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November 6, 1989

We would like to bring to your attention concerns related to Title IV, Permits; and Title VI, Enforcement, of H.R. 3030 as reported by the Health and Environment Subcommittee.

Title IV establishes a bureaucratic permitting process that will subject, according to EPA estimates, 50,000 existing plants to a series of new, complex, and time-consuming requirements that will stagnate the ability of American business to make investments and operating changes in response to domestic and international market demands. Many of the problems with Title IV are caused by a program that will duplicate processes and decisions already required under the State Implementation Plan (SIP) process (Section 110), and construction permits under Section 165, 172, and 173 of the existing Clean Air Act, and will duplicate dozens of operating permit programs in place at the state level. In addition, Title IV now has at least 23 different definitions that apply in determining what "sources" must have a permit.

Title VI enlarges civil and criminal sanctions for violations of the Clean Air Act by including greatly expanded control, record-keeping, monitoring, permit, and reporting requirements. In addition, it would make criminal such activities as unintentional or negligent reporting, record-keeping, and monitoring errors. If these amendments, as reported by the Subcommittee, are left unchanged, thousands of managers and operators of both small and large businesses will be subject to criminal penalties for unintended acts and omissions involving hundreds of thousands of pieces of equipment and other emission points. In addition, this section, as now written, actually creates disincentives for reasonable corporate managers to put in place or continue strong compliance auditing programs.

Attached for your attention are white papers that have been developed to explain our joint concerns with the Permit and Enforcement sections of H.R. 3030 as amended by the Subcommittee.

We strongly urge you to consider the changes outlined in our white papers on both of these titles.

PERMITS

Problems with Title IV, H.R. 3030 As Reported By The Health and Environment Subcommittee of the Energy and Commerce Committee

Title IV establishes a new operating permit system. It will lead to a bureaucratic process that seems destined to collapse under its own weight. EPA has estimated that 50,000 currently operating plants will be subject to this new permit section, the same number as required to submit SARA III release reports. Each of the 50,000 plants has multiple processes and discharges, sometimes numbering in the hundreds. It takes EPA almost a year to just transcribe the data in SARA 313 reports into a computer database. Yet, Title IV of H.R. 3030 sets a series of requirements that involves distribution to and consideration of components from adjoining states, EPA, and the public as well as legal and engineering decisions that will need to be made on every single process and emission point. It is hard to imagine how any agency will be able to process these permits in anything less than two to five years. On top of existing sources will be the countless changes that industry makes to remain competitive in today's market place.

Title IV establishes a new, complex, and time-consuming bureaucratic process that threatens to stagnate the ability of American business to make investments and operating changes in response to market demand.

A company who operates in the very competitive electronics business has said that, in their business, a product's life from conception to obsolescence is only 18 months. They cannot compete if they are constrained by a permit process that threatens to take years.

Many of the problems with Title IV are caused by this program duplicating processes and decisions already required under the State Implementation Plan (SIP) process (Section 110), and construction permits under Section 165, 172, and 173 of the existing Act. Many states have operating permit programs in place to varying degrees, tailored to their particular air quality problems and programs. In most cases, these programs are not overly burdensome. Title IV establishes a permit program that is far broader in scope and implication than any of the existing state programs which are limited to operating permits, and will invalidate key provisions of many of them (e.g., permit completeness).

PERMITS

November 6, 1989

Page 2 of 2

Title IV has at least 23 different definitions that apply in determining what sources must have a permit. It is almost impossible to accurately determine when a permit is required. Yet, the bill specifies enormous civil and criminal penalties, calculated on a per-day basis, for failure to have a permit for any sources.

Title IV was inspired by, and has been compared to, the NPDES permit system under the Clean Water Act. Yet, the bill fails to recognize the large differences between air and water discharges.

- Water discharges are typically collected, treated in a common system, and then discharged at only one or two points from a plant.
- Air emissions are discharged from each and every process in the plant. It is not unusual for a plant to have dozens or even hundreds of separate emission points.

The basic difference has tremendous practical and monetary implications when the bill attempts to make a direct analogy between air and water in the areas of monitoring and compliance certification and in the overall complexity and bureaucracy of the permit program.

Needed, prioritized solutions to the above problems are:

1. Limit Title IV to an operating permit program only where it is needed (like the G-9 proposal).
2. Add a simple threshold for the permitting program.
 - Process units emitting 10 TPY.
3. Provide increased flexibility for emission trading; e.g.:
 - Exempt voluntary reductions from "anti-backsliding", 404(f).
4. Compliance certification can be on the basis of engineering estimates and periodic tests.
5. Limit the fee to cover the cost of the operating permit program only (\$25/T/Y).
6. Utilize existing state operating permit programs to comply with Title IV, to the maximum extent possible.
7. Delete the "Schedule of Compliance" provisions in the permit.
8. Provide for an EPA role by making the permit federally enforceable.

