MEMORANDUM

TO: Senator Edmund S. Muskie

FROM: Leon G. Billings and Karl Braithwaite

SUBJECT: Nondegradation

Introduction

With the increasingly technical nature of Clean Air Act issues, nondegradation stands out as one of the major philosophical questions that remains unresolved. The subject relates to public perceptions of clean air, which may differ substantially from simply attaining primary ambient air quality standards. It is highly probable that when primary standards are finally met, the public will not perceive these to be "clean air" because aesthetic problems remain. The nondegradation concept, if implemented, may be essential to a perception of clean air in the minds of the public.

This memo covers the following areas:

(1) Key issues

(2) EPA regulations

(3) Choices available

Key Issues

Much of the discussion regarding nondegradation centers around the regulations promulgated by the Environmental Protection Agency December 5, 1974. It is appropriate for Congress to avoid the "trap" of being boxed in by a discussion centered around EPA's proposals. Those proposals may indeed be the best focal point for discussion, but other alternatives, rejected by EPA during its deliberations, may turn out to be preferable to Congress.

When EPA first proposed its regulations, it listed four separate choices. The regulations finally promulgated reflect only one of those choices.

One basic issue is whether the nondegradation question is best settled by framing a decision process, and allowing that process to yield whatever decisions it may reach. If there is no "Federal minimum"
incorporated -- no standard even remotely similar to a primary or secondary standard -- then nondegradation will differ from the rest of the Clean Air Act, where decision processes are geared toward relatively specific national standards.

A related question is whether or not some clean air regions are national resources, and therefore justify not only a Federally imposed decision process, but specific criteria and rigid parameters for those resources. This is somewhat analogous to the Wilderness Preservation Act or the Wild and Scenic Rivers Act, where it is recognized that some resources should be preemptively protected by Federal intervention.

Jobs versus environment protection will be raised. To the extent that industry is restrained from moving outside the Nation's borders, this argument has reduced validity. The questions then become whether jobs remain in central cities or spread to clean air zones and whether these jobs involve construction of facilities alone, or construction of facilities and manufacture of pollution control equipment. If industries leave the country, as threatened by some in the steel industry, then the nature of the debate changes. Protection may actually mean protecting jobs where tourism is a substantial industry.

Energy projects may be modified or restricted by a nondegradation standard or decision process. But clean air requirements are likely to be only one of many factors (and perhaps not the most important) determining the development of major energy resources, particularly in the west. Unless substantial water resources are made available for oil shale development, low sulfur coal mining, gasification, liquefaction and mine mouth power plants, the question of clean air requirements will be moot. Water availability and water degradation are likely to be very large factors. The concept of net energy return is also an important factor here; some studies have indicated that as much energy will be consumed in extracting oil from shale as will be produced by that process.

Proposals to develop energy resources on forest lands, particularly the strip mining of coal, are being restrained by factors other than requirements of the Clean Air Act -- principally the desire to keep recreational areas unspoiled. The Clean Air Act has not had to come into play because other factors have affected the decision first.

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The regulations have attracted substantial support from a number of States, who prefer to retain these decisions for themselves. The regulations have attracted substantial criticism from environmental groups and industry.

The chronology of these regulations is as follows:

May 31, 1972 - State Implementation Plans approved without a nondegradation provision.

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December, 1974 - Sierra Club filed suit again disputing the regulations.
Industry criticism has principally stated that such regulations are unnecessary; secondary standards ought to protect public welfare. Decisions beyond that should be left totally to States with no involvement from the federal government. Witnesses testifying before the Subcommittee may depart somewhat from this, and argue that some small Federal presence might be acceptable.

The environmental criticisms have been substantial. Only two of the six regulated pollutants are covered. These are sulfur oxides and particulates. Yet fifty percent of the nitrogen oxide comes from stationary sources as well as 20 percent of the hydrocarbons and 10 percent of the carbon monoxide. Refineries and power plants are large emitters of these pollutants.

State classifications are not reviewable on substantive grounds, and very little if any criteria are given to the States in making classification decisions. No meaningful provision is included to resolve differences between States when one State might classify and adjoining area as a Class III area and the neighboring State may have classified its area as a Class I clean air zone. EPA has maintained that a Class II zone could allow a 1000 megawatt power plant or medium-sized oil shale development. This is criticized by industry as being inaccurate and in any event too small, and by environmentalists as being too large.

The regulations introduced the concept of applying "best available technology" for sources not covered by new source standards. The 1973 proposed regulations included best available control technology for sources emitting any of the six pollutants presently regulated. This has been eliminated for the four pollutants that have been dropped from the final regulatory scheme.

