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Folder Title:
CAA [Clean Air Act] - Permitting

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

June 10, 1991

Note to Art Fraas:

Subject: Draft General Preamble for Title I

Attached for your information and review is the staff working draft of the General Preamble for Title I. As we discussed during our meeting on May 29, 1991, this document will be the focus of a public meeting on June 25-26, 1991. The public meeting will serve as a roundtable type forum for gathering comments, concerns, and discussion on the various Title I issues from the affected parties.

Additionally, I have included the Federal Register notice announcing the public meeting. Also included is the list of issues associated with this General Preamble. Both of these documents will be attached to all copies of the General Preamble to be distributed for the public meeting. Copies will be sent to various organizations, the State agencies, the Regional Offices and the General Preamble Work Group.

If you have questions or comments, please call me.

Mike Shapiro

ENVIRONMENTAL PROTECTION AGENCY

General Preamble for Title I of the

Clean Air Act Amendments of 1990

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of draft document availability and of public meeting.

SUMMARY: The EPA is planning to publish a General Preamble that describes EPA's policy and technical judgements related to implementing Title I of the Clean Air Act Amendments of 1990 (the Amendments), primarily those concerning State implementation plan (SIP) submittals for nonattainment areas. The General Preamble provides advice to States and other interested parties concerning what would be acceptable plan submittals. This Preamble also serves as the basis for subsequent EPA approval or disapproval action on the SIP submittals.

The General Preamble will cover moderate area requirements for particulate matter, all submittals due in the first 6-year period from enactment of the Amendments (November 15, 1990 - November 15, 1996) for ozone and carbon monoxide, and all submittal requirements for sulfur dioxide and lead. Supplements to the General Preamble addressing future or additional SIP submittals and related State or EPA actions will be issued at a later date.

The General Preamble will not be a regulation, but rather a notice of Agency policy. The Preamble does not supersede existing State regulations or approved SIP's and does not constitute final EPA action. The public will have an opportunity to comment on the SIP's developed by the States and the issues addressed in the General Preamble as reflected in the SIP's.

Because of the broad interest in the General Preamble and the complexities of the issues it will address, EPA believes the many parties potentially affected by the Preamble should have an opportunity to discuss its content with EPA before

preparation of a final document. This notice announces the public availability of a staff working draft of the General Preamble and EPA's intent to conduct a 2-day public meeting to discuss the ozone and carbon monoxide issues of particular concern to the parties affected by the Title I provisions. The staff work products for sulfur dioxide, particulate matter below 10 microns (PM-10), and lead are also available for public review and comment. However, given the very narrow range of issues raised by these pollutants, EPA does not presently plan to focus the discussion on the staff work products at this meeting. The public docket will remain open for 30 days after the meeting for receipt of written comments on the staff working draft of the Preamble. The Agency plans to use this process to obtain public comment on the staff working draft before developing final policies and issuing the final General Preamble.

DATES: The public meeting will be held June 25 from 9:00 a.m. to 5:00 p.m. and June 26 from 9:00 a.m. to 3:30 p.m.

ADDRESSES: The public meeting will be held at the Sheraton Reston at 11810 Sunrise Valley Drive, Reston, Virginia 22091 [Phone No. (703) 620-9000]. Participants should advise the hotel that they are attending the EPA meeting on the General Preamble.

To assist EPA in planning the public meeting, persons interested in attending should contact Ms. MaryLou Leonard at (703) 824-8240, telefax (703) 998-3333, Scientific and Commercial Systems Corporation, 4651 King Street, Suite 200, Alexandria, Virginia 22302, to give their name and affiliation. Registration closes on June 19, 1991.

COMMENTS: Written comments are due on or before July 26, 1991. Comments should be submitted (in duplicate, if possible) to: Air Docket Section (A-131), Attention: Docket No. A-91-35, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

AVAILABILITY OF STAFF WORKING DRAFT OF THE GENERAL PREAMBLE: The staff working draft of the General Preamble for ozone and carbon monoxide and staff work products on sulfur dioxide, PM-10, and lead are available for copying from the docket (address below), and single copies are available from the U.S. EPA Library (MD-35), Research Triangle Park, North Carolina 27711, telephone number (919) 541-2777. Please refer to "Draft General Preamble for Title I of the Clean Air Act Amendments of 1990." A reasonable fee may be charged for copying multiple copies.

DOCKET: Docket No. A-91-35 is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at EPA's Air Docket Section, Waterside Mall, Room 1500, 1st Floor, 401 M Street, S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Ms. Sheila C. Holman at (919) 541-0861 or Mr. Brock Nicholson at (919) 541-5517, Policy Development Section, Ozone/CO Programs Branch (MD-15), for issues related to ozone or carbon monoxide; Ms. Gwen Jacobs at (919) 541-5295 or Mr. Eric Ginsburg at (919) 541-0877, Sulfur Dioxide/Particulate Matter Programs Branch (MD-15), for issues related to sulfur dioxide, particulate matter, or lead; U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

The General Preamble is a guidance document which will address many of the issues expected to arise in implementing Title I of the Amendments. The EPA believes most of these issues stem from the new provisions for major stationary sources of oxides of nitrogen (NOx), modeling requirements, specific control requirements, procedures for tracking progress, and the interface between Title V and Title I requirements. The major issues associated with these elements of Title I of the Amendments are briefly described below under "Agenda and Schedule

for the Public Meeting."

The EPA is interested in obtaining input from the public and affected parties on these and other issues that will be addressed in the General Preamble. EPA solicits input on these issues through the process of this public meeting and associated comment period. In particular EPA is interested in the public's thoughts regarding the approach the staff draft has taken in addressing these issues. In formulating the Preamble, EPA will carefully consider the input generated from this process. The EPA will produce a summary report which will include the points, suggestions, and recommendations received as part of this public input process and EPA's decisions on the various issues to support the final preamble. The report will be included in the docket and made available to the public as a supporting document.

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The emphasis at the June 25-26 meeting will be on gathering comments and questions rather than on presenting informational materials about the new

requirements under the Amendments, except to the extent necessary to support discussion of the issues. In order to foster open discussion, the schedule for the meeting is structured around several recurring sessions that will provide different groups of participants the chance to discuss and comment on the issues under each of the different topics. In the interest of adhering to the schedule and ensuring that all topics are covered, EPA may find it necessary to limit the discussion on a given topic. Attendees are encouraged to come prepared to participate actively in the discussion of issues. The EPA requests that parties refrain from making formal oral presentations so as to permit more time for general discussion.

However, formal written presentations will be accepted at the meeting and during the comment period following the meeting.

The General Preamble will cover all criteria pollutants, but the current draft specifically addresses ozone and carbon monoxide and refers to final staff work products on sulfur dioxide, PM-10, and lead (contained in the docket and attached to the draft document). The final General Preamble document will integrate requirements for nonattainment area SIP's for all of the criteria pollutants.

GENERAL AGENDA AND SCHEDULE FOR THE PUBLIC MEETING: The topics to be covered at the meeting include, but are not limited to the following:

Ozone/Carbon Monoxide

Requirements for Sources of Oxides of Nitrogen

The Amendments establish important new requirements for major sources of nitrogen oxides (NOx) which are located in ozone nonattainment areas. The requirements that apply to major sources of volatile organic compounds (VOC's) also apply to major NOx sources except in certain circumstances where the NOx

reductions would not be beneficial overall in attaining the ozone national ambient air quality standard (NAAQS). These requirements are primarily (1) the adoption of State rules representing reasonably available control technology (RACT) on existing major NOx sources and (2) the review of new major NOx sources under the nonattainment new source review (NSR) provisions of section 173. The NSR provisions generally require sources to obtain offsets for their emissions and to install controls representing the lowest achievable emission rate.

Because of the implications for a large number of sources, it is important for the States and EPA to develop and apply appropriate and timely procedures for determining whether NOx control is needed. Issues arise in determining whether "air quality benefits" would be greater without NOx control, whether NOx controls would contribute to attainment, and whether "excess reductions" would result from the NOx controls. The EPA is considering simplified procedures that can be used to provide an early indication of the cases in which NOx control is warranted. These decisions could be verified later in more comprehensive demonstrations of attainment using photochemical dispersion modeling.

Additional issues arise in determining NOx RACT for affected sources and the relation of this requirement to the Title IV (acid rain) provisions.

Modeling

The Amendments specifically require serious and above ozone nonattainment areas to use photochemical grid modeling in preparing their demonstrations of attainment. Furthermore, the 4-year schedule provided to States for developing and submitting these modeling demonstrations reflects the difficulty and complexity of using these models.

The Amendments also require moderate and above ozone nonattainment areas to demonstrate that their plans, due within three years, will be sufficient to

attain by the appropriate date. The following issues arise: (1) what type of model or other technique can be used within the three-year period to provide adequate assurance that the plan will provide for attainment, and (2) given that serious and above areas will be submitting photochemical grid modeling results in their demonstrations that are due four years after enactment, can this "4-year" demonstration also satisfy the requirement for moderate and above areas to demonstrate attainment in the "3-year" submittal?

Control Measures

The Amendments contain a number of specific control requirements for ozone nonattainment areas. Implementation of some of these controls raises certain issues (as described below) that need to be addressed in the General Preamble.

Certain RACT Rules: States are required to submit RACT rules within 2 years after enactment. The EPA, however, is required to issue Control Technique Guidelines (CTG's) for a number of significant stationary source categories within 3 years after enactment. The CTG's generally become the basis for State RACT rules for those specific source categories. Since the State RACT rules are required to cover all major VOC sources and some of EPA's CTG's will be for sources covered by the State rules, should the State be allowed to delay the development and adoption of certain RACT rules until EPA publishes those CTG's?

Requirements for "Nonconventional" Areas: The Amendments establish a classification system that was intended to cover all ozone and carbon monoxide nonattainment areas. However, there are several areas which have limited air quality data or "borderline" circumstances that are not addressed by the classification system. How should EPA establish requirements for these areas? What should be the attainment date for these areas?

Other Control Requirements: There are also issues of applicability and

other specifications for NSR programs, motor vehicle inspection and maintenance programs, clean-fuel fleet programs, transportation control measures for ozone and carbon monoxide nonattainment areas, and gasoline vapor recovery programs for motor vehicle refueling (Stage II).

Tracking Progress

The Amendments contain important provisions directed at ensuring that States achieve the required progress toward attainment. In most cases this progress is based on reductions in the base emission inventory at a rate prescribed in the Amendments. When EPA finds that these reductions are not occurring or when they have not been sufficient to provide for attainment in an area, the area becomes subject to additional control and planning requirements. Therefore, the methods used to calculate, project, and periodically update the emission inventory become of critical importance to an area and its sources.

Several questions arise regarding calculating and tracking emission reductions. Can, for example, emission reductions which result from improvements in the enforcement and monitoring of current regulations be counted toward the emission reduction requirements? Can NOx reductions which occur within the first 6 years after enactment be used to "offset" part of the VOC reduction requirements after that period? What steps should the State take every year (2 years, 3 years) to show that the planned emission reductions are occurring? What should be the requirements of the milestone demonstrations (due after the 6-year milestone and the 3-year periodic milestones)? What is the role of the emission statements (that are required of sources in ozone nonattainment areas) in tracking progress toward attainment and reasonable further progress (RFP)?

Issues also arise with respect to the actions that occur when adequate progress is not achieved. The Amendments contain two general types of provisions to address situations where an area does not attain the standard by the

applicable date or where RFP requirements are not met. Areas that do not attain are "bumped up" to a higher classification and subject to the control and planning requirements of the new classification. Timing issues arise particularly with marginal ozone areas that do not attain by their deadline (3 years after enactment). These marginal areas would have difficulty adopting and implementing the required controls for moderate areas and achieving the mandated emission reductions quickly enough to avoid missing the attainment deadline for moderate areas. As a result, such marginal areas could eventually be "bumped up" to the serious classification and subject to even more stringent controls. What steps should these marginal areas be required to take early to avoid this situation? What modeling activities and rule development steps can be taken to expedite implementation of measures that will achieve sufficient emission reductions to ensure attainment by the deadline for moderate areas?

The Amendments also require SIP's to include contingency measures to address cases where the attainment date is not met or RFP is not achieved. In general, States must submit measures that can be implemented without further action by the State or EPA in the event the area does not attain the NAAQS or RFP is not achieved. But how many such measures are needed? How much emission reduction should the measures be capable of achieving? What does it mean to implement the measures "without further action by the State or EPA"?

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question concerns how to avoid unnecessary SIP revisions for minor changes at a source. The staff working draft suggests several SIP elements that could be handled solely by permits and others that could be shared by SIP's and by permits. The third question relates to development of RACT "protocols," or ways of more flexibly determining compliance with RACT limits. The EPA is developing protocols for two source categories and studying others and expects to produce the protocols by late 1991. The last question concerns the use of marketable permits or allowance trading. The draft proposes some basic principles that should govern these measures and that, when developed further, should help answer some of the practical questions, such as how to measure and account for trades in ozone nonattainment areas.

The public meeting will begin on June 25 at 9:00 a.m. with a plenary session which will conclude at 10:30 a.m. The agenda will be divided into four 2.5 hour blocks over the 2-day period and will cover the topic areas listed above.

Date:

JUN 10 1991

John S. Seitz, Director
Office of Air Quality Planning and Standards

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
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First (in the operating permit preamble) is the question of how to account for growth that is not a Title I modification. Two options are presented in the staff working draft, both of which account for this growth up front in the SIP demonstration and then track the growth actually occurring. The second

question concerns how to avoid unnecessary SIP revisions for minor changes at a source. The staff working draft suggests several SIP elements that could be handled solely by permits and others that could be shared by SIP's and by permits. The third question relates to development of RACT "protocols," or ways of more flexibly determining compliance with RACT limits. The EPA is developing protocols for two source categories and studying others and expects to produce the protocols by late 1991. The last question concerns the use of marketable permits or allowance trading. The draft proposes some basic principles that should govern these measures and that, when developed further, should help answer some of the practical questions, such as how to measure and account for trades in ozone nonattainment areas.

The public meeting will begin on June 25 at 9:00 a.m. with a plenary session which will conclude at 10:30 a.m. The agenda will be divided into four 2.5 hour blocks over the 2-day period and will cover the topic areas listed above.

Date:

JUN 10 1991

John S. Seitz, Director
Office of Air Quality Planning and Standards

Summary of Major Issues in the General Preamble for Title I

- Ozone and Carbon Monoxide Issues -

June 1991

U.S. Environmental Protection Agency

Major Issues in the General Preamble for Title I

Title I of the Clean Air Act as amended in 1990 contains a number of provisions regarding the development and submittal of State implementation plans (SIP's) for nonattainment areas. Some of the new provisions require statutory interpretations or the establishment of new policies before the requirements are clear for States and others involved in the preparation of the SIP submittals. These provisions and the possible approaches for addressing them are the focus of the June 25-26 public meeting.

To facilitate discussion at the public meeting, this brief summary of the major ozone and carbon monoxide issues regarding the new provisions in Title I has been prepared. The intent of the summary is to state the issues clearly and describe some of the approaches that could be followed in addressing the issues. The summary (and the staff working draft of the General Preamble) does not contain an exhaustive description or discussion of potential approaches. The EPA hopes the public meeting and subsequent comment period will help identify additional approaches and the legal support for these approaches, as well as determine the "pro's and con's" of the various approaches.

The issues are discussed below in groups corresponding to the sessions which will be held at the June 25-26 meeting.

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Requirements for Major Sources of Nitrogen Oxides (NO_x)

- **Exemptions from the NO_x Requirements**

Issue:

Which areas are required to adopt NO_x control measures and which areas can be exempted from those requirements?

Discussion:

The Clean Air Act Amendments (CAAA) of 1990 require that the provisions that apply to major sources of volatile organic compounds (VOC) shall also apply to major sources of NO_x unless the resulting NO_x emission reductions would not be beneficial in attaining the ozone standard. These provisions are primarily (1) the adoption of State rules representing reasonably available control technology (RACT) on existing major sources and (2) the review of new major sources under the nonattainment new source review (NSR) provisions in section 173 of the Act. [The NSR provisions generally require sources to obtain offsets for their emissions and to install controls representing the lowest achievable emission rate (LAER).]

The staff draft of the General Preamble takes the position that the CAAA contain a presumption that NO_x reductions are beneficial in ozone nonattainment areas. Thus, in the absence of a demonstration to the contrary (as discussed below), affected areas cannot avoid the NO_x requirements. The guidance being developed by EPA to determine what areas/sources may be exempted from the NO_x requirements will rely, in part, on photochemical grid modeling and will be provided separately from the General Preamble. The staff working draft of the Preamble is based on a reading of the statute which does not allow the State to delay the submittal of the NO_x requirements beyond November 15, 1992, while this photochemical grid modeling is being completed unless it has demonstrated that NO_x control is not needed (see discussion which follows).

Section 182(f)(1) of the Act describes the general circumstances in which an area or sources can be exempted from the NO_x requirements. Below are issues which arise for each of the cases in section 182(f)(1).

Issue A:

How can specific sources demonstrate that "net air quality benefits" are greater without NO_x reductions?

Discussion:

A basic requirement for exempting sources from the NO_x control requirements is that EPA must determine that the "net air quality benefits" are greater without controlling NO_x. Therefore, the meaning that is assigned to "net air quality benefits" takes on a special importance. Although section 182 concerns only ozone nonattainment, the

term "net air quality benefit" could be broadly defined to include other air quality considerations, in addition to the implications for ozone. For example, the term could be defined as meaning:

(1) just the effects on attainment of the ozone standard;
(2) the effects on ozone population exposure and the associated risk;
(3) the effects on other national ambient air quality standards (e.g., NO_2 or PM-10); or
(4) some combination of the above.

Issue B:

In an area not located in an ozone transport region (established under section 176A or 184), what factors must be considered in determining whether NO_x emission reductions would "contribute to attainment" and, therefore, whether the exemption under section 182(f)(1)(A) should be allowed?

Discussion:

The exemption in section 182(f)(1)(A) specifies that the area of consideration is the nonattainment area. In addition, the provision centers on the contribution to ozone attainment and it does not include a "net" benefit criterion. Therefore, the staff draft of the Preamble assumes that only the factors related to attainment of the 0.12 ppm ozone standard within the nonattainment area may be considered in the exemption determination. Ozone population exposure and/or risk assessment factors have not been included in the staff draft of the Preamble since an initial reading of the statute did not find support in section 182 for such an approach.

The EPA invites discussion on whether the "contribution to attainment" criterion is meant with respect to any ozone exceedance or whether it should be applied in a net benefit sense with respect to a majority of an area's ozone exceedances; i.e., if NO_x reductions contribute to ozone attainment in some episode instances, but not necessarily a majority of past episode cases, should the exemption be denied?

Issue C:

In an area located in an ozone transport region, what factors must be considered in determining whether NO_x emission reductions would "produce net ozone air quality benefits in such region" and, therefore, whether the exemption under section 182(f)(1)(B) should be allowed?

Discussion:

The exemption in section(f)(1)(B) specifies that the area of consideration is the ozone transport region. Because the provision centers on the "net ozone benefit," the staff working draft of the Preamble assumes that factors related to ozone population exposure and/or risk assessment factors, as well as the ozone NAAQS, must be considered. From a technical perspective, it would be difficult to demonstrate the effects of NO_x reductions from one part of the transport region to other distant parts.

Nonetheless, the Act seems to require such a regionwide demonstration before any exemption would be given. Another alternative would be to limit the necessary demonstration to a smaller area, but support in the language of section 182 for such an approach was not apparent in the development of the staff working draft of the Preamble.

Issue:

How should EPA develop and provide the guidance for determining the effect of NO_x reductions and, therefore, the need for NO_x control?

Discussion:

Even though the purpose of the General Preamble is to describe how to apply the guidance to an area requesting an exemption rather than to state the technical basis for determining the effect of NO_x reductions, as part of the review of the staff working draft of the General Preamble, EPA invites comment on the following:

(1) In what form (memorandum to Regional Offices, letter to States, guidance document, *Federal Register* notice, rule, or other form) should EPA provide the technical guidance, given that petitions for an exemption could be submitted to EPA as early as Feb-92.

(2) What is the best form for public participation in developing the guidance, given the above timing constraint?

(3) Can other factors (e.g., cost of control) can be considered in evaluating the need for NO_x control?

- **NO_x Reasonably Available Control Technology (RACT)**

Issue:

What is the relationship between Title I NO_x RACT and Title IV NO_x requirements for utility plants?

Discussion:

Sections 182 (regarding ozone nonattainment areas) and 407 (regarding acid rain controls) separately specify control technology requirements which are to apply to many of the same coal-fired utility plants. The Act does not specify that either of these requirements should supersede the other; thus, both requirements must be met. However, section 407 and the House Committee report both mention low NO_x burners as possibly satisfying the technology requirement for each section. Another option is the following approach: determine that the technology specified by the section 407 rules is equal to RACT for section 182 purposes, except in extreme ozone areas where section 182(e)(3) prescribes the level of control for boilers emitting greater than 25 tons per year.

Issue:

How will EPA determine what represents RACT for NO_x sources?

Discussion:

The EPA guidance on NO_x RACT for Title I will be provided separately from the General Preamble. Except for the above discussion, the General Preamble is not intended to define what RACT is, but rather when and where NO_x RACT is required. However, as part of the General Preamble process, EPA invites comments on:

(1) How should EPA provide guidance for NO_x RACT rules, given that States must adopt and submit rules reflecting NO_x RACT by Nov-92 and there is insufficient time to use the control technology guideline (CTG) or alternative control technique (ACT) process?

(2) How could EPA use public participation in developing the RACT guidance, given the above timing constraint?

- **New Source Review (NSR) for NO_x Sources**

Issue:

When must sources implement the NO_x nonattainment NSR requirements (i.e., offsets and LAER)?

Discussion:

The statute requires States to submit their NSR rules by Nov-92. The staff working draft of the Preamble assumes that implementation of those rules must also begin by that date. However, photochemical grid modeling, which could result in areas being exempt from the NO_x requirements, is not to be submitted until Nov-94. Below are approaches that EPA could follow to address this apparent conflict in timing:

(1) require rule adoption but allow delayed implementation until photochemical grid modeling is completed (but not later than Nov-94);

(2) allow States to delay adoption of NO_x NSR rules until photochemical grid modeling is completed or Nov-94, due to the small NO_x reduction expected in the interim period;

(3) for marginal areas, require rule adoption but allow delayed implementation until 1994, when EPA determines whether the area failed to attain the standard by the Nov-1993 attainment date and;

(4) allow an exemption if the projected NO_x reductions from the NSR program are too small to show an effect.

Modeling/Demonstration Issues

- **Modeling Requirements for Serious and Above Areas**

Issue:

Are serious and above nonattainment areas required to submit an attainment demonstration by Nov-93?

Discussion:

The statute generally requires serious and above areas to meet the requirements of moderate areas. With respect to the attainment demonstrations, the staff working draft of the Preamble assumes that the photochemical grid modeling requirement due by Nov-94 for serious and above areas supersedes the demonstration required for moderate areas by Nov-93. Other options would be to require serious and above areas to (1) submit a less rigorous analysis [such as the empirical kinetic modeling approach (EKMA)] by Nov-93 and then the more detailed photochemical grid modeling by Nov-94; or (2) submit the photochemical grid modeling by Nov-93.

- **Moderate Area Attainment Demonstrations**

Issue:

Are moderate ozone nonattainment areas required to submit an attainment demonstration?

Discussion:

Section 182(b)(1)(A) requires moderate areas to submit by Nov-93 a plan which provides for emission reductions of at least 15 percent of the baseline emissions and such additional reductions "as necessary to attain the national primary ambient air quality standard." Even though there is no specific requirement for a "demonstration of attainment" by moderate areas, the development of the staff working draft of the Preamble has assumed that the only way to determine the additional reductions needed would be through some type of demonstration. The staff working draft of the Preamble allows this requirement to be met through city-specific EKMA modeling. Another option is to assume that satisfying the 15 percent emission reduction requirement satisfies the need for a demonstration, but development of the staff working draft of the Preamble has not found language in the Act which supports such an approach.

Issue:

Are multi-state moderate nonattainment areas required to submit an attainment demonstration by Nov-93?

Discussion:

The Act generally requires moderate areas to submit a demonstration of attainment by Nov-93. Section 182(j) specifies that multi-state areas must use photochemical grid modeling in their demonstrations. This type of modeling demonstration is due by Nov-94 for serious and above areas, and, as discussed earlier, the staff working draft of the Preamble assumes that this demonstration supersedes the demonstration required by Nov-93. Therefore, the staff working draft of the Preamble has taken the position that the demonstration for a moderate multi-state nonattainment area (which must be based on photochemical grid modeling) must be submitted by Nov-94. Other alternatives: (1) require EKMA modeling by Nov-93 for the multi-state moderate areas (this would have been in addition to the photochemical grid modeling); (2) require the photochemical grid modeling to be submitted by Nov-93.

- **Areas Affected by Ozone Transport**

Issue:

How should the requirement for all moderate and above ozone nonattainment areas to submit attainment demonstrations be affected by ozone transport from upwind areas which have higher classifications?

Discussion:

In some ozone nonattainment areas the demonstrations of attainment will be complicated by the impact of ozone and precursor transport and the progress requirements and attainment deadlines that apply to areas of different classifications. For example, a moderate area located within the transport region is still subject to the 6 year attainment deadline and the section 182(b)(2)(A) requirement to provide annual emission reductions in its plan to attain by the deadline. However, this area is (at least, presumptively) being affected by transport from another area(s) and is, as well, possibly affecting other areas itself. If the "other" areas that are affecting air quality levels in this moderate area are classified as serious or severe, those areas will be reducing their emissions over a longer time frame in order to attain the standard. That is, these "other" areas could still be having significant effects on the moderate area at the time when the moderate area must demonstrate attainment.

Should the moderate area have to achieve additional emission reductions to "compensate" for the transport from the other areas that have not yet reduced sufficiently their emissions? Or should the moderate area be able to rely on the anticipated reductions in these other areas in developing its attainment demonstration? These same questions also arise in areas that may be impacted by transport but are not yet in a transport region established under section 175A.

The staff working draft of the Preamble assumes that the CAAA provisions do not allow

EPA to approve a demonstration of attainment which relies on "future" emission reductions that would be achieved beyond the attainment date established by the classification in section 181. An important question is raised, however, as to whether the intent of the Amendments could have been to require areas of lower classifications to "compensate" for reductions that will be achieved over a longer time period in areas of higher classifications in order to demonstrate attainment by the applicable date.

The EPA is considering whether and how to relieve an area from the requirement to submit a full demonstration of attainment when that area will continue to be affected by transport from upwind areas beyond the area's attainment date. The EPA is seeking comment on possible approaches and interpretations that would recognize the apparent conflict between the absolute statutory requirement for a full demonstration of attainment in such an area and the reality of ozone and precursor transport that will interfere with this demonstration.

Control Measures

- **Development of State RACT Rules for Categories That Will Be Covered by a Future Control Technique Guideline (CTG)**

Issue:

For major VOC sources which are not currently covered by a CTG but which are expected to be covered by a future CTG to be issued by EPA, what is the timing for development of the State RACT rules?

Discussion:

The Amendments require States to submit by Nov-92 rules representing RACT for VOC sources in moderate and above ozone nonattainment areas. The EPA is required to issue new control technique guidelines (CTG's) for 11 source categories by Nov-93. When CTG's are available for a source category, they generally serve as the basis for the determination of RACT for those sources. Should the latter issuance of CTG's affect the 2-year submittal requirement for State RACT rules for the "new CTG" categories? Possible options are as follows:

Option 1: Require States to adopt RACT for *all* major sources regardless of whether or not they may later be subject to a CTG. The EPA would not revisit such non-CTG rules after issuance of the CTG provided that there was no additional information to indicate that the non-CTG RACT determination was in error.

Option 2: Allow States to postpone adoption of RACT rules for these sources until

the CTG is issued. This would presume that States would adopt the CTG recommendations for these sources.

- **Requirements for "Nonconventional" Areas (i.e., transitional, not violating, sub-marginal, incomplete/no data)**

Issue:

What submittal requirements should apply to transitional ozone areas, CO nonattainment areas with no current violations, "sub-marginal" ozone areas, and areas with incomplete or no monitoring data?

Discussion:

The Amendments contain specific provisions for transitional ozone areas (areas that were officially designated as nonattainment as of the day of enactment of the Amendments but were not recording violations of the standard). These areas are exempted from the requirements of subpart 2 (the requirements that apply to areas classified as marginal, moderate, etc.) if they continue not to violate the standard. They are specifically required to submit a maintenance plan (showing no violations in the future), but the Amendments are silent on whether such areas must meet other requirements, in particular, the general nonattainment requirements under subpart 1 of part D of the Act. A similar situation arises with (1) ozone "sub-marginal" areas (areas recording violations but having design values below the range for being classified as marginal), (2) CO "not violating" areas (areas designated at enactment but not now violating the CO NAAQS), and (3) areas having incomplete or no data to determine whether violations of the ozone or CO standard are occurring.

Below are possible approaches as to what could be required of these areas.
All subpart 1 requirements apply: Section 172(b) could be interpreted to require that any area designated nonattainment under section 107(d) must submit a SIP and that such a plan must meet all nine requirements as described in 172(c) and the monitoring requirements in section 110(a)(2). This strict interpretation would impose greater controls (e.g., attainment demonstration, contingency measures) on areas not violating or barely violating the NAAQS than the controls imposed on marginal areas with clear violations.

Subpart 1 does not apply: Subpart 1 could be interpreted to apply only where a new NAAQS has been established and only then would the resulting new nonattainment areas be subject to subpart 1 requirements. This means that subpart 1 would not apply to these nonconventional areas, as their status is not the result of a new NAAQS. This interpretation might not provide a strong impetus (besides the NSR requirements) for these areas to take steps to be redesignated to attainment. In other words, an area could

remain in a transitional, sub-marginal, incomplete data or not violating status indefinitely.

Subpart 1 generally applies but EPA would interpret past State actions as satisfying specific subpart 1 requirements where possible: Under this interpretation, these areas would have three years to submit a SIP revision and to establish and operate an appropriate monitoring program (if the area does not already have a monitoring program). In addition, several, but not all, of the provisions of section 172(c) might require additional action by the State. For example, areas that were not violating the standard might not have to adopt additional RACT measures or to develop measures to satisfy the reasonable further progress (RFP) requirement. The EPA solicits comment on these and other subpart 1 requirements, such as attainment demonstrations, contingency measures, emission inventories, and air quality monitoring.

Issue:

What attainment date(s) should apply to the nonconventional areas?

Discussion:

Section 172(a)(2) appears to provide for an attainment date of no later than five years from designation of an area as nonattainment. The EPA solicits comment on the following two (and other) options regarding this 5-year attainment date:

(1) If an area fails to attain within five years from being designated nonattainment, the area is automatically bumped up either to marginal or to a classification commensurate with the area's design value.

(2) If an area fails to attain within five years from being designated, the area would not be bumped to one of the section 181 classifications (marginal, moderate, etc.) but EPA could "tighten" the subpart 1 requirements. This could include further RACT measures, a showing of enforceable rules or possibly a basic I/M program.

- **Oxygenated Motor Vehicle Fuel Programs**

Issue:

Sections 187(b) and 211(m) require SIP revisions for 2.7 percent oxygen by weight in gasoline sold to the public and distributed by refiners in the entire metropolitan statistical area (MSA) or consolidated metropolitan statistical area (CMSA) containing a CO nonattainment area for a minimum of 4 months during the high CO period (generally winter months). Can an area smaller than the CMSA or MSA suffice?

Discussion:

This issue is being addressed as part of the oxygenated fuels negotiated rulemaking. The General Preamble will reflect the outcome of that rulemaking process. In meetings to

date, the parties to the negotiated rulemaking have agreed that the Amendments are clear in requiring oxygenated fuel coverage in the larger of the CMSA or MSA containing a CO nonattainment area. The requirement for oxygenated fuel need not apply to the attainment areas that are outside of the CMSA or MSA or that were redesignated from nonattainment to attainment unless needed to maintain the CO national ambient air quality standard. A waiver from the oxygenated fuel requirement may be granted upon demonstration by the State that the use of oxygenated fuel would prevent or interfere with the attainment by the area of a national ambient air quality standard or a State or local ambient air quality standard for any air pollutant other than CO.

- **CO Offsets In CO Nonattainment Areas**

Issue:

Can the NSR permit requirement for emissions offsets for new or modified major CO stationary sources in CO nonattainment areas be avoided or in some way be limited in applicability?

Discussion:

Section 173 of the Act requires "sufficient offsetting emissions reductions" (emissions offsets) for stationary sources subject to the nonattainment NSR permit requirements. Even if EPA determines, under the guidelines required by section 187(c), that stationary sources do not contribute significantly to the CO levels in the area, the special additional provisions for CO nonattainment areas at subpart 3 of Part D do not exempt such stationary sources from the emissions offset requirements of section 173.

States may try to shrink the size of their CO nonattainment areas because CO emissions offsets for stationary sources may be very hard to find. If emissions offsets for new or modified stationary sources are not required or the applicability to major stationary sources is limited, States may feel less pressure to reduce the size of their nonattainment areas. In addition, since CO reductions are achieved from mobile source programs, such as motor vehicle inspection and maintenance (I/M), maintaining larger nonattainment areas could result in greater overall CO reductions from the total number of vehicles covered by the I/M program. The EPA solicits comment concerning the implementation of the emissions offset requirements to new or modified stationary sources in CO nonattainment areas, the effects the offset requirements may have on the size of CO nonattainment areas, the feasibility of the alternative approaches (see below), and the effects that the offset requirements may have on total reductions of CO emissions.

Alternative 1: No stationary source offsets would be required if,

- the State demonstrates for the impact area that any NAAQS exceedances are a result of mobile source emissions;

- a NAAQS exceedance at any receptor is a result of mobile source emissions when the total contribution of stationary sources to the modeled or monitored total CO concentration is less than 25%. The source's modeled impact at that receptor must not exceed 575 ug/m3, 8 hour average (or some other appropriate value);

- the new source applies the very best control of CO to reduce emissions to an absolute minimum [since LAER is required, this means a careful scrutiny of the available technologies];

- the State has an I/M program in place in all nonattainment areas within the proposed source impact area.

Alternative 2:

- A State could proposes that if new or modified stationary sources are required to obtain emissions offsets in the proposed CO nonattainment area, then the proposed CO nonattainment area will be a certain size (say three counties). However, if new or modified stationary sources can be exempt from the emissions offset requirements for CO in the nonattainment area, the State will propose a larger nonattainment area (say five counties). The reduction in CO emissions from I/M in the two extra counties would be proposed as surplus emissions credits which could be used to offset new or modified stationary sources from the emissions offset requirements in the nonattainment area.

- As a safety factor to assure that the emissions reductions from the two extra counties are actual, surplus, and enforceable, the EPA could allow a maximum of 75% of the projected reductions as credit towards future stationary source growth. The reductions from the two extra counties that are reserved to offset new or modified sources could not be used in the attainment demonstration. One air quality benefit is that early CO reductions are realized in the two extra counties. Another option would be to have I/M in the two extra counties (or statewide) and not include these counties in the nonattainment area, but allow the emissions credits for new or modified stationary sources in the nonattainment area.

- **Adoption of Long-term Measures in Certain Areas**

Issue:

To what extent should EPA provide severe areas additional time (beyond the deadline for the attainment demonstration) to fully develop and adopt certain "long-term" measures?

Discussion:

Some severe ozone nonattainment areas will have such large emission reduction

requirements that identifying, developing, and adopting in final form all of the control measures shown to be needed in their demonstrations of attainment (due by November 15, 1994) may present an unreasonable burden. This situation was specifically recognized for an extreme ozone area in section 182(e)(5), which allows such an area to submit a plan containing provisions that "anticipate development of new control technologies or improvement of existing control technologies."

"Long-term" measures would include those that may anticipate future technological developments as well as those that may require complex analyses and decision making and coordination among a number of government agencies. The staff working draft of the Preamble takes the position that additional time could only be allowed if the plan contained (1) all measures, including the long-term measure(s) for which additional time would be needed, (2) an appropriate schedule outlining the steps leading to development and adoption of the measure(s), (3) commitments from those agencies that would be involved in the development and implementation of the measure, and (4) contingency measures that could be implemented if the measure is not developed or if it fails to achieve the anticipated reductions. Furthermore, the long-term measure(s) could not be used to meet any emission reduction requirements within the first 10 years after enactment. The EPA is seeking comment on this approach and other possible approaches as well as on the general concept of allowing severe areas additional time for submitting certain measures.

- **Vehicle Miles Traveled (VMT) Offset Provisions**

Issue:

How is growth in emissions due to growth in vehicle miles traveled or number of vehicle trips determined, and what kinds of measures can be used to offset growth in VMT?

Discussion:

Section 182(d)(1) requires that, for severe and extreme ozone nonattainment areas, States must submit revisions to SIP's that identify and adopt "specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area(s) and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements" to comply with reasonable further progress requirements. Section 187(b)(2) applies the same requirements to serious carbon monoxide areas.

The EPA solicits comment on two potential interpretations of "growth in emissions from growth in VMT or numbers of vehicle trips." They are:

1. VMT offset measures must prevent any increase in vehicle emissions that might occur between any two future years in the absence of any efforts to limit VMT

growth. Under this interpretation, VMT offset measures would not have to be implemented until the effect on emissions of growth in VMT begins to outweigh the effect of the Federal Motor Vehicle Control Program.

2. VMT offset measures must prevent any increase in emissions over the emissions that would occur if VMT were held constant. Under this interpretation, VMT offset measures would have to be implemented as soon as feasible since all growth in VMT would have to be offset.

In addition to the "interpretation of growth" issue, EPA is also soliciting comments on the question of whether growth in VMT can be offset only by section 108(f) measures or by other measures as well.

- **Employer Trip Reduction Provisions**

Issue:

What is an approvable State SIP submittal for employer trip reduction programs?

Discussion:

Section 182(d)(1)(B) requires that in severe and extreme ozone nonattainment areas, employers with over 100 employees increase the average passenger occupancy per vehicle of their employees to a level 25 percent above the average vehicle occupancy (AVO) for the nonattainment area. The revised plan is to be submitted no later than November 15, 1992. It shall "provide that each employer subject to a vehicle occupancy requirement shall submit a compliance plan . . . which shall convincingly demonstrate compliance with the requirements of this paragraph . . ." Four options, or combinations thereof, are offered that would allow EPA to propose approval of a SIP submittal for employer trip reduction programs. These are:

1. Evidence in the SIP that agency resources are available for the effective plan-by-plan review of employer-selected measures to insure the high quality of compliance plans.

2. Regulations in the SIP contain a convincing minimum set of measures.

3. Regulations in the SIP provide that failure by the employer to meet the target AVO results in implementation of a regulation-specified, multi-measure contingency plan.

4. Regulations in the SIP include financial penalties that are large enough to result in a significant prospective incentive for the employer to design and implement an effective initial compliance plan of its own.

EPA is soliciting comments regarding additional options.

There may be certain advantages in allowing trading among employers for AVO credits as long as the overall increase in AVO by employers is maintained as outlined in this section. The Act states, however, that the Administrator shall ". . . require . . . [that] each employer of 100 or more persons . . . increase average passenger occupancy per vehicle . . . by not less than 25 percent above the average vehicle occupancy . . ." for the area. The EPA is soliciting comments that would provide appropriate trading options in light of the wording of the Act.

Another issue concerns language on early SIP submittals to establish the area AVO. Areas that currently have trip reduction programs in effect, either mandatory or voluntary, that are anticipated to produce significant increases in ridership levels in the short term, may wish to submit their SIP's prior to 1992. Section 182(d)(1)(B) defines AVO as the average vehicle occupancy at the time the SIP revision is submitted. Early SIP submittal will allow such areas to take credit for near-term increases in ridership levels in meeting the required 25 percent increase above AVO.

Where such programs are fully implemented and meet all requirements for an approvable SIP under sections 110 and 182, the areas can make a complete SIP submittal and receive full EPA approval. Where programs are not yet enforceable, or otherwise do not meet all SIP requirements, areas can still make a submission sufficient to qualify for conditional SIP approval, and thereby establish an area AVO before 1992. To qualify for conditional approval under section 110(k)(4), areas must commit to adopt an enforceable trip reduction program adequate to meet all SIP requirements by not later than 1 year from the date EPA approves the submittal. It should be noted that compliance dates move forward with an early SIP submittal.

