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Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01a. Note	From E. Donald Elliott to All Associates, Gerald Yamada, Raymond Ludwiszewski, Nancy Firestone RE: Docketing meetings with OIRA and other agencies (1 pp.)	12/06/90	P-5	

Collection: Bush Presidential Records
Counsels Office
Jeffrey Holmstead Files - EPA/Environment Subject File

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
Subseries: Environmental Subject Files

WHORM Cat.:

File Location: EPA [Environmental Protection Agency] - Miscellaneous

Open on Expiration of PRA
(Document Follows)
By Cap (NLGB) on 4/24/06

Date Closed: 8/6/2002	OA/ID Number: 45127-012
FOIA/SYS Case #: 2001-1865-F	
Re-review Case #:	
P-2/P-5 Review Case #:	
MR Case #:	Appeal Case #:
MR Disposition:	Appeal Disposition:
Disposition Date:	Disposition Date:

RESTRICTION CODES

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

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

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



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

OFFICE OF
GENERAL COUNSEL

December 6, 1990

NOTE TO: All Associates
Gerald Yamada
Raymond Ludwischewski
Nancy Firestone

I am inclined to concur with the attached. If you have any serious disagreement, please notify me by C.O.B. today (December 6, 1990).

E. Donald Elliott

Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01b. Memo	From Alan W. Eckert to E. Donald Elliott RE: Docketing meetings with OIRA and other agencies (1 pp.)	12/04/90	P-5	

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Counsels Office
Jeffrey Holmstead Files - EPA/Environment Subject File

Record Group: Bush Presidential Records

Office: Counsel to the President, Office of

Series: Holmstead, Jeffrey

Subseries: Environmental Subject Files

WHORM Cat.:

File Location: EPA [Environmental Protection Agency] - Miscellaneous

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DEC - 4 1990

OFFICE OF
GENERAL COUNSELMEMORANDUM

SUBJECT: Docketing meetings with OIRA and other agencies

FROM: Alan W. Eckert *Alan*
Associate General CounselTO: E. Donald Elliott
Assistant Administrator and
General Counsel

As I mentioned at the staff meeting on Monday, I do not think that we are legally required to docket summaries of most OIRA/OMB meetings, and I think it is inadvisable to do so. Every Administrator since Ruckelshaus (in his second term) has issued a "fishbowl" memo (so called because Ruckelshaus's version said we should conduct our business "in a fishbowl"). Bill Reilly's is attached. Like its predecessors, it limits our docketing obligation to memoranda "summarizing any significant new factual data or information likely to affect the final decision received during a meeting or other conversations" See p. 2 (emphasis added). Under this policy, we are free to meet with NRDC, CMA, or anyone else and to hear their policy arguments without docketing a memorandum summarizing those arguments.

There is no legal reason not to apply that rule to contacts with OIRA, the White House staff, or other agencies. In Sierra Club v. Costle, 657 F.2d 298, 406-410 (D.C. Cir. 1981), the court upheld EPA's refusal to docket a summary of a meeting attended by the President (and presumably White House staff), because the final rule was not based "on 'information or data' arising from that meeting." Id. at 407. See also National Grain and Feed Ass'n v. OSHA, 858 F.2d 1019, 1031 n. 22 (5th Cir. 1988), reconsidered on other grounds, 866 F.2d 717 (5th Cir. 1989) (refusing to remand rule because of alleged coercion by OMB).

Consistent with these cases, the Administrative Conference of the United States has recommended (Recommendation No. 80-6, "Intra-governmental Communications in Informal Rulemaking Proceedings," 1 CFR § 305.80-6 (attached) that executive agencies should be free to receive oral or written policy advice from other agencies without making those contacts public, but that material factual information should be docketed. I suggest that we follow that recommendation.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

WASHINGTON, D.C. 20460

FEB 27 1989

THE ADMINISTRATOR

MEMORANDUM FOR: All EPA Employees

SUBJECT: Conduct of the Agency's Business

I look forward to meeting and working with many of you as I take up my duties as Administrator of the Environmental Protection Agency.

Together, as a team, we must tackle some of the most pressing and vexing problems that confront our nation and, as we have become acutely aware in recent years, our planet. The very health and well-being of millions of people depend on the decisions we make and the effectiveness with which we pursue our mission. We at EPA, indeed the federal government, cannot alone do all that is necessary. We must continue to build strong working partnerships with state and local agencies, with citizens and public interest groups, with the environmental community, with business councils and trade and professional associations, with scientists, and with many others who have important roles to play in protecting public health and the environment.

My immediate predecessors, Lee Thomas and William Ruckelshaus, offered guidelines for EPA staff contacts with people outside the Agency, and I wish to affirm them. The success of our efforts at EPA directly depends on the trust of the public we serve. We must seek at all times to earn and maintain that trust, and we must conduct our business openly and fairly, responding as best we can to the needs of the people we serve. The guidelines below should maintain the fairness and openness of our procedures and thus strengthen public confidence in our decisions.

-2-

General Principles

EPA must provide, in all its programs, for the fullest possible participation by the public in our decisionmaking. This requires not only that EPA staff remain open and accessible to those representing all points of view, but also that EPA employees responsible for decisions take affirmative steps to seek out the views of those who will be affected by the decisions. EPA will not accord privileged status to any special interest, nor accept any recommendation or proposal without careful, critical examination.

Appointment Calendars

To keep the public fully informed of my contacts with interested parties, a copy of my appointment calendar for each week will be placed in the Office of Public Affairs, available to whomever is interested at the end of the week. The Deputy Administrator, and all Assistant Administrators, Associate Administrators, Regional Administrators, and Staff Office Directors similarly shall make their appointment calendars available.

Litigation and Formal Adjudication

EPA is engaged in a wide range of litigation, both enforcement and defensive in nature. All communication with parties in litigation must be through the attorneys assigned to the case. Program personnel who receive inquiries from parties in matters under litigation must immediately notify the assigned attorney, and refer the caller to that attorney.

Formal adjudications, such as pesticide cancellation proceedings, are governed by specific requirements concerning ex parte communications, which appear in the various EPA rules governing those proceedings. These rules are collected and available in the Office of the General Counsel, Room 537 West Tower. I will conduct myself in accordance with these rules, and I expect all EPA employees to do the same.

Rulemaking Proceedings

In rulemaking proceedings under the Administrative Procedure Act, EPA employees must ensure that the basis for the Agency's decision appears in the public record. Therefore, be certain (1) that all written comments received from people outside the Agency (whether during or after the comment period) are entered in the public record for the rulemaking, and (2) that a memorandum summarizing any significant new factual data or information likely to affect the final decision received during a meeting or other conversations also is placed in the public record.

-3-

You are encouraged, consistent with statutory responsibilities, to reach as broadly as possible for views to assist you in arriving at final rules. You should do so, however, in a manner that ensures that final decisions are supported by the public record and the Agency's rationale is fully explained in the preamble to the final rule. This does not mean that you may not meet with one special interest group without inviting all other interest groups to the same meeting, although all such groups should have an equal opportunity to meet with EPA. It does mean, however, that any oral communication regarding significant new factual data or information affecting a rule, including a meeting with an interest group, should be summarized in writing and placed in the public record. In addition to these guidelines, procedures have been established with OMB to ensure that relevant material received by OMB from outside parties will be placed in the EPA public record.

Communications Generally

I am confident that I can rely on EPA staff to use common sense and good judgement in communicating with the public. The openness and integrity with which we deal with the public is essential to ensuring public trust in the Agency.

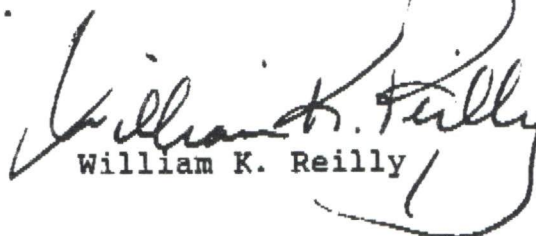
I firmly believe in developing and maintaining an effective communications capability. The Agency has taken important steps to strengthen these capabilities, and I want to see continuing emphasis on communications planning, including commitment by the programs and the regions of appropriate personnel and other resources to achieve this.

In dealing with the press, EPA staff should be open and accessible; none of our goals is well served by limiting contact with the press. Those who speak to the press should concern themselves only with their particular area of expertise. Please inform your Assistant Administrator's office and the EPA Press Office promptly about all such conversations with the press.

Finally, all communications materials, written and audio-visual, produced for public dissemination should be developed in coordination with the Office of Public Affairs, which is to assure they are done cost-effectively, done in-house or by outside contractors as warranted, and are consistent with EPA graphic standards and a number of OMB directives on such materials.

-4-

We have entered a new era in which I expect EPA to play a leading role in developing solutions to complex environmental problems and in strengthening our already firm commitment to achieving steady, tangible environmental progress. In my dealings with EPA staff to date, I have been thoroughly impressed with the professionalism and dedication of everyone. I find myself energized by the challenge ahead, and look forward to working with you all to improve the quality of our environment.


William K. Reilly

Rider A

Under the option proposed today, ILEVs would also be exempt from restrictions on high occupancy vehicle lanes ("HOV restrictions"). In addition, EPA intends to exempt ILEVs, to the extent practicable, from all other existing and future TCMS that are not safety related.

Potential Revision

The ILEV emission reduction could also be incorporated into a source trading program as discussed in Section II.A.2.b of this notice, if such a program were adopted. Obviously, the SIP credit would be reduced accordingly.

Rider A

Of course, ILEVs would qualify for the general TCM exemptions discussed above. ~~EPA intends that, as much as practicable, ILEVs be exempted from all TCMs.~~ However, because at this time the specific TCMs to be adopted in the covered areas are yet to be determined, today's proposed option only extends expanded exemptions to ^{Hov restrictions} ~~high occupancy vehicle lanes~~. EPA requests comment on other ^{existing or proposed} TCMs that should be included. If the ILEV proposal is finalized, EPA expects to designate, in future regulatory actions, additional TCMs from which expanded exemptions will be granted. Measures for which such exemptions would create a clear and direct safety hazard would not be included.

EPA is proposing that the ILEV program be formulated and administered by the EPA in order to ensure that interested manufacturers and fleet owners have consistent requirements to work toward, as well as a clear definition of the program and its requirements as early as possible. Basing the ILEV program on approved SIP revisions would jeopardize its implementation by introducing uncertainty over how (and perhaps if) the program would function. Major development and planning delays would likely occur while awaiting state by state SIP decisions. Furthermore, EPA asks

Current

The ILEV emission reduction could also be incorporated into a source trading program as discussed in Section II.A.2.b of this notice, if such a program were adopted. Obviously, the SIP credit would be reduced accordingly.

Of course, ILEVs would qualify for the general TCM exemptions discussed above. EPA intends that, as much as practicable, ILEVs be exempted from all TCMs which exist for air quality reasons. However, because at this time the specific TCMs to be adopted in the covered areas are yet to be determined, today's proposed option only extends expanded exemptions to high occupancy vehicle lanes. EPA requests comment on other TCMs that should be included. If the ILEV proposal is finalized, EPA may designate, in future regulatory actions, additional TCMs from which expanded exemptions will be granted. Measures for which such exemptions would create a clear and direct safety hazard would not be included, even if their existence was based to some degree on air quality benefits.

EPA is proposing that the ILEV program be formulated and administered by the EPA in order to ensure that interested manufacturers and fleet owners have consistent requirements to work toward, as well as a clear definition of the program and its requirements as early as possible. Basing the ILEV program on approved SIP revisions would jeopardize its implementation by introducing uncertainty over how (and perhaps if) the program would function. Major development and planning delays would likely occur

while awaiting state by state SIP decisions. Furthermore, EPA asks comment on the consistency of expanded TCM exemptions for ILEVs with the language of Section 246(h) referring to TCM exemptions for "any clean-fuel vehicle that meets the requirements of this section." Comment is specifically sought which addresses EPA's authority under this provision to implement the ILEV program described in today's proposal. EPA also seeks comment on the option of implementing the ILEV program under the provisions of Section 182. EPA also requests comment on the practicality and legality under the Act of extending the ILEV program beyond the covered areas defined in section 246 of the Act. Such a program extension would exempt ILEVs from TCMs nationwide or at least in all nonattainment areas, including those designated marginal or moderate.

Recognizing the constraints imposed by attempting to verify at a federal level that ILEVs are being operated solely on clean alternative fuels in the covered areas, EPA proposes that participation in the ILEV program be limited to dedicated-fuel vehicles and dual-fuel vehicles which are certified as ILEVs on both fuels. In this way adequate assurance of proper fuel use would be provided at time of vehicle certification. However, if flexibly fueled vehicles can qualify as ILEVs, EPA is interested in allowing their participation as well and requests suggestions on how this can be accomplished without resorting to a burdensome fuel use verification program at the federal level.



American Paper Institute
ENVIRONMENTAL & HEALTH PROGRAM
National Forest Products Association



1250 Connecticut Avenue, N.W. • Suite 210 • Washington, D.C. 20036

Robert C. Kaufmann
Director, Air Quality Program
202-463-2588

July 22, 1991

Air Docket Section [A-131]
Attn: Docket No. A-91-35
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

Re: General Preamble for Implementation of
Title I of the 1990 Clean Air Act
Amendments

Dear Sir or Madam:

The American Paper Institute and the National Forest Products Association ("API/NFPA") are submitting preliminary comments today on EPA's draft General Preamble for Title I of the 1990 Clean Air Act Amendments. API/NFPA represent the bulk of pulp, paper, paperboard and solid wood manufacturing companies in the United States. Many of our facilities are in or near existing nonattainment areas.

I. INTRODUCTION

A. Balancing Hasty Interpretation of the Clean
Air Act Amendments with the Urgent Need for
Guidance in Marginal and Moderate
Nonattainment Areas

As we understand the development of this policy guidance, the Agency will continue to elicit comments from the public on many of the issues discussed in the Preamble. Thus, like prior Title I Preambles, it will remain a fluid document that reflects future rulemakings and changes in EPA Title I implementation policies. Nonetheless, our members are disturbed by the incomplete documentation in the Preamble, the haste with which public meetings to discuss critical Title I issues were convened, and the possibility raised throughout both the document and the public meeting that the Agency might try to evade public comment on several issues of questionable legal interpretation because of time constraints. We are also troubled that the Agency seems to be "regulatory by Preamble," a move comparable to regulation by internal memorandum, an approach that we challenged in Court (top-down BACT) and settled only after EPA formally recognized that "guidance is non-binding."

