New Source Netting in Nonattainment Areas under the Clean Air Act

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Under the Environmental Protection Agency's (EPA's) bubble concept, EPA looks only to net emissions increases from an entire industrial plant or region for regulatory purposes, rather than to emissions increases from individual sources within that plant or region.1 The image is that of a huge bubble with a hole in the top, enclosing the whole plant or area.2 Within the bubble, plant operators may increase or decrease emissions from individual sources in whatever way is most efficient.3 Only the emissions escaping from the bubble trigger pollution control requirements and other regulations.4

Natural Resources Defense Council v. Gorsuch5 is the most recent of three D.C. Circuit opinions6 reviewing EPA's attempts to implement the bubble concept in one specific part of the regulatory scheme of the Clean Air Act (Act), the new source review provisions.7 The Act

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1. See, e.g., EPA's Widening Embrace of the "Bubble" Concept: The Legality and Availability of Intra-Source Trade-Offs, 9 ENVTL. L. REP. (ENVTL. L. INST.) 10,027, 10,027 (Feb. 1979) [hereinafter cited as EPA's Widening Embrace]. In some regulatory contexts, EPA has expanded the bubble concept to encompass regions containing more than one industrial plant. See U.S. GENERAL ACCOUNTING OFFICE, A MARKET APPROACH TO AIR POLLUTION CONTROL COULD REDUCE COMPLIANCE COSTS WITHOUT JEOPARDIZING CLEAN AIR GOALS: SUMMARY 8 (1982) [hereinafter cited as MARKET APPROACH]; see also infra note 37 and accompanying text.
2. MARKET APPROACH, supra note 1, at 7.
3. See infra note 31 and accompanying text.
4. See infra notes 26, 30, and 39 and accompanying text.
6. See infra notes 14-24, 83-111 and accompanying text.
prescribes three sets of requirements for new and modified stationary pollution sources: one set for sources in areas where pollution still exceeds national air quality standards (dirty air or "nonattainment" areas), another for sources in areas where national standards have been attained (clean air or "prevention of significant deterioration" areas), and a third applicable to specified categories of sources in all areas (New Source Performance Standards). Each of these new source review provisions includes a requirement that sources limit emissions of pollutants to levels that can be achieved by adopting advanced pollution control technology.

Before EPA developed the bubble concept, modification of any part of an industrial plant that increased pollution from that part triggered new source review requirements. Under the bubble concept, however, these requirements are imposed only if net emissions from the entire plant increase. A plant operator can avoid the necessity of meeting new source review requirements by offsetting pollution increases from one part of a plant against decreases elsewhere in the plant.

EPA has sought to implement the bubble concept under each of the three new source programs in the Act, and each time environmentalists or industries have challenged EPA's action before the Court of Appeals of the District of Columbia. In *ASARCO v. EPA*, the court struck down the agency's attempt to implement the bubble concept to allow industries to avoid meeting New Source Performance


11. *See infra* notes 43-46 (New Source Performance Standards), 51-52 (Best Available Control Technology), and 54-56 (Lowest Achievable Emission Rate) and accompanying text.

12. *See infra* notes 57-63 and accompanying text.


15. 578 F.2d 319 (D.C. Cir. 1978).
Standards. In *Alabama Power v. Costle*, however, the court upheld the bubble concept for the new source review provisions of the Prevention of Significant Deterioration (PSD) program. Many commentators viewed these rulings as contradictory and made efforts to reconcile them. The apparent contradiction between the two decisions left uncertain the legality of the bubble concept for the nonattainment provisions, the third new source review program of the Act.

In *Natural Resources Defense Council v. Gorsuch*, the D.C. Circuit attempted to reconcile *ASARCO* and *Alabama Power* and resolve the uncertainty surrounding the legality of the bubble concept in nonattainment areas. The court held that EPA may adopt the bubble concept under Clean Air Act programs designed merely to maintain existing air quality, but EPA cannot adopt the bubble concept under programs intended to improve air quality. Finding that new source review in nonattainment areas was designed to improve air quality by bringing it into compliance with national standards, the court ruled the bubble concept illegal under the nonattainment program.

On May 31, 1983, on petitions for certiorari filed by EPA and industry representatives, the U.S. Supreme Court agreed to review the decision in *Natural Resources Defense Council v. Gorsuch*.

Part I of this Note explains the bubble concept more fully, and examines arguments for and against applying it to the new source review provisions of the Act. Part II summarizes the decision of the D.C. Circuit Court of Appeals that is now on appeal before the U.S. Supreme Court. Part III analyzes the arguments before the D.C. Circuit Court of Appeals, and concludes that the circuit court’s opinion was largely correct and should be upheld.

16. *Id.* at 327.
17. 606 F.2d 1068 (D.C. Cir. 1979), *modified* 636 F.2d 323 (D.C. Cir. 1979).
18. 636 F.2d at 401-02.
20. See *Overview, supra* note 19, at 151-52; *EPA’s Widening Embrace, supra* note 1, at 10031.
22. *Id.* at 726; *see infra* notes 116-158 and accompanying text.
23. *Id.* at 726-27.
24. *Id.* at 726.
I. THE BUBBLE CONCEPT AND NEW SOURCE NETTING

A. Emissions Trading

The bubble concept stands for the general principle that emissions increases will not evoke regulatory responses if traded off against emissions decreases elsewhere. The cluster of EPA rules and policies employing the bubble concept has come to be known as controlled trading or emissions trading. EPA has used emissions trading in three principal ways under the Act.

First, EPA encourages states to allow industries to use emissions trading to meet the requirements imposed on existing sources by State Implementation Plans (SIPs). The use of emissions trading enables an industrial plant to exceed the state-imposed pollution limits where the cost of pollution control is high, if the plant offsets the excess pollution with reductions in pollution where the cost of control is lower. Emissions trading thus permits plants to adopt the potentially most cost-efficient mix of controls sufficient to meet the requirements of the SIP. This policy of allowing existing sources to use emissions trading to meet the emissions limitations of SIP's is called the bubble policy.

Second, EPA has used emissions trading to allow industries to construct new pollution sources in nonattainment areas. Because much of the nation's population lives in areas that are designated nonattainment with respect to some pollutant, a complete ban of new industrial construction in these areas would stifle economic growth. EPA's off-

26. See infra notes 64-69 and accompanying text.
27. See, e.g., Market Approach, supra note 1, at 7.
30. SIP Policy Statement, supra note 29, at 71,780.
31. See id.; EPA's Widening Embrace, supra note 1, at 10,029.
32. As of 1980, for example, over 140 million people lived in areas designated as nonattainment for ozone. National Commission on Air Quality, To Breathe Clean Air 113 (1981). This figure includes people in some areas where standards may have been exceeded but for which data is not available to show that standards actually have been exceeded. See id. at 112.
set policy,\textsuperscript{34} which has been incorporated into the Act,\textsuperscript{35} allows industrial expansion in nonattainment areas if new pollution sources meet stringent technological controls\textsuperscript{36} and obtain pollution reductions from existing sources in the area to offset pollution increases from the new construction.\textsuperscript{37} The offsets must be greater than the expected pollution increases to ensure reasonable further progress toward attainment of air quality standards.\textsuperscript{38}

Finally, EPA has issued regulations allowing companies to use emissions trading within a single plant to escape stringent pollution control requirements imposed by the Act on new sources or modifications of existing sources.\textsuperscript{39} The use of emissions trading to avoid such new source review requirements is known as "new source netting." It was EPA's decision to allow new source netting in nonattainment areas that was at issue in \textit{Natural Resources Defense Council v. Gorsuch}.\textsuperscript{40}

\begin{footnotesize}


\textsuperscript{36} \textit{E.g.}, the "Lowest Achievable Emission Rate" (LAER) requirements. Offset Interpretative Ruling, supra note 34, at 55,526; Clean Air Act § 173(2), 42 U.S.C. § 7503(2) (Supp. V 1981); see infra notes 53-55 and accompanying text.

\textsuperscript{37} Offset Interpretative Ruling, supra note 34, at 55,526; Clean Air Act § 173(1)(A), 42 U.S.C. § 7503(1)(A) (Supp. V 1981). The Act imposes an additional requirement that the owner or operator of the new source demonstrate that all other major stationary sources it owns or operates in the same state comply or are on schedule for compliance with all applicable emissions limitations and standards. Clean Air Act § 173(3), 42 U.S.C. § 7503(3) (Supp. V 1981).

