No. 06-__

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

STATE OF NEW YORK, ET AL.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

HENRY V. NICKEL
F. WILLIAM BROWNELL
(*Counsel of Record*)
DAVID S. HARLOW
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Under the Equipment Replacement Provision rule (the "ERP rule"), an equipment replacement project at an existing source would not trigger the New Source Review ("NSR") programs of the Clean Air Act ("CAA") if the project did not change the source's "basic design parameters" (including its maximum hourly emission rate) – *i.e.*, if it was not a "modification" under 42 U.S.C. § 7411(a)(4), CAA § 111(a)(4), as defined by the U.S. Environmental Protection Agency ("EPA") since 1971 under the New Source Performance Standards ("NSPS") program. In the 1977 CAA Amendments, Congress defined "modification" for NSR by reference to its meaning and use under NSPS. Nevertheless, relying solely on its interpretation of the words "any physical change" in CAA § 111(a)(4)'s definition of "modification," the D.C. Circuit held that the ERP rule was unlawful under the first step of *Chevron*. The questions presented are:

1. Whether reliance on a fragment of the 40-word statutory definition of "modification" to find a clear expression of congressional intent, instead of applying traditional tools of statutory construction to the provision as a whole, conflicts with this Court's *Chevron* decision.

2. Whether EPA has discretion under the CAA to adopt a rule that excludes from NSR a subset of projects that are not NSPS modifications, as that term has been defined and used under the CAA for the past 35 years.

PARTIES TO THE PROCEEDINGS

1. The following were petitioners in the consolidated proceeding, the judgment in which review is sought.

In No. 03-1380, the State of New York, State of Connecticut, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, State of New Mexico, Commonwealth of Pennsylvania Department of Environmental Protection, State of Rhode Island, State of Vermont, State of Wisconsin, the District of Columbia, the City of New York, the City of San Francisco, and the following Connecticut municipalities: the City of Groton, City of Hartford, City of Middletown, City of New Haven, City of New London, City of Stamford, and City of Waterbury, the Town of Cornwall, Town of Easton, Town of Greenwich, Town of Hebron, Town of Lebanon, Town of Newton, Town of North Stonington, Town of Pomfret, Town of Putnam, Town of Rocky Hill, Town of Salisbury, Town of Thompson, Town of Wallingford, Town of Washington, Town of Westbrook, Town of Weston, Town of Westport, and Town of Woodstock.

In No. 03-1381, the Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, Communities for a Better Environment, United States Public Interest Research Group, Alabama Environmental Council, Clean Air Council, Group Against Smog and Pollution, Michigan Environmental Council, Ohio Environmental Council, Scenic Hudson, and Southern Alliance for Clean Energy.

In No. 03-1383, the People of the State of California ex rel. Bill Lockyear, Attorney General of California, and California Air Resources Board.

In No. 03-1390, the State of Illinois.

In No. 03-1402, the South Coast Air Quality Management District.

In No. 03-1453, the Delaware Nature Society.

In No. 03-1454, the State of Delaware.

In No. 04-1029, the Natural Resources Defense Council.

In No. 04-1035, the State of New York, State of California, State of Connecticut, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of New Jersey, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, State of Wisconsin, the District of Columbia, the City of New York and the City of San Francisco.

In No. 04-1064, the South Coast Air Quality Management District.

In No. 05-1234, the State of New York, State of Connecticut, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, State of New Mexico, Commonwealth of Pennsylvania Department of Environmental Protection, State of Rhode Island, State of Vermont, State of Wisconsin, the District of Columbia, the City of New York, the City of San Francisco, and the following Connecticut municipalities: the City of Groton, City of Hartford, City of Middletown, City of New Haven, City of New London, City of Stamford, and the City of Westbury, the Town of Cornwall, Town of Easton, Town of Greenwich, Town of Hebron, Town of Lebanon, Town of Newtown, Town of North Stonington, Town of Pomfret, Town of Putnam, Town of Rocky Hill, Town of Salisbury, Town of Thompson, Town of Wallingford, Town of Washington, Town of Westbrook, Town of Weston, Town of Westport, and Town of Woodstock.

In No. 05-1287, the Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, Communities for a Better Environment, United States Public Interest Research Group, Alabama Environmental

Council, Clean Air Council, Group Against Smog and Pollution, Michigan Environmental Council, Ohio Environmental Council, Scenic Hudson, and Southern Alliance for Clean Energy.

2. The following was respondent in the consolidated proceeding, the judgment in which review is sought.

United States Environmental Protection Agency.

3. The following was intervenor in support of respondent in the consolidated proceeding, the judgment in which review is sought, and who files this petition.

The Utility Air Regulatory Group.

4. The following were intervenors in support of respondent in the consolidated proceeding, the judgment in which review is sought, and who do not join in this petition.

The Equipment Replacement Rule Coalition.

The Clean Air Implementation Project.

The Illinois State Chamber of Commerce and the Illinois Environmental Regulatory Group.

The National Environmental Development Association's Clean Air Project.

The American Iron and Steel Institute, the Steel Manufacturers Association, and the Specialty Steel Industry of North America.

The Alliance of Automobile Manufacturers.

The Commonwealth of Virginia, State of Alabama, State of Alaska, State of Arkansas, State of Kansas, State of Missouri, State of Nebraska, State of North Dakota, State of South Dakota, State of Utah, and State of Wyoming.

5. The following was intervernor in support of petitioners in the consolidated proceeding, the judgment in which review is sought.

The Adirondack Mountain Club.

