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Folder Title:
Clean Air Act - Permitting [1]

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The Society of the
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Lewis R. Freeman, Jr.
Vice President
Government Affairs

April 16, 1992

C. Boyden Gray, Esq.
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Gray:

I am writing to express the concerns of The Society of the Plastics Industry, Inc., (SPI)* with the operating permit rule currently being reviewed by the Council on Competitiveness and the Office of Management and Budget (OMB). Specifically, my comments will focus on the concepts of "enforceable commitment" and "potential to emit."

There are over 12,000 small plastics processors in the country, most of whom will be subject to clean air regulatory action for the first time under the 1990 law. The two following concerns reflect this reality.

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*SPI is a trade association with over 2200 member companies, representing all segments of the plastics industry in the United States. The Society's members include processors and manufacturers of plastics and plastics products, suppliers of raw materials, processors and converters of plastics resins and manufacturers of accessory equipment for the plastics industry. Founded in 1937, SPI serves as the "voice" of the plastics industry.

CAA –

Permitting

1. Enforceable Commitment

The original proposed permit rule (56 Fed. Reg. 21712, May 10, 1991) requested comments on an option that would allow sources to submit to a permitting authority a plan, referred to in the proposed rule as an "Enforceable Commitment" (see 56 Fed. Reg. at 21725), that would limit potential emissions to a level below the prescribed regulatory threshold.

This enforceable commitment would describe the physical, operational and other restrictions that keep the source's potential emissions to a level below the applicability thresholds. The description would have to be sufficient to demonstrate that the restrictions are real and effective constraints on emissions. However, as is the case for enforceable commitments for the Early Reductions Program, extensive details would not be required. This would be optimal for small companies already operating on narrow profit margins. This provision did not appear in subsequent drafts and SPI strongly urges its inclusion in the final permit rule.

SPI also believes that the filing of enforceable commitments would require a limited expenditure of EPA and state resources. However, the administrative burden would be far less than the burden associated with the receipt of complete applications from sources which should not be subject to the requirements.

2. Determining a Source's "Potential to Emit"

SPI firmly believes that a source's "potential to emit" should be based on realistic emission data, calculated by using actual physical and operating conditions and not on theoretically projected emissions, assuming continuous operations. There are, already, instances of state air regulatory officials making assumptions about plastics processing plant emissions based solely on perceived raw material input, without regard to proven emissions or controls in place.

All controls implemented by a plant should be considered in determining a source's "potential to emit." This will ensure that the permit regulations provide real benefit in protecting human health and the environment. To regulate based on some assumed unrealistic "potential to emit," would result in unnecessary costs without any assured benefit to health or the environment. Such a regulatory agenda could well be an economic threat to our industry.

The actual statutory language as cited in Sect. 112 (a)(1) of the Clean Air Act Amendments of 1990 defines a"major source" to mean:

> "...any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, <u>considering controls</u>, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per or more of any combination of hazardous air pollutants (emphasis added).

The legislative history accompanying the Clean Air Act further supports and clarifies the statutory language that existing sources are to be classified according to calculations based on their actual operating conditions:

> The determination as to whether a source is a major source as defined in Section 112(a)(1) is based on the emissions of hazardous air pollutants from the source <u>after</u> application of installed controls and reflecting the actual operating conditions of the particular source (emphasis added). (Report of the Senate Committee on Environment and Public Works on S. 1630, S. Rept. 101-228, 1st Session, 151 (1989).)

It seems obvious then that Congress intended for EPA to regulate sources based on actual emissions and not on an artificially high level of theoretical potential emissions. Further, when potential to emit is assessed, the operation of all installed controls, under typical operating conditions, should be included. The Clean Air Act Amendments, the Act's legislative history are clear-- potential to emit should be based on actual operating conditions after application of installed controls.

SPI would be happy to meet with you to discuss further these issues. Please feel free to call me if you have questions or if additional information is needed.

We trust you will take these views into consideration before making any final judgments on the operations permit rule.

