



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

ATTACHMENT A

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OFFICE OF  
GENERAL COUNSEL

MEMORANDUM

**SUBJECT:** Proposed Curtailment of Noise Program

**FROM:** Robert M. Perry <sup>COPY ORIGINAL SIGNED BY</sup>  
General Counsel <sub>ROBERT M. PERRY</sub>

**TO:** Kathleen M. Bennett  
Assistant Administrator for  
Air, Noise and Radiation

As you know, the Administration's budget calls for elimination of EPA's noise control program by the end of the current fiscal year. Accordingly, the Office of Noise Abatement and Control (ONAC) has asked us to review its plans to phase out various regulatory activities under the Noise Control Act. Attached is a detailed memorandum, prepared by my staff, evaluating the legal risks involved in those plans, exploring alternative approaches, and discussing procedural issues.

Essentially, we have concluded that ONAC's plans involve serious risks. The statute requires, with few exceptions, that EPA promulgate regulations for products it has identified as major sources of noise. There are a number of products which have been identified but for which regulations have not been promulgated. The noise office's plans call for "de-identifying" these products, based primarily on two propositions: (1) that state and local governments have now shown that they are capable of regulating these products; and (2) that federal regulation is not necessary for these products because the affected manufacturers do not need protection from state and local standards in the form of federal preemption.

We conclude that there are serious risks to this approach, in part because it relies on factors that the Act does not explicitly permit the Administrator to consider in determining what constitutes a "major" source of noise, and in part because the propositions mentioned above may be difficult to document. Moreover, the approach would conflict with EPA's past interpretation of the statute.

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However, the status quo involves risks that are equally serious. The statute contains deadlines for proposal and promulgation of regulations after a product has been identified as a major source of noise. The Agency is currently vulnerable for having failed to meet those deadlines.

The memorandum also discusses a variation of the "de-identification" approach which we believe involves somewhat less legal risk. The variation would involve characterizing the removal of products from the list of major noise sources as temporary, reflecting current budgetary constraints, the priorities of the Administration, and national economic concerns. This approach would seek to rely more heavily on the Administrator's discretion to set priorities under the Act, would hold out the possibility that products could be returned to the list of major noise sources at an appropriate time, and would not involve a determination that a product is not a "major" source of noise. For reasons discussed in the memorandum, we believe this approach is preferable from a legal perspective.

We would be happy to discuss these matters with you further.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

December 1, 1981

MEMORANDUM

SUBJECT: Proposed Curtailment of Noise Program

OFFICE OF  
GENERAL COUNSEL

FROM: Samuel I. Gutter *Samuel I. Gutter*  
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As we have discussed, the Administration's budget calls for elimination of EPA's noise control program by the end of the current fiscal year. Accordingly, the Office of Noise Abatement and Control (ONAC) has asked us to review its plans to phase out various regulatory efforts under the Noise Control Act. We have concluded that these plans involve serious legal risks. However, comparable risks exist under the status quo, because EPA is currently in default of its obligations to complete certain rulemaking activities under the Act.

This memorandum evaluates the legal risks of ONAC's plans, and discusses a variation of that approach which could mitigate those risks somewhat. It also discusses procedural issues raised by the plans.

Statutory Background

The regulatory actions in question arise under Sections 3 and 6 of the Act, 42 U.S.C. §§4904, 4905. EPA is obligated to regulate a number of commercial products under Section 6 because the products have all been identified as major sources of noise under Section 3(b).<sup>1/</sup> Although the initial decision

1/ The products at issue here are truck-transport refrigeration units, power lawnmowers, rock drills, pavement breakers wheel and crawler tractors, buses, and garbage trucks. These products are at various stages in the regulatory process: the first four have not proceeded past the identification stage; regulations have been proposed for wheel and crawler tractors and buses; final regulations have been promulgated for garbage trucks.

whether to identify a product as a major source of noise involves an element of discretion, <sup>2/</sup> once a product has been identified the Administrator is required to issue proposed and final regulations, unless standards are "not feasible for that product." Section 6(a)(1), (3).