6. The following appeared as *amici* in support of respondent in the consolidated proceeding, the judgment in which review is sought.

The State of Indiana, State of Ohio, and Washington Legal Foundation.

7. The following appeared as *amici* in support of petitioners in the consolidated proceeding, the judgment in which review is sought.

Sen. Hillary Rodham Clinton, Sen. Jon S. Corzine, Sen. James M. Jeffords, Sen. Patrick J. Leahy, Sen. Barbara Boxer, Sen. Frank Lautenberg, Sen. John F. Kerry, Sen. Christopher J. Dodd, Sen. Charles E. Schumer, Sen. Jack Reed, Rep. Edward J. Markey, Calpine Corporation, the American Thoracic Society, American College of Chest Physicians, National Association for the Medical Direction of Respiratory Care, and Atlantic Salmon Federation.

DISCLOSURE STATEMENT

The Utility Air Regulatory Group ("UARG") is a non-profit, unincorporated organization of individual electric utilities and national trade associations. UARG has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary or affiliate that has issued shares or debt securities to the public.

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PETITION FOR A WRIT OF CERTIORARI

The Utility Air Regulatory Group ("UARG") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. U.S. Environmental Protection Agency*, 443 F.3d 880 (D.C. Cir. 2006) ("*New York II*").[1]

OPINION BELOW

The opinion of the D.C. Circuit is reported at 443 F.3d 880, 370 U.S. App. D.C. 239, and is reproduced in the Appendix ("App.") at pages 1a-19a. The orders on the petitions for panel and *en banc* rehearing, as well as the judgment of the D.C. Circuit, are included in the Appendix at pages 189a-190a, 191a-192a, and 193a-194a.

JURISDICTION

The D.C. Circuit entered its judgment on March 17, 2006. Timely petitions for panel and *en banc* rehearing were denied by orders entered on June 30, 2006. On September 21, 2006, this Court extended the deadline for the filing of the instant petition to and including October 30, 2006. On October 30, 2006, the Court again extended the deadline to and including November 27, 2006. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] This petition seeks review of the second of two decisions rendered by the D.C. Circuit, both of which involve challenges to legislative rules promulgated by the U.S. Environmental Protection Agency ("EPA") and both of which are styled *New York v. EPA*. In *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) ("*New York I*"), the court upheld in part and rejected in part revisions made by EPA in 2002 to its rules implementing the Prevention of Significant Deterioration ("PSD") and nonattainment New Source Review (collectively, "NSR") provisions of the Clean Air Act ("CAA").

STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

This case involves portions of the Clean Air Act, 42 U.S.C. §§ 7411(a), 7475, 7479(2)(C), 7501(4), and 7502(c)(5); CAA §§ 111(a), 165, 169(2)(C), 171(4), and 172(c)(5) (App. 195a-198a); and the now-vacated Equipment Replacement Provision rule (the "ERP rule"), 68 Fed. Reg. 61,248 *et seq.*, (Oct. 27, 2003), 70 Fed. Reg. 33,838 *et seq.* (June 10, 2003) (on reconsideration), and 40 C.F.R. §§ 51.165(h), 51.166(y), and 52.21(cc) (App. 20a-142a, App. 143a-188a).

INTRODUCTION

The provision that lies at the heart of the D.C. Circuit's decision is the definition of "modification" under CAA § 111(a)(4), which was enacted in December 1970. Under that definition, a "modification" is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source" or "which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4), CAA § 111(a)(4). Beginning soon after enactment of CAA § 111(a)(4), and continuing for some 35 years to this day, EPA has interpreted "modification" under the New Source Performance Standards ("NSPS") program as a project that increases a source's capacity to emit (as measured by its maximum hourly emission rate), not a project that merely allows for continued operation within applicable emission limits.

Citing its decision in *New York I*, however, the D.C. Circuit found that "EPA's reliance on its NSPS regulations" to demonstrate the scope of EPA's discretionary authority to promulgate the ERP rule for the NSR programs was "unavailing." 443 F.3d at 889, App. 17a. Contrary to EPA's contemporaneous (and longstanding) interpretation of CAA § 111(a)(4)'s definition of "modification" for NSPS, the court found that the CAA is *not* intended to "allow sources operating below

applicable emission limits to increase significantly the pollution they emit [within those limits] without government review." *Id.* at 886, App. 12a.

Having presumed that any increased operations within applicable CAA limits is an "emissions increasing activity," the D.C. Circuit then focused on three words in CAA § 111(a)(4) – *i.e.*, "any physical change" – and concluded that those three words required vacatur of the ERP rule as a matter of *Chevron* step one. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). According to the court, because "Congress defined the phrase 'physical change' in terms of increases in emissions" within permit limits, "the word 'any' . . . indicate[s] that 'physical change' cover[s] all such [emission increasing] activities, and was not left to agency interpretation." 443 F.3d at 887, App. 14a. On this basis, and even though the court specifically recognized that it was not "decid[ing] whether part replacements . . . necessarily constitute a 'modification' under the [CAA § 111(a)(4)] definition *taken as a whole*," *id.* at 888 n.4 (emphasis added), App. 15a, the court vacated the ERP rule as contrary to congressional intent.