The regulations list sources that will be subject to review and required to have a preconstruction permit. Numerous sources are left off that list. The 1973 proposal required regulation of any source emitting more than 4,000 lbs. of pollutants per year for any one of the six regulated pollutants. This requirement has been dropped.

Complex sources that create secondary impact are not included in the review.

During the more than two years of delay in meeting the requirement to include nondegradation provision in State plans, numerous large pollution sources have passed through the stage of signing contracts. Some argue that such sources should at least be required to apply the best available technology, even if a permit review is not required.

The Department of Health, Education and Welfare contended that nondegradation regulations will hurt the residents of cities by not allowing pollution sources to leave the city so that the air might be cleaned up. Critics counter that the poor will not be able to move with this flight of industry and that transport of pollutants from rural areas to urban areas will defeat this concept in any event.
Choices

A number of choices are available to the Subcommittee. The first four listed below are the ones originally proposed by the Environmental Protection Agency in 1973 for the purpose of generating discussion.

1. Air Quality Increment Plan - Any source in a clean air area would only be able to emit a certain amount of pollution.

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3. Local Definition Plan - Localities and States would simply analyze on a case-by-case basis the emissions from new sources. Little else would be required.

4. Area Classification Plan - This would require States to divide their regions into zones. This is the plan eventually refined by EPA and promulgated as the final regulations.

5. Volumetric Plan - This is proposed by the Sierra Club, and would require measuring the output of each specific source within a one kilometer area and establishing tight limitations on all sources, as well as requiring each square mile to be within the limits established.

6. Use Emission Taxes for Excessive Emissions Above Secondary Standards to provide an economic incentive to keep pollution low. This approach could stand by itself or be asked to almost any other approach as an additional incentive to reduce pollution.

7. Establish much more specific criteria for State planning and area classification processes and require a regional planning process as part of the State plan. This could be a modification and/or expansion of section 208 of the Water Act. This alternative could contain additional Federal criteria to protect "critical, national resource areas" such as recreational areas, national landmarks, historical sites, and unique natural wonders.

8. Place a uniform "best available control technology" approach across-the-board on all sources and drop any requirement for area classification. This would be similar to the effluent guideline approach used in the 1972 Water Act.
MEMORANDUM

TO: Senator Edmund S. Muskie
FROM: Leon Billings and Don Alexander
SUBJECT: Non-degradation Hearing

On Tuesday, July 24, the Subcommittee will hold a one-day hearing on the non-degradation policy and issues resulting from the Supreme Court’s recent action upholding a lower court decision that the Clean Air Act does require non-degradation policy. There will be witnesses representing the Sierra Club and the National Coal Association which have sharply different views of the matter.

The Air Quality Act of 1967 added to the purposes of the Clean Air Act a requirement to: "protect and enhance the quality of the Nation's air resources." In 1969, the Department of Health, Education, and Welfare published guidelines setting forth, as a "non-degradation policy" that significant deterioration of air quality would not be allowed. The 1970 Act did not change that provision of the law.

In developing guidelines for implementation of the 1970 law, EPA, after including non-degradation requirement in draft guidelines, struck non-degradation from its final guidelines. Instead, EPA issued an interpretation of the 1970 Act stating that air quality could be degraded up to the level of the secondary (public welfare protective) standard. This was the position which EPA maintained during Subcommittee oversight hearings in 1972.

The Sierra Club challenged the EPA interpretation and, on May 30, 1972, the U.S. District Court for the District of Columbia issued an opinion upholding the Sierra Club’s view and ordering EPA to require States to adopt plans which did not allow significant deterioration of air quality. The Court of Appeals and the U.S. Supreme Court affirmed the District Court decision without opinions - the Supreme Court on a divided 4-4 vote. A copy of the District Court opinion is attached. It provides a competent legislative history of the matter.
Subsequent to the Supreme Court action, EPA issued guidelines with a 90-day comment period to establish regulations for "non-degradation". The EPA proposal is in the form of four alternative proposals to define "significant deterioration", with one alternative or some combination to be finally proposed. Mr. Fri's statement announcing the proposed guidelines and outlining the four alternatives is attached. The alternatives or various portions of them would appear to result in the following:

1. Degradation of air up to any level as long as best available control technology is utilized.

2. Maintenance of air quality at the levels measured in 1972 regardless of the directive in the law to "enhance" air quality.

