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Clearing the Air: Use of Chevron's Step One to Invalidate EPA's Equipment Replacement Provision

Charles F. Mills III
ax@ac.com

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CLEARING THE AIR:
USE OF *CHEVRON'S* STEP ONE TO INVALIDATE EPA'S
EQUIPMENT REPLACEMENT PROVISION

Charles F. Mills III

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CLEARING THE AIR: USE OF *CHEVRON'S* STEP ONE TO INVALIDATE EPA'S EQUIPMENT REPLACEMENT PROVISION

CHARLES F. MILLS III*

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* J.D. Candidate, Florida State University College of Law, May 2006; M.S., Louisiana State University, 1999; B.S., Clemson University, 1997. Special thanks to Professor Jim Rossi for his many insights and ideas; the editors of the *Florida State University Law Review* for their excellent work; my family for its unending support and encouragement; and my fiancée, Christian, for everything.

For thirty-three years, various administrations have wrestled with and, to a great extent, have avoided a fundamental issue addressed in the Clean Air Act, that is, at what point plants built before 1970 must comply with new air pollution standards.¹

I. INTRODUCTION

As one of the first major pieces of legislation enacted to address the country's environmental resources, one might expect that all the wrinkles of the Clean Air Act (CAA) would be ironed out thirty-five years after its passing; however, the CAA continues to be perhaps the most confounding and complex environmental legislation ever drafted.² From the electricity that powers our light bulbs to the pulp mill that generates the materials used to create the paper on which this Note appears, it is difficult, if not impossible, to think of a process or item that the CAA has not impacted in some manner.

When enacting the CAA Amendments of 1970, Congress assigned the Environmental Protection Agency (EPA) to administer and enforce this substantial piece of legislation.³ Accordingly, throughout the thirty-five-year history of the CAA, the EPA's authority to promulgate regulations as well as its interpretation and enforcement of these regulations has been under nearly constant attack. At the center of these attacks arguably lies the EPA's most difficult task: balancing the positive human and ecological health effects of pollution abatement with the potentially high expense of installing the necessary technology.⁴

Perhaps no finer example of this balancing act exists than the determination of when to require electric utilities operating prior to the 1970 legislation to install state-of-the-art pollution-control equipment. According to the CAA, these facilities must install the best available control technology when the operator undertakes a major

1. *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 832 (S.D. Ohio 2003).

2. THE CLEAN AIR ACT HANDBOOK, at xix (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004) [hereinafter CAA HANDBOOK]. Although Congress enacted the original CAA in 1963, the CAA Amendments of 1970, 1977, and 1990 form the CAA as it is known today. The CAA is codified at 42 U.S.C. § 7401 et seq. Originally enacted as Pub. L. No. 88-206, 77 Stat. 392, the CAA has been amended by five major pieces of legislation: the Motor Vehicle Air Pollution Act of 1965, Pub. L. No. 89-272, 79 Stat. 992; the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; the CAA Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; the CAA Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; and the CAA Amendments of 1990, Pub. L. No. 101-549, 108 Stat. 2399.

3. See generally 42 U.S.C. § 7401 (2000); Michael R. Barr, *Introduction to the Clean Air Act: History, Perspective, and Direction for the Future*, in CAA HANDBOOK, *supra* note 2, at 4-7.

4. For a discussion of the balancing act between energy production and the associated environmental concerns, see Stephanie Cohen, *Energy Dreams and Energy Realities*, 5 NEW ATLANTIS: J. TECH. & SOC'Y 3 (2004), available at <http://www.thenewatlantis.com/archive/5/cohenprint.htm>.

modification, or capital improvement, to the facility.⁵ However, an operating utility may be spared if such modifications merely amount to “routine” maintenance.⁶ EPA statements and judicial interpretations did little to clarify the distinction between capital improvements and routine maintenance.⁷ Therefore, on October 27, 2003, the EPA promulgated a controversial rule (the Final Rule) containing the equipment replacement provision (ERP) to clarify the point at which routine maintenance ends and capital improvement begins.⁸ Specifically, the ERP exempts replacement of components with similar or identical components that amount to twenty percent or less of the process unit’s total value.⁹ However, the ERP faced stiff resistance and was subsequently challenged on its promulgation date in the U.S. Court of Appeals for the District of Columbia.¹⁰ Less than two months after its promulgation, the court granted a motion to stay the rule.¹¹

5. 42 U.S.C. § 7411(a)(2) (2000).

6. 40 C.F.R. § 60.14(e)(1) (2004).

7. “It is clear to this Court that at various times since 1970 officials of the EPA have been remiss in . . . clarifying [the CAA’s] application to specific projects.” *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 833 (S.D. Ohio 2003). However, the judicial system is not immune from such criticism. For example, Part III.A, *infra*, discusses the landmark case of *Wisconsin Electric Power Co. v. Reilly (WEPCO)*, 893 F.2d 901 (7th Cir. 1990), and the major subsequent judicial interpretations of the applicable CAA provisions. In practice, these decisions do little to clarify the situation.

8. It should be noted from the outset that much of the controversy surrounding the Final Rule concerns the differences between the environmental policies of the Bush and Clinton Administrations. However, this Note does not intend to act as a forum for the politics behind the promulgation of the Final Rule. Certainly, the Final Rule, adopted by the Bush Administration, focuses upon energy policy considerations, rather than environmental considerations. LARRY PARKER, CONGRESSIONAL RESEARCH SERV., CLEAN AIR AND NEW SOURCE REVIEW: DEFINING ROUTINE MAINTENANCE 4 (2004). Furthermore, obvious distinctions exist between the aggressive enforcement tactics of the Clinton Administration EPA and the energy-centric approach of the Bush Administration EPA. See Bruce Barcott, *Changing All the Rules*, N.Y. TIMES, Apr. 4, 2004, § 6 (Magazine), at 38, available at 2004 WLNR 5394787. For more hostile discussions of the Bush Administration’s actions in regard to the CAA, see Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL’Y F. 363 (2004) and Eric Schaeffer, *Clearing the Air: Why I Quit Bush’s EPA*, WASH. MONTHLY, July-Aug. 2002, at 20.

9. See Prevention of Significant Deterioration (PSD) and Nonattainment New-Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,270 (Dec. 31, 2002) (to be codified at 40 C.F.R. pts. 51-52) [hereinafter Final Rule].

10. *New York v. EPA*, No. 03-1380 (D.C. Cir. Dec. 24, 2003) (order staying the rule). The twelve states challenging the rule are Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Wisconsin. The major cities challenging the rule included New York City, Washington, D.C., and San Francisco. *Id.*

11. *Id.* Subsequent to the issuance of the order, the EPA received multiple petitions for reconsideration of the Final Rule, and on July 1, 2004, it formally granted reconsideration and requested comments. 69 Fed. Reg. 40,278 (July 1, 2004). However, following a year-long reconsideration process, on June 6, 2005, the EPA announced that no changes were necessary to the Final Rule. 70 Fed. Reg. 33,838 (June 10, 2005). Accordingly, the

When evaluating the Final Rule, the question must be asked, Does the ERP frustrate the congressional intent which forms the foundation of the CAA? This Note answers that question with a resounding “yes.” Nevertheless, the judiciary is likely to grant deference to the EPA’s interpretation of the CAA. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established a two-part test, known as the *Chevron* “two-step,” to determine when Congress intended to grant interpretive authority to an administrative agency. Using that landmark decision and its progeny, this Note advances alternative justifications that a reviewing court could utilize to invalidate the ERP at step one and, as a result, avoid the substantial deference afforded to administrative interpretations at step two.

Part II of this Note provides a brief history of the CAA, including the statutory underpinnings of the New Source Performance Standards (NSPS) program, the New Source Review (NSR) program, the Modification Rule, and the Routine Maintenance, Repair, and Replacement (RMRR) exemption. Part III of this Note provides a review of the significant judicial interpretations of the Modification Rule and the RMRR exemption, including the Seventh Circuit’s influential decision in *Wisconsin Electric Power Co. v. Reilly (WEPCO)*.¹² Part IV examines the Final Rule. In particular, Part IV focuses upon the ERP’s potential effects on future installation of pollution-control technology and pending enforcement actions. Part V discusses the deference granted to an agency empowered to promulgate rules and regulations in order to administer a congressional delegation of authority. Furthermore, Part V evaluates the Supreme Court’s retreat from traditional notions of *Chevron* deference and applies alternative rationales advanced in the Court’s decisions and the literature to the ERP dispute. Finally, Part VI summarizes and concludes this Note.

II. BRIEF HISTORY OF THE CLEAN AIR ACT AND THE SALIENT PROVISIONS

Although Congress enacted the original CAA in 1963, that legislation bears little resemblance to the rigid and expansive structure under which the United States operates today.¹³ The original CAA was intended to provide federal grants to state and local air pollution-control agencies without encroaching upon individual states’ rights.¹⁴

underlying lawsuit may now proceed. *EPA Sticks with New Source Review Rule Adopted in 2003 on Equipment Replacement*, Daily Env’t Rep. (BNA) No. 108, at A-1 (June 7, 2005).

12. 893 F.2d 901 (7th Cir. 1990).

13. BRUCE G. MILLER, COAL ENERGY SYSTEMS 126-27 (2005).

14. *Id.* Stated more emphatically during its inception, the primary purpose of the CAA was to “speed up, expand, and intensify the war against air pollution in the United

However, over the subsequent twenty-seven years, due to “dissatisfaction with the progress of existing air pollution programs,”¹⁵ Congress amended the Act on five occasions.¹⁶ These amendments effectively expanded the scope of the CAA to become one of the country’s most complex and comprehensive pieces of environmental legislation.¹⁷

A. *The CAA Amendments of 1970*

Prior to the 1970 Amendments, individual states established emissions standards for stationary sources—a system which Congress found inadequate.¹⁸ In particular, Congress believed that federal emissions standards were needed to preclude individual states from lowering standards to lure industry within their borders.¹⁹

Therefore, the CAA Amendments of 1970 established the expansive primary purpose of the legislation: “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.”²⁰ In furtherance of this broad charge, these amendments required the EPA to establish maximum permissible concentrations, known as “national . . . ambient air quality standards” (NAAQS),²¹ for six “criteria” pollutants.²² Additionally, the amendments characterized the nation’s air quality in one of two manners: those regions that complied with NAAQS (attainment areas) and those regions that violated some or all NAAQS (nonattainment areas).²³ Subsequent to the EPA’s identification of these six criteria pollutants and promulgation

States with a view to assuring that the air we breathe throughout the Nation is wholesome once again.” H.R. REP. NO. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356.

15. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976).

16. For a discussion concerning the amendments of 1965, 1967, 1970, 1977, and 1990, see ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 326-29 (4th ed. 2003). This Note only provides a cursory evaluation and summary of the applicable provisions contained in the 1970 and 1977 Amendments.

17. See Bernard F. Hawkins, Jr. & Mary Ellen Ternes, *The New Source Review Program: Prevention of Significant Deterioration and Nonattainment New Source Review*, in CAA HANDBOOK, *supra* note 2, at 131, 131-32.

18. As noted by Justice Marshall, Congress enacted the 1970 Amendments to the CAA to “take a stick to the States in order to guarantee the prompt attainment and maintenance of specified air quality standards.” *Union Elec. Co.*, 427 U.S. at 249 (alterations in original) (citations omitted).

19. H.R. REP. NO. 91-1146, at 3 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5356, 5358.

20. 42 U.S.C. § 7401(b)(1) (2000).

21. See *id.* § 7408(a)(1).

22. EPA promulgated NAAQS for the following six criteria pollutants: sulfur dioxide (SO₂), particulate matter (PM), nitrogen oxide (NO_x), carbon monoxide (CO), ozone (O₃), and lead (Pb). National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. pt. 50 (2004).

