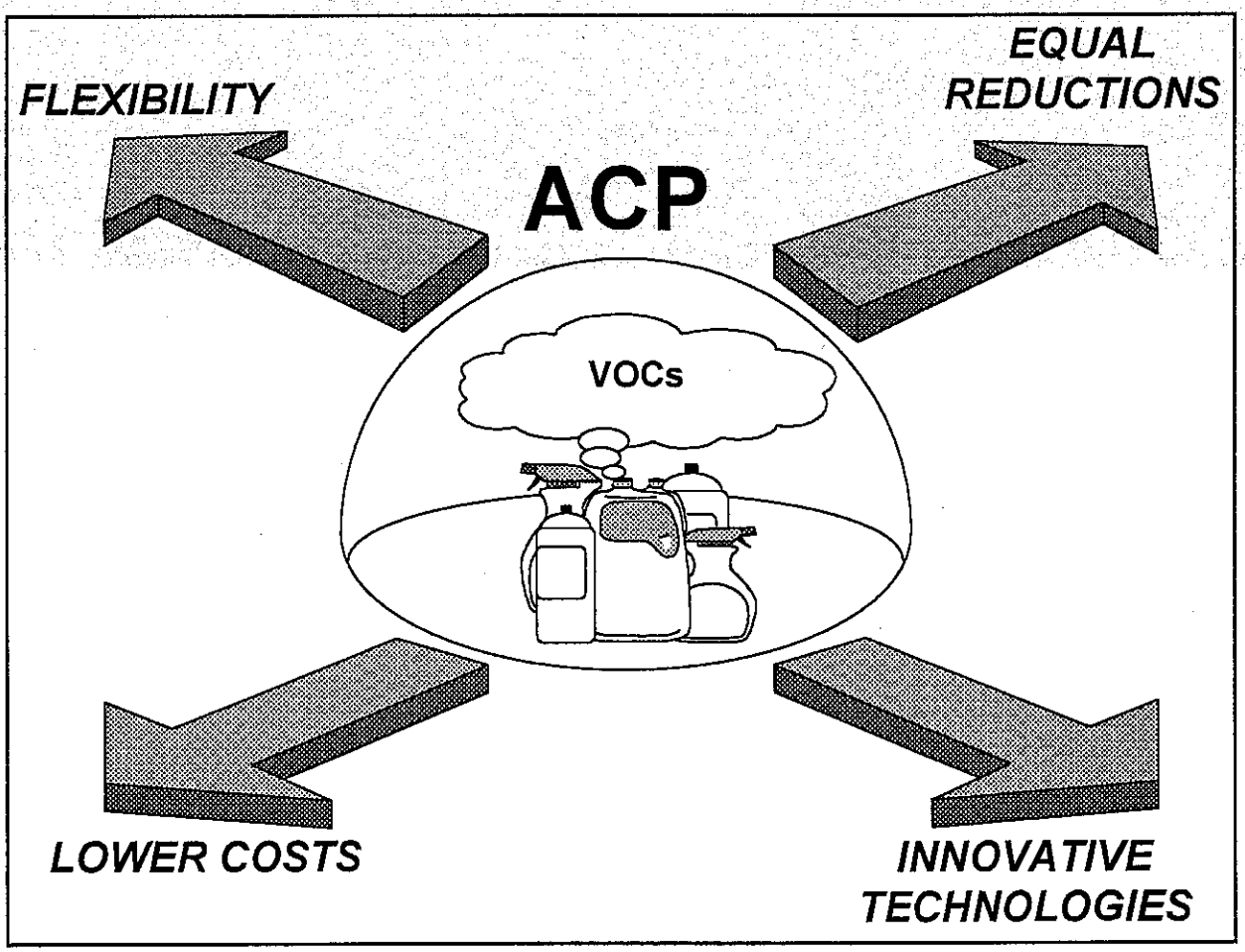
Final Statement of Reasons

for Rulemaking

PUBLIC HEARING TO CONSIDER THE ADOPTION OF THE
ALTERNATIVE CONTROL PLAN REGULATION
FOR CONSUMER PRODUCTS

Scheduled for Consideration: September 22, 1994
Agenda Item No.: 94-9-2



California Environmental Protection Agency

Air Resources Board

State of California

AIR RESOURCES BOARD

Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Responses

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I. INTRODUCTION

On September 22, 1994, the Air Resources Board (the "Board") conducted a public hearing to consider the adoption of the Alternative Control Plan regulation (the "ACP regulation") for consumer products. The ACP regulation is a voluntary regulation that will supplement the existing consumer products regulation (the "consumer products regulation"; Title 17, California Code of Regulations [CCR], sections 94507-94517). The ACP regulation employs the concept of aggregate emission caps or "bubbles" to limit the emissions of volatile organic compounds (VOCs) from products selected by participating manufacturers to the levels that would occur under the existing consumer products regulation. The ACP will supplement the existing regulation as an option to compliance with the VOC standards and the Innovative Products provision. As the third compliance option available to manufacturers, the ACP regulation provides a high degree of flexibility under the emission caps, while preserving the emission reductions in the existing consumer products regulation.

The notice of proposed action originally specified a hearing date of September 22, 1994 at the Board's headquarters in Sacramento, California. However, to accommodate a symposium to discuss future control strategies for consumer products, the hearing was relocated to Los Angeles, California on the originally scheduled hearing date. A notice of change of location was made available to the public on August 26, 1994, was mailed to each of the individuals described in Government Code, section 11346.4(a)(1) through (a)(4) and was published in the California Regulatory Notice Register.

At the hearing, the Board adopted Resolution 94-54, in which the Board approved the ACP regulation. The ACP regulation approved by the Board will be contained in Title 17, CCR, sections 94540-94555. The approved ACP regulation included modifications suggested by staff at the September 22, 1994 hearing. The modified regulation was made available to the public for a 15-day comment period from December 5, 1994 to December 20, 1994 pursuant to Government Code section 11346.8(c). The "Notice of Public Availability of Modified Text" together with a copy of the full text of the regulation with modifications clearly indicated was mailed December 5, 1994 to each of the individuals described in subsections (a)(1) through (4) of section 44, Title 1, CCR.

Based on the comments received during the 15-day comment period, the Executive Officer determined that it was appropriate to make no additional modifications to the regulation. By Executive Order #G-94-059, the Executive Officer adopted the modified regulation. All modifications made to the regulation are discussed in detail in Section III of this Final Statement of Reasons.

