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Comptroller General
of the United States

Washington, D.C. 20548

B-208593.6

December 22, 1988

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

Dear Mr. Chairman:

Your letter of September 30, 1988 requested that we respond to objections that the Environmental Protection Agency (EPA) has raised to our opinion of August 2, 1988 (B-208593.3). You asked that we provide our response on an expedited basis.

Our August 2, 1988 opinion analyzed EPA's authority to designate or redesignate certain areas as nonattainment under the Clean Air Act and the Mitchell-Conte amendment to the fiscal year 1988 continuing resolution. We concluded that EPA's authority is limited and would not support all the designation and redesignation alternatives EPA published in the Federal Register on June 6, 1988. In a letter to you dated September 23, 1988, the General Counsel of EPA disputed our analysis on two major points. We have examined his arguments, but are not persuaded that our original opinion was wrong in any respect. The EPA arguments and our responses are set forth in the enclosure to this letter.

We trust our additional comments will be both helpful and timely. In accordance with our usual procedures, this opinion will be available to the public on request 30 days from its issuance.

Sincerely yours,

for Milton J. Socolar

Charles A. Bowsher
Comptroller General
of the United States

Enclosure

FURTHER ANALYSIS OF EPA'S AUTHORITY TO DESIGNATE NONATTAINMENT AREAS UNDER THE CLEAN AIR ACT

Summary of GAO and EPA Positions

In B-208593.3, August 2, 1988, we concluded that EPA does not have plenary authority to designate or redesignate nonattainment areas under the Clean Air Act and the Mitchell-Conte amendment to the fiscal year 1988 continuing resolution. The basis for our conclusion was that the permanent statutory authority to designate and redesignate nonattainment areas places the responsibility for initiating these actions in the hands of the state governors. Clean Air Act, section 107(d), 42 U.S.C. § 7407(d) (1982).

The Mitchell-Conte amendment temporarily suspended Clean Air Act sanctions while directing EPA to gather and assess compliance data and to "take appropriate steps to designate those areas failing to meet. . . [the] standards as nonattainment areas within the meaning of Part D. . . ." Pub. L. No. 100-202, 101 Stat. 1329, 1329-199. We interpreted this direction to mean that the Administrator should present this information to the state governors under the permanent statutory procedure and request their action to designate any new nonattainment areas. We also concluded that EPA lacked authority to adjust the boundaries of nonattainment areas and annex adjacent jurisdictions where no violation of the standards had occurred.

The questions of redesignation and annexation are important ones because, as we pointed out in our August 2 opinion, once an area is properly listed as nonattainment, it becomes subject to the State Implementation Plan (SIP) requirements

applicable to Part D of the Clean Air Act, 1/ and to the Part D sanctions. 2/

The General Counsel of EPA acknowledges that, under section 107 of the Clean Air Act, as interpreted by the Seventh Circuit in Bethlehem Steel Corp. v. EPA, 3/ the agency could not have unilaterally redesignated an area from attainment to nonattainment. However, he maintains that the Mitchell-Conte amendment gave the agency full authority to redesignate attainment areas that are experiencing violations to nonattainment and, where necessary, to annex attainment areas with clean air to existing nonattainment areas nearby. 4/ He also maintains that after redesignation, EPA has authority to attach any of three alternative types of "regulatory consequences" to the new

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1/ Part D requires that nonattainment areas produce emissions reductions that constitute reasonable further progress, adopt all reasonably available control technology, commit to a vehicle inspection and maintenance program, institute a system of construction permits and implement the 7 other statutory elements contained in a Part D SIP. See Clean Air Act, section 172, 42 U.S.C. § 7502 (1982).

2/ The Part D sanctions are: a construction ban, which we maintain is mandatory for areas that remain in nonattainment after December 31, 1987; a cut off of clean air grants for areas that do not implement their SIP's; a discretionary ban on new sewage treatment grants. A fourth sanction, now expired, involved a cut off of highway funds for failing to have made reasonable efforts to submit a SIP as required on July 1, 1979 or July 1, 1982. For a complete analysis of GAO's view of sanctions see GAO/RCED-89-28, Air Pollution, EPA's Ozone Policy Is a Positive Step but Needs More Legal Authority, and the GAO legal opinions cited therein.

3/ 723 F.2d 1303 (7th Cir. 1983). Bethlehem Steel held that, absent a state request, EPA did not have the authority to change an unclassified area's designation to nonattainment when it discovered that the area in fact exceeded air quality standards.

