



# CLEAN AIR ACT

## NEW SOURCE REVIEW

### A PUBLIC HEALTH LAW

The Clean Air Act requires industrial facilities, including oil refineries and power plants, to minimize their air pollution by installing pollution control technologies. However, many of the oldest and most polluting facilities in operation prior to the passage of the Clean Air Act were exempted from these pollution reduction requirements. In its current iteration, this requirement of the Clean Air Act is known as the New Source Review program. The NSR program applies to all new facilities, but only to those existing facilities that make major modifications resulting in a significant increase in their air pollution. Accordingly, NSR is the principal tool for ensuring that these old facilities use the most up-to-date pollution controls whenever they undergo such major modifications.

NSR is a vital program that can protect the public from excessive air pollution. Unfortunately, industry has blocked the public health benefits of NSR with relentless litigation, lobbying, and other tactics to avoid compliance with the law. The Environmental Protection Agency estimates that 80 percent of oil refineries are in violation of the NSR program. Excessive refinery pollution is a major contributor to the rising rates of hospitalization and deaths from asthma and other health problems.

#### Oil Refineries' Thirty-Year Fight Against NSR

Recent NSR enforcement actions against oil refineries are the result of three decades of failed attempts by industry to escape NSR require-

ments. Since the passage of the Clean Air Act, Congress, EPA, and the courts have upheld repeatedly the requirement of modern pollution standards for new and modified pollution sources. Industry has consistently lobbied against NSR, perpetuating myths and falsehoods in an attempt to weaken this vital public health program.

The NSR program applies to major modifications, not routine procedures as industry groups purport. EPA, under the Reagan administration, filed suit to support a narrow definition of "routine maintenance, repair and replacement" and to compel NSR compliance. When the court agreed with EPA, holding that rebuilding a plant was not routine and did constitute a major modification, industry turned to Congress to pass broad statutory exemptions to NSR. When that failed, industry lobbied the administration of George H. W. Bush for regulatory exemptions. As a result, in 1992 the rules were amended to give industry a broader formula for calculating emissions increases, but no new statutory exemptions were granted.

While industry was stepping up its efforts to gut NSR, EPA and the Department of Justice were stepping up their investigations of NSR violations and discovering that over 80 percent of all refineries are in violation of the Clean Air Act. As a result of this investigation, EPA commenced enforcement against the worst violators. These enforcement actions have resulted in significant public health and community benefits. The settlement reached in one enforcement

#### The NSR Permit Program

NSR consists of two sets of permit requirements: one set for facilities in areas where air quality is poor (non-attainment areas), and one set for facilities in areas where air quality is deemed acceptable (attainment areas).

*Non-Attainment NSR Permit:* An area with poor air quality, one that does not meet national ambient air quality standards, is designated as a non-attainment area. Permitting in non-attainment areas varies with the severity of air pollution. In areas with high non-attainment pollution levels, a non-attainment NSR permit requires the industrial source to use state-of-the-art control technology equivalent to the most stringent limit achievable in practice or required by any state, known as the lowest achievable emission rate (LAER). The source must also offset its pollution levels by providing enforceable air emissions reductions from other sources in the non-attainment area. The amount of the offset must be greater than the new pollution increase, and is based on the severity of the area's non-attainment classification—the worse the air quality, the greater the offset required.

*Prevention of Significant Deterioration Permit:* An area with acceptable air quality, that meets national ambient air quality standards, is defined as an attainment area. Facilities seeking to construct or modify in these areas must comply with NSR's prevention of significant deterioration permit requirements. Generally, the permit requires sources to use the best available control technology (BACT). Technology that constitutes BACT is determined on a case-by-case basis that factors in environmental, energy, and economic impacts, along with the maximum degree of pollution reduction available. The program also requires an air quality review to demonstrate that the new emissions increase will not cause or contribute to a violation of the national ambient air quality standards that would significantly deteriorate acceptable air quality.

action resulted in a fine of \$400 million, and a requirement that nine refineries reduce their air pollution by more than 60,000 tons per year. It is this type of enforcement that industry is seeking to derail.