A Staff Report was prepared which constitutes the Initial Statement of Reasons for the proposed rulemaking. This Staff Report was released August 5, 1994. The Staff Report is incorporated herein by reference. This Final Statement of Reasons updates this document by identifying and explaining the rationale for the modifications made to the originally proposed text. The Final Statement of Reasons also contains a summary of comments received during the formal rulemaking process and the ARB's responses to these comments.

The Board has determined that the proposed regulatory action will not create costs or savings, as defined in Government Code section 11345.5(a)(6), to any state agency or in federal funding to the state, costs or mandate to any local agency or school district whether or not reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code, or other nondiscretionary savings to local agencies.

In preparing the regulatory proposal, the staff considered the potential economic impacts on California business enterprises and individuals. Overall, the staff expects the regulatory proposal to have beneficial economic impacts as compared to the existing consumer products regulation. Since entry into the ACP program is completely voluntary, the advantages of entering the program will be determined on a case-by-case basis by each manufacturer who wishes to participate. It is therefore reasonable to conclude that individual manufacturers will not enter the ACP program unless they believe their overall compliance costs will be less than or, at most, equal to the costs to comply with the existing regulation.

The staff therefore anticipate that the overall cost-effectiveness for participating ACP manufacturers should be lower than the $0.01 to $1.04 per pound of VOC reduced estimated by staff for manufacturers to comply directly with each of the VOC standards in the consumer products regulation. Similarly, we expect that the total annual cost to the entire consumer product industry, assuming that some manufacturers choose to operate under an ACP, will be lower than the approximate 13 million to 205 million dollars estimated for compliance with the consumer products

regulation. This range reflects the wide range of products and reformulation options available to manufacturers.

The Board has also determined that the proposed regulatory action will not have a significant adverse economic impact on the ability of California businesses to compete with businesses in other states, or on directly affected private persons. In accordance with Government Code section 11346.3, the Board has determined that the proposed regulation should have minor or positive impacts on the creation or elimination of jobs within the State of California, minor or positive impacts on the creation of new businesses and the elimination of existing businesses within the State of California, and minor or positive impacts on the expansion of businesses currently doing business within the State of California. A detailed assessment of the economic impacts of the proposed regulation can be found in the Staff Report.

As explained in the Staff Report, it is possible that some individual businesses (i.e., the competitors of participating ACP businesses) may be adversely affected by the proposed regulatory action, even though the overall economic impact of the ACP regulation will be positive. Therefore the Board has determined that the adoption of the proposed regulation may have a significant adverse impact on some businesses. The Board has also determined, pursuant to Government Code section 11346.5(a)(3)(B), that the regulation will affect small business. The Board has further determined that no alternative was presented or considered which would be more effective in carrying out the purpose for which the amendments were proposed or which would be as effective and less burdensome to affected persons than the adopted regulation.

II. GENERAL RATIONALE FOR THE REGULATION

The Staff Report sets forth the rationale for the proposed regulation. This section of the Final Statement of Reasons briefly summarizes the general rationale.

In 1988, the Legislature enacted the California Clean Air Act ("the Act"), which declared that attainment of the California state ambient air quality standards is necessary to promote and protect public health, particularly of children, older people, and those with respiratory diseases. The Legislature also directed that these standards be attained by the earliest practicable date.

The Act added section 41712 to the California Health and Safety Code, which requires the Board to adopt regulations to achieve the maximum feasible reduction in reactive organic compounds (ROCs) emitted by consumer products ("ROC" is equivalent to "VOC"). As part of the regulatory adoption process, the ARB must determine that adequate data exists for it to adopt the regulations. The ARB must also determine that the regulations are technologically and commercially feasible, and necessary to carry out the Board's responsibilities under Division 26 of the Health and Safety Code.

Two regulations have been adopted by the ARB to fulfill the requirements of Health and Safety section 41712. The ARB approved a regulation for reducing VOC emissions from antiperspirants

and deodorants on November 8, 1989 (the "antiperspirant and deodorant regulation"; sections 94500--94506.5, Title 17, CCR). The ARB also approved a more comprehensive regulation for reducing VOC emissions from 26 other categories of consumer products which was approved by the Board in two phases (the "consumer products regulation"; sections 94507--94517, Title 17, CCR). Phase I of the consumer products regulation was approved on October 11, 1990 and Phase II was approved on January 9, 1992.

The consumer products regulations reduce VOC emissions primarily through traditional "command and control" VOC standards. Under this approach, the regulations specify maximum allowable VOC content limits (by weight percent) for individual product categories. Although the regulations provide flexibility in a number of ways, there is room for providing additional flexibility in order to improve the efficiency of the ARB consumer products program. The purpose of the proposed ACP regulation is to provide additional flexibility and achieve this higher level of efficiency. The ACP regulation is designed to lower manufacturers' overall cost of reducing VOC emissions from consumer products, thereby reducing overall societal cost impacts to consumers, while at the same time achieving emission reductions that are equivalent to the emission reductions achieved by the existing consumer products regulations.

The proposed ACP is a voluntary, market-based regulation which employs the well-established concept of an aggregate emissions cap or "bubble." An emissions bubble places an overall limit on the aggregate emissions from a group of products, rather than placing a limit on the VOC content or emissions from each individual product. Upon implementation of the proposed ACP regulation, consumer product manufacturers will have the flexibility to choose, from the menu of available options, the appropriate combination of available emission reduction programs for its products that will minimize its overall compliance costs.

Manufacturers who voluntarily choose to enter the ACP program would select the products and formulate a detailed ACP bubble program ("ACP plan") for those products. Approval of an ACP plan would be contingent on whether it satisfactorily meets the approval process requirements. An approved ACP plan must demonstrate that the total VOC emissions under the bubble would not exceed the emissions that would have resulted had the products been formulated to meet the VOC standards. In addition, the ACP plan must be based on accurate and enforceable records of ACP product sales in California to ensure that all emission reductions will be real and quantifiable.

Once approved, the manufacturer must sell its products in accordance with the conditions contained within the ACP plan. Under an approved ACP plan, the manufacturer could sell products that exceed the VOC standards specified in the existing regulations, provided that the emissions from these high-VOC products will be sufficiently offset by the emissions from products reformulated to "overcomply" with the VOC standards. Overall, compliance with approved ACP plans will ensure that the total VOC emissions from the selected products will be no greater than the aggregate emissions that would have occurred from those same products had they been reformulated to meet the existing VOC standards.

