

NYT, September 15, 1999, Wednesday
Metropolitan Desk

In New Tactic, State Aims to Sue Utilities Over Coal Pollution

By ANDREW C. REVKIN

New York State is opening a new legal front in its fight against pollution drifting from coal-burning **power plants** in upwind states with an announcement today that it intends to sue 17 **power plants** to force them to clean up.

This action would be the first by a state directly against individual companies owning **power plants** that send pollution in the air across state lines, Federal environmental officials and other experts say. The Northeastern states and the Federal Government have long battled to force these older plants, mainly in the Midwest and the Virginias, to reduce emissions that cause smog and acid rain, but those efforts have faced recent setbacks.

In letters being sent today to the companies that own the plants, Eliot L. Spitzer, the New York Attorney General, gave notice that he intends to sue them, saying they failed to upgrade equipment that cleans smokestack emissions when they made other big investments in the plants. Such upgrades are required by the Federal Clean Air Act. 

In an interview yesterday, Mr. Spitzer said significant improvements had been made to equipment at the plants that increased their life span and output of both electricity and pollution, but no permits were sought and no new pollution controls added. The plants are in Indiana, Kentucky, Ohio, Virginia and West Virginia.

They include some of the biggest single sources of air pollution in the country, with one plant in Ohio emitting more smog-causing nitrogen oxides than all of the dozen or so coal-burning plants in New York State, Federal emissions records show.

Until now, New York and other Northeastern states had focused on direct negotiations with upwind states over cutting smog, on efforts to pass Federal acid rain laws, and suits and petitions aimed at forcing the Federal Environmental Protection Agency to stop pollution created in one place from adding to problems in another.

But the last round of state-to-state negotiations broke down two weeks ago, no new acid rain laws are likely soon, and legal maneuvers by the states that are home to the old coal plants has delayed new E.P.A. action to stanch the pollution. In light of those problems, Mr. Spitzer decided to pursue the individual suits, an approach his staff had been studying for some time. Those suits would be filed in Federal court, but where exactly has not been decided, Mr. Spitzer's staff said.

Mr. Spitzer said the new move was based on concrete facts about changes at the plants, and thus should avoid some of the legal snags that have hindered other efforts. "The other actions involve esoteric legal issues of jurisdiction and power," he said. "We're enmeshed there too. But this cuts right to the source."

When told of the impending legal action by New York, officials at the E.P.A., which is conducting its own investigation of alterations and pollution at many coal-fired **power plants**, did everything but cheer.

 "In general, we are absolutely supportive of any state's effort to secure cleaner air for its citizens," said David Cohen, an E.P.A. spokesman. "We encourage the use of all legal tools available, and we at E.P.A. are doing everything possible, given constraints from recent court decisions brought by polluters that have attempted to frustrate our work."

But representatives of the coal-power industry said they were confident that they would prevail in court against the New York suits.

 Under the Clean Air Act, older plants were granted exemptions to the stricter pollution standards required for newer ones, on the theory that they would close in a few years anyway. But the law requires companies to seek a permit and install better pollution controls if they substantially upgrade aging plants.

Federal environmental officials said that they had used the same provisions of the Clean Air Act several years ago to force changes at large pulp mills that upgraded but did not cut pollution.

The plants cited by Mr. Spitzer are owned by American Electric Power of Columbus, Ohio; Cinergy Corporation of Cincinnati; Monongahela Power Company of Morgantown, W.Va.; Northern Indiana Public Service Company; Ohio Edison Company, and Virginia Electric Power Company.

Eleven of the 17 plants named by Mr. Spitzer are owned by American Electric Power. Officials there, when told of Mr. Spitzer's plans yesterday, said the investments made at their old plants were strictly to improve reliability in the face of rising demand for electricity.

"We're required by state regulators to deliver reliable power to our customers," said Pat Hemlepp, a spokesman for American Electric Power. "If what they are questioning is whether we have done maintenance, yes, we have. Have we made improvements that would increase capacity? No."

Mr. Spitzer contends otherwise.

Lawyers for the Attorney General built their cases over the past few months by collecting data from Federal and state utility and environmental agencies that track the budgets, construction projects and pollution levels at plants, said Peter Lehner, the top

environmental lawyer in Mr. Spitzer's office. He said consultants familiar with the energy industry helped pinpoint instances where work was not simply done to replace old gear, but to improve on it.

"The concept of this case is solid and fair," Mr. Lehner said. "When an old plant's life is significantly extended, it has to play closer to the rules of the new plants."

As an example, he described changes at one West Virginia plant, which Mr. Lehner said he did not want to identify until the letters were sent out today. Records filed with regulators show that from 1988 to 1992, boilers for three generators were virtually rebuilt, he said. After the work, power generation at the plant more than doubled, he said, resulting in a corresponding rise in emissions.

The announcement today may not end up playing out in a court case, Mr. Lehner and others involved in the matter said. The plant owners could negotiate a settlement with New York in the 60-day waiting period required before such suits are filed, or they could negotiate directly with the E.P.A. to improve pollution controls, lawyers said. It is also possible that the E.P.A. could take the plant owners to court in the meantime.

And New York and other Northeastern states still are pursuing other actions, including petitioning the E.P.A. directly to force individual **power plants** to clean up pollution. In New York, the pressure on the Clinton Administration has come not from Mr. Spitzer, who is a Democrat, but from the state Department of Environmental Conservation, which -- unlike the Attorney General's office -- operates at the pleasure of Gov. George E. Pataki, a Republican.

Yesterday, the Pataki administration declined to comment on the letters, preferring to highlight the dealings with the E.P.A.

David M. Flannery, a lawyer and spokesman for the Midwest Ozone Group, a coalition of coal and power companies, said New York's contentions did not change a basic reality -- that much of the pollution in the Northeast is generated there, not carried in on the wind.

Organizations mentioned in this article:

Environmental Protection Agency

Related Terms:

Air Pollution; Suits and Litigation; Coal; Electric Light and Power