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March 13, 1990

Dear Colleague:

Next week the Senate will resume consideration of the Clean Air Act amendments. At that time, we understand that an amendment will be offered by Senator Nickles and Senator Heflin which would weaken the permit and enforcement titles of the pending package of amendments. We strongly urge you to join with us in defeating that amendment.

The permit and enforcement provisions of the pending package are modeled closely after provisions recently enacted in the Clean Water Act. That Act was resoundingly approved over President Reagan's veto by a vote of 86 to 14 in the Senate in 1987, and its permitting and enforcement procedures have worked quite well to ensure compliance.

A summary of reasons to defeat the Nickles/Heflin amendment is attached to this letter. Very briefly, the amendment should be rejected for the following reasons:

1. The amendment is unnecessary. In very large part, it tracks the language already in the pending package.

2. To the extent the amendment departs from the language of the pending package, it significantly weakens the ability of the government to enforce the Clean Air Act.

Permitting and enforcement are central to successful implementation of the Clean Air Act. It would make little sense to enact a strong clean air bill with respect to air toxics, non-attainment, mobile sources and acid rain, and then to weaken those provisions indirectly by watering down the ability of the government to monitor and enforce compliance with the law.

We trust that you will find the attached summary useful as you consider the merits of the Nickles/Heflin amendment to weaken the permit and enforcement titles of the pending package. We hope that we can count on your support in defeating that amendment.

Sincerely,

3/13/90

REASONS TO DEFEAT THE NICKLES/HEFLIN AMENDMENT ON PERMITS AND ENFORCEMENT

1. The Nickles/Heflin amendment is unnecessary. With very few exceptions, the provisions in the pending Clean Air package on permits and enforcement are the same as those in the Nickles/Heflin amendment.

2. In the few places where the Nickles/Heflin amendment differs from the pending package, the amendment weakens the ability of the government to ensure prompt, continuing compliance with the Act. The pending package is modeled after comparable provisions in the Clean Water Act that have proved useful in ensuring compliance without unduly burdening industry. Departing from that model in the ways allowed by the Nickles/Heflin amendment would allow more air pollution to go unchecked.

3. The pending package includes a "shield" (similar to the one provided in the Clean Water Act) that protects sources with respect to the actual terms of their permits, so long as they comply with their permits. However, the Nickles/Heflin amendment would expand the permit "shield" so as to protect polluters from enforcement actions even if the polluter was in violation of the Act's requirements.

4. In addition, the Nickles/Heflin amendment would restrict the ability of the EPA to modify permits in situations where there is a threat to human health. This provision would constitute a major weakening of current air law.

5. Similarly, the amendment would require the EPA to employ an undefined "cost/benefit" analysis in determining whether to exempt sources from permits provisions -- thus allowing EPA to exempt entire classes of sources whenever it concludes that the benefits of requiring permits from those sources do not exceed the costs of the permit program. This provision is an invitation to tie up implementation of the Clean Air Act through lengthy rulemakings and endless lawsuits.

6. Finally, the amendment would allow any person who releases a toxic air pollutant that endangers human life or health to escape liability so long as the release complied with "any relevant federal standard" -- a provision that is so vague that it would make convictions under the Act for endangerment activities much more difficult than under the pending package.

3/12/90

SNAPSHOT OF PERMIT PROVISIONS IN PENDING CLEAN AIR PACKAGE

Title V of the pending Clean Air package establishes a new requirement that a number of significant sources of air emissions obtain operating permits under a program administered by EPA and the States. The Administration and the EPW Committee agree that these operating permits are necessary to further the goals of the Act. However, they differ on several details.

Key aspects of the new permit proposal are summarized below:

1. The new permits would collect and recite all of the duties imposed by the Act upon each permitted source. Permitted sources would be required to submit compliance plans and schedules, to report periodically on compliance progress, and to report permit violations immediately.

2. Permits would be issued for up to a five-year term. Permitted sources would be required to pay all fees associated with permit processing, as well as to pay for monitoring emissions to ensure compliance with all permit terms.

3. EPA is granted discretion to design a variety of permits tailored to the needs of specific sources and groups of sources. For example, it could issue "general" permits for classes of similar sources.

4. The pending package protects sources that are in compliance with their permits against allegations that they are violating their permit conditions. The Administration, on the other hand, would protect sources against allegations that they are violating <u>any part</u> of the Act -- even if they are, in fact, in violation -- so long as they are in compliance with all permit terms.

Key concerns with the permit provisions include:

1. Industry and the environmental community are in disagreement over the need for the permit "shield".

2. Industry is concerned that the permits would overwhelm the regulatory process and place facilities in operational "straight-jackets" that precluded flexibility to make process modifications. The current package includes provisions that address these concerns.

? = like what?

3. Environmental groups are concerned that the permit process would inhibit their ability to monitor whether States are aggressively enforcing the Act with respect to specific sources. The current package includes provisions to protect against this possibility.

3/12/90

SNAPSHOT OF ENFORCEMENT PROVISIONS IN PENDING CLEAN AIR PACKAGE

Title VI of the pending Clean Air package amends the enforcement provisions of the Act in a number of significant respects. This title adds the kinds of enforcement weapons to the Act that have been added to other environmental statutes in recent years.

Key enforcement provisions are highlighted below:

1. The range of activities that can be subject to either civil or criminal penalties is expanded.

2. New criminal sanctions are provided for the release of toxic pollutants, including such sanctions for negligent releases. New criminal sanctions also are provided for various knowing failures to report to EPA, knowing alterations of monitoring devices, and the like.

3. EPA is granted new authority to impose administrative penalties for violations of the Act. These penalties include the authority to issue "field citations" for minor violations.

4. The burden is shifted to the source to establish that any violation of the Act that is initially established by the government or a citizen is <u>not</u> a continuing violation.

5. Courts are authorized to impose civil penalties in citizen suits. Any such penalties would be deposited in a special Treasury fund for use by EPA toward air pollution control.

6. Citizen suits could be brought to compel EPA to take non-discretionary actions that have been unreasonably delayed. In addition, EPA would be required to respond promptly to petitions for administrative action.

Key concerns with the enforcement provisions include:

1. Industry is concerned that the expanded civil and criminal provisions would result in unnecessarily stringent penalties for violations of the Act. As a remedy, industry has suggested that the enforcement provisions be conformed more closely to similar provisions in the Clean Water Act. The current package has made changes to accomplish this goal.

MAR 1 1990

Administration Changes to
Title VI of S. 1630

enough protection

Restrict potential liability under endangerment provisions

- For knowing endangerment, provide no liability if in compliance with a relevant federal standard or state permit that has been subject to federal review

NO — Can't just give blanket on

- For negligent endangerment, limit liability to situations where death or serious bodily injury occurs and remove liability if the emission was in compliance with a relevant federal standard for that pollutant or state permit that has been subject to federal review; and add requirement that person knew or should have known the release could cause death or serious bodily injury

then not just endangerment

Restrict potential criminal liability

- Limit recordkeeping violations for omission of information to situations where person knows or should have known information would be material; clarify that documents covered by the provision are ones that the Act requires the source to file or maintain

ok

- Tie "per day for each violation" language to fines only -- remove it from jail terms

Increase opportunities to challenge administrative orders

- Provide opportunity for administrative hearing on § 113(a) compliance orders before they become effective

- For emergency orders and orders stopping construction of new sources being built in violation of new source review requirements, provide that the order is effective on issuance with opportunity for expedited hearing

- For information requests and administrative subpoenas, review remains in district court enforcement proceeding but "sufficient cause defense" added to moderate potential penalty assessment

Limit potential scope of administrative subpoena authority

- Remove catch-all authorization to issue subpoenas to "otherwise carry out provisions of the act"

Clarify burdens of proof

- Presumption of continuing violation clearly limited to situation where source has notice and plaintiff shows that the violation is likely to continue

Clarify limits on use of field citations

- Avoid large fine from repeated use of "traffic ticket" type citations by setting aggregate limit of $\boxed{\$25,000}$ for 6 month period

Revise citizen suit jurisdiction and access to judicial review

- Conform the remedy for unreasonable delay to that found in the Administrative Procedure Act
- Eliminate possibility of concurrent district court and court of appeals jurisdiction over challenges to EPA decisions to defer action
- Conform the right of petitioning EPA to that found in the Administrative Procedure Act for federal agencies
- Restore citizen suit jurisdiction to EPA failures to perform non-discretionary duties

Add monetary awards provision

- Add monetary awards provision as in H.R. 3030.

Notice of violation and statute of limitations

- Clarify that enforcement action continue to be subject to statute of limitations

MAR 1 1990

1. RECORDKEEPING CRIMES: KNOWING OMISSIONS OF MATERIAL INFORMATION

Amend Section 601 of S. 1630 [new CAA § 113(c)(4)(a)] (p. 522, lines 1-7) as follows:

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

2. NEGLIGENT INJURY (FORMERLY NEGLIGENT ENDANGERMENT)

Amend Section 601 of S. 1630 [creating new CAA § 113(c)(2)] (p. 520 line 22 to p. 521 line 3) as follows:

"(2) Any person who negligently releases into the air any hazardous air pollutant listed pursuant to section 112 of this Act or any extremely hazardous substance listed pursuant to section 11002(a)(2) of title 42, which release such person knows or reasonably should have known could place another person in imminent danger of death or serious bodily injury and who ~~at-the-time-negligently-places-another person-in-imminent-danger-of-death-or-serious-bodily-injury~~ thereby causes or contributes to death or serious bodily injury to any person shall, upon conviction, be punished . . .

* * *

Amend Section 601 of S. 1630 [creating new CAA § 113(c)(2)] (p. 521 line 10) by adding at the end thereof:

"For any hazardous air pollutant listed pursuant to section 112 for which the Administrator has set an emissions standard or for which a permit under Part B of title III is in effect, or for which any other relevant federal standard has been set, a release of such pollutant in accordance with such standard or permit shall not constitute a violation of this paragraph."

Problem with existing provision: Was considered too vague, especially with regard to whether releases in accordance with standards could be "negligent", and the circumstances under which another person was negligently endangered.

Effect of amendment: Changes the nature of the crime from negligent endangerment of another person to causing actual injury or death due to negligence.

Establishes new elements of the crime for the government to prove: 1) that the person who negligently releases hazardous substances knows or reasonably should have known that the release could cause death or serious bodily injury; and 2) that the release actually caused death or serious bodily injury.

Shields from prosecution any release that was in accordance with air toxics emissions standards, federally approved permits, or any other relevant federal standard regulating the released pollutant.

3. KNOWING ENDANGERMENT

- Amend Section 601 of S. 1630 [creating new CAA § 113(c)(5)(A)] (p. 523 lines 17-19) as follows:

> ". . . For any hazardous air pollutant listed pursuant to section 112 for which the Administrator has set an emissions standard or for which a permit under Part B of title III is in effect, or for which any other relevant federal standard has been set, a release of such pollutant in accordance with such standard or permit shall not constitute a violation of this paragraph ~~unless-it-exceeds-such-standard~~.

Problem with existing provision: Regulated community expressed concern that releases in accordance with a valid permit or an applicable standard could nevertheless be violations of this section.

Effect of amendment: Extends the express statutory shield from criminal prosecution provided for any release that was in accordance with a section 112 standard to also shield releases in accordance with federally approved permits or any other relevant federal standard.

4. CRIMINAL PENALTIES

Amend new CAA § 113(c)(1) (p. 520 lines 14-16); § 113(c)(2) (p. 521 lines 3-6); § 113(c)(3) (p. 521 lines 16-18); § 113(c)(4) (p. 522 lines 16-19); and § 113(c)(5)(A) (p. 523 lines 6-9) as follows:

> " . . . be punished by a fine pursuant to title 18 of the United States Code, per day for each violation, or by imprisonment . . . or by both~~, per day for each violation~~.

Problem with existing provision: Raised fears that imprisonment "per day for each violation" would result in exorbitant sentences in the hundreds of years. (Note the Sentencing Guidelines actually preclude such a result.)

Effect of amendment: Limits the maximum "per day for each violation" to fines, not the period of imprisonment.

5. PRESUMPTION OF CONTINUING VIOLATION

Amend Section 601 of S. 1630 [creating new CAA § 113(e)(2)] (p. 530 lines 13-25) 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 subsection (b) or (d)(1) of this section, or section 304(a), or an assessment may be made under section 120, where the Administrator or an air pollution control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be deemed presumed to ~~commence-on-the-first-provable date-of-violation-and-to-continue-~~include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator ~~can-prove~~ proves by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.".

Problems with Current Provision: The current language creates a presumption of a continuing violation for purposes of determining the amount of penalty whenever the plaintiff proves an initial day of violation. The presumption appears to apply to criminal as well as civil cases.

Effect of the Amendment: Would expressly limit the presumption to civil matters, and expressly require a prima facie showing that the conduct or events giving rise to the violation were of a continuing or recurring nature.

As amended, the presumption would not begin to operate until the source had been formally notified of the violation, through a Notice of Violation, Finding of Violation, or other similar action. These amendments ensure fairness by appropriately limiting the scope and application of the presumption.

