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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1005; 82-1247; 82-1591

TITLE CHEVRON U.S.A., INC., Petitioner v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

AMERICAN IRON AND STEEL INSTITUTE, ET AL., Petitioners v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, Petitioner v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PLACE Washington, D. C.

DATE February 29, 1984

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Washington, D.C.

Wednesday, February 29, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:03 o'clock p.m.

APPEARANCES:

PAUL M. BATOR, ESQ., Office of the Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of petitioner.

DAVID D. DONIGER, ESQ., Washington, D.C.; on behalf of respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Bator, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF PAUL M. BATOR, ESQ.,

ON BEHALF OF PETITIONER

MR. BATOR: Mr. Chief Justice, and may it please the Court, this case involves the validity of an important regulation issued by the Environmental Protection Agency under the Clean Air Act Amendments of 1977.

The regulation addresses the question of what counts as a "source" for purposes of activating a permit program called the new source review program. Under the statute, the states must impose new source review in certain areas of the country in situations where construction or modification of a major stationary source of air pollution would lead to significant emissions increases, and the question is: What is a source?

The regulation at issue allows the states -- it doesn't compel them -- it allows them to adopt a plant-wide definition of the term "source." This is sometimes called the bubble definition. The Court of Appeals of the District of Columbia held that the bubble definition is unlawful; that the administrator has no

discretion in how to define "source"; that the statute compels one rigid definition; and we are here asking this Court to correct that holding and to hold that the regulation and the definition fell within the lawful discretion of the administrator.

QUESTION: Do you suppose the Court of Appeals would have had the same view had the agency taken the same definition from the outset?

MR. BATOR: We believe so. The Court of Appeals did not seem to be worried about the fact --

QUESTION: That it's changed its mind.

MR. BATOR: -- that the agency has in fact exercised its discretion in a number of different --

QUESTION: Ways, yes.

MR. BATOR: -- with a number of different resolutions of the problem from time to time.

The relevant provisions of the Act, I want to give a little bit of background here to the statutory structure. They comprise Part D of the Act, and they were passed in '77 to regulate so-called "nonattainment areas," those areas of the country that had not in 1977 met the original deadlines for attaining national air quality standards. For these areas, the Congress in '77 adopted a rather elaborately calibrated set of requirements which were designed to achieve three

overall goals:

One was to assure steady progress toward attainment; second, to encourage economic growth through the creation of new plant and equipment even during this period of movement toward attainment; and third, to assure that states should have increased flexibility in organizing their own antipollution strategies. These were the three central animating conceptions.

Now Part D is comprised of a complex of provisions. The centerpiece is the obligation on the state to create new state implementation plans. These are the things called "SIPs," and these must require annual incremental reductions in emissions which constitute reasonable further progress towards attainment.

The statute also requires the SIP to impose what is called "reasonably available control technology" on all existing sources. These requirements have nothing to do with a bubble. These are the principal engines that are supposed to drive the state toward attainment.

In addition, as one element of the scheme, Part D creates the new source performance, sometimes called NSR -- sorry, new source review, NSR program. Now this imposes stringent conditions before a permit

may be issued to construct new sources of pollution. These conditions are very severe.

For instance, one is a requirement that so-called state of the art, and therefore very expensive, control technology be installed on all new sources. It is this technology that in the trade is sometimes called LAER, or LAER technology.

Now Part D does not itself define what is a source for purposes of activating this NSR program. In fact, the agency has ever since 1977 assumed that it has some discretion in how to define what counts as a source.

QUESTION: Mr. Bator, can I interrupt you right there, because this is one thing I wasn't clear on from the brief. You say the statute does not define the term "source," and your opponents say it does.

MR. BATOR: Part D does not define "source."

QUESTION: Well, then, does the definition of "stationary source" in Section 111 --

MR. BATOR: That is one of the big disputes in the case.

QUESTION: Oh, so it is an issue as to whether that --

MR. BATOR: Whether that --

QUESTION: They don't agree with you, then,

that there's no definition.

MR. BATOR: Right. We say it doesn't apply. We say even if it does, it does not exclude the bubble. So we take both positions. But there is a dispute about whether it applies --

QUESTION: But there is a statutory definition of the term "stationary source," but you say that (a) the definition does not apply to Part D?

MR. BATOR: That definition, Your Honor, was enacted by Congress in 1970 --

QUESTION: I understand.

MR. BATOR: -- in Section 111 in the context of a separate program called the new source performance standard program.

