

EPA's Smoke Screen:

**How Congress Was Given False Information
While Campaign Contributions and Political Connections
Gutted a Key Clean Air Rule**

Executive Summary



**Congress Watch
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Acknowledgements

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A Bush appointee at the Environmental Protection Agency (EPA) gave false and misleading testimony to two U.S. Senate committees when asked whether revisions to air quality rules would threaten current and future lawsuits against companies whose coal-fired electric-generation plants have been responsible for “massive” pollution.

Responding to similar inquiries from the Senate committees, another Bush appointee overstated the enforcement record of the Department of Justice (DOJ) regarding lawsuits and notices of violation filed against electric utilities operating coal-fired plants.

Electric utility companies that faced air quality lawsuits were among the earliest financial supporters of President Bush’s 2000 campaign. Subsequently, their representatives were included on Bush’s Department of Energy (DOE) transition team and granted extensive access to Vice President Dick Cheney’s secretive task force on national energy policy.

In 2001, Cheney’s task force recommended that the EPA reassess the air quality rules which were the basis of lawsuits against nine electric utilities. In August 2003, the EPA implemented new, severely weakened rules that neutralized existing and future suits.

At the center of the dispute is the New Source Review (NSR) rule, which had required utilities to install modern anti-pollution equipment when making major upgrades to old coal-fired power plants that significantly increased emissions. Under the newly relaxed regulations announced by the EPA in late August, the NSR requirement will not be triggered if a modification amounts to less than 20 percent of the cost of the entire production line. Worse, a loophole in the new rules could allow companies to systematically replace entire generating plants without triggering NSR – regardless of how much the replaced plants would increase air pollution.

According to an EPA consultant, violations at 51 coal-fired plants that triggered the NSR lawsuits were responsible for “massive amounts of air pollutants” that were to blame for 5,000 to 9,000 premature deaths and 80,000 to 120,000 asthma attacks every year. The EPA estimates that bringing the coal-fired plants into compliance would have reduced air pollution by nearly 7 million tons annually – 50 percent of all the air pollution produced by electric utility power plants in the United States.

The new NSR rule clearly impairs the ability of the government to obtain favorable settlements or judgments against companies that have violated the rule in the past. And after the new rule was implemented in August 2003, the EPA said it is unlikely that it will bring new compliance suits based on violations of the previous NSR rule – despite the record of violations under the previous rule and the opportunity to prevent million of tons of emissions from old coal-fired plants.

This investigation into how the Bush administration rewrote air quality rules to suit the interests of the president’s campaign donors and fundraisers in the electric utility industry has found:

- **A Bush appointee gave false testimony to Congress about the EPA’s assessment of how NSR revisions would affect ongoing lawsuits.** In sworn testimony, political appointee Jeffrey Holmstead, assistant administrator for the Office of Air and Radiation, told two Senate committees that the EPA’s enforcement office had concluded that lawsuits against nine utilities for violating the Clean Air Act would not be undercut by changes to NSR regulations. In fact, two former senior EPA career officials say the consensus in the enforcement office was the opposite: that the staff felt changes would directly harm the cases.

An EPA analysis obtained by Public Citizen shows that the enforcement office examined 10 violations cited in an Ohio case and concluded – four months *before* Holmstead testified – that “not one would remain in violation” under the new NSR rule.

The former head of enforcement at EPA says she briefed Holmstead and EPA Administrator Christine Todd Whitman that the proposed new NSR rule seriously endangered enforcement cases. Another former EPA enforcement official says he told Holmstead and Bill Wehrum, Holmstead’s chief counsel the same thing. But in July 2002, Holmstead told a joint hearing of the Senate Environment and Public Works and the Judiciary Committees otherwise.

During his testimony, Holmstead also cited data downplaying the effectiveness of the previous NSR interpretation, even though his statistics directly contradicted EPA documents that had found NSR was producing significant emissions reductions.