6. REVIEWABILITY OF ADMINISTRATIVE ORDERS

A. Amend Section 602 of S. 1630 [amending Section 307 of the Act] (page 531 lines 2-23) to read as follows:

"SEC. 602. (a) Section 307(b)(2) of the Clean Air Act is amended by adding at the end thereof: "~~Orders or n~~Notices issued under sections 113~~(a)~~ or 120, ~~section 167 and section 303,~~ administrative subpoenas under section 307(a), and actions under sections 114, 206(c) and 208 of this Act are not considered final actions for purposes of this section. Such ~~orders, notices,~~ subpoenas and actions shall ~~not~~ be subject to judicial review ~~except~~ only in a proceeding commenced by the United States under sections 113, 120, 204 or 205, or in a citizen suit commenced under section 304, to enforce the ~~order, notice,~~ subpoena or action. No such ~~order, notice,~~ subpoena or action may be challenged in any citizen suit under section 304 unless the Administrator and the Attorney General are notified in writing of such challenge.

"(b) Section 307(e) of the Clean Air Act is amended by inserting at the end thereof the following: "~~Orders or notices issued under section 113(a), section 167 or section 303, s~~Subpoenas issued under section 307(a), and actions under sections 114, 206(c) and 208 of this Act may only be reviewed in a proceeding commenced by the United States under section 113, 120, 204, or 205, or in a citizen suit under section 304, to enforce the ~~order, notice,~~ subpoena or action. "

"(c) Section 307(b)(1) of the Clean Air Act is amended by striking "under section 113(d) of this title," immediately before "under section 119 of this title" in the second sentence.".

B. Amend Section 601(d) of S. 1630 [amending Section 113(a)(4) of the Act] (page 517, lines 11-23) to read as follows:

"(d) Section 113(a)(4) of the Clean Air Act is amended by deleting the first sentence and inserting at the end thereof: "An order issued under this subsection shall require the person to whom it was issued to comply with the requirement . . . or applicable implementation plan promulgated or approved under this Act. The provisions of subsections (d)(2), (d)(4), and (d)(5) of this section shall apply to any order issued under this subsection.".

C. Amend Section 601(h) of S. 1630 [creating new Section 113(d) of the Act] as follows (on page 525, lines 3-4; page 526, lines 8-10, 16, and 19; page 527, lines 22-23; page 528, lines 3, 15, and 20-22; and page 529, lines 3 and 8):

"(h) Section 113(d) of the Clean Air Act is amended as follows:

"(d) ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND PROCEDURES GOVERNING ADMINISTRATIVE COMPLIANCE ORDERS.--

* * *

"(2)(A) An administrative penalty assessed order under paragraph (1) or an order under subsection (a) of this section shall be ~~assessed~~ issued by the Administrator ~~by an order made on the record~~ after opportunity for a hearing on the record in accordance with sections 554 and 556 of title 5 of the United States Code. The Administrator may issue rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person ~~to be assessed an administrative penalty~~ to whom the order is to be issued of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within ~~fifteen~~ thirty days of the date the notice is received by such person. An order issued under this subsection or subsection (a) shall become final if no hearing is requested within thirty days or upon issuance of the order following the hearing provided for in this paragraph.

* * *

"(4) Any person against whom a civil penalty is assessed under paragraph (3) of this subsection, or to whom an order is issued under subsection (a) of this section or under paragraph (1) of this subsection, may seek review of such assessment or order in the United States District Court . . . within thirty days following the date the assessment or ~~civil penalty~~ order ~~is issued~~ becomes final. * * * Such court shall not set aside or remand such order or assessment ~~final decision~~ unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the ~~Administrator's~~ order or penalty assessment ~~of the penalty~~ constitutes an abuse of discretion. Such order or penalty assessment shall not be subject to review by any court except as provided by this paragraph. . . .

* * *

"(5) If any person fails to pay an assessment of a civil penalty or fails to comply with an order--

"(A) after the order ~~making-the-assessment-or-field citation-has~~ become final, or

"(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator,

the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount assessed (plus interest at rates established pursuant to section 6621(a)(2) of title 26, United States Code, from the date of the final order or decision or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such order or penalty shall not be subject to review.

Problem with Current Provision: Under S. 1630 as currently drafted, § 113(a) administrative compliance orders are not "final" agency action within the meaning of section 307(b)(1), and are therefore not subject to judicial review in the courts of appeals. Under S. 1630 as currently drafted, judicial review of these orders is only available in district court at the time the government seeks to enforce the orders, with a subsequent right of appeal in the court of appeals. This so-called "pre-enforcement review bar" could force order recipients to choose between expensive compliance measures and potentially large penalties for noncompliance, with no immediate opportunity to challenge the validity of the order.

Effect of Amendment: The amendment eliminates the bar to pre-enforcement review of § 113(a) administrative compliance orders and ensures that recipients of such orders will have the opportunity to challenge the validity of such an order in an administrative hearing before the order becomes final. Under the amendment, § 113(a) orders will be subject to the same procedures that apply to administrative penalty orders under new CAA § 113(d). EPA will be required to give the proposed order recipient notice and an opportunity for a formal administrative hearing "on the record" in accordance with sections 554 and 556 of title 5 of the United States Code before the order becomes final. Thereafter, the order recipient may seek judicial review of the order in federal district court.

7. REVIEW PROCEDURES GOVERNING EMERGENCY ORDERS AND NEW SOURCE CONSTRUCTION ORDERS

I. Amend Section 606 of S. 1630 [amending Section 303 of the Act] (page 534-535) by revising Section 606(d) as follows:

(d) ~~deleting subsection (b) in its entirety and redesignating subsection 303(a), as amended, as section 303.~~ replacing subsection (b) with the following: "An order issued by the Administrator under this section shall become effective upon issuance. Any person to whom such an order is issued may request a hearing under section 307(h) of this title.

II. Create new Section 60_ of S. 1630 to read as follows:

NEW SOURCE CONSTRUCTION

60_. (a) Amend Section 167 of the Clean Air Act by adding the following to the end thereof:

"An order issued by the Administrator under this section shall become effective upon issuance. Any person to whom such an order is issued may request a hearing under section 307(h) of this title. If a hearing is requested but not commenced within the time provided by regulation, such order shall be automatically stayed, and no penalties for noncompliance shall accrue thereafter, until such hearing is commenced.

(b) Section 307 of the Clean Air Act is amended by adding the following new subsection:

(h) (1) The Administrator shall provide any person to whom an order is issued under section 167 of this title or under section 303 of this title an opportunity for a hearing in accordance with sections 554 and 556 of title 5 of the United States Code. The Administrator shall issue rules for procedures for hearings under this subsection, including provisions for an expedited hearing. If a request for a hearing is not made within 30 days, the order shall be final and not subject to review by any court or agency.

(2) Once a final decision in a hearing under paragraph (1) of this subsection has been issued, the person to whom the order was issued may seek review in the United States District Court for the District of Columbia, or for the district in which the violation or emergency is alleged to have occurred, in which such person resides, or where such

person's principal place of business is located, by filing in such court within thirty days following the date of the final decision. Within thirty days thereafter, the Administrator shall file in such court a certified copy, or certified index, as appropriate, of the record on which the final decision was issued. Such court shall not set aside or remand such order or final decision unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's decision constitutes an abuse of discretion. After the person to whom the order was issued has exercised its right to an administrative hearing and, where applicable, judicial review, or after the time for requesting such hearing or review has passed, the validity of the order shall not be subject to review by any court or agency.

Problem with Current Provision: Current Section 602 of S. 1630 provides that challenges to the validity of emergency orders (§ 303 orders) and stop construction orders for new sources (§ 167 orders) can only be raised in an action brought by EPA to enforce the order. (See # 6 above.) These orders can sometimes require the source to take costly steps to comply.

Effect of amendment: Would replace the preenforcement review bar with an expedited hearing process for challenging § 303 and § 167 orders. Such orders would be effective upon issuance; however, a source could request an expedited administrative hearing. The hearing would be conducted in accordance with the Administrative Procedure Act and regulations promulgated by EPA. The final agency action could be appealed to federal district court, where it would be reviewed on the record. The failure to request a hearing or to appeal the final agency hearing decision within 30 days would preclude the source from challenging the validity of the order later or in another forum.

8. SUFFICIENT CAUSE DEFENSE FOR ADMINISTRATIVE ORDER NONCOMPLIANCE

Amend Section 601(i) of S. 1630 [creating new section 113(e) of the Act] (page 530, lines 1-12) to read as follows:

> "(1) In determining the amount of any penalty to be assessed under this section or section 304(a), the court shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 307(a), and actions under section 114 of this Act, where the violator had sufficient cause to violate or fail or refuse to comply with the subpoena or action.

Problem with current provision: Section 602 of S. 1630 (see # 6 above), which makes certain administrative subpoenas and actions under section 114 "non-final" action and therefore unchallengeable until EPA enforces the subpoena or section 114 action, does not provide sources with a defense against penalties where the source has a reasonable basis for believing the subpoena or section 114 action is invalid.

Effect of amendment: Would amend the "penalty assessment criteria" section of the bill to provide a "sufficient cause" defense for sources who fail to comply with certain subpoenas or section 114 actions. The court shall not award penalties against the source if it finds that the source had a good reason for noncompliance. CERCLA § 106 includes a similar sufficient cause defense.

9. <u>CITIZEN SUIT AND JUDICIAL REVIEW AMENDMENTS</u>

- The following three amendments are to provisions that were not offered in the original Administration bill, S. 1490.

A. <u>JUDICIAL REVIEW OF AGENCY ACTION UNREASONABLY DELAYED</u>

Amend Section 609(b) of S. 1630 [amending Section 304(a) of the Act] (page 537, line 14 through page 538, line 12) by deleting existing Section 609(b) in its entirety and substituting the following:

<u>(b) UNREASONABLE DELAY.--Section 307(d)(1) of the Clean Air Act is amended by inserting before the last sentence the following:</u>

<u>"However, actions under this subsection shall be subject to the provisions of subsection 706(1) of title 5 of the United States Code.".</u>

<u>Problem with existing provision:</u> Would provide for citizen suit in district court against EPA whenever any person alleged that EPA had unreasonably delayed taking action under the Act, and where EPA had failed to take action, whether or not that action was discretionary.

Would overturn established case law and shift authority to set EPA priorities from the Executive to the Judicial Branch.

<u>Effect of amendment:</u> Would conform the remedy for unreasonable delay to that found in the Administrative Procedure Act (APA), the general statute governing all federal agencies, by explicitly referencing the relevant provision of the APA. The APA's remedy for unreasonable delay is an action in the court of appeals.

Would not change the existing authority for citizen suits for EPA's failure to carry out a clear congressional command.

B. <u>JUDICIAL REVIEW OF DEFERRED ACTIONS</u>

Amend Section 609(d) of S. 1630 [amending Section 307(b) of the Act] (page 539, lines 3-11) by deleting Section 609(d) in its entirety.

<u>Problem with existing provision:</u> Would allow any person to

bring suit in either district court (at any time) or court of appeals to challenge EPA's decision to defer action, thus raising the possibility of concurrent suits in different courts challenging the same EPA deferral decision.

Effect of amendment: Deletes the existing provision. With amendment (A) above, the interested person's recourse for deferred action would be an unreasonable delay action in the court of appeals.

C. PETITIONS

Amend Section 609(e) of S. 1630 [creating a new Section 307(i) of the Act] (page 539, lines 15-25) by deleting the existing language in its entirety and inserting the following:

"(e) PETITIONS.--Section 307 of the Clean Air Act is amended by adding the following new subsection at the end thereof:

"(i) PETITIONS.--Any interested person shall have the right to petition the Administrator for the issuance, amendment, or repeal of a rule, unless such right is expressly limited by any other provision of this Act.".

Problem with existing provision: Would extend existing right to petition EPA for issuance, amendment, reconsideration, or repeal of a rule or regulation to also allow such petitions for orders.

Would set 12 month deadline (and sometimes 4 months) for EPA to act on the petition. Setting deadlines and allowing petitions for orders are significant departures from existing administrative law which could severely disrupt EPA's setting of priorities and require additional resources for defending such suits.

Effect of amendment: Would take language directly from the Administrative Procedure Act to clarify the right to petitions with regard to rules and regulations.

10. MONETARY AWARDS

Amend Section 601 of S. 1630 [amending Section 113 of the Act] (page 530 after line 25) by adding the following at the end thereof:

"(j) Add the following new section 113(f):

"(f) MONETARY AWARDS.-- The Administrator may pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a civil judicial or administrative judgment of liability for any violation of this Act enforced under this section. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection. An authorized contractor acting as a representative of the Administrator shall be considered an employee of the United States for purposes of this subsection. The Administrator may, by regulation, prescribe additional criteria for eligibility for such an award.".

Problem with existing S. 1630: The Senate bill did not contain this provision, which is in the original Administration bill and the Dingell/Lent substitute to H.R. 3030, as well as CERCLA and many federal wildlife statutes.

Effect of amendment: Adds to S. 1630 the authority for EPA to provide monetary awards to persons who provide information leading to a conviction or civil or administrative penalty.

11. FIELD CITATIONS

Amend Section 601(h) of S. 1630 [creating new Section 113(d)(3) (page 527 lines 5-6) as follows:

> "assessing civil penalties not to exceed $5,000 per day ~~for each violation~~ inspection. During any six month period, the total penalty assessed under this paragraph for any single facility shall not exceed $25,000. Any person to whom a field citation . . ."

Problem with existing provision: Raised concerns that, at $5,000 per day for each violation, the proposed field citation program would allow the unlimited assessment of penalties with inadequate rights of review and appeal.

Effect of amendment: Limits the penalties that EPA may assess to $5,000 per inspection (which occurs infrequently), and in any case to no more than $25,000 against any particular source in a six month period. With these limitations on the maximum penalty assessment, the existing review and appeal procedures should be sufficient.

