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Vice President

November 5, 1979

Central Docket Section (A-130)
Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

Attention: Docket No. A-79-35

RECEIVED
ENVIRONMENTAL PROTECTION
AGENCY

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SECTION

Re: Comments of American Petroleum Institute
on Proposed Rules "Requirements for Pre-
paration, Adoption, and Submittal of SIP's;
Approval and Promulgation of State Implemen-
tation Plans", 40 C.F.R. Parts 51 and 52, 44
Federal Register 51924-51957 (September 5,
1979)

The American Petroleum Institute (API) is pleased
to submit its written comments on the Agency's proposal of
September 5.

Already a part of the record for the rulemaking is
API's testimony presented on behalf of API at the public hear-
ing held on October 18, 1979 in San Francisco, California by
Dr. Carleton B. Scott, Director of the Environmental Sciences
Department, Union Oil Company of California. Moreover, API will
submit additional supplemental written comments by November 18,
1979.

In large part, the Agency's proposal is a response to
the June 18, 1979, decision of the United States Court of Appeals
for the District of Columbia Circuit in the case of Alabama Power
Co., et al. v. Costle. That decision held that several provisions
of EPA's existing PSD regulations exceed EPA's authority under the
Clean Air Act. While several of the Agency's proposed revisions
are consistent with the Court's decision, API believes that many
are not and one purpose of these comments is to address those points.

Moreover, several of the issues decided by the Court are the subject of pending motions to the Court for reconsideration or clarification. One such motion, joined by API, seeks reconsideration of the Court's approval of the application of the PSD regulations to pollutants other than particulates and sulphur dioxide. API does not intend by these comments to waive or otherwise compromise its opposition to the Agency's extension of the PSD requirements to the "other pollutants".

We trust you will carefully consider our comments.

Sincerely,



Daniel Rathbun

Enclosure

DR/jc

COMMENTS
OF
AMERICAN PETROLEUM INSTITUTE
ON
PROPOSED RULES
FOR
REQUIREMENTS FOR PREPARATION,
ADOPTION, AND SUBMITTAL OF
SIP's; APPROVAL AND PROMULGATION
OF STATE IMPLEMENTATION PLANS
40 C.F.R. PARTS 51 AND 52,
44 FR 51924-51957 (September 5, 1979)

November 5, 1979

1. POTENTIAL TO EMIT

A source's "potential to emit" pollutants in specified quantities is a basic determinant of that source's coverage under the PSD rules. EPA's June 19, 1978, regulations define "potential to emit" in terms of uncontrolled emissions - i.e.:

The capability [of a source] at maximum capacity to emit a pollutant in the absence of air pollution control equipment.

40 C.F.R. §§ 51.24(b)(3), 52.21(b)(3).

Industry challenged that interpretation in Alabama Power, arguing that the central consideration for PSD application should be a source's actual emissions to the atmosphere once the pollution controls are installed and operative. The Court agreed with industry, saying in its June 18, 1979, per curiam opinion:

The "potential to emit" of any stationary source must be calculated on the assumption that air pollution control equipment incorporated into the design of the will function to control emissions in the manner reasonably anticipated when the calculation is made.

13 ERC at 1228. Accordingly, the Court remand the regulations on this issue for appropriate revision by the Agency.

EPA now proposes to define "potential to emit" in terms of the source's "capability at maximum design capacity to emit a pollutant after the application of air pollution control equipment." Proposed 40 C.F.R. §§ 51.24(b)(3), 52.21(b)(3). This underscored change is consistent with the Court's decision and, as such, is supported by API.

EPA proposes a further change in its definition of "potential to emit", however, that is inconsistent with the Clean Air Act and is not supported by API. The June 18, 1978, regulations provide that in calculating a source's potential to emit:

Annual potential shall be based on the maximum annual rated capacity of the source, unless the source is subject to enforceable permit conditions which limit the annual hours of operation. Enforceable permit conditions on the type or amount of materials combusted or processed may be used in determining the potential emission rate of a source.

40 C.F.R. §§ 51.24(b)(3), 52.21(b)(3). (emphasis added).

EPA now proposes to delete the underscored language and to add a requirement that the maximum rated capacity of the source must be calculated "assuming continuous year round operation." With these changes, the source will be presumed to operate 24 hours a day, 365 days a year, notwithstanding that its actual hours of operation will be much less, whether because of permit limitations or because of the impracticability of the source maintaining maximum, continuous operations throughout the year. EPA attempts to justify this change with the suggestion at page 51929 of the Preamble that it is required by the Court's June 18, 1979, opinion. API submits that this proposed change is not only not required by the Court's decision, but it is inconsistent with the legislative intent.

To begin with, the Court in Alabama Power did not address the propriety of the language EPA now proposes to delete from the regulations; the issue was not raised by any of the parties in the litigation. The sole issue raised in challenge to the definition of "potential to emit" was EPA's requirement that emissions be calculated without regard to emission control equipment that would be installed. For the Court to have gone beyond that issue to set aside never-litigated, never-briefed provisions of the regulations would have been unprecedented and there is no real basis in the opinion for the assumption that the Court has done so.

EPA suggests that the Court "plainly" contemplated continuous, maximum operation, citing the Court's reference to "full design capacity." Alabama Power, 13 ERC at 1228. This reference cannot have the meaning EPA assigns to it, however, as the design capacity of most sources never contemplates continuous operations 24 hours a day, 365 days a year. A petroleum storage and transfer facility, for example, simply cannot operate with continuous loading and discharging of products, and it would be rank fantasy for the regulations to presume that it does.

Moreover, the Court emphasized that "the purpose of Congress was to require a permit before major amounts of emissions were released." 13 ERC at 1228. This follows from a number of references in the legislative history to the definitional sections of the Clean Air Act. The 1977 Senate Report, for example, emphasized that the PSD provisions would apply to "sources which will have significant total national emissions or emissions which may result in significant local problems." Sen. Rep. No. 95-127, 95th Cong., 1st Sess. 977 (1977) (emphasis added). Similarly, the 1977 House Report reflects an understanding of "design capacity" in terms of actual expected emissions, the report noting that "stationary sources emitting less than 100 tons per year would not be subject to State permit provisions." H. Rep. No. 95-294, 95th Cong. 2d Sess. 9 (1977) (emphasis added). As these statements make clear, Congress' concern was with actual emission levels to be expected from a source, not hypothetical emission rates that will never occur.

In a similar vein, Senator Domenici referred in the floor debates to the "new major sources" that would be subject to PSD review as:

principally power plants and refineries and that type of major emitters, contributing more than 100 tons of sulfur per year.

123 Cong. Rec. S.9255 (daily ed. June 9, 1977) (emphasis added). In addition, a "Nondegradation Factsheet" that Senator Muskie introduced into legislative record explained:

The provisions apply to "major emitting facilities" which emit over 100 tons of the pollutant per year and which are listed as a major emitting source category in the bill.

123 Cong. Rec. S.8917-21 (daily ed. June 6, 1977) (emphasis added). The Court thus saw that the concern of Congress was with actual emissions that will result from a source, not some theoretical emission level that, because of design limitations or permit requirements, will never exist in reality.

That this was in fact the Court's understanding on the matter is revealed by a number of comments from the Court during oral argument in Alabama Power. Thus, in response to the argument by counsel for EPA that Congress intended the measure for PSD applicability to be the maximum emissions a source is capable of without pollution controls, Judge Wilkey commented:

I myself don't see the logic of making calculation of who gets the permit on the basis of an operation which is not legally permitted, that the calculation of who gets the permit it seems to me should be on the standard, the basis on which the facility can legally operate, the maximum it can legally operate. And that is where the line is drawn.

Alabama Power Co., et al. v. Costle, Transcript of Oral Argument, p.224. Judge Wilkey then contrasted his understanding of how "potential to emit" should be calculated with his understanding of EPA's position, saying to counsel for the Government:

The new plant, you want to calculate it on the basis of a standard on which it is never going to be allowed to operate, that is, without controls, instead of calculating it on the basis of how it will actually operate, which is with controls.

Id. at 226 (emphasis added). Mr. Wyckoff, counsel for the Government, responded:

Well, that is correct, and, to a large extent, it is possible that Congress anticipated that many sources might operate at a lower level of emission control than was being legally required.

Id. The Government's position on the matter was rejected by the Court, thus confirming that actual operational emission levels was the test Congress had in mind.

Judge Leventhal concurred that actual operating emissions should control, saying, "If we are talking about pollution, I will look at this machine and say when operating how much pollution will it put out." *Id.* at 229. Judge Leventhal also understood that actual operating time would likely be less than continuous year-round operations, accounting for holidays and "a little down time - they always throw in a little down time, make life complicated." *Id.* at 230.

The Court has specifically rejected EPA's use of an unreal theoretical emission level (uncontrolled emissions) in determining a source's potential emissions. It would be plainly inconsistent with the intent of Congress, as interpreted by the Court's opinion, for the agency to fabricate yet another way to theorize potential emission levels that bear no resemblance to reality. If a source will not operate 24 hours a day, 365 days a year, if it will burn a limited amount of fuel, or if permit conditions otherwise limit the emission rate of the source, those limitations (whether resulting from practical operating considerations or permit requirements) should be taken into account in calculating the source's potential emissions. Nothing in the Court's opinion suggests otherwise.

