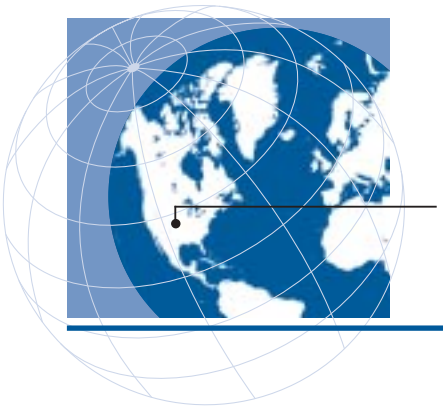

USA: States sue the federal environment agency

The Bush administration angers states and environmentalists by softening rules that encourage power plants to adopt new pollution controls.

BY *SCOTT RICHARDS AND YVETTE HURT*

A major battle has emerged in the United States during the past year between the U.S. Environmental Protection Agency (EPA) and the states. The issue is changes to the Clean Air Act's New Source Review program which issues permits to powerplants to control their air pollution.

In late 2002, with strong backing from the White House, the EPA issued new rules for the New Source Review permitting program which included, among other changes, significantly altered requirements for installing new pollution control technology at aging power plants, refineries and other industrial facilities. A group of states, led by New York Attorney General Eliot Spitzer, responded with a series of legal actions aimed at getting the EPA to reconsider the new rules. They also sought to delay the implementation of the new rules and to obtain review by the Federal Court of Appeals for the District of Columbia.

This clash over basic environmental goals, values and priorities helps illustrate the complex and dynamic relationship between states and the U.S. federal government.

Federal law gave measure of state control

Since the 1970s, the federal Clean Air Act program has required pollution sources such as power plants to install state-of-the-art pollution control equipment whenever changes were made by the plant's owners that increase air emissions under the act's New Source Review program. When originally enacted in 1977, the New Source Review provision struck a compromise: strict pollution control standards were imposed for the construction of new power plants, but existing plants were to delay adding newer, more expensive pollution control devices until the plants were renovated or expanded. Facility operators were allowed to do "routine maintenance" without installing expensive new pollution control equipment.

While this regulatory scheme ensured that older plants were given sufficient time to absorb the cost of meeting the new standards, it also gave state regulators a mechanism for ensuring the program standards were being followed. Any plant that wanted to undertake a renovation had to appear before regulators for a permit, giving state officials an opportunity to review plans and specifications, as well as operational records.

The new Bush administration rules remove this mechanism of state control. Under the new rules, industrial facilities that decide internally that they are exempt from the law won't need to seek a permit or present plans or records to state regulators proving they are exempt.

Changes seen as "roll-back" of regulation

The Bush administration first formally proposed changes to the New Source Review program in February 2002 as part of its "Clear Skies" initiative, which also included a proposed cap-and-trade system for power plant emissions such as sulfur dioxide and mercury. Environmentalists were immediately concerned about the changes, which apply to much of the nation's industrial base, arguing that it amounted to a significant rollback of the Clean Air Act.

> ***The new rules would exempt construction activities, even those that modify or expand any power plant, if they cost 20 percent or less of the plant's replacement cost.***

The Bush changes to New Source Review re-defines which "routine maintenance and repair" activities will be exempt from the program's stringent air pollution control requirements. The new definition establishes, for the first time, a capital spending threshold at power plants and other industrial facilities that must be met before the Clean Air Act pollution control requirements are triggered. The new rules would exempt construction activities, even those that modify or expand any power plant, if they cost 20 per cent or less of the plant's replacement cost.

The proposed rules would allow old coal-burning power plants, refineries, and other industrial facilities not only to continue operating, but even to expand, without installing the best available pollution control technology.

In addition, state regulators wouldn't have to be notified of planned renovations or construction unless plant operators determined *internally* that the projected cost of the work exceeds 20 per cent of the plant's replacement cost.

The utility industry has lobbied for the changes for years, arguing that the current rules are too expensive and confusing. The Bush administration goes further, arguing that the existing New Source Review rules hurt the environment by actually discouraging companies from doing anything to modernize their older facilities. The administration argues that the Clean Air Act requirements gave companies an incentive to maintain the status quo at their deteriorating plants rather than incur significant costs by renovating and upgrading.

Scott Richards *is the Chief Environmental Policy Analyst at the Council of State Governments.* **Yvette Hurt** *is a former Environmental Analyst at the Council of State Governments who currently works on state and local public policy issues. Founded in 1933, the Council of State Governments serves the executive, judicial and legislative branches of U.S. state government through leadership education, research and information services. The Council of State Governments was founded on the premise that the states are the best sources of insight and innovation.*

But some state officials and environmentalists condemn the new rules.

