
**BEFORE THE UNITED STATES SENATE
DEMOCRATIC POLICY COMMITTEE**

**TESTIMONY OF HON. PEG A. LAUTENSCHLAGER
STATE OF WISCONSIN ATTORNEY GENERAL**

FEBRUARY 6, 2004

Introduction

Good morning. My name is Peg Lautenschlager. I am Wisconsin's Attorney General. I am accompanied here today by Deputy Attorney General Daniel Bach. Thank you for inviting me to testify on a matter of serious importance to me and the citizens of the State of Wisconsin, which include our children, families, the elderly, and the infirm.

As Wisconsin's chief law enforcement officer, I lead the Wisconsin Department of Justice and its major divisions and offices, including the Divisions of Criminal Investigation and Drug Enforcement, the Division of Legal Services, the Division of Management Services, the Division of Law Enforcement and the Office of Crime Victim Services.

Within the Division of Legal Services is the Environmental Protection Unit. The Environmental Protection Unit's duties include enforcement of our state air pollution control laws. They also include representation of the State in state and federal legal actions affecting the environment as authorized by the Governor.

I understand this Committee will be addressing issues related to the Administration's changes in the NSR (New Source Review) rules for stationary sources of air pollution, and the litigation that has been initiated in response to it. My office represents the State of Wisconsin in the lawsuit, joined by several other states, challenging the Administration's changes in the NSR rules.

I see that you have several speakers lined up to fully describe the NSR rules, the Administration's changes to those rules and their effects. I understand they will address: i) How the Bush administration's actions will harm air quality by subverting the NSR program's fundamental purposes [*John Paul, on behalf of the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials ("STAPPA" and "ALAPCO")*]; ii) How these rules operate to undermine enforcement actions against polluters [*Eric Schaeffer, Environmental Integrity Project, former director of EPA's regulatory enforcement division*]; and iii) The history of federal enforcement under the NSR program and of the "routine maintenance" exemption and how the Bush administration has undercut enforcement efforts [*Bruce Buckheit, former USDOJ prosecutor of NSR cases and director of EPA's Air Enforcement Division*].

I believe my contribution on this important subject should be to discuss the stake and role of the states in the administration and enforcement of the Clean Air Act, and to describe the lawsuit we and other states are bringing against the Administration's NSR rules.

Afterwards, I would be glad to answer other questions you may have.

States' Stake in Enforcing the Clean Air Act

Wisconsin is a party to the NSR lawsuits because Wisconsin has serious air quality problems, especially with respect to excessive ozone. Ozone adversely affects human health by causing:

- decreased Lung Function Change in Biochemistry in the Lung
- Change in Lung Structure
- Depressed Immune System

Ozone harms our environment by:

- Reducing Agricultural Yields for Many Crops
- Reducing Visibility by up to 70% by creating haze
- Damaging Materials, Plants and Ecosystems

Our best estimate of the effects of the Bush administration's NSR rules in Wisconsin is that we will experience almost 3,000 **tons** of additional

air pollution per year: 990 tons of nitrogen oxides, 809 tons of volatile organic compounds, both of which cause smog, and 992 tons of soot (PM-10).¹

Much of that excessive ozone comes from other states. The problem is illustrated by the graphic attached here to my testimony (graph attached). You can easily see that Wisconsin's ozone pollution problems are largely attributable to transport from out-of-state sources. Of course, this illustration applies to other air pollutants. The importance of a national presence on the issue is self-evident.

States' Role in Enforcing the Clean Air Act

Both the states and the federal government have important complementary roles to play with respect to air quality, and protecting our citizens' health and environment from air pollution.

Wisconsin, like all other states, possesses the independent sovereign police power to protect the health, safety and welfare of our citizens. This broad power is inherent in statehood, and may be legally exercised regardless of the existence of federal law, subject to constitutional limitations.

However, largely due to their independence and the magnitude of the problem, the states are not always inclined to exercise their authority uniformly across their respective state boundaries, or to the degree necessary to provide the protection our citizens deserve.

