



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D.C. 20548

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B-205755

December 6, 1982

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

Dear Mr. Chairman:

In your letter of November 23, 1981, you requested, among other things, that the General Accounting Office provide you with an opinion concerning the legality of a waiver under section 211(f) of the Clean Air Act, 42 U.S.C. § 7545(f), (Supp. I, 1977) granted by the Environmental Protection Agency (EPA) to Anafuel Unlimited (Anafuel). You asked that we respond to six specific questions concerning various aspects of this waiver.

For the reasons discussed below, we find:

- (1) The action of the EPA Administrator in granting a waiver to Anafuel, notwithstanding staff recommendations that the waiver request be denied, was within the authority granted the Administrator by section 211(f)(4) of the Clean Air Act.
- (2) The legislative history unequivocally supports the conclusion that the Administrator can grant a waiver conditionally or unconditionally.
- (3) Referral of such waiver requests to the Office of Management and Budget for review would normally be required by Executive Order 12291, February 17, 1981 (46 F.R. 13193, February 19, 1981), but not when the time needed for review would cause a conflict with a statutory deadline for responding to the request.
- (4) The extension of the statutorily required 180-day deadline for granting or denying a waiver request was not specifically authorized by the statute. However, granting the conditional waiver did not harm the party to be protected by the deadline and resulted in the imposition of requirements on Anafuel to provide specified environmental safeguards.
- (5) EPA's action in providing internal EPA memoranda to Anafuel could be interpreted as being within the ambit of the preferential treatment prohibition in the agency's ethical standards. Because we cannot determine the nature and extent of information customarily disclosed orally by EPA to waiver applicants, however, we are not in a position to render an opinion on the propriety of EPA's actions.

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(6) Delay in publishing notice of the waiver application in the Federal Register appears to be attributable to Anafuel's own reluctance to furnish test samples until appropriate safeguards had been worked out. In any case, the statute and regulations do not require publication by any specific date.

#### BACKGROUND

Section 211(f) of the Clean Air Act, 42 U.S.C. § 7545(f), enacted as part of the 1977 amendments to the Act, Pub. L. No. 95-95, 91 Stat. 685, 763, August 7, 1977, prohibits or limits the use of certain new fuels or fuel additives in light duty motor vehicles. Section 211(f)(4) of the Act, 42 U.S.C. § 7545(f)(4), provides for waivers by the Administrator of EPA of these prohibitions and limitations, if the manufacturer applying for the waiver can establish that the particular fuel or fuel additive will not cause or contribute to the failure of any emission control device or system installed on vehicles or engines to achieve compliance with applicable emission standards. If the Administrator does not act to grant or deny an application within 180 days after its receipt, the application must be treated as if it had been granted.

On February 20, 1981, Anafuel submitted a waiver application for a proprietary fuel known as "Petrocoal." Notice was published in the Federal Register on April 13, 1981, 46 F.R. 21695, acknowledging receipt of the application and providing public notice of the application's receipt. The 180-day review period provided by section 211(f)(4) began to run when the application was received and was scheduled to expire on August 19, 1981. The proposed decision was apparently submitted to the Office of Management and Budget (OMB) for review pursuant to the terms of Executive Order 12291, on August 12, 1981, 7 days before the expiration of the statutorily mandated 180-day overall review period. The 180-day deadline initially was extended until September 18, 1981, with the consent of Anafuel and EPA, at the request of OMB which needed additional time to review EPA's proposed action. The deadline subsequently was extended until September 28, 1981, again with the consent of Anafuel and EPA. Although staff recommendations had favored denial of the waiver application, it was granted on September 28, 1981, subject to certain stipulated conditions.

#### DISCUSSION

Your letter of November 23, 1981, contained six questions which will be discussed in detail below, although not in the sequence in which they originally appeared. From discussions with your staff, we know that you

are greatly concerned about the sequence of events described above which led to the two extensions of the 180-day review period, and therefore we are responding first to your question on that issue.

