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Pete Domenici

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CLEAN AIR ACT AMENDMENTS OF 1977

PETE DOMENICI*

(text of a speech delivered in Albuquerque, New Mexico on April 29, 1978)

One of the characteristics of great moments in history is that they generally go unnoticed. I recognize that wars, the death of famous people and natural disasters all represent exceptions to this sweeping generalization. But if one looks at the sweep of human history, it is apparent that many of the watersheds of history went unnoticed by those alive at the time. The beginnings of civilization, the end of the Middle Ages, and the start of the industrial revolution are all phenomena that owe their recognition to historical hindsight rather than the consciousness of those alive at the time.

One of the joys of modern age is that our greater capacity for transmitting and analyzing information, even though it threatens to overwhelm us on occasion, allows us to identify major moments in history on short notice.

I believe that the year 1977 is such a moment. And when historians in the next century look back and ponder how the human race survived the twentieth century, 1977 will stand out as a pivotal year.

At this point, some of you may think that you're in the wrong meeting, that you are going to hear of the wonders of transcendental meditation or perhaps how a U.S. Senator feels that world hunger can be solved by increasing the consumption of sunflower seeds.

Let me assure you that you are in the right place, and that the subject is the Clean Air Act Amendments of 1977.

It would be fair, however, to question how such historical significance could be attached to a set of amendments that the Council on Environmental Quality stated only "slightly modified existing programs." Moreover, most students of environmental matters point to Earth Day in 1969 and the Clean Air Act amendments of 1970 as the true turning point in the nation's recognition that use of the air, land and water as dumping grounds for industrial wastes threatened the fabric of those ecosystems that support man's existence.

Without belittling the importance of the 1970 Air Act amend-

*Senior U.S. Senator from New Mexico; Member of the Senate Energy Committee, Senate Environment and Public Works Committee and the Senate Budget Committee; and ranking minority member on the Senate Aging Committee.

ments, I believe that the 1977 amendments to both the Air and Water Acts are of equal or greater importance. I can attest, as can many of you who committed your time and energy to the battle, that the two and one-half years spent in passing the 1977 Clean Air Act amendments were a period of almost unrivaled legislative intensity, and even ferocity.

It is this intensity that distinguishes the 1977 Air amendments from the 1970 effort. In 1970 the nation was enjoying rapid economic growth, unemployment was hovering around 4 percent and the inflation rate was just beginning to creep toward the 2 percent mark. The nation was negotiating an end to the Vietnam War and economists were speaking of a "peace surplus" with which the domestic problems would be quickly cured by a benign, paternalistic federal government.

The product of this sunny legislative atmosphere was the 1970 Clean Air Act. Despite its intricacies, the 1970 Act is a conceptually straightforward combination of standards and deadlines. There are primary ambient air quality standards to protect public health that were to be achieved by mid-1975. There were secondary standards to protect welfare values such as agricultural production. These were to be achieved within a "reasonable time," which many states interpreted to be the same time as the primary standards. Extensions of deadlines were narrowly circumscribed, with 1978 as an outside deadline from which there was no further appeal.

This system of standards and deadlines was established to insure the clean-up of six pollutants known as "criteria pollutants." These are: sulfur oxides, particulates, carbon monoxide, hydrocarbons, nitrogen oxides and photochemical oxidants.

The Act's strategy for meeting the deadlines for these six pollutants was to turn the states into shock troops. Each state was to establish a State Implementation Plan that the Administrator of EPA had to approve. These plans have over time become known, in the best tradition of bureaucratic jargon, as SIPs. These SIPs have two further components, which really comprise the heart and soul of the 1970 amendments. For stationary sources, such as power plants and steel mills, the States must set a specific limit on the pollution that could be discharged. These limits, known as emission limits, are enforced by an array of civil and criminal sanctions.

For mobile sources the 1970 Act adopted a two-part strategy. First, the law set out emission standards for automobiles. However, it was recognized at the outset that in many urban communities the number of cars would easily overwhelm any clean-up achieved on individual cars. Accordingly, the 1970 Act specifically stated that

where emissions limits on cars were inadequate to achieve the national ambient air quality standards, additional measures "including but not limited to land use and transportation controls" must be used. It is important to emphasize that automobile emission standards, land use and transportation controls are all pieces of the same puzzle, and not unconnected separate strategies. Accordingly, an easing or delay in any one of the three pieces means that controls on the other two must be stiffened if the ambient air quality standards are to be met on time.

