

determines whether the proposed project is a reconstruction.<sup>8</sup>

We observed that, in some respects, an equipment replacement cost threshold set at the NSPS reconstruction test could be an appropriate approach for distinguishing between routine and nonroutine identical and functionally equivalent replacements under the major NSR program. As under the NSPS program, we do not believe it is reasonable to exclude from major NSR those activities that involve the total replacement of an existing entire process unit.

We also noted, however, that there are other considerations pointing in favor of a threshold lower than the 50-percent reconstruction threshold that might be appropriate to bound the ERP. Under NSPS, when a source undertakes a replacement activity at an existing affected facility that constitutes half or more of the facility's capital replacement value, our rules require a case-by-case determination as to whether such replacements constitute construction. We noted that a percentage threshold lower than 50 percent might be more appropriate for determining where we would require case-by-case consideration of the question whether equipment replacements constitute a modification of an existing process unit under major NSR. We solicited comments on the appropriate level of any percentage.

Many commenters supported the threshold of 50 percent of replacement value as the upper limit on equipment replacement. They felt this number is consistent with existing regulatory requirements and would accord the flexibility originally intended under the CAA for RMRR activities, while at the same time assuring that major, nonroutine projects remain subject to major NSR applicability review, and they felt this number is consistent with a common-sense interpretation of the regulations.

They also believed a 50-percent cutoff to be consistent with reconstruction definitions used in many NSPS and National Emission Standards for Hazardous Air Pollutants regulations. Some commenters stated that a 50-percent cutoff for the ERP would be valid for the same reason as for the NSPS reconstruction test; significant changes to a process unit are necessary before retrofit controls should be

considered, provided there is no increase in emissions.

Many other commenters opposed the 50-percent replacement value threshold. They believed the capital replacement percentage should be much less than 50 percent. One commenter suggested as an appropriate threshold that the sum of equipment replacement costs for a single process unit over any period of 5 consecutive years should not exceed 50 percent of the replacement value of the process unit. Another commenter said the replacement percentage should not be higher than 25 percent. Another commenter suggested a replacement percentage of 5 to 10 percent to reduce the risk of replacement of an entire process unit over time without installation of BACT. One commenter said a more appropriate percentage for electricity producers is 0.1 to 1.0 percent. Another commenter said the threshold should be 5 percent, 1 percent, or even less, as shown by an NSR enforcement case against the Tennessee Valley Authority (TVA).

Another commenter believed the 50-percent number has no practical effect in protecting public health and the environment, and the commenter was not aware of any projects that have exceeded 50 percent in cost.

While opposed to the ERP in general, one commenter said the cost threshold should be as high a percentage as possible, so as not to promote premature replacement of equipment that is repairable. Another commenter said the 50-percent number from the NSPS is archaic and not environmentally protective. This commenter suggested that the threshold instead be 24 percent. The commenter believed this lower percentage is appropriate because the lifetime of high-cost materials will considerably exceed 5 years.

We agree with those commenters who see a relationship between establishing a threshold for equipment replacements that we will treat as RMRR under the major NSR program and the threshold the NSPS program established for reconstruction. However, we disagree that these two thresholds should be the same. The NSPS threshold was intended to identify those activities that, even though they did not qualify as a modification under NSPS, nevertheless are of such magnitude that further consideration should be given as to whether they are projects tantamount to new construction. The 50-percent NSPS threshold is not a bright line in the sense that all projects that exceed 50 percent are automatically considered as reconstruction. Rather, as discussed above, it is a threshold intended to alert permitting authorities to significant

projects and allow case-by-case decisions based on a series of regulatory factors.

The ERP replicates the NSPS concept in some ways. It identifies a threshold below which there is no need for further inquiry into whether an activity qualifies for the ERP and above which there is a need for a case-by-case determination. The major difference between the ERP and the NSPS reconstruction test is that the ERP deals with modifications, not reconstructions. This difference weighs in favor of establishing the equipment replacement threshold at something less than the reconstruction threshold. It is logical and practical to conclude, as some of the commenters do, that by using the word "modification" the CAA intended to capture activities on a smaller scale than reconstructions. As noted above, we have set the ERP cost threshold at 20 percent. This value is less than one-half of the 50-percent reconstruction threshold and, therefore, fits well within this conceptual framework.

A 20-percent cost threshold would be consistent with the decision of the U.S. Court of Appeals for the Seventh Circuit in the *Wisconsin Electric Power Company v. Reilly* ("WEPCO") case, to the extent that it would not automatically allow the activities performed there to constitute RMRR. See 893 F.2d 901 (7th Cir. 1990). This court decision directly addressed the question of what level of "like kind" replacement activities qualify as changes under the major NSR program.

In the *WEPCO* case, the Court considered an activity involving 5 coal-fired units at WEPCO's Port Washington plant. Each unit was rated at 80 megawatts of electrical output capacity. The activity involved the replacement of numerous major components. The information submitted by WEPCO showed that the company intended to replace several components that are essential to the operation of the Port Washington plant. In particular, WEPCO sought to replace the rear steam drums on the boilers at units 2, 3, 4, and 5. According to WEPCO, these steam drums were a type of "header" for the collection and distribution of steam and/or water within the boilers. WEPCO viewed their replacement as necessary to continue operation of the units in a safe condition. In addition, at each of the emissions units, WEPCO planned to repair or replace several other integral components, including replacement of the air heaters at units 1, 2, 3, and 4. WEPCO also planned to renovate major mechanical and electrical auxiliary systems and common plant support facilities. WEPCO intended to perform

<sup>8</sup> In the proposal, it was incorrectly stated that applicability of the NSPS was triggered if a project exceeded 50 percent of the cost of replacing the affected facility. As stated in this notice, if an activity exceeds this cost threshold, that only triggers further evaluation, not the automatic application of the NSPS to the source.