

**Testimony of Attorney General Bill Pryor
On the Clean Air Act New Source Review
Joint Hearing Before the
Senate Committee on Environment and Public Works and the
Senate Committee on the Judiciary
Tuesday, July 16, 2002
Room 106, Dirksen Senate Office Building
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Chairman Jeffords, Chairman Leahy, and distinguished members of the Committees, my name is Bill Pryor, and I am the Attorney General of the State of Alabama. It is my pleasure to be here today, along with my colleagues General Sorrell and General Spitzer, to discuss the important issue of Clean Air Act New Source Review. As the Attorney General of a state that exports surplus electricity, my point of view may be different from that of my colleagues who represent states that import electricity.

I support the thrust of the report submitted to President Bush by the EPA Administrator to revitalize the New Source Review Program and in so doing to restore the delicate balance of “cooperative federalism” embodied in the Clean Air Act Amendments of 1970.

Cooperative Federalism

Until the 1970s, the maintenance of clean air was viewed as predominantly a state and local concern. In 1970, after a series of smaller experiments, Congress adopted a new blueprint for the battle against air pollution. The new plan — set forth in the Clean Air Act Amendments of that year (42 U.S.C. §§ 7401-7671 (1994 & Supp. V 1999)) — created a model of “cooperative federalism.”

This new model gave the federal government responsibility for establishing national air quality standards, along with a variety of enforcement tools for ensuring that those standards are met. It reserved to each State, however, [and I quote]:

the primary responsibility for assuring air quality within the entire geographic region comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Clean Air Act § 107(a), 42 U.S.C. § 7407(a). Underlying this provision was the Congressional finding that “air pollution prevention . . . is the

primary responsibility of States and local governments.” Clean Air Act § 101(a)(3), 42 U.S.C. § 7101(a)(3).

In a series of decisions in the mid-1970s interpreting the then-new statute, the Supreme Court laid out and clarified the Act’s division of responsibilities between the federal government and the states. Train v. National Resource Defense Council, 421 U.S. 60, 79 (1975); Union Electric Co. v. EPA, 427 U.S. 246 (1976); EPA v. Brown, 431 U.S. 99 (1977) (per curiam). In the quarter century since these cases, the federal courts have staunchly protected the federalist design of the Clean Air Act.

For example, in 1984, the Seventh Circuit struck down an attempt by EPA to strengthen a State Implementation Plan (or “SIP”) through a partial approval that was more akin to an amendment. Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036 (7th Cir. 1984). As Judge Posner eloquently explained,

The Clean Air Act is an experiment in federalism, and EPA may not run roughshod over the procedural prerogatives that the Act

has reserved to the states, especially when, as in this case, the agency is overriding state policy.

Id. at 1036-37 (citations omitted).

Similarly, and more recently, the D.C. Circuit relied on the same principles and precedents to vacate an EPA rule that purported to require twelve states and the District of Columbia to amend their SIPs to adopt a particular method of controlling pollution. In so holding, the court emphasized that Section 110 of the Clean Air Act “does not enable EPA to force particular control measures on the states” Virginia v. EPA, 108 F.3d 1397, 1410, amended on other grounds, 116 F.3d 499 (D.C. Cir. 1997).

As these and other courts have acknowledged, the delegation of implementation decisions to the states reflects not only a spirit of comity but also a recognition that state regulators — well-versed in local needs and circumstances — are best able to craft detailed programs to improve air quality while ensuring the continued availability of energy and maintaining economic prosperity.

The Clinton EPA Enforcement Campaign

In the late 1990s, the United States Environmental Protection Agency upset this sound design. EPA commenced enforcement actions against a variety of companies, including a cross-section of the nation's electric utilities, claiming that certain plant activities triggered the extensive New Source Review pre-construction permitting requirements under the Clean Air Act.

For two decades, EPA, frontline state regulators, and regulated sources had all interpreted these activities as falling within an exclusion for routine maintenance, repair, and replacement. Their common understanding was that New Source Review applied only to major modification activities that are akin to new construction. During the Clinton administration, EPA advanced a novel interpretation that would require the adoption of state-of-the-art pollution controls at existing sources for activities that state regulators had considered routine maintenance, repair, and replacement activities.

The Clinton EPA's new interpretation conflicted with prior federal and state guidance. In several instances, state and local regulators inspected the facilities that are the subject of EPA's enforcement actions

— before or immediately after the maintenance activities upon which EPA has based its actions — without suggesting that a permit was necessary. Indeed, EPA’s enforcement net was so broad as to encompass certain plants that sought out and received explicit determinations from state regulators that a particular maintenance activity did not trigger the New Source Review requirements.

The Clinton-era EPA undertook this abrupt reversal of course without notice-and-comment rulemaking and without consulting the states, which have had the primary responsibility to implement New Source Review standards for over twenty years. EPA’s course eviscerated the cooperative federalist approach that is the heart of Congress’s design, in which the federal government has the authority to set national air quality objectives and standards but the States have the authority and the responsibility to implement them. EPA invaded the province of the States and threw their respective air pollution control programs into upheaval by reversing — with the blunt tool of enforcement instead of a collaborative rulemaking process —

interpretations that are central to the day-to-day activities of state regulators.

I urge these committees to work with the President and the EPA in a bi-partisan spirit to develop better defined standards of New Source Review, consistent with the original design of cooperative federalism in the enforcement of the Clean Air Act.