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Comptroller General
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B-208593.3

August 2, 1988

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

Your letter of June 7, 1988 asked for our expedited response on two issues related to EPA's recent policy proposals to designate some new areas as nonattainment under the Clean Air Act. Specifically, you wanted to know whether the Mitchell-Conte amendment to the 1988 Continuing Resolution supports EPA's November 24, 1987 proposals to redesignate some attainment areas as nonattainment and to expand the boundaries of existing ozone and carbon monoxide nonattainment areas to encompass the outlying portions of some larger metropolitan areas. Under the Mitchell-Conte amendment, we think EPA should present its proposed list of nonattainment areas to the state governors for appropriate action leading to a formal designation of such areas as nonattainment under section 107 of the Clean Air Act. However, there is no authority in the Mitchell-Conte amendment or elsewhere for EPA to attach nonattainment status to a locality where the air quality meets the standards solely by annexing it to another area found to be nonattainment.

Some other issues related to this matter will be addressed in our forthcoming report on the EPA's November 24, 1987 proposals. A staff paper is attached to this letter which analyzes the Mitchell-Conte amendment in detail. I trust it will be helpful. As agreed with your staff, this material will be available to the public on request 7 days from the date of this letter.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

Enclosure

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ENCLOSURE

AUTHORITY TO DESIGNATE NONATTAINMENT AREAS UNDER THE CLEAN AIR ACT

EPA's Redesignation Proposal

On November 24, 1987, EPA issued its proposed comprehensive strategy for responding to post 1987 ozone and carbon monoxide nonattainment. 52 Fed. Reg. 45044. Among the matters EPA proposed for comment was issuing calls for revised State Implementation Plans (SIPs) requiring Part D elements (including some new requirements that would upgrade the Part D elements) in any geographical location where recent monitoring data showed violations, irrespective of the area's past designation as attainment or nonattainment. It also proposed adjusting the boundaries of nonattainment areas to add on all counties in a metropolitan statistical area (MSA) or a consolidated MSA (CMSA), whether the areas being annexed to the preexisting nonattainment area showed violations or not. 52 Fed. Reg. 45044, 45054-55.

In the November 24 policy statement, EPA stated its opinion that the proposals to redesignate attainment areas and expand the nonattainment areas would promote early attainment of the primary National Ambient Air Quality Standards for ozone and carbon monoxide (NAAQS's), but it offered no statutory or legal basis to support the proposal. In fact, EPA admitted that such redesignation would reverse its previous unwritten policy of adhering to the decision in Bethlehem Steel Corp. v. EPA, 723 F.2d 1304 (7th Cir. 1983), in which the court held that EPA lacked the authority to initiate the designation or redesignation of an area as nonattainment. 52 Fed. Reg. 45049.

On June 6, 1988, EPA published its proposed list of nonattainment areas. As previously announced, the list included some areas never before designated as nonattainment and it enlarged nonattainment areas in an MSA or CMSA by annexing adjacent localities that were previously excluded. 53 Fed. Reg. 20722. EPA cited the legal basis for the redesignation list as the Mitchell-Conte amendment to the Fiscal Year 1988 Continuing Resolution, Pub. L. No. 100-202, § 101(f) 101 Stat. 1329, 1329-199 (erroneously cited in the EPA proposal as the Budget Reconciliation Act of 1987).

The last sentence of the Mitchell-Conte amendment reads:

> "Prior to August 31, 1988 the Administrator of the Environmental Protection Agency shall evaluate air

> quality data and make determinations with respect to which areas throughout the nation have attained, or failed to attain, either or both of the national primary ambient air quality standards referred to in subsection (a) and shall take appropriate steps to designate those areas failing to attain either or both of such standards as nonattainment areas within the meaning of part D of title I of the Clean Air Act."

Pub. L. No. 100-202, § 101(f), 101 Stat. 1329-199.

