
New Source Review Reform: A New Year's Eve to Remember

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Every media outlet from PBS Television to the *Wall Street Journal* has reported on the controversy between EPA, industry, environmental and public health groups, individual states, and various federal agencies over the continued operation of older, existing power plants and manufacturing facilities that have not installed state-of-the-art pollution controls. This controversy involves the Clean Air Act's New Source Review (NSR) program and includes multi-industry EPA enforcement actions, month-long trials in federal district courts, and appeals to the United States Court of Appeals, including one case that pitted one federal agency against another federal agency (*TVA v. EPA*). It also involves a decade-long effort to reform a program that almost everyone touched by it agrees needed improvement.

In 1996, the Clinton administration proposed a comprehensive set of NSR reform measures. On New Year's Eve—December 31, 2002—EPA issued final rules on certain portions of the 1996 package and proposed additional rules on what constitutes routine maintenance, repair, and replacement at existing utility and industrial facilities. These New Year's Eve NSR rules and subsequent NSR rulemaking have touched off a firestorm of controversy, perhaps more than any other set of environmental regulations during the last twenty years. An editorial in the *New York Times* called the Bush administration's rules a "reckless and insupportable decision to eviscerate a central provision of the Clean Air Act and allow power plants, refineries and other industrial sites to spew millions of tons of unhealthy pollutants into the air." *Politics and Pollution*, N.Y. TIMES, Aug. 28, 2003. In contrast, United States Senator James Inhofe (R-Okla.) characterized the rule as one that "takes the nation's environmental policy into the 21st century." Chris Holly, *EPA's New NSR Rule: Common-Sense Change or Massive Loophole?*, ENERGY DAILY, Aug. 28, 2003. Such public fury and passion is surprising for an arcane rule that has had only limited effect since its inception more than twenty-five years ago.

The Clean Air Act's New Source Review pro-

gram is a preconstruction review and permitting program applicable to new or modified major stationary sources of air pollution. The Clean Air Act requires owners or operators of new or modified sources that meet certain size or type criteria and emit certain pollutants to obtain permits before commencing construction. *See, e.g.*, 42 U.S.C. § 7475. In geographic areas attaining the National Ambient Air Quality Standards (NAAQS) for a pollutant, or in areas that are unclassifiable, the NSR program is known as the Prevention of Significant Deterioration (PSD) program and the requirements of Part C of Title I of the Clean Air Act apply. If an area is designated nonattainment for a pollutant, the requirements of Part D of Title I of the Clean Air Act apply. This program is commonly referred to as non-attainment NSR. This article will refer to both NSR programs as the NSR program or NSR rules.

Perhaps the most difficult, and certainly the most litigated, provisions in the NSR rules relate to "modifications" of existing major stationary sources of air pollutants. In 1996, EPA proposed a comprehensive set of revisions to the NSR rules to better address modifications. 61 Fed. Reg. 38,250 (July 23, 1996). In 1998, EPA published a "notice of availability" requesting additional comment on three of the proposed changes. 63 Fed. Reg. 39,857 (July 24, 1998).

On December 31, 2002, EPA promulgated the first installment of the much-anticipated revisions to the NSR rules. 67 Fed. Reg. 80,186 (Dec. 31, 2002). Simultaneously, EPA issued for public comment a proposed rule to clarify the "routine maintenance, repair and replacement" provisions of the NSR rules. 67 Fed. Reg. 80,290 (Dec. 31, 2002). One aspect of this proposal was subsequently finalized in October 2003. 68 Fed. Reg. 61,248 (Oct. 27, 2003).

Both the December 2002 and the October 2003 notices created controversy. On one side, many industry sources praised the final rules as the first step necessary to fix a cumbersome, costly, and complicated regulatory morass. On the other hand, the environmental community and some state leaders—largely in the Northeast—decried the entire package of rules as a terrible blow to the environment and a demonstration of the Bush administration's lack of

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commitment to protect human health and the environment. Lawsuits and administrative petitions to reconsider the final rules were filed immediately by several states and environmental organizations.

This article provides a brief overview of the issues addressed in the December 2002 final rule, the resulting litigation, and implementation issues surrounding the rule. In addition, the article examines the “routine maintenance” rule’s equipment replacement provision promulgated in October 2003. (Another article in this issue on page 22, *Utility Settlements in New Source Review Lawsuits* by Makram Jaber, addresses EPA’s NSR enforcement initiative against the utility industry and the associated settlements.)

