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Clean air - enforcement

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1990 FEB -7 PM 4:27

February 5, 1990

Honorable Albert Gore
363 Russell Senate Office Building
Washington, DC 20510

RE: Clean Air Act Amendments, S. 1630

Dear Senator Gore:

Enclosed is a packet of proposed technical amendments to Title VI of the Clean Air Act (S. 1630) that will bring the proposed enforcement provisions of the new law into conformity with the Clean Water Act which, as you know, is a tough but workable statute.

I request that you send these amendments to Senators Baucus and Mitchell, urging them to make these amendments "committee amendments" when Title VI comes up for floor vote.

These proposed amendments, I believe, represent a constructive contribution to the Senate's effort to improve our nation's air quality without unnecessarily burdening our economic base here in Tennessee.

Sincerely,



R. G. Hammonds
Production Superintendent

RGH:LA

Enclosures

CLEAN AIR ACT ANALYSIS: ENFORCEMENT (S. 1630)

GOAL: CONFORM THE CLEAN AIR ACT TO THE CLEAN WATER ACT

For selected provisions of Title VI, Enforcement, of S. 1630, this document presents a summary comparison of: existing Clean Air Act (CAA) provisions, the Administration's proposal (discrepancies between explanatory language and bill language); S. 1630 (bill language -- generally the same as the Administration's bill); and the Clean Water Act (CWA), suggesting amendments which will conform the CAA bill language to the Clean Water Act and to the Administration's explanation of what was intended.

1. PER-DAY CRIMINAL PENALTIES
2. RECORDKEEPING CRIMINAL PENALTIES
3. KNOWING ENDANGERMENT (Criminal Liability & Defenses)
4. NEGLIGENT ENDANGERMENT
5. EMERGENCY POWERS
6. PRESUMPTION OF GUILT
7. SUBPOENA AUTHORITY

NOTE: Page references are to the following sources:

Clean Air Act and Clean Water Act: "U.S. Environmental Laws", BNA, 1988 Edition.

Administration Proposal: Explanation -- "Clean Air Act Amendments of 1989, Section-by-Section Analysis," EPA, July 1989; Bill -- S. 1630.

S. 1630: Committee Print dated December 20, 1989.

Suggested Amendments: Generally refers to amendments developed by the Clean Air Legal Group (CLAG), which is part of the industry-wide coalition, the Clean Air Working Group (CAWG).

In all cases where text is underlined, emphasis was added.

SUMMARY ISSUE PAPER

CLEAN AIR ACT: S. 1630 -- SELECTED ENFORCEMENT PROVISIONS

1. PER-DAY CRIMINAL PENALTIES

- S. 1630: Imprisonment... per day for each violation. Clean Water Act: ...punished by a fine... or by imprisonment... or by both.
- "Per day for each violation": e.g., violation of a 30-day standard is punishable by five years per day; potential jail time is up to 150 years.
- FIX: Conform to the Clean Water Act -- delete "per day for each violation" as it applies to imprisonment.

2. RECORDKEEPING CRIMINAL PENALTIES

- Makes ordinary mistakes a criminal offense, e.g., submission of an incomplete permit application.
- A person should not be subject to criminal sanctions unless material information is deliberately withheld or misconstrued.
- FIX: Conform to the Clean Water Act -- only knowing and material false statements are criminal.

3. KNOWING ENDANGERMENT

- S. 1630: Any person who knowingly releases... Clean Water Act: Any person who knowingly violates...
- Virtually every industrial establishment knowingly (and lawfully) emits listed pollutants; the only defense is if in compliance with an EPA standard, if such a standard exists.
- FIX: Conform to the Clean Water Act -- liability if knowingly violates provisions of the Act, and allow affirmative defenses.

4. NEGLIGENT ENDANGERMENT

- S. 1630: Criminal liability if negligent release of listed air pollutants, even if no standard or rule is violated.

- No defenses.
- FIX: Conform to the Clean Water Act -- allow defense if in compliance with federal, state, or local standards.

5. EMERGENCY POWERS

- Expands the emergency provision to be an all-purpose authority, circumventing other regulatory programs in the Act.
- Removes limitations on the length of time that unilateral orders can remain in effect.
- FIX: Conform to the Clean Water Act or impose a time limit, e.g., 30 days, by which EPA must go to court to show cause for the emergency condition.

6. PRESUMPTION OF GUILT

- S. 1630: Shifts the burden to the accused to prove his innocence; the bill language conflicts with the explanation in the report.
- Applies to civil/criminal actions, and citizen suits.
- FIX: Require EPA to show prima facie evidence of violation and establish a period of violation.

