City of Grand Island

Tuesday, December 18, 2007
Council Session

Item G17

#2007-326 - Approving EPA Clean Air Act Designated Representative

Staff Contact: Gary R. Mader;Dale Shotkoski

Council Agenda Memo

From: Gary R. Mader, Utilities Director
Dale Shotkoski, City Attorney

Meeting: December 18, 2007

Subject: Approving EPA Clean Air Act Designated Representative

Item #'s: G-17

Presenter(s): Gary R. Mader, Utilities Director

Background

In 1990, Congress instituted a much expanded program of emission control, monitoring and reporting for major fossil burning facilities with passage of the Clean Air Act Amendments of 1990. At the time, the primary focus of the increased regulation was on sulfur emissions and the creation of the new sulfur emission accounting and trading program known as the Acid Rain Program. Among the new requirements were;

- Installation of continuous monitoring equipment on fuel burning equipment
- Extensive reporting of emissions and monitoring equipment performance and calibration
- Creation of the sulfur emission trading system
- Assignment of emission allowances to existing facilities
- Development of trading and sale provisions to produce a market system for trading the newly created commodity of sulfur allowances
- Detailed specifications for equipment operational accuracy and reliability with extensive reporting requirements
- And other provisions included in this major legislation

Being operators of fossil fueled power plants, the City was included under the new regulatory requirements. The 1990 Amendments shifted regulatory compliance from obligating subject facilities to meet limits established by EPA, to requiring much expanded monitoring and reporting to demonstrate emission limit compliance with penalties associated with any failures in the monitoring and reporting, without regard for the actual emission. With the much more complex requirements, the 1990 Amendments required the owner or operator of a source to appoint a "Designated Representative" who was to have control and responsibility for the newly enacted regulatory compliance

processes, and an "Alternate Designated Representative" to act in the event the Designated Representative is not available.

Designated Representative Responsibilities;

Environmental Protection Agency rules governing the Designated Representative are set forth in 40 CFR §72.20, Subpart B. These rules include the following:

1. The Designated Representative is defined as a "responsible person or official authorized by the owner and operator of a unit to represent the owner and operator in matters pertaining to the holding, transfer, or disposition of allowances allocated to a unit, and the submission of and compliance with permits, permit applications, and compliance plans for the unit.
2. That the Designated Representative "by his or her actions, inactions, or submissions, legally bind each owner and operator of the affected source…"
3. That the "… owners and operators shall be bound by any order issued to a Designated Representative by the Administrator, the permitting authority, or the court."
4. That "…where a particular violation resulted from acts or omissions that are within the scope of the Designated Representative's responsibilities, he will be subject to liability for that violation."

In the case of municipal ownership of power plants, there is an apparent conflict between the federal mandate to have a Designated Representative who is a "natural person" and who can "legally bind" and "be subject to liability for violation"; and Nebraska law which does not permit the City Council to delegate its authority to any individual. A notation to that affect was made on the required document submitted to EPA.

After evaluation by the Utilities Department and the Legal Department of the City, the decision was made to appoint the Utilities Director as the Designated Representative (DR) and the Assistant Utilities Director-Production Division as the Alternate Designated Representative (ADR). The appointments were made by the City Council at a regular session in December of 1994, by execution of a Representative Agreement document.

Discussion

Since the original designations were made, subsequent regulations promulgated by EPA have followed the pattern set by the 1990 Act which created the Acid Rain Program. Subsequent regulation includes programs for Nitrous Oxides, Ozone and most recently Mercury. The Platte Generating Station is subject to the Mercury regulation and the Department is working to the installation and certification of the EPA required monitoring equipment and planning for major construction of Mercury control equipment for completion in 2010.

Since the original program that set the format of subsequent regulation was specifically for the Acid Rain Program, much of the documentation and record was set up for that

initial program. Subsequent programs have required DR responsibility for program implementation and regulatory compliance. EPA is concerned that the initial DR designations records include responsibility for only that first program. Therefore, EPA is requiring all owners or operators of facilities subject to Clean Air Act regulation to reappoint Designated Representatives and Alternate Designated Representatives specifically for the subsequent programs. In the case of Grand Island, the Platte Generating Station is subject to the initial Acid Rain Program and the more recent Clean Air Mercury Rule (CAMR). Attached is a draft "Representation Agreement" incorporating the addition of the newer EPA mercury regulation. Also attached are, the Certificate of Representation to be executed by the DR and ADR, summaries of the Federal Code of Regulation (CFR) sections pertaining to DR and ADR requirements, an excerpt from the Federal Register 40 CRF §72.20 Subpart B-Designated Representative, and a legal review by the firm of Spiegel & McDairmid of the Designated Representative obligations and liabilities.

Alternatives

It appears that the Council has the following alternatives concerning the issue at hand. The Council may:

1. Move to approve
2. Refer the issue to a Committee
3. Postpone the issue to future date
4. Take no action on the issue

Recommendation

City Administration recommends that the Council approve the restated Representation Agreement to include the Clean Air Mercury Rule, retaining the appointments of Gary R. Mader as Designated Representative and Timothy G. Luchsinger as Alternate Designated Representative.

Sample Motion

Move to approve the Representation Agreement appointing the Designated Representative and Alternate Designated Representative for the City of Grand Island in compliance with the Clean Air Act and Environmental Protection Agency regulation.

Attachment #1

REPRESENTATION AGREEMENT

This Representation Agreement is made on this 18th day of December, 2007, by and between the City of Grand Island, Nebraska, a municipal corporation (CITY), Gary R. Mader ("MR. MADER"), and Timothy G. Luchsinger ("MR. LUCHSINGER").

WITNESSETH:

WHEREAS, City is the owner and operator of Platte Generating Station and C.W. Burdick Power Station ("UNITS");

WHEREAS, the UNITS are subject to regulation under the Clean Air Acid Rain Program and subsequent Clean Air Mercury Rule, as amended;

WHEREAS, MR. MADER is employed by CITY as Utilities Director;

WHEREAS, MR. LUCHSINGER is employed by CITY as the Assistant Utilities Director at the Platte Generating Station.

NOW, THEREFORE, in consideration of the premises, the covenants hereinafter set forth and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto do hereby agree as follows:

SECTION 1. Designated Representative.

Pursuant to the Clean Air Act, as amended, CITY hereby appoints MR. MADER as its Designated Representative for the UNITS. MR. MADER hereby agrees to act as CITY's Designated Representative for the UNITS.

SECTION 2. Duties of the Designated Representative.

CITY authorizes MR. MADER to fulfill the duties placed on CITY's Designated Representative as such duties are defined in the Clean Air Act, as amended, and the

implementing regulations promulgated thereunder by federal and state agencies. MR. MADER agrees to fulfill these duties.

SECTION 3. Alternate Designated Representative.

Pursuant to the Clean Air Act, as amended, CITY hereby appoints MR. LUCHSINGER to act at CITY's Alternate Designated Representative for the UNITS. MR. LUCHSINGER hereby agrees to act as CITY's Alternate Designated Representative.

SECTION 4. Duties of the Alternate Designated Representative.

CITY authorizes MR. LUCHSINGER to fulfill the duties placed on CITY's Alternate Designated Representative as such duties are defined in the Clean Air Act, as amended, and the implementing regulations promulgated thereunder by federal and state agencies. MR. LUCHSINGER agrees to fulfill these duties.

SECTION 5. Procedure for the Alternate Designated Representative to Act in Lieu of the Designated Representative.

CITY hereby authorizes MR. MADER to notify MR. LUCHSINGER either orally or in writing when he is unable to fulfill his duties as set forth in Section 2 for any reason, including, without limitation by enumeration, sickness, vacations, or business travel, and upon receipt of such notice, MR. LUCHSINGER shall fulfill MR. MADER's Section 2 duties until such time as MR. MADER notifies MR. LUCHSINGER (either orally or in writing) that he is able to resume his Section 2 duties. If MR. MADER becomes suddenly incapacitated and is unable to provide the notice required by this Section, (i) CITY authorizes MR. LUCHSINGER to assume MR. MADER's Section 2 duties; (ii) MR. LUCHSINGER will either orally or in writing notify MR. MADER of his actions; and (iii) MR. LUCHSINGER will continue to perform MR. MADER's Section 2 duties until such

time as MR. MADER notifies MR. LUCHSINGER (either orally or in writing) that he is able to resume his Section 2 duties.

SECTION 6. Certificate of Representation.

CITY authorizes MR. MADER and MR. LUCHSINGER to submit a Certificate of Representation as provided by 40 C.F. R. §72.24 and 40 C.F.R. §60.4113. CITY further agrees to be bound by the certifications made by MR. MADER and MR. LUCHSINGER in the submitted Certificate of Representation. MR. MADER and MR. LUCHSINGER agree to promptly execute and file the Certificate of Representation.

SECTION 7. Liability.

CITY agrees to indemnify and hold harmless MR. MADER and MR. LUCHSINGER for any personal liability that they may incur in their capacities as Designated Representative and Alternate Designated Representative, respectively, unless such liability is the product of personal dishonesty or fraud.

SECTION 8. Binding Effect.

This Agreement is binding on CITY in its capacity as the owner and operator of the UNITS.

SECTION 9. Termination.

This Agreement may be terminated by any party hereto at any time by giving notice of such termination in writing to the other parties. Termination of this Agreement by MR. MADER or MR. LUCHSINGER shall not affect their employment status with the CITY. The CITY agrees to immediately file a Certificate of Representative selecting a new representative upon termination of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed ad of the day and year first written above.

CITY OF GRAND ISLAND,
A Municipal Corporation

By:_____
Margaret Hornady, Mayor

Attest:_____
RaNae Edwards, City Clerk

By:_____
Gary R. Mader, Utilities Director

By:_____
Timothy Luchsinger, Alternate Representative

Attachment #2

Certificate of Representation

For more information, see instructions and 40 CFR 72.24; 40 CFR 96.113, 96.213, or 96.313, or a comparable state regulation under the Clean Air Interstate Rule (CAIR) NO_X Annual, SO_2, and NO_X Ozone Season Trading Programs; 40 CFR 97.113, 97.213, or 97.313; or 40 CFR 60.4113, or a comparable state regulation under the Clean Air Mercury Rule (CAMR), as applicable.

This submission is: ☐ New ☒ Revised (revised submissions must be complete; see instructions)

FACILITY (SOURCE) INFORMATION

STEP 1
Provide information for the facility (source).

Facility (Source) Name Platte Generating Station	State Nebraska	Plant Code 00059
County Name Hall		
Latitude 40.8550	Longitude -98.3494	

STEP 2
Enter requested information for the designated representative.

Name Gary R. Mader	Title Utilities Director
Company Name Grand Island Utilities Department	
Address P.O. Box 1968 Grand Island, Nebraska 68802-1968	
Phone Number (308) 385-5444 x 280	Fax Number (308) 385-5488
E-mail address gmader@grand-island.com	

STEP 3
Enter requested information for the alternate designated representative.

Name Timothy G. Luchsinger	Title Assistant Utilities Director
Company Name Grand Island Utilities Department	
Address P.O. Box 1968 Grand Island, Nebraska 68802-1968	
Phone Number (308) 385-5494	Fax Number (308) 385-5353
E-mail address tluchsinger@giud.com	

Facility (Source) Name (from Step 1) Platte Generating Station

UNIT INFORMATION

STEP 4: Complete one page for each unit located at the facility identified in STEP 1 (i.e., for each boiler, simple cycle combustion turbine, or combined cycle combustion turbine) Do not list duct burners. Indicate each program to which the unit is subject, and enter all other unit-specific information, including the name of each owner and operator of the unit and the generator ID number and nameplate capacity of each generator served by the unit. If the unit is subject to a program, then the facility (source) is also subject. (For units subject to the NO_X Budget Trading Program, a separate "Account Certificate of Representation" form must be submitted to meet requirements under that program.)

Applicable Program(s): ☒ Acid Rain ☐ CAIR NO_X Annual ☐ CAIR SO_2 ☐ CAIR NO_X Ozone Season ☒ CAMR

Unit ID# 1	Unit Type T	Source Category Electric Utility NAICS Code 221112	Check One: Actual ☒ Projected ☐
Date unit began (or will begin) serving any generator producing electricity for sale (including test generation) (mm/dd/yyyy): 08/01/1982			

Generator ID Number (Maximum 8 characters)	Acid Rain Nameplate Capacity (MWe)	CAIR-CAMR Nameplate Capacity (MWe)
1	109.8	109.8

Company Name: City of Grand Island Utilities Department	☒ Owner ☒ Operator
Company Name:	☐ Owner ☐ Operator
Company Name:	☐ Owner ☐ Operator
Company Name:	☐ Owner ☐ Operator
Company Name:	☐ Owner ☐ Operator

Facility (Source) Name (from Step 1) Platte Generating Station

STEP 5: Read the appropriate certification statements, sign, and date.

Acid Rain Program

I certify that I was selected as the designated representative or alternate designated representative (as applicable) by an agreement binding on the owners and operators of the affected source and each affected unit at the source (i.e., the source and each unit subject to the Acid Rain Program, as indicated in "Applicable Program(s)" in Step 4).

I certify that I have all necessary authority to carry out my duties and responsibilities under the Acid Rain Program on behalf of the owners and operators of the affected source and each affected unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions.

I certify that the owners and operators of the affected source and each affected unit at the source shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit.

Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, an affected unit, or where a utility or industrial customer purchases power from an affected unit under a life-of-the-unit, firm power contractual arrangement, I certify that:

> I have given a written notice of my selection as the designated representative or alternate designated representative (as applicable) and of the agreement by which I was selected to each owner and operator of the affected source and each affected unit at the source; and
>
> Allowances, and proceeds of transactions involving allowances, will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold, or contractual reservation or entitlement, except that, if such multiple holders have expressly provided for a different distribution of allowances, allowances and proceeds of transactions involving allowances will be deemed to be held or distributed in accordance with the contract.

Clean Air Interstate Rule (CAIR) NO_X Annual Trading Program

I certify that I was selected as the CAIR designated representative or alternate CAIR designated representative (as applicable), by an agreement binding on the owners and operators of the CAIR NO_X source and each CAIR NO_X unit at the source (i.e., the source and each unit subject to the CAIR NO_X Annual Trading Program, as indicated in "Applicable Program(s)" in Step 4).

I certify that I have all necessary authority to carry out my duties and responsibilities under the CAIR NO_X Annual Trading Program on behalf of the owners and operators of the CAIR NO_X source and each CAIR NO_X unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions.

I certify that the owners and operators of the CAIR NO_X source and each CAIR NO_X unit at the source shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit.

Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, a CAIR NO_X unit, or where a utility or industrial customer purchases power from a CAIR NO_X unit under a life-of-the-unit, firm power contractual arrangement, I certify that:

> I have given a written notice of my selection as the CAIR designated representative or alternate CAIR designated representative (as applicable) and of the agreement by which I was selected to each owner and operator of the CAIR NO_X source and each CAIR NO_X unit at the source; and
>
> CAIR NO_X allowances and proceeds of transactions involving CAIR NO_X allowances will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold, or contractual reservation or entitlement, except that, if such multiple holders have expressly provided for a different distribution of CAIR NO_X allowances by contract, CAIR NO_X allowances and proceeds of transactions involving CAIR NO_X allowances will be deemed to be held or distributed in accordance with the contract.