3. Gerrymandering of air quality regions so that very large polluting facilities could be constructed which have average pollution on a region-wide basis which is acceptable to EPA but which, within their immediate area, would have an adverse impact on air quality.

The EPA proposed guidelines have been criticized as providing four options all of which would permit significant deterioration - major new facilities would be constructed with little restriction beyond requirements of best available technology which the new source performance standards provision of the Clean Air Act (Section 111) presently requires.

Other options which would have implied a greater degree of control and restriction, including the possibility that power plants or major facilities could not be located in some areas, have not been proposed for comment. While the latter option pose problems in terms of national policy, it should have been proposed for comment to create a record on all the options rather than merely a record of one principal option with four sub-options.

The Sierra Club will be critical of the EPA proposal and urge its own, much more restrictive definition of significant deterioration which would appear to bar any facilities which would increase air pollution levels by more than 10%. This would, in effect, allow relatively dirty facilities in relatively dirty areas but bar facilities in extremely clean areas.

The National Coal Association would support a more liberal definition of significant deterioration, particularly since their major concern is to permit development of coal-related energy facilities in rural areas. This issue is the most significant of the current policy matters which the non-degradation controversy addresses.
The National Coal Association's major concern, however, in light of the EPA guidelines, is the need to develop some certainty as to a definition of significant deterioration and the intent of the non-degradation requirement. Legislative history in this area is somewhat limited - essentially it is outlined in the court opinion. The National Coal Association is concerned that because the EPA guideline's are so vague they will be tied up in court for years in struggles between the environmentalists and industry and that as long as the issue remains unresolved, long term commitments to develop coal, which is essential to development of new mines, will be very difficult to obtain.
MEMORANDUM

TO:        Senator Edmund S. Muskie
FROM:      Leon G. Billings and Karl Braithwaite
SUBJECT:   Nondegradation Hearings -- Comment on Testimony

April 22, 1975

The letter from Governor Cecil Andrus of Idaho (first item under the "testimony" tab) is powerful. You may want to read it into the hearing record.

1. Cubia Clayton, New Mexico Air Quality Division. New Mexico presented the strongest brief as an amicus participant in the Supreme Court decision. They were strongly in favor of a nondegradation standard. Interestingly, this statement does not argue for the Federal government to require States to establish any Class I (pristine) regions.

   New Mexico would like permit authority over Federal land (the statement by Hardey of Continental Oil takes just the opposite position, feeling a Federal veto over lands controlled by the Federal government would be bad and sees EPA as the actor most likely to restrict development).

   The New Mexico statement is clearly at odds with the Continental Oil statement with regard to the protection afforded by the national standards. Industry has argued that standards protect all known effects. New Mexico disagrees, indicating that values such as visibility are not protected by such standards (page 3). Further health and welfare effects may be discovered by additional air pollution research, since the field is in its infancy (page 4). The State believes that industrial development will actually be aided by a nondegradation standard, since it will provide environmentally compatible development (page 5).

2. J.D. Geist, Vice President of Public Service Company of New Mexico. Mr. Geist indicates that he might not be representative of the utility industry. You should know that he was selected at the request of the National Association of Electric Companies and other representatives of the utility industry. They chose him primarily because they thought he would be an articulate witness and would not draw the antagonism of the Subcommittee.

   His statement implies that the Clean Air Act might be partially the cause of the fact that New Mexico is ranked 49th in personal income. The assertion makes little sense, since New Mexico has historically ranked in this position (page 2).
Interestingly, he does not call for eliminating nondegradation totally from the books, but rather for making it a State program with only a very small Federal backup authority (page 2-3).

The discussion of visual pollution as the only remaining issue when secondary standards are attained ignores the question of acid rain and other such long-term effects. He assumes that secondary standards take virtually everything else into account, and while the concept of these standards was to do exactly that, the secondary standards as promulgated clearly do not, and the absence of many pollutants from the list of regulated pollutants further aggravates this problem.

The discussion on page 4 on modifying the new source performance standards process so that engineering societies might help make these decisions is simply another attempt to undermine EPA.

3. Howard Hardesty, Continental Oil Company and American Petroleum Institute. EPA indicated that a medium-sized oil shale facility and other such energy facilities could be built in Class II areas under their regulations. Mr. Hardesty disputes this, and goes on to assume that all Federal lands will eventually be excluded from development if there are any recreation resources involved.

Hardesty's statement seems to imply that the Federal government will be more restrictive than States. Actually, the Federal government is pressuring western States for development. It is highly unlikely that the Federal government will be more restrictive than the State of Colorado in dealing with oil shale, for example (page 6).

