Feldman

Comptroller General
of the United States

Washington, D.C. 20548

B-234590.5

October 28, 1993

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

Dear Mr. Chairman:

This responds to your letter of June 7, 1993, in which you requested our views on the legality of the Environmental Protection Agency's (EPA) actions concerning the cross-border sales of vehicles certified to meet California standards, but not federal Clean Air Act standards. You question whether: (1) EPA was required to issue a rule to announce its policy on cross-border sales; and (2) whether EPA acted properly in taking action on a matter that is covered by a rulemaking petition, before acting on the petition.

As explained in the enclosure, with respect to the first issue, we believe that, because EPA did not implement its policy change, it was not required by the Administrative Procedure Act to conduct a rulemaking. However, a rulemaking is required if EPA plans to go forward and implement this change. With respect to the second issue, we are not aware of any basis to conclude that a petition for rulemaking limits an agency's discretion to take any actions related to the issues covered by the petition.

We hope that the foregoing is helpful. In accordance with our usual procedures, this opinion will be available to the public 30 days from its date.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

Enclosure

558531

ENCLOSURE

ANALYSIS

BACKGROUND

New York Adoption of
California Standards

Under the Clean Air Act, states are generally prohibited from adopting or attempting to enforce their own motor vehicle emission standards. California, however, is exempt from this prohibition if it receives a waiver of federal preemption from EPA for any standard or accompanying enforcement procedure the state adopts.

Until 1977, EPA would grant a waiver of federal preemption only if the California standards were in every respect at least as stringent as the federal standards. Thus, California cars also complied with federal standards.

In 1977, Congress added section 177 to the Clean Air Act. Section 177 allows a waiver for California standards that are, in the aggregate, as strict as, or stricter than federal ones, even if some particular standards are less strict. Thus, under section 177, California cars do not necessarily comply with all federal requirements. Section 177 also allows other states to adopt and enforce California standards in lieu of the federal standard.

New York State adopted the California standards for 1993 and later model year vehicles that belong to engine families which began production on or after November 22, 1992. However, the New York State legislature passed a bill in early April to nullify the California emission standards program for 1993-94 model years for that state, unless either of two events occurred prior to May 1, 1993: (1) the state's motor vehicle officials, after consultation with EPA, made a written finding that EPA rules will not prevent cross-border sales or (2) EPA finds that the standards are necessary for the state to meet federal air quality requirements.[1]

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[1]Assembly Bill 6997 passed the New York State Assembly and Senate on April 5, 1993. The bill was recalled from the Governor on April 27, 1993 and returned to the Assembly on May 4, 1993. Accordingly, the bill did not become a law. (The practice of recalling a passed bill was declared unconstitutional, prospectively from May 6, 1993, by the New York State Court of Appeals. King v. Cuomo, 81 N.Y.2d 247 (1993).)

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In an April 27, 1993, letter to the Administrator of EPA, the Commissioner of the New York Department of Motor Vehicles requested that EPA provide New York a statement of EPA's policy on cross-border sales. The Commissioner expressed concern that EPA had changed its policy from "place of sale" to "place of use." The Commissioner stated that New York supported continuation of the "place of sale" policy, which would allow New York dealers to sell California vehicles to residents of other states as long as the sale occurs in New York.

EPA responded the following day. In its April 28, 1993, letter, EPA notified the Commissioner that EPA had reviewed the situation and modified its policy on the sale of California cars. EPA stated that its place of sale policy, with an expansion to include contiguous states, will remain in effect for 1993 and 1994 model cars.

