

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE,)	
)	
Petitioner,)	
)	
v.)	
)	
U.S. ENVIRONMENTAL PROTECTION)	Docket Nos. 94-1273,
AGENCY and CAROL M. BROWNER,)	94-1274, and 94-1276
Administrator, U.S. Environmental)	
Protection Agency,)	(consolidated cases)
)	
Respondents.)	

SETTLEMENT AGREEMENT
BETWEEN THE AMERICAN PETROLEUM INSTITUTE
AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY
IN NO. 94-1273

WHEREAS, the American Petroleum Institute ("API"), petitioner, seeks judicial review under Clean Air Act ("CAA") section 307(b), 42 U.S.C. § 7607(b), of the final rule entitled "List of Regulated Substances and Thresholds for Accident Prevention; Requirements for Petitions Under Section 112(r) of the Clean Air Act as Amended," 59 Fed. Reg. 4478 (Jan. 31, 1994) ("List Rule"), promulgated by the United States Environmental Protection Agency and Carol M. Browner, Administrator (collectively "EPA"), respondents;

WHEREAS, in the preamble and supporting documentation for the List Rule, EPA expressed the intent not to subject crude

oil, gasoline, and certain transportation-related activities to regulation under CAA section 112(r), 42 U.S.C. § 7412;

WHEREAS, API and EPA recognize that, pursuant to sections 311 and 312 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11021 & 11022, local communities receive information concerning flammable hazardous chemicals at oil and gas exploration and production ("E&P") facilities, thereby allowing for appropriate emergency response planning at the local level;

WHEREAS, API and EPA recognize the potential for overlap and confusion concerning the jurisdiction and regulatory responsibility of EPA and of the Department of Transportation ("DOT") regarding pipelines and transportation containers (e.g., tank cars, tank trucks, and intermodal containers) that are not in transportation or storage incident to transportation, within the meaning of 40 C.F.R. § 68.3;

WHEREAS, EPA will coordinate with DOT to minimize overlap and conflict between the programs of the two agencies, and such coordination will be reflected in the regulations and guidance required by CAA section 112(r)(7)(B);

WHEREAS, API and EPA wish to effect a settlement of this matter without expensive and protracted litigation;

NOW THEREFORE, API and EPA hereby agree as follows:

1. API and EPA are the parties to this Settlement Agreement. Except as otherwise provided in this Settlement

Agreement, all terms herein shall be defined in accordance with the Clean Air Act and regulations promulgated under the authority of the Clean Air Act.

2. EPA intends to conduct notice-and-comment rulemaking in accordance with Clean Air Act section 307(d) on the issue of whether 40 C.F.R. part 68 should be amended as follows:

a. to clarify that part 68 does not apply to facilities located on the Outer Continental Shelf;

b. to provide that flammable regulated substances in gasoline used as fuel for internal combustion engines and flammable regulated substances in naturally occurring hydrocarbon mixtures prior to initial processing in a petroleum refining process unit or a natural gas processing plant ("gas plant") need not be included when determining whether a threshold quantity is present at a stationary source;

c. to revise the definition of stationary source to exempt transportation and storage incident to transportation and to clarify that naturally occurring hydrocarbon reservoirs are not stationary sources or parts of stationary sources for purposes of part 68. Exempt transportation shall include, but not be limited to, transportation activities subject to regulation or oversight under 49 C.F.R. parts 192, 193, or 195, as well as transportation subject to natural gas or hazardous liquid programs for which a state has in effect a certification under 49 U.S.C. § 60105;

d. to revise the provisions of 40 C.F.R. 68.115(b)(2) so that, for mixtures that have one percent or greater concentration of a regulated flammable substance, the entire weight of the mixture shall be treated as the regulated substance unless the owner or operator can demonstrate that the mixture does not have a National Fire Protection Association flammability hazard rating of four (4).

3. EPA will use its best efforts to sign a notice of proposed rulemaking on the issues described in Paragraph 2 no later than nine (9) months after the "Approval Date," as defined in Paragraph 6 of this Settlement Agreement. After considering any public comments received, EPA will use its best efforts to sign a notice of final rulemaking on the issues described in Paragraph 2 no later than eighteen (18) months after the Approval Date.

4. The parties may extend the dates set forth in Paragraph 3 or otherwise modify this Settlement Agreement by written stipulation executed by counsel for the parties.

5. The parties agree and acknowledge that final approval of this proposed Settlement Agreement is subject to the requirements of CAA section 113(g), 42 U.S.C. § 7413(g). That subsection provides that notice of this proposed agreement be given to the public, that the public shall have at least thirty (30) days to make any comments, and that the Administrator or the

Attorney General, as appropriate, must consider those comments in deciding whether to consent to this Settlement Agreement.

6. The Administrator shall cause notice of this Settlement Agreement requesting public comment thereon to be forwarded to the Federal Register for publication within 15 days of execution of this Settlement Agreement by the parties. Within 30 days after the close of such public comment period, and after review of any public comments, the Administrator or the Attorney General, or their delegees, as appropriate, shall determine whether to consent to this Settlement Agreement. Unless such consent is withheld, the parties shall promptly thereafter move the Court, based on this Settlement Agreement, to stay further proceedings before the Court until the Settlement Agreement is implemented as provided in Paragraphs 2 and 3 or until further motion to the Court. For purposes of this Settlement Agreement, the date the parties file the finally-approved Settlement Agreement shall constitute the "Approval Date."

7. Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to the Administrator by the Clean Air Act or by general principles of administrative law. Nothing in this Settlement Agreement shall be construed to require EPA to obligate or pay funds or in any other way to take action in violation of the Anti-Deficiency Act or any other applicable appropriations law.

8. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend or revise the regulations identified in Paragraph 2 from time to time or to promulgate superseding regulations.

9. Nothing in this Settlement Agreement shall be construed to limit or modify the applicability of CAA section 112(r)(1), 42 U.S.C. § 7412(r)(1), to any stationary source, as that term is defined in CAA section 112(r)(2).

10. In the event that EPA takes final agency action within the time frames specified in Paragraph 3 that substantially conforms to each item in Paragraph 2, API and EPA shall promptly stipulate to the dismissal with prejudice of API's petition in Case No. 94-1273 in accordance with Rule 42 of the Federal Rules of Appellate Procedure. If EPA amends 40 C.F.R. part 68 in substantial conformance with each of subparagraphs 2(a) through 2(d) of the proposed amendment set forth in Paragraph 2 above, API will not exercise whatever rights it may have to seek review of that amendment pursuant to Clean Air Act section 307, or otherwise.

11. In the event EPA fails to perform its obligations under this Settlement Agreement, API's sole remedy (except as provided in Paragraph 12) shall be the right to reactivate this litigation. API agrees to give EPA thirty (30) days notice prior to exercising its rights under this Paragraph.

12. If EPA's final action under Paragraph 3 does not amend 40 C.F.R. part 68 in substantial conformance with each of subparagraphs 2(a) through 2(d) of the proposed amendment set out in Paragraph 2 above, API may exercise whatever rights it may have to seek review of that final action pursuant to Clean Air Act section 307, or otherwise.

13. Except as expressly provided in this Settlement Agreement, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have. Each party will bear its own costs and attorneys' fees, including but not limited to any costs of monitoring compliance with this Settlement Agreement and participating in the rulemaking proceeding contemplated by this Settlement Agreement.

14. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to bind the respective parties to the terms of this Settlement Agreement, subject to the provisions of Paragraphs 5 and 6.

For the United States Environmental Protection Agency and
Carol M. Browner, Administrator:

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