

EPA's Smoke Screen:

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



**Congress Watch
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Executive Summary

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.

Section I

Bush Appointees Gave False and Misleading Testimony to Senators about Effect of Weakened “New Source Review” Rule

Enforcement of Clean Air Act Could Cost Coal-Fired Utilities Billions

In 1999 and 2000, the Clinton administration’s Department of Justice (DOJ) and several states filed lawsuits against nine utility companies for violating the New Source Review (NSR) section of the Clean Air Act (CAA). (Three other companies, Dominion, Wisconsin Electric and PSEG were threatened with action and entered settlement talks.) NSR required that all coal-fired power plant upgrades that went beyond “routine maintenance” *and* substantially increased emissions be accompanied by the installation of new equipment to substantially reduce air pollution.

NSR was designed to bring sources of air pollution, like coal-fired power plants, that were grandfathered out of the CAA in 1970 under the law. “Routine maintenance” on the plants remained exempt, but anything more significant was supposed to trigger coverage by the CAA and the pollution controls it required. The lawsuits were part of a campaign by the EPA to bring under the CAA dozens of plants that had expanded and upgraded without obeying the act.

In its suits on behalf of the EPA, DOJ alleged that 51 plants owned by the utility companies had upgraded or expanded their coal-fired plants without installing the required pollution controls.¹ According to the EPA, these failures resulted in the illegal emission of “massive amounts of air pollutants,” including sulfur dioxide (the principle cause of acid rain) and nitrogen oxides (a main component of smog).² Abt Associates, a technical consulting firm that frequently works for the EPA, estimated that the illegal emissions were responsible for 5,000 to 9,000 premature deaths and 80,000 to 120,000 asthma attacks every year.³ The EPA estimated that bringing the plants into compliance would have reduced air pollution by nearly 7 million tons annually – 50 percent of all the air pollution produced by power plants in the United States.⁴

Although the EPA had found many violations of NSR since the rules were implemented in 1977, the 1999 lawsuits were its first attempts to enforce compliance. “By not having a traffic cop out there, it created a sense of comfort and the assumption that the cop isn’t going to be around any more,” said Michael Bradley, director of the Clean Energy Group, an industry association that includes at least one company cited by the EPA for an NSR violation.⁵ A federal judge in August 2003 called pre-1999 NSR enforcement an “abysmal breakdown in the administrative process following the passage of the landmark Clean Air Act.”⁶

The lawsuits threatened the utilities with serious consequences for the first time since NSR was enacted. Not only were the EPA and DOJ able to force the companies to install pollution-control equipment, but penalties – at \$27,500 per day – could reach \$50 million per plant.⁷ Tampa Electric became the first company to settle in 2000, in one of the smaller lawsuits, when it paid \$3.5 million in fines and committed itself to spend more than \$1 billion on required pollution controls.⁸ Two other companies, Cinergy and Dominion Power, reached tentative settlements of \$1.4 billion and \$1.2 billion, respectively, with the Clinton administration in December 2000.⁹ [See Figure 1]

Figure 1

EPA and DOJ “New Source Review” Enforcement Actions

Companies and Divisions (Entities facing litigation shown in bold)	Status of Litigation	Utility Industry Association Membership(s)*
American Electric Power	Case filed November 1999. ¹⁰ Trial scheduled for early 2004.	Edison Electric Institute (EEI) Alliance for Constructive Air Policy (ACAP)
Cinergy Cincinnati Gas and Electric Co. Union Light, Heat and Power Co. PSI Energy Inc	Case filed November 1999. ¹¹ \$1.4 billion settlement reached Dec. 22, 2000 but not finalized. Settlement deadline or trial, October 2004.	EEI ACAP Energy for a Clean Air Future (ECAF)
Duke Energy Corp. Duke Power	Case filed December 2000. ¹² Trial began October 2003.	EEI Electric Reliability Coordinating Council (ERCC)
Dynergy Illinois Power Company	Case filed November 1999. ¹³ Awaiting court decision.	EEI ACAP
FirstEnergy Corp Cleveland Electric Illuminating Co. Jersey Central Power and Light Co. Metropolitan Edison Co. Ohio Edison Co. Pennsylvania Power Co. Pennsylvania Electric Co. Toledo Edison Co.	Case filed November 1999. ¹⁴ Guilty verdict Aug. 7, 2003; awaiting penalty phase.	EEI ERCC
Southern Co. Alabama Power Co. Georgia Power Co. Gulf Power Co. Mississippi Power Co. Savannah Electric and Power Co. Southern Nuclear Operating Co. Southern Company Services, Inc.	Case filed November 1999. ¹⁵ Awaiting trial date.	EEI ERCC
Vectren Corp. (formerly SIGECO , Southern Indiana Gas & Electric Co.)	Case filed November 1999 ¹⁶ \$33 million settlement reached June 6, 2003. ¹⁷	EEI ACAP
TECO Energy, Inc. Tampa Electric Co.	Case filed November 1999. Settled for more than \$1 billion on Feb. 29, 2000. ¹⁸	EEI ECAF
Tennessee Valley Authority (TVA)	Case filed November 1999. ¹⁹	ERCC
Companies That Settled To Avoid Litigation		
Dominion Dominion Virginia Power (formerly Virginia Power or VEPCO) Dominion North Carolina Power	No case filed against VEPCO, only threatened. Tentative settlement agreement Nov. 15, 2000; settled for \$1.2 billion April 2003. ²⁰	EEI ACAP
PSEG	No case filed against PSEG, only threatened. \$344 million settlement reached in January 2002. ²¹	EEI
Wisconsin Electric (WE)	No case filed against WE, only threatened. \$600 million settlement reached in April 2003. ²²	EEI, ACAP

Sources: Public Citizen research based on DOJ reports, EPA press releases and news reports.

* Association memberships are listed because these groups lobby on energy issues and make campaign donations.

