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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Paper	Comments on the Agency's Paper Entitled "Section 112(g) Issue Discussion" (4 pp.)	03/27/92	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
Subseries: Subject File
WHORM Cat.:
File Location: Clean Air Act - Advisory Committee

Date Closed: 7/8/2002
FOIA/SYS Case #: 2001-1865-F
Re-review Case #:
P-2/P-5 Review Case #:

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(b)(9) Release would disclose geological or geophysical information

CONFIDENTIAL

DRAFT

Comments on the Agency's Paper Entitled "Section 112(g) Issue Discussion" distributed to Clean Air Act Advisory Committee May 26, 1992

Section 112(g) is a difficult provision to implement. It is fraught with ambiguity and difficult policy choices must be made. It is important to keep in mind in making these policy choices that Section 112(g) is primarily a transitional rule that simply brings sources into the system earlier than would otherwise be required. This suggests that unless clear and workable rules are developed regarding the applicability of Section 112(g) and the timing, scope, and content of determinations regarding MACT, plant operators will be embroiled in debate over these issues long past the actual application of the regularly scheduled MACT standards. Such a result would not only limit the ability of U.S. industry to make needed changes quickly while imposing tremendous and unnecessary burdens on the regulated community but also would drain needed resources from permitting authorities. The permitting authorities' (and EPA's) primary focus should be on implementation of MACT standards according to the promulgated schedule. To the extent permitting authorities are engaged in numerous case-by-case determinations and other Section 112(g) implementation requirements, they will be unable to devote adequate attention to implementation of source category-wide MACT standards. Even the most comprehensive implementation of Section 112(g) for individual source changes would have relatively minor environmental benefits when compared with the benefits that can be achieved through prompt and adequate development and application of MACT requirements for source categories. The Agency can avoid this result by excluding source changes that do not belong in the system and by developing clear procedures for changes that enter the system.

Under Section 112(g), like the other modification provisions in the statute, there are essentially two ways of limiting the burdens on the regulated community -- (1) to exclude certain changes at the front end (*i.e.*, through physical or operational change exclusions and *de minimis*) and (2) for those source changes that enter the system (*i.e.*, streamlined offset showings and case-by-case determinations), to limit the requirements to what is required by the language of Section 112(g). In addition, the Agency can reduce procedural burdens under Section 112(g) by limiting the use of applicability determinations and by providing for a smooth interaction between Section 112(g) and the Operating Permit Program. Within the statutory constraints, the Agency should attempt to incorporate in the guidance the primarily transitional nature of the provision in terms of both procedural and substantive requirements imposed.

Unfortunately, the approach embodied in the issue paper appears to be extremely complex and likely to impose unnecessary burdens on regulated sources. Note that the problems associated with administrative delays will be even greater here than in the Title I NSR program because the major source thresholds for hazardous air pollutants (HAPs) (and the *de minimis* levels likely to be set by EPA for some HAPs) are so low. In short, the Agency's approach does not reflect the balance of competing interests struck in the legislative process and has the potential to overwhelm the entire Section 112 effort. The issues raised in the Agency's paper are discussed briefly below.

Issue #1: "Major" Additions to Existing Plants

The Agency must reconsider its position on the new/existing source MACT split (*i.e.*, the question of what types of plant construction should be considered changes to an "existing source" as opposed to a "new source"). In enacting Section 112, Congress made a policy choice to subject both new and existing sources to MACT requirements -- although the applicable standards for new and existing sources are different. Congress also determined that modification of a major source should not deprive that source of its "existing source" status under the Section 112 program.

The approach taken in the issue paper seems to be at odds with what was understood during the legislative process to be the "tradeoff" in Section 112(g). Although it is not entirely clear, the Agency appears to be treating a number of changes that should be considered modifications of existing sources as new sources in their own right. This type of overly broad interpretation of the new source MACT provision of Section 112(g)(2) should be avoided. Essentially, changes that take place at an existing source should be considered as modifications of an existing source absent a reconstruction. In short, the approach in the paper appears to restructure a tradeoff made during the legislative debate on this issue that modification leads to a determination regarding compliance with MACT -- if needed on a case-by-case basis -- but that determination is based on the existing source MACT standard.

