The original documents are located in Box 12, folder "Environmental Protection (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

August 7, 1975

MEMORANDUM FOR: JUDY JOHNSTON

FROM: PHIL BUCHEN P.W.B.

SUBJECT: H.R. 3130 - Preparation of Environmental Impact Statements

I agree with the Department of Transportation's recommended signing statement. Both Justice and DOT correctly point out that the limitations built into this bill could result in wasteful litigation. The rationale given in the signing statement is a good, clear statement of the basis on which corrective legislation should be proposed.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: August 6 Time: 1030am

FOR ACTION: Tod Hullin
Mike Duval
Max Friedersdorf
Ken Lazarus ✓

cc (for information): Jim Cavanaugh
Jack Marsh

FROM THE STAFF SECRETARY

DUE: Date: August 7 Time: 200pm

SUBJECT:

H.R. 3130 - Preparation of Environmental Impact Statements
(enrolled bill and signing statement)

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

__x__ For Your Comments

__x__ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James H. Cavanaugh
For the President

THE WHITE HOUSE
WASHINGTON

8/5/75

TO: JAMES CAVANAUGH

RDL
Robert D. Linder

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

AUG 5 1975

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 3130 - Preparation of Environmental Impact Statements
Sponsor - Rep. LaFalce (D) New York

Last Day for Action

August 11, 1975 - Monday

Purpose

Clarifies the authority of Federal agencies to delegate the preparation of environmental impact statements.

Agency Recommendations

Office of Management and Budget	Approval
Council on Environmental Quality	Approval
Department of Transportation	Approval (Signing Statement attached)
Department of Justice	Approval
Environmental Protection Agency	Approval
Department of the Interior	No objection
Department of Housing and Urban Development	No objection

Discussion

Background

The National Environmental Policy Act of 1969 (NEPA) requires the preparation of an Environmental Impact Statement (EIS) for all major Federal actions. The EIS is intended to determine, assess, and consider the effects on the environment of a proposed federally funded program.

Since NEPA's inception, Federal agencies have delegated the initial preparation of an EIS to the State or local agency which is the

proposed recipient of a Federal grant. Federal officials review and evaluate the State or local EIS drafts and have ultimate responsibility for their adequacy and accuracy. This delegation seemed practical and reasonable to Federal officials and consistent with a conscientious implementation of NEPA. The practice of delegation has been upheld by various court decisions.

However, the Second and the Seventh U.S. Circuit Courts of Appeal issued decisions in December 1974 and April 1975, respectively, dealing with the extent to which EIS preparation may be delegated on highway projects. As a result of the December ruling requiring "genuine Federal preparation" of an EIS, DOT halted almost all major new highway projects in the three States affected by the ruling -- New York, Vermont, and Connecticut. The Seventh Circuit Decision -- affecting Wisconsin, Indiana, and Illinois -- has created similar uncertainty over highway projects in those States.

Since the Second Circuit ruling, a substantial debate has ensued over the meaning of the case. There are differences of view between DOT and the Council on Environmental Quality (CEQ), which is charged with monitoring NEPA, over whether the rulings permit substantial State preparation of a draft EIS or whether they require the Federal agency to prepare the EIS from the beginning. CEQ believes that State preparation can continue with minor administrative adjustments while DOT believes basic changes in NEPA are needed.

Provisions of H.R. 3130

H.R. 3130 is an attempt to clarify the law as it relates to procedures for delegation to State agencies of EIS preparation. While it preserves Federal responsibility for the scope, objectivity, and content of EIS's, it provides that an EIS required after January 1, 1970, for any major Federal action funded under a program of grants to States, shall not be deemed legally insufficient solely by reason of having been prepared by a State agency or official, if four conditions are met:

-- The State agency or official has statewide jurisdiction and responsibility for the action,

-- The responsible Federal official furnishes guidance and participates in the preparation,

-- The responsible Federal official independently evaluates the statement prior to its approval and adoption, and

-- After January 1, 1976, the Federal official solicits the views of any other State or any Federal land management entity regarding any action that may significantly impact on them and, in the case of disagreement, incorporates in the EIS an assessment of the impact and views.

The enrolled bill also provides that the foregoing procedure, which is limited to State agencies and officials with statewide jurisdiction, does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction (such as airport authorities, mass transit agencies, and sewer and water districts).

Agency views

CEQ believes that the bill overturns the recent court decisions and confirms long-standing administrative policies of the Federal agencies permitting State participation in EIS preparation. The Council, although acknowledging that it is not a perfect bill, believes that it accomplishes its basic purpose.

The Environmental Protection Agency believes that the uncertainties created by the court decisions can be put to rest by approval of the bill. The Interior Department notes that although it is possible that the problems could have been resolved satisfactorily without legislation, the enrolled bill is appropriately limited and should serve to resolve the matter. The Department of Housing and Urban Development believes that the bill should enable Federal agencies to carry out their NEPA responsibilities more efficiently.

Justice also notes that the bill is less than perfect in that it leaves "where it found it the question of legal sufficiency of environmental impact statements by state agencies having less than statewide jurisdiction." Justice believes, however, that

> "it may be that the recognition in the enrolled bill that the preparation of environmental impact statements by some entity other than a federal agency does not, in and of itself, render them legally insufficient will enable the courts easily to conclude that there is no particular reason why the preparation of the environmental impact statements by agencies having less than statewide jurisdiction are not also legally sufficient."

DOT, however, has serious reservations about H.R. 3130, because:

-- its applicability is limited to EIS preparation by statewide agencies or officials,

-- its effect on statements prepared by agencies or officials of less than statewide jurisdiction is ambiguous and may produce litigation, and

-- its provisions respecting impacts on another State or a Federal land management entity are vague and will generate confusion and litigation. (CEQ, however, believes that this "is not a significant additional burden to DOT, if they are already carrying out the review of the State report required by the Act.")

DOT nevertheless recommends approval of the bill, but with a signing statement indicating the intention to propose further legislation to rectify the problems it sees in the enrolled bill.

Although DOT has reservations about the limited clarification of the delegation issue, CEQ supports the limited approach of H.R. 3130. CEQ has consistently held that NEPA permits delegation of preparation of EIS's to statewide jurisdictions but not to jurisdictions of less than statewide scope. CEQ's reasoning is that a statewide agency is broader in outlook and has a continuing expertise in the often subtle aspects of EIS's whereas a less than statewide agency generally has a narrow single purpose (such as building a water treatment plant) and generally has less experience in preparing EIS's.

The Congressional hearings dealt only with statewide agencies and did not go into the advantages or disadvantages of delegation to less than statewide agencies. Rep. Leggett ((D) California), Chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Merchant Marine and Fisheries Committee, which has jurisdiction over NEPA, stated during the House floor debate on the H.R. 3130 Conference Report, that his subcommittee would hold oversight hearings in the fall on NEPA, including the issue of delegation to less than statewide agencies. DOT is concerned that the enrolled bill, although stating that it "does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction", may have a negative impact on future court decisions. In its views letter, DOT states that it fears that a court may infer that "Congress considered but did not see the need for changing the law" regarding less than statewide agencies.