23. Hawkins & Ternes, *supra* note 17, at 132.

of the NAAQS, the CAA required states to classify a region as an attainment or nonattainment area.²⁴

In addition, the 1970 CAA Amendments mandated that the EPA promulgate technology-based performance standards, known as NSPS, to regulate emissions from stationary pollution sources constructed post-1970.²⁵ As opposed to NAAQS established under sections 108 through 110 of the CAA, NSPS are not based upon ambient air quality; rather, these technology-based standards concern particular industrial source categories.²⁶ Therefore, the NSPS apply to new stationary sources regardless of the region's attainment status.²⁷ This industry-wide standard sought to eliminate the economic advantages a state in compliance with NAAQS would hold over a state not in compliance with NAAQS, vis-à-vis attracting new industrial development.

However, according to congressional discussions held during contemplation of the 1970 Amendments to the CAA, the NSPS program sought only to prevent future, that is, post-1970, degradation of our air resources. In other words, Congress avoided subjecting existing sources of air emissions to the costly installation of pollution-control technology. Instead, Congress believed that mandating updated pollution-control technology when new sources of emissions were in the process of being constructed constituted the most effective and least expensive means of advancing the CAA's goals.²⁸ As such, facilities constructed prior to 1970 became subject to the NSPS if modifications to these sources created new or increased pollution emissions.²⁹ The NSPS program was clearly viewed as a means of eliminating "new pollution problems *while* cleaning up existing sources."³⁰ In order to enforce the modification provision, the CAA required owners or operators of a facility subject to the NSPS program to provide written

24. 42 U.S.C. § 7407(d)(1)-(7) (2000). Moreover, the CAA mandates that states develop state implementation plans (SIPs) to achieve NAAQS in nonattainment areas and maintain NAAQS in attainment areas. *Id.* § 7407(a). Although the EPA provides guidance for SIP development and ultimately rejects or approves individual SIPs, the states maintain the majority of authority under this system. *Id.* § 7407(d)(1)(B).

25. *See id.* § 7411(b).

26. *Id.* § 7411(b)(1)(A).

27. Robert J. Martineau, Jr. & Michael K. Stagg, *New Source Performance Standards*, in CAA HANDBOOK, *supra* note 2, at 299, 299.

28. *See* S. REP. NO. 91-1196 (1970), *reprinted in* ENVIRONMENTAL PROTECTION AGENCY, LEGAL COMPILATION: AIR STATUTES & LEGISLATIVE HISTORY, EXECUTIVE ORDERS, REGULATIONS, & GUIDELINES & REPORTS 15-16 (Jan. 1975).

29. Congress defined "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4) (2000).

30. S. REP. NO. 91-1196, at 16 (1970), *reprinted in* 1 S. COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 416 (emphasis added).

notice to the EPA of physical alterations that may increase an applicable emissions rate prior to commencement of the change.³¹

However, subsequent amendments to the CAA have reduced the significance of the NSPS program.³² Specifically, preconstruction permitting conducted on a case-by-case basis eliminated the need for industry-wide technology standards.³³ Nonetheless, these permitting programs still refer to the NSPS program to establish the “floor” for technology implementation.³⁴

B. The CAA Amendments of 1977

Due to the overly ambitious temporal goals of the 1970 Amendments, Congress enacted the 1977 Amendments to provide a more realistic schedule for compliance with NAAQS.³⁵ In addition, and more importantly for the purposes of this Note, the 1977 Amendments established the New Source Review (NSR) program,³⁶ which refers to a set of provisions designed to establish technological requirements and permissible emissions levels for new sources of air pollution.³⁷ The NSR permitting program encompasses three distinct concepts. First, the Prevention of Significant Deterioration (PSD) program governs new emissions located within attainment areas.³⁸ Second, the Nonattainment New Source Review (NNSR) program governs, as the name would suggest, new emissions located within nonattainment areas.³⁹ Finally, the third concept involves state-regulated review of minor new emissions sources,⁴⁰ generally with little federal involvement.⁴¹

Notwithstanding the confusion surrounding the RMRR exemption and the NSR’s extensive application process, the basis of the NSR program is relatively simple in that it requires major stationary sources with a “potential to emit” a specific volume of a particular

31. 40 C.F.R. § 60.7(a)(4) (2004); *see also infra* Part II.C.

32. *See infra* Part II.B.

33. Martineau & Stagg, *supra* note 27, at 300.

34. *Id.*; *see, e.g.*, 42 U.S.C. § 7479(3) (2000) (establishing that best available control technology should be no less stringent than NSPS established in § 7411); *id.* § 7501(3) (establishing that the lowest achievable emission rates should be no less stringent than those permitted by the NSPS program).

35. Barr, *supra* note 3, at 6.

36. Hawkins & Ternes, *supra* note 17, at 131.

37. Generally, the Prevention of Significant Deterioration program and the Nonattainment New Source Review program form what has become known as “New Source Review.” Final Rule, *supra* note 9, at 61,249.

38. 42 U.S.C. §§ 7470-7492 (also referred to as Part C—Prevention of Significant Deterioration of Air Quality).

39. *Id.* §§ 7501-7515 (also referred to as Part D—Plan Requirements for Nonattainment Areas).

40. *Id.* § 7410(a)(2)(C) (requiring the state to include enforcement of emissions limitations on “any stationary source[s],” not just major sources).

41. Hawkins & Ternes, *supra* note 17, at 131.

pollutant to obtain a construction and operating permit.⁴² As such, facilities proposing projects within attainment areas must submit to a preconstruction review and obtain a PSD permit, ideally to prevent serious environmental deterioration.⁴³ The PSD program demands that new sources install the “best available control technology,”⁴⁴ a standard determined on a case-by-case basis with a floor established by the NSPS program level.⁴⁵ In contrast to the PSD program, the more stringent NNSR program governs new sources within nonattainment areas.⁴⁶ Accordingly, the NNSR program requires new emissions sources to utilize a “lowest achievable emission rate,” the strictest emissions limitation contained in a state implementation plan for an industrial category.⁴⁷ Furthermore, prior to acquiring a NNSR permit, the applicant must obtain offsets.⁴⁸

Nevertheless, Congress did not desire to dampen economic growth through the implementation of pollution-control technology.⁴⁹ In a passage oft-cited by the utility industry in support of the RMRR exemption, the NSR program seeks “to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the [pollution-control] standards by a fixed date.”⁵⁰ Accordingly, Congress viewed installing pollution-control technology at the time of construction as less costly than retrofitting other facilities once pollution-control ceilings were reached.⁵¹

42. *Id.* at 136.

43. 42 U.S.C. §§ 7475(a)(1)-(2). In order to obtain this permit, an applicant must demonstrate that the project will not generate new or increased emissions in excess of NAAQS. *Id.* § 7475(a)(3).

44. *Id.* § 7475(a)(4).

45. See PARKER, *supra* note 8, at 2. The determination of what technology constitutes best available involves an evaluation of the most effective control technologies, considering energy, environmental, and economic impacts. 40 C.F.R. § 51.166(b)(12) (2004). For a thorough analysis of the process for the best available control technology determination, see Hawkins & Ternes, *supra* note 17, at 157-64.

46. 42 U.S.C §§ 7501-7515 (2000).

47. *Id.* § 7501(3). The lowest achievable emission rate does not account for energy or economic factors. See Nathaniel Lord Martin, Note, *The Reform of New Source Review: Toward a More Balanced Approach*, 23 STAN. ENVTL. L.J. 351, 357-58 (2004).

48. 42 U.S.C. § 7503(a)(1)(A) (2000).

49. As previously noted, the 1977 Amendments to the CAA scaled back the ambitious goals of the 1970 Amendments providing a more realistic timetable. For example, compare congressional discussions held during the enactment of the 1977 Amendments concerning the balance of economic growth with achievement of air pollution reductions to congressional discussions held during enactment of the 1970 Amendments. During the 1970 congressional discussions, Senator Muskie asserted that Congress’s “responsibility is to establish what the public interest requires to protect the health of persons.” 116 CONG. REC. 32,900, 32,902 (1970). Moreover, the Senate committee noted that “existing sources of pollutants either should meet the standard of the law or be closed down.” S. REP. NO. 91-1196, at 2-3 (1970), reprinted in ENVIRONMENTAL PROTECTION AGENCY, LEGAL COMPILATION: STATUTES AND LEGISLATIVE HISTORY 15-16 (Jan. 1975).

50. H.R. REP. NO. 294, at 211 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1290.

51. H.R. REP. NO. 294, at 185 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1264.

C. The Modification Rule

With the creation of NSR, the EPA shifted its focus from enforcing NSPS emissions rates to complying with NAAQS in nonattainment areas and satisfying the PSD program within attainment areas.⁵² Rather than establish an entirely new set of definitions for the NSR program, the 1977 Amendments essentially adopted many of the existing NSPS definitions.⁵³ For example, NSR incorporated the NSPS program's definition of "modification" into its definition of "construction."⁵⁴ Clearly, Congress intended to alleviate problematic definitional nuances that have the potential to arise when creating multiple regulatory schemes sharing a central theme—protection of air resources.⁵⁵ In fact, congressional discussions focusing on the modification provision during the 1977 Amendments mirror those held during the enactment of the 1970 Amendments: "The purpose of the 'modification' rule is to ensure that pollution-control measures are undertaken when they can be most effective, at the time of new or modified construction."⁵⁶ Therefore, the modification rule constitutes the means by which the EPA regulates existing facilities under the NSPS and NSR programs.⁵⁷ A source must undergo a "physical change" which increases air pollution to satisfy the definition of modification.⁵⁸

52. See PARKER, *supra* note 8, at 3.

53. Specifically, 42 U.S.C. § 7479(2)(C) asserts that "[t]he term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility." See also *WEPCO*, 893 F.2d 901, 905 (7th Cir. 1990) ("Congress also essentially adopted its NSPS definition of 'modification' for the PSD program.")

54. 42 U.S.C. § 7479(2)(C) (2000).

55. See *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 631 (M.D.N.C. 2003) (citing 123 CONG. REC. H11,956, 3665 (daily ed. Nov. 1, 1977)) (noting that Congress incorporated 42 U.S.C. § 7479(2)(C) to conform the NSR definitions with other parts of the NSPS), *aff'd on other grounds* by 411 F.3d 539 (4th Cir. 2005). The Fourth Circuit affirmed the district court's grant of summary judgment; however, the court based its affirmation on the EPA's interpretation of "modification." *Id.* at 546-47. Specifically, the Fourth Circuit determined that the EPA applied a different definition of "modification" under the PSD program than it did under the NSPS program. *Id.* at 546. As such, the EPA violated the congressional mandate that the NSPS definition of "modification" should be used when applying the provisions under the PSD program. *Id.*

56. *Nat'l-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 843 (6th Cir. 1988) (Boggs, J., dissenting) (citing 116 CONG. REC. 32,918 (remarks of Sen. Cooper), *reprinted in* 1 S. COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 260 (1974)).

57. The PSD program is triggered when "construction" commences after August 7, 1977, the effective date of the legislation. See *Clean Air Act Amendments of 1977*, Pub. L. No. 95-95, § 406, 91 Stat. 685, 795-96 (1977). Construction "includes the modification . . . of any source or facility." 42 U.S.C. § 7479(2)(C) (2000). Similarly, the NSPS is triggered by "construction or modification" of any stationary source. *Id.* § 7411(a)(2).

