Bush guts pollution controls on energy industry

Joseph Kay
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The US Environmental Protection Agency (EPA) issued a new rule on Wednesday that will undermine a crucial component of the Clean Air Act, the main piece of legislation governing air pollution. The rule is the latest in a series of modifications of the New Source Review (NSR) amendment to the act, which regulates coal-burning power plants.

As significant as the content of the new rule is its timing. It comes less than two weeks after the worst blackout in US history, a social disaster that had its roots in the decay of the electrical transmission grid. Many of the same power companies responsible for this decay will benefit substantially from the gutting of environmental standards at the hands of the Bush administration.

The Clean Air Act was enacted in the early 1970s, a response to the growing problem of air pollution. The measure was pushed in particular by businesses and politicians from urban centers, especially in the East, where air pollution can be a major problem. In 1977, as an amendment to the Clean Air Act, Congress passed legislation necessitating NSR, which mandated that new coal plants—which now account for more than half of electricity production in the country—must have better pollution control. These plants are located primarily in the Midwest and South.

As a concession to utility companies, plants constructed before 1970 were exempt from this requirement unless: (1) They made major renovations; and (2) This was done in a way that significantly increased emissions of certain key pollutants**,** includingnitrogen oxide, sulfur dioxide and mercury. The concession was designed to reduce pollution through a process of attrition: old plants would eventually be forced either to install modern equipment or else shut down.

The new rule involves the first of these requirements for triggering NSR. Explicitly excluded from the category of major renovations was “routine maintenance.” The new rule essentially allows companies that own power plants to include almost anything under the category of routine maintenance. It stipulates that any work on a “process unit”—a self-contained production facility, more than one of which may exist at any given plant—will automatically be excluded from NSR if the cost of the work “does not exceed 20 percent of the replacement value of the entire process unit.” This work must not change the basic design of the unit.

Thus a company can make changes to extend the life of a coal-burning plant and be exempt from NSR, even if the changes increase pollution output at the plant. There are no stipulations on the time between renovations, so a company could conceivably replace the entire plant so long as these replacements are broken up into a sufficient number of pieces. The essential purpose of NSR—to force plants to eventually install pollution-control measures—is thus undermined completely.

New York attorney general Eliot Spitzer—who plans on filing a lawsuit to halt the changes from being implemented—noted, “A rule that creates a 20 percent threshold eviscerates the statute. This makes it patently clear that the Bush administration has meant all along to repeal the Clean Air Act by administrative fiat.”

The administration’s decision is the culmination of an intensive effort to undercut NSR, part of a drive to eliminate all constraints and regulations of the energy industry.

For decades after its enactment, NSR was rarely enforced. As a result, many power companies made major changes in their coal plants without upgrading pollution standards. While those supporting NSR in the 1970s had assumed that the old plants would eventually whither away over the course of the next two decades, this did not happen. In the latter years of the Clinton administration, the EPA and the Justice Department moved to enforce NSR more strictly and brought over 50 lawsuits against various utilities with plants in the Midwest and the South.

Over the past two years, one of the major goals of the utilities—which have grown in size and power under the impact of deregulation in the late 90s—has been to push for specific measures that undermine the ability of the government to use NSR to actually force changes in old plants. The companies stand to save hundreds of millions of dollars by evading the requirement to install costly pollution controls.

The drive to undercut NSR has become particularly intense as the government’s cases against the utilities have begun to meet with some success in the courts. So far, the government has agreed to settlements in five of the cases, including a $1.2 billion agreement with Virginia Electric Power. A result of a suit brought against the company for repairs it made in eight of its power plants in Virginia and West Virginia, the settlement is the largest in the history of the Clean Air Act. Part of the money will go towards installing pollution controls.

In early August, a federal judge ruled that Ohio Edison, a utility owned by FirstEnergy Corp., violated NSR. According to the finding, the modifications carried out by Ohio Edison “were not routine in any sense of the term.” The level of the fine has yet to be announced. FirstEnergy is at the center of investigations into the cause of the Northeast energy blackout earlier this month.

These cases have been pursued by the Justice Department despite opposition from sections of the Bush administration, particularly the Energy Department and Vice President Dick Cheney. Leading officials within the EPA have strongly opposed dropping the enforcement of the government’s own environmental standards. Government officials from eastern states—including Republicans such as New York Governor George Pataki—have also favored keeping NSR. These positions were reflected in the mild resistance of Christine Whitman, the former chief of the agency, to the policies that are presently being implemented. Whitman recently stepped down from the EPA and announced that she would not seek a renewal of her office if Bush were reelected.

In early 2002, a decision was made to continue with the existing lawsuits without beginning any new cases. At the same time, the administration sought to undercut the legislation upon which the suits were based. In this way utilities were encouraged to hold out on settling the cases on the hopes that the laws would eventually be changed. Eric Schaeffer, a Reagan-appointed official who stepped down from the EPA’s top enforcement position in February 2002, announced in his letter of

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resignation, “We are fighting a White House that seems determined to weaken the rules we are trying to enforce.”

Revision of NSR was one of the main concerns of Cheney’s energy task force, which produced the National Energy Policy Report in May 2001. Included in that report was a directive to the EPA to examine the provision and propose changes.