\textsuperscript{38} Offset Interpretative Ruling, supra note 34, at 55,526; Clean Air Act § 173(1)(A), 42 U.S.C. § 7503(1)(A) (Supp. V 1981); \textsc{R. Liloff}, \textit{Air Pollution Offsets: Trading, Selling, and Banking} 8 (1980).

\textsuperscript{39} See infra notes 64-69 and accompanying text.

\textsuperscript{40} A review of some of the principal terms used in this Note may be helpful.

The "bubble concept" refers to the general principle that an entire plant or area should be regarded as a single unit for regulatory purposes. An increase in emissions at one point in the plant or area thus will not have regulatory consequences if offset by emission decreases elsewhere within the plant or area.

"Emissions trading" or "controlled trading" refers to the group of EPA policies employing the bubble concept, and includes the offset policy, the bubble policy and new source netting.

The "offset policy" allows new pollution sources to locate in nonattainment areas if the new source obtains offsetting emission decreases from existing sources in the area greater than the expected emissions increases from the new source, and meets certain other requirements. See supra notes 32-38 and accompanying text.

The "bubble policy" allows industries to use emissions trading to meet the emissions limitations imposed on existing sources by SIP's. See supra notes 29-31 and accompanying text.

"New source netting" refers to the use of emissions trading within a plant to avoid the Act's new source review requirements. See infra notes 42-69 and accompanying text.

Emissions reductions may in some circumstances be stored or "banked" for future use in bubble, offset, or netting transactions. See, \textit{e.g.}, Emissions Trading Policy Statement, supra note 28, at 15,077, 15,078, 15,083-84.

\end{footnotesize}
B. New Source Netting

The Act imposes a formidable array of controls on new pollution sources or modifications of sources that increase pollution. Congress placed this burden of pollution control on new and modified plants as a matter of policy, so that newer, cleaner facilities would gradually supplant old, dirty facilities as plants were replaced or modified. New source netting allows new or modified pollution sources within a plant to avoid meeting these new source controls so long as pollution increases are offset by decreases elsewhere within the plant. EPA has implemented new source netting by defining the statutory term "source" to refer to entire plants rather than individual pieces of equipment within plants.42

There are three sets of pollution control requirements in the Act for new or modified sources. First, the Act requires the Administrator to establish New Source Performance Standards43 for categories of newly constructed or modified stationary sources44 that the Administrator finds emit pollutants endangering the public health or welfare. The New Source Performance Standards (NSPS) are limits on allowable emissions that reflect the degree of pollution control achievable by using the best demonstrated pollution control technology, taking into account the cost of controls as well as health, environmental, and energy considerations.46

The Act divides the nation into PSD areas and nonattainment areas47 and imposes further pollution control requirements in each. Controls in PSD areas48 are designed to keep clean air from deteriorating.49 The controls include a permit requirement for construction or modification of major sources50 and further limits on allowable emissions for new and modified sources, based on Best Available Control Technology.51 Best Available Control Technology must be at least as stringent

42. See infra notes 64-69 and accompanying text.
48. See supra note 9. For a discussion of the genesis of the PSD provisions, see generally Alabama Power v. Costle, 636 F.2d 323, 346-52 (D.C. Cir. 1980) (elaborating the D.C. Circuit Court of Appeals' previous per curiam decision, Alabama Power v. Costle, 606 F.2d 1068 (D.C. Cir. 1978)).

Best Available Control Technology (BACT) requires polluters to limit emissions to an
as applicable New Source Performance Standards. In nonattainment areas, requirements for new or modified major sources include meeting the Lowest Achievable Emission Rate (LAER), potentially the strictest limit on allowable emissions in the Act. Best Available Control Technology and Lowest Achievable Emission Rate apply in addition to any New Source Performance Standards that may be applicable.

By the terms of the Act, all these requirements apply to stationary "sources." Before the advent of the bubble concept, the definition of a "source" included individual components within an industrial plant, such as a kiln or a conveyor transfer point. The requirements apply to both newly constructed and "modified" stationary sources. A "modified" source is one that has undergone a change that increases pollution from the source. Accordingly, the new source review requirements are triggered not only when an operator builds a new plant,
but also whenever the operator installs or alters a piece of equipment in an existing plant and thereby increases emissions. Regulated industries assert that compliance with the new source review requirements is time consuming and expensive, because operators must meet the applicable emissions standards (e.g., NSPS, BACT, LAER), which require the installation of expensive, advanced pollution control technology.

EPA promulgated its new source netting policy in response to pressure from industry and the Department of Commerce. EPA designed netting to allow industries to escape the new source control requirements for modified pieces of equipment within plants if pollution decreases offset increases within a plant. To accomplish this end, EPA issued regulations redefining "source" as entire plants rather than as individual processes or pieces of equipment within plants. Because "modification" occurs only if pollution from a "source" increases, if a whole plant constitutes a "source", modification takes place only if pollution from the whole plant increases. Consequently, if decreases in pollution at sources within a plant offset increases elsewhere within the plant, there has been no "modification" of a "source" within the terms of the Act, and the new source control requirements are not triggered.

New source netting enables plant managers to adopt a potentially cost-efficient mix of pollution controls within the plant. Pollution

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62. See Brief for Industry Intervenor-Respondents at 8, 11, Natural Resources Defense Council v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), cert. granted sub nom. Chevron U.S.A. v. Natural Resources Defense Council, 103 S.Ct. 2427 (1983). Industry representatives argued that the dual definition stifles needed industrial growth in nonattainment areas by discouraging modernization. Plant modernizations may result in emission increases at points within the plant, they contended, and the extra expense of meeting new source review may make such modernizations uneconomical. Id. It is not self-evident that the dual definition significantly inhibits growth, however, because it remains to be demonstrated just how often compliance costs exceed the benefits of plant modernization, causing companies to abandon the proposed modernizations.

63. See e.g., R. Liroff, supra note 29, at 1.

64. ASARCO v. EPA, 578 F.2d 319, 323-24 (D.C. Cir. 1978); Note, Bubble Concept After Alabama Power, supra note 19, at 947; see generally Levin, supra note 33, at 947.

65. The NSPS bubble exempted modified facilities from new source review, where "facility" referred to a piece of equipment within a plant. ASARCO, 578 F.2d at 324 & n.18, 325; see also infra notes 83, 91-93 and accompanying text. The PSD bubble similarly exempted only modified facilities from the BACT requirement. See infra note 101 and accompanying text.

66. See ASARCO, 578 F.2d at 323-24; EPA's Widening Embrace, supra note 1, at 10,027; Levin, supra note 33, at 68-69.


68. Requirements for SIP's, supra note 67, at 16,280.

69. Id.

70. See, e.g., EPA's Widening Embrace, supra note 1, at 10,027; Note, Bubble Policy After Alabama Power, supra note 19, at 949-50.
control costs within a single plant may vary from point source to point source.\textsuperscript{71} Under new source netting, plant managers can relax pollution control at point sources where control is expensive, and compensate by tightening pollution control at other point sources where control is less expensive.\textsuperscript{72} So long as the overall emissions from the whole plant do not increase, these adjustments do not trigger the new source control requirements. Industry studies assert that such cost-efficient control strategies can significantly reduce pollution control costs.\textsuperscript{73}

Some commentators have voiced concern that new source netting and other types of emissions trading could undermine the aims of the Act. Congress designed the Act to be "technology-forcing," through an array of air quality standards, compliance deadlines, and strict limits on emissions. That is, the Act was to force polluters to develop and use pollution control devices that at first might appear economically or technologically infeasible, or which are technologically feasible but not yet achieved in practice.\textsuperscript{74} Emissions trading weakens technology forcing, critics assert, by relieving industries of the necessity of meeting strict control limits on hard to control point sources.\textsuperscript{75}

Arguably, emissions trading merely replaces a rigid system of emission limits imposed on every regulated point source with market incentives to spur advances in pollution control technology. By al-


\textsuperscript{72} See, e.g., \textit{MARKET APPROACH}, \textit{supra} note 1, at 8-9; \textit{EPA's Widening Embrace}, \textit{supra} note 1, at 10,027.