Facility (Source) Name (from Step 1) Platte Generating Station

Clean Air Interstate Rule (CAIR) SO_2 Trading Program

I certify that I was selected as the CAIR designated representative or alternate CAIR designated representative (as applicable), by an agreement binding on the owners and operators of the CAIR SO_2 source and each CAIR SO_2 unit at the source (i.e., the source and each unit subject to the SO_2 Trading Program, as indicated in "Applicable Program(s)" in Step 4).

I certify that I have all necessary authority to carry out my duties and responsibilities under the CAIR SO_2 Trading Program, on behalf of the owners and operators of the CAIR SO_2 source and each CAIR SO_2 unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions.

I certify that the owners and operators of the CAIR SO_2 source and each CAIR SO_2 unit at the source shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit.

Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, a CAIR SO_2 unit, or where a utility or industrial customer purchases power from a CAIR SO_2 unit under a life-of-the-unit, firm power contractual arrangement, I certify that:

I have given a written notice of my selection as the CAIR designated representative or alternate CAIR designated representative (as applicable) and of the agreement by which I was selected to each owner and operator of the CAIR SO_2 source and each CAIR SO_2 unit at the source; and

CAIR SO_2 allowances and proceeds of transactions involving CAIR SO_2 allowances will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold, or contractual reservation or entitlement, except that, if such multiple holders have expressly provided for a different distribution of CAIR SO_2 allowances by contract, CAIR SO_2 allowances and proceeds of transactions involving CAIR SO_2 allowances will be deemed to be held or distributed in accordance with the contract.

Clean Air Interstate Rule (CAIR) NO_X Ozone Season Trading Program

I certify that I was selected as the CAIR designated representative or alternate CAIR designated representative (as applicable), by an agreement binding on the owners and operators of the CAIR NO_X Ozone Season source and each CAIR NO_X Ozone Season unit at the source (i.e., the source and each unit subject to the CAIR NO_X Ozone Season Trading Program, as indicated in "Applicable Program(s)" in Step 4).

I certify that I have all necessary authority to carry out my duties and responsibilities under the CAIR NO_X Ozone Season Trading Program on behalf of the owners and operators of the CAIR NO_X Ozone Season source and each CAIR NO_X Ozone Season unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions.

I certify that the owners and operators of the CAIR NO_X Ozone Season source and each CAIR NO_X Ozone Season unit shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit.

Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, a CAIR NO_X Ozone Season unit, or where a utility or industrial customer purchases power from a CAIR NO_X Ozone Season unit under a life-of-the-unit, firm power contractual arrangement, I certify that:

I have given a written notice of my selection as the CAIR designated representative or alternate CAIR designated representative (as applicable) and of the agreement by which I was selected to each owner and operator of the CAIR NO_X Ozone Season source and each CAIR NO_X Ozone Season unit; and

CAIR NO_X Ozone Season allowances and proceeds of transactions involving CAIR NO_X Ozone Season allowances will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold, or contractual reservation or entitlement, except that, if such multiple holders have expressly provided for a different distribution of CAIR NO_X Ozone Season allowances by contract, CAIR NO_X Ozone Season allowances and proceeds of transactions involving CAIR NO_X Ozone Season allowances will be deemed to be held or distributed in accordance with the contract.

Facility (Source) Name (from Step 1) Platte Generating Station

Clean Air Mercury Rule (CAMR) Hg Budget Trading Program

I certify that I was selected as the Hg designated representative or alternate Hg designated representative, as applicable, by an agreement binding on the owners and operators of the source and each Hg Budget unit at the source (i.e., the source and each unit subject to CAMR, as indicated in "Applicable Program(s)" in Step 4).

I certify that I have all the necessary authority to carry out my duties and responsibilities under the Hg Budget Trading Program on behalf of the owners and operators of the source and of each Hg Budget unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions.

I certify that the owners and operators of the source and of each Hg Budget unit at the source shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit.

Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, a Hg Budget unit, or where a utility or industrial customer purchases power from a Hg Budget unit under a life-of-the-unit, firm power contractual arrangement, I certify that:

I have given a written notice of my selection as the Hg designated representative or alternate Hg designated representative, as applicable, and of the agreement by which I was selected to each owner and operator of the source and of each Hg Budget unit at the source; and

Hg allowances and proceeds of transactions involving Hg allowances will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold, or contractual reservation or entitlement, except that, if such multiple holders have expressly provided for a different distribution of Hg allowances by contract, Hg allowances and proceeds of transactions involving Hg allowances will be deemed to be held or distributed in accordance with the contract.

Clean Air Mercury Rule (CAMR) Program Other Than the Hg Budget Trading Program

I certify that I was selected as the Hg designated representative or alternate Hg designated representative, as applicable, by an agreement binding on the owners and operators of the source and each electric generating unit (EGU) (as defined at 40 CFR 60.24(h)(8)) at the source (i.e., the source and each unit subject to CAMR, as indicated in "Applicable Program(s)" in Step 4).

I certify that I have all the necessary authority to carry out my duties and responsibilities under a State Plan approved by the Administrator as meeting the requirements of 40 CFR 60.24(h) on behalf of the owners and operators of the source and of each EGU at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions.

I certify that the owners and operators of the source and of each EGU at the source shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit.

Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, an EGU, or where a utility or industrial customer purchases power from an EGU under a life-of-the-unit, firm power contractual arrangement, I certify that I have given a written notice of my selection as the Hg designated representative or alternate Hg designated representative, as applicable, and of the agreement by which I was selected to each owner and operator of the source and of each EGU at the source.

Facility (Source) Name (from Step 1) Platte Generating Station

General

I am authorized to make this submission on behalf of the owners and operators of the source or units for which the submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.

The owner and operator of this affected source is the City of Grand Island, a municipal corporation, and this certification is made only to the extent permitted by law for officers, employees, and designated representatives of a city of the first class in the Sate of Nebraska.

Signature (Designated Representative)	Date
Signature (Alternate Designated Representative)	Date

Attachment #3

§ 40 CFR 72.24

Code of Federal Regulations

TITLE 40--PROTECTION OF ENVIRONMENT

CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY

40 CFR 72.24 Certificate of representation.

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40 CFR 72.24 Certificate of representation.

PART 72--PERMITS REGULATION

Subpart B--Designated Representative

(a) A complete certificate of representation for a designated representative or an alternate designated representative shall include the following elements in a format prescribed by the Administrator:

(1) Identification of the affected source and each affected unit at the source for which the certificate of representation is submitted, including identification and nameplate capacity of each generator served by each such unit.

(2) The name, address, and telephone and facsimile numbers of the designated representative and any alternate designated representative.

(3) A list of the owners and operators of the affected source and of each affected unit at the source.

(4) The following statement: "I certify that I was selected as the 'designated representative' or 'alternate designated representative,' as applicable, by an agreement binding on the owners and operators of the affected source and each affected unit at the source."

(5) [Reserved]

(6) The following statement: "I certify that I have all necessary authority to carry out my duties and responsibilities under the Acid Rain Program on behalf of the owners and operators of the affected source and of each affected unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions."

(7) [Reserved]

(8) The following statement: "I certify that the owners and operators of the affected source and of each affected unit at the source shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit."

(9) The following statement: "Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, an affected unit, or where a utility or industrial customer purchases power from an affected unit under life-of-the-unit, firm power contractual arrangements, I certify that:

(i) "I have given a written notice of my selection as the 'designated representative' or 'alternate designated representative', as applicable, and of the agreement by which I was selected to each owner and operator of the affected source and of each affected unit at the source; and

(ii) "Allowances and proceeds of transactions involving allowances will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold, or contractual reservation or entitlement, except that, if such multiple holders have expressly provided for a different distribution of allowances by contract, that allowances and the proceeds of transactions involving allowances will be deemed to be held or distributed in accordance with the contract."

(10) [Reserved]

(11) The signature of the designated representative and any alternate designated representative who is authorized in the certificate of representation and the date signed.

(b) Unless otherwise required by the Administrator or the permitting authority, documents of agreement or notice referred to in the certificate of representation shall not be submitted to the Administrator or the permitting authority. Neither the Administrator nor the permitting authority shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

[58 FR 3650, Jan. 11, 1993, as amended at 62 FR 55480, Oct. 24, 1997; 71 FR 25378, Apr. 28, 2006; 70 FR 25334, May 12, 2005]

§ 40 CFR 60.4113

Code of Federal Regulations

TITLE 40--PROTECTION OF ENVIRONMENT

CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY

40 CFR 60.4113 Certificate of Representation.

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40 CFR 60.4113 Certificate of Representation.

PART 60--STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Subpart HHHH--Emission Guidelines and Compliance Times for Coal-Fired Electric Steam Generating Units

(a) A complete certificate of representation for a Hg designated representative or an alternate Hg designated representative shall include the following elements in a format prescribed by the Administrator:

(1) Identification of the Hg Budget source, and each Hg Budget unit at the source, for which the certificate of representation is submitted.

(2) The name, address, e-mail address (if any), telephone number, and facsimile transmission number (if any) of the Hg designated representative and any alternate Hg designated representative.

(3) A list of the owners and operators of the Hg Budget source and of each Hg Budget unit at the source.

(4) The following certification statements by the Hg designated representative and any alternate Hg designated representative:

(i) "I certify that I was selected as the Hg designated representative or alternate Hg designated representative, as applicable, by an agreement binding on the owners and operators of the source and each Hg Budget unit at the source."

(ii) "I certify that I have all the necessary authority to carry out my duties and responsibilities under the Hg Budget Trading Program on behalf of the owners and operators of the source and of each Hg Budget unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions."

(iii) "I certify that the owners and operators of the source and of each Hg Budget unit at the source shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit."

(iv) "Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, a Hg Budget unit, or where a customer purchases power from a Hg Budget unit under a life-of-the-unit, firm power contractual arrangement, I certify that: I have given a written notice of my selection as the 'Hg designated representative' or 'alternate Hg designated representative,' as applicable, and of the agreement by which I was selected to each owner and operator of the source and of each Hg Budget unit at the source; and Hg allowances and proceeds of transactions involving Hg allowances will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold, or contractual reservation or

entitlement, except that, if such multiple holders have expressly provided for a different distribution of Hg allowances by contract, Hg allowances and proceeds of transactions involving Hg allowances will be deemed to be held or distributed in accordance with the contract."

(5) The signature of the Hg designated representative and any alternate Hg designated representative and the dates signed.

(b) Unless otherwise required by the permitting authority or the Administrator, documents of agreement referred to in the certificate of representation shall not be submitted to the permitting authority or the Administrator. Neither the permitting authority nor the Administrator shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

Attachment #4

provided under § 72.41 (substitution plans), § 72.42 (Phase I extension plans), § 72.43 (reduced utilization plans), § 72.44 (Phase II repowering extension plans), and section 407 of the Act and regulations implementing section 407 of the Act, and except with regard to the requirements applicable to units with a common stack under part 75 of this chapter (including §§ 75.16, 75.17, and 75.18), the owners and operators and the designated representative of one affected unit shall not be liable for any violation by any other affected unit of which they are not owners or operators or the designated representative and that is located at a source of which they are not owners or operators or the designated representative.

(7) Each violation of a provision of this part, parts 73, 75, 77, and 78 of this chapter, and regulations implementing sections 407 and 410 of the Act by an affected source or affected unit, or by an owner or operator or designated representative of such source or unit, shall be a separate violation of the Act.

(h) *Effect on Other Authorities.* No provision of the Acid Rain Program, an Acid Rain permit application, an Acid Rain permit, or a written exemption under § § 72.7 or 72.8 shall be construed as:

(1) Except as expressly provided in title IV of the Act, exempting or excluding the owners and operators and, to the extent applicable, the designated representative of an affected source or affected unit from compliance with any other provision of the Act, including the provisions of title I of the Act relating to applicable National Ambient Air Quality Standards or State Implementation Plans.

(2) Limiting the number of allowances a unit can hold; *provided*, that the number of allowances held by the unit shall not affect the source's obligation to comply with any other provisions of the Act.

(3) Requiring a change of any kind in any State law regulating electric utility rates and charges, affecting any State law regarding such State regulation, or limiting such State regulation, including any prudence review requirements under such State law.

(4) Modifying the Federal Power Act or affecting the authority of the Federal Energy Regulatory Commission under the Federal Power Act.

(5) Interfering with or impairing any program for competitive bidding for power supply in a State in which such program is established.

§ 72.10 Availability of information.

The availability to the public of information provided to, or otherwise obtained by, the Administrator under the Acid Rain Program shall be governed by part 2 of this chapter.

§ 72.11 Computation of time.

(a) Unless otherwise stated, any time period scheduled, under the Acid Rain Program, to begin on the occurrence of an act or event shall begin on the day the act or event occurs.

(b) Unless otherwise stated, any time period scheduled, under the Acid Rain Program, to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event occurs.

(c) Unless otherwise stated, if the final day of any time period, under the Acid Rain Program, falls on a weekend or a federal holiday, the time period shall be extended to the next business day.

(d) Whenever a party or interested person has the right, or is required, to act under the Acid Rain Program within a prescribed time period after service of notice or other document upon him or her by mail, 3 days shall be added to the prescribed time.

§ 72.12 Administrative Appeals.

The procedures for appeals of decisions of the Administrator under this part are contained in part 78 of this chapter.

§ 72.13 Incorporation by reference.

The materials listed in this section are incorporated by reference in the corresponding sections noted. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they existed on the date of approval, and a notice of any change in these materials will be published in the Federal Register. The materials are available for purchase at the corresponding address noted below and are available for inspection at the Office of the Federal Register, 800 N. Capitol Street, NW., Washington, DC, at the Public Information Reference Unit of the U.S. EPA, 401 M Street SW, Washington, DC and at the Library (MD–35), U.S. EPA, Research Triangle Park, North Carolina.

(a) The following materials are available for purchase from the following addresses: American Society for Testing and Material (ASTM), 1916 Race Street, Philadelphia, Pennsylvania 19103; and the University Microfilms International 300 North Zeeb Road, Ann Arbor, Michigan 48106.

(1) ASTM D129–91, Standard Test Method for Sulfur in Petroleum Products (General Bomb Method), for § 72.7 of this chapter.

(2) ASTM D388–92, Standard Classification of Coals by Rank for § 72.2 of this chapter.

(3) ASTM D396–90a, Standard Specification for Fuel Oils, for § 72.2 of this chapter.

(4) ASTM D975–91, Standard Specification for Diesel Fuel Oils, for § 72.2 of this chapter.

(5) ASTMD1072–90, Standard Test Method for Total Sulfur in Fuel Gases, for § 72.7 of this chapter.

(6) ASTMD1265–92, Standard Practice for Sampling Liquified Petroleum (LP) Gases (Manual Method), for § 72.7 of this chapter.

(7) ASTM D2622–92, Standard Test Method for Sulfur in Petroleum Products by X-Ray Spectrometry, for § 72.7 of this chapter.

(8) ASTM D 4057–88, Standard Practice for Manual Sampling of Petroleum and Petroleum Products, for § 72.7 of this chapter.

(9) ASTM D4294–90, Standard Test Method for Sulfur in Petroleum Products by Energy-Dispersive X-Ray Fluorescence Spectroscopy, for § 72.7 of this chapter.

Subpart B—Designated Representative

§ 72.20 Authorization and responsibilities of the designated representative.

(a) Except as provided under § 72.22, each affected source, including all affected units at the source, shall have one and only one designated representative, with regard to all matters under the Acid Rain Program concerning the source or any affected unit at the source.

