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# Not-So-New Source Review: D.C. Circuit Signals A Return To NSR Enforcement

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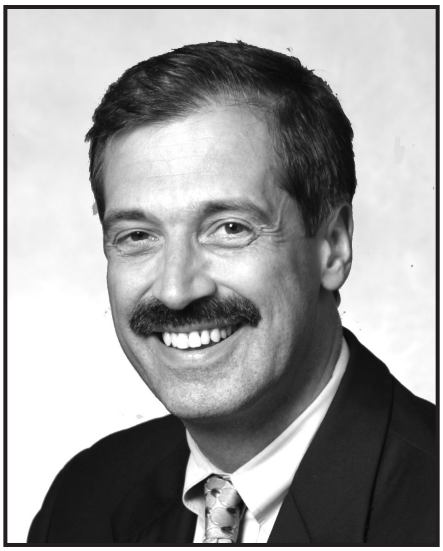
On March 17, 2006, the U.S. Court of Appeals for the D.C. Circuit vacated a rule issued by the U.S. Environmental Protection Agency (EPA) that had lain at the heart of EPA's efforts to reform the New Source Review (NSR) program under the Clean Air Act. *New York v. EPA*, No. 03-1380 (*New York II*). This marked the second time in the last nine months that the D.C. Circuit Court of Appeals struck down rules promulgated by EPA limiting the application of the NSR provisions. In June 2005 the D.C. Circuit vacated an EPA rule that excluded certain pollution control projects from NSR. *See New York v. EPA*, No. 02-1387 (*New York I*). This most recent decision, while based on an important misunderstanding of the NSR program, potentially clears the way for EPA to reenergize and perhaps expand its NSR enforcement efforts.

*New York II* concerned an EPA rule that implemented the Clean Air Act's requirement that a stationary source of air pollution that undergoes a "modification" comply with the Act's NSR permitting process. The Clean Air Act defines a "modification" as "any physical change… of a stationary source which increases the amount of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4). EPA's regulations already excluded activities that constitute routine maintenance, repair and replacement from these NSR requirements. Those provisions, however, continue to be the source of much confusion and controversy because EPA's enforcement arm claimed that the agency made such determinations on a case-by-case basis and attempted to limit the provisions to instances of *de minimis* maintenance activities. EPA intended its Equipment Replacement Provision (ERP), which was at issue in *New York II*, to establish a bright line rule that "the replacement of any component of a process unit with an identical or functionally equivalent component" such that the capital cost of the replacement does not exceed 20 percent of the replacement value of the process unit is within the Routine Maintenance, Repair and Replacement (RMRR) Exclusion to NSR requirements. 40 C.F.R. § 52.21(cc)(2005).



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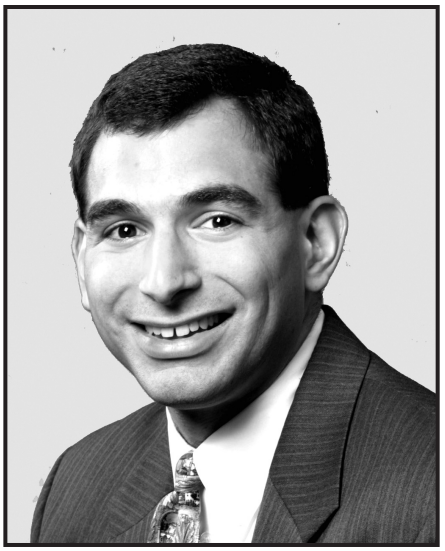

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Fourteen states, as well as several local entities and environmental organizations, challenged the ERP rule in the D.C. Circuit. The petitioners argued that the statutory definition of "modification" in the Clean Air Act is unambiguous and applies literally to *any* physical change that increases emissions. Therefore, the

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petitioners contended, EPA's rule exempting from NSR requirements physical changes of the size and scope covered by the ERP rule violated the statute. *New York II* at 8. EPA countered that the term "physical change" contained sufficient ambiguity as to require the court to defer to the agency's expertise in determining the types of "physical changes" to which NSR applied. *Id*. at 10.

