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February 16, 1984

By Hand

John Topping, Esquire
Staff Director
Office of Air and Radiation
Environmental Protection Agency
935 West Tower
401 M Street, S.W.
Washington, D.C. 20460

Dear John:

Enclosed are a copy of the memorandum and supporting attachments that address the legal issues that we have discussed with you and members of the EPA staff during the past few weeks. I sent several copies to Sam Gutter for review by him and other Agency lawyers.

I believe that our memorandum conclusively demonstrates that EPA is free to act on the pending petitions filed by the manufacturers relating to truck noise standards scheduled to beome effective in 1986 without any risk of violating the Anti-Deficiency Act. I am hopeful that you and the EPA lawyers who review our memorandum will reach the same conclusion and take those steps required to initiate promptly the rulemaking proceeding requested by my clients. Because of the importance of the legal issues discussed in the memorandum, I have sent a copy (without the attachments) to Mr. Barnes.

My clients and I appreciate the care and attention that you have given this problem during the past few months. I look forward to hearing from you in the near future.

Sincerely,

Howard P. Willens

Enclosures

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MEMORANDUM FOR THE ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: EPA's Legal Authority to Act on Pending Rule-Making Petitions Seeking Deferral of Noise Emission Standards for Medium and Heavy Duty Trucks

This memorandum is submitted on behalf of the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA")1/ and those of its member companies, Ford Motor Company, General Motors Corporation and International Harvester Company, which filed petitions requesting that the agency defer the effective date of the 80 decibel noise emission standard for medium and heavy trucks. This memorandum discusses the authority and obligation of the agency to act on the petitions filed by these three manufacturers (and the American Trucking Association, Inc.). In particular, this memorandum addresses concerns expressed by EPA staff that the Administrator cannot lawfully consider the petitions on their merits because of prohibitions contained in the Anti-Deficiency Act.

1/ MVMA member companies are: American Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, International Harvester Company, M.A.N. Truck & Bus Corporation, PACCAR Inc., Volkswagen of America, Inc., and Volvo North America Corporation.

SUMMARY OF CONCLUSIONS

The petitioners have requested that EPA defer the current effective date of the 80 decibel noise emission standard for medium and heavy trucks -- January 1, 1986 -- to coincide with the effective date of EPA's new heavy duty engine exhaust standards for NO_x and diesel particulates. The petitioners base their request on three compelling considerations: (1) the unhealthy economic condition of the trucking industry; (2) the substantial engineering and development savings that can be secured by aligning the effective date of the noise and exhaust emissions standards; and (3) the insubstantial impact on aggregate truck-generated noise that can be expected from deferral.

Although EPA has twice previously deferred the effective date of the 80 decibel standard for essentially these same reasons, the agency staff in this instance has thus far indicated a reluctance even to address the substance of the pending petitions. In several conversations with representatives of the manufacturers during the past few months, EPA staff members and lawyers have stated their view that Congress has not appropriated any funds for the Federal noise control program during the current fiscal year, and that no funds can therefore be used for the rule-making proceeding sought by petitioners.

These EPA representatives have concluded that using appropriated funds for this purpose would violate the Anti-Deficiency Act which, in essence, prohibits expenditures that exceed appropriated funds or are otherwise not legally authorized.

Based upon our review of the applicable legal precedents, appropriations acts and other relevant material, we have reached the following conclusions:

First, the Anti-Deficiency Act does not prohibit EPA from using available funds to act on the pending petitions. It is well established -- and reflected in the authoritative GAO manual on the subject -- that restrictions on the use of lump-sum appropriations, such as those received by EPA, are legally binding only if included in the appropriations act itself. In the absence of any such legally binding restrictions, EPA is authorized to expend funds to consider the pending petitions on their merits without any legal impediment arising from the Anti-Deficiency Act.

Second, Congress and EPA alike have recognized that funds would have to be expended during the current fiscal year in order to accomplish an orderly phase out of the Federal noise control program. The legislative history discloses no intent on anybody's part -- EPA's or the Congress' -- to forbid phase out expenditures that are necessary to avoid an

unreasonable ratcheting down of existing federal standards. Indeed, EPA's own recent activities belie the idea that no funds are available for phasing out the noise program. Since the close of FY 1982, EPA has completed action on a number of important phase-out rulemakings, including (1) revoking testing, reporting and recordkeeping requirements for numerous products, including medium and heavy trucks, and (2) rescinding all noise emission standards for garbage trucks. Moreover, EPA has candidly reported to the Congress substantial continuing outlays for the noise program, including approximately $660,000 in the current fiscal year. Action on the pending petitions is thus fully consistent with Congressional intent and past agency practice.

Third, EPA has an affirmative obligation to consider these petitions on their merits. The Noise Control Act remains in full force and effect and imposes legal responsibilities on both the petitioners and the Administrator of EPA. The petitioners have raised substantial questions regarding the need to defer noise control standards scheduled to go into effect on January 1, 1986. Considerations of fairness and administrative due process require that the Administrator review these issues on the merits rather than refuse to do so based upon an untenable reading of the Anti-Deficiency Act.

BACKGROUND

The Petitions

The petitioners have requested that the Administrator of EPA defer temporarily the effective date of the 80 decibel noise emission standard for medium and heavy trucks to coincide with the effective date of EPA's anticipated heavy duty engine exhaust standards for nitrogen oxides (NO_x) and diesel particulates, which are currently expected to become effective sometime after 1986. See Attachments A, B, C, and D.2/ The petitioners base their request on three compelling and undisputed propositions.

2/ See 48 FR 47864, 47915 (Oct. 17, 1983); Ford petition at page 1; and American Trucking Associations petition at page 1. International Harvester ("IH") filed its petition on September 26, 1983; General Motors ("GM") filed its petition on September 30, 1983; Ford filed its petition on December 15, 1983; and the American Trucking Associations ("ATA") filed its petition on January 9, 1984.

The 80 decibel standard was originally promulgated in April of 1976, 41 FR 15538 (Apr. 13, 1976), under the authority of Section 6 of the Noise Control Act of 1972, 42 U.S.C. §§ 4901-18. This provision empowers the Administrator to set performance standards for the noise emissions of new products that are, in his judgment, "requisite to protect the public health and welfare, taking into account the magnitude and conditions of use of such product (alone or in combination with other noise sources), the degree of noise reduction achievable through the application of the best available technology, and the cost of compliance." Id., § 4905(c)(1). It also requires that he "give appropriate consideration to standards under other laws designed to safeguard the health and welfare of persons, including standards under . . . the Clean Air Act."

First, postponing the effective date of the 80 decibel noise emission standard will provide badly needed economic relief for the trucking and truck manufacturing industries.3/ Despite a nascent turn-around over the last few months, these industries continue to be economically unhealthy. Many ICC-regulated carriers showed operating losses over the last two years. Moreover, medium and heavy truck sales are currently greatly below 1974 or 1979 levels, with the greatest decreases in larger -- and higher priced -- trucks. Imposing the 80 decibel standard on these hard-pressed industries will strain their already thin resources.

Second, postponing the effective date of the 80 decibel noise standard to coincide with the effective date of the anticipated exhaust standards would permit substantial savings in engineering and development costs.4/ It would permit manufacturers to avoid the substantial expenses of designing

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3/ See the IH petition at pages 2-5; the GM petition at page 2, the Ford petition at pages 2-3, 8-9; and the ATA petition at page 2.

4/ See the IH petition at pages 5-7; the GM petition at pages 2-3; the Ford petition at pages 3-7; and the ATA petition at page 2. Because fixed engineering and development costs will have to be recovered from a truck-sale volume that will be far smaller than originally projected, the per-unit cost -- which must ultimately be recovered from truck buyers and the general shipping public -- will be considerably higher than originally projected.

"interim" 1986 engines and trucks to comply with the 80 decibel noise standard alone, while simultaneously designing "final" post-1986 engines and trucks to comply with both the 80 decibel noise standard and the post-1986 exhaust standards. With the industry depressed and volume reduced, the expected savings would be substantial.

Third, the noise reduction benefits that can be expected from imposing the 80 decibel standard in 1986, rather than a subsequent year, are slight.5/ The environmental noise generated by medium and heavy trucks is already on the wane. Older, noisier trucks have been replaced by new, quieter trucks meeting the current 83 decibel standard.6/ Moreover, both old and new trucks have become quieter with the increased use of "quiet" radial tires, rather than "noisy" bias ply tires. Finally, the depressed state of the trucking industry has reduced the number of trucks on the road well below projected levels, thus reducing the aggregate environmental noise generated by trucks.

5/ See the IH petition at pages 7-8; the GM petiton at page 3; the Ford petition at pages 7-8; and the ATA petition at page 2.

6/ Other factors besides the 83 decibel noise standards, such as increasing use of (1) fuel efficient -- and quieter -- low r.p.m. engines, and (2) trucks that are larger and therefore need to make fewer trips, have also contributed to a general decrease in the noise generated by new trucks.

EPA's Response to the Petitions

On two previous occasions EPA has deferred the effective date of the 80 decibel standard for one or more of the very same reasons that petitioners now advance. In January of 1981, EPA deferred the effective date of the 80 decibel standard for one year, from January 1, 1982, to January 1, 1983. See Attachment E.7/ In doing so, it cited "the recent downturn in the economic condition of the truck manufacturing industry and an unforeseen increase in the demand for medium diesel trucks, which are the most costly to quiet."8/ It left open, for public comment, the question whether "a further deferral . . . would be appropriate."9/

In February of 1982, EPA deferred the 80 decibel standard for an additional three years, to January 1, 1986. See Attachment F.10/ It concluded that a further deferral was

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7/ See 46 FR 8497-512 (Jan. 27, 1981), appended as Attachment E. EPA acted in response to petitions and other less formal communications from International Harvester, Ford, General Motors, and Mack Trucks, Inc., that were filed in the fall of 1980. Id. at 8497-98.

