

All eyes on the NSR

The only certainty about the US New Source Review programme is that change is in the air. **Kyle Danish** explains



In the United States, three branches of the government – the Judiciary, the Executive, and the Legislature – interpret, enforce, and make the laws. On the agenda of each branch these days is the New Source Review (NSR) programme, a controversial set of rules established under the Clean Air Act. Outcomes in each branch could have a substantial impact on US utilities and industrial facilities.

The NSR programme requires new and certain existing stationary sources of air pollutants to install state-of-the-art emissions control technologies and implement certain air quality planning measures. NSR's application to existing sources is at the core of most of the current controversies. These sources can 'trigger' NSR when they undergo a "modification", defined in the Clean Air Act as a physical or operational change that results in a significant net increase in emissions.

Many commentators assert that the NSR programme reflects a 1970s Congressional compromise – a decision to force firms to install top-flight control technologies in any new facilities, but to forgo imposing expensive retrofits on existing plants. The rationale for this approach is that it would be more cost-effective to require installation of state-of-the-art controls when a new unit is built and brought on line. To address the concern that companies might circumvent the requirements by indefinitely extending the operational life of existing plants, Congress opted to extend the requirements to existing units that undergo "modification".

It fell to the Environmental Protection Agency (EPA) to define "modification" when it promulgated rules to implement the programme. Reasoning that Congress could not have intended every change at an existing facility to trigger NSR, the agency created an

exclusion for "routine repair, replacement and maintenance" activities. Rather than define such activities for each industry, EPA opted for a case-by-case approach.

Although always contentious, disputes about NSR rose to fever pitch in the 1990s. Industrial interests complained that uncertainty about NSR applicability was discouraging facilities from implementing basic maintenance and efficiency upgrades. But environmental groups argued that lax EPA enforcement was allowing companies to get away with countless major updates to old, dirty plants, thereby thwarting the aims of the programme.

Towards the end of the decade, the Clinton administration EPA launched a substantial nation-wide NSR enforcement initiative against electricity utilities, alleging numerous unpermitted "modifications". The utilities countered that EPA was targeting a range of clearly routine activities, implying that the agency either was misapplying the NSR rules or rewriting them without following rule-making procedures.

Thus, one act of the NSR drama has been playing out in the courts. Some utilities have entered into settlements, while others continue to litigate. A few of the preliminary decisions in these cases have been in the EPA's favour. However, key decisions are still on the horizon.

In the meantime, the Bush administration, while committing to prosecute the existing NSR cases, has pledged to implement reforms. Last year, the EPA dusted off an NSR reform package proposed in 1996 but never finalised. In December, it promulgated as final rules those elements of the reform package relating to modifications.

These rules aim to inject greater flexibility, certainty, and administrative efficiency into the NSR programme. One change would allow a facility that commits to a site-wide emissions cap the flexibility to implement facility changes without undergoing NSR, so long as the changes do not increase site-wide emissions above the cap. Another change would authorise facilities to implement specified pollution control and prevention projects without NSR review. A third change would allow facilities that had previously installed state-of-the-art controls to benefit from a ten-year exemption from NSR review. Finally, the new rules would make a number of revisions

to the methodology for determining the emissions increase resulting from a change. The EPA argues that these changes will provide new incentives and flexibility for facilities to upgrade their emissions controls.

The agency has also proposed a number of options for re-defining the "routine maintenance" exclusion. One option is an exclusion from NSR review if a facility is replacing certain equipment with a "functionally equivalent unit". Another option under consideration would define "routine" in terms of an annual investment threshold, measured as a percentage of the facility's replacement cost. Under this approach, all expenditures on facility changes below the annual threshold would be considered "routine".

All sides have attacked the agency's NSR reform package. Environmentalists claim it would create massive loopholes in NSR applicability, resulting in increased emissions. Utilities, and other industrial interests, are frustrated that the EPA did not go further in its proposed "routine maintenance" rule to identify a preferred option and alleviate lingering uncertainties. Several Northeastern states have sued the EPA (but recently had their bid to delay the rule denied). Another set of states has intervened on the EPA's behalf. What is indisputable is that the reform package is very complicated and could have far-reaching implications.

Finally, the third act of the NSR drama is in the Legislative Branch, where Congress is considering legislation that would impose a multi-pollutant cap-and-trade regime on utilities. The variant proposed by the Bush administration – the Clear Skies Act – would impose new limits on nitrogen oxides, sulphur dioxide and mercury emissions. Reasoning that these caps will force substantial reductions from both new and existing power plants, the Clear Skies Act would exempt (subject to certain limitations) all regulated plants from NSR review.

Observers will need a three-column scorecard to keep up with the litigation, regulatory reform, and legislative initiatives focusing on the NSR programme. At this point, the only certainty about NSR is that change is in the air. ■

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