NO. 05-848

IN THE
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,
Petitioners,
v.
DUKE ENERGY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF MANUFACTURERS ASSOCIATION WORK GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION

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TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

Page

ADMINISTRATIVE MATERIALS

TABLE OF AUTHORITIES - Continued

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES - Continued

MISCELLANEOUS

INTEREST OF *AMICUS*

The Manufacturers Association Work Group (hereafter "Associations") encompasses trade associations representing manufacturers in their respective industries on matters affecting their businesses.[1] The Associations' members manufacture, produce, refine and transport an array of products in virtually every state in the nation. The outcome of this case will significantly affect the members because the New Source Review ("NSR") rules at issue here apply not just to electric utilities but also to all manufacturing facilities in the United States. These rules have historically applied to projects the Associations' members have undertaken, and in many states, they continue to apply today.[2] Moreover, the Associations' members have been and continue to be subject to enforcement actions by the Environmental Protection Agency ("EPA") under the rules at issue in this case.

In addition to being current or potential subjects of enforcement proceedings, the Associations' members have extensive experience relevant to the resolution of this petition, specifically with the:

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[1] All parties have consented to the filing of *amicus* briefs in letters that are on file with the Clerk. Counsel of record for Manufacturers Association Work Group, Charles H. Knauss, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The Associations consist of the Alliance of Automobile Manufacturers; American Chemistry Council; American Forest & Paper Association; American Gas Association; American Petroleum Institute; Council of Industrial Boiler Owners; Interstate Natural Gas Association of America; National Association of Manufacturers; Chamber of Commerce of the United States of America; National Petrochemical & Refiners Association; National Oilseed Processors Association; Corn Refiners Association; and the National Cotton Council of America.

[2] While EPA revised its NSR rules in 2002, those rules have not yet been adopted and approved into state implementation plans throughout the country. Therefore, the 1980 rules continue to apply in many states where the Associations' members operate facilities.

- construction and operation of industrial facilities;
- types of activities necessary for safe, efficient and reliable operation of those facilities; and
- historical application of EPA's NSR program.

Through this experience, the Associations bring a broader context to the dispute this Court must address. An understanding of how plants are designed, constructed, and maintained and operated throughout their lives is essential for an accurate and complete consideration of the issues presented.

As discussed below, the Court should affirm the ruling of the U.S. Court of Appeals for the Fourth Circuit because it is consistent with a plain reading of the 1980 regulations and the language and structure of the Clean Air Act ("CAA" or the "Act"). Adopting the Environmental Group Petitioners' view could be devastating to American industry because activities that are and have been common industrial practice could be viewed as having triggered the requirement for sources to obtain NSR permits, even though no "modification" of their permitted operations has occurred. Affirming the Court of Appeals would categorically clarify that such commonplace projects are not subject to NSR.

SUMMARY OF ARGUMENT

The lower court's decision not only reflects EPA's longstanding interpretation of its NSR regulations but also is consistent with the way that manufacturers have designed and operated their plants in accordance with these regulations.

As the Associations demonstrate below, the normal course of business operation of industrial plants mandates that they be maintained and that their efficiency be optimized over time. Moreover, operation of an industrial facility in a competitive environment requires constant activity to accommodate changes in product mix or to allow for newer versions of products to be timely introduced.

In part II, below, we describe four examples of common and frequent activities at industrial plants that, under Petitioners' view of the law, would require NSR analysis. The examples include: (1) adjustments or "tweaks" to consumer product manufacturing processes (p. 12); (2) repair and replacement of gas turbine components (p. 14); (3) equipment alteration at grain elevators and other facilities (p. 15); and (4) engineering adjustments to paper mill fuel delivery systems (p. 16). Petitioners' interpretation would require these commonplace activities (and hundreds of others like them) to undergo NSR analysis and potentially a permitting process—typically lasting more than a year—even if their actual hourly emissions rate is unchanged and emissions stay below permit limits that have *already* been reviewed for compliance with air quality requirements.

These types of activities have not in the past been considered to trigger NSR inquiries, in part because many were not considered "modifications" under the New Source Performance Standard ("NSPS") program. As the lower court recognized, Congress defined "modification" under NSR as identical to the NSPS program definition. 42 U.S.C. §§ 7411, 7479(2)(C).

Petitioners and their *amici* claim that the lower court ruling would lead to increased emissions and severe air quality impacts. These claims have no basis in reality. Section 110 of the CAA requires each state to develop a State Implementation Plan ("SIP") for attaining national ambient air quality standards ("NAAQS"). Each state has complied with this directive and SIPs have been approved by EPA and implemented without any reliance on NSR permitting as the basis for achieving the NAAQS. Indeed, any emissions from manufacturing plants were permitted and accounted for by the states in their SIP planning process.

ARGUMENT

ENVIRONMENTAL PETITIONERS' VIEW OF THE LAW CANNOT BE SQUARED WITH THE STATUTE OR GENERAL MANUFACTURING OPERATION.

The CAA vests the primary responsibility for achieving air quality standards with the states. Section 110 of the Act allows the states substantial discretion to tailor their air emission control programs to meet the NAAQS consistent with local concerns. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470 (2001). Section 110(a)(2) *of the CAA as it existed in 1980* established the requirements for state agencies to develop implementation plans to achieve the NAAQS in relatively broad terms. In so doing, it listed eleven requirements in subparagraphs (A) through (K), beginning with the overarching broad directive that each state submit to EPA a plan to implement the NAAQS and provide for attainment "as expeditiously as practicable" and to include "emission limitations … and such other measures as may be necessary to insure attainment and maintenance" of such standards. SENATE COMM. ON ENV'T AND PUB. WORKS, 95TH CONG., LEGISLATIVE HISTORY OF THE CAA AMENDMENTS OF 1977 ("1977 Leg. History"), § 110(a)(2)(A)-(B), at 23-24 (1978) (current version at 42 U.S.C. § 7410(a)(2)(A)-(B)).[3]

In addition to the broad directive that states take the steps necessary to achieve the NAAQS, Congress included a requirement for SIPs to regulate the construction, modification and operation of stationary sources and, as a *subset* of that SIP element, to establish a separate permitting program for construction and modification of major emitting facilities as provided in parts C and D of Title I. *Id.* § 110(a)(2)(D), at 24 (current version at 42 U.S.C.

