United States
Environmental Protection
Agency

Office of
General Counsel

April 1987

EPA

General Counsel Opinions From the Office of General Counsel

January 1980 Through June 1985

General Counsel Opinions
From the

OFFICE OF GENERAL COUNSEL

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

January 31, 1980, Through June 7, 1985

Washington, D.C. : 1987

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FOREWORD

This volume contains selected legal opinions of the General Counsel of the United States Environmental Protection Agency (EPA), Washington, D.C.* These legal opinions have been selected for publication as having general applicability and continuing interest to EPA, State and local governments, or the private sector.

These legal opinions are for the period January 31, 1980, through June 7, 1985. Although these legal opinions are only a small portion of the opinions rendered by the Office of General Counsel, they cover all the major EPA program areas authorized by Federal statutes.

These legal opinions have been lightly edited for format, syntax, and clarity, but have not been altered in any way to change the content of the opinions as originally issued. Some opinions refer to attachments to the original opinions; these references remain, but the attachments are not included in this volume.

Each legal opinion was issued in response to a request for an opinion. It was based on the Federal statute and regulations that were in effect at the time and may have been based upon a particular and unique set of facts. Any person intending to rely on a position adopted or an interpretation expressed in these legal opinions is advised to take these factors into consideration.

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*The Office of General Counsel acknowledges the assistance of Joseph Foote, Esq., in preparing this volume for publication.

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December 1, 1981

MEMORANDUM

SUBJECT: Steel Industry Compliance Dates Later Than December 31, 1982

FROM: Robert M. Perry
General Counsel

TO: William A. Sullivan, Jr.
Deputy Associate Administrator
for Enforcement Policy

You have requested my advice as to the circumstances under which a steel company may obtain extensions of compliance dates beyond December 31, 1982, under the Clean Air Act, without having to apply for such an extension under the Steel Industry Compliance Extension Act of 1981, Pub.L. 97–23, 42 U.S.C. § 7413(e) (Compliance Extension Act).

Question

May a company that is eligible to apply for relief under the Compliance Extension Act obtain compliance extensions beyond December 31, 1982, without resort to the Act?

Answer

Yes—but only by meeting the requirements for a Delayed Compliance Order (DCO) set out in § 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d).

Discussion

Background

The Clean Air Act provides that each area of a State that has been designated under § 107(d), 42 U.S.C. § 7407(d), as not meeting an ambient air quality standard ("nonattainment area") must submit a revision to its State Implementation Plan (SIP) that will assure that that standard will be attained and maintained as expeditiously as practicable, but no later than Decem-

ber 31, 1982. § 172(a)(1), 42 U.S.C. § 7502(a)(1).[1] These revisions, called Part D plans, must, *inter alia*, "contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of [§ 172]." § 172(b)(8), 42 U.S.C. § 7502(b)(8).

For the pollutants of concern here (particulates and SO_2), this deadline is absolute—Congress provided no means by which the Environmental Protection Agency (EPA) or the States could extend the deadline beyond December 31, 1982. Accordingly, all sources in a nonattainment area must be in compliance with the requirements of a State's Part D plan for that area by December 31, 1982, for otherwise the State cannot assure attainment of the standard by that date. The precise question is therefore whether there are any statutory mechanisms by which a source may nonetheless be permitted to comply with the Part D plan at a later date.

Permissible Means of Extending Compliance Dates by Administrative Action

The language and structure of the Clean Air Act indicate that Congress explicitly addressed the question of the means by which a source may be permitted to comply with a Part D plan after December 31, 1982, and concluded that such extensions may only be granted under limited and precisely defined circumstances. In particular, Congress provided in § 110(i) of the Act, 42 U.S.C. § 7410(i), that:

> Exception for a primary nonferrous smelter order under section 119, a suspension under section 110(f) or (g) (relating to emergency suspensions), an exemption under section 118 (relating to certain Federal facilities), an order under section 113(d) (relating to compliance orders), a plan promulgation under section 110(c), or a plan revision under section 110(a)(3), *no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.* (Emphasis added.)

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[1] For ozone and carbon dioxide, § 172(a)(2), 42 U.S.C. § 7502(a)(2), allows an extension of the attainment deadline under certain circumstances to December 31, 1987. However, that extension is not relevant here, for iron and steel sources are principally concerned with SIP requirements for the control of particulates and SO_2, for which the attainment deadline is December 31, 1982.

Section 110(i) thus forbids the Administrator from modifying any SIP requirement unless she follows one of the procedures outlined above. Since a compliance date extension effectively modifies a SIP, that extension can therefore only be made by following one of those procedures.[2]

Of these procedures, only §§ 110(a)(3), 110(c), and 113(d) warrant discussion.[3] However, the logic and legislative history of the 1977 amendments compel the conclusion that compliance extensions may not be granted through a SIP revision submitted by the State and approved by EPA under § 110(a)(3) or through a federally promulgated SIP revision under § 110(c). As noted above, the Act sets December 31, 1982, as an absolute deadline by which States must demonstrate attainment of the ambient air quality standards. Clearly, a State could not make such a demonstration if it allowed sources to meet a post-1982 compliance date for emission limitations designed to meet the 1982 deadline.[4] Moreover, the legislative history confirms that Congress expressly considered and rejected use of SIP revisions as a means of extending compliance dates. As the House noted:

> As is made clear in new section [110(i)], the committee language is intended to confirm the correctness of the Supreme Court's opinion in the *Train* case. If a State variance or other delaying action will not prevent or interfere with the timely attainment and maintenance of the national ambient standards or with the policy of prevention of significant deterioration, and the Administrator so determines, then such a variance may be treated as a variance and approved by the Administrator

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[2] Section 110(i) was inserted in 1977, well before the Compliance Extension Act was passed. Accordingly, it obviously does not preclude use of that Act to allow compliance date extensions.

[3] Section 118 is irrelevant because it applies only to Federal facilities. Section 110(f) concerns fuel-burning sources (*e.g.*, power plants). Section 110(g) involves a potential plant closing due to a SIP requirement, which presumably is not applicable here.

[4] Of course, a State could extend a compliance deadline past 1982 if that extension would not interfere with the State's demonstration of attainment. For example, the State could grant a compliance extension for a source if it modified the SIP in some fashion so as to assure attainment by the 1982 deadline.

> under section 110(a)(3) of the act. On the other hand, if a State variance or other delaying would have any such effect, then it may only be issued in accordance with the procedures, criteria, and time constraints specified in section [113(d)].

H.R. Rep. 294, 95th Cong., 57; *see also* S. Rep. 127, 95th Cong., 45.[5] Accordingly, under the Act (as codified prior to passage of the Compliance Extension Act), EPA may only extend compliance deadlines by following the procedures for issuing a DCO under § 113(d) of the Act, 42 U.S.C. § 7413(d).[6]

The legislative history of § 113(d) further compels the conclusion that that section provides the only avenue for extending compliance dates under the Act. Prior to the 1977 amendments to the Act, EPA had followed a practice of issuing enforcement orders under § 113(a) of the Act, 42 U.S.C. § 7413(a), which allowed sources additional time in which to comply with SIP requirements. Both the House and the Senate felt that this was "of questionable validity" under the Clean Air Act, H.R. Rep. 294, 95th Cong., 55; *see also* S. Rep. 127, 95th Cong., 45. As the Senate noted:

> States normally cannot make these orders part of the SIP because the orders, allowing the source until some time after the necessary attainment date, are technically inconsistent with the attainment and maintenance deadlines specified in the Act. This leaves the source subject to citizen suits and to potential inconsistent enforcement action taken by the Administrator.

S. Rep. 127, 95th Cong., 45. Accordingly, Congress added § 113(d) to the Act precisely "to remedy that practice, [thereby] prohibiting delay in compliance or the issuance of any enforcement order except under the terms specified in [that] section."

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[5] In *Train* v. *NRDC*, 421 U.S. 60 (1975), the Supreme Court held that variances of a SIP requirement may only be issued if they are first approved by EPA and if they do not interfere with the State's demonstration of attainment and maintenance of ambient standards.

[6] A DCO is available for any source which demonstrates that it "is unable to comply with any requirement of an applicable implementation plan." § 113(d)(1), 42 U.S.C. § 7413(d)(1). If the source receives a DCO, then it must comply with the applicable SIP requirement no more than 3 years after the date specified in the SIP. § 113(d)(1)(D), 42 U.S.C. § 7413(1)(D). Thus, § 113 allows compliance extensions up to December 31, 1985.

Id. In addition, Congress inserted § 110(i) to expressly preclude EPA from using any other administrative method of extending compliance deadlines. *See* H.R. Rep. 294, 95th Cong., 57.

In sum, the Administrator clearly lacks authority to extend compliance deadlines by any administrative procedure other than that provided by § 113(d) of the Act, or by newly codified § 113(e), which was added by the Compliance Extension Act. However, a question remains as to whether the Administrator may join in a judicially issued consent decree that authorizes compliance dates beyond December 31, 1982.

Permissible Means of Extending Compliance Dates by Consent Decrees

For iron and steel sources, at least, the language of the Compliance Extension Act precludes the use of judicially issued consent decrees to extend compliance dates beyond 1982, unless those decrees meet the criteria specified in the Act. The Compliance Extension Act provides that the Administrator may enter into a consent decree allowing an iron and steel source to extend its compliance dates up to December 31, 1985, provided that, *inter alia:*

> The Administrator and [the owner of the source] consent to entry of Federal judicial decree(s) establishing a phased program of compliance to bring each stationary source at all of such person's iron- and steel-producing operations into compliance with the [SIP] . . . as expeditiously as practicable but no later than December 31, 1982, or, in the case of sources for which extensions of compliance have been granted, no later than December 31, 1985 . . . .

§ 113(e)(1)(C), 42 U.S.C. § 7413(e)(1)(C). By its terms, then, § 113(e) forbids the Administrator from agreeing to a consent decree that allows compliance extension beyond December 31, 1982, unless the sources involved meet the criteria f § 113(e)(1).

This reading of § 113(e) is amply buttressed by the legislative history of the Compliance Extension Act. First of all, Congress predicated passage of the Act in part upon the difficult financial posture of the steel industry, *see, e.g.,* H.R. Rep. 121, 97th Cong., 8–9, and in part upon its understanding that the industry was facing mandatory December 31, 1982, compliance deadlines. For example, the House Report states that "[u]nder the present law, the Clean Air Act Amendments of 1977, the

deadline for compliance with pollution control requirements is December 31, 1982." *Id.* at 1.

More important, Congress intended that this December 31, 1982, deadline be extended only upon a showing that the funds the steel industry would otherwise spend on pollution control were needed for modernization. Absent such a showing, the December 31, 1982, date would continue to apply. Thus, the House stated that "[u]nder the proposal, modernization of the steel industry is the only justification for the extension of the December 31, 1982 compliance date," *id.* at 10; and it went on to note:

> The phased program [required by § 113(e)] will thus lead to compliance as expeditiously as practicable but no later than December 31, 1982, unless the source has received an extension under this subsection, and then not later than December 31, 1985 for such sources receiving an extension.

Id. at 11; *see also* S. Rep. 133, 97th Cong., 2, 5.

Congress therefore provided in the Compliance Extension Act that the Administrator may not enter into consent decrees with the steel industry that allow steel sources to extend compliance dates beyond December 31, 1982, unless those sources meet the criteria of the Act. The Act is codified as § 113(e) of the Clean Air Act. If the Administrator were to initiate an enforcement action under any other section of the Clean Air Act, and then consent to a judicial decree allowing a compliance date extension, that decree would fundamentally conflict with the requirements of § 113(e). Therefore, in view of the standard principle of statutory construction that statutes are to be read so as to make the various provisions consistent with each other, and in view of the clear legislative intent underlying the passage of the Compliance Extension Act in 1981, well after the Clean Air Act was amended in 1977, the Administrator appears to lack authority to join with steel sources in consent decrees that extend compliance dates beyond December 31, 1982, unless those decrees are issued pursuant to the Compliance Extension Act.[7]

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[7] Not analyzed here is the possibility that in the context of an EPA enforcement action under § 113(b), a court might on its own motion grant a compliance date extension past 1982.

Conclusion

The Administrator may extend compliance dates beyond December 31, 1982, only if she enters into a consent decree pursuant to the Compliance Extension Act (now codified as § 113(e) of the Clean Air Act) or if she issues a delayed compliance order pursuant to § 113(d) of the Clean Air Act.

March 29, 1982

MEMORANDUM

SUBJECT: Insulation of Enforcement Attorneys From Review of Steel "Stretch-Out" Applications

FROM: Robert M. Perry
General Counsel

TO: William A. Sullivan, Jr.
Enforcement Counsel

Issue

Must enforcement attorneys who are involved in enforcement actions against steel facilities be insulated from review and recommendations on applications for steel stretch-out extension involving the same facilities?

Answer

No. Steel stretch-out extensions may only be granted through consent decrees entered in a Federal court. Accordingly, review of stretch-out applications should be seen as an exercise of the Environmental Protection Agency's (EPA's) enforcement function, and there is no constitutional or applicable statutory prohibition against the same person working on more than one enforcement action involving the same facility.

Background

Congress amended the Clean Air Act in July 1981 by adding a new § 113(e). Pub.L. 97–23 (July 17, 1981). This section allows the Administrator to agree to schedules in Federal court consent decrees that may extend until December 31, 1985, the deadline by which iron- and steel-producing operations must comply with emission requirements.

In light of the Seventh Circuit's decision in *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994 (1980), you have asked whether enforcement attorneys involved in pending or proposed enforcement actions against steel companies must be insulated from the review of applications under § 113(e) for extensions of time for the facilities involved. In *Bethlehem*, the Seventh Circuit ruled that EPA's action allowing review of a State-approved delayed compliance order (DCO) for a Bethlehem facility under § 113(d) by enforcement attorneys who were then litigating an

enforcement action against Bethlehem over the same facility "raise[d] significant questions" about the "fundamental fairness" of the review process, and vacated the Agency's disapproval of the DCO.[1] The court emphasized the similarity of the issues involved in the two actions, the Agency's refusal to include certain internal memoranda in the record supporting the disapproval, and indications that the enforcement attorneys had effectively influenced the Agency to disapprove the regulatory § 113(d) extension in order to preserve their enforcement action.

Discussion

A. *Commingling of Functions Generally*

The goal of the separation of functions doctrine is to ensure fairness in decisionmaking by maintaining a distinction between adversarial advocacy functions, such as enforcement, and essentially "neutral" decisionmaking functions, such as agency adjudication and rulemaking. The enforcement function is prosecutorial: it involves asserting a position in an effort to obtain compliance with the law or to impose a sanction for violating the law. *See, e.g.*, Davis, *Administrative Law Treatise*, § 13.07 (1958), 5 U.S.C. §§ 551(10), 554(d). By contrast, the regulatory function involves an essentially objective effort to "implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). In practice the distinction between functions is generally maintained by the use of different personnel to perform the tasks related to each function. Review of stretch-out applications by enforcement attorneys may appear to be a commingling of functions when those attorneys are involved in enforcement actions against the applicant because they are advocates engaged in what appears to be a regulatory function: implementing or interpreting § 113(e) with respect to the applicant by determining eligibility.

The general rule is that "the combination of investigative [prosecutorial] and adjudicative functions does not, without more, constitute a due process violation"; rather, such a finding rests on "special facts and circumstances presented in a case."

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[1] The Court held that the Administrative Procedure Act, 5 U.S.C. §§ 553, 554, 556 did not apply to EPA actions under § 113. This result appears to be sound; and as no other specific statutory separation of functions requirements apply, the analysis in this memorandum addresses only the due process issue raised by *Bethlehem*.

Withrow v. *Larkin*, 421 U.S. 35, 58 (1975). "The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle." 421 U.S. at 52. And in reviewing particular circumstances, a presumption of honesty and integrity must be overcome before a due process violation may be found.

1. Specific applications of the doctrine

The combination of adjudicative and regulatory functions with discretionary investigative or prosecutorial functions has been upheld in most of the statutory and factual situations in which the question has been presented.[2] Indeed, the courts have never in recent years struck down in the abstract—as applied to all cases—any administrative review system on the grounds of commingling of functions. In both of the leading cases in which agency rulings were overturned because commingled prosecutorial and adjudicative functions violated due process, *Amos Treats & Co.* v. *Securities Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962) and *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), individuals who had been so actively involved in investigating and prosecuting violations as to have "prejudged" the merits subsequently became members of the adjudicatory board that ultimately ruled on the merits of each case. Neither of these cases found the statutory scheme inherently violated due process.

2. The relevance of *Bethlehem*

Bethlehem also turns on the specific circumstances involved, and should not be viewed as establishing any general principles for § 113(d). It is evidently the only case to date in which the actions of agency personnel other than the ultimate decisionmakers have been the basis of a finding of fundamentally unfair commingling of functions. In *Bethlehem*, the Agency did not act on the State-issued order within the 90-day period allowed by § 113(d)(2), but did pursue its enforcement case against the facility covered by the order during that time. Memoranda from attorneys involved in the enforcement case

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[2] *See, e.g., Withrow, supra* (medical examining board may constitutionally initiate investigation of misconduct, suspend license, and press criminal charges); *Martin-Trigona* v. *Underwood*, 529 F.2d 33 (7th Cir. 1975) (State bar committee may investigate, advocate, and conclusively determine lack of fitness for admission); *Richardson* v. *Perales*, 402 U.S. 389, 91 S.Ct. 1420 (1971) (Social Security hearing examiner may investigate and determine eligibility for benefits).

outlined objections to the order based on the impact the order would have on the case; some of these materials were withheld from the rulemaking docket.

The court's emphasis on facts and precedent related to "ex parte" communications, the strategic timing of Agency actions to synchronize with the enforcement litigation, and the Administrator's use of language "substantially identical" to language found in one memorandum from the lead enforcement attorney, 638 F.2d at 1008–1010, reveal the court's reliance on a unique combination of factors to reach its conclusion; the opinion comes very close to stating that the enforcement attorneys improperly made the final decision. Even under § 113(d), therefore, the *Bethlehem* case seems considerably removed from the customary review of DCOs by enforcement personnel, which involves only a review of the provisions of the order to ensure that statutory requirements are met.

B. *Application to Section 113(e)*

1. Statutory differences

Several significant differences between § 113(d) and § 113(e) suggest that as a general rule, review of § 113(e) applications by enforcement attorneys should not give rise to improper commingling of functions.

In contrast with § 113(d), which is regulatory in nature, § 113(e) can only be construed as an enforcement function in which the Agency's enforcement personnel are necessarily involved at several important steps. Under § 113(e), the sole means of implementing an extension of time is the entry or modification of a consent decree in a Federal court. Since the entry of such a decree must be preceded by the filing of a complaint, it is clear that enforcement attorneys must be involved. Moreover, the decree granting the extension must establish or incorporate schedules of compliance for all the applicant's iron- and steel-producing operations and facilities. § 113(e)(1)(C). The broad scope of this undertaking plainly calls for participation by enforcement attorneys familiar with any previous violations, agreements, or negotiations involving the facilities in question. Similarly, certain factual findings must be made before the Administrator may agree to an extension, in-

cluding a finding that the applicant is in compliance [3] with all existing judicial decrees concerning air pollution from its iron- and steel-producing facilities. All of these factors indicate that Congress viewed § 113(e) extensions of time as a part of the Federal enforcement process, rather than a quasi-adjudicatory administrative action.

The provisions for judicial review support this conclusion. Judicial review of any finding or other action on an extension application may be had only in a district court enforcement action brought against the applicant (§§ 113(e)(7), 113(b)), not in the courts of appeals as for review of § 113(d) and other administrative regulatory actions. § 307(b). Moreover, § 113(e) explicitly contemplates extension orders as a means of resolving pending enforcement litigation, and incorporates judicial review of extension-related decisions into those same proceedings. § 113(e)(7)(B).

Conclusion

These contrasts in statutory provisions indicate that the *Bethlehem* holding should not be applied to the review of § 113(e) applications. *Bethlehem* involved a narrowly defined administrative regulatory function under § 113(d); the Agency's enforcement function was not a part of the mandated review process, and the court reacted strongly against what it perceived to be an unfair commingling of enforcement and regulatory functions in which the Agency's regulatory decisions were improperly influenced by the desire to preserve the enforcement case. Section 113(e), by contrast, authorizes the Administrator to negotiate a certain type of settlement in certain disputes. It creates a discretionary extension mechanism which is part of the enforcement process. Neither logic nor case law requires the use of different personnel for different portions of the same enforcement action. Indeed, Congress in § 113(e) explicitly required findings and procedures that critically depend on the participation of personnel familiar with all other present and proposed enforcement proceedings against the company or the specific facilities involved.

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[3] *De minimis* violations may be allowed at the discretion of the Administrator; the determination that a given violation is *de minimis* would seem to be within the scope of enforcement attorney's expertise.

(Approx.) June 25, 1982

MEMORANDUM

SUBJECT: Clean Air Act Restrictions Applying to State Implementation Plan Revisions Due on July 1, 1982

FROM: Robert M. Perry
General Counsel

TO: Sonia Crow
Regional Administrator, Region IX

You have asked us three questions relating to the manner in which the Clean Air Act restrictions on new source construction and Federal funding apply to States that are required to submit plan revisions by July 1, 1982.

Background

1. *SIP Revision Requirements*

Section 110 of the Clean Air Act requires each State to have in effect a State Implementation Plan (SIP) to attain the national ambient air quality standards. Prior to 1977, most areas were required to attain these standards by 1975. In 1977, however, Congress recognized that many areas had not yet attained these standards and would need considerably more time to do so. Accordingly, the 1977 Amendments to the Clean Air Act established new attainment dates and additional planning requirements for such "nonattainment" areas. These provisions are found primarily in a new "Part D" to Title I, §§ 171–178.

Section 172(a)(1) establishes December 31, 1982, as the new deadline for attaining the standards in nonattainment areas. Section 172(a)(2) provides for a further extension of this new deadline in areas that demonstrate that they cannot attain either the ozone or carbon monoxide (CO) standards by December 31, 1982, despite the implementation of all reasonably available measures. Such areas may request an extension to December 31, 1987.

Areas that obtain extensions to 1987 must submit two SIP revisions: one under §§ 172(a)(1) and 172(a)(2), and one under § 172(c). Under § 172(a)(2), the first plan revision must contain the request for an attainment date extension. It must also require the implementation of all control measures determined to be "reasonably available" in that area, providing for these

measures all of the commitments and assurances required under § 172(b). *Id.* Under § 172(c), the second plan revision must contain additional "enforceable measures" needed to assure attainment by 1987.

The deadlines for the two plan revisions are found in § 129(c) of Pub.L. 95–95, one of the uncodified provisions of the Clean Air Act Amendments of 1977. The revision required under §§ 172(a)(1) and 172(a)(2) must be submitted to the Environmental Protection Agency (EPA) by January 1, 1979. The second revision must be submitted on or before July 1, 1982.

2. *Restrictions on Growth and Federal Funding*

States that fail to revise their plans to meet the Part D requirements are subject to three separate restrictions.

Section 110(a)(2)(I) prohibits the construction of major new sources and major modifications of existing sources after July 1, 1979, in any area that does not have in effect a SIP meeting all of the Part D requirements. This construction ban is a mandatory measure.

Section 176(a) requires EPA and the Department of Transportation (DOT) to withhold funds from any area that needs transportation controls to assure attainment if the Administrator finds that the State has not submitted (or made reasonable efforts to submit) in 1979 or 1982 a plan that considers all of the requirements of § 172. These funding cutoffs are also mandatory measures.

Section 316(b) gives the Administrator discretion to withhold grants for the construction of sewage treatment facilities under the Clean Water Act in any area where a State fails to "have in effect" an approved Part D plan.

Discussion

Because of the number of questions you have asked and the complexity of some of our responses, we will not follow the usual format for a legal memorandum. Instead, we will restate each question in full and follow it with our response. Each response will address separately the construction moratorium, the Clean Air Act and highway funding limitations, and the sewage treatment grant limitations.

Question 1: What discretionary sanctions may be imposed and what mandatory sanctions must be imposed if:

a) A State fails to submit the required SIP revisions by July 1, 1982?

Response

1. *Construction Moratorium*

The construction moratorium would not apply if a State failed to submit a SIP revision by July 1, 1982, because that deadline is not a Part D requirement. However, there is a Part D requirement that becomes applicable on the same date. Section 172(c) requires all plans for extension areas to contain, by July 1, 1982, enforceable measures to assure attainment by 1987. Failure to have such measures in effect by that date would trigger the ban. Before the ban could come into effect, the Agency *would* have to make a finding that a plan does not include the necessary "enforceable measures." This brief response is explained in greater detail below.

a) July 1, 1982, submittal deadline:

Under § 110(a)(2)(I), the construction moratorium applies where a State does not have in effect a plan that meets all of the requirements of Part D. However, none of the Part D provisions actually require States to submit second plan revisions for extension areas by July 1, 1982. Section 172(c) refers to this second revision, but does not establish a date for its submittal.

The July 1, 1982, deadline appears in § 129(c) of Pub.L. 95–95, one of several uncodified provisions of the Clean Air Act Amendments of 1977. Section 129(c) requires States to adopt and submit by July 1, 1982, plans for extension areas that meet all of the requirements of §§ 172(b) and (c). Since § 129(c) is not physically located in Part D, it is possible to argue that a failure to submit a plan revision by July 1, 1982, would not trigger the construction moratorium.

The legislative history of the 1977 Amendments supports this argument. The Senate bill placed the July 1, 1982, deadline for extension areas and the substantive requirements for such areas in a new "Section 110(h)." The Senate Report explained that all of the requirements of § 110(h) were to be considered as "preconditions" for new source construction in carbon monox-

ide or ozone nonattainment areas. S. Rep. 177, 95th Cong., lst Sess. 56 (1977).

However, the conference bill separated the deadlines from the substantive requirements. The conference bill placed all the substantive requirements for SIP revisions for nonattainment areas into § 129(b), which became Part D. The deadlines for submitting plans to meet these requirements were placed in § 129(c), which was not inserted into Part D. This suggests that Congress did not intend the July 1, 1982, deadline to be a Part D requirement.

b) *Enforceable measures requirement:*

Although the July 1, 1982, plan submittal deadline will not trigger the construction ban, there is a Part D requirement that becomes applicable on the same date. Failure to meet this requirement could require EPA to impose the ban in extension areas. This requirement is found in § 172(c), which requires SIPs for extension areas to include, by July 1, 1982, "enforceable measures" needed to attain the standards by 1987.[1] A failure to provide needed measures by July 1, 1982, *would* trigger the construction ban, because the measures are Part D requirements.

EPA recently concluded that, prior to imposing the ban, EPA must review approved (or conditionally approved) Part D plans to determine whether Part D requirements have been met. This gives the Agency more flexibility in timing the imposition of the ban. Further details are provided in our response to your question 2, concerning procedures for applying the restrictions.

2. *Limitations on Clean Air Act and Transportation Grants*

Although the July 1, 1982, deadline is not a Part D requirement, § 176(a) would apply. Section 176(a) specifically states that EPA and DOT must withhold funds if EPA finds that a State failed to submit (or to make reasonable efforts to submit) a plan by the July 1, 1982, deadline.[2]

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[1] Section 172(c) requires these enforceable measures to be "in effect" by July 1, 1982. The measures would have to be approved by EPA before they would be "in effect." Thus, as a practical matter, § 172(c) requires States to submit these measures to EPA well before July 1, 1982.

[2] Section 176(a) also requires that an area must need transportation controls to attain the standards. As a practical matter, however, virtually every area that

Continued

However, EPA and DOT do not have to start withholding funds on July 1. Section 176(a) provides that no funds need to be withheld so long as EPA finds that a State is making "reasonable efforts" to submit the required SIP revision. This can provide significant flexibility. For example, EPA imposed funding limitations in only two States for failure to submit 1979 plan revisions even though most States failed to meet the July 1, 1979, deadline. In effect, EPA determined that most States were making reasonable efforts to submit the necessary revisions. Ultimately, EPA found that only California and Kentucky were not making "reasonable efforts" to submit approvable plans, because legislatures in these States continually failed to enact the legal authority necessary for a vehicle inspection maintenance program. EPA did not make this finding until December 1980, a year and a half after the statutory deadline for submittal of a 1979 plan revision.[3]

3. *Limitations on Sewage Treatment Construction Grants*

Section 316(b) gives the Administrator discretion to withhold grants for the construction of sewage treatment facilities under the Clean Water Act in any area where a State fails to "have in effect" an approved Part D SIP. Accordingly, § 316 could apply if EPA disapproved a plan for failure to have in effect the "enforceable measures" required under § 172(c). However, the Agency is not required to impose this restriction.

EPA has stated that it will use this discretionary authority only where it finds that a State is not making "reasonable efforts" to meet SIP requirements. Moreover, even if EPA decides

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has received an attainment date extension will need transportation control measures. Extensions are available only for the ozone and CO deadlines. Mobile sources emit significant amounts of ozone and CO. It is highly unlikely that any of the areas that have obtained extensions could demonstrate attainment without relying on some control of transportation sources.

[3] Even if EPA finds that a State is not making reasonable efforts to submit a 1982 plan, there are exemptions that can greatly reduce the economic impact of the funding restrictions. § 176(a) exempts funds for transportation projects with safety, mass transit, or air quality benefits. Moreover, although the statute does not specifically exempt any Clean Air Act projects, EPA has established exemptions for Clean Air Act grants with air quality benefits. *See* the joint EPA/DOT "Final Policy and Procedures for Section 176(a)" (45 Fed. Reg. 24692, Apr. 10, 1980). Using these exemptions, DOT has funded transportation projects in California worth $1.2 billion, and EPA has awarded all of the Clean Air Act grants California requested.

to impose a funding cutoff, it will exempt funds for projects that are needed to protect the public health. *See* EPA's "Policy and Procedures for Section 316(b)" (45 Fed. Reg. 53382, Aug. 11, 1980).[4]

Question 1. What discretionary sanctions may be imposed and what mandatory sanctions must be imposed if:

> b) A State submits the required revision, but the submittal indicates attainment by a date later than the 1987 deadline?

Response

1. *Construction Moratorium*

Sections 172(a)(2) and 172(c) require plan revisions for extension areas to provide for attainment no later than December 31, 1987. Because this deadline is a Part D requirement, the moratorium would apply in any area where a State has submitted a plan that does not provide for attainment by 1987.

However, before imposing the ban, EPA would have to review each submittal to determine whether it in fact failed to provide for attainment by 1987. Accordingly, the ban would not apply until sometime after July 1, 1982. For further information on the procedures involved, see our response to question 2.

2. *Limitations on Clean Air Act and Transportation Grants*

Since attainment by 1987 is a requirement of § 172, the funding restrictions in § 176(a) would apply if a State has not submitted a plan or made reasonable efforts to submit a plan that demonstrates attainment by 1987.

The "reasonable efforts" provision may enable a State to escape these funding restrictions if it submits a plan showing that it cannot attain by 1987 despite the implementation of all available (or all reasonably available) control measures.

The legislative history of § 176(a) provides some support for this interpretation. Senator Gravel, who introduced an amend-

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[4] The literal language of § 316(b) does not provide any exemption for a State that is making reasonable efforts to submit a required plan revision or for projects needed to protect public health. However, § 316(b) gives the Administrator complete discretion to decide when to cut off sewage treatment funds. Accordingly, these exemptions merely describe the circumstances under which the Administrator will exercise this authority.

ment inserting the "reasonable efforts" language into § 176(a), explained that he wanted to prevent EPA from restricting funds in a State where it was impossible to meet the ozone or CO attainment deadline. *See* 3 Legislative History of the Clean Air Act at 1060–1063 (1977). EPA could probably support a decision to refrain from using § 176(a) if it found that a State was making every effort to provide for attainment by 1987.

If EPA decided to impose this funding restriction, the exemptions described in our response to question 1(a) above would be available.

3. *Limitations on Sewage Treatment Grants*

As described in our response to question 1(a), this restriction is discretionary. Accordingly, although EPA could impose these funding limitations if it found that a State did not have "in effect" a plan that provided for attainment by 1987, it would not be required to do so.

Question 2: What is the procedure for implementation of sanctions, and does it vary depending upon whether the sanctions are mandatory or discretionary?

Response

EPA's procedures do vary, but the variations do not depend on whether the restrictions are mandatory or discretionary. Further detail is provided below.

1. *Construction Moratorium*

As previously explained, a failure to submit a SIP revision on July 1, 1982, will not trigger the construction moratorium. However, the moratorium will apply if a State fails to have in effect by July 1, 1982, "enforceable measures" needed to assure attainment by 1987. If a State submits a 1982 plan, the determination whether the State has satisfied the "enforceable measures" requirement would be made in the course of approving or disapproving the plan. If a State does not submit a plan, EPA still would have to make a finding that the "enforceable measures" requirement was not satisfied, in order to activate the construction moratoriums.[5] Moreover, because such a find-

[5] EPA has recently interpreted § 110(a)(2)(I) to preclude the application of the construction moratorium in any area with an approved or conditionally ap-

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ing amounts to a disapproval of the SIP, and activates the construction moratorium, it would have to be made in accordance with the procedure governing informal rulemakings, like all other SIP actions.[6] Generally, these procedures require public notice and an opportunity to submit comments. It might be possible to make "class" findings for all extension States that failed to submit 1982 SIPs and dispense with notice and comment on the basis that it would be "impracticable" or "unnecessary," since it is reasonably clear that 1979 SIPs for extension areas would not satisfy the "enforceable measures" requirement. *See* 5 U.S.C. 553(b). However, the Agency would not be obligated to conduct such an abbreviated rulemaking, and could decide to follow normal rulemaking procedures.

The Agency could choose to use the notice of deficiency mechanism to make these determinations. Sections 110(a)(2)(H) and 110(c) provide for the issuance of a Notice of Deficiency where EPA finds that an approved SIP has become "substantially inadequate" to provide for attainment of one of the national ambient air quality standards. Under § 110(c)(1)(C), the notice must provide at least 60 days for the State to respond before EPA takes further action. If a State failed to cure the deficiency or to convince EPA that its finding of deficiency was in error, EPA would disapprove the plan.

2. *Funding Limitations*

EPA and DOT have developed detailed procedures for the implementation of § 176(a). *See* 45 Fed. Reg. 24692 (Apr. 10, 1980). EPA has adopted the same procedures for § 316(b). *See*

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proved Part D SIP, unless EPA determines, after first providing notice and an opportunity to comment, that the SIP no longer satisfies Part D. EPA announced this interpretation in an Interpretive Rule informing the States that the moratorium will not apply in areas which were required to revise their new source review (NSR) regulations to conform with EPA's August 7, 1980 NSR rule, until EPA has reviewed each SIP and determined that previously approved NSR rules are not adequate to meet the August 1980 regulations (46 Fed. Reg. 62651, Dec. 28, 1981).

[6] Actions involving SIPs have been held to be informal rulemakings requiring notice and comment. *See Buckeye Power Co.* v. *EPA,* 481 F.2d 162 (6th Cir. 1973). *See also U.S. Steel Corp.* v. *EPA,* 598 F.2d 915 (5th Cir. 1979), *Sharon Steel Corp.* v. *EPA,* 597 F.2d 377 (3rd Cir. 1979), *State of New Jersey* v. *EPA,* 626 F.2d 1038 (D.C. Cir. 1980), *WOGA* v. *EPA,* 9th Cir. No. 78–1941 (1980), and *U.S. Steel Corp.* v. *EPA,* 8th Cir. No. 78–1302 (1981), remanding Agency rules promulgated without prior notice and opportunity to comment.

45 Fed. Reg. 53382 (Aug. 11, 1980). Briefly, these procedures require an opportunity for negotiations between EPA, DOT, and State and local agencies, a 30-day comment period, and the publication of a final determination in the Federal Register before funds can be withheld.

Question 3. What is the statutory or regulatory authority under which sanctions are imposed?

Response

1. *Construction Moratorium*

Section 110(a)(2)(I) requires all SIPs to contain a construction moratorium. EPA published an interpretive rule that inserted the ban into all SIPs on July 2, 1979 (44 Fed. Reg. 38473). This SIP provision is now codified at 40 C.F.R. 52.24 (1981).

The interpretive rule of December 28, 1981 (46 Fed. Reg. 62651) suggests that the ban would apply only after EPA makes a determination that a SIP does not meet a Part D requirement.

2. *Limitations on Clean Air Act and Transportation Grants*

Section 176(a) requires EPA and DOT to withhold these funds. EPA and DOT published a joint "Final Policy and Procedures for Section 176(a)" on April 10, 1980 (45 Fed. Reg. 24692).

3. *Limitations on Sewage Treatment Grants*

Section 316(b) gives EPA discretion to withhold these grants. EPA published a final policy on August 11, 1980 (45 Fed. Reg. 53382). In that notice, EPA announced that it would follow the rulemaking procedures it had adopted for funding cutoffs under § 176(a).

July 12, 1983

MEMORANDUM

SUBJECT: The "Construction Moratorium" Under the Clean Air Act

FROM: A. James Barnes
Acting General Counsel

TO: William D. Ruckelshaus
Administrator

Facts

Section 110(a)(2)(I) of the Clean Air Act states that after June 30, 1979:

> no major stationary source shall be constructed or modified in any nonattainment area . . . if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, [the applicable implementation] plan meets the requirements of Part D (relating to nonattainment areas).

One of the "requirements of Part D" that plans must meet to avoid this "construction moratorium" is to "provide for attainment of each . . . national air ambient quality standard . . . as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982." § 172(a)(1).

Congress inserted the June 30, 1979, trigger date into the law in parallel with a requirement that States update their implementation plans for nonattainment areas no later than January 1, 1979. *See* § 129(c) of Pub.L. 95–95. By updating their State Implementation Plans (SIPs) in accordance with this schedule, States could avoid the construction moratorium.

Question

Must the Environmental Protection Agency (EPA) impose the construction moratorium in areas that have fully carried out [1]

[1] Section 173(4) of the Clean Air Act imposes a second construction moratorium, separate from the one in § 110(a)(2)(I), on any State that has not "carried

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implementation plans that EPA approved as meeting Part D requirements, but that nevertheless did not meet the standards by the statutory date of December 31, 1982?

Answer

No. While automatic imposition rests on a tenable reading of the statute, the statutory language, legislative history, and purposes do not compel it. You are therefore free to decide not to impose the construction moratorium in such cases.

Discussion

I. *"Provide For"*

The argument that EPA has no discretion not to impose the construction moratorium turns on the words "provide for" in § 172(a)(1). Proponents of an automatic construction moratorium argue that if a plan does not actually result in attainment, it cannot be said to "provide for" attainment.

That term is used in the statute, however, without any reference to actual nonattainment. Section 172(a)(1), more fully quoted, reads:

> The provisions of an applicable implementation plan for a State . . . which are required by Section 110(a)(2)(I) as precondition for the construction or modification of any major stationary source in any [nonattainment] area on or after July 1, 1979 shall provide for [attainment by the end of 1982].

The focus of this language is on how States would have to update their SIPs between 1977 and 1979 to avoid the construction moratorium, not on what happens after that date. It is certainly possible that a State that "provided for" attainment to general satisfaction in 1979 might nevertheless fail to achieve the standards by 1982. The text of the statute simply does not focus on what happens in that event.

The legislative history, however, indicates Congress was aware of the possible difference between a plan that "provided for" attainment when it was approved and one that actually attained the standards.

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out" an approved implementation plan. If a State did not attain the standards on schedule because it had not carried out an approved plan, this provision would be applicable.

The 1977 House bill, H.R. 6161, consistently required plans for nonattainment areas to "assure" attainment of the national standards by 1982, or, if an extension were granted, by 1987. § 127(c)(2), H.R. 6161, 4 Legislative History of the Clean Air Act at 2853–54 (1977). By contrast, the Senate bill contained a patchwork of provisions that variously required plans to "demonstrate" attainment by 1982 (§ 110(h)(2)(E)), "assure" attainment by 1987 (§ 110(h)(2)(F)(i) and 110(h)(3)), and "provide for" attainment by either 1982 or 1987 (§§ 110(a)(2)(F)(iv) and 113(g)(3)(C), S. 252), 3 Legislative History of the Clean Air Act at 1155–56 and 1164 (1977).

Confronted with this maze of alternatives, the conference committee drafted requirements for nonattainment areas that required plans to "provide for" attainment in all but one instance.[2]

No explanation of the final choice of "provide for" appears in the formal legislative history. However, Congress must have perceived some difference in meaning between the two phrases, and the only one the dictionary suggests is that "assure" denotes a greater certainty of achievement in the plan it describes than does "provide for." According to Webster's New Collegiate Dictionary, "assure" means "to make sure or certain" while "provide" means only "to take precautionary measures."

The transcript of a committee markup shows that the sponsor of the "provide for" language in the Senate bill selected the phrase for precisely this reason. Offering an amendment that required plans to "provide for" attainment as a substitute for an earlier, unsuccessful amendment that would have required plans to "assure" attainment, Senator Domenici said:

> . . . I am substituting for the words "assures," "provides for attainment by the specified date."
>
> That may not seem like a big change, but the phrase "provide for" is used in the existing law where the word "assure" is not. It does not require a State to guarantee a program that will result in attainment. A guarantee certainly is difficult to make, given all the knowledge and lack of

[2] The conference bill—and the current Act—require plans for extension areas to contain "enforceable measures to *assure* attainment no later than 1987." § 172(c). (Emphasis added.)