Finally, it should be noted that the proposed ACP regulation would allow ACPs to include only those products for which VOC standards are specified in the ARB consumer products regulations (section 94509, Title 17, CCR). Antiperspirant and deodorant products would not be allowed to be part of an ACP, because such inclusion is impractical due to the different regulatory structures of the consumer products and antiperspirant and deodorant regulations.

III. MODIFICATIONS MADE TO THE ACP REGULATION

At the September 22, 1994 public hearing, the staff proposed various modifications to the original proposal in order to address the comments of industry representatives and other interested parties. In Resolution 94-54, the Board approved the modifications described below:

A. Section 94542. Definitions Definitions in section 94542(a) were modified to be consistent with the modification to section 94547(c) described below.

B. Section 94546. Violations A new subsection 94546(g) was added to provide an option that may be chosen by manufacturers who meet specified criteria. The option allows manufacturers to establish the number of violations for an exceedance of the ACP Limit, based on an equation which provides for one violation for each 40 pounds of excess emissions. To achieve consistency with new subsection (g), subsection (f) was also modified, and former subsections (g), (h), and (i) were renumbered to (h), (i), and (j), respectively.

C. Section 94547. Surplus Reductions and Surplus Trading A new subsection 94547(c) was added to provide for the issuance of limited-use surplus reduction credits for product reformulations occurring prior to the submittal of an ACP application.

One non-substantive change was also made to the text of the regulation after the close of the 15-day comment period. The reference in the definition of "small business" (section 94542(a)(25) of the regulation) to Government Code section 11342(e), was changed to Government Code section 11342(h) in order to accurately reflect the changes to the APA made by AB 2531 (Stats. 1994, Chapter 1039).

IV. SUMMARY OF COMMENTS AND AGENCY RESPONSES

The Board received written and oral comments in connection with the September 22, 1994 hearing. In addition, the Board received one comment letter during the subsequent 15-day comment period from the Chemical Specialties Manufacturers Association (CSMA) in support of the modifications to the ACP regulation as specified in the Notice of Public Availability of Modified Text (December 5, 1994).

A list of commenters is set forth below, identifying the date and form of all comments that were timely filed. Although we are not legally required to, we are also responding to comments provided

by Mr. Kendall Trautwein of the Flecto Company, whose written comments were not received until after the 45-day comment period was closed. Following the list is a summary of each objection or recommendation made regarding the specific adoption and amendments proposed, together with an explanation of how the proposed action has been changed to accommodate the objection or recommendation, or the reasons for making no change. Several commenters expressed general support or disagreement with the regulation or certain aspects of it, but did not suggest that the Board take any specific action. While these comments were considered by the Board, most of these comments are not separately addressed in this Final Statement of Reasons because they were not objections or recommendations specifically directed at the proposed action or the procedures followed by the Board in proposing or adopting the proposed action. However, some of these comments have been included in those cases where they add additional information or perspective on the actions taken by the Board.

List of Commenters

U.S. EPA	Mr. David P. Howekamp, Director Air and Toxics Division, Region IX U.S. Environmental Protection Agency Written Testimony: September 20, 1994
Dow	Mr. John G. Wood, Manager Regulatory Affairs, Dow Brands Written Testimony: September 19, 1994
R&C	Ms. Eileen J. Moyer Director of Regulatory Affairs, Reckitt & Colman, Inc. Written Testimony: September 16, 1994
MM	Mr. Robert K. Bereman Macfee Manufacturing Written Testimony: September 13, 1994
PZC	Sarosh J. H. Manekshaw, Director Environmental, Safety, and Health Affairs Pennzoil Company Written Testimony: September 20, 1994
Flecto	Mr. Kendall E. Trautwein Technical Director The Flecto Company Written Testimony: September 30, 1994

CSMA	Mr. Mike Thompson, Associate Director Legislative Affairs Chemical Specialties Manufacturers Association Written Testimony: December 20, 1994 Oral Testimony: September 22, 1994
SW	Mr. Doug Raymond, Divisional Director Regulatory Affairs Sherwin-Williams, Specialty Products Division Oral Testimony: September 22, 1994
CTFA	Mr. Jim Mattesich and Mr. Thomas J. Donegan, Jr. Representing the Cosmetic, Toiletry, and Fragrance Association Written Testimony: September 21, 1994 Oral Testimony: September 22, 1994
P&G	Dr. Philip Geis Procter & Gamble Oral Testimony: September 22, 1994
GC	Mr. Ted Wernick, Director Scientific Regulatory Affairs The Gillette Company Oral Testimony: September 22, 1994
SCJ	Mr. Brian Ruble, Manager - Product and Device Safety Scientific Support & Government Compliance S.C. Johnson Wax Oral Testimony: September 22, 1994
3M	Dr. Dan Knuth, Chairman of the ACP Task Force 3M General Offices Oral Testimony: September 22, 1994

Purpose and Applicability of the ACP

1. Comment: We support the concept of the ACP. However, we do not want the voluntary ACP regulation to become mandatory. We would oppose any effort to make the ACP an involuntary method of complying with future effective dates which are not technologically and commercially feasible. (CSMA, P&G, GC, 3M, Dow)

Agency Response: The text of the ACP regulation and the Initial Statement of Reasons (Staff Report) clearly specify that entry into the ACP program is voluntary. Any proposed modification which would change the voluntary nature of the ACP regulation would, like any other regulation proposed for adoption by the Board, be required to undergo the formal rulemaking procedures specified in the Administrative Procedure Act. During any future rulemaking proceeding, all interested parties will have ample opportunity to provide comments on any proposed changes.

2. Comment: The ACP should not be viewed as a replacement for "command and control" regulations. Also, the ACP should not be viewed as a vehicle for regulating other non-regulated consumer products. (CSMA)

Agency Response: We agree with the commenter. ARB staff has made it clear throughout the rulemaking process that the ACP is designed to supplement, not replace, the existing "command and control" consumer products VOC standards and the Innovative Products provision. The issue of including non-regulated products in the ACP is addressed in the response to Comments 3 and 4.

3. Comment: We urge that the rule as finalized include for participation in an ACP additional VOC-containing consumer products that may become subject to VOC content restrictions in the future. (PZC)

4. Comment: We believe that all consumer products and all sources of VOC emissions should fall under the ACP regulation. We understand the ARB staff wants to keep the scope of the ACP regulation small until they determine if it is a workable rule. However, we would urge the Board to make a commitment to add aerosol paints to the ACP as aerosol paints are regulated in January of 1995. (SW)

Agency Response: It is not appropriate to include in the ACP regulation product categories for which no VOC standards have been established, as the two commenters have suggested. Without such VOC standards there would be no baseline from which to measure reductions in VOC emissions, which is a basic requirement in an emissions averaging program such as the ACP. For the same reasons, we do not agree that it is appropriate to incorporate the second commenter's suggestion, which proposes "open market trading" whereby an emissions trading program is established for both regulated and unregulated sources. Further discussion of these issues can be found on page V.2 of the Staff Report.