QUESTION: And it's your position that in 1977, was it, they intended the word "source" to have a different meaning than it had in the already enacted statute?

MR. BATOR: We're saying that they did not intend to carry over or to incorporate the Section 111 definition. The Section 111 definition itself says, "for purposes of this section source means". The provisions which are at issue here, which were enacted seven years later, do not make an explicit cross-reference to Section 111.

QUESTION: And you think that would be necessary for us to assume --

MR. BATOR: Not always, Your Honor, but in this case there is additional history, Justice Stevens. In this case in the Senate bill that was before the Congress in both '76 and '77, there was an explicit cross-reference to the Section 111 definition of source. The Conference Committee removed that. In fact, the Conference Committee rejected the Senate bill and adopted the House approach to new source review.

The statute as it was enacted did include some explicit cross-references to other Section 111 definitions, but not to the definition of source. So we look to that history, and we say there seems to have been at least some indication that Congress did not want to tie the new NSR program to that definition of source.

And that makes sense to us, Your Honors, because the fact is that the way that definition works in the 1970 NSPS program would be very different -- that is, to carry it over would not make much functional sense, because that's a very different program and it operates in a very different way.

QUESTION: And of course the language of the definition tends to cut against you somewhat, I think,

because it's any building or any facility, and you would say that if you've got three buildings in a plant, that you don't count the buildings separately.

MR. BATOR: Your Honor, our position is that even if the definition applies, the most sensible reading of it is that within the definition there is room to adapt it, and that the Congress must have intended some administrative discretion to adapt it to the functional needs of the various Clean Air Act programs.

An illustration of that would be, there is still another program enacted in 1977. That was the Part C program to prevent deterioration of air quality in areas of the country which had attained national standards. In that program also the agency has said that the bubble definition, even though using the same language as in the Section 111 program, has in that adaptation used the bubble definition. And oddly enough in that context, the Court of Appeals upheld it saying that there is discretion to adapt the definition to meet the various different substantive needs of the various programs.

QUESTION: Mr. Bator, even assuming, arguendo, that your position is correct that the definition of source in the previous legislation was not carried over

for the new source review, what appears to me to have been done here is that EPA has defined source for purposes of 7503 in Part D two different ways. It's given a broad scope definition for purposes of structuring the bubble for emissions control, and then it's ignored the word source and referred to emissions units for purposes of engaging lowest achievable emission rate.

So really EPA has defined source two different ways, it seems to me, within the same section for new source review. And would you explain that to me?

MR. BATOR: Your Honor, the reference to what counts for purposes of the imposition of LAER technology, which is the latter example used, is not meant to be a definition of the word "source" at all.

QUESTION: Well, but it says "source" in the statute: The proposed source is required to comply with the lowest achievable emission rate.

MR. BATOR: Well, of course in order to get into LAER it has to be a source, but once you get to the imposition of LAER technology of course we are there talking on a unit-by-unit or machine basis because that's what the technology is imposed on.

QUESTION: Well, it just seems to me that EPA has seized upon the word "source" in Part D and has said

we're going to define it, but then has chosen to define it two different ways, one for the emission bubble purpose in a different way, a much more restrictive way, for the LAER purpose.

MR. BATOR: Your Honor, I think that EPA was not purporting to create a definition there. When we get to the imposition of LAER technology, the only meaningful use of the word "source" is that a -- is the particular piece of equipment because we're talking about technology-forcing equipment.

So that these are two different contexts and two different conceptual universes. One is, when is a whole administrative scheme triggered at all? Once it is triggered and you are in section 1.73 and LAER has to be imposed, it has to be imposed on particular pieces of machinery and equipment. But it doesn't have much meaning to think about LAER, which is specific technology, in the context of a plant.

So we don't think there really is an inconsistency, Your Honor, although there may be a verbal one. But we don't think that they were trying to define the term "source" when they were speaking about how the LAER requirement operates. It's an operational question in that context.

QUESTION: Well, is that the same, Mr. Bator,

that while they use the plant-wide definition to determine whether a source is new or modified, once they've determined that it's modified they impose only, as you said, the machine LAER requirements?

MR. BATOR: Absolutely. Absolutely. The plant-wide definition cannot --

QUESTION: Well, suppose they determine that it's a new, rather than a modified, a new source? Same thing?

MR. BATOR: There are statutory definitions of what is a new and what is a modified source, and they have somewhat different significance.

QUESTION: Well, perhaps I'm getting into something a little different. That is, they impose the LAER requirement only on the particular machine after they've determined, using the plant-wide definition, that the source is either new or modified.