8/ Id. at 8497.

9/ Id. at 8499.

10/ See 47 FR 7186-88 (Feb. 17, 1982), appended as Attachment F. EPA characterized the issues raised as not substantively different from those involved in the previous one-year deferral. Id. at 7186.

appropriate (1) to "provide adequate time to the truck industry to effect a reasonable level of economic recovery," (2) to "integrate, in a cost-effective manner, further noise reduction requirements with new air emission and fuel economy designs and engineering," (3) because the "loss of anticipated near-term health and welfare benefits due to the delayed entry of vehicles quieted below the current 83 db Federal standard" was "small," and (4) because of uncertain Congressional support for the program.11/ Moreover, it implied that further evaluation of the standard would be undertaken at a later date, stating:

> Based on comments and information received by the Agency, and the length of this deferral, the Administration believes it unnecessary to decide at this time whether the 80 db standard should be withdrawn.12/

Notwithstanding these earlier actions, the EPA staff has tentatively concluded that the agency cannot even consider the pending petitions because the expenditure of funds for this purpose would violate the Anti-Deficiency Act.13/ This

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11/ Id. at 7187.

12/ Id. at 7187 (emphasis added). Various petitioners and commentors had requested not merely that the 80 decibel standard be deferred, but that it be permanently withdrawn.

13/ The Anti-Deficiency Act, whose provisions are scattered throughout 31 U.S.C. Chapters 13 and 15, provides in essence that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law," and that an officer or employee of the

[Footnote continued next page]

conclusion is based on the fact that the only funds expressly requested by EPA for the noise program since FY 1981 were funds requested in FY 1982 to phase out the program. The staff's position is that when those FY 1982 funds ran out -- and the staff believes that they expired at the end of FY 1982 -- EPA ceased to have authority to spend any funds whatsoever for the noise program, other than on such ancillary activities as responding to Congressional inquiries. From this the staff infers that Congress intended to "freeze" the EPA regulations that are now on the books (including future requirements that have not yet come into effect) and to prohibit EPA from spending any money to revise them.

The EPA staff recognizes that this conclusion may impose onerous and unnecessary burdens on truck manufacturers who may be required to adhere to emission standards that are in fact inappropriately stringent. While EPA might not itself enforce the standards -- due to the same perceived lack of funds that would prevent it from addressing the petitions on

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federal government may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. §§ 1301(a), 1341(a)(1). Violations must be reported to the President and the Congress by the head of the agency involved, and, if knowing and willful, are criminal offenses. Id., §§ 1341, 1350, 1351.

the merits -- the standards could be enforced by citizen suits brought by private individuals, environmental groups, the States, or other entities.14/ The staff nonetheless has concluded that the Anti-Deficiency Act prohibits EPA from considering these petitions on their merits.

DISCUSSION

I. The Anti-Deficiency Act Does Not Forbid Expenditures On The Noise Program.

Congress has not imposed any restrictions on EPA that bar the agency from lawfully making expenditures on the noise control program. The relevant appropriations acts are entirely silent on the question of expenditures for the noise program. The most that can be said is that the legislative history of those acts demonstrates an intent by EPA and the Administration, in which Congress may have silently acquiesced, to restrict noise program spending to sums necessary for an "orderly phase-out" of the program. This legislative history does not, however, constitute the kind of explicit and specific Congressional direction that triggers the prohibitions of the Anti-Deficiency Act.

14/ Section 12 of the 1972 Noise Control Act provides for such suits. 42 U.S.C. § 4911.

In recent years, EPA's appropriations have been enacted as part of Title II of the annual "Department of Housing and Urban Development - Independent Agencies Act," an appropriations act covering HUD and numerous independent agencies. In each of the last three fiscal years, the EPA appropriations have consisted of seven separate lump sums, including one for "salaries and expenses," one for "research and development," one for "abatement, control and compliance," and one for "buildings and facilities." See Attachment G.

While Congress has, in each of these years, imposed one or more express restrictions on the disposition of the funds appropriated,15/ it has in none of these years expressly prohibited using appropriated funds for the noise emission program. Indeed, none of the appropriation acts refers to the noise emission program in any way at all.16/

15/ E.g., the annual prohibition against funding Resource Conservation and Recovery Panels out of "salaries and expenses" or "abatement, control and compliance" appropriations. See Attachment G.

16/ The relevant Committee Reports are similarly silent, with two exceptions noted below. See note 29, below, and the accompanying text. The relevant House, Senate, and Conference Reports for FY 1984, FY 1983, and FY 1982 are: House Rep. No. 98-223; Senate Rep. No. 98-152; House Conf. Rep. No. 98-223; House Rep. No. 97-720; Senate Rep. 97-537; House Conf. Rep. No. 97-891; House Rep. 97-162; Senate Rep. 97-163; and House Conf. Rep. 97-222.

The absence of express statutory language forbidding EPA from using funds for modifying noise program requirements settles the question whether use of funds for this purpose is legally permissible. It is a fundamental tenet of appropriations law that no restriction not expressly incorporated into the text of a statute is legally binding. Restrictions set forth in agency submissions or in Congressional Committee Reports are not effective unless expressly reflected in statutory language. This rule applies not only when the legislative history reveals mere acquiescence in the agency's budget request, but also when the legislative intent is clear, but not incorporated in the statute.17/

These propositions, and the authority supporting them, are set forth at length in the General Accounting Office manual, Principles of Federal Appropriations Law (June 1982) -- known popularly as the "Red Book." See Attachment H. This manual -- which the EPA staff has agreed is authoritative -- states:

> Budget estimates are not legally binding on an agency unless carried into (either specified in or incorporated by reference) the appropriation act itself.

17/ Compare Tennessee Valley Authority v. Hill, 437 U.S. 153, 191 (1978) ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress").

> Thus, an agency operating under a lump-sum appropriation may exceed the budget estimate for any given item as long as it does not exceed the lump-sum appropriation or violate any other provision of law.
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> * * *
>
> It is frequently argued that legislative history should be used to define the uses of a lump-sum appropriation in the same manner as it is used to define ambiguous terms in general; that is, that agencies should be bound by restrictions contained in legislative history. However, although legislative history may go far in accomplishing this result as a practical matter, it does not have this effect as a matter of law.
>
> The rule is that restrictions on the use of a lump-sum appropriation are not legally binding on the department or agency concerned unless they are incorporated, either expressly or by reference, in the appropriation act itself (or, of course, in some other statute).18/

The breadth of these general principles is illustrated by the leading case of In the Matter of LTV Aerospace Corporation, 55 Comp. Gen. 307 (1975). See Attachment I. The case arose when LTV Aerospace Corporation protested the Navy Department's award of a contract to the McDonnell-Douglas Corporation to develop a new fighter aircraft. The contract was to be financed out of a lump-sum appropriation captioned

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18/ GAO Red Book, chapter two, pages 26, 49. See Attachment H.

"Research, Development, Test, and Evaluation, Navy." The Conference Report stated that $20 million of the $3 billion appropriated was being provided for developing a Navy combat fighter, and that the fighter developed must be adapted from an Air Force fighter. It was conceded that the McDonnell-Douglas fighter was not adapted from an Air Force fighter, and that the Navy's selection therefore violated the Conference Committee's express instructions. The Comptroller General nonetheless ruled that the award was proper, stating:

> Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies.
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> * * *
>
> We further point out that Congress itself has often recognized the reprogramming flexibility of Executive agencies, and we think it is at least implicit in such [recognition] that Congress is well aware that agencies are not legally bound to follow what is expressed in Committee reports when those expressions are not explicitly carried over into the statutory language.
>
> * * *

> We think it follows from the above discussion that, as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there.19/

Thus even expenditures expressly forbidden in conference committee reports -- the most persuasive form of legislative history20/ -- are legally permissible. Restrictions assertedly implied from language, or dollar figures, in agency budget estimates are a fortiori ineffective to legally preclude expenditures. The Comptroller General has thus long taken the position that:

> The amounts of individual items in the estimates presented to the Congress on the basis of which a lump sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation act itself.21/

19/ 55 Comp. Gen. at 319, 321, 325; see Attachment I. To similar effect is: 55 Comp. Gen. 812 (1976); 20 Comp. Gen. 631 (1941); and numerous unpublished decisions cited in the GAO Red Book, chapter 5, pages 94-103 (appended as part of Attachment H). See also Matter of the Availability of Funds for Payment of Intervenor Attorney Fees -- Nuclear Regulatory Commission, Comptroller General of the United States, Decision B-208637 (Sept. 29, 1983) ("no year" money can be used to pay the expenses of intervenors in NRC proceedings even when Congress has expressly forbidden such expenditures out of current year funds).

20/ See the GAO Red Book, chapter 2, page 47 ("A conference report is generally viewed as the most authoritative single source of legislative history") (appended as part of Attachment H).

21/ Matter of Customs Service Payment of Overtime Expenses in Excess of Appropriations Act, 17 Comp. Gen. 147,

[Footnote continued next page]

In short, even if there were unequivocal evidence of an intent by the EPA and the relevant Congressional Committees to prohibit expenditures for the noise program -- which is emphatically not the case -- that intent would not be legally binding to restrict EPA from making expenditures for that purpose.22/ Because no such restriction appears in the relevant appropriations acts, EPA is legally free to act as necessary in this area, without fear of any Anti-Deficiency Act violation.

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150 (1937), appended as Attachment J. See also B-149163 (June 27, 1962), (quoted in the Red Book at page 96 of chapter 5; see Attachment H) ("If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts thereof submitted in the budget estimates, such control may be effected by limiting such items in the appropriation act itself. Or, by a general provision of law, the availability of appropriations could be limited to the items and the amounts contained in the budget estimates. In the absence of such limitations an agency's lump-sum appropriation is legally available to carry out the functions of the agency.")