58. "The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted

D. RMRR Exemption

Adoption of the NSPS definition of modification had major repercussions for those facilities subject to NSR. Specifically, as Judge Cudahy noted in the influential *WEPCO* decision, “trivial activities [such as] the replacement of leaky pipes” may result in an increase in emissions and subject that activity to NSR.⁵⁹ Therefore, the EPA promulgated regulations exempting certain activities.⁶⁰ The most contentious of these provisions, and central to the EPA’s Final Rule, exempts “[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category.”⁶¹ Obviously, the EPA’s intention in promulgating what came to be known as the RMRR exemption was to avoid the situation Judge Cudahy described. However, utility companies recognized that the RMRR exemption enabled them to upgrade or extend the life of their facilities, while avoiding NSR, by fitting life-extension efforts into their routine maintenance schedule.⁶² In fact, utilities began to refer to the plans

by such source or which results in the emission of any air pollutant not previously emitted.” *Id.* § 7411(a)(4).

However, rules promulgated by the EPA provided a distinction between modification of existing emissions sources under NSPS and modification of existing emissions sources under NSR. *WEPCO*, 893 F.2d at 905. Whereas a physical change resulting in an increase of the facility’s *hourly rate* of emissions constitutes a modification under NSPS, 40 C.F.R. § 60.14 (1988), the modification provision of NSR is not triggered unless the physical change results in an increase of the facility’s *total amount* of emissions. *Id.* § 52.21(b)(23)(i). The NSR program activates once sulfur dioxide and nitrogen oxide emissions pass a threshold of forty tons per year. *Id.*

59. *WEPCO*, 893 F.2d at 905.

60. The EPA promulgated six specific exceptions. However, as this Note focuses on the EPA’s October 27, 2003 rule regarding the routine maintenance exemption, it will not elaborate upon the other five exceptions. Nevertheless, these five exceptions are as follows:

The following shall not, by themselves, be considered modifications under this part:

....

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if . . . the existing facility was designed to accommodate that alternative use. . . .

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission-control system is removed or is replaced by a system which [is] determine[d] to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

40 C.F.R. § 60.14(e)(2)-(6) (2004) (discussing the NSPS program); *see also id.* § 52.21(b)(2) (2004) (discussing the PSD program).

61. 40 C.F.R. § 60.14(e)(1) (2004) (discussing the NSPS program); *see also id.* § 52.21(b)(2)(iii) (2004) (discussing the PSD program).

62. PARKER, *supra* note 8, at 3.

for lengthening a facility's life, formerly known as life-extension programs, as rehabilitation programs.⁶³

As such, the demarcation between "modification" and "routine maintenance" became increasingly more difficult to identify as life-extension efforts were merely folded into maintenance and repair schedules.⁶⁴ As noted by Judge Sargus in *United States v. Ohio Edison Co.*, "[T]he analysis required to distinguish between a modification sufficient to trigger compliance from routine maintenance, repair and replacement is complex";⁶⁵ therefore, it often required lengthy, fact-intensive examinations by the court.⁶⁶ Generally, courts identify RMRR activities as those projects of limited expense, typically performed by in-house employees, which occur regularly and result in no permanent improvements.⁶⁷ On the other hand, capital improvements falling under the auspices of "modification" are expected to be projects large in scope that require outside contractors, increase the value of the unit, and occur irregularly.⁶⁸

III. JUDICIAL INTERPRETATION OF THE EPA'S MODIFICATION RULE AND RMRR EXEMPTION

In order to understand the reasoning behind or at least the impetus for the ERP, necessity demands an examination of the U.S. Court of Appeals for the Seventh Circuit's decision in *WEPCO*⁶⁹ regarding the RMRR exemption and the three subsequent decisions by district courts that had attempted to flesh it out: *United States v. Ohio Edi-*

63. *Id.* (citing Jason Makansi, *Rehab: Get the Most from the Existing Asset Base*, POWER, June 1999, at 30-40).

64. *Id.*

65. 276 F. Supp. 2d 829, 834 (S.D. Ohio 2003).

66. *See, e.g., id.* (evaluating thirty-four parts replacements on eleven production units over fifteen years in a sixty-two-page decision); *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003) (evaluating twenty-nine projects at eight coal-fired facilities over thirteen years in a thirty-six-page decision).

67. *Ohio Edison Co.*, 276 F. Supp. 2d at 834.

68. *Id.*

69. 893 F.2d 901, 905 (7th Cir. 1990).

son Co.,⁷⁰ *United States v. Southern Indiana Gas & Electric Co. (SIGECO)*,⁷¹ and *United States v. Duke Energy Corp.*⁷²

A. Wisconsin Electric & Power Co. v. Reilly (WEPCO)

Undeniably, *WEPCO* constitutes the seminal decision in regard to defining the boundaries of the RMRR exemption under NSR,⁷³ even forming the basis of a portion of the EPA's analysis in the Final Rule.⁷⁴ In an effort to extend the life of five coal-fired generating units at its facility on Lake Michigan, north of Milwaukee, Wisconsin Electric & Power Company (Wisconsin Electric) submitted a proposed life-extension project to the Wisconsin Public Service Commission in 1988.⁷⁵ The Commission then consulted other government agencies, including the EPA, as to the viability and potential effects of the project. Subsequently, the EPA determined that the project constituted a "physical change" resulting in an increase in production and air emissions; therefore, the facility would be subject to PSD requirements through the modification rule.⁷⁶ Furthermore, the EPA claimed that Wisconsin Electric's life-extension project did not qualify for the RMRR exemption.⁷⁷

Ultimately, the *WEPCO* decision established three principle concepts that would permeate the contentious history of the RMRR exemption. The first two concepts concern the two essential elements to demonstrate a "modification." First, the Seventh Circuit established that "modification" should be broadly interpreted to include any physical change of a facility.⁷⁸ Second, *WEPCO* defined the emissions increase necessary to trigger the modification rule under both NSPS and NSR programs.⁷⁹ Third, the decision validated the EPA's multi-

70. The *Ohio Edison Co.* case involves the determination of NSR violations at Ohio Edison's W.H. Sammis Station plant in Stratton, Ohio. Following a favorable verdict for the EPA in *Ohio Edison Co.*, on March 18, 2005, the parties entered into a Consent Decree requiring installation of state-of-the-art pollution-control equipment at Sammis Station, resulting in annual reductions of sulfur dioxide emissions by 134,500 tons and nitrous oxide emissions by 28,567 tons. Following the installation of pollution-control technology at other Ohio Edison facilities, the total emissions reductions amount to over 212,000 tons per year. These upgrades are expected to cost approximately \$1.1 billion. In addition, Ohio Edison must pay an \$8.5 million civil penalty. Press Release, EPA, U.S. Announces Settlement of Landmark Clean Air Act Case Against Ohio Edison—Utility Will Spend \$1.1 Billion to Reduce Air Pollution by 212,500 Tons Per Year (March 18, 2005), available at <http://www.epa.gov/compliance/resources/cases/civil/caa/ohioedison.html>.

71. 245 F. Supp. 2d 994 (S.D. Ind. 2003).

72. 278 F. Supp. 2d 619 (M.D.N.C. 2003).

73. *SIGECO*, 245 F. Supp. 2d at 1015.

74. Final Rule, *supra* note 9, at 61,256-57.

75. *WEPCO*, 893 F.2d 901, 905 (7th Cir. 1990).

76. *Id.* at 907.

77. *Id.* at 911.

78. *Id.* at 910.

79. *Id.* at 915-18.

factor evaluation of the RMRR exemption.⁸⁰ In doing so, the court held that no one factor should be dispositive, but the EPA should consider “cost, magnitude, nature, and frequency” of activities in determining whether the RMRR exemption applies.⁸¹

1. Seventh Circuit’s Interpretation of Physical Change Under the Modification Rule

Wisconsin Electric argued that “modification,” as it is used to trigger the NSPS and NSR programs, should be defined narrowly.⁸² Specifically, notwithstanding that the life-extension project involved extensive activities including the removal of units from operation for nine-month periods, these activities would not “alter” the facility and, as such, should not bring the facility under the auspices of the NSPS and NSR programs.⁸³ In making this argument, Wisconsin Electric cited the Webster New World Dictionary’s definition of “modify” and claimed that replacement of components did not “change or alter” the facility, but merely permitted the facility to operate as it had prior to equipment deterioration.⁸⁴

However, the Seventh Circuit rejected Wisconsin Electric’s interpretation of modify. Citing the Supreme Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁸⁵ the Seventh Circuit held that more weight must be given to “congressional direction and agency construction” than the common vernacular appearing in a dictionary.⁸⁶ Therefore, characterization of an action as a basic or fundamental change to a facility was irrelevant.⁸⁷ Rather, Congress defined “modification” as “any physical change,”⁸⁸ and that meaning should not be limited to physical changes exceeding some threshold magnitude.⁸⁹

Furthermore, citing the congressional intent of the CAA, the Seventh Circuit attacked Wisconsin Electric’s definition of modification as unreasonable.⁹⁰ In a theme that reverberates throughout the contentious history of the RMRR exemption, Judge Cudahy speculated that if Wisconsin Electric’s argument were adopted, major facilities

80. *Id.* at 913.

81. *SIGECO*, 245 F. Supp. 2d 994, 1015 (S.D. Ind. 2003) (citing *WEPCO*, 893 F.2d 901, 913 (7th Cir. 1990)).

82. *WEPCO*, 893 F.2d at 908.

83. *Id.* at 908-09.

84. *Id.* (citing Brief for the Petitioner at 32-33).

85. 467 U.S. 837 (1984).

86. *WEPCO*, 893 F.2d at 908.

87. *Id.*

88. *Id.* (citing 42 U.S.C. § 7411(a)(4) (2000) (emphasis omitted)).

89. *Id.* (citing *Ala. Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979)).

90. *Id.*

could avoid NSPS and NSR application "into the indefinite future."⁹¹ However, the Seventh Circuit noted that Congress intended to further the goals of the CAA *while* allowing the continuance of economic growth but elected not to require existing facilities to install emissions-control technology immediately.⁹² To balance economic growth while enforcing emissions standards, Congress recognized that the installation of emissions-control technology during construction would be less costly than retrofitting facilities once an area reaches nonattainment status.⁹³ Hence, Wisconsin Electric's definition of modification would effectively eviscerate Congress's desire to not permanently exempt existing facilities from the NSPS and NSR programs.⁹⁴

2. Seventh Circuit's Interpretation of Net Emissions Increase Under the Modification Rule

As to the second element in the definition of modification, the Seventh Circuit first explained the crucial differences between the NSPS and NSR programs in regard to emissions increases.⁹⁵ Specifically, whereas the NSPS program regulates emissions increases as a permissible volume per hour of discharge,⁹⁶ the NSR program examines emissions increases measured in terms of total annual emissions.⁹⁷ Next, the Seventh Circuit described the proper method, under the EPA's regulations, to calculate whether an alteration resulted in an emissions increase, thereby subjecting the project to the NSPS and/or NSR programs.⁹⁸ Specifically, under the NSPS program, a unit's emissions at current maximum capacity should be compared to that unit's potential emissions at maximum capacity after the alteration to determine if the project results in an emissions increase.⁹⁹ In effect, this calculation disregards the unit's emissions at its maximum design capacity.¹⁰⁰ In general, the Seventh Circuit adopted similar methodology for the NSR program by rejecting the EPA's argument that the "potential to emit" should be used to determine future emissions.¹⁰¹ Rather, the calculation should be based

91. *Id.* at 909.

92. *Id.* (citing H.R. REP. NO. 95-294, at 211 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1290).

93. *Id.* (citing H.R. REP. NO. 95-294, at 185 (1977), as reprinted in 1977 U.S.C.C.A.N. at 1264).

94. *Id.* at 909.

95. *Id.* at 913-18.