However, the Conference Report on H.R. 3130 states that the purpose of the language included in the bill "is to provide a clear statement that the Conference report does not establish or negate the legal sufficiency of the delegation of EIS preparation responsibilities in instances other than those to which the Conference report applies." In effect, the Congress has chosen, without prejudice, to leave the issue of delegation to less than statewide agencies open to further congressional and judicial consideration.

We believe this statement substantially reduces the likelihood of the enrolled bill being interpreted as a definitive statement by Congress on all EIS delegations.

Recommendations:

All agencies concerned, despite some reservations about the bill, recommend or have no objection to its approval. As noted above, DOT recommends that you issue a signing statement which would point out problems with the bill and state that corrective legislation will be submitted to the Congress. In light of the lack of consensus both among Executive agencies and in Congress on this issue after extensive debate and consideration, however, OMB believes that such a statement of intent to submit legislation would be premature and thus recommends against its use. In the event that you decide to use the DOT statement, we recommend that the last sentence be amended to read: "I have requested the Department of Transportation to prepare proposed legislation to accomplish this result."

James M. Frey

Assistant Director for
Legislative Reference

Enclosures

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

August 1, 1975

MEMORANDUM

FOR: HONORABLE JAMES T. LYNN

SUBJECT: H.R. 3130 -- Enrolled

This is in response to the enrolled bill request on H.R. 3130, an act to amend the National Environmental Policy Act (NEPA) to clarify the role of state grant recipient agencies in the preparation of environmental impact statements. The Council, which is the agency designated by law to oversee implementation of NEPA, supports this legislation, believes it is consistent with Administration policy, and urges that the President sign it into law.

This bill represents the first substantive amendment to the language of the National Environmental Policy Act since it was enacted over five years ago. It seeks to confirm long-standing procedures for state participation in the preparation of environmental impact statements. More particularly, it overturns undesirable decisions by two U.S. Courts of Appeals, which held that state highway agencies could not assume an important role in gathering information for and preparing impact statements. The Act would adopt the more desirable rule established by other circuits which allows an active role by the states and confirms long-standing administrative policies of CEQ, DOT, and other agencies.

The effect of the two Courts of Appeals decisions striking down the procedures of the Federal Highway Administration was to cause the FHWA to call a halt to highway projects in a number of states. Particularly hard hit were New York, Connecticut, and Vermont, where many millions of dollars of construction funds for environmentally acceptable and desirable highway projects were held up because impact statements had been prepared

by the states instead of by the Federal Government. Given the need for such construction in a time of economic difficulty in many of the affected regions, several Congressmen introduced measures to clarify the law to conform to what most other circuits had already upheld.

H.R. 3130 represents the result of a difficult and drawn out legislative process that involved a number of committees of both Houses, and created considerable jurisdictional and substantive controversy. We recommend that it be signed into law because, although it is not a perfect bill, it accomplishes the purpose for which the legislation was originally introduced--to endorse state participation in the environmental review of highways. As such, it is a careful and useful amendment to NEPA and it removes any cloud over dozens of projects previously identified by FHWA as potentially held up on these procedural technicalities.

The bill is very close to versions endorsed and supported by the Administration in public hearings and throughout the legislative process related to H.R. 3130.

There are two elements of the bill that have caused DOT, subsequent to their earlier support of a limited measure, to want more from this legislation. One is the provision limiting coverage to "statewide" agencies. The bill is specifically not intended to apply to environmental review activities carried out by other than statewide grant recipients, such as airport and mass transit authorities; DOT now claims these must be covered, but such a position was not acceptable to the Senate. The other provision requires a special addendum by Federal authorities to be added to the state prepared report where there is interstate impact from proposed projects. This provision, added in the Senate, is not a significant additional burden to DOT, if they are already carrying out the review of the state report required by the Act.

The complexity of the legislative process in this case did not permit the emergence of a perfect bill. But neither is it likely that the Administration could do much better if we were to begin the process again. We urge that this bill be signed into law in order to assure clear procedures that will allow highways and other projects that meet them to proceed without fear of continued litigation and procedural delay.

Russ

Russell W. Peterson
Chairman

GENERAL COUNSEL

OFFICE OF THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

AUG 4 1975

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Lynn:

This will supplement our letter of August 1, 1975 concerning H.R. 3130, an enrolled bill

> "To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental impact statements."

In that letter we recommended two alternative courses of action. Having considered the comparative desirability of these two alternatives, we are now prepared to recommend the second one, that the President sign the enrolled bill expressing an intention to propose and support legislation designed to extend H.R. 3130 to other programs. (A suggested signing message to this effect was enclosed as Attachment B to our earlier letter.)

Obviously we have serious reservations about the bill, but given the fact that it will relieve our immediate legal difficulties in the Second and Seventh Circuits, we would recommend the second alternative stated in our earlier letter.

Sincerely,

John Hart Ely

ATTACHMENT B: SIGNING MESSAGE

I am signing today, with some reluctance, H.R. 3130, a bill that amends the National Environmental Policy Act. It would serve to remove the cloud put on federal-aid highway projects in a number of states by decisions in the United States Courts of Appeals for the Second and Seventh Circuits holding that environmental impact statements for highway projects must be prepared by the Federal Highway Administration instead of by the states that are responsible for designing, building, and maintaining federal-aid highways. The result of those decisions has been to delay the highway program in New York, Vermont, Connecticut, Wisconsin, Illinois and Indiana. H.R. 3130 will provide welcome relief for that program.

But the Congress has only provided a halfway remedy, and it may have created further complications for federal grant-in-aid programs other than highways. The bill is limited in its applicability to impact statements prepared by state agencies with statewide jurisdiction -- which describes few grantee agencies other than state highway departments -- leaving other grantees, including airport operators, transit authorities, and sewer districts, in limbo. In addressing the problem of who may prepare an impact statement, the Congress should have addressed the question across the board, for all federal grant-in-aid programs.

I believe the courts and now the Congress have made too much of the question of who actually prepares an impact statement. The important question is the statement's adequacy. An environmental impact statement is a formal presentation of the impacts of a proposed federal action and reasonable alternatives to it, calculated to inform the federal decision makers of the consequences of proposed actions and their alternatives. Actual federal preparation is not needed to guarantee that those purposes are satisfied.

I therefore urge the Congress to take up the question of the authorship of impact statements in all federal-aid programs when it returns in September so that NEPA can be brought back on course. I shall propose and support legislation to accomplish that result.

OFFICE OF THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

[illegible]

[illegible]

[illegible] esponse to your request for the views of this Department [illegible] enrolled bill [illegible]

[illegible] amend the National Environmental Policy Act of 1969 [illegible] preparation of environmental impact statements."

