Testimony of

The Honorable Eliot Spitzer

July 16, 2002

Chairman Leahy and Chairman Jeffords, Senator Schumer and Senator Clinton, and distinguished members of the committees: Thank you for convening this hearing and thank you for providing me with the opportunity to testify about the need to maintain and enforce the New Source Review (NSR) provisions of the federal Clean Air Act.

New York State has been hard hit by air pollution from coal-burning power plants. Hundreds of lakes and ponds in the Adirondack and Catskill Mountains have been ravaged by acid rain. Ground level ozone has triggered asthma attacks and other respiratory diseases in every corner of our state, particularly in New York City. In addition, nitrate and sulfate particulates cause respiratory and cardiac illness, lung cancer and thousands of deaths in the regions downwind from polluting plants.

The New Source Review provisions of the Clean Air Act constitute a powerful tool to reign in this harmful pollution. For years, power plants have been exploiting an exemption, added to the Clean Air Act in 1977, which temporarily excused existing power plants from having to install modern pollution control devices. This exemption, however, was not intended to be permanent. Congress understood in 1977 -- twenty-five years ago -- that existing plants could not operate indefinitely without having to undertake expensive life extension projects. At that time, Congress mandated, power plants would have to install state-of-the-art pollution controls. But now, decades later, many of these power plants continue to spew huge quantities of air contaminants and operate with no pollution controls, in blatant violation of the Clean Air Act.

The aim of the Clean Air Act litigation brought by New York, other northeast states, the federal Environmental Protection Agency (EPA) and various environmental organizations is to address these harms by going to their source. In 1999, working in partnership with EPA and other Attorneys General from the northeast, my office identified various power plants that were in violation of the New Source Review requirements. These coal-burning power plants had undergone major multi-million dollar improvements without installing NSR-dictated pollution controls. To date, I have filed lawsuits with respect to 17 of these power plants -- which are located in Ohio, West Virginia, Virginia and Indiana -- under the citizen suit provision of the Clean Air Act. Each of these cases has been joined by EPA and other states. The plants involved emit tons of nitrogen oxides and sulfur dioxide every day, harming New York's air quality and damaging its natural resources.

My office also has taken enforcement action against several power plants located in New York State even though they are generally responsible for much less pollution than their counterparts in the Midwestern and southern states. Working with the New York State Department of Environmental Conservation, we have identified 7 power plants that were in violation within New York, and we have filed a lawsuit against the owner of the two largest plants. The Commissioner of the State Department of Environmental Conservation and I are currently in negotiations with the owners of the other five plants.

Unfortunately, however, our efforts to enforce the Clean Air Act have prompted the Bush Administration to propose a set of illegal regulatory changes that would essentially neutralize

New Source Review as an enforcement mechanism and deprive the public of the benefits of this laudably farsighted legislation. The Administration's efforts to dismantle NSR must be defeated, and I will go to court, if necessary, to stop them. I also urge Congress to ensure that the proposed changes do not come to fruition. In the meantime, however, the Administration's retrenchment on clean air already has jeopardized all of the existing NSR cases brought by the states and the federal government, and threatens to thwart any future NSR enforcement efforts.

My testimony today addresses four points. First, I explain how the Administration's proposed changes would, if enacted, illegally contravene the Clean Air Act. I intend to go to court to challenge these illegal changes if the Administration puts them into effect. And I intend to win. Second, I demonstrate that the Administration's plans to gut the NSR provisions are already - before the changes even become effective - jeopardizing our existing enforcement cases and depriving us of the millions of tons in pollution reductions that those cases would yield. Third, I refute both the Administration's claim that the NSR program needs "clarification"and industry's contention that it was "unfairly surprised" by our enforcement cases. Finally, I offer my recommendations as to how Congress should respond to the Administration's assault on the Clean Air Act.

I. The Administration's Proposed Changes are Illegal

The Administration's proposed changes - so far as we know them through EPA's press statements - are illegal because they purport to amend the Clean Air Act. I will first explain the existing law, as enacted and enforced under the prior Reagan and Bush administrations. I will then review the changes and explain why they are illegal.

A. New Source Review Law and Regulations

In 1977, Congress created the Prevention of Significant Deterioration (PSD) program to ensure that increased pollution from the construction of new emissions sources or the modification of existing emission sources would be minimized, and to ensure that construction activities would be consistent with air quality planning requirements. This program only applied to areas of the country where the air quality met or exceeded the national ambient air quality standards. The non-attainment New Source Review program, also created in 1977 contains virtually identical requirements applicable to facilities in non-attainment areas. (I refer to both programs together as the NSR program.)