12. STATUTE OF LIMITATIONS

- Amend Section 601(a) of S. 1630 [amending Section 113(a)(1) of the Act] (p. 515 line 25 - p. 516 line 1) as follows:

> ", without regard to the period of the violation (subject to section 2462 of title 28 of the United States Code)."

Problem with existing provision: Existing language raised concerns that this provision would allow EPA to bring an enforcement action against a source at any time, regardless of the federal statutes of limitations.

Effect of amendment: Clarifies that enforcement actions continue to be subject to statutes of limitations.

13. <u>ADMINISTRATIVE SUBPOENA AUTHORITY</u>

Amend § 605 of S. 1630 (p. 534 line 17-20) as follows:

" . . . or administrative enforcement proceeding under the Act-~~(including-but-not-limited-to~~ section 113, . . . or section 306~~),-or-to-otherwise-carry-out-the-provisions~~ of the Act, . . ."

<u>Problem with existing provision:</u> The phrases "including but not limited to" and "or to otherwise carry out the provisions of the Act" could be read to imply an open-ended subpoena authority.

<u>Effect of amendment:</u> Replaces broad inclusive language with list of the specific provisions that provide subpoena authority.

February 24, 1990, 6:33pm

S1630 TECHNICAL AMENDMENTS -- ENFORCEMENT ISSUES

All references to S1630 are to the Committee Print of December 20, 1989, Calendar No. 427. S1630 section references and section references to the Administration Bill will be cited as "Sec. ___". References to sections in the current Clean Air Act (CAA) or to new sections which would be added to the existing CAA by the bill will be cited as "CAA Section ___".

1. The title designations of S1630 for Acid Deposition (Title IV, p.446 line 15) and Permits (Title V, p.495 line 7) are the inverse of the title references in the Administration Bill. Thus, title and section cross-references to those titles in Title VI (Enforcement) need to be corrected as appropriate.

2. Sec. 114 of S1630, p.280 line 14, needs amending to reflect that it adds a new section to the existing Act regarding the Role of Secondary Standards, to avoid confusion with CAA Section 114 (investigatory authority). (Cf. Sec. 113 of S1630, p. 279).

3. Title II: Title II (mobile sources) and Title VI (stationary sources) have separate enforcement authorities. The following technical amendments would conform enforcement under these Titles. (NOTE technical amendments to Title II enforcement is not comprehensively addressed in this document.)

   (a) Sec. 221(c) amending CAA Section 205(b) mobile sources "Civil and Administrative Penalties" should be amended at, p. 311 line 7, by deleting the words "or savings". Thus, the civil penalty criteria will refer to "the economic benefit (if any) resulting from the violation. . ." as in parallel provisions governing stationary source enforcement.

   This amendment is necessary because the term "economic benefit" in the current Act is generally read to include "savings". Leaving the additional words "or savings" in proposed Section 205(b) would create the unintended inference that economic savings are not to be considered in the two other places in S1630 which refer simply to "economic benefit": namely, among the administrative penalty criteria in proposed Section 205(c)(2) (page 312 lines 5-6), and the judicial and administrative penalty criteria for stationary source enforcement listed in proposed Section 113(e)(1) (page 530 line 11).

(b) Conform the Title II (mobile sources) administrative penalty authorities provisions to Title VI (stationary sources), by inserting as paragraph Section 205(c)(3)(C) (p. 312 after line 22) the following:

> The Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under paragraph (c)(1).

This authority is provided in the original Administration bill, and is identical to the authority retained in S1630 Title VI (p. 526 lines 21-24).

4. Various sections throughout S1630 provide for enforcement by cross-referencing some, but not all, CAA enforcement authorities. These authorities are found in CAA Sections 113, 114(investigations), 120 (economic benefit of noncompliance), 303 (emergency orders), 304 (citizen enforcement), 306 (contractor listing), and 307(a) as amended (administrative subpoenas). Each section in S1630 containing such cross-referencing needs amending to authorize full enforcement. See e.g. Sec. 304, adding new CAA Section 129(i) (Accident Prevention - Enforcement) (p. 402 lines 6-8).

5. ENFORCEABILITY OF WORK PRACTICE STANDARDS: Clarify that violations of design, equipment, work practice, or operational standards ("work practice standards") under CAA Section 112 are enforceable when violated without the necessity of proving the emission of an air pollutant.

DISCUSSION: Sec. 305(e) of S1630 (p. 404 lines 3-7) amends the definition of "emission limitation" and "emission standard" contained in CAA Section 302(k) to include work practice standards. In addition, Sec.301 new CAA Section 112(h) (p. 340 line 15 to p. 341 line 9), authorizes the Administrator to promulgate such standards when a numerical emissions limitation is not feasible to prescribe or enforce. However, as in current CAA Section 112(c), the prohibition in new CAA Section 112(i)(2) that "no air pollutant may be emitted from any source in violation of an emissions standard" (p. 344 lines 16-18), still arguably requires evidence that an air pollutant was emitted.

PROPOSED CLARIFYING LANGUAGE: In order to ensure the enforceability of work practice standard violations without having to make such proof, amend 112(i)(2) (p. 344 lines 15-18) to read --

> After the effective date of any emissions standard under this section --

(A) no air pollutant may be emitted in the case of a numerical emission limitation under this section from any source in violation of such limitation, and

(B) no person may violate any other emissions standard in the case of a standard promulgated under subsection (h), ...

PROPOSED LEGISLATIVE HISTORY: These technical amendments are intended to further clarify and confirm, as we did by promulgating Section 112(e)(5) in 1978, that the violation of a design, equipment, work practice or operational standard under the Act is a violation of the Act just as a violation of an emission standard is a violation, whether or not there is evidence that an air pollutant is being emitted into the ambient air.

6 To ensure enforceability of new CAA Section 179 maintenance plans (p. 200 beginning line 3), amend new CAA Subsection 110(k) which defines the term "applicable implementation plan", by adding "(including an approved maintenance plan under Section 179 of this title)" after "or most recent revision thereof" (p. 181 line 25), and by adding "or Section 179" after "promulgated under subsection (f)" (p. 182 line 1).

7 Amend Sec. 601 (p. 515 line 8) as in Administration bill by adding a new Sec. 601(a) to amend the heading of CAA Section 113(a) of the Act by replacing "FINDING OF VIOLATION" with "NOTIFICATIONS AND COMPLIANCE ORDERS".

8. To ensure that CAA Section 113(a) administrative orders do not shield sources from penalty actions or from enforcement of other requirements of the Act by citizens, amend Sec. 601(d) (p. 517 line 16), to read "No order issued under this subsection shall prevent the State, the Administrator, or a Court in an action brought under Section 304, from . . .." In addition revise the clause ". . . nor otherwise limit or affect the State or the United States' authority to enforce under other provisions of this Act . . .", to read ". . . nor otherwise limit or affect enforcement under other provisions of this Act. . .."

9. Add the following amendments to Sec. 601(b) of the bill, amending section 113(a)(2) of the Act (on p. 516) to ensure enforceability of permit program requirements (Title V of S1630), by:

(1) adding " or approved permit program" after "applicable implementation plan"; and

(2) adding "or permit program" after

(a) "in which the plan"

(b) "enforce the plan"

(c) "enforce such plan"

(d) "requirement of such plan".

10. To ensure administrative, civil judicial, and criminal enforceability (as appropriate) of the various requirements and prohibitions of the CAA as amended by S1630, CAA Sections 113 and 120 (Administration bill Sec. 613) should be amended by:

a. Striking the references to titles I, III and IV and specifically listing the enforceable sections, subparts and titles as follows:

(1) In CAA Subsection 113(a)(3) (p.516 lines 24-25), strike "any other requirement of this title, title III, or title IV" and insert in place thereof "<u>any requirement or prohibition of Section 111(d)(2)(B), 111(e), or 111(j) of this title (relating to new source performance standards), Section 112(i) of this title (relating to standards for hazardous emissions), Section 114 of this title (relating to investigatory authority), Section 126(d) of this title (relating to interstate pollution), Section 157 of this title (relating to stratospheric ozone), Section 176(a)(1) of this title (relating to sanctions), Section 185(c) of this title (relating to consumer and commercial products), Section 185(d) of this title (relating to hazardous waste facilities), Section 327 of title III (relating to outer continental shelf requirements), Sections 351(a) or 352(c) of title III (relating to permits), or any prohibition of title IV (relating to acid deposition control),</u>"

Also in CAA Subsection 113(a)(3) (p. 517 line 2) strike "titles" and insert in place thereof "<u>provisions</u>".

(2) In CAA Subsection 113(b)(2) (p. 519 lines 8-9), strike "of this title, title III, or title IV" and insert in place thereof "<u>or prohibition of Section 111(d)(2)(B), 111(e), or 111(j) of this title (relating to new source performance standards),</u>

Section 112(i) of this title (relating to standards for hazardous emissions), Section 114 of this title (relating to investigatory authority), Section 126(d) of this title (relating to interstate pollution), Section 157 of this title (relating to stratospheric ozone), Section 176(a)(1) of this title (relating to sanctions), Section 185(c) of this title (relating to consumer and commercial products), Section 185(d) of this title (relating to hazardous waste facilities), Section 327 of title III (relating to outer continental shelf requirements), Sections 351(a) or 352(c) of title III (relating to permits), or any prohibition of title IV (relating to acid deposition control), or any order or notice issued pursuant to Section 113(a), Section 113(d), or Section 167 of this title, or Section 303 or Section 307 of title III".

Also in CAA Subsection 113(b)(2) (p. 519 line 11) strike "this Act" and insert in place thereof "those provisions".

(3) In CAA Subsection 113(c)(3) (p. 521 line 12), strike "this title, title III, or IV" and insert in place thereof "an applicable implementation plan, or of Section 111(d)(2)(B), 111(e), or 111(j) of this title (relating to new source performance standards), Section 112(i) of this title (relating to standards for hazardous emissions), Section 114 of this title (relating to investigatory authority), Section 126(d) of this title (relating to interstate pollution), Section 157 of this title (relating to stratospheric ozone), Section 176(a)(1) of this title (relating to sanctions), Section 185(c) of this title (relating to consumer and commercial products), Section 185(d) of this title (relating to hazardous waste facilities), Section 327 of title III (relating to outer continental shelf requirements), Sections 351(a) or 352(c) of title III (relating to permits), or any prohibition of title IV (relating to acid deposition control), or any order or notice issued pursuant to Section 113(a), Section 113(d), or Section 167 of this title, or Section 303 or Section 307 of title III".

Also in CAA Subsection 113(c)(3) (p. 521 line 15) strike "titles" and insert in place thereof "provisions".

(4) In CAA Subsection 113(d)(1)(B) (p. 525 lines 17-18), strike "this title, title III, or IV" and insert in place thereof "Section 111(d)(2)(B), 111(e), or 111(j) of this title (relating to new source performance standards), Section 112(i) of this title (relating to standards for hazardous emissions), Section 114 of this title (relating to investigatory authority), Section 126(d) of this title (relating to interstate pollution), Section 157 of this title (relating to stratospheric ozone), Section 176(a)(1) of this title (relating to sanctions), Section 185(c) of this title (relating to consumer and commercial products), Section 185(d) of this title (relating to hazardous waste facilities), Section 327 of title III (relating to outer continental shelf requirements), Sections 351(a) or 352(c) of title III (relating to permits), or any prohibition of title IV (relating to acid deposition control), or any order or notice issued pursuant to Section 113(a), Section 113(d), or Section 167 of this title, or Section 303 or Section 307 of title III".

Also in CAA Subsection 113(d)(1)(B) (p. 525 line 20) strike "this Act" and insert in place thereof "those provisions".

b. as in the Administration and HR 3030 Sec. 611 of the November 9, 1989 Committee Print (pp. 319-20), add a new Sec. 612 to S1630 (p. 540) with conforming amendments to CAA Section 120 of the Act to ensure EPA's ability to recoup the economic benefit of noncompliance for violations of the above referenced sections and any new statutory requirements.

11. The Administrator is normally not authorized by statute to initiate criminal enforcement directly. Instead the Administrator must ask the Attorney General to initiate such enforcement. Therefore, S1630 Sec. 601(c)(4) (p. 517 line 9), and the last sentence of 601(e) (p. 518 line 14), need to be reworded as in H.R. 3030 p. 297 lines 12 - 20, to preserve these traditional roles.

12. Sec. 601(f) of S1630 (p. 518 beginning at line 17), which amends CAA Section 113(b) of the Act, needs correcting as follows:

a. add the new heading "CIVIL JUDICIAL ENFORCEMENT" (see Administration Bill Sec. 601(g));

b. add the words "as appropriate" after "shall," on line 19, to clarify discretion;

c. add the words "any source subject to title IV," before "a major emitting facility" on line 20, to ensure coverage of sources regulated under Title IV (acid deposition);

d. add the words "the United States" after "and to collect any fees owed" at p. 519 line 23, since the bill provides for fees to the States;

e. at p. 519 line 25, add a comma after the words "penalty owed under Section 120" and change the word "penalty" to "assessment".

13. Amend Sec. 601(i) (p. 530 line 6) which amends CAA Section 113(e) adding penalty assessment criteria, to read "the violator's full compliance history . . .[,]" to clarify that the court may consider past violations.

14. Insert a reference to existing CAA Section 303(a) in Sec. 606(a), (b) and (c) (p. 534-35) to clarify which paragraph of existing CAA Section 303 is being amended.