> knowledge that we have about the oxidant formation and other things. But the language requires a state, with EPA approval, to set a strategy in motion that it currently believes will meet the standards. That is the first change.

Transcript of Senate Clean Air Act Mark-Up, May 4, 1977, pp. 13–14. *See also* pp. 23–24.

Both the conference committee's decision to use "provide for" and Senator Domenici's explanation of the reasons for his switch show that Congress intended "provide for" to set forth a test for use at the time EPA evaluated SIPs for future attainment, not one for use when the deadline arrived. If this is so, a plan may "provide for" attainment, and thus avoid the construction moratorium, even if the standards are not achieved as projected.

II. *The Attainment Deadlines*

The second major argument for imposition of sanctions is that to do otherwise would rob the dates specified for attainment—1982 and, in extension areas, 1987—of substance.

However, EPA did not immediately impose a construction ban when the deadlines for attainment under the 1970 Clean Air Act expired between 1975 and 1977, even though the 1970 version of the Clean Air Act spoke far more strongly of the need to attain standards by a date certain than it did after the 1977 amendments.[3] Instead, EPA called for SIP revisions and

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[3] In 1970 Congress regarded timely attainment of the health-related standards as a matter of paramount importance. *See, e.g.*, Statements of Senators Muskie, Cooper, and Prouty, 1 Legislative History of the Clean Air Act at 227, 258–259, and 379–380 (1974). The Senate Report flatly stated that existing sources would have to shut down if there were no other way to meet the standards. S. Rep. 1196, 91st Cong., 2d Sess. 3 (1970). Relying on these strong indications that Congress wanted attainment at any cost, EPA successfully promulgated gasoline rationing requirements for several major metropolitan areas in California. *City of Santa Rosa* v. *EPA*, 534 F.2d 150 (9th Cir. 1976).

When the attainment dates actually passed, however, EPA moderated its course. Rather than forcing sources to close down, it called for plan revisions and limited new source growth as described above in the text. Congress endorsed this softer approach to the deadlines in the 1977 amendments. The amendments essentially adopted EPA's administrative solution to the problem of missed deadlines. Although Congress retained the deadline concept, it spoke of the need to balance health and economic concerns, and made it clear that the deadlines "would not require adoption of 'draconian' control measures." Statement of Senator Stafford, 3 Legislative History of the Clean Air Act at 770–771 (1977).

imposed a limited measure—the Offset Ruling—to protect air quality before the plan revisions were approved. A construction ban would have applied under that ruling only if a State failed to revise its SIP acceptably within 18 months of EPA's call to revise it. *See* 41 Fed. Reg. 55526, 55529 (Dec. 21, 1976). There is no indication that EPA intended to apply such a ban under the Offset Ruling to cases of simple nonattainment. Congress endorsed this course of action by adopting a very similar approach in the 1977 amendments.

Nothing in this history, or in the language of the statute, suggests any intention on Congress' part that EPA should change the basic course mapped out in the mid-1970s if it had to deal with a second episode of delayed attainment.

III. *The Purpose of the Statute*

Two purposes have been suggested for the construction moratorium. EPA originally interpreted it as serving a single goal—preventing new sources from aggravating pollution problems before a revised plan takes effect aimed at timely attainment of the standards. *See* EPA's interpretive ruling of July 2, 1979 (44 Fed. Reg. 38471, 39472). Others have concluded that the moratorium was also intended to serve as an incentive for the submittal of plan revisions meeting the Part D requirements. The court that has most thoroughly considered the issue concluded that the moratorium is both a limit on increased pollution from new sources and an incentive for State planning efforts. *Connecticut Fund for the Environment* v. *EPA*, 672 F.2d. 998, 1008 (2d Cir. 1982).

The legislative history does not address the purposes of the ban directly, but it does suggest that Congress saw those purposes more as an encouragement to planning than as air quality maintenance. The Senate Report emphasized the need for a mechanism to assure that, before facilities added pollution, a State had demonstrated that the increased pollution could be accommodated within a plan providing for attainment of the standards. S. Rep. 127, 95th Cong., lst Sess. 55 (1977).[4] The conference report points toward the planning incentive goal more strongly, emphasizing that a revised plan is a "condition

[4] The present construction moratorium originated in the Senate bill. The bill as reported by the committee prohibited source construction or modification after July 1, 1979, unless a State had an approved or promulgated SIP revision.

for new source growth," H.R. Rep. 564, 95th Cong., lst Sess. 121, 157 (1977).

Imposing the construction moratorium on a State that has an approved SIP but missed the 1982 deadline would damage, not further, attainment of this planning goal. It would hardly encourage planning to penalize States that had already done everything EPA had asked them to do. Indeed, once the moratorium was on, there would be little incentive for a State to submit a revised SIP to cure the deficiencies in its plan, because nothing a State could do by way of planning would enable EPA to lift the moratorium.[5]

Nor is there any reason to believe that the moratorium benefits air quality significantly. Under present law, each State must have in its implementation plan provisions that forbid the construction of a new source unless its new emissions are balanced by more than offsetting emissions reductions. Accordingly, new sources do not damage air quality under present law, but rather improve it.

Because automatic imposition of the moratorium would clearly work against the major goal for which the moratorium was inserted in the statute, and would—at a minimum—not clearly serve the second goal, we conclude on this count too that automatic imposition of the moratorium is not required.

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[5] If EPA imposed the moratorium automatically for failure to attain the standards, we do not think EPA could take it off before the standards were actually achieved. The theory on which the moratorium was imposed would have to be that "provide for" means "attain," and on that logic the moratorium would have to stay on until actual attainment.

September 20, 1983

MEMORANDUM

SUBJECT: Promulgation of Active Mill Tailings Standards

FROM: A. James Barnes
Acting General Counsel

TO: Glen A. Sjoblom, Director
Office of Radiation Programs

This memorandum concludes that "promulgation" of the active mill tailings standards within the meaning of § 275 of the Atomic Energy Act occurs upon signing of the final rule rather than upon Federal Register publication.

Question

Section 18 of Pub.L. 97–415, enacted in 1983, amended the Uranium Mill Tailings Radiation Control Act to require the Administrator of the Environmental Protection Agency (EPA) to "promulgate" final active mill tailings rules "within 11 months" of October 31, 1982. You have asked whether Congress intended that "promulgation" refer to signature by the Administrator or to Federal Register Publication.

Answer

"Promulgation" in this case refers to signature by the EPA Administrator.

Discussion

The term "promulgate" is not directly defined either in the Uranium Mill Tailings Radiation Control Act (UMTRCA), the Administrative Procedure Act, or the Federal Register Act. As a matter of dictionary meaning, "promulgate" means both "to make known or public" and "to put into action or force." Webster's New Collegiate Dictionary, 1979.

While the legislative history of UMTRCA is silent as to which meaning Congress intended, the conclusion that promulgation refers to the act of signing rather than publication is supported by two contextual considerations. First, the EPA Administrator, to whom Congress' command is addressed, has no authority or power to direct the operations of the Federal Register. Congress cannot have intended to direct the EPA Admin-

istrator to do what lies outside his power, *i.e.*, assure publication by a date certain. Second, the enactment was spurred by Congress' "displeasure" in 1982 at EPA's, not the Federal Register's, failure to act, 1982 U.S. Code Cong. & Admin. News at 3592. Congress intended to remedy EPA's failure to finalize regulations, not the Federal Register's failure to publish them.

This conclusion is supported by the Federal Register Act, 44 U.S.C. 1507, which, codifying existing law, 1968 U.S. Code Cong. & Admin. News at 4438, provides that:

> The publication in the Federal Register of a document creates a rebuttable presumption . . . that it was duly issued, prescribed, or promulgated.

See, e.g., Shafer v. *U.S.*, 229 F.2d 124 (3rd Cir., 1956) *cert. denied.* 351 U.S. 931 (1956); *Reed* v. *Franke*, 297 F.2d 17 (4th Cir. 1961). If Federal Register publication gives rise to a rebuttable presumption that the document "was duly . . . promulgated," it follows that the act of promulgation is distinct from, and precedes, the act of publication. This reading is strengthened by the provision of the same Act that those with actual notice of an unpublished rule are bound by the rule, a result that would not be possible if publication of the rule itself constituted promulgation. *See Kessler* v. *F.C.C.*, 326 F.2d 673 (D.C. Cir. 1963).

The Administrative Procedure Act, 5 U.S.C. 552(a), draws a similar distinction between "adoption" and "publication" and similarly deems that persons with actual notice of unpublished rules are bound by such rules, *Rodriguez* v. *Swank*, 318 F. Supp. 289, *aff'd*, 403 U.S. 901 (1971); *Whelan* v. *Brinegar*, 538 F.2d 924 (2nd Cir. 1976); *Timber Access Industries Co. Inc.* v. *U.S.*, 553 F.2d 1250 (Ct. Cl. 1977).

It has been EPA practice both before and since the enactment of the UMTRCA deadline to consider signature of a rule as compliance with court orders requiring promulgation by a date certain. *See*, for example, *Citizens for a Better Environment* v. *Gorsuch*, Civ. 82–1035 (D.C. Cir.) (order requiring promulgation of Subtitle C RCRA regulations by date certain); *Sierra Club* v. *Gorsuch*, Civ. C–81–2436 (N.D. Cal.) (order to propose radionuclide standards within 180 days); *State of New York* v. *Gorsuch*, Civ. 81–6678 S.D.N.Y.) (order to publish arsenic standard within 180 days). Congress gave no indication in UMTRCA that it intended to modify agency practice for complying with deadlines similar in form and identical in purpose to that which it established in UMTRCA.

If Congress intended the deadline to be October 1, 1983, a final consideration would be the fact that the Federal Register is not published on Saturdays. On balance, however, EPA should assume that the deadline is the end of the preceding month, *i.e.*, September 30, 1983.[1]

[1] The statutory requirement is that EPA promulgate the final standard "within eleven months" from October 31, 1982. This language suggests that Congress intended EPA to act by the end of September 1983.

The statute and legislative history also refer to promulgation "by" October 1, 1983, 1982 U.S. Code Cong. & Admin. News at 3015. While this could mean that promulgation *on* October 1, 1983, is permissible, such date is not "within" the eleventh month and probably expresses the first day of EPA's lapsed authority.

SOLID WASTE

July 27, 1981

MEMORANDUM

SUBJECT: Joint and Several Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

FROM: Frank Shepherd
Associate Administrator for
Legal Counsel and Enforcement

TO: Anne M. Gorsuch
Administrator

ISSUE: Whether the Agency is precluded from seeking joint and several liability under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

CONCLUSION: No. Although Congress deleted the terms "strict, joint and several" liability from § 107 of CERCLA prior to passage, the legislative history strongly indicates that Congress did not intend to preclude courts from imposing joint and several liability in all cases. Instead, Congress intended that standards of liability be determined on a case-by-case basis.

Discussion

Section 107 identifies four classes of individuals and entities who are "liable for" specified costs associated with the release or threatened release of hazardous substances. These costs include those for response actions as well as those for damage to natural resources.

Although earlier versions of CERCLA [1] contained language which imposed "strict, joint and several" liability upon responsible persons, that language was dropped from the final compromise bill and replaced with the following definition of liability:

> 'liable' or 'liability' under this title shall be construed to be the standard of liability which ob-

[1] Section 3071(a)(1) of H.R. 7020; § 4(a) of S. 1480.

tains under section 311 of the Federal Water Pollution Control Act.[2]

The incorporation by reference of the standard of liability which obtains under § 311 does not clearly resolve the issue of whether liability under § 107 is to be imposed on a joint and several basis. Section 311 does not specifically address that issue and there are no reported cases on point.[3]

At issue is whether the deletion of the terms "joint and several" liability from § 107 *precludes* a court from imposing liability on a joint and several basis in all cases.

There is a significant amount of legislative history on this issue from the House of Representatives and Senate floor debates on the compromise bill. The floor leaders of the compromise bill [4] explained in detail during the floor debates that the deletion of the terms "strict, joint and several" liability was a compromise which replaced a *statutorily* imposed system of joint and several liability with one that imposes joint and several liability based upon prevailing standards of the common law.[5]

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[2] § 101(32).

[3] It is important to note, however, that during the floor debate on the compromise bill, Congressman Florio discussed the issue of joint and several liability under § 311:

> "I might point out that Section 311 has been interpreted by the Coast Guard, the Government body responsible for administering the section 311(k) revolving fund, as imposing joint and several liability under appropriate circumstances. I would like to introduce a letter from the Coast Guard on this subject. This established policy seems particularly applicable in cases of hazardous wastes sites, where several persons have often contributed to an indivisible harm."

126 Cong. Rec. H.11787 (daily ed. Dec. 3, 1980).

The letter introduced into the Record was dated September 29, 1978, from G.H. Patrick Bursley, Chief Counsel, U.S. Coast Guard, to Mr. Phillip Berns, Attorney in Charge, West Coast Office, Department of Justice. The letter emphasized that while § 311 generally envisioned a scheme of several liability, that is not the sole remedy. In appropriate cases, the Government could seek joint liability. 126 Cong. Rec. H.11788–89 (daily ed. Dec. 3, 1980).

[4] Senators Randolph and Stafford (Chairman and Ranking Minority Member of Committee on Environment and Public Works, respectively) and Congressman Florio (Chairman of the House Subcommittee on Transportation and Commerce).

[5] Under existing general common law principles, damages are apportioned when possible among defendants according to their respective contribution to the

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Under the earlier versions of CERCLA, joint and several liability was rigidly imposed by the terms of the statute.[6] The earlier versions also contained rigid provisions that allowed a defendant to escape the statutorily imposed joint and several liability only if he could demonstrate that he had no substantial involvement in causing the injury.[7] The compromise was explained by Senator Randolph:

> The liability regime in this substitute contains some changes in language from that in the bill reported by the Committee on Environment and Public Works. *The changes were made in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases. The changes do not reflect a rejection of the standards in the earlier bill.*
>
> * * * * *
>
> *It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability.* (Emphasis added.)

Senator Randolph added:

> . . . we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable.
>
> 126 Cong. Rec. S.14964 (Nov. 24, 1980).[8]

Congressman Florio, a floor leader on the compromise bill in the House of Representatives, echoed Senator Randolph's remarks in explaining the compromise:

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damage suffered by plaintiff. Joint and several liability is imposed when there is no basis for determining, with a reasonable degree of accuracy, the respective contributions to the damage by each defendant. For example, when the actions of the defendants cause a "single indivisible result," joint and several liability is imposed. Those cases are determined on a case-by-case basis. (Prosser, Law of Torts, (4th ed. 1971), Sec. 52, (p. 313–5)).

[6] S. 1480, § 4(a).

[7] S. 1480, § 4(f).

[8] Senator Stafford explained the change from one of the compromise bills as "eliminat(ing) *the term* joint and several liability." (Emphasis added.) 126 Cong. Rec. S.14967 (daily ed. Nov. 24, 1980).

> The liability provisions of this bill do not refer to the terms strict, joint and several liability, terms that were contained in the version of H.R. 7020 passed earlier by this body. . . . I have concluded that despite the absence of these specific terms, the strict liability standard already approved by this body is preserved. *Issues of joint and several liability not resolved by* (incorporating by reference the standard of liability imposed by section 311 of the Clean Water Act) *shall be governed by traditional and evolving principles of common law. The terms joint and several have been deleted with the intent that the liability of joint tortfeasors be determined under common or previous statutory law.* (Emphasis added.)

126 Cong. Rec. H.11787 (daily ed. Dec. 3, 1980).

Congressman Florio also introduced into the Record a letter from the Justice Department regarding the effect that the absence of the terms "strict, joint and several" liability in the compromise bill would have on the ability of courts to impose strict, joint and several liability under § 107 in appropriate cases.[9] That letter included a discussion of its effect upon joint and several liability:

> Another aspect of the liability standard concerns the applicable liability where two or more persons are responsible for a release or a threatened release. As you are aware, the reference to joint and several liability contained in the original liability provisions of S. 1480 was deleted. It is clear, however, that this deletion does not in any way preclude courts from imposing joint and several liability where appropriate.

126 Cong. Rec. H.11788 (daily ed. Dec. 3, 1980).

An additional reason cited in the Department of Justice letter for concluding that the liability established by § 107 could be imposed on a joint and several basis was the presence of § 107(e)(2) in the compromise bill. The Justice Department interpreted that section as confirming a defendant's right of contribution is against other defendants who are also responsible

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[9] Letter dated December 1, 1980, from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs to Hon. James J. Florio. 126 Cong. Rec. H.11788 (daily ed. Dec. 3, 1980).

for a release.[10] Based upon its understanding that "a right of contribution is only of value to a defendant which has been held jointly and severally liable," the Justice Department concluded that the recognition of that right in the compromise bill reflects Congress' intent that joint and several liability could be imposed under CERCLA.

On the other hand, Senator Helms, an opponent of CERCLA, expressed his view that the compromise bill *precludes* joint and several liability. He said:

> It is very clear from the language of the Stafford-Randolph substitute itself, from the legislative history, and from § 311 of the [Clean Water Act] that now the Stafford-Randolph bill does not in and of itself create joint and several liability. The Government can sue a defendant under the bill only for those costs and damages that it can prove were caused by the defendant's conduct.

126 Cong. Rec. S.15004. (daily ed. Nov. 24, 1980).

In addition, Senator Helms submitted for the Record "a list of changes [in the compromise bill] as presented by the Environment and Public Works Committee" that included the statement that the bill "[e]liminated joint and several liability." It is unclear from the Congressional Record whether the exhibit Senator Helms referred to is the complete text of the Committee's document or simply a summary. While this exhibit might argue in favor of a conclusion that Congress intended to preclude the imposition of joint and several liability under § 107, the explanation of the compromise bill by the floor leaders disputes that.

The best reading of the legislative history, therefore, indicates that the compromise replaced provisions that rigidly imposed joint and several liability by statute with a standard that allows the standard of liability to be determined on a case-by-case basis. This conclusion is supported by two factors.

First, before incorporating by reference the liability imposed by § 311 of the Clean Water Act as the liability standard in

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[10] Section 107(e)(2) provides:

> Nothing in this title, including the provisions of paragraph (1) of this section, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

§ 107, Congress had been informed by the Agency responsible for administering the liability provisions of § 311 that it believed that it could seek joint and several liability in appropriate cases.[11] Second, the floor managers specifically stated that the appropriate standard be determined on a case-by-case basis according to the principles of common law.

This conclusion is reinforced by an examination of the practical consequences of deciding that the Agency is precluded in all cases from seeking joint and several liability under § 107. The Justice Department's memorandum on this issue[12] cites numerous accidents involving single, indivisible damage to natural resources where the defendant's liability could only be imposed on a joint and several basis. Without joint and several liability no damages could have been assessed. For example, in *Landers* v. *East Texas Salt Water Disposal Co.*, 248 S.W. 2nd 731 (Tex. S.Ct. 1952) two separate pipes owned by two different companies carrying salt water broke on the same day and flowed into plaintiff's lake killing fish and destroying the lake. The court explained its rationale for imposing joint and several liability:

> *at 733* Wigmore has suggested that the rule of joint and several liability in the field of torts had its inception in the need of the law, bent on justice, to relieve a plaintiff of the intolerable burden of proving what share each of two or more wrongdoers contributed to the plaintiff's injuries, and that the burden is just as tolerable and the need for relief therefrom is just as great when the independent tortious acts of multiple defendants contribute to a plaintiff's indivisible injuries as when the acts are done in concert and of common design. (Citation omitted.)
>
> *at 734* (referring to an earlier Texas case holding no joint and several liability)—
>
> The rule of the *Robicheaux* case, strictly followed, has made it impossible for a plaintiff, though

[11] *See* fn. 3 *infra*.

[12] Memorandum dated June 23, 1980, from Anthony Z. Roisman, Special Litigation Counsel, to Carol F. Dinkens, Assistant Attorney General.

> gravely injured, to secure relief in the nature of damages through a joint and several judgment by joining in one suit as defendants all wrongdoers whose independent tortious acts have joined in producing the injury to the plaintiff, which, although theoretically divisible, as a practical matter and realistically considered is in fact but a single indivisible injury. As interpreted by the Courts of Civil Appeals the rule also denies to a plaintiff the right to proceed to judgment and satisfaction against the wrongdoers separately because in such a suit he cannot discharge the burden of proving with sufficient certainty, under pertinent rules of damages, the portion of the injury attributable to each defendant. (Citations omitted.)
>
> * * * * *
>
> In other words, our courts seem to have embraced the philosophy, inherent in this class of decisions, that it is better that the injured party lose all of his damages than that any of several wrongdoers should pay more of the damages than they individually and separately caused. If such has been the law, from the standpoint of justice it should not have been; if it is the law now, it will not be hereafter. The case of *Sun Oil Co.* v. *Robicheaux* is overruled. Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit. If fewer than the whole number of wrongdoers are joined as defendants to plaintiff's suit, those joined may by proper cross action under the governing rules bring in those omitted.

In its memorandum, the Justice Department cites the following examples of ongoing suits to abate imminent hazards to public health and the environment caused by hazardous waste sites which demonstrate that situations will arise under § 107

in which the damage caused by several defendants will be a single, indivisible injury: a leaking lagoon that was filled with wastes from several generators; a single fire caused and fed by the wastes of numerous generators; ground and ground water contamination caused by spills and leaks from the barrels and leaks of many generators; and, the haphazard storage of wastes from numerous generators that created the threat of fire, explosion, and leakage of wastes. In cases such as those cited above, the only reasonable course of action available to the Agency in seeking to clean up a site may be to seek joint and several liability. Moreover, having that option available may also avoid inequitable results in the administration of Superfund. Without that option, joint defendants would escape liability for releases of hazardous substances when a single defendant would not.

In conclusion, the best reading of the legislative history indicates that the deletion of the terms "joint and several" liability from the compromise bill was not intended to preclude courts from imposing joint and several liability in all cases. Instead, it replaced a rigid, statutorily imposed scheme of joint and several liability with one which allows courts to impose it when required by traditional principles of common law.

September 1, 1982

MEMORANDUM

SUBJECT: Applicability of Section 102(2)(C) of the National Environmental Policy Act of 1969 to Response Actions Under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

FROM: Robert M. Perry
Associate Administrator and
General Counsel

TO: Rita M. Lavelle
Assistant Administrator for Solid Waste
and Emergency Response

This responds to your inquiry concerning the applicability of § 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), Pub.L. 91–190, as amended, 42 U.S.C. § 4332(2)(C), to removal and remedial actions supported in whole or in part with Hazardous Response Trust Fund monies under § 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub.L. 96–510, 42 U.S.C. § 9604. More specifically, you have asked whether removal and remedial actions are subject to the requirement for an environmental impact statement (EIS) imposed on Federal agencies by § 102(2)(C). For the reasons stated below, it is my opinion: (1) that the need for expedition in carrying out removal actions exempts such actions from the EIS requirement; and (2) that an EIS is unnecessary for remedial actions, provided the Agency complies with the standards for a functional equivalent exception to the EIS requirement. To aid your understanding of the EIS requirement, I have included in my response a background discussion of § 102(2)(C) and the implementing regulations of the Council on Environmental Quality (CEQ).

Background

NEPA establishes a national policy requiring every Federal agency to incorporate consideration of environmental factors

into its decisionmaking process.[1] To implement this policy, § 102(2)(C) of NEPA directs Federal agencies "to the fullest extent possible" to prepare a "detailed" EIS for all "major Federal actions significantly affecting the quality of the human environment." As specified in § 102(2)(C)(i)-(v), an EIS must address the following areas:

> (i) The environmental impact of the proposed action,
>
> (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) Alternatives to the proposed action,
>
> (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Section 102(2)(C) requires the responsible Federal official, prior to preparing an EIS, to consult with and obtain comments from other Federal agencies having "jurisdiction by law or special expertise with respect to any environmental impact involved." In addition, the responsible official must secure comments on the EIS from Federal, State, and local agencies "which are authorized to develop and enforce environmental standards." These comments, together with the EIS itself, must "accompany the [proposed action] through the existing agency review processes."

The CEQ has promulgated regulations implementing NEPA at 40 C.F.R. Part 1500.[2] Under these regulations, a Federal agency

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[1] Section 101(a) of NEPA, 42 U.S.C. § 4331(a), states that "it is the continuing policy of the Federal Government . . . to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony. . . ." Section 101(b) of NEPA, 42 U.S.C. § 4331(b), declares that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve . . . Federal plans . . . [and] programs" in order to achieve six specific environmental goals.

[2] Executive Order No. 11991 (May 24, 1977) required CEQ to issue NEPA regulations binding on other Federal agencies.

must normally prepare an environmental assessment to determine whether a proposed action requires an EIS. 40 C.F.R. § 1501.4(c). If the environmental assessment indicates that the project is not a major Federal action significantly affecting the environment, the Agency must issue a finding of no significant impact which briefly explains the reasons why an EIS is unnecessary. 40 C.F.R. §§ 1501.4(e) and 1508.13.

If the Agency finds, based on the environmental assessment, that the project is a major Federal action having a significant impact on the environment, the agency must initiate the formal EIS process by publishing a notice of intent to prepare an EIS in the Federal Register and by consulting with affected Government agencies and Indian tribes and interested persons as to the scope of the EIS. 40 C.F.R. §§ 1501.7 and 1508.22. According to published CEQ guidance, large projects should require about 12 months for completion of the EIS process.[3]

Upon determining the scope of the EIS, the agency must prepare a draft EIS. 40 C.F.R. § 1502.9(a). The draft EIS must specify the purpose of and need for the project, describe the affected environment, evaluate all reasonable alternatives, including the no-action alternative, and discuss the short- and long-term environmental consequences of the project and alternatives. 40 C.F.R. §§ 1502.13.16. The draft EIS must be circulated for comment for at least 45 days among relevant Federal agencies, State and local environmental agencies, affected Indian tribes, and the public. 40 C.F.R. §§ 1503.1 and 1506.10(c).

After considering the comments received on the draft EIS, the Agency must issue a final EIS. 40 C.F.R. § 1502.9(b). The Agency must file the final EIS with EPA, transmit it to agencies that commented on the draft EIS, and make it available to the public. 40 C.F.R. §§ 1502.19(d), 1506.6(f), and 1506.9. The final EIS must respond to the comments submitted on the draft EIS and discuss responsible opposing views that were inadequately addressed in the draft EIS. 40 C.F.R. §§ 1502.9(b), 1503.4. Generally, the Agency may not make a final decision on the project until at least 30 days after publication by EPA of a notice of the EIS in the Federal Register. 40 C.F.R.

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[3] *See Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* (46 Fed. Reg. 18037, Mar. 23, 1981).

§ 1506.10(b)(2).[4] The final decision must be documented in the form of a public record of decision that articulates the basis for the decision, the alternatives considered, and any necessary mitigation measures. 40 C.F.R. § 1505.2.

I. Issue

Whether removal actions under § 104 of CERCLA are subject to the EIS requirement of § 102(2)(C) of NEPA.

Answer

Removal actions are exempt from compliance with § 102(2)(C) of NEPA due to the fundamental conflict in statutory purpose between the EIS requirement and EPA's removal authority. This conflict arises from the fact that it would be virtually impossible for EPA to follow the lengthy EIS process and at the same time expeditiously undertake removal actions.

Discussion

Because NEPA does not repeal by implication other Federal laws,[5] the courts have recognized that a Federal agency is exempt from complying with § 102(2)(C) of NEPA if compliance would result in a "clear and unavoidable conflict" with the purpose or procedure of the agency's organic statute. *Flint Ridge Development Company* v. *Scenic River Association of Oklahoma*, 426 U.S. 776, 788 (1976). This exemption has been invoked to bar the application of § 102(2)(C) where it would be impossible for an agency to adhere to the formal EIS process and at the same

[4] In accordance with 40 C.F.R. § 1506.10(d), the 30-day time period between the notice of an EIS and the making of a final decision, as well as the 45-day comment period for draft EISs (40 C.F.R. § 1506.10(c)), may be shortened upon a showing by the Federal agency that there are compelling reasons of national policy to reduce the prescribed periods.

[5] *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973).

time comply with a deadline for decisionmaking [6] or a directive for prompt action,[7] mandated by the agency's organic statute.

In my opinion, removal actions under § 104 of CERCLA fall within the exemption for statutory conflict because of the incompatability between EPA's removal authority and NEPA's EIS requirement.

Briefly stated, removal actions involve the implementation of short-term cleanup measures taken in response to the release or threatened release of hazardous substances. *See* § 101(23) of CERCLA (42 U.S.C. § 9601(23)). The National Contingency Plan (NCP) divides removal actions into two categories—immediate removals and planned removals. Immediate removals are appropriate where action within hours or days may be necessary to prevent significant harm to human health or the environment (NCP, § 300.65). Planned removals, on the other hand, are appropriate where an expedited, although not necessarily immediate, response may be required (NCP, § 300.67). Both immediate and planned removals may not continue beyond 6 months or after the expenditure of $1 million, unless there is a finding that an emergency exists pursuant to the requirements of § 104(c)(1) of CERCLA.

In view of the focus of immediate and planned removals on emergency and near emergency situations, it is evident that EPA's removal authority would be seriously undermined if the

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[6] *See, e.g., Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma, supra,* (EIS requirement must yield to 30-day time limit prescribed by the Interstate Land Sales Full Disclosure Act for approval or disapproval of property disclosure statement); *National Ass'n of Property Owners* v. *U.S.*, 499 F. Supp. 1223, 126768 (D.Minn. 1980) (EIS unnecessary due to conflict between EIS requirement and effective date of motorized use restrictions under Boundary Waters Canoe Area Wilderness Act), *aff'd*, 660 F.2d 1240 (8th Cir. 1981); *Gulf Oil Corp.* v. *Simon*, 373 F. Supp. 1102, 1105 (D.D.C. 1974) (conflict between NEPA compliance and 15-day timetable for issuance of regulations under Emergency Petroleum Allocation Act precludes preparation of an EIS), *aff'd*, 502 F.2d 1154 (Em. Ct. App. 1974).

[7] *See, e.g., Dry Color Manufacturer's Ass'n* v. *Dep't of Labor*, 486 F.2d 98, 107–08 (3rd Cir. 1973) (EIS not a prerequisite for the promulgation of an emergency temporary standard under Occupational Safety and Health Act); *Atlanta Gas Light Co.* v. *Federal Power Comm'n*, 476 F.2d 142, 150 (5th Cir. 1973) (EIS unnecessary prior to approval by Federal Power Commission of emergency interim curtailment plan under the Natural Gas Act); *State of Alaska* v. *Carter*, 462 F. Supp. 1155, 1161 (D. Alaska 1978) (emergency withdrawal under Federal Land Policy and Management Act did not require an EIS).

Agency, as a pre-condition to initiating removal actions, were required to complete the formal EIS process prescribed by the CEQ regulations. Such a requirement would make it impossible for the Agency to undertake removal actions with the requisite degree of speed due to the time-consuming nature of the CEQ procedures, and would raise the possibility of further delays from litigation challenging the adequacy of EISs.[8] Under these circumstances, compliance with § 102(2)(C) of NEPA would create an irreconcilable conflict in statutory authority so as to relieve the agency of any duty to file an EIS.[9]

This conclusion is consistent with the legislative history of CERCLA, which reflects a congressional awareness that the expedited character of removal actions would justify noncompliance with § 102(2)(C) of NEPA. Congress contemplated that removal actions would proceed without a prolonged environmental review and that they would be treated for purposes of the EIS requirement in a manner similar to cleanup actions under § 311 of the Clean Water Act, 33 U.S.C. § 1321, which are explicitly exempted from the EIS process by § 511(c)(1) of

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[8] *See Natural Resources Defense Council, Inc.* v. *Nuclear Regulatory Comm'n*, 647 F.2d 1345–86 (D.C. Cir. 1981) (Robinson, J., concurring) (EIS not required due to conflict between the timetable for export licensing by the Nuclear Regulatory Commission under the Nuclear Non-Proliferation Act and the time necessary to prepare an EIS and defend against possible NEPA actions). *See also Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 380–81 (D.C. Cir. 1973) (noting existence of a conflict between the EIS process and time constraints of the Clean Air Act).

[9] The conclusion that the exemption for statutory conflict applies to planned removals is based on the assumption that planned removals will be undertaken without extensive, prior investigative studies such as those authorized under § 104(b) of CERCLA. For any planned removals that are preceded by such studies, it should be emphasized that the case for applying the exemption is not as strong. To the degree that extensive, prior investigative studies provide EPA with substantial lead time to evaluate alternative courses of action for planned removals, a court might find that the time constraints necessary to invoke the exemption are not present. In that event, the only argument potentially available to EPA in support of an EIS exemption would be that the studies constitute the "functional equivalent" of an EIS.

the Act, 33 U.S.C. § 1371(c)(1).[10] As stated in the Senate Report accompanying S. 1480:[11]

> The intent of section 3(c)(1) is to authorize removal with a minimum of delay in order to assure that injury to the public health, welfare and the environment are prevented or minimized and mitigated. This provision is similar to section 311 of the Clean Water Act. Section 511(c) of the Clean Water Act defines section 311 actions of the Administrator as not constituting a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. Removal actions may be emergency actions within the meaning of the National Environmental Policy Act of 1969.

S. Rep. 848, 96th Cong., 2d Sess. 61 (1980).[12]

In sum, given the antithesis between the formal EIS process and the congressionally recognized need for dispatch in the conduct of removal actions, there is little question but that removal actions are exempt from § 102(2)(C) of NEPA on the ground of statutory conflict.[13]

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[10] Section 511(c)(1) of the Clean Water Act provides that the EIS requirement does not apply to EPA actions under the Clean Water Act, except for the issuance of new source National Pollutant Discharge Elimination System (NPDES) permits under § 402 of the Act, 33 U.S.C. § 1342, and the award of wastewater treatment construction grants under § 201 of the Act, 33 U.S.C. § 1281.

[11] S. 1480 was the Senate version of the Superfund legislation. Although the bill was revised considerably to produce CERCLA as enacted, it did contain a provision for response actions similar to the response authority found in § 104 of CERCLA.

[12] The statement in the Senate Report that removal actions may constitute emergency actions within the meaning of NEPA is possibly a reference to 40 C.F.R. § 1506.11 of the CEQ regulations, which authorizes a Federal agency to forego NEPA review where action is necessary to control the immediate impacts of an emergency.

[13] Notwithstanding the applicability of the statutory conflict exemption, the Agency has an obligation under CERCLA to assess, short of an elaborate, EIS-type analysis, the potential environmental impacts of removal actions. Clearly, an assessment of this sort cannot be extensive for immediate removals due to their emergency orientation. However, because planned removals proceed on a relatively less urgent basis, it is incumbent upon EPA to undertake such an assessment to a greater degree when conducting planned removals.

II. Issue

Whether remedial actions under § 104 of CERCLA are subject to the EIS requirement of § 102(2)(C) of NEPA.

Answer

CERCLA requires remedial actions to include a thorough review of environmental factors. If EPA conducts this review in accordance with procedures set forth in the NCP and incorporates public participation in the decisionmaking process, it is likely that remedial actions will qualify for the functional equivalent exception to the EIS requirement.

Discussion

Remedial actions under § 104 of CERCLA involve long-term actions consistent with a permanent remedy to prevent or minimize the release of hazardous substances. *See* § 101(24) of CERCLA (42 U.S.C. § 9601(24)). In contrast to removal actions, remedial actions normally address situations that do not require an immediate or expedited response and therefore allow for the time necessary to conduct detailed planning and evaluation.

Because of the time available for remedial actions, it is unlikely that application of § 102(2)(C) of NEPA would severely disrupt the remedial action process so as to justify an EIS exemption on the ground of statutory conflict. Nevertheless, remedial actions potentially qualify for another exception to the EIS requirement developed by courts for situations where an agency achieves NEPA's objective of full disclosure of environmental effects through means comparable to an EIS. This exemption, commonly known as the "functional equivalent" exception,[14] has been applied to specific regulatory activities of

[14] As a threshold matter, it should be noted that the legislative history of CERCLA does not bar the application of a functional equivalent exception to remedial actions. The Senate Report accompanying S. 1480 states that remedial actions, by virtue of their relatively long lead time and allowance for planning, would require a written assessment of alternatives and that in some circumstances, preparation of an EIS might be deemed necessary. *See* S. Rep. 848, 96th Cong., 2d Sess. 61 (1980); note 11, *supra*. This statement, however, should not be viewed as establishing a congressional intent that the formal EIS process be the sole vehicle for analyzing the environmental impacts of large scale remedial actions. Properly interpreted, the statement reflects Congress' overriding concern that the environmental consequences of remedial actions be fully explored. Application of the functional equivalent exception does not violate this concern, since the exception can only be invoked where the substance of § 102(2)(C) of NEPA has been fulfilled.

EPA under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*,[15] the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*,[16] the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401 *et seq.*,[17] and the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*[18]

In general, under the functional equivalent exception, an Agency with expertise in environmental matters is not obligated to comply with the formal EIS process prior to taking a particular action [19] if two criteria are met. First, the agency's authorizing statute must provide "substantive and procedural standards [that] ensure full and adequate consideration of environmental issues." *Environmental Defense Fund, Inc.* v. *EPA*, 489

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[15] *See e.g., Amoco Oil Co.* v. *EPA*, 501 F.2d 722, 749–50 (D.C. Cir. 1974) (issuance of fuel additive regulations); *Essex Chemical Corp.* v. *Ruckelshaus*, 486 F.2d 427, 431 (D.C. Cir. 1973) (promulgation of new source performance standards), *cert. denied*, 416 U.S. 969 (1974); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 384–87 (D.C. Cir. 1973) (promulgation of new source performance standards). In 1974, Congress enacted the Energy Supply and Environmental Coordination Act, Pub.L. 93–319, which explicitly exempted from § 102(2)(C) of NEPA actions taken by the Administrator under the Clean Air Act (*see* 15 U.S.C. § 793(c)(1)).

[16] *See State of Wyoming* v. *Hathaway*, 525 F.2d 66, 72–73 (10th Cir. 1975) (cancellation and suspension of economic poisons), *cert. denied*, 425 U.S. 906 (1976); *Environmental Defense Fund, Inc.* v. *EPA*, 489 F.2d 1247, 1254–57 (D.C. Cir. 1973) (cancellation of pesticide registration); *Environmental Defense Fund, Inc.* v. *Blum*, 458 F. Supp. 650, 661–62 (D.D.C. 1978) (approval of exemption from pesticide registration).

[17] *See State of Maryland* v. *Train*, 415 F. Supp. 116, 121–22 (D. Md. 1976) (issuance of ocean dumping permit), *rev'd on other grounds*, 556 F.2d 559 (4th Cir. 1977).

[18] *See Warren County* v. *State of North Carolina*, 528 F. Supp. 276, 286–87 (E.D. N.C. 1981) (approval of PCB disposal site); *Twitty* v. *State of North Carolina*, 527 F. Supp. 778, 783 (E.D. N.C. 1981) (approval of PCB disposal site).

[19] While the courts have traditionally applied the functional equivalent exception to regulatory actions, there is nothing to prevent the exception from applying to site-specific, nonregulatory activities such as remedial actions, absent a specific statutory directive that the activities comply with the EIS requirement and provided the activities otherwise meet the judicially formulated standards for the exception. Certainly, an extension of the exception to remedial actions would not constitute a radical departure from existing case law, given the willingness of courts to invoke the exception for regulatory actions having site-specific impacts. *See Warren County* v. *State of North Carolina, supra* note 18; *Twitty* v. *State of North Carolina, supra* note 18; *State of Maryland* v. *Train, supra* note 17.

F.2d 1247, 1257 (D.C. Cir. 1973).[20] Second, the Agency must afford an opportunity for public participation in the evaluation of environmental factors prior to arriving at a final decision.[21]

Remedial actions appear to satisfy the first criterion for a functional equivalent exception because of the mandate for environmental assessment contained in § 104 of CERCLA and the procedural safeguards developed by EPA for the remedial planning process. In this context, § 104(a)(1) of CERCLA specifically directs that remedial actions be "necessary to protect public health or welfare or the environment." As such, it establishes a substantive standard of environmental protection that requires remedial actions to include a thorough investigation of environmental questions.[22] Moreover, this requirement is supplemented by procedures set forth in the NCP pursuant to § 105 of CERCLA, 42 U.S.C. § 9605,[23] which establish a process for conducting an analysis during the planning of remedial actions that is basically similar to the evaluation underlying an EIS.[24]

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[20] In judging the adequacy of an Agency's consideration of environmental impacts, the courts have often focused on whether the Agency examined the five core issues of an EIS set forth in § 102(2)(C)(i)-(v) of NEPA. *See Environmental Defense Fund, Inc.* v. *EPA, supra,* 489 F.2d at 1256; *Environmental Defense Fund, Inc.* v. *Blum, supra,* 458 F. Supp. at 661. They have also indicated, however, that the functional equivalent exception does not necessarily require an agency to separately address each element of an EIS analysis, especially where the Agency's authorizing statute provides for an orderly review of diverse environmental factors. *See Pacific Legal Foundation* v. *Andrus,* 657 F.2d 829, 834 n.4 (6th Cir. 1981); *Amoco Oil Co.* v. *EPA, supra,* 501 F.2d at 750; *Warren County* v. *State of North Carolina, supra,* 528 F. Supp. at 287.