4/ EPA's rationale and the list of areas to be redesignated were published in the Federal Register on June 6, 1988 at 53 Fed. Reg. 20722.

nonattainment areas based on the change in status. 5/ The General Counsel also takes issue with our use of the term "redesignate" in connection with EPA's proposed actions in its November 24, 1987 policy proposal outlining future ozone attainment strategies. EPA makes several arguments in favor of its positions on redesignation and annexation, each of which we will address below.

Redesignation Issues

EPA takes the position that the Mitchell-Conte amendment superseded the permanent statutory designation procedure in section 107 of the Clean Air Act because it directed the Administrator to "designate . . . areas . . . as nonattainment" while omitting any reference to section 107. 6/ EPA's reading embodies a temporary implied repeal of section 107(d)(5) of the Clean Air Act, which provides that --

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5/ The "regulatory consequences" proposed included requiring all nonattainment areas to undertake renewed planning obligations and sanctions under Part D, subjecting only new nonattainment areas to Part D, and taking no action based on the designations. We concluded in our August 2 opinion that proper designation as nonattainment triggers Part D SIP requirements and sanctions. Accordingly, we disagree with EPA's contention that it can choose from among several "regulatory consequences" after it redesignates areas under Mitchell-Conte.

6/ The Mitchell Conte amendment did not alter the December 31, 1987 attainment deadline, but prohibited the imposition of any of the Part D sanctions during the period from the date of enactment until August 31, 1988. The last sentence of the amendment reads as follows:

> "Prior to August 31, 1988 the Administrator of the Environmental Protection Agency shall evaluate air quality data and make determinations with respect to which areas throughout the nation have attained, or failed to attain, either or both of the national primary ambient air quality standards referred to in subsection (a) and shall take appropriate steps to designate those areas failing to attain either or both of such standards as nonattainment areas within the meaning of part D of title I of the Clean Air Act."

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

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

Whenever possible, it is preferable to construe appropriations act language consistently with the related organic or authorizing legislation. In this case, Mitchell-Conte's direction to designate nonattainment areas within the meaning of Part D can easily be harmonized with the permanent provision by having EPA submit the compliarce information it gathers to the states for their action under section 107(d)(5). We disagree with EPA's assertion that our reading would also amend section 107(d)(5) by implication. The Clean Air Act does not restrict the information the state governors may have before them when making revisions to the list.

Section 107(d)(5) is clear on its face. Additionally, it has been tested by litigation in Bethlehem Steel, cited above, where the Court of Appeals for the Seventh Circuit upheld the state governor's exclusive authority. As a matter of policy, EPA has followed that decision in the other circuits for 5 years. Until enactment of the Mitchell-Conte amendment, authority to redesignate was settled by judicial interpretation, EPA's administrative practice, and by the statute. If the continuing resolution containing the Mitchell-Conte language had amended or even referred to the permanent statute, there would have been no problem of interpretation; however, it did not. 7/

It is a generally accepted proposition that matter contained in an appropriation act or a continuing resolution is not considered to affect permanent law unless there is some specific indication of such intent. See, e.g., 65 Comp. Gen. 588 (1986). Thus, EPA's interpretation of Mitchell-Conte necessitates construing the continuing resolution as overriding both its longstanding administrative practice and

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7/ Congress's typical way of indicating the nonapplicability of permanent law (in this case section 107(d)) when an appropriation act or continuing resolution is intended temporarily to supersede it would be to use the introductory phrase, "Notwithstanding section 107(d) . . ." or the phrase, "Notwithstanding any other provision of law . . . ." No such language was included in the Mitchell-Conte amendment.

the permanent statutory provision without any express indication of such intent.

In this connection the EPA General Counsel relies heavily on Chairman Dingell's comments on the amendment. That reliance is misplaced. Chairman Dingell was arguing against, not in support of, the amendment. Furthermore, his remarks were not part of a colloquy with the amendment's sponsor. Read in this light, the comments do not constitute an authoritative expression of congressional intent.

EPA also contends that there is no basis in the text or history of the Mitchell-Conte amendment to indicate that it should work through the states to carry out the amendment's authorized designations. We, on the other hand, think the text of the amendment does indicate that EPA should follow the established statutory procedure. That is the precise meaning we placed on the language directing the Administrator to "take appropriate steps to designate. . . areas. . . as nonattainment" (emphasis added). The conspicuous absence of legislative history for the amendment's last sentence strongly suggests to us that unilateral redesignation, particularly redesignation that would trigger the Part D SIP requirements and sanctions for newly designated areas, was not intended to be authorized.