Hardesty raises a good philosophical question on page 8 of his testimony. Do we want to force industrial facilities to concentrate in present industrialized areas? On page 9 of his statement, he implies that under the nondegradation regulations only air quality criteria will be involved in answering this question. In fact, the EPA regulations would require economic and social considerations to be included.

4. The statements of the Sierra Club and the Northern Plains Resources Council have not arrived, even though their witnesses have been called frequently.

A background memo on nondegradation is attached.
April 22, 1975

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MEMORANDUM

TO: Senator Edmund S. Muskie

FROM: Leon G. Billings

SUBJECT: Clean Air Act Markup Sessions

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 divert 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 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 enforcement authority; elimination of the non-degradation policy and air quality maintenance requirements; elimination of EPA authority to require transportation 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 enforcement 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 subsequently breached.

Or, another example: If the Environmental Protection Agency is to continue to have inadequate resources to effectively enforce the requirements of implementation plans, you could insist that the citizen suit provision 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 discussion 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 provided to us by EPA (and others) many sources of pollution will be in compliance with state implementation plan (SIP) requirements 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 endangering 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 however 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 problem.

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

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 prepared 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-issue 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-promulgation 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. (PEA)

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 transport 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)
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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 i, 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.
13. 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 busses, new motorcycles, and new mid-range service vehicles (more than 6,000 pounds). Various environmental groups)
16. **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.

18. **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.
19. 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 purpose of 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.
July 23, 1975

MEMORANDUM

TO: Subcommittee Members

FROM: Staff

SUBJECT: Non-Degradation Issues

1. Class I designations:
   a. Should the statute specifically identify Class I areas?
   b. Should national forests be included in any such statutory designation?
   c. Should there be authority for Federal land managers to designate additional Class I areas?
   d. Should states be authorized to designate Federal lands as Class I areas?
   e. Are non-degradation plans and permits on Federal lands a Federal or State responsibility?

2. hiatus:
   a. Should the statute provide an interim procedure to make non-degradation decisions for the period between enactment and approval of a plan?

3. Base line air quality data:
   a. Should the statute establish a process to cause permit applicants to accumulate base line air quality data?

4. Injunctive relief:
   a. Should the Administrator be authorized to enjoin a facility or a source which he can show will cause a measurable change in the air quality of a Class I area?
b. Should the Administrator be authorized to enjoin the issuance of a permit to a facility or a source if a State violates its own plan or fails to comply with the procedural requirements of the Act including application of best available control technology?

5. Auto-related pollutants:

a. Should the Act provide a method to determine whether or not HC, CO, NOx, or other unregulated (by existing air quality increments) pollutant emissions will cause degradation of clean air areas?
January 15, 1976

MEMORANDUM

TO: The Record
FROM: Leon G. Billings
SUBJECT: Nondegradation and Transportation Controls - State Reaction

Nondegradation

During the recess, the staff met with representatives of three environmentally conservative western States. We met with the Planning Director of the State of Arizona, the Director of Human Resources for the State of Nevada, and the Executive Director of the Air Control Board of the State of Texas. The view on nondegradation varied primarily as a function of the amount of Federal land in each State and the capability of the State agencies to deal with complex environmental problems.

Texas, which has virtually no Federal land, was not greatly concerned with the concept of preservation of national resources such as parks, forests, etc. Arizona and Nevada, which are major Federal land States, were deeply concerned with the implications of these policies, as well as the application of clean air requirements to Indian lands. All three were concerned with the potential political implications associated with any real or imagined prohibition on growth.

Texas, which as a fairly sophisticated pollution control agency and a number of complex industrial metropolitan areas, was in favor of the requirement that new sources be required to meet best available control technology, as defined in the Subcommittee bill. This would be consistent with present Texas policy. They had doubts as to the validity of the incremental approach, but recognized that increments could have the effect of forcing technology. For the most part, they argued that the secondary standard for particulates would be a constraint on development in most areas and that the sulfur dioxide problem in Texas was so minimal that with best available technology the increment would provide little constraint.

The Arizona and Nevada people were alarmed at the ramifications of the Class I increments and the potential for the Federal land manager (including the Indian tribe) to indirectly prohibit development on State lands as a result of any real or implied buffer zone. They viewed this as an intrusion on States' rights, but more importantly a serious disincentive to growth because of the amount of Federal and Indian lands in their States.
They recognized the value of best available control technology and supported the concept because it would permit them to require best levels of control available as a Federal condition because of the otherwise countervailing economic pressures which tended to soften or compromise efforts to maximize emission reductions. They too recognized the need to have a mechanism which would encourage the development of new technology and had only minimal problems with the Class II increments per se, if they were unrelated to any other set of control requirements.