(b) Upon receipt by the Administrator of a complete certificate of representation, the designated representative of the source shall represent and, by his or her actions, inactions, or submissions, legally bind each owner and operator of the affected source represented and each affected unit at the source in all matters pertaining to the Acid Rain Program, not withstanding any agreement between the designated representative and such owners and operators. The owners and operators shall be bound by any order issued to the designated representative by the Administrator, the permitting authority, or a court.

(c) The designated representative shall be selected and act in accordance with the certifications set forth in § 72.24(a) (4), (5), (7), and (9).

(d) No Acid Rain permit shall be issued to an affected source, nor shall any allowance transfer be recorded for an Allowance Tracking System account of an affected unit at a source, until the Administrator has received a complete

ATTACHMENT #4

certificate of representation for the designated representative of the source and the affected units at the source.

§ 72.21 Submissions.

(a) Each submission under the Acid Rain Program shall be submitted, signed, and certified by the designated representative for all sources on behalf of which the submission is made.

(b) In each submission under the Acid Rain Program, the designated representative shall certify, by his or her signature:

(1) The following statement, which shall be included verbatim in such submission: "I am authorized to make this submission on behalf of the owners and operators of the affected source or affected units for which the submission is made."

(2) The following statement, which shall be included verbatim in such submission: "I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

(c) The Administrator and the permitting authority shall accept or act on a submission made on behalf of owners or operators of an affected source and an affected unit only if the submission has been made, signed, and certified in accordance with paragraphs (a) and (b) of this section.

(d) (1) The designated representative of a source shall serve notice on each owner and operator of the source and of an affected unit at the source:

(i) By the date of submission, of any Acid Rain Program submissions by the designated representative and

(ii) Within 10 business days of receipt of a determination, of any written determination by the Administrator or the permitting authority.

(iii) Provided that the submission or determination covers the source or the unit.

(2) The designated representative of a source shall provide each owner and operator of an affected unit at the source a copy of any submission or determination under paragraph (d)(1) of this section, unless the owner or operator expressly waives the right to receive such a copy.

(e) The provisions of this section shall apply to a submission made under parts 73, 75, 77, and 78 of this chapter and under regulations implementing sections 407 and 410 of the Act only if it is made or signed, or required to be made or signed in accordance with parts 73, 75, 77, and 78 of this chapter and regulations implementing sections 407 and 410 of the Act, by:

(i) The designated representative; or

(ii) The authorized account representative or alternate authorized account representative of a unit account.

§ 72.22 Alternate designated representative.

(a) The certificate of representation may designate one and only one alternate designated representative, who may act on behalf of the designated representative. The agreement by which the alternate designated representative is selected shall include a procedure for the owners and operators of the source and affected units at the source to authorize the alternate designated representative to act in lieu of the designated representative.

(b) Upon receipt by the Administrator of a complete certificate of representation that meets the requirements of § 72.24 (including those applicable to the alternate designated representative), any action, representation, or failure to act by the alternate designated representative shall be deemed to be an action, representation, or failure to act by the designated representative.

(c) In the event of a conflict, any action taken by the designated representative shall take precedence over any action taken by the alternate designated representative if, in the Administrator's judgement, the actions are concurrent and conflicting.

(d) Except in this section, § 72.23, and § 72.24, whenever the term "designated representative" is used under the Acid Rain Program, the term shall be construed to include the alternate designated representative.

§ 72.23 Changing the designated representative, alternate designated representative; changes in the owners and operators.

(a) *Changing the designated representative.* The designated representative may be changed at any time upon receipt by the Administrator of a superseding complete certificate of representation. Notwithstanding any such change, all submissions, actions, and inactions by the previous designated representative prior to the time and date when the Administrator receives the superseding certificate of representation shall be binding on the new designated representative and on the owners and operators of the source represented and the affected units at the source.

(b) *Changing the alternate designated representative.* The alternate designated representative may be changed at any time upon receipt by the Administrator of a superseding complete certificate of representation. Notwithstanding any such change, all submissions, actions, and inactions by the previous alternate designated representative prior to the time and date when the Administrator receives the superseding certificate of representation shall be binding on the new alternate designated representative and on the owners and operators of the source represented and the affected units at the source.

(c) *Changes in the owners and operators.* (1) In the event a new owner or operator of an affected source or an affected unit is not included in the list of owners and operators submitted in the certificate of representation, such new owner or operator shall be deemed to be subject to and bound by the certificate of representation, the submissions, actions, and inactions of the designated representative and any alternative designated representative of the source or unit, and the decisions, actions, and inactions of the Administrator and permitting authority, as if the new owner or operator were included in such list.

(2) Within 30 days following any change in the owners and operators of an affected unit, including the addition of a new owner or operator, the designated representative or any alternative designated representative shall submit a revision to the certificate of representation amending the list of owners and operators to include the change.

§ 72.24 Certificate of representation.

(a) A complete certificate of representation for a designated representative or an alternate designated representative shall include the following elements in a format prescribed by the Administrator:

(1) Identification of the affected source and each affected unit at the source for which the certificate of representation is submitted.

(2) The name, address, and telephone and facsimile numbers of the designated representative and any alternate designated representative.

(3) A list of the owners and operators of the affected source and of each affected unit at the source and all State or local utility regulatory authorities with jurisdiction over each owner.

(4) The following statement: "I certify that I was selected as the 'designated representative' or 'alternate designated representative,' as applicable, by an agreement binding on the owners and operators of the affected source and each affected unit at the source."

(5) The following statement: "I certify that I have given notice of the agreement, selecting me as the 'designated representative' or 'alternate designated representative,' as applicable for the affected source and each affected unit at the source identified in this certificate of representation, daily for a period of one week in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice."

(6) The following statement: "I certify that I have all necessary authority to carry out my duties and responsibilities under the Acid Rain Program on behalf of the owners and operators of the affected source and of each affected unit at the source and that each such owner and operator shall be fully bound by my actions, inactions, or submissions."

(7) The following statement: "I certify that I shall abide by any fiduciary responsibilities imposed by the agreement by which I was selected as 'designated representative' or 'alternate designated representative', as applicable."

(8) The following statement: "I certify that the owners and operators of the affected source and of each affected unit at the source shall be bound by any order issued to me by the Administrator, the permitting authority, or a court regarding the source or unit."

(9) The following statement: "Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, an affected unit, or where a utility or industrial customer purchases power from an affected unit under life-of-the-unit, firm power contractual arrangements, I certify that:

(i) "I have given a written notice of my selection as the 'designated representative' or 'alternate designated representative', as applicable, and of the agreement by which I was selected to each owner and operator of the affected source and of each affected unit at the source; and

(ii) "Allowances and proceeds of transactions involving allowances will be deemed to be held or distributed in proportion to each holder's legal, equitable, leasehold, or contractual reservation or entitlement or, if such multiple holders have expressly provided for a different distribution of allowances by contract, that allowances and the proceeds of transactions involving allowances will be deemed to be held or distributed in accordance with the contract."

(10) If there is an alternate designated representative, the following statement: "The agreement by which I was selected as the alternate designated representative includes a procedure for the owners and operators of the source and affected units at the source to authorize the alternate designated representative to act in lieu of the designated representative."

(11) The signature of the designated representative and any alternate designated representative and the date signed.

(b) Unless otherwise required by the Administrator or the permitting authority, documents of agreement or notice referred to in the certificate of representation shall not be submitted to the Administrator or the permitting authority. Neither the Administrator nor the permitting authority shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

§ 72.25 Objections.

(a) Once a complete certificate of representation has been submitted in accordance with § 72.24, the Administrator will rely on the certificate of representation unless and until a superseding complete certificate is submitted to the Administrator.

(b) Except as provided in § 72.23, no objection or other communication submitted to the Administrator or the permitting authority concerning the authorization, or any submission, action or inaction, of the designated representative shall affect any submission, action, or inaction of the designated representative, or the finality of any decision by the Administrator or permitting authority, under the Acid Rain Program. In the event of such communication, the Administrator and the permitting authority are not required to stay any allowance transfer, any submission, or the effect of any action or inaction under the Acid Rain Program.

(c) Neither the Administrator nor any permitting authority will adjudicate any private legal dispute concerning the authorization or any submission, action, or inaction of any designated representative, including private legal disputes concerning the proceeds of allowance transfers.

Subpart C—Acid Rain Permit Applications

§ 72.30 Requirement to apply.

(a) *Duty to apply.* The designated representative of any source with an affected unit shall submit a complete Acid Rain permit application by the applicable deadline in paragraphs (b) and (c) of this section, and the owners and operators of such source and any affected unit at the source shall not operate the source or unit without a permit that states its Acid Rain program requirements.

(b) *Deadlines.* (1) *Phase I.* (i) The designated representative shall submit a complete Acid Rain permit application governing an affected unit during Phase I to the Administrator on or before February 15, 1993 for:

(A) Any source with such a unit under § 72.6(a)(1); and

(B) Any source with such a unit under § 72.6(a) (2) or (3) that is designated a substitution or compensating unit in a substitution plan or reduced utilization plan submitted to the Administrator for approval or conditional approval.

(ii) Notwithstanding paragraph (b)(1)(i) of this section, if a unit at a source not previously permitted is designated a substitution or compensating unit in a submission requesting revision of an existing Acid Rain permit, the designated representative of the unit shall submit a complete Acid Rain permit application on the date that the submission requesting the revision is made.

(2) *Phase II.* For any source with an existing unit under § 72.6(a)(2), the designated representative shall submit a complete Acid Rain permit application governing such unit during Phase II to the permitting authority on or before January 1, 1996.

(ii) For any source with a new unit under § 72.6(a)(3)(i), the designated representative shall submit a complete Acid Rain permit application governing such unit to the permitting authority at least 24 months before the later of January 1, 2000 or the date on which the unit commences operation.

(iii) For any source with a unit under § 72.6(a)(3)(ii), the designated representative shall submit a complete Acid Rain permit application governing such unit to the permitting authority at least 24 months before the later of January 1,2000 or the date on which the unit begins to serve a generator with a nameplate capacity greater than 25 MWe.

(3) *Acid Rain Compliance Option Deadlines.* The deadlines for applying for approval of any Acid Rain compliance options shall be the

deadlines specified in the relevant section of subpart D of this part and in section 407 of the Act and regulations implementing section 407 of the Act.

(c) *Duty to Reapply.* The designated representative shall submit a complete Acid Rain permit application for each source with an affected unit at least 6 months prior to the expiration of an existing Acid Rain permit governing the unit during Phase II or such longer time as may be approved under part 70 of this chapter that ensures that the term of the existing permit will not expire before the effective date of the permit for which the application is submitted.

(d) The original and three copies of all permit applications for Phase I and where the Administrator is the permitting authority, for Phase II, shall be submitted to the EPA Regional Office for the Region where the affected source is located. The original and three copies of all permit applications for Phase II, where the Administrator is not the permitting authority, shall be submitted to the State permitting authority for the State where the affected source is located.

§ 72.31 Information requirements for Acid Rain permit applications.

A complete Acid Rain permit application shall include following elements in a format prescribed by the Administrator:

(a) Identification of the affected source for which the permit application is submitted;

(b) Identification of each Phase I unit at the source for which the permit application is submitted for Phase I or each Phase II unit at the source for which the permit application is submitted for Phase II;

(c) A complete compliance plan for each unit, in accordance with subpart D of this part;

(d) The standard requirements under § 72.9; and

(e) If the Acid Rain permit application is for Phase II and the unit is a new unit, the date that the unit has commenced or will commence operation and the deadline for monitor certification.

§ 72.32 Permit application shield and binding effect of permit application.

(a) Once a designated representative submits a timely and complete Acid Rain permit application, the owners and operators of the affected source and the affected units covered by the permit application shall be deemed in compliance with the requirement to have an Acid Rain permit under § 72.9(a)(2) and § 72.30(a); *provided* that any delay in issuing an Acid Rain permit is not caused by the failure of the designated representative to submit in a complete and timely fashion supplemental information, as required by the permitting authority, necessary to issue a permit.

(b) Prior to the earlier of the date on which an Acid Rain permit is issued subject to administrative appeal under part 78 of this chapter or is issued as a final agency action subject to judicial review, an affected unit governed by and operated in accordance with the terms and requirements of a timely and complete Acid Rain permit application shall be deemed to be operating in compliance with the Acid Rain Program.

(c) A complete Acid Rain permit application shall be binding on the owners and operators and the designated representative of the affected source and the affected units covered by the permit application and shall be enforceable as an Acid Rain permit from the date of submission of the permit application until the issuance or denial of an Acid Rain permit covering the units and subject to administrative appeal, where the Administrator is the permitting authority, or the issuance or denial of such permit as a final agency action subject to judicial review, where the State is the permitting authority.

§ 72.33 Identification of dispatch system.

(a) Every Phase I unit shall be treated as part of a dispatch system for purposes of § 72.92 in accordance with this section.

(b)(1) The designated representatives of all affected units in a group of all units and generators that are interconnected and centrally dispatched and that are included in the same utility system, holding company, or power pool, may jointly submit to the Administrator a complete identification of dispatch system.

(2) Except as provided in paragraphs (d) and (f) of this section, each Phase I unit may be listed in only one identification of dispatch system.

(3) Any identification of dispatch system must be filed by January 30 of the first year for which the identification is to be in effect.

(c) A complete identification of dispatch system shall include the following elements in a format prescribed by the Administrator:

(1) The name of the dispatch system.

(2) The list of all units and sulfur-free generators in the dispatch system.

(3) The first calendar year for which the identification is to be in effect.

(4) The following statement: "I certify that the units listed herein are and will continue to be interconnected and centrally dispatched, and will be treated as a dispatch system under § 72.92, during the period that this identification of dispatch system is in effect. During such period, all information concerning these units and contained in any submissions under § 72.92 by me and the other designated representatives of these units shall be consistent and shall conform with the data in the dispatch system data reports under § 72.92(b)(2). I understand that if this requirement is not met, then the Administrator will reject all such submissions and treat each unit's utility system as its dispatch system. In such an event, I will make the submissions required under § 72.92 (including a dispatch system data report), treating as the dispatch system the utility system of each unit that I represent."

(5) The signatures of the designated representative for each affected unit in the dispatch system.

(d) In order to change a unit's current dispatch system, complete identifications of dispatch system shall be submitted for the unit's current dispatch system and the unit's new dispatch system, reflecting the change.

(e)(1) Any Phase I unit that is not listed in a complete identification of dispatch shall treat its utility system as its dispatch system.

(2) During the period that the identification of dispatch system is in effect, all information that concerns the units in a given dispatch system and that is contained in any submissions under § 72.92 by designated representatives of these units shall be consistent and shall conform with the data in the dispatch system data reports under § 72.92(b)(2). If this requirement is not met, the Administrator will reject all such submissions, and the designated representatives shall make the submissions under § 72.92 (including the dispatch system data report) treating the utility system of each unit as its dispatch system.

(f)(1) Notwithstanding paragraph (e)(1) of this section or any submission of an identification of dispatch system under paragraphs (b), (c), or (d) of this section, the designated representative of a Phase I unit with two or more owners may petition the Administrator to treat, as the dispatch system for an owner's portion of the unit, the dispatch system of another unit. For purposes of paragraphs (f)(1) through (6) of this section, the owner's portion of the unit shall equal the percentage of that owner's ownership interest in the capacity of the unit.

