The Honorable Edmund S. Muskie  
United States Senator  
Washington, D. C.

Dear Ed:

I didn't know whether you had seen this.

Best wishes.

Sincerely,

[Signature]

William B. Spong, Jr.

Encl.
Time to Clear the Air

The Senate subcommittee members who came to Los Angeles looking for more information on air pollution control must have departed more confused than informed.

At a hearing Monday the senators listened to another round of the continuing debate on the efficiency of the exhaust control devices now required on 1966 and 1967 model cars sold in California. They paid close attention, for next year minimum standards for hydrocarbon and carbon monoxide emissions will be set by the federal government using California as a model.

What the subcommittee heard, however, was a sharp difference of opinion between experts as to how well the auto industry is meeting this state's mandatory standards.

Louis J. Fuller, county air pollution control officer, charged that the present control devices are not working properly and become even less effective with increased mileage. His conclusions, Fuller said, are based upon tests conducted by the State Motor Vehicle Pollution Control Board, which has responsibility for checking and certifying the devices.

Testing procedures used by the state board in applying state standards, Fuller declared, represent an "evasion of the clear intent" of the Legislature.

Eric Grant, executive officer of the MVPCB, defended the testing system, which calls for "averaging" the performance of device-equipped cars in meeting the statutory requirement of no more than 75 parts per million of hydrocarbon and 1.5% carbon monoxide by volume. Every vehicle is not required to pass the test.

If California had waited for a foolproof device, said Grant, it would still be waiting.

That answer does not satisfy Fuller, who argues that the current minimum, not yet met, must be sharply lowered if the smog levels in the Los Angeles basin are to be reduced to a bearable amount.

This debate could continue indefinitely, but the air continues to become more polluted. The Times, therefore, believes that the smog device "numbers game" must be settled, and without delay.

The charge has been made that the legislative intent has been evaded. The Legislature then should adjudicate the row and determine if the state standards are being properly enforced.

Someone is wrong. Either the current devices are working or they're not. If not, new legislation or new administrative action ought to be taken to assure that the mandate for cleaner air is taken seriously in Detroit.

Further, it must be emphasized to Congress and to the Department of Health, Education and Welfare that the setting of national pollution standards must not preempt state authority so as to force regulations that do not meet this area's critical needs.

The air must first be cleared of confusion before the pollution can be controlled.
March 20, 1974

MEMORANDUM

TO:       Senator Edmund S. Muskie

FROM:     Karl Braithwaite


The Administration is negotiating with Representative Staggers and Senator Jackson on the subject of a revised energy emergency bill. Staggers and Jackson met with Simon, Ash, and Bill Timmons, Friday. They generally agreed to create a revised bill. Staff discussions have gone on all through this week to reach agreements.

During the Friday meeting with Simon, there was no discussion of Title II. But Monday, the Administration submitted a 73-page bill for consideration. Numerous changes were made in Title II dealing with the Clean Air Act.

The changes were represented as being technical amendments. They are not. They are extremely substantive and go well beyond the conference report. All Congressional staff involved in these meetings have rejected these attempts to revise Title II. The Federal Energy Office, OMB, and White House representatives are passive for the time being.

The proposal expands the energy smoke screen in order to get at the Clean Air Act. It continues the inconsistency of the position that the back has been broken on the energy crisis for most matters, but that the crisis remains when the Clean Air Act is discussed.

I have tried to find out how the Administration package was put together. No EPA people have been at the staff negotiating sessions - only White House (Fred Webber), OMB, FE0 and the Labor Department.

The package was written by an interagency review process led by FE0, the White House, and OMB. OMB apparently tried to satisfy all parties by including something for everyone without complete understanding of the substantive impact.

The Clean Air Act portion was not written by EPA, after consideration of comments from other agencies. EPA's comments were only one input to
OMB and FEC, and they appear to have had little impact.

Below is a list of the major revisions contained in the Administration package. Frequently the "worst case" interpretation has been placed on the proposed changes in order to test the breadth of the Administration package.

1. Automobiles - HC and CO standards are frozen at the 1975 interim standard through 1977. EPA discretion regarding the 1977 model year has been dropped. A NOx standard is set at 3.1 forever, unless changed. A new test is added which allows the Administrator to set the NOx standard at a level he determines after balancing energy efficiency, air quality, available technology, and cost. He is to publish his considerations on these matters no later than January 1, 1976.

2. Suspensions of Emission Limitations Possible Through 1984 and Perhaps Beyond - Direct suspensions are allowed through June 30, 1980, (Section 119(b)(1)). But the source merely begins to take the steps required in the compliance schedule on that date. He is not required to reach compliance until June 30, 1984. (Sec. 119(b)(1)(B)). But many paragraphs later language appears which acknowledges that suspensions may be allowed even beyond that 1984 date. (Sec. 119(b)(4)(B)(ii)).

3. A Narrower Health Test is Substituted - The standard of "material contribution to significant risk to health" is replaced with the standard that a source must meet the primary ambient air standard by the deadline contained in the applicable implementation plan. Since this could go far as 1984, it could mean substantial pollution until that deadline, although there are provisions for interim requirements.

In addition, the enforcement mechanism shifts from emission limitations and compliance schedules to the vague enforcement of the national primary ambient air quality standard. Under the Clean Air Act, emission limitations are enforced, not primary standards. Coal conversions in the conference report were to be ordered on a case-by-case basis. It is not possible to apply an ambient air standard to an individual plant with any precision or enforceability.

4. Intermittent Control Strategies Are Locked-In - Interim requirements cannot preclude the use of ICS. That effectively precludes the use of other interim requirements if the source chooses to use ICS. It is very probable that given the lengthy suspensions, plants would invest in tall stacks, ICS equipment, and hope to completely avoid any further requirements.
5. Potentially Massive Expansion of Coal Conversion - The proposal drops the requirement that plants ordered to convert must have the necessary plant equipment to burn coal. This means a potentially massive list of power plants that could be ordered to convert to coal.

Instead of the 46 plants listed on the Federal Energy Office's first list of potential conversions, the list would be expanded into the hundreds. The unavailability of coal would make such massive conversions unattainable, but the potential would exist. The whole thrust of the coal conversion section is changed from mandatory to discretionary. All "shall"s have been replaced with "may"s.

6. Long Term Suspensions Replace Implementation Plan Revisions - A conceptual change is proposed by dropping the requirement for revision of implementation plans when needed because of coal conversions and fuel shortages. Instead, two suspensions are possible: one, through November 1, 1974, and the second, through June 30, 1980.

7. Reconversion to Oil Allowed for Five Years - The conference report required the decision on reconversion to oil must occur before November 1, 1974. The Administration proposal allows this decision to be made any time between now and May 15, 1979. This is a four and one-half year change.

With regard to non-clean air issues in Title I of the Energy Emergency Conference Report, the unemployment compensation provision has become the main stumbling block. The Administration is standing firm on the need to substantially alter this provision. They would prefer that it be eliminated.

The oil price rollback has been dropped. Other issues still under discussion and being revised are: (1) making the Congressional veto over energy conservation plans require action by both Houses rather than one, (2) softening the materials allocation provision, and (3) dropping the export, carpool, studies, and information-gathering provisions.

Senator Jackson is pressing hard for the introduction of the bill soon.
1. Notification to governors and mayors as well as notice for public hearings when possible has been dropped. Orders to convert to the use of coal would have reduced public scrutiny.

2. Reference to section 307(b) and (c) of the Clean Air Act has been dropped. These make the D.C. Court of Appeals the location of judicial action.

3. A new cost test is added to the language pertaining to switching back to clean fuels once they become available. It is unnecessary. The language in the conference report contains the phrase, "reasonably available" and is broad enough to cover the situation.

4. The conference report excluded natural gas from being classified as a fuel that when available would cause a shift back from coal. This has been dropped in the Administration's package.

5. The health standard is substantially eliminated at least until 1960 and perhaps 1934. It is conceivable that it is damaged even beyond that date. The limitation on suspensions granted is very weak. In 1973 a guess would have to be made as to whether or not a plant would contribute in 1980 to a violation of the primary standard after the applicable implementation plan has been imposed. This effectively would make it impossible to deny a suspension. Reference is no longer really made to the implementation plan (though it is mentioned in passing) but merely to the primary standard. This would override the State implementation plan, and probably any attempt to impose a secondary standard if the State wanted to require that. (Section 119(b)(1)(A)).

6. Eliminates the requirement that a converting source must enter into a contract to purchase long term supplies of coal. (Sec. 119(b)(2)). Prior approval by EPA of contractual obligations and steps to meet the compliance schedule is dropped.

7. A new test for continuous emission reduction systems is imposed. The technology must be "adequately demonstrated". While it makes sense to require that control equipment actually work, a test of adequate demonstration may be an overly burdensome hurdle given the changing state of the technology and the uniqueness of the design of scrubbers for each particular installation. (Sec. 119(b)(2)(A)).
8. A loophole exists for those who choose to construct and install continuous emission reduction systems themselves. A person could say he could do it himself, and then elect to drop that commitment on May 15, 1979. This would require the drafting of a new compliance schedule that would undoubtedly give him more years to comply.

The term continuous emission reduction system has been throughout replaced with the term "emission control System". (Sec. 119(b)(2)(A)).

9. The term "applicable implementation plan deadline" for most purposes means the national primary ambient air standard and overrides state authority to impose any emission limitations based on the secondary standards. (Sec. 119(b)(2)(B)). In addition, this is imposed only in air quality control regions. If many areas are not covered by such regions, then this is a potential loophole. (Sec. 119(b)(2)(B)).

10. Judicial review is greatly expanded. The conference report had a very narrow judicial review section. Under the proposal, all suspensions may be challenged by virtually anyone. Industry would be able to challenge every interim requirement. (Sec. 119(b)(3)).

11. Interim requirements imposed on those receiving suspensions cannot be construed to preclude intermittent control systems. This would effectively preclude other interim requirements like the use of low sulfur coal. (Sec. 119(b)(4)).

12. The conference report interim requirement of "avoiding" imminent danger to health has been replaced with the requirement to "minimize" emissions which materially contribute to significant risk to health. "Minimize" is softer than "avoid", but "materiial contribution" is better than "imminent health endangerment". (Sec. 119(b)(4)(B)(I)).

13. The groundwork is created for relaxing the primary standard well beyond 1984. Section 119(b)(4)(B)(ii) contemplates suspensions that go beyond "such deadline". Subsection (b)(1)(n) has a 1984 date. This could be read to contemplate extensions beyond that date.

14. The conference report uses the term "air pollution requirement" throughout. The Administration proposal applies suspensions to "stationary source fuel or emission limitation". This seems to apply a focus on getting rid of direct fuel or emission limitation requirements.

15. The study of SO2 chronic effects has been dropped.

16. Power for EPA to determine priorities and reallocate low sulfur fuels to areas designated has been dropped.
17. The Satterfield amendment authorizing coal conversion suspensions for voluntarily converting sources has been dropped. (See Section 119(h)(1)(B) of the Conference Report.)

18. The McCollister amendment regarding phase-out of old existing plants has been dropped.

19. EPA's authority to allocate scarce emission reduction technology is eliminated.

20. The Moss amendment regarding parking surcharges, parking management, carpool/bus lanes have been dropped.

21. New car emission standards applicable to California may be made identical to those for vehicles for the rest of the country. (This depends on interpretation of proposed new section 202(h)(1)(A)).

22. In addition to the changes in the coal conversion section listed in the first part of this memo, the proposal for coal conversion contains language that overrides any other air pollution requirement. This can be interpreted as meaning that requirements for specific types and grades of coal could not be imposed, and even that a shutdown during inversions could not be imposed. A new test has been included in the judgment to be made as to where the use of coal would have the least environmental impact; such impact is to be determined in comparison with other uses of coal. This would include steelmaking.
MEMORANDUM

TO : Senator Edmund S. Muskie  
FROM : Leon G. Billings

SUBJECT:

I am advised that you have agreed to support transfer of the Alternative Automotive Power Systems program (AAPS) from the Environmental Protection Agency to Energy Research and Development Administration. According to EPA Assistant Administrator Al Alm you agreed, at the behest of the Council on Environmental Quality Chairman, Russell Peterson, to such a move. A letter from the Office of Management and Budget apparently is being prepared which stipulates the scope of the agreement.

It may be premature to support an amendment in the Senate in light of the fact that the House bill transfers both AAPS and stationary source control technology programs to ERDA. While an argument can be made for authorizing ERDA to carry out new auto engine research and development it would seem appropriate to achieve the objective in conference (rather than in the Senate) after making sure that EPA's stationary source control program or personnel assigned to auto research are not transferred.

If ERDA wants AAPS it should not take EPA personnel in the process. EPA's auto certification and enforcement effort is already seriously undermanned.
June 14, 1974

The Honorable Russell Peterson
Chairman
Council on Environmental Quality
722 Jackson Place
Washington, D.C.

Dear Dr. Peterson,

The Advisory Committee on Alternative Automotive Power Systems (ACAAPS) at its meeting of June 13 and 14, 1974, discussed the relationship between the Alternate Automotive Power Systems (AAPS) program, presently in EPA, and the proposed Energy Research and Development Administration (ERDA). As the legislation was initially framed AAPS was to be moved to ERDA. We understand that there is now some uncertainty concerning that move.

While ACAAPS has in the past confined its attention primarily to the technological aspects of the AAPS program, we now feel compelled to comment on this legislation because we recognize that the organizational placement of the AAPS program is so vital to its success. We urge that the AAPS program be merged into the new ERDA organization.

The ACAAPS recognizes the need for research and development efforts in EPA as required to support its regulatory activities. However, there is a qualitative difference between the research efforts intended to support regulation and research activities intended to investigate and develop new technological alternatives. The AAPS program is clearly in the latter category. In addition, the goals of the AAPS program must, in view of new national priorities, extend beyond the primary concerns of environmental protection. While the alternative power sources developed under the program must clearly be environmentally acceptable, the program must also be constantly aware of the changing national fuel and national resources picture.

We, therefore, conclude that the AAPS program should be incorporated into ERDA, an agency whose long term aims are more consistent with the AAPS goals and we urge that you take whatever actions possible to promote this move.

Sincerely,

[Signature]

David V. Ragone
Chairman, ACAAPS
July 24, 1974

Honorable Roy L. Ash
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Roy:

Thank you for your letter of July 19 regarding transfer of certain parts of the Environmental Protection Agency’s alternative research and development program to the Energy Research and Development Agency. This proposal may be a basis for compromise. It appears to be in accordance with the discussions which I held with Council on Environmental Quality Chairman Russell Peterson.

In order to fully comprehend the implications of the proposal, however, I would appreciate receiving from your office additional detail as to the exact number of persons, dollars and functions to be transferred.

I assume that this proposal constitutes an Administration position and would be in lieu of the provisions of the pending House-passed ERDA legislation which would transfer certain elements of EPA’s control technology research program and additional elements of the AAPS program to the new Agency. If I can be assured that this proposal is an acceptable compromise to the House Committee, including elements of the other transfers to which I have referred, then I would be receptive to it.

Your early response would be greatly appreciated.

Sincerely,

EDMUND S. MUSKIE, U.S.S.
Chairman, Subcommittee on Environmental Pollution
HONORABLE EDMUND S. MUSKIE
UNITED STATES SENATE
WASHINGTON, D.C. 20510

DEAR SENATOR MUSKIE:

I am writing in regard to the recommendations of CEQ's Advisory Committee on Alternative Automotive Power Systems concerning transfer of certain parts of EPA's automotive R&D program to ERDA. We in OMB, CEQ and EPA have reached agreement on a transfer which I believe you will find consistent with both EPA and ERDA research goals in environment and energy.

