

Originally Processed With FOIA(s):
2001-1865-F

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2001-1865-F

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OFFICE OF THE VICE PRESIDENT
WASHINGTON

TO: NANCY MITCHELL JEFF HOLMSTEAD
DAVID RIUKIN TERESA GORMAN
ART FRAAS

FROM: David M. McIntosh
Assistant to the Vice President
For Domestic Policy

☒ FYI

☐ Comment

☐ Action

Let me know what you
think. Thanks,
Dul

EPA

Permit
Reg.

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U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515

January 21, 1992

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

Dear Administrator Reilly:

Thank you for the enclosed replies of October 25 and November 6, 1991 to my letters of March 15 and July 15, 1991 regarding the Environmental Protection Agency's (EPA) permit regulations now in review and revision within the Administration. The replies are helpful insofar as the letters cover the issues I raised. I note that you recognize that you have not, as yet, addressed some other important issues.

One issue you did address and, in doing so, defended the EPA proposed provision, relates to the "Deferral of Nonmajor Sources." I continue to disagree with your interpretation of the statute. I think your defense is not founded on the statute. Indeed, so does the Comptroller General. In his enclosed opinion (B-243632) of December 26, 1991, he states:

For several reasons, we do not find persuasive support in the record, consisting of the proposed rule and EPA's explanation, for EPA's having provided a blanket exemption of nonmajor sources.

First, under the proposed rule, the exemption applies to nonmajor sources, regardless of their size. Thus, large businesses and large governments that are not major sources, as well as small ones, are exempted. But large businesses and governments are likely to have substantial legal and technical resources, adequate to handle successfully the new program. In such cases, the rationale for EPA's finding, concerned only with small businesses and small governments, plainly would not hold up.

Second, regarding EPA's assertion concerning the inadequacy of the legal and technical resources available to small businesses and small governments, we do not dispute that many small businesses, e.g., neighborhood drycleaning establishments, may lack such necessary legal and technical resources. However, we question whether this is true for all small businesses and small governments. For example, certain businesses that can fairly be characterized as "small" may nonetheless be of sufficient size or have sufficient resources to afford the legal and technical expertise necessary to handle successfully the permit program. EPA does not explain what it means by the term "small," nor does the agency offer any facts or other data to support its broad assertion.

Third, EPA does not mention the Amendment's small business assistance program and the potential salutary effect this program may have in enabling small sources to cope with the permitting requirements. Under this program, established by section 507 of the Amendments, small business sources are eligible for technical and compliance assistance in satisfying the permitting requirements. See, H.R. Conf. Rep. No. 952, 101st Cong., 2d Sess. 346 (1990).

It may well be that EPA has ample facts at hand, or even data in its files, that provide stronger justification for its proposed blanket exemption of nonmajor sources. However, on the basis of the record before us, contained in EPA's proposed rule and explanation, EPA has not made a persuasive showing that compliance with the permit regulations by nonmajor sources would be "impracticable, infeasible, or unnecessarily burdensome."

Facts or data in EPA files, but not in the rulemaking record, cannot be used to support the rule. Clearly, the GAO believes that the record does not support your contentions. I strongly urge you to adhere to the view of the Comptroller General who also addresses two other issues of concern to me regarding sections 502(b)(6) and (1) of the law.

I request your views and comments on the Comptroller General's opinion within 30 days after the rule is finalized. Please provide a copy to him for his review, as well as his review of the final rule, and further comment to the Subcommittee.

The table of implementation included with EPA's letter of December 18 states that promulgation of this rule would occur in December 1991 and that it went to "OMB October 91." What is the status now?

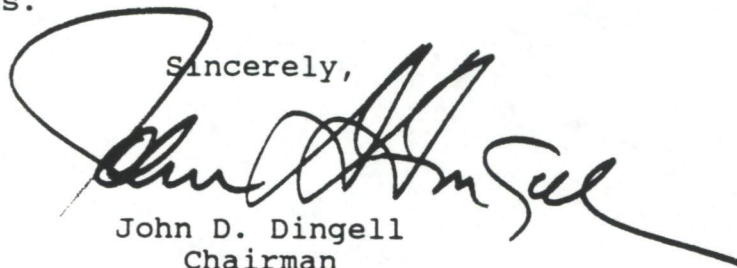
The Honorable William K. Reilly

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Please include this letter and attachments in the rulemaking record.

With best wishes.

Sincerely,

A large, stylized handwritten signature in black ink, which appears to read "John D. Dingell".

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

Enclosure

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

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

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

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

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

Vice President Dan Quayle, Chairman
Council on Competitiveness

The Honorable James D. Watkins, Secretary
Department of Energy

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

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

The Honorable Samuel K. Skinner, Chief of Staff
The White House

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

The Honorable William K. Reilly
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Mr. Ray Ludwiszewski, Acting General Counsel
Environmental Protection Agency

The Honorable William G. Rosenberg, Assistant Administrator
for the Air and Radiation
Environmental Protection Agency



Comptroller General
of the United States

Washington, D.C. 20548

92 JUNE 3 1991

B-243632

December 26, 1991

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

Dear Mr. Chairman:

This is in response to your letter of March 20, 1991, requesting that our agency review the legal issues raised in your letter to the Environmental Protection Agency (EPA) concerning EPA's "2-9-91" advance draft of a proposed rule for the operating permit provisions of the Clean Air Act, as amended (the act).¹ Subsequently, on May 10, 1991, EPA published a proposed rulemaking on the Operating Permit Program. 56 Fed. Reg. 21712-21781 (May 10, 1991). Some of the issues raised in your letter to EPA were addressed in the proposed rulemaking. In a meeting with Mr. Finnegan of your staff in May, three areas were identified as being of major concern.