Tracking Progress

- **Emission Statements**

Issue:

How will emission statements from VOC and NO_x stationary sources be used in tracking reasonable further progress and in demonstrating compliance with emission reduction milestones required under section 182(g)?

Discussion:

Section 182(a)(3)(B) requires each State with a marginal or above ozone nonattainment area to submit a plan requiring its stationary sources of VOC and NO_x to submit annual emission statements. A source that is less than 25 tons per year (tpy) can be exempted

from the requirement if the State includes the emissions from this source and other sources emitting less than 25 tpy in the State's required inventory submittals. The Act states that EPA will determine the form and content of these statements, and it is possible that the emission statements could be used in assessing reasonable further progress and in demonstrating compliance with the emission reduction milestones for serious and above areas, as required under section 182(g). The EPA is soliciting comment on the form and content of the emission statements and their role in tracking progress in the implementing the SIP and achieving the required emission reductions.

The EPA is also surveying the various reporting requirements that apply to sources to determine what type of information is available and what additional information would be necessary to use the emission statements as a tool to track progress in implementing the SIP and achieving emission reduction targets.

- **Periodic Emission Inventories**

Issue:

How will the periodic emission inventory requirements fit in with the milestone compliance demonstration requirements?

Discussion:

Section 182(a)(3) requires that a nonattainment area submit a periodic inventory at the end of every three year period beginning three years after the base year inventory is due. Therefore, the first periodic inventory is due in 1995 reflecting emissions for 1993. During the years prior to 1995, States will be required to prepare several inventories for projecting attainment and modeling purposes. Because of this burden, the staff working draft of the Preamble is suggesting that the States use the inventory work they will have put together for the other purposes to fulfill the requirements for the first periodic inventory. By doing this, the States would be able to push up the dates for submitting the subsequent periodic inventories to better coincide with the milestone compliance demonstration due dates (90 days after the applicable milestone is to be met). The EPA is soliciting comment on this approach.

Another problem is the possible conflict between the milestone compliance demonstration [required under section 182(g)] and the periodic inventory. For example, the milestone demonstration showing that the emission reductions required by November 15, 1996, have been achieved may use an "expedited" emission inventory for 1996. It is possible that the periodic inventory (due in 1998) would have 1996 as the base year, and this inventory, given the additional time to collect and report the data, may be different than the "expedited" inventory developed for the milestone demonstration. By accelerating the submittal of the periodic inventory (due in 1998) so that it could be used for the milestone demonstration, the possible conflict would be eliminated. Also, by using the

periodic inventory as the milestone demonstration, the States would have fewer inventories to prepare.

An alternative approach, if preparing a complete inventory in the 90-day timeframe is impossible, is to use some other technique (besides a complete inventory) to assess compliance with the emission reduction milestones [section 182(g)]. The periodic inventories would then be developed on the schedule required by the CAAA, but possible conflicts could arise between the compliance demonstrations and the periodic inventories that are later submitted.

- **Creditability Toward Progress Requirements**

Issue:

Can NO_x reductions be substituted for VOC reductions during the 1990-1996 period when moderate and above ozone nonattainment areas must reduce VOC emissions by 15 percent from the baseline emissions?

Discussion:

Section 182(b)(1) requires States with moderate and above ozone nonattainment areas to achieve a 15 percent reduction in VOC emissions. The staff working draft of the Preamble is based on a reading of the Act that NO_x substitution during this first milestone period is not allowed.

Issue:

Are rule effectiveness improvements in existing rules creditable toward the progress requirements?

Discussion:

Option 1: Any documented rule effectiveness improvements as determined by a "before and after" EPA protocol type test are creditable if such improvements meet the reduction criteria (i.e., reductions must be real, permanent, and enforceable).

Option 2: Documented rule effectiveness improvements greater than the 80 percent default as measured by an EPA protocol type test and meeting the reduction criteria are creditable.

Option 3: State chooses either Option 1 or Option 2.

Option 4: No rule effectiveness improvements are creditable.

Option 5: A different, technically supportable test(s) of creditability, provided the reduction criteria are met.

Issue:

How can pre-enactment banked emissions be used?

Discussion:

Since section 182(b)(1)(B) defines the baseline as actual emissions in 1990, the staff working draft of the Preamble asserts that pre-enactment banked emission reductions can not be included in the baseyear inventory for purposes of calculating the 15 percent progress requirement as the total amount of actual emissions in a given nonattainment area. Therefore, if the State elects to allow pre-enactment banked emission reductions to be used after the 1990 baseyear, the emissions must be treated as growth and accounted for in order to maintain progress toward the 15 percent emission reduction requirement. The EPA solicits comment on other options for dealing with banked emissions, given the language of section 182(b)(1)(B).

- **Contingency Provisions**

Issue:

How many control measures must States include in their plans as contingencies for possible failures to implement measures or to achieve the anticipated emission reductions?

Discussion:

Each plan must contain additional measures that will take effect without further action by the State or EPA if an area fails to make reasonable further progress (RFP) or to attain the standard by the applicable date. Serious or above ozone areas and certain CO nonattainment areas have specific contingency requirements related to meeting emission reduction milestones (for ozone areas) and ensuring consistency between projected and actual vehicle miles of travel (VMT) levels for CO areas.

How much contingency is needed? Should EPA require certain measures to be used as contingencies? Should the State have the flexibility to include whatever measures it chooses, including accelerating the implementation of certain measures scheduled for later implementation? Should EPA establish a "level of contingency" that must be maintained? For example, should sufficient measures be available so that if the need for contingency measures is triggered, a certain percentage reduction in the emission inventory or VMT is achieved?

The staff working draft of the Preamble asserts that the State must ensure that an appropriate level of emission reduction progress would continue to be made if attainment or RFP is not achieved and additional planning by the State is needed. States with moderate and above ozone nonattainment areas would have to include sufficient contingency measures in the 3-year submittal so that emission reductions equal to at least 3 percent of the emissions in the adjusted base year inventory would be achieved in the

year in which the failure has been identified. This "additional" 3 percent reduction would ensure (1) that progress toward attainment occurs at a similar rate as specified under the RFP requirements for moderate areas and serious and above areas (i.e., 3 percent per year) and (2) that the State will achieve these reductions while revising its SIP and adopting additional measures, including those necessary to correct the expected shortfall in emission reductions. Under this approach, the State would have 1 year to modify its SIP and take other corrective action needed to ensure that milestones are achieved and that RFP toward attainment continues to occur.

The contingency measures must "take effect without further action by the State or the Administrator." Does this mean that absolutely no action can be needed for implementation, or can administrative actions (e.g., notification of sources) occur? What other actions can or cannot occur?

- **Monitoring and Reporting Progress in SIP Implementation**

Issue:

What steps should States and EPA take to ensure that the SIP control strategies are implemented and achieve the expected emission reductions?

Discussion:

Sufficient tracking of plan implementation must occur to ensure that plans are implemented effectively and that anticipated emission reductions occur. Ideally, a comprehensive emission inventory would be produced for each area each year to show the implementation of controls and the resulting effect on the total inventory. In reality, the requirement to produce annual total emission inventories would place a significant burden on States and may not reflect the typical schedules for implementing many of the control measures. The Amendments recognize the difficulty in producing annual total inventories by specifying that "periodic" total inventories are only due every 3 years; however, it is not clear how these periodic inventories relate to requirements for showing RFP and achieving emission reduction milestones.

The staff working draft of the Preamble assumes that additional actions are needed to assess "interim" State progress in achieving RFP and the emission reduction milestones which occur (for serious and above areas) 6 years after enactment and every 3 years thereafter. The staff working draft of the Preamble proposes to (1) require that State plans for moderate and above ozone areas project the annual progress (i.e., the implementation of measures and the expected emission reductions) that will result from their control strategies; and (2) require States with moderate and above ozone areas to submit annual reports showing that their control measures are being implemented as planned and that the expected emission reductions are being achieved.

The EPA is soliciting comment on the form and content of these annual reports. The

EPA wants to use these reports to ensure that appropriate progress toward the milestones and attainment is being made, but the Agency does not want to impose unreasonable data collection or reporting activities. The EPA is also soliciting comment on the annual reports that CO areas must submit to show that their current VMT levels are consistent with the levels projected in the most recent SIP. For both the ozone reports and the CO reports, EPA is concerned that any annual reporting be based on "real" progress and not "paper" reductions resulting from assumed changes in the inventory or VMT that cannot be verified or quantified in a reasonable manner.

- **VMT Forecasts for CO Areas**

Issue:

Section 187(a)(2) requires that States produce a forecast of annual VMT and comparison report of actual annual VMT in moderate CO nonattainment areas with a design value of 12.7 ppm or higher for each year before the attainment year. The staff working draft would require that forecasted annual VMT and estimated annual actual VMT be within 2 percent. Since the Act does not provide for exceedances of the forecasts and clearly envisions prompt corrective actions in the event of such exceedances, is the 2 percent criterion appropriate?

Discussion:

The staff working draft of the Preamble asserts that 2 percent is a reasonable number to provide statistical confidence that the difference is not due to random fluctuations in the underlying ground counts. States are free to conservatively forecast their vehicle miles travelled to take into account possible underprojection as well as forecast a range of vehicle miles travelled or adopt a plan or package of transportation control measures (contingencies) that may be compelled by the forecast and can be effectively and easily implemented in the event of underprojection. Depending on the measures and their effectiveness, this has the potential to quickly offset a portion of the excess vehicle miles travelled. For greater increases in VMT, States are required by the Act to have adopted contingency plans which can be implemented without further action on the State's part to offset the excess VMT. The EPA solicits comment on other approaches for dealing with actual VMT in excess of projected levels.

- **"Bump-up" Provisions (regarding failures to attain or meet milestones)**

Issue:

What special reporting or planning activities should be required in marginal ozone areas (and possibly others) to minimize the chances of such areas being bumped up first to moderate, and then to serious?

Discussion:

If a marginal area does not attain by November 15, 1993, it will be "bumped up" to the next higher (i.e., moderate) classification. If the area has not commenced any early planning and rule development activities by that time, the area will have only two and a half years (from the time EPA finds that violations are still occurring) to meet all of the requirements for moderate areas (e.g., RACT rules, Stage II, 15 percent emission reduction requirement, etc.). Just making the submittals for these requirements will be difficult, but, worse, it will be practically impossible for the State to implement the measures early enough to reduce emissions and have a significant impact on ozone levels by the end of 1996. As a result, the area could face the possibility of missing the 1996 attainment date for moderate areas and be bumped up again, this time to the serious classification. If the marginal area had earlier received 1 or 2 extensions [under section 181(a)(5)], the difficulty of adopting and implementing required measures before the attainment date for moderate areas would be even greater.

The staff working draft of the Preamble introduces the idea of requiring marginal areas that may be unable to attain by the 1993 date to initiate preliminary planning and rule development activities well before that date. For example, States which request attainment date extensions for marginal areas [under section 181(a)(5)] could be required to show in their requests that (1) they have made a significant effort to initiate planning activities and rule development associated with the moderate classification and (2) they have taken steps to begin any necessary monitoring activities to develop required information (such as ambient VOC and NO_x data) for the modeling analysis that will be required for the moderate classification. For certain control measures which would be required under the moderate classification, such as inspection and maintenance, States could be required to show that they have taken any necessary preliminary steps to ensure that the controls could be adopted and implemented quickly. States could also be required to determine whether their legislative and regulatory procedures would enable these controls to be fully implemented and achieve needed emission reductions before the attainment date for moderate areas.

The EPA solicits comment on the need for and appropriateness of the above additional requirements and on other approaches that would assure satisfactory progress toward milestones and attainment.

Title V Interface with Title I

- **Relationship Between Title I and Title V**

Issue:

How should the contents of SIP's and Title V permits be defined so as to make the

documents as complementary and non-redundant as possible, while ensuring that SIP's can fulfil their statutory purposes and that permits can provide an appropriate level of operational flexibility?

Related issues: the extent to which stationary source RACT-equivalency protocols should be developed; the interface between SIP's and permits in the context of a program of marketable emissions permits; and accounting for and tracking growth allowances, especially in light of the new "progress" requirements that the 1990 Amendments place upon ozone SIP's.

Discussion:

While Title V mandates new operating permits requirements, the Amendments do not completely spell out the relationship between SIP's and permits with regard to what specific types of requirements and associated information are to be contained in each document. The approach in the staff working draft of the Preamble begins with the identification of the purposes of a SIP and the minimum legal informational elements that need to be retained in the SIP to meet its statutory burden. Additional informational elements associated with other historical SIP functions are also being identified, together with principles that should be applied in defining these legal and informational needs. EPA will then consider various options for how to apportion these additional elements between the SIP and the permits so as to best satisfy the guiding principles.

To satisfy the mandate to make attainment, maintenance, and progress requirements, SIP's need to be enforceable and retain information on baseline emissions and future growth and emissions projections. The extent to which the SIP, rather than the permit, needs to retain specifications on the emissions control strategies that are designed to result in the future emissions projections is central to the SIP-permit interface question. The staff working draft of the Preamble asserts that the relevant principles to be applied in resolving this question include the need for the control measures to be quantifiable, enforceable, and consistently applied; for procedures contained in control measures to be replicable; and that the SIP be accountable for maintaining consistency between the SIP demonstrations and source-specific permit provisions. EPA will be defining a set of options, consistent with these principles, that reflect varying degrees of moving information from the SIP to the permits. EPA solicits comments on the regulatory and informational elements associated with SIP and permit requirements, and on the extent to which the elements should be retained in the SIP only, moved to the permit only, or included in both the SIP and the permits.

To increase operational flexibility, consideration in being given to developing enforceable protocols for broad source categories to define equivalent means of compliance with RACT limits, potentially including multi-day and/or cross-line averaging. EPA will be exploring this methodology in detail during 1991 by focusing on a couple of specific examples. Hurdles to overcome during this exploration would be the need to comply with a daily ambient ozone standard as well as the progress

requirements of emission trades.

Marketable emissions permits programs and other economic incentive programs are being addressed specifically by EPA in the development of rules for economic incentive programs, targeted for proposal later this year. One basic issue associated with such programs is the extent to which emissions trades would require the same regulatory review and process associated with SIP revisions. EPA is currently considering the concept of replicable, source- or industry-specific emission quantification protocols, to be included in the SIP together with the general trading program rules, as a means to avoid regulatory delays while still providing public participation safeguards. EPA currently solicits general comments on the enforcement and informational elements that SIP's and permits should contain to implement such programs in a manner consistent with the principles outlined above for any ozone (VOC and/or NO_x) emissions control strategy.

Additionally, EPA is considering two basic options for tracking emissions increases that occur by way of minor permit amendments. These options are 1) to maintain a running balance of growth allowances that are allocated through minor permit amendments, and 2) to wait until each milestone occurs and then to rely on reconciliation of the allowances and the demonstration projections at that time. EPA solicits comments on these options and their accountability and enforceability as well as on the remedial measures that should be employed if a growth allowance is exceeded.

- **Economic Incentive Provisions**

Issue:

How can EPA encourage the use of economic incentive programs beyond than that which is mandated by the Act for specific milestone and/or attainment failures?

Discussion:

The Act mandates that States include economic incentive programs upon certain milestone and/or attainment failures in extreme ozone and serious CO nonattainment areas. In addition, economic incentive programs are one of three options required of States upon failure to meet a further progress milestone in serious and severe ozone nonattainment areas. EPA is required to publish rules to guide the States in the development of such programs.

In the case of such mandated programs, EPA recognizes that the schedule in the Act allows for very little time between certain failures, program development, review, and approval, and the next milestone. Beyond mandated programs, the Act explicitly allows for the use of economic incentive programs in the general SIP provisions and in the provisions for nonattainment SIP's. Thus, EPA is interested in encouraging the development, implementation, and evaluation of economic incentive programs prior to

actual failures, as well as in a broader range of cases in which the flexibility and cost-effectiveness benefits of economic incentive programs might be realized. EPA will solicit comment on various options to encourage the use of these programs during the comment period on the proposed Economic Incentive Program Rules (targeted for proposal in late 1991). At this time, EPA is soliciting comments based on experience with economic incentive programs, focusing on compliance and enforcement issues, as well as on the resulting benefits or problems associated with program development and/or implementation. EPA also seeks comment on the general concept of encouraging the early use of economic incentive programs and on possible approaches to providing such encouragement.

Summary of Major Issues in the General Preamble for Title I

- *Ozone and Carbon Monoxide Issues* -

June 1991

U.S. Environmental Protection Agency

Major Issues in the General Preamble for Title I

Title I of the Clean Air Act as amended in 1990 contains a number of provisions regarding the development and submittal of State implementation plans (SIP's) for nonattainment areas. Some of the new provisions require statutory interpretations or the establishment of new policies before the requirements are clear for States and others involved in the preparation of the SIP submittals. These provisions and the possible approaches for addressing them are the focus of the June 25-26 public meeting.

To facilitate discussion at the public meeting, this brief summary of the major ozone and carbon monoxide issues regarding the new provisions in Title I has been prepared. The intent of the summary is to state the issues clearly and describe some of the approaches that could be followed in addressing the issues. The summary (and the staff working draft of the General Preamble) does not contain an exhaustive description or discussion of potential approaches. The EPA hopes the public meeting and subsequent comment period will help identify additional approaches and the legal support for these approaches, as well as determine the "pro's and con's" of the various approaches.

The issues are discussed below in groups corresponding to the sessions which will be held at the June 25-26 meeting.

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- **Exemptions from the NO_x Requirements**

Issue:

Which areas are required to adopt NO_x control measures and which areas can be exempted from those requirements?

Discussion:

The Clean Air Act Amendments (CAAA) of 1990 require that the provisions that apply to major sources of volatile organic compounds (VOC) shall also apply to major sources of NO_x unless the resulting NO_x emission reductions would not be beneficial in attaining the ozone standard. These provisions are primarily (1) the adoption of State rules representing reasonably available control technology (RACT) on existing major sources and (2) the review of new major sources under the nonattainment new source review (NSR) provisions in section 173 of the Act. [The NSR provisions generally require sources to obtain offsets for their emissions and to install controls representing the lowest achievable emission rate (LAER).]

The staff draft of the General Preamble takes the position that the CAAA contain a presumption that NO_x reductions are beneficial in ozone nonattainment areas. Thus, in the absence of a demonstration to the contrary (as discussed below), affected areas cannot avoid the NO_x requirements. The guidance being developed by EPA to determine what areas/sources may be exempted from the NO_x requirements will rely, in part, on photochemical grid modeling and will be provided separately from the General Preamble. The staff working draft of the Preamble is based on a reading of the statute which does not allow the State to delay the submittal of the NO_x requirements beyond November 15, 1992, while this photochemical grid modeling is being completed unless it has demonstrated that NO_x control is not needed (see discussion which follows).

Section 182(f)(1) of the Act describes the general circumstances in which an area or sources can be exempted from the NO_x requirements. Below are issues which arise for each of the cases in section 182(f)(1).

Issue A:

How can specific sources demonstrate that "net air quality benefits" are greater without NO_x reductions?

Discussion:

A basic requirement for exempting sources from the NO_x control requirements is that EPA must determine that the "net air quality benefits" are greater without controlling NO_x. Therefore, the meaning that is assigned to "net air quality benefits" takes on a special importance. Although section 182 concerns only ozone nonattainment, the

term "net air quality benefit" could be broadly defined to include other air quality considerations, in addition to the implications for ozone. For example, the term could be defined as meaning:

(1) just the effects on attainment of the ozone standard;
(2) the effects on ozone population exposure and the associated risk;
(3) the effects on other national ambient air quality standards (e.g., NO_2 or PM-10); or
(4) some combination of the above.

Issue B:

In an area not located in an ozone transport region (established under section 176A or 184), what factors must be considered in determining whether NO_x emission reductions would "contribute to attainment" and, therefore, whether the exemption under section 182(f)(1)(A) should be allowed?

Discussion:

The exemption in section 182(f)(1)(A) specifies that the area of consideration is the nonattainment area. In addition, the provision centers on the contribution to ozone attainment and it does not include a "net" benefit criterion. Therefore, the staff draft of the Preamble assumes that only the factors related to attainment of the 0.12 ppm ozone standard within the nonattainment area may be considered in the exemption determination. Ozone population exposure and/or risk assessment factors have not been included in the staff draft of the Preamble since an initial reading of the statute did not find support in section 182 for such an approach.

The EPA invites discussion on whether the "contribution to attainment" criterion is meant with respect to any ozone exceedance or whether it should be applied in a net benefit sense with respect to a majority of an area's ozone exceedances; i.e., if NO_x reductions contribute to ozone attainment in some episode instances, but not necessarily a majority of past episode cases, should the exemption be denied?

Issue C:

In an area located in an ozone transport region, what factors must be considered in determining whether NO_x emission reductions would "produce net ozone air quality benefits in such region" and, therefore, whether the exemption under section 182(f)(1)(B) should be allowed?

Discussion:

The exemption in section(f)(1)(B) specifies that the area of consideration is the ozone transport region. Because the provision centers on the "net ozone benefit," the staff working draft of the Preamble assumes that factors related to ozone population exposure and/or risk assessment factors, as well as the ozone NAAQS, must be considered. From a technical perspective, it would be difficult to demonstrate the effects of NO_x reductions from one part of the transport region to other distant parts.

Nonetheless, the Act seems to require such a regionwide demonstration before any exemption would be given. Another alternative would be to limit the necessary demonstration to a smaller area, but support in the language of section 182 for such an approach was not apparent in the development of the staff working draft of the Preamble.

Issue:

How should EPA develop and provide the guidance for determining the effect of NO_x reductions and, therefore, the need for NO_x control?

Discussion:

Even though the purpose of the General Preamble is to describe how to apply the guidance to an area requesting an exemption rather than to state the technical basis for determining the effect of NO_x reductions, as part of the review of the staff working draft of the General Preamble, EPA invites comment on the following:

(1) In what form (memorandum to Regional Offices, letter to States, guidance document, *Federal Register* notice, rule, or other form) should EPA provide the technical guidance, given that petitions for an exemption could be submitted to EPA as early as Feb-92.

(2) What is the best form for public participation in developing the guidance, given the above timing constraint?

(3) Can other factors (e.g., cost of control) can be considered in evaluating the need for NO_x control?

- **NO_x Reasonably Available Control Technology (RACT)**

Issue:

What is the relationship between Title I NO_x RACT and Title IV NO_x requirements for utility plants?

Discussion:

Sections 182 (regarding ozone nonattainment areas) and 407 (regarding acid rain controls) separately specify control technology requirements which are to apply to many of the same coal-fired utility plants. The Act does not specify that either of these requirements should supersede the other; thus, both requirements must be met. However, section 407 and the House Committee report both mention low NO_x burners as possibly satisfying the technology requirement for each section. Another option is the following approach: determine that the technology specified by the section 407 rules is equal to RACT for section 182 purposes, except in extreme ozone areas where section 182(e)(3) prescribes the level of control for boilers emitting greater than 25 tons per year.

Issue:

How will EPA determine what represents RACT for NO_x sources?

Discussion:

The EPA guidance on NO_x RACT for Title I will be provided separately from the General Preamble. Except for the above discussion, the General Preamble is not intended to define what RACT is, but rather when and where NO_x RACT is required. However, as part of the General Preamble process, EPA invites comments on:

(1) How should EPA provide guidance for NO_x RACT rules, given that States must adopt and submit rules reflecting NO_x RACT by Nov-92 and there is insufficient time to use the control technology guideline (CTG) or alternative control technique (ACT) process?

(2) How could EPA use public participation in developing the RACT guidance, given the above timing constraint?

- **New Source Review (NSR) for NO_x Sources**

Issue:

When must sources implement the NO_x nonattainment NSR requirements (i.e., offsets and LAER)?

Discussion:

The statute requires States to submit their NSR rules by Nov-92. The staff working draft of the Preamble assumes that implementation of those rules must also begin by that date. However, photochemical grid modeling, which could result in areas being exempt from the NO_x requirements, is not to be submitted until Nov-94. Below are approaches that EPA could follow to address this apparent conflict in timing:

(1) require rule adoption but allow delayed implementation until photochemical grid modeling is completed (but not later than Nov-94);

(2) allow States to delay adoption of NO_x NSR rules until photochemical grid modeling is completed or Nov-94, due to the small NO_x reduction expected in the interim period;

(3) for marginal areas, require rule adoption but allow delayed implementation until 1994, when EPA determines whether the area failed to attain the standard by the Nov-1993 attainment date and;

(4) allow an exemption if the projected NO_x reductions from the NSR program are too small to show an effect.

Modeling/Demonstration Issues

- **Modeling Requirements for Serious and Above Areas**

Issue:

Are serious and above nonattainment areas required to submit an attainment demonstration by Nov-93?

Discussion:

The statute generally requires serious and above areas to meet the requirements of moderate areas. With respect to the attainment demonstrations, the staff working draft of the Preamble assumes that the photochemical grid modeling requirement due by Nov-94 for serious and above areas supersedes the demonstration required for moderate areas by Nov-93. Other options would be to require serious and above areas to (1) submit a less rigorous analysis [such as the empirical kinetic modeling approach (EKMA)] by Nov-93 and then the more detailed photochemical grid modeling by Nov-94; or (2) submit the photochemical grid modeling by Nov-93.

- **Moderate Area Attainment Demonstrations**

Issue:

Are moderate ozone nonattainment areas required to submit an attainment demonstration?

Discussion:

Section 182(b)(1)(A) requires moderate areas to submit by Nov-93 a plan which provides for emission reductions of at least 15 percent of the baseline emissions and such additional reductions "as necessary to attain the national primary ambient air quality standard." Even though there is no specific requirement for a "demonstration of attainment" by moderate areas, the development of the staff working draft of the Preamble has assumed that the only way to determine the additional reductions needed would be through some type of demonstration. The staff working draft of the Preamble allows this requirement to be met through city-specific EKMA modeling. Another option is to assume that satisfying the 15 percent emission reduction requirement satisfies the need for a demonstration, but development of the staff working draft of the Preamble has not found language in the Act which supports such an approach.

Issue:

Are multi-state moderate nonattainment areas required to submit an attainment demonstration by Nov-93?

Discussion:

The Act generally requires moderate areas to submit a demonstration of attainment by Nov-93. Section 182(j) specifies that multi-state areas must use photochemical grid modeling in their demonstrations. This type of modeling demonstration is due by Nov-94 for serious and above areas, and, as discussed earlier, the staff working draft of the Preamble assumes that this demonstration supersedes the demonstration required by Nov-93. Therefore, the staff working draft of the Preamble has taken the position that the demonstration for a moderate multi-state nonattainment area (which must be based on photochemical grid modeling) must be submitted by Nov-94. Other alternatives: (1) require EKMA modeling by Nov-93 for the multi-state moderate areas (this would have been in addition to the photochemical grid modeling); (2) require the photochemical grid modeling to be submitted by Nov-93.

- **Areas Affected by Ozone Transport**

Issue:

How should the requirement for all moderate and above ozone nonattainment areas to submit attainment demonstrations be affected by ozone transport from upwind areas which have higher classifications?

Discussion:

In some ozone nonattainment areas the demonstrations of attainment will be complicated by the impact of ozone and precursor transport and the progress requirements and attainment deadlines that apply to areas of different classifications. For example, a moderate area located within the transport region is still subject to the 6 year attainment deadline and the section 182(b)(2)(A) requirement to provide annual emission reductions in its plan to attain by the deadline. However, this area is (at least, presumptively) being affected by transport from another area(s) and is, as well, possibly affecting other areas itself. If the "other" areas that are affecting air quality levels in this moderate area are classified as serious or severe, those areas will be reducing their emissions over a longer time frame in order to attain the standard. That is, these "other" areas could still be having significant effects on the moderate area at the time when the moderate area must demonstrate attainment.

Should the moderate area have to achieve additional emission reductions to "compensate" for the transport from the other areas that have not yet reduced sufficiently their emissions? Or should the moderate area be able to rely on the anticipated reductions in these other areas in developing its attainment demonstration? These same questions also arise in areas that may be impacted by transport but are not yet in a transport region established under section 175A.

The staff working draft of the Preamble assumes that the CAAA provisions do not allow

EPA to approve a demonstration of attainment which relies on "future" emission reductions that would be achieved beyond the attainment date established by the classification in section 181. An important question is raised, however, as to whether the intent of the Amendments could have been to require areas of lower classifications to "compensate" for reductions that will be achieved over a longer time period in areas of higher classifications in order to demonstrate attainment by the applicable date.

The EPA is considering whether and how to relieve an area from the requirement to submit a full demonstration of attainment when that area will continue to be affected by transport from upwind areas beyond the area's attainment date. The EPA is seeking comment on possible approaches and interpretations that would recognize the apparent conflict between the absolute statutory requirement for a full demonstration of attainment in such an area and the reality of ozone and precursor transport that will interfere with this demonstration.

Control Measures

- **Development of State RACT Rules for Categories That Will Be Covered by a Future Control Technique Guideline (CTG)**

Issue:

For major VOC sources which are not currently covered by a CTG but which are expected to be covered by a future CTG to be issued by EPA, what is the timing for development of the State RACT rules?

Discussion:

The Amendments require States to submit by Nov-92 rules representing RACT for VOC sources in moderate and above ozone nonattainment areas. The EPA is required to issue new control technique guidelines (CTG's) for 11 source categories by Nov-93. When CTG's are available for a source category, they generally serve as the basis for the determination of RACT for those sources. Should the latter issuance of CTG's affect the 2-year submittal requirement for State RACT rules for the "new CTG" categories? Possible options are as follows:

Option 1: Require States to adopt RACT for *all* major sources regardless of whether or not they may later be subject to a CTG. The EPA would not revisit such non-CTG rules after issuance of the CTG provided that there was no additional information to indicate that the non-CTG RACT determination was in error.

Option 2: Allow States to postpone adoption of RACT rules for these sources until

the CTG is issued. This would presume that States would adopt the CTG recommendations for these sources.

- **Requirements for "Nonconventional" Areas (i.e., transitional, not violating, sub-marginal, incomplete/no data)**

Issue:

What submittal requirements should apply to transitional ozone areas, CO nonattainment areas with no current violations, "sub-marginal" ozone areas, and areas with incomplete or no monitoring data?

Discussion:

The Amendments contain specific provisions for transitional ozone areas (areas that were officially designated as nonattainment as of the day of enactment of the Amendments but were not recording violations of the standard). These areas are exempted from the requirements of subpart 2 (the requirements that apply to areas classified as marginal, moderate, etc.) if they continue not to violate the standard. They are specifically required to submit a maintenance plan (showing no violations in the future), but the Amendments are silent on whether such areas must meet other requirements, in particular, the general nonattainment requirements under subpart 1 of part D of the Act. A similar situation arises with (1) ozone "sub-marginal" areas (areas recording violations but having design values below the range for being classified as marginal), (2) CO "not violating" areas (areas designated at enactment but not now violating the CO NAAQS), and (3) areas having incomplete or no data to determine whether violations of the ozone or CO standard are occurring.

Below are possible approaches as to what could be required of these areas.
<u>All subpart 1 requirements apply</u>: Section 172(b) could be interpreted to require that any area designated nonattainment under section 107(d) must submit a SIP and that such a plan must meet all nine requirements as described in 172(c) and the monitoring requirements in section 110(a)(2). This strict interpretation would impose greater controls (e.g., attainment demonstration, contingency measures) on areas not violating or barely violating the NAAQS than the controls imposed on marginal areas with clear violations.

<u>Subpart 1 does not apply</u>: Subpart 1 could be interpreted to apply only where a new NAAQS has been established and only then would the resulting new nonattainment areas be subject to subpart 1 requirements. This means that subpart 1 would not apply to these nonconventional areas, as their status is not the result of a new NAAQS. This interpretation might not provide a strong impetus (besides the NSR requirements) for these areas to take steps to be redesignated to attainment. In other words, an area could

remain in a transitional, sub-marginal, incomplete data or not violating status indefinitely.

Subpart 1 generally applies but EPA would interpret past State actions as satisfying specific subpart 1 requirements where possible: Under this interpretation, these areas would have three years to submit a SIP revision and to establish and operate an appropriate monitoring program (if the area does not already have a monitoring program). In addition, several, but not all, of the provisions of section 172(c) might require additional action by the State. For example, areas that were not violating the standard might not have to adopt additional RACT measures or to develop measures to satisfy the reasonable further progress (RFP) requirement. The EPA solicits comment on these and other subpart 1 requirements, such as attainment demonstrations, contingency measures, emission inventories, and air quality monitoring.

Issue:

What attainment date(s) should apply to the nonconventional areas?

Discussion:

Section 172(a)(2) appears to provide for an attainment date of no later than five years from designation of an area as nonattainment. The EPA solicits comment on the following two (and other) options regarding this 5-year attainment date:

(1) If an area fails to attain within five years from being designated nonattainment, the area is automatically bumped up either to marginal or to a classification commensurate with the area's design value.

(2) If an area fails to attain within five years from being designated, the area would not be bumped to one of the section 181 classifications (marginal, moderate, etc.) but EPA could "tighten" the subpart 1 requirements. This could include further RACT measures, a showing of enforceable rules or possibly a basic I/M program.

- **Oxygenated Motor Vehicle Fuel Programs**

Issue:

Sections 187(b) and 211(m) require SIP revisions for 2.7 percent oxygen by weight in gasoline sold to the public and distributed by refiners in the entire metropolitan statistical area (MSA) or consolidated metropolitan statistical area (CMSA) containing a CO nonattainment area for a minimum of 4 months during the high CO period (generally winter months). Can an area smaller than the CMSA or MSA suffice?

Discussion:

This issue is being addressed as part of the oxygenated fuels negotiated rulemaking. The General Preamble will reflect the outcome of that rulemaking process. In meetings to

date, the parties to the negotiated rulemaking have agreed that the Amendments are clear in requiring oxygenated fuel coverage in the larger of the CMSA or MSA containing a CO nonattainment area. The requirement for oxygenated fuel need not apply to the attainment areas that are outside of the CMSA or MSA or that were redesignated from nonattainment to attainment unless needed to maintain the CO national ambient air quality standard. A waiver from the oxygenated fuel requirement may be granted upon demonstration by the State that the use of oxygenated fuel would prevent or interfere with the attainment by the area of a national ambient air quality standard or a State or local ambient air quality standard for any air pollutant other than CO.

- **CO Offsets In CO Nonattainment Areas**

Issue:

Can the NSR permit requirement for emissions offsets for new or modified major CO stationary sources in CO nonattainment areas be avoided or in some way be limited in applicability?

Discussion:

Section 173 of the Act requires "sufficient offsetting emissions reductions" (emissions offsets) for stationary sources subject to the nonattainment NSR permit requirements. Even if EPA determines, under the guidelines required by section 187(c), that stationary sources do not contribute significantly to the CO levels in the area, the special additional provisions for CO nonattainment areas at subpart 3 of Part D do not exempt such stationary sources from the emissions offset requirements of section 173.

States may try to shrink the size of their CO nonattainment areas because CO emissions offsets for stationary sources may be very hard to find. If emissions offsets for new or modified stationary sources are not required or the applicability to major stationary sources is limited, States may feel less pressure to reduce the size of their nonattainment areas. In addition, since CO reductions are achieved from mobile source programs, such as motor vehicle inspection and maintenance (I/M), maintaining larger nonattainment areas could result in greater overall CO reductions from the total number of vehicles covered by the I/M program. The EPA solicits comment concerning the implementation of the emissions offset requirements to new or modified stationary sources in CO nonattainment areas, the effects the offset requirements may have on the size of CO nonattainment areas, the feasibility of the alternative approaches (see below), and the effects that the offset requirements may have on total reductions of CO emissions.

Alternative 1: No stationary source offsets would be required if,

- the State demonstrates for the impact area that any NAAQS exceedances are a result of mobile source emissions;

- a NAAQS exceedance at any receptor is a result of mobile source emissions when the total contribution of stationary sources to the modeled or monitored total CO concentration is less than 25%. The source's modeled impact at that receptor must not exceed 575 ug/m3, 8 hour average (or some other appropriate value);

- the new source applies the very best control of CO to reduce emissions to an absolute minimum [since LAER is required, this means a careful scrutiny of the available technologies];

- the State has an I/M program in place in all nonattainment areas within the proposed source impact area.

Alternative 2:

- A State could proposes that if new or modified stationary sources are required to obtain emissions offsets in the proposed CO nonattainment area, then the proposed CO nonattainment area will be a certain size (say three counties). However, if new or modified stationary sources can be exempt from the emissions offset requirements for CO in the nonattainment area, the State will propose a larger nonattainment area (say five counties). The reduction in CO emissions from I/M in the two extra counties would be proposed as surplus emissions credits which could be used to offset new or modified stationary sources from the emissions offset requirements in the nonattainment area.

- As a safety factor to assure that the emissions reductions from the two extra counties are actual, surplus, and enforceable, the EPA could allow a maximum of 75% of the projected reductions as credit towards future stationary source growth. The reductions from the two extra counties that are reserved to offset new or modified sources could not be used in the attainment demonstration. One air quality benefit is that early CO reductions are realized in the two extra counties. Another option would be to have I/M in the two extra counties (or statewide) and not include these counties in the nonattainment area, but allow the emissions credits for new or modified stationary sources in the nonattainment area.

- **Adoption of Long-term Measures in Certain Areas**

Issue:

To what extent should EPA provide severe areas additional time (beyond the deadline for the attainment demonstration) to fully develop and adopt certain "long-term" measures?

Discussion:

Some severe ozone nonattainment areas will have such large emission reduction

requirements that identifying, developing, and adopting in final form all of the control measures shown to be needed in their demonstrations of attainment (due by November 15, 1994) may present an unreasonable burden. This situation was specifically recognized for an extreme ozone area in section 182(e)(5), which allows such an area to submit a plan containing provisions that "anticipate development of new control technologies or improvement of existing control technologies."

"Long-term" measures would include those that may anticipate future technological developments as well as those that may require complex analyses and decision making and coordination among a number of government agencies. The staff working draft of the Preamble takes the position that additional time could only be allowed if the plan contained (1) all measures, including the long-term measure(s) for which additional time would be needed, (2) an appropriate schedule outlining the steps leading to development and adoption of the measure(s), (3) commitments from those agencies that would be involved in the development and implementation of the measure, and (4) contingency measures that could be implemented if the measure is not developed or if it fails to achieve the anticipated reductions. Furthermore, the long-term measure(s) could not be used to meet any emission reduction requirements within the first 10 years after enactment. The EPA is seeking comment on this approach and other possible approaches as well as on the general concept of allowing severe areas additional time for submitting certain measures.

- **Vehicle Miles Traveled (VMT) Offset Provisions**

Issue:

How is growth in emissions due to growth in vehicle miles traveled or number of vehicle trips determined, and what kinds of measures can be used to offset growth in VMT?

Discussion:

Section 182(d)(1) requires that, for severe and extreme ozone nonattainment areas, States must submit revisions to SIP's that identify and adopt "specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area(s) and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements" to comply with reasonable further progress requirements. Section 187(b)(2) applies the same requirements to serious carbon monoxide areas.

The EPA solicits comment on two potential interpretations of "growth in emissions from growth in VMT or numbers of vehicle trips." They are:

1. VMT offset measures must prevent any increase in vehicle emissions that might occur between any two future years in the absence of any efforts to limit VMT

growth. Under this interpretation, VMT offset measures would not have to be implemented until the effect on emissions of growth in VMT begins to outweigh the effect of the Federal Motor Vehicle Control Program.

2. VMT offset measures must prevent any increase in emissions over the emissions that would occur if VMT were held constant. Under this interpretation, VMT offset measures would have to be implemented as soon as feasible since all growth in VMT would have to be offset.

In addition to the "interpretation of growth" issue, EPA is also soliciting comments on the question of whether growth in VMT can be offset only by section 108(f) measures or by other measures as well.

- **Employer Trip Reduction Provisions**

Issue:

What is an approvable State SIP submittal for employer trip reduction programs?

