

Testimony of

# **The Honorable Thomas L. Sansonetti**

July 16, 2002

## **INTRODUCTION**

Chairmen Jeffords and Leahy, and Members of the Committees, I am pleased to be here today to discuss the Department of Justice's enforcement activities on behalf of the Environmental Protection Agency's New Source Review or "NSR" program. We take the health impacts of air pollution seriously and view our enforcement activities in this area as an important part of the effort to clean up the air that Americans breathe and to protect public health and the environment. Accordingly, we in the Department's Environment and Natural Resources Division are continuing to prosecute vigorously a variety of actions in connection with the NSR program. In my testimony today, I will give you some background on the NSR enforcement litigation in general and then discuss in greater detail our enforcement activities in this area. One of the points that I want to convey to you is that there is much more to this program than regulation of power plants, and that we have taken a broad-based enforcement approach encompassing a number of industries. This approach has resulted in significant gains for public health and the environment across the United States. In addition, although I will not be discussing it in further detail, the Committees should be aware that the NSR litigation is only one part of the Environment and Natural Resources Division's enforcement docket. We have many other enforcement actions focusing on other, non-NSR related portions of the Clean Air Act, such as violations of permits, State implementation plans, New Source Performance Standards, and National Emission Standards for Hazardous Air Pollutants. In addition, we are also actively prosecuting violators of the Clean Water Act, the Safe Drinking Water Act, the hazardous waste laws and a variety of other environmental laws. We are committed to vigorous enforcement of all of the environmental laws as well as violations pertaining specifically to the NSR program.

## **HISTORY OF NSR ENFORCEMENT LITIGATION**

In 1977, Congress amended the federal Clean Air Act to add certain provisions which have come to be known as the New Source Review or "NSR" provisions. The NSR provisions actually have two parts -- the Prevention of Significant Deterioration provisions, which apply to areas in attainment status for national ambient air quality standards, and the New Source Review provisions proper, which apply to areas that are in non-attainment status. See 42 U.S.C. § 7470 et seq. and §7501 et seq. Both sets of provisions require that both newly-constructed sources of air pollution and existing sources that undergo "modification" obtain an NSR permit and install state-of-the-art pollution control technology. The Act defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or results in the emission of any air pollutant not previously emitted." 42 U.S.C. §§ 7411(a)(4), 7479(2)(C), 7501(4). If the source is in an attainment area, it must use the best available pollution control technology, but if it is in a non-attainment area, it must use the more stringent lowest achievable emissions reduction technology. 42 U.S.C. §§ 7475(a)(4), 7503(a)(2).

In the late 1980's, the Department of Justice began bringing enforcement actions for NSR

violations against facilities that made "modifications" without obtaining a permit or installing state-of-the-art pollution controls. Our primary goal in these actions has been, and continues to be, the protection of public health and the environment by compelling facilities that are in violation of the law to install state-of-the-art pollution controls. We also seek the imposition of appropriate civil penalties for past violations, as an important component of our efforts to discourage non-compliance and to ensure a level playing field between those who comply with the law and those who fail to do so.

Over time, working with our colleagues at EPA, we developed a strategy of targeting industries that had significant compliance problems with regard to NSR requirements and that were major sources of air pollution. These industries included the wood products industry, refineries, and coal-fired utilities. I would like to describe just a few of our recent successes in these sectors.

#### Wood Products Industry

The first industry on which we focused in our NSR enforcement efforts was the wood products industry. Our first actions concerned single facilities. See *U.S. v. Louisiana-Pacific Corp.*, 682 F.Supp.1141 (D.Colo.1988). We subsequently filed another action against Louisiana Pacific, which was resolved in 1993 by a consent decree that required the company to install pollution controls at its facilities nationwide and to pay a civil penalty of \$11 million. Since that landmark settlement, we have had a string of successes in obtaining similar settlements from other major wood products manufacturers, such as Georgia Pacific and Willamette Industries. In fact, I was privileged to announce our most recent success in this sector just a few months ago. In March of this year, we filed a consent decree with wood products industry giant Boise Cascade Corporation that will require reductions of up to 95 percent of the harmful emissions from the company's eight plywood and particle board plants, located in Oregon, Washington, Louisiana and Idaho. Boise Cascade will also pay \$4.35 million in civil penalties and has agreed to spend another \$2.9 million in supplemental controls to reduce emissions at various plants. The State of Louisiana, which joined us in bringing this action, will receive a portion of the civil penalty.

