PRODUCTION LIMITS

ADVANTAGES

easy to implement
effective, if set correctly
if stringent, stimulate innovation

DISADVANTAGES

large wealth transfers to producers
low equity
efficiency losses unless transferrable
inflexible given schedule

Other equity concerns frequently expressed by firms contemplating the prospect of regulation involve issues revolving around differential economic power. This is essentially a big versus little issue. Larger firms tend to have greater access to capital, greater market power, and greater capacity to adjust to rising prices. Dominant questions in this area concern continued access to increasingly limited supplies of ozone-depleting chemicals and access to newly emerging substitutes which may not yet be widely available. Changing the rules of the game by introducing environmental regulation has the capacity to alter the basic competitiveness of the industry by affecting market structure. This is particularly true of regulations of the command-and-control type which can act as barriers to new entrants into an industry.

STRENGTHS AND WEAKNESSES

Production-based Policies

Policies focusing directly on the limitation of production of ozone-depleting substances rate high in effectiveness. Their effects are relatively certain in limiting the total quantity of emissions. With the exception of growth limits, production-based policies are reasonably costly particularly in terms of transfer costs. Production limits all act to grant producers enhanced revenues from the increase in prices associated with increased competition for reduced supplies unless coupled with fees or marketable production permits. Thus, straight production limits score low on equity concerns. Producers would benefit and users would pay.

Unless the production entitlements implied by the limits can be exchanged among producers, further efficiency losses could ensue. For example, if all producers are required to phase-down production proportionally within a given timeframe, the remaining production levels within individual plants could be very inefficient and high cost given the nature of economies of scale, i.e. the tendency for the average costs of production to decline as output is expanded over some range. It would be more efficient and less costly if firms could combine entitlements through trading to achieve these scale economies. None of these policies is particularly flexible since they rely upon pre-determined schedules of reductions to achieve their effectiveness. Such schedules are the result of careful compromise and are not lightly overturned.

Growth rate limits are the exception in this group of polices. Such limits would not be effective in protecting the environment as they would provide little stimulus to innovate non-depleting alternatives. Neither are such policies flexible in meeting the crises that can be provoked by environmental surprise. On the plus side, such regulations would be reasonably equitable as the size of any transfer payments would depend upon the relative sizes of the rate of growth of demand compared with the specified growth limit. For similar reasons, equity is not a particular problem with this policy approach.

COMMAND-AND-CONTROL

ADVANTAGES

relatively certain emissions reductions
existing track record
equitable if adjusted for firm differences

DISADVANTAGES

encourages strategies of avoidance
high information costs for implementation
generally high fixed cost outlays
no account for economies of scale
low flexibility once investments made
no incentive to further innovate

Command-and-Control Options

The highly prescriptive policies which constitute the set of command-and-control options which EPA could employ have the advantage of providing a relatively high degree of certainty about their effectiveness. Performance of these policies can be impaired if the control technology is complicated requiring a high degree of supervision or maintenance. These options also are relatively equitable in the sense that everyone, i.e. all firms employing a particular production process, must use the same approach to managing emissions. This advantage begins to dissolve, however, when the mandated control technology is subject to economies of scale. In this case, relatively larger manufacturers will benefit from reduced pollution control costs per unit.

Weaknesses of the command-and-control approach center around their relatively high cost. As previously indicated, this form of policy requires the regulatory agency to possess detailed information concerning production processes and the suitability of pollution control devices. In the case of a diverse set of industries, such as those that have grown up around CFCs, it would be extremely expensive and time-consuming for EPA to generate the necessary expertise. Since such information already resides with individual firm managers, should EPA be reinventing the wheel?

If EPA relies upon firms to provide the detailed engineering data for its regulatory determinations, there is also a problem. Firms, recognizing the use for such information, would have incentives both to withhold such data and to inflate the costs involved. There is also a greater tendency to litigate under such policies. Further, once firms have made the necessary investments in pollution control, it is very difficult for the regulating agency to adjust its policy. Thus, flexibility is low. The upshot is that this class of policy options tends to be the most expensive and the most politically acceptable.

Emission Fees

Emission fees or, in the case of CFCs, virgin product taxes are direct incentive-based policies. As such, they have the virtue of decentralized decision-making, i.e. users would decide how much of the taxed chemicals they would use and which technologies would be most effective to employ in both production and emissions reductions, not regulators in EPA. Fees would therefore tend to promote efficient decisions by users and would tend to reduce the overall cost of the policy. In the case of the flat and escalating forms, fees would provide business with a known cost change which in turn is useful for strategic planning.

The effectiveness of fees to achieve a given environmental objective, however, does depend upon the level of the fee and the response of users. From the environmental viewpoint, fees would have to be large relative to current CFC prices in order to foster substitute chemicals. In the absence of legislation of the sort proposed by Senator Baucus, it is unclear whether EPA would have the regulatory resolve to set fees at such high levels.

EMISSION FEES

ADVANTAGES

effective, if set correctly
if contingent, flexible in changing level
economic incentive-based
efficient, if set correctly
stimulation to innovation for users

DISADVANTAGES

certainty of performance
learning period in setting the fee
equity impacts
Congressional concurrence

This is primarily an issue of the nature of the derived demand for CFCs and other ozone-depleting chemicals. For high value applications such as refrigeration or air conditioning, what is the ability of manufacturers to pay? For high value applications, users are likely to be able to sustain use over a wide range of prices plus fees. What is the shape of the demand curve for the individual industry segments? How high do prices have to become to significantly damp demand for both the input and, consonantly, the final product?

The generic question of the elasticity of demand for CFCs is very important to an evaluation of regulatory performance and yet scant data is available. While it is true that low value uses (those primarily involving prompt emissions), would tend to exit the CFC market for other readily available substitutes while prices (fees) were rising, how many industries would remain and for how long? We could end up with a situation where the value added by CFCs in particular applications are such that effective demand for the chemicals would persist. Note that price pressure on one component often forces firms to shift their attention to the component that would allow the greatest cost savings. Such options may not involve changes in the use of CFCs at all, but in materials used for other components or manufacturing changes, each of which could offset cost (price) changes in CFCs stemming from fees. Such dynamic adjustments would damp the incentive for alternative chemical formulations.

Industry has placed great value upon certainty. Certain access to materials and known prices for inputs are viewed as desirable. In the absence of high quality information concerning the nature of demand for CFCs, EPA will have to experiment with its fee level in order to insure that it is meeting its regulatory targets. Regulatory targets are essential for EPA to even begin to assess performance and may be mandated either by an international agreement or by domestic legislation. Fees become the added inducement and the mechanism for attaining those targets. Thus, a fee would use the operations of the market to restrict supply according to some pre-specified timetable. Since the information currently available does not permit precise fee setting, EPA is likely to favor the contingent fee as a hedge against performance.

