Natural Resources Defense Council

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March 20, 2002

NRDC Backgrounder

Gutting New Source Review: The 'Clean Unit' Oxymoron

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The Environmental Protection Agency plans to create a new loophole from the Clean Air Act's "New Source Review" (NSR) requirements, and to give the new loophole the perversely ironic label of "clean unit" exemption. Far from being clean, the sole purpose of the new exemption would be to allow significant increases in harmful air pollution to escape cleanup and state-of-the-art pollution controls. Significant pollution increases that require cleanup under today's NSR rules could escape control under EPA's new loophole, thereby harming air quality and public health. Indeed, internal documents show that EPA is stumped over how to explain away the air quality problem with this exemption, concluding that "[i]t it likely that fuzzy rather than clear language will be used to show [the] obligation" for air quality impact analysis.

EPA would give polluters an exemption from NSR cleanup standards if a piece of equipment had pollution controls that were considered acceptable as long as 15 years ago. EPA would not require previous controls that form the basis for this exemption to be re-evaluated to determine whether they were proper or lawful or protective. EPA also would allow the exemption to be based on controls "substantially as effective as" so-called good controls, thereby knowingly introducing legal uncertainty and room for bickering over what this means. EPA justifies this new loophole with the claim that it would create incentives to install state-of-the-art pollution controls. However, because the loophole applies *retroactively* to polluter activities undertaken without regard to an unadopted exemption, the incentives justification is plainly illogical; a retroactive loophole is not an incentive, it's a give-away. EPA further justifies the 15-year exemption period on grounds that facilities should be able to recoup capital investments in equipment, despite knowing that the IRS allows only eight years for this.

	Current Law	**Administration's Plan to Weaken Current Law**
"Clean Unit" Exemption	Current NSR rules and the Clean Air Act itself do not authorize this exemption. Significant pollution increases from plant changes or upgrades must be cleaned up with state-of-the-art pollution controls.	A company would be allowed to make changes to a piece of equipment that significantly increases pollution and avoid cleaning up that increase, as long as the unit had pollution controls that were considered good as many as 15 years ago. In fact, units could be exempted from cleanup standards based on more vague criteria about what past pollution controls would be acceptable, or even if they had no controls at all. Worse, this exemption would apply retroactively, allowing older pieces of equipment to escape better controls today based on a prior decision to install what now may be entirely outmoded pollution control technology.
Example	A piece of polluting equipment that emits 1,000 tons of harmful pollution per year upgrades and thereby emits 1,500 tons of pollution per year. Current law requires this 500-ton pollution increase to be cleaned up with state-of-the-art controls.	This same piece of polluting equipment equipped with a 10-year old pollution control device still emits 1,000 tons of harmful pollution per year today. The facility upgrades the equipment, which then emits 1,500 tons-per-year of pollution. With EPA's new loophole, the additional 500-ton pollution increase would escape

		cleanup merely because the equipment already has a 10-year old pollution control device.
Air Quality Impacts	Current law requires cleanup of significant pollution increases, such as this 500-ton increase, to better protect air quality. Cleanup is further required in recognition of the sensible notion that pollution controls should be adopted or modernized when polluters upgrade equipment and spew out significantly greater levels of air pollution. In addition, the state of technology advances.	In the example above, 500 additional tons of harmful pollution per year would escape cleanup. EPA would never require the company to control this new pollution. EPA would do so based upon the unlawful, misguided argument that outdated pollution controls are good enough, despite the air getting 500 tons dirtier. Retroactive application of this loophole would *(continued)*
Air Quality Impacts		carry only negative air quality consequences, with each instance that the loophole applies bringing dirtier air than current law would allow.
Internal EPA Comments on Weakening Changes	Concerning any "Air Quality Impacts Analysis" associated with the exemption, "[p]roposal was silent regarding air quality impacts analysis. . . . . All still not clear on what type of analysis will be required. It is likely that fuzzy rather than clear language will be used to describe this obligation." "Unresolved Issues: What exactly does the source need to do to show that there is not an air quality problem?" Concerning the 15-year duration of the exemption, EPA attorneys "expressed concern that while a length of equipment life and cost recovery and cost effectiveness arguments may make good policy decisions, they do little to support a solid legal rationale." "There was concern over using a 15 year time frame as a reasonable period to recoup capital investment, given the IRS only allows 8 years. Also we have touted equipment life as 30-40 years in some cases. [Office of Air & Radiation] will work further on the rationale for 15 years. If OAR can not develop an adequate factual record to support 15 years retrospectively, then we will consider limiting retrospective effect." Concerning the case-by-case determination that may be made to show a unit is "clean" using controls that are "substantially as effective" as BACT/LAER [best available control technology/ lowest achievable emissions reductions], EPA attorneys expressed "[concern] with the vagueness of the 'substantially as effective as' language. Suggest that this should really just mean that a BACT analysis is necessary." Enforcement office will "draft language on use of broad enforcement discretion for violations of the Clean Unit conditions." "Did not propose provisions covering how exceedances of Clean Unit emission limit will be treated. Will not address in promulgation package, either. It is implicit that if they violate the Clean Unit limits, it is a NSR violation that will be addressed by the usual enforcement procedures." "Resolution: [enforcement office] will draft language on broad enforcement discretion."	
Coalition of State Air Regulators' Criticism of Weakening Changes[1]	"Our associations have agreed that sources that install the best available controls today should be afforded an exemption from further NSR for a limited time into the future. Under the clean-unit exemption now under consideration by the Administration, however, not only would a source that has installed the best available controls be exempt from further NSR for 15 years, this exemption would apply retroactively, thus allowing sources that installed controls more than ten years ago to escape NSR until the balance of the 15 years has expired."	

[1] January 23, 2002 letter from State & Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials to U.S. EPA Administrator Christine Todd Whitman.