Our members are cognizant of the urgency of supplying states with guidance to support revisions of State

July 22, 1991

Implementation Plans ("SIPs") to meet new requirements of the 1990 Clean Air Act Amendments ("1990 CAAA"). We believe that such guidance is especially critical for areas that will be designated as "marginal" or "moderate" nonattainment areas under the new law. On this basis, many of the details on "long-range" issues that the Agency has attempted to tackle in the Preamble, such as post-1996 reductions in serious areas, economic incentives, or satisfying SIP principles, might be better deferred until the Agency has considered these issues more carefully, preferably with support provided by the regulated community, the states, and environmentalists.

It is most important that in devising SIP revisions states retain the flexibility to tailor control strategies to their local nonattainment situation. Therefore, API/NFPA oppose attempts by the Agency to bind states to inflexible and detailed lists of SIP revision requirements. In our opinion, the Preamble incorporates this inflexibility in several instances, such as the requirement for mandatory RACT for all CTG and non-CTG sources regardless of the severity of the area's designation. We submit, therefore, that the "Purpose" section of the Preamble needs to be clarified to allow state air pollution control authorities

to retain the flexibility accorded to them in Section 110 of the Clean Air Act.

B. Format for API/NFPA Comments on the Preamble.

As EPA recognized at its public meeting in Reston, Virginia, there are a number of significant issues covered by the Preamble which require rulemaking or further discussion before they can be finalized. In response to officials' requests at that meeting, API/NFPA's comments today for the most part enumerate those issues raised by the policy guidance which should be dealt with separately from EPA's General Title I Preamble. For each such issue, we explain why the issue needs to be resolved apart from the ongoing policy and suggest how the Agency should go about resolving it. In a few other instances, we seek clarification of Agency statements.

II. DISCUSSION OF ISSUES

As EPA recognizes on page 3 of the Preamble, there are a number of "specific issues concerning the proper interpretation of the Title I requirements for nonattainment areas classified under Part D, Title I, as well as the proper treatment of nonattainment areas that fall outside of the classification schemes." Not all of these issues can or

should be successfully resolved before the Preamble is finalized. API/NFPA's comments focus on a number of issues that we believe merit further study. We urge the Agency to continue its use of "Roundtable" discussions to resolve most, if not all, of these critical policy issues.

A. Noncontroversial Planning Activities

There are a number of essential and relatively noncontroversial activities discussed in the Preamble that must be finalized expeditiously to allow the states adequate time to prepare SIP revisions. These include emissions inventories, most "RACT fix-ups," and modeling requirements for attainment demonstrations. Although there are certain controversial elements in each of the required procedures in API/NFPA's view, the importance of the overall activity for planning efforts overshadows those details. Further, we recognize such issues can generally be resolved at the state and local planning level.

However, we wish to point out two areas of concern regarding emission inventories. The first is that emission inventories should be based on allowables rather than actual emissions. Also, the emission inventory requirements on page 12 of the Preamble state that emissions from major

stationary sources within a 25 mile buffer zone must be included in the inventory for "modeling demonstrations and strategy development." We are unaware of any statutory requirement for the inclusion of this information. However, on page 34 of the Preamble, EPA disallows inclusion of the emissions from those buffer zone major sources for purposes of the base and projection year emission inventories upon which the mandatory 15% emissions reductions are based, even though on page 41 EPA acknowledges that emission reduction strategies applied to these sources "may have beneficial effect on the nonattainment problem within the designated area." It seems to us that, in the absence of statutory requirements, these sources should not be included in the inventories in the first place; if EPA wishes to require their inclusion, associated mobile and area source emissions should also be included, as they may contribute equally to an ozone nonattainment problem.

B. Use of Model RACT Rules

Despite API/NFPA's recognition that "RACT fix-ups" for areas under pre-1990 SIP calls need to go forward, we are disturbed by one element of that strategy and how it spills over to requirements for all nonattainment areas, including marginal and moderate areas. On page 10 of the

Preamble, EPA refers to the "model RACT" rules. We assume this refers to the December 10, 1990 Memorandum from John Seitz to Region I-X Division Directors entitled "Corrections of Volatile Organic Compound Rule Deficiencies."

As EPA must recognize, these "model" VOC RACT rules were never circulated for public comment. However, they cover several controversial topics, including a definition of RACT for non-CTG sources at draft § XX.2300 requiring an 81% control technique capture rate. Since there is no reference to any background information document that would justify this level of control for non-CTG sources, we recommend that this element of the model VOC RACT rules be omitted until the Agency assesses the reasonable availability of pollution controls for all major sources. We note on page 19 of the Preamble that the Agency apparently intends to issue federal RACT rules in the future based on the model RACT Rules. Non-CTG RACT-related issues should be resolved at that time.

In addition, the model rules cover certification, monitoring, record-keeping, and reporting requirements. Since these issues will be covered or should be covered in future Title V and Title VII rulemakings, they should not be addressed in the General Preamble because states will be

misled into thinking these thorny legal issues have been resolved. Any generic discussion should also be deleted from the Model RACT Rules, because such requirements are frequently dependent on the type of emitting equipment that is involved. The final Preamble should note instead that compliance certification, monitoring, record-keeping and reporting issues will be resolved by future rulemaking or in case-by-case determinations in individuals permits. Similarly, any generic references to certifications (see, for example, page 24) and monitoring in the Preamble should be deleted unless the Agency is able to provide a complete reference to available guidance on these subjects.

C. New Source Review

States are required to adopt and submit to EPA revised NSR rules that meet the new Title I requirements by November 15, 1992. EPA indicates on page 25 of the Preamble that it will propose new permit requirements. API/NFPA believe that this rulemaking is the appropriate time to resolve issues surrounding the interpretation of the new Title I NSR requirements. Therefore, all references to NSR "major source" applicability, pollutant applicability, offsets, and growth margins in the Preamble should be reserved. Appendix S to 40 C.F.R. Part 51 contains adequate

guidance to states until the NSR rules are revised. It is legally improper to issue NSR directives as minimal elements of approvable SIPS in advance of this rulemaking.

1. Applicability of "Major Source"
Definition to NO_x

Guidance with respect to the applicability of the major stationary source definition to NO_x, beginning on page 25 of the Preamble for marginal areas, and continuing throughout the document's discussion of NSR applicability requirements in moderate, serious, severe and transport areas, is premature. As a minimal requirement for inclusion in an approvable SIP revision, the Agency should only apply the term "major stationary source" to sources emitting VOCs. Not only must the NSR rules be revised, but the EPA/NAS Study on the contribution of NO_x to VOC formation is not due until February 1992. Until the rules are revised, areas with proven (or even suspected) NO_x contribution problems have ample authority to regulate NO_x sources as part of their plans if needed.

In particular, the Congress intended the EPA/NAS NO_x Study to assist EPA and the states in resolving some of the complex issues associated with ozone formation. Congress also acknowledged scientific studies showing that

in certain areas, NO_x emissions deplete ozone by reducing available OH radicals in the troposphere. It clearly did not intend to shift the burden to states to make the showing under § 182(f) that NO_x is not involved in an area's nonattainment problem before any technical guidance is available. EPA should defer all related NO_x issues until at least mid-1992.

2. NSR Requirements for NO_x

Until EPA promulgates revisions to the NSR rules and the EPA/NAS NO_x study is completed, EPA should reserve the portion of the Preamble applying NSR requirements to new and major modifications of NO_x sources.

D. Offset Ratios & Growth Margins

While API/NFPA is in general agreement that states need to take special steps to track and accommodate growth from new and modified non-major stationary sources in all nonattainment areas, its members submit that the Agency does not have legal authority under the CAAA to require offsets for such sources. We note that it is not clear from p. 26 of the Preamble where such offsets are to come from. Offset provisions for minor sources should not be made a minimum

element of an approvable SIP revision for any nonattainment area. States, of course, could decide on their own whether such a provision makes economic sense in communities where ozone problems exist or are predicted. This is an example of the need for state flexibility as noted earlier in our comments.

We note on page 25 of the Preamble, and in several other locations, that the offset ratio is based on an actual to allowable calculation. We believe that this calculation, as well as calculations for base and projection year emission inventories, should be based on allowables to allowables comparisons to facilitate the future implementation of market-based strategies for pollution control. Any concerns about excess allowables are in fact addressed by the mandated emission reductions in moderate and above nonattainment areas.

Also, API/NFPA fully support EPA's statement on page 25 that "states may allow new or modified stationary sources to look to the upward nonattainment areas causing the violations for offsets." This is a fine example of EPA incorporation of the flexibility envisioned under § 110.

E. Rural Transport Areas

We agree that the Agency needs to provide additional guidance in the Final Preamble to states on how analyses on rural transport issues should be prepared and submitted under § 182(h). This direction is not provided adequately on pp. 26-28 of the Preamble, and EPA publication 450/4-91-015 does not delineate the criteria that EPA will use in exercising its discretionary judgment in determining whether intra-state areas meet the statute's definition of rural transport areas.

While for the most part we believe that real-world monitoring should supercede modeled results, we recognize that all such rules should recognize some aberrations. With respect to both intra-state and interstate upwind contributions to ozone, API/NFPA recommend that states that can demonstrate attainment with sophisticated models, but which nonetheless monitor exceedances of the standard, ought to be excused from requiring additional controls in the area as minimum elements of an approvable SIP revision if that modeling demonstration shows that ozone transport is responsible for these exceedances.

F. Requirements for 15 Percent Reduction in Emissions (Moderate and Above Areas)

We would appreciate some discussion in the Preamble of how EPA will apply the 15% reduction requirements to emissions in marginal areas that are "bumped up" to moderate. We would like to see EPA allow the states some flexibility in applying these reductions to areas that may continue to have violations due solely or primarily to upward transport.

G. Bump-up Provisions

On page 28 of the Preamble, EPA begins to discuss the procedures for reclassifying areas that fail to attain by the statutory deadlines. In view of the fact that the first attainment dates are at least two years away with an additional 6 months for reclassification, it would seem that this issue could be resolved in future guidance. Particularly, the use of monitoring data before SIP revisions can be implemented once again sheds unflattering light on EPA's use of design values as the basis of attainment demonstrations. This and the development of other criteria will benefit from public discussion and perhaps rulemaking before further Agency guidance is given on this issue.

H. Creditability of NO_x Reductions Toward 15% Annual Reductions (Moderate and Above Areas)

On page 38 of the Preamble the Agency interprets the Act as prohibiting reductions in NO_x as credits against the annual 15 percent reduction requirement for the last 6 years. This is a questionable legal interpretation of §§ 182(b)(1)(A) and 182(c)(3) by the Agency. The reasonable further progress requirements for moderate areas require only that "such plan" provide for such specific annual reductions of VOCs and oxides of nitrogen "as necessary" to attain the standard. The use of the phrase "such plan" in the second sentence of the subparagraph modifies the words of the first sentence, and in no way prohibits EPA from crediting NO_x reductions toward the required 15% reduction in 1990 baseline emissions. API/NFPA also submit that it is not reasonable to allow SIP revisions for serious areas under § 182(c)(3) to substitute NO_x reductions for VOC reductions, and prohibit the same substitution in moderate areas. States should be given the flexibility to use NO_x reductions as credits if they can demonstrate that these reductions will result in standard attainment on schedule.

I. Banked Credits

In several places throughout the Preamble (e.g., pp. 39 & 77), the Agency suggests confiscation of banked emission reduction credits ("ERCs") toward satisfaction of the Act's Reasonable Further Progress ("RFP") goals. Not only does this discussion in the Preamble fail to acknowledge the importance of ERC banking to an area's planned market-based strategy development, but the suggestion undercuts the President's stated goal of utilizing economic incentives towards realizing Clean Air Act goals. All such references to appropriation of ERCs should therefore be removed from the Preamble since certification of banked credits will penalize good corporate citizens by unconstitutionally deleting heretofore legal offsets. In fact, no states' SIPs should be approved unless they contain market-based strategy provisions which encourage emission reduction banking.

J. Major Source Nonattainment "Opt In"

In lieu of demonstrating the 15 percent required reductions in moderate areas, the Act allows a state to apply NSR requirements in moderate, serious or severe areas to sources as small as 5 tons per year, equivalent to the requirements in extreme areas. Large and small companies

find these provisions of the Act of particular concern with respect to continued facility modernization and economic development. Because API/NFPA take the position that all NSR issues need to take place in a rulemaking to revise the Part 51 regulations in Title 40 of the Code of Federal Regulations, we advocate deletion of this discussion at pp. 42-43. At the very least, we advise that there be a full public airing of the issues involved in the use of the NSR "opt-in" provisions and the technical feasibility definitions so that state air pollution control authorities and others these provisions understand the tremendous undermining effect they will have on economic development. API/NFPA encourage the Agency to discuss these and other NSR issues at a public roundtable or workshop.

K. Contingency Measures

API/NFPA support the inclusion of contingency measures in SIP planning efforts for moderate and above areas. Identifying longer-term measures sooner rather than later will ease or at least facilitate some of the hard choices we believe state lawmakers will have to make for a number of nonattainment areas that cannot meet their present deadlines. At the same time, API/NFPA realize that industrial sources could be singled out for additional

retrofit control requirements. Nevertheless, our members prefer that such additional control options (and their effects) be discussed as part of an overall implementation strategy where their costs can be compared with the implementation of options such as transportation improvements, which become infeasible to implement at the time a state fails to meet its deadline due to a lack of planning and execution time. This will ensure that additional controls are borne equitably by all segments of society.

It also appears to us that there is some relationship between contingency measures and the "bump-up" provisions in the statute. We think it would be useful to address the relationship of both issues in regional nonattainment SIP workshops. If states implement contingency measures, there may not be a need to "bump" nonattainment areas into the next designation.

L. Rural Nonattainment Areas

On pages 47 and 48, EPA asks if a full demonstration of attainment should be required in rural nonattainment areas subject to ozone transport. Once again, we believe this is a state flexibility issue, and that it makes no sense to require a state to impose stringent

controls on such an area. The Preamble suggests that such an area could be required to find relief from the conflicting statutes by forming a new transport region. A more satisfactory solution would be to allow states to seek additional controls in the areas responsible for the precursors and not penalize the area being impacted. We do not agree that forming a transport area is necessary.

M. Annual Reports

On page 53, EPA solicits comments on the form and content of annual state emissions reports. We recognize the potential for these to be "paper" accounts, and therefore of little utility in SIP planning efforts. For these reasons API/NFPA believe states should provide accounting in the form of permitted emissions to facilitate future implementation of market strategies for pollution control and address projected area growth. However, we believe that other issues associated with the content of these annual emissions reports are best left to the states, preferably after EPA has engaged them and the regulated community in a dialogue.