Fees also have an uncertain legal status. In the absence of explicit domestic authorizing legislation, it is unclear whether EPA has the necessary authority to impose fees. Further, while fees can help to offset the social costs of transfer payments, it is questionable whether the revenues derived from fees could be targeted to provide compensatory relief to the regulated. This latter point is important because fees would tend to produce differential impacts between industries and firms. The extent of these equity effects would depend upon the particular production technology, the ability of the firm to adjust, and to reinvest. Fees would tend to be easier on larger firms and firms producing high value products for which total CFC content cost would be relatively low.

MARKETABLE PERMITS

ADVANTAGES

highly effective
visible schedule with a timetable
economic incentive-based
high equity if user-based
low cost if user-based

DISADVANTAGES

uncertain authority to auction
flexibility dependent upon auction timing
complex administration if user-based

Marketable Permits

Marketable permits for production or use are the last items on the regulatory policy menu. Either form of permit would be expected to be highly effective in meeting the environmental objective. This is not surprising because the total permitted quantity of CFCs for production or use would be pre-determined. In this sense, marketable permits can be viewed as a refined form of the production-based options and thus share the strengths of those approaches. Marketable permits have the significant additional asset of being incentive-based and thus capitalize on many of the economic advantages of fees. They are both effective and low cost.

Marketable permits also have some unique assets. For example, one of the distinct advantages of marketable use permits (MUPs) is that firms would be forced to explicitly evaluate the worth of specific chemicals in their production activities against the revenues that the sale of such permits would yield. This emphasizes the opportunity cost concept which focuses on the value of opportunities foregone by a specific decision. Further, it would provide those firms wishing to adjust to non-depleting alternatives with a source of funds to facilitate that adjustment. This advantage is particularly important in reducing total policy costs to society. MUPs also avoid the problem of windfall profits accruing to the limited number of producers that would result under any of the production-based policies, including marketable production permits (MPPs).

A marketable permit program's flexibility would depend upon the length of time for which the permits were valid. The time period question poses some unique and interesting trade-offs for society. A firm's decision-making flexibility would be enhanced the longer the planning period. For example, an annual permit would only allow a firm to allocate use (or production) over the year, unless it either sold its entitlement or purchased additional permits. On the other hand, a multi-year permit written for a commensurately larger quantity would allow a firm to plan its operations over the entire permit period choosing the time pattern of use that best suited its strategic interests. Society's problem is just the opposite. The longer the permit period, the lower the flexibility to quickly adjust production, use and emissions if need be.

Marketable permits can be very equitable in their regulatory impact upon firms. The distributional effects of permits are primarily a function of the method chosen for their allocation. If MPPs were distributed to existing producers according to some baseline production level, then transfer costs would be high and users would bear a disproportionate share of the policy's cost. Auctioning MPPs to producers would tend to reduce these total costs since some of the enhanced value of limited supplies would be transferred to the government. MUPs would be most equitable and produce the least cost. Permits distributed to users would be most equitable, but would pose implementation problems for EPA and increase administrative costs. Consequently, MUPs would be most feasibly implemented by means of an auction at some sacrifice in equity.

As with fees, there is some question as to EPA's legal authority to conduct such auctions. In the event that auctions were chosen as the vehicle for permit distribution, eligibility would have to be determined.

Further, constraints on the total market share that any one purchaser could acquire in the auction might have to be considered to assuage fears of one party's "seizing the market". Such constraints would help to equalize any differential market power owing to size as well. Minimum bid prices could also be specified in order to maximize the stimulus to innovation. These minimums would insure that marketable permits were as effective as fees in narrowing the cost gap between current CFCs and their more expensive substitutes. The effect is a subsidy for non-depleting alternatives.

Other concerns that have been voiced by industry representatives include the basic issue of access to chemical supplies. Some individuals believe that a market mechanism for allocation, such as MPPs or MUPs, would produce less certain access to supplies. In fact, the opposite is true. Firms experiencing a shortfall in supplies would be able to turn to the market and offer to purchase another's permitted quantities. Certainly, the price would be higher, but that is the nature of spot markets which operate to satisfy unanticipated needs. If the price were right, an exchange would occur. If multi-year permits were employed, a futures market could be developed which would allow firms to hedge their plans and lock-in profits. It is remarkable that businesses which have the greatest stake in the smooth functioning of market processes would fear market-based regulatory initiatives designed to reduce the regulatory burden.

CONCLUSIONS

Generic issues are involved in the choice of a policy instrument to control stratospheric ozone depletion. These issues include the coordination of domestic with international policy, the scope of coverage, the timing of implementation, and monitoring and adjustment. These are all important considerations, but only the outlines of the international coordination issue will be developed here.

INTERNATIONAL NEGOTIATIONS AND TRADE RESTRICTIONS

Stratospheric ozone depletion is a global problem, without dispute. Recognition of this fact is evidenced by the existence of on-going international negotiations to produce a protocol under the Vienna Convention to Protect Stratospheric Ozone. A protocol, defining the nature of coordinated international efforts to solve this problem, is expected to emerge this year. Each nation concerned with this problem and participating in this diplomatic process has the task of coordinating its separate national policies with any international agreement. For those nations convinced of the necessity for action, there is the further problem of deciding whether to defer action until an international bargain is struck.

Proponents of separate national actions argue that such initiatives can serve to catalyze action by those nations that remain indecisive. Such unilateral actions would demonstrate leadership in assuming responsibility for the problem and provide incentives for participation through the control of trade in products utilizing ozone-depleting substances. Opponents argue that such individual actions would serve to diminish cooperation in developing coordinated solutions by encouraging free riders. Further, the

economies of nations acting alone would be damaged through a loss of competitiveness. The efficacy of each of these lines of argument critically revolves around the effectiveness of measures to control trade in the regulated commodities.

Irrespective of whether the policy adopted is unilateral or geared to any international agreement, consideration must be given to trade. Those wishing to restrict the use and application of a class of chemicals will automatically make those chemicals more expensive, more valuable, and therefore more profitable. Such enhanced value will create incentives to modify behavior in the use of these chemicals particularly in waste reduction. However, there will also be new incentives to cheat or subvert the control system to take advantage of this enhanced value. Therefore, the control of trade becomes an essential ingredient of any policy regardless of the policy instrument selected. Trade restrictions are necessary to protect the economies of those regulating ozone-depleting chemicals, to provide penalties for those who would attempt to free ride on the efforts of others, and to stimulate wider participation.

SUMMARY

The preceding discussion has perused the landscape of regulatory choices open to EPA in managing stratospheric ozone depletion. Each of the policy choices has a different set of attributes, performance characteristics, strengths and weaknesses. Four main criteria were proposed for the problem of choosing among these alternatives. Effectiveness, cost, flexibility, and equity were the primary considerations. The results of this review are summarized in Tables 1-4. If each of the assessments for each of the criteria presented in each table were converted to a numerical ranking with the best performance assigned a value of 1 and the worst a 3 and the scores summed for each policy, then marketable permits for users and producers would be judged to perform best.

Clearly, EPA has an adequate range of choice in the instruments that it can select to control stratospheric ozone depletion. For equally effective policies, an important factor in EPA's decision-making will be the reactions of interested parties to these proposals. Business is presented with an important opportunity to help ensure that cost-effective and efficient policies are pursued in the prevention of ozone depletion.