Discussion:

Section 182(d)(1)(B) requires that in severe and extreme ozone nonattainment areas, employers with over 100 employees increase the average passenger occupancy per vehicle of their employees to a level 25 percent above the average vehicle occupancy (AVO) for the nonattainment area. The revised plan is to be submitted no later than November 15, 1992. It shall "provide that each employer subject to a vehicle occupancy requirement shall submit a compliance plan . . . which shall convincingly demonstrate compliance with the requirements of this paragraph . . ." Four options, or combinations thereof, are offered that would allow EPA to propose approval of a SIP submittal for employer trip reduction programs. These are:

1. Evidence in the SIP that agency resources are available for the effective plan-by-plan review of employer-selected measures to insure the high quality of compliance plans.

2. Regulations in the SIP contain a convincing minimum set of measures.

3. Regulations in the SIP provide that failure by the employer to meet the target AVO results in implementation of a regulation-specified, multi-measure contingency plan.

4. Regulations in the SIP include financial penalties that are large enough to result in a significant prospective incentive for the employer to design and implement an effective initial compliance plan of its own.

EPA is soliciting comments regarding additional options.

There may be certain advantages in allowing trading among employers for AVO credits as long as the overall increase in AVO by employers is maintained as outlined in this section. The Act states, however, that the Administrator shall ". . . require . . . [that] each employer of 100 or more persons . . . increase average passenger occupancy per vehicle . . . by not less than 25 percent above the average vehicle occupancy . . ." for the area. The EPA is soliciting comments that would provide appropriate trading options in light of the wording of the Act.

Another issue concerns language on early SIP submittals to establish the area AVO. Areas that currently have trip reduction programs in effect, either mandatory or voluntary, that are anticipated to produce significant increases in ridership levels in the short term, may wish to submit their SIP's prior to 1992. Section 182(d)(1)(B) defines AVO as the average vehicle occupancy at the time the SIP revision is submitted. Early SIP submittal will allow such areas to take credit for near-term increases in ridership levels in meeting the required 25 percent increase above AVO.

Where such programs are fully implemented and meet all requirements for an approvable SIP under sections 110 and 182, the areas can make a complete SIP submittal and receive full EPA approval. Where programs are not yet enforceable, or otherwise do not meet all SIP requirements, areas can still make a submission sufficient to qualify for conditional SIP approval, and thereby establish an area AVO before 1992. To qualify for conditional approval under section 110(k)(4), areas must commit to adopt an enforceable trip reduction program adequate to meet all SIP requirements by not later than 1 year from the date EPA approves the submittal. It should be noted that compliance dates move forward with an early SIP submittal.

Tracking Progress

- **Emission Statements**

Issue:

How will emission statements from VOC and NO_x stationary sources be used in tracking reasonable further progress and in demonstrating compliance with emission reduction milestones required under section 182(g)?

Discussion:

Section 182(a)(3)(B) requires each State with a marginal or above ozone nonattainment area to submit a plan requiring its stationary sources of VOC and NO_x to submit annual emission statements. A source that is less than 25 tons per year (tpy) can be exempted

from the requirement if the State includes the emissions from this source and other sources emitting less than 25 tpy in the State's required inventory submittals. The Act states that EPA will determine the form and content of these statements, and it is possible that the emission statements could be used in assessing reasonable further progress and in demonstrating compliance with the emission reduction milestones for serious and above areas, as required under section 182(g). The EPA is soliciting comment on the form and content of the emission statements and their role in tracking progress in the implementing the SIP and achieving the required emission reductions.

The EPA is also surveying the various reporting requirements that apply to sources to determine what type of information is available and what additional information would be necessary to use the emission statements as a tool to track progress in implementing the SIP and achieving emission reduction targets.

- **Periodic Emission Inventories**

Issue:

How will the periodic emission inventory requirements fit in with the milestone compliance demonstration requirements?

Discussion:

Section 182(a)(3) requires that a nonattainment area submit a periodic inventory at the end of every three year period beginning three years after the base year inventory is due. Therefore, the first periodic inventory is due in 1995 reflecting emissions for 1993. During the years prior to 1995, States will be required to prepare several inventories for projecting attainment and modeling purposes. Because of this burden, the staff working draft of the Preamble is suggesting that the States use the inventory work they will have put together for the other purposes to fulfill the requirements for the first periodic inventory. By doing this, the States would be able to push up the dates for submitting the subsequent periodic inventories to better coincide with the milestone compliance demonstration due dates (90 days after the applicable milestone is to be met). The EPA is soliciting comment on this approach.

Another problem is the possible conflict between the milestone compliance demonstration [required under section 182(g)] and the periodic inventory. For example, the milestone demonstration showing that the emission reductions required by November 15, 1996, have been achieved may use an "expedited" emission inventory for 1996. It is possible that the periodic inventory (due in 1998) would have 1996 as the base year, and this inventory, given the additional time to collect and report the data, may be different than the "expedited" inventory developed for the milestone demonstration. By accelerating the submittal of the periodic inventory (due in 1998) so that it could be used for the milestone demonstration, the possible conflict would be eliminated. Also, by using the

periodic inventory as the milestone demonstration, the States would have fewer inventories to prepare.

An alternative approach, if preparing a complete inventory in the 90-day timeframe is impossible, is to use some other technique (besides a complete inventory) to assess compliance with the emission reduction milestones [section 182(g)]. The periodic inventories would then be developed on the schedule required by the CAAA, but possible conflicts could arise between the compliance demonstrations and the periodic inventories that are later submitted.

- **Creditability Toward Progress Requirements**

Issue:

Can NO_x reductions be substituted for VOC reductions during the 1990-1996 period when moderate and above ozone nonattainment areas must reduce VOC emissions by 15 percent from the baseline emissions?

Discussion:

Section 182(b)(1) requires States with moderate and above ozone nonattainment areas to achieve a 15 percent reduction in VOC emissions. The staff working draft of the Preamble is based on a reading of the Act that NO_x substitution during this first milestone period is not allowed.

Issue:

Are rule effectiveness improvements in existing rules creditable toward the progress requirements?

Discussion:

Option 1: Any documented rule effectiveness improvements as determined by a "before and after" EPA protocol type test are creditable if such improvements meet the reduction criteria (i.e., reductions must be real, permanent, and enforceable).

Option 2: Documented rule effectiveness improvements greater than the 80 percent default as measured by an EPA protocol type test and meeting the reduction criteria are creditable.

Option 3: State chooses either Option 1 or Option 2.

Option 4: No rule effectiveness improvements are creditable.

Option 5: A different, technically supportable test(s) of creditability, provided the reduction criteria are met.

Issue:

How can pre-enactment banked emissions be used?

Discussion:

Since section 182(b)(1)(B) defines the baseline as actual emissions in 1990, the staff working draft of the Preamble asserts that pre-enactment banked emission reductions can not be included in the baseyear inventory for purposes of calculating the 15 percent progress requirement as the total amount of actual emissions in a given nonattainment area. Therefore, if the State elects to allow pre-enactment banked emission reductions to be used after the 1990 baseyear, the emissions must be treated as growth and accounted for in order to maintain progress toward the 15 percent emission reduction requirement. The EPA solicits comment on other options for dealing with banked emissions, given the language of section 182(b)(1)(B).

- **Contingency Provisions**

Issue:

How many control measures must States include in their plans as contingencies for possible failures to implement measures or to achieve the anticipated emission reductions?

Discussion:

Each plan must contain additional measures that will take effect without further action by the State or EPA if an area fails to make reasonable further progress (RFP) or to attain the standard by the applicable date. Serious or above ozone areas and certain CO nonattainment areas have specific contingency requirements related to meeting emission reduction milestones (for ozone areas) and ensuring consistency between projected and actual vehicle miles of travel (VMT) levels for CO areas.

How much contingency is needed? Should EPA require certain measures to be used as contingencies? Should the State have the flexibility to include whatever measures it chooses, including accelerating the implementation of certain measures scheduled for later implementation? Should EPA establish a "level of contingency" that must be maintained? For example, should sufficient measures be available so that if the need for contingency measures is triggered, a certain percentage reduction in the emission inventory or VMT is achieved?

The staff working draft of the Preamble asserts that the State must ensure that an appropriate level of emission reduction progress would continue to be made if attainment or RFP is not achieved and additional planning by the State is needed. States with moderate and above ozone nonattainment areas would have to include sufficient contingency measures in the 3-year submittal so that emission reductions equal to at least 3 percent of the emissions in the adjusted base year inventory would be achieved in the

year in which the failure has been identified. This "additional" 3 percent reduction would ensure (1) that progress toward attainment occurs at a similar rate as specified under the RFP requirements for moderate areas and serious and above areas (i.e., 3 percent per year) and (2) that the State will achieve these reductions while revising its SIP and adopting additional measures, including those necessary to correct the expected shortfall in emission reductions. Under this approach, the State would have 1 year to modify its SIP and take other corrective action needed to ensure that milestones are achieved and that RFP toward attainment continues to occur.

The contingency measures must "take effect without further action by the State or the Administrator." Does this mean that absolutely no action can be needed for implementation, or can administrative actions (e.g., notification of sources) occur? What other actions can or cannot occur?

- **Monitoring and Reporting Progress in SIP Implementation**

Issue:

What steps should States and EPA take to ensure that the SIP control strategies are implemented and achieve the expected emission reductions?

Discussion:

Sufficient tracking of plan implementation must occur to ensure that plans are implemented effectively and that anticipated emission reductions occur. Ideally, a comprehensive emission inventory would be produced for each area each year to show the implementation of controls and the resulting effect on the total inventory. In reality, the requirement to produce annual total emission inventories would place a significant burden on States and may not reflect the typical schedules for implementing many of the control measures. The Amendments recognize the difficulty in producing annual total inventories by specifying that "periodic" total inventories are only due every 3 years; however, it is not clear how these periodic inventories relate to requirements for showing RFP and achieving emission reduction milestones.

The staff working draft of the Preamble assumes that additional actions are needed to assess "interim" State progress in achieving RFP and the emission reduction milestones which occur (for serious and above areas) 6 years after enactment and every 3 years thereafter. The staff working draft of the Preamble proposes to (1) require that State plans for moderate and above ozone areas project the annual progress (i.e., the implementation of measures and the expected emission reductions) that will result from their control strategies; and (2) require States with moderate and above ozone areas to submit annual reports showing that their control measures are being implemented as planned and that the expected emission reductions are being achieved.

The EPA is soliciting comment on the form and content of these annual reports. The

EPA wants to use these reports to ensure that appropriate progress toward the milestones and attainment is being made, but the Agency does not want to impose unreasonable data collection or reporting activities. The EPA is also soliciting comment on the annual reports that CO areas must submit to show that their current VMT levels are consistent with the levels projected in the most recent SIP. For both the ozone reports and the CO reports, EPA is concerned that any annual reporting be based on "real" progress and not "paper" reductions resulting from assumed changes in the inventory or VMT that cannot be verified or quantified in a reasonable manner.

- **VMT Forecasts for CO Areas**

Issue:

- *Section 187(a)(2) requires that States produce a forecast of annual VMT and comparison report of actual annual VMT in moderate CO nonattainment areas with a design value of 12.7 ppm or higher for each year before the attainment year. The staff working draft would require that forecasted annual VMT and estimated annual actual VMT be within 2 percent. Since the Act does not provide for exceedances of the forecasts and clearly envisions prompt corrective actions in the event of such exceedances, is the 2 percent criterion appropriate?*

Discussion:

The staff working draft of the Preamble asserts that 2 percent is a reasonable number to provide statistical confidence that the difference is not due to random fluctuations in the underlying ground counts. States are free to conservatively forecast their vehicle miles travelled to take into account possible underprojection as well as forecast a range of vehicle miles travelled or adopt a plan or package of transportation control measures (contingencies) that may be compelled by the forecast and can be effectively and easily implemented in the event of underprojection. Depending on the measures and their effectiveness, this has the potential to quickly offset a portion of the excess vehicle miles travelled. For greater increases in VMT, States are required by the Act to have adopted contingency plans which can be implemented without further action on the State's part to offset the excess VMT. The EPA solicits comment on other approaches for dealing with actual VMT in excess of projected levels.

- **"Bump-up" Provisions (regarding failures to attain or meet milestones)**

Issue:

What special reporting or planning activities should be required in marginal ozone areas (and possibly others) to minimize the chances of such areas being bumped up first to moderate, and then to serious?

Discussion:

If a marginal area does not attain by November 15, 1993, it will be "bumped up" to the next higher (i.e., moderate) classification. If the area has not commenced any early planning and rule development activities by that time, the area will have only two and a half years (from the time EPA finds that violations are still occurring) to meet all of the requirements for moderate areas (e.g., RACT rules, Stage II, 15 percent emission reduction requirement, etc.). Just making the submittals for these requirements will be difficult, but, worse, it will be practically impossible for the State to implement the measures early enough to reduce emissions and have a significant impact on ozone levels by the end of 1996. As a result, the area could face the possibility of missing the 1996 attainment date for moderate areas and be bumped up again, this time to the serious classification. If the marginal area had earlier received 1 or 2 extensions [under section 181(a)(5)], the difficulty of adopting and implementing required measures before the attainment date for moderate areas would be even greater.

The staff working draft of the Preamble introduces the idea of requiring marginal areas that may be unable to attain by the 1993 date to initiate preliminary planning and rule development activities well before that date. For example, States which request attainment date extensions for marginal areas [under section 181(a)(5)] could be required to show in their requests that (1) they have made a significant effort to initiate planning activities and rule development associated with the moderate classification and (2) they have taken steps to begin any necessary monitoring activities to develop required information (such as ambient VOC and NO_x data) for the modeling analysis that will be required for the moderate classification. For certain control measures which would be required under the moderate classification, such as inspection and maintenance, States could be required to show that they have taken any necessary preliminary steps to ensure that the controls could be adopted and implemented quickly. States could also be required to determine whether their legislative and regulatory procedures would enable these controls to be fully implemented and achieve needed emission reductions before the attainment date for moderate areas.

The EPA solicits comment on the need for and appropriateness of the above additional requirements and on other approaches that would assure satisfactory progress toward milestones and attainment.

Title V Interface with Title I

- **Relationship Between Title I and Title V**

Issue:

How should the contents of SIP's and Title V permits be defined so as to make the

documents as complementary and non-redundant as possible, while ensuring that SIP's can fulfil their statutory purposes and that permits can provide an appropriate level of operational flexibility?

Related issues: the extent to which stationary source RACT-equivalency protocols should be developed; the interface between SIP's and permits in the context of a program of marketable emissions permits; and accounting for and tracking growth allowances, especially in light of the new "progress" requirements that the 1990 Amendments place upon ozone SIP's.

Discussion:

While Title V mandates new operating permits requirements, the Amendments do not completely spell out the relationship between SIP's and permits with regard to what specific types of requirements and associated information are to be contained in each document. The approach in the staff working draft of the Preamble begins with the identification of the purposes of a SIP and the minimum legal informational elements that need to be retained in the SIP to meet its statutory burden. Additional informational elements associated with other historical SIP functions are also being identified, together with principles that should be applied in defining these legal and informational needs. EPA will then consider various options for how to apportion these additional elements between the SIP and the permits so as to best satisfy the guiding principles.

To satisfy the mandate to make attainment, maintenance, and progress requirements, SIP's need to be enforceable and retain information on baseline emissions and future growth and emissions projections. The extent to which the SIP, rather than the permit, needs to retain specifications on the emissions control strategies that are designed to result in the future emissions projections is central to the SIP-permit interface question. The staff working draft of the Preamble asserts that the relevant principles to be applied in resolving this question include the need for the control measures to be quantifiable, enforceable, and consistently applied; for procedures contained in control measures to be replicable; and that the SIP be accountable for maintaining consistency between the SIP demonstrations and source-specific permit provisions. EPA will be defining a set of options, consistent with these principles, that reflect varying degrees of moving information from the SIP to the permits. EPA solicits comments on the regulatory and informational elements associated with SIP and permit requirements, and on the extent to which the elements should be retained in the SIP only, moved to the permit only, or included in both the SIP and the permits.

To increase operational flexibility, consideration in being given to developing enforceable protocols for broad source categories to define equivalent means of compliance with RACT limits, potentially including multi-day and/or cross-line averaging. EPA will be exploring this methodology in detail during 1991 by focusing on a couple of specific examples. Hurdles to overcome during this exploration would be the need to comply with a daily ambient ozone standard as well as the progress

requirements of emission trades.

Marketable emissions permits programs and other economic incentive programs are being addressed specifically by EPA in the development of rules for economic incentive programs, targeted for proposal later this year. One basic issue associated with such programs is the extent to which emissions trades would require the same regulatory review and process associated with SIP revisions. EPA is currently considering the concept of replicable, source- or industry-specific emission quantification protocols, to be included in the SIP together with the general trading program rules, as a means to avoid regulatory delays while still providing public participation safeguards. EPA currently solicits general comments on the enforcement and informational elements that SIP's and permits should contain to implement such programs in a manner consistent with the principles outlined above for any ozone (VOC and/or NO_x) emissions control strategy.

Additionally, EPA is considering two basic options for tracking emissions increases that occur by way of minor permit amendments. These options are 1) to maintain a running balance of growth allowances that are allocated through minor permit amendments, and 2) to wait until each milestone occurs and then to rely on reconciliation of the allowances and the demonstration projections at that time. EPA solicits comments on these options and their accountability and enforceability as well as on the remedial measures that should be employed if a growth allowance is exceeded.

- **Economic Incentive Provisions**

Issue:

How can EPA encourage the use of economic incentive programs beyond than that which is mandated by the Act for specific milestone and/or attainment failures?

Discussion:

The Act mandates that States include economic incentive programs upon certain milestone and/or attainment failures in extreme ozone and serious CO nonattainment areas. In addition, economic incentive programs are one of three options required of States upon failure to meet a further progress milestone in serious and severe ozone nonattainment areas. EPA is required to publish rules to guide the States in the development of such programs.

In the case of such mandated programs, EPA recognizes that the schedule in the Act allows for very little time between certain failures, program development, review, and approval, and the next milestone. Beyond mandated programs, the Act explicitly allows for the use of economic incentive programs in the general SIP provisions and in the provisions for nonattainment SIP's. Thus, EPA is interested in encouraging the development, implementation, and evaluation of economic incentive programs prior to

actual failures, as well as in a broader range of cases in which the flexibility and cost-effectiveness benefits of economic incentive programs might be realized. EPA will solicit comment on various options to encourage the use of these programs during the comment period on the proposed Economic Incentive Program Rules (targeted for proposal in late 1991). At this time, EPA is soliciting comments based on experience with economic incentive programs, focusing on compliance and enforcement issues, as well as on the resulting benefits or problems associated with program development and/or implementation. EPA also seeks comment on the general concept of encouraging the early use of economic incentive programs and on possible approaches to providing such encouragement.

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U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON HEALTH AND THE ENVIRONMENT

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May 8, 1991

The Honorable William K. Reilly
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Reilly:

Last week, the Administration proposed a permit program to implement title V of the new Clean Air Act. Congress intended that this program would strengthen enforcement of the Clean Air Act. Unfortunately, the permit program you proposed would actually make it more difficult to enforce the Act than it is today. The proposal violates so many fundamental statutory requirements that it is best characterized as lawless.

The Health and the Environment Subcommittee held a hearing on May 1 to examine the permit proposal. At that hearing, EPA Assistant Administrator William Rosenberg and EPA General Counsel Donald Elliot agreed to respond promptly and in writing to further questions about the permit proposal. I am writing now with these questions. They explain in detail my concerns about the permit proposal. Please respond to the issues raised in this letter by May 17, 1991.

"Minor Permit Amendments"

The process for obtaining so-called "minor permit amendments" in the proposed regulations is sufficient by itself to undermine the entire proposal. In effect, the process allows a polluter to rewrite its permit at any time, unilaterally, and without any opportunity for public comment or court review.

Section 70.7(f) of the permit regulations establishes the process for minor permit amendments. It authorizes states to treat as a "minor permit amendment" essentially any request by a source for "any proposed revision" to a permit. These permit amendments can raise emissions levels, drop "work practice" requirements such as recycling requirements, or eliminate monitoring requirements. As the EPA witnesses conceded at the hearing, they occur without public notice, without notice to other affected states, without opportunity for judicial review, and without an opportunity for EPA to block the amendment by raising an objection.

The permitting agency itself has only seven days to object to the minor permit amendment. This is a wholly unrealistic timeframe, considering that states are thought to need as much as 18 months to complete other permit actions. If the permitting agency does not object, the amendments become part of the permit. By virtue of the "permit shield," no enforcement action can be taken against a source that complies with the terms of its amended permit.

As the discussion at the Subcommittee hearing made evident, many of the most objectionable features of minor permit amendments did not originate with EPA. In your agency's April 2 draft, which was the draft submitted for White House review, three important limitations where placed on minor permit amendments. First, no minor permit amendment could increase emissions by more than a de minimis amount; second, public notice was required; and third, no minor permit amendments could shield a source from enforcement actions. Unfortunately, all three of these limitations were dropped from the revised draft transmitted to your agency from the Vice President's office on April 6.

The scope of the changes allowed as "minor permit amendments" is extremely broad. Section 70.7(f) applies to "any proposed revision" of the permit. The only two limitations are that the revision cannot be a title I "modification" or violate an applicable requirement of the Act.

This language allows polluters to use a minor permit amendment to rewrite emission limits in the permit. Many polluting sources will be required by their permits to reduce emissions based on a case-by-case application by the permitting authority of one of the Clean Air Act's many narrative standards (such as the narrative requirement that a source in a nonattainment area comply with "reasonably available control technology"). If such a source does not want to make the reductions required by the permit, it would appear that it could submit a permit amendment to obtain a higher emissions limit. In this instance, the source would not be modifying its operations in any way, so the permit amendment would not be a prohibited title I "modification." The second limitation -- the requirement that the permit amendment not violate an applicable requirement of the Act -- also would not come into play. The source would assert that its amendment reinterprets, rather than violates, the applicable narrative standard. If the state did not object to this "reinterpretation" in seven days, it would become part of the permit, shielding the source from enforcement action based on the original emission limit.

Plainly, the result is abhorrent. Through a minor permit amendment, the source would have unilaterally changed the most fundamental permit term -- the emission standard -- by any amount it wished.

Minor permit amendments can also be used to undermine essential monitoring requirements. In the typical case, the monitoring requirements in the permit will be determined on a case-by-case basis by the permitting authority under the authority of section 504(c) of the Act. Changing these requirements through a minor permit amendment would not be a modification under title I and would be characterized by the source as a "reinterpretation," rather than a violation, of section 504(c), so it would again be permissible.

Likewise, it would appear that work practice standards, such as a requirement to inspect chemical tanks or recycle CFCs, are vulnerable to extensive change under the minor amendment process in any situation in which the permitting authority exercised any independent judgment in specifying the work practice standard.

These loopholes vitiate the integrity of the permit program. They have no defensible policy rationale. And they are illegal -- blatantly so.

Minor permit amendments violate at least four statutory provisions. First, minor permit amendments are illegal under section 502(b)(6), which is the very section that the agency cites as authority for minor permit amendments. According to the preamble of the proposal, section 502(b)(6) authorizes minor permit amendments because the section calls for "streamlined" and "expeditious" procedures. However, the section also expressly provides that the procedures must include "public notice, including an opportunity for public comment and a hearing" and "an opportunity for judicial review." These essential requirements of section 502(b)(6) are illegally excluded from the minor permit amendment process.

Second, minor permit amendments violate requirements for notice to affected states. Section 505(a)(2) provides that the permitting authority "shall provide an opportunity for ... States to submit written recommendations respecting the issuance of the permit and its terms and conditions." However, in the case of minor permit amendments, which can affect fundamental "terms and conditions," there is no opportunity for affected states to submit written recommendations. This is certainly illegal.

Likewise, the minor permit amendment process does not afford EPA the opportunity to review and object that section 505 requires. Under section 505(a)(1)(B), the state must transmit to EPA "each permit proposed to be issued." Under section 505(b), the state must provide EPA at least 45 days to object to the proposed permit. However, in the case of the permits proposed to be issued through the minor permit amendment process, no such review and opportunity to object is provided.

Finally, minor permit amendments are inconsistent with section 505(b)(10). This section was one of the most thoroughly considered provisions in title V. It addresses the specific issue of operational flexibility. It carefully circumscribes the degree of operational flexibility to be allowed to sources. It is astounding that the Administration would ignore the limits on operational flexibility that Congress expressly enacted and create a new operational flexibility provision out of whole cloth. But that is exactly what you have done through minor permit amendments.

Please respond in detail to these points. First, please comment on whether you intend to allow minor permit modifications to cover the changes in permit terms described above. Please specifically address whether you intend to allow sources to increase emission standards without limit, rewrite monitoring requirements, and change work practice standards through minor permit amendments. If you do not intend to allow these changes, please provide a specific, detailed discussion of the regulatory provisions that assure that sources cannot unilaterally change their emission limitations, monitoring requirements, and work practice standards in the situations described above.

Second, please address the legality of proposal for minor permit amendments. Please respond in detail to each of the legal arguments raised above, addressing in particular how the minor permit amendment process is consistent with sections 502(b)(6), 505(a)(1), 505(a)(2), 505(b), and 502(b)(10) of the Act.

Operational Flexibility

A separate provision in the permit proposal implements the "operational flexibility" requirements of section 502(b)(10) of the Act. Unfortunately, White House revisions to this provision have again illegally created a major loophole in the permit program.

The operational flexibility provision is set out in sec. 70.6(d) of the proposal. As described in the preamble, sec. 70.6(d) is intended to "provide a fast track process for changing the terms of the permit" (p. 92). Its scope is nearly as sweeping as the scope of minor permit amendments. It covers every change in permit terms allowed by minor permit amendments except those that would increase allowable emissions. Thus, like minor permit amendments, it would allow changes to such essential permit terms as monitoring requirements and work practice standards, since changes to these terms do not affect allowable emissions.

Moreover, safeguards for permit changes made under the banner of operational flexibility are nonexistent. Not only is there no public notice, no opportunity for judicial review, no notice to affected states, and no opportunity for EPA objection -- but the permitting authority is not even provided an opportunity to object to the permit change.

This operational flexibility provision is fundamentally illegal under section 502(b)(10) of the Act. Section 502(b)(10) is a command to the state to write permits that provide for operational flexibility within the four corners of the permit. It tells the state to recognize the need for operational flexibility and to provide for such flexibility in the permit. Contrary to EPA's permit proposal, the section does not authorize sources to go beyond the operational flexibility provided in the permit.

The statutory language could not be more clear on this matter. It provides that the state permit program must have "provisions to allow changes within a permitted facility ... without requiring a permit revision." The state is not required to adopt provisions that allow changes within a permitted facility that do require a permit revision. Yet as currently drafted, sec. 70.6(d) does just that. It requires a state to adopt operational flexibility provisions that allow changes that require such permit revisions. This is conceded in the preamble on page 92, quoted above, which states that sec. 70.6(d) "provides a fast track process for changing the terms of the permit."

The difference in the approach taken in the statute and the one taken in the proposed regulation is of fundamental importance. The statute recognizes that operational flexibility in a permit is acceptable, indeed even desirable, so long as the parameters of the permitted flexibility are established through the permit process. This process gives the public, affected states, and EPA a chance to comment, and it gives the permitting authority the final word on the scope of the operational flexibility. By contrast, the regulation does not give the public, affected states, or EPA a chance to comment on the extent of operational flexibility, and it does not let the permitting authority establish limitations on operational flexibility. Instead, it provides that the source can make a nearly limitless array of changes to the permit unilaterally.

I believe your agency initially recognized the validity of these points. The proposal you sent to the White House on April 2 limited operational flexibility under sec. 70.6(d) to changes that are authorized in the permit. This reading of the law was consistent with the statute. The illegal expansion of the 70.6(d) first appeared in the changes raised by the Vice President's office on April 6.

Please respond in detail to each of the points raised above. In particular, please address whether you believe section 502(b)(10) requires states to allow operational changes that violate the terms of a permit and, if so, please explain in detail the statutory authority for such a reading.

Compliance Plans

There is a third instance where White House review led by the Vice President's office significantly and illegally weakened the permit program. This is the proposal in the regulations to eliminate the statutory requirement that all permit applicants submit compliance plans.

Compliance plans are essential documents. Section 503(b)(1) provides that they must "describe how the source will comply with all applicable requirements under the Act." That section also requires that they include a "schedule of compliance" and a schedule for submission of progress reports to the permitting authority. The inclusion of the schedule of compliance insures the enforceability of the compliance plan, because a schedule of compliance is enforceable by definition in section 501(3). Citizens can also sue to enforce a schedule of compliance under section 304 of the Act (see sec. 304(f)(1)).

In effect, the compliance plan serves as a surrogate permit during the extended period while the permit application is being reviewed. It consolidates in one place all of the source's obligations under the Act, identifies the steps that the source must take to be in compliance with these obligations, and provides a basis for enforcement actions.

As required by the Act, EPA sent draft regulations to the White House that would have required that every polluting source submit a compliance plan as part of its permit application. The proposal that emerged after White House review, however, eliminates this essential requirement for almost all sources. Sec. 70.5(b)(7) of the proposal provides that compliance plans are needed only if the source is in violation of the Act at the time the permit application is submitted.

This is unlawful. Section 503(b)(1) provides that "the regulations shall include a requirement that the applicant submit with the permit application a compliance plan." This language unambiguously states that compliance plans must be a part of the permit application. Yet the proposed regulation exempts almost every applicant from this requirement.

The legislative history on compliance plans is also unambiguous. The Senate-passed bill and the House-passed bill differed markedly on compliance plans. The Senate bill would have followed the White House approach. It limited the requirement to submit compliance plans to noncomplying sources

(see sec. 352(b)). But the House-passed bill, which is the version enacted into law, required all sources to submit compliance plans. There was a clear congressional choice -- and it is being reversed by the current proposal.

Please review each of the points raised above and indicate any areas where EPA disagrees, indicating the legal authority for such disagreement.

Mr. Elliot indicated at the Subcommittee hearing that the compliance plan proposal would appear to be illegal. Please explain in detail whether the agency will modify the proposal to require that all permit applicants submit compliance plans that include schedules of compliance, as required by sec. 503(b)(1) of the Act.

A related issue is the inclusion of schedules of compliance in permits. The statutory language is again unambiguous. Section 504(a) provides that "each permit ... shall include ... a schedule of compliance." However, in defiance of the statutory language, sec. 70.6(c)(4) of the proposal would require that the permit include a schedule of compliance only in the case of sources that are in violation of a requirement of the Act.

Please explain the legal authority for sec. 70.6(c)(4), including an analysis of whether the section is consistent with section 504(a).

"Regulated Pollutant"

At the hearing, Rep. Sikorski and Mr. Elliot had an informative exchange regarding the definition of one of the central terms in the proposal -- the term "regulated pollutant." Mr. Elliot conceded that the final proposal had inadvertently excluded important pollutants from the list of regulated pollutants. However, some important questions were not answered satisfactorily.

Section 70.3(c) of the regulations provides that the permit program applies only to "emissions units." "Emission units" are defined in sec. 70.2(k) as any source of "regulated pollutants." Thus, the net effect is that only sources of regulated pollutants are regulated under the permit program. In addition, sec. 70.5(b)(3)(i) provides that a source applying for a permit is required to include in its application information about emissions of only regulated pollutants

The definition of regulated pollutant is in section 70.2(aa). It is a very narrow definition, and is illegal on several grounds.

In the first place, the definition does not cover CFCs and other pollutants that are regulated under title VI of the Act. The effect of this exclusion is to exclude sources of CFCs and other ozone-depleting emissions from the permit program. Mr. Elliot explained that this was not EPA's intent. (Indeed, sec. 70.2(g)(11) specifically defines title VI as one of the applicable requirements of the Act that should be enforced through the permit program.) Please confirm this understanding.

The definition of regulated pollutants also excludes incinerator emissions that are regulated under section 129. Again, Mr. Elliot explained that this was not EPA's intent. Please confirm this understanding.

The other major exclusion from the definition of "regulated pollutant" is toxic emissions that are listed under section 112 of the Act. The proposed definition of "regulated pollutant" would consider a listed toxic pollutant to be regulated only if EPA has promulgated a standard regulating the pollutant. Mr. Elliot indicated that this exclusion was intentional.

The exclusion of listed hazardous pollutants is plainly illegal under section 504(a). That section requires that each permit assure compliance with all applicable requirements of the Act. Section 112(g) of the Act is an applicable requirement. It provides that no source of any listed hazardous air pollutant can change its operations and thereby increase its emissions unless such modification has been approved by the permitting authority in advance. As Mr. Elliot conceded at the hearing, it is not possible for a permit to implement section 112(g), as section 504(a) requires, unless the permit applies to all sources of all listed hazardous air pollutants.

In addition, excluding listed hazardous air pollutants violates section 112(g)(3) of the Act. This section provides that "the Administrator shall establish reasonable procedures for assuring that the requirements applying to modifications under this section are reflected in the permit." The central requirement applying to modifications is the prohibition on making a modification without prior approval. There is no way that this requirement can be reflected in permit if the permitting regulations by definition do not apply to emission units that emit listed hazardous air pollutants.

Please respond in detail to these arguments. Please explain how listed hazardous air pollutants can be excluded from the definition of regulated pollutant without violating sections 504(a) and 112(g)(3). And please explain how the proposed permit program insures that sources of toxic emissions will not modify their operations in violation of section 112(g).

Applicability of Program to Nonmajor Sources

The proposed regulations authorize states to exempt nonmajor sources from permitting requirements for five years (see sec. 70.3(b)). This is also illegal, as the comments of Chairman Dingell at the hearing indicated.

Mr. Elliot justified the exemption on the basis that permitting nonmajor sources would be impracticable and infeasible for the permitting authorities. However, as Chairman Dingell pointed out, this is not the test. The authority to exempt sources is set forth in section 502(a). It authorizes EPA "to exempt one or more source categories from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such sources." The exemption is an exemption for sources from compliance with requirements applicable to sources. Therefore, it is "compliance" by the source that must be found to be impracticable or infeasible. Compliance by the permitting authority is irrelevant.

Moreover, regardless of whether the test applies to sources or regulators, section 502(a) requires that EPA make separate findings of impracticability or infeasibility for each source category exempted. No blanket exemption, such as that proposed in the regulations, is permissible.

Please respond in detail to these issues, explaining whether EPA maintains that the legal test is the burden of compliance on sources or the burden of compliance on the permitting authority, whether EPA has statutory authority to provide a blanket exemption for all nonmajor sources, and whether EPA has made any findings regarding the practicality, feasibility, or burdensomeness of compliance for individual source categories.

One particular facet of the exemption for nonmajor sources is especially objectionable. This is the exemption of nonmajor incinerators. Section 129(e) provides that "beginning 36 months after the promulgation of a performance standard ... applicable to a category of solid waste incineration units, ... each unit in the category shall operate pursuant to a permit issued under ... title V." There is no ambiguity in this language that allows EPA to exempt any incineration units from permitting requirements. Yet that is precisely what sec. 70.3(b) would do for all incineration units that are not major sources.

Please state whether EPA considered the applicability of section 129(e) in drafting sec. 70.3(b) of the proposal. Please provide EPA's views regarding whether sec. 70.3(b) is consistent with section 129(e), with citations to both the Clean Air Act and EPA's proposed regulations.

"Timely and Complete" Permit Applications

The proposal illegally overturns the requirement that a source submit a timely and complete application.

Under section 502(a) of the Act, sources are required to have permits before they can operate. There is just one exception to this: under section 503(d), sources that have "timely and complete" permit applications can operate until their applications are approved. This exception is sometimes called "the application shield."

However, in violation of section 503(d), sec. 70.5(c) of the proposal establishes a procedure under which an incomplete application can receive the benefit of the application shield. It says that an incomplete application will be deemed complete after 30 days if the permitting authority does not tell the source that the application is incomplete. This "deemed complete" procedure is a significant weakening of the Act. Complete applications are supposed to include enforceable compliance plans. If a source knows that a sloppy application can be deemed complete, it has little incentive to submit a good compliance plan to the permitting authority. This is particularly so since it is doubtful that overburdened states can evaluate many permit applications for completeness in just 30 days.

There are two other unauthorized exceptions to the requirement for timely and complete applications in the proposal. The first is that an application that is 3 months late is entitled to the same application shield as a timely application (see sec. 70.7(b)(2)). The second is that an incomplete application submitted with "good faith" is also entitled to the application shield (see sec. 70.7(b)(3)).

Each of the three exceptions to the "timely and complete" requirement has no statutory basis. Please explain whether the agency regards them as legal and, if so, please explain in detail the alleged authority for the exceptions.

The "Permit Shield"

The scope of the so-called "permit shield" is carefully circumscribed in section 504(f) of the Act. Unfortunately, on page 87 of the preamble, the agency states that a source that complies with its permit should be shielded from complying with requirements that are adopted after the permit is issued. This is illegal.

Section 504(f) provides that the permit shield can apply only in two situations. First, a source can be shielded from compliance if the permit "includes the applicable requirements" of the relevant provision. However, it is impossible for a permit to "include the applicable requirements" if these requirements have not yet been promulgated.

The other situation in which a shield is permitted is if the permitting agency "makes a determination that the provision is not applicable." Again, this appears to be impossible. A permitting authority can hardly be expected to determine that a future requirement that has not yet been promulgated is not applicable.

The conference report underscores these points. It states that no shield applies unless the permit includes the relevant provisions or there has been "a specific determination that such provisions are not applicable" (see p. 345). Once again, it does not seem possible to make a "specific determination" regarding a requirement that has yet to be promulgated.

Please explain how a permit shield could be lawfully extended to unknown future requirements. Please explain how "specific determinations" regarding such requirements could legally be presumed to exist.

The preamble also suggests that in other troublesome contexts EPA will give the permit shield an unduly "broad" reading. There is a suggestion on page 87 that "if the permit imposes the specific 'requirements' of an applicable MACT standard, ... then the source is protected from application of the 'provisions' of section 112 for the duration of the permit."

This is a ill-considered reading of the statute. There can be no shield for any provision or requirement of section 112 unless that specific provision is addressed in the permit. For instance, suppose a chemical plant whose permit includes the applicable MACT standard under section 112(d) seeks to modify its operations to add an oil refinery without complying with the requirements of section 112(g). The permit could not be a shield to an action brought to enforce section 112(g), because the applicable requirements of section 112(g) would not be included in the section 112(d) MACT standard in the permit.

Likewise, a permit that incorporated a MACT standard could not be a shield to an action to enforce the accident provisions of section 112(r), because the MACT standard in the permit would not include the requirements of section 112(r).

Please respond in detail to these examples, explaining the extent of the shield that EPA concludes is authorized by the Act. Please explain whether EPA believes that the permit shield can apply to a specific provision in the Act if the permit neither

includes the provision nor includes a determination that the specific provision is not applicable. Please include the legal authorities for the agency's conclusions.

Compliance Certifications

Section 503(b)(2) of the Act requires "the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit." However, sec. 70.5(b)(10) does not comply with this requirement. Instead of requiring a permittee to certify actual compliance, it only requires a certification of compliance "to the best of the signer's information and belief."

These qualifying words in sec. 70.5(b)(10) have great legal significance. They allow a source to argue that it is not bound by its certification because the signer lacked the relevant information or belief. However, as the statute reflects, Congress intended that compliance certifications be legally binding on the source, as is evidenced by the lack of any qualifying terms.

The explanation in the preamble for the qualifying words is extremely troubling. It states that the language is modeled after rule 11 of the Federal Rules of Civil Procedure (see p. 60). However, attorneys signing rule 11 certifications have notoriously wide leeway. The Advisory Committee that drafted the 1983 Amendment to rule 11 states that "the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual theories." Unquestionably, a rule that promotes enthusiastic and creative certifications is a wholly inappropriate model for certifications under the Clean Air Act. This sort of model significantly undermines the certification requirement.

Please explain the agency's legal authority for changing the statutory requirement that the source certify compliance without qualification. In addition, please provide an analysis of the degree of latitude allowed attorneys under rule 11 and an explanation of why the agency believes that degree of latitude should be incorporated into compliance certifications.

Vessel Activities

Section 70.2(r) of the proposal provides that the activities of vessels shall not be considered part of a major source. However, this appears in direct conflict with several sections of the Act.

First, sec. 70.2(r) violates the OCS provisions in section 328. Section 328(a)(4)(C) expressly provides that "emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS

source ..., shall be considered direct emissions from the OCS source." It is not possible to have a more clear statement that vessel emissions must be part of a major source on the OCS than this.