ENFORCEMENT

Problems with Title VI, H.R. 3030 As Reported By The Health and Environment Subcommittee of the Energy and Commerce Committee

Civil and criminal sanctions for violation of the Clean Air Act are greatly expanded by Title VI of H.R. 3030. This is a consequence not only of new enforcement authorities, but also of the greatly expanded control, record-keeping, monitoring, permit and reporting requirements of the amendments. The very uncertainty surrounding the implementation of many of these provisions, including major questions about their applicability and scope exacerbate the inherent unfairness of many of the provisions.

Some of the new enforcement provisions are inappropriate in the context of regulating sources of air pollution. By making criminal such activities as unintentional or negligent record-keeping, reporting, and monitoring errors, Congress will be subjecting thousands of managers and operators of both large and small businesses to criminal penalties for acts and omissions involving thousands of pieces of equipment and other emissions points. (Under the Clean Water Act, these obligations involve far fewer sources which are monitored at only several points in a plant.) Further, making these violations criminal is unlikely to have much to do with improving air quality in the country. These provisions are, simply by their nature, traps for both sophisticated and unsophisticated operators of all types of businesses -- from paint stores and gas stations to major automated manufacturing and production facilities.

Other provisions of Title VI have an even less plausible basis because they actually create disincentives for responsible corporate managers to put in place or continue strong compliance auditing programs. Diligent environmental management calls for continued surveillance to detect and correct environmental compliance problems at facilities. However, the criminal sanctions and civil/administrative penalties that attach to the discovery of a broad variety of potential violations of the amendments provisions would seem to militate against responsible corporate management.

Needed, prioritized solutions to the above problems are:

1. Avoid civil and criminal liability for companies and environmental managers that identify problems as a result of "self-policing", while they are affirmatively addressing problems.

ENFORCEMENT

November 6, 1989

Page 2 of 2

2. Decriminalize efforts and other "minor" violations, like:
 - Reporting and record-keeping
 - Problems with payment of fees.
 - Monitoring.
3. For criminal and civil liability to attach for negligent or knowing endangerment provisions, require that a regulation or the SIP be violated. Alternatively, restore the imminent endangerment provisions in the current Act which give EPA emergency powers.
4. Remove the presumption of continuous noncompliance after the first day of violation.
5. Restore and consider expanding delayed compliance orders presently authorized by the Act.
6. Promote state enforcement efforts through state operating permit programs.
7. Decriminalize the act of completing compliance for acts and omissions for which a manager does not possess actual knowledge.

Surely, these results could not have been intended, since they do nothing to promote sound environmental policy or achieve lasting attainment of the nation's air quality goals.

ISSUE PAPER

CLEAN AIR ACT: ADMINISTRATION'S PROPOSAL
(H.R. 3030, As Amended, and S. 1490)Enforcement, Title VI
Permit Requirements, Title IV

We are committed to working with Congress and the Administration toward constructive Clean Air Act (CAA) amendments.

The Administration's clean air proposal is a much-needed comprehensive package and a strong vehicle for CAA reauthorization this Congress. It is a tough bill that contains very stringent technology and health-based standards and control requirements.

To be workable and to actually result in improved clean air, some of the provisions need to be modified so they can make sense when placed in the context of a real-world working environment.

1. Enforcement Provisions:

- Recordkeeping Penalties
- New Crime -- Knowing Endangerment
- New Crime -- Negligent Endangerment
- "Emergency" Powers
- Bounty Hunter Provision
- Administrative Penalties
- Subpoena Powers

2. Permit Requirements:

- Multi-state Sign-offs
- Mandatory State Program
- No Certainty in the Process
- Length of Permit
- Unlimited Permit Fees

Following are brief issue papers which provide an overview of some of our concerns.

November 14, 1989

CLEAN AIR ACT ISSUE PAPER
ENFORCEMENT PROVISIONS -- TITLE VI OF H.R. 3030

The enforcement provisions of H.R. 3030 have been changed by the Dingell/Lent substitute to be more workable than the Administration bill as originally introduced (but which still exist in S.1490). Nevertheless, H.R. 3030 still contains many provisions that go beyond existing environmental statutes, creating new crimes for ambiguous and unforeseen offenses and violating the basic tenets of our legal system -- innocent until proven guilty.

1. RECORDKEEPING PENALTIES

Section 113(c)(4) makes CRIMINAL A LONG LIST OF RECORDKEEPING OMISSIONS far broader than false statement violations in the Clean Water Act. The additional record-keeping violations include knowing: (1) failure to maintain or file any permit application, any record, any notice, any report, or any plan; (2) failure to maintain or file any other document filed with EPA, required to be filed with EPA, used for purposes of compliance by EPA, or used for purposes of compliance by a state; or (3) failure to notify or report as required by the Act.

The Clean Water Act currently provides criminal sanctions if someone actively lies to the Agency or falsifies records. The proposed Clean Air Act, H.R. 3030, WOULD MAKE a knowing failure to act, including THE SUBMISSION OF AN INCOMPLETE PERMIT APPLICATION OR FAILURE TO KEEP CERTAIN NON-REQUIRED RECORDS, A FELONY. ONE OF THE CHIEF CONCERNS with this provision IS THAT THE "KNOWING" element of the OFFENSE MAY APPLY ONLY TO THE OMISSION OF INFORMATION, AND NOT TO ITS MATERIALITY TO EPA.

