

New York v. EPA: State Response to a Federal Regulatory Rollback

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In New York v. Environmental Protection Agency, the D.C. Circuit upheld most of EPA's changes to the Clean Air Act's New Source Review program. Despite widespread public criticism that the new rule would make it easier for existing sources to avoid installing pollution control technology when they make modifications, the D.C. Circuit deferred to EPA's judgment that the new rule would have compensating environmental benefits. However, the court did vacate the rule's Clean Units and Pollution Control Projects provisions, and remanded to the agency to provide a more reasoned explanation of how less stringent reporting requirements would not undermine EPA enforcement practices. The court also deferred two potentially critical questions as unripe: whether EPA can compel states to adopt the new rules and whether EPA's approval of state implementation plans containing the new rules would violate the Clean Air Act's anti-backsliding provisions. After examining the court's entire decision, this Note will focus on these two deferrals and argue that they were prudent given the very detailed factual records necessary to decide these claims. By leaving these claims unsettled, the decision allows for further analysis of the new rule's environmental and health effects—analysis that might improve the rule's clarity, practicability, and environmental sustainability.

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INTRODUCTION

On New Year's Eve 2002, the Environmental Protection Agency (EPA) promulgated changes to the Clean Air Act's New Source Review (NSR) program.¹ Attorneys general from nine states, who were apparently not celebrating the holiday either, filed challenges in the D.C. Circuit that same day, and environmental and industry groups soon followed.² The final rule transforms the NSR applicability provisions, which specify when an old facility undergoing modifications will have to install modern pollution control technology.³ Critics charge that the new applicability provisions will perpetuate the "grandfathering" of old pollution sources and frustrate the purpose of the NSR program, which aims to gradually require these sources to meet the same pollution control standards as new sources.⁴ The applicability provisions also undercut a major NSR enforcement sweep initiated by the Clinton Administration and several states by changing the rules under which facilities would be liable.⁵ In response, the director of the EPA's Office of Regulatory Enforcement left the agency in protest,⁶ and the agency's former Administrator, Christine Todd Whitman, criticized the changes because of their potential effect on pending enforcement actions.⁷

In this highly charged political environment, the D.C. Circuit denied almost all of the challenges from industry, state, and environmental

1. Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR), 67 Fed. Reg. 80,186 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51 & 52).

2. Petition for Judicial Review, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (No. 02-1387). The initial petitioner states included Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. See Katharine Q. Seelye, *9 Northeast States File Suit over New Rules on Pollution*, N.Y. TIMES, Jan. 1, 2003, at A1.

3. See 67 Fed. Reg. at 80,186.

4. See, e.g., Bob Martineau & Michael Stagg, *New Source Review Reform: A New Year's Eve to Remember*, 18 J. NAT. RESOURCES & ENV'T 1 (2004), available at <http://www.wallerlaw.com/NewSourceReviewReform.NRE.18.3.Winter2004.pdf>.

5. See Bradley Campbell, *Too Little, Too Late, Too Few*, ENVTL. FORUM, Mar.-Apr. 2005, at 42 (noting that NSR reforms undermined fifty pending cases, including ones that were late in the settlement process); Katharine Q. Seelye, *Top E.P.A. Official Quits, Criticizing Bush's Policies*, N.Y. TIMES, Mar. 1, 2002, at A19 (reporting on enforcement director Eric Schaeffer's retirement because the rule changes "had led two companies to refuse to sign consent decrees that they agreed to 15 months ago and prompted others to walk away from the bargaining table"). In 1999, New York notified utility companies that it would be enforcing NSR against facilities that had made significant modifications without obtaining a permit, and EPA and other East Coast states began their own enforcement initiatives. Several of these cases were very close to settling when the 2002 rule was promulgated, legalizing some of the conduct being prosecuted by EPA and the states. *Id.*

6. See Seelye, *supra* note 5.

7. Christine Todd Whitman, *This Land is Our Land*, ENVTL. FORUM, Mar.-Apr. 2005, at 33 ("I could not have signed regulatory changes that would have undermined the environmentally important NSR cases that were working their way through the courts.").

groups. Specifically, the court upheld EPA's primary changes to the applicability provisions, vacated two new exclusions from NSR, and remanded certain recordkeeping portions of the rule.⁸ Considering that the combined challenges involved "virtually all aspects of the 2002 rule,"⁹ the agency fared remarkably well.

However, the dust has not settled. The court deferred the questions of whether EPA could prevent states from adopting alternative NSR provisions and whether implementation of the new provisions would constitute impermissible "backsliding."¹⁰ Because EPA had neither rejected nor approved a SIP involving the 2002 rule the court dismissed both claims as unripe—leaving the parties and the regulated industry in limbo regarding the rule's practical implications. EPA's new provisions will have little impact unless states adopt them in their state implementation plans (SIPs), which EPA has hinted that it may require. Though some states apply the federal rules directly¹¹ or are prohibited by their own laws from being more stringent than federal standards in some circumstances,¹² Clean Air Act section 116 preserves states' prerogative to adopt alternative provisions that are more stringent than the federal rules. Given both the number of states that challenged the 2002 rule and EPA's expressed intention to dispute SIPs adopting alternative provisions,¹³ further litigation is undoubtedly brewing.

8. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

9. *Id.* at 17.

10. *See id.* at 41–43. Section 116, 42 U.S.C. § 7416, preserves state authority to have more stringent control requirements in a SIP than required by federal regulation. Section 193, 42 U.S.C. § 7515, forbids EPA from adopting any control requirement for non-attainment areas that is different from what was in place before 1990, unless the new requirements achieve equivalent or greater reductions in emissions. When Congress passed the 1990 amendments to the Act, it included a general savings clause, section 193. As Senator Lincoln Chafee explained in the floor debate on this provision: "The savings provision was intended to ensure that there is no backsliding on the implementation of adopted and currently feasible measures that EPA has approved as part of a [SIP] in the past." 136 Cong. Rec. S17,237 (daily ed. Oct. 26, 1990) (quoted in *Sierra Club v. Larson*, 2 F.3d 462, 470 n.8 (1st Cir. 1993)). Section 193 is commonly referred to as the Act's "anti-backsliding" provision, though it does not contain those words.

11. Fifteen states, along with several of California's air districts, D.C., and the territories, do not implement their own PSD or minor non-attainment NSR programs in all or part of their jurisdiction, but instead implement the federal program under a delegation agreement with EPA, or EPA directly issues these permits. *See* Map of Prevention of Significant Deterioration Permit Program Status, March 2006, available at <http://www.epa.gov/oar/nsr/where.html>. Among this group of states are several litigants in *New York v. EPA*, including California, Massachusetts, New Jersey, and New York. *Id.*

12. *See* STATE & TERRITORIAL AIR POLLUTION PROGRAM ADM'RS (STAPPA) & ASS'N OF LOCAL AIR POLLUTION CONTROL OFFICIALS (ALAPCO), RESTRICTIONS ON THE STRINGENCY OF STATE AND LOCAL AIR QUALITY PROGRAMS 2 (2002).

13. Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR), 67 Fed Reg. 80,189, 80,240 (Dec. 31, 2002); *New York*, 413 F.3d at 42–43.

In addition to states' ability to adopt more stringent rules, the Clean Air Act's anti-backsliding provision, section 193,¹⁴ protects against federal regulatory rollbacks. Section 193 prohibits EPA from approving control requirements in SIP a non-attainment area that do not ensure emissions reductions that are equivalent to or greater than the requirements in effect previously.¹⁵ Environmental litigants have already announced that they will raise a backsliding claim if EPA approves a SIP containing any of the new applicability provisions.¹⁶ Such a claim could call into question *New York v. EPA's* central holding that the new applicability provisions would not harm air quality.

It is widely noted that EPA produced almost no evidence to demonstrate the environmental credentials of the 2002 rule,¹⁷ raising serious questions about the procedural integrity of its rulemaking process. A 2003 investigation by the General Accounting Office noted that EPA relied primarily "on anecdotal information rather than a comprehensive survey or representative sample" and that the lack of comprehensive information or models made it "[im]possible to verify EPA's conclusions."¹⁸ Unfortunately, the D.C. Circuit's glancing review of the 2002 rule does not put sufficient pressure on EPA to develop reasoned explanations of its policies. In light of compelling evidence that EPA's revised applicability provisions are likely to be detrimental to air quality,¹⁹ reexamination of the provisions' effects is warranted.

This Note argues that state-by-state litigation of the section 116 and 193 claims will encourage all parties to engage in further research on the rule's effects and may bring to light new arguments for and against the federal NSR reform effort. This information will enhance the legitimacy

14. 42 U.S.C. § 7515 (2006).

15. *Id.* See *infra* notes 20–25 for an explanation of these terms.

16. See David Safford, [*Natural Resource Defense Council*] *Plans to Challenge Program Reforms Under 'Anti-Backsliding' Provision of Air Act*, 35 *Env't Rep.* (BNA) 1353 (June 25, 2004).

17. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *EPA SHOULD USE AVAILABLE DATA TO MONITOR THE EFFECTS OF ITS REVISIONS TO THE NEW SOURCE REVIEW PROGRAM* (2003) (finding that the support for EPA's predictions about air quality was slim and that the agency should monitor the effects of the rule), available at <http://www.gao.gov/new.items/d03947.pdf>. Don Kettl and Suellen Terrill Keiner write:

EPA has never collected comparable, accurate and complete data on the most basic aspects of the NSR program, including environmental effects, market impacts and economic costs, how it is implemented by state and local agencies, how many facilities it may cover, and whether it has promoted markets for cleaner technologies, and how many facilities used netting.

Reviving New Source Review, ENVTL. FORUM, May/June 2003, at 21.

18. U.S. GEN. ACCOUNTING OFFICE, *supra* note 17, at 4–5.

19. See, e.g., ENVTL. INTEGRITY PROJECT & COUNCIL OF STATE GOV'TS/E. REG'L CONFERENCE, *REFORM OR ROLLBACK? HOW EPA'S CHANGES TO NEW SOURCE REVIEW COULD AFFECT AIR POLLUTION IN 12 STATES* (2003); FLA. DEP'T OF ENVTL. PROT., *IMPACTS OF NEW SOURCE REVIEW REFORM ON ACTUAL EMISSIONS IN FLORIDA* (2005).

of whatever policies are ultimately implemented, though state-by-state litigation will be costly and delay resolution of the parties' legal obligations. However, it is unclear whether courts adjudicating future cases will require more rigorous evidence and well-tested rationales than were offered to the D.C. Circuit, or simply echo the D.C. Circuit's highly deferential, if reluctant, approval of the new provisions.

Part I of this Note reviews the Clean Air Act's legal background, the relationship between EPA and the states, and the role of NSR in promoting and maintaining air quality. Part II discusses EPA's December 2002 NSR rulemaking, petitioners' challenges, and the D.C. Circuit's decision. Part III anticipates states' reactions to the *New York v. EPA* decision and discusses legal and political issues that will emerge regarding sections 116 and 193. Part IV evaluates whether the D.C. Circuit's ripeness decisions were beneficial from a policy perspective by comparing the costs of ongoing litigation with the public interest in increased scrutiny of the new rule's environmental effects.

I. THE CLEAN AIR ACT

The Clean Air Act, like nearly all major environmental laws, is federally-directed but state-implemented.²⁰ EPA establishes National Ambient Air Quality Standards (NAAQS) for criteria pollutants,²¹ and states develop State Implementation Plans (SIPs) to achieve and maintain these NAAQS.²² The SIP includes "enforceable control measures, means, or techniques," compliance schedules, transportation measures, and monitoring and enforcement plans, among other tools for addressing air quality impairment.²³ If part of the state violates the NAAQS for any one of the criteria pollutants,²⁴ the region is classified as a non-attainment area, and the state must augment its SIP with

20. For a comprehensive discussion of the role of SIPs in implementation of the Clean Air Act, see Arnold W. Reitze, *Air Quality Protection Using State Implementation Plans—Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209 (2004).

21. See 42 U.S.C. § 7409 (2006). The current criteria pollutants are sulfur dioxide (SO₂), nitrous oxides (NO_x), ozone (O₃), particulate matter (PM), carbon monoxide (CO), and lead (Pb).

22. See *id.* § 7407(a). If the SIP is inadequate, or if the state chooses not to create a SIP, EPA regulates air pollution sources in the state via a Federal Implementation Plan (FIP). *Id.* § 7410(c).

23. See *id.* § 7410 (a)(2)(A)–(H) (describing the states' obligations in developing SIPs, and EPA's criteria in evaluating them).