EPA Policy on Cross-Border Sales of California Vehicles

Place of Sale

EPA's place of sale policy originated in a 1978 waiver of federal preemption for a package of California standards--some of which were more lenient than federal ones. In granting California's application for a waiver, the Acting Administrator stated that the California vehicles could only be "introduced into commerce for sale in the State of California and possibly in States which have adopted California standards pursuant to section 177 of the Act." 43 Fed. Reg. 25729, 25735 (June 14, 1978). The Administrator denied petitions to reconsider the Acting Administrator's decision on grounds that the revised act left EPA without discretion to permit nationwide sale of California cars. The United States Court of Appeals for the District of Columbia Circuit upheld the Administrator's determination. Ford Motor Company v. Environmental Protection Agency, 606 F.2d 1293 (D.C. Cir. 1979).

EPA's policy was further explained in two letters. The first letter was in response to Ford Motor Company's request for clarification of EPA's limitation on the sale of California vehicles outside of California. EPA stated that:

> "A manufacturer will not be presumed to have violated the [Clean Air] Act if a vehicle is registered or titled in California and then used outside of the state. A manufacturer will only violate the Act when a dealer outside of

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> California sells a 'California' car which is not used, titled or registered in California."

Letter from Charles N. Freed, Director, Mobile Source Enforcement Division, EPA to Helen O. Petrauskas, Esq., Office of General Counsel, Ford Motor Company, dated August 24, 1979. In this letter, EPA, in effect, expanded its place of sale policy to also include a place of use policy. California cars may be sold in states other than California as long as the car will principally be used, titled, or registered in California.

The second letter responded to a request from the California Air Resources Board (CARB) that EPA allow California dealers to sell California-certified vehicles to 49-state residents, so long as the sale takes place in California. EPA's response quoted its letter to Ford Motor Company and advised CARB that:

> "Since the scenario you present contemplates a dealer inside of California selling a 'California' car to an ultimate purchaser who is a 49-state resident, the Act's prohibition does not encompass it. EPA believes that permitting this type of sale will not undermine EPA's policy of ensuring the introduction into commerce of properly certified vehicles, i.e., certified to Federal standards for sale by dealers in the 49 states and certified to California standards for sale by dealers in California."

Letter from Benjamin R. Jackson, Deputy Assistant Administrator for Mobile Source and Noise Enforcement, EPA to Gary Rubenstein, Deputy Executive Officer, CARB, dated March 5, 1980 (emphasis in original).

Under EPA's place of sale policy, manufacturers and dealers could sell California vehicles to anyone, regardless of where the ultimate purchaser lived or intended to use the vehicle, provided the sale took place in California (or starting in model year 1993, New York). As explained in the letter to Ford, EPA's policy also included a place of use condition, allowing California vehicles to be purchased outside of California (or New York) if the vehicle will be titled, registered, or principally used in California (or New York). Manufacturers and dealers could not, however, sell California vehicles outside of California (or New York), unless the ultimate purchaser principally used, titled, or registered the vehicle in California (or New York). In the Ford Motor Company case, supra, Ford

unsuccessfully challenged the limitation imposed on selling California vehicles outside California.

Place of Use

According to an EPA Fact Sheet, for the 1994 model year, EPA began to implement an intended, or place of, use only policy. This policy would allow the sale of California vehicles anywhere as long as the vehicle was sold to an ultimate purchaser who intended to principally use, title, or register the vehicle in California or New York. This policy was more limited than the place of sale policy because California and New York dealers could not continue to sell vehicles to purchasers from other states without regard to where they intended to use the cars. According to the Fact Sheet, the place of use policy permitted manufacturers to ship California vehicles to states other than New York and California but would require their sale only to individuals who intended to principally use them in California or New York. The Fact Sheet explains that this policy was designed to allow dealers in contiguous states to continue cross-border sales.

EPA never fully implemented this policy. According to July 21, 1993, correspondence with manufacturers, EPA had issued only "a few" certificates of conformity with the intended use only language. EPA provided the manufacturers with corrected certificates containing the expanded place of sale language. These certificates were effective from the initial effective date of the original certificates.