[21] *See e.g., Portland Cement Ass'n* v. *Ruckelshaus, supra,* 486 F.2d at 386; *Environmental Defense Fund, Inc.* v. *EPA, supra,* 489 F.2d at 1256; *Warren County* v. *State of North Carolina, supra,* 528 F. Supp. at 287; *State of Maryland* v. *Train, supra,* 415 F. Supp. at 122. *See also Weinberger* v. *Catholic Action of Hawaii Peace Education Project,*__ U.S.__, 102 S. Ct. 197, 201 (1981) (stating that one objective of § 102(2)(C) of NEPA is to inform the public that environmental concerns have been considered).

[22] *See Environmental Defense Fund, Inc.* v. *EPA, supra,* 489 F.2d at 1256 (language in FIFRA requiring deregistration of pesticides that would be injurious to man or the environment creates substantive standard mandating consideration of environmental effects).

[23] Section 105(3) of CERCLA requires EPA to publish a revised National Contingency Plan that includes methods and criteria for determining the appropriate extent of remedial actions.

[24] Section 300.68 of the NCP contains procedures which provide for:

Continued

To the extent that these procedures are followed, it is likely that a court would view remedial actions as embodying the type of environmental assessment needed to qualify for the exception.

It must be recognized, however, that CERCLA does not prescribe requirements for public involvement in the remedial planning process that would enable remedial actions to meet the public participation criterion for a functional equivalent exception. Such requirements are also absent from the NCP, which merely recommends that remedial actions, to the extent practicable, be undertaken in a manner sensitive to local community concerns in accordance with applicable guidance. (NCP, § 300.61(c)(3).) Accordingly, in order for the functional equivalent exception to apply, it will be necessary for remedial actions to incorporate procedures that afford the public a meaningful opportunity to comment on environmental issues before the final selection of a remedial alternative. While these procedures need not involve the holding of a formal public hearing,[25] they should at least entail other, less formal mechanisms for soliciting public input.

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1. The identification of the appropriate type of remedy based on a consideration of factors that include environmental effects and welfare concerns (§ 300.68(e));

2. The development of feasible alternatives, including consideration of the no-action alternative where action may cause a greater environmental or health danger than no action (§ 300.68(g)); and

3. The elimination of alternatives that would have significant adverse environmental impacts (§ 300.68(h)(2)).

In emphasizing the consideration of alternatives and their environmental impacts, these procedures are similar to the analytical process mandated by the CEQ regulations, 40 C.F.R. § 1502.14.

[25] Although the provision of public hearings has undoubtedly influenced courts in granting functional equivalent exceptions, *e.g.*, *Amoco Oil Co.* v. *EPA*, *supra*, 501 F.2d at 750; *Environmental Defense Fund, Inc.* v. *EPA*, *supra*, 489 F.2d at 1256, such hearings should not be viewed as a critical element of the exception. This is because NEPA itself provides no right to a public hearing. *See Como-Falcon Community Coalition, Inc.* v. *United States Dept. of Labor*, 609 F.2d 342, 344–45 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); *Cross-Sound Services, Inc.* v. *United States*, 573 F.2d 725, 731–32 (2d Cir. 1978); *State of Wyoming* v. *Hathaway*, *supra*, 525 F.2d at 72 n.7.

In conclusion, it must be stressed that remedial actions do not automatically qualify for the functional equivalent exception to § 102(2)(C) of NEPA. Rather, the availability of the exception is contingent upon structuring remedial actions to satisfy the requirements for environmental assessment and public participation underlying the exception. If EPA complies with the procedures for environmental evaluation contained in the NCP and provides for public comment during the decisionmaking process, a strong argument can be made that the exception is applicable. However, if these precautions are not taken, there is a considerable risk that a court will find remedial actions to be subject to the EIS requirement.

December 15, 1982

MEMORANDUM

SUBJECT: Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 for Releases of Hazardous Substances in Amounts Less Than "Reportable Quantities"

FROM: Robert M. Perry
Associate Administrator and General Counsel

TO: All Regional Counsel

The question has arisen whether there is liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or the Act) for releases of hazardous substances in amounts less than "reportable quantities." I believe that CERCLA quite clearly establishes liability whenever there is a release or a threatened release of a hazardous substance, regardless of quantity.

Discussion

CERCLA creates a comprehensive scheme for dealing with hazardous waste sites and other releases or threatened releases of hazardous substances, pollutants, or contaminants. The Act grants broad authority for the Federal Government to respond whenever "any hazardous substance is released or there is a substantial threat of such a release into the environment." § 104(a). Liability arises whenever "there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance." § 107(a). The term "hazardous substance" is defined in Section 101(14) as any substance designated under CERCLA or one of four other environmental laws. None of these three provisions—regarding response, liability, or the definition of hazardous substance—is limited in any way by "reportable" or other quantities.

Only the reporting provisions of the Act are limited by "reportable quantities."[1] This indicates that when Congress in-

[1] Section 102(h) of CERCLA establishes "reportable quantities" for each hazardous substance. Pending promulgation of regulations, a quantity of either one pound or, if available, the reportable quantity established under § 311 of the Clean Water Act shall be the reportable quantity for purposes of CERCLA.
Continued

tended that a provision be triggered by the release of a certain amount of a substance, it clearly knew how to express that intent. The absence of such limitation in § 107 establishes that the release of a reportable quantity is not necessary in order for liability to arise.[2]

While the language of the Act itself is enough to establish this principle, the legislative history provides additional support. The report accompanying the Senate provision, which was very similar to the provision actually enacted, noted:

> The provision intentionally omits from the requirement to determine "reporting" quantities any reference to harm or hazard. A single quantity is to be determined for each hazardous substance, and this single quantity requires notification upon release into any environmental medium. It would be virtually impossible to determine a single quantity applicable to all media while at the same time linking such quantity to any subjective concept of harm.
>
> It is essential that quantities be relatively simple for those subject to notification requirements to understand and comply with. Since releases in *such quantities trigger notification requirements, but do not, in and of themselves give rise to other liabilities under this Act,* the President's broad discretion to select quantities will not unfairly burden those persons subject to the Act. (Emphasis added.)

S. Rep. 848, 96th Cong., 2d Sess. 29 (1980).

In conclusion, liability under CERCLA is not limited to instances where releases exceed reportable quantities.

Section 103(a) requires releases of hazardous substances "in quantities equal to or greater than those determined pursuant to Section 102" to be reported to the National Response Center.

[2] It is also noteworthy that unlike CERCLA, the liability provisions of § 311(f) of the Clean Water Act explicitly require as an element of liability that the discharge be "in violation of subsection (b)(3)," *i.e.*, quantities equal to or greater than a reportable quantity.

June 22, 1983

MEMORANDUM

SUBJECT: Resource Conservation and Recovery Act
Regulation of Wastes Handled by
Department of Energy Facilities

FROM: A. James Barnes
Acting General Counsel

TO: Pasquale A. Alberico
Acting Director
Office of Federal Activities

Issue Presented

In your June 2, 1983, memorandum, you have asked whether the Resource Conservation and Recovery Act (RCRA) applies to Department of Energy (DOE) facilities.

Conclusion

RCRA does apply to DOE facilities, including those operated under authority of the Atomic Energy Act of 1954, as amended (AEA), 42 U.S.C. § 2011 *et seq.* However, specific RCRA regulations may not apply to some aspects of DOE operations, if it is determined, on a case-by-case basis, that the application of those regulations would be inconsistent with the requirements of the AEA. In addition, RCRA does not apply to "source, special nuclear or by-product materials" as defined by the AEA.[1]

Discussion

A. *Nuclear Wastes*

The only materials that EPA can regulate under RCRA are "solid wastes" and "hazardous wastes" (which are a subset of "solid wastes"). Section 1004(27) of RCRA expressly exempts from the definition of "solid waste":

[1] This memorandum will use the term "nuclear wastes" to refer to wastes consisting of "source, special nuclear or by-product material." Other types of wastes are referred to herein as "chemical wastes."

> source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended.

Thus, it is clear that RCRA does not apply to nuclear wastes handled at DOE facilities.

B. *Chemical Wastes*

Section 6001 of RCRA expressly provides that Federal facilities that manage wastes are subject both to EPA and State requirements respecting the control and abatement of solid waste or hazardous waste disposal. However, such regulation of chemical wastes at DOE facilities is limited by § 1006 of RCRA, which provides in part that:

> [n]othing in this Act shall be construed to apply to (or to authorize any State . . . to regulate) any activity or substance which is subject to the . . . Atomic Energy Act of 1954 . . . except to the extent that such application (or regulation) is not inconsistent with the requirements of [the AEA].

While this provision clearly precludes any EPA or State regulation that would be inconsistent with DOE responsibilities under the AEA, we cannot agree with DOE's contention [2] that because "the AEA itself establishes a regulatory framework by which DOE . . . is authorized to prescribe and enforce regulations and other requirements necessary for the sound management of the AEA activities," *any* application of EPA's hazardous waste management regulations would be inconsistent with the requirements of the AEA (DOE letter, p. 2).

First, DOE's analysis would render the cited language in § 1006 a nullity. By its very presence in RCRA, that provision clearly suggests that there may be some activities and wastes subject to the AEA that EPA *can* regulate.

Second, the notion that national security considerations dictate a general exemption of all DOE AEA facilities is belied by § 6001 of RCRA, which authorizes the President to:

> exempt any solid waste management facility of any department . . . in the executive branch from compliance with [a Federal or State solid or haz-

[2] This contention was expressed in a letter (copy attached) dated November 14, 1980, from Stephen Greenleigh, Assistant General Counsel for Environment at DOE to the former Associate General Counsel for Water and Solid Waste at EPA. The letter is referred to herein as the "DOE letter."

> ardous waste] requirement if he determines it to be in the paramount interest of the United States to do so.

If the application of a Federal or State standard to DOE facilities is inimical to national security, DOE may seek a Presidential "paramount interest" exemption from those standards. Absent such an exemption, the applicability or inapplicability of EPA and State solid and hazardous waste regulations must depend on their consistency (or inconsistency) with AEA requirements.

Third, the AEA provision which DOE cites as evidence of its broad regulatory authority under the AEA (§ 161(i)(3)) does not by itself compel the conclusion that the regulation of DOE facilities under RCRA would necessarily be inconsistent with that authority.[3] Section 161(i)(3) authorizes DOE to prescribe "standards and restrictions governing the . . . operation of facilities used to conduct [AEA activities] in order to protect health and to minimize danger to life and property." Even if we admit the possibility that all of EPA's hazardous waste regulations could be inconsistent with the standards and restrictions of facility operations promulgated by DOE under this provision, there is no way of determining this without a comparison of the two sets of standards. Neither EPA nor DOE has undertaken such a comparison. Indeed, in its correspondence, DOE has not identified a single RCRA regulation that is inconsistent with requirements that DOE facilities must meet under the AEA.

In its letter, DOE also asserts that § 161(j) of the AEA preempts any application of RCRA to chemical wastes managed at DOE facilities. Section 161(j) provides that DOE may:

> without regard to the provisions of the Federal property and Administrative Services Act of 1949 . . . or any other law, make such disposition as it may deem desirable of (1) radioactive materials, and (2) any other property, the special disposition of which is, in the opinion of [DOE] in the interest of the national security.

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[3] It has already been judicially determined that the fact that RCRA may overlap with another statute does not mean that RCRA regulations are inapplicable. *CMA* v. *EPA*, 673 F.2d 507 (D.C. Cir. 1982).

Again, this provision does not compel the conclusion reached by DOE. Section 161(j) was adopted in 1959, well before enactment of RCRA and any manifestation of congressional concern about the problem of hazardous waste disposal. The quoted section, despite its "without regard to . . . any other law" provision, cannot be construed to limit the application of a law enacted 17 years later, which pertains to an area of concern that: (1) is unrelated to Federal disposition of property;[4] (2) specifically requires all Federal facilities to meet applicable State and Federal solid waste management requirements; and (3) establishes a special procedure for exempting Federal facilities from those requirements if it is in the "paramount interest" of the United States to do so. Thus, in our opinion, § 161(j) cannot be construed to confer on DOE facilities a blanket exemption from RCRA requirements.[5]

In short, we cannot conclude that DOE activities under the AEA, simply by their virtue of being AEA activities, are exempt from RCRA requirements. However, we do not reject the possibility that some RCRA regulations might be inconsistent with AEA requirements and therefore inapplicable to DOE facilities. Such inconsistency can only be determined on a case-by-case basis. EPA and DOE should be able to identify inconsistent regulations by a cooperative effort.

C. *Mixtures of Chemical Wastes and Nuclear Wastes*

EPA's authority to regulate chemical wastes at DOE facilities may be limited to the extent that such wastes are mixed with nuclear wastes. An argument can be made that any regulation of mixtures of chemical and nuclear waste would amount to *de facto* regulation of nuclear wastes, and is thus precluded under

[4] It is doubtful that the term "property" in § 161(j) even encompasses wastes. The citation in § 161(j) to the Federal Property and Administrative Services Act of 1949, the title of § 161(j) ("surplus materials") as well as references to the purchasing and leasing of property in other paragraphs of § 167 all suggest that the term has a very traditional meaning and does not include sludges, garbage, tars, trash, and other wastes.

[5] Although we believe that § 161(j) was not intended to abridge subsequently enacted statutes pertaining to different subject matter, it is an elementary principle of statutory construction that inconsistent provisions must be resolved in favor of the later enacted statute. *See, e.g., Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 456–57 (1945); *International Telephone & Telegraph Co.* v. *General Telephone and Electronics Corp.*, 518 F.2d 913, 935 (9th Cir. 1975).

§ 1004(27). It may also be argued that the addition of small quantities of nuclear waste to solid waste does not remove such solid wastes from RCRA jurisdiction.

Further information as to the precise nature of such mixtures is necessary in order to reach a definite legal position on this issue, which goes far beyond the question of whether DOE facilities are subject to RCRA regulatory requirements.[6] We would need to consult further with DOE on this matter and to analyze additional data before making a final decision.

Attachment [Deleted.]

[6] Our interpretation would affect our ability to regulate private facilities handling mixtures of nuclear and chemical wastes and our ability to bring imminent hazard actions under § 7003 of RCRA.

January 19, 1984

MEMORANDUM

SUBJECT: Relationship of the Resource Conservation and Recovery Act to the Department of Energy's Activities Under the Atomic Energy Act

FROM: A. James Barnes
General Counsel

TO: Theodore B. Olson
Assistant Attorney General

Introduction

This memorandum is in response to the memorandum of the Department of Energy's General Counsel, dated December 2, 1983 (the DOE memo). This memorandum supplements my earlier memorandum of June 22, 1983 (attached), which was discussed in the DOE memo.

Issue Presented

Are DOE facilities operated under authority of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011 *et seq.*, categorically exempt from the application of Federal and State laws governing the generation, transportation, storage, and disposal of hazardous chemical waste? [1]

Conclusion

DOE facilities operating under authority of the AEA are not categorically exempt from Federal and State hazardous waste laws unless the President orders an exemption in the "paramount interest" of the United States. Otherwise, such facilities are exempt only to the extent it is shown that the application of a particular law or regulation to a particular DOE activity is inconsistent with the requirements of the Atomic Energy Act.

The Environmental Protection Agency (EPA) accepts the premise that national security and other considerations may require some adjustments in the application of hazardous waste regulations, and agrees with DOE that continued operation of

[1] The waste referred to is that characterized as hazardous under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, and does not include source, special nuclear, or by product material as defined by the AEA. *See* RCRA § 1004(24).

certain facilities vital to the national defense cannot be "dependent on permission granted by state officials . . . ."[2]

Discussion

In enacting RCRA, Congress made clear its concern with the performance of Federal agencies in controlling hazardous waste at their own facilities. Section 6001 of RCRA, which specifically subjects Federal facilities to State and EPA hazardous waste regulation, was enacted precisely because of this concern. Significantly, the examples cited by Congress of the danger of improper waste disposal included leaks of radioactively contaminated wastes at DOE's facility in Hanford, Washington. H.R. Rep. 1491, 94th Cong., 2d Sess. 19.

As DOE acknowledges (DOE memo at 21), an important consideration in the applicability of hazardous waste law to DOE activities is § 1006(a) of RCRA, which provides:

> Application of Act—Nothing in this Act shall be construed to apply (or to authorize *any State*, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act (33 U.S.C. 1151 and following), the Safe Drinking Water Act (42 U.S.C. 300f and following), the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 and following), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 and following) except to the extent that such application (or regulation) *is not inconsistent with the requirements of such Acts.* (Emphasis added.)

The clear meaning of this provision is that activities subject to the AEA are subject to hazardous waste regulation when such regulation is not inconsistent with the requirements of the AEA. Thus, hazardous waste regulation must apply unless it can be shown to conflict with a "requirement" of the AEA.

DOE asserts, however, that *any* application of hazardous waste regulations to its facilities is proscribed. (DOE memo at 2.) We submit that § 1006 of RCRA does not provide such a categorical exemption from the clear authority of § 6001. First, it is clear that when Congress desired to defer regulation of a

[2] Letter of December 2, 1983, from Theodore Garrish to Theodore B. Olson, transmitting DOE memo, page 2, 1st para.

particular realm of activity to a different regulatory scheme, it did so explicitly. § 1006(c).[3] Moreover, there is nothing in § 1006 or its legislative history to indicate, as DOE asserts (DOE memo at 23), that RCRA was meant to apply to activities licensed by the Nuclear Regulatory Commission (NRC), but not to DOE activities under the AEA.

DOE's argument that application of EPA or State hazardous waste regulatory authority to its facilities would be inconsistent *per se* with AEA requirements appears to be based on three principles: First, under § 161(i)(3) of the AEA, DOE has authority to regulate hazardous waste. (DOE memo at 29–30.) Second, application of hazardous waste regulations, particularly the public participation procedures, would be inconsistent with national security concerns related to the production of atomic energy and military weapons. (DOE memo at 28.) Finally, the major role played by the States in hazardous waste regulation is inconsistent with the AEA's scheme of vesting complete authority over atomic energy and weapons production in DOE. (DOE memo at 27.) We submit that none of these alleged inconsistencies is cause for concluding that DOE facilities are categorically exempt from RCRA regulation.

I. *Any Authority of DOE Over Hazardous Wastes Is Not a "Requirement" of the AEA*

The first step in determining the "requirements" of a statute (where these requirements are not unambiguously stated in prescriptive terms) is to analyze the statute's stated purpose. Section 1 of the AEA declares that it is the policy of the United States that:

> a. the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and
>
> b. the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the

[3] Section 1006(c) vests in the Department of the Interior "exclusive responsibility" for implementing hazardous waste regulations with respect to coal mining wastes.

> standard of living, and strengthen free competition and private enterprise.

Section 3 of the AEA states that it is the Act's purpose to effectuate the above policy.

As the Senate Report accompanying the bill (S. 3690) which, with minor amendments, became the Atomic Energy Act of 1954 states in its analysis of § 1:

> The aim of the bill is to assure that atomic energy makes the maximum contribution to the general welfare of the Nation, subject to the paramount objective of having it make the maximum contribution to the common defense and security . . . .

S. Rep. 1699, 83d Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News at 3456, 3457 (1954).

In short, the raison d'etre of the Atomic Energy Act is atomic energy; the Act lays out a comprehensive scheme for the promotion, use, and regulation of atomic energy. The AEA is not aimed at the protection of human health and the environment from hazardous wastes; Congress enacted RCRA for that purpose. Thus, Congress provided in §§ 6001 and 1006 that RCRA's scheme for regulating hazardous waste would apply unless it conflicts with the *requirements* of the AEA. In the absence of a direct prescriptive provision in the AEA, interpretation of the phrase, "requirements of the AEA," must be predicated on whether a hazardous waste regulation would be inconsistent with the AEA's purpose of assuring that atomic energy makes the maximum contribution to the Nation's welfare and defense.

DOE appears to discern a "requirement" in § 161(i)(3) of the AEA, which:

> authorize[s] DOE to prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.

42 U.S.C. § 2201(i)(3). This provision, which is part of the chapter "setting forth the general powers of the [DOE] in operating or regulating any of the activities authorized by [the

AEA]." S. Rep. 1699, *supra*. U.S. Code Cong. & Admin. News at 3481 (1954), does not address the subject of nonnuclear hazardous wastes. Rather, as the Senate Committee's line-by-line analysis states, for purposes pertinent here, § 161 permits the Commission to ". . . govern activities authorized pursuant to the bill, including health and safety regulations; [and] to dispose of radioactive materials or property where special disposition is needed in the interests of national security." *Id.* There is no suggestion in the AEA or its legislative history that DOE is authorized, much less required, to establish a regimen for the control of nonradioactive wastes. Significantly, § 161(i)(3) refers only to the protection of human health and property and does not address the protection of the environment.[4]

Indeed, little congressional attention to the issue of hazardous waste disposal is in evidence in the AEA or its legislative history. The dimensions of the Nation's hazardous waste problem were not generally acknowledged until more than a decade after enactment of the AEA. To the extent that the statute does address such hazards, it recognizes the role of EPA and the States. Section 84 of the AEA, added by the Uranium Mill Tailings Radiation Control Act of 1978, Pub.L. 95–604, requires that the NRC ensure that the management of uranium and thorium tailings conforms to general standards promulgated by EPA under § 275 of the AEA and conforms to requirements established by NRC, with the concurrence of EPA, which are, to the maximum extent practicable, comparable to EPA's requirements for hazardous waste regulated under RCRA. In addition, § 274(k) of the AEA preserves State jurisdiction over nonradiation hazards.

Nonetheless, it is reasonable to assume that Congress intended that the Atomic Energy Commission and its successors have the authority to keep their own facilities in order, and § 161(i)(3) could be interpreted in that light. However, that common-sense assumption of housekeeping authority over nonradioactive wastes can scarcely support the contention that the AEA established a "scheme" for DOE regulation of its hazardous wastes and that any RCRA-authorized regulation of such

[4] The focus of RCRA is the protection of human health and the environment. *See, e.g.*, RCRA § 1003.

wastes must yield.[5] Any authority that DOE has over nonradioactive waste is incidental to its statutory mandate, and must yield to regulation under RCRA, the statute designed to control hazardous waste, unless such regulation would be inconsistent with the AEA's atomic energy requirements.

II. *National Security Concerns Do Not Dictate a Categorical Exemption from RCRA*

In enacting RCRA, Congress was concerned that the public have adequate notice and input regarding the measures taken by the Government to control hazardous waste. § 7004(b), RCRA, 42 U.S.C. § 6974(b).

We share DOE's concern that these procedures not compromise efforts to restrict the dissemination of restricted data pertinent to the design or construction of nuclear weapons and production and use of special nuclear materials. However, the resolution of this tension between the statutes does not lie in nonapplicability of one or the other. First, it is unlikely that public access to all information about all hazardous wastes at all DOE facilities operated under the AEA must be restricted. For example, if DOE facilities discard left-over paints, spent cleaning solvents, and pesticides (as do most industrial operations), it seems unlikely that it would be necessary to restrict public access to this information. Moreover, the RCRA program could be structured so that sensitive information is not made public. For example, permits issued might not specifically list all wastes or operations that are covered. Federal and State inspectors could be excluded from highly sensitive areas or required to obtain appropriate security clearances.[6] EPA is work-

[5] As noted above, where Congress has wished to reserve regulation over a certain set of hazardous wastes to an agency other than EPA, it has done so explicitly in the very statutory section under discussion. *Compare* § 1006(a) of RCRA *to* § *1006(c), which specifically authorizes the Secretary of the Interior* to regulate hazardous coal mining wastes. If Congress intended that DOE should be solely responsible for regulating hazardous waste management at its facilities, it was well capable of doing so explicitly.

[6] In fact, DOE has obtained National Pollutant Discharge Elimination System (NPDES) permits for its facilities under the Clean Water Act. The discharge limitations in some of the permits, such as that for the Savannah River facility (NPDES Permit No. TN–0002968), are classified.

ing with other Federal agencies, such as the Department of Defense, to ensure that the RCRA program is implemented, while fully protecting classified information.

If these or other measures are not practicable, it may be that specific applications of hazardous waste regulations will have to yield. However, this conclusion cannot be made on a general, abstract basis, but only with reference to specific AEA activities and specific aspects of hazardous waste regulation. Finally, to reemphasize a point expressed in my earlier memo, the availability of the "paramount interest" exemption in § 6001 of RCRA belies a generalized claim of exemption based on national security grounds.[7]

III. *State Regulation Is Not Per Se Inconsistent with AEA Requirements*

DOE's memorandum exhaustively details the evolution of Federal authority under the AEA and correctly concludes that State authority over atomic energy is preempted. However, that conclusion applies only to atomic energy; it does not apply to nonradioactive hazardous waste. *Illinois* v. *Kerr McGee Corp.*, 677 F.2d 571, 580 (7th Cir. 1982), *cert. denied*, ___ U.S. ___, 74 L. Ed. 2d 618 (1983). As DOE concedes: "each state remains free to regulate nuclear powerplants in order to further objectives distinct from radiation safety . . . ." DOE memo at 7, quoting *Pacific Legal Foundation* v. *State Energy Resources Conservation and Development Commission*, 659 F.2d 903, 928 (9th Cir. 1981), *aff'd sub nom. Pacific Gas and Electric Co.* v. *State Energy Resources Conservation and Development Commission*, ___ U.S. ___, 103 S.Ct. 1713 (1983). In fact, § 274(k) of the AEA specifically provides:

> "nothing in this section shall be construed to affect the authority of any State . . . to regulate activities for purposes other than protection against radiation hazards."

42 U.S.C. § 2021(k). *See Pacific Gas and Electric Co., supra; Northern States Power Co.* v. *Minnesota* 447 F.2d 1143, 1151, (8th Cir. 1971),

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[7] Contrary to DOE's suggestion (DOE memo at 31), there is no indication in the legislative history that the "paramount interest" exemption was directed at any concerns other than those pertaining to national security. Even if Congress did have other concerns in mind, there can be no doubt that national security concerns can implicate the "paramount interest" of the United States.

aff'd, 405 U.S. 1035 (1972).[8] The State role in regulating nonradioactive materials was recognized by the Supreme Court: "Congress, by permitting regulation 'for purposes other than protection against radiation hazards,' underscored the distinction drawn in 1954 between the spheres of activity left respectively to the federal government and the States." *Pacific Gas and Electric Co., supra*, ____ U.S. ____ 75 L. Ed. 2d at 769.

Even if the 1965 amendments to the AEA had preempted State authority over nonradioactive hazards at DOE facilities,[9] any notion that DOE facilities may enjoy "sovereign immunity" from State regulation of solid and hazardous wastes was put to rest by the enactment of § 6001 of RCRA, which explicitly provides for the application of State hazardous waste laws to Federal facilities. There is no general exemption for facilities conducting activities involving sensitive national security concerns; the President has authority to exempt specific facilities. Thus, the contention that DOE is exempt from State hazardous waste regulation must be grounded on either a Presidential order or § 1006(a) of RCRA, not the doctrine of sovereign immunity.

Section 1006(a), however, envisions State regulation except to the extent such regulation is inconsistent with AEA requirements. If all State regulation were *ipso facto* inconsistent with AEA requirements, there would have been no need to include that clause in the statute.[10] Rather, inconsistency with State

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[8] Contrary to DOE's assertion, *Train* v. *Colorado PIRG*, 426 U.S. 1, 16, does not find an "absence of any room for a state role under the AEA." DOE memo at 27. A more complete quotation of the passage cited by DOE: "The absence of any room for a state role under the AEA *in setting limitations on radioactive discharges* . . ." (emphasis added), reveals the limitation of *Colorado PIRG's* concern over State incursion to an area clearly subject to the AEA's preemptive authority. The holding of *Colorado PIRG* was more limited still: source, special nuclear, and byproduct material is not a "pollutant" under the Clean Water Act and is therefore not subject to permitting requirements under that Act when discharged to navigable waters. 426 U.S. at 25.

[9] Such a conclusion is scarcely tenable in light of § 274(k), which was left unchanged by the 1965 amendments.

[10] The "except to the extent inconsistent" clause cannot be explained as a provision to allow the States to regulate nonradioactive waste disposed of by AEA licensees (DOE memo at 23); States may regulate such waste without reference to RCRA and in fact most States regulate radioactive waste pursuant to agreement with NRC under § 274 of the AEA.

regulation must be determined on a case-specific basis. For example, we agree that in many cases, a State could not "condition the continued operation of a DOE facility" (DOE memo at 27) on the issuance of a permit. Clearly, the shutdown of a weapon-producing facility would be inconsistent with AEA requirements.[11] As with Federal regulation, State regulation would have to be tailored to DOE facilities in order to avoid inconsistencies with the atomic energy concerns of the AEA, while accommodating to the maximum extent practicable RCRA's goal of protecting human health and the environment from hazardous wastes.

Practical Consequences

Finally, I must take issue with DOE's contention (DOE memo at 32) that the application of RCRA to DOE facilities would work an "absurd and futile result." RCRA provides a comprehensive scheme for the management of hazardous waste to protect human health and the environment; there is no evidence that such a scheme would be superfluous at DOE facilities.[12] DOE's business is with an entirely different matter—the production and promotion of atomic energy and nuclear weapons. No reason is apparent why the RCRA and AEA programs cannot operate together, subject to adjustments necessary to meet national security concerns.[13]

Attachment [Deleted.]

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[11] It has been recognized that jurisdiction over pollution by Federal facilities does not necessarily imply that a facility must be shut down for failure to comply with the law. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

[12] To the contrary, serious concern has been expressed over the status of hazardous wastes at DOE facilities. House Comm. on Science and Technology, "The Extent and Impact of Mercury Releases and Other Pollutants at the Department of Energy's Oak Ridge Complex at Oak Ridge, Tennessee," H.R. Rep. 558, 98th Cong., 1st Sess.

[13] In fact, DOE has recently issued an internal order incorporating many elements of the EPA RCRA regulations. DOE Order 5480.2 (Dec. 13, 1982).

March 1, 1984

SUBJECT: Legal Issues Concerning Incineration of Hazardous Wastes at Sea

The Honorable Solomon P. Ortiz
House of Representatives
1524 Longworth House Office Building
Washington, D.C. 20515

Dear Congressman Ortiz:

In your December 20, 1983, letter to Jack Ravan, Assistant Administrator for Water, U.S. Environmental Protection Agency, you posed a number of legal, technical, and policy questions concerning the incineration of hazardous wastes at sea. The Agency has previously provided a response to the technical and policy questions. I appreciate the opportunity to respond to many of the legal questions you posed. To the extent your legal questions involve statutes or issues which are beyond the Agency's area of expertise, I have arranged for the Department of Justice to provide a response that addresses those issues. The Justice Department will be responding in whole or part to questions 2, 3, 4, 5, 7, 11, 12, 13, and 14 set out in the attachment to your December 20, 1983, letter.

Question 1

"Under 42 U.S.C. sections 9601 *et seq.* (hereinafter cited as [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980] CERCLA in some places), would the vessel owner be liable for at most a total of $5 million for both cleanup costs and damages for injury to natural resources?"

Response

The answer to this question turns on whether an ocean incineration ship would be considered a "facility" or a "vessel" under CERCLA. As will be discussed in more detail below, arguments could be made to support either interpretation.[1]

[1] It should be noted that for purposes of other statues which apply to the regulation of incinerator ships, I understand that it is the U.S. Coast Guard's view that these ships are clearly considered "vessels." These statues include:

§ 502 of Pub.L. 97–389 (46 App. U.S.C. § 883);

Continued

Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), defines "facility" as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; *but does not include . . . any vessel.* (Emphasis added.)

This definition is a very broad one. Clearly, an incineration ship that is built and operated for the purpose of waste disposal and treatment would constitute a "facility" unless it is considered to be a "vessel." The term "vessel" is defined in § 101(28) of CERCLA, 42 U.S.C. § 9601(28), as:

> every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

In examining whether an ocean incineration ship is considered either a "facility" or a "vessel" under CERCLA, two tenets of statutory interpretation must be considered. The first is that a statute should be interpreted in accordance with a literal reading of its provisions. The second is that a statute should be interpreted in a manner that best effectuates congressional intent.

Title I of the Marine Protection, Research and Sanctuaries Act (33 U.S.C. § 1401 *et seq.*);

Intervention of the High Seas Act (33 U.S.C. § 1471);

Port and Waterways Safety Act (33 U.S.C. § 1221 *et seq.*);

Tank Vessel Act (46 U.S.C. § 3701 *et seq.*);

The Act to Prevent Pollution From Ships (33 U.S.C. § 1901 *et seq.*);

International Navigation Rules Act (33 U.S.C. § 1601 *et seq.*); and

Inland Navigational Rules Act (33 U.S.C. § 2001 *et seq.*).

However, even though the definition of the term "vessel" which is applicable to those statutes is similar to the definition of "vessel" under CERCLA, for the reasons discussed in this letter, there are arguments that these ships are more properly considered "facilities" for purposes of CERCLA liability.

Under a literal reading of CERCLA, ocean incineration ships might well be considered "vessels." They clearly are "watercraft" that are "capable of being used, as a means of transportation." However, this approach does not specifically consider the special nature of ocean incineration ships and the overall purpose of the liability scheme established by CERCLA. These factors, which are discussed below, suggest that it may be more appropriate to consider ocean incineration ships to be "facilities" for purposes of CERCLA.

There are three major factors on which a court could base a determination that ocean incineration ships are considered "facilities" rather than "vessels" under CERCLA. The first is that the primary purpose of ocean incineration ships is to destroy wastes rather than merely to transport them. CERCLA's definition of the term "vessel" does require that a watercraft have some nexus with transportation. While ocean incineration ships are "capable of being used, as a means of transportation," that is certainly not their primary and intended use. Second, if ocean incineration ships are "vessels" for purposes of CERCLA, the owner would be subject to significantly lower limits of liability than the owner of a land-based incinerator. Owners of land-based incinerators are liable for all costs incurred by the Government in responding to a spill (plus $50 million in natural resources damages) whereas owners of "vessels" are liable under CERCLA for only up to the greater of $300 per gross ton or $5 million for response costs and natural resource damage combined. (This issue is discussed in greater detail below.) Legislative history does not reveal any intent to distinguish between land-based and ocean incinerators. Finally, if ocean incinerator ships are considered "vessels" under CERCLA, it is unclear whether the persons who arranged for disposal or treatment of wastes on the ship from which there is a spill would be liable under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) for the costs of responding to the spill and any natural resource damages. Again, those persons would be liable under CERCLA § 107(a)(3) with respect to spills from land-based incinerators. There is nothing in CERCLA's legislative history that suggests that Congress intended to create such a distinction.

Returning to your original question, if an incinerator ship is considered to be a "facility" under CERCLA the limitations of liability established in CERCLA § 107(c)(1)(D), 42 U.S.C.

§ 9607(c)(1)(D), would apply. Under that provision, the owner is liable for all response costs incurred as a result of a release of hazardous substances from the facility, plus up to $50 million for any natural resource damage. Thus, the ship owner could be held liable for the full costs and damages set forth in the hypothetical question in your letter.

If an incinerator ship is considered to be a "vessel,"[2] the limitations of liability established by CERCLA § 107(c)(1)(A), 42 U.S.C. § 9607(c)(1)(A), would apply. Under that provision, the owner's liability under CERCLA § 107 is limited to $5 million for response costs and natural resources damage combined. Therefore, under the hypothetical you posed, the owner's liability under CERCLA § 107 would be limited to $5 million unless the owner failed or refused to provide reasonable cooperation or assistance requested by a responsible official. *See* CERCLA § 107(c)(2)(B), 42 U.S.C. § 9607(c)(2)(B).

Whether the owner's liability under CERCLA § 107 is based upon a "vessel" or a "facility," that liability would not be affected by the Limitation of Shipowners Liability Act (Act of March 3, 1851), 46 U.S.C. § 183 *et seq.* (LOSLA). *See* CERCLA § 107(h), 42 U.S.C. § 9607(h).

Question 2

"Under what sections of what other federal statutes, if any, could additional cleanup costs be recovered against the vessel owner? As to any cited statutes, discuss the possible applicability of the Act of March 3, 1851 (46 U.S.C. 183ff) (hereinafter cited as the Limitation of Shipowner's Liability Act or LOSLA)."

Response

In responding to questions 2 and 3, I will address the applicability of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, and the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6901 *et seq.* The Department of Justice will be addressing the applicability of other Federal statutes.

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[2] For purposes of this and other responses in this letter, I have assumed that the vessel in your hypothetical question is subject to U.S. jurisdiction. I have not addressed whether the *Vulcanus* I and II are, in fact, "otherwise subject to U.S. jurisdiction." If you would like me to address that issue, I will be glad to do so.

A. *CWA*

Under CWA § 311 U.S.C. § 1321, the owner of "vessels" and "off-shore facilities" from which hazardous substances are released in reportable quantities is liable to the United States for the actual costs incurred in responding to that release. These costs may include governmental costs incurred in restoring or replacing natural resources damaged or destroyed as a result of the release. CWA § 311(f)(4), 33 U.S.C. § 1321(f)(4). As in the case of CERCLA, an owner is not liable if he can demonstrate that the release was caused solely by an act of war, an act of God, or the act or negligence of third parties. CWA § 311(f), 33 U.S.C. § 1321(f).

CWA § 311(a)(3), 33 U.S.C. § 1321(a)(3), defines the term "vessel" in a fashion nearly identical to CERCLA:

> vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel.

CWA § 311(a)(11), 33 U.S.C. § 1321(a)(11), defines "off-shore facility" as follows:

> off-shore facility means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or public vessel.

The arguments relating to whether an ocean incineration ship should be considered either a "vessel" or an "off-shore facility" under the liability provisions of CWA § 311 [3] are very similar to those concerning CERCLA set out in response to your first question. If an incinerator ship is considered a "vessel" under the liability provisions of CWA § 311, the owner's liability for the actual costs of cleanup is limited to the greater of $150 per gross ton of the vessel or $250,000 (for vessels carrying hazardous substances as cargo). CWA § 311(f)(1), 33 U.S.C. § 1321(f)(1).

If an incinerator ship is considered an "off-shore facility" under the liability provisions of CWA § 311, the owner's liabil-

[3] The U.S. Coast Guard regulations under CWA § 311(j), 33 U.S.C. § 1321(j), apply to incinerator ships as if they were "vessels."

ity for the actual costs of cleanup is limited to $50 million.[4] CWA § 311(f)(3), 33 U.S.C. § 1321(f)(3).

The effect of LOSLA, 46 U.S.C. § 183, upon a ship owner's liability under CWA § 311, 33 U.S.C. § 1321, will be addressed by the Department of Justice in its response.

B. *RCRA*

RCRA § 7003, 42 U.S.C. § 9673, may provide authority to recover cleanup costs from a ship owner. RCRA § 7003 provides in relevant part that:

> [n]otwithstanding any other provision of this Act, upon receipt of evidence that the . . . disposal of any . . . hazardous waste may present an immediate and substantial endangerment to health or the environment, the Administrator may bring suit . . . to immediately [enjoin the disposal] or to take such other action as may be necessary.

RCRA § 1004(3), 42 U.S.C. § 6903(3), defines the term "disposal" to include "spilling" any solid or hazardous wastes "into or on *any* . . . *water*." (Emphasis added.) While the term "water" is not defined in RCRA, it is reasonable to conclude that RCRA § 7003 applies to any spill of hazardous wastes into ocean waters over which the United States asserts jurisdiction.

Regarding EPA's authority to seek the recovery of cleanup costs under RCRA § 7003, at least one court has interpreted the phrase in that section "to take other action as may be necessary" to authorize the reimbursement of environmental testing and sampling costs associated with cleanup which are incurred by the Government. *United States* v. *Solvents Recovery Service, Inc.*, 496 F. Supp. 1127, 1142–43 (D. Conn. 1980). However, it is not possible to predict accurately whether courts will extend the reasoning of the *Solvents Recovery* case to permit recovery of actual cleanup costs.

The effect of LOSLA, 46 U.S.C. § 183, upon a ship owner's liability under RCRA § 7003, 42 U.S.C. § 6973, will be addressed by the Department of Justice in its response.

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[4] A court may determine that a ship owner's liability under CWA § 311(f) 33 U.S.C. § 1321(f), is simply a substitute for, rather than in addition to, liability under CERCLA § 107, 42 U.S.C. § 9607. *See* CERCLA § 304(b), 42 U.S.C. § 9654(b).

Question 3

"Under what sections of what other federal statutes, if any, could additional damages for environmental injury be recovered against the vessel owner? As to any cited statutes discuss the possible applicability of LOSLA."

Response

As noted earlier, the Department of Justice will be addressing the applicability of Federal statutes other than the CWA and RCRA. It will also be addressing the applicability of LOSLA.

A. *CWA*

As noted in my response to Question 2, CWA § 311, 33 U.S.C. § 1321, imposes liability for the costs incurred by the Federal Government to restore or replace natural resources damaged or destroyed as a result of a release of hazardous substances in reportable quantities from a "vessel" or an "on-shore facility," as well as for the cleanup costs. The answer provided in response to Question 2 regarding cleanup costs is equally applicable to natural resource restoration or replacement costs incurred under CWA § 311.

B. *RCRA*

It is unclear whether RCRA § 7003, 42 U.S.C. § 6973, can be read to provide for the recovery of environmental damages. Although, as noted in the *Solvents Recovery* case *supra*, RCRA § 7003 "may be the basis for equitable relief other than an order simply restraining the disposal of hazardous materials" (496 F. Supp. at 1143), at least one court has cautioned that this provision should not be read to convert an equitable action into a claim for damages. *United States* v. *Price*, 688 F.2d 204 (3rd Cir. 1982). In *Price*, the court drew a distinction between payments which might be ordered to ensure that preventive measures are taken and payments that are meant to be a form of damages. The court noted that it is permissible to order payment of the former costs pursuant to RCRA § 7003.