The legislative history of the amendment indicates that the Congress's principal intention was to give itself the time to complete work on the reauthorization of the Clean Air Act before EPA would be required by law to impose economically disruptive sanctions. 133 Cong. Rec. H10923-45 passim, (daily ed. Dec. 3, 1987) and 133 Cong. Rec. S17812 (daily ed. Dec. 11, 1987, remarks of Sen. Mitchell). It is not entirely clear how the last sentence of the amendment was intended to fit into that legislative purpose, because requiring redesignation at the present time complements implementation of the EPA November 24, 1987, proposal more effectively than it does the legislative efforts now underway. 1/ However, the language of the provision itself is clear. EPA was to gather data nationwide and designate within the meaning of Part D.

There is little legislative history to supplement our understanding of what precise actions were to be taken under the authority of the last sentence. The only statement made on the last sentence during the floor debate was to the effect that the sentence would in fact authorize redesignation. 133 Cong. Rec. H10942 (daily ed. Dec. 3, 1987, remarks of Rep. Dingell). This bolsters the conclusion that the sentence means precisely what it says: EPA should "take appropriate steps to designate" areas that have not attained the standards as "nonattainment areas."

EPA has taken a first step toward carrying out that responsibility by publishing a list of proposed nonattainment areas on June 6, 1988. EPA is prepared to finalize that list, presumably before August 31, 1988, and

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1/ In fact, it is possible that redesignation at this time might as a practical matter foreclose some options the Congress would otherwise consider in its drafting of Clean Air legislation, such as tiering the nonattainment areas according to the severity of the problem.

in the June 6th Federal Register notice it solicited comments only on what regulatory consequences should flow from the redesignation. We disagree with EPA, however, because we do not think EPA has authority to finalize the list. In our view, taking "appropriate steps" to designate or redesignate entails following the existing statutory procedure for designating nonattainment areas.

The designation procedure is set forth in section 107 of the Act and it confers on state governors the authority to initiate the designation of areas as nonattainment. Subject to some limitations not relevant here, section 107(d)(2) empowered the EPA Administrator to promulgate the state-produced lists, "with such modifications as he deem[ed] necessary." EPA's modifications would have been based on the definition of "nonattainment area" in section 171(2), which reads as follows:

> "The term 'nonattainment area' means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 107(d)(1) of this title."

Section 107 also provided in subparagraph (d)(5), for future adjustments by way of redesignations, such as the one in progress under the Mitchell-Conte amendment. That subparagraph reads as follows:

> "A State may from time to time review, and as appropriate revise and resubmit, the list [of nonattainment areas] required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection."

The Mitchell-Conte amendment, which is not an amendment to the Clean Air Act, does not waive the requirements of section 107. To comply with the amendment's direction to "take appropriate steps to designate", EPA should present its list to the state governors and request their action.

Preparing a list and presenting a request for redesignation to the state governors was the procedure EPA followed in early 1983 when it intended to invoke sanctions against those nonattainment areas that had failed to meet the

December 31, 1982, deadline, and it should be followed now. See, e.g., 48 Fed. Reg. 4972.

EPA's "Regulatory Consequences" Analysis

In its November 24, 1987, published policy, EPA proposed that all SIP revisions called under section 110(a)(2)(H) of the Act under the policy would include the Part D elements, 2/ whether or not the area had been designated nonattainment before December 31, 1987. In its June 6, 1988 Federal Register notice, EPA proposed three alternatives for using the revised nonattainment list developed pursuant to Mitchell-Conte. Two of those alternatives involve imposing the Part D SIP elements in revised SIP calls for attainment areas (redesignated as nonattainment areas under Mitchell-Conte) that were not previously subject to Part D.

We are cognizant of the fact that, as regards the newly designated nonattainment areas, imposing the Part D requirements at this time would entail significant additional planning responsibilities. We also understand that the Part D SIP elements are costly and that they involve mandating specific programs (vehicle I/M) that, because they affect lifestyles, are sensitive both politically and popularly. We further realize that attainment areas (the former status of these newly designated areas) may not be required to implement these SIP elements for constitutional reasons. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), affirmed, 566 F.2d 665 (9th Cir. 1978).