For example, a plant manager may leave off some information on a permit application that he does not believe is material to EPA's investigation, or because he does not believe that EPA needs or wants the information. EPA may later decide that the omitted information was "material" and then seek to bring a criminal enforcement action.

A PERSON SHOULD NOT BE SUBJECT TO CRIMINAL FELONY SANCTIONS UNLESS THAT PERSON DELIBERATELY MISLEADS OR CONCEALS FROM EPA A FACT THAT THE PERSON KNOWS TO BE MATERIAL. BY ADDING THE NEW LANGUAGE IN H.R. 3030, PERSONS MAY BE CRIMINALLY LIABLE FOR ANY OMISSION, EVEN IF A PERSON DID NOT KNOW THAT THE OMISSION WAS MATERIAL TO THE AGENCY, AND HAD NO INTENTION TO MISLEAD THE AGENCY.

The current language in H.R. 3030 may not even limit criminal sanctions to records that EPA requires a source to maintain. The bill would apply to a broader class of records "used for purposes of compliance." Therefore, a plant production record may be "used for purposes of compliance" because it shows when a source is operating, even though EPA does not explicitly require a source to keep that record. The result is that criminal sanctions could apply to acts or omissions not subject to civil enforcement sanctions.

H.R. 3030

Any person who knowingly:

(A) Makes any false statement, representation, or certification in, or omits material information from or knowingly alters, conceals, or fails to maintain or file any notice, application, record, report, plan, or other document filed or required to be filed, maintained, or used for purposes of compliance under this Act...

or

(B) Fails to notify or report as required under the Act...

(C) ...shall, upon conviction, be punished by a fine pursuant to Title 18 of the United States Code, or by imprisonment for not more than two years, or by both, per day for each violation...

Clean Water Act

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or by both...

In H.R. 3030, all reporting and recordkeeping violations are punishable by criminal fines of \$250,000 for an individual or \$500,000 for organizations (through incorporation by reference of Title 18 of the U.S. Code) or jail terms of up to two years, or both, per day for each violation.

2. KNOWING ENDANGERMENT

Section 113(c)(5) would establish a NEW CRIME OF "KNOWING ENDANGERMENT." This provision resembles the "knowing endangerment" provision in the Clean Water Act and the Resource Conservation & Recovery Act (RCRA). However, in those other statutes, "knowing endangerment" is a serious violation of some specific requirement. The violator knows ahead of time that the violation places someone in imminent danger of death or serious bodily injury. By contrast, H.R. 3030 DOES NOT REQUIRE A KNOWING VIOLATION OF A SPECIFIC REGULATORY OR STATUTORY REQUIREMENT AS A PRECONDITION TO LIABILITY. For example:

H.R. 3030

Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to Section 112 of this Act or any extremely hazardous substance listed pursuant to Section 11002(a)(2) of Title 42...

Clean Water Act

Any person who knowingly violates Section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections.

Given the lengthy list of pollutants under Section 112 (hazardous air pollutants) and 42 U.S.C. 11002(a)(2) (extremely hazardous substance list), VIRTUALLY EVERY INDUSTRIAL ESTABLISHMENT KNOWINGLY (AND LAWFULLY) EMITS LISTED POLLUTANTS.

The bill provides a defense only for releases of Section 112 pollutants for which EPA has set an emissions standard under Section 112, or a pollutant for which EPA or a state has issued a permit under new Section 112, provided those releases are in accordance with such standard. However, THE DEFENSE, AS PROPOSED IN H.R. 3030, DOES NOT EXTEND TO A SOURCE THAT COMPLIES WITH APPLICABLE STATE OR LOCAL STANDARDS, OR TO A SOURCE CATEGORY FOR WHICH EPA HAS NOT YET SET A STANDARD. Thus, EPA can bring a criminal enforcement action for releases it has not regulated or prohibited by rule or order.

3. NEGLIGENT ENDANGERMENT

Section 113(c)(2) establishes a NEW CRIME OF "NEGLIGENT ENDANGERMENT". A person would be subject to criminal penalties if one should have known that a particular pollutant endangers health. The explanation of the bill states that the crime applies to one who "negligently violates amended Section 112." However, the actual bill has no such language.

THE THRESHOLD TEST IS WHETHER ONE NEGLIGENTLY RELEASES INTO THE AIR ANY LISTED HAZARDOUS AIR POLLUTANT or extremely hazardous substance (EVEN IF SUCH RELEASE IS NOT IN VIOLATION OF ANY STANDARD, RULE, OR ORDER). The bill contains the same limited defense for releases in compliance with applicable Section 112 standards as is found in the "knowing endangerment" provision. THE DEFENSE DOES NOT EXTEND TO EMISSIONS IN COMPLIANCE WITH STATE OR LOCAL STANDARDS OR SOURCE CATEGORIES FOR WHICH EPA HAS NOT YET SET A SECTION 112 STANDARD.