With regard to the inclusion of aerosol paints in the ACP regulation, the Board did not approve

inclusion of aerosol paints as part of this ACP rulemaking action because the Board had not adopted an aerosol paint regulation at the time the ACP was approved in September 1994. An aerosol paint regulation was subsequently adopted by the Board on March 23, 1995. As part of the aerosol paint rulemaking the Board also adopted amendments to the ACP regulation to allow aerosol paints to be included in an ACP. The aerosol paint regulation and the ACP amendments will be submitted to the Office of Administrative Law in the future, after the ACP regulation has been approved by OAL.

5. Comment: The concept of emissions trading should be included in the ACP. We think it will be an important tool for the future and we think it should be started to be researched right now. (SW)

6. Comment: Section 94547 - Surpluses gained by parties that do not have an ACP should also be allowed to be traded. This could expand the availability of credits for small businesses. (R&C)

Agency Response: It is unclear what the first commenter is referring to by the term "emissions trading." As proposed, the ACP regulation already incorporates two types of emissions trading: (1) internal trading via emissions averaging between different product lines in an ACP, and (2) external trading of surplus emission reduction credits between two different ACP plans operated by two different responsible ACP parties.

If the first commenter is suggesting, like the second commenter, that the ACP incorporate the concept of "open market trading" (e.g., surplus reduction credits trading between regulated ACP products and unregulated consumer products or other sources of VOC emissions), such a modification to the ACP is not appropriate for the reasons discussed in the response to Comments 3 and 4.

Definitions

7. Comment: The 250 employee limitation for small business classification is much too high. This definition could encourage some large companies to contract out more of their production than they ordinarily would in order to get below the 250 employee cutoff and be eligible to buy credits. It would be much more fair to set a sales limit of $15,000,000 to designate a small company. (MM)

Agency Response: The ACP uses the same definition of "small business" that is specified in the Administrative Procedure Act ("APA"; Government Code section 11342(h)). This definition provides that "small business" does not include manufacturing enterprises exceeding 250 employees. In addition to the advantage of consistency with the APA definition, we believe the 250 employee cutoff is reasonable because it allows many small companies to participate in the surplus reduction credits. On the other hand, the 250 employee cutoff is small enough to prohibit truly large manufacturers from relying on these credits for their overall emissions averaging plan. Further discussion of the surplus trading provisions can be found in the responses to Comments 12-14 and on page V.10 of the Staff Report.

The commenter suggests that a company may contract out some of their production to meet the 250 employee cutoff and qualify as a small business. We believe that this scenario, while possible, is highly unlikely to occur. Many factors determine a business's employment decisions, and the ability to trade surplus credits in an ACP is not likely to be a significant factor in such decisions. In addition, the commenter has provided no technical or policy justification for the proposed cutoff of $15 million in sales--a dollar amount that is far larger than any of the cutoff amounts specified in the APA definition of "small business."

Requirements and Process for Approval of an ACP

8. Comment: Section 94543(a)(4)(A) - The requirements to provide the names, telephone numbers and addresses of all persons from which Enforceable Sales information will be obtained is overly cumbersome and unnecessary. Providing the name, address and telephone number of the business contact person should be sufficient. It is irrelevant to ARB as to who the clerical person who retrieves computer files is and where they are located. (R&C)

Agency Response: The commenter appears to have misinterpreted the requirements of section 94543(a)(4). The requirement to specify all contact persons who will provide information that will be used to determine Enforceable Sales is intended to address situations in which the responsible ACP party is relying on a third party to provide Enforceable Sales data to the ARB. An example of this situation would be a party who contracts with Nielsen Research; Information Resources, Incorporated (IRI); or some other market surveying service to provide the ARB with independent market share analysis data to meet the Enforceable Sales record requirements. Clearly, there would be no reason to require personal information for clerks who will simply be handling sales data, and the regulation does not require such information to be provided.

9. Comment: Section 94543(a)(7)(I) - Requiring the ACP applicant to provide a date by which participating products must meet the limits in the Table of Standards defeats the purpose of an ACP. One of the purposes of an ACP is to allow a company to continue to sell a product that cannot be reformulated to meet the established VOC limit. Forcing a company to comply with the standards defeats this purpose and explicitly disqualifies a company from using this method of compliance. Persons who simply need more time to reformulate a product should be encouraged to use the variance procedure in order to eliminate duplicative procedures. (R&C)

Agency Response: The commenter appears to have misinterpreted this provision. Section 94543(a)(7)(I) is part of a section describing what information must be contained in an ACP application and clearly does not impose a nonsensical requirement that all ACP manufacturers must reformulate all ACP products to meet the VOC standards. This provision merely requires an estimate of the approximate date when the responsible ACP party expects each product to be able to meet the VOC standards **if** the manufacturer plans to comply with the standards at some future date. If a manufacturer does not intend to reformulate some of its products to meet the standards, then it can simply state in the ACP application that the party does not intend to meet the VOC standards for all of its ACP products.

Administrative Requirements

10. Comment: While participation in the ACP program is voluntary, participation may not achieve reduced compliance costs if the costs of ongoing plan preparation and recordkeeping exceed the cost of complying with VOC content limitations. Only actual experience with ACPs will reveal whether the requirement to have an accounting system covering at least three-quarters of gross California sales is realistic or excessively burdensome. We therefore urge that administrative requirements associated with ACP be minimized as much as possible. (PZC)

Agency Response: We agree that the administrative requirements in the ACP should be minimized as much as possible. However, we also believe that the ACP must include sufficient requirements to permit the ARB to enforce its provisions by allowing an accurate determination of emissions, violations, surplus reduction credits, and shortfalls. Without this ability, it would be nearly impossible to determine if the ACP regulation is achieving the intended emission reductions. We have therefore included administrative requirements in the proposed ACP regulation which are necessary to ensure that: (1) the program is effective and works as intended, (2) the emission reductions from the existing regulation are preserved under the ACP flexible emissions caps, and (3) the ACP regulation meets the enforceability and all other applicable requirements for federal approvability as specified in the U.S. EPA's Economic Incentives Program rule (59 FR 16999).