(2) The petition shall be submitted by January 30 of the first year for which the dispatch system proposed in the petition will take effect, if approved.

The petition shall include the following elements:

(i) The owner's portion of the unit and the other owners' portion(s) of the unit and a demonstration that the sum of all owners' portions of the unit equals 100 percent;

(ii) Documentation demonstrating that the owner's portion specified in the petition equals its ownership interest in the capacity of the unit;

(iii) The name of the proposed dispatch system and documentation demonstrating that the owner's portion of the unit, along with the other units in the proposed dispatch system, are a group of all units and generators that are interconnected and centrally dispatched and that are included in the same utility system, holding company, or power pool.

(iv) The following statement, signed by the designated representatives of all units in the proposed dispatch system: "I certify that the units in the dispatch system proposed in this petition are and will continue to be interconnected and centrally dispatched, and will be treated as a dispatch system under § 72.92, during the period that this petition, as approved, is in effect."

(v) The following statement, signed by the designated representatives of all units in all dispatch systems that will include any portion of the unit if the petition is approved: "During the period that this petition, if approved, is in effect, all information that concerns the units in any dispatch system including any portion of the unit apportioned under the petition and that is contained in any submissions under §§ 72.91 and 72.92 by me and the other designated representatives of these units shall be consistent and shall conform to the data in the dispatch system data reports under § 72.92(b)(2). I am aware of, and will comply with, the requirements imposed under 40 CFR 72.33(f) (4) and (5)."

(3) The Administrator will approve in whole, in part, or with changes or conditions, or deny the petition within 90 days of receipt of the petition. The Administrator will treat the petition, as changed or conditioned upon approval, as amending any identification of dispatch system that is submitted prior to the approval and includes any portion of the unit for which the petition is approved.

(4) The designated representative for the unit for which a petition is approved and the designated representatives of all other units included in all dispatch systems that include any portion of the unit shall submit all annual compliance certification reports, dispatch system data reports, and other reports required under §§ 72.91 and 72.92 treating, as a separate unit, each portion of the unit for which a petition is approved under paragraph (f)(3) of this section and the remaining portion of the unit. The reports shall include all required calculations and demonstrations, treating each such portion of the unit as a separate unit; provided that plan reductions shall be treated in a manner to be determined by the Administrator on a case-by-case basis. The designated representatives shall demonstrate that the data in all the reports under §§ 72.91 and 72.92 has been properly attributed to or apportioned among the owners' portions of the unit and the dispatch systems and that there is no undercounting or double-counting with regard to such data.

(5) In the event that the designated representatives fail to make all the proper attributions, apportionments, calculations, and demonstrations, the Administrator may require that:

(i) All portions of the unit be treated as part of the dispatch system of the unit in accordance with paragraph (e)(1) of this paragraph and any identification of dispatch system submitted under paragraph (b) of this section; and

(ii) The designated representatives make all submissions under §§ 72.91 and 72.92 (including the dispatch system data report) in accordance with paragraph (e)(1) of this paragraph and any identification of dispatch system submitted under paragraph (b) of this section.

(6) Except as expressly provided in paragraphs (f) (1) through (5) of this section or the Administrator's approval of the petition, all provisions of the Acid Rain Program applicable to an affected source or an affected unit shall apply to the entire unit regardless of whether a petition has been submitted or approved, or reports have been submitted, under such paragraphs. Approval of a petition under such paragraphs shall not constitute a determination of the percentage ownership in a unit under any other provision of the Acid Rain Program.

Subpart D—Acid Rain Compliance Plan and Compliance Options

§ 72.40 General.

(a) For each affected unit included in an Acid Rain permit application, a complete compliance plan shall:

(1) For sulfur dioxide emissions, certify that, as of the allowance transfer deadline, the designated representative will hold allowances in the unit's compliance subaccount (after deductions under § 73.34(c) of this chapter) not less than the total annual emissions of sulfur dioxide from the unit. The compliance plan may also specify, in accordance with this subpart, one or more of the Acid Rain compliance options.

(2) For nitrogen oxides emissions, certify that the unit will comply with the applicable limitation established by regulations implementing section 407 of the Act or shall specify one or more Acid Rain compliance options, in accordance with section 407 of the Act and regulations implementing section 407.

(b) *Multi-unit compliance options.* (1) A plan for a compliance option, under § 72.41, 72.42, 72.43, or 72.44 of this part or section 407 of the Act and regulations implementing section 407, that includes units at more than one affected source shall be complete only if:

(i) Such plan is signed and certified by the designated representative for each source with an affected unit governed by such plan; and

(ii) A complete permit application is submitted covering each unit governed by such plan.

(2) A permitting authority's approval of a plan under paragraph (b)(1) of this section that includes units in more than one State shall be final only after every permitting authority with jurisdiction over any such unit has approved the plan with the same modifications or conditions, if any.

(c) *Conditional Approval.* In the compliance plan, the designated representative of an affected unit may propose, in accordance with this subpart, any Acid Rain compliance option for conditional approval, except a Phase I extension plan; *provided* that an Acid Rain compliance option under section 407 of the Act may be conditionally proposed only to the extent provided in regulations implementing section 407 of the Act.

(1) To activate a conditionally-approved Acid Rain compliance option, the designated representative shall notify the permitting authority in writing that the conditionally-approved compliance option will actually be pursued beginning January 1 of a specified year. If the conditionally approved compliance option includes a plan described in paragraph (b)(1) of this section, the designated representative of each source governed by the plan shall sign and certify the notification. Such notification shall be subject to the limitations on activation under subpart D of this part and regulations implementing section 407 of the Act.

(2) The notification under paragraph (c)(1) of this section shall specify the

exclude "designated representative" from the definition of "owner or operator" in all cases. *See id.*

The Agency today reaffirms, with some refinements, the statutory interpretation set forth in the preamble. In most cases, the responsibilities of a designated representative will be narrower than those of an operator. Accordingly, based upon comments of the Department of Energy and others, EPA has determined that it would be inappropriate to broadly sweep all designated representatives into the definition of "owner or operator" as provided in the rulemaking proposal.

In some cases, however, the scope of the designated representative's responsibilities, as provided in the final regulations, would in fact be coextensive with those of an operator, and in those cases he or she would still be an operator. As discussed below, one such case is where there is a common designated representative for multiple sources lacking a common owner and operator and participating in a substitution plan. Thus, the definition has been revised to more accurately reflect the varied nature of the role of designated representatives under the Acid Rain Program by effectively providing that a designated representative is an operator only when his or her duties and responsibilities bring him or her within the ambit of that term.

(3) Designated Representative

Title IV of the Clean Air Act requires the owners and operators of each affected source to appoint a designated representative to act as a liaison between the source and EPA on matters concerning the Acid Rain Program.

(a) Designated representative requirements. (i) Universal requirement. In the proposal, EPA required that all sources have a designated representative. Several commenters suggested that EPA eliminate the requirement to have a designated representative where there is only one owner/operator at a source. The commenters argue that a designated representative is not needed in those situations and that the certification requirements are unnecessary and burdensome where there is a single owner/operator.

Response: The Agency disagrees. The designated representative is needed to simplify the Agency's administration of the Acid Rain Program and to ensure the accountability of an owner or operator for actions governed by the program by, *inter alia*, reducing the likelihood of inconsistent submissions by a source. In addition, requiring the source to interact with the Agency exclusively through one designated representative will permit the regulated community to exercise the flexibility in compliance provided under the Acid Rain Program while being assured that EPA will only act on a submission (e.g., an allowance transfer) that is authorized by the source. Thus, no matter how many owners or operators there are at a source, having a single designated representative will benefit both the regulated community and the Agency.

The Agency agrees, however, that one of the certification requirements in the proposed rules was unnecessarily burdensome on sources with single owners and operators. For sources with a single owner and operator, the Agency has eliminated the requirement that the designated representative send written notice of the agreement under which he or she is selected to that owner and operator, who undoubtedly already knows of the agreement. In the final rules, this requirement only applies to sources with multiple owners and operators.

(ii) Designation by source or unit. Several commenters objected to EPA's proposal requiring that each source have only one designated representative. These commenters argued that the language in sections 408(a) and 402(26) of the Act specify that designated representatives should be appointed by unit. The commenters also claimed that units, not sources are accountable for allowance transactions, compliance plans, monitoring reports, and excess emission penalties.

Response: The Agency agrees that most compliance requirements under the Acid Rain Program are imposed on a unit, rather than a source, basis. Nonetheless, the Agency believes that it is appropriate to require one designated representative per source. While units at a source may have some different owners and operators, there is generally one operator who coordinates operations of all the units and whose decisions concerning one unit may have consequences for the operation of other units. The requirement of a single designated representative per source reflects this operating reality. If units at a source were to have different designated representatives, the designated representative of a unit that was out of compliance might claim that the violation was caused by actions at another unit, whose separate designated representative might dispute the claim. The Agency does not believe that it should become involved in these kinds of disputes among units when it assesses compliance with the Acid Rain Program. Therefore, the Agency is requiring that only one designated representative be certified per source. Under this approach, the designated representative will resolve such disputes and will balance the needs of all of the units at the source in order to facilitate compliance by all units whenever possible. This also minimizes the possibility of inconsistent submissions concerning the different units at the source.

(iii) Daily notice requirement. Some commenters objected to the requirement that the designated representative give daily notice for two weeks by publication in a journal of national and general circulation of the agreement by the owners and operators appointing him or her, particularly where there is only a single owner or operator.

Response: Despite these comments, the Agency believes that this requirement is necessary to ensure that all persons that might consider themselves to be owners and operators of a source have the opportunity to learn of the selection of the designated representative. Without public notice, only those persons whom the designated representative believes are owners or operators will get notice of the selection, i.e., through written notice by the designated representative. In order to reduce the potential cost of providing public notice, the Agency modified the rule to require notice for 7 days in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general notice. The provisions concerning the type of publications to be used parallel certain public notice requirements in 40 CFR part 70. The Agency believes that, in light of the significant financial consequences potentially at stake in the selection of a designated representative, this requirement is not unduly burdensome.

(b) Designated representative's responsibilities. Several commenters suggested that EPA allow sources to delegate responsibility for non-allowance related submissions to a responsible official of the company, rather than requiring the designated representative to make all submissions under the Acid Rain Program. The commenters argued that this would provide them with more flexibility and would ensure the integrity of the submissions, by allowing the source to delegate responsibility to someone with personal knowledge about the particular information.

Response: The Agency has attempted to provide sources with maximum flexibility in the Acid Rain Program while ensuring accountability, but does

not agree that submissions may be made by someone other than the designated representative without adversely affecting the integrity of the program. Under section 402(26) of the Act, the designated representative represents the owners and operators in matters under the Acid Rain Program concerning the source, and, as discussed above, there are important reasons for limiting each source to a single representative. Interposing another person between him or her and the Agency would dilute his or her responsibility and in effect create multiple designated representatives for a source. Further, by leaving the responsibility to make submissions with the designated representative, the final rule has the salutary effect of making it clear that the designated representative should be aware of all submissions and, before submitting them, should inquire of persons with personal knowledge of the information in those submissions. Within these parameters the designated representative has flexibility to delegate duties (such as the preparation of submissions). However, under the final rule, the designated representative retains responsibility under the program for, and must sign and certify, all submissions.

(c) Minority ownership issues. (i) Unanimous agreement on selection of designated representative. The Agency received numerous comments on whether the designated representative should be selected by unanimous agreement of all of the owners and operators. Opponents of that approach claim that requiring unanimous consent would result in EPA improperly interfering in existing commercial relationships and contracts. These commenters believe that existing contractual agreements provide the means of resolving potential disagreements among multiple owners of a unit and that it would be counter-productive to require unanimous consent because it would embroil EPA in commercial disputes and, contrary to EPA policy, would supersede existing agreements in some cases.

Other commenters claim that requiring unanimous agreement is necessary to protect minority owners from "tyranny of the majority." Minority owners are concerned that they will be frozen out of the choice of the designated representative, who will then have control over allowances that belong in part to the minority owners and who will exercise this control in a manner adverse to the interests of the minority owners. Minority owners are also concerned that the designated representative will be chosen over their objections and that the actions of the designated representative, over which they have no control, will result in noncompliance for which the minority owners will be liable.

Response: The Agency does not believe that it should require the designated representative to be certified by unanimous consent. Title IV does not explicitly authorize EPA to impose such a requirement. EPA does not believe that it should alter existing commercial arrangements absent express authorization from Congress to do so. (Some existing agreements among source owners, of course, may require unanimous consent). EPA's position is consistent with the approach taken in the Sanford amendment, which included what became sections 402(26) (designated representative definition) and 408(i) of the Act and which was aimed at "ensur[ing] that the existing relationship between the various parties with legal interests in an affected unit are [sic] preserved." (136 Cong. Rec. S3378, daily ed., March 28, 1990 (Senator Sanford)). In addition, requiring unanimous consent of all owners could give leverage to dissidents, allowing them to force majority owners into unreasonable concessions (which may or may not be related to the Acid Rain Program) simply to remove the objections.

(ii) Unanimous agreement on allowance decisions. Several of the commenters who supported unanimous consent in choosing the designated representative recommended that, at a minimum, EPA require that co-owners of a unit explicitly discuss and decide how to hold, use, and distribute allowances or apportion liabilities that might be incurred by the source. These commenters claimed that existing agreements, negotiated before allowances were created, do not confer adequate authority on the designated representative to handle allowances. These commenters assert that the Sanford amendment was designed to protect minority owners and that, under it, only a unanimous, new agreement, negotiated expressly to reallocate allowances, should be allowed to override the provision in section 408(i) that allowances otherwise be held and distributed in accordance with the ownership interests in the unit.

Response: The Agency agrees that section 408(i) was introduced to provide protection for minority owners without burdening EPA "with the responsibility of using scarce resources to rigorously examine the relationship between various parties whenever there are multiple holders in a unit." (136 Cong. Rec. S3379, daily ed., March 28, 1990 (Senator Sanford)). Since the section 408(i) protections are to be applied by the parties and, if necessary, the courts, the Agency has decided not to go beyond the specific requirements of section 408(i). Instead, the final rules incorporate the statutory language requiring allowances to be distributed in proportion to legal, equitable, leasehold, or contractual reservation or entitlement in the absence of a contract expressly providing for a different distribution. EPA will leave it to the parties involved to apply this provision and determine whether and under what circumstances a unanimous, new agreement is appropriate. The Agency believes that this approach gives minority owners the protection that they were granted in the Act, while preventing EPA from becoming embroiled in ownership disputes.

(iii) Limiting designated representative's discretion. Several commenters also suggested limiting the discretion of the designated representative in certain matters in order to protect minority owner interests. For example, commenters suggested that EPA: Require an agency relationship to be established between the designated representative and all co-owners; limit the ability of the designated representative to use allowances belonging to the joint owners or to sell allowances without express authorization from co-owners; require co-owners to enter into agreements concerning the holding and distribution of allowances; and take a more active role in oversight of the actions of the designated representative.

Response: The Agency has rejected these suggestions because they would require EPA to review and alter existing commercial arrangements, and oversee new arrangements, in the utility industry, a role for which EPA has neither the necessary expertise nor express statutory authority. The Agency's approach concerning section 408(i) of the Act preserves the minority owner protection granted under the Act.