15. In Sec. 607 (p. 535), amend the reference to CAA Section 113(c)(2) on lines 19 and 22 to read "113(c)(4)".

16. Sec. 304 of the S1630 creating section 129(e)(8), p. 392 line 25, needs amending to read "be admitted as evidence or used in any civil or criminal action ~~or suit for damages~~ . . ."

Rationale: Whether the term "action" includes criminal prosecutions is ambiguous and should be clarified. Deleting "or suit for damages" eliminates any misperception that the bar applies only to damage actions (and suits for damages should still be covered within "civil action"). The purpose of the evidentiary bar for the board's conclusions, findings, and recommendations has equal value in criminal cases and injunctive actions.

17. Sec. 601 amending subsections 113(a)(3) (p. 517 lines 1-2), 113(b)(2) (p. 519 lines 10-11), and 113(c)(3) (p. 521 line 15), should read "promulgated, issued, or approved" (since provision also covers orders).

18. Sec. 601 adding new Section 113(d)(2)(A), p. 526, line 19, should be amended to change "fifteen days" to "thirty days". This gives the subject of an administrative penalty order 30 rather than 15 days to request a hearing on the order before its issuance, conforming S. 1630 to a change in Dingell/Lent that was not opposed.

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Administration Changes to Title V of S. 1630

Codifying and Modifying Permits

- EPA is not required to review "codifying" permits (permits that simply implement the SIP or other applicable requirements) ok

- "Modifying" permits (permits that change the SIP or other applicable requirements) are subject to EPA review and possible veto. ok

- EPA has the authority to convert misclassified "codifying" permits into "modifying" permits. ok

Judicial Review

- EPA's veto, or decision not to veto, a "modifying" permit is subject to review in Federal court. ok

Permit Application Submittal Schedule

- The time period within which sources must submit permit applications is expanded from 6 to 30 months, with 1-year extensions if necessary. ?

Contiguous States

- Limits are placed on the circumstances under which downwind states must be notified of draft permits. ?

Permit Shield

- Revises the permit shield so that a properly issued permit constitutes compliance with all existing applicable requirements. ? - re: the permit or actual emissions, too

permit exonerates ?

? = complete shield?

Technical Changes

- Numerous other changes in response to concerns expressed, including:

  - Clarify the relationship of permits to SIPs by providing that a permit automatically becomes part of the SIP.

  - Clarify the circumstances under which EPA may modify a permit by defining cause to mean a material inaccuracy in the permit or the need to incorporate a new regulation to protect against a serious risk to public health.

  - Require that permits allow the source to shift permitted emissions from one facility to another within the source, without a permit modification, as long as there is no net increase in total actual emissions.

- Eliminate the sanction that prohibits EPA from acting on source-specific SIP revisions if a State fails to submit an adequate permit program.

- Define the circumstances under which EPA can veto a modifying permit.

- Other technical and clarifying changes, such as eliminating unnecessary definitions.

TITLE V--PERMITS

SEC. 501. The Clean Air Act is amended--

(1) by inserting after the heading "TITLE III---GENERAL" the subheading "PART A--MISCELLANEOUS and

(2) by adding at the end of title III the following:

"PART B--PERMITS

"DEFINITIONS

"SEC. 350. As used in this title--

"(1) The term 'major source' means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is a major stationary source or major emitting facility as defined in section 302(j).

"(2) For sources subject to standards issued under section 112 of this Act, the term 'area source' shall have the meaning given in that section.

"(3) The term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an applicable implementation plan, emission standard, emission limitation or emission prohibition.

"(4)the term 'permitting authority' means the Administrator, or the air pollution control agency authorized by the Administrator to carry out a permit program under this title.

"PERMIT PROGRAMS

"SEC. 351. (a) After the effective date of any permit program approved or promulgated under this title, it shall be unlawful for any person to violate any requirement of a permit issued under this title, or to operate any source subject to title IV, a major source, any other source (including an area source) subject to standards or regulations under sections 111 or 112, or any other stationary source designated by regulations promulgated by the Administrator, except in compliance with a permit issued by a permitting authority under this title. Nothing in this subsection shall be construed to alter the requirements of sections 165, 172, and 173 regarding the requirement that a permit be obtained prior to construction. The Administrator may, in the Administrator's discretion, promulgate regulations to exempt one or more source categories from the requirements of this subsection if the Administrator finds that the air quality benefits of subjecting the source category or categories to the requirements of this subsection would not be commensurate with the costs to EPA, permitting authorities, and sources required to do so, or that such an exemption would be consistent with the purposes of this Act.

"(b) Not later than twelve months after the date of enactment of this title, the Administrator shall promulgate regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include:

"(1) Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of the applications;

"(2) Monitoring and reporting requirements.

"(3) (A) A requirement under State or local law that the owner or operator of all sources subject to the requirement to obtain a permit under this title pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable costs of developing and administering the permit program, including, but not limited to, the reasonable costs of--

"(i) reviewing and acting upon any application for such a permit,

"(ii) if the owner or operator receives a permit for such source, whether before or after the date of enactment of this section, implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

"(iii) emissions and ambient monitoring,

"(iv) preparing generally applicable regulations or guidance,

"(v) modeling, analyses, and demonstrations, and

"(vi) preparing inventories and tracking emissions.

"(B) The total amount of fees collected by the permitting authority shall conform to the following requirements:

"(i) The Administrator shall not approve a program as meeting the requirements of this paragraph unless the air pollution control agency demonstrates that, except as otherwise provided in clauses (ii) through (iv) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than $25 per ton of each regulated pollutant, unless the Administrator determines that a lesser amount would meet the requirements of subparagraph (A).

"(ii) As used in this subparagraph, the term 'regulated pollutant' shall mean (I) a volatile organic compound; (II) each pollutant regulated under section 111 or 112; and (III) each pollutant for which a national primary ambient air quality standard has been promulgated (except that carbon monoxide shall be excluded from this reference).

"(iii) In determining the amount under clause (i), the permitting authority is not required to include any amount of regulated pollutant emitted by any source in excess of 4,000 tons per year of that regulated pollutant.

"(iv) The fee calculated under clause (i), shall be increased (consistent with the need to cover reasonable costs) in each year beginning after the year of enactment of this section by the percentage, if any, by which the Producer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Producer Price Index for the calendar year 1989.

"(C) (i) If the Administrator determines, under section 351(d), that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under section 351(i), that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under this title, collect reasonable fees (but only to the extent the permitting authority has failed to collect or to provide for collecting such fees) from the sources identified under subparagraph (A) without regard to the requirements of subparagraph (B).

"(ii) Any source that fails to pay fees lawfully imposed by the Administrator under this subparagraph shall pay a penalty of 50 per centum of the fee amount, plus interest on the fee amount computed in accordance with section 6621(a)(2) of title 26, of the United States Code (relating to computation of interest on underpayment of Federal taxes).

"(iii) Any fees, penalties, and interest collected under this subparagraph shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the Agency's activities for which the fees were collected.

"(iv) Any fee required to be collected by an air pollution control agency under this subsection shall be utilized solely to support the air pollution control permit program of such agency, as provided in this paragraph.

"(4) Requirements for adequate personnel and funding to administer the program.

"(5) A requirement that the permitting authority have and exercise adequate authority to --

"(A) issue permits that assure compliance by all sources required to have a permit under this title with each applicable standard, regulation or requirement under this Act;

"(B) issue permits for a fixed term, not less than one year and not greater than five years;

"(C) assure that upon issuance or renewal, permits include emission limitations and other conditions required by section 353(a);

"(D) (i) terminate, modify, or revoke and reissue a permit for a material inaccuracy in the permit that renders the permit inconsistent with the Act, or

"(ii) modify or revoke and reissue a permit if EPA promulgates regulations after the permit is issued, and modification of the permit to implement such regulations is necessary in order to protect against a serious risk to public health;

"(E) enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and appropriate criminal penalties;

"(F) ensure that no permit will be issued if the Administrator timely objects to its issuance under section 505; and

"(G) extend a permit's term if a timely and complete application for renewal is made, until the permitting authority takes final action upon the renewal application.

"(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, and 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.

"(7) Authority and procedures to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 352(e), subject to the provisions of section 114 of this Act.

"(8) Adequate and expeditious procedures for permit modification , and procedures to assure that priority attention be accorded to the processing of applications for any permits required for new or modified major sources under sections 165, 172, or 173.

"(9) Procedures and other requirements to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this title.

"(10) Requirements that --

"(A) If a permit applicant identifies the composition of emissions under the reasonably anticipated operating conditions of the permitted facility, the permit shall set forth the emission limitations, standards, and other requirements that would apply under all such reasonably anticipated operating conditions, and

"(B) The emission limitations and other permit terms shall allow the owner or operator of a facility to make changes in the operation of the facility that might shift permitted emissions from one source to another within the same facility, as authorized by a codifying or modifying permit, without the necessity for a permit modification, provided that the owner or operator provides written notification specifying changed permit requirements to the permitting authority prior to any such change, and that the permit includes such emission limitations and other requirements as are necessary to assure that the modified requirements will be enforceable and will not cause any net increase in the total actual emissions from the facility.

"(c) Not later than three years after the enactment of this title, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this title. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority and obligation to carry out the program. Not later than one year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part. The Administrator shall approve a program to the extent that the program meets the requirements of this Act, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within one hundred and eighty days after receiving notification. If the Governor fails within such period to resubmit an approvable program, the Administrator may in the Administrator's discretion take either or both of the following actions:

"(1) apply any of the sanctions specified in section 176(a) of this Act other than the sanction specified in section 176(a)(2); or

"(2) promulgate a program, or portion of a program, under this title.

"(d) The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may in such notice retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this title until they are replaced by a permit issued by a permitting program. Nothing in this provision should be construed to limit the Administrator's ability to enforce permits issued by a State.

"(e) INTERIM APPROVAL.--If a program submitted under this title substantially meets the requirements of this title, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than two years after such approval, and may not be renewed.

"(f) EFFECTIVE DATE. The effective date of a permit program, or interim program, approved under this title, shall be the effective date of approval by the Administrator.

"(g) Whenever the Administrator makes a preliminary determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this title, he shall notify the permitting authority of such determination and the reasons therefor. Such notice shall be made public. If the permitting authority fails to take action to assure adequate administration and enforcement, the Administrator may in the Administrator's discretion, but not before ninety days after issuing such notice, take one or more of the following actions:

"(1) withdraw approval of the program or portion by rule;

"(2) propose to apply any of the sanctions specified in section 176(a) of this Act other than the sanction specified in section 176(a)(2); or

"(3) promulgate a program, or portion of a program, under this title.

"PERMIT APPLICATIONS

"SEC. 352. (a) Any source specified in section 502(a) shall become subject to a permit program, and required to have a permit, on the later of the following dates:

"(1) the effective date of a permit program or interim permit program applicable to the source; or

"(2) the date such source becomes subject to section 502(a).

"(b)(1) The regulations required by section 502(b)(1) shall include a requirement that there is submitted with the permit application a compliance plan describing how the source will comply with all applicable requirements under this Act. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every six months.

"(2) The regulations shall further require the permittee to periodically certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report, consistent with provisions of the United States Constitution regarding self-incrimination, any violations of such requirements to the permitting authority.

"(c) Any person required to have a permit shall, not later than 30 months after the date on which the source becomes subject to a permit program approved or promulgated under this title, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The Administrator, in consultation with the permitting authority, shall establish a schedule for submission of all or part of the application by sources or categories of sources (including any class, type, or size within such category) within the 30-month period in a manner that minimizes administrative burdens. The Administrator may base the schedule on the amount of emissions from the sources or categories of sources, air quality considerations, or such other factors as he may consider relevant. The Administrator, in consultation with the permitting authority, may extend the date for submission of permit applications by any source or category of sources for up to an additional one year if the Administrator determines in his discretion that insufficient resources are available to assure adequate review of such permit applications by the permitting authority or the Administrator. Additional extensions may be granted for periods of not to exceed one year if the Administrator makes a new determination for each such additional extension.

"(d) Except for sources required to have a permit prior to construction under sections 165, 172, or 173, if an applicant has submitted a timely and complete application for a permit required by this title, but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this Act, unless the delay in final action was due to the failure of the applicant to timely submit information required or requested to process the application. No source required to have a permit under this title shall be in violation of section 502(a) before the date on which the source is required to submit an application under subsection (c) of this section.

"(e) A copy of each permit application, compliance plan, emissions or compliance monitoring report, certification, and each permit issued under this title, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 114(c) of this Act, the applicant or permittee may submit such information separately. The requirements of section 114(c) shall apply to such information. The contents of a permit shall not be entitled to protection under section 114(c).

"PERMIT REQUIREMENTS AND CONDITIONS

"SEC. 353. (a) Each permit issued under this title shall include emission limitations and standards, and such other measures, including schedules of compliance where appropriate, as are necessary to assure compliance with applicable requirements of this Act.

"(b) The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this Act. The Administrator shall take into account the cost and feasibility of such requirements, and the extent to which they are needed to assure compliance.

"(c)(1) Each permit issued under this title shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulations under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this title shall be signed by a responsible corporate official, who shall certify its accuracy.

(2) A permit for a source that is an affected source under title IV shall prohibit a source from emitting sulfur dioxide in excess of allowances it holds. No permit modification shall be required for increases in emissions authorized by allowances

acquired through trading or otherwise under title IV, provided that the increase complies with other requirements of the Act.

"(d) The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this title. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 503.

"(e) (1) The permitting authority may issue a single permit to an owner or operator authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this Act at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of title I. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

"(2) A single permit may be issued for a facility with multiple sources.