Based on comments received during the workshop process, we believe that the administrative requirements for the ACP are not overly burdensome. This is evidenced by the support and interest in using the program shown by various manufacturers and marketers during the three years of regulatory development. ARB staff is also committed to monitoring the implementation of the ACP and to proposing appropriate modifications if problems arise in using the ACP.

We believe the 75% Gross California Sales requirement for sales tracking systems is appropriate, as discussed on page V.7 in the Staff Report. Throughout the public workshop process, we clearly stated our desire to provide flexibility in the recordkeeping and sales reporting requirements. However, we also clearly stated the need for reported sales records to be enforceable and accurate. Based on discussions with the workshop attendees, we estimated the minimum accuracy for retail scanner-based sales records (e.g., Nielsen or IRI-type market share surveys) to be about 75%-80% for many consumer products sold in large-chain stores. In other words, these third-party surveying services could be expected to cover at least 75% of the total retail market for products surveyed in this manner. Since this type of reporting appeared to be the "state-of-the-art," we believe that a "reality check" for all sales reporting schemes proposed for approval should provide similar or better accuracy than the scanner-based data. Therefore, we developed the 75% Gross California Sales requirement as an independent check on all proposed sales reporting schemes. With this provision, the total volume of sales reported using the proposed sales records would need to be at least 75% of the total amount expected to be sold in California on a population basis. This requirement is designed to reveal situations where a proposed sales record system does not account for a significant portion of all California sales, relative to the total population-based estimate of product sales.

Violations

11. Comment: Section 94546 - The addition of a new violations section is unwarranted. Violations of an ACP should be dealt with in accordance with existing statutory language and penalties. (R&C)

Agency Response: We believe it is critical to the success of the ACP program that a violations section be included which explicitly identifies what actions will be considered to be violations of the regulatory requirements. While the penalties that will apply to violations of the ACP regulation are set forth in Health and Safety Code sections 42400 et seq., the existing statutory language is unclear as to exactly how violations are to be determined for emission averaging programs such as the ACP. In enforcement actions on existing "command-and-control" regulations, such as local district coatings regulations, it is relatively straightforward to determine a violation (e.g., a can of product is in violation if it exceeds the specified VOC content limit). However, determining which violations and how many have occurred becomes much more difficult under an ACP without an explicitly defined violations section.

To illustrate, the aggregate emissions from all ACP products in an ACP plan are placed under a limit. Without specifying how to determine a violation, it would not be clear whether a 500 pound exceedance of the ACP emissions limit results in 500 violations, one violation, or some other number of violations. The proposed ACP regulation avoids this and other potential enforcement problems by including a violations section which implements the statutory language and clarifies exactly how it will apply to specified actions. By doing this, we ensure that manufacturers operating under an ACP will be provided some certainty as to how their conduct will be evaluated. For the SIP approvability process, the violations language also provides the U.S. EPA with assurance that the ACP regulation will be consistent with the federal Clean Air Act, and will result in penalty amounts that are large enough to deter violations of the regulation. A more in-depth discussion of the violations language can be found on page V.9 of the Staff Report and on page 173 of the Transcript for the September 22, 1994 hearing.

Surplus Reductions and Surplus Trading

12. Comment: Pennzoil's products are currently in compliance with California's restrictions on VOC content in consumer products. Consequently, Pennzoil believes that the ACP regulation, if finalized as proposed, may put Pennzoil and others who have already spent research and development money at a competitive disadvantage with others who will continue to sell products with VOC content exceeding the VOC standards in the existing regulation. While Pennzoil agrees with the ACP's goal of providing regulatory flexibility, we also believe we should not be penalized for the efforts we have already made. Consequently, we urge the Board to ensure that the rule as finalized in no way penalizes those companies which have already made the adjustments to their products at tremendous cost in time and resources. (PZC)

13. Comment: Credits for early reformulation of ACP product should be given. (Dow, CSMA, 3M, SCJ, R&C, GC)

Agency Response: We agree with the commenters that companies who have made significant reductions in the VOC content of their products should not be penalized. However, we also believe that the issuance of credits from past reductions must be balanced with the need to preserve the emission reductions in the existing "command and control" consumer products regulation. At the hearing, therefore, the Board approved a modification to the original proposal which will allow surplus reduction credits to be claimed by companies who achieved early reformulations of their ACP products within one year prior to their application to enter the ACP program (see section 94547(c)). It is important to note that the ACP also provides surplus reduction credits to companies that achieve significant VOC reductions, beyond those required by the specified emission limits, **after** entering the ACP program. Manufacturers who choose not to enter the ACP program still have two compliance options available to them (direct compliance with the VOC standards and formulation of an Innovative Product).

The provision for limited-use early reformulation credits will help encourage participation in the ACP by providing a source of surplus reduction credits to manufacturers for use as a "cushion" to reconcile shortfalls occurring in the first year of their ACP plan. As stated on pages 172 and 173 of the Transcript for the September 22, 1994 hearing, the provision for issuing limited surplus credits for early reformulations was requested by industry representatives. The modification to the ACP approved by the Board to allow these limited-use credits was supported by industry representatives (see testimony by CSMA, SW and SCJ on pages 189, 195 and 228 of the Transcript).

The issuance and use of early reformulation surplus reduction credits are subject to the criteria specified in section 94547(c) for several reasons. As modified by the Board, the ACP allows manufacturers to claim credits for reducing the VOC content of their products below the VOC standard within one year prior to the date of submittal for an ACP application. Originally, some industry representatives requested an ACP provision that would grant partial or full credits for achieving overcomplying reformulations as early as 1988 up to the effective date of the ACP regulation. However, it is clear that the use of consumer product surplus credits generated years before the ACP or even the consumer products regulation became effective would not benefit California's air quality and would likely exacerbate it. Those reductions, if they occurred, have already been accounted for in the current emissions inventory, the air quality/attainment modeling conducted to date, and the State Implementation Plan (SIP). Moreover, it would be nearly impossible for the ARB to validate emission reductions which are claimed to have occurred many years ago for widely-distributed, non-point sources like consumer products.