Table 1:
PRODUCTION LIMITS

	PHASE DOWN	CAPACITY LIMIT
EFFECTIVENESS	H	M
COST	H	M
FLEXIBILITY	L	L
EQUITY	L	L

LEGEND: H denotes high
M denotes medium
L denotes low

Table 2:
COMMAND-AND-CONTROL

	EMISSION LIMITS	USE BANS
EFFECTIVENESS	H	M
COST	H	M
FLEXIBILITY	L	L
EQUITY	H	L

LEGEND: H denotes high
M denotes medium
L denotes low

Table 3:
EMISSION FEES

	KNOWN	UNKNOWN
EFFECTIVENESS	M	H
COST	M	H
FLEXIBILITY	L	H
EQUITY	L	L

LEGEND: H denotes high
M denotes medium
L denotes low

Table 4:
MARKETABLE PERMITS

	USERS	PRODUCERS
EFFECTIVENESS	H	H
COST	L	M
FLEXIBILITY	H	H
EQUITY	H	L

LEGEND: H denotes high
M denotes medium
L denotes low

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Too Much Law: Our National Disease

By BAYLESS MANNING*

ONE OF the advantages I have in speaking first is that I can set up the problem and tell you what I think causes it; my colleagues will tell you how to fix it. There was a certain amount of forethought in that tactic.

By any index or measure that you might choose to apply, our law is exploding. We are inundated by waves of new regulations, by judicial decisions, by legislation. Whole new areas of the law have sprung out of the ground overnight—environmental regulation is an example—and familiar areas like good old-fashioned property law have undergone a process of infinite fission. We have increasing numbers of statutory codes that are becoming increasingly particularistic; commercial law and taxation are two examples. The truth is, we are simply drowning in law.

All this law is irritating, annoying, and a nuisance. But I would like to suggest that it is much more serious than that and that a great deal more is at stake than the irritations we all feel as citizens and as lawyers in wrestling with this mass of material.

Too much law too fast, in my judgment, carries with it enormous long-term risks for the body politic. First, there is the simple matter of expense—expense of enforcement, the expense of compliance.

Next, quite visibly, increasing regulation is producing massive coagulation, embolisms in our legal process as a whole, clogging it and significantly impeding the availability and the distribution of justice.

There is no doubt that as the rate of new regulation increases, the prospect and the possibility of actual enforcement and enforceability decline correspondingly. That leads to a consequent opening for improper pressures (to express it charitably) or of petty official tyranny by those who are in a position to enforce law selectively.

Overregulation (I recognize the circularity of the term) is also stymieing, slowing down the implementation not only of private sector development, but also the implementation of social programs that we need but which we are not able to carry out effectively because of the overload of the circuitry.

Most seriously of all, too much law too fast, unequally enforced or simply not enforced at all, can only produce, and is producing, a gradual decline in the willingness of the public at large to assume voluntary compliance. It can only lead, I think, to a decline, or indeed, a loss of respect for the law

* Member, New York Bar. At the time of these remarks Mr. Manning was President of the Council on Foreign Relations; from 1964 until 1971 he was Dean of the Stanford Law School. These remarks are based upon a current law review article by Mr. Manning, *Hyperlexis, Our National Disease*, 71 N.W.L.R. 767 (No. 6, 1977).

itself—the underlying platform upon which every legal system must ultimately depend.

My view is, in short, that the problem of too much law that we are discussing here today is very serious. I believe hyperlexis, as I call it, is a form of social illness that has a literally fatal potential for the operation of the American political system.

Well, if it is all that nasty and pernicious, then is it not clear that, in true-blue American style, we ought to roll up our sleeves, dive in and fix it? Why do we not do so? There are two answers to that question.

The first one is that only within a very recent period have we begun to recognize that we suffer from the disease of hyperlexis.

But the second reason is more important. In Pogo's immortal words, "We have met the enemy and he is us." There is a fair amount of talk around these days about the desirability of deregulation. I believe, however, that we are dealing with a multiple set of diverse forces at work that produce this consequence and that, regrettably, the illness that we suffer from is subtle and its causes are multiple. Behind the superficial term "overregulation" a number of quite different phenomena and forces are at work, most of which are deeply rooted in American society and in American attitudes.

I start with the most obvious factor, the federal system itself. Part of the problem obviously arises out of our layered federal system, which is certainly the most complex governmental system operation in the world. We maintain thousands of lawmaking instrumentalities, each of which merrily grinds out new law with little or no coordination among them. The tiers of our government have become very much more than the classical divisions of federal, state and local. They now, of course, involve counties, districts, varieties of regulatory authorities, regional authorities, functional commissions and the like in an endless proliferation. Moreover, we have not even begun to address effectively the interface coordination between federal regulation and state and local agencies. We have constructed, or are in the midst of building, a machinery of lawmaking that itself has an innate potential to bog itself down.

Next, I would point to four other factors which I group under the gross category of ideology. The first concerns our ideological perception of the proper subjects for government action. Classical American political thought conceived of a very small discrete area as the appropriate domain for governmental functions and considered the vastly greater balance to be allocated to private sector activities. In this century, obviously, the line between those two areas has been blurred, and indeed obliterated, in the minds of many citizens. This change in basic attitude about the relative function of government is itself one of the major forces behind the recent growth of regulation. Governmental regulation reaches out to cover more and more forms of citizen conduct, because, in part, there is no longer any widely shared perception of a political, philosophic legal barrier to inhibit or to contain that extension. We are thus dealing with a fundamental shift in political attitudes.

The second subcategory under the rubric of ideology concerns equality of opportunity and egalitarianism. A part of the long historical thrust of the American dream has been that the Congress, the courts and many different lawmaking bodies have made a major effort—a major effort in recent years—to try to tilt more of the benefits of the society and of life toward groups that were seen as disadvantaged—ethnic groups, lower income groups, women, children, the elderly, the handicapped, and so forth. The major instrument we have used to try to achieve this redistribution, this tilt, is, of course, law—law regulating the nonminority in question and granting enforceable rights to the minority. In a great campaign to achieve equality of opportunity or even, as some voices would argue, equality itself, implementation of these laws has called for enormous increases in regulatory mechanisms, in surveillance techniques and in the decisional burdens that have been imposed upon the courts and the balance of the legal process.

Distributing the risks of life is the third item under the category of ideology. A significant contributor to the flood of litigation, regulations and legislation is a rising feeling among many members of the public today that the society as a whole should in some way compensate the individual for almost any loss he sustains. That is a political proposition, not an attribute of the legal system itself. How far we should go in trying to create a riskless society, a riskless life, at what cost, and who will pay for it, will be the major political issue in the United States for the balance of this century. However those issues are balanced out, the outcomes will be expressed in statutes, in regulation, and in lawsuits that will add to the inflated corpus of our law and further burden our legal institutional process.