N. RACT Requirements for All Major Sources

On page 54, EPA requires the application of RACT to all major stationary sources of VOC and NO_x in moderate areas and above, whether the source category is covered by a Control Technique Guideline ("CTG") or not. This discussion must be entirely revised. As a minimum SIP requirement for moderate and some serious areas, such a requirement is unnecessary and ignores § 182(b)(2)(A) which provides for RFP from controls on all emissions (not just stationary sources) "as necessary" to attain the national ambient air quality standard for ozone.

First, non-CTG controls may not be necessary to reach the 15% floor. Second, controls on industrial sources through implementation of RACT may be the least cost-effective way of achieving reductions, particularly where long-term transportation planning measures and alternative fuels become feasible. While EPA may feel it is helping states by removing an element of indecision about which sources to control (and thereby eliminating political friction with state lawmakers), API/NFPA submit that the Agency is violating the intent of the law that vests in the states the task of controlling emissions from stationary, transportation and area sources in the most cost-efficient

way that attains the NAAQS. Not only is the General Preamble treading on the legal flexibility of states to fashion SIPs to their own program needs, but it is also making a mockery of requirements in the CAAA for RACT cost-effective indices that help regulators and legislators rank effective controls for an area.

However, regarding the issue of state case-by-case determination of RACT in advance of EPA CTG development, we strongly support EPA's determination that states can make these case-by-case determinations "independent of the CTG as long as the State demonstrates that the statutory requirement for RACT is met by this submittal." In the absence of CTGs, a state's determination should stand unless the determination was in error.

O. Cost-Effectiveness Guidance

On page 58 of the Preamble, EPA discusses the Congressional mandate for development of cost-effectiveness guidelines for existing stationary sources that contribute to nonattainment. API/NFPA urge EPA to expand the scope of the guidance to include the cost-effectiveness of transportation and area source controls. By addressing all

sources that contribute to ozone formation, EPA will assist the states in developing the most equitable attainment plan.

P. RACT for Industrial Sources of NO_x

API/NFPA members are extremely concerned about EPA's interpretations about the definition of RACT for NO_x non-utility sources. We take issue with EPA's interpretation that the states should not assume that NO_x RACT for non-utility sources is low-NO_x burners, but possibly something more stringent. Congress clearly recognized that because of the retrofit costs associated with NO_x controls on utility boilers, mandatory controls more stringent than low-NO_x burners were unreasonable. Since there is general agreement that it is easier and far more cost-effective to retrofit large utility boilers than smaller industrial boilers, it would be patently unfair to apply more stringent controls to those smaller sources. Before making any proclamations in the Preamble, EPA needs to carefully review the cost-effectiveness and technical feasibility of the gamut of NO_x controls for these smaller sources.

Q. De Minimis Rule and Special NSR Rules in
Serious and Above Areas

API/NFPA members read with much consternation the discussion beginning on p.69 of the Preamble on de minimis rules and aggregation in netting transactions. We submit that the Agency has given the narrowest interpretation of the new law and insist that such an interpretation be deferred until the NSR rules at 40 CFR Part 51 are revised pursuant to full public notice and comment procedures. States should not be compelled or encouraged to walk into this legal battleground, especially since there is time prior to the due date for submission of SIP revisions for serious and severe areas for this controversy to be aired and resolved.

R. Technological Achievability

The CAAA allow states to require less than the required post-1996 9% reduction if they can show post-1996 controls are not "technologically achievable." EPA has defined the term as "measures which can be successfully implemented in actual practice, not measures which merely appear reasonable in a research setting." (p.79) However, EPA links what is technically achievable to measures that are "achieved in practice in nonattainment areas of the next

higher classification." This appears to link the term to controls equivalent to BACT or LAER, not RACT. This is a highly questionable definition. API/NFPA recommend deferring this section in the General Preamble until a later date, or at the very least including a fuller discussion of how "technologically achievable" controls differ from BACT/LAER levels.

S. Compliance Demonstrations and Economic Incentives

Section 182(g) of the new law provides for emission reduction milestones, compliance demonstrations for proving states have attained these interim goals, and "economic incentive programs" as one option a state has if it fails to submit a compliance demonstration or does not meet a milestone. It appears that most of the discussion on pp. 80-82 can be reserved since such requirements do not affect early SIP planning, and are not effective until November 1996.

T. Definition of Boiler (p. 107)

API/NFPA members strongly endorse the definition of a boiler found on page 107 of the Preamble. We note, however, that we are currently in litigation against EPA in

the Circuit Court of Appeals for the District of Columbia over EPA's inclusion of process dryers in the solid wood manufacturing industry under the NSPS applicable to small boilers. Babcock and Wilcox v. Environmental Protection Agency, No. 90-1509 (consolidated Case). In an industry like ours, classifying process heaters as combustion sources that produce steam ignores the technical feasibility of controlling and monitoring process emissions unrelated to emissions normally associated with combustion. We are glad to see EPA recognition of our point of view in this document.

U. NO_x RFP Reductions

On page 134 of the Preamble, EPA interprets § 182(f) of the Act to require NO_x RACT controls in all nonattainment areas. API/NFPA submit that the Act does not create the presumption that reductions in NO_x speed attainment of the ozone standard and, most particularly, objects to NO_x RFP control requirements in marginal and moderate areas. Section 182(f) does not apply to subsections 182(a) or (b) by its express terms. Nor do those subsections require automatic reductions in NO_x as part of RFP. Subsection 182(b) requires specific annual reductions for moderate areas "as necessary to attain the

national ambient air quality standard for ozone by the attainment date...." Similarly, § 182(c)(3) allows states to substitute NO_x for VOC reductions. EPA should not presume a generic need for NO_x controls in advance of the release of the NAS NO_x study.

V. Industrial Source Contribution to Carbon Monoxide Nonattainment

At pages 151 and 159 of the Preamble, EPA announces its intention to publish future guidance on which stationary sources contribute to CO levels. This will play into SIP revisions applicable to major sources of 50 tons or more that must be submitted by November 15, 1992. Because of the broad ramifications of such guidance for industries with large combustion sources, we suggest that EPA should have a workshop or roundtable to discuss the issue. We would like to see EPA address the possibility of granting CO major stationary source waivers from NSR requirements if states submit demonstrations that continued CO nonattainment is due to mobile source emission "hot spots."

W. Multi-State Ozone Nonattainment Areas

EPA cites (p. 131) S. 182(j)(2) provisions allowing states to petition EPA to determine whether a state could

have demonstrated attainment except for the failure of one of the other states in a multi-state nonattainment area to adequately implement required controls. API/NFPA believe that EPA should allow downwind nonattainment areas in ozone transport regions to either petition EPA to make a similar showing, or to make such a showing themselves. Such flexibility will address the potential inequities associated with mandated controls in areas that may fail to attain due to transport problems.

X. Redesignation to Attainment - (see pp. 184, § 107(d)(3)(E))

Because of our concerns about how EPA will address linkages to enforceable regulations and reductions from shutdowns, among other provisions contained in the "Redesignation" section, API/NFPA recommend that EPA hold roundtable discussions with the states and industry to identify all potential redesignation issues.

Y. Sanctions

1. Section 173(a)(4) Permitting Ban

On page 206 of the Preamble EPA interprets § 173(a)(4) to result in a "permitting ban" if the Administrator determines that the approved SIP is not being

"adequately implemented for the nonattainment area in which the new source wants to locate or which the source wishing to modify its facility is located." Not only is EPA reinventing the construction ban when Congress expressly repudiated its use as a sanction for states' failure to implement SIPs, but the notion of a permitting ban on new source growth as a means for alleviating nonattainment makes no sense. Offsets and stringent controls already apply to new sources, and further growth restrictions are unjustified and subvert clear Congressional intent.

When coupled with the enormous number of facility changes as a result of the Title V permit requirements that will require NSR permits, this interpretation of the law is particularly insensitive to the harsh economic realities of the 1990's. With the threat of such a sanction over their heads -- a sanction that is unrelated to their own compliance activities -- most companies would be well-advised to move overseas.

The discussion on permit bans should be removed from pages 206-208. It is a questionable legal interpretation which should have a full public airing before being incorporated into the SIP planning process.

2. Section 113 Enforcement

EPA's interpretation of § 113(a)(5) as allowing the Administrator to take enforcement action against "any source" whenever it finds a state "not acting in compliance with any requirement or prohibition of the Act related to constructing new sources or modifying existing sources" is incorrect and a dangerous enunciation of public policy. Sources are powerless to control the compliance status of states or other sources, which gives rise to source constitutional issues of the noncompliance of other subjects a source enforcement. If a source violates federal law, whether it be an element of an NSR permit program incorporated in the SIP or an NSR standard, there may be clear enforcement authorities under § 113 against the offending source - but not "any source" that needs an NSR permit to modify its facilities. It also ignores the effect of the permit shield and the issue of permit reopeners. As such, it must be removed from the final General Preamble. As presently drafted, the guidance is a completely arbitrary and capricious interpretation of the Act.

Z. Emissions Trading

At pp. 226-227 of the Preamble, EPA seems to suggest a moratorium on emissions trading until the Agency

reviews the final 1986 policy. We question this guidance and respectfully request that EPA immediately engage affected parties in a meaningful dialogue to resolve these issues.

AA. SIP/Permit Interface

API/NFPA recommend that all issues related to the SIP/Permit interface, discussed at pp. 213-219 of the General Preamble, be deferred until the final rulemaking on Title V permit programs is promulgated this fall. We would, however, like to comment on tracking emissions increases associated with minor permit amendments. It seems that these emissions are no different than emissions increases from minor sources, and should be tracked and reported as other emissions increases will be in accordance with earlier state systems designed according to the requirements of the "Annual Report" section. In addition, facility specific permits should not be included in the SIPs, as they are already federally enforceable.

III. CONCLUSION

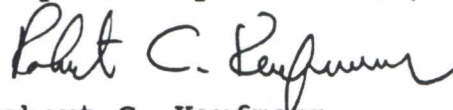
API/NFPA appreciate this opportunity to comment on the General Preamble for Title I, subject to the

July 22, 1991

reservations stated in the "Introduction" to our comments. API/NFPA, by these comments, request to be included in all future discussions on issues associated with implementation of Title I requirements for nonattainment areas.

If you have questions regarding these comments, please contact me at (202) 463-2588, or API/NFPA's counsel Leslie Ritts at Chadbourne & Parke at (202) 962-4559.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert C. Kaufmann". The signature is fluid and cursive, with the first name "Robert" being more prominent.

Robert C. Kaufmann
Director, API/NFPA
Air Quality Program



NEDA

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

July 26, 1991

Air Docket Section [A-131]
Attn: Docket No. A-91-35
U.S. Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

26 1991

Dear Sir or Madam:

The National Environmental Development Association's Clean Air Regulatory Project ("NEDA/CARP"), has reviewed the General Preamble for Title I of the Clean Air Act Amendments. Several of our members also attended the meeting in Reston to discuss elements of the General Preamble. This was a beneficial exercise although insufficient notice by the Agency prevented attendance by many members of the industrial community who would have otherwise participated. NEDA/CARP submits that there are many issues in the Preamble which would benefit by continued dialogue in such workshops or Roundtables in the future, and we recommend that the Agency schedule meetings well in advance so that this dialogue can continue.

GENERAL OVERVIEW

NEDA/CARP understands that it is very important for states to go forward and develop nonattainment strategies for revising their State Implementation Plans ("SIPs"), particularly in areas with short statutory deadlines for SIP revision submissions under the Clean Air Act Amendments ("CAAA"). Therefore, the brief comments which NEDA/CARP is submitting on the General Preamble were prepared with that recognition in mind. NEDA/CARP urges EPA to cover issues such as emission

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inventory procedures, RACT "fix-ups," and modeling guidance the final General Preamble since states require this guidance soon as possible.

NEDA/CARP has two comments on emissions inventory procedures. First, emissions inventories should be based on "allowable" emissions from stationary sources, rather than "actual" emissions as indicated in the June document. Second, NEDA/CARP's members request the opportunity to review and comment on guidance for emission statements and certifications that is referred to on page 24 of the General Preamble.

In addition, there are a number of difficult, longer range issues raised in the General Preamble which NEDA/CARP was distressed to find laid out as "minimal elements of approvable SIPs (see page 25)". A number of these "minimal elements" included by EPA for SIP approval were inappropriate, requiring considerable more dialogue and a few requiring agency rulemaking. These issues include the treatment of major sources emitting NOx, creditability of NOx reductions to 15% decreases in 1990 emissions baselines, NSR permit program revisions, economic growth issues like market-based incentives, and enforcement sanctions for the failure of air pollution control authorities to implement or enforce SIPs properly. Several of these issues relate to the permit/SIP interface. Our comments below deal with each set of issues in more detail.

Overall, NEDA/CARP submits that the General Preamble is seriously flawed in two respects. First, it limits states' flexibility to tailor SIPs to their own nonattainment programs by appearing to set forth minimum program elements for approvable SIPs. Second, the General Preamble evidences a general presumption on the part of Agency officials that nonattainment problems are primarily caused by industrial stationary sources and that the easiest "fix" is to require CTG and non-CTG RACT indiscriminately and tighten permitting requirements. These problems of limiting state flexibility and improperly targeting stationary sources for control, in NEDA/CARP's view, are interrelated and appear likely to succeed only in perpetuating nonattainment problems in many serious and above areas. Based on the data which EPA has shared publicly, industrial sources account for less than 25% of the emissions inventories of most ozone nonattainment areas; however, the Preamble will lead to imposing disproportionate burdens on stationary sources in SIPs and SIP contingency measures. Therefore, the General Preamble is disappointing because it fails to provide initiatives for states to tackle the politically tough decisions they need to make on long-range

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commitments such as transportation planning and area source controls.

SPECIFIC COMMENTS

1. Treatment of Major Sources Emitting NOx

There are several issues which the General Preamble attempts to resolve that are related to the issue of the contribution of NOx emissions to an area's nonattainment problem. They include: (a) interpretation of 182(f) of the Act as requiring a mandatory presumption that all NOx sources must be controlled with VOC sources in all nonattainment areas; (2) Reasonably Available Control Technology ("RACT") for all CTG and non-CTG RACT sources; and (3) applicability of NSR requirements for new and major modifications of VOC and maybe to sources of NOx. (The policy appears somewhat unclear on the latter issue.) Generically the Agency should defer these issues until it can issue guidance pursuant to the Section 185A EPA NAS NOx study's completion. Since there was recognition by members of Congress that not enough was understood about the atmospheric chemistry of ozone formation, the Agency should be very reluctant at this time to mandate what SIP revisions should include for the control of NOx emissions.

