

TESTIMONY OF STUART SPENCER

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BEFORE THE HOUSE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON ENVIRONMENT

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Good afternoon Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee. I appreciate the invitation to join you today to discuss the important issue of New Source Review (NSR) reform. I'll be presenting information to you in two capacities.

First, I'm here as an Associate Director of the Arkansas Department of Environmental Quality, where I oversee seventy-five employees in the Office of Air Quality located primarily in our headquarters in North Little Rock and also throughout the state in nine regional field offices. The Office of Air Quality staff includes engineers, epidemiologists, ecologists, chemists, physicists, biologists, and attorneys in the primary branches of Compliance, Permits, and Policy and Planning, as well as the Asbestos and Enforcement sections. Our primary mission is to protect and improve air quality in Arkansas while fostering responsible economic expansion opportunities.

Second, I'm here as the President of the Association of Air Pollution Control Agencies (AAPCA). AAPCA is a consensus-driven organization comprised of forty-five state and local air agencies that focuses on assisting its members and their personnel with implementation of technical issues associated with the federal Clean Air Act. The AAPCA board of directors is made up of the Air directors from our twenty geographically diverse member states, including states with representation on this subcommittee. As AAPCA's President, I serve on the board of

directors along with Air Directors from Florida, Georgia, Kentucky, Louisiana, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia, as well as states as diverse as Wyoming and Maine. Despite the miles between our state borders, we have common goals and missions.

Today, I'll be addressing a few common themes in regard to reforming NSR. The first theme is practical application. Environmental regulations should encourage necessary repair and replacement projects and should incentivize projects that improve the safety of operations, increase energy efficiency, or reduce the emissions of regulated air pollutants. The second theme is clarity. This includes removing undefined terms and exemptions, such as "routine maintenance", from the NSR rules and guidance, and replacing them with clear definitions. A prime example would be refining the term "modification" to truly mean a substantial modification, as proposed in legislation introduced by your own Rep. Griffith. As an environmental regulator, I can tell you that an ambiguous or muddy rule is often times worse than a bad rule, because it inhibits planning due to its lack of certainty, and therefore stifles growth and innovation. This leads me into my final theme: modernization. NSR is outdated and cumbersome. It's my understanding that the documents that comprise the NSR rules and guidance take up at least two file boxes if printed out in hard copy form. The time to reform was yesterday, so I'm glad we're having this conversation today.

With those themes in mind, I'll speak first as an Associate Director of ADEQ. The Office of Air Quality implements all air programs delegated by EPA Region 6 to the State of Arkansas. These programs include the Title V program for major sources of pollutants, the New Source Performance Standards (NSPS), the National Emission Standards for Hazardous Air Pollutants (NESHAP), Prevention of Significant Deterioration, and the State Implementation

Plan (SIP). Arkansas operates a one permit or “unified” system with construction, operating, state, and federal requirements all included in the Title V permit.

Under the leadership of one of your former colleagues and now Governor of Arkansas, Asa Hutchinson, Arkansas has committed to “protective permitting”, a practice we implement at ADEQ. This practice is essential to achieving our goals of maintaining our status as “The Natural State”, protecting public health and the environment in our communities, and promoting and sustaining economic growth.

Our permits are protective in a number of ways. First, they protect the environment by establishing emissions limits, operating requirements for pollution control devices or pollution prevention activities, and monitoring and record keeping requirements. These limits and requirements are established through a combination of assessing monitoring data, modeling analyses, and other empirical evaluations. According to our most recent ADEQ State of the Air report, the ambient concentrations of most pollutants decreased during the analyzed time period. Currently, all monitoring locations in Arkansas are exhibiting design values well below national ambient air quality health-based standards for all national ambient air quality standard criteria pollutants. These achievements in air quality were realized while simultaneously significantly reducing our permit backlog: Arkansas is currently ranked in the top five nationally for timely Title V significant modifications and Title V permit renewals.

Second, our permits protect the regulated community because they drive compliance through the certainty of their permit conditions. ADEQ air permits contain clearly defined specific, plant-wide, and general requirements for all emitting sources at the facility. These requirements are clear both to the permitted facility and to ADEQ’s inspectors. It’s this clarity that facilitates compliance and triggers enforcement when appropriate.

Finally, our permits protect the investments made in infrastructure and “job-creating” businesses which rely on the permits written by permit writers at ADEQ to be defensible. The permits are taken through a deliberate and public process, and include legally binding provisions that include enforceable conditions with which the source owner/operator must comply.

