

# 'Grandfathered' Air Pollution Sources and Pollution Control: New Source Review Under the Clean Air Act

by Victor B. Flatt and Kim Diana Connolly

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## Executive Summary

The modern Clean Air Act, which was enacted in 1970, established performance standards for newly constructed sources of air pollution. However, recognizing that companies had already invested capital in existing sources and aware of the cost of retrofitting these sources with modern pollution controls, Congress did not require owners of existing stationary sources to install air pollution control technology until they are modified or upgraded. The process of determining when a change in a plant is sufficiently extensive to subject it to modern pollution controls is one aspect of a broader function known as "new source review" (NSR). When Congress established this system, it expected that these "grandfathered" sources would eventually either upgrade and install the technologies that the CAA prescribes for new sources or shut down due to old age. History has not, however, borne out this optimistic expectation. Sources in operation since 1970, some in operation for more than 60 years, continue to cause a disproportionate share of air pollution in most regions in the country, thereby exacerbating health problems and making new economic growth more difficult.

One reason for this unanticipated result is the perverse incentives that flowed from the initial decision to exempt grandfathered sources for what was thought to be a limited amount of time. Another reason is the intentional evasion by some companies of the law as reflected in regulations that the Environmental Protection Agency (EPA) promulgated to allow companies to engage in minor repairs and maintenance without having to install the pollution controls required for lifetime-extending upgrades.

In order to continue operation for any time at all, existing sources must occasionally undergo routine repairs or upgrades that are not designed to allow the plant to continue in perpetuity. Hoping to accommodate "routine replacement, repair, and maintenance" that was not thought to be an attempt to illegally extend the lifetime of the plant, EPA early on carved out an administrative exception for certain "*de minimis*" repairs or modifications from the rule which required the installation of pollution control equipment when the modification of an existing source causes an increase in pollution. EPA opined that these small activities were not meant to be covered by the pollution control upgrade requirements.

The Clean Air Act's focus on new sources meant that significant existing sources of air pollution (most of which are power plants or refineries) are generally cheaper to operate and therefore generate higher profits than new plants. This gives owners an incentive to operate existing sources for as long as possible, even though they contribute a great deal to our current air pollution problem. This is perfectly legal under the current CAA, so long as the sources do not undergo significant changes. However, over time, significant changes may be necessary in order to keep the source in operating condition. A problem arises because the incentive to keep the sources running conflicts with the expense required to comply with the Clean Air Act's requirement that companies install air pollution equipment when existing sources are modified in any significant way.

Until recently, the officials in charge of issuing permits for major stationary sources decided whether a change to a source would constitute a "modification" on a case-by-case basis pursuant to specific factors set out in EPA's regulations.

Generally, the permitting official would first determine whether the changes would increase the emissions potential of the existing source. If so, the regulations required an examination of the nature, purpose, cost, and extent of the modifications. This focused on overall cost, percentage cost of the modifications, whether entire units were to be replaced, and whether efficiency and useful life would be extended. Because the regulations required permitting officials to apply multiple factors, the implementation of the new source review requirements was subject to differences in enforcement zeal over time. This unevenness in application was exacerbated by continuing industry pressure to recognize new exceptions and variances of the application of these rules. At various times, the implementation of the EPA regulations has apparently reflected a policy of promoting life-extension projects for facilities that should have been retired or brought into the mainstream of air pollution regulation years ago.

Suspecting that many companies were modifying sources in violation of the NSR policy, the Clinton Administration intensified scrutiny, and EPA determined that many existing sources had been modified without undergoing the required pollution control upgrades. This stepped up enforcement precipitated demands from existing sources for regulatory relief, and the Bush administration soon complied. However, the new rules that EPA proposed to assist in determining when modifications required upgrades go far beyond the statutory threshold and would allow large pollution sources that have a disproportionate effect on health to continue operating indefinitely. These rules have been challenged, and they have been held in abeyance by a federal court of appeals until it decides the merits of the appeals. If the court overturns the Administration's proposals, a likely possibility given their inconsistency with the relevant

provisions of the Clean Air Act, the current case-by-case approach will remain in effect. The efficacy of the program will depend upon the Bush Administration's questionable commitment to enforce the statutory requirements. Either way, existing sources will continue to pollute disproportionately for the foreseeable future if Congress does not step in to solve the problem.

