

definition of a "new source," which it defined as "any stationary source, the construction or modification of which is commenced after the publication of regulations * * * prescribing a[n applicable] standard of performance * * *." Section 111(a)(2). Section 111(a)(4), in turn, defined a "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 from such source or which results in the emission of any air pollutant not previously emitted."

Congress did not further define the terms "physical change" or "change in the method of operation" in the NSPS program. Therefore we issued regulations to clarify their meaning. As early as our 1971 NSPS regulations, we have made clear that many activities that do not affect the contemplated operation of a unit in a manner consistent with its original design are not physical or operational changes. Specifically, in our 1971 NSPS regulations, we determined that physical or operational changes do not include:

(1) "Routine maintenance, repair and replacement" of equipment;

(2) "An increase in the production rate, if such increase does not exceed the operating design capacity of the affected facility";

(3) "An increase in the hours of operation"; and

(4) "Use of an alternative fuel or raw material if * * * the affected facility is designed to accommodate such alternative use."

36 FR at 24877 (Dec. 23, 1971). The premise behind characterizing these activities as not being "changes" is that they all contemplate that the plant will continue to be operated in a manner consistent with its original design.

The 1977 Amendments to the CAA likewise made the NSR program applicable to "modifications." The original 1977 Amendments did so explicitly only in their provisions dealing with the non-attainment portion of the NSR program, *see* CAA sec. 171(4). But in "technical and conforming" amendments to the 1977 Amendments, Congress clarified that it intended the same result with respect to the prevention of significant deterioration provisions, *see* CAA sec. 169(2)(C).

Notably, Congress did not enact a new definition of "modification" in either the original 1977 Amendments or the "technical and conforming amendments." Rather, it incorporated the NSPS definition of "modification"

by cross-reference. *See* CAA sec. 169(2)(C); CAA sec. 171(4). In moving the adoption of those amendments, the sponsor (who was also the sponsor of the original 1977 Clean Air Act Amendments and who indicated that the technical amendments had been approved by all members of the original 1977 Amendments conference committee) stated in a summary and statement of intent that he placed in the Congressional Record that this was a deliberate choice. As that summary explained, Congress intended the amendment "implement[ed] the [1977 Clean Air Act Amendments] conference agreement to cover "modification" as well as "construction" by defining "construction" in part C to conform to usage in other parts of the Act." 123 Cong. Rec. 36331 (Nov. 1, 1977). We have understood this to be a reference to our preexisting rules interpreting the term "modification" in the NSPS context. 49 FR 43211, 43213 (1984); *see also* 43 FR 26388, 26394, 26397 (June 19, 1978).

The original 1978 NSR rules concerning modifications that we promulgated after enactment of the 1977 Amendments generally tracked the NSPS approach by specifying that "routine maintenance, repair and replacement" was not a change; by specifying that changes in hours of operation and rates of production were not a "change"; and by using the same basic approach NSPS used to the question of what constitutes an "increase" (increase to a source's potential to emit, except that the NSR rule used annual potential to emit while the NSPS program used short-term potential to emit). 43 FR 26388 (June 19, 1978). Even after the D.C. Circuit struck down other portions of our 1978 NSR rules in its original per curiam decision in *Alabama Power Co. v. Costle*, 606 F.2d 1068 (D.C. Cir. 1979), we continued to propose to retain the RMRR provision and the "potential to emit" approach to emissions increases in our revised rules, although to drop the "hours of operation and rate of production" provisions because the "potential to emit" provision made them unnecessary. 44 FR 51924, 51937 (September 5, 1979). In our final 1980 NSR rules, however, issued after the D.C. Circuit's final *Alabama Power* decision, 635 F.2d 323 (1980), we changed our approach to the definition of "increase" in the NSR context to specify that a change would trigger NSR if it would result in an increase over "actual annual emissions." 45 FR 52676 (August 7, 1980). At the same time, and notably, we restored the provisions

stating that increases in hours of operation or production rate were not "changes." *Id.* at 52704.

It is important to understand what we did—and did not—decide in those final 1980 NSR rules. What we did decide was that as a general proposition, we would better serve the purposes of the NSR program if we used "actual" rather than "potential" emissions as a baseline for determining whether an activity at a new source results in an emissions increase. What we did not decide was that the purposes of the NSR program never allow us to exclude from the definition of "change" any activity at a plant that may increase its actual emissions but does not increase its "potential" emissions. In particular, for example, we decided to retain the "hours of operation" and "rate of production" exclusions even though such changes might result in increases in "actual" emissions because not having the provisions "would severely and unduly hamper the ability of any company to take advantage of favorable market conditions." *Id.* Similarly, we retained the exclusion for "routine maintenance, repair and replacement" even though it too can result in emission increases. Yet there is little doubt that increases in hours of operation and rates of production and RMRR arguably could be understood to fall within the statutory definition of modification, since increases in hours of operation and rates of production certainly may be argued to be changes in the "method of operation" of a plant, and RMRR certainly may be argued to be a "physical change" to a plant. On balance, however, we rejected that interpretation and determined that the definition of modification should not be read so broadly as to encompass hours of operation or production rate increases, at least so long as they are unrelated to a physical change.

In the revisions to the NSR program we announced last December, we reiterated our adherence to the view that as a general matter we should continue to use "actual" rather than "potential" emissions in determining what activities constitute "modifications" under NSR. We continue to believe that is correct, but we also believe we should amplify our reasons for holding this view and why that view is entirely consistent with the rule we are promulgating today. In determining the scope to give to "modification," we believe it is important to give weight to both aspects of what Congress decided in 1977. Congress decided that generally speaking, existing plants would not be subject to NSR, but that they would be subject to NSR when they made