22/ In opposition to this established precedent, the EPA legal staff reportedly relies on a single published opinion -- Matter of Custom Service Payment of Overtime Pay in Excess of Limit in Appropriation Act, 60 Comp. Gen. 440 (May 6, 1981). This case wholly fails to support the staff position. Instead, it simply illustrates the difference between (1) restrictions incorporated in the text of an Appropriations Act, and (2) restrictions purportedly implied by legislative history. The Customs Service had incurred overtime expenses in excess of a limitation set forth in the text of the relevant Appropriations Act. The Comptroller ruled that an expenditure that exceeded the limit by $194.17 violated the Anti-Deficiency Act. However, he said absolutely nothing to indicate that he would have reached the same result had the limitation not been expressly set forth in the Appropriations Act. See Attachment K.

It follows from this established precedent that EPA is authorized to commit any available lump-sum appropriation not expressly earmarked for other purposes, such as its "salaries and expenses" appropriation, to processing the petitions.23/ This would be so even if Congress had not clearly contemplated transfers of funds among EPA programs and accounts -- as was in fact the case.

Congress clearly expected, as a matter of general agency-wide flexibility, some substantial amount of transferring of funds among EPA programs and accounts. Thus, the FY 1984 House Appropriations Subcommittee Report expressly contemplates "transfers of funds between programs and activities," requesting only that prior approval of the Appropriations Committee be secured if the transfers exceed $500,000. See Attachment M. The Report states:

23/ See, e.g., Matter of Obligation of Appropriation for Printing -- Commission of Fine Arts, 59 Comp. Gen. 386, 388-89 (Apr. 14, 1980) (lump sum appropriation for "salaries and expenses" could be used to cover a short fall in a printing budget) (appended as Attachment L); see also 39 Comp. Gen. 320 (1959) ("salaries and expenses" appropriation used for purchasing training materials); 32 Comp. Gen. 347 ("salaries and expenses" appropriation used for new investigative duties); 29 Comp. Gen. 419 (1950) ("salaries and expenses" appropriation used to purchase and install lights and watch towers); 27 Comp. Gen. 746 (1948) ("salaries and expenses" appropriation used to buy books).

> Of the amounts approved in the following appropriation accounts, the Agency must limit transfer of funds between programs and activities to not more than $500,000 without prior approval of the committee.24/

The EPA staff has thus far taken the position that this language does not permit transfers of funds to the noise control program. The staff apparently bases this position on the fact that EPA represented to the Congress that any activities to phase out the program could be completed without appropriations specially earmarked for the purpose. The staff position frustrates the clear Congressional understanding (discussed below) that EPA would phase out the program in an orderly fashion. It also runs counter to the well established general rule (based on the general principles already discussed above) that transfers of funds among programs funded out of a single lump-sum appropriation are permissible unless forbidden by statute.

As set forth in the GAO Red Book, transfers of funds among programs funded out of a single lump-sum appropriation -- known technically as "reprogramming" -- are generally perfectly proper even in the absence of express Committee language authorizing it. The Red Book states:

24/ FY 1984 House Appropriations Subcommittee Report at 21.

> [A]s a matter of law, an agency is free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and are not in violation of any other specific limitation or otherwise prohibited. . . . [A] reprogramming which has the effect of restoring funds deleted in the legislative process, which has been approved by both the appropriations and the legislative committees, has been held not legally objectionable. B-195269, October 15, 1979. . . . Absent a statutory basis, requirements imposed by committees for approval of reprogrammings are not legally binding upon the agencies.25/

The present case is, of course, far easier than that addressed in the quoted excerpt from the Red Book; here the key Congressional Subcommittee has evidenced no intent to restrict reprogramming, but has instead expressly indicated that it expects it.

II. Both Congress and EPA Have Recognized that Expenditures Would Be Necessary to Implement An Orderly Phasing-Out of the Noise Control Program.

Beginning with FY 1982, EPA drastically cut back its noise program budget requests to implement a major shift of Federal noise emission control policy that occurred with the advent of the Reagan Administration. As explained to the Congress, this change of policy consisted of a decision to phase

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25/ GAO Red Book, chapter 2, page 29.

out the Federal noise control program on the premise that noise control is a matter best left to State and local governments. EPA repeatedly assured Congress that State and local governments could implement effective noise control programs without Federal participation; that the EPA phase-out would be "orderly"; that the phase-out would result in the "termination" of the EPA program; and that as part of the termination process EPA would reexamine existing Federal noise regulations with an eye toward rescinding or modifying them. EPA at no point suggested to Congress that the appropriations that it was requesting would leave it helpless to deal with unreasonable constrictions in its own existing standards.

The basic theme was set forth by Acting Administrator Walter Barber in his prepared statement to the House HUD-Independent Agencies Appropriations Subcommittee in hearings on the FY 1982 EPA appropriations requests. He explained:

> In 1982 we are revising our policy with respect to the Federal effort to reduce noise exposure. We plan to phase-out the EPA Noise Control program by the end of 1982. This decision results from our determination that the benefits of noise control are highly localized and that the function of noise control can be adequately carried out at the state and local level without the presence of a Federal program. Therefore resources for noise in 1982 will decrease by 60 workyears and $10.8 million.26/

26/ House Appropriations Subcommittee FY 1982 Hearings: Subcommittee on HUD-Independent Agencies, Part 5 (Environmental

[Footnote continued next page]

This position was later elaborated in an exchange between Congressman Green of New York and the Acting Assistant Administrator for Air, Noise and Radiation, Edward Tuerk. The exchange went as follows:

> MR. GREEN. Do you envision that 1982 will be the last year for which funds are requested in the noise program?
>
> MR. TUERK. This is the current understanding.
>
> MR. GREEN. Under those circumstances, why shouldn't we just close it down now?
>
> MR. TUERK. The main reason for carrying a program into 1982 is to allow us to have an orderly phase-out.
>
> Let me give you some examples. The assumption is that State and local agencies will continue to be active in the noise field . . . .
>
> * * *
>
> In addition, there is some concern about the existing Federal regulations we have promulgated over the past half-dozen years for noise. There needs to be a way over the next 18 months of handling actions to either rescind or modify those.

[Footnote continued from preceding page]

Protection Agency) at 6 (emphasis added). The agency's detailed appropriations request makes the same point more fully. See id. at 691, 699. Excerpts from the published Hearings are appended as Attachment N.

* * *

> So it is all in the context of providing the most effective transition possible to the continuation of activities at the State and local level.27/

In the FY 1983 and FY 1984 EPA appropriations hearings, Congress was again told that "the EPA noise control program is being phased out" in a "prompt but orderly" fashion because of "a determination that the benefits of noise control are highly localized and that the function of noise control can be adequately carried out at the State and local level without the presence of a Federal program."28/ Moreover, the only Appropriations Committee Report that discusses the change in policy at all -- the FY 1983 Senate Report -- confirms a Congressional understanding (1) that EPA was stepping out of the field and (2) that the phase-out would be "orderly."29/

27/ Id. at 156-57 (emphasis added). See Attachment N. Similar statements also appear in the FY 1982 Senate Appropriations Committee Hearings on the HUD-Independent Agencies Appropriations (Part 1) at 717, 737 and 822. See Attachment O.

28/ FY 1983 House Appropriations Subcommittee Hearings (Part 3) at 770 (emphasis added); FY 1984 House Appropriations Subcommittee Hearings (Part 4) at 710 (emphasis added); see also FY 1983 Senate Appropriations Hearings (Part 1) at 693-94. Excerpts from these Hearings are appended as Attachments P, Q, and R respectively.

29/ The FY 1983 Senate Appropriations Committee Report states:

> For both 1981 and 1982, activities of the noise program were structured to achieve a

[Footnote continued next page]

There is thus no indication that Congress intended to forbid expenditures necessary for an orderly phase-out of the Federal program -- quite the contrary. Moreover, the exchange between Acting Assistant Administrator Tuerk and Congressman Green makes it crystal clear that modification of existing regulations was considered part of this "phase-out" effort. There can thus be no question that the deferral requested by the petitioners constitutes the type of phase-out activity contemplated in EPA's representations to the Congress. Indeed, EPA itself acted in FY 1982 -- the first "phase-out" year -- to defer the very standard whose further deferral the petitioners are now requesting, thus confirming its own view that deferral is a "phase-out" activity.30/

[Footnote continued from preceding page]

> prompt but orderly phase-out of current program activities by transferring to the State and local programs the knowledge and experience EPA has gained. State and local jurisdictions are now managing this program without direct EPA involvement.

See Attachment S (emphasis added). The only other FY 1982, FY 1983, or FY 1984 Appropriations Committee Report to mention the noise program was the FY 1982 Senate Report, which sets forth a brief description of the noise program.

30/ As a matter of pure logic, it is hard to see how deferral of the 80 decibel standard could be viewed as anything other than a phase-out activity. The end result of deferral is to rescind, or terminate, the 80 decibel standard for the affected years. The 80 decibel standard is simply struck off the books for those years, as if it had never existed. Such a

[Footnote continued next page]

In any event, EPA has freely announced substantial continuing expenditures and activities directed at phasing out the noise program. In its FY 1984 budget submission EPA candidly informed the Congress that the noise program was the beneficiary of substantial continuing outlays -- $1,707,000 in FY 1983 (estimated) and $663,000 in FY 1984 (estimated).31/ These outlay estimates -- which represented a quantum jump from the $350,000 in outlays estimated for FY 1983 in EPA's FY 1983 budget submission32/ demonstrate that EPA has continued to make substantial expenditures for the noise program right into the current fiscal year.33/ By communicating this fact to the

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[Footnote continued from preceding page]

termination, or rescission, is quite clearly a "phase-out" activity as the Congress, EPA, and any ordinary reader would understand the term.

31/ See FY 1984 House Appropriations Subcommittee Hearings (Part 4) at 369, 709. These pages are appended as part of Attachment Q.

