

## U.S. Court of Appeals Upholds Wisconsin's New Source Review Reform Rules

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The **federal NSR reforms** became effective in 2003, but were challenged shortly thereafter as inconsistent with the **Clean Air Act**. That litigation was resolved in 2005, when the D.C. Circuit Court authored the ***New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005)** opinion, largely upholding the reforms. Wisconsin's attempt to implement the NSR reforms was met with the same challenges put forth in *New York v. EPA*, and has finally resulted in the same outcome.

In 2006, Wisconsin adopted and incorporated the federal NSR reforms into its state implementation plan, which EPA approved in 2008. Shortly thereafter, the **Natural Resources Defense Council ("NRDC")** and the **Sierra Club** submitted to EPA a petition to reconsider its approval of Wisconsin's NSR reforms. In January 2010, EPA denied the petition.

NRDC and the Sierra Club then filed petitions in the Seventh Circuit, seeking judicial review of EPA's denial of their petition for reconsideration, and raising the same issues raised in *New York v. EPA*. On June 16, 2011, the Seventh Circuit denied the petition for judicial review, relying on the *New York v. EPA* analysis and finally securing for Wisconsin's regulated industry the certainty that the NSR reforms will remain effective in Wisconsin.

### The three elements of the NSR reforms at issue were:

- The use of the "actual-to-projected future actual" test to determine whether a stationary source modification will cause an increase in emissions that is large enough to trigger **Prevention of Significant Deterioration ("PSD")** or Non-Attainment Area NSR permitting obligations. Electric utilities have been using a similar version of this "actual to projected future actual" test for roughly two decades (often referred to as "**the WEPCO Rule**"). The NSR reform rules upheld by the Seventh Circuit will now allow non-utility sources to use this test.
- A rule allowing permit applicants to select any 24-month consecutive period out of the last ten years of emissions data to establish a facility's baseline emissions. Historically, applicants

were required to use the 24 months immediately preceding a project as an emission baseline unless otherwise approved by the **Wisconsin Department of Natural Resources (“WDNR”)**.

- A rule allowing the use of a **plantwide applicability limitation (“PAL”)**. Under a PAL, a facility can accept a facility-wide cap on a pollutant and thereby receive conditional authorization to modify and construct emission units at the facility without an NSR permit - so long as total plant emission do not exceed the cap.

Throughout the litigation, NRDC and Sierra Club argued that these three elements could result in an overall increase in emissions from stationary sources in Wisconsin, contrary to anti-backsliding prohibitions in the Clean Air Act. The Seventh Circuit rejected these “lawyers’ conjectures” in favor of the air modeling EPA conducted to provide technical support for its NSR reforms. The court noted that, at some point, air modeling will need to be replaced with actual data to demonstrate whether NSR reforms are or are not causing an increase in emissions; also that EPA’s approval of Wisconsin’s NSR reforms does not relieve the state of its obligations to prevent emissions increases. If the data generated ultimately demonstrates these reforms *do* cause an increase in emissions, “the state must do something else (or something more) to curtail pollution.” If this were to occur, WDNR would likely enact more stringent emissions limitations pursuant to the state implementation plan process.

Although the Seventh Circuit decision is a positive development, the NSR reforms remain subject to continuing confusion as to how to interpret and implement certain aspects of the rule. For example, questions remain as to how a permit applicant should properly project future actual emissions, how those future emissions should be tracked and which type of future emissions can be excluded from the calculus as not being part of a project. EPA has issued some preliminary guidance on these issues which seems to have raised more questions than it answers.

Todd Palmer represented the Wisconsin Paper Council in the petition for reconsideration process before the EPA, as well as the Seventh Circuit appeal. The decision can be found [here](#).

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