The court's *New York II* decision presents a new formulation of *Chevron*, under which specific meaning is given to fragments of statutory language in order to find an unambiguous congressional "intent" that could not be discerned if traditional canons of statutory construction were applied to the statutory provision as a whole. In applying its new formulation of *Chevron*, the D.C. Circuit has erroneously decided an important question of federal law that this Court has not previously addressed, but the importance of which this Court has recognized by granting certiorari in *Environmental Defense v. Duke Energy*, No. 05-848 (argued November 1, 2006). Specifically, under every EPA rule implementing CAA § 111(a)(4) beginning in 1971, only a change that increased a source's capacity to emit – *i.e.*, a change that increased its maximum hourly emission rate – constituted a "modification." When Congress enacted amendments to the CAA in 1977, it expressly indicated that EPA's approach was, at a minimum, a

permissible interpretation of "modification." Given that the ERP rule applied only to those projects that did *not* increase a source's capacity to emit, it necessarily follows that, contrary to the D.C. Circuit's holding, the rule comports with congressional intent.[2]

Years ago, this Court admonished the D.C. Circuit that the "fundamental policy questions appropriately resolved in Congress . . . are *not* subject to re-examination in the federal courts under the guise of judicial review of agency action." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (emphasis in original). "Administrative decisions," the Court said, should not be set aside "simply because the [reviewing] court is unhappy with the result reached." *Id.* A return to these principles is in order. In striking down the ERP rule, the D.C. Circuit has so far departed from the accepted and usual course of judicial proceedings under *Chevron* that it calls for the exercise of this Court's supervisory power.

STATEMENT OF THE CASE

In *New York II*, the D.C. Circuit concluded that Congress's use of the word "any" in defining "modification" in 1970 was dispositive of what Congress intended some seven years later, when it adopted the CAA's Prevention of Significant Deterio-

[2] In *Duke Energy*, the U.S. Court of Appeals for the Fourth Circuit found that, because Congress "expressly directed [in CAA § 169(2)(C)] that the PSD provisions of the Act employ" the "same definition" of "modification" as under the CAA's NSPS provisions, EPA had no discretion to "interpret 'modification' under the PSD *inconsistently* with the way it interprets that term under the NSPS." See *U.S. v. Duke Energy Corp.*, 411 F.3d 539, 546, 547 (4th Cir. 2005) (emphasis added). In contrast, the D.C. Circuit in *New York II* held that EPA had no discretion to interpret "modification" *consistently* under the NSR and NSPS programs. All that is needed to reject the *New York II* holding is to recognize that, regardless of whether the CAA mandates consistency or merely authorizes it, the statutory language cannot possibly be read to *preclude* consistency.

ration ("PSD") and nonattainment NSR programs. The court therefore found it unnecessary to address any aspect of the extensive regulatory history related to EPA's implementation, through notice-and-comment rulemaking, of the term "modification" between enactment of the CAA in 1970 and the CAA Amendments of 1977. Nor did the court think it necessary to take into account the 1977 Amendments themselves, even though they make clear that Congress was aware of EPA's interpretation of "modification" and expressly authorized its continued use under the new NSR programs. Consideration of this regulatory and statutory history shows why the court's "plain language" rationale based on the word "any" conflicts with this Court's decision in *Chevron*, and why the ERP rule was lawful under the CAA.

1. EPA's Interpretation of "Modification" under CAA § 111(a)(4)

In the 1970 CAA, Congress directed EPA to develop pollution-reducing "standards of performance" for categories of new stationary sources. 42 U.S.C. § 7411(b)(1)(A), (B); CAA § 111(b)(1)(A), (B). For purposes of this NSPS program, Congress defined a "new" stationary source to include any source whose "modification" commenced after the time EPA had proposed a standard of performance for the particular source category. 42 U.S.C. § 7411(a)(2), CAA § 111(a)(2).

In the 1970 CAA, Congress also directed states to adopt state implementation plans ("SIPs") to ensure that the national ambient air quality standards ("NAAQS") set to protect public health and welfare were attained and maintained. 42 U.S.C. § 7410(a)(1), (2); CAA § 110(a)(1), (2). Congress directed EPA to approve those SIPs if they contained, among other things, emission limits for existing sources designed to attain the NAAQS,[3] and a "procedure . . . for review (prior to construction or modification) of the location of new sources to

[3] Such emission limits are based on the assumption that sources "operate 24 hours a day at full capacity" every day of the year. *Cleveland Elec. Illuminating Co. v. EPA*, 572 F.2d 1150, 1160 (6th Cir. 1978).

which a [CAA § 111] standard of performance will apply." 42 U.S.C. § 7410(a)(2)(B), (D); CAA § 110(a)(2)(B), (D), *see also Train v. NRDC*, 421 U.S. 60, 66-67 (1975). The new source review procedure of the 1970 CAA ensured that pollution that had not yet been regulated under applicable CAA limits for existing sources ("new pollution") would be reviewed and subjected to regulation prior to construction.

Consistent with CAA §§ 111 and 110(a)(2)(D), the CAA § 111(a)(4) definition of "modification" reflected congressional policy to apply new source programs to activity that created a source of new pollution. Under this definition, activity that created new capacity to pollute would trigger application of both the relevant NSPS and the requirement for review (prior to construction) of the impact of that new pollution on NAAQS attainment.