4. IMMINENT AND SUBSTANTIAL ENDANGERMENT

H.R. 3030 makes significant changes to the Imminent and Substantial Endangerment order authority of Section 303(a). THE BILL EXPANDS THE FOCUS OF SECTION 303 from the "health of persons" to "public health or welfare or the environment". This language is sufficiently broad to allow Section 303 TO APPLY TO VIRTUALLY ANY ENVIRONMENTAL AIR POLLUTION CONDITION.

THE BILL REMOVES LIMITATIONS ON THE LENGTH OF TIME THAT UNILATERAL ORDERS CAN REMAIN IN EFFECT without some court action (currently limited to 24 or 48 hours). The Administrator need only determine that it is "not practicable" to seek court action to assure prompt protection or public health, welfare, or the environment. WITHOUT FURTHER LIMITATION, H.R. 3030 COULD TRANSFORM SECTION 303 FROM AN EMERGENCY AUTHORITY INTO AN ALL-PURPOSE AUTHORITY for dealing with risks of air pollutants in whatever manner the Administrator determines, CIRCUMVENTING THE OTHER REGULATORY PROGRAMS IN THE ACT.

The language in the bill is similar to the emergency authority now in the Resource Conservation and Recovery Act (RCRA). Case law exists providing that EPA need not even prove that an emergency exists to prevail under the imminent and substantial endangerment provision in RCRA. This miscarriage of justice should not be repeated in the Clean Air Act.

5. FIELD CITATIONS

Section 113(d)(3) provides EPA with the opportunity to issue field citations with civil penalties of \$5,000 per day of violation. There is no explicit maximum limit on the amount of

such citation. Because of the provisions of new Section 113(e)(2) -- Presumption of Guilt (see below) -- the total amount of a penalty can add up quickly. THIS PROVISION DELEGATES ENORMOUS AUTHORITY TO A FIELD INSPECTOR, WITH LITTLE ASSURANCE THAT THE INSPECTOR WILL ASSESS PENALTIES ON A REASONABLY CONSISTENT OR FAIR BASIS. The bill compounds this problem by providing no opportunity for cross-examination or other procedural safeguards before EPA.

By contrast, the Clean Water Act caps penalties subject to informal administrative procedures at \$25,000. In addition, although the Administration's explanatory language for H.R. 3030 suggests otherwise, the language in the bill does not say this. Therefore, Section 113(e) could provide EPA and citizens with the authority to bring another action to assess additional penalties for the same violations against someone who has already paid a penalty in a field citation.

6. PRESUMPTION OF GUILT

The language of Section 113(e)(2) SHIFTS THE BURDEN TO THE ACCUSED TO PROVE HIS INNOCENCE. The courts must assume that a violation commences the first date that the government can prove a violation, and continues each and every day thereafter until the alleged violator establishes his continuous compliance. It appears to completely relieve the government of its burden to prove that the violation is ongoing or continuous by proving a pattern of violations.

The bill language conflicts with the Administration's explanatory language for the bill, which suggests that EPA must establish a prima facie case of a "period of violation" before the burden of proof can shift to the defendant. That language suggests that the presumption would operate only for the intervening time between at least two known instances of violation. Instead, the language of the bill requires only one point of violation to trigger the presumption from that time forward indefinitely. Also, THE BILL APPLIES THIS STATUTORY PRESUMPTION OF GUILT NOT ONLY TO CIVIL ACTIONS, BUT TO CRIMINAL ACTIONS AND CITIZEN SUITS AS WELL.

7. PRISON TERMS

Section 113(c)(3) provides for up to a five-year prison sentence for a knowing violation of the Act. The present statute provides a one-year maximum penalty. The Clean Water Act and the Safe Drinking Water Act, the environmental statutes Congress most recently amended, provide for maximum three-year terms.

8. BOUNTY HUNTER

Section 113(f) establishes a "bounty hunter" provision. The Administrator may pay a reward of \$10,000 to someone who furnishes information that leads to any civil, judicial, or administrative judgment of liability. It also applies to "services" as well as "information". There are no comparable "bounty hunter" provisions in the Clean Water Act, the Safe Drinking Water Act, or the Solid Waste Disposal Act.

Taken in context with other provisions of Title VI, one co-worker could report another co-worker for failure to file a complete permit application. One co-worker would go to jail, and the other would receive \$10,000. This significantly expands the scope of this section beyond the environmental bounty hunter provision in Section 109(d) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA):

H.R. 3030

The Administrator may pay a reward, not to exceed \$10,000, to any person who furnishes information or services which lead to a criminal conviction or a civil, judicial, or administrative judgment of liability...

CERCLA

The President may pay an award of up to \$10,000 to any individual who provides information leading to the arrest and conviction of any person for a violation subject to a criminal penalty under this chapter...