We believe that the developmental as opposed to the regulatory aspects of the Advanced Automotive Propulsion Systems (AAPS) program, now conducted by EPA, should be transferred to the proposed Energy Research and Development Administration when it is established. Our reasoning is that ERDA will be in a more appropriate position than EPA to conduct long-range hardware development efforts and that much of the AAPS program could benefit from close association with related R&D programs in other energy conversion technology areas.

I would like to emphasize that the proposed transfer to ERDA would not strip EPA of its confirmatory and technology assessment capability and resources in the automotive area. Furthermore, it is not the Administration's intention to transfer any of the research activities in EPA that are connected with assessing and evaluating emission control technologies (e.g., we believe the Michigan test facility, which is not operated in support of the AAPS program, should continue to support EPA regulatory activities). In fact, the President's FY 1975 Budget request provides
for an increase for an expanded technology assessment program to enable EPA to remain abreast of technology developments that may impinge on regulatory decisions.

Again, I wish to assure you that the Administration proposes to transfer only those activities concerned with the long-range development of advanced automotive propulsion systems.

I would appreciate your support regarding the proposed transfer. Frank Zarb, my Associate Director, who handles this program in OMB and I would be pleased to discuss this matter with you further if you desire.

With warm regards.

Sincerely,

Roy L. Ash
Director

Enclosure
June 14, 1974

Honorable Russell Peterson
Chairman
Council on Environmental Quality
722 Jackson Place
Washington, D.C.

Dear Dr. Peterson,

The Advisory Committee on Alternative Automotive Power Systems (ACAAPS) at its meeting of June 13 and 14, 1974, discussed the relationship between the Alternate Automotive Power Systems (AAPS) program, presently in EPA, and the proposed Energy Research and Development Administration (ERDA). As the legislation was initially framed AAPS was to be moved to ERDA. We understand that there is now some uncertainty concerning that move.

While ACAAPS has in the past confined its attention primarily to the technological aspects of the AAPS program, we now feel compelled to comment on this legislation because we recognize that the organizational placement of the AAPS program is so vital to its success. We urge that the AAPS program be merged into the new ERDA organization.

The ACAAPS recognizes the need for research and development efforts in EPA as required to support its regulatory activities. However, there is a qualitative difference between the research efforts intended to support regulation and research activities intended to investigate and develop new technological alternatives. The AAPS program is clearly in the latter category. In addition, the goals of the AAPS program must, in view of new national priorities, extend beyond the primary concerns of environmental protection. While the alternative power sources developed under the program must clearly be environmentally acceptable, the program must also be constantly aware of the changing national fuel and natural resources picture.

We, therefore, conclude that the AAPS program should be incorporated into ERDA, an agency whose long term aims are more consistent with the AAPS goals and we urge that you take whatever actions possible to promote this move.

Sincerely,

[Signature]

David V. Ragsdale
Chairman, ACAAPS
EXECUTIVE SECRETARY
Saunders B. Kramer
Environmental Protection
Agency
2565 Plymouth Road
Ann Arbor, Michigan 48105

COMMITTEE CHAIRMAN
Dr. David V. Ragone
Dean of Engineering
University of Michigan
Ann Arbor, Michigan 48105
313/764-8470

COMMITTEE MEMBERS

Mr. James L. Dooley
Vice President, Engineering
McCulloch Corporation
5401 Beethoven Street
Los Angeles, California 90066
213/391-7187

Dr. S. William Gouse
Associate Dean
Carnegie Mellon University
Pittsburgh, Penna. 15213
412/621-2600

Mr. Jack I. Hope
Rt. 6
Hillsboro, Ohio 45133
513/666-2683

Dr. George J. Huchner, Jr.
Director of Research, Product Planning and Development
Chrysler Corporation
P.O. Box 1116
Detroit, Michigan 48231
313/956-3534

Mr. David F. Moyer
Director, Systems Research Lab
Ford Motor Company
P.O. Box 2053
Dearborn, Michigan 48121
313/337-7330

Professor Robert F. Sawyer
Associate Professor
University of California
Dept. of Mechanical Engineering
Berkeley, California 94720
415/642-5573

Mr. Ernest Starkman
Vice President-Environmental Activities Staff
General Motors Technical Center
Warren, Michigan 48090
313/575-1540

Dr. John H. Sumunu
Associate Dean
College of Engineering
Tufts University
Medford, Massachusetts 02155
617/628-5000 ext. 268
MEMO TO RECORD

FROM Leon G. Billings

SUBJECT: Clean Air Amendments of 1975

On Sunday, November 24, Russell Train called me at home to send a message to the Senator regarding what appeared to be a switch in the Administration's position on the question of permanent controls for coal burning power plants. He indicated that the Administration appeared willing to abandon its effort to obtain legislative support for intermittent control strategies on the assumption that the Congress would consider extra time for achievement of clean air deadlines. He also indicated that the Administration hoped that the Congress would be less reluctant to authorize coal conversions if their position on intermittent controls was modified. Subsequently to the Train conversation I had several interrupted phone calls from Al Alm on the same subject. Alm indicated that the Administration position was premised on as much as a 10-year extension of time for the application of permanent controls to major coal burning stationary sources in rural areas and an authorization for intermittent controls in the interim. Subsequent to that time, Robert Baum, Deputy General Counsel for Air Programs, requested a meeting to discuss in greater detail the kind of legislation which the Administration was considering. Baum more clearly indicated the thrust of the Administration proposal. In the first place, the Administration is apparently not focusing on the Clean Air Act strategy in general, but is rather only concerned with major coal burning stationary sources.
Second, it appears that their strategy is motivated by concern these sources may otherwise have to consider burning oil after the deadlines in the Clean Air Act.

Third, it appears that they are unwilling to use the enforcement capabilities in the Clean Air Act as a basis for obtaining compliance by the sources.

Finally, it appears the primary objective of the Administration is to relieve indefinitely world power plants from the requirements of State implementation plans.

I indicated to Baum that the Committee would face reality as regards those sources which had made a good faith effort to comply with the 1970 Clean Air Act. And, especially, with those sources which had chosen to use oil as a means of compliance after the effective date of the applicable emission limitations. I further indicated that the Committee would be reluctant to flatly exempt power plants regardless of their location solely on the basis of lack of interest in compliance.

Finally, I indicated that I did not anticipate that the Committee would be interested in a strategy which preempted State standards. Baum indicated that that would be the practical affect of endorsing the Administration's proposal to issue compliance orders beyond the date set forth in the Clean Air Act, because he felt the courts would simply not authorize the States to require something more restrictive than that insisted upon by EPA. He admitted, however, EPA was required by law to enforce the strictest emission limitation and, in most cases,
that is the State limitation, so therefore the preemption issue would be moot.

I subsequently discussed in another context (the Fortune Magazine interview) the possibilities and options available to the Committee. Senator Muskie and his part of the interview indicated a real reluctance to relax the deadlines in the Act. He feels that it would be better to maintain the deadlines backed up as they are by civil and criminal penalties and citizen suits and sanction the EPA variance procedure rather than extend the deadlines and indicate to industry that the Congress did not intend to seriously keep the pressure on for compliance. He also indicated an interest in paring application of the process utilized in the auto industry case, where an applicant for a variance would have to demonstrate at a public hearing, his reasons for delay and the fact that he had made a good faith effort. The Administrator could, as a result of that hearing, establish a new compliance schedule, with that compliance schedule enforced to mandatory statutorily established civil penalties, which civil penalties could only be waived if again the polluter demonstrated that he was making a good faith effort but circumstances beyond his control led to non-compliance.

It is important to note that the major, if not the entire focus of the Administration's position, are power plants now burning coal. It is also important to note that the Administration appears more concerned with obtaining delay than in getting these power plants on compliance schedules now. More effort is being placed on politics than on enforcement.
MEMORANDUM

TO: Senator Edmund S. Muskie

FROM: Leon G. Billings

SUBJECT: Pending Clean Air Amendments

May 3, 1974

On May 1 the House passed and sent to the Senate an original bill which primarily addresses the clean air issue considered in earlier energy emergency legislation. The House chose not to substitute this new bill for S.2772 (the limited auto emission extension legislation the Senate passed last December) and therefore at this point there is no basis for a conference. The House vote was 349-43. During consideration of the legislation the House rejected by a vote of 321-169 the so-called Wyman amendment which would have caused removal of existing pollution control devices and limited the application of new pollution control devices to certain major metropolitan areas with significant pollution control problems. (Last winter the House rejected a similar Wyman amendment by the considerably narrower margin of 210 to 180)

As I have indicated in previous memoranda, (copies of which are attached) in light of the fact that the energy crisis has subsided the issue today is whether or not there is an adequate justification for clean air amendments as broad as those proposed by the House. In order to maintain maximum flexibility, I would recommend that your position be that legislation should not be approved at this time on the basis of anyone’s perception of limited energy supplies which would permit compromise to public health. The public health basis for clean air standards continues to be a viable, saleable point of view and should be stressed. Any questions which you may receive regarding the pending clean air legislation should focus on three points:

1. We need to provide a legislative response to the auto industry as to what standards it must meet in 1976 because the auto industry is but a few months away from beginning certification testing for 1976 motor vehicles. Any course of action by the Congress which would delay a response to the auto industry would be both politically and economically irresponsible. Thus a decision on the auto emission standards is the highest order of Congressional priority.
2. In order to avoid the kind of crisis situation which occurred last winter to the extent attributable to environmental controls, there should be available to the Administrator of the Environmental Protection Agency adequate authority to act to meet the basic needs of people for energy during times of crisis -- which crisis should be determined on the basis of unavailability of fuels.

3. The basic premise of public policy whether it be clean air or economic productivity should be a carefully balanced judgment by the Congress and the Executive as to how best to assure protection of the public health and welfare. Any sacrifice of long range air quality goals will only injure the public health without any corresponding improvement in economic activity. Careful consideration must be given to the methods available to assure that our economic and environmental goals are consistent without sacrificing either.

I have attached various memoranda for briefing purposes and will be available at home if you have any questions. (946-5916).
MEMORANDUM

TO: Senator Edmund S. Muskie

FROM: Leon G. Billings

SUBJECT: 2:00 p.m. meeting - May 6, 1974

The House bill includes several minor changes in the Clean Air provisions, including the extended voluntary conversion feature which I mentioned this morning. As I indicated I would recommend the following courses of action:

1. The Senate should take the House bill off the table, substitute a Senate amendment relating only to auto emissions and a one year extension of authorization for the Clean Air Act, adopt the substitute and ask for a conference with the House;

2. Agree with Senator Randolph in advance to accept a limited coal conversion provision in conference conditioned upon no conversion which would cause primary standards to be exceeded;

3. Insist in return for Senate support for the authorization extension in order to take pressure off review of the Clean Air Act.

This strategy does not suggest how to deal with such other issues in the House bill as amendments relating to transportation controls, NEPA or reports by energy companies. The latter should be discussed today also.
MEMORANDUM

TO : Senator Edmund S. Muskie
FROM : Leon Billings - Karl Braithwaite
SUBJECT: Summary of Clean Air Markups Tuesday and Wednesday, January 20 and 21

Summary

Senator Randolph has indicated that if we did not complete a Committee bill by the Lincoln recess, we would have to sever automobiles and pass it separately. Senator Baker said he thought we could finish a bill.

Nondegradation has been the topic discussed both days. Senator Morgan has circulated an amendment to delete the requirement for best available technology.

Senator Morgan has not moved the adoption of his amendment, but spent considerable time Wednesday discussing arguments for the amendment. He will be absent Thursday. Senator Burdick proposed an alternative which would add the words "taking into account costs" to the present definition of best available technology. It appeared that Burdick probably could prevail with his amendment.

General Discussion

Senator Morgan has been quite active on this issue. He has criticized the legislative process through which this provision was fashioned, claiming that the hearings did not investigate nondegradation or best available technology thoroughly. He initially suggested that nondegradation be deleted and that further hearings be held. He has argued that a source ought to be able to use whatever technology it wanted as long as it "complied" with the nondegradation increment applicable.

Senator Domenici gave an introductory defense of the nondegradation provision and seemed to remain solid in his support for the provision.

He also pointed out the limitation of the hearing process and suggested the general need for something like hearings after legislative proposals have been fashioned.
Senator Gravel has supported the best available technology provision but indicated that he has problems with the particulate standard (because it does not distinguish between large and fine particulates) and with the impact that nondegradation "buffer zones" would create around new national parks likely to be designated in Alaska.

Senator Baker has indicated preference for national emissions standards similar to the effluent guidelines approach in water, but will not pursue it. On Tuesday he stated broad concerns about nondegradation. On Wednesday he seemed satisfied with the progress being made in fashioning a provision for best available technology, though he earlier expressed the belief that this approach was defective.

Senator Hart raised significant questions challenging the Morgan amendment to strike best available technology. He emphasized the fact that the first source into an area could use all the air quality if there were no best available technology requirement.

Senator Burdick raised a number of specific issues regarding nondegradation. He proposed shifting wildlife refuges from a mandatory and irreversible Class I designation to an initial Class I designation which could be reversed to a Class II with the approval of both the state and Federal Land Manager. Though he did not press this to a motion, it was quite clear that the majority of the Members would support shifting wildlife refuges (the staff supports such a shift). Senator Burdick was generally supportive of the best available technology requirement.

Attendance has ranged between seven to nine members.

Morgan BAT amendment

The Morgan and Burdick amendments will be the pending questions Thursday morning. Neither has been officially "moved".

Morgan indicated that he would modify his amendment so that it does not strike best available technology. Instead it would require that energy, environmental, economic, social and other cost implications be considered in establishment of best available technology. In arguing against best available technology, Senator Morgan presented the following points:

1. New source performance standards would be wiped out. (Wrong - they serve as the baseline and are still relevant.)

2. BAT uses a technology approach instead of emission limitations. (This is partially wrong -- the requirements would be established by the States as emission limitations and would still be enforced as such. If two similar technologies could meet the same emission limitation, then either could be chosen.)

3. BAT encourages monopolies. (This might in fact occur if one process were found to be so much superior that there was little room for a State to choose an emission limitation that would accommodate more than one technology. But that is not the usual situation in most cases of control technology.)
4. The States would be preempted from making balancing decisions particularly regarding costs. (Wrong -- States make the basic decision. It has always been anticipated that the words "achievable" ... and "available" would be used to consider whether or not costs prohibited the adoption of a system. A system that is prohibitively expensive is not "available". In any case, the States make this decision and there is no role for EPA to override that decision unless the source receiving the permit would exceed the increments established.)

5. Cost/benefit balancing language has been included in other parts of the working print, such as the sulfur study for automobiles and the heavy duty vehicle best available technology language. (The items are not comparable: the auto sulfur study is just a study, not a standard. The heavy duty best available technology requirement is an interim requirement and is replaced in 1981 by an emission limitation which requires reductions comparable to light duty vehicle reductions. In this case, the heavy duty regulations call for technology which is better than anything which exists. This is a standard certainly more stringent than a best available technology standard.)
MEMORANDUM TO RECORD

February 3, 1975

SUBJECT: Cost Benefit Analysis

During the middle 60's the test of the viability of pollution control regulations was their "technical and economic feasibility." The Congress determined in the 1970 Clean Air Act and the 1972 Clean Water Act that this test was inadequate because the determination of economic feasibility rested almost entirely with the polluter. These tests were abandoned. In water pollution a test of technical feasibility was maintained and the burden of proof was placed on business to show that regulations were not economically feasible.

