.”¹¹⁷ The phasing out of old plants has not occurred, and instead the NSR exemption has “crippled the [NSR] program,” making it “wholly inapplicable to the worst sources of air pollution in the nation.”¹¹⁸

The text of the CAA supports an interpretation of “modification” that excludes exceptions altogether. For purposes of NSR, “modification” is defined as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”¹¹⁹ The definition does not explicitly include any exceptions. However, the section of the CAA addressing hazardous air pollutants¹²⁰ does include an explicit exception for de minimis increases in emissions: “Modification” includes:

114. “Some injuries are just too small for courts to bother with.” *Rains v. Presley*, No. 96-C-6684, 1997 WL 139467, at *2 (N.D. Ill. Mar. 25, 1997).

115. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *A BREATH OF FRESH AIR: REVIVING THE NEW SOURCE REVIEW PROGRAM* 89–91 (2003), available at <http://71.4.192.38/NAPA/NAPAPubs.nsf/17bc036fe939efd685256951004e37f4> (follow “A Breath of Fresh Air Reviving the New Source Review Program” hyperlink and then the “Fresh Air Full Report.pdf” icon). Older plants exceed newer plants in pollution levels because the older plants are either in “noncompliance” or they are “tak[ing] steps to avoid obtaining an NSR permit” through legal means. See *id.* at 111.

116. See *City of Talladega v. Ellison*, 79 So. 2d 551, 553 (Ala. 1955).

117. Victor Flatt, ‘Grandfathered’ Air Pollution Sources and New Source Review, <http://www.progressiveregulation.org/perspectives/grandfather.cfm> (last visited Oct. 6, 2007).

118. See Colburn, *supra* note 56, at 10,598.

119. Clean Air Act, 42 U.S.C. § 7411(a)(4) (2006).

120. Hazardous air pollutants are chemicals that can cause adverse effects to human health or the environment. The CAA regulates hazardous air pollutants and criteria pollutants separately. See ELIZABETH H. MIKOLS, AMARJIT GILL & ANN DOUGHERTY, *THE REGULATION OF HAZARDOUS AIR POLLUTANTS UNDER THE CLEAN AIR ACT AMENDMENTS OF 1990: EFFECTS ON THE PORTLAND CEMENT INDUSTRY* 485–86 (1995), available at <http://ieeexplore.ieee.org/iel3/3930/11379/00514349.pdf?arnumber=514349>; see also John C.

any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source *by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.*¹²¹

It is common practice in statutory interpretation to look to other sections of the same statute or similar statutes for guidance on how to interpret statutory language. The Supreme Court has stated that the interpretation of a statute is approached holistically by looking at all sections of a statute.¹²² Echoing the Supreme Court, the court in *New York II* stated that “[o]nly in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view.”¹²³ Had Congress intended that there be a de minimis exemption in the NSR language of the CAA without making it explicit, there would be no reason to add explicit language for a de minimis exemption in a subsequent section of the CAA; adding such language would be “superfluous.”¹²⁴ Yet thirteen years after enacting NSR, Congress explicitly added language exempting de minimis increases in emissions for hazardous air pollutants. It is commonly understood that when “Congress includes particular language in one section of a statute but omits it in another section of the same act... Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹²⁵ Thus it can be presumed that Congress did not intend for any exceptions to apply to NSR “modifications.”¹²⁶

The de minimis exception should be eliminated, and the D.C. Circuit had the opportunity to address the issue in *New York II*, but decided against it. Elimination of the de minimis exception is consistent with

Dernbach, *The Unfocused Regulation of Toxic and Hazardous Pollutants*, 21 HARV. ENVTL. L. REV. 1, 12 (1997).

121. 42 U.S.C. § 7412(a)(5) (emphasis added).

122. See *Regions Hosp. v. Shalala*, 522 U.S. 448, 466 (1998); see also *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

123. *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 2127 (2007).