\textsuperscript{73} DuPont estimated it could save 60\% of its hydrocarbon pollution control costs across 50 plants. Drayton, \textit{supra} note 71, at 39. \textit{See also Overview, \textit{supra} note 19, at 141.}

\textsuperscript{74} \textit{See generally Union Electric Co. v. EPA}, 427 U.S. 246, 256-57 (1976); Bonine, \textit{The Evolution of 'Technology-Forcing' in the Clean Air Act}, ENV'T REP. (BNA), Monograph No. 21, at 11-22 (July 25, 1975); Ayres & Doniger, \textit{New Source Standard for Power Plants II: Consider the Law}, 3 HARV. ENVTL. L. REV. 63, 68-71 (1979). Technology-forcing became part of the Act's scheme for stationary sources with the 1970 Amendments. \textit{See} Bonine, \textit{supra}, at 12, 14-15, 20, 21-22. Among the provisions intended to force industry to develop pollution control technology were national ambient air quality standards based on health criteria without regard to technological feasibility, and specific compliance dates for achieving the standards. \textit{Id.} at 15, 18, 20. The emissions limits defined in the Act also may serve to force technology. Although the Conference Committee rewrote definitions of the New Source Performance Standards to take into account technological and economic feasibility, \textit{id.} at 21; \textit{see supra} note 46 and accompanying text, the Standards nevertheless are technology-forcing because they "need not be routinely achieved within the industry before their adoption." \textit{Note, Forcing Technology: The Clean Air Act Experience}, 88 YALE L. J. 1713, 1715 n.8 (1979) (quoting Essex Chemical Corp. v. Ruckleshaus, 486 F.2d 427, 433-34 (D.C. Cir. 1973), \textit{cert. denied}, 416 U.S. 969 (1974)); \textit{see also Ayres & Doniger, \textit{supra}, at 68-69.}

BACT and LAER are at least as stringent as NSPS and may be more stringent. \textit{See supra} notes 51, 54-56 and accompanying text.

\textsuperscript{75} \textit{See} R. Liroff, \textit{supra} note 29, at 18, discussing the bubble policy (use of offsets to meet SIP requirements); \textit{ASARCO}, 578 F.2d at 327-28 (new source netting applied to NSPS).
allowing industries to rely on less expensive controls, emissions trading may give industries an incentive to innovate cheap pollution control technology.\textsuperscript{76} Other industries seeking to lower their pollution control costs could provide a market for those cheap control processes, once the processes are developed.\textsuperscript{77}

Despite the alleged advantages of new source netting and other emissions trading mechanisms, many environmentalists doubted the wisdom of adopting them in some regulatory contexts. Critics objected that new source netting may delay the improvement of air quality by allowing industry to postpone upgrading pollution control technology.\textsuperscript{78} Further, delays in installing advanced pollution control technology might undercut Congress' intent that new and modified plants bear the brunt of air clean-up efforts.\textsuperscript{79}

Others argued that emissions trading is vulnerable to abuses because it allows industries to obtain offset credit without making meaningful efforts to control pollution. A plant that previously emitted less pollution than the SIP allows, for example, might claim an offset credit for the amount it could have polluted but did not.\textsuperscript{80} Some environmentalists referred to such offsets as "paper offsets," because they exist only on paper and may permit an increase in pollution.\textsuperscript{81} An emissions trading policy also might allow industries to offset pollution increases by shutting down pollution sources that have come to the end of their useful lives.\textsuperscript{82}

\textsuperscript{76} See Drayton, supra note 71, at 39 (discussing use of offsets by existing sources to meet SIP requirements); SIP Policy Statement, supra note 29, at 71,785 (same). See also notes 29-31 and accompanying text.

\textsuperscript{77} R. Liroff, supra note 29, at 18, discussing the use of offsets to meet SIP requirements. See also Note, Bubble Concept After Alabama Power, supra note 19, at 965.

\textsuperscript{78} In ruling on the legality of new source netting to avoid meeting NSPS, the court in ASARCO stated: "Applying the bubble concept [new source netting] thus postpones the time when the best technology must be employed and at best maintains the present level of emissions." 578 F.2d at 328.


\textsuperscript{80} R. LIROFF, supra note 38, at 28; see also D. Doniger, supra note 41, at 16-18.

\textsuperscript{81} Greene, supra note 79, at 8-9; R. LIROFF, supra note 38, at 28.

\textsuperscript{82} See D. Doniger, supra note 41, at 11-14. The Natural Resources Defense Council prepared these comments in response to an EPA policy statement proposing, among other things, to expand industry's right to use shutdowns to obtain offset credit to meet SIP requirements. Id.; Emissions Trading Policy Statement, supra note 28, at 15,076, 15,077, 15,081 (1982); see generally supra notes 29-31 and accompanying text. The policy statement also proposed allowing industries in nonattainment areas to claim offset credits for emitting less pollution than allowed under SIP's. Emissions Trading Policy Statement, supra note 28, at 15,077, 15,080 (1982). In its comments, Natural Resources Defense Council claimed that offsets based on allowable emissions were mere "paper" offsets. D. Doniger, supra note 41 at 17.
C. Prior D.C. Circuit Decisions On New Source Netting

In 1975 EPA implemented a limited new source netting policy obviating compliance with NSPS requirements when operators modified processes or pieces of equipment within a plant. In *ASARCO v. EPA*, industry challenged the regulations as not going far enough in implementing the bubble concept, while environmentalists challenged the regulations as contrary to the plain language of the Act.

The Act specifies that NSPS requirements apply to stationary sources that have been either newly constructed or modified so as to increase pollution. Until 1975, these stationary sources included pieces of equipment within larger plants. The Act defines a "stationary source" as a "building, structure, facility, or installation" emitting air pollution. "Facility" clearly referred to units smaller than plants, because EPA regulations defined "affected facility" as an "apparatus." The regulations in turn defined "modification" as a change in an "affected facility" that caused an increase in pollution from that facility. Accordingly, if an operator made alterations or added an "apparatus" within a plant so as to increase emissions, the operator had made a change in an "affected facility" and a "modification" of a "source" had occurred, triggering NSPS requirements.

To implement the bubble concept, EPA issued regulations redefining "stationary source" to refer to a building, structure, facility, or installation containing "any one or combination of" facilities. By this rather obscure change in wording, EPA intended to define "sources" as entire plants. The regulations likewise redefined "facilities" as individual components that taken together comprised a "source." At the same time, EPA declared that an operator would not have made a "modification" if the total emissions rate from all the facilities within the stationary source did not increase. As a consequence, if a piece of

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83. *ASARCO*, 578 F.2d at 324-25; see also Levin, supra note 33, at 68-69. For a discussion of New Source Performance Standard (NSPS) requirements, see supra notes 43-46 and accompanying text.
84. *ASARCO*, 578 F.2d at 325.
85. Id.
86. See supra notes 43-45 and accompanying text.
88. 40 C.F.R. § 60.2(e) (1975).
89. 40 C.F.R. § 60.2(h) (1975).
90. NSPS requirements continued to apply to any newly constructed facility, however, as well as any "reconstructed" facility; the Act defines the latter as a facility that has undergone a change costing more than a fixed percentage of the its value. *ASARCO*, 578 F.2d at 325.
91. 40 Fed. Reg. 58,416, 58,418 (1975) (to be codified at 40 C.F.R. § 60.2(d)); *ASARCO*, 578 F.2d at 324.
92. 40 Fed. Reg. 58,416-17 (1975) (discussion and analysis); *ASARCO*, 578 F.2d at 324.
93. 40 Fed. Reg. 58,419 (1975) (to be codified at 40 C.F.R. § 60.14(d)); *ASARCO*, 578 F.2d at 325.
equipment within a plant were altered so that emissions from that piece of equipment increased, under the new regulations no "modifications" of a "source" would occur if offsetting decreases elsewhere in the plant kept new pollution levels constant. Because no modification of a stationary source occurred, the alteration would not trigger NSPS requirements.