Moreover, EPA's proposal to ignore the allowable emission level in this context conflicts with the agency's proposed rules for calculating offsets involved with "major modifications" by existing sources. Under proposed § 52.21(b)(2)(vi)(B), the starting point for calculating modification offsets would be the allowable emission level, not a higher potential emissions level. In this case, permit limitations on the source's emissions become all important, whereas any higher, maximum potential is irrelevant. In addition, the Preamble at page 51935 explains:

if a source has not been operating at full capacity for a significant part of the one-to two-year period, it is considered to be physically incapable of operating at full capacity and its emission reduction credit will be calculated based on its operation for the one-to two-year period.

The Agency is thus content to honor permit limitations or lower actual operating levels for purposes of measuring offsetting credits available to a source, but not for purposes of measuring a new source's potential to emit. The absurdity of this approach is illustrated by assuming that the new proposed source is identical to the offsetting source. Also assume that the offsetting source actually employs BACT and the proposed source would employ BACT. If the actual emissions from such a source are lower than the continuous year-round hypothetical emissions (as would almost always be the case for every conceivable kind of source), then a complete shutdown of the offsetting source would not produce enough offsets for the construction of the new source under EPA's proposal. There would be a "net emissions increase" on paper which would have to be further offset, even though there would be no actual increase in emissions.

This inconsistency in approach has the effect of subjecting more sources to PSD review, of course, but it is an inconsistency that cannot be reconciled with the Clean Air Act.

Further, as a matter of administrative policy, a PSD program based on actual emissions that can be expected, rather than the hypothetical maximum a source may be capable of, makes sense. This point was emphasized by the Texas Air Control Board in the following comments on EPA's previous proposal to include uncontrolled emissions in the calculation of a source's "potential to emit".

Specifically, we believe that the language in the Act that deals with potential emissions must be interpreted to mean the maximum emissions that a source will be allowed under the conditions of an operating permit or state regulations with appropriate controls installed and operable. Your current interpretation will cause dissipation of scarce agency resources on evaluation of sources that will have little impact on air quality.

Jt. App. 1299-1300 in Alabama Power (emphasis added). As this comment makes clear, a reference to "full design capacity" (as stated by the Court) is totally consistent with the concept of maximum capacity as allowed under the terms of an operating permit. For EPA to concern itself with emission levels beyond the permitted maximum is inaccurate, pointless and wasteful of administrative time and resources.

Finally, it should be emphasized that this issue is of more than academic interest to API and its members. The plants and facilities of API member companies are frequently subject to permit limitations on emissions mass rates, emission concentrations, hours of operation and volume of throughput. Specific examples of such limitations were presented at the October 18, 1979 Public Hearing in San Francisco by Mr. Bruce Beyaert on behalf of Chevron U.S.A., Inc. (P.R.T. 33-36; Exhibit, Examples A, B, C, D. Such limitations are typically imposed on steam generators used by oil producing companies at drilling sites, and on petroleum storage and transfer facilities as a means to limit daily throughput. Many of these permit limitations have been approved by EPA itself. If as the result of such restrictions a new facility will not exceed the 100 tons/250 tons thresholds of Section 169(1) of the Clean Air Act, then such a facility simply will not be a major emitting facility as contemplated by Congress for PSD control. Further, if as the result of such restrictions a new facility will exceed the 100 ton/250 ton thresholds of Section 169(1) of the Clean Air Act, then such a facility should be regulated only to the extent that it will actually emit and not be subject to additional control requirements on the basis of its hypothetical emissions. The hypothetical emissions of the source in the absence of such permit restrictions or in the absence of practical considerations that preclude continuous year-round operations are totally irrelevant to the actual emissions test and source requirements which Congress and the Court had in mind.

The irony is that before the Court's decision on the subject, when EPA was requiring the calculation of potential emissions without regard to the actual emission levels that would result with emission controls, the Agency nevertheless took into account permit limitations on operating hours and volume of material processed or consumed. Now that the Court has ruled that EPA was reaching too far in disregarding actual emission levels with controls, the Agency proposes to ignore the very constraints on emissions it was previously willing to count. API believes the agency's shift on this issue is illogical and it has no support in the Act, its legislative history or the Court's holding in Alabama Power.

2. GEOGRAPHIC APPLICABILITY OF PSD AND NONATTAINMENT REQUIREMENTS

At pages 51938-51941 of the Preamble, the Agency attempts to clarify the geographical applicability of the PSD and nonattainment requirements. Insofar as part of the proposal merely adopts the holding in Alabama Power which makes PSD required for sources in attainment areas or unclassifiable areas or any area which would significantly impact a clean air of another state, API has no comments. Nonetheless, API does have several comments on other aspects of the broad issue.

(a) sources in designated nonattainment areas - The Agency proposes to eliminate a feature of the existing regulations which would exempt sources in nonattainment areas from new source review if it could be shown that the proposed source would not significantly impact the specific point(s) of violation. Frankly, API does not comprehend how the existing provision, narrow as it is, would be "inequitable and contrary to the apparent statutory purpose." It's only "shortcoming" appears to be that it reflects common sense and some reasonable restraints on regulatory authority. Furthermore, the exemptions of clean air islands located within designated nonattainment areas from nonattainment requirements is not inconsistent with the fundamental position that § 107(d) designations are the antecedent and determinant of whether PSD or nonattainment regulations should apply.

If the Agency is concerned about the regulatory gap created by Alabama Power (which permits application of PSD to nonattainment areas in other states, but prevents its application to nonattainment areas in the same state) the areas of concern could always be redesignated. But in fact, no regulatory gap truly exists. In order to qualify for an exemption under the existing regulations, a source operator must perform air quality analyses which demonstrates the absence of a significant air quality impact. Any exemption which results, therefore, in designated nonattainment areas is the result of the application of nonattainment requirements coupled with the factual finding that no air quality impact would occur.

To the analysis above API would add that the Agency's own convictions are less than absolute, since the Agency appears willing to reconsider its proposal if the D. C. Circuit accepts the position set forth in the Agency's petition for reconsideration on the geographic applicability of PSD. Such considerations are wholly extraneous and make the Agency's present proposal patently arbitrary.

(b) sources in designated attainment and unclassifiable areas - At pages 51939-51940 the Agency discusses, without proposing any specific regulatory language, two relaxed alternatives to the Agency's present position that all nonattainment requirements, including restrictions on construction, extend beyond sources in designated nonattainment areas to include sources in designated attainment or unclassifiable areas whose emissions would impact any point in a nonattainment area.

The first alternative, apparently favored by the Agency, would extend the nonattainment requirements beyond sources in designated nonattainment areas to include only those sources in designated attainment or unclassifiable areas at sites where the standard is being actually violated. The second alternative would exempt all sources in designated attainment or unclassifiable areas from all nonattainment requirements.

Of the two alternatives, the second comports with API's basic position that § 107(d) designations are not mere guidelines but are the antecedent and determinant for regulation. Whether a source is subject to PSD or nonattainment regulations depends on the designation of the area within which it is located; to the extent a source in a designated attainment or unclassifiable area -- and therefore subject to PSD -- would cause or contribute to violations of a NAAQS in any other AQCR, § 165(a)(3)(B) clearly applies. But, recognizing this, it does not follow that any additional nonattainment requirements, including the restrictions on construction, should apply.

(c) VOC sources - API endorses the Agency's proposed elimination of the 36-hour rule for estimating the air quality impact of VOC sources. In API's March 19, 1979 written comments filed in connection with the emission offset ruling, API, as did many others, challenged the technical basis for such a rule.

3. RESTRICTION ON CONSTRUCTION IN NONATTAINMENT AREAS

At page 51956 of the Preamble, the Agency incorporates by reference its Emission Offset Interpretative Ruling. 40 C.F.R. Part 51, Appendix, Appendix S, as revised 44 Fed. Reg. 3283, and sets forth the Agency's position on the § 110(a)(2)(I) restriction on construction in nonattainment areas. As stated in API's written comments of July 27, 1979, filed in connection with the Agency's closely related proposed regulations of July 2, 1979 (44 Fed. Reg. 38471), API is of the firm conviction that the § 110(a)(2)(I) construction ban is not self-executing as the Agency maintains.

API submits that the construction ban applies only where there exists an approved SIP, or promulgated EPA substitute, which provides for such a ban. The requirements of Part D are indeed a necessary condition for SIP approval. But failure to submit a SIP which meets the Part D requirements does not by itself trigger the construction ban. Instead, only if a state refuses to enforce an approved SIP or after EPA promulgates its own substitute plan, does the construction ban come into effect.

In any event, there is no basis in the Clean Air Act for EPA's conclusion that offset credits should be totally denied to a source seeking to locate in an area subject to a construction ban. To begin with, the notion of a construction ban derives from § 110 (a) (2) (I) of the Act. That section states that no major stationary source may be constructed or modified in such an area:

if the emissions from such facility will cause or contribute to concentrations of any air pollutant for which a national ambient air quality standard is exceeded in such area....

A source simply will not cause or contribute to an ambient standard violation if its emissions would be offset. The statute thus clearly contemplates the crediting of offsets to such a source; the construction ban can only apply to those sources unable to offset their emissions with sufficient emission reductions.

Further, the allowance of offset credits in this context makes sound, practical sense. If a new source that would be replacing an old, dirty source cannot be built because no offsets can be credited to it, the replacement of the old with the new will not take place. This would be truly unfortunate, particularly if the replacement would have resulted in a net decrease in emissions. Such an obstacle to such replacements could never have been intended by Congress, and it should not be required by EPA.