They argue that the changes violate the basic intent of the Clean Air Act, which required older plants to modernize their pollution control technology in conjunction with renovation or expansion activity that likely will increase air pollution emissions. And, they say, the new rules take control away from state and local regulators to monitor activity that may increase air pollution emissions. Not only will companies have an incentive to restrict their spending to 20 per cent or less of a facility's replacement cost to avoid state review, they may be tempted to engage in creative accounting to ensure the capital spending threshold is never triggered.

The end result, state officials argue, will likely be greater air pollution emissions in their states that put at risk their capability of meeting federal reduction requirements for pollutants such as smog and soot.

Procedural sparring

The current New York-led coalition of states challenging the Bush administration changes to the New Source Review program includes 14 states, the District of Columbia and 6 local California pollution control boards. States in the coalition are New York, California, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, Connecticut, Delaware, Illinois, Pennsylvania and Wisconsin.

The utility industry has lobbied for the changes for years, arguing the current rules are too expensive and confusing. The Bush administration goes further …

In addition, during its last state legislative session (before the recall vote that elected Arnold Schwarzenneger), California became the first state to enact legislation in opposition to the new federal new source review standards. On September 11, 2003, the state assembly approved a bill that would allow California environmental officials to retain the environmental protection standards as they were before the Bush administration changes. The Clean Air Act allows states to choose stricter standards, although the EPA must review and approve the stronger standards. California's plan puts the Agency in the position of having to approve the stronger current version of the new source review program for California, or engage in yet another legal battle with a state.

In response to the New York-led opposition to the Bush administration reforms, eight other states—Indiana, Kansas, Nebraska, North and South Dakota, South Carolina, Utah and Virginia—countered with a legal motion *supporting* the rule change. Leaders of these states say they like the increased flexibility in enforcing the Clean Air Act and argue the revisions will be beneficial to their part of the country.

Shared regulatory responsibility: a long story

Historically, state and local governments were responsible for the regulation of pollution, preceding significant federal regulations by decades. In the mid-1950s, federal regulatory oversight became more dominant with the passage of the Water Pollution Control Act. The evolution toward more federal government control continued throughout the 60s and early 70s by increasing water and air pollution enforcement authority.

The two most significant acts to change the corresponding roles of states and the federal government in environmental protection, however, came with the enactment of the Clean Air Act in 1970 and the Clean Water Act in 1972. These acts placed the federal government fully in the dominant position of setting pollution standards and increased the federal enforcement role. While the two acts moved more regulatory power into federal hands, the federal Environmental Protection Agency increasingly looked to the states to implement the pollution programs.

In recent years, there has been an increasing push to decentralize environmental regulation and send more power and control back to state and local agencies. National associations that represent states and policy organizations such as the Environmental Council of the States, the American Enterprise Institute and the Multi-State Working Group on Environmental Management Systems all advocate a greater shift toward state control and autonomy in setting standards for, and implementing, environmental protection programs.

As states seek to lay claim to more power over environmental enforcement, a significant number of them have enacted laws limiting the stringency of state environmental regulations. In one-third of the states, according to the EPA, regulators are restricted by "no-more-stringent-than" state laws that limit the ability of their regulatory agencies to adopt environmental regulations that are more stringent than applicable federal ones. The range of environmental programs to which such state laws apply vary from state to state, but, overall, the laws alter the balance of power between the states and the federal government on environmental issues. States limited by "no-more-stringent-than" clauses have essentially handed a significant amount of power to establish environmental standards for their own states to the federal government.

Environment highlights complex relationship

Many conflicts inherent in shared responsibility have arisen since the 1970s. States initially appreciated the presence of the federal government in helping enforce environmental laws. By the mid-90s, however, many states became increasingly frustrated with federal oversight. By then, states had developed the professional skills needed to administer pollution programs and were favoring decentralized solutions as a result of political changes on the state level. Many states began resisting what they saw as "unfunded mandates," new federal requirements for which the federal government did not provide adequate funding.

Another interesting component of the debate over the changes to the Clean Air Act is the fracturing of otherwise loyal party affiliations. Six of the states participating in the New York-led coalition have Republican governors: New York, Massachusetts, Connecticut, New Hampshire, Rhode Island and Maryland. These governors appear willing to break party ranks over what they see as a threat to environmental quality in their state and, perhaps just as importantly, the perceived threat to state control over industrial activities that are major sources of pollution.

Final Environmental Protection Agency consideration of the New Source Review program changes is expected before the end of this year and the battle between states and the federal government on this issue is sure to continue.