

EPA ISSUES NSR REFORM PACKAGE

After years of debate, EPA has decided to proceed with long-anticipated reforms to the Clean Air Act's New Source Review (NSR) program. The NSR program requires companies to obtain preconstruction permits and install stringent control technology for new sources or modifications that exceed certain emission thresholds. Industry has long argued that EPA's interpretation of NSR requirements is arcane, unlawful, and environmentally counterproductive.

EPA has finally agreed with many of industry's comments. In a package released June 13, EPA concluded that for power plants and refineries, "the NSR program has impeded or resulted in the cancellation of projects that would maintain or improve reliability, efficiency, or safety." The impacts extend to many other industries as well - - "... at existing industrial facilities outside the power plants sector, the NSR program does discourage projects that improve capacity or efficiency but do not result in increases in air emissions." Letter from Administrator Whitman to the President (June 13, 2002) at 1. The NSR Reform package will be implemented over the coming months and years as a final rule on some issues (those that were proposed by EPA in 1996 under the Clinton Administration) and a proposed rule for notice and comment together with guidance on other issues. The rules will be very controversial, and will likely trigger a legal and political battle in which industry should be actively involved.

Why NSR Reform Matters

EPA's NSR Reform plan will resolve many issues that unnecessarily impede industry's ability to respond to market demands, to take advantage of newer, better technology, and to promote operating efficiency and pollution prevention. Some of the highlights of the plan include:

- Elimination of "Actual to Potential" Test. EPA's "actual to potential" test probably results in more enforcement activity (and industry frustration) than any other aspect of the rule. EPA currently takes the position that whether a modification is "major" must be determined in all cases by comparing a source's actual emissions before the change to its "potential to emit" after the change - *i.e.*, the facility's maximum operating capacity under its design capabilities. Of course, most sources do not operate at full capacity year-round, because of fluctuations in market demand, downtime for maintenance and repairs, and many other factors. As a result, EPA's actual to potential test frequently results in a "paper" emissions increase, even where actual emissions will stay the same or even decrease as a result of a capital expenditure at a facility.

As part of NSR Reform, EPA has finally agreed to do away with this test (except for new sources and replacement of existing sources). Specifically, EPA plans to finalize its 1996 proposal to replace the "actual to potential" test with an "actual to actual" test for

modifications, so that the Agency will compare apples to apples. This extremely important change means that only modifications that will actually increase emissions to the atmosphere will be required to undergo NSR, and beneficial changes that increase efficiency, reduce energy consumption, enhance safety or reduce pollution will not.

- Adoption of Plantwide Applicability Limits. Under the current NSR regulations, a facility must evaluate every “physical change” or “change in the method of operation” to determine whether NSR is triggered. For facilities that must change their method of operation quickly and frequently to respond to market demands, this requirement is simply unworkable.

To address this concern, EPA plans to finalize its 1996 proposal to allow facilities to adopt “plantwide applicability limits,” or PALs, based on total plantwide actual emissions. Once a facility obtains a PAL, it could make physical and operational changes as needed, as long as actual emissions do not exceed the PAL level, the facility “applies control technology” to the new or changed unit, and the facility meets certain other requirements.

- Clarification of Exemption for Routine Maintenance. One of the few exemptions from permitting under the NSR program is for routine maintenance, repair, and replacement. Over time, however, EPA has substantially narrowed its interpretation of the scope of the exemption. As a result, facilities can currently face enforcement for actions that were at the time reasonably believed to be exempt as routine repair.

EPA plans to propose new regulations creating several explicit “safe harbors” that will constitute routine maintenance, repair and replacement. First, EPA will propose to exempt projects that do not reach the level of a “reconstruction” (*i.e.*, 50% of replacement value, probably averaged over a specific period of time). Second, EPA will propose to adopt a current exemption from the New Source Performance Standards (NSPS) program. Under this exemption, projects that fall below a facility’s “annual asset guideline repair allowance” (between 1.5% and 15%) will also be exempt. Importantly, these safe harbors are not exclusive. If a particular project does not fall within one of the safe harbors, it may still qualify for the exemption if it meets other requirements. Finally, EPA plans to propose clarifications that will help facilities identify the types of projects that are routine, including specific language allowing equipment upgrades as long as the replacement equipment serves the same function and does not alter the basic design parameters of the unit. The creation of these “safe harbors” and clarifying regulatory language could go a long way towards reducing the current confusion over the types of projects that qualify as routine repair.

EPA’s NSR Reform package addresses many other issues as well, including “debottlenecking,” exemptions for pollution prevention projects and “clean units,” and “aggregation” of unrelated projects.

Industry Cannot Take These Reforms for Granted

It has been over twenty years since complaints about EPA's interpretation of the NSR regulations first arose, and the current NSR Reform package has been pending since 1996. EPA's recent decision to proceed does not mean reform is assured, because the package still faces many obstacles. These include:

- Part of EPA's plan is to finalize its 1996 proposed reforms (e.g., the actual to actual test and PAL proposals discussed above). Once the regulations are finalized, they almost certainly will be challenged in court. Industry should support the reforms in any court challenge – industry has had to live with the old regulations and interpretations, and therefore is most qualified to explain why the reforms are necessary and logical.
- The other portion of EPA's plan requires the Agency to develop new regulations that have not yet been proposed (e.g., for routine maintenance, repair and replacement). These regulations will have to undergo public notice and comment, which again will draw significant fire from those who oppose reform. Those who support reform must take an active role in the notice and comment process, to encourage EPA to adopt substantial, useful reforms, and to discourage EPA from allowing the matter to linger for another six years or more.

If you would like any further information about any of these issues, or if you would like a copy of EPA's NSR Reform package, please contact David Friedland at 202/789-6047, Rob Brager at 410/230-3855, or Laura McAfee at 505/797-0810.