Second, sec. 70.2(r) violates section 183(f) of the Act, which requires that marine terminals, as opposed to the vessels themselves, bear the principal responsibility for controlling emissions from vessels during loading and unloading.

Finally, the proposal also appears in conflict with NRDC v. EPA, 725 F.2d 761 (D.C. Cir. 1984), where the court held that emissions from vessel loading and unloading should be attributed to the marine terminal.

Please explain the statutory and policy basis for excluding vessel activities from the definition of major source. In particular, please explain how this exclusion is consistent with sections 328(a)(4)(C) and 183(f) of the Act, and with NRDC v. EPA.

Exclusion of VOC Information from Permit Application

Section 70.5(b)(3)(viii) provides that information about location of emissions units, flow rates, and stack parameters must be part of the permit application for all pollutants except VOCs. However, the Act has no special exemption for VOCs. Moreover, given the important role of VOCs in smog formation and toxic emissions, a special exemption for VOCs would be extremely poor policy.

Please explain the statutory authority and policy rationale for the special treatment of VOCs in sec. 70.5(b)(3)(viii).

Emissions Trading

Emissions trading is addressed in sec. 70.6(a)(8) of the proposal. This rule states that if a source engages in emissions trades, it can increase its emissions by the amount of the emission allowances acquired without seeking a permit revision. By providing that emissions trades override permitted emission limitations, the rule appears to allow a source that engages in emissions trades to increase its emissions to levels that cause ambient air quality violations or that produce significant deterioration of air quality in clean air areas.

The agency's witnesses at the hearing stated that this was not the agency's intent. Please confirm this understanding and indicate whether and how the agency will change the proposal to prevent such an interpretation of the rules. Please identify the statutory authority for emission trading under title I of the Act.

Partial Programs

Section 70.4(c) provides that EPA can provide a state "partial approval" of a permit program on a source-category by source-category basis. In other words, partial approval is permissible so long as the program implements titles I, IV, and V of the Act for at least one source category.

However, this reading of the Act is in direct conflict with section 502(f). Section 502(f) prohibits partial approval unless "all requirements" of the relevant titles are implemented. For example, it expressly requires that a partial program implement "all requirements of title I applicable to sources required to have a permit under this title." A permit program that implemented the requirements of title I for just one source category would not implement all the requirements of title I, because these requirements apply to many source categories.

Please address in detail how the program for partial approval could be held to be consistent with the statutory prohibition in section 502(f).

State Program Submittals

Section 70.4 establishes requirements for state program submissions. At least two of its provisions violate statutory requirements.

First, sec. 70.4(f)(1) provides a state up to 2 years to resubmit a permit program after EPA disapproval. The statutory deadline, however, is just 180 days under section 502(d)(1).

Second, sec. 70.4(i)(1) provides that EPA may give a state that is not properly administering a program "such period as the Administrator may specify" to correct the deficiency. However, the statute requires that the deficiency must be corrected within 18 months. Otherwise, sanctions are mandatory under section 502(i).

Please reexamine section 70.4 and explain how its provisions are consistent with sections 502(d)(1) and 502(i).

I look forward to your prompt reply to the matters I have raised in this letter. I regard them as an extremely serious threat to the program to regulate stationary sources under the Clean Air Act. If this permit program goes forward as proposed, it will make our clean air objectives impossible to achieve.

With every good wish, I am,

Sincerely,

HENRY A. WAXMAN
Chairman, Subcommittee on
Health and the Environment

REGULATORY IMPACT ANALYSIS

AND

REGULATORY FLEXIBILITY ACT SCREENING ANALYSIS

FOR PROPOSED TITLE V OPERATING PERMITS

REGULATIONS

CAA - Permitting

DRAFT

FEBRUARY 12, 1991

These Regulatory Impact and Flexibility Act Screening Analyses were prepared by the Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, N.C. 27711. The principal authors are Frank Bunyard, Leland Deck, and Rosalina Rodriguez under the supervision of Allen Basala and Rich Damberg. Questions and comments should be addressed as follows:

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I. SUMMARY

A. INTRODUCTION

Executive Order 12291 requires that all Federal agencies prepare a regulatory impact analysis for major rules. Major rules are those that may likely result in any of the following:

(1) An annual effect on the economy of $100 million or more,

(2) A major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions, or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

It has been determined that Title V of the Clean Air Act Amendments of 1990 (Act) constitutes a major action.

Use of Conservative Assumptions in this Study

It is important to emphasize the conservative approach used in this study for estimating the burden associated with the implementation of Title V. Regulatory impact and regulatory flexibility analyses are intended to evaluate the additional burden imposed by a new rule. However, a majority (about 80%) of State and local air pollution control agencies already have some kind of operating permit program in place.[1] Of those States with programs in place, 88% permit small sources emitting 25 tons per year (TPY), and 79% permit sources which emit less than 25 TPY. All local agencies responding to an EPA survey issue permits to sources emitting less than 25 TPY.[2]

It was determined that calculating the incremental costs associated with implementing this regulation for each State and local agency would require several months of extensive, complicated data collection and analysis. At this early stage in program development, EPA roughly estimates, based on informal conversations with State air permitting officials, that State/local stationary source-related programs with operating permits programs already in place will require about 50% (ranging from 20-80%) additional budgetary resources to implement the requirements of Title V.

Thus, in order to meet the tight 12-month deadline for

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promulgation of Title V regulations as set forth in the new Act, the regulatory analyses contained herein describe the estimated total burden on sources, State and local agencies, and the EPA. As a result, the final estimates in this report are very conservative, and costs are generally overstated.

B. NEED FOR REGULATION

Chapter II addresses the legal and economic arguments for regulation. Title V of the Act establishes requirements for new operating permits programs. States are required to develop and submit to EPA programs for issuing operating permits to major stationary sources, sources covered by New Source Performance Standards (NSPS), sources covered by National Emission Standards for Hazardous Air Pollutants (NESHAP), certain sources of hazardous air pollutants listed in section 112, and affected sources under the acid rain program.

Title V requires EPA to promulgate regulations within 12 months of enactment that require and specify the minimum elements of State operating permit programs. Within three years of enactment, States are required to submit permit programs to EPA for approval. EPA has one year to act on the proposed programs. If a State fails to submit a fully approvable program by that date, EPA must establish a program within two years. Subject sources must submit a permit application within one year after the program is approved.

It is important to note, however, that Title V does not impose any new air pollution control requirements on sources. The other titles of the Act specify such requirements. Title V instead provides a source-specific framework with which to implement and enforce the new Act.

504(b)?

C. ALTERNATIVES EXAMINED

Chapter III briefly describes the options for permit issuance provided for in Title V. This discussion is presented in lieu of a description of regulatory alternatives. Title V implementation is required by statute, and thus alternative regulatory approaches are not applicable.

Chapter III discusses the following options for permit issuance:

(1) Specific Source Permit
(2) Deferred Applicability
(3) General Permit

D. ANALYSIS OF PERMIT FEES AND ADMINISTRATIVE BURDEN COSTS

Chapter IV addresses the methodology for estimating permit fees and administrative burden costs. Title V requires each State to develop a permit fee program by which fees collected from sources cover the direct and indirect costs of developing and administering its operating permits program.

The estimate of total permit fees (based on $25/ton of emissions) that would be collected from laregе sources (defined in this report as those emitting more than 100 tons per year) for the five criteria pollutants -- volatile organic compounds (VOC), particulate matter (PM_{10}), nitrogen oxides (NO_x), lead (Pb), and sulfur dioxide (SO_2) -- equals $ 309.6 million per year. Permit fee estimates are based on 8176 large sources across the country emitting greater than 100 tons per year of any criteria pollutant except lead, for which the threshhold is 1 ton or more per year. Fees are not required for carbon monoxide emissions because these are primarily emitted by mobile sources. In addition, fees have not been estimated for air toxics in this analysis. The permit fee estimate is probably overstated due to: 1) the conservative assumptions explained in section A. of this chapter, and 2) the fact that some States may charge fees less than $25 per ton as long as they recover sufficient revenue to cover the direct and indirect costs of developing and implementing the program.

Administrative burden costs are expected to be incurred by: (1) owners and/or operators of stationary sources who apply for operating permits, (2) State authorities who review permit applications and issue permits, and (3) the EPA, which provides oversight on program implementation, permit issuance, data management, and compliance and enforcement. The total administrative burden to industry sources, including recordkeeping costs, is estimated to be $ 115 million annually. In addition, State/local agencies and EPA are estimated to incur administratives costs on the order of $ 20 million annually. Again, it is important to note that these estimates are very likely overstated because many sources already obtain operating permits and many State/local agencies already issue permits.

Administrative costs in this analysis account only for direct costs incurred once State/local programs begin issuing permits. Indirect costs of State and local agency activities relating to air quality management, such as program development, monitoring, emissions inventories, enforcement, and compliance, are not included in the cost analysis.

E. REGULATORY FLEXIBILITY ANALYSIS

Chapter V discusses the analysis and results for certification of the Regulatory Flexibility Act (RFA). The RFA

requires Federal agencies to review the effects of their regulations on small entities and to involve these entities more actively in developing and reviewing regulations. "Small entities" here includes small businesses, small governmental jurisdictions, and small organizations.

The results presented in Chapter V can be summarized as follows. For PM_{10} sources, permitting costs higher than 3 percent of sales would be incurred in 8 of 21 (38%) industries analyzed. The highest permitting cost/sales ratio found was 7 percent. For VOC sources, 3 out of 17 (18%) industries studied had permitting costs higher than 3 percent of sales. Again, the highest cost/sales ratio found was 7 percent. For air toxics sources, none of the industries studied had permitting costs higher than 3 percent of sales.

These results indicate that Title V has some potential to adversely impact a substantial number of small entities. The number of industries with cost/sales ratios greater than 3%, however, is likely overstated because of the conservative nature of the screening analysis. It is conservative because it assumes that all small sources will receive a specific (or individual) source permit. It does not account for a certain percentage of small sources receiving a general permit, which would probably result in fewer industries having high cost/sales ratios.

Chapter V includes a discussion of measures to mitigate or avert the impact of Title V regulations on small businesses. These measures include source category exemptions, deferred applicability for non-major sources for 5 years from the date of State/local program approval, general permits, and the Small Business Technical and Environmental Compliance Assistance Program.

F. BENEFITS OF TITLE V

Chapter VI addresses the potential benefits associated with development of the Title V operating permits program. The program is designed to:

- improve air quality management;
- consolidate source requirements into one federally-enforceable document;
- provide greater certainty to sources;
- facilitate better federal/State/local enforcement efforts;
- generate revenue to cover State/local program costs;
- provide a vehicle to consolidate certain reporting requirements for sources and State/local governments;
- create incentives for sources to reduce emissions; and
- update the Clean Air Act to be consistent with other Acts which utilize systems of permitting.

REFERENCES

1. ABB Environmental Services, Inc. *Summary of State and Local Operating Permit Programs*. Final Draft Report. September 28, 1990.

2. See Reference 1.

II. THE NEED FOR AND CONSEQUENCES OF REGULATORY ACTION

A. LEGISLATIVE REQUIREMENTS AFFECTING THE IMPLEMENTATION OF THE TITLE V FEDERAL OPERATING PERMITS PROGRAM

Title V of the Clean Air Act (Act) as amended November 15, 1990 establishes requirements for a new operating permits program. States are required to develop and submit to EPA programs for issuing operating permits to major stationary sources, sources covered by New Source Performance Standards (NSPS), sources covered by National Emission Standards for Hazardous Air Pollutants (NESHAP), certain sources of hazardous air pollutants listed in section 112, and affected sources under the acid precipitation program.

Title V requires EPA to promulgate within 12 months of enactment regulations that require and specify the minimum elements of State operating permit programs. Within three years of enactment, States are required to submit permit programs to EPA for approval. EPA has one year to act on the proposed programs. If a State fails to submit a fully approvable program by that date, EPA must establish a program within two years. Subject sources must submit a permit application within one year after the program is approved.

B. THE NATURE OF THE OPERATING PERMITS PROGRAM

The operating permits program is intended to serve as a framework for implementation of the various requirements of the Act. Under Title V, all of the applicable requirements for a subject source will be consolidated into a single, federally-enforceable document. Title V itself does not impose any additional emissions limitations or applicable requirements on sources.

Title V is modeled after a similar program under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES). Adding such a program updates the Act, making it more consistent with other Federal environmental statutes which require sources of pollution to obtain operating permits.

C. THE NEED FOR REGULATORY ACTION

Title V of the Clean Air Act Amendments of 1990 calls for EPA to promulgate regulations 12 months from enactment. The operating permits program was designed to improve air quality management in several ways. First, Title V consolidates all applicable air program requirements for a source into one publicly-available permit, making enforcement (by State or local agencies, the affected public, and/or EPA) more effective and less burdensome. Second, the permit program provides industry a clear indication of emissions limits they must meet while affording sources operational flexibility to make certain periodic changes. Third, permits better facilitate State implementation of the criteria pollutant control programs as well as programs for control of acid precipitation and air toxics, including the expeditious adoption of new source-specific requirements. Finally, Title V allows States to charge permit fees to be paid by subject sources sufficient to recover the reasonable direct and indirect costs of developing and implementing the State's permit program.

The Title V program is intended to clarify the applicable requirements of the Act for subject sources, consolidate those requirements into a single federally-enforceable document, and enhance compliance and enforcement activities by Federal, State, and local levels of government. Currently, in many cases, sources' pollution control obligations (ranging from emission controls and monitoring requirements to recordkeeping and reporting requirements) may be scattered throughout numerous provisions of the SIP or Federal regulations. In addition, regulations are often written to cover broad source categories, and may not make clear how a general regulation applies to a specific source. In many cases, sources are not clearly required by applicable provisions to submit periodic compliance reports to EPA or the States. As a result, it may be time-consuming to identify the extent of a source's compliance.

Actual emission limits are mandated by other sections of the Act. Title V benefits society by providing a standardized and centralized system of permitting which provides coordination between various portions of the Act. The Title V permit program requires that all of a source's obligations under the Act be contained in a single permit. A permit system will provide the opportunity to reduce redundant paperwork and record-keeping requirements, potentially avoid unnecessarily burdensome abatement requirements, and promote an integrated approach to meeting all of a source's air pollution obligations.

The Title V permits will also improve enforcement of the various regulations. Sources will clearly know what pollution control requirements apply to them, as well as the criteria for determining whether or not they are in compliance with these

requirements. They will be required to submit periodic reports of compliance. Detection of sources failing to meet their obligations will be more certain and less costly to the government unit charged with enforcing the regulations.

The Title V permits program described here will also be used to implement Phase II of the acid rain program set forth in Title IV of the Act. In Phase II the States are required to administer a federally-approved permit program, and will thus be in accordance with the process established in Title V, as supplemented by acid rain specific content regulations to be published separately. The allowance trading provisions of Title IV, utilizing the permitting provisions of Title V, will lower the cost of the acid rain improvements by allowing sources to find the lowest total cost through redistributing reduction requirements and encouraging technological innovation in sulfur-removing technology.

In summary, the Title V permit program mandated by the Act will provide an effective permitting process for all affected major sources subject to Title V and will provide a basis for compliance determination and enforcement activities on the part of the State pollution authorities charged with implementing and enforcing the Act.

III. ALTERNATIVES EXAMINED

A. INTRODUCTION

The "alternatives" section of an RIA, as outlined in Executive Order 12291, is commonly intended to examine at a minimum the following alternatives:

a) No regulation
b) Regulations beyond the scope of legislation
c) Market-oriented alternatives
d) Alternative control strategies

This specific methodology is not applicable to Title V because Congress has mandated the implementation of this program through passage of the 1990 Clean Air Act. The statute required by statute to promulgate regulations within 18 months of enactment. These regulations must specify the minimum elements of State operating permit programs, required conditions for permit applications and permit issuance, provisions to ensure compliance and enforcement, and provisions for permit review and notification.

A primary objective of this program is the issuance of permits to applicable air pollution sources. The Title V legislation provides three distinct options for permit issuance. Thus, instead of providing a discussion of regulatory alternatives, Chapter III briefly describes the following options for permit issuance:

(1) Specific Source Permit
(2) Deferred Applicability / Exemption
(3) General Permit

B. SPECIFIC SOURCE PERMIT

All major sources and certain non-major sources will be required under Title V to obtain a specific (or individual) source permit. The activities involved in the permit issuance process include: submittal of a permit application by a source, drafting of the permit by the permitting authority, review by EPA and notification of contiguous and affected States, issuance of the permit, and permit management (including reopenings and modifications).

The Act sets forth explicit requirements regarding the application process. Section 502(b)(1) and (6) require that State programs have standard application forms, criteria for determining completeness of applications, and procedures for

timely processing. Section 503(b) requires that compliance plans be submitted along with all applications.

Since many permitting authorities already use standard permit application forms, EPA will not require a standard form for the Title V operating permits program in order to minimize disruption of existing programs. (The acid rain program requires that sources submit a standard form for that program, however.) State and local agencies will have considerable discretion to develop and use application forms that best meet their particular needs. EPA will require, however, that a minimum set of data elements be included in each application and submitted to EPA. Standard data elements will include: general company information, plant description, emissions data, and air pollution control requirements.

The permit application must contain a schedule for submission of compliance certifications. In addition, applications must be accompanied by a compliance plan that describes how the source will comply with all the applicable requirements. Submission of these compliance plans is required for permit renewal and permit modifications.

C. DEFERRED APPLICABILITY

EPA has authority under the Act to exempt non-major source categories, in whole or in part, from the requirements of Title V if EPA finds that compliance with these requirements would be "impracticable, infeasible, or unnecessarily burdensome." The Agency's proposed regulations for Title V initially provide for the deferred applicability for all non-major sources for a period of 5 years from the date of State/local program approval. At the end of 5 years, all sources will become subject to Title V unless EPA determines that a full exemption or extended period of deferral is appropriate. No full exemptions are initially proposed for any source category.

D. GENERAL PERMIT

A general permit is a single, standardized permit which applies to many similar sources. A permitting authority with an approved program may determine whether to issue general permits for certain source categories. Key criteria in making this determination will include source size and similarity of sources within the same category. Categories comprised of numerous, small, and nearly identical sources are ideal candidates for general permits. General permits may also be issued for categories of numerous, identical emissions units within larger sources. A permit for a large manufacturing operation with numerous permitted emissions units could incorporate the terms of

a general permit (e.g. for a degreaser) along with the terms drafted specifically for that source.

Sources covered by a general permit are still required to comply with all Title V requirements, including those for submitting a complete application and paying the appropriate fees. Depending upon the complexity of the source category being issued the general permit, permitting authorities may accept applications which are somewhat more simplified than specific permits. In this way, general permits provide an opportunity to reduce the administrative burden for sources required to obtain a permit. In addition, general permits will ease the burden associated with review of applications and final permits on both permitting authorities and EPA.

No discussion of
why alts. appropriate?

(1) Who are non-major sources?
How many?
How many permitted today?
What value permitting additional major
than non-major sources?

(2) Who should be exempted
- who get genl permits?

(3) Why "potential to emit"?

(4) How does SB program?

IV. ANALYSIS OF FEES AND PAPERWORK BURDEN COSTS

A. INTRODUCTION

This chapter addresses the costs in terms of the fees generated and the administrative burden associated with implementing the Title V operating permits program. Coverage includes: (1) the criteria air pollutants and their precursors--volatile organic compounds (VOC), ozone (O_3), particulate matter (PM_{10}), nitrogen oxides (NO_x), sulfur dioxide (SO_2), and lead (Pb); and (2) air toxic emissions regulated under Title III.

B. SUMMARY OF THE COST ANALYSIS

This discussion is in two parts: (1) analysis of permit fee assessments, and (2) costs of the administrative burden. Given that many States already have air permit systems in place, much of these costs are believed to be already assimilated into the existing industrial and government sectors. Thus, on an incremental basis, the costs included in this analysis are overstated.

Administrative costs in this analysis account only for direct costs incurred once State/local programs begin issuing permits. These costs for many programs may not be initially incurred until 1995. Indirect costs of State and local agency activities relating to air quality management, such as program development, monitoring, emissions inventories, enforcement and compliance, and overhead, are not included in the cost analysis. The estimates of administrative burden include impacts on small sources during the first five years of program implementation.

Fee Assessments

For the purposes of the Clean Air Act debate during the summer of 1990, EPA prepared an estimate of total fees for the five criteria pollutants -- VOC, PM_{10}, NO_x, Pb, and SO_2 -- amounting to $ 309.6 million per year for some 8176 sources emitting greater than 100 tons per year, or greater than 1 ton per year of lead emissions.[1] The basis for this estimate is the 1985 data from the EPA's National Emission Data System (NEDS). Fees are not required for carbon monoxide emissions, because these are primarily emitted by mobile sources. Fees have not been estimated for toxics in this report.

[1] The 1985 NEDS inventory represents the most recent, quality-assured, and nationwide emissions data available for large sources. (The 1985 inventory primarily reflects sources emitting

greater than 100 TPY, however.) For this reason, 1985 data was used for the permit fee assessments in this study.

EPA source emissions data are now contained in the Aerometric Information and Retrieval System (AIRS). AIRS represents the current state of knowledge on numbers of emission sources across the U. S. as of 1990, but does not provide the same level of quality assurance for emissions data as the 1985 NEDS data. Data from AIRS plus updated information from the South Coast Air Quality Management District (California) were combined to estimate the total number of major sources (which covers sources down to 10 tons per year in heavily polluted areas) impacted by the operating permits program. Accordingly, these source numbers were used only to estimate the administrative burden costs in this report.[2]

Administrative Burden

Administrative burden costs are incurred by: (1) owners and/or operators of stationary sources, who apply for operating permits, (2) State authorities who review permit applications and issue permits, and (3) the EPA, which provides oversight on program implementation, permit issuance, data management, and compliance and enforcement. The total administrative burden to industry sources including recordkeeping costs is $ 115 million annually. In addition, State /local agencies and EPA will incur administrative costs on the order of $ 20 million annually.

C. METHODOLOGY

This section discusses the methodologies used to estimate permit fees and administrative burden associated with implementation of Title V. This section discusses the approaches used to develop cost algorithms on a model plant basis for: 1) this chapter's nationwide estimate for administrative burden, and 2) analysis of economic impacts on small businesses in Chapter V. As stated above, the estimate of nationwide permit fees was taken from a previous EPA study.

Fee Assessments

For the purpose of conducting the Regulatory Flexibility Screening Analysis in Chapter V, the approach used combines emissions data from the AIRS for each pollutant at an industry level with data from the Department of Commerce Bureau of Census Reports, namely the four digit Standard Industrial Classification (SIC) code. Emission estimates were extrapolated from AIRS for each 4-digit SIC industry and matched with reported data on establishments to derive an average emission per establishment (For more information, refer to Chapter V). Total fees were

estimated by multiplying $ 25 per ton times average emission per establishment.

The $25 rate may represent a conservative assumption in this study, however. Permitting authorities may charge lower fees as long as they can demonstrate that, in the aggregate, they will recover sufficient fees to cover the direct and indirect costs of developing and implementing their program. In this way, State or local agencies may attempt to reduce the economic impact of the fee program on affected sources.

Administrative Burden

(a) Industry Sector.

Specific Permits. For the purpose of estimating administrative burden costs, a combination of the model for NSPS and NESHAPS regulations with actual permitting experience[3] was applied as the methodological tool for the specific source operating permit. The time period used for the Regulatory Impact Analysis was five years. For the owner and/or operator of a stationary source, administrative burden costs consist of a one-time charge for processing a permit application and an estimated cost for annually recurring recordkeeping activities. The initial administrative burden includes the task of interpreting the regulations and generating data and information needed for the first permit application. The one-time charge is annualized over the 5-year period of the permit. These costs are assumed to be constant per source (e.g., for large sources, a 100 ton per year source incurs the same burden as a 1000 ton per year source).

The basis for estimating resource costs for the industry sector was $ 45 per hour. The rationale for this is the assumption that 70 percent of the resources expended by industry would be in-house resources assumed at a rate of $41 per hour per hour) and 30 percent contracted with consultants at a rate of $55 per hour.[4]

The algorithm for evaluation of economic impacts to industry sources (Chapter V) is as follows:

Total Cost($/yr) = ($25/ton times plant emissions, tons emitted/yr) + ($4235/yr for a small source or $6679/yr for a large source).

The assumptions for constructing the administrative costs ($4235/yr) for a small source (less than 100 tpy) are:

- o permit processing cost (1st year) = $45/hr x 190 hr/yr, or $8550/permit

- o annualized value of permit processing based on capital recovery factor (10 %, 5 yr) = $2255/yr
- o administrative cost (recurring for 5 yrs) = $45/hr x 44 hr/yr = $1980/yr

The assumptions for constructing the administrative costs ($6679/yr) for a large source (more than 100 tpy) are:

- o permit processing cost (1st year) = $45/hr x 320 hr/yr, or $14,400/permit
- o annualized value of permit processing based on capital recovery factor (10 %, 5 yr) = $3799/yr
- o administrative cost (recurring for 5 yrs) = $45/hr x 64 hr/yr = $2880/yr

General Permits. The specific source operating permit may present a significant burden on the truly small source, in terms of resource cost. The concept of a general operating permit is being considered, therefore, to mitigate the administrative burden for small sources.

For the general permit, the assumptions for constructing the administrative costs for a small source ($47/ yr) are:

- o review of permit application and compliance plan (1st year) = $45/hr x 4 hr/yr, or $190/source
- o annualized value of permit application review capital recovery factor (10 %, 5 yr) = $47/yr

For purposes of estimating the administrative burden to industry sources, the information presented in Table IV-1 on the number of sources was used to estimate the costs. For presentation, it was assumed that half of all small sources and toxics sources listed in Table IV-1 would incur costs associated with issuance of a general permit.

Table IV-1. Estimates of Permits Issued and Administrative Burden for Respondents (Title V)

Source Classification	Numbers of Sources (Category)	Initial Burden (Hours)	Recurring Burden (Hours/yr)	Facility Annualized Costs ($/yr)	Total Annualized Costs ($ Million/yr)
Large Sources[1]	9,160	320	64	6679	61.1
Small Sources[2]-specific permit	10,707	190	44	4235	45.3
Small Sources--general permit	10,707	4	0	50	0.5
Toxics[3]--specific permit	1875	190	44	4235	7.9
Toxics--general permit	1875	4	0	50	0.1
					Total= 114.9

1 Large sources, defined as greater than 100 tons per year, are based on 1990 Aerometric Information Retrieval System (AIRS) Air Facility Subsystem (AFS).

2 Small sources, defined as smaller than 100 tons per year, are based on 1990 AIRS' AFS with a correction for the South Coast Air Quality Management District (California) classification as an extreme nonattainment area. There are an estimated 21,414 small sources that emit non-toxic emissions. "Small source" here includes estimates of all sources emitting less than 100 tons and located in Title I serious, severe, and extreme nonattainment areas.

3 Information based on Toxic Release Information System. An estimate of 3750 sources are considered to be small sources only, half of which would acquire specific permits and the remaining half general permits. Large sources are assumed to be included in the 9160 estimate.

(b) [redacted]

[redacted]
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est[redacted]
of a[redacted]
by t[redacted]
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cost[redacted]

[redacted]

For [redacted]
the [redacted]
($52[redacted]

[redacted]

For [redacted]
cost[redacted]

[redacted]

o annualized value of permit application review capital recovery factor (10 %, 5 yr) = $220/yr

For administrative burden costs associated with the general permit, resources needed are relatively small. Only 0.5 hour of initial burden per emission source is estimated to be required for the initial burden for the State/local agency. Similarly, EPA would incur a 0.5 hour initial burden for the permit review.

Table IV-2. Summary of Administrative Burden Hours Assumptions for Costs to Government Sectors. (Specific Permits Only)

Source Classification	State/Local Initial Burden (Hours)	State/Local Recurring Burden (Hours/year)	EPA Burden Initial Only (Hours)
Large Sources	60	12	40
Small Sources	30	8	20
Toxic Sources	30	8	20

D. DISCUSSION OF RESULTS

The annualized fees and estimated burden costs incurred by industry sources for the nation are estimated to be $ 444 million. This breaks down to $309 million for permit fees and $135 million for administrative burden incurred by all sectors. It was assumed that half of the small sources--nontoxic and toxic--would obtain specific permits. If all 21,414 small (non-toxic) sources and 3750 small toxics sources would obtain general permits, then the $135 million estimate would decrease to $ 62 million annually. Estimates are based on Titles I and III source information. It is assumed that sources under Title IV would be incorporated in the large source estimates presented in Table IV-1. Further breakdown of the administrative burden costs to industry, State/local agencies, and EPA are detailed in Table IV-3.

Table IV-3. Summary of Administrative Costs to Industry and Government Sectors.
($ million / year)

Source Type	Industry	State/ Local	EPA	TOTAL
Large Sources	61.2	8.4	3.2	72.8
Small Sources	45.8	5.7	1.9	53.4
Toxics	8.0	1.0	0.3	9.3
Totals	115.0	15.1	5.4	135.5

With regard to the State/local costs estimates above, it should be noted that the costs in Table IV-3 are direct costs only. Estimates of the indirect costs specified in the Act and the draft Title V preamble and regulations that States must also recover through permit fees would be significantly greater than the $15.1 million estimated above.

REFERENCES

1. Memorandum from William G. Laxton to John Calcagni, "*New Analysis of Projected Air Emissions Permit Fees*", Office of Air Quality Planning and Standards, U. S. Environmental Protection Agency, June 12, 1989.

2. Information Collection Request prepared for the Office of Management and Budget (SF- 83) by the U. S. Environmental Protection Agency, January 10, 1991.

3. See Reference 2.

4. See Reference 2.

5. See Reference 2.

V. ECONOMIC IMPACTS, REGULATORY FLEXIBILITY ANALYSIS, AND PAPERWORK REDUCTION ACT ANALYSIS

A. INTRODUCTION

The Regulatory Flexibility Act requires Federal agencies to review the effects of their regulations on small entities and to involve these entities more actively in developing and reviewing regulations. The term "small entities" includes small businesses, small governmental jurisdictions, and small organizations. Through the EPA's proposal, public review, comment period, and promulgation process provision is made for involvement of all affected parties. However, much involvement has been elicited already from local, State, environmental, and business groups.

The criteria for "smallness" applies to the entire firm, not to each of the facilities, plants, or establishments owned by the firm. The Small Business Administration (SBA) defines "small businesses" by Standard Industrial Classification (SIC) code in terms of annual sales or employment. Agencies are required to screen for potential adverse effects and to prepare a Regulatory Flexibility Analysis (RFA) if certain criteria are triggered. The following criteria are used as guidance regarding the need for an RFA. A "significant economic impact" is said to occur whenever all of the following are met:

1. A substantial number of small entities is impacted significantly. An impact of over 20 percent is generally considered significant, although this is not a fixed rule.

2. An annual compliance cost results in an increase of 5 percent or more of the total production cost or sales.

3. The potential for significant impact is disproportionate, i.e., the effect on small entities is approximately 10 percent more than the effect on large entities.

If none of these conditions result from the new regulation, then no RFA is required. If the economic impact of the new regulations results in any of these conditions, then impact mitigation strategies must be developed to the extent the objectives of the Act are not compromised.

Chapter V presents the methodology and results of an RFA screening analysis for the Title V operating permits program. The purpose of the screening analysis was to survey "high risk" industries within the small business community and identify the potential for adverse impact.

As a result of the screening analysis and comments from the Title V regulatory development work group, steps were also taken to propose regulations with features to mitigate adverse impacts on small businesses while still meeting the objectives of Title V.

B. METHODOLOGY

Industries were identified as potentially "high risk" and selected for the screening analysis based on whether an industry was comprised of predominantly small entities and whether the industry had expressed much concern over regulatory burden in the past. A list of industries that met these criteria was derived based on SIC codes for two criteria pollutants (PM and VOC) and for air toxics regulated under the Act. Sources of other criteria pollutants such as NOx and SO_2 were not included because of the nature of these emitters; namely, the emitters are mostly large sources and/or fuel combustion sources which could likely qualify for a general permit. Tables V-1,2,3 present the universe of "high risk" industries used for this analysis for PM, VOC, and air toxics, respectively.

For purposes of this screening analysis, the total cost of the permit program on air pollution sources was estimated based on the sum of permit fees (based on emissions) and administrative burden costs. The procedure for estimating these costs is explained in Chapter IV.

In this screening analysis, the impact of Title V on small businesses is measured in terms of cost as a percent of sales. The procedure for this analysis is as follows:

(1) Obtain economic data (number of establishments, payroll, sales, and value added) for companies with less than 20 employees for the SIC's in the "high risk" categories.

(2) Determine the cost of compliance with the Title V operating permits regulations as previously explained in Chapter IV.

(3) Determine ratios of compliance costs per sales.

Estimates of sales for each small entity segment of the high risk industries were obtained from the 1982 Enterprise Statistics and the 1987 Census of Manufacturers. Where necessary, the following other sources were used:

- 1987 Census of Service Industries (Subject Series)
- 1987 Census of Construction Industries (Industry Series)
- 1987 Census of Transportation (Geographic Area Series)
- 1987 Census of Mineral Industries.

C. RESULTS

The results of this analysis are summarized in Tables V-1 to V-4 and in Figure V-1. As can be seen from Table V-4, about 38 percent (8 of 21) of the industries analyzed for PM had estimated permitting costs higher than 3 percent of sales. The highest permitting cost/sales ratio was around 7 percent. For VOC, about 18 percent (3 of 17) of the industries analyzed had permitting costs higher than 3 percent of sales. The highest permitting cost/sales ratio was also in the 7 percent range. None of the industries studied for air toxics had permitting costs higher than 3 percent of sales.

Although these figures suggest the potential for adverse impact on a number of small entities, it should be noted that the methodology was deliberately designed to yield conservative estimates.

D. MEASURES TO AVERT IMPACTS ON SMALL FIRMS

EPA may exempt one or several source categories, in whole or in part, from the requirements under Title V if it is determined that compliance with these requirements would be "impracticable, infeasible, or unnecessarily burdensome." Thus, the impacts of permitting on small firms will be averted completely for any source category which receives a Title V exemption. The Agency may under no circumstances exempt a major air pollution source. EPA's draft regulations do not propose any full exemptions, but they do propose that all non-major sources are given deferred applicability for 5 years from the date of program approval.

E. MEASURES TO MITIGATE IMPACTS ON SMALL FIRMS

The impact of permitting costs on small firms can be mitigated in four primary ways. The first measure is the implementation of small business stationary source technical and environmental compliance assistance programs, as called for in section 507 of the Act, at the Federal and State levels. These programs may significantly alleviate the economic burden on small sources by establishing: 1) programs to assist small businesses with determining what Clean Air Act requirements apply to their sources and when they apply, and 2) guidance on alternative control technology and pollution prevention for small businesses.

The second measure, as described above, is through the deferred applicability or exemption of one or several source categories from the requirements of Title V. Small sources will benefit from the proposed initial 5-year deferral because they: 1) will not be required to pay permit fees during this period, and 2) will not be required to obtain a permit during the first

years after program approval, when the States and EPA will be gaining experience in implementing their new Title V programs. It would be especially burdensome to require small sources, which generally do not have legal and technical resources comparable to those of major sources, to obtain permits at this time.

The third way in which the impact of permitting activities on small sources can be mitigated is through the issuance of general permits. Permitting authorities are to issue general permits, where appropriate, to source categories comprised of numerous similar sources. It is anticipated that most general permits will be issued to categories made up primarily of small sources.

Permitting authorities will have the option to require less detailed applications from sources applying for a general permit, as long as they contain the minimum elements required under Title V. The reduced administrative burden associated with a general permit is expected to be a key benefit of general permits to small sources. In addition, general permits will typically require less administrative review by permitting authorities. This may prove to be an additional benefit to small sources because they should receive their approved permits in a more expedient fashion.

Finally, the economic impact resulting from Title V on small businesses can be reduced through the discretion of the permitting authorities. Permitting authorities have the option to charge variable emissions fee rates based upon source categories or pollutants as long as they can demonstrate that, in the aggregate, they will recover sufficient fees to cover the direct and indirect costs of developing and implementing their program. In this way, State or local agencies may charge lower per-ton fees to certain source categories made up primarily of small sources to match their ability to pay and reduce the economic burden imposed on them.

F. CONCLUSIONS

There is a potential for Title V to adversely impact a substantial number of small entities. However, the percent of small entities adversely affected by permitting costs suggested by this screening analysis may be due to the conservative nature of the analysis. Conservative assumptions were made consistently throughout this analysis and are explained below.

The first conservative assumption involves limiting the analysis only to "high risk" industries. Such an analysis is likely to yield "worst case" scenarios. A more comprehensive analysis of all potential industries comprised of small sources would likely reveal a lower percentage of industries with cost/sales ratios greater than 3 percent.

Second, the determination of permit fee costs used a conservative methodology as well. In order to determine the fee cost, total emissions reported for a SIC were divided by the total number of establishments (not firms) within that SIC for the size distribution being analyzed. Assuming that there are some large emitters in the population, the approach basically assigns more tons of emissions to an establishment than it actually emits. Since the permitting fee was calculated based on tons of emissions, the cost tends to be overestimated.

A third source of conservativism comes from the assumption that the permits concept is new to most sources and that the permit application process therefore will be extremely time-consuming. Three-quarters of the States presently have their own laws requiring operating permits for most minor and major sources of air pollution. Over half of the existing State permit programs address both new and existing sources and require renewal of permits periodically. Approximately 20 programs closely match the basic intent of Title V and have the basic requirements for issuing permits, collecting fees, etc. Since Title V permit regulations are being structured to minimize the disruption of those existing programs, the administrative cost assumptions used for this analysis may also be overestimated.

Fourth, the national scope of this analysis may have also introduced a factor that skews the results in a conservative manner because the small sources likely to be affected by permitting regulations are those located in nonattainment areas. Assuming that most small sources are also defined as "small entities," the impact of permitting costs would be a localized situation.

Finally, this analysis presents costs for obtaining initial permits and does not discuss costs for permit renewals. Permit renewals will invariably cost less for sources. The intent of the regulations is to limit information collection at time of permit renewal to any major changes that may have occurred since the time of previous permit issuance.

Table V-1

High Risk Industries for PM and Screening Analysis Results

Get Real No.s ↙ Costs/Sales

Need Sep'n of Fed/Att mtn.

SIC	Type of Industry	Cost/Sales(%)
2911	Petroleum Refineries	0.10
2840	Soap & Cleaners	1.10
2449	Wood Containers	3.58
3211	Grey Iron Foundries	3.49
2951	Asphalt Paving	0.60
2611	Pulp Mills	0.16
3273	Ready Mix Concrete	7.28
3295	Structural Clay Products	2.67
2869	Industrial Organic and Inorganic Chemicals	0.79
2861	Wood and Gum Chemicals	0.74
2873	Agricultural Chemicals	1.06
3241	Hydraulic Cement	7.29
2621	Paper Mills	3.42
1422	Crushed & Broken Stone	6.33
2421	Saw Mills	2.76
3312	Blast Furnaces/Steel Mills	4.54
2732	Bookprinting	2.35
2813	Industrial Gases	0.64
2892	Explosives	0.85
1796	General Contractors (Industrial Bldgs.)	3.69
3313	Electrometallurgical Products	1.88

Table V-2

High Risk Industries for VOC
and Screening Analysis Results

SIC	Type of Industry	Cost/Sales(%)
2899	Solvent Metal Cleaning	1.02
2711	Newspaper/Graphic Arts	7.44
2842	Perc & Petroleum Dry Cleaning	0.51
2911	Fixed Tanks	0.54
4226	Bulk Terminals	0.00
3011	Rubber and Tire Mfg.	3.30
3479	Auto and Truck Surface Coating	2.62
2461	Paper Surface Coating	0.57
1799	Architectural Coating	2.08
2621	Paper Products	2.79
2511	Wood Furniture	5.86
5541	Gas Service Stations	1.23
2435,2436	Flat Wood Paneling	1.46
3479	Can Surface Coating	1.53
1321	Natural Gas Liquids	0.63
2821,2861	SOCMI Fugitives	2.98
2431,2499, 2851	Wood Finishing	2.13

Table V-3

High Risk Industries For Air Toxics
and Screening Analysis Results

SIC	Type of Industry	Cost/Sales(%)
2851	Paint and Allied Products	0.54
2869	Organic & Inorganic Products	0.61
2861	Wood and Gum Chemicals	0.61
2873	Agricultural Chemicals	0.44
2842	Perc and Petroleum Dry Cleaners	0.45
3011	Rubber and Tire Mfg.	1.01
2011	Meat Packing	0.39
2013	Sausage and Other Meats	0.47
2046	Wet Corn Milling	0.35
2231	Weaving Mills	1.41
2732	Book Printing	1.18
2813	Industrial Gases	0.46
3339	Primary Nonferrous Materials	0.44
2875	Fertilizers	0.41
2891	Adhesives and Sealants	0.61
3111	Leather Tanning and Finishing	1.34
3291	Abrasive Products	1.30
3861	Photo Equip. and Supplies	0.65

← Do we add this to Table V-1? (2.35)

TABLE V-4

FINDINGS
COST OF PERMITTING AS PERCENT OF SALES

	Percent of Industry with Estimated Permitting Cost ≥ 1% of Sales	Percent of Industry with Estimated Permitting Cost ≥ 3% of Sales
PM	67%	38%
VOC	70	18
Toxics	28	--
TOTAL	55%	20%

55% > 10% C/S – No RFA Criterion

VI. BENEFITS OF TITLE V

A. Introduction

This chapter addresses the potential benefits associated with implementation of the Title V operating permits program. Generally, Title V was legislated in order to improve air quality management. To be more specific, the program is designed to:

- o consolidate source requirements into one federally-enforceable document, thereby providing greater certainty to sources regarding their applicable requirements under the Act and facilitating better federal/State/local enforcement efforts;
- o facilitate implementation of other titles of the Act;
- o generate revenue to cover State/local program costs;
- o improve the quality of emissions and other source-related data and provide a vehicle to consolidate certain reporting requirements for sources and State/local governments;
- o create incentives for sources to reduce emissions; and
- o update the Clean Air Act to be consistent with other Acts which utilize permit systems.