Issue #2: *De Minimis* Levels

Consistent with the transitional nature of Section 112(g), the Agency's focus should be on significant emission increases. The *de minimis* levels should be set accordingly. The triviality test articulated in the issue paper would likely bring a number of relatively minor changes into the system creating administrative burdens and preventing the Agency from focusing on significant changes.

Setting *de minimis* thresholds for HAPs is likely to prove problematic -- primarily because of the current state of the science. Unfortunately, however, the Agency will need to make a cut at establishing *de minimis* levels because they are essential to implementation of Section 112(g). In the first instance, it seems that the Agency can rely on statutory thresholds contained in Section 112 for setting *de minimis* levels. The levels would be set at the major source threshold for most pollutants (*i.e.,* 10 tons -- or less if modified pursuant to Section 112(a)(1)). This level should be reduced only where needed to meet the "significance" test expressed in the issue paper.

Issue #3: Emission Offsets - Creditable Decreases

With respect to the creditability of reductions, a two tiered process similar to the one presented in the EPA issue paper may be appropriate. A purely prospective approach would send a message that sources should postpone changes that could reduce emissions and improve efficiency and competitiveness in order to "save" reductions that would be needed for a future Section 112(g) offset. While the "pollution prevention" concept may prove apt, EPA's definition of pollution prevention will need to be broad enough to achieve the Agency's goal of encouraging reductions. The paper is unclear on what would constitute a "prospective reduction" under the Agency's simplified model. A more workable approach for the simplified model might be to look at reductions achieved beginning 24 months prior to submittal of the offset showing to the Administrator or the State.

Issues #4 and #5: Offsets -- "More Hazardous" Determination and Hazard Ranking Methodology

EPA should attempt to provide as much flexibility in the offset process as possible while ensuring that offset showings are administratively simple to accomplish. Offset showings should not become more burdensome than case-by-case determinations. If a simple quantity/toxicity approach can be developed, the Agency should attempt to do so. The offset process can be viewed as a way of achieving a net reduction in toxicity of emissions in advance of both MACT and residual risk standards.

Under this view, the Agency should encourage reduction in toxicity to the extent possible, including providing for large reductions in "less toxic" HAPs to offset smaller increases of a more toxic HAP(s) and vice versa.

Along the same lines, the issue paper's proposal to rank separately threshold and non-threshold pollutants could discourage reductions of non-threshold pollutants. Although an increase in a non-threshold pollutant cannot be offset by a decrease in a threshold pollutant, it would be counterproductive to deprive a source of the ability to offset an increase in a threshold pollutant with a decrease in a non-threshold pollutant. Although the issue paper does not address this type of offset, the Agency's decision to rank the relative hazard of non-threshold and threshold pollutants separately could be read to prohibit such trades. To the extent necessary to allow these types of trades, the Agency should "rank together" threshold and non-threshold pollutants.

Issue #6: Physical Change or Change in the Method of Operation

As stated above, the exclusions from physical or operational change are essential to the workability of the 112 program. As with the NSR and NSPS programs, Congress did not intend every change causing an increase in actual emissions to trigger Section 112 modification requirements. *See* Statement of Sen. Lautenberg, 136 Cong. Rec. S17125 (October 26, 1990) ("Under [section 111] EPA has issued regulations specifying certain kinds of activities which would not constitute a modification. Clearly it is intended that such kinds of activities would also be excluded from the definition of modification in new § 112."). One of the most important exclusions, however, appears to be missing from the issue paper -- the exclusion for pollution control projects, *i.e.*, projects that do not render a source "less environmentally beneficial." This exclusion is important to encourage participation in voluntary emission reduction programs and not to discourage process changes that could reduce emissions.