32/ See FY 1983 House Appropriations Subcommittee Hearings (Part 3) at 767; FY 1984 House Appropriations Subcommittee Hearings (Part 4) at 709. These pages are appended as parts of Attachments P and Q, respectively. In addition, EPA's FY 1983 submission to the Congress included an estimate of new obligations amounting to $40,000. See FY 1983 House Appropriations Subcommittee Hearings at 329, reproduced as part of Attachment P.

33/ It appears inconceivable that these mushrooming outlay estimates could be solely the product of obligations incurred in FY 1982; if this were the case, they would not have been so grossly under-estimated in the FY 1983 submission, whose $350,000 outlay estimate for FY 1983 was revised the following year to $1,707,000.

Congress, EPA served notice that it was continuing to make "phase-out" expenditures.

Rule-making actions initiated by EPA during the past two fiscal years to defer or phase-out noise program requirements confirm that the agency has the authority and the funds to act on the petitions now pending before it. For example:

- In December of 1982, EPA revoked its product verification testing, reporting, and recordkeeping requirements for portable air compressors, medium and heavy trucks, hearing protectors, garbage trucks, and motorcycles. See Attachment T.34/
- In June of 1983, EPA published "technical amendments" to the December 28, 1982, revisions. See Attachment U.35/
- In July of 1983, EPA rescinded its noise emission regulations for "truck-mounted solid waste compactors" (garbage trucks). See Attachment V.36/
- In October of 1983, EPA announced an action withdrawing certain products -- including power lawn mowers, pavement breakers, rock drills, and buses --

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34/ 47 FR 47709 (Dec. 28, 1982). EPA retained provisions for selective EPA auditing and testing in order to preserve "some federal mechanism by which questionable products could be adequately tested for compliance," thus expressly contemplating some continuing EPA activity.

35/ 48 FR 27039 (June 13, 1983).

36/ 48 FR 32502 (July 15, 1983). EPA had given notice of its intent to rescind this regulation in December of 1982. 44 FR 54111 (December 1, 1982).

from its list of major noise sources. See Attachment W.37/

- In October of 1983, EPA announced an intention to propose regulations to amend the noise emission regulations for interstate motor carriers to align those regulations with the standards imposed on newly manufactured trucks. See Attachment W.38/

Thus, EPA has itself established firm precedents for continued expenditures to cut back the Federal noise program.39/

Other EPA actions confirm that the agency itself does not believe that phase-out expenditures of the sort sought by petitioners violate the Anti-Deficiency Act. The Anti-Deficiency Act requires the head of any agency that has made expenditures in excess of appropriations to "report immediately

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37/ 48 FR 47893 (October 17, 1983). Listing under 42 U.S.C. § 4904(b) automatically triggers consideration for regulation under § 4905(a).

38/ 48 FR 47893 (Oct. 17, 1983).

39/ Virtually all of the actions catalogued above were based on a consideration of the very same factors that support the pending petitions -- (1) the economic state of the industries involved, (2) the unexpected costliness of the phased-out standards; and (3) lack of significant effect on noise. For example, the retraction of the garbage truck standards was expressly based on (1) the depressed state of the garbage truck manufacturing industry; (2) the high costs per-unit of satisfying the standards; (3) the expressed desires of the garbage truck manufacturing industry; (4) the minimal expected impact on environmental noise; and (5) Congressional intent that the question be examined. See 48 FR 32502 (July 15, 1983), appended as part of Attachment V.

to the President and Congress all relevant facts and a statement of actions taken."40/ This statutory directive to make a report does not depend on the good faith, or lack of it, with which the expenditure or obligation was made.41/ Neither does it contain an exception for de minimis violations or for expenditures in connection with activities that were substantially completed when the violation occurred.42/ Yet the Administrator of EPA has filed no report with the President, or the Congress, in connection with any of the noise program rulemaking activities that EPA has completed since FY 1982. If these activities constituted violations of the Anti-Deficiency Act, then they must be reported; and if they did not constitute violations of the Act, then expenditures to process the pending petitions cannot constitute violations either.

40/ 31 U.S.C. § 1351 (emphasis added).

41/ See 35 Comp. Gen. 356 (1955) (appended as Attachment X) (good faith temporary short-fall of approximately $20,000 must be reported to the Congress and the President irrespective of the extenuating circumstances); see also GAO Red Book at chapter 5, pages 60-61 ("There is no such thing as a 'technical violation'; all violations . . . must be reported"); 58 Comp. Gen. 46 at 47-48 (1978).

42/ Id.

III. EPA Has An Affirmative Obligation to Consider the Petitions on Their Merits.

The Noise Control Act of 1972 obligates EPA to choose noise emissions standards that are "requisite to protect the public health and welfare, taking into account the magnitude and conditions of use of such product (alone or in combination with other noise sources), the degree of noise reduction achievable through application of the best available technology, and the cost of compliance."43/ Under this Act, as elaborated by established agency practice, EPA has a continuing obligation to make necessary adjustments in the noise program.

In light of EPA's recent actions in phasing out the noise control program,44/ a refusal to evaluate these petitions appears especially harsh and arbitrary. Indeed, on two previous occasions the Administrator has acted promptly to defer the 80 decibel noise standard on grounds virtually identical to those now urged by petitioners.45/ For EPA to refuse, at this

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43/ 42 U.S.C. § 4905(c)(1).

44/ See pages 25-27, above.

45/ See pages 8-9, above. 42 U.S.C. § 4905(c)(3) specifies a six month waiting period that is waivable by EPA, as demonstrated by EPA's actions making its two previous deferrals of the truck noise standards effective either immediately (in the case of the three year deferral) or in thirty days (in the case of the one year deferral). 46 FR 8467, 8503-04 (Jan. 27, 1981); 47 FR 7186 (Feb. 17, 1982). See Attachments E and F.

point, to weigh the case for analogous relief based on these very same propositions would constitute an unjustifiable deviation from past precedent and would flout Congress' intent that the noise program be phased out in an orderly fashion.

In these circumstances, the Administrative Procedure Act, the Noise Control Act, and general principles of administrative and constitutional law compel the agency to proceed to consider the petitions on the merits. First, even if the relevant Congressional Appropriations Committees had expressed a clear intention to terminate the noise program -- which they did not -- that expression of intention would not suffice to override the requirements of the Noise Control Act. "Expressions of Committees dealing with requests for appropriations cannot be equated with statements enacted by Congress." TVA v. Hill, 437 U.S. 153, 191 (1978). In particular, such expressions cannot suffice to repeal, by implication, previously enacted substantive legislation. Id. at 189-93.

Second, EPA is without authority to deny the petitions on the mistaken ground that Congress has, through the appropriations process, foreclosed considering them. Indeed, the APA expressly provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."46/ If EPA were to deny the

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46/ 5 U.S.C. § 553(e). The APA additionally provides that "[p]rompt notice should be given of the denial in whole or

[Footnote continued next page]

petitions based on an incorrect assessment of its legal authority, the denial would be subject to prompt review and reversal by the Courts. See, e.g., NAACP v. FPC, 520 F.2d 432 (D.C. Cir. 1975), aff'd, 425 U.S. 662 (1976) (Commission ordered to reconsider a rulemaking petition that it had previously denied on the mistaken ground that it lacked jurisdiction to promulgate the rule requested).47/

Third, EPA is affirmatively required to consider the unexpected circumstances facing the petitioners (continued industry-wide depression; unaligned exhaust emission standards; and decreased need for a tighter noise emission standard). "[T]he agency cannot sidestep a reexamination of particular regulations when abnormal circumstances make that course imperative." Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979).48/

[Footnote continued from preceding page]

in part of a . . . petition . . . [and] shall be accompanied by a brief statement of the grounds for the denial." 5 U.S.C. § 555(e).

47/ See also National Organization for Reform of Marijuana Laws v. Ingersol, 497 F.2d 654 (D.C. Cir. 1974) (similar); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (a reviewing court must consider whether the agency has "properly construed [its] authority.").

48/ See also S. Doc. No. 248, 79th Cong., 2d Sess. 201-202 (1946) ("the facts or considerations brought to the attention of an agency by . . . a petition [for rulemaking] might be such as to require the agency to act to prevent the rule from continuing or becoming vulnerable upon judicial review.") (quoted in Geller v. FCC at 979 n. 47); WAIT Radio v.

[Footnote continued next page]

This consideration is particularly compelling in view of the express directive in the Noise Control Act that EPA, in establishing noise emission standards, "give appropriate consideration to standards under other laws designed to safeguard the health and welfare of persons, including standards under . . . the Clean Air Act."49/ This directive explicitly obligates the agency to consider the interrelationship between the 80 decibel standard and the anticipated NO_x and diesel particulate exhaust emission standards.

Fourth, EPA has an affirmative obligation to reconcile its present unresponsiveness to the pending petitions with its past receptiveness to similar proposals.50/ An agency that changes its course by deviating from past precedents and practices "'must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" National Association of Food Chains, Inc. v. ICC, 535 F.2d 1308 (D.C. Cir. 1976). To do otherwise invites reversal by the Courts.51/

[Footnote continued from preceding page]

FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); EDF v. HEW, 428 F.2d 1083, 1088-90 (D.C. Cir. 1970).

49/ 42 U.S.C. § 4905(c)(1).

50/ See pages 8-9 and 25-27, above.

51/ See also Atchison, Topeka & Sante Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 808 (1973) (an agency has

[Footnote continued next page]

* * *

The pending petitions call into question whether the noise emission standards scheduled to become effective on January 1, 1986, continue to meet the statutory criteria imposed by the Noise Control Act of 1972. The petitioners are asking the Administrator to evaluate the unexpected circumstances facing them, such as continued industry-wide depression, uncoordinated exhaust emission standards, and the decreased need for a tighter truck noise emission standards. We respectfully submit that initiating the rule-making proceeding requested by petitioners not only meets the specific needs of the industry but also provides both the petitioners and EPA with an opportunity to consider the important public policy issues left unresolved by the Administration's decision to phase out the Federal noise control program.