Your Question 3

"Just prior to the 180-day statutory period, EPA submitted the proposed waiver decision to OMB \* \* \* and, at the request of OMB, on August 18 EPA extended the 180-day period for a decision on the waiver application. The extension was with the consent of the applicant. In reply to my questions, the EPA contends that OMB can, under the Executive Order, require an agency to 'refrain from publishing its rule.'

"(a) Does the E.O. require submittal of such waivers to OMB?"

In our opinion, timely submission to OMB of section 211(f) waiver requests was required by Executive Order 12291, once EPA determined that its waiver requests fit the criteria for submission set forth in the Order. The Order establishes procedures for oversight of the regulatory process, among other things, and applies to "rules" and "regulations" setting forth agency statements "of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency." Order, section 1(a). Section (b)(3) of the Order requires that:

"For all rules other than major rules [those having a major effect on the economy], agencies shall submit to the Director, at least 10 days prior to publication, every notice of proposed rulemaking and final rule."

In its published "Guidelines for Section 211(f) Waivers for Alcohol-Gasoline Blends," 43 F.R. 24131, June 2, 1978, EPA has stated that "any waiver granted to one manufacturer will be applicable to any manufacturer similarly situated." EPA additionally states that "in the spirit of contributing to overall Executive Branch accountability," it has "preferred to submit decisions" for OMB review where there in fact may be general applicability beyond the specific decision.

Although the product in question in the Anafuel matter is proprietary and a final determination of adverse effect on emission control

systems could only be made on the basis of tests of the particular proprietary fuel submitted by the applicant, any standards established by EPA's Anafuel waiver determination would apply equally to other producers with similar products.

Accordingly, we think that section 211(f) waiver requests do, as a general proposition, fall within the criteria of the Executive Order for mandatory submission to OMB. However, section 8(a)(2) of the Executive Order exempts an agency from complying with this requirement when OMB review would conflict with a statutory or judicial deadline. The timing of such submissions and the propriety of extending the statutorily required 180-day time limit for EPA action in order for OMB to complete its review are discussed in (b) and (c) below.

"(b) Can OMB order an extension in light of the provisions of section 211(f) of the Act which require a decision within 180 days or there is automatic approval?"

Authority to order the extension of the 180-day time limit congressionally mandated by section 211(f)(4) is not provided by the Executive Order and could not, in any case, supersede the plain requirement of the statute. Your staff has informed us that EPA asserts section 3(f)(2) of the Order as legal authority for postponing the Anafuel waiver decision once that decision was submitted to OMB for review. Section 3(f)(2) states:

"(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a)(2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file." (Emphasis added.)

As mentioned above, section 8(a)(2), to which the requirements in section 3(f)(2) are subject, exempts from coverage of the Order regulations subject to statutory or judicial deadlines to the extent that consideration or reconsideration by OMB would conflict. Section 8(a)(2) provides in pertinent part as follows:

"(a) The procedures prescribed by this Order shall not apply to:

\* \* \* \* \*

"(2) Any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order, provided that, any such regulation shall be reported to the Director together with a brief explanation of the conflict, the agency shall publish in the Federal Register a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by the statutory or judicial deadlines." (Emphasis added.)

According to our information, the Anafuel waiver request was submitted to OMB for review on August 12, 1981, and on its request form, EPA indicated that there was an August 19, 1981, statutory deadline affecting issuance. This allowed a maximum of only 7 days for OMB review before the 180-day provision was automatically activated. EPA's late submission of the Anafuel case was not in compliance with section 3(c)(3) of the Order, which mandates transmission of all (non-major) final rules to the Director at least 10 days prior to publication, and appears to be precisely the kind of situation which section 8(a)(2) was intended to cover. The near expiration of the 180-day statutory time limit at the time the waiver request was submitted to OMB created the kind of situation which did not permit EPA or OMB to "adhere to the requirements" of the Order without violating a statutory deadline. By the terms of the Order itself, therefore, the OMB review requirement was not applicable.

