

Nothing in the appellate case law directly disposes of this issue in a manner that prevents a new interpretation today. Two cases, *Alabama Power* and *WEPCO*, are relied on by some commenters to assert that EPA must interpret “modification” and “change” expansively and base all exclusions on a *de minimis* rationale. However, in *Alabama Power*, the issue before the court was the emissions increase portion of the definition of “modification.” The court would have allowed *de minimis* increases in emissions to be excluded from requirements applying to “modifications” under new source review but not emissions increases equal to the thresholds set by statute for new construction. 636 F.2d at 399–400. The court did not have before it the issue of what is a “change” and did not decide this issue.

In *WEPCO*, both parties advanced the view that the statute was clear on its face. EPA advanced the view that the term “modification” is necessarily broad, and that only *de minimis* departures are appropriate. *WEPCO* asserted that the plain meaning of the term “physical change” allowed for the five large scale rehabilitation projects it contemplated at its Port Washington plant. The *WEPCO* court held that the rehabilitation projects at issue were too large to reasonably conclude that they should not be treated as physical changes. The court’s holding that the statute did not require the interpretation advanced by *WEPCO* does not deny EPA the discretion to decide to adopt a different, reasonable interpretation of the term “modification.”

While the Court in *WEPCO* decided that the projects in that case were physical changes, the decision in *WEPCO* does not answer the question of where to draw the line between activities that should and should not be considered “changes.” Nevertheless, contrary to the suggestions of several commenters, the projects at issue in *WEPCO* would have cost more than the 20 percent of replacement cost threshold selected today and, barring other applicable exclusions, would have been subject to case-by-case review in the PSD program. See section III.D above.¹⁶

Some commenters argued that, to further the purposes of the statute, any interpretation must result in the eventual elimination of so-called “grandfathered” facilities. We recognize the need to reduce emissions from many existing plants—regardless of whether they are “grandfathered” (because they have never gone through NSR) or whether they have previously gone through NSR but can further reduce their emissions. EPA and States have issued regulations under a variety of statutory provisions to accomplish this goal in the past, and we will continue to do so in the future. We do not believe, however, the modification provisions of the CAA should be interpreted to ensure that all major facilities eventually trigger NSR. In fact, such an interpretation cannot be squared with the plain language of the CAA.

An existing source—whether grandfathered or not—triggers NSR only if it makes a physical or operational change that results in an emissions increase. Thus, a facility can conceivably continue to operate indefinitely without triggering NSR—making as many physical or operational changes as it desires—as long as the changes do not result in emissions increases. This outcome is an unavoidable consequence of the plain statutory language and is at odds with the notion that Congress intended that every major source would eventually trigger NSR. Moreover, there is nothing in the legislative history of the 1977 Amendments, which created the NSR program, to suggest that Congress intended to force all then-existing sources to go through NSR. To the extent that some members of Congress expressed that view during the debate over the 1990 amendments, such statements are not probative of what Congress meant in 1977. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185–86 (1994), and cases cited.

In deciding to incorporate by reference the statutory definition of “modification” in section 111, Congress’s intent cannot have been to

deference with regard to the Agency’s interpretation of the CAA and the relevant EPA rules. In our case against Duke Energy in the U.S. District Court for the Middle District of North Carolina, the court issued a decision on cross motions for summary judgment. The decision took exception with several legal conclusions reached in the Ohio Edison decision and determined that the then existing RMRR exclusion must be applied from the perspective of what projects are routine within the relevant industrial source category. EPA today is adopting prospectively a new interpretation of the CAA and is finalizing a revision to the RMRR regulation at issue in those cases.

preclude us from adopting an interpretation of “modification” or “change” that differs from one that sweeps in all activities at a source. Under the NSPS program, this interpretation did not apply at the time of the 1977 amendments. When the NSPS definition of “modification” was adopted as part of the NSR program in 1977, the *Congressional Record* explained that this provision, “[i]mplements 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) (emphasis added). Although we do not assert that the NSPS interpretation is the only one we could have adopted for NSR purposes (we followed quite a different interpretation from 1980 until today) at the very least it delineates a zone of discretion within which EPA may operate.

Our interpretation today of physical or operational change in a flexible way furthers the purposes of the statute. As noted above, Congress made it clear that the CAA in general, and the NSR program in particular, should be administered in a manner that protects the environment and promotes the productive capacity of the nation. CAA section 101(b)(1). The *Chevron* Court recognized Congress’ intent and noted that “Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality” when it established the NSR program. *Chevron*, 467 U.S. at 851. Generally, we believe that these goals are best accomplished by providing state and local governments with discretion to make decisions as to what emissions reductions are needed in their jurisdictions to attain and maintain good air quality. See CAA section 101(a)(3).

It is now clear that many power plants and industrial facilities must substantially reduce their emissions in order to allow States to meet the stringent Federal air quality standards that the Supreme Court upheld in 2002. Under the CAA, Congress designed a number of regulatory programs that will collectively achieve the necessary reductions. Although the NSR program will effectively limit emissions from new and modified sources, it was not designed to achieve emission reductions from every existing source.

¹⁶ We note that decisions recently were rendered in two of the Agency’s pending NSR enforcement cases in the utility sector. In both cases, the Agency asserted that the then existing RMRR exclusion should be applied in a narrow fashion such that only *de minimis* projects should be excluded under that rule. In our case against Ohio Edison in the U.S. District Court for the Southern District of Ohio, the court determined that the disputed projects did not qualify for the existing RMRR exclusion. The Agency sought and received from the court broad