To ensure that air quality benefits are preserved while recognizing early reformulations, the Board approved modifications to the ACP which allows credits to be claimed for overcomplying reformulations resulting in surplus reductions in the year prior to an ACP plan submittal. We believe it is appropriate to allow credits achieved recently since these reformulated products are likely providing current air quality benefits. For example, many of the products reformulated and sold to retailers in California within the past year are likely to still be in the retail stores or being used by consumers. Also, this modification helps resolve what essentially is a timing issue with the

ACP hearing date, by allowing credits for manufacturers who reformulated their products in 1994 below the VOC standards effective in 1995. Without this provision, these early overcomplying reformulations occurring after implementation of the existing "command and control" consumer products regulation would not have been credited (see page 172 of the Transcript).

The credits that are claimed and validated under section 94547(c) are to be used only for reconciling shortfalls in the first year of an ACP plan's operation and are not allowed to be sold to any other ACP manufacturer. We believe this limitation is appropriate and have provided this limitation in the use of the early overcomplying reformulation credits as requested by industry representatives (see pages 189, 195, and 228 of the Transcript).

14. Comment: In the liquid air freshener category, 90% of the products are institutional and janitorial (I&I) products. These products historically have been formulated at a 10-15% VOC level. It would not be fair for a manufacturer in this industry to reformulate from 18% to 12% and expect to be able to profit from selling excess credits. The same argument may apply to other product categories. (MM)

Agency Response: We do not agree. We believe it is appropriate to reward manufacturers with surplus credits for reformulating their products to a VOC content below the applicable VOC standard. Without the ACP, there would be no incentive for manufacturers to reformulate products to overcomply with the standards, since the existing regulation only specifies that products cannot exceed the applicable VOC standards. Under the ACP's surplus credits provision, manufacturers will have an incentive to go beyond the reformulation required by the existing regulation. Thus, if the liquid air freshener is at the standard (18%) and is reduced further to 12%, the manufacturer would receive credit for this under the ACP.

The commenter does raise a valid concern regarding the issuance of credits for what essentially are "paper reductions." That is, the commenter appears to be concerned that some manufacturers could take a product that was already in compliance with the VOC standards, raise its VOC content, and then reduce the VOC content down to its original level, claiming a valid reduction has taken place in the process. We identified this potential in the earliest stages of the ACP rule development process and have designed safeguard provisions which will ensure that paper reduction credits are not issued. Manufacturers are essentially required to demonstrate and certify in the plan approval process that this type of VOC content manipulation has not occurred. Moreover, the Executive Officer has access to historical VOC content data which can show whether increases of VOC content have occurred recently. Finally, the potentially severe penalties prescribed in the Health and Safety Code (section 42400 et seq.) should serve as powerful deterrents against falsifying the nature of a claimed emissions reduction and selling a surplus reduction credit based on a false VOC reduction.

Reconciliation of Shortfalls and Seasonal Products

15. Comment: We are concerned that seasonal products would not have sufficient time to reconcile shortfalls within the 90 workday timeframe specified in the ACP regulation. We look forward to continuing discussions for resolving this issue, since seasonal products may result in shortfalls that would have to be reconciled possibly one year later. (CSMA)

16. Comment: The requirement to reconcile shortfalls within 90 working days is too restrictive, particularly for larger shortfalls of 50% or more. This time period should be lengthened to a minimum of 120 days. (R&C)

Agency Response: For the following reasons, we do not agree with the commenters' conclusions that the 90 working day reconciliation requirement is too restrictive and that seasonal products are not adequately addressed in the ACP regulation. First, it is the manufacturer, not the Executive Officer, who chooses which products to sell under an approved ACP plan. If the manufacturer knows that its seasonal product would likely result in shortfalls that cannot be reconciled within the specified time, then the manufacturer should not place that product in the ACP plan. Also, if the participating manufacturer does not have sufficient knowledge of its product sales patterns, then those products should not be selected for the ACP program. Such careful planning is an implicit requirement of the ACP program. The ultimate effectiveness of an emissions capping program like the ACP requires such knowledge and planning from all participating manufacturers.

In addition, participating manufacturers are required to submit detailed shortfall reconciliation plans as part of the overall ACP plan approval process. The requirement for detailed plans to be submitted and approved before the ACP begins ensures that both the manufacturer and ARB know what actions will be taken when a shortfall does occur. Manufacturers are provided a high level of flexibility to choose the appropriate shortfall reconciliation measures during the ACP approval process. Such measures should involve activities relating to the seasonal product (e.g., product recall) only if such activities can be accomplished within the specified time. It should also be noted that reconciliation measures are not required to directly involve the product resulting in the shortfalls. Thus, the manufacturer is provided a high level of flexibility in identifying reconciliation measures that do not require more than the specified 90 working days for all of its products, including any seasonal products to be included in an ACP plan. If the manufacturer cannot specify adequate reconciliation measures for all of its selected ACP products, then the ACP would not be an appropriate compliance tool for that manufacturer.

We believe the 90 working day limit for reconciling shortfalls is adequate. This requirement essentially provides manufacturers with four and a half calendar months to reconcile shortfalls. Thus, manufacturers with shortfalls have over one-third of a year to reconcile all shortfalls using measures that have already been identified and approved by the Executive Officer. The proposed extension to 120 working days for reconciliation would give manufacturers who have failed to meet its commitments six calendar months to reconcile shortfalls. This represents a 50% increase over the maximum one year compliance period allowed, which clearly would reduce the effectiveness

of the ACP in achieving equivalence with the existing consumer products regulation.

17. Comment: We are concerned about the necessity of developing shortfall reconciliation plans for 5, 10, 15, 25, 75, and 100 percent of the established ACP limit. These plans are to be implemented within 30 work days of a shortfall, and the shortfall is to be eliminated within 90 work days. While development of these plans does serve to notify an ACP applicant of the repercussions of failing to meet its ACP goals, we believe that the focus of the ACP process should be on meeting goals, rather than preparing plans to be implemented if goals are not reached. For the most part, shortfall reconciliation plans will prescribe the purchase of surplus credits; other approaches, such as product formulation, will be difficult or impossible to accomplish within the specified timeframes. Consequently, we suggest that, in lieu of preparing complex shortfall plans, the regulatory focus be on compliance with the terms of the ACP. (PZC)

Agency Response: We do not agree with the commenter and believe that the ACP regulation should focus on both compliance and reconciliation. Approved ACP plans are enforceable commitments. By entering into the ACP program, the participating manufacturers are committing to limit their products' aggregate emissions to specified levels. If the manufacturer fails to meet this commitment, air quality in California is negatively impacted and equivalence with the existing regulation is no longer preserved. To ensure that the ACP program preserves the air quality benefits of the existing regulation, such shortfalls need to be reconciled quickly and completely.