EPA's Current Policy

As stated in its April 28, 1993, letter to New York, EPA abandoned its place of use only policy. EPA stated that for the 1993 and 1994 model years, EPA's place of sale policy would remain in effect. "[D]ealers in a California-car state such as New York will be able to sell 1993 and 1994 model year California cars to purchasers from any state." Letter from Charles N. Freed, Director, Manufacturers Operations Division, EPA to Patricia B. Adduci, Commissioner, New York State Department of Motor Vehicles, dated April 28, 1993.[2]

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[2]In addition, EPA will take no action to prevent dealers in states contiguous to New York from selling California cars to purchasers from any state. EPA believes that this policy is justifiable as a de minimis exception to the general prohibition of sales of California cars in states other than California-car states.

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Petition for Rulemaking

On April 21, 1993, the Association of International Automobile Manufacturers, Inc. (AIAM) petitioned the EPA to institute rulemaking to address the issue of cross-border sales.[3] EPA did not formally respond to the petition, either by denying it or issuing a notice of proposed rulemaking.[4] In fact, as stated above, EPA advised New York on April 28 of its latest policy on cross-border sales by letter while AIAM's petition was pending. The letter stated that EPA would respond separately to the AIAM petition. On June 25, 1993, AIAM agreed to withdraw its request. AIAM stated that, due to time constraints, some informal guidance will be necessary for the 1995 model year, but it still believes that rulemaking is needed for 1996 and later model years.

LEGAL ANALYSIS

Rulemaking Requirements

EPA started to implement its intended use only policy by issuing certificates of conformity with the new, restrictive language. The agency abandoned that policy and communicated that it would continue its previous policy, in an expanded fashion, in private correspondence with the State of New York. EPA subsequently notified manufacturers and provided them with corrected certificates. In our view, because EPA did not fully implement its intended use only policy, its failure to conduct a rulemaking was not inconsistent with the requirements of the Administrative Procedure Act (APA). However, if EPA in the future goes forward with an intended use only policy, a rulemaking is required.[5]

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[3]Previously, on October 27, 1992, AIAM had advised EPA that its members were opposed to a formal rulemaking. AIAM stated: "Because the California standards will apply as early as January 1, 1993 and a rulemaking would take at least a year, AIAM would favor some kind of informal guidance such as an Advisory Circular (or statement of enforcement policy) that could be promulgated more quickly and would not require extensive proceedings."

[4]On August 11, 1993, EPA held a workshop on cross-border sales. Also, EPA has opened a public docket on cross-border sales (Docket No. A-93-30).

[5]Certain enumerated EPA rulemakings are governed, not by the APA, but by the more detailed rulemaking procedures in the

(continued...)

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The APA requires agencies to publish in the Federal Register any general notice of proposed rulemaking, unless persons subject to the proposed rule otherwise receive actual notice. 5 U.S.C. § 553(b). Agencies must then allow submission of written comments, and they may provide an opportunity for oral presentation. After consideration of the comments, the agency must incorporate in the rules adopted a concise general statement of their basis and purpose. 5 U.S.C. § 553(c). The notice and comment requirements do not apply to interpretative rules or to general statements of agency policy. 5 U.S.C. § 553(b)(A).

While the distinction between a policy and a rule is not easily drawn, the United States Court of Appeals for the District of Columbia Circuit has formulated the following two-fold test: "A policy statement is one that first, does not have a 'present-day binding effect,' that is, it does not 'impose any rights and obligations,' and second, 'genuinely leaves the agency and its decisionmakers free to exercise discretion.'" McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1988), quoting Community Nutrition Institute v. Young, 818 F.2d 943, 946 & n.4 (D.C. Cir. 1987). However, "[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is--a binding rule of substantive law." Guardian Federal Savings & Loan Association v. FSLIC, 589 F.2d 658, 666-67 (D.C. Cir. 1978) (emphasis in original).

Likewise, the APA does not define the term "interpretative rules." The District of Columbia Circuit has provided the following definition:

> "Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means."

Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952).

