Comptroller General
of the United States

Washington, D.C. 20548

B-221037

September 15, 1987

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

Dear Mr. Chairman:

You have asked us (by copy of a letter to the Environmental Protection Agency) to comment on the legal arguments in a draft brief. Pursuant to section 172(b) of the Clean Air Act, 42 U.S.C. § 7502(b), states which have failed to meet air quality standards by the statutory deadline must provide for adoption of "all reasonably available control measures." The brief concludes that stage II vapor recovery controls, which prevent release into the atmosphere, during automobile refueling, of benzene and gasoline vapors, by means of equipment installed on gasoline pumps, are a reasonably available control measure. Therefore, the brief argues, the Environmental Protection Agency (EPA) must require use of stage II. An alternative technique, onboard controls, controls the same pollutants by means of equipment installed in automobiles.

We disagree with the draft brief's assertion that stage II controls are presumptively a reasonably available control measure (RACM). In our view, there is no requirement in the law or legislative history for the EPA to find stage II to be RACM although it is, of course, within its discretion to do so. Moreover, the draft brief's assertion that Congress recognized stage II as presumptively RACM is contradicted by the legislative history of section 172(b), which indicates that the Congress expected that EPA and the states would make RACM determinations.

We concur with the draft brief that EPA's ongoing study of onboard technology, required by the Clean Air Act, does not preclude EPA from now declaring stage II to be RACM. However, we cannot say that EPA must now declare stage II as RACM and require that it be put in place. In this regard, although EPA has submitted to the Office of Management and Budget, a draft notice of proposed rulemaking in which it concludes that onboard controls are the best alternative for controlling refueling emissions, EPA observed that there may be instances where it is feasible and reasonable for states

to implement stage II controls in nonattainment areas as an interim measure for controlling refueling emissions while waiting for onboard controls to take effect.

Finally, even if EPA were to consider stage II as RACM, a decision by the Court of Appeals for the 6th Circuit suggests that EPA might have a basis for not requiring stage II in revised SIPs if attainment could be achieved without it.

Our views are discussed more fully in the enclosure.

We hope this will be helpful to you. Under our usual procedure, this opinion will be available to the public 30 days from its date, unless you release it sooner.

Sincerely yours,

for Harry R. Van Cleve
Comptroller General
of the United States

Enclosure

ENCLOSURE

I. Background

As required by section 110 of the Clean Air Act, 42 U.S.C. § 7410, EPA as established national ambient air quality standards for the protection of the public health and environment for several pollutants, including ozone. Each state was required to submit to EPA a state implementation plan (SIP) describing its program for attainment and maintenance of the standards.

The original deadline for attainment was 1975. Because many states failed to meet that deadline, 1977 amendments to the Clean Air Act permitted states to revise their SIPs to provide for attainment of ozone standards by December 31, 1982, or, if not possible by 1982 despite implementation of all reasonably available measures, by December 31, 1987. The 1977 amendments specified that the revised SIPs were, among other things, to "provide for the implementation of all reasonably available control measures as expeditiously as practicable". Clean Air Act, § 172(b)(2), 42 U.S.C. § 7502(b)(2).

The draft brief contends that stage II is a reasonably available control measure (RACM) and challenges EPA's approval of revised SIPs that do not provide for stage II controls. The draft brief argues that: (1) Stage II is presumptively a RACM; (2) Section 172(b) requires the implementation of all RACM; and (3) EPA's study of onboard technology, pursuant to a statutory requirement, does not exempt EPA from requiring stage II as a RACM.

II. Is Stage II "Presumptively" a RACM?

The draft brief, arguing that stage II controls are "presumptively" a RACM, attempts to demonstrate that EPA's statutory discretion to declare particular pollution control measures to be RACM is less in the case of stage II than in the case of other techniques. The brief relies on legislative history, prior EPA rulemakings, documents, and policy statements, as well as on two jurisdictions' actual experience with stage II.

