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Epa's Revised New Source Review Regulations Take Effect

In what may be the most significant revision to the Clean Air Act (CAA or "the Act") since the 1990 CAA Amendments, the Environmental Protection Agency (EPA) overhauled the Act's New Source Review (NSR) regulations.¹ The revisions, which took effect on March 3, 2003, exempt certain emissions increases and plant modifications from pollution control requirements. Generally, NSR allows older generating plants to escape the requirements for installing pollution control technology so long as they maintain emissions and are not physically improved. This policy stemmed from a compromise found in the original CAA whereby existing plants were "grandfathered" into the regulatory scheme but were also subject to limitations that prevented the piecemeal upgrading of the plants. Without these limitations, industry would be able to avoid building replacement plants subject to the new pollution control requirements.

On December 31, 2002, the day the final rule was published, nine Northeastern states brought suit to enjoin the implementation of the new rule. The plaintiffs contended that these changes deviated from CAA requirements and also that EPA's rulemaking process was procedurally

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1. The revisions amend 40 C.F.R. pts. 51, 52. EPA published the new rule on December 31, 2002. See Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plant-wide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51, 52) [hereinafter *NSR*]. Along with the new rule, EPA published a proposed rule that provides a regulatory definition for the "routine maintenance, repair and replacement" exemption to NSR. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Routine Maintenance, Repair and Replacement, 67 Fed. Reg. 80,290 (proposed Dec. 31, 2002) (to be codified at 40 C.F.R. pts. 51, 52). Under this proposal, all facilities would be exempted from NSR for activities undertaken to promote "the safe, reliable and efficient operation of a facility" which fall within an annual allowance determined by EPA on an industry-specific basis. *Id.* at 80,294. Also, the proposal would classify the replacement of facility equipment with functionally equivalent new equipment within the "routine maintenance, repair and replacement" exemption. *Id.* at 80,295. This change will allow the piecemeal upgrading of existing plants without triggering the pollution-control requirements that new plants must otherwise meet under the Clean Air Act. A final rule was issued on August 27, 2003. EPA, Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, (August 27, 2003), available at http://www.epa.gov/nsr/ERP_merged_8-27bh.pdf.

flawed. They also sought to prevent implementation of the rule while the suit was in progress. On March 6, the D.C. Circuit refused to stay the new rule.² However, the court agreed to expedite the hearing of legal challenges to the revision.³

EPA's revision of the NSR regulations is the culmination of a fractured, decade-long reform struggle initiated by EPA and waged by state agencies, industry groups and environmental organizations.⁴ Industry believed that EPA's implementation of the original NSR program employed rigid permitting standards, failed to recognize some pollution prevention measures, and employed biased measurement practices in determining the emissions effects of source modifications.⁵ They sought changes that would allow them to more easily make energy-saving facility modifications to older plants without triggering NSR's permitting requirements.⁶ Environmental organizations saw these proposals as a weakening of pollution control standards that would allow industry to expand and modernize older, dirtier sources of emissions without installing updated pollution control technology.⁷

The resulting rule, originally proposed by Carol Browner, EPA Administrator during the Clinton Administration,⁸ and left substantially intact by the Bush EPA, makes four modifications to NSR. The first is the creation of a "Clean Unit" exclusion.⁹ This new designation provides plants that install the equivalent of the Best Available Control Technology (BACT) a ten-year exemption from NSR and PSD requirements for physical and operational modifications that do not raise emissions beyond permit levels.¹⁰ This change provides an incentive for sources to satisfy the BACT standard in order to gain flexibility in making subsequent modifications.

Next, the rule makes two alterations in the way EPA calculates emissions increases resulting from physical or operational changes. The

2. *New York v. EPA*, No 02-1387 (D.C. Cir. 2003) (order denying stay). See Carol F. McCabe, *Stay of New Source Review Revisions Rejected*, LEGAL INTELLIGENCER, March 20, 2003, at 5. The states seeking a stay were Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont. *Id.*

3. *Id.*

4. For an account that includes an evaluation of reforms proposed by various stakeholders, see Michael Settineri, *Reforming the New Source Review Program*, 13 FORDHAM ENVTL. L.J. 107 (2001).