The interests of enforcement certainty, equitable treatment of "grandfathered" plants, and (most importantly) public health could best be served by a legislative solution that phases out the existing exemptions over time and eventually requires all major air pollution sources to install technology necessary to control pollution. This would provide the owners of grandfathered sources an economic incentive to upgrade pollution control equipment in plants where upgrades are economically justifiable and an equally powerful incentive to shut down inefficient and highly polluting plants. At the same time, this solution will also encourage investment in newer plants with modern pollution control technologies that are less polluting from the outset. In addition to providing cleaner air, a phase-out of currently exempted "grandfathers" will provide a greater degree of certainty to industry for both business decisions and compliance / enforcement activities.

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## **Introduction**

Congress passed the 1970 Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."<sup>1</sup> It has been referred to by some as the most successful public health and environmental law ever.<sup>2</sup> When the modern Clean Air Act was passed in 1970, it represented a fundamental shift in addressing

the growing national problem of air pollution. Unlike earlier efforts, it attempted to create mandatory controls on air pollution sources that harmed human health. The Act directed the EPA to establish safe levels of common air pollutants, and it required the states to enforce those limits.<sup>3</sup> In order to ensure real reductions in these pollutants and to assist the states in meeting these goals, the Act also established pollution control standards that were to be applied to new stationary and mobile sources.<sup>4</sup> These requirements are located in CAA programs known as New Source Performance Standards, Prevention of Significant Deterioration, and source controls in non-attainment areas (areas where the level of pollution to protect health have not been met). We live under these revised standards to this day. When in place, these standards, which require various kinds of pollution control technology and processes, can reduce air pollution from stationary sources by over 90 percent.

In the 1977 Amendments to the Act, Congress enacted the New Source Review (NSR) program as an enforcement mechanism to regulate those sources that required pollution control equipment. Congress designed NSR as a pre-construction review and permitting program intended to “protect public health and welfare from any actual or potential adverse effect...from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all national ambient air quality standards.”<sup>5</sup> By terms of the statute, and as may seem obvious from its name, “new source review,” was to apply to “new” sources that were subject to the performance standards of the CAA.

In the 1970 and 1977 legislation, Congress made a policy choice to exempt comparable existing sources from these requirements. Contemporaneous debates indicate that pollution control equipment was not required of older sources because of the expense of retrofitting existing sources and the perceived economic unfairness resulting from a retrofit requirement.<sup>6</sup> However, it was clear that Congress did not envision the continuation of existing sources in perpetuity. Lawmakers believed that these sources

would eventually reach the end of their useful life, and they would either be replaced by new plants or be significantly modified, at which time new state-of-the-art pollution control equipment would be installed.

Congress chose to “grandfather” existing pollution sources from the NSPS and NSR provisions at the time the statute was enacted. . . Congress did not, however, intend that such existing sources be forever spared the burden and expense of installing pollution control devices.<sup>7</sup>

Older uncontrolled plants would not only continue to contribute to dirty air directly, but new pollution-controlling plants would be comparably economically inefficient.

Congress therefore put in place a method for ensuring that these “grandfathered” plants did not contribute to air pollution indefinitely. Without modification or upgrade, the aging plants would eventually reach the end of their useful lives and close. If such plants did undertake to upgrade or “modify,” they would be required to install the pollution control equipment required of all new sources and would themselves be subject to new source review.

Nevertheless, thirty-five years after the fact, many older sources continue in use without new pollution abatement equipment. This may in part be traced to variability of enforcement at the EPA,<sup>8</sup> but whatever its cause, many of these “grandfathered” plants are operating far beyond the lifetimes originally envisioned, some in violation of the law. They continue to contribute to dangerous pollution levels in all regions, and they put a high burden on health and clean economic growth years after they were expected to close.

Polluted air from these sources is an ongoing danger to public health. The health consequences include increased hospital admissions for respiratory and cardiovascular illness and an escalating number of premature deaths.<sup>9</sup> The American Lung

Association recently released *State of the Air: 2004* which reports that 47 percent of the nation lives in areas with unhealthy levels of ozone, creating risks of decreased lung function, respiratory infection, lung inflammation and aggravation of respiratory illness.<sup>10</sup> The report also found that 28 percent of the population lives in areas with unhealthy levels of short-term particle pollution, which increases occurrences of heart attacks and strokes, frequency of emergency-room visits for respiratory ailments and cardiovascular disease, and number of deaths from respiratory and cardiovascular causes.<sup>11</sup> In addition, the report found that 23 percent of the population lives in areas with unhealthy levels of long-term particle pollution, which can increase the risk of hospitalization for asthma, slow lung function, damage the airways of the lungs, lead to premature births, and significantly increase the risk of death from lung cancer and cardiovascular disease.<sup>12</sup>

In the late 1990s, the Clinton administration began a concerted effort to enforce the new source review provisions against any existing sources that were upgrading illegally. Investigations were initiated at over 100 plants, and many were referred to the Justice Department for prosecution.<sup>13</sup> Many industrial sources cried “foul” at the stepped up enforcement, complaining that the EPA’s standards were not consistent.<sup>14</sup>