In *ASARCO*, the D.C. Circuit Court of Appeals held this limited NSPS use of the bubble concept to be inconsistent with the language and purposes of the Act. The court ruled that because "stationary source" was defined in the Act itself, EPA could not rewrite this statutory definition in its regulations.94 More importantly, the court found that the purpose of the Act was to improve air quality and not merely to maintain the status quo.95 The NSPS requirements, the court held, furthered this general purpose of improving air quality by requiring new and modified sources to incorporate advanced pollution abatement technology.96 New source netting, on the other hand, allowed plants to escape NSPS requirements and consequently postpone installing advanced pollution control technology, so long as emissions increases were offset elsewhere within the plant.97 The court therefore concluded that the bubble concept at best guaranteed that present emission levels would not worsen, but could not in itself reduce emission levels.98 Accordingly, the court found the concept inconsistent with the Act's purpose of enhancing air quality.

When Congress expanded the PSD provisions of the Act in 1977,99 EPA again tried to implement limited new source netting. As it had done earlier in its NSPS bubble rules, EPA redefined "source" to refer to entire plants rather than individual parts of plants.100 EPA then ex-
emptied modified facilities (individual processes or pieces of equipment) from Best Available Control Technology requirements,\(^{101}\) and new and modified sources from ambient air quality review requirements,\(^{102}\) if there was no net increase in pollution from the entire source. Both new major stationary sources and major modifications, however, continued to be subject to the PSD permit requirements.\(^{103}\)

In *Alabama Power v. Costle*,\(^{104}\) the D.C. Circuit Court upheld application of the bubble concept to PSD new source review, finding it consistent with the specific purposes of the PSD program.\(^{105}\) The examples of "sources" given in the Act, the court held, demonstrated that Congress intended that entire plants could be single sources.\(^{106}\) The court in addition found that Congress intended that the PSD provisions only prevent air quality in clean air regions from getting worse.\(^{107}\) Because the court in *ASARCO* based its rejection of new source netting on the NSPS program's purpose of enhancing air quality, *ASARCO* was inapposite.\(^{108}\) The *Alabama Power* court stated that the bubble concept was "precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement."\(^{109}\)

The court held that the concept nevertheless must be applied consistently. The court found no justification for EPA's refusal to exempt major modifications from PSD preconstruction permit requirements when EPA exempted such modifications from the "substantive" re-
requirements of BACT and air quality review.\textsuperscript{110} Where no net increase in pollution results from a modification within a source, the court ruled, none of the PSD program's requirements may be imposed.\textsuperscript{111} Commentators have had difficulty reconciling \textit{Alabama Power} with \textit{ASARCO}.\textsuperscript{112} One writer found the statutory language too incon-sequential to support inferences of different legislative intent behind the PSD and NSPS programs.\textsuperscript{113} Another reasoned that because the \textit{ASARCO} court held the bubble concept inconsistent with the purposes of the Act as a whole, the concept should be contrary to the purposes of the PSD program as well as those of the NSPS program.\textsuperscript{114} Because no clear rule emerged outlining the situations in which new source netting would be lawful, the two cases cast a cloud of uncertainty over the legality of the bubble concept under the Act's remaining new source review program, the nonattainment program.\textsuperscript{115} The D.C. Court of Appeals addressed this issue in \textit{Natural Resources Defense Council v. Gorsuch}.

II. \textbf{THE GORSUCH COURT'S RULING}

The nonattainment provisions of the Act impose two burdens on major\textsuperscript{116} new or modified sources: a preconstruction permit requirement and a construction moratorium. To obtain a preconstruction permit, a plant operator must meet several conditions.\textsuperscript{117} Emissions from a new or modified source must be more than offset by reductions elsewhere, so that the area continues to make reasonable further progress toward attainment of national air quality standards.\textsuperscript{118} Alternatively,

\textsuperscript{110} See id. 402-03.
\textsuperscript{111} See id.
\textsuperscript{112} See, e.g., Landau, supra note 19, at 960; Overview, supra note 19, at 150-51.
\textsuperscript{113} Note, \textit{Bubble Concept After Alabama Power}, supra note 19, at 960.
\textsuperscript{114} \textit{Overview}, supra note 19, at 150.
\textsuperscript{115} See generally, e.g., \textit{id.} at 152.
\textsuperscript{116} A "major stationary source" is a stationary source that emits or has the potential to emit one hundred or more tons per year of a pollutant for which EPA has formulated a standard. 40 CFR \textsection{51.18(j)(1)(iv)(a)} (1982). A "major modification" is "any physical change in the method of operation of a major stationary source that would result in a significant net emission increase" of any pollutant for which EPA has formulated a standard. 40 C.F.R. \textsection{51.18(j)(1)(v)(a)} (1982); see Brief for Petitioners, supra note 79, at 10. "Significant net emissions increases" are defined individually for certain pollutants. 40 C.F.R. \textsection{51.18(j)(1)(v)(x)} (1982).
\textsuperscript{117} Clean Air Act \textsection{172(b)(6), 173, 42 U.S.C. \textsection{} 7502(b)(6), 7503 (Supp. V 1981) (requiring that SIPs provide for enforcement of the permit requirements of the section 173 of the Act, 42 U.S.C. \textsection{} 7503 (Supp. V 1981)).
\textsuperscript{118} See supra notes 32-38 and accompanying text; Clean Air Act \textsection{} 173(1)(A), 42 U.S.C. \textsection{} 7503(1)(A) (Supp. V 1981). The Act defines "reasonable further progress" as "annual incremental reductions in emissions of the applicable air pollutant . . . which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title [as expedi-
the new or modified source's emissions must fall within a growth allowance identified and quantified in the SIP. 119 The new or modified source must comply with a stringent technology-based emission limit, Lowest Achievable Emission Rate (LAER). 120 All other major stationary sources in the state owned or operated by the same individual or entity must comply with all applicable emissions limitations and standards. 121 The construction moratorium bans construction of any major stationary source in a nonattainment area lacking an EPA-approved SIP. 122

On October 14, 1981, EPA implemented new source netting in nonattainment areas, allowing new and modified sources to use emissions trade-offs within plants to avoid the permit requirements and the construction moratorium. 123 Before the introduction of the bubble concept, the "sources" to which these nonattainment provisions applied included individual pieces of equipment within plants as well as entire plants. EPA at that time used a "dual definition" for "source": of the four terms in the statutory definition, "building," "structure," and "facility" were defined as whole plants, and an "installation" was defined as an identifiable piece of process equipment within a plant. 124 The 1981 regulations enacted new source netting by redefining "installation" in the same manner as "building," "structure," and "facility," thereby abandoning the dual definition. 125 The "sources" to which the nonattainment provisions applied now included only whole plants. 126 "Modification" occurs only when pollution increases from a "source." 127 Under the new plantwide definition of "source," then, an increase in emissions at one point was not a "modification" if offset by reductions within the same plant. Because no modification occurred,


120. See supra notes 54-55 and accompanying text; Clean Air Act § 173(2), 42 U.S.C. § 7503(2) (Supp. V 1981). The nonattainment provisions impose two further requirements for obtaining a preconstruction permit: (1) all other major sources in the state owned or operated by the applicant must comply or be on schedule for compliance with all applicable emissions limitations, Clean Air Act § 173(3), 42 U.S.C. § 7503(3) (Supp. V 1981), and (2) the state must be carrying out its SIP for the nonattainment area, Clean Air Act § 173(4), 42 U.S.C. § 7503(4) (Supp. V 1981).


125. 46 Fed. Reg. 50,771 (1981); Gorsuch, 685 F.2d at 724.