**Court's Opinion**

In a unanimous decision, a three-judge panel of the D.C. Circuit granted the petitions for review and vacated the ERP rule, with the decision turning largely on the court's interpretation of the word "any" in the Clean Air Act's definition of "modification." The petitioners argued that by using the phrase "any physical change," Congress intended an expansive meaning that "covers any activity at a source that could be considered a physical change that increases emissions." *Id*. at 10. EPA maintained, however, that the phrase "physical change" was inherently ambiguous and that the word "any" did nothing to resolve that ambiguity. *Id*. at 10, 13. Accordingly, EPA argued that it was entitled to deference in its interpretation of the term "physical change" in the ERP rule.

The court agreed that "physical change" was susceptible to different interpretations and meanings, but refused to defer to the meaning embodied in the ERP rule. Rather, the court noted that "when Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings; the agency may not pick and choose among them." *Id*. at 15. Thus, "[b]ecause Congress used the word 'any,' EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.'" *Id*. at 10. No further definition of "physical change" was required of EPA, the court concluded, because, by using the word "any," Congress intended "to cover all of the ordinary meanings of the phrase." *Id*. at 17. Thus, EPA had no discretion to determine the types of "physical changes" to which NSR applied.

The court held that EPA should not be accorded deference on its definition of "any physical change" because, by failing to establish ambiguity in the phrase, it could not satisfy the requirement of step one of *Chevron's* two-step test. *See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc*., 467 U.S. 837 (1984). The court reasoned that EPA's argument would require the definition of "modification" to include words of expansion such as "regardless of size, cost, frequency, effect…," in order to be viewed expansively. *New York II* at 14. The court noted, however, that this "Humpty Dumpty world" approach would require the court to ignore the expansive word "any" that Congress *did* include in the definition. *Id*. In rejecting EPA's interpretation, the court specifically contrasted the petitioners' approach, which gave meaning to all the words used by Congress, with EPA's approach, which rendered the word "any" surplusage. *Id*. Furthermore, the court stated that Congress defined "modification" in terms of emissions increases and, therefore, the court concluded that "only physical changes that do not result in emission increases are excused from NSR." *Id*. at 15. The court read the ERP rule as impermissibly excluding from NSR an entire class of equipment replacements, without regard for whether emissions increased as a result.

The court's analysis returned several times to EPA's historic practices in addressing physical changes under the NSR program. For example, it noted that EPA has exercised its inherent discretion to exempt from NSR requirements some changes that lead to *de minimis* emissions increases. *Id*. at 16. The court stressed, however, that such discretion was based on administrative necessity and did not permit the ERP's expansion of the RMRR exclusion to changes that resulted in emission increases that were not *de minimis*. Moreover, the court pointed out that nothing in EPA's history of enforcement prevented it from embracing a broad definition of "any physical change," as it had for decades interpreted the phrase to mean "'virtually all changes, even trivial ones, …generally interpret[ing] the [RMRR] exclusion as being limited to *de minimis* circumstances.'" *Id*. at 18 (quoting 68 Fed. Reg. at 61, 272). Thus, the fact that *de minimis* changes were excluded in the past provided no basis for a rule that limited the definition of "modification" to only those changes that reach some threshold of costliness. *Id*. at 19. The D.C. Circuit vacated the ERP rule because the rule erroneously applied the term "physical changes" to those that were particularly costly or substantial, i.e., those that involved a cost of 20 percent or more of the replacement value of the unit. *Id*. at 19.

**Implications Of *New York II***

The ERP rule was a centerpiece of EPA's efforts during the Bush administration to reform New Source Review so as to clarify that even relatively large and expensive maintenance and repair projects could be undertaken without implicating the NSR program. The administration intended, through this and related reforms, to facilitate the continued efficient operation of older power plants and other similar industrial facilities. One of the complexities EPA faced in promulgating the rule was its simultaneous prosecution of enforcement actions that proceeded on the basis of interpretations of the NSR program that were fundamentally at odds with those underlying the ERP rule. As a result, EPA constrained both its prosecution of the pending enforcement actions and its defense of the ERP rule in an effort to minimize the inherent contradictions of these simultaneous efforts.

With the *New York II* decision, the enforcement interpretation of the NSR program has gained new life, at least for the time being. It remains possible, therefore, that EPA could recommence its enforcement initiatives based on NSR. The *New York II* decision did not invalidate the existing routine maintenance exclusion and did not address the scope of EPA's authority to define how to measure emissions increases. Those issues lie at the heart of the pending NSR enforcement actions that continue to work their way toward the various courts of appeals, and it appears that regulatory certainty must await decisions in those cases.