

Senate Democratic Policy Committee Hearing

“Clearing the Air: An Oversight Hearing on the Administration’s Clean Air Enforcement Program”

Friday, February 6, 2004
10:00 a.m. - Noon
Rayburn House Office Building 2325

Sen. Byron L. Dorgan (D-ND)
Sen. James Jeffords (I-VT)
Sen. Patrick Leahy (D-VT)

Witnesses:

Peg Lautenschlager: Wisconsin Attorney General
Bruce Buckheit: Former EPA Enforcement Chief
Eric Schaeffer: Environmental Integrity Project
John Paul: Regional Air Pollution Control Agency

Transcript:

Senator Dorgan: [prepared statement] We're going to call the hearing to order. This is a hearing of the Democratic Policy Committee. My name is Senator Byron Dorgan. I am joined by my colleague Senator Jim Jeffords and other colleagues from the Senate will be joining us momentarily.

This is a hearing to discuss a very important issue, an issue dealing with the Clean Air Act, and more specifically, the New Source Review provisions of the Clean Air Act. Let me just make a couple of brief comments and I will call on Senator Jeffords and when Senator Leahy, Senator Lautenberg, Senator Clinton, and others arrive I will also ask them to provide statements for the record.

The Clean Air Act is a very important piece of legislation for this country. My colleague, Senator Jeffords, just once again said to me as he often says in the Senate, “This is about lives, about saving lives.” And we have in the Clean Air Act, a requirement that new plants that are built in this country, coal-fire generating plants for example, are required to have latest available technology for reducing effluence and emissions. We've been through some of that in my state of North Dakota because we produce a substantial amount of lignite coal and turn that coal into, use that coal to produce electricity. We had a huge fight in my state back in the 1970s about the requirement for latest available technology replaced in those plants. It was expensive, many

didn't want to do it, but we in our state required it, and we are better off for it. We were the first state in the nation to meet the ambient air standards and to comply with all the requirements because we required latest available technology.

Back in 1977, when the Clean Air Act was written, the proposal was that certain plants would be grandfathered with an expected life perhaps of another 20 or 30 years and that when those plants were replaced, that the plants that replaced them would be producing cleaner energy. And that revolves around something called the New Source Review provisions of the Clean Air Act.

I'm not an expert in this area. I know just enough about it to understand there's a great deal of concern. I also know enough about it to understand that over a good number of years what is happened is the question has developed: What is routine maintenance with respect to one of these grandfather plants and what represents an investment in that plant to dramatically extend its life and therefore delay the building of a new plant that would be much cleaner and much more friendly to our environment?

I know that we've had administration after administration make rule after rule about this New Source Review provision and those rules have changed back and forth and whipsawed here and there and everywhere. Some have enforced the rules, some have not, some have changed the rules and the fact is there's great uncertainty and has been great uncertainty about exactly what is the rule, how will it be enforced. And because of that, I'm one who believes that we should establish some certainty and it ought to be established with a good dose of common sense.

Now part of that certainty would establish the basis for making judgments on a predictable basis of what represents routine maintenance. I know that there are companies that have decided to incrementally replace substantial portions, but not substantial on a percentage basis, substantial portions of that plant, calling it routine maintenance when then over four or five or six years they would have effectively replaced the plant. And it is like the program MASH, which some of you may have watched with Sergeant Rizzo and the motor pool who began sending Jeep parts home. He would just send a part at a time but eventually he'd have a Jeep back home. There is a similar circumstance with New Source Review. That's probably a crude way to describe it but it's the same as sending a Jeep home incrementally at a higher level of replacing that plant year after year after year. So that's why this is an important issue.

And what makes it even more important is the current administration decided that we not only will not enforce what we think the current rule is, but they decided in ways that I think has said we'll provide retroactive liability waiver for those that were caught in the web in the past. And there is great concern about that and great angst about that. And concern that it is this Administration saying to friends in the business community—here's one more big favor—and it's done at the expense of this country's health and clean air.

Look, I believe, there needs to be a thoughtful, common-sense analysis of what the requirement is and then enforce the requirement. And so we're holding a hearing today to work through all of this and to think through the policies, both with respect to the law, the rule, and the enforcement. And I very much appreciate the witnesses.

I will introduce them in a moment, but Peg Lautenschlager is the Wisconsin Attorney General is with us, and John Paul, Regional Air Pollution Control Agency. We have Eric Schaeffer, Director of the Environmental Integrity Project and former Director of the Regulatory

Enforcement Division at the EPA, and we have Bruce Buckheit, the former Enforcement Chief at the EPA.

We very much appreciate their willingness to come and testify but while we wait for our colleagues as well, I want to call on Senator Jim Jeffords. Jim Jeffords has been a leader in this area. He is remarkably strong, assertive, has never wavered on any of these issues and has a lot to say about it and I'm very pleased that he's participating in the hearing. Senator Jeffords.

Senator Jeffords: Well thank you. It's a pleasure to be here. First, why I am so interested. I came into the Senate in 1988 with Senator—with a President Bush at that time, Bush won, and he set up a body that would create the Clean Air Act. And we worked very hard to provide the Clean Air Act, 1994. And I think the proudest thing we did was to be responsible and reasonable and set up the New Source Review and all of these things to make sure that gradually we would make sure that the clean air in this country would not be fatal to as many people as the present Clean Air Act is, the way they're defining it, anyway. So, I have a great lot of time invested in watching what's been happening and having been around when I know what we wanted to do, both originally and now that I feel very deeply disturbed by what the Administration is doing.

Today, we're here to conduct oversight that is sorely lacking. The Bush Administration continues its egregious attacks on the Clean Air Act and one of the main targets is the New Source Review (or NSR) program.

Fortunately, the courts are deciding to uphold the law so far and not the administration's continued attempts to undermine the Act.

Unfortunately, at every turn, the Bush administration, Bush two, has sought to stall or blunt our legitimate efforts to conduct oversight on the shadowy rulemakings and their closed-door energy policy meetings. As we all know, sunshine is the best disinfectant. That's why we're here today.

We need to shed some light on the travesty of these NSR rules and poor enforcement record of this new Administration. The public needs to know and has a right to know that the Bush Administration is not keeping the public's health in mind. The public needs to know that their voice is being drowned out by the owners of old, dirty power plants. These plants got a good deal in the 1977 amendments to the Clean Air Act. They were allowed to wait until making major modifications to the plants before cleaning up to new, more stringent standards.

But, here we are 27 years later and most of the oldest and dirtiest plants still haven't put on advanced pollution controls. These are the same 150 to 200 power plants that EPA projects will never put on such controls even under the so-called Clean Skies proposal or the new proposed "transport rule."

Why should the public care? Why should we be outraged? Because this inaction and willful non-compliance is dangerous.

The Bush "routine maintenance" rule, if the courts do not kill it, permanently exempts these old power plants and many others from NSR. These plants will be allowed to make an unlimited number of equipment changes that can increase emissions without having to put on pollution controls, as long as each replacement costs under 20 percent of the total plant cost.

This means 20,000 people or more will continue to die, to die, prematurely each year and 400,000 asthma attacks will continue to take place each year. All because certain big energy corporations are cozy with the White House.

We also know that lobbyists and law firms representing the big utility companies are writing the rules on mercury and air quality regulations. It's not a well-kept secret. But, the Bush White House refuses to give Congress access to the documents and materials—we've asked for them many times—despite our constitutional rights that we have. In fact, members of the administration have gone out of their way to intentionally mislead me and other Senators.

This administration has created great uncertainty and distrust in Congress by these actions.

Last November, even before the new “routine maintenance” rule was final, they announced the end of all enforcement of past violations under the old rule. This is an abuse of Executive Branch discretion and it is directly contradicted by witness statements to Senator Leahy and me in July of 2002 at our joint hearing on NSR. We were told the new rules would apply only prospectively.

Since the court stayed the rule, however, Administrator Leavitt has suggested that EPA may reconsider the decision to abandon the NSR enforcement.

I wrote to him recently to ask him about how EPA will proceed. I have no answer yet, but his actions will speak louder than his words. At a minimum, all the investigations dropped, dropped, should be restarted.

Then, perhaps the Agency and the Department of Justice can begin to once again prosecute their cases, take care of their backlog, and investigate new ones. At every turn, the public should be demanding that the large polluters be brought to trial and forced to clean up. Lives are at stake. Health care is at stake.

It is a mystery to me why President Bush hasn't just ordered the Tennessee Valley Authority to stop polluting the Great Smoky Mountains and thousands of communities for hundreds of miles. Lives and lives and lives are at stake. The Department of Justice has one week to decide whether to enforce the law of the land against his Federal agency, this Federal agency. That decision will tell us who's in charge of air quality.