Changes in Clean Air Policy Ordered by Bush Administration

Vice President Cheney's National Energy Policy Development Group ("the energy task force") issued its report to the president in May 2001, containing two recommendations that had the potential to undermine the NSR lawsuits against utilities operating coal-fired plants. One instructed the DOJ to review the lawsuits to "ensure that the enforcement actions are consistent with the Clean Air Act and its regulations." The other instructed the EPA – in consultation with the DOE and other agencies – to "review" the NSR regulations, evaluating their effect on new investment in electricity generation, energy efficiency and the environment.²³

The resulting DOJ review did not let the utilities off the hook. The review, performed by the DOJ's Office of Legal Policy (OLP), concluded that the "EPA reasonably may conclude that the enforcement actions are consistent with the Clean Air Act and its regulations." The OLP also concluded that it would be wrong for the DOJ's Environment and Natural Resources Division, the division prosecuting the cases, "to withdraw, terminate, or otherwise circumscribe them [because that] would constitute policy determinations as to Clean Air Act enforcement strategy or regulatory interpretation – determinations that properly rest with the EPA."²⁴

The EPA review, in contrast, did offer the utilities some relief. Its review, done "in consultation with the secretary of Energy,"²⁵ in June 2002 determined that NSR regulations adversely affected efficiency and investment in upgrading the capacity of existing plants and announced changes in the program that would eventually be finalized in the new NSR rulemaking of August 2003.²⁶

The General Accounting Office (GAO), however, subsequently studied the methods used by the EPA and DOE to reach those conclusions and found them flawed. It said the EPA failed to perform "comprehensive assessments that contradicted or supported EPA's conclusions or assertions ... [and] relied on anecdotes from the industries most affected by NSR."²⁷

Internal DOE documents reveal that Kyle McSlarrow, Secretary of Energy Spencer Abraham's chief of staff, met with at least four of the companies facing lawsuits – Southern, FirstEnergy, Duke, and Tennessee Valley Authority (TVA) – to discuss NSR during the review.²⁸ Former EPA officials and internal documents reveal that DOE officials were key players in the rulemaking; an early version of the rulemaking is referred to as "the DOE present value approach."²⁹

Under the Clinton administration's interpretation of NSR, utilities wishing to make significant replacements or improvements that would significantly increase air pollution from their coal-fired plants were required to install modern pollution controls – a key provision aimed at gradually bringing those plants grandfathered out of the Clean Air Act into compliance.

Under the new rule promulgated by the Bush administration in August 2003, NSR is triggered only if a specific modification activity exceeds 20 percent of the cost of a loosely defined "process unit," a designation that, for a coal-fired plant, includes the boiler, turbine, generator and other equipment. Even if the 20 percent threshold is crossed, the EPA will do case-by-case analyses that contain several escape clauses for the utilities.³⁰

The implications of the August 2003 rule are far-reaching:

- Most previously covered upgrades and replacements at grandfathered plants will no longer be subject to NSR, indefinitely extending their exemption from the Clean Air Act. In a 2001 internal memo that was obtained by the NRDC, EPA enforcement staff warned that setting the trigger for NSR at even a 5 percent cost level – referred to as “the DOE present value approach” – “would virtually eliminate the NSR program.”³¹ The much-less-stringent 20 percent cost level that the EPA settled on will exempt almost all equipment replacement and modifications, including those costing hundreds of millions of dollars. For example, in the three enforcement cases for which data are available, none of the 14 modification activities at TVA, none of the nine at Dynegy-owned Illinois Power and only one of 11 at FirstEnergy (formerly Ohio Edison) crossed the 20 percent threshold – although a federal judge found each of the FirstEnergy modifications should have triggered NSR under the Clean Air Act.³²
- A loophole in the new rule will allow companies to replace their entire coal-fired plants without triggering NSR. Lawyers for the Clean Air Task Force recently found, and former EPA officials agree,³³ there is “nothing in the draft final rule to prevent multiple exempt replacement activities from occurring simultaneously as a single process unit.”³⁴ Also, while each “activity” escapes NSR if it doesn’t cross the 20 percent threshold, “activity” is never fully defined. A utility may organize large tasks into smaller activities, and even perform them simultaneously, without triggering NSR – up to the replacement of the entire plant, regardless of the resulting increase in pollution. These aspects of the rulemaking virtually guarantee that the grandfathered coal-fired plants across the country will continue to be exempt from Clean Air Act regulations.³⁵
- Former EPA officials say the new rule also significantly threatens the ability of the government to obtain settlements or judgments against companies that violated the previous interpretation of NSR. Because almost all of the violations in the current cases being prosecuted do not cross the 20 percent threshold, the EPA and DOJ will have a hard time convincing judges to order pollution controls that can cost billions under a regulation no longer being applied, even for companies that committed the violation before the rule was changed.³⁶ As Acting EPA Administrator Marianne Horinko told reporters, the EPA is unlikely to file new cases against companies who violated the old interpretation.³⁷

And the DOJ acknowledged that the new rule has affected its NSR case against Dynegy Inc. In a Sept. 5 filing with the U.S. District Court for the Southern District of Illinois, the DOJ said, “In light of EPA’s change of position of its interpretation of the Clean Air Act, the United States does not rely on any prior statements it has made to this Court that a very narrow construction of the ‘routine maintenance’ exemption is required by the Clean Air Act.”³⁸ Two electric utilities facing NSR lawsuits, Dynegy and SIGECO (now Vectren Corp.), have used the new rule in their defenses, arguing that their plant modifications violations fall within the new NSR rule and should be dismissed since the EPA has a new interpretation.³⁹

Despite the dangers to public health, air quality and the current enforcement cases, the Bush administration pushed forward with the dismantling of the old NSR rule. When asked directly about the effect of the changes, Bush appointee Holmstead gave false information or misleading information to Congress.