24. States create air quality control regions as jurisdictions for air quality management. See *id.* § 7407(a). Some states, including California, have delegated implementation of the Clean Air Act to air quality management districts. See Cal. Air Res. Bd., *Organizations in the California Air Resources Board*, <http://www.arb.ca.gov/html/org/org.htm> (last updated May 9, 2006). For simplicity, this Note uses the term "state" to refer to all state, local, tribal, and territorial air pollution control offices that implement the Clean Air Act.

regulations, permitting programs, pollution control orders, and other policies to bring the area into attainment.²⁵

A. *The SIP Revision and Approval Process*

When EPA adopts a major change to the federal program, it may issue a SIP “call,” requiring all states to revise and resubmit their SIPs for EPA approval.²⁶ The Clean Air Act requires states to adopt revisions to their SIPs following “reasonable notice and public hearing.”²⁷ States have different procedures for amending their SIPs; some can do so administratively, while others need legislative approval. Once a state has submitted a SIP revision, EPA has one year to review the plan for completeness.²⁸ EPA can suggest changes if it finds the SIP inadequate²⁹ and can approve parts of a SIP while it continues to work with the state to address the inadequate components.³⁰ EPA can disapprove a SIP that it finds to be “substantially inadequate to attain or maintain the relevant [NAAQS] . . . or to otherwise comply with any [applicable] requirement,”³¹ or if the revision would interfere with the state’s progress towards attainment.³² However, EPA cannot condition approval of a SIP on the plan’s inclusion of specific control measures.³³ If EPA disapproves a SIP revision, the state has up to eighteen months to correct the deficiency³⁴ before EPA can impose sanctions.³⁵ If EPA intends to approve a SIP revision, the agency publishes a notice in the Federal

25. See 42 U.S.C. § 7502(c).

26. See *id.* § 7410(k)(5). For instance, when EPA issued a rule in 1998 to address interstate transport of the ozone precursor NO_x, it declared the SIPs of twenty-two eastern states and the District of Columbia inadequate and required these states to adopt a program to address NO_x pollution—commonly known as the “NO_x SIP Call.” See Finding of Significant Contribution and Rulemakings for Certain States in the Ozone Transport Assessment Group Region, 63 Fed. Reg. 57,356, 57,367 (Oct. 27, 1998) (codified in relevant part at 40 C.F.R. § 51.121).

27. See 42 U.S.C. § 7410(h) (2006). See Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 40 C.F.R. § 51.102 (2006).

28. See 42 U.S.C. § 7410(k)(2).

29. See *id.* § 7410(k)(5).

30. See *id.* § 7410(k)(3)–(4). EPA can only partially approve SIPs if it can approve the balance of the SIP within a year. *Id.*

31. *Id.* § 7410(k)(5). EPA’s criteria for approval of SIPs are found in 40 C.F.R. pt. 51.

32. See 42 U.S.C. § 7410(h).

33. See, e.g., *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) (“[S]o long as the ultimate effect of a State’s choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”); *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 589 (5th Cir. 1981) (characterizing EPA’s attempt to force Florida to adopt a certain provision as “clearly an abuse of discretion” and “agency action beyond the Congressional mandate.”); *Virginia v. EPA*, 108 F.3d 1397, 1406 (D.C. Cir. 1997) (holding that EPA could not condition approval of Virginia’s SIP on the inclusion of a specific ozone-reduction strategy).

34. 42 U.S.C. § 7410(k)(5) (2006).

35. *Id.* § 7410(m).

Register and accepts comments before finalizing its approval.³⁶ Challenges to EPA's decision on a SIP are heard by the court of appeals in the circuit in which the state is located.³⁷

To demonstrate the adequacy of their SIPs, states may use air quality models to predict how their control measures, emissions limitations, anticipated economic growth, and hundreds of other factors will affect the state's ability to achieve or maintain the NAAQS.³⁸ States are required to incorporate the elements of the federal NSR program, sometimes referred to as the "base program," or more stringent alternatives.³⁹ Thus, EPA must look not only at whether the state will meet air quality goals, but also at what mechanisms the state will use and whether these are equivalent to the federal base program.

B. *New Source Review*

Dissatisfied with the nation's progress toward achieving and maintaining the NAAQS, the 1977 Clean Air Act amendments created a pre-construction review process for new and modified sources in both attainment and non-attainment areas.⁴⁰ To obtain a Prevention of Significant Deterioration (PSD) permit, a new or modified source must analyze the project's air quality impacts and install stringent pollution control technology. Facilities in non-attainment areas face additional requirements, such as the need to obtain offsets equal to the proposed emissions increase in order to obtain a New Source Review (NSR) permit.⁴¹ The 1977 amendments required each state to develop an NSR

36. See, e.g., Approval and Promulgation of Implementation Plans; New Source Review; State of Nevada, Clark County Department of Air Quality Management, 69 Fed. Reg. 31056 (June 2, 2004) (proposed rule with thirty-day comment period); 69 Fed. Reg. 54,006 (Sept. 7, 2004) (final rule) (codified at 40 C.F.R. pt. 52).

37. 42 U.S.C. § 7607(b).

38. *Id.* § 7511a(c)(2)(A).

39. See, e.g., 40 C.F.R. § 51.156(a)(1), (2)(ii) (noting that states must adopt programs containing identical definitions and applicability provisions, respectively, unless the alternative element is "more stringent, or at least as stringent"). EPA and the petitioners refer to the set of elements that the states must include in their SIPs as the "base program." See Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR), 67 Fed. Reg. 80,186, 80,241 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51 & 52).

40. 42 U.S.C. §§ 7470-7492 (2006). The program is known as Prevention of Significant Deterioration (PSD) in attainment areas and as New Source Review in non-attainment areas, but in practice, both are referred to as New Source Review. See *New York v. EPA*, 413 F.3d 3, 16 (D.C. Cir. 2005). This Note follows this convention except where a distinction between the two programs is necessary.

41. In attainment areas, a PSD permit imposes emissions limitations are known as Best Available Control Technology (BACT). 42 U.S.C. § 7479(3). In non-attainment areas, a more stringent emission standard known as Lowest Achievable Emissions Rate (LAER) applies. *Id.* § 7501(3). See Inho Choi, *Is the U.S. Environmental Protection Agency's Revised New Source Review Rule Moving in the Right Direction?: A Deepened New Source Bias, and the Need for*

permitting program that EPA approves as part of its SIP, or to implement all or part of the federal NSR permitting program directly.⁴² Under Clean Air Act section 116, states are free to establish regulations for stationary sources that are more stringent than EPA's.⁴³

Much of the controversy with NSR derives from meaning of "modification." Congress defined modification as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."⁴⁴ *New York v. EPA* involves a dispute over the meaning of the term "increases."⁴⁵

Congress created NSR to ensure that over time, cleaner sources would replace existing sources and that existing sources would be forced to install stringent pollution control technology as they made modifications necessary to continue operating.⁴⁶ NSR has not worked quite as anticipated.⁴⁷ Industry has avoided replacing existing sources because such "grandfathered" facilities are significantly less expensive to operate.⁴⁸ Because of the difficulty and expense of obtaining NSR permits, a regulated source that is considering a modification has every incentive to avoid triggering NSR.⁴⁹ Instead of closing outdated facilities, companies have gradually rebuilt these facilities in a piecemeal fashion that allows them to avoid NSR.⁵⁰ As a result, facilities that Congress expected would be obsolete after a few years are still operating three decades later⁵¹ and remain grandfathered out of modern pollution control requirements.

Pursuing Sustainable Energy Development in Air Pollution Control Law, 35 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,316, 10,317-18 (May 2005).

42. Fifteen states have chosen this latter option. See EPA, Map of Prevention of Significant Deterioration Permit Program Status, Mar. 2006, available at <http://www.epa.gov/oar/nsr/where.html>.

43. 42 U.S.C. § 7416 (2006).

44. *Id.* § 7411(a)(4).

45. See Brian Potts' Article on *Duke Energy Corp. v. EPA*, also in this Annual Review, for discussion of another dispute over this provision. Brian Potts, *The U.S. Supreme Court's New Dukedom: The Hour and Year, or a Proposal Quite Near*, 33 *ECOLOGY L. Q.* 517 (2006).

46. See Arnold W. Reitze Jr., *New Source Review: Should It Survive?*, 34 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,673, 10,673 (July 2004). *But see* Denial of Petitioner for Reconsideration of the Routine Maintenance Exception, 70 *Fed. Reg.* 33,838 (June 10, 2005) (observing that the notion that Congress intended that all existing sources would trigger NSR or fall into disrepair is in conflict with the plain statutory language of the routine maintenance and repair provision).

47. See Kettl & Keiner, *supra* note 17, at 21.

48. See Choi, *supra* note 41, at 10,316; David G. Mandelbaum, *Thoughts on the Bush Clean Air "Strategy" so far and a Suggestion for What Might Work*, 21 *TEMP. ENVTL. L. & TECH. J.* 1, 5 (2002).

49. See Choi, *supra* note 41, at 10,319.

50. See Nathaniel Lord Martin, Note, *The Reform of New Source Review: Toward a More Balanced Approach*, 23 *STAN. ENVTL. L.J.* 351, 363 (2004).

51. See *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976).

C. Pressure for NSR Reform

In response to these problems, EPA began reassessing NSR in 1992.⁵² EPA published a set of proposed changes to the rule in 1996, and two years later issued a supplemental notice presenting new information and requesting additional comments.⁵³ The rule changes then stalled for a few years until increased enforcement activity stirred political opposition to the NSR program. Electric utilities and other industry groups facing major financial penalties and expensive compliance plans pushed the new Bush administration to reform NSR.⁵⁴ In response to an Energy Policy Development Group recommendation that EPA comprehensively reevaluate NSR, EPA undertook a ninety-day NSR review and committed to finalize some of the elements of the 1996 proposal.⁵⁵ Six months after the release of EPA's review, on December 31, 2002, the agency published final changes to the rule—the first substantive revision of the NSR program in over two decades. Several states and environmental groups filed administrative petitions in 2003 asking EPA to reconsider the rule, but EPA granted reconsideration on only six issues and ultimately made no substantive changes.⁵⁶

II. NEW YORK V. EPA

The same day EPA promulgated the new NSR rules a group of nine states filed a joint petition for judicial review.⁵⁷ Several industry groups,

52. See *New York v. EPA*, 413 F.3d 3, 16 (D.C. Cir. 2005); see also Choi, *supra* note 41, at 10,319.

53. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR), 61 Fed. Reg. 38,249 (July 23, 1996) (notice of proposed rulemaking); Notice of Availability; Alternatives for New Source Review (NSR) Applicability for Major Modifications; Solicitation of Comment, 63 Fed. Reg. 39,857 (July 24, 1998).

54. See *supra* note 5.

55. EPA, NSR 90-DAY REVIEW BACKGROUND PAPER (2001), available at <http://www.epa.gov/oar/nsr/documents/nsr-review.pdf>. The December 2002 rule did not contain the "equipment replacement provision" (ERP) that would have created an exemption from NSR for replacement of components that cost less than 20 percent of the replacement value of the unit. See 68 Fed. Reg. 61,248, 61,270 (Oct. 27, 2003). EPA had included the ERP in the proposed rule, but severed it after public comments indicated that it was highly controversial. New York and other states challenged the ERP separately. The D.C. Circuit stayed the ERP, something it declined to do with the December 2002 rule. *New York v. EPA*, 2003 U.S. App. LEXIS 26520 (D.C. Cir. Dec. 24, 2003). On March 17, 2006, the D.C. Circuit vacated the ERP as inconsistent with the clear meaning of the relevant statutory terms. *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

56. Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Reconsideration, 68 Fed. Reg. 63,021 (Nov. 7, 2003). Environmental petitioners included the Natural Resource Defense Council, Earthjustice, the Clean Air Task Force, and Environmental Defense.

57. See *supra* note 5 for a list of the states. Pennsylvania, the District of Columbia, the California Air Resources Board, and six California air quality management districts filed separate petitions. 42 U.S.C. section 7607(b)(1) requires that petitions for review of EPA actions

other states and special interest groups intervened, participated as *amici*, or filed their own challenges that were consolidated with those of the states. The D.C. Circuit's opinion, published on June 23, 2005, ultimately upheld most of EPA's 2002 rule.⁵⁸

EPA's 2002 changes to the NSR program can be divided into five categories: the actual-to-projected-actual test, the ten-year lookback period, the demand growth exclusion, the plant-wide applicability limits, and the Clean Units and Pollution Control Projects exclusions. Taking each of these changes in turn, this section describes the new provisions, the petitioners' challenges, and the court's decisions.⁵⁹ Though this Note focuses on a jurisdictional aspect of the court's decision and its aftermath,⁶⁰ a grasp of the substance of EPA's 2002 rule and the court's rationale is useful in understanding the prospects for future litigation by states and environmental groups.

A. *Actual-to-Projected-Actual Test*

Modification of an existing source triggers NSR when it "increases the amount of any air pollutant emitted."⁶¹ Since 1992, electric utilities have been required to establish a modification-induced "increase" by comparing actual baseline emissions with projected actual post-modification emissions (the actual-to-projected-actual test).⁶² However, a non-utility source was subject to NSR requirements if its potential-to-emit exceeded its baseline actual emissions (the actual-to-potential test).⁶³ The 2002 rule smoothes out this difference by giving all sources the

must be filed in the D.C. Circuit Court of Appeals. Thus, there is no district court opinion in this case.

58. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

59. This Note focuses on the challenges brought by state and environmental petitioners, rather than those raised by industry, because these are the aspects of the rule that these parties are most likely to again resist through section 116 and 193 claims.

60. See *infra* Part F for a description of the court's jurisdictional holdings.

61. 42 U.S.C. § 7411(a)(4) (2006).

62. See Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 57 Fed. Reg. 32,314 (July 21, 1992) (the "WEPCO" rule). In *Wisconsin Electric Power Co. (WEPCO) v. Reilly*, 893 F.2d 901 (7th Cir. 1990), the court questioned EPA's use of a new unit's "potential to emit" to determine whether the new unit would amount to an "increase in actual emissions from a particular physical change or change in method of operation." *Id.* at 916 (quoting 40 C.F.R. § 52.21(b)(3)(i)(a)). The court held that the agency's existing regulations did not support the use of "potential to emit," which assumes continuous operation of the unit. *Id.* at 918. EPA's 1992 WEPCO rule adjusted its methodology for calculating emissions increases from utilities, but deferred similar changes for non-utility sources because predictions about the future actual emissions from other sources are more difficult than for utilities. See 57 Fed. Reg. at 32,333.

63. See WEPCO Rule, 57 Fed. Reg. at 32,333; Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects 67 Fed. Reg. 80,186, 80,188 (Dec. 31, 2002).

option to estimate future emissions based on projected actual emissions instead of potential emissions.⁶⁴

Petitioners did not challenge this aspect of the rule, but did argue that EPA required inadequate record keeping of the actual post-modification emissions. EPA's 2002 rule does not require sources that choose the actual-to-projected-actual test to keep records to demonstrate that future actual emissions are not higher than projected, unless the source believes that there is a "reasonable possibility that [a] project . . . may result in a significant emissions increase."⁶⁵ The court agreed with petitioners that the "reasonable possibility" scheme denies enforcement authorities the evidence they need to verify a source's projections and confirm the source's determination about NSR applicability,⁶⁶ and remanded this provision to EPA to explain how the "reasonable possibility" exception does not undermine the agency's enforcement capabilities.⁶⁷

B. Ten-Year Lookback Period

The 2002 rule allows sources to define their baseline actual emissions using data from any continuous twenty-four month period within the previous ten years, referred to as the "lookback period."⁶⁸ Previously, permitting authorities required emitters to use the most recent emissions data unless the source could demonstrate that another twenty-four months from the preceding five years were more representative of normal operating conditions.⁶⁹ EPA justified extending the lookback period to ten years by noting that the longer time period enables a source to choose the baseline it finds most representative of its projected post-modification production levels.⁷⁰

Environmental and state petitioners argued that allowing sources to establish their baseline emissions using data from a ten-year lookback period without the obligation to show that these older emissions data are more representative is an impermissible interpretation of the statutory

64. See 67 Fed. Reg. at 80,279. Environmental groups have criticized the actual-to-projected-actual test because a unit's actual emissions will always be less than (at most equal to) its potential emissions (potential-to-emit), so the actual-to-projected-actual test makes NSR less frequent and may underestimate increases in a source's future emissions.

65. *Id.*

66. See *New York v. EPA*, 413 F.3d 3, 35–36 (D.C. Cir. 2005).

67. *Id.* at 35. Because sources can adjust both their pre- and post-modification emissions calculations, a paper trail is necessary for enforcement authorities to determine the reasonableness of these adjustments. See *id.* at 35–36.

68. 67 Fed. Reg. at 80,191, 80,193. A source must adjust its baseline to reflect any legally enforceable emissions limitations that have been imposed since the baseline period. *Id.* at 80,278.

69. See 45 Fed. Reg. 52,676, 52,737 (Aug. 7, 1980) (codified at 40 C.F.R. § 52.21(b)(21)(ii)); see also *New York v. EPA*, 413 F.3d 3, 24 (D.C. Cir. 2005).

70. *New York*, 413 F.3d at 24–25.

term “increases.”⁷¹ Petitioners contend that this term unambiguously requires a comparison of the most immediate pre-modification emissions level to the post-modification levels.⁷² EPA countered that the immediate pre-modification emissions level may not be representative of normal operating conditions and therefore not sufficiently analogous to the “after” period to allow a rational comparison.⁷³ EPA argued that eliminating this requirement would promote administrative efficiency, reduce the uncertainty that prevented sources from making changes during times of low production, and encourage voluntary pollution control or prevention projects.⁷⁴ Applying *Chevron* deference, the court held that Congress expressed no clear intent regarding calculation of emissions “increases,”⁷⁵ and that EPA’s construction of “increases” was permissible because it adequately “balanc[ed] the economic and environmental goals of the statute.”⁷⁶

Petitioners also challenged the lookback period as arbitrary and capricious because a higher baseline decreases the likelihood that a given modification will trigger NSR, allows sources to increase their emissions, and therefore harms air quality and public health.⁷⁷ EPA acknowledged that fewer modifications would trigger NSR but claimed that there would be no net harm because the changes would remove regulatory disincentives to implement voluntary efficiency improvements that reduce emissions.⁷⁸ Specifically, the agency was concerned about sources whose production levels had decreased in recent years having lower baselines and therefore less flexibility to make changes to their processes that might result in emissions increases.⁷⁹ The court again deferred to EPA, concluding that the arbitrary and capricious standard of review

71. 42 U.S.C. § 7411(a)(4) (2006); *see also New York*, 413 F.3d at 22.

72. *See New York*, 413 F.3d at 22.

73. *See id.* at 23.

74. *See id.* at 24–25.

75. *Id.* at 27.

76. *Id.* The court observed that “EPA is entitled to balance environmental concerns with economic and administrative concerns, at least to a point,” citing *Chevron* as primary judicial recognition that NSR represented Congress’ accommodation of the competing “economic interest in permitting capital improvements to continue and the environmental interest in improving air quality.” *Id.* at 26 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 851 (1984)).

77. *Id.* Petitioners also challenged the length of the lookback period. EPA’s rationale for a ten-year period was that it would cover the business cycle of most industries, allowing the source to select the most representative data as its baseline. The court agreed that EPA could generalize about the length of the business cycles in affected industries in order to “avoid the administrative burden of determining ‘representative’ baselines on a case-by-case basis.” *Id.* at 26.

78. *Id.* at 28. EPA also argued that because NSR is not the primary mechanism for reducing emissions from existing sources, the effects of NSR on achievement of the NAAQS were negligible. *Id.*

79. *Id.*

allows agencies “considerable latitude to exercise its expertise through reasoned projections.”⁸⁰ Nevertheless, the court expressed some skepticism given the lack of data underlying EPA projections of environmental impact, and noted that there was a “heightened need for EPA to have sufficient data to confirm that the remaining portions of the 2002 rule do not result in increased emissions.”⁸¹

C. Demand Growth Exclusion

The 2002 rule also allows sources that use projected actual emissions to subtract any emissions that are projected to result solely from increased utilization of the unit to meet growing demand.⁸² This “demand growth exclusion” applies to emissions that are unrelated to the modification—those that result from an increase in utilization—and does not apply to emissions that exceed what the unit could have emitted during the baseline (pre-modification) period.⁸³ In an earlier rulemaking stage, EPA had expressed skepticism about this exclusion because of the difficulty of separating out emissions increases enabled by the modification from those that are simply the result of increased utilization.⁸⁴ The court rejected the state and environmental petitioners’ argument that EPA’s shift was unsubstantiated, finding that the demand growth exclusion was a logical outgrowth of EPA’s earlier statements.⁸⁵

D. Plant-wide Applicability Limits (PALs)

The 2002 rule introduced the plant-wide applicability limit (PAL),⁸⁶ which is a source-wide emission cap similar to the “bubble” concept litigated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸⁷ A source operating under a PAL can increase emissions by modifying a single unit but avoid NSR by making offsetting reductions elsewhere that are sufficient to prevent net emissions from increasing

80. *Id.* at 30 (citing *Natural Res. Def. Council, Inc. v. EPA*, 655 F.2d 318, 336 (D.C. Cir. 1981)).

81. *Id.* at 31.

82. 67 Fed. Reg. 80,186, 80,192 (Dec. 31, 2002).

83. *New York v. EPA*, 413 F.3d 3, 16, 33 (D.C. Cir. 2005).

84. *See* 63 Fed. Reg. 39,857, 39,860 (July 24, 1998) (notice of availability) (announcing the agency’s “tentative conclu[sion]” that the demand growth exclusion was “not appropriate . . . in view of recent developments in the electric power sector”).

85. *See New York*, 413 F.3d at 31–32; *see also* 67 Fed. Reg. at 80,192.

86. *See* 67 Fed. Reg. at 80,206. Prior to the 2002 rule, EPA had allowed a limited number of sources to operate under PALs as part of a pilot program.

87. 467 U.S. 837 (1984). *Chevron* involved whether EPA could define “stationary source” under the Clean Air Act to encompass all the emissions sources from a particular facility, rather than regulating each emissions source independently. *Id.* at 839.

above the PAL.⁸⁸ The PAL lasts for ten years before it must be reevaluated.⁸⁹ EPA's regulations already allowed a source making a modification that results in a significant increase in emissions to avoid NSR by netting all "contemporaneous" emissions increases and decreases, which EPA defines as those that have occurred in the five years preceding the modification.⁹⁰ The PAL allows sources to monitor source-wide emissions rather than demonstrating that they have "netted out" of NSR for each modification, thereby reducing the delay and cost associated with case-by-case netting analysis.⁹¹

State and environmental petitioners argued that the ten-year PAL term violates the five-year contemporaneity requirement and is otherwise arbitrary and capricious. Environmental petitioners contended that the ten-year PAL term violates the contemporaneity requirement by allowing sources to "net out" emissions reductions that occurred more than five years prior to the modification in question.⁹² The court held that EPA's broad discretion to determine the contemporaneity period enables the agency to allow netting over a ten-year period for PALs.⁹³ EPA found that PALs benefit the environment because they capture "insignificant emissions increases that currently escape NSR" and encourage sources to reduce emissions to "create enough headroom for future expansions."⁹⁴ The court accepted EPA's conclusion despite the agency's confessed inability to "quantify the 'aggregate environmental impacts'" or benefits of pilot PALs at six facilities.⁹⁵

88. 67 Fed. Reg. at 80,207-09; *see also New York v. EPA*, 413 F.3d 3, 36 (D.C. Cir. 2005). At the same time, if the source makes a series of smaller modifications that would not individually trigger NSR, the collective emission increases may exceed the PAL and require an NSR permit.

89. *New York*, 413 F.3d at 36. EPA rules allow a source to select emissions data from any time during the ten-year lookback period as the baseline for its PAL. *Id.*

90. *See* 40 C.F.R. § 52.21(b)(3)(i) (2006) (describing the netting requirements). In *Alabama Power v. Costle*, the D.C. Circuit held that EPA had "discretion, within reason, to define which changes are substantially contemporaneous." 636 F.2d 323, 402 (1979). EPA then established the five-year period through rulemaking. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 45 Fed. Reg. 52,676, 52,736 (Aug. 7, 1980) (codified at 40 C.F.R. § 52.21(b)(3)(ii)).

91. *New York*, 413 F.3d at 37 (noting EPA's position that the PAL will reduce "administrative friction").

92. *Id.* at 36. For example, if a source establishes a PAL at a certain level in 2006 and immediately cuts emissions from one of its units, the source could increase emission from another unit by the same increment until 2016. Without a PAL, the facility would only be able to credit the emissions reduction against increases occurring before 2011.

93. *Id.* at 37. *See supra* note 90.

94. *Id.* at 37. *See* Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR), 67 Fed. Reg. 80,186, 80,206 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51 & 52).

95. *New York v. EPA*, 413 F.3d 3, 37-38 (D.C. Cir. 2005) (quoting NEW SOURCE REVIEW (NSR) IMPROVEMENTS: SUPPLEMENTAL ANALYSIS OF THE ENVIRONMENTAL IMPACT OF THE 2002 FINAL NSR IMPROVEMENT RULES 4-5 (2002)).

E. Clean Units and Pollution Control Projects

The fifth major provision is an exemption for “Clean Units,” defined as any unit that has undergone NSR in the past ten years or that has control technology and allowable emissions consistent with an NSR permit.⁹⁶ These units are exempt from NSR for ten years, regardless of whether a subsequent modification increases emissions.⁹⁷ Petitioners argued that the Clean Unit exception determines NSR applicability based on post-modification “allowable emissions,” rather than actual emissions.⁹⁸ The court agreed that the Clean Unit provision was contrary to the plain language of the statute, noting that the Clean Air Act repeatedly distinguishes between actual and allowable emissions, and that the definition of modification is clearly concerned with changes in actual emissions.⁹⁹

The court struck down EPA’s exemption for pollution control projects (PCPs) on similar grounds. EPA defines PCPs as modifications that reduce emissions of one pollutant but increase those of another.¹⁰⁰ EPA conceded that the PCP provision was contrary to the plain language of the Clean Air Act, but argued that Congress did not intend to make PCPs subject to NSR, because a PCP’s “net effect is environmentally beneficial.”¹⁰¹ The court rejected EPA’s argument that it would be absurd for Congress to subject environmentally beneficial projects to NSR, noting that Congress could have reasonably decided that allowing increases in certain emissions associated with reductions in another involved tradeoffs too subjective to justify exemption from NSR.¹⁰² The court held that EPA had no delegation from Congress to create administrative exceptions to NSR and vacated the PCP portions of the rule.¹⁰³

F. Alternative NSR Provisions and Backsliding

After setting out the new NSR applicability provisions, EPA stated that approvable SIPs “must include today’s changes as minimum program elements” because the agency “belie[ves] that the NSR program will work better as a practical matter and will produce better environmental

96. See 67 Fed. Reg. at 80,189–90; see also *New York*, 413 F.3d at 38–39.

97. *New York*, 413 F.3d at 38–39.

