

Testimony of

The Honorable Patrick Leahy

July 16, 2002

Good morning to all of you and thank you for attending this joint hearing of the Senate Environment and Public Works Committee and the Senate Judiciary Committee.

Before I move to the hearing itself, let me take a moment to mention that the record for this hearing will be open for two weeks from today and that any follow-up questions that Senators wish to pose to our witnesses today will be accepted if sent to committee staff within the next week.

I want to extend my sincere thanks to my co-chair and fellow Vermonter, Senator Jim Jeffords, for his help in putting this hearing together as well as to my good friend from the Granite State, Ranking Republican Bob Smith. And of course, I would like to thank this committee's Ranking Republican Member, Orrin Hatch.

While I am disappointed Administrator Christie Whitman did not join us today, I would very much like to thank the Administration's representatives for taking time to be here and the state attorneys general who have each traveled long distances to be present. In particular, I would like to recognize my good friend, Vermont's Attorney General William Sorrell. Thank you so much for being here. Finally, I would like to thank the many witnesses that are present to testify today - your time is much appreciated by both committees.

Our committees have come together for this special session today because the issue we are discussing -- the Administration's proposed revisions to the Clean Air Act's New Source Review regulation (or NSR) -- is not just about the future of our air quality, it is about enforcing the law.

Written in 1977, New Source Review was a part of an agreement to give corporate energy companies a temporary grace period before they adopted modern Clean Air Act standards at their facilities.

The Clean Air Act exempted, or "grandfathered," pre-1977 industrial facilities from immediate installation of modern pollution controls, requiring them to do so only when they made significant modifications to their sites and increased emissions.

This was a fair - and generous - concession that gave corporate energy companies the benefit of the doubt and trusted that they would use future modification upgrades to not only extend the life of their plants, but also to clean up the air.

Sadly, several of the largest corporate energy companies completely abused our trust, upgrading old, dirty plants on the cheap, and ignoring the required air pollution controls - controls required by the New Source Review regulation.

For more than 25 years, these irresponsible polluters have chosen to save money by allowing their 1950's era plants to belch hundreds of thousands of tons of excess pollution into the air, including harmful toxins such as mercury. Vermont and other states have paid the price, with decades of acid rain and mercury deposits in our soils, our lakes, and our rivers.

Some of us here were among the strongest supporters of the actions by former President Clinton's Environmental Protection Agency and Department of Justice that recognized and documented this corporate abuse, cracking down on our nation's most flagrant NSR violators in 1999.

The owners of these facilities happened to be some of the largest, and wealthiest, corporate energy giants in the country, especially those in the utility sector.

On the chart behind me, you can see for yourself the incredible amount of annual emissions emitted by eight of these companies. Three of them - American Electric Power, Southern Company, and Tennessee Valley Authority -- exceed the corporate average emissions for the nation's top 100 utility companies' emissions by five to eight times.

The Clinton lawsuits were landmark enforcement cases against the largest corporate air polluters - especially those in the utility sector - and set the stage for a multi-billion dollar settlements by those companies and hundreds of thousands of tons of annual pollution reductions. These, in turn, paved the way for numerous settlements with refineries around the country. While these were smaller cases in terms of fines and pollution reductions, they were and are significant cases for those communities living under the cloud of refinery smog.

Yet, as you may imagine, the largest of these corporate polluters did not like being caught - especially when it meant billions of dollars in fines.

So, last year, they went to the new Bush Administration for relief - relief from a regulation they had circumvented for more than a quarter of a century. Lobbyists for the biggest corporate polluters complained that the Clinton Administration's lawsuits were in error and that they had done nothing wrong.

Their explanation for why they continued to operate ancient, pollution-spewing facilities was simply that they have never performed major maintenance -- only "routine maintenance" -- to their facilities for the past 25 years. As you might guess, "routine maintenance" does not trigger the pollution controls of NSR.

This justification is so transparent that one would think it would not, should not, even pass the laugh test. Yet this Administration obviously saw it differently.

Meeting behind closed doors in secret meetings that have yet to be fully disclosed to Congress or to the American public, Vice President Cheney's Energy Policy Task Force created this document and sent it to the President in May 2001.

Tucked within its pages is a short paragraph, recommending a "review" of the NSR regulation by the Department of Justice and the Environmental Protection Agency.

It cannot be understated that this recommendation to review NSR by Vice President Cheney's Task Force was a huge victory for corporate polluters. With it, the path was clear for corporate energy lawyers to get their clients off the hook. As quoted in the New York Times earlier this year, one energy lawyer - who chose to remain anonymous -- revealed the strategy:

"The thinking was," he said, "how can you do things that will influence the NSR issue and the pending litigation? If the administration recants NSR provisions, the lawsuits fall apart."

And that is exactly what has happened. Last month, the Environmental Protection Agency proposed sweeping revisions to the New Source Review regulation - revisions that could have been written in corporate energy boardrooms or by the legal teams for corporate NSR violators.

And despite pledges by Bush Administration officials that these revisions would not change the course of pending litigation against NSR violators, we are already seeing the effects of this rollback.

Two of the largest utility cases that had been settled "in principle" in early 2000 under the Clinton Administration - Cinergy and VEPCO -- remain stalled to this day. Those cases would have required \$2.6 billion dollars in fines and the reduction of more than 800,000 tons of pollution.

And the case that has been called the "bellwether" case to set the precedent for all litigation against illegal pollution from coal-fired powerplants -- U.S. vs. Tennessee Valley Authority - was recently sent to mediation. This action by the judge was a surprise to all involved and is a much weaker outcome than had been expected before the NSR revisions were publicized.

By all accounts, the mediation ruling occurred because of publicity surrounding EPA's revision to the NSR regulation.

As you can see on the chart behind me, early estimates of this case might have ended in settlement and would have held TVA responsible for well over \$1 billion in fines to the American people.

This issue is not an obscure regulatory battle - the relaxation of the Clean Air Act has made headlines for months and was a lead story in today's Washington Post, with the headline "Bush Plan to Ease Clean Air Rules Roils Court Cases Against Utilities."

We will hear much more about the details of this issue in today's hearing.

I believe the American people will be listening for this Administration to explain itself. The dismantling of these lawsuits did not happen by itself. The gutting of these lawsuits was either done in a calculated and planned manner or it was a product of complete Administration incompetence and lack of foresight.

At a time when the American people are calling for tougher government action against corporate abuse, this Administration needs to be held accountable for its rollback of our nation's clean air laws for the benefit of the wealthiest, largest, dirtiest corporate polluters and, sadly, at the expense of the American people.

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