It's also a mystery to me why so many of the largest utilities in the nation, with great financial and technical capacities and capabilities, have not been forced to settlement or brought to trial by the Department of Justice since the enforcement actions were brought in 1999, almost five years ago.

But this is not entirely about punishing polluters for breaking the law. We need and must have cleaner air sooner rather than later. If all 51 of the power plants originally charged by the Clinton Administration were to put on the best available controls, NOx and SO2 pollution would be cut in half, and thousands of lives would be saved.

Today, Senator Lieberman and I are releasing the latest in a string of GAO reports looking at the Administration's NSR activities. The, this report shows that the vast majority of the state air quality directors—the people who know the most about how NSR works—think that Bush rules

will increase, increase emissions, especially in areas already suffering from bad air quality and related health effects.

The GAO report also repeats a previous recommendation that EPA improve its data collection so we will know the health impacts of the NSR rules. Instead, EPA is relaxing, relaxing Title Five monitoring requirements, largely by request of the large utilities, their buddies. It's a calculated effort to minimize the data that regulators could use to enforce the law.

Mr. Chairman, this Administration does not seriously care about the spirit or the letter of the Clean Air Act. They have squandered every opportunity for constructive reform. They stopped the discussion started by President Clinton that would have given certainty to the industry and the environmentalists.

This President can do a better job. After all, NSR is about constant improvement and saving lives. And I hope that he will see the light and will get some action immediately. Thank you.

Senator Dorgan: Senator Jeffords, thank you very much.

Let me also say in my statement I mentioned that the Clean Air Act was 1977, that was the, that of course represents the amendments to the Clean Air Act which created the New Source Review (NSR) and we did that to give the EPA the discretionary authority in order to develop the rules to understand the difference between routine maintenance and modifications. And so, that's a very important part of the Clean Air Act.

Well, I'm very pleased today to introduce Peg Lautenschlager, who is the Wisconsin Attorney General. I have a note here from Senator Herb Kohl and Senator Russ Feingold about your appearance and they regret they are unable to attend this hearing, but they wanted to say how pleased they are that you've decided to be with us. Ms. Lautenschlager is the first woman ever to hold office of Attorney General in the state of Wisconsin. She leads the Wisconsin Department of Justice in the major divisions and offices. She formerly served as U.S. Attorney for the Western District of Wisconsin. She has also served in the Wisconsin Assembly so you have a wide background in these areas of public policy. And Attorney General Lautenschlager, why don't you proceed with your statement. Thank you very much for being with us.

Ms. Lautenschlager: Thank you, Mr. Chairman. Good morning, Senator Jeffords.

My name is Peg Lautenschlager. I am Wisconsin's Attorney General. Thank you for inviting me to testify today. This is of serious importance to me and the citizens of the State of Wisconsin, which include our children, families, the elderly, and the infirm.

As you mentioned, Senator Dorgan, Mr. Chairman, Senator Jefford's remarks are right. This is about saving lives. It's about lives. In my hometown of Fond du Lac, Wisconsin, several months ago I spoke with a fourth grade class of twenty-five in number. Fourteen of them had asthma. In my own family, I, my mother, two of our children use inhalers and nebulizers in order to breathe. This is an important issue because of that, and as Wisconsin's chief law enforcement officer, leading the Wisconsin department and its major divisions, we have within

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

I understand the Committee is going to be addressing issues related to the Administration's changes in New Source Review rules for stationary sources of air pollution, and the litigation that's 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 know that you have several speakers lined up here today besides me who will discuss the Administration's changes to the rules and the effects of those changes, and also discuss the history of the enforcement under the NSR program and of routine maintenance exemption and how the Bush administration has undercut efforts.

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

Wisconsin is a party to the NSR lawsuits because Wisconsin has serious air quality problems, especially with respect to excessive ozone. Most people don't think of that when it comes to states in the Midwest, and yet five of our southeastern-most counties, counties where one third of our state's population live, are designated as ozone non-attainment areas. Every easternmost county in our state, which line the Lake Michigan's western border, have all been given "F" ratings on air quality by the American Lung Association.

Ozone adversely affects human health by causing: decreased lung function change in biochemistry in the lung, change in lung structure, and depressed immune systems. Ozone harms our environment by: reducing agricultural yields for many crops, something very important in Wisconsin, reducing visibility by up to 70 percent by creating haze, and 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 a year: 990 tons of nitrogen oxides, 809 tons of volatile organic compounds, which cause smog, and 992 tons of soot (PM-10).

Much of that excessive ozone comes from other states, which we also experience. The problem is illustrated by a graphic, which we will be providing the committee. You can easily see when you look at this graph 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 as well. The importance of a national presence, as a result, is very self-evident.

I might add parenthetically that we don't want to have to keep making comments about Illinois and Wisconsin, because that's where a lot of this is coming, but...

Both states and the federal government have important complimentary 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 health, safety and welfare of our citizens. This broad power is inherent in our 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 businesses to demand or exact weaker pollution controls as a result of keeping or expanding their facilities in the state. We are seeing that in Wisconsin today. 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 federal minimum standards on air quality and emission controls for mobile and stationary sources across the country. Thus, interstate pollution is intended to be addressed. Uniform minimum national pollution control standards are intended to take the wind out of the sails of interstate economic blackmail. New sources are expected to use advanced pollution control technology. Modified existing sources are expected to improve 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, 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 federal law.

While the U.S. EPA 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 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, as 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 stricter than the 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 important that many of our citizens have, including our children, to protect them and their environment.

And 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 we 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 deserve. That is why the NSR rule changes are so destructive and why we seek to have them voided as a matter of law.

As you know, there are actually two sets of rule changes that are being challenged. On December 31 of 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 non-attaining air quality standards to undertake changes that increase emissions without requiring actions that ensure emissions reductions. Wisconsin joined 11 other states in an action originally filed by the State of New York in federal court to block the 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.

On October 27 of 2003, the EPA published its final version of the new “routine maintenance” exemption for NSR. As other speakers will describe, under this rule almost no dirty facility would ever trigger an NSR violation and have to be cleaned up for pollution. As long as the facility spent less than 20 percent of the value of the entire plant per year on modifications, it would not have to clean up 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 the 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.

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, 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 findings that we are likely to be successful in our challenge bolsters our argument that the Administration's rule changes are illegal and will thwart the will of Congress.

Once again, thanks for your invitation to be here. If you have questions, I'd be glad to answer

them. As well, I've brought my deputy Daniel Bach who knows a lot more about this than I do, and he's sitting behind me and he'd be glad to assist. Thank you.

Senator Dorgan: Attorney General Lautenschlager, thank you very much for your testimony.

You indicated that it is a false choice to believe that you can either have energy or clean air, but not both. I couldn't agree more with that. That is a false choice. We can increase our energy supply as we need but we can also be protective of our environment and of clean air.

We are joined by Senator Leahy from Vermont and let me, before I ask for other statements from witnesses, ask Senator Leahy for an opening statement.

Senator Leahy: Thank you very much, Senator Dorgan. I appreciate you doing this and I enjoyed hearing the Attorney General's comments. Jim Jeffords, my colleague from Vermont, is a former Attorney General. I never quite made it. I was only county prosecutor but your statement, I have a feeling, is not that different than what the Attorney General in Vermont might be saying these days, and you probably know, Attorney General Sorrell. I think Senator Dorgan deserves a great deal of thanks for bring this hearing together under difficult circumstances.

After a week wondering about the impact a toxic chemical would have on all our lives, especially over in the Senate side where the buildings have been closed. I think it's appropriate for us to end the week by talking about how other toxic pollutants are affecting millions of people, not just those of us here on Capitol Hill but millions of people throughout the country every day.

We see the stealthy executive fiat from the White House, by favoritism to powerful energy interests and big polluters in the legislative process, and those, some of the people are selected for our federal courts, the Administration has done this at the expense of millions of Americans who are at greater risk from higher levels of exposure from smog and toxic pollutants like mercury.

We know that these toxics cause serious health problems such as asthma, heart disease, learning disabilities. Saw an article in this morning's paper we see that the EPA has doubled their estimate of newborn children at risk because of high levels of mercury in their blood. And one in six pregnant women has higher mercury levels than EPA considers safe. Every parent, every spouse, every grandparent is going to be concerned about that. You wonder how can EPA move ahead with such dismal air policy in the face of these numbers? You can't find a more blatant example of policy being driven by politics. We should be looking, spend more time looking at why we're bailing out corporations with annual operating revenues in the billions of dollars at the same time we squelch clean-up activities.