First, you asked that we review the procedures in the proposed rule for revising a permit, after it has been issued, to determine if the proposed procedures are in accord with subsection 502(b)(6). Subsection 502(b)(6), among other things, requires that a permit program include adequate, streamlined, and reasonable procedures for the expeditious review of permit actions, including revisions.

Second, you requested that we review EPA's implementation of subsection 502(b)(10). Subsection 502(b)(10) requires that a permit program include provisions allowing implementation of changes within a facility, without requiring a permit revision, if the changes are not "modifications" under

¹The operating permit provisions were added by title V of the Clean Air Act Amendments of 1990 (Amendments). 42 U.S.C.A. §§ 7661-7661f (West Supp. 1991). Specifically, under title V, the Administrator is required to promulgate regulations by November 1991, establishing minimum requirements for permit programs to be administered by an air pollution control agency. § 502(b), 42 U.S.C.A. § 7661a(b) (West Supp. 1991).

Title I² and do not result in emissions that exceed the level allowable under the permit. The facility, however, must provide advance written notification to EPA and the permitting authority at least 7 days prior to the implementation of the change (a shorter timeframe may be provided for emergencies).

Third, you asked that we determine whether EPA's proposed 5-year exemption of nonmajor sources from the permit rule complies with the exemption standard contained in section 502(a). Under this standard, the EPA Administrator has the discretion, consistent with the Clean Air Act, to promulgate regulations exempting one or more nonmajor "source categories" (in whole or in part) from the scope of the permit rule if he finds that "compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such [source] categories"

A. EPA's proposed revision procedures under subsection 502(b)(6)

Your first question involves revision procedures under the permit program. Under the permit program, it is unlawful for any person to violate any permit requirement or operate a source in a manner not in compliance with his permit. § 502(a).³ Accordingly, if a source wishes to make a change within his facility that would not be allowed under

²Title I of the Clean Air Act, as amended (act), includes several different definitions of "modifications." For example, with respect to the new source performance standards:

"The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."
42 U.S.C. § 7411(a)(4).

³Section 502(a) provides, in part:

". . . it shall be unlawful for any person to violate any requirement of a permit issued under this title, or to operate . . . any . . . source . . . except in compliance with a permit issued by a permitting authority under this title" 42 U.S.C.A. § 7661a(a) (West Supp. 1991).

the terms of the permit, a revision to the permit is generally required.⁴

The procedures for permit actions, including revisions, are contained in subsection 502(b)(6). This provision requires, among other things, that a permit program include adequate, streamlined, and reasonable procedures for the expeditious review of permit actions, including revisions.⁵ EPA states that the primary thrust of subsection 502(b)(6) is to avoid undue delay for the permitted facility. It does not, according to EPA, mandate any specific procedures for making expeditious "revisions." With this in mind, EPA proposes three separate revision procedures that a state may adopt. Each procedure corresponds to a separate category of change at the facility. EPA designates these changes as: "permit modifications," "administrative permit amendments," and "minor permit amendments."

EPA refers to changes that constitute modifications under title I as "permit modifications."⁶ See, proposed § 70.7(d). As proposed, "permit modifications" are subject to the same procedures required for initial permit issuance, including EPA review and opportunities for public notice and

⁴Subsection 502(a)(10) (discussed below), however, provides that for a limited category of changes, those not involving increased emissions or Title I modifications, no revision is required, as long as advance written notification is furnished to EPA and the permitting authority at least 7 days prior to the changes being implemented. 42 U.S.C.A. § 7661a(b)(10).

⁵Subsection 502(b)(6) requires that a permit program include:

"Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." 42 U.S.C.A. § 7661a(b)(6) (West Supp. 1991).

⁶"Permit modifications" also include any relaxation in the reporting requirements or to milestones with the schedule of compliance for a noncomplying source. See, proposed § 70.7(d)(2).

judicial review. The required review is restricted to that portion of the permit affected by the proposed change.

EPA defines "administrative permit amendments" as changes at the facility that are "insignificant ones which adjust details not important to air quality (e.g., changes in source name)" 56 Fed. Reg. at 21720. These amendments also cover changes that have already been subject to public review under other provisions of the act, such as new source review procedures. *Id.* EPA proposes that changes covered under the "administrative permit amendments" process can be administratively incorporated into the permit by the permitting authority. Under this proposal, neither public comment nor the advance notification procedures provided in subsection 502(b)(10) (discussed below) would apply. See, proposed section 70.7(e).

According to EPA, "minor permit amendments" relate to changes at a permitted facility that increase emission levels above the level allowed under the permit, but are not modifications under title I. Under EPA proposed regulations, such changes may be implemented through a "fast track" process similar to the procedures contained in subsection 502(b)(10). See, proposed § 70.7(f). As proposed, the permitting facility must provide EPA and the permitting authority with at least 7 days notice prior to implementing the change. The change may take effect automatically, if the permitting authority does not object within the notice period.⁷

As EPA states, subsection 502(b)(6) mandates that permit authorities include in their program "expeditious" procedures for reviewing proposed permit revisions. We would also agree with EPA that permitting authorities have the discretion to implement more than one type of revision process under that statutory provision. However, in our view, subsection 502(b)(6) requires more than a speedy review. We believe that revisions to permit requirements must be subject to public oversight as prescribed under that provision.