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[5](...continued)
Clean Air Act. Clean Air Act, § 307(d), 42 U.S.C. § 7607(d). The issuance of regulations implementing section 177 is not among the actions listed in section 307(d)(1).

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In this case, EPA abandoned its intended use policy before fully implementing it and returned to the policy it had been following for many years. Since EPA did not change its policy, a rulemaking would not be required. However, if EPA wants to implement an intended use policy for future model years, we believe that a notice and comment rulemaking is required.

EPA's intended use only policy appears to be regulatory in nature and binding on motor vehicle manufacturers, dealers, consumers, and others. The policy affects the type (California or federal) of vehicles that may legally be sold, where they may be sold, and to whom they may be sold. The policy also affects requirements for certificates of conformity and vehicle labels, among other things. As such, the policy would, in effect, create law. Thus, we believe that a change to EPA's cross-border policy from place of sale to intended use only would not be exempt from the notice and comment requirements of the APA. It would not constitute a non-binding statement of agency policy nor would it qualify as an interpretative rule. EPA's failure to conduct a rulemaking in such an instance would be inconsistent with the requirements of the APA.

We are aware that the court in Ford Motor Company v. EPA ruled that EPA was not required to implement its place of sale policy through rulemaking procedures. In that case, the petitioner had argued that EPA was not free to change its longstanding prior practice of permitting nationwide distribution of vehicles without following the notice and comment rulemaking procedures set forth in the APA. The court stated that EPA had not promulgated a new rule; it had merely recognized and effectuated legislative changes.

In Ford, the court ruled that EPA's disputed place of sale policy was simply an interpretation of the 1977 amendments to the Clean Air Act. For some 10 years prior to enactment of the amendments, the practice of distributing California cars nationwide had been lawful. This was because the statute, dating from 1967, required that, for California to receive a waiver of federal preemption, its emission control standards had to be, in every respect, more stringent than federal standards. Thus, as noted above, California cars necessarily satisfied federal standards, which were then in force in the other 49 states,[6] and there was no legal

[6]Prior to the 1977 amendments to the Clean Air Act, no state other than California was permitted to adopt or enforce its own emission control standards. Thus federal standards were in force in every state other than California.

impediment to their sale throughout the country. EPA practice at the time of permitting nationwide distribution of cars, which the court characterized as "unexceptional," conformed to the statutory requirements.

In 1977, Congress added section 177 to the Clean Air Act and significantly changed these requirements. Under section 177, California may receive a waiver of federal preemption if its emission control standards are, in the aggregate, as strict as, or stricter than, federal standards, even if some particular standards are less strict. Section 177 also permitted other states to adopt and enforce their own emission control standards, so long as they were identical to the California standards for which a waiver of federal preemption had been granted.

Thus, under section 177, California standards no longer necessarily satisfied all federal standards. As a result, the once "unexceptional" practice of distributing California cars nationwide was called into question by section 177. EPA responded to this legislative change by adopting its policy restricting the sale of California cars to California "and possibly in States which have adopted California standards." Ford Motor Company attacked the policy by asserting that the 1977 amendments were not intended to generate a carte blanche rule against the then-established practice of distributing and selling California cars nationally. It also insisted EPA could not create such a rule without following rulemaking procedures. The court, in holding that EPA was not required to follow rulemaking procedures, said: "EPA did not promulgate a new rule, it merely recognized and effectuated changes wrought by Congress." 606 F.2d at 1300. The result, as the court put it, "flows both from the text of the 1977 amendments and from the policies underlying the Clean Air Act." 606 F.2d at 1295.

The court did not dispute Ford's point that the decision to limit sale of California cars would have a substantial impact on automobile manufacturers. However, the court stated:

> "[A]ny adverse impact . . . stems not from a discretionary act of the Agency, but rather from legislative changes made by Congress. . . . Rulemaking is not required by the APA when an agency merely interprets and carries out congressional revisions as opposed to actually exercising delegated legislative powers." 606 F.2d at 1300, n. 52.

