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## Justice Department Targets Coal-Fired Power Plants

Since the November elections, there has been intense speculation regarding what environmental policies the Obama administration might adopt, particularly those involving enforcement and coal-fired power plants. An indicator of what is to come may be the February 4, 2009 announcement from the Department of Justice that it is filing a Clean Air Act enforcement action against Westar Energy for alleged violations of the new source review ("NSR") permit requirements at a coal-fired power plant in Kansas.

During the Clinton administration, the Justice Department commenced an NSR enforcement initiative targeting several categories of large emitters including power plants. The general allegations were that the plant owners had made physical changes that triggered NSR requirements without obtaining a permit to authorize the changes. A typical defense was that the changes qualified for one or more exemptions in the Environmental Protection Agency's (EPA) NSR rules.

Under the Bush administration, EPA proposed a number of changes to its NSR rules designed to provide different or more objective standards for determining when NSR permits are required. Although the Justice Department continued with the lawsuits that had already been filed, EPA announced that it would not pursue new enforcement actions for alleged NSR violations that would not be considered violations under the adopted or proposed new rules. There were a number of plants under investigation by EPA when the new enforcement policy was announced. Some of the new rules were adopted and some of the adopted rules were overturned by Court decisions. A few of the proposed rules were abandoned shortly before the end of the Bush administration.

Westar was one of the plants under investigation. The filing of the lawsuit suggests that additional lawsuits may follow in short order as there were a number of completed or soon to be completed investigations when the Bush administration announced the change in the enforcement policy.

It is particularly striking that in announcing the lawsuit against Westar, the Justice Department stated it was now "pursuing a national initiative, targeting electric utilities whose coal-fired plants violate the law." (emphasis added). Because of concerns regarding emissions from coal-fired power plants, including greenhouse gas emissions, there has been speculation that the new administration might aggressively target coal-fired power plants with increased enforcement on existing plants as well as stringent new regulations or policies that would limit or preclude the construction of new plants. The Westar suit and the Justice Department announcement are clear signs that enforcement will be emphasized. It remains to be seen whether the Obama administration also takes quick action to restrict or prohibit the permitting of new coal-fired power plants.

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