[3] Additional SIP requirements were included in Section 172 (for nonattainment areas), 42 U.S.C. § 7502, and Section 163, 42 U.S.C. § 7473 (for certain pristine areas).

§ 7410(a)(2)(D)).

It is the meaning of the term "modification" under parts C and D and former Section 110(a)(2)(D) that is at issue in this case.[4] In establishing the requirements of parts C and D in the 1977 amendments, Congress did not start with a clean slate; it relied on an established regulatory program—the NSPS program—which had been in existence for nearly a decade. Under the amended statute, the Act (1) continued to require new plants and "modifications" of existing plants to meet "new source performance standards,"[5] and also (2) required "major" new emitting facilities and modifications of those facilities to meet the additional requirements of NSR, both in areas that comply with air quality standards and in areas that do not.[6]

Importantly, Congress chose not only to continue to utilize the same definition of "modification" for purposes of determining when both NSR and NSPS are triggered for an existing facility, but expressly stated that "modification" for NSR has the "meaning" and "use" it has under the NSPS program. 42 U.S.C. §§ 7479(2)(C), 7501(4). When EPA issued its rules implementing the NSR program, after the CAA was amended in 1977, it continued to use a regulatory concept called "major modification" (originally introduced in a 1976 interpretive ruling on nonattainment NSR), based

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[4] When Congress amended Section 110 in 1990, it expanded and refined the requirements for SIPs but did not add any requirements related to parts C and D permits. SENATE COMM. ON ENV'T AND PUB. WORKS, 103D CONG., LEGISLATIVE HISTORY OF THE CAA AMENDMENTS OF 1990, § 110(a)(1), at 32 (1993).

[5] 1977 Leg. History § 111(a)(1), at 35 (current version at 42 U.S.C. § 7411(a)(1)).

[6] In areas that do not comply with the NAAQS, NSR is frequently referred to as "nonattainment NSR," while it is called "PSD" (prevention of significant deterioration) in areas that comply. *New York v. EPA*, 413 F.3d 3, 12-13 (D.C. Cir. 2005). The present case concerns PSD areas rather than nonattainment areas, but for purposes of the legal analysis, the difference is unimportant, and we shall use the term "NSR" to refer to "new source review" in both types of areas.

on whether a "modification" caused source-wide or plant-wide increases in annual emissions from an entire stationary source above threshold levels. 40 C.F.R. §§ 52.21(b)(2) (1978), 51.24(b)(2) (1978); 40 C.F.R. § 52.21(1980); 40 C.F.R. § 51.24(b)(2) (1980) (recodified as 40 C.F.R. § 51.166(b)(2) in 1987). "Modification" continued to be defined by EPA as it had always been defined under NSPS. 40 C.F.R. §§ 52.01(d), 51.100 (1987).

EPA's claim that it has discretion, and exercised that discretion, to define "modification" differently for the NSR and NSPS programs flies in the face of plain statutory and regulatory language. The fact is that EPA has never defined the term "modification" differently under NSPS and NSR, but rather created a regulatory term limiting NSR review to only those "modifications" that are also "major," as determined by source-wide netting and the significance levels. The differences EPA cites between the NSR and NSPS programs relate solely to requirements that ensue only *after* the program applies,[7] not to the threshold determination as to whether a "modification" has occurred.

I. NSR, if Applied as Petitioners Argue, Would Have Led to Serial NSR Permit Requirements for Manufacturing Facilities and Rendered Most of the 1990 Amendments to the CAA Unnecessary.

The lower court held that only an NSPS "modification" can trigger an NSR "major modification" analysis.

[7] The NSR program, as enacted in 1977, required a facility to undergo an individualized review process, in which the control technology and its air quality impacts are scrutinized, 1977 Leg. History § 165(a)(3), at 88 (air quality review), *Id.*, § 165(a)(4), at 88 (control technology review) (current version at 42 U.S.C. § 7475(a)), while the NSPS program as implemented by EPA since its enactment in 1970 requires the plant to comply with control technology requirements set on a national basis based on EPA's determination of the best "adequately demonstrated" control technology, *Id.*, § 111(a)(1), at 35 (current version at 42 U.S.C. § 7411(a)(1)).

Petitioners and EPA would have this Court believe that all air quality would fail to meet national standards if that decision is upheld. The language of the rules and the statute, and the facts, belie this prediction. Under Petitioners' view, facilities would have triggered NSR permitting requirements quite frequently, many facilities on a yearly or bi-annual basis. Any uptick in product demand that is coincident with a physical activity at the plant would then be deemed the origin of a potential increase in annual emissions. Under this view, facilities would have to face the paradox of having undertaken projects that were not "modifications" but could nonetheless be "major modifications."

Title I contains a wide range of tools for states to achieve NAAQS. Only one part of that is NSR. If Congress or EPA had believed that the NSR program would be as broadly applicable as Petitioners and EPA now advocate in this litigation, the EPA and President George H.W. Bush would have found no reason to draft and send to Congress proposed legislation in 1989 that, after much debate, became the Clean Air Act Amendments of 1990. These Amendments imposed significant new emission mandates on existing air emission sources, none of which would have been necessary under EPA's and Petitioners' rationale advocated before this Court. The litigation theory espoused by EPA and Petitioners would obviate the need for the 1990 Amendments' acid rain program to reduce nitrogen and sulfur oxides from existing utility sources and the Section 182 ozone nonattainment area provisions because existing sources would already have been subjected to NSR (by frequently undertaking projects that were not NSPS "modifications" but nonetheless "major modifications" under their view) and, thus, any controls under the acid rain or ozone programs would have been redundant with existing controls.