My fourth and last ideology category is what I would call proceduralism and participationism. Surely, no society in history has been as concerned with procedure as has the United States. Our traditional concern for the individual, for fairness, for due process, has brought us to the point where almost any matter can be challenged and reviewed again and again and again at the instance of large cohorts of possible complainants through extended formal adversary proceedings and through procedural safeguards that were designed for, and once were limited to, heinous crimes. To this concern for proceduralism has been added of late an increasing trend to engage the participation of larger numbers of citizens in all issues of public interest. Extension of voting rights has been one manifestation of the reach-out to extend participation. Community action groups and self-styled public interest groups are others. Wider class actions and lower barriers to standing in court are still others. Proceduralism and participationism together multiply exponentially the burdens imposed upon the legal process by multiplying the numbers of potential litigants and clearance procedures surrounding any undertaking, and they are, indeed, designed to do exactly that.

Not all of the forces at work in our society to pile on law are embodied

in those I have listed. There are some others. One of them has to do with the peculiar way in which the United States citizenry has always made use of its courts. Critics of President Johnson's "Great Society" described its basic principle as, "Identify a problem and throw money at it." But our true and peculiarly American trait was picked up by the inevitable de Tocqueville, who noted that the characteristic American trait is to identify a problem and throw a law at it. And that is what we do. Despite repeated disappointments, it continues to be almost universally accepted by Americans that legal resort is the most effective way to solve any problem.

Similarly, it has been a peculiarity of us as Americans, since the beginnings of the Republic, to turn to our courts for the resolution of problems that are, in most societies, solved in nonjudicial environments. The special role of the Supreme Court as the ultimate arbiter of constitutional questions enhances that impulse, but the peoples' faith and the reliance in its judges runs very much wider and very much deeper than that. Whether a matter concerns civil rights or town planning or the economics of the marketplace or labor management relations, or whatever, the judiciary in this country will play a key, and often a determining, role in resolving its outcome. The inevitable result is that we are the most litigious people in the world. We go to enormous lengths and we invest fantastic intellectual ingenuity in finding ways to cast any and every problem into the familiar pattern of a two-party adversary trial and take it to court.

Then there is the matter of interest group representation in our democratic pluralistic political system. Our representational system for decision-making is fundamentally built upon coalitions and trade-offs among elected representatives of interest groups. Though each one of us may say that he wants less law and less regulation, the fact is that every economic, ethnic, religious, or ideological group in this society wants *something* supported, regulated or banned by law. Every interest group does its best to capture the legislative, administrative and judicial system and to harness it to its own particular ideas of the good, the true and the profitable. Coalition voting patterns in our legislatures guarantee that these results will often succeed and that every year there will be a bumper crop of new laws.

Something should also be said about elected officials and scorekeeping. For elected officials, the most obvious route to reelection and perhaps even to immortality lies in new legislation. How many of us would remember Senator Sherman or Congressman Mann were it not for their Acts? As batting averages are to baseball players, stars to restaurants, ribbons to generals, and stock prices to corporate executives, so new statutes are at the heart of the scorekeeping system by which legislators are measured and measure themselves. No legislator ever gains reknown as a great non-law giver.

Next, I would mention the problem of overparticularization of our law. The national commitment to deal with the individual as an individual and to treat each case on its special merits combines with our political system of interest group representation to produce law that is often highly particularistic. Every group and subgroup seeks to obtain, and often succeeds in obtaining, special statutory provisions expressly aimed at its own particular circumstances. The result is an impenetrable legal jungle of special provisions. A significant part of the overregulation problem or the regulation problem arises from the effort to deal with problems with too great particularity. Contrary to surface impression, and, I think, public impression, detailed specificity in a legal provision does not reduce disputes. Particularization merely changes the vocabulary of the dispute. The most detailed statutes, like the Internal Revenue Code, are the ones that proliferate most rapidly and generate the greatest need for administration and the most disputes.

Technological and social change also play a part. It is a cliché to point out that the rate of change today has never been matched in the world's history. That fact, too, is a major contributor to the law explosion. Technological change often demands new public agencies, new programs unconceived before. The Atomic Energy Commission's recent transmutations through a series of steps into the Department of Energy is illustrative. Major technological change also inevitably brings with it substantial social and economic reverberations and dislocations in its aftermath. Increasingly, as a part of the risk distribution concept described earlier, it is coming to be accepted that the losses arising from such dislocations should not all have to be absorbed by those industries, workers, communities, and institutions that happen to be hit most directly by the change.

The implication of that statement is that, once again, an expanded function for the legal and administrative process is introduced in an effort to distribute that loss. Analogously, major social change, such as Black migration from the South, tends to lead to new social problems and wider governmental activity.

The biology of bureaucracy itself is an independent factor. As spiders by their nature utter cobwebs and spawn spiders, administrative agencies by their nature utter regulations and spawn more administrative agencies. Administrative agencies and programs are remarkably hardy. They are capable of surviving virtually any effort to uproot or cut them off. Growth in legal activity would not be so difficult to accommodate if old agencies died off as new ones appeared. But alas, the process does not work that way. Old laws and old agencies neither die nor fade away. Being nonbiodegradable, they only accumulate.

Finally, I close this catalogue with a point that may be functionally more important than all the others put together. It is a negative point. In our legislative and judicial process and our administrative system, there are no internal forces at work that tend to *counter* the pressures I have just listed. There are no factors internal to the system that tend to act as inhibitors or governors on the law-generating process. And externally, the same is true. Untold thousands of interest groups work unceasingly to add to, amend

or delete particular laws, but there is *no* major interest group at work that is concerned to maintain the health and workability of the legal order as a whole. Nobody is in the legal *systems* business.

It is, therefore, no wonder, as I see it, that the law-making engines of the United States grind out legal prescriptions like the fairy tale salt mill at the bottom of the sea, unremittingly and in ever-increasing volume. There are many powerful forces deep in our society and in our own fundamental philosophic attitudes that push in that direction and there are no significant forces tending to resist it.

I would like to close by reciting a little pentalogue—a half a decalogue—that I have concocted. Each of these five propositions could be elaborated upon, but time forbids. These five statements, it seems to me, are profoundly true, but we all, as American citizens, tend to act as though they were not true. In the long view, the only ultimate solution to the problems of too much law is for the American people to learn to carry these five propositions permanently in their hearts and minds. Here are the five:

To declare a law is very cheap; to administer or enforce a law is very expensive.

The secondary costs of a law are often greater than the direct costs.

The capacity of law to change human behavior is very limited.

Even where a law may effectively achieve its primary purpose, the side effects may be too great and too negative to permit or warrant its adoption.

Many problems are not amenable to legal solutions at all.

We Americans act as though regulatory law were an all-purpose instrument, free of negative side effects and, in the economist's term, a free good. Our legislators, judges, administrators and the public—all of us—must come to understand that law is in fact an instrument of limited utility, is always accompanied by significant, and frequently harmful, side effects, and that it is very expensive. A great deal of public education would be required to bring about such a change of attitude in the teeth of the set of underlying political, philosophic impulses that have animated the Republic for 200 years.