98. *Id.* at 39.

99. *Id.* at 39–40.

100. See 67 Fed. Reg. at 80,232.

101. See *id.* at 40; see also 67 Fed. Reg. at 80,190.

102. *New York v. EPA*, 413 F.3d 3, 41 (D.C. Cir. 2005).

103. See *id.* at 41–42.

results if all five of the new applicability provisions are adopted.”¹⁰⁴ The preamble reassures states that they still have the freedom to customize their NSR programs, but notes that “the review and approval process will be more complicated for States that choose to adopt a program that differs from our base programs.”¹⁰⁵

These statements gave rise to two claims by the state petitioners.¹⁰⁶ First, they claimed that EPA’s statement violated section 116, which allows states to adopt alternative, but not less stringent, standards.¹⁰⁷ Second, the states claimed that the new rules violated section 193, the anti-backsliding provision, which prevents EPA from changing the control requirements in a non-attainment area unless the new requirements will achieve equivalent or greater emissions reductions. The court dismissed both of these claims as unripe,¹⁰⁸ using the two-step *Abbott Labs* analysis, which asks whether each issue is fit for judicial review and whether there is any hardship to the parties from delaying each issue’s consideration.¹⁰⁹

1. Section 116 Claim

None of the parties disputed that section 116 grants states the authority to adopt standards above EPA’s regulatory floor.¹¹⁰ Rather, the section 116 claim arose because the states sought a judgment that because the new provisions were, on their face, less stringent than the old rules. If this were true, then EPA could not disapprove the more stringent NSR programs in existing SIPs, several of which incorporate the former federal NSR program by reference or nearly verbatim.¹¹¹ Rather than contesting this claim on the merits, EPA argued that it was unfit for judicial review

104. Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR), 67 Fed. Reg. 80,186, 80,240–41 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51 & 52).

105. *Id.* at 80,241.

106. *New York*, 413 F.3d at 42–44.

107. *Id.* at 42.

108. *Id.*

109. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). While it is not entirely clear from the *Abbott Labs* statement of the rule, subsequent decisions suggest that both the fitness and hardship factors must be satisfied for a claim to be considered unripe. *See, e.g., Poe v. Ullman*, 367 U.S. 497 (1961) (finding entirely legal in nature and thus fit for judicial review, the question whether to overturn law criminalizing contraceptive sale and use); *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972) (unfit for judicial review despite hardship because factual record was inadequate).

110. *See* Brief for Respondent at 131, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (No. 02-1387) (“EPA is not only authorized, but in fact is required to approve a SIP that contains an NSR permitting program that is no less stringent than the base federal program, provided it otherwise meets all applicable requirements.”).

111. *See* Reply Brief for Government Petitioners at 22–23, *New York*, 413 F.3d 3 (D.C. Cir. 2005) (No. 02-1387); *see also infra* notes 142–150 and accompanying text (explaining EPA’s prior position on the definition of stringency for the purposes of section 116).

“without knowing the specifics of what a State submitted, whether EPA approved or disapproved that submission, and why EPA acted as it did.”¹¹² EPA noted that states’ programs would vary, and that to resolve the claim at this point would require the court to examine a large number of hypothetical scenarios.¹¹³

The court did not address the states’ argument that the EPA rule was *per se* less stringent, but instead focused on the states’ concern with the menacing language of EPA’s preamble.¹¹⁴ The court acknowledged the states’ concern that EPA would reject their alternative programs, but found “wobble room” in the language of the rule suggesting that EPA would not take such a drastic approach in reviewing SIPs.¹¹⁵ The court dismissed the claim as unripe, but noted that it would become justiciable if EPA rejected a SIP for failure to incorporate the new provisions.¹¹⁶ The court also concluded that this deferral would not cause any hardship for the states, who would not need to invest any resources in developing new SIPs because they could simply resubmit their existing SIP to test EPA’s response.¹¹⁷

2. Section 193 Claim

The state petitioners’ second claim was that the changes made NSR less “sweeping” and therefore constituted backsliding in violation of section 193.¹¹⁸ Section 193 bars EPA from modifying “any control requirement . . . in effect . . . in any non-attainment area” prior to 1990 unless the new control requirement insures “equivalent or greater emissions reductions.”¹¹⁹ The state petitioners contended that by making NSR less likely, EPA was altering a “control requirement” in a way that does not insure “equivalent or greater emissions reduction” of an air pollutant.¹²⁰

EPA argued that the backsliding claim was unripe because it was predicated on the “assum[ption] that States will have no ability to adopt

112. Brief for Respondent, *supra* note 110, at 133.

113. *Id.*

114. *New York v. EPA*, 413 F.3d 3, 43 (D.C. Cir. 2005).

115. *Id.* at 42–43.

116. *Id.*

117. *Id.* at 43 (noting that because the states “offer[ed] no hypotheticals of new provisions that they might adopt, simple resubmission of an existing plan for EPA approval would (if rejected) present their challenge in a plainly justiciable form, imposing neither the hardship of developing new plans nor sacrifice of any as-yet apparent state policy preference.”).

118. 42 U.S.C. § 7515 (2006); *New York*, 413 F.3d at 43.

119. 42 U.S.C. § 7515. See *infra* notes 186–193 and accompanying text for discussion on whether section 193 would apply to NSR.

120. *New York v. EPA*, 413 F.3d 3, 43 (D.C. Cir. 2005).

NSR applicability tests that differ from those in the Rule.”¹²¹ In other words, EPA had not *yet* “alter[ed] a control requirement” in a non-attainment area. The states countered that EPA’s rule compelled them to adopt the new provisions and suggested that the court could “readily compare EPA’s new and old base programs.”¹²²

The court held the section 193 claim unripe, but on a different basis from the section 116 claim. The court held that the section 116 claim was unripe because EPA had not yet rejected a SIP, but did *not* find the section 193 claim unripe because EPA had not taken the action that was forbidden by the Clean Air Act: “alter[ing] a control requirement.” Instead, the court found that the claim was not fit for judicial review because it lacked an “adequate factual record.”¹²³ The court observed that while more sweeping NSR will “tend to assure improved emission controls on qualifying modifications, [it] may also deter change and thereby preserve firms’ use of older, dirtier technologies.”¹²⁴ The court announced that it was “in no position to say which effects predominate[d],” particularly given its vacatur of the Clean Unit and Pollution Control Project provisions, and then suggested that an adequate factual record might be developed “in the course of a state’s quest for approval of a SIP meeting the old criteria.”¹²⁵

III. STATE RESPONSE AND THE SHAPE OF FUTURE SECTION 116 AND 193 CLAIMS

The court’s deferrals leave the states with little guidance on how to respond to EPA’s rulemaking. The court did not clarify how EPA should address the stringency of states’ alternative programs. Nor can a state that wishes to avoid controversy simply acquiesce to EPA’s preferences, because doing so risks a backsliding challenge brought by an outside group. The tepid approval of EPA’s rule coupled with the ripeness deferrals renders the *New York v. EPA* decision ineffective in resolving many difficult questions. This Section describes states’ reactions to the decision, anticipates the issues that will be critical in future section 116 and 193 claims, and explains how these claims will revive the factual and legal arguments underlying EPA’s 2002 rule and the D.C. Circuit’s decision.

121. Brief for Respondent, *supra* note 110, at 134 n.76 (arguing that the backsliding claim is unripe for the same reason as the section 116 claim).

122. Reply Brief for Government Petitioners, *supra* note 111, at 25.

123. *New York*, 413 F.3d at 43–44.

124. *Id.* at 43.

125. *Id.* at 44. Despite the court’s expressed misgivings about the air quality impacts of the overall NSR rule, remand was not appropriate on the section 193 claim because EPA had not yet taken any action based on its predictions about the overall impacts. The general message of EPA’s preamble is that the provisions would produce air quality benefits when implemented together, but at the time of the decision, no agency action rested on this conclusion.

A. State Response

Though the court suggests that the petitioners' section 116 claim "may yet prove to be a hypothetical issue,"¹²⁶ the responses of many states to date foreshadow conflict. Only three months after promulgation, the new applicability provisions became effective in states that directly implement the federal PSD program under delegation agreements.¹²⁷ The transition has not been smooth. Massachusetts withdrew from its delegation agreement with EPA in June 2003,¹²⁸ and New York and New Jersey told EPA that they would not apply any of the new applicability provisions.¹²⁹ In April 2003, EPA withdrew PSD delegation from the majority of California's air districts and one in Nevada because authorities in those districts claimed that they were incapable of implementing the new rules without changes in state or local law.¹³⁰

EPA's rule required states with their own EPA-approved NSR programs to revise their SIPs and make a new adequacy determination by January 2, 2006.¹³¹ Colorado, Kentucky, and Missouri have already revised their SIPs to include the new regulations, and EPA has published proposed approvals for these states in the Federal Register.¹³² Several states have announced that they will not adopt the provisions of the 2002 rule, setting the stage for section 116 claims if EPA rejects these SIPs. Shortly after EPA withdrew PSD program delegation from California's air districts, California enacted the Protect California Air Act of 2003, prohibiting California air districts from making their non-attainment NSR programs less stringent than the pre-2002 federal rules.¹³³ As of March 2006, six northeastern states had indicated that they would adopt alternative programs.¹³⁴ For example, New Hampshire adopted most of

126. *Id.* at 43.

127. See Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR), 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51 & 52); Steve Cook, *Amendments to Enforcement Program Formally Applied to 11 Delegated States*, 34 Env't Rep. (BNA) 582 (Mar. 14, 2003); see also *supra* note 11.

128. Notice of Ending of Delegation Agreement Between EPA and Massachusetts Department of Environmental Protection, 68 Fed. Reg. 35,881 (June 17, 2003).

129. Martineau & Stagg, *supra* note 4, at 9.

130. Notice of Withdrawal of Delegation of Authority, 68 Fed. Reg. 19,371 (Apr. 21, 2003).

131. 67 Fed. Reg. at 80,240–41. This date is three years from the finalization of the NSR reforms.

132. See, e.g., Approval and Promulgation of Implementation Plans, 71 Fed. Reg. 19,467, 19,468–49 (Apr. 14, 2006) (Missouri); 71 Fed. Reg. 6988 (Feb. 10, 2006) (Kentucky); 70 Fed. Reg. 72,744 (Dec. 7, 2005) (Colorado). Kentucky's provisions became "state-effective" on July 14, 2004. 71 Fed. Reg. at 6990.

133. Protect California Air Act of 2003, Cal. Health & Safety Code §§ 42500–42507 (West 2006); see also Carolyn Whetzel & Laura Mahoney, *Governor Prepared to Sign Legislation to Maintain Strict New Source Review Rules*, 34 Env't Rep. (BNA) 2090 (Sept. 19, 2003).

134. See Stationary Source Review Comm., N.E. States for Coordinated Air Use Mgmt., New Source Review, <http://bronze.nescaum.org/committees/stationary/NSR> (last visited Aug. 15,

the PAL provisions, but not the actual-to-projected-actual emissions test or the ten-year lookback period.¹³⁵ Similarly, Massachusetts rejected the ten-year lookback period and maintained its preexisting five-year term for PALs.¹³⁶ All of these states except New Jersey were petitioners in *New York v. EPA*, so their alternative programs come as no surprise.

B. Clean Air Act Section 116: EPA Review of States' Alternative NSR Programs

When EPA reviews an alternative SIP provision, it requires an “equivalency demonstration” showing that the provision is at least as stringent as the corresponding federal rule¹³⁷—a demonstration that may be more or less demanding depending on the circumstances of a particular submittal.¹³⁸ Challenges to final EPA action approving or disapproving a SIP are brought in the court of appeals in the local circuit¹³⁹ and are reviewed under the arbitrary and capricious standard.¹⁴⁰

1. The States' Dilemma: The Meaning of Stringency

The states' predicament is that “stringency” is undefined in the NSR context. By deferring, the D.C. Circuit sidestepped the thorny undertaking of defining “stringency” and left the states with little guidance. Several states have expressed frustration with the lack of clear

2006). The states include Connecticut, New Jersey, New Hampshire, Rhode Island, Massachusetts, and Vermont.

