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Lacking a high-profile role, the Vice President jumped in with both feet to make the council a powerful body

THE ADMINISTRATION

Need Friends in High Places?

For industries trying to skirt the law, Dan Quayle's Council on Competitiveness is a good place to start

By MICHAEL DUFFY WASHINGTON

William Reilly thought he had a deal. The besieged chief of the Environmental Protection Agency was certain Dan Quayle had agreed that any piece of land that was flooded or saturated with water for 15 consecutive days a year would constitute a "wetland" and deserved protection from private development. The next day Reilly received a call from Allan Hubbard, who heads Quayle's Council on Competitiveness, telling him the deal was off. Within days the council hatched a new plan, narrowing the definition of "wetness" by six extra days, satisfying a powerful coalition of farmers and builders and reducing America's wetlands by as much as 30 million acres.

Reilly was privately steamed. If George Bush persuaded Congress last year to pass most of his kinder, gentler legislation untouched, Quayle's Council on Competitiveness is spending much of this year making sure that the new environmental and health laws are as beneficial to business as possible. California Democrat Henry Waxman calls the council a "shadow government." Senator Albert Gore believes that the mysterious body allows Bush to pose as an environmentalist long enough "to justify a television commercial. Then, behind the scenes, the [council] guts the law."

Bush created the panel in 1989 but gave it new powers a year later, when he began hearing complaints from friends that his government was reregulating industries that the Reagan Administration had sought to deregulate. Not long afterward, the President appeared before aides one

morning waving a newspaper clipping about reregulation and asking, "What's going on here?" Bush, who headed a task force on regulatory relief as Vice President, asked Quayle to review new regulations to make sure that costs would not outweigh benefits. Lacking a high-profile White House role at the time, Quayle jumped in with both feet.

This is no renegade operation: Bush, chief of staff John Sununu and Budget Director Richard Darman are fully apprised of the panel's activities. When such agencies as the EPA and the White House differ over how aggressively to implement a law, the council moves in to referee. Staffed by fewer than a dozen officials, who are, even by Bush White House standards, unusually conservative, the council regularly sides with business against the environment. Even Administration officials marvel at how powerful the body has become. "Because Quayle has Bush's total confidence," said a former Administration official, "nobody can touch those guys."

The council's favorite target is the 1990 Clean Air Act, which the White House backed but now fears will cost more than \$26 billion to implement. Last summer the council asked the EPA to make more than 100 changes in proposed regulations for carrying out the act, changes that top EPA officials say undercut the law. The most controversial proposed change would allow polluters to unilaterally increase their emissions if states ignore a waiver request for more than seven days. "You could drive a big truck through some of those holes," said a top EPA official.

The council has also opposed an EPA

plan to require liners and leachate collection systems at all new solid-waste landfills. For nearly a year, the council argued that the plan was too costly, though other officials noted that in the past five years no city has permitted the construction of a new landfill without such equipment. The nation is short on landfills, and the rules for creating new sites are already three years behind schedule.

Hubbard, a gregarious Indiana entrepreneur who ran Pierre du Pont's 1988 presidential bid, points out that those who object to the council's rulings are free to mount challenges in the courts. Hubbard says the council's goal is to improve the nation's competitiveness, not to shelter industry from regulation. "The higher the cost of the regulation, the higher the cost of the product to the consumer," he explains. "Our whole effort is to protect the consumer and the American worker."

There's a little more to it than that. The council is potentially a political gold mine for Quayle, who often refers businesspeople with complaints about government meddling to his eager staff of deregulators. The council spearheaded Quayle's attack on lawyers and excess litigation last August, and is preparing to move beyond reviewing new regulations to tackling rules already in place. While Quayle's detractors dismiss the Vice President as silly and feckless, his shrewd handling of the council's affairs is just another sign that he is taking full advantage of his office.

For Bush, who in the midst of a sluggish recovery can neither pass out tax cuts nor launch spending programs to promote economic growth, the council is "the only game in town," an official said. "The one thing that can cause George Bush problems in 1992 is the recession." The council also exemplifies Bush's have-half approach to political problems. In 1992 he can run as an environmentalist while telling industrialists he's on their side too.

—With reporting by Dick Thompson/Washington

ABC News with Peter Jennings
(early May)
The American Agenda with Ned Potter

ABC news reported that President Bush, while claiming to be the environmental president, is backing away from tough environmental regulations. The piece cites Los Angeles factories emitting toxic air pollution, south and midwest wetlands being threatened by developers, and New York's tainted wells as examples of the Administration "sabotaging" its own environmental platform.

In the spring of 1990, President Bush expressed his pride in the Clean Air Act Amendments of 1990, which strive to reduce emissions in smog, acid rain and toxics, making our country a safer place to live. However, industry when complained about the cost of clean-up, the President backed off.

The President was quoted as saying, "We all know the strangling effects over-regulation has on business...and quite frankly, some are not needed."

In response to concerns about excessive regulations, President Bush named Vice President Quayle head of a "Council on Competitiveness," which was designed to help industry avoid expense caused by government regulations. For example, to avoid complying with federal air regulations, industries need only to write their state governments to ask for more time to comply. If the state does not respond within seven days, the industry automatically receives permission to continue polluting.

Congressman Gerry Sikorski (D-MN) called this "environmental treason" and "a loophole a MACK truck could run through." Congressman Waxman asserted that this process is "a secret kind of process, a secret kind of government which the Vice President is in charge of, that is going to rewrite the laws."

In an effort to avoid strict regulations, industries such as the Pharmaceutical Manufacturers Association, the Motor Vehicle Manufacturers Association and Ed Lilly & Company, appealed to the EPA and were turned down. They then turned to Vice President Quayle's Council and their request was granted.

President Bush claims to be trying to strike a careful balance between government over-regulations and strict environmental laws but his critics argue that he is gaining unfair political mileage from backing environmental laws on which his Administration does not follow through.

Critics point to loopholes in the Clean Air Act

By TOM JOHNSON

The first major rule proposed by the federal Environmental Protection Agency (EPA) under the revised Clean Air Act is drawing fire from environmentalists and New Jersey officials for creating a loophole that could impede progress toward cleaning up the nation's air.

The controversy results from a proposal by the EPA on how air pollution control agencies deal with requests by industry to modify air permits, including changes that would allow emission increases of up to 100 tons a year per facility.

Unless the state agency objects within seven days, the proposed rule would allow industry to proceed with such "minor modifications" to their permits, according to officials.

"Basically, they'd be able to re-write their permits day in and day out with very little agency review and with no public input," said William Sullivan, assistant director of air quality engineering for the state Department of Environmental Protection and Energy (DEPE).

The result could severely set back state's efforts to curb emissions that contribute to persistent smog problems during summer months. Most of New Jersey has been classified as having severe ground-level ozone problems. Only

the Los Angeles area has a worse classification.

By any measure, meeting the mandates of the revised Clean Air Act is likely to be difficult for states like New Jersey, officials have warned.

"Considering we're putting together a strategy where we're trying to eke out reductions anywhere we can, to open a door where there can be emission increases of up to 100 tons a year just seems counterproductive," added Nancy Wittenberg, who as director of the DEPE's Division of Energy is in charge of putting together a plan to meet the Clean Air mandates.

"For every step forward, it has the potential of putting us two steps backward," she said.

With an estimated 3,000 New Jersey plants coming under the new operating permit program, the requirement that the state permitting agency act on requests for minor modifications within seven days struck environmentalists as ludicrous.

"It's absurd," said Edward Lloyd, director of the Rutgers Environmental Law Clinic. "It shifts the burden from the permittee to the department. The

burden should be on the discharger to show why the emissions are not detrimental to the public health."

Marie Curtis, a lobbyist for the New Jersey Environmental Lobby, argued a seven-day time frame is not a realistic deadline for a full analysis of an air pollution permit.

More significantly, under the proposed rule, say opponents, such minor modifications would allow emission increases of up to 100 tons per year and allow industry to replace major pollution control devices without agency action.

"That is not a minor modification—especially in a place like New Jersey, where the air is already severely impacted," said Joan Denzer, a lobbyist for the Sierra Club of New Jersey.

Denzer argued the Clean Air Act Amendments (CAAA) adopted by Congress in 1990 after lengthy debate marked a significant step to achieving cleaner air.

"If the regulations were written to carry out the spirit of the law, in 20 years the air in this country would be significantly better," she said. "But mi-

nor modifications that allow a facility to dump an additional 100 tons into the air each year are not going to get us there."

But Hal Bozarth, a lobbyist for the Chemical Industry Council of New Jersey, argued the state permitting agency always retains the right to review any permit modification.

"There's a natural backstop here," he said, noting the department may respond to those applications it deems important.

"I think it makes eminent sense," said Bozarth of the proposal. "It will speed up an existing, very cumbersome bureaucratic process."

He said some of his companies typically wait from seven months to two years to hear from the DEPE on an air permit application. Frequently, some of those modifications would result in emission reductions by replacing older air pollution controls with more modern and sophisticated equipment, Bozarth said.

The EPA is expected to promulgate its final proposal sometime in November, according to Wittenberg.

SEP 25 '91 14:23 U.S. EPA REGION 2

Proposed Clear Air Rules Draw Criticism

■ **Environment:** Federal officials are charged with trying to gut the landmark law. The Administration says the plan gives businesses 'flexibility.'

By MICHAEL ROSS
TIMES STAFF WRITER

WASHINGTON—The Administration's first major proposals to implement the new Clean Air Act became embroiled in controversy within hours of their release Wednesday, with environmentalists charging that the White House was trying to gut the landmark legislation passed last year.

"The long knives were out at the White House," charged David Hawkins of the Washington-based Natural Resources Defense Council. "These proposals would basically gut 20 years of enforcement of clean air legislation and would make the major provisions of the new act virtually unenforceable," he said. "The environmental community is outraged."

At issue is a lengthy set of proposed rules issued by the Environmental Protection Agency for the air pollution permit system that is the regulatory centerpiece of the Clean Air Act of 1990.

The rules are meant to help states enforce compliance with the legislation's complex requirements. They would oblige all "major sources" of air pollution across the country to obtain operating permits from state authorities that specify their obligations under the Clean Air Act and set limits on the amount of pollutants they are allowed to emit.

The rule generally would apply

only to heavy industries generating large amounts of pollution. But depending on the location of the industry and pollutant being emitted, smaller enterprises also could be affected. For instance, in most parts of the country a factory emitting chemicals known as volatile organic compounds, referred to by regulators as VOCs, would be considered a "major source" only if the factory released more than 100 tons of VOCs into the air every year. In the Los Angeles area, however, any source emitting more than 10 tons of VOCs a year would be classified as a "major" polluter.

While many states including California already have their own permit systems, the EPA proposal would standardize this regulatory mechanism and theoretically make it easier to enforce by bringing other states into line. It also would oblige polluters to pay for state enforcement programs by levying a fee of \$25 for every ton of pollutant they emit up to a maximum of \$100,000 annually. EPA officials calculate that the levy will raise about \$300 million a year for state pollution programs. Roughly 34,000 sources are affected by the ruling.

Although hailed by EPA as an "innovative" approach to meeting the Clean Air Act's goal of removing 30 million tons of pollution from the nation's air, the rules issued

Wednesday for 60 days of public comment also contained a loophole that environmentalists and legislators charged will undermine the whole system. Rather than reducing pollution, they said, the rules may actually increase it.

Inserted by the White House over EPA's initial objections, the controversial provision under certain conditions would allow a polluter to increase his emissions without applying for a new permit, provided state officials fail to veto the increase within seven days of receiving written notice of intent.

Administration officials defended the proposal as necessary to give businesses the "flexibility" to make minor changes in their operations without going through the reams of red tape involved in applying for a permit revision.

However, Rep. Henry A. Waxman (D-Los Angeles)—one of the principle architects of the Clean Air Act revisions last year—charged that the proposal instead would open "a massive loophole that will undermine efforts to implement all programs" under the legislation.

"Under the guise of 'flexibility,' pollution sources would be allowed to increase their pollution levels by any amount—double, triple, a hundred fold—once the source initially receives a permit," Waxman said.

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The Boston Globe

THURSDAY, MAY 2, 1991

Democrats cry foul on Clean Air Act

By Michael Kranish
GLOBE STAFF

WASHINGTON - Six months after President Bush signed clean air legislation that among other things is supposed to reduce acid rain dramatically in New England, key Democrats charged yesterday that Vice President Dan Quayle is leading a White House effort to sabotage the bill.

The Democrats said Quayle, acting in his capacity as chairman of the little-known Council on Competitiveness, is demanding more than 100 changes in the act's regulations on pollution

Quayle accused of bid to sabotage new law

permits. The proposed changes must be approved by the Environmental Protection Agency.

The Democrats said the most controversial proposal by Quayle would allow certain companies to increase pollution to any amount unless a state objects within seven days.

"There is unmistakable evidence that White House officials, spearheaded by Vice President Dan Quayle ... are working with industry to

undermine implementation of the new clean air law," Rep. Henry Waxman, chairman of the Energy and Commerce subcommittee on health and the environment, said yesterday. "Not only is this horrible policy, it is also flagrantly illegal."

Quayle's spokesman, David Beckwith, said it is "not true" that Quayle's proposals would gut the clean air law. He said Quayle's council has recommended many changes, including one that would give the states flexibility in the way pollution is controlled. Beckwith said Quayle supports the Clean Air Act, "but we are not going

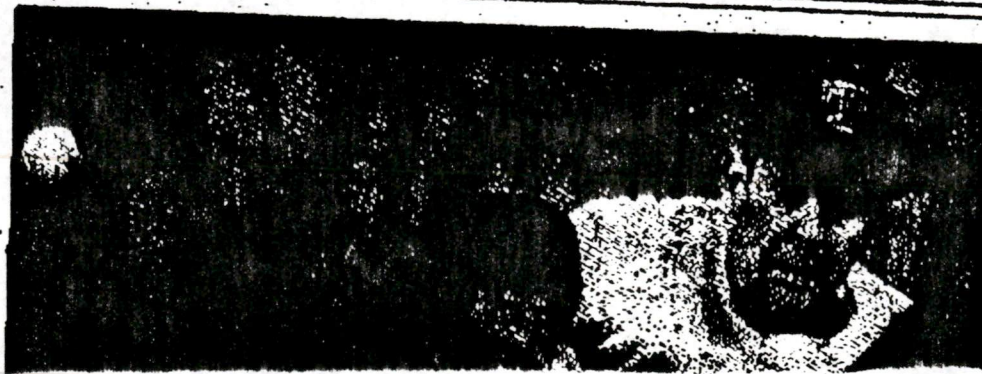
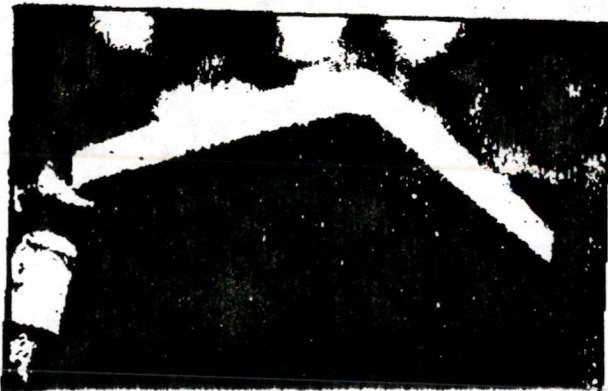
CLEAN AIR, Page 18

US, a bank prim

By Charles Stein
GLOBE STAFF

The nation's leading banks dropped their prime rates from 8.5 percent to 8.5 percent yesterday, a bit of good news that should increase the chances for an economic recovery in the second half of the year.

In another hopeful development, the Commerce Department's index of Leading Indicators rose 0.2 percent in March after a gain of 1.2 percent in February. The index is designed to reveal the economy's direction six to nine months ahead.



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Democrats say Quayle gutting clean air law

■ **CLEAN AIR**
Continued from Page 1

to do it at the cost of
torpedoing the national economy."

Beckwith said Quayle's proposals focus on giving business and states flexibility in meeting clean air laws but would not diminish the overall pollution reduction required under the bill signed by Bush last year.

Waxman, a California Democrat who was one of the leaders in the 10-year fight to pass the Clean Air Act, said Quayle's council is trying to gut the regulations under its authority to make "minor permit amendments" to help American industry cut through red tape and stay competitive.

Waxman said Quayle's proposals are not for minor changes.

Waxman said was is particularly incensed over a Quayle proposal that would "sabotage" the clean air law by allowing a polluter to increase emissions without limit if a state does not object within seven days. Waxman said some states would not be able to object in time, and other states would allow the pollution to increase.

The polluter "simply forwards a letter to the state explaining how much more pollution it wants to emit," Waxman said. "If the state fails to object within just seven days - voila - the permit is automatically revised to allow the extra pollution."

Rep. Gerry Sikorski, a Minnesota Democrat, said that under another Quayle proposal, companies could

buy extra pollution "allowances" that would let them emit higher levels of sulfur dioxide, which causes acid rain.

"Where the law says acid rain polluters cannot use allowances trading to exceed emissions limits, the council tells industry that it can spew out as much pollution as it likes as long as it pays for some allowances for it," Sikorski said. "This is environmental treason."

A White House official disputed Sikorski's assertion, saying the council's proposals were "pollution-neutral" and would have no negative impact on the law's acid rain provisions.

Quayle turned down a request by Waxman's subcommittee to respond to questions at yesterday's hearing. Instead, William Rosenberg, an assistant EPA administrator, defended Quayle's proposals.

But the EPA official indicated that changes might be needed in some of Quayle's proposals. For example, while Rosenberg said he agreed with Quayle that the government needs to give business "flexibility," he added, "I should stress, however, that this is only a proposed rule... The agency will carefully consider public comments before reaching a final decision on a number of difficult issues."

Although the EPA has tentatively accepted Quayle's proposals, the agency has until November to decide whether to finalize them. The EPA will hold hearings around the country before making its decision.

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EPA today promulgates a rule outlining the mechanics for permit revisions, including significant permit modifications, expedited permit modifications, and administrative amendments. These procedures are utilized to modify permits to accommodate changes that do not qualify under the operational flexibility, off-permit and alternate scenarios provisions.

Administrative amendments are those defined in section 70.7(d) that can be accomplished by the permitting authority without additional public or EPA review. These permit revisions include correction of typographical errors or changes in address or source ownership. Another type of administrative amendment involves the incorporation of requirements established under certain EPA-approved programs. State new source review programs for non-attainment or PSD areas and other new or existing programs should qualify, provided that include procedural and compliance requirements substantially equivalent to those in Title V.

The EPA's regulations specifically addressing all other types of permit revisions are found in section 70.7(e). As discussed more fully below, after reviewing the comments submitted on the proposed rule, the Agency has incorporated several important changes into the final rule. In general, the final rule ensures that States have broad flexibility in designing their permit programs consistent with these regulations.

The Act requires that States design "reasonable, adequate, and streamlined procedures" for processing permit modifications. In implementing this requirement, the proposal allowed minor permit modifications to occur without public participation, notification to affected States and/or an opportunity for EPA to object to the proposed change. Several significant comments stated that public participation in the minor permit modification process was required by law. After a careful analysis of the law, EPA today promulgates a rule requiring public participation in the expedited permit modification process.

Under §505(a), each permitting authority is required to transmit to the Administrator "any application for a permit modification" and notify all affected states of the proposed modification. Pursuant to §505(b), EPA has a 45-day period in which to review proposed permit modifications and to object to the modification if it is not in compliance with statutory requirements. Additionally, §505(b)(2) allows the public to petition the Administrator to object to the proposed modification. Section 505(b)(2) further states that any such "petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency." Accordingly, the Act contemplates a "public comment period provided by the permitting agency" for permit modifications -- if for no other reason than to assure the Administrator is not invited to object to permit modifications on grounds that were not fairly presented to State permitting authorities. To ensure that the public comment period

is meaningful, the public must, of course, receive reasonable notice of proposed permit modifications. [Finally, to ensure that the permitting authority has a full opportunity to receive useful information from the public on proposed permit modifications, the Agency believes that State permitting authorities, in appropriate circumstances, ~~should~~ ^{may, in its discretion,} afford the public an opportunity for a public hearing on permit modifications. Public hearings, however, can be a source of considerable delay and present a significant burden to both the regulated community and the permitting authority. To prevent this, EPA believes the decision to grant a hearing on a particular proposed permit modification should be committed to the discretion of the permitting authority.¹]

For these and other legal and policy reasons, the EPA today promulgates a rule which establishes as minimum State program elements, an expedited, streamlined permit modification process with public notice, an opportunity for public comment, an opportunity for a public hearing (when granted by the permitting authority), affected State review and a 45-day EPA review period. The notice will include a summary of the proposed change and will inform interested members of the public how they can obtain further information and how to participate in the permit revision

1

The opportunity for a hearing afforded in today's rule does not prejudge the format of the hearing (i.e.: informal, trial-type, etc.). To the contrary, the nature of the hearing should be dictated by State law or practice. The hearing is not a federal hearing pursuant to the federal Administrative Procedures Act.

process. In order to accommodate public participation, States must specify, as part of their programs, a reasonable period of time before which they will not approve an expedited modification. Generally, EPA considers 28 days to be a reasonable public comment period, although States may submit different time periods for EPA approval. The 45-day EPA review period ensures that EPA has an opportunity to review changes that might implicate a federal standard. During this review period, EPA may object to the proposed change on several grounds, including that it would (1) violate an applicable requirement of the Act (including a SIP requirement) or (2) not qualify under these regulations for an expedited permit modification. As explained below, however, State programs can allow a source to make the proposed operational change prior to the expiration of the 45-day EPA review period.

EPA also recognizes that most States have already implemented some form of State operating permits program and, based on their own experience, have developed specific approaches to processing permit revisions. In reviewing State submissions, EPA will attempt to accommodate these historical practices to the extent allowed by the Act and these regulations. The Agency also recognizes that different States have different environmental concerns. Accordingly, although States must include certain minimum elements in their permitting programs, EPA will seek to allow States considerable discretion in tailoring their program requirements to meet their individual needs.

notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

(f) **PERMIT SHIELD.**—Compliance with a permit issued in accordance with this title shall be deemed compliance with section 502. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this Act that relate to the permittee if—

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 303, including the authority of the Administrator under that section.

[42 U.S.C. 7661c]

SEC. 505. NOTIFICATION TO ADMINISTRATOR AND CONTIGUOUS STATES.

(a) **TRANSMISSION AND NOTICE.**—(1) Each permitting authority—

(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this Act, and

(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit.