Because of the expense involved in installing upgraded pollution equipment as well as the liability now faced by companies that were, or could be, under investigation by a newly aggressive EPA, relief from these requirements moved to the top of the agenda of many affected businesses. The election of President George W. Bush and a new administration with extensive knowledge of and connections to the energy and electricity generating industries brought hope for such relief. Clean Air Act “reform” was one

of the first priorities of the Bush administration. In early 2001, the Bush administration proposed amending the CAA to eliminate new source review altogether and instead focus on reducing NOx and mercury through a trading program. This proposal was known as the Clear Skies Initiative.<sup>15</sup> When serious objections to this legislation stalled its progress in Congress during President Bush’s first term, the administration moved to address the issue through rulemaking. In 2003, the EPA published rules that effectively granted many of the old grandfathered sources exemptions from pollution control requirements.<sup>16</sup> Many experts, including the Center for Progressive Regulation, suggested that these rules went beyond allowances established by the Clean Air Act and were therefore illegal. Of particular concern were indications in the proposed regulations that existing sources could improve efficiency of operation so that they could continue in perpetuity without ever

upgrading pollution control equipment. This is exactly the opposite of the situation envisioned by Congress when the CAA was passed.

### *The Law*

As implemented, NSR determines all technological and process requirements for new sources, establishing one set of permit requirements for facilities in areas where the air quality is acceptable, called attainment areas, and one in areas where the air quality is poor, called non-attainment areas.<sup>17</sup> An NSR permit in a non-attainment area requires facilities to use pollution control technology equivalent to the most stringent limit achievable, known as the lowest achievable emission rate (LAER). In an attainment area, a Prevention of Significant Deterioration (PDS) permit is required. This type of permit requires a facility to use the best available control technology (BACT) and to

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demonstrate that the new emissions will not cause or contribute to significant deterioration in the level of air quality presently found in the attainment area. Additionally, all new sources are subject to the New Source Performance Standards (NSPS).

Facilities that were in operation before the enactment of the 1970 CAA were exempted from NSR requirements. These older facilities were not, however, exempt if they undertook a modification. NSR is thus the principal tool for ensuring that older facilities which continue in use through upgrading are using the most up-to-date pollution controls. In pertinent part, a “modification” occurs if “any physical change” or “change in method of operation . . . increases the amount of any air pollutant emitted by such source.”<sup>18</sup>

This definition of modification in the Clean Air Act is explicit and clear. Consequently, the EPA must follow the explicit terms of the statute. “Regulations issued under the Clean Air Act by the U.S. EPA may not conflict with statutory language enacted into law by Congress.”<sup>19</sup> The only question for EPA is what activities technically cause an emissions increase that triggers the application of the statute.

### *The Implementing Regulations – History and Proposal of the Bush Administration*

The EPA implementing regulation for determining when an existing source must upgrade pollution control equipment has defined “modification” in substantially the same terms used by Congress:

[A]ny physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 [42 U.S.C. § 7411] of the Act.<sup>20</sup>

EPA regulations specified that a physical change constituted a modification under § 7411, if the change increased the facility’s hourly rate of

emission.<sup>21</sup> For PSD purposes, the EPA regulations provided that an increase in the total amount of emissions activated the modification provisions of the regulations.<sup>22</sup> Because the statutory definition of modification might include even the most trivial activities, the EPA also interpreted the term to provide a *de minimis* exception for “routine maintenance, repair and replacement”:

The following shall not, by themselves, be considered modifications under this part: (1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category ...<sup>23</sup>

Historically, what constituted “routine maintenance repair and replacement” (RMRR) for purposes of this regulation was made on a case by case basis.<sup>24</sup> Under the old NSR rule, a change at an existing major source was considered a major modification if it would lead to a significant net emissions increase. To determine the emissions increases, a facility would establish its baseline emissions (*i.e.* the emissions before the proposed change) by examining its average annual rate of actual emissions during the two years immediately preceding the change. To estimate the emissions after the project, a facility would assess the potential to emit after project completion. The difference between the emissions after the project and the baseline emissions before the project was compared to a significance threshold for each regulated pollutant to determine whether a significant increase would occur. Though it has varied over time, this threshold was generally quite low, resulting in a true *de minimis* exception. If the net emissions increase was greater than the significance threshold, the proposed change was a major modification. The Bush administration’s proposed new definition of routine maintenance and repair greatly expands this threshold.