MR. BATOR: Yes, sir.

QUESTION: Now I understand that's done when they determine the source is modified, but what when they determine the source is new? Is that still the same thing?

MR. BATOR: When a source is new, the plant-wide and the --

QUESTION: Well, what about the --

MR. BATOR: -- individual --

QUESTION: What about the LAER standard? How is that imposed, on what, when they determine it's a new source?

MR. BATOR: When you create a new plant, then by definition you have a source because you don't have an offset. That is, when you build a new plant.

QUESTION: So then the LAER requirements apply over the whole plant when it's a new source?

MR. BATOR: The LAER requirement insists that when you're building a new plant, the state-of-the-art technology be imposed on all of the equipment --

QUESTION: I see.

MR. BATOR: -- or on sufficient equipment within the plant so that the -- so that the offset and other requirements are met, Your Honor.

QUESTION: I see.

MR. BATOR: The bubble concept really has operational significance only in the context where you have an existing plant.

QUESTION: Forgive me for interrupting you once more.

MR. BATOR: Yes.

QUESTION: NRDC says that the EPA regulations allow the use of the plant-wide definition even in

states, even in states that haven't adopted a SIP. Is that true?

MR. BATOR: I believe that is not so, Your Honor.

QUESTION: That is not so?

MR. BATOR: That is the plant -- there may be an ambiguity there, and I just want to be very sure to be scrupulous. I believe the requirement was that the bubble definition could only be adopted by those states that were issuing SIPs that met all the other requirements of the statute -- that is, that put down the requirements for reasonable further progress and for the installation of controlling technology on existing sources.

QUESTION: Well, perhaps I should have asked NRDC to discuss that.

MR. BATOR: It may be that they meant there the use of the bubble concept in the concept of the moratorium, which is a slightly different context, and it may be that that is what they're talking about. And there is a use of the bubble concept outside of the context of an approved SIP in those states which fall under the so-called construction moratorium.

I think maybe it would be well for me just to say a word about how we think the bubble system works as

a matter of the administrative technique that is involved.

The point of the bubble system is that for purposes of determining whether this complex of administrative requirement is triggered, you look at the plant as a whole. And that assumes an existing plant. And you -- it's as if the entire plant were encased in a plastic bubble with a single emissions hole at the top.

Now if you have new construction or expansion within that plant that increases net pollution plant-wide more than a de minimus amount, then everybody's agreed that new source review comes into play. But under the bubble approach, within a plant an individual machine can be added or modified without new source review if additional pollution from that new construction is offset by reductions or elimination of another machine so that there is no significant additional net increase.

QUESTION: May I ask a question about your use of the word "significant," Mr. Bator? Section 75.11(a)(4), which I think governs the new source review engagement says that any increase in pollution engages the review. And the regulation seems to have adopted a "significant increase" definition, not just "any increase." And then there are a variety of levels

imposed, 100 tons for certain kinds, and 60 tons for others, and so forth. What is the justification for that?

MR. BATOR: Your Honor, the answer to this is I believe not in dispute between respondents and us. They way this works, that is the reason there are significance levels in this situation is because the statute only comes into operation if there is a major stationary source. That itself is defined as --

QUESTION: Well, that's defined, but I think the section does say any increase in pollution engages review under new source review, and I just wondered how we then by regulation got to "significant levels."

QUESTION: Well, as I say, it comes in in a number of different ways. The statute first of all says that if you are building something that is less than 100 tons per year, that it's not a major source at all; and under either definition there is no new source review. That is, if I put up a new plant that is 99 -- this is now new plants.

With respect to modifications, the statute says there has to be a major modification before any of this comes into play. Now the administrator issued regulations interpreting the term "major modifications." That was upheld by the Court of Appeals

in the Alabama Power case as lawful. That is, as it were, the source of the significance levels, about which the legality of which I believe there is really no dispute, and which really operate whether you have a bubble definition or a plant-wide definition.

That is, under the plant-wide definition, too, it is now the regulatory structure that if you have a modification that, for instance, increases a machine by less than 40 tons per year with respect to one of the pollutants, that the NSR review would not come into play under either definition, whether that is a source or not.

I don't believe that there is a dispute between the parties about the legality of the establishment of the significant levels. The relevant authority on that is the Alabama Power case where the Court of Appeals examined this very question and said that, in light of the legislative history, it is inconceivable that Congress should have meant that a very elaborate and very expensive administrative mechanism come into play in the case of trivial changes in emissions levels.