124. The hazardous air pollutant program was established over a decade after the enactment of the NSR Program. See Clean Air Act of 1990, Pub. L. No. 101-549, § 301, 104 Stat. 2400, 2531 (1990) (codified at 42 U.S.C. § 7412). Title III of the Clean Air Act Amendments of 1990 addresses the control of hazardous air pollutants from major sources of air pollution in the United States. Congress identified 189 compounds as hazardous air pollutants to be regulated by EPA. Previous to the 1990 amendments, there was a program in place called the National Emission Standards for Hazardous Air Pollutants, but Congress found the program ineffective.

125. *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

126. See Robert L. Munroe, *The Clean Air Act Amendments of 1990: Will Hazardous Air Pollutants Finally Be Regulated?*, 5 ADMIN. L.J. 161, 167-68 (1991).

2007] NEW YORK V. EPA *MAY HAVE LIMITED IMPACT* 855

NSR's statutory language and Congress' intent to slowly introduce pollution controls at all existing plants. Instead, the majority of power plants built before 1977 are still operating without meeting the minimum requirements of NSR permitting. It goes against the intent of Congress to allow EPA to enact regulations that practically nullify a statute's intended effects.

Not only would elimination of the de minimis exception be consistent with the statute, but it would address one of the main criticisms of NSR, that there is ambiguity as to when power plants should apply for NSR permits.¹²⁷ Power plants would be aware that they need to obtain an NSR permit whenever they make modifications to their facilities that result in *any* increase in emissions.

As long as the de minimis exception remains,¹²⁸ however, EPA or Congress should provide a concrete definition for what constitutes a "modification." The Seventh Circuit and the Southern District of Ohio concluded that any hard-line rule would render the modification exemption meaningless.¹²⁹ Yet, without a hard-line rule, industries have no guide for what may or may not trigger NSR.¹³⁰ One suggestion is "to define 'modification' in terms of plant age, not physical or operation change."¹³¹ Another suggestion would be to set another cost cutoff, but at a much lower percentage than the 20 percent rule rejected in *New York II*. EPA's Office of Enforcement and Compliance Assurance suggested that this number should be no higher than 0.75 percent of the entire value of the plant.¹³² If EPA were to set the number at a level that would still abate pollution, a court may rule that it is consistent with the plain language of the CAA.¹³³

127. See discussion *supra* Part I.B.

128. The de minimis exception is likely to remain as long as the power industry retains its strong political power. This is why it may have been best for the D.C. Circuit Court to eliminate the exception because the court is not subjected to the same political pressures as the legislative branch.

129. *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 910 (7th Cir. 1990); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 861 (S.D. Ohio 2003).

130. This is one of the reasons asserted in support of a hard-line rule. Whether it was a major motivating factor in the electrical industries' decision to join the EPA in the suit is unclear.

131. *Parker & Blodgett*, *supra* note 67.

132. See OFFICE OF INSPECTOR GENERAL, *supra* note 62, at ii. Building a new power plant can cost up to \$800 million. Thus a 0.75 percent threshold would allow modifications costing up to \$6 million. The 20 percent threshold could have allowed modifications costing up to \$160 million before NSR was triggered.

133. The 20 percent cutoff was inconsistent with the plain language of the CAA because it effectively would have exempted all modifications to power plants. However, a lower percentage that captures the majority of modifications made at plants may be interpreted as being consistent with the statute because the NSR permitting system would consistently be triggered. One state has employed a 2 percent cutoff for triggering NSR.

Another suggested solution to the grandfathering problem is to allow plants to make modifications without installing new pollution controls so long as they have installed updated pollution controls within the last ten years.¹³⁴ This solution would need to be implemented by Congress and not EPA or the courts because it would allow some modifications to be made without consideration for the increase in emissions which directly conflicts with the plain language of the CAA.

Regardless of the approach, it would be helpful to create a concrete rule for the power plants that would allow them to confidently make modifications, knowing whether they will or will not trigger NSR. A rule could also make enforcement easier because it would become clear whether or not the NSR permitting system has been violated.

*C. The Impact of New York II May Not Even
Make a Ripple in the Pond*

After *New York II*, the definition of “routine maintenance, repair and replacement” returns to the case-by-case analysis established by *WEPCo*.¹³⁵ However, enforcement under the case-by-case basis may be minimal, as EPA has already shifted agency resources away from the NSR program.