### *The Bush Administration Proposal*

The proposed rule would define RMRR in pertinent part as:

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, provided . . . the fixed capital cost of [this replacement, maintenance and repair activity] shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced.<sup>25</sup>

The RMRR Proposed rule also noted that changes that would increase “efficiency” of the unit would not automatically qualify as major modifications.

### ***Illegality of the Proposed Bush Administration NSR Rules***

Under the Supreme Court’s *Chevron* Doctrine, when determining whether a regulatory definition violates its enabling statute, a court is first to determine if Congress has directly spoken on the issue.<sup>26</sup> “If the intent of Congress is clear, that is the end of the matter because the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>27</sup>

The terms of the CAA could not be clearer. Other courts considering the modification provisions of NSPS and PSD have assumed that “any physical change [that] increases the amount of air pollutant emitted by a source” means precisely that.<sup>28</sup> Yet, nowhere does the proposed NSR rule address this salient fact. By allowing an alteration to be considered “routine” merely if its capital cost falls under 20 percent of the cost of the plant, without reference to whether the alteration would increase emissions, the regulation violates this clear command of the statute.

No part of the proposed rule references any requirement that the proposed RMRR exception be predicated on the source not increasing the amount of air pollution produced by the source.<sup>29</sup> It would thus allow an existing source to increase its emissions without requiring the installation of pollution control equipment as required by the Clean Air Act,

§§ 7475(a), 7502 and 7503. An RMRR budget of 20 percent would allow far more than *de minimis* work on an existing source. Indeed, according to the proposed rule’s explication, the only analysis that looked at RMRR systematically noted that most activities that can be considered RMRR in electric power plants would cost less than 5 percent of the replacement value of the unit.<sup>30</sup>

Although the EPA apparently assumes that it has the right to simplify a rule if it believes that it would be a good idea, the agency cannot contravene the express will of Congress. Legislative history reveals that Congress intended that modifications which increased pollutant levels were to trigger NSR requirements. As the Supreme Court noted when examining the legislative history of the Clean Air Act in the *Chevron* case, Senator Muskie, one of the Act’s chief sponsors, stated:

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 . . .<sup>31</sup>

The purpose of allowing existing sources to avoid the imposition of the pollution control equipment for new sources was to recognize the already fixed costs that had been incurred prior to the enactment of the Clean Air Act.<sup>32</sup> It was a temporary measure that the Bush administration now seeks to make permanent through illegal rulemaking.

The RMRR was only to be a limited exception, allowing simple replacement of parts with identical ones. This proposed rule seeks to expand this simple approach by allowing replacement of similar units or equipment, even if the use of an “improved” functionally equivalent version produces “process efficiency improvements.”<sup>33</sup> As enshrined in the proposed rule itself, “efficiency of a process unit” would not prohibit application of the newly proposed RMRR rule.<sup>34</sup>

In the seminal *Wisconsin Electric* case, the court noted that while repair of deteriorated equipment

may contribute to the useful life of a facility, this is significantly different from activities that would *extend* the life expectancy of the plant.<sup>35</sup> Congress did not intend for the CAA to permit the extension of the life of an unregulated plant indefinitely.<sup>36</sup>

By allowing older plants to install replacement equipment that is more efficient, the current proposal eliminates the possibility of an existing plant ever having an economic incentive to upgrade. This means that these existing plants can continue to modernize, bringing in comparable efficiencies to new plants while at the same time not being required to upgrade pollution control equipment. This flies in the face of Congress' choice in how to address the nation's serious air problem – to require old plants to phase out or control their pollution.

The proposed rule undermines the very nature of the technology-forcing requirements of the CAA, essentially eliminating them for existing sources and removing an incentive for the construction of new sources. If older sources can go on in perpetuity without installing expensive pollution control equipment, building more efficient, newer sources that require such equipment is economically unjustified. The proposed rule clearly would eviscerate the purpose of new source review and undermine the basis of the Clean Air Act itself.

The main proposed basis for the rule is to eliminate the “uncertainty” that operators face in determining whether RMRR applies.<sup>37</sup> But as laudable as that goal may be, it cannot be imposed against the direct wishes of Congress. Any elimination of pollution control equipment upgrades for existing sources must be undertaken through the legislative process and not implemented in the guise of an administrative change.