(2) The permitting authority shall notify all States—

(A) whose air quality may be affected and that are contiguous to the State in which the emission originates, or

(B) that are within 50 miles of the source,

of each permit application or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

(b) **OBJECTION BY EPA.**—(1) If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this Act, including the requirements of an applicable implementation plan, the Administrator shall, in accordance with this subsection, object to its issuance. The permitting authority shall respond in writing if the Administrator (A) within 45 days after receiving a copy of the proposed permit under subsection (a)(1), or (B) within 45 days after receiving notification under subsection (a)(2), objects in writing to its issuance as not in compliance with such requirements. With the objection, the Administrator shall provide a statement of the reasons for the objection. A

copy of the objection and statement shall be provided to the applicant.

(2) If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action. A copy of such petition shall be provided to the permitting authority and the applicant by the petitioner. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). The petition shall identify all such objections. If the permit has been issued by the permitting agency, such petition shall not postpone the effectiveness of the permit. The Administrator shall grant or deny such petition within 60 days after the petition is filed. The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable implementation plan. Any denial of such petition shall be subject to judicial review under section 307. The Administrator shall include in regulations under this title provisions to implement this paragraph. The Administrator may not delegate the requirements of this paragraph.

(3) Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c). If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c).

(c) **ISSUANCE OR DENIAL.**—If the permitting authority fails, within 90 days after the date of an objection under subsection (b), to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this title. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.

(d) **WAIVER OF NOTIFICATION REQUIREMENTS.**—(1) The Administrator may waive the requirements of subsections (a) and (b) at the time of approval of a permit program under this title for any category (including any class, type, or size within such category) of sources covered by the program other than major sources.

(2) The Administrator may, by regulation, establish categories of sources (including any class, type, or size within such category) to which the requirements of subsections (a) and (b) shall not apply. The preceding sentence shall not apply to major sources.

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

HUBBARD
REQUEST
TO DLC



OFFICE OF THE VICE PRESIDENT

WASHINGTON

November 12, 1991

MEMORANDUM FOR TIMOTHY E. FLANIGAN

Acting Assistant Attorney General, Office of Legal Counsel

FROM: ALLAN B. HUBBARD

Executive Director, President's Council on Competitiveness

SUBJECT: Legal questions regarding the proposed rule
implementing Title V of the Clean Air Act Amendments of
1990.

Under the Clean Air Act Amendments of 1990 (the "CAAA"), the Environmental Protection Agency is required to develop an operating permits program for facilities that are sources of air pollution. Under this program, all such facilities will be required to operate in accordance with a permit and, in most cases, must revise their permits before making changes in their operations.

In May of last year, after extensive interagency deliberations, EPA issued a proposed rule to implement the permit program, 56 Fed. Reg. (May 10, 1991). The proposed rule included a provision to allow facilities to make certain permit changes upon providing 7-days advance notice to the state permitting authority and EPA, unless the state or EPA objected to the change. After the proposed rule was issued, EPA's General Counsel questioned whether that provision in the rule would withstand judicial scrutiny. In a written opinion signed his last day at the Agency, he expressed the view that "it is highly unlikely that a reviewing court would uphold the regulation upon judicial review" (see attached memorandum).

Although EPA originally indicated that this memo would not be placed into the Administrative record, Administrator Reilly has now concluded these legal issues must be addressed. Accordingly, the Council on Competitiveness would like to request that the Department of Justice address the following questions:

- 1] Is the proposed rule as written legally permissible under the statute (e.g., without public notice/hearing and with the broad shield?)
- 2] Would the "minor permit amendments" section (70.7 (f))

Hubbard
55541-91
Ray L.

be legally permissible if it were drafted without public notice/hearing and without the broad "shield?"

- 3] Would it be legally permissible under the statute if section 70.7 (f) were drafted with public notice/hearing and, correspondingly, with the broad "shield?"

I appreciate the effort this will require. In order to comply to the maximum extent possible with the time constraints established by the Clean Air Act Amendments, I request that you act expeditiously to resolve this issue. Please let me know if your office requires any additional information in order to provide an opinion on this issue.

cc: William K. Reilly, Administrator, Environmental Protection Agency
C. Boyden Gray, Counsel to the President



LANGDON MARSH
EXECUTIVE DEPUTY COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233-0001

July 8, 1991

EPA Air Docket (LE-131)
Attention: Docket No. A-90-33
Room M-1500 Waterside Mall
401 M Street SW
Washington, DC 20460

JUL - 9 1991

Dear Sir/Madam:

The following are comments from the New York State Department of Environmental Conservation on the U. S. Environmental Protection Agency's (USEPA) proposed rule on operating permit programs under title V of the Clean Air Act Amendments of 1990. The new Part 70 of Chapter I of title 40 of the Code of Federal Regulations was proposed on May 10, 1991.

I would like to commend EPA staff for the tremendous job they have done over the past 18 months in preparing this comprehensive proposal. New York is pleased to have been a participant in the Federal-State internal working group that helped craft this important rule. It was encouraging that EPA staff were receptive to suggestions from states like New York which have many years of valuable experience with operating permit programs. Unfortunately, the final proposal is significantly different from earlier drafts and severely undermines and damages months of fine staff effort. We hope that the public participation process will result in changes to provisions in the final rule so as to strengthen the ability of states to achieve the goals of the Clean Air Act.

New York supports Congress' effort in enacting Title V to create a federal operating permit program that brings some degree of consistency and a leveling of the playing field, across the nation. Unfortunately, the last minute changes to the proposal by the Administration, if allowed to remain, will subvert Congress' desire for consistency and a level playing field. Each state, individually, will have to battle the regulated community when developing and implementing important provisions of the program such as those for minor permit amendments and operational flexibility. The federal government should not fail to resolve these difficult issues, and leave them for the states to contend

Minor Permit Amendments

New York questions whether the minor permit amendments provisions in Section 70.7(f) are consistent with the provisions of the Act. In fact, it is clear that the procedures for minor permit amendments in this proposal violate several provisions of the Act, most notably Section 502(b)(6). While this section calls for "streamlined" procedures, it also states that such procedures must include public notice and, among other things, an opportunity for judicial review. Using the provisions set forth in this proposal to incorporate minor permit amendments would ignore such requirements of the Act.

New York interprets proposed Section 70.7(f)(2)'s language obligating sources to give at least seven calendar days notice before making minor permit amendments to be an absolute minimum in terms of what states' programs should require. Seven calendar day notice for processing minor permit amendments is impossible to comply with in New York State. New York currently permits approximately 65,000 emission points. We anticipate that several hundred amendments will be requested annually. While not all of these will be subject to the proposed rule, a large percentage will be. Our system will be unable to thoroughly evaluate within seven days whether an application presents a significant change and determine whether it should be allowed as a minor permit amendment. New York intends, in implementing the federal permitting program, to extend the review period to 60 days.

New York now requires preconstruction permits for all sources that (1) propose to emit contaminants not previously emitted, (2) increase quantities of permitted contaminants, or (3) perform construction. Such changes have the potential to impact health and the environment and should be evaluated carefully. To allow emissions to increase above the permitted allowable, without formal approval, as this proposal would, is irresponsible and goes substantially beyond providing for the operational flexibility envisioned by Congress under Section 502(b)(10) of the Act.

Similarly, New York's ability to track incremental emission increases will make it impossible to maintain emissions inventories required by the SIP. If industries increase emissions at will, how can we plan for this in advance as part of the SIP development process? Enforcement actions against sources with permit "limits" that can vary on seven days notice will cause tremendous problems. Industry must not be allowed to increase emissions by, in effect, revising their own permits.

Last, EPA has not established a threshold for states to use in deciding what permits should be subjected to full review beyond the minor permit amendment allowance. This means each and every state will have to develop rules under intense pressure from industry to maintain high thresholds. This is unnecessary and

burdensome to the states and will result in a patchwork of inconsistent, competing and confusing requirements across the nation. New York suggests that in lieu of the approach proposed by EPA, a reasonable de minimus threshold for expedited review should be established.

Operational Flexibility and Permit Shield

New York is concerned that the language in Section 70.6(d) of the proposal is almost as far reaching in its disregard of needed regulatory strategies as the provisions for minor permit amendments. New York questions the legality of allowing revisions of Part 70 permits as "timely updates" under section 70.6(d)(3)(v). Section 502(b)(10) of the Act clearly states that operational flexibility should "allow changes within a permitted facility without requiring a permit revision." This section of the Act does not authorize sources to go beyond the operational flexibility provided in the permit, especially to the point of allowing permit revisions under the guise of timely updates.

Seven calendar days notice for proposed changes in the operation of a facility is unacceptable as an absolute. Section 70.6(d)(3)(ii) should be modified to allow a minimum of seven calendar days advance written notification. This will allow states the latitude to modify time frames for noticing that are more in keeping with their existing administrative procedures and traditional workload demands.

Another problem with operational flexibility under this proposal is that states would have to include every reasonably anticipated operating scenario in a permit. This could mean restating all applicable regulations in the permit. This would be a redundant effort and could make permits much longer and more confusing than necessary. Also, allowing sources to perform activities not included in or excluded by the permit is contrary to normal permitting practice and again goes beyond the operational flexibility intended by Congress under Section 502(b)(10) of the Act. In particular, sources should not be granted a permit shield for changes of this nature. Such an allowance goes beyond the mandate in Section 504(f) of the Act to provide a permit shield in certain circumstances.

It is highly probable that significant operating changes would occur at a facility that are not included in a permit as a reasonably anticipated operating scenario. Such changes might produce unacceptable health or environmental impacts, yet they might fall short of being modifications under Title I. It is unreasonable that such changes be allowed as they would be under Sections 70.6(d)(3)(ii) & (iv) with no provision for denial by the permitting authority. As a minimum, the phrase, ---"or that are not regulated or prohibited by the permit." should be deleted from Section 70.6(d)(3)(iv).

CALIF.

ATTACHMENT

**Specific Comments Regarding Proposed 40 CFR Part 70
Operating Permit Program**

**State of California
Air Resources Board**

July 9, 1991

IV-D-179

-8-

California Air Resources
Board

authority provided by section 502(b)(10) of the Act by attempting to allow changes not provided for within the confines of the permit. We recommend that section 70.6(d)(3)(ii) be modified to authorize only those changes expressly anticipated and allowed by the operating permit to be included in the operational flexibility provisions. Section 70.6(d)(3)(i) accomplishes this objective within statutory limits. This is consistent with how the operating permit program in California is currently structured, and consistent with section 502(b)(10) of the Act. In practice in California, if a change is authorized in the operating permit, there is no reason for the source operator to notify the permitting authority of the change. Our experience is that this structure has provided sufficient flexibility to source operators without adversely impacting our air quality control program.

3. The provisions of section 70.7(f), "minor permit amendments," are justified by EPA under section 502(b)(6) of the Act, which requires the minimum elements of EPA's regulations to include streamlined procedures for processing permit applications, renewals, and revisions along with specified due process safeguards for the public. These provisions are connected to the "operational flexibility" provisions of section 70.6(d)(2) for changes that would increase emissions above permitted levels, and would allow a stationary source operator to make an operational change that increases emissions above permit limits, when the operator provides a seven-calendar day notification period and submits the revised permit language under which the source proposes to operate as a minor permit amendment. The permitting authority would have only 7 days to review, and deny if necessary, the proposed change and minor permit amendment. If not denied in time, the operator may unilaterally implement the proposed change, and the permitting authority would be required pursuant to section 70.7(f)(3) to revise the permit accordingly within 60 days of the notification.

The proposed provision would essentially allow stationary source operators to rewrite their own permit limits or operational standards above or beyond what the permitting authority has required and does not appear to be legally founded. Emissions could be allowed to increase substantially without triggering any of the definitions of "modification" under any provision of Title I and without violating any of the provisions of the Act. The laxity of this provision is inconsistent with the overall need to maintain Reasonable Further Progress in attaining the National Ambient Air Quality Standards.

First, this provision of the rule violates section 502(b)(6) of the Act which requires the procedures for expeditious review of permit actions to include "public notice, including offering an opportunity for public comment and a hearing" and "an opportunity for judicial review". These requirements are excluded from the minor permit amendment process proposed by EPA. Second, the "minor permit amendments" violate section 505(a)(2) of the Act, which requires the permit authority to provide an opportunity for affected states to comment on the terms and conditions of the permit. Third, the minor permit amendment process violates section 505(a)(1)(B) of the Act, which requires the permit

-9-

CARB (cont)

authority to transmit every proposed permit to EPA for a 45 day review period prior to its issuance. The proposed regulation provides no review period and opportunity to object. Fourth, the minor permit amendments proposed violates the operational flexibility provisions of section 505(b)(10) of the Act by going outside the parameters of the permit to derive the flexibility, as discussed above.

The districts could encourage additional operational flexibility as contemplated by section 505(b)(10) of the Act by methods such as specifically requesting stationary source operators to apply for all anticipated changes and to provide pertinent information when the permit is being processed. The overall permit program could include criteria which must be met and the process that would be used to make determinations regarding allowable changes. The districts could then process the application with that information, and issue permits in accordance with district rules.

Recommendation

In sum, the three sets of provisions discussed above go beyond the statutory authority provided in Title V to secure "operational flexibility" and violate numerous provisions of the Act. These provisions would not achieve the intended results, but would ultimately in practice decrease industry's operational flexibility. These provisions would also be detrimental to industry because the responsibility for determining the need for flexibility would shift from the source to the permit authority. We recommend that the EPA consider other ways to meet the objectives set forth in section 505(b)(10) that are consistent with the Act.

The "minor permit amendments" provisions set forth in sections 70.7(f) and 70.6(d)(2) are set forth in the proposed regulations as discretionary provisions to be applied at the option of the permitting authority. While California may elect not to utilize them in order to avoid adversely affecting our permit programs, an equity problem would still exist in that states which choose to implement such a process will be more attractive to new industry. Because of the inequity and the illegality of the provisions, we strongly recommend that EPA eliminate them from the final regulations.

B. Permit Shield

Section 504(f) of the Act allows a permit to provide that compliance with the permit shall be deemed compliance with other provisions of the Act if the permit includes such applicable provisions or if the permit agency determines that such other provisions do not apply to the permittee. Section 70.6(h) purports to implement this provision by tracking the language of the statute and specifying that a "Part 70 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield." However, in the preamble, the EPA indicates that it is considering how broadly the permit shield should be interpreted. Presently, the EPA favors a broad interpretation which would protect a stationary source from all requirements for a regulated pollutant if the permit addresses any one of those requirements. We oppose the broad interpretation of the

TEXAS

Texas Air Control Board Staff Comments
Proposed Rule; Operating Permit Program
Federal Register, May 10, 1991
Submitted to Docket No. A-90-33
July 8, 1991

The following comments should follow the preamble outline found on Page 21712 of the May 10, 1991 Federal Register which contains the proposed rule: Operating Permit Program authored by the Environmental Protection Agency (EPA) staff. We will paraphrase requests for comments from EPA and state the page and column where possible from the proposal. We will cross reference where possible and supply examples where it is not a burden. If a section or subsection is not mentioned, it can be assumed we have no comment at this time. Questions should be addressed to Denise Simmons, P.E., or Karen Olson, P.E., at (512) 451-5711, 12124 Park 35 Circle, Austin, Texas 78753.

Preamble

I. Background and Purpose (Page 21713)

Throughout this proposed rule, EPA states that the operating permit program³⁸ that is proposed is generally based on the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA).

While we applaud EPA's efforts to ensure consistency across media lines, we are concerned that the analogy has been taken too far! We strongly urge EPA to use their NPDES experience as a guide only and to consider the many differences between water and air. With water you have a limited number of sources and no fugitive emissions, which makes it easier to determine continuous compliance at the source. To illustrate the number of air emission sources and the size of some of the sites in Texas, we have included a list of the seven largest sources in the Houston area (attachment number 1). The Dow plant in Freeport has over 3,000 discrete air emission points and is located on 5,000 acres.

We have included a copy of a state new source review permit recently issued to American Airlines in Denton County, right outside of Fort Worth. The permit itself is over 160 pages; the application filled at least 6 standard storage boxes. The American Airlines permit was handled as a site permit specifically so we could get some experience with this approach in anticipation of the proposed rule referenced above. To review this application, more than six engineers

Texas Air Control Board Staff Comments
Proposed Rule; Operating Permit Program
Federal Register, May 10, 1991
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July 8, 1991

includes the worst case hourly and annual emissions scenarios. Additionally, insignificant process changes are allowed under our standard exemption list.

The statement referenced above should be qualified to prevent a source from creating or causing a condition of air pollution or violating a state or local law.

F. Permit Issuance and Review (Page 21718)

1. (5) Permit Shield and Reopenings

We do not plan to provide the 504(f) compliance shield. We do not agree that it will help stabilize the permit process and give greater certainty to the regulated community. We believe that when coupled with the proposed requirement that a permit must be reopened to include new or changed standards, a bureaucratic nightmare will be created for both the applicant and the permitting authority. We assume that the compliance shield implied from the statement above is not mandatory and that the optional shield discussed in 504(f) which reads "the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this Act" is the one intended in this discussion.

We recommend that the permit shield apply narrowly, only to those conditions specifically addressed in the permit. We believe that the broader interpretation would lead to many legal battles between the source and the permitting authority.

2. (6) Permit Revisions (Page 21720)

This section discusses EPA belief that the permit revision process under section 502(b)(6) is not precisely defined, leaving EPA with the authority to define the "revision" process in the rules. Three methods are discussed in the proposed rule: first, minor permit amendments; second, administrative amendments; and, third, permit modifications. Section 502(b)(6) states the following:

"(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when

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Federal Register, May 10, 1991
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July 8, 1991

applications are complete, for processing such applications, for public notice, including offering for an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in state court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." emphasis added.

Regarding the first proposal, minor permit amendments, we do not feel that the statute intended for there to be increases in emissions from a source without a complete permit review. According to Representative Waxman, this process would allow a source to increase its emissions, drop "work practice" requirements, or eliminate monitoring requirements. The process proposed does not provide public notice, opportunity for judicial review, or an opportunity for the EPA to block the amendment. In addition, the permitting authority must object within seven days or the amendment becomes part of the permit and is shielded from enforcement. 

It is difficult to understand how EPA can require the reopening of a permit to add citations of new standards or revisions that will lower emissions while allowing increases without any substantive review through the "minor permit amendment process!

We have discussed in our earlier comments and will again later that the type of operational flexibility proposed within the Title V permit program is provided in the Texas, through our EPA-approved NSR permit program. With minor changes to our program, we can provide the flexibility needed by industry, while ensuring that BACT is applied appropriately. After our review is complete we believe that the "administrative amendment," discussed as the second revision process in this section, provides an efficient bridge to update the Title V permit without reopening it.

If EPA does include the "minor amendment process" as part of a Title V permit program, several issues must be addressed. First, this process should be an option and

Texas Air Control Board Staff Comments
Proposed Rule; Operating Permit Program
Federal Register, May 10, 1991
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July 8, 1991

not a required program element to obtain EPA approval of a Title V program. Second, the review time should be at least 60 days. Third, a completeness procedure should be defined by this rule which provides the permitting authority a clear process to request additional information to review a permit application, renewal, reopening or any modification request before the final action clock begins. If the information is identified after the completeness determination is made, the permitting authority must have the ability to stop the clock or rescind the completeness determination. If these mechanisms are not provided, the permitting authority will be forced to object to all requests and not ever issue a completeness determination until a full review has been conducted. This will add months of review time and give the appearance that a permit is issued immediately once it is determined complete, the result will be skewed, irrelevant data.

The second class of revision proposed, administrative permit amendments, provide the bridge between the Title V permit and other federal and state regulations, such as the SIP, PSD and nonattainment area permits, and state NSR permit programs. We wholeheartedly support EPA's proposal to allow this as a mechanism to incorporate changes to a Title V permit that have been already reviewed and processed under NSR procedures approved in the SIP. We encourage EPA to include our proposal to use this mechanism as a bridge to keep the Title V permit up to date by incorporating SIP changes, state NSR changes, and any changes that result in a reduction of emissions from the permitted allowables that occur before the renewal date. If accepted, our proposal would eliminate the need for "minor permit amendments" and would limit reopenings to major increases of emissions and for "cause." We believe our proposal would significantly streamline the proposed rule, preserve the integrity of existing programs, and meet the objective of the Act to have a sources air pollution obligations in one comprehensive document.

The third class of permit revisions proposed is "permit modification." EPA proposes that modifications will have to be subject to the same procedures as the initial review. We would emphasize again that a completeness procedure and procedures to start and stop the final

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Comptroller General
of the United States

Washington, D.C. 20548

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STANDARD MAIL

B-243632

December 26, 1991

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

Dear Mr. Chairman:

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

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

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

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

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

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

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

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

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

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

³Section 502(a) provides, in part:

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

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

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

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

⁴Subsection 502(a)(10) (discussed below), however, provides that for a limited category of changes, those not involving increased emissions or Title I modifications, no revision is required, as long as advance written notification is furnished to EPA and the permitting authority at least 7 days prior to the changes being implemented. 42 U.S.C.A. § 7761a(b)(10).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*John Schmitt
H. Schmitt?*

9 State
AG's

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

Proposed Rule: Operating Permit
Program Promulgated Pursuant to
Title V of the Clean Air Act
Amendments of 1990

Docket No. A-90-33

JOINT COMMENTS OF

ROBERT ABRAMS
ATTORNEY GENERAL OF THE STATE OF NEW YORK

GRANT WOODS
ATTORNEY GENERAL OF THE STATE OF ARIZONA

WARREN PRICE, III
ATTORNEY GENERAL OF THE STATE OF HAWAII

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SCOTT HARSHBARGER
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July 8, 1991

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are subject to requirements promulgated under §§ 111 and 112. Of all the rulemakings required by the Amendments, this rulemaking is the most critical to effective enforcement of the Act, as indeed Congress intended it to be.

While we are encouraged that EPA has issued the proposed permit regulations in a time frame that can ensure implementation pursuant to the deadlines set forth in Title V of the Amendments, we are very concerned that some of the provisions, including changes that were proposed at the last minute, will seriously impair the States' ability to attain the national ambient air quality standards, maintain air pollution control programs and provide the public with adequate information about emissions from sources within our States. We specifically wish to comment on the following areas: minor permit amendments, operational flexibility, the permit shield, preemption of State authority, separation of State and federal operating permit requirements, compliance plans, compliance certifications and criminal penalties.

II. MINOR PERMIT AMENDMENTS

Pursuant to § 502(b)(10) of the Amendments, a State permitting program is required to contain provisions "... to allow changes within a permitted facility . . . without requiring a permit revision, if the changes are not modifications under any provision of Title I" (Provisions for Attainment and Maintenance

of National Ambient Air Quality Standards) and "do not exceed the emissions allowable under the permit" (emphasis added) so long as the permittee provides the Administrator and the permitting authority with at least seven days' written notice of the change.