In sum, Petitioners seek to attribute to NSR a purpose so broad that it would erase the remainder of Title I, making it the primary vehicle through which CAA emission reductions were and are to be achieved. These claims ring hollow given

the narrower purpose that Congress itself gave the major NSR program when it was enacted, describing it as a mechanism "to permit States to allow continued growth or expansion in nonattainment areas, so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act." H.R. Rep. No. 95-294, at 210 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1289 (emphasis added). Indeed, EPA explained that:

> unlike the control measures required by Section 172(c)(1) and (c)(6), major NSR is not a measure to reduce emissions to assure attainment; nor did Congress identify the program as a control measure to help areas achieve attainment "as expeditiously as practicable." Rather, Congress intended that the effectiveness of major NSR in minimizing the impact of increased emissions should be considered together with the State's other SIP measures to assure, consistent with Section 172(a)(2), that emissions from new sources will be consistent with [reasonable further progress requirements].

70 Fed. Reg. 17,018, 17,022 (proposed Apr. 4, 2005).[8]

The statutory structure further indicates the narrower role of NSR in the "air quality toolbox." The Act directs the states to include a wide variety of measures in their SIPs to achieve NAAQS and many of these requirements address emissions from existing facilities. For example, Section 172 required states: to provide for implementation of all reasonably available control measures ("RACM") as

[8] This reasoning was adopted by EPA in its final action on reconsideration. 70 Fed. Reg. 39,413 (July 8, 2005). EPA further stated that the offset ratio requirement and lower major stationary source thresholds of the nonattainment NSR program were not included to generate emissions reductions but rather to provide a buffer to compensate for under-projections of growth in state planning. *Id.* at 39,420.

expeditiously as practicable; to require reasonable further progress, including reduction in emissions from existing sources as may be obtained through adoption, at a minimum, of reasonably available control technology ("RACT"); and to impose emission limitations, schedules of compliance and such other measures as are needed to attain the NAAQS expeditiously. 42 U.S.C. § 7502. Just one part of this laundry list is the regulation of "new" and "modified" major stationary sources through a permit program referred to as NSR. If Congress had intended NSR to play the central role in attaining air quality by being triggered almost immediately after enactment for every manufacturing plant, when those plants undertook projects that were never understood to be NSPS "modifications," it certainly would have devoted more than a few words in the list to it and stated so explicitly.[9] In any event, if NSR controls were expected to apply to virtually every existing unit in a nonattainment area shortly after the 1977 Amendments, it would have made no sense for Congress to require in Section 172 RACT, which is less stringent than the controls required under NSR, for those same units.

II. The Significant Investment That is Required to Build Manufacturing Facilities Means They Must Be Designed to Operate for Many Years, in a Variety of Modes, and at the Highest Efficiency Possible.

Construction of a new industrial plant, be it a paper mill, an automobile assembly plant, or a foundry, requires a significant investment, often in the hundreds of millions of dollars. When plants are built, SIPs provide for issuance of air quality permits that require state-of-the-art controls, also a significant investment. Because of the capital required to build manufacturing facilities, they are designed to operate for many years and, often, in a variety of modes. If the Petitioners' view of the law is accepted, then plants

[9] *Cf.* 42 U.S.C. § 7419 (more than 1500 words devoted to smelters).

constructed in 1979 that obtained major NSR permits and that operated as designed could have been subject to NSR several times more since 1979 merely because of normal maintenance and repair activities or product and process refinements ("tweaks") that were anticipated to occur when the facilities were originally constructed. Petitioners' baseless argument also conflicts with the clear recognition by permitting agencies that components of such facilities need to be maintained, repaired and replaced as they deteriorate and that various products might be made with a given set of equipment.

Obtaining the SIP air quality permits necessary to build a new plant (or process) requires a comprehensive application, with detailed emissions analyses. The permitting process typically takes over a year and involves the public through notice and comment procedures. Once a permit is issued, the company is permitted to construct and operate its facility based on its application. 40 C.F.R. § 52.21(r)(1). Companies justifiably rely on these permits to define the scope of their allowed emissions. After all, they have indicated maximum emissions profiles in their permits and been subject to permit review based on those emissions. The states also have relied on these permits in their SIP planning in establishing the maximum amount that a source can emit and its maximum impact on local air quality.

In contrast, Petitioners' reading of the statute and regulations would mean that companies cannot rely on permits they obtain that reflect their actual emissions capability. Instead, Petitioners would require permits but not allow a company to operate at the levels permitted therein because it is maintaining and operating its facilities as required by the permit up to anticipated and allowed permit levels. This view of the law undermines the permitting process itself.

Indeed, in seeking these permits, companies do not look to the next year's demand. They look to the range of potential fluctuations in demand and product mix over a long

planning period (in decades), and they obtain permits to allow for these fluctuations. As a result, state permitting agencies use continuous operation at maximum capacity as the basis for permits to ensure the full air quality impact of a plant is considered before it is allowed to be built. In actual operation, this optimal level is rarely achieved both due to demand and equipment outages that may occur for various reasons. Companies devote considerable effort to small improvements designed to bring their plants closer to stoppage-free operation, by fine-tuning and optimization of operations and repairs or replacements as needed to improve reliability of production equipment. Such activities are intended both to decrease unscheduled stoppages and to increase the time between scheduled maintenance. These improvements are not (and never have been) NSPS "modifications" because they do not affect actual hourly emissions rates, but only hours of operation.

In addition, most companies build and permit plants to operate for many years while making a variety of products or variations on the same product. When a plant is built, state-of-the-art controls are installed, at considerable expense. Under Petitioners' view of the law, companies would not be allowed to recoup these investments but instead could be subject to repeated technology reviews under NSR, even though operations remain within the scope and emission levels of their permit and actual capability, without regard to the number of hours they operate.

To the contrary, Congress, in enacting the NSR program, and EPA, in promulgating the 1980 regulations, did *not* create serial technology reviews of manufacturing operations. This is the very reason that EPA has historically looked to whether the actual emitting capability (measured on an hourly or similar basis, unaffected by increased hours of operation) has changed before inquiring into the impact on actual annual emissions from a plant--*i.e.*, whether there would be a "modification" under the NSPS rules before analyzing whether that "modification" would be a "major

modification" that involved a significant increase in annual emissions under NSR.

