EPA’s New Source Review Enforcement Initiative: What Lies Ahead

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Legal Background

NSR consists of two separate and distinct permitting programs: Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD). Under both programs, construction of new sources or major modifications of existing sources increasing emissions of regulated pollutants above threshold quantities is prohibited without obtaining a permit from the appropriate state agency or EPA. NNSR applies to pollutants for which the given area does not meet applicable National Ambient Air Quality Standards (NAAQS). Sources that trigger NNSR must obtain “offsets” for the emissions increases associated with the given project and must meet the Lowest Achievable Emissions Rate (LAER). PSD applies to pollutants for which the given area meets the applicable NAAQS and to other regulated pollutants for which NAAQS have not been established. Sources that trigger PSD are required to demonstrate that their project will not cause a NAAQS violation or significant degradation of air quality and must install Best Available Control Technology (BACT). Compliance with these requirements is governed by complex EPA regulations, backstopped by EPA guidance documents, state laws and regulations, and court decisions. As a result, even well-informed and legally sophisticated practitioners are
challenged by the day-to-day applicability and compliance decisions that must be made at industrial facilities that are potentially subject to the program.

History of EPA Enforcement Initiative

Over the last few years, the Clinton Administration made NSR a top enforcement priority and committed substantial EPA and DOJ resources to investigating industry practices and developing cases. In launching this enforcement initiative, the Administration claimed that various industries—notably power generators—were undercomplying with NSR requirements by failing to submit permit applications for costly capital projects with the potential for large increases in emissions. Industry has vigorously contested this claim, arguing that the disputed projects are within the established NSR exemption for “routine maintenance, repair and replacement” (40 C.F.R. § 52.21(b)(2)) and, in any event, did not result in emission increases large enough to trigger permitting. Industry has also argued that EPA has used NSR enforcement as a tool to achieve policy objectives—such as retrofitting facilities “grandfathered” under the 1970 CAA and imposing emission controls on large Midwest coal-fired power plants supposedly impacting air quality in the Northeast—that could not be accomplished through normal regulatory mechanisms.

Given the government’s legal theories and policy objectives, the NSR enforcement initiative has involved very high stakes. For example, EPA’s preferred remedy for facilities with alleged NSR violations is not only the payment of substantial monetary penalties but sizable reductions in emissions of regulated pollutants, either through repowering to “cleaner” fuels or through the installation of state-of-the-art pollution controls. For an uncontrolled coal-fired power plant, this can mean tens (and perhaps hundreds) of millions of dollars in capital costs, resulting in reductions in sulfur dioxide (SO₂) and nitrogen oxide (NOₓ) emissions of thousands of tons per year.

Litigation Status

The top target for the NSR enforcement initiative has been electric utilities, but EPA has also pursued the wood products industry and the petroleum refining sector. Reportedly, EPA is planning to expand its efforts to other sectors, including basic chemical manufacturing. On November 3, 1999, EPA filed federal court enforcement actions against eight large utilities operating coal-fired power plants. Soon thereafter, Tampa Electric, one of these utilities, negotiated a consent decree that calls for certain units to be repowered with natural gas-fired turbines, the installation of state-of-the-art pollution controls on units that will remain coal-fired, and the payment of several million dollars in penalties and supplemental environmental projects. More recently, EPA has announced agreements in principle with two additional utilities—Cinergy (one of the original eight defendants) and Virginia Power (which was sued by the State of New York but not by EPA). These settlements, which have not yet been reduced to consent decrees, cover many more plants than the Tampa Electric settlement and require system-wide emission reductions and phased installation of emission control at some but not all affected plants. Like the Tampa Electric settlement, they also provide a partial “safe harbor” from NSR liability for future capital projects at the affected facilities. Outside the utility sector, EPA has negotiated far-reaching consent decrees with several large refining companies, including BP Amoco, Koch Industries, Motiva, Equilon, Deer Park Refining, and Marathon Ashland.

Given the extremely high stakes and EPA’s aggressive settlement demands, the bulk of the utilities, against which EPA took enforcement action, are actively litigating their cases in court. Two of the leading cases involve the Tennessee Valley Authority (TVA) and American Electric Power (AEP).