135. See N.H. Dep't of Envtl. Servs., *Equivalency Demonstration: Comparison of State and Federal Non-Attainment and Prevention of Significant Deterioration Rules*, Jan. 3, 2006, at 4, [hereinafter “N.H. Equivalency Demonstration”] available at http://bronze.nescaum.org/committees/stationary/NSR/NH--NSR_Equivalency_Demonstration_doc.pdf. See *infra* text accompanying notes 153 and 178 for additional analysis of New Hampshire's Equivalency Demonstration.

136. See Enclosure to Letter from Robert Golledge, Jr., Comm'r, Mass. Dep't of Envtl. Prot., to Robert Varney, Reg'l Adm'r, EPA Region 1 (Dec. 30, 2005) [hereinafter “Mass. Equivalency Demonstration”], available at http://bronze.nescaum.org/committees/stationary/NSR/MA--final_equivalency_doc-DBS_DCS_final_doc.pdf.

137. See 40 C.F.R. § 51.165(a)(1) (2006).

138. See Brief for Respondent, *Duquesne Light Co. v. EPA*, 166 F.3d 609 (3d Cir. Oct. 26, 1998) (No. 98-3071), 1998 WL 34084103 at *20 [hereinafter “EPA Duquesne Brief”] (observing that EPA's regulations are silent on what constitutes an adequate demonstration and arguing that the court should defer to the agency's interpretation of those regulations).

139. 42 U.S.C. § 7607 (2006).

140. See, e.g., *Hall v. EPA*, 273 F.3d 1146 (9th Cir. 2001) (reviewing EPA's approval of certain stationary source rules for Las Vegas); *Abramowitz v. EPA*, 832 F.2d 1071, 1074-75 (9th Cir. 1987) (reviewing EPA's proposed disapproval of California's SIP for the South Coast Air Quality Management District, and noting that “[f]inal administrative actions taken by the EPA pursuant to the Clean Air Act are reviewed under provisions similar to those set forth in the Administrative Procedure Act [§ 706(2)(A)].”); *Ober v. EPA*, 84 F.3d 304, 307 (9th Cir. 1996) (holding that EPA wrongly approved an Arizona SIP that did not separately address attainment of the 24-hour standard for particulate matter).

rules for how EPA or the courts would judge the stringency of their programs.¹⁴¹ This section explores two possible definitions for stringency: (a) the flexibility the provision provides for industry or (b) the provision's effect on emissions.¹⁴²

a. Equating Stringency with Inflexibility

EPA's prior litigating positions and the limited case law suggest that flexibility for industry is the measure of stringency.¹⁴³ In *Duquesne Light v. EPA*, the plaintiff company challenged EPA's approval of Pennsylvania's SIP because EPA had failed to sufficiently address the stringency of Pennsylvania's alternative definition of "actual emissions."¹⁴⁴ Like the pre-2002 federal NSR regulations, Pennsylvania allowed the permitting authority to select older baseline data if data from the most recent two-year period were not representative. Pennsylvania limited the lookback period to five years, while no similar limitation existed in the federal regulations at that time.¹⁴⁵ Duquesne challenged EPA's failure to require a formal stringency demonstration.¹⁴⁶ The Third Circuit dismissed the suit for lack of standing because Duquesne's requested relief, demonstration of stringency of Pennsylvania's definition, would not redress Duquesne's injury.¹⁴⁷ Duquesne's injury could only be

141. For example, Massachusetts' equivalency demonstration recounts the various strands of NSR litigation and notes that "[i]t is in this ongoing, legally unsettled, and incomplete process by EPA to revise NSR that states are required to . . . show[] how their current NSR rules are at least as stringent as the new federal NSR program." Mass. Equivalency Demonstration, *supra* note 136, at 3. A 2002 letter from the major state air pollution agency association, STAPPA/ALAPCO, expresses concern that "it is unclear . . . how EPA will judge [alternative] programs." Letter from Lloyd L. Egan & Ellen Garvey, Presidents, STAPPA/ALAPCO, to Christine Whitman, Adm'r, EPA 2 (July 15, 2002), available at <http://www.4cleanair.org/71502nsrletter.pdf>.

142. State equivalency demonstrations suggest a variety of ways of conceptualizing "stringency." See, e.g., R.I. Office of Air Resources, Rhode Island SIP Demonstration Document 1-2 (Dec. 29, 2005), available at http://bronze.nescaum.org/committees/stationary/NSR/RI--NSR_SIP_doc.pdf (arguing that its program is broader in scope such that more major modifications trigger NSR); New Jersey Equivalency Demonstration Attachment 2, at http://bronze.nescaum.org/committees/stationary/NSR/NJ--Attachment-2_doc.pdf (likelihood of triggering NSR requirements); N.H. Equivalency Demonstration, *supra* note 135, at 4-6 (examining emissions impacts on specific facilities).

143. The state petitioners in *New York v. EPA* alerted the court to an earlier EPA position on "stringency" in an effort to preemptively block the agency from declaring state re-submissions of the prior NSR provisions as inadequate. See Brief of State of New York at 47, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (No. 02-1387).

144. 166 F.3d 609, 613 (3d Cir. 1999).

145. *Id.* at 612. Compare to the current federal regulations that allow the source to select data from a ten-year lookback period without a demonstration of its representativeness. See 67 Fed. Reg. 80,186, 80,199 (Dec. 31, 2002).

146. 166 F.3d at 612. During the comment period, Duquesne had complained that EPA had failed to require Pennsylvania to demonstrate the stringency of its alternative definition. *Id.*

147. *Id.* at 613. Duquesne's injury was that the Pennsylvania definition would reduce the number of emission reduction credits that Duquesne could have sold. *Id.*

redressed if EPA compelled Pennsylvania to adopt the federal definition—an option out of EPA’s power if the Pennsylvania definition was in fact more stringent. The court held that that the greater stringency of Pennsylvania’s definition—a shorter lookback period—was “apparent on the face of the definition” because it allowed the source less flexibility in selecting their baseline data.¹⁴⁸

Duquesne Light is instructive not only for the court’s conception of stringency, but for how the posture of the case prompted EPA to define stringency. EPA’s briefing in *Duquesne Light* argues that a rule that increases industry flexibility is less stringent and that the stringency of definitions that “turn on clear quantitative terms” can be assessed without a formal demonstration.¹⁴⁹ EPA cited its own 1996 proposal for a ten-year lookback period, a proposal eventually finalized in the 2002 rule, as an example of a rule that decreased the stringency of the federal program.¹⁵⁰ Almost across the board, EPA’s new applicability provisions are intended to increase flexibility for industry. If EPA maintains its litigating position in *Duquesne Light* and continues to equate stringency with inflexibility, it must find several provisions of the 2002 rule less stringent and allow states to retain their preexisting provisions, particularly those that involve “clear quantitative terms.”

b. Equating Stringency with Air Quality Effects

In its brief to the D.C. Circuit in *New York*, EPA defined stringency in terms of air quality outcomes and environmental benefits, diverging from its position in *Duquesne Light*.¹⁵¹ EPA’s ability to defend its disapproval of a SIP against a section 116 claim is stronger if its definition of stringency focuses on air quality rather than flexibility for industry. Because the air quality effects of any NSR program are uncertain, courts are likely defer to EPA’s judgment about whether a state’s program will increase emissions relative to the new federal program, just as the D.C. Circuit did in *New York*. While the D.C. Circuit addressed a facial challenge and evaluated EPA’s nationwide assessment of emissions impacts, its deference on this precise subject will weigh heavily in the decisions of local circuits.

148. *Id.* at 613. *Duquesne* had conceded this point during the comment period. *Id.*

149. See EPA *Duquesne* Brief, *supra* note 138, at *21–22 (“The key part of the definition at issue in this case (the limitation on the ‘lookback period’) is quantitative; hence it needs no further justification to demonstrate the stringency of the definition and to support EPA’s approval of the SIP.”); see also Brief of State of New York, *supra* note 143, at 47.

150. EPA *Duquesne* Brief, *supra* note 138, at *22–23.

151. EPA argued that the new provisions were not less stringent because “taken collectively . . . [they] will be environmentally beneficial compared to the existing NSR program and will improve air quality.” Brief for Respondent, *supra* note 110, at 132 n.73.

Despite their resistance to an air quality-based definition of stringency before the D.C. Circuit,¹⁵² several states' NSR equivalency demonstrations adopt this course and illustrate how their alternative provisions, including shorter lookback periods, would decrease emissions relative to the federal program. Apparently these states did not want to rely on the position of all the parties and the court in *Duquesne Light* that a shorter lookback period was more stringent on its face. For example, the New Hampshire Equivalency Demonstration illustrates how a ten-year lookback period would result in higher emissions from one of the state's pulp mills than would the state's proposed five-year period.¹⁵³ Florida completed an empirical analysis of the new federal NSR program in January 2005,¹⁵⁴ reexamining a 180-source sample of historical projects in the state as though the new applicability provisions had been in effect, assigning a positive or negative net emissions effect, and then extrapolating to project state-wide emissions under the new program. The study concluded that the new applicability provisions would result in a net emissions increase amounting to less than 1 percent of the state's total emissions from stationary sources.¹⁵⁵ However, Florida noted that depending on where these new emissions occurred, marginal attainment areas could fall into non-attainment.¹⁵⁶

Not all states rely on empirical studies of air quality impacts to demonstrate the stringency of their programs. Several states, including Massachusetts, Connecticut, and New Jersey, simply argue that their programs are facially more stringent. For example, Connecticut argues that its method for determining baseline emissions—the most recent two years unless the source meets its burden of demonstrating that other data are more representative—is necessarily more strict than the federal ten-year lookback period that imposes no restrictions on the source's choice of baseline emission data.¹⁵⁷ Similarly, New Jersey uses basic algebra to demonstrate the equivalency of its alternative program.¹⁵⁸

152. See Reply Brief for Government Petitioners, *supra* note 111, at 22–23 & n.10 (opposing EPA's attempt to define stringency in terms of environmental benefit).

153. N.H. Equivalency Demonstration, *supra* note 135, at 5–7. When the mill installed a replacement boiler in 2002, New Hampshire used baseline emissions data from 1999 and 2000, and the facility was able to meet its requirements by shutting down two old boilers and installing BACT-equivalent technology. *Id.* at 6. If the facility had been able to use baseline data from 1992 and 1993, twice as high as the emissions in 1999 and 2000, the facility would not have had to install the BACT-equivalent technology. *Id.* at 7.

154. FLA. DEP'T OF ENVTL. PROT., IMPACTS OF NEW SOURCE REVIEW REFORM ON ACTUAL EMISSIONS IN FLORIDA (2005), available at <http://www.floridadep.org/air/rules/specialprojects/newsources/nrsreform/impacts.pdf>.

155. *Id.* at 30.

156. *Id.*

157. See Conn. Dep't of Env'tl. Prot., Technical Support Document Demonstrating the Stringency of the Connecticut New Source Review Program as Compared with the Federal New Source Review Program as Revised on December 31, 2002, at 6, [hereinafter Conn. Equivalency

Several states seek to differentiate the sources in their state from those considered by the EPA in order to explain why their preexisting program will be more stringent. Connecticut notes that the size and type of facilities that EPA considered in its environmental assessment of the 2002 rule are not typical for Connecticut, which has very little manufacturing.¹⁵⁹ Connecticut argues that its largest emitters are electric utilities that are tightly controlled by its utilities commission and are therefore unlikely to make the kinds of voluntary improvements on which the environmental benefits of the PAL are premised.¹⁶⁰ Vermont makes a similar argument, noting that the vast majority of its sources are well below the major source threshold, and therefore not well served by federal rules designed for large, complex sources.¹⁶¹

States have good reason to be concerned about demonstrating the equivalency of their alternative programs.¹⁶² EPA's 2002 rule makes abundantly clear that review of alternative programs will be resource-intensive.¹⁶³ The high cost of defending an alternative program may discourage states that would otherwise retain their existing programs. Aside from *Duquesne Light*, there are no judicial decisions reviewing an EPA stringency determination. The absence of litigation in this area may suggest that EPA and the states have simply been able to resolve their differences through the administrative process. However, the lack of

Demonstration] *available at* http://bronze.nescaum.org/committees/stationary/NSR/CT--NSR_Equivalency_TSD_doc.pdf.

158. New Jersey Equivalency Demonstration, *supra* note 142, at Appendix 2. New Jersey styles its argument as a "mathematical proof that a potential to actual test (EPA) is less stringent than a potential to potential test (New Jersey)." *Id.* at 5 (error in original).

159. Conn. Equivalency Demonstration, *supra* note 157, at 10.

160. *Id.* at 10.

161. Basis for Vermont's Decision to Retain its Existing NSR SIP Provisions at 3, [hereinafter Vt. Equivalency Demonstration] *available at* http://bronze.nescaum.org/committees/stationary/NSR/Vt-NSRanalysis_doc.pdf. Some states argue that the stringency of their programs should be judged more broadly, rather than just on the state's alternatives to each of the new federal applicability provisions. Connecticut and Vermont note that they have lower NSR thresholds and major source cutoffs, respectively, than the federal program. They argue that these provisions make their programs more stringent than the federal program, in addition to the emissions benefits of their alternative applicability provisions. *See* Conn. Equivalency Demonstration, *supra* note 157, at 7; Vt. Equivalency Demonstration, *supra* note 161, at 6.