2. Credibility of NOx Controls for Reasonable Further Progress in Moderate Areas

For the same reason as stated above, we believe all NOx issues should be reserved in the final General Preamble until oxidant formation has been better analyzed. However, NEDA/CARP must take issue with EPA's conclusion that section 182(b) of the CAAA prohibits the credit for NOx controls in a moderate area's RFP demonstration, but allows that substitution in serious areas pursuant to section 182(c). NEDA/CARP asserts that the any NOx reductions that can be achieved by an area which contribute to reductions in ozone should be credited toward an area's attainment demonstration and RFP. Otherwise the General Preamble is advocating control-for-control's sake - a costly tactic which was repudiated by the legislation's managers on both sides of the aisle.

3. New Source Review Issues

The agency must revise the 40 CFR Part 51 regulations for new source review under the CAAA. In fact this effort was begun long before the CAAA were enacted to incorporate changes

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to the rules in accordance with Appendices A and B of the 1983 CMA settlement. Appendix A revisions were issued in 1989, and NEDA/CARP understands that Appendix B changes may now have been delayed until December 1991 to incorporate changes in the rules necessitated by the new law. Until a full public comment and review period can be conducted, NEDA/CARP asserts that the Agency should continue to implement Appendix S of Part 51 and defer all issues related to NSR permitting. Thus, the sections related to NSR in the General Preamble, like major source applicability definitions, pollutant applicability, offsets, emissions aggregation and ~~the~~ de minimis increases, special rules for serious and above nonattainment areas and "5 tons per year major source NSR opt-ins" should be omitted from the final General Preamble.

4. Economic Growth Issues

NEDA/CARP submits that several directives in the General Preamble concerning economic growth issues are completely counter to the CAAA sponsors' stated intention to promote the use of market-based incentives to achieve the Act's goals. In several sections of the Preamble including the general purpose sections, the agency appears to advocate confiscation of emission reduction credit banks as a simple way to lower an area's baseline emissions. On the last two pages of the document, EPA also states that it believes that a "moratorium" on emissions trading is appropriate. Finally, in sections like the discussion of the NSR "opt-ins" for states with moderate and above nonattainment problems (see pages 42-43), the agency ignores the economic repercussions that the adoption of such a provision would have for local communities.

Discussion of these issues should take place in public workshops and Roundtables and should be deleted from the General Preamble because this guidance will supersede any meaningful discussion of the issues. Not only is the President fully behind the use of market-based incentives to promote achievement of the goals of the CAAA, but Administrator Reilly has publicly committed himself to the use of these incentives wherever possible in implementing the new law's mandates (see letter from Administrator Reilly to Council of Economic Advisors' Chairman Michael Boskin, dated October 26, 1990).

5. Enforcement Sanctions

NEDA/CARP strenuously objects to the discussion of sanctions in the General Preamble. We believe the Agency's

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interpretation of amendments to section 173(a)(4) of the Act recreating and enhancing the construction ban for new sources and major modifications of existing sources in states which fail to implement their SIPs is incorrect. NEDA/CARP also finds questionable EPA's discussion of the use of section 113 enforcement sanctions against individual sources when SIPs are not timely submitted or implemented properly. Neither discussion is appropriate in the General Preamble which purportedly is to discuss guidance for SIP planning measures. Furthermore, both interpretations of the law are bad public policy and require much further discussion.

6. SIP/Permit Interface

Generally NEDA/CARP recommends deferring most of the issues concerning operating permits in the General Preamble pending promulgation of the final operating permit program rule. However, one critical issue that the General Preamble should discuss, that is omitted from the June draft, is the relationship of permits to the SIP in view of the inclusion of the new permit provisions in the Act. States should be required to omit facility specific limitations and operating conditions which will reside in the sources' permits from the SIP. If facilities are required to obtain SIP revisions for every facility change allowed under the permit regulations, the intent of the statute will be frustrated by taking away the flexibility that is needed in the permit program. More importantly, the entire program will collapse if individual permits and permit revisions need to be incorporated in the SIPs. The role played by facility specific limitations in SIPs in the past has been replaced by the permits - that is limits will be federally enforceable because they are in permits and need not be in the SIPs. In addition, EPA can review equivalency decisions made by the states when it reviews the permits themselves.

CONCLUSION

NEDA/CARP's members request to be included in further discussions on the General Preamble's Development and in workgroups and public meetings on the issues we have discussed in these comments. We urge the Agency to entertain a continuing dialogue with interest groups on these issues since industry, air pollution control authorities, and environmental advocates all have important stakes in how the issues are resolved.

If you have questions regarding these comment, please call Leslie Ritts, NEDA/CARP's counsel at Chadbourne & Parke

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July 26,

(202/962- 4559) or Steve Hellem, NEDA/CARP's Director
(202/638-1230).

Respectfully submitted,

William T. Burkhart

William T. Burkhart
Proctor & Gamble
Chairman, Steering Committee

Ernest S. Rosenberg

Ernest S. Rosenberg
Occidental Petroleum
Vice Chairman,
Committee Committee

COMMENTS BY
ELI LILLY AND COMPANY
ON
U.S. EPA's JUNE 7, 1991
GENERAL PREAMBLE
FOR IMPLEMENTING TITLE I
OF THE 1990 CLEAN AIR ACT AMENDMENTS

Eli Lilly and Company ("Lilly") is a research-based corporation in Indiana and Puerto Rico that specializes in the production of pharmaceutical and animal health products. Because our industry is confronted by numerous unanticipated plant-site equipment changes dictated by our "batch" manufacturing needs, we need maximum permitting flexibility in order to continue to timely produce lifesaving drugs in the quantities, quality and frequency that are required by the marketplace; to ensure that voluntary plant-site changes achieving emission reductions can be implemented quickly without delay; and to remain competitive in our United States operations against overseas rivals who are not faced with lengthy permitting delays in their everyday operations. Whether these goals will be furthered as the Clean Air Act amendments are carried out will be determined by how EPA and the states define the interaction between State Implementation Plans (SIPs), Title I nonattainment requirements and the Title V

operating permit program. Lilly's comments address this issue exclusively.

I. SIPs Should Be Broad Planning Documents Only.

Under the Clean Air Act, Congress requires EPA to approve SIPs that detail how states will comply with and protect the National Ambient Air Quality Standards ("NAAQS"). See 42 U.S.C. § 7410. SIPs were originally designed to be documents that would chronicle for EPA the difficult policy decisions made by states on what sources would be regulated and to what degree and how quickly. This was especially important for those regions of the state that were not attaining the NAAQS. For instance, the state in its SIP would devise a means for chronicling the state's baseline air quality, determine who is contributing to the base, and then outline the regulatory decisions to comply with the NAAQS. Thus, the SIP is supposed to be a planning document which EPA approves and which is revised as air quality changes within the state over time.

While Congress created SIPs, states also developed permit programs that would help achieve attainment and maintenance of the NAAQS. Id. These permits obviously were designed to provide individual limits and operating conditions for sources and to place in one single document the state's decisions for how that source would comply with the Clean Air Act. The dual SIP-permit system presented a problem because both programs must protect the

NAAQS yet guard against needless redundancy, which depletes federal and state agency resources and which forces sources to wade through lengthy unnecessary permitting delays.

The dual SIP-permit system is workable only if the SIP is left to its intended planning purposes and if the permits are allowed to carry out the programs and directives chosen by the state in the SIP. Unfortunately, due to a legislative omission by Congress, EPA has been forced to subsume many state permits within the SIP itself rather than have the two work in a complementary manner with each other with minimal overlap. The problem historically was Congress' failure to enact a federal operating permit program when the SIP program was enacted. Because of this failure, EPA was left unable to directly enforce state permits or to dictate or change state permit conditions, especially when a state was recalcitrant or financially unable to enforce the NAAQS.¹

Due to this, EPA's only means of assuring compliance by states with the NAAQS was through the SIP, which Congress made federally enforceable. Id. at §7410(a) (states must submit SIPs for EPA approval). See also §7410(c) (EPA can impose a federal implementation plan if the state fails to submit an adequate SIP or to revise a SIP that has become inadequate). Consequently, in order to protect the NAAQS, EPA was forced to pull into SIPs not only broad planning strategies but individual emission limits on sources as well as a host of other local decisions.

What emerged from this is an unworkable system that does not adequately plan for NAAQS issues and which makes it extremely difficult for sources to obtain permits and make changes to permits quickly. Instead of containing statewide NAAQS strategies, SIPs quickly became collecting devices by EPA for every decision by the state that had anything to do with the NAAQS. Thus, SIPs are now bloated with numerous state air pollution control regulations, requests for compliance extensions, information on facility inspections, clarifications of state policies and guidance, transportation control plans, enforcement orders, individual source limits, letters from the Governor, testing methodologies, state emissions surveillance networks, "bubble" permits, commitment letters by the state to EPA on revising state law or other matters, variance requests and determinations, state modeling results, emissions inventories, letters from local regulators, and a host of other material. The SIPs grew over time at an alarming rate. All of this information was needed in the SIP to make it "federally enforceable" but it made the SIP unworkable for EPA.

Because of Congress' historical failure to enact a federal operating permit program, nothing EPA has tried to do over time has salvaged the SIP program. For instance, in 1986 EPA tried to restructure the SIP program because "at present, these [SIP]

regulations are complex, not well organized, and contain many obsolete provisions". 51 Fed. Reg. 40656 (Nov. 7, 1986). EPA attempted to remedy this by rewriting its rules but even in the process of reform was stymied with the way to do so:

The EPA does not intend to require states to "clean up" their SIPs by removing or revising outdated material such as original emission inventories. States may make such revisions as their resources permit.

Id. at 40656. EPA also said that where SIPs referred to superseded federal rules then EPA would interpret those citations as referring to the new ones. Id. Every attempt to add a band-aid to the SIPs caused more ambiguity and burden.

What has resulted are SIPs that continue to be outdated as to state and federal law² and SIPs that are so cumbersome it is impractical for EPA to publish them in their entirety. In fact, the Code of Federal Regulations, 40 C.F.R. Part 52, is a thousand page index to these obsolete, confusing SIPs and it is practically impossible to locate an entire SIP in one place.

In addition, the procedural means for sources or states to revise SIPs and to implement operational flexibility have been affected adversely by EPA's bloating of the SIPs. If SIPs did not overlap into permits to the degree they do, then a source would only have to obtain state approval for a plant-site change, which in itself can be lengthy. [Note: In Indiana it takes six to nine months from a complete application to obtain a permit for non-PSD

projects]. However, to the extent a SIP contains the same obligations as a permit, the source must also convince the state to submit the change to EPA as a SIP revision. Once redundant SIP revisions are triggered, more permitting delay occurs.

Even when EPA has tried to streamline its SIP processing procedures by allowing parallel processing and immediate final rulemaking, significant delays still are reported. See 47 Fed. Reg. 27074 (June 23, 1982) (SIP revisions under EPA's reforms will take a minimum of 128-161 calendar delays). See also 54 Fed. Reg. 2214 (Jan. 19, 1989). The complexity of the SIPs and the sheer number of nationwide revisions that deluge EPA are causing numerous sources to face serious operational disruptions and delays of new products-- even though the NAAQS and applicable state laws are being attained. See, e.g., General Motors Corp. v. United States, 110 S.Ct. 2528 (1990), where General Motors Corp. sought to take advantage of Massachusetts' extension of time to comply with nonattainment area VOC controls which EPA policy apparently allowed. Massachusetts submitted the SIP revision on December 30, 1985 and EPA failed to issue a final decision until September 4, 1988. In the meantime, EPA sued General Motors Corp. for failing to meet the state-superceded SIP. See also U.S. v. General Dynamics Corp., No. CA4-87-312-A (N.D. Tex. Jan. 2, 1991)(defense contractor's compliance with a Texas Air Control Board's order allowing plantwide averaging of emissions violates outdated SIP which requires each emitting unit to comply with Texas' VOC limits).

It is clear that the present intrusion of SIPs into state permits is not working. Sources and state agencies who negotiate NAAQS compliance can not act upon their agreements in a timely manner without risking federal enforcement because EPA can not, as a practical matter, issue timely determinations on the SIP revision requests. EPA is not even required to make timely determinations. Id., 110 S. Ct. 2528.

The present SIP dilemma has other negative consequences. Sources under the PSD program who choose to take voluntary decreases in their emissions may bank these emissions in order to offset later increases. The banked emissions must be federally enforceable or the source, by decreasing, will lose the credit. If a SIP currently imposes a restriction on a source for which banking is contemplated then that source is faced with not making the voluntary decrease until it is needed or the source can implement the change without a SIP revision and lose the credit Congress provided for. Lilly has experienced this for voluntary decreases in SO₂ of hundreds of tons per year and if Lilly had not decided to pursue environmental protection regardless of personal permitting benefit then this large SO₂ reduction would have been delayed years. Clearly the SIP program and the state and federal operating permits need to be kept separate to the extent possible.

Fortunately, Congress in the 1990 Clean Air Act amendments enacted the Title V operating permit program which covers both nonattainment and attainment areas. By doing this, Congress

finally created a system where in the near future all state operating permits will be "federally enforceable" and thus EPA will not have to rely on the SIPs to shoulder every detail of state efforts to comply with the NAAQS. This will free up the SIP program so that it can serve its true planning function and allow for SIP revisions to be processed quickly because fewer will be needed. In addition, EPA and Congress will be assured that all permit limits which force compliance with the NAAQS will be federally enforceable. However, this can occur only if EPA takes advantage of what Congress has provided. Thus, EPA should announce that the SIP will be treated as a broad policy planning document once the state's Title V approval is effective and individual source limits can be added to the Title V permits.

A. The Clean Air Act Does Not Require SIPs To Contain Source-Specific Conditions.

Section 110(a)(1) of the Act requires SIPs to provide for "implementation, maintenance and enforcement" of the NAAQS in each air quality control region within the state. EPA in its Title I General Preamble interprets this directive to mean SIPs have two goals:

1. to make demonstrations as to attainment and maintenance through prescribed rates of progress; and
2. to provide a NAAQS control strategy to determine the effect of the state's planned measures.

General Preamble of 209-210. Clearly the SIP should, as a broad planning document, continue to provide for NAAQS demonstrations but the remaining issue is whether the NAAQS control strategy requires incorporation of state permits into the SIP. The Clean Air Act leaves this choice to EPA and the states.