Question 4

"Under what sections of the federal statutes (including CERCLA), if any, could the vessel owner be ordered to do additional cleanup beyond $5 million worth? Please take into account, at a minimum, *United States* v. *Burns*, 512 F. Supp. 916

(W.D. Pa. 1981), and 40 C.F.R. Part 264. Also, please discuss the possible applicability of LOSLA."

Response

In responding to this question, I will address the applicability of the CWA, CERCLA, and RCRA. The Department of Justice will be addressing the applicability of other Federal statutes. It will also be addressing the applicability of LOSLA.

A. *CWA*

CWA § 311(e), 33 U.S.C. § 1321(e), authorizes the President to seek, and an appropriate court to grant, relief whenever there is imminent and substantial threat to the public health or welfare of the United States because of an actual or threatened discharge of hazardous substances into or upon the "navigable waters" from an on-shore or off-shore "facility." As I understand the hypothetical example on which your question is based, the hazardous waste spill has occurred more than 3 miles from shore. The jurisdiction of CWA § 311(e), because it is limited to spills "into or upon the navigable waters," is limited to 3 miles from shore. For that reason CWA § 311(e) would not provide the Government with authority to order additional cleanup in the hypothetical example.[5]

B. *CERCLA*

CERCLA § 106(a), 42 U.S.C. § 9606(a), authorizes the President to seek a court order, or issue an administrative order, whenever there is an "imminent and substantial threat to the public health or welfare of the environment" because of a release of hazardous substances *"from a facility."* (Emphasis added.) Therefore, the Government may seek or issue an order requiring a cleanup under CERCLA § 106(a) only if the incinerator ship is considered to be a "facility" under CERCLA; it cannot do so with respect to "vessels." (Regarding the application of these terms to your hypothetical question, see response to Question 1.)

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[5] CWA § 504, 33 U.S.C. § 1364, authorizes the EPA Administrator to seek, and an appropriate court to grant, relief whenever a pollution source is presenting an imminent and substantial endangerment to the public health and welfare. The hypothetical question in your letter does not provide sufficient facts to accurately predict the applicability of this provision.

Because the limitations on liability for releases from a "facility" established by CERCLA § 107(c), 42 U.S.C. § 9607(c), and CWA § 311(f), 33 U.S.C. § 1321(f), are well above the costs and damages set out in your hypothetical, the *Burns* decision would not affect the Government's authority to secure a necessary cleanup.[6]

The Department of Justice will be addressing the applicability of LOSLA to CERCLA § 106(a).

C. *RCRA*

As noted previously, RCRA § 7003, 42 U.S.C. § 6973, may apply to spills of hazardous wastes on or into ocean waters within the United States' jurisdiction. Moreover, the legislative history of this section as well as recent case law confirm that an order issued pursuant to RCRA § 7003 may require cleanup of hazardous wastes. RCRA § 7003 imposes no monetary limit on the cleanup that may be ordered.

The legislative history of RCRA § 7003 provides that:

> The section's broad authority to take such other actions as may be necessary includes both short- and long-term injunctive relief ranging from the construction of dikes to the adoption of certain treatment technologies, upgrading of disposal facilities, and removal and incineration.

Report on Hazardous Waste Disposal by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, H.R. Committee Print No. 96–IFC 31, 96th Cong., lst Sess. 32 (1979) (hereafter "Eckhardt Report"). After reviewing the legislative history of this section, the Third Circuit in *United States* v. *Price, supra*, concluded that "[t]here is no doubt . . . that [§ 7003] authorizes the clean-up of a site, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment." 688 F.2d at 214. *See also United States* v. *Vertac Chemical Corp.*, 289 F. Supp. 870, 888–89 (E.D. Ark. 1980) (granting preliminary injunctive relief under § 7003 including the covering of soil containing hazardous chemicals with a clay topping to prevent penetration by surface waters and the construction of an underground clay barrier to

[6] No cases have arisen under CERCLA § 106(a) that address whether a court may order the restoration of natural resources if there is no imminent and substantial endangerment to public health, welfare, or the environment. It is unclear whether a court would grant that relief.

prevent migration of buried chemical wastes); *United States* v. *Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138, 138 (N.D. Ind. 1980) (granting preliminary injunctive relief including removal of containers and chemical residues). Accordingly, there would appear to be some foundation for the argument that RCRA § 7003 can be used to require cleanup of a spill from an ocean incineration vessel without consideration of a monetary limit.

The Agency has not endorsed the interpretation of RCRA § 1006(b), 42 U.S.C.A. § 9605(b), set forth in *United States* v. *Burns*, 512 F. Supp. 916 (W.D. Pa. 1981). Prominent among the flaws in the court's reasoning is its failure to address the fact that RCRA § 7003's authorities operate "[n]otwithstanding any other provision of [the] Act," including RCRA § 1006.

With respect to the applicability of RCRA Part 264 standards, under 40 C.F.R. § 270.60(a), an ocean incineration vessel which is operating under a permit issued under the Marine Protection Research and Sanctuaries Act (MPRSA) is not required to obtain an individual RCRA permit if it complies with its MPRSA permit, obtains a RCRA identification number (§ 264.11), complies with the RCRA manifest system (§§ 264.71, 264.72, and 264.76), maintains an operating record (§§ 264.73(a) and (b)(1)), and submits a biennial report (§ 264.75). These four requirements are the only Part 264 standards that apply to an ocean incineration vessel which qualifies for the § 270.60(a) exemption. *See* 40 C.F.R. § 264.1(c).

Question 6

"Would a generator of the spilled wastes be exposed to liability under 42 U.S.C. § 9607 [CERCLA Section 107]?"

Response

If the incinerator ship is considered to be a "facility" under CERCLA, any person who "arranged for disposal or treatment" of the spilled wastes by the ship (*e.g., generators*) would be liable for any spills from the ship under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). Of course, the generators would be entitled to assert any of the defenses provided under CERCLA § 107(b) 42 U.S.C. § 9607(b).

On the other hand, CERCLA § 107 does not expressly impose liability upon persons who "arranged for disposal or treatment" of hazardous substances by a "vessel." Therefore

there is no clear basis for imposing liability under CERCLA § 107 upon generators of hazardous wastes which are spilled from vessels.

Question 7

"Would a generator of the spilled wastes be subject to a clean-up obligation under any other section of CERCLA or under any other federal statute or under the federal common law? If 42 U.S.C. Section 6973 [RCRA Section 7003] is cited, please discuss the Burns case if it is applicable, and please discuss any cases or other authorities indicating whether the term 'person contributing to the alleged disposal' would include a generator."

Response

In responding to this question, I will address the applicability of the CWA, CERCLA, and RCRA. The Department of Justice will be addressing the applicability of other Federal statutes.

A. *CWA*

As discussed in response to Question 4, the jurisdiction of CWA § 311(e), 33 U.S.C. § 1321(e)—even if it were to apply to "generators"—does not extend beyond the 3-mile limit and cannot be relied upon as authority to impose liability in the hypothetical example you posed.[7] CWA § 311(f), 33 U.S.C. § 1321(f), imposes liability for cleanup costs only upon the "owner or operator" of the "vessel" or "facility" that spilled the hazardous substances.

B. *RCRA*

Considerable controversy still surrounds the question of whether a generator is considered to be a "person contributing to such handling, storage, treatment, transportation or disposal" under RCRA § 7003, 42 U.S.C. § 6973. The Agency continues to believe that RCRA § 7003's authorities should be read to encompass generators. This position is consistent with the legislative history providing that:

[7] As noted in response to Question 4, the applicability of CWA § 504, 33 U.S.C. § 1364, to the hypothetical question you posed cannot be accurately predicted.

> a company that generates hazardous waste would be someone contributing to an endangerment under § 7003, even where someone else deposited the waste in an improper disposal site (similar to strict liability under common law).

Eckhardt Report at 31.

However, recent cases have ruled against the Agency on this question with respect to past non-negligent offsite generators.[8] *United States* v. *Wade,* 546 F. Supp. 785 E.D. Pa. 1982). *Accord, United States* v. *Northeastern Pharmaceutical and Chemical Co., [NEPACCO],* No. 80–5066–CV–4 (W.D. Mo., filed January 31, 1984). In support of its decision, the court in *NEPACCO* cited the following language from the Senate Report on the 1980 amendments to RCRA:

> [S]ection 7003 should not be construed solely with respect to the common law. Some terms and concepts, such as person 'contributing to' disposal resulting in a substantial endangerment, are meant to be more liberal than their common law counterparts. For example, a company that generated hazardous waste might be someone contributing to an endangerment under section 7003 even where someone else deposited the waste in an improper disposal site (similar to strict liability under common law), *where the generator had knowledge of the illicit disposal or failed to exercise due care in selecting or instructing the entity actually conducting the disposal.*

Slip op. at 19, citing S. Rep. 172, 96th Cong., 2d Sess. 5 (1979), *reprinted in* U.S. Code Cong. & Admin. News at 5019, 5023 (1980). (Emphasis added.)

It is not clear whether in light of this contrary judicial precedent and conflicting legislative history the Agency will be able to prevail in its interpretation of generator liability under RCRA § 7003.

Regarding the applicability of *Burns* to RCRA § 7003, please refer to the response to Question 5.

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[8] No court, however, has addressed the liability of *negligent* generators under RCRA § 7003.

C. *CERCLA*

If an incineration ship is considered a "facility" under CERCLA, a generator may be subject to an administrative or court order issued under CERCLA § 106(a), 42 U.S.C. § 6906(a). This provision does not impose any explicit limitation on the nature of the party who may be subject to an abatement order in the event of a release or a threat of release. Several courts have concluded that the same persons who would be liable under CERCLA § 107(a), 42 U.S.C. § 9607(a), would also be liable under CERCLA § 106(a). *United States* v. *NEPACCO, supra* (slip op. at 23); *United States* v. *Reilly Tar and Chemical Corp.*, 546 F. Supp. 1100, 1112–13 (D. Minn. 1982); *United States* v. *Outboard Marine Corp.*, 54, 56 F. Supp. 556 (N.D. Ill. 1982).

If an incinerator ship is a "vessel" under CERCLA, there is no provision under CERCLA that would authorize EPA to require a generator to clean up spills from the ship.

Regarding the applicability of *Burns* to CERCLA § 106(a), please refer to the response to Question 5.

Question 8

"Changing the hypothetical, assume the spill occurred farther than 200 miles from shore (*i.e.*, beyond the outer boundary of the FCZ [Fishery Conservation Zone]). Would CERCLA cover the event? Please compare the sections of the federal Clean Water Act bearing on the geographical reach of the oil spill provisions of the Act with the analogous sections of CERCLA and take into account, the definitions of release and environment in CERCLA. If CERCLA would not cover the event, would anything inhibit the applicability of LOSLA as a defense against recovery under any legal theory? (The change in the hypothetical is for purposes of question 8 only.)"

Response

Under some circumstances CERCLA would authorize the Government to respond to a spill that originated further than 200 miles from shore.

Under CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1), the President is authorized to respond whenever a hazardous substance "is released or there is a threat of such a release into the environment." "Environment" is defined in CERCLA § 101(8), 42 U.S.C. § 9601(8), to include navigable waters, waters of the

contiguous zone, and "ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act [FCMA]." The quoted language extends the term "environment" out to at least the limits of the fishery conservation zone, which is 200 miles.[9] In the event that a hazardous substance that was spilled outside of the 200-mile limit migrated to within the limit, there clearly would be a "release" of hazardous substances into the "environment" for purposes of CERCLA which would authorize Government response.[10]

In general, the jurisdictional limits under CWA § 311, 33 U.S.C. § 1321, are comparable in scope to CERCLA's.[11] CWA § 311(b)(3), 33 U.S.C. § 1321(b)(3), prohibits discharges [12] of oil and hazardous substances in quantities that may be harmful:

> into or upon the navigable waters of the United States, adjoining shorelines, or unto or upon the waters of the contiguous zone . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act) . . .

Therefore, jurisdiction under CWA § 311 also extends out to 200 miles from shore.

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[9] However, the definition of "environment" in CERCLA is not necessarily limited to the 200-mile limit. The FCMA also provides that the United States shall exercise exclusive fishery management authority over all anadromous species (*i.e.*, species that spawn in fresh or estuarine waters of the U.S.) throughout their migratory zone, and over all continental shelf fishery resources (as defined in the FCMA). 116 U.S.C. § 1812. This might extend CERCLA jurisdiction beyond 200 miles from shore.

[10] There may be other factual situations involving spills that originate beyond the 200-mile limit in which the Government would be authorized to respond.

[11] Jurisdiction under CWA § 311, 33 U.S.C. § 1321, does not extend out to the 200-mile limit in all cases. For example, its jurisdiction is limited to "navigable waters" (*i.e.*, the 3-mile limit) for purposes of § 311(d), 33 U.S.C. § 1321(d) (marine disaster discharges) and § 311(e), 33 U.S.C. § 1321(e) (imminent hazard authority).

[12] The term "discharge" is defined in CWA § 311(a)(2), 33 U.S.C. § 1321(a)(2), as "including . . . any *spilling, leaking*, pumping, pouring, emptying or dumping . . ." (Emphasis added.)

Question 9

"Within the meaning of 42 U.S.C. § 9607(h), [Section 107(h) of CERCLA], what liability, if any, is provided under Section 9614 [§ 114 of CERCLA]? How is 'provided under' likely to be interpreted?"

Response

I believe that a court would likely interpret the "provided under Section 114" language of CERCLA § 107(h), 42 U.S.C. § 9607(h), to refer to CERCLA § 114(a), 42 U.S.C. § 9614(a), which provides:

> Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to release of hazardous substances within such State.

Under this interpretation, the limitations on ship owner's liability established by LOSLA would not apply with respect to any State action of the type cited in CERCLA § 114(a). It should be noted that CERCLA § 114(a) simply preserves the rights of a State to impose additional liability with respect to releases of hazardous substances within the State; it does not create such State causes of action.

I am not aware of any legislative history that addresses whether Congress intended to remove LOSLA's limitations from State liability requirements. However, given the clear language of CERCLA § 107(h) and 114(a), it is my opinion that LOSLA's limitations have been removed for State liability relating to the release of hazardous substances within the State.

Question 10

"Does 42 U.S.C. Section 9614 [CERCLA § 114] refer to causes of action in favor of private parties (for example, shrimpers or hotel owners) as well as causes of action in favor of States?"

Response

I understand your question to be whether CERCLA § 114(a), 42 U.S.C. § 9614(a), is intended to preempt private causes of action for damages resulting from spills of hazardous sub-

stances that arise under State law. I do not believe that that provision was intended to preempt such actions.
Sincerely,

A. James Barnes
General Counsel

WATER

(Approx.) January 31, 1980

MEMORANDUM

SUBJECT: Jurisdiction of Sections 402 and 404 of the Clean Water Act Over Discharges of Solid Waste in Wetlands

FROM: Michele Corash
General Counsel

TO: Jeffrey G. Miller
Acting Assistant Administrator
for Enforcement

You have asked us for a legal opinion concerning the authority of the Administrator and the Corps of Engineers in applying Clean Water Act programs to the disposal of solid waste in waters of the United States. We are providing the following response to your request.

Question

Who has the ultimate authority to determine whether a discharge of solid waste in waters of the United States requires a National Pollutant Discharge Elimination System (NPDES) permit or a § 404 permit: the Administrator of the Environmental Protection Agency (EPA) or the Secretary of the Army?

Answer

In case of disagreement between the Administrator and the Secretary, the Administrator has ultimate authority to determine whether a discharge of solid waste in waters of the United States requires an NPDES permit or a § 404 permit.

Discussion

In furtherance of the Clean Water Act's (CWA) goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, § 301 forbids the discharge of any pollutant by any person except as in compliance with §§ 301, 302, 306, 307, 318, 402, and 404. Section 402(a)(1) provides, "Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing,

issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet . . . all applicable requirements of sections 301, 302, 306, 307, 308, and 403 of this Act . . . ." The listed sections include the criteria for determining appropriate permit terms and conditions. Section 404 allows the Secretary of the Army, acting through the Corps of Engineers, to issue permits for the discharge of "dredged or fill material," through application of the § 404(b)(1) guidelines, which are prepared by EPA in consultation with the Corps. By following the requirements of § 404(c), EPA may prevent the discharge of dredged or fill material into certain sites.

The CWA does not define fill material. The legislative history does not explain inclusion of "fill" in § 404 or discuss what the term means. The most recent regulatory definition appears in the Corps' regulations at 33 C.F.R. 323.2(m) 42 Fed. Reg. 37145, July 19, 1977. That section states, "The term 'fill material' means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. *The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Federal Water Pollution Control Act Amendments of 1972.*" (Emphasis added.) The regulations are silent as to whether EPA or the Corps should decide the primary purpose of a discharge of waste that replaces an aquatic area with dry land or changes the bottom elevation of a water body. Such decision necessarily determines whether the § 402 or the § 404 permit program requirements will apply to the discharge in question.[1]

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[1] It is clear from the statutory scheme that any discharge of a pollutant (as defined in § 502(12)) not subject to § 404 is subject to § 402. It is also clear from § 402(a) that a *particular* discharge must have either a § 402 or a § 404 permit, but not both. (Of course, a particular activity may consist of discharges needing § 404 permits and discharges needing § 402 permits.)

The close connection between §§ 402 and 404 is also shown by language in §§ 404(f) and 404(r), the exemptions added by the 1977 amendments. Each of these provisions states that certain discharges of dredged and fill material are not subject to regulation under either section § 404 or § 402. This suggests that, in Congress' view, providing only a § 404 exemption for those discharges was not enough, since EPA would still be able to step in and require a § 402 permit.

The primary purpose test was added to the definition of fill material during the Corps' revision to its regulations in 1977. The 1977 preamble discussion explains that:

> During the two years of experience with the section 404 program, several industrial and municipal discharges of solid waste materials have been brought to our attention which technically fit within our definition of 'fill material' but which were intended to be regulated under the NPDES program . . . . The Corps and the Environmental Protection Agency feel that the initial decision relating to this type of discharge should be through the NPDES program. We have therefore modified our definition of fill material to exclude those pollutants that are discharged into water primarily to dispose of waste.

42 Fed. Reg. 37130.[2]

The primary purpose test was therefore added to recognize that particular discharges that would be more appropriately regulated under the EPA NPDES program should be so handled. It would be anomalous if EPA, which has the ultimate interest in the NPDES program, were not able to decide when that interest was present. EPA is better equipped than the Corps to know when a discharge of waste can be effectively regulated under the NPDES program. The Federal NPDES program is distinctly an EPA program; the Corps plays no role in developing or applying effluent limitations. While a decision that a discharge of waste should be regulated under § 402 is to some extent also a judgment that it should not be regulated under § 404, that does not undercut reliance on EPA's expertise. The § 404 program is a hybrid one, in which EPA and the Corps both play a role. Part of EPA's responsibility is to develop the guidelines which are the § 404 counterpart of efflu-

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[2] The previous definition defined fill material as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose . . . ." 33 C.F.R. § 209.120(d)(6), July 25, 1975, 40 Fed. Reg. 31325. This definition was incorporated by reference in EPA's § 404(b)(l) guidelines, 40 C.F.R. § 230.2(b), Sept. 5, 1975.

ent guidelines.[3] Thus, EPA is in a position to judge the appropriateness of both § 404 and § 402 to a particular discharge of waste.

This interpretation best accords with the statutory scheme. Under § 101(d), the Administrator is responsible for administering the CWA, except as explicitly provided otherwise. Because the primary purpose decision is effectively a decision as to which program applies to a discharge, and because the latter decision has not explicitly been assigned to the Corps, it follows that it is the Administrator's prerogative to make it.

A recent Opinion of the Attorney General concerning the Administrator's authority to determine jurisdiction under § 404 supports our interpretation. (Attorney General Civiletti to Clifford Alexander, Sept. 5, 1979.) Noting the Administrator role under § 101(d), the dual role of EPA and the Corps under § 404, and that a jurisdictional decision by the Corps would necessarily affect parts of the program administered by EPA, the Attorney General concluded that EPA, not the Corps, had the authority to determine the jurisdictional reach of the waters of the United States. While that opinion involved a term, "waters of the United States," which appears in a general provision of the Act (§ 502(7)) and the term "fill" appears only in § 404 (and related parts of § 208), in each case the interpretation of the term clearly impacts other programs under the Act. In fact, in the instant situation an interpretation by the Corps could conceivably even affect the applicability of the Resource Conservation and Recovery Act (RCRA), which is also an "EPA" statute. RCRA excludes from "solid waste" those "industrial discharges that are point sources subject to permits under § 402 of the Federal Water Pollution Control Act." Thus, where industrial wastes from a point source meet the basic definition of a fill, the primary purpose test determines the applicability not only of § 402, but also of RCRA. Where determinations that affect the applicability of an EPA statute are not clearly committed by Congress to another agency, EPA should make these determinations.

While the regulation in question was one written by the Corps of Engineers and while the courts generally give defer-

[3] EPA also approves and oversees State 404 programs, approves best management practices (BMPs) that may serve in lieu of permits (§ 208(b)(4)(B)), has the authority to veto discharge sites, and shares enforcement authority.

ence to an agency in interpreting its own regulations, that principle does not require that the Corps determine the primary purpose of a discharge of waste. First, what is involved here is not so much the interpretation of a regulation as it is the determination of facts to which the regulation will subsequently be applied. Facts relating to waste disposal are indisputably within EPA's area of expertise, because of EPA's responsibilities under RCRA as well as the CWA. Furthermore, any notion that an agency that adopts a regulatory definition should interpret it is undercut in the present instance, because the definition was developed after discussions with EPA, to meet an interest of EPA's. (*See* preamble, quoted above.) Finally, although at present the definition in question appears only in the Corps' regulation, this is only a fortuity. EPA has proposed two sets of regulations, the Consolidated Permit Regulations and the § 404(b)(1) guidelines, each of which contains the same definition of fill material.[4] If the final regulations retain these provisions, there will be two agencies with the same definition, making a nullity of any argument that the Corps has a unique proprietary interest in the definition. If EPA adopts a different definition, it will supersede the one at issue here.

The major argument to be made in support of the Corps determining the primary purpose of waste discharges is the existence of a separate dredge and fill program carved out of the NPDES program; one might argue that depriving the Corps of the authority to decide what is covered by this program undercuts Congress' recognition of the Corps' special role. However, the history of the Act does not lend much support to this argument. H.R. 11986 authorized the Secretary of the Army to continue to issue permits for dredged and fill material, after consultation with EPA. S. 2770, as amended, allowed the Secretary to recommend discharge sites for dredged material alone, subject to EPA's approval. The conference committee allowed the Corps to issue permits for dredged and fill material, using EPA guidelines and subject to an EPA veto. In explaining the conference committee version, Senator Muskie stated:

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome

[4] Section 501(a) states, "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act."

> bureaucracy in light of the fact that a system to issue permits already existed. At the same time, the Committee did not believe there could be any justification for permitting the Secretary of the Army to make the determination as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site.

1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 177.

Thus, Congress retained a separate program for dredged and fill material for administrative reasons but made it clear that such administrative interests did not override the Administrator's responsibility for environmental concerns. While Congress clearly did not anticipate the specific question addressed by this opinion, these general views concerning the § 404 program are consistent with my conclusion that the Administrator may properly determine the primary purpose test.

September 4, 1980

MEMORANDUM

SUBJECT: Applicability of the Part 25 "Public Participation" Regulations to the Approval of Variances from Water Quality Standards

FROM: Michele Beigel Corash
General Counsel
James N. Smith
Associate Assistant Administrator

TO: Ronald P. Dubois
Region X
Regional Administrator

You have requested a joint opinion on the applicability of the Environmental Protection Agency's (EPA's) "public participation" regulations (40 C.F.R. Part 25) to the issuance by the State of Washington of "a one time permit for application of an herbicide to the waters of Lake Washington." In issuing this permit, you note that the State "issued a waiver from its water quality standards to allow the degradation accompanying the application." You have specifically requested an opinion as to whether the grant by EPA of planning funds brings this activity within the scope of 40 C.F.R. 25.2(a)(5). This section extends the coverage of Part 25 to the activities supported with EPA financial assistance.

Our resolution of this matter is based on the provisions of the Clean Water Act and 40 C.F.R. 25.2(a)(1), and we need not address the scope of § 25.2(a)(5). Nor do we address whether the application of the herbicide would constitute a violation of water quality standards in the absence of a variance.

Issues

1. Are variances from water quality standards subject to the requirement of public participation under the Clean Water Act?
2. If public participation is required in the approval by a State of variances from water quality standards, do the provisions of Part 25 apply?

Conclusion

Variances from water quality standards constitute revisions to those standards, and as such are subject to the requirement of public participation. 40 C.F.R. Part 25 provides minimum guidelines for public participation in this process.

Discussion

The Clean Water Act establishes a requirement that public participation be allowed in any revision by the State of a water quality standard. Section 101(e) broadly requires public participation in all programs established under the Act. This section states that:

> [p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.

The implementation and revision of water quality standards are subject to this general requirement.

Section 303(c) establishes a specific requirement for public participation in the process of revision of water quality standards by States. This section provides that States shall "from time to time . . . hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." This section not only specifies that States must periodically review and revise water quality standards, but also, together with § 101(e), imposes an obligation to provide public participation whenever such revisions are undertaken. This requirement is codified in water quality standards regulations. 40 C.F.R. 35.1550(a).

Variances or short-term modifications of water quality standards are subject to this requirement of public participation. In the Opinion of the General Counsel No. 58, the General Counsel concluded that variances from water quality standards constituted revisions to those standards and were subject to the substantive requirements applicable to the downgrading of the designated use. That opinion went on to state that:

> (S)ince State variance proceedings involve revisions of water quality standards, they must be subjected to public notice, opportunity for comment, and public hearing. (See section 303(c)(1) and 40 C.F.R.

130.17(a) [now 35.550(a)].) The public notice should contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.

Thus, the Clean Water Act and the water quality standards regulations mandate public participation in State approval of variances to water quality standards.

Provisions of 40 C.F.R. Part 25 define minimum elements for public participation under the Clean Water Act. The applicability of this regulation to the broad scope of actions involved in the State water quality standards program is not clear, and future revisions of the water quality standards regulations should clarify this relationship.

However, we conclude that Part 25 does apply to the issuance of variances from water quality standards. 40 C.F.R. 25.2(a)(1) provided that Part 25 applies to "State rulemaking under the Clean Water Act . . . ." Although most activities specifically affecting one discharger, such as National Pollutant Discharge Elimination System permit issuance, are not within the scope of this subsection, the approval of variances involves revision of the underlying water quality standard (*see* OGC Opinion No. 58, above). As such, these variances constitute rulemaking under the provisions of § 303 of the Clean Water Act and are subject to the requirements of Part 25.

October 19, 1981

MEMORANDUM

SUBJECT: Basic Legal Requirements Concerning Effluent Guidelines Under the Clean Water Act

FROM: Robert M. Perry
General Counsel

TO: Bruce A. Barrett
Acting Assistant Administrator
for Water

Introduction

You have asked for a memorandum of law describing the basic, minimum, legal requirements the Environmental Protection Agency (EPA) must meet with regard to developing effluent guidelines. You also indicated that your priority concerns are with the best practicable control technology currently available (BPT), best conventional pollutant control technology (BCT), and best available technology economically achievable (BAT) guidelines, and this memorandum will accordingly focus on these subjects. As I'm sure you are aware, the relevant statutory provisions, legislative history, and court decisions are voluminous and complex, and this memorandum will therefore touch in a preliminary way only the most basic issues and should not be regarded as an exhaustive analysis of all legal requirements. If you would like a more detailed analysis of any particular issue, please feel free to request a supplemental memorandum.

Statutory Framework

Section 301(a) of the Clean Water Act bans all discharges of pollutants to navigable waters unless the discharger is in compliance with several enumerated provisions of the Act, including § 402. Under § 402 of the Act, EPA (or a State that has a permit program that has been approved by EPA) may issue a permit authorizing discharges into navigable waters. Such permits must assure compliance with certain specified requirements. One of these requirements is that the discharger meet effluent limitations established in accordance with § 301(b).

Section 301(b) sets up a series of requirements to be met by industrial and municipal dischargers. The minimum require-

ments for industrial dischargers are that they meet by July 1, 1977, effluent limitations based upon use of best practicable control technology currently available (BPT), that by July 1, 1984, they meet effluent limitations for toxic pollutants [1] based upon best available technology economically achievable (BAT) and for "conventional" pollutants (as defined pursuant to § 304(a)(4)) [2] effluent limitations based upon best conventional pollutant control technology (BCT). For all other pollutants, industrial dischargers must meet BAT effluent limitations by July 1, 1987.

Section 301 does not specifically require EPA to issue any regulations. Section 304(b) of the Act does require that EPA issue "regulations providing guidelines for effluent limitations." Such guidelines must be issued for BPT, BCT, and BAT and for each level of control must "identify, in terms of amounts of constituents and chemical, physical and biological characteristics of pollutants, the degree of effluent reduction attainable" through use of such level of controls. The guidelines must also "specify factors to be taken into account in determining control measures and practices." The statute specifies a minimum list of such factors that must be considered. This list is somewhat different for BPT, BCT, and BAT but in all cases requires consideration of such things as cost and nonwater quality environmental impact.

Because § 301(b) does not specifically call for EPA to issue rules and because § 304(b) speaks of "guidelines," various industry groups protested when EPA decided in 1973 to issue "effluent limitation guidelines" under both § 301 and § 304, setting out nationally applicable specific numerical effluent limitations for particular categories of industries. The industry groups argued that this was beyond EPA's authority. The dispute was ultimately resolved by the U.S. Supreme Court, which ruled in *Dupont* v. *Train,* 430 U.S. 112 (1977) that EPA has authority to issue effluent limitations under § 301 and could fulfill its obligations under § 304 by combining the guidelines development process with the effluent limitations development process, as EPA had done.

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[1] "Toxic" pollutants include all pollutants contained in a list in H.R. Rep. 95–30.

[2] "Conventional" pollutants include biochemical oxygen-demanding pollutants (BOD), total suspended solids (TSS), fecal coliform, oil and grease, and pH.

In the 1977 Amendments to the Act, Congress added a new § 307(a) and included within this provision the statement:

> Effluent limitations shall be established in accordance with sections 301(b)(2)(A) and 304(b)(2) for every toxic pollutant referred to in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives . . . no later than July 1, 1980.

Discussion

One fundamental question that may be asked is whether EPA must (as opposed to may) issue nationally applicable effluent limitations under § 301 of the Act. In this, as in many other areas, no simple, conclusive legal answer can be given, but my preliminary analysis is that any decision to issue guidelines under § 304 without also issuing effluent limitations under § 301 would entail serious legal risks, particularly with respect to BAT for toxic pollutants. Portions of the legislative history of the 1972 enactment of the Clean Water Act,[3] language in the Supreme Court's *Dupont* decision [4] and the history of the 1977 amendments to the Act [5] all contribute to this judgment.[6]

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[3] For example, the Senate Report states that "pursuant to subsection 301(b)(1)(A), and Section 304(b)" the Administrator is to set a base level for all plants in a given category, and "[i]n no case . . . should any plant be allowed to discharge more pollutant per unit of production than is defined by that base level." S. Rep. 92–414, p. 50 (1971), Legislative History of the Water Pollution Control Act Amendments of 1972, at 1468. The Conference Report on § 301 states that "the determination of the economic impact of an effluent limitation [will be made] on the basis of classes and categories of point sources, as distinguished from a plant-by-plant determination." S. Conf. Rep. 92–1236, p. 121 (1972) Leg. Hist. 304.

[4] "In sum, the language of the statute supports the view that § 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations." 430 U.S. at 129. *See also* 430 U.S. at 126–127, where the Court found the language of § 301(b) "hard to reconcile" with the view that permit writers, rather than EPA, should establish effluent limitations under § 301.

[5] *See, e.g.* statement of Rep. Roberts presenting the conference report to the House, 3 Leg. Hist. 326–27; statement of Senator Muskie presenting the conference report to the Senate, 3 Leg. Hist. 454–55.

[6] In addition, *U.S. Steel Corp.* v. *Train*, 556 F.2d 822, 844 (7th Cir. 1977), seems to hold that EPA *must* issue nationally uniform effluent limitations.

The legal risk of taking this course of action with respect to BAT for toxic pollutants is even greater because of the statement in § 307(a)(2) that "[e]ffluent limitations *shall* be established in accordance with Sections 301(b)(2)(A) and 304(b)(2) . . . [by] July 1, 1980." (Emphasis added.) This would seem to refer to mandatory rulemaking by the Administrator, a view borne out by statements of both the House and Senate managers of the 1977 amendments.[7]

Even if EPA issued only "guidelines" under § 304 it would be required to set out fairly specific definitions of BPT, BCT, and BAT. This is because § 304(b) requires the guidelines to identify BPT, BCT, and BAT "in terms of *amounts* of constituents and chemical, physical and biological characteristics of pollutants . . . ." (Emphasis added.) This rules out narrative guidance and calls for some form of numerical regulations. It is also clear that the regulations cannot be too broadly applicable, since the guidelines must identify BPT, BCT, and BAT "for classes and categories" of industrial dischargers. The legislative history also rules out regulations that would identify BPT, BCT, or BAT in terms of a particular kind of treatment of pollution, rather than as a level of performance set out in objective terms. (In other words, EPA cannot say that treatment system X is BPT, but must identify BPT in terms of what this treatment system can achieve. This leaves room for use of innovative, less costly methods which can achieve the same result.) [8]

The idea of issuing regulations containing a range of numbers, instead of single-number effluent limitations, does not have many of the legal problems discussed above and probably would be more defensible than the other alternatives to the present method of issuing guidelines regulations. However, the Seventh Circuit opinion in *U.S. Steel, supra* indicates that effluent limitations must be nationally uniform, an idea that may not be compatible with ranges.[9] Nevertheless, if you are seri-

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[7] *See* footnote 5, *ante.*

[8] *See* H.R. Rep. 911, 92d Cong., 107–8, 1 Leg. Hist. 794–95; S. Rep. 414, 92d Cong., 59, Leg. Hist. 1477.

[9] On August 8, 1973, EPA's Office of General Counsel issued an opinion that ranges would be permissible. However, the Compilation of General Counsel Opinions contains a note to this opinion indicating that it was "superceded" by the *U.S. Steel* decision. *See* 2 U.S. EPA General Counsel Opinions (Nils Publishing Co.) at p. 183 (Water Pollution).

ously interested in pursuing the idea of issuing ranges of effluent limitations, I will have my staff explore the legal ramifications of this approach in more depth than I have been able to do in this memorandum.

Various other requirements also apply to the guidelines regulations. They must demonstrate consideration of the factors listed in § 304(b), such as cost, age of facilities, and nonwater quality environmental impact (for example, creation of sludge noise, odors, etc.). In addition, in developing these regulations, EPA must meet the general requirements of the Administrative Procedure Act, including notice and opportunity for comment. As these requirements have been interpreted by the courts, EPA must make relevant information available for comment by interested parties, must respond in writing to significant comments, and must set out in writing in the record its reasons for its decisions, its assumptions, and its methodologies. Much of this is usually accomplished by explanations and discussions contained in the preamble to the regulations. I am attaching a memorandum discussing the requirements for regulation preambles that was written for the Superfund program but is generally pertinent to all Agency rulemakings.

Attachment [Deleted.]

January 15, 1982

MEMORANDUM

SUBJECT: Approval of Partial State National Pollutant Discharge Elimination System and Section 404 Programs

FROM: Robert M. Perry
General Counsel

TO: Bruce R. Barrett
Acting Assistant Administrator
for Water

Question 1

Does the Clean Water Act (CWA) authorize the Environmental Protection Agency (EPA) to approve partial State National Pollutant Discharge Elimination System (NPDES) programs? If so, are there limits on the scope or nature of partial approvals?

Answer

The CWA probably authorizes partial approvals where a State has ceded its authority to an interstate agency for certain water bodies. The Act also probably allows approval of a State program that does not cover Indian activities on Indian lands (because Congress has not expressly granted the State regulatory authority over these activities). With these exceptions, partial approvals—whereby the State would issue permits for some categories of dischargers and EPA would issue permits for the remainder—appear to pose severe legal risks under the Clean Water Act.

Discussion

Section 402(b) of the CWA authorizes any State that wishes to administer its own permit program to submit to EPA a description of the program "it proposes to establish and administer under State law or under an interstate compact." Under § 402(c)(1), within 90 days of the State's submission, EPA must suspend its issuance of NPDES permits "as to those navigable waters subject to such program" unless the Agency determines that the program fails to meet the Federal statutory or regulatory requirements. If EPA must suspend its issuance of permits "as to those navigable waters subject to [a State's] program," it

follows that the State must issue *all* permits for discharges into those waters. The legislative history confirms this reading.[1]

The Senate Report states that "after a State submits a program that meets the criteria established by the Administrator . . . , the Administrator shall suspend his activity in such State under the Federal permit program." 2A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. lst Sess., 1489 (Comm. Print 1973). (Hereinafter Leg. Hist.) Moreover, the House Report stated that under § 402(b) "a state desiring to administer its own permit program for discharges into *the navigable waters within its jurisdiction* may submit its program to the Administrator." (Emphasis added.) 1 Leg. Hist. 813. Representative Terry stated that one of the purposes of the bill was "to *assure* and encourage *full implementation* of permit issuing authority to States which are qualified and have approved programs." (Emphasis added.) 1 Leg. Hist. 580. Similarly, Representative Harrington stated that "the permit program must be put *solely* in the hands of the States" once they meet the applicable Federal requirements. (Emphasis added.) 1 Leg. Hist. 516. The conference report discusses § 402 as providing for a State "to administer its own permit program *in lieu of the Administrator's program.*" (Emphasis added.) 1 Leg. Hist. 322. Representative Roe said that a State would apply "for the program in the State" and upon approval by EPA would take over "the program." 1 Leg. Hist. 428. Thus, the legislative history strongly indicates that Congress' understanding was that States were to take over the entire NPDES program. *See also* 1 Leg. Hist. 466 (Remarks of Rep. Dorn), 577 (Remarks of Rep. Reuss), 579 (Remarks of Rep. Roe), 854 (Remarks of Administrator Ruckelshaus).

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[1] The Agency's historical construction of the Act offers little assistance. In 1972, EPA adopted initial State NPDES program requirements under § 304(i) of the CWA. 37 Fed. Reg. 28390 (Dec. 22, 1972). In § 124.10, EPA required that State programs cover all point sources. In a comment appended to that section, the Agency suggested that a State's failure to comply could be grounds for EPA to disapprove the program or to decline to suspend permit issuance for the "categories, types, or sizes of point sources" not covered by the State program. *Id.* at 28292. No partial programs were ever approved, however, and in 1979, EPA adopted a flat prohibition on partial approvals. 40 C.F.R. § 123.1 (comment), 44 Fed. Reg. 32918 (June 7, 1981). It does not appear that the legality of partial approvals was ever examined in detail in connection with either rulemaking.

This view is reinforced by an examination of § 402(a)(5). Section 402(a)(5) of CWA provides for State issuance of NPDES permits during the interim period between passage of the Act and EPA's promulgation of § 304(i)(2) guidelines specifying minimum requirements for State programs (the guidelines were promulgated in December 1972). Section 402(a)(5) requires that EPA authorize any State, which the Agency determines to be capable of administering a permit program that will carry out the objectives of the Act, "to issue permits for discharges into the navigable waters within the jurisdiction of such State." This language indicates that the interim State program was to be a full NPDES program covering all State waters. The statement of Representative Wright, a leading sponsor of the Act, supports this reading of § 402(a)(5):

> The interim program is not intended to be approved on a piecemeal basis. The managers understand the language of the conference report to require and they expect the Administrator to authorize the State to handle the total permit program during this interim period and the Administrator is not authorized to delegate bits, pieces, categories, or other parts. He must authorize the State to carry out the full program for all categories of discharges.

1 Leg. Hist. 261.

The fact that only full State NPDES programs could be approved in the interim period further suggests that only full, permanent State programs could be approved. It seems unlikely that Congress would require only full programs for an interim period, but allow partial permanent programs.[2] Again, the leg-

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[2] In § 402(c)(1) Congress authorized EPA to withdraw approval of a State program EPA found not to be administered in accordance with Federal requirements. There is overwhelming evidence that Congress authorized withdrawal only of the entire State program and prohibited withdrawal of parts of a program. For example, Congress rejected an Administration proposal to allow EPA to withdraw approval of only part of a State program. 2 Leg. Hist. 1205; 1 Leg. Hist. 854–5; 2 Leg. Hist. 1189. *See also* 1 Leg. Hist. 262 (Remarks of Rep. Wright). However, this legislative history is not dispositive as to partial *approval* of a program, since Congress could conceivably have meant that even if a partial program was approved, EPA could not withdraw only part of that program. In *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976) (hereafter *EPA* v. *California*), the Supreme Court found that this legisla-

Continued

islative history supports this conclusion. Representative Wright stated that the interim permit program was meant to allow the continuation of existing State programs, which "could be *expanded* and improved during this phase." (Emphasis added.) 1 Leg. Hist. 261. Ultimate approval was to be given to "the planned *integrated* State permit program." (Emphasis added.) 1 Leg. Hist. 262.