9. ADMINISTRATIVE PENALTIES

Section 113(d) adds a new administrative penalty authority to the Clean Air Act. However, it does not delete the current administrative penalty authority provided under Section 120. Administrative penalties allow EPA to act as prosecutor, judge, and jury. This proposal allows administrative penalties of \$25,000 a day for each day of violation, for each violation. There is a nominal limit of \$200,000, but by joint action, the Attorney General and the Administrator may waive the limit for certain cases or categories of cases, with no opportunity for judicial review.

In contrast to this bill, Section 309(g)(2) of the Clean Water Act provides a cap of \$125,000 for administrative penalties. EPA must go to court to seek any assessment higher than that amount.

November 14, 1989

CLEAN AIR ACT ISSUE PAPER
PERMIT PROVISIONS -- TITLE IV OF H.R. 3030

The bill would require all sources subject to air toxics standards to have a permit. States may be authorized to issue permits, but EPA must still review every permit application. States would be required to develop and implement a complete permitting program. Permits would be comprehensive and include all Clean Air Act requirements for a particular source. Notice of each permit applications must be given to the Governor of each state contiguous to the location of the source. Virtually no protection is afforded to confidential information that may be included in permit applications or compliance plans. There is no option for revising a permit deemed incomplete, once EPA makes this determination.

1. MULTI-STATE SIGN-OFFS

The bill would require review of permit applications by each state contiguous to the source. For example, Tennessee borders on eight other states. This means that any time a plant in Tennessee wanted to make a process change or expand its facility in Tennessee, it would have to get permit approvals not only from Tennessee, but from each of the other eight contiguous states to approve the projects under the multi-state sign-off provision -- none of which would have any requirement or incentive to give a timely review.

If this proposed multiple sign-off is to have any substantive meaning and not just lead to permit gridlock, it would seem to make sense to limit it to states where there is a good reason to believe that the applicant's source would negatively impair air quality in that state. A reasonable way to do this might be to limit eligibility for multi-state sign-off to states within a reasonable proximity of the source, say 50 miles; with a definite time limit for review, with the permit deemed approved unless the review time is met.

By way of example, small and large facilities would be required to negotiate with from four to nine states for any process notifications or facility improvements in the following states:

<u>FACILITY LOCATION</u>	+	<u>CONTIGUOUS STATES</u>
1. Tennessee (N = 9)	+	(8): Alabama, Arkansas, Georgia, Kentucky, Mississippi, Missouri, North Carolina, Virginia.

PERMIT REQUIREMENTS

November 14, 1989

Page 2 of 4

<u>FACILITY LOCATION</u>	+	<u>CONTIGUOUS STATES</u>
2. Pennsylvania (N = 7)	+	(6): Delaware, Maryland, New Jersey, New York, Ohio West Virginia.
3. Illinois (N = 7)	+	(6): Indiana, Iowa, Kentucky, Michigan, Missouri, Wisconsin.
4. North Carolina (N = 6)	+	(5): Georgia, Kentucky, South Carolina, Tennessee, Virginia.
5. Ohio (N = 6)	+	(5): Indiana, Kentucky, Michigan, Pennsylvania, West Virginia.
6. Virginia (N = 6)	+	(5): Kentucky, Maryland, North Carolina, Tennessee, West Virginia.
7. West Virginia (N = 6)	+	(5): Kentucky, Maryland, Ohio Pennsylvania, Virginia.
8. Indiana (N = 5)	+	(4): Illinois, Kentucky, Michigan, Ohio.
9. Michigan (N = 5)	+	(4): Illinois, Indiana, Ohio, Wisconsin.
10. New York (N = 5)	+	(4): Connecticut, Massachusetts, Pennsylvania, Vermont.
11. Texas (N = 5)	+	(4): Arkansas, Louisiana, New Mexico, Oklahoma.

PERMIT REQUIREMENTS

November 14, 1989

Page 3 of 4

<u>FACILITY LOCATION</u>	+	<u>CONTIGUOUS STATES</u>
12. California (N = 4)	+	(3): Arizona, Nevada, Oregon.
13. Louisiana (N = 4)	+	(3): Arkansas, Mississippi, Texas.
14. New Jersey (N = 4)	+	(3): Delaware, New York, Pennsylvania.

2. MANDATORY STATE PROGRAM

States would be required to develop and implement a complete permitting program. If the states don't seek or don't receive full delegation of the permit program, both the state and individual sources in the state would be subject to strong sanctions. Even if EPA approved the state's program, it could still interfere at its discretion in the issuance of any individual permit.

Each state should be able to decide whether to seek delegation of all, some, or none of the permitting program. ONCE DELEGATED, EPA'S REVIEW SHOULD BE AN AUDIT OF THE STATE'S ADMINISTRATION OF THE PROGRAM, NOT A PERMIT-BY-PERMIT APPROVAL.

At best, this can only add to the inefficiency of the permit program, with the permit applicant's business held hostage to the whims of any disagreement between EPA and a state.

3. NO CERTAINTY IN THE PROCESS

The permitting process should be administratively simple and provide sources with some degree of certainty. The bill does provide that submission of a complete permit application allows continued operation pending permit approval. However, there is no requirement that the permitting agency give timely notice to an applicant of the completeness of the application. Such provisions are included in other environmental laws; e.g., FIFRA, TSCA. An applicant could find itself in criminal violation of the Act if the agency decides that the application isn't complete after the six month application period.