7. SUBPOENA AUTHORITY

- S. 1630: Removes all limits on subpoenas; EPA could force the appearance of persons or documents at any time, at any place, for virtually any reason. No judicial review of the subpoena until after EPA brings enforcement action.
- Other environmental laws, e.g., the Clean Water Act, carefully limit EPA's subpoena authority to specific circumstances, e.g., in connection with an enforcement hearing.
- FIX: Conform to the Clean Water Act -- subpoena authority limited to specific enforcement actions; delete the words "...or to otherwise carry out the provisions of the Act."

PROPOSED AMENDMENTS TO S. 1630
(REFERENCE TO SENATE COMMITTEE PRINT DATED
DECEMBER 20, 1989)

SUBJECT: Enforcement (Title VI) -- PER-DAY CRIMINAL PENALTIES

SUMMARY OF AMENDMENT: This amendment conforms to the Clean Water Act by eliminating the "per day for each violation" criminal penalties.

AMENDMENTS:

Amend section 601 of S. 1630 as follows:

Re: section 113(c)(1), p. 520:

Line 16, after the words "than one year", delete ", or by both, per day".

Line 17, after the words "each violation", insert ", or by both".

Re: section 113(c)(2), p. 521:

Line 5, after the words "for not more than one year", delete ", or by both, per day".

Line 6, after the words "for each violation", insert ", or by both".

Re: section 113(c)(3), p. 521:

Line 18, after the words "than five years", delete ", or by both, per day".

Line 18, after the words "for each violation", insert ", or by both".

Re: section 113(c)(4), p. 522:

Line 18, after the words "not more than two years", delete ", or by both, per day".

Line 19, after the words "for each violation", insert ", or by both".

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Re: section 113(c)(5), p. 523:

Line 8, after the words "than fifteen years", delete ", or by both, per day".

Line 9, after the word "violation", insert ", or by both".

NOTE:

- Conforms to the Clean Water Act by deleting the reference to "per day for each violation". The punishment contemplated by the CAA is severe enough without exponentially multiplying it.

PER-DAY, PER-VIOLATION CRIMINAL PENALTIES

The Administration's bill language goes far beyond that which is described in the explanation. The explanation says that some misdemeanors are upgraded to felonies and that the maximum term of imprisonment is increased.

In fact, a precedent-breaking scheme of per day, per violation criminal penalties is created which is not found in other environmental laws, and which dramatically multiplies the maximum prison term.

For example, if someone knowingly violates a single 30-day average standard (punishable in S. 1630 by five years imprisonment per day for each violation), there are 30 days of violation and potential jail time of up to 150 years.

Further, unlike section 309(c)(5) of the Clean Water Act, S. 1630 contains no provision that courts must treat a single operational upset condition that leads to simultaneous violations of more than one pollutant parameter as a single violation, even if it results in the violation of more than one standard.

In the absence of the language of section 309(c)(4) of the Clean Water Act, under S. 1630, if a single upset condition results in a violation of standards for more than one pollutant, then the maximum prison sentence may be multiplied by the number of violations.

For example, a faulty scrubber controlling SO₂, PM-10, and NO_x that fails to operate for a single day could subject the operator to a 15-year prison term. Further, if that violation results in violations of 30-day average limits for each pollutant, then the potential prison sentence for that single act is 450 years. The government has not shown that it needs such excessive maximum prison sentences to compel compliance with the Act.

EXISTING CAA:

- p. 461 Section 113(c)(1) re: Knowingly violates:
 "Any person who knowingly... violates... [certain sections of the Act]... shall be punished by a fine of not more than \$25,000 per day of violation, or by imprisonment..., or by both."
- p. 461 Section 113(c)(2) re: Recordkeeping Errors
 "Any person who knowingly makes any false statement... shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment..., or by both."

ADMINISTRATION PROPOSAL:

- p. 61 Explanation: Upgrades some misdemeanors to felonies and increases the maximum term of imprisonment from six months to two years. No reference to intention to depart from existing CAA by creating per day, per violation criminal penalties.

Bill: Creates criminal liability on a per-day, per-violation basis, thereby greatly expanding the potential imprisonment far beyond existing law, as well as comparable environmental laws, e.g., the Clean Water Act.

S. 1630:

- p. 520 New section 113(c)(1): Knowingly fails to pay Fee

Line 15 ...or by imprisonment for not more
16 than one year, or by both, per day for
17 each violation.

- p. 521 New section 113(c)(2): Negligently Releases

Line 4 ...or by imprisonment
5 for not more than one year, or by both, per day
6 for each violation.

- p. 521 New section 113(c)(3): Knowingly Violates

Line 17 "...or by imprisonment for not more
18 than five years, or by both, per day for each
violation."

- p. 522 New section 113(c)(4): Recordkeeping

Line 18 "...not more than two years, or by both, per day
19 for each violation."