In passing the 1970 amendments, the Congress was brimming with optimism. And, in fact, such optimism was an essential prerequisite in attempting to transform the habits of an affluent, industrialized society that had grown indifferent to the eco-systems that supported it. In enacting the 1970 amendments, the Congress clearly contemplated a legislative blitzkrieg that would quickly surmount economic and technical difficulties. The Congress in 1970 also recognized that such a frontal assault would entail casualties. The Senate Report in 1970 noted that "as much as 75 percent of traffic may have to be restricted in certain large metropolitan areas if health standards are to be achieved." For power plants and steel mills, the Senate Report was equally straightforward: "either meet the standard . . . or be closed down."

These were bold words in 1970, but in 1975 when the time to deliver on these strong statements had arrived, there was a decidedly gloomier legislative atmosphere. The 1973 oil embargo had broken the nation's energy and economic optimism. Unemployment was 9 percent nationwide and 20 percent in the auto industry. The country was experiencing spasms of double digit inflation. Watergate had brought all politicians and the political process into disrepute. And the federal government was no longer considered a problem solver, but rather as a major part of the problem.

Implementation of the law reflected the national mood. Land use and transportation control plans had become mired in litigation and had been suspended awaiting Congressional mouth-to-mouth resuscitation. The automobile timetable had been delayed three times, twice administratively and once statutorily since the 1970 Act.

On the stationary source side, not one steel mill was in full compliance with the law. Close to 50 percent of the refineries, utilities, pulp mills and large commercial boilers were out of compliance. Moreover, a Supreme Court decision in 1973 supporting a policy of nondegradation in areas of the country with air cleaner than the national standards had been put in limbo by EPA under the guise of awaiting additional Congressional clarification.

Thus, it was obvious that the Act in 1975 needed a strong, friendly guiding hand on the part of Congress to put it back on the track. Such an effort should have involved careful analysis, reasoned debate and time to ponder the policy implications of each change. Those of you who were with me during those two-plus years know that nothing of the sort happened. It was a bloody two-year brawl.

The reasons for the ferocity are many, but certainly at the center of things was American industry's accurate perception that this was their last chance before the Clean Air Act became so institutionalized that only minor alterations would be possible in the future. Rather than recount the battle, let me give one example: auto standards.

The toughest vote I have made in the U.S. Senate was on the issue of auto standards. For years, despite their importance to economy, the automakers had been comparatively easy for the Congress to handle because their base of operations was in Detroit, Michigan and Michigan has only two Senators. There are 98 other ones. The mathematics was relatively easy. Since 1970, however, automakers have begun to diversify plant sites. They now are scattered throughout the country. Yet again, the math does not make them winners. But by 1975, the automakers had figured something out: Every state in the country has automobile dealers and these dealers have employees. Every state in the country has gasoline stations and they have employees. Every state in the country has automobile parts stores and they have employees. In fact, large segments of each state's economy is based on the health, care and feeding of the automobile. Most importantly, the more rural a state (and thus previously the more immune their representatives to Detroit's pleas), the more they relied on the automobile in their local economy. Accordingly, the auto industry mounted a massive grassroots campaign.

It realized that most representatives will meet with groups of concerned constituents. And that it is very, very tough, in fact painful, for an elected representative to have to tell so many people no.

And no is exactly what a majority of us did say in the Senate. But it has left scars.

I bring up the auto issue as only one example of the kind of issue that Senator after Senator faced over the two years it took to get this bill. I also bring it up to illustrate why I think the 1977 Clean Air Act amendments are of equal or greater importance than the 1970 amendments. It was in 1977 that the heat was truly on. The 1970 Act was a statement of principle: a key plank in the environmental platform. But the issue was decided in 1977 as to whether the platform would go the way of many political platforms—a collection of ideas whose time had, in fact, not come—or whether that platform would be translated into reality.