The Administration is pulling out all the stops to roll back the Clean Air Act. You know the Clean Air Act was put together by a bipartisan coalition of Republicans and Democrats and this Administration just wants to roll back. That puts our children at greater risk. It costs taxpayers billions of dollars in settlement payments from giant energy corporations. And they've used one of the public relations tactics, the Bush Administration has. They sneak out the bad news on

Fridays and around holidays, obscuring the facts, denying the truth, late in the day to try to prevent news from getting out.

Just over a month ago, a court upheld the law by blocking the implementation of the Bush Administration's so-called "New Source Review reforms." These days, it seems like the courts are the American people's only backstop against the Bush environmental rollbacks. I can just tell you, Senator Dorgan, as Ranking Member of the Judiciary Committee, I look at some of those judges they're putting, trying to pack the courts with and it's very obvious why some of them got nominated. They're there to try to carry out this political agenda, of blocking a good environmental legislation. There's no other reason for some of the nominees they've sent up. Unfortunately, the Republican Congress either has turned a blind eye to these industry favors or sometimes even worse they've given them a standing ovation.

And the Administration is still playing a shell game with EPA investigations of NSR violations and playing politics with the NSR cases.

But, you know, greenwash, like whitewash, doesn't stick for long.

And after three years in office, they finally filed their first NSR case. That begs the question of why they haven't pressed harder on the 50 pending violations stalled at EPA and, Mr. Buckheit, you know exactly what I'm speaking about, numerous case referrals sitting at the Justice Department.

It makes you wonder why they so diligently and strategically pushed NSR changes that would undercut their cases in courts right now. You think of the millions of pounds of toxic pollutants like mercury that seep into our water everyday and you wonder, why are they doing this. Why are they doing this? And they've used this tactic. They've used every single legal blockage. They've done everything possible. It's sort of the "go ahead and pollute, I don't give a hoot" and it's really a terrible, terrible thing.

We've seen this over and over again. We saw the exact same pattern with the new mercury rollback announced in December. Not only did the administration deny the real impacts of their mercury proposal by ignoring their own internal analysis, but now we know that they adopted the many parts of the industry proposal verbatim. I mean, they might as well as the paper. Just put it on the industry's stationary, they sent it to them and say, "Yes, we've rubber-stamped this, they told us to do it. We've got to do it."

So, I am glad you are doing this. I think it's time we stopped this sort of backdoor way of gutting environmental laws that are after all, there to protect our children, and protect us, and protect our grandchildren, and protect those children yet to be born. And those are the ones who are really, really being hurt. Thank you.

Senator Dorgan: Senator Leahy, thank you very much.

I'm going to ask for testimony from, next from Bruce Buckheit. Bruce Buckheit was the former enforcement Chief of the Environmental Protection Agency. He recently retired from his position as Director of the Air Enforcement Division in the EPA's Office of Enforcement and Compliance Assurance. And the Air Enforcement Division is responsible for the major case

development and prosecution, as well as policy development and national program management respecting stationary sources regulated under the Clean Air Act. Mr. Buckheit has had a long and distinguished career in public service for which we are grateful as a country.

I believe this is the first time that Mr. Buckheit will testify as a private citizen on these matters. And I expect that it is probably not pleasant or easy to come forth and testify on matters as controversial as this is, but you were, I think a great public servant that provided great service to our country while you were on the public payroll. And I think you continue that by being willing to come and give us your estimate and your analysis of and your candid thoughts about what is happening. Mr. Buckheit, thank you for joining us today.

Mr. Buckheit: Thank you, Senator Dorgan, and thank you for those kind words Senators Leahy and Jeffords. Good Morning.

It is correct, I spent 30-plus years as a federal civil servant enforcing our auto safety and environmental statutes. For the last 20 years I've been involved in enforcement and administration of Clean Air Act, including, in particular the New Source Review provisions, as an attorney with the Department of Justice in 1984, I prosecuted my first case with violations involving New Source provisions and I've been involved with a number of prosecutions and settlement discussions involving the New Source Review Provisions over the past 20 years.

I have sort of been on the ground in the battlefield in the settlements rooms with the company's and I think that during that time I obtained a fair understanding of the impact of New Source Review provisions on the companies and the communities that those companies are in. And at the end of that it's my judgment that the New Source Review Provisions are a fine set of rules. There has been a lot of controversy about them and a lot of misinformation put out by the industry about those rules, but I believe that they are a set of rules that companies can live with once they are squared up to it and have to face compliance. They can do it. I've settled a number of cases and none of those companies have gone out of business because of what has been required and indeed in many cases their productivity was increased as a result of them finally putting up pollution controls and being able to make more product without additional pollution.

And so I think that before taking on the issue of dismantling the NSR program and trying to figure out all the things that are wrong with it, people ought to step back and understand that Senators Muskie and Chafee and those folks that put the thing together in the '70s really understood the Clean Air Act and really understood what they were about and as Senator Dorgan noted, that was a time of bipartisan effort to put things together and I think folks should consider the overall benefits of the program as well as what flaws there are in deciding how to go forward with the New Source Review program.

Senator Dorgan, I would comment on one area in particular on your remarks, the industry has spent a lot of time and energy putting out the notion that these rules are too hard to understand and I guess my response to that is two-fold. One the industry itself knows these rules in great detail. While it's not public knowledge, the justice department has been successful in the last six weeks in obtaining the internal documents of the industry's lobbying organization UARG, the Utility Area Regulatory Group and those documents show that this industry knew exactly what it was doing throughout this time period. There is a brief filed by the justice department in one of

the cases, I think it's the Duke case that highlights this issue. The documents themselves are still under seal by the court, but the information in there shows clearly that these companies knew exactly what they were doing throughout.

The other comment I would make on the issue of complexity is that nearly all of the complexity in the rule came about as result of the industry's requests for specific exemptions and carve outs and detailed positions to address specific industry issues, many of those issues made sense but at bottom it is a little disingenuous for the industry to say these rules are too complex when that complexity is a result of their own requests.

These new rules that have been set out by the administration added an incredible layer of complexity on top of the existing program. The administration did not remove any of the complexity in the existing program by way of its quote "reform activities." What it did was it made them probably five times more complex than they've ever been because now we have to add in addition to engineering tests and emissions tests we had to bring out a whole new set of accounting tests and bring on the accountants and try to go through companies books to try to figure out whether there was a violation.

Couple other things I'd like to touch on beyond my prepared remarks are the impact of the rules and what I think is the purpose of the rules. We have at EPA identified violations, as you've said scores of plants. Our law enforcement activities after respecting TBA, AEP, Southern Company and Synergy, the four largest polluters in the country, those folks emit 3 million tons a year of SO₂, those four companies.

Since they're already sued, if nothing else is done they would otherwise have to put on pollution controls and reforming this program for them won't matter. They will have already been forced to put on the controls and under the New Source Review provisions, once you put on the controls it's highly unlikely you'll ever have to put on a second set of controls.

So it is my view that what the rule making is about is really trying to undercut the cases. There is a substantial amount of effort to take the oxygen out of the program. The administration has not had the nerve to simply pull the cases, but what they've done is engaged in a series of rule-making and policy activities to encourage companies to not settle.

Over the years the Department of Justice's settlement rate for these kinds of environmental cases is typically 95 percent. Prior to these rollbacks, we were on a role we at EPA and Justice, companies were talking to us seriously about settling these cases. The encouragement that they have received from the Administration activities starting with the energy policy review and the requests of the justice department to consider whether these rules were legal etc. has had the effect of moving them away from the settlement table. I think there will be one small settlement coming down the pipe here in the near term, but otherwise it's very silent out there in the settlement world.

The other comment I would make as a general comment is that the administration has failed to fund these cases properly. Senator Leahy I will tell you that, I have the highest regard for the DOJ, EDS attorneys over there who work their nights and weekends to get this kind of stuff done, but they do not have the resources to prosecute these cases, I think it's about 50 FTE is available within the government for all Clean Water Act, Clean Air Act and RCRA enforcement. Clean Air Act gets a third of that you are talking about 15 FTE for the country, for

all cases. Now, the backlog, the pipeline that we have at EPA and have submitted to the justice department for prosecution requires far more resources than that. The administration has not come forward and submitted a supplemental appropriations request and they have not changed the level of funding in the environmental enforcement section for years and so the cases that have been filed are stacking up and are stalled out. There are a couple of them that are moving forward, but a number of them, for example, the Southern Company case, resources are not being applied to move that case along. The other cases that are moving, are moving slower than they otherwise would if the department had available resources and applied them to these cases.

Folks mentioned how many thousands of deaths per year would be involved as a result of these activities, the fact that these cases are going slower than what they should be has a real impact on the public health. I come here today to suggest that that needs to be addressed.