127. See supra note 61 and accompanying text.
the nonattainment provisions were not triggered.128

Three environmental groups, the Natural Resources Defense Council, Citizens for a Better Environment, and the Northwestern Ohio Lung Association, petitioned the D. C. Circuit Court of Appeals for review of the 1981 redefinition of "source" and deletion of the reconstruction rule by EPA.129 Finding the legislative history of "source" in the nonattainment provisions inconclusive,130 the D. C. Circuit held that ASARCO and Alabama Power governed the decision.131 These two opinions, the court found, established a bright line rule of law. Under Alabama Power, new source netting is mandatory for Act programs designed merely to maintain existing air quality without necessarily improving it.132 But under both Alabama Power and ASARCO, new source netting is inappropriate for Clean Air Act programs designed to improve air quality.133 The court held that the broad purpose of the nonattainment program is to improve air quality, so as to bring nonattainment areas into expeditious compliance with air quality standards.134 Applying this bright line rule, the court struck down the application of new source netting in nonattainment areas.135

Judge Ginsburg, writing for the court, rejected EPA's attempt to draw a different line distinguishing ASARCO and Alabama Power. EPA argued that the NSPS program, which was the concern of the ASARCO court, "focuses exclusively on what demonstrated technol-

128. See Gorsuch, 685 F.2d at 724 n.26. At the same time it promulgated the plantwide definition of "source," EPA deleted the requirement that reconstructions in nonattainment areas be treated as new sources. Id. at 724. Under the old regulations, an existing source that had been upgraded counted as a "reconstruction" rather than as a "modification" whenever the fixed capital cost of new components was more than 50% of the cost of an entirely new source. 45 Fed. Reg. 52,744 (to be codified at 40 C.F.R. § 51.18(j)(1)(ix)) (1980); Gorsuch, 685 F.2d at 724. If such an overhauled source were a mere "modification," it would have to meet the nonattainment requirements only if an increase in pollution resulted. See supra note 61; Clean Air Act §§ 171(4), 111(a)(4), 42 U.S.C. §§ 7501(4), 7411(a)(4) (Supp. V 1981). Treating reconstructions as new sources had the effect of making the nonattainment provisions applicable even if pollution from the source did not significantly increase. 46 Fed. Reg. 16,281 (1981)(discussion and analysis of rules proposed March 12, 1981) Once EPA adopted the plantwide definition of "source," however, the only things that would count as "reconstructions" would be entire plants where the cost of new components exceeded 50% of the cost of a completely new plant. Few such reconstructions of whole plants were likely to occur, EPA reasoned, and consequently under the plantwide definition the rule treating reconstructions as new plants was superfluous. Id.; Gorsuch, 685 F.2d at 724. EPA therefore deleted the rule.


130. See 685 F.2d at 726 n.39.

131. Id. at 720, 725.

132. Id. at 726.

133. Id.

134. Id. at 726-27.

135. Id. at 726.
ogy can achieve.'

By this, EPA apparently meant that Congress designed the NSPS requirement to guarantee a certain advanced level of technology in new and modified sources. EPA argued that the purpose of the nonattainment program is different. The nonattainment provisions, like the PSD provisions, address the effects of emissions on air quality and the attainment of air quality standards. Because net emissions from all facilities in a plant determine that effect, EPA asserted, the appropriate method to determine compliance with these programs is to consider net emissions. EPA therefore concluded that the new source netting is consistent with both the PSD and the nonattainment programs.

The court rejected EPA’s proposed bright line for two reasons. First, the court found that the nonattainment program contained some provisions designed to be technology-forcing. EPA’s argument that the nonattainment program did not focus on technology as did the NSPS program therefore was unconvincing. Second, Judge Ginsburg pointed out that EPA’s proposed bright line differed from the one drawn in Alabama Power. Alabama Power found the distinction between maintaining and improving air quality to be crucial to the appropriateness of the new source netting. That distinction, the court concluded, establishes the correct bright line dividing Alabama Power from ASARCO.

EPA also argued that the new source netting definition of “source” as equivalent to an entire plant accorded with the purposes of the nonattainment program. EPA recognized that one purpose of the nonattainment provisions was to enhance air quality, but nevertheless asserted that the program had an additional purpose of allowing states greater flexibility to encourage economic growth while ensuring reasonable further progress toward attainment of air quality standards. With new source netting, the Act still required the states to demonstrate that air quality standards would be attained by the statu-

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136. Brief for Respondent, supra note 129, at 26; Gorsuch, 685 F.2d at 726 n.38.
138. Brief for Respondent, supra note 129, at 26; Gorsuch, 685 F.2d at 726 n.38. See also Petition for Certiorari, NRDC v. Gorsuch, supra note 137, at 22.
139. Brief for Respondent, supra note 129, at 27.
140. Id.
141. Id.
142. Id. (citing Alabama Power, 636 F.2d at 401-02).
143. See Brief for Respondent, supra note 129, at 21.
144. See id. at 21-22; Gorsuch, 685 F.2d at 727.
tory deadline and that reasonable further progress was being made toward that goal.\textsuperscript{147} New source netting, however, gave states able to meet these requirements the flexibility to adopt a theoretically less burdensome mechanism for new source review, and thereby encourage economic growth.\textsuperscript{148}

Neither of EPA’s arguments persuaded the court. Judge Ginsburg ruled that the clear goal of the nonattainment program was to improve air quality in regions slow in making progress toward attaining national air quality standards.\textsuperscript{149} Giving the states flexibility to choose how best to achieve their air quality goals might be a means toward attaining air quality standards, the court found, but flexibility was not itself an independent goal of the nonattainment provisions.\textsuperscript{150} The court noted finally that the Act imposes the permit and moratorium requirements on the states and does not give states the flexibility to opt out of them.\textsuperscript{151} Judge Ginsburg suggested that it would be inconsistent with the federal statutory scheme of the Act to allow states to define the sources to which these requirements apply.\textsuperscript{152}

The court observed that EPA had reversed itself by adopting new source netting in its 1981 regulations.\textsuperscript{153} In 1980, EPA had stated that the dual definition of “source” was more consonant with Congress’ intent to improve air quality in nonattainment areas than was the equation of source with an entire plant.\textsuperscript{154} EPA argued just the opposite in 1981: far from improving air quality, the dual definition actually might impede air quality improvement by imposing new source review requirements every time a component in a plant was replaced, discouraging the replacement of old industrial processes with more advanced,

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  \item \textsuperscript{147} Brief for Respondent, supra note 129, at 22; Gorsuch, 685 F.2d at 727.
  \item \textsuperscript{148} See Brief for Respondent, supra note 129, at 22. EPA argued that new source netting similarly accorded with the purposes of the construction moratorium. Brief for Respondent, supra note 129, at 33-36; Gorsuch, 685 F.2d at 727 n.40. According to EPA, the aim of the moratorium was not to improve air quality, but merely to prevent air quality from deteriorating in nonattainment areas while the state prepared a revised SIP for EPA approval. Brief for Respondent, supra note 129, at 33-36; Gorsuch, 685 F.2d at 727 n.40. In contrast, Petitioners asserted that the construction moratorium has two purposes: (1) to prevent construction of new plants or facilities with pollution controls less stringent than an adequate SIP would ultimately require; and (2) to provide an incentive for industry to cooperate in the development of an adequate SIP. Brief for Petitioners, supra note 79, at 14. The court did not endorse either position, but viewed the construction moratorium as an integral part of the nonattainment program as a whole. Gorsuch, 685 F.2d 727 n.40. The court asserted that application of new source netting to the moratorium would not serve the purposes of the nonattainment program. \textit{Id}.
  \item \textsuperscript{149} Gorsuch, 685 F.2d at 726-27.
  \item \textsuperscript{150} \textit{Id}. at 727.
  \item \textsuperscript{151} \textit{Id}. at 727-28.
  \item \textsuperscript{152} \textit{Id}.
  \item \textsuperscript{153} \textit{Id}. at 727 n.41.
  \item \textsuperscript{154} 45 Fed. Reg. 52,697-98 (1980); Gorsuch, 685 F.2d at 727 n.41.
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cleaner processes. Judge Ginsburg ruled that EPA had the burden of showing that the prior regulation no longer effectuated public policy. Because EPA cited no support for its change in position, the 1981 regulations did not rise to the level of reasoned decisionmaking, and EPA failed to meet its burden.

On May 31, 1983, on petition from EPA and two industry representatives, the Supreme Court agreed to review the circuit court's ruling.

III. ANALYSIS

This section examines three important questions raised by the D.C. Court of Appeals' ruling. First, what standard of review appropriately governed the court's scrutiny of EPA's redefinition of "source"? Second, was the court correct in resting its decision on a rule gleaned from prior decisions rather than on a reading of the legislative history to determine the definition of "source" Congress intended? Third, was the court correct in finding that the purpose of the nonattainment provisions and the construction moratorium was to enhance air quality, making new source netting illegal in nonattainment areas?