However, we believe the EPA is authorized to include the Part D elements in the section 110 SIP calls for all nonattainment areas. 3/ The Clean Air Act provides no basis to differentiate among designated nonattainment areas based on the date of designation. If the areas are properly designated nonattainment, they become subject to the

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2/ The Part D elements are the 11 statutory items required in a Part D SIP. They include, among other requirements, producing "reasonable further progress," mandatory vehicle inspection and maintenance, and adopting all EPA-endorsed "reasonably available control technology."

3/ In B-221421, Feb. 28, 1986, we decided that section 110, not Part D was the proper authority for all SIP revisions called after the Part D deadlines.

requirements of Part D as that authority is carried over by section 110(a)(2)(H) of the Act. 4/

EPA's third alternative is to use the list developed under the Mitchell-Conte amendment as informational only. We disagree with this proposal for the reasons stated above and because it is clear that EPA was to proceed to take the appropriate steps to formally designate the status of all areas which designation, if nonattainment, automatically triggers the imposition of requirements and sanctions of the Act.

In our view, the Mitchell-Conte amendment postponed but did not eliminate the Act's nonattainment sanctions. In order to carry out both the amendment and the underlying Clean Air Act (Section 110(a)(2)(I)), after August 31, 1988, EPA should use the designations to impose the mandatory construction ban on nonattainment areas that it has determined did not attain the standards. This means imposing the ban on the newly designated areas along with the areas that had 10 years to comply with Part D, and still did not produce attainment.

The effect of the redesignations, particularly insofar as they place substantial and even draconian burdens on the newly designated nonattainment areas, is something the Congress will likely want to address in its redrafting of the Clean Air Act. Additionally the Congress may wish to consider extending the suspense period in the Mitchell-Conte amendment in order to avoid economic disruption that will accompany the imposition of the sanctions generally.

Annexed Areas

The other matter you asked us to comment on is the EPA proposal to enlarge the boundaries of existing nonattainment areas to include adjacent localities which do not themselves violate the air quality standards but may contribute to concentrations of ozone and carbon monoxide in nearby urbanized nonattainment areas because its residents commute to the urban areas in automobiles emitting pollutants or for other reasons.

We do not see any authority in section 107 of the Clean Air Act or in the Mitchell-Conte amendment that would authorize

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4/ The interrelationship between section 110(a)(2)(H) and Part D will be discussed further in our forthcoming report.

listing an area as nonattainment if it in fact meets the standards, regardless of its residents' possible contributions to the pollution of another area. A state governor's determinations under section 107 dividing his state into areas and making findings of attainment or nonattainment cannot be changed by manipulating the geographical boundaries of such area. There is no basis for EPA to modify a governor's finding of attainment unless monitoring/modeling or other reliable information shows a violation. The Mitchell-Conte amendment directs EPA redesignations only of areas "failing to attain" the standards.

It would take legislative action to redefine the term "nonattainment area" and to change the current designation process in order to expand the boundaries of the existing nonattainment areas to include adjacent jurisdictions where the standards have been met. Since annexed areas cannot be properly redesignated under the Act, it follows that there can be no new requirements or sanctions imposed on those areas under the Act or under the Mitchell-Conte amendment.

Conclusion

There is no authority in the Clean Air Act or the Mitchell-Conte amendment to enlarge the boundaries of existing nonattainment areas by annexing nearby localities that contribute to nonattainment in adjacent cities, but do not themselves violate the standards. However, it was not improper of EPA to use the authority of the Mitchell-Conte amendment to develop a comprehensive list of areas that exceed the primary NAAQS's for ozone and carbon monoxide, and to include on that list areas that were not previously designated as nonattainment. In order to carry out the amendment's instruction to "take appropriate steps to designate", EPA should present its list to the state governors and request action under the statutory designation process in section 107 of the Clean Air Act. Designation entails subjecting the areas to the requirements of Part D, including the sanctions for nonattainment. Moreover, pursuant to the Clean Air Act, EPA must go forward and impose sanctions when the Mitchell-Conte suspense period expires.