162. One air district in California challenged the 2002 rule because of its concern about the difficulty of demonstrating the equivalence of its program to EPA. Carolyn Whetzel, *Southern California Air District Plans to Sue over Revised Rules for Large Facilities*, 34 *Env't Rep.* (BNA) 174 (Jan. 24, 2003). South Coast Air Quality Management District (SCAQMD) Executive Officer Barry Wallerstein has noted that "the SCAQMD has been in the difficult position of having to demonstrate equivalency before, and EPA has required a line-by-line comparison." *Id.* (internal quotations omitted).

163. 67 Fed. Reg. 80,186, 80,241 (Dec. 31, 2002) (noting that SIPs that do not contain the new applicability provisions will be scrutinized and may take longer to approve).

precedent on EPA's discretion in determining equivalency creates further uncertainty for states who would like to adopt alternative programs.

2. *EPA's Dilemma: Picking Its Battles*

EPA's problem is not just that states will adopt programs that they claim are more stringent. The problem is that the more stringent program they adopt may be the former federal program, or at least a piece of it, and that EPA will have to decide whether to approve the SIP, thereby passing judgment on the relative stringency of its new NSR program. By allowing some states to resist the new applicability provisions, EPA would avoid section 116 scrutiny of the new federal program. This scrutiny would be particularly uncomfortable for the agency if a court finds the old program is more protective of air quality than the new program. Such a ruling might cast doubt onto the application of those provisions elsewhere or encourage other states to adopt alternative programs as well. The publicity attending this litigation would be unwelcome, particularly as the agency tries to make additional changes to the federal NSR program.¹⁶⁴ Moreover, the new federal rules would still go into effect in those states that are enthusiastic about the new program and are home to a significant percentage of the nation's major sources.¹⁶⁵

On the other hand, declining to challenge states who defy EPA's new rule amounts to a concession that the new rules are less stringent than the prior federal program, which is also politically problematic. In front of the D.C. Circuit, EPA was adamant that the new provisions would improve air quality—a stance that could inhibit the agency from approving an unchanged state program depending on how EPA chooses to define stringency.¹⁶⁶

It is also possible that industry groups in states with unchanged programs may force the issue by seeking to compel EPA to examine the alternative state program, as in *Duquesne Light*. While EPA may be able

164. See *infra* notes 209–210.

165. Assuming environmental groups would sue under section 193 to block implementation of the federal program, such a claim could at most, prevent implementation of the new provisions only in non-attainment areas. See EPA, GREEN BOOK, CRITERIA POLLUTANT REPORTS, available at <http://www.epa.gov/oar/oaqps/greenbk/multipol.html> (last visited Mar. 15, 2006) for a current list of attainment status of air quality control regions for each criteria pollutant.

166. See ALISON CASSADY, THE POLITICS OF PREEMPTION: THE ROLE OF STATE AND FEDERAL GOVERNMENT IN ENVIRONMENTAL AND CONSUMER PROTECTION UNDER THE BUSH ADMINISTRATION 9 (2003), available at <http://uspirg.org/reports/politicsofpreemption.pdf> (“Since EPA has maintained that the NSR rule changes will encourage pollution sources to reduce their emissions, STAPPA/APALCO contends that EPA will be unlikely to approve a state request to implement state laws that exceed federal requirements.”). See *infra* text accompanying note 213 for a suggestion that EPA could reconsider its predictions about the effect of the 2002 rule.

to satisfy the courts reviewing these industry petitions with a cursory comparison of the state and federal programs, such a lawsuit would draw attention to the alternative program and potentially raise questions about EPA's response.

The challenge EPA faces in encouraging state adoption of the 2002 rule is a problem of its own making—the result of that rule's regressive nature. States cannot avoid adopting a new federal program when the federal government raises the baseline for environmental protection.¹⁶⁷ Not only does section 116 provide a means to limit the implementation of the 2002 rules, each of the section 116 claims will release more evidence of the problems with the federal program. While decisions focused on state NSR programs will have limited legal effect on the federal program, the states' resistance will be costly to EPA, in the price of both litigation and lost political capital.

C. Clean Air Act Section 193: Backsliding in Non-Attainment Areas

While states that choose to adopt alternative programs may have to defend their SIPs to EPA, states that instead adopt the new provisions may have to defend their SIPs in litigation under section 193, the Clean Air Act's anti-backsliding provision. Unlike section 116, section 193 does not address the balance of power between EPA and the states.¹⁶⁸ A section 193 claim is about whether, assuming a state adopts the new rules, the Clean Air Act allows EPA to approve the resulting SIP.¹⁶⁹ A backsliding challenge only arises when EPA approves a new control requirement that replaces one in effect at the time of the 1990 amendments.¹⁷⁰ Because a state is unlikely to challenge EPA's approval of its SIP, section 193 is more naturally the basis for a citizen suit. In fact, the Natural Resources Defense Council (NRDC) has already announced that it will challenge EPA's approval of the first SIP containing the new applicability provisions.¹⁷¹

167. A state could retain its existing program, however, if that program was already controlling emissions at the level required by the new federal program.

168. Backsliding is addressed in the state and local authority portion of the opinion not because of its inherent relation to state authority, but because the claim stemmed from the states' belief that EPA was attempting to mandate inclusion of the new applicability provisions in the SIPs. Once the court held that EPA was not, or at least not yet, mandating adoption of the reforms, then the anti-backsliding claims also became unripe. The final sentence of this section of the opinion obscures the nature of the section 193 claim. The court held the claim unripe until the adequate factual record is developed "in the course of a state's quest for approval of a SIP meeting the old criteria." *New York v. EPA*, 413 F.3d 3, 44 (D.C. Cir. 2005). To the contrary, only a state seeking approval of a SIP containing the *new* provisions would raise a backsliding claim.

169. *See* 42 U.S.C. § 7515 (2006).

170. *See supra* note 10 (discussing legislative history of 42 U.S.C. § 7515).

171. *See Safford, supra* note 16. However, neither the environmental petitioners' opening brief nor their reply brief addresses this claim. The states raised the backsliding claim as an

In finding the section 193 claim unripe, the D.C. Circuit retreated from its earlier deference to EPA's predictive judgment about the air quality impacts of the rule. In response to the states' argument that the new rules "must flunk [section 193's] equivalent or greater emission reduction test," the court recites EPA's argument that the new rules make NSR less frequent, thereby encouraging facilities to voluntarily upgrade their plants in ways that increase efficiency or otherwise decrease emissions.¹⁷² Unlike its earlier arbitrary and capricious analysis where the court deferred to EPA's judgment, here the court announced that it was "in no position to say which effects predominate."¹⁷³ While it might seem odd for the court to suddenly deny the availability of an adequate record, resolving the backsliding claim requires facts specific to the non-attainment area for which the NSR program is approved, and none of these facts were in the record before the D.C. Circuit.

1. *An Adequate Factual Record*

The record adequate for a backsliding claim is quite different from the record enabling facial judicial review. For example, the record in a backsliding claim might concern fewer facilities in greater detail. In holding that EPA's ten-year lookback period was not arbitrary and capricious, the court credited EPA's evidence that the lookback period would affect only a very small number of facilities.¹⁷⁴ EPA acknowledged that it lacked sufficient data to rigorously assess the effects of the lookback period, but predicted that "the magnitude of the change is likely to be very small."¹⁷⁵ However, when considered on a more local level, these small effects might be significant. For example, a dozen facilities avoiding NSR nationwide might be insignificant, but if ten of them are concentrated in one non-attainment area, their aggregate avoidance of NSR may impair the area's air quality. Moreover, EPA predictions about overall industry response to the rule may be valid for a broad cross-section of industry, but perhaps not for the narrower set present in a given area.¹⁷⁶ Different enforcement regimes or regulatory

alternative argument about why EPA should not be allowed to require states to adopt the new provisions.

172. *New York v. EPA*, 413 F.3d 3, 42–43 (D.C. Cir. 2005).

173. *Id.* at 43. The court seemed particularly wary of making such a judgment given that it had just vacated two portions of the rule on which EPA based its prediction.

174. *New York*, 413 F.3d at 29 (quoting ENVIRONMENTAL IMPACT ANALYSIS, *supra* note 95, at 2).

175. *Id.* at 30 (quoting ENVIRONMENTAL IMPACT ANALYSIS, *supra* note 95, App. F at 7).

176. Certain sectors may have more operational flexibility that would allow them to make the voluntary improvements in their process that EPA envisions. Conversely, an industry may be facing serious fiscal difficulties due to foreign competition, changes in commodity prices, or other factors. These difficulties may constrain the industry from making any sort of voluntary improvements that increase efficiency and decrease air pollution. Connecticut and Vermont

contexts may lead stationary sources to react differently to the same NSR program.¹⁷⁷ The court's language in deferring the backsliding challenge anticipates a factual record tailored to a particular geographic area.

A backsliding challenge could arise if EPA approves a SIP including any of the new applicability provisions.¹⁷⁸ Yet, the D.C. Circuit specifically examined only the ten-year lookback period¹⁷⁹ and the plant-wide applicability limit provisions.¹⁸⁰ In addition, the court suggested that EPA's projections about the overall rule might change in light of the invalidation of the Clean Unit and Pollution Control Project provisions,¹⁸¹ revealing a suspicion that the air quality effects of some provisions may have compensated for others. Would one of the compensated-for provisions, considered in isolation in a SIP, withstand more searching review?

If the D.C. Circuit had resolved the backsliding claim, it would have done so on a very thin record—without knowing what non-attainment area is concerned, how that area's industry is likely to respond to the new NSR rules, what new rules the state is attempting to adopt, and what rules the state applied before the revision. Because a section 193 claim forces the question of the new provisions' effect on air quality, future litigation could generate a large amount of information about the new rule's environmental impacts. State-level review will allow EPA and petitioners to focus on a narrower set of facilities, thereby increasing the rigor of their data. In opposing the lookback period, state petitioners referred to a study by the Environmental Integrity Project (EIP) that showed that the new provisions would allow 1,273 major sources to increase their emissions by nearly 1.4 million tons per year.¹⁸² In its environmental assessment of the rule, EPA criticized the EIP study for failing to account for several other factors that might have led to a recent

raised similar points in their equivalency demonstrations. *See supra* notes 158–61 and accompanying text.

177. Facilities in severe non-attainment areas must meet more rigorous conditions to obtain an NSR permit, such as higher offset requirements. *See* 40 C.F.R. § (a)(9)(i) (2006). When NSR poses a greater threat to a facility, that facility may have avoided beneficial voluntary projects to a greater extent than a facility in an area where NSR is relatively less costly.

178. In a GAO stakeholder survey, over a third of states responded that they would adopt all or most provisions of the rule. *See* U.S. GEN. ACCOUNTING OFFICE, KEY STAKEHOLDERS' VIEWS ON REVISIONS TO THE NEW SOURCE REVIEW PROGRAM 18 (2004). Based on extensive discussions among state and local officials, State and Territorial Air Pollution Program Administrators (STAPPA) and Association of Local Air Pollution Control Officials (ALAPCO) identified alternatives to the new applicability provisions and have produced a document comparing the alternatives to the specific provisions of the 2002 rule. STAPPA/ALAPCO, NEW SOURCE REVIEW MENU OF OPTIONS 63 (June 15, 2004).

179. *New York v. EPA*, 413 F.3d 3, 27–28 (D.C. Cir. 2005).

180. *Id.* at 36–37.

181. *Id.* at 43.

182. *Id.* at 29.

decrease in emissions.¹⁸³ In building an “adequate factual record” for a single non-attainment area, the parties could evaluate the relevant facilities and pollutants in greater detail, using information already available to the public, and by submitting requests to EPA and state agencies under the Freedom of Information Act and equivalent state statutes. Additional data and analysis would allow the petitioners to make a more compelling case that implementation of the new applicability provisions would not protect the area’s air quality.

Had it been unable to defer the backsliding question, the D.C. Circuit probably would have decided against the state and environmental petitioners, given the need for consistency with its earlier deference to EPA’s predictive judgment on the rule’s environmental impacts. This judgment would not have precluded as-applied backsliding challenges but would have chilled such litigation and might have emboldened EPA to reject states’ arguments that their alternative NSR programs will be more protective of air quality.

2. *Anti-Backsliding Claims: Ace in the Hole or Desperate Measure?*

Section 193 prevents EPA from altering any emission control requirement in a non-attainment area unless it ensures equivalent or greater emission reductions.¹⁸⁴ This provision is a powerful tool for environmentalists because, unlike other portions of the Clean Air Act, its language leaves no room for consideration of economic concerns. EPA’s new industry-friendly provisions survived arbitrary and capricious review largely on the grounds that the Clean Air Act’s NSR provisions permit the agency to balance economic and environmental concerns. In contrast, the only factor that EPA is allowed to consider in complying with section 193 is whether the new control requirement will ensure equivalent or greater emissions reductions.