Couple further comments, there was a press release recently where at the time the Administration filed its lawsuit and a couple of NOVs, where the Administration seemed to suggest that because of the stay in the Court of Appeals of the new routine maintenance rule that it was now going to quote "enforce the law of the land" I think that was the quote from the press release. That is not correct. The cases that have been filed based on a review of what is publicly available, the complaints and the NOVs are limited to the few sets of fact patterns, and there are only a few, where the violation would also violate the new rule. And so what I'm reading for the situation is by filing a couple of new cases where the activities would violate the new rule the industry is actually reassured that this Administration is not going to enforce "the law of the land."

I think the comments of Scott Seigel, at the time the press release was issued Scott Seigel was an industry representative, support this notion. They take comfort in the fact that okay the administration is going to go after the violations under the new rule, but there are no filings, that I have seen, that would suggest that the November enforcement policy which involved shutting down existing investigations, and I was the one that had to be on the phone call with the regional staff to tell them to shut down the investigations and put the investigations in boxes and hopefully preserve them someday. That that has not been revised, that policy is still on the books, those cases are still shut down and the boxes are still sealed.

Lastly I would comment that the NSR program has a number of very beneficial aspects that have not been addressed in any way shape or form in the analysis by the Administration to date. A couple of those aspects are, the NSR program targets just by its design the largest dirtiest facilities first, that's because if you have a small facility, you have a 40-ton-per-year trigger at a 200-ton-per-year facility, the modification trigger would be a 20-percent increase in pollution for that plant. But if you have an 80,000-ton-per-year plant and the trigger is 40 tons, almost any significant capital modification will result in a significant net emissions increase and that's a good thing because these large power plants are the most cost-efficient place to get emission reductions, if you are looking at a smaller facility or even at a refinery you might have to spend \$8, 10, 12 thousand per ton to remove SO₂ or NO_x. At these facilities it's \$1,500 a ton to \$3,000 a ton, it's far cheaper to do it here and that's the NSR program forces you to do that.

Another feature for the NSR program because the thresholds vary whether you're in the attainment area or non-attainment area, it tends force emission reductions where you need them the most. A cap-and-trade program has as many positive attributes and they're good things, but sometimes emission reductions out in the middle of nowhere, if you will, are far less valuable to

the country than emission reductions in the non-attainment areas near our cities, and that's a feature of the NSR program that is not available anywhere else.

The NSR program encourages turning over our aging fleet; like bridges and other things we have a very old fleet of power plants. Most of the power plants in this country were built in the '60s and '70; we have a number of plants that were built in the '40s and '50s and that are just sitting there. The New Source Review program discourages small efficiency improvements with large emission increases but it encourages folks if you have an old plant and you have to put a 100 million dollar emission control device on it maybe you decide, well no this is the time to scrap that old plant and build a new plant.

In fact we did a study not too long ago where they looked at the issue of what would happen if all power plants in this country had to go through the New Source of Review, and the conclusion of that study was that 31 percent of the old, the oldest and dirtiest of power plants would be shut down and replaced by new coal generation, clean coal generation. And far more fuel efficient generation...the older plants would get, just to pick a metaphor, 15 miles per gallon where a new plant can get 25 miles per gallon.

With a far more fuel efficient plant you can create not just less pollution, but you can create energy cheaper; that's also less greenhouse gas generation. The net result, according to this study was the increase in fuel efficiency more than offset the costs of the control devices and so the net cost to the consumer was zero.

And so by encouraging the turnover of the aging fleet. NSR has positive impacts in terms of global warming, clear impacts in term of public health including, Senator Leahy, mercury. The pollution controls that are required to control SO₂ and NO_x have co-benefits in terms of significant reductions in mercury. Most of the multi-pollutant bills assume that large part of the reduction would happen as a coal benefit of putting on SO₂ and NO_x controls. And so NSR enforcement has a co-benefit in terms of mercury reduction.

The NSR program prevents hoarding, and I think, Senator Dorgan, that's an issue that's in play in your state, where other utilities want to come in and build new power plants, generate electricity, but they can't because the existing power plants have ramped up emissions, increased emissions to the point where the increment, if you will, that is there to protect public health has been consumed and so they block new entrance in to the market. So their hoarding of emissions prevents other people from coming in and competing.

Similarly, the whole notion of a grandfathered power plant is a barrier to entry for new competition. The biggest bar to entry of new competition is the very very low prices that these old coal power plants are able to generate power. They have a subsidy from us, the public, because they have not put on pollution controls, so they don't bear those costs, that interferes in the market with other folks coming in to that market. So as we go through it, none of these things have been evaluated, the question of jobs, when the industry says it will cost billions of dollars to put on these controls, that's true, approximately half of that cost is labor.

It's blue-collar, high-wage steam-fitters, high-skilled jobs; in fact I think at one point in talking about the Clear Skies bill and why it had to go out till 2018; the industry tried to advance the argument that you couldn't do all this pollution control work until 2018 because there weren't enough steam-fitters and welders to do all this work. I think they've backed off that now, but it is

lost in all the discussion, what is the impact in terms of this could be the EPA project over the next 5 to 10 years, all of this work that needs to be done and that is valuable. And with that I'll close, thank you.

Senator Dorgan: Mr. Buckheit, thank you very much for your testimony; you've raised a good number of areas where we would ask questions and will, following the testimony of others. Might I just say that those of us from small states are sensitive to the phrase you used, "out in the middle of nowhere," so, I would retract that.

Mr. Buckheit: I was not suggesting that North Dakota is in the middle of nowhere.

Senator Dorgan: Or Vermont, but in any event we thank you very much for your testimony.

Next we will hear from Eric Schaeffer. Eric is the director of the Environmental Integrity Project, a venture of the Rockefeller Family Fund. Formerly served as the director of the office Regulatory Enforcement for the EPA and we very much appreciate his public service as well for this country and we appreciate your willingness to be here Mr. Schaeffer. Why don't you proceed.

Mr. Schaeffer: Thank you, Mr. Chairman and Senator Leahy, and Senator Jeffords for inviting me to testify today.

I think a number of excellent points were made in your opening statements and in some things the witnesses have said so far and I want to comment on those in summarizing my own remarks.

Senator Jeffords, you started by talking about the public health that's at risk from the continued power plant pollution. More than 20,000 premature deaths a year. We now learn more than 600,000 infants at risk from mercury exposure and Senator Leahy made the same points. I want to emphasize, these are estimates the Bush Administration accepts. These facts are beyond dispute. And this may be the only thing we can all agree on. So, we have a public health crisis. Again, that the Bush Administration seems to accept as real. I think an additional point is most of the pollution that's driving those dismal numbers comes from power plants operated by about two dozen companies with combined revenues that exceed one hundred and twenty-five billion dollars a year. So, we have the money to fix this problem. We have solutions that are within our grasp. We can afford to beat this problem. What's the Bush's Administration's reaction?

To hamstring enforcement of the laws that would allow us to do something about this pollution now, turn decision making over to industry, and try to sell rollbacks and delays as somehow strengthening the Clean Air Act. To take each of these issues in turn, I think the enforcement story has been well told and Bruce was in the middle of those battles at EPA and I was too at one time.

Let me say a word about New Source Review (NSR). I agree with Bruce's comments. It's a good law. It can be made to work. It can also be reformed to provide clarity and certainty. That's a worthy goal. I don't think that's what this debate is about.

I want to remind everybody that the National Academy of Public Administration came out with a set of recommendations for reform. They said what we need to do is close the loop holes that allow these older plants to operate and pollute as though they were still living in the 1970s and streamline and speed up permitting for the clean plants. What's wrong with that? That seems like common sense.

Completely ignored by EPA. Why is that? And again, the NAPA study I mentioned was congressionally mandated. EPA did nothing with those recommendations. Why? Because the industry's goal—and I refer to this cartel really of lawyers and lobbyists that are really running the Air Program now—the industry's goal from the get-go has been to damage and ultimately to destroy the enforcement actions the government undertook and is still struggling to finish against these same companies for violating clean air laws.

I would refer you to a memo from then—Administrator Whitman to Vice President Cheney, about two and a half years ago which makes just that point. In that memo she says what the industry cares about are enforcement cases and in effect making them go away. That's what's been driving these so called reform efforts from the Administration's first days in office. Now you've been told—Mr. Holmstead told Senator Leahy—in response to a direct question, “These changes aren't going to hurt enforcement, no problem. They are prospective only. You guys are worried about nothing.” That is just not true. I think he knew it wasn't true at the time and I encourage you to follow up on that. In the fall last year as Bruce told you, investigations of more than 70 power companies were dropped and they remain in boxes.

Senator Leahy: Excuse me, on just that point. You know I have requested from the Justice Department because the statement was so totally false. There's no question. He knew it was false and we've asked them to follow up. It will be interesting to see if they will.