1. Section §110 of the Clean Air Act gives regulators discretion to define a SIP's control strategy.

Section 110 (a)(2)(B) states that the SIP should include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard" (emphasis added). All sources in a state which emit criteria pollutants impact in some manner the applicable NAAQS. Congress, by the language quoted, does not require SIPs to mirror each and every operating permit issued by a state and to keep the SIP updated as to all permitting changes by these sources. Instead Congress gives EPA and the states the flexibility to pick and choose how they wish to comply with the NAAQS. For example, South Dakota's SIP apparently contains no source-specific limits.

Furthermore, Congress does not require SIPs to be revised as individual sources change their operations. Instead, in keeping with the planning focus of SIPs, Congress requires revisions only when the NAAQS are revised or when EPA determines that a SIP is substantially inadequate to achieve the NAAQS. See 42 U.S.C. §7410(a)(2)(H). All other revisions are optional.

2. The legislative history to the Title V operating permit program urges EPA to limit SIPs to planning purposes .

The Senate Report which spawned Title V demonstrates that Congress created the operating permit program as a means to remove excess detail and redundancies from SIPs:

Another benefit of the permitting program -- which will accrue to regulated sources -- is the simplification and expediting of procedures for modifying a source's pollution control obligations. In general, under the [pre-1990] Act, for sources subject to a SIP, the vast majority of changes in the source's pollution control obligations, no matter how minor, must be developed by the State and then approved or disapproved by EPA through informal, notice-and-comment [SIP] rulemaking. This "double-key" system has long been recognized as being laborious and resource-intensive, and has led to unacceptably long delays in EPA action on even relatively minor SIP revisions. . . . The new permit program should eliminate this problem for source-specific SIP revisions. . . .

S. Rep. No. 228, 101st Cong., 1st Sess. 347-48 (1989)(emphasis added).

EPA in its Title I General Preamble appears to appreciate this when it recognizes that "the purpose of the permit is to implement measures, not perform demonstrations, which is unquestionably a purpose of the SIP". Id. at 211.

- B. Future SIPs Should Focus Solely On "Statewide" Reductions And Compliance.

1. Incorporation Of Local Regulations

A legitimate question raised by bifurcating SIPs and permits is what will a future SIP consist of? It should certainly include those state regulations which, by their application, affect the NAAQS. However, the regulation itself should be as detailed as the SIP will get. For example, if a SIP contains a state's rules on VOC controls for pharmaceutical manufacturing, then these rules can serve as that state's planning choices for protecting the NAAQS and will be an enforceable programmatic means for doing so.

2. Incorporation Of Test Methods

Contrary to what EPA suggests in its General Preamble at page 217, permits, not SIPs, should delineate what test methods are appropriate to confirm compliance with an emissions limit. Although certain test methods might appear to cover all sources, this is not always true and it is easier for the source to negotiate an alternative test with the state via the permit than to go through this process and also have to obtain a SIP revision. Lilly recently encountered this precise issue. Our Tippecanoe, Indiana plant received a permit requiring that EPA-approved Method 25 be used to determine VOC emissions loading. Because Method 25 is geared to continuous operations rather than the batch, step-wise production cycles occurring at Lilly, Method 25 is unsuitable. If a SIP revision had been necessary before Indiana could have allowed an alternative compliance procedure, then an

entire year's market, which was seasonal and only lasted 60 days, would have been missed. Even if specific test methods are incorporated into SIPs, provision should be made for alternative equivalent tests when appropriate.

3. Incorporation Of Tracking And Emissions Inventories

The SIPs should continue to provide for states to monitor baseline emissions across AQCRs and to predict future growth. EPA in its General Preamble expresses concern about tracking emission increases from Title V minor permit amendments, especially for nonattainment areas. EPA, however, has addressed and solved this precise problem in other contexts.

In the early 1980's, EPA proposed a SIP requirement that mandated that sources and states provide EPA with notice of permitting actions only when major sources in nonattainment areas were involved. See 48 Fed. Reg. 46166 (Oct 11, 1983). Upon promulgation of the rule, EPA realized that notification of permitting actions involving new or modified minor sources in nonattainment and attainment areas was appropriate "for oversight purposes" because "a large number of minor sources could have a significant cumulative effect on air quality". Id. at 40658. Thus, EPA required that the SIP provide for reporting of all permitting actions for which the state provides notice and comment

to the public. Id. Beyond notice to EPA, no other SIP requirement was deemed necessary.³

Likewise, no SIP requirement other than notice should be imposed for minor permit amendments. Since the Title V program is certain to require seven day advance notice of all minor permit amendments to the permitting authority, the EPA will have its tracking means in place when the state's Title V program is incorporated into the SIP. If the SIP will not contain the Title V rules, then EPA need only require in the SIP that states compile records of all minor permit amendment notices and submit these periodically to EPA.

II. EPA Should Encourage States To Revise Their SIPs To Eliminate Source-Specific Provisions And To Delete From Their Regulations All SIP Revision Requirements Made Unnecessary By Title V.

It is not enough that EPA recognize explicitly that it will treat SIPs in the future as planning tools only. As seen previously, a lot of redundant detail will be contained in SIPs once states obtain approval for their Title V operating permit programs. Thus, states should be notified that EPA welcomes SIP revisions to delete requirements now covered by permits. In addition, states should be told these SIP revisions will be acted on promptly.

Furthermore, state law itself will need review in order to ensure SIPs remain as planning tools. For example, in Indiana, a

SIP revision is required for any revision to emission limits contained in operating permits. See 326 I.A.C. 2-1-5(3). In addition, bubble permits which have single overall limits or which include fugitive emissions also must be submitted as SIP revisions after being approved by the state. See 326 I.A.C. 2-4-4 and 2-4-5.

The reason for this, at least in Indiana, is that these permits needed to be made federally enforceable in order to comply with the NAAQS and the SIP. However, once Title V is implemented, changes to operating permits or the conversion of a bubble construction permit into an operating permit will automatically be enforceable by EPA. Therefore, references by state law requiring "SIP revisions" in this context should be replaced by "permit modifications, amendments or §502(b)(10) flexibility changes".

CONCLUSION

Lilly appreciates the opportunity to comment on the interface between SIPs and permits for nonattainment (and attainment) areas. Essentially, Lilly recommends that EPA pursue an aggressive campaign by rule, policy or otherwise to treat SIPs solely as planning documents and to assist states in removing redundant, duplicative conditions from the SIPs once Title V is implemented. In addition, EPA should encourage states to begin orienting their

existing permitting rules toward Title V and away from SIP revisions.

Please contact me at (317) 276-3753 with any questions or requests for more information.

David R. McAvoy
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ENDNOTES

¹Although Congress created federal construction permit programs for attainment and nonattainment areas, 42 U.S.C. Parts C and D, no operating program was authorized.

²See Indiana's SIP, 40 C.F.R. 52.770-52.797, which contains references to 1970's air regulations.

³Presumably this is either because the state would modify its planning choices in the SIP if the notices began to coincide with NAAQS violations or because the SIP already contained a growth allowance for a nonattainment area for which the notices could be measured against.

ONBOARD VAPOR RECOVERY SYSTEMS

DISCUSSION OUTLINE

IMPLEMENTATION OF CLEAN AIR ACT SECTION 202(a)(6)

- I. Introduction
- II. Legal Analysis Under §202(a)(6)
 - A. The Statutory Language and Legislative History of §202(a)(6) Require Consultation With DOT and a Satisfactory Safety Determination Before Promulgation of an Onboard Requirement
 - B. In This Matter, §202(a)(4) Requires EPA to Assess the Reasonableness of the Safety Risk of Onboard Systems, Based on DOT's Comments
 - C. EPA Should Solicit Public Comment on the Safety Issue
- III. EPA May Not Require Onboard Refueling Vapor Recovery Systems if They Will Increase the Risk to Motor Vehicle Safety
 - A. EPA's Rule Should Not Result in Any Increased Risk to Motor Vehicle Safety
 - B. EPA Has the Legal Obligation and Authority to Decline to Issue An Onboard Rule if the Technology Will Increase the Risk to Motor Vehicle Safety
 - C. The Statutory Deadline for EPA Action Does Not Override EPA's Responsibility to Make a Decision that is Consistent With the Record on Safety
- IV. Conclusion

INTRODUCTION

Section 202(a)(6) of the Clean Air Act, as amended by the Clean Air Act Amendments of 1990, directs the Administrator of the Environmental Protection Agency to promulgate standards requiring vehicle-based ("onboard") systems for the control of refueling emissions after consultation with the Secretary of Transportation about the safety of such systems. The legislative history of the provision makes it clear that Congress wanted to ensure that an onboard rule would not present safety risks. There has been some discussion, however, with respect to how EPA is required to proceed if DOT continues to express the view that canister-based onboard systems will increase the risk of serious injury or fatality for the motoring public, in view of the apparent statutory deadline of November 1991 for promulgation of the onboard refueling control standards.

LEGAL ANALYSIS OF SECTION 202(a)(6)

As enacted, the revised Section 202(a)(6) precludes the issuance of any requirement for onboard vapor recovery (OBVR) systems until the Department of Transportation has provided advice on the safety risks associated with such systems. DOT, acting through the National Highway Traffic Safety Administration (NHTSA), is the principal Federal agency with responsibility for motor vehicle safety. NHTSA's statutory mission is to reduce motor vehicle accidents, and deaths and injuries associated with motor vehicle accidents. In carrying out this mission over more than twenty years, NHTSA has developed substantial expertise on vehicle safety matters, including the causes and effects of vehicle fires. Because Congress cannot be presumed to have required a meaningless consultation on safety, the DOT/NHTSA safety advice required by Section 202(a)(6) is integral to the EPA Administrator's decision on whether to proceed to require canister-based onboard vapor recovery systems.

EPA should act promptly to obtain public comment on NHTSA's safety analysis when completed. Public participation in evaluating the safety analysis would assist EPA in its assessment of any risk identified by NHTSA.

Section 202(a)(4) of the Clean Air Act, a provision that was unchanged by the 1990 amendments, imposes a separate duty on EPA to decline to require OBVR systems that present an increased safety risk. The Subcommittee that authored Section 202(a)(6) relied on the advice of its counsel that Section 202(a)(4) of the Clean Air Act would prohibit EPA from issuing a rule requiring any system that was determined to be unsafe.

EPA has the legal obligation and authority to decline to issue a mandate for OBVR systems if they determine such a mandate to be inconsistent with Sections 202(a)(4) and 202(a)(6). Although either section alone would require and justify an EPA decision to decline to mandate unsafe technology, the two provisions act synergistically to provide additional support for this position.

THE NOVEMBER PROMULGATION DEADLINE

Although Section 202(a)(6) specifies a rulemaking deadline of November, 1991, the deadline cannot reasonably be construed to require EPA to contradict other, express wishes of Congress. If EPA concludes, based upon consultation with DOT and other record comments, that a mandate for canister-based OBVR systems would be unreasonable because it would increase the risk to motor vehicle safety, EPA promulgation of a rule in November 1991 to require such systems would arbitrarily ignore the results of the safety consultation provided under Section 202(a)(6) and would give no effect to Section 202(a)(4) as it was explained by the Subcommittee counsel.

CONCLUSION

If EPA concludes, based upon consultation with DOT and other record comments, that a mandate for OBVR systems would be unreasonable in light of the increased safety risk, reasoned decision-making dictates that EPA may not require the systems, under the plain meaning and intention of Sections 202(a)(4) and 202(a)(6). Faced with such a situation, EPA should lawfully choose how best to give effect to congressional intent, and its choice will be upheld by the courts.

If DOT/NHTSA continues to express the view that canister-based OBVR systems will increase the safety risk to the motoring public, then the only rational conclusion is to decline to require OBVR systems. EPA should announce this conclusion prior to the statutory deadline of November 15, 1991. As stated in the House Report accompanying the Clean Air Act Amendments, "No one wants a rule that requires controls for the consumer that present safety problems."

SECTION 202(a)(6)

as amended by Clean Air Act Amendments of 1990
[42 U.S.C. 7521(a)(6)]

"ONBOARD VAPOR RECOVERY.—Within 1 year after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based ('onboard') systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer's fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

"IMPLEMENTATION SCHEDULE FOR ONBOARD VAPOR RECOVERY REQUIREMENTS

Model year commencing after standards promulgated	Percentage *
Fourth.....	40
Fifth.....	80
After Fifth.....	100

* Percentages in the table refer to a percentage of the manufacturer's sales volume.

The standards shall require that such systems provide a minimum evaporative emission capture efficiency of 95 percent. The requirements of section 182(b)(3) (relating to stage II gasoline vapor recovery) for areas classified under section 181 as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 182(b)(3) for areas classified under section 181 as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet."

Automatically
gets moderate
areas out of
stage II

SECTION 202(a)(4)

[42 U.S.C. 7521(a)(4)]

(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with standards prescribed under this subsection if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods of reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to standards prescribed under this subsection without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

101ST CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPT. 101-490
Part 1

CLEAN AIR ACT AMENDMENTS OF 1990

R E P O R T

OF THE

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

ON

H.R. 3030

together with

**ADDITIONAL, SUPPLEMENTAL, AND
DISSENTING VIEWS**



MAY 17, 1990.—Ordered to be printed

available for production during the applicable model year, giving appropriate consideration to fuel volatility, and to costs, safety and energy factors. The regulations are to take effect as expeditiously as possible and phased in similarly to exhaust standards. The Administrator is to commence rulemaking under this section within 12 months of enactment. If final regulations are not promulgated under this section within 18 months after enactment of this subsection, the Administrator shall submit a statement to Congress containing an explanation of the reasons for delay and establishing a date certain for promulgation of such final regulations not later than 33 months after enactment.

Section 206. Control of vehicle refueling emissions

Section 206 of these amendments revises section 202(a)(6) of the Clean Air Act to require the Administrator within one year of enactment of this paragraph to promulgate standards requiring that all new light duty motor vehicles manufactured in the third model year after the model year in which the standards are promulgated, and in all subsequent model years, be equipped with onboard systems for control of evaporative emissions during vehicle refueling. The standards required to be promulgated under this paragraph are to apply to all new passenger cars and all light-duty trucks and are to provide a minimum evaporative emission capture efficiency of 95 percent. Evaporative emissions during vehicle refueling are a source of VOC emission that are not part of the engine exhaust. This requirement will substantially reduce motor vehicle evaporative emissions during refueling, a major source of VOC emissions from motor vehicles that is not part of the engine exhaust.

Paragraph 202(a)(6) directs the Administrator, in consultation with the Secretary of Transportation, to determine that onboard vapor recovery systems are safe. It is expected that this determination will be made before the promulgation of the regulations under this paragraph. The determination is an independent duty and shall not affect the Administrator's mandatory duty to promulgate regulations, subject to paragraph 202(a)(4), which provides that emission controls may not cause an unreasonable risk to safety.