Within a year of enactment of CAA § 111(a)(4)'s definition of "modification," EPA adopted NSPS rules interpreting the modification provision to implement this congressional policy. 36 Fed. Reg. 24,876 (1971) (the "1971 NSPS rules"). Under the 1971 NSPS rules, only projects that created a source of new pollution constituted the "modification" of that source. Thus, "modification" was defined as *not* including (i) an "increase in the production rate, if such increase does not exceed the operating design capacity" of the source; (ii) an "increase in hours of operation" of the source; or (iii) the "use of an alternative fuel or raw material," if the source had been "designed to accommodate such alternative use." 40 C.F.R. § 60.2. By providing that an "increase in hours of operation" could not be a "modification," EPA effectively required a calculation of the amount of pollutant emitted in terms of a maximum "emission rate," using a fixed period of time,[4] to

[4] A "rate" is the "quantity, amount, or degree of something measured per unit of something else (as time)." *Webster's Third New International Dictionary* 1884 (1993). An "emission rate," therefore, is the amount of pollution released per unit of time (*e.g.*, one hour; a 24-hour day; an 8,760-hour year), and a comparison of maximum "emission rates" involves a comparison of emissions over the same unit of time.

determine whether an activity would create a source of new pollution.

In October 1974, EPA proposed revisions to the NSPS rules to make explicit the "emission rate" increase requirement and to define more precisely the activities that were deemed to increase a source's capacity to emit. Under proposed 40 C.F.R. § 60.14(a), "modification" was defined as "any physical or operational changes . . . which result in an increase in emission rate to the atmosphere of any pollutant." 39 Fed. Reg. 36,949 (1974). Under proposed 40 C.F.R. § 60.14(b), "emission rate" was "expressed as kg/hr of any pollutant discharged into the atmosphere." *Id.* EPA also proposed to revise the "production rate" exclusion to establish an objective test for determining "operating design capacity." *Id.*

Explaining these changes, EPA pointed to the "considerable confusion" that then existed "outside the Agency" as to the meaning of "modification." 39 Fed. Reg. 36,946. The principal way EPA proposed to resolve this "confusion" was the adoption of "kilograms per hour" as the measure for determining whether an emission rate increase would occur. *Id.* at 36,947. Among its advantages, EPA said, this approach "automatically allow[s] increases in operating hours as intended by the . . . existing" exclusion for increases in "hours of operation." *Id.* EPA further explained that "design operating capacity" would be "implicitly" defined as the "production rate which can be accomplished without making major capital expenditures on the stationary source containing the existing facility." *Id.* at 36,949.

EPA promulgated these revisions in December 1975, in essentially the same form as they had been proposed. 40 Fed. Reg. 58,416 (1975). By defining an emission increase in terms of an increase in maximum "emission rate," unaffected by increased hours of operation, EPA implemented the congressional policy reflected in the 1970 CAA. That is, by focusing on increases in maximum hourly emission rate, and by defining "modification" to exclude (i) activity that increased the "production rate" without a "major capital expenditure,"

and (ii) the use of an "alternative fuel" that the source was designed to accommodate, the NSPS rules captured only those projects that created new pollution (*i.e.*, that actually increased the maximum capacity of a source to burn fuel, or enabled it to burn a more polluting fuel than that which the source was originally designed to use).

Beginning in 1971, therefore, EPA defined "modification" as changes that enabled a unit to emit more than it could ever have emitted before. This, then, was EPA's implementation of the congressional policy embodied in "modification" under CAA § 111(a)(4) as of 1977.

2. The 1974 PSD Rules

While the first statutory PSD preconstruction permitting program would be established by Congress in 1977, prior to that time, EPA had already undertaken rulemaking to adopt a PSD program in response to a district court preliminary injunction. 39 Fed. Reg. 42,510 (1974) (the "1974 PSD rules"). Consistent with the NSPS program, EPA applied the requirements of its 1974 PSD rules to both "new" and "modified" stationary sources. 40 C.F.R. § 52.21(d)(1) (1974). Under the 1974 PSD rules, the terms "modification" and "modified source" were defined as a physical or operational change that increased the source's "emission rate." 40 C.F.R. § 52.01(d) (1974). The 1974 PSD rules further defined "modification" to exclude the same types of activities that were not "modifications" under the NSPS rules – *e.g.*, increases in hours of operation; increases in production rate, where such increases did not exceed the source's "operating design capacity"; and the use of "alternative fuels" that the source was designed to accommodate. *Id.* As EPA explained in adopting the 1974 PSD rules, its intent was to make the "definition of modification under Part 52 [PSD] . . . consistent with the final definition of this term under Part 60 [NSPS]." 39 Fed. Reg. 42,513 (1974).

3. The 1977 CAA Amendments

Because EPA had already developed, by regulation, a PSD program as of the time work began on the 1977 Amendments, Congress was afforded the unique, if not unprecedented, op-

portunity to legislate in direct reference to those existing regulatory requirements. Reflecting this, the 1977 Amendments enacted, with specific revisions, the preconstruction review and permitting program from the 1974 PSD rules. Certain of those revisions were made immediately effective by Congress.[5] Other changes to the 1974 PSD rules were to be implemented through EPA or state SIP rulemakings. 42 U.S.C. § 7471, CAA § 161. The balance of the 1974 PSD program was left intact, including the definition of "modification" under the 1974 PSD rules (*i.e.*, 40 C.F.R. § 52.01(d)). Pursuant to CAA § 168(a), these provisions continued to govern the application of the new statutory NSR programs without the need for further rulemaking.

With respect to program coverage, the new statutory PSD program applied to the "construction" of a "major emitting facility." 42 U.S.C. § 7475, CAA § 165. In the 1977 Amendments, Congress defined the term "construction" to include "the modification (as defined in [CAA § 111(a)]) of any source or facility." 42 U.S.C. § 7479(2)(C), CAA § 169(2)(C). Similarly, the nonattainment NSR provisions of the 1977 Amendments provided that the "terms 'modifications' and 'modified' mean the same . . . as used in [CAA § 111(a)]." 42 U.S.C. § 7501(4), CAA § 171(4). Thus, far from rejecting the congressional policy reflected in the pre-1977 rules interpreting "modification," Congress ratified that congressional policy and, at a minimum, authorized a consistent application of "modification" for all of the new source programs (*i.e.*, NSPS, PSD and nonattainment NSR).