(iv) Freezing allowance accounts. EPA asked for comment on whether it should freeze allowance accounts in the event of a dispute over the actions of the designated representative. Numerous commenters objected to EPA's proposal not to freeze allowances, claiming that a freeze would better protect against the trading of co-owner's allowances without their express authorization and would further ensure compliance. Other commenters supported EPA's proposed approach of not freezing allowances because it avoids having EPA become embroiled in private disputes among joint owners. These commenters believe that aggrieved multiple owners have

adequate protection through their commercial agreements and through the courts.

Response: The Agency has decided not to include in the final rule any provision requiring the freezing of allowance accounts in the event of an allowance dispute. The Agency believes that such a provision would undermine the functioning of the allowance market, which depends on the ability of third parties to rely on the full effectiveness of the recordation of an allowance transfer.

Freezing accounts automatically whenever any owner or operator claimed there was an allowance dispute would be extremely disruptive to the allowance market. Allowance trading could be disrupted frequently and at any time. Any majority or minority owner or operator could use such "claims" to force unable concessions. Providing for routine freezing of accounts where a claimed dispute seems meritorious would require EPA to evaluate the merits of disputes. Such routine evaluation of disputes is beyond the expertise of the Agency.

However, in § 72.4 of the final rule, the Agency reserves the right to take action (e.g., with regard to the Allowance Tracking System) in extraordinary circumstances that require action to ensure the orderly and competitive functioning of the allowance system. In addition, of course, parties may obtain injunctive relief, where appropriate, from the courts.

(v) Liability of owners and operators. Many commenters objected to provisions in the proposed rule that imposed liability on all owners and operators of a source or unit for violations of title IV of the Act and the regulations. The commenters pointed to language in the proposal concerning joint and several liability for owners and operators for violations of title IV requirements. They argued that the Act does not give the Agency authority to impose joint and several liability. In addition, commenters also objected to the preamble discussion of shared liability as an attempt to impose joint and several liability without authority.

In particular, the commenters argued that under title IV, liability for violations could only arise for persons who exercised operational control over the affected source or unit. Many utility units subject to Acid Rain Program requirements are owned by several entities, some of which possess minority ownership interests in the unit or source. They argue that existing contractual arrangements often cede responsibility for operational control, including compliance with environmental laws, to the majority owners. Due to these pre-existing contractual arrangements, commenters contend they lack any operational control sufficient to exert any influence on compliance with title IV requirements. In addition, commenters claimed the Agency unlawfully relied on section 408(l) of the Act to impose responsibility for compliance with title IV requirements on minority owners. These commenters suggested that EPA should amend the proposal to exempt minority owners from liability.

Response: The Agency does not agree that the final rule should exempt minority owners from liability but does agree that all provisions in the proposal that expressly establish joint and several liability on the owners and operators of an affected source or affected unit should be removed. The question of the liability of a specific owner and operator is best left to case-by-case determination in the context of enforcement against specific violations, rather than being resolved in the abstract in a rulemaking.

On one hand, various sections of title IV impose obligations on owners and operators without distinguishing between majority and minority owners or owners that are not operators. (See sections 408(h), 409(f), 411, and 412(e) of the Act). Moreover, by virtue of an ownership interest in a business or property, an owner may exercise influence over operation of a facility and help foster compliance with environmental laws. This may be true even if the owner cannot exercise unilateral authority or significant control over operations. It is important to encourage oversight of activities at one's business or property and discourage tacit approval or willful ignorance of illegal activities that threaten the environment.

On the other hand, the Agency does not blindly enforce against all parties regardless of their level of awareness, control, and responsibility for violations of the Act. EPA focuses enforcement efforts on those parties most truly culpable for violations. EPA and the courts look to the culpability of parties in determining liability and assessing civil penalties.

The Agency, therefore, has removed from the final rule language that expressly imposes joint and several liability on all owners and operators and is leaving the question of liability to case-by-case determination in proceedings before the Agency and, ultimately, the courts.

(vi) Liability of designated representative. Several commenters expressed concern that a designated representative would be liable, under the proposal, for violations by owners and operators.

Response: As a general matter, EPA expects that its civil and administrative enforcement actions under the Acid Rain Program usually will focus on the owners and operators of affected units that do not adhere to emission limitation requirements under the program (sections 404 and 405 of the Act). Designated representatives also have responsibilities under the Act and would be liable for violations of those responsibilities. The Act, at section 402(26), defines the designated representative as a responsible person authorized by the owner or operator to represent the owner or operator as to certain matters, including, for example, holding and transfer of allowances (section 403) and submission of and compliance with permits and compliance plans and related documents (sections 408(c)(1) and 408 (h)(1)).

It is EPA's statutory interpretation that a designated representative is not liable for acts or omissions that are not within the scope of his responsibility as designated representative. Under the Act, owners and operators shall be fully liable for the emission limitations (sections 404(a) and 405(a)) and monitoring requirements (section 412) for an affected unit and are responsible for operating the unit in compliance with those requirements. A designated representative would not be subject to liability for a unit's noncompliance with those requirements, except to the extent that the designated representative is an owner, an operator, or has control over the operation of the affected unit, or has been authorized by the owner or operator to ensure compliance with those provisions. Accordingly, where a particular violation resulted from acts or omissions that are within the scope of the designated representative's responsibilities, he will be subject to liability for that violation.

(4) Phase I Substitution Plans (Subpart D)

Section 72.41 of this regulation implements section 404 (b) and (c) of the Act, which give the designated representative the option of submitting a substitution plan. Under a substitution plan, the designated representative of a Phase I unit identifies affected units (i.e., Phase II units) that would not otherwise be subject to Phase I requirements and requests that they become Phase I units subject to these requirements. Since the substitution units will then receive allowances in Phase I, this approach may enable the

the Agency would focus its enforcement on the compensating unit.

g. *Submissions.* Section 72.9(a) would require that all non-electronic written Acid Rain program submissions be delivered by certified mail. The certified mail requirement is to ensure that an independent third party would have a record to verify the transmittal. Under this provision, submissions could be sent by traditional forms of postal delivery (e.g., U.S. Postal Service) as well as by private delivery services, provided the service maintains an independent record of delivery verification.

Reservation of Other Federal and State Authorities. Consistent with sections 403(f) and 413 of the Act, subpart A would also reserve State and Federal air quality authorities and requirements under other provisions of the Act, including section 116. This reservation is intended to ensure that nothing in the Acid Rain program, including an Acid Rain program permit provision, would excuse the source's obligation to comply with other, more stringent, requirements, for example, in a State implementation plan. In addition, subpart A clarifies that the provisions of title IV and the Acid Rain program rules are in addition to the Agency's authorities under other provisions of the Act.

C. Designated Representative

1. Role and Certification Requirement

Subpart B of today's proposal governs the process for certifying, and the duties of, the designated representative. As a prerequisite to obtaining a permit, section 408(i) of the Act requires that a designated representative for the owners and operators of each affected unit at the affected source file a certificate of representation with regard to Acid Rain matters. In addition, section 408 (c)(1) and (d)(2) require the designated representative for the affected source to submit the source's permit applications. Under subpart B, no more than one designated representative must be certified for each affected source. The designated representative would represent the owners and operators of each affected unit at the affected source, as well as the owners and operators of the affected source as a whole, in matters pertaining to the Acid Rain program including: each affected unit's and source's submission of and compliance with Acid Rain permits, permit applications, and compliance plans; and the holding, transfer and disposition of allowances for each affected unit at the affected source. These duties are consistent with the provisions of title IV, which require that the owners and operators of affected units act through a "designated representative" with respect to such matters.

The proposed rule interprets the statutory authorities, responsibilities, and duties of the designated representative as establishing a specific category of "operator" role. Under this reading, provisions of the statute requiring a common "owner or operator" (e.g., substitution plans, NO_x averaging) would be satisfied by having a common designated representative. This would be consistent with the traditionally broad interpretation of the term "operator" under the Clean Air Act, which has included any "person" acting in a supervisory or control authority (e.g., site supervisors, plant managers, operating companies). The interpretation proposed today would not, however, alter the fact that the designated representative's supervisory and control authorities are both specific in purpose and fiduciary nature. The designated representative would, thus, not be required by this interpretation to have any additional authorities or duties not contemplated by the statute and today's proposed rules (e.g., the designated representative could, but would not have to be, the plant manager). An alternative reading of the statutory language pertaining to the roles and functions of the "designated representative" would be that a designated representative is not by definition a type of "operator". Under this reading, the provisions in the statute requiring common ownership or operation could not be satisfied merely by having a common designated representative (unless, the designated representative was also an owner or operator of both units.) EPA requests comment on these alternative interpretations of the relationship of "designated representative" to "operator". In addition, the rule provides that the designated representative would be deemed to be the "responsible official" for an affected source with regard to Acid Rain permitting under title V and 40 CFR parts 70 and 71. [This provision should not be confused with the use of the term "responsible official" as proposed on May 23, 1991 in 40 CFR part 73, subpart E, and new subpart F. The Agency intends to prevent any confusion in this regard by changing any reference to "responsible official" in 40 CFR part 73, subpart E, and new subpart F to "certifying official" when promulgating that rule in final form.]

The role of the designated representative is of critical importance to the functioning of the program. By proposing to require all owners and operators of an affected source and of each affected unit at a source to interact with the Agency exclusively through one designated representative, the proposed rule would afford the regulated community maximum flexibility in compliance planning, and ensure the smooth functioning of the allowance system. At the same time, the proposed approach would simplify the Agency's administration of the program and ensure source accountability.

The Agency recognizes that the designated representative cannot always be available to perform his or her duties (e.g., due to illness). Therefore, the rule proposes to allow the owners and operators of an affected source to appoint an alternate designated representative to act on behalf of the designated representative when the designated representative is unavailable. The certificate of representation required to be submitted by the designated representative under subpart B must specify the name and other information identifying the alternate designated representative selected, and the alternate must sign the certificate. The rule specifies that in the event of concurrent and conflicting actions by the designated representative and the alternate, the Administrator shall deem the action of the designated representative as superseding. The rule also specifies how the alternate can be changed. Thus, unless expressly provided to the contrary, whenever the term "designated representative" is used in the rule, it should be read to apply to the alternate designated representative, if any, included in the certificate of representation.

The proposal would ensure that the Agency or State permitting authority could rely on submissions certified by the designated representative, without having to entertain or evaluate alternative submissions by individual owners or operators of the same unit or to seek separate concurrences by individual owners or operators. This approach should ensure a streamlined and expeditious permitting process and eliminate the need for lengthy inquiries into unit ownership before a permit could be issued. Similarly, participants in the allowance market would be able to rely on representations made by the designated representative acting in that capacity, without being forced to consult with the multiple owners of the unit. Instrumental to this is EPA's proposal to treat all submissions by the designated representative as binding on each owner and operator.

2. Owner/Operator Liability

As a result of the binding authority of the designated representative, subpart B states that the designated representative and the multiple owners and operators of an affected source or affected unit would share liability for any violation by the source or unit of, or any failure by the source or unit to comply with, the requirements of title IV. In certifying an affected source's permit application, the designated representative and the owners and operators of the affected source and of each affected unit at the source would be bound to comply with its terms, and would be responsible for ensuring the affected source's and unit's compliance with those terms.

The definition of "designated representative" in § 72.2 would clarify that the representative must be a natural person. EPA considered whether to allow the designated representative to be a corporate entity rather than a natural person. Such an approach would, however, create a greater risk of disputes regarding representation and was, thus, rejected.

The requirement that the designated representative be a natural person would not result in personal liability on the part of the designated representative in the absence of any criminal wrongdoing. Nor would EPA's proposal interfere with or limit any private indemnification agreements between the designated representative and the source's owners and operators to financially protect the individual representative in the event of a violation. Thus, the designated representative could, for example, be a corporate officer acting in his or her official capacity, risking no more personal liability then would any other officer or operator of the affected source.

In designating a representative to act on their behalf, an affected source's or unit's owners and operators would bind themselves to comply with the terms of any submissions made by the designated representative, and to the actions undertaken by the designated representative, thus, creating shared liability for each and all. This, together with the liability created by the designated representative's certifications, would enable EPA to hold the designated representatives, the owners, and the operators accountable for compliance problems at the affected unit or source, without having to first demonstrate a proper allocation of responsibility among the multiple owners and operators, or between the owners, operators, and the designated representative. The burden of allocating responsibility for noncompliance among multiple owners and operators would be a private matter to be resolved by the interested parties without implicating EPA or any other regulatory authority.

3. Designated Representative, Multiple Unit Permits, and Multiple Source Compliance Options

a. *Multi-unit sources.* Since permits would be issued to each affected source, and affected sources typically will have more than one affected unit, the rule proposes that there be one designated representative certified for each affected source. Thus, even though ownership of multiple units at an affected source might vary, the important programmatic need of dealing with one representative for the affected source would be preserved. The owners and operators of any one affected unit at an affected source would not, however, be liable for violations of the title IV requirements by another affected unit at the same affected source in which they had no ownership or operator interest merely because the two units shared the same designated representative. Multi-unit liability would only be involved to the extent the two units were governed by a multi-unit compliance plan that was violated, or if the violation was of a source requirement (such as the requirement to submit a complete permit application in a timely manner).

b. *Multi-source plans.* As is provided in subparts C and D, the rule proposes, consistent with title IV, to authorize Acid Rain compliance options involving affected units located at more than one affected source. These include substitution plans, Phase I extension plans, reduced utilization plans, and nitrogen oxides averaging plans. For multiple sources electing any such option, each source's permit application and permit would have to include a copy of the cross-referencing compliance plan.

Except in the case of substitution plans and nitrogen oxides averaging plans, where the Act expressly requires common control or ownership of the affected units involved, EPA proposes to not require a single designated representative for purposes of the multi-unit compliance options authorized by subpart D, except when the affected units are located at the same affected source. Instead, the proposal would require that any multi-unit plan involving units located at different sources be jointly certified by the respective designated representatives for each source involved. Such certification would bind the individual owners and operators of all units governed by the plan, which would share responsibility for complying with the plan. The proposed role of the designated representative would make it possible for EPA to approve virtually any variation of multi-unit compliance options, thus, affording sources greater flexibility in achieving compliance.

By requiring that all owners and operators of all the units subject to a multi-unit/multi-source compliance option be bound by their designated representatives' joint submission, and that they share liability for ensuring the compliance of each unit subject to the plan, EPA would be shielded from defenses and disputes between and among multiple owners or operators concerning compliance plans and responsibility for any non-compliance. Without these safeguards, EPA would inevitably have to resolve potentially lengthy disputes between multiple owners or operators concerning their separate liability before issuing a permit or enforcing violations of program requirements. This would make it virtually impossible for EPA to authorize some of the more flexible compliance options (e.g., nitrogen oxides averaging plans which did not specify each individual unit's emissions limitation, but simply imposed a weighted-average emissions limitation for all units covered by the plan). Such disputes would erect unacceptable barriers to EPA's ability to enforce the Act's requirements, which, in turn, would preclude the flexibility proposed to be authorized for approval of multi-unit compliance plans.

4. Certificates of Representation

Subpart B of the proposed rule would require the designated representative to submit a certificate of representation stating, among other things, that he or she was selected by an agreement binding on all the owners and operators of the affected units at the source; and, as provided in section 408(i), that allowances and their proceeds will be deemed to be held for an affected unit according to each owner's respective interest in the unit or pursuant to an agreement entered into by each owner of the unit providing otherwise. In addition, the rule proposes that the terms of the certificate of representation would be deemed to be incorporated into each Acid Rain program submission made by the designated representative. This is essential to establish each element of the designated representative's authority to bind each owner and operator to subsequent submissions.