#### Refineries

We have also been very successful in reaching settlements for NSR violations with several major refiners. After prevailing at trial on the issue of liability, we joined with the EPA and the Wisconsin Department of Justice in January to announce a settlement with Murphy Oil USA, Inc., which will dramatically cut sulfur dioxide ("SO<sub>2</sub>") emissions from the company's Superior, Wisconsin refinery, and will also improve Murphy Oil's programs to monitor and repair leaks of volatile organic compounds and to prevent oil spills. Murphy will also pay a \$5.5 million civil penalty, the largest ever leveled in Wisconsin in an environmental enforcement case; the State of Wisconsin will receive \$750,000.

Also, last December, we announced comprehensive environmental settlements with Conoco Inc., Navajo Refining Company and Montana Refining Company that are expected to reduce harmful air emissions from seven U.S. petroleum refineries by more than 10,000 tons per year. One consent decree required Conoco to spend an estimated \$95-\$110 million to install the best available technology to control emissions from stacks, wastewater vents, leaking valves and flares throughout its refineries, while the other required Navajo and Montana Refining to spend an estimated \$16-\$21 million to undertake similar projects. The states of Louisiana, Oklahoma, Montana, Colorado and New Mexico joined the settlements and are sharing in the civil penalties obtained. Attorney General Ashcroft stated that "[t]hese settlements are a victory for the environment and the public," and that "[t]hey exemplify the U.S. government's commitment to protect our natural resources, to promote cleaner air and to ensure that companies are complying

with environmental law."

These are only a few of the many settlements that we have reached with major refiners in the last eighteen months and that will ensure cleaner air nationwide. Cumulatively, these settlements cover 37 refineries and 30.6% of the nation's domestic refining capacity, and are expected to reduce air emissions of nitrogen oxides and sulfur dioxide by more than 150,000 tons per year. These settlements also include provisions to facilitate the production of low sulfur gasoline and diesel fuel, enhance flexibility, and expedite permitting necessary to address future needs.

#### Coal-Fired Utilities

The Department filed seven enforcement actions in 1999 against the owner and operators of coal-fired power plants located in Illinois, Indiana, Ohio, West Virginia, Virginia, Georgia, Alabama, and Florida, and three additional actions since then for plants located in North Carolina, South Carolina, Alabama, and New Jersey. So far, we have reached settlements with the Tampa Electric Power Co., and agreements-in-principle with Virginia Electric Power Company and Cinergy, under which these companies agreed to install and operate state-of-the-art pollution controls on significant portions of their entire coal-fired generating systems.

Our most recent success in this area came in January, when we joined forces with the State of New Jersey by filing an action against and reaching a settlement with PSEG Fossil LLC. Under that settlement, PSEG will spend over \$337 million to install state-of-the-art pollution controls to eliminate the vast majority of sulfur dioxide and nitrogen oxide emissions from its Mercer and Hudson coal-fired power plants in Jersey City and Hamilton, New Jersey. The combined effect of the pollution controls will reduce the company's emissions of sulfur dioxide (SO<sub>2</sub>) by 90 percent and its emissions of nitrogen oxides (NO<sub>x</sub>) by more than 80 percent. Overall reductions will be at least 36,000 tons of SO<sub>2</sub> and 18,000 tons of NO<sub>x</sub> per year. These decreases represent 32 percent of all the SO<sub>2</sub> and 20 percent of all the NO<sub>x</sub> emitted from stationary sources in New Jersey, and 19 percent of all the SO<sub>2</sub> and 5 percent of all the NO<sub>x</sub> from all sources in the state, including cars and trucks. In addition to the pollution reductions secured by the settlement, PSEG Fossil agreed to pay a civil penalty of \$1.4 million and to spend at least \$6 million on three pollution reduction projects that will partially offset the impact of past emissions. As the Attorney General stated, "This important settlement reflects our continuing commitment to enforce vigorously the Clean Air Act to protect public health and the environment."

