

United States Senate
Environment and Public Works Committee
Subcommittee on Superfund, Waste Management, and Regulatory Oversight

Hearing: “Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, States, Local Communities and the Environment”

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Thank you Senator Wicker, Senator Rounds and Senator Markey for the invitation to be with you today. As Air Director of my state’s environmental agency, I am responsible for maintaining compliance of National Ambient Air Quality Standards and the welfare of people back home. As of today, every air monitor we operate in Mississippi indicates Design Values in compliance with these national standards, and is indicative of good planning, application of air control technology and, until recently, responsible rule making involving state officials and industry.

I want to share with you today how reasonable and transparent policy development has generally been successful in improving air quality in this country over the last three decades, but also my concerns of unintended consequences of the so-called “sue and settle” approach. In the past, impacted stakeholders, including my agency, were afforded ample time to participate in early rulemaking that ultimately reduced air emissions while minimizing the burden on the state and its companies. In general, as the final rule was ultimately signed, the industry that rule regulated had been afforded, at minimum, an advanced overview of the main elements, and in some cases a seat at the table in the rule development process itself. The states had sufficient time to engage industry, study the proposed rule, and to schedule listening sessions and provide our comments to EPA. We perceived EPA to sufficiently consider and address our comments in past rulemaking, which I feel strengthened the implementation process.

The “sue and settle” method by definition does not afford my state any input into the agreement, yet subjects us to the burden of satisfying the requirements of the agreement. Adding to the

frustration, the details and methodology used to arrive at the technical elements related to the settlement is often sealed by the courts. One recent example of such a settlement is the Sulfur Dioxide Consent Decree.

On March 20, 2015, the Mississippi Department of Environmental Quality (MDEQ) received a letter from EPA indicating that on March 2 a settlement agreement known as the SO₂ Consent Decree was reached between EPA, the Sierra Club and the Natural Defense Council. The Consent Decree addressed litigation concerning EPA's failure to complete designations regarding attainment status with the 2010 one-hour average SO₂ National Ambient Air Quality Standard (NAAQS). The notification to MDEQ identified South Mississippi Electric Power Association's (SMEPA) R. D. Morrow Generating Plant in Lamar County, Mississippi, based on emission thresholds established in the closed agreement, in jeopardy of being designated as nonattainment. The state's only acceptable option of preventing the nonattainment designation was to model the SO₂ emissions at R. D. Morrow and submit a recommendation of attainment by the Consent Decree deadline of September 18, 2015. MDEQ is in the midst of this effort, and preliminary model results, as expected, reveal Lamar County to be in attainment with the SO₂ NAAQS. The end result of EPA's "sue and settle" in this case will be the expenditure of already stretched and valuable resources for both the state and SMEPA with no environmental benefit.

The cycle of "sue and settle" begins with faulty timelines. We understand in some cases the timeline dictated to EPA is out of its control; however, it is to those instances EPA is establishing the timelines that I wish to draw your attention. In the SO₂ Consent Decree example, states were provided only six months from notification of the agreement to make its recommendations based upon an in-depth air modelling exercise and analysis. In our case, MDEQ does not have the in-house capability to handle this type of modeling. The six month timeframe hardly provided adequate time for MDEQ to establish the contract, much less perform the work necessary to assist in running the model. The short timeframe also limits a state's ability to anticipate and budget its resources. If SMEPA had not agreed to absorb the cost and utilize its modeling contractors, the state would have been relegated to accepting the unnecessary nonattainment designation for Lamar County. In such an instance MDEQ would then begin to move forward with the much more intensive effort of re-designation and more importantly, work to remedy the

negative economic impact even a temporary nonattainment designation would place on the Lamar County area. Even beyond the “sue and settle” we see EPA, where given the discretion to establish timing, chooses to be more and more stringent and less flexible. State environmental agencies and specifically MDEQ are being asked to do more with less. Good science, sufficient resource planning, and effective regulation and policy development take time.