5. Issues Concerning Representation

a. *Binding agreement of representation.* The Agency considered several approaches concerning what would be minimally necessary for inclusion in a certificate of representation to establish the representative relationship. The rule would require that the designated representative be selected by an agreement binding on all the owners and operators of each affected unit at the affected source. The Agency considered whether to require the "unanimous consent" of the owners and operators for a designated representative to be certified. Although the owners and operators of affected sources would be left free by today's proposal to privately agree on such a unanimity requirement, the Agency does not believe that it would be appropriate to prescribe the decision-making procedures that multiple owners would have to follow in selecting a representative. EPA seeks to avoid any requirement that would inadvertently alter the traditional business dealings within the utility industry. Since a source would not be able to obtain a permit or engage in allowance transactions until it had a designated representative, requiring "unanimous" agreement would give leverage to dissidents that they might not otherwise have, allowing them to force majority owners and operators into unreasonable concessions simply to remove objections. Today's proposal would afford various ownership interests no less protection than they have under existing agreements.

b. *Binding agreement regarding the holding and distribution of allowances—unanimity issue.* Pursuant to section 408(i) of the Act, § 72.20(b)(8) of today's proposal also requires that, in the case of a unit with multiple owners, the designated representative certify that allowances will be deemed to be held, and that the proceeds of allowance transactions will be distributed either (1) in accordance with the respective ownership interests, or (2) if the multiple owners have expressly agreed to a different distribution of allowances by contract, in accordance with that express agreement. Today's proposal specifies that the express contractual agreement providing for a different distribution of allowances and allowance transaction proceeds must be binding on each and every owner of the unit.

EPA seeks comment on whether the rule should also require that the allowance distribution contract be based on a "unanimous" agreement between multiple owners. Although the statute does not expressly provide for such an approach, some commentors believe that one of the statutory purposes of Section 408(i) is to override existing contractual arrangements between owners of a unit to ensure that minority interests are protected. Under that interpretation, existing commercial arrangements regarding how future agreements should be reached would be superseded. For example, a corporate relationship might call for majority vote of the Board of Directors on future agreements, another business relationship might call for arbitration, and yet another might have given all authority of a business's holdings to a general partner, a lessee, or a trustee. In addition, a Federally imposed "unanimity" requirement could impose a potential chilling effect on the designated representative's actions.

c. *Changing the designated representative/objections.* The proposal also stipulates the procedures for changing the designated representative, and that EPA would not become involved in private disputes among multiple owners or operators, nor "freeze" allowance accounts or otherwise stop dealing with the designated representative, even if notified of an objection concerning the actions of the designated representative. This approach would not alter private commercial relationships among multiple owners and operators. Furthermore, aggrieved multiple owners and operators would have adequate protection through their commercial agreements and through the courts, if necessary, to obtain injunctive or monetary relief in the resolution of private ownership disputes. Under the proposed rule the owners and operators could replace a designated representative who was not acting in accordance with the agreement of representation. In addition, if the owners and operators no longer agreed to be represented by the designated representative, and the designated representative knew this, the designated representative would no longer be able to truthfully certify in subsequent submissions to the Agency that he or she was duly authorized. Thus, the Agency does not believe that a unilateral decision by the Agency to freeze allowance accounts is the appropriate remedy to protect the rights of owners.

EPA also believes that freezing allowance accounts would undermine the functioning of the allowance market. The allowance market depends on the ability of third parties to rely on the full effectiveness of the recordation of an allowance transfer. A rule that subjected transfers to the possibility that they might be canceled administratively, even after recordation, would introduce uncertainties. These uncertainties could impair the efficiency of the market by either inhibiting activity or imposing additional transaction costs incurred in an effort to guard against such uncertainties. Second, if the mere filing of an objection forced EPA to suspend recordation of transfers to or from the account, unwarranted objections could introduce disorder into the market or force legitimate designated representatives to make unreasonable concessions to satisfy objections, however unwarranted. EPA, as an environmental regulatory agency, is not in a position to judge the legitimacy of an objection, so the Agency could not effectively guard against unwarranted objections.

The proposal would, however, protect the interests of minority owners. Though designated representatives could be selected by simple majority vote, if that is in accordance with the procedure agreed to by multiple owners and operators for making such decisions, the designated representative would be required to certify that he or she was acting with full authority with every submission to EPA or the permitting authority. If such a certification proved to be untrue—either because an objection from an owner or operator was pending, or because the action violated the rules of the multiple owners and operators agreement for authorizing designated representative actions or for apportioning the allowances among multiple owners—the designated representative would be guilty of making a false certification and risk civil and possibly criminal sanctions under the Act. This affords owners and operators substantial leverage for ensuring that the actions of the designated representative are in accordance with the fiduciary role established by the law.

D. Acid Rain Permit Applications and Compliance Plans

Section 408(a) of the Act specifies that the program be implemented through permits issued to affected sources in accordance with titles IV and V, which in turn provide that it is illegal for a source to operate without a permit. Consistent with other environmental permit programs, such as the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and as provided by title V

Attachment #5

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APPA ACID RAIN WORKSHOP

December 5, 1992

Kansas City, Missouri

ATTACHMENT #5

Table of Contents

ACID RAIN ENFORCEMENT

INTRODUCTION

In addition to dramatically expanding the nature and scope of regulation, the Clean Air Act Amendments of 1990 significantly toughen EPA's enforcement authority and the consequences of noncompliance. Utilities operating affected units without adequate allowances face not only a specific "excess emissions penalty" of $2,000 per ton, but also a potential $25,000 fine for each missing allowance for each day that it is missing. Thus, a unit which fails to obtain 1,000 allowances for 100 days would owe $2,000,000 in excess emissions penalties (1,000 allowances multiplied by $2,000) plus up to $2.5 million in ordinary civil penalties for each of the 1,000 missing allowances (100 days multiplied by $25,000) or a grand total of $2.502 billion in excess emissions and civil penalties.

Obviously, EPA has never in the history of its enforcement program recovered anywhere near what it is theoretically entitled to recover under the statute, and this nightmare scenario where the Agency adds ordinary penalties to excess emissions penalties will occur only in the worst cases. Nevertheless, these absurd calculations illustrate just how potentially serious a failure to obtain adequate allowances can be. And, of course, operating without enough allowances is only one potential violation utilities risk under the new law and its implementing regulations. Failing to operate continuous emissions monitoring equipment, exceeding emissions limits on regulated pollutants, and failing to complete paperwork in a timely fashion can also trigger the assessment of penalties, either by EPA in an administrative proceeding or by a federal court judge in a civil judicial action brought by the Department of Justice.

Accompanying these new civil penalties authorities are criminal penalties for both deliberate and negligent violations. Any person who "knowingly" violates any requirement or prohibition commits a felony punishable by five years in prison, plus a fine. Second-time violators of this and all other criminal provisions face maximum punishment of twice these terms and amounts. Any person who "knowingly" makes a false statement, fails to notify or report as required, or falsifies or tampers with a monitoring device commits a felony punishable by two years in prison, plus a fine. Knowingly failing to pay any fee imposed by the Act carries a one year jail term, plus a fine. Negligently releasing a hazardous air pollutant that places another person in imminent danger of death or serious bodily injury carries a one year term, but knowingly committing the same offense is punishable by 15

years in prison, plus a fine. Note that accidental releases into the air of chemicals such as chlorine, even if they occur because cylinders holding the chemical explode and not as a result of the operation of a stationary source, would be covered by these provisions.

Another aspect of the new law that makes the consequences of noncompliance much more severe is its definition of who is responsible for ensuring that its mandates are implemented and its requirements are met. For years, the Clean Air Act has covered the activities of "owners" and "operators," often phrasing its mandates as applying to either the owner or the operators, presumably at the parties' own option. The new law contains some potentially significant expansions of these concepts, both because it broadens who is considered an owner and an operator and because EPA reserves the right to hold all owners jointly liable for violations under certain circumstances.

Further complicating this landscape is the acid rain title's requirement that each source appoint a single "designated representative" authorized to act on behalf of all owners and bind them by those actions. Designated representatives, who must be "natural persons," can also incur liability if they make false statements to EPA, although the Agency goes to some lengths in the new regulations to reassure them that as a general matter they will not be prosecuted in their individual capacity. Of course, it is not yet clear just how much solace designated representatives (or anyone else for that matter) should take in these and other similar reassurances offered by EPA. The fact that the Agency has the statutory authority to prosecute must be considered a real threat even if it makes promises not to exercise this authority as a routine matter.

Taken as a whole, these new enforcement provisions may mean that publicly-owned electric systems owning a minority share of an affected unit cannot afford to continue to count on the majority owner to take care of environmental compliance. Most minority owner contracts confer the obligation to ensure environmental compliance on the majority owner, but stipulate that any penalties will be paid jointly in proportion to ownership share. Not only does the new law mean that penalties could be far larger than in the past, if violations get completely out of hand, EPA may very well decide to pursue all owners regardless of their efforts to delegate responsibility among themselves. Whether or not such prosecutions are ultimately upheld by the courts, they pose enough of a threat to suggest that it may be very bad business to ignore the environmental conduct of a majority owner, especially at facilities with a record of past problems.

This paper will first discuss the details of who is an owner, who is an operator, and what a designated representative must do. It will then review the general civil and criminal enforcement provisions of the 1990 Amendments, as they apply to all violations, including acid rain. It will discuss enforcement provisions specifically applicable to the acid rain title of the law and it will conclude with a description of some recent trends in EPA's enforcement of the Clean Air Act.

WHO IS COVERED AND HOW ARE THEY LIABLE?

The law and the new regulations make four categories of entities responsible for compliance: (1) "owners," (2) "operators," (3) "designated representatives" of owners and/or operators, and (4) for the purposes of the criminal provisions, "persons." The definitions of the first three categories overlap -- that is, an entity can be both an owner and an operator and, for that matter, also a designated representative. Further, the responsibilities assigned to each also overlap -- that is, either the owner or the operator must ensure permit compliance, as must the designated representative. The resulting confusion, which undoubtedly was created deliberately, gives EPA considerable flexibility in designing a frightening and therefore an effective enforcement program, or so the Agency firmly believes.

Who Is An Owner?

The statute does not contain a definition of owner. Instead, EPA defines this crucial term in the final regulations, where it states that "owner" means any of the following persons:

> (1) Any holder of any portion of the legal or equitable title in an affected unit; or
>
> (2) Any holder of a leasehold interest in an affected unit; or
>
> (3) Any purchaser of power from an affected unit under a life-of-unit, firm power contractual arrangement as that term is defined herein and used in section 408(i) of the Act. However, unless expressly provided for in a leasehold agreement, owner shall not include a passive lessor, or a person who has an equitable interest through such lessor, whose rental payments are not based, either directly or indirectly, upon the revenues or income from the affected unit; or
>
> (4) With respect to any Allowance Tracking System general account, any person identified in the submission required by

> § 73.31(c) of this chapter that is subject to the binding agreement for the authorized account representative to represent that person's ownership interest with respect to allowances.

Subpart A, § 72.2, Definitions.

This definition is in fact modeled on Section 408(i) of the statute, which defines the rights of a variety of entities to allowances including life-of-unit contract holders who cannot be considered owners in any logical sense of the word. Publicly-owned electric systems, including systems with life-of-unit contracts, vigorously argued during the comment period that it was absolutely inappropriate for EPA to convert the statute's definition of a rightful allowance "holder" into a definition of a potentially liable "owner." But EPA rejected these arguments, choosing to manipulate the statute to cast its liability net as broadly as it could. It is possible but unlikely that some of these public power systems will challenge this aspect of the regulation in court and it is possible but unlikely that a court would overturn EPA's effort to draw into the liability net entities who exercise no effective operational control as a practical matter. Assuming that the regulations stand, any utility or other entity covered by the definition faces a Hobson's choice: attempting to become more involved in the operation of the unit is the only way to determine the risks of noncompliance and take steps to prevent it. At the same time, becoming more involved may very well increase the possibility that you will be targeted for enforcement action at some future time.

Who Is An Operator?

New Section 113(h) of the Act defines "operator" as "any person who is senior management personnel or a corporate officer." The section continues:

> Except in the case of knowing and willful violations, such term shall not include any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer.

42 U.S.C. § 7613(h) (emphasis added).

According to commentary written shortly after enactment of the 1990 amendments by a former Senate staffer involved in the negotiation of these provisions, the definition was intended to protect line employees from suffering the consequences of unwitting

violations of the law without immunizing their superiors. See Stephen E. Roady, "Permitting and Enforcement under the Clean Air Act Amendments of 1990," 21 ELR 10178, 10202 (April 1991). At the same time, according to Roady, some Congressional negotiators were concerned that the language introduced a new concept of liability under environmental law that would complicate and impede enforcement. As one example, the statute does not even attempt to clearly distinguish line employees from senior management employees because no statute could do so adequately given the tremendous complexity of American corporate structures. In the absence of a clear statutory definition, defendants could tie prosecutors in knots with claims that in the context of their corporation, they played a line, and not a senior management, role. In the end, the negotiators compromised on a provision that attempts to protect line employees only from prosecutions for negligent violations. Under the Act, all employees can be held liable for knowing and willful violations.

Who Is A Designated Representative?

Both the statute and regulations contain definitions of a "designated representative." Under the statute, the term means:

> [A] responsible person or official authorized by the owner or operator of a unit to represent the owner or operator in matters pertaining to the holding, transfer, or disposition of allowances allocated to a unit, and the submission of and compliance with permits, permit applications, and compliance plans.

42 U.S.C. § 7601(26).

The regulations add the concept that designated representatives' actions "legally bind" owners and operators, defining the term as follows:

> [A] responsible natural person authorized by the owners and operators of an affected source and of all affected units at the source, as evidenced by a certificate of representation submitted in accordance with subpart B of this part, to represent and legally bind each owner and operator, as a matter of federal law, in all matters pertaining to the Acid Rain Program. Whenever the term "responsible official" is used in part 70 of this chapter, in any other regulations implementing title V of the Act, or in a State operating permit program, it shall be deemed to refer to the "designated representative" with regard to all matters under the Acid Rain Program.

Subpart A, § 72.2, Definitions (emphasis added).

It is an historic and well-established tradition of American law that representatives of potentially liable parties are not generally held accountable for the actions they either advise their clients to take or assist their clients in implementing. But the combined forces of a growing antipathy toward lawyers and the scandals that have wracked the savings and loan industry have combined to produce a new trend of enmeshing legal representatives in the liability net when they advise and participate in their clients' illegal acts. As we shall see shortly, the acid rain regulations also appear to follow this trend, holding designated representatives fully "responsible" -- that is, liable -- not just for communicating with EPA, but for every activity that they communicate. EPA promises not to routinely prosecute "DRs" as they are known colloquially, although as mentioned earlier, these promises provide scant legal solace to those targeted in an enforcement action.

Who Is A Person?

Last but not least, we have the statutory definition of a "person," important only for the purposes of criminal prosecutions under the law. The original House version of the Clean Air Act said that, except for the crime of negligent endangerment, the term "person" would not include "an employee who is carrying out his normal activities and who is acting under orders from the employer." See House bill, § 601(h). The Department of Justice reacted very strongly to this provision, arguing that it had the potential to immunize employees from liability and remove any incentive for them to cooperate with the government. As with the definition of "operator," the compromise contained in the final law protects employees carrying out normal activities and following orders only to the extent that their violations are not "knowing and willful." See 42 U.S.C. § 7413(h).