So much was at stake that the Congress had to actually pass the bill twice. The first time the House and Senate agreed on a bill, it was filibustered in the Senate in the closing days of 1976. American industry could not believe the results and wanted another chance. Finally, in 1977 they had run out of ploys. With the passage of the Clean Air Act amendments of 1977, and several months later, the Clean Water Act amendments of 1977, the nation passed an invisible historical line from which there is no retreat. Recognizing the importance of this legislation is not to underestimate the battles yet to come or the need for continued vigilance, but never again will the battle be so clearly joined, and the stakes so high.

I realize that in giving this extensive background on the 1970 amendments and the history of the 1977 amendments, I have been avoiding the main task assigned me of giving an overview of the Act. I plead guilty to at least a lesser charge. With the 1977 changes incorporated into it, the Clean Air Act is now 185 pages of tortured legal prose. It is rumored that even hardened bureaucrats have been known to weep after a first reading. No discussion of the Act can be comprehensible without some discussion of the underlying legislative process that produced the Act.

The reason is simple. There is no single individual with a pen called Mr. Congress who actually writes the law. The final law represents a compromise between the House and Senate. Each body is represented in turn by a dozen or so individuals. Often the compromises that are reached resemble what happens when one shuffles two incomplete decks of cards together and then tries to play bridge. Fortunately, in the case of the 1977 amendments, the resulting chaos worked to the environment's advantage.

The reason for this fortunate twist of fate is that the House and Senate brought competing philosophies to the bargaining table where the environmental strengths of each cancelled out the weaknesses of the other. The Senate bill was a straightforward, systematic attempt to meet the legal and policy problems of the 1970 amendments. The Senate bill spoke to a limited set of problems such as nondegradation, nonattainment, automobile emission standards and compliance strategies for noncomplying sources. Accordingly, the Senate bill had the characteristics of a legal overhaul. The Act needed to be put in good working order. And in the two particular cases of nondegradation and auto emission standards, where the industry disagreed with the Senate's diagnosis and remedy, the Senate met the issue head on and rejected industry attempts to emasculate these provisions.

The House's response was different, and for me a bit more byzantine. It was clear to environmental strategists in the House that they could not hold up against industry onslaughts with respect to

nondegradation, automobile standards and land use controls. Accordingly, they initiated a new wave of environmental initiatives not found in the Senate bill. This involved substantially tougher requirements for new sources, a new visibility standard, and the requirement that EPA study the possibility of new ambient standards for pollutants such as cadmium, arsenic and radioactive and polycyclic organic matter. Thus, when the two bills were meshed in conference, the Senate was able to patch the House's holes on auto standards and nondegradation while the House expanded upon the Senate's barebones approach by having the Act break new ground in respect to new pollutants, toughening new source performance standards and adding visibility requirements.

As you proceed through today's agenda, and as you come across anomalies in the law that appear incomprehensible, it may be helpful to remember that it undoubtedly represents a compromise between the two competing philosophies. Added to this must be the charitable recognition that several of these compromises were hammered out at three o'clock in the morning and both sides were so weary from screaming at each other that they would have agreed to almost anything.

Let me now turn to my assigned task of outlining the major provisions of the 1977 amendments. The first is nondegradation, which I consider as "my baby," since I fought for this strategy from subcommittee makeup, to full committee makeup, to Senate floor and thus for two years in conference. Despite its intricacies, the nondegradation policy is an answer to a basic question: Will the pristine areas of the West repeat the mistakes of the industrialized East? The nondegradation policy represents an affirmative act of faith in the controversial notion that man can learn from his mistakes.

The nondegradation policy has several basic elements.

1) The law provides Class I protection, which means almost no pollution, for National Parks and Wilderness Areas and those areas that the State chooses to place in Class I.

2) The law provides Class II protection, which means moderate growth from well-controlled new sources, for all other areas, except:

3) The Governor and local units of Government can agree that an area can be downgraded to Class III, allowing more intense industrial development. And,

4) All new sources, regardless of what class they are in, must use the best available control technology. This last requirement is designed to minimize some of the witchcraft that surrounds the issue of modeling air quality emissions, and more importantly, not to let the first source into an area use up the full increment of pollution

allowed in any given class. Accordingly, despite cries from individual industries that the best available control technology requirement is too expensive, it, in fact, is designed to allow room for additional industrial growth if a community so chooses.