96. *Id.* at 913 (citing 40 C.F.R. § 60.14 (1988)).

97. *Id.* at 913-14 (citing 40 C.F.R. § 52.21(b)(2)(i) (1988)).

98. *Id.* at 913-18.

99. *Id.* at 913.

100. *Id.*

101. *Id.* at 916-17 (internal quotation omitted).

on maximum emissions generated under conditions at which the facility is meant to be operated after completion of the project.¹⁰²

Applying this analysis to Wisconsin Electric's proposed activities, the Seventh Circuit held that the EPA's assumption of continuous unit operations to arrive at a "potential-to-emit" baseline for the net increase evaluation violated the language of the NSR.¹⁰³ Rather, if the EPA desired to challenge Wisconsin Electric's proposed activities as a modification under the NSR, it must use an "actual-to-actual" test. That is, the EPA must demonstrate an emissions increase based on a comparison of the unit's current actual emissions to the unit's actual emissions generated during normal operations following the completion of the proposed activities.¹⁰⁴

3. *The EPA's Implementation of the RMRR Exemption*

In addition to claiming that the life-extension activities should not constitute modification of the facility, Wisconsin Electric argued that if the facility was subject to the NSPS and NSR programs, the proposed activities amounted to nothing more than routine maintenance and repair and, thus, satisfied the requirements of the EPA's RMRR exemption.¹⁰⁵ As such, the EPA's determination that the life-extension activities failed to satisfy the RMRR exemption constituted an arbitrary and capricious application of the EPA's own regulations.¹⁰⁶

In rejecting Wisconsin Electric's argument, the Seventh Circuit granted substantial deference to the EPA's interpretation of its own rules¹⁰⁷ and concluded that the EPA's examination of a variety of factors to determine whether the life-extension activities were routine did not constitute an arbitrary and capricious application of its regulations.¹⁰⁸ Moreover, in approving the EPA's method of evaluating various factors on a case-by-case basis, the court gave "notice that the routine maintenance exemption was a multi-factor test, and that no one factor would have dispositive weight."¹⁰⁹ For example, the EPA evaluated the "nature, extent, purpose, frequency," cost, and

102. *Id.* at 917-18. The potential to emit should not be so broadly construed to allow the EPA to use emissions rates generated by a plant operating under the "worst conceivable" conditions. *United States v. La.-Pac. Corp.*, 682 F. Supp. 1141, 1158 (D. Colo. 1988) (citing *Ala. Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)).

103. *WEPCO*, 893 F.2d 901, 917-18 (7th Cir. 1990).

104. *Id.* at 918.

105. *Id.* at 911-12.

106. *Id.*

107. *Id.* at 910 (citing *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (according substantial deference to an agency's interpretation of its own regulations, particularly the subject regulations that are highly technical and complex)).

108. *Id.*

109. *SIGECO*, 245 F. Supp. 2d 994, 1015-16 (S.D. Ind. 2003).

historical precedent of Wisconsin Electric's proposed activities to "arrive at a common-sense finding" as to the routine character of the activities.¹¹⁰

B. U.S. District Court Decisions Following WEPCO

1. United States v. Southern Indiana Gas & Electric Co. (SIGECO)

Subsequent to the *WEPCO* decision, utilities struggled to determine if their life-extension projects would satisfy the requirements of the EPA's multifactor test for the RMRR exemption or if these projects would constitute a nonroutine activity subject to the NSPS or NSR programs.¹¹¹ Consequently, in the preamble to an EPA rule concerning emissions tests applicable to utility generating units, the agency attempted to clarify its judicially approved multifactor test. Specifically, to determine the routine nature of equipment repair, the EPA must evaluate whether that particular equipment is typically replaced or repaired by other sources within the industry.¹¹²

More or less a direct result of the confusion inherent in the RMRR exemption, *SIGECO* gave the judicial system an opportunity to consider the reasonableness of the EPA's actions.¹¹³ Conceding the establishment of the *WEPCO* multifactor analysis, Southern Indiana Gas & Electric Co. (Indiana Electric) argued that the EPA's analysis of a single factor—frequency of activities—constituted an unreasonable

110. *WEPCO*, 893 F.2d 901, 910-11 (7th Cir. 1990). Several factors, in particular, bolstered the EPA's determination. First, Wisconsin Electric's application for the life-extension project noted that projects "falling into the category of repetitive maintenance that are normally performed during scheduled equipment outages . . . are not included in this application." *Id.* at 911 (internal citations omitted) (emphasis omitted). Second, the EPA project manager testified that the agency could not find one instance of a rehabilitation project approaching the scope and magnitude of Wisconsin Electric's proposal. *Id.* Indeed, the proposed project was expected to cost in excess of \$70.5 million. *Id.* at 912.

111. The EPA attempted on numerous instances to clarify its interpretation and application of the RMRR exemption. However, these attempts often did nothing but muddy the waters even further. As noted by Judge Sargus, "While the law has always been clear, the enforcement strategies of the EPA have not." *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 833 (S.D. Ohio 2003). For examples of the EPA's ill-fated attempts at clarification, see *SIGECO*, 245 F. Supp. 2d at 1002-04, which discusses comments published in the Federal Register, letters drafted by the EPA's Assistant Administrator for Air Programs and the EPA's Director of Air Quality Planning and Standards, and the EPA's determination of routine maintenance for other projects.

112. Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Standards of Performance for New Stationary Sources, 57 Fed Reg. 32,314, 32,326 (July 21, 1992).

113. David M. Meezan, *New Source Review' Litigation: No End in Sight*, ANDREWS ENVTL. LITIG. REP., Sept. 2004, at 24, 24-25. However, whereas the issues in *WEPCO* arose due to Wisconsin Electric's submittal of a construction application, *SIGECO* sprang from a motion for summary judgment on an EPA enforcement action regarding modifications previously completed at three production units. *SIGECO*, 245 F. Supp. 2d at 999-1000.

interpretation of its own rules.¹¹⁴ In particular, Indiana Electric asserted that the EPA historically examined the frequency of activities at a particular type of unit across the industry as a whole.¹¹⁵ As such, regardless of whether Indiana Electric had performed a specific activity on a generating unit in the past or not, Indiana Electric may still qualify for the RMRR exemption if other utilities performed similar projects. As in *WEPCO*, the court granted substantial deference to the EPA's interpretation, particularly due to the EPA's experience in such a "highly technical and specialized area."¹¹⁶ In addition, echoing Judge Cudahy's opinion that Congress intended for existing facilities to be subject to the CAA when most cost-effective, the court in *SIGECO* preferred the broad interpretation of the modification rule and the narrow interpretation of the RMRR exemption to ensure that utilities were unable to make an "end run" around NSR.¹¹⁷

2. United States v. Ohio Edison Co.

Similar to the argument presented in *SIGECO*, *Ohio Edison Co.* involved a challenge to the EPA's interpretation of the RMRR exemption as excessively narrow.¹¹⁸ Ohio Edison argued that the exclusion should be more broadly interpreted because the EPA's interpretation was unreasonable.¹¹⁹ However, the court reaffirmed the decision in *SIGECO* that the EPA should examine the individual unit to determine the character of the activities, rather than the entire industry.¹²⁰

As in *WEPCO* and *SIGECO*, the court proceeded to dispose of Ohio Edison's argument by referencing the plain language of the CAA.¹²¹ Echoing statements made by the previous two courts, Judge

114. *SIGECO*, 245 F. Supp. 2d at 1008.

115. *Id.* at 1009.

116. *Id.* at 1010.

117. *Id.* at 1009. In addition, the court disposed of Indiana Electric's fair notice challenge stating that frequency comprised but one factor considered by the EPA, and the ultimate decision rested in the determination of frequency. *Id.* at 1012. Moreover, performance of such maintenance activities amounted to a calculated risk not subject to the protection of the fair notice doctrine. In short, Indiana Electric failed to inform the EPA of these activities and, therefore, could not use the fair notice doctrine as a shield against subsequent prosecution. *Id.* at 1023.

118. United States v. Ohio Edison Co., 276 F. Supp. 2d 829, 854 (S.D. Ohio 2003).

119. *Id.*

120. *Id.* at 855.

121. *Id.* However, in *Ohio Edison*, the court did not dispose of the question so rapidly. Although quickly justifying the EPA's interpretation, the court proceeded to conduct a detailed factual inquiry into the nature, purpose, frequency, and cost of activities, as well as the alleged increase in emissions and the methodology behind its calculation. *Id.* at 858-83. Certainly, such detailed analysis may lead the cynic to question Judge Sargus's contention that the distinction between routine maintenance and capital improvements is "hardly subtle." *Id.* at 834.

Sargus noted that adoption of Ohio Edison's broad interpretation would engulf the modification rule, thereby emasculating the CAA.¹²² Moreover, the court discussed that the RMRR exemption constituted a rule promulgated by the EPA, not a congressional mandate incorporated as part of the CAA; as such, it must correspond with the statutory intent of the CAA, which was the eventual installation of state-of-the-art pollution-control technology.¹²³

3. United States v. Duke Energy Corp.

Insofar as *WEPCO*, *SIGECO*, and *Ohio Edison Co.* were victories for the EPA and its interpretations of the CAA, *Duke Energy* marked the first defeat that the EPA suffered during judicial review of its RMRR exemption determinations.¹²⁴ Rather than follow the *SIGECO* and *Ohio Edison Co.* decisions' acceptance of evaluating projects on a unit-by-unit basis, Judge Bullock held that the EPA's repeated reference to similar projects within an industrial classification confirmed Duke Energy's assertion.¹²⁵

In applying the *WEPCO* holding, the court focused on a particular correspondence between the EPA and Wisconsin Electric, which stated that the subject activities in *WEPCO* were unprecedented throughout the industry.¹²⁶ Furthermore, Judge Bullock noted that the EPA's own argument in *WEPCO* focused on the similarity of Wisconsin Electric's proposed activities to those at other facilities.¹²⁷ Accordingly, the EPA's evaluation of activities at the eight Duke Energy facilities should not have focused on the frequency of the subject activities at particular generating units; rather, the EPA's frequency analysis should have examined similar activities at other facilities.¹²⁸

122. "[T]he CAA should not be interpreted in a way that 'would open the vistas of indefinite immunity from the provisions of NSPS and PSD.'" *Id.* at 855 (quoting *WEPCO*, 893 F.2d 901, 909 (7th Cir. 1990)).

123. *Id.* at 855.

124. *United States v. Duke Energy Corp.* was issued only nineteen days after *Ohio Edison Co.* and concerned twenty-nine projects performed at eight coal-fired generating stations located throughout the Carolinas. *Duke Energy*, 278 F. Supp. 2d 619, 623 (M.D.N.C. 2003).

125. *Id.* at 635. In addition, the court agreed with Duke Energy that the calculation of future actual emissions required the EPA to hold constant hours and conditions of operation. Therefore, a net emissions increase only results from an increase in the hourly rate of emissions. *Id.* at 641. In contrast, the EPA argued that excluding the emissions caused by an increase in the hours of operation in calculating annual net emissions discounts the differences between the NSPS and NSR programs. *Id.* at 643. As a result, the NSPS program becomes indistinguishable from the NSR program. *Id.*

126. *Id.* at 633.