Generally, the NSR program requires such sources to obtain permits from the permitting authority before the sources undertake construction projects if those projects will result in an increase in pollution above a de minimis amount. In addition, the NSR regulations usually require that sources install state-of-the-art controls to limit or eliminate pollution. Congress required and fully expected that those older existing sources would either incorporate the required controls as they underwent "modifications," or would instead be allowed to "die" and be replaced with new, state-of-the-art units that fully complied with pollution control requirements. The Clean Air Act defines "modification" as any physical change or change in the method of operation that increases the amount of an air pollutant emitted by the source. 42 U.S.C. § 7411(a). Courts for many years have interpreted the Clean Air Act term "modification" broadly. Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1979) (the term "'modification' is nowhere limited to physical changes exceeding a certain magnitude"); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901, 905 (7th Cir. 1990) ("WEPCO" ("[e]ven at first blush, the potential reach of these modification provisions is apparent: the most trivial activities - the replacement of leaky pipes, for example -- may trigger the modification provisions if the change results in an increase in the emissions of a facility.") The WEPCO court noted that Congress did not intend to

provide "indefinite immunity [to grandfathered facilities] from the provisions of [the Clean Air Act]," id. at 909, and that "courts considering the modification provisions of [the Clean Air Act] have assumed that 'any physical change' means precisely that." Id. at 908 (emphasis added) (citations omitted).

EPA recognized, however, that interpreting "modification" to include literally "any physical change" could become administratively unworkable ("the definition of physical or operational change in Section 111(a)(4) could, standing alone, encompass the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way that pipe is utilized)"). 57 Fed. Reg. 32,314, 32,316 (July 21, 1992). To exclude these trivial activities from the scope of the NSR provisions, EPA regulations have exempted routine maintenance, repair, and replacement from the definition of modification since 1977. 40 C.F.R. ' 52.21(b)(2)(iii).

EPA historically has analyzed and applied the "routine maintenance" exemption to modification by using a common sense test that assesses four primary factors, the (1) nature and extent, (2) purpose, (3) frequency, and (4) cost of the proposed work. See, e.g., Memorandum from Don R. Clay, EPA Acting Assistant Administrator for Air and Radiation, to David A. Kee, Air and Radiation Division, EPA Region V (Sept. 9, 1988). This approach was upheld by the U.S. Court of Appeals for the Seventh Circuit in WEPCO, a case brought under the first President Bush. Our cases follow these standards.

Although Congress did not authorize EPA to create this "routine maintenance" exemption, the Court of Appeals for the D.C. Circuit ruled, in a challenge to the exemption in the PSD regulations for minor emission increases, recognized that EPA may exempt de minimis activity from the scope of the modification provisions. Alabama Power Co. v. Costle, 636 F.2d at 360-61. See also Natural Resources Defense Council v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) (similar holding regarding the Clean Water Act). Thus, as long as it is construed narrowly, the routine maintenance exemption is legal.

Another change EPA made over a decade ago was to limit the scope of the modification provisions to those modifications that generate a significant increase in pollution. This requirement is essential when one considers the justifications offered by the present Administration for its NSR "reforms." In announcing the NSR changes, EPA has claimed repeatedly that NSR requirements have deterred emissions-reducing projects. In offering this justification, EPA appears to have bought into one of the power industry's favorite arguments against the NSR program -- that the program somehow prevents companies from making efficiency improvements that would benefit the environment. However, efficiency improvements that are environmentally beneficial and reduce emissions do not trigger NSR: if emissions decrease - or even increase only slightly -- existing NSR requirements are inapplicable.

B. The Bush Administration's Proposals

The Bush Administration proposed changes would sanction plant modifications that are far from de minimis. For example, EPA proposes to allow large facilities to operate under a single plant-wide emissions cap (plant-wide applicability limit or PAL) for a period of 10 - 15 years. Unlike what some who support plant-wide caps would require -- that the caps decline over time -- the Administration would allow the caps to remain high. Emissions at such a plant would remain the same throughout the 10 - 15 year period, regardless of changes in air quality, technology, or air quality standards. Because the plant's emissions are set for the duration of the PAL, states likely would be prohibited from imposing emission reduction requirements beyond what the PAL required, regardless of air quality needs.

