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# United States Senate

WASHINGTON, DC 20510-3603

June 20, 2001

The Honorable Christine Todd Whitman  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

Dear Administrator Whitman:

Thank you for your May 14, 2001 response to the Inhofe letter, regarding all requests for information under § 114 of the Clean Air Act and Notices of Violation (NOVs) issued to the energy sector. The information submitted was very useful and has provided us with a greater appreciation of the impact of the New Source Review program on our energy sector.

We have serious concerns that continuation of the prior Administration's New Source Review ("NSR") enforcement policies may interfere with our nation's ability to meet our energy and fuel supply needs. For that reason, we were very pleased to see that the President has included in his energy policy an Environmental Protection Agency (EPA) and Department of Energy review of the NSR program and a Department of Justice (DOJ) review of the NSR enforcement initiative.

Prior to the Inhofe letter, we knew that New Source Review was a major issue for the energy sector. However, as a result of the Inhofe letter, a number of companies from all over the country have contacted us to discuss their experience in responding to EPA's information requests, the first step EPA takes in initiating an NSR enforcement action. The information included in your response to the Inhofe letter and the information received from these companies has raised a number of issues for which we would appreciate additional information. Therefore, we respectfully request the following information:

- Information and examples submitted to our offices by companies over the past several weeks suggests that the response provided by EPA does not include all of the § 114 requests issued by EPA since 1998. Specifically, our offices have become aware of facilities that have received § 114 requests without any official cover letter. These requests were apparently not included in the information sent to Sen. Inhofe. Please

explain why these requests were excluded from the information presented to Sen. Inhofe's office. In addition, please explain how often the Agency submitted § 114 requests without the appropriate cover letter, and the reason for this apparent informality.

- Additionally, it has come to our attention that, in some cases, the § 114 requests came in the form of a photo-copied document with the name of one facility scratched out and the name of another facility penciled in. We are interested in knowing how many § 114 requests are issued in this manner and the reason for using photo-copied requests with new names penciled in. Please include a copy of each of these requests and the names of the individuals in both the regional offices and headquarters who signed off on the § 114 request in this form. Are § 114 requests usually allowed to be issued in this manner?
- According to individual companies that contacted our offices, some § 114 requests asked for information which had already been produced. We are interested in understanding further how often this occurs and the rationale for asking for the same information twice. In instances where the same information is requested again, does the company have to provide the same documentation again or can the company simply refer to a previous submission?
- Similarly, some companies have also stated that § 114 requests referred to attachments that were not provided. We would request your staff to review the § 114 requests sent out over the past two years to determine how often the § 114 requests refer to attachments that are not provided.
- In addition, we are puzzled by the fact that upon receiving these § 114 requests, some company officials received follow-up calls apologizing for the § 114 request, requesting that the recipient "ignore" or "put on hold" the request. Please tell us how many of these calls were made and the reason for the retraction. What are the legal implications for the company of having received a § 114 request followed-up by a "disregard call?" Is the company still obligated to respond to the request? If not, how does the company adequately document that the § 114 letter is not being pursued? In light of these incidents, please provide us with information on any requests for information under section § 114, which have been submitted to a facility and, subsequently, withdrawn for any reason, including the date of the submission and withdrawal of the § 114 request.
- Given these incidents, we would also appreciate information on the procedure that EPA personnel must follow before issuing information requests under section § 114 of the Clean Air Act. Please describe this procedure and all cases of a violation of such a procedure since 1998, including the name of the facility affected, the date of the violation of the procedure, the names and titles of any federal employees involved, the supervisors of the federal employees involved, and the nature of the specific violation of the procedure. What quality controls procedures does EPA have in place to assure compliance with these procedures?