Of course our submission, Your Honor, is that it is not at all the case that every time there is a change in plant or machinery under the bubble definition

that there is going to be any increase whatever. The plant definition may very well create reductions in emissions levels. Because if I have a machine that for instance pollutes at 500 now, an existing machine that pollutes say at the level of 500 tons a year, suppose that I want to install a brand new and very efficient new machine that only pollutes at 450. That would be a net decrease in 50.

Under the bubble definition, NSR would not come into play at all because you have an offset, and therefore I can install the new machine. Under the plant --

QUESTION: If you install another machine that polluted 50 tons more than your old one, you could still install it if you reduced the emissions in some other part of the plant by 50?

MR. BATOR: Right, Your Honor. If we collect enough offsets within the plant so that there is --

QUESTION: So you may in a modification -- you don't have to employ the state-of-the-art in modifications.

MR. BATOR: If the net increase in the plant is offset with anything other than de minimus.

QUESTION: But you do require new source performance standards to be applied --

MR. BATOR: Those are required in any event.

QUESTION: -- apparently to the individual pieces of equipment.

MR. BATOR: Those are required in any event.

QUESTION: But not the LAER --

MR. BATOR: No, the LAER --

QUESTION: -- if it falls within your --

MR. BATOR: That is right. The LAER is required only if you have a source that is a source within the meaning of new source review. The new source performance standard technology has to be installed across the board, whether the new source review program is or is no in operation.

QUESTION: But if you look at Section 7501(3) it looks like LAER has to be applied. It just --

MR. BATOR: I don't believe so. I don't think that that purports to be a definition of when the regulatory requirements apply. It purports to explain what happens to that piece of equipment once you've decided that the program is in operation.

I think I would like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Doniger.

ORAL ARGUMENT OF DAVID D. DONIGER, ESQ.

ON BEHALF OF RESPONDENT

MR. DONIGER: Mr. Chief Justice, and may it please the Court, as Mr. Justice Stevens has said, the question in this case is whether the statute defines the term "stationary source" for the purpose of this program, and we contend that it does.

Section 110(a)(2)(D) is the key provision. Section 110(a)(2), as this Court has held in the Train case is what sets forth the mandatory contents of every state plan. Subparagraph (D) establishes what each state plan must contain in the way of new source review requirements. Subparagraph (D) uses the term "source" twice. One use of that term is explicitly tied to Section 111, and the definition of source in that Section 111 is, a source is a building, a structure, a facility, or an installation.

The other use of the term is in a clause not five lines away which requires each state plan to contain a permit program as provided in part (D). The two uses of the term in the same subparagraph ought to be presumed to have the same meaning. That's the only reasonable conclusion, particularly when you look at the legislative history of subparagraph (D).

Subparagraph (D) is the result of Congress' having looked at the new source review procedure that was provided in Section -- in subparagraph (D) in the 1970 Act, deciding that it was inadequate, that it did not provide for careful review of new sources, and deciding that it needed to be strengthened by creating the permit program that we find in Section 173.

It is not credible to suggest that when Congress amended subparagraph (D) in 1977 to add to it the permit program for stationary sources. It meant the term "stationary sources" to mean something new, something different than it already meant in the same subparagraph.

Well, having established that the two uses of the term have the same meaning, what is that meaning? Again, as Mr. Justice Stevens has suggested, a term such as building and structure plainly refer to individual industrial units like boilers and blast furnaces, things that actually produce pollution. These terms, we contend, can't reasonably be defined exclusively as entire plants.

The 1977 legislative history, moreover, specifically rules out the bubble definition that EPA has adopted. It explicitly bars a new project from escaping the permit review just by obtaining an offset

from within the same plant. And I refer you to page 36 of our brief which quotes the statement of Senator Muskie who was chairman of the Senate Conferees, and he was explaining the meaning of the permit program required by the Conference bill to be included in every state plan.

He said, "..., a new source is still subject to such requirements as 'lowest achievable emission rate' even if it is used as a replacement for an older facility resulting in a new reduction from previous emission levels."

He was there explicitly referring to the situation where someone takes a facility in a plant, retires it, and replaces it with a new one, a new boiler or blast furnace. And he said, you're still subject to permit review. You cannot net out of the permit review simply by getting an offset.

Now the reasons why Congress was not satisfied with just an offset that keeps the pollution from increasing are plain in the requirements and purposes of Section 173. In enacting that section, Congress made it clear that it wasn't enough just to keep pollution from increasing. First, pollution had to be made to decrease. The offset that's required in Section 173(1) is an offset which is more than equal to the pollution

that the new boiler is going to add. The pollution overall has to be reduced.