### ***Bad Rules, Bad Policy***

Taken together, the regulatory changes proposed by the Bush administration will lead to worse air pollution when compared with effective enforcement of the current scheme. The 2003 federal revisions to NSR have been widely criticized by the national environmental community as the most dramatic rollback to the Clean Air Act since it was enacted more than 30 years ago.<sup>38</sup> The Sierra Club maintains that these changes “cripple the Clean Air Act.”<sup>39</sup> Likewise the Natural Resources Defense Council claims that the rollbacks “weaken a key Clean Air Act safeguard to the point where it will be meaningless.”<sup>40</sup> Officials from Environmental Defense also criticize the revisions asserting that “[t]his rollback puts the nation on the path to major pollution increases when sound science tells us we need rigorous pollution cuts to protect public health.”<sup>41</sup>

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The revisions have also been criticized by public health organizations including the American Lung Association and the American Heart Association. The public

health consequences of polluted air are serious, including increased hospital admissions for respiratory and cardiovascular illness and an escalating number of premature deaths.<sup>42</sup> As detailed above, the American Lung Association's *State of the Air: 2004* report notes that much of the population lives in areas with unhealthy levels of ozone and particulates.<sup>43</sup> The report is highly critical of the new revisions to the NSR program for providing huge loopholes to industry that would allow polluters to significantly increase pollution beyond the dangerous levels that currently exist, thereby further endangering the health of the nation.<sup>44</sup>

The American Heart Association also released a 2004 report confirming that air pollution can cause both heart disease and an increased risk for cardiovascular mortality.<sup>45</sup> According to the study, this

is a “serious health problem” as “even conservative risk estimates translate into a substantial increase in total mortality within the population.”<sup>46</sup> The report thus advocates strengthening air pollution regulations to improve public health and reduce cardiovascular morbidity and mortality.<sup>47</sup>

In April 2003, the National Academy of Public Administration<sup>48</sup> released *A Breath of Fresh Air: Reviving the New Source Review Program*.<sup>49</sup> The report criticizes the draft version of the RMRR rule, finding that gaping loopholes created or expanded by the revision will adversely impact Americans’ health.<sup>50</sup> Further, despite the administration’s assertions to the contrary, the report finds that the new revisions will not improve environmental protection.<sup>51</sup> In addition to criticizing the current reforms, the Public Administration report calls for a fundamental reform of NSR, including ending grandfathering of older sources, creating a performance-based system to require facilities to reduce air pollution, and adopting NSR reforms which integrate other protections of the Clean Air Act and which anticipate future environmental challenges.<sup>52</sup>

State and local air pollution control agencies have also criticized the new rules, the concern being that the new rules will compromise air pollution protections and our nation’s air quality. As a result, the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) created a document entitled *Menu of Options* as an alternative to the federal regulations. This document was designed specifically to assist states and localities when engaging in local stakeholder discussions and making their own revisions. For each of the main elements of the federal rule, the document offers several alternative approaches in the form of regulatory language.<sup>53</sup>

Even the government’s own analysis shows the shortcomings of these proposals in leading us to better health. According to an evaluation report by the EPA’s own Office of Inspector General, the proposed NSR changes have already damaged the EPA’s ability to complete enforcement actions against coal-fired electric utilities:

As a result, nearly all of the projected emission reductions of 1.75 million tons of SO<sub>2</sub> and 629,000 tons of NO<sub>x</sub> would not be realized under NSR enforcement efforts.<sup>54</sup>

Despite the significant opposition and the reports of adverse health effects, the Bush administration and the EPA stand behind the revisions. The revisions are supported by industry, which has a disproportionate level of interplay with this Administration.<sup>55</sup> For example, officials of Edison Electric Institute, a trade group for investor-

owned utilities, assert that “[a]t the end of the day, power plant operators need to be able to run their facilities without the perpetual threat of litigation.”<sup>56</sup> The political nature of the attempts to alter NSR and the harm these attempts caused are documented in Christie Todd Whitman’s new book: “It’s My Party Too: The Battle for the Heart of the GOP and the Future of America.” In this book, Ms. Whitman, the former EPA Administrator at the beginning of President Bush’s first term, states that she regrets that these NSR proposals were allowed to go forward as they weakened existing enforcement and were designed to play to the Republican Party’s anti-regulatory base, at the expense of public health.<sup>57</sup> The American public also recognizes the sweeping problems with this proposal.<sup>58</sup> In fact, 82 percent of Democrats, 81 percent of Independents, and 66 percent of Republicans support maintaining the old NSR regulations.<sup>59</sup> U.S. Public Interest Research

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Group calls the revisions “a massive gift to the energy companies that contributed heavily to the Bush campaign,” finding it difficult to imagine a “more aggressive assault on our clean air protections.”<sup>60</sup>

### *What If Anything Should Be Done about Grandfathered Plants?*

While more certainty regarding when modifications go beyond routine maintenance and repair might be desirable, problems with administration of the current case-by-case approach arise because existing sources continue to try to exempt as much alteration as they can from triggering NSR. There is no requirement that the EPA create a *de minimis* RMRR, and it is this existing loophole that grandfathered sources continue to attempt to expand. Relentless lobbying and negotiation have taken their toll over time, allowing many modifications to occur without requiring an upgrade of pollution control equipment. Most current uncertainty is based only on the EPA's attempts to allow businesses to make small “routine” changes without triggering application of the Act. Consistency of enforcement is desirable, and businesses could be disadvantaged if they must compete with other businesses based on an uncertain application of the rules. That is why we encourage the Bush Administration and all other future administrations to enforce the current case by case regulations with consistency.