The December 31, 2002 Final Rule

EPA’s December 2002 final rule addresses five separate components of the NSR rules. The five elements include: (1) means for determining baseline actual emissions; (2) the actual-to-projected-actual methodology for determining emission increases; (3) plantwide applicability limits; (4) clean units; (5) and pollution control projects.

Baseline Actual Emissions. In determining whether a proposed project constitutes a “major modification” under the NSR program, a source must determine two key things: (1) if there is a physical or operational change, and if so, (2) does that change result in a “significant net emissions increase.” In determining whether an emissions increase occurs one must compare the emissions before the change with those after the change. Prior to the December 31, 2002 rule, pre-change emissions—referred to as baseline emissions—were determined generally by calculating actual emissions for a two-year period prior to the change. Typically, this means the two years immediately preceding the change, although a source may utilize another two-year period if the Administrator determines that period is “more representative of normal source operation.” 40 C.F.R. § 52.21(b)(21)(ii) (2002).

Many industry sources criticized the rule as not recognizing factors such as downturns in the general economy, normal business cycle fluctuations, and similar economic changes. While the NSR rules provided a mechanism to utilize another time period, proponents of amending the mechanism argued that the alternative was subject to the unfettered discretion of a permitting authority and placed too onerous a burden on sources to justify alternative two-year periods. Indeed, in 1992 EPA adopted an amendment to the NSR rules for utilities (WEPCO rule) creating a presumption that utilities may use as baseline the actual emissions for any two consecutive

years within a five-year period immediately preceding the change. See 57 Fed. Reg. 32,314, 32,323 (July 21, 1992).

Under the December 2002 rules, EPA established a new procedure for determining “baseline actual emissions” by allowing a source (except for utilities) to determine the average annual emission rate of any consecutive twenty-four-month period (subject to certain adjustments) in the past ten years without having to demonstrate the “representative” nature of the chosen time period. For utilities, the “high-two-of-five-year look back” was retained. The changes for baseline actual emissions apply only when used for calculating pre-change baseline emissions as part of the actual-to-projected-actual test, for netting purposes, and to establish a PAL limit (discussed below).

EPA believes a “ten-year look back” is more reflective of changes in business cycles and does not unfairly penalize sources for those fluctuations. Environmental groups and some states oppose this reform. They believe that the longer look back allows too great a loophole for old units that are no longer able to operate at historical levels. They argue the longer look back provision allows sources to make changes at facilities to increase emissions over current levels without any review of the impacts on air quality and without any requirement to install controls. These groups suggest that the rule does not establish a baseline based on representative actual emissions but on a twenty-four-month period that may be dramatically different from “normal” historical operation. They also particularly oppose this provision when it is used to establish limits in the PAL permit provisions included in the rule.

Actual-to-Projected-Actual Methodology. In the December 2002 final rule, EPA also added a new methodology for nonutility units to calculate projected emissions increases for existing emissions units. The changes to the rule allow a nonutility source to utilize a methodology similar to that available to utilities since 1992 when EPA adopted the WEPCO rule. See 40 C.F.R. § 52.21(b)(21)(v)(2002).

Prior to December 2002, according to EPA the test for determining whether emissions increases will occur after a project was to compare the pre-change actual emissions to the post-change potential emissions. This test is known as the “actual-to-potential” test. While EPA appears to have abandoned this position in its NSR litigation, EPA historically has taken the position that even for existing sources with an actual operating history, post-change emissions must be assumed to be “potential to emit” (PTE) because the unit has not yet begun normal operations. As few sources actually operate every hour of every day for the entire year, a comparison of past actual emissions to potential emissions will

almost invariably lead to a determination that emissions will increase on a tons-per-year basis, even if the hourly emissions rate does not increase and even if actual emissions are not projected to increase.

The use of the actual-to-potential methodology for existing emissions units was declared invalid by the U.S. Court of Appeals for the Seventh Circuit in *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (*WEPCO* decision). In response, EPA amended the NSR rules to include the actual-to-projected-actual methodology, but limited its applicability to utility units. It promised to undertake future rulemaking to broaden the applicability of the methodology to nonutility units. The December 2002 final rule effected the long-promised change.

Under the actual-to-projected-actual methodology, sources must make a projection of the maximum post-change annual emissions.