This approach made sense because as long as the actual emissions capability remains stable, the plant is operating as intended. It is what it was permitted to be, and has not been transformed into a new operation that warrants a new review for control technology. The following examples are illustrative of the types of activities that companies undertake consistent with their permits and actual operating capability. In each case, the activity would not be considered a modification under the NSPS program (*i.e.*, would not increase the emissions rate or otherwise be excluded from the NSPS definition of "modification"), but could allow a plant to operate more efficiently or reliably in a manner consistent with its permitted and constructed capacity.

Example 1: Consumer Product Manufacturing Tweaks and Adjustments. In the United States, industrial facilities manufacture many products made of metal, plastic and composites, including trucks, cars, boats, trailers, buses, appliances, furniture and more. To ensure the proper look and durability (*e.g.*, to prevent corrosion), these facilities shape and apply protective and preparatory coatings and finish paints to the metal to achieve a marketable, final product.[10] Consider a plant that installs a new coating line and obtains a major NSR permit. The major NSR permit includes emission limits and control requirements and the state agency issues it based on the required air quality analyses. After that permit is issued, the plant begins production.

This is when the tweaking process begins. Plant engineers, marketing staff, and other personnel make

[10] The primary emissions from coating operations are volatile organic compounds ("VOC"), an ozone precursor, and particulate. Permits typically require sources to reduce VOC through use of control devices or low VOC coatings and particulate through use of controls.

incremental product or production process changes. These changes can be reflected in the look and design of the product, the colors, durability and texture of the coatings, and even the coating nozzles and applicators. They are made for a variety of reasons, *e.g.*, to make the product more appealing, to lower the cost of producing it, to make it more durable, to solve quality problems, to reduce the amount of paint required, *etc.* None of these tweaks constitutes an activity that would change the nature of the coating line, change its permitted emission limits, or change its actual emitting capability. But, if the tweaks are successful, people might buy more of the product, and the facility might be able to reach the production its marketing people projected when the project was approved. In addition, the *annual* emissions might increase because the plant is making more product, *i.e.*, plant operating hours increase.[11] Still, the plant is the same as permitted—the coating line moves parts along a conveyor while robotic applicators spray coatings and finish paint, and emissions are routed to a control device.

The emissions reviewed when the major NSR permit issued still represent the capability of the unit. Under Petitioners' view, each of these tweaks, from a larger or smaller product size to a different shape that might require more or less paint—to a paint applicator design improvement—to a more protective undercoating that prevents corrosion from salt, would require analysis of whether there was a "major modification" that increased annual emissions, and triggered major NSR. This would be so, under Petitioners' view, even though there has been no increase in the unit's hourly emitting capability and, therefore, no "modification" as defined in the NSPS.

The tweaking and adjustment process occurs on every plant operating day of every month of every year. Tweaking

[11] In rough economic times or if this plant's tweaks make its product that much more appealing to the public, a competitor plant might even shut down, leading to a shift of production to this plant.

is the marketer's job. It is the plant manager's job. It is the plant and design engineers' job. It is also something that companies contemplate when they obtain a permit, as long as they do not increase their actual hourly emitting capability. EPA has never suggested that these commonplace and necessary tweaks represent a "major modification" under NSR, presumably because the tweaks would not be "modifications" in the first instance as defined in the NSPS. Under the view advanced by Petitioners, tweaks would be subject to repeated analysis to determine whether they were "major modifications" even though the emissions had already been reviewed in a major NSR permit, and the coating line's actual emitting capability had not changed. It defies common sense to assume Congress or EPA intended NSR to apply (or even an analysis of whether it applies) repetitively to tweaks.

Example 2: Repair and Replacement of Gas Turbine Components. Consider the replacement of major components of gas turbines used in power generation or industrial applications, like natural gas pipelines. During a turbine's life, components like stator blades, turbine nozzles, buckets, fuel nozzles, seals, and packings are expected to be replaced. These are the same types of components the replacement of which, EPA argued below and Environmental Group Petitioners argue here, turned Duke's generating units from "existing" into "new" facilities. Replacing these components, however, does *not* convert an existing turbine into a "new" one in any sense.[12] Indeed, the

[12] STAPPA/ALAPCO claims that no changes would be subject to NSR if the lower court decision is upheld. This is patently false. If a company replaces components in a way that is an NSPS modification, NSR permitting would be required if the modification was "major." For example, if a company replaces a turbine section in a way that allows the unit to burn more fuel, increases the output, and thereby generates higher hourly emissions, the unit would have made a "modification" as defined in the NSPS and analysis of whether a "major modification" has occurred would need to ensue. If annual emissions were projected to increase by more than significance levels in the rules, the company would have made

unit's manufacturer will typically *condition the emissions performance warranty* on the replacement of these parts according to a schedule specified in the manual for the unit. After the replacement, the turbine continues to be what it was always able to be and what it was permitted to be.

In issuing the gas turbine NSPS, EPA recognized that such activities are *not* NSPS modifications. Specifically, EPA explained "replacement of stator blades, turbine nozzles, turbine buckets, fuel nozzles, combustion chambers, seals, and shaft packings" are not modifications under the NSPS.[13] Replacing these components is in no sense a modification of the emissions unit, much less a "major" one.

Example 3: Activities Excluded from the NSPS Modification Definition for Grain Elevators. Many NSPS define "modification" as not including specified activities. For example, grain elevators, which are buildings or complexes of buildings for storage and shipment of grain, are regulated under Subpart DD of the NSPS rules. EPA issued a NSPS for these facilities in 1978. 43 Fed. Reg. 34,340 (Aug. 3, 1978). In so doing, the Agency explicitly determined that the addition of gravity loadout spouts to existing grain storage or grain transfer bins, installation of automatic grain weighing scales, replacement of motor and drive units driving existing grain handling equipment, and installation of permanent storage capacity without an increase in hourly grain handling capacity are not modifications. EPA noted in issuing the final rule that these alterations "frequently occur" and that the impact of considering "these alterations as modifications, subject to compliance with the [NSPS], was viewed as unreasonable." *Id.* at 34,344-45.

It would be truly remarkable for EPA to state that

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a "major modification," and NSR would apply.