A formal quantitative benefits analysis for this rule should theoretically include the valuation of more efficient enforcement activities, fewer legal actions due to greater certainty for sources regarding their applicable requirements, administrative savings due to better emissions data and opportunities to consolidate reporting, and reduced emissions resulting from the permit fee requirement. As one can see, assigning values for such benefits would take a great deal of time and be somewhat arbitrary. For these reasons, the benefits analysis included in this study is strictly qualitative in nature.

B. Expected Benefits

A primary benefit of the Title V permit program is that it will consolidate all of the applicable requirements which apply to a particular source into a single, federally-enforceable document. In the past, many sources and air control agencies have lacked sufficient information in order to properly comply with or enforce applicable regulations. Currently, a source's obligations under the Act, ranging from emissions control and monitoring to recordkeeping and reporting, are identified in numerous provisions of the SIP Federal regulations. Lawsuits or protracted administrative appeals have occasionally resulted from

conflicting interpretations of a source's applicable requirements.

Title V is designed to clarify this vital information. The permit program will enable the source, the State, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements. This will provide certainty to industry as to their obligations, resulting in increased source accountability. Because permits are to be federally-enforceable, enforcement of Clean Air Act requirements should improve significantly, providing environmental benefits in terms of cleaner air and reduced human health problems. In addition, EPA's ability to implement the Act and enhance air quality planning and control will be greatly strengthened, in part, by providing the basis for better emission inventories.

Another benefit of the permit program is that it provides a uniform vehicle for State and local agencies to administer other titles of the Act, such as the substantially revised Federal air toxics program and the new acid deposition program. Title V may be used to facilitate implementation of the early voluntary reduction program for air toxics as required in Title III. In addition, States will use Title V permits to implement Phase II of the acid deposition program. Operating permits will play a significant role in ensuring compliance with the requirements of this program.

Finally, an important benefit of the permit program is that it will ensure that the States have the resources necessary to develop and administer the program effectively. In particular, the permit fee provisions of Title V require that sources pay their fair share of the costs of developing and implementing the permit program. To the extent that fees are based on emission levels, the fees may create an incentive for sources to reduce emissions.

VII. NET BENEFITS

The nature of this regulation does not make it amenable to quantification and monetization of benefits. As noted in Chapter VI, the benefits of Title V of the Act are mostly qualitative and non-quantifiable. These benefits include: clarification and consolidation of a source's applicable requirements into a single document; improved use of federal, State, and local enforcement resources; increased source accountability; emission reduction incentives based on the fee per ton provision; improved implementation of other titles of the Act; better emissions and source-related data; and overall improvement in air quality management.

The primary focus of Title V is to achieve the benefits of the Clean Air Act Amendments of 1990 in a cost effective manner. To this effect, Title V contains specific features that promote cost effective solutions. It also includes flexible provisions that can be employed to avert and mitigate potential adverse effects.

OFFICE OF THE VICE PRESIDENT
WASHINGTON

1-22

TO: AL Lew
OMM √Jeff Holmstead

FROM: John L. Howard
Counsel to the Vice President

☒ FYI

☐ Comment

☐ Action

Congressional Research Service • The Library of Congress • Washington, D.C. 20540

December 2, 1991

TO : Subcommittee on Health and Environment
Attention: Greg Wetstone

FROM : American Law Division
Office of Senior Specialists

SUBJECT : Possible Regulation of a Particular Stationary Source Under the Clean Air Act

This responds to your request that the Congressional Research Service analyze, based on information provided to us via the Subcommittee, whether a particular stationary source of air pollution – a facility operated by World Wide Chemicals, Inc., of Indianapolis, Indiana (WWC) – is or could be subject to regulation under the Clean Air Act. The facility is described as manufacturing automotive reconditioning products, including polishes and waxes, water and solvent degreasers, vinyl and rubber protectants, and soap and cleaners.

We conclude that the facility is potentially subject to regulation under the following provisions of the Clean Air Act:

Section 110, State Implementation Plans
Section 112, Hazardous Air Pollutants
Section 502, Permit Programs
Title VI, Stratospheric Ozone Protection

THE EMISSIONS

According to information apparently produced by the company pursuant to the Emergency Planning and Community Right-to-Know Act, the WWC facility releases, as a byproduct of its operations, a number of air pollutants, including methyl chloroform, toluene, xylene, ethylbenzene, trimethylbenzene, glycol ethers, hydrogen fluoride, and phosphoric acid. Some of these pollutants are listed as "hazardous" under section 112 of the Clean Air Act; some are volatile organic compounds (VOCs) which contribute to ozone formation.

RELATION TO CLEAN AIR ACT

Permit Programs. Title V of the CAA, added by the 1990 amendments, requires that any source subject to regulation under any one or more of the

several parts of the Clean Air Act shall have a permit in order to operate. The title contains general standards for permit programs, including those operated by a state. Section 502(a) of the CAA makes it "unlawful" to violate the terms of a permit issued under the Act or to operate a source "except in compliance with a permit issued by a permitting authority under this title." The term "permitting authority" is defined as "the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this title." CAA § 501(4). While the Administrator may exempt "one or more source categories" (but *not* a "major source") from the strictures of section 502(a), this must be done through promulgation of regulations.

WWC has not been exempted by the Administrator either directly or as part of an exempted source category.

Hazardous Air Pollutants. Hazardous air pollutants are regulated in one of two ways under CAA § 112. The Administrator is to set emissions standards "for each category and subcategory of major sources and area sources." The principal avenue is through designation of a source as a "major source." A source not large enough to qualify as a "major source" may still be subject to regulation as an "area source" if its emissions, coupled with others in the same category, warrant regulation. The principal definition of "major source" is "any stationary source . . . that emits . . . 10 tons per year or more of any hazardous air pollutant or 25 tons per year of any combination of hazardous air pollutants." The definition may be adjusted administratively; the Administrator may "establish a lesser quantity" for a particular pollutant on the basis of its "potency . . . , persistence, potential for bioaccumulation, other characteristics . . . , or other relevant factors."

According to the supplied summary of WWC's filings under the Emergency Planning and Community Right-to-Know Act, its facility does not release any of the hazardous pollutants it identified in quantities approaching the 10-ton or 25-ton thresholds, hence it would not be a "major source" as a result of those statutory standards. The reported annual amounts of hazardous pollutants range from a low of 11-499 lbs (hydrogen fluoride, for one) to a high of 6,800 lbs (1,2,4-trimethlybenzene). Total reported emissions of toxic pollutants (most of which are "hazardous" under § 112) is stated in a range of 17,333 lbs to 19,300 lbs.

There is also the possibility that the WWC facility, just as any other facility that releases any hazardous pollutants, could be regulated under section 112 as an "area source." The section defines "area source" very broadly as "any stationary source of hazardous pollutants that is not a major source"; the WWC facility apparently falls within this definition. Not all area sources are subject to regulation under section 112, however. There are two different criteria requiring regulation of area sources. The Administrator is to "list" as subject to regulation area sources that present "a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section." (§ 112(c)(3). The Administrator is also directed to list, within 5 years of enactment of the 1990 amendments,

"sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation." (§§ 112(c)(3) and 112(k)(3)).

The WWC facility could conceivably be listed under the general standard or, if EPA determines that Indianapolis is an "urban area" within the meaning of this language, under the 90% standard as well. CRS has inadequate information to assess whether regulation of the WWC facility as an area source is a practical possibility; it is, however, a theoretical possibility.

As already indicated, the Administrator may establish a quantity less than 10 tons as the threshold for a "major source" of hazardous pollutants. CRS is informed that a special study has been undertaken to assist EPA in determining whether to set such a lower level for hydrogen fluoride, one of the pollutants identified by WWC as being released from its facility.

Hydrogen fluoride is recognized elsewhere in the section as an especially hazardous pollutant; it is listed under § 112(r)(3) as among substances "which, in the case of accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment." Inclusion of a pollutant on this list can result in additional regulations and controls designed to protect against accidental releases from any stationary source, regardless of whether that source is a "major source" or an "area source."

Ozone Protection. Methyl chloroform, another pollutant identified by WWC as emanating from its facility, is listed under CAA § 602 as a "Class I substance" scheduled for production and consumption phaseout by January 1, 2002. After that date, § 604(b) provides, "it shall be unlawful for any person to produce any amount" of the substance. In the interim, a variety of regulations will govern use and disposal of class I substances. Regulations to be promulgated by 1994 must, under § 608(a)(3), include requirements that "reduce use and emission of such substances to the lowest achievable level," and also "maximize the recapture and recycling of such substances." The regulations will, in addition, require that products of which a class I substance is "an inherent element" must be disposed of in a manner "that reduces, to the maximum extent practicable, the release of such substance into the environment." (§ 608(b)(3). "Nonessential" consumer products that release class I substances into the environment -- "including any release occurring during manufacture" -- may be banned from distribution and sale in interstate commerce under authority of CAA § 610. In determining whether a consumer product is "nonessential," the Administrator is to consider "the purpose or intended use of the product, the technological availability of substitutes . . . , and safety health, and other relevant factors." The Administrator may also exercise authority under § 611 to impose labeling requirements for products that contain class I substances.

Since WWC uses methyl chloroform, it will be affected by EPA's future regulations governing use, recycle, recovery, and disposal of this regulated

substance, although such effects may not take the form of direct regulation of the facility.

State Regulation of Ozone Precursors. Indianapolis is a nonattainment area for ozone under Title I of the CAA. As such it is required to have a State Implementation Plan to attain and maintain attainment. The state has such a SIP; the Indianapolis part of it includes a requirement that a facility emitting more than 15 pounds per day of VOCs have a permit to operate. WWC is already subject to this provision.

State Regulation of Hazardous Substances. The Clean Air Act is structured so that states incorporate the federal requirements into state regulatory programs in the form of state implementation plans. Section 116 provides general authority for states to adopt requirements more stringent than those required under the CAA and its regulations. This basic posture is repeated in the 1990 amendments that strengthened the regulation of hazardous pollutants. The authority of the states to more stringently regulate hazardous pollutants is preserved both in general, (§ 112(*l*)(1)) (by implication), and as to regulation of accidental releases of hazardous pollutants. (§112(r)(11).

If this state regulation is a part of a state implementation plan required and approved under section 110 of the CAA, or is part of some other state permit program approved by the Administrator under the CAA [e.g., § 112(*l*) authorizes states to develop implementation plans for control of hazardous air pollutants], then violation of the regulation is subject to sanction under the CAA.

George Costello

George Costello
Legislative Attorney
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Document Originally Attached to Following Page

National Association
of Manufacturers

JERRY J. JASINOWSKI
President

October 20, 1990

Governor John Sununu
Chief of Staff
The White House
Washington, D. C. 20500

Dear Governor Sununu:

It was a pleasure to see you last Tuesday regarding the budget debate.

I am writing to restate that NAM is deeply troubled with the facility modernization and permitting requirements in the Clean Air conference agreement. We believe that there will be enormous costs and delays caused by unrealistic permitting and factory modernization requirements such as offsets and netting. These requirements will impede environmental progress and significantly reduce employment.

In light of the current economic slowdown, NAM asks the President to tell conferees to reject the agreement on permitting and instruct them to return to the House-passed permitting language and Senate nonattainment language on offsets and netting.

A recent study by CONSAD Research Corp. indicates that the permitting requirements will impose extraordinary new costs on manufacturing companies, especially small firms of 500 employees or fewer. The study indicated that the total cost of permitting alone will be $10 billion per year. This is in addition to the $50 billion for all other titles of the bill.

Moreover, these new permitting costs and administrative burdens are likely to directly affect over 2 million industrial jobs. A rough estimate is that 350,000 jobs could be lost to this permitting process over a ten year period, over and above the jobs that will be lost to the pollution control requirements in the bill.

The small industries most affected will be food processors, paper, printing, chemicals, glass, cement, dry cleaners, and automotive repair and painting. Additionally, permits for thousands of larger facilities must be processed under the new act. These larger companies have not been considered in the CONSAD study costs. Decreases in employment and lower productivity will ultimately affect other industrial sectors. This ripple effect, over the long term, would affect an additional 4.4 million workers.

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As an engineer, you can envision lost manufacturing opportunities because companies wouldn't want to trigger new permitting requirements or New Source Review controls by simply changing a production line or experimenting with new raw materials.

In addition to the routine $25 per ton emission fee, small businesses will need continuous emission monitoring equipment for compliance with permitting and enforcement requirements. This equipment will cost $50,000 to $250,000. Computer data costs alone range from $25,000 to $50,000. The computer hardware costs such as new computer systems and the salaries and benefits of employees to operate the monitoring system are not included in these cost estimates. Hence, these estimates should be viewed as conservative.

Recently the EPA issued an assessment of an existing permitting program involving waste permits. The study shows that EPA has 4,200 years work remaining to complete 2,500 permit applications under this existing law. The new Clean Air Act will require 150,000 new air permits.

The conference agreement does away with the flexibility that the Administration fought for in the Nickles-Heflin-Dole permitting amendment in the Senate. Further, plants will have to get approval from the state in which they operate and from neighboring states if the border is fifty miles from the facility.

The NAM also remains distressed with the factory modernization provisions which American industry lost in Title I's offsets and netting modernization provisions. The conference agreement simply guts the whole concept of letting American industry do what it needs to do to remain competitive at a time when our economy needs a strong industrial base.

We are also very concerned about the proposed enforcement provisions of the new act. Because the permitting section of the legislation is so complicated, it is unfortunately inevitable that many unintentional paperwork mistakes will occur. While intentional violations should be punished, we believe that unintentional violations should not subject permit holders to unnecessary liability. We are further concerned that companies not be prosecuted for non-health violations that are discovered through independent or internal company audits which are corrected in a timely manner.

Therefore, we request that the White House intervene in the Clean Air conference on the nonattainment, permitting and enforcement titles, and direct conferees to make needed changes to these provisions.

Sincerely,

Jerry J. Jasinowski

Permitting

Description of the Issue:

Under the Clean Air Act Amendments (the CAAA), most industrial facilities in the U.S. (even relatively small facilities) will be required to have detailed operating permits. Although the content of these permits will vary from state to state, each permit must spell out the federal requirements (including SIP requirements) applicable to the facility and must include enforceable emissions limitations. Any facility that violates its permit -- regardless of whether it violates any actual federal or state standard -- is subject to citizen suits as well as enforcement actions brought by federal or state authorities.

Under EPA's proposed rule, the process for obtaining an initial operating permit, which includes state and EPA review, will take about 18 months and must provide environmental groups the opportunity to have a public hearing on the permit. This same process will be repeated every 5 years (or more often if a state so desires) when a facility renews its permit. Much of the debate surrounding the permit program has been over the process that is required when a facility seeks to revise its permit.

In this regard, there are two related issues:

1. The process required for changes not explicitly contemplated in the permit when those changes would <u>not</u> result in emissions increases above permit allowables. The Act, in section 502(b)(10), would seem to permit such changes as long as the facility provides the state and EPA with 7-days advance notice. Environmentalists argue, however, that this provision does not preempt states from imposing more stringent procedural requirements on such changes.

2. The process required for so-called "minor permit amendments" -- changes necessary when a facility seeks to increase emissions above permit allowables but beneath levels that would trigger substantive requirements of the Act (such as New Source Review). Industry argues that it must have flexibility to respond quickly to changes in the marketplace, and therefore needs an expedited process for amending its permits. Environmentalists argue that any such process must provide them with an opportunity for a public hearing on proposed changes.

In its proposed rule, the agency left this decision largely up to the states. The proposal simply set forth "minimum required procedures" that states had to include in their programs for processing such changes. Under these minimum procedures, a facility would be required to give states and EPA 7-days notice before making a change; after 7 days, the facility could make the change unless the state or EPA objected. Environmental groups and some Members of Congress (Rep. Waxman being the most vocal)

have argued the minimum procedures must provide the opportunity for outside comments and a public hearing.

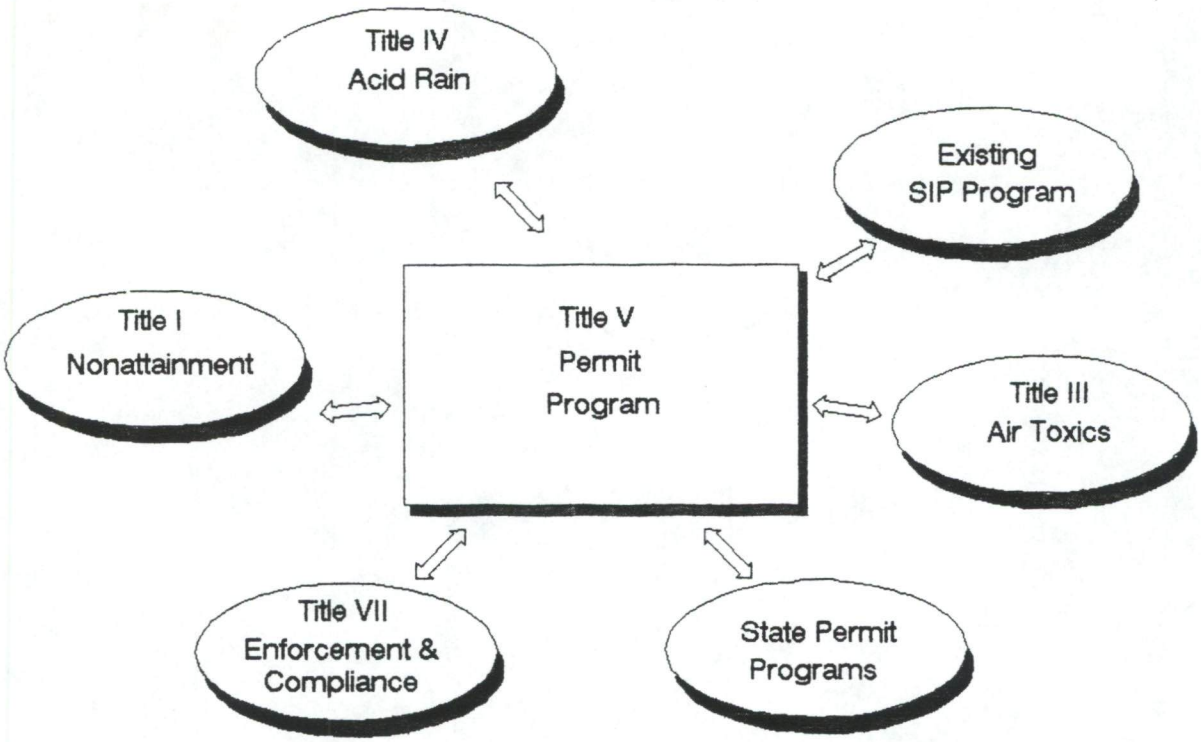
Recommended Resolution:

1. Section 502(b)(10) should be read, for both legal and policy reasons, to preempt states from imposing more stringent requirements.

2. Any procedure for minor permit amendments must not include the opportunity for a public hearing. Such a requirement would overload the whole permitting process and tie the hands of industry without providing any measurable environmental benefit.

TITLE V

OPERATING PERMITS



White House Briefing
January 10, 1991

** TOTAL PAGE.002 **

PURPOSE

- Summarize Outreach / Consensus-Building Efforts
- Status of Early Rulemaking Activity
- Major Issues and Comments Received

OUTREACH / CONSENSUS-BUILDING ACTIVITIES

- State / Local Authorities
  - Analysis of Existing Programs
  - Work Group Involvement
  - NGA Workshops on Fees and Enabling Legislation (Jan-Feb '91)
- Informal Meetings With Industry, Environmental, and State/Local Representatives (Dec. 3 & 10)
- Work Group Meetings
  - Four Meetings Held (Most Recent: Dec. 5-7)
  - All AA's, 7 RO's, 14 State/Locals
- White House Meeting (Dec. 11)
- Other Meetings
  - Industry (NAM, SOCMI, CMA, AMVMA, API)
  - State/Local Annual Meetings (Oct. '90)

STATUS OF EARLY RULEMAKING ACTIVITY

- Mission
  - Tight Deadline: 12 Months After Enactment
  - Deputy Administrator Oversight Method
  - To Define State/Local and Federal Programs
- Status
  - Draft Preamble/Regulations Under Review
- Schedule
  - Analysis of Comments on Staff Draft
  - Deputy Administrator Open Meeting (Mid-January '91)
  - Part 70 Proposal (April '91)
  - Part 70 Promulgation (November '91)

MAJOR ISSUES

- Scope of Program / Small Business Impacts
- Program Start-Up
- Permit / SIP Relationship
- Operational Flexibility
- Additional Concerns

SCOPE OF PROGRAM / SMALL BUSINESS IMPACTS

- Description
  - Defining subject sources and permit requirements in a manner sensitive to small businesses and initial administrative burden
- Statute
  - Subject sources are major sources or any other subject to section 111/112, acid rain, or PSD/NSR
  - Exemptions for non-major sources only if infeasible, impracticable, unnecessarily burdensome permitting
- Draft Position
  - Definitions: source, potential emissions, regulated pollutants
  - Defer applicability for all non-majors for 5 years
    - State must demonstrate for use in nonattainment areas
    - Source has option to still get permit
  - Promote use of general permits
  - Allow complete applications to be upgraded as necessary
- Outstanding Concerns
  - Initial focus on emissions limits, not data collection
  - Poor cross-referencing in applications and permits
  - State demonstration for exemptions in nonattainment areas

PROGRAM START-UP

- Description
  - Enable the early development of effective Title V programs at State/local level
- Statute
  - States must submit Title V program to EPA within 3 years of enactment
  - Interim approval allowable if program "substantially meets" Title V (2-year sunset provision)
  - Fees must recover reasonable costs of program development
- Draft Position
  - No interim approvals before EPA issues Part 70 rules
  - "Substantially meets" means adequate legal authority, 5-year permits (or less), EPA review, adequate fees
  - Use of interim programs for 90/95% early reductions & MACT extensions
  - Early assistance to States for adequate enabling legislation
- Outstanding Concerns
  - Easy interim approval causes longer-term problems
  - Fee collection/allocation for local agencies
  - EPA-approved fees should reflect needed program

OPERATIONAL FLEXIBILITY

- Description
  - Sources must have flexibility to make certain day-to-day changes without triggering permit revisions
- Statute
  - Allow changes within a permitted facility without a permit revision, if: 1) not a Title I modification, 2) changes do not exceed permitted emissions, and 3) at least 7 days advance notice is given
- Draft Position
  - Sources still liable for meeting any new reqs.
  - 7-day notice should identify any new reqs.
  - Title I modifications require only administrative permit changes
  - State has option of tougher definition of modif.
  - EPA will promote concept in future permitting
- Outstanding Concerns
  - Enforceability of plantwide numbers
  - Excess allowable emissions in flexible permits

PERMIT / SIP RELATIONSHIP

- Description
  - Permits must not erode SIP demonstration and SIPs must not gridlock permit changes
- Statute
  - Each permit must assure compliance with applicable requirements of Act, including SIP
  - Each SIP must include measures and limits needed to insure attainment and maintenance of NAAQS
- Draft Position
  - Each permit must:
    - meet SIP / FIP
    - address gaps
  - No permit:
    - gets shield in SIP call areas
    - needs ambient modelling
  - State may revise SIP demo for "tighter" permit (NAAQS critical) through periodic batch procedures
  - Potential for umbrella provision which tracks aggregate impact of certain permits
- Outstanding Concerns
  - Enforceability of generic permits provision
  - Gridlock as detailed permits are incorporated into SIP

E. Bruce Harrison Company, Inc.
Suite 300
1440 New York Avenue NW
Washington DC 20005
202 638 1200
Telex: 756546
Cable: EBHARRISON
FAX: 202 639 8685

TO: Jeff Holmstead

FROM: Rob Wilkins

RE: Permit Rule Issues

DATE: 3/25/91

Document Originally Attached to Following Page

_____ Please Note and Return by _____
_____ Please Note and Discard
_____ Please Note and File
_____ Please Review and Comment by _____
_____ Please Take Appropriate Action by _____
_____ Per Your Request
✓ For Your Information

Comments: You may recall this memo. "Yes" means EPA has fairly satisfactorily addressed the issue. As you can see, we've made a dent in these "killer" issues but still have a long way to go even with them, much less lower profile issues.

NEDA
National Environmental Development Association
A Coalition of Organized Labor, Agriculture and Industry

M E M O R A N D U M

DATE: January 18, 1991

TO: John Schmitz
Deputy Counsel to the President

FROM: Rob Wilkins
NEDA/CARP Project Director

SUBJECT: Key Issues in Draft Permit Program Minimum Elements Regulation

Thank you for setting up our meeting Tuesday with Jeff Holmstead. We are sorry you were unable to attend but we recognize and appreciate the other demands on your time. As a followup to that meeting, we wanted to provide you with an outline of the most significant issues that still seem to be unresolved as EPA works on this regulation and its preamble. You will note that the Agency could appear to address our issues since it does address similar terminology. However, ongoing discussions with EPA may bring us to a closer understanding of these issues.

Operational flexibility -- needs to be presented as an absolute minimum element of the state permit program rather than as an open issue; the legislation provided minimally what industry needed; EPA and states need to maximize change and other flexibility opportunities; and states need a clear signal that EPA will not second guess permits because they maximize flexibility.

yes
no
no

Gridlock -- created by redundancy between SIP and the operating permit; directly contrary to one of the EPA "implementation principles."

still there

Permit shield -- draft indicates that the shield and changes allowed without permit revision are mutually exclusive, a result not mandated by the law; SIP call vitiates shield for all permits issued by permitting authority, much too broad and not required by the statute; and challenge to permit by citizen suit blocks shield even though permit is issued by state and approved by US EPA.

no
yes
?

1440 NEW YORK AVENUE NW • SUITE 300 • WASHINGTON DC 20005 • 202 638 1230

Permit application -- compliance plan requirement is overly broad and unnecessarily burdensome, and will handcuff sources on meeting emissions standards; also application completeness determination in the statute does not require affirmative action by the state for provision requiring "adequate, streamlined and reasonable procedures for expeditiously determining when applications are complete," and the default for failure of state to give a completeness determination is that source is operating without a permit and thus must shut down.

no

yes

Permit entire facility -- preamble indicates that a facility with a source triggers a requirement to permit the entire facility, a result not mandated by the statute.

somewhat

Certification and self-reporting -- cumulative impact of permit requirements create terribly broad matters for corporate officers to certify, including items like fugitive emissions and elements of compliance plans over which such officers may have no control or knowledge.

much improved

Priority for new facilities -- draft only mentions in passing the problems that new or expanded facilities would encounter if there is no priority for action on their permit applications since such facilities cannot begin operations until after issuance of the permit.

strengthened but still no mandate

Confidential business information -- issue is glossed over in draft despite specific CBI protection granted in Title V; EPA needs to provide clearer direction that CBI is important.

yes

Many of the people at EPA, including Bill Rosenberg and Don Elliott and their key staff (notably Mike Trutna who has been responsible for the actual writing and packaging of the regulation) have been very open to discussion and comment on these and other important issues to be addressed (or not addressed) by this regulation. We hope that openness will translate into a product that will resolve our concerns consistent with the Administration's enunciated goals and in a meaningful way that will alleviate the problems we see in the draft.

John, we have a followup meeting scheduled with Jeff for Friday, January 25 at 11 am. We would like to meet with you at your convenience and of course we would welcome your participation on Friday.

cc: Jeff Holmstead

(NEDA):CA2254LMM

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U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515

March 15, 1991

The Honorable William K. Reilly
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Reilly:

Thank you for providing a copy of the Environmental Protection Agency's (EPA) "2-9-91" draft of a proposed rule for the operating permit provisions of the Clean Air Act, as amended.

I understand that you have had "roundtable" discussions (outside the advisory committee approach) involving industry, environmentalists and others. Regrettably, I am not certain that all of the diverse national interests of industry, including small business, labor, consumers, farm groups, and others, were fully and adequately represented or able to participate. I nevertheless commend you for this effort to obtain greater public participation in developing this rule and I urge that you ensure adequate representation of diverse views in developing other proposals under the amended Act, including mobile source rules. I am concerned that EPA is not following a similar process for mobile sources.

I also understand that this "2-9-91" document is an advance staff proposal that is subject to change before it is published in the Federal Register for public comment. It is not yet a rulemaking, although it apparently has also been provided to the Office of Management and Budget (OMB) for preliminary review and discussion. Indeed, I understand another EPA draft version may soon be available. Please provide to the Subcommittee a copy of any further drafts when they are completed.

I also assume that you will make further changes, as appropriate, based on the inter-agency review and public comment after publication in the Federal Register. I understand from your other correspondence with the Subcommittee that this "roundtable" effort is not intended to supplant rulemaking and related public comment, nor can it.

This letter and its enclosure, [submitted as part of our oversight (pursuant to Rules X and XI of the House of Representatives) of your Agency's implementation of the amended law] raise some issues and questions relative to this "2-9-91" document. Hopefully, subsequent drafts and the proposal ultimately published for public comment will address some of these issues and questions. Nevertheless, I think this inquiry is pertinent and I hope it and your reply will be helpful to the EPA and others. Because this "2-9-91" document is apparently changing quite rapidly I have not attempted to address all areas of concern at this time, nor have I tried to address or even consider any comments others may suggest, including others in Congress.

Some of my concerns relate to the EPA's views on what items are in accord with the amended statute or are based on relevant legislative history with respect to the amended Act and what are not based on either the law or history. These concerns stem from the apparent contentions of some interested parties, in their discussions with EPA's General Counsel and others, that the individual views of some members of the conference (or, as Chairman Waxman called them in his remarks for the permanent record on adoption of the conference report, "unrelated legislative histories") represent the views of the entire conference or a majority of the conference from both Houses. That clearly is not the case, as recognized by Congressman Waxman and myself in our remarks. I particularly call your attention to my remarks in this regard, which are very similar to those of Chairman Waxman:

> In the case of the permit's title and the enforcement title, the House bill was the vehicle. While there were changes made, I think it is appropriate to recognize that the conferees did not think it necessary, except as part of the Statement of Managers, to expand or comment on those changes. In one area relating to fees, changes were made to accommodate the Committee on Ways and Means. The changes did not result in a wider use of fees beyond what was agreed to in the House.
>
> It is important to stress once again, that the Statement of Managers as printed in the conference report, represents the views of all the managers or conferees from the House and Senate who signed the conference report.
>
> The conferees made a decision several weeks ago not to engage in writing a detailed description of the House and Senate bills and the resulting conference agreement for each and every section and title of the legislation as is often done in other conference reports. This is a very lengthy piece of legislation. It is also complex and controversial. The conferees did not believe it necessary

or wise to try to anticipate future interpretations or problems as to the application of this legislation. In general, we believe that the legislation speaks for itself and, where it was necessary to make comments, the conference report includes specific statements agreed upon by all of the conferees or managers.

I presume that some individual conferees in the House and in the Senate may want to express views relative to the legislation and to offer various interpretations. That is their right, and I applaud that. However, I want to make it clear that only the Statement of Managers, which is part of the conference report, reflects the views of all the managers or conferees in the House and Senate. To the extent that the Managers' Statement is silent regarding specific provisions and titles, that is a deliberate decision on the part of all the managers who signed the conference agreement. Silence should not be given a different reading. The regulated community, the Environmental Protection Agency, environmentalists, and others may have preferred that the managers or conferees spell out in greater detail our intent and our interpretations in order to make their tasks simpler administratively and in the courts. However, the House and Senate conferees or managers did not share that view.

Indeed, some of the matters discussed by some of the conferees were never discussed by the conference committee and/or the staff. For example, included in the floor debate on the conference report in the Senate is a discussion of an "EPA paper" regarding the meaning of the term "source." The discussion leaves the impression that the joint conferees were aware of the paper, discussed it, and that the Floor debate represented the views of all the conferees. Unfortunately, the House conferees were not aware of the "EPA paper." It was not discussed by the House or the joint conferees and it was not considered by the conference committee. Although it may indeed have been part of the thinking of one or more of the Senate conferees in their discussions with the House, they failed to impart that thinking to the House. I question whether such silence can now be cited as support for a favored view by the EPA or others, particularly in light of the comments by Mr. Waxman and myself. Yet some are citing it to the EPA as the "gospel." It is not. It is, I believe, irrelevant as legislative history.

The two Houses, their Committees, and the conferees discussed many matters before settling on the final version of Title V and the brief Manager's Statement. Unfortunately, that discussion and its scope are not part of the conference report or the Manager's Statement. Any attempted recollection or interpretation of that discussion by anyone is probably flawed. Undoubtedly, such views

would not have been shared identically by all of the conferees last October and certainly would not be today. Thus, I urge that you not be swayed by suggestions that the absence of any matter or alternative is itself evidence of some intention by the conferees to accept or reject an idea or proposal.

EPA should rely primarily on the specific language of the statute and secondarily on the brief Manager's Statement for the views of all of the conferees, while using common sense and reasonableness in preparing these and other regulations for publication. Individual Floor debate comments by the Members should, of course, not be ignored, but their weight certainly must be judged in light of the above comments.

I request your reply to these concerns at or before the time the draft is published for public comment, including, specifically, a statement of your views on the weight to be accorded by EPA to these individual Members' views in developing this and other rules. The Subcommittee will want to understand when and why EPA relies to any extent on such views in proposing rules, guidance, etc.

With best wishes.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

Enclosure

cc: The Honorable Thomas J. Bliley, Ranking Republican Member
Subcommittee on Oversight and Investigations

The Honorable Henry A. Waxman, Chairman
Subcommittee on Health and the Environment

The Honorable William E. Dannemeyer, Ranking Republican Member
Subcommittee on Health and the Environment

The Honorable Philip R. Sharp, Chairman
Subcommittee on Energy and Power

The Honorable Carlos J. Moorhead, Ranking Minority Member
Subcommittee on Energy and Power

The Honorable James D. Watkins, Secretary
Department of Energy

The Honorable Michael J. Boskin, Chairman
Council of Economic Advisers

The Honorable Richard G. Darman, Director
Office of Management and Budget

The Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

The Honorable F. Henry Habicht, Deputy Administrator
Environmental Protection Agency

Mr. E. Donald Elliott, General Counsel
Environmental Protection Agency

Mr. Roger Porter, Assistant to the President
for Economic and Domestic Policy
The White House

Mr. Boyden Gray, Counsel to the President
The White House

Issues and Questions
regarding
some of the provisions of
the Environmental Protection Agency's
Draft Permit Proposal of "2-9-91"
by Congressman John D. Dingell, Chairman
Subcommittee on Oversight and Investigations of
the Committee on Energy and Commerce

March 15, 1991

The following are issues and questions regarding the Environmental Protection Agency's (EPA) draft permit proposal of "2-9-91." In raising these matters, I also want to emphasize the following comments of our Committee in its report of May 17, 1990 on this legislation. (H.Rept. 101-490, Part 1, p. 163):

> Each title in this bill represents a substantial program, with major responsibilities for Federal, State, and local officials. Given the size of these programs, there could be a understandable tendency to treat each title and each program in isolation. In implementing this legislation, EPA should consider fully the application and effects of various relevant provisions of the legislation and the Act. Where EPA must evaluate the need for additional controls under one title, it should, when permitted, consider the impact of controls achieved under another title.

I strongly urge that EPA consider these remarks carefully in developing these regulations.

Public Hearings --

In regards to public participation, the draft states:

> Comments on the proposed regulations must be received by (60 days from the date of proposal). The EPA will not be able to extend the public comment period due to the strict 12 month deadline in the Act. The EPA will hold a public hearing on May 13, and two public meetings on May 15 and May 17, 1991, at the addresses listed below. Requests to present oral testimony must be received on or before (two weeks after the date of proposal). Comments should be sent in both paper and computerized form.

Consistent with new section 307(h) as added by section 108(p) of Public Law 101-549 and the public participation requirements of the Administrative Procedure Act and the other provisions of the

Clean Air Act, I consider public participation to be very important and I know from your recent correspondence with the Subcommittee that you share that view. While I think it useful to indicate a reluctance to extend the comment period beyond 60 days, I question the reasonableness of absolute rejection, in advance, of any such extension request, particularly in light of the above new section 307(h) which makes it clear that a deadline is not necessarily sacrosanct where public participation is involved. Such an extension may never be needed, but it should not be precluded in advance. This permit title is extremely important and deserves ample time for full public consideration.

The above statement indicates that there will be one public hearing (which will be in Washington, D.C.) and two public meetings (one in Chicago and one in San Francisco). Please explain the difference between a public hearing and a public meeting and explain why there are no hearings or meetings in the South or East. I do not understand why all of these cannot be public hearings and why there are not more regions designated for such proceedings. I clearly do not think one public hearing date is adequate for this title of the law.

I also note that the draft urges that comments be submitted "in both paper and computerized form." I presume the final proposal will make it clear that this is only a suggestion and not a requirement. Not everyone would be able to meet such a suggestion. I also assume that there will be enough time to submit written comments after the public hearings are completed.

Regulations Overly Detailed --

I am concerned that the draft seems, in some respects, overly detailed and overly intent on trying to cover all possibilities so as to ease EPA's administrative and enforcement burdens. That may be a laudable purpose, but it also may be overly ambitious and premature and it seems inconsistent with the idea, urged by EPA, that the States use existing permit programs with some changes to meet the requirements of section 502. Indeed, it appears to go beyond what is needed to establish the "minimum elements of a permit program" as required by section 502(a).

That section specifies by statute 10 "minimum" elements of any permit program. It then allows EPA to establish additional "minimum" elements. My concern is that EPA is expanding on, and even changing or interpreting the statutory elements in a way that does not appear consistent with the statute and is leaving little to the States to resolve, even though EPA notes that many States already have comprehensive regulations regarding operating permits.

The EPA is concerned about the administrative burden on the permitting authority. However, that burden appears to be exacerbated by these overly-detailed regulations. For example, in the case of monitoring and analysis, the regulations go well beyond the statute and will require great reams of paper to be filed with the permitting authority after every 6 months or sooner. What will the permitting authority do with the reports, etc.? Will the permitting authority be overwhelmed?

The Subcommittee is concerned about this problem and urges that EPA consider the prescriptive nature of these requirements, that EPA conform to the statute, and that EPA rely more on the State's capabilities and experience.

As the preamble observes, you have a short statutory time period to develop for the first time a permit program. I want you to meet that deadline, as well as others in the Act, consistent with proper public participation. While it may be desirable to resolve all problems (actual and perceived), that may not necessarily be wise absent some experience with the program. Remember, the regulations can be changed and amended later. They are not written in stone. Also, other regulations for other parts of the law may prove relevant. With experience and more time, more and better regulations may evolve quite naturally. For now, it would seem that all that is needed is the basics, not the "icing on the cake."

