February 10, 1982

PRIVILEGED AND CONFIDENTIAL

MEMORANDUM TO CMA AND ALL LITIGATION PARTIES

Re: Settlement of CMA v. EPA

After nearly a year of settlement negotiations, counsel for EPA and industry petitioners have reached agreement on a resolution of virtually all of the issues raised in this lawsuit, subject to formal approval by all parties. The following summarizes the major issues in the lawsuit and the proposed settlement of those issues.

Background

This lawsuit was originally filed in January, 1979, challenging amendments to EPA's Emission Offset Interpretative Ruling (44 Fed. Reg. 3274, January 16, 1979). As you may recall, EPA provided an opportunity for public comment on those amendments after their publication, and offered the prospect of regulatory change of the objectionable features. The lawsuit was stayed accordingly to give EPA time to reconsider the January, 1979 amendments.

Pending such reconsideration, EPA also took a number of other actions which were challenged by industry petitioners, and which were consolidated with the original case. These included EPA's "General Preamble For Proposed Rulemaking," governing the contents of revised state implementation plans under Part D of the Act (44 Fed. Reg. 53761, September 17, 1979), and EPA's rule extending the requirements applicable to sources located in nonattainment areas to sources located outside nonattainment areas (45 Fed. Reg. 31307, May 13, 1980).

The foregoing was further complicated by the decision of the Court of Appeals for the District of Columbia Circuit in Alabama Power Corp. v. Costle, which invalidated major aspects of the Prevention of Significant Deterioration (PSD) regulations. EPA decided, in light of that decision, to make major changes in both the PSD and nonattainment regulations and the Interpretative Ruling. The lawsuit was again stayed pending final rulemaking. EPA's final regulations were promulgated on August 7, 1980. Industry petitioners' challenge to these regulations was consolidated with the pending lawsuit.

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On September 11, 1980, EPA took final action revising the January 16, 1979 amendments to the Interpretative Ruling. Industry petitioners' challenge to that action was also consolidated with this lawsuit.

After reviewing all of the various changes in the PSD and nonattainment regulations and Interpretative Rule that form the basis of this action, industry petitioners in February, 1981, briefed eight major issues or categories of issues. Rather than filing responding briefs, EPA instituted settlement negotiations. The settlement outlined below is the result of those negotiations, including compromises on both sides.

Issues Involved In The Settlement

Dual Definition of "Source" and Definition of "Reconstruction"

Industry petitioners challenged EPA's "dual definition" of "source" in nonattainment areas. This was CMA's primary issue in the litigation. Industry petitioners also challenged the definition of "reconstruction" in nonattainment areas. EPA took final action deleting both on October 14, 1981 (46 Fed. Reg. 50766). This moots these issues in CMA v. EPA. However, the environmentalists have subsequently filed a new action, NRDC v. Gorsuch, challenging the October 14, 1981 action. CMA, acting as lead counsel for petitioners, and EPA, are now united in defending the October 14 action.

Actual/Allowable Emissions Issue

(a) Netting

EPA's August 7, 1980 regulations provide that in determining whether there has been a significant net increase in emissions at a source to trigger permit review, a source's actual emissions, rather than its allowable emissions, must be considered. "Actual emissions" were defined as the actual average tons per year emitted during the prior two year period. These regulations prevent sources from getting full credit for giving up usable -- and allowable -- production capacity if such capacity has not been fully utilized in the past two years.

The settlement proposal would give a source the option of determining, in any particular netting transaction, whether there has been a significant net increase in emissions based on either (1) the change in its actual emissions, as measured in tons per year, as is the case now, or (2) the change in its design capacity emissions, measured on a pounds per hour basis, as limited by any enforceable restrictions on its rates of operation.

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These alternatives can be illustrated by a source with allowable emissions of 1,000 tons/year (or 228.3 pounds per hour) of a pollutant. Assume that the source operates at peak capacity only one month out of the year, and that its actual average emissions have been 800 tons per year over the past two years. Assume also that that source needs an emission reduction of 100 tons per year to offset an increase elsewhere in the plant.

Under the present regulations, the source must reduce its actual annual average emissions (800 tons per year) to an average of 700 tons per year. It may do so by reducing its hours of operation, or its annual average operating rate. In doing so, however, it gives up 300 tons per year of usable emission capacity to receive credit for a 100 ton per year reduction.

Under the settlement proposal, the source would have the option of reducing its maximum allowable hourly emissions (228.3 pounds per hour) by ten percent to achieve the 100 ton per year reduction. However, to do so it must reduce either its peak operating capacity or its allowable emission level per hour. Using a pounds per hour calculation, the source may not obtain emission reduction credit by reducing its hours of operation or average operating rate.

The settlement proposal allows the individual source to determine which is more important -- to preserve peak operating capacity for the times when it is needed, or to obtain emission reduction credit for giving up usable production capacity. The former choice would continue to be governed by the present rules on credit for reductions in actual emissions, with the exception that the settlement proposal deletes the presumption that the prior two-year period is representative of actual source emissions, and leaves it to the source to determine and show what a representative period would be.

(b) Credit For Federally Enforceable Emission Decreases

Under the August 7, 1980 regulations, emission reduction credit is available only to the extent that restrictions on hours and rates of operation are federally enforceable. Under the settlement proposal, EPA would delete the term "federally" from 51.24(b)(3)(vi)(b), 51.24(b)(4), 52.21(b)(3)(vi)(b), 52.21(b)(4), Ruling §§ II.A.3, II.A.6(v)(d), 51.18(j)(1)(iii), and 51.18(j)(1)(vi)(e), and provide instead that a restriction is enforceable if it is enforceable under federal, state or local law and discoverable by the Administrator and any other person.

