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NSR Enforcement Litigation: What You Need to Know

Makram B. Jaber and Felicia Barnes

The New Source Review (NSR) program of the Clean Air Act requires major stationary sources to go through an extensive, time-consuming, and expensive review and permitting process prior to construction. Among other requirements, such sources are required to install the best available control technologies (BACT) to reduce levels of specific regulated pollutants. The NSR program also applies to existing facilities if they are modified in substantial ways and if, as a result, emissions increase by significant amounts (these are known as “major modifications”).

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For the first two decades of the NSR program, existing sources rarely triggered it, because the Environmental Protection Agency (EPA) applied it in a way to be triggered only by unusual projects that would expand the capacity of the source. That changed drastically in the late 1990s. In

Makram B. Jaber (mjaber@HuntonAK.com) is a partner with Hunton Andrews Kurth LLP. **Felicia Barnes** (fbarnes@HuntonAK.com) is an associate with Hunton Andrews Kurth LLP.

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an effort to drive policy, the EPA's enforcement arm filed and/or threatened a large number of lawsuits against power plant companies to force the installation of controls not otherwise required by the Clean Air Act. To achieve this goal, the EPA asserted in the lawsuits a theory of universal liability: any maintenance project—anything larger than day-to-day activity, like changing oil for a car—is a change that could trigger NSR. And the EPA said that any such change, if it addresses reliability, availability, or efficiency issues the plant might have experienced in the recent past, will increase total emissions as compared to the recent past and therefore will trigger NSR.

The EPA's enforcement arm filed and/or threatened a large number of lawsuits to force the installation of controls not otherwise required by the Clean Air Act.

The pace of enforcement actions has decreased in recent years. But the more than a decade-and-a-half of NSR enforcement litigation has failed to settle the main legal issues, resulting in contradictory court decisions. This lack of certainty has significant implications to how sources must evaluate compliance going forward. We discuss below the three main issues that have been litigated in the NSR cases: (1) whether the alleged failure to obtain an NSR permit is a one-time or continuing violation; (2) the standard for and application of the routine maintenance, repair, and replacement (RMRR) exclusion from NSR; and (3) the standard for and application of the emissions increase requirements.

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ONE-TIME OR CONTINUING VIOLATION

Whether a failure to obtain an NSR permit is a one-time or continuing violation has major implications for the timeliness of enforcement actions. The majority of courts have held that

NSR violations are one-time violations that accrue at the time of construction. As such, civil penalties are barred if construction was completed more than five years before the complaint is filed.¹

Whether a failure to obtain an NSR permit is a one-time or continuing violation has major implications for the timeliness of enforcement actions.

The courts have held also that, where the plaintiff is a citizen group, the concurrent remedy doctrine bars injunctive relief where the statute of limitations bars civil penalties.² Thus, these courts dismissed the entire NSR claim (if untimely), because neither civil penalties nor injunctive relief is available. But the three circuit courts that so held also said the concurrent remedy doctrine probably does not apply to the government.

However, another two circuit courts have held that if the statute of limitations has expired, injunctive relief is barred even if the plaintiff is the government.³ But these two cases involved NSR violations that were allegedly committed by a previous owner, and the EPA argues that these decisions are limited to that specific context. This issue will be resolved soon, at least in the Fifth Circuit.

In 2015, the US District Court in Texas dismissed the government's NSR claims against Luminant Generation Company because the alleged violations (by the current owner) occurred more than five years before the complaint.⁴ The court held that injunctive relief was barred even though the government is the plaintiff because the Clean Air Act does not allow injunctive relief for wholly past violations and because of the concurrent remedy doctrine. The government appealed, and the case is currently pending before the Fifth Circuit.

RMRR EXCLUSION

The NSR regulations exclude RMRR activity from permitting.

For the first two decades of the program (i.e., before the enforcement initiative), the EPA found only one project at utility plant non-RMRR: a "massive and unprecedented,"

“life extension” project at the Wisconsin Electric Power Company’s (WEPCO’s) Port Washington plant in the late 1980s.⁵ The *WEPCO* case established a framework for RMRR analyses, which involves evaluating the nature, extent, purpose, frequency, and cost of the project at issue to determine whether it qualifies for the exclusion. These factors are commonly known as the “WEPCO factors.” In a 1992 rulemaking on other aspects of the NSR rules, the EPA said in the preamble that these factors would be evaluated against what’s common in the industry, and that’s how the RMRR exclusion was applied until the enforcement initiative.