I request your comments.

EPA Letter to Council of Economic Advisers --

In your letter of October 26, 1990, you expressed the intention of the EPA in implementing and interpreting the Act. You said:

> As a general matter, the Agency intends to exercise the discretionary authority which it is granted under various sections in a manner consistent with the principles upon which the President's Clean Air proposal was based. This means that, to the maximum extent made possible by the actual statutory language, we will make use of the flexible, market-based approaches that are the hallmark of the President's successful initiative. For example, we will attempt in the rulemaking process to make maximum use of such concepts as banking and trading, as we have done both in the development of the acid rain proposal and in the proposed Federal Implementation Plan for California.

* * * *

In several instances, implementation of the Act will require determination of the workability, feasibility, or cost of various actions. We, of course, will work closely with the relevant economic and line agencies, such as CEA, Treasury, OMB, Transportation, and Energy, in the design and application of such determinations.

Decisions related to permitting and enforcement are some of the most important in the Act. We have worked in the development of the legislation for a permitting and enforcement regime that reduces unnecessary administrative burdens for permittees. It is our intent to implement the provisions which have been enacted with the same goal in mind. We worked to develop a comprehensive permitting section that reduces redundant paperwork requirements and the potential for "double jeopardy" in the Agency's permit review process; we recognize that micromanagement by EPA of permitting decisions is unnecessary and likely to be extremely costly.

* * * *

Permit Program Implementation and Regulatory Budget -- EPA will implement the permit program in the following ways: (a) use the discretion of the bill to phase-in the permit program starting with major sources; (b) establish a policy of reliance on review of state permit programs, rather than the individual permit veto, as the primary oversight tool; and (c) ensure that modifications to install pollution controls do not in and of themselves trigger the issuance of a new permit, to the extent allowed by law.

While I believe that this draft is clearly the result of extensive and diligent work and that your staff should be commended for its effort and timely response, I am concerned that the above comments have generally not been followed in this draft. I fear that it will not reduce paperwork and that it fosters "micromanagement by EPA." As to the phase-in suggestion, please note my comments below. I welcome your comments and an explanation as to how this proposal conforms with your letter to the CEA. I note that at p. 317 of the draft preamble EPA contends that it has "lowered the overall societal cost and any adverse economic impact" and that with permit fees, the States and local agencies "will have the resources." I question the basis for this contention. Indeed, I request that basis, taking into account the comments herein. I also question EPA's basis for proposing to certify that this rule "will not have a significant economic impact on a substantial number of small business entities" which does not require a Regulatory Flexibility Analysis. Please explain the legal basis for that certification.

Exemption of Nonmajor Sources --

Section 502(a) states:

> The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this Act, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

The EPA draft proposal states:

> Today's action would defer for 5 years the requirement for certain nonmajor sources to obtain a permit, including those in nonattainment areas if a State makes certain showings. These sources may still opt to secure a permit.

* * * *

The EPA is authorized, consistent with the applicable provisions of the Act, to exempt one or more source categories (in whole or in part) from the requirement to have a permit if the Agency determines that permitting the category would be "impracticable, infeasible, or unnecessarily burdensome" [section 502(a)]. The EPA may not, however, exempt any "major" or "affected" (i.e., acid rain) source from the permitting requirements. States may, if they wish, permit and/or charge fees for federally-exempted sources.

To promote an orderly phase-in of the program, EPA is proposing to defer initially from coverage for 5 years from the date of program approval all sources which are not major. Nonmajor sources in nonattainment areas will receive this deferral only if the permitting authority makes a showing that the State can effectively enforce its SIP obligations on such sources without using federally-enforceable operating permits. The Administrator also reserves the ability to determine on a case-by-case basis the future applicability of nonmajor sources which become subject to new section 112 standards.

* * * *

> The EPA proposes to use the authority available under section 502(a) to defer initially the applicability of the Title V program to all sources that would otherwise be affected but are not major or affected sources under the Act. This action will lower the administrative burden at the critical time when State programs first become effective and are very vulnerable to overload. States will be required to learn the permitting system and permit numerous major sources. This will undoubtedly be difficult, even if EPA defers inclusion of nonmajor sources in the system 5 years. The EPA further proposes to end automatically the exemption for these nonmajor sources on or before a date 5 years from the effective date of the permit program in the State (approval of either a Part 70 or Part 71 program). (Underlining supplied.)

The above comments from the draft appear to suggest that Congress was referring to the permitting agency when it used the words "impracticable, infeasible, or unnecessarily burdensome" and that EPA could grant a blanket exemption of any kind for a multitude of source categories without more of a showing or finding than the above comments in order to ease "the administrative burden" of the States or EPA. That is not my understanding of the law.

The law states that EPA can exercise this discretion only when EPA can find that "compliance" with the "requirements" of section 502(a) (namely that a source have a permit to operate) by the source categories "is impracticable, infeasible, or unnecessarily burdensome." There is no such finding in this proposal. The fact that a permitting authority might, for example, be burdened or may be short of personnel or funds is not a valid reason to grant an exemption. Even if it was, the draft contains no such funding.

Included in this draft is a suggestion that a different rule will apply in nonattainment areas if a permitting agency cannot show it can meet "SIP" obligations without use of permits for nonmajor sources. There is nothing in the above-quoted exemption provision that appears to authorize this sort of "special exception" to the blanket exemption. Further, I do not understand how it could work because the exemption is for source categories or a part of them. I also believe it makes the exemption illusory because it appears to give relief on the one hand and takes it back on the other.

I also do not agree with the statement that EPA can exempt categories of sources and then authorize the sources to pay permit fees when they are not required to obtain a permit. There is no legal basis for this statement.

I might add, that while I am concerned about the impact of the permit program on small business, I also observe that under the law many statutorily defined "major sources" are in fact small businesses. Some of them will be in competition with other small businesses that may not be major sources. That could create inequities.

Further, in nonattainment areas or elsewhere, it may not be wise (if it were legal to do so) to defer application of the permit requirements for 5 years, particularly when, at the very least, the general permit option exists. Many of those sources, individually or collectively, may be significant polluters and that could make it more difficult to achieve attainment and could require other stationary or mobile sources to make up the slack. Also, I fail to understand the "magic" in 5 years. Does it mean that the blanket exemption ends in 5 years? What will EPA and the permitting authority do in the period prior to the end of the 5 years? Are these sources subject to the permit rules automatically after 5 years?

I request the legal basis for this proposed blanket exemption and the basis for any finding to support such an exemption. I also request the legal basis for a permitting authority to charge a fee when no permit is required.

Also, I note that the draft does not include provisions relating to the small business provisions of section 507. Please explain why.

<u>Relationship to Water Program</u> --

The draft also states:

> The new Title V of the Act introduces an operating permits program generally modeled after the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA). Some of the regulations proposed today are also modeled on NPDES regulations in 40 CFR Parts 122, 123, and 124. The EPA, therefore, will generally resolve issues of construction by construing the Title V permits program consistent with the NPDES program.

When the House reported H.R. 3030 with permit provisions, the Committee said:

> The Committee notes the Administration's comment that the permit program is "patterned generally" after the permit program for "point sources of water pollution under the Clean Water Act." As a general statement that is helpful. But there are differences between the two

> programs and they must be recognized. For example, under the Water Act the discharge occurs into a navigable waterway, while under the Clean Air Act the pollutant is emitted into the ambient air which offers a broader geographic area than a waterway. This is particularly true in light of the new definitions of "major sources" under sections 112 and 302, and in Titles I and V.

The final version of the permit program underwent changes after Committee action and before consideration in the House and again in conference. However, as already noted, the House-passed version was the vehicle adopted by the conferees. Nevertheless, it has never been clear how closely this permit program is actually patterned after the "NPDES program."

The statement that EPA "will generally resolve issues of construction by construing the Title V permits program consistent with the NPDES program" is overly vague and broad for rulemaking. To the extent that there have been interpretations or "issues of construction" in the case of water permits which could apply to air permits, they should be identified as part of the rulemaking so the public and the permitting authority are aware of them and can consider them in commenting on the rules. After all, not everyone may agree that they are applicable to air permits. If they are not made public, future permittees and the States will be in the dark. I request a list of all such applicable interpretations and "issues of construction."

In providing the list, please explain how such interpretations were made and used and indicate the extent to which they were public and of a generic nature.

Pollution Prevention --

In regards to "pollution prevention," the preamble states:

> The EPA encourages permitting authorities to promote pollution prevention alternatives where possible in their permitting activities. Permits can, consistent with the law, be used to define creative activities for shifting to inherently cleaner processes, both in meeting requirements for criteria pollutants and the acid rain program, and in meeting otherwise applicable requirements of Title III of the Act.

This comment is interesting and may be appropriate in the context of section 101(c) as amended by the 1990 law, but it is not relevant to regulations implementing Title V of the Act. Further, it fails to include the requirement of section 101(c) that pollution prevention actions be consistent with the provisions of this Act. It is not a new activity engrafted onto the permit program. Please explain the need for the above comment.

State Law Changes --

In a December 13, 1990 letter to the Governors, EPA wisely warned that the States (even those with existing permit programs) would have to meet the permit requirements of law and noted that some may need "specific enabling legislation." However, the draft states that a "State may submit its current or proposed" permit program to EPA at any time the new rules become final. To what extent has EPA determined that permit programs of States in existence before November 15, 1990 might comply with the new law? What States need statutory changes? How does EPA intend "to assist States in identifying and obtaining any required new authorities" at the State level as noted in the preamble? What is the effect of Title V on a State's "current" operating permit program? Can there legally be two operating permit programs (i.e., the current State program and the Title V program) in a State for the same source or does this program supersede any "current program"? Please explain.

Section 506 of the Act provides that "nothing in this title shall prevent a State, or interstate permitting authority from establishing additional permit requirements not inconsistent with the Act." The draft regulation states:

> Nothing in this Part precludes a State from adopting and implementing a permit program that is more stringent or more extensive than the minimum criteria required by this Part, as long as it is not inconsistent with the Act.

I question the need to try to paraphrase the statutory provision which is consistent with section 116 of the Act. Indeed, the disclaimer is in terms of "additional requirements" not inconsistent with the Clean Air Act. Those may not, for example, be "more stringent." Section 506(a) does not need amplification or mention in the regulations. The section speaks for itself. Please explain why EPA does not rely on it. What is the statutory basis for the EPA statement?

The draft states:

> The requirements of Part 70, including provisions regarding schedules for submission and approval or disapproval of permit applications, shall apply to the permitting of affected sources under the acid rain program, except as provided herein or modified in 40 CFC, Parts 71A-74.

Please explain what this means, why it is needed, and how it would work. Is there anything in the Act or the draft regulations that precludes this rather hortatory statement?

General Comment Re: Acid Rain Provisions --

The draft notes that acid rain rules have yet to be proposed. Indeed, the preamble (p. 4) makes this clear. Yet this draft discusses at some places "anticipated requirements and solicits comments." I suggest that it is difficult to respond to that request without seeing the acid rain proposal. I also suggest that it might be better to defer discussion of acid rain provisions until that proposal is public. Please explain why this proposal contains acid rain references and comments.

Definitions --

There are a number of definitions. Some are related only to permits. However, others could apply to other parts of the Act. For example, the definition of "stationary source" is not the same for sections 111, 112 and 302. I question their need here.

Please explain why the definition of a "regulated pollutant" is needed, since I believe it only relates to fees. Also, there is a suggestion that a pollutant that is "subject to regulation" under the Act (because it is addressed by the Act) is covered by this term even though it is unregulated. Is that intended? If yes, please provide the legal and policy basis for that view.

The draft attempts to define the term "applicable requirements of the Act" which appears in several sections of Title V. I fail to understand the need for such a definition and I question its appropriateness. The term is not difficult. But the word "applicable" is important. It obviously indicates that some "requirements of the Act" may or may not be applicable to a permit. It is intended that the permitting authority will decide applicability for various permits. This definition seeks to provide a "blanket" application of some identified provisions as being "applicable requirements of the Act" for every permit. That was not intended by the conference agreement.

I understand that some want to expand this definition even more. Some also want to constrict it. I disagree with both views. It shows a lack of consensus on what provisions are applicable. I suggest that the best solution is to eliminate the definition and let it be decided by the permitting authority. Possibly at a later time and after some experience, EPA could give more guidance.

I request your explanation as to the need for this definition and the legal basis for it. It is certainly not required by the statute.

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Document Originally Attached to Following Page

I also understand that some suggest that section 70.3 of the draft be expanded to provide that Title V permits would apply to section 112(r) sources. That is not my understanding of the law or of the conference agreement, particularly since the definitions of the sources in section 112 do not apply to section 112(r). I request your views.

Review of EPA Permit Program --

Section 70.4(e) of the draft provides for EPA approval or disapproval of a permit program "by publishing a notice in the Federal Register." The statute, however, requires "notice and opportunity for public comment." This would apply to the submittal and EPA's proposed action. The regulations fail to mention this provision or explain how it will be followed. The statute, of course, controls even in the absence of such a provision in the regulations. However, the draft is very detailed regarding other matters. I wonder why this was omitted. Please explain the omission and how EPA plans to comply with this provision. If you disagree, please explain the basis for your disagreement.

This section of the rule also states:

> Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

Please explain what happens if EPA fails to act in 30 days. I assume the submittal is not deemed complete. The statute requires that EPA approve or disapprove not "later than 1 year after receiving the program." If EPA fails to act within that timeframe, the submittal is not automatically approved. Indeed section 502(d)(3) makes it clear, that if a program is not approved within two years "after the date required for submission" EPA must promulgate the program (see also section 70.10 of the draft proposal). The above provision could run afoul of the notice and hearing requirement and the two year requirement. The concept of a submittal being deemed "complete" is not part of the statute. Moreover, the issue of completeness could be a concern of the public at a hearing. If the submission is incomplete, it can be disapproved. In my view, the one year starts under the statute whenever there is a submittal, regardless of its completeness. The State should not be given more time to complete the program. Please explain the legal basis for this provision.

Please also explain the need, legality, and purpose of section 70.4(j). While this may be a good idea, it seems quite broad and vague.

In the preamble, the draft states:

> There are certain minimum critical elements that need to be included in an acceptable program when it is submitted to EPA for approval. The submittal must include the State-adopted regulations establishing the permit program and the procedures the permitting authority will use to apply the permitting regulatory requirements. The EPA also solicits comment on whether the State statutes that authorize the regulations and provide for judicial review of final permit decisions should also be part of the submittal.

I believe such State statutes should be a part of the submittal. Indeed, I do not understand why this is even an issue.

I note your discussion in the preamble (pp. 97-103) regarding "additional permitting requirements" by a State. My understanding of the new law is that EPA can approve a permitting program that includes broader or "additional" requirements of a State that are not inconsistent with the Act. However, there is nothing in the amended Act or the legislative history, that necessarily requires that such requirements are also Federally enforceable, automatically or otherwise, particularly if they are not required by Federal law. Indeed, I question the wisdom of the regulations even implying, in advance, that they should be Federally enforceable. That does not mean that EPA might, in approving a permit program, conclude that some or all such provisions are Federally enforceable. Those additional requirements could be more stringent than Federal law and not be inconsistent with the Clean Air Act and at the same time, not Federally enforceable. However, in those instances where the Congress has said in the law that the provision, for example, section 510(b)(10), is a minimum element of the permitting program, the States could not eliminate that element or choose to ignore it. Indeed, I request the legal and policy basis for a different approach.

Section 70.6(b) states:

> All provisions in a Part 70 permit that are enforceable as a practical matter and are related to the purposes and provisions of the Act are presumed to be enforceable by the United States and citizens under the Act, regardless of whether they are more stringent than required by the Act or by EPA regulations; provided that

> where a State permitting authority specifically designates such more stringent provisions that it wishes not to make federally-enforceable, such provisions shall not be enforceable under the Act.

This provision is vague. What provisions are covered by this requirement? What do the words "as a practical matter mean"? What is the legal basis for presuming by regulation a provision to be "enforceable by the United States and citizens under the Act"? What is the legal basis for the provision?

Permit Application --

The provisions of section 70.5(b)(5) and (6) seem very broad and vague. They are almost a "blank check." Please explain their need and purpose.

The preamble observes that most States "have application forms" and some "are very comprehensive." EPA tells the States that a State "may use discretion in developing application forms that best meet program needs and administrative efficiency," but then the proposal goes on to enumerate so many "key elements", such as the above paragraphs, that it appears that the discretion afforded is hardly noticeable. Is that EPA's intention? What is left for the permitting authority?

Section 503(b) of the amended law states:

> (1) The regulations required by section 502(b) shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this Act. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.
>
> (2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

Section 70.5(b)(7) properly specifies that a permit application must include a "compliance plan." It then enumerates a list of six items to be in the plan. However, that list is apparently not exhaustive. Yet it is quite extensive. Item (iv) requires a "schedule of compliance" which is a defined term in the statute. However, the draft appears to expand on that statutory

definition by the addition of paragraphs (A) and (B) for sources "not in compliance" and for "sources in compliance." In fact, it appears that (A) and (B) are already covered by 70.5(b)(7) and (iii). Please explain the reasons for this detail in light of the specific language of the statute and please explain how this requirement will or will not affect the flexibility intended and provided by section 502(b)(10). I note that some believe it will unduly limit that flexibility. If you agree, what is the legal basis for doing it? If you disagree, please explain why. Also, please explain why a "source in compliance" is proposed to be required to go into the detail specified in "(B)," particularly in light of the definition in section 501(3) of the Act which states that it "means a schedule of remedial measures...leading to compliance" and does not refer to "maintenance." What is the legal basis for "(B)"?

Operational Flexibility --

The preamble recognizes that Congress, in sections 502(b)(6) and (10), wanted to be sure that the permit program would not adversely affect the operations of the permittee that must occur daily and even hourly for the permittee to stay in business and be successful. In section 502(b)(6), Congress emphasized the need for "adequate, streamlined, and reasonable" procedures for new permits, for renewals, and for revisions. These three words apply to the completeness determination, the public process, the processing of permit applications, and for "expeditious review" for permit actions. I am concerned that these draft regulations greatly ignore these three words. The regulations and procedures are not "stream-lined" and some believe they are not "reasonable" or "adequate."

Section 502(b)(10) provides:

> (10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 503(d) without requiring a permit revision, if the changes are not modifications under any provision of Title I and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions: Provided, that the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies. (Underlining supplied.)

Clearly, Congress by statute authorized "changes...without requiring a permit revision," subject to several specified conditions. One such condition is that the changes do not exceed Title I modifications. Another is that the changes do not exceed the "emissions allowable" under the permit. The third requires advance notice of at least 7 days.

The term "change" is not limited (except by the above conditions). As long as the contemplated change is carried out properly and complies with these conditions, it is authorized. This is the needed flexibility.

All of this seems to be properly recognized in section 70.6(d) (Flexible Source Operation) which spells out in some detail how the "permitting authority shall meet" the above requirements. It generally appears reasonable and consistent with the statute.

However, EPA has apparently devised what appears to be some additional requirements that seem quite complicated and difficult regarding so-called "minor" and "major" permit amendments (sections 70.7(e) and (f)). At the same time, the preamble seeks comments regarding further complicated approaches to so-called "flexibility."

Whether or not such provisions are needed or whether the regulations should be silent on the matter and the issue left to the States is a question that certainly needs to be considered and discussed. At the same time, I am uncertain about the legal basis for these provisions. Indeed, I think they tend to limit the statutory provision which is not proper. Please explain why these provisions are needed and how they help flexibility and why the matter should not be left to the permitting authority. Please also provide the legal basis for the provisions and explain the legal basis for section 70.7(f)(4).

Action on Application --

Please explain the purpose of section 70.7(a)(1)(i) and (iv). Is (i) triggered by the Administrator's objection under section 505 and section 70.7(a)(1)(ii)? Please explain.

Section 70.7(a)(4) requires the permitting authority to prepare a "fact sheet" for "every draft proposed permit." While that may be a nice idea, it hardly deserves to be a "minimum element" of permitting program under section 502(b). It seems to involve unnecessary paperwork and possible delay. Please explain its need and why it should be part of a regulation. At best, it belongs in the preamble.

Permit Modifications --

Section 70.7(d) is written as an exception to section 70.6(d) which is based on the statutory provision, section 502(b)(10). Please explain the legal basis for the exception, particularly in light of section 70.7(d)(3) which fails to mention the statutory provisions of section 502(b)(10).

Section 70.7(d)(1) seems quite broad and vague. For example, what does the term "change to the fundamental design" encompass?

Lastly, does a modification open up the entire permit? Please explain.

Reopening for Cause --

Section 502(b)(5)(D) requires that the permitting authority have "adequate authority to...terminate, modify, or revoke and reissue permits for cause." Section 502(b)(9) provides:

> (9) A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this Act after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this title regarding renewals.

It appears that section 70.7(g)(1)(i) is attempting to conform with section 502(b)(9). However, that section refers to revisions for "major sources," not all sources, and it refers to "standards and regulations promulgated under the Act after the issuance of such permit," not "requirements under the Act." Also, the draft fails to incorporate the last two sentences of section 502(b)(9). Please explain the legal basis for section 70.7(g), particularly paragraphs (1) through (3), including clauses (ii), (iii), and (iv).

Standard Permit Requirements and Compliance Determination --

The draft (sections 70.6(a) and 70.6(c)) contains very detailed provisions as "standard permit requirements" and "compliance determinations." They seem overly detailed and

burdensome for the permitting authority and for the permittee. Many seem to exceed greatly statutory requirements. Some of the requirements impose on the permittee reporting and other duties, but the draft fails to explain what the permitting authority is to do with these reports, etc. I fear they will grow dust. Please identify the statutory basis for each of the paragraphs in these sections, particularly paragraphs (5) and (6) of section 70.6(a) and all the clauses therein. Please explain the need for paragraphs (3)(i), (ii), and (vii). There seems to be considerable redundancy and they are overly detailed. Please explain what is an "upset" in section 70.6(3)(iii) and the legal basis for that provision and also clause (v) of that section.

Fee Determination --

The statute makes it clear that fees are collected to support the permit program, not the entire air pollution control program of the permitting authority from the date the permit program is approved, not for permits issued by the State prior to that approval or prior to enactment of the 1990 amendments to the Act. The provisions of section 70.9(a)(3) and 70.9(b)(ii) are not consistent with this statutory requirement. Please explain the legal basis for these provisions.

Public Availability of Records --

The preamble states:

> Title V places considerable emphasis upon providing public access to permit information. Section 502(b)(8) requires that the permitting authority make available to the public any permit application, compliance plan, permit, and monitoring or compliance report, subject to the provisions of section 114(c). (The EPA notes that section 114(c) governs information to be provided to EPA, not to a State, and thus the provision does not truly apply where the State is the permitting authority. The Agency interprets Congress's reference to section 114(c) as authorizing the States to use the same, or substantially similar, confidentiality criteria -- otherwise the reference would be meaningless, except where EPA is the permitting authority. The EPA solicits comment on this interpretation.)

I disagree with the parenthetical comment by the EPA. Section 502(b) specifies for the "permitting authority" as defined in the title "minimum elements" of an approvable permit program in a manner similar to the requirements imposed on States under section 110 of the Act regarding State implementation plans. One of the elements in section 502(b)(8) makes it clear that section 114(c) is

to apply to the permitting agency. Congress knew what it was doing. The reference is not "meaningless." Section 114(c) is a condition for approval in the same manner and to the same extent as section 110(a)(2) of the Act prior to the new amendments. The States must have such a provision to gain approval. If you disagree, please explain the legal basis for that disagreement.

Opportunity for a Hearing --

The preamble states:

> The EPA believes the requirement in Title V for an opportunity for a public hearing can be implemented in an informal manner and is not requiring States in its proposed rules to provide a full "trial-type" hearing with a verbatim transcript and opportunity for cross-examination. The Agency proposes that a public hearing for purposes of Title V be an open meeting for concerned parties to express their concerns. A summary of comments received should be placed in the public record.
>
> The EPA also solicits comment as to the degree of discretion that State agencies should have to condition the opportunity for a hearing upon certain reasonable criteria. These might include the relevance of the issues presented by the requesters, and whether factual issues (in contrast to issues of law) are presented. The granting of a request for a hearing might also be linked to the quality of information provided by the requester to support the request, e.g., whether the request reflects comments of sufficient technical (or, possibly, legal) scope such as would benefit from the opportunities for more complete presentation and exchange of ideas afforded by the public hearing process.

I do not believe this discussion, particularly the second paragraph, is in accord with section 502(b)(6) of the Act. Please explain the legal basis for these comments or suggestions.

Requirement for Enforcement Authority

As to State permit programs, section 70.11 provides several enforcement requirements. Section 502(b)(5) requires that the permit authority have "adequate authority to...enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties." Section 70.11(a)(3)(i) appears to be consistent with that provision. However, what is the basis for EPA prescribing the State's "appropriate criminal penalties" in clauses (ii) and (iii)? What is the legal basis for the "Note" in clause (ii)? What is the basis for the "Note" under clause (iii)?

Please also explain the basis for 70.11(b) and (c), particularly the reference to "burden of proof," "degree of knowledge," and "intent" and the accompanying note. I am not aware of any discussion by the Administration when H.R. 3030 was submitted to Congress or by the Congress that there was an intention by section 502(b)(5) to have EPA establish by rule such requirements under State law. Section 502(b)(5)(E) was not changed by the Congress from the version proposed by the President and the Presidential submittal is silent on this provision (see H.Doc. 101-87, July 24, 1989). This seems to be a fairly broad intrusion into State enforcement matters. Will it require changes in State law? This, and other provisions of this section that seem to go Beyond the statutory requirements (as well as other provisions of the proposed rule) raise the issue of the extent to which such additional EPA requirements that are not based on the statute will, if not met by a State or not adequately met by a State, result in disapproval in whole or in part of a permit program. The statue provides for approval "to the extent that the program meets the requirements of this Act, including the regulations issued under subsection (b)." The draft proposal does not indicate what criteria EPA will follow regarding approvals for matters that are covered, not by the Act, but by the regulations. I request your comments.

The note and the numbered items under section 70.11(c), if appropriate, would appear to belong in the preamble not the rule. Please provide the legal and policy basis for the note and the "highly recommended" enforcement "options."

Incidentally, to what extent is EPA engaged directly or by contract in preparing model regulations for the States? Please explain that effort, if any, and the extent of participation and cost. Also, explain why it is needed.

Permit Transfer --

Section 70.7(i) provides:

> This permit is not transferable to any person except after notice to the permitting authority. The permitting authority may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act.

The first sentence seems reasonable. The second seems overly harsh and draconian for a "change" in the "name of the permittee." Firms would certainly be reluctant to change their name under that circumstance. It could also curtail sale of a firm and might

affect "takeovers." I note that several years ago U.S. Steel changed its name. If this permit provisions had been in effect, what would have been the effect for all its facilities? Please explain the need for this sentence and the legal basis for it. Is there some possible pollution control reason for this sentence that the Subcommittee does not understand, because, if so, it is not apparently obvious?

NEDA
National Environmental Development Association
A Coalition of Organized Labor, Agriculture and Industry

M E M O R A N D U M

DATE: March 26, 1991

TO: Jeff Holmstead
Associate Counsel to the President

FROM: Rob Wilkins
NEDA/CARP Project Director

SUBJECT: EPA 4th Draft of Permits Rule

Fundamentally, the problem here is the starting point. There is no doubt that each draft has shown some progress in recognizing our issues and addressing some aspects of the problems. However, the first draft was so far astray and deviated so much from the statute that it was going to take giant strides to arrive at a workable and economically efficient process. In order to "cure" the myriad of problems that still exist, a major rewrite is necessary. We can give you a list of our major issues, problems that must be resolved if you want to avoid tremendous problems in the industrial sector and if you have a genuine interest and commitment to making the law work at all. But if the Administration wants to really make the law work by having sources work within the law rather than achieve attainment as a result of sources shutting down and manufacturing moving offshore, then some modicum of sensitivity to the ability of sources to operate efficiently and competitively must be restored to the discussions surrounding this regulation and reflected in the proposed rulemaking.

This rulemaking is supposed to establish "the minimum elements of a permit program to be administered by any air pollution control agency." Section 502(b). The statute then enumerates ten elements that shall be included and goes into some detail beyond listing the ten elements. Some other provisions in Title V provide more detail on the ten elements. This is all that the law requires EPA to promulgate by November 15 of this year.

But the Agency has not limited itself to fulfilling the dictates of the law. EPA has put together a "kitchen sink" regulation that attempts to address every issue related to permits and permit programs

that EPA envisions. We don't disagree with every one of those ideas; however, the proposed regulation is so cluttered that it is difficult to focus on and address adequately all the very important issues that must be addressed in this rulemaking. At this point I would note that were EPA to divorce the ten minimum elements from the rest of this proposal, there is nothing that would prohibit that broader proposal from moving ahead with all deliberate speed while being able to give those issues the serious consideration and scrutiny that they deserve.

ISSUES NOT RESOLVED FROM 3rd DRAFT:

Operational flexibility -- absolutely no change of the substance from the 3rd draft. EPA still wants to impose federal limitations on operational changes by mandating permit reissuance at thresholds lower than those established in the statute. As Chairman Dingell noted in his letter of March 15 to Bill Reilly, just because the statute is silent certainly does not mandate that EPA regulate; rather, where the statute is silent, and pursuant to section 506(a), the states may establish additional permitting requirements that they deem appropriate and necessary to fulfill their obligations under the law. Whether the regulations should be silent on this matter and the issue left to the States certainly is a question worthy of very serious consideration.

The proposed EPA regulation of "major amendments" should be stricken and replaced (if it is absolutely necessary to say anything) with a simple statement that changes within the range above allowables but below triggers for new controls or new source review may be regulated by the permitting authorities as is necessary to address any attainment problems they face.

Compliance plans -- actually regresses from 3rd draft. Section 503(b)(1) requires the applicant to "submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this Act. The compliance plan shall include a schedule of compliance and a schedule under which the permittee shall submit progress reports ..." Somehow, EPA has interpreted this provision to require much greater detail than a statement from a source in compliance that it intends to continue operations within compliance levels and a recognition of any changes in emissions permissible to be in compliance status. The additional requirements found on Preamble p. 106 are extraordinarily detailed and in some instances highly speculative. Finally, Reg. @70.5(b)(7)(iv)(B) requires an "enforceable sequence of actions with deadlines designed to maintain current compliance" which implies that EPA wants to be able to sue a source for missing a

compliance schedule milestone even if the source is in compliance with emissions requirements and manages to "catch up" and meet the deadline for the new emissions standard.

As a <u>minimum elements rule</u>, we believe that this regulation should require no more than the minimum required by the law -- a schedule of compliance and a schedule for progress reports. Anything more should beup to the permitting authority as it finds necessary to help the authority maintain attainment or bring the jurisdication into attainment. Also, the fact that a source is in compliance and continues in compliance as new emissions standards become applicable should be an absolute defense to any enforcement proceedings arising from missed compliance schedule dates.

Definition of "source" -- EPA's choice of "potential to emit" for computation of source size (Preamble p. 62), that does not allow consideration of control equipment as was found to be correct in <u>Alabama Power</u> case, essentially redefines "source" for purposes of determining what equipment or processes are subject to Title V requirements. Also, sources who operate far below their potential to emit for any number of reasons (nature of the business or industry, number of shifts operated per day, or number of days per week of operation) will be forced either to be permitted or enter into the contract scheme EPA proposes for comment (Preamble p. 63) though it is not clear who is or how one becomes eligible for that scheme and the accompanying bureaucratic burdens it imposes.

The definition of source should remain constant throughout the regulations implementing the statute. For many sources there is more than ample historical data to support claims that those sources operate at certain levels and produce emissions substantially lower than their potential to emit. If a source has emissions or emission levels that subject it to the provisions of Title V and the source fails to obtain a permit it is in violation of the law and there are significant criminal and civil penalties for such violations.

(NEDA):CA2375LMM

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01. Memo	From Richard B. Ossias thru Alan W. Eckert to E. Donald Elliott RE: Operational Flexibility (3 pp.)	03/27/91	P-5	

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Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P-5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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Freedom of Information Act - [5 U.S.C. 552(b)]

F-1 National security classified information [(b)(1) of the FOIA]
F-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
F-3 Release would violate a Federal statute [(b)(3) of the FOIA]
F-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

TRANSMITTED FROM 03.25.91 20:31 P.01 *

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To: Jeff Holmstead

From: Rob Wilkins

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Comments

Note. Permit issues discussion beginning on Enclosure Page 11.

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DAN SCHAEFER, COLORADO
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JOHN M. CLOUGH JR., STAFF DIRECTOR

U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515

March 15, 1991

The Honorable William K. Reilly
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Reilly:

Thank you for providing a copy of the Environmental Protection Agency's (EPA) "2-9-91" draft of a proposed rule for the operating permit provisions of the Clean Air Act, as amended.

I understand that you have had "roundtable" discussions (outside the advisory committee approach) involving industry, environmentalists and others. Regrettably, I am not certain that all of the diverse national interests of industry, including small business, labor, consumers, farm groups, and others, were fully and adequately represented or able to participate. I nevertheless commend you for this effort to obtain greater public participation in developing this rule and I urge that you ensure adequate representation of diverse views in developing other proposals under the amended Act, including mobile source rules. I am concerned that EPA is not following a similar process for mobile sources.

I also understand that this "2-9-91" document is an advance staff proposal that is subject to change before it is published in the Federal Register for public comment. It is not yet a rulemaking, although it apparently has also been provided to the Office of Management and Budget (OMB) for preliminary review and discussion. Indeed, I understand another EPA draft version may soon be available. Please provide to the Subcommittee a copy of any further drafts when they are completed.

I also assume that you will make further changes, as appropriate, based on the inter-agency review and public comment after publication in the Federal Register. I understand from your other correspondence with the Subcommittee that this "roundtable" effort is not intended to supplant rulemaking and related public comment, nor can it.

This letter and its enclosure, [submitted as part of our oversight (pursuant to Rules X and XI of the House of Representatives) of your Agency's implementation of the amended law] raise some issues and questions relative to this "2-9-91" document. Hopefully, subsequent drafts and the proposal ultimately published for public comment will address some of these issues and questions. Nevertheless, I think this inquiry is pertinent and I hope it and your reply will be helpful to the EPA and others. Because this "2-9-91" document is apparently changing quite rapidly I have not attempted to address all areas of concern at this time, nor have I tried to address or even consider any comments others may suggest, including others in Congress.

Some of my concerns relate to the EPA's views on what items are in accord with the amended statute or are based on relevant legislative history with respect to the amended Act and what are not based on either the law or history. These concerns stem from the apparent contentions of some interested parties, in their discussions with EPA's General Counsel and others, that the individual views of some members of the conference (or, as Chairman Waxman called them in his remarks for the permanent record on adoption of the conference report, "unrelated legislative histories") represent the views of the entire conference or a majority of the conference from both Houses. That clearly is not the case, as recognized by Congressman Waxman and myself in our remarks. I particularly call your attention to my remarks in this regard, which are very similar to those of Chairman Waxman:

> In the case of the permit's title and the enforcement title, the House bill was the vehicle. While there were changes made, I think it is appropriate to recognize that the conferees did not think it necessary, except as part of the Statement of Managers, to expand or comment on those changes. In one area relating to fees, changes were made to accommodate the Committee on Ways and Means. The changes did not result in a wider use of fees beyond what was agreed to in the House.
>
> It is important to stress once again, that the Statement of Managers as printed in the conference report, represents the views of <u>all</u> the managers or conferees from the House and Senate who signed the conference report.
>
> The conferees made a decision several weeks ago not to engage in writing a detailed description of the House and Senate bills and the resulting conference agreement for each and every section and title of the legislation as is often done in other conference reports. This is a very lengthy piece of legislation. It is also complex and controversial. The conferees did not believe it necessary

or wise to try to anticipate future interpretations or problems as to the application of this legislation. In general, we believe that the legislation speaks for itself and, where it was necessary to make comments, the conference report includes specific statements agreed upon by all of the conferees or managers.

I presume that some individual conferees in the House and in the Senate may want to express views relative to the legislation and to offer various interpretations. That is their right, and I applaud that. However, I want to make it clear that only the Statement of Managers, which is part of the conference report, reflects the views of all the managers or conferees in the House and Senate. To the extent that the Managers' Statement is silent regarding specific provisions and titles, that is a deliberate decision on the part of all the managers who signed the conference agreement. Silence should not be given a different reading. The regulated community, the Environmental Protection Agency, environmentalists, and others may have preferred that the managers or conferees spell out in greater detail our intent and our interpretations in order to make their tasks simpler administratively and in the courts. However, the House and Senate conferees or managers did not share that view.

Indeed, some of the matters discussed by some of the conferees were never discussed by the conference committee and/or the staff. For example, included in the floor debate on the conference report in the Senate is a discussion of an "EPA paper" regarding the meaning of the term "source." The discussion leaves the impression that the joint conferees were aware of the paper, discussed it, and that the Floor debate represented the views of all the conferees. Unfortunately, the House conferees were not aware of the "EPA paper." It was not discussed by the House or the joint conferees and it was not considered by the conference committee. Although it may indeed have been part of the thinking of one or more of the Senate conferees in their discussions with the House, they failed to impart that thinking to the House. I question whether such silence can now be cited as support for a favored view by the EPA or others, particularly in light of the comments by Mr. Waxman and myself. Yet some are citing it to the EPA as the "gospel." It is not. It is, I believe, irrelevant as legislative history.

The two Houses, their Committees, and the conferees discussed many matters before settling on the final version of Title V and the brief Manager's Statement. Unfortunately, that discussion and its scope are not part of the conference report or the Manager's Statement. Any attempted recollection or interpretation of that discussion by anyone is probably flawed. Undoubtedly, such views

would not have been shared identically by all of the conferees last October and certainly would not be today. Thus, I urge that you not be swayed by suggestions that the absence of any matter or alternative is itself evidence of some intention by the conferees to accept or reject an idea or proposal.

EPA should rely primarily on the specific language of the statute and secondarily on the brief Manager's Statement for the views of all of the conferees, while using common sense and reasonableness in preparing these and other regulations for publication. Individual Floor debate comments by the Members should, of course, not be ignored, but their weight certainly must be judged in light of the above comments.

I request your reply to these concerns at or before the time the draft is published for public comment, including, specifically, a statement of your views on the weight to be accorded by EPA to these individual Members' views in developing this and other rules. The Subcommittee will want to understand when and why EPA relies to any extent on such views in proposing rules, guidance, etc.

With best wishes.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

Enclosure

cc: The Honorable Thomas J. Bliley, Ranking Republican Member
Subcommittee on Oversight and Investigations

The Honorable Henry A. Waxman, Chairman
Subcommittee on Health and the Environment

The Honorable William E. Dannemeyer, Ranking Republican Member
Subcommittee on Health and the Environment

The Honorable Philip R. Sharp, Chairman
Subcommittee on Energy and Power

The Honorable Carlos J. Moorhead, Ranking Minority Member
Subcommittee on Energy and Power

The Honorable James D. Watkins, Secretary
Department of Energy

The Honorable Michael J. Boskin, Chairman
Council of Economic Advisers

The Honorable Richard G. Darman, Director
Office of Management and Budget

The Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

The Honorable F. Henry Habicht, Deputy Administrator
Environmental Protection Agency

Mr. E. Donald Elliott, General Counsel
Environmental Protection Agency

Mr. Roger Porter, Assistant to the President
for Economic and Domestic Policy
The White House

Mr. Boyden Gray, Counsel to the President
The White House

Issues and Questions
regarding
some of the provisions of
the Environmental Protection Agency's
Draft Permit Proposal of "2-9-91"
by Congressman John D. Dingell, Chairman
Subcommittee on Oversight and Investigations of
the Committee on Energy and Commerce

March 15, 1991

The following are issues and questions regarding the Environmental Protection Agency's (EPA) draft permit proposal of "2-9-91." In raising these matters, I also want to emphasize the following comments of our Committee in its report of May 17, 1990 on this legislation. (H.Rept. 101-490, Part 1, p. 163):

> Each title in this bill represents a substantial program, with major responsibilities for Federal, State, and local officials. Given the size of these programs, there could be a understandable tendency to treat each title and each program in isolation. In implementing this legislation, EPA should consider fully the application and effects of various relevant provisions of the legislation and the Act. Where EPA must evaluate the need for additional controls under one title, it should, when permitted, consider the impact of controls achieved under another title.