- p. 523 New section 113(c)(5): Knowingly Releases

Line 7 "...by imprisonment of not more
8 than fifteen years, or by both, per day for each
9 violation."

CLEAN WATER ACT:

Section 309(c) -- Criminal Penalties:

- p. 696 Section 309(c)(1)(B): Negligent Violations

"...shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both."

p. 696 Section 309(c)(2)(B): Knowing Violations

"...shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three years, or by both."

p. 696 Section 309(c)(3): Knowing Endangerment

"...a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both."

Section 309(c)(4): False Statements

"...shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or by both."

p. 696 Section 309(c)(5): Treatment of Single Operational Upset

"For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation."

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PROPOSED AMENDMENTS TO S. 1630
(REFERENCE TO SENATE COMMITTEE PRINT DATED
DECEMBER 20, 1989)

SUBJECT: Enforcement (Title VI) -- RECORDKEEPING CRIMINAL
PENALTIES

AMENDMENT: Amend section 601 [section 113(c)(4) of the CAA]
to read as follows:

"(4) Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act, or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than four years, or by both."

NOTE:

- Conforms to the Clean Water Act by clarifying that only knowing and material false statements or misrepresentations will trigger criminal liability.
- Creates certainty as to what actions will trigger criminal liability.

RECORDKEEPING CRIMINAL PENALTIES -- VASTLY ENLARGED SCOPE

The Clean Water Act currently provides criminal sanctions if someone actively lies to the Agency or falsifies records. The language in the Clean Air Act should conform to the Clean Water Act, emphasizing knowing and material omissions of information.

As drafted, the bill may not limit criminal sanctions to records that EPA requires a source to maintain. The result is that criminal sanctions could apply after the fact to acts or omissions not subject to civil enforcement sanctions. For example, the bill appears to apply sanctions for the broader class of records "used for purposes of compliance". Thus, for example, a plant production record may be "used for purposes of compliance" because it shows when a source is operating, even though EPA does not explicitly require a source to keep that record.

As drafted, the bill would make a knowing failure to act, including the submission of an incomplete permit application or failure to keep certain non-required records, a felony potentially subject to decades of jail time, even if a person does not intend to mislead the Agency.

All reporting and recordkeeping violations are punishable by criminal fines or jail terms, or both, per day for each violation. Therefore, if someone knowingly fails to keep or file the proper records for one calendar quarter (a usual recordkeeping period), the potential criminal sanction is a felony punishable by up to 180 years imprisonment (two years per day of violation times 90 days). Under current law, the maximum penalty for active mis-reporting is a misdemeanor punishable by a total of six (6) months' imprisonment.

EXISTING CAA:

- p. 461 Section 113(c)(2) re: Recordkeeping Errors: "Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act,..."

ADMINISTRATION PROPOSAL:

- p. 61 Explanation: Existing CAA paragraph 113 (c)(2) (new paragraph 113 (c)(4)), which establishes criminal liability for knowing false statements and falsification or tampering with monitoring devices, is amended to include

liability for: knowing failures to act; knowing omissions of material information; the knowing destruction, alteration, concealment, or failure to maintain documents necessary for CAA compliance; and knowing failures to install necessary monitoring devices.

S. 1630:

p. 521 New section 113(c)(4): Recordkeeping

Line 24 Any person who knowingly --

p. 522

Line 1 (A) makes any false statement, representation,
 2 or certification in, or omits material infor-
 3 mation from or knowingly alters, conceals, or fails
 4 to maintain or file any notice, application, record,
 5 report, plan, or other document filed or required to
 6 be maintained or used for purposes of compliance
 7 under this Act (whether with respect to the re-
 8 quirements imposed by the Administrator or by a
 9 State); or
 10 (B) fails to notify or report as required
 11 under this Act; or
 12 (C) falsifies, tampers with, renders inaccu-
 13 rate, or fails to install nay monitoring device or
 14 method required to be maintained or followed
 15 under this Act; shall,
 16 upon conviction, be punished by a fine pursuant
 17 to title 18 of the United States Code, or by
 imprisonment
 18 for not more than two years, or by both, per day
 19 for each violation.....

CLEAN WATER ACT:

Section 309(c)(4): False Statements

p. 697 "Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act, or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than four years, or by both."

PROPOSED AMENDMENTS TO S. 1630
(REFERENCE TO SENATE COMMITTEE PRINT DATED
DECEMBER 20, 1989)

SUBJECT: Enforcement (Title VI) -- KNOWING ENDANGERMENT:
CRIMINAL LIABILITY.

SUMMARY OF AMENDMENT: This amendment requires that a person violate a particular standard before the crime of knowing endangerment applies to the knowing release of a hazardous air pollutant.