The companies that have most vociferously pushed NSR reform were heavily involved in Cheney’s energy task force. The Edison Electric Institute, an energy industry group, had at least 14 contacts with the task force as Cheney was formulating the administration’s energy policy. The institute—which includes all the major utilities involved in the government lawsuits—has contributed some $600,000 to the Republican Party from 1999 to 2002. Many of the major utilities that own coal-fired plants—including FirstEnergy—have individually lobbied for the changes.

While the EPA delayed carrying out Cheney’s directive, in December 2002 the agency announced a series of changes. Most of these related to one of the two NSR triggers, namely that the renovations at an old plant must significantly increase emissions of certain pollutants. By changing the way such emissions are accounted for, the new rules effectively increased the threshold, allowing plants to generate more emissions without this constituting a “significant increase.”

Before implementing any changes, the EPA is obligated to present a draft proposal for public comment. When it issued the final rules on emissions, the agency also published a draft of a new rule that would define what is meant by “routine maintenance.” It is this proposal that was finalized on Wednesday.

The manner in which the rule was finally implemented is itself significant. The measure is broadly opposed, not only by the public as a whole—the EPA’s invitation for public comment generated over 200,000 letters opposed to the measure—but even within the political establishment.

Hence the administration sought to withhold the extent of the new rule until the moment that it was implemented. The December 2002 draft omitted details critical to understanding the impact of the changes. For example, EPA stated that it was considering revising NSR so as to automatically count as “routine maintenance” any renovations below a certain percentage of the cost of replacing the equipment. However, it only gave a broad range of possible percentages under consideration, anywhere from zero to 50 percent. A draft of the final rule that was leaked to the Natural Resource Defense Council (NRDC), an environmentalist group, only called for a threshold of “X percent.”

The entire process by which NSR has been modified was designed to circumvent Congress. Because it is part of the Clean Air Act and was enacted by the legislature, NSR can only be revoked through an act of Congress. It is unlikely that the administration could push such a measure through. Indeed Bush’s “Clear Skies” initiative, which was designed to replace the Clean Air Act, has stalled in Congress. Instead, the EPA has issued “clarifications” that essentially accomplish the same thing.

Connecticut Attorney General Richard Blumenthal noted that the revocation of NSR was being carried out by “dictatorial administrative edict.”

The recent departure of Whitman may also have played a role in the timing of the new rule. Currently, there is no chief of the EPA. The acting administrator, Marianne L. Horinko, made the announcement on Wednesday. Utah Governor Michael Leavitt—who is to have his Senate confirmation hearing as the next head of the EPA hearing next month—was relieved of having to announce and take responsibility for the decision himself.

The 540 old coal power plants governed by NSR produce about half of the country’s electricity and account for the greater part of the air pollution caused by power generation.

The energy industry and the EPA have claimed that the new measures will actually decrease pollution. Companies will be encouraged to make renovations at their old plants by easing the threat of regulatory action. “This rule is desperately needed to make America’s power plants, factories and refineries safe and reliable,” argued Jeffrey Marks, director of air quality policy for the National Association of Manufactures, the industry group. Scott Segal, a utility lobbyist, stated that the rule will “move us along the path of improving efficiency and reliability of the electric power system.” Officials at the EPA have made similar claims.

The argument ignores the fact that for NSR to be triggered, pollutant emissions must increase. Renovations that would decrease pollution were never regulated in the past.

The Congressional General Accounting Office (GAO) recently issued a report that found that the EPA had no solid data to back its assertions that the earlier modifications to NSR would reduce emissions. Instead, “EPA relied primarily on anecdotal information provided by the industries most affected by new source review in concluding that the program discouraged some energy efficiency projects, including some that would have reduced air emissions.” In other words, the energy industry stated that reforming NSR would improve the environment, and the EPA simply parroted what it said, with no independent verification.

The Council of State Governments has concurred with the GAO. In a recent report, the council not only found that the EPA had no scientific foundation for making its claims about reduced emissions, but that toxic emissions would actually increase substantially. Under the changes finalized in December, a single boiler emitting 505 tons of pollution annually could increase its emissions to 938 tons and not violate the new rules.

According to the NRDC, under the new scheme, “All of the Clean Air Act violations the Justice Department is prosecuting at nine Tennessee Valley Authority power plants and those at a recently convicted Ohio Edison plant would have been allowed...The upgrades at those plants increased air pollution by hundreds of thousands of tons, but because they cost less than 20 percent of the replacement value of the process units, TVA and Ohio Edison would not have had to install modern pollution controls under the new rule.”

In an August 22 statement, the NRDC cited a study performed by Abt Associates, a consulting firm that often works for the EPA. The study found the failure to install modern pollution controls at the plants brought to court by the Clinton administration has resulted in 5,000 to 9,000 premature deaths and 80,000 to 120,000 asthma attacks per year. The EPA itself has estimated that 7 million tons of air pollution would be eliminated annually if it won all of the cases currently pending in the courts.

The National Academy of Public Administration—a congressionally chartered research organization—released a study earlier this year that called for an increase in the strength of NSR. It found that NSR has done very little to cut down pollution at old generating plants and called for measures that would shut down older power plants if they did not put in place pollution controls within 10 years.

“Contrary to congressional intent,” the report stated, “many large, highly polluting facilities have continued to operate and have expanded their production (and pollution) over the past 25 years without upgrading to cleaner technologies. The result: thousands of premature human deaths, and many thousand additional cases of acute illnesses and chronic diseases caused by air pollution.”

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