Similarly, EPA proposes that any unit that has installed "Best Available Control Technology" (BACT) or BACT equivalent since 1990 would not be required to undergo NSR review for a period of 10 - 15 years, unless "allowable" emissions increase. Again, this limit on review of the source's emissions fails to consider evolving air quality needs, and may prevent a state from imposing more stringent emission reduction requirements, even if air quality considerations would justify such measures. Congress's clear intention to have the Clean Air Act stimulate technology improvement will be frustrated.

EPA also proposes several significant revisions in the method by which NSR-triggering emissions increases are calculated. For example, EPA proposes that the baseline for measuring emissions (for facilities other than power plants) become the highest emission level achieved over any two year period during the last ten years. By allowing a source to use a baseline that extends back 10 years, EPA is proposing to permit inflation of the source's baseline, because many regulations in the last ten years have forced sources to reduce emissions. These required emission reductions, however, may not be reflected in the source's baseline generated under the Administration's proposal. Thus, a source would actually be allowed to increase emissions from current levels without any attendant pollution control upgrade.

The most alarming revision proposed by EPA is the wholesale expansion of the Routine Repair and Maintenance (RRM) exception. Specifically, EPA is proposing to allow companies to treat multi-million dollar once-in-a-lifetime projects as "routine maintenance," even though, as industry documents establish, power plant staff never considered the projects routine. EPA is planning to forego pollution control requirements for virtually limitless "like-kind" replacements that would restore and perhaps expand an old plant's capacity and dramatically prolong its life. To accomplish this, EPA proposes to include in the definition of RRM projects that are below a specified cost threshold (inflated to reflect facility replacement cost, not original cost), and that involve installation of replacement equipment that serves the same function and does not alter basic design parameters. The cost threshold test fails to consider air quality and places no limit on any emissions increase the project might produce. Thus, significant increases in emissions could occur with no attendant pollution control requirement. Similarly, the equipment replacement exemption could essentially allow a company to rebuild a source without undergoing any governmental review and without meeting pollution control requirements. Significant emission increases could result.

These impacts have severe consequences for the American public and particularly for the states. EPA's proposal would severely blunt one of the states' most important anti-pollution tools, placing the states in an extraordinarily difficult position regarding their responsibilities under the Clean Air Act. It is the states - not EPA, not the federal government - that have the responsibility for insuring that National Ambient Air Quality Standards (NAAQS) are met. 42 U.S.C. §§ 7404; 7410. Under EPA's proposed revisions, the states stand to lose flexibility in determining how best to achieve or maintain air quality because the largest sources of pollution - which generally are the most efficient to control - will essentially be exempted from regulation.

C. States Will Sue to Prevent this Illegal Rollback of Clean Air Protections

I will do all in my power to prevent the Administration from unilaterally gutting the Clean Air Act. The Administration cannot change the law retroactively as it is seeking to do, it cannot change regulations without adequate notice and comment. And, most importantly, the Administration cannot eviscerate the Clean Air Act without getting Congress to pass legislation allowing such a rollback. As explained above, the CAA itself contains no exemption for routine maintenance. Nor does it exempt like-kind replacement activities, no matter how massive or

infrequent, from the definition of modification. With the statute so clear, the permissible scope for agency-created exemptions is very narrow. When in the Alabama Power case the D.C. Circuit held, following ample Supreme Court and D.C. Circuit precedent, that EPA can exempt de minimis activity, it emphasized that EPA could only exempt the most minor of activities so that the program would be workable administratively. Indeed, the court stated in very strong terms that "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits." Alabama Power, 636 F.2d at 357. The court also held that the power to create exceptions "is not an ability to depart from the statute, but rather a tool to be used implementing the legislative design." Id. at 359.

That is not what the Administration proposes to do. The Administration's proposed changes are far from de minimis. EPA's changes would have the effect of essentially eliminating the applicability of New Source Review to modifications, contrary to the express language of the statute. EPA's announced changes will confer on existing, dirty power plants indefinite immunity from the requirements of the Clean Air Act, contrary to Congress's clear intention when it enacted the NSR provisions twenty-five years ago. This is illegal and for that reason, I -- and I expect to be joined by may other states -- intend to sue EPA if it carries out its plans.

II. The Proposed Changes and the Administration's Hostility to NSR are Already Jeopardizing the Enforcement Cases

If enacted, the Administration's proposed changes would impermissibly undercut existing law and reduce the scope of the Clean Air Act. Simply by signaling its hostility to the NSR program, however, the Administration already has compromised our existing enforcement cases. Indeed, from the day administrations in Washington changed, industry has sought to avail itself of its enhanced bargaining position.