The RMRR exclusion has been litigated in several of the NSR enforcement cases. In a nutshell, the EPA has sought to apply in these cases a narrow interpretation of the RMRR exclusion, under which the standard for whether a project is RMRR is whether the type of project at issue is routine at the unit (or at a “typical unit” in the industry). The utilities have defended on the grounds that the EPA’s prior long-standing historic interpretation of the RMRR provision demonstrates that industry practice is the standard for judging whether an activity is routine and that the EPA cannot change that prior long-standing interpretation by enforcement fiat and without notice-and-comment rulemaking. Under that standard, a component replacement of a type commonly undertaken in the industry would be RMRR even if it is undertaken only once or twice during the life of each generating unit.

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No appellate court has had occasion to rule on the RMRR issue to date, and there are no cases involving these issues currently pending in any circuit. District court decisions on RMRR have been mixed: During the first decade of the enforcement initiative, decisions in the Southern District of Ohio and the Southern District of Indiana clearly sided with the EPA,⁶ but decisions in the Middle District of North Carolina,

the Northern District of Alabama, the Eastern District of Kentucky, the Western District of Pennsylvania, and the Eastern District of Tennessee clearly sided with the companies.⁷

Two of these courts had occasion to apply the “routine-in-the-industry” standard to specific projects, and both found tube assembly replacement projects to be RMRR under that standard. In *TVA*, after a bench trial, the court held the economizer and superheater replacements at the Bull Run facility were RMRR and thus excluded from NSR. In *Allegheny*, the court thoroughly evaluated the WEPCO factors test for several tube assembly replacement projects and ruled that, when viewed through the prism of a routine-in-the-industry standard, each project was RMRR.

The government has had more success in recent years, where it convinced two courts to adopt a blended, amorphous standard, under which both industry and individual unit or plant practice would be considered. For example, in one case, the court said it would evaluate the nature, extent, purpose, frequency, and cost of the project, “taking into consideration the work conducted at the particular unit, the work conducted by others in the industry, and work conducted at other individual units within the industry.” But the court then went on to apply a decidedly unit-centric standard, categorizing as non-RMRR relatively unremarkable reheater replacement projects at two units.⁸ Similarly, the court in *Ameren* held that consideration of industry practice as well as practice at particular units would be relevant only for the “frequency factor,” and that it would defer to the EPA’s interpretation of RMRR as a *de minimis* exclusion.

The government has had more success in recent years.

Further, the court explained, “[i]n evaluating frequency, the most relevant inquiry is how *often* similar projects have been undertaken at particular units in the industry, not how *many* similar projects have been implemented industry wide.”⁹ In other words, the *Ameren* court also

applied a unit-centric standard. Accordingly, after trial, the court found that the component replacement projects at issue were not RMRR. The remedy trial in the *Ameren* case is scheduled for 2019.

EMISSIONS INCREASE ISSUES

NSR is triggered by nonexcluded physical or operational changes that would increase actual emissions by a significant amount. However, how one should determine whether a change results in an actual emissions increase has been a source of controversy since at least the late 1980s, and that determination depends, at least in part, on which version of the NSR rules applies to the projects at issue. The EPA promulgated the current, actual-emissions-based framework for NSR in August 1980. There have since been two major revisions of these rules, both of which related primarily to the emissions increase provisions: the rules were revised in 1992, partly in response to the *WEPCO* case; and they were revised again in 2002.

Most of the enforcement initiative cases were governed by the 1980 and 1992 rules. Companies initially argued that, under these rules, only an activity that constitutes a modification under the New Source Performance Standards program (i.e., a change that increases a unit's maximum achievable hourly emissions rate) triggers an annual emissions comparison under NSR. The US Supreme Court rejected this argument in *Environmental Defense v. Duke Energy Corp.*¹⁰

As a result, the EPA has generally based its allegations in the power plant NSR cases on the actual-to-projected-actual test, regardless of which version of the rule applies, and that is the only test the courts have applied to particular projects. Under that test, the source must compare its post-projected annual emission to its actual, baseline emissions before the project, excluding any post-project emissions that are unrelated to the project and could have been accommodated in the baseline period (to account for causation). If the project results in an emissions increase that exceeds the significance thresholds for regulated pollutants, NSR is triggered.

The theory of emissions increase the government has asserted in the utility NSR en-

forcement cases, which involved primarily reliability projects, rested on the following: (1) the purpose of these projects was to reduce forced outages and deratings, as evidenced by the company's own project justification documents and Generation Availability Data System (GADS) data; and (2) the reducing of forced outages and derating inexorably results in increased utilization of—and, therefore, annual emissions from—the unit. Further, the EPA argued, whether emissions actually increased after the project is irrelevant; the only thing that matters is whether the source should have expected an increase when it did the project. Defendants have generally argued that the EPA's GADS-based method is simplistic and does not represent reality, because predicting unit operations is a complex endeavor that must account for myriad factors, such as system constraints and conditions, demand conditions, and other factors. Defendants have also argued that where emissions in fact did not increase after the project, there can be no NSR violation.

