

New Source Review

A History

New Source Review (“NSR”) is a complex program created by various provisions of the federal Clean Air Act. Regulated by the Environmental Protection Agency (“EPA”), NSR requires electric utilities to undergo pre-construction review for environmental controls if the utilities propose to build new generating units. NSR also applies if utilities modify their existing units by making “non-routine” physical or operational changes that result in a significant increase in emissions of a regulated pollutant from that source.

For over two decades, EPA has interpreted and implemented the NSR program in a way that has allowed utilities to undertake “routine maintenance, repair, and replacement,” as needed to maintain safe, efficient, and reliable electricity generation. While the agency has never explicitly defined what it considers to be “routine maintenance,” EPA has always applied a commonsense understanding of the term so that utilities could, for example, repair and replace worn-out parts (like the tubes that carry steam to make the turbine blades turn) without being subject to extensive and costly NSR permitting requirements.

However, between November 1999 and December 2000, the U.S. Department of Justice, acting on behalf of EPA, filed lawsuits against eight utility companies, affecting 106 generating units. Fourteen generating units of the government-owned Tennessee Valley Authority (“TVA”) also received administrative orders. New York state filed separate suits against other facilities. EPA alleges that the repairs utilities have undertaken over the past 20 years now constitute “modifications” of electric generation units that require NSR permits. One company has reached a final settlement with EPA, and two others have agreements in principle, but have not finalized their settlements.

The following timeline outlines the history of the NSR program and reveals that utilities, which are highly regulated and have been for a long time, have been working for years to clarify this complex program.

1960s: Congress made its first attempt to provide comprehensive authority to establish federal clean air standards.

— **1967** Congress passed the Air Quality Act of 1967, the first federal legislative effort to control air quality.

1970s: Congress strengthened its clean air efforts, adding the present-day New Source Review provisions.

— **1970** Congress amended the Air Quality Act and passed the core provisions of what is now the Clean Air Act of 1970 (the “Act”). More comprehensive and more stringent than its 1967 predecessor, the Act established health-based “national ambient air quality standards” (“NAAQS”) to address particulate matter and sulfur dioxide (“SO₂”) emissions, as well as ozone (of which nitrogen oxide, or NO_x, emissions are a principal precursor).

The goal of the Act was to set and achieve NAAQS in every state by 1975. The states were given the lead for meeting this goal, and they developed State Implementation Plans (“SIPs”) to achieve emission reductions. The 1970 Act also called for EPA to develop a program to regulate new and modified sources of pollution.

— **1977** Congress amended the Clean Air Act, primarily to set new goals for achieving attainment of NAAQS, since many areas of the country had failed to meet the 1975 deadline. The New Source Review program was expanded by the 1977 amendments, and applies to the construction of new facilities (including power plants), as well as to projects that significantly reconstruct or modify existing plants.

1980s: In the mid-1980s, EPA adopted a strict interpretation of the NSR rule, expanding its coverage. This dramatic change resulted in a lawsuit against the agency, challenging such action by EPA.

— **1988** EPA issued a series of decisions regarding applicability of NSR requirements to a five-unit facility owned by Wisconsin Electric Power Company (“WEPCo”). As a result of these decisions, WEPCo initiated a lawsuit challenging EPA’s interpretation and implementation of the NSR program.

1990s: The early-1990s brought a new series of Amendments to the Clean Air Act, as well as a Court ruling in the landmark WEPCo case. The mid- to late-1990s found EPA again looking to reform its interpretation of the NSR rule.

— **1990** The U.S. Court of Appeals for the Seventh Circuit issued a decision in the WEPCo case.¹ The Court ruled that the company should not be subject to NSR because EPA had not used an appropriate method for determining the total annual increase in emissions that could potentially result from the project. However, the Court found that the “massive” overhaul of the existing unit was not routine.

— **1990** Following the WEPCo decision, EPA policy officials noted that WEPCo’s life extension project was massive, unprecedented, and “is not typical of the majority of utilities’ life extension projects, and concerns that the agency will broadly apply the ruling it applied to WEPCo’s project are unfounded.”² EPA officials confirmed that the WEPCo decision was not anticipated to have any impact on utility maintenance practices, and they did not expect it to “significantly affect utilities’ decisions to undertake power plant life extension projects.”

The overhaul of the WEPCo unit cost, in 1999 dollars, over \$100 million or about \$250 per kilowatt. By comparison, the cost of the types of projects now identified by EPA — in the November 1999 and subsequent enforcement actions — as triggering NSR range from less than \$1 to approximately \$30 per kilowatt.

¹ *Wisconsin Electric Power Co. v. Reilly, AD. EPA*, 893 F.2d 901 (7th Cir. 1990).