Subsection 502(b)(6) provides, in pertinent part, that a permit program must include:

⁷Within 60 days from receiving the notice, the permitting authority must revise the permit to incorporate the minor permit amendment, designating such revision as having been made under the minor permit amendment process. The revised permit must be submitted to EPA and made readily available to the public. See, proposed § 70.7(f)(3).

"Adequate, streamlined, and reasonable procedures . . . for processing . . . applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including . . . revisions, and including an opportunity for judicial review in State court of the final permit action by . . . any person who participated in the public comment process"
(Emphasis added.)

In our view, this requires that an expeditious revision process must provide, at a minimum, opportunities for the public to participate in a public comment period and for judicial review in state court. This reading of the provision is consistent with the procedures for issuing permits in the first instance. The permit program provides an opportunity for all interested parties to have a role in the issuance of the original permit. We believe it only reasonable to subject revisions to a similar process.

EPA's proposed "permit modification" process meets these minimum standards. The proposed process allows for public oversight and, in our view, conforms to the requirements of subsection 502(b)(6). Accordingly, we have no objection to this proposed revision process.

EPA's proposed revision process for "administrative permit amendments" does not provide for public oversight. Nevertheless, to the extent that these amendments do not impact, directly or indirectly, on permit requirements, we would not object. We view these as changes in administrative details, rather than substantive revisions to the permit. We also agree with EPA that changes that have been subject to public review under other provisions of the act should not be subject to a repetition of that process for purposes of revising the permit.

Our concern with EPA's proposed revision procedures focuses on EPA's proposed "minor permit amendment" process. Under this proposed process, emission levels could be raised above the levels allowed under the permit, without any public scrutiny. We do not believe that this process conforms to the requirements of subsection 502(b)(6). In our view, whether the revision procedures are for changes denominated as "minor permit amendments" or "permit modifications," if the change would, directly or indirectly, impact on the air quality program, certain minimum standards apply. As stated above, we believe the statute requires that any revision process must provide, at a minimum, opportunities for the public to participate in a public comment period and for judicial review in state court. This is especially true where the proposed revision would result in an increase in emissions above agreed upon permit levels. EPA's proposed

"minor permit amendment" process does not include these minimum standards. Accordingly, we do not believe these procedures comply with the requirements of subsection 502(b)(6).

B. EPA's proposed implementation of subsection 502(b)(10)

You also asked us to review EPA's implementation of the subsection 502(b)(10) process.⁸ Subsection 502(b)(10) sets forth a procedure for effecting certain changes within a permitted facility that is different from the one prescribed by subsection 502(b)(6), discussed above. Under the 502(b)(10) procedure, changes may be made in a permitted facility "without requiring a permit revision," if the changes are not modifications under title I of the act and the changes do not exceed the emissions allowable under the permit.⁹ The facility must provide at least 7 days advance written notification of the proposed changes to the permitting authority and EPA. 42 U.S.C.A. § 7661a(b)(10)

⁸Specifically, subsection 502(b)(10) requires that the permit program include:

"Provisions to allow changes within a permitted facility . . . without requiring a permit revision, if the changes are not modifications under any provision of title I and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions: Provided, That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies." 42 U.S.C.A. § 7661a(b)(10) (West Supp. 1991).⁸

⁹In its explanation of the proposed rule, EPA characterized subsection 502(b)(10) as providing a "fast track" process for "changing the terms of the permit without undue delay . . ." 56 Fed. Reg. 21745. (Emphasis added.) However, that statutory provision, by its terms, "allow[s] changes within a permitted facility . . . without requiring a permit revision." Emphasis added.) Thus, as we read subsection 502(b)(10), the "changes" it refers to are "changes within a permitted facility," not changes in the terms of the permit. Further, the statute allows certain operational changes to be made at the facility, but does not contemplate that the permit will be changed.

(West Supp. 1991). EPA characterizes this procedure as the "fast track" process.

As noted above, section 502(a) makes it unlawful to violate any permit requirement or to operate a source in a manner not allowed under the terms of the permit. Therefore, if a source wishes to make a change within a facility that is prohibited under the terms of the permit, a revision to the permit is ordinarily required. As discussed above, the procedure for a permit revision is prescribed in subsection 502(b)(6).

Section 502(b)(10), however, specifically authorizes changes within a facility without requiring a permit revision. This raises the question as to what kinds of changes may be made under the 502(b)(10) "fast track" process. The statute is ambiguous, lending itself to different interpretations.

One interpretation of subsection 502(b)(10) is that the "fast track" process it prescribes is available only for those changes that are specifically allowed or not prohibited under the permit. Under this interpretation, the statute would be limited in its application to those changes that can be made "without requiring a permit revision."¹⁰

This interpretation has the value of avoiding a conflict with section 502(a). That is, since the changes are not prohibited or are specifically allowed, the source continues to operate in full compliance with the terms of the permit. It also has the value of maintaining the integrity of the permit revision process set forth in subsection 502(b)(6). All changes prohibited under the terms of the permit--even those that do not raise emissions above the levels allowed under the permit--would be subject to the permit revision process.