Examination of these questions leads to the conclusion that the court was largely correct in its ruling. The court did not owe a high degree of deference to EPA's redefinition of "source." Congress did not define "source" explicitly in its reports and debates; although the court nevertheless might have inferred the dual definition of "source" from legislative history, the court's bright line rule is reasonable. Finally, the purpose of new source review in nonattainment areas plainly was to improve air quality and protect the public health. The court's bright line rule therefore precluded application of new source netting in nonattainment areas.

A. Standard of Review

EPA argued before the D.C. Circuit that the court owed great deference to the agency's action redefining "source," and that this very

157. Gorsuch, 685 F.2d at 727 n.41. The court also vacated EPA's deletion of the rule treating reconstructions as new sources. Id. at 728. EPA's only reason for striking the rule was that under the plantwide definition the rule would not be needed. See supra note 128. Since it had invalidated new source netting in nonattainment areas, the court found EPA's deletion of the rule no longer justified. Gorsuch, 685 F.2d at 727-28 n.41.
deferential standard of review required that EPA’s redefinition be upheld. Neither argument is persuasive.

EPA argued vehemently that a reviewing court owes great deference to an administrative agency’s construction of the statute the agency administers. It asserted that agency actions are presumptively valid, and should be reviewed under an “arbitrary and capricious” standard. EPA conceded that the reviewing court must engage in a searching, careful, and substantial inquiry into the record, but argued that the court only may evaluate the decision based on a consideration of relevant factors, and may not substitute its judgment for the agency’s.

EPA correctly stated the basic principles of administrative law that require a reviewing court to defer to an agency’s interpretation of legislation entrusted to the agency. The deference due an agency’s interpretation of the statute it administers does not, however, preclude a court from overturning agency action it finds inconsistent with a statutory mandate or with underlying congressional policy. The discretion an agency possesses to interpret law is not absolute, and must not

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In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . .


162. E.g., ASARCO, 578 F.2d at 325; Association of American Railroads v. Costle, 562 F.2d 1310, 1318-19 (D.C. Cir. 1977) (despite deference due EPA’s interpretation of Noise Control Act, court overturned regulations which misinterpreted agency’s statutory mandate). An agency’s interpretation of the statute it administers deserves judicial deference, particularly where the interpretation is longstanding and has been consistently espoused by the agency. See also Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. Daniel, 434 U.S. 551, 556 n.20 (1979). EPA’s plantwide definition, however, is not a longstanding agency interpretation of the Clean Air Act. See supra notes 123-128 and accompanying text. Even a consistent and longstanding agency interpretation of a statute may be overturned if found contrary to the language, purpose, or history of the statute. See Daniel, 439 U.S. at 556 n.20.

deviate from legislative intent.164

A reviewing court owes deference to an agency's determinations principally in areas in which the agency possesses expertise about technical issues165 or regulatory programs.166 Questions of congressional intent in drafting a statute, however, are questions of law that do not call for the agency's technical expertise.167 A reviewing court may substitute its judgment for that of an agency in determining questions of law.168 If an agency misinterprets its statutory mandate, it is the reviewing court's duty to correct the legal error.169 Because the critical issue facing the Gorsuch court was whether EPA's redefinition of "source" accorded with Congress' purposes in enacting the nonattainment provisions, EPA's action was due less deference than EPA argued. Thus, the court had a duty to decide whether EPA had overstepped its statutory authority.

EPA's second argument was more extreme. Citing Train v. Natural Resources Defense Council170 and Union Electric Co. v. EPA,171 EPA asserted that section 110(a)(2) of the Act requires EPA to approve any SIP demonstrating timely attainment of air quality standards and meeting the other requirements of section 110(a)(2), no matter whether the SIP uses the dual or the plantwide definition of "source."172 EPA

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164. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970). An agency has a higher burden to justify its action where, as here, the agency reverses a settled policy once thought to carry out congressional intent than where the agency is not reversing prior policy. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. at 2866.


166. Lubrizol, 562 F.2d at 816 n.23.

167. See B. SCHWARTZ, supra note 165, at 587-88. See also 42 U.S.C. § 7607(d)(9)(A), (C) (Supp. V 1981), reproduced supra note 160, stating that a reviewing court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." (emphasis added)

169. Association of American Railroads, 562 F.2d at 1319.

170. Brief for Respondent, supra note 129, at 25, (citing Train, 421 U.S. at 79): "Under § 110(a)(2), the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements."

171. Brief for Respondent, supra note 129, at 25. In Union Electric, 427 U.S. 246 (1976) the court stated that "[s]o long as the national standards are met, the State may select whatever mix of control devices it desires." Id. at 266.

172. Section 110(a)(2) of the Act provides in part:

... The Administrator shall approve such [state implementation] plan... if he determines that it was adopted after reasonable notice and hearing and that — (A) ... (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but... in no case later than three years from the date of approval of such plan... .

(B) it includes emission limitations, schedules, and timetables for compliance
argued that there is a statutory presumption that states are free to adopt whatever strategies for pollution control they wish so long as their SIP's demonstrate attainment of the federal standards and conform to other requirements of the Act. In effect, EPA claimed that it did not possess discretion to adopt new source netting, but must allow states to use netting so long as the states make reasonable progress toward attainment of pollution standards.

This second argument also is unpersuasive. First, it is based on a misinterpretation of the Act or a misreading of Train. The Train court ruled that EPA was required to approve any SIP providing for timely attainment and subsequent maintenance of air quality standards that also satisfies the other requirements of Section 110(a)(2). These other requirements include the provision for preconstruction permits in nonattainment areas, the construction moratorium, and the prohibition against emissions in amounts that will prevent attainment of air quality standards in other states. As Train recognized, all are federal requirements imposed on the states, applying to any "stationary source," If "stationary source" is defined by the states, these requirements are meaningless. It is incoherent to argue, as EPA did,

with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including . . . preconstruction review of direct sources of air pollution . . . .

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C [PSD program] and D [nonattainment program] . . . .

(E) it contains adequate provisions . . . prohibiting any stationary source within the State from emitting any air pollutant in amounts which will . . . prevent attainment or maintenance by any other State . . . .

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area . . . . if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless . . . such plan meets the requirements of part D (relating to nonattainment areas) . . . .


174. States may formulate SIP's more stringent than EPA regulations require. See Union Electric, 427 U.S. at 263. Thus, if EPA adopts the plantwide definition, states may use either the plantwide (bubble) or the dual (no bubble) definition in their implementation plans. States may not, however, adopt SIP's less stringent than the minimal requirements established by the Administrator. See id.

175. See supra note 170. The Court in Union Electric relied on Train to reach its conclusion. See 427 U.S. at 266.


179. The Court in Train recognized that Section 110(a)(2) of the Act contains "other general requirements" which SIP's must meet. See supra note 170.

that the Act imposes federal standards on the states but leaves crucial terms in those standards to be defined by the states themselves.

A second and more important reason for rejecting EPA's argument is that EPA's position contradicts the intent of Congress. The court in *Gorsuch* correctly pointed out that allowing the states to define "source" any way they like is inconsistent with the statutory scheme of federal requirements imposed on the states.\(^{181}\) Examination of the legislative history reveals that Congress did not intend the states to be free to choose which polluters would be subject to these requirements. In its Report on the 1977 amendments, the House Committee on Interstate and Foreign Commerce stated that the maximum control of pollution from new and modified sources in nonattainment areas should be mandated, in order to minimize health risks, make room for new growth, and achieve the technology-forcing purpose of the Act.\(^{182}\) In other words, although Congress intended to allow new pollution sources to locate in nonattainment areas, it also intended to impose on all new sources the requirements of new source review, with its technology-based emission limitations.\(^{183}\)

Whatever freedom or flexibility Congress meant to give to the states, new source review was a wholly independent requirement to which flexibility did not extend.\(^{184}\)

Consequently, neither administrative law nor the holdings of *Train* and *Union Electric* required the *Gorsuch* court to be extraordinarily deferential to EPA's redefinition of "source." In setting aside EPA's action, the court acted within its authority.

