

Testimony of Bruce Buckheit before The Democratic Policy Committee
February 6, 2004

Good morning. My name is Bruce Buckheit and I appreciate this opportunity to provide information to the Committee. I appear today as a private citizen, however, prior to my retirement from Federal Civil Service on December 27, 2003, I worked in the administration and enforcement of the New Source Review provisions of the Clean Air Act for a period of approximately twenty years. From 1984 through 1996, initially as a staff attorney and then as Senior Counsel with the Environmental Enforcement Section of the U.S. Department of Justice, I prosecuted a number of companies for violations of the NSR requirements. Subsequently, as Director of EPA's Air Enforcement Division, and working with a number of dedicated and talented professionals, I developed and implemented a program to identify and prosecute the most significant violators of the NSR rules. Until the date of my retirement I was personally and substantially involved in the enforcement initiative directed at the nations largest polluters – coal fired power plants.

There has been a substantial amount of loose criticism of the NSR program, based largely on undocumented anecdotes provided by companies that have been caught violating the NSR rules, but little substantive analysis of the overall program. My experience in enforcing and administering these rules has provided me an understanding of the real world impact of the NSR rules on the factories that are subject to the rules and on the communities in which those factories are located. I believe that the NSR program establishes a reasonable process for providing for economic growth, while maintaining and improving air quality. The architects of this program, including Senators Muskie and Chafee, had considerable expertise in this area and were operating at a time when there was a greater willingness in the body politic than there is today to substantively discuss serious problems and seek out reasonable solutions. Accordingly, I believe their work should not be lightly dismissed absent hard documentation that the program is unwise.

Today, I would like to discuss some of the important aspects of the NSR program that have not been examined in President Bush's NSR "reform" effort. I would also like to identify several serious problems in the recent NSR rules promulgated by the Administration. Finally, I appreciate the opportunity to explain the significance of the Bush Administration's wholly unprecedented efforts to undercut enforcement of the Clean Air Act.

BACKGROUND

The fundamental premise of the **New Source Review** program is straightforward: proposed **new sources** of air pollution should undergo an environmental **review** before they are constructed to assure that (1) they will not inappropriately degrade air quality in "clean" areas or interfere with improving air quality in areas that currently have unhealthy air quality and (2) that these new sources employ state of the art air pollution control devices. For this reason the program is aptly, but poorly, named "New Source Review."

What does “New Source Review” have to do with old coal-fired power plants? In 1977, Congress recognized that it would be unfair to provide existing power plants indefinite immunity from the obligation to install modern pollution controls and amended the Clean Air Act to provide that existing plants be treated as new plants if they are “significantly” modified. Congress could have specified any number of factors to use in determining whether a modification is significant. What the Congress did at that time was to accept industry’s argument that for clean air purposes a modification should only be “significant” if it significantly increases emissions. Thus, the law requires that an existing plant undergo New Source Review if the proposed change would result in a significant increase in annual emissions. For much of the country a “significant” increase is 40 tons per year (“tpy”) of Sulfur Dioxide (“SO₂”) or Oxides of Nitrogen (“NO_x”). Such an increase can occur in three ways – the change could increase hourly emission (while keeping the number of hours of operation the same); the change could permit an increase in the number of hours of operation (while keeping hourly emissions the same) or the change could increase both hourly emissions and the number of hours of operation.

One consequence of adopting an annual emissions test is that the NSR program is focused on the dirtiest sources – an entirely reasonable approach. For a 200 tpy source a 40 tpy is a 20 per cent increase; but for an 80,000 tpy coal fired boiler, 40 tpy is only 0.05 per cent. In hindsight, one would think that coal fired utilities would be the most likely facilities to trigger NSR. But in 1977, utilities were phasing out their old coal fired units and anticipating a future based on the use of nuclear power. Their operating practice at the time was not to engage in significant capital construction at existing coal fired power plants. Rather, existing units were simply maintained, some better than others, but with the expectation that at the end of a 30 year useful life they would be shut down and be replaced with either a new coal fired plant or a nuclear plant. That practice changed because of the Three Mile Island nuclear accident and the Clean Air Act. Suddenly, utilities had to revise their business plans to abandon their nuclear ambitions. New coal fired units would now have to have expensive pollution controls. In this new operating environment utilities decided that it would be cheaper to refurbish their old units. Cheaper, that is, if they could avoid having to add expensive pollution controls under the NSR program.

Over the next 25 years many old, inefficient units were refurbished to extend their lives by several decades (and increasing annual emissions) without going through NSR or installing controls. How did this happen? The utilities did not go to Congress or EPA to get relief from NSR. Rather, they and their lawyers relied on an extreme interpretation of an obscure provision of the NSR rules – an exemption for routine activities that seems to make sense until utilities try to stand it on its head.