"(f)(1) Compliance with a permit issued under this title shall be deemed compliance with section 502. Compliance with the permit shall also be deemed compliance with any other applicable emission limitation or standard in effect under this Act at the time of permit issuance. Compliance with the permit shall also be deemed compliance with any other emission limitation or standard under the Act, except as provided by the Administrator by rule. The preceding two sentences shall not apply in the case of a standard issued under section 112(f). When the Administrator has approved only part of a permit program, under section 351(c), compliance with a permit issued under that part of the program shall be deemed compliance only with those requirements for which the program was approved.

"(2) Notwithstanding the provisions of paragraph (1), compliance with a permit issued under this title shall not alter, modify or otherwise affect the authority of the Administrator under section 303 (emergency powers) or the requirement to comply with any order issued under section 303.

"NOTIFICATION TO ADMINISTRATOR AND OTHER STATES

"SEC. 354. (a)(1)(A) Each permitting authority shall transmit to the Administrator a copy of each draft permit released for public comment, and such other information as the Administrator may by rule require in order to carry out his duties under the Act. The permitting authority shall provide notice, in accordance with regulations promulgated by the Administrator, of each permit proposed to be issued by the authority, and, except as provided under subparagraph (B), transmit a copy of each such proposed permit to the Administrator for review under subsection (b).

"(B) A proposed permit shall not be required to be forwarded to the Administrator for review under subsection (b) whenever the permitting authority states in the public notice of the permit that it is a codifying permit--which is defined as a permit that implements, and does not change any material requirement of, any applicable implementation plan or other regulation or standard promulgated by the Administrator--unless--

"(i) the Administrator notifies the permitting authority, not later than the close of the public comment period that the permit is a modifying permit, which is defined as a permit that does not so implement such requirements; or

"(ii) the final permit modifies any provision in the permit submitted for public notice.

Any decision by the Administrator whether to issue a notification under clause (i) shall be committed to agency discretion and not subject to judicial review.

"(2) The permitting authority shall notify all States whose air quality may be significantly affected by a modifying permit for a major source of each draft permit released for public comment, and shall provide an opportunity for such States to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

"(3) For purposes of paragraph (2), emissions from a permitted source may significantly affect air quality in any State within fifty miles from the source. The Administrator may enlarge or reduce this distance by rule.

"(4) The notice required under paragraph (1)(A) for a draft modifying permit shall include a concise description of the manner in which the draft modifying permit does not implement, or otherwise changes the requirements of, any applicable implementation plan or other regulation or standard promulgated by the Administrator.

"(b) No permit shall be issued if the Administrator (1) within ninety days after receipt of the proposed permit under subsection (a)(1)(A) of this section, or (2) within ninety days after receiving notification under subsection (a)(2), objects in writing to its issuance as not in compliance with the applicable implementation plan or other applicable emission limitations, standards, or other applicable requirements of this Act. The Administrator may object to a modifying permit only if it would result in emissions regulated under an applicable implementation plan that are greater than under such plan (unless such emissions are either offset by reductions from another permitted source or are accounted for under an applicable implementation plan approved by the Administrator), or would not comply with another applicable requirement of this Act. The Administrator shall provide with the objection a statement of the reasons for the objection. A copy of any objection and statement shall be provided to the applicant.

"(c) If the permitting authority fails within ninety days after the date of the objection, to submit a permit revised to meet the objection, the Administrator shall promptly issue or deny the permit in accordance with the requirements of this title. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection. A failure of the Administrator to object to a modifying permit submitted for review under subsection (a)(1)(A) of this section shall be subject to judicial review under section 307(b).

"(d) The Administrator may, by regulation, require that specified modifications to requirements of the applicable implementation plan with respect to specified categories of sources (including any class, type, or size within such category) be made only through a revision to the applicable implementation plan.

"(e)(1) The Administrator may waive the requirements of subsections (a) and (b) of this section at the time of approval of a permit program under this title for any category (including any class, type, or size within such category) of sources covered by the program.

"(2) The Administrator may by regulation establish categories of sources (including any class, type, or size within such category) to which the requirements of subsection (a) and

(b) of this section shall not apply.

"(3) The Administrator may exclude from any waiver under this subsection notification under paragraph (a)(2). Any waiver granted under this subsection may be revoked or modified by the Administrator by rule.

"(f) If the Administrator finds that cause exists under section 351(b)(5)(D) to terminate, modify, or revoke and reissue a State or local permit under this title, the Administrator shall notify the permitting authority of such finding. The permitting authority shall, within ninety days after receipt of such notification, forward to the Administrator under this section a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend such ninety day period for an additional ninety days if the Administrator finds that a new or revised permit application is necessary, or that the permitting authority must require the permittee to submit additional information. The Administrator may review such proposed determination under the provisions of subsections (a) and (b) of this section. If the permitting authority fails to submit the required proposed determination, or if the Administrator objects and the permitting authority fails to resolve the objection within the period prescribed in subsection (c) of this section, the Administrator may, after notice and in accordance with duly promulgated procedures, terminate, modify, or revoke and reissue the permit.

"RELATION TO OTHER AUTHORITY

"SEC. 355. (a) Nothing in this title shall prevent an air pollution control agency from establishing additional permitting requirements not inconsistent with this Act.

"(b) Nothing in this title shall be construed to authorize the Administrator, or a State, or other permitting authority, to modify or revoke any allowance granted under title IV, or to alter or amend any requirement of sections 111 or 112.

"(c) For the purposes of this Act, any permit properly issued or revised shall become part of and supersede any inconsistent portion of, the applicable implementation plan, and shall have the effect specified in section 353(f).

"(d) In promulgating any standard under section 111 or 112, the Administrator shall identify which sources or categories of sources (including any class, type, or size within such category) subject to such standard shall be subject to this title.

SEC. 502. Section 304(f)(1) is amended to read as follows:

"(1) an emission limitation, standard of performance, or an emission standard, or a schedule or timetable of compliance that is currently legally enforceable;"

March 9, 1990

The Honorable Albert Gore, Jr.
SR-393
Russell Senate Office Building
Washington, D.C. 20510-4201

PHOTOCOPY PRESERVATION

Dear Senator Gore:

There have been several developments related to the clean air issue since you met with Earnie Deavenport and our Washington staff on February 28. As a result of these developments, I am writing because I have great concern with portions of the compromise Senate bill. As a company, we believe we have demonstrated our commitment to environmental responsibility and we support sound initiatives to ensure environmental protection. However, we feel improvements are needed in the bill.

permitting

I would like to ask for your support for changes to the bill that will ~~have very pos~~itive effects on our business. The Nickles-Heflin-Dole amendment would be a significant improvement over ~~the permitting pro~~visions of S. 1630 or the compromise bill. From an operational perspective, timely issuance of permits is critical for production and capital planning purposes. The Nickles-Heflin-Dole amendment provides for a streamlined permitting process that would benefit our company with no adverse effects on the environment. Your support for this amendment will be sincerely appreciated.

I also understand that amendments may be offered that would establish absolute risk numbers as part of the residual risk evaluation. This approach does not reflect contemporary scientific thinking on risk management. We believe that application of technological controls will lead to reductions of more than 90% of any existing risk due to chemical emissions. The evaluation of residual risks should be based on the recommendations of an independent, scientific advisory group, not on predetermined theoretical risk numbers. Please oppose amendments that insert absolute risk numbers.

We understand the challenges you are faced with in developing sound environmental legislation and hope that during the debate our concerns will be included in your deliberations.

Very truly yours,

W R Garwood

W. R. Garwood
President

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89-486 ENR

CRS Report for Congress

Clean Air Amendments: Permits and Market-Oriented Provisions In the Administration Bill

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Environment and Natural Resources Policy Division

August 18, 1989

CRS

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CLEAN AIR AMENDMENTS: PERMITS AND MARKET-ORIENTED PROVISIONS IN THE ADMINISTRATION BILL

SUMMARY

The Administration's proposed amendments to the Clean Air Act (H.R. 3030/S. 1490) include a provision establishing a comprehensive permit program to be administered by States (or interstate or local agencies) ~~under detailed~~ Federal procedures, broadly applicable ~~to stationary sources~~ subject to the various standards and requirements of the Act. The bill requires permit fees sufficient to cover the costs of the permit system. A supplemental Federal permit program would initiate permitting for the acid rain provisions of the bill; the two permit programs would eventually be consolidated into one. While many States currently do administer permit programs of their own and more than one-half utilize permit fee systems, this proposal represents a significant degree of federalization that does not now exist. Some may question whether States will find the Federal permit process burdensome and inflexible. Further, it remains to be seen what new costs the permit process will impose on permittees.

On the other hand, supporters of the proposal point out that permits will provide a key enforcement tool that current law lacks: the performance of a source can be judged against emission limitations, standards, and other requirements in the permit, to determine compliance with the law. Further, in a period of budgetary constraints and reduced Federal support for State air pollution programs, mandated permit fees will assure that agencies have the funds needed to implement permitting and related activities.

In addition to the main permit provisions contained in Title IV of the bill, the Administration's proposal includes several market-oriented procedures allowing ~~for trading, banking,~~ and pooling of emissions and reduction requirements. These initiatives are intended to implement specific provisions within the context of the permit program in a flexible manner. In particular, the acid deposition control program of Title V incorporates a system of bankable and transferrable "allowances" for sulfur oxides emission control.

This report describes the elements of the permit provisions in the bill, the related allowance and trading features, and some of the questions and issues arising from them. Interested groups and individuals are beginning to attempt to answer these and other questions, as debate on President Bush's and other Clean Air Act proposals develops.

CLEAN AIR AMENDMENTS: PERMITS AND MARKET-ORIENTED PROVISIONS IN THE ADMINISTRATION BILL

INTRODUCTION

So far, relatively little attention has focused on the permit provisions of the Administration's proposed Clean Air Act (CAA) amendments (H.R. 3030/S. 1490), although their significance is potentially quite large.[1] Most of the commentary thus far has emphasized the programmatic elements in the proposal--e.g., ozone nonattainment, acid rain, or hazardous air pollutant provisions--rather than procedural elements. These procedural elements, however, will affect all regulated sources, regardless of location or air quality status, and all State and local air pollution control agencies.

In addition, the Administration's proposal includes several provisions allowing for trading, banking, and pooling of emissions and reduction requirements. These initiatives utilizing market-oriented concepts are intended to implement various specific provisions within the context of the comprehensive permit system in a flexible manner.[2] In particular, Title II, "Provisions relating to mobile sources," would allow automakers to engage in emissions trading and refiners and marketers to engage in fuel pooling. Also, Title V, "Acid deposition control," sets up a process under which fossil fuel power plants subject to the permit provisions of that title would receive emissions allowances for sulfur dioxide and/or nitrogen oxides that could be banked and/or transferred.

This report describes the elements of the permit provisions in the bill, the related allowance and trading features, and some of the questions and issues arising from them. Interested groups and individuals are beginning to attempt to answer these and other questions, as debate on President Bush's and other Clean Air Act proposals develops.

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[1] The overall bill is summarized in CRS Report 89-449, *Clean Air Act Amendments: A Summary of the Administration's Bill* (August 4, 1988).

[2] For a general discussion of market-oriented programs in the context of environmental control, *see* John L. Moore, et al., *Using Incentives for Environmental Protection: An Overview*, CRS Report 89-360 ENR, 1989.

PERMITS

Title IV of the Administration Bill

In a major departure from the current CAA and previously proposed amendments to it, Title IV of the Administration proposal would establish a comprehensive permit program, to be administered by the States.[3] This permit program would be modeled after the existing permit program in section 402 of the Clean Water Act (33 USC 1342).

Under the Clean Water Act, the discharge of a pollutant into the waters of the United States is illegal, unless it is in accordance with a permit issued by EPA (or a qualified State). Based on this model, H.R. 3030/S. 1490 proposes that the operation of major stationary sources shall be illegal unless it is in accordance with a permit program established pursuant to the legislation. At present, the only permitting requirements under the CAA are that new or modified major stationary sources obtain a construction permit, based on review for compliance with the prevention of significant deterioration (PSD) and nonattainment provisions of the Act. New source reviews are generally done by States. Under the Administration proposal, these new source review permits would continue as under current law, while operating permits, which are not now required, would be an additional mandate.

New – only construct permits – for operating permits PTO.

Under the Administration proposal, States would be assigned the primary responsibility for the permit program and EPA would be put in a fallback position, if a State failed to administer the program adequately. In contrast, the Clean Water Act program gives primary permit responsibility to EPA, which may delegate the responsibility to qualified States.

Sources subject to the comprehensive permit program under Title IV of the Bush proposal would include those which emit or have the potential to emit 100 tons per year of any pollutant, plus stationary and area sources[4] which emit or have the potential to emit 10 metric tons/year of any hazardous air pollutant or 25 metric tons/year or more of a combination of hazardous air pollutants,[5] and new or modified stationary sources subject to standards under

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[3] Appendix 2 to this report discusses provisions in several other pending bills which would call for a permit program to carry out air toxics programs under the Act.

[4] Area sources are numerous small sources that may cumulatively produce significant quantities of pollution, such as wood stoves, dry cleaners, services stations, and automobiles.

[5] Since 1970 EPA has regulated seven substances as hazardous air pollutants--mercury, beryllium, asbestos, vinyl chloride, benzene, radionuclides, and inorganic arsenic--and has listed coke oven emissions as a hazardous air pollutant but has not yet promulgated regulations for their control.

section 111 (new source performance standards).[6] However, EPA would have the discretion to issue regulations including other sources, or of exempting categories of sources from the permit requirement, if that would be consistent with the purposes of the Act. It is unclear how many sources would be governed by the new Federal program, but the number might well exceed the 65,000 now subject to the Clean Water Act's section 402 permit program.