Under the rubric of "operational flexibility," the proposed regulations establish a procedure for "minor permit amendments." (See, § 70.7[f].) Under § 70.7(f), a permittee desiring a change in operations may make the change merely by providing the permitting authority with seven days' notice. A change in operations could include an increase in emissions above the level allowed in the permit (§ 70.7[f][1][i] and [2][ii]; 56 Fed. Reg. 21720, 21746-21747). If the permitting authority does not make an objection within the seven-day period, the permittee may go forward with the change. Each permitting authority may determine the extent of the increase in emissions for such minor permit amendments, although the revision cannot be a Title I modification or violate any applicable requirement of the Act (§ 70.7[f]; 56 Fed. Reg. 21747). This proposal in essence allows the permittee to substantially rewrite its permit without notice to the public or other affected States, without opportunity for judicial review, without an opportunity for EPA to block the amendment by raising an objection and without sufficient time for the States to review changes that would increase rates of emissions. There is nothing, however, in the statutory language

4.

or legislative history that would support such authority for the permittee.

The States have many concerns regarding the minor permit amendment provisions. Our primary concern is that the proposal vastly expands the statutory provision for operational flexibility. Section 502(b)(10) of the Amendments expressly disallows a permittee to rewrite its permit, outside the permit revision process that provides for public notice and meaningful review by the permitting authority, to increase emissions. All increases in emissions have the potential to increase impacts on health and the environment and should be carefully evaluated. To allow the potential for increases in emissions above the limits allowed in the permit without public comment, meaningful review by the States or judicial review, is irresponsible and goes substantially beyond the operational flexibility envisioned by Congress in § 502(b)(10).

A second troubling concern is that seven days is insufficient to effect any meaningful review by the permitting authority. If the permitting authority does not object within the seven-day time period, the permittee's self-styled amendment becomes part of the permit. Thus, minor permit amendments would often occur by default and thereby be insulated from scrutiny not only by the public, but by the permitting authority as well. To add further insult to injury, the permittee would then receive

the benefit of the permit shield so that no enforcement action could be taken against a permittee that complies with its permit, as unilaterally amended by the permittee (See, 56 Fed. Reg. 21744 and our comments, infra, on the permit shield.)

Although EPA's proposal establishes seven days as a minimum notification period, given the experience in our States where we have well-established permit programs, seven days is clearly insufficient for many changes and would result in the amendment occurring by default. States that have no experience with a permit program may adopt the seven-day period, unaware of the pitfalls that it presents. We strongly urge the Agency to require the permitting authorities to adopt at least a 60-day notification period. We emphasize, however, that the proposed scope of minor permit amendments is entirely too broad. The Agency should expand the notification period but, as we stated above, the scope of allowable amendments should be narrowed from what the Agency has proposed. Minor permit amendments certainly should not include an increase in emissions over those specified in the permit. Extending the time period for review by the permitting authority, however, would only provide the permitting authority, and no one else, with the authority to preserve enforceability of the permit. This is contrary to the statutory provision that provides for judicial review by "any person" (see, § 502[b][6]).

Third, there is no opportunity for public comment on EPA's minor amendments that would allow increases in emissions. This is directly contrary to § 502(b)(6) and EPA's statement in this rulemaking that public comment is the "cornerstone" of a "well established procedural basis for permit issuance" (56 Fed. Reg. 21712).

Finally, and without conceding that increases in emissions are legally allowed under the Act as minor permit amendments, allowing each State to determine the extent of allowable emissions increases under the minor permit amendment provisions is burdensome to the States and would result in a patchwork of inconsistent, competing and confusing requirements across the nation. It will also create intense political battles within each State and unfairly promote competition among the States. Some States may attempt to lure much-needed business within their borders by allowing substantial increases in emissions under the minor permit amendment provisions. Congress intended to eliminate this kind of "pollution shopping" by promoting a level playing field in the Act. EPA should set the maximum de minimis emissions increases that qualify for minor permit amendments. If a State chooses to adopt more stringent requirements, as it is allowed to do under § 116 of the Act, that would be up to the individual State. At least EPA will not have triggered the competition by leaving the field of emissions increases wide open.



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

August 16, 1991

MEMORANDUM

FROM: E. Donald Elliott *ED Elliott*
Assistant Administrator and General Counsel

TO: William G. Rosenberg
Assistant Administrator for Air and Radiation

SUBJECT: Procedural Requirements for "Minor Permit Amendments"
Under Title V of the Clean Air Act Amendments of 1990

OFFICE OF
GENERAL COUNSEL

This responds to your request for a legal opinion from this office regarding the likelihood that a court would uphold section 70.7(f) of the permit regulations ("minor permit amendments") as proposed, 56 Fed. Reg. 21712, 21777-21778 (May 10, 1991).

A. Description of Proposed Sec. 70.7(f).

As written, proposed section 70.7(f) appears to authorize a source, without public notice, hearing, or EPA review, to make changes resulting in an increase in emissions above the emissions allowable under its permit, provided that the changes do not constitute modifications under Title I, merely upon providing 7 days notice to the permitting authority. It is not entirely clear from the proposal as written whether EPA intended 7 days notice to the permitting authority as merely a necessary requirement, or a necessary and sufficient requirement.¹ However, if the proposal is interpreted to allow changes to the emissions allowable under a permit based merely upon 7 days notice to the permitting authority, then in the opinion of this office, it is highly unlikely that a reviewing court would uphold the regulation upon judicial review.

B. Summary of Conclusions.

For reasons discussed in more detail below, this office believes that Congress has spoken directly to the question of the

¹ There is some dissonance between the text of the proposed regulation, which appears to sanction "minimum" state procedures that in effect allow modification of permits upon 7 days notice to the state without notice to the public or opportunity for comment or EPA review, and the preamble, which expresses uncertainty about what additional procedures may be required for an approvable "procedural system" for fast-track revisions and "solicits comment on what are the appropriate criteria for EPA to use in approving state procedures for revising permits." 56 Fed. Reg. at 21747, 2d col. (May 10, 1991).

procedures that are necessary with regard to changes in emissions allowable under a permit. See discussion of Secs. 502(b)(6) and (10) and 505, *infra*. However, even if the statutory scheme were deemed ambiguous for purposes of Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984), this office believes that it is highly unlikely that the courts would uphold as "reasonable" an interpretation of the statute that would authorize environmentally-significant changes to be made in emissions without appropriate opportunities for public notice and opportunities to participate.

As explained more fully below, it is a fundamental principle of administrative law, universally respected under the Clean Air Act, that the public is entitled to notice, opportunity for hearing, and opportunity to petition for EPA and judicial review, regarding changes to governmental regulations that may have a significant effect on the environment. As numerous commenters have pointed out, if the proposal is interpreted to allow changes merely upon 7 days notice, a series of sequential changes to a permit ("vertical stacking"), or the cumulative effect of changes to multiple permits in an area ("horizontal stacking"), can collectively result in effects on the environment that are undeniably significant. In addition, changes to permit conditions (such as monitoring requirements) which do not directly affect emissions may also be environmentally significant. Nor does the limitation of the "minor permits amendment" procedure to changes in emissions less than the levels for major modifications (up to 100 tons per year for some pollutants)² guarantee that effects on the environment from even a single change will be de minimis.

To be judged reasonable, procedures must be tailored to the nature of the circumstances and the interests at stake.³ There is a strong presumption in the law that notice and opportunity for hearing should ordinarily occur in advance of changes in regulations. This presumption can be overcome, if at all, only in narrowly defined circumstances in cases of demonstrated need.

The basis for our conclusion that, if the minor permits amendment proposal were interpreted to allow these changes to the emissions allowable under a permit based merely upon 7 days notice to the permitting authority, a court would not uphold the "minor permits amendment" as presently written without additional safeguards is explained more fully in what follows.

² See footnote 6, 56 Fed. Reg. at 21746-47.

³ See, e.g., Matthews v. Eldridge, 424 U.S. 319 (1976).

C. General Requirement for Revisions:
Sections 502(a) and 502(b)(10).

Section 502(a) provides that a source may not operate "except in compliance with a permit," and that it is unlawful for "any person to violate any requirement of a permit" issued under Title V. Thus, unless otherwise provided in the Act, a source that seeks to operate in conflict with a permit requirement must seek a change to that permit. In accordance with this principle, Congress built into the statute detailed procedures for issuing permits. Congress also, in section 502(b)(10), outlined a limited exception to the requirement that changes in a permitted facility must be preceded by a revision to the permit. Unless a change falls within the embrace of section 502(b)(10), there is nothing in the Act that allows it to occur without undergoing the revision process.

D. The Revision Process: Sections 505 and 502(b)(6).

Section 505 deals with EPA, contiguous state, and public review of permit actions. Section 505(a)(1) provides that:

each permitting authority

(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this Act,

(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit.

(emphasis added).

Section 505(a)(2) provides for notice to contiguous states, and an opportunity for those states to submit written recommendations regarding the issuance of a permit. Section 505(b) requires the Administrator to object to the issuance of any permit that fails to comply with the Act, and establishes procedures for the permitting authority to respond to such objections. That section further provides a right of citizens to petition the Administrator to object to a permit, based on "objections to the permit that were raised during the public comment period provided by the permitting agency" Section 505(b) sets forth detailed procedures for the Administrator to follow in acting on such a petition, and any denial of a petition is subject to judicial review.

Section 505(a)(1)(A) explicitly extends a state's obligation to transmit permit applications to the Administrator to

applications for "permit modifications". This requirement is expressly linked to the Administrator's ability "to effectively review" such applications. Thus we conclude that Congress intended EPA to review and have an opportunity to veto proposed permit modifications.⁴ (The terms "modification" and "revision" are used interchangeably throughout the statute. Compare, for example, sections 502(b)(5)(D), 502(b)(6), 502(b)(9), 505(a), and 505(e)). Section 505(a)(2) requires that a contiguous state receive notice and an opportunity to comment on "each permit application or proposed permit forwarded to the Administrator under" subsection 505(a)(1). Since section 505(a)(1) requires states to furnish the Administrator, for purposes of review, with applications for permit modifications and proposed permit modifications, the obligation to notify contiguous states also applies to permit modifications.

Similarly, the public's right to comment and opportunity for a hearing must apply to permit modification procedures. Section 505(b)(2), which provides to any person the right to petition the Administrator to veto a permit, is premised on the expectation that an opportunity for comment had been provided previously by the permitting agency. Section 505(b)(2) provides:

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objections arose after such period).

Applying the requirement of public notice and hearing to the revision process is also supported by section 502(b)(6). This section requires, as a minimum element of a permit program:

Adequate, streamlined, and reasonable procedures

(1) for expeditiously determining when applications are complete,

⁴ In the Nickles-Heflin-Dole amendment, offered in the Senate on March 26, 1990, Congress was asked to broaden opportunities for permit changes without EPA review. In particular, issuance of "codifying" permits (presumably including "codifying" permit revisions) was, subject to EPA objection, exempt from EPA review. Section 354(a)(1)(B) of Nickles-Heflin-Dole, 136 Cong. Rec. S3213 (daily ed. March 26, 1990). In section 502(b)(10), Congress specifically limited permit changes without EPA review to those that "do not exceed emissions allowable under the permit."

- (2) for processing such applications,
- (3) for public notice, including offering an opportunity for public comment and a hearing, and
- (4) for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

Requirement (3) must be read in light of requirement (4), which expressly provides a right to judicial review in state court of permit revisions. Since this right is extended to "any person who participated in the public comment process," Congress clearly intended that there be a public comment process for permit revisions.

Section 502(b)(6) further provides that state procedures for processing and reviewing permit revisions be "adequate" and "reasonable" as well as streamlined. Given the structure of the Act, the standards of adequacy and reasonableness must be commensurate with the high degree of procedural safeguards for initial permit issuance. Thus there exists a structural as well as a textual basis for applying to permit revisions the requirements of state, EPA, and public review. To assure the integrity and stability of the permit system, Congress established well-supervised procedures for initial permit issuance. Congress would not have done so if subsequent changes to the exact same provisions, made virtually at will, could rewrite the permit. The Congressional mandate to enlist the state, EPA, and the public in ensuring a proper initial permit would be frustrated if the source could subsequently, without supervision, change it.

E. Caselaw in Related Areas.

Our interpretation of the statute as requiring notice and appropriate opportunities for public participation, including EPA veto and judicial review, for all environmentally-significant changes is consistent not only with the language and structure of the statute, but also with the caselaw in related areas.⁵ Under

⁵ It is a basic tenet of administrative law that courts read into ambiguous statutes opportunities for public notice, opportunity to comment and judicial review. See, e.g. PIERCE, SHAPIRO & VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 6.4 at 281 n.100 (1985); Kansas City, MO. v. HUD, 923 F.2d 188, 191-93 (D.C. Cir. 1991) (suggesting that ambiguous statute should be read to

the Clean Air Act, Congress and the courts have consistently recognized the public's right to notice and an opportunity to comment before the level of allowable emissions was increased in ways that are potentially environmentally significant. See, e.g., Section 307(d); Buckeye Power v. EPA, 481 F.2d 162, 170-71 (6th Cir. 1973). Moreover, EPA has interpreted the permitting provisions of the Clean Water Act, which are generally similar to those under the Clean Air Act, as requiring public notice and an opportunity to participate in modifications as well as initial issuance.⁶

F. Conclusion.

For all of these reasons, we conclude that without additional safeguards appropriate to the circumstances, the "minor permits amendment" provisions in proposed Sec. 70.7(f), if interpreted to allow changes to the emissions allowable under a permit based merely upon 7 days notice to the permitting authority, are unlikely to be upheld in court.

require notice and hearing before revocation of UDAG agreement).

⁶ In a ruling issued under the Clean Water Act, this Office has previously concluded that the phrase "opportunity for public hearing" applies to modifications even when the statute explicitly applies that requirement only to actions that "issue a permit." See Costle v. Pacific Legal Foundation, 445 U.S. 198, 209 n. 9 (1980). In its opinion in the same matter, the Supreme Court concluded that on the particular facts presented, the Agency had adequately met its statutory obligation to provide an opportunity for public hearing on a permit modification that extended the permit's expiration date. Id. at 213-216. The Court's willingness to read the hearing requirement as applying to modifications when the statute applied it only to "permit issuance" strongly points toward the conclusion that the courts would apply the requirement to modifications when a natural reading of the text would support such a reading.

This conclusion is consistent with the general presumption in the law that appropriate procedures for public participation apply to modifications as well as to initial issuance of a permit. See, e.g., 4 STEIN et al., ADMINISTRATIVE LAW Sec. 41.06. Similarly, constitutional due process analysis turns on the nature of the interests affected, not on whether initial issuance or subsequent modification is involved. See, e.g., Matthews v. Eldridge, 424 U.S. 319 (1976).

(4) **PERMITTING AUTHORITY.**—The term “permitting authority” means the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this title.

[42 U.S.C. 7661]

SEC. 502. PERMIT PROGRAMS.

(a) **VIOLATIONS.**—After the effective date of any permit program approved or promulgated under this title, it shall be unlawful for any person to violate any requirement of a permit issued under this title, or to operate an affected source (as provided in title IV), a major source, any other source (including an area source) subject to standards or regulations under section 111 or 112, any other source required to have a permit under parts C or D of title I, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this title. (Nothing in this subsection shall be construed to alter the applicable requirements of this Act that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this Act, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

(b) **REGULATIONS.**—The Administrator shall promulgate within 12 months after the date of the enactment of the Clean Air Act Amendments of 1990 regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

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

(2) Monitoring and reporting requirements.

(3)(A) A requirement under State or local law or interstate compact that the owner or operator of all sources subject to the requirement to obtain a permit under this title pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this title, including section 507, including the reasonable costs of—

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

(ii) if the owner or operator receives a permit for such source, whether before or after the date of the enactment of the Clean Air Act Amendments of 1990, implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

- (iii) emissions and ambient monitoring,
- (iv) preparing generally applicable regulations, or guidance,
- (v) modeling, analyses, and demonstrations, and
- (vi) preparing inventories and tracking emissions.

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

(i) The Administrator shall not approve a program as meeting the requirements of this paragraph unless the State demonstrates that, except as otherwise provided in subparagraphs (ii) through (v) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than \$25 per ton of each regulated pollutant, or such other amount as the Administrator may determine adequately reflects the reasonable costs of the permit program.

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

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

(iv) The requirements of clause (i) shall not apply if the permitting authority demonstrates that collecting an amount less than the amount specified under clause (i) will meet the requirements of subparagraph (A).

(v) The fee calculated under clause (i) shall be increased (consistent with the need to cover the reasonable costs authorized by subparagraph (A)) in each year beginning after the year of the enactment of the Clean Air Act Amendments of 1990 by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989. For purposes of this clause—

(I) the Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year, and

(II) the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1989 shall be used.

(C)(i) If the Administrator determines, under subsection (d), that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under subsection (i), that the permitting authority is not adequately administering or enforcing

Document Originally
Attached to
Following Page

4/14/92

Please file for Cam Findlay -

Curry



U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

The Administrator

400 Seventh Street, S.W.
Washington, D.C. 20590

February 20, 1992

The President
The White House
Washington, D.C. 20500

Dear President Bush:

Charlene and I deeply appreciate your kind words to us at last night's Black History Month White House recognition ceremony. Your staff could not have chosen two better people than Shirley Caesar and Maya Angelou to highlight this moving and meaningful tribute to all Americans and their history. Thank you for inviting us.

As you mentioned, the Administration has enjoyed great success in traffic safety. Seat belt use is up sharply. The number of lives lost and serious injuries caused by motor vehicle accidents is significantly down. Clearly our motor vehicles and highways are much safer today than they were three years ago.

On a related subject, I greatly appreciate the confidence shown by you and Sam Skinner in nominating me to be the Administrator of the FAA. I will not let you down.



While I would not have brought it up last night, Charlene and I genuinely appreciated your saying that, "It is time to put aside this little controversy and get on with a speedy confirmation." From our standpoint, that cannot happen soon enough.

Again, thank you for your kind words and support. You can count on me to pull together as a team with Sam Skinner and Andy Card to help make the coming years of the Bush Administration the very best that they possibly can be. You deserve no less.

Sincerely,

A handwritten signature in black ink, appearing to read "Jerry Ralph Curry", with a large, stylized flourish at the end.

Jerry Ralph Curry

cc:

Samuel K. Skinner

Andrew H. Card



U.S. Department
of Transportation

National Highway
Traffic Safety
Administration

Memorandum

Subject: Aviation Press

Date: February 19, 1992

From: Jerry Ralph Curry *JRC*
Administrator

Reply to
Attn. of:

To: Marion Blakey
Assistant Secretary for Public Affairs

Hardly a day passes without the aviation trade press offering as fact some off-the-record opinion on the status of my nomination to head the Federal Aviation Administration. Some such rumor mongering is to be expected and most of it is relatively harmless.

But the charge made in the February 18 issue of Aviation Daily that I have been lobbying the Hill on my own behalf is a contemptible lie that impinges my personal integrity and reflects poorly on the Administration's handling of a Presidential appointment.

The Department normally moves swiftly and forcefully to correct any news reports that are wrong. I expect the same standard to apply to this dead-wrong story and any others that pertain to my nomination. Indeed, the rebuttal should be especially vigorous when a colleague is being lynched by the news media.

Since you have been managing the press relations aspect of my nomination, I request that you take immediate action, and in writing, to insist that Aviation Daily print an unequivocal retraction.

This allegation must not stand.





U.S. Department
of Transportation
National Highway
Traffic Safety
Administration

Administrator

400 Seventh Street, S.W.
Washington, D.C. 20590

January 29, 1992

The Honorable John C. Danforth
United States Senate
Washington, D.C. 20510

Dear Senator Danforth:

On January 22, I took to lunch Alan Maness, one of your staff. The purpose was to review the productiveness of the 2-1/2 year relationship between your staff and NHTSA during my tenure as Administrator. It was also to suggest ways, after my departure, to continue the significant progress that has been made in saving lives and preventing serious injuries.

Finally it was to point out that Alan is perceived negatively by many of NHTSA'S careerists and to suggest ways to him that he might use to overcome these misperceptions. Other subjects were discussed, but did not directly relate to you or him.

I am told by Jim Busey that this private conversation was later made a written matter of record by Alan Maness and Walter McCormick, and that the contents of the memo are now being leaked by them around town. Busey alleges that during the luncheon I showed personal contempt for your safety concerns and for Alan himself.

The purpose of this letter is to set the record straight and to put the comments I made to Alan at the luncheon into their proper context. I wanted to do this face to face with you, but that has not been possible.

My secretary has been unable to schedule an appointment through Crystal Radcliff for me to meet with you. She phoned Crystal twice on Monday and once yesterday, to no avail. She believes that Crystal is deliberately putting her off.

Yesterday this was confirmed when Jim Busey told me that he and Walter McCormick had discussed over the phone the unsuccessful efforts of my secretary to schedule a meeting between you and me. Since it seems unlikely that I will be permitted to meet with you personally any time soon, this letter will have to suffice.

Generally speaking, Alan and my conclusions regarding progress made at NHTSA was that it has moved from the "comic book agency" you once dubbed it, to where it is now considered a respected and productive player in saving lives on our nation's highways.

Today motor vehicles are safer than they were 3 years ago. Seat belt use is up sharply. The numbers of lives lost and serious injuries caused by motor vehicle accidents is significantly down. And the promises I made to you and your Committee during confirmation hearings have been kept.

We also generally agreed that in the future there were two items that would contribute more to saving lives than any others: the rollover rulemaking that is now in progress and antilock brakes for heavy trucks which is due in 1992.

Personally I find it distasteful to put the following in writing, but since I have been informed that Walter and Alan have already done so, my reticence has to be set aside. Yet I know of nothing positive that can be gained by this exercise or by the McCormick/Maness memo.

I mentioned to Alan that there were some negative perceptions in NHTSA concerning him. He said that he wanted to hear them. Essentially I told him that he was personally perceived as being someone who was willingly manipulated by the Naderite groupies, a man who was not a friend of the Agency's efforts to promote safety and someone who could not be trusted. Alan asked if this was also my perception and I answered that it was not.

I then suggested ways that these misperceptions could be changed. For example, I recommended that he enter into a telephone dialogue with Barry Felrice, the Associate Administrator for Rulemaking. I suggested that working closely with Barry on the future of the rollover and heavy truck antilock brake efforts would show interest and concern by him and your staff.