However, this interpretation would effectively reduce subsection 502(b)(10) to a nullity. The reason is that, under the statutory scheme, a source is already free to effect any changes that are not prohibited by the permit. Such changes do not violate the terms of the permit and the source remains in compliance with the requirements of

¹⁰The proposed rule provides that certain changes may be made without a revision to the permit. These include "administrative permit amendments"--insignificant changes which adjust details not important to air quality, e.g., changes in source name--and changes that have already been subject to public review. These changes may be administratively incorporated into the operating permit by the permitting authority. See, proposed § 70.7(e). As discussed above, we have no objection to this proposal.

section 502(a). Accordingly, for such changes, the source is not required to pursue either the "fast track" process of subsection 502(b)(10) or the permit revision procedure of subsection 502(b)(6). Therefore, an interpretation limiting the application of subsection 502(b)(10) to changes already allowed under the permit would render the "fast track" process, at best, mere surplusage.

Under a second interpretation, the literal words of the statute allow any changes to be made--regardless of how major and regardless if they are prohibited under the terms of the permit--merely by providing 7 days advance notification, so long as the change does not constitute a title I modification and does not raise emission levels above those allowed in the permit.

One problem with this interpretation is that it arguably places the source in the position of violating section 502(a). Under subsection 502(b)(10), the changes are made without requiring a permit revision. Therefore, the facility would be operating in a manner not in compliance with the existing permit, which is prohibited under section 502(a). This would present an obvious conflict between section 502(a) and subsection 502(b)(10), and to resolve the conflict in favor of § 502(b)(10) would be tantamount to an implied repeal, in part, of § 502(a), a result not commonly favored by the law.

Another problem with this interpretation is that it would severely reduce the applicability of the permit revision process prescribed by subsection 502(b)(6). Permit revisions would not be required for any changes--regardless of how major and regardless of whether they are prohibited by the permit--unless they constitute title I modifications or raise emission levels to impermissible levels. A mere 7 days advance notification is all that would be required.

EPA apparently adopts the second interpretation, but it does not propose to allow a wholesale exception to section 502(a). Instead, it would allow some changes to be made through the "fast track" process of 7 days advance notification, but not others.

First, as we understand EPA's explanation of the proposed rule, EPA would apply subsection 502(b)(10) only to changes "not anticipated during permit issuance." 56 Fed. Reg. 21746. The proposed rule reflects that position. See, proposed § 70.6(d)(3)(ii). Also, in its explanation of the proposed rule, EPA stresses the application of the "operational flexibility" provisions of the statute to "routine operational changes" and states that subsection 502(b)(10) will apply to "minor changes in operation."

Thus, under EPA's proposed implementation of subsection 502(b)(10), as expressed through the explicit provisions of the proposed rule and its explanation of that rule, the "fast track" process would be limited to changes that satisfy all of the following conditions:

1. The changes would not constitute modifications under title I of the act and would not result in an increase in emissions above the levels allowable under the permit. Thus, changes which, either on their face or in practical effect, result in emissions in excess of those allowable under the permit would be subject to the permit revision process under subsection 502(b)(6), not the "fast track" process of 502(b)(10).

2. The changes could not reasonably have been anticipated at the time of permit issuance. If the changes could have been anticipated, they must be made pursuant to the permit revision process under subsection 502(b)(6).

3. The changes would constitute routine or minor changes in operation. Thus, the "fast track" process under subsection 502(b)(10) would not be available for changes that could not be fairly characterized as routine or minor, even though they would not result directly in increased emissions above the levels allowable under the permit. For example, changes that would substantially reduce the frequency of inspections of a facility's valves and tanks, or that would severely curtail monitoring activities, although they would not directly increase emission levels, probably would not, in most cases, be viewed as routine or minor operational changes. Typically, we would expect, these changes would be regarded as being so important in detecting inadvertent emission increases, and in preventing accidents that they would usually be made only through the permit revision process under subsection 502(b)(6), not the "fast track" process of 502(b)(10).

We believe EPA's position regarding the kinds of changes for which the "fast track" process would be available, as we understand it, is a reasonable one. First, it offers the promise of maintaining the integrity of the permit revision process of subsection 502(b)(6) as the mechanism for effecting many operational changes at a facility.

Second, it also preserves the vitality of the "fast track" provisions of subsection 502(b)(10). The "fast track"

¹¹This interpretation is not explicitly incorporated into the proposed rule.

process would be available for routine, minor changes that could not reasonably have been anticipated during permit issuance and do not raise emissions above the levels allowed under the permit. Thus, changes that are less than major operational changes (substantial changes in the frequency of inspections), but that constitute more than mere administrative changes (changes in source name), could be effected through 7 days advance notification, so long as they do not raise emissions above the permissible limit.

Third, it reduces the effect of the possible conflict between subsection 502(b)(10) and section 502(a). Under EPA's proposed implementation, the only changes that would be effected through the "fast track" process are routine, minor changes that could not reasonably have been anticipated. Therefore, although these changes may be prohibited under the terms of the permit, they are of less importance than the others that will be subjected to the full permit revision process. Under EPA's proposed implementation, 7 days advance notification would suffice for such changes under subsection 502(b)(10).

We believe EPA's proposed implementation, as described above, is balanced and reasonable. It allows certain changes to be made by means of the "fast track" process of subsection 502(b)(10) without requiring the full permit revision procedure. But it imposes safeguards to ensure that changes of substantial importance are subjected to full public scrutiny under the permit revision process.¹²

C. EPA's proposed 5-year exemption of nonmajor sources

Finally, you requested that we review EPA's proposed exemption of nonmajor sources from the permit program. EPA proposes to exempt nonmajor sources, otherwise subject to permit requirements, from the permit program for a period of 5 years.

