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Item # 5

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February 16, 1984

II-96-01
II-A-955

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 become 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

Howard P. Willens

Enclosures

515-1

WILMER, CUTLER & PICKERING
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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.
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> * * *

> 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

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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/

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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.

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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/

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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.

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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

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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).