- **Electric utilities facing NSR lawsuits have used the new rulemaking as part of their defenses.** In January 2003, an Indiana electric utility, SIGECO, argued in court that its NSR violations were exempt under the anticipated new rule – seven months before the new rule was implemented. Dynegy used a similar argument in September 2003, just a week after the rule was finalized. The DOJ admitted that the rulemaking has weakened its position in the Dynegy lawsuit, filing a brief in which it abandoned its previous argument that the court must apply a narrow interpretation of the NSR language in the Clean Air Act.
- **An assistant attorney general overstated DOJ’s record of pursuing NSR enforcement.** Assistant Attorney General Thomas Sansonetti, a Bush appointee in charge of DOJ’s Environmental and Natural Resources Division, testified to the Senate committees that there had been no instances of electric utilities backing away from pending settlements in NSR lawsuits. At the time of Sansonetti’s July 2002 testimony, however, it had been 19 months since Dominion and Cinergy had signed “agreements in principle” during the final months of the Clinton administration that would have required each of them to install more than \$1 billion in pollution controls. After Bush took office, both utilities delayed finalizing the settlements. Dominion did not sign off on a \$1.2 billion settlement until April 2003; and as of October 2003, 34 months after reaching tentative agreement, Cinergy still has not signed its settlement.

A review of NSR enforcement actions pending when the Clinton administration left office shows that Bush's DOJ has had an inconsistent record closing out the cases. Besides the Dominion and Cinergy cases, four electric utilities have settled with the EPA and DOJ. But seven of the NSR cases filed in 1999 and 2000 are still in the courts. The time it has taken these cases to reach trial has potentially crippled government efforts to force compliance – as the utilities have begun raising the new NSR rule in their defense.

Sansonetti also told the committees that his office was “vigorously” pursuing NSR enforcement cases. At the time Sansonetti testified, the EPA had issued 10 notices of NSR violations since Bush had taken office, but the DOJ had initiated no legal action in response to any of them. In fact, no legal action has been taken as of October 2003. In contrast, the Clinton administration's DOJ filed nine NSR cases within a year after receiving the referrals from the EPA.

- **Vice President Cheney's energy task force met repeatedly with electric utilities that were facing NSR enforcement lawsuits and subsequently directed EPA and DOJ to re-evaluate the merit of the NSR rule.** As Cheney's National Energy Policy Development Group formulated its policy recommendations in 2001, task force members consulted with at least three of the large utilities facing NSR enforcement lawsuits – Cinergy, FirstEnergy and Southern Co. – and with lobbyists representing all nine companies facing litigation. The exact nature of those discussions remains secret because Cheney's office has repeatedly refused to provide documents about the meetings to congressional investigators or public interest groups. Documents released in response to a Natural Resources Defense Council (NRDC) lawsuit, however, reveal that the task force met with representatives of Southern Co. at least seven times and with the industry's trade association, the Edison Electric Institute, at least 14 times.

In May 2001, recommendations by the Cheney task force included a call for re-evaluations of NSR by the DOJ and EPA in conjunction with the Secretary of Energy. This set the stage for the change that the electric utility industry had been pushing – as expressed in a position paper that a lobbyist for Southern Co. had sent to the task force's liaison, titled: “A National Energy Strategy Should Include Reform of EPA's New Source Review Program.”

- **Electric utility executives, employees and PACs made big donations to Bush.** How did the utilities gain so much access? Their investment in the Bush administration began 17 months before the 2000 presidential election and has continued throughout EPA's rulemaking process. In the 2000 campaign, executives, employees and PACs of the electric utility industry – virtually all of which is affected by NSR – gave \$4.8 million to the Bush campaign, the Republican National Committee (RNC), which was the GOP's arm of the Bush campaign, and the inaugural committee. That total included \$1.85 million from the four largest givers among the electric utilities facing NSR enforcement actions, as well as the leading industry trade association. Another five utilities also facing NSR enforcement actions gave an additional \$424,770.

- **The list of Bush campaign “Pioneers” included a utility executive, an industry trade group leader and a super-lobbyist for the industry.** FirstEnergy President Anthony Alexander – whose company was hit with an NSR lawsuit in late 1999 – became a 2000 election *Pioneer*, the Bush campaign’s designation for elite fundraisers who bundled \$100,000 in contributions from individual donors. Another Pioneer was Thomas Kuhn, president of a trade association that represents most publicly traded electric utilities, the Edison Electric Institute (EEI). As early as May 1999, Kuhn sent executives a memo advising them to bundle their donations under a tracking number issued by the Bush campaign in order to “ensure that our industry is credited” for its cash.