[illegible]

[illegible]

ATTACHMENT A- VETO MESSAGE

...ning without my approval H.R. [illegible], a bill to amend ...ironmental Policy Act of 1969. It was intended to ...pt of Federal-aid highway projects in a number of ...ons of the United States Courts of Appeals for the ...nth Circuits, holding that environmental impact state- ...ay projects must be prepared by the Federal Highway ...instead of by the states that are responsible for ...ing, and maintaining Federal-aid highways. The ...decisions has been to delay the highway program in ...ont, Connecticut, Wisconsin, Illinois and Indiana. ...ely, in removing that cloud on the highway program ...several others. First, H.R. [illegible] does not address ...w taken by other Federal grant-in-aid programs. The ...[illegible] impact statements prepared by State ...[illegible] ...that State highway departments. Thus the bill does ...[illegible]

[illegible]

...e bill would complicate the effort of the courts in reviewing ...g of environmental impact statements. The administra- ...[illegible] NEPA [illegible] ...impact statements by [illegible] agencies. [illegible] ...ons of the Second and Seventh Circuits to the Supreme ...petition for a writ of *certiorari* is now pending. We ...purpose and genuine benefits of NEPA when we [illegible]

on the question of authorship. Impact statements are meant to inform federal decision makers of the environmental consequences of proposed actions and alternatives to them. They have in fact led to environmentally sound federal decision-making, particularly in public works programs. As long as impact statements are accurate, and the federal agency publishing them stands behind them, their purpose is assured.

For these reasons, I cannot approve this Act. I will, however, entertain an amendment of a broader scope, if the Congress considers it appropriate.

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

Honorable James T. Lynn
Director, Office of
Management and Budget
Washington, D.C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Department of Justice on the enrolled bill "To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental impact statements."

This bill has its origin in a situation which arose when non-federal entities – principally state governments – undertook to prepare environmental impact statements in connection with proposed federal projects and programs subject to the National Environmental Policy Act of 1969 (NEPA). As it stands, NEPA requires " . . . a detailed [environmental] statement by the responsible official . . ." covering major federal actions significantly affecting the quality of the human environment. The Act contains no explicit requirement that a federal official actually prepare the statement.

There are approximately twenty reported decisions dealing to some extent with the issue of whether preparation of an environmental impact statement (or a significant portion thereof) by a non-federal entity violates NEPA. The Second Circuit has held that the preparation of an environmental impact statement is the "primary and nondelegable responsibility of a federal agency"; the Fourth, Fifth, Eighth, Ninth and Tenth Circuits, and a district court in

the Seventh Circuit, have held that preparation of the environmental impact statement by other than the responsible federal official is not per se a violation of NEPA.

As originally introduced, H.R. 3130 provided that the preparation of an environmental impact statement may be accomplished by "the responsible federal official or, at his discretion, may be delegated to an appropriate state agency or official or may be prepared by a consultant to such federal or state agency or official."

In its present form, as substantially amended in the Senate, the enrolled bill would provide that an environmental impact statement shall not be deemed to be legally insufficient solely by reason of having been prepared by a state agency or official, if the state agency or official has statewide jurisdiction. The enrolled bill concludes with a statement that it "does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction." The Conference Report accompanying the enrolled bill explains that "the purpose of this language is to provide a clear statement that the Conference Report does not establish or negate the legal sufficiency of the delegation of EIS [environmental impact statement] preparation responsibilities in instances other than those to which the Conference Report applies."

The enrolled bill's acquiescence in the preparation of environmental impact statements by state agencies having statewide jurisdiction only, and its leaving where it found it the question of legal sufficiency of environmental impact statements by state agencies having less than statewide jurisdiction, clearly presents no legal problem, but may present a practical problem. If the majority of environmental impact statements prepared by non-federal agencies are, in fact, prepared by state agencies having less than statewide jurisdiction, the enrolled bill would not have significantly cured the problem toward which H.R. 3130 was addressed. We understand that the Federal Highway Administration is particularly concerned

with the possibility of this enrolled bill's ineffectiveness to deal with a problem of much concern to that agency. In our opinion, however, the enrolled bill should be approved, even if the benefits accruing are only a fraction of those anticipated. Indeed, it may be that the recognition in the enrolled bill that the preparation of environmental impact statements by some entity other than a federal agency does not, in and of itself, render them legally insufficient will enable the courts easily to conclude that there is no particular reason why the preparation of the environmental impact statements by agencies having less than statewide jurisdiction are not also legally sufficient.

Sincerely,

Michael M. Uhlmann
Assistant Attorney General

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

AUG 5 1975

OFFICE OF THE
ADMINISTRATOR

Dear Mr. Lynn:

This is in response to your request for the views of the Environmental Protection Agency on H.R. 3130, an enrolled bill which would amend the National Environmental Policy Act (NEPA) in order to clarify the procedures therein with respect to the preparation of environmental impact statements.

The enrolled bill would amend NEPA by renumbering subparagraphs (D)-(G) of section 102(2) and by inserting a new subparagraph (D). This new subparagraph is applicable to a limited class of environmental impact statements (EIS) prepared pursuant to section 102(2)(C). For the class of EIS's covered by the new subparagraph (D), the enrolled bill provides that such EIS's shall not be deemed legally insufficient solely by reason of having been prepared by a State agency or official, if such agency or official meets the requirements of subparagraph (D)(i)-(iv).

The enrolled bill is only applicable to EIS's "for any major Federal action funded under a program of grants to States . . . ." The enrolled bill does not relieve the relevant Federal official of his ultimate responsibility for the scope, objectivity, and content of the entire statement. In order to reinforce the Congressional intent that the enrolled bill is not to be deemed an implicit rejection of delegations of EIS's to an agency or official with less than statewide jurisdiction, the enrolled bill provides that the legal sufficiency of such EIS's is not to be affected by the new subparagraph (D).

The Environmental Protection Agency recommends Presidential approval of the enrolled bill.

The enrolled bill has little, if any, effect on the programs administered by the Environmental Protection Agency. In addition to the explicit language of the enrolled bill, the legislative history makes clear that the enrolled bill is not applicable to any Federal licensing, permitting, certificating, contracting, construction programs or other programs which do not provide grants to States.

As you are aware, EPA awards construction grants almost exclusively to municipal agencies. We believe the enrolled bill, and its legislative history, cannot be reasonably construed to mean that silence concerning delegation to municipal agencies implies Congressional disapproval of such delegation.

To the extent that this enrolled bill removes uncertainties regarding State participation in the EIS process of other Federal agencies, the bill is desirable.

I should note that the House of Representatives will be conducting oversight hearings on NEPA this Fall. At that time, I understand other issues regarding this most important statute will be discussed. At this time, however, I believe the uncertainties created by certain court decisions (Conservation Society of Southern Vermont v. Secretary of Transportation and Swain v. Brinegar) can be put to rest by signing the enrolled bill into law.

Sincerely yours,

Russell E. Train
Administrator

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C. 20503

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 1 - 1975

Dear Mr. Lynn:

This responds to your request for the views of this Department concerning H.R. 3130, an enrolled bill "To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental impact statements."

We do not object to Presidential approval of the bill.

The bill would provide that environmental impact statements prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 after January 1, 1970, on a major Federal action funded under a program of grants to states shall not be deemed to be legally insufficient solely by reason of having been prepared by a state agency or official if such agency or official has statewide jurisdiction and has the responsibility for such action if the responsible Federal official furnishes guidance and participates in such preparation and independently evaluates such statement prior to its approval and adoption. With respect to statements prepared after January 1, 1976, however, the responsible Federal official would be required to provide early notification to, and solicit the views of any other state or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such state or affected Federal land management entity, and if there is disagreement on such impacts, to prepare a written assessment of such impacts and views for incorporation into the statement. Federal officials would not be relieved of their responsibilities for the scope, objectivity and content of the entire statement or of any other responsibility under the Act. The legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction would not be affected.