Thus, despite the undisputed substantial impact of the change in EPA's cross-border sales policy--a policy of long standing--the Ford court held that the agency was not required to follow notice and comment rulemaking procedures in making the change. The court's rationale was that the change was not a result of EPA's discretionary exercise of delegated legislative powers, but of legislative action by Congress. EPA merely "effectuated changes wrought by Congress." The court stressed this point, stating:

> "However meritorious Ford's position with regard to those changes may be, it was then and is now being presented in the wrong forum. Neither the Administrator nor this court is free to reverse the congressional determination." 606 F.2d at 1300.

The Ford case has elements in common with the changes EPA may consider making to its cross-border policy. For example, in both cases, the policies were, or are, of long standing (in Ford, 10 years; in the current situation, 15 years) and the impact of both changes on automobile manufacturers is, or would be, substantial. However, in Ford, the court of appeals stressed, the changes did not result from EPA's discretionary exercise of delegated legislative powers, but rather, from legislative action by Congress. By contrast, EPA's policy change to intended use only would not be in response to any legislative action by Congress. Section 177 has remained unchanged, in relevant part, since Congress enacted it in 1977, resulting in the first change in EPA's cross-border sales policy. Rather, it would be an exercise of EPA's discretionary authority. The change would be in response to changes in circumstances, not changes in the Clean Air Act.

The importance of this distinguishing factor is shown by two other U.S. courts of appeals cases, which reached different decisions on the issue whether changes in agency policy are required to go through notice and comment rulemaking.

In one of the cases, Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), vac. on other grounds, 426 U.S. 26, the court of appeals upheld an agency's change in a longstanding policy without a rulemaking, on the ground that the policy implemented a change in Treasury Department regulations which had undergone notice and public hearings. In that case, the plaintiffs, representing persons unable to pay for hospital services, challenged a change by the Internal Revenue Service (IRS) in its long-held policy on qualifications of hospitals as "charitable" organizations. Among the grounds

for plaintiffs' challenge was that the policy change had not gone through a rulemaking procedure.

Under the earlier policy, which had conformed to then-existing regulations of the Treasury Department, hospitals qualified as charitable organizations only if they provided free or below cost service to those unable to pay. In 1959, the Treasury Department changed its regulations through notice and public hearings to broaden the concept of "charitable." Ten years later, IRS issued a new ruling which modified its longstanding policy by changing the definition of the term "charitable" to conform to the revised Treasury regulations. Under the new IRS definition, hospitals no longer had to provide free or below cost service. The new policy was accomplished without notice and comment rulemaking.

The court, in upholding the policy change without a rulemaking, stated:

> "Here the Commissioner interpreted the meaning of the term 'charitable' in § 501(c)(3) [of the Internal Revenue Code]. The fact that the term had been interpreted by the [IRS] Commissioner differently in an earlier revenue ruling is not controlling. In the meantime Treasury Regulations containing a broader concept of 'charitable' had been adopted in 1959, after notice and public hearings. In our opinion Internal Revenue 69-545 conforms to the definition of 'charitable' set forth in these Regulations." 506 F.2d at 1290.

Thus, in Simon, the change in the longstanding IRS policy, by permitting hospitals to retain their status as "charitable organizations" without providing free or reduced cost to persons unable to pay, plainly had an adverse impact on the plaintiffs. The basis for the court's decision was that the IRS policy change did not constitute a new substantive rule, but rather, an interpretative rule. In changing the definition of the term "charitable," IRS merely conformed to the revised Treasury Department regulations, which had been issued pursuant to proper rulemaking procedures.

In the second case, Brown, Inc. v. United States, 607 F.2d 695 (5th Cir. 1979), the disputed changes in policy were not pursuant to "changes wrought by Congress," as in Ford, nor were they changes to conform to regulations issued through notice and hearings, as in Simon. The court of appeals held that the change was not an interpretative rule, but rather,

carried substantive consequences, and that a rulemaking was required.