QUESTION: Well, even under the government's position, though, the state plan is going to have to, whether it uses the bubble concept or not, is going to have to have an annual improvement in the air quality. The plan has to aim at that. It has to be reasonably aimed at achieving that.

MR. DONIGER: The government I think is arguing that if the plan makes up the lost ground by not having the source -- not having the thing subject to the permit review, then it doesn't make any difference. But the Act itself --

QUESTION: All I was saying is that even under the government's view, the air quality is going to have to steadily improve.

MR. DONIGER: That's correct.

QUESTION: It would just improve faster and more under your view.

MR. DONIGER: Well, what we have here is Congress deciding that new sources were going to have to play a specific role in that reducing of pollution, and the plan was going to have to make whatever residual reduction was necessary from any other source the state --

QUESTION: Right.

MR. DONIGER: -- provided.

But Congress not only wanted the new sources to produce that reduction, but to do two other things, as well. The first was, they were supposed to put on the lowest achievable emission rate technology, technology which is defined as equal to the best that somebody of that kind is already using, in order to make the lowest possible -- the least possible call on the air quality, on the pollution reduction opportunities that that state has.

We have states which are way over the limit for the amount of pollution that they can have in compliance with the health standards. They have to reduce that. Most of that reduction is going to have to come from existing sources.

QUESTION: Well, of course under -- I guess suppose at least theoretically it may be that your position, if we adopted it, wouldn't improve the air quality in these regions any faster. Because even if you used a -- even if you were required to use the best piece of equipment that you could, you may not -- you may not go to the trouble of reducing the emissions in some other part of the plant that you would if you were allowed under the bubble concept.

MR. DONIGER: Well, under Section 173 you have to do three things. You have to make that offset --

QUESTION: Yes.

MR. DONIGER: -- so that you get a net reduction. You have to use the best technology which makes it easier, by the way, to meet that first requirement because your offset doesn't have to be as big. And the third requirement, which is in 173(3), is that the new source -- the firm building the new source has to demonstrate that its existing sources are in compliance with the requirements that apply to them. These are three things that Congress wanted the permit process to provide.

EPA is suggesting that if you only do one of those things, if you only offset pollution back to the starting point, you have done everything that Section 173 intended that Congress wanted done, and that is not correct. Congress wanted pollution offset beyond the starting point. Congress wanted the best technology put on these new facilities, and Congress wanted the company building them to make sure that it was complying with the law at each of its other facilities in the same state. Those things are lost.

QUESTION: Well, under the government's view, I take it, that if a new piece of equipment could be

brought into a plant that would increase emissions by 500, that would be permissible as long as somewhere else in the plant they reduced emissions by 500.

MR. DONIGER: Well, by 460 because the levels allow actual increases.

QUESTION: All right. In any event, as long as they reduced emissions sufficiently in some other part of the plant. You say that if it were possible in putting in the new piece of equipment to increase emissions less, they must use that.

MR. DONIGER: That's right.

QUESTION: Well, if they must do that, and if they did it, it may be that they wouldn't go to the trouble of reducing emissions somewhere else in the plant.

MR. DONIGER: If, for example, in your hypothetical that the application of the advanced technology meant that the boiler would increase pollution by 400 instead of by 500 tons, then the offset would be correspondingly less and, to the extent that you had used up some opportunity for reduction, just to stay even with the new boiler, the state could use that reduction opportunity to make further progress towards the standards.

So if you have poorly controlled new sources

coming in, then just staying even requires going deeper into the well of offset opportunities, and it makes it even harder to meet the health standards or the deadlines which Congress has required they be met by.

So a great deal is being given up when a major source is left out of the permit process. I want to point out that we're not talking about a minor exemption on the periphery of the law; we're talking about an exemption which applies to 90 percent or more of the major projects which are built in our cities which don't meet the health standards. Because the statistics that we have put forth, which no one in this case contests, are that almost every major project built in a polluted area is built within a plant, not at a new site. And in almost every case, they have shown themselves to be able to get their offset. When they comply with all three conditions, they get their offset from inside the plant. Anybody who can do that can certainly get the offset that the government would like to make available to avoid meeting the other requirements. So that 90 percent of the big projects are allowed to escape review.

The purposes, I would like to amplify a little bit the purposes of the lowest achievable emission rate technology requirement and the compliance requirement. At page 39 of our brief we cite the three purposes given

by the House report. The lowest achievable emission rate technology is there to make sure that these new sources contribute as little new pollution as possible to the area so that they minimize the conflict between allowing growth and making progress toward the health standards.