Moreover, the Act sets specific deadlines for proposal and promulgation of regulations once a product has been identified under Section 5(b). In general, regulations must be proposed within 18 months of identification, Section 6(a)(2)(B), and must be promulgated within 6 months of proposal. Section 6(a)(3).

The statutory deadlines have passed for all the products in question. <sup>3/</sup> Accordingly, the Administrator is vulnerable to "citizen suit" actions under Section 12(a)(2)(A) of the Act for failure to meet the statutory deadlines. <sup>4/</sup>

ONAC's plan to phase out noise regulatory activities should be reviewed against this background. Although substantial legal risks are involved in implementation of the plan, those risks must be balanced against the Administrator's present vulnerability to citizens' suits. <sup>5/</sup>

<sup>2/</sup> Section 5(b) provides, in relevant part, that:

The Administrator shall, after consultation with appropriate Federal agencies, compile and publish a report or series of reports . . . identifying products (or classes or products) which in his judgment are major sources of noise. [Emphasis added.]

<sup>3/</sup> The regulations for garbage trucks have already been promulgated, so the statutory obligation to promulgate has already been satisfied for this product. However, EPA suspended enforcement of those regulations in February of this year, and has not acted to amend the regulations or otherwise cure the problems identified in the suspension notice. Some action is necessary. Moreover, ONAC wishes to withdraw the regulations altogether, which would violate the statutory obligation unless garbage trucks are "de-identified," or some other action is taken, as discussed below.

<sup>4/</sup> Any person may bring a "citizen suit," including a manufacturer desiring to see federal regulations in place for the protection provided by preemption.

<sup>5/</sup> Of course, the safest course legally would be to follow through with regulations for all products identified as major sources of noise. Since this option appears to be unavailable in light of budgetary constraints, it will not be discussed further in this memorandum.

### Discussion

As discussed above, EPA's obligations to promulgate noise regulations under Section 6 all flow from identification of products as major sources of noise under Section 5. Accordingly, ONAC's proposal focuses on ways to undo that identification. The principal option presented is to "de-identify" the products as major sources of noise. 6/ If successful, "de-identification" would eliminate EPA's legal obligations to regulate all products in question.

"De-identification" alone would end EPA's legal obligations to regulate those sources for which rulemaking has not proceeded past the identification stage. For regulations that have already been proposed, the Agency would have to take the additional step of withdrawing the proposals. Finally, for the garbage truck regulation, "de-identification" would have to be accompanied by rulemaking to withdraw the existing regulations.

In principle, there is no major distinction in the legal risks which result from the stage of rulemaking activity for a given product. That is, if "de-identification" is successful, proposed and final regulations could be withdrawn with no more risk than that resulting from the "de-identification" itself. As a practical matter, however, one distinction would be the extent and strength of the record already developed in support of particular regulations. For products that have progressed through the rulemaking process, EPA's past pronouncements in favor of regulation may be stronger, and the record in support of regulation may be more extensive. Where the factual record in support of regulation is strong, it may be more difficult to justify "de-identification."

The principal question posed by ONAC's proposal is whether there is an adequate legal or factual basis for "de-identification" of particular products. In summary, the option that has been suggested is to rely on the growth of state and local noise programs, in conjunction with the statutory purpose of allowing state and local regulation

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6/ The legal risks involved in "de-identification" are discussed below. In earlier discussions it was suggested that EPA might announce its intent not to proceed with regulations without removing the products involved from the list of major sources of noise. We believe that this course would be imprudent. As discussed earlier, the legal obligation to promulgate regulations for a product flows from identification of the product as a major source of noise, and only by withdrawing the identification can that obligation be removed. Thus, an announcement that EPA did not intend to proceed with regulation could invite litigation without first articulating a legal basis for the decision.

where national uniformity of treatment is unnecessary, to conclude that federal regulation is unnecessary or inappropriate for these products. For these reasons, EPA would conclude that the products should not be identified as "major" noise sources for purposes of federal regulation.