I also pointed out that during 1991, Alan was not perceived as offering support to the Agency's efforts to increase national seat belt use, and that I thought this was a mistake. The Agency is persuaded that more lives can be saved through substantially increasing seat belt use than through motor vehicle regulation.

Then I recommended to him that he phone Mike Brownlee, the Associate Administrator for Traffic Safety Programs, and ask if there was any way he, you or your staff could be helpful to NHTSA in 1992, in its efforts to raise national seat belt use from the current 59 percent to above 70 percent.

I suggested that these were representative kinds of things that he could do to demonstrate concern, to attempt to change the Agency's perceptions of him, and to foster goodwill between NHTSA and your staff.

Now if I am to be faulted, let it be for trying to be helpful and for suggesting ways to improve relations between your staff and NHTSA. Let it also be for aggressively advancing the cause of safety. Then, too, it is possible to fault me for being open and candid and for assuming that those I talk to prefer to be told the truth as I see it even though it may hurt a little, and even though occasionally I may be wrong.

Senator Danforth, because I have such strong respect for you, your personal integrity, and admire so much the way you shepherded the Clarence Thomas Supreme Court nomination, I often publicly and privately state how much I value your leadership, safety recommendations, and personal support. Clearly NHTSA has worked hard in the recent past to make many of the items in your suggested safety program a reality as the enclosure shows. And in this case, actions do speak louder than words.

Hopefully, I will be allowed to devote the same energies and management skills to the FAA that I have dedicated to NHTSA. If not, for me it will be a disappointment but I would also like to believe, whether it is justified or not, that it will be a loss for the American taxpayer. In my dedication to public service, I have willingly suffered a financial loss, since for each year I continue to serve in Government, I forfeit \$60,000 in military retirement pay. Any by law that cannot be recouped.

In closing, it has been a pleasure working with you to save lives and prevent injuries on our nation's highways. Hopefully our productive relationship can continue.

Sincerely,



Jerry Ralph Curry

Enclosure

cc: Senator John Warner

COMMENT ON CURRY NOMINATION AT CARD HEARING

2/7/92

Sen. Hollings: . . . Mr. Card, with respect to the president's nominee of FAA administrator: you folks get your act together. We were prepared to vote. I don't think it would pass the committee. From what I read of that nomination, you wouldn't want it to pass the committee. But don't come later and say you've been delayed, because we were ready to act one way or the other on it and, tactfully speaking, you folks straighten out whatever differences you have over there, and let's get a full-time individual up there quickly that you really want, and we'll be ready to move one way or another.



ALLPOINTS INTERNATIONAL, LTD.

BY HAND

January 10, 1992

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

First, I want to extend my sincere thanks for taking time out of your overwhelming schedule to autograph your picture from the Stan Scott affair for me.

I am an "Eagle" and, for many years, have belonged to numerous republican support groups; I therefore feel compelled to write this letter.

While I am not one to write many letters, as an African American who has supported you for eighteen years (copies of photos and newsletter enclosed), I would be shirking my responsibility if I did not share some of my thoughts and concerns with you.

Hopefully, you will stay with your nomination of General Curry as administrator of the FAA and, please, make sure that African American input is reflective in your campaign. You can win over the black community but your message must be carried by the right messengers.

Enclosed herein, you will find a copy of a press release from the **Council of 100**, whom you will recall, did such an outstanding job mustering support for Justice Clarence Thomas. This release expresses my sentiments, but I would also suggest to you that there are many detractors who are race-baiting and playing very dangerous games.

Faithfully yours,

James L. Denson, Ph.D

Enclosures

1250 Connecticut Ave. N.W., Suite 319
Washington, D.C. 20036
(202) 371-6767
FAX (202) 223-6779

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P.O. Box 20738
Chicago, IL 60620-0738
(312) 779-8666

PRESS RELEASE

**For Immediate Release
February 7, 1992**

**Contact: Faye Anderson
Council of 100
(202) 371-0572**

**BLACK REPUBLICAN GROUP SUPPORTS THE PRESIDENT'S
NOMINATION OF GENERAL JERRY CURRY FOR
ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION ("FAA")**

- - - - -

Washington, D.C. -- The Council of 100 (a national Black Republican organization) announced that it strongly supports the nomination of General Terry Curry as administrator of the Federal Aviation Administration (FAA). We believe that recent attacks on this outstanding Black American are both political and racial in nature--stemming from some "liberal" members of Congress--along with a few members of the administration who have been less than honest with the President.

Obviously, the Ralph Nader organizations' opposition to this appointment is clearly political and a slap at the administration. Everyone knows they are anti-Bush.

Senator Howard Metzenbaum, who also opposed the Clarence Thomas nomination is, once again, leading the charge to derail the nomination of a well deserving, well qualified Black American, to a high level position in our government.

We call on all Americans to let it be known that this arrogance will no longer be tolerated on Capitol Hill. This can be accomplished in the form of letters, telegrams, phone calls, etc., to both the White House and your Congressional Representative.

PRESS RELEASE

**For Immediate Release
February 7, 1992**

**Contact: Faye Anderson
Council of 100
(202) 371-0572**

**BLACK REPUBLICAN GROUP SUPPORTS THE PRESIDENT'S
NOMINATION OF GENERAL JERRY CURRY FOR
ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION ("FAA")**

- - - - -

Washington, D.C. -- The Council of 100 (a national Black Republican organization) announced that it strongly supports the nomination of General Terry Curry as administrator of the Federal Aviation Administration (FAA). We believe that recent attacks on this outstanding Black American are both political and racial in nature--stemming from some "liberal" members of Congress--along with a few members of the administration who have been less than honest with the President.

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Richmond Times-Dispatch

Saturday, December 28, 1991

Another Borking

Jerry Ralph Curry, the retired but certainly unretiring Army general from Virginia who heads the National Highway Traffic Safety Administration, unfortunately has encountered that strange Beltway production known as a Borking. In the elaborate shifting of personnel within the Department of Transportation connected to Sam Skinner's appointment as White House chief of staff, Mr. Curry is slated to move over to the Federal Aviation Administration. But Ralph Nader and Sen. Howard Metzenbaum, D-Ohio, have decided a Borking is in order, so Mr. Curry's nomination is on hold.

Mr. Curry, you see, is guilty of a grave offense. He has run NHTSA as it should be run, issuing new vehicle safety regulations only when he believes it necessary to do so, basing them on such unusual (for Washington, at least) influences as science and engineering. He has resisted efforts to impose new regulations which probably would result in more highway deaths, such as dramatically higher mileage standards and onboard fuel-vapor recovery tanks.

This has mightily displeased Ralph Nader and his associates, who act as if they would like the federal government to regulate the automobile out of existence. And so now a sleaze play, produced by Messrs. Nader and Metzenbaum, is set to open when Congress returns from what is appropriately called a "recess."

The ridiculous charge against Mr. Curry is that he has ignored safety concerns as NHTSA administrator. This is an interesting accusation to make against a fellow who has signed off on more new regulations than any administrator in the agency's history, but facts are not all that important in these matters. Mr. Curry stands accused, for example, of "rigging" crash tests which showed just what happens when a big car hits a small car head-on: The big car wins. If Mr. Curry "rigged" such tests, then Sir Isaac Newton was an outrageous fake.

But perhaps Mr. Curry's gravest offense was his refusal to order recalls of Jeep CJs and other sport utility vehicles which Mr. Nader's crowd and their supporters in the trial-lawyer industry, such as the Institute for Injury Reduction, claimed were defectively subject to roll-overs. Three successive NHTSA investigations, conducted under three different NHTSA administrators, led to the same conclusion: Reckless drivers have much more to do with roll-

overs than design. This decision by Mr. Curry cost the contingency-fee legal industry at least \$50 million to \$150 million, according to various estimates.

Mr. Nader and his associates claim that they did not have "an opportunity to be heard" during Mr. Curry's Nov. 25 confirmation hearing before the Senate Commerce Committee, of which Sen. Ernest Hollings, D-S.C., is chairman. At Mr. Nader's urging, Sen. Metzenbaum has placed a "hold" on the nomination. It strains credulity to believe that Mr. Nader did not have sufficient notice of the hearing, especially considering his closeness to committee member Sen. Richard Bryan, D-Nev. — a political water carrier for Naderites.

Sen. Metzenbaum's condition for getting out of the way: As the senator explained to us, he wants Mr. Curry to meet with him and Mr. Nader so that the latter's objections might be satisfied. Considering that Mr. Nader's associates recently likened Mr. Curry to Adolf Hitler in a letter to Sen. Bryan, that seems exceedingly unlikely. And who elected Ralph Nader anyway?

This sleaze play has nothing to do with Jerry Curry's commitment to safety or his competence. It has, we suspect, quite a bit to do with the fact that Jerry Curry is a black Republican who does not reside on Howard Metzenbaum's liberal plantation. Sen. Metzenbaum has acquired quite a record on this front: He was among the vocal opposition to William Lucas, President Bush's first nominee to head the Justice Department's civil rights division, and he led the opposition to Mr. Justice Clarence Thomas. Somehow the fact that Howard Metzenbaum is Borking yet another black conservative does not seem coincidental.

The White House is reluctant to bypass the Senate by exercising President Bush's authority to make a recess appointment because that might provoke a confrontation with certain members of Congress. Perhaps it has not occurred to the White House that if Mr. Bush's nominees continue to get Borked without any political penalty befalling Congress, Mr. Bush has little hope of carrying out his initiatives. Few appointees are going to be willing to go out on a limb for Mr. Bush, as Mr. Curry has at NHTSA by confronting the Naderites, if the White House's instinct at the first sign of political confrontation is to grab a saw.

Automotive News

DECEMBER 23, 1991

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\$70/YEAR; \$2/CO

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opinion

Automotive News

KEITH E. CRAIN

Publisher and Editorial Director

PETER BROWN

Editor

Curry deserves better

By any standard, Gen. Jerry Curry has done more to help make vehicles safer in the United States than did any previous administrator of the National Highway Traffic



KEITH
Crain

Safety Administration. And I'm talking about from the beginning — back before Doug Toms in 1970. Curry achieved this record in a shorter time than most have had, and with the least amount of rancor.

His reward? When he was nominated to become head of the Federal Aviation Administration, Sen.

Howard Metzenbaum tied up the appointment just because Ralph Nader asked him to. Jerry Curry even had the support of Sen. Richard Bryan, the Nevada Democrat and fuel-economy advocate. There were plenty of differences of opinion between those two. But at least Sen. Bryan distinguishes between differences of opinion and an individual's ability.

I am appalled that any senator would roll over and die just because Ralph Nader calls. The senator from Ohio wasn't the first one that Nader called; the others just wisely refused. Admitting that he will

knuckle under anytime Nader wants something should not endear Metzenbaum to anyone.

But more importantly, Curry has done a remarkable job in running a department that is difficult at best and that has to deal with unbelievably polarized constituencies. At NHTSA, it is impossible to make everyone happy at the same time. Curry has masterfully made everyone only equally unhappy at the same time, while making steady progress.

The winner has been the American consumer. Curry moved car safety standards off the dime. And finally, after too much debate, we are getting some real rules that will save lives in trucks, minivans and recreational vehicles. Up to now, they have not been regulated under the same safety rules as cars, and they should be.

With Curry's departure, NHTSA will lose a bureaucrat who has made a change for the good, and we will lose someone who has done a very good job for the industry. But the aviation industry and passengers will be well served with his appointment.

I hope that the elderly senator from Ohio will withdraw his unfounded objections and let the appointment process proceed. Curry deserves a quick confirmation.

And I hope that Ralph Nader starts to realize that these days, he appears to be more interested in fighting than in winning. And that is a real shame.

JENIGOT

2- 0-92 ; 3:20PM ;

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202 366 210614 2

NORMAN F. LENT

4TH DISTRICT, NEW YORK

COMMITTEE ON ENERGY
AND COMMERCE
RANKING REPUBLICANCOMMITTEE ON
MERCHANT MARINE AND
FISHERIESSUBCOMMITTEE ON
MERCHANT MARINE

Congress of the United States

House of Representatives

Washington, DC 20515

February 3, 1992

PLEASE ADDRESS REPLIES TO THE
WASHINGTON, DC, OFFICE
UNLESS OTHERWISE INDICATEDWASHINGTON OFFICE:
2408 RAYBURN HOUSE OFFICE BUILDING
TELEPHONE: (202) 225-7888DISTRICT OFFICES:
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BALDWIN, NY 11510
TELEPHONE: (516) 223-1818MASSAPEQUA PARK VILLAGE HALL
151 FRONT STREET
MASSAPEQUA PARK, NY 11762
TELEPHONE: (516) 795-4454

Vice President J. Danforth Quayle
Office of the Vice President
Old Executive Office Building
Washington, D.C. 20501

Dear Mr. Vice President,

I am writing to you in support of the nomination of General Jerry Curry as Administrator of the Federal Aviation Administration (FAA). As the Ranking Republican on the House Energy and Commerce Committee, it has been my pleasure to work with General Curry on matters regarding automobile and highway safety. Throughout our association, I have found General Curry to be fair, tough, and effective. I am confident that he would bring these qualities to the FAA.

During his tenure as Administrator of the National Highway Traffic Safety Administration (NHTSA), General Curry has compiled an impressive list of accomplishments. Largely as a result of his efforts, traffic fatalities have declined to an all time low of 2.0 deaths per 100 million miles travelled. Seat belt usage is now at 55%, compared to 45% just three years ago.

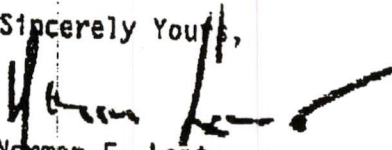
Additionally, General Curry has applied the full range of automobile safety standards to light trucks and vans, including requirements for head restraints, rear seat/lap/shoulder belts, automatic occupant protection, roof crush resistance, side impact protection, and center high-mounted stoplamps. All will be phased in during the 1990s.

It was my pleasure to work with General Curry on safety issues in the Intermodal Surface Transportation Efficiency Act of 1991. In addition to reauthorizing NHTSA for the first time since 1982, the Act contained provisions mandating inflatable restraints (airbags) in both cars and trucks, as well as antilock braking systems. Balancing the safety needs of the public with a desire to avoid overregulation of the automobile industry, General Curry worked with me and my staff to produce a bill that has been hailed by both safety experts and the automobile industry.

Page 2
Vice President Quayle
February 3, 1992

I am aware of opposition to General Curry's nomination, primarily from members of Ralph Nader's organization. I urge you to disregard their unfounded criticisms, and renew White House efforts to see that General Curry is confirmed. The travelling public deserves no less.

Sincerely Yours,


Norman F. Lent
Member of Congress

The Vice President of the
United States
Old Executive Office Building
17th. St. & Pennsylvania Avenue, N.W.
Washington, D.C. 20501

Phone : 202-456-1414
Fax : 202-456-7044

Dear Mr. Vice President:

Sincerely yours,

Andrew H. Card Jr.
Assistant to the President and
Deputy Chief of Staff
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Card:

Sincerely,

Phone: 202-456-1414
Fax: 202-456-1137

national black republican news

volume I
number 1
january 1974

Black Republicans Revitalized

Welcome to a new challenge—the national Black Republican newsletter. No doubt you have read all of the negative headlines about Black involvement in the Republican Party and very little about the good things (the ones that don't make headlines). One of the primary purposes of this newsletter is to highlight the more positive aspects of Black involvement in the GOP. From all indications, Black Republicans are alive, reasonably well and organizing throughout the country to insure their participation not only in the Party but in the total political arena.

A national effort to re-vitalize and expand the participation of Blacks in the Republican Party is now underway. This effort is spearheaded by Dr. Henry Lucas who is a member of the Executive Committee of the Republican National Committee and Arthur A. Fletcher who serves the Republican National Committee and its Chairman George Bush as Consultant/Coordinator for Minority Affairs. With the enthusiastic assistance of key Black Republicans around the country, the groundwork for this national effort was laid during regional meetings in Los Angeles, New York, Detroit, Kansas City, Kansas and Atlanta. Out of these meetings came the plan to set up a national organization of Black Republicans to coordinate efforts to increase Black participation in the Republican Party at all levels. It was agreed that this group, like other special interest groups of the Party (women, ethnics, etc.) would raise funds, set up a staff and work along with national, state and local organizations of the Republican National Committee as well as club associates and affiliates of the Republican Party to achieve goals which would be mutually agreeable to all parties involved. It was agreed that the name of this new organization be the National Black Republican Council (NBRC).

The first step toward achieving the goals visualized was the establishment of the National Black Republican Council Steering Committee to raise funds for the formal establishment of NBRC. Dr. Lucas is Chairman of the Steering Committee and Mayor Edward Bivens of Inkster, Michigan has agreed to serve as the National Finance Chairman of the NBRC

...spearheading efforts



Lucas



Fletcher

Steering Committee. Several Black Republicans have agreed to spread the word about the Council Steering Committee in respective states and regions. Among these are: Richard Allen and Ted Short of California; Calvin Johnson of Missouri; Robert Wright of Georgia; Andrew Pettress of Michigan; Leonard Briscoe and John Fonteno of Texas and others. In order to help spread the word and to get suggestions and comments from a cross-section of Republicans on the Council, letters were mailed by the new Black Political Division of the Republican National Committee to State Chairmen, Governors and Black Republicans around the country.

NOTE: Several persons have written or phoned in to inquire about these letters and ask why they have not received them. Although every effort has been made to get this correspondence about NBRC to as many people as possible, it should be pointed out that the Black Political Division at the RNC has only one full-time employee who serves as assistant to part-time consultant, Arthur A. Fletcher. This "staff" handles the variety of duties both professional and clerical necessary to keep such an office operative including appointments, speaking engagements, correspondence, phone calls and job referrals. It is sincerely hoped therefore that this newsletter will serve to bring those persons who were inadvertently "missed" up-to-date on Black Republican activities.

GOOD NEWS: According to NBRC National Finance Chairman, Mayor Edward Bivens, the drive to raise \$250,000 to take care of the above stated and other

(Continued on next page)

editorial

THE PRESS
AND BLACKS IN POLITICS

At no other time in history has the subject of politics been so predominate in the press.

Historically, the white press has all but ignored Black communities and Black people's involvement in politics and TODAY, despite all of its claims to grass roots and ethnic sensitivity, the white press continues to virtually ignore Blacks in politics and in other areas for that matter. The only exception being its coverage of stories of Blacks and crime, violence, riots, etc.

Take the recent meeting of Southern Republicans at the Regency Hyatt in Atlanta. RNC's Arthur A. Fletcher was there and in fact delivered a speech so strong that it prompted top Republicans to make some highly favorable comments. Some say that even the much-publicized speeches of Governor Reagan of California and former Governor Rockefeller of New York were somewhat anti-climactic after Fletcher's words. But if one were to read newspaper accounts of the meeting of 1,200 Republicans there seemed to be no Blacks among the group, let alone Blacks taking an active part in the two-day meeting. There was not even a hint in any stories read that Blacks were there when in fact close to 75 Blacks attended, including: Dr. Robert Wright and C.A. Scott of Georgia; Woodrow Paige of Florida and Larnie Horton of North Carolina, to name a few.

Television cameras also recorded few Blacks but that, too, is a common occurrence. Blacks who attended last year's National Urban League Conference in Washington grumbled that TV cameras left after well-known white congressmen, politicians and businessmen spoke and the Urban League is a predominantly Black organization.

Or a more recent example is testimony given in favor of the confirmation of Vice President Gerald Ford—the only coverage given were to those testimonies criticizing Ford's civil rights records. Not one line was given to the point of view given by Art Fletcher, who cited Ford's efforts in regard to passage of the controversial construction hiring and promotion plan, better known as the Philadelphia Plan.

These and other examples of press snobbery make a perfect case for touting the role of the Black press. Perhaps that role is best described in recent correspondence received by Dr. Henry Lucas from Carlton B. Goodlett, newly elected president of the predominantly Black, National Newspaper Publishers Association. Goodlett wrote, "We must recognize that in our racist country no Black person enjoys substantive power—we only have permissive power. Yet, no group has more potential power than the Black Press." He then raised a point that well illustrates the intent of

(Continued on next page)

BLACK REPUBLICANS REVITALIZED

(Continued from previous page)

problems is well underway. Mayor Bivens reports at newsletter press time that the states of Michigan, Indiana and California have already reached the \$5,000 goal set for each participating state. He also reports that other states are just short of their goals. Also, NBRC's official fund-raising reporting forms have been registered with the proper officials of the Senate, House and Government Accounting Office. In other words, the drive is in full-swing and anyone who has not had the opportunity to donate should contact Mayor Bivens at: 2121 Inkster Rd., Inkster, Michigan 48141. Phone (313) LO 5-4100.

Among the other plans of the National Black Republican Council is a major convention in early 1974. At that time, each State which reaches its dollar goal of \$5,000 will receive a NBRC Charter. Also, during this convention, an Organization Manual with the Constitution and Bylaws of the NBRC will be distributed. All conference participants will be expected to return to their respective States and regions and distribute information about the National Council as well as help organize State Councils. Once State Councils and local chapters are organized and permanent officers elected, a national Republican Party official or Council officer will install those who have been elected as state and local officials during special state conferences. Tentative draft proposals have been drawn up to illustrate the suggested staffing requirements and organizational structure of the Council along with a draft organizational chart. Interested persons may obtain Xerox copies of these drafts by writing the newsletter office at: 310 First St., SE, Washington, D.C. 20003. Also, suggestions and comments concerning the Council and newsletter are urgently needed by this office as soon as possible.

Plans for setting up NBRC offices in the national headquarters building of the Republican National Committee at the above address have been enthusiastically sanctioned and encouraged by RNC Chairman George Bush. The total and ultimate success of the National Black Republican Council, however, is dependent on the help of every man in America who envisions the growth and development of a two-party political system.

Any suggestions or questions that you have concerning the Council, newsletter or Black involvement in the Party may be directed to Arthur A. Fletcher or his assistant, Patricia A. Holt (who also serves as newsletter editor) at: (202) 484-6664, in Washington, D.C.

New Majority Workshops Held In Three Cities

They travelled from all corners of the country and came from many walks of life: Blacks, Europeans, Asians, Spanish-speaking and American Indians as well as senior citizens and youth. They travelled during the month of November (1973) first to St. Louis, then to Philadelphia and finally to San Francisco.

Most of these so-called "ethnics" came to hear about the Republican Party and what it had to offer them. Some came to tell of their experiences and share their own special problems and also the problems and concerns of their respective communities.