On November 3, 1999, EPA issued a compliance order alleging that TVA had violated NSR requirements at 13 coal-fired electric generating units located in 8 facilities in three states. TVA responded in two ways. First, it filed a petition with the EPA Administrator asking for reconsideration of the order. The Administrator agreed to reconsider the order, and delegated responsibility for reconsideration to the EPA Environmental Appeals Board (EAB). On September 15, 2000, after extensive
briefing but with only limited discovery, the EAB issued its decision on reconsideration of the compliance order. In re: Tennessee Valley Authority, Docket No. CAA-2000-04-008 (Sept. 15, 2000). While the EAB did not concur with all of EPA’s allegations, all of EPA’s key legal interpretations were upheld and at least one NSR violation was found at each unit. At the same time that it petitioned for reconsideration, TVA filed a petition in the U.S. Court of Appeals for the Eleventh Circuit challenging the enforcement order. While the briefing in this case has covered a wide range of fundamental NSR issues, key issues in this case also include the precedential impact of the EAB decision and the status of TVA as a quasi-governmental entity.

The AEP case is pending before the U.S. District Court for the Southern District of Ohio, Eastern Division. United States et al v. American Electric Power Service Corp., Civil Act. No. C2-99-1182 (S.D. Ohio). In a motion to dismiss, AEP raised key issues related to the potential applicability of the general federal statute of limitations to EPA’s NSR enforcement cases (which often involve projects that occurred well over 5 years prior to initiation of the enforcement action) and has raised the question as to whether a failure to obtain an NSR permit constitutes a single or a continuing violation. On March 28, 2001, the Court issued its decision on the motion to dismiss. The Court agreed that the general federal statute of limitations bars claims for civil penalties based on violations more than 5 years old, but found that claims for injunctive relief are not time barred. Additionally, the Court held that the Clean Air Act authorizes enforcement action against operation of a facility that failed to obtain an NSR permit. In a motion for partial summary judgment filed by EPA earlier this year, EPA asked the Court for a judgment that certain AEP projects do not constitute “routine maintenance” and, therefore, are not excluded from the NSR program. A decision on this motion is expected in the next few months.

Upcoming Litigation Developments

Judicial, regulatory, and legislative developments in the next year will determine the fate and future impact of EPA’s NSR enforcement initiative. On the litigation front, a decision by the Eleventh Circuit upholding the EAB decision in the TVA case could add legitimacy to EPA’s narrow interpretation of the routine repair and maintenance exemption and its test for determining potential emission increases triggering NSR. A ruling granting the Government’s summary judgment motion in the AEP case could have a similar effect. On the other hand, the failure of courts in these cases to embrace EPA’s legal theories would represent a major setback to the Government’s position and enhance the likelihood that defendants in these and other cases will ultimately prevail.

In the face of court rulings favorable to EPA, companies would need to reexamine the adequacy of their NSR compliance programs on a prospective basis and could decide to submit permit applications for facility modifications or operational changes that had previously been viewed as outside the scope of NSR requirements. Equally important, pressure would increase to settle pending cases. The recent Virginia Power and Cinergy settlement agreements (assuming they are finalized) could raise the bar for other companies if they become a settlement floor. Should the level of emission reduction required by these agreements become the norm for other settling companies, a large segment of the industry would be committed to control technologies that go well beyond the requirements of existing clean air programs.