This approach would represent a significant departure from EPA's interpretation of Section 5. Past identifications of products as major sources of noise have relied exclusively on the health and welfare effects of noise exposure from various products. See, e.g., 40 Fed. Reg. 23105 (May 28, 1975). Since there is apparently no evidence to suggest that the products in question no longer have the same effects on the public health and welfare, <sup>7/</sup> the criteria that were originally used to identify them as major sources of noise probably cannot support "de-identification." Accordingly, the approach suggested by ONAC would require a new interpretation of Section 5.

Although an agency ordinarily has some discretion to change its interpretation of a statute, there must be an adequate rationale for the change. In this case, the argument that is inherent in ONAC's proposal is that factors other than health and welfare effects are relevant to the exercise of the Administrator's judgment in identifying products as "major" sources of noise. Thus, EPA might argue that changed circumstances since the identification of these products -- primarily the recent growth of state and local programs -- and other factors bearing on the appropriateness of federal regulation may be considered in the exercise of the Administrator's discretion to identify products. <sup>8/</sup>

Some arguments in favor of this approach include the following:

- The Administrator has broad discretion to determine which products are major sources of noise, and should have the same discretion to determine which are not major sources of noise. <sup>9/</sup>

<sup>7/</sup> To the contrary, EPA has developed administrative records for these products documenting their health and welfare effects.

<sup>8/</sup> The variation of this approach discussed below would shift the emphasis slightly, focusing more on the Administrator's discretion to set priorities in identifying products to be regulated and less on interpretation of Section 5.

<sup>9/</sup> The Administrator's discretion is not unbounded, however. If the data supporting identification of a product as a major source of noise are strong enough, the Administrator .

(Footnote continued)

- The Administrator's discretion should be read in light of the purposes of the statute. Section 2(a)(3) declares that state and local governments have primary responsibility for noise control where "national uniformity of treatment" is not required. <sup>10/</sup> The precise meaning of this statement is unclear. <sup>11/</sup> Under one possible interpretation of it, however, an argument can be made that "national uniformity of treatment" is not required for the products in question

Footnote 9/ continued

might be required to identify that product. Thus, the Administrator has been compelled to list lead as a pollutant for which a national ambient air quality standard was necessary, given data showing the health and welfare effects of lead. NRDC v. Train, 411 F. Supp. 864 (S.D. N.Y. 1976), affirmed 545 F.2d 320 (2d Cir. 1976).

10/ Section 2(a)(3) provides:

that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.

11/ The Act and its legislative history suggest rather strongly that the need for "national uniformity of treatment" refers to the need for federal preemption of state and local regulations affecting the manufacture of a given product, rather than factors relating to the noise characteristics of the product. There is virtually no indication, however, of what circumstances Congress may have thought to warrant federal preemption. At one extreme, it could be argued that federal preemption is necessary for every product that poses a "major" noise problem, because without preemption the manufacturers of such products might be forced to produce different versions of their products for every jurisdiction that chose to regulate them. This interpretation seems overly broad, if only because it would allow EPA to preempt state and local regulation of the manufacture of all products that are "major" sources of noise and are produced for a national market; this would leave state and local governments (who are declared to have "primary responsibility" for noise control) free to regulate only the use of such products. This interpretation would also seem to preclude any argument that federal preemption is unnecessary for the products in question here.

(footnote continued)

because they do not routinely cross state boundaries in use. <sup>12/</sup> From that conclusion it could be argued that Congress did not consider federal action to be necessary for such products, and that the Administrator may consider this factor in identifying products or major sources of noise. This argument, however, is inherently weak (see note 11 supra).