A. The Administration is Overtly Hostile to NSR

Fifteen months ago, the Administration released President Cheney's "National Energy Policy: A Report of the National Energy Policy Development Group." The report directed Attorney General Ashcroft to "review existing enforcement actions regarding NSR to ensure that the enforcement actions are consistent with the Clean Air Act and its regulations." That directive immediately undercut the Department of Justice's lawyers; yet, on January 15, 2002, DOJ concluded that the NSR cases were legally sound.

The Vice President also directed the EPA "in consultation with the Secretary of Energy and other relevant agencies, to review NSR regulations, including administrative interpretations and implementation, and report to the President within 90 days on the impact of the regulations on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection." Over a year later, EPA finally announced its illegal, wholesale administrative rollback of NSR.

In its press statements, EPA claims to be simply "clarifying" the existing regulations and maintains that its proposed rewriting of the law will not affect the filed cases. Indeed, on the day of EPA's announcement, Administrator Whitman explained that EPA would continue its enforcement efforts against past violations, "because you can't get away with violating the law just because the law gets changed." See June 14, 2002 Atlanta Journal and Constitution article "Air Proposals Irk Environmentalists; Bush Plan a 'Massive Gift' to Energy Industry, Critics Say."

Earlier, on March 27, 2002, the Justice Department's environmental chief, Thomas Sansonetti, said that pursuing NSR cases was one of his top priorities. Quoted in the "Daily Environment

Report," Mr. Sansonetti stated: "We're going full steam ahead. We're actively pursuing all cases. When companies refuse to settle, DOJ will take them to trial." He predicted that DOJ would prosecute two or three NSR cases in court in the coming year. He also said that DOJ had budgeted $3 million in the current fiscal year to pursue such cases. I'd like to believe Mr. Sansonetti; his attorneys at the Justice Department have done excellent work on the pending cases and I want to continue our partnership. But his statements were made before EPA announced its retrenchment. Since then, DOJ has been silent as to its future intentions regarding NSR.

B. The Existing NSR Cases are in Jeopardy

Although we agree with the Administration that any new regulations should not be retroactive, it would be naive to believe that industry will not try to use the "NSR reforms" in court to justify their past conduct. We are already seeing the effects of this Administration's misguided and illegal policy changes: settlements are stalled, judges are wondering about the impact of the reforms on their cases, and industry lawyers are already arguing in court that the cases should not go forward. Whether or not the rollback will affect the existing cases is an issue of first impression for the courts because of the unprecedented nature of EPA's action. Never before has EPA - or Congress, for that matter - undertaken such a clear retreat on environmental protection. Conducting such a rollback while enforcement cases under the old rules are pending is not only unprecedented but was unimaginable, at least before this Administration came to power. Simply put, the existing NSR cases are in jeopardy and we are fooling ourselves if we believe that the federal government will be filing more cases after rewriting the regulations to legalize the conduct at issue.

I would like to focus my comments now on three concrete examples of how the Administration's policies are adversely affecting our pending enforcement cases.

1. Cinergy and VEPCO

On November 16, 2000, my office and the EPA reached a $1.2 billion dollar settlement in principle covering eight coal-fired power plants run by the Virginia Electric Power Company (VEPCO) -- one subject to New York's pending lawsuit and seven others that VEPCO brought into the settlement. The settlement would have reduced air pollution by more than 270,000 tons annually. VEPCO was to spend $1.2 billion over 12 years to reduce its sulfur dioxide emissions by 70 percent and its nitrous oxides emissions by 71 percent from pre-existing levels. Further, VEPCO was to pay $5.3 million in penalties to the federal government and an additional $13.9 million to fund environmental benefit projects, with a portion going to New York State. The intent at the time was to finalize the agreement within 60-90 days. Eighteen months later, this agreement remains unexecuted. My staff has spent countless hours in meetings with VEPCO and the federal government, but the regulatory uncertainty has prevented any final agreement. This is a terrible loss for the people of this nation, who expect, and deserve, cleaner air.