¹²Although changes within a facility made pursuant to subsection 502(b)(10) do not require a permit revision, EPA would "update" the permit to reflect these changes. One issue, beyond the scope of this opinion and not explicitly addressed by EPA in its proposed rule, is whether the changes effected through the "fast track" process would be within the protection of the "permit shield" provided under section 504(f). 42 U.S.C.A. § 7661c(f) (West Supp. 1991). The importance of the "permit shield" is that it may protect sources from liability for alleged violations of the act. Under the "permit shield" provision, compliance with the terms and conditions of a permit may be deemed to be compliance with other provisions of the act.

Under section 502(a), the Administrator has the discretion, consistent with the Clean Air Act, to promulgate regulations exempting one or more nonmajor "source categories" (in whole or in part) from the scope of the permit rule if he finds that "compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such [source] categories" ¹³

EPA offers two grounds for its proposed exemption of nonmajor sources. First, EPA contends that, in the initial years of the program, EPA and the states could be potentially overwhelmed by the burden of processing the permit applications for major sources, alone. EPA estimates that over 34,000 sources are covered under the Amendment's expanded definition of "major" sources. Id. EPA argues that, if the thousands more of covered nonmajor sources were included in the initial permit program, it would significantly increase EPA's and the states' workload, with only negligible air quality benefits.

Second, EPA states that small businesses and small governments may be overburdened by the proposed regulations because they may lack the necessary legal and technical skills to deal with a new and complicated permit program. Id. Therefore, EPA finds that permitting such nonmajor sources during the first 5 years of the program would be unnecessarily burdensome on those sources. 56 Fed. Reg. at 21726.

Regarding EPA's first contention, in your view, EPA's assertion that EPA and/or state permitting authorities may be overwhelmed by the initial onslaught of permit applications is insufficient to satisfy the statutory exemption standard provided for under section 502(a). You state that the exemption standard is applicable only to the source, i.e., the small entities that are the source of the pollution. We agree.

¹³Specifically, section 502(a) provides, in part:

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

Section 502(a) authorizes EPA to issue regulations "to exempt one or more source categories." The statute also sets forth the standard for such exemptions--"compliance with . . . [the permit] requirements is impracticable, infeasible, or unnecessarily burdensome on such [source] categories. . . ." (Emphasis added.) In our view, the language of section 502(a) makes it plain that source categories may be exempted only because it is "impracticable, infeasible, or unnecessarily burdensome for the source categories to comply with the permit requirements, not because EPA and the states contend they may be overwhelmed by the burden of processing a large number of permit applications.

EPA's second ground for the proposed exemption of nonmajor sources is that it would be especially burdensome on small businesses and small governments if they were forced to go through the permitting process before state and federal agencies have gained experience with the program. The reason, according to EPA, is that, "[s]mall businesses and small governments do not have the same legal and technical resources that are sometimes necessary to handle successfully a new program." 56 Fed. Reg. at 21726. On this basis, "EPA finds that permitting such nonmajor sources during the first 5 years of the program would be unnecessarily burdensome on those sources. . . ." Id.

For several reasons, we do not find persuasive support in the record, consisting of the proposed rule and EPA's explanation, for EPA's having provided a blanket exemption of nonmajor sources.

First, under the proposed rule, the exemption applies to nonmajor sources, regardless of their size. Thus, large businesses and large governments that are not major sources, as well as small ones, are exempted. But large businesses and governments are likely to have substantial legal and technical resources, adequate to handle successfully the new program. In such cases, the rationale for EPA's finding, concerned only with small businesses and small governments, plainly would not hold up.

Second, regarding EPA's assertion concerning the inadequacy of the legal and technical resources available to small businesses and small governments, we do not dispute that many small businesses, e.g., neighborhood drycleaning establishments, may lack such necessary legal and technical resources. However, we question whether this is true for all small businesses and small governments. For example, "small" may nonetheless be of sufficient size or have sufficient resources to afford the legal and technical expertise necessary to handle successfully the permit

program. EPA does not explain what it means by the term "small," nor does the agency offer any facts or other data to support its broad assertion.

Third, EPA does not mention the Amendment's small business assistance program and the potential salutary effect this program may have in enabling small sources to cope with the permitting requirements. Under this program, established by section 507 of the Amendments, small business sources are eligible for technical and compliance assistance in satisfying the permitting requirements. See, H.R. Conf. Rep. No. 952, 101st Cong., 2d Sess. 346 (1990).¹⁴

It may well be that EPA has ample facts at hand, or even data in its files, that provide stronger justification for its proposed blanket exemption of nonmajor sources. However, on the basis of the record before us, contained in EPA's proposed rule and explanation, EPA has not made a persuasive showing that compliance with the permit regulations by nonmajor sources would be "impracticable, infeasible, or unnecessarily burdensome."

We hope our comments are helpful to you. Under our usual agreement, this opinion will be available to the public 30 days from its date, unless you release it sooner.

Sincerely yours,

for 
Comptroller General
of the United States

¹⁴EPA's proposed rule discusses the requirements of section 507 in general. However, EPA does not discuss the assistance program in relationship to its proposal to exempt nonmajor sources during the first 5 years of the permit program. 56 Fed. Reg. 21722.



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

OCT 25

OFFICE OF
GENERAL COUNSEL

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

Dear Mr. Chairman:

As indicated in William Reilly's earlier letter to you regarding EPA's efforts in developing the Title V permit proposal, he had asked my predecessor to address your letter concerning how the Agency uses legislative history -- particularly individual members' statements -- to interpret statutory provisions. This letter responds to that request.

