

in the context of enforcement actions, where we have challenged an activity undertaken by a source after the fact and the source has asserted that the activity was permissible under the exclusion.

This case-by-case approach has been praised for its flexibility, but criticized for hampering activities important to assuring the safe, reliable and efficient operation of existing plants. Specifically, some of the case-by-case determinations we have made, particularly over the past decade, and particularly in a series of enforcement actions, have been criticized for giving the exclusion a narrow scope that disallows replacement of significant plant components with identical or functionally equivalent components. Critics argue that the effect is to discourage plant owners or operators from engaging in replacements that are important to restoring, maintaining and improving plant safety, reliability, and efficiency. They further argue that this effect is exacerbated by what they assert are the uncertainties inherent in the case-by-case approach.

To elaborate on the uncertainty issues: Unless an owner or operator seeks an applicability determination from his or her reviewing authority, it can be difficult for the owner or operator to know with reasonable certainty whether a particular activity constitutes RMRR. This gives the owner or operator five choices, two of which the owner or operator is not likely to select, and the other three of which have significant drawbacks for the productivity of the plant.

First, the owner or operator may simply seek an NSR permit. That course, however, is likely to be time-consuming and expensive, since it will likely result in a requirement to retrofit an existing plant with state-of-the-art pollution controls which often is very costly and can present significant technical challenges. Therefore, an owner or operator is not likely to select this option if it can be avoided.

Second, the owner or operator may proceed at risk without a reviewing authority determination. That option, however, is also not likely to be attractive where a significant replacement activity is involved, because if the owner or operator proceeds without a reviewing authority determination and if we later find that he or she made an incorrect determination on its own, the owner or operator faces potentially serious enforcement consequences. Those consequences could well include substantial fines (along with the further consequences of having been determined to be in violation of the

CAA) and penalties and a requirement to install the state-of-the-art pollution controls, even though those controls present technical issues or represent a significant enough expenditure that they likely would have deterred the owner or operator from seeking a permit in the first place. The owner or operator is not likely to take this risk if he or she believes there is a high probability of these kinds of consequences and if he or she has other options.

Third, the owner or operator may seek an applicability determination. That process, too, is time-consuming and expensive, albeit typically less so than seeking a permit. This path presents a potentially significant barrier to today's global, quick-to-market industries, such as computer chips, pharmaceuticals, and autos. This approach also is likely to result in substantial foregone activities that would enhance the safety, reliability and efficiency of the plant while awaiting the applicability determination.

Fourth, the owner or operator may forego or curtail replacements that would enhance the safe, reliable, or efficient operation of its plant, instead opting to repair existing components even though they are inferior to current day replacements because they likely have deteriorated with use and probably are less advanced and less efficient than current technology. Foregoing the replacement activities altogether will reduce plant safety, reliability and efficiency; curtailing or postponing them does as well, differing only in the degree of these effects.

Finally, the owner or operator may curtail the plant's productive capacity by replacing components with less than the best technology in order to be more certain that the replacement is within the RMRR regulatory bounds, or he or she may agree to limit the source's hours of operation or capacity or install less than state-of-the-art air pollution controls to ensure no increase in emissions. Either of those courses, however, will also result in loss of plant productivity.

The uncertainties are also problematic for State and local reviewing authorities. They require those authorities to devote scarce resources to make complex determinations, including applicability determinations, and consult with other agencies to ensure that any determinations are consistent with determinations made for similar circumstances in other jurisdictions and/or that other reviewing authorities would concur with the conclusion.

Industry commenters strongly echoed these concerns, asserting that the expense and delay associated with NSR

scrutiny, whether or not the activity is ultimately judged to be subject to major NSR, have caused a number of facilities to forego needed and beneficial maintenance, repair, and replacement activities, including ones that would likely have reduced emissions. In our June 2002 report to the President, we similarly concluded that the NSR program has impeded or resulted in the cancellation of projects that would have maintained and improved the reliability, efficiency, or safety of existing energy capacity.

We are persuaded that we should change the approach to the RMRR exclusion that we have been following for equipment replacements. The approach we have been taking often has not encompassed the replacement of existing components with identical or similar new components that serve the same function, that represent a small fraction of the value of the process unit of which they are a part, that do not change the process unit's basic design parameters, and that do not cause the process unit to exceed any emission limitations. For the reasons noted above, this approach tends to have the effect of leading sources to refrain from replacing components, to replace them with inferior components, or to artificially constrain production in other ways. We are persuaded that none of these outcomes advanced the central policy of the major NSR program as applied to existing sources, 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. We also do not believe the outcomes produced by the approach we have been taking have significant environmental benefits compared with the approach we are adopting today and, indeed, we believe our new approach may well produce environmental improvements as compared to the old one.

We are also persuaded that uncertainties surrounding the scope of the exclusion that are associated with the case-by-case approach tend to exacerbate the problem outlined above. These uncertainties can discourage replacements that would promote safety, reliability and efficiency even in instances where, if the matter were brought to EPA, we would determine that the replacement in question was RMRR. Such discouragement results in lost capacity and lost opportunities to improve energy efficiency and reduce air pollution.

We believe that these problems will be significantly reduced by the rule we