Government Regulation—Is Regulatory Reform a Challenge or a Myth?

By EDWARD C. SCHMULTS*

WHEN DAVID NELSON said that my remarks should be directed to the year 2000, I blanched—1977 is bad enough when one talks about the vintage years for regulation. I regard this subject as one of the most interesting and challenging issues facing our society today. As lawyers—as well as individual taxpayers and consumers—I am sure that I do not have to tell you it is also one of the most important.

But perhaps I am wrong. Some may believe that the present scheme of government regulation is basically sound—that a little tinkering here—and some procedural reforms there—are all that is necessary to restore regulation to its rightful place as an important tool in achieving our nation's social and economic goals.

Whether or not we all agree, I take some comfort from the fact that the American people have begun to focus attention on the complicated problems of government regulation. Over the past several years, the impact of a number of factors has made business and labor associations, universities, and public interest groups, as well as elected and appointed officials, increasingly aware of and concerned about the degree to which government rules have come to touch on nearly every aspect of the lives of our citizens. Presently, there are federal laws, rules, regulations or policies which govern everything from the size and coloring of lemons sold in grocery stores, to the prices railroad, airline and bus companies may charge for their services, to the kinds of drugs doctors are permitted to prescribe to treat our illnesses. Today the federal government essentially tells Americans how fast they can drive and what services they can obtain at their local banks, and determines somewhat less directly the price they must pay for milk. What has led to this heightened interest and increased concern about the scope, effect and manner of government regulation? The factors, in my view, are both general and specific.

Among the general factors I would list:

An increasing recognition that conventional monetary and fiscal policies are inadequate by themselves to deal with the nation's economic ills. As we look a decade ahead, more fundamental solutions to the "stagflation" problem are needed.

The crushing twin economic ills of inflation and recession have made it clear that we must become more efficient and raise productivity.

* Member of the New York Bar.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO Dr. Bledsoe, Rm. 200	Take necessary action	☐
RCB Frank	Approval or signature	☐
	Comment	☐
	Prepare reply	☐
	Discuss with me	☐
	For your information	☐
	See remarks below	☐
FROM Barbara Gittleman, Environment Branch, OMB	**DATE** 2/11/87	

REMARKS

EPA will be testifying on Friday, February 13 ± on ozone. Attached is a draft of EPA's testimony. We would appreciate any comments you may have. Please let us know by Wednesday, Feb. 11 at 7:00 P.M. if you have comments.

Many thanks.

Barbara Gittleman
x 6827

OMB FORM 4
Rev Aug 70

OZONE

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

OFFICE OF
EXTERNAL AFFAIRS

FEB 10 1987

MEMORANDUM

SUBJECT: Ozone Nonattainment Testimony for 2/13 field hearing

FROM: Steadman M. Overman
Director
Office of Legislative Analysis

TO: David Gibbons
Environmental Review Branch
Office of Management and Budget
ATTN: Barbara Gittlement

Ron Peterson
Legislative Reference Division
Office of Management and Budget
ATTN: Holly Fitter

Attached is Region IX's draft testimony for Rep. Waxman's February 13 field hearing on ozone nonattainment. Be advised that this draft is still being circulated internally and you can expect further changes.

Please direct your comments/clearance to Chris Hoff or Reynold Meni of my staff at 382-5422.

Attachment

DRAFT
FEB - 9 1987

TESTIMONY OF JUDITH E. AYRES

EPA REGION 9 REGIONAL ADMINISTRATOR

HOUSE SUBCOMMITTEE ON HEALTH & THE ENVIRONMENT

LOS ANGELES, CALIFORNIA

FEBRUARY 13, 1987

Good Morning. Thank you for your invitation to present testimony concerning the ozone and carbon monoxide nonattainment problem in California. Our remarks will be brief and will focus on the scope of the air quality problem in California, the progress thus far in addressing the mandates of the Clean Air Act, and the remaining tasks in our effort to attain the national standards for ozone and CO. David Howekamp, Director of EPA Region 9's Air Management Division, is here to assist in responding to any additional questions you may have.

The severity of the current ozone problem in California, particularly within the South Coast air basin, is displayed in this graphic, which shows the average number of exceedances of the ozone standard during 1983-1985 in California, Arizona, and Nevada (Exhibit A). In the Los Angeles area, which still has the worst air pollution in the country, violations of the ozone standard are pervasive throughout the basin, occurring on more than 100 days each year. At worst, monitored levels reach concentrations three times the national standard.

As you can see on the next graphic, which shows ozone exceedances for the entire country, the persistent ozone problem is not unique to California (Exhibit B). Attainment of the ozone standard by the Clean Air Act deadline of December 31, 1987, is now recognized as unlikely in approximately 75 metropolitan areas in the country. New York, Houston, Chicago, Boston, Philadelphia and many other urban areas will need to reduce their emissions by more than 50 percent if they are to attain the ozone standard. Moreover, continued ozone problems are not confined to urban areas. Every ozone monitor within California's San Joaquin Valley, for example, still shows multiple violations of the standard each year.

In the South Coast area, while attainment cannot be predicted within this century, it is important to recognize that significant air quality improvements have occurred during the past 30 years. This progress is shown in a graph of peak ozone concentrations from 1955 to the present (Exhibit C). Indeed, reductions in ozone precursor emissions and improvements in ozone air quality within the South Coast both continue at a sharper rate than in most other parts of the country. This progress has been achieved despite spectacular growth in population and industry. Consider, for example, the frustrations of South Coast air quality and transportation planners, viewing a 25 percent increase in vehicle miles traveled in the basin during the past 6 years.

Turning now to carbon monoxide, we see that the remaining problem is of a smaller scope, in terms of both the number of areas still violating the national standards and the degree of standard exceedance (Exhibit D). In the South Coast, concentrations twice the federal standard are recorded. Air quality improvements have been steady but, again, attainment of the CO standard within the entire South Coast air basin is difficult to forecast.

The South Coast is the only area in the country where violations of the nitrogen dioxide standard occur. This 3-dimensional display of NOx emissions within the Los Angeles area shows that the problem has two principal causes: the power plants and refineries along the coast, and motor vehicles, whose contribution can be traced by the extent to which the emission peaks correspond to the major freeway system (Exhibit E). While we expect the NO2 standard to be attained soon, we must recognize that nitrogen oxides are crucial contributors to the formation of ozone. For many years, ozone attainment efforts in most parts of California have relied on strategies for reducing not only volatile organic compounds (VOC) but also nitrogen oxides. Air pollution agencies in hydrocarbon-rich areas of the country are now also beginning to acknowledge both the necessity and the cost-effectiveness of controlling NOx emissions to help solve the ozone problem.

The role of mobile and stationary sources in contributing to our California ozone problems differs from area to area (Exhibit F). In the San Francisco Bay Area, two-thirds of the VOC comes from mobile sources, while in the Fresno area only one-third of VOC emissions derive from motor vehicles. Within the South Coast, the relative contribution of motor vehicles has declined, chiefly due to the Federal and California tail pipe standards, inspection and maintenance, and anti-tampering programs. As a result, the mobile-stationary source split is now 50/50 for VOC.