Out of fairness to the source -- especially in view of new criminal penalties -- and being realistic about governmental delays, THE PERMITTING AGENCY SHOULD BE REQUIRED TO DETERMINE WHETHER THE PERMIT APPLICATION IS COMPLETE WITHIN 30 DAYS OF SUBMISSION, AND THE APPLICANT SHOULD BE ALLOWED A REASONABLE TIME TO SUBMIT ADDITIONAL INFORMATION WITHOUT BEING IN VIOLATION.

4. LENGTH OF PERMIT

The bill would allow permits of extremely short duration; e.g., one year, up to a maximum of five years. If the permit program is to be meaningful and manageable, PERMITS SHOULD BE ISSUED FOR A FIXED TERM OF AT LEAST FIVE YEARS. To assure that permits are meaningful, new standards and limitations should not be enforceable against a permittee during the term of the permit. This would provide some reasonable certainty to a business investing huge sums of money in modifying process controls and installing emissions control devices.

5. UNLIMITED PERMIT FEES

We do not object to paying a fair fee for efficient processing of air permit applications. However, the bill would create an unfair and burdensome system whereby EPA and the state could charge open-ended fees with no commitments or incentives on their part to provide timely and competent permit review.

Under the bill, the permitting agency would be required to develop a permit fee schedule to cover all "direct and indirect" costs of developing and administering the permit program. We think it would be fairer if the fees were limited to the direct costs of the permit application. Indirect costs are vague, and could be used to support any tangentially relevant activity that the state or EPA wanted to do, without the knowledge or consent of the permit applicants who would be forced to foot the bill.

There is no limit on how much, on an annual basis or a permit basis, all permit applicants and permit holders could be charged. This bill does provide that the fees must be at least \$25 per ton of each regulated pollutant emitted (excluding CO). The regulated pollutants include VOC's and toxics, and may lead to a double assessment. EPA, solely at its discretion, could set a higher fee. The permitting authority would have discretion (but would not be required) to limit the fee liability to the first 4,000 tons per year of each pollutant emitted. The permitting authority would also be able to charge less than \$25 per ton upon demonstrating that a lower fee would cover the relevant costs.

6. NO PROTECTION FOR CONFIDENTIAL BUSINESS INFORMATION

The way the bill is drafted, there is virtually no protection for confidential business information included in a permit application. For example, when the permit application is submitted, the source is to include a detailed compliance plan regarding the specific processes and facilities at the site. Under the bill, all of this information would be available to the public, thus making proprietary information available to our competitors. This is inconsistent with all other environmental laws and should be changed.



National Association
of Manufacturers

JERRY J. JASINOWSKI
President

October 26, 1989

The Honorable John H. Sununu
Chief of Staff
The White House
Washington, DC 20500

Dear Governor Sununu:

The National Association of Manufacturers (NAM) supports reauthorizing the Clean Air Act to bring cities into compliance with our nation's air quality standards. The Clean Air Act has been effective in reducing air pollutants such as lead, smog, carbon monoxide, sulfur dioxide and oxides of nitrogen.

While we applaud the efforts of Congress and President Bush to amend the Clean Air Act, we are concerned about the enormous economic impact of pending legislation on all types of business. Small businesses offer the greatest economic opportunities in this country. More than 80 percent of the jobs created in the last decade were created by small business. NAM wants to sustain that critical part of our economic expansion and not hinder small businesses through unrealistic paperwork burdens and capital diversions.

The enclosed paper entitled "Clean Air Legislation: What Cost to Small Business?" outlines NAM's concerns with and identifies legislative solutions to the permitting and enforcement titles of H.R. 3030/S. 1490. While we support "workable" permitting and paperwork requirements in a bill, we do not believe that the bill accomplishes that goal. NAM supports strong enforcement action against companies guilty of fraud or intentional violation of any law. However, we oppose criminal prosecution of employees (laborers, plant managers, or owner/operators) who make paperwork errors, fail to pay routine fees, submit late compliance reports or incorrectly install monitors.

We urge you to review our paper and consider the impact on small businesses in your state — the dry cleaners, autobody shops, furniture manufacturers, small paint and printing companies, metal finishers, bakeries and many more.

NAM knows that the new Clean Air Act will require a large investment from all of us. But we ask you to consider the delicate balance of protecting our environment and destroying the growth potential for our nation's small businesses. We need your help in supporting realistic changes to H.R. 3030/S. 1490 to provide for small businesses across the nation while preserving the integrity of the Clean Air Act.

Sincerely,

Enclosure

EXECUTIVE SUMMARY

Clean Air Legislation: What Cost to Small Business?

