

March 17, 2004

The Honorable Michael O. Leavitt  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dear Administrator Leavitt:

On behalf of our industries, we are writing to express our strong support for EPA's recently-promulgated Equipment Replacement Provision rule (the "ERP Rule"). This rule was adopted after a decade of public proceedings and rulemaking in order to provide clarity to the Clean Air Act ("CAA") modification rule. The rule represents sound public policy deserving of your vigorous support.

We strongly agree with the Agency that the ERP Rule will help to "provide industrial facilities and power plants with the regulatory certainty that they need," and that it would "result in safer, more efficient operation of these facilities."<sup>1</sup> Sound maintenance practices and productivity improvements are essential to good environmental performance, economic progress, job creation, and worker safety. New source review ("NSR") reform is critical to achieving these goals.

Because of the importance of this issue, we as representatives of manufacturing, electric utility and other industries wish to take this opportunity to summarize both the important policies that prompted EPA to adopt the ERP Rule, as well as the widespread support for the Rule that the Administration has received from States, industry and other groups. The ERP Rule properly clarifies the application of the NSR program. It rejects an indeterminate approach to NSR applicability, an approach that places impossible burdens of regulatory uncertainty on states and industrial facilities. We strongly support the Agency's commitment to defend vigorously the rule from the unwarranted attacks that have been leveled against it in both the political and judicial arenas.

In 2001, the President's National Energy Policy directed EPA, in consultation with the Department of Energy and other Federal agencies, to review the impact of NSR on investment in new utility and refinery generation capacity, energy efficiency and environmental protection. Subsequently, EPA's Report to the President "illustrated the problems associated with [EPA's] prior case-by-case approach to identifying RMRR [i.e., routine maintenance, repair and replacement] activities," while "underscor[ing] the advantages of establishing an objective bright-line approach for administering the RMRR provision." EPA therefore committed to make changes to the NSR program that would "add to the clarity and certainty of the scope of the

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<sup>1</sup> EPA Press Release, "EPA announces new step to improve the New Source Review program" (Aug. 27, 2003).

routine maintenance exclusion,” and thereby “improve the program by reducing the unintended consequences of discouraging worthwhile projects that are in fact outside the scope of NSR.” New Source Review: Report to the President (June 2002) at 32.

The ERP Rule represents the culmination of EPA’s effort to provide that clarity and certainty. It is our hope that you and your agency will remain dedicated to fulfilling the commitments the Agency has made and implemented. Providing clarity and certainty to the NSR program, as EPA has done in the ERP Rule, has been supported by numerous states,<sup>2</sup> minority organizations,<sup>3</sup> labor unions,<sup>4</sup> and others.

The ERP Rule will not result in any “massive” increase in unreviewed emissions or otherwise threaten the environment as asserted by some critics.<sup>5</sup> We agree with the conclusion of EPA’s analyses of the electric utility and other industries that the rule will have “no practical effect on the environmental benefits of major NSR in the future.” 68 Fed. Reg. 61,266. At the same time, as EPA concludes, the ERP Rule will “result in significant improvements in safety, reliability, and other relevant operational parameters.” 68 Fed. Reg. 61,264.

Nor can any credence be given to the assertion that the ERP Rule represents a “dramatic” change in how EPA has historically interpreted and implemented the NSR provisions of the CAA. In the ERP Rule preamble, EPA explains that it has always retained discretion under the CAA to interpret the key term “physical change or change in the method of operation” as not including the replacement of deteriorated equipment with new identical (or functionally equivalent) components. 68 Fed. Reg. 61,268-271. Indeed, it was only recently, with the initiation of the so-called “electric utility enforcement initiative,” that EPA re-interpreted its RMRR exclusion as only applying to repair and replacement activities frequently performed at individual industrial facilities, rather than those activities commonly undertaken in an industrial category. The fact that there have been conflicting district court decisions regarding EPA’s authority to take this enforcement approach emphasizes the need for EPA having acted to provide clarity and certainty in the ERP Rule.