One of the primary goals of the "New Majority Workshops" sponsored by the Republican National Committee, according to RNC Chairman George Bush, was to "develop as many methods as possible for broadening the base of the Party and involving members of all heritage groups." Putting down the Party's traditional image of the rich and exclusive, Chairman Bush, who keynoted each two-day workshop said, the Party wants more ethnic candidates to put the lie to this myth of exclusiveness. It was the hope of RNC staff members who put together these workshops that they would strengthen and expand ethnic leadership in the Party. The following pictures serve to illustrate the interest in the workshops and the cross-section of Blacks and other minorities who attended.

Editorial

(Continued from previous page)

this editorial, "If the Black Press either ignores or decides to sponsor other Black political candidates more informed on the necessity of cooperative endeavor, what other vehicle would Black politicians use to communicate with the Black masses?" In his reply, Dr. Lucas agreed with Mr. Goodlett who publishes the *San Francisco Sun Reporter*, and wrote: "Black politicians certainly owe the Black Press of this country the courtesy and obligation of involving them and of keeping them informed of their deliberations." The conclusion of Dr. Lucas' letter best sums up this editorial:

"Without the Black Press, no Black politician in this country would have a forum from which to speak. It is my intent to cooperate and work with the Black Press whenever possible."

— editor.



St. Louis



Philadelphia



San Francisco

DENSON

ATTENTION!!

Do you have associates who need to receive the newsletter of the National Black Republican Council? If so, please send their names and addresses to: Patricia A. Holt, Editor, National Black Republican Newsletter, 310 First Street, SE, Washington, D.C. 20003.

people in politics

Governor Melvin Evans of the Virgin Islands was elected Chairman of the Southern Governors Conference—a historical first but more importantly, a growing indication that Blacks are entering the stream of American politics....Sen. Edward W. Brooke (R-Mass.) had some interesting comments on the subject of political power at the Black Caucus Dinner in September (where he received a standing ovation). "Americans respect and respond to political power—it influences public power at all levels...Political power and public office have been the keys which opened the doors of opportunity for various groups in America since the founding of our country," said Brooke. He also suggested that "We must form free-floating coalitions across racial lines...we should not try to go it alone when compelling alliances will serve our needs."....Samuel C. Jackson, former general assistant secretary for HUD and now a member of a prominent Washington, D.C. law firm, has been named general counsel for the National Business League headed by Berkeley G. Burrell and headquartered in Washington, D.C.

Jewell LaFontant, Deputy Solicitor General of the United States and Dr. Henry C. Lucas of the RNC's Executive Committee were among four new members named to the Advisory Council of the Joint Center for Political Studies....Dr. Helen G. Edmonds, Dean of North Carolina College Graduate School, has been appointed by President Nixon to serve on the National Advisory Council on Education Professions Development. Dr. Edmonds seconded Eisenhower's nomination in 1956 and worked in his campaign....Con-

gratulations to six new Black mayors brings the national total to 98 including Republicans...Many Republicans attended the recent reception for new Washington Bureau Urban League Director, Ronald H. Brown including: Hon. Casper Weinberger, HEW Secretary; Stanley Scott, White House; H.R. Crawford and Dr. Gloria Toote, and Arthur A. Fletcher, RNC....Lovelyn Evans of Chicago and Frances Fairbanks of Denver were among the delegates to the National Federation of Republican Women's Biennial Convention in Los Angeles in October. Speakers at the St. Louis "New Majority Workshop" sponsored by the RNC were: Dr. Vernon Rice of the New Breed Republicans in St. Louis and Robert Wright, a city councilman in Columbus, Georgia and Second Vice Chairman of the Republican Party of Georgia.

...Back in October, a group of key Black Republicans met with Vice President Gerald Ford, who was then House Minority Leader, seeking his help toward passage of Home Rule Legislation to give the District of Columbia residents the right of self-government. During the meeting, Ford indicated that he would like to see lines of communication opened up in the Party between Black and white members and said that he would speak to top GOP leadership about accepting invitations to local Black Republican activities...

Sen. Edward Brooke and Robert J. Brown, former special assistant to the President (now heads his own consulting firm in several major cities) are both members of the new Rule 29 Committee of the RNC. This committee, established in April, is working with the States and territories studying and reviewing the Rules adopted by the 1972 Republican National Convention with regard to the relationship between the RNC, Republican State Committee and other Republican organizations.

national black republican news

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Washington, D.C. 20003
(202) 484-6664

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THE WHITE HOUSE
WASHINGTON

February 12, 1992

Dear Dr. Denson:

Thank you for your recent letter to President Bush commending the nomination of Jerry Ralph Curry as Administrator of the Federal Aviation Administration. Your comments will be included in General Curry's permanent personnel file.

Thank you again for taking the time to write and share your thoughts with us. We deeply appreciate your continued interest and support of this Administration.

Sincerely,

Constance Horner
Assistant to the President
and Director of Presidential Personnel

The Honorable James L. Denson
Allpoints International, Ltd.
1250 Connecticut Avenue, N.W.
Suite 319
Washington, D.C. 20036

DCF HAS SEEN

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 CLYDE C. HOLLOWAY, LOUISIANA
 FRED UPTON, MICHIGAN

U.S. House of Representatives
 Committee on Energy and Commerce
 Room 2125, Rayburn House Office Building
 Washington, DC 20515

February 4, 1992

JOHN S. ORLANDO, CHIEF OF STAFF
 JOHN M. CLOUGH, JR., STAFF DIRECTOR

Admiral James Busey
 Acting Secretary
 Department of Transportation
 400 Seventh Street, S.W.
 Washington, D.C. 20590

Dear Admiral Busey:

Recently our Committee received copies of correspondence and testimony about the disposal by the National Highway Traffic Safety Administration (NHTSA) of several research vehicles acquired in the 1970's. The correspondence was critical of NHTSA.

Enclosed is an exchange of correspondence with the Department's Inspector General (IG), Ms. A. Mary Sterling, which indicates that NHTSA's Administrator, General Jerry R. Curry, acted properly and in accordance with the law in disposing of these research vehicles. As noted by the IG, the Smithsonian Institution did not want them and NHTSA could not keep them "indefinitely." I commend NHTSA and its Administrator.

Incidentally, I note that General Curry has been nominated to be the Administrator of the Federal Aviation Administration. In light of his administrative successes at NHTSA in enforcing the law effectively, fairly and reasonably and in improving the morale of NHTSA's fine and capable personnel, I believe he is a wise choice for the FAA Administrator. I am sure you fully agree.

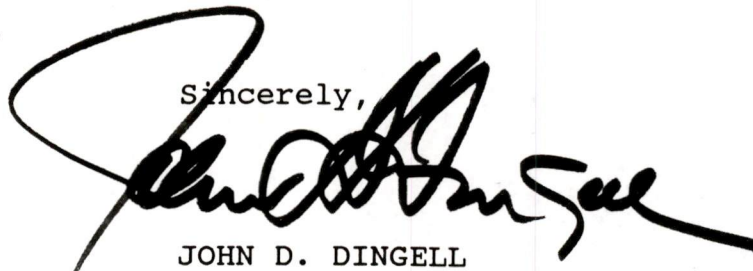
I am concerned, however, that NHTSA may not have an Administrator for many months. That would not be helpful in light of the new provisions of law enacted as part of the Intermodal Surface Transportation Efficiency Act of 1991. I am also concerned that General Curry's successor be a person who is just as effective, fair and reasonable as he is. As you know,

Admiral James Busey
Page 2

our Subcommittees on Oversight and Investigations and Transportation and Hazardous Materials maintain a close watch over NHTSA and its activities. Please keep me advised.

With best wishes.

Sincerely,



JOHN D. DINGELL
CHAIRMAN

Enclosure

cc: The Honorable Norman F. Lent, Ranking Minority Member
Committee on Energy and Commerce

The Honorable Ernest F. Hollings, Chairman
Senate Committee on Commerce, Science, and Transportation

The Honorable John C. Danforth, Ranking Minority Member
Senate Committee on Commerce, Science, and Transportation

The Honorable Samuel K. Skinner, Chief of Staff
Executive Office of the President

Ms. A. Mary Sterling, Inspector General
Department of Transportation

The Honorable Jerry R. Curry, Administrator
National Highway Traffic Safety Administration



U.S. Department of
Transportation

Office of the Secretary
of Transportation

1992 JAN 29 PM 12:08

The Inspector General

Office of Inspector General
Washington, D.C. 20590

JAN 29 1992

January 23, 1992

DF

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

Dear Mr. Chairman:

Thank you for your letter of January 7, 1992 concerning several inquiries regarding the Audit of the Acquisition, Use, and Disposal of Test Vehicles, National Highway Traffic Safety Administration, Report No. R5-NH-1-086, dated March 13, 1991. Enclosed is a response paper addressing each of your specific concerns and questions.

If you have additional questions, please contact me at 366-1959. I will be happy to respond to any further concerns.

Sincerely,

A. Mary Sterling
Inspector General

Enclosure

RESPONSE TO QUESTIONS AND CONCERNS

QUESTION 1.

I request that you review the actions taken since your final report and advise if all of the actions promised are completed and adequate and are being followed.

ANSWER

National Highway Traffic Safety Administration (NHTSA) has completed all actions promised. It revised Order 440-4, Control of Government-Owned/Contractor-Held Property and issued a change to Order 440-1, Management and Control of Nonexpendable Personal Property. Since some of the corrective actions have only recently been implemented, routine secondary followup will determine the adequacy or effectiveness of actions taken.

QUESTION 2. What steps have been taken to preclude use of vehicles for purposes not related to the purpose for which they were acquired and to ensure that vehicle disposal actions are conducted in a timely manner?

ANSWER

A procedure has been established which requires written justification and documentation for use of vehicles for other than testing purposes. Additionally, a procedure has been established to maintain written justifications for retention of test vehicles after test completion and test report acceptance. The justification shall identify specific retention needs and anticipated disposal date.

QUESTION 3.

Please identify the "problem contractor" and the problems causing this comment.

ANSWER

The problem contractor was Mobility Systems and Equipment Co., Los Angeles, California. The contractor was considered a problem by some NHTSA officials because it did not provide contractually required documentation (such as, original purchase orders, manufacturers' invoices, and dealers' invoices) to support the purchase of six vehicles

for the 1986 New Car Assessment Program (NCAP). The lack of documentation precluded NHTSA from timely disposal of the six vehicles, thus, reducing market value and increasing storage costs. NHTSA officials assured us that NHTSA no longer pays for NCAP vehicles until all paperwork is received from the vendor.

QUESTION 4.

Please explain the rules and requirements for disposal of vehicles after they have outlived their usefulness for NHTSA purposes. What disposal alternatives exist? To what extent are NHTSA vehicles capable of disposal except for scrap?

ANSWER

NHTSA is authorized to procure vehicles annually as part of its responsibility for vehicle safety compliance, standards, and research. Once NHTSA identifies vehicles which have outlived their intended purpose, paperwork is initiated to begin the disposal process prescribed by the Federal Property Management Regulations. The Code of Federal Regulations, 41 CFR Parts 101-43 through 46 cover the disposal of personal property such as vehicles. These regulations require the agency to transfer the property to General Services Administration (GSA) for sale using Standard Form 126, Report of Personal Property For Sale, which indicates the vehicle condition (repairable for highway use or not repairable for highway use - sell as salvage/scrap). The GSA acts as the single sales agency of the Government in the sale of personal property under the control of Federal agencies. NHTSA has not been provided, by Congress, any general exemptions from the Federal disposal process. The majority of NHTSA vehicles have undergone destructive testing and, therefore, are reported to and sold by GSA as salvage or scrap.

QUESTION 5.

Were all these RSVs subject to these rules and requirements? Please explain when and how each of these vehicles were last "used in public service announcements, at public conferences, and in public demonstrations"? Were all of them experimental vehicles?

ANSWER

All test vehicles discussed in our audit report including the seven experimental vehicles were subject to the same Federal Property Management Regulations for disposal. NHTSA explained that the

experimental vehicles were of negligible value and NHTSA could not attest to the safety of the vehicles. Accordingly, NHTSA requested, and GSA authorized, the destruction of the seven RSVs to preclude any possible future effort to repair, title, and operate them on public highways. NHTSA did not retain records associated with when and how the experimental vehicles were last used in public service announcements, at public conferences, and in public demonstrations. However, they were able to identify that the Hightech RSV, manufactured by Minicars, was last displayed at the Experimental Safety Vehicle Conference, October 21 through 24, 1980 in Wolfsburg, Germany.

QUESTION 6.

Please explain the legal basis for this transfer, the reasons for it, and the status of these vehicles. What, if any, authority exists to retain these vehicles indefinitely if they are no longer needed for the purposes for which they were acquired?

ANSWER

Title and control of these vehicles was not given to the University of Virginia, School of Engineering and Applied Science, Department of Mechanical and Aerospace Engineering (University). Therefore, they were not effectively transferred to the University. NHTSA, however, did have a contractual arrangement with the University for research useful to motor vehicle safety. The vehicles were provided to the University for research following the same procedures that would be used to move vehicles between other NHTSA contractors. The vehicles were requested by Kennerly H. Diggs, Research Professor, Mechanical Engineering Department, University of Virginia. Mr. Diggs indicated the vehicles would be useful in conjunction with course work in automotive safety. There is no authority to keep vehicles indefinitely. Efficiency dictates that when property is no longer needed for the purposes for which acquired, and costs are associated with retention, action should be taken to dispose of the property. NHTSA made the determination that the RSVs were no longer needed. The vehicles were offered to, but rejected by, the Smithsonian Institution. Neither NHTSA nor the Department of Transportation are funded to create or maintain a museum. Therefore, NHTSA could not keep the vehicles indefinitely.



U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

Administrator

400 Seventh Street, S.W.
Washington, D.C. 20590

February 10, 1992

The Honorable James B. Busey
Acting Secretary of Transportation
400 Seventh Street, SW.
Washington, D.C. 20590

Dear Jim,

The purpose of this letter is to confirm in writing the hand of peace and reconciliation I once more extended to you Thursday morning, February 6, 1992.

The differences between us, that are now unfortunately public, are neither unusual nor insurmountable. In the past our relationship has been professionally based on performance and contribution to the Department of Transportation as a whole, not on personalities. There is no reason why that can't continue in the future.

As you know, this is a Presidential election year and those who oppose President Bush thrive on internal conflicts within his Administration. If we are unable to reconcile our differences, it presents them opportunities to fan the flames.

In closing, for a final time I offer you the hand of peace and reconciliation. Let us today put our differences behind us and pull together as a team to help make the next years of the Bush Administration the best they can possibly be.

Sincerely,

Jerry Ralph Curry

Enclosure

cc:

Andy Card
William Kristol
Sam Skinner ✓
Bob Teeter



U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

Memorandum

Subject: Conversation with Alan Maness

Date: January 29, 1992

From: Jerry Ralph Curry *JRC*
Administrator

Reply to
Attn. of:

To: Memorandum for the Record

On January 22 I took to lunch Alan Maness, one of Senator Danforth's staff. The purpose was to review the results of my 2-1/2 year tenure as Administrator. It was also to suggest ways, after my departure, to continue the significant progress that has been made in saving lives and preventing serious injuries.

Finally, it was to point out that Alan is perceived negatively by many of NHTSA's careerists and to suggest ways to him that he might use to overcome these misperceptions.

I am told that this private luncheon conversation was made into a written memo by Senator Danforth's staff. The contents of this memo were then shared with the White House, DOT, and others. In an ethical sense, it seems similar to recording a telephone conversation without the other party's knowing it is being recorded. The memo still has not been shared with me, even though it is being used as the excuse for my attempted lynching.

The purpose of this memo is to put the luncheon comments I made to Alan into their proper context. However, the requirement and need to do this are quite distasteful to me.

Generally speaking, Alan and my conclusions regarding progress made at NHTSA was that it has moved from the "comic book agency" Senator Danforth once dubbed it, to where it is now considered a respected and productive player in saving lives on our nation's highways.

Today motor vehicles are safer than they were 3 years ago. Seat belt use is up sharply. The numbers of lives lost and serious injuries caused by motor vehicle accidents is significantly down. And the promises I made to the Senate Commerce, Science and Transportation Committee at confirmation have been kept..

We also generally agreed that in the future there were two items that would contribute more to saving lives than any others: the rollover rulemaking that is now in progress and antilock brakes for heavy trucks which is due in 1992.



I mentioned to Alan that there were some negative perceptions in NHTSA concerning him. He said that he wanted to hear them. Essentially I told him that he was personally perceived as being someone who was willingly manipulated by the Naderite groupies, a man who was not a friend of the Agency's efforts to promote safety, and someone who could not be trusted. Alan asked if this was also my perception and I answered that it was not.

I then suggested ways that these misperceptions could be changed. For example, I recommended that he enter into a telephone dialogue with Barry Felrice, the Associate Administrator for Rulemaking. I suggested that he keep up to date on the future of the rollover and heavy truck antilock brake efforts.

I also pointed out that during 1991, Alan was not perceived as offering support to the Agency's efforts to increase national seat belt use, and that I thought this was a mistake. The Agency is persuaded that more lives can be saved through substantially increasing seat belt use than through motor vehicle regulation.

Then I recommended to him that he phone Mike Brownlee, the Associate Administrator for Traffic Safety Programs, and ask if there was any way he, Senator Danforth or his staff could be helpful to NHTSA in 1992, in its efforts to raise national seat belt use from the current 59 percent to above 70 percent.

I suggested that these were representative kinds of things that he could do to demonstrate concern, to attempt to change the Agency's perceptions of him, and to foster goodwill between NHTSA and Senator Danforth's staff.

No other substantive subjects were discussed. Sam Skinner, Senator Danforth who has been my strongest supporter in the Senate, and my confirmation hearing were only mentioned in passing.

This current uproar is unkind, unfair and has about it the distinct smell of horse manure.

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Following Page

Please file for Cam Findlay

VRA S

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

April 6, 1992

MEMORANDUM FOR CAM FINDLAY

VIA FAX

FROM: Michael Brownrigg *mb*
Executive Assistant

SUBJECT: Machine Tools Update

Cam -- we have traded phone calls. Here is the update.

Last week we broke an internal logjam that had held up negotiating the VRA extensions. We are now in a position to make counterproposals to Japan and Taiwan, and expect agreement on new VRAs in the next several weeks.

Japan: The Japanese are sending a mid-level MITI officer here this week to review the VRA numbers and phaseout. We expect to reach agreement in principle, if not with him, then with his superiors once he returns to Tokyo. Japan accounts for the lion's share of machine tools covered by the VRAs.

Taiwan: Until last week, we could not agree interagency on how to proceed, but that impasse is now broken. The Taiwanese have generally been more prickly about extending the VRAs, but recently they have expressed a greater desire to conclude an agreement. We will present our proposal shortly and await Taiwan's reaction.

Industry Reactions: USTR is consulting with the National Machine Tool Builders Association (NMTBA) today to review our new proposals before giving them to Japan and Taiwan. I understand from our negotiators that the NMTBA -- of which Cincinnati Millacron is an important member -- is generally supportive. I expect that, while NMTBA will not ease up on the Administration until new VRAs are actually in place, it is now more aware of and content with the course of VRA negotiations.

To: Sam Skinner (456-6797)
Chief of Staff to the President
From: Senator Al D'Amato
Re: Machine Tool - Voluntary Restraint Arrangement
Date: March 31, 1992

CAM
What is
the story
here?
§

I will be calling you today about the political implications for the President on the machine tool VRA negotiations with Taiwan and Japan. Undermining the VRA will mean a loss of jobs and a dangerous dependency on foreign suppliers for the basic building blocks of manufacturing.

The negotiations have failed because the interagency group charged with the responsibility for guiding them has allowed the interests of a single machine tool importer, HURCO, to impede the process.

In the next day or two, the NSC will present the President with the question: Should HURCO of Indianapolis, an importer of Taiwan machine tools, be granted special treatment in the VRA extension?

The Bush Administration should be operating in the interests of U.S. manufacturers and U.S. jobs, not in the interests of Taiwan and a single importer.

I believe that any decision to grant HURCO special treatment will result in total opposition from the U.S. industry (lost U.S. jobs) and to legislative action in Congress (on national security grounds).

In addition, I will add that the lobbying activities by representatives of HURCO have been called into question. Those lobbyists who are former USTR negotiators also represent the Taiwan machine tool industry. Their foreign agent registration indicates that they will receive a contingency fee of \$20,000 if the U.S. negotiations with Taiwan fail and if no unilateral limits are placed on the import of Taiwan machine tools. Under U.S. law, a contingency fee is illegal.

(A copy of my letter to the President is attached).

cc: Neck

ALFONSE D'AMATO
NEW YORK

United States Senate

WASHINGTON, DC 20510

March 31, 1992

The Honorable George H.W. Bush
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

You will soon be asked to determine the United States trade policy necessary to carry out your December 27, 1991 directive to extend the voluntary restraint arrangement for machine tools. This directive extended the VRA with Taiwan and Japan on national security grounds.

I urge you to continue your support of our domestic machine tool industry and its 70,000 workers nationwide. Any decision to grant special treatment to HURCO, an importer of Taiwan machine tools, will result in total opposition from the domestic industry and lead to legislative action in Congress.

Your decision means jobs not only to New Yorkers but to Americans across this great nation.

Warmest Regards,



Alfonse M. D'Amato
United States Senator

ROBERT W. KASTEN, JR.
WISCONSIN

United States Senate

WASHINGTON, DC 20510-4902

January 28, 1992

Mr. Samuel K. Skinner
Chief of Staff
Executive Office of the President
1600 Pennsylvania Avenue, N. W.
Washington, D. C. 20500

Dear Mr. Skinner: *Sam;*

The decision of the Administration to seek an extension of the machine tool Voluntary Restraint Agreements (VRAs) was an important step in ensuring national security and affirming the industry's importance to the future of this nation. As you are aware, more than 190 of our Congressional colleagues joined us in strongly supporting that decision.

Now that negotiations for the extension are underway with Japan and Taiwan, we hope that the Administration will make every effort to conclude the new arrangements expeditiously. It is our understanding that negotiations with the Taiwanese may be key to finalizing the arrangements, but that the Taiwanese are balking at reaching a timely agreement. We hope that you can impress upon our negotiators the need to push the Taiwanese towards concluding an agreement before the present 30-day extension expires.

We certainly do not need to point out to you the significance of trade issues in the current political climate, however, we would like to emphasize the particular importance of the machine tool VRA negotiations. The machine tool industry is a core industry and one which is critical to protecting and creating new jobs. Thus, the machine tool VRA will not only protect U. S. national security interests, it will also improve the U. S. balance of trade at a time when those issues are of paramount importance.