Who Is Liable for What: The Relationship between Owners and Operators

The acid rain title of the new Clean Air Act addresses virtually all of its mandates to "owner(s) or operator(s)" and occasionally to either "owner(s) and operator(s)" or the "designated representative of owner(s) and operator(s)." Thus, section 405(a)(1) entitled simply "Applicability," states:

> The owner or operator of any unit operated in violation of this section shall be fully liable under this Act for fulfilling the obligations specified in section 411 of this title (imposing excess emissions penalties).

42 U.S.C. § 7651d.

The common sense reading of the use of the disjunctive "or" in this context is that the legal mandate at issue applies to either the owner or the operator, but not to both. The problem with this common sense reading is that the statute never specifies which category -- owner or operator -- takes precedence in the event of an enforcement action. As a result, EPA can argue fairly convincingly that it should be able to pick either one to prosecute or it will be faced with a situation where the parties attempt to shirk liability by claiming that EPA can only pursue an entity no longer in business. However, although EPA may have a reasonable argument that it should be able to pursue, in its discretion, either the owner or the operator, it arguably does not have a statutory leg to stand on in arguing that it should be allowed to pursue both categories of parties, holding them all jointly liable for any violation.

In the "core" acid rain regulations proposed for comment in December 1991, EPA attempted just such a power grab, announcing that it viewed owners and operators as jointly and severally liable under the new law. For those unfamiliar with the concept of joint and several liability because you have thankfully escaped a Superfund prosecution, such liability means that the government can hold each individual party liable for the full costs or damages sought by the enforcement action. The unlucky party or parties targeted in this manner must then turn around and sue fellow jointly liable confederates to recover from them a fair "contribution" to the costs or damages already paid to the government. This liability, which is both "joint" -- all parties equally responsible -- and "several" -- each party separately responsible, sets up an extremely potent dynamic where all parties have an incentive both to prevent enforcement action and to turn on each other with a vengeance once it has occurred.

EPA's effort to proscribe joint and several liability provoked a loud outcry from the entire utility industry, especially consumer-owned electric systems concerned about its implications at facilities where they possessed absolutely no ability to exert operational control. The provision eventually got the attention of EPA overseers at OMB and the White House who believed that the Agency had no authority to import Superfund's extremely controversial liability scheme without explicit Congressional ratification -- and, of course, the Clean Air Act Amendments of 1990 contain not even the faintest allusion to this extremely controversial liability standard.

In the face of all this pressure, EPA gracelessly backs down in the final rules, vowing to pursue the issue another day:

> The Agency does not agree that the final rule should exempt minority owners from liability but does agree that all provisions in the proposal that expressly establish joint and several liability ... should be removed. The question of the liability of a specific owner and operator is best left to case-by-case determination in the context of enforcement against specific violations, rather than being resolved in the abstract in a rulemaking.
>
> On the one hand, various sections of title IV impose obligations on owners and operators without distinguishing between majority and minority owners or owners that are not operators. ... [B]y virtue of an ownership interest in a business or property, an owner may exercise influence over operation of a facility and help foster compliance with environmental laws. This may be true even if the owner cannot exercise unilateral authority or significant control over operations. It is important to encourage oversight of activities at one's business or property and discourage tacit approval or willful ignorance of illegal activities that threaten the environment.
>
> On the other hand, the Agency does not blindly enforce against all parties regardless of their level of awareness, control, and responsibility for violations of the Act. EPA focuses enforcement efforts on those parties most truly culpable for violations.

Preamble to the Final Rules, pg. 72-31 of the 10/23/92 version.

The bottom line? EPA may try to bring a case against minority owners at some future time, basing the prosecution on a joint and several liability theory, if it believes that such parties are "truly culpable" for the violations. Failure to inquire about the state of compliance -- what EPA calls "tacit approval" or "willful ignorance" -- may constitute "true culpability" in EPA's view. The success of such an exercise will undoubtedly depend on the facts surrounding the violation and therefore the court's attitude toward the accused. In the meantime, minority owners are well-advised to evaluate environmental conditions and risks at their affected units, especially if there is already some reason to suspect that compliance problems could arise (e.g., a past history of violations or a current dearth of operational allowances).

The Role of the Designated Representative

As for the third important category of potentially liable parties, the designated representative, as mentioned earlier, these individuals are clearly "responsible" for making all submissions to EPA, including permits, and responding to all inquiries and demands made in turn by the Agency. Such individuals must sign a certification that they possess

authority to act on behalf of "owners and operators" and they must certify that the statements contained in the submission are truthful. They are therefore clearly liable for both civil and criminal penalties if those statements later turn out to be false.

How far the designated representative's liability for actual violations goes remains somewhat ambiguous. In response to comments, EPA deleted the term "designated representative" from the definitions of "owner" and "operator" in the final rule, supposedly so that the regulations could not be read to impose coextensive liability on "DRs," as they are known in the lexicon of the program. EPA also states in the preamble to the final "core rules" that the "responsibilities of a designated representative will be narrower than those of an operator." (See Preamble to the Final Rules, pg. 72-21 of the 10/23/92 version.) While these two clarifications are helpful, they may not provide much comfort to a designated representative enmeshed in a messy enforcement action. Consider the following deliberately ambiguous statement, also from the preamble to the final rules, describing when EPA will in fact prosecute designated representative:

> As a general matter, EPA expects that its civil and administrative enforcement actions under the Acid Rain Program usually will focus on the owners and operators ... . [However] designated representatives also have responsibilities under the Act and would be liable for violations of those responsibilities ... including, for example, holding and transfer of allowances ... and submission of and compliance with permits and compliance plans and related documents ...
>
> It is EPA's statutory interpretation that a designated representative is not liable for acts or omissions that are not within the scope of his responsibility as designated representative. Under the Act, owners and operators shall be fully liable for the emission limitations ... and monitoring requirements ... for an affected unit and are responsible for operating the unit in compliance with those requirements. A designated representative would not be subject to liability for a unit's noncompliance with those requirements, except to the extent that the designated representative is an owner, an operator, or has control over the operation of the affected unit, or has been authorized by the owner or operator to ensure compliance with those provisions.

Preamble to the Final Rules, pp. 72-32 and 72-33 of the 10/23/92 version.

In other words, designated representatives are fully and unequivocally responsible for permit compliance. And, of course, permits generally include monitoring requirements and emissions limitations. But, generally, owners or operators will really be responsible for monitoring and emissions limits, and designated representatives will not be responsible,

unless the owners and operators delegate this responsibility to their designated representatives, in which case the designated representatives will be responsible. Perhaps the two obvious conclusions from all of this are, first, that we will never really know what EPA intends until it brings some high profile enforcement actions and, second, that designated representatives would be well served to write their contracts of employment very, very carefully.

GENERAL CIVIL AND CRIMINAL ENFORCEMENT

The changes in EPA's general enforcement authorities which were made by the 1990 Clean Air Act Amendments are profound and were a direct response to the perception that the enforcement structure in the Act was, in the words of one commentator, "outmoded" and "cumbersome" and deprived EPA of the "strong and varied enforcement arsenal" included in more up-to-date federal environmental statutes. See Roady article cited earlier, at 21 ELR 10196. Examples of the shortcomings that frustrated EPA and the Department of Justice were the absence of effective administrative authority for EPA to order the payment of penalties without going to court and the requirement that EPA provide any source deemed in violation of the Act with a 30-day "grace period" in which to achieve compliance and avoid imposition of a penalty. The government also wanted the Act's criminal penalties upgraded from misdemeanors to felonies in most cases, as Congress had done with other federal environmental statutes throughout the 1980s. In addition to federal enforcement officials' concerns, Congress was also faced with demands by state enforcement agencies and the environmental community to strengthen and clarify the Act's citizen suit provisions, especially with respect to citizens' ability to sue over past violations that had ceased before the case was filed.

All of these proposals engendered considerable controversy among the industries regulated by the Act and a fierce battle was waged to blunt their impact as they were written into law. With a few notable exceptions, these efforts were unsuccessful and federal, state, and environmental advocates successfully achieved their goals. The new law's enforcement provisions escalate slowly but steadily from the administrative assessment of civil penalties, to judicial imposition of such penalties, to the criminal prosecution of corporations and individuals. The statute establishes criteria for penalty assessments, permits the payment of awards to informants assisting a government prosecution, and requires an opportunity for public comment on settlements negotiated by

the government. There are provisions authorizing EPA to issue emergency orders and citizens to file private attorney general actions to enforce the law.

Administrative Enforcement

Under Sections 113(a) and (d) of the new law, EPA may issue an administrative order against "any person" which both requires compliance and assesses a civil administrative penalty of $25,000 for each day of violation, but this authority is limited to cases where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months before the case is filed, unless EPA and the Department of Justice "jointly" determine that these limitations can be exceeded. See 42 U.S.C. §§ 7613(a) and (d). (Any such joint determination is not subject to judicial review.)

Administrative penalties can only be assessed following a notice and a hearing on the record, with opportunity to present defense witnesses and to cross examine prosecution witnesses. All orders must state with "reasonable specificity" the nature of the violation and specify a "reasonable" time period within which compliance must be achieved, not to exceed one year after the order is issued. Administrative orders issued by EPA over the protests of the defendant may be appealed to a federal district court within 30 days after the order becomes final. The Act instructs the courts not to set aside or remand an administrative order unless (1) the record lacks "substantial evidence" supporting the finding of a violation or (2) the compliance portion of the order or the penalty assessment constitutes an "abuse of discretion." These standards mean that as a practical matter, the government must grossly mishandle a case in order to lose on appeal.

Any person who fails to comply with an administrative order must pay, in addition to the original penalty: (1) interest on the penalty, (2) a nonpayment penalty of 10 percent, and (3) the government's "enforcement expenses," including attorneys fees and costs.

Field Citation Program

In addition to the authority to assess penalties administratively, the new law also gives EPA authority to initiate a "field citation program" regarding "appropriate minor violations." See 42 U.S.C. § 7613(d)(3). Field citations may assess penalties not to exceed $5,000 for each day of violation and recipients of such citations may request a hearing on the citation. Such hearings are not subject to the rights of advance discovery of the government's case, cross examination of adverse witnesses, and a full opportunity to

present a defense, but must instead merely provide a "reasonable opportunity to be heard and present evidence." Field citations challenged by the defendant may be appealed to federal district court in the same manner and under the same standards as apply to regular administrative penalty orders.

Civil Judicial Enforcement

EPA also has authority to file a civil action in federal district court seeking a permanent or temporary injunction and assessing civil penalties up to $25,000 per day for each violation. See 42 U.S.C. § 7413(b). There are no limits on the amount of penalties that may be sought in such cases, which may be filed in the district where the violation occurred (or is occurring), or where the defendant either resides or has its principal place of business.

Interestingly, if the defendant successfully defeats the government's case and the court finds the prosecution was "unreasonable," the court may require the government to pay the defendant's attorney and expert witnesses fees.

Criminal Penalties

Civil liability under the Clean Air Act can perhaps best be characterized as "strict" or "no fault" liability -- if the government catches you acting or failing to act in a manner that violates the regulations, you are liable and it does not matter whether you negligently or willfully undertook the course of action that landed you in trouble. Of course, the obviousness of the violation and the degree of your carelessness in committing it are factors the government always considers in deciding how much to assess in penalties. But as a threshold matter, these factors do not determine your guilt.

In contrast, the Act's criminal provisions depend upon determinations of the degree of culpability, applying markedly different punishments to conduct that is "negligent" versus conduct that is "knowing and willful." As mentioned in the introduction to this paper, knowing violations of requirements and prohibitions are punishable by fines and up to five years in prison (see 42 U.S.C. § 7413(c)(1)), while knowing false statements, failures to notify or report, or falsification of monitoring results can receive fines and up to two years in prison (see 42 U.S.C. § 7413(c)(1)). Persons who knowingly fail to pay a federal fee can be fined and imprisoned for up to one year (see 42 U.S.C. § 7413(c)(3)).

As has been done in other major federal environmental laws such as the Clean Water Act and the Resource Conservation and Recovery Act, the new Clean Air Act also makes it a crime to act in a way that threatens human life or health. Persons who negligently release "into the ambient air" any hazardous air pollutant or extremely hazardous substance and, as a result, negligently place another person in "imminent danger" of death or serious bodily injury are punishable by a fine and up to one year imprisonment (see 42 U.S.C. § 7413(c)(4)). While one year may not sound like a long time for threatening another person's life, keep in mind that criminal violations are traditionally defined as willful, deliberate acts. The concept that one could be sent to prison merely for carelessness is relatively innovative and Congress may not have felt comfortable throwing the book, so to speak, at such offenders.

This analysis is supported by a closely-related provision of the law which allows up to 15 years in jail and a fine of up to $1 million per violation for knowing releases of hazardous air pollutants or extremely hazardous substances into the ambient air if the person also knows at the time that the release places another person in imminent danger of death or serious bodily injury (see 42 U.S.C. § 7413(c)(5)). In determining whether the defendant had requisite knowledge, the statute instructs the judge or jury that the defendant is responsible for "actual awareness or actual belief" and that knowledge possessed by another person may not be attributed to the defendant. However, the statute explicitly permits the consideration of "circumstantial evidence," including evidence that the defendant took affirmative steps to be shielded from "relevant" information.

The statute provides one affirmative defense to prosecution for knowing endangerment in addition to defenses available to all defendants in federal criminal prosecutions: the free consent of the person placed in danger as long as the conduct alleged to be criminal was a reasonably forseeable hazard of an occupation, business, profession, medical treatment, or scientific experiment.

All of the criminal penalties explained above are automatically doubled for a second conviction of the same offense.

Penalty Assessment Criteria

In assessing both civil and criminal penalties, the statute instructs EPA and the courts to take into consideration ("in addition to such other factors as justice may require") the following factors:

- size of the business;

- o the defendant's full compliance history and "good faith" efforts to comply;
- o duration of the violation;
- o previous payment of the penalties for the same violation;
- o the economic benefit of noncompliance; and
- o the seriousness of the violation.

EPA's track record in applying these factors is discussed below.

Awards for Informants

The new law authorizes EPA to pay an award of up to $10,000 to any person who furnishes information or services leading to a judicial or administrative penalty or a criminal conviction. Federal, state, and local government officials are not eligible for such awards.

Public Participation

EPA must publish a Federal Register notice soliciting public comment on any consent order or settlement agreement at least 30 days before such settlements are either final or filed with a court. EPA and DOJ shall "promptly consider" any written comments received and may withdraw from the settlement if the comments warrant.

Emergency Orders

Upon receipt of evidence that a pollution source or combination of sources is presenting an "imminent and substantial endangerment" to either public health or welfare, or to the environment, EPA may bring suit in federal district court to immediately restrain any person causing or contributing to the pollution. If "prompt" protection is not achievable through court action, EPA may issue an administrative order containing such relief which becomes effective upon issuance. However, an administrative order expires within 60 days unless a court order reinforcing it is obtained.