127. *Id.*

128. *Id.* at 634. Judge Bullock focused on the EPA's statements concerning life-extension projects, specifically statements made by EPA officials in reference to a report prepared by the Government Accounting Office (GAO) evaluating life-extension issues at coal-fired facilities. *Id.* at 636. In response to the GAO report, EPA Assistant Administra-

Therefore, the court reasoned that EPA statements on Wisconsin Electric's life-extension project confirmed the belief that activities may qualify under the RMRR exemption if deemed routine throughout the industry.¹²⁹

IV. THE FINAL RULE

As a result of the confounding combination of judicial interpretations and EPA statements discussed above, the utility industry argued that the NSR program had become so complex and confusing that the industry could no longer predict the demarcation between routine maintenance and significant physical change.¹³⁰ Therefore, in the mid-1990s, the EPA began to reconsider the RMRR exemption with an eye toward revising its regulations to facilitate better understanding.¹³¹ Unfortunately, these efforts remained unproductive for a number of years.¹³² Nevertheless, in 2000, the EPA revisited the RMRR exemption and suggested that a bright-line approach would provide a more efficient means of identifying routine activities than

tor William Rosenberg stated that the majority of life-extension projects will not be similar to those undertaken in *WEPCO*; therefore, the *WEPCO* ruling is not expected to affect life-extension projects significantly. *Id.* at 637 (citing Letter from Rosenberg to Dingell (June 19, 1991)). The court additionally cites a letter from EPA Assistant Administrator for Air and Radiation as evidence that the RMRR exemption applies to restoration projects. *Id.* (citing Letter from Nichols to Lewis (May 31, 1995)).

129. *Id.* at 637. However, in making this inference, the court in *Duke Energy* failed to differentiate between the wide variety of projects that may occur under the rubric of a "life extension project." *Id.* Although this Note questions Judge Sargus's overly detailed analysis of activities at question in *Ohio Edison*, the distinction between routine activities and capital improvements necessitates such analysis to avoid identifying all activities performed under the moniker of "life extension" as routine, or vice versa. For that reason, perhaps Judge Bullock's contention in the *Duke Energy* opinion that a "detailed description of the work . . . would be lengthy and ultimately unnecessary" results in the far-reaching principle that the EPA believes "life-extension" projects qualify under the RMRR exemption. *Id.* at 624.

130. Barcott, *supra* note 8.

131. DAVID R. WOOLEY & ELIZABETH M. MORSS, *THE CLEAN AIR HANDBOOK* § 1:38 (13th ed. 2003).

132. *Id.* According to the then-Assistant Administrator for Air and Radiation, Robert Perciasepe, the slow movement in RMRR reform during the Clinton Administration was not due to lack of effort. Barcott, *supra* note 8. According to Perciasepe, the EPA convened ad hoc working groups comprised of members from the utility industry, environmental leaders, state and local regulators, and public health officials; however, no mutually acceptable compromise could be made. *Id.* He went on to state that the Clinton Administration EPA refused to sacrifice public health concerns and that it was impossible "to reach agreement with [the utility industry] because what they really wanted was to not have to [comply with NSR requirements]." *Id.* (internal quotations omitted).

However, although NSR reform came to a halt during the Clinton years, the new director for the Air-Enforcement Division, Bruce Buckheit, began compiling large amounts of data concerning industry-wide violations of the NSR program. *Id.* Due to these aggressive enforcement tactics and the utility industry's unwillingness to amend these potential infractions, the Department of Justice, on behalf of the EPA, filed seven lawsuits in November 1999 against major utilities such as FirstEnergy, American Electric Power, Cinergy, and subsidiaries of Southern Company, among others. *Id.*

the current case-by-case approach.¹³³ On December 31, 2002, the EPA issued a proposed rule seeking to clarify the definition of “modification” and the RMRR exemption.¹³⁴ Following a 120-day public comment period, rather than promulgating the entire proposed rule, on October 27, 2003, the EPA finalized only the “equipment replacement provision” (ERP) of the proposed rule.¹³⁵

A. *Creation of the Equipment Replacement Provision*

Noting criticisms of the existing case-by-case approach¹³⁶ by industry commentators concerned with the expense and delay associated with the NSR program,¹³⁷ the EPA sought to exempt *replacement* of functionally similar components.¹³⁸ According to the EPA, the lack of such an exemption effectively created a disincentive for utilities to replace inefficient components or, on the other hand, an incentive to replace these components with similarly inferior components.¹³⁹ Moreover, due to this lack of effective replacement, productive capacity of coal-firing generators supposedly suffered, an effect that does not

advance[] the central policy of the major NSR program . . . which is not to cut back on emissions from existing major stationary sources through limitations on their productive capacity, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so.¹⁴⁰

As such, the Final Rule seeks to clarify the RMRR exemption principally through the addition of the ERP, which identifies components that will automatically qualify for the RMRR exemption.¹⁴¹ Specifically, the Final Rule exempts replacement activities if (1) the subject component of the process unit is replaced by an identical or functionally equivalent component that does not alter the basic de-

133. *See generally* U.S. EPA, NEW SOURCE REVIEW: REPORT TO THE PRESIDENT (June 2002).

134. Prevention of Significant Deterioration (PSD) and Non-Attainment New-Source Review (NSR): Routine Maintenance, Repair and Replacement, 67 Fed. Reg. 80,290 (Dec. 31, 2002) (to be codified at 40 C.F.R. pts. 51-52).

135. Final Rule, *supra* note 9.

136. Although promulgating the ERP, the Final Rule permits a utility to request a case-by-case determination “as an alternative and/or supplement to today’s ERP.” *Id.* at 61,252.

137. *Id.* at 61,250. In addition to the ERP, the proposed rule also contained another cost-based approach for determining whether activities constitute routine maintenance. This approach, known as the “annual maintenance, repair and replacement allowance,” would have set an annual allowance for a particular industrial facility based upon an industry-specific percentage, but it was not implemented. *Id.* at 61,251.

138. *Id.* at 61,250.

139. *Id.*

140. *Id.*

141. *Id.* at 61,252.

sign parameters of the process unit or result in an inability to satisfy emissions and operational limits, and (2) the cost of the particular component is less than twenty percent of the replacement value of the process unit.¹⁴²

In attempting to close potential loopholes in this language, the Final Rule establishes definitions or guidelines for such concepts as “replacement value,”¹⁴³ “identical or functionally equivalent” components,¹⁴⁴ and “process unit.”¹⁴⁵ First, the EPA identifies several methods that may be used to calculate a process unit’s replacement value, including replacement cost, inflation-adjusted invested cost, insurance value, or any other accounting procedure established by the Generally Accepted Accounting Principles.¹⁴⁶ Second, the Final Rule attempts to define what is meant by “identical or functionally equivalent.” In particular, the Final Rule notes that, although replacement components must not alter design parameters, if the replacement component increases efficiency, then the increased efficiency will not affect the replacement activity’s exclusion under the Final Rule.¹⁴⁷ Third, the Final Rule states that the definition of “process unit” mirrors that provided by 40 C.F.R. § 63.41.¹⁴⁸ Although somewhat vague, this definition attempts to conform the ERP with “practical understandings of what constitutes a discrete production process.”¹⁴⁹ However, the Final Rule explicitly excludes pollution-control equipment¹⁵⁰ and includes nonemitting equipment¹⁵¹ in the determination of the process unit.

Due to the multiple unresolved enforcement actions initiated by the EPA under the Clinton Administration,¹⁵² the provisions regarding the retroactive application of the Final Rule constitute another

142. *Id.* at 61,251. For a thorough analysis and dissection of the individual components of the ERP, see Matthew H. Snell, Note, *Major Modifications and Routine Maintenance: Does the EPA’s New Exclusion Equal More Pollution?*, 39 NEW ENG. L. REV. 207, 230-35 (2004).

143. Final Rule, *supra* note 9, at 61,252.

144. *Id.* at 61,252-54.

145. *Id.* at 61,259.

146. *Id.*

147. *Id.* at 61,253. (“We need not and should not treat efficiency as a basic design parameter as we do not believe NSR was intended to impede industry in making energy and process efficiency improvements.”)

148. *Id.* at 61,259. “Process . . . unit means any collection of structures and/or equipment, that processes[,] assembles, applies, or otherwise uses material inputs to produce or store an intermediate or final product. A single facility may contain more than one process . . . unit.” 40 C.F.R. § 63.41 (2004).

149. Final Rule, *supra* note 9, at 61,259.

150. *Id.* at 61,260.

151. *Id.* at 61,261-62.

152. See *supra* note 132.

contentious issue.¹⁵³ The Final Rule specifically notes that the CAA contains no express grant of retroactive applicability for promulgated rules; therefore, the rule does not apply to any ongoing enforcement actions.¹⁵⁴ In addition, if the EPA previously determined that a utility's life-extension activities failed to meet the RMRR exemption, thereby requiring pollution-control equipment, the Final Rule would not invalidate those control requirements.¹⁵⁵

B. Potential Effects of the ERP

1. Installation of Pollution-Control Technology

As has been the case throughout the contentious history of the RMRR exemption, critics of the Final Rule contend that the ERP effectively exempts coal-firing power plants permanently from the NSR program.¹⁵⁶ That is, over a period of years, the entire process unit could be gradually replaced.¹⁵⁷ In contrast, the EPA argues that the Final Rule effectively removes the disincentives to performing routine maintenance at older facilities, thereby increasing efficiency, safety, reliability, and environmental performance.¹⁵⁸

Certainly, the RMRR exemption serves a necessary purpose, as it would be plainly unreasonable for a facility to report every minor repair or replacement.¹⁵⁹ However, in order to promote regulatory certainty and efficiency, critics argued and the EPA agreed that proper differentiation between a major modification and routine maintenance required a bright-line test, most likely in the form of a financial threshold.¹⁶⁰ Therefore, the EPA solicited comments from the industry, environmentalists, and its own officials to ascertain the percentage of the total value of a process unit which could be spent on routine maintenance without crossing the hypothetical threshold into major modifications.¹⁶¹ Of course, the percentages varied.¹⁶² Many commentators suggested that a fifty percent replacement threshold

153. See generally U.S. GEN. ACCOUNTING OFFICE, CLEAN AIR ACT: NEW SOURCE REVIEW REVISIONS COULD AFFECT UTILITY ENFORCEMENT CASES AND PUBLIC ACCESS TO EMISSIONS DATA (Oct. 2003) [hereinafter OCTOBER 2003 GAO REPORT].

154. Final Rule, *supra* note 9, at 61,264.

155. *Id.*

156. Barcott, *supra* note 8 (citing Frank O'Donnell, executive director of the nonprofit Clean Air Trust, who said that "[i]t's such a huge loophole that only a moron would trip over it and become subject to N.S.R. requirements").

157. Final Rule, *supra* note 9, at 61,254.

158. *Id.* at 61,251. Of course, the coal-fired power industry agrees. Katharine Q. Seelye, *Administration Adopts Rule on Antipollution Exemption*, N.Y. TIMES, Aug. 28, 2003, at A20 (citing Thomas R. Kuhn of the Edison Electric Institute).