**B. The Gorsuch Court's Bright Line**

The court in *Gorsuch* found correctly that Congress had not explicitly defined the term "source." It is possible to draw inferences, however, from Congress' deliberations, and the available inferences point toward the dual definition as the intended one, indicating that the bubble policy is inappropriate in nonattainment areas. In the 1976 floor debates on amendments to the Act, for example, Senator McClure read into the Congressional Record a memorandum from the Office of Air Quality Planning and Standards.\(^{185}\) This memorandum contains a

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183. See supra notes 54-55 and accompanying text.
184. EPA's argument is unpersuasive for another reason. Although EPA maintains that states may control pollution any way they wish so long as they can demonstrate that air quality standards will be attained on time, Congress did not intend to rely solely on attainment of the standards to clean up air in nonattainment areas. See infra notes 212-218 and accompanying text.
table listing sources that should be covered by new source review.\textsuperscript{186} EPA asserted in its brief that a perusal of the sources listed in this table demonstrated that Congress meant “source” to refer to whole industrial plants.\textsuperscript{187} EPA failed to mention that the same memorandum states that the category of “stationary sources . . . with an annual emission potential of 100 tons” includes “most average sized commercial and industrial boilers,”\textsuperscript{188} that is, units smaller than plants. Since the memorandum used “source” to refer both to whole plants and units within plants, the writer must have had the dual definition in mind.

Both the petitioners and EPA tried to convince the court that their respective definitions could be inferred from the legislative history.\textsuperscript{189} Neither side’s arguments persuaded the court, which concluded that the legislative history was contradictory\textsuperscript{190} and that the decision should rest on prior decisions interpreting the underlying intent of the Act as a whole.\textsuperscript{191} The court devised a “bright line” rule based on the policy goals of preserving as opposed to enhancing air quality.\textsuperscript{192} Although not the only one that the court could have chosen, the rule adopted by the court is reasonable.

The \textit{Gorsuch} court need not have drawn a bright line distinguishing \textit{Alabama Power} from \textit{ASARCO} at all, but could have based its decision solely on \textit{ASARCO}. In \textit{ASARCO}, the D.C. Circuit Court held that programs intended to further the Act’s general purpose of enhancing air quality conflicted with the plantwide definition of “source” and new source netting.\textsuperscript{193} In \textit{Gorsuch}, the court determined that the purpose of the nonattainment program was to enhance air quality.\textsuperscript{194} It therefore follows from \textit{ASARCO} alone that new source

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\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} Brief for Respondent, \textit{supra} note 129, at 18-19.
\item \textsuperscript{188} 122 CONG. REC. at 24,549.
\item \textsuperscript{189} Brief for Petitioners, \textit{supra} note 79, at 41-46; Brief for Respondent, \textit{supra} note 129, at 17-19. Not all of the arguments in the briefs are convincing. For example, petitioners argue that the dual definition can be inferred from the House Report on the Steel Industry Compliance Extension Act of 1981. Brief for Petitioners, \textit{supra} note 79, at 45 (citing H.R. REP. NO. 121, 97th Cong., 1st Sess. (1981), reprinted in 1981 U.S. CODE CONG. & AD. NEWS 56). The report discusses the requirement of Lowest Achievable Emission Rate on modernized facilities. \textit{Id.} Petitioners argue that a paragraph in the report gives examples of facilities to which this requirement applies, including units smaller than plants. Because LAER only applies to sources, petitioners argue, “source” must include individual pieces of equipment within plants. Brief for Petitioners, \textit{supra} note 79, at 45. It is not certain, however, that the Committee intended to use the examples referred to by the petitioners as examples of facilities to which LAER applies. Similarly, the remarks of Senator McClure offered by EPA as evidence of the plantwide (new source netting) definition are unconvincing. \textit{See supra} notes 185-188 and accompanying text.
\item \textsuperscript{190} 685 F.2d at 726 n.39.
\item \textsuperscript{191} \textit{Id.} at 720, 725.
\item \textsuperscript{192} \textit{See supra} notes 132-135 and accompanying text.
\item \textsuperscript{193} \textit{ASARCO}, 578 F.2d at 327-28; \textit{see supra} notes 95-98 and accompanying text.
\item \textsuperscript{194} \textit{Gorsuch}, 685 F.2d at 726-27; \textit{see also supra} note 134 and accompanying text.
\end{enumerate}
}\end{footnotesize}
netting is inappropriate for the nonattainment program.

The Gorsuch court evidently wanted to distinguish Alabama Power and ASARCO in order to resolve some of the uncertainty engendered by these decisions. Given this desire, the court's bright line rule represents a balanced, reasonable approach. New source netting by its very nature reduces the frequency with which new source control requirements will be imposed, and therefore delays the improvement of air quality. This delay may be tolerable where air quality is already adequate and the purpose is merely to maintain it. Delay is intolerable, however, where pollution levels currently are unacceptable and the controls imposed by the act are intended to bring about compliance with national air quality standards.

C. Purposes of the Nonattainment Program

Having derived a bright line rule from prior cases, the Gorsuch court applied the rule in light of the purposes of the nonattainment program. The court reached the obvious and correct conclusion that the central purpose of the nonattainment program was to bring air quality into compliance with national ambient air quality standards. The court therefore struck down new source netting as illegal under the nonattainment program.

EPA argued strenuously that new source netting accorded with the purposes of the nonattainment provisions. EPA asserted that improving air quality in order to assure progress toward attainment of national standards was only one of several purposes of the nonattainment program. Citing House and Senate Committee Reports, EPA proposed that another important purpose of the nonattainment provisions

195. The Gorsuch court's construction of Alabama Power was incautious. The court interpreted Alabama Power to require, not merely to allow, the plantwide definition in programs designed merely to keep air quality from getting worse. 685 F.2d at 726. Alabama Power does contain language to support this interpretation. The Alabama Power court found, for example, that a definition of "modification" that included increases in emissions from individual units within plants, even if offset elsewhere in the same plant, would be "unreasonable and contrary to the expressed purposes of the PSD provisions of the Act." 636 F.2d at 401. The Alabama Power court later asserted that "the bubble concept is precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement." Id. at 402.

Alabama Power, however, admits to give a more conservative interpretation than the one given by the Gorsuch court. The court could have interpreted Alabama Power to hold merely that the plantwide definition is allowed in the PSD program and that if the definition is adopted it must be implemented fully for all PSD requirements. See supra notes 109-111 and accompanying text. The Gorsuch court's construction of Alabama Power gives the force of precedent to the plantwide definition in the PSD program, and will make it difficult for future administrators to retreat from new source netting if that should prove desirable. The court in Gorsuch would have been more prudent not to have interpreted Alabama Power at all.

196. See supra notes 112-115 and accompanying text.
was to afford states flexibility to permit reasonable economic growth while ensuring progress toward attainment of air quality standards. EPA asserted that new source netting is well-suited to this purpose, because it allows the states to adopt a mechanism for new source review that is potentially more cost-effective and less burdensome to industry, thus encouraging economic growth. Moreover, EPA contended that the Act’s requirements of reasonable further progress and attainment of quality standards by statutory deadlines ensure that air quality will continue to improve in nonattainment areas. EPA further relied on *Union Electric* and *Train* for the proposition that states may adopt whatever strategies they choose for attaining air quality standards, so long as they meet the standards according to schedule and continue in compliance thereafter.

Although superficially persuasive, EPA’s argument is supported by neither legislative history nor precedent. The 1977 amendments granted some flexibility to the states, but Congress never intended to give the states a blank check on all matters related to air pollution control.

EPA misplaced its reliance on *Train* and *Union Electric*. As shown above in Part A, these decisions do not authorize the states to decide which polluters will be subject to new source review. *Train* and *Union Electric* hold only that a state may set the source-by-source emissions limitations as it sees fit, so long as its SIP ensures timely at-

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198. *Id.* at 21-22. EPA cited the following passage from the House Committee Report:

[The nonattainment program] has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretative [sic] regulations afford.

*Id.* at 21 (citing H.R. REP. No. 294, supra note 182, at 211, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 1290).

The passage cited from the Senate Committee Report reads:

The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals. States and localities are given broad discretion to make decisions, while maintaining the minimum national air quality baselines designed to protect health and welfare. . . .

Brief for Respondent, supra note 182, at 22 (citing S. REP. NO. 127, 95th Cong., 1st Sess. 10 (1977)).

199. Brief for Respondent, supra note 129, at 22; see *supra* notes 70-73 and accompanying text.


203. *See supra* notes 170-180 and accompanying text.
tainment of air quality standards and other requirements, and specifies that new or modified stationary sources in nonattainment areas obtain a permit contingent upon new source review. New source review therefore is an independent federal requirement, and states may not evade it merely by designing a SIP that provides for attainment by the deadlines in the Act.