The second condition -- the second purpose is to make it possible for an area to have as many new sources as possible without compromising those health standards. And the third reason is to serve the purpose of advancing technology of improving the rate at which it's developed and deployed on new sources. All of those things are lost if lowest achievable emission rate technology is not applied to these 90 percent of the major projects.

The third requirement is the requirement to demonstrate compliance. I refer you to page 39 of our brief again. The House report language -- the House report passages discussed there are ones in which the House had found that there was an alarming level of noncompliance with the law in 1975 and 1976, and they sought to create a new incentive to comply by making someone who wanted to build a new source responsible for demonstrating that he was complying with the law with the sources that he already owned. These are important

purposes which are rendered unachieved completely if nothing applies, if not of these projects fall under the definition of source and therefore under the permit requirement.

It is a cardinal principle of statutory construction that an agency can't rewrite a definition to subvert specific statutory requirements that were adopted to serve specifically articulated congressional purposes, yet under this definition all three of the important purposes Congress intended Section 173 to serve are frustrated.

Now I want to amplify on an aspect of Justice White's question of a few moments ago. The government has suggested in its briefs that it doesn't make any difference if all these things are lost, provided that there is a plan which will on paper at least project meeting the deadlines -- meeting the standards by the deadlines of the law.

Congress has clearly decided that it's not enough to have a plan that projects progress and attainment by the deadlines. It has established a two-track system which doesn't put all of its eggs in one basket. In 1970, and again in 1977, Congress specifically chose not to put total reliance on that plan.

The history of the Act shows that that was a wise judgment, because the plans alone don't work sufficiently to meet the standards on time. In the early '70s under the obligation to develop a plan to meet the standards by 1975, every state submitted a plan which it projected would do that. But when the '75 deadline passed, although there had been progress, two-thirds of the nation's people still lived in areas that didn't meet health standards.

In 1977, Congress called for a new round of plans to meet the deadlines by 1982. But by the end of 1982, there were still more than 100 major metropolitan areas which don't meet the health standards. The projection of attainment all by itself is useful but not reliable all by itself, and that's why it's backed up by specific requirements that apply to major stationary sources.

It seems to me a novel proposition that by complying with one of those three conditions, albeit only partly the offset condition, something which otherwise would be a source, it's a thing by itself that emits the requisite amount of pollution is not a source at all anymore and can forget entirely about the other conditions that would normally -- that it would normally be subject to.

Now Justice Marshall asked a question about situations in which EPA is applying --

QUESTION: Justice Marshall is --

MR. DONIGER: I'm sorry. Justice Brennan --

QUESTION: -- indisposed today.

MR. DONIGER: -- in situations where there is no state plan, that even on paper purports to provide a method for getting to the standards on time. And that situation is the construction moratorium situation, and also EPA's offset ruling, two situations.

Both of those apply in situations where the state either has not yet written the plan, or is overdue for writing the plan. What EPA has said there is that it's okay to use a definition which lets 90 percent of the projects which would otherwise be subject to the moratorium escape the moratorium, regardless of whether they may increase pollution, and in spite of the fact that they're not even being built with lowest achievable emission rate technology and with a certification by the source builder that its other sources are meeting the requirements applicable to them.

So in that case, the government doesn't even have the fig leaf of protection from the requirement that the state have a plan that promises to meet the

standards on time.

One final argument that I'd like to mention that the government makes is that, on the assumption that it has some discretion in this area, on the assumption that the statute doesn't require coverage of these major units, the government is arguing that its definition actually makes things better. And the argument for that case is that, they say, that the older definition which EPA had for 10 years, which covered the units, might discourage in some instances the replacement of a project which might be cleaner than the thing that it was replacing.

QUESTION: How long has this provision that we're fighting about been in force?

MR. DONIGER: The original definition which covered units has been in effect from 1971 through October of 1981, and the revised definition which allows the units to escape the review has been in effect only since October of 1981. And in the 10 prior years, we had the units being covered.

In fact, in 1976 EPA established the offset ruling -- excuse me. I would like to return to a question about the law for a moment. One of the government's arguments is that a provision explicitly incorporating the unit definition was dropped from the

Senate bill in the 1977 Conference Committee.

In order to make that argument work, that the dropping of that Section 302(m) was meaningful and was intended to exclude -- to drop the unit definition, you have to be able to show that the House bill coming to the Conference intended something different than the Senate bill. And I believe we can show that the House bill covered units just as much as the Senate bill.