Despite the fact that section 193 seems to be a formidable tool for environmentalists, it has rarely been litigated.¹⁸⁵ *New York v. EPA* is the first case in which the claim has been discussed in the NSR context, so it is unclear how the courts will approach a ripened backsliding claim. Section 193 claims may be difficult for several reasons. First, a court may find that section 193 does not apply to NSR. Even if it does apply, it will be expensive to bring these actions in the NSR context because the requisite factual showing is complex. Finally, any party bringing the claim

183. *Id.* at 28–29.

184. 42 U.S.C. § 7515 (2006).

185. *See* *Sierra Club v. Larson*, 2 F.3d 462, 470 (1st Cir. 1993) (finding that a change in Massachusetts regulations did not lead to backsliding because the earlier regulation had not been federally enforceable); *Coal. for Clean Air v. EPA*, 971 F.2d 219 (9th Cir. 1992) (failing to reach the backsliding question).

will be pitted against EPA and the state together, making it more difficult to obtain certain information and win the court's confidence.

a. Applicability of Section 193 to New Source Review Provisions

EPA approval of a SIP containing the new NSR applicability provisions raises backsliding questions only if those provisions are considered “control requirements,” which EPA has defined as “discrete regulations directed at a source of pollution.”¹⁸⁶ In their reply brief, the state petitioners in *New York v. EPA* argued that both Congress and the EPA have referred to the NSR technology standards (*e.g.*, BACT and LAER) as control requirements.¹⁸⁷ While the applicability provisions themselves are not discrete regulations in the same sense as technology standards, they do determine whether a given source must comply with those technology standards. Furthermore, courts have held that a broad range of regulatory controls falls under the definition,¹⁸⁸ suggesting that “control requirement” might be liberally construed to promote Congress’ intent to prevent backsliding. In a recent rulemaking, EPA suggested that Congress intended section 193 to be more inclusive than the words “control requirement” standing alone would suggest.¹⁸⁹ However, the

186. *See, e.g.*, Arizona—Maricopa and Pima Non-attainment Areas; Carbon Monoxide Federal Implementation Plan, 56 Fed. Reg. 828 (Jan. 9, 1991). There is little case law applying this definition in the context of section 193. In *Coalition for Clean Air v. EPA*, 971 F.2d 219 (9th Cir. 1992), the court accepted EPA’s argument that the 1990 amendments relieved EPA of its settlement agreement obligations to implement a FIP for the South Coast Air Quality Management District. The court interpreted section 193 to “preserve[] every regulation in effect before the date of the amendments,” but the settlement agreement was not a regulation. *Id.* at 233–34.

187. *See* Reply Brief for Petitioners, *supra* note 111, at 25.

188. *See* Coal. Against Columbus Ctr. v. New York, 967 F.2d 764, 774 (2d Cir. 1992) (finding that a “commitment to implement mitigating measures constitute[d] a ‘control requirement . . .’”).

189. EPA recently noted that section 193 begins with a statement indicating that Congress intended the anti-backsliding prohibition to be broadly applied. *See* Non-attainment Major New Source Review Implementation Under 8-Hour Ozone National Ambient Air Quality Standard: Reconsideration, 70 Fed. Reg. 39,413, 39,420 (July 8, 2005) [hereinafter “8-hour Ozone Reconsideration”]. EPA did so in the course of distinguishing section 193 from an analogous section relating to relaxation of NAAQS. Earthjustice had filed a petition for reconsideration of EPA’s implementation plan for the new 8-hour ozone NAAQS, claiming that the reclassification of certain air quality management areas under the new NAAQS violated section 172, which requires EPA to promulgate rules providing for “controls which are not less stringent than the controls applicable to areas designated non-attainment before such relaxation.” *Id.* at 39,414–15; 42 U.S.C. § 7502(e) (2006). Earthjustice and other commenters argued that in moving from the 1-hour standard to the 8-hour standard, certain air quality control regions were redesignated in ways that lowered their offset ratios and raised the stationary source thresholds. *See* 8-hour Ozone Reconsideration, *supra*, at 39,416. EPA concluded that section 172(e) did not apply to offsets and thresholds because these were not “control measures” in the sense that their primary function was to avoid emission growth, rather than to reduce emissions. *See id.* at 39,418–49. In its reconsideration, EPA drew a comparison between sections 172 and 193 because they use

term “control requirement” closely resembles the term “control measure,” which EPA has interpreted to *not* encompass NSR programs—an interpretation recently upheld by the Sixth Circuit.¹⁹⁰

The structure of section 193 also suggests a broad construction. The first sentence of section 193 requires that “[e]ach regulation, standard, rule, notice, order and guidance . . . shall remain in effect,”¹⁹¹—a list that comfortably includes NSR programs. In the second half of section 193, Congress clarifies that control requirements can be changed so long as the new provision “insures equivalent or greater emission reduction.”¹⁹² Control requirement should be interpreted to include the just-enumerated items because it appears that Congress used “control requirements” as a catch-all category in the second half of section 193.

State petitioners also noted that EPA has previously evaluated changes to states’ applicability provisions for consistency with section 193.¹⁹³ For example, when Rhode Island and Massachusetts submitted revised SIPs incorporating a plant-wide NSR definition of “source” in the early 1990s, EPA approved those SIPs after examining whether the new provisions would lead to backsliding.¹⁹⁴ In a recent approval of a SIP component for the Las Vegas area, EPA evaluated the consistency of the NSR measures with section 193, taking the opportunity to clarify that “in the context of NSR programs, which are not specifically designed to produce emissions reductions themselves . . . the phrase means equivalent or greater *mitigation* of emissions increases due to new stationary source

similar terms (“control” in section 172 and “control measure” in section 193), but ultimately determined that section 172 was less inclusive than section 193. *See id.* at 39,420.

190. In *Greenbaum v. EPA*, 370 F.3d 527, 537–38 (6th Cir. 2004) the court deferred, under *Chevron*, to EPA’s determination that a state’s NSR program is not a pollution control measure for the purposes of section 175A of the Clean Air Act. This section requires states to continue implementing “all measures with respect to the control of the air pollutant concerned” once they are re-designated as in attainment for that pollutant. *See* 42 U.S.C. § 7505A(d) (2006). In *Greenbaum*, EPA argued that NSR was not a pollution control measure under section 175A because section 110 distinguishes between control measures and NSR, and because NSR does not provide immediate emissions reductions that influence whether an area maintains its new attainment status. 370 F.3d at 537–38. In the 8-hour Ozone Reconsideration, EPA made the same argument in support of its position the NSR was not a “control” within the meaning of section 172. *See supra* note 189, at 39,419.

191. 42 U.S.C. § 7515.

192. *Id.*

193. Reply Brief for Government Petitioners, *supra* note 111, at 25–26 (citing EPA review of SIPs submitted by Rhode Island and Massachusetts, discussed *infra* notes 200–203). *See also* New Source Review; State of Nevada, Clark County Department of Air Quality and Environmental Management, 69 Fed. Reg. 54,006, 54,012 (Sept. 7, 2004).

194. *See* Rhode Island; Amendments to Air Pollution Control Regulation Number 9, 64 Fed. Reg. 29,563, 29,564 (June 2, 1999); Massachusetts; New Source Review Plant-wide Definition, 58 Fed. Reg. 10,964, 10,966 (Feb. 23, 1993); *see also infra* notes 201–04 and accompanying text.

growth.”¹⁹⁵ EPA has argued that it does not believe that section 193 is “clearly appl[icable] to revisions in the NSR programs” but that it has conducted these comparisons on the “assumption that it may.”¹⁹⁶

Another unsettled issue is whether section 193 applies only if the area is now in non-attainment for the same pollutant that exceeded allowable standards at the time of the 1990 amendments. For example, would it apply if an area was out of attainment for carbon monoxide in 1990, and is now in attainment for that pollutant, but has been out of attainment for particulate matter since 2000? Section 193 forbids modification of control requirements “in effect . . . before November 15, 1990, in any area which is a non-attainment area for *any* air pollutant . . . unless the modification insures equivalent or greater emissions reductions of *such* air pollutant.”¹⁹⁷ The word “such” suggests that Congress was concerned about increases in emissions of the same pollutant regulated by the control measure at issue. The lack of clarity on this point would not have been a problem in the short term, when an area’s attainment status was unlikely to have changed. Over fifteen years later, the courts will have to address a number of thorny interpretive issues in order to resolve section 193 claims.¹⁹⁸

b. Evaluating Equivalent or Greater Emissions Reductions

Assuming that section 193 does apply to NSR applicability provisions, a court must determine whether the new provisions will ensure “equivalent or greater emission reduction,” or as EPA has put it, “equivalent or greater *mitigation* of emissions increases due to new stationary source growth.”¹⁹⁹ EPA’s review of Rhode Island’s revised SIP, mentioned in the previous section, reveals a non-quantitative, netting approach.²⁰⁰ EPA found that Rhode Island’s decision to allow for plant-wide “bubbling” (now known as a PAL) would allow more sources to net out of NSR review and result in an insignificant increase in emissions,

195. New Source Review; State of Nevada, Clark County Department of Air Quality and Environmental Management, 69 Fed. Reg. 54,006 at n.4 (Sept. 7, 2004) (emphasis added).

196. See 8-hour Ozone Reconsideration, *supra* note 189, at 39,419.

197. 42 U.S.C. § 7515 (2006) (emphasis added).

198. Relatedly, EPA has recently argued that section 193 does not apply to elements of the Clean Air Act introduced in 1990, such as increased offset requirements and lower stationary source thresholds for severe non-attainment areas. See 8-hour Ozone Reconsideration, *supra* note 189, at 39,417. EPA argued that Congress intended section 110(*h*) to apply to the new provisions of the Clean Air Act. *Id.* Section 110(*h*) forbids EPA from “approv[ing] a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of this chapter.” 42 U.S.C. § 7410(*h*).

199. New Source Review; State of Nevada, Clark County Department of Air Quality and Environmental Management, 69 Fed. Reg. 54,006 at n.4 (Sept. 7, 2004) (emphasis added).

200. Rhode Island; Amendments to Air Pollution Control Regulation Number 9, 64 Fed. Reg. 29,563, 29,564 (June 2, 1999).

though EPA could not determine the number of sources affected.²⁰¹ But EPA determined that another change to the NSR program since 1990, a clarification of the state's minimum BACT requirement, would offset this possible increase.²⁰² Therefore, the program as a whole would not increase emissions.²⁰³

Would a court approve EPA's method of weighing the emissions impacts of the state's entire suite of control measures? A court might find that the inflexible language of section 193—"no control requirement in effect . . . may be modified . . . unless the modification insures equivalent or greater emission reductions"—refers to individual control measures or requirements and leaves little room to argue that it is acceptable to weaken one control requirement while strengthening another. The non-quantitative, back-of-the-envelope methodology presented in EPA's backsliding analysis in these SIP approvals has never been tested in court. There are both drawbacks and advantages to allowing EPA to "net" provisions and to estimate, rather than calculate, each NSR provision's emissions impact. Requiring EPA to conduct detailed, quantitative analysis of each change would be expensive and time-consuming, and could impair the agency's ability to develop new regulations.²⁰⁴ On the other hand, because Congress' language limits EPA's discretion in order to assure the effectiveness of the 1990 amendments, the court is justified in taking a harder look at EPA's judgment about the new rule's emissions impact.

As was apparent in the *New York v. EPA* decision itself, the emissions impact of NSR applicability provisions is complicated because NSR does not apply to passive regulated entities, but rather induces them to act strategically.²⁰⁵ Because it is impossible to know precisely how facilities will react to each state's NSR program, there is inevitable uncertainty in determining each program's impact. This does not, however, mean that all rigorous analysis is impossible and that industry anecdotes are a sufficient basis for rulemaking as EPA argued before the D.C. Circuit. Rather, judicial scrutiny of EPA's factual determinations about the emissions impacts is necessary to give full effect to section 193.

201. *Id.*

202. *Id.*

203. Similarly, in finding that the inclusion of plant-wide emissions netting would not have an adverse effect on emissions in Massachusetts, EPA looked at all the changes that the state had made to its non-attainment plan since 1982 and estimated the overall emissions impact would be beneficial. Massachusetts; New Source Review Plant-wide Definition, 58 Fed. Reg. 10,964, 10,966 (Feb. 23, 1993).

204. This burden would be partly self-imposed, given that EPA's netting approach accounts for changes in control requirements over several decades. See *supra* notes 202–03.