Bush Pioneer, super-lobbyist and former RNC Chairman Haley Barbour represented Southern Co. and one of the groups set up by the companies to lobby and funnel campaign money, the Electric Reliability Coordinating Council (ERCC). Just two weeks before the Cheney task force released its report, Barbour donated \$250,000 to an RNC fundraising gala – \$150,000 of which came from Southern Co.

ERCC also paid the law firm of Bracewell & Patterson for representation by lobbyists including Marc Racicot (whom Bush subsequently named in January 2002 to head the RNC and then in June 2003 to chair the Bush-Cheney ’04 campaign). Racicot accompanied Barbour to a meeting with Cheney and the energy task force in May 2001. The two also met with Deputy Energy Secretary Frank Blake in July 2001.

- **Utilities facing NSR enforcement lawsuits were represented on Bush’s Energy Department transition team.** Electric utility executives – and their highly paid lobbyists – enjoyed an inside track with the Bush administration. The Energy Department’s transition team included Kuhn from EEI and officials from three companies facing NSR litigation: Alexander, president of FirstEnergy, Stephen Wakefield, a vice president for Southern Co., and Thomas Farrell, a vice president of Dominion.
- **Bush EPA and DOJ appointees responsible for NSR policy and enforcement have pro-industry backgrounds.** The assistant administrator for the Office of Air and Radiation, **Jeffrey Holmstead**, came from Latham & Watkins, a law firm that lobbied on behalf of at least two industry trade associations that sought NSR changes. (Even though he is identified as the “contact” person on the firm’s federal lobby disclosure filings, Holmstead was not listed as counsel or as a lobbyist for those groups.) Earlier, as associate counsel to President George H.W. Bush, Holmstead worked on behalf of Vice President Dan Quayle’s controversial Council on Competitiveness, a business-friendly, anti-regulation panel that was accused of acting in secrecy and fighting to weaken the Clean Air Act amendments of 1990.

Two colleagues from his old firm also joined Holmstead at EPA. **William Wehrum**, is counsel for Holmstead and the EPA’s Office of Air and Radiation and was a leading architect of the new NSR rule. He specialized in “clean air matters” at Latham & Watkins and represented “a few” clients facing NSR actions, according to an EPA spokeswoman. And

Linda J. Fisher, now the deputy administrator of the EPA, previously worked at Latham & Watkins.

And two of Holmstead's EPA colleagues left the agency for pro-industry jobs within weeks of the new NSR rules being issued. **John Pemberton**, Holmstead's chief of staff, was hired by Southern Co. as director of federal affairs. And **Ed Krenik**, EPA's associate administrator for congressional affairs, joined Bracewell & Patterson, a Houston-based law firm that coordinated lobbying on NSR for several utilities. The firm shares its Washington offices with the Electric Reliability Coordinating Council (ERCC), an industry group created by Southern Co., among others, to lobby on NSR changes.

Thomas Sansonetti, assistant attorney general for the Environment and Natural Resources Division at DOJ, was head of the Wyoming Republican Party from 1983 to 1987. He moved to the Department of Interior under President Reagan – first as an associate solicitor for energy and resources from 1987 to 1989 and then as the No. 3 official at Interior, the head solicitor, from 1990 to 1993. When he left the government, Sansonetti went to work as a specialist in natural resource and environmental law and partner at the firm of Holland and Hart. Congressional records show that Sansonetti lobbied from 1999 to 2001 for three of the biggest coal producers in the United States: Kennecott Energy Corp., Peabody Energy Corp. and Arch Coal. (Arch Coal lists two electric utilities that were sued under NSR, American Electric Power and Southern Co., among its biggest customers.)

While at Holland and Hart, Sansonetti was Wyoming's Republican national committeeman from 1996 to 2002 and the RNC's general counsel in 2001. After Bush's election, he served on the Interior Department transition team, helping select the officials in charge of regulating his clients' coal leases.