There is also a complicated waiver procedure for locating facilities near Class I areas. Both this procedure and the Class III designation process come from the House bill and were resisted and ultimately modified by the Senate. The final compromise on the waiver places so many hurdles in front of a facility that they would do better looking elsewhere, away from Class I areas. And in fact, that is what they are doing. The specific facility, the IPP project in Utah, that was pushing for the waiver so it could locate near the majestic array of national parks in Southern Utah, is now examining sites in Central Utah, well away from any Class I areas. It would be fun to take you through the waiver procedure, but I am afraid that would be a lawyer's delight—would, in fact, put many of you to sleep. The key point is that the complicated procedures eventually end on the President's desk. The Senate felt that any individual facility's chances of getting that far would be remote.

For me, the nondegradation provision is the jewel that made the entire effort to pass the 1977 amendments worthwhile. The beauty of this provision is that, like a fine gem, its beauty varies with the angle from which you view it. Those who love the aesthetic qualities of the West need no fancy explanations—minimizing pollution is enough. For those worried that present existing health standards do not adequately protect against the hazards of fine particulates, nitrates, sulfates and an array of heavy metals, the extra protection offered by the nondegradation provisions provides a needed margin of safety.

Some people are concerned about the long-range transport of pollution over thousands of miles such as is evidenced by the acid rains falling on the lakes of Northern New York that are markedly reducing the biological productivity of those waters. Lower levels of pollution under a nondegradation policy would reduce such transport.

State officials in New Mexico and New Mexico environmentalists such as John Bartlitt and others in testifying before us emphasized the need to prevent clean air from being used as a bargaining chip in siting negotiations with industry. Without a federal policy, new industries could shop around in various states, looking for the best deal. Nondegradation, by establishing national standards, minimizes the potential for such destructive bargaining.

As a personal matter, the argument that most captured my atten-

tion was the fact that New Mexico and the other Western states are becoming an energy colony for California, and to a lesser extent, Phoenix. The Four Corners power plant is an example. Here we have a facility pouring so much pollution into the sky that when the astronauts first circled the earth, the only visible sign of man was the plume from the Four Corners power plant. And while New Mexico was cursed with the pollution, California benefitted from the electricity. It seemed little to ask that the California consumer at least pay a small price for keeping New Mexico habitable.

Nondegradation deals with the question of new sources in areas of the country that are cleaner than the national standards. Non-attainment deals with the question of new sources in areas of the country where the air is dirtier than the national standards. The basic issue presented by this latter problem is whether there should be any new sources in dirty air regions at all.

Perhaps if dirty air pockets were limited, the answer might be no. But for oxidants, better known as smog, the entire eastern half of the country from Mississippi is in violation. To say that there could be no growth in the entire east, particularly in light of its continued economic problems in the central cities, was clearly unrealistic. And to even contemplate such a policy could trigger a backlash that could jeopardize the entire Act.

The 1977 Act offers two avenues of escape for new sources in dirty air areas, both purposefully narrow. The first is called the trade-off policy. This means that a source may expand if it can either clean itself up enough to create an increment for growth, or if it cleans up other sources enough to allow for growth. In doing this, a source is not allowed to use up the full amount of pollution that it either reduces from its own operations or that it buys up from others. By this process, successive trade-offs can move an area toward meeting the air quality standards. If this sounds again like blue smoke and mirrors, it is. Thus, in addition to all the administrative hokum, the Congress also said that the new facility must use technology that will provide the "lowest achievable emission rates."

In addition to the offset strategy, the Congress required the States to begin revising their SIPs to the standards in 1982. These new SIPs are due in 1979. As part of this SIP process, states can adopt state-wide strategies that will allow for growth as long as the standards are met in 1982, rather than using the offset strategy. For the automobile-related pollutants, another five-year extension is available under certain circumstances until 1987.

The key requirement embedded within this SIP revision process is that communities must begin to use all reasonably available

measures. As in many cases, the Congress purposefully left this term of art vague. However, it did specifically require that unless such a list of reasonably available measures includes vehicle inspection and maintenance programs, federal highway funds could be lost. This requirement of maintenance on automobiles reflects a response to overwhelming data that the poor performance of cars after sale is one of the major stumbling blocks to improving the nation's air quality in urban centers.