For the first time in more than a decade, Congress is likely to revise the federal Clean Air Act. One of the bills being considered was presented by President Bush. The measure, H.R. 3030/S. 1490, contains seven titles covering all aspects of air pollution: acid rain, urban pollution, automobiles and off-the-road vehicles, air toxics, permits and enforcement. This paper deals with the issues of permitting and enforcement titles. NAM's complete, soon-to-be-released, white paper on the subject addresses *all* titles of the legislation.

The current law imposes high costs on manufacturers and needs revision. It requires that all national air quality standards be met by December 31, 1987. That date came and went and the nation did not attain the standards. This created a risky and unstable economic environment for manufacturers. Many cities have failed to meet federal air quality standards and face economic sanctions or construction bans. Such actions slow economic growth and prevent the building of factories or

modernization of existing factories. Much of the nation's productive manufacturing capacity is located in our larger cities where air pollution is complex.

Industry has made substantial progress in cleaning up the nation's air. More than two decades of controlling factories and automobiles have reduced emissions of air pollutants such as lead, sulfur dioxide, carbon monoxide and even smog. This has cost industry \$34 billion a year.

According to the Environmental Protection Agency (EPA), more than 100 metropolitan areas do not meet the ground-level ozone or "smog" standard. This makes smog the most common air pollution problem. Smog results from hydrocarbons and nitrogen oxides that "cook" in the sunlight and form pollution. It is an irritant that can pose a health threat at high levels of concentration. Most of the new controls in the

pending clean air legislation affecting small businesses are designed to control substances that make smog.

What Does NAM Want?

1. Streamline the permit process and improve emissions data without forcing companies to use expensive continuous (24-hours-a-day) monitoring equipment. Paperwork burdens in permitting should be minimized.
2. Small "batch" manufacturers should not have to repermit every time a company retools or makes production-line changes.
3. Encourage the use of group permits or permits by rule-making for categories of industrial sectors to speed up the permit process.
4. Permitting fees should realistically reflect the cost of administering a permit program and should not be used to balance government deficits.
5. Fines and penalties should match the seriousness of the offense. Criminal prosecution and jail sentences are not appropriate for late submittal of forms, permit records, or payment of routine administrative fees. NAM supports criminal prosecution where fraud has been established.
6. The legislation should provide technical assistance and guidance materials to small manufacturers to reduce common air pollution problems resulting from the use of solvents, paints, coatings and inks.

Q. Who is Covered by These Requirements?

A. Thousands of companies will be regulated under the new bill. Even if you are not regulated now, you probably will be if you are in the painting, printing, plastic coating, chemical processing, dry-cleaning, solvents usage, electronics and commercial bakery sectors. Many small businesses often emit (or exhaust) up to 100 tons per year. This means emitting as little as 23 pounds an hour. Medium and large companies will continue to be regulated.

Q. What Will My Company Have to Do? What Is Permitting?

A. No matter what you make or where you are located, you will probably have to get a permit to manufacture. This is true even if you manufacture in an area that meets the air quality standards.

Permits are like contracts with the state to allow you to manufacture or do business while controlling air pollution. Permit applications often take 6-42 months to process and can be expensive.

Typical Permitting Costs for a Medical Instrument Sterilizing Company

Modeling	\$5,000
Staff time	5,000
Sampling	4,000
Legal Counsel	2,100
Public Relations	150
Public Notice	102
Total	\$16,352

Source: Texas Air Control Board

Under the bill, businesses would have to submit detailed emission analyses and compliance schedules, and periodically submit compliance certifications to the state or the EPA. Companies must notify the authorities of any violation of the permit. The bill sets operating permits for up to five years. New companies would need construction permits, too.

Solution

NAM believes the permit system should be streamlined and recognizes that some small sources should obtain new permits. Paperwork requirements should be kept to a minimum and not hinder business opportunities. Any new permitting system should be a cost-effective way to control air pollution.

Q. What if My Company Already Has a State Permit?

A. The bill is not clear about existing permits and fees. It does not state whether existing permits will be valid or replaced with new permits.

Solution

NAM does not want existing state-approved permits to be thrown out. In fact, throwing out existing permits before the new permitting program is in place could cause chaos.

Q. What Happens to 'Batch' Manufacturers?

A. Many manufacturers operate on a "batch" system where one product is produced for awhile, followed by retooling and production of a different product.

The bill calls for batch manufacturers to obtain new permits every time a major modification is made, even for a production-line change. For some batch operators, permit application changes might be needed every year. The complicated new permit requirements could make batch operations unprofitable for many small manufacturers.

Solution

Batch manufacturers should not have to repermit for periodic product-line changes and should have some protection against constantly changing regulations. Group permits or permits by rule-making may assist some companies in simplifying the permit process.

Group permits or permits by rule-making would help categories or manufacturers get new permits without all the individual company expense and use of manpower. For example, all electroplaters could work with the state and federal permitting authorities to establish group permits for all electroplaters in an area or state. In other instances, printers or other subcategories of an industrial sector might benefit from permits obtained through rule-making.

Choices for permits by rule-making instead of group permits will entirely depend on the type and size of the source as well as the severity of the pollution problem. The legislation should allow for state agencies to work out these problems.