Today the many interest argue that "cost benefit analysis" is the appropriate basis for evaluating environmental regulations. The auto industry, utility industry and others insist that there be a total "cost benefit analysis" of any environmental regulations to determine whether or not a given level of pollution control should be required.

Cost benefit analysis is at best witchcraft and at worse it simply does not exist. To perform a cost benefit analysis one would have to be able to attribute specific dollar values to all known or anticipated benefits. Business knows that cost of pollution control can be determined. They can be inflated or deflated or they can be fairly precisely established. They also know that benefits are not quantifiable nor are they achieved in a time frame similar to the expenditures associated with their achievement. Thus it is easy to argue that costs outweigh benefits.

As a practical matter cost will always be greater than benefits because few environmental benefits have specific dollar values and to the extent that you cannot specifically quantify benefits, once you fall victim to believing in witchcraft, those who propose cost benefit analysis will be able to argue effectively that cost clearly outweigh any known or anticipated benefits and therefore regulation should be compromised.

There is a major effort being made to have the National Commission on Water Quality do a cost benefit analysis of the 1983 regulatory requirements on the Clean Water Act. There are major elements of the industrial community trying to obtain a cost benefit analysis of implementation of ambient air quality standards. The question is how do you respond to that initiative. According to scientist at the National Environmental Research Center, EPA:

"In our opinion, precipitous movement to a cost-benefit philosophy in the absence of greatly improved health damage functions would tend to slow drastically the air pollution control effort and leave a rather large but poorly defined residual of continuing ill health."
Under the Clean Air Act, the response is to look at the basis for regulations. The Congress asserted in 1970 that air quality standards based on health and welfare effects should be established and that regulatory measures to achieve those air quality standards should be implemented.

Public health was defined in the Senate report as follows: "...the Committee recognizes that such standard will not necessarily provide for the quality of air required to protect those individuals who are otherwise dependent on controlled internal environment such as patients in intensive care units or new born infants in nurseries. However, the Committee emphasizes that included among those persons whose health should be protected by the ambient standard are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment. Establishing an ambient standard necessary to protect the health of these persons, reference should be made to a representative sample of the persons comprising the sensitive group rather than to a single person in such a group."

The Congress did not attempt to apply a dollar value to protecting the health of people. In its stead the Congress determined that regulatory measures would have to be taken to be sure that the health of "sensitive groups" were protected without regard to economic cost. To now require that the regulatory decisions be made on the basis of a cost-benefit ratio would in effect place a dollar value on the health of people and suggest that those lives or that health could be written off because of the expense of achieving applicable emission controls.

The question becomes then whether or not Congress should declare, as public policy in the environmental areas, a goal for which the benefits may not be quantifiable in dollars and require a regulatory process which is clearly quantifiable in dollars. If so should the benefits to be achieved be compromised by the cost of regulations. There is no doubt as to the answer to that question.

Congress has responsibility to assure protection of public health. If Congress determines that protection of public health is too expensive than it has the responsibility to either inform the American people that certain portions of the population will have to be written off in the name of economic stability or it will have to provide some alternative means of protection for people who are susceptible to air pollution related illnesses.

Of equal importance in any discussion of cost benefit analysis are the arguments relative to marginality. It is asserted by some that achievement of the final degrees of control required to implement the ambient standards on a constant basis is uneconomic, because the cost of the last increments of control is always much greater proportionately than the first increments. This argument falls on the same logic of the previous arguments. The health of people becomes no less important because it takes more money to remove the last increment of pollutants from an emission source.

More importantly, it assumes no new technology is introduced: the auto catalyst in 1975 did not have cost/benefit...
Cost benefit analysis also is contrary to an assertion of a basic environmental right. The issue is whether or not people have a right to healthy air, and conversely whether for the purpose of profit or convenience other people have the right to destroy healthy air and whether as between those there is a balancing judgement which modifies either right. Again there seems to be no doubt as to the answer to the question.

Clean air like Clean Water are public rights -- they cannot be compromised by cost benefit analysis. They cannot be taken away by the acts of private individual in the name of profit or convenience. Each individual citizen has the right to a healthy environment. No individual citizen or corporate citizen has the right to render that environment unhealthy in the name of economics or technology or otherwise. And the environmental right extends beyond the property right. No amount of cost benefit analysis can alter that fact. If we fall into the trap of quantifying the economic, social environmental benefits of our regulations against the economic, social and environmental costs we may as well abandon our effort to obtain an improved environmental quality. Let me repeat one point. If you accept the premise of the cost benefit analysis then in the absurdity it could be demonstrated that the cost of pollution always outweigh the benefits -- even pollution which has a direct and immediate impact on the health of a large body of the population. The classic example comes where a source of toxic pollutants which is causing discernible increases in morbidity and mortality asserts that it cannot afford to clean up its pollutants and will close if required to do so. In light of the Reserve mining decision it can be fairly argued that costs outweigh the benefits because the costs would be immediate while the benefits would not be discernible until people actually began to die and in most instances would be years later. Unless you have direct and irrefutable correlation between stack gases and moritlity and morbidity, the decision will always be on the side of maintaining the economic structure, jobs and so on.

It is, in classic sense, the statement of the Mayor of a small town who said "it may smell like rotten eggs to you but it smells like jobs to us."

Our scientific technical data base is so limited that benefits are always going to be speculative; cost are always going to be firm. What the American people must decide is whether or not environmental quality, ecological integrity, public health, aesthetic improvement, the quality of life in general is important. Once that decision has been made then the regulatory process can be formulated.

In the early part of this decade it appeared that the American people were prepared to support the pattern of regulations and investment to achieve an improved quality of life. Now the business community would sacrifice that improvement on the altar of cost benefit analysis. This is a fraud and they know its a fraud or they wouldn't be proposing it.
MEMORANDUM

TO: Members of Subcommittee on Environmental Pollution

FROM: Leon G. Billings

SUBJECT: Agenda of Clean Air Act Issues

The following is an agenda of issues pending before the Subcommittee in the order of consideration proposed. The issues are keyed to the attached staff memorandum of June 20, 1975.

1. Auto Emissions (Pages 8-9)
   a. oxides of nitrogen
   b. deadlines
   c. fuel economy
   d. other vehicles
   e. warranty
   f. testing
   g. unregulated emissions

2. Air Quality Planning
   a. significant deterioration (Pages 1-2)
   b. transportation and land use controls (Pages 4-5)
   c. air quality maintenance

3. Implementation Plans (Pages 3-4)
   a. emission limits vs. intermittent controls
   b. revision of emission limits for secondary standards
   c. preemption
   d. emission taxes.

4. Enforcement (pages 5-6)
   a. Federal-State relationship
   b. penalties
   c. deadlines
5. Coal Conversion (Page 7)
   a. deadlines
   b. regional limitations
   c. significant risk
   d. allocation
   e. emergency authority

6. Other Issues
   a. state program grants (Page 2)
   b. air quality criteria and standards (Pages 2-3)
   c. new source performance standards (Page 6)
   d. hazardous pollutants (Page 6)
   e. President's Air Quality Board (Page 7)
   f. control of Federal facilities (Page 7)
   g. definitions (Page 9)
   h. judicial review (Page 9)
   i. employee protection (Page 9)
   j. public hearings (Page 9)
   k. citizen suits (Page 10)
   l. conflict of interest (Page 10)
   m. monitoring (Page 10)
FLOOR STATEMENT - COLLOQUIUM ON MAJOR EMITTERS
(Senator McClure - Senator Muskie)

Senator McClure: Mr. President: the definition of a major emitter is an important aspect of the no significant deterioration policy contained in the bill before us. The bill language states that the source must meet two criteria; the source must be among the 28 identified categories of facilities, and must also have the potential to emit over 100 tons per year. The bill language also gives the Administrator of EPA the authority to add categories to the 28 listed. It is important that we establish guidance for the use of this authority.

It is my understanding that this authority should be used cautiously and only after careful analysis indicates that a category of sources clearly presents a significant problem requiring the application of the requirements and procedures that are a part of the conditions major emitters must meet prior to approval for construction of the source. Is that the same understanding reached by the floor manager of the bill?

Senator Muskie: Yes. This authority is neither a permissive license to add extensively to the Committee's list nor an iron clad definition of sources forever frozen in print. The Committee selected 28 categories from a list of 190 compiled by the stationary source program within the Environmental Protection Agency. The fact that the Committee selected less than 1/6 of the sources on that list indicates that the Committee was selective about the types of facilities that it feels are necessary to be reviewed in order to prevent the significant deterioration of air quality in clean air areas. The 28 categories also indicates that the Committee felt that some categories should be added to the rather narrow list which EPA presently uses under its present nondegradation regulations.
EPA's present regulations require review of only nineteen categories of major emitters. The Committee made substantial additions to this list, feeling that many sources had been ignored by EPA which had the potential of having significant impact on air quality.

The EPA will need to chart a middle course in this area. Any additions to the list of 28 must be based on careful analysis. Yet the agency has a direct responsibility to protect air quality in clean air areas, and can only fulfill that responsibility if sources that create pollution problems are adequately reviewed and controlled prior to their construction.

Mr. McClure: I have some concern that EPA might not exercise adequate restraint in selecting new categories to be added to this list of 28.

Mr. Muskie: That is a legitimate concern, and one that I believe has received instruction in the Committee report but could benefit from further guidance at this time. The EPA has obviously shown restraint in this area already -- in fact more restraint than the Committee felt was proper to protect air quality in clean air areas. The Agency made its own review and determination when it published its regulations December 5, 1974, and in those regulations only covered nineteen sources. That was clearly an act of restraint rather than an act of aggressive "over-control". We would expect and instruct the Agency to continue to exercise care in any additions made to this list.

To be more specific, the Agency should apply this authority to two particular cases: (1) In the first case, new processes may be developed which are unknown to us at this date but which will create new activities that bring potential for significant adverse effect on air quality. We
can only assume the development of such technologies or such activities, and it is essential that the Agency have the authority to place such activities on the list as they are developed and as control is justified;

(2) in the second case, there may be existing processes or activities that are found, through subsequent analysis or through existing information that was not known to the Committee at the time if its decision, that do in fact create significant problems for the prevention of significant deterioration. It may be that such sources are existing processes that for some reason have an accelerating rate of growth that is more substantial than other kinds of sources. Or it may be that their emissions are more troublesome than early analyses had indicated.

In any event, we would expect the Environmental Protection Agency to examine all of these factors carefully, prior to any additions to the list.

Mr. McClure: It is certainly not my intent to indicate that sources that clearly need to be added to the list be somehow kept from that list. But I did feel it was necessary to also insure that the discretionary authority provided to EPA in this language is used carefully and selectively by the Agency.

Mr. Muskie: I appreciate the Senator’s intentions and I believe his discussion here has helped to provide a useful guideline for the Agency in implementing this authority. I thank the Senator from Idaho for raising this issue.
MEMORANDUM

TO: Senator Edmund S. Muskie

FROM: Leon G. Billings

SUBJECT: Clean Air Act Markup Sessions

June 5, 1975

The staff needs guidance on how best to proceed in preparation for the markup sessions which are scheduled to begin on June 17. As I indicated previously, there is considerable Member interest in spending the first couple of days identifying issues and options through staff presentations and discussions. The staff is preparing issue papers which will include proposed options. The issues will be divided into three categories: major areas in controversy; technical problems; and special issues.

Our initial effort will be to present the major issues in controversy. We will attempt to deal with the technical questions at the staff level and we will raise the special issues if appropriate after the general structure of any amendments has been agreed to.

I think it is important to begin the markup sessions with a general discussion of the basis for national clean air policy. The Committee staff generally agrees (with a few notable exceptions) that the Committee must first determine whether or not public health continues to be a viable basis for the establishment of clean air regulatory policy and, in that context, whether a policy based on achievement of public health protection can be honestly sold to the American public if the necessary regulatory policies, including enforceable emission limits and compliance schedules, are not a part of the fabric of the law.

I suggested to the staff that the questions before the Committee this year are no different than those confronted in 1970, which were:

1. Is public health protection from air pollutants a viable basis for the development of air pollution control policy;

2. If public health continues to be a viable, defensible basis for such policy, the Congress must determine whether or not deadlines for achievement of the protection of public health from air pollutants are useful and if so, what should those deadlines be;
3. If both health related air quality standards and deadlines continue to be the basis for control, to what extent do sources (moving and stationary) need to be controlled to achieve health related standards; and

4. Over what time frame, trading off the impact of emission controls or the relaxation thereof with regional control policies designed to achieve any appropriate deadlines for public health protection.

These questions exist today in a different political environment. It is not likely, for example, that the Committee will be as unanimous in setting aside economics when public health is involved. At the same time, it is not likely that the regulatory policies envisaged by the Clean Air Act will ever be implemented (which means that health related air quality will never be achieved) if economics become the basis for compromising emission limits or compliance schedules.

Virtually no opponent of current clean air regulations argues that the technology to achieve most applicable limitations is unavailable. In most cases, they do not even argue that the technology taken by itself is too costly. Rather, it is argued that the gross national costs of pollution control unreasonably diverts economic resources from needed plant expansion and increased productive capacity without quantifiable benefits. And, if there is a "control cost" to "health benefit" analysis, health will lose because the benefits are simply not quantifiable in dollar terms, while industry can easily come up with dollar costs of pollution control.

For example, the steel industry has just spent over $500,000 on a study to show that they will not be able to finance needed future capacity if they must also finance "unreasonable" environmental controls. Thus, they advocate revision of primary ambient air quality standards so that certain controls will be judged unnecessary. And, they advocate technology based standards derived from a process which includes a test of economic practicality because they have concluded that the technology available to achieve control of certain emissions would be determined not economically practical if analyzed from a national point of view.

I think the staff can overcome these arguments and support maintaining momentum, including taking new initiatives if you decide to take the offensive. The staff recognizes that there are real problems with the Clean Air Act, such as those posed by Federally maintained transportation and land use controls; duplicative Federal-State enforcement requirements; inadequately designed non-degradation policy; the absence of civil penalties; inadequate public participation and hearing process; and perhaps (if one accepts the auto industry's basic assumption) even overly strict auto standards.

At the same time, the Record does not support many industrial proposals which include new (and virtually meaningless) attainment dates; mandatory revision of existing ambient air quality standards; establishment of national emission standards based on technology to be applied regionally
based on air quality requirements; elimination of Federal backup enforce-
ment authority; elimination of the non-degradation policy and air quality
maintenance requirements; elimination of EPA authority to require trans-
portation and land use controls; administratively flexible deadlines for
both moving and stationary sources; Federal preemption of emission standards
applicable to major stationary sources of pollution; de novo judicial review
of all administrative determinations; inclusion of a benefit/cost analysis
of all emission control requirements; and so on.

I think you could take the initiative by proposing reasonable
amendments which will maintain momentum while dealing with real problems.
You can reasonably insist on new initiatives where past initiatives must
be compromised by current events or lack of technology. For example, if
auto emission standards are to be delayed then the statute could be broadened
to require regulation of other moving sources such as busses, trucks and
motorcycles to take up the slack. And, if auto emission standards delay is
based on fuel economy, you could propose that only those cars which meet
minimum Federal fuel economy requirements would be afforded the benefits of
less restrictive emission limitations.