1. NSR Is Ineffective at Reducing Emissions from Older Power Plants

The general trend throughout the G.W. Bush administration has been to minimize NSR enforcement against power plants.¹³⁶ Yet even before President Bush took office, NSR was thought to be ineffective at reducing emissions from older power plants. These views were confirmed by a 2003 report commissioned by Congress to analyze NSR.¹³⁷ The report recommended that Congress end the grandfathering of major air emission sources and require all major sources that have not obtained an NSR permit to install the best available control technology if located in an attainment area, or the lowest achievable emission rate control equipment if located in a nonattainment area.¹³⁸ The report found that

134. Parker & Blodgett, *supra* note 67.

135. See *United States v. E. Ky. Power Coop., Inc.*, 498 F. Supp. 2d 976, 993 (E.D. Ky. 2007).

136. See J.R. Pegg, *Polluters Face Fewer Lawsuits Under Bush EPA*, ENVIRONMENT NEWS, Oct. 14, 2004, available at <http://www.ens-newswire.com/ens/oct2004/2004-10-14-10.asp>; see also DEMOCRATIC POLICY COMMITTEE, BUSH ADMINISTRATION STOPS CLEAN AIR LAWSUITS (2003), available at http://democrats.senate.gov/dpc/dpc-issuenew.cfm?cf_issue=all (follow “Bush Administration Stops Clean Air Lawsuits (11/18/03)” hyperlink).

137. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 115. This report analyzed NSR before EPA introduced the equipment replacement program.

138. See *id.* at 133. Best available control technology, “[f]or any specific source, [is] the currently available technology producing the greatest reduction of air pollutant emissions, taking

the grandfathering of old plants and the nonenforcement of NSR have resulted in thousands of premature deaths.¹³⁹ The problems with NSR will persist because the court in *New York II* returned the NSR standard to its status prior to EPA's introduction of the equipment replacement program, which has shown to be ineffective. Thus, while environmentalists may be satisfied that the equipment replacement program was not upheld by the court in *New York II*, their air quality will not benefit from the NSR program unless the courts, EPA or Congress take steps to fix NSR's inefficiencies.

If the courts, EPA and Congress are unwilling to eliminate the routine maintenance, repair and replacement exception, one solution to the NSR problem may be to establish a committee that reviews all modifications at all major sources on a case-by-case basis¹⁴⁰ to determine whether NSR is triggered in each instance. Because the majority of states implement their own plans, the review committee may be most effective as part of each state's implementation plan. Review committees would have a significant impact on NSR because EPA is often unaware of whether or not a plant is making substantial modifications. This lack of information makes enforcement difficult.¹⁴¹ Although implementation of a review committee is likely to be costly,¹⁴² there would likely be huge benefits gained from it; many argue that if NSR is actively enforced, air pollution would be greatly reduced. The committee would also help eliminate the "uncertainties" the EPA referred to when it introduced the equipment replacement program. Furthermore, effective execution of

into account energy, environmental, economic, and other costs." EPA, Office of Communications, Education, and Media Relations: Terms of Environment, http://iaspub.epa.gov/trs/trs_proc_qry.org_info?P_REG_AUTH_ID=8&p_list_option_cd=ORG (follow "Terms of Environment: Glossary, Abbreviations, and Acronyms" hyperlink) (last visited Oct. 30, 2007). In contrast, the lowest achievable emission rate is defined as "the rate of emissions that reflects (1) the most stringent emission limitation in the implementation plan of any state for such source unless the owner or operator demonstrates such limitations are not achievable; or (2) the most stringent emissions limitation achieved in practice, whichever is more stringent." *Id.* A locality where air pollution levels exceed the national ambient air quality standards is designated as a nonattainment area, and those areas with air pollution levels within the National Ambient Air Quality Standards are designated as attainment areas.

139. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 115, at 81.

140. This refers to the case-by-case standard established by *WEPCo*.

141. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 115, at 110. The lack of transparency in the functioning of existing plants means "that life-extending modifications can be made without anyone on the outside knowing." Colburn, *supra* note 56, at 10,601.