I strongly urge that EPA consider these remarks carefully in developing these regulations.

Public Hearings --

In regards to public participation, the draft states:

> Comments on the proposed regulations must be received by (60 days from the date of proposal). The EPA will not be able to extend the public comment period due to the strict 12 month deadline in the Act. The EPA will hold a public hearing on May 13, and two public meetings on May 15 and May 17, 1991, at the addresses listed below. Requests to present oral testimony must be received on or before (two weeks after the date of proposal). Comments should be sent in both paper and computerized form.

Consistent with new section 307(h) as added by section 108(p) of Public Law 101-549 and the public participation requirements of the Administrative Procedure Act and the other provisions of the

Clean Air Act, I consider public participation to be very important and I know from your recent correspondence with the Subcommittee that you share that view. While I think it useful to indicate a reluctance to extend the comment period beyond 60 days, I question the reasonableness of absolute rejection, in advance, of any such extension request, particularly in light of the above new section 307(h) which makes it clear that a deadline is not necessarily sacrosanct where public participation is involved. Such an extension may never be needed, but it should not be precluded in advance. This permit title is extremely important and deserves ample time for full public consideration.

The above statement indicates that there will be one public hearing (which will be in Washington, D.C.) and two public meetings (one in Chicago and one in San Francisco). Please explain the difference between a public hearing and a public meeting and explain why there are no hearings or meetings in the South or East. I do not understand why all of these cannot be public hearings and why there are not more regions designated for such proceedings. I clearly do not think one public hearing date is adequate for this title of the law.

I also note that the draft urges that comments be submitted "in both paper and computerized form." I presume the final proposal will make it clear that this is only a suggestion and not a requirement. Not everyone would be able to meet such a suggestion. I also assume that there will be enough time to submit written comments after the public hearings are completed.

Regulations Overly Detailed --

I am concerned that the draft seems, in some respects, overly detailed and overly intent on trying to cover all possibilities so as to ease EPA's administrative and enforcement burdens. That may be a laudable purpose, but it also may be overly ambitious and premature and it seems inconsistent with the idea, urged by EPA, that the States use existing permit programs with some changes to meet the requirements of section 502. Indeed, it appears to go beyond what is needed to establish the "minimum elements of a permit program" as required by section 502(a).

That section specifies by statute 10 "minimum" elements of any permit program. It then allows EPA to establish additional "minimum" elements. My concern is that EPA is expanding on, and even changing or interpreting the statutory elements in a way that does not appear consistent with the statute and is leaving little to the States to resolve, even though EPA notes that many States already have comprehensive regulations regarding operating permits.

The EPA is concerned about the administrative burden on the permitting authority. However, that burden appears to be exacerbated by these overly-detailed regulations. For example, in the case of monitoring and analysis, the regulations go well beyond the statute and will require great reams of paper to be filed with the permitting authority after every 6 months or sooner. What will the permitting authority do with the reports, etc.? Will the permitting authority be overwhelmed?

The Subcommittee is concerned about this problem and urges that EPA consider the prescriptive nature of these requirements, that EPA conform to the statute, and that EPA rely more on the State's capabilities and experience.

As the preamble observes, you have a short statutory time period to develop for the first time a permit program. I want you to meet that deadline, as well as others in the Act, consistent with proper public participation. While it may be desirable to resolve all problems (actual and perceived), that may not necessarily be wise absent some experience with the program. Remember, the regulations can be changed and amended later. They are not written in stone. Also, other regulations for other parts of the law may prove relevant. With experience and more time, more and better regulations may evolve quite naturally. For now, it would seem that all that is needed is the basics, not the "icing on the cake."

I request your comments.

EPA Letter to Council of Economic Advisers --

In your letter of October 26, 1990, you expressed the intention of the EPA in implementing and interpreting the Act. You said:

> As a general matter, the Agency intends to exercise the discretionary authority which it is granted under various sections in a manner consistent with the principles upon which the President's Clean Air proposal was based. This means that, to the maximum extent made possible by the actual statutory language, we will make use of the flexible, market-based approaches that are the hallmark of the President's successful initiative. For example, we will attempt in the rulemaking process to make maximum use of such concepts as banking and trading, as we have done both in the development of the acid rain proposal and in the proposed Federal Implementation Plan for California.

* * * *

In several instances, implementation of the Act will require determination of the workability, feasibility, or cost of various actions. We, of course, will work closely with the relevant economic and line agencies, such as CEA, Treasury, OMB, Transportation, and Energy, in the design and application of such determinations.

Decisions related to permitting and enforcement are some of the most important in the Act. We have worked in the development of the legislation for a permitting and enforcement regime that reduces unnecessary administrative burdens for permittees. It is our intent to implement the provisions which have been enacted with the same goal in mind. We worked to develop a comprehensive permitting section that reduces redundant paperwork requirements and the potential for "double jeopardy" in the Agency's permit review process; we recognize that micromanagement by EPA of permitting decisions is unnecessary and likely to be extremely costly.

* * * *

Permit Program Implementation and Regulatory Budget -- EPA will implement the permit program in the following ways: (a) use the discretion of the bill to phase-in the permit program starting with major sources; (b) establish a policy of reliance on review of state permit programs, rather than the individual permit veto, as the primary oversight tool; and (c) ensure that modifications to install pollution controls do not in and of themselves trigger the issuance of a new permit, to the extent allowed by law.

While I believe that this draft is clearly the result of extensive and diligent work and that your staff should be commended for its effort and timely response, I am concerned that the above comments have generally not been followed in this draft. I fear that it will not reduce paperwork and that it fosters "micromanagement by EPA." As to the phase-in suggestion, please note my comments below. I welcome your comments and an explanation as to how this proposal conforms with your letter to the CEA. I note that at p. 317 of the draft preamble EPA contends that it has "lowered the overall societal cost and any adverse economic impact" and that with permit fees, the States and local agencies "will have the resources." I question the basis for this contention. Indeed, I request that basis, taking into account the comments herein. I also question EPA's basis for proposing to certify that this rule "will not have a significant economic impact on a substantial number of small business entities" which does not require a Regulatory Flexibility Analysis. Please explain the legal basis for that certification.

Exemption of Nonmajor Sources --

Section 502(a) states:

> The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this Act, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

The EPA draft proposal states:

> Today's action would defer for 5 years the requirement for certain nonmajor sources to obtain a permit, including those in nonattainment areas if a State makes certain showings. These sources may still opt to secure a permit.

* * * *

> The EPA is authorized, consistent with the applicable provisions of the Act, to exempt one or more source categories (in whole or in part) from the requirement to have a permit if the Agency determines that permitting the category would be "impracticable, infeasible, or unnecessarily burdensome" [section 502(a)]. The EPA may not, however, exempt any "major" or "affected" (i.e., acid rain) source from the permitting requirements. States may, if they wish, permit and/or charge fees for federally-exempted sources.
>
> To promote an orderly phase-in of the program, EPA is proposing to defer initially from coverage for 5 years from the date of program approval all sources which are not major. Nonmajor sources in nonattainment areas will receive this deferral only if the permitting authority makes a showing that the State can effectively enforce its SIP obligations on such sources without using federally-enforceable operating permits. The Administrator also reserves the ability to determine on a case-by-case basis the future applicability of nonmajor sources which become subject to new section 112 standards.

* * * *

> The EPA proposes to use the authority available under section 502(a) to defer initially the applicability of the Title V program to all sources that would otherwise be affected but are not major or affected sources under the Act. This action will lower the administrative burden at the critical time when State programs first become effective and are very vulnerable to overload. States will be required to learn the permitting system and permit numerous major sources. This will undoubtedly be difficult, even if EPA defers inclusion of nonmajor sources in the system 5 years. The EPA further proposes to end automatically the exemption for these nonmajor sources on or before a date 5 years from the effective date of the permit program in the State (approval of either a Part 70 or Part 71 program). (Underlining supplied.)

The above comments from the draft appear to suggest that Congress was referring to the permitting agency when it used the words "impracticable, infeasible, or unnecessarily burdensome" and that EPA could grant a blanket exemption of any kind for a multitude of source categories without more of a showing or finding than the above comments in order to ease "the administrative burden" of the States or EPA. That is not my understanding of the law.

The law states that EPA can exercise this discretion only when EPA can find that "compliance" with the "requirements" of section 502(a) (namely that a source have a permit to operate) by the source categories "is impracticable, infeasible, or unnecessarily burdensome." There is no such finding in this proposal. The fact that a permitting authority might, for example, be burdened or may be short of personnel or funds is not a valid reason to grant an exemption. Even if it was, the draft contains no such funding.

Included in this draft is a suggestion that a different rule will apply in nonattainment areas if a permitting agency cannot show it can meet "SIP" obligations without use of permits for nonmajor sources. There is nothing in the above-quoted exemption provision that appears to authorize this sort of "special exception" to the blanket exemption. Further, I do not understand how it could work because the exemption is for source categories or a part of them. I also believe it makes the exemption illusory because it appears to give relief on the one hand and takes it back on the other.

I also do not agree with the statement that EPA can exempt categories of sources and then authorize the sources to pay permit fees when they are not required to obtain a permit. There is no legal basis for this statement.

I might add, that while I am concerned about the impact of the permit program on small business, I also observe that under the law many statutorily defined "major sources" are in fact small businesses. Some of them will be in competition with other small businesses that may not be major sources. That could create inequities.

Further, in nonattainment areas or elsewhere, it may not be wise (if it were legal to do so) to defer application of the permit requirements for 5 years, particularly when, at the very least, the general permit option exists. Many of those sources, individually or collectively, may be significant polluters and that could make it more difficult to achieve attainment and could require other stationary or mobile sources to make up the slack. Also, I fail to understand the "magic" in 5 years. Does it mean that the blanket exemption ends in 5 years? What will EPA and the permitting authority do in the period prior to the end of the 5 years? Are these sources subject to the permit rules automatically after 5 years?

I request the legal basis for this proposed blanket exemption and the basis for any finding to support such an exemption. I also request the legal basis for a permitting authority to charge a fee when no permit is required.

Also, I note that the draft does not include provisions relating to the small business provisions of section 507. Please explain why.

Relationship to Water Program --

The draft also states:

> The new Title V of the Act introduces an operating permits program generally modeled after the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA). Some of the regulations proposed today are also modeled on NPDES regulations in 40 CFR Parts 122, 123, and 124. The EPA, therefore, will generally resolve issues of construction by construing the Title V permits program consistent with the NPDES program.

When the House reported H.R. 3030 with permit provisions, the Committee said:

> The Committee notes the Administration's comment that the permit program is "patterned generally" after the permit program for "point sources of water pollution under the Clean Water Act." As a general statement that is helpful. But there are differences between the two

> programs and they must be recognized. For example, under the Water Act the discharge occurs into a navigable waterway, while under the Clean Air Act the pollutant is emitted into the ambient air which offers a broader geographic area than a waterway. This is particularly true in light of the new definitions of "major sources" under sections 112 and 302, and in Titles I and V.

The final version of the permit program underwent changes after Committee action and before consideration in the House and again in conference. However, as already noted, the House-passed version was the vehicle adopted by the conferees. Nevertheless, it has never been clear how closely this permit program is actually patterned after the "NPDES program."

The statement that EPA "will generally resolve issues of construction by construing the Title V permits program consistent with the NPDES program" is overly vague and broad for rulemaking. To the extent that there have been interpretations or "issues of construction" in the case of water permits which could apply to air permits, they should be identified as part of the rulemaking so the public and the permitting authority are aware of them and can consider them in commenting on the rules. After all, not everyone may agree that they are applicable to air permits. If they are not made public, future permittees and the States will be in the dark. I request a list of all such applicable interpretations and "issues of construction."

In providing the list, please explain how such interpretations were made and used and indicate the extent to which they were public and of a generic nature.

Pollution Prevention --

In regards to "pollution prevention," the preamble states:

> The EPA encourages permitting authorities to promote pollution prevention alternatives where possible in their permitting activities. Permits can, consistent with the law, be used to define creative activities for shifting to inherently cleaner processes, both in meeting requirements for criteria pollutants and the acid rain program, and in meeting otherwise applicable requirements of Title III of the Act.

This comment is interesting and may be appropriate in the context of section 101(c) as amended by the 1990 law, but it is not relevant to regulations implementing Title V of the Act. Further, it fails to include the requirement of section 101(c) that pollution prevention actions be consistent with the provisions of this Act. It is not a new activity engrafted onto the permit program. Please explain the need for the above comment.

State Law Changes --

In a December 13, 1990 letter to the Governors, EPA wisely warned that the States (even those with existing permit programs) would have to meet the permit requirements of law and noted that some may need "specific enabling legislation." However, the draft states that a "State may submit its current or proposed" permit program to EPA at any time the new rules become final. To what extent has EPA determined that permit programs of States in existence before November 15, 1990 might comply with the new law? What States need statutory changes? How does EPA intend "to assist States in identifying and obtaining any required new authorities" at the State level as noted in the preamble? What is the effect of Title V on a State's "current" operating permit program? Can there legally be two operating permit programs (i.e., the current State program and the Title V program) in a State for the same source or does this program supersede any "current program"? Please explain.

Section 506 of the Act provides that "nothing in this title shall prevent a State, or interstate permitting authority from establishing additional permit requirements not inconsistent with the Act." The draft regulation states:

> Nothing in this Part precludes a State from adopting and implementing a permit program that is more stringent or more extensive than the minimum criteria required by this Part, as long as it is not inconsistent with the Act.

I question the need to try to paraphrase the statutory provision which is consistent with section 116 of the Act. Indeed, the disclaimer is in terms of "additional requirements" not inconsistent with the Clean Air Act. Those may not, for example, be "more stringent." Section 506(a) does not need amplification or mention in the regulations. The section speaks for itself. Please explain why EPA does not rely on it. What is the statutory basis for the EPA statement?

The draft states:

> The requirements of Part 70, including provisions regarding schedules for submission and approval or disapproval of permit applications, shall apply to the permitting of affected sources under the acid rain program, except as provided herein or modified in 40 CFC, Parts 71A-74.

Please explain what this means, why it is needed, and how it would work. Is there anything in the Act or the draft regulations that precludes this rather hortatory statement?

General Comment Re: Acid Rain Provisions --

The draft notes that acid rain rules have yet to be proposed. Indeed, the preamble (p. 4) makes this clear. Yet this draft discusses at some places "anticipated requirements and solicits comments." I suggest that it is difficult to respond to that request without seeing the acid rain proposal. I also suggest that it might be better to defer discussion of acid rain provisions until that proposal is public. Please explain why this proposal contains acid rain references and comments.

Definitions --

There are a number of definitions. Some are related only to permits. However, others could apply to other parts of the Act. For example, the definition of "stationary source" is not the same for sections 111, 112 and 302. I question their need here.

Please explain why the definition of a "regulated pollutant" is needed, since I believe it only relates to fees. Also, there is a suggestion that a pollutant that is "subject to regulation" under the Act (because it is addressed by the Act) is covered by this term even though it is unregulated. Is that intended? If yes, please provide the legal and policy basis for that view.

The draft attempts to define the term "applicable requirements of the Act" which appears in several sections of Title V. I fail to understand the need for such a definition and I question its appropriateness. The term is not difficult. But the word "applicable" is important. It obviously indicates that some "requirements of the Act" may or may not be applicable to a permit. It is intended that the permitting authority will decide applicability for various permits. This definition seeks to provide a "blanket" application of some identified provisions as being "applicable requirements of the Act" for every permit. That was not intended by the conference agreement.

I understand that some want to expand this definition even more. Some also want to constrict it. I disagree with both views. It shows a lack of consensus on what provisions are applicable. I suggest that the best solution is to eliminate the definition and let it be decided by the permitting authority. Possibly at a later time and after some experience, EPA could give more guidance.

I request your explanation as to the need for this definition and the legal basis for it. It is certainly not required by the statute.

I also understand that some suggest that section 70.3 of the draft be expanded to provide that Title V permits would apply to section 112(r) sources. That is not my understanding of the law or of the conference agreement, particularly since the definitions of the sources in section 112 do not apply to section 112(r). I request your views.

Review of EPA Permit Program --

Section 70.4(e) of the draft provides for EPA approval or disapproval of a permit program "by publishing a notice in the Federal Register." The statute, however, requires "notice and opportunity for public comment." This would apply to the submittal and EPA's proposed action. The regulations fail to mention this provision or explain how it will be followed. The statute, of course, controls even in the absence of such a provision in the regulations. However, the draft is very detailed regarding other matters. I wonder why this was omitted. Please explain the omission and how EPA plans to comply with this provision. If you disagree, please explain the basis for your disagreement.

This section of the rule also states:

> Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

Please explain what happens if EPA fails to act in 30 days. I assume the submittal is not deemed complete. The statute requires that EPA approve or disapprove not "later than 1 year after receiving the program." If EPA fails to act within that timeframe, the submittal is not automatically approved. Indeed section 502(d)(3) makes it clear, that if a program is not approved within two years "after the date required for submission" EPA must promulgate the program (see also section 70.10 of the draft proposal). The above provision could run afoul of the notice and hearing requirement and the two year requirement. The concept of a submittal being deemed "complete" is not part of the statute. Moreover, the issue of completeness could be a concern of the public at a hearing. If the submission is incomplete, it can be disapproved. In my view, the one year starts under the statute whenever there is a submittal, regardless of its completeness. The State should not be given more time to complete the program. Please explain the legal basis for this provision.

Please also explain the need, legality, and purpose of section 70.4(j). While this may be a good idea, it seems quite broad and vague.

In the preamble, the draft states:

> There are certain minimum critical elements that need to be included in an acceptable program when it is submitted to EPA for approval. The submittal must include the State-adopted regulations establishing the permit program and the procedures the permitting authority will use to apply the permitting regulatory requirements. The EPA also solicits comment on whether the State statutes that authorize the regulations and provide for judicial review of final permit decisions should also be part of the submittal.

I believe such State statutes should be a part of the submittal. Indeed, I do not understand why this is even an issue.

I note your discussion in the preamble (pp. 97-103) regarding "additional permitting requirements" by a State. My understanding of the new law is that EPA can approve a permitting program that includes broader or "additional" requirements of a State that are not inconsistent with the Act. However, there is nothing in the amended Act or the legislative history, that necessarily requires that such requirements are also Federally enforceable, automatically or otherwise, particularly if they are not required by Federal law. Indeed, I question the wisdom of the regulations even implying, in advance, that they should be Federally enforceable. That does not mean that EPA might, in approving a permit program, conclude that some or all such provisions are Federally enforceable. Those additional requirements could be more stringent than Federal law and not be inconsistent with the Clean Air Act and at the same time, not Federally enforceable. However, in those instances where the Congress has said in the law that the provision, for example, section 510(b)(10), is a minimum element of the permitting program, the States could not eliminate that element or choose to ignore it. Indeed, I request the legal and policy basis for a different approach.

Section 70.6(b) states:

> All provisions in a Part 70 permit that are enforceable as a practical matter and are related to the purposes and provisions of the Act are presumed to be enforceable by the United States and citizens under the Act, regardless of whether they are more stringent than required by the Act or by EPA regulations; provided that

> where a State permitting authority specifically designates such more stringent provisions that it wishes not to make federally-enforceable, such provisions shall not be enforceable under the Act.

This provision is vague. What provisions are covered by this requirement? What do the words "as a practical matter mean"? What is the legal basis for presuming by regulation a provision to be "enforceable by the United States and citizens under the Act"? What is the legal basis for the provision?

Permit Application --

The provisions of section 70.5(b)(5) and (6) seem very broad and vague. They are almost a "blank check." Please explain their need and purpose.

The preamble observes that most States "have application forms" and some "are very comprehensive." EPA tells the States that a State "may use discretion in developing application forms that best meet program needs and administrative efficiency," but then the proposal goes on to enumerate so many "key elements", such as the above paragraphs, that it appears that the discretion afforded is hardly noticeable. Is that EPA's intention? What is left for the permitting authority?

Section 503(b) of the amended law states:

> (1) The regulations required by section 502(b) shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this Act. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.
>
> (2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

Section 70.5(b)(7) properly specifies that a permit application must include a "compliance plan." It then enumerates a list of six items to be in the plan. However, that list is apparently not exhaustive. Yet it is quite extensive. Item (iv) requires a "schedule of compliance" which is a defined term in the statute. However, the draft appears to expand on that statutory

definition by the addition of paragraphs (A) and (B) for sources "not in compliance" and for "sources in compliance." In fact, it appears that (A) and (B) are already covered by 70.5(b)(7) and (iii). Please explain the reasons for this detail in light of the specific language of the statute and please explain how this requirement will or will not affect the flexibility intended and provided by section 502(b)(10). I note that some believe it will unduly limit that flexibility. If you agree, what is the legal basis for doing it? If you disagree, please explain why. Also, please explain why a "source in compliance" is proposed to be required to go into the detail specified in "(B)," particularly in light of the definition in section 501(3) of the Act which states that it "means a schedule of remedial measures...leading to compliance" and does not refer to "maintenance." What is the legal basis for "(B)"?

Operational Flexibility --

The preamble recognizes that Congress, in sections 502(b)(6) and (10), wanted to be sure that the permit program would not adversely affect the operations of the permittee that must occur daily and even hourly for the permittee to stay in business and be successful. In section 502(b)(6), Congress emphasized the need for "adequate, streamlined, and reasonable" procedures for new permits, for renewals, and for revisions. These three words apply to the completeness determination, the public process, the processing of permit applications, and for "expeditious review" for permit actions. I am concerned that these draft regulations greatly ignore these three words. The regulations and procedures are not "stream-lined" and some believe they are not "reasonable" or "adequate."

Section 502(b)(10) provides:

> (10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 503(d) without requiring a permit revision, if the changes are not modifications under any provision of Title I and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions: Provided, that the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies. (Underlining supplied.)

Clearly, Congress by statute authorized "changes...without requiring a permit revision," subject to several specified conditions. One such condition is that the changes do not exceed Title I modifications. Another is that the changes do not exceed the "emissions allowable" under the permit. The third requires advance notice of at least 7 days.

The term "change" is not limited (except by the above conditions). As long as the contemplated change is carried out properly and complies with these conditions, it is authorized. This is the needed flexibility.

All of this seems to be properly recognized in section 70.6(d) (Flexible Source Operation) which spells out in some detail how the "permitting authority shall meet" the above requirements. It generally appears reasonable and consistent with the statute.

However, EPA has apparently devised what appears to be some additional requirements that seem quite complicated and difficult regarding so-called "minor" and "major" permit amendments (sections 70.7(e) and (f)). At the same time, the preamble seeks comments regarding further complicated approaches to so-called "flexibility."

Whether or not such provisions are needed or whether the regulations should be silent on the matter and the issue left to the States is a question that certainly needs to be considered and discussed. At the same time, I am uncertain about the legal basis for these provisions. Indeed, I think they tend to limit the statutory provision which is not proper. Please explain why these provisions are needed and how they help flexibility and why the matter should not be left to the permitting authority. Please also provide the legal basis for the provisions and explain the legal basis for section 70.7(f)(4).

Action on Application --

Please explain the purpose of section 70.7(a)(1)(i) and (iv). Is (i) triggered by the Administrator's objection under section 505 and section 70.7(a)(1)(ii)? Please explain.

Section 70.7(a)(4) requires the permitting authority to prepare a "fact sheet" for "every draft proposed permit." While that may be a nice idea, it hardly deserves to be a "minimum element" of permitting program under section 502(b). It seems to involve unnecessary paperwork and possible delay. Please explain its need and why it should be part of a regulation. At best, it belongs in the preamble.

Permit Modifications --

Section 70.7(d) is written as an exception to section 70.6(d) which is based on the statutory provision, section 502(b)(10). Please explain the legal basis for the exception, particularly in light of section 70.7(d)(3) which fails to mention the statutory provisions of section 502(b)(10).

Section 70.7(d)(1) seems quite broad and vague. For example, what does the term "change to the fundamental design" encompass?

Lastly, does a modification open up the entire permit? Please explain.

Reopening for Cause --

Section 502(b)(5)(D) requires that the permitting authority have "adequate authority to...terminate, modify, or revoke and reissue permits for cause." Section 502(b)(9) provides:

> (9) A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this Act after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this title regarding renewals.

It appears that section 70.7(g)(1)(i) is attempting to conform with section 502(b)(9). However, that section refers to revisions for "major sources," not all sources, and it refers to "standards and regulations promulgated under the Act after the issuance of such permit," not "requirements under the Act." Also, the draft fails to incorporate the last two sentences of section 502(b)(9). Please explain the legal basis for section 70.7(g), particularly paragraphs (1) through (3), including clauses (ii), (iii), and (iv).

Standard Permit Requirements and Compliance Determination --

The draft (sections 70.6(a) and 70.6(c)) contains very detailed provisions as "standard permit requirements" and "compliance determinations." They seem overly detailed and

burdensome for the permitting authority and for the permittee. Many seem to exceed greatly statutory requirements. Some of the requirements impose on the permittee reporting and other duties, but the draft fails to explain what the permitting authority is to do with these reports, etc. I fear they will grow dust. Please identify the statutory basis for each of the paragraphs in these sections, particularly paragraphs (5) and (6) of section 70.6(a) and all the clauses therein. Please explain the need for paragraphs (3)(i), (ii), and (vii). There seems to be considerable redundancy and they are overly detailed. Please explain what is an "upset" in section 70.6(3)(iii) and the legal basis for that provision and also clause (v) of that section.

Fee Determination --

The statute makes it clear that fees are collected to support the permit program, not the entire air pollution control program of the permitting authority from the date the permit program is approved, not for permits issued by the State prior to that approval or prior to enactment of the 1990 amendments to the Act. The provisions of section 70.9(a)(3) and 70.9(b)(ii) are not consistent with this statutory requirement. Please explain the legal basis for these provisions.

Public Availability of Records --

The preamble states:

> Title V places considerable emphasis upon providing public access to permit information. Section 502(b)(8) requires that the permitting authority make available to the public any permit application, compliance plan, permit, and monitoring or compliance report, subject to the provisions of section 114(c). (The EPA notes that section 114(c) governs information to be provided to EPA, not to a State, and thus the provision does not truly apply where the State is the permitting authority. The Agency interprets Congress's reference to section 114(c) as authorizing the States to use the same, or substantially similar, confidentiality criteria -- otherwise the reference would be meaningless, except where EPA is the permitting authority. The EPA solicits comment on this interpretation.)

I disagree with the parenthetical comment by the EPA. Section 502(b) specifies for the "permitting authority" as defined in the title "minimum elements" of an approvable permit program in a manner similar to the requirements imposed on States under section 110 of the Act regarding State implementation plans. One of the elements in section 502(b)(8) makes it clear that section 114(c) is

to apply to the permitting agency. Congress knew what it was doing. The reference is not "meaningless." Section 114(c) is a condition for approval in the same manner and to the same extent as section 110(a)(2) of the Act prior to the new amendments. The States must have such a provision to gain approval. If you disagree, please explain the legal basis for that disagreement.

Opportunity for a Hearing --

The preamble states:

> The EPA believes the requirement in Title V for an opportunity for a public hearing can be implemented in an informal manner and is not requiring States in its proposed rules to provide a full "trial-type" hearing with a verbatim transcript and opportunity for cross-examination. The Agency proposes that a public hearing for purposes of Title V be an open meeting for concerned parties to express their concerns. A summary of comments received should be placed in the public record.
>
> The EPA also solicits comment as to the degree of discretion that State agencies should have to condition the opportunity for a hearing upon certain reasonable criteria. These might include the relevance of the issues presented by the requesters, and whether factual issues (in contrast to issues of law) are presented. The granting of a request for a hearing might also be linked to the quality of information provided by the requester to support the request, e.g., whether the request reflects comments of sufficient technical (or, possibly, legal) scope such as would benefit from the opportunities for more complete presentation and exchange of ideas afforded by the public hearing process.

I do not believe this discussion, particularly the second paragraph, is in accord with section 502(b)(6) of the Act. Please explain the legal basis for these comments or suggestions.

Requirement for Enforcement Authority

As to State permit programs, section 70.11 provides several enforcement requirements. Section 502(b)(5) requires that the permit authority have "adequate authority to...enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties." Section 70.11(a)(3)(i) appears to be consistent with that provision. However, what is the basis for EPA prescribing the State's "appropriate criminal penalties" in clauses (ii) and (iii)? What is the legal basis for the "Note" in clause (ii)? What is the basis for the "Note" under clause (iii)?

Please also explain the basis for 70.11(b) and (c), particularly the reference to "burden of proof," "degree of knowledge," and "intent" and the accompanying note. I am not aware of any discussion by the Administration when H.R. 3030 was submitted to Congress or by the Congress that there was an intention by section 502(b)(5) to have EPA establish by rule such requirements under State law. Section 502(b)(5)(E) was not changed by the Congress from the version proposed by the President and the Presidential submittal is silent on this provision (see H.Doc. 101-87, July 24, 1989). This seems to be a fairly broad intrusion into State enforcement matters. Will it require changes in State law? This, and other provisions of this section that seem to go Beyond the statutory requirements (as well as other provisions of the proposed rule) raise the issue of the extent to which such additional EPA requirements that are not based on the statute will, if not met by a State or not adequately met by a State, result in disapproval in whole or in part of a permit program. The statue provides for approval "to the extent that the program meets the requirements of this Act, including the regulations issued under subsection (b)." The draft proposal does not indicate what criteria EPA will follow regarding approvals for matters that are covered, not by the Act, but by the regulations. I request your comments.

The note and the numbered items under section 70.11(c), if appropriate, would appear to belong in the preamble not the rule. Please provide the legal and policy basis for the note and the "highly recommended" enforcement "options."

Incidentally, to what extent is EPA engaged directly or by contract in preparing model regulations for the States? Please explain that effort, if any, and the extent of participation and cost. Also, explain why it is needed.

Permit Transfer --

Section 70.7(i) provides:

> This permit is not transferable to any person except after notice to the permitting authority. The permitting authority may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act.

The first sentence seems reasonable. The second seems overly harsh and draconian for a "change" in the "name of the permittee." Firms would certainly be reluctant to change their name under that circumstance. It could also curtail sale of a firm and might

affect "takeovers." I note that several years ago U.S. Steel changed its name. If this permit provisions had been in effect, what would have been the effect for all its facilities? Please explain the need for this sentence and the legal basis for it. Is there some possible pollution control reason for this sentence that the Subcommittee does not understand, because, if so, it is not apparently obvious?

703-549-2588

LIST OF PRIORITY ISSUES UNDER MARCH 22, 1991,
DRAFT PART 70 PERMIT RULES

After a careful review of EPA's latest revisions to the draft Title V rules, [redacted] discovered that virtually none of its February 28, 1991, comments, except on calculating permit fees, were addressed by EPA. Therefore, [redacted] resubmits its comments again in an updated, expanded letter attached to this memorandum.

For convenience, [redacted] outlines below the most important two issues for the pharmaceutical industry under EPA's draft rules. Without resolution of these two issues, EPA's rules will severely impact the ability of pharmaceutical companies to timely manufacture lifesaving, cost-effective drugs in response to changing demands by hospitals, patients and physicians; and, in many cases, plantsite changes that will decrease pollutant loadings to the atmosphere will be delayed to the environment's detriment while a permit revision is processed. Thus, unless EPA focuses on solving the concerns listed below, EPA, the public, and the environment, as well as industry, will be affected quite negatively by Title V. For example, each day of delay for a new drug means one more day of delay for a person afflicted with a disease in need of a cure. Each day of delay for a project causing a reduction in previously allowed emissions means unnecessary loadings of tons of pollutants to the atmosphere.

1. OPERATIONAL FLEXIBILITY

Congress in Section 502(b)(10) of Title V requires EPA to create a program whereby sources can implement changes at the plantsite without first amending the permit as long as (a) seven-day notice of the change to the local agency is provided, (b) the change will not cause an exceedance in "allowable" emissions, and (c) the change will not be a Title I modification (i.e. invoke other federal air permit programs like PSD or NSPS). For the vast majority of U.S. industries that manufacture products from dedicated equipment, EPA's rules may work. However, these same rules do not work if blindly applied to batch processors.

a. EPA unnecessarily limits the flexibility granted by Congress to only "anticipated" changes in manufacturing.

EPA's rules require the states to issue permits that define all possible operating scenarios in advance, and these rules do not allow sources or the states to apply the Congressionally-mandated §502(b)(10) flexibility to unforeseen changes in manufacturing that occur during the life of the permit. For reasons outlined in [illegible] attached comments, the pharmaceutical industry's very existence and ability to deliver drugs is contingent on making quick changes due to unpredicted circumstances, such as, process/product improvements discovered only from production experiences, epidemics or changed patient demands for drugs, new drugs coming on-line after issuance of plantwide operating permit, FDA policy changes, differing research needs, problems implementing pilot plant scaleup from blueprints, and production equipment scheduling conflicts. The simple fact is the pharmaceutical industry cannot predict at permit issuance its production needs over the five-year life of EPA's permit. In fact, it is unclear how EPA is being flexible for changes if its rules require all changes to be anticipated and previously accounted for.

b. EPA must define §502(b)(10) "changes" explicitly to include construction or, at least, to allow the states this ability.

Congress did not define what "changes" it allows flexibility for in permitting; EPA acts likewise. In other air programs, EPA considers changes to be physical as well as procedural. If operational flexibility is limited to procedural changes only, then EPA will address changes that are extremely narrow in range. In essence, only changes in raw materials or solvents or changes in procedures, such as number of boilouts, will be affected. By far, most pharmaceutical plantsite production changes involve some physical aspect or construction, such as routine substitution of equipment, adding control equipment (or improved controls), debottlenecking, repiping due to equipment rescheduling, or adding computers to improve efficiency. If EPA does not address this explicitly, then flexibility for plantsite changes will be nearly nonexistent.[1]

[1] [**Note:** EPA's new source review (NSR) prohibition against construction without formal permit revision will not be affected by this proposal because NSR does not apply to non-Title I modifications under the §502(b)(10) operational flexibility created by Congress.]

c. Operating permits must be based on emission limits defined plantwide per pollutant.

As seen, the §502(b)(10) ability to make changes without first updating the permit is limited to changes not exceeding what is allowed already in an enforceable restriction. The only way to give real meaning to this procedure is to link "allowable" to a plantwide limit, not an individual source-specific limit. That is, the plant would have one overall VOC limit, one overall $MeCl_2$ limit, etc. By doing this, EPA would allow sources to unilaterally increase emissions for one project by simultaneously and equally decreasing emissions from a different project. If the permit's "allowable" limits are defined by individual emitting units, then §502(b)(10) flexibility will not exist, at least for this example. Nonetheless, "allowable" should be explicitly defined in the proposed rules.

d. The minor permit amendment concept is supported but should be expanded.

EPA presently allows for unilateral changes over "allowable" emissions (with some advance notice) as long as (1) the change is individually not more than 10 tpy (or other "de minimis" levels), (2) the change involves only existing equipment, and (3) the total changes during the life of the permit do not aggregate over 10 tpy (or other "de minimis" levels). Although this proposal by EPA is applauded, it still remains too stringent and will result in the negative impacts to the public and environment alluded to earlier. The minor permit amendment procedures should apply to new as well as existing equipment changes, should drop the 10 tpy trigger and expand up to Title I modifications, and should not aggregate separate changes unless the same project is involved.

2. PERMIT CONTENT AND SUBSEQUENT ENFORCEABILITY

EPA's draft rules on what must be included in state operating permits go far beyond what Congress contemplated. First, EPA requires overly detailed compliance plans for sources already in compliance. This would subject sources to enforcement actions or penalties for failure to achieve a compliance milestone even if no violation of a permit emissions limit occurred.

Second, EPA requires "all" emissions sources, however small, to be identified and included in the permit with enforceable restrictions. Such a rule would appear to establish emission limitations of "de minimis" sources that are not now regulated by states in attainment areas.

Third, EPA appears to require "all" emissions sources to be sampled or measured physically for compliance. This creates problems for those pollutants, such as inhalable particulate, for which no acceptable monitoring has been developed yet. Furthermore, there are reliable ways to confirm compliance other than testing, such as mass balance calculations or use of emission factors. EPA already in existing guidance and rules embraces these two other means for determining pollutant loadings. This flexibility in compliance should be addressed in EPA's draft rules.

5

6/17/62

23/01/9

3/5/68

DATE: March 27, 1991

TO: Kate Fay, Environmental Protection Agency

FROM: Kevin Bromberg, Small Business Administration

SUBJECT: Major Remaining Issues Regarding Draft Proposal for Clean Air Permits (Title V Regulations)

As requested, I am placing in writing our major comments that we request be addressed in either the text of the rule or preamble language. This memorandum updates and modifies our previous March 13 memorandum on permits.

I. Exemptions

Upon further reflection, we believe that EPA should propose exemptions for wood stoves, asbestos demolition sites and certain types of fuel combustion sources (e.g. residential boilers) named by EPA. It is "impracticable, infeasible or unnecessarily burdensome" (the legal basis for an exemption) to include such sources as a Federal minimum for state permit programs. What purpose is served by tens or hundreds of thousands of asbestos demolition permits? What will be reviewed by the permit writer? What specific requirements would the permit add to the asbestos demolition standard itself?

EPA should include a well-reasoned one- or two-paragraph rationale for these and possibly other exemptions, and include the exemptions in the proposal. At a minimum, such a proposal will aid EPA in determining when exemptions are appropriate for these and other future categories, which EPA must address in the future.

Title V

II. General Permit Language

It is clear that the specific language that defines the content of the individual permit, which encompasses pages 32 to 36 of the draft proposal, should not determine the content of the general permit or the general permit application. For example, a dry cleaner need only specify its name and address, the model and vendor of its equipment, and some other general information about its operation. It need not provide process diagrams, legal citations, or information about methods of determining compliance. It need only follow the operating instructions with the equipment, and keep appropriate books and records. In a real sense, the "permit" could be a larger document that is incorporated by reference by all dry cleaners, and the application could be by postcard.

Therefore, the rule language appearing on pages 32 to 36 should not be applied to the general permit. That language should be reserved until EPA completes several model general permits in order to learn more about the desired content of such a permit. Further, EPA should specifically solicit suggested language for this provision. Incidentally, we are very pleased that Bill Harnett has informed us that EPA intends to pursue these model general permits in the near future.

III. Regulatory Flexibility/ Paperwork

As explained in the March 13 memorandum, EPA should eliminate the language about the certification of no significant impact under regulatory flexibility, and revise the regulatory analyses in accordance with the memorandum. Also, the paperwork analysis language should be revised in conformity with the OMB procedure, and more realistic alternatives should be addressed in the paperwork analysis.

IV. De Minimis

Please address the de minimis point raised on the third page of the March 13 memorandum. Without a cut-off analogous to SARA Section 313, the "applicability"

review will include many de minimis emissions that will detract from important permitting activities.

I hope these points are fairly straight forward, and each deserves incorporation into the proposal. Again, I commend EPA on its tremendous effort and look forward to working with you.

cc: Mike Trutna, OAQPS
Bill Harnett, OAQPS
Teresa Gorman, Domestic Policy Council
Troy Hillier, OMB
Ed Watts, OMB

~~Ty~~ Isn't Gene going to be on a leave of absence from Sidley + Austin?

Teresa
Call mclane - 214-5757

Rob

Jeff - We just finished a good session w/ Bob Grady + Ed Watts. Hope this helps you - when can we get together?
Rob

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← Photocopy of reverse side of attached business card.

Photocopy from George Bush Presidential Library

NEDA
National Environmental Development Association
A Coalition of Organized Labor, Agriculture and Industry

M E M O R A N D U M

DATE: March 27, 1991

TO: Jeff Holmstead
Associate Counsel to the President

FROM: Rob Wilkins
NEDA/CARP Project Director

SUBJECT: EPA 4th Draft of Permits Rule

Fundamentally, the problem here is the starting point. There is no doubt that each draft has shown some progress in recognizing our issues and addressing some aspects of the problems. However, the first draft was so far astray and deviated so much from the statute that it was going to take giant strides to arrive at a workable and economically efficient process. In order to "cure" the myriad of problems that still exist, a major rewrite is necessary. We can provide for you a more detailed list of our major issues, problems that must be resolved if the Administration wants to avoid tremendous problems in the industrial sector and has a genuine interest and commitment to making the law work.