4. DEFINITION OF SOURCE AND VARIABLE BUBBLE

The Court in Alabama Power concluded that the term "major modification", as intended by Congress, must have reference to a net increase in emissions from the source. As such, the source is to be viewed as encased in a "bubble": so long as increases in a pollutant caused by a modification at the source are offset by equivalent or greater decreases in that pollutant resulting from other changes at the source, new source review requirements do not apply. 13 ERC at 1232-33.

The Court further recognized that the significance of the bubble concept and the extent of its application in a given case would be largely dependent upon the agency's definition of the components of "stationary source". Id. at 21. To the extent "source" is defined narrowly, the smaller the bubble and the fewer the offsetting credits potentially available.

Under §§ 51.24(b)(4) and (5), 51.21(b)(4) and (5) of the proposed regulations EPA proposes to define "source" in two different ways. For purposes of the PSD requirements, EPA proposes that "source" means any grouping of structures, buildings, facilities or installations "which are located on one or more contiguous or adjacent properties which are owned or operated by the same persons." EPA explains at page 51931 that this definition applies the PSD requirements "to the largest industrial grouping that, as a practical matter, industry and the reviewing authorities can reasonably deal with as a single unit."

For purposes of the nonattainment rules, on the other hand, EPA proposes at page 51932 to define "source" both as an entire plant and as a separate piece of process equipment. Under this proposal, a source will be subject to both a big bubble and a little bubble, requiring not only that there be no net emission increases from the plant, but also that there be offsetting emission reductions within the individual piece of equipment being installed or modified.

The Court in Alabama Power cautioned that in defining "source" under the various provisions of the Clean Air Act, "the definitions applicable to each set of provisions must be reasonably appropriate for the purposes of those sections." 13 ERC at 1229 n. 13. In the context of the nonattainment provisions, API submits that small, individualized bubbles for each piece of process equipment are not appropriate for the purpose of the nonattainment rules - compliance with ambient air quality standards.

As noted by the Court in Alabama Power, the policy basis supporting the use of a bubble is the incentive it provides industry "to upgrade the quality of air pollution control technology employed in each facility." 13 ERC at 21. As EPA itself has noted at page 5132 of the Preamble:

[p]roviding industry with the offset option will facilitate upgrading of production capacity, and encourage application of improved controls to obtain offsets. Permitting plant-wide use of offsets provides the greatest opportunity for both of these desirable results.

The encouraged application of improved emission controls is desirable, of course, both for clean air areas and for nonattainment areas. Where a small bubble is imposed, however, the incentive to upgrade control technology will be substantially reduced, as the creation of offsets at the piece of equipment itself may be impossible and the cost and time involved with a full-scale new source review as a precondition for a permit may not be worth the effort. The result would be no upgrading of existing facilities and no application of improved control techniques.

EPA suggests, nevertheless, at page 51932 that a plant-wide bubble only holds emissions constant, whereas the nonattainment provisions require a positive reduction in emissions. This is an overgeneralization, of course, as plant-wide offsets can and often do result in net reduction of emissions. The overriding consideration should be whether the net emission changes at the plant increase environmental damage. If they do, then the modification (with the improved production capacity and control technology it brings) should be allowed, whether the offsets result from the modified equipment itself or from elsewhere in the plant. In any event, where plant-wide offsets produce a net reduction in emissions from the plant, the purpose of the nonattainment provisions is fully served and there is no justification for employing any bubble other than the plant-wide bubble.

5. BASELINE CONCENTRATION

In responding to the Court's holding that the baseline for calculating PSD increments must be the date of filing of the first PSD permit application in the relevant area, EPA has raised the question of the appropriate geographic boundaries of the area for which the baseline is established. The Agency proposes to answer this question by applying the baseline for the Air Quality Control Region (AQCR) in which the source is or is to be located to "every part" of that AQCR that has been designated as "unclassifiable" or "attainment" under § 107 (d)(1)(D) or (E) of the Clean Air Act. 44 Fed. Reg. 51941, 51949, 51953 (Sept. 5, 1979). EPA also raises the possibility of affording the states flexibility to define the baseline area more broadly, such as the entire AQCR or the entire state, or more narrowly, such as the area of the source's impact.

API submits that the baseline should be established only for the area significantly impacted by the permit applicant, not for areas of the AQCR or the state unaffected by the permit applicant. Such a rule would be compatible with the Clean Air Act and would facilitate a permitting program that is workable and far less complicated than EPA's proposal.

To begin with, the Clean Air Act speaks in terms of "baseline concentration" not "baseline date". § 169(4) of the Act provides that "baseline concentration" means:

...with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. (emphasis added).

As the underscored language indicates, the focus of the definition is on ambient concentration of the clean air areas in which the source will be located, nothing more. The statutory language provides no basis for keying the baseline concentration to AQCR boundaries, state line boundaries, or any geographic boundary other than the particular clean air area which the source affects.

Moreover, it simply does not follow, as EPA suggests, that the establishment of a uniform baseline data throughout all clean air areas of an AQCR, whether significantly impacted by the source or not, would "minimize... the administrative problems that would result from the profusion of different baseline starting points in the same AQCR." 44 Fed. Reg. 51942, col.1. Like the uniform August 7, 1977, baseline data approach

invalidated in Alabama Power, a uniform AQCR baseline date determination would increase the administrative complexity and prove more costly and less accurate than a program that fixes baseline concentration on a source by source basis in accordance with measured air quality in the area of impact by the source, as API proposes.

To illustrate, assume Source A submits in 1980 the first application to construct a major new source in a given AQCR. That application will include monitoring data and modeling projections out to the predicted geographic limits of the source's significant impact on air quality. As Congress and EPA both recognize no legitimate purpose would be served by requiring the source to undertake costly monitoring and modeling beyond that area of impact, and nothing in the Clean Air Act or Sound Air Pollution Control Policy requires that it be done.

Next, assume that in 1985 (5 years later) Source B applies to locate in the same AQCR that is not impacted by Source A. Source B will be required to monitor and model with respect to its projected area of significant impact, thereby establishing the baseline concentration for that area.

If EPA's proposal was in effect, however, the baseline for all clean air areas in the AQCR, including the area where Source B expects to locate, would have been established by Source A back in 1980. As such, Source B would be required to do what may be a practical impossibility, and will certainly be very inaccurate, to step back in time 5 years and reconstruct the ambient concentrations of air pollution that existed in Source B's impact area in 1980. Source A's 1980 monitoring data would be of no help to Source B, as that data would have related only to the area of the AQCR significantly impacted by Source A. In the absence of comprehensive EPA or state monitoring data, Source B would simply be unable to determine for its area of impact the baseline concentration as of the earlier baseline date as fixed by Source A.

The severity of this problem would depend upon the nature and extent of growth that occurs in the AQCR between 1980 and 1985. The alternatives could be (i) fast, positive growth, as in the case of a new suburb (new since 1980) of a fast-growing metropolitan area, with new housing developments, highways and supporting small industry; (ii) slow, positive growth, as in the case of an existing suburb already established in 1980, adjacent to a metropolitan area; and (iii) negative growth, as in the case of an agricultural area that is experiencing declining productivity.

In case (i), where fast, positive growth has been experienced, Source B would have the impossible task of, first, identifying the contributing sources (including highways and housing developments) of present concentrations of air pollution in its area, determining whether

those sources were constructed prior to or after 1980, and measuring the relative contribution those sources have made to ambient concentration levels. EPA has offered no guidance in its proposal as to how this might be done, and the prospect of trying to reconstruct ambient levels that existed in such an area 5 years ago would be an administrative nightmare. The problem would be aggravated, of course, to the extent Source B's entry into the AQCR is separated from Source A's entry, not by 5 years but by 10 or 20 years or more.

Estimating the 1980 baseline in case (ii), where slow, positive growth has been experienced, might be easier, but considerable difficulties would be encountered even under the simplest of assumptions. Even if only 3 minor sources have been constructed in the area in the 5 year period, Source B still has the problem of identifying those sources, determining their dates of construction, and estimating their relative contributions to present ambient levels. Assuming that these facts could be determined, Source B would then have to work back from 1985 concentration levels, subtracting out minor sources that have been constructed since 1980, in an attempt to estimate concentration levels that existed in the area in 1980. Such an estimate, even with the best computer assistance, is likely to be but a rough approximation. This chore is made all the more difficult by the fact that any such other minor sources in the area will be exempt from PSD and may be virtually impossible to locate and identify.

Case (iii), where negative growth has been experienced, would present the same problems in reverse. Source B would begin by measuring ambient concentrations in its anticipated area of impact in 1985, and add to that concentration estimated emissions from sources (both major and minor) which would have ceased impacting on the area since the 1980 baseline date set by Source A. Even if this could be done, the result would be a baseline concentration higher than 1985 ambient levels, and conceivably higher than ambient levels that will exist after Source B is operative. The excess baseline, together with the allowable PSD increment on top of that baseline, could afford substantial industrial growth in the area. That Congress did not intend such a loophole is obvious.