[Footnote continued from preceding page]

a "duty to explain its departure from prior norms") (plurality opinion); Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2nd Cir. 1977) ("changes in policy must be rationally and explicitly justified"); Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977) (per curiam) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them.").

WILMER, CUTLER & PICKERING

Counsel for the Motor Vehicle Manufacturers Association of the United States, Inc., and for Petitioners Ford Motor Company, General Motors Corporation, and International Harvester Company

February 16, 1984

ATTACHMENTS

Attachment A	Petition filed by International Harvester Company on September 26, 1983.
Attachment B	Petition filed by General Motors Corporation on September 30, 1983.
Attachment C	Petition filed by Ford Motor Company on December 15, 1983.
Attachment D	Petition filed by the American Trucking Association, Inc., on January 9, 1984.
Attachment E	Federal Register notice of January 27, 1981, deferring the effective date of the 80 decibel standard from January 1, 1982, to January 1, 1983.
Attachment F	Federal Register notice of February 17, 1982, deferring the effective date of the 80 decibel standard from January 1, 1983, to January 1, 1986.
Attachment G	Excerpts from the FY 1982, FY 1983, and FY 1984 Department of Housing and Urban Development - Independent Agencies Appropriations Acts.
Attachment H	Excerpts from Principles of Federal Appropriations Law, published by the United States General Accounting Office ("GAO").
Attachment I	In the Matter of LTV Aerospace Corporation, 55 Comp. Gen. 321 (1975).
Attachment J	17 Comp. Gen. 147 (1937).
Attachment K	Matter of Customs Service Payment of Overtime Pay in Excess of Limit in Appropriations Act, 60 Comp. Gen. 440 (May 6, 1981).
Attachment L	Matter of Obligation of Appropriation for Printing -- Commission of Fine Arts, Decision B-197289, -- Decisions of the Comptroller General 386, 388-89 (Apr. 14, 1980).
Attachment M	Excerpts from the FY 1984 House Appropriations Subcommittee Report.

Attachment N	Excerpts from the FY 1982 House Appropriations Subcommittee Hearings on the HUD-Independent Agencies Appropriations (Part 5) (Environmental Protection Agency).
Attachment O	Excerpts from the FY 1982 Senate Appropriations Committee Hearings on the HUD-Independent Agencies Appropriations (Part 1).
Attachment P	Excerpts from the FY 1983 House Appropriations Subcommittee Hearings (Part 3).
Attachment Q	Excerpts from the FY 1984 House Appropriations Subcommittee Hearings (Part 4).
Attachment R	Excerpts from the FY 1983 Senate Appropriations Committee Hearings (Part 1).
Attachment S	Excerpts from the FY 1983 Senate Appropriations Committee Report.
Attachment T	Federal Register notice of December 28, 1982, revoking product verification testing, reporting, and recordkeeping requirements for certain products.
Attachment U	Federal Register notice of June 13, 1983, announcing technical amendments to the December 28, 1982, regulations.
Attachment V	Federal Register notice of July 15, 1983, rescinding noise emissions regulations for garbage trucks.
Attachment W	Federal Register notice of October 17, 1983, announcing an action withdrawing certain products from EPA's list of major noise sources.
Attachment X	Matter of Customs Service Payment of Overtime Pay in Excess of Limit in Appropriation Act, 35 Comp. Gen. 356 (Dec. 12, 1955).

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Public Service Commissions § 5; States, Territories and Possessions § 36 — supremacy clause — rural power cooperative

1a-1c. A state Public Service Commission's assertion of jurisdiction over the wholesale rates charged by a rural power cooperative to its member retail distributors does not offend the supremacy clause of the United States Constitution (Art VI, cl 2). (White, J. and Burger, Ch. J., dissented from this holding.)

Commerce § 203; Public Service Commissions § 5 — commerce clause — rural power cooperative

2a-2c. A state Public Service Commission's assertion of jurisdiction over the wholesale rates charged by a rural power cooperative to its member retail distributors does not offend the commerce clause of the United States Constitution (Art I, § 8, cl 3).

Appeal and Error § 1085 — review — commerce clause — pre-emption

3a, 3b. The question whether the commerce clause (Art I, § 8, cl 3) precludes state regulation of wholesale electric rates, raised in an appellant's jurisdictional statement, has a barely close enough relationship to the question of whether the supremacy clause (Art VI, cl 2) operates to preempt such state regulation as to render the preemption question a "subsidiary question fairly included" within the commerce clause, under Supreme Court Rule 15.1(a), and place the preemption argument properly before the Supreme Court.

[See annotation p 820, infra]

States, Territories, and Possessions § 19 — preemption — no federal regulation

4. A federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much as preemptive force as a decision to regulate.

Public Service Commissions § 5 — Federal Power Act — rural power cooperative

5. There is no bar to a state Public Service Commission's assertion of jurisdiction over the wholesale rates charged by a rural power cooperative to its member retail distributors either in the Fed-

the pre-emption of state regulation by federal law are well known. See Fidelity Federal Savings & Loan Assn. v De la Cuesta, 458 US 141, 73 L Ed 2d 664, 102 S Ct 3014 (1982); Jones v Rath Packing Co., 430 US 519, 525-526, 51 L Ed 2d 604, 97 S Ct 1305 (1977). In this case, we are concerned with the possible pre-emptive effects of two federal statutes and administrative acts taken pursuant to them: the Federal Power Act and the Rural Electrification Act.

A

[4, 5] As we discuss supra, at 381-382, 76 L Ed 2d, at 8, 9, the FPC determined in 1967 that it did not have jurisdiction under the Federal Power Act over the wholesale rates charged by rural power cooperatives.[7] That does not dispose of the possibility that

[461 US 384]

the Federal Power Act preempts state regulation, however, because a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate. See NLRB v Nash-Finch Co., 404 US 138, 144, 30 L Ed 2d 328, 92 S Ct 373 (1971); cf Fidelity Federal Savings & Loan Assn. v De la Cuesta, supra, at 155, 73 L Ed 2d 664, 1025 Ct 3014. In this case, however, nothing in the language, history, or policy of the Federal Power Act suggests such a conclusion. Congress's purpose in 1935 was to fill a regulatory gap, not to perpetuate one.[8] Moreover, the FPC's refusal in 1967 to assert jurisdiction over rural power cooperatives does not suggest anything to the contrary. In that decision, the FPC simply held that, purely as a jurisdictional matter, the relevant statutes gave the REA exclusive authority among federal agencies to regulate rural power cooperatives. Dairyland Power Cooperative, 37 FPC, at 26, 67 PUR3d, at 352-354. It did not determine that, as a matter of policy, rural power cooperatives that are engaged in sales for resale should be left

87, 94, n 9, 74 L Ed 2d 250, 103 S Ct 416 (1982); United States v Arnold, Schwinn & Co., 388 US 365, 371, n 4, 18 L Ed 2d 1249, 87 S Ct 1856 (1967). See also Vance v Terrazas, 444 US 252, 258, n 5, 62 L Ed 2d 461, 100 S Ct 540 (1980).

A more serious, because jurisdictional, problem was raised by AECC's counsel's statement at oral argument that, although the pre-emption issue was raised before the Arkansas PSC, it may not have been raised before the Arkansas Supreme Court. Tr of Oral Arg 8. As it turns out, however, the pre-emption argument *was* raised, if half-heartedly, both in AECC's petition for review in the Pulaski County Circuit Court, Record 104, and in its brief in the Arkansas Supreme Court, Brief for Appellee in No. 80-313, pp 16-17.

7. Neither party here has challenged the correctness of that determination, and we express no opinion on the subject. Were the FPC or the courts ever definitively to overrule Dairyland and decide that the FPC did have jurisdiction, we would obviously be faced with a very different pre-emption question.

8. As the dissent suggests, Congress in 1935 almost certainly thought that state regulation of the wholesale activities of rural power cooperatives operating in interstate commerce would be barred under this Court's Attleboro doctrine. Cf. infra, at 389-390, 76 L Ed 2d, at 14. To the extent that Congress sought to freeze its perception of Attleboro into law, however, it did so only as a means to accomplishing the end of workable federal regulation, not as an end in itself. If we start from the premise that Congress did not intend to subject rural power cooperatives to the federal regulatory scheme it was creating in the 1935 legislation, see n 7, supra, then it would not have served Congress' purposes to pre-empt state regulation over such cooperatives. Significantly, the dissent does not put forward any argument to the contrary.

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ANNOTATION REFERENCE

Requirements for jurisdictional statements on appeal to Supreme Court. 76 L Ed 2d 820.

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

AUG 23 1983

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Noise Authorities

FROM: A. James Barnes
Acting General Counsel

TO: Charles L. Elkins
Acting Assistant Administrator
for Air, Noise and Radiation

Your memorandum of August 2, 1983, asks for our views on EPA's current obligations under the Noise Control Act of 1972, 42 U.S.C. §4901 et seq. ("the Act").

ISSUE PRESENTED

Whether EPA has continuing legal authority to implement the Act.

ANSWER

No. Until Congress appropriates funds to carry out duties under the Act, EPA may not lawfully expend funds for that purpose.

DISCUSSION

Although the Noise Control Act technically remains on the books, the authorization for the Act lapsed several years ago, and Congress has neither reauthorized the Act nor otherwise appropriated funds to implement it. Accordingly, EPA is precluded from expending funds for that purpose:

> Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

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

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31 U.S.C. §1301(a). "The unambiguous meaning of this relatively straightforward provision is simply that appropriated funds are to applied solely to statutorily-enumerated purposes. . . ." United States ex rel. Joseph v. Cannon, 642 F.2d 1373, 1380 (D.C. Cir.), cert. denied, 102 S.Ct. 1630 (1981) (construing 31 U.S.C §628, the similarly worded predecessor to 31 U.S.C. §1301(a)).