Sincerely,

Lew Freeman

Lewis R. Freeman, Jr.
Vice President
Government Affairs

cc: Mr. Jeff Holmstead
Associate Counsel to the President
Room 106 Old Executive Office Building
The White House
Washington, DC 20500

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Richard B. Ossias thru Alan W. Eckert to E. Donald Elliott RE: Operational Flexibility (3 pp.)	03/27/91	~~P-5~~	

Collection:

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Series: Holmstead, Jeffrey
Subseries: Subject File
WHORM Cat.:
File Location: Clean Air Act - Permitting [1]

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(Document Follows)
By MM (NLGB) on 01/19/2009

Date Closed: 7/12/2002
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Presidential Records Act - [44 U.S.C. 2204(a)]

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

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

ATTORNEY-CLIENT PRIVILEGE

MEMORANDUM

OFFICE OF
GENERAL COUNSEL

SUBJECT: Operational Flexibility

FROM: Richard B. Ossias
Assistant General Counsel
Air & Radiation Division

THRU: Alan W. Eckert
Associate General Counsel
Air & Radiation Division

TO: E. Donald Elliott
Assistant Administrator and General Counsel

In the course of drafting EPA's proposed regulations concerning operational flexibility, we have concluded that even our current "de minimis" exception from permit revision requirements for certain minor changes may be somewhat vulnerable under the statute. Expanding this exception to embrace changes beyond the truly de minimis will invite courts to strike down the regulation. The grounds for this conclusion are outlined below.

- Basic Requirements: Section 502(a) provides that a source may not operate in violation of its permit conditions. Section 502(b)(10) sets forth the circumstances in which a source may depart from its permit without being compelled to obtain a permit revision. Section 502(b)(6) requires "adequate, streamlined, and reasonable procedures for . . . public notice, . . . and for expeditious review of permit actions, including . . . revisions . . ." and provides for judicial review by any member of the public who participated in the State permit proceeding. Section 505(a)(1)(A) requires all applications for permits and permit modifications to come to EPA for review. Section 505(a)(1)(B) then requires the state to provide a copy of "each permit proposed to be issued and issued as a final permit", and section 505(b)(1) requires EPA review within 45 days of receiving each "proposed permit under subsection (a)(1), or (B) . . . ."

- Read together with the history, the most straightforward reading of these provisions is that any change at a source that would either trigger a Title I modification or exceed the allowable emissions under the permit must be preceded by a permit revision that has undergone some significant public and EPA review.

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- o The Alabama Power decision of the D.C. Circuit, however, accepts the notion that an agency may "exempt de minimis situations from a stationary command as a tool in implementing the legislative design." 636 F.2d at 360. The agency may use this power when "the burdens of regulation yield a gain of trivial or no value." 636 F.2d at 360-361.

- o The previous and current drafts rely on the de minimis theory, as well as the absence of clarity in § 502(b)(6) as to what degree of public processing applies to revisions, to authorize changes resulting in only small emissions increases to undergo a drastically limited public review -- and no EPA review at all -- before the permit is revised to authorize the change. Moreover, as now structured, the draft allows the source to make these small changes even before the permit is revised to reflect the change.

- o The current de minimis option is itself legally vulnerable because:

  -- the docket contains no technical justification for the conclusion that the authorized changes are indeed de minimis; and

  -- even if the draft were restructured to make the permit amendment effective (perhaps automatically) before the source makes the change, the lack of public participation and especially prior EPA review are difficult to reconcile with sections 502(b)(6) and 505(b)

- o Ernie Rosenberg has suggested that 502(b)(6) is so vaguely worded that EPA could authorize even a non-de minimis source change without public participation and prior EPA review, so long as the change did not cause a violation of any applicable federal requirements or trigger a Title I modification. Under this option, the source would not be shielded from such applicable federal requirements following the change. This option is even more legally vulnerable than the de minimis approach because EPA could not rely on the Alabama Power theory (since the change could result in even large emissions increases without triggering a Title I modification), and for the following reasons:

  -- it is difficult to read § 505(a)(b) to authorize EPA to exempt from prior EPA review any type of permit revisions it chooses; 505(a)(1)(A)'s requirement that every application for a permit modification come to EPA for review would make no

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sense if EPA were not required to review each of the resulting permit modifications under section 505(b);

-- since one of the key purposes of public participation under the permits title is to ensure that the public can check for itself whether a permit is consistent with underlying federal requirements, denying such participation just because the source claims that the change is consistent with such requirements would ignore the main purpose of the public participation requirements;

-- the fact that the shield would not apply as to these changes does not help, because the point under Title V is to ensure that the permit indeed reflects the underlying requirements; taken to its logical conclusion, relying on the absence of a shield is equivalent to saying that we do not need permits at all since the source will still need to meet the underlying requirements.

- In sum, expanding the exemption (from full-fledged permitting procedures) beyond de minimis changes would be highly vulnerable to reversal in the courts.