The House bill provided for new source review by adopting into the law EPA's 1976 regulations. EPA's 1976 regulations specifically provided that every building, structure, facility, or installation which emits more than 100 tons was subject to this review process. So the House came into the Conference with a unit-specific definition; the Senate came in with a unit-specific definition; they conferenced their language to conform it into what we see in the final law; and at the end of the Conference Senate Muskie went back and explained to his colleagues that the bubble was not allowed.

I think in that legislative history context it is not credible to claim that Congress left open the question whether units like boilers and blast furnaces were covered by the permit requirements.

QUESTION: Would you comment on the -- perhaps

it's a superficial point, but the government makes the argument that there's some at least inconsistency between using the bubble concept in programs that are designed to maintain quality as opposed to those that are -- and then to forbid it in programs designed to improve air quality. Is there some inconsistency there?

MR. DONIGER: It's our position that all three of these programs ought to have the same unit definition. The Alabama Power case I think has been misinterpreted by the government and --

QUESTION: You think it's been misinterpreted by the Court of Appeals, too?

MR. DONIGER: I think so, in that if you read that case, what it says is that -- well, the issue in that case was whether EPA could aggregate small units that were not major, in and of themselves, but were built all at the same time into a group that together emitted more than the threshold amount of pollution, and then subject that group to new source review. And EPA had done that by adopting a definition that included the phrase "or combination thereof," combination of the buildings, and structures, and so forth. And the Court of Appeals said you can't do that; you're restricted to those four words, but we think that it would be

reasonable for you to define "facility" or "installation" not only as a unit but as a plant, too.

There you get the dual definition of the source.

QUESTION: Didn't it require that different definition?

MR. DONIGER: I believe it requires that --

QUESTION: I mean, required, not authorized. It required that different --

MR. DONIGER: What it requires is that if you are building a bunch of small units at the same time, or you're adding a small unit, one that is not by itself large enough to qualify as a major source -- i.e., by itself it's not a 100-ton emitter -- then the only way EPA can subject that thing to new source review is by virtue of making it a modification of the whole plant. And if the only way it is subject to new source review is by virtue of it being a modification of the whole plant, then you ought to -- then the symmetry of it is that you have to let the plant owner get an offset within the plant in order to eliminate the net increase in its plant's emissions.

If that unit by itself is major in size, it does emit more than 100 tons, or in the case of that other program it's a higher level of 250 tons, but if

those thresholds are crossed, that thing, that boiler is subject to review all on its own, regardless of whether it's located on a greenfield site or in a plant.

But even if Alabama Power is rightly interpreted as mandating a plantwide definition for the program to limit how much worse pollution can get where it's currently better than the standards, it is not consistent with the purpose of reducing pollution to let sources which it applies in this program, to let these big projects escape from all the pollution reducing requirements that are found in Section 173.

So to the extent the distinction means that when the program is to reduce pollution it's not legal to let these sources out of it, it's right. To the extent that the distinction is used to say that even in a pollution increasing program like part (C) you don't need the unit definition, I think that that's a misinterpretation of the opinion.

QUESTION: Well, your central position, then, if I understand you, is that if you need say three smaller units to be aggregated into one plant to qualify as a source, you just have to be consistent in treating that the same way.

MR. DONIGER: That's right.

QUESTION: And if each of the three was large

enough to be a source all by itself, then you're dealing with three sources --

MR. DONIGER: That's right.

QUESTION: -- and you can't aggregate them into a bubble.

MR. DONIGER: That's correct.

QUESTION: I see.

MR. DONIGER: I want to return to the modernization argument for a moment, which I had started on. EPA's position is that -- or argument is that sometimes in a few cases you will find that a project is delayed a little bit, which if it were allowed to be built even with poor controls, would be cleaner than the thing that it's replacing, and that this justifies changing the definition.

What EPA has failed to do, though, is look at all the instances in which the poorly controlled sources result in more pollution than they would have if they were subject to the permit requirement and those three requirements were imposed.

This is a case just like MVMA v. State Farm where the government's rationale -- again, assuming it has some discretion -- is defective because it only considers a small fragment of the problem before it. It doesn't consider what happens in all the instances where

its definition makes things worse rather than better.

If there are no further questions, I will stop here.

CHIEF JUSTICE BURGER: Mr. Bator, do you have anything further?