[13] *See* EPA, *Standards Support and Environmental Impact Statement Vol. 1: Proposed Standards of Performance for Stationary Gas Turbines*, EPA-450/2-77-017a, at 5-6 (Sept. 1977).

subjecting such activities to NSPS modification requirements is unreasonable and just a short time later consider subjecting such alterations to NSR major modification analysis to be reasonable. Yet, under Petitioners' view of the law, these "frequent" activities that EPA had determined not to be "modifications" would nonetheless be subject to NSR analysis to determine if they were "major modifications." Surely if EPA had considered these activities potentially subject to NSR analysis, there would have been some statement so indicating and an analysis of the rule's economic impact.[14]

Example 4: Debugging Bark Handling and Delivery System to a Biomass Bark Boiler at a Paper Mill. Paper mills need to remove the bark from wood ("debarking") prior to processing it into product. Rather than disposing of the bark, mills put it to beneficial use by conveying it to plant boilers for energy production. Because mills are permitted for a variety of fuels, when there is no bark, their boilers typically run on oil or natural gas. One reason that bark might not be available is due to plugging that occurs in the bark handling and delivery system.

Plant engineers spend considerable effort to minimize the likelihood of unscheduled breakdowns of the bark handling operations. Feeder system repairs and component

[14] There are numerous other instances of activities excluded from the definition of NSPS modification that EPA has never considered to require a NSR modification analysis. *See, e.g.*, 40 C.F.R. § 60.560(a)(4)(ii) (for polymer production, addition or replacement of equipment for the purposes of improvement accomplished without an expenditure of funds above a specified threshold is not a modification)**;** *Id.* § 60.590(c) (for equipment leaks at refineries, addition or replacement of equipment for the purpose of process improvement accomplished without a capital expenditure is not a modification); *Id.* § 60.751 (lateral expansion of a municipal solid waste landfill is not a modification unless it results in an increase in the design capacity of the landfill). Under Petitioners' view of NSR, these activities could nonetheless constitute "major" modifications, even though they were not "modifications" in the first place.

replacements are implemented as needed to minimize the likelihood, and the equipment used may vary depending on the bark characteristics of the plant's raw materials. Debugging the feeder system does not affect emission rates at all. It merely allows the system to operate more annual hours within its constructed and permitted capacity, and is entirely consistent with its prior emitting capability. Such repair and replacement activity has never been considered a "modification," much less a "major modification" potentially subject to NSR.

III. EPA's Application of the Regulations Shows That the Examples Above Are Not and Never Have Been "Modifications" or "Major Modifications."

The examples in the prior section are instructive regarding how EPA has interpreted its regulations in practice and its view of the statutory definition of modification. EPA has defined modification in the NSPS program as follows: "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere [excluding increases in hours of operation] of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act." 40 C.F.R. § 60.14(a) (1977). Congress, in turn, defined modification for purposes of NSR by reference to its meaning and use under Section 111. 42 U.S.C. § 7479(2)(C).

EPA further provided when it promulgated regulations to implement the NSR program that permitting requirements would only apply to those "modifications" that are also "major modifications," 40 C.F.R. §§ 52.21(i), 51.166(i). A "major modification" is a modification that increases plantwide annual emissions above "significance" levels. Petitioners urged the Court of Appeals to simply read the word "modification" out of the EPA definition and assume that any activity that increases annual emissions above significance levels is a "major modification" regardless of

whether it is also a "modification." The Court of Appeals declined that invitation, and this Court should too.

Indeed, under Petitioners' theory, the increased production, the grain loading equipment alterations and a host of similar activities that are needed to maintain the nation's productive capacity as constructed and permitted to operate—activity that has never been considered a "modification"—could trigger "major modification" NSR analysis. Triggering the NSR permit process for activities defined not to be "modifications" by EPA or that occur every year at industrial facilities across the country to maintain and improve reliability of existing permitted equipment would subject companies to serial NSR reviews.

The experience of the Associations' members is that obtaining an NSR permit typically takes well over a year, with 3 to 6 months devoted to application preparation and 6 to 12 months or more required for agency processing. Moreover, because no actual construction can occur until the permit is issued, the activities in the examples above would need to await issuance of the permit, bringing the introduction of new versions of products to a virtual standstill. If Congress had established a definition of "modification" with such potentially far-reaching implications, it surely would have said something indicating as much. Instead, it said that for NSR purposes, "modification" would have the meaning and use it has under the NSPS program.

IV. EPA's Claimed Need for Discretion to Address the NSR and NSPS Program Purposes Cannot Undo Plain Statutory Language and Ignores the Requirements Congress Established to Address Them.

The government argues that to effectuate the different purposes of NSR, it needs discretion to interpret the term "modification" differently for the NSPS and NSR programs. United States Br. in Support of Pet'rs ("United States Br.")

at 48-50. This assertion is without merit. The argument ignores that Congress outlined which elements of NSR should be based on NSPS and which should differ to take into account the purposes of the NSR program. Congress chose to use identical definitions of "modification," but it required more stringent control technology requirements for NSR than NSPS, a case-by-case permitting procedure for NSR as compared with the national standards for NSPS, and a detailed air quality analysis for NSR which does not apply under the NSPS program.

EPA and Petitioners fail to explain why the differences Congress set forth do not adequately take into account the differing purposes of the NSR and NSPS programs, or why such purposes would allow EPA to ignore not just an identical definition of modification for the programs, but the adoption of the "meaning" and "use" of the NSPS "modification" definition by reference into the NSR program.

EPA's litigation position is that much more untenable because it goes well beyond what is needed to address any differences in the purposes of the NSPS and NSR programs. EPA's interpretation offered in this litigation would require NSR even where the emissions associated increased operating hours following repaired or replaced equipment are within the emission levels allowed by a plant's construction and operating permits, emissions that *have already been reviewed for their impact on local air quality*. For example, a plant operating under a permit obtained in a previous NSR review already contains "emission limitations . . . which conform to the requirements of [the Act]," and any additional reviews would be redundant. 42 U.S.C. § 7475(a)(1).