In all parts of the country, the inventories for CO and nitrogen oxides are overwhelmingly dominated by motor vehicles. This can be seen in a display of past, present, and projected emissions in the South Coast (Exhibit G). This chart also indicates the extent of emission reductions needed to attain each of the national standards.

In the South Coast, emissions must decrease by a further, almost unbelievable, 75 percent before attainment could be expected. Quite simply, Congressmen, if we eliminated all VOC emissions except those motor vehicles--and in so doing we would need not only to shut down most manufacturing and fuel burning but also prohibit many consumer products--the South Coast would still violate the ozone standard by a substantial margin. Conversely, if VOC emissions from mobile sources were reduced to zero--if every car, truck, bus, and airplane were removed from the basin--the South Coast would still have twice the allowable VOC emissions.

The 1977 amendments to the Clean Air Act required that all areas of the country show attainment of the ozone and CO standards no later than December 31, 1987. What has been done in California to meet these statutory requirements?

The 1982 SIPs for four of California's nonattainment areas failed to demonstrate attainment by the Clean Air Act deadline. These four areas are the South Coast, Ventura, Sacramento, and Fresno. In each of these areas, the SIP included ambitious and wide-ranging control strategies which, in EPA's judgement, met a principal substantive requirement of the Clean Air Act for nonattainment areas: adoption and expeditious implementation of reasonably available controls.

It is evident that, except in the area of transportation control measures, the 1982 SIP for the South Coast was, and still is, ahead of most other areas of the country, even those with an intractable ozone attainment problem. For example, service station nozzle control systems (or Stage II vapor recovery) have been required in the South Coast and other California urban areas for a decade, but are still not in use in most other parts of the country. Low solvent paints are required in the South Coast and other California areas; the sizeable reductions from this cost-effective strategy are not realized elsewhere. Great credit must be given also to the California motor vehicle and gasoline volatility programs.

This superiority of our present air pollution control program has not been viewed by the State, or the South Coast Air Quality Management District as a reason to stop our efforts until the rest of the country catches up. It is unfortunately true, however, that the easy controls have already been applied in California, and further reductions must now largely depend upon accumulating small reductions from thousands of minor sources through new rules that are particularly difficult and expensive to enforce.

In both technical and program management areas, we believe that EPA has many of the tools needed to make continued progress toward attainment of the ozone and CO standards. The first and most important of our advantages is the continued strong partnership among the State, California local districts, and EPA. This partnership brings together the greatest air pollution control technical expertise in the world. In fields where strategies are just emerging, such as methanol fuel substitution, we hope that our united efforts will yield technical breakthroughs and feasible implementation strategies. Statewide review committees continuously examine available air pollution control technologies and practical methods for applying them. These efforts have recently been most successful with respect to solvents, where further advances in either solvent substitutions or evaporative controls are crucially important.

Our tools for expediting air pollution control progress also include systematic program reviews and corrections. Three separate efforts are worthy of mention. First, each of the major nonattainment areas annually prepares a detailed review of strategy implementation and effectiveness. These assessments are issued to the public as reports on the degree to which reasonable further progress has been achieved; the reports also evaluate reasons why any existing control strategy has not achieved predicted levels of emissions reduction and what changes need to be made to increase control effectiveness.

Second, the State and EPA perform comprehensive program evaluations of the major local districts. Our joint evaluation of the South Coast District was issued last week. We believe that implementation of recommendations in this report will achieve significant emissions reductions and improve the efficiency of the District's operation.

The third program review we are undertaking is an in depth examination of implementation of the 1982 SIPs. We expect to complete within the next several months our findings on SIP implementation in the South Coast, Ventura, Sacramento, and Fresno. If we determine that these areas have not made reasonable efforts to implement their SIPs, we must impose the construction ban and must restrict air pollution grants, in accordance with the Clean Air Act. We should add here that EPA has also acted to disapprove rule relaxations in the South Coast and to directly enforce rules relaxed by the District, as the Clean Air Act requires.

EPA has not yet disapproved these four SIPs and imposed sanctions merely because the SIPs acknowledged an inability to attain the standards by the December 1987 deadline. We felt that such penalties would not serve as an incentive but rather as a disincentive to further effort, since the sanctions would likely be viewed as inequitable, punitive, and permanent. Instead, we have indicated that we would impose sanctions only if an area fails to continue to make every reasonable effort to improve air quality. This "Reasonable Extra Efforts Program" may not be legally supportable under the current Clean Air Act. In that event, EPA must not only disapprove the plans and impose sanctions but also promulgate and enforce an attainment SIP.

The California areas not predicting attainment of the standards by 1987 are now engaged in preparing revised SIPs. These SIPs are expected to embrace all of the new technically available and reasonable strategies for achieving emissions reductions. Despite aggressive implementation of these controls, however, the Clean Air Act attainment deadline will pass with most of the people in the State still experiencing unhealthy air quality. Our best efforts, which we hope will be embodied in these SIPs, cannot guarantee ozone attainment in the foreseeable future in areas like the South Coast. Nevertheless, in every case the SIPs should promise expeditious progress, reflected in significantly fewer polluted days and lower pollution levels each year.

Our continuing difficulties in eradicating the ozone problem in the South Coast basin arise, very simply, from a growing population now approaching 12 million, together with a flourishing industrial base, sited in an area with plentiful sunshine, year round warm temperatures, coastal breezes, and high mountain ranges to the north and east. This area, known as the "valley of smokes" before extensive settlement by man, will challenge our greatest technical efforts and persistent dedication. We are not inclined to give up in the face of this massive problem, created by our society and compounded by nature. Our determination continues to be to take every reasonable step to reestablish healthful air quality in every area of the country, including this "valley of smokes."

United States Department of State

Bureau of Oceans and International Environmental and Scientific Affairs

Washington, D.C. 20520

February 18, 1987

To: EPA - Bill Long
NASA - Bob Watson
NOAA - Joe Fletcher
Commerce - Michael T. Kelly
USTR - Bruce Wilson
DOE - Ted Williams
DPC - Ralph Bledsoe
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CEQ - Coleman Nee
EB - Dennis Lamb
L/OES - Debbie Kennedy
L/EBC - Gerald Rosen
E - Martin Bailey

From: OES/E - Richard Elliot Benedick

Subject: Position Paper for UNEP Negotiations to Control Ozone-Depleting Chemicals, Vienna, February 23-27

Attached for your reference and for the information of all interested offices in your agency is the position paper for the subject negotiations, agreed at the February 13 interagency meeting.

OES/ENH:SButcher
2788T

~~LIMITED OFFICIAL USE~~

U.S. POSITION PAPER

UNEP Ozone Layer Protocol Negotiations

Second Session: February 23-27, 1987

Vienna, Austria

I. Background:

This is the second round of resumed negotiations under U.N. Environment Program auspices to control chemicals which deplete stratospheric ozone. In the first round, in Geneva December 1-5, 1986, most participants agreed that new measures must be taken in the near-term to control emissions of ozone-depleting chemicals. However, differences remain over the scope, stringency and time-phasing of control measures.