Refueling emissions control has been a contentious issue for many years. This provision will resolve the safety issue.

The Committee has conducted an extensive investigation into the matter, particularly the safety of onboard controls. Hearings were held in October 1987.

There are two types of control. One at the pump, called "stage II," the other on the vehicle, called "onboard." For many years, California has required stage II controls in nonattainment areas. It is required in other States. New Jersey and New York are now under court order to install stage II controls. Both are doing so, but they have not fully completed the effort, because as recently noted by the Service Station Dealers of America, the equipment and qualified contractors apparently are lacking. This has also increased costs.

In July, 1987, EPA proposed the use of onboard systems, contending there were simple systems that were safe. Others disagreed, particularly several Federal and private safety organizations, such as the National Highway Traffic Safety Administration (NHTSA),

the National Transportation Safety Board, the Insurance Institute for Highway Safety, and the National Safety Council. However, the Center for Auto Safety contends that there are no safety risks associated with onboard canisters. According to a March 24, 1988 report by the Center for Auto Safety:

The Environmental Protection Agency should move ahead as soon as possible with onboard systems to control refueling emissions. The potential crash fire risk from onboard systems is small. The improved onboard systems under EPA's proposed evaporative control rule are only marginally more complex than present onboard systems. Any increased crash safety risk from onboard systems would be a marginal increase of an already minimal safety risk and could easily be handled by improved technology.

In a recent letter to the Committee, NHTSA explained its safety concerns:

Our major concern centers on the additional engine compartment and underbody heat generated when onboard refueling vapors are burned in the engine and exhaust system. Safety-related problems continue to occur with existing evaporative vapor control systems and result in safety-related recalls. The problems would be aggravated if onboard refueling vapor recovery systems were required. In addition, we are concerned that there has been insufficient testing of the "simple" onboard vapor recovery system in real world summertime temperatures to adequately address these safety issues.

EPA never finalized the rule, although EPA believes onboard controls are safe. The Committee wants onboard controls that are effective and safe. No one wants a rule that requires controls for the consumer that present safety problems. Those problems need to be resolved in the rulemaking under section 206(a). The bill provides the mechanism for this to occur. It should.

Paragraph 202(a)(6) also provides that the requirements for installation of stage II vapor recovery for gasoline dispensing systems in section 182(b)(3) shall not apply to areas classified under section 181 as moderate ozone nonattainment areas after the promulgation of the onboard vapor recovery regulations under paragraph 202(a)(6). The Administrator is further authorized to revise or waive the application of section 183(b)(3) for areas classified under section 181 as serious or severe ozone nonattainment areas after such time as the Administrator determines by rule that onboard emission control systems required under this paragraph are in widespread use throughout the motor vehicle fleet. In allowing areas to waive application of the requirement for stage II vapor recovery in future years, the Committee recognizes that full implementation of onboard vapor recovery, after a full turnover of the fleet, could render stage II vapor recovery at gasoline dispensing stations unnecessary.



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

AUG 6 1991

THE ADMINISTRATOR

NOTE TO AL HUBBARD

As a follow up to our discussion last week, I offer the following points:

- ♦ **We are not writing on a blank slate – the terms of the statute and the 1988 Report to Congress require the Federal government to establish criteria.**
- ♦ **Rather than create a large Federal program to establish localized Federal standards, our goal is to establish a protective baseline which makes clear that the primary action, discretion and responsibility should be at the State and local level.**
- ♦ **To say that liners are "not necessary" to prevent significant leakage in vulnerable parts of the country is not credible. We will say explicitly in the rule, however, that the uniform liner provisions are designed for the most vulnerable areas and that they will be overprotective in certain parts of the country. Therefore, the rule also includes a performance standard which provides substantial flexibility to State programs.**
- ♦ **Whenever a State develops a program to deal with local conditions, the Federal liner design would have only the legal status of "guidance." Approved States in the arid west would not be required to seek a "waiver," from the liner requirement.**
- ♦ **We intend to have language in the preamble saying that liners are not needed under all rainfall and ground-water conditions. In addition, as we have discussed, we will exempt all small community landfills in areas of low rainfall from the rule. And, we will make it clear that the Federal government will not second-guess specific elements of a State program.**
- ♦ **To the best of our knowledge, over the past 5 years no major commercial landfill has been sited and built in vulnerable areas without a liner.**

MUNICIPAL SOLID WASTE LANDFILL CRITERIA

BACKGROUND

The purpose of this document is to explain EPA's approach for fulfilling its statutory mandate under RCRA Section 4010(c) to establish national standards for municipal solid waste landfills. It covers the nature of the statutory mandate EPA is fulfilling with the rule and why the rule's approach to landfill design is the most appropriate response to the statutory mandate. Finally, it lays out EPA's strongly held philosophy that States should be the implementers of this program and how we envision this philosophy operating in practice.

I believe EPA's regulation presents a protective, yet flexible approach to municipal solid waste landfills. The regulation originally transmitted to OMB has been modified to provide additional flexibility. The rule exempts small communities in arid areas. It includes expanded flexibility to approved States to tailor the frequency of ground-water monitoring to local situations. Additional flexibility is also provided to approved States regarding the location of ground-water monitoring wells. The revised cost of the rule attributable to the Federal government is \$320 million which is approximately \$1.50 per person per year.

The rule responds to a specific statutory mandate under RCRA. The statute requires EPA to revise its existing land disposal criteria as necessary to protect human health and the environment.¹ EPA views this mandate as requiring the Federal government to publish those standards that will ensure a reasonable level of protectiveness at municipal solid waste landfills. This mandate places EPA in a role that traditionally was left to the States -- establishing regulatory standards for sound design and operation of municipal solid waste landfills.

A FLEXIBLE APPROACH IS NECESSARY

In responding to this mandate the program EPA developed had to be designed with sufficient flexibility to account for the fact that there are over 3000 facilities that manage municipal solid waste under widely varying geological and climatological locations. Such a program had to recognize the vast differences in design dictated by these divergent locations.

¹ Section 4010(c) reads "The Criteria shall be those necessary to protect human health and the environment and may take into account the practical capability of such facilities."

Establishing appropriate requirements for the design of municipal solid waste landfills requires consideration of many factors, including the vulnerability of ground water, soil characteristics, and the potential for migration of contaminants from the landfill. In a large percentage of the country (especially the States east of the Mississippi River and in the Pacific Northwest), there is high rainfall and the ground-water table is quite close to the surface. Landfills built without liners in these environments would not meet the statutory mandate of protecting human health and the environment because of the high probability of contaminant migration. Conversely, EPA recognizes that other areas of the country present a quite different situation. In the arid West, rainfall is low and ground water can be far below the surface. Engineered liner systems would be unnecessary to protect ground water in some of these locations.

A NATIONAL PERFORMANCE STANDARD PROVIDES THE FLEXIBILITY NEEDED TO ADDRESS DIVERSE SETTINGS

The use of a single national design suffers from many of the problems described above. A design that meets the statutory test in areas with vulnerable ground water would be unnecessarily stringent in other locations where ground water is not highly vulnerable.

The use of a national performance standard provides the flexibility required to address the wide variety of geological and hydrogeological settings. This approach has been used successfully by some States. For example, Texas currently requires a specific liner design or it can approve alternative designs based on site-specific conditions. It successfully uses this flexibility to tailor designs for the arid Western portion of the State while relying more heavily on the design standard in the wetter Eastern portions.

Given this diversity an ideal approach to a national standard would be one that categorized areas based on rainfall and other factors (i.e., a "categorical" approach). During rule development, EPA and the States attempted to develop such an approach. The result was soundly rejected by both Agency research and technical staff and by the States because it was technically infeasible to tailor categories to the wide variety of situations. All attempts to simplify the categories led to over or under regulation. Each attempt suffered from a variety of technical deficiencies. However, it was universally agreed that the final rule needed to accommodate these technical differences.

EPA'S RULE INCORPORATES A FLEXIBLE NATIONAL PERFORMANCE STANDARD

EPA's approach in the final rule reflects the above differences through the use of a national performance standard governing landfill design. This standard requires that whatever design the State selects must be capable of protecting ground water at the specified point of compliance. In selecting a design needed to meet the performance standard, an approved State may use the rule's uniform liner design or it may use any design it determines would be capable of preventing contamination of ground water beyond acceptable standards.

Specifically, the liner design is not mandatory for approved States, rather it is only one option for States to consider. It is our expectation that only States with vulnerable ground water will choose the uniform liner design option. In fact, some States with highly vulnerable ground water will mandate stricter liner requirements. On the other hand, States in arid areas are unlikely to choose this design because such a design would be unnecessary. These States will meet the performance standard by tailoring design requirements to individual site characteristics. In fact, this is the approach Texas and other Western States currently follow. Thus, EPA's rule is the optimal response to protecting ground water when it is vulnerable, while providing needed flexibility when ground-water vulnerability is not at issue.

EPA'S APPROACH PRESERVES THE TRADITIONAL STATE ROLE AS LEAD IMPLEMENTERS OF THIS PROGRAM

As the above discussion demonstrates the performance standard approach preserves the traditional State role in defining appropriate standards to the greatest extent possible, while having a protective national standard. EPA's approach to State program approval also recognizes the traditional State role in implementing landfill standards. EPA fully intends that States will maintain the lead role in implementing this program. Our approach is modeled after the successful underground tank State delegation program. EPA's goal is for States to apply for and receive approval of their programs. In order to assure that this takes place, a separate rule governing State program approval is under development in consultation with the States. This rule allows States maximum flexibility to maintain their own individual program structure and operational procedures.

The rule does not define how a State must implement these elements. Thus, it allows States to use their own design standards, performance standards or a combination of those two approaches. The State approval process will not be used as a way to require the States to adopt the uniform liner design. Similarly, the Agency will not perform line-by-line program reviews that force the States to become mirror images of the Federal

program. We do not intend to "second guess" the meaning of State rules and regulations and we will not conduct extensive implementation reviews as a prerequisite for program approval. State programs will be deemed adequate if they have the key program components of the rule necessary to implement the land disposal requirements. Finally, the rule provides considerable latitude to the States to operate their program as they see fit.

SUMMARY

For these reasons, EPA believes the landfill regulation is the best approach to achieving our dual goals of fulfilling the statutory mandate for national standards which protect human health and the environment and maintaining the States' strong role in standard setting and implementation.



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

AUG 6 1991

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Municipal Solid Waste Landfill Criteria

FROM: Don R. Clay *DR Clay*
Assistant Administrator

TO: Allen Hubbard, Executive Director of the Council
on Competitiveness

As you will recall during our July 11 meeting we agreed that we would reach a decision on how to proceed on the municipal solid waste landfill rule within four weeks. With that understanding, I made a commitment to the court to make a decision by August 8. Failure to meet this legal obligation will likely result in a court order to publish the rule on an extremely short deadline. Fast action now can enable us to seize the initiative before the court can act.

With this in mind, I am writing to summarize the issues discussed during our recent meetings regarding the municipal solid waste landfill rule. I believe that these discussions were particularly fruitful since they helped to clarify that the current approach in the rule reflects the statutory mandate and at the same time accommodates our mutual concerns on cost effectiveness and Federalism.

As we discussed, this rule is in response to a specific statutory mandate under RCRA. The statute requires EPA to revise its existing solid waste disposal criteria as necessary to protect human health and the environment. This mandate requires the Federal government to publish those standards that will ensure a reasonable level of protectiveness at municipal solid waste landfills. It places EPA in a role that traditionally was left to the States -- establishing regulatory standards for sound design and operation of municipal solid waste landfills.

In light of this clear Congressional mandate, yet recognizing the traditional and continuing preeminence of States in implementing this program, EPA's rule establishes national standards that fully accommodate diverse State solid waste programs. EPA's approach in the final rule reflects these differences. The unique circumstances of individual States are

fully accommodated in a national performance standard governing landfill design. This standard requires that a design be capable of protecting ground water at the specified point of compliance. In selecting a design to meet this performance standard, an approved State may adopt its own performance standard, it may use the rule's uniform liner design or it may use any design it determines would be capable of preventing contamination of ground water beyond acceptable standards.

It is our expectation that States will fully utilize the flexibility the rule provides. We expect that States with vulnerable ground water will choose either the uniform liner design option or use their own liner design. Frankly, given the fact that unlined landfills will leak, it is unthinkable that a major municipal solid waste landfill located in vulnerable areas would be built without a liner. To the best of knowledge, over the past 5 years, no major commercial landfill has been sited or built in vulnerable areas without a liner. On the other hand, States in arid areas are unlikely to choose the rule's design because this design would be unnecessary in such settings. These States will meet the performance standard by tailoring design requirements to individual site characteristics. Thus, EPA's rule is the optimal response to protecting ground water when it is vulnerable, while providing needed flexibility when ground-water vulnerability is not at issue.

EPA's approach to State program approval also recognizes the traditional State role in implementing landfill standards. EPA fully intends that States will maintain the lead role in implementing this program. EPA's goal is for States to apply for and receive approval of their programs. EPA is planning to propose a separate rule governing State program approval. This rule will allow States maximum flexibility to maintain their own individual program structure and operational procedures. As discussed above, EPA expects States, particularly in arid areas of the country, will use their own specific liner design which will, for valid technical reasons, be quite different than the liner design included in the rule. In recognition of these legitimate design differences, EPA will not use the State approval process to require such States to modify their liner designs to mirror the rule's liner design. Consistent with our policy on Federalism, State programs will be deemed adequate if they have the key program components of the rule necessary to implement the solid waste disposal criteria.

For these reasons, the inclusion of design provisions in the municipal solid waste landfill regulation is the best approach to achieving our dual goals of fulfilling the statutory mandate for national standards which protect human health and the environment

- 3 -

and maintaining the States' role in standard setting and implementation. I have attached a paper that expands on the above discussion. If you should have any further questions, please do not hesitate to contact me.