On May 16, 1983, a bill was introduced in the Senate to authorize the appropriation of $10,000,000 for fiscal year 1984 to carry out the Act. S. 1280 (98th Cong., 1st Sess.). However, that bill has not passed the Senate, and there is no comparable bill pending in the House. Until such legislation is enacted, or funds are otherwise appropriated to carry out the Act, 2/ EPA is barred from implementing it.

cc: Howard Messner
Alvin Alm
Morgan Kinghorn
Joseph A. Cannon
Louise Giersch

1/ The situation is not unlike those we have faced in recent years when, absent appropriated funds or a continuing resolution allowing expenditures, federal agencies have been instructed to direct their efforts to winding down programs.

2/ The normal process takes place in two stages: first, Congress authorizes appropriations and then, as part of the budget process, it actually appropriates funds. In fact, the Comptroller General has ruled that Congress can dispense with the first step, and may appropriate funds based solely on the existence of a statute imposing substantive functions upon an agency. B-111810, March 8, 1974. However, that short cut is not only unusual, but is technically a violation of the rules of the House of Representatives. See Rule XXI(2).

ATTACHMENT A

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

DEC 10 1981

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Proposed Curtailment of Noise Program

FROM: Robert M. Perry COPY ORIGINAL SIGNED BY ROBERT M. PERRY
General Counsel

TO: Kathleen M. Bennett
Assistant Administrator for
Air, Noise and Radiation

As you know, the Administration's budget calls for elimination of EPA's noise control program by the end of the current fiscal year. Accordingly, the Office of Noise Abatement and Control (ONAC) has asked us to review its plans to phase out various regulatory activities under the Noise Control Act. Attached is a detailed memorandum, prepared by my staff, evaluating the legal risks involved in those plans, exploring alternative approaches, and discussing procedural issues.

Essentially, we have concluded that ONAC's plans involve serious risks. The statute requires, with few exceptions, that EPA promulgate regulations for products it has identified as major sources of noise. There are a number of products which have been identified but for which regulations have not been promulgated. The noise office's plans call for "de-identifying" these products, based primarily on two propositions: (1) that state and local governments have now shown that they are capable of regulating these products; and (2) that federal regulation is not necessary for these products because the affected manufacturers do not need protection from state and local standards in the form of federal preemption.

We conclude that there are serious risks to this approach, in part because it relies on factors that the Act does not explicitly permit the Administrator to consider in determining what constitutes a "major" source of noise, and in part because the propositions mentioned above may be difficult to document. Moreover, the approach would conflict with EPA's past interpretation of the statute.

However, the status quo involves risks that are equally serious. The statute contains deadlines for proposal and promulgation of regulations after a product has been identified as a major source of noise. The Agency is currently vulnerable for having failed to meet those deadlines.

The memorandum also discusses a variation of the "de-identification" approach which we believe involves somewhat less legal risk. The variation would involve characterizing the removal of products from the list of major noise sources as temporary, reflecting current budgetary constraints, the priorities of the Administration, and national economic concerns. This approach would seek to rely more heavily on the Administrator's discretion to set priorities under the Act, would hold out the possibility that products could be returned to the list of major noise sources at an appropriate time, and would not involve a determination that a product is not a "major" source of noise. For reasons discussed in the memorandum, we believe this approach is preferable from a legal perspective.

We would be happy to discuss these matters with you further.

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

December 1, 1981

MEMORANDUM

SUBJECT: Proposed Curtailment of Noise Program

FROM: Samuel I. Gutter
Attorney
Air, Noise and Radiation Division

TO: Robert M. Perry
General Counsel

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As we have discussed, the Administration's budget calls for elimination of EPA's noise control program by the end of the current fiscal year. Accordingly, the Office of Noise Abatement and Control (ONAC) has asked us to review its plans to phase out various regulatory efforts under the Noise Control Act. We have concluded that those plans involve serious legal risks. However, comparable risks exist under the status quo, because EPA is currently in default of its obligations to complete certain rulemaking activities under the Act.

This memorandum evaluates the legal risks of ONAC's plans, and discusses a variation of that approach which could mitigate those risks somewhat. It also discusses procedural issues raised by the plans.

Statutory Background

The regulatory actions in question arise under Sections 5 and 6 of the Act, 42 U.S.C. §§4904, 4905. EPA is obligated to regulate a number of commercial products under Section 6 because the products have all been identified as major sources of noise under Section 5(b). 1/ Although the initial decision

1/ The products at issue here are truck-transport refrigeration units, power lawnmowers, rock drills, pavement breakers wheel and crawler tractors, buses, and garbage trucks. These products are at various stages in the regulatory process: the first four have not proceeded past the identification stage; regulations have been proposed for wheel and crawler tractors and buses; final regulations have been promulgated for garbage trucks.

whether to identify a product as a major source of noise involves an element of discretion, 2/ once a product has been identified the Administrator is required to issue proposed and final regulations, unless standards are "not feasible" for that product. Section 6(a)(1), (3).

Moreover, the Act sets specific deadlines for proposal and promulgation of regulations once a product has been identified under Section 5(b). In general, regulations must be proposed within 18 months of identification, Section 6(a)(2)(B), and must be promulgated within 6 months of proposal. Section 6(a)(3).

The statutory deadlines have passed for all the products in question. 3/ Accordingly, the Administrator is vulnerable to "citizen suit" actions under Section 12(a)(2)(A) of the Act for failure to meet the statutory deadlines. 4/

ONAC's plan to phase out noise regulatory activities should be reviewed against this background. Although substantial legal risks are involved in implementation of the plan, those risks must be balanced against the Administrator's present vulnerability to citizens' suits. 5/

2/ Section 5(b) provides, in relevant part, that:

> The Administrator shall, after consultation with appropriate Federal agencies, compile and publish a report or series of reports . . . identifying products (or classes or products) which in his judgment are major sources of noise. [Emphasis added.]

3/ The regulations for garbage trucks have already been promulgated, so the statutory obligation to promulgate has already been satisfied for this product. However, EPA suspended enforcement of those regulations in February of this year, and has not acted to amend the regulations or otherwise cure the problems identified in the suspension notice. Some action is necessary. Moreover, ONAC wishes to withdraw the regulations altogether, which would violate the statutory obligation unless garbage trucks are "de-identified," or some other action is taken, as discussed below.

4/ Any person may bring a "citizen suit," including a manufacturer desiring to see federal regulations in place for the protection provided by preemption.

5/ Of course, the safest course legally would be to follow through with regulations for all products identified as major sources of noise. Since this option appears to be unavailable in light of budgetary constraints, it will not be discussed further in this memorandum.

Discussion

As discussed above, EPA's obligations to promulgate noise regulations under Section 6 all flow from identification of products as major sources of noise under Section 5. Accordingly, ONAC's proposal focuses on ways to undo that identification. The principal option presented is to "de-identify" the products as major sources of noise. 6/ If successful, "de-identification" would eliminate EPA's legal obligations to regulate all products in question.

"De-identification" alone would end EPA's legal obligations to regulate those sources for which rulemaking has not proceeded past the identification stage. For regulations that have already been proposed, the Agency would have to take the additional step of withdrawing the proposals. Finally, for the garbage truck regulation, "de-identification" would have to be accompanied by rulemaking to withdraw the existing regulations.

In principle, there is no major distinction in the legal risks which result from the stage of rulemaking activity for a given product. That is, if "de-identification" is successful, proposed and final regulations could be withdrawn with no more risk than that resulting from the "de-identification" itself. As a practical matter, however, one distinction would be the extent and strength of the record already developed in support of particular regulations. For products that have progressed through the rulemaking process, EPA's past pronouncements in favor of regulation may be stronger, and the record in support of regulation may be more extensive. Where the factual record in support of regulation is strong, it may be more difficult to justify "de-identification."

The principal question posed by ONAC's proposal is whether there is an adequate legal or factual basis for "de-identification" of particular products. In summary, the option that has been suggested is to rely on the growth of state and local noise programs, in conjunction with the statutory purpose of allowing state and local regulation

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6/ The legal risks involved in "de-identification" are discussed below. In earlier discussions it was suggested that EPA might announce its intent not to proceed with regulations without removing the products involved from the list of major sources of noise. We believe that this course would be imprudent. As discussed earlier, the legal obligation to promulgate regulations for a product flows from identification of the product as a major source of noise, and only by withdrawing the identification can that obligation be removed. Thus, an announcement that EPA did not intend to proceed with regulation could invite litigation without first articulating a legal basis for the decision.

where national uniformity of treatment is unnecessary, to conclude that federal regulation is unnecessary or inappropriate for these products. For these reasons, EPA would conclude that the products should not be identified as "major" noise sources for purposes of federal regulation.

This approach would represent a significant departure from EPA's interpretation of Section 5. Past identifications of products as major sources of noise have relied exclusively on the health and welfare effects of noise exposure from various products. See, e.g., 40 Fed. Reg. 23105 (May 28, 1975). Since there is apparently no evidence to suggest that the products in question no longer have the same effects on the public health and welfare, 7/ the criteria that were originally used to identify them as major sources of noise probably cannot support "de-identification." Accordingly, the approach suggested by ONAC would require a new interpretation of Section 5.

Although an agency ordinarily has some discretion to change its interpretation of a statute, there must be an adequate rationale for the change. In this case, the argument that is inherent in ONAC's proposal is that factors other than health and welfare effects are relevant to the exercise of the Administrator's judgment in identifying products as "major" sources of noise. Thus, EPA might argue that changed circumstances since the identification of these products -- primarily the recent growth of state and local programs -- and other factors bearing on the appropriateness of federal regulation may be considered in the exercise of the Administrator's discretion to identify products. 8/

Some arguments in favor of this approach include the following:

- The Administrator has broad discretion to determine which products are major sources of noise, and should have the same discretion to determine which are not major sources of noise. 9/

7/ To the contrary, EPA has developed administrative records for these products documenting their health and welfare effects.