Where emissions in fact did not increase after the project, there can be no NSR violation.

Of the cases that went to trial, the government prevailed using its GADS method in *Ohio Edison* and in *Ameren*. The government lost in *Cinergy*, where the case was tried before a jury after the court held that the pre-project expectation of the “reasonable power plant owner or operator” for the potential effect of a project on annual emissions would determine whether the project triggers NSR. The trial pitted the government's experts, who used their GADS methodology, against Cinergy's engineers, who testified that common replacement projects are undertaken to maintain availability and do not necessarily increase generation, which primarily responds to demand and dispatch conditions. The jury returned a largely favorable-to-the-defense verdict, finding liability for only four projects out of the 14 projects at issue.¹¹

Cinergy appealed, arguing that the GADS methodology is untested and unreliable and thus should have been excluded under the

Daubert standard for expert testimony. The Seventh Circuit agreed and reversed the judgment against Cinergy, ruling the methodology proffered by the government's experts was unreliable for units that did not operate as baseload units and thus was inadmissible.¹² The government in later cases has sought to blunt the impact of the Seventh Circuit decision by presenting additional evidence to get over the *Daubert* hurdle (but these cases were later settled, so no actual decision on the merits of the methodology was made).¹³

Common replacement projects are undertaken to maintain availability and do not necessarily increase generation.

The most consequential case for projects going forward is probably the *DTE* case, which has been ongoing since 2010—not only because of the decisions it resulted in, but also because it prompted the EPA recently to issue guidance that clarifies how the 2002 NSR rules should be applied. In August 2010, the EPA filed the first enforcement action under the 2002 NSR rules, alleging that tube components replacement projects undertaken by DTE at its Monroe Power Plant in mid-2010 were major modifications. The EPA alleged this even though the company's pre-project analysis showed the project would not result in a significant emissions increase, and actual post-project emissions confirmed the company's projection.

The district court granted summary judgment to DTE in 2011, concluding that in the absence of an actual significant increase in emissions caused by the challenged projects—and there had been none—the EPA could not meet its burden. On appeal, the Sixth Circuit concluded that the district court's premises were largely correct. The NSR rules create a “project-and-report” system.¹⁴

The EPA cannot enforce NSR by second-guessing the operator's projection, because that would create, in effect, a prior approval system. But the court also allowed room for a narrow category of enforcement actions—i.e., those that would assess whether the operator, “at a basic level ... [made] a projection in compliance with how the projections are to be made.” The

Sixth Circuit thus remanded the case to allow the district court to consider this question.

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DTE promptly renewed its motion for summary judgment. DTE had conducted a pre-construction projection and concluded that the challenged projects would not cause an emissions increase. These dispositive facts were not in dispute.

The EPA argued that DTE misapplied the *demand growth exclusion*—the part of the rules that allows operators to exclude from projections increases in emissions that are unrelated to a project. The EPA argued that it was insufficient for DTE to show it excluded emissions attributable to factors other than the projects. The EPA could still win, it argued, if it could persuade the court that DTE had excluded too much. The district court rejected the EPA's reading of the Sixth Circuit's decision, agreeing with DTE that, under that decision, the EPA “is only entitled to conduct a surface review of a source operator's preconstruction projections to determine whether they comport with the letter of the law,” and that “[a]nything beyond this cursory examination would allow EPA to ‘second-guess’ a source operator's calculations; an avenue which the Sixth Circuit explicitly foreclosed to regulators.” The court concluded the EPA's challenge to DTE's application of the demand growth exclusion was precisely the type of second-guessing the Sixth Circuit forbade.

The EPA's challenge to DTE's application of the demand growth exclusion was precisely the type of second-guessing the Sixth Circuit forbade.

On January 10, 2017, the Sixth Circuit issued a fractured decision reversing again.¹⁵ Under the Sixth Circuit's procedures, the second DTE appeal was decided by the same panel as the first appeal. Judge Martha Craig Daughtrey, who had unreservedly joined the 2013 *DTE* majority opinion, reversed course and declared that


all of the prohibition of EPA second-guessing of the 2013 DTE decision was “technically dicta.” She adopted the EPA’s argument that it can base NSR liability on its own experts’ projections, regardless of whether the company undertook a projection before the project and regardless of whether actual emissions ever increased.

She adopted the EPA’s argument that it can base NSR liability on its own experts’ projections, regardless of whether the company undertook a projection.

Judge Alice M. Batchelder, who had dissented in the first appeal, concurred in the judgment but not on Judge Daughtrey’s reasoning. Although Judge Batchelder still believed the first appeal was wrongly decided, she felt she was bound by that decision, and she interpreted *DTE I* as allowing the EPA to base PSD liability on its experts’ projections. Judge John M. Rogers, who had written the majority opinion in *DTE I*, dissented on the grounds that DTE’s projection complied with the basics of the projection regulations and the EPA could not base its claim of liability on second-guessing that projection. The case was remanded to the district court, where it is currently stayed pending settlement discussions.