159. See *WEPCO*, 893 F.2d 901, 905 (7th Cir. 1990).

160. Final Rule, *supra* note 9, at 61,255-56.

161. *Id.*

162. *Id.* at 61,256.

would permit the flexibility intended by Congress under the CAA.¹⁶³ In contrast, following an inquiry ordered by EPA Assistant Administrator Jeffrey Holmstead to suggest a threshold value, Sylvia Lowrance, the EPA's Deputy Assistant Administrator of Enforcement, and her office analyzed the appropriate data and arrived at a value of 0.75%.¹⁶⁴ For example, a utility operating with a \$1 billion process unit would be allowed to spend \$7.5 million per year on routine maintenance.¹⁶⁵

However, after considering various suggestions, the EPA believed a twenty percent threshold would be appropriate based on two factors: (1) conformity with the Seventh Circuit's decision in *WEPCO*, and (2) data supplied by the utility industry.¹⁶⁶ First, the EPA believed the threshold to be consistent with the decision in *WEPCO*.¹⁶⁷ In support of this assertion, the EPA compared both the actual costs of the Wisconsin Electric projects and the costs cited by the Seventh Circuit to the total cost of Wisconsin Electric's process units in order to arrive at a metric—a judicially supported, unacceptable threshold that may be compared to other projects.¹⁶⁸ Accordingly, using the actual cost of the Wisconsin Electric projects,¹⁶⁹ this “unacceptable” threshold amounted to twenty-nine percent. Using the cost cited by the Seventh Circuit, the “unacceptable” threshold amounted to twenty-two percent.¹⁷⁰ As such, the EPA claimed that, as the twenty percent threshold falls below these judicially impermissible values, the promulgated threshold conformed to the *WEPCO* decision.¹⁷¹

Second, the EPA asserted that data compiled by the utility industry; case studies of other industrial sectors, including pulp and paper mills, chemical manufacturers, and petroleum refineries; and general economic theory supported the twenty percent threshold.¹⁷² Without providing specific data and admitting that this data derived from a “limited inquiry,” the EPA claimed that “most typical replacement activities” would not cross the twenty percent threshold.¹⁷³

In asserting that the promulgated threshold conformed to the *WEPCO* decision, the EPA disregarded the emphatic nature in which the Seventh Circuit rejected Wisconsin Electric's life-extension pro-

163. *Id.*

164. Barcott, *supra* note 8.

165. *Id.*

166. Final Rule, *supra* note 9, at 61,256.

167. *Id.*

168. *Id.*

169. The actual costs of the WEPCO construction projects were greater than the costs considered by the Seventh Circuit in its decision.

170. Final Rule, *supra* note 9, at 61,256.

171. *Id.*

172. *Id.*

173. *Id.* at 61,257.

ject.¹⁷⁴ Repeatedly, the Seventh Circuit recognized Wisconsin Electric's life-extension project as "far from being routine," "unprecedented," and "highly unusual," and cited the EPA's claim that not a single electric utility renovation project "approached [Wisconsin Electric's] life-extension project in nature, scope or extent."¹⁷⁵ Most certainly, a reading of the *WEPCO* decision did not create the impression that Wisconsin Electric's life-extension project *nearly* satisfied or *just barely* surpassed the court's concept of what constituted routine maintenance. Rather, the court supported the contention that the subject project's aim was to "*completely* rehabilitate" an aging utility.¹⁷⁶ Furthermore, although the EPA contended that its promulgated threshold conforms to the twenty-two and twenty-nine percent replacement percentages rejected in *WEPCO*, the Seventh Circuit, although not expressly basing its decision on a cost threshold, only considered the cost associated with the EPA's twenty-two percent replacement value.¹⁷⁷

Therefore, if applying the metric the EPA utilized to validate the twenty percent threshold, the Seventh Circuit's emphatic invalidation of a twenty-two percent replacement value hardly seems to conform to the EPA's acceptable value of twenty percent. Using this metric, if Wisconsin Electric reduced the scope of its life-extension project by less than nine percent, or \$6.3 million, the project so emphatically rejected by the Seventh Circuit would satisfy the recently promulgated threshold.

As to the second line of evidence used to support the twenty percent threshold, the EPA relied on data from four industries believed to be most affected by the NSR program.¹⁷⁸ In its defense, the EPA lacked its own comprehensive data necessary to evaluate the effects of the Final Rule because the CAA does not require the EPA to collect information regarding the costs and benefits of the NSR program.¹⁷⁹ Nonetheless, selective data submitted by industry companies surely painted a one-sided picture of the costs and benefits of the NSR program. Accordingly, the General Accounting Office (GAO) classified the data—suggesting that the NSR program deters energy efficiency projects through delays in the permitting system and high

174. *See generally WEPCO*, 893 F.2d 901 (7th Cir. 1990).

175. *Id.* at 911 (quoting Brief for the Respondent).

176. *Id.* (emphasis added) (quoting Clay Memorandum).

177. The twenty-nine percent replacement value derived from the actual cost of \$87.5 million; however, the Seventh Circuit based its decision in *WEPCO* on a cost of \$70.5 million, not \$87.5 million. Final Rule, *supra* note 9, at 61,256.

178. U.S. GEN. ACCOUNTING OFFICE, CLEAN AIR ACT: EPA SHOULD USE AVAILABLE DATA TO MONITOR THE EFFECTS OF ITS REVISIONS TO THE NEW SOURCE REVIEW PROGRAM 16 (Aug. 2003) [hereinafter AUGUST 2003 GAO REPORT].

179. *Id.* at 11.

technology costs—as “anecdotal,”¹⁸⁰ an observation which the EPA itself admitted.¹⁸¹ The GAO noted that statistically valid samples or an industry-wide survey would have been more appropriate.¹⁸² In closing, the GAO concluded that the EPA’s determination that the Final Rule would create economic and environmental benefits was an “uncertain” consequence of its enactment.

2. Existing Enforcement Actions

As previously noted, during the late 1990s the EPA began an aggressive campaign seeking to enforce the provisions of the NSR.¹⁸³ Of primary interest, the Department of Justice (DOJ) filed enforcement actions against seven of the largest operators of coal-fired power plants in the country, targeting thirty-two facilities in ten states.¹⁸⁴ Generally, the lawsuits concerned life-extension projects which had not received NSR permits, or for that matter, RMRR applicability determinations from the EPA.¹⁸⁵ As many of these actions remained active when the December 2002 proposed rule was published, the DOJ and state attorneys general involved expressed concern that the proposed rule would affect the course of their cases.¹⁸⁶ In short, the prosecutors argued that, although the proposed rule and the subsequent Final Rule could not be retroactively applied,¹⁸⁷ defendant utilities may delay settlement proceedings, or judicial remedies may be affected.¹⁸⁸

Interestingly, the October 2003 GAO Report agreed with the prosecutors’ argument, citing that typically the EPA settles ninety to ninety-five percent of its cases prior to trial.¹⁸⁹ However, under these circumstances, settlement proceedings were developing more deliberately than normal.¹⁹⁰ More to the point, the October 2003 GAO Report cited an example of a utility attorney asking EPA officials what reasons the utility had for conforming to a rule the EPA itself was at-

180. *Id.* at 16.

181. U.S. EPA, *supra* note 133, at 26; AUGUST 2003 GAO REPORT, *supra* note 178, at 23.

182. AUGUST 2003 GAO REPORT, *supra* note 178, at 23.

183. *See supra* note 132.

184. These seven utilities are American Electric Power, Cinergy, FirstEnergy (Ohio Edison), Illinois Power, Southern Company, Southern Indiana Gas & Electric, and Tampa Electric. Press Release, U.S. Dep’t of Justice, U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act (Nov. 3, 1999), available at <http://www.usdoj.gov/opa/pr/1999/November/524enr.htm>; see also OCTOBER 2003 GAO REPORT, *supra* note 153, at 2.

185. OCTOBER 2003 GAO REPORT, *supra* note 153, at 2-3.

186. *Id.* at 4.

187. *See supra* note 154 and accompanying text.

188. OCTOBER 2003 GAO REPORT, *supra* note 153, at 5.

189. *Id.* at 18.

190. *Id.*

tempting to reform.¹⁹¹ Additionally, in one of the NSR actions, a utility attorney recommended a delay to the court as the EPA was reconsidering its interpretation of the NSR.¹⁹² Perhaps most disturbing, at least to prosecutors at the DOJ and the interested state attorneys general, was EPA Administrator Christie Whitman's declaration during her testimony before the Senate Committee on Government Affairs in March 2002 that "[i]f [she] were a plaintiff's attorney . . . [she] would not settle anything until [she] knew what happened."¹⁹³

In support of the GAO's contention, following publication of the proposed rule in December 2002, settlement agreement activity increased as several utilities entered into consent decrees with the EPA and DOJ.¹⁹⁴ Unfortunately, following publication of the Final Rule, the EPA decided to drop investigations of fifty power plants around the country due to the Final Rule's extension of the RMRR exemption.¹⁹⁵

V. INVALIDATION OF THE ERP USING THE *CHEVRON* TWO-STEP

A. *Judicial Deference to an Agency Interpretation: The Chevron Decision*

Without a doubt, *Chevron* constitutes the seminal federal decision in regard to judicial deference vis-à-vis administrative interpretation of statutory law.¹⁹⁶ The decision, ironic in the sense that it also involved an EPA interpretation of the CAA, articulated a two-step process, known as the *Chevron* two-step, to determine the level of deference to be afforded an administrative interpretation. The decision also spawned what has been referred to as, perhaps incorrectly so, *Chevron* deference—which is great deference to an agency's interpretation of a congressional statute. As will be discussed, great deference is only afforded at the second step, and much of the power remains in the hands of the reviewing court at the first step.

191. *Id.*

192. *Id.*

193. Barcott, *supra* note 8; *see also* Schaeffer, *supra* note 8, at 20.

194. OCTOBER 2003 GAO REPORT, *supra* note 153, at 19. Following publication of the December 2002 proposed rule, the DOJ and the EPA reached agreements with four utilities resulting in an annual reduction of 421,000 tons of sulfur dioxide and nitrogen oxide. *Id.* The DOJ and the EPA reached additional agreements with two other utilities prior to December 2002, resulting in a net annual reduction of over 244,000 tons of sulfur dioxide and nitrogen oxide. *Id.* at 19 n.18.

195. Christopher Drew & Richard A. Oppel Jr., *Lawyers at E.P.A. Say It Will Drop Pollution Cases*, N.Y. TIMES, Nov. 6, 2003, at A1.

196. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *see also* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 839 (2001) ("Chevron's two-step doctrine is as ubiquitous as if Congress had written it into the APA.").

1. *The Chevron Two-Step*

The *Chevron* two-step has been cited thousands of times by both federal and state courts in their efforts to identify the level of deference afforded an administrative interpretation of law.¹⁹⁷ The basic premise is simple. First, if Congress speaks directly to the precise question at issue, then a court and the agency must follow the expressed and clear congressional intent.¹⁹⁸ In other words, if the administrative construction of a statutory provision is “contrary to clear congressional intent,” the judiciary must reject the agency interpretation.¹⁹⁹ Second, when Congress fails to speak directly to the question at issue, creating ambiguity in the statute, the reviewing court affords deference to the agency and rejects its interpretation only if deemed unreasonable.²⁰⁰ According to such implicit delegation of authority, the agency must develop policies and rules to fill in the gaps left by Congress.²⁰¹ The judiciary’s role is to determine whether the agency’s regulations, addressing the congressional ambiguity of a specific statutory provision, constitute a “permissible construction” of the statute.²⁰²

Therefore, the determination of whether Congress specifically addresses the question at issue within a statutory provision dramatically affects the standard of review imposed by the judiciary on an administrative regulation. If it is determined that Congress has directly spoken to the issue, a court reviews the agency interpretation *de novo*.²⁰³ On the other hand, if a court determines that the statutory provision is ambiguous and therefore affords great deference upon the administrative interpretation, known as *Chevron* deference, the court applies the less stringent arbitrary and capricious standard.²⁰⁴ Certainly, if an agency regulation “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”²⁰⁵ As such, the

197. According to Westlaw KeyCite, as of October 2005, the *Chevron* decision has been cited 179 times by the Supreme Court and 8121 times by lower federal and state courts.

198. “If the intent of Congress is clear, that is the end of the matter” *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984).

199. *Id.* at 843 n.9; *see also* *Fed. Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (“[The courts] must reject administrative constructions of [a] statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.”).

200. *Chevron*, 467 U.S. at 843.

201. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

202. *Chevron*, 467 U.S. at 843.

203. *Merrill & Hickman*, *supra* note 196, at 877.