Bush Appointees Gave Senate Committees False and Misleading Answers to Questions about NSR Rule and Enforcement Cases

Following media reports about the extensive contacts between the energy industry and the Cheney task force, Congress asked the General Accounting Office (GAO) to look into the process used to develop the National Energy Policy. Several senators, notably Sens. Jim Jeffords (I-Vt.) and Joe Lieberman (D-Conn.), also inquired about the NSR rulemaking and requested related documents and information. The administration, however, refused to provide information on the meetings to Congress. As the GAO concluded in a report released in August 2003, the Office of the Vice President's "unwillingness to provide ... records or other related information precluded GAO from fully achieving its objectives and substantially limit[ed] GAO's ability to comprehensively analyze the [task force] process."⁴⁰

After the EPA declared its intention to weaken NSR requirements in June 2002, Sens. Patrick Leahy (D-Vt.) and Jeffords held a joint hearing of the Senate Environment and Public Works (EPW) and Judiciary committees on the proposed rule. At the hearing on July 16, 2002, and in correspondence afterward, Bush EPA and DOJ appointees gave false or misleading information to Congress on at least three occasions:

1. Holmstead Gave False Testimony to Congress about Danger to NSR Enforcement Cases

Jeffrey Holmstead, assistant administrator of the EPA Office of Air and Radiation, the division in charge of writing the new NSR policy, was one of the witnesses called before the committees. Before the Bush administration put him in charge of air policy, Holmstead had worked for a law firm, Latham & Watkins, which represented and lobbied on behalf of some of the companies whose pollution he is now in charge of regulating.⁴¹

By the time Holmstead testified on July 16, 2002, it had become clear that many of the utilities facing government lawsuits were delaying their settlement negotiations while the NSR rulemaking was underway. Cinergy, for example, had agreed in principle to a \$1.4 billion settlement with the Clinton administration in December 2000, but had avoided signing the papers after Bush took office. One former EPA enforcement official described how Cinergy began canceling meetings and "losing" documents. "All they had to do was sign [the settlement agreement]," she said. "But they kept losing their pens."⁴² As of October 2003 – 34 months after the tentative agreement – Cinergy still had not signed off on the settlement.

The link between the rulemaking and the lawsuits was clear: If the EPA was "improving the New Source Review program," as acting EPA Administrator Marianne Horinko said,⁴³ then utilities facing litigation could argue that the previous interpretation had been wrong all along. Said one lawyer for the energy industry, "The thinking was: How can you do things that will influence the NSR issue and the pending litigation? ... The two are tied together. If you affect the program, you can affect the progress of lawsuits. If the administration recants NSR provisions, the lawsuits fall apart."⁴⁴

At the joint hearing, Leahy cited press reports indicating that utilities were backing away from their settlement negotiations. He inquired about Holmstead's consultations with the DOJ and the Office of Enforcement and Compliance Assurance (OECA), the enforcement arm of the EPA. Specifically, Leahy asked, "Did you go into a question of how these proposals would impact either prospective or retrospective NSR enforcement cases?"

Holmstead replied: "Yes, that was one of the primary issues that was discussed. What I can say is, based on numerous meetings that I have had, which included staff attorneys from [Thomas Sansonetti's] office as well as attorneys from our own enforcement office, is we do not believe these changes will have a negative impact on the enforcement cases."⁴⁵

Sansonetti is the assistant attorney general in charge of the Environment and Natural Resources Division of the DOJ, the division charged with prosecuting NSR and other environmental enforcement cases. Sansonetti previously had lobbied for the companies that are the major coal suppliers for coal-fired power plants like the ones in the cases.

Later in the hearing, Holmstead reiterated the point, saying, "I have been informed by our enforcement folks as well as by people in Mr. Sansonetti's office that they do not believe these will have a negative impact on the enforcement cases."⁴⁶

Holmstead's assurance was repeated by J.P. Suarez, an appointee who took over OECA in August 2002. In a response to a letter from Jeffords and Lieberman, Suarez wrote on Aug. 23:

"As Mr. Holmstead testified and as I have been informed by staff, OECA was extensively involved in the development of the 90-day NSR report and the accompanying list of recommendations. During this deliberative process, OECA staff highlighted the potential relationship between the regulatory changes being discussed and ongoing litigation. The consensus position of the Agency is that neither the report nor recommendations are intended to, nor should, adversely impact the current enforcement cases."⁴⁷

But this assurance was false.

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 Committee and Judiciary Committee otherwise.

One of the former EPA officials is Sylvia Lowrance, the acting administrator of the OECA at the time of the hearing. She said Holmstead was among the officials present at many meetings where enforcement officials expressed strong opposition to a significant portion of the rulemaking because of its potential effect on the cases.⁴⁸

Lowrance, a 24-year veteran of the EPA, spent six years in the OECA as the highest-ranking civil servant in the division and 18 months as its acting head. She was one of four EPA employees awarded the President's Distinguished Executive Award in 2000. The award commended Lowrance as "a leader and innovator in redesigning the EPA's environmental enforcement and compliance program. Under her leadership, the program has dramatically improved its environmental results."⁴⁹

Lowrance, who retired from OECA on July 27, 2002 – only days after the Senate hearing – says that enforcement officials repeatedly told Holmstead that the new NSR rule would inevitably hurt the cases – and that she, herself, briefed Whitman to that effect.

Eric Schaeffer, chief of civil enforcement at the agency until March 2002 and now head of the Environmental Integrity Project, backs up Lowrance's description of events. "I was at a meeting with [EPA administrator] Whitman and top EPA staff where we specifically warned them that the kinds of rules they ended up announcing in August 2003 would jeopardize the cases," Schaeffer said. "Holmstead and Wehrum were warned many times by the enforcement staff of the danger the rulemaking posed to the cases."⁵⁰

Internal EPA analyses obtained by Public Citizen back up Schaeffer and Lowrance. One analysis dated Feb. 28, 2002 – four months *before* Holmstead's testimony – examined 10 alleged NSR violations cited in a lawsuit against FirstEnergy (parent company of Ohio Edison). The Air Enforcement division of OECA determined that "not one would remain a violation" under the new rule (which, at that time, proposed an even lower threshold than was eventually enacted for changes to coal-fired generating plants).⁵¹

Another, undated, analysis by the Air Enforcement division, examined nine alleged NSR violations cited in a case against TVA, and determined each of the nine was "not likely to survive" the new rule.⁵²

(It is unclear whether the Air Enforcement division's analyzes in the FirstEnergy and TVA cases included all – or just a portion – of the NSR violations cited in the lawsuits.)

Responding to concerns that ongoing NSR cases might be jeopardized by the new rule, Holmstead assured senators that, "it is certainly our intent to make [the rulemaking] prospective only,"⁵³ theoretically not applying to past violations.

