

EPA, NSR and Power Plants: A Case Study in (Un)Civil Disobedience

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NSR Modification Provision Was a “Grandfathering” Legislative Compromise

“The statutory scheme intends to ‘grandfather’ existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program.” *Alabama Power v. Costle* (D.C.Cir. 1979).

The Bush EPA NSR Agenda

“Don't accept the old order, git rid of it.”

-- Johnny Rotten, *The Sex Pistols*



Bush EPA Agenda: the Effective Elimination of NSR – and NSR Enforcement -- for Existing Power Plants

■ Anti-Enforcement:

- “[T]he goal of NSR reform was to prevent any enforcement case from going forward. Some people thought the [NSR power plant enforcement initiative] should never have been brought. The reform was really designed to thwart our ability to do it.”

-- J.P. Suarez, Former EPA enforcement chief and Bush political appointee (October 2004)

Bush EPA NSR Agenda

■ Anti-Enforcement (cont.):

- “[NSR III proposal’s approach] is Duke’s, and every other Defendant’s, favorite defense in the NSR enforcement cases: we have not expanded capacity and, consequently, NSR was not triggered.”
- NSR III proposal would be “fatal” to enforcement cases and render NSR program “largely unenforceable.”
- Internal EPA enforcement office memo blasting NSR III proposal to effectively exempt power plants from NSR

Bush EPA NSR Agenda

- Allow Massive Local Increases in Power Plant Pollution:
 - An EPA enforcement office case study (from enforcement cases) of a single power plant “modification” showed NSR III proposal’s emissions increase test would show no emissions increase (on paper) when actual emissions of SO₂ increased by 13,096 tons per year.
 - Same internal EPA enforcement office memo.

Bush EPA NSR Agenda

- Legal Relativism and Defiance:
 - “Any physical change”:
 - “Any” does not mean any (*Overtured*)
 - “Physical change” does not cover \$200 million construction activities (*Overtured*)
 - “That increases the amount of any air pollutant emitted”:
 - This does not mean *actual* pollution increases (*Overtured*)

The Bush Administration's "New Reality"

“The [senior White House adviser to President Bush] said that guys like me were ‘in what we call the reality-based community,’ which he defined as people who ‘believe that solutions emerge from your judicious study of discernible reality.’ I nodded and murmured something about enlightenment principles and empiricism. He cut me off.”

“Without a Doubt,” by Ron Suskind, New York Times Magazine, October 17, 2004.

Creating the “New Reality”

"That's not the way the world really works any more," he continued. "We're an empire now, and when we act, we create our own reality. And while you're studying that reality -- judiciously, as you will -- we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do."

“Without a Doubt,” by Ron Suskind, New York Times Magazine, October 17, 2004.

Bush EPA NSR Agenda

“Nothing requires a greater effort of thought than arguments to justify the rule of non-thought.”

-- Milan Kundera

Shoot First, Don't Ask Questions Later

- “[B]ecause EPA lacked comprehensive data, it relied on industry anecdotes in concluding that NSR discourages sources from making changes that improve operating efficiency.”
- “GAO further pointed out that EPA’s projection that these efficient changes will decrease actual emissions is based on the unverified assumption that sources will not increase their production levels after implementing the changes.”
- “[T]here is a heightened need for EPA to have sufficient data to confirm that the [upheld] portions of the 2002 rule do not result in increased emissions that harm air quality and public health.”

-- *New York v. EPA* (D.C.Cir. June 2005)

Bush EPA's CAIR Substitution Agenda (i.e., Prolonged Immunity)

- In 2010, 81% of 975 EGUs will lack scrubbers or SCR or both
- In 2015, 70% of 995 EGUs will lack one or both controls
- In 2020, 68% of 1041 EGUs will lack one or both controls
 - EPA data submitted to Senate EPW Committee.
- CAIR will not achieve a 70% reduction in utility SO₂ emissions until some time in the mid-2020's, over *45 years* after the 1977 Clean Air Act.

Utility Industry's NSR Agenda

- Indefinite immunity from NSR controls for existing power plants:
 - “[T]o adopt WEPCO's definition of "physical change" would open vistas of indefinite immunity from the provisions of NSPS and PSD,” and “the application of NSPS and PSD to important facilities might be postponed into the indefinite future.” (7th Cir. 1990)
 - Prominent utility industry attorney's infamous statement.

Utility Industry's NSR (CAIR and Mercury Rule) Agenda

Utility industry lobbyist's *April 2001* prediction – since perfectly realized – of the White House's air pollution agenda for power plants:

“And the goal here will be to gain a foothold, an irreversible foothold on the next generation of reasonable cost effective SO₂ and NO_x reductions, plus air toxics that we can all live with and that someone else can't undo.”

Speech by Edison Electric Institute lobbyist, April 2001, to a western U.S. coal conference

Smoking Guns and Cover-ups

- Documents obtained by Justice Department over utility industry objections "confirm[] that EPA's interpretation of the modification rules in this [Duke Energy] case is the same interpretation that [the Utility Air Regulatory Group] had acknowledged, and informed Duke of, for more than a decade." December 2003 *redacted* Justice Department motion, quoted in January 14, 2004 Greenwire article.
- Industry attorneys rushed into court to place even this redacted motion under court seal, along with all the other direct evidence of their longstanding knowledge and culpability. The Bush Justice Department capitulated.

What is the ending of the NSR story?

“The good ended happily, and the bad unhappily. That is what Fiction means.”

-- Oscar Wilde, *The Importance of Being Earnest*

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