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## Draft of Air Rule Is Said to Exempt Many Old Plants

By KATHARINE Q. SEELYE

**W**ASHINGTON, Aug. 21 — After more than two years of internal deliberation and intense pressure from industry, the Bush administration has settled on a regulation that would allow thousands of older power plants, oil refineries and industrial units to make extensive upgrades without having to install new anti-pollution devices, according to those involved in the deliberations.

The new rule, a draft of which was made available to The New York Times by the Natural Resources Defense Council, an environmental group, would constitute a sweeping and cost-saving victory for industries, exempting thousands of industrial plants and refineries from part of the Clean Air Act. The acting administrator of the Environmental Protection Agency could sign the new rule as soon as next week, administration officials have told utility representatives.

The exemption would let industrial plants continue to emit hundreds of thousands of tons of pollutants into the atmosphere and could save the companies millions, if not billions, of dollars in pollution equipment costs, even if they increase the amounts of pollutants they emit.

The action could also spare Gov. Michael O. Leavitt of Utah, if he is confirmed as the new E.P.A. administrator, from having to make a decision on a highly contentious issue.

The current rule requires plant owners to install pollution-control devices if they undertake anything more than "routine maintenance" on their plants. Industries have long argued that the standard is too vague and hinders substantial investment in cleaner, more efficient equipment.

The new rule says that as much as 20 percent of the cost of replacing a plant's essential production equipment — a boiler, generator or turbine — could be spent and the owner would still be exempt from installing any pollution controls, according to people involved in the deliberations.

Together, such equipment can cost hundreds of millions of dollars, sometimes more than \$1 billion, to replace. A utility or factory could thus make tens of millions of dollars worth of improvements without being required to install pollution controls.

At the end of last year, the administration proposed that the current standards be eased, saying that the threshold for requiring pollution control devices could be anywhere from nothing to 50 percent of the cost of replacing major equipment. Members of Congress protested that the public could not meaningfully comment on such a range, and 225,000 people objected to the rule before the comment period ended on May 31, according to John Walke of the Natural Resources Defense Council.

Only in the last few weeks have officials settled on the 20 percent figure, which had been a closely held secret within the administration. The draft of the new rule, in fact, describes the point at which pollution-control devices must be installed only as "X percent," but officials and several others in

contact with those who wrote the rule said that the level was 20 percent, though they warned that the percentage could change before being made final.

Officials said that Marianne Horinko, the acting administrator of the Environmental Protection Agency, would probably sign the rule before Labor Day. It would go into effect shortly thereafter, without further review or public comment.

The only way to stop it would be through court action, which critics of the new rule are threatening.

Eliot Spitzer, the attorney general of New York, said he would file a challenge to the new rule as soon as it was signed.

"A rule that creates a 20 percent threshold eviscerates the statute," he said of the Clean Air Act. "This makes it patently clear that the Bush administration has meant all along to repeal the Clean Air Act by administrative fiat."

Administration officials, including Ms. Horinko, declined to comment. Jarrod Agen, a spokesman for the E.P.A., said that officials could not comment because the matter was still under review. "But I can say that we are working on this final rule," he said, adding that it would "encourage facilities to improve their efficiency, reliability and safety."

Spokesmen for industry groups reacted positively to the new rule. Scott Segal, executive director of the Electric Reliability Coordinating Council, representing utilities, said that industries would appreciate having a "bright line." He said that the 20 percent, though he did not know precisely how it would be calculated, "is not an unreasonable number."

Mr. Walke of the Natural Resources Defense Council called the 20 percent standard "a grotesque accounting gimmick" that would "let companies completely overhaul their plants over time and spew even more pollution than now."

Clarifying the rule — and making it more lenient — has been a central goal of industry for more than a decade, and the administration has been reviewing it since President Bush came into office more than two years ago.

While industry — and many of Mr. Bush's political and financial backers — have supported a broad exemption like 20 percent, many state and local officials, including Governor Leavitt's director of air quality in Utah, have strongly opposed the concept.

Governor Leavitt is still likely to encounter harsh criticism on the matter during his confirmation hearings, which are expected to begin shortly after Congress returns from its summer recess on Sept. 2. Democrats have indicated they plan to challenge him to defend the rule, which would put him in opposition to his own state's air experts.

Determining when a plant must install pollution-control devices has been one of the thorniest and most controversial environmental decisions facing the Bush administration.

The new rule also appears to run counter to the stance the administration has taken in several lawsuits against polluters across the country, trying to enforce more rigorous standards under the Clean Air Act.

The Justice Department during the Clinton administration initiated lawsuits against dozens of oil

refineries and about 50 coal-fired power plants for their failures to install pollution controls under the requirement of routine maintenance.

The Justice Department during the Bush administration has continued to prosecute those cases, but only after an internal dispute.

Oil, coal and electric companies had lobbied the administration to drop the suits; Christie Whitman, the former E.P.A. administrator, resisted. As a result, Vice President Dick Cheney's energy task force directed the Justice Department to analyze whether to continue the suits. In January 2002, the department decided to do so.

And in a striking counterpoint to the administration's new rule, the department won a landmark victory two weeks ago in federal court against an Ohio Edison plant in Jefferson County, Ohio.

That decision, which found that Ohio Edison violated the Clean Air Act when it failed to install pollution controls, could set a precedent for the other cases and puts the administration on a collision course with itself because of its new rule.

Senator James M. Jeffords, the Vermont independent who is the ranking minority member of the Environment and Public Works Committee, called the new rule "just one more flagrant violation of the Clean Air Act and every court's opinion on this matter." He added: "Its publication will amount to malfeasance."

Mr. Cheney's energy task force also directed the E.P.A. to review the regulations regarding routine maintenance and report to Mr. Bush within 90 days. That deadline slipped repeatedly as the administration mulled how to respond.

The current trigger point of "routine maintenance" was set by Congress in a 1977 amendment to the Clean Air Act. The idea was to avoid shutting at once all plants that might be in violation of the Clean Air Act.

Instead, Congress said, when old plants were refurbished, they had to add the best available air-pollution control equipment. The amendment became known as "new source review" because it required review when a plant added new power sources that could raise emissions.

During the preparation of its report on energy policy, Mr. Cheney's task force was visited often by officials from several industry groups and companies seeking to alter the new source provisions.

According to documents obtained through the Freedom of Information Act by the Natural Resources Defense Council, those visitors included officials from the Edison Electric Institute, the North American Electric Reliability Council, the National Mining Association, the American Petroleum Institute and the Southern Company.