Another disconcerting issue we have with “sue and settle” and the SO₂ Consent Decree in particular is the posture of presumed “guilt” for the identified areas – meaning the area is presumed not in attainment based simply on a single site’s sulfur dioxide emissions. In addition, only modeling data is allowed to justify otherwise because monitoring didn’t pre-exist. In the SMEPA case, MDEQ believes Lamar County to be in compliance empirically and based on experience. MDEQ currently operates two SO₂ NAAQS monitors located in much more industrial and commercial areas than rural Lamar County. These monitors currently read well below the standard. MDEQ does not believe it is a stretch to use a comparative analysis along with an understanding of SMEPA’s control strategies and actual emissions to conclude that Lamar County would be in attainment. Preliminary modeling results now support this. Due to the closed nature of the agreement made through “sue and settle,” MDEQ is not provided the basis for which Lamar County was found to be presumed in violation of the NAAQS. Without state involvement or at least an open process regarding “sue and settle” agreements, we believe states will continuously find themselves defending unsubstantiated claims of rules and standards violations, further directing value time and resources away from programs that prove effective in protecting human health.

In addition, EPA at its discretion often makes decisions that seem arbitrary, not science-based.

Designations for the 1997 Ozone standard were made in 2004. EPA originally proposed to include DeSoto County, Mississippi, in the Memphis Ozone Non-Attainment Area. MDEQ submitted a robust technical support document supporting designating DeSoto County as in attainment. Monitoring data was well within the 1997 ozone standard and the county had a much smaller population and traffic density than other counties in the Memphis urbanized area. In the months prior to the designation, there was constant dialogue between MDEQ and EPA,

and there were several times when EPA requested clarification on some points of MDEQ's technical support document. MDEQ was given ample opportunity to answer EPA's questions regarding separating DeSoto County from the Memphis Non-Attainment Area. EPA's final decision was to designate DeSoto County as attainment and separated it from the Memphis Ozone Non-Attainment Area. MDEQ agreed with this decision and applauded EPA for the clarity of EPA's decision-making process and open communication in this action and felt this created a favorable precedent.

For the 2008 ozone standard, final designations were made in 2012. Again, EPA's proposal was to include DeSoto County in the Memphis Ozone Non-Attainment Area. MDEQ submitted a new and more vigorous technical support document recommending a designation of attainment for DeSoto County. After the submission of the technical support document, MDEQ contacted the EPA regional office several times asking if any further information or clarification would be helpful. Each of these attempts for open communication was declined. MDEQ was told final decisions were being made at the headquarters level without input from the regional office. Even though the data from the air quality monitor in DeSoto County was well within the 2008 ozone standard and the county still had a much smaller population and traffic density than other counties in the Memphis urbanized area, EPA ignored the prior precedent and included DeSoto County in the Memphis Ozone Non-Attainment Area. Additionally, when EPA released comments to MDEQ's technical support document, EPA gave little or no response to most of MDEQ's significant points, stating "EPA disagrees" without providing any significant basis for its decision.

To conclude, I recommend future litigation resulting in agreements the EPA makes that involve states like mine be considerate of the burden being placed not only on the states but on the process of developing policies that advance air quality and reduce pollution. In an era of diminishing appropriations and seemingly ever-increasing regulation complexity and burden, each action taken by EPA to mandate a response by my state forces us to make critical decisions involving programs, spending and personnel.

I thank you for your time and once again for the gracious invitation to join you today.

Biography of **Dallas Baker, P.E., BCEE**

Dallas Baker is Air Director and Chief of the Air Division with the Mississippi Department of Environmental Quality. He is responsible for attainment of and compliance with U.S. National Ambient Air Quality Standards and management of state-wide programs that promote air quality and protection of Mississippi citizens' well-being.

Mr. Baker graduated with a Bachelor of Science in Mechanical Engineering and a Master of Science in Environmental Engineering from the University of Mississippi. He earned an MBA from Mississippi College and is a Certified Public Manager. He serves on the Ole Miss School of Engineering Advisory Board as chair of the Geological Engineering Committee. Dallas is a licensed Professional Engineer and is board certified by the American Academy of Environmental Engineers & Scientists. He currently is President of the Air & Waste Management Association.