Mr. Schaeffer: That's great. I'm, I hope you will pursue that. It came as a shock to me anyway, in the audience, and I think to a lot of enforcement staff.

Even if the administration has an election-year conversion, and decides to open a couple of those boxes and files a couple of those cases, the damage has been done. What these NSR rollbacks do is wipe out, and I mean completely wipe out the laws the government was trying to enforce. You can imagine the chaos that is creating in the courts. If you want certainty, that's not the way to provide certainty.

Now the government is stuck with a handful of big cases slogging through the court, trying to explain to judges why it's trying to get compliance with the law that the Administration has ridiculed and is busy trying to wipe off the books. That's a recipe for chaos. It means no settlements, or very few settlements and a lot of confused judges. The Administration loves to talk about how we have too many lawyers and we need to put the lawyers out of work. I can tell

you this is a billable hour bonanza for attorneys in private law firms that represent these companies. They will grow fat on these cases for years to come and we will have no certainty.

Now I think I heard Governor Leavitt, at his hearing nomination and since then, talk up the virtues of collaboration of working with stakeholders and that's a great thing. I can tell you from bitter experience, this administration has only one stakeholder when it comes to the Clean Air Act and that is the power industry and their lobbyists. There are too many examples to mention—we have Senator Leahy's example of sections of the Mercury rule being drafted by Latham and Watkins—lawyers representing power companies, and another one is last summer, the week after the major rollback in NSR went into effect, the chief of staff for the Air Program at EPA went off to work for the Southern Company, one of the principal defendants in the NSR cases and a major beneficiary of this rule rewrite and there are many other examples.

I think when it comes to, at least when it comes to NSR and that component of the Clean Air Act, it doesn't matter what the law says. Public opinion doesn't count, the states aren't heard when they raise objections, critiques by the General Accounting Office are ignored, recommendations from the National Academy of Public Administration dismissed. There is really only one stakeholder that matters; that's the power industry. I don't know how you can build a credible policy with that kind of cozy relationship between the industry and the people that are supposed to regulate it and that's a major problem right now.

I think that problem has also contributed to a kind of ideological blindness on the part of the people that run the Clean Air Program right now to the point where they will misstate facts so blatantly that, I mean our jaws drop, and we're left short of accusing them of lying outright. We're left thinking that they probably, somehow convinced themselves that these facts are correct and truly believe it because they are so wedded to the positions handed to them by the industry.

And I'll give you just one example, Governor Leavitt said last month, in a speech to the Addison Electric Group, we've got a mercury emissions trading program that's going to reduce mercury emissions by 70 percent by 2018. Now I happen to think that's too long—that's 15 years from now—but let's take that at face value. That's 70 percent by 2018. If you go on EPA's website and look at the emission projections they have run, for actually a more stringent proposal, its 54 percent reduction in emissions somewhere between 2018 and 2022. That's before the mercury proposal that the administration put in the register was actually weakened to raise the allowable emissions limit for mercury.

So, the public statement is 70 percent and that statement is made in the rule itself, the actual numbers are somewhere under 50 percent. That just seems wrong, it seems wrong to have a public health agency with so much at stake mislead the public into thinking that what the agency is proposing is something that it's not. If we can't get a straight story on the facts from the EPA, it's difficult to even have a conversation. That's been our frustration so far. We've tried to engage the administration and the political appointees on facts. We can't get them to respond. We can't get letters answered. They simply will not come out and debate these issues in the sunlight. And I think given the public health stakes, that's a really serious problem right now.

I think ultimately some of the changes the Administration, most of the changes the Administration has pursued, will fail. I think the court will throw out the routine repair rule,

which allows the Sergeant from Mass. to rebuild power plants in four or five years completely without permits. I think that rule will die. But the industry and the defendants from these cases will still benefit. Why will they benefit? It will take years to get to that resolution. They will get years of delay before they have to clean up. That's the game they are playing right now.

I hope you'll stay with this issue. I hope you'll help us, help the attorney generals and other people who care about this issue take that advantage away from the defendants in this situation. Don't let them get away with staling out on the Clean Air Act. We really just can't afford to wait any longer. Thank you.

Senator Dorgan: Mr. Schaeffer, thank you very much. We appreciate your testimony and finally we will hear from John Paul.

John Paul is the supervisor for the Regional Air Pollution Control Agency of Dayton, Ohio. RAPCA is a local air pollution agency responsible for permanent reviews, inspections, and enforcement air quality monitoring, and various other duties and we appreciate your appearance here, Mr. Paul. Why don't you proceed.

Mr. Paul: Thank you Mr. Chairman, Senators Leahy, and Jeffords. It should be—it's that, it. OK.

Thank you for convening this hearing, and thank you for calling this panel. I have a lot of respect for the members of this panel and to a certain extent I feel I am batting clean up and the bases are loaded.

You know the testimony provided to you thus far is very accurate and I would want to state my agreement with that. I am here today on behalf of STAPPA and ALAPCO, the two national associations that represent state and local air directors across the country. And I am pleased to have this opportunity to testify on the impacts of the Administration's changes to the New Source Review (NSR) program.

My message this morning is simple and straightforward: the NSR changes that were promulgated by EPA in December 2002 and August of 2003 are serious detriments to public health and to environmental protection and they severely erode the ability of state and local air directors to control air pollution. I am not alone in reaching this conclusion. In fact, it is one that has been reached by state and local air directors across the country and its something that as you stated, Senator Dorgan, that is going to be born out by the GAO report which will be released today.

Um, and I think that you as Senators should be concerned over this. You should be concerned that that the current rules not only effect public health and the environment but that they contradict the clear intent of Congress and they are running against what we feel are clear mandates from Congress.

New Source Review is actually a pretty simple program in its basics. The program assumes that the best time to control a source of air pollution is when you are either building the source or you are doing a major modification to the source. In other words, when you're spending money on

the source and you're planning for its future operation that's the best time to control the air pollution that emits from the source and this is a simple concept. I would agree with Bruce Buckheit, that its been complicated over the years mainly by court cases and by special exemptions and therefore we do believe that NSR simplification is something that should be strived for; however, it's interesting that the process of NSR simplification started out as that. It was even titled that, "New Source Review Simplification"; today you'll hear, New Source Review Reform, they've gone away from simplification, because quite simply, the new rules they have are not more simple, they are more complicated. They look back 10 years at base lines; they consider different pollutants for base lines; they have a base line for every piece of equipment at a plant; and so from the standpoint of a local administrator in looking at this rule, it's very complicated to follow.

But we do agree that some reforms are possible, simplification is possible, as a part of that, as a part of that agreement, we participated in EPA's efforts under the last administration. We participated in stakeholder meetings, we met separately with the different stakeholders, and we thought that was a good process and we had a lot of agreement and we were very close, I believe, to having reforms that would have simplified the process, but would have maintained the environmental integrity of the process, but we simply ran out of time.

You have a copy of assistant administrator Robert Perciasepe memorandum, which summarized those meetings, and outlined the concepts that had been developed and makes recommendations to the administration for changes. And that memorandum states that he hoped the new administration would consider finalizing them.

However, when the new administration took office, the discussion ceased abruptly, and it was not really until sometime in 2002 that we as state and local air regulators, the ones who actually enforce these rules, that we learned that a comprehensive New Source Review reform effort was in fact proceeding but without the participation of state and local regulators. We were troubled by this closed process.

We were also very troubled by what we heard was content of those reforms and so in July of 2002 we wrote the EPA administrator and we told her of our concerns. We detailed those specific concerns and let me quote to you from that letter: "Individually, each of these reforms will serve to weaken the NSR program by allowing an unacceptably large number of sources that are currently subject to NSR to escape air pollution controls. Even more distressing, however, is that, when taken in combination, these reforms will allow most sources to modify their plants with and avoid NSR, resulting in unchecked emission increases that will degrade our air quality and endanger public health."

We further expressed our firm belief that these reforms would undermine the chances for any reasonable change to the NSR program ever taking effect. So, we were looking at these changes, we were saying boy we were really close on some agreements. These are just going to put these real close agreements in the background. Throughout the year, we continued to express our concerns to EPA but to no avail. The final NSR package, not only instituted the very rollbacks that we cautioned against, many of which went beyond what industry was asking for. But the changes also were made mandatory rather than discretionary. I think this is an important point.

Under the Clinton administration, the NSR provisions that they had worked out were to be discretionary so states could look at it, if it made sense to adopt one of these then they would do that. Under this administration, the changes are mandatory and so we either adopt them word for word or we have to go through a long process and explain and prove why our regulations which we would believe would be better fit our state, better fit our local and would be more protective of public health. We have to defend those to EPA before they could be approved.