5. McCabe, *supra* note 2, at 5.

6. *Id.*

7. See Settineri, *supra* note 4, at 143.

8. See Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR), Part II, 61 Fed. Reg. 38,249, 38,252 (July 23, 1996).

9. For an overview, see *NSR*, *supra* note 1, at 80,189-90 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51, 52). For a detailed description, see *id.* at 80,222-232.

10. *Id.* at 80,189.

size of the emissions increase determines whether a change at the source is “significant,” and therefore large enough to trigger NSR pollution-control requirements.¹¹ The first alteration is in how EPA measures a source’s pre-modification baseline emissions.¹² Under the old rule, EPA derived the baseline from a facility’s annual average emissions during the previous two years.¹³ The new rule allows the source to use the annual average emissions from any consecutive two-year period within the last decade.¹⁴ EPA states that this change will lead to greater accuracy, since it will “account for variations in the business cycles, and provide a bright-line test for measuring pre-change emissions levels[.]”¹⁵ However, EPA’s choice of measure in fashioning the new baseline will undoubtedly lead facilities to choose the highest two-year emissions data available in order to avoid triggering the permitting procedure. On average, therefore, this change will allow modifications to escape NSR that would not have been able to do so under the previous methodology. One potential outcome of this is to lessen the environmental gain that might occur due to the Clean Unit provision – plants will have less incentive to install BACT in order to qualify for the Clean Unit status.

The second alteration to the approach EPA uses to measure changes in emissions corrects a conservative bias that the old rule contained. Previously, the effect of a modification was measured by comparing the plant’s *actual* pre-modification emissions (the two-year baseline emissions measure) with its *potential* post-modification emissions.¹⁶ Thus, a facility that was not operating at full capacity for the past two years (and thus polluting less than its potential) would be more likely to have its proposed modification trigger NSR requirements than if it had been operating at its potential. With the new rule, EPA has extended its “WEPCO rule” approach for utilities to cover non-utility sources.¹⁷ Now, EPA will compare actual pre-modification emissions with estimated

11. ROY S. BELDEN, CLEAN AIR ACT, 46 (2001).

12. For an overview, see *NSR*, *supra* note 1, at 80,189. For a detailed description, see *id.* at 80,191-206. This change does not apply to power plants. *Id.* at 80,191.

13. BELDEN, *supra* note 11, at 47-48.

14. *NSR*, *supra* note 1, at 80,189.

15. EPA, *EPA Announces Improvements to New Source Review Program*, at <http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/37214d064455f14f85256c7c005bba39?OpenDocument> (Nov. 22, 2002).

16. *NSR*, *supra* note 1, at 80,191.

17. In 1992, EPA issued its “WEPCO rule,” named after the decision in *Wisconsin Electric Power v. Reilly*, 893 F.2d 901 (7th Cir. 1990). This rule allowed utilities (but not other facilities) to compare past *actual* to projected *actual* emissions, so long as the source had been operating normally. Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Standards of Performance for New Stationary Sources, 57 Fed. Reg. 32,314 (July 21, 1992) (codified at 40 C.F.R. pts. 51, 52, 60).

actual post-modification emissions when deciding if a modification triggers NSR requirements.¹⁸

The third feature of the new rule, the Plantwide Applicability Limits (PALs), allows plants that operate under site-wide emissions caps to avoid NSR when modifying operations, so long as the change does not result in a violation of the plantwide cap.¹⁹ EPA calculates the cap by taking the actual emissions (using the new method described above) and adding onto it the significance level for the pollutant.²⁰ PALs allows plants to make a variety of modifications that result in greater efficiency without triggering NSR if the total emissions increase does not rise above the significance level.²¹ Under the previous program, a plant could make a non-significant modification in year one that increased emissions (but not enough to trigger review), a different change in year two with the same rise in emissions, and so on.²² Now, a plant operating under PALs has the incentive to undertake voluntary pollution-reducing measures in order to create "headroom" with which it can accommodate future expansions.²³ These expansions, if kept within the PALs, will not require separate permitting.²⁴ Thus, plants that voluntarily curb emissions will enjoy greater flexibility in making modifications in response to market pressures.²⁵