The projection must be for five years after the change, or ten years after the change if the proposed change involves an increase in the unit's PTE or design capacity. In determining projected actual emissions, a source calculates its maximum annual rate in tons per year at which it is projected to emit a pollutant covered by NSR review. A source may then exclude any emissions increases that the emissions unit was "capable of accommodating" before the change as well as any projected increases that are unrelated to the change, such as increase in demand. To maintain accountability, post-change emissions must be tracked for five years following resumption of normal operations. If the change increases design capacity or PTE, a source must track post-change emissions for ten years. Utility units must report the information to EPA. Nonutility units must report annual emissions if they result in a significant emissions increase and are inconsistent with preconstruction projections.

Environmental groups oppose the actual-to-projected-actual methodology for a variety of reasons. For example, with the ten-year look back to determine past actuals, they believe the actuals as pre-change emissions will be artificially inflated. This would then allow some sources to avoid NSR applicability and avoid the requirement to install NSR pollution controls. Second, they object to a provision in the rule that excludes from the "projected actual" calculation emissions resulting from increased utilization due to demand growth if that unit was capable of accommodating that increased

utilization before the change.

Plantwide Applicability Limits. The December 2002 final rule adds explicit provisions authorizing plantwide applicability limits, commonly referred to as PALs. The PAL provisions provide sources an optional approach to manage facilitywide emissions on a plantwide cap basis. The emissions are capped at a level reflecting baseline actual emissions plus a margin, which is equal to the significance level of a pollutant (e.g., 40 tons per year for NO_x). As sources do not end up operating twenty-four hours a day, 365 days a year, sources typically emit at levels well below their "allowable," legally authorized emission levels. Under an actuals PAL, in exchange for capping emissions levels at "actual" emissions levels and giving up its legal right to emit at higher levels, a source gains increased operational flexibility and increased certainty about its ability to undertake

projects without triggering NSR permitting requirements. If a source's plantwide emissions remain below the PAL limit, it may make any physical or operational changes without triggering NSR. In the final rule, EPA announced that it is considering an additional type of PAL based on allowable emissions. PALs are effective for ten years and can be renewed.

Environmental organizations have criticized PALs because of the perception that a source has the unfettered ability to make physical changes without review,

and because PALs fail to ratchet down emissions automatically over time or if the actual emissions fall well below the cap.

Clean Units. The December 2002 final rule includes another approach to determine applicability of major source NSR for units that are designated as "clean units." Under the clean unit provision, physical or operational changes at a unit can be made without triggering NSR if the changes do not exceed the unit's allowable emission limit and the unit has installed NSR-level controls. If an emissions unit has not been through major NSR, it may nevertheless qualify for clean unit status if the source is able to demonstrate to the permitting authority that its controls are "substantially as effective" as BACT or lowest achievable emission rate (NSR-level controls).

Environmental organizations object to the length of the ten-year designation as a clean unit and to the provisions that allow a source to requalify as a clean unit after ten years even without additional controls. They also believe that the "substantially

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as effective” provisions are too broad and will allow too many sources to be designated “clean units” without state-of-the-art controls.

Pollution Control Projects. The final component of the December 2002 rule addresses pollution control projects. The pollution control project exclusion allows a project that will reduce emissions of one or more pollutants to avoid major NSR even if the project might cause a significant net emissions increase of another pollutant.

Prior to December 2002, the pollution control project exclusion in the NSR regulations applied only to electric utilities. The utility exclusion was added to the NSR rules in the 1992 WEPCO rule. In 1994, EPA by guidance memorandum extended the availability of the exclusion to other industries. See Memorandum from John S. Seitz, Director, EPA OAQPS, *Pollution Control Projects and New Source Review (NSR) Applicability* (July 1, 1994). The December 2002 final rules replace EPA’s guidance and the utility provisions formerly contained in the rule and adopt new requirements for all sources. This exclusion applies only to existing units.

A pollution control project is defined as “an activity, set of work practices, or project at an existing emissions unit that reduces emissions of air pollution from the unit.” 67 Fed. Reg. at 80,232.

The exclusion may be obtained where a project reduces emissions of one pollutant but may cause a collateral increase of another pollutant. For example, in installing an incineration device to reduce VOC emissions a source would create some NO_x emissions from the combustion of natural gas on the flare. The permitting authority must determine that the project as whole will result in an overall environmental benefit. EPA believes that without the exclusion, some sources may forgo installation of a pollution control project if the increase of a collateral pollutant would trigger NSR review. To facilitate implementation of the provision, EPA listed certain projects that would be presumed to be environmentally beneficial.