This mention of the automobile brings us to the issue of automobile emission standards. Despite their position at center stage, the auto standards resulted more from hard bargaining than substantive arguments. Basically, the House bill provided for a permanent relaxation of the carbon monoxide standard, and a series of waivers for the nitrogen oxides standard that could keep those emissions from ever reaching the Senate's standard of 1.0 grams per mile. The tide was eventually turned on raw emotion. Both sides had assumed their strongest bargaining postures. The auto industry was threatening to close down its production lines if nothing happened. It was 1:30 in the morning and my friend Senator Wendell Anderson blew his top. After a ten minute tirade, he ended by shouting, ". . . and the thing wrong with Washington, D.C.'s air is that you can see the stuff."

At this point the House retired. When it came back out, it adopted the Senate position with several minor changes. Several House members told me later that they thought all the Senate Conferees were slightly crazy, but that Anderson had apparently flipped out and that they wanted to get out of the same room. So the next time you read some learned treatise on automobile emission standards, complete with formulas and tables and charts, remember that it was raw human emotion, not strictly facts, that carried the day.

There are a host of additional provisions that all merit extended comments. The House provisions on visibility, adding new criteria pollutants and tougher new source standards are stories in themselves. The battle over land use and transportation controls was heated. But there are other participants in today's proceeding and I am sure that they will address these items in detail. Rather than providing you more details on the 1977 Act, I would, in closing, like to glance quickly toward the future.

First, the 1977 Clean Air Act amendments broke the ice on using economic penalties to reduce pollution with a new section on non-compliance fees. I realize that for years many environmentalists have tabbed such fees as "licenses to pollute." In response, I would say that an operating permit is also a license to pollute. And from discussions with industry, the thing they fear most are such fees.

Charges mean money and American industry understands money. Long battles in the Congress over standards and before federal and state regulators are preferred by industry to actually forking up cash. I think there is a lesson here for the environmental community. Fees may offer an ideal supplement when all the regulatory options have been exhausted. I bring this up because I believe that the environmental battles of the 1980's will involve extended discussion of fees.

The second area that I believe will begin to dominate future discussions on Clean Air is the Act's role in an overall national policy on carcinogens. Again, the 1977 amendments tiptoed around the issue. The House, with their list of new pollutants was more on the mark. But, overall, the relationship of the Clean Air Act to reducing the total exposure of man to toxic and carcinogenic substances was skirted. The designation of New Jersey, with its heavy industrial concentrations, as the cancer capital of the United States means that American industry can look forward to closer, not less scrutiny of its operations. The recent epidemic of 32 cases of leukemia in the past five years in Rutherford, New Jersey is cause for grave concern. Air sampling in the area has found seven suspected carcinogens. Water samples have found 50 possible carcinogens. The issue of environmental carcinogens will dominate the 1980's.

Beyond the 1980's, the Clean Air Act will be involved in an issue that was tangentially touched upon in the 1977 amendments. This is the fate of the upper atmosphere. The 1970's have been concerned with providing protection for man's immediate needs. The 1970 Act was basically a health statute. The 1977 amendments broadened the reach of this health mandate while initiating protection of some of the nation's natural and scenic values. But beyond the range of man's immediate senses lies an atmospheric envelope which protects him from the sun's rays and which in conjunction with the oceans determines the earth's climate. During the 1977 amendments, the threat of fluorocarbons to the ozone shield came to the fore. The Congressional response was to put a series of studies and regulatory authority in place. Administrative action by the Food and Drug Administration and EPA have since quieted much of the controversy by requiring a phase-out of fluorocarbons from aerosols. But the issue has not gone away. While aerosols were a comparatively easy political pigeon, major uses of fluorocarbons include refrigeration and automobile air conditioners. If any of you had your automobile air conditioners on while you came to the meeting, enjoy it while it lasts. Perhaps more important is that nitrogen oxides from power plants and nitrogen fertilizers may pose a greater threat to the ozone shield than fluorocarbons.

But all the above may be small potatoes compared to the impact of the carbon dioxide in the earth's atmosphere, and its alteration of the world's climate. The scientific literature on this is growing. The political perception of this is minimal at best. But at stake is clearly the ability of the world to continue to rely on fossil fuels. And if some of the scientific projections are accurate, fundamental decisions may have to be made by the end of the century.

Thus, while the 1977 Clean Air Act amendments institutionalized the Act, and I believe immunized it from future major attacks, it is clear that the job is a long way from over.

Thank you.