Because of the relative volatility and unpredictability of the consumer products markets, it is possible that manufacturers may experience shortfalls of varying degrees. To account for this variability in shortfalls, the ACP regulation requires shortfall reconciliation measures that will be implemented in steps, with less stringent steps for smaller shortfalls and more stringent steps for larger shortfalls. By requiring manufacturers to identify and commit to these steps in the approval process, we will avoid significant delays in the implementation of the reconciliation measures. Without this up-front approval requirement, manufacturers could incur significant delays in identifying appropriate reconciliation measures and additional delays in actually implementing those measures.

Cancellation of an ACP

18. Comment: It is unreasonable to expect a product to immediately be in compliance with VOC standards immediately upon cancellation of an ACP. If a responsible party entered into an ACP because reformulation was not feasible, this action will actually be a ban on the product that cannot meet the standards. There should be a mechanism for appeal to the Executive Officer. (R&C)

Agency Response: We do not agree with the commenter. As stated in the rulemaking record, approved ACP plans are binding commitments which commit participating manufacturers to limiting their aggregate VOC emissions to specified limits. The manufacturer who fails to meet the requirements of this commitment is exceeding its emission limits and adversely impacting air quality. In addition to its air quality impacts, noncomplying ACP parties may also be enjoying

economic benefits under the ACP at the expense of competitors who are meeting the requirements of the ACP and the existing regulation in good faith. If we do not require immediate compliance with the VOC standards upon cancellation of an ACP plan, we would be continuing to erode the effectiveness of the ACP program in preserving the benefits of the existing regulation.

It is important to note that the Executive Officer can cancel an ACP only if certain criteria apply, as specified in section 94551. To preserve the air quality benefits of the existing regulation, the Executive Officer can cancel an ACP if the manufacturer demonstrates an inability to meet the requirements of the ACP on a continuous basis. Such inability is demonstrated through an excessive shortfall (i.e., 20% or greater exceedance of the ACP Limit for any compliance period), a recurring pattern of violations for which the manufacturer has consistently failed to take the necessary corrective steps, or failure to fully implement the shortfalls reconciliation measures and completely reconcile all shortfalls within the specified timeframe.

We also need to emphasize that the cancellation of an ACP is essentially the end result of many failures by the manufacturer which can be avoided. It should be remembered that manufacturers are allowed to choose compliance periods up to one year. This gives manufacturers ample opportunity to monitor their sales and emissions throughout the year to ensure that a gross exceedance of the ACP Limit does not occur at the end of the compliance period. The regulation also encourages manufacturers to build into their planning a "cushion" of surplus reduction credits to offset any unforeseen increases in emissions. In the unlikely event of an unanticipated emissions increase, manufacturers are allowed 30 working days to implement its shortfall reconciliation measures (i.e., about one and a half calendar months) and 90 working days to fully reconcile shortfalls (i.e., about four and a half calendar months). Clearly, the significant amount of lead time afforded to manufacturers to discover and correct shortfalls justifies the requirement for immediate compliance with the VOC standards if the manufacturer remains unable or unwilling to fulfill its commitments under the ACP.

Finally, the commenter has suggested that there be a mechanism to appeal a cancellation to the Executive Officer. Since it is the Executive Officer who makes the cancellation decision in the first place, an "appeal" to the Executive Officer would serve no purpose. However, in section 94511(c) the regulation does provide that an ACP cannot be cancelled unless the responsible ACP party is first provided an opportunity for a public hearing. This provision should address the underlying due process concerns raised by the commenter. In addition, the responsible party also has the option of filing a lawsuit in the courts if he is dissatisfied with a cancellation decision.

Use of the ACP by Other Regulatory Agencies

19. Comment: We oppose the present ACP regulation because it offers no discernible benefit to our members. Because of recent regulatory developments in other states, products that comply with the California regulations as a part of an ACP would not comply with the regulations of any other state and wouldn't comply necessarily with any regulations the U.S. EPA comes out with on a national basis. This is due principally to the emissions bubbling aspects of the ACP. We wouldn't be able to produce products and sell them in other states simply because we are able to produce and sell it in California under the ACP. (CTFA, P&G)

20. Comment: P&G opposes the ACP regulation for two reasons. First, we cannot use the ACP because we do not have the required balance of product lines in order to offset the large amount of VOCs in our hairsprays by reformulating the remainder of our existing product lines, which already have few VOCs to reduce. More importantly, other states that are developing consumer product regulations do not have the ACP regulation. Thus, we can only use the ACP in California. Our distribution systems do not allow us to isolate or sequester California. So the other states are an impediment to our use of the ACP, since high VOC products legally sold under an ACP in California would not meet other states' requirements. This means only a handful of California-only companies or companies with specialized distribution systems can use the ACP regulation. (P&G)

Agency Response: As we noted previously, the ACP is a voluntary program designed to be used by those manufacturers that will benefit from its flexibility. We recognize that other states may develop regulations that do not necessarily use the same VOC limits as those contained in the existing ARB regulation. However, the development of different regulations by other states does not invalidate the need for the ACP regulation for those companies who can benefit from its use. While the ACP may not be useful to the commenter, there are other companies who have expressed considerable interest in the ACP and have stated that they can benefit from using the ACP in California alone.

Regarding regulations that might be developed in the future by the U.S. EPA, it is possible that nationwide U.S. EPA regulations could prevent certain products from being sold in California under an ACP. However, it is also possible that future U.S. EPA regulations would be structured in such a way that the ACP could still be used for some or all products sold in California. Since no U.S. EPA regulations have yet been proposed, it is premature to speculate about the effect of such regulations on the ACP.

Commercial and Technological Feasibility

21. Comment: We also oppose the ACP regulation because discussions with other state agencies and U.S. EPA representatives indicate that a potential exists for misusing the ACP to justify VOC standards that are not technologically and commercially feasible. We believe other states or the U.S. EPA will view the existence of emissions bubbling under the ACP in California as justification that a 55% standard for hairsprays, for example, will not harm industry since the emissions from the

hairsprays can be averaged with other product lines to achieve emission reductions. (CTFA, P&G)

Agency Response: Clearly, the ARB cannot control or dictate the actions of other state regulatory agencies or the U.S. EPA. It would be of little value for the ARB to make regulatory decisions based on speculation about possible misuse of the ACP by other agencies. With regard to California, Health and Safety Code section 41712 specifically requires the ARB to adopt only VOC regulations that are commercially and technologically feasible. Each regulation that is adopted by the ARB for consumer products must meet this test, and the ARB cannot use the ACP to inappropriately circumvent this statutory requirement. Additional discussion of this issue is contained in the response to the following comment. Regarding the 55% hairspray standard, when this standard was adopted in 1990 (four years prior to Board approval of the ACP), the Board determined that it was commercially and technologically feasible. This determination was based on the availability of formulation technology and the market presence of hairsprays that already complied with the standard.