I am joined today in the gallery by the ADEQ Senior Associate Director and General Counsel, Julie Linck. Under the leadership of ADEQ Director Becky Keogh and Senior Associate Director Linck, ADEQ has taken steps to reaffirm the state’s role in the collaborative process of cooperative federalism. Before the U.S Senate Environment and Public Works Committee, Director Keogh testified about the need for USEPA to move from “coercive” federal role to one which supports states proper role. In asserting our position at the table, Director Keogh has suggested that many state programs have matured and as she has repeatedly stated “at 40 years of ages, states have grown up and are ready to leave home and be given the freedom and flexibility to make a better future.” She had publicly praised the recent efforts of the United States Environmental Protection Agency’s (EPA) Administrator Scott Pruitt as he has worked to shift the relationship from parent to partnership.

We are working cooperatively with our counterparts at EPA to submit state plans and issue permits that are approvable and defensible respectively. We have asserted our place in policy setting and decision making. No longer a pawn in a coercive system of onerous federal plans, we are beginning to see movement on a number of our submissions. To borrow a phrase from Director Keogh’s colleague in Arizona, Misael Cabrera, we are working our way out of the “regional haze maze”, having recently received approval from EPA on a portion of our first planning period SIP. But navigating the “haze maze” is a topic for another day. Today, we’re here to talk about what I term “bizarre NSR”.

I use the term bizarre because the NSR rules and regulations often times demonstrably discourage rather than encourage pollution control and efficiency projects because they create a fear and disincentive in the regulated community to maintain and update aging equipment. You may recall my first theme was practical application. The EPA NSR draft guidance document is the appropriately titled 1990 “puzzle book”. This puzzle book is almost 30 years old and it has never been finalized. Most EPA guidance exists in a perpetual “draft” status, yet is relied upon and enforced by EPA staff as if it is final. It is a haphazardly-stitched quilt of rules, manuals, memos, guidance documents, and disparate applicability determinations.

ADEQ believes the NSR rules should be clear and concise in order to allow facilities to achieve compliance and ensure that both ADEQ and the regulated community have a well-defined understanding of the requirements. Changes to the NSR program would support our efforts to ensure that regulated facilities are in compliance with the rules, but do not become subject to potential enforcement actions based on divergent rule interpretations that are either ambiguous or evolving.

Both the EPA and the United States Department of Justice (DOJ) recently released guidance documents regarding NSR-related enforcement issues. ADEQ believes this new guidance is important to reorient policies toward pursuit of actual violations that create emissions increases. To date, NSR enforcement appears to be focused on what a company might have projected based on available information that, in many instances, is years or even decades old and that may not be based on actual emissions resulting from a project undertaken at a facility. Even where a facility has a clear NSR applicability process and has performed an emissions analysis in compliance with the NSR rules, there has historically been no guarantee that EPA and DOJ would not bring an enforcement action. In the same way that ADEQ ensures protective

permitting, EPA and DOJ need to move toward implementing protective policymaking that provides practicality and clarity to both the delegated regulators – the states- and the regulated community.

On that point, the guidance that EPA Administrator Pruitt issued on December 7, 2017 clarifies that EPA will not second-guess a facility's preconstruction emissions analysis. This will help ensure that both regulators and the regulated community have certainty in the process. The guidance also explains that EPA will not bring an enforcement action unless there has been an actual increase in emissions from a project. ADEQ believes this will help focus priorities on activities that have caused actual pollution increases rather than on-paper increases.

Likewise, the DOJ's January 25, 2018 memorandum prohibiting DOJ civil enforcement of noncompliance with other agencies' guidance documents has significant implications for NSR enforcement. As I've indicated, while the NSR rules are only a handful of pages, there are thousands of pages of guidance purporting to interpret the rules. Enforcement of the NSR program should not be based on guidance that can be revised over time as agency staff changes.

ADEQ welcomed the news in the Fall of 2017 that EPA Administrator Pruitt would be convening a NSR Reform Task Force. I speak both as an ADEQ Air Director and the President of AAPCA when I say we look forward to the opportunity to engage with EPA and stakeholders of interest to tackle NSR reform. The 2002 NSR Reform Rule was well-intentioned, but it did not deliver defensible clarity or certainty to the regulated community.