In Brown, the Interstate Commerce Commission (ICC) had followed a 40-year policy of notifying affected carriers about certain applications filed with the Commission. The policy had been established voluntarily by the ICC, without going through a rulemaking. After 40 years, the ICC attempted to eliminate the notification policy by filing a "Notice of Elimination" in the Federal Register, to become effective 15 days after publication, without an opportunity for comment by interested persons. The Commission argued that, because it had never had a formal regulation requiring that notice be given to interested parties, its Notice of Elimination was an interpretation that was exempt from notice and comment rulemaking. 607 F.2d at 700.

The U.S. Court of Appeals for the Fifth Circuit held that the Notice of Elimination was not an interpretive rule and was not thereby exempt from the APA rulemaking requirements. The court reasoned that the Notice "effects a change in the method used by the Commission in granting substantive rights. As such, it is a new rule and cannot be interpretive." Id.

The court also rejected the ICC's argument that the Notice of Elimination was exempt from rulemaking requirements as a general statement of policy. The court stated:

> "The exemption of section 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated." 607 F.2d at 702.

Further, the court stressed the longstanding nature of the ICC's policy, stating:

> "[T]he industry's reliance on the forty-year-old practice of notifying existing competing carriers, pending ETA applications was not unjustified, and the change in that practice had a substantial impact on the motor carrier industry." 607 F.2d at 703.

Thus, even though the original ICC policy had not been established through a rulemaking, the court held that, in light of the longstanding nature of the policy, the justifiable reliance that industry placed on it, and the substantial impact of the policy change, a rulemaking was required for the ICC to effect the policy change.

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In all three cases discussed above--Ford, Simon, and Brown--the policies the respective agencies sought to change were of long standing and the change had a substantial impact on the respective plaintiffs. In Brown, because of these factors the agency was required to go through a rulemaking to effect the policy changes. However, in both Ford and Simon, the court of appeals held that a rulemaking was not required.

What distinguished the decisions in Ford and Simon from the decision in Brown is that in the former two cases, the substantive changes had been made by entities to which the defendant agencies were subordinate (in Ford, the Congress; in Simon, the Treasury Department). In those two cases, the agencies merely interpreted and implemented those changes. However, in Brown, the ICC was not effectuating a change made by Congress or conforming its policy to one that had been established by an executive department to which it was subordinate. It was the ICC itself that sought to make the policy change through the exercise of its discretionary authority. Even though the original policy had been established by the ICC voluntarily, a rulemaking was required to change it.

EPA's change in its cross-border sales policy, as in Ford, Simon, and Brown, would involve a change in a policy of long standing which would have a substantial impact on affected parties (here, automobile manufacturers). However, unlike the situation in Ford, these changes would not stem from an intervening legislative change made by Congress. Similarly, unlike the situation in Simon, the change would not serve to conform to regulations properly issued through notice and hearings. Rather, these changes would represent EPA's discretionary response to changed circumstances--New York's adoption of California standards.

As in Brown, the fact that EPA's initial policy was not adopted by rulemaking does not exempt a change in that policy from the rulemaking requirement. Accordingly, in our view, EPA's change in its long-held cross-border sales policy may be effected only after notice and comment rulemaking.

Petition For Rulemaking

EPA took action on its cross-border policy in a letter to New York while a petition for rulemaking on its cross-border policy was pending. The issue presented is whether EPA acted properly in taking action on a matter that is covered by a rulemaking petition, before acting on the petition.

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AIAM's rulemaking petition is governed by the APA. The pertinent provision of the APA states that:

> "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

5 U.S.C. § 553(e). An agency is not, however, compelled to undertake a rulemaking merely because a petition has been filed. WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981). The agency is only obligated to give prompt notice of a denial of a petition, accompanied by a brief statement of the grounds for denial. 5 U.S.C. § 555(e).