#### CURRENT STATUS OF PENDING NSR ENFORCEMENT ACTIONS

We currently have eleven pending enforcement actions in which NSR violations are the main issue. Eight actions involve coal-fired power plants, and the remaining three involve other industries.

Of the eight pending power plant cases, five are currently in active discovery on liability issues. The first of the five (U.S. v. Southern Indiana Gas & Electric Co. ("SIGECO")) is scheduled to go to trial later this year in October. In the other three pending power plant cases, the parties are either engaged in settlement negotiations (U.S. v. Cinergy Corp. in Indiana) or discovery has been stayed because the district courts are awaiting the Eleventh Circuit's decision in TVA v. EPA. (U.S. v. Georgia Power Co. and Savannah Power Co. in Georgia and U.S. v. Alabama Power Co. in Alabama). TVA v. EPA is a challenge by TVA to EPA's 1999 administrative order directing TVA to install pollution controls at coal-fired power plants in Kentucky, Tennessee and Alabama that have undergone modifications. Although that case has been fully briefed and was argued in May 2002, the Eleventh Circuit has not reached a decision and recently referred the case to mediation until the end of August.

Seven northeastern States (New York, New Jersey, Connecticut, Vermont, New Hampshire,

Massachusetts, and Rhode Island) and Maryland have joined as plaintiffs in one of the enforcement actions against coal-fired power plants (U.S. and State of New York et al. v. American Electric Power Co. et al.) New York, New Jersey and Connecticut also joined as plaintiffs in U.S. and State of New York et al. v. Ohio Edison Co. et al. and in U.S. v. Cinergy Corp.

A number of citizen and environmental groups also have joined as plaintiffs in four of the enforcement actions against coal-fired power plants. Citizen plaintiffs in U.S. and State of New York et al. v. American Electric Power Co. et al. include Ohio Citizen Action, Natural Resources Defense Council, Sierra Club, Clean Air Council, U. S. Public Interest Research Group, Izaak Walton League of America, National Wildlife Federation, Citizens Action Coalition of Indiana, Hoosier Environmental Council, Valley Watch, Inc., Ohio Valley Environmental Coalition, West Virginia Environmental Council, Indiana Wildlife Federation, and the League of Ohio Sportsmen. Citizen plaintiffs in U.S. v. Duke Energy Corp. include the North Carolina Sierra Club, North Carolina Public Interest Research Group, and Environmental Defense. Citizen plaintiffs in U.S. v. Georgia Power Co. include Physicians for Social Responsibility, Campaign for a Prosperous Georgia, U.S. Public Interest Research Group, and the Alabama Environmental Council. The Alabama Environmental Council is also a plaintiff in U.S. v. Alabama Power Co. Finally, Hoosier Environmental Council and Ohio Citizen Action have joined as plaintiffs in U.S. v. Cinergy.

#### THE ATTORNEY GENERAL'S NEW SOURCE REVIEW REPORT

In May 2001 the National Energy Policy called for the Attorney General to "review existing enforcement actions regarding new source review to ensure that the enforcement actions are consistent with the Clean Air Act and its regulations." This review was conducted by the Department of Justice's Office of Legal Policy, which issued its report in January 2002 ("New Source Review: an Analysis of the Consistency of Enforcement Actions with the Clean Air Act and Implementing Regulations"). The Office of Legal Policy determined that "the existing enforcement actions are supported by a reasonable basis in law and fact," and that the Department's Environment and Natural Resources Division "will continue, as it has during the pendency of this review, to prosecute vigorously the EPA's civil actions to enforce the new source review provisions." OLP New Source Review Report, January 2002, p. vi. I should also note that our determination does not mean that EPA cannot revise NSR regulations in the future. As OLP said in its report: "The effect of the Department's conclusion is retrospective. It examines only currently pending enforcement actions to determine their lawfulness, and expresses no opinion on how the Clean Air Act should be enforced in the future. Those policy determinations rest with the EPA."

#### CONCLUSION

In closing, I would like to assure these Committees that the Department of Justice takes very seriously its obligation to enforce the existing laws and to protect public health and the environment. As directed by the Attorney General, we will continue to vigorously prosecute the NSR enforcement actions and to defend the action brought by TVA against EPA to the full extent of the law. I would be happy to answer any questions that you may have about my testimony.