The best solution may be to phase out the grandfather exemption altogether. Since all of the existing plants have already operated far beyond the life expectancy originally envisioned by Congress when it granted the exemption, it would be logical to remove grandfathering exemptions by a date certain.

These grandfathered plants continue to contribute to high pollution levels in almost all jurisdictions,

making it harder to improve air quality and putting a higher economic burden on newer pollution sources and future growth. This is both unfair and inefficient. If all plants were on an equal playing field, some suggested pollutant trading systems could be more fairly administered, and far more significant reductions would result than those envisioned in the Clear Skies proposal.

This change is more than fair to regulated industry. Many grandfathered sources have been allowed to operate with no pollution controls at all for thirty-five years. While retrofitting technology might be more expensive than newer technology, the grandfathered sources are in no worse shape than anyone proposing to build a pollution source from scratch. Industry could simply retire these sources that have been operated far longer than envisioned. Any sunk costs in the original construction of the grandfathered sources have been accounted for, recovered, and amortized. There is no need to enhance profitability of these plants at the expense of public health.

A suitable phase-in period would reduce any inequalities that might occur. Phasing out the exemptions over a five year period, for example, would allow companies that still operate grandfathered plants to avoid both business and energy production shocks while they determine whether upgrading with state-of-the-art pollution control equipment or shutting down would be the best solution.

Phasing out the grandfathered exemptions meets the needs of both the regulated community and the public. It provides for continued improvement of air quality and reflects the policy that Congress thought it was enacting in 1970.

## About the Authors



**Victor Flatt** is a Member Scholar of the Center for Progressive Regulation and the A.L. O'Quinn Chair in Environmental Law, University of Houston Law Center and Visiting Professor of Law, University of Washington College of Law. His teaching and research emphasis are focused in the areas of environmental and administrative law. Professor Flatt served on the Board of Directors of the Georgia Center for Law in The Public Interest, which won the *Hankinson* case regarding the establishment of Total Maximum Daily Loads (TMDLs) in Georgia. He regularly teaches courses to U.S. Army Corps of Engineers Professionals on Environmental Law, and advises government, nonprofit and private organizations such as the Sierra Club, the Blue Skies Initiative and the Greater Houston Association for Smog Prevention (GHASP). Professor Flatt has published extensively in numerous journals including the *Notre Dame Law Review*, *Hastings Law Journal*, the *University of Washington Law Review*, *Environmental Law* and *Boston College Environmental Affairs Law Review*. Three of his articles were either finalists or selected for the year end "Best of Environmental and Land Use Law" compendium. Professor Flatt is an author of the forthcoming *Legal Protection of the Environment* for West Publishing, along with co-authors William Funk and Craig Johnston.



**Kim Diana Connolly** is an Associate Professor of Law at the University of South Carolina School of Law. She directs the Environmental Law Clinic, and teaches Introduction to Environmental Law and Policy, Environmental Advocacy, Legislation, and Interviewing, Counseling and Negotiating. She is also a member of the summer faculty at Vermont Law School (the #1 U.S. News and World Report-ranked environmental program) where she teaches Wetlands Law and Policy. Her areas of scholarly interest include natural resources and public lands law, as well as law teaching methodology. Professor Connolly's scholarly works have appeared in *The Catholic University Law Review*, *Washington University Journal of Law and Policy*, *Vermont Journal of Environmental Law*, *Southeastern Environmental Law Journal*, *Law Teacher*, and other publications. She speaks regularly at national and international conferences. Professor Connolly is a co-editor of the forthcoming American Bar Association book, *Federal Wetlands Regulation*. She is also an associate faculty member of the University of South Carolina School of the Environment, and winner of the University-wide Faculty Environmental Stewardship award for 2004.