"(c) Does the Act contemplate that extensions with the consent of the applicant of the 180 [day] statutory period are proper, particularly when other interested parties have not agreed to the extension or even been consulted?"

We have examined the legislative history of section 211(f) to establish the intent of Congress in selecting this particular time limit for EPA action. The history of this provision sheds no light on the reasons for selecting a 180-day limit whether it was intended to be rigidly enforced, or whether extensions were to be countenanced. The history is also silent with regard to the role of interested parties in the waiver procedure.

A provision substantially similar to section 211(f) first appeared in section 36 of S. 252, 95th Cong., 1st Sess., as reported by the Senate Committee on Environment and Public Works. In the report accompanying the bill, with respect to the 180-day limit, the committee stated only:

"The waiver process of subsection (3) was established \* \* \* so that the prohibition could be waived, or conditionally waived, rapidly \* \* \*.

\* \* \* \* \*

"The Committee was mindful that the Administrator could choose not to act on the waiver application within the 180 days provided for such action." S. Rep. No. 95-127, 95th Cong., 1st Sess. 91 (1977).\* \* \*"

The conference committee on the bill ultimately enacted (H.R. 6161, 95th Cong., 1st Sess.,) adopted the substance of the waiver provisions of S. 252 as they were reported, including the 180-day limit for EPA action. The report of the conference committee is silent with regard to this provision, however. H.R. Rep. No. 95-564, 95th Cong., 1st Sess. 160-162 (1977).

A review of congressional debate on the 180-day limitation yields similar results. There is nothing pertinent in the record on this specific provision of the Act. The pertinent language in section 211(f) states:

"\* \* \* If the Administrator has not acted to grant or deny an application under this paragraph within one hundred and eighty days of receipt of such application, the waiver authorized by this paragraph shall be deemed to be granted."

This is in contrast to the more flexible provision enacted with respect to the time allowed for the approval or denial by the Secretary of Health and Human Services of a petition for the issuance of a regulation prescribing the conditions under which a food additive may be safely used. Section 409 of the Federal Food, Drug and Cosmetic Act, as amended, 21 U.S.C. § 348, states in pertinent part:

"(c)(2) The order required by paragraph (1)(A) or (B) of this subsection shall be issued within ninety days after the date of filing of the petition, except that the Secretary may (prior to such ninetieth day), by written notice to the petitioner, extend such ninety-day period to such time (not more than one hundred and eighty days after the date of filing of the petition) as the Secretary deems necessary to enable him to study and investigate the petition."

The purpose of section 211(f), although unstated, appears to be to prevent inaction or unwarranted delay by EPA in processing waiver applications by requiring a relatively speedy response by EPA to all

waiver applications. This is enforced by the provision for automatic approval of an application if the Administrator fails to act.

Information furnished by your staff indicates that EPA and OMB are not solely responsible for the delay in completing action on this application. Actions by Anafuel caused several delays in EPA's testing of the evidence submitted by Anafuel in support of its claim that Petrocoal will not harm vehicular emission control mechanisms. At one point, Anafuel would not provide EPA with the composition of the fuel because of its concern that this information remain confidential. This issue was resolved, but more time was spent in negotiating other technical matters. Finally, there was a significant delay in getting usable samples of the fuel to the organizations prepared to carry out necessary analytical and performance testing.

Given these facts, it is not surprising that Anafuel acceded to the request for an extension of the statutory deadline. If it had refused to agree, Anafuel would have forced EPA to act precipitously to avoid triggering the automatic approval provision. Most staff recommendations up to that time favored denial of the waiver (a fact known to Anafuel), and it is possible that would have been the Administrator's decision had she in fact responded within the 180-day period. Had the Administrator elected to deny the waiver request on the ground that the applicant's delays left insufficient time for a judicious determination to be made within the statutory time limit, in our view this action would have been wholly warranted. Ultimately, in any case, after a relatively brief delay, Anafuel obtained the outcome it sought (although the waiver was conditional).