On the issue of reform efforts, AAPCA has submitted a number of comments in various federal dockets and has issued reports highlighting areas ripe for revisions and modifications. In June of last year, AAPCA provided to this Committee a letter containing consensus principles for Clean Air Act modernization, and a similar letter was also sent to the Senate Environment

and Public Works Subcommittee on Clean Air and Nuclear Safety. AAPCA's outlined principles included several related to permitting:

- “Maintain permitting requirements but allow facilities to be built or expanded in any area of the country as long as: (1) state or local environmental officials determine that the facility will not have a meaningful adverse impact on human health or the environment; and (2) they employ the best available technology to control their emissions.”
- “Maintain state and local agency discretion in permitting decisions and clarify that permits may be challenged only for clear and significant deficiencies that would have a meaningful impact on air quality.”
- “Provide for a limited exemption from Prevention of Significant Deterioration/New Source Review permitting for projects that are determined to be environmentally beneficial based upon a cumulative impacts analysis.”

AAPCA also submitted comments to the docket on EPA's review of regulations that may be appropriate for repeal, replacement, or modification under Executive Order 13777 on Enforcing the Regulatory Reform Agenda. In the AAPCA's comments, specific suggestions to revisions to NSR permitting included: “removal of volatile organic compound (VOC) requirements in areas with oxides of nitrogen limits under NSR”; as well as “modifications to PSD and NSR that consider environmentally beneficial projects; and providing a clean unit exemption.” AAPCA also tracked state and local agency comments on EPA's evaluation of existing regulations and produced a report in July 2017 entitled *The State of Regulatory Reform: Navigating State Perspectives on Clean Air Act Regulations Under Executive Order 13777*.

In conclusion, speaking again as an ADEQ Associate Director, any efforts to modernize and reform NSR, particularly the upcoming EPA-directed NSR Task Force discussions, should address the following issues:

1. Revise the emissions increase test under NSR to match the hourly test under NSPS. This would eliminate many of the issues with the current program and would streamline the entire program. Many of the other changes to the program could be avoided or simplified if NSR applicability was based on an increase in maximum achievable emission rates rather than annual tons.
2. Clarify the factors to be considered in determining whether a project is a routine maintenance, repair, or replacement activity. Many of those factors apply to almost any activity undertaken at a large industrial facility and have been raised in enforcement actions to claim that maintenance activities are not routine.
3. Create an exemption from NSR for efficiency projects. The current program is a disincentive to companies undertaking projects to make their operations more efficient. An hourly emission rate test would resolve this issue.
4. Codify the information in the EPA Administrator Pruitt's December 7, 2018 memo, that EPA will not second-guess a facility's emissions projection and clearly identify the circumstances when an emissions projection will be subject to review, such as if there were errors in the calculations or where the company used the wrong significant emissions threshold.
5. Clarify the definition of a "source" in order to ensure that geographically separate facilities are not artificially combined to create a single major source for NSR purposes.

6. Define when projects need to be aggregated for NSR purposes.
7. Clearly identify what types of projects should be considered as changes in the methods of operation.

At the end of the day, I can assure you that to the best of my knowledge all state Air Directors are unified in their mission to preserve and improve air quality. This mission can and should be achieved with mindful and modern policies and, where appropriate, regulations. Thank you again for opportunity to provide testimony today. I welcome any questions you may have for me.

Summary of Stuart Spencer's Testimony

The time for meaningful New Source Review (NSR) reform is now. Environmental regulations should encourage necessary repair and replacement projects and should incentivize projects that improve the safety of operations, increase energy efficiency, or reduce the emissions of regulated air pollutants. Permitting programs should allow facilities to be built or expanded in any area of the country as long as state or local environmental officials determine that the facility will not have a meaningful adverse impact on human health or the environment and that best available technology is employed to control emissions. State and local agencies should maintain discretion in permitting decisions and permits should only be challenged for clear and significant deficiencies that would have a meaningful impact on air quality. Any reform should provide for a limited exemption from Prevention of Significant Deterioration/NSR permitting for projects that are determined to be environmentally beneficial based upon a cumulative impacts analysis. The NSR rules and guidance should remove undefined terms and exemptions, such as “routine maintenance”, and replace them with clear definitions. Consequently, the factors to be considered in determining whether a project is a routine maintenance, repair, or replacement activity should be clarified. The terms “modification” should be revised and the emissions increase test under NSR should be based on an increase in maximum achievable emission rates rather than annual tons. Circumstances under which an emissions projection will be subject to review should be limited to those instances where there were errors in the calculations or where the company used the wrong significant emissions threshold. Geographically separate facilities should not be artificially combined or aggregated to create a single major source. Finally, the NSR rules should clearly identify what types of projects should be considered as changes in the methods of operation.