Transportation Controls

In addition, the staff discussed transportation control amendments with representatives of Southern California Mayors as well as the other States. There was not a great deal of guidance provided from these meetings. No magic answer was found. But there were three significant issues raised.

First, in California, there is an ongoing air quality management planning process. Task forces of elected officials have been established to develop air quality maintenance plans. Air quality maintenance plans are the long-range air quality-related land use plans required to assure that air quality does not deteriorate below achieved levels. Associated with this process is a significant amount of transportation control planning. In many respects, the structures of the air quality maintenance planning task forces will be similar to those anticipated by the transportation control planning process. Californians urge that the new amendment not disrupt this ongoing effort, but require the two to be integrated in an appropriate manner. The staff recommends that suggestion be adopted.

A second and more controversial issue was raised by the State of Texas Air Control Board. The Texas staff opposes the requirement that regional groups of elected officials be designated for the purpose of developing metropolitan-wide transportation control plans. They would prefer to have discretion regarding such designations in order to maintain State control of that planning process.

Third, the staff raised an important question regarding the development of the list of regions subject to either nondegradation or transportation control planning. They noted that, by and large, the Environmental Protection Agency would have to rely on information developed by State agencies under implementation plan monitoring requirements to make any determination as to which categories each region fell under.

In response to these latter two concerns, the staff has outlined procedures which could ameliorate the problem of identifying regions and providing flexibility to the process of designation of planning agencies.
Dear Colleague:

When the Clean Air Act Amendments of 1976 reach the Floor for consideration, we intend to offer our amendment to reduce the performance warranty to 18 months/18,000 miles. At issue is the competitive disadvantage that will be incurred by thousands of small businesses across the Nation if the present statutory 5 years/50,000 mile performance warranty is maintained. Also of issue is the cost impact on car purchases and repair, especially for those who perform their own repair work. The House Interstate and Foreign Commerce Committee without objection adopted the terms of our amendment, and it is supported by the American Automobile Association, which is the world's largest association of car owners.

The Senate Public Works Committee has attempted to deal with the problem by adding language designed to prohibit the auto manufacturer from conditioning its performance warranty upon the use of its own parts installed by its own franchised dealers. The language of the bill will not achieve the goal intended because of the following reasons:

1. The bill authorizes the EPA to waive the prohibition designed to cure the problem. We believe the automakers may well be able to demonstrate that the effectiveness of their current emission control systems depends greatly upon the performance of numerous other engine parts, and that those related parts will have to be properly installed. Their case for a waiver will be strong.

2. The automakers could also be expected to seek redress through the courts. They would, no doubt, maintain that being held financially liable for the performance of a system over which they effectively had no quality control would simply be unfair. We do not know how the courts would decide, but the manufacturer can be expected to forcefully argue their case.
3. The problem of who provides service is inadequately considered. The proposed parts certification program will help to insure that non-OEM parts can be used, and that process is, therefore, included in our amendment. But the Committee bill says nothing of who will be liable for damage inadvertently done to the emission control system by either the car owner who repairs his own vehicle or any service establishment not affiliated with the manufacturer. We do not believe the Congress intends the automakers to be liable in that case, nor do we believe Congress intends to encourage car owners to have their vehicles serviced by franchised dealers out of concern that to do otherwise might jeopardize a warranty costing them as much as $250 when the car was purchased.

Our 18 months/18,000 mile amendment is proposed as an effective alternative. It does not reduce the manufacturer's obligation to produce a durable emission control system, since the full production, or defects, warranty will remain in effect.

That production warranty, as stated in Section 207(a) of the 1970 Act, requires the manufacturer to warrant that the vehicle or engine is (1) "designed, built, and equipped so as to conform at the time of sale" with the applicable emission standards and is (2) "free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life" (defined as 5 years/50,000 miles). We believe the production warranty provides adequate assurance that the vehicle manufacturer must produce automobiles which meet the standards both at the time of sale and throughout their useful life (5/50). If the manufacturer fails to do so, he is financially liable to make the repairs needed under the terms of this production warranty, a warranty which is absolutely essential to the Act and which we do not in any way propose to change.