The Administration proposal would require States or interstate air pollution agencies, within three years of enactment, to develop and submit a permit program to EPA. The Agency would have one year to approve or disapprove the submission. (The Clean Water Act gives EPA 90 days to review a State program, which States may elect to submit but are not required to, in contrast to the Bush clean air proposal.) It may be approved in whole or in part, or EPA may grant interim approval for no more than two years, if the program substantially meets requirements of the Act. If disapproved, the State would have 180 days to resubmit the program proposal. If the State fails to resubmit a program, EPA is required to withhold final action on SIP revisions and may apply certain sanctions (e.g., imposing a construction ban) or may promulgate a permit program for the State.

In acting on a State submission, EPA may approve a partial program if it covers all the required elements of permits for acid rain control, *or* for hazardous air pollutant emissions under section 112, *or* for other programs under Title I of the Act. States are still required to submit programs to cover the full range of permit activities.

A permit program is effective once approved by EPA, and sources then have six months (or, approximately four and one-half years after enactment) to submit a permit application to the permitting authority.[7] This application is to include a *compliance plan*, describing how the source will comply with all applicable requirements of the Act. A condition of permits is that owners/operators must submit progress reports at least every six months describing the status of compliance, and periodically to certify compliance. The Clean Water Act also requires the permittee to submit monitoring reports which describe compliance. Like the Clean Water Act, the proposal does not require the permitting authority to act on an application within a specified time (except that permits for affected sources under Title V, acid deposition, are to be issued by EPA by July 1, 1997, if a State has not acted[8]).

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[6] EPA's new source performance standard rules currently regulate 56 industrial categories.

[7] The legislative language is somewhat unclear on this point, but six months is the apparent intention.

[8] Title V, concerning acid rain, contains a series of modifications to the Title IV permit requirements; because relevant deadlines in Phase I of the acid deposition control program are too early for the State programs to be in

Permitting authorities must notify adjacent States and EPA of permit applications. States must notify adjacent States and EPA of permit applications. Adjacent States may make recommendations concerning permits, and the permitting State must respond to those recommendations, and to notify EPA if a recommendation is not accepted. (Once a State's permit program is approved by EPA, this process of notification, plus a new authority under which regional transport commissions would address interstate pollution problems, would supplant the existing procedures under section 126 for addressing interstate air pollution.[9])

EPA would have the right to review all permit applications and actions related to an application or modification. If, within 90 days, EPA objects to a permit, the State is to revise the permit accordingly; if not, EPA may issue or deny the permit. EPA's decision to issue or deny a permit is judicially reviewable. (This is generally the same under the Clean Water Act, although that Act provides the opportunity for a hearing on EPA's objections.) EPA also may terminate, modify, or revoke and reissue a permit, if it finds cause to do so and if it has first given the State an opportunity to act.

Like the Clean Water Act model, Title IV permits are to be issued for fixed terms, not to exceed five years.[10] Similarly, a permit may not be reissued or modified with less stringent emission limitations than under a previous permit or an applicable State implementation plan, except under

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effect, Phase I permits would be issued by EPA. Subsequently, under Phase II, the State permit program would supercede the Federal one. These modifications are discussed in detail below. In addition, see appendix 1, "Timetable of Permit Provisions in the Bush Clean Air Act Bill."

[9] Section 126 allows States to petition the EPA Administrator for action when emissions from another State are believed to be causing violation of national ambient air quality standards. While States' use of that process has been limited by procedural difficulties and unsuccessful to date (thus, arguably the provision is unnecessary), the proposal in H.R. 3030/S. 1490 would foreclose an existing opportunity to address potential interstate air pollution concerns. The transport commission proposal in section 102(f) of the Administration bill may adequately address such concerns, according to some State officials, if it clearly includes both non-urbanized *and* urbanized regions of metropolitan areas.

[10] During consideration of the most recent Clean Water Act amendments, P.L. 100-4, Congress debated extending the term of a permit to 10 years. Advocates said that a longer permit was needed because of the regulatory backlog resulting from five-year permit review and renewals. P.L. 100-4 retained the five-year permit term, on the basis that permitting authorities need to review facility operations more often, especially in order to incorporate new standards or mandate improved control technology.

restricted circumstances, including if the source can demonstrate that any increased emissions will be offset by reductions from another permitted facility.[11] The similar so-called "anti-backsliding" provisions in the Clean Water Act were debated extensively before they were enacted as part of the most recent amendments to the law, P.L. 100-4. At issue was how to fashion allowance for permit modifications in clearly appropriate cases (such as availability of information that did not exist when a permit was first issued), while restricting such opportunities and not hindering progress towards the water quality improvement goals of that Act. No evaluation has been done on implementation of the Clean Water Act anti-backsliding provisions which were enacted in 1987.

Unlike the Clean Water Act model, the Administration's proposal would direct States to collect fees sufficient to cover the direct and indirect costs of administering the permit program, with revenues to be used to support the agency's air pollution control program. The bill specifies that the fee schedule shall be set at a level to collect from all sources, in the aggregate, not less than $25 per ton of each regulated pollutant. In calculating the fee, the permitting authority is not required to include emissions by any source in excess of 4,000 tons per year, however.[12] For purposes of establishing permit fee schedules, regulated pollutants include volatile organic compounds, all national ambient air quality standard pollutants except carbon monoxide, and pollutants regulated under the hazardous air pollutant and new source performance standard provisions of the Act.[13] If a source does not pay the fee, it is subject to a 50 percent penalty. Any fees collected by EPA are to be deposited in a special fund in the U.S. Treasury for licensing and other services,[14] subject to appropriations, to carry out EPA's permitting activities

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[11] The bill gives EPA the discretion to fashion rules for this emissions offset process. The bill is silent, for example, on whether the other permitted facility must be subject to the same permitting authority or could be located in a non-contiguous geographic area.

[12] EPA can adjust the per ton fee as long as it "adequately reflects the costs of the program" [section 402(b)(3)(B)(i)]. Fees on emissions over 4,000 tons are discretionary.

[13] EPA has established national ambient air quality standards (NAAQS) for five pollutants (**not counting** carbon monoxide, which would not be covered by permit fee schedules) and currently regulates seven hazardous air pollutants under section 112 and 10 pollutants under new source performance standards. Five of the 10 NSPS pollutants are NAAQS pollutants, as well.

[14] This special fund was established in 1988 for the deposit of fee receipts from environmental programs including the licensing of pesticides and chemicals and for fees imposed on private firms seeking an EPA proficiency rating for radon mitigation methods. Funds are available until expended but are subject to appropriations.

(for example, for Federal permits under Phase I of the acid rain control program, discussed below).

Permit applications, permits, compliance plans, emission monitoring data, and compliance certifications would be available to the public.

Discussion

The permit proposal in the President's legislation raises a number of questions about implementation and the relationship to the structure of the existing Act (such as State implementation plans) and other proposals in H.R. 3030/S. 1490. How, for example, is the trading of emissions allowances under new Title V (acid rain) to be reflected in a fixed-term source permit that is to include a detailed compliance schedule? More broadly, how will these new Federal requirements affect ongoing State activities? As of 1987, 42 States had authority to collect permit fees, and more than 30 were doing so.[15] It is unclear how Federal permit and fee requirements will expand, complement, or conflict with those of the States.

Support for the proposal is likely to come from those concerned with enforcement of the Act. Experience under the Clean Water Act permit model strongly suggests that the existence of a comprehensive permit which includes operating limitations, monitoring, and reporting by the permittee provides valuable information to pollution control officials and others--including environmental groups and individual citizens--who seek to ensure compliance with the law and progress towards its goals.

Those who would be permitted are the most likely to oppose the permit provision. The Clean Air Working Group, consisting of some 2000 large and small business and trade associations, has suggested that the permit program be eliminated from the bill.

Being primarily responsible for carrying out the permit program, State air pollution control officials are particularly concerned about the potential impacts of these and related provisions in the Administration's bill. As yet, there is no apparent consensus among States; many will endorse permit programs and fee schedules that will preclude a competitive advantage for States that currently have no such programs, while others will oppose any such Federal intrusion, and still others are uncertain about the proposal. One preliminary view is that most States will not oppose the permit program proposal, fee schedule, or procedural elements (including Federal oversight, enforcement, and imposition of sanctions for failing to carry out a program).

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[15] Sullivan, Mary M. State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials (STAPPA and ALAPCO). *Air Permit and Emissions Fees, Results of a Survey.* Washington, D.C. 1987. 136 p.

Initially, the greatest concern among State officials is over the bill's inclusion of permit-by-permit review and veto by EPA. Such individual review is likely to lead to delay and "nitpicking" over the terms of permits, States say, even though EPA would be authorized to waive permit review for categories of sources. Based on State experience under the Clean Water Act (which also has such a waiver provision), this is a valid concern, as there continues to be friction between some States and EPA about the appropriate degree of Federal oversight once portions of the Federal water program have been delegated to a qualified State. Many air pollution officials would favor an approach similar to the Clean Air Act's new source review process, which has no counterpart in the Clean Water Act. Under the Air Act's new source review, States submit a generic program demonstrating compliance with EPA regulations; the Agency has the opportunity to participate in State new source permitting decisions; and EPA can audit the State program to determine ongoing compliance.

How difficult will States find it to establish the required permit programs within the deadlines outlined in the bill? As yet, there are no clear answers to this question. Some that now have permit programs for operating sources (including Ohio, Minnesota, Kentucky, and about 20 others) may have little problem in this regard. A number of States with no air permit and fee programs (for example, Georgia, Iowa, Montana, Rhode Island, and Nebraska) or construction permit programs only (such as Connecticut and Missouri) are likely to have greater start-up difficulties.

In addition, activities covered by existing permit and fee programs vary widely from filing and administrative only, construction, renewal or operating, compliance and inspection, banking or bubble application processing, and emissions.[16] Many are not as extensive as the program proposed in H.R. 3030/S. 1490. Many States are likely to need to change the basis for fee collection (State fees often are based on a fixed rate, according to the size of the source, for example). New or amended State enabling legislation may be required in some cases, a process that can take one or two years, depending on a State legislature's schedule. Implementation will be simplified to the extent that States can translate from the Clean Water Act permit program model to a new air permit program. This will depend, however, on the provisions in a bill that Congress may enact and on the individual States themselves, which vary in their institutions and arrangements for administering environmental programs.

The proposed permit program will impose costs on owners and operators of permitted sources, but the cost dimensions are unknown. Costs will arise as a source develops the information needed to apply for a permit and maintains the monitoring and recordkeeping required by an operating permit. Sources will also be required to pay the permit fee mandated by the bill; how permit fee costs will affect individual sources will depend on the amount of

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[16] STAPPA and ALAPCO, *Air Permit and Emissions Fees.*

emissions by that source and others emitting the same pollutant. In general, the cost burden is likely to fall most heavily on smaller sources and facilities, since environmental control costs are often a larger relative share of their operating expenditures, compared with major industrial operations. In either case, however, the procedural and compliance costs of the permit program are likely to be significantly less than costs incurred by a source which must make capital investments to meet other pollution reduction requirements under the bill.

ACID DEPOSITION: PERMIT MODIFICATIONS AND MARKETABLE ALLOWANCES

Permits

Title V modifies the permit program as it applies to steam electric-generating facilities subject to the acid rain provisions of the bill. These modifications would put steam electric facilities on a different procedural track and timetable from other sources to be permitted under Title IV. In addition, the permits for many sources will include "allowances" necessary for emission of SO_2 and/or NO_x.

Because Phase I deadlines for the acid deposition control program require compliance decisions well before the State permit programs authorized by Title IV would be in effect, Title V establishes a separate, interim Federal permitting process for affected sources. This Federal permitting process would be superceded by the State permit programs when they are approved. To implement the first phase of SO_2 reductions, EPA is to promulgate regulations for this Federal permit program within 18 months of enactment. These regulations are to be "in accordance" with the requirements of Title IV--presumably including permit fees (under the timetable of the bill, EPA will already have issued regulations under Title IV for the State permit programs; *see* appendix 1, "Timetable for Permit Provisions in the Bush Clean Air Act Bill").

Within 27 months of enactment, sources subject to Phase I of the acid deposition control program must submit permit applications to EPA--while other sources would not have to apply for permits until four or more years, after State permit programs under Title IV are effective. EPA then would have 6 months to issue Phase I permits for 107 powerplants named in the bill plus any other sources which meet specified criteria under section 504 or which choose to come under Phase I requirements.

States are expected to have established Title IV permit programs by 1996 and are required to issue permits for Phase II by July 1, 1996, thus giving utilities four and one-half years to install controls or otherwise comply with Phase II SO_2 reduction requirements. July 1996 is approximately two years after States would have begun administering the Title IV permit program, under the timetable in the President's proposal.

Allowances

As part of the Title V program, the bill establishes a system of marketable "allowances," which would be incorporated in each affected source's permit. An "allowance" is a limited authorization, issued by the Administrator, to emit, during a specified calendar year, a ton of sulfur dioxide or nitrogen oxides [sections 502(3) and 503(f)]. Allowances are issued for the years covered by a permit (up to 5 years), and may be transferred. The Administrator is to issue regulations governing the issuance, transfer, and use of allowances within 18 months of enactment.