The draft brief never states exactly what is meant by saying that stage II is presumptively RACM. In a legal sense, a presumption is an evidentiary rule that shifts the burden of proof or persuasion to the party denying the facts or proposition at issue. As applied here, the draft brief uses the concept to mean that the Congress found stage II to be a RACM, but left it open to EPA or others to rebut that

finding. Under this theory, Congress left EPA with less discretion to decide whether stage II was RACM in the first instance, than with respect to all other control measures.

In our view, there is no requirement in the law or legislative history for EPA to find stage II to be RACM without making an independent determination whether that treatment is warranted. Moreover, the brief's assertion that Congress recognized stage II as presumptively RACM is contradicted by the legislative history of section 172(b), which indicates that Congress expected EPA and the states to make RACM determinations.

Section 172(b) was primarily derived from the Senate version (S. 252, 95th Cong.) of the 1977 amendments to the Clean Air Act. The Senate report explained that the bill did not define reasonable measures, leaving this determination to state and local officials in cooperation with EPA so as to preserve flexibility and take into account varying local and regional conditions. S. Rep. No. 127, 95th Cong., 1st Sess. 40 (1977).

During debate on the bill, Senator Muskie, chairman of the Subcommittee on Environmental Pollution, recognized the respective roles of EPA and the states in determining reasonable measures: Senator Muskie stated that, if EPA determines that all reasonable measures have not been adopted by the state, EPA is required to promulgate additional reasonable measures. 123 Cong. Rec. 18019 (1977).

As the draft brief notes, the 1977 amendments to the Clean Air Act included several provisions related to stage II. Section 108(f), 42 U.S.C. § 7408(f), directed EPA to issue information about strategies to reduce pollutants, including "programs to control vapor emissions from fuel transfer . . . ." A report of the Senate Committee on Environment and Public Works said that "it is assumed that most of the list [of strategies] will be found" to be RACM. S. Rep. No. 127, 95th Cong., 1st Sess. 39 (1977). This is at best inconclusive.

Several other sections in the amendments which the draft brief cites in support of the proposition that stage II is presumptively RACM set forth conditions, limitations, or standards for any stage II regulations EPA might issue. Clean Air Act §§ 202(a)(5), 323, 324, 42 U.S.C. §§ 7521(a)(5), 7624, 7625. Although these provisions would affect the use of stage II, they would apply, by their terms, only if EPA promulgated stage II regulations.

Congress may have assumed stage II was RACM, but it left to EPA the task of making this determination.

The draft brief points out that EPA has previously characterized stage II as a reasonably available control, explicitly in a 1976 guidance memorandum and by implication in an information document published in 1978. Stage II was listed as a reasonably available transportation control measure in an April 1978 EPA workshop, and examined as a RACM in a February 1979 EPA study. Also, EPA's 1981 Final Policy on approval of SIPs stated that vapor recovery is RACM. Moreover, California and the District of Columbia have implemented stage II.

EPA responds that it does not believe that a legal duty arises from its previous statements about stage II. EPA also says that it has never required that a state include stage II as RACM as a condition for SIP approval, or otherwise defined stage II as RACM in any SIP or other rulemaking. (Letter from Lee Thomas, EPA Administrator, to Chairman Dingell, dated January 20, 1987.)

EPA's previous statements about stage II do indeed suggest that agency officials may have considered stage II to be RACM. However, since EPA never took final regulatory action concerning stage II, we believe that EPA is not legally bound by its earlier position.

On the other hand, the brief is correct that stage II is in use in two jurisdictions and that at one time EPA seemed to have assumed that stage II was reasonably available. Although EPA has suggested that what is RACM in one state may not be RACM in another, it has failed to explain clearly its current position on whether stage II is RACM and, if not, why not. We do not read the Clean Air Act as in effect removing from EPA the discretion to decide whether or not stage II is RACM, but we are sympathetic to the position in the brief that EPA should provide "fully articulated reasonable grounds" for concluding that stage II is not RACM.