8/ The variation of this approach discussed below would shift the emphasis slightly, focusing more on the Administrator's discretion to set priorities in identifying products to be regulated and less on interpretation of Section 5.

9/ The Administrator's discretion is not unbounded, however. If the data supporting identification of a product as a major source of noise are strong enough, the Administrator

(Footnote continued)

- The Administrator's discretion should be read in light of the purposes of the statute. Section 2(a)(3) declares that state and local governments have primary responsibility for noise control where "national uniformity of treatment" is not required. 10/ The precise meaning of this statement is unclear. 11/ Under one possible interpretation of it, however, an argument can be made that "national uniformity of treatment" is not required for the products in question

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Footnote 9/ continued

might be required to identify that product. Thus, the Administrator has been compelled to list lead as a pollutant for which a national ambient air quality standard was necessary, given data showing the health and welfare effects of lead. NRDC v. Train, 411 F. Supp. 864 (S.D. N.Y. 1976), affirmed 545 F.2d 320 (2d Cir. 1976).

10/ Section 2(a)(3) provides:

> that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.

11/ The Act and its legislative history suggest rather strongly that the need for "national uniformity of treatment" refers to the need for federal preemption of state and local regulations affecting the manufacture of a given product, rather than factors relating to the noise characteristics of the product. There is virtually no indication, however, of what circumstances Congress may have thought to warrant federal preemption. At one extreme, it could be argued that federal preemption is necessary for every product that poses a "major" noise problem, because without preemption the manufacturers of such products might be forced to produce different versions of their products for every jurisdiction that chose to regulate them. This interpretation seems overly broad, if only because it would allow EPA to preempt state and local regulation of the manufacture of all products that are "major" sources of noise and are produced for a national market; this would leave state and local governments (who are declared to have "primary responsibility" for noise control) free to regulate only the use of such products. This interpretation would also seem to preclude any argument that federal preemption is unnecessary for the products in question here.

(footnote continued)

because they do not routinely cross state boundaries in use. 12/ From that conclusion it could be argued that Congress did not consider federal action to be necessary for such products, and that the Administrator may consider this factor in identifying products or major sources of noise. This argument, however, is inherently weak (see note 11 supra).

- Section 5(c) requires, inter alia, that EPA review and, as appropriate, "revise or supplement" identifications. This suggests that Congress intended to allow EPA to do something other than "supplement" identifications; i.e., it could imply discretion to change earlier decisions. 13/

- Subsequent amendments to the Act (in 1978) initiated an extensive effort to support state and local noise control programs. These amendments and their legislative

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Footnote 11/ continued

Another possible interpretation is that federal preemption is necessary where products routinely cross state boundaries in use, because conflicting state regulations might otherwise require physical alteration of the products each time they crossed a state line. As discussed below, however, Congress rather clearly envisioned federal regulation of some products that would not meet this test. In addition, this interpretation focuses on potential burdens on use, rather than manufacture, of a given product, and Congress explicitly preserved the rights of state and local jurisdictions to regulate use in most cases. Section 6(e)(2).

Still another interpretation would focus on the expense or difficulty of producing different versions of a product for different jurisdictions. Although this interpretation has a certain logic and may well be the best interpretation that is possible, it is by no means clear that it is what Congress intended. For present purposes, it could also involve EPA in some difficult factual judgments.

12/ As is discussed below, this argument may be flawed with respect to buses.

13/ An argument against this position is that Section 5(c) applies to noise criteria documents, as well as identifications. The "revise" language could be read as applying only to criteria documents.

> history suggest an intent to deemphasize federal regulatory efforts to some degree in favor of state and local controls. 14/

These points lead us to conclude that EPA could make a plausible argument in favor of "de-identifying" products on grounds other than their health and welfare effects per se. However, we cannot be sure that the Agency's position would prevail, if challenged. 15/ There is no clear indication in the language or legislative history of Section 5 that Congress intended EPA to select "major" noise sources based on such factors as the likelihood that state or local governments will regulate them, or the need for national uniformity of treatment.

14/ The Senate committee explained this shift:

> The committee is concerned that the Environmental Protection Agency may have misdirected its efforts by pushing only for Federal standards and regulations. It is now time to shift the emphasis to a more balanced approach, in which State and local governments take an aggressive role.

S. Rep. No. 95-875, 95th Cong., 2d Sess. 3 (1978). This and similar statements in the 1978 legislative history are helpful. For several reasons, however, their ultimate significance is somewhat unclear. First, under ordinary principles of statutory interpretation, this subsequent legislative history would not be considered determinative of congressional intent at the time Section 5 was enacted. Second, despite the apparent shift in emphasis in 1978, Congress retained EPA's statutory obligations to regulate major sources of noise without change, and it took no action to amend the criteria for identification of such sources. Thus, it could even be argued that the 1978 amendments ratified EPA's original interpretation of Section 5. On the other hand, it could be argued that Congress viewed the existing language of Section 5 as conferring sufficient discretion for EPA to refrain from identifying products more appropriately regulated by state and local governments; if so, no amendment of Section 5 would have been necessary in 1978. On balance, we conclude that the 1978 amendments and their legislative history provide some support for the argument that the Administrator may consider the likelihood or appropriateness of state and local regulation and similar factors in deciding which products are appropriate candidates for federal regulation; i.e., in exercising her discretion in the identification of major sources of noise.

15/ As indicated above, manufacturers seeking preemption of state and local regulation could sue to compel promulgation of federal regulations under Section 12. Thus, EPA might face challenges from industry groups as well as environmental groups.

Indeed, it is clear that Congress envisioned federal regulation of at least some sources for which national uniformity of treatment would not appear necessary under the interpretation mentioned above, 16/ and that it intended EPA to preempt, rather than rely on, state and local regulation in some cases. Finally, the suggested interpretation of Section 5 could appear strained to a reviewing court. In ordinary usage, the word "major" would seem to suggest the quantitative noise impact of a product, not whether the product is an appropriate candidate for federal regulation based on other criteria. For these reasons, the courts may be especially skeptical of any conclusion that the products in question are not major noise sources, and may view such a departure from EPA's original conclusions as reflecting a desire to deregulate rather than a reasoned interpretation of the statute. 17/

Modified Approach

A variation of the plan discussed above might involve somewhat less risk. In general, it would seek to rely on the Administrator's discretion to set priorities for regulation of products under Sections 5 and 6. Under this approach the Administrator would not find that the products in question are not major noise sources. Rather, the Administrator would indicate that present circumstances, including reduced funding for the noise program, national economic concerns, and current regulatory priorities of the Administration,

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16/ That interpretation focused on whether products routinely cross state boundaries in use. However, Section 6(a)(1)(C) lists four broad categories of sources for which federal regulations are required if products falling in these categories are identified as major sources of noise: construction equipment, transportation equipment, any motor or engine, and electrical or electronic equipment. Unlike such sources as railroad locomotives and motor carriers engaged in interstate commerce (addressed in Sections 17 and 18 of the Act, respectively), many if not most products in these categories would ordinarily be used in relatively small geographic areas once sold.

A broader interpretation of the need for national uniformity of treatment would avoid this objection but, as noted above, would tend to preclude any argument that such treatment is unnecessary for the sources in question here. See note 11, supra.

17/ It should be noted that citizens' suits, if any, would most likely be brought in federal district courts, and that the plaintiffs could seek discovery and even oral testimony of Agency officials. By these means, plaintiffs could seek to show that EPA's plans to "de-identify" products were based on a desire to deregulate, even though Congress had not yet acted to amend the statute.

demonstrate that it would be inappropriate to proceed with federal regulation of certain noise sources at this time. 18/ Under this rationale, the Administrator would remove the products in question from the list of major noise sources for the time being but leave open the possibility of regulation in the future.

This approach has several legal advantages. Rather than basing "de-identification" on what may seem to be a strained construction of the word "major," this approach could appear to a reviewing court to be a pragmatic response to the realities of present budget cuts, while preserving the Administrator's discretion to initiate rulemaking at an appropriate time. Indeed, this approach would not require a new interpretation of Section 5, since it would not be necessary to find that the sources are not "major." 19/ Moreover, since the Administrator would be leaving a number of products on the list of major noise sources (i.e., those products for which regulations would remain under the ONAC plan), this approach could appear to a reviewing court to be a discriminating choice among priorities. 20/

Litigation might be less likely under this approach. Manufacturers concerned that "de-identification" could lead to the imposition of conflicting state and local standards would be able to ask EPA to return a product to the list of major noise sources if that occurred. This opportunity would not be so readily available if EPA removed a product from the list based on a finding that it was not a major source of noise. Thus, an affected manufacturer might be more likely to challenge a final "de-identification" than a temporary withdrawal of a product from the list.

18/ As is discussed below, garbage trucks would require separate treatment under this approach, since final regulations already exist for those products.

19/ To avoid signaling a new interpretation of Section 5, Federal Register notices implementing this approach should speak in terms of "withdrawing products from the list of major sources of noise," rather than "de-identifying" them.

20/ In explaining this approach, EPA could refer to the discretion the Administrator would have if she were writing on a clean slate. With no products identified as major sources of noise, the Administrator would probably have discretion to list only a few sources at a time, based on program priorities and budgetary constraints. Under the approach discussed above, the Administrator would be exercising similar discretion, to carve the list back to a level reflecting current realities.

Under this approach, EPA could also note that the growth in state and local noise control programs would mitigate the potential environmental harm of not proceeding to regulate these products. Indeed, EPA could note that it would be appropriate to evaluate the success of state and local regulations prior to returning products to the list of major noise sources, to decide whether these programs had reduced noise exposures to the point that these products may no longer be major noise sources from a health and welfare perspective. Finally, the congressional intent for EPA to deemphasize federal regulation, indicated by the 1978 amendments and their legislative history (discussed above), would support this approach, as well.