Finally, it is clear that Congress knew how to expressly provide for partial State program approvals in environmental statutes. Section 110(a)(2) of the Clean Air Act thus provides that "the Administrator shall approve . . . [a State implementation] plan, or *any portion thereof*," if he determines that it meets Federal requirements. And under § 1422(b)(2) of the Safe Drinking Water Act, the Administrator may "approve, disapprove, or approve in part and disapprove in part," a State underground injection control program. One cannot attribute too much weight to Congress' use of different language in a separate statute, but the omission of similar language in the CWA nevertheless is some evidence that it does not authorize partial program approvals.

There are two circumstances, however, under which partial approval is probably lawful. In the first, a State has ceded its authority over part of its waters to an interstate agency.[3] In such a case, the Supreme Court concluded, in *dicta*, that a State may have a program that covers only the remaining waters. *EPA* v. *California*, *supra*. The second case arises where a State cannot, under Federal law, issue certain permits.[4] Here, again,

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tive history simply indicated that States must "be given maximum responsibility for the permit system and that the EPA's review authority be restricted as much as was consistent with its overall responsibility for assuring attainment of national goals." *Id.* at 224 n. 29.

[3] Section 402(b) allows programs to be submitted by an "interstate agency."

[4] In *EPA* v. *California*, *supra*, the Court said that "the EPA obviously need not, and may not, approve a state plan which the state has no authority to issue because it conflicts with Federal law." *Id.* The Court was referring specifically to permits for Federal facilities, which it held States had no authority to issue under the pre-1977 CWA. The 1977 amendments to the Act lifted this prohibition. Under a similar rationale, the General Counsel has concluded that State NPDES programs may not, absent "clear Congressional consent," be applied to Indian activities on a reservation. Letter from G. William Frick to Louis J. Breimhurst, May 24, 1977, at 1.

it appears lawful for EPA to approve the State program if it is otherwise complete.

It is less clear whether a State may voluntarily renounce authority to issue NPDES permits for certain navigable waters within its territorial jurisdiction. Except for the interstate compacts referred to in the preceding paragraph, the general structure of the statute's approval and disapproval process, together with the legislative history recited above, pose serious legal risks for approval of any such partial program. It is even more doubtful that the Clean Water Act and its legislative history provide a basis for arguing that the Act history provide a basis for arguing that the Act authorizes any other type of partial program (*e.g.*, by industrial category).

Question 2

Does the CWA authorize EPA to approve partial State § 404 programs? If so, are there limits on the scope or nature of partial programs?

Answer

The language in § 404 concerning the effect of program approval is different from that in § 402. Because of this, the argument for approval of partial § 404 programs is somewhat more plausible than that for approval of partial § 404 programs. However, most of the legislative history and statutory construction problems associated with partial § 402 programs also apply to § 404, with one exception. The CWA does clearly authorize EPA to approve State § 404 programs that do not cover certain traditional navigable waters and adjacent wetlands.

Discussion

Section 404 authorizes States to submit to EPA for approval "permit program[s] for the discharge of dredged or fill material into the navigable waters." However, under § 404(g), States are prohibited from assuming administration of the program for discharges into "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high

water mark on the west coast, including wetlands adjacent thereto." In this sense, therefore, all State programs must be partial programs.

The real question is thus whether EPA can approve State § 404 programs that only partially cover the remaining navigable waters in the State or that are otherwise incomplete. The statutory obstacle to partial approval of § 402 programs, as noted above, is the requirement that EPA suspend issuance of permits "as to those navigable waters" regulated by the State. By contrast, § 404(h)(2)(A), (3), and (4) require the Corps of Engineers to suspend issuance of permits "for activities with respect to which a permit may be issued" under the State program. On its face, this distinction between the two sections makes the case for partial § 404 approvals more plausible. However, some risk remains, because Congress probably had another meaning in mind for the § 404 language cited above.

This parallel between § 402 and § 404 means that the obstacles in § 402 to partial approval of State programs apply with some force to § 404. In addition, when Congress intended partial progams for dredged and fill material, it made its intent clear. For example, under § 208(b)(4)(B) and (C), States may establish regulatory programs to develop and apply supplemental best management practices for certain discharges or "placements" of dredged or fill material. The legislative history is clear that such § 208 programs did *not* need to reach all discharges, but could be limited to particular classes of activities. *See, e.g.*, 3 Leg. Hist. 421 (Remarks of Rep. Harsha); 3 Leg. Hist. 530 (Remarks of Sen. Wallop).

Thus, as with § 402, partial approval of State § 404 programs entails some significant legal risk.

February 23, 1982

MEMORANDUM

SUBJECT: Interpretation of Section 301(b)(1)(C) of the Clean Water Act

FROM: Robert M. Perry
General Counsel

TO: John E. Daniel
Chief of Staff

It is my understanding that you wish an analysis of the Environmental Protection Agency's (EPA's) authority under § 301(b)(1)(C) of the Clean Water Act to impose effluent limitations based on water quality standards. Before turning to some specific questions, which are set out in Attachment A, I would first like to discuss the interpretation of § 301(b)(1)(C) in more general terms.

Sections 301(b)(1)(A) and (B) require all point sources to achieve, by July 1, 1977, effluent limitations that require the application of best practicable control technology currently available (BPT), or, in the case of publicly owned treatment works, secondary treatment. Section 301(b)(1)(C) requires that there shall also be achieved:

> not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, established pursuant to any State law or regulations, (under authority preserved pursuant to section 510) . . . or required to implement any applicable water quality standard established pursuant to this Act.

Section 402 of the Act establishes the National Pollutant Discharge Elimination System (NPDES) permit program, under which the Administrator or an approved State issues point source permits reflecting the requirements of the Act, including the requirements of § 301.

On its face, § 301(b)(1)(C) clearly requires each point source to meet, by July 1, 1977, any more stringent limitation necessary to meet water quality standards established up to that date. The real question is whether it also requires sources to meet limitations based on water quality standards established after July 1, 1977. For the reasons set forth below, it is my

conclusion that § 301(b)(1)(C) is not limited in scope to those water quality-based limitations that could have been imposed up to July 1, 1977.

First, the language of the section does not expressly exclude post-1977 water quality standards as a basis for effluent limitations. Nor is there any legislative history that expresses an intent to limit the provision to pre-1977 requirements. Had Congress intended to so restrict the scope of § 301(b)(1)(C), it could easily have done so. In light of this, July 1, 1977, is best viewed as nothing more than an initial compliance deadline.

Second, § 303(c) requires States to review, and, if necessary, revise their water quality standards at least once every 3 years.[1] Thus, it is clear that water quality standards were not expected to be static but rather to change and frequently to become more stringent over time.[2] This periodic revision of water quality standards loses much of its meaning if the new standards cannot be enforced in NPDES permits through § 301(b)(1)(C).[3]

Moreover, the 1977 legislative history provides evidence that Congress expected post-1977 water quality standards to be enforced through § 301(b)(1)(C). As the Senate Report explained, "Congress intended in 1972 that State water quality standards would be imposed through section 301 . . . . This amendment [to § 401] follows the original congressional intent and clarifies that."[4] The 1977 conference report also emphasizes that "section 301 is always included by reference where section 301 is listed."[5] Such statements in 1977 make sense only if

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[1] Section 24 of the 1981 amendments to the Act reemphasizes Congress' intent that this be done by restricting the availability of construction grant funding to only those States that carry out such reviews.

[2] *See, e.g.*, remarks at 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 246, 353, 489, 524.

[3] In addition, it may be assumed that water quality standards will also be made less stringent in some instances. A cramped reading of § 301(b)(1)(C) would require EPA either to ignore post-1977 water quality "downgrades" or to adopt the position that the section discriminates between downgraded water quality standards and upgraded water quality standards. Either way, the Agency would be placed in an illogical situation.

[4] S. Rep., 4 Leg. Hist. 705–06.

[5] Conf. Rep., 3 Leg. Hist. 280.

§ 301(b)(1)(C) includes, not only water quality standards promulgated up to July 1, 1977, but also new or revised water quality standards promulgated after that date.

Moreover, interpreting § 301(b)(1)(C) as restricted to July 1, 1977, water quality standards would create an unnecessary inconsistency with § 401. Section 401 provides for State certification that discharges will comply with § 303. Thus, such certifications reflect those water quality standards in effect at the time of certification, not those in effect in 1977. It would be strange if post-1977 water quality standards could be imposed through § 401 (which applies only to Federal permits) but not through § 301(b)(1)(C) (which also applies to State permits). That Congress did not intend such a discrepancy is evident from the 1977 legislative history, where the conference report stressed the linkage of §§ 301, 303, and 401. 3 Leg. Hist. 280.

In my view, an interpretation of § 301(b)(1)(C) as not restricted to 1977 water quality standards does not present any conflict with § 302. Section 302 establishes a mechanism through which the Administrator may establish effluent limitations for particular sources to facilitate attainment of "fishable, swimmable" water quality, where those sources still interfere with such water quality after application of limitations required under § 301(b)(2) ("BAT" or "BCT" technology). Section 302 limitations may be imposed on such sources only after the Administrator determines that there is a reasonable relationship between costs and benefits.[6]

There are really two questions to be considered concerning the relationship of § 301(b)(1)(C) and § 302. The first is whether § 302 in some way supercedes or limits § 301(b)(1)(C). The second is whether interpreting § 301(b)(1)(C) broadly makes § 302 superfluous. In my view, § 301(b)(1)(C) should not be read as constrained or superceded by § 302. First, by its own terms, § 302 makes clear that it does not affect the application of effluent limitations imposed under § 301. Section 302(c) provides: "The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under § 301 of this Act." Effluent limitations established under § 301(b)(1) to implement water quality standards promulgated under State law or pursuant to

[6] Only the Administrator may establish requirements under § 302; the States cannot utilize this provision.

§ 303(c)(4) are "effluent limitation[s] established under §§ 301(b)(1)(A) or (B) or 301(b)(2) to implement technology-based effluent guidelines promulgated under § 304 are also "established under § 301." In explaining § 302(c), the Senate Report stated that § 302 is intended to furnish a supplemental basis for improving water quality, and not to be a cause for delay in executing the requirements of § 301, or for requiring any less stringent effluent limitations." 2 Leg. Hist. 1466.

Furthermore, to read § 302 as limiting § 301(b)(1)(C) would upset the careful Federal-State balance under the Act. Section 510 expressly preserves the rights of States to adopt and enforce standards and limitations more stringent than Federal requirements, and § 301(b)(1)(C) on its face converts them into requirements that must be reflected in NPDES permits under § 402. It would therefore be inconsistent with congressional intent to read § 302 as limiting the authority of States to require compliance with their post-July 1, 1977, water quality standards.[7]

Turning to the other side of the § 302 question, it is also clear that interpreting § 301(b)(1)(C) as applying to the post-1977 period does not make § 302 superfluous. Section 301(b)(1)(C) protects only the water quality specified in existing water quality standards. That quality may be less than "fishable, swimmable" water for particular streams. Thus, § 301(b)(1)(C) can be used to achieve the statutory goals of "fishable, swimmable" water only when that goal has been adopted in a water quality standard. Section 302, on the other hand, may be used to establish limitations to attain or maintain "fishable, swimmable" water even though standards calling for such water quality have not been promulgated under § 303 or State law.[8] Thus, § 302 is recognized as simply an alternative way to improve water quality, applicable to those situations where technology-based standards are inadequate and no water quality standards are in place calling for "fishable, swimmable" water.

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[7] The problem is compounded by the fact that § 302, unlike problem § 301(b)(1)(C), provides no mechanism for establishing limits less stringent than needed to achieve "fishable, swimmable" water quality.

[8] It is in this situation, where there is no existing water quality standard developed through rulemaking, that the detailed procedural and substantive requirements of § 302 are most appropriate.

In conclusion, based on the express statutory language, the statutory scheme, and the legislative history, I believe that the correct interpretation of § 301(b)(1)(C) is that it requires point sources to comply with any more stringent limitations necessary to meet not only those water quality standards in effect on July 1, 1977, but also any more stringent water quality standards adopted after that date. I believe that arguments to the contrary are based on an incorrect reading of the statute. The question is not completely free from doubt because there is no case law directly on point. However, the clear tendency of the courts has been to read the Clean Water Act broadly, so as to carry out its purpose, *i.e.*, to restore and maintain the integrity of the Nation's waters.[9] Consequently, I believe it highly unlikely that any other interpretation would be accepted by the courts.

I will now turn to the specific questions set out in Attachment A.

1. "May EPA impose on a factory constructed in 1982 a water quality standard that is more stringent than the standard that would have been imposed on July 1, 1979?"[10] Yes, for the reasons discussed above.

2. "May EPA impose on a factory constructed in 1974, that has already met the more stringent standards imposed prior to July 1, 1977, a still more stringent standard promulgated in 1982?" Yes, for the reasons discussed above, with one qualification. The question does not state whether the factory's permit expires in 1982. Until the permit reflecting the earlier, more lenient water quality standards expires, § 122.15(a)(3)(i)(C) of the Consolidated Permit Regulations prevents EPA from modifying the permit to reflect the new water quality standards, unless the permittee requests such a modification.[11] This restriction does not apply when the permit expires and EPA or a State reissues it.

3. "May EPA impose on a factory constructed in 1970 that has not yet met the more stringent standards imposed prior to

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[9] *See, e.g., E.I. duPont* v. *Train*, 430 U.S. 112, 131–32 (1977); *American Frozen Food Inst.* v. *Train*, 539 F.2d 107, 130–31 (D.C. Cir. 1976).

[10] I assume the reference to "July 1, 1979" is a typographical error and should be to "July 1, 1977."

[11] Under § 402(k), compliance with an NPDES permit also constitutes compliance with § 301, for enforcement purposes.

July 1, 1977, a still more stringent standard promulgated in 1982?" Yes, for the reasons discussed above, subject to the same qualification as Question 2.

4. "May EPA impose on a factory that was issued a permit in 1978, the requirements of which did not, in fact, cause that permit holder to meet the standards in effect in 1977, [limitations] to meet a still higher standard imposed in 1982?" Yes, for the reasons discussed above, subject to the same qualification as Question 2.

5. "May EPA impose on a factory that was issued a permit in 1976 the requirements of which did not, in fact, cause that permit holder to meet the more stringent standards imposed after July 1, 1977 [limitations] to meet a still higher standard promulgated in 1982?" Yes, for the reasons discussed above, subject to the same qualification as Question 2.

Attachment [Deleted.]

June 2, 1982

MEMORANDUM

SUBJECT: Delegation of EPA's Permitting Authority Under the Clean Water Act to Permitting Authorities Under the Surface Mining Control and Reclamation Act of 1977

FROM: Robert M. Perry
Associate Administrator for Legal and Enforcement Counsel and General Counsel

TO: The Administrator

Background

The Environmental Protection Agency (EPA) and the Office of Surface Mining (OSM) of the Department of the Interior have been negotiating a memorandum of understanding (MOU) that would provide for the combination of permits under the Clean Water Act (CWA) and the Surface Mining Control and Reclamation Act of 1977 (SMCRA) into joint permits prepared by the SMCRA authority. OSM would like to include in the MOU a provision that if EPA does not approve the issuance of a joint permit within a specified period of time, it shall be deemed to have concurred in the joint permit's issuance. This memorandum addresses the legality of such a provision.

Issue

May EPA lawfully allow the OSM or a State authority implementing SMCRA to issue National Pollutant Discharge Elimination System (NPDES) permits under the CWA in the absence of an affirmative EPA concurrence?

Conclusion

EPA has no such legal authority.

Discussion

Section 402(a)(1) of the CWA provides for the issuance by the Administrator of permits for the discharge of pollutants into waters of the United States. Such permits must require compliance with various provisions of the Act. Section 402(a)(2) requires that "the Administrator shall prescribe conditions for such permits to assure compliance with the requirements of

paragraph (1) of this section . . . ." Section 402(b) provides the mechanism and requirements under which States may assume permitting authority.

According to the Administrative Procedure Act, 5 U.S.C. § 558(b), "a sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." The authority to issue permits allowing discharges of pollutants into the Nation's waters is vested in EPA under § 402(a) of the Act. Accordingly, no other agency may exercise that authority unless it is delegated pursuant to statute.

Authority for delegation of authority from one agency to another was granted by the Reorganization Act of 1939, as amended, 5 U.S.C. § 901. The Reorganization Act provided that executive reorganization plans, including the transfer of all or part of one agency's functions to another agency, must be submitted to Congress. 5 U.S.C. § 903(a)(1). The plans would take effect unless disapproved by either House of Congress. However, the Reorganization Act expired April 8, 1981. Hence, unless and until the Reorganization Act is reauthorized by Congress, any delegation must find authority in another statute.

OSM has suggested [1] that § 501(b) of the CWA confers such delegatory authority on EPA. Section 501(b) provides as follows:

> The Administrator, with the consent of the head of any other agency of the United States, may utilize such officers and employees of such agency as may be found necessary to assist in carrying out the purposes of this Act.

OSM's contention finds little support in the language of § 501(b), its legislative history, or in the case law on delegation of authority by Federal agencies. Section 501(b) must be examined in the light of § 101(d) of the Act, which provides:

> Except as otherwise *expressly provided* in this Act, the Administrator of the Environmental Protection Agency . . . shall administer this Act. (Emphasis added.)

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[1] Some of the arguments attributed to OSM in this memorandum have been expressed in informal communications from OSM counsel. Others, I understand, were raised directly to you by Secretary of the Interior Watt.

The authorization in § 501(b) for the Administrator "to utilize such officers and employees of such agency as may be found necessary *to assist* in carrying out the purposes of this Act," (emphasis added) is hardly an "express provision" to allow other agencies to administer the Act. On its face, this language contemplates only the assistance of other Federal agencies, not their assumption of the Administrator's responsibilities under the Act.

Furthermore, there is a strong presumption that the authority conferred on one agency should not be delegated to another. In *Textile and Apparel Group, American Importers Association* v. *FTC,* 410 F.2d 1052, 1057–58 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 910 (1969), the court rejected the Federal Trade Commission's contention that it could act pursuant to a statute that gave authority to the Bureau of Customs:

> [T]he Commission's argument runs afoul of the general principle that authority committed to one agency should not be exercised by another. The reason for this is that Congress delegates to one agency certain authority, perhaps because it feels that agency is the most capable of exercising it. Thus, Congress may well have felt that the Commission should restrict its enforcement powers to the type with which it was generally familiar—cease and desist procedures—and that Customs was better equipped to handle detention of goods at a port. Further, the political realities are often such that Congress has chosen a particular agency with a particular orientation toward a problem; the proper place for interested parties to get a different agency (with perhaps a more favorable orientation) to handle the job is back in Congress.

The above language argues strongly against the delegation of NPDES authority. EPA was the agency chosen by Congress to implement controls on water pollution. As noted earlier, Congress made that clear in § 101(d), which requires EPA to administer the Act unless "otherwise expressly provided." The issuance of permits by the Administrator is an integral part of EPA's administration of the CWA.

In addition, in most States having significant coal mining operations, the SMCRA permitting authority is the State itself. Section 501(b) makes no mention of utilizing officers and em-

ployees of State, as opposed to Federal, agencies. On the contrary, it is clear that § 402(b) provides the sole mechanism by which States may assume responsibility for NPDES programs. In enacting § 402(b), Congress imposed substantial prerequisites on both the States and EPA before such responsibility could be assumed. A construction of § 501(b) allowing the delegation of NPDES permitting authority to States that do not administer NPDES programs and have not met the substantial qualification requirements of § 402(b) would be manifestly inconsistent with the purposes of § 402(b) and would do considerable violence to the statutory scheme of the Act.

A comparison of § 501(b) with other statutory provisions that do authorize agency delegations buttresses the conclusion that no delegation of permitting authority is contemplated by § 501(b). Most compelling is § 107(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. § 1401 *et seq.* That section, enacted in the same year as the CWA, provides:

> The Administrator or the Secretary may delegate responsibility and authority for reviewing and evaluating permit applications, including the decision as to whether a permit will be issued, to an officer or agency, or he may delegate, by agreement, such responsibility and authority to heads of the Federal departments or agencies, whether on a reimbursable or nonreimbursable basis.

This section demonstrates clearly that Congress, when it wished to do so, knew how to allow the delegation of permitting authority. Congress provided such authority under the MPRSA; it did not do so under the CWA.

Moreover, an expansive reading of § 501(b) to permit the delegation at issue is not supported by the section's legislative history.[2] First, the outline of title V of H.R. 11896, § 501(b) of

[2] Nor can I agree with OSM that § 101(f) of the Act should be construed to authorize the delegation of permitting authority. Section 101(f) declares as a national policy the minimization of paperwork and interagency decision procedures and the avoidance of manpower duplication in implementing the Act. There is nothing in its language or the legislative history of § 101(f) indicating that EPA has authority to delegate major functions. On the contrary, § 101(f) must be read in conjunction with § 101(d), which makes clear that § 101(f) is to be implemented by means other than delegations of authority.

which was enacted verbatim in the CWA, indicates that § 501(b) was intended to permit the Administrator to "borrow personnel with consent." Legislative History of the Water Pollution Control Act Amendments of 1972 at 417 (1973). Second, the predecessor of § 501(b), § 8(b) of the Water Pollution Control Act of 1956, authorized the Secretary of Health, Education, and Welfare (HEW) to "utilize officers and employees of other U.S. agencies to assist in carrying out the purposes of the Act." (Pub.L. 84–660.) [3] That this language was not intended to authorize delegations is strongly suggested by a juxtaposition of § 8(b) with § 8(a) of the 1956 Act, which authorized the Surgeon General to "prescribe necessary regulations subject to the approval of the Secretary of HEW and to *delegate* his authority under the Act to officers and employees of the Public Health Service." (Emphasis added.)

OSM refers to various situations where CWA activities are carried out by entities other than EPA, arguing by analogy that they support the conclusion that delegation is authorized here. OSM notes that some States issue CWA permits, that the Corps of Engineers issues permits under § 404 of the CWA, and that the Coast Guard performs certain functions under § 311 of the Act. However, as discussed above, § 402(b) specifically provides for the assumption of permitting authority by States. Similarly, § 404 specifically authorizes the Corps to issue permits for dredging operations. Section 311 differs from the rest of the CWA in that authority is conferred on the President, not EPA. Section 311 expressly allows the President to delegate authority and also provides specific authority to the Coast Guard.[4] Instead of supporting OSM's arguments, the express language of these provisions actually undercuts OSM's position. It demonstrates that Congress knew well how to au-

[3] 1 USEPA Legal Compilation at 248 (1973).

[4] I understand that OSM has argued that EPA has delegated authority under the Safe Drinking Water Act to the United States Geological Survey (USGS). This is not the case. Some agreements are currently being negotiated between USGS and States that have assumed the underground injection control (UIC) program, whereby USGS and the States would cooperate to minimize duplication of regulatory effort. While EPA has helped to negotiate them, the agreements, if concluded, would be strictly between the States and USGS and would not relieve the States of their primary responsibility under the UIC program.

thorize the exercise of CWA authority by agencies other than EPA.

OSM has also cited *United States* v. *Weber*, 255 F. Supp. 40, 42–44 (D.N.J. 1965), *aff'd*, 384 U.S. 212 (1966), in support of its contention that the delegation at issue is lawful. *Weber* relied on *Goldberg* v. *Battles*, 196 F. Supp. 749, 755 (E.D. Pa.), *aff'd*, 299 F.2d 937 (3d Cir. 1961), *cert. denied*, 371 U.S. 817 (1962), which upheld the delegation by the Department of Labor of certain investigatory functions to the Department of Justice, pursuant to §§ 601 and 627 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 521, 527.

Weber and *Goldberg* do indicate that under some circumstances courts will uphold a delegation of authority, even in the absence of express statutory authorization. However, the statutory language of the LMRDA construed in those cases is far broader than § 501(b) of the Clean Water Act.[5] More importantly, the LMRDA does not contain a clause similar to § 101(d) of the CWA, which, as noted above, requires the Administrator to administer the Act "unless otherwise expressly provided." Thus, the CWA, unlike the LMRDA, does not afford the latitude for a court to uphold a delegation of authority.

In addition, investigatory functions are normally a central part of the Department of Justice's responsibilities, but presumably comprise only a peripheral part of the Department of Labor's responsibility. By contrast, the permitting function is an integral part of EPA's responsibility under the CWA. The permit is the primary mechanism for control of the discharge of pollutants into the environment and for ensuring compliance with applicable water quality standards. EPA has issued numerous water pollution control permits to coal mines. OSM and

[5] Section 627 of the LMRDA allows the Secretary of Labor to enter into "arrangements or agreements for cooperation or mutual assistance in the performance of his functions" and to "utilize *the facilities or services* of any department, agency or establishment of the United States . . . including the services of any of its employees . . . ." (Emphasis added.) *Goldberg* concluded that this section, read in conjunction with § 601(b), which specifically recognizes that the Secretary of Labor may "designate" officers to institute investigations, clearly authorized the delegation in question.

By contrast, § 501(b) of the CWA authorizes the Administrator only "to utilize such officers and employees of such agency as may be found necessary *to assist* in carrying out the purposes of this Act." (Emphasis added.)

State SMCRA authorities have comparatively little experience in the area of effluent limitations and water quality standards.[6]

In conclusion, for the reasons set forth above, I believe that EPA lacks legal authority to delegate its permit issuing responsibility to State SMCRA authorities or to OSM.

[6] A recent court decision interpreted SMCRA to require that applicable OSM regulations be consistent with EPA regulations under the CWA. *In re Surface Mining Litigation,* 627 F.2d 1346 (D.C. Cir. 1980). The latest OSM regulatory proposal simply incorporates by reference EPA's effluent limitations guidelines and applicable water quality standards.

December 16, 1982

MEMORANDUM

SUBJECT: Waivers for Federal Facilities Under Section 301(h) of the Clean Water Act

FROM: Robert M. Perry
Associate Administrator and General Counsel

TO: Paul C. Cahill, Director
Office of Federal Activities

We have just received your memorandum of November 10, 1982, concerning an October 15, 1982, Department of Defense (DOD) request that the Environmental Protection Agency (EPA) consider DOD sewage treatment plants eligible for variances under § 301(h) and § 301(i) of the Clean Water Act (CWA). You have requested that we review an EPA legal opinion dated September 12, 1978, (attached) and determine whether DOD treatment works may be considered "publicly owned treatment works" (POTWs) for the purposes of § 301 of the Act.

Our 1978 opinion concluded that wastewater treatment works at Federal facilities are not "publicly owned treatment works" within the meaning of § 301(h) and § 301(i) and that therefore operators of these facilities cannot qualify for modified permits under those provisions. As the opinion explains, the legislative history of § 301 indicates that Congress equated POTWs with municipalities and had no intent to treat Federal facilities as POTWs, either in general or for the purposes of § 301(h). We have carefully reviewed the September 1978 opinion and find no basis to question its conclusions.[1] In addition, we find nothing in the 1981 amendments to § 301(h) that might change our views.

Attachment [Deleted.]

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[1] Your memorandum suggests that the purpose of our prior opinion was to assure that Federal facilities would not be eligible for Title II grant funds. The memorandum noted that incidental effect, but was based solely on our interpretation of the Act, the legislative history, and pertinent regulations.

March 17, 1983

MEMORANDUM

SUBJECT: Legal Issues Concerning Section 404(b)(1) Guidelines

FROM: Robert M. Perry
Associate Administrator and General Counsel

TO: Frederic A. Eidsness, Jr.
Assistant Administrator for Water

You have asked me to address certain legal issues concerning the § 404(b)(1) guidelines under the Clean Water Act (CWA). I have previously furnished you an opinion addressing whether the guidelines need to be a binding regulation. The questions addressed in this memorandum concern the scope of the guidelines. I will address in a separate memorandum the legal aspects of revising the definition of "waters of the United States."

Because of the short schedule under which you are operating, and the abstract nature of some of the issues, this memorandum sets out in general terms, without being exhaustive, the applicable legal options and constraints. As you develop more concrete options and proposals, I will of course be glad to address in more detail the legal basis for, or risks associated with, particular approaches.

Scope of the Guidelines

Question: Must the guidelines consider impacts of water quality in the broad ecological sense, or may the guidelines be limited to assuring compliance with water quality in the sense measured by water quality standards under § 303 of the Act?
Answer: The guidelines must consider water quality in the broad ecological sense.

Discussion

Before addressing your specific question, I would like to make some general observations about interpreting § 404(b)(1). Section 404(b)(1) directs the Environmental Protection Agency (EPA) to develop guidelines for the specification of disposal sites for discharges of dredged material, "which guidelines shall be based on criteria comparable to the criteria applicable to the

territorial seas, the contiguous zone, and the ocean under section 403(c)." Therefore, in determining the required scope of the § 404(b)(1) guidelines, one must look to the criteria applicable under § 403(c). As the guidelines need only be based on criteria "comparable" to the § 403(c) criteria, the latter may be modified or adapted to reflect different characteristics of the types of waters and discharges subject to § 403 and § 404 (*e.g.*, open, saline waters versus mainly inland open water and wetlands, primarily sewage and industrial discharges versus dredged and fill material). Subject to that flexibility, if a concept or consideration is included under § 403(c), it should also be reflected in the § 404(b)(1) guidelines.

Turning to the question at hand, the argument in favor of a broader scope starts with the fact that § 403(c) clearly requires consideration of ecological concerns, beyond "water quality" in the § 303 sense, including:

> (A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;
>
> (B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts [sic] through biological, physical, or chemical processes; change in marine ecosystem diversity, productivity, and stability; and species and community population changes;
>
> (C) the effect of disposal, [sic] of pollutants on esthetic, recreation, and economic values.

Second, § 404(c) also goes beyond strict water quality considerations.[1] It appears unlikely that we would have the authority to veto sites on grounds that go beyond § 303 water quality standards and yet not be able to address such grounds in the § 404(b)(1) guidelines used to select such sites.

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[1] Section 404(c) allows the Administrator to veto a site if a discharge of dredged or fill material will have "unacceptable adverse effect" on enumerated resources. On its face, § 404(c) is not limited to considerations of water quality in the § 303 sense; it refers to "unacceptable adverse effect on municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife or recreational areas." In addition, the legislative history characterizes such effects as "environmental." 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 177.

Another indication of the scope of the § 404(b)(1) guidelines can be found in § 404(e). That section allows the Secretary to issue general permits when he determines that the separate and cumulative impacts of a category of activities will have minimal adverse "environmental" effects. The statutory term "environmental" is clearly broader than the § 303 water quality standards. Where the separate or cumulative "environmental" effects are more than minimal, the Corps must apply the § 404(b)(1) guidelines to each discharge individually. (Any general permit is also to be based on the § 404(b)(1) guidelines.) Unless the guidelines consider "environmental" impacts in this broader sense, there would be no reason to consider such impacts in deciding whether it would be appropriate to forgo scrutiny of individual discharges.

As I understand it, the following are the principal arguments that have been raised in support of confining the guidelines to water quality as measured by water quality standards. First, it has been argued the Clean Water Act was intended as a "water quality" act and the focus of § 404 should therefore be water quality, in a strict sense, and not the aquatic environment. The second argument is that a broader ecological approach may result in unnecessary duplication because such concerns are considered in the Corps' "public interest review" [2] and under the National Environmental Policy Act (NEPA). Because § 101(f) expresses a congressional desire to avoid duplication, it would be reasonable to limit the scope of the guidelines to water quality in the narrow sense.

The first argument is undercut by the legislative history and various court decisions. A narrow water quality standards approach to § 404 has been specifically rejected by the courts. *Minnehaha Creek Watershed District* v. *Hoffman*, 594 F.2d 617, 626–27 (8th Cir. 1970), *Buttrey* v. *United States*, 690 F.2d 1170 (5th Cir. 1982), slip op. at 546. The legislative history shows that Congress was concerned with the removal of wetlands and alteration of aquatic habitat (an impairment of the physical and biological integrity of the Nation's waters) as well as with the introduction of toxic chemicals (a threat to their chemical in-

[2] The "public interest review" is a balancing test that the Corps conducts as part of its review of permit applications under the River and Harbor Act of 1899, the CWA, and the Marine Protection, Research, and Sanctuaries Act. *See* 33 C.F.R. § 320.4.

tegrity). *See,* for example, statements by Senators Stafford and Baker, 3 Leg. Hist. 484, 523. Numerous courts have recognized the ecological focus of § 404. *See, e.g., Deltona* v. *United States,* 657 F.2d 1184 (Ct. Cl. 1981), *Avoyelles Sportsman's League* v. *Alexander,* 473 F. Supp. 525 (W.D. La. 1979) (appeal pending on other grounds).

The second argument, elimination of duplication, ignores the fact that Congress established the § 404(b)(1) guidelines, not the "public interest review" or NEPA review, as the *specific* standard for permit issuance under the Clean Water Act. Moreover, when States issue 404 permits, they are not required to apply the Corps' public interest review or to comply with NEPA; and when EPA reviews State permits, it also does so on the basis of the guidelines, not NEPA. Therefore, it is apparent that the guidelines themselves must address all matters required to be considered under § 404.

Taking these points into consideration, it appears clear that the § 404(b)(1) guidelines are intended to address a broader concept of environmental quality than is addressed by water quality standards under § 303 of the Act.

Question

What is the permissible role of economic considerations under the guidelines?

Answer

The guidelines must consider economic losses that would be caused by pollution. They must also consider the costs of alternatives as part of the alternatives analysis. However, a general cost-benefit analysis or weighing of economic benefits against environmental loss would present a significant legal risk.

Discussion

This issue is best addressed by approaching it from two sides: (1) To what extent *must* economic considerations be a part of the guidelines? (2) What restrictions are there on considering economics?

Turning to the first point, the "touch stone" for the guidelines is § 403(c) of the Act, as explained above. Section 403(c) primarily deals directly with environmental impacts from dis-

charges of pollutants. However, § 403(c)(1)(C) calls for consideration of "the effect of disposal, [sic] of pollutants on asthetic, recreation, and *economic* values." (Emphasis added.) This clearly contemplates recognition of the loss of economic values due to pollution. In addition, § 403(c)(1)(F) refers to "other possible locations and methods of disposal or recycling of pollutants including land-based alternatives." Consideration of "possible" alternatives implicitly includes consideration of their costs.[3] If an alternative is too costly, one could reasonably infer that it is not "possible." Therefore, it appears that the guidelines must consider the effect of pollution on economic values, and must consider the costs of the alternatives.

As to the second part to the question, the factors set out in § 403(c) are environmental ones, related to the identification and assessment of degradation of the aquatic system by discharges of pollutants (including economic losses caused by such degradation). The economic benefit of the project is not among the items listed. While the factors considered under the § 404(b)(1) guidelines need be only "comparable" to those under § 403(c), it would be difficult to argue that the economic benefit of the project is "comparable" to, or even consistent with, the § 403(c) factors. Consequently, in my view, it would be risky to develop § 404(b)(1) guidelines under which economic benefit, an unlisted factor, could outweigh environmental considerations that are listed.[4] Moreover, if economic considerations could be used under the guidelines to outweigh environmental concerns, there would be no need for the § 404(b)(2) override based on economic impacts on anchorage and navigation.

The Army has suggested that, because (in its view) NEPA calls for equal consideration of economic and environmental consequences, the § 404 decisionmaking process must include a similar consideration. However, I do not believe that NEPA governs this issue. Under § 511(c), EPA's action in developing the guidelines is not subject to NEPA. Therefore, if economic

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[3] The legislative history contains some references to considering the costs of alternatives, but it is unclear if this is in the context of the § 403(c) criteria or § 404(b)(2). *See* 1 Leg. Hist. 178, 325.

[4] Unlike § 102 of the Marine Protection, Research, and Sanctuaries Act (MPRSA), § 403 does not speak to "unreasonable" degradation.

considerations are to be applicable, they must be based on the CWA, not NEPA.

In sum, in my view, the guidelines must consider costs as part of its alternatives analysis and must consider the economic consequences of degradation caused by proposed discharges of dredged or fill material. On the other hand, it would be legally risky to include a general balancing of economic benefit from the discharge activity against the harm to the environment. The risks of an approach between these two extremes are harder to assess in the abstract.

Question

What legal constraints does § 101(g) impose on the guidelines?

Answer

Section 101(g), which was enacted in 1977, states the congressional policy that the CWA is not to supercede, abrogate, or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction. This could be read to provide that, to the extent any action under the CWA would conflict with State water allocation, such action is improper. However, the applicable legislative history indicates that the effect of this statement of congressional "policy" was not intended to be quite so sweeping. During the Senate debate on the conference report, Senator Wallop, the sponsor of the provision, stated:

> This amendment is not intended to create a new cause of action. It is not intended to change present law, for a similar prohibition is contained in section 510 of the act. This amendment does seek to clarify the policy of Congress concerning the proper role of Federal water quality legislation in relation to State water law. Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of sections 402 and 404 permits may incidentally affect individual water rights. Management practices developed through State and local 208 planning units may also incidentally affect the

use of water under an individual water right. It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

This amendment is an attempt to recognize the historic allocation rights contained in State constitutions.

It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the act was designed.

3 Leg. Hist. 531–32.

Discussion

This is the principal explanation of the section in the legislative history.[5] Therefore, the courts have taken it into account in considering the interpretation of § 101(g). *See NWF* v. *Gorsuch*, 530 F. Supp. 1291 (D.D.C. 1982), *rev'd on other grounds*, ____ F.2d ____ (D.C. Cir. 1982).

Applying § 101(g) to the § 404 program in accordance with the congressional intent that the courts have found in the legislative history, it appears that incidental effects on water allocation stemming from application of the statutorily mandated § 403(c) factors (or merely from the fact of regulation of dredged and fill material) are proper. However, in applying those factors we should avoid interference with States' allocations of water quality within their jurisdictions, where such interference is not necessary in order to accomplish the objectives of the guidelines. *See NWF* v. *Gorsuch*, F.2d ____ (D.C. Cir. 1982), in which the court interpreted the legislative history quoted above, stating that "we find specific indication in the Act that Congress did not want to interfere *any more than neces-*

[5] The only other reference is in the conference report, which, after paraphrasing the statutory language, merely states, "This provision is intended to clarify existing law to assure its effective implementation. It is not intended to change existing law." 3 Leg. Hist. 236.

sary with state water management." Slip op. at 43. (Emphasis added.)

Question

Must the guidelines consider secondary impacts?

Answer

By "secondary impacts," I am assuming you mean reasonably foreseeable impacts of the discharge itself that occur away from the immediate site of the discharge, *e.g.*, downstream impacts or impacts from the altered circulation as opposed to impacts on whatever is buried by the discharged material. Such secondary impacts must be included in the guidelines. Some impacts that may be caused by the subsequent operation of a project or by associated development may be considered, depending on the directness of the causal connection, the predictibility of such impacts, and a general rule of reason.

Discussion

The statute itself indicates that secondary impacts (as defined above) should be addressed under the guidelines. For example, § 403(c) requires consideration of impacts on shores and beaches, which are secondary impacts from ocean dumping, in recognition of the effects of currents. Also, § 404(f)(2) indicates that Congress was concerned with the effects of discharges of dredged and fill material on flow and circulation.[6] It follows from § 404(f)(2) that the guidelines should consider impacts on flow and circulation; unless such considerations were part of the permit process there would be no point in "recapturing" discharges because of such impacts.

Finally, there is nothing in the Act that indicates Congress intended to exclude from consideration adverse impacts on the aquatic environment caused by a discharge merely because they were "secondary." To the contrary, part of the very rationale for extending the Act's jurisdiction beyond traditionally navigable waters was the fact that the effects of pollution move through the aquatic system. *See, e.g., United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974), *Commonwealth*

[6] Section 404(f)(2) reinstates § 404 permit requirements for discharge of dredged or fill material otherwise exempt under § 404(f)(1) if, *inter alia*, "the flow or circulation of navigable waters may be impaired."

of Puerto Rico v. *Alexander*, 438 F. Supp. 90, 95 (D. D.C. 1977). Pollution is controlled at the source in order to prevent such secondary effects. There can be no serious doubt that such off-site effects are to be considered in deciding whether to allow the discharge.

When one moves beyond secondary impacts, as defined above, to impacts caused by the subsequent operation of a project or by associated development, the question becomes more difficult. While it is hard to answer in the abstract, in general whether such impacts must be considered would appear to depend on the directness of the causal connection and the predictability of the impacts, interpreted in light of a rule of reason. For example, where fill is discharged to build a dam whose *purpose* is to manipulate the flow of water, the permitting authority, in evaluating the impacts of the fill, may reasonably take into account the fact that water levels will be manipulated. On the other hand, when a barge-loading facility for an upland factory involves some fill, the water quality impacts of the factory are outside the scope of the guidelines, even if they are, in a sense, a "result" of the fill.

Question

What are the legal requirements for an alternatives analysis in the guidelines?

Answer

Some consideration of possible other locations and methods of disposal or recycling of pollutants, including land-based alternatives, is required. The Agency has substantial flexibility in deciding what kind of alternatives analysis to include.

Discussion

Section 403(c), upon which the guidelines are to be based, expressly includes "other possible locations and methods of disposal or recycling of pollutants including land-based alternatives." Moreover, the 1972 legislative history refers to the need to consider alternatives, including upland sites, under the § 404 program.[7] Therefore, it is clear that the guidelines must contain

[7] 1 Leg. Hist. 177–78, 325.

some provision addressing alternatives, ranging from onsite modifications to other possible locations.