4. The ERP rule

From the first days of the modification program, EPA's rules have provided that a "modification" did not include the routine repair or replacement of broken or deteriorated equip-

[5] Those provisions that took effect immediately and superseded inconsistent portions of the 1974 PSD rules were identified in 42 U.S.C. § 7478(b), CAA § 168(b) – *i.e.*, a new definition of "commenced," area classification requirements, and more stringent increments.

ment. In the NSPS rules, EPA provided that "routine" would be determined in reference to activity in the relevant source category. *See* 40 C.F.R. § 60.14(e)(1). In 1992, EPA confirmed that the same test applied to the RMRR provision for purposes of NSR, stating that the "determination of whether the repair or replacement of a particular item of equipment is 'routine' under the NSR regulations," while made on a "case-by-case basis," must be "based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category." 57 Fed. Reg. 32,326 (1992). Beyond this clarification, however, EPA explained that it used a "multi-factor test for determining whether a particular activity falls within or outside the exclusion." 68 Fed. Reg. 61,249 (2003), App. 28a.

Because of the confusion that this approach engendered in recent years, particularly in the context of enforcement cases, *see*, *e.g.*, *U.S. v. Duke Energy*, 278 F.Supp.2d 619, 630-38 (M.D.N.C. 2003), EPA adopted the ERP rule for the NSR programs. Under the ERP rule, certain projects would automatically be deemed to constitute RMRR – and, thus, could never give rise to an NSR "major modification" – where those projects met specific requirements.

Generally speaking, in order for a project to qualify under the ERP rule, all of the following had to be true:

(1) the project must involve the replacement of existing components of a process unit with new components that were either identical, or functionally equivalent, to the replaced components;

(2) the fixed capital costs associated with the replacement component must not exceed 20 percent of the current value of the replacement value of the process unit;

(3) the replacement must not alter the "basic design parameters" of the process unit; and

(4) the replacement must not cause the unit to exceed either an applicable emission limitation or a legally enforceable operational limitation. *See*, *e.g.*, 40 C.F.R. § 52.21(cc); 68 Fed. Reg. 61,252 (2003), App. 36a-37a.

The term "basic design parameters" was defined by the ERP rule to include such factors as "maximum hourly heat input," "maximum hourly fuel consumption rate," and "maximum steam flow rate," *i.e.*, factors which determine a unit's maximum hourly emission rate. 40 C.F.R. § 52.21(cc), App. 141a-142a. A major stationary source that undertook an equipment replacement project that qualified under the ERP rule, therefore, might well increase its total annual emissions from one year to the next, due to a reduction in the number of hours of operation lost on account of defective or deteriorated equipment. But in no circumstance would the ERP rule excuse from NSR any project that altered the unit's basic design parameters, including its maximum hourly emission rate.

5. *New York II*

Numerous petitions for review of the ERP rule were filed in the D.C. Circuit within a few days of the rule's publication in the *Federal Register*. All of these cases were subsequently consolidated under the lead docket, *State of New York v. EPA*, No. 03-1380.[6] UARG was one of several entities that subsequently intervened in support of the ERP rule.

On March 17, 2006, the D.C. Circuit issued its decision in *New York II*. Having cautioned that "[t]he court has no occasion to decide whether part replacements . . . constitute a 'modification' under the [statutory] definition as whole," 443 F.3d at 888 n.4, App. 15a, the court struck down the ERP rule citing *Chevron* step one, finding the rule to be "contrary to the plain language of section 111(a)(4)" of the CAA. *Id.* at 883, App. 6a.

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[6] On December 24, 2003, some of the petitioners in *New York II* petitioned EPA to reconsider certain aspects of the ERP rule. EPA subsequently granted reconsideration, undertook further notice-and-comment rulemaking on the ERP rule, and issued its final decision on reconsideration on June 10, 2005. 70 Fed. Reg. 33,838, App. 143a. Petitions for review of EPA's decision on reconsideration were subsequently filed in the D.C. Circuit, and those challenges were consolidated with the original petitions under lead docket No. 03-1380.

According to the court, because CAA § 111(a)(4) defines "modification" to mean "any physical change . . . which results in the emission of any air pollutant," and because the word "any" has an "expansive meaning,"[7] "Congress's use of the word 'any' . . . means that all types of 'physical changes' are covered." *Id.* at 890, App. 19a. This includes, the court said, the replacement of broken or deteriorating equipment with functionally identical equipment that does not change a source's emission characteristics, but which allows the source to recover any hours of operation lost due to the deterioration. Relying on the remarkable assertion that Congress could not have "intended . . . to allow sources operating below applicable [CAA] emission limits to increase significantly the pollution they emit [within those limits] without government review," *id.* at 886, App. 11-12a,[8] the court concluded that the ERP rule was unlawful because it "would allow equipment replacements resulting in non-*de minimis* emission increases to avoid NSR." *Id.* at 890, App. 19a.

REASONS FOR GRANTING THE PETITION

Under the CAA, the requirements of the PSD program are triggered by the "construction" of a "major emitting facility," with "construction" defined to include the "modification" (as defined in CAA § 111(a)) of "any source or facility." 42 U.S.C. § 7475(a), 7479(2)(C); CAA §§ 165(a), 169(2)(C). Similarly, the requirements of the nonattainment NSR program are triggered by the "construction" of a "new or modi-

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[7] 443 F.3d at 885, *quoting U.S. v. Gonzales*, 520 U.S. 1, 5 (1997), App. 10a.