Section 5(c) requires, inter alia, that EPA review and, as appropriate, "revise or supplement" identifications. This suggests that Congress intended to allow EPA to do something other than "supplement" identifications; i.e., it could imply discretion to change earlier decisions. <sup>13/</sup>

• Subsequent amendments to the Act (in 1978) initiated an extensive effort to support state and local noise control programs. These amendments and their legislative

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Footnote 11/ continued

Another possible interpretation is that federal preemption is necessary where products routinely cross state boundaries in use, because conflicting state regulations might otherwise require physical alteration of the products each time they crossed a state line. As discussed below, however, Congress rather clearly envisioned federal regulation of some products that would not meet this test. In addition, this interpretation focuses on potential burdens on use, rather than manufacture, of a given product, and Congress explicitly preserved the rights of state and local jurisdictions to regulate use in most cases. Section 6(e)(2).

Still another interpretation would focus on the expense or difficulty of producing different versions of a product for different jurisdictions. Although this interpretation has a certain logic and may well be the best interpretation that is possible, it is by no means clear that it is what Congress intended. For present purposes, it could also involve EPA in some difficult factual judgments.

<sup>12/</sup> As is discussed below, this argument may be flawed with respect to buses.

<sup>13/</sup> An argument against this position is that Section 5(c) applies to noise criteria documents, as well as identifications. The "revise" language could be read as applying only to criteria documents.



history suggest an intent to deemphasize federal regulatory efforts to some degree in favor of state and local controls. 14/

These points lead us to conclude that EPA could make a plausible argument in favor of "de-identifying" products on grounds other than their health and welfare effects per se. However, we cannot be sure that the Agency's position would prevail, if challenged. 15/ There is no clear indication in the language or legislative history of Section 5 that Congress intended EPA to select "major" noise sources based on such factors as the likelihood that state or local governments will regulate them, or the need for national uniformity of treatment.

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14/ The Senate committee explained this shift:

The committee is concerned that the Environmental Protection Agency may have misdirected its efforts by pushing only for Federal standards and regulations. It is now time to shift the emphasis to a more balanced approach, in which State and local governments take an aggressive role.

S. Rep. No. 95-875, 95th Cong., 2d Sess. 3 (1978). This and similar statements in the 1978 legislative history are helpful. For several reasons, however, their ultimate significance is somewhat unclear. First, under ordinary principles of statutory interpretation, this subsequent legislative history would not be considered determinative of congressional intent at the time Section 5 was enacted. Second, despite the apparent shift in emphasis in 1978, Congress retained EPA's statutory obligations to regulate major sources of noise without change, and it took no action to amend the criteria for identification of such sources. Thus, it could even be argued that the 1978 amendments ratified EPA's original interpretation of Section 5. On the other hand, it could be argued that Congress viewed the existing language of Section 5 as conferring sufficient discretion for EPA to refrain from identifying products more appropriately regulated by state and local governments; if so, no amendment of Section 5 would have been necessary in 1978. On balance, we conclude that the 1978 amendments and their legislative history provide some support for the argument that the Administrator may consider the likelihood or appropriateness of state and local regulation and similar factors in deciding which products are appropriate candidates for federal regulation; i.e., in exercising her discretion in the identification of major sources of noise.

15/ As indicated above, manufacturers seeking preemption of state and local regulation could sue to compel promulgation of federal regulations under Section 12. Thus, EPA might face challenges from industry groups as well as environmental groups.

Indeed, it is clear that Congress envisioned federal regulation of at least some sources for which national uniformity of treatment would not appear necessary under the interpretation mentioned above, 16/ and that it intended EPA to preempt, rather than rely on, state and local regulation in some cases. Finally, the suggested interpretation of Section 5 could appear strained to a reviewing court. In ordinary usage, the word "major" would seem to suggest the quantitative noise impact of a product, not whether the product is an appropriate candidate for federal regulation based on other criteria. For these reasons, the courts may be especially skeptical of any conclusion that the products in question are not major noise sources, and may view such a departure from EPA's original conclusions as reflecting a desire to deregulate rather than a reasoned interpretation of the statute. 17/

#### Modified Approach

A variation of the plan discussed above might involve somewhat less risk. In general, it would seek to rely on the Administrator's discretion to set priorities for regulation of products under Sections 5 and 6. Under this approach the Administrator would not find that the products in question are not major noise sources. Rather, the Administrator would indicate that present circumstances, including reduced funding for the noise program, national economic concerns, and current regulatory priorities of the Administration,