ORAL ARGUMENT OF PAUL M. BATOR, ESQ.,

ON BEHALF OF PETITIONER - REBUTTAL

MR. BATOR: Yes, Your Honor. The difficulty here is that we, the government, simply doesn't recognize Mr. Doniger's description of the Act. It seems to us that he has collapsed into one a dazzlingly intricate statute, has given it a straightforward sort of one-purpose interpretation, that there's only one thing going on here, which is that Congress meant that things move as fast as possible toward maximum expensive technology.

Now in fact Congress -- and I don't know where he was reading from when he said "the following are the purposes of the statute." We read those reports and we see that Congress had a number of different purposes in mind: state flexibility --

QUESTION: What was Senator Muskie talking about, for example?

MR. BATOR: Senator Muskie, from the Conference Report, made one statement which we discuss

in our reply brief, which does seem to presuppose -- although it's somewhat ambiguous; he may just have been saying that what he was insisting was that the new provisions do apply to modifications as well as to new construction.

QUESTION: What if that was what he was saying? Does that make any difference to you?

MR. BATOR: I don't think, if that's all he was saying, that it makes any difference. But we think the most fundamental point here is that Congress was trying to balance a number of different problems.

It found the '70 statute to be deficient because it did not sufficiently balance the problem of renewal and growth with the problem of achieving attainment. Congress said, we want a different scheme. So everything that Mr. Doniger says about the fact that ever since 1971 this is the way it was defined, we have here Congress saying we really want to take a slightly different path. We want the states to have added flexibility. And we have particularly in mind the problem of disincentives to growth.

The bubble idea has behind it a very simple and elegant idea, which is: That you will have incentives to growth if you allow industry the flexibility to spend its pollution dollars in the most

efficient rather than the least efficient way. If you can reduce pollution by spending a million dollars on machine A, that is a better idea than requiring you to spend two million dollars on having the same reduction by making you do it on machine B.

If I have a machine that is a very efficient machine and I want to double its capacity and that will create 200 new tons of pollution, it may cost a million dollars to put LAER on that to bring that 200 back down and to eliminate the 200. But I might be able to get rid of the 200 simply by eliminating the next machine, which is an inefficient machine.

Now Mr. Doniger's whole argument is that if we insist on LAER on the new machine and eliminate the old machine, we will get rid of 400 units. But you have created a one million dollar extra cost on the expansion of your efficient machine. The choice isn't between the new machine with LAER or the new machine with LAER, because the antecedent question is whether the plant will put in the new machine. That is, the question is on the incentives to renew at all.

Under the source definition, under the tight definition that Mr. Doniger puts before you, we have the antecedent question: Will there be renewal at all?

QUESTION: Well, I guess the question is

whether Congress has mandated that. That's all. It's really not for us to determine --

MR. DONIGER: Yes. Absolutely.

QUESTION: -- which policy makes the more sense. It's what Congress mandated.

MR. DONIGER: And Mr. Doniger comes here and he says that Congress, by positive law, has eliminated the administrator's discretion. And we say: Show us where the law says that? Show us where the structure of the statute requires that.

And then we get very complicated and rather artificial explanations of why Congress said one thing but meant another.

QUESTION: Well, your argument of course is that they intended to change the statutory definition and delegate to the administrator the power to define source without saying so in so many words.

MR. DONIGER: Your Honor, that statutory definition that he speaks about was never an all purpose definition even back in --

QUESTION: No, but normally when you find a term defined in the statute and you don't find any alternative definitions, your first impression is it probably has the same meaning throughout the statute -- at least that's the way I start when I read complicated

statutes.

MR. DONIGER: Your Honor, in this case Congress was thinking about a particular program, which of course was machine-oriented.

QUESTION: And one of the things they had to do was to redefine the term "source," but they just sort of did it implicitly, or allowed you to do it implicitly, or allowed your client to do it implicitly.

MR. DONIGER: Your Honor, our submission is that Congress really wasn't focusing -- wasn't focusing specifically on what should count as a "source" for new source performance.j

QUESTION: Well, I thought that part of your submission was that even with this alleged definition --

MR. DONIGER: That is also the case.

QUESTION: -- that there is enough room right within that language of buildings and so on for the agency to do --

MR. DONIGER: That is our alternative argument, Justice White, and that is the one that the Court of Appeals, at least in these other contexts, accepted.

QUESTION: Yes.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:57 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1005, 82-1247, 82-1591-CHEVRON U.S.A., INC., Petitioner v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

AMERICAN IRON AND STEEL INSTITUTE, ET AL., Petitioners v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; AND
WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, Petitioner v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Diane Hammond

(REPORTER)