

replaced as they wear out due to the high temperature and pressure conditions inside the turbine. In fact, these gas turbines are built with the knowledge and expectation that such replacements will be needed. In recognition of this fact, under the New Source Performance Standard for gas turbines, 40 CFR part 60, subpart GG, we have concluded that "replacement of stator blades, turbine nozzles, turbine buckets, fuel nozzles, combustion chambers, seals, and shaft packings" are not "changes" for regulatory purposes. See EPA-450/2-77-017a, background support document for Subpart GG. Such replacements are akin to getting a new set of brakes on a car—not something that happens often, not an activity that is necessarily inexpensive, but plainly an activity that is an expected part of maintaining and operating the facility and one that does not represent an alteration of the affected process unit.

As the preceding examples suggest, identifying activities that are "changes" for NSR purposes—and thus potentially trigger the need for an NSR permit—requires the exercise of Agency expertise. The application of agency expertise to the interpretation of this statutory term is the classic situation in which an agency is accorded deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Historically, we have asserted the power to interpret the relevant statutory terms. For example, even though both the NSPS and NSR programs incorporate the definition of "modification" from section 111, from the outset EPA has adopted quite disparate readings of the term in our rules. See 57 FR 32314, 32316 (July 21, 1992) (WEPCO rule discussion of how emission increases are calculated differently for the NSPS and NSR programs). The NSPS program requires a change to result in an increase in the hourly potential to emit of the facility. 40 CFR 60.14(a)–(b). In contrast, under NSR, we require an increase in annual emissions. *E.g.*, 40 CFR 51.165(a)(1)(x). These disparate tests reflect the Agency's view that the statutory term "modification" must be construed with a view to what makes sense in particular statutory context, and are not obvious on their face.

The exclusions from NSR we adopted in 1980 also reflect the exercise of the *Chevron* discretion. Not only did we adopt the RMRR exclusion at that time, but we also adopted exclusions for increases in the hours of operation, fuel changes, and raw material changes. Only the RMRR exclusion arguably could be justified as *de minimis*. For example, by doubling hours of

operation, a 500 tpy emitting plant could conceivably double its emissions.¹³ The extra 500 tpy is far above any level EPA has ever thought justifiable as *de minimis*. *E.g.*, 40 CFR 51.166(b)(23)(i) (definition of "significant"). Nor is it likely that these other exclusions could be based on some inherent power to adopt categorical exclusions from the CAA's commands. See *Alabama Power Company v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1980) ("categorical exemptions * * * are not favored"). Accordingly, these other exclusions must be justified as an exercise of *Chevron* discretion.

As noted previously, in 1977 when Congress incorporated by reference into the NSR program the pre-existing NSPS statutory definition of modification, EPA had already adopted and had been administering regulations and policy under the NSPS program related to the meaning of the term "modification." Our rules and policy provided that certain significant activities did not constitute physical or operational changes under the NSPS program prior to 1977 (or, for that matter, under the NSPS program as administered today). In addition to the gas turbine example provided above, perhaps the best indication that EPA did not consider the terms "modification" or "change" to cover everything other than *de minimis* activities is the exclusion for production rate increases under the NSPS program. 40 CFR 60.14(e)(2).

Under this provision, projects valued at millions of dollars can be implemented—with no limitations on the nature of the project—without triggering applicable NSPSs. For example, up to 10 percent of the asset value of affected operations at a kraft pulp mill can be invested in a project without triggering the applicable NSPS, 40 CFR part 60, subpart BB. The affected facilities at a kraft pulp mill typically are valued in excess of \$100 million. Therefore, an owner or operator can implement projects costing millions of dollars without triggering the applicable NSPS. This holds true regardless of the nature of the project—it can be a "like-kind" replacement of the kind addressed by today's rule or it can result in a substantial change in the nature of the operation. Thus, under the NSPS program that existed when Congress enacted NSR and incorporated into NSR the applicable NSPS definitions, projects of substantial cost that result in

substantial change in affected facilities were not considered "changes." The same is true under the NSPS program as it stands today.

We recognize that the Agency previously has not specifically asserted that our interpretation of "change" and the exclusions from NSR are based on an exercise of *Chevron* discretion. In some instances, such as in a decision of the EAB, *In re: Tennessee Valley Authority*, 9 E.A.D. 357 (EAB 2000), and in briefs in various enforcement-related cases, we have previously interpreted "change" such that virtually all changes, even trivial ones, are encompassed by the CAA. Thus, we generally interpreted the exclusion as being limited to *de minimis* circumstances. However, EPA does have the authority to interpret these key terms through rulemaking. Upon further consideration of the history of our actions, the statute, and its legislative history, EPA believes that a different view is permissible, and, for policy reasons discussed above, more appropriate. Therefore, we adopt this view prospectively in today's action.¹⁴

The argument that our authority to exclude certain activities from being modifications under new source review can only be based on a *de minimis* rationale sometimes relies on the word "any" used to modify "physical change" and "change in the method of operation," pointing to the word "any" in the definition of "modification" as a signal from Congress that the term "change" must be interpreted as encompassing the broadest possible sense of the term. Such an interpretation is not compelled by the language and legislative history of the statute, as demonstrated by the manner in which we have interpreted the word "change" under both the NSPS and the NSR programs.¹⁵

¹⁴ We have taken positions in numerous court filings concerning the proper interpretation and usage of key statutory terms, such as "physical change" and "any physical change." These positions were based on permissible constructions of the statute of which the regulated community had fair notice, and correctly reflect the Agency's reasonable accommodation of the Clean Air Act's competing policies in light of its experience at the time it adopted the RMRR exclusion in 1980. The Agency has sought, and has obtained, deference for its interpretations, and, notwithstanding today's adoption of a revised interpretation of the statute and an expansion of the RMRR exclusion, the Agency shall continue to seek deference for those prior interpretations in ongoing enforcement litigation.

¹⁵ We note that the word "any" is simply a modifier that does not change the meaning of the word it modifies. For example, using the term "any" to modify the word "car" does not somehow change or expand the meaning of the word "car." "Any" simply means that, once you have decided what a car is, then all objects meeting the definition are encompassed.

¹³ As discussed below, our regulations provided a comparable exclusion from NSPS at the time of the 1977 Amendments that established the NSR program.