By contrast, a system which establishes baseline concentrations only in accordance with a source's significant area of impact would be simple, accurate and straight-forward to administer. An applicant would monitor and model its anticipated area of impact; if that area has previously been impacted by a PSD source, the baseline concentration for that area will have been determined by the monitoring data presented by the earlier source at the time of its PSD permit application. If only a portion of the second source's impact area has been impacted by an earlier PSD source, then only that portion would be subject to the baseline concentration established by the earlier source; the remainder of the area would have a baseline concentration as measured and established at the time of the second source's application. Such a system would be far more consistent with the Clean Air Act than EPA's proposal, and it would assure vastly greater accuracy and ease in administration.

Finally, API believes it important that the regulations make clear the fact that baseline concentrations are to be established on a pollutant by pollutant basis. The Preamble to EPA's proposal states that when a major new source or modification "for any pollutant regulated under the Act" applies for a PSD permit, "it establishes the baseline date for both PM and SO₂". 44 Fed. Reg. 51941, col. 3. API submits that this cannot follow under the clear terms of the Clean Air Act, as § 169(4) speaks in terms of the baseline concentration "with respect to a pollutant", not all PSD pollutants. Accordingly, a new source that would emit PM but not SO₂ should be deemed to establish the baseline concentrations only for PM in the area of the source's impact, but not for SO₂. Any other requirement of the regulations would simply be contrary to the statutory terms and would cause the administrative and technical problems outlined above.

6. DE MINIMIS EXEMPTIONS

At page 51937 of the Preamble the Agency proposes that de minimis levels be employed as the basis for exempting qualifying sources from PSD review. API endorses the concept of an exemption based on de minimis levels as a sound and logical exercise of the Agency's discretion and because of its clear consistency with the Alabama Power decision.

However, upon examination of the particular de minimis levels prescribed for each pollutant in Table 1 and the corresponding significance levels in Table 2, it is API's preliminary conclusion that the de minimis levels and significance levels, for at least certain pollutants, have been set unreasonably and arbitrarily too low from a monitoring, modeling, and public health and welfare standpoint.

In this regard, as indicated in API's October 18 testimony, API has authorized extensive consulting work on this issue. This work is being conducted on an expedited basis and the results will be a substantial part of supplemental API submission on or before November 18.

7. FUGITIVE EMISSIONS

Citing the express terms of § 302(j), the Court in Alabama Power held that fugitive emissions may be included in the calculation of annual tonnage thresholds for "major" sources under § 169(1) "only if and when EPA issues an appropriate legislative rule." 13 ERC at 1231. Noting the "special problems presented in the regulation of sources where the predominant emissions are fugitive," id., the Court proceeded to state that the "requisite rulemaking gives flexibility to provide industry-by-industry consideration and the appropriate tailoring of coverage." Id.

Rather than the selective, industry-by-industry rulemaking the Court clearly intended, EPA proposes simply to state summarily in the regulations that fugitive emissions from any of 26 categories of sources (basically the same sources listed in § 169(1) of the Act)* or from any source regulated under § 111 or § 112 of the Act are to be counted in the calculation of the "major" source thresholds. 44 Fed. Reg. 51931, 51948, 51952. This gives lip service to the legislative rulemaking Congress and the Court had in mind, as they clearly contemplated a selective, discriminating analysis by the agency of the peculiar characteristics and problems associated with fugitive emissions as they vary from one source category to another. What is required for fugitive emissions rulemaking, no less than for any other subject of administrative rulemaking, is a "hard look at the salient problems" and "reasoned decision-making." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). EPA's proposed approach to fugitive emissions is a far cry from the "hard look" analysis required.

At page 41931 of the Preamble the Agency attempts to justify its feeble attempt at compliance with Alabama Power by suggesting that "its experience in quantifying the 'fugitive emissions' from such sources is, in general, greater than its experience in quantifying such emissions from other sources." The petroleum industry is aware of some work that has been done in connection with the fugitive emissions of certain pollutants at certain facilities or types of equipment with certain categories

* The 2 lists, while first appearing to be identical, are not. §169(1) includes a number of qualifying limits on the source categories (e.g., only petroleum storage facilities with capacity exceeding 300,000 barrels are "major"); whereas EPA's proposed list of covered fugitive emissions sources does not. At the very least, the 2 lists should be identical.

of sources, but the industry's experience with such work is that it is woefully inadequate as an accurate quantification guide for all fugitive emissions from the referenced source categories. Further, API is unaware of any body of information that could support the sweeping proposal offered by the Agency. Given this state of ignorance and the injunction of the Court in Alabama Power, it would be more appropriate at this time for EPA to issue an advance notice of proposed rulemaking on fugitive emissions, listing the specific questions and issues that need to be addressed in an appropriate rulemaking on the subject.

* API is aware that Radian has recently completed a study for EPA that suggests a basis for estimating fugitive emissions of volatile organic compounds from valves and flanges. This does not mean, however, that sufficient information is available to predict the fugitive emissions of all other regulated pollutants from all other pieces of equipment located within a petroleum refinery.

In the case of chemical process plants, another source category EPA has listed, there are no reasonable data base and methodologies for predicting even emission of volatile organic compounds from valves and flanges.

EPA references its publication AP-42. It is well known to those with experience, however, that the emission factors in AP-42 are, in most cases, based on limited factual data and are highly inaccurate. Indeed, at a November, 1978, workshop sponsored by the West Coast Section and the Technical Counsel of the Air Pollution Control Association, a consensus was reached among participating industry, government and consulting experts that a disclaimer as to the accuracy of AP-42, which had been previously purged by EPA, should be reinstated in the document.

8. FUGITIVE DUST

In a like manner, API cannot accept the Agency's summary disposition of the fugitive dust issue. Whereas the Agency would summarily include fugitive emissions for purposes of PSD review, the Agency at page 51931 of the Preamble would summarily exclude fugitive dust from consideration for an exemption from PSD review.

Although the Court in Alabama Power vacated the Agency's generalized exemption for fugitive dust, it also held that the Agency "has latitude, on remand, to accomplish its objective through appropriate rule-making." 13 ERC 1231. But contrary to this holding the Agency would abruptly eliminate the existing fugitive dust exemption in not only the PSD regulations, but under the emission offset ruling as well.

In our view, such precipitous action is wholly unnecessary. Instead the Agency should undertake a reasoned appraisal of the situation, soliciting comments on specific items that it deems relevant to a final disposition of the fugitive dust issue.

9. SECONDARY EMISSIONS

At page 51947 of the Preamble and under § 51.24(b)(20) and 52.21(b)(20) of the proposed regulations, the Agency proposes to include secondary emissions within the scope of the PSD regulations as it had previously done in connection with nonattainment areas under the emission offset ruling at 44 FR 3274 (January 16, 1979).

API understands that secondary emissions, even if included, would not count for determination of potential to emit but would be taken into account for assessing violation of an increment or standard, at least where "well known and quantifiable."

For this reason, API would incorporate by reference its earlier objections to the incorporation of secondary emissions in the emission offset ruling. These comments are set forth at pages 8-9 of API's written comments of March 19, 1979 on the emission offset ruling, a copy of which is enclosed as Appendix B.

10. MODIFICATION

At pages 51934-51937 of the Preamble the Agency treats several aspects of the modification issue.

(a) no net increase - In the discussion of "contemporaneous reductions" at page 51934 the Agency takes the position that "only an actual change that reduces design capacity can be credited as an offset in calculating whether a net increase has occurred." This makes sense but, as indicated above in our comments on potential to emit, is inconsistent with the Agency's position that "potential to emit" should be calculated using the presumption of continuous 24 hour day, 365 days a year operation. If it makes sense to consider only actual changes for determining whether a net increase has occurred, it also makes sense to consider actual operations for calculating potential to emit.

At page 51935 the Agency also takes the position that the phrase "contemporaneous reductions" should be given a practical interpretation and not denote simultaneous offsetting. Since simultaneous offsetting is only possible in the rarest of situations, API concurs with the Agency's construction of the phrase.

(b) emission offset baseline - In the Preamble at page 51935 the Agency's double standard on allowable emissions again emerges. As emissions reductions required under an SIP do not qualify for credit as emission offsets, the Agency should not presume for purposes of determining "potential to emit" that unlawful emission reductions will be emitted.

In the Preamble at 51936 the Agency also alludes to the "problem" associated with crediting efforts under the scheme proposed by EPA. In the Agency's view, it appears that there is a possible incentive to seek a loose BACT requirement in order to lay an early claim to an excess amount of the increment; upon altering the proposal and tightening BACT the slack would then be used to offset future expansion without full PSD review. In this case the Agency is engaging in flight of speculative fantasy and forgets that the Agency itself -- or a state agency -- is making the BACT determination. To recognize this and maintain this fear implies an intent to deceive on the applicant's part and suggests that the Agency has no confidence in the intelligence and fairness it brings to bear on BACT determination. The loose BACT "problem" is a phantom and should not bring about any change in the regulations.

(c) restriction on construction - At page 51936 of the Preamble EPA solicits comments on two alternatives involving the statutory restrictions on construction. Under the first alternative, the bubble concept would be wholly inapplicable in all areas subject to construction restrictions. Under the second alternative, the bubble concept would have limited applicability in all areas subject to construction restrictions, i.e. the bubble would be applicable if RACT were applied.

Of the two alternatives, the second is clearly more reasonable. In fact, the second alternative would be even more reasonable if it were restricted only to RACT measures required at the time of the new source application to meet the applicable SIP RFP requirement.

However, it is also API's legal position that the restrictions on construction are not self-executing, as EPA suggests, and that the restrictions on construction are limited to nonattainment areas.