Having found little sympathy in the courts, industry unsuccessfully lobbied Congress to force EPA to drop the lawsuits. Now industry is counting on its campaign contributions and friendship with the new Bush administration to buy what Congress and the EPA have refused them since 1970 -- a permanent exemption from NSR requirements under the Clean Air Act.

## History and Key Provisions of the Clean Air Act

1970 - Congress enacts the Clean Air Act, which establishes two crucial requirements for improving the nation's air quality: (1) national ambient air quality standards; and (2) new source performance standards that require industrial facilities to utilize the best practices in pollution reduction.

*Grandfather Exemption:* Industrial facilities operating prior to 1970, such as oil refineries, power plants, and chemical plants, are exempted from the requirement to use best practices to meet new source performance standards, largely based on the belief that these facilities, many of which were built before 1950, would soon be retired. This is known as the grandfather exemption.

*Limits on Grandfather Status:* Congress did not exempt old facilities from the requirement to use best practices to meet new source performance standards in perpetuity. When a modification occurs at a grandfathered facility, the Clean Air Act requires the facility to comply with the new source performance standards. In the 1970 Act, Congress defined modification as "any physical change or change in method of operation" that increases emissions. This broad definition was intended to prevent evasion of the new source performance requirements by facilities attempting to hold on to their grandfather exemption after a modification occurs. EPA later established regulations under the New Source Review Program to fine-tune modification permitting requirements. EPA regulations provide that compliance with NSR is triggered not by "routine maintenance, repair, or replacement," but only when a facility modification is (1) major; and (2) results in substantial pollution when compared to a project's baseline emissions.

1977 - Congress amends the Clean Air Act, adopting the NSR permit program. With this amendment, Congress: (1) expanded the application of NSR to all new and modified industrial facilities; (2) established a pollution threshold that triggered compliance with NSR; (3) set the level of performance for reducing pollution on a case-by-case determination of current best practices; and (4) required all sources of pollution subject to the Clean Air Act to prevent the deterioration of air quality.

## Loopholes in NSR

In its NSR regulations, EPA has created too many loopholes, allowing sources to avoid NSR even as they continue mak-

ing significant investments and increasing pollution year after year. These loopholes include: (1) categorical exemptions for routine maintenance, repair, or replacement, change in ownership, or increase in the hours of operation or production rate (unless prohibited under an existing permit); (2) broad provisions that allow significantly increased pollution levels to be netted out based on five years of purported decreases in pollution that occurred while a facility was in grandfather status; and (3) a new and generous formula for determining baseline emissions.

EPA provides generous calculations for determining whether a pollution increase is significant. Such increases must exceed what is known as baseline emissions in order to trigger NSR. Baseline emissions are the average of annual emission levels during the preceding two years, or during a different two-year period if it is shown to be more representative.

## Industry Still Violates NSR

While industrial lobbying groups and law firms have been working to gut the law, the facilities they represent have been flagrantly breaking the law. After 20 years of industry attempts to rollback NSR, in the 1990s EPA launched an investigation into the low number of NSR permit applications. EPA's investigation confirmed its suspicions that violations were widespread, with hundreds of facilities spewing excessive amounts of pollution into the air. EPA reports that it has more than 260 NSR enforcement cases currently pending against refineries and power plants. There are multiple enforcement cases pending against 57 oil refineries and 15 oil-related facilities, nearly half of them operating in communities of color along the 260-mile corridor between Louisiana's Cancer Alley and Houston. EPA's efforts to protect public health and the environment through these enforcement cases were recently frozen by the Department of Justice as part of its reconsideration of those cases, as directed by President Bush and as recommended in The National Energy Policy report. The report claims, without providing any supporting factual data, that compliance with NSR deters investment in increased oil refinery and power plant capacity. However, EPA's preliminary report to President Bush (*NSR 90-Day Review Background Paper*, June 22, 2001) finds that NSR compliance does not block investments in refineries and power plants, but instead is a routine and minor cost.

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