204. *Id.*

205. *United States v. Shimer*, 367 U.S. 374, 383 (1961).

Chevron doctrine creates an “all-or-nothing proposition,”²⁰⁶ as it is highly unlikely that a court will invalidate an administrative interpretation under the arbitrary and capricious standard of review.²⁰⁷

2. Foundations of the Two-Step

The principles espoused by the Court in *Chevron* are founded on a determination of legislative intent.²⁰⁸ That is, the judiciary should only afford deference to an agency when administrative authority has been congressionally delegated.²⁰⁹ Therefore, the inquiry mandated in step one is not as simple as originally believed. Rather, that inquiry has been transformed, against the wishes of Justice Scalia and other textualists,²¹⁰ to require determination of whether statutory ambiguity necessarily results in an implicit delegation of authority to an administrative agency.²¹¹

Interestingly, the Supreme Court emphasized two institutional considerations as appropriate policy rationale for judicial deference of agency interpretation: political accountability and agency expertise.²¹² Administrative agencies, the Court stressed, retain greater political accountability than a federal judge and, therefore, are the preferred avenue of significant policy decisions.²¹³ Moreover, *Chevron* reiterated the Court’s reluctance to inject its own judgment where the acting agency maintains a high level of expertise, particularly in complex and intricate regulatory arenas.²¹⁴

The Court’s discussion of these two institutional considerations weakens the belief that step one of the *Chevron* analysis is a simple question of how “clearly” Congress addressed a particular issue. Effectively, the Court’s acceptance and heavy reliance upon these two

206. Merrill & Hickman, *supra* note 196, at 855.

207. In fact, a review of Supreme Court decisions evidences only two instances in which the Court has rejected an administrative interpretation at *Chevron*’s step two: *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), and *Whitman v. American Trucking Assoc.*, 531 U.S. 457 (2001).

208. *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 479 n.14 (1997); Merrill & Hickman, *supra* note 196, at 870.

209. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); Merrill & Hickman, *supra* note 196, at 870.

210. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

211. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2090 (1990) (“[T]he *Chevron* approach might be understood as the best reconstruction of legislative instructions on the question of deference.”).

212. *Chevron*, 467 U.S. at 865.

213. *Id.* at 865. Indeed, legal scholars have advanced the political accountability dialogue even further claiming that executive branch agencies should be afforded more deference than so-called independent agencies due to greater political accountability. Elana Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376-77 (2001).

214. *Lyng v. Payne*, 476 U.S. 926, 939 (1986).

institutional considerations creates either an expansion of the Court's examination of congressional clarity²¹⁵ or a semi-independent third step positioned between those articulated in *Chevron*. That is, first evaluate how clearly Congress addressed the precise question at issue. If the statutory language is reasonably ambiguous, examine these institutional considerations to determine if Congress would have desired agency decisions to carry the force of law. If not, then, defer to the agency and apply the arbitrary and capricious standard. These three steps appear mutually exclusive unless the consideration of institutional characteristics is shoe-horned into an evaluation of step-one clarity. Seemingly, this is exactly what the judiciary has done: a determination of congressional clarity involves the evaluation of these institutional considerations. In *Chevron*, this worked to the agency's advantage as the Court decided that the CAA was ambiguous and the EPA's political accountability and expertise favored great deference to its interpretations. However, what if the case involved an independent agency that was not under the direction of the executive branch, thus lacking substantial political accountability? Or, a severely understaffed agency lacking significant expertise in the field? In such situations, these additional institutional considerations may enable a court to substitute its own judgment rather than grant deference to the agency's interpretation.²¹⁶

However, perhaps political accountability and agency expertise are not the only considerations that a reviewing court should examine when establishing how clearly Congress has spoken.²¹⁷ As discussed below, *FDA v. Brown & Williamson Tobacco Corp.* constitutes a more recent example of the Court's indecisiveness vis-à-vis application of the *Chevron* two-step. The opinion relies heavily on a then-Judge Breyer article which espouses an "important legal question" rationale in ruling against the FDA.²¹⁸ However, Breyer's article also articulates additional considerations a court may evaluate to determine step-one clarity. Included in these additional considerations are whether the question involves agency administration, common law, or constitutional law and the trustworthiness of the agency.²¹⁹

215. See Note, "How Clear is Clear" in *Chevron's Step One*, 118 HARV. L. REV. 1687 (2005).

216. See *id.* at 1702-08.

217. *Id.*

218. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

219. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

B. Retreat from Chevron's Strong Deference

Although the *Chevron* analysis maintains a fair number of supporters,²²⁰ many commentators have expressed a variety of concerns, including the prudence of such a grant of authority to an agency,²²¹ the conflict with the nondelegation doctrine,²²² the administrative theory underlying the decision,²²³ and the judiciary's sporadic application of *Chevron's* principles.²²⁴ Arguably, the Court has retreated from the strong deferential posture espoused by *Chevron* through a willingness to halt the *Chevron* analysis at the first step and through the articulation in *United States v. Mead* of a divergent deference doctrine applicable to nonlegislative rules issued by an agency.²²⁵ However, as discussed in subsequent parts of this Note, it is the Court's willingness in step one of the *Chevron* analysis to find congressional verbiage addressing the precise question at issue and its increasing reluctance to conduct the "reasonableness" evaluation in step two that drives the thesis of this Note.

Once determined that an administrative interpretation should be subject to the *Chevron* two-step, the question becomes: How clear must Congress be? A reviewing court will likely have some unspoken, nebulous standard of clarity somewhere between expressed intent and unqualified ambiguity.²²⁶ A lower standard of clarity would create a decreased presumption of deference. A lower standard of clarity might also enable the reviewing court to look outside the expressed intent to underlying policy rationales and considerations when determining how clear Congress was or how clear Congress should

220. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 112-14 (3d ed. 1994) ("The *Chevron* Court's reconceptualization of the process of statutory construction is an enormous improvement over the inconsistent and wooden characterizations of the process that dominated judicial decisionmaking in the pre-*Chevron* era.")

221. Sunstein, *supra* note 211, at 2074-75 (noting the language of *Marbury v. Madison*, which suggested that only judges may interpret laws).

222. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487-88 (1989) (suggesting that the ability of agencies to make policy and define allegedly ambiguous legislative directives "is fundamentally incongruous with the constitutional course by which the Court came to reconcile agencies and separation of powers").

223. Mark Seidenfeld, *A Syncoated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 86 (1994).

224. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 993 (1992) ("[T]he Court's persistent refusal to abide by the narrow strictures of *Chevron* suggests that there must be something wrong with either *Chevron's* implicit theory of deference, or its practical implications, or both.")

225. *United States v. Mead Corp.*, 533 U.S. 218 (2001). To determine the level of persuasion of an administrative interpretation, the Court applies the multifactor approach espoused in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead*, 533 U.S. at 228; *see also* *Christensen v. Harris County*, 529 U.S. 576 (2000); Robert A. Anthony & Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, ADMIN. & REG. L. NEWS, Fall 2000, at 10.

226. *See* Note, *supra* note 215, at 1691-92.

have been.²²⁷ As previously noted, in *Chevron* itself the Court considered political accountability and agency expertise in determining its standard of clarity.

An example of the Court's willingness to incorporate additional considerations into its determination of a standard of clarity is the recent decision *FDA v. Brown & Williamson*, in which the Court rejected the FDA's contention that the Food, Drug, and Cosmetic Act permitted it to regulate cigarettes as a device used to deliver drugs.²²⁸ In an opinion authored by Justice O'Connor, the Court reiterated that, regardless of the nature of the issue which the agency seeks to address, that agency's action must conform to the administrative structure created by Congress.²²⁹ Accordingly, employing the *Chevron* two-step, the Court stated that it "should not confine itself to examining a particular statutory provision in isolation."²³⁰ Rather, the reviewing court should evaluate the statute holistically, as a "symmetrical and coherent regulatory scheme."²³¹

In addition to instructing a reviewing court to examine the entirety of the statutory scheme, *Brown & Williamson* further augments the types of evidence available to determine if Congress has clearly delegated authority by mandating the use of "common sense" when construing a statute.²³² Specifically, if an issue is of great economic and political magnitude, the Court expects that Congress itself would address the issue rather than implicitly delegate authority to an administrative agency.²³³ Drawing upon then-Judge Breyer's work, the Court noted, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."²³⁴ Accordingly, applying its reasoning in *MCI Telecommunications Corp. v. AT&T*,²³⁵ the Court concluded that regulation of tobacco products constituted such a significant economic and political decision that Congress would not have cryptically delegated authority to an administrative agency.²³⁶

227. Certainly, some judges may be more active while some more deferential. For a critique of both approaches, see Seidenfeld, *supra* note 223, at 103-24.

228. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000).

229. *Id.* at 125 (citing *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

230. *Id.* at 132.

231. *Id.* at 133 (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

232. *Id.*

233. *Id.*

234. *Id.* (quoting Breyer, *supra* note 219, at 370).

235. 512 U.S. 218 (1994) (rejecting the Federal Communications Commission's (FCC) assertion that the Communications Act of 1934 authorized the FCC to rate-regulate an entire industry).

236. *Brown & Williamson*, 529 U.S. at 160.

In effect, *Brown & Williamson* enhances a reviewing court's ability to reach a "clarity" ruling at step one of the *Chevron* analysis by enabling or reestablishing²³⁷ review of the greater, holistic statutory mechanism and examining the nature of the administrative agency's interpretation or action. Certainly, this more stringent analysis serves to lower the standard of clarity, thereby weakening the presumption of deference believed to be espoused by *Chevron*.²³⁸

Nevertheless, it should be noted that, as with *Chevron*, *Brown & Williamson* has its critics,²³⁹ many of whom point to the five to four decision as less than resounding support for its holding.²⁴⁰

C. EPA Lacks the Authority to Promulgate the ERP

For the purposes of this Note, it is assumed, and perhaps safely so,²⁴¹ that a reviewing court would validate the ERP if it reaches step two of the *Chevron* analysis.²⁴² Furthermore, Congress made it abundantly clear that authority to promulgate rules and adjudicate individual issues under the CAA rests with the EPA.²⁴³ The question here is whether the EPA's interpretation of its statutory mandate, that is, the ERP, frustrates the expressed desire of Congress. If so, what

237. This concept is far from new. *See, e.g.,* *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989); *United States v. Morton*, 467 U.S. 822 (1984); *Stafford v. Briggs*, 444 U.S. 527 (1980). However, the *Chevron* two-step's focus on clarity of a particular provision perhaps overshadowed this canon of statutory construction.

238. *See* Note, *supra* note 215, at 1706.

239. *See generally* Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002).

240. *Merrill & Hickman*, *supra* note 196, at 843.

241. If a reviewing court seeks to fashion a means to reject the ERP as contradicting congressional delegation, from a sheer statistical standpoint, step two of the *Chevron* analysis is not an overly fertile place to accomplish that objective. *See supra* note 207.

242. Although this Note focuses on truncating the *Chevron* analysis at step one due to the overwhelming odds faced for a challenge at step two, it is not out of the question that a reviewing court would find the ERP an unreasonable interpretation of the CAA. For instance, *Iowa Utilities Board* involved a challenge to rules enacted by the FCC pursuant to the Telecommunications Act of 1996. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Act demanded that incumbent service providers make a minimum number of network elements available to new carriers entering the market and provided the statutory criteria that Congress expected the FCC to follow in implementing this unbundling directive. *Id.* at 388. Specifically, the Act demanded that only those network elements considered necessary to the incoming carrier were required, such that failure to provide these elements would impair the incoming carrier's ability to provide services. Accordingly, the FCC promulgated Rule 319, which mandated that existing service providers make seven particular network elements available to new carriers. *Id.* The Court found the FCC's interpretation of the statutory criteria irrational, enabling the Court to hold Rule 319 unreasonable.