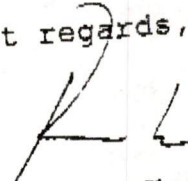
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please advise us of the Administration's outlook on these negotiations. We feel certain that our colleagues will join us in supporting a tough negotiating posture as these talks progress.

Thank you for your attention to this important matter.


Alfonse M. D'Amato
U. S. Senate

Best regards,


Robert W. Kasten, Jr.
U. S. Senate

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Please file in
Cam Findlay's
Competitiveness
Council.

Thank you.



OFFICE OF THE VICE PRESIDENT
WASHINGTON

April 9, 1992

MEMORANDUM FOR CAM FINDLAY

FROM: DAVID MCINTOSH AND JOHN COHRSEN
SUBJECT: BIOTECHNOLOGY/GENOME PATENTING ISSUES

*file!
Competitiveness
Council*

Attached is a proposal by OSTP for a FCCSET group to set up a public meeting on technology transfer issues associated with certain possible patents that may arise out of federally funded research on the structure of human and plant genomes. These patents hold the possibility of remarkable commercial opportunity.

As you may know HHS Secretary Sullivan asked that a Cabinet level group give policy guidance regarding the many thorny policy issues. Should the government patent this material? Would government patenting stifle private sector research? If the government does hold a patent, what licensing arrangements should be made to ensure that the information can be commercialized expeditiously?

These issues relate to the Council activities in biotechnology and technology transfer. The Council on Competitiveness can consider these licensing and technology transfer issues associated with federally funded genome research. Ede Holiday agrees with this course of action.

We plan to hold a meeting within the next week to begin to look at these issues. The reason for taking immediate action is that the FCCSET group has announced plans to convene a public meeting on May 21-22, and is preparing a draft white paper on this subject. A copy of draft materials is attached. It may be best to postpone this public meeting until the Council has reviewed the issues.

How should we nail this down?

NATIONAL SCIENCE FOUNDATION
WASHINGTON, D.C. 20560OFFICE OF THE
ASSISTANT DIRECTOR
BIOLOGICAL SCIENCES

April 2, 1992

MEMORANDUM TO:

Dr. John Borlight, DOS
Dr. David Galas, DOE
Dr. Bernadine Healy, NIH
Dr. D.A. Henderson, OSTP
Dr. Elke Jordan, NCHGR
Dr. Harry Mussman, USDA
Ms. Deborah Wince-Smith, DOC

FROM:

Mary E. Clutter, Chair *Mary*
Genome Patent Working Group

The following documents require your personal attention as soon as possible:

- (1) draft white paper, "Intellectual Property Protection and Genome Research: Background Information for a Public Meeting;"
- (2) draft Federal Register Notice of the Public Meeting we agreed to hold on May 21-22, 1992, at the National Academy of Sciences.

Both documents were produced by the staff representatives of all GPWG member agencies. They have gone through a number of preliminary drafts and now need our final approval. We are working on a tight schedule and need to announce the meeting in the Federal Register a month in advance. Therefore, I urge you to respond by FAX or telephone (numbers below) with your comments no later than April 8, 1992.

The next GPWG meeting to discuss the May Public Meeting will be held on April 16, 1992, 2:00 p.m., at the National Science Foundation, Room 506. You will receive background materials in advance.

Liaison cc: Mr. John Cohrsen, OVP
Mr. Jefferson Hill, OMBcc: Reid Adler, NIH
Dan Drell, DOE
Machi DiIworth, NSF
Carolyn Fulco, CLSH
Kathy Hudson, CLSH
Rachel Levinson, OSTP
Jon Paugh, DOC
Lawrence Rudolph, NSF
Gary Smith, OSTP
William Tallent, USDA

Attachments

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Federally Funded Genome Research: Science and Policy Issues

AGENCY: Committee on Life Sciences and Health / Federal
Coordinating Committee for Science, Engineering and
Technology

ACTION: Notice of Public Meeting

SUMMARY: This is an announcement of a public meeting to be held on May 21 - 22, 1992, in Washington D.C. to discuss science and technology transfer issues as related to Federally funded genome research. The meeting is sponsored by the U.S. Department of Agriculture (USDA), the Department of Commerce (DOC), the Department of Energy (DOE), the National Institutes of Health (NIH), the National Science Foundation (NSF), the Office of Science and Technology Policy (OSTP), and the Department of State (DOS).

Several Federal science agencies have recently established coordinated genome research projects. Infusion of new research funding through these projects to the already strong biological research base in the U.S. has resulted in a rapid rate of scientific progress in all areas of genome research. At the same time, a number of broad science policy and related technology transfer issues have been raised. In order to address these issues and to provide an interagency forum for discussing them, the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) has formed an ad hoc working group, the Genome Patent Working Group (GPWG). The GPWG is established under the Committee on Life Sciences and Health (CLSH) of the FCCSET.

The GPWG is chaired by Dr. Mary E. Clutter, Assistant Director for Biological Sciences, National Science Foundation, and consists of high-level officials from the seven Agencies and Departments listed above as sponsors of the public meeting. The GPWG is charged with the task of defining the pertinent science and related technology transfer issues, examining different views and perspectives on these issues, and proposing a series of policy options with an assessment of their potential impacts on scientific progress in Federally funded genome research and potential commercialization of the research results. These options will be presented to CLSH, FCCSET, and the Science Advisor to the President.

The GPWG, in seeking input from as broad a community as possible, is holding the public meeting for all interested parties to express their views on the issues identified below in the "SUPPLEMENTARY INFORMATION" section. With input from the public, the GPWG will develop policy options for consideration at the federal policymaking level. A range of intellectual property protection mechanisms will be considered in the formulation of these options. Ideally, each option should offer a different method for arriving at an optimal balance between protecting free access to scientific information and encouraging translation of

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this information into useful products. In order to achieve this balance, it will be necessary to assess the potential impacts of each of the options on the ability of the affected parties to carry out their individual functions and to achieve their objectives. Such an assessment will require input from these parties. This Notice and the public meeting will serve to gather information to assist in the development of the policy options.

DATES: The meeting will be held on May 21 and 22, 1992, in the auditorium of the National Academy of Sciences in Washington D.C. (see "ADDRESS" below for detail). The meeting will begin at 8:30 A.M. on both days, and is expected to last till 5:00 P.M. on May 21, and 12:00 Noon on May 22. Members of the public are invited to attend.

HOW TO REGISTER: To register to attend the meeting, contact Sandra Beaulieu, Science/Engineering Education Division, Oak Ridge Associated Universities, P.O. Box 117, 200 Badger Avenue, Oak Ridge, Tennessee 37831-0117, at (615)576-7393, by May 14, 1992. Advance registration is desirable for those who wish to make oral presentation. Individuals wishing to make oral presentations (limited to 3 minutes) should submit their names, affiliations, addresses, and a general topic area for their comments to Sandra Beaulieu at the above address, or fax the information to her at (615)576-0202, by May 14, 1992. Representatives of organizations wishing to make oral presentations (limited to 5 minutes) should submit their names, the names and addresses of organizations represented, and a general topic area for their comments to the same. Oral presenters may submit additional written comments as well. On-site registration will also be held on the days of the meeting from 8:00 a.m. to 8:30 a.m. From those who are not able to attend the meeting, written comments (not more than 5 pages) will be accepted by the Oak Ridge Associated Universities until May 19, 1992. Comments should be mailed or FAXed to Sandra Beaulieu. Because of the limited time for oral presentation, presenters will be accommodated to the extent possible; all presentations, whether oral or written, will be given full consideration by the GPWG. A full public record will be created to contain all comments, written and oral, submitted to the GPWG. Individuals and groups with similar comments are asked to consolidate comments into single remarks to the extent possible.

ADDRESS: The meeting will be held at the auditorium of the National Academy of Sciences in Washington, D.C. Attendees should use the entrance at 2100 C Street NW. The meeting is from 8:30 A.M. to 5:00 P.M. on May 21, and from 8:30 A.M. to Noon on May 22, with registration from 8:00 A.M. to 8:30 A.M. on both days.

FOR FURTHER INFORMATION CONTACT: Dr. Machi F. Dilworth, National Science Foundation, 202/357-7652.

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SUPPLEMENTARY INFORMATION: The GPWG has prepared a document "Intellectual Property Protection and Genome Research: Background Information for a Public Meeting" as background material for the public meeting. Individuals and organizations interested in responding to this Federal Register announcement are strongly encouraged to obtain a copy of this document. A copy of the document may be obtained by contacting Sandra Beaulieu. Her address, phone and fax numbers are listed in the "HOW TO REGISTER" section above.

The document contains brief descriptions of the scientific background on genome research, various means of protecting intellectual property, pertinent laws on patenting and licensing, and how various Federal agencies promote technology transfer activities. It also lists some issues and questions on which the GPWG members are particularly interested in obtaining public comments. Essentially, they revolve around the following questions:

- ▶ What is the impact of the intellectual property system on genome research, and what is the impact of that system on scientific progress likely to be, depending on the phase of research, the genome being studied, and the products of the research?
- ▶ Is genome research fundamentally different from other types of biological research funded by the Federal Government; in what ways; and how does this affect the application of laws and policies relating to technology transfer to the private sector?
- ▶ What impact might various options for intellectual property protection, including patenting, have on free exchange of information among researchers and on international scientific collaboration, and how can such collaboration best be encouraged?

The GPWG seeks diverse perspectives from a broad range of organizations and individuals including scientists in academia, industry and government laboratories; trade associations; professional societies; international organizations; and other interested individuals and organizations. In addition, the GPWG would welcome any comments on issues that are not identified here but are pertinent to the subject in question.

Mary E. Clutter
Chair, GPWG

James O. Mason
Chair, CLSH

D. Allen Bromley
Chair, FCCSET

Intellectual Property Protection and Genome Research: Background Information for a Public Meeting

**Genome Patent Working Group
Committee on Life Sciences and Health
Federal Coordinating Council for Science,
Engineering and Technology**

April 1992

INTELLECTUAL PROPERTY PROTECTION AND GENOME RESEARCH: BACKGROUND INFORMATION FOR A PUBLIC MEETING

I. INTRODUCTION

Federal Involvement in Genome Research. Various Federal agencies have established coordinated genome research projects in the last several years.¹ The National Institutes of Health (NIH) and the Department of Energy (DOE) both have established human genome research programs, involving research on genomes of humans and selected model organisms.² The U.S. Department of Agriculture (USDA) supports the plant genome research project³ as well as the animal genome research project.⁴ The National Science Foundation (NSF) supports a genome research project on a model plant system, *Arabidopsis*.⁵ Other countries in Europe and elsewhere have launched coordinated genome projects addressing genomes of humans, plants, animals, and bacteria.⁶

Working Group Charge. Infusion of new Federal funding through the new projects into the already strong biological research base in the United States has encouraged genome research in this country and contributed to a rapid rate of scientific progress beyond earlier expectations. At the same time, a number of broad science policy and related technology transfer issues have been raised that involve several agencies. In order to address these issues, the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) has formed a high level interagency committee, the Genome Patent Working Group (GPWG), under the auspices of the FCCSET Committee on Life

¹ A *genome* is the total gene complement of a set of chromosomes found in higher life forms, or the functionally similar but simpler linear arrangements found in bacteria and viruses.

² **Understanding Our Genetic Inheritance.** The U.S. Human Genome Project: The First Five Years, FY1991-1995. A joint publication of the Department of Energy and the Department of Health and Human Services. Washington, DC, April 1990.

³ **USDA Plant Genome Research Program.** Washington, DC: U.S. Department of Agriculture, June 1991.

⁴ **Federal Register**, Vol. 56, No. 231, 2 December 1991.

⁵ **A Long-range Plan for the Multinational Coordinated *Arabidopsis thaliana* Genome Research Project.** Washington, DC: National Science Foundation, July 1990.

⁶ **Human Genome Research: A Review of European and International Contributions.** London: Medical Research Council of the United Kingdom, January 1991.

Sciences and Health (CLSH).⁷ The GPWG is charged with defining the pertinent science and related issues, examining different views and perspectives on these issues, and proposing a series of policy options to CLSH, FCCSET, and the Science Advisor to the President. The scope of the GPWG is limited to the issues related to federally funded genome research.

It should be recognized that rapid progress in genome research is possible only because of the vast array of accumulated information in biology that has resulted from basic research supported by various agencies over a long period. All the agencies involved in genome research are aware of the importance of integrating genome research with all of biology, as evidenced by the fact that most of the coordinated genome research projects take a broad view of the kind of research and experimental systems that they support. Similarly, issues related to the protection of intellectual property rights and commercialization of federally funded research results are not new or unique to genome research. There are existing laws and policies that deal with these issues. However, genome research has highlighted some of the problems of interpretation and application of existing laws in the rapidly evolving area of molecular genetics. In carrying out its assigned tasks, the GPWG will base its recommendations on the collective experiences of the member agencies with input from the relevant communities.

Purpose. The GPWG plans to seek input from a broad community in completing its tasks. The purpose of this document is to provide the interested public with general information on what genome research is, how intellectual properties are protected, and how the Federal Government encourages technology transfer from laboratories to commercialization. The document is written as background for a public meeting to be held on May 21-22, 1992, in Washington, D.C. It is not designed to be a comprehensive treatise, but is intended rather as an aid to focus the discussion about this extremely complex subject on a few key issues of common interest. Several of these issues are identified in Section VII at the end of this document. Essentially, they revolve around the following questions:

- What is the impact of the intellectual property system on genome research, and what is the impact of that system on scientific progress likely to be, depending on the phase of research, the genome being studied, and the products of the research?
- Is genome research fundamentally different from other types of biological research funded by the Federal Government; in what ways; and how does this affect the application of laws and policies relating to technology transfer to the private sector?

⁷The seven member agencies are the Departments of Agriculture, Commerce, Energy, Health and Human Services, and State, along with the National Science Foundation and the Office of Science and Technology Policy. The NSF chairs the working group.

- What impact might various options for intellectual property protection, including patenting, have on scientific collaboration internationally, and how can such collaboration best be encouraged?

II. SCIENTIFIC BACKGROUND

Genome Projects. Since the discovery of the double helical structure of deoxyribonucleic acid (DNA) by Watson and Crick in 1953, it has been evident that the sequence of its "letters" (the nucleotide bases adenine, cytosine, guanine, and thymine--or A, C, G, and T, for short) was the secret to its information content. Reading the order of the letters was the same as decoding the information in the DNA molecule. The Human Genome Project, cosponsored by the DOE and the NIH, is a coordinated 15-year effort to locate and decode all the information in the complete human DNA, or human genome. Concurrently with the development and establishment of the Human Genome Project, the USDA planned and established the Plant Genome Project in 1991. The goal of the USDA project is to facilitate the genetic improvement of plants by locating important genes and markers on plant chromosomes, determining the structure of those genes, and transferring the genes to improve the performance of commercial plant varieties to meet market needs.

The genome exists in living cells in a highly organized structure called a chromosome. The number of chromosomes varies greatly from species to species, but is always a characteristic number for each one. In the case of humans, each of the 24 distinct human chromosomes is a single, enormously long, double helical molecule (averaging an inch and a quarter per chromosome, with 23 pairs of chromosomes stuffed into a volume of less than one billionth of a cubic centimeter within each nucleated cell--i.e., within every human cell except sperm and eggs). Along the length of that molecule are regions of special sequences, called genes, that are functionally distinct because they encode instructions for the manufacture and control of products (proteins) that build, manage, and organize everything in the cell--which is itself the basic building block of all living tissues. It is estimated that an adult human being has about ten trillion (10,000,000,000,000) cells of many different kinds and functions. To oversee this complexity, the organization of the information contained in the genome must also be highly complex so that only the parts needed to do specific jobs are expressed where and when necessary. The genomes of some crop plants can be even more complex, with multiple copies of chromosomes beyond the normal number of two. The need to understand the basic structure and organization of the genome--whether human, animal, or plant--is a driving force behind the several organized genome projects.

Project Objectives. Scientists do not yet thoroughly understand the organization of the information in the genome of even a very simple organism--much less the human genome; nor do they understand all the multiple and subtle control mechanisms that operate within the genome. Current estimates are that there are perhaps 100,000 genes in the human genome, of which, to date, some 5,000 are named and 2,300 localized (mapped) onto one of the 24 distinct chromosomes. For fewer than 1,500 human genes is there even a partial understanding of their function. The first step in building this

understanding is to construct a detailed "map" of where the genes are. To do this, one of the first aims of the Human Genome Project (and other genome projects) is to place reference points, or landmarks, on the chromosomes so that genes can be oriented as they are found. This procedure is similar in concept to the mile markers on interstate highways. The marker may not, by itself, indicate anything more than the number of miles from a city boundary or exit, but it is very useful as a milestone to someone traveling on the highway. The most useful markers have two qualities: (1) they must be easily recognizable and (2) there must be lots of them, spread relatively evenly along the length of the chromosome so that one is never very far away from a unique point. As of February 1992, the Human Genome Project had seen the mapping of almost 1,000 specific sequence markers (referred to as Sequence Tagged Sites, or STSs). This is still a small percentage (about 3.5%) of the number that will be needed to complete the map for the human genome.

The mapping procedure involves the use of sophisticated biotechnology. Very briefly, the DNA constituting a gene (or several genes) is first transcribed into a temporary intermediate molecule called hnRNA (for "heterogeneous nuclear ribonucleic acid"). This intermediate is then processed through the precise removal of intervening sequence fragments (in ways only beginning to be understood), into a cleaned-up form of RNA called mRNA (for "messenger RNA"). This streamlined mRNA is the working copy for the building of a specific protein product. Since this working copy bears sequence information unique to the protein product, its sequence is useful for identifying on the original starting chromosome exactly where the gene for the given protein is situated, thus mapping it. In this process, a "reverse intermediate" called "complementary DNA," or cDNA for short, is made from the mRNA. This cDNA is as streamlined as the mRNA was and is an artificial construct, made in the test tube expressly for the purposes of mapping and sequencing.

Intense efforts are currently underway across the United States and in many other countries around the world to continue and accelerate this kind of mapping effort, both in humans and in selected model organisms. Once these activities are farther along, greater efforts will be made to generate the ultimate map, which will be the nucleotides sequence itself. When this map is completed, perhaps around the year 2005, the "Owners' Manual" for the genetics of humans and other organisms genetics will be written.

Potential Benefits of Genome Research. Many genes code for the production of protein products; these proteins are used to build larger proteins, to assemble the physical structure of a cell or tissue, and to serve as enzymes (which carry out the metabolic reactions) or as signal molecules (hormones, needed for internal regulation and control) that are necessary for the functions of a cell and ultimately of the organism. Human diseases can result when there is an error in the gene coding for a protein product that catalyzes necessary cellular chemical reactions. One example is cystic fibrosis, in which a very small change in the gene sequence results in a defective membrane transport molecule that cannot efficiently control the flow of chloride ions into certain cells. As a consequence, these cells regulate improperly the amount of water kept inside the membrane and retain more than they should. This results in the formation of a sticky

mucous secretion which is characteristic of the disease and is the source of the clinical symptoms, particularly in the lungs and pancreas. In plants, a single base pair change in the gene sequence that encodes the chloroplast membrane protein can result in herbicide resistance.

The identification of the gene offers several kinds of promise. On one level, the product of the gene can be generated using recombinant DNA methods and this product supplied as a drug or other useful compound for humans, animals, and plants. On another level, the gene itself can be supplied using gene therapy approaches. In addition, the gene can be genetically engineered to produce completely new plants or useful industrial microbes that cannot be found in nature. These prospects offer opportunities for commercial benefit to the inventors and developers of such products and therapies. As more human genetic defects are identified, many new and extremely specific therapies and medicines will emerge for diseases that have few effective therapies today. Similarly, as more economically important genes are identified in crop plants, many new varieties will emerge that would help increase efficiency and reduce losses in crop production. For the human genome, as well as for plants and other organisms, the elucidation of the organization and function of the genetic endowment will ultimately lead to enormous utility and benefit.

III. INTELLECTUAL PROPERTIES AND PATENTING

The Patent System. The U.S. Constitution, through Article I, Section 8, clause 8, has empowered Congress with a broad grant of authority to promote the "progress of the useful arts." The basic concept of the patent system is that providing a limited grant of exclusive rights to inventors will give them an incentive to disclose their inventions to the public, rather than retain them in secrecy. Through this mechanism the public gains information not only on technical advances, but also on activities of their competitors in related fields of technology, so as to prevent duplicative research efforts. The incentive offered is a 17-year grant of a right to exclude others from making, using, or selling the invention. The patent grant does not, however, provide the patent holder with authority to make, use, or sell the patented invention; it only provides authority to preclude others from such activities. Thus, for example, while an inventor may produce and patent a new drug, he/she will not be able to sell that drug in the United States until the drug has received marketing approval from the Food and Drug Administration. The inventor with the patent, however, will be able to stop others from producing, using, or selling the drug.

Basic Requirements for Patentability. There are four fundamental, statutory requirements that every invention must meet in order to become entitled to patent protection, regardless of the technological field of the invention: namely, utility, adequacy of disclosure, novelty, and non-obviousness.

First, the patent applicant must demonstrate that the invention is "useful" in some sense. This requirement, referred to as utility (35 U.S.C. 101), is met when the patent applicant identifies some useful purpose to which the invention can be applied. Certain

applications or classes of innovations are not sufficient to satisfy the utility requirement. Thus, inventions which are unapplied mathematical algorithms, laws of nature, abstract ideas, or natural products indistinguishable from the form in which they exist in nature are not protectable through the patent laws.

Second, to obtain a patent for a new invention, one must file an application that describes the invention in detail and that describes the subject matter for which patent protection is sought. Each patent application thus has two sections, the specification and the claims. The specification describes in detail the field of technology to which the invention pertains, and then describes, both generally and in detail, the features of the invention. The claims, on the other hand, set forth in detail the subject matter for which the patent applicant desires protection.

Substantive application disclosure requirements are governed by 35 U.S.C. 112. This section of the patent code requires that applicants describe their invention in sufficient detail as to enable a person skilled in the field of technology to which the invention pertains to "practice" the invention. This requirement ensures that patent documents provide a sufficient technical description of the invention to people working in the field of the invention, so as to provide them with the opportunity to study and possibly to improve upon the patented invention.

Novelty refers to the requirement that the invention not be known or in use prior to the filing of the patent application. A lack of novelty, which will preclude the grant of a patent, can be based upon any prior technical publication, an issued U.S. or foreign patent, or evidence that the invention was in public use or was on sale prior to the filing of the application. An absolute bar to patentability due to lack of novelty can occur if there was prior disclosure, use, or sale more than one year before the filing of the U.S. patent application. Where the publication or use occurs less than one year prior to the application filing date, the patent applicant may still be able to overcome the novelty bar and obtain a patent.