Or, another example: If transportation and land use controls must
be delayed, thus delaying the dates for achievement of health-related air
quality in urban areas, then you could insist that the statute specify
minimal requirements for transportation control programs which states and
regions must put in effect in order to buy more time.

Or, another example: If deadlines have been breached and enforce-
ment orders are to be issued extending compliance to dates later than those
established by the 1970 Act, you could insist on statutory penalties where
good faith has not been demonstrated or if new compliance schedules are sub-
sequently breached.

Or, another example: If the Environmental Protection Agency is
to continue to have inadequate resources to effectively enforce the require-
ments of implementation plans, you could insist that the citizen suit pro-
vision be amended to permit compensation of citizen attorneys and expert
witnesses from penalties collected from polluters.

I have tried to identify the kinds of questions which need dis-
cussion in order to provide the staff with guidance as to how to proceed to
draft any amendments to the Act. I have mentioned above the question of
whether or not public health is retained as a policy guide for dirty air areas.

Another question relates to extension of deadlines: According to
information which has been provide to us by EPA (and others) many sources of
pollution will be in compliance with state implementation plan (SIP) require-
ments by the current deadlines. Many more are on compliance schedules which
will result in achievement of applicable limitations in the near future. These
sources can be classified generally as acting in good faith and have cost a
considerable competitive advantage over those who have chosen to delay. It
can be fairly argued that any change in basic policy to accommodate those
who made a good faith effort will also reward bad faith, in addition to en-
dangering the public health for a longer period of time.
Another major issue is nondegradation. Most of industry (and the Administration) would prefer to eliminate the "protect and enhance" concept of the Act in favor of requiring only that level of air pollution control which is necessary to achieve and maintain primary and secondary standards. Such a proposal is defensible if the Clean Air Act is considered only in the context of ambient air quality standards and without regard to any distinction made between clean air and dirty air areas.

I indicated above that it was important to first discuss whether or not public health remained the basis for clean air regulatory policy. Public health is a basis which makes sense in areas with already dirty air. It has no relevance to areas in which visibility, aesthetics, and smell are of primary concern. The planning provision which the staff is developing will make a distinction between policies and procedures to achieve standards and policies and procedures to protect clean air. Also, it will suggest a different role for the Federal government in areas depending on how clean or how dirty the air currently is.

On auto emissions I have no specific recommendation but there are a number of alternatives which I will spell out in a separate memo. The staff will need guidance as to whether or not the Members feel there is any necessity in relaxing or delaying any of the current standards. I would like to discuss this issue with you in some detail.

Other questions which come to mind are: What about deadlines? Should EPA be allowed to issue orders backed up with civil penalties? Should state enforcement be preempted? Should intermittent control strategies be authorized as a substitute for continuous emission limitations? And, there are a host of lesser questions which will be identified in the issues papers.

Finally, there is considerable interest in the private sector to completely rewrite the Clean Air Act to establish a new regulatory basis. At least most industrial groups want substantial modification of the current law, the effect of which would be a new law. They believe this approach would make it much easier for them to get around an otherwise more difficult political problems.

The staff would prefer to propose specific amendments designed to deal with real problems of the law which may interfere with (or make difficult) achievement of clean air objectives. Only two sections of the law would be significantly altered under the staff proposal: planning and enforcement. This approach would place the burden on those who would rewrite the basic Act to justify major departure from the Act's concept in open markup sessions.

There are practical arguments for not rewriting the entire law. Deadlines have been breached; authorizations expire at the end of June; the President wants action on the environmental aspects of his energy legislation; etc. None of these problems could be dealt with swiftly if a comprehensive rewrite was undertaken.
MEMORANDUM

TO: Senator Edmund S. Muskie
FROM: Leon G. Billings
SUBJECT: Discussion of Possible Amendments to the Clean Air Act.

June 25, 1975

On Friday I gave you a memo entitled "Proposed Amendments to the Clean Air Act." Over the weekend I prepared a discussion paper keyed to that earlier memo. What follows is a repeat of the text of the earlier memo, together with discussion of each issue.

1. Significant Deterioration

   a. Incorporate in the statute, by reference, EPA's regulations regarding significant deterioration. (EPA staff)

   b. Incorporate EPA's regulations in the statute except for provision for Class III (pollute up to primary or secondary standards) in the statute; include all criteria pollutants under the nondegradation requirements and authorize the States to regulate construction on Federal lands with an EPA veto over State permits. (New Mexico Air Pollution Control Agency)

   c. Require classification of clean air areas into Class I areas of critical environmental concern and into Class II all other areas in which primary or secondary standards are not currently being exceeded; include all regulated pollutants; require applicant for construction of a major source to submit meteorological and emission data to obtain a Federal permit; require use of best available control technology and cover transportation and development as well as construction of new major emission sources. (Sierra Club)

   d. Require economic and social factors to be considered in nondegradation designation; eliminate the buffer zone requirement which protects Class I regions from sources located immediately outside such regions; authorize State control of development on Federal lands with residual power to the Federal government; require use of best available control technology; and establish an engineering task force and an environmental review team to make determinations regarding new source performance standards. (New Mexico Public Service Company)
e. Delete requirement for no significant deterioration policy.
   (Administration and various industry groups)

Discussion:

The significant deterioration controversy is a result of litigation. The courts held (and the 1970 Clean Air Act intended) that EPA must develop a mechanism to assure that "significant deterioration" of existing clean air would not occur. EPA regulations were promulgated and are now pending a review as to their validity. The industry position is that the effect of the regulations will be to prohibit development in any of the energy resource areas of the west, whereas the Sierra Club - State of New Mexico argue that States can zone major areas for pollution up to ambient standards and thus not comply with the requirement that no significant deterioration occur.

The EPA regulations identify three potential classes of regions. Class I regions (with which industry is concerned) are areas in which development is virtually barred. This classification is intended to protect areas of critical environmental concern (national parks, forests, scenic areas, etc.). Class II regions are areas in which well-controlled, well-planned, and well-thought out development can occur. EPA estimates that in a Class II area a 1,000 megawatt power plant could be constructed so long as that plant used best available control technology. Class III regions (with which the environmentalists are concerned) are regions which the States could designate in which development could occur so long as secondary standards were not exceeded.

All regions not exceeding primary and secondary standards are classified by regulation as Class II with an opportunity for the State to reclassify as I or III. Industry is concerned that Class I regions and associated buffer zones will exclude development whereas environmentalists are concerned that Class III regions will allow significant degradation.

The Class II region concept is essentially sound. It requires a careful air quality data gathering effort. It requires best available control technology and it establishes a reasonably precise standard for determining whether or not deterioration will take place. There is also general agreement that areas of critical environmental concern should be designated, which should include national parks, forests, wilderness waterways, and so on. These should be designated by statute.

I recommend that you propose as an alternative to the five listed options, the alternative outlined as a part of the proposed planning amendment which is discussed in Attachment A. You will note that this proposal establishes three regions: Class I regions which are regions of critical environmental concern; Class III regions which are current primary and secondary standard regions; and the rest of the country in
so-called Class II, which would be non-degradation regions and would require careful analysis of any proposed development decision. This designation certainly should be adequate for the near-term in that it will not bar reasonable and well-controlled growth. In the future, the Congress can determine what, if any, modifications in the concept are necessary in areas of intense energy activity.

2. State Program Grants

a. Amend existing law to permit the Administrator to waive the maintenance of effort requirement where a reduction in the level of air pollution control expenditures is a result of an overall reduction in State expenditures as a result of anticipated reductions in revenues and where the air pollution control agency cutback is no greater than the cutbacks in other State programs. (State agencies)

Discussion:

It would appear that the States really are interested in only having to maintain their effort if Federal grants are not reduced.

3. Air Quality Criteria

a. Require EPA to expedite development of air quality criteria documents for fine particulates and sulfates. (Environmental groups)

b. Delete the requirement that criteria identify any "anticipated adverse effects." (Shell Oil Company)

c. Mandate EPA to increase the level of research activity both to monitor pollutants in the ambient air and to identify effects of pollutants on health and welfare. (Various Committee Members)

d. Require EPA to study the possibility of early development of a fine particulate and sulfate criteria and report back to Congress on same. (Buckley and others)

e. Mandate EPA to revise existing air quality criteria based on new scientific and medical data. (McClure)

Discussion:

Most of the proposals have been thoroughly discussed in the review which took place in the first two days of markup session. I would recommend that you support Item d, which requires a report from EPA setting forth a schedule for the development of fine particulates and sulfate criteria, which report should include an outline of proposed expenditures and personnel commitments.
Such an amendment may be proposed by Senator Buckley. The report should also discuss the availability of monitoring techniques to discern and differentiate between discreet pollutants.

As to the potential McClure amendment requiring revision of air quality criteria based on new scientific and medical data, little needs to be added to the discussion which took place earlier. The key point is that mandatory review would imply mandatory revision, the result of which would be litigation to set in abeyance all current air pollution control requirements based on such criteria until such a review and/or revision had taken place.

In 1967, the Committee ordered EPA to review and, if necessary, revise and re-issu the sulfur oxides criteria because of pressure from the coal industry. The effect of that amendment was withdrawal of the draft sulfur oxides criteria which had been in development stages since 1964. That criteria was not re-issued until March of 1970, nearly four years after its initial circulation.

4. Control Techniques Information

a. Require EPA Administrator to include in any information on control techniques data relating to the cost of application of alternative control techniques in relation to the emission reduction benefits to be achieved and including information on any negative environmental impact and energy requirements of such alternative techniques. (Bentsen)

Discussion:

The Bentsen amendment appears harmless from a regulatory point of view, and it might be helpful in identifying potential options available to State air pollution control agencies based on the trade-offs in terms of the degree of emission reduction as compared to energy and negative environmental impact. It may be thought of as a means to force EPA to consider cost. As a practical fact, EPA does that anyway. I think that such a requirement, however, would provide air pollution control officials with a sounder basis on which to justify regulations and certainly remove one of industry’s major complaints.

5. Air Quality Standards

a. Mandate re-issuance of ambient air quality standards. (American Iron and Steel Institute)

b. Revise air quality standards and review automatically every five years. (Texas Air Pollution Control Board)

c. Mandate promulgation of a short-term nitrogen dioxide standard. (American Lung Association, National Clean Air Coalition)
d. Revise ambient air quality standards to exclude certain categories of susceptible groups; delete the requirement that standards provide for an "adequate margin of safety"; delete the requirement that secondary standards include any "anticipated adverse effects". (Shell)

e. Require HEW to establish national ambient air quality standards rather than EPA. (Shell)

f. Require re-publication of secondary ambient air quality standards to reflect aesthetics and visibility as currently required by the law. (Environmental groups)

Discussion:

The arguments against re-promulgation of ambient air quality standards are the same as against mandatory revision of air quality criteria. If there is new information which has been developed subsequent to the initial promulgations, and if EPA has not acted on that information, the judicial review provision is available to re-open the standards.

More importantly, the Committee on Public Works has spent $300,000 examining this issue and the National Academy of Sciences concluded that the new information available did not suggest the need for a re-promulgation of standards.

As to Item c, while it is true that the National Academy of Sciences and others have recommended a short-term nitrogen dioxide standard, Congress should not substitute its technical-scientific judgment for that of the EPA Administrator in matters of this kind. It is one thing to write a technological mandate, it is quite another to make a scientific judgment based on medical evidence. I think the report should indicate, however, that the Administrator should give careful consideration to the recommendations of the National Academy of Sciences and others on this issue.

The same is true of Item f. The report should indicate that the Administrator may wish to examine the extent to which public values, such as aesthetics and visibility, are protected by current secondary standards. To go beyond that would open the question of substituting the Congress' judgment for the Administrator and argue for the McClure approach.

6. Implementation Plans

a. Substitute national emission standards for regionally-developed emission limits related to regional ambient air quality requirements. (Staff)

b. Establish national emission standards for emission sources which standards can be made less stringent where regional air quality
allows; prohibit States and localities from establishing more stringent standards and provide State enforcement of such standards. (American Iron and Steel Institute)

c. Extend deadlines for achievement of primary ambient air quality standards through 1977. (Various State air pollution control officers)

d. Substitute an emission charge system for currently required emission limitations and schedules of compliance. (Ruff, Ford Foundation economist)

e. Establish a fee for sulfur emissions after compliance schedules are met to reduce sulfate concentrations until EPA promulgates an ambient sulfate standard. (NRDC)

f. Require the Administrator to assure that any approved plan includes adequate provisions to assure that the social, economic, environmental and energy costs of attaining any limitation implementing a secondary ambient air quality standard are reasonably related to the social, economic, environmental and energy benefits to be achieved. (Bentsen)

g. Prohibit Federal approval of any element of any State implementation plan which is more stringent than necessary to achieve primary or secondary standards and bar Federal enforcement of any such provisions. (Steel and utility industries)

h. Mandate Federal revision of State implementation plan deadlines for secondary standards which such deadlines impose an unreasonable impact on implementation of clean fuels policy. (FEA)

i. Allow construction of new sources of pollutants in regions or portions of regions where primary standards are being exceeded or would be exceeded from such sources. (Various industrial groups)

Discussion:

Item a, national emission standards, has some compelling support. Congress knows a great deal today that it did not know in 1967 and 1970 when national emission standards were rejected. The following points can be made for national emission standards:

1. EPA has identified what a major source of air pollution is (a source capable of emitting more than 100 tons of pollutants per year);

2. EPA has identified most major emitters (20,000 source contributing 85% of emission);
3. EPA and the States have a much better idea of what the technological alternatives available for controlling these sources are and the degree of emission reduction which such technologies are capable of delivering;

4. EPA knows where these sources are and a large part of what their impact is in ambient air quality;

5. It is the major emitter who is most likely not to be in compliance with current implementation plan requirements because the major emitters have litigated, delayed and put off compliance; and

6. Many of these major emitters simply are too powerful for States to handle, politically or technically.

On the other hand, it can be fairly argued that most major sources of pollution are on schedules to comply with State implementation plans even though they are in violation of those compliance schedules. To establish a new regulatory regime would be to set aside the current compliance schedules. New litigation would result in causing more delay. Enforcement, rather than regulation, may be a more effective tool of dealing with these major emitters, especially if enforcement procedure includes the kind of penalties which are proposed later in this memo.

You may wish, however, to hold out the possibility of a national emission standard approach for certain national industries who have failed to comply with State regulatory requirements and whose failure is a result of bad faith. To deal with such sources, you may wish to propose national regulation and national abatement as a supplement rather than a substitute for any ongoing State action. Such a proposal would bring major emitters who have resisted compliance under the same level of regulatory control as those major emitters who have made a good faith effort. An amendment to accomplish this purpose is attached.

Item b is a steel industry proposal which, in effect, would substitute a national decision on the capabilities of technology for a State decision on the requirements of ambient air quality, and then permit the States to make the national decision less stringent where local conditions permitted but in no case would more stringent requirements be imposed. Also, only the States would have enforcement authority. The effect of this proposal is to eliminate the strength of both programs, local emission standards and Federal enforcement.

Item c may have some relevance, but I would suggest that any extension of the time for compliance be stated in a total number of years available and not a specific date and be tied in the Section 110 requirements which are discussed under Enforcement.
Item d, which would require the re-creation of the regulatory program based on taxes rather than regulation, has the same drawback as Item a. It would place everything in abeyance until the tax system came into existence with no guarantees that the tax system would do its job.