With regard to the routine maintenance proposals we found that proposal particularly egregious and as a result the state and local air quality officials from across the nation, from Arizona, Ohio, New York, and Oklahoma presented the Association's reviews at EPA's public hearings on March 31, 2003. In that testimony, we stated that we believed this proposal would "eviscerate our nation's NSR program which has already been compromised by the December 31, 2001 final rule changes and severely undermine the ability of states and localities to achieve and sustain clean air goals."

We recommended to EPA that they rescind that rule. Nonetheless, EPA went forward and finalized that rule. We believe this rule, which creates a new and almost unbounded categorical exclusion from NSR, will allow plants, as you've heard in the testimony, go through and rebuild piece by piece.

The only test, as a matter of fact, the rule even states that if a source meets the economic test, you've heard this, the 20-percent test—that is if they spend, what they spend on replacing a unit, the cost of that is less than 20 percent of the cost of replacing the whole plant—then they are exempted from NSR. And the rule even says, without regard to other considerations, so this is an economic test, not an environmental test, and it amazes me personally that the EPA could have a rule which says that if you pass an economic test, you are exempt, without regard to other considerations.

Let me give you just a brief example of the potential impact of this equipment replacement rule. In Ohio, we looked at, as a local agency in Ohio were concerned with emissions obviously around us, and we looked at data for the coal-fired electric generating units in Ohio. And we have found, there are 66 boilers that are 30 years old or older. Thirty years is a common age that a floor and electric generating station that at 30 years you should be deciding are we going to shut this boiler down or are we going to allow this, remodel this boiler and operate it into the future.

As the Clean Air Act dictates, that is the time, when you then should upgrade the air pollution control equipment. The rule would allow all 66 of these boilers to modify, to make changes in the boiler system that could operate in the future without going through NSR. These boilers, the 66 that we identified in 2002, their SO₂ emissions were about 966,373 tons per year. Now, if they went through NSR and they installed best available control technology then those emissions would be cut, probably as much as 90 percent. When they are exempted from NSR and they continue to operate into the future those emissions could double or triple.

Finally, in conclusion, how are we dealing with this as state and local agencies? Our membership is very concerned with the rules and with the task of either adopting the rules, or coming up with rules and proving they are the equivalent.

So what the associations have done in response to this is we have authored a menu of options. So, we have a document with the legal the legal language, its EPA's rule and then optional language along side that would be more protective of public health and what we believe public policy. We have drafted that we have put that out for review and we're going to finalize that soon.

In conclusion, we believe that the rules are serious rollbacks. We believe that these rules will seriously handicap us as state and local air regulators and providing clean air for our citizens. Thank you.

Senator Dorgan: Mr. Paul, thank you very much for your testimony. We normally will ask witnesses to submit their testimony in writing, which you have done, and we very much appreciate that, and we have had a chance to read that, and then we ask for oral presentations of five minutes to summarize. But I wanted to let all of you continue today because your testimony is very compelling. This is a very important subject, and I don't know that we could have much of a dialogue with you with five-minute testimonies. So I have taken more time; I have asked you to go ahead take more time than we normally would at a hearing just because this is a difficult subject, a controversial and a very compelling subject.

My colleague Senator Jeffords is at the moment supposed to be on the floor of the Senate—he's one of the two managers of the highway bill that has been on the floor of the Senate all this week—so he is going to have to leave momentarily, but I do want to call on him for questions first.

Senator Jeffords: ...find out how politically we can get things done in this body, as we know from all the testimony we had today that politics is behind a great deal of what's going on, as far as contributions from power companies etc. ...to try to figure out a way to try to get this over to the public.

[indicating chart] We have prepared here a map over here to the left of the United States that demonstrates the seriousness of the pollution. You notice that almost all of the eastern United States is very badly effected except for Texas—we won't bring that up—but anyway, what it shows is that in those very red areas we have a large number of deaths as it goes out so it seems to me we ought to find a way talk to the administration in something they understand. Now they have a terrorism chart and the terrorism chart goes from I think from green to red and I think that if we do a terrorism chart relative to the number of deaths—as far as I know, we have had a few if any deaths from the terrorism, but we know we are getting 20,000 deaths a year from this terrorism, so I hope we can find—I'm just throwing this out as a suggestion—how we can get to the public the dangers they are experiencing because of this pollution, whether it's health or death, and I don't if this is what we can do, but we got to able to articulate in a way that the public will demand that what needs to be done will be done. Any ideas you have, that's one of mine. Thank you.

Senator Dorgan: Senator Jeffords, thank you very much. Thank you for your leadership. Senator Leahy.

Senator Leahy: I found this very interesting, first. Mr. Buckheit, Mr. Schaeffer, I had heard before and I found I gained a lot by listening to them. Mr. Paul and Ms. Lautenschlager—did I pronounce that correctly? I tell you, I'm delighted you are here because you have added to this. It still comes down to this, I can't understand how when something is—Senator Jeffords pointed it out, Senator Dorgan and others and you have—that something that so directly affects us and especially affects our children because they are developing their endourological systems and so that what might be a detriment physically in health to an adult maybe is far more of a detriment to them the same dosage. Obviously as to why we have child doses of medicines and adult doses, the effect is a lot different, so it's even greater to them. I hear great slogans in education, “no child left behind” and “protect the family” and everything else, but this is a direct assault on children and on the family. And Mr. Schaeffer, you have observed the actions of what you call a cartel of lawyers and lobbyists running the EPA's air office from both inside and outside the agency; you discussed some of the more detrimental but less obvious actions that have gutted the Clean Air Act and gutted and only make it harder to enforce. Often I remark on the marketing savvy this administration's shown striking down on environmental laws with laser-like intensity to make increasing arsenic in water sound like a good thing and so on and you point out how the public relations tactics have been used and I look at the Washington Post mercury article today are very alarming, but I don't know even with all the marketing and public relations and gobbledey gook and the double-speak that they can ignore the fact that children are at risk. The administration continues to play fast and loose with the facts.

If I were a parent of young children I'd be outraged and I must tell you as a grandparent with two young children and one on the way, it just is terribly frightening. You point out they claim a 74-percent reduction but their own models show only 54-percent cut and that's 15 years from now. Children being born today or children today are going to be grown up and that is 15 years from now' if we get the past all loopholes they put in the law.

So Mr. Buckheit and Mr. Schaeffer, let me just ask you this; either of you actually. From your experience inside the EPA, did the agency ever consider the double-whammy the NSR and mercury rollbacks would have on children's health and, when these policies were discussed, were the EPA scientists allowed to have any role in that?

Mr. Buckheit: Senator Leahy, I observed from one step removed the development of these proposals; the normal inter-agency review process where career staff are involved in developing proposals were not employed here, these were top-down proposals and rules that came from the White House and by that I mean the CEQ and the Department of Energy in particular and so no, there was no EPA consideration of the impacts of these particular proposals on children's health or other issues. The EPA staff's role and rule-making staff's role in these matters was limited to summarizing public comments and writing up the rules at the direction of Mr. Holmstead and the folks he was working with in the White House and the Department of Energy.

Senator Leahy: Mr. Schaeffer, what about you?

Mr. Schaeffer: Senator Leahy, there is a children's health advisory committee that advises the EPA on environmental issues that affect children's health and there is an executive order that requires the EPA to consider those impacts. That advisory committee has written the EPA with respect to mercury rule and has said that, this rule just doesn't do it and this rule is not protective of children and you didn't take in to account.

Senator Leahy: How did they respond to that?

Mr. Schaeffer: I don't know. I will read their answer, if it ever comes, with a lot of interest.

Senator Leahy: Because I don't pretend to be a scientist, but I've talked to an awful lot of different scientists, and they tell me basically what all of you have said: This is something you just can't ignore; a fact is a fact.

Mr. Schaeffer: The administration's public relations response seems to be to quickly say, "We accept that this is a problem. That's why we proposed a 70-percent cut in mercury emissions." What you hear less of is it may take 25 years to get that 70-percent reduction. That's the part that's left out. Also left out is we just dropped a more stringent rule that would have gotten us the results much faster. So there is an awful lot of spin and you've seen the statements and had them inflicted upon you as well, and I hope that you stay with it as you have and continue to push the agency to try to get us some straight answers.

Senator Leahy: I will. I mean these 1- and 2-year-old children can't ask the questions, and if they do they are not going to answered, but I hope that as Senators we might have.

