Senate Democratic Policy Committee Hearing

"Clearing the Air: An Oversight Hearing on the Administration's Clean Air Enforcement Program"

ERIC SCHAEFFER
former Director, Regulatory Enforcement Division, EPA

February 6, 2004

Thank you for the opportunity to testify today. My name is Eric Schaeffer and I was Director of the Environmental Protection Agency's Office of Regulatory Enforcement before resigning two years ago this month.

I have been invited to talk about the legacy of pollution from a fleet of electric power plants built in the nineteen fifties and sixties that do not yet meet the air pollution control requirements established in the nineteen seventies. These power plants, owned by just a handful of very big companies, are responsible for two-thirds of the sulfur dioxide and one quarter of the nitrogen oxides emitted from all sources in the U.S. today. Scientists over the past decade have determined that these pollutants combine with ammonia in the atmosphere to form fine particle pollution that robs our lungs of their ability to absorb oxygen, which in turn triggers asthma attacks, chronic bronchitis, and lung and heart disease. From EPA estimates, we know that fine particle pollution from power plants contributes to more than 20,000 premature deaths every year.

If these grim statistics are not enough, the same plants are responsible for one-third of the airborne mercury emissions released every year from all sources. These emissions damage waterways and contaminate humans exposed to the high levels of mercury that bioaccumulate in fish. Because mercury is a potent neurotoxin, especially dangerous to infants in the earliest stage

of development, it is particularly alarming to hear from the Centers for Disease Control that one out of twelve women of childbearing age have unsafe levels of mercury in their blood.

These estimates of risk, which the Bush Administration accepts, suggest that we have a public health crisis that demands an urgent response from government, not politics as usual. What has the Administration done?

- It has crippled enforcement of the very laws that require cleanup of these power plants;
- It has invited the same companies that the Justice Department has accused of violating the Clean Air Act to rewrite the law in their favor;
- It has promoted relaxed, polluter friendly approaches that would delay cleanup for decades.

Environmental Enforcement Undermined: Over four years ago, the Justice Department filed lawsuits against some of the biggest power companies in America, alleging that they had modified their boilers and illegally increased emissions without obtaining permits and upgrading pollution controls as required by the Clean Air Act's "New Source Review" provisions. From its first day in office, the Bush Administration set about undermining these enforcement actions through rule changes that inflated exemptions to the point where New Source Review is now more loophole than law. One rule change allows a company to replace up to twenty percent of an entire plant, increasing pollution by thousands of tons in the process, while pretending that these investments are no more than routine repair activities that are exempt from the law.

The Administration has stubbornly insisted that pollution will not increase under this new loophole. Last August, a federal court in Ohio found that First Energy Corporation had undertaken eleven unpermitted modifications at its Sammis plant, which resulted in thousands of

tons of illegal increases of sulfur dioxide and nitrogen oxide. All of these projects would be exempt today, because they cost far less than the new twenty percent threshold for exemption in the Administration's new rule (see Attachment A). I wrote to the Agency three months ago asking them if in fact the First Energy projects the court found had illegally increased pollution would be exempt under the new rule, but have yet to receive a reply.

While the Justice Department has continued work on the handful of court cases it inherited from the previous Administration, until last week it had filed no new complaints against approximately seventy companies under investigation for New Source Review violations, even though some of those had been referred to the Justice Department for prosecution years ago. In fact, in November the EPA's Assistant Administrator for Enforcement specifically directed the regions to drop those investigations, at the direction of either the White House or someone else inside the EPA. In December, the DC Circuit stayed the Bush Administration's most significant rollback of NSR regulations, so last week the Justice Department dusted off and finally filed a complaint against the Eastern Kentucky power plant. But the Justice Department's position has already been compromised by having to justify to courts its attempt to enforce a law that its clients at EPA are desperately trying to repeal. Attachment B identifies the seven companies that are still in court, and nine of the companies that were under investigation but now appear to be escaping prosecution thanks to the Bush Administration. As the chart shows, these are very large operators with combined revenues of over $125 billion in 2002, who are also responsible for the lion's share of pollution from power plants.

There is no happy ending to the trap the Bush Administration has set for its own attorneys. At best, power companies have been able to delay for another three years a final reckoning with pollution control standards that have been in place for nearly thirty years. But

the crippling of enforcement cases offers only the most outrageous example of how completely the energy industry has captured the Agency that is supposed to be its regulator.

