

**Statement Of Senator Byron Dorgan
Democratic Policy Committee Hearing On Bush Administration Enforcement
Of The Clean Air Act**

February 6, 2004

I want to thank everyone for attending this hearing. We have come together today to examine the impacts of the recent decision by the Bush Administration to abandon enforcement activities of the New Source Review (NSR) provisions of the Clean Air Act (CAA). Today we will hear testimony from various individuals on the issues of (1) how the Administration's decision will affect NSR enforcement cases currently pending in federal court and already referred to the Department of Justice; and (2) how the Administration's decision will impact the ability of states to enforce the previous NSR provisions that will be in effect in many states for three more years.

Among those who will testify, we have:

- Peg Lautenschlager, the Attorney General of Wisconsin who will focus on state enforcement efforts and the recent lawsuit filed against the Administration.
- John Paul, the supervisor of the Regional Air Pollution Control Agency in Dayton, Ohio, who will focus his testimony on the states' ability to enforce the current NSR rules that will remain in effect for three years.
- Eric Schaeffer, who directed the EPA's regulatory enforcement division during the first years of the Bush Administration and recently resigned after publicly expressing his frustration with Administration efforts to weaken enforcement of the Clean Air Act and other environmental laws. Mr. Schaeffer will focus his testimony on recent court rulings and the public health impacts of air pollution.

- Bruce Buckheit, who directed EPA’s air enforcement division from 1996-2003 and previously worked in the environmental enforcement division at the Department of Justice. Mr. Buckheit is the fourth top-ranking enforcement official over the last two years to cite the Administration’s NSR rule changes as the reason for an early departure and will focus his testimony on past settlements, pending NSR investigations, the backlog of unfiled cases, and settlement fines.

When most people talk about reforming New Source Review, what they are talking about is the need for regulatory clarity and regulatory certainty. Problems occur when a facility has been operating under one Administration’s interpretation of NSR and that interpretation changes with the next Administration. It can be from a narrow interpretation to a broad one, or vice versa. However, a change in interpretation should not mean that previous violators get to have their slates wiped clean.

New Source Review (NSR) was part of the 1977 amendments to the Clean Air Act. When these amendments were passed, Congress granted EPA the discretionary authority to decide when an existing facility was performing “routine maintenance” and when they were performing “modifications.” This discretion was needed so that mundane events, such as replacing light-bulbs, would not trigger NSR. However, over time, this discretion has led to inconsistent interpretations, depending on who was in the White House. Public health and environmental protections should be bi-partisan, but this Administration has made it more partisan than ever. Instead of an open, public dialogue, the Administration formulated these NSR “reforms” behind closed doors, with input from the industry and without a balanced argument from citizen groups.

The basic premise of NSR is to ensure that new sources of air pollution undergo an environmental review before they are constructed, ensuring that newly constructed facilities or additions to older facilities don't increase air emissions. This ensures new sources will not degrade the air quality in attainment areas. It also ensures that new facilities will not contribute to the degradation of air quality in non-attainment areas. Any new facilities that will increase pollution are thus required to install state-of-the-art pollution control technologies.

NSR is a valuable and essential tool for the EPA. It ensures more efficient facilities and ensures that air quality and health concerns are addressed before any modifications are made. In North Dakota we are lucky. We have some of the cleanest air in the Nation. This has been achieved by a cooperative effort between industry and our citizens. Unfortunately, not every state can say this. That is why we must ensure that the EPA has the appropriate tools to enforce environmental protections, including the Clean Air Act.

Whether through negotiations or through litigation, we must ensure that industry expansion is done in a manner that continues to protect our environment and our citizens. North Dakota has major coal deposits and our state has a big economic interest in the coal industry. One out of every sixteen jobs in North Dakota is directly or indirectly tied to the lignite coal industry. I don't know of any facility in North Dakota that doesn't want to adhere to the requirements of the NSR program. However, with varying interpretations of the rules, it is becoming more difficult. That is why NSR provisions should provide clear guidance on what can and cannot be done at these facilities.

In 2002, I signed a bi-partisan letter to the EPA asking them to clarify and reform the NSR program. I still feel this program needs to be reformed, but the way the Administration has gone about it is a mistake and has probably hurt, more than helped, the needed clarity. In our letter, we asked the EPA to implement necessary changes consistent with the regulatory process and in a manner that “protects human health and the environment.”

The need for regulatory certainty was a driving force behind our letter. Because Congress allowed the EPA to decide what constitutes “routine maintenance” and “modification,” many facilities were being found in violation under one Administration’s interpretation and not being found in violation under another Administration’s interpretation. Like I indicated earlier, I still believe there needs to be some type of regulatory certainty in this area. We need to eliminate the gray area that allows facilities to manipulate the system under one interpretation and punishes them under another interpretation.