Testimony of

Mr. Eric Schaeffer

July 16, 2002

Thank you, Mr. Chairman and Members of the Senate Environment and Judiciary Committees, for the opportunity to testify today. I am presently Director of the Enviromental Integrity Project at the Rockefeller Family Fund, a nonprofit organization dedicated to fair enforcement of our nation's environmental laws. Until this February, I was Director of EPA's Office of Regulatory enforcement, a position I held for five years.

Last month, the Administration unveiled its program to effectively repeal the New Source Review (NSR) provisions of the Clean Air Act. I would like to briefly highlight why the Administration's proposal is unlawful, threatens public health, is premised on an energy shortage that does not exist, and undermines enforcement of the Clean Air Act.

Twenty five years ago, Congress exempted existing coal-fired power plants, refineries, and other facilities from the strict permit and pollution control requirements all new operations had to meet. Under the law, the exemption for these so-called "grandfathered plants" ends whenever a facility is physically modified in a way that increases its potential to emit above a minimal amount. EPA has recognized an exemption for routine repairs to prevent ordinary maintenance activities from triggering permit review. Because this exception was created by EPA and does not appear in the law itself, it must be read narrowly under the federal rules of statutory construction.

Federal courts have taken this law much more seriously than the Bush Administration, beginning with the landmark Alabama Power decision by the D.C. Circuit Court of Appeals more than 20 years ago. That decision rejected EPA's effort to carve out an exemption for certain sources, holding:

Implementation of the statute's definition of "modification" will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for de minimis increases. The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit.

The 7th Circuit Court of Appeals adopted the same broad reading of the law in finding that Wisconsin Electric Power Company had violated New Source Review. And the Justice Department, when enforcing the rules, reminds defendants that their exemption is temporary and ends when a physical modification increases pollution.

Why does New Source Review matter? Because older plants still claiming to be exempt from the law after 25 years are responsible for the lion's share of some of our worst pollution. For example, coal fired power plants, almost all built before 1977, are responsible for 2 out of 3 tons of sulfur dioxide and a quarter of the nitrogen oxide from all sources. According to national

epidemiological studies by the American Cancer Society, the Health Effects Institute, the Harvard School of Public Health and others, these pollutants form fine particles now associated with high levels of premature death among exposed populations.

In 1999, the Justice Department filed lawsuits against eight power companies responsible for over 20% of the sulfur dioxide emissions in the U.S. for violating NSR requirements. An Abt Associates study, using EPA models and the most conservative of a range of choices, estimates 5,900 premature deaths a year from power plants owned by just these eight companies. That analysis has recently been validated by Jonathan Levy of the Harvard School of Public Health. EPA's expert witness, Professor Morton Lippman of the New York University School of Medicine, estimates more than 420 premature deaths a year are caused by the Illinois Power Baldwin plant alone - then cautions that this is likely an underestimate. The steady drumbeat of bad news from public health experts should push the EPA to treat this matter with some urgency by stepping up its enforcement against big polluters responsible for this problem.

What has the Bush Administration done instead? It has announced changes to New Source Review last month to carve new loopholes, turn the law on its head, and promise eternal life to some of the worst polluters in the country. For example, the Agency proposes to treat as routine repair, "replacement of existing equipment with equipment that serves the same function and does not alter the basic design parameters of a unit." In other words, you can rip out and replace all the major components of a utility boiler - over and over - no matter how expensive, complex, or time consuming these modifications are. And if that's not enough, you'll also get an exemption for any project to, "facilitate, restore or improve efficiency, reliability, availability or safety within normal facility operations." Contrary to the plain meaning of the law, almost every project would be exempt from the definition of a physical modification that requires permit review and pollution control. These changes take an administrative exception for routine repair not found in the law that courts insist must be read narrowly, and expands it until it swallows the law whole.

Almost as bad, the Administration has turned back the clock by allowing companies to look back ten years, pick the 24 months in which their pollution peaked, then keep polluting at those levels for the next decade and beyond. Rather than ratcheting pollution down, this proposal creates a kind of property right in pollution that can be used to avoid permit review and pollution control. Given what we know about the damage to human health, why create a new entitlement to actually increase pollution above current levels?