Another "front end" issue that isn't raised in the paper is the causation requirement -- *i.e.*, that a change must actually cause the increase in emissions. How the Agency plans to address the causation requirement, including the scope of a demand growth-type exclusion will need to be addressed in the guidance to clarify the applicability of Section 112(g). Additionally, the issue paper does not discuss the methodology for determining if an increase in actual emissions will occur. Like the PSD program, modifications under Section 112 are defined with respect to increases in actual emissions. The Agency should use the WEPCo-type "actual-to-future actual" methodology for determining if actual emissions from an existing source will increase and not the "actual-to-potential" test. Note here again that Section 112(g) is mainly a transitional rule and that the sources covered will soon be covered by a MACT standard. Therefore, the Agency's concern regarding future increases above the "future actual estimate" is significantly abated for Section 112(g).

Finally, the Agency seems to be making the appropriate policy choice regarding the raw materials exclusion. The only concern will be in implementation of the exclusion. For example, how would a source determine if a raw material is "more hazardous?" Would such a determination involve a review or would pre-established rules govern the determination? Lengthy delays to determine whether a raw material is more or less hazardous could be extremely burdensome and should be avoided.

Issue #7: MACT Coverage for Modification

The Section 112(g)(2) determination should apply only to the equipment that is being modified and should be as narrow as possible. In addition to the obvious benefits for sources undertaking these changes, this approach could limit the problems that are likely to arise when MACT for the source category is set. Moreover, narrowing the scope of case-by-case determinations will help to reduce the burdens on permitting authorities and help to streamline the process. Again, it is important to make these types of policy choices with the limited scope and timing of Section 112(g) in mind.

Issue # 8: Timing of MACT and Offset Determinations

The issue paper appears to confuse two separate processes -- offset showings and case-by-case determinations. These two issues should be treated separately in the Section 112(g) guidance.

For offsets, Section 112(g) requires the source to "submit a showing" to the Administrator or the State that an increase has been offset. Thus, the use of the word "determination" in the issue paper is a misnomer as no "determination" by the Administrator or the State is required. A system in which the source submits a showing and then proceeds with the change and the offset after a reasonable period of time might be appropriate.

The Agency's resolution of the procedural and substantive case-by-case issues will be critical to successful implementation of Section 112(g). It makes sense to provide existing sources three years from the date of a final determination to meet MACT requirements. This is consistent with Section 112(i). In other words, the presumption identified in the issue paper should be reversed so that sources have three years to comply. A workable approach to this determination requirement might be to have the source submit a determination of MACT to the permitting authority. The source would wait a certain period, then proceed with the change and have three years from the expiration of the waiting period to comply with the MACT determination. If the permitting authority notifies the source within the waiting period that its determination is incomplete, the source could still proceed with the change while the determination was made. In that case, the source would have three years from the date of the final determination to comply with MACT. Note that Section 112(g) does not impose a deadline for the determination or for complying with MACT.

An additional issue applicable to both offset showings and case-by-case determinations is the coordination with the permit rule. As with Title I NSR permits, these requirements should not need further review before being incorporated into the operating permit and under Section 112(g)(3) could be incorporated through administrative permit amendment procedures. In any case, it will be important for the Agency to carefully review the final permit rule to ensure adequate coordination between the two programs.

DRAFT
FOR CAA ADVISORY COMMITTEE DISCUSSION

GENERAL PRINCIPLES FOR ECONOMIC INCENTIVE PROGRAMS

1. Increased flexibility necessitates an effective system of accountability (e.g., quantification, monitoring, recordkeeping, reporting, noncompliance penalties, backstops). Quantification may include different measuring techniques, such as the use of emission factors, calculations, emission and/or parameter monitoring, or inventory tracking, depending upon particular circumstances.