However, making the rule "prospective only" does little to protect the lawsuits, Lowrance says. "The fact that the rule states it is prospective does not obviate the fact that this rule contains many provisions harmful to the cases and ongoing investigations."⁵⁴

Schaeffer agrees, saying the new rule, even with the "prospective" clause, "knocks the legs out from under the government's case."⁵⁵

And while the new rule does not remove the penalties for breaking the law from the NSR suits, it does jeopardize the government's ability to force compliance – requiring upgraded pollution controls that can cost billions of dollars.

In fact, most of the plant modifications at issue in NSR lawsuits fall below the new rule's threshold. OECA staff stated in a memo – written before Holmstead's testimony – that a 5 percent threshold “would virtually eliminate the NSR program.”⁵⁶ In three ongoing enforcement cases for which the Environmental Integrity Project has compiled data, only one of 34 cited violations breaks the 20 percent threshold. In the lawsuit against FirstEnergy, only one of 11 modification activities would fall under the new 20 percent threshold; in the TVA case none of 14 activities cited would;⁵⁷ and in the Illinois Power case none of the nine would.⁵⁸

A federal judge ruled in the FirstEnergy case on Aug. 7, 2003, just before the NSR rule was finalized, that EPA's flip-flopping on NSR would affect the compliance phase of the trial. Although he found that “the EPA's approach to the interpretation of the routine maintenance exemption is reasonable and is consistent with the plain language of the regulation as well as the stated purpose and language of the CAA,” and that “each of the 11 activities undertaken at the [FirstEnergy] plant effected a [modification] for which compliance with the CAA was required,” he acknowledged that he may have to “consider the less-than-consistent efforts of the EPA to apply and enforce the Clean Air Act” when he issues his compliance orders.⁵⁹

Indeed, utilities facing NSR litigation have begun using the new rule as their central defense against the government's charges. Even before the new rule came out, SIGECO, an Indiana utility, argued in January 2003 that the announcement in the *Federal Register* of a proposed rulemaking was an acknowledgement “by EPA itself that not even EPA accepts the view advanced by the government in this case.” It also noted that one of EPA's proposed thresholds for NSR exemptions, a 5 percent threshold “is much larger than the ... SIGECO projects.”⁶⁰

Just after the rulemaking, Dynege argued on Sept. 5, 2003, that EPA's new rule “decisively undercuts the critical premise of the government's case.” It also argued that because its modifications “cost considerably less than 20 percent of the replacement cost of each unit” they should “not be subject to regulation.”⁶¹

The DOJ itself acknowledged that the rulemaking had undercut its case in a brief filed in the Dynege case on Sept. 5, 2003. “In light of EPA's change of position of its interpretation of the Clean Air Act,” it wrote, “the United States does not rely on any prior statements it has made to this Court that a very narrow construction of the ‘routine maintenance’ exemption is required by the Clean Air Act.”⁶²

Holmstead's false testimony to Congress regarding the impact of the new NSR rule on existing lawsuits was not the only time he failed to provide pertinent information to lawmakers.

When Sen. Thomas Carper (D-Del.) proposed the Clean Air Planning Act on April 28, 2003, an alternative to Bush's Clear Skies initiative, he asked the EPA to do an analysis comparing the two. When preliminary analysis showed that Carper's proposal would provide immensely greater environmental benefits while only costing marginally more than the president's proposal, Holmstead reportedly killed the rest of the analysis and buried the preliminary data.

“How can we justify Clear Skies if this gets out?” an EPA staffer quoted Holmstead as saying at a meeting.⁶³

After the story broke in the *New York Times*, Holmstead had the EPA release another analysis of Clear Skies using new assumptions that made the administration’s proposal appear more favorable, yet still hasn’t released any new analyses of competing proposals under the new model.⁶⁴

When Jeffords and Leahy proposed another alternative to Clear Skies, the Clean Power Act, the senators requested an environmental analysis in May 2001. Holmstead’s office has failed to produce that analysis, but it has produced two environmental and health benefit analyses of Clear Skies. Holmstead’s office also had produced a lengthy analysis of how much the Clean Power Act would cost.⁶⁵ Clear Skies essentially guts NSR enforcement, while the bills offered by Carper, Jeffords and Leahy, would largely preserve it.

2. Holmstead Presented Distorted Information about Effect of NSR on Emissions

In the July 2002 joint committee hearing, Holmstead told Sen. Hillary Clinton (D-N.Y.) that the new NSR rulemaking “will not have any effect on [sulfur dioxide] emissions from power plants ... [and] our preliminary indications are that any change that we would make might have a modest impact on [nitrogen oxide] one way or the other.”⁶⁶

Holmstead’s statement reflects the Integrated Planning Model (IPM) for NSR emissions done by EPA’s Clean Air Markets division in 2002. The IPM is a tool EPA uses to predict emissions increases or decreases due to changes in policy. The IPM does show a minimal effect on sulfur dioxide and a modest increase in nitrogen oxide under the new NSR rule versus the estimate of emissions under the old NSR rule. The IPM, however, assumed that no potential benefits were to be gained from the old NSR interpretation, and that emissions would actually go up over time under it. The actual enforcement of NSR – the way it is supposed to work – was not built into the model.⁶⁷

But an EPA enforcement office memo, which contradicted the IMP, had been circulated to Holmstead’s Office of Air and Radiation. It said that the previous interpretation of NSR had been producing, and was projected to produce, significant emissions reductions.⁶⁸

According to an internal document leaked from OECA – a memo that EPA sources say would have been circulated to a high-level EPA official like Holmstead before he testified in July 2002⁶⁹ – the DOJ and EPA already had settled one case and reached preliminary agreements on two more. Those settlements were estimated to reduce air pollution by 711,000 tons of sulfur dioxide and 235,000 tons of nitrogen oxide annually. In that memo, OECA further estimated that if similar settlements were to be reached with the other companies, the total reductions would be 4.9 million tons of sulfur dioxide and 2 million tons

Figure 2
Emission Reductions Anticipated by EPA
from Enforcement of Previous NSR Interpretation