(b)

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(c) Emission Offset Baseline

In accordance with the above changes, EPA would also, under the settlement proposal, amend the offset ruling and nonattainment regulations to provide that the baseline for determining credit for emission reductions and offsets is either the source's potential to emit, measured in pounds per hour (if the source elects to net on a pounds per hour basis) or the source's actual emissions (if the source elects to net on an annual tons per year basis). EPA would also add a new 51.18(j)(3)(ii)(f), providing that by the time the source is to commence operations, the offsetting emissions, together with the SIP, must constitute reasonable further progress toward attainment.

Banking Emission Reductions

Section IV.C. of the Offset Ruling includes a number of restrictions on banking offsets, including a new restriction added on September 11, 1981 (IV.C.6) where a source is subject to a NSPS or NESHAP. Under the settlement proposal, EPA would delete Sections IV.C.1 (baseline where there is no applicable SIP requirement); IV.C.2 (restriction on credit for full switches); IV.C.5 (restriction on banked offsets); and IV.C.6.

Credit For Source Shutdowns And Curtailments

Industry petitioners challenged the provisions of the Offset Ruling and nonattainment regulations precluding credit for source shutdowns or curtailments occurring prior to the date of a nonattainment permit, unless the proposed source is a replacement for the shutdown or curtailed source. EPA has proposed to amend these requirements to provide that emission reductions achieved by shutting down a source or permanently curtailing production below baseline levels are creditable if the reduction occurred after December 21, 1976 (Ruling § IV.C.3), or after a reasonable time specified in the SIP (51.18(j)(3)(ii)(c)).

Restrictions On Emission Trades With The
Same "Health And Welfare Equivalence"

Industry petitioners challenged the requirement in both the PSD and nonattainment regulations that no credit is available for an emission reduction unless it has the same health and welfare effect as the contemporaneous emission increase. EPA has proposed to delete this requirement (51.24(b)(3)(vi)(c), 52.21(b)(3)(vi)(c), Ruling § II.A.6(v)(d)). EPA would replace it with language presently contained elsewhere in the regulations that a reduction in emissions of nonreactive hydrocarbons (Table 1, Recommended Policy on Control of Volatile Organic Compounds, 42 Fed.

Reg. 35314 (July 8, 1977)) could not be used to offset an increase in a reactive hydrocarbon.

Technology Transfer In Determining LAER

Ok Industry petitioners challenged EPA's requirement that in determining LAER, reviewing authorities are required to consider transfer of technology from a source category where such technology has been demonstrated to achieve reductions to other source categories where the ability to achieve the reductions has not been demonstrated. EPA proposes to publish clarifying language that transfer technology is not required, and that SIPs which include such a requirement may be amended to delete it. EPA will not, however, require states to delete such a requirement.

Fugitive Emissions

Industry petitioners challenged various aspects of EPA's August 7, 1980 regulations on fugitive dust. These issues were raised in the context of the PSD program, but the proposed settlement changes will affect both PSD and nonattainment.

(a) Source Applicability

Ok EPA proposes to amend the definitions of "major stationary source" and "major modification" (52.21(i)(4)(vii); 51.24(i)(4)(vii); Ruling § II.A.4(iii); 51.18(j)(1)(iv)(c)) to clarify that unless and until EPA has gone through rulemaking for a particular class of sources (e.g., chemical plants), fugitive emissions from such source need not be counted in determining whether the source is "major" or there is a significant net increase in emissions to trigger preconstruction review. Conversely, however, until such rulemkaing is complete, decreases in fugitive emissions could not be used to offset increases in process emissions elsewhere in the plant.

(b) Automatic Buffer Zones

Ok EPA proposes to delete 51.24(b)(23)(iii) and 52.24(b)(23)(iii), which define as "significant" any emission increase within 10 km of a Class I area having an impact of 1mg/m^3.

(c) Secondary Emissions

Ok EPA proposes to amend 52.21(k) and 51.24(k), which require a source impact analysis preliminary to a PSD permit, to delete the requirement that secondary emissions be considered in conducting such an analysis.

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(b) Innovative Control Technology

EPA proposes to delete 51.24(s)(2)(iv)(b) and 52.21(v)(2)(iv)(b), which preclude use of innovative control technology by a source impacting on a Class I area. Instead the owner must demonstrate that the requirements of subsection (p) (requirement for sources impacting on Class I areas) will be satisfied during the life of the source.

Vessel Emissions

EPA's August 7, 1980 regulations defined the term "source" to include vessel emissions in determining whether marine terminals are major sources for purposes of preconstruction permit review. On December 17, 1981, EPA proposed to delete that requirement, and stayed the requirement pending final rulemaking (46 Fed. Reg. 61612). For purposes of CMA v. EPA, this issue is now moot. However, the environmentalists have filed a new action, NRDC v. Gorsuch, challenging the December 17 action. CMA is not a party to that case.

Timing Of The Settlement

EPA will implement the aspects of the settlement agreement dealing with fugitive emissions, federal enforceability, health and welfare effects, and LAER transfer technology, by proposing regulations 90 days from signing the settlement agreement, allowing 60 days for public comment, and taking final action within 150 days of publication of the proposal in the Federal Register.

With regard to the remaining issues not already disposed of by final rule (e.g., the dual definition of source) or in rulemaking (e.g., vessel emissions), EPA feels that more time is necessary for both proposed and final regulations. EPA originally proposed a date of July, 1983 for final action on these issues. Industry petitioners do not feel that such further delay is justified, but have agreed to inform the court that rulemaking on these issues will proceed "as expeditiously as practicable," and hope to convince the Agency that prompt action on these issues can and should be taken. EPA has also agreed to grant interim relief to any individual petitioner that can demonstrate that it is significantly harmed by the present regulations.

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