

The Obama Administration is beyond its 100th day, but still busy on the environmental front undoing the work of its predecessor. One thing that means at EPA is breathing life back into the Clean Air Act's New Source Review program, which the Bush Administration had been busily trying to write out of existence. In the latest development on this front Lisa Jackson, Administrator of Obama's EPA, has [agreed to review three controversial NSR regulations](#).

NSR requires regulatory review before new pollution sources are created or existing ones expanded. The purpose of that review is to ensure that newly constructed facilities install state-of-the-art pollution controls, and that when existing facilities are updated or expanded they also bring their pollution control equipment up to modern standards. Although it has been criticized as inhibiting modernization, NSR is a crucial aspect of bringing old plants up to modern technological standards over time. (For a helpful analysis of the effect of NSR on air quality, see Jonathan Remy Nash and Richard L. Revesz, Grandfathering and Environmental Regulation: The Law and Economics of New Source Review, 101 Northwestern University Law Review 1677 (2007).)

The Bush Administration was openly hostile to NSR, especially as applied to updated (as opposed to entirely new) facilities. When Bush took office, the Clinton Administration had just launched a long-needed initiative to actually enforce NSR provisions as plants modernized. Prodded by its friends in the energy industry, the Bush EPA issued a suite of rules designed to limit the application of NSR. [Eric Schaeffer](#), then director of EPA's Office of Regulatory Enforcement, resigned in frustration that the administration was essentially pulling the rug from under his efforts. EPA administrator [Christine Todd Whitman](#) followed Schaeffer out the door when she could not persuade the White House to back down.

The worst of the changes in that rulemaking, a provision exempting any modification that cost less than 20% of the replacement value of the modified unit, was struck down in *New York v. United States*, 443 F.3d 880 (D.C. Cir. 2006). Still determined to undermine NSR, the Bush administration issued a flurry of new rules limiting the program's application from late 2007 until just before it left office in 2009.

In this latest action, responding to petitions submitted by environmental groups and the state of New Jersey, EPA has agreed to reconsider three aspects of the late Bush NSR rules. The first authorized some sources not to keep records of how they determined that a modification would not increase emissions, and therefore did not require NSR permitting; the second limited the extent to which "fugitive emissions" from leaks and other non-smokestack sources count in determining whether a change increases emissions; and the third allowed the use of large particulate matter emissions as a surrogate for small particulate matter in some circumstances. In each case, EPA has agreed to take additional

public comment and to review the prior decisions. With respect to particulate emissions, EPA has already signaled that it plans to undo at least one part of the Bush rule.

The issues raised in these petitions for reconsideration are among the most arcane details of Clean Air Act practice, usually of interest only to specialists in the area. What's important in this case is the overall pattern of EPA action on NSR since Obama's inauguration. Jackson has already [stayed implementation](#) of a last-minute Bush rule allowing sources to disaggregate modifications to minimize the likelihood that NSR would kick in and, in cooperation with the Department of Justice, [launched a new initiative to enforce NSR requirements](#).

NSR, it would appear, has been revived after being left for dead in the last administration.