If the the Bush Administration wants to make the law work by having sources work within the law rather than achieve attainment as a result of sources shutting down and manufacturing moving offshore, then some modicum of sensitivity to the ability of sources to operate efficiently and competitively must be restored to the discussions surrounding these drafts and reflected in the proposed rulemaking. Also, the underlying test must be changed from us and you having to justify why something should be deleted to EPA having to justify what in the law requires that an item be included in this regulation.

This rulemaking is supposed to establish "the minimum elements of a permit program to be administered by any air pollution control agency." Section 502(b). The statute enumerates ten elements that shall be included and goes into some detail beyond listing the ten elements. Some other provisions in Title V provide more detail on the ten elements. This is all that the law requires EPA to promulgate by November 15 of this year.

EPA has not limited itself to fulfilling the dictates of the law. Instead, EPA has put together a series of draft regulations that attempt to address every issue -- some of which Agency staffers have been pursuing for years -- related to permits and permit programs that EPA envisions. We don't disagree with every one of those ideas; however, the proposed regulation is so cluttered that it is difficult to focus on and address adequately all the very important issues that must be addressed in this rulemaking. At this point I would note that were EPA to divorce the ten minimum elements from the rest of this proposal, there is nothing that would prohibit that broader proposal from moving ahead with all deliberate speed while being able to give those issues the serious consideration and scrutiny that they deserve.

ISSUES NOT RESOLVED FROM 3rd DRAFT:

Operational flexibility -- absolutely no change of the substance from the 3rd draft. EPA still wants to impose federal limitations on operational changes by mandating permit reissuance at thresholds lower than those established in the statute. As Chairman Dingell noted in his letter of March 15 to Bill Reilly, just because the statute is silent certainly does not mandate that EPA regulate; rather, where the statute is silent, and pursuant to section 506(a), the states may establish additional permitting requirements that they deem appropriate and necessary to fulfill their obligations under the law. The regulation can and should be silent or minimal in addressing this matter.

The proposed EPA regulation of "major amendments" should be stricken and replaced (if it is absolutely necessary to say anything) with a simple statement that changes within the range above allowables but below triggers for new controls or new source review may be regulated by the permitting authorities as is necessary to address any attainment problems they face.

Compliance plans -- actually regresses from 3rd draft. Section 503(b)(1) requires the applicant to "submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this Act. The compliance plan shall include a schedule of compliance and a schedule under which the permittee shall submit progress reports ..." Somehow, EPA has interpreted this provision to require much greater detail than a statement from a source in compliance that it intends to continue operations within compliance levels and a recognition of any changes in emissions permissible to be in compliance status. The additional requirements found on Preamble p. 106 are extraordinarily detailed and in some instances highly speculative. Finally, Reg. @70.5(b)(7)(iv)(B) requires an "enforceable

sequence of actions with deadlines designed to maintain current compliance" which implies that EPA wants to be able to sue a source for missing a compliance schedule milestone even if the source is in compliance with emissions requirements and manages to "catch up" and meet the deadline for the new emissions standard.

As a <u>minimum elements rule</u>, we believe that this regulation should require no more than the minimum required by the law -- a schedule of compliance and a schedule for progress reports. Anything more should beup to the permitting authority as it finds necessary to help the authority maintain attainment or bring the jurisdication into attainment. Also, the fact that a source is in compliance and continues in compliance as new emissions standards become applicable should be an absolute defense to any enforcement proceedings arising from missed compliance schedule dates.

Definition of "source" -- EPA continues to choose the "potential to emit" for computation of source size (Preamble p. 62). By selecting "potential to emit," EPA does not allow consideration of pollution control equipment (as was found to be correct in <u>Alabama Power</u> case), essentially redefining "source" for purposes of determining what equipment or processes are subject to Title V requirements. Also, sources who operate far below their potential to emit for any number of reasons (nature of the business or industry, number of shifts operated per day, or number of days per week of operation) will be forced either to be permitted or enter into the contract scheme EPA proposes for comment (Preamble p. 63) though it is not clear who is or how one becomes eligible for that scheme and the accompanying bureaucratic burdens it imposes.

1st 3 or 4 digits of SIC code

contracting scheme

The definition of source should remain constant throughout the regulations implementing the statute. For many sources there is more than ample historical data to support claims that those sources operate at certain levels and produce emissions substantially lower than their potential to emit. If a source has emissions or emission levels that subject it to the provisions of Title V and the source fails to obtain a permit it is in violation of the law and there are significant criminal and civil penalties for such violations.

SIP/Permit redundancy -- no significant change from the 3rd draft in addressing this prospectively huge problem that the Agency continues to basically punt in the 4th draft. As EPA notes in its Implementation Principle D (Preamble p. 14), and discusses further in Statement of Program Goals (Preamble p. 56), the SIP

and the permit have differing purposes: the permit to set source specific regulatory requirements and source compliance obligations all out in one document; the SIP to be the mechanism for demonstrating attainment and maintenance of NAAQS.

There are several avenues EPA could take to resolve this problem, but the one thing that is clear is that EPA must address this issue and should be addressing it rather than insisting on debating dozens of other non-mandated issues. Two possible solutions would include the suspension of all source specific provisions in SIPs for a period of time after the issuance of the first permits while analysts ascertain where problem areas could exist, or the issuance of a uniform SIP that would replace current SIPs though the permitting authorities could have some expedited procedure for integrating provisions of the existing SIP into the new one.
period

40+ States already have state permit plans in their SIPs

CONCLUSION:

At this point, after twelve weeks of participation in EPA's roundtable discussion process and four drafts of the proposed rule, there are still great strides that would have to take place for this rule to be workable and consistent with the letter and intent of the permits title in the law. The recommendation we feel may be most productive at this point is that the Administration with help from whatever external groups may be helpful should reexamine the regulation in light of section 502(b) and produce a true minimum elements rule for immediate proposal. The other issues related to the permit process and programs could then be packaged in a second rulemaking on permits. Of course, we would be willing to provide whatever help we could to this process and in fact we have already begun of trying to redevelop the instant package into a workable minimum elements rule.

(NEDA):CA2375LMM

EPA assumes that existing SIPs will stay in effect

Model national SIP w/ expedited review for putting current provision into model

OFFICE OF GENERAL COUNSEL
AIR & RADIATION DIVISION (LE-132A)

US ENVIRONMENTAL PROTECTION AGENCY
[redacted]
WASHINGTON, DC 20460

EPA

FACSIMILE REQUEST AND COVER SHEET

PLEASE PRINT IN BLACK INK ONLY

TO: Art Fraas

OFFICE/PHONE:

REGION/LAB:

FROM: Alan Echert

PHONE:

MAIL CODE: LE-132A

OFFICE: Office of General Counsel
Air & Radiation Division

DATE: 4/5/91

NUMBER OF PAGES TO INCLUDE THIS COVER SHEET: 4 w/cover

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[redacted]

EPA Form 5040-5 (Rev. 12-83) Replaces EPA Form 5040-5A and the previous edition of EPA Form 5040-5, which are obsolete.

April 5, 1991

NOTE FOR JEFF HOLMSTEAD

At Don Elliott's request, I am transmitting two documents:

(1) the final EPA-OGC Paper on permit-related legal issues; and

(2) OAR's policy position on the permit shield.

Alan Eckert

EPA-OGC April 5, 1991 (Final Version)

Definition of "major source" -- The "source" for title V purposes is determined by first aggregating all pollutant-emitting facilities within the same SIC code that are collocated and under common ownership. Whether the source is a "major source" is then determined by summing emissions of individual criteria pollutants or hazardous air pollutants from all such facilities. If for any pollutant (or any combination of hazardous air pollutants) the total emissions exceed the major source threshold, the source is a major source. EPA has authority to exempt any non-major source from the requirement to obtain a permit, or to defer that requirements, as the draft currently proposes. EPA may not defer or exempt major sources.

Scope of permit -- If a source is required to obtain a permit, the permit must include all "applicable requirements." These include the approved SIP requirements that implement the relevant requirements of the Clean Air Act, and any applicable federal standards or regulations. However, the permit is not required to include emission limitations or other conditions for any portion of the source (including emission points that are included within the source but do not emit the pollutants for which the source is major) unless such limitations or conditions are required by applicable federal standards and regulations (such as new source performance standards or MACT requirements), or approved SIP requirements that implement the relevant requirements of the Act.

Operational flexibility for more stringent state limits -- In developing their permit programs, states have legal authority, but are not required, to include in their permits emissions limitations more stringent than required by federal law. With respect to any such limitations, the states may also include in the permit a provision authorizing permitted sources to deviate from the specific limitation set forth in the permit. Of course, adequate substantive and procedural requirements must be included to assure that the permit complies with federal law.

Scope of the permit shield -- The permit shield in EPA's current draft regulations extends not only to regulations or standards in existence at the time the permit was issued, but also to regulations promulgated after the permit was issued. DOE urges that EPA extend the shield to operational changes made after the permit was issued that could subject the permittee to standards or regulations not reflected in the permit.

EPA's proposed interpretation is not compelled as a matter of law. Other interpretations (including making the scope of the shield coterminous with the scope of the permit) are permissible.

Attachment

EPA's policy position on this matter is that emissions from such operational changes should not be shielded, and thus be left entirely uncontrolled for the remainder of the permit term. EPA believes that this approach is clearly more consistent with the purposes of the Act, which contemplates that some operations enjoying shield protection must also be a product of the permitting process; specifically that the permitting authority must have adequate time to review the proposed operational change and issue the permit, and that EPA and the interested public have an opportunity to review and comment on the changes.

EPA-OGC April 5, 1991 (Final Version)

Definition of "major source" -- The "source" for title V purposes is determined by first aggregating all pollutant-emitting facilities within the same SIC code that are collocated and under common ownership. Whether the source is a "major source" is then determined by summing emissions of individual criteria pollutants or hazardous air pollutants from all such facilities. If for any pollutant (or any combination of hazardous air pollutants) the total emissions exceed the major source threshold, the source is a major source. EPA has authority to exempt any non-major source from the requirement to obtain a permit, or to defer that requirements, as the draft currently proposes. EPA may not defer or exempt major sources.

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EPA's proposed interpretation is not compelled as a matter of law. Other interpretations (including making the scope of the shield coterminous with the scope of the permit) are permissible.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION
of the United States, Inc.

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TLX NO. 706211 AUTOMAKERS WSH UD • FAX NO. 202-775-2710

Thomas K. Kmiec
President & Chief Executive Officer

March 28, 1991

Mr. William G. Rosenberg
Assistant Administrator for
Air and Radiation
U.S. Environmental Protection Agency
401 M Street, S.W.
Room 937 West Tower, Mail Code ANR-443
Washington, D.C. 20460

Dear Mr. Rosenberg:

The Motor Vehicle Manufacturers Association of the United States, Inc. (MVMA) has actively participated in the continuing evolution of the Agency's proposed operating permit rule. Sharing the sentiment expressed by other industry representatives, we endorse the Roundtable process as conducive to issues identification and, in some cases, consensus building. In this regard, we particularly commend Ms. Kathleen Fay, Mr. Michael Trutna and Mr. Alan Eckert, of EPA staff, for their considerable efforts.

While the March 21 draft rule is an improvement, in some respects, over the February 9 version, it does not respond adequately to all of the concerns MVMA raised. Attached for your consideration is a summary addressing a number of these concerns, along with proposed solutions. We plan to submit detailed comments during the rulemaking process.

In crafting the operating permit program, EPA seems to have lost sight of the clear path created by the 1990 Clean Air Act Amendments. Section 504 envisions permit requirements and conditions falling into three broad categories:

WHAT - Emissions limitations and standards, Sec. 504(a)

WHEN - Schedule of compliance, if applicable, Sec. 504(a)

ACCOUNTABILITY - Monitoring and analysis, Sec. 504(b)

Inspection, entry, monitoring, certification and reporting, Sec. 504(c)

While Congress clearly chose to stop short of mandating inclusion of the "HOW" into operating permit requirements, the latest draft rule does not. MVMA members must retain the latitude to implement incremental improvements in day-to-day manufacturing operations. Otherwise, the very real consequence will be the widespread stifling of innovation in the manufacturing environment. American industry's ability to compete in world markets is threatened by proposed provisions which are extraneous to the mandate of 1990 Amendments.

Sincerely,

Thomas J. Carr

Thomas J. Carr
Vice President, Technical Affairs

TJC/srd
Attachment

March 28, 1991

MVMA PROBLEMS AND SOLUTIONS

Below are some of the major issues that MVMA believes need to be addressed by EPA before proposing the Title V permit regulations. These comments are not exhaustive but simply pick up and expand upon the most important issues covered in MVMA's February 26, 1991 and March 8, 1991 letters to Mr. Michael Trutna of EPA as well as points MVMA has raised at the roundtable and related discussions. MVMA will, of course, file formal detailed comments on the proposal. However, it is hoped that the problems identified here will be resolved prior to proposal.

Program Goals

Problem #1: On page 13 of the preamble EPA lists "Environmental Protection" as Congress' basic goal in adopting Title V. This goal, however, must be viewed in light of section 101(b)(1) of the existing Act, which identifies a second basic goal -- promotion of the Nation's productive capacity.

Solution: EPA should state that Title V has two basic goals: (1) protection of the environment and (2) promotion of the Nation's productive capacity and the competitiveness of American industry. Paragraph "A." on page 13 of the preamble should be entitled "Ensure Environmental Protection and Promote the Nation's Productive Capacity." The additional goals of the program listed on pages 13 through 17 of the preamble should augment the two basic goals listed above. As noted below, EPA should minimize unnecessary regulations which undermine industry's productivity and ability to compete in the world marketplace.

Minimal Elements

Problem #2: EPA does not make good on its promise on page 10 of the March 21, 1991 draft preamble: "The Part 70 regulations have been designed to minimize the disruption to current state efforts by offering as much flexibility as is provided by the law, while ensuring that existing (and new) state programs will meet the requirements of the Act." The draft regulations go far beyond the statutory mandate of § 502 providing that the Agency shall establish the minimum elements of a permitting program virtually eliminating any flexibility provided by the law. The following requirements are just a few examples of EPA's overreaching: maintenance plans; on-site operation procedure information; modifications that are greater than allowables but less than Title I thresholds; and incorporation of additional state substantive requirements into federal Title V. Going beyond the mandated minimum will not achieve further environmental benefits

but will serve to exacerbate the complexity of the permit program for both the states and industry as well as the competitive disadvantage that such provisions would evoke compared to foreign manufacturers not subject to as stringent requirements.

Solution: EPA should delete provisions which are overreaching and go beyond the minimum elements specified in the statute.

Applications, Compliance Plans, and Permits

Problem #3: The draft requires sources that are in compliance to submit compliance plans, compliance schedules, and semi-annual progress reports. Under the guise of a compliance plan and schedule, the draft regulations would require sources that are currently in compliance with all requirements of the Act to submit what are in fact maintenance plans. There is no statutory basis for requiring an operation or maintenance plan for sources or control equipment. EPA states in the preamble that § 501(3) defines a schedule of compliance as remedial measures leading to and maintaining compliance. (Preamble, p. 109). This is incorrect as § 501(3) does not refer to maintenance in defining a compliance schedule. With regard to progress reports, it seems clear that a source complying with the Act does not need to make progress as it has already reached its destination. This is covered by the compliance certification requirement. EPA should avoid requiring the filing of documents that are duplicative, burdensome, and not required by the statute.

The draft requires too much complexity in compliance plans. As noted above, EPA would require a great amount of detail in both applications and compliance plans including operation and maintenance procedures. Congress did not intend this level of detail to be required particularly in compliance plans.

Solution: Compliance plans should only be required of sources that are not in compliance or that will become subject to future standards (such as a MACT standard) during the permit term. To the extent that compliance schedules are required of sources in compliance, they should be made as simple as possible. A statement that a source will continue to meet the requirements of the Act should be sufficient. Congress has indicated its support for this type of compliance schedule in § 408(b) of Title IV. In § 408(b), Congress addressed the requirements for acid rain compliance plans. This section provides that a statement by the owner or operator that the source will meet the applicable requirements of the Act shall be deemed to satisfy the proposed and approved compliance planning requirements of Title IV and Title V. This statement demonstrates the linkage between Title IV and Title V compliance plans and indicates that Congress did not envision the onerous system that EPA has proposed.

Accordingly, maintenance plans should not be required. In addition, progress reports should be eliminated for sources that are in compliance with applicable requirements of the Act. There is simply no need for progress reports if a source is in compliance. In sum, the preamble and the regulations need to be completely reworked in this area.

Problem #4: The current draft would allow compliance plans and applications to be incorporated into permits. Allowing incorporation of these documents creates a vast potential for disabling American industry from competing in the marketplace. Applications will contain an array of information including identification and description of all emission points, emissions rates, fuels and fuel use, identification of air pollution control equipment, emissions related operation procedures, and work practice implementation. If this information is incorporated into the federally-enforceable permit, it will become binding on the source. Any change in operating procedures will require at least a minor permit amendment, even if it has no impact whatsoever on emission compliance. Changing a valve could well require 7 days notice. Sources simply cannot operate under such a scheme and compete in today's marketplace.

Applications should be viewed as necessary background for a final permit but not as a menagerie of absolute permit conditions. Projections or estimates contained in an application, albeit based on an engineer's best professional judgment, can become outdated and should be irrelevant so long as the permit emission limits are being met.

Solution: While EPA states on page 129 of the preamble that the Agency does not support the incorporation of applications into permits but encourages the permitting authority to perform a thoughtful analysis of the available information to determine which details of the application are necessary for incorporation into the permit, the regulations should clearly preclude incorporation by reference and require detailed explanation when significant portions are to be included.

Problem #5: Although the preamble states at page 106 that the compliance plan need not have great detail, it requires instead that detailed plans be kept on site at the source. There is no statutory basis for requiring these plans and no purpose served by keeping them on site.

Solution: Delete the requirement for "on site plans".

Operational Flexibility

Problem #6: EPA states in the preamble that it recognizes the importance of operational flexibility, yet the draft regulations provide little flexibility to industry. Congress intended that EPA and the states be given broad discretion to address modifications to sources short of Title I modifications. See §§ 502(b)(6) and 112(g)(3). This is why the statute

contemplates reasonable procedures (but not necessarily those applicable to a permit revision) for incorporating such changes into a permit. The provision for administrative and minor permit amendments is in general a workable one, but the category of minor permit amendments is far too narrow. It does not provide sufficient flexibility for industry to respond to the rapidly changing conditions of the marketplace. The ten ton per year and 40% thresholds are too low to allow companies to respond to market opportunities. In addition, the time for approval of minor permit amendments will prevent companies from taking advantage of opportunities that require quick action. Prevention of such timely action leads directly to competitive disadvantage.

Solution: The minor permit amendments category should be expanded. Minor permit amendments should include all operational changes which do not trigger Title I modification procedures. In addition, sources should be allowed to implement proposed amendments more quickly than the current scheme allows.

Federal Enforceability

Problem #7: Section 70.6(b) of the draft regulations improperly directs that all enforceable provisions in a Part 70 permit "related to the purposes and provisions of the Act" are presumed enforceable by the United States and citizens under the Act. Moreover, § 70.6(b) also improperly vests states with the discretion to determine which requirements will be federally enforceable.

Solution: Under section 505(b), EPA's charge in reviewing Title V permits is to ensure that the provisions of each permit are in compliance with the applicable requirements of the Act. It follows, therefore, that EPA's enforcement authority should be limited to applicable requirements of the Act as that term is defined in § 70.2(g) of the draft regulations.

Definition of Regulated Pollutant

Problem #8: EPA's current draft defines a regulated pollutant in terms of the date on which a standard is first promulgated that addresses that pollutant. § 70.2(aa)(3). EPA has solicited comment on the appropriateness of this definition.

Solution: EPA should define regulated pollutant in terms of the date that a MACT standard for that pollutant first becomes applicable to the permitted source. For sources that are not regulated for any other pollutant, it would serve no purpose to require a permit for the source prior to the date when the source needed to meet an emission limitation. Additionally, monitoring and reporting data collected after the date a standard

is promulgated but before the effective date of the standard would contribute little more than substantial paperwork to the permit process.

Reporting of Violations

Problem #9: Section 70.6(a)(3)(iii) states that the permit shall require prompt reporting of violations including upsets as defined in the permit. Sources should not be put in the position of making the legal conclusion that they have violated their permits. Section 503(a)(2) of the Amendments states that sources must "promptly report any deviations from permit requirements to the permitting authority."

Deleted audits. Did not "void

Solution: Change the wording of § 70.6(a)(3)(iii) to require reporting of "deviations from permit requirements."

Permit Shield

Problem #10: EPA encourages states to limit applicability of the permit shield. On pages 175-76 of the preamble, EPA notes that states may limit the applicability of the shield even where EPA has not chosen to limit it. Because § 504 makes the permit shield discretionary with the states, the only apparent reason for pointing this out would be to encourage the exercise of state discretion to further circumscribe the situations in which it will apply. This is unnecessary and is contrary to EPA's statement that it is taking broad view of the shield in the regulations.

Solution: Delete the statements that encourage states to limit the applicability of the shield.

Enforcement

Problem #11: EPA provides in the § 70.11(a)(1) that state programs must contain a provision to restrain immediately any violation of a permit. In the 3/21/91 draft, EPA deleted the limiting phrase "which is endangering or causing damage to public health or the environment." EPA should not seek to restrain "violations" that have no harmful effect. Equitable relief is an extraordinary remedy, and while it is doubtful that a state could obtain a temporary restraining order or an injunction for any violation of a permit, EPA should not create meaningless requirements. In addition, this is another case where EPA has gone far beyond the statutory minimum. Section 502(b)(5)(B) states that the regulations must contain a requirement that the permitting authority have adequate authority to enforce permits ... including authority to recover civil penalties ... and provide

appropriate criminal penalties. Nothing in § 502 requires that a permitting authority have authority to restrain any violation of a permit.

Solution: EPA should either delete § 70.11(a)(1) in its entirety or should reinstitute the requirement that a violation present a danger to human health or the environment.

Problem #12: In § 70.11 of the draft regulations, EPA provides a list of enforcement options for the states that are not "mandatory" but are "highly recommended." EPA should not encourage the states to go beyond the requirements of the statute. EPA should set out a minimum elements program and no more, as discussed above in Problems #1 and #2.

Solution: EPA should delete these recommended enforcement options and should, in general, refrain from expansion upon the minimum elements of the program.

TRANSMITTED FROM 04.09.91 12:48 P.01 *

NEDA
National Environmental Development Association
A Coalition of Organized Labor, Agriculture and Industry
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Comments

Was Reilly at meeting yesterday with Gov. Sununu?

April 8, 1991

The Honorable John Sununu
Chief of Staff
The White House
Washington, DC 20500

Dear Governor Sununu:

The undersigned organizations want to express our serious concerns with the draft Clean Air Act permitting regulations that are now being reviewed by the Administration prior to issuance in the Federal Register.

It is our belief that the draft rule goes far beyond the requirements of the Act. We do not question the permitting program but we must express our serious reservations about a proposal that will negatively affect industry's ability to continue operations, promote economic growth, introduce new products in the marketplace, or may very well delay projects that could immediately reduce environmental pollutants in the atmosphere.

In particular, the regulations must include needed operational flexibility to ensure that while proceeding through a time consuming and costly permit program our companies are not put at a competitive disadvantage.

Clearly, the Administration has repeatedly stated support for regulations that are balanced and recognize their effect on the economy and the international competitiveness of the United States. We would hope that the Administration would very carefully review and consider this proposed regulation prior to issuance to make sure that the rule only does what the law requires.

Sincerely,

American Furniture Manufacturers Association
American Paper Institute
Ashland Oil
AT&T
Electronic Industries Association
Eli Lilly and Company
IBM
Lukens Inc.
National Association of Manufacturers
National Association of Metal Finishers
National Environmental Development Association's
Clean Air Regulatory Project
Phillips Petroleum
Procter and Gamble
National Rural Electric Cooperative Association
U.S. Chamber of Commerce
Union Camp Corporation

Department of Energy
Washington, DC 20585

27 March 1991

MEMORANDUM FOR C. BOYDEN GRAY
JOHN P. SCHMITZ
JEFF HOLMSTEAD

FROM: DBR David B. Rivkin, Jr.

SUBJECT: The definition of "major source," and the extent of the "permit shield" for purposes of Title V of the Clean Air Act Amendments of 1990

You have asked us to review two issues pertaining to the proper interpretation of EPA's legal authority to implement Title V of the Clean Air Act Amendments of 1990 ("CAAA" or "Act").[1] The first issue is whether the Environmental Protection Agency ("EPA") may restrict the applicability of the source definition, for purposes of Title V permitting program of the Act, to the particular equipment, or group of equipment, at a site which emit the pollutant for which the site is a "major source" under the Act. The second issue is whether permittees may have the benefits of the Act's "permit shield" as related to operations not expressly reviewed and approved by EPA in issuing a permit.

1. The Definition of "Major Source" under Title V.

EPA claims that the Act prohibits it from "segregating groups of equipment according to the pollutant(s) they emit," in determining whether or not a facility is a "major source" that must be permitted under Title V, requiring it instead to aggregate and permit all "pollutant-emitting activities" from a particular industrial complex. EPA concludes that, "for purposes of 'major

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[1] Before we finalize our views on two other outstanding legal issues -- operational flexibility and source definition for MACT/early reductions purposes -- we would like to see EPA's views on these matters reduced to writing. As I understand from talking to John this morning, their write-ups will be dispatched imminently. Accordingly, our views on these two issues will be sent to you separately.

sources,' the permit program applies to all such equipment, without regard to whether individual pieces of equipment within that group emit the pollutant for which the source is major."[2] For the reasons detailed below, we believe that, while the Act grants the EPA discretionary authority to define "major source" based upon all "pollutant-emitting activities," the Act does not compel the interpretation advanced by EPA. Accordingly, the way in which the source is defined should be determined based on the relevant policy considerations.

Under the CAA, "major source" is defined as any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either a "major source" under section 112 of the CAA, or a "major stationary source" as defined by section 302 or part D of title I of the CAA.[3] The key defining phrase for current purposes in each of these sections is "any stationary source of group of sources located within a contiguous area and under common control that emits . . ." certain pollutants. For example, section 112 defines "major source" as:

> [A]ny stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.[4]

EPA argues that Congress' use of the phrase "source or group of sources located within a contiguous area and under common control" requires it to aggregate all of a facility's "pollutant-emitting activities" in determining whether or not a particular installation is a "major source" that must be permitted under Title V. Recognizing that the language of the Act itself is silent on this issue, it relies upon a statement in the House Report on H.R. 3030 providing that:

> The definition of "major source" here and elsewhere in the bill uses the term "group of sources located within a contiguous area and under common control." The

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[2] Memorandum from E. Donald Elliott to William G. Rosenberg, Mar. 13, 1991, at 1.

[3] 42 U.S.C. § 7661(1).

[4] 42 U.S.C. § 7412(a)(1) (Supp. 1990) (emphasis added). "Stationary source" is defined by section 111(a) of the CAA as any "building, structure or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3) (1982).

> Committee understands this to mean a group of sources with a common industrial grouping, i.e., the same two-digit SIC code. It is the approach followed today by EPA as a result of the Alabama Power litigation. It avoids the possibility that dissimilar sources, like a power plant and an adjacent coal mine, will be considered as the same "source" because of common ownership.[5]

Based upon this statement, EPA argues that it is compelled to "use the approach reflected in its post-Alabama Power 'major stationary source' definition in defining 'major source' both in Title I and elsewhere in the Act."[6] In EPA's view, this "approach" includes in the definition of "stationary source" "all of the pollutant-emitting activities which belong to the same industrial grouping . . . located on one or more contiguous or adjacent properties, and . . . under the control of the same person . . . ."[7]

We believe that EPA's argument is misguided. To begin with, it should be noted -- as EPA itself admits[8] -- that stray statements in a bill's legislative history are not dispositive of a statute's meaning, but are only some evidence of congressional intent.[9] Here, the language of the statute does not itself compel EPA's interpretation.

Moreover, EPA's interpretation is based upon a misreading of the House Report. It assumes that the House Report statement was referring to its entire "approach" in the regulations that followed the Alabama Power case.[10] We believe that this proves too much. In Alabama Power, the United States Court of Appeals for the District of Columbia Circuit dealt with a wideranging challenge to EPA's regulations implementing the "prevention of significant deterioration" ("PSD") provisions of the Clean Air Act Amendments of 1977. The statement in the House Report is very limited. It

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5 Clean Air Act Amendments of 1990, Report of the House Committee on Energy and Commerce on H.R. 3030, H.R. Rep. No. 101-490, 101st Cong., 2d Sess. 236-37 (May 17, 1990) [hereinafter House Report].

6 Memorandum of Rich Ossias to Don Elliott, 11 Mar. 1991 at 2 [hereinafter Ossias Memorandum].

7 Id., citing 40 CFR 51.165(1)(ii)(1990).

8 See Ossias Memorandum, supra note 6, at 2.

9 See Brock v. Pierce County, 476 U.S. 261, 263 (1986).

10 Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979).

states that the term "group of sources located within a contiguous area and under common control" is understood to mean "a group of sources with a common industrial grouping, i.e., the same two-digit SIC code," which is the approach currently followed by EPA in the wake of the Alabama Power litigation with respect to grouping different kinds of industrial activities for purposes of the Clean Air Act.

Thus, the "approach" the committee report refers to is not the EPA definition of "building, structure, facility, and installation" to include "all of the pollutant-emitting activities which belong to the same industrial grouping," as EPA claims, but the limitation on EPA's ability to include different types of industrial activity together as a single grouping. As the committee itself explained, "[i]t avoids the possibility that dissimilar sources, like a power plant and an adjacent coal mine, will be considered as the same "source" because of common ownership."[11]

Therefore, the legislative history identified by EPA merely makes clear that Congress was aware of an overbreadth problem with the phrase "any stationary source or group of sources located within a contiguous area and under common control," and the solution adopted by EPA after Alabama Power to ensure that only activities belonging to the same industrial grouping or SIC would be aggregated in determining whether or not the site is a covered source. There is no indication that Congress intended to adopt all of EPA's post Alabama Power regulations. It limited its statement by the examples it gave.[12]

2. The Scope of Title V's Permit Shield.

Section 504(f) of the CAAA, 42 U.S.C. § 7661c(f), provides that "[c]ompliance with a permit issued in accordance with this title shall be deemed compliance with section 502," i.e., the operating permit program. Moreover, EPA can provide by rule that compliance with the permit shall be deemed compliance with other applicable provisions of the act if (1) the permit includes the applicable requirements, or (2) the permitting authority in acting on the permit application "makes a determination relating to the permittee that such other provisions . . . are not applicable and the permit includes the determination or a concise summary

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[11] House Report, supra note 5, at 236-37.

[12] I.e., avoiding the "possibility that dissimilar sources, like a power plant and an adjacent coal mine, will be considered as the same "source" because of common ownership." House Report, supra note 5, at 236-37.

thereof."[13]

EPA has taken the position that operational changes made under section 502(b)(10) of the Act are not covered by the Title V "permit shield,"[14] because these changes would not be made with "the opportunity for EPA review and after public participation."[15] We are informed that EPA believes that this position is dictated by the Act and its legislative history. We disagree.

The effect of the section 504(f) "permit shield" is modest but important. It merely allows the permittee a defense to the allegation that it is not operating in compliance with section 502 of the Act, requiring an operating permit of covered sources, and with other applicable sections of the Act, when the permit includes those requirements or contains a statement that the permitting authority has determined that those requirements do not apply to the permittee.[16]

Denying the benefit of this permit shield to the permittee who takes advantage of section 502(b)(10) would severely limit the use of that section. Section 502(b)(10) was incorporated into the Act to give permittees a certain amount of flexibility in conducting their operations, so that they would not have to go through the entire permit modification process, including review

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[13] 42 U.S.C. § 7661c (f).

[14] Under section 502(b)(10), 42 U.S.C. § 7661a(b)(10), EPA is required to promulgate regulations to allow changes within a permitted facility "without requiring a permit revision," if the changes are not "modifications" under Title I (generally, changes at stationary sources that will increase their emissions), and the changes do not exceed the emissions allowable under the permit. To take advantage of this exemption, facilities must provide EPA and the State permitting authority a written notification in advance of the proposed changes a minimum of 7 days before, unless a different timeframe for this notification has been provided by the permitting authority for emergency cases.

[15] See Preamble to EPA Draft Permitting Regulations 134 (March 21, 1991).

[16] As you all know, the permit shield issue has a long history. The Administration sought to obtain a much broader and sturdier permit shield, as reflected in the Nichols-Heflin-Dole substitute for Title V. In my view, having lost that fight, it is all the more imperative to ensure that the permit shield provided by the EPA rules goes as far as the statute permits.

by EPA, the state permitting authority, and public comment, before making every change in operations. As the Conference Report notes "[f]acilities will be authorized to make changes in operations without the necessity for a permit revision" so long as the changes are not "modifications" and 7 days notice is given in advance.[17] If the permit shield does not apply to such changes, however, a permittee must make such changes at its own risk. No permittee could be certain of being found to be in compliance with the law, even though it is in compliance with its permit. Under this scheme, permittees would have to proceed by permit revision to be adequately protected.

EPA apparently bases its interpretation on the fact that, with a section 502 change, it has not had the opportunity to review the change before it is incorporated into the permit. This, however, was precisely why the provision was adopted, so that minor changes to a permit could be effected without the full panoply of EPA, state and public review, so long as a notice was given to EPA and the state permitting authority prior to the change. Moreover, the principal concern of the Congress with respect to the permit shield's applicability was that permitting authorities do not make determinations in secret that particular parts of the Act do not apply to a particular permittee, but that these determinations be clearly stated in the permit itself. According to the statement of the bill's managers -- admittedly only some evidence of intent -- Congress was principally concerned that permittees not be exempted from various provisions of the Act in secret:

> This provision is designed not only to protect facilities that are in compliance with the provisions of their permits, but also to preserve the ability of the public to know how it is that sources are to be regulated. In particular, this provision ensures that no permitting authority will be able to tuck away in a file drawer -- far from the public eye -- a determination that a source will be shielded from any requirement of the Clean Air Act. Under this provision, all such determinations will be made in a public fashion and will be open to public review and comment before such determinations take effect.[18]

Thus, the Act provides that the permit may provide that compliance with its requirements will be deemed compliance with

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[17] Conference Report to Accompany S. 1630, Clean Air Act Amendments of 1990, Rep. No. 101-952, 101st Cong., 2d Sess. 345 (Oct. 26, 1990).

[18] Clean Air Act Amendments of 1990 Chafee-Baucus Statement of Senate Managers, 136 Cong. Rec. S16933 (Oct. 27, 1990).

other applicable provisions of the Act that relate to the permittee if "the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof."[19]

While the language of the Act and the legislative history do not compel the conclusion that the permit shield should apply to section 502(a)(10) changes, we believe that this interpretation can be adopted based upon a fair reading of the Act and its legislative history, and that this interpretation will best effectuate Congress's purpose to give permittees the necessary flexibility to operate within the scope of the new Title V permit program.

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[19] 42 U.S.C. § 7661b(f)(2).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

April 2, 1991

MEMORANDUM

SUBJECT: Clean Air Act Permits - Definition of "Major Source." OFFICE OF GENERAL COUNSEL

FROM: E. Donald Elliott, EDE
Assistant Administrator and General Counsel
Environmental Protection Agency

TO: David B. Rivkin, Jr.
Assistant General Counsel
for Legal and Policy Analysis
Department of Energy

This is in response to your March 29 memo taking issue with EPA's interpretation of the term "major source," as set out in my memo to Bill Rosenberg dated March 13, 1991. As you know, the definition of the term "major source" is important for the reason that the statute limits EPA's authority to exempt "major sources" from the requirement to have a permit. Pub. L. 101-549, Sec 502(a)("except that the Administrator may not exempt any major source from such [permit] requirements").

The disagreement between us is a narrow but fundamental one (which was apparently brought on by our failure to address the issue as fully in our March 13 memo as, in retrospect, we might have). As I understand your position, you believe that EPA may limit the definition of "major source" to "a piece of equipment or a discrete industrial process that generates regulated emissions in excess of the relevant threshold amount" (Rivkin Memo, March 29, 1991, p. 4). Thus, under your view, if several different "pieces of equipment" located at a single site each emitted 99 tons of the same air pollutant, they would still not be considered a "major source" under Clean Air Act Sec. 302(j) (which defines a major source as a source which emits 100 tons per year or more).

You appear to base this surprising (perhaps even astonishing) conclusion on your belief that "the language of the Act itself is silent on this issue" (Rivkin Memo, March 29, 1991, p. 3), and your belief that EPA's position is grounded solely on certain language from the House Committee Report concerning common SIC codes, which you (properly) point out is intended as a "limitation on EPA's ability to include different types of industrial acitivity together as a single grouping." Id.

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We disagree with the fundamental premise for your argument that the statute is silent. On the contrary, the plain wording of the statute specifically defines the term "major source" to include all the sources of air pollution that are located in the same area and are under common control:

> "The term 'major source' means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:
>
> (A) A major source as defined in section 112.
>
> (B) A major stationary source as defined in section 302 or part D of title I."

Sec. 501(2)(emphasis supplied).

The plain meaning of the parenthetical language underscored above is that EPA must consider all sources of air pollution which are located together under common control in computing the "major source" thresholds. We agree that the language from the House Committee Report, quoted in our previous memos, attempts to cut back on the breadth of the statutory language by reading into it EPA's prior interpretation from the PSD new source review program (40 C.F.R. 51.166(b)(6)) that only sources within the same SIC code should be considered "under common control." H. R. Rep. No. 101-490, 101st Cong., 2d Sess. 236-37 (May 17, 1990). Neither the Senate nor the Conference addressed this issue separately.

Although the statutory language itself does not include the SIC code limitation, but rather appears by its plain terms to apply to all sources of air pollution which are collocated and under common control, EPA was willing to follow the limiting gloss placed on the statutory language by the House Report as the "better reading" (Elliott Memo, March 13, 1991, p.1).

However, in light of both the explicit statutory language, and the explicit legislative history addressed to the issue, EPA believed, and continues to believe, that Congress clearly focused on the question of whether sources of air pollution which are collocated and under common control must be aggregated for purposes of the "major source" thresholds and made a "conscious policy decision" which we must respect. Chevron v. NRDC, 467 U.S. 837 (1984).

In making the determination that we are bound by an explicit Congressional decision expressed with tolerable clarity through statutory language and legislative history, we have taken into account the fact that there is a long history under the Clean Air Act to the question of whether sources and pollutants must be aggregated for purposes of applying the thresholds for inclusion as a "major source." The House Committee Report cited above specifically referred to the PSD analogy, also cited above, but

our decision does not rest on that reference alone (as you seem to believe) but rather on the statutory language in the context of the history, both legislative and regulatory, which convinces us that Congress focused on and decided the aggregation issue.

In light of this background, we believe that we are bound by the statutory language to consider the emissions from the "group of stationary sources," not individual pieces of equipment, in making the determination whether a facility is a "major source."[1]

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[1] Our March 13 memo also concluded that once it is clear that a source is a "major source," the permit must include all applicable requirements, including those relating to emission points which would be considered minor sources if they were isolated and not under common control. We do not understand the Rivkin memo to take issue with this aspect of our analysis. In any event, it is also very clear from both statutory language and legislative history.

Sec. 504(a) was amended in conference to make clear that each permit shall include "applicable requirements of this Act, including the applicable implementation plan." Applicable requirements are clearly all those that apply to the "source," not merely the portion of the facility which is considered "major." See H.R. Report No. 101-952, 101st Cong., 2d Sess. 345 (1990)(conference)("The conference agreement includes provisions that require various sources of air pollution to obtain operating permits which would ensure compliance with all applicable requirements of the Clean Air Act.")(emphasis supplied). See also S. Rep. No. 101-228, at 354 ("permits ... must describe all of the source's obligations under the Act.")(emphasis supplied); Ibid., at 347 ("The air permit program will ensure that all of a source's obligations with respect to each of the air pollutants it is required to control will be contained in one permit document.")(emphasis supplied).