Similar delay has beset our effort to reach a final agreement with the Ohio-based utility Cinergy. In December 2000, I joined the federal government and the States of Connecticut and New Jersey in reaching a settlement in principle covering ten of Cinergy's coal-fired power plants (one subject to New York's lawsuit and nine others). We were to see over 300,000 tons in emission reductions, and $30 million in penalties and environmental projects. Like VEPCO, the Cinergy agreement remains in limbo. After tolerating two years of settlement discussions, the Cinergy court has placed the case back on the litigation track. Although DOJ advised the court that it intended to file an amended complaint by July 10, it has not yet done so, raising questions about DOJ's willingness to pursue NSR enforcement cases when its client, EPA, is in the process of

changing the rules.

Although Cinergy and VEPCO have continued to express their interest in settlement, their actions speak louder than words. As might be expected, the softening of EPA's regulatory posture has only hardened Cinergy's and VEPCO's positions on the remaining issues to be worked out. I now see no way for these settlements to become final unless the states and DOJ capitulate on the remaining issues, something that I am not prepared to do.

2. Tennessee Valley Authority case

In 2000, EPA issued a final determination that TVA had violated the NSR requirements of the Act by undertaking enormous and expensive modification projects at several of its power plants. TVA appealed to the Eleventh Circuit, briefs were submitted and oral argument was held this past May. Like many others involved in these cases, I was hopeful that the Eleventh Circuit would issue a quick decision, affirming EPA's determinations. A decision from the Eleventh Circuit would be an extremely important precedent for the other NSR cases.

Instead, in the wake of EPA's recent announcement on NSR "reform," the Eleventh Circuit took the extraordinary step of ordering the parties to mediation. Although we cannot be certain that this order was issued in direct response to the EPA announcement, it is unlikely that the timing of the two events is coincidental.

3. Niagara Mohawk case

On January 10, 2002, Governor Pataki and I filed a lawsuit in federal court against Niagara Mohawk Power Corporation and NRG (the current owner of the power plants) for violating NSR at two power plants in western New York. The Dunkirk and Huntley coal-burning power plants account for more than 20 percent of the nitrogen oxide emissions and 38 percent of the sulfur dioxide emissions released by all power plants in New York State.

The defendants filed a motion to dismiss all or portions of the case on jurisdictional grounds. Briefing was completed and my attorneys were preparing to argue the case. But shortly after EPA's announcement, the judge called us in to explain how the Administration's announced intention to change the NSR rules would affect the existing case. In its brief on this issue (see Exhibit 2), Niagara Mohawk has described EPA as "reconsidering" its position on NSR and recommended that the Court put the case on hold until EPA takes final action on the NSR changes:

In order to consider the merits of the case, the Court would ultimately have to decide whether EPA's interpretation of the Act and regulations, as applied by DEC, is reasonable and in accordance with law. The Court cannot properly make that decision until the EPA decides finally what its interpretation is.

* * *

In short, EPA has said that its recommendations involve clarification of existing law and policy, and definition of a regulatory concept (routine maintenance, repair and replacement) that derives from EPA's interpretation of the Clean Air Act. Accordingly, to the extent that EPA's final action follows its recommendations, its action may affect not only the State's request for prospective injunctive relief, but also its request for penalties for alleged past violations.

Niagara Mohawk also contends that even if the new rules were purely prospective, "they would still affect the State's request for injunctive relief." We think this argument is wrong. When a business breaks the law -- no matter how much influence it may now have inWashington -- the rule of law requires courts to order compliance. However, Niagara Mohawk's argument

evidences a practical problem that judges will face if the Administration succeeds in implementing its "reforms." We expect the courts to find with relative ease that the utilities violated the law. But when it comes time to select a remedy, will they require substantial emission reductions even though the Administration's proposed policy would not require such reductions? Will a practical judge require a company to spend millions of dollars on pollution controls for actions that EPA is now saying do not require such controls? Indeed, now can EPA even ask for that relief with a straight face? If any of these cases go to trial, we might see the payment of some fines for past wrongdoing, but we may be deprived of the emission reductions we so desperately need. More money in the state and federal coffers, while welcomed, will not help us reverse the ravages of acid rain and respiratory disease in New York State and elsewhere. I intend to continue to press forward on this important case. Niagara Mohawk violated the law and we need the remedy of dramatic emission reductions. Unless EPA tries to take away the states' authority to reject the regulatory changes - something I hear may be in the works - New York can continue to implement the law as it has existed for 25 years within New York. But we enjoy no such comfort in our out-of-state cases, where it will be difficult to proceed if EPA pulls the rug out from under us.