It is apparent that the statutory deadline was enacted to protect applicants from dilatory actions of the regulatory agency. In this instance, Anafuel contributed to the delay and was quite willing to extend the deadline. Therefore the granting of the conditional waiver did not harm the party to be protected and resulted in the imposition of requirements on Anafuel to provide specified environmental safeguards to protect the public. To negate the terms of the waiver conditions at this late date, thus permitting Anafuel to avoid taking necessary precautions to which it has already agreed, appears to be an unwise and unnecessary action. In order to avoid any question as to the conditions under which such extensions of the deadline may be made in the future, however, the Congress may wish to consider an amendment to the statute authorizing a brief extension of the deadline under defined conditions.

Your Question 5

"Does GAO agree that EPA may condition the granting of a waiver?"

Yes, we agree that the Act contemplates the granting of conditional waivers under section 211(f)(4). The legislative history on this question is clear, as can be seen from the following language in the Senate report on S. 252:

"\* \* \* The Administrator's waiver may be under such conditions, or in regard to such concentrations as he deems appropriate consistent with the intent of this section. If the conditional waiver is granted, the manufacturer of the fuel additive, or a fuel using such additive, may only distribute such fuel or fuel additive under the stated conditions." S. Rep. 95-127, 95th Cong., 1st Sess. 91 (emphasis added).

As we noted earlier, the waiver provision of the Senate bill was adopted by Congress essentially unchanged and without further comment. This language is, therefore, unequivocal evidence that Congress contemplated the use by EPA of conditional grants of waivers under the Act.

Your Question 6

"In determining the legality of the waiver, please consider the recommendations of denials by the responsible EPA officials and whether the applicant met the statutory burden."

As part of our review of the actions taken by EPA in processing the Anafuel waiver application, we reviewed several draft decisions and memoranda in which EPA staff recommended denial of the waiver. We considered internal EPA memoranda, provided by your staff, in which questions were raised about the adequacy of Anafuel's information and data to support the applicant's statutory burden of satisfying the Administrator that Petrocoal would not damage emission control mechanisms. We also reviewed the memoranda and letters from Anafuel and others on both sides of this issue.

It is obvious from these documents that key EPA staff were not convinced that Anafuel had met its burden of proof. In addition, in EPA documents that described the options available to the Administrator in deciding the waiver request, denial of the waiver was the favored option.

In an early analysis of test data provided by Anafuel, numerous potential emission and materials compatibility problems were described, and the memorandum stated:

"The statistical weakness of much of the emission information reported above, and the remaining concern about materials compatibility lead to the the conclusion that we need more information before we can fairly and accurately characterize the emissions and materials compatibility effects of this fuel \* \* \*.

\* \* \* \* \*

"Additional information, especially test data from General Motors and Ann Arbor, will independently confirm or deny the conclusions reached by Anafuel, and significantly expand the collection of data upon which a decision could be based." Information Memorandum, undated, from Acting Assistant Administrator for Enforcement, to the Administrator.

The additional information eventually was obtained, and in the EPA staff's view, it did not confirm the conclusions reached by Anafuel. In a Briefing Memorandum dated August 5, 1981, on the subject of the imminent waiver decision, the director of the relevant program office recommended that the Assistant Administrator for Air, Noise and Radiation deny the waiver. All of the problems which showed up after the preliminary analysis of Anafuel's data were, in the staff's opinion, still present and unresolved, and several new ones had arisen such as poor driveability and separation of the blended contents of the fuel (Briefing Memorandum pp. 3-5). The possible options were discussed as follows:

"1) Deny the waiver. Based on the data, this is clearly the most viable option. It is consistent with our decisions, and is clearly the best decision environmentally.\* \* \*

"2) Not act on the waiver. The waiver request will be automatically granted on August 19 if the Administrator does not act at all. \* \* \* The rationale for a non-decision in the case of gasohol was that its usage would be small, less than a tenth of one percent. For methanol blends [such as Petrocoal], no such 'negligible' type of rationale is present.\* \* \*

"3) Grant a conditional waiver. EPA could mold some conditions into a grant. Some which make sense are (i) limit Petrocoal sales to areas with CO problems (and no oxident problems), or (ii) limit Petrocoal to high altitude

areas. \* \* \* These conditions are of questionable legality. While EPA has conditioned waivers in the past, it has always been based on ASTM standards for gasoline, and not based on geographical considerations.