The final requirement for patentability is that the invention be non-obvious through 35 U.S.C. 103. This requirement serves to preclude patenting of minor improvements, where those improvements would have been considered to have been obvious to a person skilled in the field of the invention. Measuring whether an invention would have been obvious requires an assessment of several factors, including the state of the art at the time the patent application was filed, the level of skills of the ordinary worker in the field of the invention, and the difference between what the applicant has claimed as his or her invention, and that which is known in the prior art. (The term "prior art" refers to patents, technical publications, and other published documents available anywhere in the world prior to the filing date of a particular patent application.) If a patent applicant fails to demonstrate under these criteria that the invention was not obvious, additional factors, such as commercial success of the invention, or proof that the invention solved a long-felt need, may be offered to establish that the invention was not obvious.

Patent Examination Process. The U.S. Patent and Trademark Office (PTO) receives a tremendous volume of patent applications from inventors both in the United States and

abroad. These applications are examined by highly trained examiners at the PTO, which is an agency of the Department of Commerce. More than 1,800 examiners are employed by the PTO to handle applications involving virtually every imaginable field of technology. In the field of biotechnology, the PTO has employed over 150 highly skilled scientists, most of whom have advanced degrees and/or postdoctoral experience. Despite the volume of applications, the PTO has maintained an average pendency for filed applications of between 18 and 19 months.

The examination process before the PTO is confidential. Examiners and PTO staff are prohibited by law from disclosing the content of pending applications. Thus, the content of patent applications is not disclosed unless the application is approved and issued as a patent.

If an examiner determines that a patent applicant has failed to establish any of the four criteria for patentability noted earlier, the patent application will be rejected. If the decision of the examiner is made final, the patent applicant can appeal to the Board of Patent Appeals and Interferences, an appellate panel within the structure of the PTO staffed by experienced examiners who are also lawyers. If the Board upholds the rejection, the applicant may seek judicial review of this decision, and may ultimately petition for *certiori* to the Supreme Court.

Plant Patents. In addition to utility patents, plants are afforded two other forms of protection. Title 35 of the U.S. Code, section 161, provides protection for asexually reproduced varieties of plants, including cultivated sports, mutants, hybrids and newly found propagated plants, but excludes tuber-propagated plants or plants found in an uncultivated state. The Plant Variety Protection Act (PVPA) of 1970 provides patent-like protection for sexually reproduced varieties of plants including fungi, bacteria, or first generation hybrids. Though work will be done to define plant genomes, it is generally expected that utility patent protection will be sought for the discoveries.

Enforcement of Patent Rights. As noted above, a patent gives its owner the right to preclude others from making, selling, or using the invention described in the claims of the patent within the territorial limits of the United States. This right is classified as a property right, and can be assigned to others or licensed on an exclusive or non-exclusive basis. To enforce one's rights under a patent, one may file a civil suit in a Federal District court, alleging patent infringement. If successful, the patent owner may obtain an injunction, monetary damages, or both. Thus, the patent owner can effectively stop the patent infringer from making, using, or selling the patented invention, and may recoup whatever damages were incurred during the period of infringement.

Experimental Use Defense. Liability for infringement of patent rights can be avoided by showing that the use of the patented invention was for research purposes. This defense, called the experimental use defense, is strictly limited to research activities which are non-commercial. If the purpose of the research is to discover a means of exploiting the patented invention commercially, the defense will not be successful. In addition to the common law experimental use doctrine, the patent law provides an explicit exemption from infringement for parties other than the patent owner who make, use, or sell

patented drugs where the use is solely for the purpose of producing data to satisfy requirements for Federal regulatory review (e.g., FDA marketing approval).

Foreign Patent Systems. Patent systems outside the United States share many substantive similarities with our system. For example, most industrialized nations with patent systems require the four elements of utility, adequate disclosure, novelty, and non-obviousness, irrespective of the names which are used to describe these elements. The primary differences lie in the procedural elements of our system. Thus, in every country except the United States and the Philippines, if a conflict in priority arises over which of two inventors of the same invention is entitled to a patent, the patent is awarded to the first party to file the patent application. In the United States, the patent is granted to the first inventor.

Another significant difference between the U.S. and foreign systems is the absence of a "grace period" in foreign systems. The grace period provides inventors with up to one year to file patent applications after publication of the invention. Thus, a patent applicant in the United States can overcome a rejection based upon lack of novelty if the publication relied upon to defeat novelty was authored by the inventor. In most foreign systems, the novelty bar could not be overcome even if the publication was by the same inventor.

One mitigating factor against harsh results of the lack of a grace period is the right of foreign priority provided through the Paris convention. This convention is a treaty which has been signed by over 100 different countries. Through the treaty, an individual can file first in the United States, and then for up to one year file abroad in treaty countries. The priority right allows the applicant in his/her foreign application to rely upon the date of filing in the United States. This is also true for applications filed in foreign countries and then filed in the United States.

Biotechnology. In recent years, biotechnology has brought an avalanche of new patents. These range from the genetically engineered Harvard mouse to a tasty tomato with extended shelf life, to a recombinant bacterium (*E. coli*) that can convert a whole spectrum of sugar molecules into ethanol. The avalanche in patent application filings was unleashed by the holding of the Supreme Court in Diamond v. Chakrabarty that a bacterium altered through genetic engineering techniques that was different from the bacterium as it existed naturally was eligible for patent protection.

Copyright and Trademarks. Other protections for intellectual property include copyright and trademarks covered by Federal law and trade secrets covered by state law. Though copyrights were originally envisioned to cover the discoveries of the genome projects, that idea was quickly abandoned because copyrights do not protect an idea but only the expression of the idea and do not extend to any procedure, process, system, method of operation, concept, principle, or discovery. Trademarks have no applicability in protecting genome discoveries. Trade secrecy is used in private industry either to provide a competitive business advantage, or prior to the time the invention has matured to the point where it is ripe for the patent process. Trade secrets are governed by state law, most of which are patterned after the Uniform Trade Secrets Act. Trade secrets

rights cannot be held and enforced by the Federal government. Thus, except for information whose disclosure is restricted through Federal laws or regulations, any citizen can compel disclosure of information generated by a Federal laboratory or agency through the Freedom of Information Act. An important exception to this policy of disclosure is created by the National Competitiveness Technology Transfer Act, which authorizes laboratories to withhold from disclosure certain categories of information relating to CRADAs under the FTTA for up to five years.

Dedication to the Public. Another option under some circumstances is dedication to the public. Dedication to the public not only makes the information immediately available to all, but also becomes a block to others' gaining protection. This can be accomplished in various ways including publishing, making the product available, or through a formalized Statutory Invention Registration (SIR) procedure making it available through the PTO. A SIR has the same requirements for disclosure as a patent application but does not need to meet the test for novelty, non-obviousness, and utility. If an application is filed at the PTO with a SIR request, it is taken up out of turn and published quickly if the criteria are met.

IV. RESEARCH EXEMPTION

The Plant Variety Protection Act, mentioned in Section III, contains a provision that may offer a useful precedent for broader application. This is the Research Exemption. Section 114 of the PVPA defines this Exemption as follows:

The use and reproduction of a protected variety for plant breeding or other bona fide research shall not constitute an infringement of the protection provided under this Act. (7 U.S.C. 2544).

Since any novel, distinct, uniform, and stable variety developed in such research would in turn be eligible for a Plant Variety Protection certificate, it follows that such a variety derived directly from a protected one would itself also be protectable. The possibility exists that this situation might be changed. The PVPA was initially enacted to bring the United States into compliance with the International Convention for the Protection of New Varieties of Plants (UPOV). Recently, this UPOV Convention has been revised to extend protection for the developer of a new variety to include related varieties "essentially derived" from it. If the United States is to remain in compliance with UPOV, the PVPA will have to be amended to provide the same extension of protection.

Options for Extent of Research Exemption. To implement a research exemption policy for public sector gene or gene segment utility patents such as those arising from the genome projects, three distinct options appear to be available:

1. Following the example of the revised UPOV Convention, research utilizing a patented gene or gene fragment could be freely allowed, but an invention "essentially derived" from the original patent could not be practiced without a license from the original patent owner.

2. Taking the PVPA as a precedent, research using a patented gene or gene segment could be freely allowed and any new invention resulting from this research could be protected by a new patent with all of the usual rights unqualified by the earlier patent.
3. An intermediate option would allow the research and the patent resulting from it but require cross-sublicensing on reasonable terms between the licensee of the parent patent and the inventor who exploited the research exemption.

Option 1 should require no changes other than to formally call attention to the fact that, as pointed out in Section III, an experimental use defense has been established by case law for utility patents. The ideal route to implementation of options 2 or 3 would be an enabling amendment to the Patent and Trademark Act. Alternatively, or as an interim course of action, an Executive Order or other formal Administration policy statement could be issued authorizing research exemptions so implemented for gene or gene segment patents arising from Federal laboratory research.

Legal Mechanism. To extend options 2 or 3 to federally funded research other than that conducted in U.S. Government laboratories without an amendment to the Patent and Trademark Act, the "exceptional circumstances" provision of the Bayh-Dole Act (Public Law 96-517), might be invoked. Section 202 of the Act provides:

...a funding agreement may provide otherwise [than giving unrestricted title to fund recipients]...in exceptional circumstances when it is determined by the agency that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of this chapter...

The objectives referred to include:

- promote the utilization of inventions arising from federally funded research; and
- promote collaboration between commercial concerns and nonprofit organizations.

Agencies using this authority are required to submit a supporting determination to the Department of Commerce for review. If Commerce believes the determination is "contrary to the Policies and objectives" of the law, it must so advise the agency and the Office of Federal Procurement Policy and recommend corrective action. Where small business firms are involved, the Chief Counsel for Advocacy of the Small Business Administration must also be advised of the determination.

V. LICENSING

Background. The patenting and licensing of inventions made by Federal employees as well as the recipients of Federal funding is authorized by U.S. patent law and

regulations. Congress legislated a preference for patenting when it enacted the Patent and Trademark Act Amendments of 1980.

It is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development ... to ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions ...

For Federal research laboratories, the Federal Technology Transfer Act of 1986 (FTTA) further authorizes the sharing of royalty revenues with inventors and the retention of royalties at the agency level for various purposes related to enhancing technology transfer activities. The FTTA strongly encourages agencies to transfer commercially applicable technology through patenting and licensing, although this is not mandatory.

Licensing Process of the Federal Government. The licensing rules applicable to all government inventions are set forth in the patent law at Title 35, United States Code Sections 200-212 and implementing regulations of the Department of Commerce at Volume 37, Code of Federal Regulations, Part 404. Pending patent applications also are routinely licensed by Government as well as industry and academia, although enforceable patent rights do not exist until a patent is actually issued by the U.S. Patent and Trademark Office. Because patents grant limited rights (see Section III), a patent license agreement cannot grant rights to use or sell a product where regulatory approval (e.g., from the FDA) is legally required; the license merely is a promise by a licensor not to sue a licensee for patent infringement.

Typically, the licensing of Government inventions is pursued by the involved Federal agencies shortly after the filing of a patent application. Inventions that are available for licensing typically are identified through notices published in the Federal Register to invite the filing of license applications by prospective licensees. If an agency contemplates licensing an invention exclusively, a notice of that intention must also be published in the Federal Register. Applicants for license are required by law to submit plans for the development and/or marketing of inventions. The application period must be held open for at least 30 days before a subsequent Federal Register notice would be permitted to announce a contemplated exclusive licensee for such inventions. Following the announcement of an agency's intention to license an invention exclusively, a 60-day objection and comment period is mandatory.

The agency handling the licensing of a given invention has the responsibility for promoting their inventions, making judgments as to the appropriate degree of exclusivity to grant in a license, and determining which applicants are qualified and acceptable. Actual license negotiations often focus on business matters, such as royalty rates and benchmarks for assessing the likely diligence of a licensee's performance. Many agencies utilize a model licensing agreement based on agreements developed in academic licensing offices. Licenses normally are granted to companies that agree to manufacture in the United States any inventions that are to be used or sold in the

United States, although waivers from this requirement may be obtained in appropriate circumstances.

Licensing Process in Academia. The negotiation process utilized in academia is very similar to that of Government agencies because the kinds of terms to be negotiated are generally very similar. However, the competitive aspect and public notice requirements that pertain to licensing as described above do not apply to universities. Some universities have their own procedures about selecting licensees, particularly when companies founded by their own faculty pursue license rights. Often, universities promise invention rights to their research sponsors for applicable studies.

Federal law does require that the Government retain a nonexclusive, paid-up license to practice (or have practiced) any invention made with Government funding. This applies whether the invention is made by Government employees or grantees. The domestic production requirement discussed above also applies to licensing by grantees.

Exclusive vs. Nonexclusive Licensing. For the licensing of any given invention, the exclusivity of available rights falls along a continuum ranging from nonexclusive to semi-exclusive to exclusive. Government agencies and academic licensing offices have the legal flexibility to provide through licensing the degree of exclusivity needed to facilitate the development of particular products. The paramount consideration in determining the degree of licensing exclusivity is the encouragement of product development. However, obligations to partners in Cooperative Research and Development Agreements (CRADAs) pursuant to the FTTA (at Government agencies) or to research sponsors (at universities) may preempt a more open approach to licensing.

Nonexclusive licensing typically is appropriate for very basic and enabling technology, such as certain types of materials having many different commercial uses or general laboratory techniques. Semi-exclusive licensing, in which a few licensees share patent rights, becomes appropriate when there are larger markets, lower developmental costs, and less overall risk. Exclusive licensing is appropriate when it is determined that nonexclusive licensing will not lead to expeditious product development.

Issues of Scope. The scope of rights that can be licensed also lies along a continuum for any particular invention. Rights to commercialize all uses may be granted, or more limited rights to a family of diagnostic or therapeutic products might be licensed, or perhaps only the rights to commercialize a specific product for a specific use. Rights may also be divided by geographic territories.

A family of uses itself can be of variable scope and might include, in the case of medical products, for example, all cancer therapeutics or all solid tumor anticancer therapeutics. Decisions about the appropriate scope of rights generally are made after consideration of factual data about various factors, including market size and affected patient population.

Royalty Rates. Royalties also fall along a continuum ranging from no charge in cases where patents effectively are dedicated to the public, to a cost recovery level that would

recoup patenting and administrative costs, to market rates. Most Government agencies and universities have adopted a model system for which royalty rates generally fall within a range of about 0.5%-6% of product sales, depending on the extent to which the Government or university scientists have developed a product--i.e., from basic research through some development or prototyping stages--before it is licensed.

Procedural Issues. Various standard licensing provisions and practices may be modified to facilitate the transfer of specific types of inventions. For example, minimum notice provisions can be expanded where extra concern exists about increasing disclosures of licensing opportunities.

VI. THE FEDERAL TECHNOLOGY TRANSFER LAWS AND ITS IMPLEMENTATION AT VARIOUS FEDERAL AGENCIES

Mechanisms for Technology Transfer. The Federal Technology Transfer Act (FTTA) of 1986, which amended the Stevenson-Wydler Technology Transfer Act (15 U.S.C. Section 3701-14), directs the Federal Government to transfer federally owned or originated technology to State and local governments and to the private sector, where appropriate. The Act, which affects only federally owned laboratories (Government-owned-contractor-operated and Government-owned-government-operated facilities), authorizes a variety of mechanisms designed to promote the transfer of technology to the marketplace, including Cooperative Research and Development Agreements (CRADAs) between Federal labs and non-Federal entities; award programs for Federal employee-inventors; and royalty sharing with employee-inventors when agencies retain ownership of the inventions. It also directs agencies to allow their employees to patent inventions when the agencies do not themselves patent or "otherwise promote commercialization" of those inventions.

The original Stevenson-Wydler Act prescribes certain technology transfer activities requiring Offices of Research and Technology Applications at each federal laboratory over a certain size and establishing the Federal Laboratory Consortium for Technology Transfer. Nevertheless, technology transfer activities do vary from agency to agency because of differing structures and missions.

Agency Activities. The Department of Agriculture has a long history of developing farm-related technology and disseminating it to farmers, and its Agricultural Research and Forest Services have entered into about 250 CRADAs since the Federal Technology Transfer Act became law.

The Department of Commerce, through its National Institute of Standards and Technology, regional Centers for the Transfer of Manufacturing Technology, and Advanced Technology Program, carries out cooperative programs with industry in order to speed innovation and accelerate the adoption of new technologies by U.S. companies. It also sponsors conferences and seminars focusing on government-university-industry partnerships and enters into CRADAs with private industry.

The Department of Energy, whose laboratories are operated by contractors in most cases and by DOE in others, aggressively pursues and encourages technology transfer. Each DOE laboratory has a Technology Transfer Office, and DOE uses CRADAs and collaborative agreements to transfer technology to the marketplace.

The Department of Health and Human Services, through the National Institutes of Health, operates the world's largest biomedical research facility. It transfers all types of biomedical and health-related research to industry, primarily through licensing agreements and CRADAs. The NIH Office of Technology Transfer's licensing efforts include: promotion of technologies at conferences and meetings; publication of an annual directory on technology transfer at NIH; an on-line abstract of Public Health Service (PHS) technologies; and a database of companies and their interest by technological field for direct marketing of PHS technologies to industry.

Since the National Science Foundation is barred by its Organic Act from itself operating any laboratories and the federally funded research and development centers it owns are chiefly astronomical observatories, most NSF-originated technology comes from non-Government-owned laboratories, largely at colleges and universities.

Like most Federal agencies, the NSF allows its contractors and grantees to retain the principal rights to inventions and other forms of intellectual property produced through NSF-funded research. This treatment of inventions is required in awards to small businesses and non-profit organizations, including universities, by the Bayh-Dole Act. A Presidential Memorandum issued in 1983 directs agencies to apply the policies of that Act to all awardees unless prevented from doing so by statute. Policies directing agencies to leave with the grantees the rights to software, data, and other copyrightable material are stated in the Office of Management and Budget circulars and the Federal Acquisition Regulations. Allowing commercial rights to remain with the institutions or individuals that performed the research assures that those with the greatest knowledge of the technology have the maximum incentives to bring it into the marketplace.

VII. ISSUES AND QUESTIONS

As is often the case with any rapidly advancing field of science, genome research has drawn (and will continue to draw) many new participants unfamiliar with pertinent laws and practices; and it has produced (and will continue to produce) scientific discoveries that do not fit neatly into existing molds. This document, in Sections II-VI, provides a baseline of information about the existing means of protection of intellectual property and current technology transfer practices. The understanding of these facts will form a common ground at the public meeting to be held on May 21-22, 1992, in Washington, D.C. The purpose of the public meeting is to involve all interested parties in identifying science and policy issues central to maintaining scientific advances in genome research and promoting rapid application of new discoveries to commercial development. In order to facilitate discussion at the public meeting, the GPWG has identified some key issues and questions, as listed below.

I. Genome Research

- What impact, if any, does the existing protection of intellectual property (for detail, see Section III) have on scientific progress in relation to genome research?
- What, if any, consequences for scientific progress would result from the Federal Government holding patents on key products of genome research? Would these consequences be altered by enactment of a statutory exemption for research under the patent laws?
- How would the impact of Government-owned intellectual property rights differ for basic research as compared to applied/development research?
- How would the impact of Government-owned intellectual property rights differ depending on the genome being studied (e.g., human, farm animal, crop plants, or industrial microorganisms); and depending on the products of the research (e.g., molecules or whole organisms)?
- Should patenting, licensing and technology transfer policies be uniform for all federally funded research, whether it is conducted at Federal laboratories, at Government-contracted laboratories, or at academic institutions?

II. Commercialization of the Products of Federally Funded Genome Research

- Are there any important circumstances that make federally funded genome research different from other federally funded biological research? If so, what are those special circumstances and what impact would they have on the application of Federal laws and policies relating to the transfer of federally funded technologies to the private sector?
- To what extent might patenting and licensing of the results of genome research at an early stage of discovery provide incentives or disincentives to product development?

III. Collaboration

- What impact might the various intellectual property protection modes have on data and resource sharing?
- What impact might patenting have on genome research partners in other countries?
- How can both dissemination of research results and the encouragement of product development be facilitated on an international scale?



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Briefing materials for tomorrow's
Competitiveness Council meeting to be
held from 1:30 - 2:15 p.m. in the
Vice President's EOB office (Room 274)

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OFFICE OF THE VICE PRESIDENT
WASHINGTON

April 23, 1992

MEMORANDUM FOR MEMBERS OF THE COUNCIL ON COMPETITIVENESS

FROM: David M. McIntosh, Executive Director

SUBJECT: Council Meeting on Wednesday, April 24, 1992

On Friday, April 24, 1992, the Vice President will host a meeting of the Council on Competitiveness, at 1:30 p.m. in Room 274 of the Old Executive Office Building.

Attached is the agenda for the meeting and support documents for each of the items to be discussed.

Please call me at 456-6614 if you have any questions.

NOTE: PLEASE KEEP THE ATTACHED MATERIALS VERY CLOSELY HELD FOR USE BY COMPETITIVENESS COUNCIL AND OVP DELIBERATIONS.

A G E N D A

Council on Competitiveness

April 24, 1992

I. Privatization of local infrastructure

Tab A - Options paper

Tab B - Draft Executive Order

Tab C - Schedule of possible agency initiatives

II. Update on plans for end of 90-day moratorium

April 23, 1992

PRIVATIZATION INITIATIVE

This memorandum summarizes proposed privatization initiatives developed by the interagency cluster group on infrastructure privatization. The cluster group was commissioned by the Vice President and included policy officials (Deputy and Assistant Secretary or equivalent) and staff from HUD, DOT, Army, EPA, Commerce, WH/CofS, OVP, WH/OPD, WHC, and OMB.

These initiatives seek to enable: (1) improved financing of the expansion and modernization of infrastructure; (2) the more efficient operation of infrastructure, through contracting-out; and (3) the devolution of decision-making from the Federal to State and local levels.

RECOMMENDATIONS

The Cluster Group recommends the following actions:

- Clearance of an Executive Order to encourage, and remove impediments to, privatization of Federally financed infrastructure (see Attachment 2). Two issues are posed in the memorandum concerning (i) the appropriate Federal recoupment policy and (ii) whether a fundamental principle in the proposed Executive Order should encourage user fees that do not charge users more than once for the same facilities. All other issues have been resolved.
- Possible agency-specific initiatives during April and May (see Attachment 3):
 - visible privatization announcements in mass transit in six cities;
 - ceremonies in over 10 cities to highlight Federally supported low income home-ownership;
 - information forums, councils, and written materials on private-public opportunities in intelligent vehicle systems development, toll roads, ports and highways;
 - increased efforts to secure enactment of legislative proposals for privatization of uranium enrichment and troubled public housing projects; and
 - issuance of policy guidance or regulations to permit increased private participation in wastewater treatment facilities as well as the privatization of existing treatment plants.

