

**TESTIMONY OF JAMES SAMUEL PEW
STAFF ATTORNEY, EARTHJUSTICE
BEFORE THE
HOUSE SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC
BUILDINGS, AND EMERGENCY MANAGEMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES
APRIL 1, 2008**

Chairman Norton, Ranking Member Graves, and members of the subcommittee, thank you for holding this hearing today on the Capitol Power Plant, a significant threat to the health and welfare of the District of Columbia. My name is James Pew. I am a staff attorney with Earthjustice, a non-profit public interest law firm founded in 1971 as the Sierra Club Legal Defense Fund. Earthjustice represents, without charge, hundreds of public interest clients, large and small, to protect public health and the environment.

Based on the Capitol Power Plant's reported coal consumption, its size in comparison to similar units, and its inclusion on a list of affected facilities compiled several years ago by the Environmental Protection Agency, it appears extremely likely that the Plant is a major source of hazardous air pollutants. If so, it is currently operating in direct violation of federal law, which required it to obtain a permit setting limits on its toxic emissions.

According to EPA, steam-generating boilers such as those used by the Capitol Power Plant can be expected to emit toxic metals including mercury, lead, and arsenic, toxic organic compounds such as dioxins, benzene, and formaldehyde, and toxic acids, such hydrochloric acid and hydrofluoric acid.¹ After lengthy investigation and extensive hearings involving testimony from experts from a wide variety of disciplines, Congress listed these pollutants and more than 150 others as "hazardous" in the Clean Air Act Amendments of 1990.² A "major source" of hazardous air pollutants has the potential to emit them in large quantities — ten tons or more of any single hazardous air pollutant or twenty-five tons or more of any combination of hazardous air pollutants.³

EPA has indicated that exposure to the pollutants emitted by boilers such as the Capitol Power Plant can cause cancer, birth defects, developmental damage in babies and children, and damage to the lungs, kidneys, liver, and nervous system.⁴ Pollutants from

¹ 68 Fed. Reg. 1660, 1664-1665 (January 13, 2003).

² 42 U.S.C. § 7412(b)(1).

³ 42 U.S.C. § 7412(a)(1).

⁴ 68 Fed. Reg. at 1664-1665.

this plant, in particular, are emitted directly into a densely populated city. Needless to say, the District of Columbia is already afflicted by some of the worst levels of toxic pollution in the country.⁵

One might expect that a major source of hazardous air pollutants located in the heart of the Nation's Capitol would be closely monitored and subject to protective standards requiring the maximum level of reduction in emissions that is achievable. In fact, notwithstanding Congress' clear direction in the 1990 amendments the Capitol Power Plant does not today meet any standards for emissions of toxic air pollutants. Its permit does not contain any limits or, indeed, any schedule for meeting limits in the future. The permit does not even indicate which hazardous air pollutants the Capitol Power Plant emits, or in what quantities it emits them.

Although the Clean Air Act required EPA to issue the Act's most protective standards for all major source boilers no later than November 15, 2000, the agency did not issue the standards for this category until 2004.⁶ These standards were hopelessly defective, however. Among other things, they simply failed to establish any standards for the majority of hazardous air pollutants that boilers emit. They were vacated as unlawful by the United States Court of Appeals for the District of Columbia Circuit in a June 8, 2007 decision.⁷

When Congress enacted the Clean Air Act Amendments of 1990, it wisely anticipated the possibility that EPA would leave major sources of hazardous air pollutants uncontrolled notwithstanding its statutory obligations. Accordingly, Congress enacted a backup provision known as the "hammer." When EPA has failed to set standards for air toxics by the statutory deadline, State governments and the polluters themselves must take over the job.⁸

Although responsibility for the delay in reducing hazardous emissions from the Capitol Power Plant fell on EPA until the D.C. Circuit vacated the agency's unlawful standards, responsibility shifted to the District when that decision took final effect on July 30, 2007. To continue operating the Plant, the Architect of the Capitol and the General Services Administration were required to submit a special permit application to the

⁵ See EPA, National Air Toxics Assessment, <http://www.epa.gov/ttn/atw/nata/natsa4.html>.