Opponents of the rule claim that the pollution control project provisions are too broad in that they allow replacement or reconstruction of equipment to constitute a pollution control project. They also contend that the final rule impermissibly expands the scope of the former policy because it eliminates the requirement that the “primary purpose” of a project is for pollution control purposes.

Challenges to the Rule

On the same day the December 2002 rule was issued—December 31, 2002—nine northeastern states (Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont) filed a lawsuit in the U.S. Court of Appeals for the D.C. Circuit challenging certain aspects of the final rules. These states generally challenged four portions of the final rules: (1) the baseline actual emissions formulas, (2) the actual-to-projected-actual emissions test, (3) the clean unit exclusion, and (4) plantwide applicability limits. See *New York v. United States EPA*, No. 02-1387 (D.C. Cir. filed Dec. 31, 2002).

After the original nine northeastern states filed their challenge to the final rule, California, Delaware, Illinois, Pennsylvania, Wisconsin, Washington, D.C., and various environmental and public health groups either joined the original suit or filed separate lawsuits challenging the final rule.

To oppose these states and environmental groups, eight states (Indiana, Kansas, Nebraska, North Dakota, South Carolina, South Dakota, Virginia, and Utah) and various industry groups, including the Utility Air Regulatory Group (UARG) and the National Environmental Development Association’s Clean

Air Regulatory Project (CARP), either intervened or obtained amicus status in support of EPA in the original suit or filed their own challenges to the final rule. Some states—including Alabama, Idaho, Illinois, Kentucky, Michigan, Minnesota, Ohio, Tennessee, and West Virginia—chose to remain neutral by refusing either to join the lawsuit challenging the final rule or to intervene on behalf of EPA.

As part of their challenge to the 2002 final rule, on February 2, 2003, the nine original states and Pennsylvania filed an Emergency Motion for Stay of the final rule before it became effective on March 3, 2003. The D.C. Circuit denied the motion for stay on March 6, 2003.

Although there is generally broad industry support for the December 2002 rule, some industry organizations filed challenges to certain aspects of the rule. On February 27, 2003, UARG filed a petition for review of the final rule. UARG also petitioned the D.C. Circuit to reopen petitions filed on behalf of UARG members in two consolidated cases filed in 1980 and 1992 involving NSR rule changes.

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The D.C. Circuit had administratively terminated the cases subject to a party requesting reopening of the cases. On March 6, 2003, the D.C. Circuit reopened the earlier cases and consolidated them with the challenges to the December 2002 rule.

In a related administrative action, in January and February 2003 ten states and ten environmental groups petitioned the EPA Administrator to reconsider the December 2002 rule and reopen the rule for public comment. EPA announced that it would reconsider six limited areas of the final rule and reopened the rule for public comment, but did not grant a stay of the rule pending reconsideration. 68 Fed. Reg. 44,620 (July 30, 2003). The notice of reconsideration was very limited in scope, although EPA said it will address other issues raised in the reconsideration petition as well. EPA's reconsideration decision was announced at 68 Fed. Reg. 63,021 (Nov. 7, 2003). EPA decided to include a definition of "replacement unit" in the regulations and to clarify that the PAL baseline calculation for newly constructed units does not apply to modified units. Because of EPA's reconsideration, efforts by states to adopt the 2002 NSR rule into state implementation plans may have been stalled.

The Routine Maintenance, Repair, and Replacement Rulemaking

In addition to promulgating the final NSR rule on December 31, 2002, EPA also proposed other revisions to the regulations governing the NSR programs required by the Clean Air Act. This proposal put forth two cost-based approaches for providing more certainty to the routine maintenance, repair, and replacement (RMRR) provisions of the NSR rules. See 67 Fed. Reg. 80,290 (Dec. 31, 2002). In the preamble to the proposed regulations, EPA stated:

The proposed changes provide a future category of activities that would be considered to be routine maintenance, repair and replacement (RMRR) under the NSR program. The changes are intended to provide greater regulatory certainty without sacrificing the current level of environmental protection and benefit derived from the program. We believe that these changes will facilitate the safe, efficient, and reliable operation of affected facilities.

Id. at 80,290. EPA added: "The purpose of today's proposed rule is to add greater flexibility to the existing major NSR regulations. These changes will

benefit reviewing authorities and the regulated community . . . by providing increased certainty as to when the requirements of the NSR program apply." *Id.* at 80,305.