As you know, the issue of the use of legislative history to inform analysis of statutory construction has been the subject of extensive debate by judges, scholars, administrative agencies and the Congress. Nevertheless, we believe that there is wide agreement over certain principles.

First, it is a fundamental principle of statutory construction that unless otherwise defined, words in a statute will be interpreted as taking their ordinary, contemporary, common meaning. Perrin v. United States, 100 S.Ct. 311, 314 (1979) citing Burns v. Alcala, 420 U.S. 575, 580-81 (1975). That meaning, as amplified by fair inferences from the overall structure of the law, is the authoritative source of statutory construction. In some instances, however, the meaning of a statutory provision is not clear from reading its text.

When confronted with an ambiguity in a statute, an agency may use relevant legislative history as one tool to aid in interpretation. As you note in your letter, conference report statements agreed upon by all of the managers are typically considered to be the most reliable historical aids to statutory construction. See, e.g., United States v. UAW, 352 U.S. 567, 585-586 (1966). I can assure you that the Agency is extremely cautious in the use of legislative history to support a particular interpretation, particularly when the legislative history is a statement by a single member of Congress. We are very sensitive to the concerns raised in your letter and

expressed by you and several of your colleagues in your extension of remarks shortly after the passage of the Clean Air Amendments of 1990. 126 Cong. Rec. E3714, E3699 (November 2, 1990). These statements are consistent with the customary rule that one resorts to the legislative history only in the rare instance where the meaning of the statute is not clear from its language and structure, and that statements in conference reports agreed upon by all managers should normally be given higher precedence than individual statements by members.

The Agency's position on the use of legislative history -- particularly, the use of individual members' statements -- as an aid in statutory construction is consistent with the principles outlined above. If I can be of any further assistance on this issue, please do not hesitate to contact me.

Sincerely,


Raymond B. Ludwyszewski
Acting General Counsel



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

NOV 6 1991

THE ADMINISTRATOR

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

Dear Mr. Chairman:

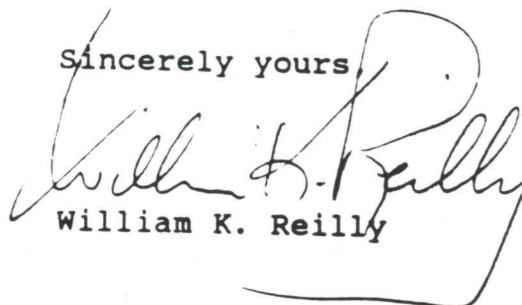
Thank you for your letter of July 15, 1991 expressing your continuing interest in EPA's proposed permit regulations. That letter and your previous letter of March 15, 1991, raise important issues and questions that we are currently analyzing as part of the public comment process. Some of the issues raised in your March 15, 1991, letter were addressed in our response of April 17. Responses to the remaining issues are enclosed.

As you know, the regulatory task of implementing Title V is a massive and complex undertaking that has generated a substantial amount of controversy. We have held four public hearings and have received over 400 written comments on the proposed regulation. We are currently determining the extent to which the proposal needs revision in light of these comments, and in light of the points you raised in your letter and enclosure of March 15, 1991.

We are happy to share with you our current thinking on a number of the issues presented in your letter, although these thoughts and positions may change during the rulemaking process. Furthermore, it would be premature to answer several of your questions now because they address topics on which EPA currently is reviewing its position.

We appreciate your continuing interest in the permit program.

Sincerely yours,


William K. Reilly

Enclosure to DBF only

To RS
PCL
DBF
JClaw

RESPONSES TO SPECIFIC QUESTIONS

Level of Detail in Regulations

EPA appreciates your concern that the permit regulations not be too detailed, particularly where detail may be inconsistent with the goal of minimizing disruption to existing, successful state air permitting programs, to the extent possible. Minimizing disruption to state programs was one of EPA's goals in drafting the proposal and continues to be a goal for the final rule. EPA is communicating frequently with state permitting authorities in an attempt to ensure minimal disruption to existing programs.

EPA believes that it would be a mistake to issue bare bones regulations that would need to be revised substantially over time, although the permitting regulations likely will evolve and require change as EPA and the states gain more experience with the program. The purpose of the regulations is to provide states with guidance as to what elements must be contained in the permit programs they are required to submit to EPA within the next two years. States need guidance now, not years down the road. To the extent EPA currently knows what must be in a program, based on extensive experience with other permitting programs and on discussions with state permitting authorities, industry and environmentalists regarding what is necessary for successful programs, EPA believes it should set forth those minimum elements now rather than later. Although the regulations will set minimum requirements for state programs, states will have numerous issues to resolve for themselves.

You also express a general concern that EPA has acted inconsistently with the Act by expanding on the ten "minimum" elements for state programs. As you note in your letter, under Section 502(b), EPA clearly has the legal authority to establish minimum elements for program approval beyond those specified in the statute. EPA will not use this authority to require elements that are inconsistent with the statute. This section of your letter does not specify which program elements are of concern to you, so we are not responding here with regard to specific program elements. Of course, where we have received comments from you or the public regarding specific concerns about specific provisions, we are currently evaluating these comments to ensure that we have not gone beyond what is allowed by the Act.

With respect to your specific concern regarding the frequency of filing reports, EPA believes it is necessary for state, federal and citizen enforcement of the Clean Air Act requirements that monitoring reports be submitted on a regular basis. Enhancing the ability to enforce the Clean Air Act was one of the key goals of the permitting program. This goal cannot

be achieved unless monitoring reports are available on a timely basis.