Because of the assurance provided by the production warranty, we believe our amendment to the performance warranty--a warranty which the House Small Business Committee has determined to be "unnecessary, anti-competitive, and anti-consumer"--will not in any way reduce Detroit's obligation to produce a durable emissions control system, will permit the car owner to choose whomever he wishes to service his car without fear that he is invalidating his warranty, and will prevent hundreds of thousands of small businesses from being frozen out of much of the routine automotive service work performed in this country.
We must consider the consequences if EPA grants the waiver, if the courts strike this year's language, or if the car owner resolves not to risk his warranty. Over 400,000 small businesses make their livelihood by providing for the automotive service needs of the American people. They annually account for 80-85% of the service work performed, and they are chosen because they are price competitive. We believe that any public policy which might result in a diminution of that competition is unwise and ill-considered.

We would, therefore, urge your support of our performance warranty amendment.

Sincerely,

Lloyd Bentsen
Roman Hruska
Joseph Montoya
Jake Garn
Jess Helms
Ernst F. Hollings
Paul Laxalt

Philip Hart
J. Bennett Johnston
Robert Griffin
Frank Murge
Paul Laxalt

Philip Hart
Harold Brown
J. W. Symington
Richard Stone

Ernest F. Hollings
Ernst F. Hollings
Paul Laxalt
Richard Stone
MEMORANDUM

TO: Leon Billings

FROM: Haven Whiteside

SUBJECT: The Bentsen Amendments and Related Topics

Revised Bentsen Amendment

On April 27 Philip Hart introduced an amendment for Bentsen, #1614, which essentially replaces the previous Bentsen amendment #1596 and narrows its scope. Bentsen put in a Record statement saying that the first version was a mistake. However, it is clear from looking at it that it was not accidental. Amendment #1614 does the following things:

(a) Deletes replacement cost (section 27);

(b) Deletes certificate of conformity label;

(c) Replaces 50,000 mile performance warranty by 18,000 mile performance warranty;

(d) Retains a Federal Trade Commission study but makes it specific to the 18,000 mile issue. It deletes the requirement of consultation with the Department of Justice and the Environmental Protection Agency, and also deletes the requirement that the study be reported to the Congress within 18 months after enactment. The impact of the study is changed so that the performance warranty would go back up to 50,000 miles if the FTC found no significant anti-competitive effect would result from this;

(e) Retains parts certification but deletes any exception thereto. It also gives EPA two years to establish certification procedures instead of one year, and it deletes the automatic certification in the interim;

(f) Retains maintenance instruction provision but presents it as a new provision; and

(g) Adds a provision to section 207(c)(the recall provision) which requires that the owner of a vehicle be compensated by the manufacturer for any amount expended by him at an earlier date if a vehicle later becomes subject to recall.
This revised amendment does not delete the assembly line test nor does it
delete the sulfur emission study as the early Bentsen amendment did.

Comments

(1) We should continue to oppose this amendment, it is still bad. The
Baker-Buckley-Stafford amendment is preferable.

(2) The most strategic way to approach the Bentsen amendment would be to
let it come up and then have the Baker-Buckley-Stafford amendment introduced
as a substitute. The Baker-Buckley-Stafford amendment could be augmented if
they wish by the recall reimbursement provision in section 207(c)(4) from
the Bentsen amendment which seems ok. Phil thinks it would be easier for
Members to vote for the Baker substitute than to record a vote against the
Bentsen amendment.

(3) I do not agree with your draft memo suggesting a possible compromise
with Bentsen at 25,000 miles. He has not been straightforward with the Commit-
tee in dealing with this amendment so he might not be straightforward in any
compromise. Furthermore, he has shown no willingness to compromise the 18,000
miles anyway. Apparently, he has reasons that he must hold to it, whatever
they might be. It also would be bad policy, in the sense that its hard to come
up with a rationale to defend 25,000 miles except to say that its 7,000 better
than 18,000. Whereas 50,000 miles can be justified on the basis of average
emissions over the total life of the car,

(4) If the Bentsen amendment should carry, we might want to have available
a perfecting amendment that would improve it somewhat. The label of conformity
described on page 72, line 23 of the bill to page 73, line 5 could be restored.

The Department of Justice and the EPA could be brought back into a consult-
ativa role in the FTC study, and the 18 month reporting date should be restored
in order to avoid intemineable delays while the study goes on.

Under the parts certification provision, we could restore the original one
year for the Administrator to promulgate regulations, as well as the provision
that: "before the effective date of such regulations all parts shall be deemed
to have such certification."

