

May 25, 1984

JPS Draft #1 [2\$1005i, 2\$1005if]

82-1005 - Chevron U.S.A. Inc., a Corporation v. Natural Resources Defense Council, Inc., et al.

82-1247 - American Iron and Steel Institute v. Natural Resources Defense Council, Inc. et al.

82-1591 - William D. Ruckelshaus, Administrator, Environmental Protection Agency v. Natural Resources Defense Council, Inc., et al.

JUSTICE STEVENS delivered the opinion of the Court.

In the "Clean Air Act Amendments of 1977", 91 Stat. 685, Congress enacted certain specific requirements applicable to those areas of the country--known as "nonattainment areas"--that had not achieved the air quality goals that had been set under earlier legislation. Among those provisions was a requirement that no "new or modified major stationary sources" could be constructed without a permit evidencing compliance with certain stringent conditions.¹ The regulation adopted by the

¹Section 172(b) (6) provides:

"The plan provisions required by subsection (a) shall--

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements);" 91 Stat. 747.

Footnote continued on next page.

Environmental Protection Agency to implement this permit requirement employs a plant-wide definition of the term "stationary source."² Thus, in a plant that contains several pollutant-emitting installations, the construction or modification of one piece of equipment may not require a permit if the change will not increase the total emissions from the plant. The question presented by this case is whether the regulation that allows all of the pollutant-emitting activities within the same industrial grouping to be treated as though they were encased within a single "bubble" is a sufficiently reasonable construction of the Act that it should be accepted by reviewing courts. See Train v. Natural Resources Defense Council, 421 U.S. 60, 75 (1975). The EPA regulation adopting a plant-wide definition of the term "stationary source" was promulgated on October 14, 1981, 46

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"(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 C.F.R. §51.18(j)(1)(i) and (ii).

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Fed. Reg. 50766. Respondents³ filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit.⁴ That court concluded that its course was "marked by two prior decisions in which panels of this court determined the applicability vel non of the bubble concept to distinct Clean Air Act programs." App. to Pet. for Cert. A-2.⁵ In substance, the Court concluded that the EPA must employ the bubble concept in programs designed to maintain air quality in clean air areas but that it may not employ that concept in programs designed to enhance air quality. Accordingly, it held the regulation invalid. To explain why we disagree with this holding, we must describe the historical background that led to the adoption of the 1977 Amendments, the text of those Amendments, their legislative history, and the conflicting policy concerns that Congress sought to accommodate.

I

³National Resources Defense Council, Inc., Citizens for a Better Environment, Inc. and North Western Ohio Lung Association, Inc.

⁴See 42 U.S.C. §7607(b)(1). Petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corporation, and Rubber Manufacturers Association were allowed to intervene and argue in support of the regulation.

⁵The cases to which the Court referred were Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979) and ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978).

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See Train, 421 U.S., at 63-64. The Clean Air Amendments of 1970, 84 Stat. 1676, "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," 421 U.S., at 64, but continued to assign "primary responsibility for assuring air quality" to the several States. See 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's)⁶ and §110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, §111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish performance standards for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

Section 111(a) defined the terms that are to be used in the setting and enforcing standards of performance for new stationary sources. It provided: "For purposes of this section: * * *

⁶Primary standards were defined as those whose attainment and maintenance were necessary "to protect the public health" and secondary standards were intended to specify a level of air quality that would "protect the public welfare."

"(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. at 1683.

In the 1970 Act, that definition was not only applicable to the new source performance standards (NSPS) program required by §111, but also was made applicable to a requirement of §110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards.⁷

In due course, the EPA promulgated the National Air Ambient Air Quality Standards (NAAQS), approved the several States' implementation plans (SIP's), and adopted detailed regulations governing new source performance standards (NSPS's) for various categories of equipment. In at least two of its programs, the EPA used a plant-wide definition of the term "source."

In 1974, it issued new source performance standards for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant.⁸ And in a program designed to

⁷See §§110(a)(2)(D) and 110(a)(4).