AMENDMENT: Amend section 601(g) [amending section 113(c)(5) of the CAA], as follows:

"(5)(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 112 of this Act in violation of any applicable standard promulgated pursuant to section 112, and who knows at the time that he thereby 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 of not more than 15 years, or by both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. (S. 1630, p. 522, line 24 to p. 522, line 25; and p. 523, line 1 to p. 523, line 21).

NOTE:

- As proposed, section 113(c)(5) creates a new crime of "knowing endangerment." While this provision appears to parallel similar language in the Clean Water Act, there are significant differences. For example, unlike the CWA, this bill would not require a violation of any requirement of the Act before a party could be convicted of knowing endangerment.
- Conforms to the CWA by providing for a knowing violation of standards. EPA is authorized and, in fact, is required, to take whatever actions are necessary to protect public health. A source should be able to rely on EPA's judgment enough to know that compliance with applicable requirements would not put any person in imminent danger of death or serious bodily injury.

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- Deletes the reference to section 11002(a)(2) of Title 42, which is the SARA (Superfund) Title III reporting list for "extremely hazardous substances". This SARA list triggers reporting requirements only. The CAA section 112 list is far more inclusive, and will result in emissions standards. Many of the SARA substances are covered by the amended section 112.

To include the SARA list in this section creates substantial uncertainty because the SARA list, unlike section 112, does not translate into emissions standards. The inclusion of the SARA list in the context of the CAA is inappropriate and unnecessary.

- Conforms to the Clean Water Act by deleting the reference to the expanded criminal liability of "per day, per violation". The punishment contemplated by the bill is severe enough without exponentially multiplying it.
- The defense of compliance with a section 112 standard is incorporated into the first sentence of this amendment.
- Deletes the penalty of \$1,000 per day for an organization because there is a specific reference to fines for organizations in Title 18, which is incorporated.

KNOWING ENDANGERMENT

A number of the subsections of the Administration's bill are the same as the "knowing endangerment" provision in the Clean Water Act. The entire provision should be made to conform to the Clean Water Act.

In the CWA, "knowing endangerment" is an aggravated form of a felony violation for some specific discharge limit. A higher penalty is justified because the violator knows that the violation thereby places someone in imminent danger of death or serious bodily injury. By contrast, S. 1630 does not require a knowing violation of a specific regulatory or statutory requirement as a precondition to liability.

Given the lengthy list of pollutants under section 112, plus the addition of the basically redundant SARA (Superfund) Title III list which is used in SARA for reporting purposes only, virtually every industrial establishment knowingly (and lawfully) emits listed pollutants.

The bill provides a defense only for releases of section 112 pollutants for which EPA has set an emissions standard, provided those releases do not exceed such standard. There are no emissions standards, as such, for the SARA Title III list. The defense does not extend to a source that complies with applicable state or local standards, or a source category for which EPA has not yet set a standard.

Another major difference between S. 1630 and the Clean Water Act is that, as noted above, the new penalties include 15 years imprisonment per day for each violation. In addition, unlike section 309(c)(3)(B)(ii) of the Clean Water Act, the bill provides no affirmative defenses for consent.

EXISTING CAA:

No comparable provision.

ADMINISTRATION PROPOSAL:

- P. 61 Explanation: New paragraph 113 (c)(5) authorizes felony-level sanctions against anyone who knowingly violates amended section 112 or releases of certain specified extremely hazardous substances and toxic chemicals and who knows at the time that another person is thereby placed in imminent danger of death or serious bodily injury.

Bill: As drafted, a knowing violation of a specific regulatory or statutory requirement is not a precondition to criminal liability. In addition, reference is made not only to the amended section 112 air toxics listed for which EPA must establish standards but also to the reporting list from SARA (Superfund) Title III which is used for reporting purposes only.

For air emissions purposes there is no threshold standard for compliance for the SARA list. The SARA list can, at best, create open-ended daily criminal liability for the fact of responsibly operating an industrial facility and "knowingly releasing" a substance for which there is no emissions standard.

S. 1630:

p. 522 New section 113(c)(5): Knowingly releases.

Line 24 (5)(A) Any person who knowingly releases into the
25 air any hazardous air pollutant listed pursuant to

p. 523

Line 1 Section 112 of this Act or any extremely hazardous
2 substance listed pursuant to section 11002(a)(2) of
title
3 42, United States Code, and who knows at the time
4 that he thereby places another person in imminent
5 danger of death or serious bodily injury shall, upon
6 conviction, be punished by a fine under title 18 of
the
7 United States Code, or by imprisonment of not more

P. 524

Line 8 than 15 years, or by both, per day for each viola-
9 tion. Any person committing such violation who is
an
10 organization shall, upon conviction under this para-
11 graph, be subject to a fine of not more than
\$1,000,000
12 per day for each violation....
16 ...For
17 any hazardous air pollutant listed pursuant to
Section
18 112 for which the Administrator has set an emissions
19 standard, a release of such pollutant shall not

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consti-
20 tute a violation of this paragraph unless it exceeds
21 such standard.
22 (B) In determining whether a defendant who is
23 an individual knew that the violation placed another
24 person in imminent danger of death or serious bodily
25 injury --

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PROPOSED AMENDMENTS TO S. 1630
(REFERENCE TO SENATE COMMITTEE PRINT DATED
DECEMBER 20, 1989)

SUBJECT: Enforcement (Title VI): KNOWING ENDANGERMENT --
DEFENSES.