Decisions Facing the Bush Administration

As the pending cases advance in the courts, the Bush environmental team will need to grapple with the implications of policy decisions made by the outgoing Administration. An immediate question will be whether to maintain an aggressive litigation posture in these cases. The Bush Administration’s recently-issued National Energy Policy directs the Department of Justice to “review existing enforcement actions regarding New Source Review to ensure that the enforcement actions are consistent with the Clean Air Act and its regulations.” On one hand, this directive appears to represent good news for defendants (and potential defendants) because it signals that the new Administration may not continue to rely on the controversial legal theories that underlie
most of the ongoing NSR cases. On the other hand, while the NSR enforcement initiative has many critics, and EPA’s legal theories are both untested and highly debatable, a sudden change in direction on these cases could open the Administration to criticism that it is inappropriately injecting its political agenda into law enforcement decisions. Moreover, Northeastern states and environmental groups are parties to several suits and will vigorously oppose any effort by the Government to dismiss these suits or settle them on nominal terms. Members of Congress aligned with environmentalist interests, including some Northeastern Republicans, will likely echo these views although they will to some extent be offset by opposition to EPA’s approach to NSR by members from other parts of the country. Thus, some believe that the President has left himself in a no-win situation by elevating the NSR enforcement initiative to a broad national stage.

If the Government decides not to pursue the pending cases, then it is highly unlikely that new cases will be filed. But if the pending cases proceed, the Administration will need to decide whether to file an additional round of cases. Using its authority under Section 114 of the CAA, EPA has aggressively investigated several facilities in the power generating, refining and pulp and paper industries, laying the groundwork for numerous new cases based on the same factual claims and legal theories underlying the cases now pending. Indeed, EPA could probably make colorable claims of non-compliance against most of the nation’s coal-fired plants using the same types of plant maintenance and capital project data it has relied on in the current cases. But adding dozens (and perhaps hundreds) of plants to EPA’s enforcement initiative will greatly raise the stakes for industry and the Agency and almost certainly expose the Government to charges of abuse of prosecutorial discretion and overreaching. On the other hand, failure to file additional cases would undoubtedly cause defendants who have settled or are still litigating to complain about the absence of a level playing field and argue that they are being subjected to selective enforcement.

The administration must also decide whether to complete EPA’s longstanding rulemaking to modify and clarify NSR requirements. Initially intended to simplify complex and confusing regulations and guidance, this rulemaking has become a lightning rod for the many controversial issues surrounding the NSR program—including creation of an NSR “off ramp” for utilities that agree to install emission controls, the continued viability of the so-called WEPCO test for determining whether power plant modifications will increase future emissions and disagreements over the scope of the routine repair and maintenance exemption from NSR. The Clinton administration tried but failed to complete this rulemaking in the last few weeks before the Presidential inauguration. As part of the National Energy Policy, Governor Whitman has been instructed, in consultation with the Department of Energy, “to review New Source Review regulations, including administrative interpretation and implementation, and report to the President within 90 days on the impact of the regulations on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection.” The report is due in early August. Reportedly, the review will include an assessment as to whether the Agency should proceed with all, some or none of the proposals of the previous EPA management. This decision could affect the legal positions being advanced in the pending enforcement actions as well as the compliance challenges facing industry on a prospective basis.

Congressional Role

Congress is yet another player whose actions could impact the NSR program and related enforcement initiative. Interest is growing in the Senate and House in “multi-pollutant” legislation for power plants which might set long-term emission reduction targets for NOx, SO2, and perhaps other pollutants in return for relief from NSR requirements. Such legislation could directly or indirectly lay the groundwork for resolving both the pending enforcement actions and other cases in the pipeline. However, it is uncertain when or even whether multi-pollutant legislation will be passed and how it
would modify the current NSR program. At present, the outlook for such legislation is clouded by tension between energy and environmental policies in Congress and the Administration and debate over the inclusion of carbon dioxide emissions in any multi-pollutant program. Moreover, since the proposed legislation would only apply to power plants, other industry sectors targeted by EPA’s enforcement initiative would not receive NSR relief. For these reasons, while a legislative solution to the NSR controversy offers obvious benefits, it may not materialize, forcing industry and the Administration to confront the difficult legal and policy issues spawned by the NSR enforcement initiative. Notably, the recent shift in the Senate to Democratic control will complicate the prospects for legislation because the new Senate leadership may see political advantages in prolonging the NSR controversy—particularly with the approach of the 2002 elections and given the Democrats’ belief that the President’s environmental policies are a political liability.

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If you have any questions about this Client Alert, please contact Robert M. Sussman or William L. Wehrum in our Washington, D.C. office, or any of the attorneys listed at the right.