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16/ That interpretation focused on whether products routinely cross state boundaries in use. However, Section 6(a)(1)(C) lists four broad categories of sources for which federal regulations are required if products falling in these categories are identified as major sources of noise: construction equipment, transportation equipment, any motor or engine, and electrical or electronic equipment. Unlike such sources as railroad locomotives and motor carriers engaged in interstate commerce (addressed in Sections 17 and 18 of the Act, respectively), many if not most products in these categories would ordinarily be used in relatively small geographic areas once sold.

A broader interpretation of the need for national uniformity of treatment would avoid this objection but, as noted above, would tend to preclude any argument that such treatment is unnecessary for the sources in question here. See note 11, SUBEA.

17/ It should be noted that citizens' suits, if any, would most likely be brought in federal district courts, and that the plaintiffs could seek discovery and even oral testimony of Agency officials. By these means, plaintiffs could seek to show that EPA's plans to "de-identify" products were based on a desire to deregulate, even though Congress had not yet acted to amend the statute.

demonstrate that it would be inappropriate to proceed with federal regulation of certain noise sources at this time. <sup>18/</sup> Under this rationale, the Administrator would remove the products in question from the list of major noise sources for the time being but leave open the possibility of regulation in the future.

This approach has several legal advantages. Rather than basing "de-identification" on what may seem to be a strained construction of the word "major," this approach could appear to a reviewing court to be a pragmatic response to the realities of present budget cuts, while preserving the Administrator's discretion to initiate rulemaking at an appropriate time. Indeed, this approach would not require a new interpretation of Section 5, since it would not be necessary to find that the sources are not "major." <sup>19/</sup> Moreover, since the Administrator would be leaving a number of products on the list of major noise sources (i.e., those products for which regulations would remain under the ONAC plan), this approach could appear to a reviewing court to be a discriminating choice among priorities. <sup>20/</sup>

Litigation might be less likely under this approach. Manufacturers concerned that "de-identification" could lead to the imposition of conflicting state and local standards would be able to ask EPA to return a product to the list of major noise sources if that occurred. This opportunity would not be so readily available if EPA removed a product from the list based on a finding that it was not a major source of noise. Thus, an affected manufacturer might be more likely to challenge a final "de-identification" than a temporary withdrawal of a product from the list.

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<sup>18/</sup> As is discussed below, garbage trucks would require separate treatment under this approach, since final regulations already exist for these products.

<sup>19/</sup> To avoid signaling a new interpretation of Section 5, Federal Register notices implementing this approach should speak in terms of "withdrawing products from the list of major sources of noise," rather than "de-identifying" them.

<sup>20/</sup> In explaining this approach, EPA could refer to the discretion the Administrator would have if she were writing on a clean slate. With no products identified as major sources of noise, the Administrator would probably have discretion to list only a few sources at a time, based on program priorities and budgetary constraints. Under the approach discussed above, the Administrator would be exercising similar discretion, to carve the list back to a level reflecting current realities.

Under this approach, EPA could also note that the growth in state and local noise control programs would mitigate the potential environmental harm of not proceeding to regulate these products. Indeed, EPA could note that it would be appropriate to evaluate the success of state and local regulations prior to returning products to the list of major noise sources, to decide whether these programs had reduced noise exposures to the point that these products may no longer be major noise sources from a health and welfare perspective. Finally, the congressional intent for EPA to deemphasize federal regulation, indicated by the 1978 amendments and their legislative history (discussed above), would support this approach, as well.

On balance, we conclude that this approach is somewhat more defensible than permanent "de-identification" based on findings that the products in question are not "major."

#### Special Concerns

Although this memorandum has examined the products in question collectively, special consideration should be given to two products: buses, and garbage trucks.