Anticipated Improvement	Sulphur Dioxide	Nitrogen Oxide
Anticipated reduction in emissions resulting from tentative NSR settlements with TECO, Dominion and Cinergy	0.7 million tons	0.2 million tons
Anticipated reductions in emissions from other utilities facing NSR enforcement action	4.9 million tons	2.0 million tons
Total anticipated emissions reductions resulting from NSR enforcement	5.6 million tons	2.2 million tons
Annual national emissions as of 2000	11.2 million tons	5.1 million tons
National reduction in emissions anticipated from enforcement of previous NSR interpretation	50 percent	43 percent

Source: Internal OECA document released to NRDC and provided to Public Citizen.

of nitrogen oxide, a nearly 50 percent reduction from the amount of pollution predicted by the Clean Air Markets Division.⁷⁰ [See Figure 2]

If the Clean Air Markets Division study had reflected the enforcement results under the previous interpretation of NSR, the results would have shown a dramatic increase in emissions under the new rule. As previously noted, most violations cited in the existing enforcement cases fall below the new 20 percent threshold – and the new standard will make it nearly impossible to force the companies to install all the required pollution controls and achieve reductions in acid-rain and smog-forming emissions. Former EPA officials say Holmstead and Whitman were warned this would be the case.⁷¹

Additionally, cases referred to DOJ but not yet filed – as well as investigations in progress at EPA – involve utility plant activities that are likely to be legally permitted under the new NSR rule. In fact, acting EPA Administrator Marianne Horinko has publicly declared that the agency likely will bring no new compliance suits based on violations of the previous interpretation of NSR – despite the record of violations and the opportunity to clean up millions of tons of emissions from old coal-fired plants.⁷²

3. Sansonetti Overstated DOJ’s Record of Pursuing NSR Enforcements

Thomas Sansonetti, head of the DOJ’s Environmental and Natural Resources Division, also testified at the July 16, 2002, Senate joint committee hearing. Leahy asked him if “there [are] cases where [utility companies] were close to settlements and now they are backing away?”

“No,” Sansonetti replied.⁷³

That answer was not true. At the time of his testimony, it had been 19 months since two companies, Dominion and Cinergy, had signed “agreements in principle” with the Clinton administration for settlements that topped \$1 billion each in required pollution controls. Once Bush took office, however, the companies put off signing the settlements.

Both Lowrance and Schaeffer say they had been frustrated by Dominion and Cinergy stalling in their settlement talks. As of October 2003, 34 months after its tentative agreement, Cinergy still has not finalized 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. [See Figure 1]

Although Dominion eventually signed off on a \$1.2 billion settlement in April 2003, the *Wall Street Journal* reported in June 2002 that the corporation had stepped away from the bargaining table pending the NSR review recommended by the Cheney task force:

“James Sanderlin, senior vice president for Dominion Resources Inc., said the Richmond, Va., utility was about to sign a consent decree with DOJ, in which the company would promise to comply with a \$1.2 billion pollution-control upgrade, when government negotiators told Dominion it should wait until Aug. 17, when the review is finished.”⁷⁴

The *Journal* also quoted a spokesman for “another major company nearing a settlement” as saying “government lawyers ‘told us they would not put pressure on us to sign’ until the review is finished.”⁷⁵

In March 2002, Cinergy spokesman Steve Brash told the New Orleans *Times-Picayune*: “We didn’t feel it was appropriate under the circumstances to finalize a consent decree and present it to our board when there was potential that there could be a substantial change in the nature of the litigation.”⁷⁶

In addition to Dominion, four other electric utilities have settled with the EPA and DOJ since 2000. Three of these settlements came in response to lawsuits or threats of lawsuits by the Clinton administration, and one came in a case initiated by the state of New Jersey:

- In 2000, TECO Energy Inc. settled with the Clinton administration for more than \$1 billion.
- In January 2002, PSEG and the state of New Jersey reached a settlement for \$344 million, on which the DOJ signed off.
- In April 2003, Wisconsin Electric (WE) settled for \$623 million.
- On June 6, 2003, after holding out for over three years, SIGECO of Indiana settled for \$33 million, just a few weeks short of being forced into court.⁷⁷

Schaeffer argues that Bush's EPA should not receive credit for the WE or Dominion settlements. Schaeffer said WE had lost a major NSR case in 1990 and settled because the new case was in a federal district with strong NSR case law. And he said Dominion's lawyers were aware that the anticipated new NSR rule might not withstand legal challenges from a number of states and the NRDC. "They kept hoping the Bush administration would dismiss the lawsuits, but after that failed they decided to settle," Schaeffer said.⁷⁸

Seven of nine NSR lawsuits initiated by the Clinton administration 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.

- Lawsuits against Dynegy, Duke and TVA are currently being tried.
- FirstEnergy has been found guilty of NSR violations and is awaiting the penalty phase of its trial.
- Cases against American Electric Power and Cinergy are scheduled for trial in 2004.
- The case against Southern Co. is awaiting a trial date.

In his testimony, Sansonetti also overstated DOJ efforts to bring polluters to justice. "We are continuing to prosecute vigorously a variety of actions in connection with the NSR program," he said. "EPA will continue to vigorously pursue its current enforcement actions."

What Sansonetti failed to mention was that at the time of his July 2002 testimony, the EPA had issued 10 notices of NSR violations to utility companies⁷⁹ since Bush took office, but the DOJ had initiated legal action in response to none of them. In fact, no legal action has been taken as of October 2003.⁸⁰ In contrast, the Clinton administration's DOJ filed nine NSR cases within a year after receiving the referrals from the EPA.⁸¹

On Oct. 17, 2002, two months after she had retired from the OECA, an alarmed Lowrance sent a letter to Sen. John Edwards (D-N.C.) explaining, "In practice, once an investigation is completed and a violation notice issued, serious settlement talks should be underway. Despite [the EPA's] active investigation program targeted at these industries ... the fact is that settlements and filing of new cases have ground virtually to a halt."⁸²

Revolving Doors: Regulators and Enforcers Come from Special Interests

While the EPA/DOE review of NSR was initiated by Cheney's energy task force, the subsequent rulemaking was carried out by top-level EPA and DOJ officials who migrate between government posts, party positions and jobs affiliated with the energy industry.