- Unfortunately, because of the fear of retribution, many of the parties receiving these § 114 requests have requested that we not disclose their names. None-the-less, we find it very troubling that we did not see any of these § 114 requests included in EPA's May 14, 2001 response. In your testimony before the Senate Committee on Environment and Public Works on May 15, 2001, you responded to inquires on these issues by stating that the problem is being addressed. Please explain to us what actions you are taking to assess the magnitude of these potential procedural missteps and the measures that you are planning to take to address the problem.
- In addition, we would also like information on all requests for information since 1998, which may not explicitly cite section § 114, but derive the power of the requests from this section.
- With regard to the NOV's and complaints submitted, please provide us with a list of the types of projects cited in the NOV's and complaints.
- Finally, we would appreciate an explanation as to why EPA apparently chose not to comply with the requirements of the Paperwork Reduction Act (PRA) when it issued these § 114 requests to the electric utility companies and refineries. As you maybe aware, under the PRA and the Office of Management and Budget's (OMB's) implementing regulations, an agency such as EPA is not to conduct or sponsor the collection of information without first consulting with and obtaining approval from OMB. Under the PRA, this consultation and approval process is intended to ensure that, among other things, the agency's information collection request is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

As you maybe aware, the PRA applies to all information collection requests consisting of essentially identical questions or requests for information imposed on ten or more persons. OMB's implementing regulations further specify that any collection of information addressed to all or a substantial majority of an industry is presumed to involve ten or more persons. The information you previously submitted to Sen. Inhofe indicates that this threshold requirement has been met with respect to both the electric utility and refinery sectors.

Since the § 114 requests you previously provided to Sen. Inhofe do not display OMB control numbers, should we assume that EPA has concluded that those requests are not subject to the PRA? If so, what is the basis for EPA's conclusion? We are aware of the fact that the PRA makes an exception for requests for information submitted during the conduct of a civil action to which the United States or an agency thereof is a party, as well for requests made in conjunction with an administrative action or investigation involving an agency against specific individuals or entities. But if this is the provision of the PRA on which EPA is relying, we must remind you that OMB's implementing regulations clarify that this exception applies only after a case file or equivalent is opened with respect to a particular party. Are we to understand

that EPA has opened a case file for each and every one of the electric utility companies and refineries to which EPA has submitted § 114 requests? If so, we would appreciate your formally confirming this for us. If not, then the question remains, what is the basis for EPA's apparent conclusion that the PRA does not apply? In particular, we direct your attention to the provision of the PRA that specifies that the PRA *does* apply to the collection of information during the conduct of *general* investigations undertaken with reference to a category of individuals such as a class of licensees or an entire industry.

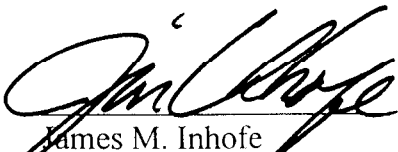
We respectfully request this information no later than July 13, 2001. A timely response is requested, so that we can assess the impact of these enforcement policies on our energy supply. We trust that producing such information will bring to light some interesting facts for your review of the New Source Review program.


These examples concern us because they suggest a sloppy and poorly managed enforcement initiative with little regard to the impact on companies that often have to unearth and certify up to 20 years of information in 30 days. Additionally, it costs a small facility hundreds of man hours and hundreds of thousands of dollars to comply with these information requests. Because these companies face the full force of the law and must respond to any information request, the government must bear the responsibility of being judicious in undertaking these requests.

Therefore, we further request a full investigation by the EPA's Inspector General, involving procedural errors and mismanagement. Additionally, we request that you share this information and any findings with DOJ, so DOJ can use this information for their review. We will also be requesting that, during the NSR enforcement review called for by the National Energy Plan, DOJ take a serious look at the extent to which these and other procedural errors exist within the NSR enforcement initiative.

We understand that you are still working hard to place your team together, but we firmly believe that these issues must be investigated immediately. If you have any questions, please feel free to contact us or have your staff contact Louis Renjel with Sen. Inhofe's staff.

Sincerely,

  
James M. Inhofe  
United States Senate

  
Arlen Specter  
United States Senate

cc: The Honorable Richard Cheney, Vice President of the United States of America  
The Honorable John Ashcroft, Attorney General of The United States of America  
The Honorable Mitchell Daniels, Director of the Office of Management and Budget, The White House