Deferral of Nonmajor Sources

Before addressing your specific concerns with the proposed deferral of nonmajor sources, some clarifying information may be useful. First, the proposal merely allows states to defer nonmajor sources, it does not require deferral. Second, even if states decide to use the deferral authority for nonmajor sources, that would not relieve nonmajor sources of complying with any applicable requirements of the Act except for the requirement to obtain a permit to operate. Third, the deferral is not a permanent exemption for nonmajors. Instead, it ends in five years. In the preamble to the proposed regulation, we explained this as follows:

"All deferred sources will be required to submit permit applications by the end of the 5-year deferral period, unless they are sources or source categories that receive a continued exemption (i.e., EPA determines that permitting such source categories would be impracticable, infeasible, or unnecessarily burdensome) in a future rulemaking."

56 Fed. Reg. 21712, 21716 (May 10, 1991).

Your letter points out that the Act allows EPA to exempt source categories only if it is "impracticable, infeasible, or unnecessarily burdensome" for sources to comply with the requirements of section 502(a). Numerous public comments also raised this issue. EPA is evaluating your views on this issue and will respond in issuing the final rule. We note, however, that even if you are correct that EPA can look only to the effect on the sources (and not on the permitting authorities or EPA), that legal standard is also met for the reasons outlined below. Thus EPA has the authority to allow states to defer permitting of nonmajor sources for five years.

EPA's preliminary analysis indicates that nonmajor sources would be unnecessarily burdened. Most nonmajor sources are not currently required to obtain air permits under existing state programs. Therefore, state authorities anticipate that nonmajor sources will need more assistance from the permitting authorities when the sources first become subject to the permit program. Thus, absent a deferral, nonmajors would need the most assistance just when state permitting authorities will be least able to give

it -- at the start of a new program or significant modification of an existing program. This is likely to make it much harder for nonmajor sources to obtain the necessary information to prepare and submit permit applications.

It is also anticipated that, given their unfamiliarity with permitting requirements, it is more likely that nonmajors will need to modify their permits. The stress on the permitting system from a significant number of amendment applications from nonmajor sources is likely to hinder the system's responsiveness to all sources. We recognize that eventually these problems will be alleviated to some extent by the small business assistance program mandated by section 507 and by the use of general permits. Nonetheless, the Agency's analysis supports a conclusion that initially it will be impracticable, infeasible and unnecessarily burdensome for nonmajor sources to obtain permits during the first five years of the permit program.

You also express concern that the Act does not authorize the type of "special exception" that the proposed regulation included for deferral of nonmajors in nonattainment areas. Based on your concerns and concerns raised by public comments, EPA is considering dropping from the final rule the proposed provisions that would have a different deferral rule apply in a nonattainment area.

You are also concerned that deferral of nonmajor sources may create some inequities among small businesses in competition with each other because some small businesses may be major sources. As an initial matter, it is not clear that there will be inequities between competing small businesses of comparable size. EPA is monitoring the public comments to see whether this is raised as a concern by the affected sources. Furthermore, to the extent there is such an inequity, EPA cannot redress it by exempting small businesses that are major sources because Congress prohibited the exemption of major sources. The only redress would be to drop the deferral altogether. With respect to the deferral, EPA currently believes that any inequities to individual small businesses are outweighed by the benefits to the small business community as a whole.

You also question the basis for a permitting authority to charge a fee when no permit is required. EPA continues to believe that EPA's deferral of permitting requirements for nonmajor sources does not prevent states from permitting or assessing fees on such sources because section 506 allows states to impose permitting requirements not inconsistent with the Act. It is important to note that EPA is not requiring states to assess fees on unpermitted nonmajor sources, but merely is not

prohibiting such activity. Section 502(a) gives EPA the authority to exempt source categories (except major sources), but does not require EPA to prohibit states from regulating those sources. As you point out, EPA is to set only minimum elements necessary for program approval. Under Title V and section 506, the states have the authority to add requirements to the program not inconsistent with the Act. Charging fees to sources for which the permit requirements are deferred is not inconsistent with Title V. During a five-year deferral for nonmajors, the states certainly will be incurring start-up expenses that ultimately will benefit the deferred sources, such as setting up the small business assistance program.

You are correct in noting that the proposal does not include provisions relating to the small business assistance program under section 507. EPA is in the final stages of preparing guidance for the states on the section 507 program. Draft guidance was circulated this summer and a public meeting, which was attended by numerous state representatives, was held this summer. The guidance should be out in final form in the near future.

Relationship to Water Program

You and public comments have raised serious concerns with the statement in the proposal that EPA generally will look to the NPDES program to construe Title V program issues. EPA recognizes that there are numerous differences between the NPDES and proposed Title V permit programs which limit the usefulness of the NPDES permit program as a guide to resolving many Title V permit program issues. Based on your concern and comments raised by others, EPA believes that the statement that it will look to the NPDES program causes more confusion than it resolves. Therefore, EPA is considering dropping this language from the final rule and preamble.

Pollution Prevention

Your letter requests the basis for the preamble statement that encourages permitting authorities to promote pollution prevention activities in their permitting programs, where possible. EPA believes that state and federal authorities should always look for opportunities to prevent pollution consistent with the relevant statutory mandate. In particular, Congress set promotion of "reasonable Federal, State and local governmental actions . . . for pollution prevention" as a primary goal of the Act. Section 101(c) of the Clean Air Act. It was unnecessary for EPA to specify in the preamble that any pollution prevention requirements must not be inconsistent with the Act because that

is a requirement for all state permit program requirements under section 506. EPA is not requiring states to include pollution prevention in permits, but is merely encouraging states to consider the opportunity permits present for pollution prevention. We believe that this primary goal of the Act is relevant to the permit program.