The principal purpose of H.R. 3130 is to remedy administrative difficulties arising from several recent court decisions dealing with the degree to which preparation of environmental impact statements can be delegated by a Federal agency to state governmental entities. These decisions have interrupted work on several highway

projects and uncertainty as to the ultimate outcome of this litigation and the delays it would involve led to passage of the enrolled bill. It is possible that environmental impact statement problems such as those giving rise to this legislation could have been satisfactorily resolved without amendment to the National Environmental Policy Act of 1969 and we would have preferred this course. The enrolled bill is, however, appropriately limited and should serve to resolve the matter promptly.

With respect to the bill's requirements for environmental impact statements prepared after January 1, 1976, the Interior Department is a Federal land management entity both with respect to its direct Federal lands responsibilities and its Indian trust responsibilities. We would expect regulations promulgated under the Act as revised by the enrolled bill to reflect this dual role for purposes of the early notification and views solicitation provision.

Sincerely yours,

Kent Frizzell

Acting Secretary of the Interior

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C. 20503

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

AUG 1 1975

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Attention: Miss Martha Ramsey

Dear Mr. Frey:

Subject: H. R. 3130, 94th Congress (Enrolled Enactment)

This is in response to your request for the views of this Department on the enrolled enactment of H. R. 3130, an Act "To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental impact statements."

This enrolled bill would amend Section 102 of the National Environmental Policy Act of 1969 to authorize explicitly the delegation of the preparation of an environmental impact statement for any major Federal action, funded under a program of grants to States, to a State agency or official having statewide jurisdiction. However, such delegation would not relieve the responsible Federal official of ultimate responsibility for such environmental impact statement.

This Department has no objection to Presidential approval of this enrolled enactment. If approved, this Act should enable the relevant Federal agencies to carry out their NEPA responsibilities more efficiently.

Sincerely,

Douglas M. Pahl

for Robert R. Elliott

Economy

THE WHITE HOUSE

WASHINGTON

June 10, 1976

MEMORANDUM FOR: JIM CANNON
BILL SEIDMAN

FROM: PHIL BUCHEN P.

SUBJECT: Proposed amendments to the Clean Air Act

After participating with you in the recent meetings on this subject, I would like to call your attention to the pending petition before the U.S. Court of Appeals in the District of Columbia Circuit in American Petroleum Institute, et al. v. Environmental Protection Agency. This petition is for review of regulations by EPA that were issued to impose Federal non-degradation standards on the states. These regulations were issued as a result of the decision in Sierra Club v. Ruckelshaus, 344 F. Supp. 253, affirmed per curiam, by the Court of Appeals which, on review by the Supreme Court, was undisturbed because of an equally divided vote of that court as reported in 412 U.S. 541 (1973).

In the pending petition by the American Petroleum Institute and others, the argument has been made that a more recent decision of the Supreme Court in Train v. NRDC, 421 U.S. 60 (1975), has changed the holding in the Sierra Club case.

If the presently proposed legislation passes with the Moss amendment included, the pending litigation will continue, and petitioners in the pending court case have urged that we support the Moss amendment. Petitioners are quite confident of prevailing, if not in the Circuit Court of Appeals, then in the Supreme Court when the present case reaches that court.

I got the impression from our meeting that no one was particularly willing to recommend to the President that the pending Clean Air Act amendments would be acceptable if the Moss amendment were included, but you may want to reconsider this position in light of the pending petition brought by the American Petroleum Institute and others.

I have copies of the briefs filed by the petitioners in the present court case if you would like to see them.

cc: Frank Zarb

STARK RITCHIE
ATTORNEY AT LAW
2101 L STREET, N.W.
WASHINGTON, D.C. 20037

202-457-7370

Mr. Philip W. Buchen
Counsel to the President
The White House
Washington, D.C. 20500

June 10, 1976

Dear Phil:

I am enclosing only our briefs in the significant air deterioration litigation which provides, admittedly, a one sided view. There are numerous petitioners and almost one thousand pages of briefs and we shall be glad to get the other material to you should you want it.

I think it important that you know that Bruce Terris, representing the Sierra Club, in response to direct questioning by Judge Robinson during oral arguments yesterday morning, stated that if the proposed legislation on significant air deterioration now pending before Congress is passed without the Moss amendment, our litigation will be mooted; if the Moss amendment passed he expressed opinion that the litigation would not be mooted. We believe we have sound grounds for a holding by the Supreme Court that the Clean Air Act, as it now stands, does not mandate non degradation.

Politically it would seem highly undesirable for the President to find himself facing the dilemna of a statute which would grant much needed relief to the automobile industry but impose exceedingly difficult burdens on the rest of the country in making needed plant expansions and relieving urban congestion. The Moss amendment is not the ideal solution, but it is far better than the currently proposed legislation without such amendment.

Sincerely,

Stark

SR/bw
Enclosures

EPA

THE WHITE HOUSE

WASHINGTON

June 10, 1976

MEMORANDUM FOR: JIM CANNON
BILL SEIDMAN

FROM: PHIL BUCHEN P.

SUBJECT: Proposed amendments to the Clean Air Act

After participating with you in the recent meetings on this subject, I would like to call your attention to the pending petition before the U.S. Court of Appeals in the District of Columbia Circuit in American Petroleum Institute, et al. v. Environmental Protection Agency. This petition is for review of regulations by EPA that were issued to impose Federal non-degradation standards on the states. These regulations were issued as a result of the decision in Sierra Club v. Ruckelshaus, 344 F. Supp. 253, affirmed per curiam, by the Court of Appeals which, on review by the Supreme Court, was undisturbed because of an equally divided vote of that court as reported in 412 U.S. 541 (1973).

In the pending petition by the American Petroleum Institute and others, the argument has been made that a more recent decision of the Supreme Court in Train v. NRDC, 421 U.S. 60 (1975), has changed the holding in the Sierra Club case.

If the presently proposed legislation passes with the Moss amendment included, the pending litigation will continue, and petitioners in the pending court case have urged that we support the Moss amendment. Petitioners are quite confident of prevailing, if not in the Circuit Court of Appeals, then in the Supreme Court when the present case reaches that court.

I got the impression from our meeting that no one was particularly willing to recommend to the President that the pending Clean Air Act amendments would be acceptable if the Moss amendment were included, but you may want to reconsider this position in light of the pending petition brought by the American Petroleum Institute and others.

I have copies of the briefs filed by the petitioners in the present court case if you would like to see them.

cc: Frank Zarb

THE WHITE HOUSE

WASHINGTON

June 12, 1976

Dear Bud:

Many thanks for your letter of June 4th. It came about the time that Stark Ritchie had called to indicate you might be able to come to talk to me on the subject. I explained to him then that my office was not particularly involved in the proposed amendments to the Clean Air Act but that Bill Gorog, who is Bill Seidman's Deputy, was deeply involved. However, I found out later that Bill Gorog had to be out of town for the entire week and I was not able to set up a time when you could have seen him during the past week.

I do think that the Seidman office and the Domestic Council are fully aware of the problems involved with the proposed Clean Air Act amendments, and I recently attended a meeting where the problems with such amendments were discussed with the President. I do think the most important need now is to convince the Members of Congress of the objectionable features of the amendments just as the people on the White House staff have been trying to do.

It was good to hear from you, and I send my best personal regards.