- **1990** Congress amended the Clean Air Act again to extend deadlines for NAAQS compliance. The Clean Air Act Amendments (“CAAA”) also addressed acid rain and ground-level ozone. The CAAA did not contain any generic provision addressing the rules affecting the NSR program.
- As a result of the CAAA, electric utilities are required to substantially reduce SO₂ and NO_x emissions. Congress set a national goal of a 10-million-ton SO₂ reduction, most of which would be accomplished by utilities, and required utilities and other industries to reduce NO_x emissions by approximately two million tons. **Electric utilities have thus far exceeded these emission reduction targets, despite increased electricity production.**
- **1992** As a result of the 1990 Court decision, EPA promulgated the so-called WEPCo rule to apply exclusively to electric generating units. The rule implemented the NSR program for the electric utility industry in a flexible and commonsense manner to allow utilities to engage in routine activities without being subject to NSR permitting requirements.
- **1996** EPA proposed rules to reform NSR. EPA’s proposal reflected a marked departure from the current NSR program and represented a decision made by the agency to seek even further emission reductions.
- **1997** Electric utility companies and EPA’s Office of Air and Radiation (“OAR”) began discussing how the NSR program might be reformed to make it clearer and more certain.
- **1997** EPA announced it was investigating what it called ‘potentially widespread noncompliance’ with NSR program requirements. EPA sent letters to various utility companies and to boiler manufacturers; these letters were issued pursuant to the agency’s information collection authority established in Section 114 of the Act. EPA said it would take appropriate enforcement actions if it found noncompliance. This initiative was consistent with EPA’s “reinterpretation” of the applicability of the NSR rules as exemplified by its 1996 NSR “reform” proposal.
- **1998** EPA issued a notice to modify its 1996 NSR proposal that would specifically affect the WEPCo rule. This proposal, like the 1996 rulemaking, would effectively implement the NSR program in a “revisionist” manner (consistent with the position the agency later takes in its 1999 enforcement actions). [Technically, the rulemaking is open and continuing, but it is clearly being overshadowed by the agency’s 1999 enforcement initiative.] A final NSR “reform” rule resulting from this rulemaking is expected in Spring 2000 at the earliest.
- **1999** In response to the 1998 notice, a number of electric utilities voluntarily proposed several different programs to achieve further utility emission reductions. Under one specific program, power plants would be subject to additional emission reductions once they reach a certain age, beginning in 2010. This proposal goes well beyond existing requirements, and would phase-in additional reductions in a manner that will not jeopardize the safety, reliability, and efficiency of the nation’s supply of electricity.
- **1999** Electric utilities and EPA continued to meet with EPA’s OAR on how to reform NSR.
- **1999** In early Fall 1999, the Attorney General for the State of New York sent a notice to several utility companies informing them of New York’s intent to file a lawsuit against them for essentially violating NSR program requirements. New York asserted that these companies made changes at their facilities that violated NSR requirements, and the resulting emissions from these plants were transported to New York, affecting the state’s air quality.

² *Electricity Supply: Older Plants’ Impact on Reliability and Air Quality*, General Accounting Office, September 1990, (GAO/RCED-90-200), p. 30-31.

In November, following New York's action, EPA's Office of Enforcement and Compliance Assurance issued notices of violation to seven utility companies, affecting many generating units. Acting on behalf of EPA, the U.S. Department of Justice filed lawsuits against these same utilities. Fourteen generating units of the government-owned TVA also received administrative orders. EPA's lawsuits allege that these utilities and TVA engaged in "modifications" of electric generation units without first obtaining NSR permits. [After EPA's announcement, the state of New York and eleven environmental organizations filed lawsuits against American Electric Power ("AEP"); and Connecticut, Vermont, and New Jersey filed suits similar to New York's or intervened on behalf of New York.]

The timing of the agency's actions surprised utilities, including those that were engaged in negotiations with EPA. Facing EPA's revisionist view of the NSR program's applicability, utilities were confronted with untenable options. These included: deferring needed repair and maintenance, thus risking worker safety, as well as electricity reliability; shutting down their plants altogether, again jeopardizing reliability; or continuing to perform routine activities and face civil – and potentially criminal – sanctions from EPA.

1999 Utilities across the country, as well as other industries, became concerned that they, too, could be targeted by EPA for the same types of repairs.

2000s: In the early 2000s, EPA continues to enforce a strict interpretation of NSR. The future will find electric utilities continuing to reduce their emissions, while seeking NSR reform.

2000 EPA initiated enforcement actions against another utility and additional facilities, alleging the same type of violations brought in its 1999 enforcement actions. A total of 120 generating units are subject to lawsuits or comparable actions.

One utility company has reached a final settlement with EPA, resolving its NSR enforcement action. Two other companies have entered settlements in principle, but the settlements have not been finalized.

2000 A final NSR rule was not promulgated.

2001 Following the recommendations of the May 2001 National Energy Policy report, EPA, in consultation with the Secretary of Energy and relevant federal agencies, is conducting a 90-day review of the NSR regulations, including administrative interpretations and implementation. EPA will report to the President on the impact of the regulations on investment in new utility and refinery generation capacity, energy efficiency, and environmental performance. In addition, the U.S. Attorney General is reviewing existing NSR enforcement actions to ensure they are consistent with the Clean Air Act and regulations.

2003-2004 Electric companies in the East will reduce summertime NO_x emissions by almost one million tons. The industry will emit less than 20 percent of annual manmade NO_x in the U.S.

2010 National SO₂ emissions are projected to be at their lowest level in 100 years (except for a few years during the Great Depression), largely due to utility reductions.