The fact that the plant is currently operating with a "compliance margin" or "cushion" between its actual emissions and its permitted emissions—as most plants do—is not a reason for a second review of an emission level that has already been reviewed at least once. Such a rule can

only punish companies that operate their control equipment at maximum capability, in that their efforts to keep their plants well below permitted levels would only serve to impair their ability to make future productivity improvements without further duplicative NSR review. Such a result has no conceivable relation to the differences between NSR and NSPS, or to the goals of the CAA.

EPA has also taken into account local air quality impacts by creating a regulatory definition of "major modification" that looks at annual emissions source-wide. That EPA has discretion to assess the overall impact of the source in netting does not mean, however, that it can change the definition of "modification" any way it likes.

For all of these reasons, the lower courts were correct in concluding that under EPA's established rules, there must be a "modification" of a facility before there can be a "major modification" at a stationary source.

V. Petitioners Misconstrue General Motors' Brief in Prior Litigation on the 1980 Rules; Moreover, Petitioners' Focus on Industry Briefs Instead of EPA Statements Highlights the Lack of Support for Their Reading of the Rules.

The Petitioners argue that the *CMA* litigation (*Chemical Mfrs. Ass'n v. EPA*, No. 79-1112, *et al.* (D.C. Cir.)) shows that, as of the time of promulgation of the 1980 rules, "regulated parties understood that EPA had adopted a new, PSD-specific approach to determining modifications." Pet'rs Br. at 24. Specifically, Petitioners contend, certain parties in the *CMA* litigation, including "General Motors and other major industrial firms," had "attacked EPA's use of an 'actual emissions' test in place of the capacity-based test used in the 1978 PSD regulations and the 1979 proposal." *Id.* at 12.

General Motors Corporation ("GM") is a member of the Alliance of Automobile Manufacturers, participating as

amicus curiae in the preparation of this brief. Contrary to Petitioners' claims, GM has *never* stated *nor understood* the 1980 rules to adopt a different standard for judging whether a "modification" has occurred than the NSPS definition of "modification" Congress enacted for the NSR program. GM's challenge to the 1980 rules was directed at the second step of the analysis that EPA created in those rules in response to the *Alabama Power* remand—the determination of whether a modification is "major" and the corresponding annual accounting of emissions on a source-wide basis.

Quoting from the brief filed in 1981 by GM and other industry petitioners, the Petitioners observe that GM "raised as its first issue" in that case "whether EPA exceeded its 'statutory authority' by providing 'that a modification subject to review under Parts C and D of the Clean Air Act would occur whenever actual emissions from a [major stationary] *source* increased as a result of an alteration to that source, even where the *source's* capacity to emit remains constant." Pet'rs Br. at 12. (quoting Br. of Industry Pet'rs on Actual Emissions Definition of Net Increase at 1, *CMA*, No. 79-1112, *et al.* (D.C. Cir. Feb. 12, 1981) ("1981 GM Brief")) (emphasis added). According to Petitioners, this shows that GM and other petitioners in *CMA* recognized that "EPA had adopted [in the 1980 rules] a new modification standard specially tailored to the PSD provisions," insofar as the *CMA* petitioners "complained vociferously that under the new regulations PSD would apply to projects that 'result in a significant increase in *actual* emissions [of the source], even though the source's net *capacity* to emit remains constant or declines.'" *Id.* at 32 (quoting 1981 GM Brief at 5-6) (*italics* in original) (underline added).[15]

Petitioners misconstrue the challenge GM sought to

[15] The United States has a similar take on the *CMA* litigation, arguing that "EPA's actual annual emissions test, including its consideration of hours of operation, was subjected to industry challenge as early as 1981." United States Br. at 32-33.

mount in the *CMA* litigation, have distorted the arguments raised by GM in its 25 year-old brief that argued the original PSD rulemaking was inconsistent with the CAA, and selectively quote the content of the settlement agreement in a way that changes its meaning. That GM challenge did not involve the same issues presented in this case. When read in its entirety, the 1981 GM Brief confirms that the portion of the PSD rule at issue was EPA's improper interpretation of the CAA in promulgating the "significant net emissions increase" definition. The GM petition and brief did not engage the issue before this Court, *i.e.*, whether Congress authorized EPA to deviate from the NSPS definition of "modification" as the construction trigger for a "major modification" analysis of projects at existing emission units. Thus, the settlement documents focus on the definition of "major modification." Petitioners' statement that the settlement agreement required EPA to propose that "*modification*" be defined with respect to potential emissions, *id.*, is not true. The settlement agreement required EPA to propose that "*major* modification" be defined with respect to potential emissions.[16]

In *CMA*, GM challenged EPA's promulgation of

[16] Conveniently dropping the word "major" from the settlement language, Petitioners claim that the settlement required EPA to propose a new (b)(2)(v) "providing that a *modification* 'shall not be deemed to occur if one of the following occurs: (a) there is no significant *net* increase in the *source's* potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or (b) there is no significant *net* increase in the *source's* actual [annual] emissions.'" Pet. Br. at 13 (emphasis in original removed) (emphasis added) (quoting 61 Fed Reg. 38,250, 38,269 (July 23, 1996)). The actual language of the settlement, however, explicitly provided that EPA will propose a revision providing that "[a] *major modification* shall be deemed not to occur if …" Settlement Agreement, Ex. B, ¶A.1, No. 79-1112 (D.C. Cir. Feb. 22, 1982) ("*CMA* Settlement") (emphasis added). Moreover, as the emphasized terms "net" and "source" demonstrate, it is clear that the settlement addressed the netting rules, not what activity constitutes a modification in the first place.

"netting" rules that were based on net increases in a major stationary source's overall "actual" emissions, instead of net increases in the source's overall "potential to emit" (as EPA had originally proposed in 1979). At no point in its brief did GM indicate any understanding that the 1980 rules provided that projects or activities at a major stationary source that were not NSPS "modifications" would nonetheless be considered "major modifications" under NSR. To the contrary, as explained in more detail below, GM's brief is clear on its face that the only type of "change" or "alteration" to a major stationary source that the industrial petitioners then contemplated would ever constitute a "major modification" under the 1980 rules was the addition of an entirely *new* emissions unit (either as a replacement for an existing unit at the source or as additional capacity). *See, e.g.,* 1981 GM Brief at 6-11.

