

“modifications.” It is also important to understand why Congress chose this point at which to impose NSR on existing plants: to avoid the need to impose costly retrofits, but require placement of new control technology at a time when it makes the most sense for it to be installed. See H.R. Rep. No. 294, 95th Cong., 1st Sess. 185, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1254; 116 Cong. Rec. 32,918 (Sept. 21, 1970) (remarks of Sen. Cooper). See also *WEPCO*, 893 F.2d at 909–910; *National-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 843 (6th Cir., Boggs, J., dissenting), *cert. denied*, 488 U.S. 955 (1988). A wholesale exclusion of any activity that restores a plant to its potential to emit from the definition of modification is not consistent with this balance, since there are many activities that might have that effect but the conduct of which would be an extremely effective time for the placement for new control technology.

At the same time, we believe it is also important to give equal weight to the converse proposition that existing plants should not have to install new control technology in the ordinary course of their operations. To require them to do so would fail to give full effect to Congress’s decision that existing sources generally would not be required to obtain permits. It would also subject these plants and the consumers who rely on them to enormous dislocation and expense. That is why we believe we have rightly excluded increases in hours of operation and rates of production from the definition of “change.” That is also why we believe we have rightly excluded “routine maintenance, repair and replacement” of existing plants from that definition.

For similar reasons, we believe today’s rule draws an appropriate line of demarcation between replacements that should not be treated as changes, and those as to which further consideration of the question is appropriate. Our rule states categorically that the replacement of components with identical or functionally equivalent components that do not exceed 20% of the replacement value of the process unit and does not change its basic design parameters is not a change and is within the RMRR exclusion. On the other hand, the rule contemplates case-by-case evaluation of identical or functionally equivalent equipment replacements that do not have these characteristics.

We believe this approach is consistent with the intended scope of “modification” under the NSR program. The record of this rulemaking demonstrates that there are substantial categories of replacement activities

undertaken in order to assure the safety, reliability and efficiency of existing plants that, if conducted at the same time, cost less than the 20-percent replacement cost threshold. It also demonstrates that there are sound business reasons why an owner or operator may find it makes sense to conduct some of these activities at the same time.

On the other hand, given the costs and technical problems associated with installing state-of-the-art pollution controls at existing facilities, we do not believe it plausible that, if faced with the choice of replacing equipment that has a value less than 20 percent of a process unit and having to install those controls, or coming up with another solution—such as repairing the existing equipment or limiting hours of operation so as to be confident that the activity will not trigger NSR—the owner of a source would elect to replace the equipment if he also has to install the state-of-the-art controls. Rather, we believe he will repair the existing equipment or artificially constrain production. Therefore the replacement of that equipment is not, in fact, an opportune time for the installation of such controls. It follows that treating such replacements as an NSR trigger will not lead to the installation of controls. Rather, it will merely create incentives to make a plant less productive than its design capacity would allow it to be.

We do not believe it is the policy of the CAA to seek to promote emissions reductions by forcing new limits on hours of operation or rates of production of existing plants. We made that point clear in 1980 when we determined that we should retain the hours of operation and rate of production exclusions in the NSR context. To the contrary, as we said in promulgating the 1980 rules, Congress’s decision to exclude existing sources because of the dislocation that covering them would cause can reasonably be understood as allowing those sources to increase hours of operation or production up to permitted levels as market conditions dictate. We note that this does not leave such activities outside the scope of the CAA: if a State concludes that resulting air quality considerations warrant revision to its SIP to add further limitations to a permit, it may exercise its authority to impose them, even in the absence of anything that constitutes a “change” to an existing plant. But we believe that our 1980 conclusion that increases in hours of operation or production at existing plants should not trigger NSR remains the better construction of the CAA. That being the case, we now

believe that the fact that such increases may occur after replacement of equipment that does not present an opportune time for the installation of controls should change that conclusion.

To summarize: with respect to existing sources, the purpose of the NSR provisions is simply to require the installation of controls at the appropriate and opportune time. The kind of replacements that automatically fall within the equipment replacement provision established today do not represent such an appropriate and opportune time. Accordingly, and given that it is consistent with the meaning of “change” to treat this kind of replacement as not being a “change,” we believe excluding them on that basis from the definition of “modification” as used in the NSR program is well calculated to serve all of the policies of the NSR provisions of the CAA, and is therefore a legitimate exercise of our discretion under *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), to construe an ambiguous term. Likewise, we believe this approach is consistent with the holding in the *WEPCO* case, and with some though not all of that case’s reasoning.

Today’s rule treats the activities excluded from the definition of “change” as a category of “routine maintenance, repair and replacement”. We received many comments as to whether we can and should adopt the ERP as an expansion of the RMRR exclusion. We believe it is appropriate to expand the former RMRR exception. Before promulgation of today’s rule, we interpreted the phrase “routine maintenance, repair and replacement” to be limited to the day-to-day maintenance and repair of equipment and the replacement of relatively small parts of a plant that frequently require replacement. Today we are expanding the former definition of RMRR through this rulemaking to include other activities covered by the 20 percent cost threshold that are needed to facilitate the efficiency, reliability and safety of affected sources.

We believe it is appropriate to add one final note regarding the fact that this approach represents a change from the approach we have taken in the recent past. As the Supreme Court explained in *Chevron*, where it upheld a considerably more significant shift in the Agency’s understanding of Title I of the CAA, to wit, the scope of the term “stationary source,” there is nothing inherently suspect about a change of approach of this type by an expert Agency seeking to interpret a technical statutory term so as best to accommodate competing