But as you know at some of these hearings its been like pulling teeth to get an answer, unlike Mr. Buckheit who's had a distinguished career just as you have Mr. Schaeffer and shows your commitment of upholding our laws, but Senator Jeffords and I held a hearing on the Bush administration change in NSR in the July of 2002. We held a joint hearing with the Environmental Committee and Judiciary Committee; we were concerned about how this would impact the EPA's ability to carry out investigations. We had repeated assurances at that hearing of the EPA the rules would only be prospective and would not impact current cases and investigations, which was what they knew we wanted to hear—to let at least the current ones go on—but then after that hearing we find current so and we have documents such as this memo from Administrator Whitman warning Vice President Cheney that the actions could slow down or stop settlements.

I mean very professional non-partisan staff had worked hard to get settlements to move forward to get people to agree and they're almost there and then the administration comes in and says, "Whoops, forget about that. I don't care how hard they've worked, I don't care if you're willing to agree to these settlements, hold off; the cavalry is coming. You are going to be allowed to keep doing whatever you want to do."

I think about Cinergy that had potentially a \$1.4 billion settlement on the table—all the sudden they are standing back saying, "whew"—I was going to say saved by the bell, saved by Bush administration is what it amounted to.

We have a chart here used by the defense attorneys in the government's case against Illinois Power that showed that they were going to use proposed rules. They asked the judge to dismiss the case. If I was the attorney general in the state involved with that I would have a very sinking feeling that the rug's been pulled out from under us. I mean how do these kinds of proposals impact your work at the EPA and settlements with the industry? Bruce, you wanna give it a try?

Mr. Buckheit: Sure, thank you, Senator. It absolutely took the oxygen out of room; I was involved in the Cinergy settlement discussions and we had a deal with Cinergy, we had all the major components buttoned up but as they kept reading the press and their attorney's would go over to meetings in the Old Executive Office Building and come back to our settlement meetings, it made it pretty clear that in their view it would be foolish to sign on to a settlement, why not wait and see what happens, and the thing that I am most concerned about is what happens in November of 2004.

I am very concerned that, win or lose the election, the Bush administration may be contemplating a tobacco set of settlements in these cases and I would urge folks to keep their eye on that ball.

Mr. Schaeffer: Just to make clear the Cinergy agreement was very public, it was announced in December of 2000, for some reason Cinergy still carries the announcement on their website, even though they have no intention of honoring it.

Senator Leahy: That's very interesting.

Ms. Lautenschlager: As somebody who sat in on negotiations with industry folks, it's very frustrating as well to talk about the political impact of very wealthy and very powerful special interests, but to say for example we would hope that you would consider compliance with what's going to be required of you in the year 2000 and whatever and perhaps move it up a couple of years and when the reply is: we'll have the law changed by then and we won't need to comply. It's very frustrating and you feel as though what cards you were dealt have been taken away from you by the federal government through an agency that I think is acting contrary to the wishes of Congress.

Senator Leahy: Well especially, attorney general, because you are in there representing the people.

Ms. Lautenschlager: Absolutely. And we in the state of Wisconsin have an SIP, we have a State Implementation Plan, where as the gentlemen from EPA, we were very proud to at least previously have standards that were even higher and felt a real need to enforce those and to have the rug pulled from us in this case, but some of the new things that are being done with NSR has been very very frustrating.

Mr. Paul: Let me add also is that state and local regulators...I mean good air pollution control in the country depends on a cooperative working of the state, local, and federal government. And the federal government was providing leadership, the EPA under Mr. Buckheit and Mr. Schaeffer finally we had these utilities to the point of where we were going to see significant reductions and they were winning the cases, they won Ohio Edison, Ohio Edison is a case where they did 11 projects, 10 of those projects would be exempted under this 20 percent...

Senator Leahy: Ten?

Mr. Paul: Yes, 10 of the 11...so finally we would get to the point of where we were going to get to see the controls and then the equipment replacement rule comes along which would pull the rug out from under—

Senator Leahy: I can think of a couple boardrooms where they must have wanted to break out the champagne when they got the word.

I look back, Mr. Paul and Mr. Buckheit, in the Justice Department's report, the President on pending cases, that was the report issued in 2002, it reads that any decision that would draw, terminate or otherwise circumscribe in the cases would rest in the discretion ENRID, the environmental division which must assess the relative strengths and weaknesses of the given case. We held a hearing later that year; we asked Assistant Attorney General Mr. Sansonetti if they had been consulted and agreed with the EPA's new NSR proposals, both Mr. Sansonetti and Mr. Holmstead testified that their staff had been consulted and did not believe their changes would have any effect on the enforcement cases. In fact, Mr. Homestead specifically said—let me read from the transcript, "On numerous meetings I have had which have included staff attorneys Tom's"—that is Mr. Sansonetti's—"office as well as attorneys from our own enforcement office is we do not believe that these cases will have a negative impact on the enforcement cases."

Now, in the past year or so we have seen action after action after action of the EPA that totally contradict what he said. And frankly, and I've said this before it seems to me that Mr. Holmstead's testimony and Mr. Sansonetti's testimony are just more examples of how the administration misrepresents their facts when it comes to their environmental rollbacks. They were saying what they thought we wanted to hear—they were not saying what was going on. And since you were at the EPA during these consultations they testify about, can you tell us what conversations took place and how much of a role either the enforcement division of the EPA or the environmental division of justice had in advising Mr. Holmstead of the effect the rules would have on pending investigation of cases?

Mr. Buckheit: I was involved in a number of meetings not only with Jeff Holmstead but also with Governor Whitman. Where our staff briefed the administrator and the assistant administrator on the impacts of the proposed rules, that's sort of almost all we were doing at one period of time our staff was generating analysis after analysis look at the impact of a 5-percent rule, looking at the impact of a 10-year baseline on the enforcement program, that's what we were doing. There's a country music song that's popular right now "What was I thinking?" and I don't know what Mr. Holmstead was thinking when he answered that question.

Senator Leahy: Well, I could perhaps get in to what I think he was thinking. That's why I have asked the Justice Department to look at the testimony he gave me. I mean I take these kinds of hearings very seriously, I have an enormous amount of respect for Congress and Congressional hearings, but I expect the people that come there to testify honestly and I in the 29 years here, Senator Dorgan, I think I have only once or twice referred testimony from a hearing to the Department of Justice, that was one of the times.

I have other questions but I will submit them and again I thank you and I know that each one of you had to rearrange your schedules, you had to do a lot of work to get here, its helpful that you are here and it's nice to see you, Mr. Schaeffer and Mr. Buckheit, again and, Mr. Paul and Attorney General, thank you so much for doing this.

I just want to close with this: in our state, environment is a real priority. We don't think of it as a Democratic or a Republican issue. Vermonters are just generally environmentalists; we are relatively a very tiny state. As Senator Jeffords' map shows we're kind of downwind of a lot of these pollutants; we have to expect our government, our federal government to uphold the laws and uphold the rules. There is enormous disillusionment in the state of Vermont because this administration has not upheld the rules on the environment, especially rules that were put in by a bipartisan effort. So thank you.

Senator Dorgan: Senator Leahy, thank you very much. Let me just point out that my colleagues have requested a formal hearing and the Environmental Public Works Committee and the Senate has unable to get that hearing. As a result, we have held a hearing in the auspices of the Democratic Policy Committee—there are policy committees, Republican Policy Committee and Democratic Policy Committee in the Senate established by law in the 1940s and the law that

establishes these committees anticipates that the committees will hold hearings on public policy issues. The reason I say that is that at the door there was deposited a press release today from the National Association of Manufacturing and it says “NAM condemns mock hearing on NSR...incredibly disappointed with the Democratic Policy Committee’s decision to conduct a counter-productive mock hearing with predictably partisan witnesses.”

Let me ask the question—first of all this is not a mock hearing—and if the National Association of Manufacturers would not stop a few yards short of good research, they’d understand that. But, let me ask, are you predictably partisan witnesses? Mr. Buckheit?

Mr. Buckheit: No, sir.

Senator Dorgan: Mr. Schaeffer, are you a politician?

Mr. Schaeffer: I am not.

Senator Dorgan: Partisan?

Mr. Schaeffer: I am not.

Senator Dorgan: Mr. Paul?

Mr. Paul: No, sir.

Ms. Lautenschlager: [inaudible] The same kind of air that Democrats are breathing, Republicans are, too, Senator.

Senator Dorgan: Well, Attorney General Lautenschlager, you were engaged with other state officials around the country responding to this. Are they all Democrats?

Ms. Lautenschlager: No, absolutely not. If you look at the states that have been involved in various lawsuits, whether there are those that take a partisan bent on things clearly, there are Democrats, Republicans and independent candidates alike who are concerned about air quality

and water quality and we have worked together as attorney generals, state attorney generals to pursue our concerns with the federal government's position on this.