Q. Is There Any Technical Assistance in Sight?

A. The permit requirements would increase manufacturers' paperwork and other compliance duties. Often, permit applications can only be done by registered environmental engineers. Most small companies don't employ engineers or attorneys qualified to apply for construction and operating permits.

Solution

NAM will work to get the legislation to provide technical assistance for small business to reduce air pollution through the improved and efficient use of such materials as solvents, paints and spray operations.

Q. What About Monitoring?

A. The bill would require continuous (24-hours-a-day) emission monitoring of pollutants. Continuous monitoring equipment typically costs \$50,000-\$250,000 for monitoring just four pollutants and requires a computer database. Some small companies do not have personal computers and would need to purchase computer equipment and provide staff to analyze and manage the data.

Solution

Requiring small manufacturers to monitor all emissions 24 hours a day is not necessary. We can improve the EPA emissions inventory by letting companies use good engineering estimates or mass balance. In some instances, periodic monitoring may be needed. Continuous monitoring of pollutants is expensive and complex and does little to actually improve air quality. Such expenditures may divert capital away from modernization or expansion.

Q. Are Other Costs Involved?

A. Yes. The bill gives the states authority to impose fees on a company to pay for the review and processing of permit applications. The bill requires permitting agencies to assess fees of at least \$25 for each ton emitted. In the case of substances that are also toxic, sources emitting 10 tons or more each year will be charged.

Solution

NAM recognizes that states need more money to run permit programs. But permit fees should be reasonable and based on true administrative costs. NAM opposes any efforts to balance government deficits by taxing industrial emissions routinely emitted in manufacturing safe and reliable products. Linking permit fees to the Consumer Price Index is unnecessary and will hit small manufacturers disproportionately.

Q. What About Trade Secrets?

A. Neither the contents of a permit nor the compliance plan may be considered confidential business information. Your competitors can easily learn how you make your product and what makes it profitable.

Solution

Confidential business information or trade secrets should be protected. The U.S. balance of trade and the domestic economy won't benefit from disclosure of confidential manufacturing-process details. NAM supports the disclosure of legitimately needed information to protect the health of workers, consumers and the general public. The association, however, will work to minimize the information provided to the public and regulators which could be the key to what makes a company or industrial sector profitable.

Q. What if I Simply Don't Apply for a Permit?

A. Your company will face a \$25,000-a-day penalty for each violation. You could also wind up in jail for one year for each day of each violation.

The bill increases the scope of violations subject to criminal penalties and civil fines. If you fail to pay a permit fee, follow administrative rules, or submit compliance plans and orders, you could be sent to jail. *Negligent* release of one of the bill's 180+ hazardous air pollutants could also constitute a criminal violation.

Knowing omission of information or tampering with, or failure to install, any required monitoring device, would constitute a criminal violation. For example, the accidental late submission of a six-month compliance report could subject a manufacturer to civil penalties of up to \$25,000 for each day of noncompliance.

Solution

Intentional violation of any law deserves prosecution. NAM, however, opposes criminal prosecution for *paperwork* violations where no harm to the public occurred. We support criminal prosecution where *fraud* has been established. Criminal prosecution and jail sentences, however, are not appropriate for late submittal of forms, permit reports, or payment of routine administrative fees. Under current law, even failure to pay taxes to the Internal Revenue Service (IRS) or loss of IRS paperwork does not constitute jail time unless fraud has been established.

Civil penalties should realistically reflect the seriousness of the violation. The bill limits access to the courts when *administrative judgments* have been made against companies. Further, NAM believes the bill unfairly limits appeal opportunities by requiring all companies accused of violations to seek *judicial review* in the District of Columbia courts only. NAM believes all companies and individuals deserve full access to the U.S. courts to appeal decisions made by the EPA, states or other authorities. The right to appeal is a fundamental constitutional right.

Status

Markup of H.R. 3030 and S. 1490 in committee will continue through the fall of 1989. House and Senate passage of a new Clean Air Act could take place as early as this year or into next year.

NAM Position

NAM will work to protect human health and our natural resources as well as provide for economic expansion. More than 80 percent of the jobs created in the past decade have been created by small business. NAM believes capital costs, human resource allocation and nonmanufacturing tasks are critical to the success or failure rate of small business.

Permitting and enforcement requirements should recognize the realities of operations and capitalization

limitations in small businesses. Permitting requirements and enforcement action should consider the real-world experience and technical expertise of plant managers and owner/operators.

All Americans must work to improve our nation's air quality and business will play a significant part in the ongoing quest for a cleaner, safer environment.

NAM will strive to reauthorize a workable and effective Clean Air Act. A comprehensive Clean Air Act should protect public health while making environmental gains through realistic and tailored control programs that ensure a sound economy.

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The National Association of Manufacturers is a voluntary business association of more than 13,500 member companies and subsidiaries, large and small, located in every state. Members range in size from the very large to the more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce more than 80 percent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses throughout its Associations Council and the National Industrial Council.

Additional NAM issue briefs are available on acid rain, toxic air pollutants and urban air pollutants.