## End Notes

1. 42 U.S.C. § 7401(b)(1) (2000).
2. Tom Valtin, *Bush Chips Away at Clean Air Act*, <[http://www.sierraclub.org/planet/200302/clean\\_air\\_act.asp](http://www.sierraclub.org/planet/200302/clean_air_act.asp)> (accessed June 16, 2004).
3. 42 U.S.C. §§ 7409 and 7410.
4. 42 U.S.C. § 7411.
5. 42 U.S.C. § 7470(1).
6. H.R. Rep. No. 294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 185, reprinted in 1977 U.S. Code Cong. Admin. News at 1264.
7. *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 850 (S.D. Ohio 2003).
8. *Id.* at 834.
9. American Lung Association, *State of the Air: 2004* <[www.lungaction.org/reports/sota04\\_full.html](http://www.lungaction.org/reports/sota04_full.html)> (accessed June 29, 2004).
10. *Id.*

11. *Id.*
12. *Id.*
13. See e.g., Press Release, Department of Justice, U.S. SUES ELECTRIC UTILITIES IN UNPRECEDENTED ACTION TO ENFORCE THE CLEAN AIR ACT: Complaints Filed After One of the Largest Enforcement Investigations in EPA History, (Nov. 3, 1999), available at <<http://www.usdoj.gov/opa/pr/1999/November/524enr.htm>>. More details available at <<http://www.epa.gov/compliance/civil/programs/caa/coal/index.html>>.
14. *AEP Files Motion to Dismiss Majority of Claims in Complaints by U.S. EPA, Other Parties*, PR NEWSWIRE, May 10, 2000; *CLEAN AIR: Industry Says EPA Enforcement Confusing*, GREENWIRE, Feb. 29, 2000; *GOOD FAITH DISAPPEARS: EPA policy toward grandfathered power plants*, POWER ENGINEERING, Jan. 1, 2000.
15. Clear Skies Act of 2003, H.R. 999, S 485, 108<sup>th</sup> Cong. (2003), reintroduced as Clear Skies Act of 2005, S. 131, 109<sup>th</sup> Cong. (2005).
16. Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61248 (published Oct. 27, 2003) (stayed pending outcome of court challenges).
17. A non-attainment area does not meet the primary or secondary NAAQS for one or more criteria pollutants. 42 U.S.C. §7407(d)(1)(A)(i).
18. 42 U.S.C. § 7411(a)(2).
19. 42 U.S.C. § 7411(a)(4).
20. *Ohio Edison* at 833.
21. 40 C.F.R. § 60.14(a) (2004).
22. 40 C.F.R. § 60.14.
23. 40 C.F.R. § 52.21(b)(3) (1988).
24. 40 C.F.R. § 60.14(e) (1988) (NSPS program); see 40 C.F.R. § 52.21(b)(2)(iii) (1988) (PSD program).
25. *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 911 (7th Cir. 1990).
26. 68 Fed. Reg. 61277, 61278, and 61280 (Oct. 27, 2003).
27. *Chevron, U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984).
28. *Id.*
29. See, e.g., *National-Southwire Aluminum Co. v. United States Environmental Protection Agency*, 838 F.2d 835 (6th Cir. 1988), cert. denied, 488 U.S. 955, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988) (turning off pollution control equipment constitutes “physical change” and modification); *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C.Cir. 1979) (“[T]he term ‘modification’ is nowhere limited to physical changes exceeding a certain magnitude.”); *ASARCO, Inc. v. EPA*, 578 F.2d 319, 322 (D.C.Cir. 1978) (NSPS applies to any stationary source that is “physically or operationally changed in such a way that its emission of any air pollutant increases.”) (emphasis removed). *Cf. United States v. Narragansett Improv. Co.*, 571 F. Supp. 688, 694-95 (D.R.I. 1983) (replacement program not modification because, despite physical change, no increase in emissions); *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 908 (7th Cir. 1990) (boiler replacement and upgrade triggers NSR if emissions will be increased.)
30. 68 Fed. Reg. at 61276-61279 (Oct. 27, 2003).
31. 68 Fed. Reg. at 61257 (Oct. 27, 2003).
32. 467 U.S. at 853, 104 S.Ct. at 2787 (quoting 123 Cong. Rec. 26847 (1977)).
33. H.R. Rep. No. 294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 185, reprinted in 1977 U.S. Code Cong. Admin. News at 1264.