2. Programs should be as equitable as possible, taking into consideration socio-economic impacts.

3. ~~Statutory provisions in Title I allowing for market-based programs do not supersede other statutory requirements; thus, market-based programs must be consistent with other statutory requirements (e.g., RFP, RACT, NSR, NESHAPS, attainment demonstrations).~~

4. Market flexibility should not be constrained beyond what is required for adequate accountability, equity, and consistency -- adequacy should be defined by comparison with traditional regulatory programs, not with a "perfect" program.

SPECIFIC PRINCIPLES FOR EMISSION TRADING PROGRAMS

ACCOUNTABILITY

a. Emission quantification methods must be adequate to assess compliance with total emission caps. Quantification methods (which may include direct emission measurement, monitoring process parameters, calculations based on emission factors, inventory accounting, or other approaches) should reflect technical differences among types of sources and specific program requirements.

b. Monitoring, recordkeeping, and reporting requirements must be adequate to demonstrate compliance and provide enforceability, but not so burdensome as to discourage participation.

c. The severity of civil or criminal penalties, as with any traditional program, should be commensurate with the degree of intent and the extent of any violation.

CHA
Adv.
Comm

d. Backstop provisions must be adequate to discourage and minimize "backsliding", take effect promptly when appropriate, and be tailored to the observed deficiency. Backstop provisions must distinguish between "source" deficiencies and "system" deficiencies.

EQUITY AND CONSISTENCY

a. Initial baseline allocations should be as equitable as possible, while allowing for adequate reconciliation with the prescribed RFP baseline and ensuring that the State does not double-count emission reductions.

   i) Sources that operate equipment pursuant to federal or state preconstruction permits should receive baseline credit equal to permitted levels.

   ii) Sources should receive baseline credit for properly banked emission reduction credits.

   iii) Baselines should reflect consideration of the extent to which sources have already controlled emissions; otherwise, requiring an equal degree of reductions from all sources could penalize those that have done more in the past and would preserve past inequities.

b. Trading programs designed to meet one or more environmental goals should not thwart other environmental objectives or statutory requirements and, to the greatest extent possible, should be integrated with other regulatory programs.

MARKET FLEXIBILITY

a. Trading rules should be as simple as possible, consistent with ensuring the integrity of the market and providing for adequate public notice and agency review.

   i) For a program to be workable, trading rules must be readily understandable to all participants, and be based on a common currency (preferably pounds of emissions per period of time).

   ii) Facility-specific requirements, when necessary, should be placed on a federally enforceable permit, rather than on the underlying entitlement or allowance.

   iii) Allowance trading and permit modifications should be as streamlined as possible.

b. The duration of credit for tradable emission reductions should reflect the period of time for which the reductions are surplus. Emission caps should be imposed to ensure that the reductions are enforceable for the time period for which credit is given.

c. The time period over which the tradable commodity is averaged should be longer than 24 hours, provided that the agency can demonstrate that the trading program meets short-term progress and attainment targets.

d. Because "allowance" trading programs are conditioned on the use of predetermined accounting and tracking protocols, trades should not require preapproval. By contrast, "emission reduction credit" trading programs use the preapproval of trades to assure adequate accounting and tracking.

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

MAY 20 1992

OFFICE OF
PESTICIDES AND TOXIC
SUBSTANCES

MEMORANDUM

SUBJECT: EPA Review of FDA's Food Biotechnology Policy

FROM: Elizabeth Milewski Elizabeth Milewski

TO: John Cohrssen

Thank you for the opportunity to review and comment on the FDA's Food Biotechnology Policy. On a quick review, the draft appears to be well done.

We focused particular attention on section IX of the policy statement. In general we find this section to be well written and to fairly represent EPA's position. We would only support one change to this section. EPA is currently developing its own policy position for pesticides in plants. It would be helpful to the public to be more explicit in section IX concerning EPA's intention of publishing such a policy. Similarly, EPA has been discussing with FDA the utility of developing a Memorandum of Understanding between the agencies, and it might be helpful to mention this.