III. Does EPA's Study of Onboard Controls Exempt EPA From Requiring Stage II?

The draft brief also contends that section 202(a)(6) of the Clean Air Act, 42 U.S.C. § 7521(a)(6), which requires EPA to study onboard technology to determine its feasibility and desirability in lieu of stage II, does not excuse EPA from requiring stage II as RACM under section 172(b). We agree

that at EPA's study of onboard technology does not preclude EPA from now declaring stage II to be RACM in nonattainment areas.

We find support in the structure of the Clean Air Act itself: section 172(b) only applies to nonattainment areas and requires expeditious implementation of "all RACM." Section 202(a)(6) requires EPA to consider onboard or stage II as a national requirement--that is, in both attainment and nonattainment areas--and to look at various factors, including cost.

Moreover, anticipating that EPA might issue stage II regulations, Congress specifically enacted several provisions, discussed above, directly related to stage II controls (Clean Air Act §§ 202(a)(5), 324, and 325). Congress did not condition the applicability of these provisions on EPA's onboard decisionmaking process. In fact, the House Report (section 202(a)(6) was derived from the House version of the 1977 Amendments) explicitly stated that

> "The Committee's action in providing the new authorities [concerning onboard technology and vapor recovery fill pipe standards] . . . is not intended in any way to limit or affect the authority or duty of the Administrator with respect to the promulgation of vapor recovery regulations under the Clean Air Act." H.R. Rep. No. 294, 95th Cong., 1st Sess. 304 (1977).

We therefore disagree with EPA's position, stated in its January 20 letter, that to require stage II as a RACM would render section 202(a)(6) a nullity. However, as we explained in answer to the argument that stage II is RACM, we cannot say that EPA must now declare stage II as RACM and require that it be put in place. In fact, as we stated in our report to you (GAO/RCED 87-151, August 7, 1987), EPA has submitted a draft notice of proposed rulemaking to the Office of Management and Budget in which EPA concludes that onboard controls are the best alternative for controlling refueling emissions and also observes that there may be instances where it is feasible and reasonable for states to implement stage II controls in nonattainment areas as an interim measure for controlling refueling emissions while waiting for onboard controls to take effect.

ENCLOSURE

IV. Does Section 172(b) Require All RACM?

The draft brief further points out that section 172(b) requires that SIPs for nonattainment areas provide for adoption of all RACM, and concludes that EPA has no discretion to allow fewer than all measures. Thus, in this view, even if a nonattainment area can reach attainment by 1987 without stage II, the nonattainment area is foreclosed from implementing fewer than all reasonably available measures, and therefore must implement stage II (assuming that stage II is RACM).

EPA has not directly responded to this argument. Since EPA has not yet decided whether stage II is RACM, the brief's argument about the interpretation of "all" is premature. However, in one case (admittedly under somewhat different statutory language), a federal appeals court suggested that, if the required air quality could be achieved with fewer than all reasonably available measures, EPA might permit that result, even though adoption of such measures was "mandatory."

In National Steel Corp., Great Lakes Steel Div. v. Gorsuch, 700 F.2d 314 (6th Cir. 1983), a case concerning a requirement in section 172(b)(3) for SIPs in nonattainment areas to require the adoption, "at a minimum, of reasonably available control technology," or RACT, EPA offered to approve state plans which could demonstrate attainment as expeditiously as practicable without requiring RACT--an administrative exemption to an otherwise mandatory requirement under section 172(b)(3). The court ruled that RACT is mandatory under section 172(b)(3), but also in effect accepted EPA's proposed alternative, saying that the state "could have avoided RACT requirements . . . by otherwise demonstrating attainment as expeditiously as practicable.'" 700 F.2d at 322, 324. In terms of the overriding purpose of the statute--the attainment of national ambient air quality standards--this result makes sense, even though the literal wording of the law makes it somewhat problematical.

Under the draft brief's reasoning, EPA would have to require SIPs to contain each and every reasonably available pollution control method, even if some were duplicative of others. However, as National Steel illustrates, a court might conclude that despite the requirement of section 172 for all RACM, something less than that might be acceptable if attainment were still achieved.