The last feature of the new rule eliminates New Source Review for certain types of projects that EPA classifies as "environmentally beneficial."²⁶ For instance, if a facility proposes to install a pollution control device that EPA has deemed environmentally beneficial, or switch to a cleaner fuel, it will not have to subject the proposal to NSR.²⁷

The new rule's effective date of March 3, 2003 did not apply uniformly to all states. States that had their own NSR program were given three years to incorporate the reforms into their NSR regulations.²⁸

18. *NSR*, *supra* note 1, at 80,192.

19. For a summary of this provision, *see NSR*, *supra* note 1, at 80,189. For a detailed discussion of the change, *see id.* at 80,206-222.

20. *NSR*, *supra* note 1, at 80,208. The significance level for a pollutant is the amount of emissions increase for that pollutant that triggers NSR review. For instance, in an attainment area, a "significant" net increase for carbon monoxide is one hundred tons. 40 C.F.R. § 51.21(b)(23) (2003). A modification that increased carbon monoxide emissions less than one hundred tons per year would not trigger review.

21. *NSR*, *supra* note 1, at 80,207.

22. *Id.* at 80,206, n. 27.

23. *Id.* at 80,207.

24. *Id.*

25. *Id.*

26. For a summary of this provision, *see NSR*, *supra* note 1, at 80,190. For a detailed discussion of the change, *see id.* at 80,232-240.

27. *Id.* at 80,235. "Cleaner" fuels includes those that cause less ozone depletion. *Id.*

28. *Id.* at 80,240-241.

This delay allows states that have a proven NSR implementation record to customize the regulations somewhat and thereby mitigates the extent to which EPA is “pre-empting” state innovation. However, for states that do not have their own NSR program and instead incorporate EPA’s program by reference into their state regulations, parts of the new rule became effective on March 3, 2003.²⁹ Finally, the rule took effect immediately for the eleven states that do not have an approved NSR program as part of their State Implementation Plan.³⁰

In addition to the Northeastern states’ lawsuit³¹, Earthjustice, acting on behalf of ten environmental organizations, has petitioned EPA to reconsider the final rule.³² The petition alleges that EPA relied on information gathered after the comment period for the new rule ended in 1998, and that this prohibited informed public comment.³³ To rectify this, EPA announced on July 25, 2003 that it would reopen consideration of the new regulation for additional comments.³⁴ EPA plans to finish this reconsideration by October 28, 2003, and it has not stayed the implementation of the rule during this time. It seems quite likely that however the final rule gets resolved, the underlying controversy and lawsuits over NSR reform will continue for some time.

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29. *Id.*

30. McCabe, *supra* note 2, at 5.

31. *See id.* The lawsuit cites procedural and substantive violations by EPA in issuing the new regulation. *Id.*

32. Earthjustice, *Petition for Reconsideration*, (Feb. 28, 2003) available at <http://www.earthjustice.org/backgrounders/documents/NSRpetition.pdf>. The organizations are: Alabama Environmental Council, Clean Air Council, Environmental Defense, Communities for a Better Environment, Group Against Smog and Pollution, Michigan Environmental Council, Natural Resources Defense Council, The Ohio Environmental Council, Scenic Hudson, Southern Alliance for Clean Energy. *Id.*

33. *Id.* at 1.

34. 68 Fed. Reg. 44,620 (July 30, 2003); *see* EPA, *New Source Review Fact Sheet*, available at <http://www.epa.gov/nsr/factsheet.pdf>.