That provision is an exemption that makes such common sense that it was adopted by EPA with little or no discussion – an exemption for routine maintenance activities. Since the environmental review is to be conducted before the project is constructed, a comparison of actual emissions before the change with an estimate of

potential post change emissions is used to determine whether the project will result in an emissions increase. However, if the rules applied to every single change, companies could be put through the effort of determining that “no emission increase will occur” for activities as mundane as changing a light bulb. To avoid such a result EPA promulgated the exemption for “routine maintenance.” A comprehensive definition for “routine maintenance” was thought to be unwise in light of the vast number of potential maintenance actions that might occur and probably would have required legislation to amend the specific language of the statute. Instead, EPA provided that this exemption would be a narrow exclusion to be applied on a case by case basis using common sense.

This issue was fought over in the Bush (I) Administration, with EPA and the Court of Appeals determining that large capital projects at coal fired power plants are not routine maintenance. Near the end of the Bush (I) Administration, utilities warned EPA that if the EPA interpretation of “routine maintenance” was ever enforced, the result would be the imposition of enormous “pollution control” costs on the industry. As we have subsequently learned in our investigations, the result of all this was that EPA assumed that industry had gotten the message; while industry kept on doing what it had been doing before EPA and the Court spoke.

Beginning in February of 1997, my office, the Air Enforcement Division, working with enforcement staff in several EPA Regional Offices, began investigations of coal fired utility boilers to determine compliance with NSR provisions. These investigations were started because of concerns that deregulation of electric power generation in the Midwest might create NSR compliance issues. However, we soon learned that coal consumption from existing power plants had doubled in the period from 1977-1997 with no reviews under the NSR program to evaluate the impact of this growth. We also learned that much of this growth in coal consumption (and resulting emissions) was made possible by what the industry termed “Life Extension” programs where large components of existing boilers were replaced in their entirety. As these projects were being planned and implemented, the industry represented to the Public Utility Commissions that these programs were capital improvement projects that should be treated for rate setting purposes as new investments, not as ongoing maintenance activities.

In November of 1999, after attempting settlement discussions and failing, EPA and the Department of Justice filed suit against a number of utilities. We at EPA supported the filed cases and continued our investigations and settlement efforts with other utilities.

RULEMAKING ISSUES

In June of 2001, the Bush Administration began its public assault on the New Source Review program, commencing with recommendations from Vice President Cheney’s Energy Policy Review and a request to the Justice Department to review the filed cases to determine whether the legal theory underpinning the cases was correct. At the same time EPA undertook to “reform” the NSR program. Midlevel EPA employees

were dispatched to public hearings around the country, while more senior employees conducted meetings with interested groups in Washington. The result was the promulgation of several rules amending the NSR program.

The major criticism that was made of the New Source Review program is that it is too complicated. The program can be complicated to apply for two reasons. First, the program applies to over 20,000 diverse factories and power plants with an almost infinite number of potential fact patterns. Second, and more significantly, the regulations have over time gotten more complex and difficult to administer **at the request of the regulated industry**. Over the years the regulated industry has lobbied EPA for exemptions, special rulings and interpretations to address perceived or real inequities or policy goals. While these special provisions may be justified in many instances, it is somewhat disingenuous for industry to request complicating provisions and then complain that the result is a more complex program.

Whether such comments were valid or not, they were trumpeted by the “reformers” as one of the reasons why the “old” rules were broken. So, how did the EPA “reforms” address this issue – the revisions retained every bit of the complexity of the old program and added an extraordinary level of additional complexity to the program. In one instance, the changes took a good concept – an exemption for “Clean Units – and tacked on a number of loopholes to ensure abuse in the coming years. In every other case, the rules are simply designed to ensure that fewer modifications undergo New Source Review. The “equipment replacement rule” is particularly egregious. It allows a utility to make an unlimited number of modifications per year so long as each modification cost less than 20 per cent of the replacement cost of a new unit. Since no single component in a boiler costs more than 20 per cent of the cost of a coal fired power plant, this rule virtually exempts all existing coal fired power plants from NSR.

In each of these cases it is important to remember that NSR does not apply unless the proposed modification would result in an increase in emissions. Thus, the impact of these revisions is to help sources avoid NSR review even where the modification to the plant would have resulted in an emissions increase under the rules that were in effect for the last 25 years.

The other argument that is raised in support of these changes is that the current NSR rules discourage efficiency improvements. I believe that a careful analysis of this argument would show that while NSR may discourage projects that have a small increase in efficiency (but a large increase in annual emissions) it actually serves to increase the overall efficiency of power generation in this country. If an operator of an old, inefficient plant needs to make modifications that would trigger the obligation to install \$100 million in pollution controls; it may well decide that it is time to retire the unit and replace it with a new, more efficient unit. In fact, a DOE study concluded that if all coal fired units were required to go through NSR, 31 per cent of those units would be retired. According to this study, those units would be replaced by new, far more efficient coal fired units where the increase in efficiency offsets the cost of the pollution controls.