Citizens' Suits

The Clean Air Act contains a citizens' suit provision allowing any person to sue in federal district court to enforce its requirements. Such suits may be brought against "any person" (including the United States) alleged to be in violation of any emission standard,

emission limitation, permit, or order. Suit may also be brought against EPA for failure to carry out a statutory mandate. Sixty days prior notice to the defendant is required in most cases. Penalties assessed in such cases must be deposited in a special fund in the United States Treasury or, if ordered by the court, may be used for "beneficial mitigation projects" which are consistent with the Clean Air Act and enhance public health or the environment.

SPECIAL ACID RAIN ENFORCEMENT PROVISIONS

The general enforcement provisions of the Clean Air Act apply to a wide variety of potential violations that can be committed by the owner or operator of an affected unit because such units must continue to comply with the emissions limitations and continuous emissions monitoring provisions of their normal permits at the same time that they must also possess enough allowances to operate the unit under the new acid rain requirements. In effect, the statute establishes two parallel, yet distinct, regulatory schemes: traditional permitting and the acid rain allowance system.

The acid rain title contains two specific enforcement provisions of its own, the first of which establishes a $2,000/ton "excess emissions" penalty for allowance shortfalls, while the second ensures that each missing allowance also counts as a single, full-fledged violation of the law's general enforcement provisions. This second provision, which has been consistently overlooked in the commentary written since the 1990 Amendments were enacted, means that missing allowances can become a staggering expense should EPA decide to utilize all of the weapons in its enforcement arsenal. Details concerning these provisions and a hypothetical illustrating their potential impact follow.

Excess Emissions Penalties

Section 411 of the law, 42 U.S.C. § 7651j, provides that a penalty of $2,000 for each ton of excess emissions is automatically payable to EPA, without the Agency having to give the owner or operator any written demand. Penalty payments are due within 60 days of the end of the year in which the excess emissions occurred, and interest is charged on late penalty payments.

In addition, owners or operators of units where emissions occurred are liable to offset the excess by an equal tonnage amount in the following calendar year, or such longer period as EPA prescribes. Owners or operators must submit a plan for achieving these

offsets at the same time that they pay the penalty -- 60 days after the end of the calendar year in which the excess emissions occurred.

The final acid rain "core rules" contain specific requirements for offset plans. The rules divide such plans into two categories: (1) those that specify deducting allowances immediately, and (2) those that specify deducting allowances at a later date. The first category may be immediately approved by EPA as an amendment to the unit's permit and requires no public comment. For plans in the second category -- proposing offsets later in the year or in a subsequent year, the public will be given an opportunity to comment on the proposal. Further, the only acceptable reason for delaying offsets until a date more than one year from the year in which the excess emissions occurred is that earlier deductions would interfere with electric reliability. If a unit has had excess emissions for more than two years in a row, the plan must also include information on how the excess emissions occurred and what measures are being taken to prevent them in the future.

Double Dip Penalties

The acid rain title's provision entitled "Enforcement" states:

> In addition to the other requirements and prohibitions provided for in this title, the operation of any affected unit to emit sulfur dioxide in excess of allowances held for such unit shall be deemed a violation, with each ton emitted in excess of allowances held constituting a separate violation.

42 U.S.C. § 7651m (emphasis added). This provision means that EPA has the authority to assess -- in addition to an automatic penalty of $2,000 -- $25,000 for each ton of excess emissions could be assessed $25,000 for each day that the excess lasted. If the excess tonnage also happens to exceed the permit limitations applicable to the unit, an additional $25,000 per day for that violation could be assessed, although such penalties probably would not be calculated on a per ton basis.

Hypothetical

Take the unit mentioned at the outset of this paper which falls 1,000 allowances short for 100 days. Excess penalties of $2,000 per ton, or $2 million, would be payable within 60 days after the year in which the excess occurred. The utility would also be obligated to provide 1,000 in offsetting allowances. Ordinary civil penalties of $25,000 per allowance per day could also be assessed, for a total per allowance of $2.5 million and an obviously absurd but still theoretically possible grand total of $2.5 billion. Lastly, if the

1,000 in excess tons also violated the emissions limit established in the unit's permit, a penalty of $2.5 million ($25,000 per day) could be assessed.

We turn next to EPA's actual practices in assessing penalties under the Clean Air Act.

EPA PRACTICE IN ASSESSING CIVIL PENALTIES UNDER THE CLEAN AIR ACT

The last four years have seen a renewed emphasis on enforcement by EPA and the Department of Justice. Hobbled by a budget that leaves it with the same effective purchasing power as it had in the early 1970s, EPA has had little choice but to emphasize enforcement as it tries to both toughen and sharpen an image tarnished badly by the Reagan years. In the three years from fiscal year 1988 to 1990, EPA collected 54 percent of all the civil penalties assessed in its 21-year history. The simple fact is that enforcement, especially in relation to regulatory or grant programs, is an inexpensive way to inform both the public and the regulatory community that the nation's Environmental Protection Agency is on the job trying to protect the environment.

EPA has issued an elaborate series of guidance documents explaining the policies and criteria it applies in preparing penalty assessments. These documents, while full of disclaimers that they do not in any way limit the Agency's statutory authority, are generally followed fairly carefully by enforcement personnel and, upon receiving a notice of violation, defense counsel's first move should be to independently calculate the appropriate penalty under applicable guidance.

In 1984, EPA issued a general Policy on Civil Penalties covering the assessment of penalties under all of the statutes it administers, and this guidance is supplemented by specific guidance documents tailored to the goals of each statute. The general policy establishes three goals for penalty assessment: (1) deterrence, (2) fair and equitable treatment of the regulated community, and (3) swift resolution of environmental problems.

By deterrence, EPA means deterring both the defendant and industry as a whole from committing any further violations. The deterrence factor includes both a "benefit" and a "gravity" component.

By benefit, EPA means that it intends to recover any economic benefit the defendant achieved from the violations, thereby returning the defendant to the same economic situation it would have been in had the violations not occurred. EPA calculates this factor by looking at both the costs avoided by the violations (e.g., buying additional

allowances) and the value of delaying payment of those costs (e.g., how much use of the money that would have been necessary to buy allowances was worth to the defendant). EPA has even developed a computer model called "BEN" (short for benefit) to produce such calculations.

Although the recovery of economic benefit can involve significant sums, if all EPA did was to recover that benefit, effective deterrence would not be achieved. Especially in situations where the cost of compliance is high, industry could decide to defer those costs in a bad year, knowing that the worst that could happen would be eventual payment, hopefully when financial conditions have improved.

To prevent this type of calculation, EPA includes the so-called "gravity" component which penalizes the defendant depending on the seriousness of the violation. Violations that result in releases of pollution into the ambient air cost significantly more than recordkeeping violations under this calculation.

The second goal of penalty assessment -- fair and equitable treatment of the defendant -- involves EPA consideration of such factors as the defendant's ability to pay; the degree to which the violation resulted from willful misconduct, as opposed to negligence; the defendant's compliance history; and the nature and extent of its cooperation with the government. Because this goal is very important to the calculation of penalties, and is used to diminish the punitive aspect of penalties, wise defendants and their counsel go to great lengths to demonstrate their willingness to cooperate with the government, even to the extent of voluntarily turning themselves in rather than waiting to be caught. Cooperation is especially important for publicly-owned electric systems. Public power begins the enforcement process with a small but significant advantage over private industry because it is a sister government entity from EPA's perspective. But this advantage can be easily squandered by actions perceived as non-cooperative during settlement negotiations.

The third goal of the general policy -- swift resolution of environmental problems -- involves reduction of the punitive, or gravity, component of penalties where the defendant has already instituted remedies for its noncompliance. On the other hand, EPA will increase the gravity component where violations continue throughout the negotiation period. Shrewd defendants remedy violations as soon as possible after the initial inspection has brought them to light. They also try to develop ongoing environmental assessment and compliance programs as an alternative to cash payments.

The general policy advises EPA enforcement officials to first calculate a preliminary "deterrence amount": economic benefit plus gravity component. The policy then instructs that this figure be adjusted -- usually downward -- by the so-called "fair and equitable" factors. Once negotiations have begun, defendants can win a second downward adjustment by either developing their case that they lack ability to pay, or offering the government assurances that they have programs in place to guarantee future compliance, or both.

The specific penalty guidance that applies to stationary sources under the Clean Air Act was issued on October 25, 1991 and is entitled Clean Air Stationary Source Civil Penalty Policy. The policy requires use of the most aggressive assumptions in calculating the initial penalty so that EPA is never in the position of asking too little at the outset, especially in administrative (as opposed to judicial) cases. Eight appendices supplement the policy; the most relevant to utilities is an appendix specifying how to calculate penalties for violations of the prevention of significant deterioration (PSD) regulations for new sources.

If your utility is ever cited for a violation of the Clean Air Act, the most important steps you can take are to stop the violations immediately and to engage competent defense counsel. The key to surviving the enforcement process is to understand the penalties policies thoroughly and to develop a defense strategy that convinces the government you are repentant and cooperative while at the same time aggressively advocating the reduction of the initial penalties assessment.

Each year, EPA publishes a National Penalty Report presenting enforcement statistics for the major statutes it implements. The following table is based on that Report and summarizes civil judicial penalties for Stationary Source violations for the period from 1988 through 1991:

Civil Judicial Penalties For Stationary Source Violations

Fiscal Year	Total Dollars	Total Cases w/ Penalties	Average Penalty	Median Penalty	Highest Penalty
1988	8,914,384	71	125,555	30,000	1,750,000
1989	4,668,171	67	69,674	32,253	600,000
1990	5,936,281	59	100,615	48,000	687,224
1991	7,346,481	64	114,789	48,250	1,500,000

As the table demonstrates, 1988 marked a surge in the number of enforcement actions; in addition, EPA recovered its highest judicial penalty that year. The effect of this high penalty is to skew the average penalty for 1988. The "median penalty" column tells the true story of enforcement trends: Stationary Source penalties have increased by 60 percent in just four years and undoubtedly will continue to rise.

In addition to the National Penalty Report, EPA publishes an annual Penalty Management Report providing data on enforcement activity within each region. Region V, covering Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin consistently produces the highest number of enforcement actions and the highest penalty amounts. The following table, which was compiled from EPA data, shows some typical enforcement results for stationary sources in Region V.

CONCLUSION

Even before passage of the 1990 Clean Air Act Amendments, EPA was emphasizing enforcement as never before. The new law strengthens exponentially the variety and severity of EPA's enforcement tools, and in no substantial area is this more obvious than acid rain.

Owners, operators, an designated representatives -- as well as line employees -- are potentially exposed to devastating corporate and personal liability, and EPA has clearly signaled its intention to pursue enforcement beyond the traditional level of the majority owner and senior management. Minority owners must become concerned about compliance as they never have before and all future power supply contracts must be negotiated with liability considerations firmly in mind. EPA has already succeeded in its goal of creating the atmosphere of fear and uncertainty that inspires those sitting on the sidelines to share responsibility for the daily operation of the pollution source.

Clean Air Act Violations
Region V

Facility	Date Filed	Penalty
GAF Chemicals Corp., Madison, Wisconsin	05/20/92	79,028
Marathon Oil Co., Detroit, Michigan	05/20/92	25,566
Sun Refining Marketing, Cleveland, Ohio	05/20/92	42,886
Central Illinois Public Service Co., Quincy, Illinois	05/20/92	30,000
Signode Corp., Chicago, Illinois	05/20/92	40,698
The UNO-VEN Co., Chicago, Illinois	05/20/92	910,000
Gardean Environmental Co., Chicago, Illinois	05/20/92	92,200
Hennepin Generating Station, Hennepin, Illinois	05/20/92	25,000
H.P. Smith Inc., Bedford Park, Illinois	06/16/92	40,210
Asbestos Abatement Inc., Lansing, Michigan	06/16/92	54,600
Meyercord International Inc., Northbrook, Illinois	07/01/92	200,000
Illinois Tool Work Inc., Frankfort, Illinois	07/01/92	200,000
Phoenix Chemical Co., East Dubuque, Illinois	07/06/92	200,000
Kerr Group Inc., Los Angeles, California	07/30/92	130,312
Meyer Steel Drum Inc., Chicago, Illinois	08/31/92	42,029
The G & S Asphalt Co., Marshall, Illinois	09/02/92	55,460
AM International Inc., Mount Prospect, Illinois	09/08/92	57,186
Packaging Corporation of America, Evanston, Illinois	09/08/92	40,696
Heekin Can Inc., Alsip, Illinois	09/08/92	26,000
Kalamazoo Regional Psychiatric, Kalamazoo, Michigan	09/25/92	176,760
B.P. Oil Company, Lima, Ohio	09/30/92	200,000
Clark Oil & Refining Co., Blue Island, Illinois	09/25/92	50,000
Mobil Oil Corporation, Joliet, Illinois	09/30/92	200,000
Marathon Oil Company, Indianapolis, Indiana	10/02/92	180,060
Total Violations: 24	Total Penalties:	$ 3,098,671
	Average Penalty:	129,111.19
	Median Penalty:	57,186
	Modal Penalty:	200,000

RESOLUTION 94-234

WHEREAS, the City of Grand Island's Platte Generating Station and C.W. Burdick Power Station are subject to regulation under the Clean Air Act, as amended;

WHEREAS, The Clean Air Act, as amended, requires a Designated Representative and an Alternate Designated Representative be appointed on behalf of the City of Grand Island;

WHEREAS a form of agreement has been agreed to between the City of Grand Island and Gary R. Mader as Designated Representative and Timothy G. Luchsinger as Alternate Designated Representative;

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the Mayor and City Clerk be, and hereby are, authorized to sign on behalf of the City of Grand Island, the agreement by and between the City and Gary R. Mader and Timothy G. Luchsinger whereby Gary R. Mader agrees to be the City's Designated Representative and Timothy G. Luchsinger agrees to be the City's Alternate Designated Representative pursuant to the Clean Air Act, in accordance with the terms of the agreement.

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Adopted by the City Council of the City of Grand Island, Nebraska, September 12, 1994.

_____

Cindy K. Cartwright, City Clerk

Approved as to Form ▼ _____
September 9, 1994 ▲ City Attorney

ATTACHMENT 5

RESOLUTION 2007-326

WHEREAS, in 1990, Congress instituted an expanded program of emission control, monitoring and reporting for major fossil burning facilities with passage of the Clean Air Act Amendments of 1990; and

WHEREAS, because the City of Grand Island is the operator of a fossil fueled power plants, the City is bound under the regulations of the Clean Air Act Amendments of 1990; and

WHEREAS, as a requirement of the Clean Air Act Amendments of 1990, an appointment of a "Designated Representative" is necessary to have control and responsibility for the enacted regulatory compliance process. It is further required that an "Alternate Designated Representative" be appointed to act in the event the Designated Representative is not available; and

WHEREAS, it would be in the best interest of the City to appoint Utilities Director Gary Mader as the Designated Representative and Assistant Utilities Director Timothy Luchsinger as the Alternate Designated Representative.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the appointments of Utilities Director Gary R. Mader as Designated Representative and Assistant Utilities Director Timothy G. Luchsinger as Alternate Designated Representative for the City of Grand Island, in compliance with the Clean Air Act and Environmental Protection Agency regulation are hereby approved.

BE IT FURTHER RESOLVED THAT the Mayor is hereby authorized and directed to execute the Representation Agreement on behalf of the City of Grand Island.

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Adopted by the City Council of the City of Grand Island, Nebraska, December 18, 2007.

_____

Margaret Hornady, Mayor

Attest:

_____

RaNae Edwards, City Clerk

Approved as to Form ¤ _____
December 13, 2007 ¤ City Attorney