(5) Another alternative we might want to have available in case Bentsen
passes is a group of two or three amendments that have the effect of improving
the quality of automobiles as actually produced, but not have any anti-competi-
tive effect on the aftermarket because they deal with the manufacturers. It
could be argued by Muskie that the reduction of the performance warranty has the
effect of reducing the quality of automobiles as produced. These amendments
were sketched out by Marcia Williams and Hal is somewhat interested. They
could be:
(A) Add at the end of paragraph (1) of section 207(a) of the Clean Air Act (present law):

"(3) at time of sale, in conformance with emissions standards as measured by the test procedure detailed in section 207(b). Provided that the test procedure was promulgated at least 180 days prior to the model year introduction."

Discussion: This would protect the consumer from buying a vehicle which at the time of sale did not comply with the same test standard which may later be used in an inspection/maintenance program by requiring the manufacturer to certify such conformity.

(B) Insert at the end of section 207(b) of present law:

"The purchaser of a vehicle may, if desired, require the manufacturer to test the vehicle between 12 and 18 months after initial purchase and require the manufacturer to bring such vehicle into compliance with emission standards. Provided that the purchaser can show the proper maintenance as discussed in section 207(c)(3) and that the test procedure specified in section 207(b) was promulgated at least 180 days prior to model year introduction."

Discussion: This would provide the owner with assurance that the vehicle was built with the durability to conform to emission standards in real life use. It also discourages manufacturers from readjusting vehicles to improve driveability at the expense of emission control.

(C) Amend section 207(c)(1) of present law by inserting the following sentence after the first sentence:

"A determination of substantial number is to be made by the Administrator, but in no case is it to be less stringent than twenty percent defective, recognizing the fact that an assessment of vehicle compliance should include the fact that vehicles can be expected to deteriorate as they accumulate mileage."

Discussion: This should result in a stronger recall program being conducted by EPA, and giving additional protection to the consumer. (Marcia suggested 40% which seemed too weak to me)

Is it true that we will oppose all unprinted amendments in principle? If so, this amendment ought to be printed on Monday if we want to use it. We would have to find a horse. Phil was not very optimistic about any of these three amendments passing if anyone on the Committee who knows anything focusses on them. For example, McClure, Morgan, etc.

Nevertheless, they could provide a useful counterbalance to the kinds of activities that are going on around the Bentsen amendment.
Dear Colleague:

When S. 3219 is considered on the Senate floor, we urge that you vote against Amendment 1596 or 1614, the so-called Bentsen amendments involving automotive warranties.

The Committee carefully considered the Bentsen Amendment to reduce the performance warranty on emission control systems from 5 years or 50,000 miles to 18 months or 18,000 miles. While adopting other measures to protect the independent parts and service dealers, the Committee rejected a reduced warranty. We continue to oppose that amendment for the following reasons:

1. It ignores the objective of clean, healthy air;
2. It is anti-consumer because it would shift the burden and/or expense of repairing a faulty emission control system from the manufacturer to the owner;
3. It would eliminate any financial incentive for manufacturers to produce an emission control system that functions effectively for the car’s life since their exposure would be for only 18,000 miles; and
4. It fails to accomplish its stated objective to improve the competitive position of the independent garage owner.

Strong warranty provisions are vital if the goals of the Clean Air Act are to be achieved. Automakers were required in 1970 to warranty both the design and performance of emission control systems. The latter requirement was based on the expectation that automakers would build auto emission control systems to meet the 5 years or 50,000 miles standard if they were legally exposed under a performance warranty for the same period. The rationale for the performance warranty remains valid.

Reducing the length of the performance warranty, of course, does not terminate the legal responsibility of the consumer to assure that his car remains in compliance with required standards. More and more States are adopting emission inspection programs. These programs expose consumers to penalties for failure of their vehicles to meet standards. Under the Bentsen Amendment, the consumer loses protection against any failure of the manufacturer to produce a clean car, even before most cars are paid for. The Bentsen Amendments are opposed by the Consumer Federation of America and Consumers Union.
While backing off from the clean car requirements in the law, the Rentsch Amendments fail to augment the competitive position of the independent garage owner. Under current law, automakers are prohibited from conditioning the performance warranty upon the purchase of parts or service from a franchised dealer. The committee bill requires that all owners' manuals contain instructions that any necessary maintenance need not be performed by a franchised dealer or using the manufacturer's parts. The limited authority of EPA to waive this prohibition under limited circumstances does not lessen its benefits to the consumer. The Administrator can only waive this requirement when he makes a "public interest" finding—a finding which would be indefensible if the effect would be to reduce competition.