SUMMARY OF AMENDMENT: This amendment provides the defendant with an affirmative defense to prosecution for the crime of knowing endangerment.

AMENDMENT: Amend section 113(c)(5)(B)(ii) of the Act.

"(ii) Knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant; except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information. It is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered, and that the danger and conduct charged were reasonably foreseeable hazards of an occupation, a business, or a profession; or medical treatment or medical or scientific experimentation conducted by professionally-approved methods, and such other person had been made aware of the risks involved prior to giving consent; and such defense may be established under this subparagraph by a preponderance of the evidence. (S. 1630, p. 524, line 2, to p. 524, line 9).

NOTE:

- Confirms the Clean Air Act amendments to the affirmative defense language of the Clean Water Act, which provides protection if there was consent by the person endangered. This affirmative defense language should also apply to all "knowing" violations under section 113.

EXISTING CAA:

No comparable provision.

S. 1630:

p. 524

Line 1 (i) the defendant is responsible only for
 2 actual awareness or actual belief possessed; and
 3 (ii) knowledge possessed by a person other
 4 than the defendant, but not by the defendant, may
 5 not be attributed to the defendant;
 6 except that in proving a defendant's possession of
 7 actual knowledge, circumstantial evidence may be
 used,
 8 including evidence that the defendant took
 affirmative
 9 steps to be shielded from relevant information."...

CLEAN WATER ACT:Section 309(c)(3): Knowing Endangerment

p. 696 (A) General Rule: Any person who knowingly violates
 section 301, 302, 303, 306, 307, 308, 318, or 405 of
 this Act, or any permit condition or limitation imple-
 menting any of such sections in a permit issued under
 section 402 of this Act by the Administrator, or by a
 state, or in a permit issued under section 404 of this
 Act by the Secretary of the Army, or by a state, and who
 knows at that time that he thereby places another person
 in imminent danger of death or serious bodily injury,
 shall, upon conviction, be subject to a fine of not more
 than \$250,000 or imprisonment of not more than 15 years,
 or both....

Section 309(c)(3)(B)(ii):

p. 697 it is an affirmative defense to prosecution that the
 conduct charged was consented to by the person endan-
 gered and the danger and conduct charged were reasonably
 foreseeable hazards of:

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experi-
 mentation conducted by professionally-approved methods
 and such other person had been made aware of the risks
 involved prior to giving consent; and such defense may
 be established under this subparagraph by a preponder-
 ance of the evidence;"

....

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- Deletes the reference to section 11002(a)(2) of Title 42, which is the SARA (Superfund) Title III reporting list for "extremely hazardous substances." This SARA list triggers reporting requirements only. The section 112 list is far more inclusive and will result in emissions standards. Many of the SARA substances are covered by the amended section 112. To include the SARA list in this section creates substantial uncertainty, because the SARA list, unlike section 112, does not translate into emissions standards. The inclusion of the SARA list in the context of the CAA is inappropriate and unnecessary.

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**PROPOSED AMENDMENTS TO S. 1630
(REFERENCE TO SENATE COMMITTEE PRINT DATED
DECEMBER 20, 1989)**

SUBJECT: Enforcement (Title VI) -- NEGLIGENT ENDANGERMENT

SUMMARY OF AMENDMENT: This amendment provides for criminal liability for any person who negligently releases a hazardous air pollutant in violation of a standard where the violation results in death or serious bodily injury.

AMENDMENT: Amend section 601(g) [amending section 113(c)(2) of the CAA] to read as follows:

"(2) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 112 of this Act in violation of any applicable standard promulgated pursuant to section 112, which such person knew or reasonably should have known could cause personal injury and, where that violation results in 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 one year, or by both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

NOTE:

- Conforms to the Clean Water Act and to the explanation of the Administration's bill which refers to negligent violations of amended section 112.
- Conforms the CAA to section 309(c)(1)(B) of the Clean Water Act, which includes a knowledge element for any danger associated with a negligent release.
- Since the threshold for liability is low, a "negligence" test, the result of actual harm would be required to trigger criminal penalties.
- The reference to per-day, per-violation is removed, conforming the criminal penalties to those in the Clean Water Act.