[8] The "limits" to which the D.C. Circuit refers are emission limits created by EPA or states to protect the NAAQS and the PSD increments. Therefore, changes in pollution levels below such limits have *already* been subject to, and, indeed, are the product of, "government review." *See, e.g., Train v. NRDC*, 421 U.S. 60, 78-81 (1975) (NAAQS); *Alabama Power v. Costle*, 636 F.2d 323, 361-364 (D.C. 1979) (protection of the increments).

fied stationary source," with "modified" defined to "mean the same as the term 'modification' as used in" CAA § 111(a). 42 U.S.C. §§ 7502(c)(5), 7501(4); CAA §§ 172(c)(5), 171(4). Because EPA has discretion under the CAA to define "modification" for NSPS to exclude projects that do not increase an existing source's capacity to emit, it follows that EPA was, at a minimum, authorized to promulgate a legislative rule that excludes such projects from the requirements of NSR.

I. THE D.C. CIRCUIT'S APPROACH TO STATUTORY CONSTRUCTION CONFLICTS WITH *CHEVRON*.

In the case below, the D.C. Circuit had no answer for why a rule that excludes from NSR a subset of projects that are not NSPS modifications is unlawful under the "plain language" of the CAA, when Congress in the 1977 Amendments (i) defined "modification" for NSR to have the "mean[ing]" and "use[]" it has under NSPS, and (ii) specifically authorized EPA to continue to define "modification" as it had under the 1974 PSD rules (*i.e.*, 40 C.F.R. § 52.01(d)). Unable to respond, the court simply says that it "ha[d] no occasion to decide whether part replacements or repairs necessarily constitute a 'modification' under the definition taken as a whole." 443 F.3d at 888 n.4, App. 15a.

The D.C. Circuit nevertheless vacated the ERP rule, applying a new approach to judicial review of EPA's interpretation of its authorizing statute. Under the guise of a *Chevron* step one analysis, the court excerpted three words (*i.e.*, "any physical change") from the definition of "modification" as the focus of its inquiry into congressional intent. Identifying "[t]he parties' essential disagreement" as being "the effect of Congress's decision . . . to insert the word 'any' before 'physical change'," *id.* at 885, App. 10a, the court found it clear that "when Congress places the word 'any' before a phrase [*i.e.*, "physical change"] with several common meanings, the statutory phrase encompasses all of those meanings." *Id.* at

888, App. 15a. Then, in a complete reversal of *Chevron* deference, the court told EPA that even though its interpretation of "modification" in the ERP rule might reflect "better policy," that interpretation must be rejected unless EPA could show that the statutory "policy" found by the court in the word "any" "borders on the irrational." *Id.* at 889, App. 18a.

In *Chevron*, this Court enunciated the now-familiar approach to judicial review of an agency's interpretation of its enabling statute: "First, always, is the question whether Congress has directly spoken to the precise questions at issue." 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter." *Id.* If, however, "the court determines Congress has not directly addressed the precise question at issue . . . the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In the latter case, "federal judges . . . have a duty to respect legitimate policy choices" made by the agency. *Id.* at 866.

The judiciary is "the final authority on issues of statutory construction." 467 U.S. at 843 n.9. Exercising this authority with care is particularly important for the D.C. Circuit, because it is charged with exclusive jurisdiction to review many of the legislative rules issued by EPA and other agencies. In exercising this authority, this Court has made clear that the "court . . . employ[s] *traditional tools of statutory construction* . . . [to] ascertain[] whether . . . Congress had an intention on the precise question at issue." *Id.* at 843 n.9 (emphasis added).

Application of "traditional tools of statutory construction" requires a court to examine both the statutory context and the history of a word or phrase. Thus, while "[a] 'word may have a character of its own not to be submerged by its association' [citation omitted] . . . the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate . . . the true meaning." *Chevron*, 467 U.S. at 860, 861. For that reason, a reviewing court "should not confine itself to examining a par-

ticular statutory provision in isolation." *See FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 132 (2000). *See also Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

Other provisions of a statute may be relevant to discerning congressional intent for other reasons as well. For example, "identical words used in different parts of the same act" are generally presumed "to have the same meaning." *Comm'r of Internal Rev. Serv. v. Lundy*, 516 U.S. 235, 250 (1996); *IBP, Inc. v. Alvarez*, 126 S.Ct. 514, 523-24 (2005) (heightened presumption of identical meaning where the term is explicitly referenced in a separate section of the same statute).

Moreover, what the *agency* has said historically about a statutory provision may be relevant to congressional intent, because "agencies charged with applying a statute make all sorts of interpretive choices . . . [that] certainly may influence courts facing questions the agencies have already answered." *U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001). And, as this Court has observed, once an agency has given meaning to a term through rulemaking, Congress is presumed to be aware of that regulatory definition and is presumed to ratify it when adopting the term in subsequent legislation. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 581-82 (1978) (When "Congress adopts a new law incorporating sections of a prior law," Congress "normally can be presumed to have had knowledge of the interpretation given to the incorporated law.").