Beyond this, however, the statute provides little direct guidance as to the exact nature of the alternatives analysis. Therefore, the Agency has substantial discretion in this area. For example, although § 230.10(a), the current alternatives analysis in the guidelines, is legally permissible, other approaches can be considered. The rest of this discussion addresses possible limits on our flexibility.

One question that has been raised is whether the guidelines must require that alternatives be examined in every instance. In my opinion, the answer is no. For example, if the proposed discharge is itself clearly environmentally acceptable, as defined by the guidelines, we may reasonably take the position that a separate analysis of possible alternatives is unnecessary because the selection of an alternative site or method would presumably not yield a significant environmental benefit. Conversely, where it is clear the proposed discharge would cause significant degradation, the guidelines may legally require that the permit be denied whether or not alternatives exist. Again, in such cases, an alternatives analysis would be unnecessary.[8] (The § 403(c) guidelines take this approach. *See* 40 C.F.R. § 125.123.) Of course, we should not limit the use of alternatives analysis so much that we effectively read that factor out of the Act.

Another aspect of the alternatives issue is the extent to which permits may (or must) be denied because reasonable, environmentally preferable alternatives exist. In my view, the existence of such an alternative may be a *permissible* ground for permit denial. First, there would be little purpose in including an alternatives analysis in a permit program if the existence of alternatives could not be a factor in permit denial. Second, such a ground for denial is clearly consistent with the goals of the Act and the purposes of the § 404 program, as evidenced by § 101(a) and § 403(c) and the legislative history.

Whether the guidelines *must* require that permits be denied because reasonable, environmentally preferable alternatives exist is a somewhat more complicated question, and probably de-

[8] Of course, the guidelines *may* require some alternatives analysis even when a discharge appears not to involve significant degradation. This approach would be based on the concept that it is permissible to require that *all* of the § 403(c) requirements be considered in every case.

pends in part on the environmental effects of the proposed discharge. For example, where the proposed discharge would have environmental effects of serious concern *and* a reasonable, environmentally preferable alternative is available, the statutory scheme and legislative history virtually compel denial. On the other hand, where the impact of the discharge in question is insignificant we would justify not requiring selection of a "better" alternative (or even, as noted above, not doing an alternatives analysis at all).[9]

[9] Another question that has been raised is whether the guidelines can authorize a discharge which will admittedly cause unacceptable degradation, on the grounds that no practicable alternative is available and there is a "need" for or "benefit" from the discharge which outweighs the environmental degradation. This presents the same issue discussed, *supra*, concerning economics. As explained there, allowing "economics" or "need" to override environmental degradation under the guidelines is legally risky. Of course, where navigational interests are at stake, § 404(b)(2) provides a separate basis for authorizing discharges prohibited by the guidelines.

April 5, 1983

SUBJECT: Applicability of Section 404 of the Clean Water Act to Certain Channelization and Stream Maintenance Activities

Mr. Glenn Kinser
Supervisor, Annapolis Field Office
Fish and Wildlife Service
Division of Ecological Services
1825-B Virginia Street
Annapolis, Maryland 21401

Dear Mr. Kinser:

Jose Allen has referred to me your letter of December 29, 1982, concerning the applicability of § 404 of the Clean Water Act (CWA) to certain channelization and stream maintenance activities. Because at least some of the apparent conflict in this area appears to stem more from confusion over the issues involved than from legal disputes, I would like to begin by carefully framing the issue. I am assuming for purposes of this letter that the streams in question are "waters of the United States," as defined in 40 C.F.R. § 230.3.

Channelization and stream maintenance work can involve a number of different operations, which must be distinguished for purposes of analyzing the applicability of § 404. For example, sediment can be excavated by a dragline or clamshell bucket that is located either in the stream or on the bank. The material so excavated can be deposited on the shore or in a new location in the stream. Stream work can also be performed by a bulldozer working in the stream. Such a bulldozer may push sediment up onto the bank above the ordinary high water mark in a continuous motion, may stockpile excavated sediment in the stream, may fill depressions in the stream bed, may release varying amounts of excavated material as temporarily suspended solids, may leave mounds at the edge of the blade's path, and so forth.

Section 404 governs the discharge of dredged or fill material into waters of the United States. A "discharge" involves an addition of a pollutant, such as dredged or fill material, to waters of the United States from a point source, § 502, 33 U.S.C. 1362. Bulldozers and draglines are "point sources," *Avoyelles Sportsman's League* v. *Alexander*, 473 F. Supp. 525 (W.D. La. 1979)

(appeal pending on other grounds); *United States* v. *Holland*, 373 F. Supp. 665 (M.D. Fla. 1974). "Fill material" includes any material that changes the bottom elevation or converts a wetland to a dry land, 40 C.F.R. § 122.3; "dredged material" includes any material excavated from waters of the United States, *id.* Dredged material by definition comes from waters of the United States, and, when not disposed of on land, is usually discharged in the same water body albeit at a different location. Consequently, the term "addition" in the definition of "discharge" has been traditionally interpreted to include the relocation of dredged material to a different part of the original stream as well as its introduction to a new water body.

It appears from your letter that there is no serious dispute that mere drippings from a dragline or clamshell bucket, at least where *de minimis*, do not constitute a discharge of dredged or fill material subject to § 404. Section 404 does not regulate dredging *per se*, but only the discharge of dredged or fill material from a point source into waters of the United States. Whether the equipment itself is located in the stream or on dry land is immaterial from a jurisdictional standpoint, as long as the load itself (minus normal, *de minimis* drippings) is deposited on dry land. Similarly, there can be little dispute that a discharge of dredged or fill material occurs when a bulldozer working in a stream leaves its load in a different part of the stream or in an adjacent wetland.

The real issue seems to be whether a discharge of dredged or fill material occurs in *every* instance in which a bulldozer works in a stream, even if the equipment ultimately pushes its load up onto dry land. The answer is that whether a discharge occurs depends in significant part on the factual circumstances of particular operations, *e.g.*, whether the bulldozer works "cleanly," removing virtually all its load from the stream, with the exception of *de minimis* spillage, whether the bulldozer deposits more than *de minimis* amounts of its load in stream bed depressions, raising the bottom elevation, or whether excavated material is stockpiled in the stream prior to planned removal, and if so, for how long. I hazard no guess as to which of these scenarios is more "typical."

In the case of "clean" bulldozing, where the bulldozer moves virtually all its load onto the bank, with the exception of *de minimis* spillage, I see little basis for drawing a distinction between such an operation and the dragline operation discussed

earlier. A common sense reading of the applicable definitions leads to the conclusion that such operations involve simply dredging, not the discharge (addition) of dredged or fill material. The fact that the material was carried across the stream bed does not, in and of itself, create a discharge. On the other hand, where a bulldozer actually fills in bottom depressions with more than *de minimis* amounts of sediment, thereby raising the bottom elevation, there is a discharge of dredged or fill material. *See Avoyelles Sportsman's League* v. *Alexander, supra*. Again, *de minimis* refers to the unavoidable residue that one would expect to be left by a careful dredging operation. Similarly, mounds at the edge of the bulldozer blade are analogous to bucket drippings. *De minimis* mounds incidental to normal dredging should not be considered discharges; conversely, more than *de minimis* mounds left at the side of the blade would be discharges. In the case of stockpiling, one must use a common sense approach and consider whether there is simply a brief pause in an otherwise continuous removal operation or whether the material is being stockpiled indefinitely, with less certainty of prompt removal. In the former case, there is arguably no "addition"; in the latter, at least at some point, it would be reasonable to find a discharge.

Your letter also raises the question of jurisdiction over dredged material that sloughs off the bank back into the water, that is, material placed by a point source on the bank where natural forces (other than gradual erosion) are likely to result in its slipping back into the water and which in fact does slip into the water. In such a case, the point source does not directly place the material in the water, although it is largely instrumental in that result. Such deposits are clearly covered by the Refuse Act of 1899, one of the predecessors to the Clean Water Act. Since the coverage of the Clean Water Act was generally intended to encompass at a minimum the coverage of the Refuse Act (*see United States* v. *Hamel*, 551 F.2d 107 (6th Cir. 1977)), it appears reasonable and consistent with congressional intent to consider such sloughed material to be a discharge of dredged material subject to § 404. I do not interpret your example to refer to material that gradually erodes from either the natural bank or from deposits on the bank. Where there is simply gradual erosion, it would probably be more appropriate to consider it nonpoint source pollution subject to § 208 of the Act, not the § 404 permit program.

For these reasons, the application of § 404 to instream bulldozing operations should ordinarily be judged on a case-by-case basis, with reference to specific facts. It appears likely that when the issue is approached this way, rather than through invocation of broad, abstract statements, there will turn out to be little disagreement between the Fish and Wildlife Service, the Environmental Protection Agency, and the Corps of Engineers. I hope this analysis facilitates the continued cooperation of our respective agencies and the Corps in carrying out the § 404 program. Please let me know if we can be of further assistance.

Sincerely,

Courtney M. Price
Acting Associate Administrator
and General Counsel

July 5, 1983

MEMORANDUM

SUBJECT: Clean Water Act Jurisdiction Over Springs in Ash Meadows, Nevada

FROM: A. James Barnes
Acting General Counsel

TO: Frank Covington, Director
Water Management Division
Region 9

Pat Alberico has referred to this office your request for guidance on Clean Water Act (CWA) jurisdiction over isolated springs in Ash Meadows, Nevada. Based on our review of the background materials you provided and the applicable law, it appears that CWA jurisdiction exists over the springs in question.

Facts

Ash Meadows is an oasis area in the Mohave Desert in Nye County, Nevada, near the California border. Because of its geomorphology, this area contains approximately 20 seeps and springs (hereinafter referred to collectively as springs), which discharge a total of approximately 17,000 acre feet of water per year. These springs are fed by underground water. They do not flow beyond the borders of the Ash Meadows area. Those waters and their adjacent marshes are home to a number of endemic plants and animal species. Ash Meadows apparently has the highest density of endemic plants and animals of any locality in the United States. Four species have been listed as endangered species under the Endangered Species Act, and another 14 are candidates for listing. These species, both listed and unlisted, have been extensively studied by a large number of scientists, including many from States other than Nevada.[1] The Devil's Hole spring was declared a disjunct part of the Death Valley National Monument by President Truman in 1952. The Bureau of Land Management maintains public use facilities in the area for recreational visitors. At times in the

[1] By letter of November 8, 1982, the Fish and Wildlife Service provided a list of 50 scientists actively involved in research in Ash Meadows. More than half are from States other than Nevada.

past, water drawn from the springs has been used for agriculture, largely unsuccessfully due to the high mineral content of the water, limitations on available water quantity, and poor soils. Preferred Equities Corporation, the present owner of a significant portion of the water rights for discharges from the springs, intends to use the water for a new urban development.

Discussion

Clean Water Act jurisdiction extends, in inland waters, to the "waters of the United States" (§ 502(7) of the Act), which are defined in the applicable regulations, 40 C.F.R. § 230.3(s).[2] As nonnavigable, isolated, intrastate waters, the Ash Meadows springs would fit the definition of waters of the United States only if their:

> use, degradation, or destruction . . . would affect or could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

Wetlands adjacent to the springs would have the same jurisdictional status as the springs themselves.

Whether any particular isolated water, such as the Ash Meadows springs, falls within the regulatory definition will, of course, depend upon the facts of the situation. In the present case, the record indicates that the springs in question have attracted a significant number of scientists from out of State to study the unusual flora and fauna they support, including several endangered species. If the springs are degraded or destroyed, they will no longer support the distinctive endemic species that attract the scientists. Thus, the springs appear to

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[2] Identical definitions appear at 40 C.F.R. §§ 122.2 and 233.3, and 33 C.F.R. § 323.2(a). Despite some wording changes over the years, intrastate waters used by interstate travelers for recreational or other purposes have been included since the first regulation interpreting "waters of the United States" was promulgated.

fit the class of waters of the United States described in § 230.3(s)(3)(i), that is, waters the use, destruction, or degradation of which could affect interstate commerce including such waters "which are or could be *used by interstate or foreign travelers for* recreational or *other purposes.*" (Emphasis added.)

While there is no case law directly on point, such a finding has support in *United States* v. *Byrd,* 609 F.2d 1204 (7th Cir. 1978) and *Palila* v. *Hawaii Dept. of Land and Natural Resources,* 471 F. Supp. 985 (D. Ha. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981). The *Byrd* case held that the use of a 2,500-acre lake by out-of-State travelers for recreational purposes could serve as the basis for a finding of CWA jurisdiction.[3] In the *Palila* case, the District Court held that the Endangered Species Act was a proper exercise of the commerce power because, by protecting the natural habitat of endangered species, it "preserves the possibility of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species . . . ."

Given the unusual collection of species directly dependent on the Ash Meadows system of springs, and the intensive study of species and their habitat by a significant number of interstate scientists, and the Federal interest reflected by listing under the Endangered Species Act, an assertion of CWA jurisdiction over the Ash Meadows springs is consistent with the applicable case law interpreting the Commerce Clause, the applicable CWA regulations, and the general purpose of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters (§ 101(a)). Since Congress intended that CWA jurisdiction extend to the maximum

[3] The opinion does not indicate the number of travelers involved.

extent permissible under the Commerce Clause,[4] it follows that there is jurisdiction over the springs in question.[5]

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[4] Conference report, 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 327, *Leslie Salt Co.* v. *Froehlke,* 578 F.2d 742 (9th Cir. 1978); *NRDC* v. *Callaway,* 392 F. Supp. 685, 686 (D. D.C. 1975); *Puerto Rico* v. *Alexander,* 438 F. Supp. 90, 95 (D. D.C 1977); *Wyoming* v. *Hoffman,* 437 F. Supp. 114 (D. Wyo. 1977).

[5] While not all the springs in question actually contain listed endangered species, the evidence suggests that the springs are so related that significant alterations to the springs that do not support such species may have an effect on those that do. In addition, the file indicates that the attraction for scientists is not merely the endangered species, but the whole system of endemic species dependent on the collection of springs. Therefore, I consider it appropriate to assert jurisdiction over the collection of springs, not just the specific springs that contain endangered species. Of course, discharges into those springs that do not contain endangered species are probably covered by the Corps of Engineers' nationwide permit for isolated waters, 33 C.F.R. § 330.4. The Corps should be consulted on questions concerning the scope of that permit, and the applicability of its conditions.

January 9, 1984

MEMORANDUM

SUBJECT: EPA's Authority to Pay Expenses Associated With Forum to Discuss Matters Pertaining to the Pending Application to Incinerate Chemical Wastes in the Gulf of Mexico

FROM: A. James Barnes
General Counsel

TO: Jack Ravan
Assistant Administrator for Water

Question

Is the Environmental Protection Agency (EPA) authorized to pay the expenses of technical experts associated with the Gulf Coast Coalition to attend a public forum pertaining to the pending application to incinerate chemical wastes in the Gulf of Mexico?

Answer

No.

Discussion

On October 21, 1983, EPA published notice of its tentative determination to issue ocean incineration permits to Chemical Waste Management and announced public hearings to receive further comment. One of these public hearings was held in Brownsville, Texas, on November 21, 1983. At this hearing the Gulf Coast Coalition requested an opportunity for their experts to sit as a panel to answer questions from the audience. The Gulf Coast Coalition experts were given an opportunity to present their views; however, rather than permit them to sit as a panel to answer questions at this public hearing, you offered to return to Brownsville at a later date and, to the extent permitted by law, to cover the expenses of their experts to answer any questions from the public in a separate forum that would not be an EPA public hearing. The Coalition has now arranged for such a forum to be moderated by a local TV sta-

tion at which they and we would have technical experts available on the podium to answer questions from the public.[1]

I must conclude that paying the expenses of technical experts associated with the Gulf Coast Coalition to participate in such a forum is barred by § 410 of Public Law 98–45, the Agency's 1984 Appropriations Act. This section provides, in pertinent part, as follows:

> None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, non-Federal parties intervening in regulatory or adjudicatory proceedings.

The ocean incineration permit proceeding is a regulatory proceeding under the Marine Protection, Research, and Sanctuaries Act (MPRSA). The Gulf Coast Coalition is an interested party that has participated actively in this proceeding. I understand that two of the six experts the Coalition has chosen for the public forum presented statements at the previous public hearing on this permit. All of the six experts are clearly associated with the Gulf Coast Coalition and thus could not be considered disinterested technical experts. The Gulf Coast Coalition and the technical experts who are their spokespersons would be, accordingly, considered intervenors within the meaning of § 410, and the Agency is not authorized to expend funds on their behalf. The fact that the Coalition's public forum is not an EPA public hearing does not change this result, since the Coalition is clearly an intervenor in the regulatory permit proceeding that is the subject of the public forum.

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[1] Chemical Waste Management, the applicant in the ocean incineration permit proceeding, and At-Sea Incineration, another incinerator company, have requested to participate in this forum. Their participation is not relevant to the legal issue discussed in this memorandum.

May 11, 1984

MEMORANDUM

SUBJECT: State National Pollutant Discharge Elimination System Control Over Forest Service Property and Operations

FROM: A. James Barnes
General Counsel

TO: Alvin L. Alm
Deputy Administrator

We have looked into the question of whether the Environmental Protection Agency (EPA) can approve a State to administer the National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act (CWA), but reserve for Federal regulation discharges from facilities or operations under the ownership or control of the Forest Service. Our conclusion is that this would not be authorized under the CWA.

Section 402(b) of the CWA authorizes States to assume control of the NPDES program for waters within their jurisdiction in lieu of Federal EPA control. Section 402(c) requires that, once the Administrator approves a State request for NPDES authority, EPA must suspend its issuance of NPDES permits as to those waters subject to the State program. EPA has consistently interpreted this provision to preclude EPA approval of partial State program requests whereby the State would issue permits for some categories of discharges and EPA would issue permits for the remainder. The reasoning is that if EPA must suspend issuance "for those navigable waters subject to the [State's] program," it follows that the State must issue *all* permits for discharges into those waters. The legislative history supports this reading.

In addition, in 1977 Amendments to the CWA, Congress explicitly authorized approved NPDES States to assume permitting control over Federal facilities. Limited Presidential exexemptions for Federal facilities from State requirements are authorized under §313(a). These may be granted either for a particular source or, through regulations, for a class or category of sources. However, in both cases the exemption is predicated on a showing of paramount interest. In addition, class exemptions are limited to property "owned or operated by the Armed

Forces of the U.S. (including the Coast Guard) or by the National Guard of any state and which are uniquely military in nature." Because § 313 provides for such limited class exemptions, which by definition would not include Forest Service property or operations, it is reasonable to infer that such a Forest Service exemption was not intended by the CWA.

February 8, 1985

MEMORANDUM

TO: Josephine S. Cooper
Assistant Administrator for External Affairs

FROM: Gerald H. Yamada
Acting General Counsel

SUBJECT: Issues Concerning the Interpretation of Section 404(f) of the Clean Water Act

You have asked for guidance clarifying the application of § 404(f) of the Clean Water Act (CWA) and its implementing regulations to the expansion or intensification of farming operations.[1] This memorandum provides general guidance on the interpretation of the applicable law and regulations as they relate to that topic. It is intended to assist the Environmental Protection Agency (EPA) and Corps of Engineers personnel in understanding and consistently applying § 404(f) and in explaining that section to the public.

I. General

At the outset, it should be stressed that § 404 jurisdiction extends only to point source discharges of dredged or fill material into waters of the United States. § 404(a). Unless an activity involves such discharges into such waters, it is not subject to § 404, and there is no need to consider the applicability of § 404(f). Thus, activities confined to those portions of a property that have been determined by EPA or the Corps of Engineers, as appropriate, not to be waters of the United States do not need a § 404 permit, regardless of what the activities are.

If an activity *does* involve a discharge of dredged or fill material into waters subject to the Act, then it is relevant to consider whether the activity is exempt under § 404(f). Section 404(f)(1) states that:

> Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material [from activities specified in (A) through (F)] is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this

[1] EPA is charged with the ultimate administrative responsibility for interpreting § 404(f). *See* Op. Att'y. Gen., Sept. 5, 1979.

> Act (except for effluent standards or prohibitions under section 307).

Section 404(f)(2), commonly referred to as the "recapture provision," provides:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters, into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Thus, in order to conclude that a given discharge activity is exempt from regulation, one must determine not only that it falls within § 404(f)(1), but also that it is not recaptured under § 404(f)(2).

Discharges which are not exempt under § 404 must be evaluated through the appropriate permit process. If the permit issuer determines the discharges comply with the § 404(b)(1) guidelines and other applicable criteria, they may be authorized by a suitably conditioned permit.

Section 404(f) was enacted in 1977 as part of the mid-course corrections to the CWA and in response to public reaction to the Corps' expansion of its § 404 jurisdiction following the decision in *NRDC* v. *Callaway,* 392 F. Supp. 685 (D. D.C. 1975). In very general terms, the legislative history indicates that § 404(f) reflects a tradeoff between activities and geographic jurisdiction, that is, a decision by Congress to explicitly exempt certain activities that it never intended to regulate or that are sufficiently minor so as not to require scrutiny through the permit process, while maintaining the program's broad geographic jurisdiction because of the latter's importance to the purposes of the Act. However, as noted in the preamble to EPA's first proposed regulations implementing § 404(f), 44 Fed. Reg. 34263 (June 14, 1979), the interpretation of the section is exceptionally complex, because of the need to work with the language of the statute and the extensive but sometimes ambiguous or inconsistent legislative history.

EPA first proposed regulations interpreting § 404(f) on June 14, 1979. After consideration of the numerous comments and following close consultation with the Corps, EPA published final § 404(f) regulations on May 19, 1980, as part of its "Con-

solidated Permit Regulations." 40 C.F.R. § 123.91. Both the proposed and final regulation were accompanied by extensive preambles. On July 22, 1982, the Corps of Engineers incorporated EPA's § 404(f) regulations into its own permit regulations (at 33 C.F.R. 323.4) verbatim, except for (with EPA's concurrence) small changes to the definition of "minor drainage" and to the description of facilities associated with irrigation ditches.[2] EPA recodified its 1980 § 404(f) regulations as 40 C.F.R. 233.35 on April 1, 1983. References in this memorandum will be to 40 C.F.R. 233.35.

On its face, § 404(f) does not provide a total, automatic exemption for all activities related to agriculture. Rather, § 404(f)(1) exempts only those agricultural activities listed in paragraphs (A) through (F), namely certain "normal" farming practices (§ 404(f)(1)(A)), certain ditching activities (§ 404 (f)(1)(C)), farm roads meeting specified criteria (§ 404(f)(1)(E)), and other discharges covered by best management practices (BMPs) developed through an approved § 208(b)(4) program (§ 404(f)(1)(F)).[3] In addition, even discharges which are associated with the activities listed in § 404(t)(1) are not eligible for the exemption if they involve toxic materials[4] or if they are recaptured by § 404(f)(2).

The legislative history leaves little doubt that Congress intended to limit the environmental effect of the exemptions by defining them narrowly and by including § 404(f)(2).[5] As Sena-

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[2] The amended irrigation ditch provision was challenged in *NWF* v. *Marsh*, D.D.C., Civ. No. 82–3632. As part of the settlement in that case, EPA and the Corps agreed to the proposal of new wording. Final regulations reflecting the settlement were published on October 5, 1984.

[3] As noted in the preamble to the 1979 proposed regulations, if § 404(f)(1)(A) covered all kinds of farming activities, there would be no need to provide for ditches, ponds, and roads in § 404(f)(1)(C) and (E). 44 Fed. Reg. 34264.

[4] Most farming operations will probably not involve discharges containing toxic pollutants. However, should the soils to be discharged contain substances such as pesticides listed as toxic pollutants pursuant to § 307, a permit would be required. *See* 40 C.F.R. 233.35(b).

[5] This legislative history was relied on by the principal reported court decisions construing § 404(f), *Avoyelles Sportsman's League* v. *Alexander*, 473 F. Supp. 525, 535–36 (W.D. La. 1979) and *Avoyelles Sportsman's League* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). The district court held that the exemptions should be narrowly construed and that under § 404(f)(1)(A) only activities that are part of an on-

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tor Muskie put it, "New subsection 404(f) provides that Federal permits will not be required for those *narrowly defined activities that cause little or no adverse effects either individually or cumulatively.*" 3 Legislative History of the Water Pollution Control Act Amendments of 1972, at 474. (Emphasis added.) *See also* statements by Rep. Harsha, *id.* at 420, and Senator Wallop, *id.* at 530. The numerous statements concerning what § 404 did not exempt are also telling. For example, Senator Muskie explained, "[T]he exemptions do not apply to discharges that convert extensive areas of water to dry land or impede circulation or reduce the reach or size of the water body." 3 Leg. Hist. 474; *see also* statement of Senator Baker, *id.* at 523. As Senator Stafford stated, "Permits will continue to be required for those farm, forestry, and mining activities that involve the discharge of dredged or fill material that connect [sic—presumably intended to be 'convert'] water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees or other fills in wetland or other waters." 3 Leg. Hist. 485. *See also* Senate Report, 4 Leg. Hist. 710 (permit review necessary for discharges to convert a hardwood swamp to another use through dikes or drainage channels).[6]

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going agricultural or ongoing silvicultural operation were intended to be exempted. (This holding preceded the regulations, and hence simply interpreted the statute, without weight being given to EPA's regulations interpreting the statute.) On appeal, the Fifth Circuit affirmed the district court's result, but found it unnecessary to decide the challenge to the district court's limitation of § 404(f)(1)(A) to "established" operations since application of § 404(f)(2) would lead to the same result.

The legislative history cited in this memorandum has also been relied on in two recent unreported decisions, *United States* v. *Huebner*, No. 83–3140 (7th Cir. Jan. 11, 1985), *United States* v. *Akers*, Civ. S–84–1276 RAR (E.D. Cal. Jan. 15, 1985).

[6] There has been a contention that the references in the legislative history implying that agricultural activities as a class are best regulated by the States (*i.e.*, not by the Corps) supports a broad exemption. However, such references are either to the "Bentsen" amendment, which was rejected, or to activities to be addressed under § 208 plans. When it authorized § 208(b)(4) programs as part of the 1977 amendments, Congress assumed that States would use such programs to control "quasi-point source" silvicultural or agricultural activities in order to obviate the need for a Federal permit. *See, e.g.*, statement by Senator Stafford, 4 Leg. Hist. 911–912. However, to date no State has an approved § 208(b)(4) plan that would qualify for exemption any agricultural activities not otherwise enumerated in § 404(f)(1)(A)–(E).

Thus, in determining whether discharges associated with expansion or intensification of farming in waters of the United States are exempt, the issue is whether the discharge activities in question are among those specifically listed in §§ 404(f)(1)(A) through (F) and, if so, whether § 404(f)(2) recaptures them. The next section of this memorandum discusses pertinent points relating to the specific provisions of § 404(f)(1), as interpreted by existing regulations.

II. Section 404(f)(1)(A)–(F)

Section 404(f)(1)(A). This subsection lists discharges of dredged or fill material from "normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices." The implementing regulation quotes this language, and then explains that § 404(f)(1)(A) is limited to activities which are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation," gives examples of what is and is not "established," and defines the listed activities (*see* 40 C.F.R. 233.35(a)(1)(i) and (ii)). This "established" requirement is intended to reconcile the sentiments in the legislative history that although § 404 should not unnecessarily restrict a farmer in continuing to farm his land,[7] discharge activities which could destroy wetlands should be regulated.[8]

Several points should be kept in mind in deciding whether this "established" requirement is met in a given case. First, to fall within § 404(f)(1)(A), the specific cultivating, seeding, plowing, etc., activity need not *itself* have been ongoing as long as it is introduced as part of an ongoing farming operation. For example, a farmer may decide to initiate "minor drainage" for the emergency removal of blockages in an area already being farmed (*see* 40 C.F.R. 233.35(a)(1)(iii)(C)(1)(iv), definition of "minor drainage"). Similarly, if crops have been grown and

[7] *See, e.g.*, statement of Rep. Stump, 3 Leg. Hist. 418.

[8] *See supra.* An assumption in both the regulation and the legislative history is that ongoing farming operations normally are not carried on in waters of the United States (unless perhaps specializing in a wetland crop like rice or cranberries), and hence that ordinarily there is little basis or purpose to apply § 404 to ongoing operations. *See, e.g.*, statement of Senator Muskie, 4 Leg. Hist. 869.

harvested on a regular basis, the mere addition of a cultivating step to that farming operation is not inconsistent with the *operation* being an "established" one for purposes of § 404(f)(1)(A). (Of course, the mere fact that there is an "established" operation under § 404(f)(1)(A) does not foreclose the possibility of recapture under § 404(f)(2).)

Second, the thrust of the last three sentences in § 233.35 (a)(1)(ii) is to ensure that the "established" requirement is used neither too restrictively (*e.g.*, to block use of a conventional rotational cycle) nor too loosely (*e.g.*, to allow the fact that an area has been timbered or farmed at any point in history to automatically make it an ongoing farm or forest operation). To guard against the latter, the regulation sets out two alternative tests to be used to determine whether there is no longer an ongoing operation on a previously farmed area, *i.e.*, whether a new, nonfarming use has taken place in the interim or whether the area is no longer in a condition such that farming could resume without hydrologic modification. *See United States* v. *Akers*, *supra*, for an example of application of this "established" requirement.

The regulations (and preamble) define in some detail the specific "normal" activities listed in § 404(f)(1)(A). Three points may be useful in the present context. First, as explained in the 1979 preamble, the words "such as" have been interpreted as restricting the section "to the activities *named* in the statute and other activities of essentially the same character as named," and "preclude the extension of the exemption . . . to activities that are unlike those named." (Emphasis added.) 44 Fed. Reg. 34264. Second, plowing is specifically defined in the regulations not to include the redistribution of surface materials by grading in a manner which converts wetland areas to uplands (*see* 40 C.F.R. 233.35(a)(1)(iii)(D)).

The third point relates to the definition of "minor drainage." Because of the numerous statements in the legislative history that draining wetlands was not exempt under § 404(f),[9] and because § 404(f)(1)(C) makes it clear that discharges from the construction of drainage ditches are not exempt, the "minor drainage" definition was carefully crafted to describe very specific drainage activities that were identified and judged through rulemaking to be necessary components of normal operations

[9]*See, e.g.*, Senate Report, 4 Leg. Hist. 709, as well as the references cited *supra*.

but to have minimal adverse effects. Thus, subparagraphs (1)(ii) and (1)(iii) of the minor drainage definition are limited to discharges associated with continuation of established *wetland* crop production (*see* 40 C.F.R. 233.35(a)(1)(iii)(C)). Although those activities may involve plugging ditches and rebuilding small rice levees, for example, paragraph (2) of the minor drainage definition stresses that the term "does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a . . . wetland or aquatic area constituting waters of the United States."

Section 404(f)(1)(B). This subsection covers discharges resulting from maintenance, including emergency reconstruction of damaged parts, of currently serviceable structures. The regulation, after repeating the statutory language, states that "maintenance" does not include changes in character, scope, or size of the original fill design, and requires that emergency work take place a reasonable time after damage occurs (*see* 40 C.F.R. 233.35(a)(2)). Thus, discharges to increase the height or length of a dike are not covered by this section.

Section 404(f)(1)(C). The statutory language applies only to the "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches."

A brief history of the regulations interpreting this provision is in order, as they have been modified several times insofar as they relate to irrigation ditches. EPA's initial regulations (May 19, 1980) supplemented the statutory language by specifying that connections and certain other work related to irrigation ditches were included in the exemption.[10] In July 1982, EPA authorized the Army to replace that supplementary language with a simplified wording that EPA felt was consistent with its

[10]A simple connection of an irrigation return or supply ditch to waters of the United States and related bank stabilization measures are included within this exemption. Where a trap, weir, drain, wall, jetty or other structure within waters of the United States which will result in significant discernible alterations to flow or circulation is constructed as part of the connection, such construction requires a 404 permit.

The rationale for this expansion was that all irrigation ditches need connections in order to function. Unless the connections were exempted, too, the provision would have no meaning.

interpretation.[11] Thus, § 323.4(a)(3) of the Corps' July 22, 1982, regulations included the following statement:

> . . . Discharges associated with irrigation facilities in the waters of the U.S. are included within the exemption unless the discharges have the effect of bringing these waters into a use to which they were not previously subject and the flow or circulation may be impaired or reach reduced of such waters.

This latter language was challenged in *NWF* v. *Marsh* as improperly expanding the statutory exemption, and new, clearer language was developed under the settlement agreement. Following rulemaking, EPA and the Corps approved the following substitute language, which was published as a final regulation effective October 5, 1984:

> . . . Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures and other such facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

The preamble to the 1984 regulation explains that the new wording is intended to clarify the type of irrigation structures involved.

"Irrigation" discharges that occurred while the July 22, 1982, regulations were in effect probably should, as an equitable matter, be evaluated under the 1982 language, even though EPA's 1980 language remained on the books; however, the 1982 language must of course be interpreted in light of the statutory language, EPA's basis for approving the change, and the explanation accompanying the 1984 clarification. Thus, even under the Corps' 1982 regulation, exempted irrigation facilities must at a minimum be appurtenant to irrigation *ditches*.

Another issue that has been raised is the applicability of § 404(f)(1)(C) to construction of ditches that can serve as either irrigation or drainage ditches. The regulations and preamble do not explicitly address this issue. However, since the statute clearly does not exempt the construction of drainage ditches,[12]

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[11] *See* Letter from Anne Gorsuch to Senator Hart, dated Jan. 5, 1982.

[12] It does exempt *maintenance* of drainage ditches. Maintenance includes removal of accumulated debris and silt.

and the legislative history indicates that limitation was deliberate and important, it follows that dual function ditches[13] should be considered drainage ditches, *i.e.*, their construction is not exempt.

One final point should be made about § 404(f)(1)(C). Because neither that section nor the implementing regulations have an "ongoing" requirement, it is immaterial for purposes of § 404(f)(1)(C) whether an irrigation ditch waters an area that was previously irrigated or indeed whether the area was previously farmed at all (although such facts could be highly relevant under § 404(f)(2)).

Section 404(f)(1)(D). This section relates only to construction of temporary sedimentation basins on construction sites, not to the actual building or other structure being constructed.

Section 404(f)(1)(E). This section covers farm, forest, and temporary mining roads, provided they are:

> constructed and maintained in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the environment will be otherwise minimized.

EPA's regulations translate these statutory criteria into a number of BMPs (*see* 40 C.F.R. 233.35(a)(5)). If a farm road is built in accordance with those BMPs (and in the case of a State § 404 program, with any additional BMPs specified by the State), it is deemed to meet the criteria of § 404(f)(1)(E).

Section 404(f)(1)(F). As discussed above, this provision is designed to cover activities controlled under an approved § 208(b)(4) program, and therefore is inoperative where a State does not have an approved § 208(b)(4) program. To date, no State has such a program.

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[13] Of course, a ditch is not considered "dual function" in this sense if the water it carries away is not water which contributes to the maintenance of waters of the United States (*e.g.*, wetlands) but rather is simply irrigation return flow.

III. *Section 404(f)(2)*

As noted above, if a discharge activity falls within the scope of the specific § 404(f)(1)(A)–(F) subsections just described but does not pass muster under § 404(f)(2), it is not exempt from regulation. The applicable regulations, 40 C.F.R. 233.35(c), provide:

> Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in [(f)(1)(A)–(F)] must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation *may* be impaired by such alteration. (Emphasis added.) [Note: For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill materials into waters of the United States in conjunction with construction of dikes, drainage ditch or other works or structures used to effect such conversion. A discharge which elevates the bottom of waters of the United States without converting it to dryland does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.]

Section 404(f)(2) has two requirements: the "new use" requirement, and the "reduction in reach/impairment of flow or circulation" requirement. Although both requirements must be met, it is the interpretation of the first that raises the most questions.

The legislative history discussed earlier leaves no doubt that the destruction of the wetland character of an area (*i.e.*, its conversion to uplands) is a change in use of the waters of the United States, and by definition also a reduction in their reach, within the meaning of § 404(f)(2). The fact that some farming operations may have previously been conducted in the wetland

without altering its wetland status, or that some new operation could theoretically be conducted without a discharge, does not mean that discharges associated with an operation that *does* convert the wetland are exempt. Conversely, if there is already an established farming operation in a wetland, any discharges resulting from farming activities listed in the regulation which do not convert the wetland to upland *are* exempt, whether or not there is an intensification of farming, change in crops, etc. Similarly, discharges from the construction of irrigation ditches[14] are exempt, even if they affect a wetland, as long as they do not convert the wetland to upland, bring it into initial farming use, or otherwise bring a water of the United States into a new use, and reduce or impair its reach, flow, or circulation.

To give some concrete examples, if there is an established hay harvesting operation in a wetland, discharges associated with the activities listed in § 404(f)(1)(A) would not need a permit, even if new agricultural crops were introduced, as long as the wetland was not destroyed. If annual "upland" crops[15] could be grown in the wetland (during the dry season, presumably) without such an effect, their introduction would not *per se* eliminate the exemption. Conversely, if the listed farming activities are employed to grow a perennial upland crop that cannot survive in a wetland, it follows that establishing that crop so that it survives from year to year will require effectively eliminating the wetland; the associated discharges would not be exempt (because elimination of the wetland would be both a "new use" and a reduction in reach).

Finally, it should be noted that in order to trigger the recapture provisions of § 404(f)(2), the discharges themselves do not need to be the sole cause of the destruction of the wetland or other change in use or sole cause of the reduction or impairment of reach, flow, or circulation of waters of the United States. Rather, the discharges need only be "incidental to" or "part of" an activity that is intended to or will forseeably

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[14] Per discussion above, this means ditches strictly for irrigation, not dual function ditches.

[15] Such labels should be used cautiously in this context. The controlling factor is whether establishing the crop is compatible with the area's remaining a wetland, not what the plant label is.

bring about that result. Thus, in applying § 404(f)(2), one must consider discharges in context, rather than in isolation.

If additional questions arise concerning the interpretation of § 404(f) that are not addressed by this memorandum, please contact me or Cathy Winer of my staff.

PESTICIDES AND TOXIC SUBSTANCES

January 3, 1984

MEMORANDUM

SUBJECT: Tolerance Issues Relating to Ethylene Dibromide

FROM: A. James Barnes
General Counsel

THRU: Alvin L. Alm
Deputy Administrator

TO: William D. Ruckelshaus
Administrator

This memorandum provides a summary of the legal background and discussion of a number of issues involved in the cancellation/suspension of the pesticide ethylene dibromide (EDB). Specifically, it describes the relationship between the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the tolerance provisions of the Federal Food, Drug, and Cosmetic Act (FFDCA), details the procedures which the Environmental Protection Agency (EPA) follows in setting tolerance, and discusses certain contemplated tolerance actions for EDB and the legal and policy implications of such actions.

Legal Background

The sale, distribution, and use of pesticides in the United States is governed directly by the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136, *et seq.*, and is also influenced heavily by the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 301, *et seq.* FIFRA requires that all pesticides that are sold and distributed in the United States must be registered in accordance with the statutory standard for registration set forth in FIFRA. That standard requires, among other things, that the pesticide perform its intended function without causing "unreasonable adverse effects on the environment," (FIFRA, § 3(c)(5)), a criterion that takes both risks and benefits into account. Under § 6 of FIFRA, the Administrator may cancel the registration of a use of a pesticide (or require modifications in the terms and conditions of registration in lieu of cancellation) whenever he determines that

the use of the pesticide no longer satisfies the statutory standard for registration.

If a pesticide is to be sold and used in the production or storage of crops, meat, milk, or eggs, not only must the pesticide be registered for the particular use under FIFRA, but, for practical purposes, there also must exist a FFDCA tolerance (maximum allowable limit of pesticide residue) or an exemption from the requirement of a tolerance for each individual crop or edible animal product on which it will be used or may be present because of another approved use. The FFDCA authorizes the establishment of tolerances and exemptions from tolerances for residues of pesticide chemicals in or on raw agricultural commodities pursuant to § 408, and the promulgation of food additive regulations for pesticide residues in processed food under § 409 of the Act. Without such tolerances, exemptions from tolerances, or food additive regulations (sometimes also referred to as "tolerances"), a food is "adulterated" under § 402 of the FFDCA, and hence may not legally move in interstate commerce.

EPA regulations (40 C.F.R. 162.7(d)(3)(v) and 40 C.F.R. 162.18–4(a)(4)) require that before a pesticide may be registered for a food or feed use, there exist appropriate tolerances and food additive regulations for the pesticide residues. As a practical matter, the agricultural community would be unlikely to use a pesticide if the crop would thereby be legally adulterated under the FFDCA. Under the Reorganization Plan that established EPA in 1970, the authority to set tolerances for pesticide chemicals in raw agricultural commodities and processed food under §§ 408 and 409, respectively, of the FFDCA was transferred from the Food and Drug Administration (FDA) to EPA. FDA retains the authority to enforce the tolerance and food additive provisions under this plan. Tolerances are set by informal rulemaking, and may then be challenged in formal adjudicatory hearings.

Section 408 of the FFDCA

Under FFDCA, § 402, a raw agricultural commodity is adulterated if it contains a pesticide residue not authorized by a FFDCA § 408 tolerance or an exemption from the requirement of a tolerance. A tolerance (or exemption from the requirement of a tolerance) under § 408 can be issued only if EPA finds that the establishment of the tolerance or exemption would

"protect the public health." In addition to considering the risks posed by the residue levels of the pesticide, the Agency must consider, among other relevant factors, the necessity for the production of an adequate, wholesome, and economical food supply, and the other ways in which the consumer may be affected by the pesticide. Thus, in essence, § 408 of the FFDCA gives the Agency the authority to balance risks against benefits in determining appropriate tolerance levels.