The Energy Lobby Takes Over EPA: Last weekend, we learned in the Washington Post that some sections of the preamble to EPA's new mercury rule were lifted verbatim from a submittal by Latham and Watkins lawyers representing power companies. Last fall, a U.S. General Accounting Office report suggested that decisions to weaken New Source Review rules were driven by unexamined anecdotes from the very industries that benefited from the rule changes. The week after EPA announced the virtual repeal of New Source Review regulations, the chief of staff of the Office of Air and Radiation went to work for the Southern Company, one of the nation's largest electric utilities and a principal defendant in the Clean Air Act lawsuits. EPA's former head of Congressional Affairs has taken up his new assignment with the National Electricity Reliability Coordinating Council, the lobbying outfit formed to fight EPA's enforcement actions.

The cartel of lawyers and lobbyists that run EPA's Office of Air and Radiation are making sure that any laws that do survive will be much harder to enforce. Those few companies that somehow find a way to violate the much weaker New Source Review regulations will be much harder to catch, according to the GAO, because key reporting requirements were eliminated. And last month, EPA decided to surrender its authority to require tougher emissions monitoring in air permits to "settle" a lawsuit brought by its industry friends, even though a virtually identical suit had been thrown out of court. The Administration's campaign fundraising network of "pioneers" and "rangers" includes companies, lawyers and lobbyists fighting to hamstring enforcement of the Clean Air Act (see Attachment C).

Selling the Rollbacks: Less is More: While campaign contributions play a role, I don't doubt that Bush Administration policies are also fueled by a deep ideological hostility to the laws enacted by Congress to safeguard our environment and protect public health. These ideological blinders may explain why the Administration so often appears to operate in a "fact free" zone when promoting its alternatives. The EPA has made no secret of its desire to eliminate permits that require each plant to use the best available technology to reduce emissions, in favor of allowing the market trading of pollution rights under a national emissions ceiling. That has led the Administration to propose allowing utilities to buy and sell the right to emit mercury, a deadly neurotoxin, as though it were pork bellies or some other innocuous commodity.

The Administration brushes off critics by saying that its mercury trading program will reduce emissions much further and faster than traditional alternatives. How much faster? Governor Leavitt told power company executives gathered at the Edison Electric Institute on January 9 that EPA's proposal would cut mercury emissions seventy percent over the next fifteen years, from 48 tons today to 15 tons by 2018. That 70 percent reduction is also reflected in EPA fact sheets and the preamble of the proposed rule. But EPA's own data show that we'll be lucky to get a 50% reduction in mercury over the next twenty years under the Agency's "cap and trade" proposal.

The Integrated Planning Model that EPA uses to project power plant emissions, which was updated in 2003 and is available on the Agency's website, projects that mercury emissions under Clear Skies would reduce emissions from today's 48 tons to 22.2 tons somewhere between 2018 and 2022. That represents a 54% reduction, not the 70% promised in EPA's public statements. But we are likely to see even fewer reductions because the proposed rule is less

stringent than the original Clear Skies legislation, in allowing greater emissions of mercury in the near-term.

This slower rate of reductions is in part a consequence of the "emissions banking" established under the trading program. Under EPA's proposal, each company receives a set number of pollution allowances (i.e. the right to emit a certain amount of mercury), but can emit pollution above that amount by either buying allowances from other companies or accumulating unused allowances from earlier years. In the first years of the program, EPA expects to distribute more mercury pollution allowances than industry actually needs. These "surplus" allowances can be stored away and used in later years, when lower emission ceilings shrink the supply of new emission credits. The Administration also shuts off the requirement to reduce mercury emissions when control costs get too "expensive," although it has not explained why such controls are not affordable.

How Long Can We Afford to Wait? Many of EPA's adventures in rewriting the Clean Air Act seem destined for a bad end. The DC Circuit has already stayed the most important New Source Review rollback, which seems likely to be struck down once the court hears arguments on the merits. States and environmental groups will challenge the mercury rule and the rollbacks in air emission monitoring, and seem equally likely to prevail. The Bush Administration likes to boast about how it is getting rid of lawyers, but its wild and fact-free forays into rulemaking will force us all to slog through the courts for years to come. These delays benefit no one but the handful of big power companies still fighting a Clean Air Act passed by Congress nearly three decades ago.

But now, our scientists have put us on notice that further delays will come at a terrible cost to the public health. In the two hours it will take to hold this hearing, another five lives will

be cut short from fine particle pollution from power plants, and more than thirty infants will face mercury exposures that increase the risk of developmental disorders. How much longer can we afford to wait?