The federal district court that rejected EPA’s enforcement interpretation (*U.S. v. Duke Energy Corporation*, 278 F.Supp. 619 (M.D.N.C. 2003)) recently reiterated that its ruling that

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<sup>2</sup> Alabama, Alaska, Arkansas, Indiana, Kansas, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Utah, Virginia and Wyoming have filed in the D.C. Circuit in support of the ERP rule, and additional states supported EPA’s efforts to provide clarity and certainty to the NSR program during the rulemaking.

<sup>3</sup> Minority organizations expressing support for the Administration’s efforts include the Maryland Conference of Black Mayors, the National Conference of Black Mayors, the National Indian Business Association, and the Texas Conference of Black Mayors.

<sup>4</sup> Labor organizations expressing support for NSR reform have included the International Brotherhood of Boilermakers; the Paper, Allied-Industrial, Chemical & Energy Workers International Union; and the United Brotherhood of Carpenters and Joiners of America.

<sup>5</sup> Letter from D. Magraw, President, Center for International Environmental Law, *et al.* (February 5, 2004)

the RMRR exclusion “must be defined according to what is routine ... within the relevant source category” was “compelled by the statutory mandate of the PSD program and congressional intent.” In rejecting EPA’s motion for reconsideration, the Court reaffirmed that the “primary basis for the court’s holding was the plain statutory language and congressional intent,” and that the statutory language and congressional intent did *not* support EPA’s enforcement interpretations. Order, *U.S. v. Duke Energy Corporation*, No. 1:00CV01262 (Feb. 23, 2004) at 2, 3. Given this, the ERP Rule represents a return by EPA to its historical interpretation of its NSR rules, confirmed in the 1992 WEPCo Rule preamble, and does not constitute the “dramatic enforcement retrenchment” that some are claiming.

Finally, NSR is the ultimate command-and-control program. Without the reform measures that EPA has adopted, including the ERP Rule, the NSR program would undercut the sound policy of market-based environmental protection that Congress enacted in the Acid Rain Program, that EPA promulgated in its NO<sub>x</sub> SIP Call, and that your recently proposed mercury and Interstate Air Quality rules have embraced.

The organizations listed below wish to emphasize the critical need for NSR reform. The ERP Rule is a key element of these urgently needed reforms. This rule will help to assure that projects needed to maintain safe, efficient and reliable operations can move forward in a manner consistent with environmental protection. We respectfully request that EPA ensure clarity and fairness to the regulated community by confirming its commitment to the legal interpretations and policies announced with the ERP Rule.

Sincerely,

U.S. Chamber of Commerce	National Association of Manufacturers
American Boiler Manufacturers Association	Maryland Chamber of Commerce
American Chemistry Council	National Mining Association
American Coke and Coal Chemicals Institute	National Oilseed Processors Association
American Composites Manufacturers Association	National Petrochemical & Refiners Association
American Forest & Paper Association	National Rural Electric Cooperative Association
American Furniture Manufacturers Association	Pharmaceutical Research and Manufacturers of America
American Gas Association	Portland Cement Industries
American Iron and Steel Institute	Printing Industries of America
Alliance of Automobile Manufacturers	Puerto Rico Manufacturers Association
Arizona Association of Industries	Rubber Manufacturers Association
Associated Industries of Florida	Salt Institute
Associated Industries of Missouri	Texas Association of Business
Association of American Railroads	The Ohio Manufacturers’ Association
Association of Washington Business	The State Chamber - Oklahoma’s Association of Business & Industry
California Manufacturers & Technology Association	Utah Manufacturers Association
Clean Air Implementation Project	Utility Air Regulatory Group
Corn Refiners Association, Inc.	Wisconsin Manufacturers & Commerce
Council of Industrial Boiler Owners	
Edison Electric Institute	
Grocery Manufacturers of America	
Indiana Coal Council, Inc.	
Indiana Manufacturers Association	

cc: Jeffrey R. Holmstead