What You Should Know About Electric Companies and New Source Review

- All electric companies – regardless of age – are subject to substantial environmental regulation, including dozens of federal and state air quality laws. One of the most important laws is the federal Clean Air Act, which Congress passed in 1970 (with significant amendments added in 1977 and 1990) to establish health-based “national ambient air quality standards” (NAAQS) administered by the Environmental Protection Agency (EPA). Older power plants are not exempt (or “grandfathered”) from NAAQS, acid rain, and other Clean Air Act requirements.

- Despite increased electricity production, electric companies have met or exceeded Congress’ emission reduction targets, including those set in amendments to the Clean Air Act passed in 1990 that required dramatic reductions of sulfur dioxide (SO₂) and nitrogen oxides (NOₓ).

- Electric SO₂ emissions peaked in 1975 at 18.3 million tons; they declined to 13.2 million tons by 1998. Within a decade, these SO₂ emissions will fall to 9 million tons (more than a 50-percent reduction) despite a tripling of coal use since 1970. By 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 electric industry emission reductions.

- Electric NOₓ emissions peaked in 1980 at 7 million tons. The Department of Energy projects that by 2005 these NOₓ emissions will be reduced to 4.3 million tons, which represents only about 20 percent of U.S. manmade NOₓ emissions.

- New Source Review (NSR) is a complex program created by the Clean Air Act. NSR requires electric companies to undergo pre-construction review for environmental controls when new plants are built, or if existing plants are modified by making “non-routine” physical or operational changes that result in a significant increase in emissions.

- Electric companies are legally obliged to provide an adequate supply of power to their customers, requiring companies to perform routine maintenance, repair, and replacement to ensure operational reliability.

- For nearly three decades, EPA rules and guidance, state implementation of these, and historical power plant maintenance practices determined which activities were considered “routine.” Between November 1999 and December 2000, however, the U.S. Department of Justice, acting on behalf of EPA, filed lawsuits against 8 electric companies, affecting 106 generating units, charging that these companies significantly modified their plants without first securing NSR permits. Fourteen generating units of the government-owned Tennessee Valley Authority also received administrative orders, and New York State subsequently filed separate suits.

- In June 2002, EPA began issuing more Notices of Violation, potentially signaling a new round of lawsuits.
The lawsuits generated significant controversy, as the projects in question represented the type of routine activities undertaken throughout the industry to maintain the safety, reliability, and efficiency of generating units. The projects did not meet an earlier standard of “massive” and “unprecedented” replacement work established as “non-routine” in a 1990 court ruling referred to as the “WEPCo case.” These projects also involved costs much lower than the massive WEPCo project, typically in the $1 to $30 per kilowatt range, as opposed to about $250 per kilowatt for WEPCo.

The EPA lawsuits came as the agency and industry were discussing how to reform the NSR program, reflecting EPA’s longstanding recognition that the program needed revision and clarification. Without clarification, and in light of more potential lawsuits, companies face the decision of whether to continue to make routine repairs on their plants – some of the same repairs that triggered the enforcement activity – or to forgo this maintenance and risk having the plants shut down. With electric demand remaining high, plants taken out of commission, combined with ongoing transmission constraints in certain parts of the country, could result in a serious threat to reliable electric generation.

After significant review and in consultation with the Secretary of Energy and relevant federal agencies, EPA announced an NSR reform package on June 13, 2002. The package consists of two major components: a report to the President on the impact of NSR on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection; and separate EPA recommendations to reform existing rules to improve and streamline NSR.

In its report, EPA concludes that, as applied to existing electric power plants and refineries, “the NSR program has impeded or resulted in the cancellation of projects which would maintain and improve reliability, efficiency, and safety of existing energy capacity. Such discouragement results in lost capacity, as well as lost opportunities to improve energy efficiency and reduce air pollution.” In addition, “(c)hanges to the NSR program that add clarity and certainty of the scope of the routine maintenance exclusion will improve the process by reducing the unintended consequences of discouraging worthwhile projects that are in fact outside the scope of NSR.”

EPA’s recommendations set in motion a process that could simplify, clarify, and streamline the NSR program, but there are few concrete details to help determine the potential impact.

Later this year, EPA is expected to finalize a Clinton Administration proposal that would provide general NSR reforms to other industries, and to initiate a new rulemaking to clarify the routine maintenance, repair, and replacement exclusion in order to provide greater certainty to the electric industry. The new rulemaking process is expected to be contentious and lengthy; it could take 18-36 months according to EPA.

EPA’s announcement that it will propose new rules to help clarify what constitutes routine maintenance, repair, and replacement, paired with its decision not to provide any new guidance on the subject, means that EPA’s announcement clearly cannot be viewed as a “rollback” or weakening of the enforcement of the Clean Air Act. All electric companies remain subject to federal and state emissions reduction requirements, including NAAQS.