It is hard to understand the argument that a 50,000 mile warranty threatens the livelihood of 400,000 independent service and parts dealer as the sponsors of the Rentsch Amendments assert. The 50,000 mile warranty has been law for 6 years. By the sponsors own admission, the independent dealers now hold 80-85 per cent of the business. This proportion has actually increased in the years since adoption of the 50,000 mile warranty in 1970.

We doubt that any anti-competitive potential exists in the clean car warranty, particularly in view of the five amendments to protect the aftermarket industry already included in the committee bill. Any doubts can be further resolved by adoption of Amendment 1580, offered by Senators Baker, Buckley and Stafford. That amendment states affirmatively that car owners can go anywhere to have maintenance work done, including accomplishment of the work themselves, without infringing the warranty.

The performance warranty establishes a realistic test of whether the manufacturer is carrying out its responsibility that cars be built to meet the emissions standards for the useful life of each vehicle. Without an effective performance warranty, we believe that the manufacturers will have no incentive to produce an emissions system that, when properly maintained, performs to the emission standard for which the consumer has paid.

If we cannot be sure that new cars meet the standards and that those cars will continue to meet those standards on the highway, our clean air goals will not be realized and public health will be endangered. This, we believe, frustrates the effort to eliminate the automobile as a major source of this nation's air pollution.

Sincerely,

EDMUND S. MUSKIE, U.S.S.

JAMES L. BUCKLEY, U.S.S.
Dear Conferree:

Attached is a copy of the latest, September 21, 1976, Chase Econometrics Associates, Inc., study comparing the fuel economy, sales, and employment effects of the Senate adopted automobile emissions schedule as compared to the Dingell-Broyhill (Train) emissions schedule as adopted by the House.

To summarize the results of the study, the Senate adopted emissions schedule would result in a fuel economy penalty on the magnitude of 8 - 16% for model years 1979 through 1985. The biggest adverse impact would occur in model years 1980 and 1981 when the fuel penalty would be 16%.

The Senate emissions schedule would also result in increased maintenance costs of some $220 per vehicle life for model year 1980 and thereafter. Besides increased maintenance costs, the Senate emissions schedule would result in significant increased purchase costs of approximately $150 per vehicle in 1980 through 1985.

The Chase macroeconomic impact study also predicts the Senate emissions schedule would result in a loss in car sales of some 440,000 units in 1979. By the end of 1985, adoption of the Senate emissions schedule would result in a cumulative loss of six and a quarter million units.

With respect to jobs, the Senate emissions schedule would lead to loss of some 80,000 jobs in 1979 alone. The job loss directly resulting from the Senate emissions schedule would peak in 1982, with the loss of some 330 thousand jobs, and level off thereafter at approximately 230 thousand jobs per year lost due to the Senate emissions schedule.

In short, the Senate emissions schedule would mean poorer fuel economy, higher purchase and maintenance costs, and significant losses in employment and automobile sales between 1979 and 1985. Congressman Broyhill and I urge adoption of the House position.

With every good wish,

Sincerely yours,

John D. Dingell
Member of Congress
April 30, 1976

MEMORANDUM

TO : Senator Edmund S. Muskie
FROM : Haven Whiteside
SUBJECT: Bentsen Aftermarket Amendment (No. 1614)

Explanation - This amendment would reduce the automobile performance warranty from 5 years/50,000 miles to 18 months/18,000 miles. It would delete the replacement cost provision and delete the emission certification label. It would also weaken the aftermarket parts certification provision and remove the time limit on the Federal Trade Commission study.

Recommendation - You should vote against the Bentsen amendment as you did in Committee and speak strongly against it. It is a bad amendment. You should vote for the Baker amendment (No. 1586), if it is offered as a substitute for Bentsen as discussed in a separate memo.

Floor Strategy - The vote could be close on this. If possible, you should conduct the floor action so that the Bentsen amendment comes up first. Then the record vote will be on the Baker substitute, with only a voice vote on Bentsen. Lobbying by the aftermarket industry has been very heavy and some Members may find it possible to go against Bentsen on a voice vote but not in a record vote.

Arguments

1. The Bentsen amendment will defeat the goal of having clean cars on the road.

2. It will cost the consumer money, and is opposed by major consumer organizations.
3. It will only make life easier for the automobile manufacturers, which would no longer be financially responsible for the emissions performance of their cars beyond 18,000 miles.

5. See attachments:

   (a) Dear Colleague sent by you and Buckley opposing Bentsen
   (b) Letters from Consumer Federation of America
   (c) Letters from Consumers Union
   (d) Letter from Talph Mador