- Completion of review by Secretary of Transportation of issues paper on airport privatization (if at all possible, by May 1, 1992).

PRINCIPAL POTENTIAL AREAS OF INFRASTRUCTURE PRIVATIZATION

- Airports. Airport expansion is supported by (1) Federal "Airport Improvement Program (AIP)" matching grants on selected projects with financing through a 10 percent passenger ticket tax, and (2) local passenger facility charges.

While the Federal share of individual grant projects is high (75-90 percent), such grants support a relatively small portion of total airport construction costs. The Reason Foundation estimates the Federal contribution at the New York (JFK/LGA) and Boston airports is 11-12 percent of total costs. Official data are not available.

Airport privatization is generally expected to involve payments to State and local authorities greatly in excess of costs (due to land use appreciation).

- Sewage Treatment Plants. Throughout the 1970s and 1980s, local governments received matching grants (55-85% Federal share) to support wastewater construction needs. Beginning in 1987, these grants began being replaced by State revolving funds (with Federal contributions until 1994).

Billions of dollars will be required for the expansion and modernization of wastewater facilities to meet the Clean Water Act's standards. With minor exceptions, only "publicly owned" treatment works are eligible for Federal assistance.

Localities will have a major interest in obtaining private investment to finance treatment plant modernization. Privatization also avoids the need for new locally funded investment. A major factor will be whether or not Federal funds for wastewater treatment works are authorized after 1994. The depreciated value of treatment plants will, however, make their privatization sensitive to the degree of Federal recoupment (see below).

- Mass Transit. A capital projects investment fund and formula assistance program provide capital funds (80 percent Federal share) and operating assistance (50 percent Federal share) to State and local governments.

A standard transaction involves public agency purchase and then lease of buses to a private operator for \$1 per year.

To maintain the vehicles in working order as required by law, DOT requires reimbursement of book value (calculated on a 12 year straight line basis) if the buses are sold or otherwise removed from service. After 12 years, the public agency may dispose of the vehicles without Federal recoupment.

Active privatization is already occurring in this area under existing law.

- Roads and Bridges.

- Initial Construction. The Intermodal Surface Transportation Act of 1991 allows private financing and ownership of new highway (except on the interstate system), bridge, and tunnel construction. In these cases, the State may provide a construction loan from its Federal funding allotment. This loan would probably be a minor portion of total project costs. The private party would then own the property and may recoup its costs through tolls.

- Reconstruction. Similarly, the State may loan a private party a portion of its Federal funding allotment for major reconstruction. The private party then would be permitted to lease the property for a period of time in order to recoup its costs, repay its loan, and earn a profit.

ISSUE 1: REIMBURSEMENT OF FEDERAL GRANTS

To what extent should the Federal Government's current reimbursement policy be modified to encourage greater privatization by State and local governments?

- The recoupment issue is primarily relevant to privatization of airports, wastewater treatment plants, and ports. Recoupment is not an issue in connection with roads, bridges, and mass transit.
- As a matter of marketplace economics, the degree of Federal recoupment should not materially affect the price that the private party is willing to pay. However, it could affect the State and local governments' incentive to privatize. If the asset has appreciated (e.g., airports), the price will be a significant inducement to the local authority in any event (although recoupment could reduce that incentive); if the asset has depreciated (e.g., wastewater treatment plants), recoupment poses a potential barrier, although the benefit of needed capital to pay for modernization will be substantial.

- Current policy is embodied in OMB Circular A-102 and the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" regulation (a.k.a., "the Common Rule"). They provide that the Federal Government recoup an amount equal to the asset's fair market value multiplied by the Federal share of the original project cost (i.e., pro-rata reimbursement).
- Critics of current policy argue that the Reagan Administration's pro-rata reimbursement policy discouraged privatization, particularly of appreciated assets such as airports.
- The cluster group concluded, from a policy perspective, that, while the Federal Government might normally expect reimbursement in connection with direct Federal investments (e.g., power marketing administrations and uranium enrichment facilities), there was no such expectation with respect to Federal grants.

State and local authorities should be able to use or sell grant funded assets at their discretion (providing the Federal Government receives assurances that the asset will be used for its originally authorized public purposes until the original grant obligation would expire, that user charges are reasonable (where existing Federal grants so require), and users are protected in the event of insolvency or other failure to perform).

- The question remains to what degree, if at all, there should be some Federal recoupment (even if not pro rata recoupment). Options 1-4 present several approaches to this issue.
- OPTION 1: No Federal recoupment.

No Federal recoupment would require an assurance that the Federally funded asset would continue to be used for its original purpose and other critical grant obligations would be fulfilled. The Administration would state that Federal reimbursement is not required, except as required by law, as long as the infrastructure continues to be used for its original public purpose and there exists, at the outset, some market, contractual, or regulatory mechanism to ensure that user fees remain reasonable.

- PROS:
1. This approach provides maximum incentive for infrastructure privatization.
 2. This approach is consistent with normal expectations associated with the term "grant." So long as the money provided by the grant is used

for the purpose of the grant (e.g., building the highway), the Federal Government's interest should terminate, providing certain assurances are maintained.

3. This approach is consistent with the Administration's proposal enacted last year in the Intermodal Surface Transportation Efficiency Act of 1991.

CONS:

1. This approach might be viewed as a resource transfer that would (i) be analogous to general revenue sharing, or (ii) effectively reduce the State/local matching burden envisaged in Federal authorizing legislation.

2. This option provides an incentive for State and local governments to generate infrastructure privatization transactions without regard to social needs.

3. The Administration could be accused of providing windfalls to States and localities (and possibly private parties).

- OPTION 2: Federal recoupment of original grant less 5-year straight line depreciation (regardless of the infrastructure's useful life).

This option would provide for no recoupment after 5 years. It (i) provides limited recoupment, (ii) avoids complexity in calculating depreciation, and (iii) avoids discouragement of privatization. By depreciating motor vehicles and treatment plants over the same period, this option does not relate depreciation to actual assets' useful lives.

- OPTION 3: Federal recoupment of original grant less accelerated depreciation (as provided in Internal Revenue regulations).

This option would provide for recoupment on the basis of accelerated depreciation over a term differentiated by asset type. Depreciation would be calculated using the 150% double declining balance method over the number of years defined in IRS's accelerated depreciation tables ("MACRS recovery period"). This method provides the majority of the depreciation benefit up-front without completely ignoring assets' actual useful lives.

- OPTION 4: Federal recoupment of original grant less "standard" depreciation (as provided in Internal Revenue regulations).

This option would calculate depreciation on the straight line basis over the period defined in IRS's straight line depreciation tables ("alternate MACRS recovery period"). This methods would most accurately approximate actual depreciation.

Pros and Cons: Options 2, 3 and 4. Options 2-4 provide increasing degrees of recoupment; thus, there is increasing applicability of the following general pros and cons. Attachment 1 provides a comparison of these options.

PROS: 1. These options ensure that the Federal Government receives some recoupment for its contribution to project costs, and counters the "giveaway" argument.

2. These options minimize weakening (explicitly or implicitly) current Federal-State-local cost sharing requirements (hard won over the years).

CONS: 1. For State and local governments, these options will provide a weaker financial incentive to privatize, and could in some instances prevent privatization.

2. We have not traditionally required recoupment when facilities have been sold from one public entity to another.

3. Some argue that recoupment could relieve the grantee of its grant obligations (e.g., the facility would no longer have to be used for its original purposes). This is not, however, a necessary outcome.

DECISION

OPTION 1 (no recoupment) _____

OPTION 2 (original grant less 5-year depreciation) _____

OPTION 3 (original grant less accelerated depreciation) _____

OPTION 4 (original grant less "standard" depreciation) _____

OTHER _____

NOTE: Certain agency statutes might effectively require alternate reimbursement and depreciation schedules under

certain circumstances. In these cases, Administration action would be subject to any legal constraints (although a separable decision might be to seek a legislative remedy in that event).

ISSUE 2: COLLECTION OF USER FEES

Should the Executive Order include, as a principle, the following language (proposed by DOT):

"Current and future user fees are more efficient than general taxes as a means to support infrastructure construction, and their benefits as a preferred financing mechanism should not be undercut through charging users more than once for the same facilities."

- PRO: Inclusion of this language would prevent users (e.g., passengers) from being forced to pay a second time for assets (e.g., airports) for which the users have already paid (e.g. through ticket taxes). Such action is analogous to charging a business rent in a building for which it has been making mortgage payments.
- CONS: 1. Inclusion of this language would prevent the privatization of appreciated assets (e.g., airports).
2. In the private sector, businesses indirectly recoup from customers their real property costs.

DECISION

INCLUDE PROPOSED CRITERION _____

DO NOT INCLUDE PROPOSED CRITERION _____

OTHER _____

Attachment 1**DEPRECIATION SCHEDULES**

	<i>Option 1</i>	<i>Option 2</i>	<i>Option 3</i>	<i>Option 4</i>	<i>FYI</i>
<i>Asset Class</i>	<i>No Recoup- ment</i>	<i>5-Year Straight Line Method</i>	<i>IRS Accel Deprec Term</i>	<i>IRS Straight Line Term</i>	<i>Agency Useful Life Estimate</i>
Automobiles	Not Applic. (NA)	5 years	5 years	5 years	
Buses	NA	5	5	9	12
Vans	NA	5	5	9	5-7
Land Improvements (e.g., roads, bridges, docks, wharves)	NA	5	15	20	20(?)
Office Furniture, Fixtures, and Equipment	NA	5	7	10	
Commercial and Industrial Buildings	NA	5	NA	31.5	
<i>NOTE: The depreciation periods for industry-specific items listed below apply only to those items not covered above.</i>					
Railroad Structures and Similar Improvements (i.e, bridges, etc.)	NA	5	7	14	
Railroad Tracks	NA	5	7	10	
Water Utilities (includes assets used in gathering, treatment and commercial distribution of water)	NA	5	15	22	
Municipal Wastewater Treatment Plants	NA	5	15	24	20-25
Municipal Sewers	NA	5	20	50	

Attachment 2

Executive Order:
Infrastructure Privatization

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that the United States achieves the most beneficial economic use of its resources, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this Order:

- (a) "Privatization" means the disposition or encumbrance of asset title either by sale or by a long term lease to a private sector party.
- (b) "Infrastructure" means any property or facility which directly supports the economy, including but not limited to: roads, tunnels, bridges, electricity, mass transit, rail transportation, airports, ports, waterways, water supply, wastewater treatment, solid waste disposal, recycling, housing, and school buildings.
- (c) "Originally authorized purposes" refers to the objectives of the original grant program; however, it is not intended to refer to every condition required for a grantee to have obtained the original grant.

Section 2. *Fundamental Principles.* In formulating and implementing policies, Executive departments and agencies shall be guided by the following objectives and principles:

- (a) Adequate and well maintained infrastructure is critical to economic growth. Consistent with the principles of Federalism enumerated in Executive Order 12612, State and local governments should have greater freedom to privatize infrastructure to better utilize Federal funds to allow the private sector to provide for infrastructure modernization and expansion.
- (b) Private enterprise and competitively driven improvements are the foundation of our nation's economy and economic growth. Federal financing of infrastructure should not act as a barrier to additional market financing and competitive practices to achieve economic efficiencies.
- (c) State and local governments are in the best position to assess and respond to local needs. State and local governments should, subject to assuring continued public use on reasonable and non-discriminatory terms, have maximum possible freedom to make decisions concerning the maintenance and disposition of their Federally financed infrastructure assets.

Option 1A:
[(d)

Current and future user fees are more efficient than general taxes as a means to support infrastructure construction, and their benefits as a preferred financing mechanism should not be undercut through charging users more than once for the same facilities.]

Option 1B:
Do not include (d).

Option 2A:
[(e)

The Federal Government should not require that Federal grants to State and local governments to assist in the development and improvement of public infrastructure be repaid in the event of encumbrance or disposition of such infrastructure, providing that the infrastructure continues to be used for its original purposes.]

Option 2B:
Do not include (e).

Section 3. *Privatization Initiative.* The head of each Executive department and agency shall undertake the following actions, subject to existing law and regulation:

(a) review those procedures affecting the management and disposition of Federally financed infrastructure assets owned by State and local governments, and to the extent permitted by law, modify these procedures to encourage appropriate privatization of such assets consistent with this order;

(b) assist State and local governments in their efforts to advance the objectives of this order; and

Option 3A:
[(c)

approve State and local governments' requests to privatize infrastructure assets, consistent with the criteria in Section 4 of this Order, and where necessary, grant exceptions and deviations to the disposition requirements of the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" common rule.]

Option 3B:
Add at end of (c):

[...provided the granting agency recoups the Federal grant award less the applicable share of accumulated depreciation on the underlying asset or assets based on _____ depreciation method.]

Section 4. *Criteria.* Before the head of an Executive department or agency approves a request under Section 3(c) of this Order, the grantee must establish to the satisfaction of the head of the granting Executive department or agency that a market mechanism, legally enforceable agreement, or regulatory mechanism exists, or will exist, to ensure that

- (a) the asset will continue to be used for its originally authorized purposes even if the purchaser becomes insolvent or is otherwise unable to perform; and
- (b) user charges will be reasonable, where Federal conditions currently so provide, to protect users and the public.

Nothing in this section is in any way intended to limit any existing authority of the heads of Executive departments and agencies to approve privatization proposals, otherwise consistent with law.

Section 5. *Use of Proceeds.* Except as required by law, State and local government may use the proceeds from infrastructure privatization for investment in additional infrastructure needs (providing there is full public disclosure of such use), or for debt or tax reduction.

Section 6. *Government-wide Coordination.* In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements of this Order.

Section 7. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Attachment 3**POTENTIAL PRIVATIZATION ANNOUNCEMENTS**
(SHORT TERM)

Agency/Area	Initiative Actions
DOT/FTA: Mass Transit <i>Note: Specific dates for announcement can be tailored to Administration needs.</i>	• Administration support for competitive contracting for the operation of transit services. -- Announcement of Federal Capital bus grant for newest privatization project -- \$5 million for suburb to suburb service; Los Angeles, CA. April/May 1992 -- Selection of private contractor for service expansion; Las Vegas, NV. April/May 1992 • Grant awards for entrepreneurial ventures. -- Joint Venture for traveler centers (\$500K) in four cities. May 1992 -- Combined courier and transit services (market research, \$80K); Tysons Corner, VA. May 1992 -- Private metro transit company serving 5 black colleges; Orangeburg, SC. Ribbon-cutting scheduled. April 23, 1992 -- Reverse commute service (planning, \$50K); Baltimore, MD. Service to begin within 4 months of grant. May/June 1992 • Administration support for private sector ventures. -- Purchase of buses, communications system, etc., for \$30 million (\$22 million is FTA share); Sacramento, CA. Closing ceremony. Early April 1992 • Establishment of Business Transportation Council to provide forum for business community to examine critical transportation issues affecting business and economic development. April 29, 1992
DOT/FHWA Highways	• DOT sponsored workshop on public-private sector roles in intelligent vehicle highways systems deployment. April 8-9, 1992 • FHWA issued guidance to its field organization on private/public highway funding earlier this month. It allows for substantial State flexibility. March 12, 1992 • Education of States through an informational campaign about FHWA's new policy guidance and requirements, and the implication of these Federal actions for State actions (to create conforming legislation). April/May 1992

HUD: Home Ownership <i>Note: Specific dates for announcement can be tailored to Administration needs.</i>	• Transmit to Congress the Administration's proposed legislation, "Perestroika for Troubled Housing Act of 1992," that will assist 23 troubled PHAs in disposing of properties. <i>March 23, 1992</i> • Hold selected ceremonies around the following closing, approval, and occupancy actions: <i>April/May 1992</i> -- Patterson, NJ. Brooke-Sloate Development. 242 units; occupied. -- New York, NY. Project Home. 430 units. Families ready to purchase. -- Delaware. 15 tenants ready to purchase. -- High Point, NC. 27 units. All sold. -- Louisville, KY. Low income conversion. -- Grand Rapids, MI. 50 units. 2 units to be occupied soon. -- Edinburg, TX. Up and out program. First resident, Mr. Jose Garcia, selected. -- Dallas, TX. Seven homebuyers close to acquiring title. -- New Orleans, Louisiana. Two residents to take at any time. -- Fresno, CA. 30 units. Families in occupancy; several are close to taking title. -- Pierce County, WA. 15 units. Closing ceremony for one resident planned (for early May).
HUD: Community Development Block Grants	• Notify grantees that Federally supported infrastructure may be sold if the proceeds are reinvested in other applicable projects. <i>May 1992</i>
Army Corps of Engineers: Transfer of Federal Facilities to State/Local Governments	• Complete environmental assessment and hold public meeting necessary for transfer of Wynoochee multiple-use reservoir project to Aberdeen, WA. <i>April 1992</i> • Complete Memorandum of Agreement between the Corps, GSA, and Interior to expedite transfer of Federal recreation areas to State and local governments where requested (no change in land use is permitted). <i>May 1992</i>
EPA: Wastewater Treatment Plants	• Publish in the Federal Register EPA's intention to define "publicly-owned" through policy, guidance, or regulation to provide for less than 100 percent public ownership and announce initiation of a negotiated rulemaking to develop a mechanism for privatization of current wastewater facilities. This permits greater private involvement in waste water treatment plants under existing law. <i>by May 15, 1992</i>

Commerce: Ports	• Issue policy statement reminding grantees that present policy permits publicly owned ports and related facilities to be privatized (subject to local laws). (The only Federal requirement is pro-rata repayment of the Federal share of project costs (which is typically very small).) <i>May 1992</i>
DOE: Uranium Enrichment	• Administration will work with the Congress to obtain passage of legislation containing the Administration's position (i.e., privatization of Federal uranium enrichment facilities after 5 years as a restructured corporation). (Note: The Administration has proposed uranium enrichment legislation for 10 years without achieving enactment.) <i>Legislation pending</i>

POTENTIAL PRIVATIZATION ANNOUNCEMENTS
(LONGER TERM)

Agency/Area	Initiative Actions
DOT/FHWA: Highways	• Highlight the private sector plan to build a private toll road (without Federal assistance). Financing for Dulles toll road extension should be completed soon. <i>May 1992</i> • A major milestone is scheduled for May in one of four planned private toll roads to be built in California. This road (SR91) is to be a 10 mile toll highway located in Orange County, CA. There may be an opportunity for a joint State-Federal announcement. <i>last week of May 1992</i> • Work with States in developing conforming legislation and implementing private/public highway projects. <i>1992</i>
EPA: Wastewater Treatment Plants	• Enter into a negotiated rulemaking process with interested parties for disposition of Federally funded wastewater treatment facilities. <i>by July 1, 1992</i> • Conduct public meetings to discuss public-private partnerships for wastewater treatment. <i>May - July 1992</i>
HUD: Home Ownership	• Award \$40 million in HOPE-3 (single family) homeownership planning grants and \$85 million in HOPE-3 implementation grants. <i>1st week of August 1992</i>
DOE/DP: Non-nuclear Facilities Consolidation	• Complete ongoing environmental assessment for plant consolidation. <i>December 1992</i> • Transfer 16 to 28 non-nuclear manufacturing activities to the private sector in conjunction with consolidation of non-nuclear manufacturing sites. <i>FY 1993-95</i>

THE WHITE HOUSE
WASHINGTON

April 23, 1992

MEMORANDUM FOR ROGER PORTER

FROM: DIANA FURCHTGOTT-ROTH *DEFR*
SUBJECT: Privatization Executive Order: The Issue of
Federal Grant Recoupment

The proposed Executive Order on privatization will be discussed at a meeting of the Competitiveness Council tomorrow, Friday, April 24. The question of the extent of Federal grant recoupment upon the sale of state-owned infrastructure is generating substantial discussion. The purpose of this memo is to provide you with some background on the issue.

The law does not require that Federal grants for infrastructure be repaid to the Federal government when an asset is sold as long as that asset is used for its originally-intended purpose. Until now, OMB has had a policy that when an asset partially funded with Federal funds be sold, the Federal government recoups an amount equal to the fair market value of the asset multiplied by the Federal share of the original project cost. Under this policy, hardly any assets have been sold to the private sector.

The alternatives under discussion at tomorrow's meeting are

- no recoupment;
- limited recoupment over five years;
- recoupment with accelerated depreciation; or
- recoupment with standard depreciation.

The privatization cluster of the regulatory reform working group concluded that, as long as the asset is used for its originally designated purpose and the original grant assurances are kept in place, no recoupment should be required for the following reasons.

- According to the Department of Justice and the White House Counsel, the law does not require recoupment of Federal grants. The issue of whether grants are recouped is one of policy.
- Congress has explicitly provided for grant recoupment for sales of certain assets in particular statutes. Given that

express recognition, there is no basis on which Federal law requires repayment in general.

- It is immaterial whether a Federally-funded facility is operated by the public or by the private sector. Federal grants have been given to private operators to construct public-use facilities.
- In the past, when an asset is sold by one state and local authority to another, no recoupment has occurred.
- Under current policy, no recoupment of Federal grants takes place when states sell public housing projects.

An argument raised by proponents of requiring grants to be paid back hold that it is unfair for the seller to "cash in" on taxpayers' dollars used to fund Federal projects. This contention is unfounded.

The grants are still embedded in the infrastructure for the benefit of the users. All continue to derive benefits from those grants for the purpose which they were made. The users of the facility remain protected by virtue of the continued assurances that will be provided as a condition of the sale.

Two further arguments have been raised. Concern exists that in a time of great budget deficit, the Federal government would appear to be giving a windfall to states. Second, it is thought that no grant recoupment would encouraged states to "churn" assets -- to build a facility with a Federal grant one year, and sell it the next year.

However, it can be argued that the Federal grant was a gift, with no expectation of repayment, and therefore the states would not be receiving a windfall. Second, as mentioned above, Federal grants are given to private parties to build public-use infrastructure, and so it does not matter whether the state sells the facility to the private sector the next year, as long as the asset is used for its originally authorized purpose.

The extent of recoupment will have a substantial effect on the number of asset sales by states. Allowing states to sell their infrastructure (and encouraging them to spend the proceeds on new infrastructure or tax reduction, as in this Executive Order) provides an opportunity for the Administration to guide more funds into infrastructure without increasing the deficit.