11. INNOVATIVE TECHNOLOGY

EPA proposes to revise the PSD regulations in order to accommodate the installation by sources of innovative technologies to control emissions. Such sources can now seek waivers from New Source Performance Standards under § 111 (j) of the Clean Air Act, but there is as yet no administrative mechanism under which such waivers may be taken into account under the PSD program. As EPA explains:

Since a large number of NSPS sources are also subject to PSD, the Administrator is concerned that failure to accommodate § 111 (j) sources under PSD would tend to discourage the development of newer, more effective control technologies.

44 Fed. Reg. 51946, col. 1 (Sept. 5, 1979). API agrees and endorses the Agency's proposals (i) to define as BACT for a source that has received a § 111(j) waiver the innovative technology that source is installing; (ii) to permit the source to model its projected emissions as though the innovative technology will be installed and operative at the time the plant is completed; and (iii) to extend the foregoing provisions to sources which may not be eligible for § 111(j) waivers (because they are not subject to NSPS) but which EPA determines (with the consent of the Governors of the affected states) are in fact installing innovative technologies.

The need for special incentives to industry to explore innovative methods for controlling pollution was emphasized in the Congressional debates of the Clean Air Act Amendments. Senator Benson, for example, said during the 1976 debates:

In writing the 1970 act, the Congress established a mechanism for pollution abatement with both firm deadlines and stringent emission limitations. Both were needed to accomplish the emissions reductions which have already been achieved. They have, moreover, encouraged industry to undertake a major research effort to develop more effective and less costly technologies.

As with any research and development effort, however, progress is not always smooth, uninterrupted or without setback. Promising leads often have had to be abandoned and new possibilities pursued. This is the very nature of invention.

122 Cong. Rec. S. 11152 (Aug. 4, 1976).

Similarly, Senator Buckley endorsed the concept of a special waiver for innovative technologies, explaining:

...I would like to stress that I see this provision as no more than Congress honoring its commitment to those who have undertaken research efforts as a result of the passage of the 1970 amendments to the Clean Air Act....The committee amendments acknowledge the extra time needed to bring some emerging technologies to fruition.

122 Cong. Rec. S. 13352-53 (Aug. 4, 1976).

Likewise, the 1977 House Committee Report emphasized that the absence of relief for innovative technology "could potentially have the unfortunate effect of locking in existing technology and stifling development of new improved technologies." H. Rep. No. 95-294, 95th Cong., 1st Sess. at 196 (1977).

Congress' specific response to these concerns was the enactment in § 111(j) of the Act of a mechanism for administrative waivers from New Source Performance Standards. But Congress did not intend to limit such relief to NSPS waivers, as is evident from the provision in § 113(d)(4) for the issuance of delayed compliance orders to existing sources installing innovative technology, and from the directive in the PSD provisions of the Act (§ 169(3)) that the permitting authority, in determining BACT for a source, should consider "available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant."

Moreover, a construction of the Clean Air Act that prohibits EPA from affording the proposed PSD relief to new sources installing innovative technology would create an anomaly Congress clearly did not intend -- rather than encouraging new sources to develop and install innovative and more effective means of emission control, the Act would in fact discourage such innovation through the fear of a PSD violation. EPA's proposal with regard to innovative technologies would avoid this anomaly in a manner totally consistent with Congress' will. That the Agency has authority for such a proposal is now clear.

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.

Morton v. Ruiz, 415 U.S. 199, 231 (1974). Accord, Citizens to Save Spencer County v. United States Environmental Protection Agency, 12 ERC 1961 (D.C. Cir. 1979) (citing EPA's general rule - making authority under § 301(a)(1) of the Clean Air Act to reconcile seemingly conflicting provisions of the Act).

1.2. AMBIENT MONITORING

(a) pre-construction monitoring - At page 51943 of the Preamble and § 51.24(n)(1) of the proposed regulations the Agency attempts to respond to the increased pre-construction monitoring called for by Alabama Power. API has two concerns here.

First, if the de minimis levels have a rational basis and are to mean anything at all, it seems wholly unnecessary for the Agency to undertake a case-by-case analysis of situations and perhaps require monitoring data where sources impact a Class I area, even though modeling shows that the de minimis levels will not be exceeded. This is especially true when one considers the inherent conservatism of EPA-approved models.

Second, the Agency takes the position that where monitoring technology does not exist for certain pollutants, modeling may be required. In this regard, as previously noted, API has authorized consulting work in connection with the proposed de minimis levels. This work includes a consideration of certain non-criteria pollutants and an assessment of state-of-the-art modeling and monitoring techniques. The results of this work will be a part of API's supplemental submission on or before November 18.

(b) post-construction monitoring - At page 51943 of the Preamble and under § 51.24(n)(2) of the proposed regulations, the Agency proposes to require post-construction on a discretionary basis, but directed principally at very large sources (e.g. refineries, power plants, etc.)

API endorses the selective requirement of post-construction and would only emphasize that post-construction monitoring may in some cases be essential to track increment consumption which would generally be expected to be less than that predicted if EPA-approved models are employed.

13. BEST AVAILABLE CONTROL TECHNOLOGY

At pages 51942-51943 of the Preamble the Agency would adopt the holding in Alabama Power that BACT be applied to every pollutant regulated even though only some pollutants triggered PSD review.

However, the Agency goes on to suggest that "closely tailored de minimis exemptions may be unnecessary, since in setting BACT, the permitting authority may take into account the relative costs of the various control alternatives." API's only comment here is that BACT does have the identified flexibility; however, sensibly selected de minimis levels can operate to avoid a lot of costly, arbitrary, case-by-case review.

14. PSD SIP REVISIONS

(a) equivalent state programs - At page 51945 of the Preamble the Agency proposes that the states be afforded more flexibility in assembling PSD programs. Although state alternatives would be prescribed for some items (e.g. increments), alternatives would be allowable for many other items (e.g. banking). Overall program equivalence would be based on the ability of the state program to capture as many emissions if no alternatives were employed. API concurs in this proposal.

(b) baseline area - At page 51945 of the Preamble the Agency proposes that states be given latitude in defining "area subject to this part" for purposes of PSD.

As noted above, API is of the firm conviction that upon the filing of the first PSD application in an "area subject to this part" ought not to trigger the baseline for the entire AQCR within which the source would be located but only for an area more nearly associated with the actual impact of the source. Thus, the prospect of having a state permitted to expand "area subject to this part" to embrace an entire state is from API's perspective wholly inappropriate.

On the other hand, there may be in some instances an appropriate scheme of a priori AQCR subdivision which reasonably reflects the zone of projected area quality impact associated with a proposed source. The number and diversity of sources expected within an area would bear on the final choice.

15. NOTIFICATION

At page 51944 of the Preamble and under Section 51.24(v) of the proposed regulations, the Agency proposes to implement a preconstruction notification system. The rationale for this scheme is that the new definitions of "potential to emit" and "modification" have radically shrunk the population of sources to be controlled and increased the opportunity for mistakes or evasion of control. Even if there were some basis for the Agency's rationale, the Institute has several concerns about the proposal.

First, the Agency's reliance on Section 114 as the basis for the proposed regulation is misplaced. By imposing a monolithic notification requirement on all source operations by regulation, the Agency tends to undercut the confidentiality provisions of Section 114(c). Requests for information of the type sought by the Agency should emanate from a reasonable belief that PSD regulation is called for and are best handled on a case-by-case basis.

Second, the Agency's proposal casts many source operators into the burdensome situation of proving obvious non-violations. Proving obvious non-violations is just unnecessary and causes the generation of yet another layer of paperwork having only speculative benefits. There is no reasonable basis for superimposing a registration process on the existing and already clogged permitting process.

Third, the proposal doesn't square with Alabama Power. In Alabama Power the Court rejected a feature of the existing PSD regulations which would "restrict in certain respects the ability of the emitter to make such offsetting changes without permission" finding that such restrictions are "beyond EPA's statutory authority." 13 ERC 1233. The same rationale applies equally here.

Fourth, the Agency's notion of coupling the notification requirement for PSD sources with the section 173 requirement for nonattainment sources is wholly inappropriate. The section 173 notification requirement is a special creature of the Congress, involves some extraordinary requirements and cannot lawfully be extended to PSD sources. Moreover, the section 173 requirement applies only to new or modified major stationary sources, whereas at page 51944 of the Preamble the Agency would have it apply to non-major sources as well.

Fifth, absent a sound statutory or practical basis for the notification proposal it follows that failure to comply with the notification requirement should not constitute an SIP violation.

16. TRANSITION

EPA proposes that the revised regulations will be made effective upon promulgation and that they will be applicable to covered sources that have not filed a completed PSD application at that time. By the same token the Agency proposes that any source that has already filed a completed PSD application or that does so prior to the final promulgation of the revisions will be subject to the existing PSD rules, not the revised ones.

These proposals would facilitate transition to the new rules, minimizing confusion that frequently exists with major revisions to existing rules, and avoiding a permitting moratorium during the period of the transition. API supports these regulatory objectives.

A special problem exists, however, with reference to sources that are issued permits under the existing rules but would not be subject to PSD requirements under the revised rules. As to such sources, EPA proposes at page 51927 of the preamble that the existing permit would remain in effect, but that the source could apply for a rescission of the permit within 90 days after the revised rules take effect. In making such application, the source would have the burden of demonstrating that the PSD permit requirements do not apply to it under the revised regulations, a situation not unlike that created for all sources under the proposed notification requirements treated in the previous section of these comments.