Air pollution is a serious national and international problem that crosses state and national boundaries and affects all states. While Wisconsin can control pollution sources within its boundaries, Wisconsin cannot enact laws to control air pollution coming into Wisconsin from sources in other states or nations. Interstate agreements to effectively control air pollution are virtually unheard of.

In addition, we are all too aware of the active competition among the states for economic and job growth, especially in today's sluggish national economy. This creates a fertile environment for existing, new or expanding

¹ www.dnr.wi.gov/org/aw/air/hot/taskforce/NSRcaatf.pdf at 27.

businesses to demand or exact weaker pollution controls as a condition of keeping or expanding their facilities in a state. This competition between states can incite a "race to the bottom" of pollution control at the hands of those who espouse the false choice between jobs and human health or the environment.

Recognizing these realities the Congress enacted the Clean Air Act. The Clean Air Act imposes minimum federal standards of air quality and emission controls for mobile and stationary sources across the country. Thus, interstate air pollution is intended to be addressed. Uniform minimum national pollution control standards are intended to take the wind out of sails of interstate economic blackmail. New sources are expected to use advanced pollution control technology. Modified existing sources are expected to use improved pollution control technology. Dirty air is required to be cleaned up. Clean air is required to be maintained. Public health and welfare, including the environment, are supposed to be protected.

In addition, the Congress established an opportunity for the states to enter into partnership with the federal government in the administration and enforcement of the Clean Air Act. The Clean Air Act program has been delegated to Wisconsin and to most other states based on their agreements to carry out the requirements of the federal law.

While the U.S.E.P.A. retains oversight and enforcement roles in Wisconsin, the Wisconsin Department of Natural Resources administers the permit program for the state, and refers violations to the Wisconsin Attorney General for enforcement. We in Wisconsin welcome that partnership and take our Clean Air Act enforcement responsibilities very seriously. Last year, 49 civil and criminal air pollution control violations were referred to my office for prosecution, of which 20 civil and 4 criminal air violation cases came to judgment, including court orders requiring compliance and imposing heavy civil forfeitures. More cases are pending and keep coming in.

Unfortunately, due to the "race to the bottom" phenomenon I described earlier, the "ceiling" of environmental protection often is not represented by state standards of air quality and pollution control that can be stricter than federal standards. This is because many states (unfortunately including the State of Wisconsin) have adopted state laws that require state regulatory agencies to adopt environmental standards that are **no** more strict

than those in compliance with federal standards. This includes air pollution control standards. Under these "no less strict/no more strict" laws, federal standards represent both the ceiling **and** the floor of environmental protection in our nation. As a matter of reality, federal law is the most that many of our citizens, including our children, have to protect them and their environment.

We simply can't do the job alone. We and our neighboring states can't get to the point where our air is healthy to breathe unless **all** work together to reduce emissions. It only hurts all of us if we or our neighbors either choose to relax our standards or are compelled to do so by the federal government's actions.

As for enforcement, the strength of my law enforcement authority to protect Wisconsin's citizens is only as strong as the law itself. Thus, what the federal government does to weaken federal air pollution control laws directly affects my ability, as Attorney General, to deliver the protections our citizens both expect and deserve. This is why the NSR rule changes are so destructive and why we seek to have them voided as a matter of law.

NSR Litigation

There are actually two sets of rules changes that are being challenged.

First Rule - First Suit

On December 31, 2002 EPA published the first round of NSR rule changes. At the same time it issued a proposed revision to the "routine maintenance" exemption from NSR. Among other things this rule effectively would allow existing sources in areas not attaining air quality standards to undertake changes that increase emissions without requiring actions that insure emission reductions. Wisconsin joined 11 other states in an action originally filed by the State of New York in federal court to block implementation of the rule changes.

Although the petitioning states' motion to stay the effect of the rule was denied, the court took the extraordinary step of ordering expedited handling of the case. Briefing is expected to be completed by the end of the summer of 2004.