- **Jeffrey Holmstead's** position as assistant administrator of the Office of Air and Radiation put him in charge of air policy, including NSR, at EPA. He came from the environmental department of the Latham & Watkins firm,⁸³ which represented two coal-fired utility industry groups – Alliance for Constructive Air Policy and Energy for a Clear Air Future – whose membership included seven of the 12 utilities that were sued or have had pending NSR settlements.⁸⁴ Although Holmstead is an expert on air pollution law, he is not listed as having lobbied or having done significant work for those clients.

Before he worked for Latham & Watkins, Holmstead served as associate counsel to President George H.W. Bush from 1989 to 1993, where his primary focus was implementation of changes to the Clean Air Act.⁸⁵ In his time at the White House, Holmstead also did work for the controversial Council on Competitiveness, a business-friendly, regulation-cutting commission headed by Vice President Dan Quayle,⁸⁶ although he told senators at his confirmation hearing that he was not an official member.⁸⁷ The council, which was accused of acting in secrecy, successfully fought for rules that weakened the Clean Air Act amendments of 1990.⁸⁸ Holmstead described his connection to the group during his confirmation hearings:

“My boss, C. Boyden Gray, was the counsel to the president and was one of several senior officials who attended meetings of the Council on Competitiveness. Because I was often responsible for doing the staff work to prepare him for these meetings, I had the opportunity to interact on a regular basis with the staff of the Competitiveness Council.”⁸⁹

- **Thomas Sansonetti** was confirmed as the assistant attorney general for the Environment and Natural Resources Division at the Department of Justice in November 2001. As head of that department he is charged with handling the government’s cases against violators of environmental laws, including the NSR cases.

Sansonetti was head of the Wyoming Republican Party from 1983 to 1987. He moved to Washington under President Reagan and worked for the Department of Interior – 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 he went to work as a specialist in natural resource and environmental law and partner at the firm of Holland and Hart.⁹⁰ Congressional records show that Sansonetti lobbied from 1999 to 2001 for three of the biggest coal producers in the United States: Arch Coal, Kennecott Energy Corp., and Peabody Energy Corp.⁹¹

Those clients have a significant financial interest in the NSR cases that Sansonetti is now charged with pursuing. Most of the settlements thus far have mandated converting coal-fired boilers to natural gas, at costs that sometimes reach hundreds of millions of dollars.⁹² If the government were to succeed in its cases, then some of the biggest coal-fired power plants in the country would likely be converted to natural gas, including those owned by Southern and American Electric Power. These electric utilities are Arch Coal’s two biggest customers.⁹³

While he was a partner in the law firm, Sansonetti served as Wyoming Republican national committeeman from 1996 to 2002 and as the RNC’s general counsel in 2001.⁹⁴ After Bush’s election, he served on the Interior Department transition team, helping select the officials in charge of regulating his clients’ coal leases.

- **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 – as counsel but not as a lobbyist.

An EPA spokeswoman said that Wehrum had “a few clients that were involved in NSR enforcement issues” at Latham & Watkins,⁹⁵ that he disclosed these in his filing with the EPA’s ethics office and was given a waiver to work on matters involving former clients.

The spokeswoman did not disclose who the clients had been, but federal lobby disclosure records show that Latham & Watkins has represented at least seven of the 12 firms facing NSR enforcement actions. In 2001 and 2002, Latham & Watkins lobbied for a consortium called Energy for a Clean Air Future,⁹⁶ which included at least three firms that have faced NSR enforcement actions: [Cinergy](#), [Tampa Electric Co.](#) and [Wisconsin Electric](#).⁹⁷

In the late 1990s, Latham & Watkins also lobbied for the Alliance for Constructive Air Policy,⁹⁸ a consortium that included at least six companies facing NSR enforcement: American Electric Power, Cinergy, Illinois Power Co. (now part of Dynegy), SIGECO (now Vectren Corp.), Virginia Power (now Dominion) and Wisconsin Electric.⁹⁹

- **Linda J. Fisher**, also from Latham & Watkins, was appointed deputy administrator of the EPA. She had previously served at the EPA under President George H. W. Bush.¹⁰⁰
- **John Pemberton**, Holmstead’s chief of staff at Air and Radiation, was hired by Southern Co. as their director of federal affairs one week after the EPA finalized the new NSR rule. An EPA spokeswoman claimed that Pemberton had withdrawn from any potential conflicts with Southern on July 31, 2003 – a month before the new NSR rule was put in place – and also claimed that Pemberton did not play a major role in the rulemaking.¹⁰¹
- **Ed Krenik**, the EPA’s associate administrator for congressional affairs, also left the agency within days of EPA’s implementation of the new NSR rule, joining the firm of Bracewell & Patterson on Sept. 2, 2003. The Houston-based law firm coordinated lobbying on NSR for several electric utilities and shares their Washington office with the ERCC – the industry group created by Southern Co., among others, to lobby on NSR changes.¹⁰²

Krenik was in charge of selling the new NSR rule to Congress, an effort that included incomplete responses and denials to requests for information from senators,¹⁰³ as well as the false or misleading information that senators received from EPA officials. Krenik said he joined the Houston firm that represents electric utility interests because he had “known the guys here for many years.”¹⁰⁴

Section II

Electric Utilities Gave Generously to Bush and the RNC – and Were Rewarded with Access to Policymakers

The relationship between George W. Bush and the electric utility industry blossomed even before the Texas governor had made his bid for the White House official.

In late May 1999, Thomas Kuhn, president of the electric utility industry's main trade association, the Edison Electric Institute (EEI), sent a memo to energy industry officials soliciting money for Bush's nascent presidential campaign. The memo was extraordinary for two reasons: It was written on stationery labeled "George W. Bush Presidential Exploratory Inc.,"¹⁰⁵ and it baldly declared that the Bush campaign would be keeping tabs on which industries helped his cause.

"A very important part of the campaign's outreach to the business community is the use of tracking numbers for contributions. Both Don Evans and Jack Oliver have stressed the importance of having our industry incorporate the #1178 tracking number in your fundraising efforts," Kuhn wrote.¹⁰⁶

Evans was Bush's campaign chairman. He would later be appointed secretary of commerce and serve as a leader of Vice President Dick Cheney's national energy task force. Oliver was the campaign's national finance director, a role he's playing again for 2004.