Of the products under consideration, buses fit least logically into the class of products not requiring national uniformity of treatment under the interpretation mentioned previously. At least one portion of the class of buses, inter-city buses, routinely cross state lines and seem a less appropriate candidate for state and local regulation than products that do not. Moreover, "de-identification" of buses may be more likely to generate litigation than action on the other products. General Motors and International Harvester, leading bus manufacturers, have been active in litigation with EPA under the Noise Control Act, and might be concerned with the lack of protection from state and local regulations that would result from "de-identifying" buses. As noted earlier, however, litigation for this reason would seem less likely under the modified approach discussed above. 21/

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21/ In a letter to the Administrator dated October 12, 1981, General Motors urged that EPA "suspend indefinitely the promulgation of a final federal bus noise regulation," arguing that such a regulation is not warranted "at this time." GM did not specifically request withdrawal of the proposal. It is unclear whether GM believes that the existence of the proposed rule has some chilling effect on state and local regulation, or whether it would support "de-identification" of buses and withdrawal of the proposed rule. In any event, GM's concerns would appear to be addressed by removing buses from the list of major noise sources temporarily, in that buses could be put back on the list if circumstances warranted and there would be no federal regulation in the interim.

Garbage trucks also present special concerns because final regulations for this class of products are already in effect. Temporary removal of a product from the list of major noise sources based on the argument that the federal government is constrained from proceeding with additional regulations at this time cannot be used to support revocation of a regulation already in place. Accordingly, if the modified approach is pursued, garbage trucks will require separate treatment.

Possible bases for revoking the garbage truck regulations include:

- Concluding that federal regulations are not "feasible" for these products. See Section 6(a)(1)(B). As noted earlier, enforcement of the garbage truck regulations has been stayed administratively. This stay was based in large part on test burdens and technical problems EPA recognized as stemming from the requirement that garbage truck manufacturers verify the noise levels of the entire product, including the truck chassis produced by others. Given these problems, EPA might develop a record showing that federal regulation is infeasible for this particular product.
- Concluding that the costs of federal regulations are excessive. See Section 6(c)(1). EPA's analysis projected a 10% increase in the cost of the product; past and present industry estimates are much higher. The Administrator might reconsider these costs in light of current economic conditions and conclude they are unreasonable.
- "De-identifying" garbage trucks (ONAC's alternative) on the basis that they are not a major source of noise, based on the lack of a need for national uniformity of treatment under the interpretation mentioned previously. Although that interpretation is open to question, the industry, the Council on Economic Advisors, and others have been vocal in criticizing these regulations, based in large part on the argument that control of garbage truck noise is best left to the state and local governments, through curfews, purchase specifications, and the like.
- Concluding that the current regulations do not contain standards "requisite to protect the public health and welfare," Section 6(c)(1), since the regulations do not affect air brakes, a large, intrusive noise event associated with garbage collection. Once the final regulations were off the books, garbage trucks could be

removed from the list of major noise sources under one of the alternatives discussed earlier.

The first two options appear most promising, at present. However, we recommend that ONAC and OGC staff consult further to address the particular problem of the garbage truck regulations, to see if other options exist for revoking them. Initiation of action on other products need not await the outcome of these discussions.

Finally, it should be noted that any efforts to revoke the garbage truck regulations likely will be greeted with support and not protest. As noted above, the garbage truck industry has argued vociferously for elimination of the regulations, and state and local governments have shown an ability to control this noise problem themselves.

#### Other Alternatives

There are few alternatives to taking some action to remove products from the list of major sources of noise. Other than proceeding with regulation, an alternative with its own legal risks is to continue the status quo of not proceeding with regulations for identified products. As discussed earlier, the Administrator is legally vulnerable for failure to promulgate regulations. EPA would be unlikely to prevail in litigation challenging a failure to promulgate, and the steady departure of ONAC staff will make it increasingly difficult for EPA to comply with a judicial order to engage in rulemaking. Although no manufacturer has yet chosen to prod EPA toward Section 6 rulemaking, this could in part be based on the chilling effect that existing identifications and proposals may have on state and local regulations. State and local governments could choose to regulate the products in question if it appears that EPA will not issue further regulations. That possibility could lead manufacturers to litigate in favor of federal rulemaking.