Second Rule - Second Suit

On October 27, 2003, EPA published its final version of the new "routine maintenance" exemption from NSR. As other speakers will describe, under this rule almost no old, dirty facility would ever trigger NSR and have to clean up its emissions of pollution. As long as the facility spent less than 20% of the value of the entire plant per year on modifications, it would not have to clean up its emissions under the NSR program.

Legal challenges were again filed on the day the rules were published. This time our motion for a stay was granted because the court found that we had demonstrated both substantial harm and a likelihood of success on the merits of our challenge. Although court declined to formally consolidate the two challenges, it did decide to assign them to the same panel and indicated it may hold argument on them concurrently. (A copy of that order is attached.)

We hope to get a decision from the court later this year or early next year.

In short, our position is that a rule, that allows an existing and antiquated air pollution source to spend up to 20 percent of the value of an entire unit and still avoid pollution control upgrades, violates the Clean Air Act's intent to require such upgrades. And, of course, it defeats the purpose of the law to clean up our dirty air. The court's finding that we are likely to be successful in our challenge bolsters our argument that the Administration's rule changes are illegal and thwart the will of the Congress.

Conclusion

Once again, thank you for your invitation. If you have questions, I will be glad to try to answer them, or get back to you with answers in a timely fashion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WISCONSIN,

Petitioner,

v.

Case No.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PETITION FOR REVIEW

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure and § 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), Wisconsin hereby petitions the Court to review the final rule of the United States Environmental Protection Agency entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-To-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects." The final rule has been published at 67 Fed. Reg. 80185 (December 31, 2002), to be codified at 40 C.F.R. §§ 51.165, 51.166, 52.21, and 52.24.

Dated this 27th day of February, 2003.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, STATE OF CONNECTICUT,)
STATE OF MAINE, STATE OF MARYLAND,)
COMMONWEALTH OF MASSACHUSETTS,)
STATE OF NEW HAMPSHIRE, STATE OF)
NEW JERSEY, STATE OF NEW MEXICO ex rel.)
Patricia A. Madrid, Attorney General and Ron Curry,)
Secretary of the Environment Department,)
COMMONWEALTH OF PENNSYLVANIA,)
STATE OF RHODE ISLAND, STATE OF VERMONT,)
STATE OF WISCONSIN, the DISTRICT OF)
COLUMBIA, the CITY OF NEW YORK, CITY OF)
SAN FRANCISCO, the following CONNECTICUT cities:)
GROTON, HARTFORD, MIDDLETOWN,)
NEW HAVEN, NEW LONDON, STAMFORD,)
WATERBURY, and the following CONNECTICUT)
towns: CORNWALL, EAST HARTFORD,)
GREENWICH, HEBRON, LEBANON, NEWTOWN,)
NORTH STONINGTON, POMFRET, PUTNAM,)
ROCKY HILL, SALISBURY, THOMPSON,)
WALLINGFORD, WASHINGTON, WESTBROOK,)
WESTPORT, WESTON, and WOODSTOCK,)
)
Petitioners,)
v.)
)
UNITED STATES ENVIRONMENTAL PROTECTION)
AGENCY,)
Respondent.)
)

Docket No. 03-_____

PETITION FOR REVIEW

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure and § 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), the petitioners listed above hereby petition the Court to review the final rule of the United States Environmental Protection Agency entitled “Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Routine Maintenance, Repair, and Replacement.” The rule, which has been published at 68 Fed. Reg. 61247-61280 (October 27, 2003) (to be codified at 40 C.F.R. §§ 51.165, 51.166,

52.21, and 52.24), is related to a rule, entitled “Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-future-actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects,” 67 Fed. Reg. 80185 (December 31, 2002), that is the subject of a challenge already pending before a complex panel of the Court. *See New York et al. v. EPA* (02-1387 and consolidated cases).

Dated: October 27, 2003

Respectfully submitted,

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Local vs. Upwind Contribution to 2010 Residual Ozone Nonattainment (ppb)

For each downwind area, how much of 2010 ozone problem is local and how much is due to transport?

Blue indicates portion of ozone attributable to area's own emissions.

Orange indicates portion of ozone attributable to transport.