Kuhn's next sentence drove home the intent of the tracking numbers:

"IT DOES ENSURE THAT OUR INDUSTRY IS CREDITED AND THAT YOUR PROGRESS IS LISTED AMONG THE OTHER BUSINESS/INDUSTRY SECTORS." [emphasis in original].

With industry donors following his advice on the tracking numbers, Kuhn eventually became a Pioneer, Bush's designation for those who bundled together at least \$100,000 in contributions for his campaign.¹⁰⁷

The country's largest electric utilities – including several that were facing Justice Department lawsuits for violating New Source Review – later received spots on the administration's Energy Department transition team and extensive access to Vice President Cheney's closely managed energy task force, which made decisions that played a significant role in pushing for EPA to develop the new NSR rule sought by industry.

Kuhn's memo demonstrates the value of participating in Bush's fundraising machine. Representatives of the companies of at least five of the eight people to whom Kuhn's memo was addressed eventually received meetings with Cheney's energy task force, which shaped the administration's NSR policy. The meetings included at least three, and possibly four, of the individuals listed on Kuhn's memo, including Jeanne Wolak a lobbyist for Southern Co., one of several large utilities facing NSR litigation.¹⁰⁸

In the 2000 presidential 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 (which was the GOP’s arm of the Bush campaign) and the inaugural committee. That total included \$1.85 million from the four biggest givers among those facing NSR enforcement actions and the leading industry trade association. Another eight utilities also facing NSR lawsuits gave an additional \$424,700. [See Figure 3]

Employees and PACs of the four companies – Southern, Cinergy, FirstEnergy and Dominion – gave Bush \$128,860 in “hard money” contributions in 2000. They also gave \$1.1 million in unregulated “soft money” to the RNC. Moreover, the RNC collaborated with the Bush campaign to raise \$100 million for his election.¹⁰⁹ These four companies also gave \$400,000 to Bush’s inaugural fund and furnished Bush with another Pioneer – Anthony Alexander, president of FirstEnergy.¹¹⁰ EEI, the trade group of electric utilities headed by Kuhn, gave \$194,490 in soft money to the RNC and \$13,500 to the Bush campaign.

All of Bush’s big givers who faced NSR enforcement actions met with the task force or belonged to an industry association that did. Southern met with the task force independently and through its affiliation with the ERCC¹¹¹; FirstEnergy met with the task force independently and through its association with the ERCC¹¹²; and Cinergy participated in a task force meeting.¹¹³ It is unclear whether employees of Dominion or its affiliates met with the task force.

The utilities appear poised to ante up for the administration again in 2004. Kuhn was invited to Bush’s Aug. 9 barbecue for elite donors in Crawford, Texas,¹¹⁴ signifying that he had lassoed at least \$50,000 toward the president’s re-election. FirstEnergy CEO H. Peter Burg hosted a fundraiser on June 30 in Akron, Ohio, that raked in \$600,000 for Bush-Cheney 2004.¹¹⁵

Electric Utilities Get the Inside Track

The electric utility companies’ access to the administration began when Bush formed his transition team. Named from the electric utility industry were Kuhn and officials from three of the four biggest givers facing NSR litigation: Alexander, president of FirstEnergy and a Bush Pioneer in 2000, Stephen Wakefield, a vice president for Southern Co., and Thomas Farrell, a vice president of Virginia Power (now Dominion).¹¹⁶ In addition, Vicky Bailey, president of Cinergy subsidiary PSI, was appointed assistant energy secretary for international affairs and domestic policy.¹¹⁷

EEI and the companies facing NSR litigation were given red carpet access to Cheney’s energy task force. EEI had contact with the task force at least 14 times, according to documents released in response to an NRDC lawsuit.¹¹⁸ A representative or representatives of EEI met privately with EPA Administrator Christine Todd Whitman on energy policy, met separately with Whitman’s staff, and met with senior officials at the DOE, according to a recent GAO report.¹¹⁹

Task force records and press reports indicate that Southern Co., whose representatives had contact with the task force seven times, according to NRDC, was influential in convincing the

Figure 3

Contributions to the Bush 2000 Campaign, the RNC and the Bush Inaugural by Utilities Charged with Violating NSR, or Potentially Facing Litigation, and Their Trade Group

Organization	\$ to Bush in 2000*	\$ to RNC in 2000	\$ to Bush Inaugural	Total	Other Notes
FirstEnergy Corp.**	\$81,685	\$348,630	\$100,000	\$530,315	President Anthony Alexander named to Energy Department transition team; Alexander attended meeting with energy task force members.
Dominion Resources**	\$13,000	\$335,555	\$100,000	\$448,555	VP Thomas Farrell named to Energy Department transition team.
Southern Co.**	\$24,425	\$242,365	\$100,000	\$366,790	VP Stephen Wakefield named to Energy Department transition team; company representatives met with energy task force members seven times.
Cinergy Corp.**	\$9,750	\$189,690	\$100,000	\$299,440	Company Chairman Jim Rogers met with energy task force members; President of a subsidiary, Vicky Bailey, received Energy Department appointment.
Edison Electric Institute (EEI)	\$13,500	\$194,490	\$0	\$207,990	President Thomas Kuhn named to Energy Department transition team; EEI representatives met with energy task force members 14 times.
Other Utilities Under NSR Litigation***	\$42,500	\$357,270	\$25,000	\$424,770	
Remaining Electric Utilities ****	\$257,679	\$2,199,072	\$100,000	\$2,559,751	
Total	\$442,539	\$3,867,072	\$525,000	\$4,834,611	

Sources: Center for Responsive Politics and Natural Resources Defense Council. Contributions include PACs, employees and corporate treasuries.

* Donations to Bush include \$6,000 contributed to the Bush-Cheney Recount Committee.

** Member of Edison Electric Institute

*** Other electric utilities that were facing NSR lawsuits or had settled cases by the end of the 2000 election cycle included Dynegy, American Electric Power, TECO Energy, Duke Energy, Public Service Enterprise Group, Vectren Corp., Tennessee Valley Authority and Wisconsin Electric.