Section 409 of the FFDCA

FFDCA § 402 states that food is adulterated if it contains any food additive (including any pesticide residues) not authorized by a § 409 food additive regulation. An important exception to this provision is that a processed food containing pesticide residues resulting from the "carryover" from treatment at the raw agricultural commodity stage is not regarded as adulterated if the residue levels in such a food are no greater than that allowed by the § 408 tolerance established for the raw agricultural commodity. In order to establish a food additive regulation for a processed food under § 409, the Agency must make a finding that the pesticide "may be safely used" (§ 409(a)). Relevant factors in this safety determination include (1) the probable consumption of the pesticide or metabolites; (2) the cumulative effect of the pesticide in the diet of man or animals, taking into account any related substances in the diet; and (3) appropriate safety factors to relate the animal data to the human risk evaluation.

A food additive regulation under § 409 may not be established for a carcinogenic substance because of the "Delaney Clause" (§ 409(c)(3)(A)), which provides that no additive is deemed safe if it induces cancer when ingested by man or animal. Note that the Delaney Clause does not apply to the issuance of tolerances for pesticide chemicals on raw agricultural commodities pursuant to § 408 of the FFDCA.

Determination of Tolerance Levels Under §§ 408 and 409

Data Review and Safety Determinations

The system for setting tolerances entails the review of residue chemistry and toxicology data by EPA. The required data are essentially the same as those necessary to support the registration of a pesticide product used on food, *i.e.*, safety data (acute, subchronic, and chronic effects), analytical method for

determining residues, residue studies, chemical composition and identity, amount, frequency, and time of application. To be acceptable, a tolerance level must be both high enough to cover residues likely to be left when the pesticide is used properly, and low enough to be safe. In making its safety determination, the Agency estimates the level of daily exposure that is not expected to cause appreciable risks during the human lifetime.[1] If toxicity data indicate that the pesticide is an oncogen, the Agency uses a linear dose-response model to estimate the human risk at anticipated levels of exposure. This risk is then compared with benefits to arrive at an unreasonable adverse effects determination. This type of analysis only applies to § 408 tolerances because the Delaney Clause in § 409 prohibits issuing food additive regulations allowing residues of oncogens in processed food.

Tolerance-Setting Process

Under § 408, a registrant or applicant can file a petition proposing the issuance of a tolerance or an exemption from the requirement of a tolerance or the Agency can initiate a tolerance rule on its own or at the request of any interested person. In situations where a registrant or applicant files a petition requesting a tolerance, the Agency publishes in the Federal Register a very brief Notice of Filing (statement that tolerance has been proposed and analytical method) within 30 days of filing. As required by the statute, the Agency requests at this time a certification of usefulness of the pesticide from the Secretary of Agriculture. The statute provides that the person filing the petition or the Agency can request that the petition

[1] With regard to risks other than cancer, this level is called the acceptable daily intake (ADI), and is calculated by dividing the no-observed-effect level (NOEL) (the dosage level at which any effects observed at higher levels are absent) by appropriate safety factors (usually 100, although 10 is used for reversible effects such as cholinesterase inhibition). The theoretical maximum residue contribution (TMRC), which represents the total amount of pesticide residue that a human could ingest by consuming food covered by proposed and existing tolerances, is then calculated by multiplying the tolerance level for each food times the percentage of the food in the human diet, and totalling the values for all foods with tolerances for the given chemical. The TMRC is then compared with the ADI, and the tolerance is established if the TMRC is less than the ADI. (In certain situations where the TMRC is greater than the ADI, the Agency has approved tolerances based on a determination that the actual human exposure is not likely to exceed the ADI.)

be referred to an advisory committee. If no request for advisory committee review is received (or, if such a request is received, the Agency has received the report of the committee and determines to issue the rule), the Agency publishes a final tolerance rule in the Federal Register. This document contains a discussion of the test data supporting the safety determination and the conclusions of the Agency regarding the safety of the residues (including an estimation of the percentage of the ADI utilized), discusses any regulatory actions that the Agency has taken regarding the pesticide, and states the Agency's determination that the issuance of the tolerance rule meets the statutory standard. A hearing on the final tolerance rule can be requested within 30 days of publication of the final rule.[2]

For § 409 food additive regulations, the Agency publishes in the Federal Register, within 30 days after filing, notice that a request for a food additive regulation has been received, or publishes a proposal on its own initiative. If no objections are received with regard to the proposal within 30 days after publication of the proposed rule, the Agency may establish the final rule by publication in the Federal Register.[3] Any person adversely affected by the final rule may request a public hearing within 30 days after publication of the regulation. If a hearing is requested, the Administrator may stay the effectiveness of the final rule.

The procedures for amending or revoking tolerances or exemptions from the requirement of a tolerance conform to the procedures provided above for the promulgation of tolerances and food additive regulations, pursuant to §§ 408 and 409. *See*

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[2] When the Agency is the initiator of the tolerance rule, a proposal is published in the Federal Register with a discussion of the supporting test data and the ADI calculations. The statute provides a 30-day period for the registrant or applicant to submit a request that the proposal be referred to an advisory committee. If no request for an advisory committee review is received, the Agency can publish the final regulation. When a request for an advisory committee review is received, the Agency may publish the final regulation within 30 days after receipt of the advisory committee report. Any person adversely affected by the regulation may request a public hearing within 30 days after publication of the regulation by "specifying with particularity the provisions of the regulation deemed objectionable, stating reasonable grounds therefor." § 408(d)(5).

[3] The degree of detail in the proposal and final rule for § 409 regulations tracks the scheme set forth above for the § 408 tolerance rules.

attached memorandum. The only practical difference between establishing tolerances and revoking such rules is that in the case of the revocation actions, the Agency is required to send each revocation rule to the Office of Management and Budget (OMB) for review pursuant to § 3 of Executive Order No. 12291, and must provide a certification that the revocation action meets the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–12, 94 Stat. 1164; for the promulgation of tolerance rules, the Agency has been granted a blanket exemption from OMB review, and has published a generic certification statement stating that the establishment of tolerances meets the requirements of the Regulatory Flexibility Act. 46 Fed. Reg. 24950 (May 4, 1981). The necessity to comply with OMB review requirements and to provide a Regulatory Flexibility Act certification for the revocation action could lengthen the time required for the issuance of a revocation rule over that required for the establishment of a tolerance.

FDA Enforcement Authority and Action Levels

The Food and Drug Administration has the responsibility for enforcing the tolerances promulgated by EPA, and will seize an adulterated commodity or processed food if the pesticide residues exceed the tolerance, food additive regulation, or "action level." The term "action level" refers to the level of contamination at which a food will be deemed to be adulterated, in situations in which a tolerance or exemption has not been established or has been revoked. 21 C.F.R. 109.4(b). FDA derives its authority to set such action levels from the prosecutorial discretion conferred by § 306 of the FFDCA, together with the general adulteration provision of § 402(a) and the authority to promulgate regulations for the efficient enforcement of the Act pursuant to § 701(a): §§ 408 and 409 do not directly govern FDA's authority to set action levels.

In a situation where a tolerance or food additive regulation does not exist to cover residues resulting from the use of a pesticide, an action level may be established by FDA, based on the recommendations of EPA, pursuant to criteria set forth in 21 C.F.R. 109.6. These criteria include a finding that the substance cannot be avoided by good manufacturing practice, and that the action level established is sufficient for the protection of the public health, taking into account the extent to which the presence of the substance cannot be avoided and the other

ways in which the consumer may be affected by the same or related substances.

An action level is effective once established by FDA; the regulations in 21 C.F.R. 109.4(b)(2) do, however, require that a notice of the establishment of the action level be published in the Federal Register as soon as practicable. This notice must state that the material supporting the action level is on file with the FDA, and must invite public comment on the action level. Any interested person may petition the FDA to set a different action level under the procedures set forth in 21 C.F.R. Part 10; the action level can be challenged in court under the provisions of the Administrative Procedure Act, 5 U.S.C. 702, 704, 706. An action level may be changed at any time if the protection of the public health so requires. 21 C.F.R. 109.4(b).[4]

Agency Actions Concerning EDB

Suspension and Cancellation Actions Under FIFRA

On September 28, 1983, the Administrator issued an emergency suspension order for the soil fumigation use of EDB, as well as a notice of intent to cancel registration of that use and the other major uses of the chemical, namely fumigation of stored grain, spot fumigation of grain milling equipment, quarantine fumigation of citrus and tropical fruit, and felled log fumigation. 48 Fed. Reg. 46228, 46234 (Oct. 11, 1983). This action was based on a determination that the carcinogenic, mutagenic, and adverse reproductive risks posed by the use of EDB outweighed the benefits associated with the use of the chemical. Requests for an adjudicatory hearing to challenge the proposed cancellation of EDB for all the major uses listed above have been filed by registrants and users.

Based on new food residue data received since the issuance of the notice of intent to cancel, the Agency is currently considering the possibility of issuing an emergency suspension order for the grain uses (fumigation of stored grain and spot fumigation of grain milling equipment). This action is contem-

[4] Since § 409 does not govern the establishment of action levels, FDA is not constrained by the Delaney Clause in taking such regulatory action. In the past, FDA has set a few action levels for processed foods for carcinogenic pesticides, *e.g.*, BHC in animal feed and dairy products; the bulk of the action levels have been set for raw agricultural commodities.

plated because of high EDB residues that have been found in processed grain products by the State of Florida and others.

Attachment [Deleted.]

January 31, 1985

MEMORANDUM

TO: Lee M. Thomas
Acting Administrator

FROM: Gerald H. Yamada
Acting General Counsel

SUBJECT: The Relationship of the Toxic Substances Control Act to Other Federal Programs Under Section 9

Issues Presented

You have asked us to advise you concerning Environmental Protection Agency's (EPA's) authority to regulate chemical substances or mixtures under the Toxic Substances Control Act (TSCA) when those substances are also potentially subject to regulation under other Federal statutory authority, whether administered by EPA or another Federal agency. Specifically, you have asked that we address:

(1) Under what circumstances EPA is required to submit a report to another Federal agency pursuant to § 9 of TSCA;

(2) The authority EPA has to act (a) pending a response from that agency and (b) after that agency has responded;

(3) The discretion the Administrator has to use the authority under TSCA to regulate a chemical substance or mixture that might be addressed under statutory authority administered by EPA.

Answer

Section 9 establishes a statutorily required procedure to determine to which Federal agency or Federal law should be given the first opportunity to regulate the risk associated with a chemical substance or mixture identified by EPA under its TSCA authority. More specifically, the answers to your questions are as follows:

(1) Under § 9(a)(1) of TSCA, the Administrator is statutorily required to submit a report to another Federal agency when two statutorily required determinations are made. The first determination is whether the Administrator has reasonable basis to conclude that a chemical substance or mixture presents or will present an unreasonable risk of injury to health or the en-

vironment. The second determination is whether the unreasonable risk may be prevented or reduced to a sufficient extent by action taken by another Federal agency under a Federal law not administered by EPA. This section envisions that where the Administrator makes the two determinations required by § 9(a), EPA must provide a first opportunity to the other Federal agency to assess the risk described in the report, to interpret its own statutory authorities, and to initiate an action under the Federal laws that it administers.

(2) (a) Under § 9(a)(2), with one exception, EPA is prohibited from taking any action under §§ 6 or 7 with respect to the risk reported to another Federal agency pending a response to a report from the other Federal agency. There would be no similar restriction on EPA for any risks associated with a chemical substance or mixture that is not within the § 9(a)(1) determinations and therefore not part of the report submitted by EPA to the other Federal agency. The exception for EPA to act pending a response is where the other Federal agency has failed to respond within the time limit specified by EPA.

(b) After a report is submitted to another Federal agency and a response is received, EPA may act to regulate the risks described in the § 9(a)(1) report if the other Federal agency fails to initiate an action under its authorities within 90 days of the Federal Register publication date of its response, informs EPA that it does not have the statutory authority to prevent or reduce the risk to a sufficient extent, or agrees the risk is unreasonable but chooses not to regulate. Conversely, if the other Federal agency concludes that the risk described in the report does not present the described risk or initiates an action to regulate the risk, EPA is precluded by § 9(a)(2) from acting under its authorities as to the described risk.

(3) Where there is an overlap of statutory authorities administered by EPA, the other EPA statutory authorities are given a preference to regulate the risk. But unlike § 9(a), the Administrator can elect to regulate under TSCA upon a finding that regulation under TSCA is in the public interest.

Section 9 and Its Legislative History

In enacting TSCA, Congress anticipated that questions would arise as to the statutory authority and/or agency that should most appropriately be used to regulate risks from chemical substances and mixtures. This was particularly necessary in

light of TSCA's role as a gap-filling authority. Thus, before addressing your specific questions, it is helpful to set forth the congressionally provided mechanisms for resolving these questions, namely, § 9 of TSCA and its legislative history.

Section 9 establishes a statutorily required procedure to determine which Federal agency or authorities should be given the first opportunity to regulate a risk identified by EPA under TSCA. Where there are overlapping authorities between EPA and another Federal agency, § 9(a)(1) establishes a formal reporting and response mechanism between EPA and the other Federal agency to provide the other Federal agency the first opportunity to regulate under the Federal law that it administers. Section 9(a)(1) provides in part that:

> If the Administrator has reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment and determines, in the Administrator's discretion, that such risk *may* be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by the Administrator, the Administrator *shall* submit to the agency which administers such law a report which describes such risk and includes in such description a specification of the activity or combination of activities which the Administrator has reason to believe so presents such risk. (Emphasis added.)

After a report is submitted to another Federal agency, EPA is precluded under § 9(a)(2) from taking any action under §§ 6 or 7 of TSCA with respect to a risk reported to another Federal agency if the other Federal agency either:

> (A) issues an order declaring that the activity or combination of activities specified in the description of the risk described in the report does not present the risk described in the report, or
>
> (B) initiates, within 90 days of the publication in the Federal Register of the response of the agency under paragraph (1), action under the law (or laws) administered by such agency to protect

> against such risk associated with such activity or combination of activities . . . .

If EPA has initiated an action under §§ 6 or 7 with respect to a risk associated with a chemical substance or mixture that is the subject of the report, then § 9(a)(3) requires that the other Federal agency:

> . . . shall before taking action under the law (or laws) administer by it to protect against such risk consult with the Administrator for the purpose of avoiding duplication of Federal action against such risk.

Where there are overlapping authorities between two or more Federal laws administered by EPA, § 9(b) imposes a preference that the risk identified by EPA under TSCA be regulated under the other EPA authorities unless the Administrator determines that regulation under TSCA is in the public interest. Section 9(b) provides in part that:

> If the Administrator determines that a risk to health or the environment associated with a chemical substance or mixture could be eliminated or reduced to a sufficient extent by actions taken under the authorities contained in such other Federal laws, the Administrator shall use such authorities to protect against such risk unless the Administrator determines, in the Administrator's discretion, that it is in the public interest to protect against such risk by actions taken under this Act.

The legislative history for § 9 is very limited. The conference report best describes the legislative purpose of § 9 as follows:

> The conferees have drawn from both the Senate bill and the House amendment to assure that overlapping or duplicative regulation is avoided while attempting to provide for the greatest possible measure of protection to health and the environment.

H.R. Rep. 1679, 94th Cong., 2d Sess. 84 (1976).

The prevention of duplication had been considered in a number of earlier iterations of § 9 during the first session of the 94th Congress. These sections contained general prohibitions on the use of the substantive regulatory provisions of TSCA if risk could be prevented or reduced sufficiently by ac-

tions under other Federal laws.[1] No formal interagency dialog was required in any of the provisions considered. Some of the provisions did require EPA to give public notice and make available to other Federal agencies data relevant to the risk.

The notion of a formal interagency dialog did not appear until TSCA was being considered in the second session of the 94th Congress, when § 9(a) began to resemble its final form more closely. The Senate version, like the final version of § 9(a), provided a two-part test for initiation of an interagency dialog. The Senate version provided that, if the Administrator:

> has reason to believe that . . . a chemical substance or mixture causes or contributes to, or is likely to cause or contribute to an unreasonable risk of injury to health or the environment, and determines, in his discretion, that such risk may be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by the Administrator,

EPA is to "request" the other agency to issue an order declaring whether such risk is present and, if so, determine whether the risk can be reduced by laws administered by that other agency.[2] The requirements imposed on EPA and the other agency, and the consequences of the response, were similar to those contained in the final version.

The House bill contained the same two-part test for initiation of an interagency dialog, but differed in two major respects. First, the determination as to whether the other agency's law could reduce the risk sufficiently was not committed to EPA's discretion.[3] Second, the House inserted the formal re-

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[1] Hearings Before the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives, 94th Cong., 1st Sess. on H.R. 7229, H.R. 7548, and H.R. 7664 (June 16 and July 9, 10, and 11, 1975) (Ser. No. 94–41).

[2] Hearings Before the Subcommittee on the Environment of the Committee on Commerce, United States Senate, 94th Cong., 1st Sess. on S. 776 (Mar. 3, 5, 10, and Apr. 15, 1975) (Ser. No. 94–24).

[3] Although the determination as to whether the risk may be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by EPA is committed to the Administrator's discretion in § 9(a), this change was made to make clear that this determination would not be subject to judicial review. H.R. Rep. 1679, 94th Cong., 2d Sess. 84 (1976).

quirement to submit a report to the other agency and required both agencies to publish Federal Register statements.

The conference committee drew from both versions to establish the relationship between TSCA and Federal laws not administered by EPA. Thus, the two-part test for the initiation of an interagency dialog consists of an EPA determination that the agency "has a reasonable basis to conclude that . . . a chemical substance or mixture presents or will present an unreasonable risk of injury . . ." and a second determination that the risk may be reduced sufficiently by actions taken by another Federal agency under the laws that it administers. After this two-part test is met, the final version requires the use of a formal report and response mechanism in the public view[4] to make the decisions as to which Federal agency or statutory authority will be used to prevent or reduce a present or potential unreasonable risk identified by EPA under TSCA. One of the purposes of the report and response mechanism is to "give the other agency an opportunity to act to protect against the risk before the Administrator uses the authorities in Section 6 or 7 to protect against the risk." H.R. Rep. 94–1679, 94th Cong., 2d Sess. 84 (1976).

Discussion

Under What Circumstances Is EPA Required to Submit a Report to Another Federal Agency Pursuant to Section 9 of TSCA?

Section 9(a) requires that the Administrator must submit a report to another Federal agency if two determinations are made. The first is that the Administrator has reasonable basis to conclude that a chemical substance or mixture presents or will present an unreasonable risk of injury to health or the environment. This determination is a factual determination that must be made on an individual basis and must be supported by the analysis which is made part of a § 9(a) report.

The second determination requires that the Administrator determine whether the present or potential unreasonable risk may be prevented or reduced to a sufficient extent by action taken by another Federal agency under a Federal law not administered by EPA. This determination must be exercised to avoid regulatory duplication that may be created by overlapping au-

[4] The report submitted by EPA and the response by the other Federal agency must be published in the Federal Register.

thorities between TSCA and a Federal law administered by another Federal agency. The potential for regulatory duplication is strongest where another Federal agency is already regulating a risk that EPA identifies as a regulatory candidate under its TSCA authority.

In considering the second determination, EPA must make an initial assessment as to whether any overlap of authorities or duplication of regulations may exist or be created between TSCA and Federal laws administered by another Federal agency. One of the purposes of the formal mechanism required by § 9(a) is to give the other Federal agency the opportunity to interpret the laws that it administers and to determine whether it is legally capable to prevent or reduce the risk to a sufficient extent.

Although § 9(a)(3) authorizes EPA to initiate action under §§ 6 or 7 of TSCA with respect to a risk associated with a chemical substance or mixture that was the subject of a § 9(a)(1) report, this provision is not an exception to submitting a report. Such a reading would be inconsistent with the statutory scheme of § 9 and with the legislative purpose to avoid regulatory duplication. Furthermore, unlike § 9(b), § 9(a) does not allow the Administrator the option to choose to regulate under TSCA rather than submitting a report to another Federal agency after the Administrator has made the two determinations required by § 9(a). Section 9(a)(3) applies, for instance, where EPA is able to regulate under the circumstances described in § 9(a)(2)[5] and is not available as an exception to § 9(a)(1).

If the two § 9(a)(1) determinations are made, then EPA is statutorily required to submit a report with the other Federal agency that may have overlapping authority to regulate the risk.

What Authority Does EPA Have to Act (a) Pending a Response from a Federal Agency to Which EPA Submitted a Section 9(a) Report and (b) After that Agency Has Responded?

Under § 9(a)(2), with one exception, EPA is prohibited from taking any action under §§ 6 or 7 of TSCA while EPA is waiting for a response. This is supported by the conference report at page 84:

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[5] These circumstances are discussed *infra*.

> Section 9(a) establishes the relationship between the Act and Federal laws not administered by the Administrator. If the Administrator has a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture presents or will present an unreasonable risk of injury and if the Administrator makes a discretionary determination (which is not subject to judicial review) that the risk may be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by the Administrator, then the Administrator must give the other agency an opportunity to act to protect against the risk before the Administrator uses the authorities in section 6 or 7 to protect against the risk.

This prohibition applies only to the risks that are the subject of a § 9(a) report. Various risks or risk elements may be associated with a chemical substance or mixture. Section 9(a) requires that only those risks or risk elements that may be prevented or reduced to a sufficient extent by action under a Federal law not administered by EPA are to be the subject of a § 9(a) report. For those risks that are not the subject of a report, EPA may proceed to regulate such risk under §§ 6 or 7 provided that the requirements of § 9(b), if applicable, are met. The coordination requirement under § 9(d) must also be met.

In submitting a report to another Federal agency, EPA can set a deadline for response so long as the other Federal agency is given at least 90 days to respond. Failure to respond within the specified time limit may be a basis for EPA to act. If EPA decides to initiate action under §§ 6 or 7 of TSCA, then the other Federal agency must consult with EPA under § 9(a)(3) before taking action under the Federal laws it administers. The purpose of the consultation is to avoid duplication of Federal action against the risk.

The circumstances under which EPA may act after a response is received from another Federal agency are defined by Congress. Section 9(a)(2) clearly sets forth the two circumstances when EPA cannot act. The two circumstances are described in the conference report at page 84 as follows:

> Section 9(a) prohibits the Administrator from acting under section 6 or 7 with respect to the

> risk about which the Administrator notified the other agency if the other agency takes one or two alternative courses of action. First, if the other agency issues an order declaring that the activity specified in the Administrator's report does not present the unreasonable risk described in the report, then the Administrator may not take action under section 6 or 7 with respect to such risk. Alternatively, if within 90 days of the publication in the Federal Register of the other agency's response, the other agency initiates action to protect against such risk, then the Administrator is precluded from taking action under section 6 or 7 with respect to such risk. If the other agency does not take one of these actions, then the Administrator is permitted to act under section 6 or 7 to protect against the risk.

Hence, EPA may act to regulate the risk if the other Federal agency fails to initiate an action under its authorities within 90 days of the Federal Register publication date of its response. EPA may also act if the other Federal agency informs EPA that it does not have the statutory authority to prevent or reduce the risk to a sufficient extent or agrees that the risk is unreasonable but chooses not to regulate. But EPA may not act if the other Federal agency initiates an action to regulate the risk under another Federal law.

The conference report at pages 84–5 recognizes that the action initiated by the other Federal agency must be more than the mere open-ended possibility of action:

> The conferees recognized that the other agency may not because of time constraints be able to initiate formal regulatory action to protect against the risk within the specified time period. As long as the other agency has officially initiated an action which will culminate as soon as practicable in effective regulatory action to protect against the unreasonable risk and sets forth a general time schedule of steps for such action, the requirement should be deemed satisfied. However, the requirement that the other agency initiate action to protect against the risk is not satisfied by the mere

> open-ended possibility of action by the other agency.

What Discretion Does the Administrator Have to Use the Authority of TSCA to Regulate a Chemical Substance or Mixture that Might Be Addressed Under Another Statutory Authority Administered by EPA?

Section 9(b) expresses a preference that other EPA-administered statutes be used to regulate risks identified under TSCA. The Administrator may set the preference aside and regulate under TSCA if the Administrator determines that it is in the public interest. This is further explained in the conference report at page 85:

> Subsection (b) establishes the relationship between this Act and other laws administered in whole or in part by the Administrator.
>
> * * * * *
>
> If the Administrator determines that a risk to health or the environment associated with a substance or mixture could be eliminated or reduced to a sufficient extent by actions taken under the authorities contained in other Federal laws, then the Administrator shall use such other authorities unless the Administrator determines, in the Administrator's discretion, that it is in the public interest to protect against such risk under this Act. While it is clear that the Administrator's determination that it is in the public interest to use this Act, and is a completely discretionary decision not subject to judicial review in any manner, it is expected that the Administrator will review the other authorities and present the results of that review at the same time the Administrator takes action under this Act. While the Administrator's decision to use this Act, notwithstanding the other authorities, is unreviewable by any court, a reviewing court is expected to require that the Administrator have examined the other authorities and present the results of that examination when making the finding that it is in the public interest to use this Act. Of course, the requirement to examine other EPA laws and to make determinations applies only when the Administrator takes regula-

> tory action to protect against an unreasonable risk under this Act. It does not apply when the Administrator takes action necessary for the administration or enforcement of the Act, such as issuing recordkeeping requirements.

Unlike § 9(a), the Administrator has more flexibility under § 9(b), to choose the regulatory authority he believes to be most appropriate. In making a determination as to whether it is in the public interest to regulate under TSCA, the Administrator is guided by the factors set out in § 6(c) of TSCA.

June 7, 1985

MEMORANDUM

TO: Lee M. Thomas
Administrator

FROM: Gerald H. Yamada
Acting General Counsel

SUBJECT: Section 9(a) of the Toxic Substances Control Act

I. Introduction and Summary

You have asked us for our opinion of the legal standards governing Environmental Protection Agency (EPA) decisions under § 9(a) of the Toxic Substances Control Act (TSCA) to refer, or to withhold referral of, chemical control issues to another Federal agency (the "second agency" or the "referral agency").

Under § 9 of TSCA, the Administrator is required to submit a report to a second agency, and withhold EPA regulatory action on the issues involved pending resolution of the referral, upon making two statutorily required determinations. The first is that the chemical meets the "unreasonable risk" threshold for regulation under §§ 6 and 7. The second is that this risk may be reduced to a sufficient extent by action under a law administered by the second agency. In our previous memorandum dated January 31, 1985, we opined that once these two findings had been made, the Administrator had no discretion to withhold referral. In this memorandum, we consider the circumstances in which the Administrator should make these findings—and the second finding in particular—and therefore refer a regulatory issue to a second agency for its consideration. Our analysis and conclusions fall into three parts.

A. TSCA explicitly confers discretion on the Agency in implementing § 9(a). This language, read together with its supporting legislative history, essentially bars judicial review of the merits of any EPA decision whether or not to make a § 9(a) referral. Within the zone of this discretion, legal analysis can help identify the approaches to § 9(a) that best represent a faithful implementation of the purposes of the statute.

B. Section 9(a) was included in TSCA to encourage EPA in appropriate cases to step back from its own policy choices in favor of the policy choices of other agencies, and should be

implemented with this purpose in mind. In particular, our legal analysis leads us to conclude:

1. That Congress expected EPA—particularly where the Occupational Safety and Health Act was concerned—to err on the side of making referrals rather than withholding them;

2. That possible EPA disagreement with the referral agency's policy choices should not be the basis for withholding referral; and

3. That informal consultation is generally not a substitute for formal referral.

In some cases, application of these principles alone would call for a referral without the need for extensive policy or factual analysis. In all cases, these principles call for a good faith analysis of the authority over a problem that other agencies may possess, and the resolution of legitimate doubts in favor of referral.

C. Despite the general purpose of § 9(a) to encourage referrals, our statutory analysis can identify possible situations in which withholding referral would not conflict with congressional intent. We discuss examples of these in section III.B.4. The extent to which these situations exist, and justify EPA in withholding referral, may call more for policy than for legal judgments.

II. Background

A. *The Statute*

1. *General*

Congress enacted TSCA in 1976 out of a concern for human and environmental exposure to toxic chemicals. TSCA § 2(a). Major provisions of the statute are informational or concern new chemicals. They provide broad authority for EPA to require chemicals to be tested, TSCA § 4, direct manufacturers to provide "premanufacture notification" to EPA before they bring new chemicals on the market so that EPA has the opportunity to take any necessary regulatory action, § 5, and provide EPA with broad and general information-gathering authority, § 8.

2. *Sections 6 and 7*

In addition to this information-gathering emphasis, one of the stated purposes of TSCA is that:

> adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances which are imminent hazards.

TSCA § 2(b)(2).

Sections 6 and 7 of TSCA embody this purpose. Section 6 in particular gives EPA authority to regulate a chemical presently on the market in a variety of ways upon finding that it may pose an "unreasonable risk" to health or the environment.[1] The Administrator may, *inter alia*, ban use of the substance; restrict the quantity manufactured; impose labeling, notification, recordkeeping, and disposal requirements; or regulate "any manner or method of commercial use" of the chemical, § 6(a). Upon complying with additional regulatory requirements, EPA may also regulate quality control in chemical manufacture. § 6(b).

Section 7 gives EPA similar authority to take court action against chemicals that pose "imminent hazards."

3. *Section 9(a)*

Section 9(a) of TSCA sets up a mechanism to coordinate decisions by EPA under §§ 6 and 7 with decisions by other agencies that may have authority under their own statutes to regulate the same risks. It states that if the Administrator of EPA (1) has a reasonable basis to conclude that "the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or any combination of such activities" presents or may present an "unreasonable risk," and thus could be regulated under § 6, and (2):

> determines, in the Administrator's discretion, that such risk may be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by the Administrator, then he "shall" submit a report to the agency that administers this second law. That report must describe in some detail the risk and the activities that cause it, must include a detailed statement of the

[1] Any § 6(a) rule must rest on a balancing judgment that considers all relevant factors, including the nature and extent of any health or environmental risk, the benefits of the use at issue, and economic consequences. § 6(c)(1).

information on which it is based, and must request the second agency to determine once again whether action against that risk under its law "may" prevent or reduce that risk "to a sufficient extent." EPA must give the second agency at least 90 days to respond.

The second agency can then do one of five things, two of which block further EPA action and three of which allow it:

a. It can block further EPA action by issuing an "order" within the EPA deadline stating that the activities EPA has described do not present the "unreasonable risks" EPA has attributed to them; or

b. It can block further EPA action if it "initiates" within 90 days of its response to EPA action to "protect against" the risk identified by EPA; or

c. It can determine its law does not authorize action to prevent or reduce the unreasonable risk to a sufficient extent, thus freeing EPA to act; or

d. It can explicitly defer to EPA despite the existence of adequate legal authority on its part, presumably on the ground that action by EPA is preferable on practical or public policy grounds; or

e. It can do nothing, in which case EPA, once the deadline has expired, remains free to act as before.

4. *Other Parts of Section 9*

a. *Section 9(b)*

While § 9(a) governs coordination between TSCA and statutes administered by other agencies, § 9(b) provides for coordination between TSCA and other statutes administered by EPA. Like § 9(a), it directs EPA, once a risk has been established, to consider whether these other statutes could reduce the risk to a sufficient degree. However, unlike § 9(a), which directs EPA to move to a second stage—referral—once it finds that these other statutes "may" be able to satisfactorily handle the risk, § 9(b) provides for a second stage only if EPA finds that these other statutes "could" do that job. The second stage of § 9(b) is not referral—which would make no sense where statutes administered by a single agency are concerned—but a directive to EPA to use these other statutes "unless the Administrator deter-

mines, in the Administrator's discretion, that it is in the public interest to protect against such risks under [TSCA]."[2]

b. *Section 9(c)*

Section 9(c) of TSCA states that:

> In exercising any authority under this Act, the Administrator shall not, for purposes of section 4(b)(1) of the Occupational Safety and Health Act of 1970, be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

Section 4(b)(1) of the Occupational Safety and Health Act (OSHA) forbids the Occupational Safety and Health Administration to set standards governing working conditions "with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health," 29 U.S.C. 653(b)(1). The effect of this provision is therefore to say that EPA standards under TSCA cannot preempt authority under OSHA to issue regulations addressing the same chemical substance or work environment.

c. *Section 9(d)*

Section 9(d) directs EPA, in administering TSCA, to "consult and coordinate" with other agencies with the goal of "achieving the maximum enforcement of this chapter while imposing the least burden of duplicative requirements."

B. *Legislative History*

1. *General*

The legislative history of TSCA billed it as a response to the increasing loading of the environment by chemicals, a development that, the legislative history emphasized, raised substantial potential public health concerns. House Committee on Interstate

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[2] Section 6(c) of TSCA states that in making such a "public interest" finding:

> [T]he Administrator shall consider (i) all relevant aspects of the risk, as determined by the Administrator in the Administrator's discretion, (ii) a comparison of the estimated costs of complying with actions taken under this chapter and under such law (or laws) and (iii) the relative efficiency of actions under this chapter and under such law (or laws) to protect against such risk of injury.

and Foreign Commerce, Legislative History of the Toxic Substances Control Act (1976) at 159–60 (Senate Report), 411–12 (House Report).

Section 6 was placed against this background as a means of filling "regulatory gaps," Leg. His. p. 157 (p. 1 of Senate Report). The legislative reports explain, in similar language, that there may be cases where a ban or limit on use, rather than emission limits of the sort often set under other statutes, may be the most effective response to the dangers posed by a chemical. *See, e.g.*, Leg. Hist. pp. 161–2 (Senate Report), where a discussion of the many environmental sources of mercury concludes by saying in effect that use of § 6 might well be the most appropriate response to this problem, and pp. 414–15 (House Report), citing PCBs as a similar example and concluding:

> Intelligent standards for regulating exposures to a chemical in the workplace, the home, or elsewhere in the environment cannot be set unless the full extent of human or environmental exposure is considered . . . . [P]resent regulations controlling workplace exposure, exposure in the home or elsewhere to a hazardous chemical may often be based on measurements indicating only one source of exposure, thereby resulting in less than full protection from the hazard. *Id.* at 414–415.

The House Report also recognizes the "conspicuous gaps" that exist in other laws and states that, among the most significant of the deficiencies, is the fact that authorities "to reduce or eliminate the harmful exposure to a chemical may not be adequate or may be cumbersome or inefficient." *Id.*, at 414.

Similarly, in the Senate Report, the legislative history discusses consideration of "all the risks" by recognizing that:

> While individual agencies may be authorized to regulate occupational, environmental, or direct consumer hazards with respect to a chemical substance, there is no agency which has the authority to look comprehensively at the hazards associated with the chemical. Existing authority allows the agencies to only look at the hazards within their jurisdiction in isolation from other hazards associated with the same chemical. The bill would grant

the Environmental Protection Agency the authority to look at the hazards in total. *Id.*, at 158.

2. *Section 9*

Some early versions of the bills that became TSCA flatly prohibited the Administrator from taking action within the jurisdiction of another agency.[3]

However, by the time TSCA was passed by the House and Senate, the provisions of § 9(a) had reached essentially their present form. The only material difference between the two versions was that the Senate bill made § 9(a) referrals subject to the "discretion" of the Administrator while the House bill did not.

All three committee reports—House, Senate, and conference—describe the purpose of § 9(a) as being to avoid overlapping or duplicative regulation while providing full protection for health and the environment. *See* Leg. Hist. pp. 179 (Senate Report), 452 (House Report), and 697 (conference report).

The only further discussion of § 9(a)'s purposes was contained in the Senate Report. It tended to describe the obligations of § 9 in mandatory terms, most particularly in a passage entitled *"The Committee Bill does not extensively overlap with other Federal authorities and authorities within EPA."* That discussion states, in part, that under § 9(a):

> The Administrator is directed to give notice to other relevant Federal agencies if the risk associated with a chemical may be prevented or reduced to a sufficient extent by action taken under the other Federal laws not administered by EPA. If the other agency issues an order declaring that there is no unreasonable risk of injury to health or the environment, or initiates appropriate action under its own authority the Administrator has no authority to take restrictive action under this Act. In order to ensure that the vital premarket notification, testing, and reporting requirements are re-

[3] *See* § 9(b) of H.R. 7229 and § 9(b) of H.R. 7664, reprinted in Hearings Before the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives, 94th Cong., 1st Sess. on H.R. 7229, H.R. 7548, and H.R. 7664 (June 16, and July 9, 10, and 11, 1975) (Ser. No. 94–41) at pp. 11 and 48, respectively.

> tained, nothing contained in the provision is to effect [sic] that authority or requirements.
>
> * * * * *
>
> The entire provision is designed to minimize duplication and overlap in the regulation of toxic chemicals, while providing EPA with sufficient authority to alert other agencies of chemical dangers where those other agencies have sufficient regulatory authority to eliminate these dangers.

Leg. Hist. p. 167. *See also* p. 164 ("the Administrator must request").

The conference report adds a discussion explaining that EPA decisions under both §§ 9(a) and 9(b) are not subject to judicial review. For § 9(a), that statement is contained in a parenthetical phrase, Leg. Hist. p. 697. For § 9(b), the discussion is more extensive. The key sentence reads:

> While the Administrator's decision to use this Act, notwithstanding [other potentially available EPA] authorities, is unreviewable by any court, a reviewing court is expected to require that the Administrator have examined the other authorities and present the results of that examination when making the finding that it is in the public interest to use this Act.

Leg. Hist. p. 698.

C. *Post-Enactment History*

Section 9 of TSCA has never been construed by any court, nor has EPA issued regulations that interpret it. The only general EPA statement on point is an "Interim Policy for Referring Workplace Exposure Problems to the Department of Labor" issued by former Deputy Administrator Alvin Alm on August 22, 1984. That policy states that:

> EPA will refer chemical problems to [the Department of Labor] when:
>
> 1. Occupational exposures constitute all or most of the hazards posed by the chemical; and
> 2. Workplace standards (*e.g.*, permissible exposure limits) appear to provide the most effective remedy for all or most of these hazards.

It also states that EPA will *not* refer a chemical when it determines that OSHA "cannot adequately address that prob-

lem"—for example, when too much of the exposure lies beyond OSHA jurisdiction, when "a single rule under TSCA would be more efficient than piecemeal regulation under several authorities," or when:

> a full or partial ban on the production or use of the chemical, or other remedies uniquely available under section 6 of the TSCA, provide the most effective or efficient remedy.

Finally, the memorandum states that before invoking § 9(a), EPA will discuss the issues involved with Occupational Safety and Health Administration, and that "[t]ypically, then, sec. 9(a) referrals will only take place after informal communications have established their merit."

EPA has never made a formal § 9(a) referral. However, it once rejected a petition for rulemaking essentially on § 9(a) grounds, finding that the risk alleged in the petition lay entirely within the jurisdiction of another agency that had found it was not unreasonable. 47 Fed. Reg. 32779, 32780 (July 29, 1982). On two other occasions, EPA has declined to refer based on an analysis of the referral agency's statutory authority that found it inadequate to deal with the risk involved. 49 Fed. Reg. 24658, 24659 (June 14, 1984) (restrictions on metalworking fluids); 45 Fed. Reg. 61973–74 (Sept. 17, 1980) (asbestos in schools). In two other proposed rules the Agency stated it would consult, or had consulted, with other agencies informally to determine what action under § 9(a) might be appropriate. 44 Fed. Reg. 60056, 60066 (Oct. 17, 1979) (commercial and industrial use of asbestos fibers and consumer products containing asbestos); 42 Fed. Reg. 24542, 24546 (May 13, 1977) (prohibition of the use of chlorofluoroalkanes in aerosols).

III. Discussion

A. Congress Denied the Courts Any Significant Power to Oversee the Implementation of Section 9(a)

The text of § 9(a) states that decisions whether another agency's authority is able to reduce a risk to a sufficient extent to make a referral mandatory are subject to the "discretion" of the Administrator. The conference report states that such decisions are not subject to judicial review, and the history of the statute's development reveals that the present version of § 9(a) succeeded earlier versions that did not provide any shield

against judicial review and were criticized as likely to lead to disruption and delay. *See* Leg. Hist. 499–500 (House Report, reprinting earlier EPA comments on H.R. 7664).

The legislative history of § 9(b), parallel in many respects, repeats the prohibition against *substantive* judicial review, but couples it with a recognition that courts can review whether EPA has adequately *documented* its consideration of that issue. One might argue that the same requirement should be imported into § 9(a) even though it is not mentioned there.[4] However, even should this be done, the duty would be merely to *discuss* the referral issue. Cases under the National Environmental Policy Act make clear that such a duty simply to discuss an issue is compatible, as far as the courts are concerned, at the very least with an extremely wide range of substantive outcomes. *Stryckers Bay Neighborhood etc.* v. *Karlen*, 444 U.S. 223, 100 S. Ct. 497 (1980).

B. *The Legal Standards Governing Section 9(a) Referrals*

Even though EPA is free, as far as the courts are concerned, to adopt a very wide variety of approaches to implementing § 9(a), legal analysis can still help the Agency determine that approach or set of approaches that best carries out what Congress had in mind when it enacted this provision. Legal analysis may provide a particularly useful approach to § 9(a) because Congress in § 9(a) did not establish technical or economic tests for the referral judgment, but tests involving analysis of statutory authorities and judgments based on a view of the proper balance of power between institutions. A number of guidelines emerge from such an examination.