We suggest two minor editorial changes:

1) Page 7, paragraph 1 - We suggest changing "is no longer GRAS" to "is not GRAS". We suggest this change because researchers/companies may actually intend to introduce into a plant the ability to produce a substance that does not meet the GRAS criteria.

2) Page 71, paragraph 2 "Because all pesticides..." We suggest changing this sentence to reflect the fact that when there are pesticides involved in the processing of a food these pesticides are covered by FDA not EPA. This could be simply done by adding the word "generally".

cc: Jim Maryanski

ID # 241903 CU

rec'd 5/3 7:00p

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Subject: Membership to the Clean Air Act Advisory Committee

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Office/Agency (Staff Name)		Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
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- S - For Signature
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U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515

May 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 your enclosed April 30, 1991 reply to my letter of April 10 concerning membership to the Clean Air Act Advisory Committee and for Assistant Administrator William Rosenberg's commitments about this matter at the recent hearing of the Subcommittee on Health and the Environment regarding permits.

You state:

> As you are aware, the current Committee membership is 46. Given this current size, we feel we must limit the number of new members. Although we have received several inquiries and requests for reconsideration of previously nominated candidates, we will not be able to add more than a few members.

I observe that when the Environmental Protection Agency (EPA) first proposed this Advisory Committee and I raised these questions regarding diversity and balance and the need for representation of labor, farmers, consumers, environmentalists, and small business; the size of the Committee, as projected by the EPA, was only 25. It was not 46.

Like you, I do not favor such large Committees. However, EPA created this size problem and the problem of diversity. In order to deal with it, the Committee must grow as it is not practical to terminate anyone on the Committee or necessarily appropriate. EPA should not be concerned at this late date about the Committee's size. Any growth should be solely to provide the needed diversity and balance. I might add that the larger size could help to ensure that the Subcommittees are also balanced and diverse.

I urge you to resolve this matter quickly. Please keep us advised also about the establishment of the subcommittees and the "issues of areas of concern" to be considered.

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 F. Henry Habicht, Deputy Administrator
Environmental Protection Agency

The Honorable William G. Rosenberg, Assistant Administrator
for Air and Radiation
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

CKNV

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

APR 30 1991

THE ADMINISTRATOR

Honorable John D. Dingell
Chairman, Subcommittee on
Oversight and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of April 10, 1991, and previous correspondence related to membership on the Clean Air Act Advisory Committee (CAAAC). You have raised a number of concerns regarding the adequacy of representation of the current membership. As a result of your correspondence and subsequent discussions with current Committee members, we have developed similar concerns. At the Advisory Committee's first meeting on April 11, 1991, we announced that we are considering additional names to help strengthen representation in several key membership categories.

As you are aware, the current Committee membership is 46. Given this current size, we feel we must limit the number of new members. Although we have received several inquiries and requests for reconsideration of previously nominated candidates, we will not be able to add more than a few members.

Regarding the use of subcommittees, we also agree with you that subcommittees should be formed to provide advice on specific issues that require more detailed discussions than a meeting of the full Committee can provide. Again, we announced at the April 11th meeting that we would be forming such subcommittees and invited the committee members to recommend issues or areas of concern where subcommittees could further the Committee's work. We are currently evaluating the Committee's recommendations and will be establishing subcommittees or a work group structure in the near future.

We are taking action to confirm individuals as new members of the Advisory Committee. Once these actions have been completed we will notify your Office of these new appointments. We appreciate your recommendations on the composition and management of the Committee. As your correspondence noted, the CAAAC will not substitute for full, timely and effective rulemaking with adequate time for public input. We see the CAAAC as an important "reality check" on our proposed rulemaking and guidance development, and an important new communication mechanism with the public on our implementation efforts. We look forward to the future deliberations of this expanded Committee in helping us to meet the ambitious goals set out in the Clean Air Act of 1990.

Sincerely,

William K. Reilly

William K. Reilly