Policy ??, ? when decided by PP?

The U.S. delegation asserted that the risk to the ozone layer warrants a scheduled phase-down of emissions of the major ozone-depleting chemicals (e.g., CFC 11, 12, 113, 114, Halon 1211, and 1301). We also emphasized that the protocol should provide for periodic assessment and possible adjustment of the control measures, based on a periodic review of advances in scientific/technical knowledge. Neither the U.S. protocol text nor others (e.g., Canada's) were discussed in detail. It was apparent that many participants had not yet begun to consider in depth many of the elements the U.S. believes important to an effective protocol.

The U.S. delegation focused in the first round on seeking support for the basic elements of a protocol which would have both meaningful near and longer term control measures.

II. Overall U.S. Position:

The U.S position is to continue to pursue our ozone layer protection goals and objectives as advanced in the U.S. proposed protocol text.

III. U.S. Objectives for this Session:

Based on extensive discussions with representatives of other countries subsequent to the resumption of negotiations in Geneva last December, it appears highly unlikely that agreement on a protocol text can be reached in Vienna, and thus at least one further session will be required. Nonetheless, the U.S. delegation should approach this second session with a view to achieving agreement on as many of the key components of a protocol as possible, if not on the total document. At the minimum, it is important to ensure that all key components, and issues, are identified and debated.

The principal U.S. objectives therefore include:

- utilizing this session to heighten awareness of the ozone depletion problem, and the need for effective international controls on an urgent basis.

- soliciting the views on, and support for, the U.S. position from other nations (including developing countries) which have thus far not been heard from or have been noncommital.

- focusing attention on U.S. protocol text, and attempting to have it utilized as the principal negotiating vehicle.

- ensuring full discussion of ozone depletion risk management in the longer term, noting the essentiality of including this in any protocol.

- seeking to achieve agreement on as many areas as possible, and identifying differences in order to facilitate post-Vienna consultations and analyses.

IV. Positions on Key Issues:

This section identifies the key issues which the USG believes must be addressed in the protocol, along with instructions for the delegation for each.

1. Stringency: The delegation should support: (1) a near-term freeze at 1986 levels and (2) longer-term phased reductions, at levels substantial enough to give real incentive for conservation, recycling, and development of substitutes. The U.S. proposed text calls for phased reductions down to 95%. This figure should be used as the U.S. position, illustrating our conception of longer-term measures. However, within the context of the short and long-term goals, the delegation may indicate its willingness to consider other reduction levels and formulas, noting that the degree of stringency which it could accept depends on the timing (i.e. when a control provision would take effect) and the scope (i.e., which chemicals are controlled).

The U.S. proposed protocol text contains four phases in the reduction schedule. The delegation should continue to support

having several phases, so as to provide multiple opportunities for scientific review and risk assessment before the required reductions take effect, and to provide "milestones" by which Parties' progress in achieving reductions can be gauged.

2. Timing: The delegation should support a timeframe for the controls which: (a) is short enough to provide incentive for the development of conservation/recycling techniques and substitutes, yet (b) long enough that compliance does not create undue economic disruption.

Since it is likely to be 3-5 years before the protocol enters into force, the delegation should support having the near-term freeze take effect within one year after entry into force, with the final phase of 95% reduction taking effect within 10 - 14 years after entry into force (based on current analysis).

3. Scope: The general U.S. objective is for the protocol to cover all major ozone-depleting chemicals. Therefore, the delegation should support having the protocol control the following chemicals: CFC 11, 12, 113, 114, and Halon 1211 and 1301. In the U.S. proposed text, reference is made to controlling "all fully-halogenated alkanes", which would include other chemicals in addition to those listed above. This discrepancy can be corrected by replacing the phrase "fully-halogenated alkanes" with "the controlled substances" and then listing the specific chemicals in an annex.

Policy decision

For the purposes of this session, the delegation should maintain the U.S. position of including all six chemicals listed above in the reduction schedule. However, if there is significant opposition to this position and, depending on the dynamics of the discussions, the delegation may indicate that the scope question is linked to the stringency and timing questions; e.g., the broader the scope of control, the greater the flexibility which the U.S. could show on stringency or timing, and vise versa. If this is indicated, the delegation should insist that all six chemicals be covered in the protocol (even if not initially controlled) and that the protocol provide a mechanism for moving chemicals onto (or off of) a control schedule, based upon the periodic scientific/technical review. In this regard, the delegation may advance the "three-tiered" approach for addressing the scope question (see separate paper).

4. Calculation of Emissions: The delegation should support measuring compliance with the reductions in Article II by use of "adjusted production" (production + bulk imports - bulk exports to parties - amount destroyed); i.e., by removing the brackets in Article III para. 1 of the U.S. proposed text. There is considerable efficacy in using this formulation as the measure of emissions for each Party to the protocol, because it: (a) allows for free trade among the Parties; (b) gives countries which use but do not produce the controlled chemicals some responsibility for protecting the ozone layer; and (c) provides a more equitable allocation than control measures based strictly on production. The EC alternative

-- using production as the surrogate for emissions -- is less equitable, excludes non-producers, and may create an incentive for movement of production capacity "offshore" to non-Parties. The delegation should therefore oppose basing the control measures strictly on production.

5. Allocation: The U.S. proposed text implicitly allocates an emissions limit via a reduction schedule based on current levels of adjusted production. The delegation should oppose any explicit allocation mechanism; e.g., such as that in the Canadian or USSR draft texts, on the grounds of the complexity of such mechanisms and the difficulty of negotiating what would amount to emission allocation rights worldwide.

6. Countries with Low Adjusted Production: The delegation may support an exemption for countries which have an adjusted production of less than a certain per capita level. The Nordic proposal for an exemption up to .2 kg per capita may allow too much expansion of global emissions.

7. Assessment and Adjustment of Control Measures: The delegation should support retention of language in the U.S. draft Article IV, while being open to alternative versions as long as they improve rather than dilute the commitment to a serious periodic review. If there is significant opposition to including the establishment of an international monitoring and detection network in the protocol (para. 1 of Art. IV), the delegation should insist that

in lieu of such a provision, the commitment to such a network be confirmed by a Diplomatic Conference resolution calling for the Convention Parties to establish and support the network as soon as possible.

The current U.S. draft calls for the scientific panel to convene at least one year before implementation of future reductions. The delegation should seek to have the scientific panel convene two years before each reduction and the Parties to carry out their assessment at least one year before each scheduled reduction. This change will allow adequate time for conducting a fairly comprehensive assessment.

The delegation should amend paragraph 3 of the U.S. draft to insert "and in light of new technical and economic information" after "scientific review." This will enable Parties to make an informed risk management decision prior to another phase taking effect.