NEGLIGENT ENDANGERMENT

New section 113(c)(2) establishes a new crime of "negligent endangerment". To convict someone of this crime, the government need only prove a negligent mental state. Thus, one is subject to criminal penalties if one should have known that a particular pollutant endangers health. The explanation of the bill states that the crime applies to one who "negligently violates amended section 112." However, the actual bill has no such language. The threshold test is whether one negligently releases into the air any listed hazardous air pollutant or extremely hazardous substance (even if such release complies with all standards, rules, and orders). Unlike the "knowing endangerment" provision, the bill does not contain any defense for releases in compliance with applicable standards. Like other criminal provisions in S. 1630, the one-year prison term applies on a per-day basis for each violation.

EXISTING CAA:

No comparable provision.

ADMINISTRATION PROPOSAL:

- P. 61 Explanation: Subsection 113(c)... is amended to authorize... misdemeanor-level sanctions for certain negligent violations.

New paragraphs 113(c)(1) and (c)(2) authorize misdemeanor-level criminal sanctions against anyone ...who negligently violates amended section 112 and thereby places another person in imminent danger of death or serious bodily injury.

No mention is made of the incorporation the SARA (Superfund) Title III list which is used for SARA reporting purposes only, and for which EPA does not establish air emissions standards.

Bill: As drafted, no violation of law is required as an element of the offense. The Administration's proposal has no language stating that the crime applies to one who "negligently violates amended section 112." In addition, the SARA (Superfund) Title III list is incorporated by reference. This list is used for reporting purposes only in SARA. In SARA, no substantive air emissions standards are issued for these substances. Also, no statutory defenses are proposed, and the per-day, per-violation language substantially expands the liability beyond that in existing law.

S. 1630:

p. 520

Line 22 (2) Any person who negligently release into the
 23 air any hazardous air pollutant listed pursuant to
 sec-
 24 tion 112 of this Act or any extremely hazardous sub-
 25 stance listed pursuant to section 11002(a)(2) of
 title

p. 521

Line 1 42, and who at the time negligently places another
 2 person in imminent danger of death or serious bodily
 3 injury shall, upon conviction, be punished by a fine
 4 under Title 18 of the United States Code, or by
impris-
 5 onment for not more than one year, or by both, per
 6 day for each violation.

CLEAN WATER ACT:

Section 309(c)(1)(A) and (B): Negligent Violations:

p. 695 Any person who --

(A) negligently violates section 301, 302, 306, 307,
 308, 318, or 405 of this Act, or any permit condition or
 limitation implementing any of such sections in a permit
 issued under section 402 of this Act by the Administra-
 tor or by a state,...; or

(B) negligently introduces into a sewer system or into a
 publicly owned treatment works any pollutant or hazard-
ous substance which such person knew or reasonably
should have known could cause personal injury or prop-
erty damage or, other than in compliance with all
applicable Federal, State, or local requirements or
permits, which causes such treatment works to violate
 any effluent limitation or condition in any permit
 issued to the treatment works under section 402 of this
 Act by the Administrator or a State; shall be punished
 by a fine of not less than \$2,500 nor more than \$25,000
 per day of violation, or by imprisonment for not more
 than one year, or by both...

DRAFT

1/31/90

**PROPOSED AMENDMENTS TO S. 1630
(REFERENCE TO SENATE COMMITTEE PRINT DATED
DECEMBER 20, 1989)**

SUBJECT: Enforcement -- EMERGENCY POWERS

AMENDMENT: Amend section 606 [amending section 303 of the Act]
to read as follows:

"(1) Modify the penultimate sentence by striking 'twenty-four hours' and inserting '30 days'; and

"(2) Modify the last sentence by striking 'forty-eight hours' and inserting '45 days'."

NOTE:

- Retains the scope of the existing Clean Air Act, allowing EPA to take emergency action where there is a threat to the health of persons.
- Removes the current 24- and 48-hour limitation on EPA's emergency orders and replaces them with 30- and 45-day limits.
- This addresses the issue of allowing EPA substantial flexibility in issuing administrative enforcement orders that can extend for four to six weeks, but still establishes a time frame by which EPA must allow the parties the opportunity for due process.

EMERGENCY POWERS

Without further limitation, S. 1630 could transform section 303 from an emergency authority into an all-purpose authority for dealing with risks of air pollutants in whatever manner the Administrator or a court may think appropriate, notwithstanding the regulatory programs of the Act.

As drafted, the bill expands section 303 far more than is stated in the explanation. It goes from "health of persons" to "public health or welfare or the environment." This is sufficiently broad to allow section 303 to apply to virtually any environmental air pollution condition. The explanation describes this new section as allowing "emergency" action for threatening "episodes." However, as drafted, it could allow the Administrator extremely broad authority to issue orders or seek court action to address any risks posed by air pollutants.

