

# United States Senate

WASHINGTON, DC 20510

October 22, 2003

The Honorable Nikki L. Tinsley -  
Inspector General  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

Dear Inspector General Tinsley:

We are writing to request that you conduct an investigation into the handling of New Source Review (NSR) enforcement actions compiled by the EPA Office of Enforcement and Compliance Assurance and filed by the Department of Justice in 1999. Specifically, we would like you to determine if actions by Mr. Jeffrey Holmstead, Assistant EPA Administrator for Air and Radiation, or other Agency personnel, intentionally undermined the swift and environmentally protective resolution of NSR enforcement cases.

Based on information available to us, we have reason to believe that may have occurred. As the enclosed transcript from a July 16, 2002 joint hearing before the Senate Committees on Environment and Public Works and on the Judiciary demonstrates, Mr. Holmstead repeatedly told the Committees that the Administration's announced or proposed changes to the NSR provisions of the Clean Air Act would not negatively impact enforcement cases. Recent news accounts have brought to light a number of documents and statements that indicate that Mr. Holmstead knew that the Agency's proposals to change to NSR regulations would in fact undermine these enforcement cases. A new report from the General Accounting Office confirms that enforcement officials on numerous occasions outlined the negative impact of the proposals on cases.

In undertaking your investigation, we would like you to review the following documents, as well as other relevant documents and statements:

- 1) the May 4, 2001 memo from then-EPA Administrator Christine Todd Whitman to Vice President Cheney stating that changes to the routine maintenance provisions of NSR would "likely slow down or stop" settlements;
- 2) the February 28, 2002 analysis by OECA's air enforcement division showing that of the 10 violations cited in the FirstEnergy case, "not one would remain a violation" under the proposed new rule;
- 3) the June 3, 2002 internal memo from the EPA Office of Enforcement and Compliance Assurance (OECA) to EPA's Office of Air and Radiation, which stated that "...the very specific change [in the draft 'Recommended Improvements to the New Source Review Program'] in EPA's interpretation [of like kind replacement] of the current law...may require the Justice Department to dismiss the currently filed cases,"

- "...could undermine current enforcement activities if promulgated as final rules" and "If applied only on a prospective basis it would still impair our ability to obtain appropriate controls either in settlement or by way of injunctive relief;"
- 4) the June, 2002, press release and announcement of EPA's proposed changes in interpretation of New Source Review rules for routine maintenance, repair and replacement projects, and whether the press release and other materials had been revised to reflect concerns raised by enforcement;
  - 5) statements by Acting Administrator Horinko, Mr. Holmstead, or other agency officials indicating that the agency would not apply the previous rules to violations that occurred before those rules were changed, except for the few cases already filed in court;
  - 6) the final rule establishing an exemption for replacement projects costing less than 20% of the value of the affected process unit, and whether any of the projects in the pending lawsuits would be exempt under this new standard;
  - 7) statements by Ms. Horinko, Mr. Holmstead, and other EPA officials that the August rules would not result in increases in emissions;
  - 8) the attached list of pending notices of violation of New Source Review requirements;
  - 9) findings by the EPA's Environmental Appeals Board in the TVA case and the Ohio district court in the Ohio Edison case that emissions had increased substantially as a result of modifications that could now be treated as exempt under the new rules;
  - 10) the October 21, 2003 GAO report on NSR revisions and its transcripts;
  - 11) documents and statements by industry officials related to the pending NSR enforcement cases; and,
  - 12) Department of Justice documents sent to EPA that assessed potential impact of the NSR revisions on the NSR litigation.

In several of these cited documents, it appears that enforcement staff raised concerns about changing the routine maintenance exemption and other proposals on several occasions. It further appears that the nature of these concerns went well beyond whether the cases already filed at that time would have to be withdrawn if the rulemaking were not made prospective. In fact, it appears from these documents that the concerns included the potential for the rulemaking to undermine the strength of the government's cases, the government's ability to obtain settlements and the government's ability to enforce in the future. Recent court filings by DOJ and industry litigants seem to confirm the concerns raised by government attorneys on several occasions were valid ones. To clarify the timing and extent of the concerns raised, we would also like you to interview appropriate staff and attorneys that were involved in compiling and prosecuting the cases.

Congress relies on the forthright and accurate testimony of Agency officials in reviewing major policy changes such as the NSR proposals. Accordingly, we would also like you to examine all of the Agency's testimony before Congress on this issue to determine whether or not Agency

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officials mischaracterized before Congress the Agency assessments of the impacts of the NSR proposals on enforcement cases and the potential emission increase that may result.

Congress, and we believe the public, also expects that the Agency and its employees will not act in a manner that contradicts or undermines ongoing enforcement actions. If your investigation determines that Mr. Holmstead or other government officials acted to undermine the cases or made false or misleading statements about the impact of the NSR proposals on enforcement cases, please recommend appropriate corrective actions, including any disciplinary actions or referrals in accordance with Section 4 (d) of the Inspector General Act of 1978.

In accordance with your responsibility to keep the Administrator and the Congress fully informed concerning problems, abuses and deficiencies relating to the administration of Environmental Protection Agency's (EPA) programs, please provide us with a report of the findings and recommendations. Thank you for your attention to this matter.

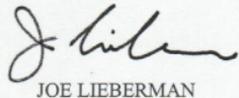
Sincerely,



JAMES JEFFORDS



PATRICK LEAHY



JOE LIEBERMAN

Enclosure