NERA
ECONOMIC CONSULTING

At A Glance

New Source Review

Overview

The New Source Review (NSR) program of the Clean Air Act is a pre-construction program, meaning that before making any physical or operational changes to a facility, sources determine whether the proposed changes fall within the scope of the NSR program. Unless an activity meets one of the exclusions from NSR (such as being a routine replacement, repair, or maintenance activity), the source must determine if the activity could be deemed a "major modification" and thus potentially trigger NSR. Should an activity be deemed a major modification and not opt out of NSR for some other reason, the source may be required to take binding permit limitations or, possibly install best available control technology.

Under both the Clean Air Act and the regulations adopted by the EPA, a major modification is a physical or operational change that results in a significant increase in net emissions of a regulated pollutant. A key issue, therefore, is whether an activity can be expected to cause a significant increase in emissions.

In 1992, the EPA clarified their regulations on determining whether an activity was likely to result in a significant anticipated increase in emissions. This rule, called the "WEPCO Rule," adopted an "actual-to-future-actual" test to determine if an activity could reasonably be expected to result in a significant anticipated emissions increase. This rule applied only to electric steam generating units. For a source to take advantage of the test, it must also report certain data to the permitting authority—although the WEPCO Rule clearly articulated that the necessary data were already being submitted.

In 2002, the EPA modified its regulations and introduced the Actual-to-Projected Actual Applicability Test, which included slight changes to the construct of "actual-to-future-actual" test of the WEPCO Rule.

Focus Areas of Expertise

NERA has considerable experience in preparing expert testimony in NSR litigation cases, providing analyses and consulting litigation assistance, and advising clients on how to conduct emissions increase analysis to determine if NSR is likely to apply to contemplated activities. NERA has implemented the instructions in the 40 CFR 52.21 to determine the proper calculations necessary to implement the actual-to-future-actual test and its predecessor, the Actual-to-Projected Actual Applicability Test.

NERA's expert work on the litigation cases and litigation assistance projects has focused on whether the utilities could reasonably have expected the activities they undertook to cause a significant increase in net emissions. NERA staff have implemented tests that rely on data that electric utilities generally construct for regulatory, planning, and financial reporting purposes. The use of these data is important because they were not prepared for the purposes of the litigation, but rather represent the company's expectations for the future operations of their facilities at the time the modifications were made.

NERA also assists companies with ongoing NSR regulation compliance. Some companies currently undertaking activities at their facilities may believe that the activities are routine repair, replacement, or maintenance and are exempt from the NSR program. However, given that the rules and law surrounding "routine" exclusions are in flux, we assist clients in conducting actual-to-projected-actual emissions analyses prior to undertaking the activity. These analyses are important as a defense if the activities are not deemed to be routine in the future.

Illinois Power Company / Dynegy Midwest Generation, Inc.

Illinois Power Company was one of the seven companies the DOJ filed suit against in 1999. In this case the EPA alleged that between 1982 and 1994 the company modified three electric generating units at the coal-fired Baldwin Power Station without obtaining the appropriate NSR permit and without installing best available emissions control equipment. NERA's team prepared an expert report describing an emissions increase analysis to assess whether Illinois Power Company would reasonably have expected emissions to increase as a result of the projects undertaken at the Baldwin Station. The approach utilized the actual-to-future-actual test of the WEPCO rule and implemented the direction in the regulations to exclude the emissions that the unit was capable of accommodating in the baseline period.

American Electric Power

The largest of the DOJ's NSR suits was filed against American Electric Power (AEP). The government initially alleged that AEP failed to comply with the NSR provisions by undertaking 160 projects at 11 power plants in Indiana, Ohio, Virginia, and West Virginia. NERA was engaged to prepare an emissions increase analysis and describe the results in an expert report. The NERA team compiled the data necessary to conduct an emissions increase analysis for the numerous alleged projects that occurred between 1975 and 2001. The emissions increase analysis used the 1992 WEPCO Rule's actual-to-future-actual test and implemented the regulatory direction to exclude the emissions the unit was capable of accommodating in the baseline period.

Confidential Clients-Consulting Litigation Assistance

NERA has been providing consulting litigation assistance with respect to requests for information under Section 114(a) of the Clean Air Act and Notices of Violation issued by the EPA. These engagements include data collection, review, and submission; emission analyses; calculation of baseline actual, capable of accommodating, and representative actual emissions; calculation and review of projected actual emissions; causal analyses; and review of the respective companies' processes, models, and results used over the period of interest.

Large Generating Company

NERA has been providing NSR advisory services to a large coal-fired generator. This engagement has involved two major efforts. The first effort reviewed the process employed by the company for performing the necessary analyses for NSR compliance. The NERA team worked with many functional areas of the company including finance, legal, operations and maintenance, and planning to formalize the company's process for conducting NSR emissions increase analyses. The resulting process includes warehousing the data necessary to conduct the analysis and developing the infrastructure to derive projected data for the actual-to-projected-actual emissions increase test. Once the process was established, the NERA team worked with outside counsel to prepare pre-project emissions submissions pursuant to 40 C.F.R. 52.21 for activities to be performed during routine planned outages. Although the activities planned are routine maintenance, repair, and replacement, these submissions are being prepared as a necessary component for preserving a defense, given the uncertainty of the NSR regulations.

About NERA

NERA Economic Consulting (**www.nera.com**) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

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