Item e raises the question of whether or not Congress wants to propose a mechanism for dealing with emissions which remain after emission limitations have been implemented as a means to reduce risk such as posed by sulfates. A proposal to authorize assessment of technological innovation fees has been prepared and is attached.

Item f may not be offered. The effect of it is to substitute a national judgment for a State judgment as to when and how a State wants to achieve a secondary standard. The Federal role in secondary standards should be limited to:

1. The establishment of the standard itself;

2. Review of the State plan to see whether or not the plan is adequate to meet the secondary standard and so advise the State; and

3. A determination of whether or not the State has, in fact, established a "reasonable time" for the achievement of such standard.

If Senator Bentsen wants to propose that the Administrator make a balancing analysis before he substitutes his own judgment on "reasonable time", for a State decision there is little reason to object.

Item g is a backdoor attempt to block out Federal enforcement of aspects of State implementation plans with which the steel industry is uncomfortable. It gets into the question of whether or not State authority to establish requirements more strict than Federal standards should be protected. The Clean Air Act is based on the assumption that the State propose and the Federal government helps dispose. To limit the Federal capability to enforce aspects of State implementation plans would be a serious inroad into that basic philosophy. If the States have overly strict regulations unrelated to primary and secondary standards, they can change them. If they are related to secondary standards and primary standards, they cannot. Their authority in this regard should be protected.

Item h is another preemption question. The Federal Energy Administration and others would like the Federal government to substitute its judgment on secondary standards for State judgment. There may be a legitimate question as to whether or not the States have authority under existing law to revise overly restrictive plans related to secondary standards on the basis of new information and the planning section which the staff proposes would permit such a revision. Under the staff proposal anyone who could make a case for implementation plan overkill could go to the States and argue their point and perhaps get a revision, but it would not substitute a national judgment for a State judgment.
Item 1 raises a critical issue. In many cases, Item 1 may be the major concern of some industries, especially those industries which have chosen to "roundout" existing facilities in terms of new production as opposed to those who have decided to develop "greenfield" sites. The steel industry is a particular example. The steel industry plans to obtain most of its projected demand of 30,000,000 annual tons by rounding out existing plants. At the same time, most steel plants are located in urban areas. In most cases, those steel plants, by themselves, or in combination with other sources, are causing primary standards to be exceeded. Steel plants want to add more sources of pollution in areas in which existing sources of pollution are not controlled or not controlled adequately, and in some cases, if controlled adequately, would simply not leave enough room in the quality of the ambient air to permit addition of emission sources. This is a sort of fish-or-cut bait kind of provision. It ought to be left alone. We only know of one instance to date in which a steel industry permit has been denied by a State. At the same time, as the Act moves into full implementation and as these new expansion decisions are made, it is quite likely that questions will arise which involve this provision. To change this provision and, in effect, permit the expansion or the addition of new sources of pollution in areas in which primary standards are already exceeded, would a major change in the thrust of the Act.

7. Transportation and Land Use Control

a. Prohibit EPA from requiring land use and transportation controls as a part of implementation plans. (Various real estate groups)

b. Adopt a comprehensive new planning provision in the Act which requires the involvement of local government in developing transportation plans and land use controls related to implementation and maintenance of primary and secondary air quality standards. (Staff)

c. Authorize land use and transportation control planning only for long term prevention rather than short term solutions. (Colorado Air Pollution Control Agency)

d. Allow States to apply for two successive five year extensions (through 1987) where transportation control and land use planning requirements have unreasonable or adverse social and economic impact. (Administration)

e. Authorize EPA to grant individual cities up to four years beyond present attainment dates (from 1977-1981); cities or States receiving such extensions must accomplish specific vehicle miles travelled reduction established by statute; create a major grant program to assist communities in achieving goals, with such funds being subject to phased cutbacks if compliance schedules begin to slip, new indirect sources which would contribute to levels in excess of standards would be allowed construction permits only in areas with an approved plan or schedule and only if such violations would not extend beyond the attainment date. (NRDC)
f. Require adequate transportation planning where land use and transportation controls will be used; require that substitute forms of transportation be available before such controls are implemented; require that permits for such programs be implemented by State agency with general land use responsibility; require a one stop permit process; establish a Federal interagency land use board which would advise in the promulgation of regulation; require that direct controls on moving sources be implemented before controls on indirect sources are used. (International Council of Shopping Centers)

g. Provide direct, positive incentives to those cities with major air pollution problems to elevate air quality management in transportation and growth planning; Federal funds for State and local transportation projects should give a high priority to those areas with significant air pollution problems. (Texas Air Pollution Control Board)

h. Establish priorities for clean fuels for States which have severe air quality problems and are making serious attempts to reduce them; similar priorities should be given for mass transit funds. (California League of Cities)

i. Extend 1977 standards, case by case, when reasonable efforts are in effect, and if a compliance schedule is established with the agreement of EPA, the governor, regional and local bodies requiring specific increments of progress with specific time limits. (California League of Cities)

j. Authorize the Administrator to require the use of parking surcharges as a disincentive to vehicle use. (Energy Supply and Environmental Coordination Act)

k. Prohibit EPA from requiring regulations on the size or availability of parking facilities as an element of transportation control programs. (Various shopping centers and real estate groups)

Discussion:

much of the transportation and land use control issue was discussed during the first two days of markup. The staff proposal on planning provides a comprehensive approach to transportation and land use controls, incorporating all of the land use and transportation control mechanisms into one comprehensive planning provision, together with non-degradation and secondary standards. Adjustments in current plans should be made through this new provision which will specify certain kinds of transportation controls which are viable and are expected to be utilized while permitting the States and local governments a broad range of flexibility with other options. The Administrator's role will be reduced, but his presence will still be assured though hopefully in a less politically unacceptable manner. I refer you to the attached memo on the planning
provisions for a general discussion of the proposal and recommend that, rather than defend EPA's policies or oppose the amendments that have been developed to circumvent those policies, you take an initiative in this area.

Item j under transportation controls raises another issue. You will recall that a number of Senators have proposed emission fees as a means of controlling emissions through the market system. It is somewhat inconsistent to support emission fees for stationary sources and then reject the opportunity to use parking surcharges as a means of reducing mobile source pollution. I think that you should note that inconsistency for the purpose of establishing a subsequent bargaining point and perhaps for consideration of an authorization for limited use of parking surcharges in the planning provision.

8. Enforcement

a. Authorize EPA to issue enforcement orders with new compliance dates beyond the attainment deadlines (with no final deadlines in the statute). (Administration)

b. Allow States to issue enforcement orders beyond the date of attainment with Federal backup authority; require finding good faith in enforcement order cases and define the term; require public hearing on proposed adjustment and compliance schedules under enforcement orders. (Nebraska Air Pollution Control Agency)

c. Extend Section 110(f) (which provides for States to seek one-year extensions for compliance) to permit State extensions for more than one year with EPA retaining final review of such State proposals. (West Virginia Air Pollution Control Agency)

d. Require penalty payments by sources who breach compliance deadlines equal to the savings associated with not installing pollution control equipment on the time schedule established by the implementation plan. (NRDC)

e. Prohibit citizens from bringing suits against sources under State or Federal orders which permit compliance beyond deadlines. (Administration)

f. Authorize a Federal excess emission penalty calculated on a per pound basis on all emissions in excess of present emission limitations to supplement present regulatory programs. (NRDC)

g. Authorize civil penalties in addition to criminal penalties for enforcement. (Administration)

h. Establish mandatory statutory penalties for sources which violate enforcement orders which authorize compliance date extensions beyond statutory deadlines. (Staff)
i. Amend Section 110(f) (relating to State authority to seek one additional year for compliance) to require a State to consider "practicability" in determining the length of any extension of compliance date upon a showing by the source that compliance by a date specified presents an unreasonable economic burden. (Bentsen)

Discussion:

There are three basic enforcement questions: Should deadlines be extended; who should initiate the enforcement action; and, how should penalties be set?

Both EPA and the staff agree that the deadlines should not be extended. Rather, enforcement orders beyond the deadline should be utilized in order to keep a source under the threat of the penalty provisions. In point of fact, even industry demands for extension of deadlines would diminish if authority for issuance of compliance orders was granted.

The second question regarding who should initiate enforcement orders is more complex. The States want the authority to issue compliance orders beyond deadlines in order to maintain control of the program. As a practical matter, State authority in this area must be granted because EPA simply does not have (and probably should not have) the resources to do the job. The staff recommends that Section 110(f) of the Act be modified to create greater flexibility for the States on a case-by-case basis to submit to the Administrator proposed compliance date extensions together with a justification for such compliance date extension, but with a caveat that no compliance date extension can go beyond three years from the compliance date originally established, nor can any source which has a current compliance date extension beyond the deadlines be permitted to delay his compliance by more than one year. Such a provision should require compliance by the "earliest practicable date", but no later than three years after the date of enactment of this Act, which would put some pressure on the source to obtain a compliance date extension early for the maximum amount of time.

EPA should have the authority to enforce under four circumstances: (1) where a State has not acted within 90 days after enactment to grant or refuse to grant a compliance date extension; (2) where a source is in violation of a State compliance date extension or has not evidenced good faith in meeting an existing compliance deadline; (3) where a source has failed to comply with a new compliance date extension order; and (4) where a citizen sued the Administrator to enforce a violation of emission standards. After resolving the issue of who should initiate the order and the duration of such an order, the Committee should consider the question of penalties. There is a great deal of appeal in establishing a penalty for non-compliance related to the cost of compliance, plus the savings associated with non-compliance. The so-called Connecticut
plan, which is outlined in a proposed amendment for you, would require the payment of a penalty equivalent to the savings from non-compliance, including debt service, operation and maintenance. Most of the penalty would be repaid to the emission source if he met his new compliance schedule. The source would begin to forfeit the potential repayment on a monthly basis if he failed to meet the new compliance schedule.

Beyond this proposal, for those sources which the Administrator does not consider large enough to justify a full scale penalty review, civil penalties should be available. And, for sources which obtain a compliance date extension but which fail to achieve compliance in the extended period, statutory penalties should be mandatory.

(After all, such plants would have had ample warning with one five-year period under the Clean Air Act, combined with an additional three-year period.)

As to Item 4, a test of practicability in relation to compliance date extension is reasonable so long as it does not affect the limitation to be achieved or the final compliance date. You might indicate that you are willing to go along with "practicability" so long as it is a word of art by itself without a specific definition -- that you would resist a defined term.

9. New Source Performance Standards

a. Authorize the Administrator to waive application of new source performance standards to a source in order to encourage technology innovation. (Administration)

b. Authorize the Administrator to establish design standards where new source performance standards are inappropriate to control the particular class of sources. (Administration)

Discussion:

I would think that you could support a limited provision for the waiver of the application of a new source performance standard in order to encourage technology innovation. The staff should be instructed to draft carefully the provision to avoid potential misuse by sources which simply do not want to meet the requirements of new source performance standards. Item b, which would authorize the Administrator to establish design standards, also is well intended and, if properly drafted, could be included in the law. I recommend that you support this proposal.

10. Hazardous Pollutants

a. Authorize the Administrator to promulgate design standards where standards of performance are inappropriate to control the emissions of hazardous pollutants from a particular class of sources. (Administration)
discussion:

The Administration is seeking authority to promulgate design standards where performance standards are inappropriate. I would recommend that you support this proposal if it can be properly drafted to make sure that it is not a loophole. (Note: you would have now supported four Administration proposals.)

11. Preemption

a. Preempt State authority to require achievement of ambient air quality standards more stringent than those establishing national primary and secondary ambient air quality standards. (Various industry groups)

b. Preempt State or local emission regulations more stringent than required to implement national primary and secondary air quality standards. (Various industry groups)

c. Preempt State enforcement actions where States require compliance schedules earlier than those proposed in a Federal enforcement order. (Various industry groups)

d. Authorize States to veto coal conversion requirements where the result will be emissions which exceed State emission limitations or cause violation of State compliance schedules. (States)

Discussion:

I think you should actively resist any effort in this section or any other section to preempt the authority of States to set and enforce air pollution control requirements and I think you should support the authority of a State to veto coal conversion deadline extensions where a State determines such a deadline extension is inconsistent with a general public interest test.

At the same time, you could argue that a State could only veto the deadline extension and not the coal conversion itself, because coal conversion is national policy and emission limitations are State policy. The effect of a State veto would be that a power plant (or other industrial source) could not begin to burn coal until it had installed necessary emission control technology. This would preserve both clean air and coal conversion policy.

12. President's Air Quality Board

a. Abolish the President's Air Quality Board (Staff)

Discussion:

I think you should support abolition of the President's Air Quality Advisory Board.
Control of Federal Facilities

a. Require Federal facilities to comply with the procedural requirements of State implementation plans. (Various Committee Members)

Discussion:

You have already indicated in the markup session that you felt that Federal facilities should comply with State procedure requirements. An amendment has been drafted and I think it speaks for itself.

14. Coal Conversion

a. Authorize power plants ordered to convert to coal to exceed applicable emission limitations until 1985. (Administration)

b. Repeal the regional limitation condition which bars coal conversion in regions where primary standards are being exceeded. (Administration)

c. Extend FEA's authority to issue conversion orders until June 30, 1975; extend FEA authority to enforce such orders until December 31, 1984; and authorize FEA to prohibit sources currently burning coal from converting to oil or other fuels as a means of compliance with emission limitations. (Administration)

Discussion:

I do not think there is any need for any change of the coal conversion section at this time, and that any changes would be more appropriately made in the legislation Senator Randolph is working on. It is unlikely any major oil burning source could get a guaranteed regular supply of coal at a time before such source could also construct the necessary pollution control equipment. As regards those sources which are presently burning coal and which plan to convert to oil as a means of compliance with the Clean Air Act, they would be eligible for compliance date extension under the enforcement provision which would give them an additional three years to get their scrubbers installed, and there is absolutely no reason why they should have any special preference.

15. Mobile Source Emissions

a. Mandate a specific emission standard for sulfates by 1978 model year. (Environmental groups)

b. Mandate the Administrator to establish emission standards for new and existing heavy duty trucks and buses, new motorcycles, and new mid-range service vehicles (more than 6,000 pounds). Various environmental groups)
Auto Emission Standards

Auto emission options are the subject of a separate memo.

17. Related Auto Issues

Related auto issues are the subject of a separate memo.

I think you should support the repeal of the Low Emission Certification Board though you may just wish to propose transferring its authority to the Energy and Research Development Agency.

I suggest you also propose an amendment which would permit "limited production vehicles" and "specialty cars" the production of which by any manufacturer does not exceed 150 per year to be exempted from the durability certification requirements of EPA's regulations. This would mean such limited production vehicles would still have to comply with the standards and the 4,000 mile requirements, but would not have to go through a 50,000 mile test.

13. Definitions

a. Define 'emission limitation' as a limitation which results in a constant reduction in emissions. (NRDC)

b. Add to the definition of "air pollution control agency" Indian tribal organization with authority to implement the Act.

c. Delete Puerto Rico from the definition of "State". (Puerto Rico)

Discussion:

I think you should propose and insist upon the definition of "emission limitation" which precludes the utilization of so-called intermittent control systems. Intermittent control strategies as a basic control option should be barred. Supplementary control systems to maintain compliance with standards after the best available technology has been used would still be an available option without any statutory change. However, "emission limitations" should be articulated as a continuous emission reduction requirement.

