

## Alert: Federal Appellate Court Strikes Down Air Regulation Exclusion for Minor Repair Projects

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On March 17, 2005, the D.C. Circuit Court of Appeals issued an extremely important opinion that likely will cause much angst for electrical power plants, refineries, and many regulated industries that use turbines and boilers. Whenever a facility makes a modification to its facilities that results in a significant change to its air emissions, the Clean Air Act imposes onerous regulatory permitting and other regulatory requirements -- a New Source Review (NSR). In 2003, the EPA enacted the Equipment Replacement Provision (ERP), a rule that would broadly define what would be considered "routine" maintenance, repair and replacement of equipment -- and such "routine" activities would be exempt from New Source Review.

Before adopting the ERP rule, the EPA, or the delegated state environmental agency, would exempt replacement projects on a case-by-case basis. The agency did not define which projects would be exempt; instead, each new project was subjectively reviewed, and, as a result, these determinations frequently were contested. It was extremely difficult for industry to predict whether they were in compliance with the NSR rules whenever they undertook to repair a boiler, turbine or other piece of equipment that had the potential to emit air emissions. This case-by-case analysis also resulted in enforcement problems -- since the exemption was applied inconsistently from region to region. The EPA was adopted to eliminate these inconsistencies. The EPA had excluded repair and replacement activities as "routine" if: (1) they represented no more than 20 percent of the replacement cost of the entire process unit; (2) the replacement components are identical or functionally equivalent to the components being replaced; (3) the replacement components do not alter the basic design parameters of the process unit; and (4) the activity does not cause the facility to exceed any emission limits. The EPA would have enabled industry to avoid the tremendous cost and delay associated with undertaking the NSR that otherwise would have been mandated for these projects.

In *State of New York, et al v. EPA (No. 03-1380)*, however, the DC Circuit Court strikes down the ERP that had permitted regulated industries to avoid burdensome NSR provisions for large categories of maintenance and repair work. The court vacated the ERP because the court determined that the ERP rule would allow increases in emissions that were not de minimis. Under section 111(a)(4) of the Clean Air Act, NSR is triggered when any physical change occurs that increases emissions, and the Court concluded that the EPA was not entitled to re-write Congress' definition of "modification" by limiting it to only those physical changes that are "costly or major." Click here for link to the full opinion: [State of New York, et al v. EPA \(No. 03-1380\)](#).

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