Contrary to Petitioners' mischaracterizations, the 1981 GM Brief addressed only that portion of the PSD rules that based source-wide "netting" on "actual emissions" rather than "potential to emit." In its brief, GM focused its argument on the illogical netting[17] result under EPA's 1980 rulemaking. The brief explained that replacement of an existing unit with a new unit of identical size and capacity would be deemed a "major modification," and subject to NSR, unless emissions from other units at the source were at the same time reduced. A new emissions unit was presumed under the 1980 rules to emit at its annual "potential to emit"

[17] Netting refers to a process by which new emissions—*i.e.*, those from a new unit or modification of an existing unit—are internally offset within the plant based on all increases and decreases over a 5-year period. 40 C.F.R. § 52.21. If a source uses netting to internally offset new emissions, there has not been a "major modification," and NSR does not apply. In GM's view, EPA's rules required an apples to oranges comparison, in that the netting calculus was based on the potential emissions from new units for increases and on actual emissions from existing units in determining how much of a decrease in emissions had occurred. *See* 1981 GM Brief at 8-11.

(*i.e.*, assuming annual operation at 8,760 hours even though, as a practical matter, no unit would, or could, reach that level). At the same time, for "netting" purposes under the 1980 rules the emissions from the existing unit that was being replaced were determined on the basis of that unit's "actual emissions" (*i.e.*, a level that would in all cases be less, and likely considerably less, than the new unit's annual "potential to emit").

It is this situation to which GM was referring when it characterized the 1980 rules as providing that a "major modification" would occur "whenever a series of contemporaneous changes at a [major stationary] source result in a significant increase in *actual* emissions, even though the source's net *capacity* to emit remains constant or declines." 1981 GM Brief at 5-6 (emphasis in original). GM was *not* saying that, by shifting to an "'actual emissions' test in place of the capacity-based test used in the 1978 PSD regulations and the 1979 proposal," *see* Pet'rs Br. at 12, EPA had adopted rules under which an activity or project that did not constitute a "modification" of an existing *emissions unit* (because it did not increase the unit's "capacity") could nevertheless constitute a "major modification" of a source. Put simply, the Petitioners' entire argument with respect to the *CMA* litigation founders on their failure to appreciate the distinction between the "capacity" of a major stationary *source* (*i.e.*, the source's "potential to emit") and the "capacity" of an individual emissions *unit*.

Whether GM's view of the CAA would have been sustained by the courts if it had been pursued fully in 1981 instead of settled is not relevant here. There is simply no intersection between GM's position advocated in a past lawsuit and the current case. The prior case involved the netting requirements addressed by the 1980 rules.[18] This

[18] The settlement agreement in *CMA* required EPA to propose that netting would be based on a comparison of potential emissions from new units and potential emissions from existing units in summing increases

case involves the threshold question that precedes netting—whether there has been a modification of an existing emission unit in the first instance.

GM certainly would have raised an additional objection to the rules if it had believed that they provided a modification definition different from the NSPS definition as Congress established. That GM only raised examples involving new units that would be required to utilize the source-wide netting process to determine if a "major modification" had occurred clearly indicates that GM did not address the NSR interpretation first advanced by Petitioners some 20 years after GM filed its brief. Indeed, the very fact that neither GM, nor any other industry party, raised such a challenge to the 1980 rules at that time proves the point: no one within industry had any notion at that time that EPA had promulgated rules with that effect, or that EPA was so interpreting the 1980 rules. This is not the least bit surprising. EPA shared that view as evidenced in formal applicability determinations issued by its chief of enforcement in consultation with its Office of Air Quality Planning and Standards and Office of General Counsel. *See* JA 35-37; JA 27-28.

The Petitioners' determination to rely so heavily on an industry brief, which in fact does nothing to support the Petitioners' position, is instructive. If Petitioners could produce statements *by EPA* at the time the 1980 rules were issued, they surely would offer those in this case. Because EPA's contemporaneous records do not support the revisionist interpretation of the 1980 rules, Petitioners instead have resorted to misstating industry positions through selective quotation of 25-year old briefs and settlement agreements. That they need to misconstrue a brief filed *by industry* to support their position indicates how weak their theory truly is.

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and decreases over a 5-year period. *CMA* Settlement, Ex. B.

VI. Claims of *Amici* STAPPA/ALAPCO Are Baseless.

A. STAPPA/ALAPCO's claim that the lower court ruling will adversely affect air quality is incorrect.

Amici STAPPA/ALAPCO's brief contends that if the lower court is upheld, "virtually all renovations on existing industrial sources of air pollution will be exempted from installing modern pollution controls." STAPPA/ALAPCO Br. at 4-5. Nothing could be further from the truth.

Member companies of the Associations filing this brief have been subject to numerous NSPS requirements since that program was established based on application of the modification provisions of those rules. Moreover, many NSPS have been revised over time to reflect advances in technology. Virtually every automobile paint shop in the United States is subject to the NSPS for automobile and light duty truck coating which limits emissions of volatile organic compounds from these operations. 40 C.F.R. part 60, subpart MM. Similarly, numerous paper mills have become subject to 40 C.F.R. part 60, subpart BB; corn refiners have become subject to the standards for grain elevators in subpart DD; and numerous refineries are subject to the control requirements of subparts GGG and QQQ.[19] The STAPPA/ALAPCO brief attempts to paint an EPA memorandum regarding applicability of NSPS to utility emission units as a broad statement that industry has never become subject to NSPS requirements. Numerous additional examples of NSPS that apply to units as a result of modification exist (*e.g.*, gas turbines, industrial boilers, glass manufacturing furnaces). STAPPA/ALAPCO is well aware of the broad applicability of these requirements because its members administer the NSPS program in many states.

[19] The memorandum cited in support of *amici's* contention that emission units have not become subject to NSPS modification provisions referred specifically to electric generating units and was in the context of proposed electric utility NSPS revisions. STAPPA/ALAPCO Br. at 5.