"4) Grant a waiver for Petrocoal with a lesser amount of alcohol. While lower alcohol levels would undoubtedly ameliorate some of Petrocoal's problems, it is of questionable legality to grant a waiver for something other than what was applied for.\* \* \*

"5) Deny the waiver request but grant a limited test exemption to Anafuel. \* \* \* Such an exemption could allow a certain amount of Petrocoal to be sold annually. The effect would be to allow Anafuel to market its gasoline in its local area and meet its current needs, but would probably squelch Anafuel's real desire to invest in mass production of methanol. There is some question as to whether this is legal \* \* \*." Briefing Memorandum, August 5, 1981, 8-9.

Attached to this memorandum was a draft notice of denial of the waiver, which was based on the staff's belief that Anafuel had failed to meet its burden of proof to establish that Petrocoal would not harm emission systems.

Subsequently, in an Action Memorandum dated August 12, 1981, the Assistant Administrator recommended a denial of the waiver. The five options discussed in the Briefing Memorandum were listed, with the following comment.

"Only the first two options, denial or no action are really viable. The third through fifth options [including granting a conditional waiver] are really different ways of attempting to grant some conditional, strained waiver to avoid the negative effects of a denial of a methanol blend. These are all in some way somewhat outside the law and impractical." Action Memorandum, p. 2.

This recommendation of denial for failure to meet the statutory burden was concurred in by EPA's Offices of General Counsel and of Policy and Resource Management.

Finally, in memoranda prepared to summarize arguments favoring Anafuel's request, received from OMB and an Anafuel contractor during the extension period, the EPA staff rebutted each argument presented. The following statement was made by EPA staff in a September 15, 1981 memorandum to the Assistant Administrator: "After consideration of all the new observations made, we would not modify our previous recommendation to deny the waiver request."

This recommendation was rejected by the Acting Administrator, and instead a conditional waiver was granted on September 28, 1981. As discussed at page 8, above, Congress clearly contemplated the granting of conditional waivers under section 211(f)(4). See S. Rep. 95-127, 95th Cong., 1st Sess. 91. The conditions include certain specific, minimum concentrations and ratios of methanol to other products in the finished fuel, a requirement that Petrocoal meet recognized fuel volatility specifications, and a provision specifically making Petrocoal subject to all Federal regulations applicable to unleaded gasoline.

In our view, the action of the Acting Administrator in granting a conditional waiver, notwithstanding advice from the staff to deny any waiver, was authorized by section 211(f)(4).

That section provides:

"The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibition established under paragraph (1) or (3) of this subsection \* \* \* if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof \* \* \* will not cause or contribute to a failure of any emission control device or system \* \* \* to achieve compliance by the vehicle with the emission standards with respect to which it has been certified \* \* \*." Clear Air Act, section 211(f)(4), as added by Pub. L. No. 95-95, section 220 (August 7, 1977) (emphasis added).

The record before us contains conflicting evidence concerning this decision, and we do not know whether the Offices of EPA which had favored denial of the waiver application finally concurred in the grant of the waiver or in the conditions included in it. Nevertheless, we cannot state that the Administrator totally disregarded clear evidence, or acted arbitrarily without any support at all, since the conditional waiver option had been discussed in the August 5 briefing memorandum as a possible ("some [conditions which] make sense"), if not favored, course of action.