An agency's denial of a rulemaking petition is generally reviewable in court as a final agency action. WWHT v. FCC, 656 F.2d at 809. However, the scope of judicial review is "extremely narrow." Animal Legal Defense Fund v. Madigan, 781 F. Supp. 797, 804 (D.D.C. 1992). Agencies' refusals to institute rulemaking proceedings following a rulemaking petition have been overturned only rarely, primarily where there have been plain errors of law. Id. at 803-804. An agency's inaction on a petition for rulemaking does not amount to a denial where there is no indication that the agency's deferral of a final decision on the petition is unreasonable or arbitrary. Consolidation Coal Co. v. Donovan, 656 F.2d 910, 916 (3rd Cir. 1981).

Further, while the APA requires a "prompt" agency response to a petition for rulemaking, 5 U.S.C. § 555(e), it does not define prompt. Promptness is decided by the courts on a case-by-case basis. For example, in cases interpreting section 555(e), a delay of 14 months and another of over 3 years on matters pending before agencies were not excessive. Kent v. Hardin, 425 F.2d 1346 (5th Cir. 1970); Federal Trade Commission v. J. Weingarten, Inc., 336 F.2d 687 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965). Here, the petition was withdrawn 2 months after it was filed. On the facts presented, we cannot conclude that EPA had either failed to respond promptly to the petition or, by inaction, had denied AIAM's petition before it was withdrawn.

We are not aware of any basis, in the APA or otherwise, to conclude that a petition for rulemaking limits an agency's discretion to take action related to issues covered by the petition. The APA requires only that an agency respond to the rulemaking petition. It does not state that the filing of a petition bars an agency from taking actions that are the subject of the petition while the petition is pending. Any injury to AIAM would be correctable on review of EPA's

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final disposition of AIAM's petition for rulemaking. This review would include review of any intermediate irregularities in the rulemaking petition process. Clark v. Busey, 959 F.2d 808, 813 (9th Cir. 1992).

Feldman

B-234590.5

October 28, 1993

DIGESTS

1. Because Environmental Protection Agency (EPA) did not implement changes to its cross-border policy on sale of California vehicles, rulemaking is not required by the Administrative Procedure Act (APA). If EPA changes its long-held policy, rulemaking is required because the policy changes do not constitute non-binding statements of agency policy nor do they qualify as interpretative rules.

2. We are not aware of any basis, in the Administrative Procedure Act (APA) or otherwise, to conclude that a petition for rulemaking limits an agency's discretion to take action related to issues covered by the petition. The APA requires only that an agency respond to a rulemaking petition.

United States General Accounting Office

GAO Release of GAO Legal Decision or Opinion

155853

Subject: EPA's actions concerning cross-border sales of vehicles certified to meet California standards but not federal Clean Air Act standards

Date: 11/25/93

No. 150625

B-Number: B-234590.5

Date: 10/28/93

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

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Comptroller General
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October 28, 1993

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

Dear Mr. Chairman:

This responds to your letter of June 7, 1993, in which you requested our views on the legality of the Environmental Protection Agency's (EPA) actions concerning the cross-border sales of vehicles certified to meet California standards, but not federal Clean Air Act standards. You question whether: (1) EPA was required to issue a rule to announce its policy on cross-border sales; and (2) whether EPA acted properly in taking action on a matter that is covered by a rulemaking petition, before acting on the petition.

As explained in the enclosure, with respect to the first issue, we believe that, because EPA did not implement its policy change, it was not required by the Administrative Procedure Act to conduct a rulemaking. However, a rulemaking is required if EPA plans to go forward and implement this change. With respect to the second issue, we are not aware of any basis to conclude that a petition for rulemaking limits an agency's discretion to take any actions related to the issues covered by the petition.

We hope that the foregoing is helpful. In accordance with our usual procedures, this opinion will be available to the public 30 days from its date.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

558531

Enclosure