**** Balance of contributions credited to the electric utility sector (virtually all of which is effected by NSR) once contributions from utilities facing litigation are subtracted.

task force to recommend re-evaluation of the NSR rule. Southern Co. lobbyist Michael J. Riith e-mailed task force liaison Joseph Kelliher a position paper on March 23, 2001 titled, “A National Energy Strategy Should Include Reform of EPA’s New Source Review Program.”¹²⁰ The topic was promptly added to the task force’s March 29 agenda, according to the *New York Times*.

“There was a real flurry of activity after the Southern Co. e-mail to put NSR on the energy policy agenda,” the *Times* quoted an unnamed source who participated in formulating the energy policy. “And it didn’t go away.”¹²¹

Riith subsequently had lunch with Kelliher on April 20, 2001, an hour after the task force held a conference call on NSR, according to task force records. He met again with the task force about a month after the report was issued, along with Jeanne Wolak, the Southern lobbyist who had received Kuhn’s 1999 fundraising memo.¹²²

Southern Co. and the other utilities got exactly what they wanted. The task force ordered the DOJ to scrutinize the legality of existing lawsuits regarding NSR, and EPA to report to the president on the impact of the NSR regulations on investment in new utility and refinery generation capacity, energy efficiency and environmental protection.¹²³ In short, the task force asked two cabinet agencies to undertake studies that had the potential to chop the legs out from under NSR.

In the end, DOJ determined that the lawsuits were legal. The EPA review, in contrast, did offer the utilities some relief. Its review, done “in consultation with the secretary of Energy,”¹²⁴ in June 2002 found that NSR regulations adversely affected efficiency and investment in upgrading the capacity of existing plants and announced changes in the program that would eventually be finalized in the new NSR rulemaking of August 2003.¹²⁵

Barbour Gets VIP Treatment

Southern’s influence was aided by its employment of super-lobbyist Haley Barbour, another Pioneer. Southern paid Barbour’s firm a total of \$460,000 in 2001 and 2002.¹²⁶ Southern also contributed \$150,000 of Barbour’s \$250,000 donation to an RNC fundraising gala in May 2001, just two weeks before the energy task force released its report.¹²⁷

Southern strengthened its claim on Barbour’s time by participating in the Electric Reliability Coordinating Council (ERCC), a group formed a few months into Bush’s presidency to push for overhauling NSR. The ERCC, which also included FirstEnergy, paid Barbour’s firm \$900,000 in 2001 and 2002.¹²⁸

In 2001, ERCC also paid the law firm Bracewell & Patterson \$226,000 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.¹²⁹ And the organization employed C. Boyden Gray, President George H.W. Bush’s point man on the Clean Air Act amendments of 1990 and a mentor to Holmstead,¹³⁰ the EPA official who shepherded the recent re-write of NSR rules.

Gray has not filed disclosure forms for his ERCC work because his lobbying for the group was not extensive enough to trigger the reporting requirement, he told Public Citizen. He was primarily responsible for press relations, he said. But Gray confirmed a press report that he had met with the White House once, the Energy Department at least three times, and the EPA “in passing” in the formulation of the energy policy.¹³¹

The ERCC, and especially Barbour, received VIP treatment from the task force:

- Gray met with DOE Chief of Staff Kyle McSlarrow on March 22, 2001, the day before Southern Co.’s Riith e-mailed the task force’s liaison a position paper calling for reform of NSR.¹³²
- Three employees of Barbour’s lobbying firm met with DOE Senior Policy Adviser Kevin Kolevar on March 29, 2001.¹³³
- Barbour met with McSlarrow on April 17. “The topic of the meeting is Energy policy and New Source Review. [Barbour] will be met curb-side by advance staff and escorted to Kyle’s office. Depending on the schedule, S-1 may stop by this meeting,” a task force e-mail said. S-1 refers to Energy Secretary Spencer Abraham.¹³⁴
- Barbour and Racicot attended an energy task force meeting with Cheney on May 3, 2001.¹³⁵
- Barbour and Racicot attended a meeting with Deputy Energy Secretary Frank Blake on July 23, 2001.¹³⁶

Blake’s calendar is a testament to the degree of access granted to energy industry representatives regarding NSR. He held seven meetings with energy industry officials and their representatives concerning power plant pollution in the course of 2001, according to a letter sent from the department to Rep. Henry Waxman (D-Calif.) in 2002. Blake held one meeting with an environmental group.¹³⁷

Blake’s seven meetings with energy industry representatives were attended by 60 people, according to the records. Kuhn of EEI attended three of the meetings; companies represented at more than one meeting included Southern and Duke, both of which were facing NSR lawsuits.¹³⁸

Environmental and conservation-oriented groups accused the task force of shutting them out, a charge that is supported by analysis of task force members’ calendars. The task force had 714 direct contacts with industry, compared with 29 with representatives of non-industry organizations, such as environmental groups, according to the NRDC’s analysis.¹³⁹

A coalition of major environmental organizations requested a meeting with Energy Secretary Abraham on Feb. 20, 2001, “to discuss important energy and environmental concerns.” The department denied the request, saying Abraham was too busy. A spokeswoman later said the request was denied because the groups did not specifically ask to talk about the national energy policy, and that the crafters of the policy were reaching out to environmental groups.¹⁴⁰

But this claim loses credibility in the face of documents which suggest that environmental considerations were afterthoughts of the task force. First, an e-mail from policy staffer Margot Anderson indicates the energy report did not initially include an environmental section. “This is the environmental chapter,” Anderson wrote in an e-mail on March 23, 2001, soliciting

comments from about 20 task force colleagues. “I am unclear about the process on this one. I do know the topic was added in late.”¹⁴¹

Another e-mail revealed that the task force allotted itself fewer than two days to ask for ideas from environmental and conservation groups, receive the ideas, and analyze them.

On March 21, Anderson asked staffer Peter Karpoff to solicit ideas from 11 environmental and conservation-oriented groups and to “review the proposals and recommend some we might like to support that are consistent with the Administration’s energy statements to date?”¹⁴²

The e-mail was sent to Karpoff at 12:49 p.m. on a Wednesday.

“Need by Friday noon,” Anderson concluded.

Endnotes

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