Sincerely,

Phil

Philip W. Buchen
Counsel to the President

Mr. A. B. Lundahl
Senior Vice President
Deere & Company
Moline, Illinois 61265

THE WHITE HOUSE
WASHINGTON

Arthur B
Bud Lundahl

(309) 792-4361

DEERE & COMPANY

MOLINE, ILLINOIS 61265

A. B. LUNDAHL
SENIOR VICE PRESIDENT

June 4, 1976

Mr. Phillip W. Buchen
Counsel to the President
The White House
Washington, D. C.

Dear Phil:

The President's letter of May 28 to Congressman Harley O. Staggers on the Clean Air Act prompts this letter.

The President is to be commended for his stand. We believe that Regulatory Agencies at this time do not have the facts necessary to make proper decisions. John Deere, both before the 1970 Clean Air Act and since, has had an outstanding record in regard to clean air. In fact, studies made at two of our foundries established the basis for present foundry standards.

We are concerned that the present proposals could have a serious impact on our proposed expansion plans, which are at the $200 million/year level. We are equally concerned that both senators and congressmen really do not understand the basic amendments. During the past two weeks we have had technical people on the Hill and they are alarmed at the lack of understanding of the amendments' impact on future economic growth.

We have supplied data to the Department of Commerce to support our position. If there is need for additional information within any White House staff, we would welcome the opportunity to support the President.

Very truly yours,

tp

P.S. Phil, I have enclosed a copy of the telegram we sent to the President.

T E L E G R A M

4 June 1976

President Gerald R. Ford
The White House
Washington, D.C.

Dear Mr. President:

We at Deere & Company were pleased to learn of the strong stand you have taken in opposition to the sections of the House and Senate Clean Air Act amendments which deal with the prevention of significant deterioration of air quality. Your recognition of the seriousness of the potential economic and energy impacts of these proposed sections contrasts sharply with the alarming lack of information about the proposals which we have found in expressing our concerns to individuals in the Congress.

John Deere's studies, which have been submitted to the Department of Commerce, show that the proposals could have a serious impact upon our own proposed expansion plans, which are at the $200 million/year level.

Thank you for exercising good judgment on this critical issue.

A. B. Lundahl
Senior Vice President
Deere & Company
Moline, Illinois

THE WHITE HOUSE

WASHINGTON

June 16, 1976

MEMORANDUM FOR: L. WILLIAM SEIDMAN

FROM: PHILIP W. BUCHEN

SUBJECT: Clean Air Act Issues

In response to your memorandum of June 14 concerning two draft memoranda, my comments are as follows:

1. EPA's proposed selective audit regulation.

Inasmuch as there is no substantial opposition on the part of industry to EPA's new proposal, Option B appears to be the reasonable solution to the problem at hand and appears to have substantial merit. Therefore, Counsel's Office supports Option B.

In respect of Option A, before the memo is submitted to the President, I would revise the wording to read as follows:

"Ask OMB to advise EPA that the preferred policy is not to promulgate the proposed SEA regulation."

The above suggestion is made because of the independent regulatory status of EPA.

2. Clean Air Act Amendments

Counsel's Office recommends Option A. However, we think the statement of the option should be clarified to indicate that the choice of this Option would leave open the possibility of direct Administration support for the Moss Amendment which would postpone adoption of any amendments governing the control of significant deterioration pending the completion

of a study of the problem by a legislatively created Commission.

You may want to call attention in the memo to the fact that the present "significant deterioration" regulations are presently being challenged in a case brought by the American Petroleum Institute and others against EPA in the United States Court of Appeals for the District of Columbia Circuit. If the Clean Air Act Amendments were to be adopted by the President, this litigation would be mooted because the effect of the amendments would be to replace the current EPA regulations. If no new legislation were to pass, other than the Moss Amendment, the litigation would continue. In that event, the Court of Appeals would probably rule promptly and would likely uphold the validity of the current EPA regulations. Such a decision however would probably be taken to the Supreme Court by the petitioners on a petition for certiorari and if the petition is granted, petitioners believe that the Supreme Court will declare that the EPA is not required under the existing Clean Air Act to issue such regulations. EPA has an opinion quite the contrary and the Department of Justice indicates that the result will probably turn on what view Judge Stevens takes.

When the issue was previously before the Supreme Court, the eight justices participating split evenly on this decision, but Justice Douglas who was replaced by Justice Stevens was on the side that upheld the requirement for "significant deterioration" regulations. In the prior case, Justice Powell abstained and will probably do so in this case as well.

It is likely that if the case reaches the Supreme Court it will be decided by the end of June, 1977.

cc: Bill Gorog
Ken Lazarus

THE WHITE HOUSE

WASHINGTON

June 16, 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS

SUBJECT: Clean Air Act Issues

Bill Gorog is out of town today but I spoke this morning with Coleman Andrews who has been assisting Bill with regard to the subject noted above. I made the following points:

(1) It is unlikely (though possible, of course) that we will see final action on the Clean Air Act Amendments this year.

(2) With regard to the memorandum on EPA's proposed selective enforcement audit regulation, I made two observations:

(a) In view of EPA's "independent" nature, Option A should be modified to suggest that OMB "advise" rather than "instruct" EPA of its views with regard to the revised SEA regulation; and

(b) Since there is no substantial opposition on the part of industry to EPA's new proposal, Option B would appear to be a reasonable political solution to the problem at hand. Additionally, it would also appear to be desirable on the merits. Therefore, Counsel's office supports Option B.

(3) With regard to the question of significant deterioration provisions in the bill, I indicated that Counsel's Office supports Option A and also indicated that the statement of the option should be clarified to indicate that this would also leave open the possibility of direct Administration support for the Moss Amendment which, I have determined, merely tables this question for the time being to be studied by a commission.

(4) I also clarified the purpose behind your memo on pending litigation relevant to the proposed legislation. I

believe it is now in proper perspective, however, Bill Gorog has requested that we attempt to ascertain the likely timing involved in the API case. I made clear to Coleman that it is difficult to identify even a range of time regarding the resolution of the case but that you are continuing discussions of the matter with Counsel at Justice and EPA.

THE WHITE HOUSE

WASHINGTON

June 14, 1976

MEMORANDUM FOR PHILIP BUCHEN

FROM: L. WILLIAM SEIDMAN LWS

SUBJECT: Clean Air Act Issues

In response to a Presidential request, two draft memorandums have been prepared by an interagency group on EPA's proposed selective enforcement audit regulation and on the significant deterioration provisions in the Clean Air Act amendments.

I would appreciate your comments and recommendations on the attached memorandums by c.o.b. Tuesday, June 15.

Attachments

THE WHITE HOUSE

WASHINGTON

June 11, 1976

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: L. WILLIAM SEIDMAN

SUBJECT: EPA's Proposed Selective Enforcement Audit (SEA) Regulation (Assembly-line Vehicle Testing)

This memorandum responds to your request for a reconsideration of the SEA issue. This issue was included in an early memorandum on the Clean Air Act, a copy which is attached.