III. NSR Needs No "Clarification"

The power industry has always understood the scope of NSR and has never considered the modifications at issue to be routine maintenance. These modifications were large-scale capital projects that required significant advance planning and typically cost millions of dollars; they were intended to fix problems that routine repair or replacement had been unable to address. By contrast, activities considered by industry to be "routine" include relatively mundane actions, such as the day-to-day repair of leaky or broken pipes. In short, the record supplies no basis for the Administration's claims that the law was somehow unclear and that industry was somehow ambushed by our enforcement cases.

A. Industry Officials Originally Distinguished Routine Activities from Upgrades

Industry documents establish that industry officials appreciated the potential applicability of the NSR provisions to their power plant life extension projects. Because of protective orders entered in our various cases, I am unable to quote from most of these documents in my testimony. However, despite the utilities' attempt to cloak their plant life extension projects in secrecy, publicly available industry documents amply demonstrate industry's acknowledgment of the routine maintenance exemption's limited scope. For example, the Babcock and Wilcox company, in its definitive power plant treatise, Steam, Its Generation and Use, distinguished some of the very plant life extension activities at issue in our NSR cases from routine maintenance activities as follows: "Older boilers represent important resources in meeting energy production needs. A strategic approach is required to optimize and extend the life of these units. Initially, routine maintenance is sufficient to maintain high availability. However, as the unit matures and components wear, more significant steps become necessary to extend equipment life." Id. at 46-1 (Exhibit 3). Our cases involve such "more significant," as opposed to the routine maintenance activities that the plants conduct on a day-to-day basis.

Similarly, the American Electric Power Company (AEP) explained to the Ohio Public Utilities Commission that life extension activities go beyond routine maintenance: "As time goes on, the cumulative effects of operation affect more components, and affect those components more severely. Finally, the major subsystems and components reach a stage at which "normal" maintenance and repair become inadequate to support satisfactory continued operation." Direct

Testimony of Myron Adams, AEP's Manager of Integrated Resource Planning, filed with the Public Utilities Commission of Ohio on July 20, 1994 at 20 (Exhibit 4).

Publicly available information likewise demonstrates the magnitude of the projects we have cited in our cases. For example, modifications performed by TVA include projects costing $57 million, $23 million, and $29 million. These modifications required that the affected units be shut down for 13 months, 3 months and 6 months respectively. Another TVA project costing $11 million required construction of a railroad track and a monorail to facilitate the replacement of 44% of the 234,000 square feet of total boiler surface area. At Ohio Edison, the NSR violations include installation of an entirely new and redesigned furnace and burner system - the core of any power plant - at the W.H. Sammis plant, as described in the accompanying article (Exhibit 5).

Documents produced by Niagara Mohawk show that the company originally used the term "routine maintenance" to apply to only a narrow category of work done at the plant. (Exhibit 6 A). In another company document, Niagara Mohawk made clear that work done at the plant for the purpose of extending the life of an electric generating unit concerned "components that are not routinely replaced." (Exhibit 6 B). Indeed, Niagara Mohawk requested that its contractor not include "maintenance" type recommendations in a life extension report for one of the generating units. (Exhibit 6 C).

Industry's complaint that EPA suddenly changed its interpretation of the NSR requirements during the Clinton Administration is similarly contradicted by industry documents dating from the 1980s, which cite particular plant life extension projects as exceeding routine maintenance and therefore triggering the NSR requirements. Thus, in 1984 -- seven years after the enactment of the NSR requirements -- the Electric Power Research Institute (EPRI) held a conference that included the topic of extending the lives of old power plants The conference literature explicitly recognized that "a fossil fuel power plant is designed for a 30-year life," meaning that all plants existing when the NSR/PSD requirements were enacted would reach the end of their useful lives by 2007. (Exhibit 7). Conference attendees then discussed the life extension activities that would be needed. A Duke Power representative stated that keeping the old plants running "necessitated us developing a different approach than routine maintenance" which only keep "the plant in service until the end of its design life." (Exhibit 8).

Similarly, at 1985 and 1986 EPRI conferences, industry representatives recognized that life extension activities transcend routine maintenance:

If plant life extension serves the balanced interests of stockholders and ratepayers, capital improvements and increased attention to equipment above and beyond routine maintenance may be warranted....

It is of primary importance to define the distinction between plant life extension work and routine maintenance.

(Exhibit 9).