EPA offers several half-hearted explanations for this gutting of the Clean Air Act. My personal favorite is that NSR gets in the way of energy growth, and keeps power companies from maintaining their capacity. But according to the Department of Energy, 2001 set a new record for power plant growth, and we have so much capacity that new plants are being delayed or canceled. Another Department of Energy Report, prepared for Congress in 2000, found that electricity prices would not increase even if all coal-fired plants above 20 megawatts had to put on modern pollution controls within five years. Power companies keep telling us that they will lose generating capacity because NSR makes them afraid to keep their plants in repair. But even the 43 power plants targeted by EPA in its complaints show no real decrease in capacity between 1998 and 2002, according to information available on the companies' own websites.

What about refineries? Again, the Department of Energy tells us that distillation capacity in U.S. refineries has increased from less than 16 million barrels a day in the mid 1980's to nearly 18 million barrels today. And U.S. refineries have expanded 50% over the same period, from an average capacity of 46,000 barrels a day to 73,000 barrels. In other words, the greatest periods of growth in our capacity to generate electricity and refine oil have occurred exactly when enforcement of New Source Review requirements was at its peak. So much for the argument that NSR inhibits energy supply.

Another argument you'll hear is that New Source Review gets in the way of projects that decrease emissions. But the law doesn't even apply unless your project is expected to increase emissions, which is why the Agency doesn't offer much more than innuendo and a couple of anecdotes to support this red herring. EPA's enforcement cases demonstrate that many of these projects increased emissions many times above the minimal amounts allowed by law. And the Administration's proposals - by exempting every project as routine no matter how much emissions increase, and by allowing refineries to ratchet pollution back up to their highest levels in 10 years - hardly provide an incentive to reduce pollution.

The Administration would have us believe that New Source Review does little for the environment. But the reductions in sulfur dioxide from refinery enforcement cases, and from just two power plant settlements (TECO and PSE&G) come to 220 thousand tons a year, as much as the emissions from all power plants in the state of New York. Add the Dominion and Cinergy agreements, on track until derailed by the Bush Administration, and you get another 400,000 tons of sulfur dioxide a year. That's more than 600,000 tons from just a handful of cases in less than a two year period. So much more could be accomplished if the Administration weren't so determined to stop enforcing the law.

The Bush Administration and the energy lobby argue that New Source Review is just too confusing to comply with. I invite you to read the transcript of the TVA trial, as well as the many documents that EPA has gathered in the course of its investigations. When asked if the some of the gigantic projects targeted by EPA's enforcement qualified as routine repair or ordinary maintenance, TVA's own plant supervisors admitted they did not. Read the court's decision in the Murphy Oil case, in which the judge blasted refinery managers for hiding emissions increases to avoid NSR requirements. The evidence shows that these companies knew full well the risks they were taking. They gambled with the law and lost. Now they have the arrogance to demand that the government cover their losses by changing the rules to their liking.

Finally, there's the Bush "Clear Skies" proposal, featuring a snazzy website and colorful charts, but no actual legislative language. Clear Skies, of course, applies only to power plants and asks nothing of refineries, pulp mills, and other factories that will benefit from EPA's new, polluter-friendly interpretation of the Clean Air Act. For power plants and refineries, EPA enforcement actions would cut sulfur dioxide emissions about 70% over the next ten years, as does North Carolina's new state law. The Bush Administration thinks we should take about 20 years to get that much from power plants, and proposes nothing but Clean Air rollbacks for refineries and other polluters. The Administration is free to make its case, but ought not to blackmail Congress and the public by refusing to enforce the law until it is changed to the energy industry's liking.

Given the Administration's policy changes and vague and conflicting statements by the Administrator of EPA, what is to become of the cases filed by the Justice Department? Mr. Sansonetti, the Assistant Attorney General for Environment and Natural Resources at the Justice Department, has argued that the Clean Air Act is broad and the exemptions narrow, but the Bush Administration now suggests exactly the reverse. Mr. Sansonetti and the Justice Department have argued that industry understood well the requirements of the law, while his own Administration is insisting the law is too complex to understand. Mr. Sansonetti and the Justice Department have argued that New Source Review is fundamental to environmental protection, while the Bush White House pretends it doesn't matter at all.

At you can tell from my testimony, I don't think much of the Administration's proposals or the arguments its offers to support them. President Bush has the right to recommend that Congress weaken the Clean Air Act. What is most disturbing is the spectacle of large companies - some of the biggest and wealthiest in America - avoiding enforcement of the law by getting their friends in power to change it in their favor. By all means, let's have an honest debate on the future of the Clean Air Act. But in the meantime, I hope you will insist that the environmental laws you have written be enforced when they are not obeyed.