For the most part, the proposed revisions to the PSD regulations are in response to the Court's holding that portions of the June 19, 1978, regulations were beyond the Agency's authority under the Clean Air Act. As the result of the EPA's definition of "potential to emit", for example, the Court held that 1978 regulations covered more sources than Congress had intended. As to such a source, API questions the appropriateness of placing the burden on the source to apply for rescission of its permit and of requiring that applicant to demonstrate that it is not subject to PSD. If Congress never intended such a source to be subject to PSD review in the first place, then that source should have no application or burden of proof requirements whatsoever; its existing PSD permit should be rescinded by operation of law automatically upon promulgation of the revised regulations.

Particularly objectionable is the proposal that if the source does not apply to rescind the permit within 90 days, the permit will remain effective. Again, if Congress never intended the source to be subject to PSD permit requirements, the source should not be held to an arbitrary time period for seeking the permit's revocation. At the very least, such an arbitrary cut off period should be extended to a minimum of 180 days (rather than the proposed 90) so as to afford plant operators, who usually have many varied responsibilities, sufficient time to prepare their applications for rescission.

17. PORTABLE FACILITIES

At page 51947 of the Preamble and §§ 51.24(i)(4) and 52.21 (i)(10) proposed regulations, the Agency proposes to substitute for the existing 30 day notice requirement for relocation of portable facilities, the requirement of notice within a reasonable amount of time to be not less than 10 days. API endorses such an amendment since it better reflects operating conditions within the petroleum industry.

18. ECONOMIC IMPACT ASSESSMENT

At page 51947 of the Preamble the Agency identifies several reasons why no economic impact assessment under Section 317 or regulatory analysis under Executive Order 12044 has been prepared. Although the Agency proceeds to explain that such analyses will be undertaken once the final opinions in Alabama Power are issued, API is hopeful that the public will have sufficient time for adequate review of this important regulatory step.

American Petroleum Institute
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202/637-7226

March 19, 1979


Mr. D. Kent Berry
Offices of Air Quality Planning
and Standards
Environmental Protection Agency
Mail Drop 11
Research Triangle Park, NC 27711

RE: Comments of the American Petroleum Institute
on Part 51 - Requirements for Preparation,
Adoption, and Submittal of Implementation
Plans: Emission Offset Interpretative
Ruling, 44 FR 3274-3285, 3298-3299
(January 16, 1979).

Dear Mr. Berry:

By letter dated February 15, 1979, API submitted to you written comments directed at the three items (question nos. 7-9) listed in the January 16, 1979, Federal Register notice for which comments were due no later than February 15, 1979. By this letter API submits its written comments on the remaining six items (questions nos. 1-6) listed in the January 16, 1979 Federal Register for which comments are due no later than March 19, 1979 (Part A) as well as some additional issues (Part B). These comments form the attachment to this letter.

Sincerely,


Daniel B. Rathbun

COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE
ON EPA'S EMISSION OFFSET INTERPRETATIVE RULING

44 FR 3274-3285, 3298-3299
(January 16, 1979)

March 19, 1979

A. COMMENTS ON ISSUES IDENTIFIED BY EPA.

1. Major VOC Sources: Geographic Applicability of Ruling and the Area Where Offsets May Be Obtained

At Section II.C the Ruling states that "VOC sources locating within 36 hours travel time (under wind conditions associated with concentrations associated exceeding the NAAQS for oxidants) of a nonattainment monitor shall also be subject to § IV of this Ruling." As a general matter, more fully discussed under issue B-1 below, API is of the firm conviction that the Ruling should not and lawfully cannot be applied to any source located outside a nonattainment area.

More specifically, API regards the 36-hour travel time criterion, which serves as the basis for the presumption that Condition 4 (positive net air quality benefit in the affected area) applies, as unduly conservative, without any sound technical basis, and therefore completely arbitrary.

The 36-hour travel time criterion reflects no reasonable allowance for the meteorological conditions that play such a central role in the air pollution problems of individual nonattainment areas. Nor does EPA distinguish between the roles of ground level versus elevated winds in inter-basin pollutant transport.

For these and other reasons the 36-hour travel time criterion needs to be reassessed. Relevant to the assessment are materials generated by API within the last few years; these include:

Exhibit 1: L.G. Polgar, "Commentary on the U.S. Environmental Protection Agency's Interim Guideline on Air Quality Modeling, American Petroleum Institute, January 31, 1978.

Exhibit 2: Greenfield, Attaway & Tyler, Inc., "An Examination of the Accuracy and Adequacy of Air Quality Models and Monitoring Data For Use in Assessing the Impact of EPA Significant Deterioration Regulations on Energy Developments," August 8, 1975.

Exhibit 3: Systems Applications, Inc., "An Evaluation of Methodologies for Assessing the Impact of Oxidant Control Strategies," August 24, 1976.

Exhibit 4: Systems Applications, Inc., "A Commentary on the Analysis of Control Measures Required to Achieve Compliance with the National Ambient Air Quality Standards," May 24, 1977.

Exhibit 5: "Industry Petitioners Brief on Modeling," (U.S. Court of Appeals for the District of Columbia Circuit, Nos. 78-1006 and Consolidated Cases), December 19, 1978.

At §IV.D. the Ruling states that "offsets may be obtained from sources located anywhere in the broad vicinity of the proposed new source" with the additional specification that "[g]enerally, offsets will be acceptable if obtained from within the same AQCR as the new source or from other areas which may be contributing to the oxidant problem at the proposed new source location." Furthermore, §IV.D states that offsets associated with distant sources should be proportionately reduced and that before such offsets are accepted there is a showing that nearby offsets were investigated and reasonable alternatives were not available.

In API's view VOC and NO_x offsets should be allowed without question from existing sources anywhere within the air basin. This is consistent with EPA's sanctioned control strategies for use in developing State Implementation Plans. Moreover, given the absence of reliable means of determining the downstream impact of VOC and NO_x emissions, emissions from distant sources within the air basin should not be subject to proportionate reduction for offset purposes.

2. Criteria for Determination of Entity Control/Cross Compliance Penalty

At §IV.A. Condition 2, the revised Emission Offset Ruling reflects the common control/cross compliance permit requirement of the CAA §173.

As to the "common control" aspect of this requirement, API is of the view that the phraseology "owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the applicant)" will acquire a clearer meaning only through case-by-case determinations. The problem lies not with the term "operated" but with the companion terms "owned" and, especially, "controlled" which in a variety of contexts are the subject of extensive and continuing litigation. The issue of "control", for example, arises in many areas of corporate law, insurance law, anti-trust law and domestic relations law under many statutes and regulations. The issue is decided in those areas differently depending upon the policies involved.

We strongly feel that the EPA should be guided in its control determinations by sensible Clean Air Act policies. For example, we strongly oppose EPA's example of a criteria for determining issues of control that any person with a 10 per cent voting interest might be deemed to control the entity. We do not believe that Congress's purpose in enacting §173(3) will be served by setting arbitrary percentage limits to determine such an important control question. Instead, we think that Congress clearly had in mind regulating only on the basis of actual authority to make major emission-control decisions. Certainly, only those with real power to make compliance decisions should be penalized for noncompliance.

Even this test is very disturbing, though, because it would subject minority equity interests to an extremely severe penalty based upon the actions of majority controlling interests. Another kind of approach that might be considered would be an "instrumentality" test under which control would not refer to majority stock control but would require such a domination of finances, policies and practices that the controlled corporation has no separate existence of its own but is simply a business conduit for its principal (see *Fletcher Cyc Corp* (Perm Ed.) § 43 (1974 Rev. Ed.)).

As to the cross compliance aspect of this requirement, API endorses the use of certification as the means by which an applicant is to demonstrate compliance. However, the Emission Offset Ruling might be clarified to specify that only established non-compliance need be considered in the course of certification. If alleged noncompliance precludes the required certification, the siting of sources and the permit process stand subject to delays on the basis of even suggestions of noncompliance. To illustrate, one API member recently received a letter from a Regional enforcement officer claiming that two gauge ports on a tank were leaking VOC in violation of an EPA-approved rule. It took six weeks for the member to persuade EPA to reverse itself on that claim and determine that its claim was invalid. However, under EPA's language, the company could have been prevented from obtaining construction permits state-wide for six weeks.

This example not only illustrates the extreme harshness and possible illegality of the provision but also shows its inflexibility. All other noncompliance penalties can be carefully controlled to achieve agency enforcement policies. By contrast, absent some clarification in the regulations, this new penalty could apply automatically without any enforcement discretion regardless of the magnitude, duration or impact of the violation. For example, if the violation has occurred in another air basin, it may be a violation of a rule which has been rejected for the air basin where the new source is to be built; the kind of violation may be one which you would choose not to penalize or would penalize lightly; or the violation may only be alleged and the allegation may be one which your staff would not make in the circumstances.

Also, the term "schedule" is not defined in the Ruling and could refer to a variety of legal devices. At the very least, the applicant for a new source permit should not have to wait from the time a violation is found until a schedule is approved to construct any new sources. Many delays before approval could be entirely beyond the applicant's control.