Certainly, an argument exists that the EPA has misinterpreted the modification rule. This misinterpretation may influence a reviewing court to find the ERP unreasonable. Therefore, invalidation at step two is certainly not precluded by the Court's previous decisions.

243. 42 U.S.C. §§ 7413, 7607(d) (2000).

tools could a reviewing court use to increase the clarity with which the CAA speaks and restrict the deference granted to the EPA?

1. *The ERP Frustrates Legislative Intent*

As discussed in Part II.B, to avoid dampening economic growth and stability, Congress crafted the CAA to exempt existing facilities from the NSPS and NSR programs until a point in time when installation of pollution-control technology became more efficient and cost effective.²⁴⁴ As such, by including the modification rule, Congress attempted to designate a trigger for compliance with the NSPS and NSR programs.²⁴⁵ It is at this point that Congress's role in defining modification ends and the EPA's role begins. However, Congress undeniably desired that existing facilities eventually become subject to the NSR program.²⁴⁶

Certainly, the RMRR exemption does not conflict with the clear and unambiguous language of the CAA. Congress could not possibly have intended for minor maintenance activities to force utilities into submitting their facilities to the NSPS or NSR permitting process.²⁴⁷ However, Congress failed to directly address *how* the EPA was to identify routine maintenance activities. Insofar as the RMRR exemption seeks to clarify the distinction between routine maintenance and a modification, it merely fills the statutory gap implicitly delegated to the EPA by Congress and is, therefore, harmonious with the congressional intent of the CAA. The RMRR exemption unquestionably attempts to *further* the desires of Congress by specifying *when* existing coal-fired electric power plants would be exempt from EPA review and, consequently, when these plants would be regulated.

Similarly, at least on its face, the ERP falls under the same implicit legislative delegation of authority as the RMRR exemption. The plain language of the ERP does not conflict with the congressional intent of the CAA. Rather, the ERP has the identical purpose of the RMRR exemption—to clarify when Congress expected facilities to be brought under the auspices of the NSR program. Therefore, at least facially, the judiciary must accept the ERP if it is deemed reasonable.

The plain language of the ERP reasonably promotes Congress's desire to temporarily exempt existing facilities from the NSR program. However, that is not its effect. The ERP will likely enable utilities to completely rebuild a process unit within a five-year period while avoiding the stringent pollution-control requirements of the

244. S. REP. NO. 91-1196 (1970), *reprinted in* ENVIRONMENTAL PROTECTION AGENCY, LEGAL COMPILATION: STATUTES AND LEGISLATIVE HISTORY (Jan. 1975).

245. 42 U.S.C. § 7411(a)(2) (2000).

246. *See supra* Part II.B.

247. *See supra* note 59 and accompanying text.

NSR program.²⁴⁸ Even the most cursory reading of the CAA renders this result unacceptable.

Furthermore, the mere proposal of the ERP caused the DOJ to halt many ongoing investigations and enforcement actions.²⁴⁹ Congress incorporated a strong penalty feature into the CAA to facilitate something greater than a mere “command-and-control” regulatory scheme.²⁵⁰ The substantial civil penalties give the regulators a significant tool to punish violators while creating a substantial deterrent aspect to the Act. While not completely emasculating the EPA and the DOJ’s ability to prosecute violators under the CAA, the ERP undoubtedly restricts it severely.²⁵¹ Therefore, a likely ancillary effect of the ERP and the DOJ’s subsequent dropping of so many enforcement investigations is a considerable decrease in the deterrent aspect of the CAA.

2. *Judicial Review of the ERP*

Clearly, the effects of the ERP frustrate the congressional intent of the ERP. However, how can a reviewing court invalidate the ERP? What tools are available? Although the *Mead* decision limits *Chevron*’s applicability, Congress bestowed broad authority to the EPA to promulgate rules and regulations that carry the force of law. Therefore, *Mead* would not apply and, invariably, judicial review of the ERP would demand utilization of the *Chevron* analysis.

As difficult as invalidation becomes at step two of the *Chevron* analysis, using the expanding standard of clarity under step one, two potential rationales for invalidating the ERP are available to a reviewing court and are discussed below.

(a) *Review of the Entire Statutory Scheme*

In *Brown & Williamson*, the Court reemphasized that step-one analysis demands a review of the entire statutory scheme, rather than mere evaluation of the provision at issue. It should be noted that the ERP constitutes the EPA’s attempt at interpreting the modification rule; therefore, it is the statutory intent of the modification rule which should be examined by a reviewing court. Moreover, in accord with *Brown & Williamson*, the modification rule should be evaluated as a single provision within the larger statutory scheme of the NSR program and the CAA.

248. See *supra* Part IV.B.1.

249. See *supra* Part IV.B.2.

250. See 42 U.S.C. § 7413(b) (2000) (discussing civil penalties); *id.* § 7413(c) (discussing criminal penalties).

251. See *supra* Part IV.B.2.

Through the broad lens of statutory review demanded by the *Brown & Williamson* Court, the ultimate goal of the NSR program was undeniably the eventual modernization of pollution-control technology at existing power plants. To be sure, Congress recognized the importance of this modernization occurring when most financially opportune for the utility.

However, even the most superficial review of the CAA reveals that Congress did not intend to provide a permanent exemption for power plants existing prior to enactment of the CAA. Congress specifically used the term “modification” in defining when modernization should occur. Most certainly, if Congress intended to exempt existing facilities or subject them to the NSR program only after complete reconstruction of the plant, a narrower term than “modification” would have been used. Moreover, Congress would not have used the phrase “any physical change” to define modification.

Following a review of the entirety of the CAA, in particular the provisions and definitions of the modification rule, it becomes clear that, although Congress may not have spoken directly to the issue of *when* existing plants are subject to NSR review, it has directly addressed *if* existing plants are subject to NSR review. However, prodigious mathematical skills are not necessary to determine that replacing twenty percent of a power plant’s components every year would completely rebuild that plant within five years.

(b) Use of Additional Institutional Considerations

The *Chevron* Court discussed the use of two institutional considerations—political accountability and agency expertise—in determining the standard of clarity applicable to step-one analysis. In all likelihood, a reviewing court using these considerations would arrive at the same conclusion as the Court in *Chevron*. That is, as an agency within the executive branch, the EPA is under direct control of the President, and it therefore carries a high degree of political accountability. Furthermore, the EPA maintains a solid foundation of expertise in the arena of air pollution. Therefore, if a reviewing court were to consider these alternative considerations, a greater standard of clarity would likely be recognized, granting increased deference to an agency interpretation.

However, Breyer’s article articulates several additional institutional considerations that a reviewing court may consider useful in determining a standard of clarity. Of particular note, Breyer identifies the “important legal question” doctrine discussed in *Brown &*

Williamson and whether the agency can be trusted to give a balanced answer.²⁵²

The *Brown & Williamson* Court utilized the important legal question doctrine to determine that Congress would not implicitly delegate authority to an administrative agency when the issue involved significant economic and political implications. Although the economic implications of the ERP will be great,²⁵³ implementation of the ERP will economically benefit utilities rather than economically burden them, as was the case in *Brown & Williamson*. In this sense, the significant economic implications will positively affect the regulated industry, perhaps affording the agency more deference than if the rule were to negatively affect the regulated industry.

Nonetheless, if the Court was willing to evaluate the economic and political considerations of an administrative interpretation, then certainly other significant considerations, such as human health, may be available. Perhaps an evaluation of the detrimental effects of the ERP on human health would prove to be such a significant consideration that the reviewing court may decrease the standard of clarity.²⁵⁴ If the Court proved unwilling to consider the human health effects per se, the economic implications of the human health effects, such as treatment costs, missed work days, etc., may shoehorn into the Court's willingness to review significant economic considerations.

Although his view was not formally adopted by the Court, then-Judge Breyer suggests that the reviewing court should also consider the ability of an administrative agency to provide a balanced answer to the question at issue. This Note has attempted to avoid the political influences at play in the ERP debate. However, it is undeniable, and readily admitted by the Bush Administration, that environmental policy shifted dramatically in the transition from Clinton to Bush. While the Clinton Administration made no headway in resolving the RMRR exemption debate, the EPA launched an aggressive campaign to enforce the NSR program on alleged violators. In contrast, Bush's energy-centric view of environmental policy has attracted much criticism from commentators. Most certainly, the ERP

252. Breyer, *supra* note 219, at 370.

253. For example, in civil penalties alone, Tampa Electric will pay \$3.5 million as a result of its settlement with the EPA and the DOJ. In addition, it is required to spend \$10 to \$11 million on environmentally beneficial projects in the region and install state-of-the-art pollution-control equipment at multiple facilities. Press Release, EPA, U.S. Settles Landmark Clean Air Act Case Against Electric Utility (Feb. 29, 2000), available at <http://yosemite.epa.gov/opa/admpress.nfs/01bcfb1deb9fec85256aca005d74df/fa7860fd1b15b6ff85256894006e59af?OpenDocument&Highlight=0,tampa>.

254. See CASARETT & DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS 867-77 (Curtis D. Klaassen ed., 5th ed. 1996) (discussing the acute and chronic toxicological effects of air pollutants emitted by coal-fired power plants).

constitutes one of the Bush Administration's primary attempts to ease the regulatory burden on the energy industry.²⁵⁵

Therefore, if a reviewing court were inclined to further draw upon Breyer's proposed institutional considerations, the administrative agency's ability to provide a balanced answer to the modification rule provides a potential means of decreasing the standard of clarity. To be sure, any discussion of agency bias could be countered with a strong argument based upon the EPA's and the Bush Administration's political accountability. That is, people need to elect different representation if they do not like the policy. However, the argument against agency bias would provide another arrow in the quiver for a challenger.

VI. CONCLUSION

As articulated by Judge Sargus, throughout the thirty-five-year history of the CAA, the EPA has struggled to define when existing facilities should be subjected to the rigors of the NSR program.²⁵⁶ Unfortunately, the ERP provides yet another means for aging, coal-fired facilities to avoid the NSR program. Although facially neutral and arguably a reasonable means of administering the statutorily-crafted modification rule, the effects of the ERP frustrate the congressional intent of the CAA in two respects. First, the ERP provides aging, coal-fired facilities the ability to completely rebuild a process unit within a five-year period without updated emissions abatement technology. Second, the ERP has shackled the EPA's ability to enforce past NSR violations, leading the agency to discontinue the investigation of many alleged violators. Moreover, the controversies that provided the impetus for the ERP—complex and inefficient agency and judicial review exemplified by the *WEPCO* decision and its progeny—will not be avoided. New suits will arise challenging the substance and language of the ERP.

Undoubtedly, the EPA's authority to promulgate a rule such as the ERP will be determined by a reviewing court applying the *Chevron* two-step. However, notwithstanding traditional notions of extreme deference believed to be inalienably associated with the *Chev-*

255. Although beyond the scope of this Note, *Motor Vehicles Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), examines an administrative policy decision, announced after Carter left and Reagan entered office, which diverged from the policy under the Carter Administration. In *State Farm*, the Court articulates the evaluation that needs to be performed by the agency to make such an alteration. For discussions of the presidential control of agency actions, see Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); William M. Jack, Comment, *Taking Care That Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479 (2002).

256. See *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 832 (S.D. Ohio 2003).

ron two-step, jurisprudence regarding the deference granted an administrative agency has mutated, potentially creating alternative avenues for a reviewing court to invalidate an administrative regulation at step one. The Court's reemphasis on a holistic evaluation of a statutory scheme and utilization of the "important legal question" doctrine may signify its acceptance of such alternative avenues.