Attachment



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

AUG 6 1991

THE ADMINISTRATOR

NOTE TO AL HUBBARD

As a follow up to our discussion last week, I offer the following points:

- ♦ **We are not writing on a blank slate – the terms of the statute and the 1988 Report to Congress require the Federal government to establish criteria.**
- ♦ **Rather than create a large Federal program to establish localized Federal standards, our goal is to establish a protective baseline which makes clear that the primary action, discretion and responsibility should be at the State and local level.**
- ♦ **To say that liners are "not necessary" to prevent significant leakage in vulnerable parts of the country is not credible. We will say explicitly in the rule, however, that the uniform liner provisions are designed for the most vulnerable areas and that they will be overprotective in certain parts of the country. Therefore, the rule also includes a performance standard which provides substantial flexibility to State programs.**
- ♦ **Whenever a State develops a program to deal with local conditions, the Federal liner design would have only the legal status of "guidance." Approved States in the arid west would not be required to seek a "waiver," from the liner requirement.**
- ♦ **We intend to have language in the preamble saying that liners are not needed under all rainfall and ground-water conditions. In addition, as we have discussed, we will exempt all small community landfills in areas of low rainfall from the rule. And, we will make it clear that the Federal government will not second-guess specific elements of a State program.**
- ♦ **To the best of our knowledge, over the past 5 years no major commercial landfill has been sited and built in vulnerable areas without a liner.**

MUNICIPAL SOLID WASTE LANDFILL CRITERIA

BACKGROUND

The purpose of this document is to explain EPA's approach for fulfilling its statutory mandate under RCRA Section 4010(c) to establish national standards for municipal solid waste landfills. It covers the nature of the statutory mandate EPA is fulfilling with the rule and why the rule's approach to landfill design is the most appropriate response to the statutory mandate. Finally, it lays out EPA's strongly held philosophy that States should be the implementers of this program and how we envision this philosophy operating in practice.

I believe EPA's regulation presents a protective, yet flexible approach to municipal solid waste landfills. The regulation originally transmitted to OMB has been modified to provide additional flexibility. The rule exempts small communities in arid areas. It includes expanded flexibility to approved States to tailor the frequency of ground-water monitoring to local situations. Additional flexibility is also provided to approved States regarding the location of ground-water monitoring wells. The revised cost of the rule attributable to the Federal government is \$320 million which is approximately \$1.50 per person per year.

The rule responds to a specific statutory mandate under RCRA. The statute requires EPA to revise its existing land disposal criteria as necessary to protect human health and the environment.¹ EPA views this mandate as requiring the Federal government to publish those standards that will ensure a reasonable level of protectiveness at municipal solid waste landfills. This mandate places EPA in a role that traditionally was left to the States -- establishing regulatory standards for sound design and operation of municipal solid waste landfills.

A FLEXIBLE APPROACH IS NECESSARY

In responding to this mandate the program EPA developed had to be designed with sufficient flexibility to account for the fact that there are over 3000 facilities that manage municipal solid waste under widely varying geological and climatological locations. Such a program had to recognize the vast differences in design dictated by these divergent locations.

¹ Section 4010(c) reads "The Criteria shall be those necessary to protect human health and the environment and may take into account the practical capability of such facilities."

Establishing appropriate requirements for the design of municipal solid waste landfills requires consideration of many factors, including the vulnerability of ground water, soil characteristics, and the potential for migration of contaminants from the landfill. In a large percentage of the country (especially the States east of the Mississippi River and in the Pacific Northwest), there is high rainfall and the ground-water table is quite close to the surface. Landfills built without liners in these environments would not meet the statutory mandate of protecting human health and the environment because of the high probability of contaminant migration. Conversely, EPA recognizes that other areas of the country present a quite different situation. In the arid West, rainfall is low and ground water can be far below the surface. Engineered liner systems would be unnecessary to protect ground water in some of these locations.

A NATIONAL PERFORMANCE STANDARD PROVIDES THE FLEXIBILITY NEEDED TO ADDRESS DIVERSE SETTINGS

The use of a single national design suffers from many of the problems described above. A design that meets the statutory test in areas with vulnerable ground water would be unnecessarily stringent in other locations where ground water is not highly vulnerable.

The use of a national performance standard provides the flexibility required to address the wide variety of geological and hydrogeological settings. This approach has been used successfully by some States. For example, Texas currently requires a specific liner design or it can approve alternative designs based on site-specific conditions. It successfully uses this flexibility to tailor designs for the arid Western portion of the State while relying more heavily on the design standard in the wetter Eastern portions.

Given this diversity an ideal approach to a national standard would be one that categorized areas based on rainfall and other factors (i.e., a "categorical" approach). During rule development, EPA and the States attempted to develop such an approach. The result was soundly rejected by both Agency research and technical staff and by the States because it was technically infeasible to tailor categories to the wide variety of situations. All attempts to simplify the categories led to over or under regulation. Each attempt suffered from a variety of technical deficiencies. However, it was universally agreed that the final rule needed to accommodate these technical differences.

EPA'S RULE INCORPORATES A FLEXIBLE NATIONAL PERFORMANCE STANDARD

EPA's approach in the final rule reflects the above differences through the use of a national performance standard governing landfill design. This standard requires that whatever design the State selects must be capable of protecting ground water at the specified point of compliance. In selecting a design needed to meet the performance standard, an approved State may use the rule's uniform liner design or it may use any design it determines would be capable of preventing contamination of ground water beyond acceptable standards.

Specifically, the liner design is not mandatory for approved States, rather it is only one option for States to consider. It is our expectation that only States with vulnerable ground water will choose the uniform liner design option. In fact, some States with highly vulnerable ground water will mandate stricter liner requirements. On the other hand, States in arid areas are unlikely to choose this design because such a design would be unnecessary. These States will meet the performance standard by tailoring design requirements to individual site characteristics. In fact, this is the approach Texas and other Western States currently follow. Thus, EPA's rule is the optimal response to protecting ground water when it is vulnerable, while providing needed flexibility when ground-water vulnerability is not at issue.

EPA'S APPROACH PRESERVES THE TRADITIONAL STATE ROLE AS LEAD IMPLEMENTERS OF THIS PROGRAM

As the above discussion demonstrates the performance standard approach preserves the traditional State role in defining appropriate standards to the greatest extent possible, while having a protective national standard. EPA's approach to State program approval also recognizes the traditional State role in implementing landfill standards. EPA fully intends that States will maintain the lead role in implementing this program. Our approach is modeled after the successful underground tank State delegation program. EPA's goal is for States to apply for and receive approval of their programs. In order to assure that this takes place, a separate rule governing State program approval is under development in consultation with the States. This rule allows States maximum flexibility to maintain their own individual program structure and operational procedures.

The rule does not define how a State must implement these elements. Thus, it allows States to use their own design standards, performance standards or a combination of those two approaches. The State approval process will not be used as a way to require the States to adopt the uniform liner design. Similarly, the Agency will not perform line-by-line program reviews that force the States to become mirror images of the Federal

program. We do not intend to "second guess" the meaning of State rules and regulations and we will not conduct extensive implementation reviews as a prerequisite for program approval. State programs will be deemed adequate if they have the key program components of the rule necessary to implement the land disposal requirements. Finally, the rule provides considerable latitude to the States to operate their program as they see fit.

SUMMARY

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AUG 6 1991

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Attachment



Department of Energy
Washington, DC 20585

July 17, 1991

MEMORANDUM

TO: C. Boyden Gray

FROM: *DBR* David B. Rivkin, Jr.

RE: Problem Areas in the Enforcement Provisions of the
Clean Air Amendments of 1990 and Recommended Fixes

As you know, the Clean Air Act Amendments of 1990 ("CAAA") greatly enhanced the Environmental Protection Agency's ("EPA") ability to undertake enforcement actions for statutory violations. While the general augmentation of EPA's enforcement authority reflects an overall trend, spanning across an entire range of environmental statutes, several CAAA specific enforcement provisions are particularly troublesome.¹ This subject is of more than academic interest. In my view, having completed the permitting rule, the time is ripe to take the necessary steps to fix, to the extent possible, the enforcement problems. My reading of the industry's sentiments is that they are rather concerned about the enforcement issues, and worry that, in contrast to other CAAA matters, the implementation of the enforcement title has received little high-level Administration attention. Attached hereto as Exhibit A is a

¹ As you may recall, both John and I spent a considerable amount of time working on enforcement issues during the CAAA legislative debates. Indeed, we fixed most of the problems in the Senate bill. However, for a variety of reasons, we were unable to achieve similar results in the House. Unfortunately, when the Conference Committee took up the bill, it split the difference -- permitting provisions came from the Senate bill, while enforcement language was largely that of the House version. As a result, most of the Administration's enforcement fixes were lost.

memorandum that sets forth these various enforcement problems and possible solutions.

There are also several other action forcing events. Attached hereto as Exhibit B is a brief outline of all major enforcement provisions and their associated timelines. For example, EPA indicated its intent to issue in 1992, two key rulemakings, pertaining to the so-called field citations and administrative fines. Imminent agency action is expected on both of these issues. EPA is also planning to issue guidance on various citizen lawsuit related issues, defining, among other things, which EPA actions are discretionary and hence not subject to citizen lawsuit provisions. An early involvement by the White House and DOJ is imperative if all these rulemakings are to result in establishing good, solid procedures, that provide a proper degree of due process to all concerned parties. Moreover, as you may recall, during the CAAA debates, Dick Stewart and Barry Hartman indicated their willingness to make appropriate revisions to the DOJ prosecutor's manual, so as to ensure that at least some semblance of fairness is brought into various negligent endangerment prosecutions. Unfortunately, it appears that their first foray in this area, issued shortly before Dick Stewart's departure, fails to resolve most of the outstanding problems. Hence, a supplemental DOJ guidance is required. Indeed, given the variety of enforcement issues to be tackled, I would recommend establishing an informal White House "CAAA enforcement" group, chaired by Jeff Holmstead, similar to the FERC working group, chaired by Gene Schaerr.

I believe it would be desirable to commence this project as soon as possible. Accordingly, once you have had an opportunity to review this memorandum, I would like to meet with you to discuss these issues further.

cc: John P. Schmitz
Jeff Holmstead

Exhibit A

The discussion which follows lays out the key enforcement issues to be considered, the various problems they present, and potential solutions. These are as follows:

I. NEGLIGENT ENDANGERMENT

The CAAA provide for fines and criminal sanctions for knowing violations of specified sections of the CAAA or where a person knowingly releases certain hazardous air pollutants and knowingly places another in imminent danger of death or serious bodily injury. CAAA § 113(c)(1)-(3)(5). These prescriptions are designed to punish, and thereby deter, knowing actions that threaten to harm others. Accordingly, the knowing endangerment provisions are relatively noncontroversial. However, certain other CAAA provisions are more troublesome. In particular section 113(c)(4) provides that:

Any person who negligently releases into the ambient air any hazardous air pollutant . . . , and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 of the United States Code, or by imprisonment for not more than 1 year, or both.

CAA § 113(c)(4)(emphasis added).

Under this section, any person who negligently releases any hazardous air pollutant ("HAP") and who thereby endangers the life of another, is subject to imprisonment, regardless of whether the person involved had actual knowledge of the release or its consequences,¹ or whether anybody was actually injured.

¹ This provision is made even more untenable by the fact that, for many HAPs, EPA may not be able to promulgate for years the relevant standards, setting forth permissible ambient concentrations. In the interim, EPA is certain to utilize extremely stringent, technology-driven standards. It also can be expected that virtually any accidental HAP release would run afoul of these standards. One might also anticipate that EPA may well opt to argue that any exposure to a HAP concentration, caused by an accidental release, constitutes an imminent endangerment. Given the fact that the statutory language does not require any showing of actual harm and that reliable toxicological data on individual HAPs may be lacking, the industry may well be unable to mount a viable defense to a negligent endangerment prosecution.

This attempt to apply the civil tort standard of negligence to a criminal statute is quite problematic. To begin with, this statutory language likely runs afoul of the constitutional "vagueness doctrine." That doctrine requires that every criminal statute be drafted so as to satisfy two due process related requirements: give fair warning to the actor regarding the proscribed conduct, and provide adequate legislative guidance to judges and juries if a prosecution is brought. However, the definition of what constitutes "negligent" conduct is inherently highly subjective and may differ from jury to jury, and even from judge to judge, and will only be clear in hindsight. Indeed, one can envision that many a jury would construe any accidental release of HAPs to be a negligent act, regardless of how carefully the corporate culprit involved trained its employees or tested its equipment.

Further, an additional complication is presented by the fact that section 113(h) of the CAAA states:

Except in the case of knowing and willful violations, for purposes of subsection (c)(4) of this section, the term "a person" shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of paragraphs (1), (2), (3), and (5) of subsection (c) of this section the term "a person" shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.

CAAA § 133(h).

Thus, section 113(h) ensures not only that a person may be jailed for an accidental HAP release, which he should have known could have caused danger to another person, but that a member of senior management or a corporate officer may be held criminally liable for the negligent actions of his employees. The fact that the employees were not carrying out their normal activities, or that they were acting without orders is not available to senior management and officers as a defense. To be sure, in the past, corporations and their officers have been held vicariously liable for the torts of their employees. However, the use of vicarious liability in civil suits represents society's judgement regarding how compensation for certain losses should be best recovered. Section 113(c)(4) of the CAA is intended to be a deterrent, not a compensatory measure; it is unclear how imprisoning the boss will deter the employees' negligence.

Because the potential range of the authority granted to the EPA under section 113(c)(4) presents serious issues of due

process we should issue a rule,² or guidelines, that would ensure the avoidance of at least the most blatant abuses. For example, EPA should only recommend the prosecution of cases in which actual harm was done by the negligent action involved, and in such cases, only prosecute those who actually participated in the activity -- as distinguished from those senior managers who had no actual "line" control over the "negligent" activity.³ Since the July 1, 1991, DOJ issued revisions to the prosecutor's manual fail to address most of the negligent endangerment problems, a further effort in this area is needed.

II. ADMINISTRATIVE PENALTY AUTHORITY

Under section 133(d)(1) and (2) of the CAAA, EPA may assess administrative penalties of up to \$25,000 per day in "matters where the total penalty sought does not exceed \$200,000" and where the action is brought within one year of the "first alleged date of violation". The \$200,000 cap, and the requirement that the action be brought within a year of the first alleged date of violation, may, however, be extended and increased in cases where the Administrator and Attorney General agree that extending the covered period of violation, or increasing the penalty, is appropriate. Significantly, a decision to extend is not subject to judicial review.

Administrative penalties are assessed by issuance of an administrative order for (i) violations of an implementation plan during Federally Assumed Enforcement⁴ ("FAE") or 30 days after a section 113(a)(1),⁵ notice has been given; (ii) violations of any requirement relating to attainment and maintenance of NAAQS, hazardous air pollutants, acid deposition, permits, or ozone protection; or (iii) attempting to modify or construct a major stationary source where a section 113(a)(5) finding has been

² The key advantage of issuing a rule, as compared with EPA/DOJ guidelines, is that a rule would bar inconsistent citizen lawsuits, while the guidelines would not.

³ However, even if this is done, it still is likely that any criminal prosecution for negligent conduct will be subject to constitutional challenge.

⁴ Federally Assumed Enforcement occurs when the Administrator finds that "violations of an applicable implementation plan or approved permit plan . . . are so widespread that such violations appear to result from a failure of the State" to enforce the plan or permit program. CAAA § 113(a)(2).