BACKGROUND

Legal Authorities - Authorization for a discretionary SEA program is contained in the 1970 Clean Air Act. SEA is one of several mechanisms provided in the Clean Air Act of 1970 for reducing auto pollution. Others include:

Emission standards
Certification (prototype testing)
Recall - (Manufacturer corrects deficient model lines)
Warranties - (Manufacturer corrects deficient cars)
Inspection and Maintenance Programs - (at State or local option)

Purpose of SEA

Test data generated by industry indicates that 95% of production line cars would meet emission standards. EPA questions this data and also believes that industry will turn out dirty cars unless there is the threat of a Federal SEA program. Two reasons supporting the EPA belief are (a) industry's action several years ago to get around emission controls by installing override devices -- which were then removed when challenged; and (b) the extra incentive which industry will have to get around emissions controls in the years ahead -- in order to meet mandatory fuel economy standards which are backed up by tough penalties.

EPA's Initial Proposal - EPA proposed on December 31, 1974 to institute an assembly line test requirement, titled Selective Enforcement Audit (SEA). These regulations would have resulted in a de facto tightening of emission standards for certain cars, because 90% of every model line tested would have had to meet emission standards. In effect, this proposal would have required manufacturers to design all cars to a target cleaner than the standards mandated in the Clean Air Act.

EPA's New Proposal - Following comments by industry and government agencies, EPA developed a revised proposal. Under the new proposal EPA estimates that 800 vehicles will be tested annually. These tests would be performed by the manufacturer under the supervision of EPA. This regulation no longer requires that every car meet the standards. No enforcement action would be taken if at least 60% of the cars tested in a model line pass the test.

Congressional Action - The House Committee has not dealt with this issue, but the Clean Air Act amendments reported by the Senate Public Works Committee require that EPA implement an assembly line test program. If this provision is enacted into law, the requirement would be significantly harsher than EPA's current proposal because the Committee report specifies that every car must pass the test. This could result in a significant de facto tightening of emission standards.

Whether the Senate would delete the provision if EPA's regulations are promulgated is not known. However, Administrator Train is willing to try to convince the Senate to delete the provision if EPA's new regulatory proposal is promulgated.

OPTIONS

Option A: Instruct EPA not to promulgate its revised SEA regulation

Pros:

- Not needed. Manufacturers' test data indicate that 95 of 100 vehicles manufactured currently meet EPA's regulatory requirements.

- Not cost-effective. Virtually no air quality or health benefits would flow from the regulation.

- Is inconsistent with Administration's public commitment against initiating marginal regulatory programs; SEA is a discretionary action.

- EPA should bear the burden of proving that the auto industry is not building cars which meet auto emission standards prior to initiating a test program.

Cons:

- Risks criticism of Presidential interferrance with activities of a regulatory agency.

- Would impair Federal government's credibility with consumers.

- Would retard development of state and local mandatory maintenance inspection programs because of lack of assurance that production line cars actually meet established standards.

- Opens door to unfair competition among auto makers in the marketplace.

- Precludes a cost-effective approach to public health protection.

- Absent regulations, Congress may mandate EPA production line testing and the courts may interpret this requirement as mandating de facto reduction in emission standards. This would have a much harsher impact than EPA's proposed regulation.

Option B: No action; allow EPA to promulgate its revised SEA regulations; work to eliminate mandatory EPA production line testing in Senate bill

Option C: Instruct EPA to re-propose its SEA regulation and solicit additional public comment prior to promulgation; work to eliminate mandatory EPA production line testing in Senate bill

Option D: Submit a $4 million Budget amendment to provide EPA with resources to verify industry generated production line data

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

June 11, 1976

THE ADMINISTRATOR

Dear Mr. President:

This letter sets forth in summary fashion a description of the nature and potential benefits of our proposed Selective Enforcement Audit (SEA) regulations providing for emission testing of new motor vehicles.

The Clean Air Act requires that motor vehicles meet emission standards throughout their useful life. It was in response to substantial rates of failure by vehicles in-use to meet emission standards that Congress amended the Clean Air Act in 1970 to provide, inter alia, authority for assembly line testing to help assure that vehicles meet standards at least when new. Data from EPA emission testing programs indicate that vehicles in-use continue to fail to meet standards early in their lives. Recent data indicate that more than 60 percent of the 1975 vehicles failed to meet one or more standards in their first year of operation.

The causes of these in-use failures appear to be lack of proper construction and lack of proper maintenance; however, our ability to separate the two causes is limited by a lack of comprehensive reliable data describing the performance of new vehicles. While voluntary assembly line testing activities of several manufacturers have increased substantially since development of the SEA regulations became known, the resulting data are subject to shortcomings and limitations, and conclusions based thereon must be guarded. Even so, manufacturers' own data indicate high noncompliance rates for some vehicle classes.

The SEA regulations establish uniform ground rules for assembly line compliance testing, prescribe an allowable failure rate (40 percent), and set forth EPA's procedures for implementing its authority to require assembly line testing and to take remedial action at the assembly line for unacceptable performance. However, SEA relies in the main on voluntary manufacturer effort. In the absence of evidence of excessive failure rates, one test (involving approximately 20 vehicles) will be authorized for each 300,000 vehicles of annual production by that manufacturer. A total of only about 800 vehicles will be required by EPA to be tested industry-wide. SEA is primarily a deterrent to non-compliance. This approach minimizes direct Federal involvement with industry and maximizes a manufacturer's flexibility to meet product performance requirements in his own preferred way.

There are three principal potential benefits of SEA: cost effective protection of public health, credibility of the Federal Government with the consuming public, and protection of fair competition in the marketplace.

First, at a time when maximum reduction of motor vehicle related emissions is necessary to attainment of health protective ambient air standards in many urban areas of the country, the reductions achievable by SEA, although not in themselves adequate to ensure achievement of the standards are among the least costly of those achievable by any program. The maximum cost of the program based on apparent 1975 performance will be less than $20 million for consumers, manufacturers, and the Federal Government combined. Any performance improvement in 1976 would indicate lower cost. Any suggestion by the manufacturers that they will face much larger costs from production interruptions and repair costs is illogical in that it assumes an unexplainable willingness to take large risks of failure rather than adopt inexpensive preventive measures.

Second, SEA is essential to a fully credible auto emission control program. In the absence of a testing program for new production vehicles, the Federal Government can provide no assurance to the public that they are receiving the benefits of the emission controls for which they are paying. Indeed, testing of in-use vehicles suggest that such benefits are not being fully realized, and a new production vehicle audit program is an essential element for the correction of that situation. Further, consumers will eventually become subject to State requirements to maintain acceptable automobile emissions performance and are entitled to reasonable Federal efforts to assure that their vehicles have acceptable emissions performance when new. The fact that States (other than California) are pre-empted by Federal law from requiring such assurance themselves serves to emphasize the Federal responsibility to do so.

Third, uniform enforcement of emission standards is essential to fair competition in the marketplace. It is the responsibility of the Federal Government, especially when confronted with data which indicate wide variation in the degrees of compliance with Federal standards by competing auto manufacturers, to take steps to ensure that all manufacturers adhere to the same rules. Even if the percentage of noncomplying vehicles were small, that percentage can exceed the total production of each of many small manufacturers. Hence, a small domestic manufacturer whose vehicles meet standards could be disadvantaged in competition with a large manufacturer whose competing car lines do not meet standards, even though those lines represent a small portion of the larger manufacturer's production.