1. *Congress intended EPA to make Section 9(a) referrals relatively freely. This is particularly true where actions under the Occupational Safety and Health Act are concerned.*

a. *Section 9(a) Generally*

Section 9(a) of TSCA was drafted and defended in Congress as a way to make sure that enactment of TSCA would not create "overlap" and that TSCA would be restricted to filling "gaps" in existing statutory authority. In particular, its existence was used in the Senate to rebut the charge that TSCA conferred

[4] The most definitive, previous statement on the point by EPA suggests an opposite position. Menotti, Primer on TSCA Section 4(f), Oct. 30, 1980, p. 43.

too far-reaching a mandate on EPA. Where EPA does not use this section, despite the existence of potential overlap, it would therefore be declining to make use of the formal mechanism established by Congress for coordination among agencies.

The language of § 9(a) reinforces the case for a liberal referral policy. Section 9(a) says that EPA must submit a report whenever it determines that the chemical at issue presents or will present an unreasonable risk and that the risk "may" be reduced or prevented sufficiently by action under a non-EPA statute. This language contrasts pointedly with the language of § 9(b) calling on EPA to take the analogous step concerning the use of other EPA statutes when it determines that these other statutes "could" do the job.

Even beyond this point, TSCA uses very precise distinctions in describing the degree of certainty that EPA must have before taking an action under it. For example, EPA may not issue substantive regulations under § 6 of TSCA unless it finds that there is a "reasonable basis to conclude" that a chemical "will present" an unreasonable risk to health.

By contrast, the word "may" is used to describe the standard of proof before EPA takes other, more preliminary types of actions. Perhaps the closest parallel to § 9(a) is § 4(f), which calls on EPA either to "initiate appropriate" regulatory action, or to publish an official statement finding that no "unreasonable risk" is present, once it received information that indicates that "there may be a reasonable basis to conclude" that a chemical presents a risk of "serious or widespread harm" to humans from cancer, mutations, or birth defects. Section 4(f) was quite clearly inserted in TSCA to require accelerated scrutiny of substances that present the specific dangers it identifies, and a similar "attention forcing" purpose should be attributed to the similar language in § 9(a).[5]

b. *Section 9 and OSHA*

For a number of reasons, the case for a pro-referral approach where action under OSHA is concerned seems stronger than in the case of other statutes. First, Congress specifically provided

[5] Similarly, § 5(e) allows regulation of new chemicals upon a finding that they "may" present health risks or create significant human exposure. However, that finding must be bracketed with a finding that there is a lack of sufficient information to reach a judgment on the potential risks of the new chemical, a qualification on the inquiry of a type not present in §§ 9(a) or 4(f).

in § 9(c) that no EPA action under TSCA could preempt action under OSHA, despite an otherwise applicable preemption provision in OSHA. This means that in any area where the Occupational Safety and Health Administration has authority and is considering regulation, overlapping regulation may occur if EPA also regulates. The fact that in § 9(c) Congress negated the preemption clause in OSHA that otherwise serves to avoid this result suggests, not that they had abandoned the goal, but that they intended § 9 to be used to achieve it instead.

Second, the question of EPA's authority to set OSHA-type standards that govern in the workplace and provide worker protection there is arguably somewhat open. Under § 6 of TSCA, EPA may clearly ban a use or uses of a product, require recordkeeping, or specify "clear and adequate warnings and instructions" for the use, distribution, or disposal of the substance. However, the only explicit authority to set other types of standards is phrased as an authority to set requirements:

> prohibiting or otherwise regulating any manner or method of commercial use [of a chemical]. TSCA § 6(a)(5).

Section 6 describes the regulations that EPA may set under it as regulations applicable to "manufacturing," "processing," "distribution in commerce," or "disposal." One might argue, therefore, that the § 6(a)(5) authority to regulate "commercial use," read against the structure of § 6 as a whole, does not extend to direct regulation of the workplace, since that would be a regulation of "manufacturing" or "processing."

The legislative history in this area is not definitive. Section 6(a)(5) had its origins in the Senate version of TSCA. The House version did not contain § 6(a)(5) or equivalent language, and accompanying language in the House Report explicitly emphasized that its version of TSCA should not be construed as authorizing the EPA to issue standards (other than bans, labeling requirements, and the like) directly regulating the workplace. Leg. Hist. at 441. The conference committee adopted the Senate language on "commercial use" without comment on the issue of workplace standards. However, one of the sponsors of the House position asserted in a post-passage floor statement that the House position on workplace regulation had nonetheless been adopted. Leg. Hist. at 753–54.

EPA may have authority under § 6(a)(5) or other provisions of § 6 to set workplace emission limitations and the like in appropriate cases. A definitive answer to the workplace issue is not essential here. Our point is a narrower one—that the existence of these questions about EPA authority evidences some ambiguity in the congressional attitude about EPA's direct regulation of the workplace, and this should make EPA somewhat more willing than it would otherwise have been to invoke § 9(a) where OSHA authority is concerned. EPA's ability to regulate in the workplace would obviously be strengthened after it goes through the formal § 9(a) referral process for a workplace risk and the Occupational Safety and Health Administration declines to regulate that risk. Similarly, where the authority of OSHA does not extend to a particular risk, EPA's regulation in that area would not conflict with the legislative intent to avoid duplication and overlap.

2. *Disagreement with the referral agency's policy positions should not be the basis for nonreferral under section 9(a).*

This conclusion follows directly from the structure of § 9(a). EPA cannot make a § 9(a) referral without also making a preliminary finding that the chemical in question meets the "unreasonable risk" threshold required for TSCA regulation under §§ 6 and 7. The statute then proceeds directly to describe two ways in which the referral agency can absolutely block EPA from actually basing regulations on that judgment. The first, perhaps not too surprising, is that the second agency can "initiate" action under its own laws to protect against that risk. Even here, the statute gives EPA no power to second-guess the adequacy of that action, and is relatively relaxed about how much the second agency must do to "initiate" action.[6]

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[6] Specifically, the conference report states:

> The conferees recognize that the other agency may not because of time constraints be able to initiate formal regulatory action to protect against the risk within the specified time period. As long as the other agency has officially initiated an action which will culminate as soon as practicable in effective regulatory action to protect against the unreasonable risk and sets forth a general time schedule of steps for such action, the requirement should be deemed satisfied. However the requirement that the other agency initiate action to protect against the risk is not satisfied

Continued

The second way the referral agency can block action is more surprising. It can find that the activities described in EPA's report do not present the unreasonable risks that EPA says they do. Here Congress gave the referral agency the right to disagree with EPA, and to bind EPA by that judgment, on questions of science or risk management as to which it had no reason to believe the second agency would be more expert.[7] The only prerequisite to this right of binding disagreement was that the referral agency have apparent jurisdiction to address the problems caused by the chemical.

This decisionmaking structure can only be explained as a deliberate congressional attempt to assure that TSCA would remain a limited and gap-filling statute, not just in name, but in fact, by subordinating EPA's policy choices to those of other agencies, at least in many cases of potential overlapping jurisdiction.

An argument against this conclusion could be based on the language of § 6(c)(1). This provides that in deciding whether to regulate under TSCA even though another EPA statute could reduce risks to an acceptable degree, *EPA* must consider such factors as the relative cost and cost-effectiveness of action under each of the two competing statutes. Though this language governs EPA choices under § 9(b), one might argue that the same policies should govern choices under § 9(a) as well, and that EPA must therefore take them into account in making referral decisions.

We believe that this conclusion, though defensible, does not represent the best reading of the statute. First, as discussed

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by the mere open-ended possibility of action by the other agency.

Leg. Hist. p. 698.

[7] The statutory language, calling on the second agency to find that "the activity or combination of activities [described in the EPA report] do not present the risk described in the report," is somewhat ambiguous as to whether the second agency simply has power to find that EPA was technically wrong in its assessment of the risk, or whether it also has power to disagree with EPA on whether the risk was "unreasonable." The legislative history, however, adopts the second interpretation, *see* pp. 697, (conference report), 167, 179 (Senate Report). Since the purpose of such a finding by the referral agency is to block EPA from implementing its own "unreasonable risk" finding, this second interpretation also seems correct from the standpoint of statutory structure and policy.

earlier, the threshold for considering the use of other statutes was deliberately set lower for § 9(a) than for § 9(b). Second, and more important, the "public interest" test in § 9(b) was set out for EPA to use *after* it had decided that EPA statutes other than TSCA could handle a risk "to a sufficient extent." When EPA makes such a finding with respect to other agencies' statutes, however, it must refer. Nothing then prevents EPA and the other agency from mutually agreeing—after referral—on whatever division of labor among statutes seems best to them in addressing the chemical at issue. Such an agreement might well embody some or all of the principles in § 6(c)(1). However, while in § 9(b) Congress required EPA to use the provisions of § 6(c)(1) in addressing this decision when it lay fully within the competence of EPA, for § 9(a), where jurisdiction would be divided, it provided instead a decision rule specifying which agency's policy choices would govern. Though principles similar to those in § 6(c)(1) may properly play a role in some § 9(a) determinations, they should be subordinated to the basic jurisdictional pattern set out in § 9(a) itself.[8]

3. *Informal communications are not a substitute for formal Section 9(a) referral.*

To some extent, this conclusion follows naturally from the points discussed earlier. If § 9(a) is meant to carry the weight of keeping EPA within its proper role in case of statutory overlap, EPA should not, consistent with that purpose, substitute other less potent mechanisms for § 9(a).

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[8] Section 9(a) calls on EPA to determine that a referral agency "may" be able to reduce a risk sufficiently before making a referral. One might argue that this language calls on EPA to assess the referral agency's practical ability, and willingness, to act as well as its legal authority before making a referral. Once again, though we believe such a reading is possible, it is not the best reading. It is inconsistent both with the overall structure of the section, as described above, and with the legislative history. *See* Leg. Hist. 697 (conference report) ("If the Administrator determines that another Federal law contains authorities adequate to prevent or reduce the suspected risk to a sufficient extent, the Administrator shall submit [a § 9(a) report]") 16 (Senate Report):

> The entire provision is designed to minimize duplication and overlap in the regulation of toxic chemicals, while providing EPA with sufficient authority to alert other agencies of chemical dangers where those other agencies *have sufficient regulatory authority* to eliminate these dangers. (Emphasis added.)

It is no answer to this point to say that informal consultations would be more efficient. Congress must have considered, and accepted, the inefficiencies that would result when it gave referral agencies the power to reject EPA's judgment on questions of risk management. Indeed, where such inefficiencies were unacceptable, Congress carefully provided that:

> In order to ensure that the vital premarket notification, testing, and reporting requirements [contained in TSCA Sections 4, 5, and 8] are retained, nothing contained in [Section 9(a)] is to effect [sic] that authority or requirements.

Leg. Hist. p. 167.

A textual argument also supports this conclusion. Section 9(d) of TSCA already provides for informal coordination between EPA and other agencies on implementing TSCA. If informal coordination alone had been thought sufficient, Congress would have had no need to include § 9(a) in the law in addition to § 9(d).

4. *Areas for policy development.*

It is a good deal harder to come up with guidelines for *not* referring than it is to extract from the statute the general policies in favor of referral discussed above. One might argue that whenever there is not a *single* second agency with authority over the *entire risk as comprehensive as EPA's,* § 9(a) does not compel referral. We believe that this conclusion, though consistent with the language of the statute and the legislative history, cannot be automatically adopted and applied in all cases consistent with the statutory policy. Indeed, the decision when it is proper not to refer is essentially a policy judgment involving the balancing of potentially competing legal principles in light of the particular facts. Legal analysis simply provides part of the framework for such a decision. As our contribution to that framework, we set out below three descriptions, in outline form, of situations in which a decision not to refer might be proper.

a. *A single activity poses significant risks within the jurisdiction of different agencies ("split risks").*

This case might arise—to give an example that is purely hypothetical as far as we know—where the use of a chemical inside buildings posed risks both inside and outside those buildings, and a potential referral agency, though it had au-

thority over the activity within buildings, could not consider risks outside the buildings in deciding how strictly to regulate. Such an agency's authority would thus extend only to a portion of the risk that the activity created. Here it would be relatively straightforward for EPA to find that action under "a Federal law not administered by the Administrator" could not sufficiently reduce a risk that lay in significant part entirely outside its scope. Indeed, this case of a "split risk" that lies within the authority of more than one statute is one of the cases discussed in the legislative history as an example where the use of TSCA would be proper.

b. *Several related activities pose risks within the jurisdiction of several different agencies ("divided risks").*

This case might arise where use of a chemical in the workplace posed workplace risks, but no significant risks of other types, while use of that same chemical in consumer products posed similar risks to consumers. Here, each individual activity would pose risks within the jurisdiction of a single agency, rather than overlapping risks, as in our first example.

The statutory language gives no clear guidance here. It calls on the Administrator to refer upon finding (1) that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or *that any combination of such activities,* (emphasis added) presents an "unreasonable risk" and (2) that "such risk" may be sufficiently controlled "by action taken under a Federal law not administered by the Administrator." But what if a chemical substance or mixture can be said to pose either a *single* "unreasonable risk" or a *combination* of risks, depending on whether the "activities" involving that chemical are combined together or divided? It might be that if the risks are combined, they cannot be handled by a *single* second statute, and thus the conditions for referral are not met, while if they are divided into pieces each covered by a single statute, referral of each piece might be appropriate. The question therefore is whether Congress intended risks to be divided in this manner. To that question legal analysis yields no clear answer. The text of the statute is neutral. The TSCA policy that other agencies be given first cut at making policy judgments on the regulation of chemicals within their jurisdiction would argue for referral. On the other hand, EPA might be able in an appropriate case to conclude that the inconvenience

and/or inefficiency of duplicative regulation caused by dividing the problem among a number of agencies outweighed these considerations. Such duplication would also be inconsistent with the intent of § 9(a) to avoid regulatory overlap and the intent of § 6 to be responsive to all the risks. *See* Leg. Hist. at § II.B., *supra*. *See also*, in this connection, TSCA § 2(c), directing EPA to administer TSCA in a "reasonable and prudent [and balanced] manner," and to "consider the environmental, economic, and social impact of any action" taken under TSCA.

c. *The referral agency, though it possesses some authority over the chemical, lacks power to regulate it tightly enough ("residual risk").*

The language of the statute calls on EPA to make a preliminary determination that the referral agency has the power to reduce risks "to a sufficient extent," and it is hard to deny that this language gives EPA a basis on which to make at least a rough-cut evaluation of the "sufficiency" of the second agency's statutory authority. EPA has made such evaluations in the past and acted on them. *See supra*. On the other hand, we have seen that EPA should not withhold referral because of disagreement with how the referral agency is likely to exercise its power. Since a referral agency can always give a problem back to EPA if it thinks its own authorities are not sufficient, one could argue that any withholding of a referral on "insufficient authority" grounds, once some jurisdiction in the second agency has been established, amounts in effect to EPA making a policy decision on acceptable courses of action that under the statute should be left to the second agency. However, where EPA's analysis indicates that some significant portion of the total risk associated with a substance would not be covered by the authority of another Federal agency or agencies, it would then seem prudent for EPA to decide whether it should regulate that residual risk or, in an appropriate instance, the total risk. Only in this way might it be possible for EPA to fulfill the congressional intent to consider the "cumulative impact of all sources of exposure." Leg. Hist. p. 414.

5. *Conclusions.*

In all cases the question of referral under § 9(a) falls within the virtually unreviewable discretion of the Administrator. In some cases the principles outlined above would clearly point to a § 9(a) referral. The most compelling case for referring a chemical control question to another agency would be one

where both the risk in question and the activity that generated it fell within the authority of a single second agency whose legislative authority over both activity and risk was as comprehensive as or more comprehensive than EPA's.

In other cases, however, the balance between the competing policies is less clear, and the question will have to be decided as a matter of judgment. In such cases, EPA should remember that § 9(a) was intended as a check on its natural tendency to use its own authorities rather than deferring to authorities administered by other agencies. Section 9(a) therefore calls for a careful inquiry into the possibly applicable authorities of other agencies, and resolution of legitimate doubts about their sufficiency in favor of referral. Notwithstanding the general purpose of § 9(a) to encourage referrals, it is anticipated that the Agency will identify situations in which withholding referral would not conflict with congressional intent.

GRANTS

May 14, 1981

MEMORANDUM

SUBJECT: Request for Office of General Counsel Opinion on the Use of Confidential Information During Criminal Investigations and Trials

FROM: Michele Beigel Corash
General Counsel

TO: Richard D. Wilson
Acting Assistant Administrator for Enforcement
Attn: Peter Beeson

On February 24, 1981, Jeffrey Miller, the Acting Assistant Administrator for Enforcement, inquired about legal restrictions on authority of the Environmental Protecton Agency (EPA) to provide confidential business information to other Federal agencies and courts in connection with criminal enforcement proceedings under the environmental laws. Specifically, Mr. Miller asked the following questions:

1. Is there any legal prohibition against disclosing confidential business information to Justice Department attorneys, Federal Bureau of Investigation (FBI) agents, or U.S. Postal Service inspectors in connection with a criminal investigation?

2. May the Justice Department present such information to grand juries and courts?

3. What procedures must EPA follow in disclosing confidential business information to other Federal agencies?

4. Do the answers to these questions vary according to which environmental statute is being enforced?

Conclusion

The statutes and regulations under which the Agency operates recognize the importance of cooperation among Federal agencies in connection with their enforcement. They allow a relatively free exchange of confidential information among agencies, provided the agencies follow certain guidelines to maintain confidentiality with regard to the public. The same rules and procedures apply to such exchanges of information regardless of which environmental statute is involved.

Question 1

Is there any legal prohibition against disclosing confidential business information to Justice Department attorneys, FBI agents, or U.S. Postal Service inspectors in connection with a criminal investigation?

Answer

The environmental statutes authorize disclosure of confidential business information to other U.S. officers or employees concerned with carrying out the statutes. *See* Federal Insecticide, Fungicide and Rodenticide Act at 7 U.S.C. § 136(h); Toxic Substances Control Act at 15 U.S.C. § 2613; Clean Water Act at 33 U.S.C. § 1318; Safe Drinking Water Act at 42 U.S.C. § 300j–4(d); Noise Control Act at 42 U.S.C. § 4913; Solid Waste Disposal Act at 42 U.S.C. § 6927; and the Clean Air Act at 42 U.S.C. §§ 7414, 7542.

EPA regulations specifically provide that we may disclose information subject to a confidentiality claim to the Justice Department for the purpose of "investigation or prosecution of civil or criminal violations of Federal laws related to EPA activities" or "representing EPA in any matter." No notice to affected businesses is required. 40 C.F.R. § 2.209(c). The same provision authorizes disclosure to FBI agents, since the FBI is part of the Justice Department.

The regulation also provides that we may disclose confidential business information to other Federal agencies that are performing a function for EPA. Since the U.S. Postal Service is an independent agency subject to the confidentiality provisions of 18 U.S.C. § 1905, EPA may disclose confidential business information to Postal Service inspectors. No notice to affected businesses is required. 39 U.S.C. §§ 201 and 410(b)(2), 40 C.F.R. § 2.209(c)(3).

Question 2

May the Justice Department present such information to grand juries and courts?

Answer

The Justice Department is primarily responsible for determining its authority to disclose confidential business information to grand juries and courts. However, the basic confidentiality stat-

ute at 18 U.S.C. § 1905 forbids Federal employees to disclose confidential business information only "to the extent not authorized by law," and in my opinion there is ample legal authority to disclose such information to grand juries and courts.

Most of the environmental statutes specifically authorize disclosure of confidential business information "when relevant in any proceeding . . . . " *See* Toxic Substances Control Act at 15 U.S.C. § 2613; Clean Air Act at 42 U.S.C. §§ 7414, 7542; Clean Water Act at 33 U.S.C. § 1718; Solid Waste Disposal Act at 42 U.S.C. § 6927; Noise Control Act at 42 U.S.C. § 4913; and the Safe Drinking Water Act at 42 U.S.C. § 300j–4(d), all of which contemplate criminal or civil enforcement proceedings.[1]

Moreover, "effluent data" collected under the Clean Water Act and "emission data" collected under the Clean Air Act may be disclosed to anyone, even if such data would otherwise be entitled to confidential treatment. 42 U.S.C. § 7414, 33 U.S.C. § 1318, 40 C.F.R. §§ 2.301, 2.302.

Even if the environmental statutes did not provide explicit authority for disclosure, the Federal Rules of Evidence and the statutory provisions that authorize the Attorney General and the U.S. Attorneys to conduct litigation and prosecute crimes on behalf of the United States imply legal authority to present any relevant evidence to grand juries and in public court trials, regardless of whether such evidence is subject to a claim of business confidentiality. *See* Fed. R. Evid. 401, 402 and 28 U.S.C. §§ 515, 547.

Indeed, a claim of trade secrecy ordinarily does not even give rise to a privilege against civil discovery (although a court may impose a protective order or arrange for *in camera* examination of the evidence). *National Utility Service, Inc.* v. *Northwestern Steel & Wire Co.*, 526 F.2d 222 (7th Cir. 1970); *F.T.C.* v. *Anderson*, 552 F. Supp. 1118 (D. D.C. 1977); *Federal Open Market Committee, Etc.* v. *Merrill*, 553 U.S. 340 (1979).

As Mr. Miller's memorandum pointed out, members of grand juries may be held in contempt if they reveal information acquired in the course of their deliberations. Fed. R. Crim. P.

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[1] The provisions of EPA regulations that establish special conditions for "disclosure of information relevant to a proceeding" under the environmental statutes apply only to internal EPA proceedings. These conditions do not apply to grand jury or court proceedings. *See* 40 C.F.R. §§ 2.301(a)(4) and (g), 2.302(a)(4) and (g), 2.303(a)(4) and (g), 2.304(a)(4) and (g), 2.305(a)(4) and (g), 2.306(a)(6) and (i), and 2.307(h)(4).

6(e). In addition, several provisions of the environmental statutes supplement 18 U.S.C. § 1905 by establishing criminal penalties for unauthorized disclosures of confidential business information by those who are not Government employees. *See* Solid Waste Disposal Act at 42 U.S.C. § 6927 and Toxic Substances Control Act at 15 U.S.C. § 2613.

Question 3

What procedures must EPA follow in disclosing confidential business information to other Federal agencies?

Answer

Where such disclosures are made, the regulation requires that the responsible EPA program office:

(1) Inform the Justice Department or other agency of any unresolved confidentiality claim or of any determination that the information is entitled to confidential treatment; and

(2) Keep an internal log of the disclosures for no less than 36 months, setting out the name of the affected business, the date of disclosure, the person or body to whom disclosure was made and a description of the information disclosed. 40 C.F.R. § 2.209 (c) and (g).

EPA regulations at 40 C.F.R. § 2.209(c)(5) also forbid EPA employees to disclose confidential business information to another Federal agency unless the other agency either (1) agrees in writing not to disclose the information further or (2) obtains a written statement from the EPA General Counsel or a Regional Counsel that further disclosure would be proper. While I doubt that EPA could properly withhold from the Justice Department information that may be relevant to a criminal proceeding, this memorandum nonetheless constitutes my "statement," if one is needed, that it is proper for the Justice Department to disclose confidential business information gathered by EPA to grand juries and courts. Of course, it is also proper for Postal Service inspectors to disclose such information to the Justice Department. (*See* 39 U.S.C. § 409(d).)

Question 4

Do the answers to these questions vary according to which environmental statute is being enforced?

Answer

Neither EPA's authority to provide confidential business information to other agencies nor the Justice Department's authority to use any relevant evidence in grand jury or court proceedings depends upon which environmental statute is being enforced.

September 9, 1981

MEMORANDUM

SUBJECT: EPA Responsibility to Contractors' Employees

FROM: Robert M. Perry
General Counsel

TO: Edward J. Hanley, Director
Office of Management Information
and Support Services

Your memorandum of July 20, 1981, requested my opinion on two questions relating to the tort liability of the Environmental Protecton Agency (EPA) and its employees arising out of health and safety procedures at EPA laboratories and at laboratories operated by EPA contractors.

You stated that you have copies of two memorandums on this subject issued by this Office on July 12, 1979, and November 14, 1980. I have attached two other memorandums dated August 10 and 17, 1979, that discuss most of the issues you raised in your inquiry. Accordingly, for the most part I will confine my discussion to matters that were not covered earlier.

Your questions are as follows:

Question 1

What is the liability of the EPA and its managers in cases of occupational illness of or injury to EPA laboratory employees?

Answer

As discussed on pages 2 and 3 of our memorandum of July 12, 1979, the Government's liability to its employees for work-related injuries is limited to benefits under the Federal Employees' Compensation Act. An injured employee may nonetheless have a cause of action against a fellow employee whose negligence caused the injury. *Bates* v. *Harp,* 573 F.2d 930 (5th Cir. 1978). However, a fellow employee is not likely to be liable except in cases of direct negligence, such as spilling acid on a fellow employee. Management decisions concerning safety procedures in laboratories probably would not lead to personal liability. *Barr* v. *Matteo,* 360 U.S. 564 (1959).

Question 2

What is the liability of the EPA and its managers in cases of occupational illness of or injury to employees of a contractor providing laboratory support to the Agency? Please consider contractor employees located in EPA-controlled space as well as contractor-controlled space.

Answer

Employees of EPA contractors generally are not entitled to benefits under the Federal Employees' Compensation Act. 5 U.S.C. § 8101. However, these employees are presumably entitled to benefits under State compensation plans.

As discussed in our memorandums of August 10 and 17, 1979, employees of contractors may have a cause of action against the United States under the Federal Tort Claims Act. Although the principles of liability depend on State law, liability might be based on the Government's failure to warn of known dangers, failure to require the contractor to take appropriate safety measures or failure to ensure that the contractor follows whatever safety measures are prescribed.

Where contractor employees are located in EPA laboratories, the Government has a direct duty to provide a safe working environment. Any injury resulting from a breach of this duty would likely result in liability.

Where the Government is liable, awards and settlements of $2,500 or less are paid from Agency appropriations. Larger amounts are paid from the permanent indefinite appropriation established under 31 U.S.C § 724a. 28 U.S.C. § 2672.

Again, it is unlikely that EPA managers would be personally liable for occupational illnesses or injuries of contractor employees caused by the Agency's policy decisions or decisions made in the course of administering a contract.

In my opinion, Executive Order No. 12196 of February 26, 1980, "Occupational Safety and Health Programs for Federal Employees," does not alter the liability principles discussed above and in our earlier memorandums. Failure to follow this guidance may increase the risk of Government liability, but it is not likely to increase the risk of personal liability.

Preventive Measures

Our memorandums of August 10 and 17, 1979, largely answer your questions concerning the steps EPA ought to take to fulfill its duty to warn of known dangers and to require appropriate safety measures. In my opinion, adequate warning of risk could be provided either by a contract article or by written instructions from the Project Officer. Oral warnings, although theoretically adequate, may be difficult to prove. General contract language requiring compliance with Federal, State, and local statutes, regulations, and ordinances is likewise probably sufficient.

Although I am not familiar with the "DHEW Draft Guidelines for the Laboratory Use of Chemical Carcinogens, March, 1980," I suspect that it may be prudent to incorporate these guidelines into our contracts (where relevant), unless program managers have valid objections.

Although other agencies, such as the Occupational Safety and Health Administration, are statutorily responsible for enforcing their own statutes and regulations, as a matter of tort law EPA managers probably have a duty to monitor compliance where these requirements are included in EPA contracts. As discussed in our earlier memorandums, the Government's legal risk is about the same whether a claimant alleges that EPA prescribed inadequate safety requirements, failed to enforce requirements, or failed to require any precautions.

Attachments [Deleted.]

June 11, 1982

MEMORANDUM

SUBJECT: Status of Issues Information System Under the Freedom of Information Act

FROM: Robert M. Perry
Associate Administrator for Legal and
Enforcement Counsel and General Counsel

TO: John E. Daniel
Chief of Staff

This office has reviewed the proposed computer Issues Information System to determine whether information that will be contained within the system would be subject to disclosure under the Freedom of Information Act (FOIA). The Issues Information System will clearly consist of Agency records within the meaning of the FOIA. These records will have to be disclosed upon request unless they fall within one of the nine exemptions of the Act. Even if information in the system is exempt from disclosure under the FOIA, the Act does not authorize withholding the information from Congress.

The Issues Information System will enable certain Environmental Protection Agency (EPA) officials to access information on issues of concern to the Agency. Every issue maintained in the system will contain approximately 13 data elements. Based on our review of these data elements, it is likely that much of the sensitive information in the system will be exempt from disclosure under exemption 5 of the FOIA, 5 U.S.C. 552(b)(5). This exemption protects records that reflect internal Agency deliberations that form part of the process by which the Agency makes decisions or formulates policy. The kinds of information that are protected are opinions, recommendations, discussions of options, and similar predecisional, deliberative materials. Factual materials, information that reflects final Agency policy, and information already in the public domain are not withholdable under exemption 5. The following is a discussion of the applicability of exemption 5 to each of the data elements that will be contained in the Issues Information System.

The data elements that are likely to be withholdable under exemption 5 are: "Significance to the Agency," "Impact," and

"Current EPA Position." It appears that these data elements will usually consist of opinions, evaluations, and the Agency's tentative positions on the issues rather than factual statements and expressions of existing Agency policy. Such information reflects the Agency's internal deliberations. Disclosure of this information would tend to chill frank and candid discussion in the future. Of course, if the data elements on a particular issue incorporated within the system do, in fact, contain factual information or statements of existing policy, this nonexempt material would have to be disclosed under the FOIA.

It is more difficult to generalize concerning the status under the FOIA of the data elements listed as "Issue," "Next Critical Date," "Background," and "Key Actions to Date." To the extent these data elements contain or reveal proposed Agency actions or policies that are not already in the public domain, they are part of the Agency's deliberative process and thus withholdable under exemption 5. If, however, these data elements consist of recitals of factual information that do not reveal the Agency's deliberations or that are already public, they must be disclosed.

It is very unlikely that the following data elements in the Issues Information System will be exempt from disclosure: "Region," "City/State," "Category," "Key Contacts," "Alternate Contacts," and "Reference Material." In most cases these data elements will consist entirely of factual material that does not reveal protected deliberations and that must, therefore, be released under the FOIA.

One additional issue merits brief mention. If information in the Issues Information System contains enforcement related material, exemption 7 of the FOIA may be applicable to that information. Exemption 7 protects investigatory records compiled for law enforcement purposes to the extent that disclosure would result in one of the specific harms described in § 552(b)(7) of the FOIA.

September 27, 1983

MEMORANDUM

SUBJECT: Construction Grant Funds Allotted for New York City Convention Center Project

FROM: A. James Barnes
Acting General Counsel

TO: Morgan C. Kinghorn
Comptroller

This memorandum provides a legal opinion addressing issues raised in the attached July 18, 1983, letter to the Administrator of the Environmental Protection Agency (EPA) from Senator Daniel Patrick Moynihan and Congressman James J. Howard concerning funds allotted under § 205(k) of the Clean Water Act (CWA) for construction of an interceptor to serve the New York City Convention Center. Senator Moynihan and Congressman Howard asked whether these funds will be subject to the reallotment requirements in § 205(d) if they are not obligated by October 1, 1983. As explained below, it is my opinion that the § 205(k) allotment is not subject to the requirements of § 205(d).

Background

The Municipal Wastewater Treatment Construction Grant Amendments of 1981 added a new subsection (k) to § 205 of the CWA. Section 205(k) required a separate allotment of funds appropriated for fiscal year (FY) 1982 to the State of New York for construction of an interceptor to convey sewage from the planned convention center to the Newtown Sewage Treatment Plant on an interim basis. Pub.L. No. 97–117, § 16 (1981). At that time, it appeared that the convention center would be open for business substantially before the North River treatment plant would be able to receive wastewater from the convention center. The North River Plant ultimately will be the treatment facility to serve the convention center.

Congress appropriated funds to be allotted under § 205(k) as part of the construction grants appropriation in the Urgent Supplemental Appropriations Act, 1982, Pub.L. No. 97.216. In that Act, Congress provided that the § 205(k) allotment be drawn in equal parts from New York's construction grants al-

lotment, New Jersey's construction grants allotment, and the remaining States' construction grants funds. EPA established this separate allotment of $2.799 million, which remains unobligated.

It now appears that the convention center may not be completed as early as expected, and that the need for interim treatment at the Newtown plant may not exist. Consequently, it may not be necessary to construct an interceptor connecting the convention center to the Newtown facility.

Issues [1]

1. If the funds authorized in § 205(k) are not obligated, will the States of New York and New Jersey be ineligible for receipt of reallotted construction grants funds under § 205(d)?
2. What would happen to the special § 205(k) allotment if the convention center project is not built?

Answers

1. No. Assuming New York and New Jersey fully obligate their regular FY 1982 allotments, they will be eligible to receive reallotted FY 1982 funds even if the § 205(k) allotment is unobligated.
2. The Agency will determine the disposition of the unobligated § 205(k) funds consistent with the general purposes of the construction grants appropriation.

Discussion

A. *Applicability of reallotment requirements to § 205(k)*

Construction grant funds are allotted by formula to the States and are available for obligation in the respective States for the fiscal year for which appropriated and the next succeeding 12 months. CWA, § 205(c), (d). At the end of the period of availability, § 205(d) provides that any unobligated funds must be reallotted on the basis of the current allotment formula. Section

[1]The issues stated herein are those posed in the letter from Senator Moynihan and Congressman Howard. The letter also includes the issue of whether failure to obligate § 205(k) funds would make New York or New Jersey ineligible for future construction grant funds. There is nothing in the Clean Water Act that bars receipt of future allotments for any reason. The only prohibition to receipt of construction grant funds is in § 205(d), concerning reallotted funds, which is discussed herein.

205(d) further provides that "none of the funds reallotted by the Administrator for the fiscal year 1978 and for fiscal years thereafter shall be reallotted to any State which failed to obligate any of the funds being reallotted."

In order to determine whether New York[2] will be prevented from receiving reallotted FY 1982 funds, it is necessary to determine whether unobligated § 205(k) funds must be reallotted under § 205(d).

Section 205(k) is the only provision in the Clean Water Act that establishes a separate allotment in addition to a State's regular annual allotment of appropriated construction grant funds. Section 205(k) provides:

> The Administrator shall allot to the State of New York from sums authorized to be appropriated for the fiscal year ending September 30, 1982, an amount necessary to pay the entire cost of conveying sewage from the Convention Center of the City of New York to the Newtown sewage treatment plant, Brooklyn-Queens area, New York. The amount allotted under this subsection shall be in addition to and not in lieu of any other amounts authorized to be allotted to such State under this Act.

By stating that this allotment "shall be in addition to and not in lieu of any other amounts authorized to be allotted to such State under this Act," Congress evidenced a clear intent to keep this allotment distinct from New York's regular FY 1982 allotment.

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[2] The issue posed by Senator Moynihan and Congressman Howard questions whether both New York and New Jersey will be affected by the reallotment requirements. Presumably the issue of New Jersey's participation in reallotment is based on the fact that one-third of the § 205(k) allotment was taken from New Jersey's regular allotment. The source of funds for § 205(k) is not determinative of which State or States may be precluded from receiving reallotted funds. Rather, the State with control over the funds, *i.e.*, the State to which the funds are allotted, is the only one subject to the restriction in § 205(d). Section 205(d) prevents reallotment to those States "which failed to obligate any of the funds being reallotted." As the allotment of funds under this section is to the State of New York, there is no basis for limiting New Jersey's eligibility for reallotted FY 1982 funds if the § 205(k) funds remain unobligated. Only New York, to which the funds were allotted, could be subject to this limitation.

The Urgent Supplemental Appropriations Act, 1982, Pub.L. No. 97–216 further evidences Congress' intent that funds for the convention center project be distinguished from New York's regular FY 1982 allotment. The appropriation act directs that the § 205(k) allotment be made up of:

> an amount equal to one-third of the total cost from the amount made available under this paragraph to the State of New York, one-third from the amount made available to the State of New Jersey, and one-third from the amount made available to the remaining States, ...

Pursuant to this provision and § 205(k) EPA established a separate allotment of $2,799,000, made up of $933,000 from the total FY 1982 appropriation for construction grants and $933,000 each from the New York and New Jersey allotments. 47 Fed. Reg. 42024 (Sept. 23, 1982). This allotment is designated as "New York Convention Center" on the allotment table in the notice of allotment. 47 Fed. Reg. 42025.

Although it is clear that the § 205(k) allotment is separate from the regular New York allotment made pursuant to § 205(c), neither the language of § 205(k), the appropriation act language, nor the legislative history of the respective provisions addresses the question of whether these funds are subject to the reallotment requirements of § 205(d). However, in viewing the purpose of § 205(k) together with that of § 205(d), it is reasonable to conclude that Congress did not anticipate that the failure to obligate § 205(k) funds would subject those funds to reallotment or would prevent New York from otherwise participating in reallotment.

The reallotment process is designed to adjust the distribution of construction grant funds among the States to better reflect the actual needs of the States for currently available funds.[3] Presumably, States with unobligated funds at the end of the period of availability are without an immediate need to receive additional funds; otherwise those States would have obligated their entire allotment. Thus, by prohibiting States contributing funds to reallotment from receiving reallotted funds, § 205(d)

[3] *See* general discussion of allotment and reallotment, H.R. Rep. 911, 92d Cong., 2d Sess. 92–94 (1972); S. Rep. 1236, 92d Cong., 2d Sess. 113–14 (1972) (conference report).

ensures that only States immediately able to use the reallotted funds receive the additional monies.

If New York does not obligate the § 205(k) funds, it will not be because New York did not have sufficient need for all available construction grant funds in the State. Rather, New York will not have obligated the funds because the one project for which the funds could be used is no longer necessary. Therefore to conclude that § 205(d) requires the reallotment of those funds, precluding New York from receiving a share of the reallotted FY 1982 funds, would be contrary to the purpose of § 205(d).

I conclude, therefore, that § 205(d) does not require the reallotment of unobligated § 205(k) funds at the end of FY 1983. Because the § 205(k) allotment will not be a part of the unobligated FY 1982 funds being reallotted, New York will not, by virtue of these funds, be a "State which failed to obligate any of the funds being reallotted," and thus will not be precluded from receiving a share of the reallotted funds. CWA, § 205(d).

B. *Disposition of § 205(k) Allotment*

Having established that funds remaining in the § 205(k) allotment are not subject to reallotment, it must be determined whether any other requirements govern the disposition of these funds.

These funds are "no-year" funds, *i.e.*, available until expended. Thus, the issue arises as to whether 31 U.S.C. § 1555 requiring certain unobligated no-year funds to revert to the Treasury applies. Specifically, § 1555 provides:

> (a) An unobligated balance of any appropriation for an indefinite period shall be withdrawn in the way provided in section 1552(a)(2) of this title [providing for reversion to the Treasury] when the head of the agency concerned decides that the purposes for which the appropriation was made have been carried out *or when no disbursement is made against the appropriation for 2 consecutive fiscal years.* (Emphasis added.)

The Comptroller General addressed the applicability of 31 U.S.C. § 1555 to funds set aside in the Interior Department Appropriation Act, 1954, and reappropriated for a specific purpose in the Interior Department Appropriation Act, 1955. 39 Comp. Gen. 244 (1959). The Interior Department argued that

these funds were part of its 1954 appropriation, against which disbursement had been made, and therefore the funds did not have to be returned to the Treasury. The Comptroller General held that because the funds had been reappropriated by Congress for FY 1955, they formed a separate appropriation against which no disbursements were made. The Comptroller General concluded that the funds had to be redeposited into the general fund of the Treasury. 39 Comp. Gen. at 245–46.

Unlike the Interior Department funds, the funds allotted under § 205(k) do not constitute a separate appropriation. An allotment is not a separate appropriation; it is a distribution of appropriated funds. The § 205(k) funds were appropriated by the Urgent Supplemental Appropriations Act, 1982, Pub.L. No. 97–216, in the appropriation entitled "Construction Grants" in which all funds "[f]or necessary expenses to carry out Title 11 of the Federal Water Pollution Control Act" are included. All FY 1982 funds for construction grants, against which many disbursements have been made, were appropriated by Congress in that provision. Consequently, I conclude that 31 U.S.C. § 1555 does not require that the § 205(k) funds revert to the Treasury.

As the § 205(k) funds are not subject to the reallotment requirements of § 205(d) or to the disposition provisions of 31 U.S.C. § 1555, there is nothing that requires these funds to be removed from the § 205(k) allotment by October 1, 1983. The funds were appropriated to remain available until expended, and the duration of this separate allotment is unspecified. Therefore, the Administrator may maintain this allotment until the need for the convention center project is finally determined. If it is ultimately determined that the interceptor project will not be necessary, the Administrator may exercise his discretion in deciding how best to allocate the funds.

The Administrator's discretion in determining the use of the funds must be exercised consistently with the purposes of the appropriation. Funds appropriated by Congress must "be applied solely to the objects" for which they were appropriated. 31 U.S.C. § 13011. Because these funds are part of the Title II construction grants program and were taken from the regular construction grants allotments in a manner specified by the appropriation act, application of these funds most consistent with the appropriation act would be to distribute the funds to the sources from which they were derived, *i.e.*, one-third of the al-

lotment among all the States and one-third each to New York and New Jersey. In keeping with the construction grants regulation governing reallotment, 40 C.F.R. § 35.2010, these funds should be treated in the same manner as the most recent allotment as of the date the funds are issued for obligation in the respective States.

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