I think you should support what may be a Montoya amendment to add to the definition of air pollution control agency any Indian tribal organization with the authority and the capacity to carry out the responsibility of the Clean Air Act as determined by the Administrator.

I think you should support a Buckley proposal to delete Puerto Rico or, if he offers the Puerto Rico amendment to grant a special waiver from compliance with the primary ambient air quality standards, you should propose the deletion of Puerto Rico as an alternative.
Legal Issues

a. Extend time for seeking judicial review to 90 days.

b. Authorize EPA to appear in litigation on its own behalf. (EPA staff)

c. Provide hearings with an opportunity for oral presentation and limited examination of witnesses in accordance with the International Harvester case. (Staff)

d. Provide hearings on the record in relation to any State or Federal promulgation. (Various industry groups)

e. Provide legal remedies for employees when work force reduction is threatened as a result of an air pollution control requirement. (Culver)

Discussion:

I think you should support an amendment or offer an amendment to extend the opportunity for judicial review to 90 days from 30 days. This was adopted in the Clean Water Act.

I think it is essential that EPA be authorized and required to appear in its own behalf in litigation. We have seen over the past several years (and a separate memo is attached) where the Justice Department has been reluctant to take EPA cases for what appeared to be political reasons. In many cases the Justice Department has been extremely slow in seeking review or bringing enforcement actions.

Items c and d are related. Item d is a staff alternative to industry's proposal that EPA be required to hold hearings "on the record" in relation to any promulgation and the States be required to hold hearings "on the record" in regard to any requirement of an implementation plan. The purport of the basis for this requirement is the inadequacy of the record justifying State and Federal regulatory actions. I have asked Tom to prepare a special memo discussing the implications of hearings "on the record". The staff proposes that you offer an alternative to the requirement having a hearing "on the record". Item c would provide an opportunity for oral presentation and limited examination of witnesses in accordance with the International Harvester case. This is also discussed in Tom Jorling's memo on legal issues.

Item e will be proposed by Senator Culver. I recommend that you support it.

You may also wish to propose an addition which would require that, when plants propose to close at the end of a compliance period as a form of compliance, that a performance bond be posted. At the end of a compliance period if the plant fails to close, the performance bond would be forfeited. This would take some pressure off of EPA where, at the end of a compliance period, the industry announces that EPA is
forcing closure, the performance bond would be forfeited and EPA would go to court to seek penalties for violation.

20. Additional Issues

a. Citizen Suits

(1) Prohibit citizens from suing to enforce provisions contained in enforcement orders issued by the Federal Government (Administration)

(2) Clarify authority in the citizen suits provision which permits suits to require implementation of any regulation or standards under this Act. Establish new authority for citizens to sue to contest the construction of new or modified sources which would lead to pollution levels that would exceed ambient air quality standards or exceed nondegradation regulations, allow suit for immediate injunctive relief to prevent irreparable harm, and expand recovery of attorney's fees to include citizen actions brought under judicial review procedures set forth in Section 307. (National Clean Air Coalition)

Discussion:

The Administration's proposal to protect its enforcement actions from citizen suits is an attempt by the Agency to insulate itself from suits which have pointed out the inadequacy of EPA's enforcement program. This proposal should be opposed.

Some courts have interpreted the authority for citizen suits narrowly and limited it to cases that deal with emission limitations only. The Committee intended citizen suits process should be available for application to other aspects of State implementation plans and to EPA actions. For example, if citizen suits are restricted to emission limitation issues, they cannot be initiated as transportation control questions, review of indirect sources, parking management, or other land use control activities. Nor could they be used to prod the Agency to issue regulations that have been required by the Act.

In addition to clarifying existing authority, the proposal would allow a citizen suit to protect air quality when a new source seeks construction permits rather than waiting until the source is built and an emission is actually causing ambient standards or nondegradation limits to be exceeded.

The proposal to expand recovery of attorney's fees would still leave the discretion to the court. It is necessary because the courts have held that fees cannot be awarded unless the statute so authorizes. To protect against misuse of the authorization, however, we would propose that fees only be available where the litigant has no "economic" interest in the subject matter reviewed.
b. Conflict of interest

(1) Prohibit employees of the Environmental Protection Agency from participating, independently or representing an interest, in EPA rulemaking for a period of two years after leaving the employment of EPA. (Staff)

(2) Provide guidelines for the composition of State air pollution control agencies, similar to the Water Act. (Staff)

Discussion:

A number of employees who have left the Environmental Protection Agency are misusing their unique relationship with the Agency and access to individuals within the Agency. There are numerous examples of former EPA employees using this access to influence the regulatory administrative and enforcement process prior to the public procedures. The implications of this are clear. Such advantages are not limited to the issues directly handled by the former employees when they were with the Agency—such employees usually have access throughout the Agency. In some cases, this has meant that former officials who appointed personnel within the Agency come back to those same appointees to gather information and to lobby for positions of special interests. This proposal might be expanded to cover appearances in adversary proceedings. It is now limited to representation in EPA rulemaking. But all of the special treatment involved in the activities of former employees is just as useful in adversary proceedings, if not more so.

If not offered by other Members of the Committee, I suggest you offer this proposal. The proposal regarding the composition of State Air Pollution Control Agencies simply makes the Clean Air Act parallel to the Water Pollution Act.

c. Self-Monitoring for Stationary and Indirect Sources

(1) Require monitoring by sources under guidelines from EPA. (National Clean Air Coalition)

Discussion:

The present Act already gives EPA authority to require monitoring by sources. The intent of requiring such action is useful. This should not, however, be seen as a substitute for governmental activity in monitoring, for such activity should not be reduced even if private sources are required to monitor themselves.
To: Edmund S. Muskie

From: Leon Billings

Subject: Buckley proposal on coal conversion (response to Senator Randolph memo, attached)

1) **Support** enforcement orders with delayed compliance beyond the statutory deadlines, thereby, in effect, extending deadlines as late as January 1, 1979 on a case by case basis. (The Subcommittee has already voted this)

2) **Oppose** additional authority to revise State Implementation Plans. It is not needed since the Energy Supply and Environmental Coordination Act, Section 4, provided this authority to eliminate "State Implementation Plan overkill" and allow more coal burning, and EPA and the states have already responded in most cases.

3 & 4) **Support** delayed compliance orders as in item #1. Coal conversion deadlines can be handled in the same way as deadlines in general, with "extensions" as late as January 1, 1979 allowable. This is also true when natural gas curtailments are involved.

5. **Oppose** making emission requirements, in the event of an extension, those in effect at the end of the extension. This sounds deceptively good, but would cause chaos in the enforcement-compliance schedule process.

6) **Oppose** relaxation of the regional limitations. If necessary, fall back to the House position which allows this limitation to be a rebuttable presumption.

7) **Oppose** use of intermittent controls on remotely sited facilities (The Subcommittee has already voted on this)

8) **Oppose** relaxation of the significant risk provision. The Administration considered this proposal but finally did not even submit it.
9) **Support** coal and scrubber allocation authority. EPA has scrubber allocation authority already under Section 119 (e). Extension of coal allocation authority for FEA is included in the ESECA extension in **Section S: 1777**.

10) **Oppose** a ten year freeze on emission standards to allow for amortization of equipment. This would require pre-emption of the State, which has the right to establish the implementation plan.

11) **Support** a study of emergency energy shortage authority (standby). This is the one issue that Senator Randolph identified as being especially important. Perhaps the best response is to require FEA to study and make a proposal in 6 months. This would allow coordination with other energy emergency legislation like S. 622.

12) **Support** extension of FEA's authority to issue orders under ESECA by 2 years until June 30, 1977 and their authority to enforce orders by 6 years to December 31, 1984. This is included in S. 1777.
TO: Members of the Committee on Public Works
FROM: Senator Jennings Randolph
RE: Energy -- Clean Air Issues: Coal Conversion

In my judgement the principal "energy--Clean Air" issues affecting the utilization of present coal supplies and the promotion of greater coal usage are as follows:

1. Compliance date extensions on a case-by-case basis for facilities not in compliance with State Implementation Plans.

2. Mechanism for revision of State Implementation Plans to permit use of available coal supplies (not now possible due to court decisions on non-degradation).

3. Coal conversion deadlines (Extension proposed by the Administration)

4. Compliance extensions for facilities converting to coal due to natural gas curtailments.

5. Emission requirements at the time of coal conversion should be those existing at the time that the extension ends rather than at the time the extension is granted.

6. Regional limitation for remotely sited plants undertaking coal conversion. (Administration Amendment.)

7. General policy for remotely sited facilities.

8. Significant risk limitation. (Administration amendment.)

9. Coal and scrubber allocation.

10. Amortization of equipment.

11. Emergency energy shortage authority.
LEON: ...chronology of these events because...I mean what I did last night. Bernie was I sat down and I went through the 9 day period from Friday, see you left last...

BERNIE: I left Friday, the previous Friday when, the day after there was the agreement that Muskie would come back to town.

LEON: And it really was, we were told to get together, that we had offered the Senate bill...

BERNIE: It had been agreed that the Senate bill with the thirteen basic provisions would...

LEON: be the pending business of the Conference together with the agreements that had previously been reached and that the House was to come back with a proposed amendment to the Senate bill in order to get the matter before the Conference.

BERNIE: And Muskie said that his main interest in that, so he told me, was at least there were thirteen things to deal with instead of 36.

Leon: And he also said as he left, he said to me "I just hope to hell that they understand the importance of keeping that list short and he didn't say it nicely or anything." It was a very firm statement.

BERNIE: You mean must to make it workable.

LEON: So from that point which was late Thursday evening, it must have been about 7:30 Thursday evening, until 5:30 the following Friday evening is the area of events that will cover this conversation. The 23th of September, from 6:30 the 23rd until 5:30 on the first of October. That is the period we are speaking of. What I tried to do last night was to sit down and sort of sketch out what happened in that time and because I can give it to you chronologically and then as we go through chronologically, you can ask questions and flesh out because I am not really capable of doing it extemporaneously.
LEON: So we went out Thursday evening; on Friday we had a meeting with the House staff and we went through the issues in the bill and we tried to identify what their basic points were. That's Friday September 24th, and they told us what they really needed and then we went with House staff. I'm not sure that we didn't meet here Friday morning in this office and I think it was Steve Connolly, Jeff Schwartz, myself, Karl, I'm not sure who else. Steve Connolly is to Jeff Schwartz what Karl is to me.

BERNIE: And Jeff Schwartz is Rogers staff chief.

LEON: He is the Committee Counsel assigned to this activity. Charlene, after the Thursday night session we had a Friday morning meeting on this office. Remember Connolly's train was late or some silly thing like that and seems to me that I had to go to some other kind of mark-up session or some other kind of meeting that morning. (Leon checks with Sally)

Alright we had a water resources staff meeting. So you guys met until

KARL: The night before that Tom had talked with you some about nondegradation. He gave you an outline and stuff and that is when, that morning is the morning that I exploded at you and then after we went out, Tom told me that I didn't need to because you had talked to a lot of the same things the night before.

LEON: That was the morning that you yelled that nobody was listening to you. So Tom and Karl and Steve and Jeff and others worked that morning while I met on the water pollution thing with the Full Committee staff. And then I can't recall what the final disposition of that was....Alright so I can't recall how we disposed of that afternoon, or what time we even got out of there that evening.

KARL: I don't know what you want to focus on. One of the side plays that
you might not have seen that was going on was that after we trashed through things and talked some here and you went to a water meeting and I sat here negotiating some stuff with Steve and the rest of those guys, Tom didn't know what to do, he had the rest of the day and I sat here and rewrote the outline of the thing that eventually became the working document that the House offered us on nondegradation. I wrote that up here that morning after you had met with us and after Steve and Jeff had gone and we talked, going over things from your conversation with them earlier. That is when that document got written and Tom kind of didn't know what to do...

BERNIE: How long is that document?

KARL: Just three pages.

BERNIE: In other words just outline?

LEON: This is the outline of nondegradation.

KARL: It wasn't done in headings or outline. It was the thing they used in the Conference that we made lots of copies of.

LEON: no, no that is not the truth. The first outline of that...

KARL: Yes

LEON: Yes, okay

KARL: And then Tom came back and after the first part of that at the lunch hour and redrafted the counsel draft to correspond pretty close with that and that is what I used to do my draft of the nondegradation.

LEON: What did we do that afternoon?

KARL: That afternoon was when we met with the House...

LEON: Didn't we go over to Legislative Counsel?

KARL: Maybe -I've got my dates backwards.

LEON: Didn't we go over to the Legislative Counsel? Cause Saturday we met
with them on significant deterioration. Did we go over to the House Legislative Counsel that afternoon and try to identify all of the issues that they were concerned with? Yes. Okay so Friday afternoon...

KARL: I may be getting things really confused because I'm not even sure that TOM was here that day. When did Tom leave? Was it Friday or Thursday?

LEON: He came down on Thursday morning and left Friday afternoon. We worked through the afternoon with the House trying to isolate their positions and we agreed to come back in on Saturday morning at ten to try to come up with some kind of a staff agreement on nondégradation. With the House staff that is.

BERNIE: Are you... Is your mood one of cooperation against one of your combined principles or is it a...

LEON: The relationship with the House staff was as good as it could possibly be recognizing pride of authorship problems and so on. I don't know that we had more than two or three flare ups in the entire time that we negotiated with them over the three week period.

LEON: Now Saturday we met with the House at 10:00 and we went through nondégradation and we isolated a series of issues, we agreed to meet from 10:00 until 2:30. By 2:30 we had resolved all but two issues which we sort of left hanging. We had only a couple of abrasive moments and that was with Steve Connolly who is the House staff guy and who is Jeff Schwartz's main man. That is spelled Connolly. Steve is interestingly also from Helena, Montana and about ten years my junior.

BERNIE: Please give my ten little descriptions of each of these guys.

Connolly is from your home town. He is ten years younger than you which makes
BERNIE: (continued) him...

LEON: He is bright, he is tall, skinny, wears a beard, lives in a commune in Elkridge. There are three families that have an old manor house, each adult person cooks one meal a week and that kind of stuff.

BERNIE: How does he dress?

LEON: Just like normal, ordinary people. House staffs wear suits, Senate staffers wear sportscoats. Schwartz is a former EPA lawyer who has been counsel to the House Committee for three or four years now on air pollution. Very intense. Very specific. Short, dark. By the way this meeting was held on Rosh Hashanah and anyway so we isolated the issues and Karl did a summary and I think just for kicks you might want a copy of that summary because over the weekend Karl did a summary for House Legislative Counsel and that is a copy of it. That is a copy of exactly what was prepared for

KARL: That is Connolly's earlier thing and mine was...

LEON: Well we'll find one of yours. What Karl did...

BERNIE: ... is a xerox of rule paper in hand and its purposes.

LEON: What Karl did was he did a dummy in hand and gave it to House Legislative Counsel on Sunday to be drafted sometime by Monday which the House Legislative Counsel was not able to do. But in any event, we had pretty well isolated the issue and then Karl did a more detailed write up on Monday morning of the...

KARL: Not much more

LEON: But it was... You flushed it out in sentence form.

BERNIE: All on Monday on stationary sources.

LEON: At this point there had been no conversations on auto emissions. The only conversation about that had taken place in the entire time to my knowledge, that doesn't mean that there were not other ones, was a brief conversation between Muskie and Rogers which Rogers showed Muskie a piece of
paper on Thursday evening which he basically accepted in one of the breaks in the meeting in which he suggested a position very close to the Senate's as a possibility. But that was strictly a sort of exchange between the two of them which I only observed.