In the December 2002 RMRR proposal, EPA proposed to add one or both of two specific categories of activities that EPA may consider RMRR in the future: (1) component replacements that meet certain criteria under an "equipment replacement" approach, and (2) activities within an annual maintenance, repair, and replacement "allowance." As proposed, owners' or operators' use of either of these two categorical approaches would be voluntary, and if an RMRR activity does not fall within one of the two categories, the activity still could qualify as RMRR under EPA's case-by-case test.

In what many observers viewed as an attempt to finalize at least one portion of the December 2002 proposal before the United States Senate confirmation hearings of Governor Mike Leavitt (R-UT) as EPA Administrator, EPA finalized and announced one portion of the December 2002 RMRR proposal ahead of its original target date. On October 27, 2003, EPA promulgated the equipment replacement approach. See 68 Fed. Reg. 61,248 (Oct. 27, 2003). It remains to be seen whether EPA eventually will finalize an annual

allowance approach, but now it appears unlikely that EPA will proceed with the approach.

The cost-based approach proposed in December 2002 and promulgated in October 2003 is the equipment replacement provision of the RMRR exclusion. In the final rule, EPA excludes from NSR review the replacement of existing equipment at a source with identical or functionally equivalent equipment. According to EPA:

This rule specifies that the replacement of components of a process unit with identical components or their functional equivalents will come within the scope of the exclusion, provided the cost of replacing the component falls below 20 percent of the replacement value of the process unit of which the component is a part, the replacement does not change the unit's basic design parameters, and the unit continues to meet enforceable emission and operational limitations.

68 Fed. Reg. at 61,251.

According to EPA, the equipment replacement provision will allow sources to "replace components under a wider variety of circumstances" than under EPA's case-by-case approach and will provide

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greater certainty to both owners and operators as well as reviewing authorities. *Id.* Facilities should be less hesitant to perform RMRR activities because they will know before the activities are undertaken that they will be covered by the RMRR exclusion. Consequently, efficiency, safety, reliability, and environmental performance will be improved, according to EPA.

Certain safeguards apply to replacements. First, the replaced component should be inherent to the design and purpose of the process unit. Second, there should be no reason to believe that emissions will increase due to the replacement. Finally, the component replacement should maintain operations and implement good engineering practices. Functional equivalent replacements are allowed because an old-style technology may no longer be available, or because it makes no sense to provide a disincentive to owners or operators to replace a component with something less than the best available equipment, which may serve to increase efficiency and decrease pollution. Thus, EPA does not view efficiency as a basic design parameter.

EPA established a bright-line, cost-based threshold for determining whether certain equipment replacement activities should automatically qualify as RMRR or whether the activities should undergo case-specific consideration. EPA chose to include identical and functionally equivalent equipment replacements as RMRR if the fixed capital cost of replacement plus the cost of any repair and maintenance activities that are part of the replacement do not exceed 20 percent of the replacement value of the process unit. EPA defined “process unit” as “any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.” *Id.* at 61,277. Pollution control equipment, administrative offices, and warehousing facilities generally are not part of a process unit. EPA provided specific definitions of process units for steam electric-generating facilities, petroleum refineries, and incinerators.

Under the final rule, equipment replacement activities that change the basic design parameters of a process unit do not qualify as RMRR. EPA defined “basic design parameters” differently for

steam electric-generating facilities and all other process units. For steam electric-generating facilities, owners or operators may use either (1) maximum hourly heat input and maximum hourly fuel consumption rate, or (2) maximum hourly electric output rate and maximum steam flow rate. For all other process units, owners and operators may choose between (1) maximum rate of fuel or heat input, (2) maximum rate of material input, or (3) maximum rate of product output. An owner or operator also may choose to propose alternative basic design parameters to a reviewing authority if it believes the specific design parameters provided by the final rule are not appropriate. Finally, if no specific design information is available for a process unit, the owner or operator may establish parameters using a five-year look back period.

The second of EPA’s two December 2002 proposed cost-based approaches is the annual routine maintenance, repair, and replacement allowance (annual RMRR allowance). Under EPA’s annual RMRR allowance approach as defined in the proposal,

certain activities engaged in to promote the safe, reliable and efficient operation of a facility—that is, those that involve relatively small capital expenditures compared with the replacement cost of the facility—[are] to be excluded from NSR provided that total costs did not exceed the annual maintenance, repair and replacement allowance.