205. See *New York v. EPA*, 413 F.3d 3, 27–32 (D.C. Cir. 2005) (discussing parties' arguments about how regulated industry would respond to the new applicability provisions).

c. The Consequences of Backsliding Decisions

Many of the questions raised above, such as whether section 193 applies to NSR, whether it requires continuous non-attainment status for the same pollutant, and what the standard of review should be, are questions of law on which courts must eventually reach consensus. However, courts are likely to reach differing conclusions on the more factual questions involving specific facilities and state programs. Inconsistent decisions might occur even where two non-attainment areas are regulated under the federal base program before and after the 2002 rules, because each area has a unique industry composition and environmental factors. Even if EPA successfully demonstrates that the applicability provisions will ensure equivalent or greater emissions reductions in one non-attainment area, this decision would not have any preclusive effect for challenges in other states. The influence of a particular decision may turn on whether the court bases its holding on a factual record from the non-attainment area in question, or finds that the new applicability provisions, on their face, do or do not ensure equivalent emissions reductions. Meanwhile, regulated industry in states with new NSR programs will face uncertainty about which provisions will ultimately apply to their upgrades. Sources in non-attainment areas that intend to utilize the new provisions may need to await the outcome of a backsliding challenge—a dilemma worsened by the potential for extended litigation.

Realistically, because environmental groups with limited resources are most likely to bring section 193 challenges, repetitive litigation is unlikely. Even if another state brings a section 193 challenge, such as a downwind Northeastern state challenging the approval of a SIP for a Midwestern state, generating the factual record necessary to withstand arbitrary and capricious review could be expensive given that neither neighboring states nor environmental groups are likely to have full cooperation of the state whose SIP is being challenged. In addition, the state whose SIP is being challenged is likely to be allied with EPA on these claims. These diverging interests ultimately limit the effectiveness of section 193 as a means to subject the new NSR program to greater scrutiny. Furthermore, the courts' deferential attitude means that they are likely to find for the state and EPA since these parties can validly claim to know the state's pollution sources best.

IV. POLICY IMPLICATIONS OF DELAYED ADJUDICATION

In tallying up the wins and losses in the *New York v. EPA* decision, the ripeness deferrals do not belong in any single column. States may be unable to prevent implementation of the new NSR program in neighboring states, but do have a second (and perhaps better) chance of

preserving their unique NSR programs through the SIP process. Similarly, environmental groups failed to prevent widespread implementation of these provisions in non-attainment areas across the country, but now have the opportunity to bring the backsliding claim in a variety of potentially ideal factual situations outside of the D.C. Circuit.²⁰⁶ While EPA guided its rule through an important stage of review, it will likely face a second round of challenges that may make it legally and politically difficult to see this rule actually implemented.

States that desire a higher level of pollution control may be concerned that neighboring states will take the path of least resistance and adopt the new federal program. If the D.C. Circuit had decided that the new federal NSR program was *per se* less stringent than the prior federal program, then more states might have chosen to retain their existing programs rather than go through the laborious administrative or legislative processes necessary to adopt state rules consistent with the new federal program. A favorable decision for the states on the backsliding issue would also have been valuable, because it would have prevented the implementation of the new federal program in all non-attainment areas. For states with air quality problems attributable to interstate air pollution,²⁰⁷ or that are concerned about economic competition with states having less stringent control requirements, a victory on the section 193 claim at the D.C. Circuit would have had long-term benefits. Deferral also means that state attention will continue to be directed towards sorting out what NSR rules will be in place—diverting resources from actual enforcement of those rules.

The deferrals also create problems for EPA, despite the fact that the agency argued before the D.C. Circuit that the claims were unripe. As discussed above, EPA faces a dilemma about whether to contest states' alternative programs and incur greater scrutiny of its new NSR program.²⁰⁸ EPA is currently changing other elements of the federal NSR

206. Petitioners might be at a particular disadvantage bringing these claims in the D.C. Circuit. A study by Richard Revesz revealed that decision making on the D.C. Circuit in environmental cases is politicized and outcome-oriented. See Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997). Republican presidents appointed nine of the thirteen judges currently sitting on the D.C. Circuit. See Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998), for the counter-argument that judicial decision making is driven more by the collegial nature of the court than ideology.

207. For example, Pennsylvania officials joined the suit against EPA due to concerns that Pennsylvania businesses would be at a competitive disadvantage because they would have to pay for the cleanup of pollutants generated in upwind states. See Lorraine McCarthy, *Pennsylvania Sues to Block EPA Changes To Program Covering Modified Industrial Sites*, 34 Env't Rep. (BNA) 241 (Jan. 31, 2003).

208. See discussion *supra* Part III.B.2.

program, including certain rules for electric utilities²⁰⁹ and implementation of the new 8-hour ozone NAAQS.²¹⁰ Ongoing conflict with the states over the 2002 rule may decrease cooperation and make those rules more difficult to finalize or implement.

The second round of review gives EPA the opportunity to revisit its predictions about the rule.²¹¹ If EPA indeed intended, as of December 2002, to mandate that states adopt the new rule, the court's deferral allows EPA to reconsider, based on either political considerations or new information about the rule's impacts. In a tantalizing bit of dicta, the D.C. Circuit suggested that EPA's "wide latitude to make policy based on predictive judgments . . . implies a correlative duty to ascertain whether they work."²¹² The court may have envisioned EPA tracking whether facilities were making voluntary improvements as a result of the 2002 rule, but EPA could also ascertain whether its predictive judgment was valid based on the conflicting judgments presented by states or environmental petitioners through their equivalency demonstrations or reports produced in support of litigation on the section 116 and 193 claims. While the D.C. Circuit established no specific mechanism to enforce this "duty," the ripeness deferrals may indirectly serve this function.

The Clean Air Act's structure enables review of regulations at multiple stages and on different criteria: both when EPA promulgates rules and when states adopt them. Contrast this framework with that presented in *Ohio Forestry Ass'n v. United States Forest Service*,²¹³ a 1998 Supreme Court ripeness decision that has been criticized for impeding review of agency action.²¹⁴ In *Ohio Forestry*, the Supreme Court

209. See Emissions Test for Electric Generating Units, 70 Fed. Reg. 61,081 (Oct. 20, 2005) (proposed rule).

210. See Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase II, 70 Fed. Reg. 71,612 (Nov. 29, 2005) (to be codified at 40 C.F.R. pt. 300).

211. In *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998), the Supreme Court recognized a similar benefit of deferring judicial review of a forest management plan, noting that

immediate judicial review . . . could hinder agency efforts to refine its policies: (a) through revision of the [National Forest Management] Plan, e.g., in response to an appropriate proposed site-specific action that is inconsistent with the Plan, . . . or (b) through application of the Plan in practice, e.g., in the form of site-specific proposals.

(internal citation omitted).

212. *New York v. EPA*, 413 F.3d 3, 30 (D.C. Cir. 2005) (quoting *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993)). The *Bechtel* court's admonishment of the FCC is equally applicable to EPA:

Despite its twenty-eight years of experience with the policy, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it. As a result, the Commission ultimately rests its defense of the integration criterion on the deference that we owe to its "predictive judgments."

Bechtel, 10 F.3d at 880.

213. 523 U.S. at 728–29.

214. See, e.g., Eacata Desiree Gregory, comment, *No Time is the Right Time: The Supreme Court's Use of Ripeness to Block Judicial Review of Forest Plans for Environmental Plaintiffs in*

held that a citizen group's challenge to a National Forest Management Plan was not ripe because the agency had to take further action to remove trees and threaten the plaintiffs' interests.²¹⁵ The Court also noted that review would be premature because the plan "may affect many different parcels of land in a variety of ways"²¹⁶ and that "further factual development would 'significantly advance our ability to deal with the legal issues presented.'"²¹⁷

In *Ohio Forestry*, only one agency, the Forest Service, was responsible for generating, analyzing, and presenting the information to justify its management decisions. In this scenario, the Forest Service has little incentive to conduct additional assessments while developing its management plan and making on-the-ground decisions. In contrast, the Clean Air Act creates multiple forums for EPA and the states to compete over whose policy will prevail. Whether these forums are overtly adversarial or as informal as the exchange of letters and comments between agencies, the result is that each agency must generate some support for its position. These forums also have different ground rules, require different kinds of evidence, and are accessible and accountable to different sectors of the public. For instance, members of a community group concerned about air quality may focus on regulatory changes at the state rather than federal level, or may have a relationship with state regulators that ensures greater consideration of their input. SIP revisions must undergo notice and comment procedures at the state level before being submitted to EPA,²¹⁸ which provides a venue for public input that may be more responsive than the federal notice and comment process.²¹⁹ At the judicial review stage, states must meet the tougher burden of showing that EPA's new provisions are arbitrary and capricious in light of both economic and environmental factors central to the Clean Air Act. However, if EPA rejects a SIP including alternative provisions, then the courts' general solicitude for state authority in stationary source air

Ohio Forestry Ass'n v. Sierra Club, 75 CHI.-KENT L. REV. 613 (2000); Amanda C. Cohen, Recent Development, *Ripeness Revisited: The Implications of Ohio Forestry Association, Inc. v. Sierra Club for Environmental Litigation*, 23 HARV. ENVTL. L. REV. 547 (1999) (criticizing *Ohio Forestry* for frustrating full review of management plans, leaving plaintiffs only the option of challenging each logging decision made pursuant to that plan).

215. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732 (1998).

216. *Id.* at 736.

217. *Id.* at 737 (internal quotations omitted). The ripeness test also considers potential interference with further administrative action. *Id.* at 736 ("Hearing the Sierra Club's challenge now could thus interfere with the system that Congress specified for the agency to reach forest logging decisions.").

218. 42 U.S.C. § 7410(j) (2006).

219. Victor B. Flatt et al., *Let the People Speak: Notice-and-Comment Rulemaking (Lessons from the Controversial New Source Review Proposal of the Clean Air Act)*, 34 ENVTL. L. REP. (ENVTL. L. INST.) 10,115 (2004).

regulation may make it more difficult for EPA to convince the court that the federal NSR program is more stringent.²²⁰

The result of this shared implementation is that policies undergo more thorough review than if all interested parties had only one forum, at one point in time, to challenge a policy. The D.C. Circuit's decision to defer the section 116 and 193 claims adds to these existing incentives for more thorough review because the passage of time itself improves the available data. States may not have had the resources to quickly conduct studies of the impacts of the 2002 rule in their state before presenting the case in the D.C. Circuit.²²¹ Additionally, because *New York v. EPA* vacated the Clean Unit and Pollution Control Project provisions, the emissions impact of a state's overall NSR program might change. States would have needed to rework any analyses already begun after the June 2005 decision—less than six months before EPA required the states to submit revised SIPs.

The flimsy record in *New York v. EPA* illustrates that without more searching review, EPA may have inadequate incentives to respond to new or adverse information and generate supporting information. “Hard-look” review induces agencies to collect additional information and conduct supplemental analyses of the effects of their rules. The trade off for more informed rulemaking is that the cost of developing regulations may become so inflated that rulemaking is disrupted.²²² For this reason, judicial interference with the regulatory process is always a concern when advocating stronger review of agency action. In this case, the hazards of interference are mitigated by the fact that sections 116 and 193 provide for further review of regulations only when federal regulations are weakened. When review is furnished through subsequent state administrative processes and litigation rather than in one episode in the D.C. Circuit, the intensity of the review will vary with the perceived legitimacy and strength of EPA's policy. State resistance to EPA's policies will be greater when states perceive that EPA has not adequately considered the evidence before it or the states' perspectives.

The deferrals create the conditions for deliberation on the rule's environmental impact—deliberation that is sorely needed because of the

220. See *supra* note 33 and accompanying text.

221. Florida recently completed an extensive study involving surveys sent to nearly 200 facilities followed by extensive data analysis—a time-consuming methodology that was not completed until the beginning of 2005. See *supra* notes 154–56 and accompanying text.

222. For discussion of whether substantive hard look review of agency action makes the cost of rulemaking prohibitive and thereby “ossifies” agency policy, compare Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C.L. REV. 1013 (2000) and Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1403–07 (1992) with Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 485 (1997).

acrimony surrounding EPA's rule that was generated in part by the agency's inadequate supporting evidence. Regardless of one's opinion of the rule's air quality impacts, the prospect of better-informed decision making has broad appeal. The delay and cost to the parties may be justified if subsequent review encourages development of a better factual record and allows more public involvement with the rulemaking. However, it remains to be seen whether future challenges will actually generate a more substantial factual record and raise new arguments for and against the new applicability provisions, or simply repeat the D.C. Circuit's unsatisfying review.

CONCLUSION

Courts should avoid prematurely deciding claims not only because of judicial manageability issues, but also to prevent haphazard consideration of the benefits of disputed policies. This virtue of the ripeness doctrine has been recognized in cases involving higher-order constitutional questions as a means not only to prevent error, but also to "preserve room for continuing democratic deliberation."²²³ The same values are at stake in *New York v. EPA*. When courts decide claims that are not ripe, they foreclose other means of resolving conflict. The lack of a factual record supporting EPA's December 2002 NSR rule should be of grave concern to anyone whom the administrative process affects. Allowing states and environmental groups to challenge the presumptions of EPA's NSR rule on a more concrete factual record serves the public interest, and provides a more rational and informed implementation of our nation's environmental laws.

223. Cass Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 6, 52 (1996).