B. Industry was Fully Aware that Its Activities were not Exempt from NSR

Not only did industry recognize that plant life extension activities failed to qualify as "routine maintenance," industry also understood that NSR requirements would likely be applicable. For example, an article entitled "Regulatory Aspects of Power Plant Life Extension" -- which was presented at a 1985 industry conference -- expressly discussed the circumstances under which life extension projects could require NSR permits. (Exhibit 10). As a result, EPRI recommended "that corporate counsel be consulted as a part of life extension planning activities, particularly for

the interpretation of regulatory and environmental issues when such activities are clearly beyond the scope of what might be considered typical maintenance." (Exhibit 11)
Rather than seeking EPA's guidance, however, industry simply attempted to conceal its activities. For example, a 1984 EPRI workshop on life extension recommended that life extension projects be described as maintenance activities in order to avoid triggering NSR requirements:
[T]here are a number of issues which require clarification. Several of these are: What is considered 'routine' repair, replacement, or maintenance for the purpose of qualifying for an exemption to the NSPS modification provisions? Some aspects of life extension projects may not be considered routine repair/maintenance/replacement. To the extent possible these projects should be identified as upgraded maintenance programs....

Life extension projects will result in increased regulatory agency sensitivity to facility retirement dates.... Regulatory agencies may contend that since life extension projects will defer the need for new generation, additional pollution control should be required for the older, higher emitting affected plants.

It may be appropriate to downplay the life extension aspects of these projects (and extended retirement dates) by referring to them as plant restoration (reliability/availability improvement) projects. To the extent possible, air quality regulatory issues associated with these projects should be dealt with at the state and local level and not elevated to the status of a national environmental issue.

To the extent possible, project elements should be stressed as maintenance related activities to maximize chances for NSPS exemptions. Utility accounting practices play a significant role here.

(Exhibit 12).

In 1988, EPA issued an applicability determination to the Wisconsin Electric Power Company, or WEPCO, in which EPA determined that WEPCO's multi-million dollar life extension projects were not covered by the routine maintenance exemption. The issuance of the WEPCO interpretation conclusively disabused industry of any notion that it might avoid compliance with NSR requirements. Shortly after EPA issued its WEPCO applicability determination concerning the life extension projects at issue there, the Utility Air Regulatory Group (UARG), a leading industry group, advised its members that "Life Extension is [now] an unpopular term in the wake of WEPCO." (Exhibit 13, p. 2.). Consistent with other industry missives at the time, the memo further recommended against using "the term 'life extension' to describe any project." Id., at 5. The same industry memorandum demonstrates that UARG and its members fully understood EPA's interpretation limiting the routine maintenance exception:
According to UARG, EPA equates 'routine' with 'frequent' . . . . UARG believes that under present EPA policy, in order to qualify for the routine maintenance exemption, the activity would have to be:

* frequent,
* inexpensive,
* able to be accomplished at a scheduled outage,
* will not extend the normal economic life of the unit,
* be of standard industry design.

Id., at 4. UARG also advised its members that if the WEPCO applicability determination were upheld by the courts, it "will set a serious precedent if it is adverse." Id., at 5.

After the WEPCO determination, one of Ohio Edison's in house attorneys and one of the lawyers at the law firm representing Ohio Edison wrote an article explaining that, under the EPA interpretation reflected in WEPCO, Ohio Edison's own plant improvements would be subject to NSR, since: "[a]fter WEPCo, virtually any physical change to an existing facility, even pollution abatement activities and an unpredictable array of repair, replacement, and maintenance projects, can trigger new source control obligations." See June 18, 1990 letter from David Feltner, Senior Attorney for Ohio Edison, to Ms. Cheryl Romo, with enclosed draft article entitled "Is There Life Extension After WEPCo?." (Exhibit 14). (I note that the authors of this article overstate the reach of the NSR requirements by overlooking that the requirements apply only if an emissions increase is projected.) Despite the opinions of its attorneys, Ohio Edison continued to undertake expensive life extension activities at its plants without applying for an NSR permit or otherwise notifying the permitting authorities.

IV. The Role of Congress

Congress need not sit idly while the Administration unilaterally ignores its earlier mandates and jeopardizes public health and the environment. As I've said, I will fight these changes; I urge you to do so as well.

First, while I can go to the courts, you have a greater ability to ensure this rollback does not occur. Any litigation I bring may take years to be resolved. You can act strongly and quickly. I urge you to pass specific legislation, this session, that would expressly prohibit the Administration from proposing or finalizing any new exemptions from NSR, including those that EPA has announced.