⁸The Court of Appeals ultimately held that this plant-wide approach was prohibited by the 1970 Act, see ASARCO, INC., supra, Footnote continued on next page.

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prevent significant deterioration (PSD) in the quality of the air in regions that complied with NAAQS's, the EPA has employed the plant-wide definition. *p*

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The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, however, the statutory goals were not attained.⁹ In 1976, Congress was therefore confronted, on the one hand, with the environmental concern about the continuing excessive levels of air pollution and, on the other hand, with the economic concern that strict enforcement of existing laws might deter industrial development in nonattainment areas. These concerns did not produce legislation in 1976,¹⁰ but they did lead the EPA to publish its "Emissions Offset Interpretative Rule" in December 1976. See 41 Fed. Reg. 55524.

The emissions offset interpretative rule stated that it was intended to address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded

578 F.2d, at _____. But this standard was in effect when Congress enacted the 1977 Amendments.

⁹See Report of the National Commission on Air Quality, pages 3.3-20 thru 3.3-33.

¹⁰A bill did however pass both Houses of Congress, even though it was never enacted into law. See H.R. Rep. 1742, 94th Cong. 2d Sess. (1976).

stationary air pollution sources." J.A. 8. In general, the ruling provided "that a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." Id. The ruling gave primary emphasis to the attainment of the statute's environmental goals.¹¹

Consistent with that emphasis, the ^{CONSTRUCTION OR} conditions imposed on new construction in nonattainment areas were applied to every major new source within a plant and could not be avoided by offsetting savings elsewhere in the same location. Every new ^{SOURCE} installation had to meet the "lowest achievable emission rate" under the

current state of the art for that type of ^{FACILITY} source. See J.A. 12.

The 1976 Resolution DID NOT, HOWEVER, EXPRESSLY SPECIFICALLY REJECT ADOPT OR REJECT
The "bubble concept" was firmly rejected in nonattainment areas by the EPA in December 1976.

II

Although the text of the Clean Air Act Amendments of 1977 is over 100 pages long, see 91 Stat. 685-796, only a few pages deal expressly with nonattainment areas. Id., at 745-751. Those

¹¹For example, it stated:

"Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health." J.A. 18.

FN - In Jan, 1979, the EPA rejected the argument that the issue had not been expressly resolved in 1976, and it stated:

" 2. J.A. 42

pages are, however, significant. They require each State in the nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative ruling of December 21, 1976. Id., at 745.

The deadline for attainment of the primary NAAQS was extended until December 31, 1982, and with certain exceptions until December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goal as expeditiously as possible.¹² Most importantly, the statute

¹²Thus, among other requirements, §172(b) provided that the SIP's shall--

"(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

"(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

"(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;

"(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section"

91 Stat. 747.

Footnote continued on next page.

provided that each plan shall:

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirement)." Id., at 747.

Before issuing a permit, §173 requires the state agency to determine that they²⁶ will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, the applicant must certify that his other sources in the State are in compliance with the SIP, and the agency must determine that the applicable SIP is otherwise being implemented. Of greatest importance, however, §173 expressly provides that "the proposed source is required to comply with the lowest achievable emission rate." This requirement--known as "LAER"--is defined in terms that make it even more stringent than the applicable new source performance standard developed under §111 of the 1970 statute.¹³

Section 171(1) provided:

"(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a)." Id., at 746.

Footnote(s) 13 will appear on following pages.

The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "source." They do, however, define the term "major stationary source" as follows:

"(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." Id., at 770.

Thus, this much is clear from the face of the statute. If a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to §172(b)(6) and in order to do so, it must satisfy the §173 conditions, including the LAER requirement. If,

¹³Section 171(3) provides:

"(3) The term 'lowest achievable emission rate' means for any source, that rate of emissions which reflects--

"(A) the most stringent emission limitations which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

"(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

"In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance." Id., at 746.

however, an old plant containing several large emitting units is to be modernized by the replacement of one unit emitting over 100 tons of pollutant, the question whether the new unit must satisfy the LAER requirement depends on whether the individual unit, or the entire plant, is regarded as the major stationary source.

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