We note that the Administrator's decision has been challenged by the Motor Vehicle Manufacturers Association (MVMA), which has filed an informal request for reconsideration with EPA, and a Petition for Review with the Court of Appeals for the District of Columbia Circuit. MVMA asserts, among other things, that in granting the waiver, EPA ignored data indicating emissions and performance difficulties and that the conditions in the waiver do not solve these problems. We have been advised that the court action has been stayed pending a decision on the reconsideration request before EPA, and that during this time, Anafuel is free to market Petrocoal pursuant to the terms of the conditional waiver. As of December 3, 1982, EPA had not issued a decision on this request, which is the first ever received by EPA in connection with a section 211(f) waiver.

Your Question 1

"The application was filed in February, but a notice thereof was not issued until April 1981. Please ascertain the reasons for the delay and what, if any, impact this delay had on the matter."

It appears, on the basis of our analysis of the files in this case, and of informal advice from EPA staff, that the principal reason for the delay in publishing formal notice of EPA's receipt of the waiver application was Anafuel's claim of confidentiality for the contents of Petrocoal. EPA needed to test, and to have others test, the fuel in order to obtain independent data on which to base its decision on the waiver, but Anafuel wanted to maintain confidentiality as to the specific mix of ingredients in the fuel. Protracted negotiations resulted in an arrangement under which Anafuel would supply fuel for testing provided that prospective testers executed confidentiality agreements with Anafuel. Until this arrangement was arrived at and test samples were available, EPA believed it was premature to notify potential testers that the application had been received. During this time, EPA also was attempting to obtain additional test results from Anafuel.

It seems likely that the difficulty in providing test samples of Petrocoal to parties interested in testing the fuel contributed to the need for an extension of the 180-day review period as well. In any case, section 211(f) is silent about the time of publication. (For an example of environmental legislation mandating immediate publication of a Federal Register notice of a waiver application, see Toxic Substances Control Act, section 5(h)(6), 42 U.S.C. § 2604(h)(6).)

Your Question 2

"According to an Anafuel letter of August 11, 1981 to EPA, the EPA provided to the applicant internal memoranda and met with the applicant. Mr. Cannon of the EPA confirmed this at our hearing. Please examine the applicable EPA rules and regulations to determine if such actions were proper. This should include an examination of the applicable ex parte rules."

We have examined the documents referred to in your question, including EPA's published Ethical Standards of Conduct for Employees, 40 C.F.R. § 3.103. The internal EPA document referred to is an Action Memorandum recommending that the Administrator deny the Anafuel waiver request, and an attached Briefing Memorandum describing EPA's waiver procedures and setting forth action options, policy and technical concerns and other background information.

We have been informally advised by EPA staff that action and briefing memoranda have not previously been provided to applicants, although the staff's recommendation and reasoning are at times discussed in some detail with applicants. The relevant ethical conduct rules state:

"§3.103 Ethical standards of conduct for employees.

"Each employee shall refrain from any use of his official position which is motivated by, or has the appearance of being motivated by, the desire for private gain for himself or other persons. \* \* \* Pursuant to this policy, each employee will observe the following standards of conduct:

\* \* \* \* \*

"(e) He shall avoid any action, whether or not specifically prohibited by law or regulation (including the provisions of this part), which might result in, or create the appearance of:

- "(1) Using his public office for private gain;
- "(2) Giving preferential treatment to any organization or persons
- "(3) Impeding Government efficiency or economy;
- "(4) Losing his independence or impartiality of action;

"(5) Making a Government decision outside official channels; or

"(6) Affecting adversely the confidence of the public in the integrity of the Government." 40 C.F.R. § 3.103(e)

As indicated, it is our understanding that documents such as the one given to Anafuel are not provided to applicants. Further, the staff recommendations were overruled and the waiver granted only after Anafuel had been given what appears to have been an unprecedented opportunity to study the briefing memorandum and to rebut it in detail in subsequent meetings, with EPA and with other Government officials.