An operator is free to manage the source’s post-project emission in a way to avoid any emissions increase—whether caused by the project or not—and thus categorically avoid the potential for NSR.

On December 7, 2017, the EPA issued guidance responding to the uncertainty and confusion created by the two *DTE* decisions from the Sixth Circuit. The EPA clarified that, at least going forward, it will interpret and apply the 2002 NSR rules consistent with Judge Rogers’s holding in *DTE I* and his dissent in *DTE II*. In particular, the guidance explained that the EPA would not second-guess operator pre-project emissions increase projections and would consider bringing an enforcement action only where post-project emissions actually increase as a result of the project. The guidance also confirmed

that an operator is free to manage the source’s post-project emissions in a way to avoid any emissions increase—whether caused by the project or not—and thus categorically avoid the potential for NSR applicability. 

NOTES

1. See, e.g., *Sierra Club v. Oklahoma Gas and Elec. Co.*, 816 F.3d 666 (10th Cir. 2016) (*OG&E*); *United States v. EME Homer City Generation*, 727 F.3d 274 (3d Cir. 2013); *United States v. Midwest Generation*, 720 F.3d 644 (7th Cir. 2013); *Sierra Club v. Otter Tail Corp.*, 615 F.3d 1008 (8th Cir. 2010); and *Nat’l Parks Conservation Ass’n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322–24 (11th Cir. 2007) (“*TVA 11th Cir.*”). But see *Nat’l Parks Conservation Ass’n v. Tenn. Valley Auth.*, 480 F.3d 410, 418–19 (6th Cir. 2007) (adopting the minority view that PSD violations are continuing violations, relying on the Tennessee SIP provision allowing for post-construction PSD permitting).
2. *OG&E*, 816 F.3d at 675–76; *Otter Tail*, 615 F.3d at 1018–19; *TVA 11th Cir.*, 502 F.3d at 1326–27.
3. *Midwest Generation*, 720 F.3d at 648; *Homer City*, 727 F.3d at 292–93.
4. *United States v. Luminant Generation Co.*, 2015 WL 5009378 (Aug. 21, 2015).
5. *WEPCO v. Reilly*, 893 F.2d 901 (7th Cir. 1990).
6. See *United States v. Cinergy*, 495 F.Supp.2d 909 (S.D. Ind. 2007) (citing *United States v. Southern Ind. Gas & Elec. Co.*, 245 F.Supp.2d 994, 1007–10 (S.D. Ind. 2003) (“*SIGECO*”); see also *New York v. Am. Elec. Power Serv. Co.*, 2007 WL 539536 (S.D. Ohio Feb. 15, 2007) (“*AEP*”) (citing *United States v. Ohio Edison*, 276 F.Supp.2d 829 (S.D. Ohio 2003)).
7. *United States v. Duke Energy Corp.*, 278 F.Supp.2d 619 (M.D.N.C. 2003), aff’d on other grounds, 411 F.3d 439 (4th Cir. 2005), vacated sub nom *Env’tl Defense v. Duke Energy Corp.*, 127 S.Ct. 1423 (2007) (the Fourth Circuit and Supreme Court decisions addressed emissions increase only and did not address the district court’s RMRR ruling); *United States v. Alabama Power Co.*, 372 F.Supp.2d 1283 (N.D. Ala. 2005); *United States v. East Kentucky Power Coop.*, 498 F.Supp.2d 976 (E.D. Ky. 2007) (“*EKPC*”); *Pa. Department of Env’tl Protection v. Allegheny Energy*, 2008 WL 4960090 (W.D. Pa. Nov. 18, 2008); *National Parks Conservation Ass’n v. Tenn. Valley Auth.*, 618 F.Supp.2d 815 (E.D. Tenn. 2009) (“*TVA*”).
8. *United States v. Louisiana Generating LLC*, No. 09-100, 2012 WL 4107129, at *4 (M.D. La. Sept. 19, 2012) (“*LaGen*”).
9. *United States v. Ameren Missouri*, 2016 WL 728234, at *5 (E.D. Mo. Feb. 24, 2016).
10. 127 S.Ct. 1423 (2007).
11. After the court granted a retrial on the 10 projects that the government lost, the jury again largely exonerated Cinergy, finding NSR liability for only two projects involving pulverizer upgrades at the Gallagher plant.
12. *United States v. Cinergy*, 623 F.3d 455, 459–60 (7th Cir. 2010).
13. See, e.g., *United States v. Alabama Power Co.*, 730 F.3d 1278 (11th Cir. 2013).
14. *United States v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013).
15. *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).