142. A review committee would require many resources and would also be subject to the Administrative Procedure Act, which could potentially cause a multitude of litigation. However, at the same time, the ability for citizens to sue under the Administrative Procedure Act may further strengthen the NSR Program. Furthermore, depending on how many resources are devoted to the review committees, the typical eighteen months to obtain an NSR permit may be reduced.

NSR may help avoid hot spots¹⁴³ that could occur under a cap and trade system or even under NSR where geographic areas do not have the resources to ensure compliance.

2. *Clean Air Interstate Rule and Clean Air Mercury Rule: More Rules Recently Introduced by EPA that are Targeted at Air Pollution*

In addition to changing NSR regulations, the Bush administration has sought to revise other areas of the CAA. One such change came when EPA announced the Clean Air Interstate Rule on March 10, 2005.¹⁴⁴ The Clean Air Interstate Rule is similar to the Clear Skies Initiative, introduced by the Bush administration in 2002. The goal of the Clear Skies Initiative was to place a national cap on sulfur dioxide, nitrogen oxides, and mercury emissions.¹⁴⁵ This legislation was met with congressional resistance and has yet to obtain the consensus of both houses.¹⁴⁶ EPA reacted to the Clear Skies Initiative resistance by enacting a cap and trade system under the CAA titled the Clean Air Interstate Rule.¹⁴⁷ The rule amends six different sections of the Code of Federal Regulations¹⁴⁸ and places a permanent cap on sulfur dioxide and nitrogen oxide emissions in twenty-eight eastern states and the District of Columbia.¹⁴⁹ On March 15, 2005, EPA also introduced the Clean Air Mercury Rule, which places a permanent cap on mercury emissions.¹⁵⁰ EPA holds that together these rules “create a multi-pollutant strategy to reduce emissions throughout the United States.”¹⁵¹ While some are hopeful that EPA’s new cap and trade rules will increase the air quality in the eastern states,¹⁵² others have labeled the new regulations as

143. Hotspots are areas of localized emissions resulting from nearby or upwind stationary sources.

144. See EPA, Clean Air Interstate Rule, <http://www.epa.gov/cair/> (last visited Oct. 6, 2007) [hereinafter Clean Air Interstate Rule].

145. See EPA, Clear Skies, <http://www.epa.gov/clearskies/> (last visited Oct. 6, 2007).

146. The Democrats were more highly opposed to the rule, and the recent party change in the houses will likely further delay the passage of the bill, if not bury it for good.

147. See Mary Simmons Mendoza & Jim Braddock, *Environmental and Natural Resources Law*, 69 TEX. B.J. 32, 32 (2006).

148. See 40 C.F.R. pts. 51, 72, 73, 77, 78, 96 (2007).

149. See Clean Air Interstate Rule, *supra* note 144; see also McCarthy, *supra* note 7, at 31. The Clean Air Interstate Rule (CAIR) will be implemented in two phases. The first phase for NO_x will begin in 2009, and the first phase for SO₂ will begin in 2010. The second phase for both NO_x and SO₂ begins in 2015. EPA feels that “[t]he required emissions reductions requirements are based on controls that are known to be highly cost effective for electric generating units.” Clean Air Interstate Rule, 70 Fed. Reg. 25,162-01 (May 12, 2005) (codified at 40 C.F.R. pts. 51, 72, 73, 74, 77, 78, 96) (final rule).

150. See EPA, Clean Air Mercury Rule, <http://www.epa.gov/oar/mercuryrule/> (last visited Oct. 6, 2007).

151. *Id.*

152. See generally Mark D. Sullivan & Christine A. Fazio, *The EPA’s New Clean Air Rules*, 78 N.Y. ST. BAR J. 11 (2006).

2007] NEW YORK V. EPA *MAY HAVE LIMITED IMPACT* 859

“backdoor enactment of the Clear Skies legislation that had failed to pass congressional inspection and analysis.”¹⁵³

Both the Clean Air Interstate Rule and the NSR regulate nitrogen dioxides and sulfur oxides.¹⁵⁴ EPA announced that it will be shifting its focus away from NSR because programs such as the Clean Air Interstate Rule make NSR enforcement less necessary.¹⁵⁵ Marcus Peacock, Deputy Administrator at EPA, stated that the Clean Air Interstate Rule will reduce power plant emissions “deeper, faster and more efficiently than would be achieved by continuing certain litigation in case-by-case enforcement actions of existing NSR regulations.” This shift of focus could be problematic for NSR enforcement because its enforcement is already limited.