The best alternative from a legal perspective is to seek a legislative solution. The bills to amend the Act currently pending in Congress, however, would not free EPA from all the regulatory obligations in question. <sup>22/</sup> To remedy this, the Administration might take more vigorous action to obtain legislation consistent with its current plans. In any event, both the timing and the content of any legislative relief are uncertain at best.

<sup>22/</sup> For example, the House bill would leave in place EPA's obligations to promulgate regulations for transportation noise sources identified as major sources of noise. This would leave a continuing obligation to promulgate the bus regulation.

A third alternative would be to "de-identify" the products in question based upon a reevaluation of the health and welfare effects justifying identification. Such a reevaluation, however, would probably require EPA to change the ambient noise level it previously identified as "requisite to protect the public health and welfare with an adequate margin of safety." 23/ This level, Ldn 55, was based on extensive health and welfare criteria, and served as the basis for identifying products as major sources of noise. Reassessing that level would necessitate reexamining the criteria and developing technical data to support any new conclusions.

A final alternative, which would not require "de-identification," would be to find that federal regulations are not "requisite to protect the public health and welfare." Section 6(c)(1). 24/ That is, the Administrator might conclude that the growth of state and local programs, discussed earlier, demonstrates that federal regulation is not "requisite," or necessary. The principal problem with this alternative is that it takes the phrase "requisite to protect the public health and welfare" out of its statutory context. The logical purpose of the phrase is to define the basis for determining the appropriate noise level of a standard in a regulation, not whether a regulation is necessary at all. Moreover, the requirement that a standard be based on "criteria published under section 5" presents problems similar to the alternative discussed earlier of "de-identifying" based on a reassessment of the health and welfare effects. Here, too, EPA would likely have to reevaluate the Ldn 55 ambient noise level, to conclude that federal regulation was not requisite based on those criteria.

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23/ Section 6(c)(1) requires, *inter alia*, that any regulation for a product identified as a major source of noise:

include a noise emission standard which shall set limits on noise emissions from such product and shall be a standard which in the Administrator's judgment, based on criteria published under section 5, is requisite to protect the public health and welfare

24/ This action was taken under Section 5(a)(2), which required the Administrator to:

publish information on the levels of environmental noise the attainment and maintenance of which in defined areas under various conditions are requisite to protect the public health and welfare with an adequate margin of safety.

Procedures

If one of the approaches to removing products from the list of major noise sources is implemented, an issue is whether it should be accomplished through notice-and-comment rulemaking. Although earlier identifications were made without those procedures, rulemaking would allow EPA to assess the depth of opposition to its plans, and could allow the Agency to reassess all or part of those plans based on the public comments. Moreover, public comment could help EPA strengthen the administrative record in favor of the proposal; e.g., by soliciting comments from state and local governments on their ability to regulate the sources in question.

Whether a reviewing court would conclude that EPA's action constitutes a "rule," subject to notice-and-comment requirements, is not certain. <sup>25/</sup> A court might be more likely to conclude that notice-and-comment rulemaking was required under ONAC's plan than under the alternative of

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25/ 5 U.S.C. §551(4) defines a "rule," in relevant part, as

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . .

This broad definition could be read to encompass the "de-identification" process.

If EPA's action is treated as a "rule" under the Administrative Procedure Act, notice-and-comment procedures may be omitted only if the Agency, "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(3)(B). It would be difficult to make such findings for "de-identification," where no emergency suggests that notice-and-comment could not precede final rulemaking. The legislative history of the APA makes it clear that Congress intended this exception to be construed narrowly. The good cause exception is to be invoked only where notice is "impossible or manifestly unnecessary," or where "the execution of agency functions would be unavoidably prevented." Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong. 2d Sess. 348 (1947).



Aside from actually promulgating regulations for the products identified, or seeking appropriate legislative relief, there appears to be no available alternative, including the alternative of taking no action, that presents substantially less risk.