In the case below, the D.C. Circuit concedes that it did not "decide whether part replacements or repairs necessarily constitute a 'modification' under the [§ 111(a)(4)] definition taken as a whole." 443 F.3d at 888 n.4, App. 15a. Nor did the court look to "the structure of the Act," *id.* at 889, App. 18a; EPA's contemporaneous rulemaking interpretation of the 1970 CAA; or the nature and implications of Congress' action

in 1977 defining "modification" for NSR by reference to its "mean[ing]" and "use[]" under NSPS. CAA §§ 169(2)(C), 171(4). Rather, the court dismissed the relevance of such statutory and regulatory context on the grounds that there is no "ambiguity in the phrase 'any physical change.'" 443 F.3d at 886, App. 12a.

By limiting its analysis to the words "any physical change," while not resolving whether equipment replacements that met the requirements of the ERP rule were "modifications" under the definition read as a whole, 443 F.3d at 888 n.4, App. 15a, the D.C. Circuit has created a new standard for reviewing an agency's interpretation of its authorizing statute. Reading *Chevron* to require a determination of the "plain meaning" of words isolated from their statutory context produces precisely the result this Court sought to avoid in *Chevron*: disregard for the agency's legitimate policy choices.

Had the D.C. Circuit applied "traditional tools of statutory construction" here, as opposed to trying to divine the meaning of three isolated words, the court would have found that Congress in 1977 made it clear that, at a minimum, the NSPS interpretation of "modification" could continue to govern NSR applicability. First, Congress in 1977 had before it EPA's preexisting PSD rules, and Congress reviewed those rules provision-by-provision, adopting some elements and changing others. Having undertaken this review, Congress did not require that EPA change the way it had been implementing CAA § 111(a)(4)'s definition of "modification" under the 1974 PSD rules in 40 C.F.R. § 52.01(d), as it did with the 1974 regulatory provisions defining "commence construction" and "best available control technology." *See* 40 C.F.R. §§ 52.01(f); 52.21(b)(7) (1974). To the contrary, Congress in CAA § 168(a) expressly directed that, until such time as an implementation plan was approved for a particular area, the "applicable regulations under this chapter prior to August 7, 1977 [i.e., the 1974 PSD rules] shall remain in effect to prevent significant deterioration of air quality in any such area,"

except as those rules were automatically amended by operation of CAA § 168(b) (emphasis added).

Second, Congress in 1977 expressed no disagreement with the way CAA § 111(a)(4) was implemented under the NSPS program. To the contrary, it specifically (i) defined "construction" for PSD as including "the modification (as defined in section 111(a) of this title) of any source or facility"; and (ii) provided that, for nonattainment NSR purposes, the "terms 'modifications' and "modified' mean the same as . . . used in" CAA § 111(a). 42 U.S.C. §§ 7479(2)(C), 7501(4); CAA §§ 169(2)(C); 171(4). In this manner, Congress made it clear that, at a minimum, EPA had discretion to continue to interpret "modification" under NSR consistent with its interpretation of that term under NSPS. Indeed, it would be a particularly odd approach to statutory interpretation to conclude that, by defining "modification" for NSR to mean "modification" as defined in NSPS, Congress intended to *preclude* EPA from implementing CAA § 111(a)(4) for NSR the same way it had always implemented that provision for NSPS.

Among the traditional tools of statutory construction that are available to a reviewing court is the canon that a court "may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). This is "especially so where Congress has reenacted the statute without pertinent change." *Id.* at 275. In such circumstances, "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is one intended by Congress." *Id.*

In the "circumstances" of the 1977 CAA Amendments, Congress effectively did "reenact" the congressional policy reflected in EPA's NSPS rules by defining "construction" for PSD to include "modification" as defined for NSPS, and defining "modification" for nonattainment NSR to "mean the same as . . . used in" NSPS. In so doing, Congress did not "revise or repeal" EPA's interpretation of "modification" as a project that increases an existing source's operating design

capacity. That interpretation was squarely before Congress in its review of the 1974 PSD rules, and Congress did not require any change in this particular aspect of those rules. *Cf. Lorillard*, 434 U.S. at 580-81 (1978) (where "Congress adopted a new law incorporating sections of a prior law," it "normally can be presumed to have had knowledge of the interpretation given to the incorporated law," with that presumption being "particularly appropriate [where] Congress exhibited both a detailed knowledge of the [prior law's] provisions . . . and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.").

In sum, Congress in 1977 specifically defined "modification" for NSR by reference to its meaning and use under NSPS and expressly authorized EPA to continue to follow the approach to "modification" taken in the 1974 PSD rules. The court missed these clear indications of congressional intent by reformulating *Chevron* step one to require an inquiry into whether isolated words in a statute have a meaning of their own that is "plain" or "clear," as opposed to what "the definition [of modification] taken as a whole" signals as to congressional intent. 443 F.3d at 888 n.4, App. 15a. This new *Chevron* test has resulted in precisely the problem this Court sought to avoid in that case, *i.e.*, rejecting the agency's legitimate policy choices. Because the D.C. Circuit has shown of late a penchant to apply this reformulated *Chevron* step one test,[9] this Court should grant certiorari to address the conflict between *New York II* and *Chevron*.

[9] *See, e.g., New York I*, 413 F.3d at 39-40, where the D.C. Circuit's *Chevron* step one analysis turns on the "juxtaposition" of isolated words (*e.g.*, "emit," "emitted," "potential to emit") in the CAA.

II. GIVEN THE CENTRAL IMPORTANCE OF THE NSR PROGRAMS TO THE ECONOMY, WHETHER EPA HAS AUTHORITY TO DEFINE "MODIFICATION" CONSISTENTLY FOR NSR AND NSPS IS AN IMPORTANT ISSUE THAT MERITS THIS COURT'S ATTENTION.