However, agency regulations cannot conflict with the plain language of statutes.¹⁵⁶ Even though the Clean Air Interstate Rule cannot replace the NSR program, EPA can choose what it wants to focus on and shift resources away from NSR. If EPA does not enforce NSR, then the holding in *New York II* may have little impact on the effectiveness of NSR.¹⁵⁷ Even if “the proposed source is required to comply with the lowest achievable emission rate”¹⁵⁸ the statute will be powerless without enforcement.¹⁵⁹ Another problem with shifting resources to the Clean Air Interstate Rule is that it only applies to twenty-eight states; NSR is still necessary in the other twenty-two states.

If EPA shifts its focus from NSR to the Clean Air Interstate Rule, the criteria pollutants not covered by the Clean Air Interstate Rule may go unchecked. There are benefits to a cap system including bright line rules that create certainty for the power plants and more easily identify polluters.¹⁶⁰ At the same time there is always the worry that the rule is

153. Jeffrey Rudd, *Restructuring America's Government to Create Sustainable Development*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 371, 443 (2006). CAIR is “a pattern of corrupt practices designed to enact Executive legislation.” *Id.* at 444.

154. While NSR addresses individual plant emissions, cap programs address the aggregate pollution.

155. See E. Donald Elliott, Robert Fabricant & Alexander Schmandt, *Recent Clean Air Act Developments*, ALI-ABA Course of Study, SL063 ALI-ABA 1, 3 (2006).

156. See McCarthy, *supra* note 7, at 32.

157. States may still enforce NSR standards. They will also be charged with implementing CAIR.

158. Clean Air Act, 42 U.S.C. § 7503(a)(2) (2006).

159. Although CAIR may potentially shift resources away from NSR enforcement, NSR may still be effective if states choose to enforce the NSR regulations. New York has filed multiple lawsuits to enforce the NSR permitting requirements. See Press Release, Office of the New York State Attorney General, State Files Major Lawsuit Against Western NY Power Plants (Jan. 10, 2002), available at http://www.oag.state.ny.us/press/2002/jan/jan10a_02.html.

160. For example, an analysis by an advocacy organization in 1999 found that many power plants emitted over twenty tons more pollution because they were not in compliance with the current pollution standards. See U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND & STATE PIRGS, *LETHAL LEGACY 1* (2000), available at <http://www.net.org/relatives/4216.pdf>.

only as good as what the caps are set at and that caps tend to create hot spots. Depending on what cap is set, the cap system may be good for air quality in the long run but it will almost certainly take resources away from NSR and further diminish the environmental value of the holding in *New York II*.

CONCLUSION

New York II maintains the current implementation of NSR permits and the modification of older electrical plants. Had the court ruled in favor of the new equipment replacement program, any requirement for older power plants to implement pollution controls when making modifications would rarely, if ever, be triggered. Although the court did not take this position, neither did it take the opportunity to push forward air quality regulation by eliminating the de minimis exception. The court's holding maintains NSR at a level that appears to be slowly diminishing due to lack of enforcement along with the enactment of other regulations.

One positive aspect of the holding in *New York II* may come from the recent rise in public awareness of air pollution. Because the court did not take steps to make NSR more effective, Congress may be forced by public concerns to address the issue of NSR and grandfathered power plants. If and when Congress addresses the issue, there is the possibility that it will make substantial changes to the NSR program that EPA cannot achieve through regulations and that the courts cannot achieve through adjudication.

Ultimately, *New York II* does little to ensure healthier air in America and is likely to be overlooked as a stepping stone in improving the air quality of the United States.