Even if STAPPA/ALAPCO could legitimately claim that the lower court's interpretation would lead to all renovations avoiding NSR, which it cannot, STAPPA/ALAPCO members remain fully capable of regulating (and indeed are required to regulate) existing sources through their SIP rules as necessary to attain and maintain NAAQS, and to protect the PSD increments. The member state and local agencies of STAPPA/ALAPCO possess the regulatory authority to require the controls they claim are needed under their SIPs right now, without waiting for a source to make a modification. As explained earlier, Section 110 mandates that states include sufficient measures in their SIPs to attain and maintain applicable NAAQS. 42 U.S.C. § 7410. States regulate existing sources of emissions under SIPs all the time.

For example, numerous SIP rules limit the amount of particulate emissions per unit of product output from all existing sources (so-called process weight rate rules). Similarly, many SIPs impose limits on the NOx or SO_2 emissions per unit of energy generated or on the pounds of VOC that may be contained in a coating product (*e.g.,* for appliances or automobiles). Also, states are required to "review the adequacy of a [PSD] plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated." 40 C.F.R. § 51.166(a)(4). If the increments are violated, the state is required to remedy any increment violation. *Id.* § 51.166(a)(3).

B. STAPPA/ALAPCO's claim that state and local agencies cannot meet their CAA obligations without reductions from existing electric generating units is beside the point.

STAPPA/ALAPCO devotes an entire section of its brief to arguing that reductions from electric generating units are needed to meet SIP obligations to attain the NAAQS. STAPPA/ALAPCO Br. at 7-12. This discussion is entirely

inapposite. It has nothing to do with the proper interpretation of the term "modification" under the CAA or EPA's NSR regulations. If emission reductions from one or another source category are needed for an area to achieve a NAAQS, Section 110 requires the *state to regulate that category or find other reductions to meet the NAAQS.* Section 110 does *not* require that EPA expand the scope of NSR to relieve the state from its obligation to issue appropriate regulations to meet the NAAQS. Congress vested states with the decision-making authority for how NAAQS would be achieved. The STAPPA/ALAPCO brief disavows that approach and seeks to foist the technical and political decisions that Congress asked states to make (and that states fought vigorously to keep, *see, e.g.*, *Train v. NRDC*, 421 U.S. 60 (1975)) back to EPA under the guise of the NSR program.[20]

STAPPA/ALAPCO's claim that state law prevents their members from meeting the NAAQS is a red herring. STAPPA/ALAPCO Br. at 12. They claim that half the state agencies are subject to state laws or policies prohibiting them from adopting any regulation more stringent than the "minimum federal law." The "minimum federal law" is Section 110, which requires those states to adopt regulations as needed to attain the NAAQS. A state law that prohibits rules more stringent than federal law has no application in the case where a state agency shows that its rules are needed to meet the requirements of CAA Section 110.

[20] STAPPA/ALAPCO's brief claims states will face sanctions if NSR is not applied as they suggest. This is untrue. States only face sanctions if they do not submit a SIP containing control measures needed to attain the NAAQS. 42 U.S.C. § 7509(a). Indeed, STAPPA/ALAPCO's approach is backwards: States can revise their SIPs at any time to include the controls needed to attain the NAAQS, and are subject to sanction if they do not do so. *Id.* If NSR *is* applied as STAPPA/ALAPCO's brief suggests, emissions will not necessarily decrease sufficient to meet the NAAQS.

C. STAPPA/ALAPCO's claim that the lower court ruling will limit economic growth is baseless.

The STAPPA/ALAPCO brief states that a "NSR program that effectively exempts renovated units from installing modern pollution control technology will limit economic growth." STAPPA/ALAPCO Br. at 12. In particular, STAPPA/ALAPCO claims that unless Petitioners view of NSR is adopted, the PSD increment will be consumed by increased operating hours of existing units and that this will prevent new units from being installed. There is simply no basis for claiming that subjecting a lower number of existing emissions units to NSR will limit economic growth. Indeed, just the opposite is true. Stifling business' ability to operate their plants—both existing and new (the latter become "existing" once they are built and have started operating)—optimally will hinder economic growth.

The preamble to the 1980 rules in fact recognizes and addresses the specific issue raised by STAPPA/ALAPCO. First, while noting that increments must be protected separately from any preconstruction requirements, EPA explained that states must periodically review air quality and take "corrective action" if the increments are exceeded by *any* activity, including activity at existing sources that consumes increment but is not a major modification subject to NSR permitting.[21] 45 Fed. Reg. 52,676, 52,677 (Aug. 7, 1980). *See also* 40 C.F.R. §§ 51.166(a)(3)-(4). Second, EPA explained that states could "revise SIPs and/or issue operating permits so that SIP requirements and permits reflect actual source operating conditions," if needed to protect the increments. 45 Fed. Reg. at 52,721-22. Thus,

[21] This is one of the PSD program elements that Congress specifically "tightened" in the 1977 Amendments. *See Alabama Power v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979). The 1974 rules neither required nor authorized state action to protect increments if exceeded as a result of activity that was not a modification, *e.g.*, raw material changes.

states have both the mandate and tools to protect increments quite apart from preconstruction review, and there is no basis for claiming that an overly broad reading of the "modification" rules is essential for increment protection. The "modification" definition is applicable to "renovated" units whenever they exceed their past actual emissions capability; if a source has been restricted in its emissions or operating hours to protect increment, any exceedance of those levels would be subject to PSD review. Thus, it is simply untrue that renovated units can never be considered to have been modified.

In the PSD program, Congress struck a delicate balance "to insure that economic growth will occur in a manner that is consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). Industrial operations fluctuate constantly, on an hourly, daily, monthly and yearly basis. The origins of these fluctuations are varied and include the overall state of economic growth in the country and the world economy, discovery of new uses for existing products, consumer preferences, competition, the availability of raw materials or other facilities, and more.

Companies seek and are issued permits to allow them to operate in dynamic markets and to increase their operating hours while maintaining their facilities. As EPA has consistently recognized, Congress did not intend to regulate fluctuations in operation. Rather, it is the litigating position of Petitioners and EPA and advanced by STAPPA/ALAPCO in its brief that would restrict economic growth by frustrating the intended operation of American manufacturing facilities that have already been reviewed for their emissions impact.

CONCLUSION

The judgment of the Court of Appeals should be upheld.

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