BERNIE: Did he get any reaction out of Rogers do you know?

LEON: Rogers showed it to Muskie, it was not Muskie's proposal. And there was no real reaction. There was sort of... well Muskie turned to me and said well what about this. And I said well it has 1.5 NOx in it and that is unacceptable to the Senate.

BERNIE: You mean that was the lowest...

LEON: Yes. So...

BERNIE: Everything you're describing nothing has touched on autos

LEON: That is right. We have not yet touched on autos. Autos is a more interesting, fascinating event. So Saturday we quit with a general agreement, a couple of issues hanging, came in Monday not to say that some people didn't work on Sunday, Karl did, and on Monday we had a meeting with the Senate staffs to... Let's see did we have a meeting with the House staff on Monday morning. Charlene do you remember? On Monday afternoon we had our meeting with our staff because they would have a 1:30 meeting with their people.

KARL AND CHARLENE: We had our morning meeting.

LEON: Did we have a meeting with them in the morning?

CHARLENE: At 10:00

LEON: No, I don't think we had any meeting with the House. We had a 9:30 meeting of the Senate staffs in which we went over the list of issues and then we...
KARL: Which was the day that I went over to Rogers' office and spent a couple of hours with Connolly.

LEON: That was Monday. Was that Monday afternoon late? Or was that Friday afternoon. That may have been Friday afternoon. It could have been Friday afternoon, because Friday afternoon is very confused in my memory. And there was no Tune-In lunch. Well in any event Monday the House staff was to have had a meeting of their majority at 1:30 and a meeting of their combined committee at 4:00. Karl got a call, we were having a meeting...

BERNIE: Was it combined meeting...

LEON: Majority and the minority.

CHARLENE: Well wasn't Monday staff meeting when you presented the package or was that the week before?

LEON: That was the week before. The Committee rejected that on Wednesday the week before. In any event, we had a meeting and we got the word that the House was going to ask for 17 items and we shit a brick.

BERNIE: You mean seventeen amendments to the Committee Senate bill.

LEON: Seventeen amendments to the Senate bill and at that point we sort of threw up our hands and said we will never get a bill. But it was basically a feeling on the part of Rogers that he had to at least offer all of the special provisions of the House bill, even if the Senate was going to reject them. So we had a discussion of that and what they were and so on and we broke up that night. I think everybody was pretty discouraged. We had a scheduled mark-up at 9:30 the next morning and we didn't have anything really concrete and I got home by 8:30 on Tuesday and I can't remember what kept us down here so long, I mean Monday.

BERNIE: Were were the hang-ups?
LEON: Well it was just the idea of having seventeen items for the Conference instead of just five or six which is what Muskie was hoping for. So Tuesday we came in and had a meeting with the House at 9:30 and when that finally got started Muskie came in and he called Rogers and he told Rogers that he was going to be late and Rogers told him about the seventeen items and Muskie was very discouraged about the whole thing and he told Rogers that the only reason that he was hanging in to try to get a bill was because of Rogers personal optimism but otherwise Muskie would have bunched a long time before. Went to the meeting, the House presented seventeen items and rather than react to it...wasn't there a flare-up between Muskie and Staggers at that point, I believe that there was, which Staggers...

BERNIE: We are at the mark-up.

LEON: Yes

BERNIE: Where is it taking place?

LEON: H 140 and we should have a transcript from that mark-up. There was a flare-up between Muskie and Staggers on autos just before they left and then we recessed to the Sam Rayburn room which is a little office over in the House and Culver was there, Hart was there, Morgan was there, Muskie was there. Basically we said we will take your seventeen issues...I had suggested to our people that they not react to these seventeen issues, that this was posturing on the part of the House, that we take the issues and go back into a caucus and come out and

BERNIE: This was in H 140

LEON: No H 140 was where we had the Conference. We left there and then went to the Sam Rayburn room which is on the same floor, the first floor and Culver was there, Hart was there, Muskie, McClure, Domenici and Randolph
LEON: was there and I believe that is almost all of the Senate Conferees. Baker was there. Buckley, Stafford and Gravel were not there. Alright, then over the weekend, not over the weekend, over Monday night I was concerned because when they came back with seventeen offers unless we had something to work from I thought we were really going to be in trouble. We knew this list, we had gone over it with the House there bottom line as it were.

BERNIE: Does the seventeen include autos?

LEON: Yes, we got over with the House their so-called bottom line and they had come up with this list of things that they absolutely had to have and I had been concerned by this absence of something clear for the Senate to counter-offer and we met with the House, we knew what their seven items were; seven specific items that they thought were essential: unregulated pollutants, basis for administrative standards, best available control technology for new source performance standards, tall stacks, indirect sources, vapor recovery and civil litigation. Those were the seven items in the House bill that were not in the Senate bill and which they felt were absolutely essential. In addition, they had the prevention of significant deterioration and the auto emissions standards. So there were nine items on which we should confer.

I set down when I came in on Tuesday morning about 3:00 and I wrote a note to Muskie and here is the substance of the note, I'll give you a copy, which suggested a proposed compromise with the House which was presented to them in this form.

BERNIE: This is headed the Senate proposal.

LEON: Then I presented this.

BERNIE: This is the text of what you gave them?

LEON: That is exactly what we presented to the House, the clean type version
of what I gave Muskie and of what I wrote. Muskie got the clean typed version and then we took out the preparatory paragraph which said that the House apparently believes, late though it is, that they must at least go through a charade of having offered all elements of the House bill for Senate acceptance or rejection. They will this morning ask the Senate to accept seventeen amendments and two deletions. You may wish to suggest a caucus of the Senate Conferees for the purpose of responding, rather than having extended debate. At the caucus I would suggest first that the Senate reject the House proposal and second, that the Senate proposal be the following alternative which includes the minimum items for the House and deals with many of the objections of the Senate Conferees and this assumes the Senate amendment...

BERNIE: Now from that point on your amendment becomes, your amendment of Muskie becomes the Senate proposal.

LEON: After we got their proposal with seventeen items, we adjourned to the Sam Rayburn room and we were there for three hours and in that three hours I went through and I sold this entire package to the Senate Conferees. That is the House proposal modified... Let me run through them for you: (1) on unregulated pollutants. It was obnoxious to Senator Baker because it had a reverse burden of proof. We changed that and made that the proposal. (2) I sold on its merits the deletion of one sentence which was obnoxious to the Senate Conferees. (3) Was the the most difficult which was the new source performance standards and it was necessary in order to get that to add a, you'll note some xerox Xerox language that says report language on the right hand side of your copy, the Senate Conferees had only agreed to submit that as long as the House agreed to some report language which was subsequently drafted and adopted and I will show it to you. It was specific
report language to deal with the problem that Senator Domenici and Senator McClure had. The next one, same kind of problem to get some acceptable report language. The next one had no problem with, the next one I had no problem with really, that one is number six, number seven no real problem, number eight no real problem, on number nine which were sort of some dogs and cats that I threw in because of specific interests of individual Members: Gary Hart's interest in high altitude, John Culver in vehicle inspection and the staff interest in interstate abatement. Then on number 10, the staff proposal on nondegradation which we have discussed, we worked up over the weekend. Remember the net result of that all day Saturday negotiating session was a staff proposal and then

BERNIE: Which the House staff thought they would sell to their people.

LEON: Yes and what we thought we would try to sell to ours and finally that the Senate Conferees rejected the House proposal on auto emissions. So, with the exception of the two pieces of report language on items 3 and 4, an agreement to develop some language on item 9 which relates to high altitude emissions, agreement to defer discussion of nondegradation, the Senate Conferees adopted this and between you and me, it was a major coup on my part.

BERNIE: Tell me a little about that. Why?

LEON: Because this was the lynchpin of keeping the Conference going. The first thing to do was to get a climate for negotiation. So the strategy was rather than reacting to the House seventeen proposal, taking it under advisement and caucus. So we did not have a public confrontation over the fact that they had such a huge list. That first step was accomplished by my discussion with Muskie, Muskie talked to Rogers and he said to Rogers: "Look
we won't react to your proposal in the room; we'll have a caucus and bring you back something; you can have a caucus and we'll go that way and maybe we can make some progress. So that was the first strategic decision. Second, everything thing was to have a piece of paper which put this in terms of we are giving the House something but you are getting something in return. Senator Baker, we solved you problem with this. And we solved your problem with number 1 and we solved your problem with number 2. Senator Domenici, we have solved your problem with number 3 by the clean fuels reference. Senator Domenici and Senator McClure, we are accepting their tall stacks language but we are making them reopen the smelter issue to give us some additional protection for your benefit. Senator Buckley, they are either going to accept our attorney's fees in return for us accepting their civil litigation provision or we are going to drop them both. We are only going to accept their indirect source control provision if they accept our transportation control provision. And so on so it appeared to be a pretty straight trade-off document in which our Members could feel comfortable that they were getting something. And when I presented it, I presented it bearing in mind that the House, in accepting this, accepted our delayed compliance penalty provision, our civil penalty provision, our enforcement order provision, and three or four critical provisions, top provisions of the Senate bill, were part of the package. So the House had to take this back and not only did they have to vote to accept these compromises in their bill, but they also had to accept our really tough enforcement provisions, which they did by a 6 to 5 vote. A very close vote in the House Committee.

BERNIE: And that is because they wanted a bill.
LEON: That's because they wanted a bill in that there was tremendous opposition. So we brought this back. I presented it to them, told them what we wanted, identified the kind of report language that we wanted, I made this presentation before the Senate conferees. I said we wanted to defer on nondegradation. They were supposed to come back at 1:30. There was delay and delay and delay and I don't think we...

BERNIE: The House people

LEON: Yes. And so we decided that we would have a meeting of the Senate Conferees to begin to discuss significant deterioration. We started to have a meeting in Muskie's hideaway office in S. 143

BERNIE: Who did?

LEON: The Senate Conferees.

BERNIE: All of the Conferees?

LEON: And their staffs to the extent we could. And got a call from the House that they were ready to meet and, that is around 4:30, so we went back to the House and the House went through this thing and you will note that it is marked as to what they accepted.

CHARLENE: They accepted almost everything.

LEON: They agreed in...

BERNIE: Then these notes then are notes on what the Senate side agreed to accept?

CHARLENE: No, what the House side did. They accepted the first eight items.

LEON: On five they agreed to drop both.

CHARLENE: On five they agreed to the second option. They deleted both provisions. They deleted the Buckley attorney fee provision which was the Senate bill and then they deleted also the House provision on EPA representation.
LEON: We had taken Buckley's position all the way through this thing.
BERNIE: Who gave you the nod on what was acceptable to Buckley?
LEON: We didn't ask him. We made a clear option. They knew what the trade was, Buckley's people knew what the trade was. In any event, they accepted all of this stuff as it was written and then they said that they would not accept the provision on auto emissions.
CHARLENE: Which was our position.
LEON: And that is when Staggers just blew up at Muskie.
BERNIE: Tell me about that.
LEON: Basically, Staggers said that he was being unreasonable, we can get a bill, we are not that far apart.
BERNIE: Do you have a transcript of this?
CHARLENE: Yes we do, but we do not have a full set.
LEON: So then Rogers, in order to move the thing said I offer

BREAK IN TAPE

LEON: ...seven item list on what the Senate Conferees hadn't resolved on significant deterioration. I walked in and Muskie said how are we going to proceed. I said that I thought I would make some notes on the issues and he said to make copies of them for all Members. I said that it doesn't mean anything. He said that we had to have some kind of an agenda so I made the copies and then we started. It was sort of a disjunctive process because there were votes and people were coming and going and so on. But I started these guys down through the list of issues and Muskie had me present the whole thing as to what the issues were and in each case we gradually moved toward a consensus on whether there should be... The Senate bill had mandatory pristine Class I areas, the House bill had mandatory and discretionary.
LEON: Senator Baker said that if there were discretionary Class I areas, he would have to leave the bill. It was the only thing that he felt

BERNIE: Leave the bill?

LEON: No longer support it. Absolutely, he had made his commitment that these regions...he said that he had made such a strong personal commitment on that issue that there was no way he could support the bill. We had made a proposal of limiting it somewhat and Huskie said 'alright, Howard has been a strong and firm supporter of this bill. I think we are just going to have to go back to the House and say that we cannot accept any discretionary Class I areas. So that was the first one. Then we got into the procedures for redesignation, we got into the question of whether...

BERNIE: What kind of commitment did Baker have?

LEON: Baker had made speeches to the effect that by god there would be no discretionary Class I areas. There would be no areas which could be declared Class I which were not declared Class I in the statute.

BERNIE: In other words, the Administrator does not have any....

LEON: Residual authority. That's right. So we took that. Then we discussed the concept of air quality increments; we discussed the procedures; we discussed enforcement; we discussed coverage, what kinds of facilities would be covered; and we discussed exclusions and exceptions and we broke down on these issues. Domenici wanted to have a different increment for one pollutant for one time period and the Committee finally agreed to this proposal.

BERNIE: Why did he want that?

LEON: Because he thought that the increment proposed in the staff proposal new was too restrictive on development of power plants.

BERNIE: Is California credible to this State now?
LEON: McClure wanted to have a study of the implication of having facilities which emit 250 tons or more of pollutants and he wanted to make sure that the national forests were not precluded as being designated as Class III. We had a vote and he lost 6 to 5. So this was when we moved over to the Capitol to Mike Mansfield's office. It is the middle of the afternoon on Wednesday.

BERNIE: Why did you move to the Capitol?

LEON: Because of votes. And we continued to go through the remainder of the issues. We had resolved all of these issues and Baker said he had to leave at 4:00 and he couldn't come back until 5:00 and we had not yet resolved or hadn't even discussed autos. At about 4:45 all of the issues on nondegradation had just sort of plopped like a big cow pie. It was so anti-climactic after having had this struggle for two years to get a significant deterioration provision to have everything just sort of fall into place. There was no crisis; there was no climax; it just fell. And we got to autos...

BERNIE: Maybe the pressure itself created it.

LEON: Maybe. And we got to autos and the Conferees agreed that they would, the Senate Conferees that is, we were still in Mike Mansfield's office...

First, Muskie was very reluctant to even talk about auto emissions until Gary Hart was there. He literally refused to discuss auto emissions in Gary Hart's absence.

BERNIE: Why? Because Gary Hart was the only one voting against it.

LEON: Because Muskie's position was that while he had fought with Hart in Committee, he had gone as far as he was going to go in Committee and by god he was going to stick with it, stick with Hart.

BERNIE: I don't quite understand that. See they opposed each other in Committee.
LEON: Well they opposed compromising to the degree that Muskie did in Committee.

CHARLENE: Particularly the NOx.

LEON: Yes. Muskie decided that the Committee position was, in fact, his bottom line. And that he was not going to go below it unless Gary Hart was prepared to go below it. So the...

BERNIE: You mean below the 1.0

LEON: Less strict. So Muskie had trouble getting Hart. Hart came in and made a very strong plea not to make any compromise on the Senate position. They finally agreed that they would make a compromise.

BERNIE: So Hart is now accepting the Senate provision which he previously opposed.