Moreover, reading the last sentence of the amendment to allow unilateral redesignation accompanied by significant "regulatory consequences" could contravene the whole amendment's overriding purpose, which was to facilitate Congress's redrafting of the Clean Air Act. The floor debate on the amendment makes it absolutely clear that the intent was to reserve the imminent threat of sanctions while postponing them briefly, thereby generating leverage for Congress to complete its work within a time frame extended to August 31, 1988. The importance of this particular factor in enacting the Mitchell-Conte amendment is demonstrated by the fact that 18 members of the House who spoke in favor of the amendment on the floor mentioned it. 8/ If EPA were to redesignate under the amendment and

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8/ See 133 Cong. Rec. H10923-45 passim, (daily ed. Dec. 3, 1987, remarks of Reps. Conte, Weber, Waxman, Morella, Scheuer, Gilman, Coughlin, Walker, Lewis, Sikorski, Snowe, Dreir, Kolbe, Gallo, Jeffords, Vento, Miller, and Martin). The same intent was evidenced on the Senate side; however, there was less urgency there because the Senate had already completed work on its version of comprehensive clean air legislation (S. 1894, 100th Cong. 2d Sess.). See 133 Cong.

(continued...)

issue SIP calls setting new attainment deadlines for those areas and including the Part D SIP requirements, that action could, as a practical matter, impede Congress in exercising its legislative options to set different deadlines, to tier attainment strategies according to the severity of the problem in nonattainment areas, or to make other choices that might conflict with EPA policy or regulations.

EPA also states that we mischaracterized its November 24, 1987 policy statement 9/ as including a proposal to redesignate some areas. Although it proposed issuing SIP calls for nonattainment areas that would have considered the emissions from, and required controls for, sources outside the existing nonattainment areas, EPA points out that it did not term its proposed action a redesignation and that it did not propose to apply Part D sanctions in such cases for planning and implementation failures.

It is correct that EPA did not use the word "redesignate" with respect to its proposals in November 1987. However, in our view, this is a distinction without a difference because the requirements imposed on these areas would be substantially the same. We also note that EPA was at least considering redesignation in November 1987, because it did solicit public comment at that time on whether it should reverse its longstanding adherence to Bethlehem Steel.

Annexation Issues

EPA objects to our conclusion in the August 2, 1988 opinion that there is no authority in the Clean Air Act to support designating an area nonattainment if the area in fact meets air quality standards. The EPA General Counsel maintains that in proposing to annex some attainment areas to nonattainment areas as a part of the redesignation process, EPA was merely regularizing its existing practice of using

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8/(...continued)
Rec. S17812 (daily ed. Dec. 11, 1987, remarks of Sen. Mitchell). This intent is further borne out by the fact that the House considered and rejected an alternative to the Mitchell-Conte amendment which would simply have extended the attainment deadlines by 21 months. 133 Cong. Rec. H10946 (daily ed. Dec. 3, 1987).

9/ 52 Fed. Reg. 45044. Issued one month before the Mitchell-Conte amendment was enacted, the November 24, 1987 proposed policy sets forth a comprehensive strategy for dealing with ozone and carbon monoxide nonattainment after the December 31, 1987 statutory deadline.

metropolitan statistical area (MSA) or consolidated MSA boundaries when issuing SIP calls. According to EPA, authority for this action lies in the fact that the Act does not dictate where nonattainment area boundaries should be set.

That assertion is only partially correct. When the original boundaries of nonattainment areas were set in 1979, the state governors were free to draw the lines as seemed best to them. Once the boundaries were set, however, any change would necessitate formal redesignation of the area by the state governor because enlarging a nonattainment area "triggers . . . grave consequences" for the annexed territory. Bethlehem Steel 723 F. 2d at 1306. When EPA discussed annexations in the November 24, 1987 policy statement and proposed them on June 6, 1988, it was not writing on a clean slate. Rather it was drastically altering the rights and responsibilities of attainment areas whose status had been fixed through the statutory designation process.

Whether the process is called annexation or boundary adjustment, in fact it entails a redesignation from attainment to nonattainment. Redesignation in turn involves placing significant additional responsibilities, penalties and costs on the redesignated area. When drafting the original Clean Air Act and the 1977 Amendments, Congress was sensitive to the burdens that would be imposed on states and in particular on nonattainment areas. Under section 107 of the Act, Congress gave to the state governors initial and primary responsibility for designation and redesignation of nonattainment areas. It did not give this responsibility to EPA, and EPA should not be permitted to do in the name of boundary adjustment what it cannot do by redesignation.