⁶ 69 Fed. Reg. 55218 (September 13, 2004). See 42 U.S.C. § 7412(e)(1)(E) (requiring standards for all categories of major sources of hazardous air pollutants "not later than 10 years after November 15, 1990").

⁷ *Natural Resources Defense Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007).

⁸ 42 U.S.C. § 7412(j).

District requesting limits on the Plant's emissions of hazardous air pollutants.⁹ EPA and the Department of Justice have confirmed that vacating EPA's defective standards for boilers triggered these hammer requirements.¹⁰

Technically, these applications were due immediately. At a minimum, they were due within a reasonable time afterwards. While Congress did not anticipate that EPA's rulemaking would be so outrageous as to merit a vacatur by the Courts, analogous regulatory provisions make clear that hammer permit applications must be filed within 30 days.¹¹ This deadline can be easily met. The National Association of Clean Air Agencies, which represents the permitting authorities that receive and evaluate permit applications, estimates that the total time needed for filing the required applications is four hours or less.¹² Thus, filing the required application is not burdensome and requires no significant effort on the part of the Architect of the Capitol or GSA.

No notice is required from EPA or the Government of the District of Columbia to trigger the hammer requirements. The Clean Air Act places the obligation to apply for a permit squarely and unconditionally on the source itself.¹³ Despite its assertions to the D.C. Circuit,¹⁴ EPA has refused to acknowledge sources' obligation to submit permit applications. Further, EPA has attempted to muddy the waters with reference to the Paperwork Reduction Act.¹⁵ The Paperwork Reduction Act applies only where a government agency seeks information, not here where a Federal statute requires a source

⁹ 42 U.S.C. § 7412(j)(2)-(3). *See also* 42 U.S.C. § 7412(j)(4)-(5) (within eighteen months after it receives the permit application, the District Government must set the required limits and include them in the Capitol Power Plant's permit).

¹⁰ In a May 4, 2007 pleading in *Natural Resources Defense Council*, DOJ on behalf of EPA asserted "EPA recognizes that vacatur of the standards will trigger the requirements of Clean Air Act Sections 112(g) for new sources and 112(j) for existing sources."

¹¹ 40 C.F.R. § 63.52(b) (providing that when sources become "major" after the deadline for hammer permit applications has expired, they must file applications within thirty days).

¹² Comments of NACAA on EPA's Proposed Collection Comment Request; Requirements for Control Technology Determinations from Major Sources in Accordance with Clean Air Act Sections 112(g) and (j); EPA ICR No. 1648.06 OMB Control No. 2060-0266 ("NACAA Comments") at 9-10.

¹³ 42 U.S.C. § 7412(j)(2)-(3).

¹⁴ *See supra* at n9.

¹⁵ NACAA Comments at 1.

to submit an application to State permitting officials.¹⁶ The current administration's foot-dragging does not release the Architect of the Capitol and GSA from their statutory obligations.

If the Capitol Power Plant is a major source of hazardous air pollutants, it is currently violating federal law by operating without a permit. Its operators, the Architect and GSA, violate the Clean Air Act each day the Capitol Power Plant continues to operate without submitting this permit application.

It is fundamental that the federal government should not be acting in violation of federal law. Beyond that, Congress enacted the hammer permit requirements for a reason, to ensure that the public is protected from exposure to air toxics even if EPA fails to set standards. Since July 30, 2007, GSA and the Architect have had ample time to put forth the 4 hours of effort needed to submit a permit application for the Capitol Power Plant's toxic emissions. The Capitol Power Plant needs to submit its permit application immediately to start the process that will yield important practical results: emission standards that at last control the toxic pollutants that it pumps into this city and protect the District's residents from the adverse health and welfare effects these pollutants can cause.

The obligation of Federal facilities goes far beyond the Capitol Hill power plant. GSA and other Federal agencies are similarly operating numerous other major sources of hazardous air pollutants and to our knowledge none of these sources have complied with the law. In addition, several thousand privately owned industrial boilers are similarly operating without the necessary permits and controls for hazardous air pollutants. EJ respectfully requests that this Committee act (or refer to the appropriate committee) to fully investigate this broader issue.

Thank you again, Ms. Chairman, for the opportunity to testify on this important issue.

James S. Pew
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, D.C. 20036
(202) 667-4500

¹⁶ NACAA Comments at 1-2, 5-6.