Second, I urge you not to be seduced by the Administration's claim that NSR can be replaced by the Administration's so-called "Clear Skies" initiative. That plan is an inadequate substitute for existing law and a wholly unsatisfactory alternative to Senator Jeffords's "Clean Power Act." At the outset, I note that "Clear Skies" is still no more than a press release. Although months have elapsed since the "Clear Skies" replacement for NSR was announced, no plan has even been introduced in Congress. Many of us took note of Administrator Whitman's criticism of the "Clean Power Act," which she dismissed on the grounds that it is unlikely win Congressional approval. I would point out that Senator Jeffords's legislation has been introduced, and has passed the Senate Environment and Public Works Committee -- so it is at least two steps ahead of "Clear Skies."

Even if the Administration were serious about "Clear Skies," the pollution reductions that program would offer are too little, too late: the caps are too high and would not take affect until the distant future.

To be blunt, the "Clear Skies" caps are based on little more than politics. They do not guarantee compliance with air quality standards. The caps certainly are not based on sound science. Every month, another study shows the need to reduce pollution more aggressively. For example, a recent study finds new links between fine particulate matter (PM) and cancer.

Nor does technical feasibility stand in the way of higher caps. More aggressive SO2 and NOx cuts are clearly technically feasible even with existing technology. Nor is it a question of rates that consumers must pay for power. The Department of Energy itself determined that the country could cut NOx and SO2 by 60-80% by 2010 with virtually no rate impact. See Energy Information Administration, Analysis of Strategies for Reducing Multiple Emissions from Power

Plants: Sulfur Dioxide, Nitrogen Oxides, and Carbon Dioxide (December 2000).

The Administration tries to sell its plan by using faulty comparisons to current emissions. Don't be deceived. Even at their end point, the Bush pollution caps would be 50% higher than, for example S.556, the Clean Power Act, or EPA's own initial proposal. This 50% is roughly equivalent to all emissions produced within the State of Ohio, a leading producer of emissions. This difference alone could lead to hundreds, and perhaps thousands, of additional deaths each year. Under the Administration's program, states will find it far more difficult, if not impossible, to attain their mandated air quality standards.

Under the Administration's program, many dirty old plants will remain uncontrolled. In 1977, when it enacted the NSR provisions, Congress clearly expected that all plants would be controlled by 2018 - over 40 years after the 1977 amendments made the NSR requirements applicable to plant modifications. However, if all plants were controlled with "best available control technology" by 2018, the SO2 cap would be below 2 million tons, not 3 million tons as contemplated by "Clear Skies."

Moreover, the "Clear Skies" caps would not be fully phased in until the 2020's. Even EPA's own graphs acknowledge that pollution levels will not reach the cap level by the Administration's announced target dates. While EPA speaks instead of incentives for early reductions, the flip side of early reductions is late compliance. Under the Administration's program, any cuts now can be banked, ton-for-ton, to offset subsequent emissions. We should insist on early reduction and caps that are lower and take effect sooner.

Finally, the Administration's claim that the President's plan achieves more reductions than current law is directly contrary to what EPA and the Department of Energy found when they included the emission reductions attributable to full enforcement of the New Source Review provisions. See, e.g., Energy information Administration, Analysis of Strategies for Reducing Multiple Emissions from Power Plants: Sulfur Dioxide, Nitrogen Oxides, and Carbon Dioxide (December 2000). Furthermore, in its analysis, EPA ignores the emission reductions that will result under current law from other programs, such as the regional haze rule, the mercury Maximum Available Control Technology (MACT) requirements and the new ozone and particulate matter standards. Thus, the Administration is not comparing its proposal to the Clean Air Act as it is now written and as it should be implemented and enforced. Comparing Clear Skies to a Clean Air Act that is ignored or eviscerated is WorldCom-style math at best.

I support the "Clean Power Act" because we need swift and significant reductions in sulfur dioxide, nitrous oxides, mercury and carbon emissions. I am especially supportive of including carbon in the four pollutant legislation and commend Senator Jeffords for working so hard on this legislation. The Administration finally admits that global climate change is happening. Unlike the Administration, however, Senator Jeffords has a plan of action. I urge you to pass the Jeffords "Clean Power Act."

Conclusion

Allow me, and others who are serious about environmental law enforcement, to continue to use the Clean Air Act to reduce pollution. That is what Congress intended when it adopted New Source Review twenty-five years ago. Don't allow the most serious attack on the Clean Air Act since it was adopted to succeed. Don't allow the product of 30-plus years of bi-partisan cooperation on clean air to be cast aside.