On the other hand, EPA has no published guidelines of which we are aware that outline the proper use of internal memoranda which might have been of assistance to Mr. Cannon. Nevertheless, we think that Mr. Cannon's actions raise a question as to his lack of sensitivity in disclosing internal, confidential material to one applicant and not to others. This could be interpreted as being within the ambit of section 3.103(e)(2), quoted above, which prohibits even the appearance of preferential treatment. On the basis of the information available to us, however, we are not in a position to render an opinion on the propriety of Mr. Cannon's actions, particularly in view of the agency practice of oral discussions with applicants of proposed action on waiver requests, which may disclose essentially similar information. In order to ensure that such questionable acts do not recur, EPA should consider issuing guidance to its employees on the proper handling of internal memoranda.

EPA has published no specific ex parte rules of which we are aware. We note that under the Administrative Procedure Act (APA), 5 U.S.C. § 553, the term "ex parte communications" refers to off-the-record communications where prior notice is not given to "all parties," 5 U.S.C. § 551(14), and the term "party" excludes interested organizations which are not formal parties to the proceedings. 5 U.S.C. § 551(3). Since there were no other formal parties to the Anafuel waiver request proceeding there were no "ex parte communications" within the meaning of the EPA standard.

#### Your Question 4

"On August 21, 1981, a lawyer for the applicant, the applicant's president, and others met with OMB and Office of Science and Technology people to discuss the waiver. On August 25 the applicant's lawyer submitted to an EPA official, Mr. Cannon, an analysis by the applicant's contractor, a memorandum on the August meeting, and a fact sheet. Please examine these and advise whether or not such meetings and related actions are proper and in accord with all applicable rules and regulations."

As you requested, we have examined the documents and actions referred to in your question, and have determined that they are proper and in accord with EPA's ethical standards and guidelines.

There was no impropriety in Anafuel's directly contacting OMB and the Office of Science and Technology, which were reviewing for EPA certain aspects of the waiver application, to present its position to these offices. We are aware of no restrictions on such open contacts.

Similarly, we see nothing improper in Anafuel's submitting its contractor's analysis, or the fact sheet and memoranda you mentioned, to EPA through Mr. Cannon. The only applicable standards or guidelines of which we are aware are EPA's Section 211(f) waiver guidelines, 43 F.R. 24131, June 2, 1978, which recommend that all of an applicant's supporting information be submitted at the same time as its application. These are not requirements, however, and in any event were waived by EPA through its acceptance of subsequent submissions by Anafuel.

As part of its effort to make an informed decision, EPA reviewed technical reports on Petrocoal submitted by General Motors and an EPA testing facility in Ann Arbor, Michigan. We believe that EPA was justified in also accepting and reviewing a technical analysis prepared by Anafuel's contractor, and that this action violated no guideline or regulation of which we are aware.

#### SUMMARY OF MAJOR CONCLUSIONS

On the basis of the foregoing analysis of the various questions raised in your letter of November 23, 1981, we conclude that the Administrator's decision to grant Anafuel a conditional waiver was not arbitrary or capricious, notwithstanding advice from the staff. We also find that while the Clean Air Act does not, by its terms, allow extension of the 180-day time limit for considering fuel additive waiver requests, where the party for whose benefit the deadline was enacted contributed to the delay and willingly consents to an extension of the deadline, we are not required to object to the extension. Moreover, negating the conditional waiver at this time would permit Anafuel to operate without any restrictions at all, which is clearly not in the public interest. We recommend, however, Congressional clarification of the conditions under which an extension may be granted. Finally, the action of an EPA official in providing internal memoranda to Anafuel raised a question of lack of sensitivity in disclosing confidential material to one applicant, in view of the agency's ethical standards against creating an appearance of preferential treatment, and EPA may wish to consider issuing guidelines on the use of internal memoranda.

Sincerely yours,

*for Milton J. Dowler*  
Comptroller General  
of the United States