34. 67 Fed. Reg. 80301 (Dec. 31, 2002).
35. 68 Fed. Reg. 61278 (Oct. 27, 2003).
36. *Wisconsin Electric*, at 912.
37. *Id.*
38. 68 Fed. Reg. 61249-61250 (Oct. 27, 2003).
39. Natural Resources Defense Council, *The EPA's Changes to New Source Review*, <<http://www.nrdc.org/air/pollution/pnsr.asp>> (Mar. 31, 2002); Environmental Defense, *NSR Rollback Undermines Critical Local Air Quality Protections*, <<http://www.environmentaldefense.org/pressrelease.cfm?ContentID=2103>> (June 13, 2002).
40. Sierra Club, *President Bush Poised to Abandon Clean Air* <<http://lists.sierraclub.org/SCRIPTS/WA.EXE?A2=ind0206&L=ce-scnews-releases&D=1&T=0&H=1&O=D&F=&S=&P=1469>> (June 13, 2002).
41. Natural Resource Defense Council, *supra* n. 39.
42. Environmental Defense, *NSR Rollback Undermines Critical Local Air Quality Protections* <<http://www.environmentaldefense.org/pressrelease.cfm?ContentID=2103>> (accessed June 29, 2004).
43. American Lung Association, *State of the Air: 2004* <[www.lungaction.org/reports/sota04\\_full.html](http://www.lungaction.org/reports/sota04_full.html)> (accessed June 29, 2004).
44. *Id.*
45. *Id.*
46. Robert D. Brook et al., *Air Pollution and Cardiovascular Disease*, 109 *Circulation* 2655 (2004).
47. *Id.* at 2666.
48. *Id.*
49. NAPA is an independent, nonprofit organization chartered by Congress to improve governance.
50. National Academy of Public Administration, *A Breath of Fresh Air: Reviving the New Source Review Program* <<http://www.napawash.org/Pubs/Fresh%20Air%20Full%20Report.pdf>> (Apr. 2003).
51. *Id.* at 118.
52. *Id.* at 121-23.
53. *Id.* at 133-37.
54. STAPPA and ALAPCO are two national associations of air pollution control officials from the states, territories, and major metropolitan areas. They serve to provide an exchange of information between air pollution control officials, enhance interagency cooperation, and facilitate air pollution control activities that will improve our nation's air quality. For more information see: STAPPA/ALAPCO: New Source Review: A Menu of Options, <<http://www.cleanairworld.org/newsourcemenue.html>> (accessed Mar. 7, 2005).
55. *New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-fired Electric Utilities*, Office of Inspector General, EPA, <<http://www.epa.gov/oigearth/reports/2004/20040930-2004-P-00034.pdf>> (accessed Sept. 30, 2004).
56. In a recent study, NRDC reviewed more than 12,000 pages of documents provided by the Energy Department and found that energy industry lobbyists enjoyed extraordinary access to Vice President Cheney's energy task force. From January to September 2001 industry representatives had 714 direct contacts with the task force, whereas non-industry representatives had only 29 (105 direct contracts could not be categorized). Natural Resource Defense Council, *Data Shows Industry Had Extensive Access to Cheney's Energy Task Force*, <<http://www.nrdc.org/media/pressreleases/020521.asp>> (May 21, 2002).

57. Edison Electric Institute also met with Vice President Cheney's energy task force 14 times and contributed nearly \$600,000 to the Republican Party from 1999 to 2002. Natural Resource Defense Council, *supra* n. 58.
58. Greenwire, *Whitman book questions NSR reforms' impact on Clear Skies momentum, EPA enforcement*, <<http://www.eenews.net/Greenwire/include/print.php?single=01200501>> (Jan. 20, 2005) (also on file with CPR and the authors).
59. League of Conservation Voters, *LCVEF Poll Shows Public Support for New Source Review*, <<http://www.lcv.org/News/News.cfm?ID=643&c=27>> (June 19, 2002).
60. *Id.*
61. US PIRG, *President Bush Strikes at Heart of Clean Air Act: Move Could Allow Hundreds of Thousands of Additional Tons of Air Pollution*, <<http://uspirg.org/uspirnnewsroomasp?id2=7154&id3=USPIRGnewsroom&>> (June 13, 2002).

### ***About the Center for Progressive Regulation***

Founded in 2002, the Center for Progressive Regulation is a nonprofit research and educational organization of university-affiliated academics with expertise in the legal, economic, and scientific issues related to regulation of health, safety, and the environment. CPR supports regulatory action to protect health, safety, and the environment, and rejects the conservative view that government's only function is to increase the economic efficiency of private markets. Through research and commentary, CPR seeks to inform policy debates, critique anti-regulatory research, enhance public understanding of the issues, and open the regulatory process to public scrutiny. Direct media inquiries to Matthew Freeman at [mfreeman@progressiveregulation.org](mailto:mfreeman@progressiveregulation.org). For general information, email [info@progressiveregulation.org](mailto:info@progressiveregulation.org). Visit CPR's website at [www.progressiveregulation.org](http://www.progressiveregulation.org). The Center for Progressive Regulation is grateful to the Deer Creek Foundation for its generous support of this project and CPR's work in general.



*1200 New York Ave., NW, Suite 400, Washington, DC 20005  
202-289-4026 (phone) / 202-289-4402 (fax)*