LEON: Well he was a Confereree on the Senate bill. He had no choice. So what they decided to do is offer the House, offer to delete the 10% at 1.0 in 1979 and drop the State preemption provision so the numbers came out to 4/3.4/2.0 in 1979 and we kept 4/3.4/

CHARLENE: The first was the House rejection of the Senate provision.

BERNIE: We are still in the Senate caucus here, right.

LEON: I'm talking right now about what the Senate offer was from the Senate caucus. On Wednesday afternoon we met and the last item we decided was to make an offer to the House and if I remember correctly, the only change in the Senate bill was to drop the 10% and to drop the preemption. Now the question is whether the NOx number in that offer in 1980 still 1.0. And that is what your other chart shows.

KARL: Well the House was the first one to make an offer. And then we came back right.
LEON: I'm not clear on that but that is not what is important. What is important is what the Senate offer is...
HAVEN: Let me run through the scenario here and so if we get there. That is what I'm trying to do. Okay, the Senate offered the Senate provision for a starter. The House rejected...
LEON: And offered Dingell.
BERNIE: This is pro forma right?
HAVEN: But then on the 28th the House came back with this offer of .41/3.4/2.0 for 1980.
BERNIE: Now you are at the formal Conference itself.
HAVEN: Yes. And along with that they had 1.0 with a waiver to 2.0 in 1981; they had 1.0 with a waiver to .4 in 1982.
LEON: The first offer was the Senate. What the Senate did, what the Senate offer was was to drop the 10% in 1979 so we have it at .4/3.4/2.0 and then the second part of our offer was to extend the 1.0 from 1980 to 1981. So what we offered the House was our statutory standards in 1979 for hydrocarbons, carbon monoxide; dropped the 10% and also the preemption; extend NOx for one year.
BERNIE: That means that that loss you suffered in November, you were now even pushing back one more year.
CHARLENE: But that is what was ultimately accepted.
LEON: That's right.
BERNIE: This is what in Mansfield's office the Senate Conferees decided.
LEON: And they agreed to it unanimously. And they agreed to it as an absolute minimum Senate position and the...so we went in and presented the Senate
proposition.

BERNIE: Was there a long discussion on this or did you go through it very quickly, through the Senate Conferences?

LEON: We went through it in about 15 or 16 minutes.

BERNIE: Then there was not much fight on this.

LEON: Baker said that we are not going further; I want no waivers; I want no extensions; I want that number fixed in the statute;

BERNIE: 1.0

LEON: 1.0 and McClure said recognizing that there will be a fuel penalty associated with this and that I might have reservations otherwise, I am willing to support it. Domenici said fine. Hart said as long as I understand that this is as far as you are going to go.

BERNIE: Gary was more concerned about about the 1.0 than the year.

LEON: No I don't think so. Nobody focused specifically, nobody spoke to specific points. He just said as far as we are going to go. What is the problem?

HAVEN: Your order of things. The House did make an offer before we made this offer.

LEON: Did they really?

HAVEN: The first offer was the Senate bill. Remember we said the Senate bill plus agreed upon items. We were proceeding from that state. Then the House came back with this...

LEON: This is in the afternoon after Rogers had offered the staff proposal and then what you are saying is that at that point, the House then offered a compromise on their own standards which was to adopt the current...

BERNIE: unintelligible
and then going immediately to the .41/3.4/1.0 in 1981, dropping all the waivers...

LEON: Excuse me. .41/3.4/2.0 in 1980? And 1.0 in 1981.

HAVEN: No more waivers, except that at that point they put in the diesel waivers. The diesel waiver was a waiver of the NOx standard to 1.5 on a year by year basis until 1985.

LEON: What they said was that the NOx standard would be 1.0 in 1980 except that the Administrator could waive for diesel engines the NOx standard to 1.5 grams per mile for the four year period on an annual basis to 1985.

BERNIE: That is pure Bill Chapman right?

LEON: That is Bill Chapman and Harley Staggers. Staggers was very...he had been gotten to on the diesel obviously. That's GM. So the Senate Conferees went out...

HAVEN: They also, before you get to that, had bought the Senate .4 NOx research objective with an amendment.

LEON: That's right. They wanted to have the auto companies require to submit a research program.

BERNIE: That makes it a little tougher.

LEON: Right. So the Senate caucused; they rejected the auto thing; they rejected the House waiver. At this point the Senate Conferees just rejected it out of hand didn't they. They didn't make any compromise suggestion.

BERNIE: Now what is really happening here. Now here is the House with a lousy bill, which even in itself didn't like. And then pressing for .4?

LEON: They are not really pressing .4 anymore. They kept it this first time around.

BERNIE: But there is even some undercurrent of desire for it.

LEON: The environmentalists made .4 a cause celebre and they were trying to
HAVEN: The House's first proposal to us was .41/3.4 and 2.0 in 1980 followed by 1.0 NOx in 1981 with a waiver to 2.0.

LEON: With a potential to waive the NOx standard up to 2.0.

HAVEN: And a 1.0 NOx in 1982 with a potential to waive the standard, as they called it, to .4.

LEON: Were they silent after 1982 in that proposal. My recollection was that they were.

HAVEN: It was a little confusing by now.

LEON: They never did say anything about thereafter, however. They never made any point about it.

HAVEN: No, but at one point someone did say something about thereafter and other people didn't.

BENNIE: In other words, the House waivers would allow the Administrator to strengthen the standards but not weaken them.

LEON: Weaken them in 1981, strengthen them in 1982. What the House was trying to do, what Rogers was trying to do, was to create a situation in which he could keep .4 in the statute. This was not in Conference in our view. It was...the .4 number. The Administrator's discretion was obviously in Conference because the House bill provided for Administrator discretion. In any event, we returned with an offer; the House then caucused and they accepted most of our proposals on nondegradation except that they did not want...they wanted to have included in discretionary Class I, a natural area national monuments and they wanted to keep their three hour increment on Class II sulfur dioxide, and they then made another offer on auto emissions. Now what was that offer Haven?

HAVEN: The House's counter-offer on auto emissions was .41.3.4/2.0 in 1980
keep it alive, in the environmental side of their Committee. Waxman, Maguire combined. Whereas they wanted to hold it out as a statutory number somewhere. So we came back and McClure reopened the national forest issue in the nondegradation thing and this time insisted on deleting national forests from the bill.

BERNIE: This is in the Senate Caucus right? and where physically are we?
LEON: Yes in the Senate Caucus. We are in a room off the Joint Committee on Atomic Energy. The Conference is in Joint Committee and we just went into a little room off there to have our caucus. All of the meetings Wednesday night took place in the Joint Committee on Atomic Energy and its caucus room right off there.

So McClure gets a 5 to 6 vote to drop forests. We come up with a new compromise number on this three hour standard. And we offer a study of national monuments. We reject the auto offer. I have the exact notes on that somewhere. The House...we go back in and present this to the House and the House comes back and they said alright we agree with the three hour number, we agree to drop the national monument study, the House does not agree to drop forests, and they offer us two options. Option A is to keep the 1979 standards the same as 1978 at 1.5/15/2.0 and to go to 4/3.4/2.0 in 1980, 4/3.4/1.0 in 1981 and then 4/3.4/ and administrative discretion for NOx in 1982 to 1985. They don't say in this offer whether the Administrator can go above or below 1.0. They just leave it to Administrator discretion.

BERNIE: That is not too far from the Dingell amendment.
LEON: I don't think they meant that he could go up but they did not say.
And option B was to go to 4/3.4/2.0 in 1979, 4/3.4/2.0 in 1980, 4/3.4/1.0 in 1981 with a waiver to 2.0 and then 4/3.4 and administrative discretion
after 1981. Now is that your recollection of that offer.

HAVEN: 1981 is between 1.0 and 2.0.

BERNIE: Now what did the House want here?

LEON: Well this is not entirely clear. We have to get to that. So the Senate goes back in and caucused again and they decide to come up with their own...Muskie and Rogers have a little conference and Rogers says "Jesus Ed!, this is in a bathroom, they go into a bathroom behind the dais, Muskie, I and Rogers and Rogers says "Ed, we have just got to have that 1979 numbers". So the Senate Conferees go back...

BERNIE: Which 1979 numbers?

LEON: 1.5/15/2.0. They need those numbers. So the Senate goes back to caucus. They say to hold on forests, and they say well we'll give the House an A and B offer. And this was a suggestion: we'll accept 1.5/15/2.0 in 1979, but we will go back to .4/3.4/1.0 in 1980 and thereafter. So we give up on the Senate's statutory hydrocarbon, carbon monoxide numbers in 1979, but we come back and get our 1.0 grams per mile NOx in 1980. That is option A. Or if the House doesn't like that, then we'll go back to option B which was our original proposal of .4/3.4/2.0 in 1979 and 1980 and then go back to 1.0 in 1981. We gave the House two options. We came back in ....

BERNIE: When Rogers is saying "we got to have these numbers", what is he saying?

LEON: Well he is saying I guess that he can't do anything unless he gets... I don't know what he is saying because we come back in, we present this, the House goes out and caucuses and says that they just can't accept it and they ...I don't know what their proposal was at that point. What was their
proposal after that?

HAVEN: Their proposal was .41/3.4/2.0 in 1979 and again in 1980 followed by .41/3.4/1.5 in 1981. And then going to 1.0 NOx in 1982. Muskie was insulted by that offer.

LEON: So the Senate Conferees just decided not even to caucus at this point. They decided that they...they huddled around the table and I suggested that they just have a vote rejecting it, a public vote, and they decided that that wouldn't do but that they would reject the House offer. So then Muskie made a statement saying there wasn't any reason to pursue this any further. We have made you our final offer. Now we'll go home and sleep on your latest offer tonight and we'll come back tomorrow. But I see no reason to pursue this any further. And we had unanimity in the Senate Conferees still. This was about 10:50, on Wednesday night. So Rogers moved to adopt Senate plan B. Rogers moves to adopt the Senate plan B. Staggers calls for the vote and the ayes have it. The republicans ask for a division. The division is 7 to 3.

BERNIE: Do you remember who the three were?

LEON: Broyhill, Satterfield, and Carter.

HAVEN: And Madigan. It was six to four.

BERNIE: So there was sudden agreement.

LEON: Rogers boles it through and then we said well what about forests. And he says we'll leave the law exactly as it is, they moved it, they adopted it, and the Conference was over. I tried to get the Senate Conferees to stop and think about what the forest vote meant. But they all just said that that was it, they didn't need to vote and they left and then it began to dawn on McClure that what that meant was that the EPA regulations as they currently exist, would continue to apply to nothing in the world except
national forests. And there was a horrendous pissing match. Yelling, McClure was intimidating staff, Domenici who had signed two of the papers crossed his name off the papers. Baker said by gosh there will be no Conference report if this issue isn't resolved. He stomps out.

HAVEN: Or was it both perhaps?

LEON: No Baker was the one who said it. McClure may have said it, but he couldn't carry through with it while Baker could. Rogers asked me what the motion was. I repeated the motion. McClure said that I wasn't telling the truth. That it was not that motion at all. I said to Rogers, I went over to Rogers and I said forget it. We will resolve it but let's not try to do it here. He left and he blew his stack later in the elevator.

CHARLENE: No I heard him there. McClure said you just killed this bill. Rogers said, no my friend if anybody is going to take the blame, it is you.

LEON: We adjourned and went over to the House Legislative Counsel and began to write a Conference report. That was 11:00 pm. What time did you go home.

CHARLENE: 4:00

LEON: Haven and Charlene went home at 4:00. Karl and I and Lee Rawls and Jeff and Steve and Pope Barrow, who is the House Legislative Counsel.

BERNIE: Why Lee Rawls?

Leon: Because Rick Herod was sick and Lee was acting minority counsel. And nobody else from the minority would stay. We worked until 1:30 the next day writing a Conference report, agreeing on a bill, drafting a statement of managers. Charlene worked until 4:00 in the morning finishing a statement of managers. Haven finished on ozone and heavy duty.

HAVEN: The Conference report is actually the legislative language, the bill
in other words.

LEON: So what it was was that she finished up the statement of managers which she had been working on all week. It is just a description of the bill. The statement of managers says the House bill did this, the Senate bill did this, and the Conference agreement does this. It is a non-legislative description, in non-legislative language. By 1:30 we agreed on everything and we started the reproduction process and about 3:30 I had the Senate copy signature sheet and I had arranged for the Senate, ran across there. We got over there and I gave...both McClure and Morgan wanted to read the Conference report before they signed it. I give a copy to each of them and I told them that I didn't know how long we had but we would give them as much time as we had. And we began to get ready to come to the floor. At 5:00 we told them we had to have it back. That's 5:00 pm on Thursday. We had McClure's signature, but Morgan was still sitting in his office reading this dam document which I will show you what it looks like. At 5:30 Haven comes back with Morgan's signature.

BERNIE: And according to what Haven says, George Freeman, the lawyer-lobbyist for the electric companies, John Adams sidekick, was sitting in the office with Morgan or that is how the rumor went.

LEON: Haven comes back terribly upset because there was confusion on the House side. It turns out that somebody had signed one of the House conferees names to the papers and the Conferee happened to be out of the United States. There was no way he could have signed the papers.

HAVEN: Pryor?

LEON: NO Scheuer, James Scheuer's name was signed by a machine or something. The problem was Scheuer was out of the country and there was no way he could
have signed it. So Rogers calls and he says look either take it off or say that I authorized it. Either one is acceptable. I took it off. I said screw it. I just struck it out. And then we thought that we were going to be called up. And that is what all the haste was because they were getting ready to call us up. Byrd says be ready on the floor. This was at 5:30 in the afternoon. At 5:30 in the afternoon we were ready to come up on the floor. Byrd had promised us that we could come up and at that point Byrd started to screw Muskie. This is what you really ought to get from Muskie. You really should get from him what his reaction was to this. At 5:30 at night until 10 minutes to 10, we waited to be called up. The theory was that the Clean Air Act was so controversial that if we could get it up, there would be enough controversial matters behind it to give it the force to get it through. To overcome a Garn filibuster.

BERNIE: That is what Byrd's reasoning allegedly was.

LEON: No this was Muskie's reasoning. Get it up early. Byrd kept pushing in front of us other pieces of legislation. Other issues, other things that people cared about, until the list of items which people were really interested in to get through before adjournment got smaller and smaller. And Muskie was getting more and more furious.

BERNIE: Do you know what explanations Byrd was giving him?

LEON: Byrd wasn't giving any explanation. Byrd just kept saying, well Ed you'll be up anytime.

BERNIE: He was acting majority leader and it was absolutely up to his discretion.

LEON: Sort of. Muskie could have pushed it and he should have pushed it earlier but he didn't know he was getting screwed for a while. At around
7:30 or 7:45, Byrd called up the nomination of George Murphy to the Joint Committee on Atomic Energy, a very controversial issue and strongly opposed by environmentalists and a filibuster then began. So what he did was create a situation in which a filibuster on a nomination prior to bringing up our bill which he knew was going to be filibustered. So Muskie...

BERNIE: Now why was that bad for your bill?

LEON: Well it just moved it off into the future. The filibuster was going to take place on Murphy's nomination and that was coming out of our hide. It meant less time to debate our bill. Less time to wear down the opposition on our bill. So Byrd threw this other thing in. Murphy was a patronage of John Pastore. We listened to Pastore's defense of Murphy, then Muskie said let's go get a drink and we went down to S. 143 and had a couple of drinks and then he said let's go get something to eat because we won't be able to get done. We went in and sat down with the Baker family to have dinner.

I said to the Senator sure as hell if I order dinner