



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

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OFFICE OF  
GENERAL COUNSEL

MEMORANDUM

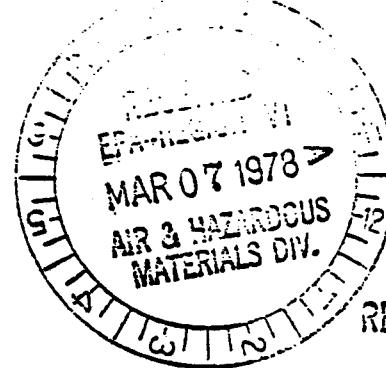
SUBJECT: Guidance to States for Meeting Conflict of Interest Requirements of §128

FROM: David O. Bickart *David Bickart*  
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TO: Regional Air Directors

The Clean Air Act Amendments of 1977 created new conflict of interest requirements for members of certain state boards and executive agencies which are to be incorporated into State Implementation Plans by August 7, 1978. Section 128 of the Act as amended provides that all SIPs shall, at a minimum, require that a majority of the members of any state board or body approving permits or enforcement orders under the Act represent the public interest and not derive any significant portion of their incomes from persons subject to permits or enforcement orders. Also, all such members and heads of executive agencies with similar powers must be required to adequately disclose any potential conflicts of interest.

The enclosed letter and the suggested definitions attached to it are intended to provide guidance to the States concerning the requirements of §128. Insofar as possible, given the differences between the statutes, the suggested definitions are consistent with the conflict of interest regulations under §304 of the FWPCA (40 CFR §124.94). In view of the fact that many state legislatures are meeting now, you may want to expedite distribution of the letter and suggested definitions to the appropriate state authorities.



MAR 10 1978

Several issues have arisen which are not included in the letter for direct communication to the States, but which you may need to be aware of in counseling States on compliance.

Timing: Section 128 requires that all SIPs include conflict of interest provisions by August 7, 1978. There is some question whether EPA will be prepared to promulgate regulations by that date for all States which have not adopted approvable SIP revisions on time. The Agency will, however, require adequate conflict of interest provision in the 1979 SIP revisions.

Permits and enforcement orders issued by non-complying boards: The question has been raised whether permits and orders will be approvable by EPA and enforceable in the courts if they are issued by state boards the members of which do not meet the requirements of Section 128. In the absence of any specific provision to the contrary in the Act, the Agency may eventually take the position that such permits and enforcement orders would be both approvable and enforceable. However, you might want to alert States to the possibility that permits or enforcement orders issued by non-complying state boards after August 7, 1978, may be subject to challenge in the courts.

Representing the public interest: The suggested criteria for determining whether board members represent the public interest are all phrased in negative terms. While we believe the suggested standards meet the minimum level of stringency required by Section 128, the States are authorized to adopt more stringent regulations. Some States may want to consider adopting additional provisions for selection of some number of board members from lists submitted by state conservation leagues, by a panel of representatives of environmentally concerned public interest groups, or by some similar mechanism.

If, other problems arise which are not addressed in this guidance, please contact Roberta Baruch of my staff (FTS 755-0788).

Model Letter from Regional Offices to States

Re: Conflict of Interest Requirements for Certain State Boards and Executive Agencies

The Clean Air Act Amendments of 1977 added to the Act Section 128, which sets out new conflict of interest requirements for certain state boards and executive agencies. Section 128 is somewhat similar to §304(i)(2)(D) of the Federal Water Pollution Control Act (FWPCA, as amended December 28, 1977) and is generally aimed at assuring that decisions to issue permits or enforcement orders neither be nor appear to be influenced by the private interests of individual decision makers.

More specifically, Section 128 provides that by August 7, 1978, all State Implementation Plans (SIPs) shall require that a majority of the members of any state body issuing permits or enforcement orders under the Clean Air Act (1) represent the public interest and (2) not derive any significant portion of their incomes from persons subject to such permits or orders. In addition, the SIPs must require that all members of such boards and the heads of executive agencies with similar powers disclose any potential conflicts of interest. Finally, Section 128 provides that States may adopt more stringent conflict of interest requirements if they wish, and that EPA shall approve any such requirements if submitted as part of a SIP.