BUSH ADMINISTRATION EFFORTS TO UNDERMINE THE ENFORCEMENT EFFORT

From the outset, the Bush Administration has undercut the enforcement effort by criticizing the underlying statute, promulgating rules that would substantially weaken the NSR requirements and refusing to file new enforcement actions where EPA has identified significant violations. Notably, the Bush Administration has not provided sufficient resources to properly prosecute each of the cases filed in the Clinton Administration initiative.

The combined effect of these actions is that the enforcement initiative has lost almost all of its momentum. Where, at one time, settlements were moving towards conclusion, with a number of companies offering substantial emission reductions¹; the settlement process has now ground to a near halt². Self-imposed resource constraints have led the Justice Department to agree to a stay of several years duration in the cases against the Southern Company (Georgia Power and Alabama Power) as well as a number of lengthy time extensions in the Ohio Edison, AEP, Cinergy and Illinois Power cases. In spite of the clear health impacts associated with these resource-based delays the Bush Administration has not sought to increase appropriations so as to properly and promptly prosecute each of the filed cases, let alone address the backlog of cases referred to the Justice Department by EPA.

In November, 2003, EPA announced a new enforcement policy where enforcement staff would stop work on all coal fired utility investigations, unless the enforcement staff had reason to believe that the facility had conducted activities that would violate the “new rules.” Approximately 75-100 investigations will be “set aside,” with only a handful of cases remaining. I believe this policy amounts to unlawful rulemaking, since it effectively changes the law, even in states that have not and will not adopt the Bush Administration rules, without going through the appropriate rulemaking process. This policy is particularly outrageous since the Court of Appeals has issued a stay of the effectiveness of the equipment replacement rule.

Recently, the Administration announced the issuance of two Notices of Violation and filed one enforcement action, its first under President Bush and Attorney General Ashcroft. The agency’s press release states that these activities show that the Administration is “continuing to enforce the law,” and strongly suggests that the agency has abandoned its new enforcement policy. However, a review of the underlying documents shows that these activities are merely the result of implementing this policy. The enforcement actions taken all seem to address activities that would be violations under the new rules. I have inquired of agency staff and as far as I am able to determine

¹The Cinergy Agreement in principle would have yielded emission reductions of 200,000 tpy of SO₂ and 85,000 tpy of NO_x.

²There is one settlement yet to be concluded. At this point there are no other active utility settlement discussions.

the enforcement staff have not been told to restart the investigations that have been shut down. Industry spokesmen have recognized these facts as well and in their public statements assumed that these token gestures do not represent a sea change in this Administration's attitude toward enforcement of the Clean Air Act.

BENEFICIAL ASPECTS OF THE NEW SOURCE REVIEW PROGRAM

The NSR program has a number of positive features that were not considered by the Administration in the course of its "reform" activities. NSR adds pollution controls gradually, rather than imposing an artificial deadline. In the course of the NSR rulemaking industry submitted comments that can be read to mean that complying with the current NSR program would reduce annual emissions by 3 per cent per year. If true, this is not an unreasonable glide path. The NSR program also tends to increase the likelihood that emission reductions will occur where they are most needed to assure public health.

Over time it will end the "grandfathering" of old plants and end the economic disadvantage that clean facilities currently operate under. An investor seeking to enter the power generation market must be able to recover his costs. Allowing old units to put off the date when they must have modern pollution controls makes it less likely that new entrants will be able to compete in the market. Thus, NSR can be said to encourage investment in new plants, turning over our aging inventory of power generating stations and improving overall energy efficiency. It also diminishes the ability of existing sources to block new competing investment by "hoarding" emissions.

NSR is also technology forcing – requiring a determination at the time of the plant modification that the proposed pollution control technology is state of the art. Other Clean Air Act programs, including the New Source Performance Standards, do not provide this feature. Further, it is designed to target the dirtiest facilities where emission reduction can be achieved at the lowest unit costs.

By requiring installation of expensive pollution controls and encouraging investment in new power plants, the NSR program can create thousands of jobs. I have been advised that approximately half of the cost of a SO₂ scrubber is labor – high skill, blue collar jobs. The Administration's rulemaking analysis did not evaluate this issue.

Lastly, but most importantly is the impact of the NSR program on public health and welfare. Thanks to the industry's cavalier disregard for the law over the past twenty years, the current enforcement activities can reduce SO₂ and NO_x emissions by several million tons per year. The public health benefits of these kinds of emission reductions have been studied as part of the discussion of multipollutant legislation so I will close by simply suggesting that such benefits are enormous.

Thank you.