State Law Changes

Your letter raises several questions regarding the impact of the proposed Title V permitting regulations on state programs. EPA is working closely with the states to minimize disruption to existing state programs to the extent allowed by the Act. States were represented in the work group that prepared the proposed regulation and EPA continues to talk to state permitting authorities as specific issues are raised in finalizing the rule.

You question whether there could be two operating air permit programs in a state after Title V becomes effective -- the Title V program and a separate state program. EPA is not aware of any authority that would prohibit states from running their own permit program separate from the Title V program. However, many states with existing permit programs have indicated that they would prefer to have one program, rather than two.

You also expressed concern that the draft inaccurately paraphrased section 506 of the Act regarding the additional requirements a State could incorporate in a permit. The provision that concerned you in the draft was modified in the proposal that appeared in the Federal Register. The provision in the proposed regulation accurately states the limits imposed by section 506.

Acid Rain Provisions

You questioned why the Title V proposal contained acid rain references and comments. The preamble to the proposed Title V permit regulations contains references to acid rain permitting because Phase II acid rain permit provisions are intended to be incorporated into the Title V permits to be issued by states to affected sources. EPA thought affected sources and the general public should be reminded of this. The fact that affected sources, through trade associations and individually, commented on how the proposed permit regulations would interface with the Act's acid rain requirements indicates that the preamble language served its purpose. Comment on the acid rain regulations will not be foreclosed in any way. EPA will issue a notice of proposed rulemaking soliciting comments on proposed acid rain permit regulations.

Definitions

With respect to your question regarding the applicability of Title V permitting requirements to section 112(r) sources, EPA's view is that, under section 112(r)(7)(F), no source would be subject to the Title V permit program merely because it is subject to section 112(r) requirements.

Action on Application

You ask for an explanation of the purpose of section 70.7(a)(1)(i) and (iv). (Please note that the numbering of these provisions changed from the February 9, 1991, draft to the proposal to section 70.7(a)(1)(iii) and (ii), respectively.) These sections prohibit a permit from issuing unless public participation requirements have been met and the permit provides for compliance with all applicable requirements of the Act and its regulations. The purpose of these sections is to ensure compliance with sections 502(b)(5) and (6), 503(b) and 504(a) of the Act.

You also questioned whether the requirement under draft section 70.7(a)(1)(i) (section 70.7(a)(1)(iii) in the proposal) would apply regardless of whether EPA objected under section 505. It would.

Your letter questioned the need for a "fact sheet" for each permit. Although section 70.7(a)(4) of the draft proposal contained this requirement, the regulation as proposed (section 70.7(a)(5)) did not require preparation of a "fact sheet." The proposal would require the permitting authority to "develop a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." EPA believes this is necessary so that EPA and interested persons have information essential to determine the basis and rationale for the permit terms and whether extensive review of the draft permit is required. The ability of the public to comment on draft permits would be made more difficult if the only information available were the full draft permit.

Permit Modifications

You questioned whether a modification opens up the entire permit. It does not. As EPA noted in the preamble to the proposed regulation:

"The EPA stresses that only the subject material associated with, or affected by, the modification need be exposed to review and comment.

". . . The only parts of a permit that require change are those which relate directly to the material being modified."

56 Fed. Reg. 21712, 21748 (May 10, 1991).

Requirement for Enforcement Authority

You raise several questions regarding what enforcement authority will be required of states. This is one area where there was significant change from the draft to the proposed regulation. Proposed section 70.11 does not contain "Notes" providing additional guidance or requirements for the states.

You also question whether EPA is preparing model regulations for the states. EPA intends in the near future to issue proposed Part 71 regulations to establish the federal permitting program. These regulations should be useful to states as a model for their own programs. EPA also is working to provide guidance to states regarding necessary enabling legislation and other permit program requirements. EPA is exploring the extent to which further guidance would be useful, but EPA is concerned that model regulations beyond EPA's Part 71 regulations would be of limited assistance to states because many states are not writing their programs on clean slates. As you point out in your letter, many states are seeking to modify their existing programs to meet Title V requirements and would prefer to change those programs as little as possible. Differences in existing state programs make it very difficult for EPA to write meaningful and useful model regulations for the states.

Permit Transfer

Your letter also requests the legal basis for section 70.7(i) in the draft, which addressed the permitting authority's ability to require modification, revocation or reissuance of a permit when the name of the permittee changes. EPA did not include it in the proposed rule. Instead, ownership changes can be reflected in the permit through an administrative amendment. Section 70.2(c)(4) of the Proposed Rule, 56 Fed. Reg. 21712, 21768 (May 10, 1991).

EPA's final positions on the issues discussed above are still the subject of rulemaking and may change based upon further review of public comments and other factors. We recognize that we have not addressed in this letter several of the major policy and legal issues you raised, including those regarding operational flexibility, certain definitions, EPA review of state programs, and permit modifications. EPA cannot comment on these issues now because we are currently evaluating them in light of the public comments we have received. We will address these additional concerns of yours as part of the rulemaking. With regard to the issue you raised regarding the appropriate weight to be given to various types of statements and documents that comprise the legislative history for the Act, I have asked our Acting General Counsel, Raymond B. Ludwiszewski, to send a response directly to you in the near future.