One court has found that, under similar language in the Resource Conservation and Recovery Act (RCRA), Congress intended to confer upon courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes. U.S. v. Price, 688 F2d 204, 213-14 (3rd Cir. 1982). To prevail under the imminent and substantial endangerment provision in RCRA, EPA need not even prove that an emergency exists. U.S. v. Waste Industries, Inc., 734 F2d 159, 165 (4th Cir. 1984). The language in S. 1630 closely parallels the RCRA language found to grant this authority.

The bill gives EPA the authority to issue orders even when state or local authorities act to abate the sources of pollution or otherwise to deal with the problem. The bill removes limitations on the length of time that unilateral orders can remain in effect without some court action (currently limited to 24 or 48 hours).

EXISTING CAA:

p. 558 Section 303(a):

Notwithstanding any other provision of this Act, the Administrator, upon receipt of evidence that a pollution source... is presenting an imminent and substantial endangerment to the health of persons, and that appropriate State or local authorities have not acted to abate such sources, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain... If it is not practicable to assure prompt protection of the health of persons solely

by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources). ...Such order shall be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period. Whenever the Administrator brings such an action within such period, such order shall be effective for a period of forty-eight hours, or such longer period as may be authorized by the court occur pending litigation or thereafter.

ADMINISTRATION PROPOSAL:

P. 64 Explanation: Section 607 amending section 303 "...to authorize injunctive actions and emergency orders for episodes threatening to the environment, in addition to this current authority to safeguard human health. In addition, both the 24- or 48-hour time limitation on the duration of emergency orders, and the prohibition against judicial enforcement of emergency orders unless state and local authorities have not acted, are eliminated. This will allow the Agency to effectively order necessary emergency action and to enforce any order issued without delay, and conforms the CAA to other environmental laws. This amendment preserves the existing section 303 requirement that the Administrator consult with state and local authorities before taking any action.

S. 1630:

P. 534

Line 23 Section 606: section 303 of the Clean Air Act is
 24 amend-
 25 ed by --
 26 (a) striking "the health of persons, and that appropriate State or local authorities have not acted to

p. 535

Line 1 abate such sources" and inserting "public health or
 2 welfare, or the environment";
 3 (b) revising the second sentence to read, "If it is
 4 not practicable to assure prompt protection of public

5 health or welfare or the environment by commencement
6 of such a civil action, the Administrator may issue
7 such orders as may be necessary to protect public
8 health or welfare or the environment.";
9 (c) striking the last two sentences in their en-
10 tirety; and
11 (d) deleting subsection (b) in its entirety and re-
12 designating subsection 303(a), as amended, as
section
13 303.

CLEAN WATER ACT:

Section 504: Emergency Powers:

P. 770 (a) Notwithstanding any other provision of this Act, the Administrator, upon receipt of evidence that a pollution source or combination of sources is presenting imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution, or to take such other action as may be necessary.

DRAFT

1/31/90

PROPOSED AMENDMENTS TO S. 1630
(REFERENCE TO SENATE COMMITTEE PRINT DATED
DECEMBER 20, 1989)

SUBJECT: Enforcement -- PRESUMPTION OF GUILT (PENALTY
ASSESSMENT CRITERIA).

AMENDMENT: Amend section 601(i)(2) [amending section 113(e) of
the Act] to read as follows:

"(2) A penalty may be assessed for each day of each violation. For purposes of determining the number of days of violation for which a penalty may be assessed under this section or section 304(a), or an assessment may be made under section 120, where a prima facie case of continuing violation has been established, the violation shall be deemed to commence on the first provable date of violation, and to continue each and every day thereafter until the next provable day of violation, provided such provable days are within a reasonable period of each other, except to the extent that the violator can produce evidence that there were intervening days during which no violation occurred, or that the violation was not continuing in nature."

NOTE:

- Confirms the Administration bill to its explanation (p. 62), which calls for EPA to make a prima facie case that establishes a period of violation.

PRESUMPTION OF GUILT

As drafted, a court must assume that a violation commences the first date that the government can prove a violation and continues each and every day thereafter until the alleged violator establishes his continuous compliance. This provision shifts the burden to the accused to prove its innocence and completely relieve the government of its burden to prove that the violation is ongoing or continuous, or even that a definable period of violation existed.

The bill language conflicts with the explanatory language for the bill, which states that EPA must establish a prima facie case of a "period of violation" before the burden of proof can shift to the defendant.

Also, the bill appears to apply this statutory presumption of guilt not only to civil action, but criminal actions and citizen suits as well.

EXISTING CAA:

No comparable provision.