We believe that SEA is needed and that it represents the most cost-effective and least burdensome approach to assuring emissions compliance of new production vehicles that has yet been advanced. In the absence of this program, it is likely that pending legislation will require a program that could result in substantially greater impact on the automobile industry by way of a substantial de facto tightening of the emissions standards. For these reasons, we believe the SEA regulations should be promulgated. After extensive consideration of all relevant views, I would hope that you will agree with me that the appropriate course in a regulatory matter such as this is for the final decision to be left to the judgment of the responsible agency head.

Sincerely yours,

Russell E. Train

The Honorable Gerald R. Ford
The White House
Washington, D.C. 20500

THE WHITE HOUSE

WASHINGTON

June 11, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: L. WILLIAM SEIDMAN

SUBJECT: Re-examination of House Clean Air Bill

In a letter to Chairmen Randolph and Staggers on May 28, 1975, you recommended that the Congress should amend significant deterioration provisions until sufficient information concerning final impact can be gathered. Following your meeting on June 8 with the Senate Minority Leadership you indicated that you wanted a memorandum discussing possible amendments to the House Clean Air Act amendments as reported by the House Committee on Interstate and Foreign Commerce.

I. BACKGROUND

Significant deterioration amendments, as well as current EPA regulations, deal with areas of the Nation which are already "cleaner" than needed to meet EPA established health standards.

Although the House and Senate significant deterioration provisions are somewhat similar in the specific procedural mechanisms and their delegation of authority to State governments in many instances, the two approaches are quite unique. They are both, however, very different from EPA regulations.

Current EPA regulations, promulgated pursuant to action by the Courts in 1973, provides for the States to divide "clean" areas of the Nation -- areas where the quality of the air currently present no health threat -- into three geographical classes -- those which must remain pristine (Class I), those which would be permitted moderate but well controlled growth (Class II), and those areas which would be allowed heavy industrial growth so long as the health standards were not violated (Class III). Reliance upon EPA regulations is somewhat tenuous as the regulations are currently under legal attack by all sides. The outcome

as to the ultimate configuration of the regulations is therefore quite uncertain. Until final judicial review, there could be continued uncertainty in the application of the regulations for both the regulated industries as well as the regulators without clarifying legislation.

The major Senate significant deterioration provisions provide:

- Only for Class I and Class II. There is no provision for Class III which would permit States to select certain areas for heavy industrial growth as long as the national ambient air standards were not violated;

- That best available control technology be applied by the States to major sources on a case by case basis. It is a clear signal that more stringent control than current EPA's new source performance standards is required. This would mean scrubber-like technology.

- That all national parks and wilderness areas greater than 5,000 acres be designated mandatory Class I areas.

The major House significant deterioration provisions provide:

- For a Three Class system similar in overall structure to EPA regulations.

- More stringent increments for pollution increases through arbitrary percentage limitations. For instance the Class III allowable increments are only one-half that permitted in EPA regulations.

- The most stringent definition of best available control technology yet proposed by the House or Senate to be applied by EPA. The definition would require scrubber like technology without any flexibility.

- Makes significant deterioration applicable not only for emissions of sulfur dioxide and particulates as in current EPA regulations but also for the other four pollutants which have national ambient standards.

- Would require that all major sources (rather than sources listed as in the Senate bill and EPA regulations) be covered by the significant deterioration provisions.

- That all national parks and wilderness areas greater than 25,000 acres be designated mandatory Class I areas.

II. SUGGESTED MODIFICATIONS TO THE HOUSE PROVISIONS

The first six amendments below have been examined at the staff level by Commerce, FEA, Interior, and EPA. All the agencies, except EPA, feel that the six amendments are necessary for an acceptable bill. EPA, does not object to the amendments but would not oppose the House bill without them. The six recommended modifications of the House bill are:

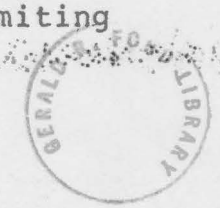
- Delete the House allowable increment numbers in their entirety (including the overall 90 percent limitation) and substitute the appropriate increments from EPA regulations. This would ensure flexibility in Class II and III in terms of industrial siting and would permit certain areas to increase their pollutant levels up to the national standards rather than some arbitrary lower level.

- Delete the House provisions requiring that all major sources be covered. Substitute the Senate bill's provisions which would limit the coverage to a list of sources specified in the legislation.

- Delete the House provision that requires the expansion of the current coverage of EPA's significant deterioration regulations from particulates and sulfur dioxide to all pollutants (six) that have national ambient air quality standards. Substitute the Senate provisions which would require examination of the need to include the other pollutants and authority to include them if the Administrator deems it necessary.

- Exempt surface mining operations from the significant deterioration provisions. This will clarify the intent of the House report in a critical area.

- Amend the House bill to indicate that the ambient standards can be violated no more than once a year rather than never. This would provide needed flexibility in light of technical limitations that might, under the current law, result in very limiting conditions on industrial siting and growth.



The major unresolved issue is the use of best available control technology. Commerce, FEA, and Interior, at the staff level, would continue to oppose the requirement for best available control technology. In that instance, EPA's new source performance criteria would remain effective. EPA supports either the House or the Senate definition of best available control technology. Although the agencies state they are willing to evaluate a modification to the House bill, progress toward development of an acceptable approach has not been substantial.

III. COMPARISON OF POSITIONS

A comparison of the House bill as modified above in relation to the option of no new legislation (i.e., leave EPA regulations in effect) would reveal the following:

- If best available control technology were deleted from the House bill, the House provisions for significant deterioration would be very similar in content and impact to EPA regulations.

- If best available control technology remained in the House bill and were enacted, there would be additional capital and energy costs most heavily impacting the electric utility industry.

IV. OPTIONS

Option A: Maintain your present position on House Bill - oppose any Federal requirement for significant deterioration

Pros:

- Reinforces your position that Federal government should stay out of local level-use decisions.

- Provides no quantifiable health benefits since air quality in significant deterioration areas is already cleaner than needed to protect public health and welfare.

- Minimizes the risk of retarding energy development and curtailing industrial growth.

- Could force the Congress to act only on auto emissions since there would be a greater lack of consensus on significant deterioration.

- States already have authority to establish and implement stricter air quality standards if they wish.

- Give you greater bargaining power at a more appropriate time, perhaps after full Senate action.

Cons:

- Could result in getting a bill you should veto.

- Will be opposed by environmentalists, Republican members of the Senate Public Works Committee and Administrator Train.

- Could lead to visual pollution at some National Parks.

- Could result in no legislative clarification of this issue with the resultant effect that the issue would continue to be litigated in the courts and compound uncertainty associated with industrial investment decisions.

Option B: Submit Amendments to the House Bill which enact the significant deterioration program presently Administered by EPA

Pros:

- Places you in a position of not opposing significant deterioration.

- Permits the states to pollute up to the level needed to protect public health.

- Reduces potential energy losses relative to the House and Senate Bills.

- Reduces the uncertainties that might cause retardation of industrial growth due to continued litigation.

Cons:

- Makes it a role of the Federal government to prevent significant deterioration.

- Signals the Congress, prior to going to Conference, that you will accept a significant deterioration provision - could weaken your future bargaining position on this issue.

- Will retard industrial growth and energy development.