We think that many of these problems could be avoided by adding some certainty to the term "compliance". For example, an applicant should be able to satisfy this requirement by certifying on the date a complete application is filed that each existing major

source subject to Condition 2 satisfies one of the following requirements on such date:

- a. Such existing source is not subject to any final civil or criminal judgment by any State court or Federal court sitting in the State, issued as the result of the noncompliance of such source with any emission limitations or standards which apply to its major emissions and which are part of the State Implementation Plan approved by the Environmental Protection Agency; or
- b. Such existing source has complied with any such final civil or criminal judgment; or
- c. Such existing source is on a court-approved schedule for compliance with any such applicable emission limitations and standards.

3. Banking

In API's comments of March 17, 1977 on the original Emission Offset Ruling, API deplored the prohibition of banking for a number of reasons. Accordingly, the revised Emission Offset Ruling which at §IV.C.5 accords the states the flexibility to employ banking receives API's full support.

Like the Agency, API recognizes that an offset banking program -- like any innovative program -- poses many unresolved administrative questions. In these comments we direct the Agency's attention to the January 24, 1979 testimony of the Bay Area Council before the California Air Resources Board (see Exhibit 6) which illustrates the willingness of industry to work with regulatory agencies in resolving these questions.

4. Fugitive Dust

At §II.A.8 of the Ruling "fugitive dust" is defined in a manner identical with §51.21(b)(6) and §51.24(b)(6) of the Agency's final PSD regulations. The PSD regulations, including the "fugitive dust" definition, are at issue in the litigation now before the District of Columbia Circuit and for the purpose of these comments we adopt the Industry Petitioners' Brief on Fugitive Dust Issue (see Exhibit 7) submitted in that litigation.

At §II.F of the Ruling the Agency's "interim policy" for treatment of fugitive dust is described. In this regard, it is API's view that the Emission Offset Ruling is limited geographically to nonattainment areas, as discussed more fully under issues A-1 and B-1.

5. Use of Technology Transfer for Determination of LAER

At §II.A.7 of the Ruling, the Agency adopts a definition of "lowest achievable emission rate" (LAER) which corresponds closely to the statutory definition at §171(3) of the Clean Air Act. However, in the Preamble to the Ruling the Agency at 44 FR 3282 takes the position that "the reviewing authority may consider transfer of technology from one source type to another where such technology is applicable." It is API's view that the Agency by permitting technology transfer has clearly exceeded its statutory authority under the Clean Air Act.

As a practical matter API is especially concerned because there are many situations where technology transfer would be wholly inappropriate. For example, one instance where EPA has acknowledged that technology cannot be readily transferred is the control of organic vapor emissions created by loading tankers and barges. Organic vapor emissions control technology is well demonstrated for gasoline bulk terminals and bulk plants. However, this technology cannot be extended safely to ships and barges. EPA recognizes this and has contracted with MRI to test a vapor control system on a barge loading installation. The U.S. Coast Guard is sufficiently concerned with this technology transfer that they contracted with the Jet Propulsion Laboratory to do extensive work on flame and detonation propagation and arrest in vapor control systems.

Another illustration of the problems of control technology transfer would be for scrubbing sulfur oxides from combustion stack gases. This technology is being employed in many electric power plants. However, it cannot be readily transferred to petroleum refinery furnaces or to marine vessel boilers.

6. Offset Credit and Tightened SIP Requirements

At 44 FR 3274-3275 the Preamble to the Ruling states the Agency's position that offset credits will not be allowed for tightening SIP requirements down to federal new source performance standards or national emission standards for hazardous air pollutants.

API is of the view that the Agency's position on this matter is just plain wrong, based as it is on a strained reading of §129(a)(1) of the Clean Air Act Amendments of 1977. That section states clearly and unequivocally that the original 1976 Emission Offset Ruling "shall apply except that the baseline to be used for determination of appropriate emission offsets under such regulation shall be the applicable implementation plan of the State in effect at the time of application for a permit."

Since EPA new source performance standards apply only to new or modified sources, any existing source which reduces emissions beyond the requirements of SIP regulations pertaining to the source,

including down to or beyond new source performance standards, should obtain full credit for that emission reduction and be able to use it as an offset. As a legal matter, we cannot understand how any other rule could be justified.

The Agency's allusion to the need for avoiding so-called "paper" reductions is wholly speculative and serves as no basis for departing from the plain meaning of the statute. Reductions from actual levels permitted by State Implementation Plans to levels which might theoretically be achievable under Federal NSPS or NESHAPS are in no sense "paper" reductions. They are actual reductions from legally permitted emission rates. In fact, applying NSPS or NESHAPS regulations to such offset sources would itself involve a certain degree of unreality: such regulations were designed to apply to new sources or modifications which would increase pollution levels, not to changes in operation or equipment designed to decrease air pollution. Therefore, it will be very difficult to determine how to apply such regulations to an emission reduction to be used as an offset. This practical concern illustrates why Congress chose not to impose such an artificial baseline.

Another good practical reason for rejecting such an NSPS/NESHAPS baseline is because of its counterproductive air pollution control effects. NSPS and NESHAPS have not been promulgated for all sources or all pollutants. Only the sources and pollutants of greatest concern have so far been subjected to such regulation. Yet, reductions of emissions from those sources and of those pollutants would receive the least offset credit and, therefore, be the least preferred by new sources. This seems to be precisely the opposite result which the EPA would wish to encourage, and it illustrates the arbitrary nature of any such limitation.

Even among offset sources of the same kind, the regulation would have a counterproductive effect. Existing sources would be unsuitable for use as offset sources in proportion to the amount by which they exceeded NSPS. At the same time, existing sources with emissions close to NSPS would be the first to be further controlled because a greater proportion of their emissions reductions would count as an offset credit. The net effect would be to leave those existing sources which most exceed NSPS in place while eliminating the best-controlled sources.

API's comments on another closely related issue are set forth below under B-5 (Limiting Offsets to Actual Emissions).

B. COMMENTS ON OTHER ISSUES

1. Noncompliance with Rulemaking Requirements

In API's written comments of March 17, 1977, API criticized the Agency for using the label "interpretative" as an insufficient basis for invoking §553(b)(3)(A) of the Administrative Procedure Act in an attempt to avoid the general rulemaking requirements of §553.

In the wake of the Clean Air Act Amendments of 1977 the Agency raises this procedural problem anew. In a dazzling display of administrative sleight-of-hand the Agency has:

- undertaken a substantial revision of the original 1976 Emission Offset Ruling;
- made most of the changes immediately effective while designating others (e.g. 36-hour travel time for VOC, treatment of fugitive dust) "not final action" but "interim policy";
- solicited comments on some of the most substantial changes (in two stages) while purportedly relying on comments submitted on the original 1976 Emission Offset Ruling even though no §553 rulemaking was even undertaken; and
- set the deadline for the second stage of comments to coincide with the end of statutory 60-day period within which a challenge to the Agency's final action must be filed.

Furthermore, all of this has been undertaken despite §129 (a)(1) of the Clean Air Act Amendments of 1977 which specifies that the 1976 interpretive regulation shall apply "as may be modified by rule of the Administrator."

The Clean Air Act and the Administrative Procedure Act leave no room for the Agency's recent antics and the Emission Offset Ruling should be withdrawn and made the subject of proper rulemaking.

2. Applicability of Emission Offset Ruling to Attainment Areas

At 44 FR 3274 in the Preamble to the Emission Offset Ruling, the Agency's stated position is that "some sources can affect both types of areas [i.e. nonattainment and attainment areas]." While as a practical matter this may be true in some cases, the conclusion that sources in both nonattainment areas -- and attainment areas -- are subject to the Emission Offset Ruling is wholly inconsistent with the Statute.

What the Agency chooses to ignore is the clear, albeit imperfect, statutory scheme prescribed by the Clean Air Act Amendments of 1977. Under Part C of the Act (§§160-169) complex requirements for sources in attainment areas were established; under Part D of the Act (§§171-178) complex but somewhat different requirements for sources in nonattainment areas were set. Linking Parts C and D is §107 which sets forth an attainment/nonattainment classification process, which even accounts for areas in which insufficient data is available and provides for classification revisions as conditions change.

It may be that the Congressional scheme falls short of perfection; the very act of classifying relatively large geographical areas is bound to introduce some anomalies, especially at the edges of the areas defined. But recognition of the rough-hewn nature of the Congressional scheme serves as no basis for the Agency to undertake its own amendment of the Clean Air Act by expansive regulation.

API recognizes that the Agency's attempt to have the Emission Offset Ruling apply to attainment areas complements its attempt to have the final PSD regulations apply to nonattainment areas. This issue is already the subject of litigation now before the U.S. Court of Appeals for the District of Columbia Circuit and we would direct the Agency's attention to the Brief for Industry Petitioners on that issue which reflects an interpretation of the Act in large part equally applicable to the PSD regulations and Emission Offset Ruling (Exhibit B).

3. Secondary Emissions

At §II.A.11 of the Ruling "secondary emissions" are defined to include:

- a. Emissions from ships or trains coming to or from a refinery, terminal facility, etc.
- b. Emissions from off-site support facilities which would be constructed or would otherwise increase emissions as a result of the construction of a major source.

At §II.G of the Ruling, and subject to some exceptions, secondary emissions are made subject to "applicable conditions of this Ruling."

As to the inclusion of "ships and trains," the obvious fact is that such mobile sources are simply not stationary sources, the focal point of §§171-178. However, the Agency would justify the inclusion of such sources through a curious "negative implications" rationale: Regulation of certain mobile sources (i.e. motor vehicles and aircraft) is severely restricted by the statute; therefore, the Agency is free to regulate other mobile sources (i.e. ships and trains).