22. Comment: CTFA cannot support the ACP regulation as proposed. However, if the Board decides to adopt it, we would like the following language either in the Board resolution or in the regulation itself to address the three reasons described previously which are the basis for our opposition:

> "The Board is enacting the Alternate Control Plan (ACP) for the benefit of companies that are able to use this as an alternative means to comply with the ARB consumer product regulations. It is a totally voluntary option, and the Board recognizes that many companies will not be able to use the ACP. The ARB therefore recognizes the continuing need to ensure that both present and future VOC content limits for consumer products are technologically and commercially feasible. The ARB confirms its intent that the availability of the ACP for any regulated product category is **not** to be considered in determining whether present or future VOC limits for that product category are technologically and commercially feasible." (CTFA, P&G, GC, 3M)

Agency Response: We believe that the suggested language is inappropriate for inclusion in either the Board resolution or the regulation. The reference to the ACP as a voluntary option is unnecessary, since both the Staff Report and text of the regulation clearly state that the ACP is voluntary. The remainder of the proposed language is ambiguous and would create uncertainty in the implementation of the consumer products regulation. The basic problem is that the suggested language essentially attempts to define "commercially and technologically feasible" in a very limited way. The Board's interpretation of these terms is set forth in the Technical Support Documents and Final Statement of Reasons for the Phase I and Phase II consumer products regulations (these documents are part of the record for this rulemaking action). To very briefly summarize, a regulation is "technologically feasible" if we can reasonably expect its requirements to be met within the time frame provided, and a regulation is "commercially feasible" if the "basic market demand" for regulated consumer products can be satisfied. Depending on the particular fact situation, it may

well be possible for a regulation to meet these criteria if the ACP (or a modified version thereof) is considered as part of the regulatory framework. Including the proposed language in the regulation or resolution would therefore inappropriately limit the Board's ability to consider all relevant factors in making future determinations on technological and commercial feasibility.

Economic Impacts

23. Comment: In the staff report, the cost of compliance pertaining to paints and coatings should not, in general, be applied to consumer products. (MM)

Agency Response: The commenter appears to be referring to an earlier version of the ACP regulation which allowed aerosol paints and coatings to be included in an ACP. This comment does not apply to this rulemaking action since the proposed ACP regulation does not currently include paints and coatings. The economic impacts of including aerosol paints and coatings in the ACP are discussed in the Initial Statement of Reasons for the proposed Aerosol Coatings Regulation. (Additional information on the proposed Aerosol Coatings Regulation is set forth in the response to Comments 3 and 4.)

24. Comment: We oppose the ACP regulation because it will discriminate against small or single-product-line manufacturers that don't have another product to provide sufficient emissions offsetting through reformulation. Larger manufacturers may have a distinct advantage if this ACP is adopted, but the small and single-line companies will be put at a disadvantage. We recognize that staff has attempted to address this with the emissions trading options; however, since this is a very competitive industry, the small or single-product line manufacturers may not be able to purchase credits from their larger competitors. (CTFA)

25. Comment: We believe that the credit trading idea in the ACP favors large suppliers of goods like aerosols. When a producer sells different lines of products, some that conform and others that do not, both may be sold. Those organizations that only supply one quality product will be forced to try to sell the original product under the ACP. This will eliminate small business and support larger corporations and will not effect reducing VOC emissions. Therefore, we believe that a regulation that states a defined goal for all manufacturers is desirable. A credit trading concept, we feel, provides some organizations with unfair advantages in the marketplace. (Flecto)

Agency Response: We disagree with the commenters. The Staff Report provides an extensive discussion of the overall benefits which the ACP regulation will provide to the regulated industry and consumers. The formulation and marketing flexibility afforded by the ACP will allow all manufacturers, large and small, to choose which of the three available compliance options are cost-minimizing and most appropriate for its products.

We believe that small and single-product companies will be able to purchase credits from larger companies. Because surplus reduction credits are recalculated at the end of each compliance period, all credits issued in one compliance period become invalid by the end of the next compliance

period (new credits, if any, are calculated at that point). Therefore, manufacturers who cannot use all of their surplus credits by the end of the next compliance have a strong incentive to sell such credits, especially to smaller businesses with whom they may not directly compete.

We believe the second commenter is also incorrect in implying that the ACP does not state a defined goal. Clearly, the ACP's defined goal is to achieve emission reductions equivalent to those that will be achieved under the existing consumer products regulation, thereby ensuring that the air quality benefits from the existing regulation are preserved, while at the same time providing an unprecedented level of enforceable flexibility to regulated manufacturers.

In Chapter VI of the Staff Report, we provided an extensive discussion of the potential adverse economic impacts to small and one-product businesses under the ACP program. We evaluated this potential both for companies who participate and those that do not participate in the ACP program. Using the best available data on the consumer products market, we determined that, overall, the consumer products industry will benefit from the ACP program. While we believe the scenarios which may result in adverse impacts to small and one-product manufacturers are unlikely, we also recognize that some marginal companies may be affected. To encourage small and one-product companies to participate in the ACP and thereby gain from its benefits, we have designed the external trading of surplus reduction credits primarily to benefit these companies. We believe this provision will help minimize any adverse impacts the ACP may have on smaller manufacturers.

SIP Approvability

26. Comment: Extensive revisions have been made to the ACP regulation in response to our comments, which have alleviated our concerns about the applicability and enforceability of the regulation. However, as indicated in our letter, there remain State Implementation Plan (SIP) approvability issues with the ACP, which we believe can be remedied by making some additions to the staff report. Alternatively, the issues could be addressed by including an administrative procedures document with the formal submittal of the ACP to the U.S. EPA. The U.S. EPA does not believe these issues warrant a rule revision. The ARB staff have indicated a willingness to address these issues. (U.S. EPA)

Agency Response: At the Board hearing and in Resolution 94-54, we committed to working closely with the U.S. EPA staff to ensure that all necessary documentation is submitted to support the approvability of the ACP as a SIP provision. We agree with the U.S. EPA that any SIP approvability issues can be adequately addressed in the administrative materials accompanying the ARB's SIP submittal, without the necessity of making revisions to the text of the ACP regulation.