Senator Dorgan: And the executive vice-president of NAM, Mike Cobarutti, who belonged to the quotes says here, “attacking EPA administrator Michael Leavitt just two weeks after he announced his determination of enforcing existing NSR rules at a NAM luncheon” and it goes on. Were you here attacking Mike Leavitt, Governor Leavitt—now Governor Leavitt is someone I have worked with and known for a long while, he just assumed the reins of the EPA not to long ago—but did I miss something in your testimony, Mr. Buckheit?

Mr. Buckheit: I don't believe I mentioned Governor Leavitt's name at any point in my testimony. I did comment that in a press release, and this may be associated with the NAM event, I disagreed with their suggestion that they were in fact enforcing the current law because the new lawsuits were designed to operate under the policy that was announced in November.

Senator Dorgan: Well, enough for the National Association of Manufacturers. I would suggest to them although they don't need my suggestions that the country would be well served in my judgment by the building of new more efficient power plants which would produce lower cost power for manufacturers number one, but number two would produce a substantial amount of business opportunity for manufacturers to manufacture the construction of materials that are necessary for building of a new plant.

So I don't quite understand why they seem to lobby against their interest, but that of course is the prerogative of interest here in Washington, DC to take a position that is counter to their interest.

Let me ask a couple of questions. I don't know whether my colleague Senator Leahy has other questions but I have several questions that have risen from your testimony. I asked Attorney General Lautenschlager, whether the groups that you are involved with are partisan; you say no, there is an amalgamation, a coalition of interests across the country, Republicans and Democrats who are concerned about the direction this is heading. Is that correct?

Ms. Lautenschlager: Absolutely, and if I look to Wisconsin alone we have an incredibly broad coalition, we talked about some of the health concerns of people who are concerned about the impact on individual health particularly infant health and the health of small children. One thing we didn't mention for example is that among the people who are most concerned about this in the state of Wisconsin are our commercial fishermen and folks who rely on the Great Lakes and the quality of water. What mercury is doing to our Great Lakes is a frightening prospect and the foot dragging that's going on when it comes to mercury emission enforcement is really going to have an impact on things like that, now that isn't a democrat issue, that isn't a Republican issue, that's an issue for the people and the food they eat and the people who make a living out of doing these sorts of things so we have a broad based coalition in Wisconsin with people that are

expressing these kinds of concerns and I think it's reflective of what's going on throughout the nation.

Senator Dorgan: Mr. Paul, you indicated that you through negotiations had been close to certain agreements with the industry and members of the industry; you had written to the EPA; is that what I had heard?

Mr. Paul: Yes.

Senator Dorgan: I'm curious, did you receive a response from the EPA?

Mr. Paul: Nothing that sticks in my mind, so if we did receive a response, it would have been one which probably said wait for the rules and see if your concerns are valid, which they were.

Senator Dorgan: Mr. Buckheit, tell me about the phone call with your regional offices in which you were apparently required to tell them that they had to shut down regional investigations?

Mr. Buckheit: Mr. Suarez, the then assistant administrator from enforcement had been out in Seattle a few days prior, where he advised senior regional enforcement folks of this new policy which was to quote "set aside"—was, I think, the word—existing cases unless they were violations under the new rules. I had been advised that this was coming a week or two sooner and two or three days after that meeting, perhaps even the next day after that meeting.

I had the privilege of being on a conference call with the people out in the regions who do the work who were clearly upset, confused, did not know exactly what this meant and I had to sort of walk them through the details of what this meant. Would we be withdrawing these existing cases; it was that kind of a question.

One question was asked that there is not an answer to is: What is the Justice Department doing? Our number, I think the number 17 matters that have been referred to the department but not prosecuted because of lack of resources, a question is out there is: Has the Department of Justice adopted EPA's policy? Will the Department of Justice file cases only if they violate under the new rules? But we don't have the answer to that. But that call went on for an hour or two, to try to answer all the questions that arose in the enforcement staff's mind out of this sort of a bolt out of the blue announcement.

Senator Dorgan: Did you or Mr. Schaeffer leave your jobs because of your disagreement with the policies?

Mr. Buckheit: I think I'll let Mr. Schaeffer answer that question for himself. My decision to leave was a complicated set of factors, but I had put seven years into this effort. I was deeply committed to it. If I had a sense that that effort was going to continue in a productive way for the next year or two, I would have stayed.

Mr. Schaeffer: I did leave out of frustration over what was happening to the Clean Air Act, and I laid my reasons out in a letter to Miss Whitman at the time.

Senator Dorgan: Now let me ask one other question. We have, as you know, a lot of cooperatives in North Dakota—good organizations owned by the people that they sell to. I grew up in the cooperative movement. My grandfather and my father were managers of cooperatives. And so we have cooperative organizations that own power plants, and frankly some of them have told me—and I say this in response to your comment, Mr. Buckheit—they have told me over time that it is not altogether clear and certain exactly what you can and can't do. And they have some old power plants, and so the question is: When you go back in and try to do some maintenance, what's over the line? What's under the line?

You said something that I responded to emotionally because I used to be an administrator in a state tax agency, and I can tell you that the complexity of tax laws is there because particularly the largest tax payers have had an enormous impact on making it complex for their special exemptions, and each one of these makes it more and more complex. I assume the same is true with NSR, but having said that and having understood your comment, I also will tell you that there are organizations that are not behemoth organizations—that don't have an army of lawyers—who tell me that NSR *is* complicated and difficult, and its enforcement is horribly inconsistent, and they do want predictability, clarity, certainty. Is that an unusual request? An unusual plea from a cooperative that is involved in producing power?

Mr. Buckheit: Absolutely not, Senator. I think that's entirely appropriate. When I was speaking to that point, again I was thinking in my mind of the big folks who have the Washington lobbyists. In fact, in 1992, in response to that very concern, the agency put out a proposal that would have clarified routine maintenance. The industry's response, having seen that strawman proposal, was "Oh no. The rules are quite clear, thank you. We don't need that clarification." Because the clarification that was put out at that time would have clarified that none of these capital improvement projects would have been considered routine. So at the request of the agency—I mean of the industry—the agency shelved that proposal.

I certainly agree with the comment that these rules have gotten complicated and that smaller entities out there are definitely at a disadvantage compared to those that are plugged into the Washington network.

Senator Dorgan: And so, calling for—what’s the word? I won’t use the word “reform”—but calling for a review of NSR in order to provide some better clarity and better certainty is not necessarily suggesting somehow that you’re retreating on air quality, is it?

Mr. Buckheit: No.

Senator Dorgan: This goes beyond I think the background that Mr. Schaeffer and Mr. Buckheit have in enforcement. I am told that we are nearing a point where we could have a near-zero emissions coal-fired electric generating plant. And a new coal-fired electric generating plant that is nearly zero emission in which you could sequester the CO₂ used, produce hydrogen, use wind, I mean this whole series of things with clean coal technology that I think are exciting.

My sense is that we’re going to continue to use coal. I talk about fossil fuel, coal, oil, natural gas. We’re going to continue to need fossil fuel in this country. The question is how do we use it—particularly coal—how do we use it in a way that is sensitive to our environmental interests and to human health. And I think there are some exciting opportunities there, particularly with respect to the new clean coal technology and what that is going to provide for us in the future.

So I think, Attorney General Lautenschlager, when you said it is a false choice to talk about “either, or—we can either have energy, or we can have a clean environment,” but you can’t have both at the same time—I don’t agree with that at all. I think that is a false choice, and policymakers need to think through these policies in a way that protects our air and still allows us to continue to develop energy in a thoughtful way.

The thing that bothers me the most about your testimony—the testimony of all of you—is that what ought to be done in the open, and what ought to be done in the construction of public policy, with people coming from all centers of the compass, with different ideas and different views and different interests, and yes that includes industry because they are a stakeholder and they certainly have an interest in this—that kind of interaction ought to produce the best public policy for the country.

When policies are basically constructed behind closed doors, in secret, with only one stakeholder, I think the American public loses, and I think public policy—the quality of public policy—is diminished. And that’s what I worry has happened here. And it’s not just your testimony but others that persuade us that this was not an open process in which we had a discussion in our government about “What do we do about this? How do we provide clarity and certainty with NSR?” That was not what happened. I am going to also, if the EPW committee does not at the request of my colleagues—Senator Jeffords, Leahy, Clinton, Schumer, Lautenberg, and many others—I’m going to ask the EPA officials to come to a hearing. I don’t know whether they will, but they need, it seems to me, to be able to have an interaction with us about these policies.

In the meantime, I want to thank the four of you for preparing testimony and coming to Capitol Hill today to be part of this hearing. I think it is very helpful, and I think it is just but one step in a long public discussion to try to get this right. This hearing is adjourned.