



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

DIVISION OF PUBLIC ADVOCACY
Environmental Protection Bureau

Robert Rosenthal
Assistant Attorney General
State/Federal Relationships in Cases & Settlements

STAPPA/ALAPCO/EPA
ENFORCEMENT & COMPLIANCE WORKSHOP
June 14, 2006

Robert Rosenthal
Assistant Attorney General
State/Federal Relationships in Cases & Settlements

STAPPA/ALAPCO/EPA
ENFORCEMENT & COMPLIANCE WORKSHOP
June 14, 2006

1) Nature of NSR Lawsuits

- Major Modification = Non-routine physical change + increase in emissions.
40 C.F.R. § 52.21.

Robert Rosenthal
Assistant Attorney General
State/Federal Relationships in Cases & Settlements

STAPPA/ALAPCO/EPA
ENFORCEMENT & COMPLIANCE WORKSHOP
June 14, 2006

2) Legal Landscape Effects Terms of Settlement

- *New York I*, 413 F.3d 3 (D.C. Cir. 2005)/*New York II*, 2006 U.S. App. LEXIS 6598 (D.C. Cir. Mar. 17, 2006): Provided details of meaning of both parts of “modification” test.
- *United States v. Duke Energy*, 411 F.3d 539 (4th Cir. 2005): Supreme Court granted *certiorari* on issues related to NSR emissions test.
- *United States v. Cinergy* (7th Cir.): Interlocutory appeal pending on emissions test.
- *National Parks Conserv. Ass’n v. TVA* (11th Cir): Appeal pending on statute of limitations & other issues.
- *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990): Affirmed EPA’s routine maintenance determination; explained NSR emissions test.
- *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989): Affirmed EPA’s use of potential emissions as measurement of post-change emissions for non-utility.
- Numerous District Court Decisions.
- Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005): Imposes SO₂ and NO_x reductions requirements in 2009/10 and 2015. Being challenged by some companies.

Robert Rosenthal
Assistant Attorney General
State/Federal Relationships in Cases & Settlements

STAPPA/ALAPCO/EPA
ENFORCEMENT & COMPLIANCE WORKSHOP
June 14, 2006

3) Summary of Settlements w/New York as Participant

- *United States v. Virginia Elec. & Power Corp.*, (E.D. Va. Oct. 10, 2003).
- *United States v. Ohio Edison Co.*, (S.D. Ohio July 11, 2005).
- *New York v. Niagara Mohawk Power Corp.*, (W.D.N.Y. June 6, 2005).
- *New York v. NYSEG*, (W.D.N.Y. Mar. 29, 2005).
- *New York v. Mirant New York, Inc.*, (S.D.N.Y. Oct. 9, 2003).

SUMMARY OF NSR SETTLEMENTS

Case	Pollution Controls (Approximate Cost)	Civil Penalties	Benefit Projects in NYS
O&R Utilities and Mirant (2 units)	<ul style="list-style-type: none"> ·\$100 -200 million ·NO_x: SCR ·SO₂: Alkaline-based in-duct sorbent injection ·Baghouse ·Cap/rates 	\$600,000 to NYS (from O&R)	<ul style="list-style-type: none"> \$800,000 (O&R for: Digester gas renewable installation Low income energy efficiency School PV installation
VEPCO (10 Units)	<ul style="list-style-type: none"> ·\$1.2 billion ·NO_x: SCR ·SO₂: FGD ·Cap/rates 	\$5.3 million to U.S.	<ul style="list-style-type: none"> \$13.9 million total; 2.1 million in NYS for: Solar PV systems on municipal buildings
NiMO and NRG (10 units)	<ul style="list-style-type: none"> ·\$400 million (NRG) ·Caps 	\$3 million to NYS (from NiMO)	<ul style="list-style-type: none"> \$3 million (NiMO) for: School bus retro fits Coal boiler replacement in public housing Low income energy efficiency <p>In addition, NiMO is conveying 2,500 acres of land to the state for preservation.</p>
NYSEG and AES (6 units +)	<ul style="list-style-type: none"> ·\$50 million (AES) ·SO₂: MPC Project or FGD ·NO_x: SCR ·Caps /rates 	\$700,000 to NYS (from NYSEG)	<ul style="list-style-type: none"> \$1 million (AES) for: PV on Schools and BOCES tree plantings Low- income energy efficiency <p>NOTE: projects are under development</p>
Ohio Edison (7 units +)	<ul style="list-style-type: none"> ·\$1.1 billion ·NO_x: SCR/SNCR ·SO₂: Wet/dry FGD ·Caps /rates 	\$8.5 million to U.S.	<ul style="list-style-type: none"> \$10 million total for all states over 5 years; \$6.1 million in NYS over 5 years: Year 1 will fund solar PV <p>\$14.385 million for long-term purchase of wind power (wind farm will likely be in Pennsylvania, but it may be built in WNY)</p> <p>NOTE: projects are under development</p>
TOTAL	\$2.85 - 2.95 billion	\$18.1 million	\$43,085,000 (\$13 million in NYS)

Robert Rosenthal
Assistant Attorney General
State/Federal Relationships in Cases & Settlements

STAPPA/ALAPCO/EPA
ENFORCEMENT & COMPLIANCE WORKSHOP
June 14, 2006

4) Settlement Principles

- Potential different interests of U.S. and States: Location of source, capacity of unit, stack height.
- Local Concerns: Environmental vs. Public Health. SIP compliance.
- Emission rates, annual reductions, caps: As close to BACT as possible. Consideration of plant-specific issues.
- Pollutant specific issues: SO₂ vs. NO_x.
- Promoting New Technology.
- Remediation: Civil Penalty vs. Environmental Benefit Projects.
- Addressing Other Industry Concerns: Resolution of Claims/Covenant Not to Sue.
- Precedent: Prior settlements may effect negotiations.