67 Fed. Reg. at 80,294. In light of EPA’s decision to finalize the rule on equipment replacements,

the December 2002 annual RMRR allowance approach will not be discussed further.

State Implementation of the NSR Reform Rules

The PSD and nonattainment NSR programs are administered by state permitting authorities in one of two ways. Most states have “SIP-approved” permit programs whereby the permitting authorities adopt their own state rules that are in turn approved by EPA if they are at least as stringent as the federal rules. Some states, however, do not have EPA SIP-approved permit programs. In these states, EPA “delegates” the authority to implement the PSD or nonattainment NSR program to the state and the state implements the federal rules. Eleven states—Hawaii, Illinois,

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Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, South Dakota, Washington—and the District of Columbia have full or partially delegated programs. In addition, a number of local programs—most notably in California—have delegated programs.

States that are SIP approved have until January 2, 2006, to submit a revision to their SIP to incorporate EPA's December 2002 final rule changes and until October 27, 2006, to address the equipment replacement provision adopted in October 2003, or to demonstrate that their state programs will achieve comparable environmental results. A number of states are beginning the process of looking at the EPA rules. Some states have expressed the view that the December 2002 final rules are not as stringent as the rules they replaced; thus, the states should, if they desire, be able to keep their existing rules in place. Several other states, including Alaska, Texas, and Indiana, have legislation pending that endorses the NSR reform rules promulgated by EPA.

In its December 2002 final rule, EPA stated that states implementing the PSD or the nonattainment NSR provisions "must include today's changes as minimum program elements." 67 Fed. Reg. at 80,240. EPA is urging states to adopt all aspects of the changes in the "belief that the NSR program will work better as a practical matter and will produce better environmental results if all five of the new applicability provisions are adopted and implemented." *Id.* at 80,241. EPA recognizes that "different but equivalent" regulations may be adopted. The various states considering implementing these rules likely will become the next battlegrounds in the NSR war.

In delegated states there has already been much controversy. Under the delegation provisions, these federal provisions of the December 2002 final rules became effective for the state-delegated PSD programs on March 3, 2003. Immediately after the December 2002 rule was published, states began taking measures to resist application of these rules in delegated states. EPA rejected a request by the trade associations of state and local air directors to delay implementation. In Massachusetts, the state terminated its delegation agreement with EPA rather than implement the PSD program under EPA's new rules. 68 Fed. Reg. 35,881 (June 17, 2003).

In California and Nevada, where EPA was presented with an unwillingness by a number of local

programs to implement the requirements, EPA took the unusual step of withdrawing the PSD delegation from those permitting authorities. 68 Fed. Reg. 19,371 (Apr. 21, 2003). In the midst of the controversy, the state legislature in California is considering a bill (S.B. 288) that would require the California Air Resources Board to adopt regulations that were in effect prior to the December 2002 rule changes. Local agency officials are working with the legislature to craft this legislation. If adopted, the bill could serve as a prototype for other states.

New York and New Jersey also have told EPA officials that they intend to apply only the portions of the NSR rules that did not change in December 2002. In response, EPA told the New York Department of Conservation that it should refer any applicability issues to EPA for its consideration.

On the congressional front, presidential hopefuls Senators Edwards (D-N.C.) and Lieberman (D-Conn.) have tried to obtain legislation to allow states to opt out of adopting the NSR reform package on the state level. The proposed legislation would preclude EPA from forcing states to adopt the reform rules unless EPA can show that emissions from major sources would not increase under the new rules when compared to the old rules. This would be no easy thing to determine. Doing so would require determining how EPA's previous rules should be interpreted, a key issue being litigated in EPA's NSR enforcement cases. On the other hand, legislation introduced on behalf of the Bush administration to

implement its Clear Skies Initiative also would address NSR by generally limiting its application to nonutility sources.

As furious and contentious as the battle over NSR has been to date, the war has really just begun. EPA's NSR enforcement cases continue in various federal district courts, although it remains to be seen if additional cases will be filed. Litigation over the final rules has been launched and will now run its course in the U.S. Court of Appeals for the D.C. Circuit. And perhaps just as important, state implementation of the final rules has yet to occur, and this will provide still more battlefields for the dispute over the NSR program. Certainly, EPA's December 31, 2002 proposed and final rules will make it a New Year's Eve to remember in the history of the Clean Air Act.

Some states have expressed the view that the December 2002 final rules are not as stringent as the rules they replaced.