Furthermore, the Clean Air Act defines the term "nonattainment area" as follows:

> "[A]n area which is shown by monitored data or which is calculated by air quality monitoring. . . to exceed any national ambient air quality standard. . . ."

Section 171(2), 42 U.S.C. § 7501(2) (1982).

Whatever value it may have in expediting attainment in the downwind area, we do not see how, under the existing Clean Air Act, EPA can justify imposing major regulatory requirements on an area unless the area at least meets the statutory definition of nonattainment. In addition, as we pointed out in our August 2, 1988 opinion, the Mitchell-

Conte amendment conveyed no authority to annex attainment areas to nonattainment areas. The designation authority there was limited to areas "failing to meet the standards".

Considering the foregoing, EPA cannot argue that redesignation of attainment areas, characterized as boundary adjustments, falls within the general ambit of its interpretative discretion. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), which EPA correctly cites as authority for a broad concept of discretion, does not encompass authority to reach beyond the parameters established by statute.

EPA cites two decisions in defense of its position, Western Oil and Gas Assoc. v. EPA, 767 F. 2d 603 (9th Cir. 1985), and Ohio v. Ruckleshaus, 776 F. 2d 1333 (6th Cir. 1985). 10/ Neither supports the agency's view of its broad unilateral authority. Western Oil and Gas held that a state may adjust the boundaries of a nonattainment area in such a way as to include upwind stationary sources. Ohio v. Ruckleshaus upheld EPA's refusal to redesignate a nonattainment area to attainment when, despite the absence of measured violations in the immediate area, major sources in the area were impairing attainment downwind. These cases stand for the proposition that the existence of violations is not the sine qua non of nonattainment status. Neither case supports the proposition that EPA may annex a designated attainment area where no violations exist because of downwind effects.

Conclusion

In recent reports, we have looked at EPA's performance in oversight of state planning and implementation and at its policy for assuring future ozone attainment. Some of EPA's past actions and inactions have contributed to the present degree of nonattainment. However, the problems we have identified in the redesignation proposal and in the proposed November 24, 1987 ozone policy, stem from the fact that EPA is trying to mount a new attainment campaign without the legislative authority necessary to support such actions.

In our most recent report, we cited EPA's November 24, 1987 ozone policy as a commendable, but unauthorized, effort to attempt to continue progress toward attainment. We recognize that EPA's analysis of the redesignation authority

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10/ A third case cited in the EPA letter is now on remand, and may, when finally decided, support Ohio v. Ruckleshaus. Illinois State Chamber of Commerce v. EPA, 775 F. 2d 1141 (7th Cir. 1985).

of Mitchell-Conte could be more productive of progress toward clean air than would strict adherence to the current statute. However, EPA is not free to rewrite the Clean Air Act to accomplish its commendable goal. For this reason we reaffirm the analysis in our August 2, 1988 opinion regarding redesignation.

Full Text of Mitchell-Conte amendment

"No restriction or prohibition on construction, permitting or funding under sections 110 (a)(2)(I), 173(4), 176(a), 176(b), or 316 of the Clean Air Act shall be imposed or take effect during the period prior to August 31, 1988, by reason of (1) the failure of any nonattainment area to attain the national primary ambient air quality standard under the Clean Air Act for photochemical oxidants (ozone) or carbon monoxide (or both) by December 31, 1987, (2) the failure of any State to adopt and submit to the Administrator of the Environmental Protection Agency an implementation plan that meets the requirements of part D of title I of such Act and provides for attainment of such standards by December 31, 1987, (3) the failure of any State or designated local government to implement the applicable implementation plan, or (4) any combination of the foregoing. During such period and consistent with the preceding sentence, the issuance of a permit (including required offsets) under section 173 of such Act for the construction or modification of a source in a nonattainment area shall not be denied solely or partially by reason of the reference contained in section 171(1) of such Act to the applicable date established in section 172(a). This subsection shall not apply to any restriction or prohibition in effect under sections 110(a)(2)(I), 173(4), 176(a), 176(b), or 316 of such Act prior to the enactment of this section. Prior to August 31, 1988 the Administrator of the Environmental Protection Agency shall evaluate air quality data and make determinations with respect to which areas throughout the nation have attained, or failed to attain, either or both of the national primary ambient air quality standards referred to in subsection (a) and shall take appropriate steps to designate those areas failing to attain either or both of such standards as nonattainment areas within the meaning of part D of title I of the Clean Air Act."