In concept, the allowance system provides sources of SO_2 flexibility in achieving the SO_2 reduction goal. By limiting the availability of allowances, the bill constrains SO_2 emissions; by allowing sources to transfer allowances (and to trade SO_2 and NO_x allowances), the bill offers sources a way to find economically efficient reduction opportunities. In contrast, current law only limits SO_2 emissions by requiring compliance with the primary National Ambient Air Quality Standard, with which most areas are in attainment[17] and which does not address "acid rain"-induced adverse effects. Also, while current law and regulation provides some market-type opportunities for netting, banking, bubbling, and offsetting emissions, their application in practice has been quite limited[18]; and no interpollutant trades are allowed.

Ultimately, the Administration bill would create an extensive SO_2 emission allowance market system that substantially "caps" emission growth. After the year 2000, all fossil-fuel fired steam production facilities beginning operation after enactment of the bill must obtain allowances for their SO_2

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[17] The Clean Air Act requires each State to prepare a State Implementation Plan (SIP) that will limit emissions for which National Ambient Air Quality Standards (NSPS) have been set. The SIP must ensure that the NAAQS is maintained, but it need not reduce emissions that the ambient air can assimilate without violating NAAQS. For SO_2, most areas are in compliance with the NAAQS, so no further reductions under the SIP process would be required. In addition, however, the Act requires that *new* major coal-fired electric generating facilities meet a New Source Performance Standard (NSPS), regardless of the ambient air quality at the site on which they are placed. Beginning in 1971, the utility NSPS was 1.2 pounds of SO_2 per million Btus; after 1978, the NSPS was strengthened to require a 90 percent reduction in SO_2 for high sulfur coal and a 70 percent reduction for low sulfur coal. The 1978 standard is approximately equivalent to an 0.4 to 0.6 pounds of SO_2 per million Btu emission rate. Because of the stringent controls on new sources, acid deposition is an issue of emissions from older, SIP-regulated facilities.

[18] CRS Report 89-360 ENR, *Using Incentives for Environmental Protection: An Overview* (June 2, 1989), p. 68.

emissions, but under the bill no new allowances will be created for them; they must obtain their allowances from those already allocated to existing sources--or created through NO_x reduction or unaffected sources electing to reduce emissions. In concept, at some point in the distant future, essentially all sources[19] of SO_2 would deal in an SO_2 market for their necessary allowances.

For the foreseeable future, however, many aspects of how the allowance system authorized by the proposed legislation will work in practice are uncertain. The bill spells out certain details--for example, the bill specifies that 1.5 allowances for NO_x equal 1.0 allowances for SO_2 for purposes of interpollutant trading, and that Phase I NO_x allowances can be banked and used in Phase II. But other crucial issues affecting the transferability of allowances remain to be decided in EPA's regulations concerning their issuance, transfer, and use--for example, when banking would actually start, and within what regions utilities would be able to transfer allowances in Phase II.

Additional complexity is added because different categories of sources are subject to different emission limitations, which in turn determine the amount of SO_2 allowances that will be allocated to them. For existing sources--those in operation when the bill is enacted--the bill sets out how the SO_2 allowances will be allocated among sources in several situations: in Phase I of the acid deposition control program; in Phase II; in cases where otherwise unaffected sources elect to receive allowances (which they presumably would then trade); and for sources that choose to repower with clean coal technologies. As noted, the bill requires but does not allocate allowances for future sources--i.e., post-2000 fossil fuel-fired steam production facilities that commence operation after enactment of the bill. The bill would not require any source to have NO_x allowances--but a source can elect to receive them. NO_x allowances would be tradeable with SO_2 allowances at a 1.5:1.0 ratio. Table I depicts various categories of sources, the provision for allowances, and whether they would be transferrable.

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[19] Although the reduction requirements of the bill are directed at utility emissions of SO_2, the "cap" is so worded that it would apply to any fossil fuel-fired steam generating facility.

TABLE I

ALLOWANCES BY SOURCE CATEGORY

SOURCE	ALLOWANCE (Tons SO_2 per year)	EFFECTIVE DATE	TRADEABLE?
(PHASE I) Steam-electric, existing prior to enactment, ≥100 MWe & ≥2.5 #SO_2/mmBtu in any year up to 2001	Listed in Table A of bill, or baseline[a] x 2.5 ÷ 2000	1995-2000	Yes, within State or Service Area
Steam-electric, producing power to compensate for ≥20% reduction in use of facility in category above	Baseline x actual 1985 emission rate ÷ 2000	1996-2000	Yes?
(PHASE II) Steam-electric, existing prior to enactment, ≥75 MWe & 1.2 #SO_2/mmBtu in 1985[b]	Baseline x 1.2 ÷ 2000	2001-	Yes, within regions defined by EPA
Steam-electric, existing prior to enactment, <75 MWe *or* <1.2 #SO_2/mmBtu	None required	NA[c]	NA
Any unit (fossil-fuel fired steam production device) commencing operation after enactment	Required: SO_2 emissions must be offset with allowances from other sources with allowances	2001-	Yes, without regional restriction

Repowered steam-electric, demonstrating engineering with clean coal technology by 2001	*During extension:* Baseline x (lesser of SIP limitation or 1996 actual emission rate) [÷ 2000]	2001-2003	No
	Year of repowering: Baseline x 1.2 ÷ 2000, prorated	2003?	Yes
	After repowering: Baseline x 1.2 [÷ 2000]	2004-	Yes
	or		
	(Baseline x 1.2 [÷ 2000]) + (NSPS emission rate x increase in generating capacity following repowering x heat rate of repowered unit x 3.1)		No
Any unit not required to have an allowance can elect to receive allowances	*Through 2000:* Baseline x (lesser of 1985 actual rate or allowable emission rate) ÷ 2000	-2000	Yes[d]
	After 2000:	2000-	
	For SO_2, baseline x actual 1985 emission rate ÷ 2000		Yes[d]
	For NO_x, baseline x EPA-established rate ÷ 2000		Yes, at 1.5 NO_x to 1.0 SO_2[d]
Process sources as defined by EPA by regulation (discretionary)	To be defined by EPA by regulation	?	Yes[d]

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[a] The baseline is the average annual consumption of fossil fuel during 1985-1987 or, if the facility was not operating in those years, other years as determined by EPA. Measured in millions of Btus.

[b] If the facility did not operate in 1985, a year determined by EPA.

[c] NA = Not Applicable

[d] Allowances produced as a result of reduced utilization or shutdown of the source cannot be transferred or banked.

Discussion

The provisions of Title V affecting the permitting process and establishing allowances raise several issues, both in practical terms--such as how the requirements will conjoin with Title IV permit requirements and how the allowance system will work in practice--and in strategic terms--especially as to the implications of creating a market system for the right to emit pollution.

Procedural and practical problems could arise in the transition from the interim Federal permit process established for Phase I of the acid deposition control program to the State permit programs that are scheduled to be operational only six months before sources have to apply for their Phase II permits. As the timetable for interrelated EPA and State actions leaves little room for miscalculation, disruptions could result if any of EPA's permit-related regulations are delayed, if State programs cannot be established as quickly as envisaged, or if EPA cannot act to approve them expeditiously. Similar sources, in the same State or service area and perhaps having the same owners, could find that their permit applications go to different permitting authorities, potentially raising problems of consistency.

Questions are likely to arise about how allowances relate to permits. Can owners/operators of SO_2 sources be confident that allowances will be available for the full anticipated life of a facility? According to the proposed legislation, allowances will be issued for the life of a permit, which is five years [see section 507(e)(3)]. While one presumes new allowances will automatically follow with a new permit, owners/operators are likely to want clear assurance on this point. Similarly, they will likely want such assurance for any allowances that they received via a transfer from another source. Presumably, EPA's regulations would address these questions, but Congress may wish to include clear directions in any legislation.

If an allowance system is created, additional practical questions arise. For example, how will they be treated by State Public Utility Commissions? And, what is the likelihood that sources might hoard allowances, either to shut out competition or in anticipation of future growth? Because experience is so limited, such questions cannot now be answered.

Important questions remain about the procedures by which the NO_x allowances will be computed and made available. As a result, the implications of interpollutant trading remain speculative, not only for those generally interested in how the bill's emission reduction goals will be achieved, but also for those who wish to start planning whether to elect to become affected sources for NO_x and thereby transfer allowances, and in turn for those SO_2-emitting sources whose plans may be affected by the availability of NO_x allowances. Whereas the SO_2 allowances would be allocated according to limitations derived from a specified baseline, the NO_x allowances would be allocated according to limitations derived from an emissions rate designed to meet a future, estimated baseline. At least until EPA issues regulations, the amount and availability of NO_x allowances is unclear.

In addition, since there is no limit on total NO_x emissions--but rather a requirement to reduce emissions by 2 million tons from what they would have been in the year 2000--debate is likely to concern whether future growth in NO_x emissions (subject to NSPS constraints) could lead to future increases in acid deposition precursors, either NO_x itself or SO_2 through interpollutant trading. At the same time, the amount of NO_x allowances that might be available for trading cannot be known until the NO_x regulations are out as well as the regulations governing how sources elect to become affected sources.

This question of future limits will involve debates about the "cap" requirement,[20] by which all new fossil fuel-fired steam production devices must obtain allowances from existing sources. This requirement raises at least three issues: one, how it will affect desirable growth; two, variations in regional impact; and three, effects on potential competitors, particularly where new sources may be competitors of existing sources holding allowances.

Besides the more or less practical issues associated with the allowances system of the proposed legislation, the idea of creating a system of marketable "rights to pollute" will likely be debated.[21] Although the CAA currently allows some banking and trading of pollutants, the circumstances are narrowly constrained. Many economists have long advocated shifting pollution control toward market-oriented systems on the basis that they are more flexible and minimize the societal costs of pollution control; in general, economists are likely to support the concept. Industry and utilities have long advocated flexibility and minimal costs, but this advocacy has usually been manifest in a preference for flexible requirements and administrative discretion; they have not been particularly enthusiastic for a system of marketable permits (allowances, in the Administration bill). However, this lack of enthusiasm stems partly from questions about how the allowances would be allocated originally, and whether the number of allowances would expand as growth occurs. Industry and utilities are therefore likely to focus on these elements of the proposal; in particular, they find any "cap" objectionable. Generally, environmentalists have been even less enthusiastic about the concept, though their objections tend to arise from philosophical repugnance at marketing "rights to pollute," and even those who accept the concept often question its practicality.

As noted, the original allocation of allowances is a critical issue in who is likely to support the proposed system of H.R. 3030/S. 1490. Basically, under the proposal, transferrable allowances would be given free to sources

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[20] For a discussion of "caps" and their implications, see CRS Report 89-408, *Acid Rain Control: Baselines, Growth, and Emissions Caps* (July 5, 1989).

[21] For more extensive discussion of these issues, see *Using Incentives for Environmental Protection: An Overview*. CRS Report 89-360 ENR, June 2, 1989.

existing at the time of enactment. Sources beginning operation after enactment would have to buy into the system of marketable allowances. This raises questions about the availability and cost of allowances for new sources, which in turn has implications for the likely choice of fuels by new sources. One of several alternative approaches to the allocation of allowances--one not chosen in the Administration bill--would be for EPA to estimate the tonnage of SO_2 (and, potentially, NO_x) that the North American environment can absorb, and then auction off that amount of allowances. Compared to the approach of "grandfathering" existing sources, this would put all sources on more equal footing; but it would substantially raise costs to existing sources, most especially those that would have not only to buy allowances but also to finance reductions in emissions.

OTHER PROVISIONS ON TRADING AND INCENTIVES

Several provisions in Title II of the Bush bill, concerning mobile sources of pollution, and one in Title III, concerning hazardous air pollutants, would allow the type of market-based decisionmaking that Title V would establish. The goal of such systems is to provide regulated sources the flexibility to choose the lowest-cost approach to a given pollution reduction requirement, thus providing more efficient and cost-effective solutions. While EPA has had an emissions trading and banking policy in place for several years, experience with the policy is still rather limited and does not approach the scope of the proposals in the President's legislation.[22] Thus, there are many more initial questions than answers about interpreting and implementing these proposals. Neither the Administration nor others have yet presented any detailed discussion.

How to implement and enforce these market-oriented provisions--including emissions allowances, fuel trading, and others discussed below--in the context of comprehensive permits is an issue of major concern to State air pollution officials. The Clean Water Act does not provide a model, as it has no similar trading or incentive elements. And, while there has been limited trading and banking of emissions by a few sources in some States under an EPA policy, it is unclear how that experience will serve as a possible basis for implementing the Administration's broader proposals. What is clear is the need for discussion and analysis by EPA and others of how these related provisions of the proposal are intended to work, alone and in combination.

Title II Provisions

Some of the Title II features would require coordination with a State's comprehensive permit program under Title IV. Others would not require

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[22] For more extensive discussion of these issues, see *Using Incentives for Environmental Protection: An Overview*. CRS Report 89-360 ENR, June 2, 1989.

explicit coordination through permits but would be reflected in overall State efforts to implement the law. In the latter category, for example, cities designated under the Act to be "serious" nonattainment areas are to adopt clean-fuel vehicle programs, based on Federal performance standards requiring clean alternative fuels and vehicles to use them. But, EPA would be authorized under section 103 of the bill (new section 182(c)(3) of the Act) to approve a State's alternative strategy, if it would achieve equivalent long-term reductions in ozone-producing and toxic air emissions, compared with the clean-fuel vehicle standards. Depending on details of such an approved program, the alternative reduction strategy might impose controls on sources which are part of a State's permit program.