On balance, we conclude that this approach is somewhat more defensible than permanent "de-identification" based on findings that the products in question are not "major."

Special Concerns

Although this memorandum has examined the products in question collectively, special consideration should be given to two products: buses, and garbage trucks.

Of the products under consideration, buses fit least logically into the class of products not requiring national uniformity of treatment under the interpretation mentioned previously. At least one portion of the class of buses, inter-city buses, routinely cross state lines and seem a less appropriate candidate for state and local regulation than products that do not. Moreover, "de-identification" of buses may be more likely to generate litigation than action on the other products. General Motors and International Harvester, leading bus manufacturers, have been active in litigation with EPA under the Noise Control Act, and might be concerned with the lack of protection from state and local regulations that would result from "de-identifying" buses. As noted earlier, however, litigation for this reason would seem less likely under the modified approach discussed above. 21/

21/ In a letter to the Administrator dated October 12, 1981, General Motors urged that EPA "suspend indefinitely the promulgation of a final federal bus noise regulation," arguing that such a regulation is not warranted "at this time." GM did not specifically request withdrawal of the proposal. It is unclear whether GM believes that the existence of the proposed rule has some chilling effect on state and local regulation, or whether it would support "de-identification" of buses and withdrawal of the proposed rule. In any event, GM's concerns would appear to be addressed by removing buses from the list of major noise sources temporarily, in that buses could be put back on the list if circumstances warranted and there would be no federal regulation in the interim.

Garbage trucks also present special concerns because final regulations for this class of products are already in effect. Temporary removal of a product from the list of major noise sources based on the argument that the federal government is constrained from proceeding with additional regulations at this time cannot be used to support revocation of a regulation already in place. Accordingly, if the modified approach is pursued, garbage trucks will require separate treatment.

Possible bases for revoking the garbage truck regulations include:

- Concluding that federal regulations are not "feasible" for these products. See Section 6(a)(1)(B). As noted earlier, enforcement of the garbage truck regulations has been stayed administratively. This stay was based in large part on test burdens and technical problems EPA recognized as stemming from the requirement that garbage truck manufacturers verify the noise levels of the entire product, including the truck chassis produced by others. Given these problems, EPA might develop a record showing that federal regulation is infeasible for this particular product.

- Concluding that the costs of federal regulations are excessive. See Section 6(c)(1). EPA's analysis projected a 10% increase in the cost of the product; past and present industry estimates are much higher. The Administrator might reconsider these costs in light of current economic conditions and conclude they are unreasonable.

- "De-identifying" garbage trucks (ONAC's alternative) on the basis that they are not a major source of noise, based on the lack of a need for national uniformity of treatment under the interpretation mentioned previously. Although that interpretation is open to question, the industry, the Council on Economic Advisers, and others have been vocal in criticizing these regulations, based in large part on the argument that control of garbage truck noise is best left to the state and local governments, through curfews, purchase specifications, and the like.

- Concluding that the current regulations do not contain standards "requisite to protect the public health and welfare," Section 6(c)(1), since the regulations do not affect air brakes, a large, intrusive noise event associated with garbage collection. Once the final regulations were off the books, garbage trucks could be

removed from the list of major noise sources under one of the alternatives discussed earlier.

The first two options appear most promising, at present. However, we recommend that ONAC and OGC staff consult further to address the particular problem of the garbage truck regulations, to see if other options exist for revoking them. Initiation of action on other products need not await the outcome of those discussions.

Finally, it should be noted that any efforts to revoke the garbage truck regulations likely will be greeted with support and not protest. As noted above, the garbage truck industry has argued vociferously for elimination of the regulations, and state and local governments have shown an ability to control this noise problem themselves.

Other Alternatives

There are few alternatives to taking some action to remove products from the list of major sources of noise. Other than proceeding with regulation, an alternative with its own legal risks is to continue the status quo of not proceeding with regulations for identified products. As discussed earlier, the Administrator is legally vulnerable for failure to promulgate regulations. EPA would be unlikely to prevail in litigation challenging a failure to promulgate, and the steady departure of ONAC staff will make it increasingly difficult for EPA to comply with a judicial order to engage in rulemaking. Although no manufacturer has yet chosen to prod EPA toward Section 6 rulemaking, this could in part be based on the chilling effect that existing identifications and proposals may have on state and local regulations. State and local governments could choose to regulate the products in question if it appears that EPA will not issue further regulations. That possibility could lead manufacturers to litigate in favor of federal rulemaking.

The best alternative from a legal perspective is to seek a legislative solution. The bills to amend the Act currently pending in Congress, however, would not free EPA from all the regulatory obligations in question. 22/ To remedy this, the Administration might take more vigorous action to obtain legislation consistent with its current plans. In any event, both the timing and the content of any legislative relief are uncertain at best.

22/ For example, the House bill would leave in place EPA's obligations to promulgate regulations for transportation noise sources identified as major sources of noise. This would leave a continuing obligation to promulgate the bus regulation.

A third alternative would be to "de-identify" the products in question based upon a reevaluation of the health and welfare effects justifying identification. Such a reevaluation, however, would probably require EPA to change the ambient noise level it previously identified as "requisite to protect the public health and welfare with an adequate margin of safety." 23/ This level, Ldn 55, was based on extensive health and welfare criteria, and served as the basis for identifying products as major sources of noise. Reassessing that level would necessitate reexamining the criteria and developing technical data to support any new conclusions.

A final alternative, which would not require "de-identification," would be to find that federal regulations are not "requisite to protect the public health and welfare." Section 6(c)(1). 24/ That is, the Administrator might conclude that the growth of state and local programs, discussed earlier, demonstrates that federal regulation is not "requisite," or necessary. The principal problem with this alternative is that it takes the phrase "requisite to protect the public health and welfare" out of its statutory context. The logical purpose of the phrase is to define the basis for determining the appropriate noise level of a standard in a regulation, not whether a regulation is necessary at all. Moreover, the requirement that a standard be based on "criteria published under section 5" presents problems similar to the alternative discussed earlier of "de-identifying" based on a reassessment of the health and welfare effects. Here, too, EPA would likely have to reevaluate the Ldn 55 ambient noise level, to conclude that federal regulation was not requisite based on those criteria.

23/ Section 6(c)(1) requires, inter alia, that any regulation for a product identified as a major source of noise:

> include a noise emission standard which shall set limits on noise emissions from such product and shall be a standard which in the Administrator's judgment, based on criteria published under section 5, is requisite to protect the public health and welfare . . . .

24/ This action was taken under Section 5(a)(2), which required the Administrator to:

> publish information on the levels of environmental noise the attainment and maintenance of which in defined areas under various conditions are requisite to protect the public health and welfare with an adequate margin of safety.

Procedures

If one of the approaches to removing products from the list of major noise sources is implemented, an issue is whether it should be accomplished through notice-and-comment rulemaking. Although earlier identifications were made without those procedures, rulemaking would allow EPA to assess the depth of opposition to its plans, and could allow the Agency to reassess all or part of those plans based on the public comments. Moreover, public comment could help EPA strengthen the administrative record in favor of the proposal; e.g., by soliciting comments from state and local governments on their ability to regulate the sources in question.

Whether a reviewing court would conclude that EPA's action constitutes a "rule," subject to notice-and-comment requirements, is not certain. 25/ A court might be more likely to conclude that notice-and-comment rulemaking was required under CNAC's plan than under the alternative of

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25/ 5 U.S.C. §551(4) defines a "rule," in relevant part, as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . .

This broad definition could be read to encompass the "de-identification" process.

If EPA's action is treated as a "rule" under the Administrative Procedure Act, notice-and-comment procedures may be omitted only if the Agency, "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(3)(B). It would be difficult to make such findings for "de-identification," where no emergency suggests that notice-and-comment could not precede final rulemaking. The legislative history of the APA makes it clear that Congress intended this exception to be construed narrowly. The good cause exception is to be invoked only where notice is "impossible or manifestly unnecessary," or where "the execution of agency functions would be unavoidably prevented." Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong. 2d Sess. 348 (1947).

temporary withdrawal from the list of major noise sources based on national priorities. 26/ In any event, before concluding that notice-and-comment rulemaking should be followed for either approach, it should be considered whether this might set an undesireable precedent for listing or delisting actions under other programs.

A possible alternative would be to publish a simple "notice," rather than a notice of proposed rulemaking, setting out EPA's intent to remove products from the list and inviting comment on the idea. This could satisfy the desire of interested parties to participate in the process, would still allow EPA to reassess its plan in light of the comments received, and would not establish the precedent of following full rulemaking procedures for such actions.

Another procedural issue is whether actions on the various products should be accomplished through a single notice, or by individual notices. Either approach could be justified legally. However, since the rationale and record supporting the rulemaking would have to provide appropriate justifications for each product, and these justifications could differ for the various products involved, a single notice could be unwieldy. On the other hand, a single notice would avoid some duplication of effort.

Finally, either a combined notice or individual notices for products for which proposed or final regulations currently exist could propose simultaneously to withdraw those proposals or regulations, and the final notice(s) could both withdraw the products from the list of major noise sources and withdraw the proposals or regulations.

Conclusions

There are serious legal risks in "de-identifying" the products in question as major sources of noise based on the growth of state and local activity and the inappropriateness of federal regulation. A somewhat more promising approach would be to remove the products from the list of major noise sources temporarily, based on budgetary constraints, national priorities, and similar concerns, leaving open the possibility of restoring products to the list at an appropriate time.

26/ Under ONAC's plan, the permanent nature of the "de-identifications" would tend to preclude interested parties from obtaining changes in the results later. Under the modified approach, interested parties could urge EPA to restore a product to the list of major noise sources, and could participate in the rulemaking proceedings that would follow.

Aside from actually promulgating regulations for the products identified, or seeking appropriate legislative relief, there appears to be no available alternative, including the alternative of taking no action, that presents substantially less risk.