Underscoring the Agency's own ambivalence on the matter, however, ships and trains are deemed stationary sources for some purposes (i.e. Conditions 1-4) but not stationary sources for other purposes (i.e. determining whether the 50 tons/year, 1,000 pounds/day, 100 pounds/hour emission rates are exceeded).

Moreover, if Conditions 1-4 are to apply, another absurd result would occur. Because of the LAER requirement, existing sources would be subject to extensive retrofitting. This result runs counter to the new source thrust of §§170-179 and, at least in the case of ships, abrogates the authority of other federal agencies to require changes in vessel design or equipment. (See Ray v. Arco, 98 S.Ct. 988).

As to the inclusion of "off-site support facilities" within the scope of secondary emissions APT's concern is of a different type. For many petroleum industry sources, the principal off-site support facility is a power plant which, like ships and trains, often have different owners and, in any event, are already subject to extensive air pollution regulations. Their inclusion, therefore, is wholly inappropriate.

4. Aggregation of Emissions from Incremental Modification

At §II.C of the Ruling the Agency takes the position that the emissions from incremental modifications granted a permit after December 21, 1976, which independently do not but cumulatively do exceed the 50 tons per year/1000 pounds per day/or 100 pounds per hour level are subject to the Ruling. The only qualification is that before LAER may be imposed on the increments, the reviewing authority "must consider the stage of construction of such increment and the ability of the source to install additional control equipment."

Although the "stage of construction" proviso is helpful, the notion of applying LAER to individual incremental modifications ought to be reexamined in light of the ultimate disposition of the "bubble concept" as applied to intra-source offsets. If incremental modifications are to be aggregated, individual imposition of LAER ought not to be required.

Moreover, in the absence of a lower limit for increases and the Agency's position of ignoring decreases, plant operators are faced with an emission accounting system which is not only an administrative nightmare but is blatantly unfair.

5. Limiting Offsets to Actual Emissions

At §IV.C of the Emission Offset Ruling the Agency takes the position that where offsets are calculated on a tons per year basis,

"the baseline emissions for existing sources providing the offsets should be calculated using the actual annual operating hours for the previous one or two-year period (or other appropriate period if warranted by cyclical business conditions)."

In a theoretically perfect scheme existing actual emissions (available for offsets) would be compared with the projected actual emissions associated with the proposed new source. But the problem, of course, is that the accurate projection of future emissions is especially difficult with the result that permits are formulated with maximum capacities and maximum operating hours used as the datum. As a consequence, estimates of future emissions are subject to overprediction in the permit review process. Compensation for this overprediction could be effected by reliance on allowable or permitted emission levels rather than the actual emission levels specified in the Emission Offset Ruling. Indeed, reliance on allowable emission levels as the baseline would free operators to explore innovative technology or processes which result in decreased emissions below the allowable level without pulling the baseline down.

The use of allowable emission levels as the datum for calculation of available offsets would not only be more manageable but comport with the language of the Clean Air Act which at §173(l)(A) is expressly directed at "emissions from existing sources allowed under the applicable implementation plan."

ITEM No. 1

TESTIMONY OF
CARLETON B. SCOTT
ON BEHALF OF
THE AMERICAN PETROLEUM INSTITUTE
BEFORE
THE ENVIRONMENTAL PROTECTION AGENCY
SAN FRANCISCO, CALIFORNIA - OCTOBER 18, 1979
ON

Requirements for Preparation, Adoption and
Submittal of SIP's; Approval and Promulgation
of State Implementation Plans, 44 FR 51924,
September 5, 1979

AMERICAN PETROLEUM INSTITUTE

Mr. Chairman, my name is Carleton Scott; I am Director of the Environmental Sciences Department, Union Oil Company of California.

I am appearing here today on behalf of the American Petroleum Institute (API), to comment on EPA's proposed "Requirements for Preparation, Adoption, and Submittal of SIP's; Approval and Promulgation of State Implementation Plans," as set forth in the September 5, 1979 Federal Register beginning on page 51924.

I will confine my remarks to five key issues which reflect major flaws in the proposed regulations. Additional details on these and other issues will be covered in API's written comments which will be submitted by November 5, the end of the period for written comments, or November 18, the end of the 30-day period for which the record of this hearing will be left open. A substantial part of API's comments will be directed at the proposed de minimis levels and geographic applicability of baselines for which API has authorized extensive consulting work on an expedited basis. Other issues to be covered in written comments include the variable bubble concept; the meaning of "contemporaneous"; the use of accumulated emissions for major modifications and various aspects of the construction ban.

The five issues I will cover this morning, however, are:

- Potential to Emit

- Fugitive Emissions
- Fugitive Dust
- Geographic Applicability of Baseline
- Practical Operability

POTENTIAL TO EMIT

API supports the concept of defining "potential to emit" in terms of a source's "capability at maximum design capacity to emit a pollutant after the application of air pollution control equipment." Such a definition recognizes real-world conditions and is eminently logical.

But API cannot support - and frankly cannot understand - EPA's proposal which assumes wide-open operation 24-hours a day, 365 days a year, without regard to permit conditions that may limit operating hours or volume of material processed, or without regard to actual operating conditions that may involve periods of inactivity or reduced operations and certainly will involve periods of downtime for maintenance.

The Court in the Alabama Power Decision specifically rejected use of a theoretical emission level - based on an assumed use of no emission controls - in determining a source's potential emissions, and it clearly would be inconsistent with the Court's opinion to once again use another theoretical emission level, this time based on assumed operating conditions that may bear no semblance to reality.

We urge EPA to clarify the definition of "potential to emit" to take into account actual operating conditions and actual emissions. "Potential to emit" should be based on an actual rated capacity as modified by scheduled and unscheduled downtime, and enforceable permit conditions that may cover hours of operation and type or volume of materials combusted or processed.

FUGITIVE EMISSIONS

API certainly endorses the approach taken by the Court in saying that specific rulemaking on the quantification of fugitive emissions "gives flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage." Again, this approach recognizes real-world variations in fugitive emissions - both between industries and between specific facilities - and provides a basis for determining, as accurately as possible, an emission level that could profoundly affect the building of a new facility or the modification of an existing facility.

But API cannot support the approach taken by EPA in merely listing some 26 types of sources, as well as any source type being regulated under Sections 111 or 112, for which fugitive emissions will be estimated. Such an approach is not the legislative rulemaking contemplated by the Court.

Further, such an approach seems to overlook the woefully

inadequate data base that now exists for actually estimating fugitive emissions from these sources, and certainly overlooks plant-by-plant variations in actual emissions as a result of differences in plant maintenance and housekeeping procedures.

The Court clearly directed a rifle approach rather than a shotgun approach. It would, therefore, be far more appropriate for EPA to issue an advance notice of proposed rulemaking on fugitive emissions, listing the specific questions and issues that must be addressed so that an accurate quantification guide can be developed that will take into account both the diversity of sources and the diversity of pollutants from those sources. The proposed approach of summarily listing more than 26 types of sources is simply unacceptable.

FUGITIVE DUST

In a like manner, we cannot accept EPA's summary decision to eliminate the fugitive dust exemption and to simply include fugitive dust with all other fugitive emissions. To do so would, again, put far too much reliance upon an inadequate data base, and would subject applicants to critical decisions without any reliable means of calculating probable fugitive dust emissions.

The Court clearly concluded that EPA has sufficient rulemaking authority to exempt fugitive dust from the PSD increment test where the facts for a specific source type justify exemption. We

cannot agree with EPA's suggestion that it has no such rulemaking authority, and urge EPA to publish an advance notice of proposed rulemaking that solicits comments on specific items that must be addressed by the Agency before a formal and workable regulation on fugitive dust is proposed.

BASELINE GEOGRAPHIC APPLICABILITY

API supports the Agency's proposed withdrawal of the uniform baseline date of August 7, 1977, as the Clean Air Act clearly requires that the baseline concentration for a given area be determined as of the date of first application for a PSD permit in that area.

But, API cannot support the proposal that a single project could establish the baseline for all clean air areas within an Air Quality Control Region. We do not believe that such a proposal complies with the Clean Air Act, and we fear that it would create a nightmare of artificiality and complexity for both the permitting authorities and for sources seeking PSD permits. The better approach, we submit, would be to limit the baseline concentration resulting from a source's PSD application to the area of significant impact by the source.

We urge, therefore, that EPA develop a regulatory scheme that establishes baseline concentrations only in accordance with a source's actual significant area of impact. We believe such a

system would be far more consistent with the Clean Air Act and would assure greater accuracy and ease of administration.

PRACTICAL OPERABILITY

And finally, a plea for help on behalf of those of us -- both in industry and in state and local governments -- who must live with these regulations when finally promulgated.

Confusion and misunderstandings of procedural requirements under current regulations are causing shameful wastes of public and private manpower and dollars, and shameful delays of critically needed energy projects. Our nation can ill-afford to continue sending great amounts of money abroad each day as domestic energy projects continue to be delayed just because applicants and regulators alike are bogged by the complexities of regulations concerning construction and operating permits.

These proposed regulations we are discussing today are even more complex than those already in existence. So we urge EPA, most sincerely, to make the improvements we are recommending, and then to clarify and simplify the final regulations so we can get on with the real job of helping air quality and spend less time trying to understand what is expected of us.

I will try to respond to any questions.