The PSD and nonattainment NSR programs are the gateway to economic development in this country. New electric generating facilities, new manufacturing facilities, new refineries, and virtually every other type of facility that makes up this country's economic infrastructure are potentially subject to this NSR gatekeeper. Not surprisingly, therefore, every time this Court has been asked to review D.C. Circuit decisions significantly affecting the nature and scope of those programs, it has granted certiorari.

First, in 1972, the U.S. District Court for the District of Columbia issued a preliminary injunction ordering EPA to establish a PSD program. *See Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972). The D.C. Circuit affirmed, without opinion. *Id.*, 4 ERC 1815 (D.C. Cir. 1972). This Court granted certiorari and, without a written opinion, remanded the case to the District Court as a result of a 4-4 decision. *See Fri v. Sierra Club*, 412 U.S. 541 (1973). The regulatory PSD program adopted in December 1974 resulted from that remand.

Second, industry challenged the 1974 PSD rules in the D.C. Circuit. The D.C. Circuit affirmed those rules in 1976. *See Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976). This Court again granted certiorari to review the D.C. Circuit's decision. Before that case was decided, however, Congress enacted the statutory PSD program, and the petition was dismissed without opinion. *See Montana Power Co. v EPA*, 434 U.S. 809 (1977).

Third, when EPA in 1981 revised the rules governing NSR in nonattainment areas, the Natural Resources Defense Counsel challenged those rules in the D.C. Circuit. The D.C. Cir-

cuit vacated the rules and ordered EPA to adopt rules that would expand coverage of the nonattainment NSR program. This Court granted certiorari in *Chevron* and was finally able to write an opinion addressing the NSR program. The Court reversed the D.C. Circuit and affirmed EPA's nonattainment NSR "major modification" rule. As this Court explained, EPA properly "exempt[ed] modifications of existing facilities [from NSR] that are accompanied by intrasource offsets so that there is no increase in emissions" [*i.e.*, no "major" modification]. 467 U.S. at 854 (quoting EPA's rulemaking description of the rule); *see also id.* at 840 (Under the "major modification" rule, a source "may install or modify one piece of equipment without meeting [NSR] . . . if the alteration will not increase the total emissions from the plant.").

Fourth, in *Alaska Dep't Envtl. Conserv. v. EPA*, this Court granted certiorari to address EPA's authority to review state determinations under the PSD program. 540 U.S. 461 (2004). In his dissent, Justice Kennedy noted the central role of PSD in "Congress' design to grant States a significant stake in developing and enforcing" the CAA, and the substantial impacts of PSD on individual companies and the economy. *Id.* at 516, 517 (noting that some companies "spend up to $500,000 on the permit process and . . . the time for approval [for a complex project] can take from five to seven years.").

Most recently, this Court granted certiorari to the Fourth Circuit to address whether "modification" must be interpreted consistently for NSPS and NSR. *Environmental Defense v. Duke Energy Corp.*, No. 05-848. In that case, states, unions, industry groups and others filed briefs as *amici curiae* addressing the importance of interpreting the scope of NSR consistent with congressional policy, dating back to the 1970 CAA.

All of the *amici* supporting Respondent Duke Energy explain that, contrary to the D.C. Circuit's decision in *New York II*, they have always understood the statutory term "modification" (as opposed to the regulatory concept of "major modification") as having a consistent meaning across the NSPS and

NSR programs of the CAA, *i.e.*, as activity that creates new emitting capacity that could be measured in terms of maximum hourly emission rate. By contrast, as the state *amici* explain, the reading of "modification" advanced by Petitioner Environmental Defense (under which "modification" for NSR is much broader in coverage than "modification" for NSPS) "[e]nvisions a breathtaking transfer of enforcement authority from the States to the federal government . . . undermin[ing] the Clean Air Act's federalism-respecting foundations . . . and . . . needlessly overwhelming the limited resources [of] . . . state environmental agencies." Brief of *Amici Curiae* the States of Alabama, *et al.* (Sept. 15, 2006), at 1. Indeed, as Duke *amici* explain, an NSR program under which "sources operating below applicable emission limits" established either by EPA or the states could not undertake projects that would increase their operations within those limits without an endless cycle of "government review," *cf. New York II*, 433 F.3d at 886, App. 12a, would be devastating to the environment and the economy. Brief of *Amici Curiae* Alabama Power Co., *et al.* (Sept. 15, 2006); Brief *Amici Curiae* of the American Public Power Ass'n. and the National Rural Electric Cooperative Ass'n (Sept. 15, 2006); Brief *Amici Curiae* of the International Brotherhood of Boilermakers, *et al.* (Sept. 15, 2006); Brief *Amici Curiae* of the Manufacturers Ass'n Work Group (Sept. 15, 2006).

This case involves the latest chapter in the NSR saga, but one having greater implications for the economy than any earlier one. Repairing and replacing worn out equipment is something every industrial source does repeatedly. As a result of the D.C. Circuit's vacatur of the ERP rule, today and for the indefinite future, every existing major facility is potentially subject to NSR (nonattainment and PSD) whenever they repair or replace existing equipment to avoid losing hours of operation due to normal equipment deterioration. In reaching this result, the D.C. Circuit overthrows 35 years of statutory and regulatory history based on its interpretation of a three-word phrase excerpted from a 40-word definition in a lengthy

and complex statute. The Court should grant certiorari to address this important issue of law and public policy.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

HENRY V. NICKEL
F. WILLIAM BROWNELL
(Counsel of Record)
DAVID S. HARLOW
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for the Utility Air Regulatory Group

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