Another such provision not related to permits concerns production of clean alternative fuels (such as methanol or ethanol). Under section 201(b) of the bill (new section 212(b) of the Act), EPA may grant credits to vehicle manufacturers if they produce clean-fuel vehicles that reduce emissions below required levels or more clean fuel vehicles than mandated, or if they produce heavy-duty truck engines capable of operating on clean fuels. These credits may be transferred (traded or sold) to other manufacturers to demonstrate compliance with emission standards for gasoline-fueled vehicles. Similarly, EPA may grant transferable credits to producers of clean fuels, if they produce more such fuel in response to demand outside "serious" nonattainment areas.

Probably the most complex market-based provisions in the Bush Clean Air Act bill are found in section 218 (new section 214 of the law). Section 214 would require EPA to promulgate regulations within 12 months of enactment establishing performance standards for motor vehicles and fuels marketed in so-called "serious" ozone nonattainment areas where clean-fuel vehicle programs are to be adopted. The regulations are to provide performance standards to be achieved by motor vehicle manufacturers or fuel refiners that elect to use alternative strategies to meet emissions reduction requirements in the law. The EPA regulations are to provide for averaging of reductions in ozone-producing emissions among manufacturers and fuel refiners, that is, "trading" and "pooling" of emissions reduction requirements. For such an alternative to be approved by EPA, the manufacturer or refiner must demonstrate that it would meet or exceed the required performance standards over the same time period as the control measures to be replaced.

More broadly, section 214 also would permit (but not require) EPA to promulgate regulations allowing manufacturers, refiners, and fuel marketers to obtain approval for similar averaging strategies on a nationwide basis, not just in certain nonattainment areas. Like many other provisions in the bill, the EPA Administrator would apparently have considerable discretion under section 214 to determine how such averaging programs could be established, implemented, and enforced. How EPA interprets many of these issues, which are not explicit in the Administration's bill, will greatly influence the success of implementing any that are enacted.

These proposals in the Administration's bill appear to be modeled after a recent EPA program that allowed gasoline refiners to engage in banking and trading in order to phase-down the lead content in gasoline. This program is believed to have been the most effective to date in using market mechanisms to reduce the costs of environmental compliance.[23] However, the current Administration clean air proposal is broader in scope (for example, apparently involving interpollutant trading of ozone-producing emissions). Further, there is no clear role for the States in this process, although they are ultimately responsible for demonstrating compliance with the law, through State Implementation Plans. Analysis of the proposals is complicated by uncertainty over assumptions to be used: will there be extensive trading and pooling (including between geographic regions), with widespread impacts; or will there be minimal or no trading (due to administrative constraints which impose high transaction costs, for example), so that impacts--whether beneficial or otherwise--will be limited?

Title III--Alternative Emissions Limitations

A related provision in the Bush clean air bill which links both emission reductions incentives and permits is found in section 301 (creating new subsection 112(g) in the Act). Regarding existing sources that are subject to toxic air pollutant standards, it authorizes a State to issue a permit with alternative emissions limitations in lieu of standards, if the source demonstrates that it has previously achieved voluntary reduction of emissions by 90 or 95 percent (depending on the type of pollutant).

By utilizing this incentive to reduce its emissions, the source could achieve air quality improvements at less cost than if it were required to install maximum achievable control technology, pursuant to standards issued by EPA. It remains to be seen, however, whether the EPA standards, when promulgated, would mandate *more* than the 90 or 95 percent reduction included in subsection 112(g) and, thus, would achieve *more* air quality improvement than voluntary reductions would provide.

CONCLUSION

It is unlikely that debate over the procedural elements of the Administration's Clean Air Act proposal will be the critical element in determining whether Congress accepts, rejects, or modifies the legislation. Nevertheless, some nuances of the proposals are likely to be debated intensely (such as the trading of SO_2 and NO_x emissions reductions under the acid rain provisions). If accepted and enacted, however, the permit system and particularly the provisions for market-oriented programs would significantly affect decisions, activities, and resources related to achieving the programmatic substance of the bill.

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[23] Ibid., pp. 46-47.

With the large number of uncertainties surrounding many of the provisions in the Administration proposal, it is very difficult at this time to delineate likely impacts. This uncertainty reflects both the lack of experience available to assess many of the proposals as well as the administrative discretion built into many of the procedures. Until regulations concerning the permit program put flesh to the bone, and allowances and other market-oriented provisions are sorted out, many questions can only be identified and debated, not answered.

Nevertheless, the proposed permit system does parallel the permit program of the Clean Water Act, which provides some basis for projecting general implications, even though many details differ. Moreover, the permit system is compatible with the basic structure and approach of the Clean Air Act. Consequently, it is likely to be less controversial than the Title V allowance system and other market-oriented provisions in Title II and elsewhere, which do represent a significant redirection.

How Congress will respond to the market-oriented provisions is unclear. Several scenarios are possible. The uncertainties and the lack of debate thus far on introducing new systems of market-oriented procedures into the Act could lead Congress to delay the timetable for considering the legislation, pending further analysis, hearings, and debate. Or, the congressional debate may focus on programmatic issues, and some or all of the market-oriented provisions might be enacted without a great deal of discussion. Or, under another scenario, Congress might move ahead on the more familiar programs while deleting--or minimally endorsing, or experimentally testing--initiatives for market-based approaches to pollution control, leaving them for more extensive consideration for another time. Early indications suggest that the market-oriented provisions will attract close scrutiny.

APPENDIX 1.
TIMETABLE FOR PERMITS UNDER BUSH CLEAN AIR ACT PROPOSAL

Enactment	12 Months After	18 Months After	27 Months After	33 Months After	36 Months After	48 Months After	54 Months After	Jan. 1, 1995	Dec. 31, 1995	July 1, 1996	July 1, 1997	Jan. 1, 1998	Dec. 31, 1998	Jan. 1, 2000	Dec. 31, 2000
Title IV Permits															
ASSUME Jan. 1, 1990	ASSUME Jan. 1, 1991 EPA issues rules for State permit programs (Sec. 402(b))				ASSUME Jan. 1, 1993 States to submit permit program applications covering all applicable standards, regs, or requirements under CAA (Sec. 402(d))	ASSUME Jan. 1, 1994 EPA to approve State permit program, in whole or in part; also may give interim approval for 2 years (Sec. 402(d))	ASSUME July 1, 1994 If State program was disapproved, State resubmits NO deadline is specified for EPA action on resubmittal, but sanctions are listed (Sec. 402(d)) If State program was approved, sources submit permit applications (Sec. 403(a)) NO deadline for State action on permit application; may assume State takes 6 months, as for EPA permit under title V, above	If State acts on permit application in 6 mos., permit takes effect now Permit is for 5-year fixed term (Sec. 402(b)(5)(B)) Permit would expire Dec. 31, 1999						Likely date for renewal of title IV permits, if issued as indicated on Jan. 1, 1995	
Title V Permits															
ASSUME Jan. 1, 1990		ASSUME July 1, 1991 EPA issues acid rain permit regulations (Sec. 507(c)(3))	ASSUME Apr. 1, 1992 Affected utilities apply for Phase I permits, including plan for complying with title V (Sec. 507(c)(1))	ASSUME Oct. 1, 1992 EPA shall disapprove Phase I permits, if application is not in compliance with Clean Air Act (Sec. 507(c)(2))				Sources subject to Phase II are to submit permit applications to States (Sec. 507(e)(1))	Phase I requirements take effect for reductions of SO2 (Sec. 504(b))	States must issue permits for Phase II of SO2 reductions (18 months after applications are submitted and MAYBE 2 years after State permit program under title IV takes effect) (Sec. 507(e)(2))	EPA issues Phase II permits if State does not (Sec. 507(e)(2))	Small units must submit Phase II applications (Small units are those less than 75 MWe or 1.2 lbs/mmBTU) Also, sources subject to NOx requirements must submit applications for permits (Sec. 507(e)(4))	New units submit permit applications (or, 24 mos. before commence operations, whichever is later) (Sec. 507(f)(2)) No deadline is specified for action on permits		Affected sources must achieve NOx reduction provided under EPA regs (No deadline is specified for EPA to issue NOx regs (Sec. 506(b)) Phase II SO2 requirements take effect for affected units (Sec. 505(b)) Also, small units are subject to SO2 reduction requirements (Sec. 505(c))

Appendix 2. Permit Provisions in Other Legislation

Other Clean Air Act proposals pending in the Congress, although less comprehensive than the Administration's bill, include permit provisions which differ in approach from H.R. 3030/S. 1490. For example, three bills to amend section 112 of the Act (H.R. 2585, introduced by Reps. Leland, Waxman, and others; H.R. 4, by Rep. Dingell; and S. 816, by Sen. Durenberger and others) contain similar requirements that sources which are subject to emissions standards for hazardous air pollutants obtain an operating permit. More like the Clean Water Act permit model, these bills would give primary responsibility to EPA, which could delegate permitting to States which elect to submit a qualifying program.

Required elements of permit programs are similar in the three bills. State programs are to include enforcement authority, including civil and criminal penalties; public participation in permit decisions; five-year limit on issued permits[1]; and authority to terminate or modify permits for cause. Both EPA-issued permits and State programs are to include monitoring and reporting requirements; and imposition of fees to offset the costs of administering the permit program. Permit fee revenues are to be used by the permitting authority to administer the permit program; S. 816 is more explicit that fees for toxic air permits shall not be used to support other aspects of a State air pollution control program, although additional State permit fees would be allowed.

Two of the bills, S. 816 and H.R. 4, authorize the same type of EPA permit-by-permit review and veto of State-issued permits included in the Administration's bill. Both would prohibit issuance of a State permit, if EPA objects in a timely manner, thus giving EPA the authority to issue or deny the permit under a process that States do not favor, as indicated from their reaction to Title IV of the Bush bill. H.R. 2585, in contrast, is silent on the subject of EPA review of individual State permits.

Like the Administration bill, H.R. 4 provides that a single permit may be issued for a facility with multiple sources.

Two of the bills, S. 816 and H.R. 2585, contain authority for two-stage permits. H.R. 2585 would allow an existing source subject to a section 112 standard to certify compliance with the standard in order to obtain a temporary operating permit, for not more than one year. During the one-year period, the permitting authority would be required to complete inspection of the facility to determine whether a full operating permit should be issued. In a similar vein, S. 816 would authorize a temporary operating permit for existing **and new** sources, following certification of compliance by the source owner or operator. Under this Senate bill, within six months the permitting

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[1] H.R. 4 provides for 10-year permits.

authority would begin a review of the facility to determine whether a full operating permit should be issued. Sources with temporary permits would be required to recertify annually their compliance with section 112--suggesting that temporary permits could be valid for longer than just six months.

Both S. 816 and H.R. 2585 state that, to the extent possible, air toxics permits should be consolidated with other permits required under the Act.

Among the several bill addressing acid rain control, the Administration's is the only one that proposes to use permits to implement an SO_2 and NO_x reduction program. The other congressional proposals (including H.R. 144, H.R. 1470, H.R. 2379, H.R. 2586, H.R. 2909, and S. 57) would utilize State plans--either amendments to existing State implementation plans or supplementary plans--to carry out the emissions reduction requirements and emissions trading provisions (under H.R. 144, H.R. 2379, H.R. 2586, and H.R. 2909). (For further information, see *House Acid Rain Bills in the 101st Congress: Comparison of Major Provisions*, Report 89-450 ENR, Aug. 1, 1989)

DON NICKLES
OKLAHOMA

permitting

COMMITTEES:
APPROPRIATIONS
BUDGET
ENERGY AND NATURAL
RESOURCES

United States Senate

WASHINGTON, DC 20510-3602

January 10, 1990

KATIE

Fr: Rick

Dear Colleague:

At the close of the 1st Session, the Senate Environment and Public Works Committee reported out S. 1630 as amended, its 430-page bill to amend the Clean Air Act. During the one day of markup of this important bill, not a single amendment was considered to Title V, which establishes an extraordinary new permit program for all sources of air emissions in the United States.

This permit program would require sequential approval by both the state and the EPA of each permit application filed by more than 50,000 of the nation's businesses for every emissions point that meets pollutant threshold levels regulated by other provisions of S. 1630. Moreover, this new permit program would grant the EPA virtually unbridled discretion to amend state air regulations in approved State Implementation Plans. This new, two-level permit program would duplicate existing state air permit programs and inject enormous uncertainty into the regulatory process.

Such a scheme could make expanded growth, or even modest adjustments in manufacturing processes, difficult. I have my doubts whether such a monumental regulatory program is even possible without greatly increasing state and federal bureaucracies and without jeopardizing normal competitive business activities.

It is clear that the permit program proposed in Title V of S. 1630 has not received the scrutiny it deserves in light of the enormous potential impact such a program would have on the economy in general and small businesses in particular. Accordingly, I am enclosing for your information a booklet developed by the National Environmental Development Association's Clean Air Act Project that outlines a number of its concerns with these permitting provisions.

Now that the members of the Senate have the opportunity to review S. 1630, I hope you will pause to carefully review Title V and the enclosed booklet. Over the next few weeks I will be working to develop viable and balanced alternatives to these permitting provisions. I welcome your input in finding workable approaches to give the EPA the power it needs to administer the Clean Air Act in a manner that will not damage industrial growth or reduce employment.

Sincerely,

Don

DON NICKLES
U.S. Senator

Enclosure

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Federal Air Permits

Realistic Hope or Regulatory Quicksand?

NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION
CLEAN AIR PROJECT
JANUARY 1990