V. RECOMMENDATIONS

Agencies favoring Option A:

Agencies favoring Option B:

VI. DECISION

Option A _____

Option B _____

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: July 22 Time:

FOR ACTION: Phil Buchen ~~xxx(xxxxxxxxxxx)~~:
Jim Cannon Max Friedersdorf
Jack Marsh Mike Duval
Jim Lynn
Bill Seidman
FROM THE STAFF SECRETARY

DUE: Date: FRIDAY, July 23 Time: NOON

SUBJECT:

Gorog memo (7/22) re: Clean Air

ACTION REQUESTED:

____ For Necessary Action
X For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
X For Your Comments
____ Draft Remarks

REMARKS:

COULD WE PLEASE HAVE THIS BACK BY NOON TOMORROW

No objections.

T.W.B

Philip W. Buchen
Counsel to the President

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

July 22, 1976

ACTION

MEMORANDUM FOR THE PRESIDENT

THROUGH: L. WILLIAM SEIDMAN
JAMES CANNON

FROM: WILLIAM F. GOROG wfg

SUBJECT: Clean Air

In accordance with your recent instructions, we have discussed further amendments to the Clean Air Act Amendments of 1976 with Senator Buckley and Congressman Broyhill. These discussions and our efforts to find a position on Clean Air that may be acceptable to the Administration were predicated on the belief that we would definitely be faced with a Bill this year, and that we should therefore not leave ourselves in a position of having to veto environmental legislation.

As you directed, we indicated in our meetings with Buckley and Broyhill that you had not changed your position concerning the unacceptability of the Bill. Furthermore, we indicated that these amendments were not to be presented as a "White House compromise," but rather that they were presented in a good faith effort to demonstrate our willingness to work positively for a reasonable Bill.

Throughout this exercise, we have been concerned that regardless of the manner in which we handled our presentation of amendments, industry might perceive our efforts as a betrayal of legitimate industrial interests. Industry had formed a broad coalition, in concert with a few labor groups, to attempt to defeat the most odious portions of the Amendments. Their efforts have been predicated on the assumption that they would ultimately be successful in killing the Amendments. They gave virtually no consideration to the possibility that they may in fact be faced with legislation of some sort. For this reason, we viewed our efforts to improve the House and Senate Amendments as a parallel operation to the position taken by industry.

To prevent our efforts from undermining those of industry, particularly before August, Max Friedersdorf and I talked with Senator Baker to determine if it were possible to defer action in the Senate, which precedes the House on this issue, until after the Convention. Senator Baker attempted to defer action, but was unsuccessful. Based on the assumption that we would be faced with a Bill of some kind, we proceeded to attempt to gain positive changes.

Our fears concerning industry's reaction to our efforts were realized today when a group of six industry representatives visited my office and expressed great concern about our actions. In spite of previous general consultations, industry maintains the belief that our efforts, despite excellent intentions, would in fact undermine their moves.

My major political concern is that regardless of the technical merits of our position, the various forces are so polarized that we have a great deal to lose if these Amendments are presented in the Senate. I discussed this issue with Dick Cheney, and he suggested we seek Howard Baker's advice.

Max Friedersdorf and I visited with him this afternoon, and I explained my concerns. Senator Baker said that he felt it would be best not to offer the Amendments arrived at by our Task Force. It was his opinion that they would be defeated under any circumstances and that it would needlessly expose you politically. He expressed his gratitude that you had been willing to be forthcoming and indicated that our work was not in vain since it would be valuable if and when the Bill comes to Conference.

Congressman Broyhill has reviewed our suggested amendments and has advised us that he would like to have several others considered. I have asked him for his changes to permit review by our Task Force. Broyhill's position is exactly opposite of the position of the Senate Minority. He feels our changes still leave major problems with the Bill while the Senate feels we have moved too far towards the position desired by industry.

RECOMMENDATION:

That we accept Senator Baker's suggestion that the changes be withheld at this point. If the Senate Bill passes, we should then work with Congressman Broyhill to improve the House version.

APPROVED _____ DISAPPROVED _____

Clean air

THE WHITE HOUSE

WASHINGTON

INFORMATION

August 3, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN

SUBJECT: Sierra Club, et. al. v. Environmental Protection Agency (D. C. Cir., decided August 2, 1976): EPA's "Significant Deterioration" Regulations.

The above-captioned case, decided yesterday by the United States Court of Appeals for the District of Columbia Circuit, sustained the regulations promulgated by the Environmental Protection Agency (EPA) to prevent "significant deterioration" of air quality under the Clean Air Act [42 U.S.C. 1857, et. seq. (1970)].

As you know, the twin objectives of the Clean Air Act are to improve air quality where pollution levels do not meet national minimum standards, and to protect the quality of air that already exceeds minimum standards. Pursuant to court order in Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D. D. C. 1972), aff'd. per curiam, 4 ERC 1815 (D. C. Cir. 1972), aff'd. by an equally divided Court, sub. nom. Fri v. Sierra Club, 412 U.S. 541 (1973), the Administrator of EPA was ordered to follow the statutory directive contained in Section 101 (b)(1) of the Act [42 U.S.C. 1857 (b)(1)], to ". . . protect and enhance the quality of the Nation's air resources . . . .", by promulgating regulations designed to prevent "significant deterioration" of air quality in those areas which have air that already surpasses national air quality standards.

The subject suit represents an attack on the EPA regulations by a number of disparate forces -- indeed, fourteen separate petitions were consolidated in the one case. Petitioner Sierra Club contends that the regulations fail, in a variety of ways, to prevent degradation of existing clean air. The states of New Mexico, Wyoming and California are concerned that the regulations infringe on authority vested in the states. A large number of electric power companies, the American Petroleum Institute (API) and other organizations argue that the regulations are not authorized by the Clean Air Act, that their promulgation was procedurally defective, that the allowable increments are arbitrary and capricious, and that the regulatory structure is unconstitutional.

The Circuit Court, by its decision, has rejected these various objections and has thus sustained the validity of the regulatory scheme. This result was anticipated by attorneys for API and other industry representatives who now plan to take the matter to the Supreme Court on a petition for certiorari. If the petition is granted, plaintiffs believe that the Court will rely on a recent ruling [Train v. NRDC, 421 U.S. 60 (1975)] as overruling sub silentio the result which obtained in the Sierra Club case and lift the requirement for EPA to issue such regulations. EPA has an opinion quite the contrary and the Department of Justice indicates that the result will probably turn on what view Justice Stevens takes.

When the issue was previously before the Supreme Court, the eight justices participating split evenly on this decision, but Justice Douglas who was replaced by Justice Stevens was on the side which upheld the necessity of the regulations. In the prior case, Justice Powell abstained and will probably do so in this case as well. Assuming the Supreme Court agrees to take the case, it will likely be decided about this time next year.

If the pending Clean Air Act Amendments are enacted this year, this case would be mooted as the effect of the amendments would be to replace the current regulations. If no new legislation (other than the Moss Amendment, which would merely create a commission to review the "significant deterioration" issue) is enacted, the litigation will continue.

#

Senate Passes A Relaxed Clean-Air Bill

By Spencer Rich
Washington Post Staff Writer

An omnibus clean-air bill giving au-

Clean air

Some items in this folder were not digitized because it contains copyrighted materials. Please contact the Gerald R. Ford Presidential Library for access to these materials.