⁵ Under section 113(a)(1), the Administrator gives notice of violations of implementation plans or permits.

made.⁶ The fine is assessed by an order on the record after an opportunity for an adjudicatory hearing pursuant to 5 U.S.C. §§ 554 and 556.⁷ Discovery rules and hearing procedures shall be issued by the Administrator.⁸ The Administrator must give written notice to the alleged violator, who then has 30 days to request a hearing.⁹

Appeals of administrative penalties (including field citations under section 113(d)(3), described infra) are to the District Court in one of the following locations: the District of Columbia, the location where the violation allegedly occurred, the alleged violator's residence, or the alleged violator's principal place of business. Appeals must be made within 30 days after a section 113(d)(2) penalty becomes final (a section 113(d)(3) penalty becomes final because no hearing was requested), or a final decision following a section 113(d)(3) hearing. On appeal, the penalty shall be set aside only if there is no substantial evidence in the record, taken as a whole, to support the finding, or if the Administrator's assessment of the penalty constitutes an abuse of discretion. Section 113(d)(4) sets forth the exclusive means of review for administrative penalties.

Although the high dollar cap in this section presents a great potential for abuse, this problem could be mitigated by EPA's establishment of proper guidelines¹⁰ for the exercise of its prosecutorial discretion. Moreover, given the standard of review involved, it is essential that a good record be compiled during the administrative review stage. In that regard, I recall that, during the CAAA debate days, several senior EPA officials complained about the inadequacies of EPA's existing ALJ system. Accordingly, it is important to ensure that EPA's ALJ system is

⁶ Section 113(a)(5) findings are made where "a State is not acting in compliance with any requirement or prohibition of the act relating to the construction of new sources or the modification of existing sources."

⁷ CAAA § 113(d)(2).

⁸ Id. See Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. § 22 et seq., as amended by 55 Fed. Reg. 23,838 (June 12, 1990), covering similar hearings under TSCA, FIFRA, and the CWA.

⁹ CAAA § 113(d)(2).

¹⁰ As discussed in note 2, supra, promulgating a formal rule is even more advantageous, since such a rule would limit not only government prosecutions, but citizen lawsuits as well.

given the appropriate personnel and resources to handle increases in enforcement activities.

III. FIELD CITATION PROGRAM

Under section 113(d)(3), the Administrator may implement, by regulation, a field citation program, whereby designated employees may assess civil penalties not to exceed \$5,000 for "appropriate minor violations." There is no cap, however, on the number of field citations that may be issued in the course of one year to any single source. Assesseees may request a hearing or simply pay the fine. The time within which a hearing must be requested will be established by regulation, and the hearing is not subject to the Administrative Procedure Act ("APA"). Still, such a hearing "shall provide reasonable opportunity to be heard and to present evidence."¹¹ Significantly, payment of the field citation is not a defense to other enforcement actions if the violation continues.¹² Appeals of field citations are taken pursuant to the procedures utilized for other administrative penalties, as described supra.

Because there is no aggregate limit on the number of field citations that may be issued to a single facility,¹³ there is a potential for EPA employees to use the field citation program as a tool for harassment of facilities that may be challenging the EPA's authority in other areas. This is especially true because of the provision that precludes the payment of a field citation from being a defense to other enforcement actions if the violation continues. Under this section, it could be argued that EPA has the authority to issue a field citation to a facility, for example, every day for a year, instead of, or even at the same time as, attempting to collect the statutory maximum penalties under section 113(d)(1). The problems of fairness presented by this scheme are exacerbated by the exemption of requests for hearings on field citations from the due process requirements of the APA.

Although section 113(d)(3) does require "a reasonable opportunity to be heard and to present evidence", the time for requesting such a hearing and the designation of a hearing

¹¹ CAAA § 113(d)(3).

¹² Id.

¹³ Theoretically, in the course of a single year, any facility may be issued 365 citations.

officer is to be set by regulation.¹⁴ Thus, these issues, as well as guidelines regarding the number of field citations that may be issued and when regular administrative penalties must be used, could be reasonably resolved by the issuance of EPA regulations and guidelines. Indeed, we should be able to insist that, as a matter of sound administrative policy, any field citation procedures established by EPA must substantially conform with the APA strictures.

IV. USE OF INFORMATION OBTAINED IN AUDITS REQUIRED BY THE ADMINISTRATOR

Under the old CAA, the Administrator had the authority to order any owner or operator of an emission source to establish and maintain records, make reports, install monitoring equipment, sample emissions, and provide other information. The CAAA gave the Administrator the additional power to order audit procedures, prescribe that records on control equipment parameters be kept when monitoring is impractical, and require that compliance certifications be submitted. The CAAA also allow the Administrator to issue orders under this section not only to owners and operators of sources, but also to any manufacturer of emission control equipment or against any person that the Administrator believes has information "necessary for the purposes set forth in this subsection."¹⁵ Significantly, the House version of the CAAA contained a provision that stated that "[n]othing in this paragraph shall be construed as requiring disclosure of information . . . that is subject to applicable law concerning self-incrimination."¹⁶ This provision, however, was deleted from the final version of the bill.

To be sure, the Conference Report's discussion of the criminal penalty provisions contained in Title VII of the CAAA states that:

Nothing in subsection 113(c) is intended to discourage owners or operators of sources subject to this Act from

¹⁴ Any EPA action to improve the existing system would be highly desirable. I recall that during the CAAA legislative debates, EPA's existing field citation system has been strongly criticized by the industry. The industry alleged, for example, that frequently the EPA reviewing official was a co-worker of a person who issued the initial citation. Clearly, a situation such as this creates a serious appearance of a conflict of interest.

¹⁵ CAAA § 114(a)(1).

¹⁶ S. 1630 (May 23, 1990--as passed by the House of Representatives), 101st Congress, 2d Sess., § 602(b).

conducting self-evaluations or self-audits and acting to correct any problems identified Such internal audits will improve the owners' and operators' ability to identify and correct problems before, rather than after, government inspections and other enforcement actions are needed.

The criminal penalties available under subsection 113(c) should not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting an audit or the audit report itself should not ordinarily form the basis of the intent which results in criminal penalties.

H. Conf. Rep. No. 952, 101st Cong., 2d Sess. 348 (1990)(emphasis added).

However, this language only applies to the use of voluntarily gathered and reported information for criminal prosecutions. This is hardly a major concession. Indeed, the ability of the Administrator to force sources to report incriminating information under section 114, for use in enforcement proceedings, is limited by constitutional protections against self-incrimination.¹⁷ The constitutional protections though bar only criminal prosecutions. The statutory language does allow the Administrator to bring civil actions against sources based solely on information reported to EPA by such sources.

That aside, the key problem with the CAAA's language is that it is unclear whether or not the Administrator, upon receipt of information indicating that a violation has occurred, must immediately prosecute the violator. That is, may the Administrator exercise his prosecutorial discretion to allow a source, that conducts an audit and discovers a violation a grace period within which to come within compliance with CAA standards

¹⁷ Other provisions contained in section 114 anticipate the use of information gathered thereunder in enforcement actions: e.g., section 114(d)(2), which provides:

Nothing in paragraph (1) shall be construed to provide that any failure by the Administrator to comply with the requirements of such paragraph shall be a defense in any enforcement action brought by the Administrator or shall make inadmissible as evidence in any such action any information or material obtained notwithstanding such failure to comply with such requirements.

before an enforcement action is taken? The first issue that must be addressed in this context is whether or not the Administrator has any prosecutorial discretion.

In that regard, the Conference Report accompanying S. 1630 states that "[i]t is the conferees' intention to provide the Administrator with prosecutorial discretion to decide not to seek sanctions under Section 113 for de minimis or technical violations in civil and criminal matters."¹⁸ Although this language implies that the Administrator does not have prosecutorial discretion when non-technical and non-de minimis violations are reported, other sections of the Conference Report speak of the enforcement sections as "authorizing" the Administrator to enforce the CAAA.¹⁹ For example, the Report refers to section 113(a), which authorizes the Administrator to take actions regarding violations of State Implementation Plans and permits, as authority, which "can also be used by EPA when States fail to enforce SIPs or permit requirements." This description implies that EPA's use of such authorities is optional.²⁰

The statutory language of the CAAA is also less than precise on the issue of the overall enforcement discretion of the Administrator. Specifically, section 113(a) states that:

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation . . . --

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d), or

(C) bring a civil action in accordance with subsection (b).

CAA § 113(a)(1) (emphasis added).

¹⁸ H. Conf. Rep. No. 952, 101st Cong., 2d Sess. 347 (1990).

¹⁹ Id.

²⁰ Id.

Although the use of the term "shall" could be read to require the Administrator to make notifications regarding any and all violations, the use of the word "may," followed by the list of alternative actions, could be read as giving the Administrator either optional or mandatory authority.²¹ In addition, the language of another one of the enforcement options, civil judicial action, also could be read to be either discretionary or mandatory. In that regard, section 113(b) states:

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than \$25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this title, section 303 of title III, title IV, title V, or title VI, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this Act, or for the payment of any fee owed the United States under this Act (other than title II).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) has been made.

²¹ One matter is clear -- if an order requiring compliance is issued, the order must require compliance "in no event longer than one year after the date the order was issued, and shall be nonrenewable." CAAA § 113(a)(4). Arguably, this provision alone substantially curtails the Administrator's prosecutorial discretion by precluding the Administrator from granting any source a longer grace period to come into compliance. To be sure, theoretically, the Administrator does not have to issue a compliance order, in which case the one-year period restriction would not apply. However, EPA would be unable, in virtually any case, to reject an anticipated citizen petition, asking the Agency to issue, at the very least, a compliance order against an out-of-compliance source.

CAAA § 113(b) (emphasis added).

The meaning of the "shall, as appropriate" language is unclear, if not self-contradictory. Although the words "as appropriate" follow "shall" and would therefore seem to confer discretion on the Administrator, such an interpretation would render meaningless the distinction between the first class of sources, those that "shall" be prosecuted, and the second class, those that "may" be prosecuted. It may be that the "as appropriate" language was intended to confer discretion on the Administrator that could be exercised in cases where State authorities have already taken enforcement measures. Still, it is at least arguable that the Administrator has some prosecutorial discretion under this section.²²

To the extent that the Administrator does have prosecutorial discretion, he may exercise it as he sees fit. As an exercise of that discretion, the Administrator may promulgate rules, that codify how and when enforcement actions may be taken with respect to commonly-occurring situations.²³ To be sure, those rules cannot conflict with statutory requirements. Thus, as noted supra, it is significant that compliance orders must require compliance within one year of issuance. It would seem that even if the Administrator may choose to allow certain violators time to come into compliance before penalties are imposed, any compliance order that he issues would be subject to the one-year limitation.²⁴

V. CONTINUING VIOLATIONS

The issue of continuing violations was a hotly contested matter during the CAAA enactment debates. The original language of that section would have enabled EPA, if it succeeded in establishing that, on two given days in the past, a source violated the CAAA, to allege that on all days in between the source also violated the CAAA, shifting the burden of rebutting this allegation to the source. After long and arduous negotiations, this problem was fixed in the Senate bill. Furthermore, fortunately, in pertinent part, the CAAA contain the Senate language on continuing violations.

²² One may argue that the "as appropriate" language precludes an exercise by the Administrator of a case-by-case discretion, but allows the Administrator to issue relevant generic guidelines/rules.

²³ As noted in note 10, supra, such rules would apply to both government prosecutions and citizen lawsuits alike.

²⁴ For a discussion of this issue, see note 21, supra.

In that regard, section 113(e)(2) states:

For purposes of determining the number of days of violation for which a penalty may be assessed . . . where the Administrator or an air pollution control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

CAA § 113(e)(2)(emphasis added).

Still, while the continuing violation provisions do not evidence any major problems, we should consider issuing guidelines/rules that clarify what types of violations are likely to be of a continuous nature.

IV. Citizen Lawsuits

As you may recall, various constitutional disputes, relevant to citizen lawsuit issues, were prominent throughout the CAAA enactment debates. One of the Administration's major victories was to defeat statutory language that would have enabled citizens to sue EPA over its discharge of its discretionary duties. What remains unsettled at this time is which EPA actions may be categorized as non-discretionary. As I understand it, EPA is presently working on this issue. I believe that it would be highly beneficial for this exercise to receive some high level interagency input.

Exhibit B

Key Enforcement Issues

<u>PROVISION</u>	<u>PROBLEM</u>	<u>LEGISLATIVE HISTORY</u>	<u>ACTION FORCING EVENT</u>
<u>Negligent Endangerment</u> (§ 113(c)(4))	*Imposes criminal penalties without requiring that release of HAPs be committed knowingly or actual injury to others; is based on negligence or possibly even strict liability, standard	*Same in House and Senate versions	*Issuance of EPA enforcement policy manual
	*Imposes vicarious liability on management; ex-empt employees	*House and Senate versions imposed liability on management; exemption for employees added in Conference	*Issuance of EPA enforcement policy manual
<u>Administrative Penalty Authority</u> (§ 113(d)(1)-(2))	*High dollar cap; allows Administrator and Attorney General to jointly	*Same in House and Senate versions, except Senate version did not contain provision	*Issuance of EPA enforcement policy manual

determine that a fine should exceed the cap

*Administrative review process potentially inadequate

*Deferential judicial review standard

allowing the cap to be exceeded

*Substance same in House and Senate versions

*Substance same in House and Senate

*Procedural rules to be issued by Administrator (no statutory time limit, but expected action by EPA: February 1992 --proposed rule: November 1992 -- final rule)

*None (could be mitigated by above actions)

Field Citation
Program
(\$ 113(d)(3))

*No cap on number of citations

*Senate version contained \$25,000 cap for a six month period for a single facility; House version ultimately adopted

*Issuance of EPA enforcement policy manual

*Hearings not subject to APA

*Same in House and Senate

*Procedural rules to be issued by Administrator (no statutory time limit, but

*Payment no defense to other enforcement actions "if violation continues"

*Same in House and Senate

expected action by EPA: February 1992 -- proposed rule; november 1992 -- final rule)

*Issuance of EPA
enforcement policy
manual

Use of Audit
Information in
Enforcement
Actions
(§§ 113 & 114)

*No prohibition on
use of audit
information in
enforcement
actions

*Same in House and
Senate, except
House version
provided that
information need
not be disclosed
if such disclosure
amounted to
constitutionally
proscribed self-
incrimination

*Issuance of EPA
enforcement policy
manual
(regulations
implementing § 114
must be issued
within 2 years)