As the House Committee Report noted, the 1977 amendments to the Act attempted to reconcile conflicting interests. The overriding purpose of the amendments, and of the Act as a whole, was to protect the public against air pollution-related health hazards. On the other hand, a clear aim of the amendments was to enable carefully controlled industrial growth to occur in nonattainment areas. A complete prohibition on industrial growth or expansion in nonattainment areas could have a serious economic impact on some American cities, because such a prohibition might require new facilities to be built in undeveloped areas or far from existing plants. The Committee acknowledged these two conflicting aims by stating that two main purposes of the amendments were to allow reasonable economic growth while assuring reasonable further progress toward attainment of air quality standards, and to give states greater flexibility in achieving this first purpose.

The flexibility to which the Committee referred does not leave states free to do as they please in controlling pollution. The House Report clearly reveals that the Committee intended the 1977 amendments to afford states only a sharply restricted flexibility to make certain kinds of decisions. For example, the states may allow new growth in nonattainment areas through use of the offset policy, or through revision of their SIP's to inventory emissions from all pollution sources and specify growth to be allowed.

206. Id. at 210, reprinted in U.S. Code Cong. & Ad. News at 1289.
207. See id. at 211, reprinted in U.S. Code Cong. & Ad. News at 1290 (reproduced in part in supra note 198).
209. Under the heading "STATE FLEXIBILITY," the Report states:

As indicated above, one purpose of this section is to give the States more flexibility in determining how to protect public health while still permitting reasonable new growth. Thus, this section provides the States with two basic options: (1) EPA trade-off policy, as it may be modified; or (2) plan revision under this section.

Id. See also supra notes 34-38 and accompanying text (offset policy); H.R. Rep. No. 294, supra note 182, at 212, reprinted in 1977 U.S. Code Cong. & Ad. News at 1291 (plant revision). Other elements of state flexibility are the authority for states to adopt California new-car emissions standards on adequate notice, and the freedom for states to define boundaries for nonattainment areas and to subdivide the areas. Id. at 213, reprinted in 1977 U.S. Code Cong. & Ad. News at 1292.
Further, the Report expressly directs that the LAER requirement, part of new source review in nonattainment areas, be imposed on any new or expanding sources in nonattainment areas. In other words, Congress did not intend for states to have the flexibility to opt out of new source review in nonattainment areas. The Committee Report states this in unmistakeable terms:

[In light of the adverse air quality and health consequences of this new pollution [from new or expanded sources in nonattainment areas], the committee concluded that all feasible efforts to reduce or control this new pollution should be mandated.]

Furthermore, maximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth. This is particularly true in light of the indications that emissions from many existing sources in nonattainment areas will be increasing or remain static. Finally, the technology-forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas.

For all these reasons, the committee adopted the requirement for proposed new or modified major stationary sources in nonattainment areas to meet the LAER requirement.

The Committee could not have expressed more clearly its intent that new source controls apply to the maximum extent possible in nonattainment areas, and that the states do not have the flexibility to opt out of them. While allowing the states a degree of flexibility in certain specific areas of pollution control, Congress adamantly required nonattainment new source review, both to ensure the improvement of unhealthy air and to allow room for growth in nonattainment areas. Because new source netting narrows the scope of new source review, it plainly contradicts Congress’ intent as manifested by the House Committee Report.

Legislative history showing that Congress never intended to rely exclusively on attainment of air quality standards to achieve the objectives of the Act further undercuts EPA’s position. EPA argued that even if the states enjoy the flexibility to adopt new source netting for the nonattainment program, the requirements of reasonable further progress toward air quality and of attainment of quality standards by statutory deadlines ensure that the air will be cleaned up. Yet the Senate Committee Report found that “[l]ack of information has plagued the air pollution program since its inception, and is an excellent argument for not relying on ambient air quality standards as the

211. Id.
212. See supra notes 200-201 and accompanying text.
mechanism for enforcing the Clean Air Act."\textsuperscript{213} Besides alluding to the paucity of air pollution data, the Report cited the shortage of state personnel and the lack of monitoring equipment to ascertain air quality as reasons for not depending on attainment of quality standards as an enforcement mechanism.\textsuperscript{214}

Commentators have advanced other persuasive reasons why requiring attainment of air quality standards will not by itself guarantee clean air in nonattainment areas. To devise the source-by-source emissions limitations in their SIP's, for example, states must compile inventories of sources of pollution in nonattainment areas.\textsuperscript{215} These inventories, and consequently the emissions limitations based on them, have been inadequate.\textsuperscript{216} As a result, compliance with SIP's approved as adequate to ensure timely attainment may not bring about actual attainment of the standards.\textsuperscript{217} There also may be pressures on states to give overly optimistic projections of clean-up efforts needed, as states use lax pollution control requirements as a means to compete with other states in attracting industry.\textsuperscript{218}

EPA's argument that new source netting comports with Congress' purpose of giving flexibility to the states therefore must be rejected with regard to nonattainment areas. The 1977 amendments grant only a strictly limited flexibility, and not the right to determine the scope of new source review. On the contrary, although the amendments enable the states to permit new pollution sources in nonattainment areas, legislative history shows that Congress wanted to minimize the emissions increases from these new sources by applying new source review as often as possible. Congress found the attainment requirements inadequate by themselves to ensure that nonattainment areas would fulfill the Act's clean air goals.

The D.C. Circuit Court of Appeals correctly found that the paramount goal of the nonattainment program is to enhance air quality. Although one purpose of the 1977 amendment may have been to allow new growth in nonattainment areas, Congress intended to pursue this purpose only "so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act."\textsuperscript{219} The legislative history of the 1977 amendments repeatedly emphasizes that the paramount purpose of the Act is to protect the

\begin{itemize}
\item \textsuperscript{213} S. Rep. No. 127, 95th Cong., 1st Sess. 95 (1977).
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Levin, supra note 33, at 62-63.
\item \textsuperscript{216} See id. at 73.
\item \textsuperscript{217} See id. at 73-74.
\item \textsuperscript{218} See Brief for Petitioner, supra note 79, at 16-17 (citing R. Goodman, The Last Entrepreneurs: America's Regional Wars for Jobs and Dollars 1-8 (1979)).
\end{itemize}
public health. Air pollution exceeding national air quality standards seriously threatens public health. The House Committee found that air pollution above national standards results in "progressively greater adverse health effects," and in a wide and densely populated area "could result in a phenomenal health impact" affecting tens of millions of people. In floor debates on the 1977 amendments, Senator Stafford noted that the national air quality standards were "just adequate" to protect public health. Pursuant to Congress' basic purpose to protect public health, therefore, a fundamental priority of the Act must be to decrease pollution in nonattainment areas to meet national standards. The House Committee accordingly concluded that all feasible efforts to control new emissions in these areas should be mandated.

Because new source netting reduces the number of sources subject to new source review and hence slows progress toward clean air, it conflicts with the purpose of the nonattainment program. The Gorsuch court therefore correctly found new source netting illegal in nonattainment areas.

CONCLUSION

As Congress recognized, EPA's highest priority in implementing the Clean Air Act should be to safeguard public health from the deleterious effects of pollution. The goals urged by the bubble concept's advocates, such as reducing the cost of complying with federal regulations, making pollution control more cost-effective, and giving the states control over their own clean-up efforts, though important, are secondary considerations. The Gorsuch court's balanced approach to the bubble concept reflects this set of priorities. For programs designed merely to maintain existing air quality, where pollution is not a serious threat to public health, the court fully endorsed the bubble concept. On the other hand, for programs designed to improve air quality in regions where existing air quality threatens public health, the holding in Gorsuch requires states to alleviate the danger posed by pollution before they may concern themselves with easing the cost of compliance with pollution control requirements. This circumspect position on the bubble concept deserves sympathetic consideration by the Supreme Court.

220. E.g., id. at 2, 208, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 1080, 1287.
221. Id. at 208, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 1287.
222. Id. at 209, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 1288.
223. 123 CONG. REC. 18,038 (1977) (statement of Senator Stafford).
225. See generally supra note 220 and accompanying text.