In many States the composition of state boards affected by Section 128 is determined by statute, and legislative action may be required to comply with the new requirements. Executive orders may also be necessary in some cases. In view of the fact that many state legislatures are meeting now, EPA is providing this guidance so that state agencies and legislatures can begin work immediately on any legislative or other actions necessary to implement Section 128.

Attached to this letter is a set of suggested definitions for key phrases appearing in Section 128. The suggested definitions are offered for two purposes: (1) to assist the States in identifying the principal issues that must be addressed in proposed SIP revisions, and (2) to suggest provisions that EPA would view as approvable elements of a SIP revision. To the extent possible, the suggested definitions are consistent with those appearing in the conflict of interest regulations issued under §304(i)(2) (D) of the FWPRA (40 CFR §124.94). Differences between the two sets of definitions reflect statutory differences, including the more stringent eligibility requirements of the Water Act and the inclusion of disclosure requirements in the Air Act.

The Agency recognizes that States have a variety of procedures and special concerns that may warrant differing approaches to implementation of Section 128. Accordingly, this guidance is not intended to suggest that all SIPs must

include the suggested definitions verbatim, or even that definitions per se must be included in the SIPs. In general, however, EPA views the substance of the suggested definitions as representing the minimum level of stringency necessary to meet the requirements of Section 128.

As indicated above, any State is free to adopt more stringent conflict of interest provisions than those required by Section 128. If you are in doubt as to the appropriate standards called for by your State's particular scheme, erring on the side of tighter rather than looser controls may avoid the necessity of SIP disapproval and the imposition of federal requirements that may not be best suited to the needs of your program.

If you have questions not answered by this letter, please do not hesitate to contact [redacted] or Roberta Baruch (202-755-0788), Office of the General Counsel at EPA Headquarters in Washington, D.C.

Suggested Definitions

- (a) "Board or body" includes any individual, agency, board, committee, council, department, or other state, local, or regional instrumentality authorized to approve permits or enforcement orders under the Clean Air Act, in the first instance or on appeal.
- (b) "Majority of members" means a majority of all members of a board or body having or sharing authority to approve permits or enforcement orders under the Clean Air Act, and a majority of members making up any panel of fewer than all members (including panels of a single member) where individual permits or orders are considered by such a panel.
- (c) "Represent the public interest" means does not own a controlling interest in, have 5% or more of his or her capital invested in, serve as attorney for, act as consultant for, serve as officer or director of, or hold any other official or contractual relationship with any person subject to permits or enforcement orders under the Clean Air Act or any trade or business association of which such a person is a member.
- (d) "Significant portion of income" means 10 percent or more of gross personal income for a calendar year, including retirement benefits, consultant fees, and stock dividends, except that it shall mean 50 percent <sup>or more?</sup> of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangement. For purposes of this section, income

derived from mutual-fund payments, or from other diversified investments as to which the recipient does not know the identity of the primary sources of income, shall be considered part of the recipient's gross personal income but shall not be treated as income derived from persons subject to permits or enforcement orders under the Clean Air Act.

(e) "Persons subject to permits or enforcement orders under this Act" includes any individual, corporation, partnership, or association who holds, is an applicant for, or is subject to any permit, or who is or may become subject to any enforcement order under the Clean Air Act, except that it does not include (1) an individual who is or may become subject to an enforcement order solely by reason of his or her ownership or operation of a motor vehicle, or (2) any department or agency of a state, local, or regional government.

(f) "Potential conflict of interest" includes (1) any income from persons subject to permits or enforcement orders under this Act, and (2) any interest or relationship that would preclude the individual having the interest or relationship from being considered one who represents the public interest.

(g) "Adequately disclosed" means explained in detail in a signed written statement prepared at least annually and available for public inspection.