ADMINISTRATION PROPOSAL:

- P. 62 Explanation: New section 113(e)(2) ("Penalty Assessment Criteria"): New subsection 113(e)... clarifies and confirms that the maximum statutory penalty may be assessed for each day of each violation, including each day of a multi-day averaging period.

...In addition, subsection 113(e) clarifies and confirms that once EPA has made a prima facie case that establishes a period of violation, the burden of proving any intervening days of compliance rests with the source. Sources may then rebut this presumption by proving by a preponderance of the evidence that there were intervening days with no violation or that the violation was not continuous in nature.

Bill: As drafted, the bill does not require EPA to prove a prima facie case that establishes a period of violation. As drafted, EPA must establish only one point of violation and then the source is presumed to be in continuous violation until it can prove otherwise.

S. 1630:

p. 530

Line 13 "(2) A penalty may be assessed for each day of
14 each violation. For purposes of determining the
number
15 of days of violation for which a penalty may be as-
16 sessed under this section or section 304(a), or an
as-
17 sessment may be made under section 120, the violation
18 shall be deemed to commence on the first provable
date
19 of violation and to continue each and every day
there-
20 after until the violator establishes that continuous
com-
21 pliance has been achieved, except to the extent that
the
22 violator can prove by a preponderance of the evidence
23 that there were intervening days during which no vio-
24 lation occurred or that the violation was not
continuing
25 in nature.".

CLEAN WATER ACT:

No comparable provision.

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PROPOSED AMENDMENTS TO S. 1630
(REFERENCE TO SENATE COMMITTEE PRINT DATED
DECEMBER 20, 1989)

SUBJECT: Enforcement -- SUBPOENA AUTHORITY.

AMENDMENT: Amend section 605 [amending section 307 of the Act]
to read as follows:

"Section 307(a) of the Clean Air Act is amended by redesignating subsection (a)(1) as subsection (a) and, in that newly-designated subsection, striking "or" before "section 202(b)(5)" and inserting "any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under section 113, section 114, section 120, section 205, section 206, section 208, section 303, or section 306", immediately after "section 202(b)(4) or 211(c)(3)".

NOTE:

- Conforms the CAA to section 309(g)(10) of the Clean Water Act, which provides subpoena authority in support of specific enforcement provisions of the Act.
- This is done by deleting the language "...or to otherwise carry out the provisions of the Act." (p. 534, line 20).

SUBPOENA AUTHORITY

EPA should have sufficient authority to compel production of information and persons to carry out specific provisions of the Act. No federal agency should have open-ended, unfettered authority to compel such production for any generic purpose it might choose. The words "or to otherwise carry out the provisions of the Act," should be deleted from the bill, conforming the Clean Air Act to comparable provisions of the Clean Water Act.

EXISTING CAA:

p. 562 "Section 307(a)(1). In connection with any determination under section 110(f) or section 202(b)(5), or for purposes of obtaining information under section 202(b)(4) or 211(c)(3), the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths...."

ADMINISTRATION PROPOSAL:

p. 64 Explanation: Section 605 amends subsection 307 (a) to give EPA express authority to issue administrative subpoenas in support of its enforcement activities under the Clean Air Act. This expands existing authority to issue subpoenas in support of rulemaking activities. This authority corresponds to the increased administrative enforcement mechanisms proposed in these amendments, and conforms the CAA to other environmental statutes.

Bill: As drafted, the bill goes far beyond other environmental laws such as the Clean Water Act, by giving EPA open-ended subpoena authority for any purpose it chooses.

S. 1630:

p. 534

Line	12	Section 605. Section 307 of the Clean Air Act is amended...
	13	by redesignating subsection (a)(1) as subsection (a), and, in
	14	that newly designated subsection, striking "or" before "section 202(b)(5)"
	15	...and inserting "any investigation, monitor-
	16	ing, reporting requirement, entry, compliance inspection, or

Line 17 administrative enforcements proceeding under the ACT
(includ-
18 ing but not limited to section 113, section 114,
section 120,
19 section 205, section 206, section 208, section 303 or
section
20 306), or to otherwise carry out the provisions of the
Act,"
21 immediately after "section 202 (b)(4) or 211 (c)(3)".

CLEAN WATER ACT:

Section 309(g)(10): Subpoena Authority:

p. 702 "The Administrator... may issue subpoenas for the attend-
ance and testimony of witnesses and the production of
relevant paper, books, or documents in connection with
hearings under this subsection. In case of contumacy or
refusal to obey a subpoenas issued pursuant to this para-
graph and served upon any person, the district court of
the United States for any district in which such person
is found, resides, or transacts business, upon applica-
tion by the United States and after notice to such per-
son, shall have jurisdiction to issue and other requiring
such person to appear and give testimony before the
administrative law judge or both, and a failure to obey
such order of the court may be punished by such court as -----
a contempt therefor."