The current Article IV would have the Parties adjust the stringency, timing, or scope of the control article using the protocol amendment procedures in the Convention (Article 9), with slight modification. Under the "three-tiered" approach, stringency and timing could be adjusted via Article 9 of the Convention and scope via Article 10, amendment of annexes. The delegation should explore the possibility of more streamlined procedures for the limited scope required for this Article of the Protocol.

8. Control of Trade:

a. Import Restrictions - Restricting imports from non-parties would: (a) protect industries in countries party to the protocol from being put at a competitive disadvantage vis a vis industries of non-parties; (b) create an incentive for non-parties to join the protocol, in order to preserve existing (or gain access to new) export markets in other Parties; and (c) discourage the movement of capital or production facilities to non-Parties.

The delegation should therefore strongly support paragraph 1 of Article IV of the U.S. proposed text, which calls for a ban of bulk imports from non-parties. The delegation should replace "fully-halogenated alkanes" with "the controlled substances", and should support having the same number of years for this provision to take effect as for the first phase in the Article II reduction schedule.

In principal, the same rationale in support of restrictions on bulk imports from non-parties applies to product imports (i.e., products made with or containing the controlled substances). However, developing and implementing such restrictions, and ensuring that they are applied uniformly by all parties, could unduly slow down the negotiations if all the details were to be worked out in the protocol itself. Hence, the U.S. proposed text calls for the parties to "jointly study the feasibility" of restricting imports of products from non-Parties. In order to emphasize the importance which the U.S. attaches to protecting protocol members

from being put at a competitive disadvantage, the delegation should, during discussions on this issue, offer the following amendment to the U.S. text:

> Within [ ] years after entry into force of this Protocol, each Party shall restrict imports of products containing substances controlled by this Protocol from any state not party to this Protocol [unless such state is in full compliance with Article II and this Article, and has submitted information to that effect as specified in paragraph 1 of Article VI]. At least one year prior to the time such restrictions take effect, the Parties shall elaborate in an annex a list of the products to be restricted and standards for applying such restrictions uniformly by all Parties.

This should become new paragraph 2 of Article V. The delegation should support having the number of years for this provision to take effect no later than the second phase in the Article II reduction schedule. Current paragraph 3 of the U.S. text would remain, with the words "containing or" deleted and the phrase "fully-halogenated alkanes" replaced by "substances controlled by this protocol". As appropriate, the delegation may also add the phrase "and practicality" after the word "feasibility".

b. Export Restrictions:

The U.S. proposed text includes (in Article V par. 2) bans on technology exports to, and direct investment in, the territory of non-parties. However, further assessment of these provisions subsequent to the December session has indicated that such bans may not be effective. With respect to technolgy exports, the ready availability of the technology would make it difficult for all the

parties to enforce a ban. With respect to an investment ban, the diversity (and velocity) of transboundary monetary flows would make such a ban virtually impossible to enforce by any party. In addition, it is not clear that the U.S. has the legal authority to impose such a ban, other than the general language in section 157 of the Clean Air Act (see separate paper).

In discussions on these issues, the delegation should note the importance of technology and investment flows to non-Parties. The delegation should support retention of sub-par.(a) (export of technologies) in order to emphasize the importance which the U.S. attaches to this issue -- and to use as a "tradeable" in subsequent sessions for the higher priority import restrictions. In addition, the phrase "for producing fully-halogenated alkanes" should be replaced by "for the production or use of the controlled substances".

The delegation should propose that sub-par.(b) (the ban on direct investment) be deleted, and a new paragraph be added:

> Parties shall not provide bilateral or multilateral subsidies, aid, credits, guarantees, or insurance programs for the export of products, equipment, plants, or technology for the production or use of the controlled substances.

V. Positions on Other Articles:

The delegation should support the revised text prepared by the "Working Group on institutional and financial matters "(UNEP/WG.157/CRP.9) at the December session, except as indicated below:

1. Article I (Definitions) - In order to clarify the distinction between "bulk" and "product" exports/imports, the delegation

should seek to have the following definition added:

> "bulk" exports or imports means any export or import of a commodity containing [10 lbs.] or more of non-recycled substance(s) controlled by this protocol.

2. Article III (Secretariat) - Redraft subparagraphs (b) and (c) so as to be consistent with new operative articles.

3. Article XII (Entry into Force) - The USSR may oppose the working group's text (in CRP.9). In particular, they may take issue with the requirement of nine instruments of ratification (etc.) and the thirty days entry into force provision in para. 1, preferring instead eleven instruments and 90 days, respectively, as indicated in Article 17, para. 2 of the Convention. The delegation should initially support the 9/30 format. However, if this appears to be a major obstacle to Soviet concurrence on this article, the delegation should propose a 10/60 format and may, if other delegations do not have a strong preference to the contrary, agree to the 11/90 format.

The delegation should also support amending Article XII so as to ensure that the protocol enters into force only when a sufficient number of the major producer/user countries have submitted instruments of ratification (etc.). To this end, the delegation should propose adding qualifying language to paragraph 1, specifying that of the number of instruments required for entry into force, [X] number must be from nations with adjusted production greater than [Y]. This will decrease the possibility of the protocol entering into force with just the U.S. and 9 or 10 developing countries as the initial Parties, thus putting the U.S. at a competitive disadvantage vis a vis its primary competitors.

In order to ensure that nations which become Party to the Protocol do not have less obligations than nations already Party, and to remove an incentive for countries to be "free-riders" by delaying entry into the protocol, the following sentence should be added at the end of paragraph 3:

> "Any such Party shall assume all applicable obligations then in effect for all other Parties.

Although agreement on including this sentence in the final protocol text may not be achievable, having it inserted at this session is tactically beneficial in that it gives other countries the message that there are advantages to joining the protocol as one of its initial parties, and that there is a potential penalty for not joining the protocol right at the start (i.e., the controls to date would not be phased in for that Party).

VI. Other Issues:

A. Future Negotiating Schedule - The original UNEP schedule called for the Diplomatic Conference to be held in April 1987. If it appears that the protocol is sufficiently close to completion at the conclusion of this session, the delegation should support holding the Conference May 4-8, 1987. If not, the delegation should push for a third negotiating session during the May 4-8 time-slot, and support having the Diplomatic Conference as soon as possible thereafter; i.e., in the first or second week of July. If it appears that two negotiating sessions prior to the Diplomatic Conference are needed, the delegation should push for a May-July timeframe, with the Diplomatic Conference as possible thereafter.

Who is "The delegation"?

B. Financial Contributions for Future Meetings - UNEP has previously indicated that it may not have sufficient funds for future meetings and/or to support participation by developing country representatives. UNEP may raise this issue again at this session. If so, the delegation should indicate that U.S. EPA is willing to contribute up to $20,000. for these purposes.

C. Press: All press inquiries should be referred to the head or alternate head of delegation, or their designee.

D. Budgetary Commitments: The delegation should not commit the USG to any activity that cannot be funded out of current appropriations.

Drafted by: Jim Losey - EPA/OIA (382-4894)
Suzanne Butcher - OES/ENH (647-9312)
2/18/87

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